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CONSTITUTIONAL VALIDITY OF RESTITUTION OF CONJUGAL RIGHTS

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ABSTRACT

In a world that's moving towards independence and more emphasis on individual freedom and privacy, there are still laws that hold on traditional values, there is a massive debate on whether it is the right time to give up those laws and evolution of such laws. One such traditional law is the Section 9 of Hindu Marriage Act, 1955 which talks about restitution of conjugal rights. Restitution of conjugal provides that where either the husband or the wife has without reasonable cause withdrawn from the society of other, the aggrieved party may apply to the District Court by filing a petition for Restitution of Conjugal Right. The significance of conjugal rights in a marriage is recognized by numerous provisions of Indian personal law. "Restitution of Conjugal Rights" is a legal clause that enables the offended party to restore cohabitation against a spouse who withdrew without cause. It's frequently thought of as a strategy to keep a marriage intact. Marriage imposes various marital obligations and grants

each spouse legal rights under all matrimonial laws. There are two opposing views in the debate over whether or not this regulation is constitutional. One is the conventional perspective, which maintains that marriage is a social institution held together by conjugal rights. Contrarily, the present viewpoint views marital rights as being intrusive, unlawful, and in violation of fundamental human rights. A kind of personal liberty infringement and consequent violation of their right to life is the court's involvement in the enforcement of the spouse's right to have their married status restored. Thus, this article will focus on the violations of fundamental rights by Section 9 of Hindu Marriage Act, 1955 and will also discuss the differences in the Indian Personal Laws.

KEYWORDS: Restitution, Reasonable Cause, personal liberty, Conjugal Rights

INTRODUCTION - HISTORICAL OVERVIEW OF RESTITUTION OF CONJUGAL RIGHTS

For Indian matrimonial law, which has its roots in Jewish law, the remedy of restitution of conjugal rights is novel. Up until the British introduced it, the remedy was unknown to Hindu Law. In actuality, it is the sole matrimonial remedy that was made available to all communities in India under general law during the British era. After independence, the Hindu Marriage Act of 1955 included this remedy. According to Paras Diwan, neither the Dharmashastra nor Muslim law established any provisions for the remedy of restitution of conjugal rights. The idea of restoring conjugal rights has its roots in feudal England, where unfortunately a man's wife was seen as a chattel, much like his other possessions. In the 1867 decision of *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, where these acts were treated as grounds for specific performance, the idea of restitution of conjugal rights was introduced to India. The Privy Council initially enacted it in India in 1866, and it eventually made its way into the personal laws through judicial interpretation and legislative action.

RESTITUTION OF CONJUGAL RIGHTS

Marriage is regarded as the most holy rite in Hindu Law. Both the husband and the wife are required to fulfill specific rights and obligations as a result of the Saptapadi ceremony during

their marriage. These obligations and rights are known as conjugal rights, and they include things like living together as husband and wife, having children, raising a family among other duties. The idea of restitution of conjugal rights is unleashed by Section 9 of The Hindu Marriage Act, 1955. Section 9 can be interpreted as a means of preserving the sanctity of a marriage and as an extension of Section 23's Subsections (2) and (3), which encourage court-ordered reconciliation.

According to Section 9 of the legislation, the aggrieved party may file a petition for restitution of conjugal rights at their discretion if either the husband or the wife withdraws from the other's company and society without a valid reason. He may submit a petition to the district court, and if the district judge is persuaded that the information in the petition is accurate and there is no valid reason why the application should not be granted, the district judge may issue a decree of restitution of conjugal rights. The following criteria must be met in order to get a decree:

- The other spouse has left the petitioner's society.
- There isn't any reasonable justification for such a withdrawal. The respondent has the burden of evidence if they claim a valid basis for doing so.
- The petition's assertions have been accepted by the court.
- There are no legitimate reasons to reject issuing the decree.

