

Community Service as an Alternative Form of Punishment under the Domestic Violence Act 1994 in Malaysia

DaleleerKaurRandawar¹, Sheela Jayabalan²

^{1,2}Faculty of Law, UniversitiTeknologi MARA (UiTM), Shah Alam 40160 Selangor, Malaysia

¹dolly_uitm@yahoo.com

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Abstract:This article intends to explore the punishment meted under the law relating to domestic violence in Malaysia. The investigation extended to an analysis with the need to implement and introduce community service as a form of punishment for domestic violence offences. A comparative legal research methodology is employed in comparing the positions in Malaysia and certain selected jurisdiction. It is expected that the findings of this paper will look into the need to introduce and implement community service as a form of punishment which will optimisticallyencourage repentance by the offender and preserve the sanctity of marriage. Community service as a form of punishment will be a great intervention that will more likely emphasize the responsibility of the wrongdoer in healing a family relationship. The article seeks to suggest legislative reforms which will involve a comparative study of other comparable jurisdictions.

Keywords: Community, service, domestic violence, punishment, alternative

1. Introduction

Family violence is not a new occurrence in the society.(Randawar and Jayabalan, 2018). Domestic violence involves physical and non-physical violence. Physical violence involves abuse that leaves visible marks and non-physical violence involves psychological and emotional violence. Despite the kind of violence, there is no excuse for any kind of abuse and the abuser is always responsible for causing hurt and harm be it physical or non-physical. Home being a safe place, can often also be a space where physical, psychological and sexual abuse occurs, as this is the place where violence can be wrench by the abuser without the knowledge of any outsider (Jones&Isham, 2020).

Horstman, Bond & Eriksson (2019) study indicated that victim-offender relationship is an important factor seen in giving judgments for sentencing in domestic violence cases. Horstman, Bond & Eriksson (2019) findings also highlighted the importance of continued community awareness and education about domestic violence. Many women who sufferviolence in the home may not want the abuser to be punishedor charged under a criminal offence as it may derive them suffering financial loss and derange the relationship between the father and children. (Gleeson, 2019).

Gannon and Mihorean (2004) findings suggest when judges often take into consideration the victim's hankering for reconciliation or financial support from the abuser when they are sentencing domestic violence cases. Bond and Jeffries (2014) explained that it is very unlikely for domestic violence offenders as compared to other crime offenders to be sentenced to prison; and even if they are at all sentenced to prison it is most likely they will receive a significantly shorter sentenced term. Carlson and Worden (2005) study revealed the acts of physical belligerence can be tagged as domestic violence but substantially less certainty with regards to the illegality of the abusive actions. The concern that arises in domestic violence offences is usually on punishing the offender who is a parent, and the impact of punishment may be indirectly be suffered by the family(Ezra, 2005).

Hence, domestic violence laws should be made to tackle bad behaviour or minor misdemeanour offences. Often the abuser is the victim's only support system and the sole bread winner of the family. Sometimes, offender or victim may request a less severe sentence in view of remorse and the interests of any children. Punishment meted out to abusers in domestic violence offence should depend on whether the charge is a misdemeanour or a felony, well-being of family relationship and an opportunity for the abuser to repent. This paper seeks to fill the void in the current research on domestic violence in Malaysia by discussing its relevance and application with regards to the form of punishments which are available in the context of Malaysian Domestic Violence Act 1994. The purpose of this study is to evaluate the existing legal framework relating to punishments available under the Malaysian Domestic Violence Act 1994. This study will examine the need to introduce and incorporate community service as part of the form of punishment in dealing with domestic violence offences. Community service being a form of restorative and rehabilitative method of intervention is a more amicable form of self-realization way to remorse for hurting their loved ones.

