# RESTITUTION OF CONJUGAL RIGHTS - PRESERVING A SACRAMENT OR CREATING A LIABILITY

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## INTRODUCTION

'The essence of marriage is encapsulated in jointly sharing the experiences, joys and trials of life. Co-habiting is a symbol of this shared living and separation a negation of this essential quality of marriage'.[2] Restitution of marital rights, as laid out in Sec 9 of the Hindu Marriage Act, raises a gamut of contestations, from constitutional legitimacy to progressive jurisprudence. In this context, this paper explores an article written by Vimal Balasubhramanyam,[3] which analyses the sectional provisions of the act, against the backdrop of the **T. Sareetha case**,[4] of the Andhra Pradesh High Court. Vimal locates the judgment along the dual arguments of, the benefits of an unbreakable bond of Hindu marriage, contrasted to the recognition of the right of women over their own body.

Since the article was written prior to the antithetical Supreme Court judgment, it provides us a foundation for furthering the analysis. Through this paper, I shall also be examining the historical context of the provision, the reason it became such an integral part of the Hindu code and its critique on considerations of freedom and liberty. This paper also examines the dual trend in the higher Courts to retain this provision as an indispensable part of the marriage act, or to question the constitutional legitimacy of similar laws.



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[2] 71st Report of the Law Commission- the Hindu Marriage Act, para 6.5
[3] Vimal Balasubrahmanyan,Conjugal Rights Vs Personal Liberty: Andhra High Court Judgment. 18 (29) EPW. 1263–64(1983). http://www.jstor.org/stable/4372307
[4] AIR 1983 AP 356

## THE HISTORICAL CONTEXT

Hindu marriage is viewed as a sacrosanct. It has both contractual, as well as sacrament aspects.[5] The smritis, which comprise a major source of Hindu law, traditionally regard marriage as an essential samskara or religious obligation.[6] This aspect of Hindu law can be noticed in the stipulations like satpadi or sacred fire, that are essential to constitute a valid marriage as elucidated in sec7.[7] Marriage is considered as a socio-legally sanctioned route to progeny, in obligation to ancestral debts and mandates.[8] Further, the categorization of wife as dharampatni connotes a set of unalienable religious responsibilities and obligations.[9] The courts expect that in exchange for the rights conferred by the personal laws on the parties to the marriage, they fulfill the marital obligations imposed on them by the provisions of the act. In this context, the performance of religious ceremonies and rituals are deemed mandatory and the sacrosanct marital bond as eternal and in dissolvable.

Noted scholar Paras Diwan considers that, both the Dharmashastra and the Muslim Law do not identify the therapy of restitution of conjugal rights. Emulating the property characteristics attributed to marriage in feudal England, the British introduced it in colonial India. The idea of restitution of conjugal rights was first showcased in India in M Buzloor Ruheem v Shumsoonissa Begum.10 In the said case this provision was viewed as a facilitator of specific performance, and that procedure is now statutorily recognized in this provision.



[5] A. Jayachandra v Aneel Kaur , AIR 2005 SC 534
[6] FLAVIA AGNES, Family Law and Constitutional Claims, Oxford University Press,(2011).
[7] Sec 7 Hindu Marriage Act
[8] *Supra 2*
[9] *Id.*
[10] ( 1867) 11 MIA 551

## THE DIALECTICS

In England, the original source of this provision, the idea of restitution has an ecclesiastical connotation. In the early Ecclesiastical courts, desertion did not constitute a matrimonial offence and thus restitution of conjugal rights was viewed as the only alternative for a party whose spouse had deserted. This led to a proliferation of decrees ordering the party who deserted, to return to the matrimonial home. Disobedience of the decree was subject to punishment.[11] The Crown report listed the key arguments both in favour of retaining the section and those for the abolition of the remedy.[12]



***Arguments in favour of the Remedy***

a) Based on the data collected it was found that in most cases the real purpose of instituting legal proceedings is to persuade the deserting spouse to return, The committee went on to add that "the preponderance of consideration is in favour of utilizing legal proceedings to save marriages, however few".

**b)** The Morton Commission report[13] concluded that since a few members of the legal profession were in justified support of retaining the provision the remedy should be retained.

***Arguments for Abolition of the Remedy***

a) If the sole purpose behind the petitioner choosing to adopt this remedy is the preservation of the marriage, then there are more appropriate measures to serve this purpose. If the alternatives do not succeed, it is very unlikely that the legal system will produce better results.

[11] Law Comission Report – No. 23.
[12] *Id.*
[13] Royal Commission on Marriage and Divorce, 1952.

b) With the introduction of abandonment as a ground for divorce, the provision no longer retains value.
c) The low effectiveness of this remedy of restitution is evident in the rare usage of the proviso.

