

## Restitution of Conjugal Rights v. Individual Autonomy: Looking Through the Constitutional Lens in India

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### Abstract

Marriage is an institution that varies from religion to religion. For Hindus, it is an indissoluble union; for Muslims, a civil contract; and for Christians, a holy union. However, individual autonomy has entered the forefront through the Indian Constitution and the revolution in Indian family law.

The Constitution of India specifies that the people can decide who they should marry, who they should not, and with whom they want and don't want to continue their marital bond. The remedy of the restitution of conjugal rights (RCR), available under personal law, applies to those who are legally married but withdraw from marital ties without a reasonable excuse.

This study found that RCR is one-sided and used against the other spouse's will. However, the Supreme Court of India has decided that individual autonomy is needed to protect individual liberty and promote national interest, but it has also upheld the validity of RCR, creating a genuine controversy. The object of this paper is twofold—to analyze the individual autonomy enshrined under article 21 of the Indian Constitution, which is contrary to the right to RCR, and to explore this topic through a comparative law technique.

**Keywords:** Marriage, Restitution of Conjugal Rights, Individual Autonomy, Article 21 of the Constitution of India 1950

### INTRODUCTION

#### The legal background of the study

The institution of marriage recognizes and legitimizes the sexual behavior of human beings. Over time, marriage has come to represent the right to perpetuate the human race and preserve instinctive identity.

The nature of Hindu marriage is sacramental, which implies that it is a permanent union.<sup>1</sup> The first Hindu law code, the *Manusmriti* (*Manavadharmashastra*), which Manu presented between 200 BCE and 200 CE, is a famous *Dharmashastra* that lays down guidelines for social and moral conduct and principles of governance for Hindus. The extended text encompasses marriage, inheritance, social hierarchy, and the duties of different *varnas* (castes).<sup>2</sup> Manu defined the term 'marriage' in this text as a union between two Hindus for an undetermined period. The concept of divorce for Hindus at that time was unknown; only in some exceptional cases did the

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<sup>1</sup> Paras Diwan, *Law of Marriage and Divorce*, 5th ed. (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2008).

<sup>2</sup> *The Laws of Manu*, trans. George Bühler (Oxford: Clarendon Press, 1886), <https://www.onelittleangel.com/download/The-Law-of-Manu.pdf>.

sage allow a woman to separate from her husband. Narada<sup>3</sup> and Parasara<sup>4</sup> continued this practice and relied upon the earlier version of the *Manusmriti*.<sup>5</sup>

Distinctly, the prospect of Christian marriage is a lifelong commitment of two persons, which is solemnized by taking an oath in a church.<sup>6</sup> The nature of Muslim marriage, on the other hand, is a civil contract<sup>7</sup> and can be broken at any time for non-fulfillment of the contractual obligation. This latter option can serve as a relief for a spouse whose life is under threat or who is in a situation where there is no possibility of living with their partner peacefully. However, this power has historically been androcentric, and the notion has changed since the British took steps via family law to give women an equal standing in matrimonial proceedings.

The restitution of conjugal rights (RCR) is a remedy used before judicial separation that provides one more chance to restore the marital relationship and protect the sanctity of marriage. RCR appeared in early Jewish law, wherein the spouse was entitled to the support and comfort of their partner, so if either partner abandoned the other despite a legitimate explanation, the aggrieved party could approach a court to state a claim against the other.<sup>8</sup> Jewish law divides matrimonial privileges and marital responsibilities into separate categories to improve the value of marriage. Nevertheless, if ambiguity arises between the parties, their marriage can be restored by giving them a chance for reconciliation.<sup>9</sup>

Historically, the laws that have downgraded women in society and the dominance in marriage that the husband has enjoyed have slowly shifted towards spousal equality in decision-making and the division of labor. One such instance is the remedy of RCR, which is rooted in Jewish law, but adopted in English law. In England, marriage was considered a property transaction whereby the wife was merely chattel in the owner's possession.<sup>10</sup> Ironically, women were burdened with maintaining their husbands and had no opportunities to leave the marital home. The husband's role was like a 'Lord and Master' who exercised all marital rights and served as the predominant authority relating to those rights.<sup>11</sup>

In India, like in other common law countries, RCR was introduced by the British. The remedy first appeared in *Moonshee Buzloor Ruheem v. Shusoonissa Begum*<sup>12</sup> ("Moonshee"), where the High Court Judicature of Calcutta dealt with a 'restitution suit.' Under Muslim personal law, 'restitution suits' are predominantly lodged by Muslim husbands.<sup>13</sup> The rationale is seemingly that the husband can defeat the wife's right at any time by delivering *talaq*.<sup>14</sup>

In *Moonshee*, the issue was whether a Muslim spouse could sue in a civil court in India or whether the husband could enforce his marital rights under Muslim personal law by compelling his unwilling wife to cohabit with him. In that instance, the court scrutinized the matter and determined that Muslim personal law encompasses both rights and responsibilities for safeguarding individuals. Therefore, if there was a risk of neglecting or

<sup>3</sup> The *Narada Smriti* is an old *Smriti* consisting of 1,028 verses. There are two commentaries. One is attributed to Asahaya (AD 650–750), while the other is attributed to Bhavasvamin (AD 700–1000). The *Narada Smriti* treatise resembles the *Manusmriti*. The text covers various subjects, including *rnadana* (debt recovery), *upanidhi* (deposits and lending), *dattaprada-nika* (gifts and resumption thereof), *abhyupetya-asusrusa* (breach of a service contract), *asvativikraya* (sale without ownership), *samayasya-anapa-karma* (conventional violation of guilds), *simabandha* (boundary settlement), *dayabhaga* (partition and inheritance), *stripumsayoga* (marital relations), crimes and punishments, and *vyavahara* (social conduct).

<sup>4</sup> The *Parasara Smriti* has 592 verses and originated between the 1st and 5th centuries CE. The text has numerous verses that are comparable to those found in the *Manusmriti*. It provides instructions on various aspects of daily life, such as responsibilities, family obligations, agriculture, penalties, rewards, and expiating sins.

<sup>5</sup> *Ibid.*, 65. See also the *Rig Veda* IX, 85, and *Manusmriti* VIII, 227–28.

<sup>6</sup> "A Christian View of Marriage," Christianity.org, accessed May 22, 2024, <https://www.christianity.org.uk/article/a-christian-view-of-marriage>.

<sup>7</sup> Aqil Ahmad, *Mohammadan Law*, 26th ed. (Allahabad: Central Law Publications, 2016).

<sup>8</sup> J. Duncan M. Derrett, "Jewish Law in Southern Asia," *International and Comparative Law Quarterly* 13, no. 1 (Jan. 1964): 288–301, <https://doi.org/10.1093/iclqaj/13.1.288>.

<sup>9</sup> Flavia Agnes, *Family Law*, vol. 1 (Oxford: Oxford University Press, 2011).

