

Emerging Scathed: A Critical Analysis of Current Approaches to Domestic Violence – Fusing Punitive & Restorative Solutions

Evaluating the challenges posed by the Covid-19 pandemic in cases of domestic violence and preparing for similar future events.

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Abstract

As the UK is taking steps to emerge from Covid-19 pandemic related restrictions, the tail-end of the pandemic itself seemingly in sight, as people, a Nation, residents of this world, we are faced with certain grim realities. One such reality, is the knowledge that during the extended lockdown period there was a substantial increase in ‘police recorded domestic abuse crimes’ (Ivandic, Kirchmaeir and Linton, 2021). Specifically, *Refuge* and *Respect*, charities against domestic violence, submitted, in a BBC report, an astounding 60-70% increase in reports of domestic violence to their call centres from female and male victims respectively, during the initial period of lockdown, describing it as an ‘epidemic beneath a pandemic’ (June, 2021). In a quick turn of events, present Government responded quickly. Not only was additional funding provided to preventative and reporting services, but new legislation was passed, the *Domestic Abuse Act 2021*, helping to illustrate and cement the seriousness of domestic violence. Yet, despite their efforts, both the legislation passed, and the funding provided should not, in fact, serve as the end-goal for the cause. Rather, as cornerstones of a movement, they should pave the way for additional survivor-centred approaches to take root. The newly enacted legislation purports to be supportive of a legal approach predominantly punitive in nature, focusing on the offender, rather than restorative thus aiming to rectify the harm afflicted upon the victims of domestic abuse. The article at hand will attempt to illustrate how overemphasis on a punitive approach might not necessarily be in the public’s best interest. Acknowledging the legislation’s marginal attempts at a dual approach, a further attempt will be made to critically analyse current measures and how while they may be a significant step in the right direction, better provisions could have been enacted in certain circumstances. On a final note, an effort will be made to demonstrate how specific restorative practices can be highly beneficial in dealing with certain instances of domestic violence, when utilised in tandem with the current punitive approach.

Ascertaining Domestic Abuse

“There is nothing more deceptive than an obvious fact”; a statement made by the esteemed author Sir Arthur Conan Doyle when contemplating an individual’s, and perhaps society’s at large, perception of a crime. In a similar vein, Domestic Abuse, also addressed as Intimate Partner Violence in certain circles of academic research (IARS, IKF, IRKS, LOKK, MJF, EPLO, VJI and EFRJ, 2016), is understood to be often a “hidden crime”, a violation of legal and moral obligations that is frequently not disclosed or reported to the authorities (Office of National Statistics, 2020). The reasons for this are many and varied, yet primarily rooted in psychology in the way that it relates to a victim’s state of mind and perception of their existing status (Felson et al., 2002). In fact, due to the mental state they have been placed in by their abuser, in their view they are presented with a scale: weighing the “incentives” against the “costs” associated with disclosing the domestic abuse (Felson et al., 2002) they are suffering through.

In essence, there are incentives that could theoretically urge a victim of abuse to seek assistance by reporting their abuser. Firstly, *Protection*; the need to stop an ongoing attack or deter future ones from occurring against themselves. Secondly, *Justice*; a strong desire to see their attacker deservedly punished for their transgressions. Lastly, *Defence*; an incentive that shares common elements with that of protection except it primarily serves to be for the sake of minimising harm done onto others, who have even less of a chance to be able to fend for themselves, such as children (Felson et al., 2002). Aforementioned notions can often be fleeting and may potentially wax or wane in a victim’s perception depending on the severity of the abuse they are suffering through (Felson et al., 2002). Thus, while more severe physical and emotional abuse might serve to reinforce a conviction to report, more subtle but still no less damaging methods of domestic abuse may lead to the dismissal of the notion to report (Felson et al., 2002).

As such, while theoretical incentives exist that may or may not serve as a catalyst for reporting, they are weighed down by a significant amount of perceived “costs” on the opposing scale, associated with the act of reporting. Specifically, research dictates (Felson et al., 2002) that there are five primary costs:

- Concern about embarrassment and stigmatisation due to social status, particularly if it involves a violent partner, often accompanied by feelings of cowardice and the association with labels such as ‘weak’,

- Desire to protect the offender, particularly relevant in cases with significant emotional attachments to an abusive spouse or substantial economic dependence,
- Fear of reprisals, in the sense that the offender may seek to inflict physical violence or use some sort of non-violent method of retribution in retaliation for being reported to the authorities,
- Engaging in illegal activities, such as drugs or potentially having the status of an illegal immigrant, and
- Opportunity costs greatly outweighing the capacity of the victim to cope with the reporting and subsequent judicial process (Felson et al., 2002).

