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Toward a new ‘measuring of harm’:
A critique of the offence of ‘coercive control’ under the Domestic
Violence Act 2018

Darragh Sheehy

On 5 November 2015, Ireland signed the Council of Europe’s Convention on Preventing and Combating Violence against Women.¹ This convention aims to combat all physical, psychological, sexual, and economic violence that occurs between former and current spouses or partners, regardless of their cohabitation status.² The Istanbul Convention seeks to ensure this through the use of a legally binding treaty which lists the minimum standard for ensuring the eradication of all forms of violence between intimate partners. The Convention also aims to harmonise the laws and procedures around gender violence so that each state creates a comprehensive system to protect victims and adequately prosecute any crimes committed.³ A State signatory of the Convention is, thereafter, bound under international law, to act with due diligence in protecting victims from gender based violence perpetrated by non-State actors and subsequently punishing offenders.⁴

Until the enactment of the Domestic Violence Act 2018, Ireland’s approach to fulfilling its obligations under this Convention was characterised by a traditional perception of domestic abuse: criminalising incidents of physical violence through the paradigm offences of assault and harassment.⁵ Confining the legal conception of domestic abuse to these offences allowed courts to adhere to formulaic principles when adjudicating cases, but inadvertently shrouded many harmful aspects of abusive relationships from the courts’ gaze.⁶ Crucially,

* LLM, National University of Ireland, Galway. The author would like to thank Professor Thomas O’Malley for his helpful guidance and suggestions on a previous version of the article. All mistakes or omissions are the author’s own.

¹ Also known as the Istanbul Convention.

² Convention on Preventing and Combating Violence against Women (adopted 11 May 2011, entered into force 1 March 2014) CETS no 210 (Istanbul Convention) art 3.

³ Convention on Preventing and Combating Violence against Women CETS No 210 (Istanbul Convention) Art 1.

⁴ *ibid* art 5.

⁵ For the purposes of this article, domestic violence will be used to refer to intimate partner violence, as this is the main term used in current Irish literature and legislation. ‘Intimate partner violence’, ‘partner violence’, ‘partner abuse’ will be used interchangeably when discussing domestic violence. When referring to the person affected by domestic violence, they will be referred to as ‘victim’, rather than ‘survivor’, as this reflects the terminology used by the criminal justice system.

⁶ See the definition of domestic violence currently used by Irish law enforcement: ‘the physical, sexual, financial, emotional or psychological abuse of one person against another who is a family member or is or has been an

these offences failed to capture the repetitive nature of domestic violence, where abuse is not isolated to particular incidents, but carried out systematically for years both through physically and psychologically means.⁷ Prior to the 2018 Act, Irish legislation neglected to make reference to ‘coercive control’: the micro-regulation of a victim’s life that aims to subvert their liberty.⁸ The newly created offence under the same name dispels the stereotype that abuse is predicated purely upon physical assault and aims to fill the lacuna of statutory guidance and case law on emotional manipulation, economic abuse, and subversion of liberty.

This article will explore the sociological underpinnings of domestic violence, focusing upon Lenore Walker’s ‘battered woman’ theory of physical transactional violence, and Stark’s theory of coercive control.⁹ This article argues that the latter approach appropriately confronts the sociological realities that victims face. Thus, this article seeks to highlight difficulty with legislating for the huge gradation of coercive control through comparison of the English and Irish offences. Last, this paper questions the offence’s constitutionality, coming to the ultimately conclusion that the term ‘coercive control’ is a general term. Prior to this examination, it should be highlighted that whilst abuse can and does occur in same-sex relationships or by a woman against a man, domestic abuse is predominantly perpetrated by a male abuser in a heterosexual relationship.¹⁰ Hence, this paper will principally refer to domestic violence as a crime committed by a male perpetrator against a female victim.

1. Understanding domestic violence

It is vital to understand the realities of domestic violence so that the State may tailor an appropriate legal response to the needs of the victim. The original conceptions of domestic violence are assessed in a severity based test on the injury caused, and consequently relied upon the prevalence of physical injury to be actionable by the criminal justice system.¹¹ This section will explore theories that recognise domestic violence as the cumulation of many different forms of abuse that tactically deprive the victim of liberty and autonomy.¹² Without

intimate partner, regardless of the gender or sexuality, can be considered to constitute ‘domestic abuse’; 2017 Gardaí Domestic Abuse Prevention Policy, <www.garda.ie/en/Crime/Domestic-abuse/Domestic-Abuse-Intervention-Policy-2017.pdf> (accessed 20 August 2019).

