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From Wife to Spouse: Reimagining Consent and Criminal Liability under Section 63 of the Bharatiya Nyaya Sanhita, 2023

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ABSTRACT

The retention of the marital rape exception under Section 63 of the Bharatiya Nyaya Sanhita, 2023 presents a constitutional anomaly within Indian criminal jurisprudence. Modern constitutional law treats dignity, privacy and bodily autonomy as fundamental guarantees under Article 21, yet the penal law continues to presume irrevocable consent within marriage. This paper evaluates the constitutional, empirical and comparative dimensions of marital sexual violence in India. It argues that the present doctrine is inconsistent with Articles 14 and 21 in denying protection to married women, and that it is further inadequate in excluding male, transgender and non-binary spouses from any legal remedy. Moving beyond a gender-binary frame, the paper argues for the repeal of Exception 2 to Section 63 of the Sanhita and for a gender-neutral framework of spousal sexual violence, substituting "spouse" for "wife", which treats free and continuing consent as an indispensable precondition irrespective of gender or marital status.

Keywords: marital rape, Bharatiya Nyaya Sanhita 2023, Section 63, Exception 2, consent, bodily autonomy, gender-neutral criminal law, Article 14, Article 21, spousal sexual violence, CEDAW

I. INTRODUCTION

The legal recognition of rape reflects a society's commitment to safeguarding bodily autonomy and human dignity. Despite significant developments in constitutional jurisprudence, Indian criminal law continues to recognise an exception that denies married individuals adequate protection against non-consensual sexual intercourse. That exception, embedded in statutory law, creates a troubling inconsistency between constitutional guarantees and the criminal justice framework. Sexual assault is not merely physical harm; it displaces self-determination and can inflict mental trauma that endures for a lifetime.

The origins of the marital rape exemption lie in the doctrine set out by Sir Matthew Hale, Chief Justice of the King's Bench, whose *History of the Pleas of the Crown*, published posthumously

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in 1736, asserted that marriage constituted irrevocable consent to sexual intercourse.¹ Although that reasoning has long been rejected across the major common law systems, its influence persists in Indian law. The enactment of the Bharatiya Nyaya Sanhita (BNS), 2023 was expected to modernise criminal jurisprudence; the retention of Exception 2 to Section 63, however, reflects statutory continuity rather than structural reform. The exception provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.² In that single respect the Sanhita departs from Exception 2 to Section 375 of the Indian Penal Code, 1860, which set the threshold at fifteen years until the Supreme Court read it down to eighteen in *Independent Thought v. Union of India*.^{3,4}

II. RESEARCH METHODOLOGY

This paper employs a mixed-methods doctrinal and empirical research design.

Doctrinal analysis. Systematic examination of the statutory provisions of the Indian Penal Code, 1860⁵ and the Bharatiya Nyaya Sanhita, 2023, read alongside the leading constitutional decisions (*Puttaswamy*, *Navtej Singh Johar*, *Joseph Shine* and *Vishaka*), the High Court split verdict in *RIT Foundation*, and comparative common law authority (*R v. R*).

Empirical integration. Secondary analysis of official national datasets, specifically the National Family Health Survey (NFHS-5) and the annual reports of the National Crime Records Bureau (NCRB), in order to map the structural patterns of relational sexual violence and the reporting deficit.

Comparative and international law framework. Synthesis of India's treaty commitments under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), together with legislative trends across common law and civil law jurisdictions.

III. LITERATURE REVIEW

Legal scholarship on marital consent and sexual violence in India has developed across three broad phases.

Historical common law foundations. Early treatises, dominated by Hale's dictum, conceptualised marriage as a contract of irrevocable consent and the wife as marital chattel, insulating spousal sexual violence from criminal liability.⁶

¹ 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (Sollom Emlyn ed., 1736).

² Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, exception 2, Acts of Parliament, 2023 (India).

