

**SYIN & SERN LAW REVIEW**

## SHORT POST

**RESTITUTION OF CONJUGAL RIGHTS AS A MATRIMONIAL  
RELIEF: A LEGAL RETALITORY WEAPON**Damini Sinha<sup>^</sup>

## ABSTRACT

*Marriage is historically perceived as an eternal, indissoluble, and holy union sanctified by performing certain religious ceremonies. The various legislations governing the matrimonial disputes in India craft specific reliefs that each spouse may claim. While examining the popularly contested provisions relating to the restitution of conjugal rights across statutes, the research objective of this paper calls for an in-depth exploration into the challenges and legal consequences of the indicated relief. Analyzing the interpretations laid down by the Courts in a series of cases, this study draws a link to the inconsistency of such a legal relief with the subsequent alternations to perspectives of social norms and values. In light of contemporary developments, the paper examines the dynamics of the legal provisions of granting a decree for restitution of conjugal rights, which has transformed itself into a retaliatory weapon often employed in Indian society.*

Keywords: Matrimonial Rights, Restitution of Conjugal Rights, Matrimonial Obligations, Family Justice, Societal Change.

## INTRODUCTION

The oath taken, the seven steps, *Ijab-e-Qubool*<sup>1</sup> serve to consolidate the foundation of the historically acknowledged sacrament of marriage. Solemnizing the marriage union creates and confers certain obligations and rights upon each spouse. The outset of the de-formalization process of the legal system dealing with divorce, maintenance, and other family matters dates back to 1976-1985, the *Decade of Women*.<sup>2</sup> With the recorded rise of growing demands and efforts of the feminist movement, the 59th Law Commission of India Report, 1974<sup>3</sup> recommends radical steps of adopting a unique approach of promoting reconciliation and ensuring speedy settlement in disputes relating to marriage before trial. The implementation of various legislations governing domestic relations highlight the legislative intent of establishing the status and perceived roles of a husband and wife upon the spouses. In 1955, the codification and enactment of the Hindu Marriage Act, 1956, diluted the nature of marriage as a sacrament. However, the elements of this religious union have been safeguarded through the judicial interpretation of the Act. The performance of certain religious rites and fulfilling the requirements of consent and options to dissolve a marriage consolidates a Hindu Marriage.

This paper divides into four sub-sections that deal with different facets of the law governing the dissolution of marriage in India, emphasizing the specific reliefs crafted under the above-mentioned statutes. First part of this paper embodies the research objective of this paper by tracing the evolution of the matrimonial relief of courts granting a decree of Restitution of Conjugal Rights (*hereinafter referred to as RCR*). Moving on, the second section grapples with the ratification of Section 9 of The Hindu Marriage Act, 1955 (*hereinafter referred as HMA*) and traces down the series of cases challenging the constitutional validity of such provisions relating to RCR. The third section affixes another perspective to the reading down of the RCR provisions across other personal law statutes. It is not simply an exclusive mechanism stipulated under the HMA. Subsequently, the fourth section examines the current law, contemporary developments, suggested reforms to the semantics of the transplanted relief of RCR in the Indian context; and links the concluding analysis of the leading research objective of this paper premised on the findings unfolded.

## AN INDIGENIZED LEGAL REMEDY TO FILL THE GAPS CREATED BY THE PUBLIC-PRIVATE DIVIDE IN INDIA

The Indian legal system continues to clutch onto one of the many colonial gifts. In the late nineteenth century, it imparted the sustained entry of suits for restitution of conjugal rights into Indian courts from the English ecclesiastical law, which simultaneously gained

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<sup>1</sup> *Ijab-e-Qubool* refers to the proposal to marriage made by one party and the consent given by the other. Such a ritual constitutes one of the essential elements validating marriages under Mohammedan law.

<sup>2</sup> The United Nations declared this time period as the “Decade of Women” while recognizing the need for access to justice and equity in law for women.

<sup>3</sup> Law Commission of India, 59<sup>th</sup> Report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954 (March 1947).

recognition.<sup>4</sup> The assortment of this old ecclesiastical remedy into the Indian legal system was on account of the principles of natural justice, good conscience, and equity. Before interacting with the trajectory of the historical developments of this concept by dissecting specific case laws, it is imperative to decipher the nature, meaning, and substance of such provisions encapsulating the relief of restitution of conjugal rights.

