SEXUAL VIOLENCE - A FEMINIST PERSPECTIVE

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Introduction

I proposed that the Legal Research Foundation provide a forum for the discussion of sexual violence because of the various proposals that have and are about to emerge to protect the interests of the victims of sexual violence. Although it is gratifying to see the political and administrative institutions recognise the presence amongst us of sexual violence and to acknowledge that efforts should be made to prevent it, women have learnt from history to be wary of the patriarchal institutions' solutions to the problems of women. This wariness is understandable when it is recognised that many of the problems of women are attributable to the operation of the patriarchy. While women may be wary of the patriarchal solution, they also recognise their dependence upon the political, legal, and administrative institutions to effect any positive change in the position of women. Unfortunately for most women they cannot live lives independent of the patriarchy. For this reason we are compelled to organise and participate in exercises designed to influence those who make the decisions. This forum will hopefully be an exercise of influence upon those who have the power to make decisions relating to the prevention of sexual violence. It is hoped it will also enable them to recognise that there can be no long-term effective prevention of sexual violence until there is recognition of the nature of such violence. And that the key to understanding the nature of sexual violence lies in an understanding of sexism in our society.

I also wish to state at the outset that this paper is confined to a consideration of sexual violence inflicted upon women. It is recognised that children are also subjected to sexual violence. This aspect of sexual violence is not the focus of this paper though much of the argument may prove useful to understanding the position of children as victims of sexual violence. It has also been argued that men are the victims of sexual violence, with that violence being inflicted by women and also by men upon other men. It is undeniably true men are physically assaulted, on occasions, by women. However,

to understand the nature of sexual violence is to understand that the gender of the violator is not the determining characteristic. It is not that men are inherently evil. It is the fact that, within the patriarchal system, they are assigned the role of the rulers, the controllers, the powerful.

Form of Sexual Violence

As I have said there have been emerging proposals on ways in which to protect the victims of sexual violence. These proposals have focused upon the forms of sexual violence. The physical expression of the violence. Those forms which have received much of the attention have been what is named domestic violence, that is, violence inflicted by men upon women with whom they share a living arrangement; rape, that is, violence inflicted by men upon the genitalia of women; indecent assault, which under our law may differ from rape only in so far as the instrument of violence is not the penis; and sexual harassment, which in its extreme form may take the form of rape, or may be continual verbal propositions of a sexual nature. I would also include pornography within the definition of sexual but will not consider this issue in this paper because of the constraints of time.

There is a need to focus on the forms of sexual violence if the proposals for reform are largely centred on the need to reform the law. The law, is amongst other things, the expression of the decision of the state to outlaw certain types of behaviour. A person who behaves outside the law will be punished with the consent of the state through the operation of the legal process. Since the consequences for the misbehaving citizen may be serious, our legal system requires proof of guilt. This proof is derived normally from a consideration of the act performed and the state of mind of the offender. It is therefore important that the offending behaviour be clearly defined.

Much of the energy surrounding proposals for reform of the law relating to rape has been directed to defining the nature of the act that is considered rape. Is there a difference between your genitalia being violently attacked by a penis or a broken bottle? If so what is the basis of the distinction?

Should the penetration of the penis alone be one of the distinguishing characteristics of the law relating to rape? And why is penetration of the vagina any different from penetration of the anus or the mouth when defining what constitutes the act of rape? Could it be that the law regards the use of the penis and vagina as what distinguishes rape from other forms of physical assault? At the moment the law would appear to assume the use of a penis more serious than that of a bottle or knife or other instrument.

When defining the form of sexual violence for the purposes of the law, the state is expressing what element in the behaviour it considers must be punished. In the case of domestic violence, there is no specific offence of domestic violence. There is no specific recognition of the violence that may result from the domestic relationship. Protection from such violence in law comes from the general offences relating to offences against the person. Section 194 does provide for a specific offence of assault by a male on a female with a penalty of up to two years.

