



## Property, Contract, and Consent: The Economic Foundations of Conjugal Rights Doctrine in European Legal History and Its Disintegration Under 20th Century Human Rights Frameworks

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### **Abstract**

*This paper explores the evolution and eventual decline of the doctrine of conjugal rights in European legal history. It views this history primarily through the intersecting lenses of property, contract, and consent. Historically, the restitution of conjugal rights was a legal mechanism administered initially by ecclesiastical courts and later by secular tribunals. It allowed one spouse to demand the physical return of a partner who had left the marital home without a legally recognised excuse. Grounded deeply in the common law doctrine of “coverture,” this legal remedy viewed marriage not merely as a spiritual or emotional bond, but as a binding economic and contractual arrangement. Within this framework, legal identities merged in a way that heavily favoured patriarchal structures and household economic stability. As the twentieth century progressed, the rise of international human rights frameworks profoundly challenged these historical notions. Driven by evolving legal standards of individual dignity, bodily autonomy, and equality championed by instruments like the European Convention on Human Rights and the Convention on the Elimination of All Forms of Discrimination against Women, the doctrine lost its legitimacy. The forced enforcement of intimacy became irreconcilable with modern understandings of continuing consent. Consequently, this remedy was abolished across multiple European and common law jurisdictions. This paper asserts that the disintegration of this doctrine was not merely a procedural legal update. It was, rather, a foundational shift in how the state and the law interact with the institution of marriage and the individuals within it.*

**Keywords:** Marriage, Restitution of Conjugal Rights, Coverture, Property Law, Contractual Consent, Human Rights, European Legal History, Bodily Autonomy, Socio-Legal Studies.

### **1. Introduction**

The institution of marriage has long operated in two different worlds at once. It is, of course, a private bond of affection and companionship. Yet it has also always been a public structure, deeply embedded in social and economic regulation. For centuries, European legal thought did not see marriage just as a personal relationship. It was the bedrock of society. It decided where people lived, how labour was divided, and who legally inherited wealth. Because marriage did so much heavy lifting for the economy and social order, the law rarely viewed separation as a private issue. When a marriage broke down, early legal systems saw it as a collapse of a vital economic and structural unit. This is exactly why the doctrine of conjugal rights was born.<sup>1</sup>The doctrine operated on a simple, rigid presumption: marriage created strict obligations that the

law could enforce by compulsion. If a husband or wife left the family home without a legally acceptable excuse, courts had the power to step in and demand their return. In public, the law often justified this using elevated language. It spoke of sacred vows, moral duty, and the spiritual union of marriage. However, beneath this rhetoric, the true logic was intensely practical and economic. The family home was viewed as a productive enterprise. If a spouse walked out, they were breaking a recognised legal and financial arrangement. The state believed it had a fundamental duty to hold that arrangement together to prevent broader social instability.<sup>2</sup>This paper suggests that to understand the doctrine of conjugal rights fully, we must look at how heavily it borrowed from property and contract law. A marriage was not the same as buying a piece of land or signing a commercial lease. The law never openly called a wife or a husband a piece of physical property. However, it treated the components of a marriage living together, helping run the home, and sexual intimacy as if they were legal rights that one person held over another. If those rights were denied, a person could go to court, sue, and have state power restore what they were "owed."<sup>3</sup>We can also see the influence of contract law in how marriages began and were governed. Like a contract, it required initial consent. But unlike a business contract, which parties can usually renegotiate or cancel, the marriage contract was nearly impossible to undo. The law assumed that consenting to marry meant consenting forever. Therefore, leaving the home was treated as a breach of contract that a judge could order a party to fulfill. The property logic was even deeper. The doctrine treated human companionship and domestic labour as things that could be claimed and recovered. By allowing a spouse to sue for the "restitution" of conjugal rights, the state turned intimate human relationships into assets that could be repossessed by judicial order. This approach treated the household not as a place of mutual choice, but as a rigid hierarchy maintained by the continuous threat of legal action.