2. Methodology

This paper is based on a doctrinal study and review on the law relating to law on domestic violence in Malaysia with specific reference to the forms and punishment under the Act. A comparative legal research methodology is employed in comparing the positions in Malaysia and certain selected jurisdiction. The primary question that is addressed in this paper is the need to incorporated community service as another type of punishment for the domestic violence offender. A censorious approach of the law is adopted in this study (Gawas, 2017). Its focus is to investigate and amend the idea, and principles of law. As such, article embrace a discrete method of legal analysis that focuses on legal problems (Hutchinson & Duncan, 2012). Reference is made with three developing Asian jurisdictions, Bangladesh, Laos and Thailand asthese jurisdictions display a strong self-referencing in the context of Asian backdrop.

3. Forms of Protection and Punishment

To deter the issue of domestic violence in Malaysia, the Malaysian Parliament passed the Domestic Violence Act 1994 (Act No. 521) (hereafter referred to as the DVA 1994) in early 1994. For the purpose of criminal proceedings, the provisions of the DVA 1994 is to be read with the Penal Code as stated under section 3 of the DVA 1994 (Randawar&Zin, 2019). All offences involving domestic violence are now deemed to be seizableand serious offences as explained under section 18A of the DVA 1994.

The recent amendments to the DVA 1994 enforcement on 1 January 2018, added protection in the form of an emergency protection order (EPO) which will be issued by a social welfare officer and the within two hours after the application has been made (Section 3(A)(1) &(5) of the DVA 1994). Besides, according to section 3A(6) of the DVA 1994, an application for an EPO can be made without making a police report. As such the EPO provides fast interim protection for victims without having to lodge a police report or go to court. The introduction of EPO is more family friendly where the parties can work towards the preservation of family relationship (Randawar&Zin, 2019).

As compared to EPO and according to section 4(1) and section 12 of the DVA 1994, an interim protection order (IPO) will be issuedby the court during the pendency of police investigations into incidents of domestic violence. Thus, application of an IPO requires a police report to be made first; in which the police will start investigation in relation to the offence involving domestic violence. The provision regarding an IPO has been enhanced under the new 2017 amendments under section 4(3A) of the DVA 1994 where during the IPO, victims are entitled to the same remedies or orders as provided under a Protection Order (PO) that are spelt out under section 6(1)(a)-(f) of the DVA 1994. Hence, orders such as exclusive occupation of the shared residence; prohibit from entering the residence, employment, school; allow the victim to enter the home to collect personal belongings accompanied by an enforcement officer; requiring the abuser refrain from communicating with the victim and requiring the victim to continue use the vehicle.

A protection order (PO) is granted by the court when there is a proceeding in court involving domestic violence offence which is stated under section 5(1) of the DVA (Randawar&Jayabalan, 2014). The court can grant a protection order to stop the offender to inflict violence against the family. (Randawar&Jayabalan, 2014). Similar to IPO, the PO under section 5 of the DVA 1994 too includesthe same orders which are available section 6(1)(a)-(f) of the DVA 1994. Moreover, these orders are only for a period not exceeding twelve months [section 6(1)(1A) of the DVA 1994] and can later be extended, if required, for a further period of not more than twelvemonths [section 6(2)(b) of the DVA 1994]. Thus, a PO from the date of its issuance can only be valid for twelve months and later be extended for another twelve months.

In addition to above, according to section 7 of the DVA, if the court believes that the offender is likely to cause harm to the victim, the court shall attach a power of arrest to such PO or IPO. Section 8(1) of the DVA clearly states that anyonefound to breach the PO or IPO shall be finedwith an amount not exceeding two thousand ringgit or imprisonment not exceeding six months or to both. If any person uses violence and breach the PO and IPO, the fine and imprisonment shall be increased to an amount not exceeding four thousand ringgit or to imprisonment not exceeding on year or both (Section 8(2) DVA 1994). Further, if a person is convicted for breaching the PO or IPO for the second time, according to section 8(3) of the DVA 1994, that person shall be punished with imprisonment for a period of not less than seventy-two hours and not more than two years, and shall also be liable to a fine not exceeding five thousand ringgit. As follows, it is seen that the fine and imprisonment differs and increases when offender contravenes second and subsequent violation of IPO and PO using violence.

