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Supreme Court Examines Marital Rape Exception under BNS amid Debate over Consent, Autonomy and Constitutional Equality

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Recent Developments:

- The **Supreme Court** is examining a batch of petitions challenging the constitutional validity of the marital rape exception under the **Bharatiya Nyaya Sanhita, 2023**, along with related challenges arising from the earlier Indian Penal Code framework.
- On 9 September 2026, a three-judge Bench headed by Chief Justice Surya Kant, comprising Justice Joymalya Bagchi and Justice V. Mohana, directed that the matters be listed for final hearing after three weeks, with hearings scheduled on Wednesdays and Thursdays.
- The Court has also questioned whether a husband can be prosecuted for rape while the statutory exception remains in force, particularly in the context of a Karnataka High Court judgment that permitted prosecution in a marital sexual-assault case.
- The Union Government has maintained that **criminalising marital rape is primarily a matter for Parliament**, while the Court has indicated that marriage cannot automatically extinguish an individual woman's autonomy.

Current Legal Framework:

Bharatiya Nyaya Sanhita, 2023:

- **Exception 2 to Section 63** excludes sexual intercourse or sexual acts by a man with his own wife, when the wife is 18 years of age or above, from the legal definition of rape.
- **Section 67** separately criminalises sexual intercourse by a husband with his wife without her consent when she is living separately, whether under a decree of separation or otherwise, with imprisonment of two to seven years and liability to fine.
- **Section 85** penalises cruelty by a husband or the relatives of a husband, but it does not create a separate offence specifically addressing non-consensual sexual intercourse within an ongoing marriage.

Protection of Women from Domestic Violence Act, 2005:

- The **Protection of Women from Domestic Violence Act, 2005** recognises **sexual abuse** as a form of domestic violence, including conduct of a sexual nature that abuses, humiliates, degrades or violates a woman's dignity.
- The Act primarily provides protective and remedial mechanisms such as protection orders, residence orders, monetary relief and compensation, rather than treating marital rape itself as a separate offence under the general law.

Status and Prevalence:

Crime Data:

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- The **National Crime Records Bureau** does not maintain a separate category for marital rape, making the precise national incidence difficult to quantify through recorded crime statistics.
- In 2024, cruelty by husband or relatives remained the largest reported category of crime against women, accounting for 27.2% of registered crimes against women.

National Family Health Survey:

- **NFHS-5** reported that 29.2% of ever-married women aged 18–49 years had experienced spousal physical and/or sexual violence, demonstrating the wider prevalence of violence within marital relationships.
- The absence of a separate marital rape category can contribute to an **evidence gap**, because non-consensual sexual violence within marriage may be recorded under other forms of domestic violence or may remain unreported.

Why Should Marital Rape Be Criminalised?:

Article 14 and Equality:

- **Article 14** guarantees equality before the law and equal protection of the laws; critics argue that excluding married women from the protection of rape law creates an **arbitrary classification** between married and unmarried women despite the common element of absence of consent.
- The constitutional question therefore concerns whether marital status can constitute a sufficient basis for denying a woman equal protection against non-consensual sexual violence.

Article 21, Privacy and Bodily Autonomy:

- **Article 21** protects life and personal liberty, which judicial decisions have expanded to include **privacy, dignity, bodily integrity and individual autonomy**.
- The Supreme Court's privacy jurisprudence recognises that every individual possesses an inalienable sphere of personal autonomy, including the ability to make intimate decisions concerning the body and personal life.
- Supporters of criminalisation therefore argue that marriage cannot by itself amount to permanent or irrevocable consent to sexual activity.

Constitutional Rejection of Coverture:

- Retaining the exception is criticised as perpetuating the **colonial doctrine of coverture**, under which a married woman was historically treated as having a diminished independent legal identity within marriage.
- Contemporary constitutional morality increasingly recognises women as autonomous rights-bearing individuals rather than persons whose bodily choices are subsumed within the marital relationship.

Justice J. S. Verma Committee:

- The **Justice J. S. Verma Committee**, constituted after the 2012 Delhi gang-rape case, examined the legal framework concerning sexual violence and recommended major reforms to strengthen women's protection.
- Its approach rejected the assumption that marriage itself establishes continuing consent to sexual activity and emphasised the need to treat sexual autonomy as an individual right. The Committee's broader recommendations substantially influenced the **Criminal Law (Amendment) Act, 2013**.

International Human Rights Standards:

- The **Committee on the Elimination of Discrimination Against Women** has previously urged India to criminalise marital rape and bring the legal framework into conformity with protections against gender-based violence.