⁷ Thom Brooks, *Punishment* (Routledge 2012) 190.

⁸ Michael P Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Northeastern University Press 2008) 11.

⁹ Lenore E Walker, *The Battered Woman* (Harper & Row 1979); Lenore E Walker, *The Battered Woman Syndrome* (4th edition, Springer Publishing Company 2017); Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007).

¹⁰ Dorothy Watson and Sara Parsons, *Domestic Abuse of Men and Women in Ireland: Report on the National Study of Domestic Abuse* (National Crime Council 2005) 24.

¹¹ Examples include the current offences used in Ireland to prosecute instances of domestic violence, namely assault, threats, coercion, harassment, sexual assault and rape.

¹² Evan Stark, ‘Rethinking Coercive Control’ (2009) 15 (12) *Violence Against Women* 1509, 1511.

intervention, the cycle of control reinforces the legitimacy of the aggressor's tactics, resulting in the victim's loss of autonomy. This section will analyse theories by Walker and Stark and will focus upon the latter's re-conceptualisation of abuse, in order to highlight the lack of offences available to adequately prosecute specific harms.

1.1 Walker's Theories - The groundwork for theorising domestic violence

Walker's 'battered woman' theory aimed to answer the question perennially asked of victims: 'Why doesn't she leave?'. She originally described the idea that while battery within family violence is comparable to common law assault, the relationship between the victim and the offender is the root cause of the differing psychological responses to these crimes.¹³ Walker was one of the first scholars to attempt to ground an explanation for intimate partner violence in social science. Her thesis depicts domestic violence as existing within a cycle, whereby tensions build between partners, an acute battering incident occurs, and a remorseful phase follows.¹⁴ The first phase contains a gradual escalation of tension through discrete acts, where the aggressor highlights his dissatisfaction or hostility, but not in an obvious manner.¹⁵ The next phase of the cycle is an acute burst of violence;¹⁶ the tension builds until it is finally released in a fit of rage, typically resulting in a barrage of verbal and physical aggression.¹⁷ The third phase involves apologies, kindness, and remorse by the aggressor.¹⁸ According to Walker, this act of contrition is the main reason for women staying in the relationship, developing a 'learned helplessness'.¹⁹

As a consequence of Walker's study, a focus emerged on 'transactional violence', where the State sought to criminalise the violent acts that emerged out of this cycle, rather than the control which perpetuated it. Until now, Ireland has not had a specialised law to protect domestic violence, instead relying on our Non-Fatal Offences Against the Person Act 1997 to prosecute culprits.²⁰ These offences predominantly capture the type of transactional violence Walker posed. They focus on criminalising the physical actions which occur after the tension phase. Many scholars refuted this approach as they believed only specially crafted offences could reflect that intimate partner violence is more than a repetition of physical violence; but rather that it is a pattern of discrete acts with the intent to control the victim.²¹ Since Walker's

¹³ Leigh Goodmark & Catherine Klein, 'Deconstructing Teresa O'Brien: A Role Play for Domestic Violence Clinics' (2004) 23 St Louis University Public Law Review 253, 258-259; 'The Cycle of Violence was conceived by Lenore Walker as a means of understanding the dynamics of a battering relationship'.

¹⁴ Walker, *The Battered Woman* (n 9) 55.

¹⁵ See her most recent edition, Lenore E Walker, *The Battered Woman Syndrome* (4th edition, Springer Publishing Company 2017) 95-97.

¹⁶ Walker, *The Battered Woman Syndrome* (n 9) 97.

¹⁷ *ibid.*

¹⁸ *ibid* 95-97.

¹⁹ *ibid* 98.

²⁰ The specific offences are discussed later in the article.

²¹ Deborah Tuerkheimer, 'Recognising and Remediating the Harm of Battering: A Call to Criminalise Domestic Violence' (2004) 94 Journal of Criminal Law and Criminology 959, 960: 'The criminal justice system's structurally

influential research, domestic violence has been rethought as less related to a cyclical form of violence, but rather deliberate acts - both violent and non-violent - to control the victim's liberty and freedom.

