

Dead at Home, Alive Abroad: Restitution of Conjugal Rights in South Asia

MUHAMMAD ZUBAIR ABBASI*

Abstract

The remedy of restitution of conjugal rights (RCR) has its roots in canon law. It was incorporated into Muslim, Hindu and Parsi personal laws through the judgements of the Judicial Committee of the Privy Council during the British colonial period. It has been abolished in the United Kingdom in 1970 when a Law Commission report found it ineffective in saving marriages. In South Asia, however, this remedy is still available despite constitutional challenges to it before superior courts. The Federal Shariat Court refused to declare this remedy invalid in its judgements reported in 2016. This is despite the fact that far from saving marriages, this remedy is routinely abused by husbands as a countermeasure in response to suits of maintenance, custody of children, recovery of dower and dowry, and dissolution of marriage. Devoid of any Islamic basis, the RCR remedy violates the right to liberty, privacy, and equality as guaranteed under the Constitution of the Islamic Republic of Pakistan 1973 and should be declared illegal and unconstitutional.

Keywords

restitution of conjugal rights (RCR), canon law, Privy Council, British India, Federal Shariat Court (FSC), Pakistan, India, Bangladesh.

Introduction

Marriage entails a set of marital obligations and legal rights for the husband and wife under all legal systems. These rights and duties are defined largely by personal religious laws, and to some extent, they are negotiated between the spouses themselves in the South Asian context.

* Associate Professor, Shaikh Ahmed Hassan School of Law, Lahore University of Management Sciences (LUMS), Pakistan.

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The primary implication of marriage, regardless of the law under which marriage has been instituted, is the cohabitation of the couple. The spouses are entitled to the companionship of each other during the wedlock. Therefore, where either of the spouses withdraws from the society of the other, without a lawful excuse, or neglects to perform the obligations imposed by the law or by the contract of marriage, the court may decree restitution of conjugal rights (RCR).¹ A decree for RCR implies that the guilty party is ordered to live with the aggrieved party. Notionally, it is a remedy aimed at preserving the marriage. To obtain a decree for RCR, the petitioner must demonstrate that the respondent has withdrawn from the petitioner's society without any reasonable excuse or lawful ground. The court will grant the decree if it is satisfied with the truthfulness of the petition, and the absence of any other legal ground to grant such a petition.² In this way, RCR resembles the specific performance of a contract.³

In Pakistan, the remedy of RCR can be sought by filing an independent suit in a family court under Section 5 of the Family Courts Act 1964. Section 9(1)(a) of the Act allows a husband to claim a decree of RCR in his written statement to a suit for dissolution of marriage or maintenance.⁴ The permissibility of RCR under Pakistani law is a source of many problems for women. In one case, Justice Jamila Jahanoor Aslam observed that it has become standard practice for husbands to file suits for restitution of conjugal rights in response to suits for maintenance to establish their *bona fides* and oust the wives' right to maintenance.⁵ When wives, who have been either forced or thrown out of their marital homes, fail to abide by restitution decrees they are declared "*nāshizahs*" (disobedient) by courts and lose their maintenance rights. Moreover, the law provides the option of attachment of property as a mode of execution for restitution decrees against wives. Although case law suggests that recently courts have become cautious when granting

¹ Faiz B. Tyabji, *Muhammadan Law*, 3rd ed. (Bombay: N. M. Tripathi, 1940), 165.

² *Ibid.*

³ Shahbaz Ahmed Cheema, "Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for Its Abolition," *LUMS Law Journal* (2018): 5.

⁴ New subsections (1a) and (1b) inserted by the Family Courts (Amendment) Ordinance 2002 (LV of 2002).

⁵ Tariq Mehmood v. Farah Shaheen 2010 YLR 249 (Lah).

decrees of restitution, the availability of the remedy itself is problematic because it is used to pressurize wives.⁶

The Federal Shariat Court (FSC), which is a constitutional court to exercise Islamic judicial review, missed an opportunity to declare the archaic remedy of RCR invalid in its decisions in two related judgements.⁷ This article examines these two judgements of the FSC in the historical and contemporary contexts of South Asia. Based on the analysis of these judgements, it is argued that this remedy does not have a sound basis in Islamic law.⁸ Consent of spouses is a prerequisite for the validity of marriage in Islam and there is no justification for replacing it with coercion and compulsion during the marriage by the application of RCR.⁹ RCR was transplanted into the Indian subcontinent during the British colonial period.¹⁰ It goes against the Islamic conception of marriage as a contract, which is based on mutual love, affection and companionship.¹¹ The FSC, however, has avoided declaring RCR un-Islamic on the technical ground of lack of its jurisdiction to review Muslim Personal Law and the absence of any legal authority from the Qur'ān and *sunnah*. Since RCR violates the fundamental rights to liberty, privacy, and equality as enshrined in the Constitution of the Islamic Republic of Pakistan 1973, High Courts or Supreme Court may declare it unconstitutional.

