



# **AN APPROACH OF RESTITUTION OF CONJUGAL RIGHTS: PRESERVING THE ESTRANGED RELATIONSHIP OR MAKING IT MORE ESTRANGED**

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## **Abstract**

Restitution of conjugal Rights is the matrimonial relief included in the Personal laws to preserve the marriage. The remedy should be retained or should be abolished is the hypothesis of the research paper and by studying various Indian case laws and International laws of the country like Canada, U.K, Australia we came to the conclusion that the practice of providing couples with this remedy is coercive against Women under Article 14,19 and 21. The restitution should be abolished and the Irretrievable Breakdown of Marriage theory should be adopted by the Court in cases where the relationship is too estranged and there is no hope of bonding between the couples. The marriage should not be treated as a burden in the name of matrimonial relief. The researcher has adopted Doctrinal method in the research paper and relies solely on books, articles, journals, case laws for the research.

**Keyword:** **restitution of conjugal rights**

## **Introduction**

Marriage under Hindu is sacramental which means the eternal bonding of the couples and a sacred tie which can never be broken. In the other words, Marriage improves, refines and ennobles the character<sup>1</sup>. Marriage is the foundation stone of new relationship and forms the family. The relationship connotes various rights and obligations between the spouses. Restitution means restoration or reinstatement and the conjugal rights means right to stay together and cumulatively it denotes reinstatement of the rights or privileges arising from marital bond. Personal laws as well as Criminal laws protect the conjugal rights of the couples. The later protects the party by payment of maintenance and alimony and the former in the form of Restitution of Conjugal rights<sup>2</sup> in the family law of all the religion.

### **Restitution of conjugal rights in various laws in India**

English law inherits provisions relating to restitution of conjugal rights from Jewish law and Indian law from Britishers. The ancient sources of Hindu law do not recognise the remedy of restitution of conjugal rights because marriage is thought to be sacred and continue till death. The seeds of restitution of conjugal rights was introduced in our country by the Britishers. In **Moonshee Buzlur Raheem** case the relief of specific performance was provided and after Independence, it was included in the Hindu Marriage Act 1955<sup>3</sup>. The voice against this relief in Parliament at the time of discussion of the Special Marriage Bill and Hindu Marriage Bill

<sup>1</sup> D.S.Shara: Hinduism Through the Ages, 3<sup>rd</sup> Edition., (1967), p. 92.

<sup>2</sup> Section 9

<sup>3</sup> sec 9

has been raised by Mr. Khardekar who said that “this particular cause is uncouth, barbarous and vulgar. That the government should be abettors in a form of legalized rape is something very shocking....”<sup>4</sup>

In India, the provision regarding Restitution of Conjugal Right is uniform in the personal laws of all the religion.

### **Hindu Law**

The codification of Hindu Marriage Act in 1955 changes the nature of Hindu marriage and now the Hindu marriage has both the attributes such as contractual as well as sacramental. The contractual rights of Hindu marriage such as divorce remarriage off windows etc and sacramental nature as given under Section 7 of Hindu Marriage Act making the ceremonies such as Saptpadi mandatory for the marriage

The statutory provisions which is applicable on Hindus for enforcing the restitution of conjugal rights is section 9 of the Hindu Marriage Act section, 22 of the special Marriage Act and Order 21, Rule 32 and 33 of Code of Civil Procedure. The aforesaid laws empower the court to provide remedies to the aggrieved party in the form of restitution of conjugal rights. The court may order the respondent to live together and in case of non fulfillment of order can attach the property of the deserted person.

The Law relating to restitution of conjugal rights is gender neutral i.e. both the husband and wife have equal opportunity for availing the remedy in case for restitution of conjugal rights. The Section 9 of the Hindu Marriage Act, 1955 is as follows:

**When either the husband or wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such a petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.**

### **Burden of Proof for reasonable excuse**

Where a question arises whether there has been reasonable excuse of withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

The section has been amended by the Marriage Laws Amendment Act, 1976. The Amendment Act, 1976 repealed subsection 2 of the Hindu Marriage Act, 1955 and Explanation has been added which helps in removing ambiguities in interpreting the law.

Section 13 (1-A) (ii) of the Hindu marriage Act state about the non compliance of the decree of Restitution of Conjugal Rights is a ground of divorce.

Section 22 of the Special Marriage Act, 1954 also applicable on Hindus contains provision for availing the remedy.

Order XXI Rule 32 of the code of Civil Procedure provides for attachment of the property of the judgment debtor , and detention in civil prison<sup>5</sup> in case of non fulfillment of order of the Court.

