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# THE RESTITUTION OF CONJUGAL RIGHTS AND ITS VIOLATION OF THE RIGHT TO PRIVACY

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## ABSTRACT

The provision for restitution of conjugal rights under Sec. 9 of the Hindu Marriage Act, 1955 and Sec. 22 of the Special Marriage Act, 1954 creates a vacuum in law as it tends to violate the provisions of right to privacy under Article 21. A court mandated restitution of conjugal rights tends to be a coercive act on the part of the government and violates a person's decisional autonomy. In several previous judicial pronouncements, the court has upheld the validity of restitution of conjugal rights denying equal status and equal rights to women in a marriage. This opens to a lot of interpretations with regard to the law being in force. The paper contends that the provision of restitution of conjugal rights tends to violate the Right to Privacy guaranteed under Article 21. The provision of restitution of conjugal rights although gender neutral, poses a great threat to the Indian women. Given the plethora of Indian judgments upholding individual interests and bodily autonomy, the existence of this provision raises a constitutional dichotomy between an individual's right to privacy and the archaic provision of restitution of conjugal rights.

**Keywords:** Autonomy, Coercive, Conjugal rights, Marriage, Privacy,

## 1. INTRODUCTION

Taking the literal meaning of the term ‘conjugal’ - connected to marriage or the marital relationship of a couple. Hence coming to the term conjugal rights, it means the rights arising from a marital relationship. Marriage being considered sacred as per Indian customs, the provision for restitution of conjugal rights was never a part of the Indian traditions and customs. This archaic provision was drawn into the Indian system from the British, in whose system it has been cut off ironically now. The provision for restitution of conjugal rights under Sec. 9 of the Hindu Marriage Act, 1955 and Sec. 22 of the Special Marriage Act, 1954, creates a vacuum in law as it tends to violate the provisions of right to privacy under Article 21. A court mandated restitution of conjugal rights tends to be a coercive act on the part of the government and violates a person’s decisional autonomy. In several previous judicial pronouncements, the court has upheld the validity of restitution of conjugal rights denying equal status and equal rights to women in a marriage. This opens to a lot of interpretations with regard to the law being in force. The paper contends that Sec. 9 of the Hindu Marriage Act, 1955 and Sec. 22 of the Special Marriage Act, 1954 tends to violate the Right to Privacy guaranteed under Article 21.

### 1.1 Background

In the year 2021, a writ petition was filed by students from Gujarat National Law University challenging the constitutionality of Section 9 of the Hindu Marriage Act, 1954 and Section 22 of the Special Marriage Act, 1955. The concept of restitution of conjugal rights is a colonial idea which was drawn into the Indian legal system. It basically gives the Courts the power to ask the spouse who has ‘withdrawn from the society of the other’ to go back to his/her spouse if the withdrawn spouse fails to give a ‘reasonable cause’ for the same. A plain reading of both the sections would imply that the said provisions are in direct violation of the Right to Privacy enshrined in Article 21 of the constitution. In the 2017 case of *Justice K.S. Puttaswamy vs. Union of India (2017)*<sup>1</sup> The Supreme Court of India held that Right to Privacy forms an intrinsic part of the fundamental right to life and liberty.

### 1.2 Developments over the years

If we take a walk-through history, during the late 19th century, suits for restitution of conjugal

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<sup>1</sup> AIR 2017 SC 4161

rights were predominantly brought forward by wives abandoned by their husbands in the hope that the husbands would provide something for the sustenance of the wife and children. Also, it is to be noted that this was a time when there was no provision for divorce in Hindu law. Post independence, restitution of conjugal rights as well as provision for divorce were brought under the ambit of the Hindu Marriage Act. A major shift happened with the suits for restitution of conjugal rights when women started working and suits were brought forward by husbands mainly in comparison to the number of suits brought forward by wives. In the case of *Tirath Kaur v. Kirpal Singh*<sup>2</sup>, upheld section 9 of the Hindu Marriage Act, and said 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.*” As more and more hindu women became independent and started taking up jobs, the Courts ordered these women to give up their jobs if that's what their husbands wanted. During the mid-1970s, there was a mild shift with respect to the number of cases which favored the women who wanted to live away from their marital home due to job constraints. It is pertinent to say that the biggest change happened in 1983, when the Andhra Pradesh High Court in the case of *T Sareetha v T Venkata Subbaiah*<sup>3</sup> struck down the provision and declared it null and void. The court said, “*a matter so intimately concerned the wife or the husband the parties are better left alone without state interference*”. However, in the same year, the Delhi High Court in the case of *Harvinder Kaur v Harmander Singh Chaudhry*<sup>4</sup> upheld the provision. Hence, we can see that there are a number of judgments giving conflicting views on restitution of conjugal rights. There still remains a huge void as to the constitutionality of restitution of conjugal rights.

