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# **THE JUDICIAL PARADOX OF RESTITUTION OF CONJUGAL RIGHTS: A NON-CONSENTUAL COLONIAL REMEDY IN A MODERN CONSTITUTIONAL FRAMEWORK**

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## **ABSTRACT**

A fundamental paradox in our constitutional framework has been highlighted by the continued implementation of the restitution of conjugal rights in Indian law, a democracy which cherishes individual liberty nevertheless allows coercion in marriage. This paper asserts that Restitution of Conjugal Rights breaches the right to privacy, equality and dignity is an obsolete legal construct that is in no way a means of relief. Initially defended as an approach to sustain marriages, this remedy has since emerged as a legislation that justifies coercion in the name of safeguarding marriage. Threatening the core value of consent that underpins all relationships. It turns the marriage from a voluntarily chosen union into a state enforced obligation by imposing cohabitation. This paper argues that genuine reform does not involve overseeing affection; instead it is rebuilding marriage as an institution of autonomy, equality and choice. Therefore, declaring this relief unconstitutional is not just a legal evolution - it is a moral correction long overdue. Despite its technically impartial wording, the legal doctrine of Restitution of Conjugal Rights functions in a manner that systematically compounds inequality within the marital relationship. It is typically the spouse possessing lesser socio-economic power—a position still frequently occupied by women—who faces the coercive weight of such a decree, compelling a return to a shared residence that may be a source of profound distress or danger. This legal instrument is fundamentally predicated on an antiquated valuation of the marital institution above the autonomy and safety of the individual. Consequently, for a person without independent means or robust external support, acquiescence is not an exercise of free will but a stark imperative for survival. The statute's ostensibly neutral language thus fails to mask its substantive violation of contemporary constitutional norms, as it empowers the state to enforce a deeply invasive model of marriage that subverts the core principles of equality, genuine consent, and the fundamental liberty to sever oneself from a damaging partnership.

## INTRODUCTION

Marriage, at its core, is the formation of a shared life through the union of a husband and wife. For the Hindus marriages are considered to be more of sacramental union than a contractual relationship. Here sacramental means that is an eternal union which is not only valid in the present life but also for the seven lives ahead. To keep the sanctity of this holy union intact the Indian laws provide matrimonial remedies to restore the marriage for the spouses who do not wish to cohabit together which may ultimately lead to the separation of spouses. One of these remedies include Section 9 of The Hindu Marriage Act, 1955 that is The Restitution of Conjugal Rights. Ironically this statute which is called a remedy has been violating the basic fundamental rights of the spouses.

The legal concept of "restitution of conjugal rights" can be understood by examining its components, "restitution" refers to the restoration of a prior state or right, while "conjugal rights" denotes the privileges and obligations inherent to marriage, principally the right to cohabitation and shared companionship. When unified, the phrase describes a specific legal recourse where a court can mandate the reinstatement of the marital partnership, and mandating the reinstatement of the shared household and thereby restore matrimonial bond.

Section 9 of the Hindu Marriage Act authorizes that either of the spouse can approach the court to request an order directing their, spouse who has withdrawn without reasonable cause to restore marital cohabitation. It is shown as a means of protecting the conjugal harmony however it undermines the fundamental right to privacy, dignity and bodily integrity which ultimately converts the holy companionship into a mandatory obligation.

## HISTORICAL BACKGROUND

“The principle of restitution of conjugal rights, was never documented under the Dharmashastra nor did the Muslim law made any provisions for it.”<sup>1</sup> It is a legal import with roots in Jewish law that was subsequently adopted by the English judiciary. British colonial authorities transplanted this concept into India, a move formally initiated by the ruling in *Moonshee Buzlur Raheem*. Historically, this law reflected a feudal worldview that granted a husband proprietary control over his wife, requiring her constant residence in his home. Her

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<sup>1</sup> Paras Diwan, *Family Law in India* 143-147 (2011).

individuality was not valued, they were treated as subordinates to their husband. Withdrawing or fleeing from the house was not an option as she was compelled to live with the husband, nearly the same manner in which a cow ran away from his master's shed which could be brought back and tied to its post. This decree could be implemented through coercive methods in the ancient days of the conjugal laws, especially when English ecclesiastical principles were in play. These so-called remedies included the respondent's arrest and, in some circumstances, the physical delivery of a spouse to the husband. The very premise of this law is deeply fallacious, stemming from a period when women were treated as the chattel of their husbands.<sup>2</sup> Despite being discontinued in its own country of origin by the Matrimonial Proceedings and Property Act, 1970 by acknowledging the forced cohabitation was against the personal freedom and dignity of the spouses. However this imperialist construct was later imported into the Indian personal laws through statutory codification - most considerably Section 9 of The Hindu Marriage Act 1955<sup>3</sup> and Section 22 of The Special Marriage Act, 1954.<sup>4</sup> The legal framework' patriarchal instinct was echoed in these very archaic clauses where marriage for the wife meant mere obligation.

