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Governing Conjuality: Social hygiene and the doctrine of restitution of conjugal rights in England and India in the nineteenth century

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Abstract

This article focuses on the doctrine of restitution of conjugal rights (RCR) as a colonial legal transplant and examines how ideas of social and moral hygiene manifested in the debates around the doctrine in late-nineteenth century England and India. Originating in ecclesiastical law, the doctrine of RCR provides remedies and sanctions for the deserted spouse when one party has violated the obligation to cohabit as husband and wife. Through a critical examination of the history and application of the doctrine, the article traces the specific ways in which such suits developed and became rooted in Hindu, Parsi and Muslim marital law in India, while simultaneously falling out of favour in England. It places the doctrine in the context of changing ideas of marriage and argues that social hygiene became the tool through which the doctrine was both resisted in England and lauded in colonial India.

Key words:

matrimonial law – colonial law - restitution of conjugal rights – social hygiene – moral hygiene

1.0 Introduction

Though marriage was understood and regulated in different ways in nineteenth century England and in colonial India, in both the countries the idea of marriage came under increasing scrutiny and became the object of both social and legal reform. This paper examines how notions of hygiene came to influence the doctrine of restitution of conjugal rights (RCR) and

through it the governance of conjugality in both countries during this period. RCR had its origins in ecclesiastical law: grounded in Christian notions of monogamy and the indissolubility of marriage the doctrine allowed a deserted spouse to petition the court to order the deserting party to return to the marital home to live as husband and wife. By analysing the development of this transplanted doctrine in India, we show that during the late nineteenth century its legal status and enforcement rapidly diverged in India and in England. The debates around RCR provided an avenue for women's rights advocates to address underlying gender imbalances within contemporary marriage. Simultaneously, the debates allowed conservative voices to air their anxieties over the changing nature of marriage. We argue that both sides adopted the language of social hygiene to opposing ends, and that the prism of contemporary social and moral hygiene movements offers a useful lens through which we can understand the doctrine of RCR and the anxieties around its reform.

In this article we make an original contribution to the existing literature on RCR in two ways. First, we provide a comparative analysis of the legal history of this still influential doctrine, showing how the legal transplant became rooted in India while falling out of favour in England. The doctrine, now established part of Indian marital law, remains influential to this day, compelling women to return to the husbands and homes they have chosen to leave. We trace the legal history of RCR in England and in India through an analysis of relevant statutes, common law doctrines, and case law. In particular, we focus on key cases from the nineteenth century divorce cases in the High Courts of England and India that were influential in shaping the doctrine and its implementation. By analysing Christian and non-Christian marriage cases on RCR comparatively, we place the doctrine in the broader context of legal shifts and trends in marriage, and further analyse the different understandings of marriage as a status, sacrament, and a contract, and the impact that these ideas have had on the doctrine's legal history. Second,

we place the doctrine in the wider context of marriage reform, and analyse the calls for and resistance to, reform through the prism of social hygiene. We argue that the very idea of social hygiene became the tool through which the doctrine was both resisted in the metropole and lauded in the colony.

Hygiene, as a medical, social and moral concept and ideal, became increasingly important in nineteenth century England, and manifested in various forms across the Empire.¹ While hygiene became an all-encompassing term during the late nineteenth century, the term was originally rooted in concern over unhygienic living standards particularly amidst the urban poor in England.² The focus, if not obsession, that the Victorians had with hygiene both as a personal and political project, therefore, began through sanitation and public health initiatives before quickly escalating to a wide range of approaches including notions of domestic, medical, social, moral, maternal, racial, and imperial hygiene – many of which were deeply gendered in their foundation.³

In the late nineteenth century, social hygiene came to be understood as a public concern that had to be facilitated through structural reforms and legal interventions so as to ensure a good and healthy social and public life.⁴ For instance, Havelock Ellis, best known for his early studies in sexology, argued that social hygiene was ‘exclusively concerned with the improvement of the conditions of life’, and therefore, the movement quickly grew from a focus on urban sanitation measures to include conditions of work, family life, and in the view of

¹ Alison Bashford, *Imperial Hygiene: A Critical History of Colonialism, Nationalism and Public Health Sex* (Palgrave Macmillan 2004).

² Sparked by a damning report by Edwin Chadwick, Report on the Sanitary Condition of the Labouring Population of Great Britain (1842), <<https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t2k64mf5w&view=1up&seq=8> > accessed 22 January 2021.

³ Bashford above note 1 at 5.

⁴ Nancy Tomes, ‘The Private Side of Public Health: Sanitary Science, Domestic Hygiene, and the Germ Theory, 1870–1900’ (1990) 64 *Bulletin of the History of Medicine* 509.

Ellis, eugenics, of which he was an enthusiastic proponent.⁵ If social hygiene was characterised by the focus on the social and the public life, moral hygiene focused on the internal human struggle for cleanliness and mental purity, often fused with religious ideals. In Alison Bashford's words moral hygiene and 'Victorian culture made "cleanliness" into a subjectivity, a practice which shaped one's soul.'⁶

In India, these ideas of social and moral hygiene were inherently intertwined with the process of colonisation, and they manifested through concern over sanitation, nutrition, and family formation and later family planning, with all these facets being viewed through a racialised lens.⁷ In the country, as in the other colonies, questions of tradition and modernity came to be played upon the bodies of the indigenous women,⁸ with claims to hygiene and hygienic practices playing a central role in how these arguments were articulated. While hygiene, in social and moral forms, might have been a colonial concept, it was soon adopted by local reform organisations too.⁹ Reformists came to link the health of the women, with the health of the society, the nation and ultimately the race.¹⁰ For instance, Pratapchandra Majumdar, a notable social reformer, wrote in 1891, 'Because of the flaws of the mother, the child is ruined; the family is ruined; when family life crumbles, society decays; and when society is polluted, no nation can advance.'¹¹ At the same time, in many ways the Victorian moral discourse around

⁵ Havelock Ellis, *The task of social hygiene* (Constable & Co 1927).

⁶ Bashford above note 1 at 5.

⁷ Stephen Legg, *Prostitution and the Ends of Empire: Scale, Governmentalities, and Interwar India* (Duke University Press 2014) 174-175.

⁸ Partha Chatterjee, 'Colonialism, Nationalism, and the Colonized Women: The Contest in India' (1989) 16(4) *American Ethnologist* 622 ; Mrinalini Sinha, *Colonial Masculinity: The 'Manly Englishman' and the 'Effeminate Bengali' in the Late Nineteenth Century* (Manchester University Press, 1995); Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (University of California Press, 1998); Tanika Sarkar, *Hindu Wife, Hindu Nation: Community, Religion and Cultural Nationalism* (Permanent Black, 6th impression, 2017).