For hundreds of years, this legal framework held firm. It survived because it aligned perfectly with a society that valued social control, economic stability, and patriarchal authority over individual freedom. The doctrine of conjugal rights made sense in a world that did not prioritise equality within the home. However, this centuries-old system eventually encountered an insurmountable challenge. In the twentieth century, the rise of human rights paradigms completely transformed the language and priorities of legal reasoning. Following the devastating events of the mid-century, international law began to focus intensely on human dignity as the supreme value. New frameworks, like the European Convention on Human Rights, began to centralise personal liberty and the absolute right to privacy. Later agreements heavily championed gender equality and bodily autonomy.<sup>4</sup>These new legal ideas fundamentally clashed with the old marital doctrines. Human rights law demanded that consent must be continuous and revocable. The idea that a person permanently signed away their right to choose who they lived with or slept with simply by getting married became legally and morally unacceptable. If dignity and equality are the highest legal values, then the state cannot force a man or a woman back into a home they wish to leave. Because of this monumental shift in legal philosophy, the forced restitution of marital life became impossible to justify. The old doctrine was exposed as a coercive misuse of state power.<sup>5</sup>Recognising this, jurisdictions across Europe and the common law world began to abolish the action for the restitution of conjugal rights. It was discarded not just as outdated, but as a fundamental violation of basic freedoms. The doctrine disintegrated entirely, leaving behind a modern family law system that looks very different. Today, courts still regulate marriage and divorce, but the goal is no longer to forcefully maintain physical proximity between unwilling parties. Modern law focuses on untangling the economic fallout of separation, ensuring fair financial division, and protecting the welfare of children. The law finally accepted that while it can

divide bank accounts and distribute property, it cannot use a judge's order to manufacture a marriage.

## **2. Historical Foundations: Ecclesiastical Courts and Coverture**

### **2.1 The Origins of Ecclesiastical Jurisdiction Over Marriage**

To fully comprehend the doctrine of conjugal rights, it must be situated within the broader context of early modern European family law. Marriage, in the medieval European world, was not primarily a civil or secular institution. It was a sacrament. The Catholic Church claimed exclusive jurisdiction over all matters relating to marriage its formation, its validity, and its continuation. This jurisdictional monopoly gave the ecclesiastical courts enormous power over the intimate lives of ordinary people across the length and breadth of Europe, from the most remote agricultural village to the grandest royal court. The Church's legal position was theologically grounded. Drawing on Pauline theology and later systematised by canonical scholars such as Gratian in his twelfth-century *Decretum*, the Church taught that a valid marriage created an indissoluble bond. The parties to a marriage were bound to one another not merely by social convention or economic arrangement, but by a sacramental tie that no human authority could sever. This theological foundation had immensely practical consequences. Because marriage was indissoluble, a spouse who abandoned the matrimonial home could not simply begin a new life elsewhere. The Church insisted that the deserting spouse return to cohabitation, and it backed this demand with the full weight of its spiritual authority.<sup>7</sup>The action for the restitution of conjugal rights was, in this early form, a petition to the bishop's court the consistory court asking a judge to issue a formal order directing an absent spouse to return. The petitioner might be a husband whose wife had left the family home, or occasionally a wife whose husband had refused to live with her. The absent spouse would be summoned, given an opportunity to raise defences, and if none were accepted, commanded to return. If the absent spouse defied the court order, the ultimate sanction was excommunication exclusion from the sacraments, from the community of the faithful, and, in a world where social life was inseparable from religious life, from society itself. This was an extraordinarily powerful threat in a deeply religious culture. Excommunication was not merely a spiritual penalty. It carried with it social stigma, economic disadvantage, and in some cases legal disabilities. The ecclesiastical courts thus wielded real coercive power through spiritual means.

