Marriage is, the most common, universal and respectably accepted institution all over the world, and it has a unique history of its own. The Institution of marriage is of vital importance in every civilised society. No social institution has been found to be more enduring than the institution of marriage. Marriage carries such a sanctity with it that it is difficult to define it in any framework and in water-tight compartments. This inherent difficulty has led to intellectual confusion. Derrett says:

Some think that marriage is an almost mystical union of man and woman, in which the couple are joined by psychological developments which takes place within each of them, and become in a social sense productive of good in ways that were not open to them before they were married.¹

As the nature of marriage varies under different laws, the definition of marriage also differ in different religious communities. Mazumdar, defines marriage "as a socially sanctioned union of male and female or as a secondary institution devised by society to sanction the union and mating of male and female, for purpose of (a) establishing a household, (b) entering into sex relations; (c) procreating; and providing care for the offsprings."²

² Grammar of Sociology, p. 582.
Thus, marriage is an alliance between a man and woman recognised by law. Marriage is, no doubt an individual relationship, a private affair of the parties, but more than that it is a social institution having complex social dimensions. The institution is an amalgam of tradition, religion, superstitious instinct and reason. Whatever may be the form of marriage, it has been evolved as a result of deliberate and determined efforts of the people themselves. So there is social interest in the preservation and protection of the institution of marriage. Thus, this institution is hedged in with all round protection. It is assumed to be a basic, vital and fundamental institution not only for the physical, mental, spiritual and social comforts of the spouses but also for the maintenance, protection and education of progeny.

It is protected so that children be cared for and properly trained. It is never left unregulated in a civilised society. There are always norms concerning what persons, under what conditions, and in what manner may establish a marriage relationship, what they will be expected to do once they are married and how they may dissolve their relationship (if at all), and under what conditions.

Stability of marriage is the sine-qua-non of every civilised society. Ever since the mankind instituted the institution of marriage, it has endeavoured to make marriage stable in bond or in freedom. A social duty is imposed on the spouses to strive for compatibility to avoid hasty dissolution of marital ties.

Family, which is an outcome of marriage, is one of the important social groups of the society. It is closely knit,
smallest and the most enduring in our social institutions. Stability of families is also needed for maintenance of peace and harmony in the society. Mutual love, confidence and affection must form the basis of marital relations, so that there may be all round development of the spouses and children of marriage.

A family is not only a reproductive unit and a socializing agency, it also provides each person with his main link to wider society. Every one is born, not of a collectivity or into a full fledged social system, but of parents into a family. In all types of societies, the family is the fundamental multi-purpose organisation for the performance of main functions of the individual and of society. Moreover, as Eric Wolf has written, 'the family is the bearer of virtue and of public reputations, a man's reputation is linked with that of his family and with his own relations to family'.

A number of legal rights, obligations and consequences arise from marriage as well as family. The concepts underlying matrimonial relations affect not only happiness of the individuals, they are also concerned about social norms and ethical mores. The institution of marriage has facets which are public as well as private in nature. They impinge, as inevitably they would, upon our notions of public and private morality. Being human, we all have our angularities and weaknesses. Like other associations and relationships of human beings, differences may occasionally arise between the spouses.
It has been rightly pointed out:

Broken homes and strained marital relations are not only a source of extreme anguish for the individuals concerned, they are also symptomatic of a social malaise and call for rational and sympathetic approach.³

Thus, a social duty is imposed on the spouses to avoid hasty dissolution of marriage.

Emphasizing the importance of marriage and family as social institutions, Mr. I.D. Dua, J., has pertinently observed as under:

"The institution of marriage is the foundations of our society and both public and the state are interested in its stability. Once marital status of the parties is proved, then interest of the society as well as that of state requires that, so far as possible, such status should have some permanency in its character, for, on this depends the structure of our society on which in turn would depend good citizenship. Tolerant behaviour among the family members is thus the basic foundation on which happy family life can be founded and the parties must adopt an attitude of give and take and of mutual adjustment. The normal wear and tear and stresses and strain of a matrimonial home are notorious, but sensible and properly educated spouses always rough them in a

disciplined manner both for their own sake and in the interest of their progeny. Neither a woman is to be treated as a slave nor is the husband to be deprived of a home and a house-wife. They both owe a social duty towards each other and towards their offsprings which nature and God have entrusted to their care to be brought up with their co-operative joint efforts. The basic requirement of indispensable tolerance and mutual understanding in matrimonial life is unfortunately not sufficiently realised by many spouses in modern times; normally constituted spouses properly educated with healthy mental outlook are expected not to make mountain out of mole hills nor to magnify small differences and bickerings. 4