⁹ Sarah Hodges, 'Towards a history of reproduction in modern India' in Sarah Hodges (ed), *Reproductive Health in India: History, Politics, Controversies* (Orient Longman 2006) at 1.

¹⁰ For a discussion see Mrinalini Sinha, *Specters of Mother India: The Global Restructuring of an Empire* (Duke University Press 2007).

¹¹ Pratapchandra Majumdar, *Stricharitra* (Nababidhan 1891) cited in Sujata Mukherjee, *Gender, Medicine and Society in Colonial India: Women's Health Care in Nineteenth- and early Twentieth- Century Bengal* (OUP 2017), 102.

hygiene was consonant with the upper-caste Hindu orthodox morality. This was particularly true in matters relating to the constraint of female sexuality as well as ideas of cleanliness and purity, both in physical and moral terms.¹² In fact, we argue in this paper, as the colonial anxiety around hygiene came to colour the relationship between the colonizer and the colonized, Indians who were opposed to marital reform, learned to couch their own objections in a new language and on the grounds of hygiene.¹³

Often the medical, social and moral notions of hygiene converged, most notably in relation to the regulation of sex work. It is in this context, and in relation to the Contagious Diseases Acts (CDAs) enacted across the Empire and the subsequent campaigns for their repeal, that these intertwined forms of hygiene are most commonly discussed.¹⁴ The figure of the prostitute came to occupy a central position in the discourses on hygiene, and while sex work and the regulation of venereal diseases (VD) was often the explicit focus of social hygiene campaigns, this was not distinct from marriage and remained closely related to it. Indeed, the figure of the prostitute was intricately intertwined with the figure of the wife, in ‘our great twin-system of marriage and prostitution’ as Mona Caird, a nineteenth century feminist author, called it.¹⁵ RCR was a legal instrument that simultaneously protected the institution of marriage, controlled women’s

¹² Ashwini Tambe, *Codes of Misconduct: Regulating Prostitution in Late Colonial Bombay* (University of Minnesota Press, 2009) 15.

¹³ This came to be a central theme of the coterminous debate on age of consent in India, which eventually led to the raising of the age of consent for girls in the country from 10 to 12 through the Age of Consent Act 1891. For instance, see Ishita Pande, *Medicine, Race and Liberalism in British Bengal: Symptoms of Empire* (Routledge 2010); Antoinette Burton, ‘From Child Bride to “Hindoo Lady”: Rukhmabai and the Debate on Sexual Respectability in Imperial Britain’ (1998) 103(4) *The American Historical Review*, 1119-1146; Padma Anagol-McGinn, ‘The Age of Consent Act (1891) Reconsidered: Women’s perspectives and participation in the child marriage controversy in India’ (1992) 12(2) *South Asia Research* 100.

¹⁴ Philippa Levine, *Prostitution, Race and Politics: Policing Venereal Disease in the British Empire* (Routledge 2003); Philip Howell, *Geographies of Prostitution: Policing Prostitution in Nineteenth-Century Britain and Empire* (Cambridge University Press 2004); Stephen Legg, ‘Stimulation, segregation and scandal: geographies of prostitution regulation in British India, between registration (1888) and suppression (1923)’ (2012) 46(6) *Modern Asian Studies* 1459; for a discussion of the Indian ‘prostitute’ also see Durba Mitra, *Indian Sex Life: Sexuality and the Colonial Origins of Modern Social Thought* (Princeton University Press 2020).

¹⁵ Mona Caird, *The Morality of Marriage and Other Essays on the Status and Destiny of Women* (G. Redway 1897).

sexual behaviour and restricted their sexual autonomy. It also spoke directly to the fears and aims of the social hygiene movement. It was a reflection on contemporary fears about the erosion of marriage, an institution that protected property and bloodlines. Furthermore, it was a reflection of the deep discomfort both Indian and English societies held about the potentially sexually deviant woman. As Durba Mitra has persuasively argued, in colonial India the figure of the 'prostitute' was always shadowed by the figure of the 'clandestine prostitute', where all women outside the confines of a Hindu monogamous marriage were viewed with suspicion and believed to be imbued with the capacity for sexual deviance on which they may act imminently.¹⁶ Thus, the catch all term of the 'prostitute' included the courtesan, the widow, lower caste and class women, Muslim women, mendicants and importantly for this essay, those women who for one reason or another no longer lived with their husbands.

Through the campaigns against CDAs, the women's rights' movements gained tools for political and legal activism that were echoed in the quest for marriage reforms discussed in this paper.¹⁷ Furthermore, marriage and its reforms also came to be increasingly discussed in the language of hygiene and for many women's rights campaigners social hygiene encompassed women's rights. In particular, many hoped that the practice of social and moral hygiene would bring an end to the existing sexual double standards that punished women and left them responsible for all consequences of sex outside marriage.¹⁸ In their articulation this meant that men, who had traditionally been given remarkable leeway in their sexual behaviour, should adhere to the same social and moral norms that had been imposed on women for centuries.¹⁹ This would inevitably lead to a hygienic sexual life contained within marriage, and mark the

¹⁶ Mitra above note 14, especially see ch 2.

¹⁷ Levine at above note 14.

¹⁸ Kristin Luker, 'Sex, Social Hygiene, and the State: The Double-Edged Sword of Social Reform' (1998) 27(5) *Theory and Society* 601.

¹⁹ Josephine Butler, 'The Double Standard of Morality,' *The Philanthropist* (October, 1886).

end of the spread of VD, stories of seduction, and indeed, the downward spiral many women faced after the seduction led to pregnancies out of wedlock.²⁰ While on the surface the RCR doctrine was about cohabitation and the preservation of marriage, it also resonated with the core concerns of the social hygiene movement: perceived purity within marriage, maternal health, anxiety over women's improper sexual behaviour, and the closely associated threat of venereal disease. The paper focuses on these key themes by investigating RCR through the lens of social and moral hygiene in the colonial context.

2.0 The Doctrine of Restitution of Conjugal Rights and its development

2.1 RCR diverging paths in England and India

The legal doctrine of RCR provided sanctions and remedies for when a party to marriage has violated the *consortium vitae*, an obligation to cohabit as husband and wife. As an ecclesiastical law doctrine RCR is rooted in the notion of an indissoluble Christian marriage. Despite the Reformation, mediaeval canon law largely continued to regulate marriage in England until the mid-nineteenth century when it became part of civil law.²¹ As per canon law, Christian marriage has a 'distinctive firmness by reason of the sacrament'.²² While desertion was not a matrimonial offence under the Ecclesiastical Courts in England and Wales, the deserted party could obtain a decree for restitution of conjugal rights ordering the deserting party to return to live as husband or wife and to resume conjugal relations. Failure to comply with the decree was punished by excommunication until the Ecclesiastical Courts Act 1813 replaced the punishment with imprisonment not exceeding six months. Imprisonment remained the

²⁰ Lynda Nead, 'Fallen Women and Foundlings: Rethinking Victorian Sexuality' (2016) 82(1) History Workshop Journal 177.