### **2.2 The Doctrine of Coverture and Its Legal Architecture**

Within this ecclesiastical framework, the broader doctrine of coverture provided the legal architecture that gave the conjugal rights action its distinctive shape and its lasting power. Coverture was a cornerstone of English common law, though its roots run deeper into the feudal customs of Norman and pre-Norman Europe. It dictated that upon marriage, a woman's separate legal identity was entirely absorbed into that of her husband. Sir William Blackstone articulated this principle with characteristic clarity in his *Commentaries on the Laws of England*, first published in 1765. He observed that the husband and wife are, in the eyes of the law, one person and that person is the husband. The very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything.<sup>8</sup>The consequences of this legal merger were sweeping and deeply practical. A married woman could not independently own real property. Any property she brought into the marriage or inherited

during it passed immediately into her husband's control. She could not enter into contracts in her own name. She could not sue or be sued without her husband as a co-party. She could not keep her own earnings. She could not make a valid will without his consent. In every meaningful legal sense, she ceased to exist as a separate person. She became what Blackstone's phrase "feme covert" literally describes a covered or hidden woman, sheltered beneath the legal identity of her husband. This was not merely an English peculiarity. Variants of coverture doctrine operated across continental Europe, with local variations in the degree of its application. In France, the Civil Code of 1804 the Napoleonic Code formally codified the incapacity of married women, providing that a wife owed obedience to her husband and could not engage in legal acts without his authorisation. German customary law recognised the concept of the *Geschlechtsvormundschaft* the guardianship of a woman's legal affairs by her male relatives, which passed to her husband upon marriage. Across Catholic Europe, canon law reinforced these civil law disabilities by teaching that the husband was the head of the family in spiritual as well as temporal matters, and that the wife's primary duty was submission and obedience.

### **2.3 Coverture and the Conjugal Rights Action: The Practical Connection**

Within this framework of coverture, the action for the restitution of conjugal rights served a function that was simultaneously punitive, regulatory, and economic. Since a married woman had no independent legal identity, she had no legal right to leave. Walking out of the matrimonial home was not simply a personal choice it was a legal transgression. She was, in legal terms, abandoning a status and a set of obligations that the law had imposed upon her, and to which the law would hold her.<sup>9</sup>The petitioning husband was not merely asking the court to compel his wife's return on sentimental grounds. He was asking the court to protect his legal rights his right to her domestic labour, to her management of the household, and to sexual access. These were not regarded as merely personal interests. They were treated as legally cognisable claims, enforceable at law in the same way as any other legal right. The court was not being asked to save a marriage in any emotional or pastoral sense. It was being asked to enforce a legal arrangement that the absent spouse had breached.

The economic dimension here is crucial and deserves emphasis. The medieval and early modern household was not merely a site of emotional life. It was a unit of production. In agrarian economies, the household produced food, textiles, and other goods. It managed land and livestock. It raised children who would become the next generation of agricultural labourers. The wife's domestic labour was, in the most literal sense, economically indispensable. Her departure disrupted not merely the emotional life of the family but its productive capacity. The action for conjugal rights thus protected an economic as much as an emotional interest.

### **2.4 The Secularisation of the Doctrine: The Matrimonial Causes Act 1857**

The mid-nineteenth century brought massive institutional changes to the administration of family law in England, and by extension to the law of conjugal rights. The passing of the Matrimonial Causes Act 1857 was a watershed moment. It transferred jurisdiction over matrimonial matters including the action for the restitution of conjugal rights from the ecclesiastical courts to newly established secular civil courts, specifically the Court for Divorce and Matrimonial Causes. This transfer reflected the broader secularisation of English public life and the growing conviction that matters of civil status should be governed by civil, not

religious, authority.<sup>10</sup> However, despite this dramatic change in institutional setting, the fundamental premise of the doctrine remained entirely unchanged. The new secular courts continued to issue orders compelling absent spouses to return to the matrimonial home. The language of the courts shifted from spiritual obligation to civil duty, but the content of the order was identical. The coercive logic was preserved intact only the institution administering it had changed. The spiritual sanction of excommunication was replaced by secular sanctions: initially, imprisonment for contempt of court if the absent spouse defied the order, and later, as Parliament grew uneasy with the spectacle of imprisoning people for refusing to live with their spouses, the automatic grant of a decree of judicial separation. This evolution in sanctions is itself revealing. The shift from imprisonment to financial and status-based consequences reflects a gradual, incremental discomfort with the most coercive aspects of the doctrine. Legislators and judges began to recognise, at some level, that physically forcing a person back into a home they had left was an exercise of state power that required justification. That recognition was tentative and incomplete in the nineteenth century. It would take the full force of the twentieth-century human rights revolution to make it definitive.