In a welfare state, state is interfering in every aspect of human life. The old concepts of marriage have changed with the passage of time. A number of matrimonial laws have been passed to regulate marital relationship. The marriage under Hindu and Christian laws has ceased to be a sacramental and indissoluble union. In the context of industrialised societies and the resulting increase in social awareness amongst the people, especially the female, about their rights to equality and personal liberty, the stability in marital relationship cannot be maintained through adopting an extreme rigid attitude of making marriages indissoluble. Indissoluble marriages are also responsible, to a greater extent, for the atrocities against women. The indissolubility of a marriage is no guarantee for its stability. Stability of marriage does not simply mean enduring marital relationship but essentially imply the continuance of a happy, congenial, cordial and

harmonious relationship between the spouses. Stability can not be ensured only through legal sanctions. It can be ensured through creating an atmosphere of mutual fidelity, confidence and understanding. Derett has very aptly pointed out in his book 'A Critique of Hindu Law' that, in a marriage when the love flies out of the window, the solicitor enters through the door. So the fundamental basis of any marriage under any system is mutual trust, mutual caring, mutual sharing, mutual love and affection, and also a concern for mutual rights and obligations. So, where there is an imbalance between the rights and the obligations, the problems would certainly arise in marital relationship.

Thus, for help of aggrieved spouses, the matrimonial remedies of divorce and judicial separation, Restitution of Conjugal Rights etc. are provided under different personal laws. The various grounds of divorce are available to the spouses. But the matrimonial remedies are not meant to undermine the stability of marriages and families in India. Divorce is granted by the courts only when the parties can't pull on together. If a home has become an arena of bouts, it can't serve any social purpose. If a marriage has broken down completely then and there is no use of retaining an empty shell. A duty has also been imposed the courts to strive for reconciliation if any matrimonial remedy is sought by the spouses. Although the trial court is to endeavour for reconciliation, yet the appellate court has also to observe the procedure while disposing of appeals. N. Srinivasa Rau, J. of Mysore High Court observed:

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5. See Section 34 of the Special Marriage Act, 1954.
Section 45 of the Indian Divorce Act, 1869.
Section 23(2) of the Hindu Marriage Act, 1955.
"If no endeavour had been made by the court (trial court) it will undoubtedly be a serious omission which has to be taken into account. But it cannot affect the jurisdiction of the court to try the case. It also follows that, as it is the constant duty of the court to bring about a reconciliation, such efforts are not only open to appellate court or courts but that it is appropriate that those courts also should make the endeavour.\(^6\)

Thus, the courts takes a realistic approach to avoid hasty dissolution of marriage and all the surrounding facts are taken into consideration. In Tripathi v. Tripathi\(^7\) a decree of judicial separation was refused, since the parties had lived as husband and wife for seventeen years. Mr. M.P. Mehrotra, J., sagely said:

"In the filed of matrimonial relationship a purely mechanistic and formal approach is not called for.\(^8\)

Thus, inspite of recognition of divorce, the divorce laws have not been liberalised enough in India. However, the position is totally different in other western countries, where the very institution of marriage is in danger due to increasing number of divorces.

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7. (1975) ALJ 162.
8. Ibid., p. 166.
An important report of U.N. points out:

Materialism coupled with erosion of moral values in holding its sway whereas marital ethics are totally in disarray. The liberalisation of divorce laws is in no way a comprehensive solution of the potential and alarming problems because the growing demand for termination of lawful marriage has presented a very serious situation in countries which have liberalised their divorce laws.9

It is further highlighted that:

It is rather encouraging unlawful cohabitation and posing a serious threat to the institution of marriage. In many countries it has assumed such an alarming dimension that it is becoming a compelling ground for the courts to recognise it as de-facto marriage.10

Thus, safeguards against improper or casual use of the facility of divorce are as significant as is the felt necessity to liberalise laws in cases of extreme breakdown. The fact has been well emphasised by Mr. Justice Chandrachud (as he then was), in Dastane v. Dastane11

"Acts of a spouses which are calculated to impair the integrity of a marital union have a social significance. To marry or not to


11. AIR 1975 SC 1534.
marry and so whom, may be a private affair but the freedom to break a marital tie is not. The society has a stake in the institution of marriage".12

However, he circumscribed the role of the court and observed:

"Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court. To Philosophise on the modalities of married life."13

Further, in all civilised groups some rights and obligations of one spouse towards the other have been recognised both by law and morality or religion. Recognition of marital rights and duties in its logical sequence entitles the claim to parties to a marriage for the enforcement of the same. The right to conjugal company and cohabitation is inherent in the institution of marriage. If one spouse withdraws from conjugal company of the other or is not willing to perform the obligations imposed by law or marriage, the aggrieved spouse may file a suit to seek Restitution of Conjugal Rights. This is the only positive remedy which aims at reconciliation of the spouses to remain together under the marital relationship.