²¹ Philip Lyndon Reynolds, *Marriage in the Western Church: The Christianization of Marriage During the Patristic and Early Medieval Periods* (Brill 1994) 147-154.

²² Code of Canon Law, c. 1056.

punishment for failure to comply even after the civil judges took over the jurisdiction of the doctrine from Ecclesiastical Courts under the Matrimonial Causes Act of 1857.

Meanwhile in India, though in the late eighteenth century the fledgling colonial state had sought to proceed with the understanding that only the laws of the Hindu *shastras* would apply to the Hindus and those of the Quran to Muslims in matters of personal law,²³ this objective was never truly fulfilled. Instead, a new ‘hybrid monstrosity’²⁴ of Anglo-Hindu law and to a lesser extent Anglo-Mohammedan law came into existence.²⁵ Based on a few European inspired codes of Hindu and Muslim law created under colonial auspices, religious personal law in India was largely arbitrated by colonial judges who remained deeply suspicious of the Hindu pandits and Muslims maulvis who were attached to the courts to help them interpret the religious texts.²⁶ Even the limited influence of these indigenous legal officers came to an end when they were removed under Act XI of 1864, after which the judges turned exclusively to precedent and the previously mentioned codes. Lastly and perhaps most importantly, any gaps in Hindu law were plugged by the judges using the principles of ‘equity, justice and good conscience’ which was simply a means of introducing English law into Indian religious laws.²⁷ This emergent hybridity was not always imposed against the wishes of the Indian population, as scholars have shown: often Indian elites actively sought out and encouraged these interventions to carve out a particularly high-caste patriarchal notion of Hindu law.²⁸ In fact, amidst these wider changes to the legal system, the legal transplant of the doctrine of RCR

²³ The Judicial Plan of 1772.

²⁴ JDM Derrett, ‘The Administration of Hindu Law by the British’ (1961) 4 *Comparative Studies in Society and History* 10, 35.

²⁵ Marc Galanter, ‘The Displacement of Traditional Law in Modern India’ (1968) *Journal of Social Issues* 65; Michael Anderson, ‘Islamic Law and the Colonial Encounter in British India’ (1996) *Women Living Under Muslim Laws Occasional Paper no. 7*.

²⁶ For instance, see Sir William Jones’s letter to Charles Chapman dated 28 Sep 1785 in Lord Teignmouth (ed), *Memoirs of the Life, Writings, and Correspondence, of Sir William Jones* (WM Poyntell & Co, 1805), 271.

²⁷ *Waghela v Sheikh Masludin* (1887) 14 Ind App 89.

²⁸ For instance, see Kumkum Sangari and Sudesh Vaid, ‘Recasting Women: An Introduction’ in their *Recasting Women: Essays in Colonial History* (Zubaan 1989); Sarkar (n8).

serves as yet another example of what Ashwini Tambe has succinctly described as ‘colluding patriarchies’, wherein British and Indian patriarchies machinated together to further gain control over Indian women’s sexual lives.²⁹

The transplantation of the doctrine of RCR to India was a slow process, and one that initially remained strongly tied to its roots within English ecclesiastical law. For instance, under the Bombay Charter of Justice 1823 the ecclesiastical law that was exercised by the diocese in London could be administered by the Ecclesiastical Side of the Supreme Court of Bombay if it deemed it to be suitable. Suits for RCR were one such ecclesiastical law that could be administered by the Court, and indeed a handful of such cases had been heard by the court in the first half of the nineteenth century.³⁰

In the middle of the nineteenth century however, suits for RCR began appearing more markedly in non-Christian religions in India. These early prominent cases reveal some of the concerns that British judges had about applying this decree to followers of the ‘native’ religions. In fact, one of the earliest such cases, heard by the Privy Council in 1856,³¹ the defendant husband challenged the applicability of the doctrine to non-Christian religions, namely in this case to Parsi marital law. As the judge, Dr Lushington, noted his own reservations:

We must remember that the English Ecclesiastical law is founded exclusively on the assumption that all the parties litigant are Christians; indeed originally, more

²⁹ Ashwini Tambe, ‘Colluding Patriarchies: The Colonial Reform of Sexual Relations in India’ (2000) 26(3) *Feminist Studies* 586.

³⁰ Between 1800 to 1856 eight suits for RCR had been brought in Bombay – two from the Armenian community, five from the Parsis and one involving a Muslim couple. As many as seven out of these eight suits had actually been brought by wives against their husbands. Padma Anagol, *The Emergence of Feminism in India, 1850 – 1920* (Routledge 2016), 185.

³¹ *Ardaseer Cursetjee v Perozeboye* (1856) 6 MIA 348 (PC).

strictly speaking, Christians professing the doctrine of the Church, and that till of late days, the only mode of enforcing the decrees of Courts Christian was by process of excommunication...³²

The suit in question had been brought by a deserted wife, Perozeboye, against her husband Ardaseer Cursetjee, who was cohabiting with another woman. Cursetjee, in turn, claimed to have married the other woman, the second marriage being entirely valid under Parsi law. The Privy Council (PC), thus, found itself in a dilemma – were it to issue a decree for restitution of conjugal rights it would in essence be forced to send Perozeboye either to an adulterer or a bigamist, both of which would ‘utterly repugnant to [English Ecclesiastical Law and] its character, its practice, and its principles.’³³ However, the PC also held that to adapt such law to make it flexible enough to take into account the practices of different religions, for instance to recognise polygamous Parsi marriages, would render the law meaningless. At the same time, cognizant of the fact that women like Perozeboye may need the protection of the courts in their marital lives, the judgment ended with the query whether the civil courts in India which already applied religious laws of the non-Christian population of the country may not be more suitable for such a role?

Ten years later this inquiry was resolved in the affirmative, when, in a suit brought by a Muslim man against his wife, the PC held that the civil courts in India could decide on cases of RCR when approached by a Muslim husband, and that the husband could obtain these rights without the consent of the wife.³⁴ However, the court restricted itself to rights within a Muslim marriage. The very next year, while the Bombay High Court elected not to uphold a Hindu

³² At 387.

³³ At 389.