## **2.5 Social Functions of the Doctrine: Class, Gender, and Social Order**

It is important to understand that the doctrine of conjugal rights did not operate in a social vacuum. Its enforcement patterns were deeply shaped by class, gender, and the social anxieties of each era. In practice, it was more commonly deployed by husbands against wives than the reverse, reflecting the underlying asymmetry of coverture. A husband who left the matrimonial home had, in a sense, already exercised the mobility and autonomy that the legal system reserved for men. A wife who left was transgressing not merely her legal duties but the entire social script that assigned her identity to the domestic sphere.

The doctrine also served as a mechanism for reinforcing class-based social order. For propertied families, it protected the integrity of dynastic arrangements marriages contracted not merely for personal reasons but for the consolidation of estates, the management of inheritance, and the alliance of families. For working-class families, it served a different but related function: ensuring the stability of the household as a unit of labour reproduction, keeping together the domestic arrangements on which economic survival depended. In both cases, individual freedom particularly the freedom of women was subordinated to structural interests that the law was explicitly designed to protect.<sup>11</sup> This class dimension also affected access to the courts. The ecclesiastical courts were expensive to litigate in, and the wealthier classes used them far more than the poor.<sup>17</sup> The secularisation of 1857 did not fully democratise access to matrimonial remedies. The costs of legal proceedings remained prohibitive for many working-class litigants. This meant that for much of its history, the action for the restitution of conjugal rights was in practice a remedy available primarily to those with sufficient resources to use it another dimension of its function as a tool for maintaining established hierarchies rather than protecting universal rights.

## **3. Property, Contract, and the Marital Economy**

The economic scaffolding of the conjugal rights doctrine can be best analysed through the twin legal pillars of contract and property law. Both areas of law deal with expectations, obligations, and state enforcement. Contract law, at its core, requires mutual consent, clear terms, and a binding exchange of value. In historical family law, marriage heavily mirrored this structure at



its inception. A valid marriage required the initial, free consent of both parties. However, a marital contract differed vastly from a commercial one. Unlike a commercial contract that could be renegotiated, modified, or mutually dissolved, the initial consent to marry locked the individuals into a rigid, state-mandated status. As legal historian Henry Sumner Maine observed, progressive societies move from "status to contract." Yet, marriage remained stubbornly rooted in status. The law assumed that the singular moment of agreement at the altar authorised a perpetual legal structure.<sup>16</sup> Thus, abandoning the marital home was litigated as a breach of an ongoing, unbreakable contract. This justified state intervention to compel performance.<sup>12</sup> The influence of property law was perhaps more insidious. Economic property rights are defined by authority, control, and the right to exclude or reclaim. When these concepts bled into family law, intimate human relations were subtly transformed into reclaimable assets. The law developed the concept of "consortium" the right of one spouse to the company, affection, and assistance of the other. The action for restitution of conjugal rights operated on a distinctly property-like logic to protect this consortium. It operated on the presumption that one spouse held an enforceable legal claim over the physical presence, companionship, and domestic labour of the other. The court's role was akin to returning stolen property. It sought to restore the marital "asset" to its rightful place.<sup>15</sup> Modern European law still acknowledges the economic nature of marriage. Today, spouses routinely negotiate matrimonial property regimes through prenuptial and postnuptial agreements. However, there is a vast conceptual gulf between dividing financial assets upon separation and employing state police power to physically force two adults to live together. It is in this exact gulf that the old doctrine eventually faltered. Financial arrangements are quantifiable, divisible, and regulatable. Human intimacy is none of these things. By attempting to command physical proximity and affection, the conjugal rights doctrine confused the economic scaffolding of marriage with its deeply personal core. This fundamental error set the stage for its eventual rejection.