Rule 33 Order XXI of the code of Civil Procedure has a provision to sell the attached property by the Court, if disobedience continues for 6 months.

The Court has discretion to enforce financial sanction in the form of periodic payments also. The remedy was adopted in order to preserve the institution of Marriage but due to the societal changes and unscrupulous practices becomes the weapon in the hands of spouse to harass the other.

### **Muslim law**

Muslim Family law is not codified in India. The laws on various matrimonial matters of Muslim are as follows: The Muslim Personal Law (Shariat) Application Act, 1937 deals with the matters relating to marriage, succession, inheritance, gifts, etc.

The Dissolution of Muslim Marriage Act1939 deals with the divorce

The Muslim Women Protection of Rights on Marriage Act 2019 criminalises triple talaq.

The Muslim marriage is a civil contract between bride and groom<sup>6</sup>. According to **Faiz Tyabji**, The restitution of conjugal rights is also provided between Muslim couples and he states that when either of the spouses withdraw from the society of another without any reasonable excuse, the aggrieved party may apply by filing a petition for decree of restitution of conjugal rights and if the court has no valid reason to reject the petition then the court may order the decree in favour of the petitioner<sup>7</sup>. **Moonshee Buzlur Raheem V Shimsoonissa Begum**<sup>8</sup> was the first Indian case relating to restitution of conjugal rights.

<sup>4</sup> Parliamentary Debates on Special Marriage Bill 10<sup>th</sup> December 1954

<sup>5</sup> Sub rule1 of rule 32 order XXI

<sup>6</sup> Abdul Qadir V Salima and Others 1886 ILR 8 ALL 149

<sup>7</sup> Faiz Badruddin Tyabji, Principles of Muhammadan Law (4<sup>th</sup> edition N.M.Tripathi Bombay)

<sup>8</sup> 1866-67 (11) MIA 551

The defences available to the Muslim wife against Restitution of Conjugal Rights are as follows:

- Cruelty by the husband<sup>9</sup>
- Neglect of marital obligations by the husband
- Marriage being irregular or fasid
- Husband is impotent
- Husband makes a false charge of adultery on the wife

Apart from that after the passing of Dissolution of Muslim Marriage Act, 1939 the judiciary is quite responsive in protecting the rights of the wife.

### **Christian law**

Christian law **Indian Divorce Act, 1869** contains provision relating to restitution of conjugal rights for Christians under section 32 and 33. The Christian couples can move to the District Court and the court on being satisfied on the truth of the statement may grant a decree for restitution of conjugal rights. The application for restitution of conjugal rights cannot be replaced by the judicial separation or divorce application<sup>10</sup>

The court may refuse to pass decree for the restitution of conjugal rights in any of the following condition

- Cruelty by the wife or husband
- One or both the spouse are insane
- Either of the spouse remarries

### **Parsi law**

The provision for restitution of Conjugal Rights is given in **Parsi Marriage and Divorce Act, 1936**<sup>11</sup>. The grounds for enforcing restitution of conjugal rights are as follows:

- One of the spouse has deserted other
- The desertion is without reasonable excuse or has stopped cohabitation with the other

The Court on being satisfied can pass order for the same.

The word 'deserted' has been used in the Act instead of 'withdrawn from the society'.

### **Special Marriage Act 1954**

It is a secular law which contains provision relating to restitution of conjugal rights under section 22 of the Act.

The Section 22 of **Special Marriage Act** and Sec 9 of the Hindu marriage Act 1955 contains same provision but applicable on the couples marrying under the Act.

The **essential conditions** for availing the remedy in all the personal laws are as follows:

- The respondent has withdrawn from the society of the petitioner
- The withdrawal by the respondent party is without reasonable excuse or lawful ground
- The court is satisfied that the statements made in the petition are true
- There is no legal ground for refusing to grant application

The Restitution of Conjugal Rights though included in the personal laws to preserve the sacramental character of the marriage. But this character loses its importance with the change in the time as well as through Amendment of 1976 in the Hindu Marriage Act.

The Act has taken a step ahead to make it contractual by introducing Divorce By Mutual Consent<sup>12</sup>, the time period has been reduced from 2 years to 1 year for filing cases for judicial separation as well as Divorce, the desertion which was earlier the ground of Judicial Separation was also made a ground of divorce.

