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Personal Autonomy versus The Matrimonial Remedy of Restitution of Conjugal Rights

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ABSTRACT

Background: *Recently, in 2019, two law students of National Law University, Ghandhinagar had filed a Public Interest Litigation before the Supreme Court of India under Art. 32 of the Constitution of India thereby, challenging the constitutional validity of Section 9 of the Hindu Marriage Act, 1955 ('HMA'), Section 22 of the Special Marriage Act, 1954 and Rules 32 and 33 of Order XXI of the Code of Civil Procedure all dealing with the matrimonial remedy of restitution of conjugal rights.*

Objective: *In lieu of the above, the author, in this paper seeks to understand the remedy of restitution of conjugal rights and the manner in which it has been misused by the spouses. Further, the author also seeks to analyze the constitutional validity of the said remedy in light of expanding scope of Articles 14, 19 and 21 of the Constitution of India and make suggestions accordingly.*

Research Methodology: *The study undertaken herein is doctrinal research based on data gathered from articles, blogs, research papers, case laws, Govt. reports and academic-books. Reliance has also been placed on statutory and constitutional provisions to substantiate the research.*

Findings and Conclusion: *Through the research undertaken, it was found that more often than not, the remedy of restitution of conjugal rights was misused by the husbands thereby, making it an outdated remedy not suitable for the modern and empowered India. It is worthwhile to mention that the said remedy has already been abolished in a number of foreign jurisdictions and it is high-time that India breaks free from the shackles of the patriarchal conception of a woman being dependent on a man and not having her own autonomy, keeping in mind that the said remedy is in fact violative of the fundamental rights guaranteed under the Constitution.*

Keywords: *Constitutional validity; Hindu Marriage Act, 1955; Misuse; Personal Autonomy; Restitution of Conjugal Rights*

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I. INTRODUCTION

Marriage is a sacred institution established when two people come together i.e., it is the union of two people, which lays the foundation of a healthy, stable family and a civilized society.[2] As it a legally recognized contract between two people, the laws dealing with the same also impose certain duties on both the spouses/partners while also providing them with certain legal rights and remedies.[3] It is to be noted herein that the necessary and important implication of marriage, as has been understood since ages, is that both the parties i.e. the husband and the wife, after being lawfully married to each other, will live together. The reason being that each partner is entitled to comfort consortium of his/her other partner.[4] Therefore, after the concerned parties get married while satisfying the conditions laid down under the law, if either of the two partners, without any reasonable excuse, withdraws from the marital institution i.e., the society of the other partner, then the law provides the aggrieved partner the option to file a petition in the district court seeking the relief of restitution of conjugal rights.

This matrimonial relief of restitution is available to spouses is provided under Section 9 HMA. Furthermore, Section 36 of the Parsi Marriage and Divorce Act, 1936; Section 22 of the Special Marriage Act, 1954 and Section 32 of the Indian Divorce Act, 1869 also provides either of the spouses to avail the relief of restitution of conjugal rights. Even under the Muslim Law, despite the absence of a statutory provision providing for the relief of restitution of conjugal rights, it is well settled under the Principles of Mohammedan Law that, *"where a wife, without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights; and similarly, the wife has the right to demand from the husband, the fulfillment of his marital duties."*.[5]

II. RESTITUTION OF CONJUGAL RIGHTS VIS-À-VIS SECTION 9 OF HMA

Sec. 9 of the HMA provides the matrimonial relief of restitution of conjugal rights. It states that when either of the spouses i.e., the husband or the wife, without any reasonable excuse, withdraws from the society of the other, then the other spouse i.e., the aggrieved party, by virtue of this provision, has the right to file a petition in the district court seeking a decree for restitution of conjugal rights.[6] If the Court is satisfied that the statement made in the petition are true and there exists no legal ground for rejecting or not allowing the application, then a

[2] PROF. KUSUM, FAMILY LAW I 1, 3 (5th ed. 2021).
[3] Mohd. Khurshid Alam, *Legal Aspects of Restitution of Conjugal Rights*, DULJ, at 135, 135.
[4] 2 Mulla, Principles of Hindu Law 63 (SA Desai ed., Lexis Nexis Butterworths, 20th ed. 2007).
[5] Mulla, Principles of Mohammedan Law 274 (22nd ed., 2017).
[6] Hindu Marriage Act, 1955, § 9, No. 25, Acts of Parliament, 1955 (India).