12 Stark's Theory of Coercive Control

Stark further re-conceptualises perceptions of abusive behaviour in his book *Coercive Control: How Men Entrap Women in Personal Life*.²² Stark's re-conceptualisation of domestic violence declined to focus on incident-specific harm, instead concentrating upon abuse in its cumulative form.²³ Stark saw coercive control as the: 'use of force or threats to compel or dispel a particular response'.²⁴ He explained this form of control as being:

comprised of structural forms of deprivation, exploitation, and command that compel obedience indirectly by monopolising vital resources, dictating preferred choices, microregulating a partner's behaviour, limiting her options, and depriving her of supports needed to exercise independent judgement'²⁵

Although the violence in coercive control can be fatal, it is generally minor and distinguished from other forms of assault by its frequency.²⁶ Stark's theory, like Walker's, accepts the fact that physical and psychological abuse occurs in abusive relationships. However, it substantially departs from the 'battered woman' theory by arguing that physical abuse is mainly used as a tool for a singular result – to rob the victim of autonomy, liberty and personhood.²⁷

Under Stark's theory of 'coercive control', there are three purposes to the abuser's tactics: to monopolise the tangible and intangible resources needed by the victim to enjoy personhood, to orchestrate their behaviour through rules, and to eliminate opportunities for the victim to garner external support.²⁸ The control is centred on the regulation of the victim's life, and their exploitation through both visible and subtle tactics.²⁹ For example, the coercive effect may be achieved through obvious ways such as locking the victim in their room, taking their money, or through physical assault. These obvious manifestations have been, for the most

deficient response to harms suffered largely by women percolates outside the boundaries of law, warping social understandings of domestic violence.'

²² Stark (n 9).

²³ *ibid* 205. Victim advocacy groups raise awareness around the impact of coercive control and lobby for its criminalisation. See Women's Aid Domestic Violence Bill 2017 Submission <www.womensaid.ie/download/pdf/womens_aid_submission_domestic_violence_bill_november_2017.pdf> (accessed 20 August 2019).

²⁴ *ibid* 228.

²⁵ *ibid*.

²⁶ *ibid* 205-206.

²⁷ *ibid* 367.

²⁸ *ibid* 204.

²⁹ *ibid*.

part, protected under corollary offences within the criminal law such as assault;³⁰ assault causing harm;³¹ assault causing serious harm;³² threats³³ coercion;³⁴ harassment;³⁵ and false imprisonment.³⁶

Less overt tactics that restrict decisional autonomy have historically been ignored by the law and require a nuanced legislative response.³⁷ For example, intimidation is often used by the aggressor to compel the victim into silence.³⁸ Threats and surveillance reinforce the victim's vulnerability,³⁹ where the latter is used to ensure the victim is constantly aware 'that the perpetrator is omnipotent and omnipresent'.⁴⁰ Degradation is used by aggressors to establish their superiority in the hierarchy of the relationship.⁴¹

Stark's theory of coercive control opened a dialogue on the many existing forms of abuse that remain unprotected by the legal system. Scholars in the field have identified multiple modes of non-physical violence which are more detrimental to women's health than situational assault.⁴² For example, economic abuse, whereby women may be prevented from working, using resources, and told how to use given resources, may result in women losing their

³⁰ Non-Fatal Offences Against the Person Act 1997, s 2(1): 'A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly, directly or indirectly, applies force to or causes an impact on the body of another, or causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact.'

³¹ *ibid* s 3(1): 'A person who assaults another causing him or her harm shall be guilty of an offence.' 'Harm' to either body or mind.

³² *ibid* s 4 (1): 'A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence.'

³³ *ibid* s 5 (1): 'A person who, without lawful excuse, make to another a threat, by any means intending the other to believe it will be carried out, to kill or cause serious harm to that other or a third person shall be guilty of an offence'.

³⁴ *ibid* s 9: This is committed by a person who, with a view to compelling another to abstain from doing something or to do something which the person has a lawful right to do or not to do, wrongfully and without lawful authority. It includes using violence or intimidation, injuring or damaging the victim's property, persistently following them, watching or besetting their work place or place of residence, or following the person.

³⁵ *ibid* s 10(2): This occurs when a person by his acts intentionally or recklessly seriously interferes with the other's peace or causes alarm, distress or harm to the other, and his acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

³⁶ *ibid* s 15 (1): A person shall be guilty of the offence of false imprisonment who intentionally or recklessly—(a) takes or detains, or (b) causes to be taken or detained, or (c) otherwise restricts the personal liberty of another without that other's consent.

³⁷ Adrienne E Adams et al 'Development of the Scale of Economic Abuse' (2008) 14 (5) *Violence Against Women* 563, 565-566.

