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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

MARITAL COERCION OR LEGAL REMEDY? RE- EXAMINING THE CONSTITUTIONALITY OF RESTITUTION OF CONJUGAL RIGHTS

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ABSTRACT

Section 9 of the Hindu Marriage Act, since its inception, has been a topic of debate. Restitution of Conjugal Rights raises the question of one's own personal liberty and will. RCR compels one of the spouses to cohabit with the other spouse. Such a provision is violative of the Right to live with dignity and personal liberty granted under Article 21. This article critically analyzes the Restitution of Conjugal Rights and its constitutionality. The paper will deal with all the relevant provisions and statutes, especially Section 9 of HMA. Further, it examines the constitutionality of the Restitution of Conjugal Rights. Supreme Court's interpretation of Section 9 in various cases. This work will also deal with the moral question of forcing marital duty, which is also a big concern, especially when marriage is considered a sacrament or samskara. There will be a comparative analysis of remedies granted by their system in place of the Restitution of Conjugal Rights. Feminist critique of RCR will be discussed as provisions of RCR are mainly availed by men. As India is progressing towards a rights-based system, such forceful duties are acting as an impediment. There is an urgent need to resolve this coercive remedy. Despite India is called Dharma and Karma Pradhan (Duty-based legal system), duty no longer remains a duty when it is forcefully imposed. It is no longer a legal remedy, but rather a constitutional wrong. In conclusion, there will be a quick analysis of the paper, its purpose, and potential remedies for the ailment of RCR.

Keywords: Restitution of Conjugal Rights, Cohabitation, Remedy, Constitutionality, Coercion.

INTRODUCTION

India, post-independence, kept many of the laws made by the British, as it is, at least in spirit. Many of those laws are fairly serving their purposes, and at the same time, some laws have been transferred to independent India, which continues to subsist despite being against the spirit of the constitution. One such law is the Restitution of Conjugal Rights, which imposes patriarchal norms and is against the right of the spouse who is unwilling to cohabit. Such laws have held their place so long in the Indian legal system that it has become so hard to do away with them. The Supreme Court is trying to eliminate those evils from the Indian legal system through the fundamental constitutional instruments like 'Constitutional Morality' and 'Transformative Constitutionalism'. Using such tools, the S.C. decriminalized homosexuality and Adultery.

Restitution of Conjugal Rights is the *pernicious legal transplant*.¹ Pre-Independence, when polygamy was prevailing, it happened that due to unequal treatment of wives, they left their homes. Sometimes husbands abandoned their wives for a variety of reasons, and without any reason in the prevailing patriarchal setup. In such circumstances, RCR evolved as a remedy from ecclesiastical laws, from cases by abandoned wives or deserted husbands. Although it was alien as far as the statutes were concerned, it established strong hold by the introduction of Section 9 in the Hindu Marriage Act, 1955. Hindu Code Bill consisted set of four statutes aimed at reforming Hindu personal Laws in India. Section 9 of the HMA failed to fulfill its purpose by gaining undue precedence over the *right to personal liberty* granted under Article 21 of the Indian Constitution.

WEDDED RIGHTS OR COERCED DUTIES

Section 9 of HMA, "When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly." This provision gives rights to both the husband and wife who have even been abandoned or deserted be it *actual or constructive desertion*.

¹ Kanika Sharma: Restitution of Conjugal Rights: A Pernicious Legal Transplant – Law & History Review, (last visited May 8, 2025).

Conditions for filing RCR:

- Withdrawal from society of the spouse, be it actual or constructive desertion
- Such withdrawal must be without reasonable cause
- Only the aggrieved party can apply for RCR
- Such withdrawal must not be caused due to the conduct of the deserted spouse

Section 22 of the Special Marriage Act, 1954, “When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply for restitution of conjugal rights.” Such a statutory remedy violates the right to choose a spouse.

The courts have often cited the reasons for *marital duty of cohabitation as fundamental to the institution of marriage*. As per the provision, Restitution of Conjugal Rights is the *right* of the aggrieved spouse, and the other spouse has the *duty to comply even without his or her will*.

SECTION 9 OF THE HMA: A REMEDY IN CONFLICT WITH CONSTITUTIONAL RIGHTS?

This provision violates the *Right to Privacy and Bodily Autonomy* granted under *Article 21*, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Although HMA is the procedure that jeopardizes Article 21, Section 9 of HMA restricts it unreasonably. *Justice K.S. Puttaswamy v. Union of India*,² The S.C., through its 9-judge constitutional bench, reaffirmed that the right to privacy is fundamental to a person. Section 9 infringes one's bodily autonomy, right to privacy, and right to choice. *Suchita Srivastava v. Chandigarh Administration*³ (2009) Hon'ble S.C. reiterated that reproductive rights and bodily autonomy have been entitled to by the constitution itself under Article 21.