According to Raj Kumari Agrawala:

"In the award of matrimonial reliefs two lines of thought are basic. One is to afford

12. Ibid 1540.
13. Ibid 1541.
protection to the innocent spouse whose right is violated, the other is to punish the guilty or the offending spouse. The difference is really one of emphasis on protection or punishments; neither is sought to be excluded. In reality these remedies are allowed by law neither as a punishment to the offending spouse or as a favour to the innocent one law recognises them because law is process of social control to promote harmony in the society.  

The term 'Conjugal Rights' denotes a peculiar type of cluster of obligations inherent in the institution of marriage. In wider sense the term denotes conjugal comfort, love and affection, mutual obligations and right to 'cohabitation' and 'consortium'. The remedy for restitution aims at restoring all important elements in a marital life, so that the stability of marriage institution may not be in danger.

I OBJECT OF STUDY

Law and society are closely linked. Law must serve the needs of the society. If it does not serve any social purpose it becomes redundant and fossilised. A very cautious approach is needed when a law or a remedy is capable of being misused by the mechanisations of human beings.

The remedy for restitution of conjugal rights, aiming at the stability of marital ties, was adopted from Jewish Law to English Law and to Indian Laws during the period of British

Administration. It is obvious that neither the Dharamshastras recognised it nor did the Muslim Law givers made any provision for it. The remedy was made available to different religious communities through judicial decisions. However, the peculiar feature is that it has been abolished in England from where it was borrowed. Section 20 of the Matrimonial proceedings and Property Act, 1970, has abolished the remedy from English Law.

Though, the remedy is positive in nature but the real implications of the remedy are to be taken into consideration. Further, it must not be forgotten that the ties between the spouses are strong but the relations are equally delicate. Mutual understanding, respect and self realisations are the prevailing characteristics of this unit and seldom there is a scope for puzzles. Perplexing problems are seriously viewed and the intervening figure can never influence the mind to change the opinion. There are grave doubts about the efficacy of the remedy in modern era, where right to Privacy and Human Dignity are duly recognised and respected.

There is large gulf between the so called educated class and that of uneducated rural masses among different communities. It is to be observed how far Indian masses would accept ‘punishment’ in good spirits and set the things rights. Human mind is emotional and may not welcome external ‘violences’. The decree for restitution is meant to compel one spouse to provide conjugal company to the other spouse. Can the ruffled feelings of the spouse be cooled down just by passing of the decree? Can there be any meaningful external compulsion which can serve any purpose in a marriage tie? This is an important question which should be given thorough consideration. Though the remedy is positive in nature and
aims at reconciliation; yet it must be kept in mind that the court is not a work shop and the human mind is not a machine. We are to examine:

Can the adversary procedure followed by the courts in restitution proceedings either by compromising the matter or by decreeing the application bring any change in the attitude of contending parties to arrive at reconciliation?

It is also pointed out that:

Persuasion by either of the parties, in confidence, may at times reconcile the spouses but external intervention may stimulate the sub-conscious feelings and lead to spurious results.¹⁵

The provision may speak of progressive outlook but we are to examine the effects of the remedy in actual life. It is too difficult to set apart the 'private' and 'public' spheres in the institution of marriage though the institution is both public and private in nature.

The decree for restitution of conjugal rights is not capable of being specifically enforced and as such the respondent cannot be compelled to live or co-habit with the petitioner. These are only financial sanctions to enforce it and there is no compulsory measure to force the parties to

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come together, even after the decree. This aspects for examination remains.

How far is it possible to achieve the re-union of mind with compulsion?

It is difficult to believe that the person who has gone out of the conjugal society with or without reasonable excuse, would return with sportive spirit, after accepting a defeat in the legal battle. In many cases restitution proceedings have become rehearsals for the main drama leading to dissolution of marital ties. The remedy has grave legal and social implications under different personal laws. Instead of reconciliation of the spouse, it can be manipulated for other sinister purposes. For instance, non compliance of the decree for restitution of conjugal rights for a period of one year or more matures into a ground for divorce under Section 13 1 A (ii) of the Hindu Marriage Act.