³⁸ Stark (n 9) 249.

³⁹ *ibid* 250.

⁴⁰ *ibid* 255.

⁴¹ *ibid*.

⁴² Andy Myhill, 'Measuring Coercive Control: What can we Learn from National Population Surveys?' (2015) 21(3) *Violence Against Women* 355, 366 - 'It appears to be the case, though, that, on average, relationships with coercive control are characterized by more frequent and severe violence, and that this violence results in greater physical injury to the victim... Being a victim of coercive control increased the odds of having experienced mental or emotional problems by more than 2.5 times compared with having experienced situational violence'.

ability to be self-sufficient.⁴³ The inverse can also occur: abusers may refuse to work, squandering money and accumulating debt so as to economically exploit their partner. ⁴⁴ ‘Paper abuse’, only recently recognised, is abuse through frivolous and malicious litigation, usually within family law proceedings. This can occur in situations where the perpetrator files legal actions against the victim in order to force contact and prolong the harassment by procedural means.⁴⁵ The necessity of the victim’s presence in court gives the abuser the opportunity to exert their control once again in an arena where it is legally permissible.⁴⁶

Indeed, Stark reconceptualised the way we categorise domestic violence. The offence of coercive control aims to fill the void of statutory guidance and case law on emotional manipulation, economic abuse and subversion of liberty, to be used in tandem with assault. Domestic violence reduces options available to the victim, while the remaining options are subject to the arbitrary control of the perpetrator.⁴⁷ The use of physical and non-physical, criminal and non-criminal tactics amount to a pattern of abuse, seeking to regulate the victim’s life, with refusal often met with violence. Stark’s primary goal in his theory was to show that previous policies based on transactional violence did not improve the long-term prospects of victims as they failed to respond to the continuous nature of domestic abuse. Equating domestic violence with physical harm denies the myriad of different abuses suffered.⁴⁸ Coercive control, then, has the capacity to capture the non-physical elements of control.

2 Coercive Control in English Law

In 2015, the offence of coercive control was introduced to English law under section 76 of the Serious Crime Act 2015. It is an offence to engage in behaviour with someone that one is personally connected with where: that behaviour is controlling or coercive; it has a serious effect on that person; and the perpetrator knows or ought to know that behaviour will have a serious effect.⁴⁹ Behaviour can have a ‘serious effect’ where it causes the victim on at least two occasions to fear the use of violence against them or it has a substantial effect on the victim’s day-to-day activities.

⁴³ Adrienne E Adams et al, ‘Development of the Scale of Economic Abuse’ (2008) 14(5) *Violence Against Women* 563, 564, and 567.

⁴⁴ *ibid* 567.

⁴⁵ Susan L Miller and Nicole L Smolter, ‘Paper Abuse: When All Else Fails, Batters use Procedural Stalking’ 17(5) *Violence Against Women* 637, 638.

⁴⁶ *ibid* 640-641.

⁴⁷ Victor Tadros, ‘The Distinctiveness of Domestic Abuse: A Freedom Based Account’ (2005) 65(3) *Louisiana Law Review* 989.

⁴⁸ Stark (n 12) 1509-1510.

⁴⁹ Serious Crime Act 2015 s 76(1).

Having a wide-ranging offence that encompasses the many forms of abuse is the only effective way of capturing the broad behaviour designed to destroy personal autonomy. However, it is also imperative that the offence is not so far reaching that it criminalises anything less than acts which result in undermining victim's privacy, self-respect and autonomy. Appropriately, the English coercive control offence also contains specific defences, including if the defendant was acting in the best interests of the victim,⁵⁰ or if the behaviour was reasonable in the circumstances.⁵¹ An example of this could be controlling the finances of someone with an intellectual disability to ensure they have enough to sustain their living costs. However, the accused abuser may not avail of these defences where they have caused the victim to believe physical violence will be used against them.⁵² Adding an objective defence where the behaviour was reasonable under the circumstances allows for the defendant to rely on an objective standard to justify his actions and protect from any unjust conviction. As will be discussed later, defences of this sort were omitted from the equivalent Irish offence under the Domestic Violence Act 2018.