³⁴ *Moonshee Buzloor Ruheem v Shumsoonissa Begum* (1867) 9 MIA 551 (PC).

husband's suit for restitution of conjugal rights on account of him suffering from syphilis and leprosy, the court seemed to hold that such suits would otherwise be recognised within Hindu marriages too.³⁵ Thus, we see that the transplantation of suits for restitution of conjugal rights from a specific remedy in ecclesiastical law to a civil action applicable to non-Christian religions in India can be traced back to a few cases in the mid-nineteenth century. And that from its very inception in India, the doctrine's implementation was alive to issues of hygiene by way of excluding claimants who suffered from contagious diseases such as syphilis or leprosy from its remit.

2.2 Suits for Restitution of Conjugal Rights and the Quest for Ancillary Relief

While, suits for RCR were ostensibly about conjugal rights, in reality they were frequently related to financial demands and served as a precursor to bids for ancillary relief, especially when brought by plaintiff wives.³⁶ In 1879, Sir James Hannen, as he then was noted: 'I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand.'³⁷ In numerous cases such suits were brought to obtain maintenance, or at the very least to persuade the deserting party into negotiations over maintenance, and as such women's rights groups were unable to call for it to be abolished pending reform of marriage and divorce provisions.

In the Indian context, Dr Lushington had attempted to make a forceful intervention in *Ardaseer Cursetjee* to assert that the courts did not have the power to consider the demand for such financial relief. He argued that the ecclesiastical law could only support marital separation, and therefore alimony, in cases of adultery or cruelty; and in all other cases, 'if the wife succeed[s]

³⁵ *Bai Premkuvar v Bhika Kallianji* (1868) 5 Bom HCR 209.

³⁶ Law Commission, *Proposal for the abolition of the matrimonial remedy of restitution of conjugal rights 1969* (Law Com No 23 1969).

³⁷ *Marshall v Marshall* (1879) 5PD 19.

in a suit for the restitution of conjugal rights, the sole remedy is to compel the husband to take her home.³⁸ Despite Dr Lushington's protestations, even the most cursory glance at the cases for RCR in India reveals how closely they were tied to the issue of demands for maintenance by deserted wives. As Anagol notes, in the absence of clear marital remedies for non-Christian wives under the law, wives of neglectful or cruel husbands were encouraged by their lawyers to apply on the equity side of ecclesiastical courts in India for pleas of maintenance or alimony.³⁹

This is not to say that only plaintiff wives brought suits for restitution of conjugal rights in order to gain financial redress. The most famous case for restitution of conjugal rights in colonial India, which caused a huge furore both in India and England was, in fact, brought by a husband against his heiress wife. This landmark case of *Dadaji Bhikaji v Rukhmabai*⁴⁰ has attracted a wealth of scholarship examining it in the context age of consent movements in India,⁴¹ the rise of women's rights,⁴² the early history of RCR in India,⁴³ the relation between early Indian and British women's rights movements,⁴⁴ and consent to marriage.⁴⁵ Here it suffices to say that at its heart, *Dadaji Bhikaji v Rukhmabai* was a case of a man who had married a child bride (entirely legally at the time) and who now wished to gain access to her wealth through the threat of cohabitation that he believed a successful suit for RCR would

³⁸ *Ardaseer Cursetjee v Perozeboye* above note 31 at 389.

³⁹ Anagol above note 30 at 187.

⁴⁰ *Dadaji Bhikaji v Rukhmabai* (1885) ILR 9 Bom 529; and *Dadaji Bhikaji v Rukhmabai* (1886) ILR 10 Bom 301.

⁴¹ Tanika Sarkar, 'Rhetoric against Age of Consent: Resisting Colonial Reason and Death of a Child-Wife' (1993) 28(36) *Economic and Political Weekly* 1869.

⁴² Sudhir Chandra, *Enslaved Daughters: Colonialism, Law and Women's Rights* (2nd edn, OUP 2008); and Anagol above note 30.

⁴³ Kanika Sharma, 'Withholding Consent to Conjugal Relations within Child Marriages in Colonial India: Rukhmabai's Fight' (2020) 38 *Law and History Review* 151.

⁴⁴ Antoinette Burton, 'Conjugalities on Trial: The Rukhmabai Case and the Debate on Indian Child Marriage in Late Victorian Britain,' in George Robb and Nancy Erber (eds) *Disorder at the Court: Trials and Sexual Conflict at the Turn of the Century* (Palgrave, Macmillan 1999).

⁴⁵ Kanika Sharma, Laura Lammasniemi, and Tanika Sarkar, 'Dadaji Bhikaji v Rukhmabai: Rewriting Consent and Conjugal Relations in Colonial India' (2021) *Indian Law Review* (forthcoming).

culminate in. Rukhmabai, in turn, averred that she would rather risk imprisonment than choose to cohabit with a man that she found distasteful. This punishment had been made mandatory less than a decade earlier through an amendment to Sec 260 of the Indian Code of Civil Procedure in 1877.⁴⁶

In the aftermath of Rukhmabai's case, the public debate centred around the court's power to incarcerate a woman who chose to disobey a decree for RCR. This debate came to be mired in ideas of social and moral hygiene, with supporters of retaining the punishment claiming that the fear of such imprisonment was the only thing that made women obey their moral duties as wives. They also expressed the fear that if 'liberated' these women would turn into prostitutes who would fill the cities of India and would therefore also become a concern for social hygiene. The association between prostitution and anxiety over reform of marriage became a particularly long-lasting one both in India and in England. The figure of the 'prostitute' was a complex and fragmented one in the public domain, however. She was simultaneously and contradictorily framed as sexually deviant, diseased and corrupting and as a victim of the male dominated society. At times she was framed as a financially independent woman of some standing evoking further anxiety.⁴⁷ Despite these different perspectives, it is inescapable that the figure of the 'prostitute' was inherently linked to the figure of the 'wife'. In India, many late nineteenth century commentators argued that access to divorce or freedom to choose one's partners would corrupt women and lead them to prostitution, highlighting how medicalised notions of hygiene became interlaced with social hygiene in the imperial setting. In turn, the language of prostitution and sexual slavery was evoked by radical women's rights activists in England to

⁴⁶ Chandra above note 42 at 205.