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decree for restitution of conjugal rights may be passed. The idea behind providing such a relief by a court order is to conserve and safeguard the holy institution of marriage as far as possible by allowing the Court to intervene and enjoin upon the withdrawing spouse to join his/her partner.

It is to be noted herein, that in order to obtain such a decree, the following four conditions provided under Sec. 9 of the Act, needs to be satisfied[7]:

- The aggrieved party's spouse has withdrawn from his/her society.
- There is no reasonable excuse justifying such a withdrawal.
- The Court is satisfied with regards to the truth of the statements made in the petition.
- There exist no legal grounds for refusing the application or not granting the decree.

With regards to the second condition, reference has to be made to the case of *Annie Thomas v. Pathrose*,[8] wherein it was held that what is reasonable excuse for withdrawal depends upon the facts and circumstances of the case and reasonable excuse should be a just or rational excuse. In simple words, a reasonable excuse would be one which is in accordance with reason, justness and fairness in lieu of the facts and circumstances of that particular case. Moreover, it is worthwhile to refer to the explanation to Sec. 9 of HMA which expressly states that the burden of proof with regards to whether the withdrawal was based on a reasonable excuse or not always lies on the respondent i.e. the person/spouse who has withdrawn from the society of the petitioner.

III. ISSUES ARISING UNDER SEC. 9 AND MISUSE OF THE REMEDY

(A) The most pertinent issue that has frequently come up before the Courts for consideration is that, whether the employment of the wife which requires her to stay at a place other than the one where her husband resides amounts to desertion and her withdrawal from his society as without reasonable excuse which in turn entitles him to sue her for restitution of conjugal rights.[9] -

Reference w.r.t this has to be made to *Tirath Kaur v. Kartar Singh*[10], wherein the Court adopted a very restrictive view and held that if the wife undertakes a job which essentially requires her to live away from her husband and she refuses to quit or resign from such an employment, then

[7] PROF. KUSUM, FAMILY LAW I 46 (5th ed. 2021).
[8] Annie Thomas v. Pathrose, (1988) 2 KLT 237 (India).
[9] Kusum, *Wife's Right to Employment versus Husband's Conjugal Rights*, J. IND. L. INST. (JILI), 1977, at 77, 77-82.
[10] Tirath Kaur v. Kartar Singh, AIR 1964 Punj 28 (India).

it can be said that she has deserted her husband or has withdrawn from his society without any reasonable excuse. The Court opined that the primary duty of a wife is to obediently submit herself to her husband's authority and to remain under his roof and protection. Furthermore, she is not entitled to reside separately unless it is proved by her that it is by reason of her husband's misconduct or by his refusal to maintain her at his residence or any other justifiable cause, that she has been compelled to live separately. Similarly, in *Kailashwati v. Ayodhia Prakash*[11], the earlier position taken by the Court was reiterated and it was held that when the wife goes against the wishes of her husband and undertakes a job or accepts an employment which requires her to move away from her matrimonial home, then such an act by the wife would amount to unilateral withdrawal and would be in contravention of the mutual obligation of the husband and wife to reside together.

