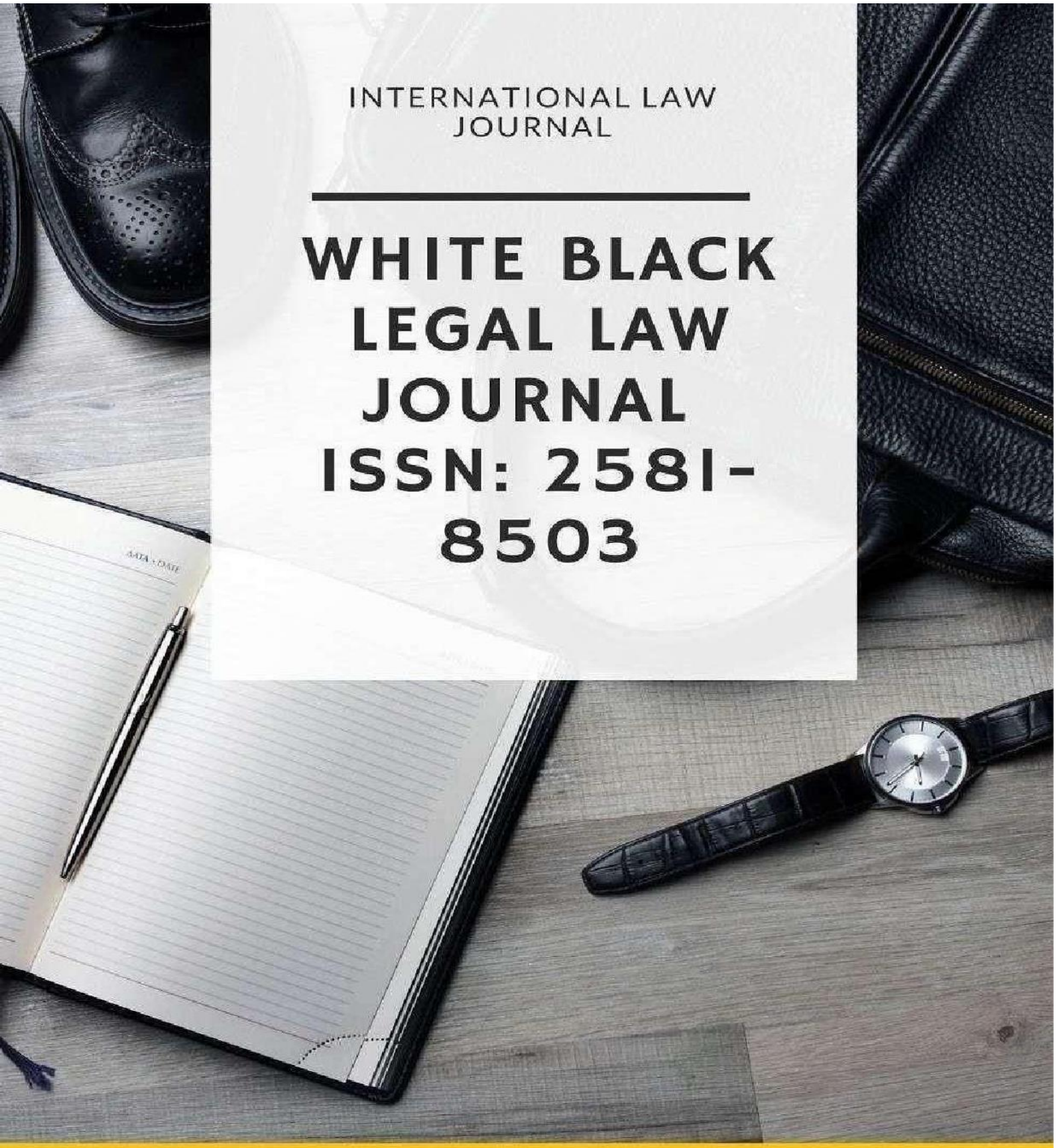


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# MARITAL PRIVACY AND INDIVIDUAL AUTONOMY IN INDIA: ANALYSING THE LIMITS OF LEGAL REGULATION OF INTIMATE RELATIONSHIPS

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## Abstract

Indian law has a strange relationship with the marital home. For most of its history it has treated that space as too private for the state to enter when a wife complains of sexual violence, and as public enough for the state to enter when a husband complains of her infidelity or her absence. This paper asks what the constitutional recognition of privacy in *Justice K.S. Puttaswamy v. Union of India* (2017) has changed, and what it has left untouched. It reads the privacy and autonomy cases of the last decade (*Puttaswamy*, *Navtej Singh Johar*, *Joseph Shine*, *Independent Thought*, *Shafin Jahan* and others) alongside four long-standing sites of regulation: restitution of conjugal rights, the marital rape exception, adultery and its civil consequences, and the evidentiary exposure of spouses. The paper argues that the law's central difficulty is not too much regulation or too little, but regulation that protects the institution of marriage at the expense of the individuals who make it up. Drawing on liberal, feminist and relational accounts of autonomy, it proposes a workable test for the legitimate limits of state intervention in intimate life: the law may protect persons *within* relationships from coercion and harm, but it may not enforce the relationship itself, police its moral content, or presume consent from its mere existence.

**Keywords:** marital privacy, autonomy, right to privacy, marital rape exception, restitution of conjugal rights, adultery, Article 21, intimate relationships.

## 1. Introduction

Indian law treats the bedroom in an oddly double way. On one hand it has been closed to the state. Courts and legislators have repeatedly said that what happens between a husband and wife is a matter for the family, and that the criminal law has no business there. On the other hand, the same law has never really kept out. It has told spouses when they may leave, whom

they may sleep with, which of their communications can be used against each other, and, until very recently, whether a husband could be punished for entering another man's marriage but not for violating his own wife.

