

**ANOTHER BRICK IN THE WALL: DEFINING THE MORAL CONTOURS OF A
RESTITUTION OF CONJUGAL RIGHTS PROVISION**

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ABSTRACT

The restitution of conjugal rights provision, born in medieval England and bequeathed to colonial India, is a problematic provision in modern day Indian jurisprudence. Its problems are not new. Since its introduction into personal law, which for the purposes of this essay is Hindu law, a restitution of conjugal rights decree has been misused for one purpose or another. Marital cohabitation is nearly always an ostensible object.

A relic of both colonial supremacy and Victorian morality, this provision has historically been protected by the illusory rectitude of keeping families together, which has effectively given courts the license to construct and adjust a marital relationship at their discretion.

A recent family court order quashed by the Aurangabad Bench of the High Court of Bombay raises new questions of constitutionality of restitution of conjugal rights in the mind of the author. By tracing the moral complexities of its origin, this essay argues that a restitution of conjugal rights provision blurs the lines between the reproductive autonomy of a woman and the independent decision of parties to end their marriage and creates a constitutional catch-22 situation regarding marital rights.

I. INTRODUCTION

In December 2019, a young wife caught in divorce proceedings against her husband, sought directions to have a second child during the pendency of a petition seeking restitution of conjugal rights. The family court judge held reproductive rights to be basic civil rights with the condition that any In Vitro Fertilisation [IVF] procedure to bear such child, would require the estranged husband's consent. The Aurangabad Bench of the High Court of Bombay quashed the order, finding the conclusion of the family court to be 'western' and 'shocking to the judicial conscience of the court.'¹

Many questions arise in this situation: If the restitution of conjugal rights provision encourages a marital relationship by way of intercourse, does that not include the right to bear a child? Would it then be unconstitutional to restrict such a right? Should the court's moral imperative be the sanctity of the marital institution or the welfare of the parties involved? How does the constitutional morality of such a provision align with the jurisprudential morality of the courts?

The remedy of restitution of conjugal rights is for the purposes of Hindu law, to which this essay is restricted, enshrined in Section 9 of the Hindu Marriage Act, 1955.²

¹ KGP v. PKP, (2019) SCC OnLine Bom 5305 ¶28, 30 (India) [hereinafter KGP].

² § 9, Hindu Marriage Act, No. 25 of 1955.

Conjugal rights connote both the right which spouses have to one another's company and the right to marital intercourse. When one spouse leaves the other without any just cause or excuse, the provision enables the latter to bring the former into the conjugal fold so to speak. The restitution of conjugal rights decree requires amicable co-residence, though not necessarily sexual intercourse, and is viewed as a mechanism that preserves the institution of marriage for the parties involved. Thus, deprived of the primary rights of cohabitation and companionship in a marriage, a spouse so bereft is entitled to approach the courts seeking the restitution, or the restoring of marital cohabitation.

When early British settlers first came to India, in search of both thrill and treasure, they left their womenfolk at home in England. Away from their spouses in a foreign land, the early Englishmen in India, established *bibi* culture or the taking up of an Indian mistress while in India, as a common law wife of sorts.³ In peak emigration years, it was found that 'leaving' was the most common male response to domestic problems.⁴ In those days, desertion without cause for two years and upwards was a valid ground for judicial separation. What such wives most required was alimony, and with every petition for judicial separation there was filed an application for interim alimony, calculated at little less than a fifth of her matrimonial income.⁵

Yet, research indicates that judicial separation was redundant for such a deserted wife, who could at the very best only refuse to entertain such an emigrant husband upon his future return.⁶ Deserted wives increasingly preferred the speedier and simpler remedy of a restitution of conjugal rights petition, which statutorily entitled a deserted wife to interim alimony just as in a suit for judicial separation but without the onerous two year wait period.⁷ Research indicates that if such suits came to hearing they were unencumbered by strict rules of evidence and were generally designed to succeed unless the husband was able to attribute any adultery or legal cruelty to the petitioner wife.⁸ In fact, records reflect that as many as 33 restitution petitions were filed between 1858 and 1860, but only 17 petitions were filed for judicial separation on the ground of desertion.⁹ Towards the end of the century, restitution of conjugal rights was adapted to fit into both Hindu and Muslim personal law in India.

³ VIKRAM SAMPATH, *MY NAME IS GUAHAR JAAN*, Chapter 1: The Early Years (2012).

⁴ Olivia Anderson, *Emigration and Marriage Break-Up in Mid-Victorian England*, 1 Ser. 2 ECON. HIST. REV., 104-7 (1997).