Burden of Proof

According to a legal norm known as the burden of proof, the parties must show that a claim is true or false based on the facts and supporting evidence. The petitioner has the initial onus of proof in a case of restitution of marital rights. The petitioner must demonstrate that the respondent left the petitioner's social circle without justification. The onus of proof transfers to the respondent to establish that the petitioner's departure from society was due to a justifiable excuse or cause if the petitioner is successful in carrying its burden.

Only when a husband and wife are legally wed and one of them has irrevocably left the other's society without good cause is this right granted. The necessity of regaining conjugal rights is a topic that generates debate every year. While some see it as a terrible release, others see it as a beneficial cure. Both are combined in it. While it is a tool used to protect marriages, which are considered to be more sacramental than a contract or any other thing in

countries like India, it is a negative relief because it forces a person to stay with the other person against his or her will, violating their right to personal liberty. On the other hand, it is considered to be a positive relief. Marriage is viewed as a divinely formed, eternal, irrevocable, and inseparable tie that cannot be dissolved by people and this remedy tries to sustain that very belief.

CONSTITUTIONAL VALIDITY OF SECTION 9 OF HINDU MARRIAGE ACT, 1955

There is a huge opposition that challenges the constitutionality of Section 9 of Hindu Marriage Act, 1955 as while people recognize that marriage is sacred no doubt, but no matter how high it is held in society's esteem, it is still not a crime to wake up one day and decide that you no longer want to be part of a marriage. And even though some might say that it is unethical to do so, it is legal. And that's what matters. Many petitions are filed with this regard so as to secure the rights of women and to safeguard women from any kind of discrimination or exploitation in the name of preservation or restoration of conjugal rights. A common viewpoint is that there is a gross infringement of fundamental rights like Article 14 which guarantees equality to all and Article 21 which provides for right to live with dignity and personal liberty.

Furthermore, the fact that this remedy conflicts with other Supreme Court rulings from the past is another reason it has been contested. The Supreme Court ruled in *Josephine Shine v. Union of India*¹ that a married woman's right to privacy and bodily autonomy cannot be compromised by marriage. This statute specifies the opposite, though. If everyone has the right to bodily autonomy and privacy, how can a court order two adults to cohabit if one of them doesn't want to?

VIOLATION OF RIGHT TO EQUALITY THAT IS GUARANTEED UNDER ARTICLE 14 OF THE INDIAN CONSTITUTION.

The remedy adversely affects women disproportionately, despite the fact that this law is ex-facie gender-neutral in that it permits both the wife and the husband to seek restitution of conjugal rights and to petition the court for the same. In the *Harvinder Kaur v. Harmandir*

¹ Joseph Shine v. Union of India, (2019) 3 SCC 39.

case², it was determined that the remedy of restitution of conjugal rights was not in violation of Article 14, or the fundamental right to equality, because it was open to both spouses. However, the equality guaranteed by the Indian Constitution includes both legal equality and equality in practice as was given in the case of *Matd. Works v. The Asst. Collector*³. Equality between husband and wife does not just refer to physical equality; it also refers to equality of thought, action, and self-realisation, which is regrettably lacking in this cure because it is so obviously prejudiced in favour of the husbands and gives them a potent tool. Furthermore, it is antiquated for women to be ordered by the State to relocate to a location where they have withdrawn. Moreover, because marital rape is still not considered a crime, women are frequently called back to their marital homes as a result of this clause, making them vulnerable to such forced cohabitation. Legal experts have also raised a number of objections about the question of whether the state can have such a strong interest in upholding the institution of marriage that it permits legislation enforcing cohabitation of spouses. Hence, although claimed as gender neutral and both men and women in the society can use this section for restoration for their marital life, the aftermath of this section is reportedly impacting the women in the society to a great extent which leads to indirect discrimination. The concept of indirect discrimination has recently been acknowledged by the Court in *Navtej Singh Johar*⁴, which noted that "*facially neutral action by the State may have a disproportionate impact upon a particular class.*" The processes for restoring conjugal rights are impartial on the surface. However, when analyzing the direct and inevitable impact of the provision, it is important to take into account the glaringly unequal familial power structures that dominate in Indian society. Due to such cohabitation under pressure, it is common for the woman to experience unwanted pregnancies, sexual exploitation, as well as physical and mental abuse at the hands of her spouse and his family. Since the restoration of conjugal rights contradicts the right to equality, which includes the equality of thoughts, deeds, and self-realization, it is unlawful to implement this remedy. This provision is challenged because it infringes on such rights when someone's decision regarding who to live with is forced upon them.

