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THE TROUBLE WITH PSYCHOLOGICAL ABUSE IN AN INTIMATE OR FAMILY RELATIONSHIP: THE LEGAL AND SOCIETAL CHALLENGES IN MEETING A HUMAN CONDITION

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Introduction

Psychological abuse in an intimate or family relationship is a critical issue but frequently an invisible one. It is often described in the literature as intimate terrorism. The perpetrator's impact on the victim may be devastating and have life-long consequences for both their physical and mental health. The perpetrator and the victim may be in any form of intimate or family relationship, of any age, gender or sexual orientation. The victim may be, for example, an elderly relative, a disabled person, a heterosexual man, a homosexual person, but the most common situation by far is where the perpetrator is a man and the victim is a woman in a heterosexual relationship. This article considers the latter scenario in particular, although much comment is of general application. It also considers developments in a number of jurisdictions, but concentrates on the jurisdiction of England and Wales.

This article will first set out what may be meant by psychological abuse in an intimate or family relationship. Following this, it will outline key provisions of the United Nations Resolution 'Declaration on the Elimination of Violence against Women' before considering the response of some jurisdictions. It will then raise various issues in dealing with psychological abuse as a criminal harm as well as considering other strategies that society may implement in preventing or ameliorating psychological abuse.

Defining psychological abuse in an intimate or family relationship

Producing a definition of psychological abuse in an intimate or family relationship that is all-encompassing and thoroughly exhaustive well may be impossible. Psychological abuse in a domestic setting may be insidious and subtle; it is often

indiscernible to third parties; and both the perpetrator and the victim may not readily identify continuously occurring actions and behaviours as psychological abuse.

In order to describe the nature and complexity of psychological abuse, the Statutory Guidance Framework used in England and Wales will be considered (Home Office, 2015). This was drafted to underpin the section 76 offence of 'Controlling or coercive behaviour in an intimate or family relationship' introduced by the Serious Crime Act 2015.¹ The Statutory Guidance Framework contains a non-exhaustive list of behaviours which a perpetrator might inflict upon their victim (Home Office, 2015, p.4). Examples include isolating a person from their friends and family; taking control over aspects of their everyday life, such as where they can go, who they can see, what they can wear, what they can spend and when they can sleep; monitoring a person via technology; repeatedly putting a person down by telling them they are worthless; and enforcing rules and activity which humiliate, degrade or dehumanise. The Statutory Guidance Framework comments that '... the perpetrator may limit space for action and exhibit a story of ownership and entitlement over the victim.' (Home Office, 2015, p.4).

United Nations Resolution: Declaration on the Elimination of Violence against Women

Until relatively recently, psychological abuse in a domestic setting was not much discussed and debated in the public domain, let alone being categorised as a serious harm punishable by the criminal law. The United Nations Resolution 'Declaration on the Elimination of Violence against Women' of 1993 has been significant in framing the debate in heterosexual relationships, although for various reasons many nations have been slow to act on its Articles, particularly with respect to psychological harm.

¹ For more information about this offence, see Lloyd Bright, K. ['Controlling or coercive behaviour in an intimate or family relationship: A new domestic abuse offence in England and Wales'](#)

The Declaration on the Elimination of Violence against Women (1993) followed and complemented the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was adopted in 1979 by the UN General Assembly. Violence against women is commonly linked to inequality, discrimination and power imbalance (domination and subordination).² As the title of the Declaration indicates, it is concerned with all forms of violence against women, which includes psychological violence. 'Violence against women' is defined in Article 1 of the Declaration.

Article 1

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 4 of the Declaration sets out the obligations of states, which includes exhorting them to 'Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women ...' (Article 4(c)) and to 'Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence' (Article 4(d)). It would appear that Article 4 is also intended to apply to psychological harm.

The response of states to meeting their obligations following the Declaration

The Articles of the Declaration have no legal effect and they seek only to have persuasive force. It is entirely for each state to decide which provisions to implement and to what degree. Many states continue to adhere to the position that violence of whatever kind against women in the private domestic sphere is not a matter for state concern or intervention. Progress has in consequence been slow. Most states in the

² See, for instance, the UK Home Office statutory guidance for the Serious Crime Act 2015 'Controlling or coercive behaviour is primarily a form of violence against women and girls and is underpinned by wider societal gender inequality' (Home Office, 2015, p.7).

Middle East and sub-Saharan Africa, for example, have no legal sanctions against any form of domestic abuse, physical, sexual, psychological or otherwise. Where states have acted, it is domestic abuse of the physical kind that is generally addressed.