As observe, the Penal Code has amended several provisions where the penalty has been increased in certain types of offences (Randawar&Najibah,2019). In the context of injuries caused to the spouse, i.e. husband or wife, sections have been incorporated under section 326A Penal Code and section 352A Penal Code, where the penalty has been increased for a term of twice as long as the maximum term. Besides, section 375A Penal Code has also been incorporated into the Penal Code pertaining to hurt committed within a valid marriage. Section 326A Penal Code which deals with punishment for causing hurt by spouse, section 352A Penal Code which deals with criminal force by spouse and section 375A which deals with causing hurt in order to have sexual intercourse reads:

326A. Whoever, during the subsistence of a valid marriage, causes hurt to his spouse and commits an offence under section 323, 324, 325, 326, 334 or 335 shall be punished with imprisonment for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence under the relevant section.

352A. Whoever, during the subsistence of a valid marriage, assaults or uses criminal force on his spouse shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand ringgit, or with both.

375A. 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.

Hence, the punishment under the DVA 1994 and the Penal Code are subjective to punitive measures involving fine and imprisonment. Law implemented has a range of sanctions aimed at penalizing the offender for the abuse committed.

4. Legal Framework of Community Service in Malaysia

Community service is a form of voluntary and unpaid work, intended to be of social use, that an offender is required to do instead of going to prison. In Malaysia, there are several legislations that deals with community service which are Criminal Procedure Code(hereafter referred to as the CPC) and Offenders Compulsory Attendance Act 1954 (hereafter referred to as the OCA).

Under the CPC, community service will be ordered on youthful offender as an alternative to custodial sentence or a fine (Appukutan, 2020). “Youthful offender” is explained under section 2(1) of the CPC as offender who is above eighteen and below the age of twenty-one(Rahim, et.al, 2013). Community service order is explained in section 293(1)(e)(i)(ii)(iii) which reads as:

(i) to make an order requiring the offender to perform community service, not exceeding 240 hours in aggregate, of such nature and at such time and place and subject to such conditions as may be specified by the Court;

(ii) “community service” means any work, service or course of instruction for the betterment of the public at large and includes, any work performed which involves payment to the prison or local authority; and

(iii) the community service under this paragraph shall be under the Minister charged with the responsibility for women, family and community.

As such, this community service order can only be foisted upon a child offender from the age of 18 to 21 and not for children below the age of 18. (Rahim, et.al, 2013).

The other Act that deals with compulsory work is the OCA which provides for the performance of compulsory work by offenders as an alternative to sentenced by fine and imprisonment. As stated under section 5(1)(a)(b)(iii) OCA, this order will require the person to attend daily at a Centre and to undertake compulsory work for a period not exceeding three months and for such number of hours each day not exceeding four. As such, in order for the court to regulate this order, the court will consider the character of the person, the seriousness of the offence or also circumstances of the person’s failure to pay the fine. According to section 6 of the OCA an offender is required to report daily at such time and place and shall each day undertake such compulsory work as may be ordered by the Compulsory Attendance Centre Office; and if the offender is gainfully occupied in employment, the time at which he is ordered to report daily shall not interfere with such employment.

It is believed that the implementation for community work involving minor offenders under the Compulsory Attendance Order (CAO) has reduced the cost for offender management in the country (Borneo Post, 2011).

5. Comparative Perspective

Intimate partner violence is a reality that affects people in all walks of life. (Oche et.al,2020). It is a widespread problem that affects all cultures of groups (Mukamana, Machakanja&Adjei, 2020). Violence that impacts a society needs to be eliminated through proper legal action. Legal measures are required to make offenders better and to attribute positive change; a proper system is required to enhance the corrective impact of punishment. Some countries have adopted alternative method of disciplining offenders of domestic violence by implementing community service. Reference is made to certain developing countries incorporating community service as an alternative form of punishment for domestic violence abusers.