In the social reality of today, the husband almost always employs this marital therapy, whereas the wife seldom ever does. Because of this, the matrimonial remedy in our Hindu

² Delhi High Court. AIR 1984 Delhi 66, ILR 1984 Delhi 546

³ Matd. Works v. The Asst. Collector 1974 AIR 497

⁴ Navtej Singh Johar v Union of India, (2018) 10 SCC 1

society is fundamentally unable to fulfill the promise of equal protection under the law. As a result, this remedy really simply serves as a weapon for the husband to use against the wife in order to mistreat her. The social reformers claim that because of the social and sexual obligations involved, women suffer more when they must return to their married family and responsibilities than men do. Many of these cases centered on "weekend marriages," in which a pair lived apart because of professional obligations. For instance, In *Tirath Kaur vs. Kirpal Singh* 1964⁵, a woman was challenged with an Restitution of conjugal rights lawsuit after she obtained work in another town after getting married in order to support her family. The High Court of Punjab held that "the husband was justified in asking the wife to live with him even if she had to give up service" and that "a wife's first duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection." This shows the amount of injustice that happens to women although the act is said to help both men and women. The origin of laws on restitution of conjugal rights is feudal English Law, where women were considered chattel, or property. It is important to note that it is a Feudal English law when slavery or quasi slavery was not considered as illegal or vile. And thus, it has no place in a constitutional setup that guarantees personal liberties and equality of status to both men and women. Additionally, it was determined in the case of *Ojaswa Pathak v. Union of India*⁶ that this Section violates Articles 14 and 15(1) of the Indian Constitution by placing an unfair burden on women. The judge further pointed out that Section 9 violates Article 14's right to equality rather than serving any public purpose.

Critics and analysts argue that from a socio-legal perspective, it is impossible to overlook how women are viewed in our culture because they continue to be associated with inferior social and economic standing than men. The worst kind of unfairness in such a situation would be to permit males to benefit from the unfair benefits they obtain under such a provision. This remedy therefore is unconstitutional as being ultra vires the Constitution itself and flagrantly violating Articles 14.

VIOLATION OF RIGHT TO PRIVACY AND PERSONAL LIBERTY ENSHRINED UNDER ARTICLE 21 OF THE INDIAN CONSTITUTION

⁵ Tirath Kaur vs. Kirpal Singh 1964 Punj 28

⁶ Ojaswa Pathak and Anr. vs. Union of India, WP (C) 250/2019

Critics are also very concerned that the concept of marriage as a sanctity should not come at the cost of sanctity of free will and human dignity. In *KS Puttaswamy and Anr v Union of India* and Anr, (2017)⁷ has held: “Privacy includes at its core the preservation of personal intimacies. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.”

Subsequently, the Court in *Navtej Singh Johar v Union of India*,⁸ observed: “Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such a concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual.”

Restitution of conjugal rights gives one spouse the right to invite the other spouse to move back in with them. While this right appears to be true from the perspective that it is a chance to save the family and preserve the relationship, it does not appear to be so when it forces someone to stay with someone they do not want to stay with and takes away their right to be left alone and of choice. The right to privacy can be extended to personal intimacies of the home and marriage because they are a person's private space and the state should not interfere with the same, the Supreme Court decided in the case of *Gobind v. State of Madhya Pradesh*⁹ in 1975.