This double character is the puzzle that animates this paper. The privacy of marriage has been invoked, often with great sincerity, to shield the institution from scrutiny. Yet it has seldom been invoked to protect the person inside the institution. A husband's claim that the state should stay out has usually been taken seriously. A wife's claim that the state should keep out of her body, her phone, her choice of partner or her decision to leave, has had a much harder time.

The constitutional landscape has shifted a great deal. In *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1, a nine-judge Bench held that privacy is a fundamental right under Articles 14, 19 and 21, and described it as including decisions about marriage, procreation and family life. The following years produced a run of decisions that took the idea seriously: *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1 on same-sex intimacy, *Shafin Jahan v. Asokan K.M.*(2018) 16 SCC 368 on a woman's choice of spouse and faith, and *Joseph Shine v. Union of India* (2019) 3 SCC 39, which struck down the offence of adultery. And yet the marital rape exception remains on the statute book, now carried into the Bharatiya Nyaya Sanhita, 2023. Restitution of conjugal rights remains available under Section 9 of the Hindu Marriage Act, 1955. The constitutional promise and the statutory reality sit uneasily together.

The question this paper pursues is a deliberately broad one: what are the limits of legal regulation of intimate relationships? That question has two faces. One asks what the law *may not* do, that is, where the constitution draws a line around the intimate sphere. The other asks what the law *must* do, because leaving an intimate relationship entirely unregulated may simply hand power to the stronger party. A defensible account of marital privacy has to answer both.

I will argue that the best way through is to separate two things that Indian law has persistently run together: the privacy *of the relationship* and the privacy *of the individuals within it*. The first is a claim by a couple, or really by a family, against outsiders. The second is a claim by a person, against everyone, including the person they married. Treating the first as if it were the second is how a doctrine meant to protect freedom has ended up protecting domination.

## 2. Scope, Questions and Method

The paper is doctrinal in method, but it does not stay purely doctrinal. It reads judgments and statutes closely, and then asks what theory of the person and of marriage they quietly assume. Three research questions guide it.

1. How has the Indian constitutional right to privacy, as developed after *Puttaswamy*, treated the marital relationship, and does it distinguish between the couple and the individual?
2. In four contested areas (restitution of conjugal rights, the marital rape exception, adultery and its collateral consequences, and the use of private marital communications as evidence), has the law protected individual autonomy or the institution of marriage?
3. What principled limit can be drawn on state regulation of intimate relationships that avoids both libertarian neglect and paternalistic intrusion?

A few boundaries are worth stating at the outset. The paper focuses on marriage, and mainly on heterosexual marriage as recognised by statute, because that is where most of the case law sits. It draws on the same-sex and live-in relationship decisions only to the extent they sharpen the argument. It covers personal laws only where they intersect with the constitutional questions, and does not attempt a survey of Hindu, Muslim, Christian and Parsi family law. Statutory references are to both the older and newer criminal codes where relevant, since the Bharatiya Nyaya Sanhita, 2023 (BNS), the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and the Bharatiya Sakshya Adhiniyam, 2023 (BSA) replaced the Indian Penal Code, the Code of Criminal Procedure and the Evidence Act with effect from 1 July 2024. Some matters discussed below, the marital rape challenge in particular, were pending before the Supreme Court at the time of writing, and readers should verify their current status before relying on this paper.

## 3. Conceptual Framework: Privacy, Autonomy and the Marital Sphere

### 3.1 What privacy protects

Legal writing on privacy tends to begin with Warren and Brandeis, who in 1890 described a "right to be let alone" (Warren & Brandeis, 1890). The phrase has had a long afterlife, but it describes only one slice of the idea. Modern accounts, and the opinion of Chandrachud J. in *Puttaswamy*, distinguish at least three dimensions: privacy as a spatial zone, free from intrusion; privacy as decisional autonomy, the freedom to make intimate choices without interference; and privacy as informational control, the power to decide who knows what about you.

All three matter for marriage. The spatial dimension explains why police entering a couple's home feels different from police entering a shop. The decisional dimension is the one doing the most work in the recent case law: whom to marry, whether to have children, whether to

remain married. And the informational dimension is less discussed but increasingly important, as phones, messages and recordings become the raw material of matrimonial disputes.

### 3.2 Autonomy, and its critics

The liberal tradition from which these ideas descend roots privacy in individual autonomy. John Stuart Mill's harm principle, that power may rightfully be exercised over a member of a civilised community only to prevent harm to others, is the classical statement (Mill, 1859). In the twentieth century that thinking produced the Wolfenden Report in England (1957), and the famous Hart–Devlin debate over whether the law may enforce a society's shared morality. Hart said no, absent harm; Devlin said a society may defend itself against moral disintegration (Hart, 1963; Devlin, 1965).

It is worth noticing how much of Indian law on intimate relationships is, in effect, Devlin's side of that argument. The old adultery offence, the restitution decree, and the refusal to see sexual violence within marriage are all, at bottom, legal defences of an institution thought to be valuable in itself.

Feminist scholarship has made the sharpest objection to the liberal picture. If privacy is a wall around the home, it also shuts in whoever is inside with the most power. Catharine MacKinnon put it bluntly: the private is the sphere in which women have been left to the mercy of men (MacKinnon, 1989). Reva Siegel's study of the law of wife-beating in the United States shows how "privacy" served as the language by which a husband's physical authority was preserved after its older justifications had been abandoned (Siegel, 1996). Carole Pateman made the deeper point that the marriage contract has historically included a sexual contract, under which access to a wife's body was part of the bargain (Pateman, 1988).