⁴⁷ Lynda Nead, *Myths of Sexuality: representations of women in Victorian Britain* (Basil Blackwell 1988) 91,127.

critique marriage and women's financial dependence on their husbands, and many of the more radical women's rights voices called marriage itself a form of prostitution.⁴⁸

Thus, while the basis of the doctrine of RCR may have originally rested on the concept of indissolubility of marriage under ecclesiastical law, by the late nineteenth century these cases were rarely about reconciliation. In England, by the end of the century marriage was no longer indissoluble, neither under law nor in the people's imagination. While in India the incipient nationalism was accompanied by an upper-caste patriarchal desire to control the private sphere of family life⁴⁹ and resulted in all forms of separation being disavowed especially within Hindu marital law.⁵⁰

3.0 Reforming Marriage, Divorce and Restitution of Conjugal Rights

In nineteenth century England, the doctrine of RCR gradually weakened as part of wider reforms of matrimonial laws. These changes did not happen in isolation, but formed part of a decades long feminist re-imagining of the idea of marriage and a woman's role within it.⁵¹ Other than a few radical voices such as Elizabeth Wolstenholme-Elmy, the women's rights campaigners in England did not challenge the notion of marriage as such but fought to reform the contemporary conditions of marriage and coverture.⁵² Marriage was once considered a core institution of social hygiene; essential for healthy private and public life, and one that should be facilitated and protected by structural and legal means. Yet, the understanding of a 'good

⁴⁸ Stephanie Forward, 'Attitudes to marriage and prostitution in the writings of Olive Cchreiner, Mona Caird, Sarah Grand and George Egerton' (1999) 8(1) *Women's History Review* 53.

⁴⁹ For a discussion of the relation between domesticity, conjugality and early Indian nationalism see Chatterjee, and Sarkar, both above note 8.

⁵⁰ For instance, see Anagol, above note 30, esp. chs 3&4.

⁵¹ Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (Princeton University Press 1989); Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality 1885-1914* (Penguin Books 1995) chapter 4; Philippa Levine, "'So Few Prizes and So Many Blanks': Marriage and Feminism in Later Nineteenth-Century England' (1989) 28(2) *Journal of British Studies*, 150.

⁵² For the works of Elizabeth Wolstenholme Elmy, see Wright Maureen, *Elizabeth Wolstenholme Elmy and the Victorian Feminist Movement: The Biography of an Insurgent Woman* (Manchester University Press 2014).

marriage' became increasingly nuanced at the turn of the century, and for many women's rights activists a good marriage now entailed the pursuit of a more equal and hygienic marriage. This sentiment was expressly articulated by Christabel Pankhurst in the early twentieth century when she wrote: 'be warned of the fact that marriage is intensely dangerous, until such time as men's moral standards are completely changed and they become as chaste and clean-living as women'.⁵³

By the late nineteenth century, birth control was very difficult to obtain,⁵⁴ the courts refused to recognise marital rape as rape⁵⁵, drawing from Hale's words 'the husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract'.⁵⁶ Therefore, issues around marriage such as reproductive autonomy and lack of access to divorce had become particularly contentious issues for women's rights activists even if rarely debated in the mainstream. If this discussion and focus of sexual and reproductive autonomy was limited in England, in India it did not exist at the time. Although neo-Malthusian and eugenicist undertones formed part of the early Indian concerns over population growth at the end of the nineteenth century and developed into concerns for family planning⁵⁷ alongside the broader social and imperial hygiene movements

⁵³ Christabel Pankhurst (1913) *The Dangers of Marriage*, reprinted in Marie Mulvey Roberts & Tamae Mizuta (Eds) *Perspectives on the History of British Feminism – The Wives: the rights of married women* (Routledge/Thoemmes Press 1994) 5.

⁵⁴ Fergus D'Arcy, 'The Malthusian League and the Resistance to Birth Control Propaganda in Late Victorian Britain' (1977) 31(3) *Population Studies* 429.

⁵⁵ *R v Clarence* (1889) 22 QB 23, drawing from Hale Matthew Hale, *The History of the Pleas of the Crown, Volume 1* (1736).

⁵⁶ Matthew Hale, *The History of the Pleas of the Crown, Volume 1* (1736). It was not until 1991 when marital exception was finally removed following the House of Lords case of *R v R* [1991] UKHL 12. In India, only marital rape of girls under the age of 18 is now recognised as rape following *Independent Thought v Union of India* (2017) 10 SCC 800.

⁵⁷ Sanjam Ahluwalia, *Reproductive Restraints: Birth Control in India, 1877-1947* (University of Illinois Press, 2007) 26-27.

in the early twentieth century,⁵⁸ notions of sexual and reproductive autonomy did not come to occupy centre stage in legal discussions about RCR in India for almost another hundred years.⁵⁹

In England, however, by the end of the nineteenth century the reduction of women to reproductive bodies and the language of ‘breeding’ were unsurprisingly challenged by women’s rights campaigners.⁶⁰ Many openly voiced their objection to the contemporary conditions of marriage, and by extension RCR, the lack of autonomy and decisions over sex, pregnancies, and financial dependence. Lady Florence Dixie wrote in the *Women’s Herald* criticising the institution of marriage and its link to reproduction that ‘She is looked upon as a mere breeding machine for the creation of the so-called dominant sex... plaything and slave of man’.⁶¹ At the time, reproductive choices within a marriage slowly emerged as an increasingly important theme in the writings of authors like Wolstenholme-Elmy, Cobbe, Alma Gillen, all of whom spoke of the right not to have motherhood imposed on women against their will.⁶² In the words of Caird ‘dependence, in short, is the curse of our marriages...of our homes and of our children, who are born of women who are not free – not free even to refuse to bear them’.⁶³ Through such interventions, these women’s rights activists clearly sought to move away from the preservation of marriage at all costs and mount a challenge to the contemporary conditions of marriages, while still utilising the language and concepts of hygiene. Yet, law was slow to respond to these challenges.

⁵⁸ Legg above note 7 at 173.

⁵⁹ See *T Sareetha v T Venkata Subbaiah* (1983) AIR AP 356.

⁶⁰ Breeding, reproduction and eugenics, see Ellis above note 5 at 61.

⁶¹ Florence Dixie, ‘A Woman’s Plan of Campaign’ *Women’s Herald* (London 24 January 1891) 211.

⁶² Frances Power Cobbe, *The Final Cause of Women* in (ed) Josephine Butler, *Woman’s Work and Woman’s Culture* (Macmillan 1869) 8; Alma Gillen in (1894) 13(2) *Shafts*, 229.

⁶³ Mona Caird, *The Morality of Marriage and Other Essays on the Status and Destiny of Women* (G. Redway 1897) 135.