³ Indian Penal Code, No. 45 of 1860, § 375, exception 2 (India).

⁴ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

⁵ Indian Penal Code, No. 45 of 1860, Acts of Parliament, 1860 (India).

⁶ HALE, *supra* note 1, at 629.

Feminist legal critique and bodily autonomy. Feminist legal scholars dismantled the "privacy of the home" defence, demonstrating how the marital rape exemption sustains domestic subordination and deprives married women of the guarantees of Articles 14, 15 and 21.^{7,8}

Emerging gender-neutral jurisprudence. Contemporary scholarship identifies the limits of a strictly gender-binary framework. It emphasises that sexual coercion, emotional pressure, financial control and reproductive abuse can affect male, transgender and non-binary spouses, and argues for a model of criminal liability built on continuous, revocable consent.

IV. EMPIRICAL REALITY OF SEXUAL VIOLENCE WITHIN MARRIAGE

Empirical data challenge the assumption that marriage is a space of inherent consent. The National Family Health Survey (NFHS-5), 2019-21 records that 29.3 per cent of ever-married women aged 18 to 49 have experienced spousal physical or sexual violence, and that approximately six per cent report spousal sexual violence.⁹ The figures indicate that, for a substantial number of women, the domestic space is a site of violation rather than of safety.

A. Expanding the Spectrum of Violence and Coercion

Sexual violence within marriage is not confined to physical assault. It extends to a range of coercive mechanisms that compromise autonomy across genders.

Non-physical and emotional abuse. Emotional pressure, manipulation and threats may be used to secure compliance.

Financial control. Withholding financial resources or restricting economic independence can operate as a means of domination directed at securing sexual availability.

Reproductive coercion. Sabotaging contraception, compelling pregnancy, or using parental rights as leverage constitutes a serious interference with bodily autonomy, and can be directed at a spouse of either sex.

B. Institutional Barriers and the Invisibility of Male Victims

Reporting remains low. Social stigma, financial dependency and the absence of a clear legal framework keep survivors within abusive households and keep the harm invisible to formal legal systems. Male survivors face an additional set of obstacles.

⁷ INDIA CONST. arts. 14, 15, 21.

⁸ See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

⁹ MINISTRY OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF INDIA, NATIONAL FAMILY HEALTH SURVEY (NFHS-5), 2019-21: INDIA REPORT (2022).

Disbelief and invalidation. Prevailing stereotypes hold that men cannot be coerced or victimised, which leads to disbelief and to ridicule, frequently from peers of the same sex.

Absence of support systems. With few safe spaces, no tailored legal protection and limited avenues for disclosure, male survivors are pressed into silence, which entrenches the harm and reinforces cycles of unaddressed abuse.

V. NCRB DATA AND STRUCTURAL PATTERNS

Data published by the National Crime Records Bureau (NCRB) offer insight into the structural character of sexual violence in India. In *Crime in India 2022* the offenders were known to the victim in 30,454 of the 31,516 rape cases registered, that is, in roughly 96 per cent of cases, the category of known offenders ranging from family members and neighbours to friends and online acquaintances.¹⁰ Offences registered under Section 85 of the Bharatiya Nyaya Sanhita, the successor to Section 498A of the Indian Penal Code ("cruelty by husband or his relatives"),¹¹ accounted for 31.4 per cent of all crimes against women recorded in that year, the single largest category.¹²

A. The Myth of Stranger Danger and the Reality of Relational Violence

These patterns show that sexual and domestic violence in India is overwhelmingly relational rather than stranger-based. It is far more likely to occur within the home, at the hands of persons within the victim's immediate social or legal circle.

B. The Statistical Void around Marital Rape

Non-consensual sexual acts within marriage nevertheless remain absent from official NCRB categorisation, because the statutory exception removes them from the definition of rape. Two consequences follow.

Distorted public policy. Because marital sexual violence is legally invisible in crime statistics, budgeting, shelter provision and victim support programmes cannot be calibrated to its actual scale.

