

Sexual Consent in The Irish Legal System: Sex Scripts in Irish Law

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Content note: this essay deals with topics that are related to rape and sexual assault

The aim of the present report is to provide a broad knowledge of the current policy in Ireland. The laws regarding sexual assault and rape will be outlined. Further, the connection between these laws and sex script theory will be analysed. Sex script theory proposes that individuals develop standardised behaviours during sexual interactions based on social norms (Beres, Herold & Maitland, 2004). For example, a common sex script is that in a heterosexual interaction the man should actively encourage sex whereas the woman should deny sex (Byers, 1996). The connection between sex script and Irish policy indicate that stereotypical beliefs may influence written Irish policy and affect legal decisions of cases of sexual crimes. This finding has implications for potential changes to the Irish legal system.

Introduction

Sexual assault and rape can be highly traumatic and have been linked to both short and long-term effects such as Post-Traumatic Stress Disorder (PTSD) (Rothbaum et al., 1992) and greater levels of depression, anxiety and fear compared to other populations (Santiago, McCall- Perez, Gorcey & Beigel, 1985). In addition to the crime itself being traumatic, research suggests that the aftermath of sexual violence can have a negative impact on victims. Victims may experience adverse reactions to the disclosure of sexual assault. This experience, termed 'revictimisation' or 'secondary victimisation', may be caused by a variety of individuals (Campbell & Raja,

1999) and may result from a strong belief in stereotypes of rape (Hockett, Smith, Klausing & Saucier, 2016).

Revictimisation of sexual violence victims may occur in multiple settings, including the criminal justice system. For example, a study conducted by Kelleher and McGilloway (2009) found that sexual assault and rape victims in Ireland report experiencing revictimising behaviours during interactions with personnel at multiple levels of the criminal justice system. The potentially harmful effects of the criminal justice system for victims of sexual violence may be, at least, partially a result of the very core of this system: Irish laws. Irish laws may incorporate stereotypical perceptions of sex, as described by sex script theory. The inclusion of these stereotypical beliefs of sex may obscure instances of sexual violence. To fully address the needs of victims of sexual violence, the role of stereotypes in Irish law needs to be addressed.

This report will outline the current laws of sexual assault and rape within Ireland. A brief analysis of sex script theory and specific sex scripts will follow, and it shall then be proposed that themes of sex scripts are present in Irish law. Finally, the author plans on demonstrating that an understanding of the influence of stereotypes on the Irish legal system identifies how the Irish legal system can improve for the benefit of victims of sexual violence.

Sexual Assault and Rape in the Irish Legal System

Sexual assault and rape have evolved in the Irish legal system through numerous laws. Specifically, the Criminal Law (Rape) Act of 1981 and the Criminal Law (Rape) Act of 1990 have been largely influential in the formation of current policy. The Criminal Law (Rape) Act of 1981 stated that the sexual history of a victim could not be discussed during a trial of sexual crimes unless the judge allows for it. The Criminal Law (Rape) Act of 1990 then defined the new charge of rape. In section 4 of this act, rape is defined as, “(a) penetration (however slight) of the anus or mouth by the penis, or (b) penetration (however slight) of the vagina by any object held or manipulated by another person.” This definition is still used for the conviction of rape within the Irish legal system. This offense is gendered in that only a male can be charged with rape. The charges of sexual assault and aggravated sexual assault are, however, gender neutral. A review of the current law by the Director of Public Prosecutions (2006) defined sexual assault as “an assault accompanied by circumstances which are objectively indecent” and defined aggravated sexual assault as “sexual assault involving serious violence or the threat of serious violence or which is such as to cause injury, humiliation or degradation of a grave nature.”

These definitions provide the foundation for the prosecution of sexual assault and rape in Ireland.

To prove that the crime of rape has been committed, the state must prove that the alleged perpetrator had sexual intercourse with a woman without the woman's consent (The Department of Justice, Equality and Law Reform, 1998). Consent has recently been defined in Irish law by the Criminal Law (Sexual Offences) Act 2017 as when an individual, "freely and voluntarily agrees to engage in that act." Further, it outlines multiple circumstances in which consent cannot be given such as due to the influence of alcohol or where force has been used.

Ireland has clearly defined rape, sexual assault, and consent. These laws may be affected by gender and stereotypical beliefs about sexual relationships, though. A review of sex scripts may provide further insight into the Irish legal system.

Sex Scripts

Sex scripts were proposed by Simon and Gagnon (1986), who used sex scripts to compare people in sexual situations to actors in a play. According to this theory, when in sexual situations people respond according to what their perceived role is, similar to actors in a play. This allows for individuals to feel confident in their behaviours. Once individuals develop sex scripts that they are comfortable with, they continue to use those scripts. These scripts are developed within specific cultural contexts based on collectively agreed upon acceptable sexual behaviours (Beres, Herold & Maitland, 2004).

