

# **Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for its Abolition**

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## **Abstract**

The paper is a socio-legal analysis of the remedy of restitution of conjugal rights ('RCR') with reference to Pakistan. It analyses the way an alien remedy, the RCR – a legal transplant by the colonial government of British India – has been indigenised in the country. The RCR has progressively penetrated and constructed various matrimonial rights and responsibilities such as dower, maintenance, and dissolution. It is also employed in sexual offences for avoiding or delaying a judicial trial, metamorphosing an affirmative remedy of the RCR into a defense plea. The RCR is a domesticated version of a suit for specific performance but it has failed to retain its essence over the years due to its susceptibility to manipulation and unrivalled potential for transmutation. It is a ready-made legal instrument in the hands of unscrupulous husbands to be employed as a sword and shield against the rights of their wives. The exact nature of the RCR has never been determined, which consequently leaves the space for its exploitation. Considering the manipulative instinct and transmutative potential of the RCR, this paper recommends that this remedy should be abolished, and other alternatives be contemplated upon.

## **Introduction**

The paper is an analysis of indigenization of the RCR in Pakistan and argues for the abolition of this remedy. The process of indigenization of the RCR encompasses the manner of its transplantation and its use and misuse. The RCR was introduced apparently with the noble objective to compel spouses to perform their conjugal responsibilities. However, this objective is not enough to dictate its precise effects or categorically predict its future, which depends on the peculiarity of circumstances in which it is sought to be enforced. Numerous factors, including religious dictates, legislative measures, and social norms influence the application of this remedy. The paper is replete with such instances from the Pakistani case law, discussed and analysed in the later part.

The paper encapsulates the distance the RCR has travelled from its origin to the present day. It will reveal that the RCR has invasively interwoven itself with a number of other legal issues connected to family law and criminal law, e.g., dower, maintenance, and illicit sexual offences. This penetrative tendency sometimes materially influences reciprocal rights and responsibilities. Further, the contours of the RCR have never been precisely laid down by any statutory instrument or judicial pronouncement. Consequently, such characteristics of the RCR generate an immense space for its manipulation and misapplication. It is this elasticity and the manipulative potential of the RCR that has robbed it of its essence, assuming that this essence was the virtuous purpose of ensuring that spouses honour each other's rights.

The paper is divided into two parts. The first part discusses the origin and development of the RCR in British India. It also refers to some of the contemporary debates on the RCR in the United Kingdom (UK) and India along with briefly suggesting its alternatives. Furthermore, this part mentions some of the pertinent legal and judicial developments in Pakistan to set the stage for analysis of the case law. The second part of the paper is dedicated to this analysis in order to

discover the manner in which the RCR has constructed and influenced numerous issues pertaining to family law and criminal law. These include dower, maintenance, divorce, consent in marriage, and trial of illicit sexual relationship. This part will lay bare the manipulative instinct and transmutative potential of the RCR.

### **Origin of the RCR and Contemporary Debates**

The RCR is one of the familiar remedies in family law and does not require much introduction for the legal fraternity in Pakistan and other common law jurisdictions. Marriage is entered into for important social and religious necessities: it forms the basic unit of a society for mutual sharing of responsibilities and enjoying the joys of life, including procreation and rearing of children. If one of the spouse does not perform his/her role, the other spouse, through the judicial process of the RCR, may force him/her to do so. Theoretically, this remedy can be filed by any spouse but in an overwhelming majority of cases, it is initiated by husbands against their purportedly non-compliant and errant wives. In the Indian subcontinent, this judicial remedy was not pursued before the advent of the British Empire. It is argued that no comparable instrument or apparatus like the RCR is prescribed in either Muslim or Hindu religious laws.<sup>1</sup>

W. H. Macnaghten does not mention that the suit for RCR was available under Islamic law at the time when he wrote his treatise, though he states – in the background of attaching of an illegal condition to a marriage contract – that the husband “has a full power to carry his wife to his own house”,<sup>2</sup> after the full payment of dower. Similarly Sircar, without reference to the RCR, states that the effect of marriage under Islamic law is that it legalizes sexual relationship between spouses and empowers a husband to prevent his wife to go outside the nuptial abode without permission.<sup>3</sup> Such prescriptive statements may be treated as the foundations for the RCR under Islamic law; however, no evidence exists which suggests that without the legal enterprise of the British colonial government, these statements independently matured and transformed into a full-fledged suit for the RCR.

Al-Haj Mahomed Ullah ibn S. Jung states that the civil suit for RCR can be initiated by either spouse against the other. He has further discussed the after-effects in case of non-compliance with regards to attachment of property, which has been laid down in Civil Procedure Code 1908. After discussing these aspects, he concludes that “[t]his part of Anglo-Muslim Law is absolutely the product of legislative and judicial development...”<sup>4</sup> After analysing some

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<sup>1</sup> Preet Singh, *Restitution of Conjugal Rights: A Comparative Study* (PhD Thesis, Maharshi Dayanand University 1995) 98-99.

<sup>2</sup> William Hay Macnaghten, *Principles and Precedents of Moohummudan Law* (3<sup>rd</sup> Edition by William Sloan, J Higginbotham, Mount Road, Madras 1825) 256. In this illustrative case, the wife married with a condition to stay at her parental house, even after the marriage. Macnaghten’s statement was founded on the analogy of sale that in such like situations the contract would be valid, though an illegal condition would be treated as *void ab initio*.

<sup>3</sup> Shama Churun Sircar, *The Muhammadan Law* (Thacker, Spink & Co. Calcutta 1873) 319.

<sup>4</sup> Al-Haj Muhomed Ullah ibn S. Jung, *A Dissertation on the Development of Anglo-Muslim Law in British India* (The Juvenile Press: Allahabad 1932) 27.

cases, the same author argues that “they conclusively show that the Courts in British India [with reference to the RCR] have been more guided by the principles of the English Law.”<sup>5</sup>

The RCR was linked to canon law and its development was orchestrated by the British courts. Marriage in Catholic Christianity is regarded as a sacrament that ought to be monogamous and is considered as an indissoluble and eternal bond that, once established, could not be terminated. The structure of churches was built to encourage the perpetuation of marriages and eliminate all such avenues through which this sacred and eternal institution could be dissolved. Another feature which had been instrumental for enrooting the RCR in England was the fact that the wife was not considered to have an independent identity after marriage and her status was defined by the marital tie she had entered into. Man and woman were treated as ‘one person’ after the marriage and the male was legally and religiously vested to manage all affairs of the weaker sex, considered to be the woman.<sup>6</sup> The marriage-related disputes fell within the jurisdiction of the ecclesiastical courts. The equity jurisdiction, which evolved in Britain to soften the angularities of common law, was administered by the same courts. They introduced some innovative remedies in the legal arena, over and above those legal remedies which had been provided by the common law. For instance, a breach of contract was redressed in common law by damages, whereas equity courts engineered the remedy of specific performance of contract. This remedy of specific performance – in the domain of family law – transformed into the RCR. The RCR was quite well-known during later medieval England and such suits were often filed by the husbands to exercise control over their wives.<sup>7</sup>

