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GENDER-BASED VIOLENCE 1: 'DOMESTIC VIOLENCE'

Introduction

Violence in the home has only come to public consciousness in Ireland, as in many other countries, since the 1970s. The gendered nature of such violence is clear from a range of studies and statistics; the vast majority of victims are women, the vast majority of perpetrators are men. Yet while in recent years there has been increased recognition of the danger to women posed by so-called 'domestic' violence, there has also been a backlash, as men's groups have challenged legislation offering remedies and protection to women, and have sought to project themselves as victims of violence by women. In fact the legislation is gender-neutral, although its introduction was due to the efforts of feminist campaigners and women's support groups.

Legislation

Prior to 1976, women (or men) suffering violence within the home had to rely upon the ordinary criminal law on assault, but as this meant a public trial in open court, many were afraid to bring prosecutions. In 1976, after intensive lobbying by feminist activists, the Family Law (Maintenance of Spouses and Children) Act introduced the concept of a 'barring order', an order which a spouse could obtain to prohibit a violent spouse from entering the family home for three months. In 1981, this legislation was amended so that barring orders could be made for up to one year; and a second remedy, the 'protection order,' was introduced.

Then in 1996, the Domestic Violence Act was introduced, extending the remedy of a barring and protection order to anyone suffering from physical, sexual, emotional or mental abuse in a relationship of cohabitant or family member, as well as spouses. Orders are granted on the basis of the safety and welfare of the victim –welfare includes 'physical and psychological welfare'. The Act also introduced the new remedy of a 'safety order', allowed for the making of an 'interim barring order', and gave the police increased power of arrest for breach of orders.

Civil and Criminal Remedies

Under the 1996 Act, the procedure by which a barring, safety or protection order is sought is regarded as a civil procedure, but is not heard in public. Other civil applications dealing with maintenance, or custody, for example, may be heard at the same time. However once it is alleged that an order has been breached, then the gardai will institute criminal proceedings.

Barring Orders

These are orders directing the respondent, if residing at a place where the applicant or dependent resides, to leave such place, and prohibiting them from re-entering the place. An applicant who is not a spouse seeking this remedy must have an equal or greater interest in the property than the respondent. The following groups of people may apply for barring orders: spouses/former spouses; cohabitants who have lived as spouses for at least six months out of the previous nine months; parents of adult children; a health board on behalf of a victim.

Interim Barring Orders

These orders under section 4 of the 1996 Act were controversial, because they were capable of being obtained ex parte, ie without notice to the respondent; although they could only be granted on the basis of an immediate risk of significant harm to the applicant or any dependent person, where a protection order would not be sufficient protection. The power to make such orders was however deemed unconstitutional by the Supreme Court in Keating v. Crowley, Ireland and the Attorney-General, 9th October, 2002.

The Court found that in 'failing to prescribe a fixed period of relatively short duration during which an interim barring order made ex parte is to continue in force', the interim barring order provision had 'deprived the respondents to such applications of the protection of the principle of audi alterem partem in a manner and to an extent which is disproportionate, unreasonable and unnecessary.'

This decision led to an outcry by women's groups, since it meant that for a period of time, victims of violence in the home would be put at risk, with no access to emergency remedies. As a result, the Domestic Violence (Amendment) Act 2002 was introduced, allowing for the making of interim orders, but providing that they could only be valid for a period of eight days.

Protection Orders

These orders do not put the respondent out of the family home, but instead they prohibit the respondent from using violence or threats against the applicant or dependents. They only last until the making of a barring or safety order.

Safety Orders

These are like a long-term version of the protection order; they do not evict the respondent from the home, but

prohibit them from engaging in violence against the applicant on an extended or continuing basis.

Police Powers and Sanctions
The gardai (police) have a duty to investigate fully and promptly all incidence of family- or household-based violence, and all incidents of such violence must be recorded. Section 18 of the 1996 Act gives gardai power of arrest, even where they have reasonable cause to believe that a person is being assaulted, and that they could apply for a safety or barring order. Where an order has been granted, breach of that order is a criminal offence, and the gardai may arrest for breach. The penalty is a fine or up to twelve months' imprisonment.
The gardai have a clear published pro-arrest policy. In 1993, the Domestic Violence and Sexual Assault Investigation Unit was established within the gardai to co-ordinate policing in this area, and in 1994 the Garda Policy on Domestic Violence Intervention was introduced, and amended in 1997. It now forms the basis for the national Domestic Violence Intervention Programme.