⁵ Olivia Anderson, *Civil Society and Separation in Victorian Marriages*, No. 163 Past & Present, 173 (May 1999) Oxford University Press on behalf of The Past and Present Society, <https://www.jstor.org/stable/65117>.

⁶ Macqueen, *Practical Treatise on the Law of Marriage*, Divorce and Legitimacy, 309. See Olivia Anderson, *supra* note 5, at 172.

⁷ § 17, 20 & 21 Vict., c. 85 (U.K.); See Olivia Anderson, *supra* note 5, at 173.

⁸ See JOHN M. BIGGS, *CONCEPT OF MATRIMONIAL CRUELTY*, 205 (1962). See also Olivia Anderson, *supra* note 5, at 174.

⁹ Parliamentary Papers, 1862 (99) XLIV, 11-13; See Olivia Anderson, *supra* note 5, at 174.

Although it was a century before restitution of conjugal rights was imagined in the context of independent India, its tenuous origins in England had set the stage for its subsequent acceptance into the fold of Indian personal law. What is remarkable, however, is that while the Supreme Court of India stood by the restitution of conjugal rights provision in 1962, eight short years later, it was abolished in England in 1970.¹⁰ This essay argues in Part I, that a restitution of conjugal rights provision has no place in contemporary jurisprudence, as it creates more problems than it solves. Part II of this essay traces the origins of the remedy of restitution of conjugal rights, in the context of introduction in Indian law. It outlines some of the fundamental misuses of the provision, such as being a stepping stone to divorce or a ploy to defeat other financial claims. Part III deals with the moral implications of the restitution of conjugal rights provision. It follows the jurisprudence on the constitutional validity of the provision before re-contextualizing the challenge to the restitution of conjugal rights provision, in face of the nuanced exposition of privacy in *Justice (Retd.) K. S. Puttaswamy v. Union of India* [**Puttaswamy**].¹¹

Part IV specifically analyses the outcome of a recent judgment of the Aurangabad Bench of the High Court of Bombay which might change the course of how restitution of conjugal rights is viewed in India. Part V concludes the essay by encapsulating the moral and legal ambiguities of the restitution of conjugal rights provision, defending why such an antiquated provision cannot continue to occupy space in modern day Indian jurisprudence.

II. THROUGH THE LOOKING GLASS: RESTITUTION OF CONJUGAL RIGHTS

A. *The Origins of Conjugal Rights and the Colonial Necessity to Provide for their Restitution*

Ancient Hindu law as originally laid down, did not entertain the concept of conjugal rights. Derived from a sacrament, enjoined by divinity, marriage in ancient Hindu law bound two parties with reciprocal obligations, within which litigation was forbidden. Given that divorce was unthinkable, the restitution of conjugal rights much less so. The remedy of restitution of conjugal rights is a creation of medieval English law. The extent to which it could be imported into Hindu law in India formed a considerable question of late nineteenth-century jurisprudence.

The remedy of restitution of conjugal rights was one of the many products of the coverture rules that originated in eighteenth century English law, which followed the legal doctrine of yesteryears, marking husband and wife as one entity. The legal, political, sexual and economic rights of the

¹⁰ §20, The Matrimonial Proceedings and Property Act, 1970 (U.K.).

¹¹ *Justice (Retd.) K. S. Puttaswamy v. Union of India* (2017) 10 SCC 1 (India) [hereinafter *Puttaswamy*].

wife were subsumed by those of her husband to the extent that the wife was considered a 'dependent', incapable of independent existence.¹² In this respect, the presumption of consent was effectively invalid for women. In that pre-suffragette political climate where men and women fell into two very distinct categories with unimpeachable boundaries, the law encouraged withholding political, social and economic rights that concerned daily functioning in the outside world, from the domestic, house-bound and family-oriented women of the time.¹³

Given that a wife was considered the legitimate 'chattel' of her husband,¹⁴ the husband was entitled by way of their marriage to her consortium. The feudal remedy of restitution of conjugal rights enabled one spouse to move the court when the other withdrew from such consortium. The court would then, upon an examination of the facts, order the erring spouse to return into the conjugal fold. Early Indian observations on the remedy, have not failed to recognise the feudal anachronism from which it originates: *The wife was treated like a cow, who if she ran away from the master's shed, could be brought back and tied to the post in that shed.*¹⁵

Yet, there is little to give credence to the necessity of importing the remedy of restitution of conjugal rights into Hindu law. The borrowing of the remedy was considered by the Privy Council in the context of Muslim law, where the court held that the remedy of restitution of conjugal rights could be availed in Muslim law.¹⁶ The remedy was also held to apply *mutatis mutandis* to Hindu law as well.¹⁷ Exactly where and how the restitution of conjugal rights fit into the pervasive idea of marriage as a sacrament, was left unanswered.