The Judgements of the FSC on RCR

The availability of the remedy of RCR was challenged before the FSC in two separate cases.¹² In the first case, the petitioner challenged Section 5

⁶ Data shows that husbands file 99% restitution of conjugal rights petitions. Naima Qamar, Maliha Zia and Tara Khan, *Deconstructing Conjugal Rights in Pakistani Law* (Karachi: Legal Aid Society, 2019), 3.

⁷ Nadeem Siddiqui v. Islamic Republic of Pakistan PLD 2016 FSC 1 and Nadeem Siddiqui v. Islamic Republic of Pakistan PLD 2016 FSC 4.

⁸ Shahbaz Ahmad Cheema, "Islamisation of Restitution of Conjugal Rights by the Federal Shariat Court of Pakistan," *Islamic Studies* 58, no. 4 (2019): 535-50.

⁹ Ibid.

¹⁰ Faisal Chaudhry, "Rethinking the Nineteenth Century Domestication of the Shari'a: Marriage and Family in the Imaginary of Classical Legal Thought and Genealogy of (Muslim) Personal Law in Late Colonial India," *Law and History Review* 35, no. 4 (2017): 842.

¹¹ Preet Singh, "Restitution of Conjugal Rights: A Comparative Study" (PhD diss., Maharshi Dayanand University, Rohtak, India, 1995), 332-41.

¹² Nadeem Siddiqui v. Islamic Republic of Pakistan PLD 2016 FSC 1 and Nadeem Siddiqui v. Islamic Republic of Pakistan PLD 2016 FSC 4.

of the Family Courts Act 1964 on the ground that it is repugnant to the injunctions of Islam.¹³ The impugned section is as follows:

Subject to the provisions of the Muslim Family Laws Ordinance 1961, and the Conciliation Court Ordinance 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule.

The Schedule includes matters pertaining to the restitution of conjugal rights. Relying upon several verses of the Qur'ān, specifically, 4:35, the counsel for the petitioner argued that the Family Court cannot issue a decree in matters of restitution of conjugal rights, nor can it force a wife to live with her husband against her will. At best the court can try for reconciliation between the spouses whose relationship is constrained. The counsel conceded that a wife, who is living away from her husband without a reasonable justification, loses her right to maintenance but a court cannot force her to perform her marital obligations without her free consent under Islamic law. Justice Fida Muhammad Khan wrote the judgement. He considered the contentions raised by the petitioner in light of verse 4:35, which reads as follows:

And if you fear a breach between the two (husband and wife) then appoint an arbitrator from his people and an arbitrator from her people. If they both desire peace Allah will make them of one mind. Certainly, Allah knows all, Aware about all things.

Justice Khan noted that a bare perusal of the verse makes it clear that reconciliation is preferred if both the spouses desire to make peace and resolve their differences. The Family Courts Act 1964 has already provided reconciliation mechanisms both at the pre-and post-trial stages of family suits, in conformity with the injunctions of Islam. The courts are constituted to resolve conflicts and settle disputes which crop up between various individuals including the spouses. While resolving such disputes, the courts are bound to follow the Constitution of the Islamic Republic of Pakistan 1973 and the injunctions of Islam. Justice Khan, however, observed that the petitioner had failed to satisfy how the impugned Section of the Family Courts Act 1964 authorizing the Family Courts to issue decrees for restitution of conjugal rights is repugnant to the injunctions of Islam. He noted that the petitioner could not cite any verse or *ḥadīth* prohibiting the Family Court to pass an order of restitution of conjugal rights. Justice Khan held that if either of the spouses is not happy with their marriage, they may opt for its dissolution. He observed that it will be detrimental for a wife to live apart from her husband without her entitlement to maintenance for an

¹³ Nadeem Siddiqui v. Islamic Republic of Pakistan PLD 2016 FSC 1.

indefinite period, especially when she does not have a source of income. This will also lead to disputes regarding the custody of children and cause mental agony to the spouses. In view of the foregoing reasons, the Court found the petition misconceived and dismissed it.¹⁴

In the second case, the same petitioner, Nadeem Siddique, challenged Order XXI, Rules 32 and 33 of the Code of Civil Procedure 1908 on the ground of repugnancy to the injunctions of Islam.¹⁵ The impugned Rule 32 of the Order, besides other things, provides that wherein the case for a decree of restitution of conjugal rights, the party against which a decree has been passed, fails to satisfy the decree despite having an opportunity to do so, such a decree will be enforced by attaching the property of the defaulting party. Rule 33 provides that, in case, the judgement-debtor fails to satisfy the decree for restitution of conjugal rights within the period specified, the judgement-debtor will make periodical payments, as may be just, to the decree-holder.