<sup>10</sup> Raj Kumari Agarwala, "Restitution of Conjugal Rights Under Hindu Law: A Plea for the Abolition of the Remedy," *Journal of the Indian Law Institute* 12, no. 2 (1970): 257–68.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Moonshee Buzloor Ruheem v. Shusoonissa Begum*, (1867) 1 MIA 551.

<sup>13</sup> Flavia Agnes, *Family Law*, vol. 1 (n 9).

<sup>14</sup> The word *talaq* originated from the Arabic word *t'alakas*, which means to repudiate. Per Islamic law, *talaq* is the man's unilateral right to divorce his wife.

abandoning these rights, and if personal law proved insufficient in protecting individuals' rights, the court, as a competent authority, could intervene to provide necessary safeguards. The court explained that if the wife does not separate herself from her husband, and her husband mistreats her, and if Muslim personal law fails to provide any relief for the wife, the court will entertain the matter by refusing to force her to reside with her husband.<sup>15</sup> The court introduced the principle of natural justice (equity and morality),<sup>16</sup> even under personal law.

The Allahabad High Court addressed RCR in *Abdul Kadir v. Salima*,<sup>17</sup> ruling that if the wife stops cohabiting with her husband without a reasonable cause, the husband can sue for RCR. In that case, the court adopted a mixed approach to create a balance between the principle of equity and the law enshrined in Muslim personal law. In *Nazrul Islam v. Mustt. Sajeda Begum*,<sup>18</sup> the Gauhati High Court held that an RCR petition should be addressed based on the principle of Muslim law, not on the principle of justice and equity. However, in *Sonal Aashish Madhapariya v. Aashish Harjibhai Madhapariya*, the court opined that it had the discretionary authority to grant or deny an RCR decree.<sup>19</sup>

In *Dadaji Bhikaji v. Rukhmabai* ("Rukhmabai"),<sup>20</sup> the marriage was solemnized between Rukhmabai and Dadaji Bhikaji according to Hindu rites and ceremonies. Rukhmabai was just eleven years old at that time, and her husband, Bhikaji, was nineteen. The marriage was arranged and functioned with the consent of their parents. Rukhmabai, as a bride after her marriage, never visited her matrimonial home because both husband and wife were minors. As such, she remained in her parental home and fulfilled her education. Even after finishing her education and reaching majority, she never showed any desire to join her husband to perform her marital obligation. However, after numerous efforts to take her back, Bhikaji ultimately filed a petition in court based on the grounds of RCR, which was only meant to compel his wife through the court's help. In the first instance, the High Court of Bombay favored the respondent. This was based on the court's factual argument; it held that the respondent (Rukhmabai) had no liability to join her husband because both were minors when the marriage was solemnized, so their consent had not been established. Eventually, this was overruled in an appeal, where the judge decided in favor of the husband, giving Rukhmabai a choice between joining her husband or facing six months' imprisonment. Rukhmabai accepted imprisonment, as she never wanted to engage in conjugal life with her husband. The matter was finally resolved with Queen Victoria's intervention through an out-of-court settlement, which required Rukhmabai to provide Bhikaji with a lump sum monetary payment.<sup>21</sup>

In independent India, RCR has faced much criticism and numerous challenges based on constitutional perspectives that conflict with Part III of the Constitution<sup>22</sup> and has raised concerns about individual autonomy. Indeed, the Indian judiciary has faced several difficulties with RCR's constitutional validity. In the case of *T. Sareetha v. Venkata Subbaiah*<sup>23</sup> ("*T. Sareetha*"), the Andhra High Court underscored the issue of RCR's constitutionality. This judgment has guided the recent case of *Ojswa Pathak v. the Union of India*.<sup>24</sup> In that case, the petition challenged the validity of the RCR provision based on articles 21<sup>25</sup> and

<sup>15</sup> Sudhir Chandra, *Enslaved Daughters: Colonialism, Law and Women's Rights*, 2nd ed. (Oxford: Oxford University Press, 2008), 73–76. <https://doi.org/10.1093/acprof:oso/9780195695731.003.0003>.

<sup>16</sup> Simon Petch, "Law, Equity, and Conscience in Victorian England," *Victorian Literature and Culture* 25, no. 1 (1997): 123–39, <https://doi.org/10.1017/s1060150300004666>.

<sup>17</sup> *Abdul Kadir v. Salima*, (1886) 8 All 149.

<sup>18</sup> *Nazrul Islam v. Mustt. Sajeda Begum*, AIR (2006) Gau. 159.

<sup>19</sup> *Sonal Aashish Madhapariya v. Aashish Harjibhai Madhapariya*, AIR 2020 Guj. 146. Before granting the RCR decree, the court had to be satisfied beyond a reasonable doubt that the respondent withdrew from the petitioner's society without a reasonable excuse, and the court was free to decide the case accordingly to grant or not grant the said decree. In this case, the husband claimed abandonment on the one hand and stated that the wife asked him to leave his house and reside with her parents. But no clarity was found in the husband's statement as to how, when, and under what circumstances the wife withdrew. Thus, the decree couldn't be granted in favor of the husband.

<sup>20</sup> *Dadaji Bhikaji v. Rukhmabai*, (1885) ILR 9 Bom 529.

<sup>21</sup> Sudhir Chandra, *Enslaved Daughters*, 213 (n 15).

<sup>22</sup> The Constitution of India places fundamental rights under Part III (arts. 12–35).

<sup>23</sup> *T. Sareetha v. Venkata Subbaiah*, AIR 1983 AP356.

<sup>24</sup> *Ojswa Pathak v. the Union of India*, MANU/SCOR/18703/2021.

<sup>25</sup> Article 21 of the Indian Constitution: No person shall be deprived of his life or personal liberty except according to a procedure established by law.

14<sup>26</sup> of the Constitution. It claimed that the RCR provision violates the right to privacy and individual autonomy by placing an additional burden on the woman's life. The case is now pending before the Supreme Court of India.

The Constitution of India, being the supreme law of the land under article 13<sup>27</sup>, can declare any law null and void if it curtails or contradicts citizens' fundamental rights. So, the following questions arose in *State of Bombay v. Narasu Appa Mali*<sup>28</sup>: What will occur if personal laws violate fundamental rights? Are personal laws excluded from the purview of article 13? These queries were answered by the High Court of Bombay, which held that uncoded personal laws are not included within the scope of the expression "laws in force" (paragraph 93 of "The Sabarimala Judgment"), so they were excluded from the ambit of article 13(1). However, Justice Chandrachud, concurring with the *Narasu Appa Mali* judgment, observed that personal laws are not always a subject of fundamental rights<sup>29</sup>:

Custom, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny, is to deny the primacy of the Constitution.<sup>30</sup>

The Indian courts have indeed rendered different decisions on RCR petitions on different occasions, which reflects society's general division on attitudes towards RCR. Some proponents of RCR contend that it can benefit society by encouraging spouses to reconcile,<sup>31</sup> allowing them to resolve their differences to regain each other's trust and save their marriage (which is healthy for entire families).<sup>32</sup> Sometimes, RCR can prevent unnecessary breakups and divorces, which can have positive social and economic repercussions.<sup>33</sup> On the other hand, opponents of RCR have alleged that the remedy might compromise an individual's autonomy and free will within a marriage. Further, these opponents argue that RCR might not always be conducive to a healthy and respectful relationship, perpetuating unhealthy or abusive relationships where a spouse might be forced to return to an abusive partner, jeopardizing their well-being and safety.