B. Restitution of Conjugal Rights as a Means to Divorce

The real predicament with a restitution of conjugal rights provision is not always with itself, but in the purposes that such a remedy is often used for. One of these purposes is, as a stepping stone to divorce. The restitution of conjugal rights provision has always been considered a means to either thwart or hasten divorce proceedings. In the general realm of uncodified Hindu law, divorce was not recognized unless where tempered and accepted through custom. The codification of Hindu personal law resulted in the inclusion of a divorce provision through Section 13(1A) of the

¹² SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND BOOK 1, Chapter 15: Of Husband and Wife, LONANG INSTITUTE (1765-1769), <https://Lonang.Com/Library/Reference/Blackstone-Commentaries-Law-England/Bla-115/>.

¹³ Priyanshi Vakharia, *Unveiling Privacy for Women in India*, (2019) 10 Law Rev. GLC 37, page 44-45.

¹⁴ SIR WILLIAM BLACKSTONE, *supra* note 12.

¹⁵ Paras Diwan, *Week-end Marriages and Restitution of Conjugal Rights*, 20 J. IND. L. INST. 1 (1978).

¹⁶ *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum*, (1886) 11 MIA 551 (PC).

¹⁷ *Kateeram Dokanee v. Mt. Gendhenee*, (1875) 23 Suth WR 178.

Hindu Marriage Act, 1955;¹⁸ although divorce is to this day, granted on extremely specific and limited grounds.

The earliest recorded instance is *Ishwar Chander Ahluwalia v. Shrimati Pomilla Ahluwalia*¹⁹ [**Ishwar Chander Ahluwalia**] wherein the applicant husband filed for, and subsequently received a decree of restitution of conjugal rights provision, one year after his marriage. Shortly thereafter, he filed for a decree for nullity of marriage on the grounds that the restitution of conjugal rights decree had not been complied with. The court remarked that the very fact that the nullity petition was filed a year after the restitution of conjugal rights decree was passed, makes it doubtful whether any sincere efforts were made on behalf of the husband to get his wife to comply with the decree for restitution of conjugal rights.²⁰ The idea of a sincerity test was loosely fashioned in *Ishwar Chander Ahluwalia* and generally left unencumbered. However, the implications are significant.

In *Captain B. R. Syal v. Smt. Rama Syal* [**Captain B. R. Syal**] the very same Court illuminated the concept of a sincerity test in holding that the essence of a restitution of a conjugal rights decree is that the spouse desiring the company of the other makes an effort through the court to restore cohabitation.²¹ The court observed that in the case before it, the restitution of conjugal rights petition was filed as a mere pretense or sham. It was actually intended for an extraneous and different purpose, that is, to enable the husband to obtain a divorce from a wife against whom the charges justifying a divorce could not be leveled, and who was free from blame or blemish, and was mentally and physically sound.²² The court held that in a petition for the restitution of conjugal rights, where the purpose was cohabitation in preservation of marriage and not its dissolution, the petitioner was required to show that s/he was sincere.²³ For the court, this meant showing that the petitioner had a bona fide desire to resume marital cohabitation and to render the rights and duties of such cohabitation. In fact, the court went so far as to clarify that a petitioner who was sincere in this sense was entitled to a decree, even if the parties may not have evinced any affection for each other.²⁴

Despite the lucid interpretation of the sincerity test in *Captain B. R. Syal*, there is no doubt as to the continued misuse of the remedy. In *Shreevastava v. Veena*, a decree for the restitution of conjugal rights was passed on application by the husband.²⁵ The wife had no objections. However, the

¹⁸ § 13(1A), Hindu Marriage Act, No. 25 of 1955.

¹⁹ *Ishwar Chander Ahluwalia v. Shrimati Pomilla Ahluwalia*, AIR 1962 (Punj.) 432 (India).

²⁰ *Id.*, at ¶10.

²¹ *Captain B. R. Syal v. Smt. Rama Syal*, 1968 SCC OnLine P&H 5 (India).

²² *Id.*, at 397.

²³ *Id.*, at 398.

²⁴ *Id.*, at 398-99.

