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RAPE AND RELATED OFFENCES – A LEGAL PERSPECTIVE

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There are now many sexual offences known to Irish law, and the number is due to increase with the enactment of the Criminal Law (Sexual Offences) Bill 2015 which is in its final stages in the Oireachtas. However, in light of the present concerns of this Assembly, I shall concentrate on those sexual offences involving heterosexual intercourse, as these alone may result in pregnancy. Essentially, four offences fall to be considered:

Rape

Sexual act with a person under the age of 17 years

Sexual act with a protected person

Incest.

The paper will also address the sentencing of serious sexual offences and some of the issues that might arise if rape were to be accepted as reason for allowing abortion.

ANIMATING VALUES

Conviction of a criminal offence may have severe consequences including, potentially, the loss of personal liberty through imprisonment. Human conduct should not therefore be criminalised except where it is necessary to protect the rights of others or to advance some other compelling social objective. Sexual offences, especially those considered in this paper, are justified because they violate the bodily integrity, human dignity and personal autonomy of victims. Bodily integrity is well established as a constitutional right, while human dignity and personal autonomy are equally important constitutional values. Today, in most Western countries, including Ireland, the regulation of sexual conduct by means of the criminal law is inspired by three complementary sets of values, all of which relate in one way or another to the concept of personal autonomy. First, it is accepted that persons of full age and capacity should be free to engage in sexual acts with partners of their own choosing. Thus, homosexual acts between consenting adults are no longer criminalised. Secondly, and as a corollary of the first, it is accepted that everyone has the right to refuse to engage in sexual activity, either in general or with any particular person or in any particular circumstances. This explains the centrality of consent, a concept to be described later, in the definition of rape and sexual assault offences. Thirdly, it is accepted that certain persons, because of their young age or lack of mental capacity, require special protection from sexual victimisation. This explains why, for example, sexual intercourse with a person under the age of 17 years is a criminal offence even if the young person in question consents or appears to consent.

RAPE

Rape is defined by the Criminal Law (Rape) Act 1981 as sexual intercourse by a man with a woman who is not consenting to the intercourse, and where the man is either aware that she is not consenting or is reckless as to whether she is or not. As it happens, there is another offence of rape, created by the Criminal Law (Rape) (Amendment) Act 1990, which consists of certain forms of sexual penetration other than penile-vaginal intercourse, but that is immaterial for present purposes. As with all serious criminal offences, in a trial for rape the prosecution must prove all the ingredients of the offence to the criminal standard of proof, namely, beyond a reasonable doubt. As is clear from the statutory definition, rape has three essential elements or ingredients, each of which must be proved to the required standard. They are:

(1) That the defendant intentionally had vaginal sexual intercourse with the complainant;
(2) That the complainant was not at the time consenting to the intercourse; and
(3) That the defendant knew that the complainant was not consenting or was reckless as to whether she was or not.

The second and third of these elements require some further analysis.

Consent

There is currently no statutory definition of consent, although it is planned to insert such a definition in the Criminal Law (Sexual Offences) Bill 2015 before it is finally enacted. However, it is generally accepted and supported by Irish case law that consent must be freely and voluntarily given.[1] Consent will therefore be absent where a woman refuses to have sexual intercourse with a man, or where she is not in a position to grant or refuse consent. For example, person who is asleep cannot indicate consent. The same holds true where a woman is suffering from a disability (and a mental disability in particular) of such nature or degree that it prevents her from making a genuine and informed decision as to whether to consent to sexual intercourse. This situation, as we shall see, is specifically addressed in the Criminal Law (Sexual Offences) Bill which is about to become law. Likewise, there is no consent if submission to a sexual act is obtained by the use of force, by mispresenting the nature of the act involved or by holding the victim in captivity. It is further accepted that a person may be incapable of consenting as a result of being heavily intoxicated through the consumption of alcohol, drugs or both.