The counsel for the petitioner contended that Islam ensures the dignity of human beings and attaches great sanctity to the institution of marriage. He submitted that under Islamic law divorce is an undesirable act and it is permitted only as a last resort when the spouses are unable to live within the limits prescribed by Allah. A Muslim judge is assigned the task of reconciliation between the spouses. The judge, however, cannot force a wife to live with her husband. It was argued that in the case where the wife fails to satisfy the decree for restitution of conjugal rights, the attachment of a wife's property puts her through immense misery and torture. Similarly, under Rule 33, directing the wife to make certain payments to the husband, on non-compliance with the restitution of conjugal rights decree, amounts to coercing her to yield to her husband's desire for cohabitation. Therefore, the petitioner contended that the law that provides for the attachment of the property of a wife for her non-compliance with the restitution of conjugal rights decree is against the injunctions of Islam. The counsel for the petitioner placed reliance upon verse 2:231 and two traditions (*aḥādīth*) of the Prophet Muḥammad (peace be on him). The Court rejected these arguments holding that a decree of a competent court enjoys a status of sanctity and significance in Islam.¹⁶ Justice Fida Muhammad Khan, who wrote the judgement, noted that matrimonial and family law matters reach courts for resolution and if no mode of execution exists for

¹⁴ Ibid., 4.

¹⁵ Nadeem Siddiqui v. Islamic Republic of Pakistan PLD 2016 FSC 4.

¹⁶ Ibid., 9.

compliance with a competent decree, the entire judicial exercise become meaningless. Justice Khan observed that the impugned provisions of the Code of Civil Procedure 1908 provided a mechanism to execute judgements. He further noted that if a wife willingly marries, in the presence of witnesses, and expresses her willingness in writing, she is bound by the terms of marriage (*nikāh*). However, if she does not want to live with her husband, she can move the court to dissolve her marriage based on *khul'*. Additionally, verse 2:231, upon which the petitioner relied, dealt with the situation where divorce has already been pronounced. Similarly, the traditions (*aḥādīth*) of the Prophet Muḥammad upon which the petitioner's counsel relied also dealt with the matters of *khul'* and divorce. Thus, the petitioner failed to point out any specific provision in a verse, *ḥadīth*, or even *fiqh* to support his contentions.¹⁷

At the end of the judgement, Justice Khan noted that under Article 203-B(c) of the Constitution, the FSC is authorized to examine any law or provision of a law on the touchstone of the Islamic injunctions as contained in the Qur'ān and *sunnah* of the Prophet (peace be on him). However, Muslim Personal Law falls outside the jurisdiction of the Court. Since the impugned Order and Rules were not only procedural in nature but fell within the category of Muslim Personal Law, they were excluded from the jurisdiction of the FSC. Therefore, the petition was dismissed.¹⁸

It would be fair to say that the FSC missed an opportunity to strike down what is essentially a legally sanctioned mode of harassment available to husbands. However, as the analysis below illustrates it would be entirely unfair to place the entire burden on the FSC which relies on the assistance provided to it by the lawyers. The FSC is empowered to review laws on the touchstone of the injunctions of Islam as laid down in the Qur'ān and *sunnah*. In both judgements, the FSC mentioned the failure of the petitioner to point out specific verses of the Qur'ān or *ḥadīth* that would convince the Court that RCR was against the injunctions of Islam. The FSC, however, did not explore the history and origins of RCR. Had that been done, it would have been discovered that RCR was progressively transplanted, through various judicial pronouncements and legislative measures, into Muslim personal law in the Indian subcontinent during the British colonial period.

¹⁷ Ibid., 7-8.

¹⁸ Ibid.