These critiques are not attacks on privacy as such. They are attacks on a particular, gendered use of privacy. In India, scholars like Flavia Agnes and Ratna Kapur have made parallel arguments, observing that Indian family law has long been organised around the protection of the family as a unit, with the individual woman's interests understood through her role as wife and mother (Agnes, 1999; Kapur & Cossman, 1996).

### 3.3 Relational autonomy

There is a third strand that I find more useful than either pure liberalism or pure critique. Theorists of relational autonomy accept that people do not choose in a vacuum. Our choices are shaped by family, money, dependence, social expectation and fear, and a theory of autonomy that ignores this will misjudge many real situations (Nedelsky, 2011; Mackenzie &

Stoljar, 2000). For a woman in a household where she depends on her husband and his family for shelter, money and standing, a formally free choice to stay, or to consent, may be less free than it looks.

But relational autonomy does not license paternalism. It asks the law to look at the conditions under which people choose, and to remove the coercive ones, rather than to substitute the state's view of a good marriage for the couple's. That distinction does much of the work later in this paper.

### 3.4 Marital privacy as a legal idea

The phrase "marital privacy" comes largely from American constitutional law. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court struck down a ban on contraceptive use by married couples, speaking of a zone of privacy surrounding the marital relationship, and described marriage as an association older than the Bill of Rights. Seven years later, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court made the crucial move that is the hinge of this paper. It observed that the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. The right of privacy, it said, belongs to the individual.

That shift, from the couple to the person, is exactly what Indian law has been slow to make. We will see that the pattern repeats: where courts speak of marital privacy as the family's shield, wives lose; where they speak of privacy as the individual's right, wives gain.

## 4. Historical Background: How Indian Law Came to Regulate Marriage the Way It Does

### 4.1 The colonial inheritance

To understand the present, it helps to see how little of it is ancient. The Indian Penal Code, 1860, drafted by Macaulay's Law Commission and enacted in the aftermath of 1857, did not invent patriarchal marriage, but it gave it a durable statutory form. Two provisions are the most relevant to this paper. Section 375, defining rape, carried an exception: sexual intercourse by a man with his own wife, she not being under a stipulated age, was not rape. And Section 497 criminalised adultery, but only for the man who had intercourse with a married woman without her husband's consent. The woman was not punishable as an abettor, and the husband had no corresponding liability for his own infidelity.

The marital exception has an English pedigree. Sir Matthew Hale, writing in the seventeenth

century, had said that a husband could not be guilty of rape on his lawful wife, because by the marriage contract the wife had given herself up in this kind to her husband, which she could not retract (Hale, 1736). Hale cited no authority for the proposition. It nevertheless travelled across the common-law world and became embedded in codes, including India's. England itself abandoned it by judicial decision in *R v. R* [1992] 1 AC 599, and the European Court of Human Rights later confirmed in *S.W. v. United Kingdom* (1995) 21 EHRR 363 that the change was a foreseeable development of the law rather than a retrospective penalty. India did not follow.

The key point is that the exception was not an accident. It reflected a view of marriage as a status in which the wife's legal personality was, to a significant extent, absorbed into her husband's. Consent to sex was understood to be given once, at the wedding, and to continue until death or divorce.

**4.2 Codified personal law and the family as the unit**

Post-independence reform produced the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, and a series of other statutes. These were in many ways progressive: they introduced divorce for Hindus, monogamy, and a formal equality of grounds. But they also imported a sense of marriage as an institution to be preserved. Section 9 of the Hindu Marriage Act allowed either spouse to petition for restitution of conjugal rights if the other had withdrawn from their society without reasonable excuse. Section 13 listed fault-based grounds for divorce, adultery among them. Counselling and reconciliation provisions pushed courts to save marriages.

There is nothing wrong with a legislature wanting to help couples reconcile. The problem begins when that goal is pursued through compulsion, or when it is allowed to override the safety and dignity of one partner. We will see both.

**4.3 The protective turn, and its limits**

From the 1980s onwards, a different legal impulse emerged, shaped largely by the women's movement. Section 498A was added to the Indian Penal Code in 1983 to criminalise cruelty by a husband or his relatives, in response to dowry-related violence. The Protection of Women from Domestic Violence Act, 2005 created civil remedies, including protection orders, residence orders and monetary relief, and defined domestic violence broadly enough to include sexual abuse. These statutes accepted, at least in part, that the home was not a safe haven for every inhabitant and that the state had a role inside it.

But notice what these reforms did and did not do. They addressed violence, cruelty and dowry demands. They did not touch the basic assumption that sexual access was an incident of

marriage. The Domestic Violence Act reaches sexual abuse in a civil proceeding, yet the criminal law of rape continued to say that a husband could not commit the offence against a wife above a certain age. We therefore have, side by side, a law that protects wives from cruelty and a law that denies that sexual violence by a husband is rape. That tension is not resolved by the post-*Puttaswamy* case law; it is exposed by it.

## 5. The Constitutional Turn

### 5.1 *Puttaswamy* and the architecture of privacy

The nine-judge Bench in *Puttaswamy* was convened to settle a technical question left hanging by two older decisions, *M.P. Sharma v. Satish Chandra* (1954) and *Kharak Singh v. State of U.P.* (1962), which had doubted that privacy was a fundamental right. The case itself arose from a challenge to Aadhaar, not from any family dispute. Yet the judgment is full of reflections on intimate life, and the plurality opinion of Chandrachud J. states that privacy includes the autonomy to make decisions on matters such as marriage, procreation, the family and sexual orientation.