The above-mentioned position gives the impression that both the Courts and the husbands were not ready to accept the independence of a woman. In the modern-day society, holding the old notion of a wife being an appendage to the household of the husband, to be still true is very problematic and it has to be done away with. Soon thereafter, the interpretation given by the Courts changed and a more liberal view was adopted. In *Shanti Nigam v. RC Nigam*[12], it was held that *"It is one thing for a wife to say that she will not go to her husband and will not cohabit with him nor will she allow him to come to her and it is a different thing to say that it is necessary for the upkeep of the family that she should also work and she would go to her husband whenever it is possible for her to do so and the husband could also come to her at his own convenience"*. Therefore, in this case, the position of law with regards to wife's employment versus her husband's conjugal rights, finally changes and now if both the husband and wife, in lieu of the altered social and economic conditions think that it is necessary for her to work and contribute or if the wife, in lieu of the exigencies of her service cannot stay for all the time with her husband, then the same cannot be considered as unreasonable withdrawal from his society.

Similarly, it was held that if a wife, owing to the financial exigencies or a mutual or an implied agreement between her and her husband, undertakes an employment which requires her to live separately from her husband, then it cannot be said that she has unreasonable withdrawn from her husband's society.[13]

[11] Kailashwati v. Ayodhia Prakash, (1977) LXXIX PLR 216 (India).
[12] Shanti Nigam v. RC Nigam, (1971) All LJ 67 (India).
[13] NR Radhakrishnan v. Dhanalakshmi, AIR 1975 Mad 331 (India); Pravinaben v. ST Arya, AIR 1975 Guj 69 (India).

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In another case of *Vibha Shrivastava v. Dinesh Kumar*[14], it was held that the wife's refusal to quit her job, which was at a different place than the one where her husband resided, and come live with her husband did not amount to unreasonable withdrawal from her husband's society. Furthermore, on another instance, the Court went ahead and emphasized upon the concept of complete equality of the spouses. Herein, similar to Vibha Shrivastava's case, it was held that the wife's refusal to resign from her employment doesn't constitute cruelty so as to entitle her husband to matrimonial relief.[15]

In the words of the Rajasthan High Court, *"The orthodox concept of the Hindu wife is that she is expected to be Dharampatni, Ardhangini, Bharya or Anugamini. The literal meaning is that she has to follow the husband. This orthodox concept of wife and expectations from her to subject herself to husband's wishes has undergone a revolutionary change with education, high literacy in women and with recognition of equal right in the Constitution and abolition of sex distinction in all walks of life. She is a partner in marriage with equal status and equal rights as that of the husband."*[16] Thus, *"there is no point in making a woman's employment a scape-goat or a spring-board to seek matrimonial relief"*.[17]

(A) What constitutes a reasonable excuse for withdrawal from the society of the Petitioner? –

As already stated above, that what qualifies as a reasonable excuse for withdrawal depends upon the facts and circumstances of the case. For instance, in *Chand Narain v. Saroj*[18], it was held that the husband's insistence on his wife to consume non-vegetarian food, drink and his conduct of issuing invitations for another marriage would amount to both physical and mental cruelty and thus, would be a valid ground to refuse the husband's claim for matrimonial relief in the form of restitution of conjugal rights. In *Gurdail Kaur v. Mukand Singh*[19], it was held that if the husband gets married again while his first wife is alive and resides with him, then the same would be a reasonable excuse for the wife to withdraw from his society and live independently/separately.

Furthermore, in *Mohinder Singh v. Preet Kaur*[20], the facts were that the husband, after mere 6 months of marriage became blind, following which, the wife withdrew from his society. The

[14] Vibha Shrivastava v. Dinesh Kumar, AIR 1991 MP 346 (India).
[15] R Prakash v. Sneh Lata, AIR 2001 Raj 269 (India).
[16] R. Prakash v. Sneh Lata, AIR 2001 Raj. 269 (India).
[17] Kusum, *Wife's Employment or Husband's Conjugal Rights: Who has the say?*, J. IND. L. INST. (JILI), 1977, at 97, 106-107.
[18] Chand Narain v. Saroj, AIR 1975 Raj 88 (India).
[19] Gurdail Kaur v. Mukand Singh, AIR 1967 Punj 397 (India).
[20] Mohinder Singh v. Preet Kaur, (1981) HLR 321 (India).