Proposals for reform in the area of domestic violence have concentrated upon the protection of the women from the violence rather than the punishment of the male offender. The proposals for reform are contained in the Domestic Violence Bill presently before a Select Committee of Parliament. This would seem a constructive approach and an example of the law not only providing protection for the victim by providing for the detention of the offender, but also recognising the reality of the victim's condition. That reality is that she cannot remove herself from the violence because she has no place to go for shelter and protection. The Bill makes provision for the women to obtain a legal right to occupy the household residence, in an attempt to mitigate the effects of domestic violence upon the women and children. It is to be hoped that the Bill progresses with some haste through the Parliament so it can afford some relief for the victims of domestic violence.

While then the law defines the specific offence of rape, but is concerned not so much with the definition of domestic violence but with its effects, it has yet to directly confront the third form of sexual violence I have

mentioned, namely, sexual harassment. This lack of attention by the law is not surprising. Women's organisations have been working for some years to protect women from domestic violence, and to have the law relating to rape reformed. It is only relatively recently in New Zealand that sexual harassment has been named. By this I mean that women have always been subjected to this type of abuse but have never known how to identify it and thereby embark upon a struggle to make the community recognise this form of sexual violence and to start thinking of ways in which to prevent it.

Sexual harassment is commonly associated with the workplace. Women workers have started complaining in numbers of the sexual harassment to which they are subjected by male colleagues and male superiors. I do not feel that sexual harassment is confined to the workplace, as any woman will understand who has tried to have a drink in a pub or taken her car to be serviced. In any activity where women step outside their assigned role in society, and insist upon remaining women and not honorary men, they are subjected to some form of sexual harassment.

Since, however, the objections to sexual harassment have arisen in numbers from the workplace, there has been a tendency to define the issue in terms of the workplace. Trade unions, in an attempt to protect their members from this type of treatment, have sought remedies from the law. They have sought them from the law because often women are in industries where it is difficult to organise forms of direct action. They have also sought a remedy from the law because they consider it crucial that the law recognises this behaviour and declares it unacceptable and subject to penalty or at least ensures women's jobs are not endangered by such treatment.

They have sought a remedy from the Human Rights Commission, which issued a policy statement on the issue. It decided that the concept of sexual harassment would fall within the definition of unlawful sex discrimination under s.15 of the Human Rights Commission Act 1977. Whether particular behaviour amounted to sexual harassment would be a matter of fact and degree. As some guidance on this question the Commission indicated it would be difficult to

prove that sexual harassment had "any detriment" to the woman worker's conditions of employment. There would have to be evidence of a threat, or the creation of any unpleasant working environment, and the harassment must be a serious nature and persistent, as well as being unwelcome and offensive, work-related and unreasonable in all the circumstances.

I feel there are serious problems with the Commission's policy statement but there is not time now to explore those problems. It is interesting to note that the Federation of Labour has issued a policy statement also on the question in which it has taken a different approach to the question and has recommended that sexual harassment complaints should be pursued through the s.117 (personal grievance procedure) of the Industrial Relations Act 1973. This advice may have as much to do with the foreshadowed approach of the Human Rights Commission, as it has with the inadequate remedies available under the Human Rights Commission Act 1977.

Proposals for Legal Reform

(a) Domestic Violence

The recent attempts of law reform surrounding the issue of sexual violence have all concentrated upon how the law can protect the victim, the woman. In the case of domestic violence, as I have stated, the emphasis has been moved from the violence itself to the procedures available for protection. This emphasis is reflected in the change of title to the Bills before Parliament. When legislation was first introduced last year, the Bill was titled the Domestic Violence Bill. When the Bill was reported back to Parliament it was decided to introduce a more comprehensive Bill, which was titled the Domestic Protection Bill. The non-violence and non-molestation orders in the Bill are designed for the legal system to attempt to physically protect the woman from violence, while the occupation and tenancy orders are designed to enable the woman to have access to shelter and thereby be more likely to take the steps necessary to protect herself from the violence.

