

RESTITUTION OF CONJUGAL RIGHTS: A DEBATE OVER ITS CONSTITUTIONALITY

A great marriage is not when the "perfect couple" comes together. It is when an imperfect couple learns to enjoy their differences. -Dave Meurer

ABSTRACT

Marriage is an integral aspect of the very dominant social organization termed society. Marriage has been regarded as a sacrament which is both eternal and indissoluble in nature as per the Hindu teachings. Matrimony binds two people who are consequently placed on equal footing in terms of rights and liabilities arising out of their marital ties. A renowned notion which established its roots in society is Manu's idea, "*neither by sale nor by desertion is wife released from the husband*".¹ The controversial misinterpretation of Manu's idea has caused a false belief amongst masses that this principle is merely applicable to women only. Evidently, in India a wife has been underplayed as a dispensible counterpart furthering unequal treatment of women in our society. Hindu Marriage Act, 1955 facilitates remedies to protect the sacramental aspect of marriage. Restitution of Conjugal Rights surfaced as a positive concept but has been misused thereby abusing the sanctity of a wife. In light of the disdainful reality the authors will examine the viability of this remedy by questioning the constitutionality. The inappropriate usage of this matrimonial remedy could possibly attack the righteousness of right to life, liberty, privacy and equality. Thus one can render it unconstitutional as it attacks the crux of the constitution of India. The conclusive findings suggest that there are inherent disparities existing in law despite of extensive judicial activism that has penetrated in the legal system. The flaws need to be sieved and eliminated to ensure Restitution of conjugal rights is embraced as a socially viable remedy.

I. INTRODUCTION

The two indispensable institutional pillars in our society are family and marriage. Urban and rural societies in India, are connoted as chariots resting on these institutions that serve as a pair of wheels furthering their existence. Having a moral path often channelizes a social machinery in the right direction and helps it attain the purpose of its existence. Societies must be governed by certain norms which have developed into customs and usages with the passage of time.² This paper encompasses the concept of marriage and its implications in the form of restitution of conjugal rights. Undoubtedly, it is an institution governed and

¹ The Laws of Manu, c. 1500 BCE, Indian History Sourcebook (Chapter IX Rule 46), available at <http://hinduism.about.com/library/weekly/extra/bl-lawsofmanu8.htm> (last visited Aug. 10, 2013)

² B M GANDHI, HINDU LAW 277-278 (2nd ed. Eastern Book Company 2003)

recognized by personal laws of every recognized religion in India. The institution of marriage is presently appearing as a peak of an assorted concept which has extended over a long period.³With the onset of urbanization and the broadening of social ideologies marital life complexities namely divorce, judicial separation and conjugal rights gained a significant footing in personal laws. Inevitably, highlighting notable issues linked with codification of marriage laws in India.⁴ Consequently, this has caused a stir amongst dominant religions of the nation. They have ploughed considerable effort to codify their own personal laws ,giving birth to anew era of personal law legislation that presently encompasses Hindu Marriage Act, 1955, Indian Divorce Act, Parsi Marriage and Divorce Act, 1936 and etc.⁵

The authors after having assessed personal laws in their objective sense,deduced that they carries provisions to ensure parties in a marriage arevested with certain rights existing specifically out of the wed-lockonly.

These rights are called Conjugal Rights.⁶ When spouses who have previously entered into marital ties

start living separately *i.e.* one spouse leaves the society (matrimonial home) of the other then in order

to have some remedial measures for the disadvantaged party, which acts as a kind of restoration there comes

the concept which in a way tries to fulfil one of the most important objectives of these personal laws *i.e.* to

prevent the marriage ties from being getting broken and fulfilling one of the most fundamental purposes of

marriage *i.e.* spouses must live together after the marriage and that one spouse is entitled to the society and

comfort of the other spouse.⁷ This concept is known as “restitution”⁸ of these all important conjugal rights.

It is a much known reality that the law of the land has been held at the topmost pedestal and regarded as a

supreme authority in governance. Every piece of legislation must be in accordance with the basic structure

of the Constitution of India. In light of this grassroot principle the authors have grasped the essence of

personal laws and the esteemed importance of marriage as an integral component of society also discussing

over the most important concept in the field of protecting the marital ties from getting broken *i.e.* restitution

of conjugal rights. Recently, numerous issues have been raised in court of laws particularly the Apex court

(guardian of fundamental rights) questioning whether the laws related to restitution of conjugal rights is

against the principles of natural justice and part III of the Constitution of India or not? This debatable

question has garnered attention of the legal fraternity and the nation. For any law to remain alive in the legal

system of India it should comply with the basic structure of the Constitution and fundamental rights *i.e.*

