Marital Rape and Indian Law

Why in news?

The Chhattisgarh High Court has discharged a man from facing trial for allegedly raping his wife, citing exception under **Section 375** of the Indian Penal Code.

What is the case on?

- Based on the allegations of his wife, charges against the husband were framed by a trial court under:
    1. IPC Section 376 (rape)
    2. IPC Section 377 (carnal intercourse against the order of nature)
    3. IPC Section 498A (cruelty towards wife by husband or his relatives)
- While, the High Court upheld charges under Sections 498A and 377, it discharged the husband under Section 376 i.e rape.
- The Exception 2 to Section 375 (the definition of rape) was cited, under which sexual intercourse by a man with his own wife (above 18 years) would not amount to the offence of rape.

Unmarried girls below 18 years - Sex, with or without her consent, is statutory rape under Section 375 of IPC

Within marriage - Exception 2 to Section 375 earlier gave the husband of a girl child (15-18 years) blanket liberty to have non-consensual sexual intercourse with her.

In 2017, the Supreme Court narrowed this provision and held that sexual intercourse by a man with his wife, who is below 18 years of age is rape. But Sec 375 still does not criminalise marital rape of women above 18 years.

Why is the marital rape exception contentious?

Protection of Women from Domestic Violence Act (2005) regards marital rape as a form of domestic violence and provides for a lesser jail term than non-marital rape. It is the only way of penalizing marital rape in India, and it is a civil remedy and not a criminal action

Inconsistent with other sexual offenses

- A husband may be tried for the following offences:
    1. sexual harassment, molestation, voyeurism, and forcible disrobing (in the same way as any other man)

2. even be tried for rape, if he is separated from his wife (though not divorced) - Under Section 376B
3. non-consensual penetrative sexual interactions other than penile-vaginal penetration with his wife - Under Section 377

The element of consensus was included in Sec 377 after the Supreme Court judgement in Navtej Singh Johar v. Union of India, 2018.

- In effect, forcible or non-consensual penetrative penile-vaginal intercourse is protected from criminal prosecution, when performed by a husband with his wife.

Liberal and progressive values of Indian Constitution

- Individual autonomy, dignity & gender equality are enshrined in fundamental rights such as Article 21 & Article 14.
- In this light, in Joseph Shine v. Union of India (2018), the Supreme Court held that the criminalising adultery was unconstitutional as it treats the wife as the husband's property.
- But exception to marital rape holds that a wife's right to personal and sexual autonomy, bodily integrity & dignity are surrendered to his husband.
- It is also violative of India's obligations under the Convention on the Elimination of All Forms of Discrimination against Women (advocates against women's subordination to men within marriage) .

Institution of marriage

- SC had earlier observed, "Marriage is not institutional but personal – nothing can destroy the 'institution' of marriage except a statute that makes marriage illegal and punishable."
- Hence recognising marital rape as a criminal offence would not 'destroy the institution of marriage'

Legal challenges

- It is argued that since marriage is a sexual relationship, determining the validity of marital rape allegations would be difficult.
- But **marriage does not signify perpetual sexual consent**.
- The determination of consent or lack thereof in the context of a sexual interaction within marriage would be the same as in any other context.
- E.g., through physical evidence and testimonies

What does this call for?

Exception 2 to Section 375 of the IPC should be struck down, and adult married women should also be afforded the same protection and dignity in marriage.

Source: The Hindu, The Indian Express



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