<sup>26</sup> Article 14 of the Indian Constitution: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

<sup>27</sup> Article 13 of the Indian Constitution: "(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) 'Law' includes any ordinance, order, bylaw, rule, regulation, notification, custom, or usage having in the territory of India the force of law.

(b) 'Laws in force' includes laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

<sup>28</sup> *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 84, (1951) 53 BOMLR 779, ILR 1951 Bom. 775.

<sup>29</sup> Gautam Bhatia, "The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality," Constitutional Law and Philosophy (Sep. 29, 2018), <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/>.

<sup>30</sup> *Indian Young Lawyers Association v. The State Of Kerala* ("The Sabarimala Judgment"), 2018 SCC Online SC 1690, p. 232.

<sup>31</sup> Justice P.B. Gajendragadkar, Chairman, Law Commission of India, "Law Commission of India Report no. 59," New Delhi: Government of India, Union Minister of Law and Justice, Ministry of Law and Justice, Mar. 6, 1974, [https://lawcommissionofindia.nic.in/report\\_sixth/](https://lawcommissionofindia.nic.in/report_sixth/).

<sup>32</sup> Law Commission of India, "Irretrievable Breakdown of Marriage – Another Ground for Divorce," Report no. 217, New Delhi: Government of India, Ministry of Law and Justice, Dept. of Legal Affairs, Mar. 30, 2009, <https://indiankanoon.org/doc/117804397/>.

<sup>33</sup> *Linda v. Belisario*, (1795) 1 Hag. Con. 216(21) per Sir William Scott, at pp. 23, 30.

## THE LEGAL PROVISIONS OF RCR UNDER INDIAN LAW

In modern India, RCR is one of the matrimonial remedies expressly available under all personal laws except Muslim law. The Hindu Marriage Act 1955,<sup>34</sup> the Indian Divorce Act 1869,<sup>35</sup> the Parsi Marriage and Divorce Act 1936,<sup>36</sup> and the Special Marriage Act 1954<sup>37</sup> all include RCR as a matrimonial remedy. Although there is no direct provision under Muslim law, a court may implement RCR through the principles of justice, equity, and good conscience. Tayabji explains that the concept of RCR is clearly present in Muslim law: “The [c]ourt may intervene and order recovery of conjugal rights if one of the spouses has withdrawn from the other’s society or has disregarded his duty towards the partners [sic] for no acceptable reason.”<sup>38</sup> Further, a court may deny an RCR petition if there is evidence of the husband and in-laws’ involvement by looking at the following factors: (1) the existence of any performance of cruelty by the husband and the in-laws; (2) the husband’s refusal to fulfill his marital obligations; or (3) the husband’s failure to pay the dower on time.<sup>39</sup>

The RCR remedy is only available to those who are legally married<sup>40</sup> and separated for a long time without a valid reason.<sup>41</sup> According to the aforementioned lines of cases, Indian courts have played a predominant role in resolving disputes between the spousal parties in the interest of the community’s welfare. However, before granting an RCR decree, the court checks the eligibility of the parties involved.

As explained earlier, RCR has received significant criticism over the years. During the drafting of the Hindu Marriage Act 1955, RCR sparked heated debates among the drafters and creators. Mr. Khardekarhad, one of the prominent drafting committee members, opposed the incorporation of the RCR section, remarking, “To say the least, this particular cause is uncouth, barbarous and vulgar. That the government should be abettors in the form of legalized rape is something very shocking [...]”<sup>42</sup> Renu Chakrabarti suggested utilizing this remedy as a reconciliation ground and not more,<sup>43</sup> and Lord Herschell observed, “[I]t would be monstrous to pronounce a decree for

<sup>34</sup> Section 9 of the Hindu Marriage Act 1955 states, “When either the Husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for Restitution of conjugal rights and the court, on being satisfied with the truth of the statements made in such petition and that there is no legal ground why the application should not be granted may decree Restitution of conjugal rights accordingly.”

<sup>35</sup> The Indian Divorce Act 1869, §§ 32, 33. An order of restitution of conjugal rights may also be requested by a Christian husband and wife. For the following grounds, the court would be unable to issue the decree if (1) There is cruelty to the wife or husband; (2) Either one or both of the spouses exhibit symptoms of mental illness; or (3) In the event that either of the spouses enters into a subsequent marriage.

<sup>36</sup> Section 36 of the Parsi Marriage and Divorce Act 1936 provides the following: “Suite for restitution of conjugal rights.—Where a husband shall have deserted or without lawful cause ceased to cohabit with his wife, or where a wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights and the Court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.”

<sup>37</sup> Section 22 of the Special Marriage Act 1954: “When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. [Explanation.—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.]”

<sup>38</sup> Dr. Rakesh Kumar Singh, *Textbook on Muslim Law*, 10th ed. (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2011).

<sup>39</sup> “Restitution of Conjugal Right: A Comparative Study Among Indian Personal Laws,” Indian Bar Association (n.d.), accessed May 22, 2024, <https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-indian-personal-laws/>.

<sup>40</sup> *Pallavi Bhardwaj v. Pratap Chauhan*, (2011) 15 SCC 531.

<sup>41</sup> Tahir Mahmood, *Family Law in India* (Lucknow, India: Eastern Book Company, 2023).

<sup>42</sup> Deepnainee Kaushal, “The Restitution of Conjugal Rights: An Analysis from Privacy Conundrum,” *International Journal of Law Management and Humanities* 4, no. 3 (2021): 5302–12, <https://doi.org/10.1000/IJLMH.111135>.

<sup>43</sup> Mrs. Renu Chakravarty’s Observation on the Deletion of Section 9 from the Hindu Marriage Bill (as it was then), *Lok Sabha Debates*, pt. 2, session 9th, 1955, vol. 4, 7625.