When Britain colonised the Indian subcontinent, it brought along and engrafted numerous legal structures, instruments, and remedies in the host legal system, with RCR being one such example. The early traces of this remedy are found in the first half of the 19<sup>th</sup> century, though its firm grip was established into the legal system during the second half.<sup>8</sup> The British colonial government established its judicial system in the Indian subcontinent initially on the lines of its counterpart in Britain, which considered the courts to be vested with dual jurisdiction of ecclesiastical and civil matters. In *Ardaseer Curesjee v Perozebye*,<sup>9</sup> the Privy Council declared that the Supreme Court in Bombay was not competent to grant relief of the RCR under its ecclesiastical jurisdiction to natives, who in this case were Parsee spouses. This was partly on the basis of lack of jurisdiction of the court and partly on the ground that English ecclesiastical law could not be applied to a Parsee couple. The Privy Council suggested that such proceedings might be initiated in the civil jurisdiction of the courts as they properly took into account the personal laws of the parties before them and tailored the relief accordingly. Rebecca R. Grapevine has confirmed that the earlier suits of the RCR nature were filed under the ecclesiastical jurisdiction of the colonial courts,<sup>10</sup> but ultimately the Judicial Committee of the Privy Council decided that this remedy could be sought under the civil jurisdiction of the

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<sup>5</sup> Ibid, 28.

<sup>6</sup> (n 1) 93-94.

<sup>7</sup> Sara Margaret Butler, ‘The Language of Abuse: Marital Violence in Later Medieval England’ (PhD Thesis, Dalhousie University 2001).

<sup>8</sup> Rebecca R. Grapevine, ‘Family Matters: Citizen and Marriage in India, 1939-1972’ (PhD Thesis, University of Michigan 2015) 110.

<sup>9</sup> 1856 Indian Appeals (PC) 265 (Compiled by D. Sutherland).

<sup>10</sup> (n 8).

courts.<sup>11</sup> This judicial *dictum* provided an unabated judicial impetus to indigenise the remedy and progressively camouflaged its complex religious and historical baggage.<sup>12</sup> Further, it paved the way for all religious communities to discover and articulate their own justifications/foundations for seeking the remedy.

On the other hand, under Islamic law, marriage is neither a sacrament nor merely a civil contract; it has religious undertones and overtones and generates reciprocal contractual responsibilities.<sup>13</sup> Moreover, it is not considered indissoluble or eternal and there are avenues to dissolve it. In contrast to a Christian marriage, marriage under Islamic law may legally be polygamous, making the enforcement of the RCR problematic. Moreover, the wife is not stripped of her independent status after entering into a marriage contract; she manages her affairs and retains control over her assets and properties. All such factors emphasising her individuality, in one way or another, challenge the adoption of the RCR into the Islamic fabric. In spite of this, the judges in *Moonshee Buzloor Ruheem* overemphasised the contractual nature of marriage under Islamic law and then expressed astonishment as to how a marital contract could be envisioned without the prospect of specific performance.<sup>14</sup> This line of reasoning overshadowed numerous distinctive features of a marriage under Islamic law from its Christian counterpart and brought the former closer to the latter for the introduction of the RCR. The legal engineering involved in the process is worth noting: marriage under canon law was considered as a sacrament/status and the RCR was its logical consequence. In contrast, the Privy Council held marriage to be a contract under Islamic law but conceived RCR as its rational incidence.

The Privy Council, while addressing the question of whether a Muslim husband could force his wife without the latter's consent to return to cohabitation through civil courts of India, observed that, "[i]f a law which regulates the relations of the parties gives to one of them a right, and that be denied, the denial is wrong; it must be presumed that for that wrong there must be a remedy in a Court of Justice."<sup>15</sup> The Council concluded that, "their Lordship have no doubt that the Mussulman Husband may institute a suit [for the RCR] in the Civil Courts of India, for declaration of his right to the possession of his Wife, and for a sentence that she return to cohabitation; and that suit must be determined according to the principles of the Mahomedan law."<sup>16</sup> During the course of the judgment, the Privy Council did not hesitate to acknowledge that it did not find the comparable remedy of the RCR in the *Hedaya*, which only stated that the disobedient wife or the wife going abroad without her husband's consent would be deprived of maintenance until she returned to submission. It was stated that "it seems implied throughout, that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation, made with his consent."<sup>17</sup> The Council in the aforementioned case enlisted factors which underscored the individuality of a Muslim wife and distinctiveness of a Muslim marriage, such as her proprietary rights, polygamous nature of

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<sup>11</sup> *Moonshee Buzloor Ruheem v Shumsoonissa Begum* (1867) 11 Moore's Indian Appeals 551.

<sup>12</sup> (n 8) 110-111.

<sup>13</sup> See Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (Luzac & Co. London 1911) 327; Muhammad Munir 'Marriage in Islam: A Civil Contract or a Sacrosanct' (January-March 2008) XXXI (1) *Hamdard Islamicus* 77-84.

<sup>14</sup> (n 11).

<sup>15</sup> Asaf A. A. Fyzee, *Cases In The Muhammadan Law of India and Pakistan* (Oxford University Press 1965) 294.

<sup>16</sup> *Ibid*, 296.

<sup>17</sup> *Ibid*, 296.

marriage, and relative ease for dissolution, but did not consider these rights antagonistic to the introduction of the RCR. The response of the Council was routed through the judges' supposed responsibility and shaped by their religious and cultural sensibilities of enforcing the spouses' conjugal rights coercively. This was done to maintain the husband's control over the wife and her movements, in line with the established English tradition of the time.<sup>18</sup>

Another important case on the RCR is *Abdul Kadir v Salima*.<sup>19</sup> The last-mentioned case of the Privy Council introduced the RCR as a civil remedy for all inhabitants of the Indian subcontinent, devoid of any religious impulse. The exception was that the defenses to the suit would be determined with reference to personal laws of parties. This case supplied a much needed religious sanctity by equating the RCR with the spouses' right of cohabitation under Islamic law. Justice Syed Mahmood, who authored the judgment, reproduced extracts from legal texts to conclude that the incidents of a Muslim marriage, such as the responsibility of dower and mutual rights of cohabitation, flow simultaneously. Hence, the husband could not be refused the remedy of the RCR until he paid the outstanding prompt dower, though his wife had a right to initiate an independent judicial proceeding for recovery of dower.<sup>20</sup>

British colonial governments transplanted the RCR around the globe in territories that were under its dominion. After wrapping up the colonial enterprise from Britain India, it started to look inward by bringing reforms to its legal system. One of these reforms was the eradication of the RCR. Section 20 of the Matrimonial Proceedings and Property Act 1970 abolished the suit for the RCR in Britain.<sup>21</sup> Many other jurisdictions, particularly those of common law, have followed suit, e.g., Ireland, Scotland, Australia, and various provinces of Canada. After independence, the RCR was retained by both India and Pakistan. In India, it found specific reference in section 9 of the Hindu Marriage Act 1955.<sup>22</sup> The constitutionality of section 9 was questioned in the Andhra Pradesh High Court<sup>23</sup> on the ground that it undermined various constitutionally enshrined fundamental rights such as the right to privacy, human dignity, and gender equality.<sup>24</sup> The court found the provision problematic from the perspective of an egalitarian constitutional framework and declared it unconstitutional. In a similar litigation before the Delhi High Court,<sup>25</sup> the RCR was held to be constitutional on the grounds that the

<sup>18</sup> (n 8); (n 11).