Historical Context of RCR

The roots of the matrimonial remedy of RCR can be traced to canon law. Marriage under Christian law is sacramental and indissoluble.¹⁹ In feudal England, marriage was considered in some ways to be a property deal in which the wife was a part of the husband's possessions along with his other chattels. She was required to live with him, willingly or unwillingly, in the matrimonial home. This phenomenon has been likened to women in such marriages as being cattle which could be brought back to their masters in the case that they ran away.²⁰ The indissoluble nature of Christian marriage is in contrast with Muslim marriage which is primarily contractual. The essential elements in an Islamic marriage contract are an offer (*ījāb*) and an acceptance (*qabūl*), before witnesses.²¹ Similar to civil contracts, most jurists agree that a Muslim marriage contract is based on consent.²² This conceptualization of a Muslim marriage as a civil contract between two consenting adults demonstrates the significance Islam places upon the intention and will of two individuals to live together as husband and wife. Verse 30:21 of the Qur'ān states, "And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy." This illustrates that the key purpose of marriage is an exchange of love and compassion to find serenity in one's personal life.²³ Therefore, a matrimonial remedy that forces two adults to live together will not serve the Islamic purpose of marriage of love and companionship. It is unlikely that forceful restitution will usher serenity in life. It may perhaps exacerbate the matter by exposing both spouses to further marital discord. Hence, the remedy of restitution and its available mode of execution go against the spirit of a Muslim marriage. It forces the wife to choose between either unwillingly cohabiting with her husband or losing her property by way of dissolution on the basis of *khul'*.

In English law, the remedy of restitution of conjugal rights could be sought from the Ecclesiastical Courts until 1813. Desertion was not

¹⁹ Chibli Mallat, *Islamic Family Law* (London: Graham & Trotman, 1993), 78.

²⁰ Mohammed Ahmad Qureshi, *Marriage and Matrimonial Remedies: A Uniform Civil Code for India* (New Delhi: Concept Publishing Company, 1978), 97.

²¹ David S. Pearl, *A Textbook on Muslim Personal Law* (London: Croom Helm, 1987), 125.

²² Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, 5th ed. (London: Oxford University Press, 1949), 69.

²³ Hammudah 'Abd al-'Ati, *The Family Structure in Islam* (Indianapolis, IN: The American Trust Publications, 1977), 145.

considered to be a matrimonial offence. However, a decree could be obtained, which ordered the deserter spouse to return and render conjugal rights, and failure to do so could result in excommunication. The use of religious isolation as a threat to save marriages demonstrates the inextricable link between the institution of marriage and religion in England. This notion of the indissolubility of a marriage does not exist in Islamic law. The contractual form of a Muslim marriage does not remove the element of sacrament attached to it. The institution, which has been sanctioned in the Qur'ān, requires the terms of the contract to be within the limits imposed by Allah.

The Privy Council introduced the notion of RCR through two judgements in 1856 and 1867. These decisions combined to import RCR into Indian law and removed it from the ambit of Ecclesiastical Law. Conjugal rights were placed within the ambit of Hindu and Muslim personal law, making a specifically English canon law remedy available to litigants of all religious communities.²⁴ In the first of the two cases, *Ardaseer Cursetjee v. Perozeboye*,²⁵ the Privy Council ruled that Parsis (non-Christians) could not bring a suit for conjugal rights on the ecclesiastical side of the Bombay Supreme Court. However, a suit could be entertained in the civil jurisdiction. This judgement presumably applied to Hindus and Muslims as well. This decision pushed conjugal rights litigation firmly into the civil jurisdiction of the Indian courts. In the case of *Moonshee Buzloor Raheem v. Shumsoonissa Begum*,²⁶ the Privy Council opened the way for conjugal rights suits for Muslim litigants and recognized the principle in the following words:

Upon authority, then, as well as principle, their Lordships have no doubt that a Mussulman husband may institute a suit in the Civil Courts of India, for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation; and that that suit be determined according to the principle of Mohamedan law.²⁷

With this decision, the Privy Council firmly established that conjugal rights could and should be enforced and adjudicated under religious personal laws. After the decision, the remedy became extremely popular among the Hindu community as well. In a post-partition case, that is, *Gurdev Kaur v. Swaran Singh*, it was noted that the action for restitution was borrowed from old Ecclesiastical Courts in England, and was, in fact,

²⁴ Rebecca R. Grapevine, "Family Matters: Marriage and Citizenship in India, 1939-1972" (PhD diss., University of Michigan, 2015), 110.

²⁵ *Ardaseer Cursetjee v. Perozeboye* (1856) 6 MIA 348.

²⁶ *Moonshee Buzloor Raheem v. Shumsoonissa Begum* (1867) 11 MIA 551.

²⁷ *Ibid.*

originally not Hindu.²⁸ The English ecclesiastical remedy of the restitution of conjugal rights was introduced into the Indian Procedural Code with little modification and it subsequently became completely controlled and shaped by Indian interpretations of marital rights and duties. The theological foundation of the remedy of restitution in Islamic law is shaky and untenable. A hesitant wife can be persuaded to join her husband, but one who is unwilling to do so cannot be directed against her will to return to the man she does not want to live with.²⁹ Tahir Mahmood contends that the remedy of RCR is in contrast with the matrimonial freedom and the unconditional power of independent action available to women in marital affairs in Islam.³⁰ Therefore, the FSC erred in making the unavailability of a Qur'ānic verse or *ḥadīth* the basis of its decision to not strike out this remedy.