## 2. THE PROVISION IS IN DIRECT VIOLATION OF THE FUNDAMENTAL RIGHT TO PRIVACY

In the year 2017 case of *Justice K.S. Puttaswamy vs. Union of India (2017)*<sup>5</sup> The Supreme Court of India held that Right to Privacy forms an intrinsic part of the fundamental right to life and liberty. A person deciding whether or not to cohabit with her/his spouse is completely a question of personal liberty and choice and is not a matter of state interference. In the writ petition filed, it says that a court ordered restitution of conjugal rights, amounts to a “coercive act” on the part of the state, which goes against one's right to privacy and dignity as well as

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<sup>2</sup> AIR 1964 Punjab 28

<sup>3</sup> AIR 1983 AP 356

<sup>4</sup> AIR 1984 Delhi 66

<sup>5</sup> *Id.* at 1

their sexual and decisional autonomy. Restitution of conjugal rights is indeed an archaic provision, the one that gives law more authority than individual rights. It is unjustified for the state to interfere into something as personal as marriage and mandate an estranged husband or wife to go back to cohabiting with their spouse. In the case of *T. Sareetha v. T. Venkata Subbaiah*<sup>6</sup>, the court commented that, *If the right of privacy means anything it is the right of the individual, 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.*

## 2.1 The provision is against the sexual autonomy of an individual

In the landmark case of *Joseph Shine v. Union of India*<sup>7</sup>, a 5-judge of the Supreme Court struck down and held unconstitutional the adultery provision i.e. Section 497 of the Indian Penal Code. In the judgment it was rendered that *Sexuality cannot be disassociated from the human personality. For, to be human involves the ability to fulfill sexual desires in the pursuit of happiness. Autonomy in matters of sexuality is thus intrinsic to a dignified human existence. Human dignity both recognises and protects the autonomy of the individual in making sexual choices. The sexual choices of an individual cannot obviously be imposed on others in society and are premised on a voluntary acceptance by consenting parties.*<sup>8</sup> Hence the Apex Court has undoubtedly accentuated the importance of sexual autonomy under article 21. Sexual intercourse being an essential element of a marriage, co-cohabitation can essentially lead to potential forced sexual intercourse between the couple. It is also to be noted that in India, marital rape i.e. sexual intercourse by a man with his wife aged not less than 18 is not rape. Therefore, forced and non-consensual sex with the spouse is marital rape. Hence, there is a wide conflict among these laws. With the Supreme Court having a clear stance on sexual autonomy of women, any law that tends to contradict such a decision would be violative in nature. Not only is restitution of conjugal rights constitutionally wrong but also tends to violate women's dignity via several other laws too. When the constitution as well as the judiciary has upheld the importance of individual and sexual autonomy, by virtue of what grounds can a court mandate an individual to go back to cohabiting with the co-spouse when he/she does not wish to do so?

