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MARRIAGE, RIGHTS, AND THE LAW: EXAMINING THE LEGITIMACY OF RESTITUTION OF CONJUGAL RIGHTS

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ABSTARCT

Marriage, being a basic social institution, has varied legal, religious, and cultural connotations across the globe. In India, it is both a sacrament and a civil contract, giving rise to rights and duties on the spouses. One such is the legal relief of Restitution of Conjugal Rights, which forces separated spouses to live together. But its ethical and constitutional legitimacy is debatable. This concept was brought to India during British times based on Jewish and Christian ecclesiastical law. Even after India gained independence and constitutional protection against gender discrimination, Restitution of Conjugal Rights was enacted under various personal laws such as Section 9 of the Hindu Marriage Act, 1955. Though England did away with this remedy in 1971, India still maintains it, which has given rise to heated debates regarding its need and abuse. While aimed at facilitating reconciliation, this is frequently misused, with husbands employing it to escape maintenance payments or create grounds for divorce. Women, especially in Indian traditional society, are coerced into unwanted cohabitation, even in abusive marriages. Courts have commented on Restitution of Conjugal Right's patriarchal roots, comparing it to treating wives as property. The validity this 'remedy' has been questioned on the grounds of constitutionality, with critics contending that it is a violation of Article 21 (Right to Privacy and Personal Liberty), Article 14 (Right to Equality), and Article 19 (Freedom of Residence and Profession) by limiting personal freedom and autonomy. In light of the changing jurisprudence regarding privacy and gender equality, the Supreme Court is now examining the validity of restitution of conjugal rights. This article critically analyzes judicial precedents and competing views on the issue, identifying how such a matrimonial remedy violates basic rights. The Court's upcoming decision will decide if Indian matrimonial laws are consistent with modern constitutional ideals of dignity, autonomy, and gender justice.

Keywords: Restitution of Conjugal Rights, Constitutional Validity, Privacy and Personal Liberty, Fundamental Rights Violation, Matrimonial Remedy, Gender equality

INTRODUCTION

Marriage has evolved over centuries into a very important social institution with complex rights and obligations between parties, influenced by different cultural, religious, and legal traditions. This has produced laws or regulations unique to each country aimed at the effective management of marriage practices across the globe.

In India, where various religions coexist, marriage is perceived differently—some view it as a sacrament while others consider it a civil contract. Regardless of the religious or legal basis, marriage confers a set of rights, duties, and obligations on the spouses. The legislations mainly aim to protect the institution of marriage and improve it transform this institution of marriage. In Hindu philosophy, it is regarded as a sacrament, a sacred union with three primary aims: Dharma or justice, Praja or procreation, and Rati or pleasure.¹ Similar goals are purported to be met through marriage in other religious philosophies as well. At other times, these goals underscore the significance of not merely emotional but physical union between the two spouses. A prominent example of this is the concept of *Restitution of Conjugal Rights*, a legal remedy that enforces cohabitation between estranged spouses, is controversial due to the ethical and constitutional questions it raises, particularly regarding personal autonomy and fundamental rights.

HISTORY

The concept of restitution of conjugal rights is not indigenous to India but was introduced during British rule. Rooted in the Jewish laws it found its way to the English society through Christian ecclesiastical law and then to India during the British Raj.² Law of restitution of conjugal rights have been followed in the Indian sub-continent for more than a century. At one time, the law was that if a wife ceases to cohabit with her husband without lawful cause, he may sue her for restitution of conjugal rights. It is, therefore, necessary for the husband to come to the Court with clean hands, otherwise this relief will not be granted to him.³ The wife can similarly demand the fulfillment by the husband of his marital duties.

¹ M. Gangadevi, *Restitution of Conjugal Rights: Constitutional Perspective*, 45 J. INDIAN L. INST. 453, 453 (2003).

² Sanchita Sanand & Devesh Pandey, *Restitution of Conjugal Rights: An Analysis*, 4 INDIAN J.L. & LEGAL RSCH. 2 (2022-2023).

³ Md. Khurshid Alam, *Legal Aspects of Restitution of Conjugal Rights*, IX(1) DHAKA U. STUD. PART-F 115, 115 (June 1998).

