



**National University
of Lesotho**

**THE ANALYSIS OF THE LAWFULNESS OF THE RESTITUTION OF CONJUGAL
RIGHTS ORDER IN LESOTHO DIVORCE LAW**

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By

Mateisi V.V (200803875)

Supervisor: Mrs Mosito

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DECLARATION

I, the undersigned, VOYELWA VERONICA MATEISI, do hereby declare that the Degree of Bachelor of Law research dissertation that I herewith submit for the LLB qualification at the National University of Lesotho is my independent work and that I have not previously submitted it for qualification at another institution of higher education.

VOYELWA VERONICA MATEISI

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Virus
CPWA	Children's Protection and Welfare Act
HIV	Human Immune Deficiency Virus
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
RB	Reconciliation Body
UDHR	Universal Declaration on Human Rights
RC	Reconciliation Body
SCAS	Supplementary Convention on the Abolition of Slavery
CEDAW	Convention on Elimination of all forms of Discrimination Against Women

CHAPTER ONE

1.0 INTRODUCTION

In Lesotho legal system, there are two grounds of divorce which are adultery and malicious desertion. However, the procedure in the divorce proceedings differs according to the ground alleged. In the case of adultery, the court will upon prove of adultery issue a decree of divorce straight away, while in the case of malicious desertion, the court will as a matter of procedure order restitution of conjugal rights. This study is aimed at analyzing the lawfulness of restitution of conjugal rights order. Terms shall be defined to provide a common understanding of technical terms and exclusive jargon which are used within the scope of the study. The study will further look into the background of restitution of conjugal rights order from its origin until it was imported in Lesotho, as well as the problem which arises as a result of this order, along with some general literature review relevant to the topic.

1.1 DEFINITION OF TERMS

Conjugal rights

The term, 'conjugal rights', means relating to marriage or to married persons and their relationships'.¹ This right is explained as a privilege or sexual right granted to a married couple, meaning it is the right of sexual intercourse between the husband and wife. It could be placed against any of the spouses who is guilty of staying away from the other party without reasonable cause, and if the suit succeeds the couple would be ordered to stay together.²

In *Hoohlo v Hoohlo*,³ the court emphasized that restitution order entails more than just presentation of a spouse to the physical address of the other spouse, there must be proper communication through the parties' attorneys or by email. The respondent too must be prepared to receive the appellant if he is to avoid being labeled the deserter.

¹ Durge M, 'Restitution of Conjugal Rights' [1996] (<https://www.academia.edu/31028094>) 27 May 2019

² Chadda S, 'What are Conjugal Rights? Who can file for it? Where to file? What are the Conditions?'[2017]

³ (C of A (CIV) 66/2011) LSCA 31 (03 September 2012)

Consortium Omnis Vitae

The common law recognizes the husband's right to his wife's consortium as comprising services, company and the sexual relationship.⁴ Consortium was however described in different cases. In a case of *Peter v Minister of Law and Order*,⁵ the court explained that consortium is used as an umbrella word for all the legal rights of one spouse to the company, affection, services and support of the other. Such includes intangibles, concern as well as the more material needs of life such as physical care, financial support, the rendering of services in the running of the house-hold or in a support generating business.

In *Grobbelaar v Havenga*,⁶ consortium has been described as an abstraction comprising the totality of a number of rights, duties and advantages accruing to the spouses of a marriage, it includes companionship, love, affection, comfort, mutual services and sexual intercourse.

In *Dawood v Minister of Home Affairs*,⁷ the court elaborated that in terms of the common law, marriage creates a physical, moral, and spiritual community of life. This community of life includes reciprocal obligations of cohabitation, fidelity and sexual intercourse, to maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another.

Marriage

At common law, marriage is defined as the voluntary union of one man and one woman to the exclusion of all others while it lasts.⁸ Since marriage has its roots in the Christian tradition that defined marriage as a sacramental union entered into between one baptized man and one baptized woman. This monogamous union of the Roman Dutch Law was until recently the only form of marriage recognized.⁹

⁴ Krause H D, *Family Law*, (West Publishing Co, 5th Edition, Nutshell Series Minnissita, 1988 p. 93)

⁵ 1990 (4) SA 6 (E) at 9G

⁶ 1964 (3) SA 522 (N)

⁷ (CCT35/99) [2000] ZACC 8

⁸ *Mashia Ebrahim v Mahomed Essop* 1905 TS 59 at 61

⁹ Hahlo, *The South African Law of Husband and Wife*, (Juta and Co Ltd, 4th Edition Welton 1975, p 29)

Malicious desertion

Malicious desertion is defined as the act of one of the spouses' without just or sufficient cause, or leaving the joint residence and staying away with the intention, either originally, or later, of not returning or the persistent refusal without good reason of marital privileges.¹⁰ Malicious desertion is a ground for having a restitution order, failing compliance there with a decree of divorce.

Restitution of conjugal rights order

Restitution of conjugal rights basically comprises of two major words which are 'restitution' and 'conjugal rights'. Restitution refers to the restoration of something that is lost, while on the other hand conjugal rights relate to marriage or the relationship between husband and his wife. If either party to marriage withdraws from the society of the other without reasonable cause or where there is separation in marriage, then a remedy in the form of restitution of conjugal rights is offered to the deserted spouse.¹¹

A decree of restitution of conjugal rights implies that the guilty party is ordered to live with the deserted party and perform the variable consequences of marriage in a form of *consortium omnis vitae*.¹² The withdrawal from the society of the other spouse exists through termination of the existing relationship with the intention of forsaking the other, and permanently and indefinitely abandoning such relationship. This remedy attempts to promote reconciliation between the parties and to protect the society from denigrating, it is however the decision of the parties whether to obey the restitution of conjugal rights order and continue with the matrimony or not.¹³

1.2.1 BACKGROUND OF THE STUDY

Marriage is explained as a holy bond wherein the necessary implication of marriage is that the parties will live together. Each party is entitled to comfort consortium of the other. Each party therein is vested with the right of receiving certain rights from each

¹⁰ Wille R, *Principles of South African Law*, (Juta Co Ltd, Butterworths, 1977, 7th Edn, page 126)

¹¹ Kumari Ernest, 'Restitution of Conjugal Rights: "An Analysis 26 July" [2018]

¹² Durge (n1)

¹³ Wille (n10)

other. In order to make sure that these rights are prevalent, there was codification of certain laws. Included in the laws was the restitution of conjugal rights. If either of the spouses without reasonable cause withdraws from the society of the other, then the aggrieved party has a legal right to file a petition in the Matrimonial Court for restitution of Conjugal rights.¹⁴

The concept of restitution of conjugal rights was borrowed from English Law.¹⁵ The genesis of this remedy is traced back to the Ecclesiastical Courts of the West.¹⁶ In those courts, desertion was not considered to be an offence, that is why, the decree of restitution would be issued against a deserter, which ordered a deserter to return home and render conjugal rights, that is, the Courts decreed restoration of conjugal rights for the recalcitrant spouse to render what is due to the complaining spouse.¹⁷ Failure to comply with the decree was punishable by excommunication which was replaced by imprisonment of not less than six years.¹⁸

The Matrimonial Causes of 1884 replaced imprisonment with the statutory desertion which entitled estranged spouse to judicial separation or divorce where desertion is coupled with adultery. Later, the Matrimonial Causes Act 1923 gave a wife a power to divorce on the basis of adultery alone without coupling it with the failure of the recalcitrant spouse to comply with the restitution order.

The Matrimonial Causes Act of 1884 was repealed by the Supreme Court of Judicature (Consolidation) Act of 1925 which did not insert the provision Act 1884 which deemed the failure to comply with the decree as desertion. Section 185 of Act 1925 provided that failure to comply with the decree is a ground for judicial separation. The conception of the English law restitution order is similar to the Dutch Law as substantiated by Bell in contemplation of Mrs Farmer:

¹⁴ *ibid*

¹⁵ Deeksha Gupta, 'Restitution of Conjugal Rights: A Pool Of Controversies' [2019] 1 Indian Nation Bar Association View Point available at (<http://inbaviewpoint.org/restitution-of-conjugal-rights-a-pool-of-controversies/>) (accessed on the 22 May 2019)

¹⁶ *Ibid*

¹⁷ *Ibid*

¹⁸ Ecclesiastical Courts Act 1883

'...it is good English as well as Dutch law that a woman compelled by her husband to live apart from him, must return to those moral restraints which she was obliged before marriage to impose upon herself, and is not entitled to justify by his conduct, the prostitution of her person and mind'.