Relatively few states have wrestled with how to address psychological harm in intimate or family relationships. It is not just the lack of political will owing to societal, customary and religious reasons. There are other issues too: perhaps it is just too difficult. There is a continuum of human behaviour from the give and take, rough and tumble of intimate and family relationships through to more serious and even extreme psychological harm. Where should lines be drawn along the continuum between acceptable behaviours, the just about acceptable, the unacceptable and the thoroughly unacceptable which calls for intervention from the civil and criminal justice systems?

In a number of jurisdictions, sanctions and remedies for psychological abuse are expressly and impliedly provided for within existing civil law. In England and Wales for example, these include non-molestation orders, occupation orders, restraining orders and the ground of unreasonable behaviour for divorce.

Turning now to the issue of criminalising psychological abuse in an intimate or family relationship, Australia provides an example of where existing law has been extensively reviewed but not yet substantially changed. The Australian Law Reform Commission has proposed that all Australian states adopt a standard definition of family violence which includes psychological harm, but this proposal has not yet been universally adopted (The Australian Law Reform Commission, 2010). The Royal Commission into Family Violence in the Australian State of Victoria considered evidence about psychological abuse, but its recommendations did not include a new criminal offence (Faulkner, Neave and Nicholson, 2016). So while the debate continues, apart from Tasmania, no other Australian state has yet criminalised psychological abuse (McGorrery and McMahon, 2017 and 2019).

Some national jurisdictions (admittedly few) have though taken the decisive step to penalise domestic psychological abuse under the criminal law. Sweden included the

offence of 'Gross Violation of a Woman's Integrity' in the Swedish Penal Code in 1998. Psychological abuse has also been criminalised in countries such as France (Law 2010-769 Violence Against Women, Violence Between Spouses, and the Effects of These Types of Violence on Children), England and Wales (s.76 Serious Crime Act 2015), Scotland (Domestic Abuse (Scotland) Act 2018) and Ireland (Domestic Violence Act 2018).

Criminalising psychological abuse: some issues and hurdles

Legislating in this area is radical and innovative, but it has also proved challenging for a variety of reasons.

A jurisdiction first needs to determine where to set the bar for the psychological abuse to be considered harmful enough to attract criminal penalties beyond existing civil sanctions and remedies. Decisions have to be made about how to frame the offence. Sweden, France, England and Wales and Scotland all refer to repeated acts or a course of conduct inflicted by the perpetrator upon the victim which may or may not be separate crimes in their own right as opposed to a single act.

A decision then has to be made about whether to frame the offence in a way that is gendered or that is gender neutral. Sweden has taken the former course: in Sweden, the offence is framed as 'Gross Violation of a Woman's Integrity' to emphasise the highly gendered nature of the offence (there is another offence in the Swedish Penal Code which captures psychological harm in other circumstances). In England and Wales the offence is gender neutral and framed much more widely to include all family relationships between those who are age 16 or over and not just intimate relationships.

A jurisdiction needs to decide whether or not to provide examples of psychological abuse to illustrate the many guises of the offence and if so, whether the examples are exhaustive or non-exhaustive. It has already been noted that the criminal offence of coercive control in legislation in England and Wales is explained by reference to an extensive list of behaviours in statutory guidance (Home Office, 2015, p.4). This is expressed to be non-exhaustive. By contrast, the criminal offence in France has

been criticised for lacking absolute certainty and precision. The offence is described as 'repeated acts which could be constituted by words or other machinations, to degrade one's quality of life and cause a change to one's mental or physical state.' (Atwill, 2010).

A jurisdiction needs to decide how the criminal offence is proven and whether the burden is placed upon the evidence of the victim to prove that they have suffered from serious psychological harm. Scotland in its legislation includes an objective 'reasonable' person test: would a reasonable person conclude that the course of behaviour of one person ('A') towards a partner or ex-partner ('B') was intended or was reckless as to whether the course of behaviour would cause B physical or psychological harm (s.1 Domestic Abuse (Scotland) Act 2018).

A jurisdiction will need to consider police and prosecution resources in investigating and litigating cases of psychological abuse. The training needs of police officers should be assessed as a pattern of behaviour resulting in psychological harm may often be challenging to identify and evidence. As has been noted above, the victims themselves often fail to recognise that they are being subjected to psychological abuse. Needless to say, forms of physical harm such as assault and criminal damage are much easier to prove. The police forces in England and Wales have been repeatedly criticised for the inconsistent level of training that has been provided across different constabularies, which in turn may impact upon the number of arrests, investigations and perpetrators charged with the offence. The offence has also been introduced in England and Wales at a time when the number of police officers has been reduced owing to budget cuts. In a time of shrinking resources, police forces necessarily have to decide their policing priorities and where best to focus their efforts.