Three features of the judgment matter for what follows. First, privacy is anchored in dignity and individual autonomy, not in property or in the sanctity of a place. The older cases had approached privacy through the home as a physical enclosure; *Puttaswamy* moved it to the person. Second, the Court accepted that privacy is not absolute. Any invasion must satisfy a threefold test: it must have a basis in law, serve a legitimate state aim, and be proportionate to that aim. Third, and this is easily overlooked, the opinion acknowledged the feminist critique that privacy can be used to cover up domestic violence and entrench hierarchy within the family. In other words, the Court itself saw that a doctrine of privacy that protected the household as such could end up protecting abuse. That acknowledgment is the best textual foothold for the argument I am making: the right belongs to individuals, and it cannot be invoked by one family member to defeat another's.

### 5.2 *Navtej Singh Johar*: intimacy without morality as a justification

In *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1, the Court read down Section 377 of the Indian Penal Code insofar as it criminalised consensual sexual conduct between adults. The reasoning mattered as much as the result. The Bench held that the Constitution's morality, which is about dignity, equality and liberty, must prevail over popular or majoritarian morality, and it treated sexual orientation as intrinsic to identity rather than as a lifestyle preference. The

judgment is therefore a statement of the principle that the state cannot punish intimacy merely because society disapproves of it.

The application to marriage is not direct, but it is real. If the criminal law cannot be used to enforce a moral ideal about whom adults may love, it is hard to see why it can be used to enforce a moral ideal about how married adults must behave toward each other.

### 5.3 *Shafin Jahan*: the choice of partner

The Hadiya case, *Shafin Jahan v. Asokan K.M.* (2018) 16 SCC 368, began when the Kerala High Court annulled the marriage of an adult woman on the footing that she had been unduly influenced, effectively treating her as unable to make her own decision. The Supreme Court restored her marriage and held that the choice of a life partner, like the choice of faith, lies within the protected core of personal liberty under Article 21, beyond the reach of the state, the family and the community. The decision builds on earlier statements in *Lata Singh v. State of U.P.* (2006) 5 SCC 475 and *Shakti Vahini v. Union of India* (2018) 7 SCC 192, the latter dealing with honour-based violence against couples who marry outside the community's approval.

These cases establish something simple but important. The state, and the family, may not decide for an adult whom she will marry. What they do not squarely decide is what happens after the wedding, when the person who chose may wish to leave, refuse, or withdraw.

### 5.4 *Joseph Shine*: marriage as a relationship between equals

*Joseph Shine v. Union of India* (2019) 3 SCC 39 is, to my mind, the most important decision for a paper on marital privacy. A five-judge Bench unanimously struck down Section 497 IPC and the related procedural bar in Section 198(2) of the Code of Criminal Procedure. The four opinions approached it from different directions. Misra C.J. and Khanwilkar J. emphasised that the provision treated a wife as the property of her husband, whose consent could convert an offence into no offence at all. Nariman J. focused on Article 14 and the manifest arbitrariness of a law that punished only the man. Chandrachud J. brought in privacy, dignity and sexual autonomy, observing that the law's assumptions about a woman's sexuality were inconsistent with the Constitution. Indu Malhotra J. wrote that adultery, while a moral wrong, was not a wrong the state had to punish through the criminal law.

Two features of the judgment deserve attention. The first is that the Court did not say that adultery is acceptable. It said that it remains a ground for divorce and a civil wrong between the spouses, but that criminal punishment was disproportionate and rested on a patriarchal view

of marriage. The second is that the Court treated spouses as two autonomous individuals, not as a single unit represented by the husband. That is exactly the move *Eisenstadt* made in 1972. It took India until 2019.

### 5.5 Other recent signals

Two other decisions round out the picture. In *Independent Thought v. Union of India* (2017) 10 SCC 800, decided shortly after *Puttaswamy*, the Court read down Exception 2 to Section 375 so that sex with a wife below eighteen would be rape, grounding the decision in the child's bodily integrity and in the conflict with the Protection of Children from Sexual Offences Act, 2012. And in *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*(2023) 9 SCC 433, the Court held that for the purposes of the Medical Termination of Pregnancy Rules, a married woman may be a survivor of sexual assault or rape by her husband, and that the term "marital rape" is therefore relevant to her reproductive choices. Finally, in *Supriyo v. Union of India*, decided on 17 October 2023, the Court declined to read a right to marry into the Constitution for same-sex couples, leaving the matter to Parliament, but it affirmed that queer persons have a protected right to form intimate relationships and to be free of discrimination.

### 5.6 A pattern

Reading these decisions together, a pattern emerges. The Court has been most willing to act where a law punishes or polices sexuality on the basis of morality or of a husband's proprietary interest (*Navtej*, *Joseph Shine*). It has been less willing where the regulation is defended as protecting marriage itself, as the continued existence of the marital rape exception and of Section 9 shows. That asymmetry is the subject of the next part.

## 6. Four Sites of Regulation

### 6.1 Restitution of conjugal rights

Section 9 of the Hindu Marriage Act, 1955 allows a spouse to petition for restitution of conjugal rights when the other has, without reasonable excuse, withdrawn from the society of the petitioner. If the court is satisfied that the petition's statements are true and that there is no legal ground for refusal, it may decree restitution. Parallel provisions exist in the Special Marriage Act, 1954 (Section 22), in several other personal laws, and in Order XXI Rule 32 of the Code of Civil Procedure, which lets a court enforce such a decree by attaching the property of the

non-complying spouse.

The constitutional challenge to Section 9 has a short, vivid history. In *T. Sareetha v. T. Venkata Subbaiah* AIR 1983 AP 356, Choudary J. of the Andhra Pradesh High Court struck the provision down. His reasoning was that a decree for restitution forces a woman into sexual cohabitation against her will, and that this violates the right to privacy and human dignity under Article 21. A year later in *Harvinder Kaur v. Harmander Singh Choudhry* AIR 1984 Del 66, Rohatgi J. of the Delhi High Court reached the opposite conclusion, finding that the remedy is designed to bring spouses together and that introducing constitutional law into the home would be like bringing a bull into a china shop. The Supreme Court settled the matter, for the time being, in *Saroj Rani v. Sudarshan Kumar Chadha* (1984) 4 SCC 90, which upheld Section 9 and disapproved *Sareetha*. The Court reasoned that the provision serves a social purpose by preventing the break-up of marriages, and that the decree is not enforced by physical compulsion.