The above citation shows how a woman who has deserted her husband due to constructive desertion would be compelled to return home so as to render conjugal rights, among other things to her husband. The famous Dutch jurist *Van der Linden in the Institutes of the Law of Holland* according to Morice says:

'A divorce on the ground of malicious desertion (for willful) desertion (that is desertion without good cause) is obtained by bringing an action for restitution of marital rights, and, in the alternative, for divorce. When desertion is proved, the Court grants an order, calling on the deserting spouse to return within a fixed period. On its being brought to the notice of the Court by affidavit that this order has not been complied with, the Court grants a divorce'.

It is clear from the above background that in both English and Dutch law that where there was desertion, the first leg in the procedure for divorce is restoration of conjugal rights. And if such conjugal rights have not been restored as ordered a decree of divorce is granted on the ground of the wrong party's desertion. Thus a restoration order is a remedy available to either man or woman who has been deserted.¹⁹

The Roman Dutch Law rationale for restitution of conjugal rights was drawn from the case of *Sacolo v Sacolo*,²⁰ where Nathal CJ said;

'It is well-settled principle, indeed almost elementary, that the whole object of issuing a restitution order is to afford a defendant *spatium deliberandi*, and it is only when the court is satisfied that he has disregarded that order and is thereby guilty of malicious desertion that the court would grant a final order of divorce.'

¹⁹ Ibid.

²⁰ (4095/08) [2010] SZHC 100 (01 July 2010)

Nevertheless, desertion is not a ground for divorce *a mensa er thoro*. Where one spouse deserts another, the spouse who has been deserted may avail himself or herself of the right to take proceedings for the restitution of conjugal rights. Where the spouse continues to cohabit, no proceedings may be taken even though either spouse refuses to have marital relations with the other.²¹ The Privy Council concluded that the remedy of restitution of conjugal rights is today inappropriate and ineffective and should be abolished.²² Subsequently the restitution of conjugal rights was abolished in England.²³

1.2.2 POSITION OF LAW IN LESOTHO

In *Fobo v Fobo*²⁴ the court enunciated the two grounds of divorce in Lesotho which are adultery and desertion. Currently in Lesotho it is only the High Court which is clothed with the jurisdiction to entertain and determine divorce in respect of civil marriage²⁵. The foregoing procedure is the same with Lesotho's divorce law. According to *Maqutu*²⁶, estranged spouse can only claim divorce straight away on the ground of adultery but where there has been malicious desertion, restitution order has to be sought first.

In order for the order to be actionable, no minimum time limit is set. The procedure for obtaining the divorce has two stages. The first one is of obtaining the a restitution of conjugal rights order, if the restitution order does not lead to reconciliation and restoration of the normal marital stage, then stage two follows when a divorce is asked for and granted Failure to comply with the order leads to divorce. The estranged spouse has a right to pray for divorce in the same way as on the ground of adultery.²⁷

In the same year of the enactment of Matrimonial Causes Act 1978, the apex Court of Lesotho was confronted with the estranged party who claimed for divorce on the ground

²¹ Duncan CF, 'Desertion and Cruelty in Irish Matrimonial Laws', 7 ir. Jur (N.S.) 213 AT 218 [1972]

²² Report of the Royal Commission on Marriage and Divorce, 1951-1955, 6 (d)

²³ Matrimonial Proceedings and Property Act 1970, S 20

²⁴ CIV/T/523/89

²⁵ Mamashela MP, 'Divorce Law in Lesotho: A Critical Appraisal of the Guilt Principle and the Present Grounds for Divorce.' Volume 7 LLJ (1) 1999 1

²⁶ Maqutu WC, *Contemporary Family Law* (2005) 378.

²⁷ Vide Matrimonial Causes Act 1978 as cited by Maqutu op cit note 6.

of malicious desertion. This was in the case of *Makara v Makara*²⁸ where *Maisels P* said:

'...Those who seek judicial intervention in consequence of domestic difficulties should be made to realize malicious desertion is not per se a ground of divorce. It is only non-compliance with an order of restitution of conjugal rights that forms the basis for a decree of divorce.'²⁹

In 1980, restitution of conjugal rights was provided for in Rule 42(1) of the High Court Rules.³⁰ This Rule provides that in any action for the restitution of conjugal rights the plaintiff may in the alternative claim a decree of divorce.

In the case of *Matekane v Matekane*, Ramolibeli P said the Rule incorporates the common law principle of restitution of conjugal rights in view of upholding the sanctity of marriage.³¹ In view of divorce, the learned Judge Hoexter JA in *Belfort v Belfort*³² explained that as the ultimate resort, divorce is needed by public policy so as to avoid the extension of constructive desertion.

The procedure of obtaining restitution of conjugal rights in Lesotho was illustrated in *Nkabane v Nkabane*,³³ where the plaintiff sued the defendant seeking an order of restitution of conjugal rights, failing compliance therewith, a decree of divorce on the grounds of defendant's malicious desertion and forfeiture of defendant's benefits arising out of the marriage in community of property. In the alternative, the plaintiff sought a decree of divorce on the grounds of defendant's adultery.

1.2.3 POSITION OF LAW IN INDIA

English Law was imported to many countries of the world through colonization, and so was the concept of restitution of conjugal rights order. In India, this concept has been the subject of controversy, and was called 'uncouth barbarous and vulgar' by Khaderkar

²⁸ 1978 LLR 30

²⁹ Ibid

³⁰ No. 9 of 1980

³¹ (C OF A) [2010] LSCA 37, (22 October 2010) paragraph 4

³² 1961 (1) SA 257 (A) at 259

³³ CIV/T/293/83

(MP) at the time of drafting of Hindu Marriage Act.³⁴ However the Constitutional Court upheld the constitutionality of the restitution of conjugal rights order in *Saroj Rani v Sudarshan Kumar Chadha*,³⁵ for reasons that it serves a social purpose as an aid to the prevention of break-up of marriage. The Human Rights Watch had criticized this concept as being a cause of violence and discrimination against women.

Recently this law was challenged by Ojaswa Pathac and Mayank Gupta, the students of Gujarat national Law University. The petitioners had challenged the validity of section 9 of the Hindu Marriage Act, section 22 of the Special Marriage Act,³⁶ and Order 21, Rules 32 and 33 of the Code of Civil Procedure³⁷ which provide the statutory scheme for the restitution of conjugal rights, saying it is an unreasonable provision used by the courts in India to save marriage at the cost of the liberty and autonomy of the individual. The bench told senior advocate who appeared for the petitioners that the question had already been settled by the apex court in 1984 when it upheld the provisions as constitutional.³⁸

1.2.4 POSITION OF LAW IN SOUTH AFRICA

In South Africa (SA), the legal action for restitution of conjugal rights was abolished by the Divorce Act.³⁹ It provides that it shall not be competent for a court to issue an order for the restitution of conjugal rights or for judicial separation.

