

# **NUPTIAL BOUNDARIES: THE FUTILITY OF RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS IN INDIA**

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**Abstract:** Marriage is universally recognized as a civil right and right to marry is considered as one of the important constitutional rights of an individual. Marriage in India, across the religions is a sacramental union between heterosexual couple. Within the institution of Hinduism, it is believed that marriage is one of the essentials of life that helps in the pursuit of “Dharma” (duty), “Praja” (progeny) and “Rati” (pleasure).

A valid marriage confers the status of husband and wife on the parties which in turn confers matrimonial rights, duties, and remedies on them. Restitution of conjugal rights is one such matrimonial remedy which restores the matrimonial rights and privileges of the legally wedded spouses. The Hindu Marriage Act, 1955, under Section 9 gives power to the Court to grant the decree of restitution of conjugal rights to the married couple in case one of them withdraws from the society of another without any reasonable cause or excuse.

The privacy of the spouses under HMA, 1955 Section 9 gets scrutinized which quite evidently reflects the weakness of the impugned legislation. The conundrum is that in the absence of a justifiable reason, the law infringes upon the personal liberty and privacy of the spouses and thereby forces them to live and perform all the conjugal duties with each other. Moreover, what constitutes a justifiable reason has not been defined anywhere. Further, the burden of proof of reasonable justification lies on that spouse which has withdrawn from the society of the other.

This research paper intends to analyze the ineffectiveness of restitution of conjugal rights in the present scenario and the necessity to do away the same in order to protect the interests of the spouses in a matrimonial union and let them live in a dignified manner.

**Keywords:** Fundamental Rights, Matrimonial Union, Restitution of Conjugal Rights, Privacy, Weakness.

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**Introduction:** The institution of Hindu marriage occupies a prominent place in the social institutions of the present world. It is a religious sacrament in which a man and woman are bound in a relationship for physical, social and spiritual purposes of dharma, procreation and sexual pleasure. Ancient Hindu law recognized marriage as *samskar*. With the introduction of divorce, the sacramental character of Hindu marriage has lost its true character. A valid marriage bestows certain rights, duties and obligations on the parties to the marriage. These matrimonial rights include maintenance, custody, succession and matrimonial remedies like restitution of conjugal rights, judicial separation, and divorce and so on.

One of the important ramifications of marriage is that the spouses live together. So if the parties to the marriage after solemnization leave each other without any reasonable ground the remedy of restitution of conjugal rights under section 9 is available to the aggrieved spouse. Restitution of conjugal rights means restoring the conjugal rights of the spouses where one of the spouse has withdrawn from the society of another without a justifiable reason.

The remedy of restitution of conjugal rights has been adopted into the Indian personal laws from the English law. It is a gift of colonial rule. Under the English law, husband and wife were treated as a single entity and therefore a wife could not sue her husband or vice versa. This provision was imported by the British to India through judicial pronouncements and further adopted by the Indian Parliament after the codification of Hindu law. This remedy is provided under Section 9 of the Hindu Marriage Act, 1955.

Another important implication of this section is that it provides a ground for divorce under the under Section 13(1A) of the Hindu Marriage Act, 1955 on a condition that there has been no restitution of conjugal rights between the parties for a period of one year or more after the passing of such a decree.

**Restitution and Tussle between Articles 14 and 21 of the Constitution:** The constitutionality of Section 9 of the Hindu Marriage Act, 1955 has been challenged in several instances. A pertinent question arises that to what extent the remedy of restitution of conjugal rights is an effective one. In 1983 the Andhra Pradesh High Court struck down Section 9 of the Hindu Marriage Act, 1955 in *T. Sareetha v. T. Venkata Subbaiah* (AIR 1983 AP 356) by declaring it unconstitutional and violative of the right to equality, personal liberty, dignity and privacy which are guaranteed and protected by the Constitution of India. The court observed that, “*the object of the section is to bring about cohabitation between estranged parties so that they can live together. That in the privacy of home and married life neither Article 21 nor Article 14 has any place.*” It further observed that a person gets access to “*one’s body to be used as a vehicle for procreation of another human-being*” and finally by observing that the law is a “*savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution*” declared it to be void.

In *Harvinder Kaur v. Harmandar Singh* (AIR 1984 Del. 66) the constitutionality of Section 9, was upheld by the Delhi High Court. It was observed by the Hon’ble court that this remedy is available to both the spouses and purports to preserve marriage, rebuild a broken home and re-establish the “two-in-one” relation between the estranged spouses and therefore doesn’t violate the Constitutional provisions.

The matter was finally settled by the Supreme Court in *Saroj Rani v. Sudarshan Kumar Chadha* (AIR 1984 SC 1562). While observing the remedy gives the husband and the wife an opportunity to amicably resolve their differences and live together and it serves a social purpose and as an aid to restore the marital tie upheld the judgement of the Delhi High Court and over ruled the judgement of the AP High Court. Even after that, the view taken by the AP High Court still remains to be one of the landmark judgements which was brave and ahead in time.

Though the remedy of restitution is available to both the husband and the wife, it is violative of Article 14 and Article 21 of the Constitution. Equality doesn’t mean physical or superficial equality but it means equality which is substantive in nature and is equal in thought and action. On what basis can the state interfere in the personal sphere of a woman and direct her to live with someone whom she doesn’t want to. Such remedies will lead to forced cohabitation and unwanted pregnancies which is again a gross violation of a woman’s self-respect, freedom and dignity.