<sup>19</sup> (1886) 8 All 149.

<sup>20</sup> Shahbaz Ahmad Cheema 'Revisiting *Abdul Kadir v Salima: Locus Classicus* on Civil Nature of Marriage?' (2018) XXXIII (XLIX) *Al-Adwa* 63-78.

<sup>21</sup> <[http://www.legislation.gov.uk/ukpga/1970/45/pdfs/ukpga\\_19700045\\_en.pdf](http://www.legislation.gov.uk/ukpga/1970/45/pdfs/ukpga_19700045_en.pdf)> accessed 18 August 2017. This enactment is based on the recommendation of the Law Commission Report titled: Law Commission, *Proposal for Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights* (Law Com No 23, 1969) <<https://www.lawcom.gov.uk/project/proposal-for-the-abolition-of-the-matrimonial-remedy-of-restitution-of-conjugal-rights>> accessed 18 August 2017.

<sup>22</sup> <<https://archive.org/details/HinduMarriageAct1955>> accessed 9 August 2017. For discussion on the Act, see Paras Diwan 'The Hindu Marriage Act, 1955' (1957) 6 (2) *The International and Comparative Law Quarterly* 263-272.

<sup>23</sup> *T Sareeta v Venkatasubbiah* AIR 1963 AP 356.

<sup>24</sup> Vimal Balasubrahmanyam 'Conjugal Rights vs Personal Liberty: Andhra High Court Judgment' (1983) 18 (29) *Economic and Political Weekly* 1263-1264; Guatam Bhatia 'The Constitution and the Public/Private Divide: T. Sareetha vs Venkatasubbaiah' (2017) <<https://ssrn.com/abstract=3010972>> or <<http://dx.doi.org/10.2139/ssrn.3010972>> accessed 23 October 2018.

<sup>25</sup> *Harvinder Kaur v Harminder Singh* AIR 1984 Del 66.

egalitarian scheme of the constitution should be kept away from the domain of the family. This conflict of judgments was brought before the Supreme Court of India, which eventually leaned in favour of the Delhi High Court.<sup>26</sup> Despite settling the controversy in a heated judicial battle, criticism of the RCR remains, with attempts made to persuade the government to remove this archaic remedy from the statute books.<sup>27</sup> It is suggested that the RCR should be replaced by reconciliation, which may be conducted under the auspices of courts,<sup>28</sup> by eminent persons of society<sup>29</sup> or even by qualified professionals such as psychiatrists.<sup>30</sup>

In Pakistan, all family disputes, including the RCR, were heard and decided by the civil courts until the promulgation of the Family Courts Act 1964. This law constituted independent courts for speedy disposal of family disputes. In 2002, an amendment was brought to the Family Courts Act 1964 to simplify some of its provisions which related to the multiplicity of family suits and the manner of dissolution of marriage. Some of these amendments were proposed by the Law and Justice Commission of Pakistan.<sup>31</sup> Under the Act, in order to avoid multiplicity of suits, the defendant spouse should present his/her pleas and defences in his/her written statements/replies against the suit initiated by the plaintiff-spouse instead of filing independent and separate suits. A husband is not required to file an independent suit for the RCR after initiation of suit for maintenance and dissolution of marriage by the wife.<sup>32</sup> Furthermore, wives are directed not to file a separate suit for maintenance and dissolution of marriage after initiation of suit for the RCR. They are legally expected to comprehensively present their arguments in their written statements.<sup>33</sup> This legislative amendment intends to curb the practice of multiplying suits in family disputes and encourages the litigating spouses to be comprehensive in the articulation of their grievances. Further, this amendment acknowledges the futility of filing an independent suit of the RCR by a husband when a suit for maintenance or dissolution has already been initiated by the wife. It implies that there was a realization albeit inchoately on the part of the legislature regarding the misuse of the RCR.

Efficaciousness of the RCR has substantially been reduced by the progressive liberalisation of the jurisprudence on *khula* in Pakistan by various judicial pronouncements and

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<sup>26</sup> *Saroj Rani v Sudarshan Kumar Chadha* AIR 1984 SC 1562.

<sup>27</sup> Hiranmaya Nanda 'Restitution of Conjugal Rights: A Legitimate Claim or Pseudo Defense' (2015) 5 (4) *Indian Journal of Applied Research* 333-334; Arushi Nayar 'Restitution of Conjugal Rights – Preserving a Sacrament or Creating a Liability' 2 (6) *Journal on Contemporary Issues of Law* 1-11.

<sup>28</sup> Raj Kumari Agarawala, 'Restitution of Conjugal Rights: A Plea for the Abolition of the Remedy' (1970) 12 (2) *Journal of Indian Law Institute* 256.

<sup>29</sup> Mr. Prashanth S.J 'Hindu Women and Restitution of Conjugal Rights: Do We Need the Remedy?' <<http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=797c51f7-0615-4fa8-b92e-7d7d24d03689&txtsearch=Subject:%20Family%20Law>> accessed 14 September 2018.

<sup>30</sup> Priyanka Priyadarshini 'The Futility of the Provision of Restitution of Conjugal Rights (As Under Hindu Marriage Act, 1955) in the Present Scenario' 1 (3) *International Journal of Legal Development and Allied Issues* 99-114.

<sup>31</sup> Law and Justice Commission of Pakistan, *Reformation of Family Laws* (No 12, 1992) <<http://www.commonlii.org/pk/other/PKLJC/reports/12.html>> accessed 16 August 2017.

<sup>32</sup> Section 9 (1a) - "A defendant husband may, where no earlier suit for restitution of conjugal rights is pending, claim for a decree of restitution of conjugal rights in his written statement to a suit for dissolution of marriage or maintenance, which shall be deemed as a plaint and no separate suit shall lie for it."

<sup>33</sup> Section 9 (1b) - "A defendant wife may, in the written statement to a suit for restitution of conjugal rights, make a claim for dissolution of marriage including *khula* which shall be deemed as a plaint and no separate suit shall lie for it: Provided that the proviso to sub-section (4) of section 10 shall apply where the decree for dissolution of marriage is to be passed on the ground of *khula*."

legislative initiatives.<sup>34</sup> The mechanism of attachment of property against the non-compliant spouse in case of decree for the RCR persists in the procedural law<sup>35</sup> despite the fact that it is seldom resorted to. This gradual reduction in the significance of the RCR in the legal system of Pakistan can be pitched against another scenario depicted by some recent decisions of the Federal Shariat Court which give an impression that the RCR cannot be objected to from the perspective of Islamic injunctions.