Thus, even in the country of its origin the remedy of restitution has been viewed as ineffective at adequately addressing issues in conjugal rights.

## THEMATIC -CONJUGAL RIGHTS AND LIBERTY

Vimal through his article analyses the judgement laid down by Justice Chowdhary in the case of **T. Sareetha v Venkata subbiah**.[14] In its judgment the court posited that Sec 9 of the Hindu Marriage Act was violative of Article 21[15] and therefore liable to be quashed. The author examines remedy in light of this judgment, looking at the far reaching consequences of this decision. Further, the author reviews the validity of the arguments of the dissenters, with regard to whether this provision truly benefits women, the group it seeks to primarily liberate.



## CRITICAL ANALYSIS

### *Cross Currents in Indian Courts*

What should be noted is that according to ancient Hindu Law, there was never a clear recognized institution of restitution of conjugal rights; rather it was something that was considered to be more of an informal obligation or duty than an actual rule.[16] In the case of **Bai Jiva v Narsingh Lalbhai**,[17] the court held that *"*Hindu law itself, was focused on the duty of the wife to live with and obey the husband. Yet it did not provide for a procedure of enforcing this by compulsory action of the courts, or otherwise."

[14] *Supra 1*
[15] Article 21 , The Indian Constitution
[16] Women & Law in India – Hindu Woman and Marriage Law , Monmayee Basu
[17] AIR 1927 Bom 264

In the Indian milieu the tendency of the courts, in the words of Flavia Agnes, is to view this doctrine of restitution in the "lord and master concept". Close she examination of judicial trends reveals that the court, under the flawed notion of marital rights, continued to undermine a women's right to work against the wishes of her husband. This manifest inequality is observed in the various court decisions to license the husband's choice, while deciding on the matrimonial home. A typical example is the **Kailashwati vs Ajodhia Prakash**[18]*case in* which the court accepted the Husband's implicit assertion of the conjugal home being the husband's home .Shockingly the high court decided in favour of the husband who wanted restitution of conjugal rights with his wife who was a school teacher in another village. The wife's defense was that she had not refused to perform her marital obligations, and the husband was aware that she was employed at the time of matrimony and therefore should not restrict her right now. The court felt that "the institution of marriage conferred upon the husband some form of proprietary right over his wife" and therefore implied that "the wife was duty bound to oblige the legally tenable right of the husband, to command her to leave her job".

The majority of court rulings have held that Hindu marriage is reparation of sorts with the implied function of the consort to "follow, cohabit with the husband, wherever he may desire to do so".[19] Even back in 1958 in the case of **Ram Prakash v Savitri Devi**,[20] the court implied that "the chosen abode of the husband was the sanctioned locus of performance of duties, under holy matrimony". In fact, in the case of **Tirath Kaur v Kirpal Singh** [21] the Punjab high court went to the extreme extent of ruling that a wife 's employment away from the husband amounted to desertion, with a remedy under section 9 of the Hindu Marriage Act". In contrast to contemporary thought, the courts resorted to retrograde statements about "wife's paramount duty of obedience to the husband, in his house"[22] and that "a wife is expected to forfeit her employment".[23]

[18] 1977 PLR 216
[19] Flavia Agnes , *Hindu Women and Marriage Law ,OUP,2004*
[20] AIR 1958 Punj 87
[21] AIR 1964 Punj 28
[22] Gaya Prasad v Bhagwat , AIR 1966 MP 212
[23] Kailash Walti v Ayodhia Prakash , ILR (1977) 1 P&H 642 FB

The aforementioned liturgy of retrograde judgments makes Justice Chowdary's observation so refreshing. It marks a sharp deviation from the socio-legally popular understanding, `of the place of the wife is at the feet of the husband and under his roof'.[24]

Post 1975, some of the courts started recognizing a woman's right to employment unfettered by the place of residence of the husband, starting with the case of **Praveenben v Sureshbhai**.[25] This principle was reiterated in the Madras High Court Judgment in **Radhakrishna v Dhanalakshmi**[26] where the court noted that "with the changing times, it is not feasible to enunciate or enforce an unconditional concept of obedience to and a duty to reside, with the husband". Further, in a progressive move, Justice Deshpande opined that "husbands don't enjoy an exclusive privilege to unilaterally decide residence, as this is in violation of Article 14."[27]



**DECONSTRUCTING THE SEMINAL CASE: T. SAREETHA V VENKATASUBBIA**

The case of T.Sareetha, was the first to question the foundational legitimacy of the proviso on the restoration of conjugal rights. In this case Sareetha, a 16 year old high school girl was married to one Venkat in Tirupati. Post their marriage, they spent 6 months in Cuddapah in Venkata's house and then in Madras. After a while, the two separated and Venkata petitioned for restoration of marital privileges. The court ruled that the place of residence as per the meaning of the act would be construed to be the place where they reside "together, permanently or for a length of time, thus excluding temporary residences". Based on this, the court held that Madras could not be considered the last place of residence. The court then addressed the issue of constitutionality of section 9 as contended by the petitioner. The petitioner contended that Sec 9 was "liable to be removed from the statute as it was in violation of articles 14, 19 and 21. The petitioner implied that this remedy is contrary to the freedoms of life, liberty and dignity."