2.2 Issues with policing coercive control in England

Weiner analysed how the new section 76 offence was being used and operated by the police forces. In her interviews with criminal justice officials, Weiner found that while the offence was theoretically sound, the investigative powers and policies of the police force were still based on transactional violence. Her studies found the abstract nature of the offence was perceived by officers to be 'murky', 'a grey area', and a 'mind-set challenge'.⁵³ First responders explained the difficulty with the offence in practice, being more complicated than simply taking a statement on a singular event of violence. Coercive control requires a narrative.⁵⁴ While the legislation itself is straightforward, the behaviour being regulated is not.⁵⁵ One of the interviewees best expresses the nuances of the offence in practice:

'Is it coercive control, or isn't it? Where does coercive control sit?' . . . This is where it becomes that much more complicated . . . being asked to make decisions about someone else's life and relationships – between what's normal behaviour and what isn't. But what is the threshold for what is coercive control? And what is a 'normal relationship'?⁵⁶

The police officer's critique is well founded. The behaviour is not a single transactional harm which the police are equipped to deal with. A typical assault is easier to recognise by law

⁵⁰ *ibid* s 76 (8)(a).

⁵¹ *ibid* s 76 (8)(b).

⁵² *ibid* s 76 (10).

⁵³ Cassandra Weiner, 'Seeing what is "Invisible in Plain Sight": Policing Coercive Control' (2017) 56(4) *The Howard Journal* 500, 505.

⁵⁴ *ibid*.

⁵⁵ *ibid*.

⁵⁶ *ibid*.

enforcement, yet the measure of coercive control will only be discovered through fact-finding in discovery. This is highlighted in the Hertfordshire Police Checklist on coercive control, which records that 7 of the 12 behaviours associated with the offence are largely outside the scope of possible policing.⁵⁷

Isolation, deprivation of needs, control over everyday life, enforcing degrading rules, financial abuse, and preventing a person from working are, in the author's opinion, largely outside the scope of the police's ability to investigate. While this article focuses on incorporating coercive control theory into a viable offence, such nuances, which the offence aims to tackle, manifest themselves inconspicuously within a relationship, creating difficulties for law enforcement outside of legal control. In order to make full use of the innovative new offence of coercive control there will need to be comparable reforms in how domestic violence is approached by law enforcement officers and spoken about in society. Such policy reforms are outside the remit and expertise of this article. The English situation demonstrates that systematic training is needed alongside the new legislation to ensure there is no disparity between the lawmakers and policy.

3. The Offence of Coercive Control in Ireland

The Domestic Violence Act 2018 created the first offence of 'coercive control' in this jurisdiction where an individual knowingly and persistently engages in behaviour that is controlling or coercive which has a serious effect on the person.⁵⁸ The legislation adds a further objective test in that this behaviour is only an offence where a reasonable person would also believe that the behaviour would have a serious effect on the victim. 'Serious effect' is categorised as either fear of violence by the victim or any behaviour which causes a substantial adverse impact on their day-to-day activities.⁵⁹ Section 4 of the 2018 Act expands the protections of this act beyond marital couples to anyone in an intimate relationship.⁶⁰

⁵⁷ County Community Safety Unit, 'Coercive Control Fact Sheet' (Hertfordshire County Council, 2015) <www.hertfordshire.gov.uk/media-library/documents/herts-sunflower/coercive-control-factsheet.pdf> (accessed 20 August 2019). (1) Isolating a person from their friends and family; Monitoring their time; (2) Depriving them of their basic needs or access to support services, such as specialist support or medical services; (3) Monitoring a person via online communication tools or using spyware; (4) Taking control over aspects of their everyday life, such as where they can go, who they can see, what they can wear and when they can sleep; (5) Repeatedly putting them down, such as telling them they are worthless; (6) Enforcing rules and activity which humiliate, degrade or dehumanise the victim; (7) Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities; (8) Financial abuse including control of finances, such as only allowing a person a punitive allowance; (9) Threats: to hurt or kill; to a child; to reveal or publish private information (eg threatening to 'out' someone); (10) Assault; Rape; (11) Criminal damage (such as destruction of household goods); (12) Preventing a person from having access to transport or from working.

⁵⁸ Domestic Violence Act 2018 s 39(2).

⁵⁹ *ibid.*

⁶⁰ *ibid* s (4).

Legal scholars have long been advocating for an adaptation of Stark's theory into the criminal law to move from 'transaction-based physical violence' to a 'pattern of conduct occurring within a relationship categorised by power and control'.⁶¹ Assaults, threats and stalking are already non-fatal offences, but when threaded together they show the attempt to subvert a victim's liberty. Prior to this, the need to explain the background context of power, control, coercion, and intimidation was filtered out as being irrelevant to the offences of assault and harassment.⁶² The offence of coercive control is a vital step forward in recognising non-physical harm and keeping Ireland in line with its obligations under the Istanbul Convention.