1.3 STATEMENT OF THE PROBLEM

Despite the abolishment of restitution of conjugal rights order in England where it originated, courts in Lesotho still uphold this order. Legal practitioners and their clients still have doubts with respect to the efficacy of this remedy and demand its abolishment. This is seen in the pending case of *Lebina v Lebina*,⁴⁰ where the applicant challenges

³⁴ Hindu Marriage Act of 1995

³⁵ 1984 AIR 1562, 1985 SCR (1) 303

³⁶ 1954

³⁷ 1908

³⁸ [Http://indianexpress.com/article/india/supreme-court-to-look-into-plea-against-laws-for-restitution-of-conjugal-right-5612942](http://indianexpress.com/article/india/supreme-court-to-look-into-plea-against-laws-for-restitution-of-conjugal-right-5612942) (visited on the 30 November 2019)

³⁹ No. 70 of 1979, S 14

⁴⁰ CC/20/18

the lawfulness of this order. The question is whether any law that forces a person to live with another is not contrary to the values of the society, and whether such order is in harmony with the fundamental human rights such as entitlement to respect for privacy, family life and home, and freedom of association that are guaranteed under the constitution.⁴¹ Also whether the restitution of conjugal rights order does not condone marital rape contrary to section 3 of the Sexual Offences Act⁴² which provides that marriage shall not be a defense where the other spouse had deserted. This would mean that a spouse who had deserted has waived his/her right to engage in sexual intercourse with the estranged spouse, thereby implying that such marriage had irrevocably broken down.

It can be assumed that the Legislature could be comfortable with the remedy of restitution of conjugal rights or not aware of the discrepancies resulting from this order. Lesotho has since adopted the Common Law in respect of divorce law. Recently there has never been any attempt by the legislature to reform this law like South Africa did. This could be resulting from the nature of parliament that is dominated by men, therefore see no need to reform divorce law in Lesotho bearing in mind that men have a history of deserting their wives. This inference can be drawn from the Deserted Wives and Children Proclamation,⁴³ that only men can be charged and sued for desertion.

1.4 RESEARCH QUESTIONS

The purpose of this study is to investigate the following questions; whether the restitution of conjugal rights order still necessary today and effective? Whether desertion is in fact a valid ground for divorce? Whether courts have a duty to coerce a spouse who withdraws his/her consent to continue with the rights and obligations arising from the marriage to perform such obligations? Whether the restitution of conjugal rights order is in harmony with the constitution as well as the Sexual Offences Act No. 3 of 2003? And whether this remedy so far has succeeded in reconciling spouses and retained marriage?

⁴¹ 1993

⁴² No. 3 of 2003

⁴³ No. 60 of 1959

1.5 RATIONALE OF THE STUDY

The rationale of the study is to learn deeply the nature of the restitution of conjugal rights order in as far as it is applied in Lesotho, to find the reason for this remedy and determine whether it is still necessary in the modern era, to test whether the restitution of conjugal order being the common Law principle, is in harmony and in compliance with The Constitution of Lesotho 1993 and The Sexual Offences Act (*supra*), and Finally to make necessary recommendations regarding orders.

1.6 LITERATURE REVIEW

Marriage shall be entered into only with the free and full consent of the intending spouses.⁴⁴ Because marriage is an inherently consensual relationship, neither spouse should be trapped in the relationship unwillingly. Accordingly if a spouse is in a marriage she/he does not want and to which she no longer consents, she/he should be allowed a way out.⁴⁵ The contract of marriage is like any other contract therefore if one party to the marriage is unsatisfied for any reason, they should be able to get out of the contract. A woman's right to freedom of association is violated when she is forced to stay in a loveless, undesirable, unhappy and unwanted marriage by any means.⁴⁶

The question is whether the restitution of conjugal rights order forces any spouse to stay in the association of the husband unwillingly. This question was however addressed in *Nkabane v Nkabane*⁴⁷ as a matter of procedure, that where the plaintiff institutes an action for restitution of conjugal rights, failing compliance therewith, a decree of divorce on grounds of the defendant's malicious desertion shall be issued.

In *King v King*,⁴⁸ the court emphasized that marriage creates community of life and love between husband and wife in a form of *consortium omnis vitae*. Parties to marriage should afford each other full conjugal privileges, meaning to allow each other sexual intercourse. The conjugal relationship however involves more than that, the mutual

⁴⁴ Universal Declaration of Human Rights 1948, Article 16 (2)

⁴⁵ Convention on Elimination of All Forms of Discrimination Against Women 1979, ICCPR Article 23 (3), and Women's Protocol to the African Charter Art 6 (a)

⁴⁶ Ezer T, 'Divorce Reforms: Rights Protection in the New Swaziland' [2006]

⁴⁷ (N 33)

⁴⁸ 1947 (2) SA 517 (D) AT 522

obligation of care, support and affection. However sexual intercourse is not an essential element in marriage especially if one spouse is in poor health status, of old age, and incapable of sexual intercourse. A spouse cannot however be forced by an order of court to render companionship, love (consortium) to the other spouse because it would obviously be impossible to enforce such an order.⁴⁹This decision raise the issue of the efficacy of the order of restitution of conjugal rights especially where as a result of desertion the plaintiff has totally lost love and affection and therefore considers marriage to have irretrievably broken down, bearing in mind that the court cannot enforce consortium and enforcement of restitution of conjugal rights order.

The essentials relating to desertion are that: the respondent must have withdrawn from cohabitation, the petitioner did not consent to the respondent's withdrawal from cohabitation, and the respondent must not have any reasonable cause to withdraw from cohabitation.⁵⁰It is therefore inferred from the essentials of desertion that the respondent could have reasonable cause of desertion, thereby calling for the courts to order restitution of conjugal rights.

Restitution of conjugal rights found a place in the colonial times when women were regarded as the 'chattel' of the husband with no legal personality of their own. This law was abolished in the United Kingdom following the report of Scarman Commission in 1969 on the basis of futility. However it remains intact in India and other British protectorate states despite being challenged vehemently more than once.⁵¹It is not denied that restitution of conjugal rights has never been resorted to for expressing a genuine desire to rehabilitate the matrimonial relationship, but in majority of cases it is peddled for ulterior motives, therefore better alternatives should be explored to ensure nits benefits, if there are any remaining.⁵²

On the contrary this remedy (restitution of conjugal rights order) is regarded as having some utility by leading the deserting spouse to come to their senses and return to their

⁴⁹ Bekker J C, *An Introduction to Family Law*, (1st Edn Juta and Co Ltd, Cape Town 1990 p.27)

⁵⁰ Bond T, Black j, and Bridge; *Family Law*,(3rd Edition Black Stone Press Ltd, Aldine Street London 1994,) 52

⁵¹ Upadhayay S, 'Restitution of Conjugal Rights; Legal intrusion into the lives and Bodies of Women', (April 11 2019)

⁵² Dr Cheema S A, 'Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for its Abolition', Volume 5, 1999

home, it is commended for offering a way to a sincere spouse of seeking to encourage another spouse to come home rather than forcing the deserted spouse to seek a legal separation.⁵³ It is however not imperative to generalize its importance since each case has its own merits. In *Vermaak v Vermaak*,⁵⁴ the court said bearing in mind the proper function of a restitution order and that the granting of a divorce is a matter of public policy, and that the policy of the court is to uphold the sanctity of marriage and not lightly to put an end to what is the very foundation of the most important unit of our social structure, the family. This imposes a risk that courts would not grant a degree of divorce even in circumstances where divorce is the only solution.

Experience shows that by the time a divorce action is taken before the court, the prospects of reconciliation are minimal. By the time the a matrimonial course reaches a hearing, the parties are too far apart, one of them at least is too anxious for the final determination of the suit and too much bitterness has been engendered to allow any reasonable prospects of reconciliation. Even in cases where the plaintiff desires divorce for no just reasons than that they have grown tired of each other, reconciliation attempts are generally doomed.⁵⁵ This may call for the courts to consider the time of desertion between the estranged spouses, especially where there is total breakdown of communication between the parties to marriage. In *Hoohlo v Hoohlo*,⁵⁶ Ramodibedi J held that a restitution order entails more than just a party presenting himself to the physical address of the other, there must be proper communication such as through the parties attorneys as well as by mail, Therefore communication should be of essence in the determination of whether marriage has irretrievably broken down.