I think *Saroj Rani* was wrongly decided, and not only because of what has happened since. Its core argument has two weaknesses.

First, the claim that there is no physical compulsion understates what the decree does. A court order that tells an adult to resume cohabitation with a specific person, backed by attachment of her property, and followed by an eventual ground for divorce if she does not comply (Section 13(1A)(ii)), is a form of legal coercion over the most intimate decision a person makes. That the coercion is financial rather than physical does not make it neutral. For a woman who left because of violence or ill-treatment, the effect is particularly harsh, because the burden of proving "reasonable excuse" falls on her.

Second, the stated purpose is one the state is poorly placed to pursue. Reconciliation is a goal that depends entirely on the willing participation of both parties. A decree cannot produce it; at best it produces a compliant façade and a record for later litigation. This is why England abolished the remedy in 1970, and why comparable remedies have largely fallen out of use in other common-law jurisdictions.

After *Puttaswamy*, the analysis is easier to state. The decree interferes with decisional autonomy and bodily integrity, so it must satisfy the legality, legitimate aim and proportionality test. Legality is met, since a statute authorises it. The aim, preserving marriages, may be legitimate in the abstract. But proportionality fails, because the means chosen is a compulsory order directed at the person, when far less intrusive tools exist: mediation, counselling, maintenance, and divorce on breakdown. A writ petition challenging Section 9 and the related provisions, *Ojaswa Pathak v. Union of India*, has been pending before the Supreme Court since

2019, and I have not been able to confirm whether it has been decided; it should be checked.

It is also worth noticing how Section 9 is actually used. Practitioners report that it is often filed in response to a wife's maintenance claim or a domestic violence complaint, as a tactical counter. I would treat that as a hypothesis that deserves empirical study rather than as an established finding, but even as a hypothesis it points to the same concern: the remedy offers a husband a lever for pressuring a wife, with the machinery of the court behind it.

### 6.2 The marital rape exception

Exception 2 to Section 375 IPC provided that sexual intercourse by a man with his own wife, the wife not being under a stipulated age, is not rape. The BNS, 2023 carries this forward as Exception 2 to Section 63, with the age fixed at eighteen. Following *Independent Thought*, the immunity thus applies only to wives who are adults. A narrow qualification exists in Section 376B IPC (now Section 67 BNS): a husband who has intercourse with his wife while they are living separately, whether under a decree or otherwise, commits an offence punishable with imprisonment of two to seven years.

The qualification is instructive. The law's distinction does not turn on whether the woman consented, since that is equally absent in both cases. It turns on whether the couple is still cohabiting. Rape within marriage is thus treated as a lesser matter, or as no crime at all, not because the harm is lesser but because the *relationship* is intact. This is exactly the conflation I identified at the start: the law is protecting the relationship, not the person.

**The institutional history.** The Justice Verma Committee, convened after the 2012 Delhi gang rape, recommended in 2013 that the exception be removed, noting that the relationship between the perpetrator and the victim is not a relevant consideration in rape. Parliament did not act on that recommendation. A parliamentary Standing Committee in the same period warned that criminalising marital rape could destabilise the institution of marriage. The Union government's position in litigation has been consistent in outline: that remedies already exist under Section 498A and the Domestic Violence Act, that the question has a social dimension and not only a legal one, and that the offence could be misused. The Law Commission's 172nd Report (2000) did not recommend repeal. And although the BNS was an opportunity to revisit the matter, it did not.

**The litigation.** In *RIT Foundation v. Union of India*, the Delhi High Court delivered a split verdict in May 2022. Shakdher J. held the exception unconstitutional under Articles 14, 19(1)(a) and 21, reasoning that it creates an unjustifiable distinction between married and unmarried women and permits a husband to violate his wife's bodily integrity. Hari Shankar J.

disagreed, holding that marriage creates a legitimate expectation of sexual relations and that the classification was intelligible and rationally related to the protection of the marital institution. Around the same time the Karnataka High Court in *Hrishikesh Sahoo v. State of Karnataka* (2022) allowed a husband to be tried for rape, observing that the exception cannot be read as a licence for sexual violence. The matters came before the Supreme Court, where, to the best of my knowledge, they remained undecided at the time of writing. This is another point that must be checked before submission.

**The arguments for retention, and why they are weak.** Four justifications are usually offered. The first is the preservation of marriage. But this argument proves too much. An institution that can survive only if one party has an immunity from the criminal consequences of sexual violence is not an institution worth the protection. And since the law already allows divorce on grounds including cruelty, there is nothing sacred in the idea that marriages must be preserved at any cost.

The second is evidentiary difficulty: consent within an ongoing marriage is hard to prove. This is a real practical issue, but it is not a reason to deny the offence. Difficulty of proof is a feature of rape prosecutions generally, and the criminal law handles it through burden of proof and the requirement of proof beyond reasonable doubt, not through a blanket exemption.

The third is misuse. The fear of false cases is a recurring theme in debates on family law, and I take it seriously, since the Supreme Court itself has warned of the misuse of Section 498A. But the answer to potential misuse is procedural safeguards, not immunity from liability. We do not abolish theft because of false theft complaints.

The fourth is that other remedies exist. This is the most plausible argument and the one that most needs a direct answer. Section 498A and the Domestic Violence Act do provide relief. But they respond to cruelty and abuse generally; they do not name the specific wrong of non-consensual sexual penetration, and they do not carry the gravity or the recognition that comes with the label of rape. A woman who has been raped by her husband is told, in effect, that what happened to her is a species of domestic discord.