As indicated above, the difficulty of obtaining evidence sufficient to satisfy the criminal burden of proof can be extremely challenging. It is often a case of one person's word against another's. In England and Wales, the police and the Criminal Prosecution Service will only bring a case to court if there is enough evidence for a realistic prospect of conviction and that it is in the public interest to prosecute the defendant. The evidential requirements have meant that the number of prosecutions

has been small. In the year to March 2018, in England and Wales there were 599,549 domestic abuse related offences. Of these, 960 prosecutions for coercive control offences were begun in the magistrates' courts; up from 309 in the previous year but still disproportionately low (Office for National Statistics, 2018).

Finally, a jurisdiction needs to determine the type and severity of criminal penalties imposed on perpetrators who have been successfully prosecuted. These include fines and imprisonment. Maximum prison terms vary from three years in France, to five in Ireland, England and Wales, six in Sweden and fourteen years in Scotland (the offence in Scotland incorporates both physical and psychological abuse).

Are there more effective strategies in confronting psychological abuse than criminalisation?

In view of the difficulties in securing a successful prosecution, is there much point to this particular criminal offence being on the statute books of jurisdictions or included in their criminal codes? The answer must be a resounding 'yes'. It indicates the seriousness with which psychological abuse is regarded. That the domestic sphere, the private domain, is not a 'no go' area for policing. That what happens behind closed doors is important and should be weighed against legal rules and the perpetrators brought to justice. But there also needs to be pragmatism about the offence and the numbers that can be realistically prosecuted. The prosecution of the offence can also be viewed as one of last resort when all else has failed; of addressing the symptoms and not the cause. The issue of psychological abuse should be considered in a way that is more holistic and which seeks to prevent psychological abuse between those in an intimate and family relationship from becoming progressively more extreme over a period of time.

The testimony of one victim of psychological abuse has described her experience as 'death by a thousand cuts'. She also said that: 'It has often not been taken seriously until there are bruises, until there are cuts, until people are in situations where they are almost getting killed. I think it can be stopped way before then if you recognise the signs and the signs are taken seriously.' (Brocklehurst, 2018)

It would appear that the majority of people are unaware of the warning signs of psychological abuse. Media of all kinds, including social media, has played and could increasingly play an important role in disseminating factual information and personal testimony. The effectiveness in provoking debate has already been proven in other previously hidden or little discussed subjects such as child sexual abuse, sexual harassment and the #MeToo Movement. Those in the public eye should be encouraged to come forward with their own stories; their own personal testimony.

Schools have a crucial preventative role to play as well. If children and adolescents were better informed, more of them would be able to identify the warning signs of psychological abuse amongst friends and family members and to call it out at an earlier stage of a relationship. Many victims would have greater awareness of their circumstances and perpetrators would be put on notice of their unacceptable behaviour (Hearn, 2004; Eliasson and Ellgrim, 2007). The response to the consultation conducted in England and Wales prior to the drafting and publication of the Draft Domestic Abuse Bill in 2019, places significant emphasis upon relationships education in primary and secondary schools to include all forms of domestic abuse (Transforming the Response to Domestic Abuse. Consultation Response and Draft Bill, 2019).

Educational and therapeutic interventions to inform and change behaviour such as counselling, cognitive behavioural therapy and group therapy could also be ordered by civil and criminal courts in appropriate cases. In terms of sentencing policy, these interventions could be provided both within and outside prison as an element of a sentence for those perpetrators for whom they would be deemed suitable (Dobash and Dobash, 2004). However, some cautionary notes need to be sounded. These programmes are not suitable for all perpetrators, not least because perpetrators need to demonstrate awareness of their actions and take responsibility for them; and to demonstrate a willingness to respond positively to the demands of the programme with a view to changing their behaviour. Even if perpetrators are assessed as suitable to take part in these programmes, this is not to say that they will complete them. There are also issues over funding and availability of the programmes to overcome.

Conclusion

The Declaration on the Elimination of Violence against Women (1993) provided a call to arms which in the case of psychological abuse has been largely met with silence by many jurisdictions.

For those few jurisdictions which have criminalised psychological abuse, the criminal justice system has been enabled to condemn it as a significant harm and to punish the perpetrators. But this particular tool can only ever deal with a minority of cases and the majority will never come before the court for the reasons outlined above. What will however assist the many victims and perpetrators is a much greater awareness of the psychological dynamics and the means to change behaviours.

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