A displaced reporting burden. Survivors must register complaints under broader, non-sexual heads such as cruelty or domestic violence, which dilutes the specific character of the violation in the legal record.

¹⁰ NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, *CRIME IN INDIA 2022: STATISTICS VOLUME I* (2023).

¹¹ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 85, Acts of Parliament, 2023 (India); Indian Penal Code, No. 45 of 1860, § 498A (India).

¹² NATIONAL CRIME RECORDS BUREAU, *supra* note 10.

C. Patriarchal Tropes and Double Standards

The structural patterns visible in NCRB data reflect entrenched social assumptions about marital entitlements and duties that operate at the expense of individual consent.

Normalisation of entitlement. Abusive conduct by husbands is often rationalised within the family and the community, whether by reference to intoxication or by treating sexual availability as an inherent marital obligation rather than as a continuing choice.

Reproductive decision-making and consent. Social norms frequently treat the reproductive decisions of one spouse as legitimate irrespective of the other's consent. Where one partner is deceived or pressured into parenthood, or where a wife is denied reproductive agency, the conduct tends to be characterised as an exercise of marital rights, which leaves the underlying interference with bodily autonomy unexamined.

Dismissal of male non-consent. Where men express non-consent or distress about coerced intimacy or unwanted fatherhood, the assumption that men are invariably willing partners tends to displace the complaint, leaving them without institutional or social recourse.

VI. THE GLOBAL LEGAL POSITION

Comparative legal systems have moved to recognise that marriage does not diminish the right to bodily integrity or the requirement of consent. International jurisprudence and legislative reform increasingly affirm that a sexual act performed without free and continuing consent constitutes rape, irrespective of the relationship between the parties.

A. The Landmark Case: *R v. R* [1991]

In 1989 the appellant forced his way into the home of his estranged wife's parents, where she was then living following their separation, and attempted to have sexual intercourse with her against her will, assaulting her in the process. He argued that because no decree of divorce or court order had been made, his wife could not at common law revoke her matrimonial consent, so that a conviction for rape was not open.¹³

The House of Lords unanimously dismissed the appeal and abolished the marital rape exemption in English law. Delivering the leading speech, Lord Keith of Kinkel made three determinations.¹⁴

¹³ *R v. R*, [1991] UKHL 12, [1992] 1 A.C. 599 (HL) (appeal taken from Eng.).

¹⁴ *R v. R*, *supra* note 13 (opinion of Lord Keith of Kinkel).

Rejection of irrevocable consent. Hale's proposition was treated as an outdated legal fiction. Marriage is in modern law a partnership of equals, not an arrangement in which one spouse is the subservient chattel of the other.

Reinterpretation of the statutory language. The defence argued that the statutory reference to "unlawful" sexual intercourse meant intercourse outside marriage. The House rejected that reading, treating the word "unlawful" as surplusage, so that the statutory definition presented no obstacle to declaring the exemption at an end.

The conclusion. The House declared that in modern times the supposed marital exemption in rape forms no part of the law of England. The removal of the immunity was subsequently held by the European Court of Human Rights not to offend Article 7 of the European Convention on Human Rights in *S.W. v. United Kingdom*,¹⁵ and the statutory language was amended by section 142 of the Criminal Justice and Public Order Act 1994.¹⁶

B. Parallel Statutory Reform in the United States

A similar evolution occurred in the United States, where state penal codes had inherited spousal exemptions from English common law. From the mid-1970s onwards, state legislatures and courts began to repeal or strike down those exemptions. The prosecution tried in Marion County, Oregon, in December 1978 was the first in which a husband stood trial for raping a wife with whom he was still living, although the jury acquitted him.¹⁷ By 1993, when Oklahoma and North Carolina removed the last of the blanket exemptions, every state had brought non-consensual sexual acts between spouses within the reach of the criminal law, although a number of states retained narrower definitional or procedural differences between marital and non-marital offences.¹⁸

VII. INTERNATIONAL LAW AND INDIA'S OBLIGATIONS

India's retention of the marital rape exception falls to be assessed not only against domestic constitutional standards but also against its international commitments. As a state party to the principal human rights treaties, India has undertaken to ensure that its legal framework prevents gender-based violence, protects bodily autonomy and eliminates discrimination in every sphere of life, marriage included.