The ecclesiastical courts in England crafted the remedy accessible to the deserted spouse. Enforcing a decree of RCR meant ordering the deserter to return to the society of their spouse and render their conjugal rights. Such a relief was actively employed as a tool for seeking an ancillary relief of securing maintenance. The Matrimonial Proceedings and Property Act, 1970 put an end to the action of RCR.<sup>5</sup> In 1969, the working paper on family law and restitution of conjugal rights was published by the Law Commission. It provided the arguments in favor of the abolition of such a provision while categorizing it as a toothless order bringing the law into disrepute.<sup>6</sup> In contrast to the developments in England that discredited RCR, this common law principle gained thrust in India. It ceased to be alien, which ensued from the Civilizing mission of the British Raj. Subsequently, it was expressly codified into Indian law by pegging it under Section 9<sup>7</sup> of HMA.

The influence of RCR in India was significantly prominent, as in *Kailash Wati v. Ayodhia Parkash* (1977).<sup>8</sup> The court held that a requisite incident of marriage that any working woman entering matrimony naturally consents to the apparent marital duty of living with her husband.<sup>9</sup> The court recapitulated that only the husband possessed the right to choose and establish the matrimonial home. Over the years, as recorded that the incipient claims of RCR sparked two famous debates revolving around the public-private divide and age of consent—consequently allowing the recognition of women’s voices that were forcibly put to rest earlier. For instance, in the case of *Dadaji Bhikaji v. Rukhmabai* (1884),<sup>10</sup> the court departed from the precedents involving the relief of RCR. While investigating into an intelligent or personal consent of a woman, it challenges the link of age and consent under the colonial matrimonial law in India.<sup>11</sup> During the late 19<sup>th</sup> century, the verdict of Justice Pinhey to rescind Dadaji Bhikaji’s claim of RCR over his wife, Rukhmabai, escalated into a verbal duel between the Anglo-Indian and native press.<sup>12</sup> While dismissing the petitioner’s application,

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<sup>4</sup> Sharma, Kanika. “Withholding Consent to Conjugal Relations within Child Marriages in Colonial India: Rukhmabai’s Fight”, 38 LAW AND HISTORY REVIEW 151, 24 (2020).

<sup>5</sup> Kanika Sharma, Restitution of Conjugal Rights: A Pernicious Legal Transplant, LAW & HISTORY REVIEW (May 1, 2021, 3:54PM), <https://lawandhistoryreview.org/article/kanika-sharma-restitution-of-conjugal-rights-a-pernicious-legal-transplant/>.

<sup>6</sup> The Law Commission, PROPOSAL FOR THE ABOLITION OF THE MATRIMONIAL REMEDY OF RESTITUTION OF CONJUGAL RIGHTS (London, Her Majesty’s Stationary Office 1969).

<sup>7</sup> The Hindu Marriage Act, 1955, §9, No. 25, Acts of Parliament, 1955 (India).

<sup>8</sup> Smt. Kailash Wati v. Ayodhia Parkash, 1971 CLJ 109 (P & H).

<sup>9</sup> Kanika Sharma, Restitution of Conjugal Rights: A Pernicious Legal Transplant, LAW & HISTORY REVIEW (May 1, 2021, 3:54PM), <https://lawandhistoryreview.org/article/kanika-sharma-restitution-of-conjugal-rights-a-pernicious-legal-transplant/>.

<sup>10</sup> Dadaji Bhikaji v. Rukhmabai, ILR 9 Bom 529 1885.

<sup>11</sup> Kanika Sharma, Withholding Consent to Conjugal Relations within Child Marriages in Colonial India: Rukhmabai’s Fight, 38 LAW AND HISTORY REVIEW 151, 24 (2020).

<sup>12</sup> Sudhir Chandra, Rukhmabai: Debate over Woman’s Right to Her Person, 31 ECONOMIC AND POLITICAL WEEKLY 2937, 10 (1996).

he regretfully observed that the transplanted relief of RCR in India originated from England under peculiar circumstances, and lacked foundation under Hindu law.<sup>13</sup>

The radicalism associated with the subsequent constitutional challenges to RCR is analyzed against the backdrop of the public-private dichotomy. An overview of this protean distinction underlines different images of the social world driven by concerns that produce divergent problematics.<sup>14</sup> The influence of modernity on the public-private binary marks the contradistinction between the general interests and private interests –with the former concerning the State and the latter constituting a civil society.<sup>15</sup> The private space outlines the realm of personal intimacy within varying relationships that are to be guarded against public scrutiny or interference of values, which shall be excluded from the public realm.<sup>16</sup> The conception of the right to privacy<sup>17</sup> was held to incorporate and protect the personal intimacies of the home, family, marriage, procreation and child rearing.<sup>18</sup>