(b) Sexual Harassment

Although it is too early to determine the future of legal protection from sexual harassment, it would appear, as I have stated, that it is recognised women have a right not to be sexually harassed in the workplace under s.15 of the Human Rights Commission Act 1977. The extent and effectiveness of those rights have yet to be determined, as has the right to access to the personal grievance procedure under s.117 of the Industrial Relations Act 1973.

(c) Rape

As far as rape is concerned, we have yet to see what proposals emerge from the government's officially commissioned report on the subject that is to be produced by the Department of Justice and the Institute of Criminology. The emphasis in the report, I understand, is to be upon the victim and the victim's response to the criminal justice system from the time of reporting of the rape to the verdict of the jury. It seems to have been accepted that the present operation of the criminal justice process has turned the victim into the accused and thus failed to protect the rights of women who are raped because they have lost confidence in the whole legal process.

While I am reluctant at this time to go into the details of types of reforms to the law relating to rape - that exercise would have been better conducted at the conference in Wellington sponsored by the Department of Justice and the Institute of Criminology - I shall, because this is a matter of immediate concern, briefly identify the areas in need of reform. I have already mentioned the definition of rape needs to be broadened to include instruments other than the penis, and the vagina should not be the only part of the body protected by the law relating to rape.

There is then the question of what evidence should be admissible at the trial. The argument usually revolves around whether evidence of the complainant's sexual relationships with the accused and/or other men should be permitted at the trial. At the moment in New Zealand it is in the discretion of the Judge whether to admit evidence of previous sexual relationships with other men.

The purpose of admitting evidence of sexual activity is to damage the credibility of the complainant. It is assumed if women have sex before marriage or sex with a man other than the husband, then it is more likely women will lie as to whether they have been raped. Since there are rarely independent witnesses to a rape, the credibility of the complainant and the accused assume a great importance. The assumption that evidence of previous sexual activity is relevant in a particular case of rape is an assumption that once a woman has ever had sexual intercourse she is more likely to have consented to future sexual intercourse. The likelihood becomes greater with the frequency of intercourse and the circumstances. Those circumstances being when women have sexual intercourse outside the accepted roles, that is, outside of marriage. The perceived need to provide for the admission of evidence of previous sexual activity to me is evidence of a perceived need to continue sexism in our community.

Apart from evidence as to sexual history, there is another rule relating to rape that needs to be abolished, and that is the requirement for the judge to direct the jury of the dangers of convicting the accused on the uncorroborated evidence of the complainant. Because, as I have stated, there is rarely an independent witness as to the rape, it is difficult to obtain a conviction unless the complainant has suffered some physical damage. This places a woman in an impossible position if she is about to be raped. If she fears for her life and decides not to struggle and risks death or maiming, she is unlikely to be able to prove later that she was raped. If, however, she struggles and escapes with her life but endures bruising, cuts, broken bones etc, she is more likely to be able to successfully make out her complaint. What is the purpose of this rule as to corroboration? It appears to stem from the myth that women are more likely to lie than men and that they are particularly likely to lie about being raped. This belief may be connected to the male fantasy that women secretly like to be raped, or the myth that they are biologically more likely to be spiteful and to be liars. There is no evidence that women are more likely to lie than men. It is also shown that evidence of large numbers of women making false complaints is suspect. Of course women have been known to

make a false complaint as men have been known to lie when it is to their advantage. To make a rule, however, that institutionalises these myths about women, is but further evidence of the sexism that pervades the institutions in our society.

One further point related to the type of evidence and direction given to the jury is that if the complainant delays in making her complaint, this may be taken as evidence against the veracity of the complainant. It is assumed that if a woman is genuinely raped, she will immediately contact the police. Since women have lost confidence in the criminal justice system, it is not difficult to understand why women frequently delay or never bother to complain to the police. Again we have an example of a sexist attitude being institutionalised into our legal system.

