Autonomy vs. Obligation: A Human Rights Critique of Restitution of Conjugal Rights in India

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Abstract

"Restitution of conjugal rights" (RCR), provided in various personal law statutes in India, and is a remedy that obligates a spouse to rejoin another, when the copulation is withheld by him/her. The remedy is by no means a neutral procedural tool, but rather a legal tool, which puts individual bodily autonomy underage to the performative of marriage. This paper critically examines RCR through the intersecting lenses of constitutional law, international human rights norms, and feminist jurisprudence. It surveys the pivotal judicial contest between "T Sareetha v T Venkata Subbaiah" and "Saroj Rani v Sudarshan Kumar Chadha", situates the remedy against the evolving Article 21 privacy jurisprudence culminating in K S Puttaswamy, and measures India's legislative inaction against the State's CEDAW obligations. The paper argues that RCR is constitutionally unsustainable in the contemporary rights framework and that Parliament must repeal it without further delay. A comparative survey of common law jurisdictions underscores that India now stands as an outlier among its peers.

Keywords: restitution of conjugal rights, bodily autonomy, Article 21, privacy, CEDAW, feminist jurisprudence, marital coercion, personal law reform.
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I. Introduction

The "restitution of conjugal rights" is among the most contested survivals of colonial-era matrimonial law. Enacted through the "Hindu Marriage Act 1955", the "Special Marriage Act 1954", the "Indian Divorce Act 1869", and the "Parsi Marriage and Divorce Act 1936", the remedy permits "either spouse to petition a court for an order directing the other to return to the matrimonial home when that other has, without reasonable excuse, withdrawn from the society of the petitioner". A decree issued under these provisions is not merely advisory, upon non-compliance within a year, it converts into a ground for divorce and, until legislative amendment in 1983, could be enforced through attachment of property.

The remedy's lineage is traceable to ecclesiastical courts in England, where it was employed to coerce an errant spouse back into cohabitation under the theological understanding that marriage dissolved indissolubly the two spouses into a single legal and spiritual unit. Transplanted to India by colonial courts and subsequently absorbed wholesale into independent India's personal law codes, RCR carries the ideological residue of a conjugal order predicated on wifely submission.

The constitutional legitimacy of the remedy was most dramatically challenged in 1983 when Justice Choudary of the "Andhra Pradesh High Court" struck it down as "violative of Articles 14, 19, and 21 of the Constitution".[1] Within months, the Delhi High Court took the contrary view.[2] The Supreme Court in Saroj Rani resolved this impasse by upholding the provision, and the judgment has been subject of continuous academic scrutiny and has never been called up for reconsideration by a larger bench. But in the forty years after the invalidation of the Saroj Rani principle, much of the terrain of the constitution has been shifted by a series of significant rulings that have furthered the interpretation of Articles 14, 19 and 21 in a manner that renders the Saroj Rani proposition unacceptable.

This paper proceeds in seven parts. Part II situates RCR within its historical and statutory context. Part III analyses the constitutional framework governing the remedy. Part IV reconstructs and critiques the principal judicial decisions. Part V brings international human rights norms to bear. Part VI engages feminist and autonomy-based critiques. Part VII surveys comparative jurisdictions. Part VIII sets out the case for legislative repeal.

II. Historical and Statutory Context

The English ecclesiastical "remedy of restitution of conjugal rights" rested on the canonical notion that "spouses owed each other a debitum conjugale, a mutual debt of cohabitation and sexual intercourse". An absconding spouse could be cited before an ecclesiastical court, and persistent defiance could result in excommunication. The remedy was transferred to the secular Divorce Court established by the Matrimonial Causes Act 1857 and carried to India through the earliest personal law codes administered by British-Indian courts.