The passage of time between the geneses of restitution of conjugal rights could imply that a lot has changed in the way people live, and the way they perceive the marriage union, as well as the adoption of human rights which give individuals fundamental freedoms which never existed back in 1884. The question is whether this remedy is still

⁵³ The law reform commission, Report on Restitution of Conjugal Rights: Jactitation of Marriage and Related Matters (LRC-19883)

⁵⁴ 1965 (1) SA 431 (N) AT 435

⁵⁵ Hahlo HR, *The South African Law of Husband and Wife*, (5th Edn Juta and Co. Ltd, Welton 1985, p 333)

⁵⁶ Hoohlo (n3)

necessary in today's era. In *R v Saluturo*,⁵⁷ the court emphasized that the judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

This we have seen in the enactment of the Sexual Offences Act of 2003 which abolished the common law crime of rape by remedying its defects, thereby protecting all persons inclusive of married couples from sexual act performed under coercive circumstances and where the other spouse had deserted. Sexual Act between a wife and her husband is not a crime as such, although it depends on whether force was used. There are however significant constitutional doubts regarding the criminality of such conduct and the right of marital privacy.⁵⁸This brings us to question the harmony between the common law principle of restitution of conjugal rights order and the Sexual offenses Act.

1.7 CHAPTER BREAKDOWN

The whole dissertation shall comprise of four chapters. The first chapter shall be introductory chapter which shall map the whole paper. It will contain the origin of restitution of conjugal rights order from the international sphere. The second chapter entails the legal framework in respect of restitution of conjugal rights order. The third chapter shall deal with the comparative study between Lesotho, South Africa and Indian law because of all these jurisdictions borrowed that remedy from English Law. It is a common cause that they were under British Protectorate or Colony for that reasons they share a similar legal heritage. The last chapter shall be the concluding chapter which has the singular aim of providing the findings of the research, conclusions and recommendations.

1.8 CONCLUSION

This chapter had shed some light into the origin of restitution of conjugal rights order, demonstrating the current status of the law in India as it still retains the order, as well as the position of the law in South Africa where the restitution of conjugal rights order was

⁵⁷ [1992] 8 CRR (2^d) 173; [1993] SCR 654

⁵⁸ Krause (n4)

abolished. The exercise further reflected the status quo in Lesotho along with the problems that arises as a result of the current status quo. General literature was included to share ideas of other writer within the scope of this study with some few cases to demonstrate the applicability of the order of restitution of conjugal rights.

CHAPTER TWO

LEGAL FRAMEWORK OF RESTITUTION OF CONJUGAL RIGHTS

2.1. Introduction

At the very heart of the global human rights framework are the fundamental human rights of dignity, family and equality. Unfortunately there is not much published information to specifically deal with the order of restitution of conjugal rights within the human rights instruments, however there are human rights instruments that are relevant to the order of restitution of conjugal rights in that, during the process of restitution of conjugal rights, certain recognized rights are likely to be infringed or upheld. These instruments are at international level, regional level, sub-regional level, and the national level. This chapter will attempt to deal with and share all the relevant information relating to restitution of conjugal rights order, with a view to test its lawfulness. In doing this, the chapter will interrogate human rights instruments, inclusive of the relevant practices and policies as enshrined at different levels.

2.2 International level

Lesotho is party to various human rights instruments which are binding to it. Domestic legislation in Lesotho has drawn aspiration from International human rights instruments. The Universal Declaration on Human and People's Rights (UDHR) provides that every person has the right to an effective remedy by the competent national tribunals for acts which are violating the fundamental human rights granted to him/her by the constitution or by law.⁵⁹ This provision is relevant to test the effectiveness of the order of restitution of conjugal rights against some rights which are contained in the Bill of Rights of the constitution as the supreme law. The Constitution shall be the yard stick used to measure whether this order is still reasonable in our legal system.

This element was advanced in the International Covenant on Civil and Political Rights (ICCPR) that state parties should ensure that any person whose rights or freedoms are recognized and violated shall have an effective remedy, notwithstanding that the

⁵⁹ UDHR (n44) Article 8

violation has been committed by persons acting in an official capacity.⁶⁰ Having learnt that the order of restitution of conjugal rights is a remedy that is intended to safeguard the marriage union from dissolution, it is pertinent to investigate whether this remedy has indeed succeeded in saving the marriage so as to determine its effectiveness.

The UDHR further provides that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation, and shall have the right to the protection of the law against such interference or attacks.⁶¹ The question is whether the order of restitution of conjugal rights as a lawful order, can be presumed to interfere arbitrarily with the privacy, home or family of the parties to marriage especially when the parties are expected among others to engage in sexual intercourse.

This instrument also entails the right to freedom of peaceful assembly and association, emphasizing that no one may be compelled to belong to an association,⁶² and no restrictions may be placed on the exercise of this right other than those prescribed by law which are necessary in a democratic society.⁶³ It is yet to be determined whether freedom to associate has a meaning comprehensive enough to cover married couples who may wish to live the association of the current spouse to join another association, and whether marriage falls within the restrictions that are prescribed by the law.

Family is considered as a natural and fundamental group unit of the society that is entitled to protection by the society and the state, and no marriage shall be entered into without free and full consent of the intending spouses.⁶⁴ The challenge may arise where such consent that is necessary to substantiate marriage, is withdrawn by one of the parties to marriage by instituting an action for divorce. This brings us to the issue whether the court in its wisdom can order restoration of such consent through the order of restitution of conjugal rights, and if so, can we safely say such consent is given freely.

⁶⁰ ICCPR 1966, Article 3 (3)

⁶¹ *Ibid* Article 17 and UDHR (n44) Article 12

⁶² *Ibid* Article 22 and UDHR (44) Article 20

⁶³ *ibid* Article 22 (2)

⁶⁴ *Ibid* Article 23 (1) and (2)

It is significant to note that both the UDHR and the ICCPR allow no derogation from the fundamental human rights recognized in any state party to the covenant.⁶⁵ The term derogation refers generally to the suspension or suppression of the law under particular circumstances. The question therefore is whether enjoyment of some human rights can be suppressed as between married spouses.

The UDHR⁶⁶ provides that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family, they are also entitled to equal rights as to marriage, during marriage and its dissolution. Marriage shall also be entered into only with the free and full consent of the intending spouses.⁶⁷ The above provision though not directly dealing with the restitution of conjugal rights order becomes relevant to this topic because it deals with the principles that guide the validity of marriage, making it apparent that essential to marriage is freedom and full consent of the spouses who wish to enter into marriage, while observing equal rights during the subsistence of marriage and during its dissolution.

The right to conjugate by spouses in marriage finds its meaning as part of the *consortium vitae* which is an invariable consequence of marriage. As illustrated earlier, the concept of *consortium vitae* is inclusive of sexual intercourse between spouses. Fundamental human sexual and reproductive rights are expressed by the Universal Declaration on Sexual Rights (UDSR).⁶⁸ The Declaration places both sexual freedom and sexual autonomy as paramount. It provides that the right to sexual freedom encompasses the possibility for individuals to express their full sexual potential. However, this excludes all forms of sexual coercion, exploitation and abuse at any time and situation in life.⁶⁹ The Declaration further provides that the right to sexual autonomy, sexual integrity, and safety of the sexual body involves the ability to make autonomous decisions about one's sexual life within a context of one's own personal and social

⁶⁵ *Ibid* Article 5 (2)

⁶⁶ UDHR (n44) Article 16 (1) and paragraph 1 of Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1964 and Article 23.4 of ICCPR (n60)

⁶⁷ *ibid* Article 16.2, ICESCR 1966 Article 10 (1) and ICPPR (n60) Article 23 (3)

⁶⁸ 2014

⁶⁹ (*ibid*)

ethics. It also encompasses control and enjoyment of our own bodies free from torture, mutilation, and violence of any sort.⁷⁰

The Supplementary Convention on the Abolition of Slavery, the slave Trade and Institutions and Practices Similar to Slavery (SCASSIPSS),⁷¹ makes a list of practices and institutions that need complete abandonment by state parties in order to ensure free and full consent of the parties who are intending to marry; Any institution or practice whereby (i) a woman without the right to refuse is promised or given in marriage on payment of a consideration in money, or in kind of her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person. It is important to note that the two instruments lay down principles prior to marriage and during the subsistence of marriage and not when one spouse intends to end the marriage union.