²⁵ *M. P. Shreevastava v. Mrs. Veena*, 1967 AIR 1193 (India).

husband, actively resisted the wife's attempts to resume marital cohabitation. When the wife moved court to record the satisfaction of the decree as far as her conduct was concerned, the husband objected on the grounds that such decree cannot be unilaterally complied with. The court observed that the husband's conduct was clearly indicative of a planned design to obtain a decree for divorce on the basis of the decree for restitution of conjugal rights in order to rid himself of the liability towards his wife and child.²⁶ Non-compliance of a decree of restitution of conjugal rights is not a fact to be acknowledged which may then serve a broader purpose. In *Someshwar v. Leelavathi*, when the husband refused access to the wife in resuming cohabitation under a decree for restitution of conjugal rights, the court found that while the wife had returned with the genuine intention of resuming marital cohabitation, she was prevented from doing so by an act of the husband himself.²⁷

The ability of one spouse to use the non-compliance of the other spouse with a decree for restitution of conjugal rights, as grounds to move a divorce petition under Section 13 of the Hindu Marriage Act, 1955, did not slip by unnoticed by the courts of the time. Indeed, the court opined in *Bimla Devi v. Singh Raj* that while the conduct of the parties following a decree for restitution of conjugal rights could be considered while granting relief, the refusal thereof was not a consideration which could weigh against a party claiming dissolution of marriage.²⁸

This does not suggest that misuse of the remedy is in all cases prevented. Often the weight of the court has rested behind the erring party. One instance of this, is *Santosh Kumari v. Mohanlal [Santosh Kumar]*, wherein the wife against whom a decree for restitution of conjugal rights was passed, was ready to resume marital cohabitation.²⁹ She was materially prevented from doing so by the husband, upon which she filed an execution application against the husband. The husband defended his non-acceptance of his wife, and his non-resumption of marital cohabitation on the grounds that he had already initiated divorce proceedings. The court dismissed the wife's execution application as its purpose had been fulfilled.

It must be noted that if recourse was taken to the sincerity test first broached in *Ishwar Chander Ahluwalia*, and then crystallised in *Captain B. R. Syal*, the court in *Santosh Kumari* might have found the husband's petition for restitution of conjugal rights a mere sham or pretense, made simply for the extraneous purpose of obtaining a divorce. The court might have then reasoned that the husband's conduct was not for the purpose of resuming cohabitation under a restitution decree, but for obtaining a divorce, thus lacking sincerity. It is remarkable if somewhat puzzling to note

²⁶ *Id.*

²⁷ *Someshwar v. Leelavathi* AIR 1968 (Mys.) 274, ¶27 (India).

²⁸ *Bimla Devi v. Singh Raj*, AIR 1977 (P&H.) 167 (India).

²⁹ *Santosh Kumari v. Mohanlal*, AIR 1980 (P&H) 325 (India).

how the sincerity test has been pushed to the sidelines despite streamlining the considerable ambiguity surrounding the restitution of conjugal rights. This indeed has paved the way for precisely what *Captain B.R. Syal* cautioned against—the misuse of a restitution decree to defeat other claims.

C. Restitution of Conjugal Rights as a Means to Defeat Claims

The misuse of a decree for the restitution of conjugal rights is not restricted to serving as ground for divorce. A decree for the restitution of conjugal rights need not even be a means to an end. It may as well be an impediment thrown in by one spouse to defeat claims made by the other spouse. The most tangible form such claims take is in the context of maintenance, claimed for by one spouse and denied by the other spouse. Therefore, a decree for restitution of conjugal rights becomes a tool of strategy that is used as a ploy to either escape or impose maintenance as per the party's intentions.

For instance, in *Teja Singh Subedar Santa Singh v. Sarhit Kaur*, the wife had been living apart from her husband for a period of several years, during which there was no litigation. Compelled by her circumstances, the wife filed for maintenance. Once she had obtained such an order, the husband filed for a decree for restitution of conjugal rights in order to defeat the maintenance order.³⁰ Similarly, in *Venkattama v. Patel Venkatswamy Reddy* the wife left her matrimonial home as her husband had taken on a second wife.³¹ However, when the wife filed for maintenance, the husband moved the court for a decree for restitution of conjugal rights. Although the decree was ultimately refused on other grounds, it was observed that the husband did not want to resume cohabitation with the first wife, but had filed for restitution of conjugal rights to defeat her claim for maintenance.

