

EXAMINING THE REMEDY OF 'RESTITUTION OF CONJUGAL RIGHTS' UNDER HINDU LAW IN LIGHT OF GENDER JUSTICE AND CONSTITUTIONAL IMPERATIVES

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Abstract

Hindu law views marriage as an important rite. Since ancient times, there has been a strong cultural presumption that after marriage, a husband and wife become one. Instead, marriage is acknowledged as a necessary institution with legal safeguards in all major religions. However, this concept's only flaw was the antiquated prohibition on spouses suing one another. But as society advanced, complexity increased, and concepts like divorce, legal separation, and marital rights formed, it became imperative to formalise these laws governing marriage, with particular attention paid to Hindu weddings in this context. As a result, a spouse who left their partner had the option of filing a petition to reinstate their conjugal rights. It is a constructive remedy that requires cohabitation between the married parties under Section 9 of the Hindu Marriage Act, 1955. Under all matrimonial laws, marriage imposes specific marital responsibilities and grants the spouses certain legal rights. The problem, however, is that with society's rapid growth, the aforementioned rule is being questioned on the grounds of Privacy and Gender Justice. Restitution of Conjugal Rights has been criticised across common law countries, leading to its elimination in the UK, Australia, Ireland, and South Africa. This is because common law nations have gradually come to the realisation that the law must act in family problems and defend people's rights. In India too, it has been highlighted that the Restitution of Conjugal Rights is equivalent to the State using coercion to breach a person's sexual and decisional autonomy, infringing upon or violating that person's Right to Privacy. Thus, the purpose of this Article is to examine the present validity of the aforementioned law in the context of Gender Justice and Constitutional Imperatives, with a focus on the Right to Privacy.

Keywords: *Constitution, Gender Justice, Right to Privacy, Restitution of Conjugal Rights, Hindu Marriage.*

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1. INTRODUCTION

The importance of the institution of marriage for any country, society, community or religion is not unknown. Marriage and families are seen by sociologists as societal institutions that contribute to forming the fundamental component of social structure. Different cultures throughout the world may define and practise marriage and families in different ways. Like other institutions, families and marriages adjust to societal change.

Specifically, in a country like India, this institution plays a significant role in the overall establishment and development of not just families but nation at large. From all perspectives, be it sociological, philosophical or psychological, marriage has a prominent role to play since ages. The philosophical view of marriage is that partners should support one another's development both individually and jointly, whether it is in terms of finances, spirituality, or emotional well-being. The existence of any civilized society cannot be imagined without the bond of marriages. The institution of marriage provides for understanding one another and being willing to adapt for the other are key elements of a successful marriage.

It is noteworthy that Hindu marriage is an age-old custom that has survived from the Vedic era to the present, with several changes made along the way. Among the 16 sacraments of Shastri Hinduism, marriage is one of the most significant sacraments. The ideal marriage according to the ancient Indians is one in which the bride is ceremonially given to the bride-groom by her father or another suitable family member in order for them to fulfil the objectives of human life together. In this idea, the term "*vivaha*," which originally referred to the wedding ceremony but has come to signify marriage as a whole, is used to refer to reproduction and the beginning of a family (*ketumba*). One is thought to have entered the *grihastha ashrama*, the second stage of life, after being married and starting to take up domestic tasks.¹

However, the Hindu marriage has been diluted with the advent and introduction of Hindu Marriage Act of 1955 and relative laws. The provisions such as of Divorce and Judicial Separation, which is abhorrent to Hinduism, received the most criticism. Nonetheless, it is peculiar to note that under those laws, each party is granted particular legal rights, one of them is the relief via Restitution of Conjugal Rights². The Restitution of Conjugal Rights provision states that if either the husband or the wife ever failed or refused to fulfil the duties that were expected

¹ Marriage in Hinduism, available at: https://en.wikipedia.org/wiki/Marriage_in_Hinduism#cite_note-4 (last visited on: October 2, 2023).

² The Hindu Marriage Act 1955, s. 9.

of him or her without explanation, the aggrieved party may seek legal assistance from the appropriate district court. It is occasionally acknowledged as a marital cure as a result.