Part III is the basic structure of the constitution. Therefore, the main aim and object of this article is to

³ S.J. Peasants, *Hindu Women and the Restitution of Conjugal Rights : Do we need a remedy*, available at <http://www.manupatra.com/Articles/Articles.asp> (last visited Aug. 8, 2013)

⁴ KUMUD DESAI, *INDIAN LAW OF MARRIAGE AND DIVORCE* 136-137 (7th ed. Wadhwa and Company Nagpur 2008)

⁵ SIR DINSHAH FARDUNJI MULLA, *MULLA PRINCIPLES OF HINDU LAW* 895 (Satyajee A. Desai eds., 21st ed. Lexis Nexis Butterworths Wadhwa 2010)

⁶ B M GANDHI, *HINDU LAW* 277-278 (2nd ed. Eastern Book Company 2003) defines Conjugal rights as ‘*it is the rights of the couples to have each other’s society and have marital intercourse*’

⁷ B M GANDHI, *HINDU LAW* 277-278 (2nd ed. Eastern Book Company 2003)

⁸ B M GANDHI, *HINDU LAW* 277-278 (2nd ed. Eastern Book Company 2003) defines Restitution as ‘*In its etymological sense it means restoring to a party on the modifications, variation or reversal of a decree what has been lost to it in execution of the decree or in direct consequence of the decree*

adjudicate upon the issue of the validity of the provisions granting restitution of constitutional rights in various personal laws, on the touch stone of the constitutional law principles enshrined under Part III of the constitution.

With the above stated aim and object the methodology that the authors have adopted to write this paper, is an indepth analysis of authoritative books written by remarkable and credible scholars. Relevant case laws adjudicated by the various High Courts and the apex court have been appropriately utilized to support the authors' findings.

II. RESTITUTION OF CONJUGAL RIGHTS: CONCEPT, ORIGIN AND APPLICATION IN THE INDIAN SCENARIO (UNDER FOUR MAJOR PERSONAL LAWS IN INDIA)

In order to appreciate the debate over the constitutionality of the provisions of Restitution of Conjugal Rights it is necessary to explore the origin, concept and application of the law on restitution of conjugal rights. A peek into the history will help understand the course taken by the legislation with the transition of time.

A. ORIGIN

Before embarking on the pathway to assess the future of Restitution of Conjugal Rights understanding the historical development is essential. A window in the past serves as a prerequisite for gauging its origin in India. The principle of restitution of conjugal rights, was never documented under the *Dharmashastra* nor did the Muslim law made any provisions for it.⁹ Nevertheless, it entered India during the much detested British Invasion where it was introduced with the name of social reforms (as per the British Raj).¹⁰ Furthermore, on conducting an extensive study on the issue it was learned that Restitution of conjugal rights has its roots in the period of feudal England, where marriage was merely considered as a property deal and a wife was rendered as a meagre part of man's possession like other chattels. In this regard there is an ever increasing need to highlight that this concept was never welcomed by the English Society and to support this line of thought, the authors would like to make a mention of the opinion given by *Sir J Hannen* in the famous English judgment of *Russell v. Russell*.¹¹ This demonstrates that the concept of restitution of conjugal rights is very barbarous, moreover it has been blatantly misused resulting in the ultimate abolishment of this reform in England by the Law Reforms (Miscellaneous Provisions) Act, 1947.¹² Thus, it

⁹ .PARAS DIWAN, LAW OF MARRIAGE AND DIVORCE 328 (5th ed. Universal Law Publishing Co. 2008)

¹⁰ *Ibid*

¹¹ Saloni Tuteja, *Restitution of Conjugal Rights: Criticism Revisited*, available at <http://www.legalserviceindia.com/articles/abol.htm> (last visited Aug. 12, 2013)

¹² S.P.GUPTA, HINDU LAW IN BRITISH INDIA 186 (2nd ed. Premier Publishers Delhi 1947)

was brought by the Britishers as a social reform and for the first time this concept was introduced in India in the case of *Moonshee BuzloorRuheem v. Shumsoonissa Begum*¹³, where such actions were regarded as considerations for specific performance.¹⁴

B. CONCEPT

Now after having a good overview over its origin, we must sweep over the conceptual background of this marital remedy to stimulate our thoughts regarding its nuances and for developing a strong background. As it has been repeated for times immemorial that marriage is an institution under all prevailing matrimonial laws, it is a kind of pious union where spouses gets certain legal rights to rely upon in exchange of which they are additionally vested with certain duties to perform. Rights, duties, obligations and emotions play a pivotal role to run the cycle of marital life with all its implications. It is a union to enrich lives of those involved however when the course of events turn otherwise matrimonial remedies serve as a legal aid to heal.