Similar to the transactional theory of Walker, the Irish offence only penalises behaviour which results in diagnosable injury, threat of violence or serious alarm or distress. The offence fails to appropriately recognise violence as a tool, rather focusing upon the physical harm or distress that may be caused. The offence's consequentialist approach declines to overtly criminalise controlling behaviour (such as paper abuse, or economic abuse, as previously mentioned), instead drawing on the harms caused by such activity. It is not a full translation of the theory into practice as it predicates victim status on our existing scope of harm instead of expanding what could constitute harm to the much subtler micro regulation of victim's liberty and deprivation of personal autonomy. As the empirical evidence in England demonstrates, leaving interpretation of the offence open in this manner may complicate enforcement. In coercive control, violence is used to reinforce complementary forms of oppression, its frequency and effects, including injury or death, are as often the by-products in attacking the victim's personhood.⁶³ Criminal law tends to focus upon the effects of violence, being a tangible means with observable consequences, making it easier to adduce harm. There is still a need to shift the legal response to identify and condemn new, more subtle behaviours as wrong.⁶⁴ This is the crux of the Irish offence's shortcoming. While the 2018 Act undoubtedly represents a positive step for the law in this area, there are a variety of persisting issues that this article will now address: the issue of proof, the lack of a subjective element, and the potential unconstitutionality of the offence.

3.1 *The Issue of Proof*

Crimes are conceived at the exact moment the actus reus and mens rea collide.⁶⁵ Restructuring the idea that the guilty act can occur over a period of time, as the offence of coercive control requires, creates difficulties with regard to this collision. Often, acts of domestic violence or control are only brought to police attention following an 'acute

⁶¹ Tuerkheimer (n 21) 971-972.

⁶² Non-Fatal Offences Against the Person Act 1997, (s 2-4); Susan Edwards, 'Coercion and compulsion – re-imagining crimes and defences' (2016) *Criminal Law Review* 876- 879.

⁶³ *ibid* 376.

⁶⁴ *ibid* 384.

⁶⁵ *Fowler v Padget* [1798] 101 ER 1103.

battering incident',⁶⁶ which focuses upon the incidental nature of the abuse rather than the long-term controlling relationship that preceded the act. Similarly, the inconspicuous nature of certain abusive tactics, such as economic or paper control, makes it difficult to establish an intent to control. There is an inherent difficulty in establishing the mens rea element, where disproportionate power may be explained by the persistence of traditional gender roles in that relationship's dynamic. The requirement under section 39(1) of the Act, that the offender is 'knowingly engaging in the abusive behaviour', is an added burden for prosecutors to prove the intentional mens rea of power and control over this long period of time.⁶⁷

The effect of section 39(2)(a) is to focus upon whether or not the victim actually fears violence *but not* the controlling and coercive behaviour described above.⁶⁸ The key use of the word 'or' between sections (a) and (b) can give rise to a problematic interpretation by the courts. If the victim in a case has had no threat of violence against them, but instead fears ruin, destitution or reputational damage, they then fall within section (b), where they must prove it caused 'serious alarm or distress' and had a 'substantial impact'. Serious and substantial have created a high threshold of notional harm in other offences containing these terms. section 4 of the Non-Fatal Offences Against the Person Act 1997 prohibits assaults causing serious harm, with serious harm being defined as an injury which creates a substantial risk of death or which causes serious disfigurement/impairment to the mobility of the body or functioning of an organ.⁶⁹ In comparing the two offences it is likely the notional idea of 'serious' used for adducing harm or injury in criminal offences raises an incredibly high threshold on the injury sustained. Requiring the 'substantial' impact to affect 'day-to-day activities' suggests an affliction or serious impairment.⁷⁰ Proving 'serious alarm or distress' that has a 'substantial impact' could very likely require a medical diagnosis of some sort of ailment, perhaps anxiety, stress, or depression. The Irish coercive control offence seems to only reach serious coercion, requiring proof of 'serious alarm or distress', which can be seen to deny redress to anything except substantive coercion. Weiner's study highlights the highly contextual nature of coercion - what may control and coerce one victim in one relationship may have no impact on another.⁷¹ This offence may therefore share the same name as Stark's theory, but it lacks the unique quality which set it apart from Walker's by establishing a high threshold for proving non-physical harms.