¹⁵ *S.W. v. United Kingdom*, App. No. 20166/92, 21 Eur. H.R. Rep. 363 (1995).

¹⁶ Criminal Justice and Public Order Act 1994, c. 33, § 142 (U.K.).

¹⁷ *State v. Rideout* (Marion Cnty. Cir. Ct., Or., Dec. 27, 1978) (unreported; verdict of acquittal).

¹⁸ See Hasday, *supra* note 8.

A. Binding International Frameworks: CEDAW

As a state party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), India has undertaken to dismantle legal and institutional structures that discriminate on the ground of sex. The CEDAW Committee has clarified, in General Recommendations Nos. 19 and 35, that gender-based violence is itself a form of discrimination within the meaning of Article 1 of the Convention, and General Recommendation No. 35 requires state parties to ensure that the definition of sexual offences, marital rape included, rests on the absence of freely given consent and takes account of coercive circumstances.¹⁹ Retaining the marital exemption in domestic penal law therefore leaves a gap between India's treaty commitments and its domestic legal architecture.

B. Judicial Interpretation: Bringing International Commitments into Domestic Law

The Indian judiciary has recognised that international conventions may be used to interpret constitutional rights and to fill a legislative vacuum. In *Vishaka v. State of Rajasthan*,²⁰ the Supreme Court held that in the absence of domestic legislation, international conventions not inconsistent with fundamental rights, and CEDAW in particular, must be read into Articles 14, 15, 19(1)(g) and 21 of the Constitution.²¹ The decision confirms that international human rights norms bear directly on the enforcement of fundamental rights, and that bodily integrity is protected within the home as it is in public life.

VIII. CONSENT AND CONSTITUTIONALITY

Modern constitutional jurisprudence places consent and bodily autonomy at the centre of both criminal law and fundamental rights analysis. Consent must be free, voluntary, informed and continuing, and it must be capable of revocation at any stage of an intimate interaction. To treat a legal relationship such as marriage as an irrevocable surrender of consent is difficult to reconcile with the guarantees of the Constitution.

A. Judicial Foundations: Autonomy and Self-Determination

In *Justice K.S. Puttaswamy (Retd.) v. Union of India*,²² a nine-judge bench unanimously held that the right to privacy is a fundamental right protected by Article 21, and that privacy encompasses spatial privacy, informational privacy and decisional autonomy over the body.

¹⁹ U.N. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *General Recommendation No. 19: Violence Against Women*, U.N. Doc. A/47/38 (1992); U.N. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, U.N. Doc. CEDAW/C/GC/35, para. 33 (July 26, 2017).

²⁰ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India).

²¹ INDIA CONST. arts. 14, 15, 19(1)(g), 21.

²² *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).

That authority over one's own body is not surrendered on entering a marriage or on crossing the threshold of the home.

In *Navtej Singh Johar v. Union of India*,²³ reading down Section 377 of the Indian Penal Code insofar as it criminalised consensual sexual acts between adults, the Court emphasised that constitutional morality must prevail over popular morality, and that individual dignity and consensual intimate choices are constitutionally protected.

In *Joseph Shine v. Union of India*,²⁴ striking down the offence of adultery under Section 497 of the Indian Penal Code, the Court held that a provision treating a spouse as the property of the other offends the guarantee of equality, and that marriage does not divest an individual of constitutional agency.