Restitution and enforce it by imprisonment. I think the law of RCR as administered in the courts did sometimes lead to results which I can only call barbarous.”<sup>44</sup>

## ORIGIN AND EVALUATION OF THE CONCEPT OF INDIVIDUAL AUTONOMY IN MATRIMONIAL LIFE

The emphasis on individual autonomy in India gained momentum with the social transformation. Subsequently, the women’s movement advocated equal status in society, particularly after its enshrinement in the Constitution of India in 1950. The Indian Constitution guarantees the fundamental right to life and personal liberty, except according to procedures established by law. This constitutional protection emphasizes the significance of individual autonomy, ensuring that neither religion, custom, nor tradition can force or bind a person against their will, as it is contrary to the constitutional framework. This principle establishes a clear boundary between personal freedoms and societal expectations, empowering individuals to make choices aligned with their values and beliefs while upholding the foundational principles of the Constitution of India.<sup>45</sup>

The right to privacy entails autonomy over one’s own body, which has been the subject of judicial interpretation where Indian courts have taken contrasting views on the matter. In the pre-independence era, the aforementioned *Rukhmabai* case created intense speculation about increasing the minimum age for marriage. There, using the power under RCR, the husband came before the court, asking it to compel his wife to return to him. As stated earlier, *Rukhmabai* became a cornerstone decision, generating tremendous public interest, which resulted in educating the community about the status of women in society. This was a case where the Bombay High Court decided that RCR doesn’t qualify with any sources of the prevailing Hindu norms and customs. It also held that the husband’s plea for RCR was incompatible and inapplicable as their marriage was never consummated.<sup>46</sup> Indeed, Judge Pinhey’s bench justified the contention as follows:

It seems to me that it would be a barbarous, a cruel, a revolting thing to do to compel a young lady, under those circumstances, to go to a man whom she dislikes so that he may cohabit with her against her will; and I am of [the] opinion that neither the law nor the practice of our courts either justified my malting [sic] such an order, or even justifies the plaintiff in maintaining the present suit.<sup>47</sup>

The judgment was overruled on appeal. However, Judge Pinhey’s observation has taken an important place in the advancement of society, which can be clearly observed in *Shakila Banu v. Gulam Mustafa*,<sup>48</sup> where the Bombay High Court rejected the husband’s plea for RCR. There, the court opined that “[t]he notion of [the] restitution of conjugal rights was a relic of antiquity when slavery or quasi-slavery was regarded as natural.” This was especially true after the Indian Constitution came into effect, guaranteeing personal freedoms and equality of status and opportunity for both men and women and granting the Indian State the authority to create special provisions for their protection and security.<sup>49</sup>

In 1975, the Supreme Court ruled in *Gobind v. State of Madhya Pradesh*<sup>50</sup> that, although the right to privacy can be extended to personal intimacies of home and marriage, it is a private space of the individual, and the law should not interfere with it. In a later case, *Nimeshbhai Bharatbhai Desai v. State of Gujarat* (“*Nimeshbhai*”),<sup>51</sup> Judge J.B. Pardiwala<sup>52</sup> of the Gujarati High Court ruled that a husband cannot be allowed to consider his wife as property because it violates her dignity. Accordingly, so that a woman’s privacy, dignity, and bodily integrity are not compromised, the husband cannot force her to engage in a sexual act without her full and free consent. In *Nimeshbhai*, the court held that “[t]he law must protect the bodily autonomy of all women, irrespective of their

<sup>44</sup> *Russell v. Russell*, [1897] A.C. 395.

<sup>45</sup> Art. 21 of the Constitution of India.

<sup>46</sup> Dr. Poonam Pradhan Saxena, *Family Law Lectures I*, 5th ed. (New Delhi: LexisNexis India Ltd., 2021).

<sup>47</sup> *Dadaji Bhikaji v. Rukhmabai*, 1885 (1885) ILR 9BOM529, para. 2.

<sup>48</sup> *Shakila Banu v. Gulam Mustafa*, AIR 1971 Bom. 166, ILR 1971 Bom.

<sup>49</sup> Maha Ali, “Restitution of Conjugal Rights under Islam,” *RSIL Law Review* II, no. I (2018).

<sup>50</sup> *Gobind v. State of Madhya Pradesh*, AIR 1975 SC 1378, 1975 2 SCC 148, 1975 3 SCR 946.

<sup>51</sup> *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, R/CR.MA/14508/2021.

<sup>52</sup> Saba, “Marital Rape: A Husband Cannot Be Permitted to Treat His Wife like a Chattel and Violate Her Dignity,” SCC Times, Case Briefs, Apr. 18, 2018, <https://www.scconline.com/blog/post/2018/04/18/marital-rape-a-husband-cannot-be-permitted-to-treat-his-wife-like-a-chattel-and-violate-her-dignity/>.

marital status.” In *T. Sareetha*,<sup>53</sup> the Andhra Pradesh High Court in 1983 issued a relatively progressive ruling, deciding that section 9 of the Hindu Marriage Act 1955 was a severe violation of the right to spousal privacy. This decision represented a step towards rectifying a feudal provision that violated the fundamental rights of individuals under the guise of protecting matrimonial alliances.

In *Harvinder Kaur v. Harmander Singh Chaudhary*,<sup>54</sup> the Delhi High Court changed its approach. In that case, the court agreed with the Indian Supreme Court’s ruling in *Gobind v. State of Madhya Pradesh*. In the *Harvinder Kaur* case, the court upheld section 9 of the Hindu Marriage Act 1955 as a provision protecting the sanctity of marriage. It differentiated sexual relations from the concept of consortium or cohabitation in marriage, holding that section 9 only requires cohabitation<sup>55</sup> and does not mandate sexual relations within a marriage. In asserting that courts lack the authority to enforce this fundamental right in the private space of individuals, the ruling restricted the right to privacy’s scope. The precedent-setting<sup>56</sup> opinion established that the right to privacy includes exercising autonomy over one’s body. Therefore, it is immensely unjust to expose an individual to the possibility of losing control over their own body, a freedom that is integral to article 21 of the Indian Constitution, which guarantees the fundamental right to live with dignity.

Recently, the previously mentioned *Ojaswa* case (still pending in the Supreme Court), has highlighted that individual dignity and the right to privacy have been blatantly violated by section 9 of the Hindu Marriage Act 1955 and section 22 of the Special Marriage Act 1954.<sup>57</sup> Though the petitioners acknowledged that the conjugal rights framework is not discriminatory in and of itself, its effect on men and women is discriminatory due to the unequal power structures that characterize Indian families. In an earlier case, *Dwarkadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co.*,<sup>58</sup> the Supreme Court ruled that any evaluation of a statute’s constitutionality must consider the statute’s actual impact on society. Therefore, the petitioners in *Ojaswa* contended that, although the laws themselves do not apply exclusively to women, the Court must evaluate the effect of the laws on society as a whole.<sup>59</sup> Moreover, regarding the right to privacy, Justice R.F. Nariman has classified the aspects of privacy as non-interference with the individual’s body, the protection of personal information, and autonomy over personal choices<sup>60</sup>. Hence, privacy protection is of the utmost importance to preserve the individual’s dignity; it safeguards personal independence and constitutes the right to be left alone.<sup>61</sup>

## OVERVIEW OF COUNTRIES THAT HAVE REMOVED RCR FROM THEIR LAWS

Some countries have observed that the RCR decree is a grievous violation of the right to equality and individual autonomy. In general, those jurisdictions have either removed it from their books of statutes or kept it in a quiet corner for reconsideration. This study only considers those countries that have removed RCR from their statutory codes.