**The constitutional analysis.** Under Article 14, a classification must rest on an intelligible differentia having a rational nexus with the object of the law. The object of the law of rape is the protection of bodily integrity and sexual autonomy. Whether the victim is married to the perpetrator has no bearing on that object. The distinction is therefore arbitrary in the sense *Joseph Shine* applied to Section 497. Under Article 21 as understood after *Puttaswamy*, a woman's right to decide whether, when and with whom she has sexual intercourse is the core of decisional autonomy and bodily integrity. A legal rule that presumes her consent from the

fact of marriage is an irrebuttable presumption that contradicts the right.

The deference argument, advanced by Hari Shankar J., is that this is a matter for Parliament. It deserves respect, but it misdescribes what a court would be doing. Striking down the exception would not create a new offence. It would remove an immunity and return marital sexual violence to the ordinary law of rape, which Parliament has already enacted. The legislature remains free to design sentencing, procedure and safeguards; what it may not do is declare that a married woman's consent does not count.

I would add one more point in fairness to those who worry about overcriminalisation. There is a respectable argument that marital rape may call for different procedural handling, such as stronger arrangements for counselling, graded sentencing, or a requirement of prior judicial scrutiny before arrest. These are legitimate topics for legislative design. They are not arguments for the immunity itself.

**6.3 Adultery and the life it still has in the law**

When *Joseph Shine* struck down Section 497, many people read it as the end of adultery as a legal concern. It was not. The offence is gone, and the BNS did not restore it, although a parliamentary Standing Committee examining the new codes in 2023 recommended reintroducing a gender-neutral adultery offence. The government did not adopt that suggestion. But the civil and quasi-penal consequences remain in place. Adultery is a ground for divorce under Section 13(1)(i) of the Hindu Marriage Act and under parallel provisions in other personal laws. And Section 125(4) of the Code of Criminal Procedure, carried into Section 144 of the BNSS, still disqualifies a wife who is living in adultery from claiming maintenance from her husband.

These consequences are not all of a piece, and it helps to separate them. A divorce ground is, at its core, a recognition that a spouse may leave a marriage when the other has broken its central promise. That enlarges the wronged spouse's autonomy; it does not restrict anyone's. I do not think it raises a serious privacy objection, provided that proof does not require invasive inquiry into the other spouse's private life. The maintenance disqualification is different. It attaches a financial penalty to a woman's sexual conduct, applies only to wives, and survives in a form that is hard to square with the reasoning of *Joseph Shine*, which rejected the idea that the law may police a woman's sexuality in the name of marital fidelity. A court that held in 2018 that the state may not punish adultery as a crime would find it awkward to hold that the state may nonetheless impose a lifelong economic penalty for it on one sex only.

There is also the question of fault itself. The Law Commission recommended as long ago as its

71st Report (1978) that irretrievable breakdown be added as a ground of divorce, but Parliament has never enacted it generally. In *Shilpa Sailesh v. Varun Sreenivasan* (2023), a Constitution Bench held that the Supreme Court may, under Article 142, dissolve a marriage directly where it has broken down irretrievably. That is welcome, but it leaves the ordinary litigant, who cannot approach the Supreme Court, within a fault-based system in which spouses must accuse each other of misconduct. Fault-based divorce has a privacy cost of its own: it invites each side to dig up intimate details of the other's life to make its case, and that brings us to the evidentiary questions.

### 6.4 Private communications, bodies and proof

The fourth site is the least discussed but, I suspect, the one most likely to grow. Matrimonial disputes are fought on evidence about private life, and the rules that govern that evidence say a lot about how the law balances truth-finding against intimacy.

**The marital communications privilege.** Section 122 of the Indian Evidence Act, 1872, now Section 128 of the BSA, provides that a married person, or a former spouse, cannot be compelled to disclose communications made during marriage by the other spouse, and cannot be permitted to do so without the other's consent, except in suits between married persons or in proceedings where one is prosecuted for a crime against the other. The justification is the protection of marital confidence and harmony. The Supreme Court examined its scope in *M.C. Verghese v. T.J. Ponnan* (1969) 1 SCC 37. The provision is, in effect, a statutory acknowledgment of informational privacy within marriage. Its exceptions, though, mean that in the very proceedings in which privacy matters most, divorce and cruelty cases, it gives little protection.

**Recordings and surveillance.** The harder modern question is what happens when one spouse secretly records the other. In *Rayala M. Bhuvaneswari v. Nagaphanender Rayala* AIR 2008 AP 98, the Andhra Pradesh High Court held that a husband's tapping and recording of his wife's phone conversations was an invasion of her privacy and that the recordings could not be used. The Punjab and Haryana High Court took a similar view in *Vibhor Garg v. Neha*. The Supreme Court reversed the latter decision in 2025. As I understand its reasoning, the Court held that such recordings are not barred by Section 122, which expressly excepts proceedings between spouses, and it was concerned that excluding them would make it nearly impossible to prove cruelty, since marital misconduct usually takes place in private. The Court still left the ordinary requirements of relevance and authenticity in place. Readers should consult the full judgment for the exact scope.

There is something right and something troubling in this. It is right that a rule of automatic exclusion could protect the spouse who behaves worst, since abuse, threats and coercion rarely occur in front of witnesses. It is troubling because covert recording of a spouse is itself, in many relationships, a mark of control. The Supreme Court had already held in *PUCL v. Union of India* (1997) 1 SCC 301 that telephone tapping implicates the right to privacy and must follow procedural safeguards. If the state cannot tap a phone without procedure, one wonders why a husband may, and the answer cannot simply be that the case is a matrimonial one. A proportionality approach after *Puttaswamy* would sit between the two extremes: admit such material where it is directly relevant to a serious allegation, such as cruelty or violence, and where there is no other practical means of proof, but treat the manner of acquisition as a factor in weight, and keep the unlawful interception of communications actionable in its own right.