In *Nadeem Siddique v Islamic Republic of Pakistan*,<sup>36</sup> the RCR was challenged on the touchstone of Islamic injunctions before the Federal Shariat Court. Since the petitioner could not point out a specific verse of the Qur'an and *Sunnah* of the Prophet Muhammad (PBUH) against the RCR, the petition was dismissed. The Court was of the opinion that, without any specific repugnance to any verse of the Quran or precedent from the Prophet's life, the Court did not possess jurisdiction to grant relief. Moreover, referring to the Qur'anic precepts of reconciliation between spouses, the Court pointed out that the courts should make their utmost efforts to bring the litigating spouses to compromise but if that does not work, both the husband and the wife have avenues to terminate the wedlock. In another connected Shariat petition of an identical title, *Nadeem Siddique v Islamic Republic of Pakistan*,<sup>37</sup> the petitioner challenged the procedure laid down under Order XXI Rules 32 & 33 of the Civil Procedure Code 1908 regarding the manner of enforcement of the RCR decree against the defaulting spouse. Once again, the Court, relying upon contractual nature of marriage along with the sanctity attached to contracts in the Qur'an and necessity of some coercive manner for enforcing contracts, held that there was nothing in the prescribed procedure that could be held against the injunctions of Islam. In addition to controverting the petition on merit, the Court pointed out its lack of jurisdiction on the issues of Muslim personal law and procedural laws under the 1973 Constitution.<sup>38</sup>

The Family Courts Act 1964 has enacted the provisions relating to compromise and reconciliation between spouses at pre-trial<sup>39</sup> and post-trial stages of family litigation.<sup>40</sup> If these provisions are properly developed and put into operation, they may prove to be an effective alternative to the RCR if the latter is abolished in Pakistan.

### **Analysis of Pakistani Case Law**

Circumstances beyond the contemplation of the original introducers may take precedence if a remedy is thrown into the hands of common litigants, lawyers and courts. This is reflected precisely in the case of the RCR under the Pakistani legal system. In addition to shaping various aspects of family law, e.g., dower, maintenance, and dissolution of marriage, the RCR has outreached its circumference of influence into uncharted territories. In this part, we will discuss

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<sup>34</sup> Muhammad Zubair Abbasi 'Women's right to unilateral no-fault based divorce in Pakistan and India' (2016) 7 (1) *Jindal Global Law Review* 81-95.

<sup>35</sup> Rules 32 & 33, Order XXI, Civil Procedure Code 1908.

<sup>36</sup> PLD 2016 FSC 01.

<sup>37</sup> PLD 2016 FSC 04.

<sup>38</sup> The Constitution of Pakistan 1973, art. 203B(c).

<sup>39</sup> Section 10 (3) – "The Family Court may, at the pre-trial stage, ascertain the precise points of controversy between the parties and attempt to effect compromise between the parties."

<sup>40</sup> Section 12 (1) – "After the close of evidence of both sides, the Family Court shall make another effort to effect a compromise or reconciliation between the parties within a period not exceeding fifteen days."

various legal issues influenced and shaped by the RCR. This will be done by analysing the case law, with an aim to expose the ever-expanding, penetrative, and transmutative nature of this remedy and the propensity it has for being misused. Despite the fact that it is resorted to in many judicial proceedings, the exact nature of this remedy remains undefined and uncertain, facilitating its misapplication and transmutation.

### **Payment of Prompt Dower**

In *Moonshee Buzloor Ruheem* case,<sup>41</sup> it was held that though the RCR was a suit of civil nature, its defenses can be derived from the personal laws of parties. A question as to whether non-payment of prompt dower was a valid defense against the RCR came before the Allahabad High Court in *Abdul Kadir v Salima*.<sup>42</sup> The Court, while considering the RCR as an equivalent to the right of cohabitation under Islamic law, observed that it accrues, like dower, from the fact of marriage and its performance cannot be deferred till the payment of dower. On the analogy of transferring possession of a movable commodity without payment of consideration, the Court further observed that, once a wife had allowed her husband to have conjugal intercourse, she could not refuse afterwards merely on the grounds of non-payment of prompt dower. There was only one option left for her – to file a suit for recovery of prompt dower. This is similar to the option of a seller who, having once delivered the possession of a movable property, can only sue for the unpaid price of goods. It means that the wife's right over her body is permanently lost once conjugal intercourse is performed.

After the independence, in *Mst. Rahim Jan v Muhammad*,<sup>43</sup> the Court departed from the above decision with an observation that non-payment of prompt dower did not deprive a wife of the right to refuse her body to her husband even after the consummation of marriage. This defence may be raised before and after the consummation of marriage. When it is raised after the consummation, the decree for the RCR depends on its payment and, when it is demanded before the consummation, the suit for the RCR is to be dismissed.<sup>44</sup>

Prompt dower can be demanded by a wife at any time and even a pending suit for the RCR cannot preclude her from claiming the same.<sup>45</sup> Once a demand for prompt dower is made by a wife and refused by her husband, she is at liberty to remain wherever she wishes and that too on the expenses paid by her husband.<sup>46</sup> Pakistani courts have travelled well beyond the *ratio* laid down in the aforementioned Allahabad case by not depriving the wife's control over her body even after the consummation of marriage. The invasive nature of the RCR is evident from these cases where it has been linked to the consummation of a marriage and has consequently influenced the payment of prompt dower.

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<sup>41</sup> (n 11).

<sup>42</sup> (n 19).

<sup>43</sup> PLD 1955 Lah 122.

<sup>44</sup> *Rukhsana Tabassam v Judge Family Court* 1999 CLC 878 (Lah).

<sup>45</sup> *Tahir Ayub Khan v Mst. Alia Anwar* 2017 MLD 412 (Kar).

<sup>46</sup> *Mst. Shazia v Muhammad Nasir* 2014 YLR 1563 (Pesh).



## **Maintenance of Wife**

Under Islamic law, a husband is legally required to maintain his wife and this responsibility depends on the conjugal relations of spouses which are symbolised by the RCR. Hence, this remedy has left its marks on various aspects of wife's maintenance and its judicial administration in Pakistan. In *Parveen Akhtar v Javed Akhtar*,<sup>47</sup> it was observed that a wife cannot claim maintenance if she lives separately and violates a decree for the RCR without any lawful justification. Therefore, a decree for the RCR relieves a husband from the payment of maintenance and shifts the burden for proving justifiable cause onto the wife. In *Israfeel v Nekam Zada*,<sup>48</sup> after the dissolution of marriage the wife's demand for the recovery of maintenance pertaining to the duration of marriage was refused because the husband had procured a decree for the RCR.

