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LEGALITY AND PUNISHMENT OF MARITAL RAPE- Aryan Pathak¹**ABSTRACT**

According to the World Bank data, many countries declared marital rape a crime but India has so far not criminalized marital rape.

In older days, if the woman is married then she is her husband's sexual property and if the woman is unmarried then she is her father's property. Being raped by them was considered to be vandalizing their father's or husband's property. Sexual intercourse with anyone's wife or daughter was punishable by death. It is believed that a husband can't rape his wife because she is his property and can do anything with her.

The doctrine of coverture says women cannot protect themselves. So, her father or husband has to protect them. Due to this thinking from the British era, there was a conservative thinking that a woman is known only by her husband because they were believed to be their property.

Marital rapes are not criminalised in India because of exception 2 of section 375 of IPC (Indian Penal Code, 1860) which says, sexual intercourse by a man with his wife, the wife not being under "fifteen" years of age, is not rape.

Rape laws are amended twice to date. Firstly, in 2013, called Criminal Law (Amendment) Act, 2013, which expanded the definition of rape to include oral sex. Secondly, in 2018, called the Criminal (Amendment) Act, 2018, stringent the punishment for rape in IPC as well as in POCSO Act.

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Therefore, every crime will end with a punishment. The main goal of punishment is to rehabilitate criminals, make them decent people, and transform them into law-abiding citizens. In addition to making sure that a crime won't be repeated, the individual is punished for his illegal behaviour. The deterrent theory aims to reduce crime by ensuring that no crime will be committed again.

Introduction

Approximately 70% of Indian women are victims of domestic violence, according to an NCRB (National Crime Record Bureau) survey. In today's time, marital rape is considered as a part of such violence.

According to the World Bank data, more than 100 nations have criminalised marital rape but India is one of the 36 countries that have so far not criminalized marital rape due to some reasons.

In older days, daughters are considered as the property of their father or her husband. If the woman is married then she is her husband's sexual property and if the woman is unmarried then she is her father's property. Being raped by them was considered to be vandalizing their father's or husband's property.

As we have seen that women are considered as their father's property so rape become a crime against women not against their father or husband. It happened when the IPC (Indian Penal Code), 1860 was drafted in India. But after drafting it section 375 was introduced which defines rape as only sexual intercourse without the consent of the woman but in this ambit, marital rape was not considered.

Status of Women in the Ancient World

Around 1900 BCE, sexual activity with anyone's wife or daughter was punishable by death, in Babylonia. It was believed that a daughter or wife was the property of a father or husband. Similarly, in many countries at that time rape was considered a father or husband-related property offence. Women were considered as property. Due to this reason, it is believed that the husband can't rape his wife because she is property and can do anything with her.

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Even in the 17th and 18th centuries when British Empire was established rape laws were introduced, in which rape was considered a crime against women. This law is only introduced because rape violates the sexual purity of a woman. Therefore, it became a crime. And, it was believed that after marriage a husband cannot violate his wife's purity.

Now, the purity of a woman came into question all around the world, and rape cases started to increase. Due to this, all the liabilities are handed over to the father and/or husband so that they will protect their daughter or wife. The father or husband was now considered to be responsible.

Doctrine of Coverture

Women cannot protect themselves. So, her father or husband has to protect them. Due to this thinking from the British era, there was a conservative thinking that a woman is known only by her husband because they were believed to be their property.

In 1860, due to the crimes against a woman, the need for the Indian Penal Code (1860) was aroused.

Now, the question arises that why marital rapes are not criminalised in India?

Exception 2 of Section 375 of IPC

Sexual intercourse by a man with his wife, the wife not being under "fifteen" years of age, is not rape.²

When IPC was drafted, section 375 was introduced which make rape a crime officially but marital rape was not recognised in this provision. IPC recognises all types of rapes e.g., gang rape, date rape, campus rape, etc., but marital rape is not recognised in this.

Exception 2 does not criminalise rape with a wife other than if she is a minor (under the age of 15 years).

Section 375 talks that sexual intercourse with a woman without her consent is rape. At the same, it was not rape when the woman is his wife other than she is under the age of 15 years.

²Section 375 (Exception 2) of IPC, 1860.

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Due to Exception 2, marital rape will not be criminalized in India. It will only be criminalized when this exception is removed.

Arguments Supporting Criminalizing Marital Rape

- Exception 2 violates Article 14 of the Indian Constitution because it creates a difference between married and unmarried women.
- Exception 2 criminalizes marital rape with a woman under 15 years only: In POCSO and Juvenile Justice where legislature under the age of 15 years to 18 years considers an individual as a child, Exception 2 only considers it below the age of 15 years.³
- Section 498A does not specifically criminalize marital rape.
- By Article 21 of the Indian Constitution, Exception 2 of section 375 of IPC, infringes the woman's right to autonomy.