Post-independence, Parliament reproduced the provision across all major personal law statutes without interrogating its normative premises. Section 9 of the "Hindu Marriage Act 1955" is the most widely litigated formulation. It provides that "when either spouse has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply for restitution, and the court, on being satisfied of the truth of the statements made, may decree restitution accordingly". This has led to courts applying a generous definition to the term "reasonable excuse" to encompass situations where serious abuse occurs, constructive desertion, and irreparable breakdown, with this framework of judicial coercion in place.

According to the "Code of Civil Procedure 1908" the enforcement of the paid by attachment of the respondent's properties was originally provided. "The Civil Procedure Code (Amendment) Act 1976" eliminated direct physical enforcement, while being able to

[1] T Sareetha v T Venkata Subbaiah, AIR 1983 AP 356.

[2] Saroj Rani v Sudarshan Kumar Chadha, AIR 1984 SC 1562.

attach the property. In its 71st Report, the Law Commission also raised "discomfort" with the remedy but suggested that the remedy should not be abandoned, but only amelioration in a procedural manner be suggested.[3] In 1983 Parliament amended the mode of enforcement, but did not challenge the right itself, nor, in general, the remedy's underlying conceptual constructs, an ambivalence that was exhibited in the legislation.

III. Constitutional Framework

The validity of RCR must be assessed against "Articles 14, 19(1) (d), (e), and 21 of the Constitution".[4] Each provision raises distinct but interrelated objections.

Article 14 guarantees "equality before the law and equal protection of the laws". While the remedy is textually gender-neutral, its operation is structurally gendered: the overwhelming majority of petitions are filed by husbands against wives, and the remedy's effect compelling a woman to return to a household she has fled intersects with the documented prevalence of domestic violence and marital rape in India. It fails the test of substantive equality articulated in a long line of decisions from "Air India v Nargesh Mirza" to "Joseph Shine v Union of India".[5]

Article 19(1) (d) and (e) protect "the rights to move freely throughout the territory of India and to reside and settle in any part thereof". A decree for restitution, even without physical compulsion, operates as a juridical restraint on the respondent's liberty of movement and choice of residence. The state-conferred remedy creates a legal jeopardy conversion into a ground for divorce and exposure to property attachment that is coercive in its incentive structure.

The most transformative ground of challenge lies under Article 21, which the Supreme Court has progressively read to encompass dignity, privacy, and bodily autonomy. In Francis Coralie Mullin[6] and Olga Tellis[7] the Court held that "the right to life includes the right to live with human dignity". In Suchita Srivastava the Court held that "a woman's right to make reproductive choices is a dimension of personal liberty under Article 21".[8] In Shafin Jahan the Court characterized "the right to choose one's partner and the manner in which one lives as fundamental to individual liberty".[9]

The turning point has been ruling in "K S Puttaswamy v Union of India" that found that "privacy is a fundamental right under Article 21".[10] In the entire decision signed by Justice D Y Chandrachud, co-signed by two other judges, "consented to explicitly locate in the core of the protection of privacy, the autonomy of decision-making in matters relating to intimate choices, concerning physical being of the individual." When the individual becomes a withdrawer from the marital home, that withdrawal is often the very same decisional autonomy the freedom to leave a relationship or living arrangement "that has become unacceptable, unprotected, or unloved" that is sought after in the vast majority of cases. A state remedy that punishes such withdrawal by attaching property and

[3] Law Commission of India, 71st Report on the Hindu Marriage Act 1955 and Special Marriage Act 1954 (1978).
[4] Constitution of India 1950, arts 14, 19, 21.
[5] Joseph Shine v Union of India, (2018) 2 SCC 189.
[6] Francis Coralie Mullin v Administrator, Union Territory of Delhi, AIR 1981 SC 746.
[7] Olga Tellis v Bombay Municipal Corporation, AIR 1986 SC 180.
[8] Suchita Srivastava v Chandigarh Administration, (2009) 9 SCC 1.
[9] Shafin Jahan v Asokan K M, (2018) 16 SCC 368.
[10] K S Puttaswamy v Union of India, (2017) 10 SCC 1.

facilitating divorce is a direct incursion into the privacy guarantee that Puttaswamy places at the apex of fundamental rights.