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) provides that member states undertake to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to marriage and choice of spouse.⁷² The right to choice of spouse however is exercised within the scope of the law of marriage, in that neither spouse may enter into another civil marriage or a customary marriage with anyone else, while the civil marriage still subsists.⁷³ On the face of it, this right is only limited to persons who are not married or who have legally dissolved such marriage. The Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of a Child have both stressed the importance of additional legal safeguards to protect the right of all individuals to freely enter into marriage, even in plural legal systems which include both customary and statutory laws.⁷⁴

⁷⁰ (*ibid*)

⁷¹ SCASSIPSS Article 1 (c) 1957

⁷² CEDAW 1981 Article 5(iv)

⁷³ Heaton J and Kruger H, *South African Family Law*, (4th Edition, Lexis Nexis, Durban, 2015, P 41)

⁷⁴ General Assembly Resolution 1763 A (xvii)

Freedom to enter into marriage seems to enjoy protection from both International human rights instruments and the national laws, as well as in the dualist system like Lesotho because the element of consent to enter into marriage is prescribed in both civil and customary law. The law of divorce however does not expressly emphasize the element of consent, especially where one spouse withdraws his or her consent by way of instituting the divorce action. One may deduce that at least in an action for divorce, on the ground of desertion, the law is cognizant of the withdrawal of consent because there is no procedural requirement of restitution of conjugal rights order, unlike in divorce instituted on the ground of malicious desertion where the law irrespective of the withdrawal of consent in marriage will order the litigant spouse to go and perform invariable consequences of marriage.

2.3 African Regional Level

In the African context, guidance is sought from the African Charter on Human and Peoples' Rights (ACHPR),⁷⁵ as a primary source of human rights in the African Continent. This context will further be narrowed down to the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa known as Maputo Protocol.⁷⁶

The African Charter provides that every individual shall have a right to free association as long as he or she abides by the law, and no one may be compelled to join an association.⁷⁷ The issue of association between spouses may imply compliance with the Charter because marriage is entered into freely and voluntarily. The issue of freedom of association becomes controversial after one spouse has shown intention to disassociate from the marriage association by instituting divorce. It becomes questionable whether the court by issuing the order of restitution of conjugal rights does not appear to be compelling a spouse to join the association. One may argue that the order is not compelling association since the court would not enforce the association if the order is not complied with.

⁷⁵ ACHPR (1981/86)

⁷⁶ Maputo Protocol 2005

⁷⁷ ACHPR (n75) Article 10

The Charter further provides that family shall be the natural unit and basis of society and shall be protected by the state, which shall take care of its physical health and moral. Similar to the UDHR and the ICCPR, the African charter dictates that state parties should enact appropriate legislation to ensure that women and men enjoy the same rights in cases of separation, divorce or annulment of marriage that is effected by judicial order.⁷⁸ The order of restitution of conjugal rights is equally applicable to both men and women and a means towards ensuring that they enjoy the same rights in divorce proceedings.

The Charter further provides that states shall have the duty to assist the family which is the custodian of morals and traditional values that are recognized by the community,⁷⁹ and ensure the elimination of every discrimination against women, while ensuring the protection of the rights of the woman and the child as stipulated in international declarations and conventions. The challenge is whether the court when issuing the order of restitution of conjugal rights is cognizant of the rights that are available to children. Children have rights to live with parents and to grow up in a caring environment as prescribed by the Children's Protection and Welfare Act (CPWA).⁸⁰

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (*supra*) provides that state parties should ensure that the right to health of women, including sexual and reproductive health is respected and promoted.⁸¹ This include the right to be informed on one's health status and on the health status of one's partner particularly if affected by sexually transmitted infections including HIV/AIDS.⁸² As indicated earlier, consortium vitae is inclusive of sexual intercourse between spouses, the issue is whether the court embarks on measures to guard against the spread of HIV/AIDS or at least inquire into the HIV status of the parties before issuing the order of restitution of conjugal rights. This poses a challenge because the law is silent about the precautionary measures that are aimed at respecting and promoting good health.

⁷⁹ (*ibid*) Article 18 (2)

⁸⁰ No. 7 of 2011 Section 10

⁸¹ Maputo Protocol (n76) Article 14 (1)

⁸² (*ibid*) Article 14 (1) (e)

This Protocol further provides that in cases of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children, and in any case, the interests of the children shall be given paramount importance.⁸³ The order of restitution of conjugal rights is in a way a preliminary procedure prior to the granting of divorce. It goes without saying that no party to marriage would disassociate himself or desert the matrimonial home without any hazardous and intolerable situation which forces him/her to live. In most cases measures would have been taken by both families to reunite the spouses but all failed and divorce left as the only solution. In the process children are left more vulnerable and the procedure of restoration of conjugal rights is ignorant of the interests of the children.

2.4 National Level

Lesotho legal system has its civil law foundation in both Roman Dutch and English Law, which both observe the order of restitution of conjugal rights. Nonetheless, the English law has abolished this order based on the acknowledgement that marital rape is a consequence to restitution of conjugal rights. The Roman Dutch foundation of this order had seemed to persist in modern legal systems such as Lesotho. It is only in advanced democratic states that have found a way to repeal it, as a consequence of inconsistency with constitutional norms.

This section considers the law that is implicated by the restitution of conjugal rights order as well as the law that directly deals with the order of restitution of conjugal rights. The primary source considered is the constitution of the Kingdom of Lesotho and how it relates to the rights of individuals and which bears direct implication to the rights of married persons. Some provisions of the Marriage Act⁸⁴ and High Court Rules⁸⁵ as well as the Sexual Offences Act⁸⁶ would be significant to the study.

⁸³ (*ibid*) Article 7 (c)

⁸⁴ No. 10 of 1974

⁸⁵ (n30)

⁸⁶ (n42)

The Constitution of Lesotho 1993

Right to respect for private and family life

The constitution of Lesotho provides that every person shall be entitled to respect of his private and family life and his home.⁸⁷ It is apparent that this right guarantees individual's rights to be left alone in matters concerning their body, their home and their family. It goes further to warrant that the state does not regulate civilian's everyday lives especially in their intimate affairs. The state is expected to recognize a sphere of personal autonomy, this includes the decision whether to have sexual relations or not and with whom.

Freedom of Association

Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labor, social, cultural, recreational and similar purposes. Marriage as a social institution is entered into with full consent of both spouses.⁸⁸ It is implied by this provision that marriage will subsist as long as both spouses continue to consent to this association.

High Court Rules No. 9 of 1980

The High Court Rules prescribes that;

'In an action for the restitution of conjugal rights the plaintiff may in the alternative claim a degree of divorce. Upon the hearing of the action for restitution of conjugal rights the court may upon proof of the malicious desertion of plaintiff by defendant order restitution of conjugal rights and may further direct the defendant to show cause why a decree of divorce should not be granted. The order of restitution of conjugal rights shall, unless the court otherwise directs, be served on the defendant personally. If upon the return day it is proved that the defendant has failed to comply

⁸⁷ (n41) S 11

⁸⁸ (n84) S 3

with the order, the court may grant a decree of divorce or make such order as it may seem just'.⁸⁹

Although the order of restitution of conjugal rights is originally a common law principle, it was domesticated through the High Court Rules. These rules lay out the procedure of restitution of conjugal rights order. They do not only prescribe the procedure in divorce on the ground of desertion but also elevate the order of restitution of conjugal rights to a more important and valuable aspect of our divorce law in that the statute has more legal implication than that of the common law.

Opponents of the order of restitution of conjugal rights share a view that marriage is no longer an indissoluble undertaking saying the relationship now implies something which exists essentially for the fulfillment of both partners, and is intended to endure only for as long as this purpose is served.⁹⁰ This implies that once a party to marriage is no longer fulfilled by the marriage, the purpose of such marriage is in question and a more justiciable reason to dissolve such marriage without a delay in a form of restitution of conjugal rights.