While it is accepted that all costs are detrimental, the last ‘cost’ can be especially damaging, not only to the prosecution but also to the reporting process. Victims are far less likely to report instances of domestic abuse if criminal justice procedures are extensively time-consuming, with little to no emotional support provided to an individual, who has already taken a monumental step in their attempt to break free from a toxic environment (Felson et al., 2002). Therefore, it is suggested that a hyper-focused approach on punitive measures, to the detriment of restorative practices, may in fact do more harm than good in the long term.

In fact, it genuinely may have been difficult for victims to have any sort of faith in the process whatsoever. While government has shown great progress as of late in the subject area of domestic violence, by passing the Domestic Violence Act 2021, following the Covid-19 Pandemic’s growth in police recorded domestic abuse crimes (Office of National Statistics, 2020), such a steadfast stance purports to be more of a recent phenomenon. In fact, before the Domestic Violence Act 2021 introduced its new precise definition for such crimes, the previous definition was adopted by ‘Victim Support in England and Wales’ stating:

“Any incident of threatening behaviour, violence or abuse (psychological, physical, verbal, sexual, financial or emotional) between adults who are or have been intimate partners, or intimately related within a family or domestic setting, regardless of gender or sexuality. Domestic violence involves abuse of power and control by one person over another and typically escalates in frequency and severity over time” (Liebman and Wootton, 2010, p. 3).

Lastly, while the authorities were tasked with the requirement to flag when an offence can be classified as domestic abuse, with the exceptions of controlling and coercive behaviours,

domestic abuse by itself was not a specific criminal offence (Office of National Statistics, 2020). Therefore, offences that were ‘domestic-abuse related’ would be recorded under the relevant offence (Office of National Statistics, 2020). An important distinction, which though may seem superfluous to some, carries deeper societal ramifications in how such crimes would be perceived. While the passing of the 2021 Act marks a significant shift in previous perceptions, in theory, it is very likely that a practical shift in attitude will require a while longer to take hold, especially when it comes to recognising non-violent acts as legitimate forms of abuse.

The findings discussed, serve as a substantial and poignant reminder that domestic abuse, in all its forms, is a complex phenomenon not simply limited to physical acts of violence. With psychology and psychoanalysis being among the principal disciplines that have addressed the crime over the years, a gradual shift in research has been noted, adjusting the scope to critically analyse the non-visible mental shackles that tether victim and abuser. Especially, with this particular crime being under-reported as it is (Office of National Statistics, 2020), the need to understand, on the one hand the intricacies behind a perpetrator’s motivation to commit abuse, the methods both evident and cryptic of infliction, while on the other the ensuing victim’s mental state, is absolutely critical to the creation of a unified correct approach for recognition of abuse. In turn, this information could enable law enforcement as well as everyday citizens to perceive signs of potential abuse, even in the absence of ‘physical evidence’.

Due to all the factors listed above, in addition to potential others that may be unearthed as research into the subject matter continues to progress, current data gathered by charities, law enforcement and the criminal justice system, can perhaps only provide a partial glimpse into the real extent of domestic abuse experienced (Office of National Statistics, 2020), as the issue is far too complex for the ‘legal approach’ alone to be expected to solve. Nonetheless as will be evidenced by the legislative analysis in the following section of the article, the Domestic Violence Act 2021 marks a significant step forward towards the cementing of Intimate Partner Violence as a crime in and of itself, rather than a simple consequential addition to ‘assault’.

Defining Domestic Abuse

Despite potential issues that the Domestic Violence Act 2021 may fail to cover, it still nonetheless stands as a beacon of progress. Specifically, this current piece of legislation does its best to address the matter of intimate partner violence on two fronts, taking it one step further compared to its predecessor: The Domestic Violence, Crime and Victims Act of 2004.