Before 2017, the right to privacy was not recognized as a fundamental right but after the judgement by the Hon’ble Supreme Court in *Justice K S Puttaswamy v. Union of India* (Writ petition (Civil) No 494 of 2012) it has been recognized as a part of right to life under Article 21 of the Constitution. In *Bai Jiva v Narsing Lalbhai* (AIR 1927 Bom 264) the Bombay High Court held that the Courts have no right to force the wife to return to her husband against her will. This kind of compulsion by the Court acts as a psychological restraint on the freedom of an individual.

The rationale behind the remedy of restitution was to give the spouses a cooling off period to try and preserve their matrimonial union, it has been observed that this remedy has been blatantly used by the spouses for fulfilling ulterior motives other than reconciliation like for seeking maintenance or divorce under Section 13 (1A) (ii) of Hindu Marriage Act, 1955.

**Other Issues Involved in Restitution:** The remedy of restitution transgresses the personal liberty of the spouses. Marital cohabitation and intercourse is an important facet of the marital union. But forcing the spouses to perform these obligations against their wishes is nothing short of barbaric and inhuman. Marriage gives innate rights to the spouses over each other’s society. But are these rights absolute in nature? In a situation where the spouse is not willing to perform the marital obligations, shouldn’t the

law protect the spouse in such a situation, instead the law is such that it is allowing the spouse to misuse it and violate the rights of the other.

Another important issue is that what constitutes a reasonable cause has nowhere been defined anywhere. It is open to judicial interpretation. In several cases “reasonable excuse” has been interpreted to mean and include all the fault grounds for divorce under the Hindu Marriage Act, 1955, any act or omission by the spouse which makes it impossible to live with the petitioner. In cases where the respondent can prove that the reason for withdrawing from the petitioner’s society was based on a well-founded reason, the court may not grant the decree of restitution.

It must be understood that a court’s order awarding restitution cannot at once crease out the emotional complications of the spouses. The court can pass the decree and direct the spouses to live together but it cannot force the defaulting spouse to physically come back to the aggrieved spouse and perform the obligations. This will only leads to forced sexual cohabitation between the spouses which is one of the most unacceptable forms of human rights violation. If a matrimonial rule has an adverse impact on the essential privacy of the individual it becomes overbearing. The state must not interfere between the marital spheres to such an extent that it leads to gross human rights violation.

Under the Indian law a decree of restitution of conjugal rights can be executed by attachment of the respondent’s property under Order 21 Rule 32 of Civil Procedure Code, 1908. But it is to be noted that the court cannot compel the defaulting spouse to physically return to the comfort-consortium of the decree-holder spouse. The maximum extent that the court can go is attaching the property of the respondent and selling it off or granting a divorce under Section 13(1A) of the Hindu Marriage Act, 1955 on the condition of non-obedience of the decree for more than one year. It falls under the breakdown theory of divorce. This is the most fundamental problem related to this remedy. The aggrieved party files a restitution petition and willing disobeys the decree for more than one year which in turn becomes a ground for divorce. The legislature has basically created an additional ground for divorce without putting much thought about the repercussions of the same. Also what happens in case the respondent doesn’t have property, because in majority of the cases the respondent are women who don’t have property, in such cases her share is determined from the husband’s property which is a very long and tedious process.

**Conclusion:** It is a well-known fact that the institution of marriage is an unavoidable social necessity for the formation and permanence of a family which preserves culture and eventually the society as a whole. The socio-economic conditions in India and the UK are very different from each other. However, certain basic values and rights are universally accepted, like one’s right to life and personal liberty, which includes with whom a person wants to spend his/her life with. Just because a person is married to another doesn’t entitle either the court or any other authority to force him/her to live with his/her spouse, unless they are willing to. The remedy of restitution is doing nothing but the same.

Furthermore, autonomy in private matters and an unrestricted discretion in the use of one’s body is the foundation of human dignity. Such enunciation has been made and recognized by the courts globally. Such a right is one that is most fundamental in nature to human existence and cannot be waived or allowed to be infringed under any circumstances.

In India, people file restitution of conjugal rights for two purposes: A hassle free divorce, and as a defence for maintenance. It is high time this misuse or abuse of the court process is stopped, and provisions for restitution of conjugal rights are abolished as it grossly abuses the rights of the spouses especially the women. The remedy of restitution needs a serious think over by the legislature and the judiciary in order to protect the inviolability of the mind and body of a spouse in a matrimonial union.

#### References:

1. Agnes, Flavia. Law and gender Inequality: The Politics of Women’s Rights in India. Oxford University Press, New Delhi, (2006) p. 38

2. Raj Kumari Agarwala, Restitution of conjugal rights under Hindu law : A plea for the abolition of the remedy, *Journal of the Indian Law Institute*, Vol. 12, No. 2 (APRIL-JUNE 1970), pp. 257-268
3. Prashanth S.J, Hindu Women and Restitution of Conjugal Rights: Do We Need The Remedy?<http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=797c51f7-0615-4fa8-b92e-7d7d24d03689&txtsearch=Subject:%20Family%20Law>
4. Paras Diwan, Peeyushi Diwan, *Family Law*, Allahabad Law Agency, Faridabad, (1998) p. 113
5. J.D.M. Derrett, *A critique of Modern Hindu law* (1970), p. 292

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