### **A BRIEF REVIEW OF RCR AMONG INDIAN PERSONAL LAWS**

The Indian soil has forever been diverse, multi-ethnic, and multi-religious. It has fabricated a country that celebrates unity in diversity. While categories of persons considered Hindus marry under HMA, 1955, it also implemented under different personal laws. Christians are guided by the Indian Christian Marriage Act, 1872 and the Parsi community adheres to the Parsi Marriage and Divorce Act, 1936. Further, Mahomedan Law provides that under such an instance wherein a wife ceases to cohabit with her husband without lawful cause, the husband may sue the wife in a Civil Court by filling the suit for restitution of his conjugal rights.<sup>19</sup> However, the non-payment of prompt dower<sup>20</sup> renders a valid defense against such a suit, provided the marriage has not been consummated.<sup>21</sup> Among the range of defenses available, cruelty of the husband has been commonly invoked, under the circumstances whereby it is unsafe for the wife to the dominion of her husband.<sup>22</sup>

As narrated in the preceding sections of this paper, the relief of restitution of conjugal rights is constructed as an equitable relief under the Hindu Law that requires equitable considerations. A Christian husband or wife is entitled to file a petition for restitution of

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<sup>13</sup> *Id.* at 2937.

<sup>14</sup> Jeff Weintraub, *THE THEORY AND POLITICS OF THE PUBLIC/PRIVATE DISTINCTION IN PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY*, (University of Chicago Press, 1999).

<sup>15</sup> Don Slater, *PUBLIC/PRIVATE IN CORE SOCIOLOGICAL DICHOTOMIES*, (Chris Jenks ed., London: Sage Publications 1998).

<sup>16</sup> *Id.* at 140.

<sup>17</sup> The Supreme Court of India held the Fundamental Right to privacy to be an emanation from Articles 19(a), (d) and 21 of the Constitution in *Govind v. State of Madhya Pradesh and Ors.*, AIR 1975 SC 1378.

<sup>18</sup> *Govind v. State of Madhya Pradesh and Ors.*, AIR 1975 SC 1378.

<sup>19</sup> *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*, (1867) 11 M.I.A. 551.

<sup>20</sup> Mahr or Dower refers to the sum of money or property, constituting consideration of the marriage, which the wife is entitled to receive from the husband. *See Mulla, Dinshah Fardunji, Principles of Mahomedan Law* 154 (Bombay: Thacker & Company 1905).

<sup>21</sup> *Abdul Kadir v. Salima and Ors.* (1886) ILR 8 All. 149.

<sup>22</sup> *Mulla, Dinshah Fardunji, PRINCIPLES OF MAHOMEDAN LAW* (Bombay: Thacker & Company 1905).

conjugal rights under Section 32<sup>23</sup> of the Indian Divorce Act, 1869 (hereinafter referred to as IDA).<sup>24</sup> What is interesting to note here is that this section is slightly contrasting to the Hindu Law studied above as under IDA, either party was entitled to file for such a decree. This remedy was not made exclusive to the aggrieved spouse. Section 32 IDA does not cast the burden of proof on the withdrawing party.

A significantly modified essence of this remedy embodies under Section 36<sup>25</sup> of The Parsi Marriage and Divorce Act, 1936. Although this provision is silent in determining upon which party the burden of proof rests. It stipulates that the cause of action arises out of the desertion or cessation cohabitation without lawful excuse by the husband or wife. A culmination of such diverse personal laws brings about the intricacy of the relief of granting a decree of restitution of conjugal rights.

## CONTEMPORARY DEVELOPMENTS

The Hon'ble Supreme Court of India referred to the case of Harvinder Kaur<sup>26</sup> and reaffirmed the decision in *Saroj Rani v Sudarshan Kumar* (1984).<sup>27</sup> Upholding the constitutional validity of Section 9 of HMA, the Hon'ble court observed that the remedy stipulated under this section does not violate Article 13, 14, and 21 of the Constitution of India. A second issue raised in this case required the courts to interpret Order 21 of Rule 32 of Civil Procedure Code, 1973 with Section 9 of HMA. Wherein the disobedience of the decree of restoration of conjugal rights follows willful conduct, the court approbates attachment of property against such disobedience.

The current law relating to the matrimonial relief of restitution of conjugal rights declares Section 9 constitutionally valid. The popular view denotes that the purpose of such a decree shall be analyzed in its proper perspective by keeping in view the method of execution in cases of disobedience. If a decree of execution is still disobeyed, then courts resort to an attachment of her property. However, if there is no property, then the spouse may wait to do nothing and allow the guilty spouse to return within one year before filing for a decree of dissolution of marriage under Section 13(1A)<sup>28</sup> of HMA.

