



The Conditional Prohibition of Marital Rape in the Caribbean

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Abstract

Historically women were seen as property of their husbands. This absolved married men from numerous crimes relating to their wives including battery, assault and rape.

Keywords: Seal of Protection; Prohibition; Autonomy; Amended Laws; Caribbean countries; Restrictive conditions

Introduction

For centuries women who suffered sexual assault perpetrated by their spouses had no legal recourse [1]. In 2014 Tenesha Myrie, a Jamaican attorney and lecturer, passionately expressed in a local newspaper article that “Marriage does not mean irrevocable consent to sexual intercourse;” and pleaded with us that “as a people, let us not use the notions of privacy and sanctity of marriage to condone sexual violence.”[2]. Legislation in numerous countries was later created to correct this. In the late 1900’s states such as the US began to legally prohibit this historical right. By mid-2000’s Caribbean states followed the same steps including Jamaica in section 5 of their 2009 Sexual Offences Act; Barbados and Grenada in their Amendment Acts, and other Caribbean countries. Despite the step taken, married women are still not fully protected from marital rape due to conditions provided for in the relevant legislations, which render the prohibition conditional. These conditions appear to protect married women, however, the language used depicts otherwise. This proves that no significant change has been made throughout the centuries regarding the right of married women to bodily autonomy and not be treated as their husband’s property.

Problematic legislation

Numerous Caribbean countries criminalize marital rape, however the prohibition is dependent upon the couple being separated, divorced or entering into divorce proceedings. These conditions, heavily imply that no protection can be afforded to married women, only single women, or women separating from their partners. Marriage has created a seal of protection for men to commit the gruesome crime of rape without facing the full sanctions.

Pursuant to the Sexual Offences Act (2009) of Jamaica marital rape is prohibited once the conditions that are explicitly provided for in section 5 subsection 3 of the said act are met. These conditions are as follows:

- (a) The spouses have separated and thereafter have lived separately and apart within the meaning of the Matrimonial Causes Act;
- (b) There is in existence a separation agreement in writing between the spouses;
- (c) Proceedings for the dissolution of the marriage or for a decree of nullity of marriage have been instituted.
- (d) There has been made or granted against the husband an order or injunction, as the case may be, for non- cohabitation, non-molestation or ouster from the matrimonial home for the personal protection of the wife; or
- (e) The husband knows himself to be suffering from a sexually transmitted infection.

Similar conditions are found in the Antigua and Barbuda Sexual Offences Act (1995) section 4; the Criminal Code of St Lucia section 123(3); Belize’s Criminal Code (Amended) section 72 and the relevant acts of other Caribbean countries. Some countries for example St. Vincent and the Grenadines and Haiti are silent on the issue of marital rape. Their legislation prohibits rape but contains no provision explicitly prohibiting marital rape.

Based on these conditions married women are not afforded full protection. The legislations limit the rights of these women and increases the defences which may be relied on by a husband who is accused of marital rape. Furthermore, the provisions which are silent on marital rape, create full indemnity to husbands who rape their wives and contribute towards the normalization of marital rape. The general prohibition of rape cannot speak to marital rape. The laws of interpretation, penal statutes should be strictly construed. Thus the law generally prohibiting rape cannot be construed to prohibit marital rape. Thus so as to afford full protection, countries must not only explicitly prohibit marital rape in their laws, conditions should not be included in the prohibition.

Discussion

Discrimination against married women

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) defines discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women...”[3].

One major question which arises when conducting this research is “Whether the conditions provided for in the legislation allow men to freely rape their wives without sanctions?” except in the case of separation or dissolution of marriage [4,5].

The failure of the legislation’s to explicitly and exclusively criminalize marital rape allows discrimination through the judicial system, which consist of courts and the legal system on a whole. This leaves the law open to narrow interpretation and misinterpretation by

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courts. This also leads to marital rape being normalized and unreported as the victims may not consider it a criminal offence [6].

Most individuals are under the misconception that domestic violence is limited to only physical abuse however domestic violence includes verbal, emotional and sexual abuse- which would include marital rape. In November 2018 the Jamaican Information Service (JIS) established that nearly 15 per cent of all women in Jamaica, aged 15 to 49, who have ever married or partnered have experienced physical or sexual violence from a male partner in the previous 12 months. These statistics are not a true reflection of the actual marital rape rate as it is an under-reported crime [7]. CEDAW in their 2012 Concluding observations of the Committee on the Elimination of Discrimination against Women expressed concerns about gender-based violence cases being under-reported and the limited data available on violence against women. They believed it was due to the prevalence of social and cultural norms, as well as the insufficiency in the legal system (judges, police and lawyers) due to lack of awareness on violence against women [8]. Most Caribbean countries including Jamaica have a culture of silence, especially in regards to domestic violence and marital rape. Most women are unaware that marital rape is illegal due to its normalization over the years.

Jamaica has a high domestic violence rate and a trend of uxoricide which implies a high marital rape rate. This culture has been accepted by women over the years, causing there to be no statistics to show the extent to which these issues have plagued the small island of Jamaica and other Caribbean territories.

Inadequate action by governments

The overall efforts by the relevant legislative bodies have been inadequate except countries such as Trinidad and Tobago, who have implemented legislation that prohibits marital rape without conditions. Countries including Jamaica and Antigua and Barbuda, have started discussions in regards to amending the legislation to prohibit marital rape without conditions; and other countries, including Haiti are having discussions regarding amending their laws to include an explicit prohibition against marital rape. These efforts must be applauded, however, discussions are just a start; action needs to take place to ensure married women's right to bodily autonomy is not breached without sanction [9].

The judiciary plays a pivotal role in the interpretation and application of the law. The matters go before well learned Judges who determine the cases based on the circumstances and with their discretion. However their interpretation is restricted based on the language of the law. The currently language of the law only affords protection to women who are separated from their husbands or entering proceedings to do so. Common law is also important, however amended laws would better allow Judges to make rulings which protect the rights of married women [10].

Recommendations

a) The researcher recommends that the law regarding marital rape in Jamaica and other Caribbean countries be amended and the conditions be removed. Therefore amending the law 'with a view to criminalizing all marital rape, with no restrictive conditions

b) That women should be educated about their bodily autonomy and their rights regardless of their marital status.

c) That the amended laws be properly enforced and more resources be put in place to ensure married women are protected.

Conclusion

According to Robin West "The classification and differential treatment of married women rests on the assumption that married women, unlike all other persons, have no interest in receiving protection from the state against violence and sexual assault." All women have a right to bodily autonomy. These rights should not be restricted or infringed because of the sanctity of marriage. The laws prohibiting marital rape are inadequate. They seek to protect single women, not married women hence the conditions of separation and divorce. The law tip toes around a veil of protection created by marriage. The relevant Legislation's need to be amended so proper protection may be afforded to women who are victims of marital rape. Additionally, resources must be utilized to obtain proper statistics regarding marital rape and the de-normalization of marital rape and silence regarding crimes. Law makers have erred in placing conditions on marital rape, some countries are having discussions regarding amending the laws. However, discussions, though important, are inadequate, action is needed so as to properly protect women who are victims of marital rape.

Acknowledgement

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Conflict of Interest

None

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