The mental element of rape

As already noted, an essential element of the offence of rape is that the man must have been aware that the woman was not consenting or have been reckless in that regard. This is known as the mental element of rape or, in traditional legal terms, the *mens rea* ("a guilty mind"). It is sometimes said that a defendant has "a defence" if he can show that he believed that the woman was consenting. This is not, in fact, the case. The man does not have to prove anything (though he can, of course, give evidence in his own defence if he so wishes). It is

[1] In *People (DPP) v C* [2001] 3 I.R. 345 at 360, the Court of Criminal Appeal said: "Consent means voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent and with the requisite mental capacity. Knowledge or understanding of the facts material to the act consented to is necessary for the consent to be voluntary or to constitute acquiescence."

for the prosecution to prove all the elements of the offence, and that includes proving that the man knew that the woman was not consenting or that he was reckless in that regard. As the law stands, the mental element of rape is governed by a subjective test. The question in each case where the matter arises is whether the accused person knew the complainant was not consenting or was reckless in that regard. That is clear from the terms of the Criminal Law (Rape) Act 1981 and was confirmed by the Supreme Court last year in *People (DPP) v C. O'R* [2016] IESC 64, although the Court did stress that the accused person's belief must be genuine. In some other jurisdictions, the test is objective in the sense that the question is whether the accused person reasonably believed that the complainant was consenting or whether a reasonable person in the position of the accused would have so believed. There are currently indications that the Law Reform Commission may be asked to review this aspect of rape law in Ireland.

Rape within marriage

The Criminal Law (Rape) (Amendment) Act 1990 clarified that there is no so-called spousal rape immunity. A man may be convicted of raping his wife. The definition of rape and the maximum sentence it attracts (life imprisonment) are the same irrespective of whether it occurs within marriage or otherwise.

SEXUAL ACT WITH A PERSON UNDER THE AGE OF 17 YEARS

Absence of consent is an essential element of rape (and of certain other sexual offences). However, it is accepted that persons below a certain age, even if they may be willing in certain circumstances to engage in sexual activities with others, need special protection to prevent them from being sexually abused or exploited. This has long been reflected in Irish law. Under the Criminal Law Amendment Act 1935, for example, there was an offence commonly known as unlawful carnal knowledge whereby it was an offence for a male of any age to have sexual intercourse with a female under the age of 17 years. If the female was under the age of 15 years, the offence was punishable with a maximum sentence of life imprisonment. This was effectively an offence of strict liability. Once a male was proved to have had sexual intercourse with a female under the age of 17 years, he was guilty of an offence. Consent on the part of the female afforded him no defence, and neither did a mistake on his part as to her age, no matter how genuine the mistake may have been. The absence of a defence based on mistake as to age led to the relevant provisions of the 1935 Act being declared unconstitutional by the Supreme Court in *CC v Ireland* [2006] 4 I.R. 1.

In response to this decision, the Oireachtas enacted a new law, the Criminal Law (Sexual Offences) Act 2006, which introduced two new offences which were very similar to those in the 1935 Act, but with the crucial difference that a person charged with either of the new offences had a defence if he could prove that he was genuinely mistaken as to the age of the other party. However, it remains the law that consent on the part of an underage person provides no defence to an accused. The offences created by the 2006 Act are now about to be replaced with similar but somewhat differently defined offences in the Criminal Law (Sexual Offences) Bill 2015, which will shortly become law. The definitional changes are not particularly significant for our present purposes. It will still be an offence for a person to

engage in a sexual act (which is defined to include heterosexual intercourse) with a person under the age of 17 years. Where the young person is under the age of 15 years, the maximum sentence will remain as life imprisonment. Somewhat shorter maximum sentences apply where the young person is under the age of 17 years. One change of some importance is that, once the new law enters into force, a person charged with an offence will have a defence only if he can prove that he was *reasonably* mistaken as to the young person's age. As the law stands, it is sufficient if he can prove that he was *honestly* mistaken as to age. One important aspect of the law will remain unchanged. Consent on the part of the young person to the sexual act in question will provide no defence to the accused, except in the very limited circumstances mentioned in the next paragraph.