B. The Constitutional Untenability of the Exemption

Article 14 and manifest arbitrariness.²⁵ Article 14 guarantees equality before the law. The exemption draws a classification between an unmarried survivor of a non-consensual sexual act, who is protected by the penal law, and a married survivor of the identical act, who has no criminal remedy against the spouse. The sole differentiating factor is the existence of a marriage, and it is difficult to identify the legitimate state purpose that the classification is said to serve.

Article 15 and the perpetuation of stereotypes.²⁶ Article 15 prohibits discrimination on the ground of sex. The exemption rests on the assumption that a spouse owes an absolute and continuing duty of sexual availability.

Article 21 and the guarantee of dignity.²⁷ Article 21 protects the right to live with dignity and the right to bodily integrity. Denying a survivor recourse under the criminal law leaves the person exposed to continuing violations of that integrity.

IX. THE PENDING SUPREME COURT PROCEEDINGS AND THE HIGH COURT SPLIT VERDICT

The constitutionality of the marital rape exception is presently before the Supreme Court of India. The proceedings arise from a divided body of High Court authority, principally the Delhi

²³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

²⁴ *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).

²⁵ INDIA CONST. art. 14.

²⁶ INDIA CONST. art. 15.

²⁷ INDIA CONST. art. 21.

High Court's split verdict in *RIT Foundation v. Union of India*²⁸ and the Karnataka High Court's judgment in *Hrishikesh Sahoo v. State of Karnataka*.²⁹

The split in *RIT Foundation* reflects a genuine divide in judicial approach. Justice Rajiv Shikdher gave priority to individual autonomy, bodily integrity and continuing consent, holding that consent must remain revocable at every stage within a marriage. Applying a strict constitutional standard, he concluded that Exception 2 offends Articles 14, 15 and 21 of the Constitution, and considered it the duty of the court to strike down a penal provision that infringes fundamental rights.^{30,31} Justice C. Hari Shankar reasoned from judicial restraint and from the distinct character of the marital relationship, taking the view that sexual relations within marriage carry continuing institutional expectations. He held that the statutory distinction between marital and non-marital non-consensual intercourse satisfies the test of reasonable classification under Article 14,³² and that the definition of criminal offences and the assessment of their social consequences are matters reserved for Parliament rather than for the courts.³³

When India replaced the Indian Penal Code with the Bharatiya Nyaya Sanhita, 2023, Parliament retained the marital rape exemption in Section 63.³⁴ The proceedings before the Supreme Court expose a doctrinal inconsistency: outside marriage the criminal law treats the absence of consent as determinative, while within marriage it proceeds on a presumption of consent. The appeal from *Hrishikesh Sahoo* and the connected petitions were heard in part in October 2024 before a Bench presided over by Chandrachud C.J.; the hearings were deferred and, following his retirement, the matter awaits fresh consideration by a reconstituted Bench, the judgment of the Karnataka High Court having been stayed in the interim.³⁵ Doctrinal coherence would require the penal provision to be brought into line with the constitutional standard.

X. THE MISUSE ARGUMENT AND STRUCTURAL REALITY

A principal argument advanced against criminalising spousal sexual violence is the risk of misuse: that removing the exemption would invite false complaints in the course of contested divorce or custody proceedings. The argument has to be assessed against both the empirical position and settled constitutional principle.

²⁸ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India).

²⁹ *Hrishikesh Sahoo v. State of Karnataka*, 2022 SCC OnLine Kar 371 (India).

³⁰ *RIT Foundation*, *supra* note 28 (opinion of Shikdher, J.).

³¹ INDIA CONST. arts. 14, 15, 21.

³² INDIA CONST. art. 14; *RIT Foundation*, *supra* note 28 (opinion of C. Hari Shankar, J.).

³³ *RIT Foundation*, *supra* note 28 (opinion of C. Hari Shankar, J.).

³⁴ Bharatiya Nyaya Sanhita, *supra* note 2, § 63, exception 2.