- International human-rights bodies have also raised concerns that the continued exclusion of marital rape from the BNS leaves a gap in protection against gender-based violence.

Arguments Against Criminalisation:

Protection of Marriage as an Institution:

- The Union Government has argued that criminalising marital rape could **destabilise the institution of marriage** and produce greater state intervention in intimate family relationships.
- The Government has also maintained that the issue involves complex social, cultural and legal considerations that should be addressed through legislative deliberation rather than judicial law-making.

Evidentiary Challenges:

- Establishing the **absence of consent** within a continuing and often cohabiting marital relationship can create difficult evidentiary questions, particularly when allegations are made after prolonged periods.
- Criminal law must balance effective protection of survivors with procedural safeguards for accused persons, including the presumption of innocence and proof beyond reasonable doubt.

Possibility of Misuse:

- Opponents of criminalisation argue that the provision could be **misused in matrimonial disputes**, particularly during separation or divorce proceedings.
- They compare this concern with broader debates surrounding the misuse of laws relating to cruelty and dowry, although allegations of potential misuse do not by themselves determine whether an offence should exist.

Legislative Competence and Separation of Powers:

- The Union Government argues that defining a new criminal offence is fundamentally a **legislative policy choice**, requiring Parliament to determine its ingredients, evidentiary framework, safeguards and punishment.
- The Supreme Court has also recognised the need for caution in constitutional review of penal provisions because judicially created uncertainty in criminal law can have serious consequences for individuals.

Important Judicial Developments:

Independent Thought v. Union of India:

- In **Independent Thought v. Union of India**, the Supreme Court removed the protection of the marital rape exception for wives below 18 years of age, thereby affirming that marriage cannot shield sexual intercourse with a minor wife from rape law.

Privacy and Autonomy Jurisprudence:

- The **K. S. Puttaswamy judgment** established privacy as a constitutionally protected right linked with liberty, dignity and individual autonomy, providing an important constitutional foundation for arguments concerning bodily integrity and decisional autonomy.

Present Constitutional Question:

- The present controversy therefore goes beyond whether marital rape should be criminalised and raises the broader question of **how constitutional rights interact with marriage, legislative policy and individual**

consent.

Key Constitutional and Governance Issues:

Individual Autonomy versus Marital Institution:

- The central constitutional tension lies between recognising marriage as an important social institution and ensuring that marriage does not extinguish the individual's **bodily autonomy, dignity and right to consent**.

Judicial Review versus Legislative Policy:

- The Supreme Court must consider whether the existing exception violates fundamental rights and, if so, whether it can be read down or invalidated, while also respecting Parliament's role in determining criminal policy.

Gender Justice and Substantive Equality:

- The debate highlights the distinction between formal equality and **substantive equality**, because identical legal treatment may not adequately protect women from structural forms of gender-based violence.

Data and Reporting Gap:

- The absence of a dedicated marital rape category in official crime statistics creates difficulties in measuring prevalence, designing evidence-based policy and evaluating the effectiveness of existing remedies.

Way Forward:

Rights-Based Legal Reform:

- Any reform should place **free and meaningful consent**, bodily integrity, dignity and equality at the centre while ensuring due-process safeguards for accused persons.

Clear Legislative Framework:

- Parliament may consider defining marital sexual violence through clear statutory ingredients, evidentiary safeguards, appropriate punishment and protection against malicious prosecution.

Strengthening Support Systems:

- Legal aid, medical assistance, counselling, shelter services and trauma-informed investigation should be strengthened so that survivors have effective access to justice irrespective of the final classification of the offence.

Better Data Collection:

- The **National Crime Records Bureau** and other relevant institutions should consider improving data collection on sexual violence within domestic relationships while maintaining survivor confidentiality.

Balance Rights with Due Process:

- Criminalisation, if undertaken, should be accompanied by safeguards against arbitrary investigation, victim-blaming, secondary victimisation and malicious prosecution, thereby protecting both survivor rights and principles of criminal justice.

Value Addition for UPSC:

Important Legal Provisions:

- **Article 14:** Equality before law and equal protection of laws.
- **Article 21:** Protection of life and personal liberty.
- **Section 63 of the Bharatiya Nyaya Sanhita, 2023:** Definition of rape and marital rape exception.
- **Section 67 of the Bharatiya Nyaya Sanhita, 2023:** Sexual intercourse by husband with wife during separation.
- **Section 85 of the Bharatiya Nyaya Sanhita, 2023:** Cruelty by husband or relatives.
- **Protection of Women from Domestic Violence Act, 2005:** Recognition of sexual abuse as domestic violence and provision of protective remedies.