The earliest Indian case that dealt with restitution of conjugal rights was *Dadaji Bhikaji v. Rukhmabai*⁴, drawing attention to the struggle for cohabitation of marriage and personal freedom. In this case, a husband sought a decree forcing his bride who was married off as a child, to live with him against her will. Although the case was dismissed by the lower court as unconscionable, the appeal and overruling of the judgment further sealed the patriarchal character of marital obligations under colonial law.⁵

This concept of restitution of conjugal rights though alien to other personal laws was then adopted by other religions in India. Following India's independence in 1947, the Constitution guaranteed fundamental rights, particularly aimed at addressing historic gender discrimination. Despite this, the restitution of conjugal rights provision, though argued as a relic of the patriarchal judicial system, was still a valid practice and was also followed in different personal laws-for example, Section 9 of the Hindu Marriage Act, 1955⁶. However, though England abrogated this remedy in 1971, India continued to retain this remedy within its own law.⁷

LEGAL FRAMEWORK OF RESTITUTION OF CONJUGAL RIGHTS

Legal Framework of Restitution of Conjugal Rights restitution of conjugal rights exists as a remedy under various personal laws in India⁸. Additionally, in the Muslim Law, although the Holy Qur'an and the Sunnah do not specifically address the issue of restitution of marital rights, Islam goes a great deal further in dictating the proper conduct for husbands and wives and promoting the performance of marital duties.⁹

Therefore, in order to file a lawsuit for the restitution of conjugal rights under any personal law, the following requirements are to be met:¹⁰

- (a) Moving out of the wife from the society of the petitioner.
- (b) There is no legal justification or plausible explanation for the withdrawal.
- (c) Refusing the relief should not have any legal justification.
- (d) The court should accept the petitioner's statement as accurate.

⁴ *Dadaji Bhikaji vs. Rukhmabai* (1885) MANU/MH/0047/1885

⁵ Sanand & Pandey, *supra* note 2

⁶ Saumya Uma, *Wedlock or Wed-Lockup? A Case for Abolishing Restitution of Conjugal Rights in India*, 00 INT'L J. L. POL'Y & FAM. 1, 8 (2021).

⁷ Sanand & Pandey, *supra* note 2

⁸ See Hindu Marriage Act, 1955, §9; Special Marriage Act, 1954, § 22; Parsi Marriage and Divorce Act, 1936, § 36; Christian Divorce Act, 1869, § 32 & 33

⁹ Alam, *supra* note 3

¹⁰ *Id.*

INEFFECTIVENESS AND MISUSE

“Restitution is rarely the aim of the petitioner in restitution petitions.”¹¹

Restitution seeks to promote reconciliation, in contrast to divorce, nullity, judicial separation, or permanent dissolution of marriage. Given that marriage law favors reconciliation over dissolution of the union, the reparation remedy seems to be acceptable. Therefore, legislators and courts work to maintain the legitimacy of the restitution of conjugal rights. However, in actual practice, this positive character tends to become just as harmful as the other cures, therefore it is only theoretical in the first place. This is due to the fact that a provision ignores the fundamental reality that people are emotional beings rather than robots.¹²

Initially, restitution of conjugal rights was backed with sanctions like imprisonment, ex-communication, attachment of property of the defaulter etc.¹³ But it quickly became clear that forcing cohabitation would only make circumstances worse between spouses. restitution of conjugal rights is still in use, despite the ultimate removal of such sanctions—typically more as a tactic than as a sincere effort at reconciliation.

Reviewing case laws relating to "restitution of conjugal rights" reveals that although the husband requested the decree of restitution of conjugal rights against his wife, in nearly all of the cases it was established that the husband was either cruel to his wife or brought the petition merely for the purpose of avoiding maintenance¹⁴ or to set the stage for divorce by requesting restitution first and then using non-compliance as grounds for divorce. Despite being a gender-neutral legal provision, women are disproportionately impacted by the application of restitution of conjugal rights. In traditional Indian society, women may be coerced into unwelcome cohabitation or reconciliation—even in circumstances of domestic violence or emotional abuse—because marriage is frequently viewed as a woman's obligation and the husband's power is culturally upheld.