Arguments Against Criminalizing Marital Rape

- Implied consent of a married woman to indulge in sexual intercourse: Sexual intercourse of an unmarried woman is rape but when a married woman engages in sexual activity it is not rape it's implied. Therefore, sexual intercourse by the husband is immunized.
- Already an offence under section 498A IPC and Domestic Violence Act: There is a remedy for marital rape in IPC i.e., section 498A and Domestic Violence Act which talks about cruelty. Also, setting a criterion for marital rape is very challenging and easily be misused.
- Defeats the purpose of section 375 IPC Exception 2.
- Increase in cases of harassment against men.

Amendments to Rape Laws in India

Criminal Law (Amendment) Act, 2013-

- The 2013 Amendment Act expanded the definition of rape to include oral sex.

³Section 2(1)(d) of POCSO Act, 2012
Section 2 (12) of Juvenile Justice Act, 2015

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- Added insertion of an object or any other body part into a woman's vagina, urethra or anus will amount to rape.⁴

Criminal Law (Amendment) Act, 2018-

- It is stringent the punishment for rape in IPC as well as in POCSO Act.
- Minimum punishment for rape of women is now from 7 years to 10 years.
- Rape and gang rape of girls below the age of 12 years carries a minimum punishment of 20 years (extendable to life imprisonment or death).⁵

At the time of the Nirbhaya case⁶, Justice Verma Committee recommended to criminalize marital rape in India but a standing committee of Parliament replied that by doing so family system of India comes under stress due to which anarchy will develop.

So basically, it remained a stereotype in Indian society that sexual violence against women only occurs outside the house her husband won't do anything like that.

Criminological Aspect of Marital Rape

Deterrent theory of criminology deals with serious crimes like rape, marital rape, etc. This theory focuses on stopping future crimes by setting an example of the punishment given to the offender.

Every crime will end with a punishment. The main goal of punishment is to rehabilitate criminals, make them decent people, and transform them into law-abiding citizens. In addition to making sure that a crime won't be repeated, the individual is punished for his illegal behaviour. The deterrent theory aims to reduce crime by ensuring that no crime will be committed again.

In 2013, an article by Daniel S. Nagin,

“Deterrence in the 21st Century,” is the primary idea of the deterrent theory, which can be summed up as the fear of being caught is far worse than severe punishment. The ability of the judicial system to apprehend criminals can cause other criminals to develop a terrible psychosis. Sentinels and hotspot policing are two tactics applied by police that are very effective in

⁴Mukesh & Anr. v. State for NCT of Delhi & Ors.

⁵Mohd. Akhtar v. The State of Jammu & Kashmir

⁶(2017) 6 SCC 1

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eliminating the threat. Criminals are more likely to change their behaviour if they see armed, uniformed police officers than if they read the stringent penalties on a piece of paper.

It can be seen that the death sentence has not done a very good job of deterring society's most heinous crimes. It is extremely frustrating that the crime has not been fully eradicated in the light of the rise in rape cases over the past few decades. According to the reports, India has a very large number of rape cases and still has no appropriate law for marital rape.

To reduce crime and make our society more civilised and decent, the legal system is constantly improving its laws, policies, processes, and interpretations. After all, human rights legislation only takes effect when society is civilized.

Important Cases

Sakshi vs. UOI (2004):

Facts- An NGO said that if physical violence to a woman by his husband is a punishable offence, then why having sex without a wife's permission is not viewed as a crime punishable by law?

Held- SC upheld the existing definition under section 375 of IPC in which marital rape is not discussed and said that no alteration is to be done to section 375 of IPC.⁷

Independent Thought vs. UOI and ANR. (2017):

Fact- An NGO filed a petition challenging section 375 Exception 2 of IPC.

Held- SC said that the age factor under Exception 2 increased from 15 years to 18 years but it didn't consider married women victimized by marital rape.⁸

Nimeshbhai Bharatbhai Desai vs. State of Gujrat (2018):

In this case, Justice J.B. Pardiwala shared his views that "A wife is not cattle and a husband having sexual intercourse with his wife is not merely using a property, he is fulfilling a marital duty with a fellow human being with dignity equal to that he accords himself. He cannot be

⁷(2004) 5 SCC 546, AIR 2000 SC 3479

⁸AIR 2017 SC 4904

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permitted to violate this dignity by coercing his wife to engage in a sexual act without her full and free consent.”

By this, he delivered the message to society that marital rape is not a privilege of a husband and this type of crime against a woman is not tolerated.⁹

Conclusion

In the 21st century, there are still people who treat women as their property. If she is somebody's daughter then her father will treat her as his property and take all the decisions related to her. His father's decision is final for her and if she is the wife of somebody then she will be her husband's property. He can use her whenever he wants especially for sex. Nowadays women are literate and have the power to raise their voices against any crime which is going to be committed against them but still, there are some localities which are not so literate about their rights. In those areas woman's consent for sex is not mandatory when her husband wants, he can do it. So Criminologists trying to solve this problem with the help of the deterrent theory which aims to create fear and set examples in the same mentality of people to not commit marital rape.

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