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The Decree That Cannot Command Consent: Restitution of Conjugal Rights and the Penalisation of Sexual Refusal in India

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ABSTRACT

Restitution of conjugal rights (RCR) under Section 9 of the Hindu Marriage Act, 1955 and its analogues allows a spouse to obtain a decree directing a withdrawn partner to resume cohabitation. Indian courts maintain that such a decree does not compel sexual intercourse. This paper tests that claim and asks how far RCR can legitimately attach adverse legal consequences to a spouse's refusal of consent to sexual relations.

The paper traces the remedy from the English ecclesiastical courts to Section 9, maps the sanctions that follow non-compliance with a decree, and reads T. Sareetha, Harvinder Kaur and Saroj Rani against the post-Puttaswamy jurisprudence on privacy, dignity and sexual autonomy. It also examines the parallel route by which persistent refusal of sex is treated as matrimonial cruelty, and compares jurisdictions that have abolished the remedy.

Applying the four-limb proportionality test, the paper argues that no coercive or punitive consequence can legitimately attach to sexual refusal as such. The law may, at most, treat a sustained and unexplained withdrawal from shared life as evidence of breakdown when a spouse seeks dissolution. The paper proposes statutory clarification that a decree confers no claim to sexual relations, repeal of property attachment as a mode of execution, and the eventual replacement of RCR with a conciliation-centred procedure.

Keywords: *restitution of conjugal rights; sexual autonomy; consent; marital rape exception; Article 21; proportionality; Hindu Marriage Act, 1955.*

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1. Introduction

1.1 Background

Section 9 of the Hindu Marriage Act, 1955 (HMA) allows a court to decree restitution of conjugal rights where a spouse has, "without reasonable excuse, withdrawn from the society of the other". Near-identical remedies sit in Section 22 of the Special Marriage Act, 1954 (SMA), Sections 32–33 of the Indian Divorce Act, 1869 and Section 36 of the Parsi Marriage and Divorce Act, 1936, and the remedy survives in uncodified form in Muslim personal law. Uttarakhand's Uniform Civil Code of 2024 carried it forward almost verbatim in Section 21. In each, the State orders one adult to resume living with another.

The difficulty lies in the word "conjugal". In T. Sareetha v. T. Venkata Subbaiah (AIR 1983 AP 356), the Andhra Pradesh High Court held that the decree transfers to the State the choice of whether, when and by whom a woman's body is sexually used. The Delhi High Court in Harvinder Kaur v. Harmander Singh Choudhry (AIR 1984 Del 66) and the Supreme Court in Saroj Rani v. Sudarshan Kumar Chadha ((1984) 4 SCC 90) replied that the decree aims at cohabitation and consortium, not at intercourse. The Union repeated that reply in its counter-affidavit in Ojaswa Pathak v. Union of India (WP (C) No. 250 of 2019): the remedy, it said, aims at cohabitation "and not merely sexual intercourse" (The Leaflet 2022). The word "merely" concedes the point this paper presses. Sexual relations sit inside the remedy's object, even if they are not the whole of it.

The question is now live on three fronts. Ojaswa Pathak, which challenges Section 9 HMA, Section 22 SMA and Order XXI Rules 32–33 of the Code of Civil Procedure, 1908 (CPC), has been pending since 2019. On 9 September 2026, a three-judge bench directed that the challenge to the marital rape exception be listed for final hearing, with Bagchi J accepting that marriage does not extinguish individual autonomy (Bar & Bench 2026). And in Rina Kumari v. Dinesh Kumar Mahto (2025 INSC 55), the Supreme Court held that a wife's non-compliance with a restitution decree does not by itself disqualify her from maintenance.

1.2 Research Question

This paper asks: to what extent can restitution of conjugal rights (RCR) legitimately penalise a spouse's refusal of consent to sexual relations? "Penalise" is used in a functional sense. It covers every adverse legal consequence the law attaches to refusal: the coercive command of the decree itself; execution by attachment of property; non-compliance as a ground of divorce; loss of maintenance; and the treatment of refusal as cruelty or desertion in fault-based litigation.

1.3 Central Argument

The paper contends that no coercive or punitive consequence can legitimately attach to the refusal of sexual consent as such. The law may legitimately notice something different: that a shared life has ended. It may let that fact ground a neutral, no-fault dissolution. What it may not do is convert a refusal of sex into a breach of duty, a liability or a forfeiture.