#### **4. The Human Rights Turn and the Requirement of Consent**

The mid-to-late twentieth century witnessed a radical shift in the moral and philosophical language of the law. The catastrophic human rights abuses of the Second World War prompted the international community to draft robust frameworks that prioritised individual dignity over institutional preservation. Documents such as the European Convention on Human Rights, drafted in the 1950s, began to elevate the right to privacy, family life, and bodily autonomy to the status of fundamental law. Article 8 of the Convention guaranteeing respect for private and family life and Article 12 the right to marry together created a framework within which the idea of legally commanded cohabitation became increasingly difficult to defend. Later, the Convention on the Elimination of All Forms of Discrimination against Women in 1979 aggressively dismantled the remaining vestiges of coverture. It demanded absolute equality within the private sphere of the family, recognising that women had historically borne the overwhelming burden of coercive family laws. This human rights turn fundamentally altered the legal understanding of consent. Under the older contractual model of marriage, consent was a singular, historical event. You consented on your wedding day, and the state enforced that consent forever thereafter. Human rights law demanded a total re-evaluation.<sup>14</sup> It posited that consent in intimate relations must be continuous, meaningful, freely given, and instantly revocable. A person does not sign away their bodily autonomy or their right to privacy simply by entering a marriage. This conceptual shift was monumental. It meant that the state could no longer view marriage as a black box of private

authority where individual rights were suspended indefinitely. Modern jurisprudence reflects this consistently. The European Court of Human Rights established clearly that consent to marriage absolutely cannot imply irreversible consent to future sexual or cohabitational relations. As equality and dignity solidified as supreme constitutional values, the restitution of conjugal rights was exposed for what it was not a romantic effort to save a family, but an oppressive misuse of state coercion.

## **5. The Disintegration of the Doctrine**

Recognising this irreconcilable conflict, European and common law jurisdictions systematically dismantled the doctrine in the latter half of the twentieth century. The shift was not accidental; it was the result of changing social mores and rigorous legal advocacy. In England, the tide turned definitively in the late 1960s. Following a highly critical Law Commission report that deemed the remedy outdated and offensive to personal dignity, the action was formally abolished by the Matrimonial Proceedings and Property Act 1970. The lawmakers recognised that a court order could not manufacture affection or restore what was already irretrievably broken. Similar legislative developments occurred across the common law world. Australia eliminated the remedy through its sweeping Family Law Act 1975, which simultaneously introduced no-fault divorce. Scotland abolished the action in 1984, and Ireland followed through the Family Law Act 1988. These abolitions were not merely procedural housekeeping. They represented a profound philosophical pivot away from state-enforced intimacy and toward a model of family law grounded in individual rights and voluntary association.<sup>13</sup> However, the disintegration of the conjugal rights doctrine does not imply that the state completely withdrew from regulating marriage. Family law remains a highly active and heavily legislated area of civil law.<sup>18</sup> What has changed is its methodology and its core objectives. Modern family courts focus heavily on the equitable distribution of property, the awarding of spousal maintenance, and the welfare of children. The law now manages the economic and relational fallout of marital breakdown. It no longer attempts to forcefully prevent the breakdown itself.<sup>19</sup> The older doctrine erroneously believed that a judge's gavel could forge a marriage.<sup>20</sup> The contemporary legal framework concedes humility. It accepts that genuine marital life is entirely reliant on ongoing mutual consent, which no state coercion can create or sustain.

## **6. Conclusion**

The doctrine of the restitution of conjugal rights was born from a specific historical and legal ecology. It thrived in a society that viewed marriage primarily as an economic enterprise and a rigid structure of domestic authority. This environment was heavily influenced by the inequalities of coverture, where a wife's legal identity was erased and her labour, her person, and her future placed under the control of her husband. In this setting, the principles of property and contract provided the legal grammar necessary to treat human companionship, cohabitation, and sexual access as enforceable, reclaimable obligations. However, the advent of twentieth-century human rights frameworks exposed the fundamental flaws of this coercive approach. The modern legal consensus, driven by instruments like the European Convention on Human Rights, insists that individual dignity, privacy, and bodily autonomy remain fully intact within a marriage. Consent is now understood as a continuous, daily necessity, not a historical artifact of a wedding ceremony. The state's power to command intimate life has been permanently stripped away. The disintegration of the conjugal rights doctrine marks a



foundational evolution in European legal history signalling the transition of marriage from an unbreakable, state-enforced contract of servitude into a voluntary partnership, regulated respectfully by the boundaries of human freedom and individual dignity.

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