⁶⁶ Walker, *The Battered Woman* (n 9) 55.

⁶⁷ Domestic Violence Act 2018 s 39(1)

⁶⁸ Susan S M Edwards, 'Coercion and Compulsion – Re-Imagining Crimes and Defences' (2016) *Criminal Law Review* 876, 884.

⁶⁹ Non-Fatal Offences Against the Person Act 1997 s 4(1)

⁷⁰ Edwards (n 68) 884-885.

⁷¹ Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System* (New York University Press 2012) 49.

32 *Objective versus Subjective*

While section 39(2) of the offence adds a subjective test of whether the behaviour is serious enough to come within the remit of the offence, it is entirely dependent on satisfying section 39(1) first. One way to address these concerns is to centre coercive control entirely subjectively. Coercion must be defined in a way which gives the victim centrality in the legal process. As in the case of sexual offences, Catherine McKinnon highlights subjectivity as being paramount in ensuring that actors in the criminal justice system are not simply substituting their own judgement in place of the victim's.⁷² Having an individual-centred approach would focus upon the effects of these acts on the victim; that is, whether or not they subjectively felt abused psychologically or emotionally rather than whether the acts would be considered objectively abusive to the reasonable person.

In this regard, the English equivalent offers a preferable adaptation of Stark's theory. It creates a fully subjective offence to adequately capture the many forms of coercive control whilst also offering defences to ensure that the offence is adequately prosecuted. Goodmark accurately posits that this shifts the focus from the intent of the abuser to control (which he may not have), to the effect the control constraints the victim's freedom.⁷³ This would allow the courts to expand the offence where fit to encompass changing tactics of control.⁷⁴

33 *Coercive Control's constitutional standing*

Coercive control is, by nature, a broad term and whether or not this would meet our constitutional requirements on the clarity of the criminal offences.⁷⁵ The 2018 Act fails to offer an explicit explanation of 'coercive control'; leaving the concept open to greater interpretation, likely with the intent of capturing more inconspicuous forms of abuse. The Irish Supreme Court has traditionally been willing to declare an offence to be unconstitutional where it fails to be certain or specific.⁷⁶ *King v Attorney General*⁷⁷ held an offence will be deemed unconstitutional where it:

make(s) a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is invested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality...⁷⁸

⁷² See Catherine McKinnon, *Feminism Unmodified* (Harvard University Press 1987) 90.

⁷³ Goodmark (n 71) 50.

⁷⁴ *ibid.*

⁷⁵ Art 38(1) Bunreacht na hÉireann.

⁷⁶ *Attorney General v Cunningham* (1932) IR 28, 32.

⁷⁷ (1981) IR 233.

⁷⁸ *ibid* 257.

The requirement for clarity and the rule against vagueness also applies on a European level. Article 7 of the European Convention on Human Rights has been extended to require that the criminal law be clearly defined, which is satisfied once the person can know from the wording of the provision whether they are criminally responsible.⁷⁹ This principle was justified in *Cagney* on the basis that: ‘a citizen should know, or at least be able to find out, with some considerable measure of clarity, what precisely is prohibited and what is lawful.’⁸⁰

This prohibition on vague offences empowers the court to insist on standards of definitional clarity by the legislature to ensure human dignity, autonomy and freedom from frivolous prosecution.⁸¹

34 Offences which are expressed in vague language

Previous Irish jurisprudence on the issue of clarity involved issues of the criminalising of conduct based on unfair arbitrary reasoning. The courts concluded that the offence should be clearly and specifically defined. The seminal case of *King v Attorney General* arose where section 4 of the Vagrancy act 1984 contained an offence of loitering with intent that applied to: ‘every suspected person or reputable thief’ which was deemed to be too vague.⁸² *Dokie v DPP*⁸³ involved similar phrasing. The court held that ‘satisfactory explanation’ was too vague as it gave rise to an ‘arbitrary application’.⁸⁴ The offence was not precise enough to reasonably enable an individual to foresee the consequences of their acts or omissions, or fathom what kind of explanation was necessary to avoid punishment.⁸⁵ It is likely that a conviction under section 39 could be challenged based on the test of arbitrary application of *King* and *Douglas*. As this article has discussed, coercive control covers a multitude of different actions. It could be argued that the current phrasing has failed to strike an equilibrium between an adequately broad offence and the need to delineate the exact behaviour within its purview. Like Hogan J’s argument, it may be shown that the 2018 Act clarifies itself through section 39(2) and 39(4) of the Act where it defines what behaviour causes serious effect between two persons in a relationship. Requiring that fear of violence be used against the person or an act causing serious alarm or distress that impacts on day-to-day activity has restricted the offence

⁷⁹ *Sunday Times v United Kingdom* (1980) 2 EHRR 245; See Thomas O’Malley, *The Criminal Process* (Round Hall 2009) 157.