1.4 Methodology and Structure

The study is doctrinal and comparative, with a normative evaluation under the proportionality standard adopted in Justice K.S. Puttaswamy (Retd.) v. Union of India ((2017) 10 SCC 1). Part 2 traces the remedy's origins. Part 3 maps its sanctions. Part 4 asks whether the decree reaches sexual relations. Part 5 reads that question against the post-2017 constitutional jurisprudence. Part 6 examines the parallel route through cruelty. Part 7 compares jurisdictions that abolished the remedy. Part 8 applies the proportionality test, and Parts 9 and 10 set out reform proposals and conclusions.

2. Origins: From Coverture to Section 9

2.1 The English Remedy and the Doctrine of Coverture

RCR is a transplant, not an indigenous institution. It was developed by the English ecclesiastical courts as a suit to compel a deserting spouse to return, enforced first by excommunication and later by imprisonment. Its premise was coverture: on marriage the wife's legal personality merged into the husband's, and her body was treated as part of the consortium he could claim.

The same premise produced the marital rape exemption. Hale's Historia Placitorum Coronae (1736) declared that a husband could not be guilty of raping his wife because, by the marriage contract, "the wife hath given up herself in this kind unto her husband, which she cannot retract" (Hale 1736, vol. 1, 629). RCR and the exemption are therefore siblings. One denies that marital sex can be non-consensual; the other supplies a civil procedure for restoring access to it.

2.2 Abolition in England

England began dismantling the remedy in the nineteenth century. The Matrimonial Causes Act 1884 abolished imprisonment for disobedience and instead treated non-compliance as desertion. In R v Jackson [1891] 1 QB 671, the Court of Appeal held that a husband could not seize and confine a wife to enforce his conjugal rights. The Law Commission of England and Wales then recommended abolition (Law Commission 1969), and Section 20 of the Matrimonial Proceedings and Property Act 1970 abolished the remedy.

2.3 Transplantation into India

In India, colonial courts transplanted the remedy without legislative debate. The Privy Council in Moonshee Buzloor Ruheem v. Shumsoonnissa Begum ((1867) 11 MIA 551) treated it as available under Muslim law, and High Courts extended it to Hindus. Dadaji Bhikaji v. Rukhmabai ((1885) ILR 9 Bom 529) became its defining case. Rukhmabai, married as a child, refused to join her husband. The litigation ended with her facing imprisonment for non-compliance before a settlement was reached (Chandra 2008). The case showed, at the remedy's Indian origin, that its real target was a woman's refusal.

2.4 Codification and Proposals for Reform

Codification entrenched rather than questioned the remedy. Parliament copied it into Section 22 SMA and Section 9 HMA despite objections in the Lok Sabha that it should be deleted (Sarker and Biswas 2024). The Hindu Marriage (Amendment) Act, 1964 converted non-compliance into a ground of divorce available to either spouse. The Marriage Laws (Amendment) Act, 1976 shortened the period of non-compliance to one year and placed on the withdrawing spouse the burden of proving reasonable excuse. Agarwala (1970) had already pleaded for abolition, and the Law Commission's 2018 Consultation Paper on Reform of Family Law recommended deleting Section 9 HMA, Section 22 SMA and Section 32 of the Indian Divorce Act (The Leaflet 2022).

Table 1. Milestones in the development of restitution of conjugal rights

Year	Development	Bearing on sexual refusal
1736	Hale's doctrine of irrevocable marital consent	Treats the wife's consent to sex as given once, at marriage
1867	Moonshee Buzloor Ruheem (Privy Council)	Imports RCR into Indian personal law
1885–88	Dadaji Bhikaji v. Rukhmabai (Bombay High Court)	A woman's refusal met with the threat of imprisonment
1891	R v Jackson (Court of Appeal, England)	Husband cannot confine wife to enforce conjugal rights
1955	Section 9 HMA enacted	RCR codified for Hindus

Year	Development	Bearing on sexual refusal
1964	Section 13(1A) added to HMA	Non-compliance becomes a divorce ground for either spouse
1970	Matrimonial Proceedings and Property Act, s 20 (UK)	England abolishes RCR
1976	Marriage Laws (Amendment) Act	Waiting period cut to one year; burden on withdrawing spouse
1983–84	Sareetha, Harvinder Kaur, Saroj Rani	Validity contested; upheld by Supreme Court
2018	Law Commission Consultation Paper	Recommends deletion of RCR provisions
2019	Ojaswa Pathak filed	Post-Puttaswamy challenge, still pending
2024	Uttarakhand UCC, s 21	RCR retained in India's first state civil code

Table 1 shows a divergence. The jurisdiction that invented the remedy abandoned it, while India extended it into new codes.