Restitution of conjugal rights might be used as leverage by a partner who is being abandoned by the other partner. The guilty spouse may be ordered by a court order to cohabit with the victim spouse. It is a process that is applied to divorce and marital cases in both religious tribunals and courts. It's a marital issue that the Christian courts have traditionally had jurisdiction over. Jewish law is the source of this idea, which was introduced to other common law nations under British authority. Infringing on their fundamental rights, wives were prohibited from leaving their husbands under British law since they were regarded as chattel. Several nations, including the UK, Ireland, Australia, and South Africa, have abolished the legal process for recovery of conjugal rights.³

Nevertheless, marriage is seen as a sacred institution and a vital aspect of life in Indian culture. Progressive marriage theories are still attempting to establish themselves in a culture where society and the law interact in a tortuous way. Restitution of conjugal rights is one remedy that still exists as the proprietary rights of husbands over their wives, despite the increasing shift away from the notion of women as mere chattel. When one of the spouses withdraws from the other's company "without any reasonable cause," restitution of conjugal rights takes place.

2. SECTION 9 OF THE HINDU MARRIAGE ACT

One sort of legal remedy offered to spouses in distress in the institution of marriage is the restoration of conjugal rights. Conjugal rights may be restored under Section 9 of the Hindu Marriage Act of 1955 (hereinafter referred to as the Act). According to this section of the Act, "When either the husband or the wife has, without reasonable justification, withdrew from the society of the other, the aggrieved party may apply, by petition to the District Court, for the restitution of conjugal rights and the court, upon being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights in accordance⁴."

The one who withdrew from the spouse's company bears the duty of proving a valid defence. Because the abuser usually leaves no evidence, scars occasionally fade, and bruises fade over

³ Restitution of Conjugal Rights: A Peril to Fundamental Rights in India, available at: <https://www.jurist.org/commentary/2023/01/khushi-gupta-and-vishakha-shakya-conjugal-rights-india-womens-rights/> (last visited on: October 2, 2023).

⁴ *Supra* note at 2.

time, it can be difficult to establish any kind of abuse. However, when the same savagery takes an emotional or mental turn, it becomes very hard to depict. How can a woman or husband prove that their partner is torturing them emotionally, starving them, or putting them down? Since these are hard to demonstrate, divorce is usually their only viable alternative.

3. CONSTITUTIONALITY: PRIVACY AND GENDER JUSTICE

It is significant to note that Section 9 of the Hindu Marriage Act of 1955 has had its constitutional validity contested on the basis that it breaches the right to privacy and personal liberty provided by Article 21 of the Indian Constitution. The claim is that it violates a person's physical autonomy and privacy to make them engage in sexual activity with their spouse against their consent.

However, the Supreme Court of India has repeatedly ruled that Section 9 is constitutionally legitimate. The Supreme Court held in *Saroj Rani v. Sudarshan Kumar Chadha*⁵ that the idea of restitution of conjugal rights is founded on the notion that marriage is a sacrament and it is the parties' obligation to live together. According to the court, Section 9 does not infringe on any basic rights, such as the right to privacy and the right to personal liberty. As a result, it may be said that Section 9 of the Hindu Marriage Act is still in effect and that the Supreme Court of India has affirmed its constitutional legitimacy⁶.

It should be highlighted that there is a claim that the wife's right to privacy is manifestly violated by the restoration of conjugal rights. The Supreme Court has ruled that the right to privacy "is an essential ingredient of personal liberty" in its ruling in *Kharak Singh v. State of UP*⁷. The court had to address the problem brought up in the *Kharak Singh* case once more in *Gobind v. State of M.P.*⁸. The Honourable Supreme Court determined in this decision that among other rights, the right to privacy is a part of the right to liberty.

The clause for the restoration of marital rights' legitimacy has repeatedly come under attack. Examining how the legal definition of privacy has evolved in this context and how it has impacted significant decisions like *T. Sareetha*⁹ and *Saroj Rani*¹⁰ on the restoration of marital

⁵ 1984 AIR 1562.

⁶ Restitution of Conjugal Rights (RCR) - Overview, available at: <https://vakilsearch.com/restitution-of-conjugal-rights> (last visited on: October 3, 2023).

⁷ AIR 1963 SC 1295.

⁸ (1975) 2 SCC 148.

⁹ *Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356.

¹⁰ *Saroj Rani v. Sudarshan Kumar Chadha*, 1984 AIR 1562.

rights is the key. The Andhra Pradesh High Court ruled in *Sareetha v. Venkata Subbaiah*¹¹ that Section 9 of Hindu Marriage Act, which grants the relief of restitution of conjugal rights (RCR), is unconstitutional because it infringes on both Articles 14 and 21 of the Constitution (Right to equality, the Right to privacy, Right to liberty).