Sexual Offences Act No. 3 of 2003

The Sexual Offences Act has expressly alluded to the prohibited sexual acts between married spouses. The Act seems to acknowledge that sexual intercourse/act is an invariable consequence of marriage and a right between spouses. However it goes further to surmount this right under certain circumstances that appear to be coercive.

Unlawful sexual act

'Marriage or any other relationship shall not be a defense against a charge under this Act where it is shown that;

- (a) The accused spouse or partner had or was reasonably suspected to have sexually transmitted diseases;
- (b) One of the spouses had deserted.'

⁸⁹ (n30) Rule 42

⁹⁰ Kaganas F and Murray C, 'Rape in Marriage: Conjugal Rights or Criminal Wrong?' (1983) *Acta Juridica* 125 1983

The parliament in its wisdom lay out a number of circumstances under which the sexual act between the spouses shall be presumed unlawful. The two outlined provisions are relevant to the order of restitution of conjugal rights. Firstly a spouse who is suspected to have sexually transmitted diseases cannot raise the subsistence of marriage as justification to engage in the sexual act with the other spouse. This implies that the spouse so suspected is presumed to have relinquished his/her right to engage into the sexual act with the other spouse until the suspicion is removed. The order of restitution of conjugal rights however, as stated earlier is issued without proper investigation as to the health status of the spouses. This could lead to risk of transmission of the diseases and a violation of the fundamental human rights such as the right to life because poor health can lead to death.

The United Nations General Assembly is deeply concerned that the Global HIV/AIDS epidemic through its devastating scale and impact constitutes a global emergency and one of the most formidable challenges of human life and dignity as well as to the effective enjoyment of human rights, which undermines the social and economic development throughout the world and affects all levels of society. Serious legal, social and policy issues such as negative norms and practices that affect people who are vulnerable to HIV/AIDS remain largely unchallenged.⁹¹ It is questionable therefore whether the order of restitution of conjugal rights does not constitute a negative norm and practice that have a potential of increasing the prevalence of HIV/AIDS.

Secondly, The Sexual Offences Act provides that marriage cannot be a defense to engage in the sexual act with the other spouse where one of the spouses had deserted. From this provision we can equally deduce that parliament regard desertion as a serious matrimonial offence and a wrong that disentitle a deserted spouse of his/her right to engage in the sexual act with the other spouse. This provision does not seem to be in harmony with the procedure of ordering the restitution of conjugal rights in the proceedings of divorce instituted for the ground of malicious desertion. The Sexual

⁹¹ Global Commission, HIV and the Law, 64, 'Global Action to Reduce HIV Stigma and Discrimination' (Journal of the International Aids Society) (2013)

Offences Act disapproves the act of deserting while on the other hand, the order of restitution of conjugal rights condones the act of desertion.

2.5 Conclusion

This chapter has reflected on the international human rights instruments which have direct implication on the order of restitution of conjugal rights at the international and regional level. The instruments have become customary international law, therefore are binding on Lesotho and other states. These rights are further enshrined in both the constitution as the supreme law as well as statutes. The High Court Rules has been a mechanism through which the restitution order was domesticated by laying out the mandatory procedure where the court has to deal with a case of divorce on the ground of desertion. The Sexual Offences Act however lays down principles which may not necessarily coincide with the restitution order.

CHAPTER THREE

COMPARATIVE STUDY RESTITUTION OF CONJUGAL RIGHTS ORDER IN SOUTH AFRICA AND INDIA

3.1 Introduction

This chapter seeks to comparatively understand the current position in the two above mentioned countries, and interrogate their compliance with the human rights instruments as compared to the Kingdom of Lesotho. In doing so, this exercise will further trace the historical context of the order of restitution of conjugal rights in these countries respectively. The choice of these countries is influenced by the fact that they all were under the British protectorate prior to their independence, hence the common law principle of restitution of conjugal rights order was relevant to their jurisdictions.

3.2 South African Law

South Africa has helped to shape the legal evolution in the Lesotho legal sphere. This is due to the fact that though both systems share Roman Dutch foundations, South Africa boast an advanced democracy.

The Constitution

In South Africa, the constitution is the supreme law. Any law or conduct that is inconsistent with the constitution is invalid, and the obligations imposed by the constitution must be fulfilled.⁹² The first three chapters of the constitution encompass a bill of rights outlining inalienable fundamental human rights such as the rights to privacy, human dignity and freedom of association.⁹³ The constitution further provides that every person has the right to administrative action that is lawful, reasonable and procedurally fair.⁹⁴

⁹² The Constitution of the Republic of South Africa 1996, S2

⁹³ (*ibid*) Section 18

⁹⁴ (*ibid*) Section 33 (1)

Unlike Lesotho, South Africa has provided for the establishment of the Human Rights Commission,⁹⁵ whose functions are to promote respect for human rights, to promote protection, development and attainment of human rights, and to monitor and assess the observance of human rights in the Republic.⁹⁶ The South African Constitution expressly provides that customary international law is law in the republic unless it is inconsistent with the constitution or an Act of parliament. This approach differs from that of Lesotho because in the Kingdom, in order for international law to be binding and enforceable, it has to be domesticated into an Act of parliament. It is well acknowledged that the UDHR as well as other human rights instruments have become customary international law. This means that such are binding on all states, therefore need no ratification by a state.

Recognition of Customary Marriage Act 120 of 1998

Both parties' consent is required for the marriage to be valid. A person who cannot give consent such as a mentally insane person will not be permitted to enter into a marriage union. Similar to Lesotho, in South Africa, marriage is validated by the consent of both spouses. This means without prior consent of the parties to marriage, such marriage is null and void *abinitio*.⁹⁷

Prior to the coming into operation of the Divorce Act⁹⁸ in South Africa, a decree of divorce could be granted by the court either on one of the two Common Law grounds namely adultery and malicious desertion, or on one of the two grounds introduced by the Divorce Laws Amendment Act,⁹⁹ which are incurable insanity for not less than seven years, or imprisonment of the defendant spouse for at least five years after such spouse had been declared to be a habitual criminal. Severe criticism of the old divorce law led to an investigation by the South African Law Commission, whose report on the matter ultimately resulted in the enactment of the Divorce Act of 1979.

⁹⁵ (*ibid*) S 181

⁹⁶ (*ibid*) S 184

⁹⁷ 120 Of 1998

⁹⁸ (n39)

⁹⁹ 1935

Divorce Act No. 70 of 1979

The old grounds of divorce were replaced by the ground of irretrievable breakdown of marriage, but the law specifically mentions one year separation, adultery and habitual criminality as factors which may prove irretrievable breakdown of marriage.¹⁰⁰ Incurable insanity is retained as a ground of divorce but the minimum period of mental illness was shortened considerably to two years, while the continuous unconsciousness of one of the spouses for a minimum period of six months was added as a new ground of divorce.¹⁰¹ The Act further provides that the court shall not issue a decree of divorce until it is satisfied that the welfare of minors or dependent children of the marriage are satisfactory or are the best that can be effected in the circumstances. To be specific, the Act prescribes that;

‘It shall not be competent for a court to issue an order for the restitution of conjugal rights or for judicial separation’.¹⁰²

The feeling that underlined the abolition of the order of restitution of conjugal rights was the idea that this order lends itself to the idea of marital rape, and creates an environment in which wives may be sexually assaulted and there is no argument weighty enough for it to be sustained.¹⁰³

3.3 Indian Law

Indian constitution 1950

The constitution is the supreme law in India, and all laws that are inconsistent with or in derogation of the fundamental rights are void.¹⁰⁴ The controversial issue in India was to harmonize the restitution order with the right to equality, right to life and right to liberty before the law as contained in the constitution.