3. The Statutory Architecture and Its Sanctions

A restitution decree is never only a declaration. It sits at the head of a chain of consequences, each of which attaches a cost to the respondent's continued refusal. Identifying that chain is the precondition for asking which link, if any, can legitimately bear on sexual refusal.

3.1 The Cause of Action

Section 9 HMA requires that the respondent has "withdrawn from the society" of the petitioner without reasonable excuse. Courts read "society" as cohabitation and consortium, the shared life of spouses. The Explanation, inserted in 1976, places the burden of proving reasonable excuse on the spouse who withdrew. Section 23(2) HMA and Section 9 of the Family Courts Act, 1984 oblige the court first to attempt reconciliation.

3.2 Execution against Property

Order XXI Rule 32(1) CPC provides that where the judgment-debtor has had an opportunity to obey a restitution decree and has wilfully failed to do so, the decree may be enforced by attachment of property. Civil imprisonment, available for other decrees under the same rule, is excluded for restitution decrees. If the attachment remains in force for six months without compliance, the attached property may be sold and compensation paid to the decree-holder. Rule 33 adds an asymmetry: against a husband, the court may instead order periodical payments to the wife. Against a wife, attachment remains the ordinary mode of execution.

3.3 Divorce on Non-Compliance

Under Section 13(1A)(ii) HMA and Section 27(2) SMA, either spouse may seek divorce where there has been no restitution for one year or more after the decree. In Saroj Rani, the Supreme Court allowed even the non-complying husband to obtain divorce on this ground, following Dharmendra Kumar v. Usha Kumar ((1977) 4 SCC 12): mere non-compliance is not a "wrong" that bars relief under Section 23(1)(a). This route is the remedy's most common modern use.

3.4 Loss of Maintenance

Section 144(4) of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which re-enacts Section 125(4) of the Code of Criminal Procedure, 1973, disentitles a wife who "without any sufficient reason" refuses to live with her husband. Husbands have used restitution decrees to invoke this bar. In Rina Kumari (2025), the Supreme Court held that a decree followed by non-compliance is relevant material but not determinative; the maintenance court must assess the wife's reasons independently.

3.5 Evidentiary Spillover

A finding that the respondent withdrew "without reasonable excuse" travels into later litigation on desertion, cruelty, custody and maintenance. A decree obtained on the footing of sexual withdrawal can therefore shape outcomes well beyond the restitution proceeding itself.

3.6 Cumulative Effect

Each link is triggered by withdrawal. Where withdrawal is, in substance, a refusal of sexual relations, every link operates as a sanction on that refusal. The statute is gender-neutral in form. Its sanctions, however, fall hardest on the economically dependent spouse, usually the wife. Sarker and Biswas (2024) find that the remedy is typically invoked one-sidedly, against the other spouse's will.