IV. The Judicial Contest: Sareetha to Saroj Rani

The constitutional drama surrounding RCR reached its peak in 1983 in two concurrent High Court decisions that arrived at diametrically opposed conclusions.

In "T Sareetha v T Venkata Subbaiah", Justice Choudary struck down section 9 of the "Hindu Marriage Act" as "violative of Articles 14, 19, and 21". The learned judge characterized the decree as a "coercive instrument" that reduces a wife to a "chattel" and that "strikes a blow at individual dignity and self-respect."[11] Crucially, he held that "sexual cohabitation enforced by state authority however indirectly implicates the most intimate realm of personal liberty and is the antithesis of constitutional respect for the person". He further observed that "the provision disproportionately burdens women, given the structural realities of marriage in India, and thereby infringes Article 14's guarantee of substantive equality".

The Delhi High Court in "Harvinder Kaur v Harmander Singh Choudhry" took the contrary view.[12] Justice Rohatgi expressed "scepticism about importing the language of fundamental rights into the "domestic domain" of marriage, holding that human rights norms are designed for the public sphere and that the family home is governed by a distinct logic of intimacy and interdependence". He accepted the argument that RCR is a remedy designed to preserve marriage as a social institution. The court declined to characterize sexual cohabitation as an obligation incompatible with constitutional dignity.

The Supreme Court in "Saroj Rani v Sudarshan Kumar Chadha" affirmed the Delhi High Court approach.[13] The Court held that "section 9 of the Hindu Marriage Act "serves a social purpose" as a "vinculum juris" a legal tie and that it promotes reconciliation. The Court dismissed the bodily autonomy argument by observing that the decree operates "only in the negative" to convert into a ground for divorce, and that no spouse can be physically compelled to cohabit".

The Saroj Rani reasoning is vulnerable to at least three serious objections. First, the distinction between direct and indirect compulsion is jurisprudentially unsound: a remedy that threatens property attachment and the loss of divorce rights unless the respondent submits to an unwanted living arrangement is coercive in all but name. Second, the social purpose argument proves too much: many impugned provisions may be said to serve some social purpose; the constitutional test is whether the purpose justifies the infringement of a fundamental right, and this proportionality analysis is entirely absent from the judgment. Third, Saroj Rani predates the transformative expansion of Article 21 in Puttaswamy by 33 years. The constitutional predicate on which it rests has been fundamentally altered.

[11] T Sareetha v T Venkata Subbaiah, AIR 1983 AP 356.
[12] Harvinder Kaur v Harmander Singh Choudhry, AIR 1984 Delhi 66.
[13] Saroj Rani v Sudarshan Kumar Chadha, AIR 1984 SC 1562.

V. International Human Rights Dimensions

"The Universal Declaration of Human Rights" guarantees the "right to life, liberty, and security of person and protects individuals from arbitrary interference with their privacy".[14] "The International Covenant on Civil and Political Rights", to which India is a party, prohibits arbitrary or unlawful interference with privacy in terms that the "Human Rights Committee" has held to extend to bodily integrity in intimate relationships.[15]

The most directly applicable instrument is the "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW), which India ratified in 1993. Article 16 of CEDAW requires "States Parties to ensure, on a basis of equality of men and women, the same personal rights as husband and wife, including the right to choose freely a spouse and to enter into marriage only with free and full consent".[16] The CEDAW Committee in General Recommendation No 35 has characterized legal mechanisms that "constrain women's freedom of movement within the marital relationship as forms of gender-based violence constituting discrimination under the Convention".[17] RCR, particularly when operationalise by husbands against wives attempting to flee harmful marriages, falls within this characterization.