Responding to this move, in the People's Republic of Bangladesh, under section 31 of the Domestic Violence (Prevention and Protection) Act, 2010, the Court, may pass an order to perform various community welfare services if the offender breaches the protection order. The section reads as:

Community welfare service

(1) The Court, if it deems fit, instead of passing an order of sentence against the respondent under section 30, may pass an order to perform various community welfare services by the respondent and responsibility may be vested upon any institution or organization to supervise such services.

(2) From the income gained by the respondent due to the community welfare services under sub-section (1), the Court may pass an order to pay such portion of the income to the victim and where applicable, to her child/children or any dependants as it deems appropriate.

(3) For the purpose of the sub-section (1) and (2) rules may be framed.

The provision even allows the court to order that some portion of the income gained from the community services to be paid to the victim. Such humane activities may not pay much but some additional fund may impact family's income in excess of poverty. When an offender breaches a protection order in Bangladesh, the court shall punish the offender for imprisonment or fine, or with both as stated under section 30 of the Domestic Violence (Prevention and Protection) Act, 2010. As such, to avoid criminal sanctions, the court may order the offender for community service. In support to the above, Bashar (2019) supported that offences related to family matters which are not violent and serious should be punishable by community service.

It is quite compelling to discern the fact that the Lao's law on Preventing and Combatting Violence against Women and Children highlights on settlement of violence against women and children. This is indicated under Article 47 of the Law on Preventing and Combatting Violence against Women and Children 2014 which states two ways in which settlement of violence can be conducted which are firstly re-education, compromise or mediation and secondly judicial proceedings. Article 47 further explains that settlement (re-education, compromise or mediation) can be used for violence which does not cause harm and not serious but if violence is serious, then it must be settled by judicial proceedings only. Also, there-education and compromise can be conducted by family members, close relatives, elders of the village or an organization that the victim or perpetrator of violence belongs to (Article 48 of the Law on Preventing and Combatting Violence against Women and Children 2014). In the event, if any of the re-education or compromise fails, victims can request for mediation or report to the police (Article 49 and Article 50 of the law on Preventing and Combatting Violence against Women and Children 2014). Therefore, the law in Laos provides a gradually from of settlement in domestic violence which includes community service as a form of punishment in educating the offender. The act focuses on educating and likewise imposes sanctions equally on serious offences too. Sananikone, Ayuwat and Kaen (2016) study found that community in Laos mainly used education and focused more on family and reconciliation when addressing family disputes, rather than using the formal legal system or focusing on the legal rights of an individual woman.

Enthrillingly, in Lao People Democratic Republic under Article 51 of the Law on Preventing and Combatting Violence against Women and Children 2014, violence which are not criminal offence, imprisonment which are less than one year and defined as minor offences committed against women and children can be mediated. Under Article 52 of the of the Law on Preventing and Combatting Violence against Women and Children 2014, states that the mediation can be conducted by Village Mediation Committee, Counselling and Protection Unit for Women and Children, Police Interrogation-investigation official, The Public Prosecutor and People's Court. Thus, perpetrator committing such offences can be ordered for community service or

society under Article 54 of the Law on Preventing and Combatting Violence against Women and Children 2014 which reads as:

Article 54. Measures against Perpetrator of Violence In mediating [cases of] violence against women and children, organizations that have the right to mediate can use the following measures against perpetrators of violence:

- Apology to the victim, the victim's family, and other affected persons;
- Warning; re-educating the perpetrator of violence to understand the negative impact of his/her action and to stop that behavior;
- Management of the behavior that caused the violence such as psychological rehabilitation, rehabilitation for alcohol and drug abuse;
- Community service or society at certain duration;
- Other measures as needed.