A marital bond is based on obvious concepts such as both the spouses are under a necessary obligation to live together both physically and emotionally *i.e.* **comfort consortium**.¹⁵ This is categorically emphasized under all the personal laws *i.e.* Muslim, Hindu, Christian and Parsi religion. The concept of restitution of conjugal rights is present in all the following listed laws *i.e.*

- **Hindu Law:** Hindu law is mainly governed by Hindu Marriage Act, 1955. This one piece of legislation covers almost all the nuances of Hindu religion. The concept of restitution of Conjugal Rights is also present in Hindu Marriage Act¹⁶ and expressly given under Sec.9 of the act.
- **Muslim Law:** Under Muslim religion this concept of restitution of Conjugal Rights is given under the general law as they consider it as the concept with securing to the other spouse the enjoyment of his or her legal rights. Here earlier it was considered as the concept of specific performance but the case of *Abdul Quadir v. Salima*¹⁷ inculcates new understanding whereby from the period followed after the case the concept of restitution must be decided on the principles of Muslim Law and not on the basis of justice, equity and good conscience.¹⁸

¹³ *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1877) ILR 1 Bom 164

¹⁴ *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1877) ILR 1 Bom 164

¹⁵ SIR DINSHAH FARDUNJI MULLA, *MULLA PRINCIPLES OF HINDU LAW* 895 (Satyajeet A. Desai eds., 21st ed. Lexis Nexis Butterworths Wadhwa 2010)

¹⁶ Hindu Marriage Act, HINDU CODE (1955), §.9

¹⁷ *Abdul Quadir v. Salima* (1886) ILR 8 All 149

¹⁸ *Ibid*

- **Christian law:** Under Christian Law the provision of restitution of Conjugal Rights is stated under sec.32 and 33 of the Indian Divorce Act, 1929.¹⁹
- **Parsi Law:** Under Parsi law also there is a provision of restitution of conjugal rights and it is given under sec.36 of the Parsi Marriage and Divorce Act, 1936.²⁰
- Another category beyond all the religions where only special marriages are being recognized is under **Special Marriage Act, 1954**²¹ which also carries the remedy of restitution of conjugal rights under sec.22 of the act.²²

Hence, it can be concluded that all personal laws in India imbibe full fledged provisions of restitution of conjugal rights and all the above listed provisions are gender neutral consequently give equal remedy to both the spouses. Therefore, just going by all the provisions in all the above listed set of personal laws, the authors just want to say that there are mainly four major premises in all the personal laws based on which the court of law order the decree of restitution of conjugal rights *i.e.*:²³

- **Withdrawal by the respondent from the society of the petitioner.**
- **The withdrawal is without any reasonable cause or excuse or lawful ground.**
- **There should be no other legal ground for refusal of the relief.**
- **The court should be satisfied about the truth of the statement made in the petition.**

On examining all the above listed requisites the court will only grant the decree of restitution of conjugal rights if it gets satisfied on the grounds when the petitioner prove that the respondent has withdrawn from the society of petitioner without any reasonable excuse,²⁴ in addition to which all the statements made by the aggrieved spouse should be true so that there should not be an establishment of any valid ground on which the petition of the aggrieved party should not be granted.²⁵

C. APPLICATION

¹⁹ Indian Divorce Act, GEN. S.R. & O. (1929), § 32 & § 33

²⁰ Parsi Marriage and Divorce Act, GEN. S.R. & O. (1936), §36

²¹ Special Marriage Act, GEN. S.R. & O. (1954), § 22

²² Mohan Lal v. Shanti Devi, A.I.R. 1964 All 21

²³ KUSUM, FAMILY LAW 1(FAMILY LAW LECTURES) 42-44 (3rd ed. Lexis Nexis Butterworths Wadhwa 2011)

²⁴ AdityaSwarup, *Constitutional Validity of Restitution of Conjugal Rights: Scope and Relevance*, available at <http://works.bepress.com/adityaswarup/8> (last visited Aug. 12, 2013)