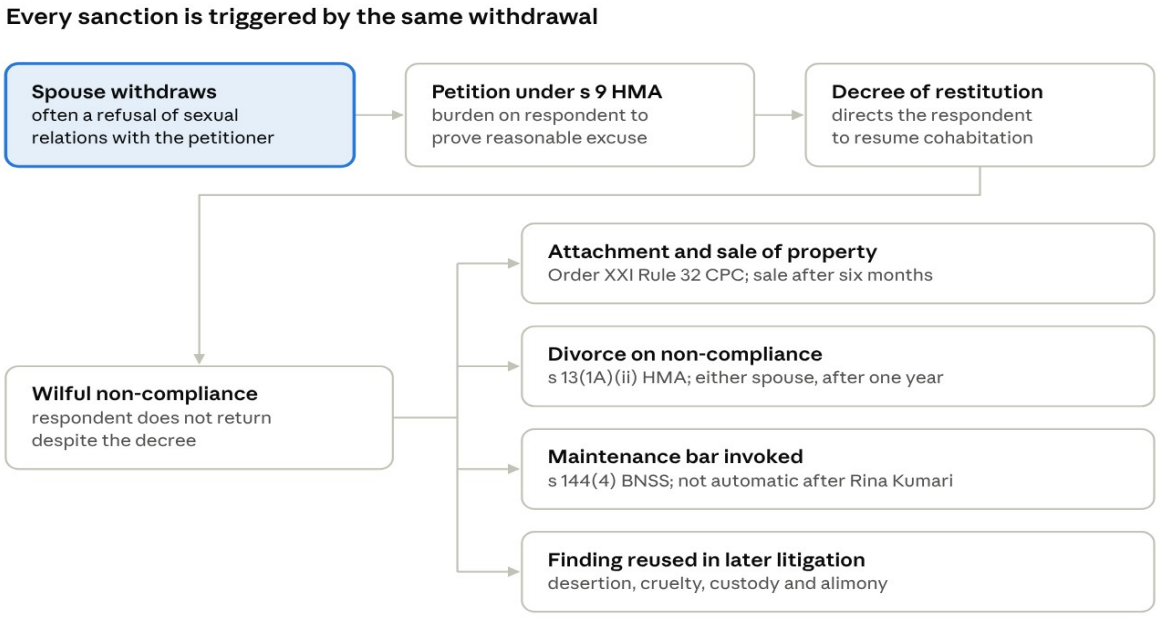


Figure 1. Sanctions attached to a decree of restitution of conjugal rights

Each consequence flows from the same finding of withdrawal. Where that withdrawal is a refusal of sex, each consequence operates as a penalty on refusal.

4. Does the Decree Reach Sexual Relations?

The 1983–84 trilogy turned on a single question: what does a restitution decree command? The answer decides whether RCR penalises sexual refusal at all.

4.1 T. Sareetha: The Decree as Sexual Coercion

Choudary J held Section 9 void under Articles 14 and 21. Drawing on Govind v. State of Madhya Pradesh ((1975) 2 SCC 148), he located a right of privacy in Article 21 that protects the choice of whether to allow one's body to be used for sexual intercourse and procreation. A restitution

decree, he reasoned, transfers that choice from the woman to the State and makes the unwilling spouse's body "a soulless and a joyless vehicle" for another's purposes. He also held that the remedy, though neutral in form, operated in practice against wives.

4.2 Harvinder Kaur: The Decree as Cohabitation

Rohatgi J rejected Sareetha within a year. Sexual intercourse, he held, is one element of marriage but not its essence. The decree aims at consortium, the shared life of the home. He warned that importing constitutional rights into the home would be destructive, and reasoned that in the privacy of married life neither Article 14 nor Article 21 had a place.

4.3 Saroj Rani: The Decree as Social Aid

Mukharji J, for a two-judge bench, preferred Harvinder Kaur. Conjugal rights, he held, are inherent in marriage and not a creature of statute. Section 9 serves a social purpose as an aid to preventing the break-up of marriage. Because execution under Order XXI Rule 32 is limited to attachment of property, the remedy offers an inducement to settle, not physical compulsion. On that understanding, Section 9 did not violate Article 14 or Article 21.

4.4 Why Cohabitation Cannot Be Severed from Sexual Relations

The Harvinder Kaur–Saroj Rani answer rests on separating cohabitation from sex. That separation fails for three reasons.

4.4.1 The Definitional Reason

"Conjugal" rights are, by definition, rights arising from the marital union, and Indian courts have never excluded sexual relations from consortium. The Union's own affidavit says only that the remedy is not merely about intercourse. A remedy that partly aims at restoring sexual relations cannot be defended on the footing that it does not aim at them at all.

4.4.2 The Justificatory Reason

Under the Explanation to Section 9, the withdrawing spouse must prove a reasonable excuse. The statute nowhere says that unwillingness to have sexual relations with the petitioner is such an excuse. Meanwhile, the cruelty jurisprudence discussed in Part 6 treats refusal of intercourse "without valid reason" as a matrimonial wrong. The combined effect is that the law requires the refusing spouse to justify refusal. That inverts the moral structure of consent. On the account defended by Madden Dempsey and Herring (2007), it is sexual penetration that requires justification, and the absence of consent is a complete answer. Section 9, as applied, demands a justification for saying no.

4.4.3 The Protective-Vacuum Reason

Saroj Rani stressed that no spouse is physically compelled to return. But once a wife does return under a decree, Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS), which re-enacts Exception 2 to Section 375 IPC, provides that sexual intercourse by a husband with his wife, she not being under eighteen, is not rape. The Protection of Women from Domestic Violence Act, 2005 offers civil remedies against sexual abuse, but no criminal-law protection against forced intercourse. The decree thus directs a person back into a space where her refusal has no criminal-law protection. Mandal (2014) argues that the marital rape question cannot be separated from the wider legal regulation of marriage. RCR is the clearest illustration: the civil decree and the criminal exception are two halves of one assumption, that marriage settles consent in advance.

4.5 Findings on the Reach of the Decree

The conclusion of this Part is narrow but important. Whatever its form, a restitution decree obtained against a spouse who has withdrawn in order to refuse sexual relations operates as a sanction on that refusal. Saroj Rani did not confront this because it treated cohabitation and sex as severable. They are severable in argument but not in the lives the decree governs.

5. The Constitutional Transformation after Puttaswamy

Saroj Rani rested on three premises: that the marital home is largely outside constitutional scrutiny, that conjugal rights are inherent in marriage, and that a gender-neutral text satisfies Article 14. Each premise has since been displaced by larger benches.