One contentious issue in this entire area is the age at which young persons should be deemed capable of consenting to sexual acts, especially in so far as sexual intercourse is concerned. In Ireland, the age of consent remains at 17 years, which is rather high by European standards. This can be a particularly difficult matter where both parties are of or about the same age as, for example, where a 16-year-old male and a 16-year-old female who are in a relationship have sexual intercourse. Is it right that he should be guilty of a criminal offence while she is not? To address this issue the new Bill provides that where the young person is aged between 15 and 17 years, consent will be a defence provided the defendant is younger or less than two years older than the young person. This will be on the assumption that the defendant was not in a position of authority over the young person and was not in a relationship with the young person that was intimidatory or exploitative. Once this law enters into force, it will mean, for example, that where a 15-year-old male has intercourse with a 16-year-old female or where an 18-year old male has intercourse with a 16½-year-old female, he will not be guilty of an offence, provided of course, in all cases, the female has consented.

SEXUAL ACT WITH A PROTECTED PERSON

The Criminal Law (Sexual Offences) Bill 2015 also makes important changes of the law governing the sexual exploitation of persons with mental disabilities. As the law stands, it is an offence for a man to have sexual intercourse with a "mentally impaired" woman unless he is married to her (or reasonably believes that he is married to her). The offence carries a maximum sentence of 10 years' imprisonment. Mental impairment is defined as meaning "suffering from a disease of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation."[2] An accused person has a defence if he can show that at the time of the alleged offence he did not know and had no reason to suspect that the other person was mentally impaired.

This is an area of criminal law where there is a strong tension between the competing values of protection and autonomy. On the one hand, we want to protect vulnerable persons from being sexually exploited. On the other, a person with a mental disability or learning difficulty should not be denied sexual fulfilment as a result of a legal provision that outlaws, perhaps more than is necessary, any sexual activity with a person who has such a disability or difficulty.

[2] Criminal Law (Sexual Offences) Act 1993, s. 5(5).

The Criminal Law (Sexual Offences) Bill 2015 aims to address this problem by creating a new offence of engaging in a sexual act with "a protected person." This is defined as a person who lacks the capacity to consent to a sexual act, meaning that, by reason of mental or intellectual disability or mental illness, he or she is incapable of:

(a) understanding the nature, or the reasonable foreseeable consequences, of the act;

(b) evaluating the relevant information for the purposes of deciding whether or not to engage in the act; or

(c) communicating his or consent to that act by speech, sign language or otherwise.

An offence contrary to this new section, where the act involves sexual intercourse, will carry a maximum sentence of life imprisonment, the same maximum as applies to rape.

INCEST

Incest has been a statutory offence in this country since 1908.[3] Essentially, a man commits incest if he has sexual intercourse with his mother, sister, daughter or granddaughter. A woman, provided she has reached the age of consent (17 years), commits incest if, with consent, she permits her father, grandfather, brother or son to have sexual intercourse with her. Where a man is charged with incest it is no defence for him to show that the female party consented to the act. Further, there is no upper age limit for the purpose of this offence which means, for example, that a middle-aged brother and sister who have consensual sexual intercourse are both guilty of incest (and even if there is no risk of pregnancy). Incest carries a maximum sentence of life imprisonment when committed by a male and, at present, a maximum of seven years' imprisonment when committed by a woman. However, under the Criminal Law (Sexual Offences) Bill 2015, the maximum will be life imprisonment irrespective of whether the offender is male or female.

As noted, incest may be committed by persons within the relevant degrees of blood-relationship, irrespective of age or consent. In practice, it is most likely to be charged where it has been committed in the context of an abusive or exploitative relationship between a parent and a child or between an older and a younger sibling. From a prosecution perspective, it has the advantage that there is no need to prove absence of consent. There has been some debate as to whether an offence of incest is needed at all, and whether it is appropriate to criminalise consensual sexual relationships between consenting adults merely because they are closely related to each other. A similar law in Germany was challenged before the European Court of Human Rights in *Stübling v Germany* (2012) 55 E.H.R.R. 24, but the challenge failed. From the terms of the Criminal Law (Sexual Offences) Bill 2015, it is clear that Ireland intends to main the existing prohibition on incest.