⁸⁰ *People (DPP) v Cagney* [2008] 2 IR 111, 121-122.

⁸¹ Rephrasing of Stephen Shute, ‘Appropriation and the Law of Theft’ (2002) *Criminal Law Review* 445, 452.

⁸² *King v Attorney General* [1981] IR 233, 257: Henchy J condemned the vague nature of the impugned provision as failing to distinguish between real and apparent criminal nature by the arbitrariness and discretion vested in the prosecutor and/or judge, to criminalise conduct committed by one person in certain circumstances, when the same person doing the same conduct in the same circumstances is free from criminalisation.

⁸³ *Dokie v DPP* [2011] 1 IR 805. Here, the applicant was facing prosecution under section 12 of the Immigration Act 2004 for failing to produce a passport and ‘he or she (fails to) give a satisfactory explanation of the circumstances which prevent him or her from doing so.’

⁸⁴ *ibid* 818.

⁸⁵ *Dokie* (n 83) 819.

substantially to the effect that it cannot be applied completely arbitrarily. The legislation does use standards as opposed to hard and fast rules. However, these standards allow for a constant application in different scenarios, as the fair adjudication aspect of legality requires.⁸⁶

35 Offences which contain general terms

In *Douglas*, Hogan J gave invaluable insight on the reasoning behind why the offences of offensive conduct⁸⁷ and threatening, insulting or abusive behaviour⁸⁸ in the Criminal Justice (Public Order) Act 1994 were considered permissible. While not a precise or exact test, his rationale was that offensive conduct contained a definition in a subsection, and that section 6 of the Act required a mens rea element that adequately clarified the offence.⁸⁹ In order for the criminal law to apply to a host of different scenarios it must contain general terms. Hogan J in *Douglas* acknowledged that our common law system cannot be absolutely precise. In order to satisfy the condition of vagueness we must have clear and objective laws which are sufficiently general to apply to new sets of facts within certain defined parameters.⁹⁰ While the argument could be made that coercive control is vague, it is likely the court would see it as necessarily general.

Conclusion

The range of harms caused by the tactics of coercive control are arguably more harmful than violence.⁹¹ The victims are subjected to constant intimidation and controlling conduct through the use of denial of money, monitoring of time, and restriction of movement. In the 2018 Act, the legislature had a prime opportunity to create an adaptable offence that would provide redress to these victims in a way that the longstanding non-fatal offences had failed. While Stark hoped inter-family violence would be reconceptualised as ‘an ongoing and gender-specific pattern of coercive and controlling behaviours that cause a range of harms in addition to injury’, the Irish offence prioritises ‘injury’.⁹² The ineffectiveness of the Irish offence to grasp the nuances of coercive control is further highlighted by its more efficient English counterpart. The English offence of coercive control better attempts to balance practicality of prosecution within the sociological realities of the subject.

⁸⁶ David Prendergast, ‘Douglas v. DPP and the Constitutional Requirement for Certainty in Criminal Law’ (2013) 50(2) *The Irish Jurist* 235, 243.

⁸⁷ Criminal Justice (Public Order) Act 1994 s 5.

⁸⁸ *ibid* s 6.

⁸⁹ *ibid*.

⁹⁰ *Douglas v DPP* [2013] IEHC 343 (unreported) [26].

⁹¹ EU Campaign Against Domestic Violence, 2004 <<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10635&lang=EN>> accessed 20 August 2018; one in every three women experience severe psychological abuse from their partner, one in four experience severe physical abuse.

⁹² Stark (n 9) 99-100.

While the new Irish coercive control offence will capture instances of violence that it was previously blind to and has successfully pushed private harm into the public sphere, there remains much to be done to reforming the offence as clarified by statute. For too long, abuse has been beyond the scope of criminal law due to the complexities of policing behaviour within an intimate relationship. Shifting the requirement for victim status from transactional violence toward a more comprehensive adaptation of domestic abuse encompasses the key issues of infringing upon the victim's autonomy and liberty. Thus, broadly conceptualising what constitutes 'harm' can redress the previous subversion of forms of abuse victims face.