Figures on Violence in the Home
In 2001, the most recent year for which statistics are available, the gardai recorded 9,983 incidents of domestic violence, a decrease of 8% from 2000. The vast majority of the complainants were women (87%), and the vast majority of the offenders male (89%), reflecting the gendered nature of this type of violence.
Safety and Sanctions (1999), a study conducted for Women's Aid examining the response of the civil and criminal justice systems to domestic violence, found that out of 427 domestic violence callouts by gardai, 42% of the alleged perpetrators were arrested; 23% were charged, 14% were found guilty, and 3% received a prison sentence.

Supports for Victims
There are now many groups offering support to those who are victims of gender-based violence. The best known and most established, Women's Aid, has been in existence since 1974 and has run a national helpline since 1994. It is a voluntary organisation which provides support, information and access to services to women and their children who are being physically, emotionally and sexually abused in their own homes or who are experiencing male violence. Women's Aid describes itself as "a feminist, service based, political and campaigning organisation committed to the elimination of violence and oppression against all women through effecting political, cultural and social change" (www.womensaid.ie). It has lobbied over the years for many of the changes in the law described above and continues to offer supports to women victims of abuse.

Reforms – Best Practice
In the 1999 report, Women's Aid recommended that a wide range of changes should be introduced to improve the position for women seeking protection against violence. Among other things, they recommended that the eligibility criteria to seek protective orders should be extended to include a person with a child in common. They advocated improved recording practice in civil applications for orders; and a more formal support service for women. In relation to the role of the gardai, they called for better recording of call-outs, and for a risk assessment to be carried out at initial call-out stage. They also sought training for police and judiciary, and improved court procedures and facilities. Finally, they called for a better system of tracking and monitoring cases of domestic violence through the civil and criminal systems.

GENDER-BASED VIOLENCE 2: RAPE LAW

Introduction
Like the law on violence in the home, the law on rape has long been a site of gender struggle, in Ireland and elsewhere. This is because the origin of many rules and principles governing the trial of rape may be found in traditional sexist assumptions about the nature of female sexuality. Feminists have sought to challenge these persistent myths, and to change both the law itself and those features of trial procedure which derive from the myths, and which can make the legal process particularly traumatic for rape victims.

Study on Rape Law
The issue of how rape victims experience the legal process was the central focus of an EU-funded Irish study, Bacik, Maunsell & Gogan, The Legal Process and Victims of Rape: Dublin Rape Crisis Centre, 1998. Our study examined the laws and procedures on rape across the 15 member states of the EU, and the impact which those laws and procedures have on the victims of rape. We then developed a set of recommendations, based upon the findings of the study, through which we hoped to establish a best practice model for the trial of rape within different legal systems, which could be applied in Ireland and in the other member states of the EU.

We found that despite the many differences between types of legal system, many common concerns about the trial of rape are shared throughout the member states of the EU. Concern about the definition of rape; the difficulty of proving absence of consent; concern about the lack of judicial training or training for police and legal personnel in

dealing with rape cases; concern about sentencing, and, overall, concern about the treatment of rape victims within the process.

We argued that a best practice model for rape law should incorporate a total of 51 recommendations based upon our findings, relating to all stages of the legal process. But perhaps the most important recommendation was that the victim should be entitled to legal representation, both at the pre-trial stages and during the trial itself. The findings of this study show that such representation is the norm in other European legal systems, and that the victim's overall satisfaction with the legal process is significantly increased where she is legally represented.

We found that reform of rape law and procedures is ongoing in most European jurisdictions, largely due to assertive campaigning by women. We also found that there is a heightened awareness of the need for reform in order to address more fully the levels of harm done to the victims of rape and sexual abuse. However, despite the work done by women's groups, an insufficient understanding still exists of the level of harm caused by rape, particularly the psychological impact upon the victim and her family and at a wider level, the cost to society.

Rape in Irish Law

Rape is defined in section 2(1) of the Criminal Law (Rape) Act, 1981: A man commits rape if (a) he has sexual intercourse with a woman who at the time of intercourse does not consent, and (b) at the time he knows she does not consent or is reckless as to whether or not she is consenting. This provision represents the common-law definition of rape, and is gender-specific.