Various sex scripts have been proposed for males and females in heterosexual relationships. Byers (1996) reviewed some existing sex scripts. The first traditional sex script (hereafter referred to as TSS) that Byers discussed is a difference in sexual desires. This TSS proposes that men have a greater desire and interest in sex as compared to women. Secondly, TSS proposes that being sexually active is socially damaging to women whereas sexual activity is socially beneficial for men. Thirdly, men are given the active role in sexual encounters, whereas women are viewed as passive in response to men's actions. Fourthly, is the idea of 'token refusal.' According to this concept women are obligated to deny sex when it is proposed by a man. Since this is an obligation of the woman rather than an actual reflection of her desire, men are meant to persist and convince a woman to partake in sexual activity. Other theorists have referred to women as the 'gatekeeper' based on this TSS (Wiederman, 2005). The fifth TSS according to Byers (1996) is that romantic relationships are socially beneficial for

women whereas sexual relationships benefit men; thus, women must attempt to form a romantic relationship while maintaining men's sexual interest. The sixth, and final, TSS discussed by Byers states that men should not demonstrate emotions whereas woman should. This leads to the woman being emotionally affected by the relationship more than the man. These TSS reflect simplified and generalised beliefs about males and females in relationships.

Varying sex scripts may lead to complications in sexual activities. For example, the concept of token resistance encourages men to persist after rejection. This indicates a link between TSS and non-consensual sexual activity. Ryan (2011) analysed the link between rape myths and sex scripts. Ryan defines myths as, "false beliefs embedded in history, religion, and culture that guide behaviours." This definition parallels the definition of sex scripts. Similar to TSS, numerous specific rape myths have been proposed. These include the myth that rape cannot occur between a husband and wife, women secretly desire being raped, the victim's behaviour is at least partially responsible for the rape occurring, and that women falsely accuse men of rape, often for revenge (Edwards, Turchik, Dardis, Reynolds & Gidycz, 2011). Ryan proposes that rape myths are held by both men and women to increase their sense of security. Women are proposed to believe in rape myths in order to believe they have a sense of control. If a woman believes that victims are chosen based on certain characteristics, then a woman can avoid certain behaviours or circumstances and, thus, believe that she is safe from rape. Men may maintain rape myths to feel as if they are less blameworthy if questionable sexual activities do occur. Ryan also proposes that these myths may be highly influential to incidents of acquaintance rape. Overall, Ryan concludes that myths affect TSS that are held and, together, these affect both potential victims and potential perpetrators of rape.

Sex scripts propose typical behaviours for men and women in sexual situations. These scripts indicate that a man has the role of encouraging sex while a woman is meant to minimise her sexual desires. Importantly, these scripts have been linked to rape myths and perceptions of perpetrators and victims of rape. The relationship between sex scripts and sexual aggression may go beyond this link, though. Sex scripts may have influenced the formation of sex laws in multiple contexts, including in Ireland.

Sex Scripts and the Legal System

An analysis of both Irish law and TSS indicate that there may be a connection between specific sexual scripts and Irish law. One such previously mentioned rape myth is the myth that marital rape is impossible.

This myth has been traced back to Hale, an English Chief Justice. Hale's statement, known as the Hale Doctrine, asserts that marriage is a contractual agreement and, therefore, once consent has been given once it can be assumed from that point on (Edwards, Turchik, Dardis, Reynolds & Gidycz, 2011). This principle has been removed from Irish law by The Criminal Law (Rape) (Amendment) Act of 1990 which states that the rape laws are not influenced by marital status. However, this principle still remains a problem in Irish society. Indeed, The Irish Times published an article which stated that only two people in Ireland have been found guilty of marital rape. As a part of that, Noeline Blackwell, the chief executive of the Dublin Rape Crisis Centre, was interviewed. Blackwell said that their helpline receives numerous calls for instances of marital rape despite the lack of cases in the legal system. She asserts that collecting sufficient evidence to prosecute these cases is difficult (Holland, 2016).

The effect of the relationship between the perpetrator and victim of sexual assault on legal proceedings, in an American context, was studied by Spohn and Holleran (2001). As a part of this study, cases were divided based on the victim's relationship to the perpetrator, the victim's behaviours during the incident, criminal background, risk-taking behaviours, and morality as measured by a questionnaire. The results indicated that when a rape was committed by an individual unknown to the victim decisions of prosecution were not highly influenced by the other assessments of the victim. However, when the alleged perpetrator was an acquaintance or partner of the victim, decisions of prosecution were influenced by the victim's character. This study showed that an implicit bias may still exist within the legal system whereby victims of sexual crimes committed by a perpetrator known to the victim receive additional scrutiny. Therefore, while marital rape is no longer written into the law in Ireland, the TSS surrounding marital rape may have an effect on how cases of this matter are managed in the legal system.