One of the endeavors of the Law Commission of India has been to protect and preserve the diverse plurality constituting the cultural and social fabric of the nation.<sup>29</sup> In the *Consultation Paper on Reform of Family Law*,<sup>30</sup> the Commission traced the discriminatory patterns and suggested a series of reforms aimed at limiting ambiguity while interpreting the applicability

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<sup>23</sup> The Indian Divorce Act, 1869, §32, No. 4, Acts of Parliament, 1869 (India).

<sup>24</sup> Paluck Sharma, Restitution of Conjugal Rights: A Comparative Study Among Indian Personal Laws, INDIAN NATIONAL BAR ASSOCIATION (May 1, 2021, 3:04pm), <https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-indian-personal-laws/>.

<sup>25</sup> The Parsi Marriage and Divorce Act, 1936, §36, No.3, Acts of Parliament, 1936 (India).

<sup>26</sup> Harvinder Kaur v. Harmander Singh Choudhry, AIR 1984 Delhi 66.

<sup>27</sup> Saroj Rani v. Sudarshan Kumar, 1985 SCR (1) 303.

<sup>28</sup> The Hindu Marriage Act, 1955, §13(1A), No. 25, Acts of Parliament, 1955 (India).

<sup>29</sup> LAW COMMISSION OF INDIA, Consultation Paper on Reform of Family Law (August, 2018).

<sup>30</sup> *Id.*

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of such personal laws. On undertaking an analysis of the case laws and concerned provisions of statutes, in 2015, the Ministry of Women and Child Development placed their recommendations in the Report by High-Level Committee on Status of Women. In Independent India the Restitution of conjugal rights lack relevance and the existing matrimonial laws protect conjugal relations, by recognizing a denial of consummation as a ground for divorce.<sup>31</sup> Hence, the Commission echoes the Committee's recommendation and suggests the deletion of Section 9 from the HMA, Section 22 of the SMA, and Section 32 of IDA.

It is imperative to spotlight the successful steps implemented towards establishing a slightly progressive trend within the Indian Legal system. As observed by J. Katju in *Shanti Nigam v. Ramesh Chandra* (1971),<sup>32</sup>

*“[A]be withdrawal from the husband’s society may be merely physical, with no intention to shun his company. So long as the wife does not cut herself from the husband, i.e., refuses to go, refuses his matrimonial rights, or refuses him to visit, the mere fact that she is herself working even contrary to the wishes of the husband, will not furnish a good ground for a decree of restitution. Mere refusal to the quit a job at the instance of the husband is not ground either.”*

In March 2019, public interest litigation against restitution of conjugal rights was presented before the Hon’ble Supreme Court of India. In *Ojaswa Pathak v. Union of India* (2019),<sup>33</sup> the constitutionality of the remedy of restitution of conjugal rights across multiple matrimonial laws was challenged. The petitioners in an interview stated that

*“[A]be state has no legitimate or compelling interest in enforcing companionship and cohabitation as an aid to prevent the break-up of marriage because genuine desire between two couples can never be negotiated let alone enforced through a court of law... and this is an enabler for domestic and sexual abuse of a woman if she complies with the RCR decree to cohabit with her husband.”<sup>34</sup>*

## CONCLUSION

The socio-religious fabric of the Indian society has undergone a series of successful attempts examined above ensued in breaking the pull of such inequitable practices. The law concerning the matrimonial relief of RCR in the Indian Context is inconsistent with the changing times – an anathema to human rights. The private interest of an individual’s sexual autonomy and dignity is positioned below other external concerns, such as societal morality or unbalanced cultural practices. It is reasonable to argue that there exists no cogent interest of the State to interfere in the matters of private domestic relations. Over the years, this legal

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<sup>31</sup> Government of India, The Report by High Level Committee on Status of Women (Ministry of Women and Child Development, 2015).

<sup>32</sup> *Shanti Nigam v. Ramesh Chandra*, AIR 1971 All 567

<sup>33</sup> *Ojaswa Pathak v. Union of India*, W.P.(C) No. 250/2019 PIL-W.

<sup>34</sup> Kanika Sharma, Restitution of Conjugal Rights: A Pernicious Legal Transplant, LAW & HISTORY REVIEW (May 1, 2021, 3:54PM), <https://lawandhistoryreview.org/article/kanika-sharma-restitution-of-conjugal-rights-a-pernicious-legal-transplant/>.

provision has been utilized as a weapon directed at confining parties to matrimonial unions parties against their will. While aiming to protect society from denigrating, it fails to account for the criteria that the final judgment shall boldly feature the decision of the parties whether or not to continue with their matrimony, rather than unwillingly obey the decree of restitution of conjugal rights. The dynamic nature of the law ought to factor in that the current legal provisions of RCR operate as a retaliatory weapon rather than a remedy.

### **CONFLICT OF INTEREST**

The authors declare that the research work does not have any conflict of interest and the was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.