United Kingdom and Ireland: During the first half of the 19th century, under English personal law, the RCR remedy was predominantly administered by the ecclesiastical courts.<sup>62</sup> At that time, desertion was not considered a matrimonial offense: the only recourse for a deserted spouse was to obtain an RCR decree, which compelled the deserter to return to the matrimonial consortium. The punishment for disobedience of the order was ex-communication, which led

<sup>53</sup> *T. Sareetha*, AIR 1983 SC 356.

<sup>54</sup> *Harvinder Kaur v. Harmander Singh Chaudhary*, AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187.

<sup>55</sup> Lord Goddard specified in *Thomas v. Thomas*, [1948] 2 K.B. 294, 297, “Cohabitation consists of the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, with the wife performing housewifely duties for the husband and the husband cherishing and supporting his wife as a husband should.” See also *Weatherley v. Wetherley*, [1946] 2 All E. R. 1 (II) (6); *Evans v. Evans* [1948] 1 K.B. 175 (7).

<sup>56</sup> *Justice K.S. Puttaswamy Retd. and Anr. v. Union of India*, (2017) 10 SCC 1: (2017) SC 420.

<sup>57</sup> *Ojaswa Pathak v. Union of India* (n 24).

<sup>58</sup> *Dwarkadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co.*, 1954 AIR 119, 1954 SCR 674.

<sup>59</sup> “Writ Petition (*Ojaswa Pathak*) Summary,” Supreme Court Observer (July 8, 2021), <https://www.scobserver.in/reports/union-india-restitution-conjugal-rights-writ-petition-ojaswa-pathak-summary/>.

<sup>60</sup> *Justice K.S. Puttaswamy Retd. and Anr. v. Union of India*, (2017) 10 SCC 1, See paras 335, 371.

<sup>61</sup> Ruchi Makhija, “Should Restitution of Conjugal Rights Be Removed?,” *South Asian Law Review Journal*, vol. 9 (2023): 76–85, <https://doi.org/10.55662/salrj.2023.902>.

<sup>62</sup> Dinshaw Fardunji Mulla, *Hindu Law*, 24th ed. (Gurgaon, India: LexisNexis, 2021).

up to six months' imprisonment. Later, the RCR provision was modified so that it was not punishable by imprisonment; non-compliance with an RCR order amounted to 'statutory desertion,' which allowed the spouse to obtain a decree of judicial separation.<sup>63</sup>

The Matrimonial Causes Act 1884 was replaced by the Matrimonial Causes Act 1923, which made desertion and adultery direct grounds for judicial separation. If the wife committed adultery, the husband could obtain an immediate divorce, although the same was not available for the wife. Eventually, the application of RCR became ineffectual in England, Scotland, and Ireland as described below.<sup>64</sup>

In 1969, the Law Commission proposed to abolish the remedy based on several observations. For example, restitution proceedings were employed to facilitate the reconciliation of a willing spouse and to help the willing spouse resume their marriage bond. However, if the aforementioned approach failed to achieve the desired outcome, it was unlikely that initiating legal proceedings would have a more significant impact. Sometimes, the restitution lawsuit was filed, and nothing more happened; the purpose was solely to establish grounds of desertion to obtain financial compensation. Increasingly, the Law Commission found that this remedy was rarely effective and accordingly recommended abolishing it. Ultimately, the Matrimonial Proceedings and Property Act 1970 abolished RCR in England.<sup>65</sup>

The Law Reform (Husband and Wife) (Scotland) Act 1984<sup>66</sup> was a Scottish statute that modified the law governing marriage and conjugal rights. The term 'adherence' under this act was equivalent to RCR, which was removed by section 2(1). The remedy of RCR previously permitted a spouse to ask the court to return their partner to the marital home if they had left without a valid reason. In Ireland, the RCR remedy was repealed on November 23, 1988, by the Family Law Act, 1988.<sup>67</sup>

South Africa: In South Africa, RCR was adopted in 1885 under the 31st Rule of Court (Cape).<sup>68</sup> Initially, it was enacted to be applied in two ways: in the first instance, there would be an action for RCR, and in the second, the court would be brought a measure of divorce for non-compliance with the order of the first instance. However, this legal action was entirely fictitious because the decree was issued if any desertion was committed by one of the spouses.

In an eminent incident, a husband deserted his wife for over four years, prompting her to seek a divorce before the court, believing he wouldn't contest it. However, the husband contested the suit, subjected his wife to cross-examination, and accused her of adultery. The husband never attempted or showed his willingness for a reconciliation; he had made no efforts to do so during the preceding four years of his absence. Despite the wife's repeated efforts to salvage the marriage, she ultimately sought a divorce but without seeking monetary compensation. However, the court found itself unable to compel reconciliation between the parties. The dilemma persisted because, although the husband obtained a decree of RCR against his wife, there remained the constant threat of him leaving her again.<sup>69</sup>

In many instances in South Africa, reconciliation proved unattainable, as living with a spouse with whom the marital bond had dissolved became untenable. Despite being compelled to navigate legal procedures to seek relief

<sup>63</sup> Law Reform Commission, "Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters, Ireland" (1983), 5, [https://www.lawreform.ie/\\_fileupload/reports/rjactitation.htm](https://www.lawreform.ie/_fileupload/reports/rjactitation.htm).

<sup>64</sup> Karl Hayes, 'The Matrimonial Jurisdiction of the High Court,' *Irish Jurist* 8, no. 1 (Summer 1973): 55–77, <http://www.jstor.org/stable/44026605>.

<sup>65</sup> The Law Commission, "Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights," London: Her Majesty's Stationery Office, July 24, 1969, <https://www.gov.uk/government/publications/proposal-for-the-abolition-of-the-matrimonial-remedy-of-restitution-of-conjugal-rights>.

<sup>66</sup> Law Reform (Husband and Wife) (Scotland) Act 1984, <https://www.legislation.gov.uk/ukpga/1984/15/section/2>.

<sup>67</sup> Family Law Act, 1988, <https://www.irishstatutebook.ie/eli/1988/act/31/enacted/en/html>.

<sup>68</sup> This was part of the rules and procedures governing legal proceedings in the Cape Colony during the colonial period to regulate the functioning of the courts and ensure fair and orderly proceedings including various aspects of litigation, such as filing procedures, service of documents, court appearances, evidence, and judgments.