²⁵*Ibid*

The integral value of any law is not known by what the law is in its textual form but the manner in which the law has been adopted by the society, executed and applied on the subjects. On applying the provisions of restitution of conjugal rights, the background situation which should be considered is that suppose any problem stems between spouses due to which either of them withdraws from the other's society then the party can seek the remedy provided by the law. In exchange of this an aggrieved party can file a legal petition in the court of law to attain a decree in favour of an aggrieved party and thus reconstitute the marital or conjugal life which could be suffering from negative vibrations. Many a times a negative storm of grave magnitude can result into a breakdown of relationships.²⁶ This right of cohabitation with the other spouse, as per the text of law is gender neutral and here the rights are equally available to both the spouses. Further, as a consequence it can lead up to two outcomes. Either both the spouses will find harmony in togetherness again thus rekindling their marital life or if it is not obliged by any of the spouse then it can be enforced by the attachment of property²⁷. In the event that it is again not followed, the court will punish him or her for not following the decree as if it is not followed and then it will amount to constructive destruction from the side of erring spouse as it hampers the ultimate motive of the marital life which endorses that both the spouses should enjoy the society of each other.²⁸ There is a very important requirement for the execution of the provision of restitution of conjugal rights in the correct sense *i.e.* there should be a presence of reasonable excuse based on which the erring spouse has withdrawn from the society of the aggrieved spouse and the burden of proof for this reasonable excuse is on the erring spouse.²⁹

III. IS RESTITUTION OF CONJUGAL RIGHTS CONSTITUTIONALLY PLAUSIBLE?

The discussion can be taken forward from the last stage since a very clear picture has been drawn about the concept and background of the principle of restitution of conjugal rights. The authors are tilting towards the debate over the constitutionality of restitution of conjugal rights. Before starting the debate first of all, the authors are likely to put forth their own opinion over the origin of the whole concept which is contradictory to what has been mentioned earlier in this paper *i.e.* it cannot be said that the concept of restitution of conjugal rights and that its embodiment in Indian legal jurisprudence is foreign to the Indian culture and society. Such right is innate in the very foundation of marriage in itself. The only thing which can be said as new about this concept which is been visible in the Indian society right from the distant past, is its formal

²⁶ S.J. Peasants, Hindu Women and the Restitution of Conjugal Rights : Do we need a remedy, available at <http://www.manupatra.com/Articles/Articles.asp> (last visited Aug. 14, 2013)

²⁷ CODE CIV. PROC. 1908, Order 21(Rules 31&32)

²⁸ Vimal Balasubrahmanyam, *Conjugal Rights vs. Personal Liberty: Andhra High Court Judgment* 1983 18(29), available at <http://www.jstor.org/stable/4372307> (last visited Aug. 10, 2013)

²⁹ Arlette Gautier, *Legal Regulation Of Marital Relations: An Historical And Comparative Approach* 19(47), <http://lawfam.oxfordjournals.org/content/19/1/47.abstract#target-1> (last visited Aug. 12, 2013)

incarnation under the various set of personal laws.³⁰ Now with this understanding and opinion the authors are heading towards the debate in order to arrive over a definite and concrete conclusion over the question of constitutionality of restitution of Conjugal rights. In order to appreciate this debate first of all the authors have reviewed the past periodicals from where the question of constitutionality of restitution of conjugal rights came into the picture for the very first time. In order to consider this question, the authors would firstly like to cross check the assumption which was made in the starting, the assumption was that personal laws comes within the ambit of “art.13”³¹ of Constitution of India because the personal laws have the base of custom which is as same as “custom” given under art.13 (3) of the Constitution of India. After having taken into consideration the decision of *State of Bombay v. Narasu Appa Mali* and *J. Chagla’s* general opinion over art.13 and 17 of the constitution, the authors want to put forth that the personal laws which are based upon the customs are not the same as what custom means in the context of art.13 of Constitution of India because the customs which forms the base of the personal laws is not able to fulfil the scope of art.13. Additionally if personal laws become a part of art.13 then art.17³² would not have been added in the constitution thereby demonstrating that the constitution drafters did not consider embodying personal laws under the ambit of art.13. Nevertheless, even then any principle of personal law should not contradict the basic structure of the Constitution and in this regard Part III of the Constitution because it is also a kind of law and no law should go against the law of the land *i.e.* Constitution of India.³³ On this the erring spouse *i.e.* the wife challenges the constitutional validity of S.9 of Hindu Marriage Act, 1955 which deals with the restitution of conjugal rights. This case was decided in a single bench by a learned judge *P. Chaudhary J.* who held that Sec.9 is a “*savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution, hence void*”.³⁴ Again just after a period of one year when for the second time the same question surfaced again in the case of *Harvinder Kaur v Harminder Singh*³⁵ then the dicta used by *Chaudhary, J.* did not find support and acceptance with the Delhi then the High Court opinion where the case of *Harvinder Kaur* was decided by single judge bench *i.e.* *Rohtagi J.* who opined that “*Justice Chaudhary in the case of T. Sareetha has over relied on sex is the basic fallacy in his opinion. As per J. Rohtagi, J. Chaudhary only seems to suggest that restitution of conjugal rights order has only a maiden purpose, that is, to forcethe disinclined wife to enter into sexual intercourse with her husband*”.³⁶ Following such intense heated debate this matter finally came before the apex court in the case of *Saroj Rani v Sudarshan Kumar Chadha*³⁷ where the Supreme Court override the