In regard to helping victims, the Domestic Abuse Act 2021 shall provide for, but not limit itself to, the following:

- Creating a statutory definition for Domestic violence: This element helps emphasize that domestic abuse is not just limited to physical violence but also extends to emotionally coercive behaviours and economic abuse. Furthermore, children are finally recognised as victims if they bear witness to scenes of domestic abuse as per the statutory definition (Domestic Violence Act, 2021, ss. 1-3).
- Creating a new offence for non-fatal strangulation, as well as extending and clarifying the offences of ‘controlling and coercive behaviour’ post-separation abuse (Domestic Violence Act, 2021, s. 70), ‘revenge porn’, namely disclosure of explicit materials without express consent (Domestic Violence Act, 2021, s. 69) and deterring claims of ‘rough sexual intercourse gone wrong’ in cases of serious injury and/or death (Domestic Violence Act, 2021, s. 71).
- Providing a variety of statutory presumptions, establishing support for victims, in addition to creating a duty for local authorities, councils and family proceedings to abide by a set of recommendations that place survivors in a category of ‘priority need’, sparing them any unnecessary undue trauma resulting from housing crisis, homelessness, lack of legal aid and other potential issues (Domestic Violence Act, 2021, ss. 7, 9, 22, 57, 78-80).

On the other side of the spectrum, in relation to strengthening measures against predators, the Domestic Abuse Act 2021 shall seek to:

- Mitigate a predator’s abuse of power when cross examining their victims during family and civil court proceedings (Domestic Violence Act, 2021, ss.65-66),
- Invalidate any defence of ‘consent’ in instances where a victim suffers serious harm and/or death by bringing forwards and ingraining the case of ‘R v Brown’ into legislation (Domestic Violence Act, 2021, s. 71),
- Implement a new statutory duty upon the Secretary of State, to formulate and publish a ‘Domestic Abuse Perpetrator Strategy’ (Domestic Violence Act, 2021, s. 84), and
- Arrange for improved ‘Domestic Abuses Protection Orders and Notices’, prohibiting perpetrators from seeking contact with their victims, while urging them towards a path of rehabilitation by seeking counselling and other mental health services (Domestic Violence Act, 2021, ss.62-64).

The last factor is an interesting departure from the purely punitive approach aimed at perpetrators. In fact, one could argue that it is even restorative in a way, as it urges the perpetrator onto a path of rehabilitation. Therefore, even if only a kernel, the understanding that a purely punitive approach may not be enough to lower re-offending rates exists within the legislation. However, and this shall be a point addressed shortly, it seems strange that focus would be maintained upon the perpetrator in relation to a restorative effect, rather than shifting it where it primarily belongs onto the victim, particularly as there is mention of mental health.

Lastly, coming back to the earlier point of “costs for victims” in relation to reporting domestic violence, as addressed in the section above titled ‘Ascertaining Domestic Abuse’, we see that in fact during the process of consideration of the ‘Domestic Abuse Bill’, an amendment was raised regarding ‘Migrant Victims’. According to a written statement made by Victoria Atkins, Parliamentary Under Secretary of State for Safeguarding, it was agreed that all victims of domestic abuse should be treated, utmost and foremost, as victims and should not be deterred from seeking support because of their immigration status (Atkins, 2021). In a move, seemingly filled with compassion and understanding of the plight of these men and women, government has eclipsed, at least partially, one of the more significant “costs” contributing to underreporting of instances of domestic violence among migrants.

It is greatly evident that, even in some minor way, this new piece of legislation has actually and legitimately attempted to take matters one step further in relation to improving the reporting and prosecution process, as well as by setting plans in place for victims, post any form of criminal justice procedure. However, despite these positive advances, it could be argued that the Domestic Violence Act 2021 did not in fact cover all the necessary fronts in relation to such criminal acts.

Limitations of the Law

At this point in the article at hand and given all the positive influence that the various sections of the Domestic Violence Act 2021 have to offer, at least in theory, one might pause to contemplate its limitations.

Specifically, if there is one thing that the current piece of legislation lacks, it is a semblance of clarity for a long-term solution regarding a victim’s mental health. While the Domestic Violence Act 2021 is shown to have made provisions for victims in relation to labelling them as a priority with regard to rehoming and simplifying vexatious family proceedings, as

showcased in the section above, in reality the duty of care needs to extend beyond that, to have a real and substantial lasting impact.

A solution to these issues may in fact be achieved through the use of Restorative Justice practices. While the term in and of itself has proven to furrow the brows of sceptics, especially those that consider it completely non-viable in Domestic Violence scenarios, when implemented correctly and under the right circumstances, it has been proven to work. Furthermore, in this instance the submission is for Restorative Justice to work in conjunction with the criminal justice system, to achieve a dual outcome of restoring the harm done to the victim, while simultaneously combining the punitive measures of the justice system with gradual rehabilitation, in the interest of the public. The article is not suggesting an either-or approach, where one practice replaces another. Rather it wishes to offer insight into how the two can work in tandem. But do this, the notion of Restorative Justice, for the purposes of this submission, must first be defined.