## **CONCEPTUAL UNDERSTANDING OF RESTITUTION OF CONJUGAL RIGHTS**

The Special Marriage Act, 1954 (Section 22) and The Hindu Marriage Act, 1955 (Section 9) comprehend Restitution of Conjugal Rights and permit a decree in cases where one spouse leaves the other without an adequate reason. A gradual evolution from a sacramental to a contractual view of marriage was portrayed in The Marriage Laws (Amendment) Act, 1976 which modernized these provisions by introducing divorce by mutual consent and thereby minimizing the separation period.

Muslim law considers marriage as a contractual relationship, and if one spouse separates from the other without any legitimate explanation, the other party may demand compensation. This right has been reinforced by laws like the Muslim Personal Law (Shariat) Application Act, 1937, and the Dissolution of Muslim Marriage Act, 1939, and has its roots in cases like *Moonshree Buzlur Raheem v. Shumsoonissa Begum* (1866).

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<sup>2</sup> Ojaswa Pathak v. Union of India AIR 2018 SC 4321.

<sup>3</sup> Hindu Marriage Act, No. 25 of 1955 S 9 (India).

<sup>4</sup> Special Marriage Act, No. 43 of 1954, S 22 (India).

The Parsi Marriage and Divorce Act of 1936 and the Indian Divorce Act of 1869 both of these religious communities have identical provisions for Christians and Parsis that empowers the aggrieved spouse to seek restoration of their conjugal status through court. In cases involving cruelty, insanity, or remarriage, this remedy can get declined in order to avoid the ruling from being applied in an oppressive way.

## **CONSTITUTIONAL VALIDITY OF THE RESTITUTION OF CONJUGAL RIGHTS**

### ***Article 14- Lost Equality in Marital Life***

The Constitutionality of Section 9 of the Hindu Marriage Act is called into question for its alleged violation of Article 14 of the Indian Constitution. Article 14 establishes the fundamental principle of equality before the law and secures the equal protection of the laws for every person within the territory of India. The provision is challenged on the grounds that it contravenes this core constitutional guarantee. Despite this foundational principle, the legal framework established by Section 9, while appearing neutral on its face, imposes a disproportionately heavy burden on women in its practical application. The court has failed to recognize the actual, and the primary impact of such legislation. It results in an unequal impact as it affects women more due to the societal and economic dependence in marriage. In its outward form, both husband and wife have the right move to the court to resume their problematic marital life. However, it has ignored the fact that power imbalances and structural inequalities exist in Indian society.

### ***Article 15- The Law Enfolded Patriarchy***

This provision also presents serious concerns regarding its compliance with Article 15(1) of the Indian Constitution, which expressly prohibits the state from discriminating against citizens solely on grounds of sex, among other factors. The application of the restitution of conjugal rights law demonstrates a clear gender disparity, as a predominant number of such petitions are initiated by husbands. This pattern reflects the function of a legal instrument within a patriarchal societal structure, where men are often positioned with disproportionate social and financial authority, which the law effectively reinforces and relies upon. In such a patriarchal social framework women are in a vulnerable situation where they have to unwillingly return to their marital home because of the social stigma related to divorce and economic dependence on their husband. Therefore, this law hints that a woman's duty is to protect the marriage even

if she is not willing to do so. It reinforces the old age notions of female obedience that a women's primary duty is to cohabit and serve her husband.