In addition to issues of sexual and reproductive autonomy, much of the discontent with marriage at the time focused on financial and other forms of inequality within the institution, and on the difficulty of obtaining a divorce.⁶⁴ The Divorce and Matrimonial Causes Act 1857 had established a new court for Divorce and Matrimonial causes, but the grounds for divorce were restricted, proceedings were exceedingly costly and as a rule men obtained custody of children.⁶⁵ As a result, divorce remained a distant possibility for the vast majority of estranged couples, most of whom continued to live separately while still formally married.⁶⁶ As divorce continued to be legally available but practically unattainable, many feminist and liberal campaigners turned their attention to the ills of marriage such as lack of financial independence and the issue of domestic violence.⁶⁷

As part of wider concern over the contemporary conditions of marriage, RCR also came under intense scrutiny. Towards the end of the century, the doctrine also fell out of favour with legislators following the widely reported case of *Weldon v Weldon*.⁶⁸ Though Mrs Weldon's financial needs were being met by her husband, she wished to cohabit with him in the marital home and thus sought a decree for RCR. The court ordered Captain Weldon to take her home and to receive her as his wife, but he refused, at the threat of imprisonment. The *Weldon* case prompted much commentary in the English press and led to the speedy review and amendment

⁶⁴ Bland above note 51 at 124; Oliver Ross McGregor, *Divorce in England: A Centenary Study* (Heinemann Educational Publishers 1957) 882.

⁶⁵ The Custody of Infants Act of 1839 had permitted the mother to petition the courts for custody of her children up to the age of seven and for access in respect of older children, curtailing the father's near absolute right to custody.

⁶⁶ Ann Sumner-Holmes, 'The Double Standard in the English Divorce Laws, 1857–1923' (1995) 20(2) *Law and Social Inquiry* 601; Margaret K Woodhouse, 'The Marriage and Divorce Bill of 1857' (1959) 3(3) *The American Journal of Legal History* 260.

⁶⁷ Frances Power Cobbe, 'Wife Torture in England' (1878) *Contemporary Review* 82, Lee Holcome, *Wives & Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (University of Toronto Press 1983) Chapter 1; Mary Lyndon Shanley, 'Suffrage, Protective Labor Legislation, and Married Women's Property Laws in England' (1986) 12(1) *Signs* 62.

⁶⁸ *Weldon v Weldon* (1885) 10 PD 72.

of the doctrine by the Parliament under the Matrimonial Causes Act 1884.⁶⁹ The decision of the Parliament to review the doctrine was welcomed by many despite the fact that the Parliament had been sprung to action by a husband's plight, while they had long remained unmoved by the plight of the wives.⁷⁰

The key change brought about by the 1884 Act was the introduction of the concept of 'statutory desertion'. Following the Act, failure to comply with the writ of RCR in England was no longer punishable by imprisonment, rather it was considered to be statutory desertion. This entitled either spouse to a decree of judicial separation, speeding up divorce proceedings if they subsequently approached the courts for a divorce. If the decree was coupled with evidence of the husband's adultery, the wife could also obtain immediate divorce; a relief which had so far only been available for men in cases of adultery.

Meanwhile, in India, as the doctrine of RCR had developed, it had become unmoored from its origins in English ecclesiastical law and adapted to the non-Christian religions of the country. This led to some unique compromises which would have taken Dr Lushington entirely by surprise, for instance, a Hindu or Muslim woman could not use her husband's second marriage (even if it was against her wishes) as a defence against a suit for restitution of conjugal rights.⁷¹ And though a wife could usually defend against such a suit if the husband brought a prostitute to live within the household,⁷² some Hindu communities' customs of concubinage could even supersede that.⁷³

⁶⁹ Shanley above note 51 at 178.

⁷⁰ John Francis Compton Miller, 'Restitution of Conjugal Rights' (1937) 20 Bell Yard: Journal of the Law Society's School of Law, 3.

⁷¹ *Virasvami Chetti v Appasvami Chetti* (1863) 1 Mad HCR 375.

⁷² *Lalla Gobind Pershad v Dowlut Butee* (1870) 14 SWR 451.

⁷³ *Gantapalli Appalamma v Gantapalli Yellayya* (1897) ILR 20 Mad 470.

At the same time, the colonial government remained mindful of the recent legislative changes brought in relation to RCR and related age of consent debates in England as they dealt with the aftermath of Rukhmabai's case.⁷⁴ This led to polarising debates and agitations against child marriage in the next decade,⁷⁵ which eventually led to the increase of the minimum age of consent to twelve for girls through the Age of Consent Act 1891.⁷⁶ The Rukhmabai case had highlighted the tussle between the Hindu orthodoxy and the reformists over the continuing shape of Hindu law. However, the government was aware that no matter which side of the debate people stood on, they would never countenance an educated upper-class Hindu woman being imprisoned for not following the decree. A new legislation would have taken the matters out of the judge's hand, and that is exactly what the government embarked on.

This move towards abolition of imprisonment as a punishment for recalcitrant wives was also supported by Sir Andrew Scoble, Law Member of the Legislative Council of India, who proposed bringing the Indian provision in line with the English Matrimonial Causes Act 1884.⁷⁷ However, Scoble did not limit his recommendations to the removal of imprisonment as a punishment for disobeying decrees for RCR, but also suggested introducing provisions for separation and divorce across the Indian personal laws. In 1887, while the Rukhmabai case was still ongoing, the central government distributed a circular to the local governments seeking their opinions and the opinions of the native leaders. As public pressure mounted from all sides, in a bid to be seen as doing something, the Centre eventually made this letter public.⁷⁸

⁷⁴ For age of consent in England, see Laura Lammasniemi, "'Precocious Girls': Age of Consent, Class and Family in Late Nineteenth-Century England" (2020) 38 *Law and History Review* 241.

⁷⁵ The instrumental case on the issue was the death of the child wife Phulmoni due to injuries succumbed through sexual intercourse. *Queen Empress v Hurry Mohun Mythee* (1891) ILR 18 Cal 49.

⁷⁶ A minimum age of marriage was only introduced three decades later when the Child Marriage Restraint Act 1929 set the minimum age of marriage for girls at 12 and men at 18.

⁷⁷ Chandra above note 42 at 161.

⁷⁸ As above.

As with the Rukhmabai case, the responses to the circular fell fairly neatly into the reformist and the Hindu orthodox camps. And the public debate came to be framed around the punishment for disobeying the decree rather than any discussion of the merits of the doctrine itself. For instance, supporting the reform, *The Hindustan* agreed with the government proposal of removing imprisonment as a punishment, citing as their justification both the fact that Indian men were not forced to live with their wives, and their right to polygamy.⁷⁹ A similar stance was taken by those who viewed the punishment as a ‘foreign penalty’ but not the decree itself. *The Sind Times* noted: ‘It is not Hindu law that should send a wife unwilling to fulfil the marriage contract to jail. Compulsion of this sort is repugnant to the spirit and letter of the Hindu law.’⁸⁰ The paper went on to compare those who wanted to retain imprisonment as punishment to those who had attempted to defend the practice of *Sati*⁸¹ many decades ago.