¹¹ Raj Kumari Agarwala, *Restitution of Conjugal Rights Under Hindu Law: A Plea for the Abolition of the Remedy*, 12 J. INDIAN L. INST. 257, 259 (1970).

¹² *Id*

¹³ Agarwala, *supra* note 10 at 257

¹⁴ *See generally*, Smt. Venkatamma v. Venkataswamy (1962) AIR 1963 MYSORE 118, Trade Links Ltd. and Ors. vs. Mount Shivalik Breweries Ltd. and Ors (1998) MANU/CL/0003/1999, Tarab Nath Dhar v. Sneharani Dharr', AIR 1949 Cal 87, Gurcharansingh v. Smt. Waryam Kuar AIR 1960 P&H 422, Kamala Bai v. Rathnavelu AIR 1965 MADRAS 88, Jinarthanammal v. P.Srinivasa, A.I.R. 1964 Mad. 48, Varalakshmi v. Viramulu, AIR 1956 Hyd. 75, Teja Singh Subedar Santa Singh Vs. Sarjit Kaur (1961) MANU/PH/0129/1962: AIR 1962 Punj 195

J.B. Kriplani and other critics have denounced restitution of conjugal rights in this context, calling it "aesthetically disgusting, morally repugnant, and physically undesirable."¹⁵ Judge Vaid noted that "restitution of conjugal rights are very old and ancient laws of the times when slavery and quasi slavery were considered natural" in the *Shakila Bano v. Gulam Mustafa* case¹⁶, which was heard under Muslim law. It is evident from the foregoing that the foundation of the restitution of conjugal rights concept was the antiquated and false notion that husbands should have greater authority in the home and that wives should be treated like "chattels".

CONSTITUTIONALITY OF THE REMEDY

***"PRIVATE is what men call the damage they want to be permitted to do as far as their arms extend to whomever they do not want permitted to fight back."* - Catharine A. MacKinnon, American feminist legal scholar, activist, and author¹⁷**

Given the ineffectiveness and misuse of this remedy, the legal challenges and validity questioned is to be taken into account. The next step taken by the society or the interested parties towards invalidating this remedy is by challenging the constitutionality and legality of this 'Marital Remedy' as violative of one's fundamental rights.

According to the ruling in the case of *State of Bombay v. Narasu Appa Mali*¹⁸, personal laws are subject to article 13 and must therefore meet specific criteria in order to be deemed legal. Considering this logic, the Hon. Andhra Pradesh High Court heard a challenge to the validity of the provision in the *T. Sareetha v. T. Venkatasubbaiah*¹⁹ case. The plaintiff in this case claims that Articles 14, 19, and 21 of the Constitution's fundamental rights are violated by Section 9 of the Hindu Marriage Act. The Court felt that this clause was particularly unfriendly and barbaric towards women. It proved in *T. Sareetha* that, despite the decree's lack of power to force sexual relations, women's privacy rights would be violated in such situations due to marital inequality. Because equality is a prerequisite, women's rights are thus not adequately granted.

¹⁵ Parliamentary Debates on Special Marriage Bill, 10th December, 1954,

¹⁶ *Shakila Banu v. Gulam Mustafa* (1971) AIR 1971 Bom 166

¹⁷ The Leaflet, *Restitution of Conjugal Rights: Case for Its Abolition*, THE LEAFLET (Sept. 6, 2023, 9:45 AM), [https://theleaflet.in/restitution-of-conjugal-rights-case-for-its-abolition/#:~:text=%E2%80%9CPPRIVATE%20is%20what%20men%20call,want%20permitted%20to%20fight%20back.%E2%80%9D&text=In%20Toward%20a%20Feminist%20Theory,\(1989\)%2C%20Catharine%20A.](https://theleaflet.in/restitution-of-conjugal-rights-case-for-its-abolition/#:~:text=%E2%80%9CPPRIVATE%20is%20what%20men%20call,want%20permitted%20to%20fight%20back.%E2%80%9D&text=In%20Toward%20a%20Feminist%20Theory,(1989)%2C%20Catharine%20A.)