When the provisions of restitution of restitution of conjugal rights in the Special Marriage Bill and the Hindu Marriage and Divorce Bill were debated in parliament, many members raised their voices against the desirability of the remedy.
J.B. Kripalani said:

This provision was physically undesirable, morally unwanted and aesthetically disgusting...16

Prof. Derrett suggests some special use of the remedy for Hindu Society. He says:

"The practical utility of the remedy is little in contemporary England, but in India where spouses separate at times due to misunderstanding, failure of mutual communication or the intrigues of relatives, the remedy of restitution is still of considerable value".17

He believes that the moral qualities of Hindu spouses will, give a chance, reconcile them to the shortcomings of their partners, whom they have after all deserved through their merits or demerits in previous births.18

The experiences in the Indian context and specially about Hindu Marriages have proved otherwise and it is difficult to agree to what learned Professor Derrett says:

Even according to R.K. Agrawala, optimism of Derrett

regarding the utility of this remedy in the Hindu society in rather well meant wishful thinking than a considered conclusion.\(^{19}\)

Thus, a strong debate has started in the judicial and academic circles regarding the use and efficacy of the remedy. The voices are being raised to abolish the provisions for the remedy.

Thus, the object of the study is to examine the various aspects of the remedy under different personal laws. A comparative study of judicial trends and other related aspects of the remedy becomes imperative to arrive at some conclusion. The conflicting decisions of Delhi\(^{20}\) and Andhra Pradesh\(^{21}\) High Courts have added new dimensions to the controversy. It is submitted that all controversial questions, concepts and aspects have been critically analysed under various chapters with the help of relevant case laws. Suggestions have also been made at various places. The study will be helpful in generalising laws and in making suggestions in this regard.

II PROVINCE OF THE REMEDY

The remedy for Restitution of Conjugal Rights is available to both the spouses under different personal laws. As the nature of marriage differ under different personal laws, there are different aftereffects of the remedy. Further, the availability of a remedy is not sufficient for its use by

a particular group or a Section of the society. Though there is equality before law and equal protection of law, yet the women still suffer from many disabilities. Thus, the various matrimonial remedies are being misused to the disadvantage of women. True, we have social justice guaranteed categorically in horative clauses of Constitution, which when matched with realities, remind one of Tolstoy’s words:

"The abolition of slavery has gone on for a long time. Rome abolished slavery, America abolished it, and we did, but only the words were abolished, not the thing."

Justice Choudhary’s remarks are most pertinent to be quoted:

"A decree for Restitutions of Conjugal Rights denies the wife her free choice whether, when and how her body is to become the vehicle for the procreation of another human being." 22

Thus, the correlation between status of women and matrimonial remedies needs proper examinations. The remedies are of little use unless and until the women are aware of their rights. Regarding the position of women in the society, Dr. Ranbir Singh rightly points out:

"It is not that there are not enough laws in India for the protection of women. Most of the laws are in a state of suspended animation. The laws are observed more in the breach than in observance. In reality the picture is not as rosy as is sometimes

22. Ibid., p. 367.
painted. Despite fundamental rights and Directive principles of state policy, even after 47 years of independence, women are discriminated against—socially, economically and politically.\(^\text{23}\)

The study of historical development of remedy, the religious philosophies of different communities, the changing concepts of Marriage stability and its rationale under personal laws are within the scope of present study. Further its aftereffects on spouses vis-a-vis fundamental rights also need proper scrutiny. It is to be examine whether the remedy is violative of right to equality, right to private privacy and human dignity and right to freedoms guaranteed in Part III of the Constitution. The desirability of the remedy under the old laws and its socio-legal implications under the modern laws are to be relevantly considered. The concept of 'Matrimonial Home' is to be judged in the light of changes in the society. Further the new trend in the interpretation of marriage laws reflects the social awareness that a woman has an independent status of her own and is not to be treated as an appendage of her husband. The wife have now come to be recognised as an equal partner in life, which is not surprising in view of changing of our society. Women are coming out of homes and different fields of life are open for them. The new trends in marriage laws has also contributed to the stability of marital ties. All these aspects are included with in the province of the study, so that the matter may be thoroughly examined.