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husband filed a petition seeking the relief of restitution but the same was dismissed as the Court held that the husband becoming blind was a reasonable excuse for the wife to withdraw. In another case namely *Kharak Singh Dasila v. Prema*[21], where the husband was insensitive towards the family due to which the burden had entirely fallen upon the wife to single handedly manage the family and further, both the spouses were living separately for a long time, it was held that the husband's application for restitution cannot be allowed under Sec. 9 as the Court observed that the husband has clearly developed a habit and could easily live separately, away from his wife. Lastly, reference also has to be made to *Vijay Kumar v. Suman*[22], wherein the Court held that demanding dowry from the proposed wife's family and subjecting the wife to physical and mental torture constitutes reasonable excuse for the wife to withdraw from her husband's society.

Apart from the above-mentioned cases, there are several other cases where the Courts, as per the facts and circumstances of that case, has held as to whether the withdrawal of the spouse from the society of the other was based on a reasonable excuse. In *Rabindranath v. Promila*[23], the Court found that since the wife was habitually nagged and ill-treated by her mother-in-law i.e. the husband's mother, she had a reasonable excuse to withdraw from his society. Similarly, in *Kuldeep Kumar Dogra v. Monika Sharma*[24], the wife who was popularly known as "Sandhoori Mata" and used to perform religious pujas in a particular temple had a reasonable excuse to withdraw from his society when her husband prevented her from going to the temple, subjected her to physical and mental cruelty in order to compel her to hand over her offerings and disconnected the telephone line and electric line of her room.

Moreover, it has been held in *Nalini v. Radha*[25], that when the wife refuses to stay at her in-laws but is willing to stay with her husband at his place of employment would amount to a reasonable withdrawal from the husband's society. Another question that have arisen before the Courts is that whether the impotence or incapacity of the husband to have sexual relations with his wife, be a valid defense to a petition under Sec. 9. The Court, in *Khageshwar v. Aduti Karnani*[26], answered the question in the affirmative. Similarly, the wife's contention that since her husband was impotent, she had a reasonable excuse to withdraw from his society was upheld after it was established before the Court that the wife's virginity was intact and the

[21] Kharak Singh Dasila v. Prema, 2018 (108) 384 Utt (India).
[22] Vijay Kumar v. Suman, (1996) 1 HLR 24 (P&H) (India).
[23] Rabindranath v. Promila, AIR 1979 Ori 85 (India).
[24] Kuldeep Kumar Dogra v. Monika Sharma, AIR 2010 HP 58 (India).
[25] Nalini v. Radha, 1988 (2) HLR 408 (Ker) (India).
[26] Khageshwar v. Aduti Karnani, AIR 1967 Ori 80 (India).

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husband had failed to establish sexual relations with her.[27]

(C) An application for restitution can only be entertained if the concerned parties are married and the same is legal

It is to be noted herein that a petition filed by a spouse seeking restitution of conjugal rights under Sec. 9 of the Act can only be entertained by the Court if there subsists a lawful marriage between the two parties. If it so happens that the concerned parties are not legally married or the marriage between them was not subsisting at the time when the petition was made, then the question of granting a decree for restitution under Sec. 9 will not arise.[28]

For instance, in *Chitralekha Kunju v. Shibha Kunju*[29], it was held that since, one of the parties to the marriage was not a Hindu, the marriage was not legally valid under Sec. 5 of HMA and thus, the relief of restitution could not be granted. In another case of *Kewal Kumar v. Pawan Devi*[30], where the marriage between the two spouses was dissolved by a mutual agreement, it was held that since, there was no subsisting relationship at the time when the petition was made, the wife was not entitled to seek the relief of restitution.