³⁰ Saloni Tuteja, *Restitution of Conjugal Rights: Criticism Revisited*, available at <http://www.legalserviceindia.com/articles/abol.htm> (last visited Aug. 12, 2013)

³¹ INDIA CONST. art.13

³² INDIA CONST. art.17

³³ H K SAHARAY, *FAMILY LAW IN INDIA* 41 (1st ed. Eastern Law House 2011)

³⁴ KUSUM, *CASES AND MATERIALS ON FAMILY LAW* 58 (2nd ed. Universal Law Publishing House 2010)

³⁵ *Harvinder Kaur v. Harminder Singh*, A.I.R 1984 Del. 66

³⁶ Vimal Balasubrahmanyam, *Conjugal Rights: Shift in Emphasis Needed* 1984 19(35) EPW, available at <http://www.jstor.org/stable/4373507> (last visited Aug. 13, 2013)

³⁷ *Saroj Rani v. Sudarshan Kumar Chadha*, A.I.R 1984 S.C. 1652

dicta of *T. Sareetha*³⁸ on the basis of the judgement given by J. Rohtagi in the case of *Harvinder Kaur*³⁹. This case was decided in a single bench by J. Sabyasachi Mukarji who said that “*it cannot be viewed in the manner the learned single Judge bench of the Andhra Pradesh High Court has viewed it and we are unable to hold that S.9 is to be violation of Article 14 and Article 21 of the Constitution*”.⁴⁰ Thus, ultimately in the legal purview as per the law declared by the apex court the issue was in favour of sec.9 of Hindu marriage Act, 1955, and most importantly the principle of restitution of conjugal rights stands as constitutional in the Indian legal system of personal laws.⁴¹

The principles on which the Constitution of India got developed was basically the principles of Equality, Human Dignity and Personal Liberty *i.e.* more or less art.14, 19 and 21 of the Constitution of India and for any law if there is a need to check the constitutionality then, we should check the law on the basis of the above listed three basic principles of Constitution of India. Taking into account the aforementioned discussions, the authors would effectively begin the discussion which has the possibility of getting complex with passing time. The discussion on the constitutionality of restitution of conjugal rights will be divided into two parts *i.e.* First part will deal with the arguments which says that it is perfectly constitutional on the contrary to it the second part will deal with the arguments which are unconstitutional.⁴²

A. PART 1

This part will be divided into two sub-parts in which in each part the authors would compare the principle of restitution of conjugal rights with two main fundamental rights *i.e.* right to equality (art.14) and right to life and privacy (art.21). So *Firstly*, in this line is the comparison of restitution of conjugal rights with the right enshrined to every Indian citizen by the virtue of art.14 *i.e.* right to equality, the authors would like to start by saying that our social approach is without any interruption and termed as one with wide range of gender discrimination.⁴³ Due to this most of the women have been subdued to this discrimination because of their gender. Presently, this is the pivotal reason as to why restitution of conjugal rights was challenged on the ground that it violates the mandate of art.14 but in addition to this it must also be noted that as per the stats in our society the suit for restitution filed by the men is much higher in statistics as compare to women. Thus, it was challenged in the case *T. Sareetha v. T. VenkataSubbaiah*⁴⁴ and it was affirmed. At the same time we need to look at gender discrimination in our society. It is mostly done on the grounds of

³⁸ *T. Sareetha v. T. Venkata Subbaiah*, A.I.R 1983 AP 356

³⁹ *Harvinder Kaur v. Harjinder Singh*, A.I.R 1984 Del. 66

⁴⁰ KUSUM, CASES AND MATERIALS ON FAMILY LAW 55 (2nd ed. Universal Law Publishing House 2010)

⁴¹ H K SAHARAY, FAMILY LAW IN INDIA 41 (1st ed. Eastern Law House 2011)

⁴² *supra* note 40

⁴³ Aditya Swarup, *Constitutional Validity of Restitution of Conjugal Rights: Scope and Relevance*, available at <http://works.bepress.com/adityaswarup/8> (last visited Aug. 12, 2013)