\(^{23}\) Ranbir Singh, Dean Faculty of Law, M.D. University, Rohtak in his paper, 'Gender Justice and Human Rights - A frazile Myth' presented at LAW ASIA Conference, Beijing (China) from 16th to 20 Aug., 1995.
III SOCIO-LEGAL EFFECTS

A decree is not without any effect. The effects of a decree are generally apparent and within the contemplation of the parties. However, sometimes the effects are of such a nature which can’t be anticipated by the innocent parties. The remedy for restitution of conjugal rights has grave socio-legal implications. The remedy of restitution is based on the notion that by the fact of marriage, husband and wife are entitled to the society of each other. The nuptial vow suggests that each party is to associate with the other after passing of decree by court. However, restitution is not an absolute law and in undeserving cases claims for remedy may fail. The decree is capable of being misused for ulterior purposes particularly by the husband. Further, the implications are generally against the interest of women. The husband is least affected by compliance or non-compliance of the decree. The socio-legal effects of the remedy are to be examined in detail under different personal laws.

IV SCHEME OF THE STUDY

The whole study has been divided into nine chapters.

Chapter I relates to Introduction. The importance of stability of the marriage institution has been emphasised. The object of study, province of study and socio-legal aspect of remedy are discussed in this chapter.

Chapter II explains the changing concept of marriage stability. The marriage, as a social institution, is given importance in every civilised society. However, like other
social concepts, the nature of marriage varies under different personal laws. Marriage as a prime social institution is devoid of any exact definition. The old concepts of marriage have also undergone sea change with the changes in the society. The final blow has been given to the sacramental concepts of Hindu and Christian marriages. To help the aggrieved spouses, various matrimonial remedies are available under different personal laws. Though divorce is recognised, yet the emphasis is still on the stability of marital ties. The remedy for restitution of conjugal rights is also meant for the stability of marital ties. The various aspects relating to marriage stability are discussed in this chapter.

Chapter III deals with the historical development of the remedy in Jewish and English Laws. The incorporation of the remedy under different personal laws has been given in detail. The meanings of the terms 'conjugal rights', 'cohabitation' and 'consortium' have been explained in detail. The history relating to the codification of the remedy under Hindu law has also been discussed.

Chapter IV relates to the changing status of women and matrimonial remedies. The changing status of the Hindu, Muslim, Christian and Parsi women through ages has been discussed. The Constitutional safeguards and other welfare legislations for the benefit of women have been discussed in detail. The anomalies, disparities and discriminatory provisions against women in existing laws are discussed in detail. The co-relationship, between status of woman and matrimonial remedies is also highlighted in detail.
Chapter V relates to the study of the remedy under Hindu Law. Section 9 of the Hindu Marriage Act is analysed to find the essential requirements to seek the remedy. The concept of 'Matrimonial Home' under English Law has been discussed to examine present position under Hindu Law. What amounts to reasonable excuse has been discussed in detail with the help of case law. The corelationship between Sections 9 and 13 I A has been explained. The application of Section 23 (I) (a) under Section 13 (I) A(ii) has also been discussed. The judicial trends of petitions by husband and wife have been discussed separately to judge efficacy of the petitions. The controversy relating to Constitution validity of Section 9 has also been discussed along with the rationale of the remedy under Hindu law.

Chapter VI deals with the remedy under Muslim, Christian and Parsi Laws. The chapter has been divided into three parts. Part I, relates to the remedy under Muslim Law. The incorporation of the remedy, nature of suits, the essential requirements to seek the remedy and judicial trends are given in detail. The Islamic Religious philosophy has been explained to judge the rationale of the remedy under Muslim Law.

Part II of the chapter, relates to Christian Law. The basis of the remedy, statutory provisions of the remedy, essential conditions to seek remedy, judicial trend of the cases and rationale of remedy etc. are discussed in detail.

Part III relates Parsi Law. The religious doctrine of Parsis and basis of the remedy are explained in detail. The statutory provisions of the remedy, requirements to seek remedy, judicial trends and the rationale of the remedy, are discussed
in detail. The concluding observations are also given regarding efficacy of the remedy.

Chapter VII deals with restitution of conjugal rights vis-à-vis fundamental rights. The nature of personal laws and the different. Judicial observations on the validity of Section 9 are given in detail. The effects of the decree for Restitution of Conjugal Rights on Articles 14,19,21 and 23 of the Constitution have been discussed in detail. The development of the Right to privacy in U.S.A., England and India has been explained in detail.

Chapter VIII relates the socio-legal implications of the remedy under different personal laws. These implications are generally against the legal and social interest of the women. The implications are different under personal laws, so the same have been discussed separately.

Chapter IX deals with conclusions and suggestion. The chapter has been divided into I and II parts. The first part relates to the conclusions of the study. The reasons for arriving at the conclusion are given in detail. In the second part of the chapter some humble suggestions are given. The necessary implications of the suggestions is also given to authenticate the study.