Restorative Justice Practices

What is Restorative Justice? There are many schools of thought on this particular topic, morphing this seemingly basic question into something veritably complex. However, for the purposes of this article, it can simply be stated that Restorative Justice is defined as:

“Restorative Justice is an ethos with practical goals, among which is to restore harm by including affected parties in a (direct or indirect) encounter and a process of understanding through voluntary and honest dialogue. Restorative justice adopts a fresh approach to conflicts and their control, retaining at the same time certain rehabilitative goals” (Gavrielides, 2007. p. 139).

However, even with this understanding, why and when should Restorative Justice be considered for cases of Domestic Violence?

To answer this question, it is necessary to delve deeper and analyse the crux surrounding general circumstances of domestic violence. In doing so, one would quickly come to the realisation that domestic abuse is very often complex with a level of violence that ranges from structural to occasional, with varying levels of frequency, intensity, severity, and underlying purposes to the act itself (Liebman and Wootton, 2010). Yet, even with such a pendulum of differences, it is possible to distinguish two main patterns: ‘intimate terrorism’ and ‘situational couple violence’ (Liebman and Wootton, 2010, p. 3). As indicated by their assigned names the

two patterns can be construed as polar opposites. Perpetrators of the former seek absolute dominant control over their partner, via the use of calculated violent and non-violent acts (IARS, IKF, IRKS, LOKK, MJF, EPLO, VJI and EFRJ, 2016). However, the latter is characterised by situational violence potentially perpetrated by either partner in response to conflict (IARS, IKF, IRKS, LOKK, MJF, EPLO, VJI and EFRJ, 2016). But why is such a distinction important or even relevant, considering that both patterns are still forms of domestic violence which remains unacceptable on a societal, legal and moral level?

In essence, Restorative Justice is about ensuring the safety of the victim, helping them heal as a primary goal while avoiding the risks of re-victimisation and re-traumatisation (IARS, IKF, IRKS, LOKK, MJF, EPLO, VJI and EFRJ, 2016). Given this ethos and way of thought it stands to reason that restorative justice would not be appropriate in cases of Domestic Violence, if there are believed to be genuine risks of recidivism. In such instances, if used incorrectly and if participating mediators fail to recognise signs of coercive control from the perpetrator during the process, consequences to the victim could be devastating. However, when implemented in a correct manner, the process can assist in ending the violence by empowering the victim (IARS, IKF, IRKS, LOKK, MJF, EPLO, VJI and EFRJ, 2016). Through facilitated communication they can have their voices heard, perhaps for the first time, compensating for existing power imbalances within the abusive dynamic (IARS, IKF, IRKS, LOKK, MJF, EPLO, VJI and EFRJ, 2016). In the non-judgemental environment that Restorative Justice practices purport to offer, an open dialogue can occur, initiating the healing process while maintaining the possibility that the offender, particularly in instances of ‘situational couple violence’, will take responsibility for their behaviour without assigning blame to the victim or circumstance (IARS, IKF, IRKS, LOKK, MJF, EPLO, VJI and EFRJ, 2016).

Restorative Justice has been proven to work across multiple programmes and countries. ‘The Freedom Programme for Women’, ‘The Freedom Programme for Men’, the ‘Integrated Domestic Abuse programme’, ‘Women’s Safety Worker Role’, ‘Respect’ and more are all examples of programmes that prove that Restorative Justice can be applied, in some way, to cases of Domestic Violence (Liebman and Wootton, 2010, pp. 5-13). Yet, despite their success one has to wonder why Restorative Justice has not become more of a mainstream phenomenon in the West. While it is clear that such practises do offer something unique and valuable to this area, with their primary focus being restoring the harm inflicted upon the victim, whether such an emphasis on healing outweighs the need to ensure their safety has yet to be accurately determined. As such, when factoring in the undeniable need for resources, such restorative

practises are going to be extensively resource heavy, not making them viable on a large scale independently, unless specifically integrated within the justice system itself (Liebman and Wootton, 2010, p.14).