³⁵ *Hrishikesh Sahoo v. State of Karnataka*, SLP (Crl.) Nos. 4063-4064 of 2022 (Sup. Ct. India) (pending; interim stay of the judgment of the Karnataka High Court granted July 19, 2022).

The underreporting problem. The available data disclose substantial underreporting rather than over-litigation. Stigma, financial dependency and the absence of support make reporting difficult for female and male survivors alike.³⁶

Misuse does not invalidate a right. In *Sushil Kumar Sharma v. Union of India*,³⁷ the Supreme Court held that the mere possibility of abuse of a provision is not a ground for declaring it unconstitutional. The answer to misuse lies in procedural safeguards, not in the withdrawal of substantive protection.

Procedural safeguards. Concerns about false allegations do not require an absolute criminal immunity for spouses. They can be met through preliminary inquiry protocols, the ordinary evidentiary threshold of proof beyond reasonable doubt, the quashing jurisdiction conferred by Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023, which corresponds to Section 482 of the Code of Criminal Procedure, 1973,³⁸ and the offence of instituting a false charge under Section 248 of the Bharatiya Nyaya Sanhita, corresponding to Section 211 of the Indian Penal Code.³⁹

XI. TOWARDS A GENDER-NEUTRAL FRAMEWORK OF SPOUSAL SEXUAL VIOLENCE IN INDIA

To achieve doctrinal coherence and constitutional compliance, India would need to move beyond a gender-binary paradigm towards a comprehensive, gender-neutral statutory model.

Substitution of "wife" with "spouse" in Section 63. Amending Section 63 of the Bharatiya Nyaya Sanhita⁴⁰ to replace the gender-specific terms "woman" and "wife" with the gender-neutral terms "person" and "spouse" would ensure that sexual assault within marriage is criminalised irrespective of the gender identity of either the survivor or the accused.

Recognition of male, transgender and non-binary victims. A gender-neutral framework addresses the legal void that presently surrounds male victims of spousal coercion and sexual assault, and extends equal protection to transgender and non-binary persons in lawful marriages.

³⁶ MINISTRY OF HEALTH AND FAMILY WELFARE, *supra* note 9.

³⁷ *Sushil Kumar Sharma v. Union of India*, (2005) 6 SCC 281 (India).

³⁸ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 528, Acts of Parliament, 2023 (India); Code of Criminal Procedure, No. 2 of 1974, § 482 (India).

³⁹ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 248, Acts of Parliament, 2023 (India); Indian Penal Code, No. 45 of 1860, § 211 (India).

⁴⁰ Bharatiya Nyaya Sanhita, *supra* note 2, § 63.

Statutory codification of affirmative consent. A colonial-era presumption would be replaced by an express statutory definition of consent as free, voluntary, informed and continuing, and as revocable at any point before or during sexual activity.

Universal safeguards and support mechanisms. Investigation protocols, legal aid and anti-misuse safeguards would need to operate equitably across genders, so as to guard against instrumental use of the provision while securing access to justice.

XII. CONCLUSION

The retention of the marital rape exception represents a contradiction between India's expanding constitutional rights framework and its statutory penal law. The empirical evidence, India's obligations under CEDAW,⁴¹ and the constitutional jurisprudence of *Puttaswamy*, *Navtej Singh Johar* and *Joseph Shine*⁴² point in the same direction: marriage does not extinguish individual bodily autonomy or the requirement of consent. The proceedings pending before the Supreme Court offer an opportunity to restore doctrinal coherence. Replacing Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita with a gender-neutral framework of spousal sexual violence, substituting "spouse" for "wife", would secure dignity, equality and the protection of the criminal law for every individual within the home.

⁴¹ U.N. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *supra* note 19.

⁴² See *Puttaswamy*, *supra* note 22; *Navtej Singh Johar*, *supra* note 23; *Joseph Shine*, *supra* note 24.