SENTENCING

[3] Punishment of Incest Act 1908.

Ireland's sentencing system remains largely discretionary. For the vast majority of offences, including all sexual offences, a maximum sentence is specified by statute, leaving it to the courts to decide on the penalty to be imposed in each specific case. Ireland does not have sentencing guidelines, except in respect of two offences (serious assaults and possession of firearms in suspicious circumstances) for which the Court of Criminal Appeal indicated sentence ranges in 2014. There are no similar guidelines for any sexual offence. However, there are some important judicial statements on the proper approach to the sentencing of rape and these also apply to other serious sexual offences. In *People (DPP) v Tiernan* [1988] I.R. 250 the Supreme Court held that, save in the most exceptional circumstances, rape should attract an immediate and substantial custodial sentence. This has been reaffirmed by appeal courts several times over the past 30 years. It is rare in the extreme for a suspended sentence to be imposed for rape or any other serious sexual offence. When considering the sentencing of sex offences regard must be had to the wide range of circumstances in which they are committed. Some cases involve a single isolated offence of rape, while others will involve rape and one or more other offences such as assault, robbery or false imprisonment. The most difficult cases of all are those involving serial sexual abuse of one or more children over a long period, typically over a period of years. Life imprisonment has been imposed in a number of such cases while in most others the sentence will range from 10 to 14 years or even higher. The most fundamental principle of sentencing in Irish law is that a sentence must always be proportionate to the gravity of the offence and the personal circumstances of the offender. Two sets of factors must always, therefore, be taken into account. The first is the gravity of the offence which is measured according to the harm caused by the offence including the impact on the victim and the offender's culpability at the time of the offence. The second set of factors are the offender's personal circumstances at the time of sentence. In cases of so-called historic child abuse in particular, where a long period of time has elapsed since the offences were committed, the offender's circumstances may have changed, sometimes quite radically, as a result of old age, ill-health, disability or infirmity. All of these factors must be taken into account.

The punishment of criminal offenders can in general be justified on a number of grounds such as retribution (or just deserts), deterrence, rehabilitation and incapacitation. Imprisonment certainly serves to advance the goals of retribution and incapacitation and it may, though not necessarily will, have a deterrent or rehabilitative effect as well. The deterrent impact of penalties is very often over-estimated. Certainly the threat of severe punishment has some deterrent effect.in the sense that more people might commit crime were it not for fear of the penalties they would suffer. But punishment, no matter how severe, can never be guaranteed to deter, and experience shows that it does not. What research has shown is that increasing penalty levels has no more than a marginal impact at best on the incidence of crime. The risk of being caught or detected tends to have a greater deterrent impact than the punishment that is likely to be imposed in the event of conviction, no matter how heavy that punishment may be. Sexual offences already attract heavy penalties. If a sentence seems unduly lenient, the DPP can apply to have it reviewed by the Court of Appeal which, in turn, can increase the sentence if it considers it unduly lenient. But as matters stand, there is no reason to believe that a general increase in the levels of sentence imposed for sexual offences would have any appreciable deterrent effect.

RAPE AS A GROUND FOR ABORTION

Whether rape should be accepted as a ground for abortion is obviously a policy issue, and outside the scope of this paper. However, it is worth drawing attention to some problems and issues that might arise if rape were seriously being considered as a ground for abortion. The major legal issue would be the proof of rape for this purpose. Recall that before a person accused of rape can be convicted following a contested trial, the prosecution must prove beyond a reasonable doubt (1) that he had sexual intercourse with the complainant; (2) that the complainant was not at the time consenting; and (3) that the accused knew that the complainant was not consenting or that he was reckless as to whether she was or not. It is only when a properly instructed jury returns a guilty verdict that an accused person stands convicted of rape in the eyes of the law. The third element which the prosecution must prove, the so-called mental element, is crucially important. In many rape trials, this is the principal question. The accused may accept that he had sexual intercourse with the complainant. But she testifies that she was not consenting at the time, while he claims either that she was consenting or that he genuinely believed she was consenting.