T Sareetha v. T Venkata Subbaiah is a 1983 Andhra Pradesh High Court's ruling which was an important milestone in the Indian Constitutional law.<sup>5</sup> Justice P.A. Choudhary questioned the Constitutionality of section 9 of the Hindu Marriage Act, 1955. T Sareetha the Petitioner disputed this law on the grounds that it interfered with her fundamental rights to equality, liberty and privacy under article 14, 19, 21. Of the Constitution of India by mandating by forcing cohabitation. The T sareetha verdict by justice pa Choudhary was remarkable as it defined marriage as a relationship based on consensus rather than coercion. His rationality integrated into Indian law the concept that dignity cannot be interrupted by marriage and the constitutional safeguards extend to the home and body. Even though other courts overturned the ruling it remains to have an impact on India's developing gender and privacy jurisprudence making it a pillar for studies on feminist legal theory Constitutionality and personal liberty.

#### ***Article 19- Independence or Forced Residing***

Section 9 of the Hindu Marriage Act, 1955, which decreed the restoration of conjugal rights is certainly violating the liberties protected by Article 19(1)(a) and 19(1)(d) of the Indian Constitution. Article 19(1)(a) states that every individual has freedom of speech and expression. This includes the ability to express or suppress personal and emotional feelings in addition to linguistic communication. Court dictates the unwilling spouse to resume cohabitation with their partners and to display feelings of intimacy, affection, companionship which may no longer exist. T. Sareetha v. Venkata Subbaiah. Similarly, it violates article 19(1)(d) which safeguards the freedom of movement and residence. This occurs when a person is legally forced to live with a spouse against their will, restricting their ability to choose where they want to live. Thus, an enforcement of cohabitation through this statute hinders an individual's freedom to choose how their personal life evolves.

#### ***Article 21: Restitution of conjugal rights an an Attack on Bodily Autonomy and Human Dignity***

The legal provision for the restitution of conjugal rights is fundamentally at odds with the

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<sup>5</sup> T. Sareetha v. T. Venkata Subbaiah, AIR 1983 AP 356 (India)

protections guaranteed by Article 21 of the Indian Constitution. Through its evolving jurisprudence, the Supreme Court has progressively expanded the interpretation of "life and personal liberty" to include those freedoms that form the bedrock of a dignified human existence. This broadened understanding now unequivocally recognizes the right to privacy, bodily integrity, sexual autonomy, and the liberty to make intimate decisions regarding one's personal and familial life. This transformative shift in constitutional doctrine has been cemented by a series of landmark rulings. The Supreme Court's judgments in *K.S. Puttaswamy (Retd.) v. Union of India* (2017), *Joseph Shine v. Union of India* (2018), and *Navtej Singh Johar v. Union of India* (2018) have collectively established a robust framework for personal liberties.

In the landmark *Puttaswamy* case, the Court explicitly affirmed that the right to privacy is an intrinsic component of Article 21. This right encompasses the inviolability of one's physical self, the autonomy to make personal choices, and the freedom to lead a private existence, shielded from unwarranted state interference.

In *Joseph shine*, the Honourable judges ruled that in no circumstances the state should interfere in matters related to conjugal rights. "The Petitioners submit that 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".

Similarly, the court affirmed in *Navtej Singh Johar*, which decriminalised consenting same-sex relationships, that prioritizing individual choices, intimacy, and identity over traditional social morality is a requirement for upholding constitutional morality.

The Supreme Court overturned the evolutionary judgement rendered in the case of *T.Sareetha v. T. Venkata Subbaiah* by reaffirming the validity of Section 9 of the Hindu Marriage, Act in the case of *Saroj rani v. Sudarshan kumar chadha*. "When the court has decreed restitution for conjugal rights It serves a social purpose as an aid to the prevention of break-up of marriage." Arguing that the ruling provides a chance for reconciliation the court supported it as a means to preserve marital harmony and avert marital breakdowns. This decree validated judicial interference in private affairs. Although, a judgement affirming this statute does not necessarily force the spouses to have sexual intercourse. In practical terms, decree mandatorily requiring cohabitation invariably conveys an implicit assumption of sexual engagement, undermining a woman's bodily autonomy and liberty though the objective of the Supreme Court in *Saroj rani*

was to preserve marriage the decision significantly reduced for constitutional foundation for individual liberty within marriage.

## **INTERNATIONAL PERSPECTIVE**

United Kingdom- The Matrimonial Proceedings and Property Act 1970<sup>6</sup> terminated the remedy in 1970. The British courts affirmed that forced cohabitation was in contradiction with individuals' freedom and privacy and has no substantial part in safeguarding marriage.