Similarly, in *Ranjana Kejriwal v. Vinod Kumar Kejriwal*[31], the wife, in a petition brought by her seeking the relief of restitution, alleged that her husband had suppressed his earlier marriage from her. In lieu of this, the Court observed that since, the petitioner's marriage being contrary to law was void, she cannot claim the relief of restitution. Lastly, reference has to be made to the case of *Sarvesh Mohan Saxena v. Sanju Saxena*[32], wherein the husband brought a petition while his first marriage was subsisting and thus, the second marriage with the respondent being void under the HMA, it was held that the husband's petition for restitution against the second wife was not maintainable.

(D) An application u/s 9 of HMA cannot be maintained if it's not bona fide.

Reference w.r.t this has to be made to the case of *Solomon v. Chandriah Mary*[33], wherein the Court dismissed the petition for restitution of conjugal rights filed by the husband u/s 32 of Indian Divorce Act, 1869 as it found that the same was introduced solely for the purpose of getting rid of a prior maintenance order granted in favour of his wife. Similarly, the Court, while denying relief has observed that the husband had filed a petition for restitution of

[27] Jagdish Lal v. Shyama Madan, AIR 1966 All 1950 (India).
[28] Jiva Magan v. Bai Jethi, AIR 1941 Bom 535 (India).
[29] Chitralekha Kunju v. Shibha Kunju, (1998) II DMC 454 (Bom-DB) (India).
[30] Kewal Kumar v. Pawan Devi, AIR 2011 HP 58 (India).
[31] Ranjana Kejriwal v. Vinod Kumar Kejriwal, AIR 1997 Bom 380 (India).
[32] Sarvesh Mohan Saxena v. Sanju Saxena, AIR 2010 Utt 16 (India).
[33] Solomon v. Chandriah Mary, (1968) 1 MLJ 289 (India).

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conjugal rights u/s 9 of HMA solely for the purpose of countering his wife's application for maintenance as made u/s 125.[34]

In *Kusum Lata v. Kampta Prasad*[35], the husband had, for a long period neglected his wife, but as soon as she filed an application judicial separation, he countered it with a petition for restitution of conjugal rights. Both the petitions were rejected by the Court. It is interesting to note that the husband did not go in appeal against the rejection of his claim for restitution maybe because his purpose was served the moment his wife's claim for judicial separation failed.

IV. RETHINKING THE CONSTITUTIONAL VALIDITY OF SEC. 9 OF HMA: A CASE FOR ABOLITION OF THE REMEDY

(A) Assault on the Fundamental Right of Life and Liberty

The Right to Life and Personal Liberty as enshrined under Art. 21 of the Constitution of India is an extremely broad and far-reaching term that encompasses a range of essential rights such as right to reputation[36], right to live a dignified life[37], livelihood[38] among numerous others. It is to be noted herein that Art. 21 guarantees one of the most important privileges i.e. of individual dignity.[39] As has been held in the case of *Joseph Shine v. Union of India*[40], individual dignity essentially means the right of an individual to be valued and respected. In simple words, it is "a human frame" in which a person desires to live. In addition to the right of individual dignity, it has been held that the right to privacy also constitutes an integral part of Art. 21. Furthermore, it has been held that "privacy and confidentiality encompass a bundle of rights including the right to protect identity and anonymity".[41] It is also to be noted that in *Navtej Singh Johar v Union of India*[42], it was held that "sexual choices as an essential attribute of autonomy, intimately connected to the self-respect of the individual."

Having understood the different kinds of rights emerging out of Art. 21 and the interpretations adopted thereby, it is important to note herein that in cases dealing with the matrimonial relief of restitution of conjugal rights, Courts can be indirectly condemning a systematic violation of Art. 21 in the garb of cohabitation, as there clearly exists a grave violation of sexual autonomy

[34] Tarsem Lal v. Surendra Rani, (1988) 1 HLR 371 (India).
[35] Kusum Lata v. Kampta Prasad, AIR 1965 All 280 (India).
[36] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).
[37] S.P. Mittal v. Union of India, (1983) 1 SCC 51 (India).
[38] M.J. Sivani v. State of Karnataka & Ors., (1995) 6 SCC 289 (India).
[39] Jolly George Verghese v. Bank of Cochin, (1980) 2 SCC 360 (India).
[40] Joseph Shine v. Union of India, (2018) 2 SCC 189 (India).
[41] Central Public Information Officer v. Subhash Chandra Agarwal, (2020) 5 SCC 481 (India).
[42] Navtej Singh Johar v Union of India, (2018) 10 SCC 1 (India).