¹⁰⁰ (n92) S 3

¹⁰¹ (*ibid*) S 14

¹⁰² (*ibid*)

¹⁰³ *Siphiwe Vilakati*, A Legal Analysis on the Validity of the Sustained Practice of the Restitution of Conjugal Rights in Swazi Divorce Law, In Partial Fulfilment of the Requirements for the Degree of Masters of Laws (LLM), Loyola University Chicago School of Law, (2017)

¹⁰⁴ The Indian Constitution 1950

The Hindu Marriage Act provides for the three grounds of divorce namely: adultery, cruelty and desertion.¹⁰⁵ India is one of the countries that continue to sustain the legal remedy of restitution of conjugal rights in several legislative Acts. These pieces of legislation as indicated earlier prescribe the uniform procedure in divorce where one of the spouses had deserted. These are section 9 of Hindu Marriage Act 1955, section 32 and 33 of Indian Divorce Act 1969, section 36 of Parsi Marriage and Divorce Act 1969, and section 22 of Special Marriage Act 1954. These statutes provide that:

‘When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District court, for restitution of conjugal rights and the court may decree restitution of conjugal rights accordingly’.¹⁰⁶

As per the entailment of marriage *consortium*, the law in India provides room for the spouse who has withdrawn from the society of the other to argue any reasonable grounds for withdrawal if there are any. It is only if such grounds do not exist that the order of restitution of conjugal rights will be granted.

The Indian position has not been free from controversy. It is safe to say that India is constantly evolving, which is admirable. The Hindu court, in the case of *T. Sareetha v T Venkata Subbaiah*¹⁰⁷ was afforded the opportunity to consider the constitutionality of the order of restitution of conjugal rights as encompassed in section nine of the Hindu Marriage Act.¹⁰⁸ An insightful aspect of the case is firstly the understanding of this right in the Hindu context. The court alluded that conjugal rights connote two ideas; Right which husband and wife have to each other’s society as well as marital intercourse.

¹⁰⁵ (n34), S 13

¹⁰⁶ Hindu Marriage Act (n34) S9, Indian Divorce Act 1869, S32 and 33, Parsis Marriage and Divorce Act of 1969, s36 and Special Marriage Act (n36), S22

¹⁰⁷ AIR 1983 AP 356

¹⁰⁸ (n34)

The court made reference to some scholars¹⁰⁹ stating that;

‘...In other words, sexual cohabitation is an inseparable ingredient of a decree of restitution of conjugal rights. It follows therefore that a decree for restitution of conjugal rights extends not only to the grant of relief to the decree holder to the company of the other spouse, but also embraces the right to have marital intercourse’.

This case continues to explain that it is the state that carries the rights, in that they become enforceable by the state against the recalcitrant spouse through financial sanctions, this aspect therefore makes the right to restitution of conjugal rights to be more coercive. This led to the decision that section nine of the Hindu Marriage Act is unconstitutional, holding that it promotes no legitimate public purpose contrary to sections 14 and 21 of the Indian constitution which provides for equality before the law.¹¹⁰ Balasubrahmanyam V¹¹¹ states however that the Supreme Court upheld the constitutionality of the section on appeal, stating that the order does not violate the fundamental right to life and liberty.

Nayar A,¹¹² similarly explores the constitutionality of the right to restitution, she goes into slighter greater depth as to the constitutional nuances that this right touches on. She is of the view that section 9 is simply unfit for a modern gender sensitive society and against the principles of natural justice, therefore fails at the touchstone of justice and fairness. Finally she says that though she understands the argument that this right is maintained in the guise of preservation of the sanctity of marriage, but doubts whether this is worth the sacrifice of rights, often times for marriage beyond saving.

The two Indian authors agree on one thing though. They agree on the proposition of introduction of another ground of dissolution of marriage, further they also agree on the

¹⁰⁹Raghavachariar NR, 'Hindu Law', 7th Ed. Volume II (2004) p, 980

¹¹⁰ (n104)

¹¹¹ Balasubrahmanyam V, 'Conjugal Rights: Shift in Emphasis needed', Economic and Political Weekly, Vol. 19, No.35, 1984,p 1510

¹¹² Naya A, 'Restitution of Conjugal Rights-preserving a sacrament or creating a liability', Journal on Contemporary Issues of the Law (JCIL), Volume 2, (2006)p 1 to 11

ground of the irremediable breakdown of marriage. Contesting that alongside the option of the provision for restitution of conjugal rights, it would do away with the use of the provision even in inappropriate circumstances, thereby yielding inappropriate results.

It is worth noting that the Indian position shows the nuanced nature of the layers that goes into addressing the lawfulness of the order of restitution of conjugal rights. Presenting clearly that it is not to be dealt with in a linear fashion. This paper draws heavily from this thinking and a foundation to the approach towards reforms that considers appropriate remedies to societies that observe human rights. This decision in my opinion makes the dissolution of marriage rigid and impossible even in circumstances where the subsistence of such marriage would lead to death of either of the spouses. I would also concur with the opinion raised by Naya A that the order of restitution of conjugal rights is against the principle of natural justice, in that the court before issuing the restitution order does not afford the deserter an opportunity to tell the court the reasons why he/she has deserted even if the court is aware of the existence of such reasons.

3.4 Lesotho Law

Lesotho still retains the order of restitution of conjugal rights since 1884 when it became the British protectorate.¹¹³ The order of restitution of conjugal rights was founded on both the Roman Dutch Law and the English Law and adopted by various legal systems including Lesotho. It is significant to note that Lesotho is a signatory to a number of human rights instruments as it is the situation in India and South Africa. However, unlike South Africa, in order for these instruments to be applicable in the courts of Lesotho, they must be domesticated into national law.

As indicated earlier, the order of restitution of conjugal rights in Lesotho was domesticated through the High Court Rules (*supra*). The High Court Rules provides that in any action for the restitution of conjugal rights the plaintiff may in the alternative claim a decree of divorce.

¹¹³ Proclamation 2B 1884

The High Court in the case of *Matekane v Matekane* (*supra*), made clear emphasis that the rule incorporates the common law principle of restitution of conjugal rights in view of upholding the sanctity of marriage, and not lightly to put an end to what is the very foundation of the most important unit of our social life which is the family. The court's approach impliedly is to preserve the marriage union even in circumstances which would yield undesirable outcomes.

This we have seen in the case of *Hoohlo v Hoohlo*.¹¹⁴ The significance of this case is the contradictory decisions and reasoning between the High Court and the Appeal Court. The High Court had granted a decree of divorce to the respondent on the ground of malicious desertion. The parties had since marriage never lived together as husband and wife. After solemnization of marriage, the respondent took the appellant to his parental home. The respondent soon left to Johannesburg for work, and the appellant moved to Maseru for work. A year later, the respondent filed a divorce on the ground of malicious desertion. Eventually the restitution order was issued by the court in 2010.

The applicant complained to the court that she only knew about the order only 21 minutes left within which to restore conjugal rights. She applied to the court for the extension of the restitution order, but the court refused it on the ground that the marriage had become "a hallow shell" therefore there would be no point in prolonging the anguish of the parties. The court refused to re-issue the restitution order thereby issuing the decree of divorce. The Appeal Court held that the trial court had misdirected itself saying that the court was not to determine whether the marriage was a hallow shell or not, but whether the appellant had restored conjugal rights or not.

The Appeal Court made reference to the case of *Vermaak v Vermaak*,¹¹⁵ which laid the principle that the granting of divorce is a matter of public policy and that the policy of the court is to uphold the sanctity of marriage and not lightly to put the end to what is the very foundation of the family unit. The defendant was ordered to restore conjugal rights and the decree of divorce was set aside.

¹¹⁴ Hoohlo (n3)

¹¹⁵ Vermaak (n54)

One would say that at the back of the mind of the High Court Judge was the inutility of the restitution order, in that he looked at the circumstances surrounding the marriage between the parties and made a conclusion that granting the restitution order is equivalent to prolonging the anguish between the parties. The Appeal Court on the other hand was very strict and rigid in its approach in that it applied the law as it is without necessarily interrogating the usefulness of the restitution order in the circumstances with the purpose of upholding the sanctity of marriage. This approach in my view may be suitable in some circumstances and may turn to be unbecoming in other situations, and eventually yield undesirable outcome especially where the court would want to reunite the parties to marriage at all costs.