Despite the text of section 9 of HMA being gender neutral, it has unjustified and disproportionate repercussions on women in patriarchal marital setups. Husbands frequently use non-cohabitation as an excuse against alimony or maintenance under Section 24 of HMA or Section 125 of the CrPC. Section 9 can be potentially used as a weapon against women. Hence, Section 9 lacks the factor “*equal protection under the law*,” subsequently leading to a violation of Article 14 of the Indian Constitution. *Saroj Rani v. Sudarshan Kumar Chadha*⁴

² K.S. Puttaswamy v. Union of India, 2019 (1) SCC 1.

³ Suchita Srivastava v. Chandigarh Administration, AIR 2010 S.C. 235.

⁴ Saroj Rani v. Sudarshan Kumar Chadha, 1984 AIR 1562.

there was constructive desertion by the wife due to ill treatment by the husband. She demanded maintenance, and her husband filed for RCR, and subsequently, the petition for maintenance was rejected. For any dependent woman, is she left with any other option than to forcefully and unwillingly cohabit with a cruel husband?

COURTS IN MARITAL SPHERE: THE JURISPRUDENCE OF CONJUGAL RESTITUTION

With time, women being educated and becoming independent, cases of RCR increased with an increased number of husbands as petitioners. Such cases often arose from ‘weekend marriages’ where the couple do not cohabit due to the reasons of employment. One such case is *Tirath Kaur v Kirpal Singh* (1964)⁵, wife was working in another town, and subsequently she was served with a suit for Restitution of Conjugal Rights. The trial court said that: “the husband was justified in asking the wife to live with him even if she had to give up service.” On the appeal same decree was upheld by the High Court of Punjab, stating that: “a wife’s first duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection.”

Interestingly, England abolished RCR through the “*Matrimonial Proceedings and Property Act*” 1970, and contradictorily, RCR has gained a stronghold day by day and still exists as an integral part of personal laws, despite India having gained this law from the British. *Kailash Wati v Ayodhia Parkash* (1977)⁶In this case, the court said that if the working woman marries, She has an implied obligation to cohabit and declared that the husband has the “right to choose and establish the matrimonial home”.

T Sareetha v T Venkata Subbaiah (1983)⁷ Justice Chowdhry declared Section 9 of HMA to be violative of the Constitution and said that the suits of RCR have a foreign nature. Wife has to live with her husband against her own will, which may lead to coercive and forceful sexual intercourse. It is undeniable that women and men are treated unequally in society, and if we treat them equally in law, then that will deprive women of their equal protection under the law and hence violate Article 14.

Harvinder Kaur v. Harmander Singh, 1984,⁸ the Delhi High Court declared Section 9 as constitutional. Justice Rohatgi refrained and criticized for holding personal laws accountable

⁵ *Tirath Kaur v Kirpal Singh*, AIR 1964 Punjab 28.

⁶ *Kailash Wati v Ayodhia Parkash*, (1977) 79 PLR 216.

⁷ *T Sareetha v T Venkata Subbaiah*, AIR 1983 AP 356.

⁸ *Harvinder Kaur v. Harmander Singh*, AIR 1984 DELHI 66.

in front of the Constitution. “Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull into a China shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither Article 21 nor Article 14 has any place.” The same judgment has been upheld by Hon’ble Supreme Court in the case of *Saroj Rani vs Sudarshan Kumar Chadha* (1984)⁹.

INDIA’S LEGAL NECROMANCY: RCR, EXILED BY THE WEST, EXALTED IN INDIA

The United Kingdom has banned RCR through the “*Matrimonial Proceedings and Property Act*”, 1970, Section 20¹⁰ states that: “No person shall be compelled, by any order of any court, to cohabit with his or her spouse.” RCR evolved through ecclesiastical courts in England, having its roots in Christianity. With the rise of *liberal individualism*, British courts questioned the coercive nature of RCR, as it interferes with individual liberty and personal autonomy. In *R v Jackson*¹¹ Husbands cannot use physical force to compel their wives to cohabit with them. It can be analogically deduced, if RCR had subsisted, it would have served as a replacement for the husband’s physical force. RCR is unjustified, and one’s personal autonomy outweighs any such marital duty.