One such permissible ground for living separately is the non-payment of prompt dower. If a husband does not provide maintenance to his wife for two years, she may initiate the proceedings for dissolution of marriage.<sup>49</sup> Cruelty is another lawful ground for the dissolution of marriage. In *Syed Nobahar Shah v Mst. Salma Bibi*,<sup>50</sup> the husband was found guilty of cruelty; hence, the wife's staying separate from him was considered legal. For the period of separation, the husband was obliged to pay maintenance to his wife and their daughters. The court issued the conditional decree for the RCR on the payment of outstanding dower and maintenance and observed that if she stays away from her husband despite the husband discharging his financial liabilities, she would not be entitled to future maintenance.

In *Mst. Ambreen v Muhammad Kabir*,<sup>51</sup> the Court affirmed that a wife, after leaving her husband's house, can lawfully demand maintenance in presence of a decree for the RCR, provided that there is proof of cruelty of her husband or his other family members. Moreover, cruelty is not confined to physical maltreatment – it encompasses psychological, and other insidious manners for making a wife's stay at her conjugal abode miserable.

A wife is generally supposed to stay at her husband's house if she wants to have maintenance. Sometimes, however, the peculiarity of circumstances, such as financial status of the husband along with the conduct of his family members, may oblige a husband to maintain his wife in a separate house. In *Rizwan Sarwar v Sadia Majeed*,<sup>52</sup> the Court upheld the decree for the RCR which was conditional on the provision of separate accommodation to the wife.

Defining 'cruelty' liberally and opening up the possibility of a separate accommodation for wife are good initiatives for women. However, they are either the effects of modernising discourse on spousal relationship or are being developed as an exception to the standard discourse of the RCR, which is that a wife is obliged to live under her husband's control in his house. It would be interesting to note that both *Moonshee Buzloor Ruheem*<sup>53</sup> and *Abdul Kadir*<sup>54</sup>

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<sup>47</sup> 1985 MLD 454 (Lah).

<sup>48</sup> 2016 YLR 1103 (Pesh).

<sup>49</sup> *Mst. Rahilan v Sana Ullah* PLD 1959 Lah 470.

<sup>50</sup> 2016 CLC 1668 (Pesh).

<sup>51</sup> 2015 YLR 170 (SC AJ & K).

<sup>52</sup> 2015 CLC 1048 (Lah).

<sup>53</sup> (n 11).

discussed the defence of cruelty against the RCR, as it was a recognised defence in English law and affirmed that under both English law and Islamic law, mild beating that does not leave marks on the body does not constitute ‘cruelty’ in the legal sense of the term.

Penetration of the RCR into various aspects of wife’s maintenance has sharpened its manipulative potential. This has been aptly illustrated by the Lahore High Court in *Tariq Mahmood v Mst. Farah Shaheen*.<sup>55</sup> According to the Court, wives are first maltreated by their husbands and circumstances are engineered which force them to leave their marital house. When suits for maintenance are filed, their husbands counter-file for the RCR. This move, in a majority of cases, prevents the wives from having their maintenance decreed. In this stalemate, when the wives ask for the dissolution of marriage, the decree for the RCR further portrays them as disobedient wives who are not willing to maintain their marriage. Therefore, the decree of the RCR not only deprives them of maintenance during the marriage but it also adversely influences the nature of dissolution which they are entitled to.

### **Dissolution of Marriage**

The RCR interacts with the dissolution of marriage in numerous ways. From the very outset, it seems appropriate to state that in almost all suits for dissolution of marriage, the remedy of the RCR is routinely counter-filed by the husbands in order to portray that they are determined to maintain the marital tie, unlike their wives who are seeking the dissolution/divorce.<sup>56</sup> This is done to avoid the payment of maintenance and dower on the one hand, and to minimize their financial liabilities in case of dissolution on the other hand. Keeping in view that the remedy of the RCR is likely to be claimed by husbands in cases of dissolution of marriage, an amendment was brought in 2002 in the Family Courts Act 1964. As per this amendment, instead of initiating an independent suit for the RCR, the husbands can now claim it in their written statements.<sup>57</sup> The Lahore High Court held in *Mst. Kausar Jabeen v Additional District Judge*<sup>58</sup> that the husband’s separate suit for the RCR was not maintainable since it should have been presented in reply to the wife’s suit for the dissolution of marriage. It is hoped that this amendment would reduce the unnecessary multiplicity of suits.

The Family Courts Act 1964 has also provided that no appeal would be allowed against the decree for dissolution of marriage;<sup>59</sup> therefore, such a decree would be considered final. On the other hand, the right of appeal is provided for in a suit for the RCR. An anomalous situation arises when a court is simultaneously conducting proceedings on two suits – one for dissolution

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<sup>54</sup> (n 19).

<sup>55</sup> 2010 YLR 349 (Lah).

<sup>56</sup> For instance see, *Asif Jahangir v Mst. Zaheen Kousar* 2015 YLR 1547 [Shariat Court (A J & K)]; *Abdul Jabbar v Kalsoom Bibi* 2007 CLC 1131 (Lah); *Abdul Fateh Babar Sani v Mst. Naureen* 2003 SCMR 1551; *Bashir Ahmad v Mst. Nagina* 2003 YLR 1147 (Peshawar); *Amanullah v District Judge Gujranwala* 1996 SCMR 411.

<sup>57</sup> Section 9 (1a) – “A defendant husband may, where no earlier suit for restitution of conjugal rights is pending, claim for a decree of restitution of conjugal rights in his written statement to a suit for dissolution of marriage or maintenance, which shall be deemed as a plaint and no separate suit shall lie for it.”

<sup>58</sup> 2006 CLC 1185 (Lah).

<sup>59</sup> Section 14 (2) – “No appeal shall lie from a decree passed by Family Court - (a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (a) of item (viii) of section 2 of the Dissolution of Muslim Marriages Act 1939.”

and the other for the RCR – and decrees the former while dismissing the latter. If the aggrieved husband opts to file an appeal in his dismissed suit, its outcome would have implications for the suit for dissolution. This anomalous situation was in fact brought before the court and settled in *Sh. Qudrat Ullah v Mst. Iqbal Begum*.<sup>60</sup> The High Court refused to entertain the husband's appeal against the dismissed suit for the RCR due to the fact that the decree of dissolution was considered final.