3.5 Conclusion

The three countries share much similar history in that they were British protectorate. As a result they acquired into their legal systems the common law principle of the order of restitution of conjugal rights. The phenomena of human rights called for practices that are compliant with the international human rights instruments along with the Bill of Rights contained in the constitutions of the respective countries. However while some countries have eradicated this remedy in their legal systems, some countries like India and Lesotho still retain it.

CHAPTER FOUR

CONCUSIONS AND RECOMMENDATIONS

4.1 Introduction

We have since learned that the order of restitution of conjugal rights dates back to feudal England, where marriage was primarily a property deal, and the wife and the children were part of man's possession as other chattels. The remedy finds its origin in the ecclesiastical courts of England before 1813, the sanction of such degree was excommunication. Later the sanction was substituted by six months imprisonment, hence a decree could be executed by arresting the wife who has deserted. It is remarkable that many other archaic common law actions were gradually abolished.¹¹⁶ This remedy was retained in England, though some of its stings contrary to the concept of equality of sexes were picked out. The decree could no longer be executed by the arrest of the respondent but by the attachment of the property.

Later this mode of execution was abolished. The non-compliance of the decree amounted to constructive desertion, thus becoming a ground for divorce. The British Law Commission¹¹⁷ presided by Mr. Justice Scarman in its report recommended abolition of this remedy in English law which led to section 20 of the Matrimonial Proceedings and Property Act,¹¹⁸ abolishing the right to claim restitution of conjugal rights in English courts.

As indicated earlier, this remedy was welcomed into the countries which were British Protectorates such as South Africa, India and Lesotho by Proclamation 2B of 1884. South Africa has since abolished this remedy in 1979, while India and Lesotho still retain it. In Lesotho this rule has since been practiced as a common law principle and was later domesticated in 1981 through Rule 42 as a mandatory procedure in an action for divorce on the ground of malicious desertion.

¹¹⁶ Priyanka Priyadarshini, 'The Futility of the Provision of Restitution of Conjugal Rights (As Under Hindu Marriage Act 1955) In the Present Scenario', (1999) 6

¹¹⁷ 23rd Law Commission of England 's Report, Proposal for the Abolishment of the Remedy of Restitution of Conjugal Rights, (09 July 1969)

¹¹⁸ (n23)

The basic aim of restitution of conjugal rights is to give a cooling off period which is not only desirable but essential to the spouses before breaking off their relationship abruptly.¹¹⁹ This remedy though set up for an extremely noble cause, its results however does not lead to the desired outcome mostly. It was set up to preserve the very sacramental bond of marital relationship and to protect it from mere whims of the spouses or from petty wear and tear of marriage. It is to see that the parties are able to find a way back to each other and sort out their differences. Marriage has been a union of two families and a sublime bond to which high amount of importance is attached since olden times. Hence it has been considered to be the duty of the judiciary to see that marriage does not cease to exist because of any whimsical or petty reasons therefore the restitution of marriage is preserved.

However, as time passes by, the very foundation on which the strength of the marital bond rested has suffered a change. The human rights instruments have expressly provided that every person have a right to effective remedy by the national tribunals for acts which are violating fundamental human rights granted by the law, notwithstanding that the violation has been committed by persons acting in official capacity.¹²⁰ The restitution order in this instance is issued by the courts in compliance with the High Court Rules,¹²¹ however the supreme Law which is the constitution provides for the Bill of Rights alluded in the UDHR and have a supremacy clause that declares any law that is inconsistent with the constitution null and void.¹²²

The UDHR further prohibit arbitrary interference with a person's privacy, family, home and reputation. The court by issuing the restitution order expects the parties to come together, cohabit and perform all the invariable consequences of marriage that include sexual intercourse. This order eventually becomes known to the public and maybe a decided case from which other decisions can be derived from. These instruments made it clear that no marriage shall be entered to without full and free consent of the intending spouses. It is apparent that ordinarily withdrawal of consent in any contract terminates

¹¹⁹ Sharma SK, 'Privacy Law: A Comparative study' [1994]

¹²⁰ UDHR (n44)

¹²¹ (n30)

¹²² (n41), S 2

the agreement itself. It is also against public policy for a person to enter into a contract which he/she may not be free to get out of.

Despite the provisions of the international human rights instruments, there seems to be a huge contradiction between the restitution order and the Sexual Offences Act (supra) because while the Rules prescribes the restitution order as a matter of procedure in an action for divorce on the ground of desertion. The Sexual Offences Act on the other hand provides that marriage shall not be a defense where one of the spouses had deserted. This means that by deserting, the spouse has waived his/her right to engage into sex with the other spouse. Where there is contradiction, the rules of interpretation dictate that the latest statute will prevail.

From its origin, the restitution order was relevant at the time because marriage back then was essentially a property deal and the wife and children were considered to be the man's belongings. That reasoning no longer holds water in many countries including Lesotho because the marital power of men was abolished by The Legal Capacity of married persons.¹²³ Women are no longer under the guardianship of their husbands and are free to perform certain acts without necessarily seeking the consent of their husbands.

Fundamental human rights are the cherished gift that the constitution has bestowed upon the people of Lesotho. Barring a few exceptions, the fundamental rights secured to the individuals are limitations on the state actions. Violation of these rights is not only frowned by the courts, but also the law that so envisages their violation is deprived of its validity by declaring it null and void.¹²⁴ This means that all laws must be in conformity with the fundamental rights. The constitution further has a provision which ordinarily empowers the judiciary to review the actions of other branches of government. This implies that the High Court has the power to nullify any act of parliament or any law that appears to be inconsistent with the constitution.

¹²³ No. 9 of 2006

¹²⁴ (n41), S2

Marriage is an emotional bond. Making a withdrawing spouse resume cohabitation with the aggrieved spouse does not bring about the emotional connection. The stress or the wear and tear of marriage cannot be sorted by a decree which dictates that the parties have to cohabit. It has been rightly said in the Law Commission report which proposed abolishment of this remedy in England that; a court directing individuals to live together is hardly an effective measure of attempting to effect reconciliation.¹²⁵

4.2 *Recommendations*

The will of the aggrieved spouse is not given attention in this remedy. Hence, even if the decree is successful in bringing about cohabitation, it cannot bring about the lost affection and love that a relationship requires. This can only increase the bitterness and unrest in the relationship and makes the withdrawing spouse's attitude stiffer, frustrating the very purpose of this remedy. Moreover, there are various other ways and techniques of reconciliation. If a spouse is truly interested in bringing about resumption of cohabitation, he/she can opt for those procedures, rather than a decree which will facilitate only the physical presence of the other spouse and not the emotional, intimate presence in the relationship.

The instances of the abuse of this remedy are increasing rapidly and its redundancy too. This remedy therefore violates the constitution of Lesotho in that it infringes on individuals right to privacy, the right to family and home, individual autonomy and dignity as well as the freedom of association. The remedy is thus detrimental and obsolete, and should be done away with and novel ideas for reconciliation which are effective in its execution as suggested by the Law Commission should be brought about. A Reconciliation Body (RB) should be formed which could prove to be helpful and effective for the spouses without diluting their relationship in any manner.

A Reconciliation Body can be formed by the judiciary, consisting of qualified professionals (such as psychologists or any other person suitable for the purpose). This body can make an earnest effort in reconciling the spouses and reviving the lost love and affection between them. Such a body can try to mend the differences and sort out

¹²⁵ (n116)

the existing problems. The reconciliation process can take place through the discretion of the court, during the divorce proceedings. If the court feels that there is a scope for rehabilitation of marriage, then it can order the Reconciliation Body to take over the matter and strike a compromise between the spouses, failing which the court shall grant them divorce.

Therefore, in brief, redundancy of the provision of restitution has become apparent due to the rapid social changes, the change in the social position of women introduced by the legal Capacity of Married Persons, prohibition of marital rape introduced by the Sexual Offences Act, the ineffectiveness of the consequences of this remedy, lingering of the bickering in the marital home due to this provision which seeks to achieve a healthy cohabitation, insincerity of the petitioner who may have ulterior motives in most of the cases, incapacity of the judiciary in making a difference to an emotional bond and its unconstitutionality.

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