⁴⁴ *supra* note 37

society, economic and education. It is not on the grounds of matrimony and marriages.⁴⁵ Moreover this got affirmed as an instance that all personal law provisions related to marriages are gender neutral and give equal rights to both the spouses. Since, this argument is related to art.14⁴⁶ which has an underlying principle that persons who are similarly circumstanced should be treated alike both in terms of conferring of privileges and imposition of liabilities.⁴⁷ In this regard the authors would like to refer the sayings of famous scholar *Gupte* whose line of thought was affirmed by the court in the case of *T. Sareetha* but *Gupte's* sayings came before the drafting of many personal laws which are considered as modern legislation and which are made on the grounds of justice, equity and good conscience. No inequality existed in these set of laws at that point.⁴⁸ In addition to this specifically for Hindu Marriage Act, 1955, by the virtue of 44th amendment act of 1964 both the set of laws *i.e.* sec.9 (RCR) and Sec. 13(1) (divorce) were made gender neutral. Therefore the concept of gender discrimination has not been integrated in the Hindu Marriage Act and all are treated as equals under this section. Ultimately we can conclude that sex is not the distinguishing factor and all are treated equally. Specifically Sec.9 of the Hindu Marriage Act and generally the provision of restitution of conjugal rights cannot be struck down on the ground of violation of art.14 of the Constitution. The only thing which is presently going wrong and must be corrected instantaneously is the way of understanding, the idea present behind the law.⁴⁹

Secondly, the restitution of conjugal rights came into question as it violates the right to life and privacy enshrined under art.21 of the constitution. It has been said that that the provision of restitution of conjugal rights given under various personal laws has been criticized and challenged as they are only used as a vital instrument to encapsulate the forced sexual relation. Hence, it is violating “right to privacy”⁵⁰ enshrined indirectly under art.21 of the Constitution.⁵¹ However, if one goes into the purpose of restitution which aims at cohabitation and comfort consortium and not just sexual intercourse, the above claim stands baseless.⁵² The claim made was that the concept of restitution of conjugal rights is mainly an act of denial to free the choice of the spouse of when and how his/her body will become the vehicle or chattel or address for the other spouse. But our constitution enshrines us with the right to privacy and human dignity under which the personal intimacy of human life and home and family which includes marriage also is must be protected. Secondly, taking authority from the Halsbury’s Laws of England where it was said (cohabitation) access not

⁴⁵ Arlette Gautier, *Legal Regulation Of Marital Relations: An Historical And Comparative Approach* 19(47), available at <http://lawfam.oxfordjournals.org/content/19/1/47.abstract#target-1> (last visited Aug. 12, 2013)

⁴⁶ INDIA CONST. art.14 which states that ‘The state shall not deny to any person equality before the law or the equal protection of laws within the territory of India’

⁴⁷ *Ibid*

⁴⁸ S.P.GUPTA, HINDU LAW IN BRITISH INDIA 186 (2nd ed. Premier Publishers Delhi 1947)

⁴⁹ *Godabai v. Narayan*, A.I.R. 1973 MP 4

⁵⁰ *Govind v. State of M.P.*, A.I.R. 1975 S.C. 1378

⁵¹ VIJENDRA KUMAR, MATERIALS AND CASES ON FAMILY LAW 42 (Ranbir Singh and Vijender Kumar eds., 1st ed. Lexis Nexis Butterworths 2006)

⁵² HALSBURY’S LAWS 284 (3rd ed. Lexis Nexis Butterworths 1968) vol.12

necessarily mean serial intercourse, which the court cannot enforce, so that refusal of sexual intercourse by itself does not constitute refusal to cohabit."⁵³ So taking into account both the arguments we can say that the overreliance of *J. Chaudhary* on sex in the judgement of *T.Sareetha*⁵⁴ is nothing but a fundamental fallacy in the reasoning. And from this it can be very concretely put forth that RCR is only wilful in the nature and depends upon the will of the aggrieved spouse and under this unreasonable excuse for leaving your partner will never be justified as it against the principle of justice, equity and good conscience as laid down in the case of ***Maneka Gandhi v. Union of India***.⁵⁵ Therefore, principles of RCR, is in accordance to three principles of justice, equity and good conscience and not against the mandate of art.21 of the Constitution of India.

The authors have mainly argued on the base of judgements given by the High Court's but now the same question when raised in the apex court in the case of ***Saroj Rani v. Sudarshan Kumar***.⁵⁶ Then also it was argued and judged in the same manner as it was decided in the case of *Harvinder Kaur* and finally affirmed the provision on restitution of conjugal rights as perfectly constitutional and it is not in violation with art.14 and 21 of the Constitution of India.⁵⁷

A. **PART 2**

As a rule for debate, the authors have posted all the best possible arguments which favour all the position that provisions of RCR are completely in accordance with the constitutional norms but as we all know that for every situation there always stands two possibilities, one in the favour of the situation and other one against the situation. The authors have already discussed the "for" situation which helped the authors to develop a very good understanding over the issue. Thus, it is the time to contradict the arguments given in the favour of the situation in order to find out the answer for the first research question. In this regard, the first thing which comes in the mind of the authors is that the provision of RCR was declared as constitutional in the case of **Saroj Rani** but how far it the reliance of judges while deciding this case on the judgement of Harvindar kaur is reliable? If one thoroughly reads the judgement of Harvindar Kaur then there we will clearly see that J. Rohtagi was himself not in the favour of granting RCR as the remedial