"The Human Rights Committee's" "General Comment No 28" on equality between men and women interprets Article 23 of the ICCPR on the protection of the family to require that "no party be coerced into continued cohabitation against their will, and that "reasonable excuse" provisions in RCR-type statutes must be broad enough to encompass any genuine unwillingness, not merely provable fault by the petitioner".[18]

The Supreme Court has recognized since "Vishaka v State of Rajasthan" that in the absence of domestic legislation governing a field touching fundamental rights, international conventions ratified by India may be read into those rights.[19] Read together with Puttaswamy, this interpretive principle provides a constitutionally sound pathway for a High Court or the Supreme Court to hold, in a future challenge, that CEDAW norms on bodily autonomy and freedom from coercive matrimonial arrangements are subsumed within Article 21's privacy guarantee.

VI. Feminist and Autonomy-Based Critique

Feminist legal scholarship has long identified RCR as a paradigmatic site where the law's formal equality conceals deep structural gender subordination. Agnes has argued that "the remedy, deployed predominantly by husbands, functions as a legal instrumentalisation of the sexual economy of marriage, encoding the assumption that a wife's sexuality is an entitlement of the husband rather than a dimension of her own personhood".[20] Grover has noted that "the very framing of the right as the husband's

[14] Universal Declaration of Human Rights (adopted 10 December 1948).
[15] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976).
[16] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981).
[17] Committee on the Elimination of Discrimination Against Women, General Recommendation No 35 on Gender-Based Violence Against Women (2017).
[18] UN Human Rights Committee, General Comment No 28: Equality of Rights Between Men and Women (Article 3) (2000).
[19] Vishaka v State of Rajasthan, AIR 1997 SC 3011.
[20] Flavia Agnes, "Conjugal Rights: Marital Rape and Domestic Violence" in Flavia Agnes and Sudhir Chandra (eds), *"Women and Law in India"* (Oxford University Press 2004).

entitlement to the wife's "society" reproduces the common law principle that the wife has no independent legal personhood within marriage".[21]

From a capabilities standpoint, Martha Nussbaum's argument that "bodily integrity is a central human capability the ability to have one's bodily boundaries treated as sovereign condemns any legal arrangement that places a person's body at the disposal of another's legal claim".[22] A decree for restitution does precisely this: it transforms the respondent's body into the object of judicial enforcement, conditioning the respondent's liberty on submission to cohabitation. The decree may not physically compel, but it financially and legally coerces, and coercion at law is no less an affront to bodily sovereignty than physical force.

Another useful theory is Khaitan's notion of discrimination law. He states that "the pattern of a law and here it is the woman's gendered experience of matrimonial coercion that implies that the imposition, on the salient part of that characteristic, of an abusive treatment is more properly called discrimination, no matter how formally neutral the law may state its effect".[23] The facts are, "almost one-third of Indian women who have ever been married have suffered physical and/or sexual violence at the hands of an intimate partner", as documented by the National Family Health Survey, making a case for a group of citizens who are already at disproportionate risk, against whom RCR is applied. In this setting, rather than "the remedy not protecting," it is "the remedy actively re-exposing the vulnerable respondent to the source of that harm.

Also relevant is Parashar's account of the association between personal law reform and gender equality in India. She is debating that "although constitutional tools are present to reform to remove patriarchal structures from personal law, they do not exist because of the lack of them, but because of a political economy that uses women's rights as a price to pay for community identity claims".[24] The same can be seen in the survival of RCR in the different personal law regime of Hindu, Christian, Parsi, and civil marriage, where the preservation of the normative integrity of the matrimonial regime is a concern for each of these communities and a proviso for adherence to the law of the land has never been forced upon its members. This way around-approach to the correct constitutional logic: "Where a provision violates fundamental rights, community preferences are not a valid justification.