Another sex script that is currently written into the Irish law is the belief that men always desire sex. This TSS may have influenced the formation of rape laws in Ireland. As previously stated, under The Criminal Law (Rape) (Amendment) Act of 1990, rape in Ireland cannot be committed by a woman. The Director of Public Prosecutions (2006) defended the gendered nature of this law by stating that if a man were to be raped it would be a less concerning matter than if a woman were to be raped. The DPP provided no evidence to support this statement. An analysis of data independently collected by U.S. federal agencies conducted by Stemple and Meyer (2014) focused on sexual assaults in which men were non-consensually forced to penetrate females. They found that the number

of men who stated that they were forced to penetrate a woman was similar to the number of women who reported being raped. This finding indicates that women are capable of activity that parallels rape. The defence of the gendered rape law in Ireland provided by the director is problematic and unfounded. Often studies of male rape victims focus on offences committed by another male. Studies of male and male rape indicate that rape leads to long term effects on the mental health of male rape victims including depression, anxiety, decreased self-esteem, thoughts of revenge, and flashback memories of the incident (Walker, Archer, & Davies, 2005). Differences between male and male rape compared to male rape committed by a female may exist, however, the research in this area appears to be lacking. Without the proper research, the statement made by the DPP is inappropriate. This statement may have been at least partially influence by TSS. It is possible that the concept that men always want sex subconsciously influenced the legal environment and discredits the possible effects of forced penetration on men.

A third sex script that may affect legal procedures is the concept that women victims of sexual violence act in a way that provokes sexual attacks. The Criminal Law (Rape) Act of 1981 is highly important in this regard in that it prohibits a victim's sexual history from being discussed in court unless a judge grants permission otherwise. However, while the law may not specifically allow for this TSS to influence legal decisions, research shows that this concept may still have an affect. It has been proposed that consent is similar to the tort of "assumption of risk." Rather than consent being freely granted by the victim of assault or rape, it is assumed based on characteristics of the victim (Ireland, 1977). The effect of victim characteristics on legal proceedings of rape has been empirically demonstrated. Victim blaming has been linked to numerous manipulations. A study by Sommer, Reynolds, and Kehn (2016) demonstrated that mock jurors judged victims differently if the victim had been raped in the past. This indicates that the past assault on the victim may be an implication of a personal characteristic that makes the victim at least partially responsible for the attacks. Additionally, the manipulation of victims' perceived respectability, levels of physical attractiveness, and levels of provocativeness as manipulated by clothing choice has been shown to affect the levels of responsibility attributed to a victim for her role in an act of rape. These manipulations were shown to affect the judgments and recommended punishments of men more than women whereby men were more likely to place at least some blame on the victim of the rape and believed less severe punishments for the perpetrator were appropriate (Kanekar & Kolsawalla,

1980).

In addition to analysing how variations in victims affect judgments, research has analysed how variations in jurors themselves affects decisions. A study by Field (1979) analysed the effects of jurors' background and attitudes of rape on their assessment of rape cases. The study found that jurors who believed women were at least partially responsible for their rape, that rapists should receive lenient punishments, that men who rape are ordinary men, that women who are raped are undesirable and that women should not physically resist rape were more likely to recommend less severe sentences for alleged rapists. This study also found that the jurors' age, education, and the relationship between the rapists and victim had an influence on decisions. The previous three studies did occur outside of the Irish context, which may mean they are less relevant to the Irish legal system. However, these effects should still be considered and further studies within the Irish legal system could provide insight. These studies taken together indicate that victim blaming may still occur within a legal system due to implicit attitudes regardless of explicit laws. Further, these opinions regarding the victim may affect legal decisions.

The three sex scripts discussed above may have effects on how cases of rape are processed within the legal system. In Ireland specifically, the conceptualisation of rape may reflect stereotypical beliefs about men's sexual desires. Evidence also shows that the way women are viewed as victims may be influenced by TSS. This tie between TSS and legal decisions is concerning. The influence of personal beliefs as opposed to presented evidence on legal decisions may result in an unjust system that varies in its treatment of victims.

Conclusion

The above analysis provided a brief summary of Irish laws regarding sexual crimes and TSS to demonstrate a connection between the two. The connection between the legal system and TSS may have an influence on current legal decisions in Ireland. Irish law has changed and developed through time. The Criminal Law (Rape) Act of 1981, the Criminal Law (Rape) Act of 1990, and, most recently, the Criminal Law (Sexual Offences) Act of 2017 have added elements of protections of victims of sex crimes. They have attempted to create clear definitions of sexual offences and reduce the influence of characteristics of the victim on legal decisions. While these acts have progressed the law in Ireland, there are still shortcomings.

For Ireland to further progress, an explicit examination of the

influence of stereotypical beliefs on legal proceedings is required. Firstly, this analysis should consider male victims of sexual violence who are currently ignored by the Irish legal system. However, the analysis should not cease at this point. Rather, a tangible plan must be created to counter the subtle effects of gender stereotypes on the Irish justice system. While such a challenge requires change at a societal level, efforts to specifically combat the influence of stereotypes in legal settings is needed to create a fair justice system for the protection of victims of sexual violence.

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