⁵³*Ibid*

⁵⁴ *T. Sareetha v. T. Venkata Subbaiah*, A.I.R 1983 AP 356

⁵⁵ *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597

⁵⁶ *Saroj Rani v. Sudarshan Kumar Chadha*, A.I.R 1984 S.C. 1652

⁵⁷ Ankit Mudgil, *Restitution of Conjugal Rights*, available at <http://www.scribd.com/doc/35180854/Restitution-of-Conjugal-Rights> (last visited Aug. 15, 2013) "*We are unable to accept the position that Section 9 of the Hindu Marriage Act is violative of Art. 14 and 21 of the Indian Constitution. Hindu Marriage is a sacrament and the object of section 9 is to offer an inducement for the husband and wife to live together in harmony. If such differences may arise as in this case, it may be a valid ground for divorce after a period of one year. Hence Section 9's validity is upheld.*"

measure but forcefully laid his hands over it.⁵⁸ Additionally the doctrine of RCR is asserting as infringement of women's self respect, individual realization and solemnity.⁵⁹

Secondly, the doctrine of RCR also stands in contradiction with art.21 in relation to right to privacy. This right is not directly mentioned in art.21 but it comes under its ambit by only implications so as there is no concrete definition of it, the apex court has tried to define it in the case of ***Kharak Singh v. State of U.P.*** where the court said that it must include all the personal intimacies of home, family and marriage.⁶⁰ Therefore when any court of law enforces the decree of RCR then it acts as a compulsion over the spouse who has been withdrawn from the society of the other and it is a kind of psychological restraint for him/her. This can be concretely supported by the analysis of the apex court in the case of Kharak Singh where the court said that every individual has a right to be either married or not, to be always free from unwanted state over reach in such personal matters.⁶¹ This is equivalent to forcing any individual and interfering into his/her privacy in an unwanted manner then nothing can be more deleterious as compare to this.⁶²

Thirdly, art.19 of the Constitution guarantees numerous number of rights like right to freedom of employment, freedom of expression and free movement but is subject to certain restrictions given under art.19(6) also stands in contradiction with the doctrine of RCR. Under RCR by the decree the female spouse (mostly) who is engaged in some kind of employment is compelled to leave their jobs and forced to live with their husbands at their husband's place because in this issue the court of law most of the time gives the reasoning that if the wife refuses to give up her job and not live with her husband then this fulfils the criteria of withdrawal of one spouse from the society of the other spouse.⁶³ The rationale behind giving this kind of judgement is to preserve the holy union between the husband and the wife. However, if one critically analyse the whole picture then we can say that court always failed in recognizing and appreciating the oppressed position of the women in the society. On concluding, we can clearly say that doctrine of RCR stands in clear contradiction with art.19 of the Constitution. This can be very validly concluded by the authors after thoroughly reading the judgement of Harvinder Kaur in which J. Rohtagi clearly establishes the ineffectiveness of the remedy of RCR because there again raises the question that why should someone

⁵⁸ Harvinder Kaur v. Harminder Singh, A.I.R. 1984 Del. 66 para 78 "*even the most fervent and sincere hope of one spouse that there will be reconciliation cannot create a possibility of reconciliation where the other spouse is irreconcilable. Whatever maybe the cause of breakdown of marriage, if there is a withdrawal from matrimonial obligations with the intent of destroying the matrimonial consortium as well as physical separation, there is a clear sign that the marriage is at an end.*"

⁵⁹ Frances Raday, *Culture, religion and gender*, available at

http://wunrn.com/news/2008/03_08/03_03_08/030308_culture_files/030308_culture.pdf (last visited Aug. 13, 2013)

⁶⁰ Kharak Singh v. State of U.P, A.I.R. 1963 S.C. 1295

⁶¹ *supra* note 65

⁶² *supra* note 60

⁶³ Gaya Prasad v. Bhagwati, A.I.R. 1966 MP 212 "*According to ordinary customs of the Hindu Society, the wife is expected to perform a marital obligation at her husband's residence and she could not impose her unilateral decision on the husband by merely stating that she has no objection to allow the husband to live with her at the place where she has accepted her service.*"

enter into the issue to resolve the marriage that has almost come on the verge to reach into coffin.⁶⁴ Taking a strong move from here the next issue is the misuse of RCR and intention of the legislature for passing this law, because RCR is been very blatantly misused and used as a spring board by the erring spouse for divorce by the virtue of sec.13(1-A)(ii). By this, the authors just wanted to raise another question *i.e.* what is the need of having this kind of remedy with the aim of reconstituting the marriage when it is been palpably misused as another tool for getting the divorce under sec.13(1-A)(ii) of the Hindu Marriage Act, 1955.⁶⁵ By reading the judgement more deeply the authors are stringed on more threads which rolled down on the point that the judgment given by J. Rohtagi in the case of Harvinder Kaur is not the judgement which came with full wilful reasoning but it came with the compulsion under which the judge has something else as intention as he almost termed the provision of RCR as an anarchic remedy, but at the time of giving the final resort he has given that judgement which was not in consonance with the intention of the judge because apparently it seems like that his hands were tied by the limitations of the law.⁶⁶