In *Jinarthanammal v. P. Srinivasa*, the husband filed a decree for restitution of conjugal rights whilst in the middle of divorce proceedings, merely to defeat the wife's claim for maintenance.³² The court dismissed the restitution of conjugal rights petition on the grounds that it was not bona fide. It is seen that the decree of restitution of conjugal rights is often less a remedy, and more a barrier for an applicant to break through in order to prove their claims.

³⁰ *Teja Singh Subedar Santa Singh v. Sarhit Kaur*, AIR 1962 (Punj.) 195 (India).

³¹ *Venkattama v. Patel Venkatswamy Reddy*, AIR 1963 (Mys.) 118 (India).

³² *Jinarthanammal v. P. Srinivasa*, AIR 1964 (Mad.) 482 (India).

III. AN ENGLISH ANACHRONISM IN INDIAN LAW: THE MORAL IMPLICATIONS OF THE REMEDY OF RESTITUTION OF CONJUGAL RIGHTS

A. Addressing the Bull in the China Shop: The Constitutional Validity of Restitution of Conjugal Rights

The restitution of conjugal rights has often been regarded as an affront to liberty and equality. Its most compelling critique comes from the High Court of Andhra Pradesh, which found Section 9 of the Hindu Marriage Act, 1955 to be unconstitutional and violative of the life and personal liberty guaranteed under Article 21 of the Constitution of India.³³ In *T Sareetha v. T Venkata Subbiah* [*T. Sareetha*], Justice Choudhary, had considered the restitution of conjugal rights provision to have the effect of coercing unwilling parties into having sex against such person's free will and consent, through the judicial process.³⁴ This was based on the reasoning that sexual expression in itself is so integral to one's personality that it is impossible to conceive of sexuality on any basis except on the basis of consensual participation.³⁵ Therefore, the very provision of restitution of conjugal rights constituted the grossest form of violation to an individual's right to privacy.³⁶

Justice Choudhary's focus on sexuality rests on the exposition of marital privacy. Marital privacy forms an important constitutional thread of thought that carries forward in the judgments that counter decision in *T. Sareetha*. The traditional concept of marital privacy afforded protection to the institution of marriage and not to the two individuals who constituted the sphere therein.

Very often, courts have felt it their moral imperative to preserve the sanctity of marriage rather than specifically assessing the rights of the individuals therein. This preservation of the marital sphere is echoed from the verdict of the High Court of Delhi in *Harvinder Kaur v. Harmandar Singh Choudhry*, which protected the spatial construct of marital privacy when it likened the introduction of constitutional law in the home to letting loose a bull in a china shop, to the detriment of the institution of marriage and all that it stood for.³⁷ In deciding a restitution of conjugal rights petition, the High Court of Delhi found that because the nature of marriage was so intimate, and protected by the traditional idea of marital privacy, it would be inappropriate to apply constitutional principles to marriage.

The Supreme Court of India eventually confirmed the judgment of the Delhi High Court, effectively overruling the decision in *T. Sareetha*.³⁸ Conjugal rights were found to be inherent to the

³³ *T Sareetha v. T Venkata Subbiah*, AIR 1983 (AP.) 356 (India).

³⁴ *Id.*, at ¶17.

³⁵ *Id.*, at ¶18.

³⁶ *Id.*, at ¶30. See also *Smt. Saroj Rani v. Sudarshan Kumar Chadha*, AIR 1984 SC 1562, ¶10 (India).

³⁷ *Harvinder Kaur v. Harmandar Singh Choudhry*, AIR 1984 (Del.) 66, ¶34 (India).

³⁸ *Smt. Saroj Rani v. Sudarshan Kumar Chadha*, AIR 1984 SC 1562, ¶16 (India).

very institution of marriage itself. They served the social purpose of aiding the prevention of breaking up of marriages. Indeed, as far as the concerns of liberty were concerned in a restitution of conjugal rights matter, it was held that the provision itself contained sufficient safeguards to prevent it from being a tyranny. Further, it was found that a spouse reluctant to comply with a restitution of conjugal rights decree would always pay the requisite fee provided they had properties which could be attached.³⁹

The moral imperative of the courts, with notable exceptions of Justice Choudhary of the High Court of Andhra Pradesh and a few others, has always been to protect and preserve the institution of marriage. The judicial morality is ensconced in protecting general society against a more 'western' outlook on marriage by adopting an attitude of apparent non-interference. In this context the restitution of conjugal rights provision is an interesting intersection. The provision itself allows courts to intervene in marital relationships by decreeing when and for how long marital cohabitation must take place.