Most of the time when the cohabitation is forced or is made against the consent or will of the women, it will take a toll on her health and self-confidence and might also be forced to stay in isolation. All these consequences might take a huge toll on women's mental health. They should be allowed to stay anywhere she wants to stay and certainly not be forced to cohabit. Law has evolved to acknowledge an individual's right to privacy and dignity and has even abolished adultery as a crime. Every person has the right to privacy under the Constitution, even within the framework. Thus, any rule that compels someone to engage in

⁷ KS Puttaswamy and Anr v Union of India and Anr, (2017) 10 SCC 1

⁸ Navtej Singh Johar v Union of India, (2018) 10 SCC 1

⁹ Gobind v. State of Madhya Pradesh 1975 AIR 1378

sexual activity or even occupy a residence against her choice violates the constitutional rights to privacy, individual autonomy, and dignity.

In the well known case of *T. Sareetha v. T. VenkataSubbaiah*¹⁰, it was argued that Section 9 of the Hindu Marriage Act, 1955, is constitutionally invalid because it violates the fundamental right to liberty guaranteed by Article 21 of the Indian Constitution. The Hon'ble Court observed that if a woman is forced to live with her husband, this will likewise infringe her right to privacy. The remedy of restitution offends the inviolability of the body and mind and invades the marital privacy and domestic intimacies of such a person. Additionally, according to Justice Choudary, Section 9 is a cruel and barbaric remedy that violates the right to privacy and the dignity of all people provided by Article 21 of the Constitution. It takes away the woman's autonomy over if, when, and how her body will be used to carry out human reproduction. Her ability to manage her most private choices is lost. Therefore, a decision of restitution of conjugal rights blatantly violates the right to privacy protected by Article 21.

In a country where marital rape is still not categorized as an offense, enforcing cohabitation upon a spouse puts them and their fundamental rights at grave risk. In addition, the constitutionality of the restoration of conjugal rights was contested in *Ojaswa Pathak v. Union of India*, 2019, on the grounds that:

- The decree issued under this Section is against a woman's autonomy as it forces her to return to her husband's home against her will, where she may be subjected to violence or misconduct
- This Section indirectly violates the private interest of sexual autonomy and forces them to enter into a sexual relationship with their husband. It is humbly suggested that Section 9 is one of the most heinous legal instruments that may be abused to violate someone's physical and mental integrity¹¹

Furthermore, This provision is physically undesirable, ethically undesirable, and aesthetically repugnant, according to J.B. Kriplani. According to Mr. Khardekar, who opposed the solution, "this particular cause is rude, barbarous, and vulgar. It is astonishing that the government should encourage a type of legalised rape."¹² The Supreme Court and the Delhi

¹⁰ T. Sareetha, AIR 1983 AP 356

¹¹ Ojaswa Pathak and Anr. vs. Union of India, WP (C) 250/2019

¹² Parliamentary Debates on Special Marriage Bill (10th December, 1954)

High Court may have overlooked the fact that marital rape is lawful in India, nevertheless. With the exception of a drawn-out divorce petition based on cruelty or a domestic violence petition based on sexual violence, neither of which include any criminal impunity, the husband may very likely force the wife to have sexual relations with him. Therefore, by forcing an unwilling wife to live with her husband in "cohabitation" and "consortium," the decree inadvertently subjects the wife to coerced sexual relations with her husband and, in the process, robs her of her basic freedom to make decisions about her own life and body as well as her bodily autonomy, dignity, and independence. By placing limitations on a person's ability to choose, the remedy of restitution of conjugal rights offends their essential being. Due to the extreme patriarchy in our country, marriages are rarely equal between the two partners, and the wife is frequently financially and socially reliant on the husband. In reality, husbands in India frequently utilise the remedy of restitution of conjugal rights as a weapon against their wives' potential for cruelty and domestic abuse as well as a means of coercing them into submission.

Our patriarchal society has created an illusion that divorce is a social disgrace forcing women to often stay in abusive marriages. Separation is said to be the better option to the victims of domestic violence due to this very reason when wives are treated like chattel. The remedy of restitution of conjugal rights, on the other hand, denies women this right by compelling them to "cohabit" with their spouses against their will and against their will, which can have grave repercussions and, in the worst-case scenario, even put their lives in danger. The courts must therefore recognise the provision's practical application and reevaluate its validity.