On the other hand, those who were against the proposed modification were particularly incensed that these changes to the law were being considered due to a woman like Rukhmabai, a woman who had ‘incurred general odium by her misbehaviour’.⁸² Underlying this was the oft articulated fear that educated and ‘modern’ women like Rukhmabai were far removed from true religious and scriptural injunctions and if the government was persuaded by them, the Hindu religion and marital life would soon be entirely corrupted. Because if Hindu women were to ‘become as free as European women, [they] will leave their husbands whenever they

⁷⁹ *Hindustan* (Kalakankar), 7 February, Selections from the Vernacular Newspapers Published in the Panjab, North-Western Provinces, Oudh, Central Provinces and Berar, 14 February 1888. South Asia Open Archives (Hereafter SAOA).

⁸⁰ *The Sind Times*, 22 June 1887, Report on native papers published in the Bombay Presidency for the week ending 2nd July 1887 (no. 27 of 1887). SAOA.

⁸¹ The immolation of a Hindu widow on the funeral pyre of her husband.

⁸² *Subodh Sindhu* (Khandwa), 6 July, Selections from the Vernacular Newspapers Published in the Panjab, North-Western Provinces, Oudh, Central Provinces and Berar recvd upto 11 July 1887, 423. SAOA.

please.⁸³ This concern transcended religions and was seen as a problem alike for the Hindu and Muslim communities. As the *Aftab-i-Panjab* published in Lahore lamented at length:

The liberty granted to women by the British government had proved the bane of native society. Nowadays women do not respect their husband and lead immoral lives. If the latter interfere with them, they leave their husbands and become professional prostitutes. Thousands of respectable persons, overcome with shame and grief at the misbehaviour of their female relatives have committed suicide...If women are exempted from imprisonment in execution of decrees for the restitution of conjugal rights, the public streets in the cities will be filled with prostitutes ere long.⁸⁴

Here, wrapped up in the anxiety of removing imprisonment as a punishment for disobeying a decree for RCR were two underlying fears closely interconnected to concerns of moral and social hygiene: Firstly, the fear that if the social transgression of living away from a husband was tolerated by law, it would act as a doorway to other moral transgressions which would inevitably lead to sexual transgressions. The Hindu scriptures had long been suspicious of the sexual desires of women: 'The bed and the seat, jewellery, lust, anger, crookedness, a malicious nature and bad conduct are what Manu assigned to women'⁸⁵, and had sought to constrain them within marriage. This fear of the sexually deviant woman often cast as the 'prostitute' along with the desire to control female sexuality also played a central role in the colonial examination and construction of knowledge about the Indian society.⁸⁶ Thus, it was not surprising that these criticisms of the punishment for disobeying a decree for RCR and therefore allowing women

⁸³ *Bharat Bandhu*, 29 July 1887 (Aligarh) Selections from the Vernacular Newspapers Published in the Panjab, North-Western Provinces, Oudh, Central Provinces and Berar, 8 August 1887. SAOA.

⁸⁴ *Aftab-i-Panjab* (Lahore) 26 March 1888, Selections from the Vernacular Newspapers Published in the Panjab, North-Western Provinces, Oudh, Central Provinces and Berar, 03 April 1888. SAOA.

⁸⁵ *Manusmriti* Verse 9.17 in Wendy Doniger (trans), *The Laws of Manu* (Penguin Book 1991).

⁸⁶ Mitra above note 14.

freedom outside of the marital home were deliberately framed in order to speak directly to the colonial fears of the prostitute.

The second fear was a related one, that is, that this tolerance of disobedience was a first step towards an introduction of separation and divorce within Hindu marital laws, which would also give women cover for their sexual deviance. Critics were at pain to point out that Hindu marriage was an indissoluble sacrament and that '[t]he idea of divorce is foreign to the higher moral nature of the Hindus.'⁸⁷ The Anglo-Marathi paper the *Subodh Patrika* went on to note that though divorce was not alien to the lower castes, only upper caste Hindu law should be taken into account by the state due to its superior morality.⁸⁸ Hindu scriptures and upper caste customs had always been clear on the lack of female independence: 'Her father guards her in childhood, her husband guards her in youth, and her sons guard her in old age. A woman is not fit for independence.'⁸⁹ This lack of independence was seen as the only way to curb and control the sexual appetite of Hindu women. And while such rights of divorce already existed with Muslim marriages, albeit for the benefit of the man rather than the woman, greater rights to divorce for the latter were seen as a threat to the Muslim community too for it 'would encourage women to leave their husbands on the occurrence of slight disputes and to become prostitutes.'⁹⁰

Thus, we see that, at the end of the nineteenth century, the desire to keep Indian women bound within marital ties that were against their wishes, were recast in the language of colonial patriarchy. In order to appear both more 'rational' and 'modern' these concerns over women's

⁸⁷ 'Restitution of conjugal rights', *Subodh Patrika* (Bombay), 26 June 1887. Report on native papers published in the Bombay Presidency for the week ending 2nd July 1887 (no. 27 of 1887). SAOA.

⁸⁸ As above.

⁸⁹ *Manusmriti* Verse 9.3 in Doniger above note 124.

⁹⁰ *Oudh Akhbar* (Lucknow) 24 August, Selections from the Vernacular Newspapers Published in the North-Western Provinces and Oudh, Central Provinces and Rajputana, 28 August 1894. SAOA.

existence outside the conjugal home were now being articulated as concerns for the prevention of prostitution and maintenance of social and moral hygiene without any of the emphasis on the gendered double standards around marriage that the women's rights movements sought to expose.

Though Rukhmabai's plight had provided the impetus for the proposed legislation, as the debate continued to swirl all over the country, her own circumstances saw a sudden change. Proving that his main aim was to access her wealth and not in fact force her to cohabit with him, Bhikaji agreed to a compromise facilitated by the Appellate Court in 1888. In exchange for Rs 2,000 he agreed to not enforce the execution of the decree for RCR against her.⁹¹ With this compromise the proposed legislation lost all its sense of urgency, and even Law Member Scoble now felt that 'the less we meddle with the matter the better.'⁹² In the end, it was decided that doing away with the punishment of imprisonment altogether may be unnecessarily vexatious given that public opinion stood largely against any change. Instead, the decision was made in 1890 to relegate the issue to the next time the Code of Civil Procedure was due to be revised, and instead of abolishing imprisonment altogether the government decided to give the courts discretion in the matter.⁹³ After another failed attempt to revive the matter in 1893, the proposed amendment was quietly dropped in 1895.⁹⁴ Reformists railed against the move noting that the colonial government continued to apply Christian law in India even after it had been de-established in England, and still refused to rectify the mistake of ever introducing imprisonment as a punishment for disobeying a decree for RCR despite their own pledges.⁹⁵

⁹¹ "The Last of the Rukhmabai Case" *The Times of India* (Bombay), 7 July 1888, 3.