In his judgement, Justice Fida Muhammad Khan noted that it would be detrimental for the wife to live apart from her husband without her entitlement to maintenance for an indefinite period, especially when she does not have a source of income.³¹ In making this argument, Justice Khan placed reliance on the notion of the performance of conjugal duties by the women in exchange for her maintenance. This argument is problematic on two levels. Firstly, the argument that a wife should only be given food, shelter, and clothing by the husband if she is sexually available to him seems to reduce the idea of a Muslim marriage to a glorified contract of sale where the wife's only role is to serve her husband sexually and get compensated for this exclusivity of sexual access through dower (*mahr*) and/or maintenance. Secondly, Justice Khan's opinions seem to be devoid of the social and legal reality in which suits of restitution are filed in Pakistan to harass and intimidate women who seek their rights through courts. In one case, Justice Jamila Jahanoor Aslam of the Lahore High Court observed that husbands filed RCR petitions with ill intention in response to the maintenance suits of wives.³² The existence of prior maintenance suits of wives demonstrates that the women are not living away from their marital homes without a legitimate cause. They are either willfully thrown out or forced to leave their marital homes due to circumstances including cruelty meted out by

²⁸ Gurdev Kaur v. Swaran Singh AIR 1959 Punj 164.

²⁹ Tahir Mahmood, *Islamic Law in Modern India* (Bombay: N. M. Tripathi, 1972), 125.

³⁰ *Ibid.*

³¹ Nadeem Siddiqui v. Islamic Republic of Pakistan PLD 2016 FSC 1.

³² Tariq Mehmood v. Farah Shaheen 2010 YLR 249 (Lah).

husbands and their families, second marriages contracted by the husbands, or the husband's failure to maintain them and their children.

Thirdly, in both judgements, Justice Khan employed the reasoning that if a wife does not want to live with her husband she can file for dissolution of marriage. This is an absolutist argument, which attempts to mask a lacuna in the law. Based on this argument, the law leaves the wife with two options: either live with the husband or get a divorce. This argument fails to recognize the inherent disadvantage of divorce by *khul'* (no-fault divorce initiated by the wife) whereby a wife will have to forego a certain portion of her dower. The threat of attachment of an already beleaguered wife's property is cruel and against the spirit of marriage in Islam. Islam conceptualizes marriage as a means of sound emotional, spiritual, happy, lovely, and peaceful life-long companionship. Justice Khan himself elaborated it in the case of *Saleem Ahmad v. Government of Pakistan*³³ where he referred to verse 2:28 of the Qur'ān³⁴ to argue that Islamic law endorses the principle of gender equality.

Notionally, the remedy of restitution of conjugal rights is available to both spouses. However, most textbooks on Muslim personal law, including D. F. Mulla's *Principles of Mahomedan Law*, treat it as if the remedy is available to the husband alone.³⁵ A possible explanation of this one-sided view of the law is that in almost all cases suits for restitution are filed by husbands. However, perhaps the most important explanation lies in the ability of the Muslim husband to unilaterally divorce his wife, which can easily be used to frustrate the relief sought by the wife or ordered by the court. The availability of this right to the husband is codified in the law of Section 9(1)(a) of the Family Courts Act 1964 which provides the husband with the right to file a suit for restitution as a part of his written statement in response to a suit for maintenance or dissolution of marriage.³⁶ The non-availability of this right to women as held in the case of *Nelly Zaman v. Ghiasuddin Khan*³⁷ by the High Court Division of the Supreme Court of Bangladesh was cited as one of the

³³ *Saleem Ahmad v. Government of Pakistan* PLD 2014 FSC 43.

³⁴ "Women shall have rights similar to the right against them, according to what is equitable."

³⁵ "Where a wife shall have without lawful cause ceased to cohabit with her husband, the husband may sue the wife in a Civil Court for the restitution of his conjugal rights." D. F. Mulla, *Principles of Mahomedan Law* (Bombay: Thacker & Company, 1905), 157.

³⁶ New subsections (1a) and (1b) inserted by the Family Courts (Amendment) Ordinance 2002 (LV of 2002).

³⁷ *Nelly Zaman v. Ghiasuddin Khan* 34 DLR (1982) 221.

reasons for holding the remedy unconstitutional. It was held that there is mutuality and reciprocity between the rights of the husband and the wife since it “is not available to a wife as against her husband apart from claiming maintenance and alimony.”³⁸ Marriage in Islam is based on a contract between two consenting individuals. This option is only made available to men in Pakistan and executable by attachment of property of the wife introduces inequality into the relationship.