<sup>69</sup> *Daniels v. Daniels*, 1 1958 (1) S.A. 513 (A.D.); *Van Wyk v. Van Wyk and Another*, 1962 (3) S.A. 976 (D). The latter case was first discussed in South Africa in 1962. It concerned the court's discretion to disregard the plaintiff's adultery while deciding when to grant her application for an order restoring conjugal rights. Judge Fannin said that the court's discretion to overlook the adultery of a plaintiff suing for an order for RCR can only be exercised in favor of the plaintiff where the defendant does not insist on raising such misconduct as a defense to the plaintiff's claim.

and gather evidence, achieving resolution remained elusive. Even resorting to perjury failed to secure relief, as South African courts lacked the authority to prevent its misuse. To obtain a restitution order, demonstrating the other party's intention to terminate the marriage, known as *animus deserendi*, was essential.<sup>70</sup> Courts scrutinized claims of adultery as a basis for desertion, exercising discretionary power to grant divorce in cases of malicious desertion. Van Zyl<sup>71</sup> termed this process a fictitious preliminary action for divorce, sometimes unnecessary, as societal remedies often facilitated marital reconciliation without legal intervention.<sup>72</sup> When voluntary cohabitation was unviable, court intervention appeared futile in preserving marital bonds. Moreover, the courts' ineffectiveness in enforcing orders compounded the flaws and injustices of the system. Ultimately, section 14 of the Divorce Act, 1979 abolished RCR.<sup>73</sup>

Australia: The Family Law Act 1975 was introduced in Australia with multiple reformative changes. For instance, it made changes regarding adultery, which is no longer a crime or a ground for divorce. The proceedings for the decree of RCR have been repealed. In other instances, one of the contradictory sections was still presented under the same act (i.e., section 114[2]).<sup>74</sup> The section was related to the marital obligation to perform marital service or to render conjugal rights through an injunction granted by the court.<sup>75</sup> Therefore, the Law Reform Commission of Australia strongly recommended its abolition because it violated the modern concept of equality and autonomy in marital life.<sup>76</sup> Consequently, the Family Law Amendment (Family Violence and Other Measures) Act 2018 repealed the above-mentioned section.<sup>77</sup> The present practices establish if either spouse wants a divorce, they must prove an 'irretrievable breakdown' of the marriage by demonstrating their separation for at least twelve months before filing the divorce petition.<sup>78</sup>

Although some Commonwealth countries have repealed RCR from their codes of law, India still upholds it as a matrimonial remedy. Since there have been increasing calls to reform family law to promote equality and gender justice, RCR remains in effect despite condemnations of it limiting autonomy and liberty. The hierarchical nature of family norms often infringes upon individuals' autonomy, exerting significant societal influence.<sup>79</sup> RCR, in particular, has been a source of harassment and abuse between spouses. In Muslim society, Islamic laws permit husbands to sue for RCR if their wives cease to cohabit, but the reverse is not true, except in cases where the husband fails to pay the dower money.<sup>80</sup> Additionally, a husband loses entitlement to an RCR decree if he takes a second wife or falsely accuses his wife of adultery.<sup>81</sup> Conversely, if the wife refuses to fulfill marital obligations or is absent from conjugal life, the husband may avail himself of the said decree. During court proceedings related to the RCR decree, the burden of proof is placed on the petitioner before transitioning to the

<sup>70</sup> *Van Vuuren v. Van Vuuren*, 1959 (3) S.A. 765 (A.D.).

<sup>71</sup> Casper Hendrik Van Zyl, *The Theory of the Judicial Practice of the Colony of the Cape of Good Hope, and of South Africa Generally, with Suitable and Copious Practical Forms Subjoined to and Illustrating the Practice of the Several Subjects Treated of* (London: W. Clowes & Sons, 1902), 482–91.

<sup>72</sup> J.M. Didcott, "Plaintiff's Adultery as a Defence to an Action for Restitution of Conjugal Rights," *South African Law Journal* 82, no. 2 (May 1965): 164–68.

<sup>73</sup> Section 14 of The Divorce Act, 1979 (Act no. 70 of 1979): "It shall not be competent for a court to issue an order for the restitution of conjugal rights or for judicial separation."

<sup>74</sup> As per section 114(2), the court can "make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights."

<sup>75</sup> Family Law Act 1975, <https://www.legislation.gov.au/Details/C2020C00374>. Under Part I of the Act, Section 8(2) of the Proceedings for a decree of restitution of conjugal rights, of jactitation of marriage or of judicial separation shall not be instituted or continued after the commencement of this Act.

<sup>76</sup> NSW Law Reform Commission, "Family Violence—A National Legal Response," ALRC Report 114, NSWLRC Report 128, Australia: Ligare Pty. Ltd. (Oct. 2010), [https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114\\_WholeReport.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114_WholeReport.pdf).

<sup>77</sup> Family Law Amendment (Family Violence and Other Measures) Act 2018, <https://www.legislation.gov.au/C2018A00097/latest/text>.

<sup>78</sup> "Divorce," Family Relationships Online, Australian Government, Jan. 28, 2022, <https://www.familyrelationships.gov.au/separation/divorce>.

<sup>79</sup> Mattison Mines, "Conceptualizing the Person: Hierarchical Society and Individual Autonomy in India," *American Anthropologist* 90, no. 3 (Sep. 1988): 568–79, <https://doi.org/10.1525/aa.1988.90.3.02a00030>.

<sup>80</sup> Asaf A.A. Fysee, *Outlines of Muhammadan Law* (Oxford: Oxford University Press, 2008), 116.

<sup>81</sup> Dinsha Fardunji Mulla, *Mulla Principles of Mahomedan Law*, 23rd ed. (Gurgaon, India: LexisNexis, 2021).

respondent. This procedural approach ensures thorough consideration of the case's merits and equitable treatment of both parties involved. It also ensures careful consideration of the parties' eligibility and circumstances.<sup>82</sup> Ultimately, upon satisfaction with the presented facts, it is up to the Indian courts to decide who must obey an RCR decree.<sup>83</sup>

### THE IMPORTANCE OF RCR VIS-À-VIS THE STATE'S AGENCY

The importance of RCR can be traced back to the codification of the Hindu Code Bill 1948, the Special Marriage Act 1954, and the Hindu Marriage Act 1955. The drafting committees of the Hindu Code Bill and the Hindu Marriage Act justified the annexation of RCR under Hindu personal law based on the social structure of Hindus, which was sacramental and where divorce was not recognized. The idea of RCR was taken as a reformative step because divorce is an extreme step, where RCR works as a preliminary remedy that can serve the public good and secure the marriage bond.<sup>84</sup>

Relying on the above notion, the Joint Secretary of the Ministry of Law and Justice (central government) filed a counter affidavit opposing the petition presented in the aforementioned *Pathak* case (related to the constitutional validity of RCR). The central government submitted that, even though *K.S. Puttaswamy* (also discussed above) held that the right to privacy was a fundamental right that could be claimed against the State, the holding has no merit in the context of RCR because privacy rights are not absolute but subject to restrictions.<sup>85</sup> The counter affidavit also highlighted that the RCR remedy is positive, valuable, and practical because of its gender-neutral characteristics. Specifically, the document claimed that RCR had helped to solve marital problems that sprouted from minor differences between spouses.<sup>86</sup> Eventually, the counter affidavit concluded that the RCR remedy was intended to provide an opportunity to preserve a marriage, and it is a relatively soft remedy that benefits the married couple by restoring their broken home and giving them a healthy and satisfying life.<sup>87</sup>

The judiciary's perception regarding the constitutional validity of RCR was raised earlier before the Delhi High Court; there, the court abrogated an Andhra Pradesh High Court (APHC) judgment, which had held that RCR is against constitutional principle and was declared null and void. However, in contrast, the Delhi High Court held that section 9 of the Hindu Marriage Act 1955 only provided an opportunity for reconciliation. Based on this remedy, the court wouldn't compel the spouses in the case to have sexual intercourse. Instead, a remedy was sought to uphold the institution of marriage. The court criticized the Andhra Pradesh High Court's judgment as follows: First, the court indicated that it had misunderstood the goal of section 9 of the Hindu Marriage Act. Second, the reason behind the declaration of unconstitutionality of section 9 was based on the view that the State has no power to curtail a person's right to autonomy in their own body, which is not an absolute right. Third, the Andhra Pradesh High Court's presumption about the nature of Hindu marriage (i.e., marriage is not a sacrament but a contract) is also not relative to the Indian Hindu familial context. Consequently, in the *Harvinder Kaur* case, the Delhi High Court upheld the constitutionality of section 9 of the Hindu Marriage Act.