Canada- It originated from the English Common law, however it is no longer a legal relief in most of the provinces. This relief is viewed as antiquated and is not incorporated in current Canadian Family Law in the majority of the country as the legal environment for family law has evolved with time.

South Africa- By implementing Section 14 of the Divorce Act in 1979 South Africa outlawed the restoration of conjugal rights.

Australia- The Family Law Act 1975, eliminated the courts power to grant judgements mandating the restoration of conjugal rights. It was last used in 1978, since then it has become outdated. In 2010 the Australian Law Commission supported this stance and declared that its restitution of conjugal rights should be removed as it is incompatible with family law principles.

## **WHY INDIA HAS NOT YET ABOLISHED RESTITUTION OF CONJUGAL RIGHTS**

India still preserves section 9 of Hindu Marriage Act 1955 and similar provisions in other personal laws. Despite widespread constitutional criticism and global extinction and international abandonment of such remedies. The reasons for its continuation are outlined below:

1. Colonial legacy: Historically the decree of Restitution of Conjugal Rights functioned as the legal mechanism to compel cohabitation between spouses in Christian marriages under British colonial law When the Hindu Marriage Act 1955 was proposed there was no discussion of the morality and Constitutionality of such a law. Ironically it was revoked in its country of origin

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<sup>6</sup> Matrimonial Proceedings and Property Act 1970, c. 33, S 20 (U.K.).

UK in 1970, however India even in its 21st century considers it to be an aid for the breakup of marriage.

2. Judicial validation by the Supreme Court:-The Supreme Court validated section 9 of Hindu Marriage Act, 1955 citing its goal of upholding the institution of marriage rather than coercing spouses. This decision built a legal precedent that hindered more challenges and strengthened the notion that restoration of conjugal rights was a valid reconciliatory remedy. The Courts are powerless to abolish this remedy due to the current legal framework. In the case of *Saroj Rani* the judge acknowledged: “At the end, I will reiterate what I have already said: It is for the government to abolish the remedy of restitution, not for the courts to declare it unconstitutional. I believe S. 9 to be entirely valid.”

3. Political sensitivity of personal law reforms: In India family laws of all religions fall under the sphere of personal laws. When these personal laws are amended or reformed a major Political and religious reaction is triggered. Governments fear backlash so they typically refrain from modifying laws like this, which can be interpreted as interfering with religious beliefs.

4. Cultural and religious conservation: Marriage is embedded in social and religious custom in India; it is considered to be sacred rather than being a civil contract. Accordingly the concept of forced cohabitation aligns with social views regarding the eternal nature of marriage and the obligation of spouses to sustain family unity.

5. Misuse by litigants: The existence of this law in India is also because of the underlying objectives of the petitioner in the restitution cases leading to the deliberate abuse of this clause by the litigants. This remedy is frequently used for concealed purposes instead of using it as a means for reconciliation. Many spouses, especially husbands, lodge these petitions solely for seeking divorce by obtaining an award that they do not intend to abide by, just to later seek for divorce under Section 13(1-A)(ii) of the Hindu Marriage Act on the basis of their failure to comply. Some use it as a counter approach to thwart a wife's plea for monetary assistance under section 125 CrPC, consequently preventing the maintenance claims. This tendency which is observed in cases such as *Veena Handa v. Avnash Handa* and *Malkiat Singh v. Shinderpal Kaur*,. Exposes how it is often destructive than reconciliatory defeating its fundamental objective and reinforcing the pressing requirement for its elimination



## **MODERN ALTERNATIVES TO THE RESTITUTION OF CONJUGAL RIGHTS**

For the purpose of settling disputes over marriages and promoting reconciliation, many jurisdictions have introduced alternate strategies that do not require forceful cohabitation under the law. These techniques concentrate on offering spouses, going through difficulties in marriage, support counselling and mediation services.

One modified approach could be encouraging and expanding mediation initiatives for the spouses having disputes over their marriage. This could include establishment of court-annexed mediation services conducted by qualified experts who can assist couples in resolving quarrels without going to the court.<sup>7</sup>

Additionally, to implement a more extensive system of marriage counseling preferably with public funding to ensure accessibility. This emphasizes that communication problems and financial stress and other factors that could be corrected with professional intervention are the underlying factors of many marital conflicts.