VII. Comparative Perspectives

A related survey corroborates the finding that RCR is an anachronism. In England, as early as 1969, the Law Commission recommended abolition and, the remedy was taken away by the "Matrimonial Proceedings and Property Act 1970". Australia abolished the remedy under the "Jurisdiction of Courts (Marital Causes) Act 1967" in New South Wales and subsequently rendered it effectively unavailable nationally under the "Family Law Act 1975". New Zealand abolished it by statute in 1963.[25] South Africa's courts declared

[21] Vrinda Grover, "The Right to Bodily Integrity and Conjugal Rights" (2001) 3 *National Law School of India Review* 45, 51.
[22] Martha Nussbaum, *"Sex and Social Justice"* (Oxford University Press 1999) 219.
[23] Tarunabh Khaitan, A Theory of Discrimination Law (Oxford University Press 2015) 87.
[24] Archana Parashar, Women and Family Law Reform in India: Uniform Civil Code and Gender Equality (Sage Publications 1992) 112.
[25] Matrimonial Proceedings Act 1963 s 4, abolished in New Zealand. For South Africa, see Honey v Honey 1992 (3) SA 597 (W).

it unconstitutional. The consistent pattern across the common law world is that jurisdictions with functioning constitutional or human rights protections have found RCR incompatible with those protections, and have moved to abolish it either legislatively or judicially.

India thus stands as an outlier: a jurisdiction with a judicially activist constitutional tradition, a sophisticated human rights discourse, and legislation protecting women from domestic violence[26] that nonetheless maintains a remedy compelling the victims of matrimonial breakdown and potentially of matrimonial violence to return to the matrimonial home under judicial coercion. This anomaly cannot be explained on principled grounds; it is a product of legislative inertia and judicial deference to a precedent that has been rendered obsolete by four decades of constitutional evolution.

VIII. Conclusion

Restitution of conjugal rights is a strange and uncomfortable aspect of Indian matrimonial law. It is a straitjacket within which the idea that personal law exists is totally at odds with the constitutional framework of an independent India that the countrymen have carefully built up in more than seven decades, and has survived from the days of church law until today.

The constitutional legitimacy of the remedy was most dramatically challenged in 1983 when Justice Choudary of the Andhra Pradesh High Court struck it down as "violative of Articles 14, 19, and 21 of the Constitution". Within months, the Delhi High Court took the contrary view. The Supreme Court in Saroj Rani resolved this impasse by upholding the provision, and the judgment has been subject of continuous academic scrutiny and has never been called up for reconsideration by a larger bench. But in the forty years after the invalidation of the Saroj Rani principle, much of the terrain of the constitution has been shifted by a series of significant rulings that have furthered the interpretation of Articles 14, 19 and 21 in a manner that renders the Saroj Rani proposition unacceptable. The remedy is based on the sham that marriage creates guiding duties for physical sexual relations that if not fulfilled can be used as a pretext for state interference in the most intimate sphere of human existence. This fiction is unsustainable in the face of the right to privacy as guaranteed in Puttaswamy, the right to dignity as guaranteed in Navtej Singh Johar and Joseph Shine and with India's commitment under CEDAW. So it cannot coexist with the insight that feminists and scholars of human capabilities have both shared – that bodily sovereignty cannot be ceded, and certainly not by the legal device of marrying someone.

It is apt to endorse here, Baxi's comment that human rights, as originally envisioned as aspirational rights progressed towards reality, will need constant legislative and judicial care. Now, as the Supreme Court is about to hear arguments to reconsider the law on marital rape and also seek a convergence in the law on intimate autonomy, there is perhaps a golden opportunity in the intervening decades for the bench to revisit Saroj Rani and strike down both the Constitutionally problematic section 9 of the Hindu Marriage Act and its companion statutory provisions as unconstitutional. If there is to be no such judicial intervention, Parliament should act. In the dictionary of the law, RCR does not mean "doctrinal embarrassment," but rather "daily affront to the dignity of the

[26] Protection of Women from Domestic Violence Act 2005.

spouses, who are submitted to it" (and its application is disproportionately to women). It seems quite impossible for a constitutional democracy that honors and respects rights to declare bodily autonomy sacred if it also has a remedy in place that aims to run against it.