¹⁸ *State of Bombay v. Narasu Appa Mali* AIR 1952 BOMBAY 84

¹⁹ *T. Sareetha v. T. Venkatasubbaiah* AIR1983AP356

However, this progressive ruling was short-lived. In *Harvinder Kaur vs Harmander Singh Choudhry*²⁰ the Delhi High Court, only a few months after *T. Sareetha*, held that marriage is “the very foundation of civil society” and thus, public interest in the preservation of marriage is not unwarranted. In *Saroj Rani*, it was said that conjugal rights haven’t been created by law, but are rights “inherent in the very institution of marriage itself”²¹. In both the cases, the institution was placed at a higher pedestal than the decisional privacy of its participants.²² Currently, the constitutionality of the remedy of restitution of conjugal rights is pending before the Supreme Court in the writ petition of *Ojaswa Pathak v Union of India*.²³

The constitutionality of restitution of conjugal rights has been repeatedly challenged, particularly regarding its violation of fundamental rights under Articles 14 (Right to Equality) and 21 (Right to Life and Personal Liberty) and even Article 19 (Freedom to Settle and Freedom to practice any Profession).

1. **THE RESTITUTION OF CONJUGAL RIGHTS VIOLATES THE RIGHT TO PRIVACY UNDER ARTICLE 21**²⁴

The subject of whether a person's autonomy over their own body is protected by the right to privacy has come up in court cases throughout the years. Judicial views on this issue have been divided. The Supreme Court recognized in *Gobind v. State of Madhya Pradesh* that a person's right to privacy could include private areas such as their house and marriage, where the government should not intrude. One of the first cases discussing the right to privacy in the context of marriage was this one.

However, in *T. Sareetha v. T. Venkatasubbaiah*, the Andhra Pradesh High Court adopted a more progressive position. The right to privacy is granted by Article 21. The High Court noted that becoming married does not automatically revoke this right. The court held that choosing to have children is a part of the right to privacy, using American Jurisprudence as support. It quoted from the landmark United States Supreme Court decision in the case of *Eisenstadt v. Baird*²⁵ “If the right of privacy means anything it is the right of the individual,

²⁰ *Harvinder Kaur vs Harmander Singh Choudhry* AIR1984DELHI66

²¹ *Id*

²² *Supra*. Note 16

²³ *Ojaswa Pathak and Anr. vs. Union of India*, WP (C) 250/2019

²⁴ *Sanand & Pandey*, *supra* note 2 at 7

²⁵ *Eisenstadt v. Baird* (1972) 405 U.S. 438

married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child". Therefore ruling that there had been a grave invasion of privacy with regard to Section 9 of the Hindu Marriage Act, which deals with the recovery of marital rights. This decision was viewed as a remedial action toward the removal of a feudal legislation that violated fundamental rights in the name of marriage protection.

In contrast, the Supreme Court adopted a different stance in later cases even though it upheld *Gobind v. State of Madhya Pradesh*.²⁶ It argued that the sacredness of marriage was safeguarded by Section 9. The Court emphasized that Section 9 simply requires cohabitation and does not impose sexual interactions, drawing a distinction between cohabitation and consortium ideas. Because courts lack the jurisdiction to trespass into such private areas, the Court found that Section 9 did not violate the right to privacy. The Court determined that requiring cohabitation did not violate privacy, despite the fact that doing so might seriously jeopardize individual rights, particularly in a nation where marital rape is not considered a criminal offense.

A person's right to privacy is fundamental to their capacity to manage their own body, according to the historic ruling in *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*²⁷ Therefore, forcing someone to live with another compromises their bodily autonomy, which is a basic component of the right to live with dignity that Article 21 of the Constitution guarantees. Therefore, it seems reasonable to conclude that restoring marital privileges through restitution of conjugal rights violates a person's basic liberties and rights.

2. THE RESTITUTION OF CONJUGAL RIGHTS VIOLATES THE RIGHT TO EQUALITY UNDER ARTICLE 14

Additional to the infringement of the basic right guaranteed by Article 21, The petitioners in *T.Sareetha* argued that the restitution of conjugal rights are facially neutral because they grant the right to both the husband and the wife to file a court application. However in reality that's not the case. The very uneven family power structures that are prevalent in Indian society must be taken into consideration when evaluating the provision's direct and

²⁶ *Gobind v. State of Madhya Pradesh* (1974) AIR 1975 SC 1378

²⁷ *K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors* 2019 (1) SCC 1

inevitable effects.