These are clearly matters which can be determined only in the course of a criminal trial. Problematically, for present purposes, a considerable period of time can elapse between the initial reporting of a rape (or other serious offence) to the Gardai and the final disposal of the case by the trial court, assuming the case gets that far. Rape, it should be said, is triable in the Central Criminal Court only.[4] The other sexual offences described in this paper are dealt with in the Circuit Court. The number of rape offences dealt with annually by the Central Criminal Court is quite significant. According to the Annual Report of the Courts Service for 2015, 389 rape offences involving 59 defendants (and 361 sexual assault offences) were resolved by the Central Criminal Court in that year. There were convictions for 156 rape offences. Because of the number of cases and the relatively small number of judges assigned to the Central Criminal Court, it takes quite some time for cases to be disposed of. For instance in cases disposed of in 2015, an average of 645 days had elapsed between the receipt of a return for trial and the final order in the case. Suffice it to say, therefore, that two to three years can elapse between the commission of the alleged offence and the final verdict. Bear in mind also that a person convicted of rape or any other serious offence is entitled to appeal against conviction to the Court of Appeal which also has an enormous case load and where there will inevitably be some delay before the case is heard.

All of this is on the assumption that a case proceeds to trial and to verdict. Of course, a prosecution may not be initiated in the first place because the DPP takes the view that there is no realistic prospect of a conviction in the circumstances. Or, a prosecution may be discontinued for some reason. Or, the accused may get acquitted. In 2015, there were 75 acquittals for rape offences. Needless to say, there are probably many rape and related offences that are never reported to the Gardai at all. Where they are committed against children, they may not be reported until many years later.

Problems would therefore arise if rape had to be *legally* proved, in the sense of requiring a criminal conviction, before it could justify abortion. For reasons already outlined, that would

[4] The Central Criminal Court is the High Court exercising criminal jurisdiction.

be practically impossible in most cases. Alternative means would have to be sought for proving rape or for accepting that it had been committed if a woman sought an abortion on that ground. If it were decided to adopt some such means, the following are among the questions that would require consideration:

1. Should abortion be available to a woman who asserted that she had been raped, without requiring further proof?

2. Should some means of proof (other than a criminal trial) be introduced? Who would be the adjudicator? What standard of proof should be required – beyond a reasonable doubt (the criminal standard), on the balance of probabilities (the civil standard) or some specially-worded standard?

3. If some special adjudication or decision-making procedure were introduced for this purpose, should be the alleged perpetrator be identified and, if so, should that person have a right to be heard?

4. Would a woman claiming to have been raped in this circumstances be entitled to immunity from any criminal or civil proceedings in respect of the claim?

5. In any event, should it be an absolute requirement that the woman must have made a formal complaint to the Gardai?

6. Would evidence of the abortion or a request for an abortion be admissible at a subsequent criminal trial of the alleged perpetrator?

All of this is on the assumption that abortion would be available only in respect of *rape*, in the strict sense of non-consensual sexual intercourse. But if rape were accepted as a ground for abortion, consideration would also have to be given to making abortion available in cases of sexual intercourse with a person under the age of consent, and also in cases of incest (unless, presumably, the incest occurred between fully consenting adults). Of course, sexual intercourse with young persons under the age of consent and incest committed by males with younger female family members often constitute rape in everything but name. The intercourse will have occurred as part of a pattern of abuse, and it will not have been consented to, either at all or in any meaningful way, by the victim. Would there be any rational basis for denying abortion to such victims if it were available to an adult victim of rape? The same question would arise in the case of a woman with a mental disability who became pregnant as a result of being a victim of the offence of a sexual act with a protected person described at page 4 above.

One final and rather difficult question in this connection is whether abortion should be available to any young woman under the age of consent (17 years) who became pregnant as a result of sexual intercourse, even if she had factually consented to it – perhaps because the intercourse was with a person in her own age group with whom she was in a relationship. Strictly speaking, she is the victim of criminal offence. But many would make a qualitative

distinction between this situation and that of a young person who became pregnant as a result of sexual abuse perpetrated by an immediate family member or somebody else.