In what will soon be a post covid world and considering the influx of domestic violence reporting that occurred during the height of the pandemic, would it not be prudent for governing and legislative bodies to consider every available solution to safeguarding and protecting victims from their abusers? Having reached what seemed like apex rates of domestic violence reporting in the United Kingdom, should restorative practices not be considered as a valuable addition to the process? Factoring in how they could benefit survivors, alleviate pressure on the judicial system, shorten the latency between passing of the legislation and widespread sector implementation and in some instances even assist in the rehabilitation of the offender, it makes little sense to at least not revisit the option.

Conclusion

In 2003 the government consultation paper titled “Restorative Justice: the Government’s strategy” put forward a simple query regarding restorative justice and domestic violence. Specifically:

“What would be the benefits and disadvantages of developing more specific principles in particular areas – for example for sensitive offences such as hate crimes, sex crimes and domestic violence?” (Liebman and Wootton, 2010)

At the time, responses to this question were highly polarised. Specialists in the area of domestic violence were strongly against the use of Restorative Justice, citing risks of re-victimisation, the seriousness of domestic violence, as well as the power imbalance than often characterises relationships that lead to domestic violence (Liebman and Wootton, 2010). Conversely, Restorative Justice advocates were in favour specifically citing a survivor’s right to choose, alongside the implementation of various safeguards such as the use of highly skilled mediators, counselling, and the prerogative of the survivor to interrupt the process at any time (Liebman and Wootton, 2010), to name but a few.

The government conclusion at the time was that more evidence was required to understand what specifically worked for victims (Liebman and Wootton, 2010). It would seem that this is a stance held, at least in a passive sense, to this day. Domestic violence has been painted with a rather broad brush in the most recent piece of legislation. While such an act of sweeping

reform undoubtedly has a great number of benefits, as listed earlier on in the article, the consequence is the loss of the big picture. In a fevered attempt to tackle a rising problem, by imposing stricter regulations and more safeguards, the understanding that victims need more options, more choices and more opportunities to voice their feelings seems to have been eclipsed in favour of a more centralised punitive approach, with definitive improvements in regard to victim physical safety but not enough regard to their future mental well-being.

This article does not disparage present reform, if anything it acknowledges the positive and ground-breaking effects it offers. Yet, at the same time, it stands as a reminder of the key restorative elements that are currently lacking and which, when enacted in conjunction with the current punitive criminal justice approach, will create a system that benefits all. After all, Domestic Violence, Domestic Abuse, Intimate Partner Violence or however else it shall be defined as in the future, is not just a legal matter but a social, moral and ethical one as well, that in some way affects us all.

References

Legislation

Domestic Violence, Crime and Victims Act (2004)

<https://www.legislation.gov.uk/ukpga/2004/28/contents>

Domestic Abuse Act (2021)

<https://www.legislation.gov.uk/ukpga/2021/17/contents/enacted>

Other Publications

Atkins, V. (2021) *Domestic Abuse Bill Statement UIN HCWS918*

<https://www.ukpol.co.uk/victoria-atkins-2021-statement-on-the-domestic-abuse-bill/>

Felson, R., Messner, S., Hoskin, A. and Deane, G. (2002) Reasons for reporting and not reporting domestic violence to the police. *Criminology*, 40(3), 617-648.
<https://doi.org/10.1111/j.1745-9125.2002.tb00968.x>

Gavrielides, T. (2007) *Restorative Justice Theory & Practice: Addressing the Discrepancy*, HEUNI: Helsinki.

IARS, IKF, IRKS, LOKK, MJF, EPLO, VJI and EFRJ (2016) *Restorative Justice and Domestic Violence: A Guide for Practitioners*.

https://www.ikf.ac.at/pdf/RJ_Guide_for_Practitioners.pdf

Ivandic, R., Kirchmaier, T. and Linton, B. The Role of Exposure in Domestic Abuse Victimization: Evidence from the COVID-19 Lockdown (May 27, 2021). Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3686873>

June, K. (2021) *Home Affairs Respondent, Coronavirus: Domestic Abuse an 'Epidemic Beneath a Pandemic'*. Available at: <https://www.bbc.co.uk/news/uk-56491643> (Accessed: 29 January 2022)

Liebman, M. and Wootton, L. (2008) *RESTORATIVE JUSTICE AND DOMESTIC VIOLENCE/ ABUSE: A report commissioned by HMP Cardiff Funded by The Home Office Crime Reduction Unit for Wales*

Office of National Statistics (2020) 'Domestic abuse during the coronavirus (COVID-19) pandemic, England and Wales' Available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseduringthecoronaviruscovid19pandemicenglandandwales/november2020> (Accessed January 29, 2022)