In order to sum up, the authors are just want to say that the judgement given by J. Rohtagi is very ambiguous and is very hard to understand but just want to make a mention of one point that if the apex court has decided the issue of constitutionality of RCR raised in the case of *Saroj Rani* by making the judgement of *Harvinder Kaur* as the base then here arises a time to think at least twice over the issue and look at the wider aspect of marriage and then decide the issue.⁶⁷ This argument has somehow prima facie answers the first question where from this point we can say that the grounds on which the RCR was declared as constitutional was not acceptable as the judge has acted under a kind of guided discretion to answer this question of constitutionality of RCR and above it this judgement was made as base by the Apex Court in deciding the same issue.⁶⁸ In order to contradict the arguments stated under part 1 of this article in relation to the fundamental rights and RCR, *firstly* the authors want to say in relation to art.14 of the Constitution that the RCR violates right to equality. Equality not just only connotes physical aspect but it also connotes equality presence in giving thought, action and self-realization.⁶⁹ In addition to it this doctrine of RCR is turning more like very obsolete in nature for the women of 21st century who is educated and self-reliant as the concept to force them by the state mandate to again live with the person from whose society they have withdrawn.

This marks up an uncertain end over the debate where the authors have shown how legally as per the law the doctrine of restitution of conjugal rights is clearly constitutional and also declared as same by the apex

⁶⁴ *Ibid*

⁶⁵ *supra* note 61, para 74 “so the legislation is creating a number of grounds for divorce, what is bad in it?”

⁶⁶ *supra* note 61, para 85, 87 & 91

⁶⁷ S.J. Peasants, *Hindu Women and the Restitution of Conjugal Rights : Do we need a remedy*, available at <http://www.manupatra.com/Articles/Articles.asp> (last visited Aug. 12, 2013)

⁶⁸ SIR DINSHAH FARDUNJI MULLA, *MULLA PRINCIPLES OF HINDU LAW* 895 (Satyajeet A. Desai eds., 21st ed. Lexis Nexis Butterworths Wadhwa 2010)

⁶⁹ *supra* note 65

court but after relying on that discussion and judgement which was not given with a free will but under a guided discretion, whereas on the contrary of this if we see its application on the society and how it is being perceived we can say that the doctrine of RCR still stands unconstitutional.

IV. CONCLUSION AND SUGGESTIONS

From the above stated long discussion one thing is very clear that the answers to the question of constitutionality of restitution of conjugal rights has formed an ambiguity over its existence in the legal system as from legal point of view it is constitutional whereas from the practical approach and application it seems to be still unconstitutional. It is a clear result of the complex situation been created by the judiciary as they have generated different answers to the same question which has completely made the doctrine to stand in a position from where it looks like an unresolved misery which stands in clear clash and tussle with the fundamental rights like right to life, liberty, privacy and equality enshrined upon the citizen by the virtue of supreme law of the land. The above discussion is a reply that very clearly signifies that the conceptual standing of the remedy of restitution is still addressing many ambiguities which in return affecting its correct application drastically. Taking recourse to the findings of the debate we can therefore say that after the milestone judgements of all the three major cases as discussed above, the concept of restitution has completely changed its recourse and taken new dimension which has more complicated the underpinnings of the remedy. Therefore, from this juncture a kind of realization has to be made and especially by the judiciary that in this regard they should give more importance to the rights of the individuals rather than considering that marriages are to be preserved at any cost. However, if this is not then this can lead onto a more degraded position from which the road to recovery will become very hard to achieve as the tussle between the personal laws and the eternal fundamental rights is turning very capricious in nature.

In a form of suggestion the authors would like to suggest that the remedy of restitution which is been suffering from a problem that most of the time it is been misunderstood and also misused very blatantly has to be substituted by reconciliation. The harsh, offensive and compelling tone of restitution in which we ask the spouse to cohabit with the other spouse unwillingly it might result in the breakage of the relation. Reconciliation sounds more mild, acceptable and inoffensive in which both the spouse not only cohabit but it also clears all the misunderstandings.