Eventually, the Supreme Court of India resolved these two contradictory verdicts of the two high courts in 1984 in *Saroj Rani v. Sudharshan Kumar*.<sup>88</sup> Relying on the Delhi High Court in the *Harvinder Kaur* case, the Court upheld the constitutionality of section 9 of the Hindu Marriage Act. The apex court decided that section 9 is appropriate for Indian society and that the institution of marriage is inherent in maintaining societal structures. According to the Supreme Court, RCR serves a social purpose by giving new life to a family and working to restore the

<sup>82</sup> Justice Ranganath Misra and Dr. Vijeendar Kumar, *Mayne's Treatise on Hindu Law & Usage*, 16th ed. (New Delhi: Bharat Law House, 2008).

<sup>83</sup> Hindu Marriage Act 1955, § 23(2).

<sup>84</sup> Dr. Babasaheb Ambedkar, "Writings and Speeches," 17 vols., Ministry of Social Justice & Empowerment, Govt. of India, accessed July 5, 2024, [https://archive.org/details/Dr.BabasahebAmbedkarWritingsAndSpeechespdfsAllVolumes/Volume\\_14\\_01/page/n671/mode/1up?q=restitution+](https://archive.org/details/Dr.BabasahebAmbedkarWritingsAndSpeechespdfsAllVolumes/Volume_14_01/page/n671/mode/1up?q=restitution+).

<sup>85</sup> Ashish Tripathi, "Centre Defends Restitution of Conjugal Rights in SC, Says It's a 'Practical Matrimonial Remedy,'" *Deccan Herald*, Sep. 6, 2022, <https://www.deccanherald.com/national/centre-defends-restitution-of-conjugal-rights-in-sc-says-its-a-practical-matrimonial-remedy-1142796.html>.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ojaswa Pathak v. Union of India* (n 24).

<sup>88</sup> *Saroj Rani v. Sudharshan Kumar*, 1984 AIR SC1562, 1985 SCR (1) 303.

marriage. In paragraph 91 of its judgment, the Court clearly stated that it is not the judiciary's role to declare section 9 unconstitutional or that the remedy should be struck down; only the legislature should do this.<sup>89</sup> Though the central government's stance has not been to eliminate RCR, it has clarified that the right to privacy upheld in *Puttaswami* is not absolute but subject to reasonable restriction. According to the Indian government, the RCR remedy has protected the institution of marriage and preserved family kinship.<sup>90</sup>

### THE MISUSE OF RCR AND ITS IMPACT ON INDIVIDUAL AUTONOMY

In the current social landscape, the constitutional paradigm highly values and protects personal autonomy. The ongoing debates about marital obligations and the legal recourse of RCR regarding the practicality and potential abuses of individual autonomy and personal liberty are controversial subjects. Though the remedy is gender-neutral, the husband and wife can both file a petition against the other. However, the judicial trend before 1975 often granted RCR decrees favoring the husband.<sup>91</sup> In traditional societal norms, a wife's first duty was to submit herself to her husband to fulfill her marital obligations. The wife was expected to comply with her husband's wishes to reside in the same matrimonial household. Likewise, it was also essential for the husband to remain with his wife to assist her in day-to-day life.

However, the position started to change, as Judge A.B. Rohatgi argued in the *Harvinder Kaur* case that marriage and cohabitation are not all about sex or causal commerce but are marital obligations between husbands and wives. He relied on one ruling decided nearly two hundred years ago, *Forster v. Forster*, in which Lord Stowell said, "The Court can decree cohabitation; it cannot decree sexual intercourse."<sup>92</sup> Thus, the Delhi High Court later acknowledged in *Swaraj Garg v. R.M. Garg* that if couples are working in different cities, such a situation could not be classified as a case for desertion.<sup>93</sup> Here, the court considered the plight of the working woman, and it directed the husband to reside with the wife adjacent to her workplace.<sup>94</sup> In *Sushila Bai v. Prem Narayan*,<sup>95</sup> the Madhya Pradesh High Court found that the husband's abandonment and unresponsive behavior towards his wife were sufficient proof of withdrawal from her life, and the court granted the wife's petition for RCR.

Indeed, RCR is also used as a simultaneous option; while one spouse seeks maintenance, the other files for RCR.<sup>96</sup> There must be a valid justification for exemption from the law to avoid legal sanctions. For instance, if the respondent can provide evidence of legitimate reasons (adultery, cruelty, or desertion) for withdrawal from their spouse, it can serve as a strong defense against a restitution petition. It is important to note that the intention to 'withdraw from society' implies desertion. Otherwise, it will not be considered a withdrawal, and the court will refuse to compel the respondent to return to the marital home.

A court may attach the respondent's property for non-compliance per Order 21, rules 32 and 33 of the *Code of Civil Procedure*.<sup>97</sup> This remedy is often used unjustly as a shield against divorce or to deny alimony payments,<sup>98</sup>

<sup>89</sup> Amrita Atul Deshmukh, 'Constitutional Validity and Ethicalness of Restitution of Conjugal Rights in India,' *Acclaims*, vol. 4 (Dec. 2018).

<sup>90</sup> *Ibid.*

<sup>91</sup> Balwinder Singh, "Wife's Right to Employment Vis-a-Vis Husband's Conjugal Rights Under Hindu Law: A Critique," *NUALS Law Journal*, vol. 8 (2014): 87–100.

<sup>92</sup> *Forster v. Forster* (1790) 1 Hag. Con. 144 (3)

<sup>93</sup> *Swaraj Garg v. R. M. Garg* AIR 1978 Del. 296.

<sup>94</sup> Balwinder Singh, "Wife's Right to Employment Vis-a-Vis Husband's Conjugal Rights Under Hindu Law: A Critique," *NUALS Law Journal* 8 (2014): pp. 87–100

<sup>95</sup> *Sushila Bai v. Prem Narayan*, AIR 1986 MP 225.