5.1 Privacy Belongs to Persons, Not Households

The nine-judge bench in Puttaswamy held privacy intrinsic to Article 21 and located within it bodily integrity, decisional autonomy and choices about intimate life. The plurality accepted the feminist critique that privacy, invoked as a shield for the family, can conceal subordination within it; the right protects individuals, including against other members of their household. Harvinder Kaur's view that Articles 14 and 21 have no place in married life cannot survive that holding. Nor can RCR shelter behind State of Bombay v. Narasu Appa Mali (AIR 1952 Bom 84): Section 9 is enacted law, squarely subject to Part III of the Constitution.

5.2 Marriage Does Not Transfer Sexual Autonomy

In Joseph Shine v. Union of India ((2019) 3 SCC 39), a five-judge bench struck down the adultery offence because it treated a wife as her husband's property and denied her sexual agency within marriage. Navtej Singh Johar v. Union of India ((2018) 10 SCC 1) placed sexual autonomy and intimate choice at the core of dignity, and preferred constitutional morality to social morality. Shafin Jahan v. Asokan K.M. ((2018) 16 SCC 368) and Suchita Srivastava v. Chandigarh Administration ((2009) 9 SCC 1) treat choices about partners, sex and reproduction as personal liberty. Together these decisions repudiate the coverture premise that Hale and Saroj Rani share.

5.3 The Marital Rape Exception in Retreat

Independent Thought v. Union of India ((2017) 10 SCC 800) read down the marital rape exception for wives below eighteen, Lokur J observing that a rape that actually occurs cannot be legislatively wished away. In X v. Principal Secretary, Health and Family Welfare Department ((2023) 9 SCC 433), the Court held that, for the Medical Termination of Pregnancy Rules, "rape" includes non-consensual intercourse by a husband. In RIT Foundation v. Union of India (2022 SCC OnLine Del 1404), Shakdher J held the exception unconstitutional, while Hari Shankar J upheld it on the footing that the marital relationship, including the expectation of sexual relations within it, marks an intelligible differentia. In Hrishikesh Sahoo v. State of Karnataka (2022 LiveLaw (Kar) 89), the Karnataka High Court refused to quash a rape charge against a husband; the Supreme Court stayed that ruling in July 2022.

5.4 Proceedings Pending before the Supreme Court

The Union, by affidavit of 4 October 2024, opposed judicial removal of the exception (Supreme Court Observer 2026). On 9 September 2026 the Supreme Court directed final hearing of the consolidated matters and framed two questions: whether a prosecution can proceed while the exception stands, and whether the exception is valid (Bar & Bench 2026). The Court's acceptance that marriage cannot extinguish individual autonomy is, at minimum, inconsistent with a civil remedy that treats sexual withdrawal as a default to be corrected.

5.5 Equality beyond Formal Neutrality

Joseph Shine and Navtej Johar moved Article 14 beyond the classification test, towards manifest arbitrariness (Shayara Bano v. Union of India, (2017) 9 SCC 1) and anti-stereotyping. Under that standard, a facially neutral remedy whose burdens fall predictably on wives, and whose premise is the wife's sexual availability, is open to challenge as discriminatory in effect.

5.6 The Doctrinal Consequence

Saroj Rani was decided by two judges. Puttaswamy (nine judges), Joseph Shine (five) and Navtej Johar (five) bind every smaller bench on the principles they declare. Saroj Rani has not been formally overruled, and Section 9 remains valid until Ojaswa Pathak is decided. But its reasoning that the home is a constitution-free zone, and that conjugality is a pre-legal entitlement, no longer reflects the law. A court applying Puttaswamy today must ask whether each sanction in Part 3 is a proportionate restriction of sexual and decisional autonomy. Part 8 undertakes that inquiry.

6. The Parallel Channel: Sexual Refusal as Cruelty

RCR is not the only doctrine that prices sexual refusal. Indian matrimonial law also treats refusal as a fault, through the ground of cruelty in Section 13(1)(ia) HMA. Any account of how far the law may penalise refusal must address both channels together, because litigants use them in combination.

6.1 The Indian Position

In Samar Ghosh v. Jaya Ghosh ((2007) 4 SCC 511), a three-judge bench listed illustrations of mental cruelty. Illustration (xii) reads: a unilateral decision to refuse intercourse for a considerable period, without physical incapacity or valid reason, may amount to mental cruelty. Vidhya Viswanathan v. Kartik Balakrishnan ((2014) 15 SCC 21) went further, holding that denying a spouse sexual intercourse for a long time without sufficient reason "itself amounts" to mental cruelty. High Courts apply these holdings routinely; the Orissa High Court in Anubhav Mohanty v. Varsha Priyadarshini (MATA No. 353 of 2023) is a recent example.