Moreover, as a counter measure to both immediate divorce and restitution, reformers could comply with an enhanced structure legal separation and offer an acceptable balance for couples who are uncertain about getting a divorce by providing them with a formal way to live apart and divide assets while sustaining their legal marriage.

One of the reasons for acceptance of such a barbaric law is due to societal and cultural conservatism. Therefore, it is important to find a balance between conventional marriage and family values and contemporary ideas of individual rights and gender equality.

The measures for reform must cautiously manage this issue. One of the strategies might be to preserve certain facets of traditional dispute resolution procedure like household or community mediation but while making sure that these practices uphold gender equality and individual rights. This may involve educating the community on modern concepts of marital rights and obligation. In order to reduce the gap between older customs and modern day rights educational initiatives may also be of considerable significance. With time public awareness efforts on gender equality, marital rights and the presence of support services can contribute to a change

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<sup>7</sup> Journal of Emerging Technologies & Innovative Research (JETIR), Vol. 12 Issue 7 (July 2025).

in the society's belief.

## **THE RECOMMITMENT FOR ABOLISHING THE RESTITUTION OF CONJUGAL RIGHTS IN INDIA**

The legal remedy of restitution of conjugal rights, a provision extant in various Indian matrimonial statutes, faces concerted calls for its abolition from significant governmental and legal bodies. This movement is grounded in the provision's documented misuse and its fundamental incompatibility with contemporary rights-based jurisprudence.

A pivotal critique originates from the High Level Committee on the Status of Women (HLCSW), constituted by the Ministry of Women and Child Development. The Committee's report determined that the provision, initially intended to preserve marriage, is now strategically deployed to prejudice women's rights. It observed a recurring pattern wherein husbands file suits for restitution of conjugal rights specifically to counter claims for maintenance or complaints of cruelty filed by their wives. This tactical litigation effectively forces women into a legal dilemma, undermining their access to financial support and legal recourse.

Furthermore, the HLCSW and subsequent legal authorities have condemned the remedy as an affront to human rights and individual autonomy. The core objection is that a court decree compelling the resumption of cohabitation is tantamount to enforcing a marital relationship, thereby violating personal liberty and bodily integrity.<sup>8</sup>

This position has been formally endorsed by the Law Commission of India in its consultation paper on family law reform. The Commission affirmed that in a modern context where women are educated and economically contributory, the provision unjustly curtails their hard-earned freedoms. It concurred with the HLCSW's finding that the remedy is largely redundant, as denial of conjugality is already a recognized ground for divorce under existing laws.

Consequently, a consensus has emerged recommending the legislative deletion of the provision. The Law Commission explicitly proposes the repeal of Section 9 of the Hindu Marriage Act, 1955, Section 22 of the Special Marriage Act, 1954, and Section 32 of the Indian

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<sup>8</sup> Law Commission of India, Consultation Paper on Reform of Family Law (2018).

Divorce Act, 1869, signaling a critical shift towards prioritizing individual rights over coercive marital remedies.

## **CONCLUSION**

The Indian legal framework continues to hold an extremely misogynistic perspective onto women's private life. Section 9 of the Hindu Marriage Act, 1955 compels women to silently put up with all the inequalities embedded in the institution of marriage under the pretext of preserving the sanctity and morality of marriage. Although it may appear to foster marital harmony, the restitution of conjugal rights effectively strengthens a system that limits women's choices, bodily integrity and personal freedom.

In a society where marital rape continues to be not illegal ordering an hesitant wife to reside with her husband is like stating that coercion is acceptable and that consent is not paramount, which strikes contrary to the very foundation of human dignity. The restitution order often portrayed as a positive way to facilitate reconciliation can in terms of execution result in both emotional and bodily submission. It renders it difficult to differentiate between reconciliation and mandated adherence as well as it employs the authority of the state to control intimacy and companionship of the spouses.

This clause was first executed to safeguards the vows of conjugation. During a time when divorce was relatively rare. However, its persistence in the 21st century is incompatible with the principles of constitutional values and gender justice. Most progressive nations like the United Kingdom, South Africa and Australia have succeeded in getting rid of this customary practice because they have acknowledged the fact that marriage cannot sustain if the spouses are compelled to commit to it. India must reconsider this colonial legacy and modify it with consent based practices such as mediation and counseling. There can only be true harmony in a marriage when both spouses are willing to live together, not because they are compelled to cohabit with each other.

## REFERENCES

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