Much of the evidence in a rape trial is centred around establishing whether or not the complainant consented to the rape. If the complainant incurs physical injury in the course of the rape, it may be used as evidence that she did not consent because rape is frequently associated, not with absence of consent, but with the presence of force. In other words, the evidence of lack of consent is evidence of use of force. It appears to be assumed that women do not mean "no" when they say "no" to sexual intercourse and that you can only believe them if they say "no" and are also willing to endure physical harm to support their refusal. A cruel judgment on women but not too far from what happens in practice. It is difficult to see what can be done to reform the law on this point as the problems lie more in the attitudes and perceptions of those who control the criminal justice system, than in the legal rules.

One further suggestion for reform of the law relating to rape that is frequently heard, is that the complainant's identity should be suppressed and that the proceedings of the trial should not be open to the public. The reason behind this suggestion is that the ordeal of the trial and the depositions is so great for the complainant that it deters women from laying complaints. This reason is a recognition of the assumption that it is the woman on trial. as much as the accused - that somehow being raped is the fault of the woman herself

If such a practice would restore confidence in women to lay complaints it must be seriously considered. It seems again, however, that the problem lies deeper within the attitudes and practices of our society, that women should regard themselves as guilty, and any such reform should never be a substitute to attacking the underlying sexism that pervails in our community.

The final comment I wish to make on reform proposals relating to the law of rape is the extension of the crime to include rape within marriage. At the moment it is held that once a woman marries she cannot be raped by her husband while the marriage subsists. This rule has been viewed as a licence to rape within the state of marriage. The status of wife removes all protection from rape. It is argued that it would be impossible at law to prove that rape took place because of the nature of the marriage state. The only comment I would make at this stage is that such an argument reinforces the conventional patriarchal attitudes to the role of women within marriage. It is consistent however with the traditional notion that once a woman marries her status as an individual is radically changed and rights of the male partner within the marriage are considered dominant.

The Nature of Sexual Violence

So far in this paper I have concentrated upon the attitude of the legal system towards sexual violence. As I have stated, many of the proposals for change have been framed in terms of legal reform. While I do not underestimate the necessity for legal reform, I do submit that we need not be surprised if little will change in the incidence of sexual violence in the community if, even all, the proposals for reform are accepted. As I stated at the beginning of this paper women are now wary of legal reform leading to substantive changes in their lives because those reforms reflect what is acceptable to the patriarchal decision makers - the Parliamentarians, the judges, the lawyers, the police. If they do not recognise their sexism and attempt to introduce and enforce a new value system, little will substantially change for women as a whole.

Before there can be real change there must be an understanding, as I have stated previously, of the true nature of sexual violence. The physical and psychological violence men inflict upon women is not the same as other acts of violence. It is frequently the expression of an exercise of patriarchal power and control over the lives of women. It is a brutal reinforcement of the accepted role of women as subordinate in our society. Whether this exercise of power is expressed on an individual level through a husband beating a wife, a man raping a woman, or an employer making sexual inuendos to his female employee, or at an institutional level of the making and administration of the criminal justice system, it is still an expression of the patriarchal relationship between the sexes. It is a relationship based upon power and control to ensure the maintenance of a patriarchal system.

Conclusion

If there is to be a real commitment to the elimination of sexual violence in our community, it will be necessary to recognise that most of the proposals for reform have been concerned with the forms or expressions of sexual violence, and not with the causes and nature of sexual violence itself. Each reform proposal must be measured against an awareness of the true nature of sexual violence to assess whether it will represent a step upon the path to change or merely a tinkering with the rules of a system that will reinforce the sexism in our community. Although I have personally accepted the reality of the long march to sexual equality, I sometimes wonder if the march will ever end when I observe that the processes of change are still firmly in the control of the patriarchy.

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