6.2 The English Contrast

The House of Lords in Weatherley v. Weatherley [1947] AC 628 held that persistent refusal of intercourse did not by itself constitute desertion. Sheldon v. Sheldon [1966] P 62 allowed that prolonged refusal could amount to cruelty where it injured the other spouse's health, but treated it as a factual question of harm, not a breach of a sexual duty. England has since removed fault from divorce altogether through the Divorce, Dissolution and Separation Act 2020.

6.3 The Two Functions of the Cruelty Doctrine

The doctrine performs two functions that should be separated.

It gives the spouse who wants sexual intimacy an exit from a marriage that lacks it. That function is legitimate. A person cannot be held indefinitely in a marriage whose intimate life has ended.

It brands the refusal a wrong. That label carries costs. Section 25 HMA directs the court to consider "the conduct of the parties" when fixing permanent alimony, and a finding of cruelty colours custody and maintenance disputes. The "valid reason" qualifier also places the burden of justification on the refusing spouse, the same inversion identified in Part 4.

6.4 The Missing No-Fault Ground

The first function needs no finding of fault. It could be served by a no-fault ground of irretrievable breakdown, which the Law Commission recommended in its 71st Report (1978)

and 217th Report (2009). The Supreme Court has granted such relief under Article 142 in Shilpa Sailesh v. Varun Sreenivasan (2023 INSC 468), but the statute itself still offers no such ground. In its absence, spouses whose marriages have ended are pushed to plead fault, and refusal of sex becomes the fault pleaded.

6.5 Implications for Restitution of Conjugal Rights

The lesson for RCR is direct. The legitimate interest in both doctrines is the same: recognising that a shared life has ended. Neither doctrine needs to treat refusal of consent as a breach of duty in order to serve that interest. The penal element is surplus, and Part 8 asks whether that surplus can be justified.

7. Comparative Perspectives

Every major common-law jurisdiction from which India received RCR has abolished it. In each, abolition of the remedy and abolition of the husband's immunity from rape travelled together, because both rested on the same premise of irrevocable marital consent.

Table 2. Abolition of restitution and of marital immunity in selected jurisdictions

Jurisdiction	RCR abolished by	Marital immunity removed by	Replacement for the "exit" function
England and Wales	Matrimonial Proceedings and Property Act 1970, s 20	R v R [1992] 1 AC 599 (HL)	Irretrievable breakdown; no-fault divorce under the Divorce, Dissolution and Separation Act 2020
Scotland	Law Reform (Husband and Wife) (Scotland) Act 1984, s 2 (decree of adherence)	Stallard v HM Advocate (1989)	Irretrievable breakdown under the Divorce (Scotland) Act 1976
Ireland	Family Law Act 1988, s 1	Criminal Law (Rape) (Amendment) Act 1990, s 5	Living apart under the Family Law (Divorce) Act 1996
Australia	Family Law Act 1975 (Cth), s 8	State legislation from 1976; R v L (1991) 174 CLR 379 (HCA)	Irretrievable breakdown shown by 12 months' separation
South Africa	Divorce Act 70 of 1979, s 14	Prevention of Family Violence Act 133 of 1993, s 5	Irretrievable breakdown under the Divorce Act 1979
India	Retained (s 9 HMA; s 22 SMA; s 21 Uttarakhand UCC)	Retained (BNS s 63, Exception 2)	Fault grounds; s 13(1A) on non-compliance; Article 142 relief only

Table 2 yields three lessons, discussed below.

7.1 Abandonment for Futility and Oppression

The remedy was abandoned because it had become either futile or oppressive. The Law Commission of England and Wales concluded that a decree which cannot lawfully be enforced against the person serves only as a tactical step towards other relief (Law Commission 1969). The Law Reform Commission of Ireland reached a similar view (Law Reform Commission of Ireland 1983). Neither found that abolition harmed reconciliation.

7.2 Replacement of the Legitimate Functions

Abolition did not leave marriages unprotected. Each jurisdiction replaced the remedy's two genuine functions with less intrusive tools. The reconciliation function passed to counselling, mediation and family dispute resolution. The exit function passed to no-fault divorce based on separation or breakdown. The function that was not replaced was the coercive one.

