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Protecting Privacy: A Case Against State Interference Through Restitution Of Conjugal Rights

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transformed our understanding of privacy, autonomy, and equality; significantly so

post the Supreme Court's *Puttaswamy* ([https://www.livelaw.in/breaking-right-privacy-](https://www.livelaw.in/breaking-right-privacy-fundamental-right-sc/)

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[puttaswamy-ors-vs-union-of-india-ors?searchmultiquery=667476](https://www.livelaw.in/breaking-right-privacy-fundamental-right-sc/)) judgement. In

Harmander Singh Choudhry on 15 November, 1983&text=JUDGMENT Avadh Behari Rohatgi, J,for restitution of conjugal rights.) also adopted this view and held that the restitution of conjugal rights is an important remedy to protect the institution of marriage. The Delhi High Court rejected privacy considerations by stating that a decree of RCR was not the "*starkest form of governmental intervention into marital privacy*" since it merely aims to restore cohabitation and does not enforce sexual intercourse. As I argue below, this reasoning raises questions about individual autonomy. However, the Delhi High Court's rationale was accepted by the Supreme Court in *Saroj Rani vs. Sudarshan Kumar Chadha* (https://privacylibrary.ccgnlud.org/case/smt-saroj-rani-vs-sudarshan-kumar-chadha?searchuniqueid=192224)_(1984), where the apex Court upheld the constitutionality of RCR and reiterated that the right to cohabitation is "*inherent in the very institution of marriage itself.*"

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This view of RCR — to preserve the institution/ sanctity of marriage — creates tensions with the objective of the State to protect individual rights. An RCR decree interferes with the right to privacy and autonomy by compelling an individual to cohabit with their spouse against their will. This may especially be true after the articulation of the right to privacy by the Supreme Court in *Puttaswamy I*. The decree of RCR creates an unwanted intrusion into a person's personal life by denying them autonomy over where they live, and also potentially on the sites of sexual and reproductive decision making. Any analysis of RCR must recognise the power asymmetry (https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.878.579&rep=rep1&type=pdf) within domestic relations that pervasively results (https://www.thehindu.com/data/data-in-eight-states-including-karnataka-and-maharashtra-domestic-violence-rose-in-2019-20/article37927294.ece) in women being subject to physical and sexual violence at home. Thus, contrary to the reasoning given by courts in *Harvinder Kaur* and *Saroj Rani* by compelling women to

cohabit with men they have deserted, a decree of RCR may place women at significant risk of domestic violence, economically compromised living conditions, and non-consensual sexual intercourse.

The Andhra Pradesh High Court in *T Sareetha*

(<https://indiankanoon.org/doc/1987982/>) *vs. Venkata Subbaiah*

(<https://indiankanoon.org/doc/1987982/>) in 1983 recognised that the grant of an RCR decree would amount to an interference of the State into the private sphere, compelling cohabitation or even indirectly, sexual intercourse. The High Court found that this interference of the State through RCR violated the right to privacy, autonomy, and dignity of the individual against whom the decree was sought by '*transferring the decision to have or not have marital intercourse from the individual to the State*'. This decision was overruled by the Supreme Court's *Saroj Rani* decision in 1984. While the *Puttaswamy* judgement in 2017 did not expressly refer to *Sareetha*, all nine judges broadly adopted the approach taken in the *Sareetha* judgement, adopting a conception of privacy that recognises its basis in individual autonomy and dignity.

In *Puttaswamy I*, the Supreme Court ruled that individual autonomy, that recognises the ability of individuals to control vital aspects of their life (including reproductive rights, sexual orientation, gender identity), is an intrinsic part of the right to privacy guaranteed under Article 21 of the Constitution. By this reasoning, a decree of RCR does not account for the right to autonomy of an individual and violates their right to privacy by legally compelling the individual to cohabit despite them making a conscious choice to separate from their spouse.

In recent years, there has been a shift in the thinking of courts, where the right to individual privacy and autonomy is prioritised as opposed to protection of the institution (and specific conceptions of that institution) of marriage. For instance, in *Joseph Shine* (<https://www.livestock.com/patriarchy-paternalism-underpinnings-of-section-497-inequity-chandrabud-in-adultery-judgment-read-judgment/>)

- ii. there is a rational nexus between the proper purpose and the measure adopted to achieve it and there are no alternative measures which would achieve the purpose but are less restrictive of rights (necessity); and
- iii. the restriction on the constitutional right must be proportionate to the purpose set out by the State (balancing or proportionality).