### **International Perspective on Restitution of Conjugal rights**

The perspective on the remedy in various countries of the world are as follows:

#### **Australia**

In Australia the Family Law Act of 1975<sup>13</sup> curtail the powers of the court relating to pass a decree for restitution of conjugal rights .Section 114(2) of the Act, 1975 contains provisions relating to marital services or conjugal right services. But has now become an obsolete remedy

. Australian Law Commission also stated to repeal the above provision.<sup>14</sup>

#### **United Kingdom**

<sup>9</sup> sec 2(viii) of Dissolution of Muslim Marriage Act, 1939

<sup>10</sup> Section 33

<sup>11</sup> section 36

<sup>12</sup> Section 13-B

<sup>13</sup> Family Law Act 1975 No 53, Acts of Parliament, 1975 (Australia)

<sup>14</sup> Australian law reform Commission, Australian government

Matrimonial Proceedings and Property Act, 1970 eliminated the provision of passing of decree relating to restitution for conjugal rights<sup>15</sup>

### **Canada**

The restitution of conjugal right is deemed to be a valid law in some provinces of Canada but abolished in others.

The various Countries of the World has agreed that the remedy is oppressive and hence should be repealed

### **Constitutional mandate and the Restitution of Conjugal Rights**

The Constitutional validity of the Restitution of Conjugal Rights has been questioned many times. The important case laws relating to it are as follows:

**T Sareetha V T Venkata Subbaiah<sup>16</sup>**, the Andhra Pradesh High Court held that Section 9 of Hindu Marriage Act does not satisfy the traditional classification test because of its inheritance from the English society. The remedy is against Right to Privacy as given under Article 21 of the Indian Constitution and hence unconstitutional. section 9 is offensive against the rule of law as given under article 14 of the Indian Constitution.

The dissenting judgement was delivered in **Harvinder Kaur versus Harminder Singh Chaudhary<sup>17</sup>**. The Delhi High Court has held that section 9 was created with intention to preserve the marriage and introducing principles of constitutional law in the matrimonial disputes is most inappropriate. Cohabitation and consortium is necessary for sexual intercourse which is the important objective of the marriage and it does not violate Article 14 and 21 of the Constitution.

In **Saroj Rani versus Sudarshan Kumar Chadha<sup>18</sup>** the Apex court followed the decision of Delhi High Court and held that section 9 of the Hindu Marriage Act provides for resolving matrimonial disputes amicably and does not violate the constitution and hence a valid law.

In **Shakila Banoo versus Ghulam Mustafa<sup>19</sup>**, where Vaidya J. explained the oppressiveness of restitution of conjugal rights and denote it as ‘a relic of ancient times when slavery and quasi slavery was regarded as natural.’

In **KGP V PKP<sup>20</sup>**, the court went far away while protecting the reproductive rights of the women and directed the couple to visit the doctor expert in IVF procedure, where the husband doesn’t want the child and the decree for divorce was pending in the court but the High Court quashed the order in appeal by the husband.

In **Joseph Shine versus union of India<sup>21</sup>**, the Supreme Court has held that Right to Privacy and bodily autonomy of a married women should be protected and the court should refrain from passing any decree in contrary to it.

In the same way in the case of **K S Puttaswamy versus Union of India<sup>22</sup>**, the Apex court has laid down Right to Privacy is a fundamental right and has derived its existence from Article 14, 19, and 21 of the Constitution of India. It also includes Right to autonomy and over the reproductive choices of the couples too.

In **Prakash Chandra Joshi vs Kuntal Prakash Chandra Joshi and others<sup>23</sup>**, the Bombay High Court help that when a wife is staying abroad and residing with the couples child for career would not amount to cruelty to husband or desertion of her spouse. the court through this judgement paved the path of the woman right to freedom of trade and profession and also checks the misuse of remedy of restitution of conjugal rights which is used as a tool in the hands of the husband to harass the woman.

In **Navtej Singh Johar V Union of India<sup>24</sup>**, The Supreme Court in his landmark judgment decriminalise consensual homosexuality. The married woman should also be given choice relating to engaging in sexual with the spouse which is new dimension of right to live with human dignity of a married woman restitution of conjugal rights in personal laws in India.