In Thailand, under section 12 of the Domestic Violence Victim Protection Act, B.E. 2550 (2007), the court can order for community service as an alternative to sentencing. This section reads as:

Section 12

In the case where the court passes judgment that a person who commits domestic violence is guilty under section 4, the court shall have the power to impose the measure for rehabilitation, treatment or probation to that person or to order that person to pay financial assistance, to conduct community service, to refrain from doing an act which may give rise to domestic violence or to be on parole in accordance with the procedure and period specified by the court in lieu of sentencing. Moreover, under section 12 of the Domestic Violence Victim Protection Act, B.E. 2550 (2007), the inquiry official or court shall take all the necessary measures to ensure the compliance of the community service order as such and if the accused breaches or does not comply with the order, the inquiry official or the court shall have the power to continue with litigation. Based on a study conducted in Thailand, psychological violence had shown to have the highest prevalence as compared to physical and sexual violence and thus national policy should work towards eradicating the root cause of violence against women in order to have a society free of violence. (Chuemchit et al, 2018).

Thus, the above discussion shows countries with provisions which specifically deals with community service under the Act in relation to the protection on domestic violence. The following Table 1 below sets out and simplifies community service as a form of punishment under their specific Act, which includes Malaysia too.

Table 1. Community Service as Punishment

Country	Legislation	Legal Provision
People's Republic of Bangladesh	The Domestic Violence (Prevention and Protection) Act, 2010	Section 31 (1)(2)(3)
Lao People Democratic Republic	Article 51 of the Law on Preventing and Combatting Violence against Women and Children 2014	Article 54
Thailand	The Domestic Violence Victim Protection Act, B.E. 2550 (2007)	Section 12
Malaysia	The Domestic Violence Act 1994	No provisions relating to community service as a form of punishment

6. Discussion and Recommendations

Activists and researchers involving domestic violence issues have strived for domestic violence offender to be imposed with the same punishment like any other criminal offender outside the family context. (Bond & Jeffries, 2014). Victims' reluctance to take part in the criminal justice system may imply that there is a need to create a better access to material support making the criminal justice solution as simply not the best choice for all victims (Bailey, 2012). Violence will need to be reported and thus victim's unwillingness to report could undermine the efficacy of the justice system. Usually, it is seen that violence is less likely to be reported if the victim knows the offender in any way. Thus, having a multivariate legal framework with fine, imprisonment and community order could lift the barrier of guilt and apprehension in a victim.

Ironically, family ties make it exceptionally difficult for the victims at times to step out to lodge a report against their abusive husband for domestic violence. Concerted efforts and programmes are required to make offenders better and to attribute positive change. A proper system is required to enhance the corrective impact of punishment. Proper intervention programs are required in order to deal with the issue of family violence from the grassroot. Erez (2002) believes that because physical abuse in a family places high merits in family seclusion, it makes it difficult for the justice system to criminalize the acts of domestic violence.

Community service may hopefully change the culture of violence in the society. Imposing community service as punishment in the act would be good in cases where physical evidence of abuse is not convincing. In such cases, where evidence on abuse is not cogent, judges may be resistant to foist punishment upon the wrongdoer. The law can only be enforced when a physical violation has actually occurred. Thus, when there are other mechanisms that exist to provide more satisfactory protection, or when criminal law is not an appropriate sanction, then the criminal justice system and retribution will have to be withdrawn and altered according to the situation of each case. (Maculan & Gil, 2020).

By implementing community service as a form of punishment against the offender, doesn't imply that the victim is not allowed to press charges against the offender. It also in anyway doesn't undermine or impede women's rights by maintaining sanctity of marriage above all. Proper holistic reinforcement should be strategized to explore the need to maintain the family institution. It is always important to strengthen legal frameworks that protect victims of domestic violence. As such, the legal framework must comprise of legal, social, educational mechanism and corrective strategies like community service, labour and public service to enhance protection to victims of domestic violence and deter such behaviour.