Having already been involved in the apparently intimate space of a marriage by the letter of law, the court's moral imperative is not then to interfere as little as possible. Instead the court must perform its duty as the guardian of constitutional and fundamental rights, by ensuring that the rights and liberties of parties are not infringed. The non-interference argument is thus suspect: the courts cannot adopt an attitude of respecting the privacy of a marriage, when the legislation allows parties to come forward and compel their spouses to marital cohabitation. Interestingly, the Supreme Court of India is currently hearing a petition as to the validity of the restitution of conjugal rights provision in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, thus offering perhaps a second chance to do away with what is essentially a feudal anachronism in Indian jurisprudence.⁴⁰

B. Peering through the Privacy Lens: Re-examining the Restitution of Conjugal Rights

These clear-cut lines of constitutionality however, have blurred after the Supreme Court of India's incisive decision in *Puttaswamy*. Just as Justice Choudhary broke open the shell of marital privacy in *T. Sareetha*, in the same way, the Supreme Court of India, asserted that the unit of privacy is first and foremost the individual. The individualistic notion of privacy that *Puttaswamy* propounds rests on the fact that in creating a private sphere for oneself, one chooses the space surrounding oneself

³⁹ *Id.*

⁴⁰ Samanwaya Rautray, *SC to decide validity of provisions governing restitution of conjugal rights*, ECONOMIC TIMES, Mar. 6 2019, <https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-decide-validity-of-provisions-governing-restitution-of-conjugal-rights/articleshow/68279688.cms?from=mdr>.

and actively controls it thereafter to warrant safeguard from unwanted intrusion. As a result, privacy is attributable to the individual; it is at the individual's discretion to create a space for themselves in a way that they see fit.

Justice Choudhary's reasoning of unconstitutionality of the restitution of conjugal rights provision is based on the fact that the presumptive lack of consent and compelling of sexual relations at the hands of the adjudicating court is an infringement of the right to life and personal liberty under Article 21 of the Constitution of India. Of course, in his exposition of sexual privacy, he did not have recourse to the Supreme Court of India's nuanced interpretation of privacy in *Puttaswamy*. However, if the constitutionality of the restitution of conjugal rights provision is considered today, it might read something like this.

According to the majority opinion in *Puttaswamy*, violations of privacy under Article 21 must satisfy the proportionality standard.⁴¹ The Supreme Court opined: "An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them."⁴² The Court further held:

*'The concerns expressed on behalf of the Petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State: (i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference.'*⁴³

Of the three requirements of the Article 21 standard, it may be construed that the State has its evidence for legality – there certainly is the existence of a law, Section 9 of the Hindu Marriage Act, 1955, which sanctions the ability of one spouse to file a decree against another. The question that arises is with regard to the other two prongs: necessity and proportionality. The legitimate State aim, so to speak, is to safeguard the sanctity of the marital institution. In democratic twenty-first century India, there is little, if nothing, to justify such an absurdly outdated State aim. Further, the preservation of the institution of marriage cannot come at the cost of the safety and autonomy of the individuals in a marriage. The proportionality standard applied in this context does not draw a rational nexus between the object of protecting marital relationships and forcing sexual

⁴¹ The proportionality standard arose from the *Wednesbury* principle of reasonableness in English law. The proportionality standard is a common test of review to keep State infringement of individual rights under check. It requires that the measure to be enacted *via* legislation or executive action is likely to achieve its ends and cause as little harm as possible.

⁴² *Puttaswamy*, at ¶3(H).

⁴³ *Id.*, at ¶71.

relationships to the detriment of one party or the other. This is suspect especially when there exists a plethora of case law (as discussed in the earlier sections) that outline the potential mischief a restitution of conjugal rights decree can cause.

In order to substantiate a privacy claim under Article 21, it is important to revisit the origins of a restitution of conjugal rights provision. In eighteenth century England, because women were confined to the domestic sphere, it was the legitimate aim of the State to ensure their dependency on their male counterparts.⁴⁴ The umbrella protection of the coverture rules which may have rendered the State aim of eighteenth century England legitimate, is difficult to justify in modern day India.⁴⁵ Having adopted the constitutional ideals of equality and liberty, women are no longer 'dependents'—they are independent (if not always equal) citizens under law.⁴⁶ Their sexual freedom must be reflected in their agency to enter or end marriages. A provision like the restitution of conjugal rights therefore interferes with their inherent right to privacy, which encompasses their sexual privacy.