The remedy of RCR is essentially a legally sanctioned form of harassment available to husbands. An analysis of recently reported judgements of the superior courts in Pakistan demonstrates that the courts are more sceptical of the suits filed by husbands for restitution of conjugal rights as mostly the suits are not *bona fides* and are merely resorted to as a calculated attempt to counter the suits for maintenance filed by the wives.³⁹ The husband’s failure to maintain his wife and children, cruelty and maltreatment, non-payment of dower, and husband’s second marriage are accepted by the courts as valid defences to a restitution suit. However, the cautious attitude adopted by the courts in granting decrees of restitution does not fully prevent the hardships caused to women by the availability of this remedy and is no excuse for the law to continue to exist. The remedy of restitution has, as demonstrated by case law, great potential to be abused. In the case of *Muhammad Ashraf v. Muhammad Ilyas*,⁴⁰ the FSC confirmed the acquittal of the accused persons in the gang rape of a thirteen-year-old girl because the charge had not been proved beyond reasonable doubt and the Family Court had decreed a suit for restitution of conjugal rights filed by the alleged abductee. The Court relied on a principle laid down by the Supreme Court in *Muhammad Azam v. Muhammad Iqbal*⁴¹ in which the Court held that a decree of RCR weakened the prosecution case for rape. In this case, the Court refused to overturn the acquittal in a rape case by relying on the judgement of the Family Court despite the medico-legal report confirming the rape of the victim.⁴² The plea of a valid marriage (*nikāḥ*) is often taken by alleged abductors who also file a suit for restitution and if the prosecution fails to prove their cases, the suit for

³⁸ Ibid.

³⁹ For instance, see *Mst. Amreen v. Muhammad Kabir* 2015 YLR 170; *Shoab v. Sadia Altaf* 2015 PLD 34; and *Mst. Rukhsana Younas v. Aziz ur Rehman* 2014 CLC 1751.

⁴⁰ *Muhammad Ashraf v. Muhammad Ilyas* 2014 YLR 2247.

⁴¹ *Muhammad Azam v. Muhammad Iqbal* PLD 1984 SC 95.

⁴² Ibid.

restitution gets decreed.⁴³ In *Muhammad Javed v. The State*,⁴⁴ the FSC acknowledged the problematic nature of the remedy of restitution by stating that the accused had filed a suit for restitution of conjugal rights just to add credulity to his false claim of marriage (*nikāḥ*) with the abductee. In *Allah Dad v. SHO*,⁴⁵ the petitioner, a ninety-year-old man, was accused of having abducted a girl and keeping her in illegal confinement. The counsel for the petitioner argued that the abductee was the lawfully wedded wife of the accused and a suit for restitution of conjugal rights was pending adjudication. The Peshawar High Court held that the suit for restitution had been instituted by the respondent as an afterthought to save himself from the charge of abduction of the abductee. This demonstrates that the law is extremely defective and has huge potential to negatively impact women.

RCR in India and Bangladesh

RCR has also been contested on the touchstone of the Constitution in both India and Bangladesh. In India, the remedy of RCR is available to Hindus under Section 9 of the Hindu Marriage Act 1955, to Muslims under their general personal law, and to Parsis through Section 36 of the Parsi Marriage and Divorce Act 1936. Section 22 of the Special Marriage Act 1954 also provides for this right to those citizens who have contracted this marriage under the provisions of this Act. The constitutional validity of this remedy has come under consistent challenge in India. The Supreme Court of India, in the case of *Smt. Saroj Rani v. Sudharshan Kumar*,⁴⁶ upheld Section 9 of the Hindu Marriage Act 1955 to be constitutionally valid. In this case, a petition for RCR was filed by the wife after she was thrown out of the house with her two daughters. After the lower court judgements, the case finally reached the Supreme Court of India, which along with other case-specific questions, also considered the broader question of the constitutional validity of Section 9 of the Hindu Marriage Act 1955.

The Supreme Court looked at two contrasting judgements of the High Courts. The appellants had relied on the case of *T. Sareetha v. Venkata Subbiah*⁴⁷ where the Andhra Pradesh High Court held that RCR

⁴³ See *Qari Abdur Rasheed v. The State* 2012 YLR 2142; *Muhammad Hanif v. The State* 2011 YLR 253; and *Mukhtar Ahmad v. The State* 2011 MLD 1020.

⁴⁴ *Muhammad Javed v. The State* 2012 YLR 695.

⁴⁵ *Allah Dad v. SHO* 2012 YLR 2926.

⁴⁶ *Smt. Saroj Rani v. Sudharshan Kumar* AIR 1984 SC 1562.

