

MAKING RAPE IN MARRIAGE ILLEGAL (1999)

A new Combating of Rape Bill is expected to come before Parliament this year. This bill will make many changes to the existing law on rape. One of these changes will be to make it possible for a wife to charge her husband with rape (or vice versa). This article by Dianne Hubbard of the Legal Assistance Centre discusses the problem of marital rape and explains why the existing law needs to be changed.

The history of the marital rape exemption

Rape is currently defined as “unlawful intercourse with a woman without her consent”. But in the eyes of the Roman-Dutch law, sexual intercourse between a husband and a wife can never be unlawful – and so it cannot be rape.

The most commonly-cited reason for this exemption of marital rape from the general crime of rape concerns the nature of marriage. The theory is that upon marriage, a woman gives a blanket consent to sexual intercourse with her husband for the duration of the marriage. But it is obviously absurd to interpret the marriage vows as an agreement to sexual intercourse at any time, under any circumstances, for years to come – regardless of whether the husband is drunk, violent, or abusive.

Even the law itself is inconsistent on this point. For example, it is permissible under existing law for a wife to refuse to have sexual intercourse with her husband if he is suffering from a sexually transmitted disease, such as HIV/AIDS. Also, if a husband uses violence to force sexual intercourse on his wife, she can charge him with assault even though she cannot charge him with rape. (Some people may argue that a charge of assault should be sufficient in such circumstances. The flaw in this argument can be illustrated by an analogy. A storekeeper who was beaten up and robbed at gunpoint would undoubtedly feel unsatisfied if he were told that he could charge the culprit only with shoplifting. Rape under any circumstances should be treated like the serious crime that it is.)

Another defence of the marital rape exemption is that to allow a wife to charge her husband with rape would wreck the marital relationship -- as if allowing the husband to rape his wife with impunity will do the relationship no harm!

What the marital rape exemption really does is to reinforce the view that wives are the property of their husbands. The existing law does not acknowledge that women, married or single, have the right to make choices about their actions and about their bodies. The law as it stands turns marriage into a power relationship which gives the husband the right to force his wife to submit to him, at any time, regardless of her wishes.

Marital rape in Namibia

In a recent study of abused spouses in Lüderitz, Karasburg and Keetmanshoop, 25% of the women who were interviewed said that they had been raped by their husbands.

Two other recent studies found that there are differences of opinion amongst members of the public about marital rape. Some Namibians feel that forcing a woman to have

sex against her will is wrong even within marriage, while others feel that it is the husband's right. Some persons interviewed said that forced sex within marriage is wrong, but wondered if it should be called "rape". Others (particularly women) said that any sex against a woman's will should be called rape and dealt with as such. One headman who was interviewed said that a woman who refuses to have sexual intercourse with her husband deserves to be hurt as she is withholding what is rightfully his. Others said that a husband who forces his wife to have sex against her will does not respect her and has damaged her dignity as a human being. Some persons interviewed said that it would be even worse for a woman to be raped by her husband than by a stranger, because of the mutual trust and understanding one expects in a marriage.

What is clear from interviews with women who have actually been forced to have sex with their husbands against their will is that they would like help. For example, one 43-year-old woman who had been married for 8 years refused to have intercourse with her unfaithful husband because she was afraid of contracting HIV/AIDS. When he forced her to have sexual intercourse, she tried to charge him with rape but found that the police were reluctant to help.

Another wife spoke to the researcher with tears running down her face of how her husband tried to insert a broomstick into her vagina after beating her. A third described how she was raped in front of her children, surrounded by her own blood from the brutal beating he had just given her.

There is no data on the psychological impact of marital rape in Namibia. But studies in other countries have found that marital rape causes as much or more psychological distress in the victim as any other form of rape, and that it causes long-term effects of equal severity. As one person put it, "When you are raped by a stranger you have to live with a frightened memory. When you are raped by your husband, you have to live with your rapist."

Law reforms in other countries

Many countries have repealed marital rape exemptions – including Australia, Austria, Canada, Denmark, England, Finland, France, Germany, Ireland, Israel, Mexico, New Zealand, Norway, Poland, South Africa, Spain, Sweden, Trinidad/Tobago, and some states in the USA.

Speaking on the proposal to repeal the exemption in Canada in 1982, the Canadian Minister of Justice said that "marriage should no longer mean forced sexual submission." In England, one writer speaking in support of the law reform said that "if we believe that marriage is a valuable institution, we should aim towards making it a just, equal and rewarding partnership in all ways, rather than a means of subordinating one person's will to that of another". In South Africa, a 1997 report of the South African Law Commission quoted two legal commentators who describe marital rape as "one of the most serious violations of a woman's bodily integrity".

The experience of other countries suggests that proving rape in the context of marriage is often difficult, but making this form of rape clearly illegal sends out an important message to society nevertheless.

The Namibian Constitution

In Namibia, the marital rape exemption is probably unconstitutional in any event. Article 124 of the Namibian Constitution states that men and women "are entitled to equal rights as to marriage, during marriage, and at its dissolution". Allowing the husband, who is usually the physically stronger partner, to force sexual intercourse on his wife thoroughly undermines the notion of equality in marriage.

The Namibian Constitution also states that no person may be discriminated against on the grounds of sex or social status. This means that a married woman has the same right to freedom of choice and bodily integrity as an unmarried woman, or a man.

Furthermore, the Namibian Constitution guarantees dignity to all – a principle which is completely inconsistent with an institution of marriage that requires either party to submit to sexual activity unwillingly.

Convention on the Elimination of all Forms of Discrimination against Women

The UN General Assembly has specifically identified marital rape as an act of gender-based violence in its 1993 Declaration on the Elimination of Violence against Women. This means that Namibia has an obligation under the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) to take steps to protect women against this form of violence, including the passage of laws against it. This position has been made clear by the General Recommendations of the UN Committee which monitors compliance with CEDAW. In this way, Namibia is obligated in terms of international law to outlaw marital rape.

Marital rape is also mentioned specifically in the Beijing Declaration and Platform for Action as a form of violence against women which states have a duty to combat. Namibia has also committed itself to this Platform for Action, and thus has promised to take action against marital rape.

Conclusion

Opinions on marital rape may differ within Namibia, but protecting women against this form of harm is not a matter of opinion. It is an obligation under Namibia's own Constitution, as well as in terms of international law. This provision of the Combating of Rape Bill which will remove the marital rape exemption should receive wholehearted support from our lawmakers.

The information on marital rape in Namibia is taken from the following studies:

- *Dr SMH Rose Junius et al, An investigation to assess the Nature and Incidence of Spouse Abuse in Three Sub-Urban Areas in the Karas Region, Namibia (1998).*
- *Debie LeBeau, The Nature, Extent and Causes of Domestic Violence against Women and Children in Namibia (1997).*
- *Heike Becker & Pamela Claassen, Violence Against Women and Children: Community Attitudes and Practices (1996).*