<sup>96</sup> *Sh. Amit Chopra v. Smt Poojaa*, AIR 2012 P&H 112011, SCC OnLine P&H 6859, *Shri.Satish Saha v. Smti. Madhabi Saha*, July 10, 2019, High Court of Meghalaya FA. No. 1 of 2016.

<sup>97</sup> Rule 32, Order 21, *Code of Civil Procedure* (1908), Decree for specific performance for restitution of conjugal rights or for an injunction, (1)Where the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for an injunction has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced in the case of decree for restitution of conjugal rights by attachment of his property or in the case of decree for specific performance of contract or for an injunction by his detention in the Civil prison or by attachment of his property or by both.

<sup>98</sup> *Shri Satish Saha v. Smt. Madhabi Saha* (Aug. 1, 2019).

irrespective that the RCR remedy is employed against someone's free will. The Law Commission of India defined RCR as serving a social purpose that can aid the court in determining whether the marriage has irretrievably broken down or if there is a possibility of reconciliation. However, this situation can lead to social and psychological stigmas for women who are unemployed, less knowledgeable, and living in rural areas. Many do not have sufficient income to pursue legal action, and/or they have limited knowledge about court proceedings. In *Pushpa Kumari v. Parichhit Pandey*,<sup>99</sup> the wife filed a criminal case against her husband and in-laws under section 498A of the *Indian Penal Code* 1860 and the Dowry Prohibition Act 2005. In retaliation, the husband filed a petition for RCR. If a restitution decree had been granted, it could have nullified the effect of the criminal proceeding that the wife instituted. Hence, the application was dismissed. Judge H.S. Prasad observed the following:

In the present society, particularly when parties are middle-class persons, it is very difficult to perform the marriage of the daughter, and when a marriage has been solemnized, then it will be more difficult for the parents of the daughter to allow marriage to break because of the difficulties that the parents of the daughter face in settling or performing marriage and they will never try that their daughter be allowed to break her marriage with her husband and they will try to ask her to bear the trouble till she can bear but when water goes high above the head, then in such a situation even [a] daughter or bride revolts and refuses to live with her husband and then [the] parents come to their rescue being father and mother of the daughter.<sup>100</sup>

Flavia Agnes conducted a study on the Family Courts of Maharashtra, Karnataka, Andhra Pradesh, and West Bengal between 2003 and 2005. The investigation revealed that wives tended to file more petitions for divorce, judicial separation, or annulment than their husbands, while the ratio was reversed when it came to RCR applications. It is customary to seek an RCR decree if the wife seeks maintenance from her husband, which was also reflected in Agnes's study.<sup>101</sup> However, there have been a few instances where the ratio of cases has gone down a different path, which indicates that the objective of RCR is moving in the wrong direction.

## CONCLUSION AND RECOMMENDATIONS

The analysis confirms the Indian courts' prioritization of safeguarding the institution of marriage over individual autonomy. Nevertheless, the judiciary has concurrently taken steps to uphold the right to privacy and the bodily autonomy of married women, affirming that marriage does not diminish a woman's sexual freedom and choice. Thus, the following question arises: How does the court mandate the cohabitation of two adults against their will? In *Joseph Shine v. Union of India*,<sup>102</sup> while striking down India's archaic adultery law<sup>103</sup>, the Supreme Court held that adultery, as defined under section 497 of the *Indian Penal Code*, is manifestly arbitrary and discriminatory because it is liable to deny the constitutional guarantees of dignity, liberty, privacy, and sexual autonomy. Marriage—whether it be a sacrament or contract—does not result in one spouse's cession of that autonomy to another<sup>104</sup>. As Justice D.Y. Chandrachud observed, autonomy, in matters of sexuality, is intrinsic to a dignified human existence.<sup>105</sup> In *Kharak Singh v. State of UP*<sup>106</sup> and *Govind v. State of MP*,<sup>107</sup> the Court explored the term 'life' as enshrined in article 21 of the Indian Constitution in the broadest sense and concluded that the right to privacy and human dignity is an integral part of article 21. The Court also determined in the

<sup>99</sup> *Pushpa Kumari v. Parichhit Pandey*, 2005 (1) BLJR 486, 2005 (1) JCR 134 Jhr.

<sup>100</sup> *Ibid.*, para. 12.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

<sup>103</sup> *Indian Penal Code* (1860), § 497: Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offense of rape, is guilty of the offense of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case, the wife shall not be punishable as an abettor.

<sup>104</sup> Para. 60.

<sup>105</sup> Para. 36.

<sup>106</sup> *Kharak Singh v. State of UP*, 1963 AIR 1295, 1964 SCR (1) 332.

<sup>107</sup> *Govind v. State of MP*, 1975 AIR 1378.

*Govind* case that, although the Indian Constitution does not directly guarantee the right to privacy, it does imply this right based on article 21. Nevertheless, the RCR remedy is fragmentary and infringes on the right to privacy.

Countries that have removed the RCR remedy from their legal codes had mainly experienced a decline in RCR petitions, or they were attempting to ensure individual liberty. In India, the Supreme Court has the protection of the institution of marriage in mind. Still, if the Court has faced a choice between marital rights and individual autonomy, the Court has favored personal liberty. The Court has stated that marriage does not mean a license exists to do anything with the spouse.

If the above is correct, then the legal compulsion of the attachment of property for failure to comply with an RCR decree, through Order 21, rules 32 and 33 of the *Code of Civil Procedure*, could place an extra burden on the spouses. Thus, the Court can avoid imposing any legal compulsion before pronouncing the decree. If we look at today's scenario, the number of cases concerning RCR is immensely high, which becomes a challenge for the Indian judiciary in terms of quantity. In contrast, the RCR decree is a coercive remedy where women are predominantly affected.<sup>108</sup> Eventually, this remedy is redundant and contributes to increasing numbers of matrimonial disputes on court dockets.

The RCR remedy has undoubtedly been abused. Renu Chakrabarty<sup>109</sup>, one of the prominent parliamentary committee members during the enactment of the Hindu Marriage Act 1955, suggested reconciliation through mediation should be introduced instead of restitution. However, this option is missing from the Hindu Marriage Act 1955; there is no provision for reconciliation through mediation. Therefore, the provisions in the act should be strengthened in a way that will resolve the dispute through compassion rather than compulsion and will contribute to the family's well-being.

Overall, marriage is not only based on performing customs or rituals but also on the freedom of choice of two individuals who agree to share their private space. Consequently, compelling two people to stay together who have decided not to live together is futile; it is better to respect the spouses' decisional autonomy<sup>110</sup> to remain apart in a dignified manner by taking recourse from a court of law. Indeed, the liberty of persons should be an utmost priority;<sup>111</sup> we should make it a central theme to understand the values of bodily autonomy and consider it an integral part of one's well-being, which is deeply connected with societal development. Therefore, the law should be adopted and modified in such a manner that it will be ready to meet society's needs. The responsibility is now upon India's law-making body to take revolutionary measures and explore alternatives to preserve individual privacy while still maintaining the sanctity of the Indian family structure.

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