Firstly, it must be noted that, as observed by the Supreme Court in *Saroj Rani*, the stated purpose of the measure is protecting the institution of marriage. As stated above, in *Joseph Shine* the Supreme Court rejected the State's argument that protecting the institution of marriage was a proper purpose where the State's measure protected "*a notion of marriage that is one sided and denies agency to women*". In this context, RCR only protects a notion of marriage where individuals cohabit and engage in sexual intercourse, denying agency to individuals and violating individual autonomy. Secondly, the decree of RCR should have a rational nexus with the aim of protecting the institution of marriage. In this regard, it is relevant to note that, in certain instances (<https://indconlawphil.wordpress.com/2022/01/19/the-marital-rape-exception-case-two-constitutional-issues/>), individuals routinely file RCR cases *expecting* non-compliance by the other party, using this non-compliance with the RCR decree as a ground for divorce. Thus, the historically dominant objective of the State of "protecting" the institution of marriage through the positive remedy of RCR may also not be satisfied.

Even if RCR furthers the State's aim of protecting marriage, it would need to pass the third prong of the proportionality test, i.e., the State must meet the objective of the law through the 'least restrictive measure'. The State could resort to alternate measures, similar to the ones observed under divorce petitions; an order of mediation or a 'cooling off' period provisioned in cases of divorce with mutual consent furthers the aim of protecting the institution of marriage without violating individual rights.

However, in a decree of RCR there persists a violation of an individual's privacy,

The fourth part of the proportionality test emphasises the need to have a balance between the interest of the State and the rights of individuals. As stated earlier, the infringement of individual rights through an RCR decree creates severe consequences that violate the right to privacy and autonomy of an individual, including putting women in particular, at risk of harm. Thus, the gravity of the rights violation arguably outweighs the State interest of protecting marriage, especially since the State aim is often not met and the decree becomes a ground for divorce.

The application of the test of proportionality by Indian courts has garnered criticism (<https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-Proportionality-in-India-1.pdf>) as being deferential to the State. However, even with this deferential application, as demonstrated above, RCR would likely not pass the four-part test of proportionality endorsed by the courts in *Modern Dental College* and *Aadhaar*.

In the post-Puttaswamy era, various High Courts (<https://privacylibrary.ccgnlud.org/case-tracker>) have recognised the autonomy and dignity of women within marriage under the fundamental right to privacy. For instance, in a recent right to abortion case, the High Court of Kerala (<https://www.lawyerservices.in/Neethu-Narendran-and-Another-Versus-State-of-Kerala-Represented-by-Secretary-To-Government-Department-of-Health-and-Family-Welfare-Thiruvananthapuram-and-Others-2020-04-30>) relied on *Puttaswamy I* and held that a woman's autonomy of body and mind with respect to reproductive decisions are part of the right to privacy. As discussed above, the High Court of Karnataka, (https://www.livestorm.com/pdf_upload/89-hrishikesh-sahoo-v-state-of-karnataka-23-mar-2022-412964.pdf) in its recent decision, while allowing rape charges against the husband, acknowledged that the exception of marital rape stems from an archaic notion of marriage where the wife was considered property. On similar grounds, one may argue that RCR should be considered invalid since it is

based on the outdated notion of marriage where the wife was considered the property of the husband and had no individual autonomy of her own. As noted above, it is also incompatible with the test of proportionality.

On 30 December, 2021, the Gujarat HC observed (<https://www.livelaw.in/news-updates/restitution-conjugal-rights-cant-force-wife-cohabit-husband-court-decree-gujarat-high-court-188543>) that an RCR decree could not force a woman to cohabit with her husband. The court recognised that a decree of RCR needs to consider both the parties' and not solely the 'right of the husband'. Further, it opined that the very fact that there exists an option given to not comply with the RCR decree under the Civil Procedure Code indicates that the court cannot force a woman to cohabit against her will. The court further laid down certain grounds under which a person could refuse to comply with an RCR decree including cruelty, adultery, and failure of the husband in performing marital obligations. Although this decision seems to encourage considering the rights of women in a marital relationship - it fails to reaffirm the right to privacy and autonomy of the subject of the decree against a law that is effectively discriminatory. It grants power to the courts to decide on a case-to-case basis whether the right can be granted, which could lead to a potential violation of individual rights given the nature of this provision.

Striking down RCR provisions does not mean that there must be a complete embargo on the interference of the State into marriage - for example, the power asymmetry in domestic relationships necessitates the enforcement of laws against domestic violence and most likely requires the criminalisation of marital rape. However, taking into consideration the constitutional scrutiny of laws against the backdrop of State interference and right to privacy, RCR may not stand the test of constitutionality. Currently, a petition (<https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-decide-validity-of-provisions-governing-restitution-of-conjugal-rights/articleshow/68279688.cms?from=mdr>) challenging the constitutionality of

No. 17 of 2017 (https://www.supremecourt.in/getting-there-with-web-push-notifications-in-2017)
RCR is pending before the Supreme Court if the above arguments are considered by the court, RCR may be struck down on the grounds that it violates the right to privacy.

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In a significant decision earlier this month, the Bombay High Court revisited a frequently overlooked provision of the Trade Marks Act, 1999, namely the proviso to Section 20(1). The case, *Yamaha Hatsudoki Kabushiki Kaisha v. The Registrar of Trade Marks*[1], challenges not just a refusal order but the manner in which trademark examiners approach...

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