In the aforesaid mentioned case, the husband submitted a request for Restitution of Conjugal Rights, and his well-known actress wife (Sareetha) responded opposing the request. According to the defence presented on behalf of the wife, a woman has the “right of free choice as to whether, where, and how her body is to be used for procreation of children, as well as the choice of when and by whom the various parts of her body are to be sensed” under the terms of the right to privacy. She has the freedom to make any decisions she wants. She claimed that this is guaranteed under Article 21 as a component of her “liberty.” By approving the remedy of recovery of conjugal rights under Section 9 of the Hindu Marriage Act, the State violates this basic right guaranteed by Article 21. Additionally, the remedy breaches Article 14 by treating individuals who are inherently unequal as equals by being accessible to both married men and married women.

In *Gobind Singh v. State of MP*¹², the Supreme Court of India further defined privacy as something that “preserves the intimate intimacies of the home, the family, marriage, motherhood, procreation, and child-rearing.” In accordance with this interpretation of the term “right to privacy,” a person’s home is a private area into which the law should not be applied. In *T. Sareetha*, the Andhra Pradesh High Court provided a more individualistic and forward-thinking view of privacy. According to the ruling, a person’s right to privacy belongs to them and is unrelated to whether or not they are married. Therefore, when this choice regarding whether to have marital relations is shifted from the wife to the state, there is a major violation of the woman’s right to privacy and bodily autonomy.

Although this clause is gender-neutral, it takes advantage of the fact that women in India still experience prejudice in society. For instance, dowry killings are still rampant in society, and women are routinely subjected to emotional and mental abuse and torture for dowry. As these weary and devastated wives leave their husband’s house, a decree of the return of conjugal rights is a noose around their necks. How can a lady who is already on the edge of breaking down be

¹¹ AIR 1983 AP 356.

¹² *Supra* note 8 at 5.

given permission to go back to the location where she was abused by our courts, which swear to uphold the three principles of justice, equality, and conscience?

In light of the most recent progressive decisions made by the Supreme Court, this viewpoint has to be re-evaluated. The Supreme Court ruled in *Navtej Singh Johar v. Union of India*¹³ that Article 21 of the Indian Constitution must be acknowledged in order to safeguard each person's complete sovereignty over intimate choices affecting their personal life. In a similar vein, the supreme court decided in *K.S. Puttaswamy v. Union of India*¹⁴ that a person's "right to privacy" should be interpreted using an individualised lens, including the right to complete autonomy over their body. According to the court, the right to privacy must be respected before any other basic right enumerated in Part III of the Constitution can be used. Additionally, the court in *Navtej Singh Johar* case emphasised the connection between "choice and dignity" and the difficulty of conceiving dignity in its hallowed whole in the event that the right to freedom of choice is curtailed. In India, the judiciary and society need to adopt more progressive attitudes on marriage. In light of *Puttaswamy and Joseph Shine's* rulings, which discussed the right to privacy as a basic right under Article 21, the remedy of Restitution of Conjugal rights as a provision must be deemed invalid.

The Indian judicial system has a history of having a highly paternalistic view on women's private life, which is a difficult fact to accept. Because of the regulations, women are now compelled to accept the complicated patriarchal structure that governs their everyday lives.

While both the husband and the wife are eligible for the Restitution of Conjugal Rights remedy, it is important to remember that men and women are fundamentally different from one another. There isn't enough of a solution accessible in society, and we shouldn't ignore the reality that most women still have lower social and economic status than males do.

The right to Equality¹⁵ and Life¹⁶ are violated by the restitution of conjugal rights in this manner. Equal thinking, deed, and self-realization are implied by the term equality. The continuance of the treatment results in unintended pregnancies, and it is said that this undermines women's self-respect, dignity, and sense of fulfilment.¹⁷

¹³ AIR 2018 SC 4321.

¹⁴ (2017) 10 SCC 1.

¹⁵ The Constitution of India, art. 14.

¹⁶ The Constitution of India, art. 21.

¹⁷ Constitutional Validity of Restitution of Conjugal Rights, available at: <https://ccrd.vidhiaagaz.com/constitutional-validity-of-restitution-of-conjugal-rights/> (last visited on: October 5, 2023).

Due to illiteracy, economic reliance, and other causes, males often benefit from many laws and remedies in the men-dominated society. Because the woman is typically placed in an unfavourable circumstance, there is just one clear trait.