⁴⁷ *T. Sareetha v. Venkata Subbiah* AIR 1983 AP 356.

provided for under Section 9 of the Hindu Marriage Act 1955 was a savage and barbarous remedy violating the right to privacy and human dignity guaranteed under Article 21 of the Constitution of India. It was held that Article 21 of the Constitution of India guaranteed the right to life and personal liberty against the state action and its range of operation, positively forbidding the state from depriving any person of their life or personal liberty except according to the procedure established by law was of far-reaching dimensions and overwhelming constitutional significance. The Andhra Pradesh High Court took notice of the collaboration between the substantive law in Section 9 of the Hindu Marriage Act 1955 and the procedural law set out in Order 21, Rules 32 and 33, of the Civil Procedure Code (similar to the law in Pakistan) for the enforcement of a restitution decree through financial sanctions. It was held that a decree of restitution of conjugal rights passed by a civil court extends not only the grant of relief to the decree-holder to the company of the other spouse, but also embraces the right to have marital intercourse in the enforcement of such a decree. This transfers the choice regarding marital intercourse and allowing one's body to be used as a vehicle for another human being's creation. Justice P. Choudhary used particularly harsh language in describing the purpose of a decree of restitution as to "coerce through judicial process the unwilling party to have sex against that person's consent and freewill with the decree-holder."⁴⁸ Section 9 of the Hindu Marriage Act 1955 was held to violate Article 14 of the Constitution of India as well. The Court conceded that the law, on the face of it, satisfied equality by providing the remedy to both the husband and wife. However, it failed the test when it was confronted with social realities because husbands mostly used the remedy. Section 9 of the Act promoted no legitimate public purpose based on any conception of the general good, and, therefore, was arbitrary and void as offending Article 14 of the Constitution of India. The respondents before the apex court relied on the case of *Smt. Harvinder Kaur v. Harmander Singh Choudhry* from the Delhi High Court,⁴⁹ which held Section 9 of the Hindu Marriage Act 1955 to be not in violation of Articles 14 and 21 of the Constitution. The Delhi High Court refused to accept Justice Choudhary's characterization of a restitution decree as using the arm of the law to force intercourse between spouses. It was held that the objective of the restitution decree under Section 9 of the Act was to bring about cohabitation between the estranged parties

⁴⁸ *Ibid.*, 365.

⁴⁹ *Smt. Harvinder Kaur v. Harmander Singh Choudhry* AIR 1984 Delhi 66.

and preserve the marriage. The Supreme Court of India overruled the *T. Sareetha* judgement of the Andhra Pradesh High Court and agreed with the judgement from the Delhi High Court. It held that right of the husband or the wife to the society of the other spouse is not merely a creature of the statute. Such a right is inherent in the very institution of marriage itself. The restitution decree served a social purpose as an aid in the prevention of the breakdown of the marriage. It was further held that there were sufficient safeguards in Section 9 to prevent it from its misuse and that this remedy did not violate Articles 14 or 21 of the Indian Constitution.

The Supreme Court in Bangladesh took the lead in declaring RCR unconstitutional in 1982, but the introduction of the provision of RCR under the Family Court Ordinance 1985 again caused legal controversy. The High Court Division of the Supreme Court of Bangladesh has in multiple cases held that no court can order a husband and a wife to live together because such orders would violate constitutionally guaranteed rights to equality before the law, women's equality before the state and in public, and their right to life, personal liberty, and body. In *Nelly Zaman v. Giasuddin Khan*, Justice Syed Mohammad Hussain found the right to restitution unacceptable for three reasons: 1) time and social development had made the concept of forcible restitution of conjugal rights against a wife unwilling to live with her husband, outmoded; 2) lack of mutuality and reciprocity between rights of the husband and wife; and 3) violation of fundamental rights under Article 27 (equality for all citizens before law), Article 28(2) (equal rights of men and women in all spheres of the state and public life, and Article 31 (right to enjoy the protection of the law and to be treated only in accordance with the law).⁵⁰ The Court asserted that a reference to Article 28(2) of the Constitution of Bangladesh would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights against an unwilling wife to live with her husband is violative of public policy.

Following the judgement in the *Nelly Zaman* case, the High Court Division of the Supreme Court of Bangladesh dealt with RCR in two further judgements. In *Sharmin Hossain Rupa v. Mizanur Rahman (Tuhin)*, Justice Muhammad Abdul Mannan held that RCR violates the fundamental rights of equality and liberty guaranteed by the Constitution because a Muslim husband has the arbitrary power to divorce and thus cannot be subjected to RCR, unlike his wife who does

⁵⁰ *Nelly Zaman v. Giasuddin Khan* 34 DLR (1982) 221.

not have the similar right to dissolve her marriage on her own.⁵¹ In *Khodeja Begum v. Md. Sadeq Sarkar*,⁵² the Supreme Court held that a wife's refusal to abide by a decree of restitution may result in the attachment of her property. However, according to the Court, it was rare for a wife to hold property independently of her husband or family, making the decree infructuous in most cases. The Court termed the law repressive as it treated women as property. Finally, the Court held the remedy to be in violation of the constitutional guarantees of life and liberty, freedom, equality, non-discrimination, and social justice as contained in the preamble and Articles 27, 28, 31, and 32 of the Constitution of Bangladesh and declared it to be void.