The remedy for the RCR is sometimes sought by ex-husbands simply to harass their ex-wives after the dissolution. This is a sheer abuse of the judicial process and it can take years for the final decision to arrive. For instance, in *Mst. Moondan v Judge Family Court*,<sup>61</sup> the petitioner and the respondent no. 3 (her husband) had been in a marital-tie for 24/25 years. In 1981, the wife procured the dissolution of marriage by an *ex-parte* decree and contracted another marriage after observing the waiting period (*iddat*). Afterwards, the ex-husband approached the family court for setting aside the decree. On the dismissal of the application, he appealed to the appellate court which directed the family court to look into the case afresh in 1983. To give credence to his version, respondent no. 3 also filed a suit for the RCR. Both the re-opened suits for dissolution and the RCR were processed before the family court. In a fresh proceeding, the family court dismissed the petitioner/wife's suit for dissolution, and she had to file an appeal to the appellate court which again remanded the case back to the family court. Their suits were fixed for adducing evidence before the family court in 1987. The petitioner, extremely vexed by the prolonged and zigzagged judicial process, eventually filed a writ petition challenging the first order of the appellate court made in 1983 which was issued on the application of the husband. The High Court rightly identified what had gone wrong in the process and held that the decree of dissolution of marriage, though pronounced *ex-parte*, could not be set aside, and thereafter, the entire judicial saga involving a suit for the RCR was declared to be one without lawful authority. It was the end of 1988 when the judicial course was corrected, and the petitioner and her family were rescued from the clouds of uncertainty under which they had been lingering for about seven years.

A decree for the RCR may foil a wife's attempt to seek the dissolution of marriage. In *Mst. Rahim Jan v Muhammad*,<sup>62</sup> Justice Kaikaus observed that a mere non-payment of maintenance for the statutorily prescribed period of two years<sup>63</sup> was not a ground for dissolution of marriage. This was in presence of a decree for the RCR and the wife had been living separately without a justifiable reason. She approached the court for dissolution of marriage on the basis of non-provision of maintenance after a lapse of two years. During the pendency of the suit for the RCR, the wife never raised the plea of non-payment of prompt dower. However, she brought an independent suit for recovery of prompt dower which was disposed of as consent decree. In the dissolution proceedings, the wife asserted that she did not move to the husband's house because she had not been given her prompt dower. The court pointed out that the plea of non-payment of dower was not taken up in the suit for the RCR – hence, her stay away from the

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<sup>60</sup> PLD 1968 Lah 309.

<sup>61</sup> 1989 MLD 339 (Lah).

<sup>62</sup> (n 43).

<sup>63</sup> Dissolution of Muslim Marriages Act 1939, s. 2(ii) - "A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely - (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years."

husband – and defeating his conjugal rights was without any justifiable reason. According to the court, the husband could not have been blamed for the non-provision of maintenance, as an unjustified separation was in contravention of the decree for the RCR. While dismissing the wife’s appeal, the court further noted that a decree for the RCR may become an “insuperable obstacle in the plaintiff’s [wife’s] way”.<sup>64</sup> The decision would have been different if the word ‘neglected’ in section 2(ii) of the Dissolution of Muslim Marriages Act 1939 had been given proper consideration by the court and mere procurement of the decree of the RCR by the husband was not considered enough on his part.

The High Court’s observation in the above-referred decision has not been considered a rigid rule. In *Abdul Rasheed v Mst. Momina Khatoon*,<sup>65</sup> the husband successfully obtained an *ex-parte* decree for the RCR. Afterwards, the wife initiated a dissolution suit which was decreed on the basis of *khula*. The court treated the fact of separate living by the spouses for eleven years as a prime factor for dissolving the marriage. The husband argued that the marriage could not be dissolved because of the decree for the RCR. However, the court refused to take the argument to its logical conclusion as was done in the previously-mentioned case. It observed that the decree for the RCR may be a valid ground against the claim of dissolution and maintenance, but it could not prevent a court from dissolving a marriage if the dissolution is justified by peculiarity of the circumstances.

In *Razzak Hussain Shah v Qazi with Powers of Family Court*,<sup>66</sup> the court again surpassed the hurdle caused by the decree for the RCR in a dissolution suit. The court held that though the facts in both suits were similar, the relief sought in the dissolution suit was different from the RCR; hence, the decree in the latter would not prevent the court from granting relief in the former suit.

Lastly, decree for the RCR may also have impact on the nature of dissolution of marriage and consequently, on the wife’s financial/proprietary rights. *Mst. Ghulam Sakina v Umar Bakhsh*<sup>67</sup> dealt with the right of pre-emption of the appellant/wife on the basis of half share in the ancestral house of the respondent no.1/husband, which the latter conveyed to her as half dower. The relationship became strained due to the second marriage of respondent no.1, with both parties resorting to the judicial battleground. A suit for the RCR, filed by the husband, was decreed while the wife’s dissolution suit was dismissed. Thereafter, in the appeal, the parties – the appellant/wife (through her father) and the respondent no.1 – reached an agreement that the wife would not claim transfer of her share in the house in case the husband pronounced *talaq*. After the pronouncement of *talaq*, the appellant/wife disputed her father’s authority to relinquish her share in the house and claimed that the dissolution arrived at between the parties was *mubaraat* (divorce by mutual consent) and not *khula*; hence, her share in the house still subsisted. According to the husband, he did not willingly pronounce *talaq* which was affirmed by the decree of the RCR – he pronounced it on his wife’s insistence. He further stated that the dissolution should be treated as *khula* and the appellant’s share in the house be considered extinguished. The court, considering the decree for the RCR, treated the dissolution as *khula*

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<sup>64</sup> (n 43) 138.

<sup>65</sup> 1999 YLR 342 (Karachi).

<sup>66</sup> 1986 CLC 1691 (Quetta).

<sup>67</sup> PLD 1964 SC 456.

instead of *mubaraat* and dismissed her suit for pre-emption. Consequently, the decree of the RCR influenced the court to determine the nature of dissolution that substantially impacted the wife's right.

Before moving ahead, it is pertinent to state that the nexus between the RCR and dissolution of marriage is significantly diluted due to some recent developments in the realm of *khula* jurisprudence. This took place in wake of the amendment to section 9 of the Family Courts Act 1964 and the decision of the Federal Shariat Court in *Saleem Ahmad v Government of Pakistan*.<sup>68</sup>

### **Consent in Marriage**

The suit for the RCR assumes the existence of marriage and is not meant to determine factual controversies regarding the marriage. It primarily seeks to enable the spouses to carry out their matrimonial relationship. However, a situation can sometimes arise when one spouse denies the factum of marriage or claims that the consent was forcibly taken under pressure from the family. In such circumstances, the spouse may initiate proceedings for declaring the marriage null and void and the other spouse may approach a court by filing the suit for the RCR, seeking a declaration that they are in fact married and that their marriage was solemnised with consent. The suit for the RCR is a domesticated version of the suit for specific performance but the proceedings initiated in such situation converts it into a declaratory proceeding. This conversion is illustrated in the following cases.

In *Mst. Gulshan Parveen v Amar Safeer Khan*,<sup>69</sup> the appellant and respondent contracted court marriage in 2008 after four years of engagement. The marriage took place in Islamabad where the appellant was pursuing her MPhil degree. The family of the appellant was not happy with the marriage; therefore in 2009, while the appellant was visiting her family, she filed a suit for jactitation of marriage. This, however, was withdrawn on realisation that without a *nikahnama*, the suit might not succeed. When the respondent filed a suit for the RCR, she initiated fresh proceedings for jactitation of marriage in which a fabricated *nikahnama* was produced in the court. It is worth-mentioning that the alleged husband of the appellant did not appear in the court, while the respondent brought all witnesses of the court marriage, including the advocate who assisted them in the process. On the basis of evidence, the court found that the marriage was contracted with free consent of the parties and dismissed the suit for jactitation of marriage. Thereafter, the appellant brought the *lis* before the appellate forums which approved the decision of the trial court.