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<sup>6</sup> *Id.* at 3

<sup>7</sup> (2019) 3 SCC 39

<sup>8</sup> *Id.*

## 2.2 The provision appears to be biased against women under Article 14 of the constitution.

Although restitution of conjugal rights is a gender-neutral provision that allows both the husband and wife to seek restitution of conjugal rights, the same appears to be biased against women. A woman leaving her marital home for whatever reason, could or might be called back or forced to come back to her marital home by obtaining a decree of restitution of conjugal rights. This opens up opportunities for forced cohabitation, or maybe even forced sexual intercourse which can amount to marital rape as discussed in the previous paragraph. This altogether tends to violate or contradict the very reason for which such a provision came into existence i.e. preserving the institution of marriage. Hence, the provision can tend to be discriminatory in nature against women. Also, it is to be noted that there is no guarantee the existence of a legislation would ensure a happy marriage henceforth for the couple. Women being stereotyped as the weaker gender in the country, it is only impending that such a provision would tend to do more harm than good because of certain inconsistent laws existing in the country. It can be concluded that this provision gives a possibility that it might have negative rather than positive effects in the marital lives of women strongly interfering with their private lives. Hence, the provision of restitution of conjugal rights tends to disproportionately discriminate against women.

The Supreme Court had previously in the adultery case noted that *the identity of the woman must be as an “individual in her own right”. In that sense, her identity does not get submerged as a result of her marriage. Underlying the norm is a notion of control over and subjugation of the woman. Such notions cannot withstand scrutiny under a liberal Constitution.*<sup>9</sup>

## 3. CONJUGAL RIGHTS DO NOT NECESSARILY SERVE THE BEST INTERESTS OF A FAMILY

In a survey conducted by the Ministry of Women and Child Development on the status of women and children, it was found that although the provision for conjugal rights came into existence with the intention to preserve the integrity of ‘family’, however the same provision has been misused as a tool and catalyst to deny women’s claim for maintenance or of cruelty.

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<sup>9</sup> *Id.* at 1

The survey also suggested the provision to be deleted as it does not serve the best interest of a family as it should.

### **3.1 The provision tends to overweight marital interests over individual interests**

It has been argued in the petition whether the state can have such a compelling interest in preserving the institution of marriage that it permits laws that make it enforce cohabitation of spouses. In the case of *T. Sareetha v. T. Venkata Subbaiah*<sup>10</sup>, the court said that a married couple is not an individual entity as such but rather the association of two separate individuals. *“If the right of privacy means anything it is the right of the individual, 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.”*

The Indian legal system during the British era, found it more convenient to protect group identities rather than individual rights. Contrary to this, the Indian constitution has always been a pioneer of protecting the rights of individuals.<sup>11</sup> In fact, in India individual interests are also protected as a way to protect group interests.

Combining the above-mentioned points, the state acting as the compelling force to decree an estranged couple to retrieve to cohabiting suggests that the state overweights marital interests over individual interests. This again tends to be violative of Article 14 of the constitution.

## **4. CONCLUSION**

The provision of restitution of conjugal rights although gender neutral, poses a great threat to the Indian women. The fact that Indian women are still subjected to discrimination acts as a catalyst to the same. Also, it is pertinent to know that India is a country where torture and killings for dowry is prevalent. A decree of restitution of conjugal rights is literally an albatross around the neck for a spouse to walk away from his/her unhappy marriage. The provision has been misused over the years with women forced to go back to their abusive marital houses. The court needs to reexamine the position of this right with the various judgments. In the case of *Navtej Singh Johar V. Union of India*<sup>12</sup>, the court placed a great emphasis on the autonomy

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<sup>10</sup> *Id.* at 3

<sup>11</sup> Pratap Bhanu Mehta, 2015, *Being Free to be Free*, Open the Magazine, last visited 20 April, 2023, 11:53 a.m., <https://openthemagazine.com/voices/being-free-to-be-free/>

<sup>12</sup> AIR 2018 SC 4321

of individual's interests pertaining to intimate decisions. Also, with the help of the arguments in the above paragraphs, the author has established how the provision is in direct violation of the Right to Privacy. The right to privacy, being a fundamental right guaranteed under *Justice K.S. Puttaswamy vs. Union of India (2017)*<sup>13</sup>, is not something to be trifled with considering the patriarchal history of India. Marriage is an institution based out of mutual consent, respect and liberty of two adults. The existence of restitution of conjugal rights in the Indian legal system, deprives the spouse her bodily and decisional autonomy. Such a provision should be stripped off as there are judgments upholding an individual's right of bodily and decisional autonomy. Hence, it is high time for the Indian judiciary to reexamine this archaic provision and to do away with this 'patriarchal remedy'.

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<sup>13</sup> *Id.* at 1