7.3 The European Human Rights Perspective

The European Court of Human Rights treated the end of marital immunity as an affirmation, not a disruption, of legal order. In SW v United Kingdom and CR v United Kingdom (ECtHR, 22 November 1995), the Court held that abandoning the idea of a husband's immunity accorded with the Convention's core respect for human dignity and freedom. A civil remedy built on the same idea sits uneasily with that reasoning.

7.4 India as an Outlier

India is thus an outlier on both axes at once (on the civil remedy, see Sarker and Biswas 2024). The pairing is not coincidental. So long as the criminal law presumes marital consent, the civil law's insistence on restoring cohabitation carries a sexual meaning that comparator jurisdictions have deliberately removed.

8. A Legitimacy Test: Proportionality Applied

8.1 The Proportionality Framework

The test of legitimacy is the four-limb proportionality standard adopted in Modern Dental College and Research Centre v. State of Madhya Pradesh ((2016) 7 SCC 353), endorsed in Puttaswamy and refined in K.S. Puttaswamy v. Union of India (Aadhaar) ((2019) 1 SCC 1). A restriction on a fundamental right must (i) pursue a legitimate aim, (ii) be rationally connected to it, (iii) be necessary, in that no less restrictive and reasonably effective alternative exists, and (iv) strike a proper balance between the benefit gained and the right infringed. The right engaged here, sexual and decisional autonomy over one's own body, lies at the core of Article 21 as read in Puttaswamy and Navtej Johar. The justification required is correspondingly high.

8.2 Legitimate Aim

Three aims are claimed for RCR. Reconciliation, the aim stressed in Saroj Rani, is legitimate. Providing an orderly exit from a marriage that has ended is legitimate. Restoring a spouse's sexual access to the other is not a legitimate aim at all. No constitutional value supports the State in securing one adult's sexual access to another's body. To the extent any sanction pursues that aim, it fails at the threshold.

8.3 Rational Connection

Coerced cohabitation does not produce reconciliation. The English Law Commission found the decree served only as a tactical step to other relief (Law Commission 1969). Indian practice confirms that pattern: decrees are sought as a precursor to divorce under Section 13(1A), or, as in Rina Kumari, as a shield against maintenance. The connection between sanction and reconciliation is therefore weak.

8.4 Necessity

Less restrictive means exist for each legitimate aim. Reconciliation can be pursued through the conciliation duties in Section 23(2) HMA and Section 9 of the Family Courts Act, 1984, and through court-annexed mediation. The exit function can be served by a neutral ground of separation or breakdown. The financial security of a deserted spouse is served by maintenance under Section 144 BNSS and Sections 24–25 HMA, and by the right of residence and monetary relief under Sections 17 and 20 of the Protection of Women from Domestic Violence Act, 2005.

8.5 Balancing

On one side lies an intrusion on bodily integrity of the gravest kind. On the other lies, at best, a marginal gain in reconciliation that the evidence does not show. The balance falls decisively against any sanction attached to sexual refusal.

8.6 Sanction-by-Sanction Assessment

Table 3 applies the test to each sanction identified in Part 3.

Table 3. Proportionality assessment of the sanctions attached to restitution

Sanction	Aim it actually serves	Less restrictive alternative	Verdict on penalising sexual refusal
Decree commanding return (s 9 HMA)	Reconciliation; implicitly, restored sexual relations	Statutory conciliation and mediation	Illegitimate where withdrawal is a refusal of sexual relations; at most a non-coercive declaration
Attachment and sale of property (O XXI r 32 CPC)	Coercing compliance	None needed; the aim itself is suspect	Illegitimate; fails aim, necessity and balancing
Divorce after one year's non-compliance (s 13(1A)(ii) HMA)	Orderly exit, open to either spouse	A direct breakdown or separation ground	Legitimate as a neutral recognition of breakdown, not as a penalty
Maintenance bar (s 144(4) BNSS)	Preventing unjustified desertion	Independent assessment of reasons (Rina Kumari)	Legitimate only if unwillingness to have sexual relations always counts as "sufficient reason"
Cruelty finding for refusal (Samar Ghosh, illus. (xii))	Exit for the other spouse	No-fault breakdown ground	Exit legitimate; the fault label and its alimony consequences are not

8.7 Objections Considered

8.7.1 The Expectation of Intimacy

It may be said that marriage involves a reasonable mutual expectation of intimacy, and that the disappointed spouse's interest deserves weight. It does, and the law vindicates it by allowing that spouse to leave. An interest in intimacy cannot become a claim on another person's body.

8.7.2 The Remedy as Merely Symbolic

It may be said that decrees are rarely executed and are largely symbolic. But the maintenance and evidentiary consequences are real, and law that symbolically endorses a duty of sexual availability does expressive harm.