It must be disclaimed that unlike other provisions, such as for instance the marital rape exception which is undeniably disadvantageous to women in particular, a restitution of conjugal rights provision is disadvantageous to an unwilling party, who could be either husband or wife. The dubiety surrounding the provision therefore need not be restricted to the coverture rules of England alone. After all, it is perfectly possible for an applicant wife to move the courts for a decree of restitution of conjugal rights against her respondent husband. The pervasive idea however, that it is for the courts to decide when and how a marriage is to be salvaged and to what extent this is done by marital cohabitation is problematic.

Another interesting perspective to re-evaluate is the feminist exposition of privacy and how this affects the case against the restitution of conjugal rights.⁴⁷ Feminist scholars usually find that privacy is ambiguous; often an excuse to protect male bad behaviour; creates a problematic distinction between acts performed in 'public' spaces; and is largely irrelevant to claims of liberty.⁴⁸ Eminent feminist scholar Martha Nussbaum, has said of the validity restitution of conjugal rights in India, that marital privacy has no place in claims of bodily integrity. She argues that the guarantee of life and liberty in Article 21 of the Constitution of India involves protection of the very basic

⁴⁴ Priyanshi Vakharia, *supra* note 13.

⁴⁵ *Id.*, at 45.

⁴⁶ *Id.*, at 45.

⁴⁷ *Id.*, at 48-49.

⁴⁸ Martha Nussbaum, *Is Privacy Bad for Women?* The Boston Review, Apr. 1, 2000, <http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women>.

right of sexual autonomy, including the right to refuse sex one does not want.⁴⁹ Of course, this was written seventeen years before *Puttaswamy* came to be. When read in light of the individualistic notion of privacy that *Puttaswamy* propagates, the idea of marital privacy is unsustainable, if not done away with entirely.

IV. TO BEAR OR NOT TO BEAR: A MORALLY TROUBLING CONSEQUENCE OF THE RESTITUTION OF CONJUGAL RIGHTS PROVISION

The potential trouble that a restitution of conjugal rights provision creates is not restricted to its role in giving impetus to divorce or in defeating other claims. The trouble is far more permanent and far more damaging to the fabric of the very society such a provision seeks to protect. The continued existence of a restitution of conjugal rights provision certainly gives rise to some tricky questions.

For instance, consider a recent case where an applicant wife sought directions to have a second child with her estranged husband, either through sexual relations or through IVF procedure, during the pendency of a petition seeking restitution of conjugal rights. The husband strongly resisted the want of a second child and initiated divorce proceedings against the wife. The family court judge, in deciding the restitution of conjugal rights petition held reproductive rights to be basic civil rights with the condition that any IVF procedure to bear such child, would require the estranged husband's consent.⁵⁰ The Aurangabad Bench of the High Court of Bombay quashed the order, finding the conclusion of the family court to be 'western' and 'shocking to the judicial conscience of the court.'⁵¹ The family court judge invoked international treaties like the United Nations Convention for the Elimination of all Forms of Discrimination Against Women, to hold reproductive rights of women to be basic civil rights which could not be thwarted by the other spouse's decision to initiate divorce proceedings.⁵²

The complications that ensue are palpably landmark: a ruling that allows for such IVF procedure might have the effect of including within the fold of a restitution of conjugal rights petition, the right to ask for, or to bear (depending on whether it is the husband or the wife who so asks) a child. A ruling to the contrary might limit the well-established position in law that a woman's reproductive rights are basic civil rights of which she may not be deprived. A ruling on either side plays directly into the dilemma of the constitutionality of a restitution of conjugal rights provision:

⁴⁹ *Id.*

⁵⁰ Swati Deshpande, *Maharashtra: HC says it's shocked by family court's view on reproductive rights*, TIMES OF INDIA (Dec. 9, 2019), <https://timesofindia.indiatimes.com/city/mumbai/maharashtra-hc-says-its-shocked-by-family-courts-view-on-reproductive-rights/articleshow/72433226.cms>.

⁵¹ KGP.

⁵² Deshpande, *supra* note 50.

assuming marital cohabitation could and would probably include the right to bear a child, if the parties so choose. Any interference of the court with the extent of the marital cohabitation between two parties would be inherently unconstitutional. In fact, it might very well be the introduction of a bull in the china shop, as cautioned by the High Court of Delhi in *Harvinder Kaur*.