It is also hoped that by introducing community service, it could reduce recidivism and the prison population. This is one way we can balance security needs and social justice to the society. A restorative justice is required as it tends to boost penitence in an individual will allow offenders to participate actively in resolving the difficulties resulting from the offence. Community service also signifies on actions that includes harm reparation which will definitely be in the interest of the victim. Bouffard & Muftić, (2007) study revealed that those who engage in community service sentences will unlikely attend post-program recidivism. As such, law and policies implemented must be framed out to allow wrongdoer offender to lead a decent righteous life. This will optimistically assist the offender, especially involving domestic violence to be responsible for the crime committed and restore the respect and dignity of the family members.

Ssebuggwawo (2010) opined that in order to eradicate recidivism, government should undertake on teaching the society, by conducting awareness programmes and workshops that will educate the society to leave all criminal activities and motivate the youths to engage in good activities. Afrin (2017) opined that laws which instruct altering of human habits and conduct usually is difficult to succeed without the society acceptance and thus women's organizations should emphasize more on community awareness programmes as a change in attitude must come from each individual, not merely by enforcing new regulations.

Rosenberg & Pugach (2012) study offers a resolution mechanism that is sensitive to the balance between the different considerations and diverts the focus from the contents of the request per se (to lighten the sentence) towards a spectrum of various motives for the request, such as fear, love, the desire not to harm children and family, and practical considerations such as economic dependence. Transferring attention from the issue of the content of the request to the motive underlying the request that the assailant be given a more lenient sentence may allow the proper weight to be assigned to each request in any given case, by taking into account the entire spectrum of considerations on either side of the double-edged sword (Rosenberg & Pugach, 2012). Thus, discussion by Rosenberg and Pugach places importance to the victim's point of view at the sentencing stage in requesting for a leniency of sentence. Hence, when a victim or the survivors of a victim is given the opportunity to address the court and recommend leniency or strictness for the sentence, community service can be considered as an alternative of punishment to domestic violence offenders.

It is important to develop a well-integrated law to impose community service, if necessary, as a type of punishment involving family violence cases. This article does not in any way suggest to substitute the existing form of punishment that are available under the law. It must be recognised that domestic violence is a criminal offence and infringes human rights and dignity. Punishment need to be meted out in any violation of law.

However, in certain circumstances, particularly in domestic violence cases, the judgment given must not only be within the purview of the penal section. Instead domestic violence law should focus as well in educating and

reconciling parties if it entails misdemeanour offences. To begin with, domestic violence offences involving psychological, mental or economic abuse, could if necessitate be punished with community service.

Imposing a proper model of community service which is suitable with the legal framework could assist and benefit the society too. Wahabet. al (2014) suggest that community service orders have substantially benefited the community and to ensure the successful implementation of this orders, proper preparation of guidelines or a complete implementation model need to be implemented for community service orders.

7. Conclusion

A more practical approach has to be incorporated into the DVA 1994 in order to deter first time offender committing misdemeanour crimes. Victims and public can gain an advantage from the offender's income earned through community service activities. Community service should not be made available when offences committed are serious and violent in nature or if there is a possibility for the wrongdoer to inflict harm upon the victim. This study does not in any way suggest that fine and imprisonment be abolished or withdrawn as punishment against the offenders in domestic violence cases. Statutory penalties such as fine and imprisonment are set and mandatory for each crime. Community service as a penalty is suggested as an alternative to imprisonment and fine when dealing with less serious offenses committed by first-time offenders. It should not be made available for any form of serious offences. Punishment gives a message to the offender (society too) that what they have done is wrong. Community service can also be foisted upon the offender in addition to receiving some other form of punishment.

The sentences passed by judges can be commensurate with the gravity of the crime committed. Due to being at the nearest proximity with the offender has placed the victims of domestic violence at the most disadvantageous position as compared to other victims from different offences. Courts should take into account chances of recidivism and ubiquity of cases in administering the punishment. In spite of this, it must be acknowledged that domestic violence offences relate to family and even if the victims have left the relationship, they still remain connected through the children and family. For this reason, introducing community service can wield as an intervention method, if needful, on a case to case basis.

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