In 2019, while hearing a public interest litigation (PIL) that claimed the clause was anti-women as it forced a woman to go back to her husband against her will and in violation of her rights, a two-judge panel led by Chief Justice of India Ranjan Gogoi transferred the matter to a bigger court. Senior attorney Sanjay Hegde claimed that although the legislation appears to be gender neutral on the surface, it is actually profoundly patriarchal and is based on feudal English law, which views a woman as the husband's "chattel" or personal property. It violates Article 15(1) of the Constitution and is rooted in patriarchal gender stereotypes, he claimed.¹⁸

However, as per reply by the Centre in 2022, according to the Centre, the remedy for conjugal rights is gender neutral in the constitution and in how it is applied. In practise, spouses of both sexes utilise the remedy, and no evidence has been shown to show that there is any prejudice in how it is used.

"It is submitted that, in fact, the remedy enables both sexes to enforce their marital rights within a reasonable framework and in no way does it create an unequal playing field." The Centre stated.

Although the provision affects women disproportionately, the legislation is gender-neutral in that it permits both the wife and the husband to request the restoration of conjugal rights. Because marital rape is not a felony, women are frequently summoned back to their marital homes as a result of this clause, making them vulnerable to this forced cohabitation.

It is also disputed whether the State may have a compelling interest in preserving the institution of marriage to the point where it permits legislation that makes it illegal for spouses to live together.

Even if we talk about gender equality and the fact that the law is gender-neutral, women still face discrimination in persisting culture, and this clause takes advantage of that. Women are frequently emotionally and mentally mistreated and tortured for dowry, and dowry killings are a scourge on society.

¹⁸ Samanwaya Rautray, "SC to decide validity of provisions governing restitution of conjugal rights", *The Economic Times*, 6 March 2019, available at <https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-decide-validity-of-provisions-governing-restitution-of-conjugal-rights/articleshow/68279688.cms> (last visited on: 5 October 2023)

A decree of the return of conjugal rights is a noose around the necks of these exhausted and shattered spouses as they depart the husband's home. The Indian judicial system and society need to adopt more progressive philosophies, beginning with the progressive notion of marriage. Marriage is based on two people agreeing to share their autonomy and freedom with one another, not on the ceremonies.

4. CONCLUSION AND SUGGESTIONS

Conjugal rights restitution is a hotly debated and contentious topic. Some people believe it is to keep the marriage together, while others argue that it serves no purpose to make the offended person stay with the other party since they are not at all interested. There is, however, always room for improvement via tinkering. In place of traditional marital rights, the idea of reconciliation might be considered.¹⁹ Restitution is a very hard and cruel concept since it requires compromise from both parties. On the other side, the plea for reconciliation is made in a very kind manner. The issue with restitution is that once both parties are made to live together against their choice, there is a great likelihood that things will go nasty. However, if reconciliation is the chosen course of action, it may not offend either party and will also clear up any confusion.

We must recognise, nevertheless, that marriage is the institution through which two willing adults create a relationship and voluntarily decide to live together. It is predicated on two people's voluntary agreement to share their freedom and liberty.

Restitution of conjugal rights deprives a woman of their autonomy over their body and their choice as a marital relief. Such a provision cannot be sustained in view of the present state of the law following the Joseph Shine ruling and cultural standards. India has to reconsider this barbaric clause and do away with this strict, patriarchal "remedy" once and for all.

By imposing restrictions on a person's ability to choose his living partner, the remedy for the restitution of conjugal rights goes against that person's basic nature. In our more patriarchal countries, the wife is typically socially and economically reliant on the husband, and both married couples are not usually equal.

As a result, individual rights should take precedence above the idea that marriages should be upheld at any costs. Consequently, the struggle between the inalienable fundamental rights and personal rules is becoming increasingly acrimonious.

¹⁹ Restitution of Conjugal Rights: Criticism Revisited, *available at:* <http://www.legalserviceindia.com/articles/abol.htm> (last visited on: October 5 2023).

Courts ought to consider core constitutional rights while evaluating family legislation. The criteria of whether remedy of reparation is comparable to India's Constitutional Fundamental Rights has not been met. Natural law principles are violated and the repayment clause is inappropriate in today's gender-sensitive culture. It falls short when it comes to fairness and justice. It is necessary to specifically include irretrievable breakdown of marriage as a ground of divorce since men often utilise the remedy of RCR to get a divorce on more amicable terms.

Without an iota of doubt, Restitution of Conjugal Rights may be used to force cohabitation on an unwilling person, which is a serious breach of human dignity and an improper use of the legal system. Individual bodily autonomy takes precedence over intrusive governmental interests, and Section 9 of the HMA is fundamentally discriminatory and abusive while offering no benefit to the public.

Therefore, the need of the hour is that either the legislature must take the initiative to remove this clause from the concerned Statute, or the Supreme Court must stamp its decision as unconstitutional and overturn it so as to further the social and legal cause.