In the context of the clashing proceedings and the questions to be answered, the Aurangabad Bench of the High Court of Bombay settled two fundamental issues: firstly, if either spouse could be compelled to have another child despite strong resistance from the other spouse; and secondly, what the fate of such child might be were he to in the future, stumble upon the litigation between his parents.⁵³ The latter issue is a novel, if somewhat peculiar framing: certainly the possibility that a child's mental state might be affected upon learning of vexatious litigation between his or her parents cannot in any way play a conclusive role in determining or denying the parents the basic rights that accrue to them. The reasoning is not far from the logic of the coverture rules as laid down in England, or from the so-called social purpose of the restitution of conjugal rights provision in *Saroj Rani*. The Aurangabad Bench asserts that the growth of a child is not money centric but instead family centric—a fact they find the family court to have lost sight of.⁵⁴ Yet, no heed is paid to the mother's assertion that she does not require any financial assistance in raising her children, nor does she expect any financial support from her estranged husband.

The Aurangabad Bench remained unconvinced that a single mother might be complete family to her children. Just as the constitutional validity of the restitution of conjugal rights provision was tested against the sanctity of marriage, similarly, the ability of one spouse to bear a child is tested against the sanctity of family. To be precise, the traditional idea of what constitutes a family. Noble as these concerns are, they further obfuscate the murky waters in which restitution of conjugal rights lay.

Even as to the former issue, of compelling the bearing of a child by one spouse despite strong protest from the other, the Aurangabad Bench loops in the sanctity of family to hold to the contrary. Indeed, they felt the conclusion of the family court that women have the upper hand over men in matters of procreation and reproduction, to be unsustainable. Although the Aurangabad Bench found the conclusion of the family court to be 'western'⁵⁵ and 'shocking to the judicial conscience of the court',⁵⁶ the exact reason as to why such IVF procedure was untenable remained unanswered.

⁵³ KGP, at ¶24.

⁵⁴ *Id.*, at ¶35.

⁵⁵ *Id.*

⁵⁶ *Id.*

This is particularly stark, when contrasted with the reasoned judgment of the family court. Recognising the international legal bases upon which reproductive rights of a woman is a basic civil right, and a fundamental right under Article 21 of the Constitution of India, the family court opined that women had the right to both be and not be mothers as they wished. This choice was to be respected and unreasonable restrictions as to their exercise were not to be placed. The curtailing of a woman's reproductive rights, by preventing her from procreating was akin to compelling her to forcibly sterilize.⁵⁷ The family court's exposition of family life somewhat preemptively addresses the Aurangabad Bench's concerns:

Involvement of men in reproductive decisions and choices of women, which are pragmatic and reasonable, will create a gender synergy between men and women. Men can propagate responsible fatherhood and gender equality by supporting the women's choice of family planning. In issues of reproduction the common aim of both genders should be the well-being of all family members.⁵⁸ The concern to protect institutions, whether they might be those of marriage or family, is an old and outdated concern. It does more harm than good to the parties whose very rights and duties, courts are tasked with exacting. A restitution of conjugal rights provision therefore is no more than a complication. Unfortunately, the dilemma as to its constitutionality is not merely academic. Whatever turn this proceeding might take, will substantively change the application and understanding of restitution of conjugal rights and reproductive rights as they exist today. Until and unless the provision regarding restitution of conjugal rights is done away with for good, the troubles of liberty, equality, privacy and now reproductive rights will continue to rage.

V. CONCLUSION

The restitution of conjugal rights provision which was a relic from medieval England and passed down to colonial India, is a complication in modern day personal law. Despite the historic scope of misuse, the remedy of restitution of conjugal rights gives rise to more dubiety in a recent case before the Aurangabad Bench of the High Court of Bombay. If and when the restitution of conjugal rights provision can be used to affect reproductive rights of women, it would set forth a precarious precedent, open to abuse.

The restitution of conjugal rights provision has already been tested for constitutional validity once before. In the absence of a crystallised notion of individualistic privacy, the provision was retained to fulfill the so-called social purpose of preserving the sanctity of marriage. However, in a post-

⁵⁷ *Id.*, at ¶27.

⁵⁸ *Id.*

Puttaswamy era, its value is no longer supported by an outdated State aim. It is a burdensome provision, with burdensome consequences that impinge on not only the constitutional fabric of society as a whole but also on the right of life and personal liberty of individuals in particular.

Any challenge to the restitution of conjugal rights provision now would necessarily have to be construed in light of the individualistic notion of privacy: the preservation of the marital sphere can no longer be prioritised over the rights to privacy, and liberty of the individuals in such a marriage. The restitution of conjugal rights provision is a constitutional complication which left as it is, will create significant dilemmas in the enjoyment of one's fundamental and constitutional rights.