The Court in *Joseph Shine*²⁸ has observed: “A provision of law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates. In its operation, law “permeates and is inseparable from everyday living and knowing, and it plays an important role in shaping (legal) consciousness.” A contextual reading and interpretation of the law shows that it is influenced by social practices, and makes “asymmetries of power seem, if not invisible, natural and benign”

It has been noted that when analyzing restitution of conjugal rights, the "direct and inevitable consequence" test must be included in order to detect violations of fundamental rights²⁹. Many laws, like restitution of conjugal rights, may not appear to be discriminatory at first, but they ultimately would be, and if a consequence-based approach is not taken, they may avoid judicial scrutiny.

This very aspect was highlighted in *T. Sareetha*, when the court observed “...(this) matrimonial remedy is found (to be) used almost exclusively by the husband and is rarely resorted to by the wife [emphasis added]. A passage in *Gupte’s “Hindu Law in British India”* page 929 (second edition) attests to this fact. The learned author recorded that although “the rights and duties which marriage creates may be enforced by either spouse against the other and not exclusively by the husband against the wife; a suit for restitution by the wife is rare.”

Thus by interpreting and reading the laws along with their cultural context, it is quite evident that such a provision is likely to cause gender discrimination and violation of one’s right to equality under article 14.

3. THE RESTITUTION OF CONJUGAL RIGHTS INFRINGES THE FREEDOM TO SETTLE IN ANY PLACE AND THE FREEDOM TO PRACTICE ANY PROFESSION OF CHOICE UNDER ARTICLE 19(1)(e) AND 19(1)(g).³⁰

In the current social structure, where women are working hard to obtain employment in order to become economically and independently independent as well as to live honorably,

²⁸ *Joseph shine vs Union of India* 2019 (3) SCC 39

²⁹ The Leaflet, *A Rights-Based Jurisprudence Demands Abolition of Legal Provision for Restitution of Conjugal Rights*, THE LEAFLET (July 3, 2023, 10:30 AM), <https://theleaflet.in/a-rights-based-jurisprudence-demands-abolition-of-legal-provision-for-restitution-of-conjugal-rights/>.

³⁰ Gangadevi, *supra* note 1 at 455

a wife's simple refusal to quit her work at her husband's request is insufficient justification for a decree of restitution to be granted in the husband's favor. This changing social situation was given prominence while deciding upon a restitution of conjugal rights petition in *Swaraj Garg v. K.M. Garg*³¹

CONCLUSION

The Restitution of Conjugal Rights, a matrimonial remedy, which was initially meant to maintain marital harmony, has evolved into a controversial and outdated legal provision in India. Although its supporters claim that it offers a chance for reconciliation, its coercive nature and abuse have serious ethical and constitutional implications. The provision, which is frequently used as a weapon by one spouse—usually the husband—undermines autonomy and dignity. Constitutionally, this remedy undermines basic rights in the Indian Constitution. It disproportionately targets women by forcing them to share living space unwillingly, which contravenes Article 14 (Right to Equality) and Article 21 (Right to Privacy and Personal Liberty). Courts have also recognized its patriarchal origins, but the law still stands.

Comparative law analysis points out that England, where RCR was brought to India, repealed it in 1971, realizing its incompatibility with contemporary matrimonial legislation. Most jurisdictions today focus on mutual consent and personal choice within marriage, not coercion. The fact that India continues to have Restitution of Conjugal Rights is in opposition to such advanced legal developments. With the Supreme Court revisiting the provision in *Ojaswa Pathak v. Union of India*, its ruling will have profound repercussions for marital rights, gender justice, and personal freedom. It would be a major step in the direction of acknowledging marriage as a union founded on consent rather than forced union if it were struck down. Or, conversely, if it is reaffirmed, it could remain a weapon of oppression, especially against women in marginalized situations.

In a gender-just and freedom-oriented society, laws should be in consonance with constitutional values. The repeal of RCR would not undermine the institution of marriage but strengthen the notion that relationships are based on mutual respect and consent, not legal compulsion.

³¹*Swaraj Garg v. K.M. Garg* AIR 1978 Del 296