In 1990, a new and additional gender-neutral offence of 'rape under section 4' was introduced (section 4 of the Criminal Law (Rape)(Amendment) Act 1990). This prohibits penetration of the anus or mouth by the penis, or penetration of the vagina by an object, again where carried out with the same level of awareness as to the victim's lack of consent. This offence carries the same maximum penalty as common-law rape (life imprisonment). Thus, two separate rape offences now exist in Irish law, both carrying the same potential penalty.

For the offence of common-law rape, the prosecution must prove beyond reasonable doubt that: (a) sexual intercourse occurred between a man and a woman; (b) the woman did not consent to it at the time; (c) the man either knew she did not consent, or was reckless as to whether or not she consented.

'Consent' is not defined in any legislation, but it is now established in case law that failure to offer resistance does not amount to consent. Section 9 of the 1990 Act provides that 'It is hereby declared that in relation to an offence that consists or includes the doing of an act to a person without the consent of the person, any failure or omission by that person to offer resistance to the act does not of itself constitute consent to that act.

The test for mens rea or the mental element in the crime of rape is a subjective one - the prosecution must show that the accused either knew the victim was not consenting, or that he was reckless as to the absence of consent; that is, that he himself was conscious of the possibility or risk that she was not consenting. Thus a defence of 'genuine belief' is open to the accused in rape cases, so that he is entitled to an acquittal if it genuinely did not occur to him that the victim might not be consenting, even in circumstances where her non-consent would have been obvious to any reasonable person.

The effect of this decision was to make it more difficult for the prosecution to obtain a conviction in rape cases. But its effect was moderated in Ireland by section 2(2) of the 1981 Act, which provides that, if the question of the accused's belief in the victim's consent arises at trial, 'the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters.'

Following the report, and as a result of our recommendation, the principle of separate legal representation for the complainant was introduced, in any application brought by the defendant seeking to adduce evidence or cross-examine a complainant about her or his past sexual experience (section 34 of the Sex Offenders Act, 2001).

Recommendations for Change – Best Practice

There are also other means which could be introduced to support complainants in the course of trial. In particular, it would be possible to extend the right to legal aid to cover legal representation by a solicitor for the complainant during the pre-trial stages and the trial itself would enable her or him to remain fully informed at all times about the course of the case, and would substantially decrease the trauma of the trial process for the complainant. Complainants should also have statutory rights to information and consultation.

A single, codified sexual offences statute should be enacted which would replace the present complex and inconsistent set of offences with a scheme based on two principal offences; penetrative sexual assault (rape) and non-penetrative sexual assault. The statute should also specify those factors to be considered as aggravating for both species of sexual assault.

A 'sliding scale' of aggravating factors, accompanied by a differential maximum sentence depending on the presence or absence of such factors, would mean the gap between rape and sexual assault would be lessened, and it would remove the need for the present 'halfway house' offence of aggravated sexual assault. The definition of penetration should be extended to include penetration of the anus with an object, and digital penetration of the anus or vagina. Such an Act could contain a definition of those circumstances in which consent may be presumed to be absent (such as where the complainant is asleep, unconscious or has a mental disability such that he or she is incapable of

consent, or where the defendant was in a position of authority over the complainant). Any definition of consent should be non-exhaustive, so that a jury would be entitled to find an absence of consent even where the circumstances at issue are not covered by the definition.
Finally, various procedural and practical changes should be introduced, to abolish altogether the need for a corroboration warning, for example; and to ensure that the victim and the defendant are never placed in close proximity during the trial.

Conclusions
Some of these recommendations might help in improving both the experience that complainants in rape trials have of the legal system; and it might go towards increasing the currently very low conviction rate in rape cases. But in terms of both rape and domestic violence, apart from legal change, attitudinal change is necessary.
A preventative approach to gender-based violence must be taken, which emphasises the vital role of education in changing the attitudes and challenging the prevailing myths about rape and violence in the home. Through education, training and public information campaigns, the aggressive construction of masculinity could be challenged, in order to create 'zero tolerance' of violence against women. Similarly, education should be aimed at empowering girls and women, not just in their relations with men, but also in their working lives. If rape and domestic violence are abuses of power by men over women, then the attainment of real economic and social power by women is the most effective way in which to tackle the incidence of such gendered violence.