However, many judicial pronouncements like in the *Harvinder Kaur v. Harmander Singh Chaudhary*, the Delhi High Court upheld the stance of The Supreme Court's decision in the case of *Gobind v. State of Madhya Pradesh*. The Court maintained Section 9 as a clause protecting the sacredness of marriage. It made a distinction between sexual connections and the idea of consortium or cohabitation as it applied to marriages. Furthermore, Section 9 only requires cohabitation between spouses; it does not mandate sexual interactions within a marriage. By ruling that courts lack the ability to uphold this basic right in an individual's private area, this judgment trimmed down the reach of the right to privacy. With regard to the criticism of the provision causing "legalised rape", the Court said that the aforementioned rule does not force sexual interactions, but the lack of law to prevent marital rape presents a gap that could be exploited by getting a decision of restitution of conjugal rights.

AN ANALYSIS

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. 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 broken wives leave their husband's home, 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 given permission to go back to the place where she was abused by our courts, which swear to uphold the three principles of justice, equality, and conscience?

According to Section 20 of the Matrimonial Proceedings Act, 1970²², the UK itself eliminated the clause, which had its roots in feudal English law. Significant countries including Ireland, Australia, and South Africa have repealed RCR after it was criticized by renowned sociologists and jurists. India needs to follow suit now more than ever.

- **South Africa** abolished the restoration of conjugal rights as early as 1799 by enacting Section 14 of the Divorce Act in 1979.
- **Australia** - The ability of courts to issue judgments ordering the restitution of conjugal rights was eliminated by the Family Law Act of 1975.¹⁶ According to Section 114(2) of the Family Law Act of 1975, the court may require a party to provide for conjugal rights or marital services.¹⁷ However, it was last used in 1978 and is now out of date. The Australian Law Commission agreed with this stance in 2010, stating that Section 114(2) is inconsistent with family law principles and ought to be repealed.

Society is changing into one where the private interest of sexual autonomy, dignity, and happiness of an individual is put before concerns like societal morality or family life. Thus,

there exists no compelling interest for the state to interfere in matters related to conjugal rights. In addition, a committee was established by the Ministry of Women and Child Development in June 2015 to investigate the situation of women and children in India. The committee's report advises against keeping the provisions for restitution of conjugal rights as a matrimonial remedy and urges their removal. In the report, it says "*Although Section 9 was intended to protect the institution of marriage, it is presently being abused. Every time a woman requests maintenance or reports cruelty, it is customary to file a lawsuit for return of conjugal rights, which negates her case. Restitution of conjugal rights also violates a person's human rights because no one should or may be compelled to live with another.*"¹³ In addition to this, the Law Commission of India then released a consultation paper in 2018 on the reform of family law. The Commission states that the restoration of conjugal rights "*should not be allowed to take away these hard-earned freedoms in the current setting where numerous women are as educated as men are and are contributing to their family income.*" Furthermore, In 1967, United Nations Member States adopted the Declaration on the Elimination of Discrimination against Women considering that discrimination against women is an offence against human dignity. It also calls on States to "*abolish existing laws, customs, regulations and practices which are discriminatory against women*".¹⁴ Hence, this section of Hindu Marriage Act, 1955 which indirectly discriminates against women and places a huge burden on women by violating some of the crucial fundamental rights should be reviewed and revised.

CONCLUSION

The Indian judicial system has a history of having a very paternalistic view on women's private lives, which is a difficult truth to accept. Because of the regulations, women are now compelled to accept the complicated patriarchal structure that governs their daily lives. We must recognize, though, that marriage is the institution through which two willing adults establish a relationship and freely 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 spouse of their autonomy over their body and their choice as a marital relief. While through the many judicial pronouncements and legislations, we are in a better position with regard to equality to all, protection to women and privacy and bodily autonomy, we still have a long way to go to completely assure the fundamental rights to the citizens.

¹³ Ministry of Women and Children, Special Committee 2015

¹⁴ United Nation -Women's rights are human rights(2014)