**Bodies and tests.** Courts have also been asked to order intrusive examinations of spouses. In *Sharda v. Dharmpal* (2003) 4 SCC 493, the Supreme Court held that a court may direct a medical examination of a party in a matrimonial case, for instance where mental illness is alleged, but only where a strong prima facie case is made out and the court is satisfied that it is necessary; it held that this does not violate Article 21, though the right is to be weighed. In *Surjit Singh Thind v. Kawaljit Kaur* AIR 2003 P&H 353, by contrast, the High Court refused to permit a virginity test of a wife, treating it as a violation of her right under Article 21. And in *Dipanwita Roy v. Ronobroto Roy* (2015) 1 SCC 365, the Supreme Court allowed a DNA test where a husband alleged adultery and the wife wished to prove that the child was his, observing that the wife herself could rely on it. An older line of authority, represented by *Goutam Kundu v. State of West Bengal* (1993) 3 SCC 418, warns against ordering paternity tests as a matter of routine.

The common thread in these decisions is a balancing exercise, and in each the outcome depends on how much weight the court gives to the integrity of the body and to the need for truth. I would only note that when the party resisting the test is the wife, and the allegation is about her sexual conduct, the privacy interest is at its greatest and the risk of using litigation as a means of humiliation is at its highest.

## 7. The State at the Threshold: Choosing a Partner

So far, the sites of regulation I have discussed arise *within* marriage. A fifth, conceptually distinct problem arises at the threshold: the state's regulation of whom one may marry and how openly one must do it.

The Special Marriage Act, 1954 originally required a thirty-day public notice of intended marriage, displayed in the registrar's office and open to objections. In practice, as courts have recognised, this exposes interfaith and inter-caste couples to harassment from families and vigilantes. In *Safiya Sultana v. State of U.P.* (2021), the Allahabad High Court held that mandatory publication of such notice violates the couple's privacy and their freedom to choose a partner, and that publication should be at the couple's option. In the same period the same court, in *Salamat Ansari v. State of U.P.*(2020), had said that interference with the right of two adults to live together, regardless of religion, is an interference with the right to life and liberty. State anti-conversion statutes, such as the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, have gone the other way, imposing declarations, notices and criminal penalties on conversions connected with marriage, and have been challenged on privacy and autonomy grounds. More recently, the Uttarakhand Uniform Civil Code Act, 2024 introduced mandatory registration of live-in relationships, with penalties for non-registration, a measure that has drawn criticism on the same grounds. I would flag that the constitutional challenges to several of these laws were pending when this paper was written.

What these developments show is that the logic of marital privacy as a family shield and marital privacy as individual liberty also divides the threshold cases. When the state or the community insists on being informed and consulted before two adults may marry, it is acting on the premise that a marriage concerns the family and community first, and the couple second. *Shafin Jahan* rejected that premise. The Court's willingness to extend some protection to live-in partners without insisting on marriage, in *S. Khushboo v. Kanniammal* (2010) 5 SCC 600 and *Indra Sarma v. V.K.V. Sarma* (2013) 15 SCC 755, which brought a woman in a "relationship in the nature of marriage" within the Domestic Violence Act, shows that the law can protect persons in intimate relationships without requiring that the relationship take a particular form. That is a model worth building on.

## 8. When Protection Overreaches: The Other Limit

If the previous sections are about the state's reluctance to protect, this one is about the opposite danger. An account of the limits of regulation that dwelt only on the first would be a one-sided account, and probably a dishonest one.

Section 498A IPC (now Section 85 BNS) makes cruelty by a husband or his relatives a cognisable and non-bailable offence. It was a response to genuine and terrible violence. But its design, which made arrest almost automatic and allowed the whole of a husband's family to be

named, led to a body of litigation about misuse. In *Sushil Kumar Sharma v. Union of India* (2005) 6 SCC 281, the Supreme Court upheld its validity but described the possibility of misuse as a real concern. In *Arnesh Kumar v. State of Bihar* (2014) 8 SCC 273, it directed police not to arrest automatically, and to apply the checklist in the Code of Criminal Procedure. *Rajesh Sharma v. State of U.P.* (2017) 8 SCC 746 went further, proposing family welfare committees, though that scheme was substantially modified in *Social Action Forum for Manav Adhikar v. Union of India* (2018) 10 SCC 443.

It would be easy to read that history as proof that the criminal law is the wrong instrument for the home. I do not think that follows. It shows rather that a blunt criminal tool, used without the discipline of proportionality, harms the innocent while still failing many of the intended beneficiaries, who often want protection, housing and money rather than prosecution. The Domestic Violence Act, 2005 is the more carefully designed model. It offers protection orders, the right to reside in the shared household, and monetary relief, through a civil process that does not depend on arrest. Its development has not been trouble-free: *S.R. Batra v. Taruna Batra* (2007) 3 SCC 169 narrowed the meaning of "shared household" and was corrected in *Satish Chander Ahuja v. Sneha Ahuja* (2021) 1 SCC 414, while *Hiral P. Harsora v. Kusum Narottamdas Harsora* (2016) 10 SCC 165 struck down the limitation of respondents to adult males. But the template is sound: it protects the person without enforcing the relationship.

This gives us a useful contrast with the marital rape exception. In one case, the state under-reaches, because the law refuses to treat a particular wrong as a wrong. In the other, it over-reaches, because the law gives an unguarded weapon to anyone who wishes to use it. The two failures have the same root. Neither rests on a clear principle about what the state is entitled to do inside an intimate relationship, and why.