8.7.3 Protective Use of the Remedy by Wives

It may be said that wives also use RCR, often to secure a home or support after being turned out. That is true, and Saroj Rani itself began as a wife's petition. But Rule 33's provision for periodical payments shows that what such wives need is financial and residential security. Maintenance law and the residence rights under the 2005 Act deliver that directly, without commanding anyone's return.

8.8 Answer to the Research Question

RCR can legitimately do two things. It can provide a forum in which conciliation is attempted, and it can record that cohabitation has ceased so that a neutral dissolution may follow. It cannot legitimately command the return of a spouse whose withdrawal is a refusal of sexual relations, coerce that return through property, forfeit maintenance on that account, or supply a finding of fault. Beyond the declaratory and the conciliatory, every consequence that RCR attaches to sexual refusal is disproportionate.

9. Reform Options

The analysis supports a graded programme. Courts can act at once within existing text; Parliament should then remove the sanctions that interpretation cannot reach; and the remedy should ultimately be replaced.

9.1 Immediate Measures: Judicial Interpretation

Read the Explanation to Section 9 HMA, and its analogues, so that a spouse's unwillingness to have sexual relations with the petitioner, or any experience of sexual coercion, always constitutes a "reasonable excuse". A court should decline a decree where the withdrawal is shown to be a refusal of sexual relations.

Extend Rina Kumari by holding that, under Section 144(4) BNSS, a wife's refusal to resume a sexual relationship is always a "sufficient reason" for living apart.

Restate illustration (xii) in Samar Ghosh so that prolonged absence of intimacy may evidence the breakdown of a marriage, but refusal of consent is not by itself a matrimonial wrong or "conduct" relevant to alimony under Section 25 HMA.

9.2 Short-Term Measures: Legislative Amendment

Insert a clarifying proviso in Section 9 HMA, Section 22 SMA, Section 32 of the Indian Divorce Act, Section 36 of the Parsi Marriage and Divorce Act and Section 21 of the Uttarakhand Code. A suggested text:

Provided that nothing in this section shall be construed as conferring on either spouse any right to sexual relations with the other, and no decree under this section shall direct, or be executed so as to compel, the resumption of sexual relations; and unwillingness to have sexual relations with the petitioner shall be a reasonable excuse for the purposes of this section.

Omit the reference to restitution decrees in Order XXI Rules 32 and 33 CPC, so that no restitution decree is enforceable by attachment or sale of property. The financial needs Rule 33 addresses should be met through maintenance law.

Enact a no-fault ground of irretrievable breakdown, as the Law Commission recommended in its 71st and 217th Reports. This would make both the Section 13(1A) route and fault pleadings of sexual refusal unnecessary.

9.3 Long-Term Measures: Replacement of the Remedy

Abolish RCR across all personal laws and the Uttarakhand Code, as the Law Commission's 2018 Consultation Paper proposed, and replace it with a mandatory conciliation track before the Family Court. States drafting civil codes should not reproduce the remedy.

Remove the marital rape exception in Section 63 BNS. Civil reform alone leaves intact the criminal-law premise that marriage settles consent. Ideally, Ojaswa Pathak should be heard with, or immediately after, the marital rape batch, since both turn on that premise.

10. Conclusion

The extent to which restitution of conjugal rights can legitimately penalise refusal of consent to sexual relations is, on the argument of this paper, nil. The remedy may legitimately offer a forum for conciliation and may record that a shared life has ended. It may not attach any coercive or punitive consequence to a spouse's refusal of sex.

That conclusion follows from four findings. First, the 1984 defence of RCR in Saroj Rani depended on severing cohabitation from sexual relations, a severance the Union's own affidavit concedes is incomplete. Second, the remedy's sanctions, from attachment of property to loss of maintenance, operate as penalties whenever withdrawal is a refusal of sex, and they operate in tandem with a criminal exception that withholds protection once the spouse returns. Third, Puttaswamy, Joseph Shine and Navtej Johar have displaced each premise on which Saroj Rani stood. Fourth, under the proportionality test, the only aims RCR can legitimately pursue are better served by conciliation, maintenance law and a no-fault breakdown ground.

The jurisdictions that gave India this remedy abandoned it together with the husband's immunity, and their marriages did not collapse. India now has before its Supreme Court both halves of the same assumption: Ojaswa Pathak on the civil remedy and the marital rape batch on the criminal exception. Deciding them together, or in sequence, would allow the Court to say in one voice what the Constitution already implies: that consent to sexual relations is given act by act, and that a decree of court cannot give it on a spouse's behalf.

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