⁹² Quoted in Chandra, above note 42 at 168.

⁹³ As above, 176.

⁹⁴ 'A Timid Refusal,' *The Times of India* (Bombay), 5 March 1895, 4.

⁹⁵ *Indian Spectator* (Bombay), 10 March, Report on native papers published in the Bombay Presidency for the week ending 16th March 1895 (no. 11 of 1895), 16. SAOA. The punishment of imprisonment for disobeying an RCR decree was finally done away through Act 29 of 1923, sec 2.

While the debates on the appropriate form of punishment were ongoing in India, in England, it was clear that RCR had lost much of its strength by the 1890s. In 1891 in the high-profile case of *R v Jackson*, also known as the Clitheroe case, the Court of Appeal confirmed that a husband did not have the right to keep his wife imprisoned or confined against her will after she had defied a writ for RCR.⁹⁶ Lord Esher, ordering Jackson to immediately release Mrs Jackson, said that were Jackson's arguments accepted, it would 'make an English wife the slave, the abject slave, of her husband.'⁹⁷ The case, heard only a few years after the case of Rukhmabai, was also reported in colonial India, where English newspapers sympathised with the plight of Mr Jackson, wishing that he had been a Hindu and noting that 'the Hindu law which we permit is more generous than our own',⁹⁸ highlighting just how far the legal position between England and colonial India had diverged.

4.0 Conclusion: the lingering death of RCR

As the legal positions on marriage diverged in the late nineteenth century between England and colonial India, so did the language and notions of social hygiene. The high-profile cases dealing with RCR discussed throughout this paper have wider significance beyond the development of the doctrine in that they offered a language under the guise of which allied issues related to morality and hygiene could be discussed in a covert way, by both the champions and critics of the doctrine. An inescapable facet of such suits was the fact that as an unwilling woman was forced to return to her unwanted marriage, she could not refuse intercourse to her husband;⁹⁹

⁹⁶ *R v Jackson* [1891] 1 QB 671. See also Lois Bibbings, *Binding Men: Stories about violence and law in late Victorian England* (Routledge 2014) Chapter 5.

⁹⁷ *R v Jackson* [1891] 1 QB 671, 682.

⁹⁸ 'A Hindu Clitheroe Case', *Englishman's Overland Mail* (Calcutta) 20 May 1891.

⁹⁹ Above note 56.

and subsequently had little reproductive autonomy as birth control was expensive and not widely available.¹⁰⁰ Therefore, while on the surface, suits for RCR appeared to be about cohabitation, union, and even financial remedies, underneath them lay questions of hygiene, and in specific sexual and maternal health and autonomy. By enforcing decrees of RCR against defendant wives, the courts sanctioned marital rape and imposed unwanted physical and emotional intimacy on the woman.

Though effectively the doctrine fell out of favour in England by the end of the nineteenth century, its legal demise was a ‘lingering death’ as noted by Stephen Cretney,¹⁰¹ and it was not formally abolished until 1970.¹⁰² In India simultaneously, the doctrine became ever more firmly rooted in the legal system. After the judgment of Pinhey J in the Rukhmabai case, the ‘alien’ nature of suits for restitution of conjugal rights was never really considered by the Indian courts again. Deemed to be a part of the personal law systems in India the doctrine was given statutory footing under Section 36 of the Parsi Marriage and Divorce Act 1936, and after Indian independence this statutory footing was extended through sec 22 of the Special Marriages Act 1954 and sec 9 of the Hindu Marriage Act 1955, and continued for Muslims through common law.

However, in post-colonial India as Hindu women started gaining more independence, and also gained the right to divorce, a shift could be seen in such cases wherein men began to bring about significantly more cases for RCR than women. Husbands most often brought these cases

¹⁰⁰ D'Arcy above note 53; Angus McLaren, ‘Abortion in England, 1890-1914’ (1977) 20(4) *Victorian Studies*, 379-400; Patricia Knight, ‘Women and Abortion in Victorian and Edwardian England’ (1977) 4(1) *History Workshop Journal*, 57-68.

¹⁰¹ Stephen Cretney, *Family Law in the Twentieth Century* (OUP 2005) 146.

¹⁰² Sec 20 of the Matrimonial Proceedings and Property Act 1970.

against their wives if the latter filed for judicial separation or maintenance,¹⁰³ or charged the husbands with criminal offences such as dowry demands.¹⁰⁴

In 1983 a forceful critique of the doctrine of restitution of conjugal rights emerged from the Andhra Pradesh High Court. In a judgment akin to Pinhey, Choudary J argued that ‘the origin of this uncivilised remedy in our ancient country is only recent and is wholly illegitimate.’¹⁰⁵ Taking recourse to the right to privacy under Article 21 of the Indian Constitution he made a strong case for respecting women’s sexual and reproductive autonomy within the marital relation.

[A] Court decree enforcing restitution of conjugal right constitutes the starkest form of governmental invasion of personal identity and individual's zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being.¹⁰⁶

However, a few months later the constitutionality of sec 9 of the Hindu Marriage Act 1955 was upheld by the Delhi High Court in *Harvinder Kaur v Harmander Singh Choudhry*¹⁰⁷, and the latter was backed by the Indian Supreme Court in 1984. The Supreme Court held that the doctrine of RCR was not a legal transplant or a creature of statute, but a right inherent in the very idea of marriage itself.¹⁰⁸ The court went further to argue that the remedy of restitution was aimed at ensuring cohabitation and consortium rather than sexual intercourse. However,

¹⁰³ Flavia Agnes, *Family Law: Family Law and Constitutional Claims*, vol 1(OUP 2011) 25-26.

¹⁰⁴ For instance, see *Puspa Kumari v Parichhit Pandey* (2005) MLR 551.

¹⁰⁵ *T Sareetha v T Venkata Subbaiah* (1983) AIR AP 356.

¹⁰⁶ At 52.

¹⁰⁷ (1984) AIR Delhi 66.

¹⁰⁸ *Saroj Rani vs Sudarshan Kumar Chadha* (1984) AIR 1562 (SC).

in a country where marital rape is still not recognised as rape such platitudes are meaningless. When courts force Indian women to return to their marital homes against their wishes, they do so with complete disregard for the woman's sexual and reproductive autonomy and leave her vulnerable to rape. Almost four decades after the Indian Supreme Court's judgment, a legal transplant that has died a natural death in its original jurisdiction continues to affect the lives of Indian women today.