[24] *Supra 14*
[25] AIR 1975 Guj 69
[26] AIR 1975 Mad 331
[27] Article 14 , The Constitution of India

According to Justice Chowdary, marital rights connote two formulations, first that marriage partners have right for each other and second, marital intercourse. He held that "enforcing this right would amount to transfer of the right of the individual over her body, to the state". He posited against the continued use of the section to enforce unwilling sex over a partner, under the garb of tyranny of the law. Lord Herschell has also recorded his strong opinion about such proviso, since it violates the sanctity of the body. In **Russel v Russel**,[28] he went as far to say that 'some of the case outcomes, based on restitution, bordered on the barbaric'. The judgment highlights the fact that even the decision to have a child is an intimate decision that should be taken by the woman and not something she should be coerced into against her will. This provision is truly a reminder of the illegitimate colonial era. It lacks legal backing and is a blatant infringement of an individual's right over his/her body, thereby violating an individual's liberty under Article 21 of the Indian constitution. Justice Subba Rao perceptively made this observation and extended the right to life to include individual's liberty as well.

The Supreme Court in **Govind v State of M.P**[29]also used the American Judgment in Roe v Wade[30] to examine the right to privacy under article 21. The honorable court held that this right should "encompass the right to personal intimacies of home, family and marriage". The court reiterated that the right to privacy is available to every person irrespective of the marital status. Similarly, Justice Chowdary held that 'there could be no legitimate grounds for the withdrawal of this right to privacy, by state sanction'. Read together, the two judgments can be construed to advocate the protection of the right to privacy, over restitution.

Concomitantly, the law as laid out in **Menaka Gandhi**[31] case, provides insightful balance. The court ordained that "due process" connotes being right, just and fair and does not accept arbitrary action by certain individuals. Further, under Article 14 it was observed that 'a blind adherence to equality of treatment without a reference to circumstances is neither just nor constitutional'. The court acknowledged that while section 9[32] might exhibit formal equality, wherein there are no distinctions between the rights of husband and wife. "However, husband and wife in them are

[28] (1897) AC 395
[29] 1975 AIR 1378
[30] (1973) 35 L Ed 2d p. 147
[31] Menaka Gandhi v Union of India , 1978 AIR 597
[32] Section 9 , Hindu Marriage Act

unequal and treating unequal's equally is neither just not fair." Since this makes the remedy oppressive for the wives, while benefiting the husbands. These cases mark the evolution of a different line of thought in family jurisprudence.

## LIBERTY AND THE APPROACH TO SARITHA

The author identifies three key stakeholders that this case decision would impact. First, women who live away from their spouses pursuing a career while continuing to fulfil marital obligations. The second category comprises those women who have been deserted by their husbands and who are unable to obtain a divorce by mutual consent. The third group is women, who have been subject to sexual oppression within the marriage.



The Saritha judgment can go a long way in benefiting working women, by firewalling them from being subject to intimidation to give up their careers or suffer threats of dissolution of marriage. This section was assumed to be a lifeline for deserted women who were unwilling to divorce their husbands. However, the author brings to light how a possible amendment in Section 13 to introduce irreversible collapse of marriage as logic for divorce would go a long way in solving this problem and the wife would no longer be forced to use the convoluted route of section 9, for severing the marital ties.

Further, the author notes how justice Chowdary through his other pronouncements on subjects like "forced sex is a denial of joy" and his scathing critique, calling it barbarous and laws enforced indignity, has positively liberated women. The court would enforce its powers either through CPC O 21, rules 32, 33 or by holding the other party in contempt.[33] The author observes this statement as a tacit admission of the existence of marital rape, which the law thus far doesn't recognizing.

[33] Maynes , Hindu Law And Usage 16th Edition , pg 93

The author finally concludes saying that while this verdict recognizes the lack of constitutional validity of this provision, what is the remedy available for the aggrieved party? What punishment will be awarded to the offender? These are questions that need further analysis.