In another case *Mst. Nagina v Muhammad Hussain*,<sup>70</sup> the petitioner was allegedly married to the respondent but was denying this due to her father's pressure. There were two claimants of marriage with the petitioner: one was supported by the father and the other by the grandfather. The mother of the petitioner had been divorced since she was two years old. When the petitioner reached adulthood, the issue of her marriage became the bone of contention between her father and grandfather. Her marriage with the respondent was solemnised by the

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<sup>68</sup> (n 34) PLD 2014 FSC 43.

<sup>69</sup> 2014 CLC 397 (Sh.C. AJ&K).

<sup>70</sup> 2008 YLR 1571 (Lah).

grandfather as *wakeel*. She was pregnant when her father overpowered her decision-making and wedded her with another man with whom she had been living as his wife. The last-mentioned marriage procreated two children. The petitioner initiated a suit for jactitation of marriage against the respondent at the behest of her father and claimed that she was abducted and forcefully wedded by him. The respondent filed a suit for the RCR. Both suits were jointly tried and after evaluating the evidence, the court concluded that the petitioner was lawfully wedded to the respondent with her free consent and volition. To arrive at this conclusion, the court found the evidence of the petitioner and her father as unreliable, while the evidence of her grandfather and *nikah* registrar was deemed to be convincing. Hence, the court decreed for the RCR, and dismissed the petitioner's suit for jactitation of marriage. This decision held ground in all appellate forums.

### **Illicit Sexual Relationship**

Consensual sexual relationship without marriage was outlawed in Pakistan with the introduction of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 ('Zina Ordinance'). This legal shift opened another avenue for the misuse of the suits of the RCR. Before the introduction of this offence, alleged male offenders could have been exonerated from the charges of rape just by proving that the victim was a consenting party. However, this did not work due to the paradigmatic shift that the law brought; in order to save themselves, the men allegedly involved in an unlawful sexual relationship had to prove that they were lawfully married to their victims. With this goal in mind, the alleged offenders started utilising judicial proceedings for the RCR resulting in a serious misuse of this 'remedy'.

On the other hand, the alleged victims of sexual offences now have to establish that either they have been forcefully subjected to sexual abuse or they have to acknowledge that they are wives of the alleged offenders. Before the Zina Ordinance, the tactical use of suit for the RCR by alleged male offenders was minimal in cases of rape, as proving mere consent of the victims was sufficient for their exoneration. This, however, has been altered due to the modification in the concept of an 'illicit sexual relationship' by the Zina Ordinance. The analysis in this subsection reveals that a remedy which originally intended to be affirmative has now been transformed into a defense plea.

The Shariat Appellate Bench of the Supreme Court dealt with the issue of a sexual offence and a valid marriage at length in *Muhammad Azam v Muhammad Iqbal*.<sup>71</sup> It laid down certain principles that were to be followed by the courts. The Court held that the Zina Ordinance recognized the plea of a valid marriage in cases of sexual offences; therefore, every effort should be made to ascertain its veracity. Though it is a primary duty of an accused alleging marriage to prove the same, the courts dealing with this situation should not confine themselves within the adversarial framework. Rather, they are obliged to scrutinize the issue inquisitorially. Further, the Apex Court said that it is in the domain of family court to decide on the plea of marriage and the decision of a family court would have binding effect on the criminal court prosecuting on the alleged sexual offence. Therefore, the criminal proceedings should be stopped until the family court decides the matter, as the latter's decision would have far-reaching implications on the trial. Though the Supreme Court, in its detailed judgment, covered numerous aspects of legality

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<sup>71</sup> PLD 1984 SC 95.

and procedural appropriateness of the plea of marriage in sexual offences, but for our purposes the most important outcome is to make the suit for the RCR relevant.

In *Muhammad Ashraf v Muhammad Ilyas*,<sup>72</sup> in addition to initiating criminal proceedings, the alleged abductee/victim of sexual abuse filed a suit for jactitation of marriage and the accused responded with a suit for the RCR. The family court concluded that the marriage was lawfully solemnized between the parties and decreed for the RCR while dismissing the jactitation suit. Taking into account the decision of the family court, the criminal court exonerated the accused from the charges of abduction and the sexual offence.

In another case, *Qari Abdul Rasheed v State*,<sup>73</sup> the accused was alleged to have abducted two of his female students who used to learn Qur'an from him. He subjected them to sexual abuse for few weeks and then had *nikahnamas* prepared showing he was married to both of them. He pleaded marriage in suits for the RCR; however, he could not prove free consent of the victims to the alleged marriages and the genuineness of the *nikahnamas*. Consequently, his suits were dismissed while the suits for jactitation of marriage filed by the victims were decreed. Despite this, the initiation of civil remedy of the RCR provided some relief to the accused by delaying the criminal trial.

In *Muhammad Javed v State*,<sup>74</sup> the alleged perpetrator of sexual offence misused the process of the RCR to its hilt. During the pendency of the trial, he filed a suit for the RCR and then withdrew it on the pretext that the parties had reached an amicable compromise. Thereafter, he brought the evidence of this suit to the criminal court to support his claim that he was married to the victim. The court unearthed the mischievous manner in which the accused had attempted to misuse the judicial process and observed that he “filed a suit for restitution of conjugal rights just to add credulity to his false claim of *nikah* with the abductee/victim, and further in order to make it gullible, one-sided story of compromise was added so that false suit for restitution of conjugal rights [RCR] could be rolled back before facts were unfolded before the learned trial court.”<sup>75</sup>

The cases disclose that the outcome – positive or negative – of the suit for the RCR is bound to influence the decision in an alleged sexual offence. Hence, decision in the RCR suit is a double-edged sword. If it is decreed, the accused will be exonerated but if it is dismissed, it may have serious consequences for the accused. Nevertheless, during the pendency of trial in sexual offences, the suit for the RCR is an effective plea for granting bail to accused persons. Following the dicta of the Supreme Court<sup>76</sup> in a great majority of cases, the courts treat the initiation of suit for the RCR as a convincing ground for granting bail until the decision on the suit is given by a family court. Hence, by initiating a suit for the RCR, an accused is sure to have temporary respite from the consequences of his alleged offence.<sup>77</sup>

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<sup>72</sup> 2014 YLR 2247 (FSC).

<sup>73</sup> 2012 YLR 2142 (FSC).

<sup>74</sup> 2012 YLR 695 (FSC).

<sup>75</sup> *Ibid*, 701.

<sup>76</sup> (n 71).