The three judgements of the High Court Division of the Supreme Court of Bangladesh against RCR are built on solid legal reasoning and must have served as precedents worth following for the judges of the Supreme Courts in India and Pakistan. However, it seems that RCR is entrenched in the South Asian legal systems and it is hard to expunge it. In a later judgement in *Hosna (Munna) v. Md Shajahan (Shaju)*,⁵³ Justice M. A. Aziz of the Supreme Court of Bangladesh held that the Family Courts Ordinance 1985, which provides RCR, prevails over the judgements not only in the *Nelly* case but also over two other judgements. He contended that the Court has not declared the Ordinance invalid while exercising its constitutional power of judicial review. The controversy over RCR in Bangladesh is far from over and a judgement of the Appellate Division of the Supreme Court may resolve the conflicting judgements.⁵⁴ Despite this controversy, the judges of the superior courts in Bangladesh have delivered judgements against RCR. In one such judgement in *Mst. Nur Akhtar v. Md. Abdul Mabud Chawdhry*, the Division Bench of the High Court reversed a decree of restitution on the ground that ordering an unwilling wife to live with her husband was barbarous.⁵⁵ The Court cited a *ḥadīth* of the Prophet Muḥammad (peace be on him) to the effect that he did not decree restitution of the unwilling wife to her husband.

⁵¹ Sharmin Hossain Rupa v. Mizanur Rahman (Tuhin) 2 BLC (1997) 509 (HC).

⁵² *Khodeja Begum v. Md. Sadeq Sarkar* 50 DLR (1998) 181.

⁵³ *Hosna (Munna) v. Md Shajahan (Shaju)* 51 DLR (1999) 295 (HC).

⁵⁴ Md. Khurshid Alam, "Legal Aspects of Restitution of Conjugal Rights," *The Dhaka University Studies* 9, no. 1 (1998): 135, 155.

⁵⁵ *Mst. Nur Akhtar v. Md. Abdul Mabud Chawdhry* 16 BLD (1996) 396.

Conclusion

The law providing for RCR is discriminatory against women because it provides a tool for aberrant husbands to usurp the legally protected rights of wives. If wives fail to comply with the decree of RCR, they are declared disobedient, and the law allows courts to order the attachment of property as a mode of execution for a restitution decree. The ineffectiveness of the remedy was discussed in the Law Commission's report authored by Lord Scarman and presented to the English Parliament which recommended the abolition of the remedy in 1969.⁵⁶ The report argued that if the legal route of restitution proceedings is used as a measure to demonstrate a spouse's willingness to save the marriage, this can be demonstrated equally well by other out-of-court approaches and if those do not work it is highly unlikely that court's restitution proceedings will be of any effect. Further, the report suggested that it was inappropriate for a court to order two adults to live together as husband and wife. The report also demonstrated how rarely this remedy was sought. It was in response to this report that the remedy was abolished in England through the Matrimonial Proceedings and Property Act 1970.⁵⁷

Despite its abolition from the country of its origin, i.e., England, RCR still holds ground in South Asian countries. Despite infrequent judicial outcries against RCR in different jurisdictions in South Asia, its conclusive demise seems unlikely in near future. However, RCR violates various fundamental rights as enshrined in the constitutions of various South Asian countries. RCR violates the right to privacy, liberty, and dignity of women. It also fails on the touchstone of providing women with equal protection of the law. The use of the remedy as a form of a legal loophole by husbands also hinders access to justice for women. It seems implausible that a husband will require a court decree if he intends to demonstrate his commitment to save his marriage. If the husband is serious about his marriage, he could demonstrate his willingness by continuing to maintain his wife instead of initiating RCR.

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⁵⁶ The Law Commission No. 23, "Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights" (Her Majesty's Stationary Office, 1969).

⁵⁷ RCR has also been abolished in other countries such as Australia, Canada, New Zealand, Ireland, and South Africa. Saumya Uma, "Wedlock or Wed-lockup? A Case for Abolishing Restitution of Conjugal Rights in India," *International Journal of Law, Policy and The Family* 35, no. 1 (2021): 1, 17, <https://doi.org/10.1093/lawfam/ebab004>.