Criticism of RCR in the UK before the blanket ban

- Obsolete and unnecessary in sacred and egalitarian modern marriages.
- Implied violation of fundamental human rights, with enforcement of RCR.
- Unnecessary legal fiction when other options of judicial separation and divorce were available.

The same criticism is applicable to Section 9 of HMA and Section 22 of SMA, and the elimination of RCR from the UK’s legal system is a lesson for India to do the same.

South Africa banned RCR in 1979 with the introduction of *the Divorce Act, 1979*¹² Aligning with the constitutional principles. Section 10 guarantees dignity to an individual, and Section 14 guarantees the right of privacy. Cannada also put an end to RCR respecting autonomy and in furtherance of spousal equality.

⁹ Supra note.4.

¹⁰ Matrimonial Proceedings and Property Act, 1970, § 22, No. 45, Acts of Parliament, 1970 (U.K.).

¹¹ *R v Jackson*, [1993] 4 SCR 573.

¹² The Divorce Act, 1979, No. 70, Acts of Parliament, 1979 (South Africa).

ECHOES OF RUKHMABAI IN OJASWA PATHAK'S PETITION

In the pre-independence case of *Dadaji Bhikaji v. Rukhmabai*¹³ A girl child was married, and after she grew up as an educated woman, she refused to cohabit with the person with whom she was married initially Bombay High Court emphasized personal liberty and individual autonomy, and Justice Robert Hill Pinhe said that there was no cohabitation before. Hence, there can be no restitution of cohabitation that never existed before. On appeal, Justice Farhan ruled in favor of the husband. Rukhmabai was given the choice either to cohabit with her husband or choose six months imprisonment; she chose imprisonment. She struggled for a divorce and eventually became India's first divorcee.

*Ojaswa Pathak vs. Union of India*¹⁴, a PIL questioning the constitutionality of Section 9 of HMA, i.e. Restitution of Conjugal Rights in both the secular and nonsecular laws. The petition claims a violation of Articles 14, 15, and 21 of the Indian Constitution. Despite it has been more than a century since Rukhmabai had to face imprisonment fighting against the evil restitution of cohabitation. Then was the time of colonialism, even after 75 years of freedom, not much has changed regarding the *forceful restitution of conjugal rights*. Despite from whom India has borrowed, such a law has been repealed since 1970, setting a precedent for India to do the same.

CONCLUSION

Restitution of Conjugal Rights is an anachronistic remedy. Many times, RCR has been compared to “*legalized rape*”.¹⁵ As per CPC, non-compliance with the decree of RCR may result in the attachment of the property of the spouse.¹⁶ One's liberty is sacrosanct with their very existence, and if the question of women's dignity is raised, then it becomes much more crucial. The decree of RCR is a violation of human dignity within the ambit of the procedure established by law. Such restitution makes the spouse vulnerable to violation of sexual autonomy. *Sukhram Bhagwan Mali v. Mishri Bai Sukhram Mali*.¹⁷ In the given case, the father-in-law has an evil eye on the wife, and the wife deserted her husband for such reason husband filed for RCR and was granted. This is the perfect example of forced union, which contradicts

¹³ Dadaji Bhikaji v. Rukhmabai, (1885) ILR 9 BOM 529.

¹⁴ Ojaswa Pathak vs. Union of India, Writ Petition (Civil) No.250/2019 the S.C. of India.

¹⁵ Parliament of India, Lok Sabha Debates 7626 (Lok Sabha Secretariat 1955).

¹⁶ Or. 21 R. 32, The CPC, 1908, No. 5, Acts of Parliament, 1908 (India).

¹⁷ Sukhram Bhagwan Mali v. Mishri Bai Sukhram Mali, AIR 1979 MP 144.

the Fundamental right to form an association, having the implied right not to form an association.¹⁸ RCR exists, which does not fall under Article 19(6) of the Indian Constitution dealing with reasonable restrictions of morality, public order, and health. Transformative Constitutionalism is one of the tools in the hands of the Hon'ble Supreme Court, which aims to bridge the gap between precedents of old practices that have lost their relevance today, to reforms. RCR is a conservative and unconstitutional seems to treat women as a subjects of their husbands will. The Report by the Law Commission of India titled "Reform of Family Law" suggests the deletion of section 9 from the Act, 1955, section 22 of the SMA, 1954, and section 32 of the Indian Divorce Act, 1869.¹⁹

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¹⁸ M. Sitharamachary v. Inspector of Schools, AIR 1958 AP 78.

¹⁹ Reform of Family Law, Law Commission of India, 2018, (last visited May 8, 2025).