**POST SAREETHA – THE SUPREME COURT'S VIEW ON SECTION 9**

One year after the historic Sareetha judgment, the Delhi High Court in **Harvinder Kaur v Harminder Singh,**[34] re-examined this issue and held to the contrary. In this case the wife challenged a decree for restitution granted to her husband by the lower court. The court, while dismissing the appeal, held that the section was constitutionally valid, stating that the dual objective of the section was 'restoring amity in marital life through a legally enforced rapprochement'. The court went on to add that introducing constitutional law in the sphere of marriage is like a bull in a china shop, and that articles 14, 21 have no place in the privacy of the home. The Delhi court redefined the foundations of marital relationships, away from the protection of right to privacy. Further, the court considered intercourse as a vital element of marriage, but not necessarily the *sumnum bonum*, or the sole motivation behind petitions of restitution. Thus, unlike justice Chowdhary, the Delhi high court took a more narrow view of the proviso of restitution.

Post these two diametrically differing judgments, the Supreme Court in **Saroj Rani V. S.K Chadda,**[35] clarified its stance on this provision. The court construed that marriage, as a socially sanctioned practice and family as its essential structure, provided husband and wife inherent rights over each other's society. The Supreme Court expressed its motivation to protect these un-codified laws towards, the social function of preventing the breakup of the marriage.

The Supreme Court also pointed out how the section contained sufficient safeguards to prevent oppression of a party to the marriage. Further, the court held that the rule 32 of Order 21 was not coercive, but only a financial instrument (attachment of property) to induce the re-establishment

[34] AIR 1984 Del 66
[35] AIR 1984 SC 1562

of conjugal relations and to prevent the severing of the marital tie. Therefore, Justice Mukherjee was unequivocal in upholding Harvinder Kaur v Harminder Singh, and finding that section 9 was not in violation of Art 14 and 21 of the constitution.

## CONCLUSION

The Supreme Court by permitting section 9, yet calling it outdated and not in tune with modern times, provided only a pyrrhic victory. Substantial progress in this jurisprudence can be claimed only after two breakthroughs. First, if henceforth the grounds of divorce include, 'irretrievable breakdown of marriage'.[36] Second, if courts comprehensively test family laws on the touchstone of fundamental constitutional guarantees.[37] Generally the Supreme Court has refrained from getting embroiled in personal law, probably guided by *Appa Mali*[38] findings that it is difficult to denote law based on customs, as either laws or enforced laws under Articles 13 and 372 of the Constitution. However, it has occasionally tested (*in* cases -*Vallamattom; Hariharan; Adithyan* )[39] personal laws on the touchstone of fundamental rights. A three judge bench in the landmark **Mudaliar v Swaminath Thirukoil** case[40] opined that "the fundamental principles of the constitution pervade equality and any law imposing subsidiary status of women is abhorrent to equality". Further, "every woman is entitled for removal of obstacles to development and not their perpetuation by law". Thus the court re-established the primacy of equality and constitutional guarantees.

Regrettably, the praxis is contrary to the above leanings of the Supreme Court. Even while deciding a petition under section 9, the court has to look at whether the withdrawal was without "reasonable cause". The subjective interpretation of 'reasonable cause' lies with the courts and

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[36] CSWI REPORT ON Hindu Marriage Act , Pg 118

[37] The abolitionist still argue that section 9 is violative of freedom of association 19(1)(c) ;freedom of residence 19(1)(e); and freedom to practice any profession 19(1)(g).

[38] AIR 1952 Bom 84

[39] i. 2003 6 SCC 611;John Vallamattom v union of India-Constitutional validity of Indian succession act.
ii. 2002 8 SCC 106;. Adithyan v Travancore devasthanam Bd.- Issue of allowing non brahim priest- Usage or custom can't trump constitution. iii 1999 2 SCC 228 ;G Hariharan v RBI- Hindu minor and guardianship act, equal opportunity to mother

[40] 1996 ,8 SCC 525

portends a pernicious gender bias. Similarly in **S Nigam v RC Nigam**[41] the court relied on economic efficiency and held 'in favor of economic dependence, employment restriction and resultant direction to` live together', against the wife. Abolitionists lament that the court, 'totally evades the issue of the individual woman's right to decide whether or not to work'. Such gender adverse interpretation of the statute is neither progressive nor restorative. The clamor by feminist groups is for the courts to proactively lead this change, rather than be stuck in the interpretations of Manu.

I consider the restitution section unfit for a modern gender sensitive society and against the principles of natural law. It fails at the touchstone of justice and fairness. Since the primary use of this section was by women who sought an easier ground for divorce, exploring the author's suggestion for irretrievable breakdown of marriage is introduced as a ground deserves to be considered by the courts. While some might argue that this section aims at preserving the bond of marriage, the question we should possibly ask ourselves is whether it is worth sacrificing our fundamental rights for a marriage beyond saving?



[41] AIR 1971 All LJ 67