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## 9. Towards a Principled Limit

### 9.1 A glance abroad

India is not alone in having struggled with these questions, and the comparative experience is more encouraging than the Indian debate sometimes assumes. England removed the marital rape exemption by judicial decision in *R v. R* [1992] 1 AC 599, and the European Court of Human Rights treated that as consistent with the Convention in *S.W. v. United Kingdom*. South Africa criminalised marital rape by statute in 1993, Nepal's Supreme Court struck down the exemption in 2002, and the great majority of American states had removed it by the early 1990s. The predicted collapse of marriage did not follow. The UN Committee on the

Elimination of Discrimination against Women has repeatedly urged India to criminalise marital rape. Comparative law does not decide the Indian question, but it removes the claim that the exception is a necessary feature of any stable marriage law.

### 9.2 The framework

The argument so far points toward a handful of principles, which together amount to a test for the legitimate limits of legal regulation of intimate relationships. I offer them as a proposal, not as a settled doctrine.

**First, protect persons, not the relationship as such.** The law may legitimately protect an individual within a relationship from violence, coercion, exploitation and abandonment. It may not compel the relationship to continue, nor to take any particular form. Restitution of conjugal rights fails this principle, because it directs a person back into a relationship. The Domestic Violence Act passes it, because it protects the person whatever happens to the relationship.

**Second, status does not supply consent.** Marriage creates obligations, but it does not create a standing authorisation over another person's body. A rule that makes a person's consent irrelevant because of a legal status is a rule that has stopped treating the person as an end. The marital rape exception is the plainest example; the evidentiary and medical-examination cases show smaller versions of the same issue.

**Third, disapproval is not harm.** Following *Navtej* and *Joseph Shine*, the law should not penalise consensual intimate conduct between adults simply because it is thought immoral. The state may offer a spouse an exit when fidelity is broken, but it should not impose a punishment, whether criminal or economic, on one party for her sexual conduct. The maintenance disqualification for a wife living in adultery fails this principle.

**Fourth, protection must be proportionate.** Where the law does intervene to protect, it should choose the least intrusive means that is effective, and it should include safeguards against misuse. The history of Section 498A is a lesson in what happens when this is neglected, and the civil model of the Domestic Violence Act is a lesson in what happens when it is not.

**Fifth, the privacy of the couple against outsiders is real, and it belongs to the individuals.** Families, communities, vigilantes and the state have no general claim to know or approve whom adults choose to marry or live with. This is the part of the marital privacy tradition worth keeping. But it must be understood as the privacy of two (or more) individuals against third parties. It must not be turned inward, so that one partner can invoke it against the other.

Put as practical questions, a court or legislature considering any rule that regulates an intimate

relationship might ask: Does this rule compel or restrict an intimate choice that belongs to a person? If so, does it do so in order to protect someone from coercion or harm, or merely to preserve an institution or enforce a moral view? Is there a less intrusive way to achieve the protective goal? And whose privacy is being invoked, and against whom?

### 9.3 Objections

Three objections deserve a short reply. The first is that this framework undervalues marriage. I do not think so. It values marriage as something people choose and sustain, and it treats the law's job as removing the conditions that make that choice unfree. Marriages that last because the law holds them together are not the ones worth celebrating.

The second objection comes from the other side: that the framework is too individualistic, ignoring the relational character of real lives, especially in joint families where a woman's economic security depends on her husband's household. That is partly right, and it is why I borrow from relational accounts of autonomy. The protective and economic remedies, such as residence and maintenance, matter exactly because autonomy is not a purely individual achievement. But relational thinking supports intervening to repair the conditions of choice; it does not support the state taking the choice over.

The third is the institutional-competence objection, that courts should leave such questions to Parliament. Courts do have a legitimate role in policing the constitutional boundary, and *Joseph Shine* shows that it can be exercised without the heavens falling. What a court should not do is design the entire regime. That task, including questions such as sentencing, procedural safeguards, reconciliation mechanisms and the status of non-marital relationships, properly belongs to the legislature, and a good deal of the work is still waiting to be done.

## 10. Conclusion

This paper began with the observation that the law treats the marital home as both closed and open: closed to the wife who seeks protection, and open to the state when it wishes to compel, test or punish her. The cases of the last decade have started to unsettle that pattern. *Puttaswamy* placed decisional autonomy at the centre of Article 21, *Navtej* and *Joseph Shine* refused to let morality justify criminal punishment of intimacy, and *Shafin Jahan* protected the choice of partner. But the settlement is incomplete. The marital rape exception endures, a restitution decree can still be sought against an unwilling spouse, and the law still penalises a wife's sexual conduct through maintenance rules, while an overbroad

criminal remedy has too often been used in ways that discredit the cause it was meant to serve. The central claim of the paper is that these problems share a source: the habit of treating the privacy of the relationship as though it were the privacy of the people in it. Once the two are separated, much of the confusion clears. The law has good reasons to stay out of a couple's life when outsiders want to supervise it, and good reasons to come in when one partner needs protection from the other. What it has no good reason to do is to enforce the relationship, to presume consent from status, or to use marriage as a screen behind which one person's rights are suspended.

There is a great deal that this paper has not done. It has not tested its claims empirically, for instance by examining how Section 9 petitions are actually filed or how marital rape complaints under existing provisions fare. It has dealt mainly with heterosexual statutory marriage, and has said little about personal laws outside the Hindu framework, about unregistered unions, or about the intersection of caste, class and gender in determining who can actually use the remedies the law provides. These are directions for further work. For now, the modest conclusion is that the Constitution's promise of dignity and autonomy has a plain implication for family law, and that Indian law has yet to fully honour it.

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