<sup>77</sup> *Muhammad Madni v State* 2014 YLR 2137 (Lah); *Muhammad Siddiq v State* 2012 MLD 1530 (Lah); *Mukhtar Ahmed v State* 2011 MLD 1020 (Lah); *Muhammad Bakhsh v State* 2008 YLR 2269 (Lah).

In *Fayyaz Ahmed v State*,<sup>78</sup> the court, while granting bail, held that the genuineness of the *nikahnama* could not be scrutinised extensively at bail stage because it might prejudice one of the parties. It is often noticed that both parties, the accused and the victim of the sexual offence, file separate suits for initiating the RCR and jactitation of marriage respectively and such conflicting suits are treated as a ground for granting bail to the accused.<sup>79</sup> Further, the criminal courts are more likely to disallow the application for cancellation of bail during the pendency of a suit for the RCR before a family court.<sup>80</sup>

The provisional relief of bail may bring an accused of the sexual offence in a better bargaining position against his victim, who can be pressurised to retrieve the allegations. In a society like ours where crimes are committed with impunity by well-placed people, the victim may start perceiving that the accused who managed to get out of prison on bail due to his suit for the RCR would possibly be exonerated at the end. This can influence the victim to enter into a compromise; in this manner, a temporary respite may turn into emancipation for the accused.

When the courts discover deceptive tactics of the accused for initiation of the RCR, they may deny the benefits of granting bail in the criminal proceedings. For instance, in *Muhammad Yusuf v State*,<sup>81</sup> the accused was denied bail as his suit for the RCR was dismissed for non-prosecution. Further, the victim categorically implicated him and asserted that she had never been married to him. In another case, *Haq Nawaz v State*,<sup>82</sup> the victim of sexual offence was a married woman. The court observed that pendency of the RCR in such a situation was not of much consequence for the criminal trial.

*Muhammad Siddique v Mst. Zahida Begum*<sup>83</sup> is a classic illustration of how a suit for the RCR could be misused in the context of a pending criminal proceeding. The petitioner filed a suit for the RCR in December 1982 against Mst. Zahida Begum, Azizur Rehman, and others, claiming that he was married to Mst. Zahida in 1977 and entitled to her conjugal company. He further averred that owing to the first marriage of Mst. Zahida, her second marriage with Azizur Rehman was illegal. A parallel criminal proceeding was also initiated against Mst. Zahida and Azizur Rehman for having an illicit sexual relationship. The accused were on bail in the criminal proceeding and the suit of the petitioner had been scheduled for a later stage. Azizur Rehman, with connivance of Mst. Zahida, filed a suit for RCR against her without disclosing the first suit to the court. Thereafter, a consent decree was procured on the basis of compromise between the parties. When this decree came to the knowledge of Muhammad Siddique – the alleged first husband – he filed a writ petition to set it aside. Taking into account such misuse of the RCR, the High Court observed, “[n]ot only the suit previously instituted by Muhammad Siddique, claiming restitution of conjugal rights was likely to be affected, the impugned decree is equally shown a deliberate attempt to defeat the criminal trial and direction of this Court in bail order. Under present situation, Mst. Zahida Begum and Azizur Rehman are living together in utter disregard of ultimate fate of the case. Such an anomalous state of relationship cannot be allowed

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<sup>78</sup> 1997 MLD 3078 (Lah).

<sup>79</sup> *Sajjad Ahmad v State* 2003 MLD 1514 (Lah); *Muhammad Muzammul v State* 2002 YLR 1165 (Lah).

<sup>80</sup> *Muhammad Nazir v Anwar Ali Shah* 2005 MLD 419 (Lah); *Mst. Farzana Mai v State* 2002 PCrLJ 598 (Lah); *Muhammad Asghar v Ijaz Ahmad* 1995 PCrLJ 1770 (Lah).

<sup>81</sup> 2000 YLR 2816 (Lah).

<sup>82</sup> 2002 YLR 193 (Lah).

<sup>83</sup> 1986 CLC 2963 (AJ & K).



to prevail.”<sup>84</sup> Consequently, the court set aside the impugned decree and directed that both suits of the RCR – one initiated by Muhammad Siddique and another by Azizur Rehman – to be disposed of jointly.

## **Conclusion**

The RCR was engrafted into the legal system of Indian Subcontinent by the British colonial government. It was first dissociated from its religious and historical baggage, founded in Christian ethics of medieval England, and given a civil texture for its smooth transplantation. This paved the way for its complete engrafting into personal laws of various communities inhabiting the Indian subcontinent. Once the RCR was presented as a religiously neutral instrument, the specificities of religions and legal norms of each personal law including Muslim law started to indigenize it in their own way. In Pakistan, the RCR has penetrated almost all aspects of Muslim family law and left its indissoluble footprints on spousal rights and responsibilities. In this manner, the RCR has gathered an impression as if it has featured in this fashion since antiquity. The abstinence of the Federal Shariat Court to declare it against Islamic injunctions has reinforced the impression that the RCR is acknowledged by Islamic Law.

The process of indigenization of the RCR in Pakistan is not without contradictions and anomalies of its own kind. Due to its undefined nature and contours, it is predisposed to widen its own sphere of misapplication. For instance, the RCR has been transformed from an affirmative relief for fulfilment of spousal responsibilities to an efficacious defence plea in securing exoneration from sexual offences. It has also been used as a delaying tactic in criminal trials. In the domain of family law, it is often resorted to by husbands to achieve those objectives which are not specifically spelled out in their repertoire of matrimonial grievances brought before the judicial forums. The husbands in such cases simultaneously employ it as sword and shield against the lawful rights of their wives; for instance, maintenance is not awarded generally if there is a decree for the RCR. Judicial order for the RCR determines the nature of dissolution sought by a wife and may have an adverse effect on the financial rights of wife in case of dissolution.

Considering the penetrative tendencies and manipulative nature of the RCR, it seems difficult to accept that no strenuous endeavour has ever been made to delimit or define its precise nature and sphere of application. It is unbecoming of any viable legal system to accommodate and tolerate the extensive misuse and misapplication of the RCR without any reproach and remorse. Of late, there are some legislative efforts to curb the manipulative tendencies of the RCR in addition to occasional judicial outcry. However, such legislative initiatives and sporadic denunciatory remarks by the judges are not adequate to dismantle the settled exploitative tradition of the RCR. Nevertheless, it would be unfair not to give credit to the recent amendments made to the Family Courts Act 1964 for discouraging the multiplication of suits.

It is not denied that the RCR has never been resorted to for expressing a genuine desire to rehabilitate a matrimonial relationship but, in an overwhelming majority of cases, it is peddled for ulterior motives and sinister intentions to deprive the wives of their rights – financial or otherwise. Taking into account the manipulative enterprise established around the RCR, it is not

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<sup>84</sup> Ibid, 2970.

too late to contemplate its abolition. Instead, better alternatives should be explored which could ensure its benefits, if there are any, remain while dissociating it from its bad consequences.