In **Ojaswa Pathak and Another V Union of India<sup>25</sup>**, the petition was filed challenging the constitutional validity of Section 9 of HMA before the Suupreme Court where Government was asked to file an Affadavit. In September, 2022 the central Government filed a Counter affidavit stating it to be legal.<sup>26</sup>

<sup>15</sup> Royal Commission on marriage and divorce 1952

<sup>16</sup> AIR 1983 AP 356

<sup>17</sup> AIR1984 Delhi 66

<sup>18</sup> AIR 1984 SC 1562

<sup>19</sup> AIR1971 Bombay 166

<sup>20</sup> AIR 2020(NOC)535 Bom

<sup>21</sup> AIR 2018 SC 1676

<sup>22</sup> (2017) 10 SCC

<sup>23</sup> 2021 5 AIR Bom 148

<sup>24</sup> (2018) SC 4321

<sup>25</sup> AIR 2018 SC 4321

<sup>26</sup> <https://www.livelaws.in/top-stories/supreme-court-restitution-of-conjugal-rights-hma-special-marriage-act-cpc-208473>

In many cases Judiciary has held that the remedy is not discriminatory hence do not violate Article 14. But pragmatically it does. Treating unequal as equal is infact injustice in the patriarchal Indian society, where women are treated as the property of the husband. The matrimonial relief also discriminates between women and men under Article 19 and 21, because the marital rape is no rape in India where women not being under 18 years of age<sup>27</sup> does not criminalises non consensual sexual intercourse by the husband with his wife which is against freedom of Speech and Expression and Right to Life and liberty<sup>28</sup>. The Marital remedy is also acting as barriers in the career of the working women where women are forced to leave their employment in order to fulfil their matrimonial duty<sup>29</sup>. Judiciary has now been very sensitive while dealing with the cases relating to article 21 by including bundle of rights within its purview. The Court has liberalized the cooling period during the time of divorce by mutual consent where the marriage has been Irretrievable broken.<sup>30</sup>.

### **Various flaws in providing Relief in Restitution of Conjugal Rights**

The various flaws of the remedy are:

- The compliance of the Decree for restitution of conjugal rights is never demanded but the ulterior motive of non compliance is to take the advantage of Section 13 (1-A)(ii) which provides that if the decree of Restitution of Conjugal rights is not complied then after the expiry of one year from the passing of decree, the petitioner has a right to file divorce petition.
- Women are called back at their matrimonial home and women had to live forcefully without their will where they have to face various hardships such as sexual abuse, harassment etc. The physical and mental health of the married woman in India is ruined due to the abusive relationship. The husband treats the woman as their property and have right over the wife's body and can have sexual intercourse with her whenever they want even without consent. India has ratified the United Nations Convention on Elimination of All Forms of Discrimination Against Women which proposes to criminalize the marital rape as it is against equality and human dignity but India has not taken any step to criminalise marital rape.<sup>31</sup> and has been included in the exception 2 of section 375 of Indian Penal Code. It is extremely shocking to remark that the marital rape is not a crime but restitution of conjugal right is punishable if decree has been passed against the person.

- The enforcement of the decree of restitution is also sometimes become difficult in the cases where the spouse does not have any property of his own or in his own name. The women in India generally do not have any property of their own and ascertaining the share in the husband property is a cumbersome process and there can also a situation where men does not have any property.

All the above provisions of the law favours the abolition of the matrimonial practice though given the name of relief i.e. Restitution of Conjugal Rights.

### **Conclusion and Suggestions:**

The restitution has lost its importance with the social transformation. The remedy was added in the law to preserve the estranged relationship but it does not accomplish the above stated purpose and making the relationship more estranged. The remedy is also misused by the couple for their posterior motives and is also violative of the golden triangle of the Constitution. Hence, should be repealed from the personal laws of various religion of India.

The suggestions of the researcher for Restitution of conjugal rights are as follows:

- The restitution of conjugal rights is unfit in the modern society due to the harsh and barbaric nature and also against natural law. The section is burden on the woman and threat to bodily autonomy and also against the constitution as it violates women privacy and hence should be declared unconstitutional and hence should be repealed.
- The Legal Service Authorities should maintain the list of qualified matrimonial lawyers which can provide amicable reliefs to the couples in the time of need
- The delay in deciding matrimonial matters should be reduced so that the agony of the aggrieved can be minimized.
- Restitution should be replaced by Reconciliation and the Committee should be formed by the Judiciary to accomplish the purpose of preserving the marriage.
- Irretrievable breakdown of marriage should be introduced as an additional ground of divorce by the legislators.

<sup>27</sup> Independent Thought v Union of India (2017) 10 SCC 800

<sup>28</sup> Article 21

<sup>29</sup> Freedom of Trade and Occupation Article 19(f)

<sup>30</sup> Amardeep Singh V Harveen Kaur civil appeal No 11158 of 2017

<sup>31</sup> India today, marital rape in India Today web, 12 March 2016

- The marital rape should be made a criminal offence by the legislature  
The need of an hour is to abolish restitution of conjugal right as it is against the fundamental rights guarantee to the married woman such as right to equality liberty dignity freedom of speech and expression freedom to profession etcetera in India the right of privacy and right to live with human dignity

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