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of the concerned person.[43]

Furthermore, in *T. Sareetha. T. Venkatta Subbiah*[44], the Andhra Pradesh High Court declared section 9 of Hindu Marriage Act relating to restitution of conjugal rights as unconstitutional on the ground of taking away the wife's right to privacy by compelling her to live with her husband against her wishes. However, in *Harvinder Kaur v. Harmander Singh*[45], the Court declared section 9 of Hindu Marriage Act to be valid. The same was upheld in *Saroj Rani v. S.K. Chadha*[46]. In this case, the Supreme Court held that in the privacy of home and married life neither article 21 nor article 14 has any place.

In my opinion, the right to cohabit or take part in sexual intercourse with another is an intimate personal choice. These continue to exist in each individual – man or woman even after marriage. The scheme for restitution of conjugal rights is violative of the same in as much as it allows a man/woman to take coercive measures (in the form of attachment of property) against his/her spouse who is unwilling to have a conjugal relationship.

Furthermore, reliance is to be placed on the Report published by the Ministry of Women and Child Development wherein it was observed that, *"The objective of Section 9 was to preserve the institution of marriage but is now being misused. The practice of filing a suit for restitution of conjugal rights every time a wife for maintenance or files a complaint of cruelty continues, thereby defeating her claim. Further restitution of conjugal rights is against human rights of a person as no can be or should be forced to live with another person."*

Thus, it is stated that Sec. 9 of HMA is outdated and needs to be struck down for being violative of Art. 21 of the Constitution of India.

(B) Assault on the Fundamental Right of Equality

The matrimonial relief of restitution of conjugal rights as provided u/s 9 of HMA not only poses an imminent danger to the sexual autonomy of the person but also fails to address the inequalities existing within it, in reality. With regards to the same, reference has to be made to Article 14 of the Indian Constitution which guarantees every individual, equality before the law and equal protection of the laws. It is to be noted herein that equality must not always be in writing but it must also be seen to be done and implemented in reality, i.e. the changing realities of equality between men and women must be shown.[47] This essentially refers to a law

[43] Joseph Shine v. Union of India, (2018) 2 SCC 189 (India).
[44] T. Sareetha. T. Venkatta Subbiah, AIR 1983 AP 356 (India).
[45] Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66 (India).
[46] Saroj Rani v. S.K. Chadha, AIR 1984 SC 1562 (India).
[47] Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1 (India).

that only ex-facie appears to treat all individuals falling within a class alike, but in effect it operates unevenly on persons or property evenly situated. In furtherance of the same, reliance is to be placed on ***T. Sareetha. T. Venkatta Subbiah,***[48] wherein it was observed that although Sec. 9 satisfies the classification test laid down under Art. 14 in as much as it makes no discrimination between a husband and a wife, the effect of the remedy in reality is highly uneven. According to the Court, "bare equality of treatment regardless of inequalities of realities is neither justice nor homage to the constitutional principle". And the reality remains that the said remedy is mostly taken by husbands, rather than wives.[49]

Moreover, it cannot be ignored that a woman has equal rights in a marriage and she cannot be subjugated to the will of her spouse as she has her own identity and sexual autonomy, as has been held in a catena of judgments. It is also worthwhile to mention that a woman cannot be considered to consent in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband as the same is contrary and violative to liberty and dignity of the individual and such a notion has no place in the constitutional order.[50] Therefore, it is stated that the matrimonial relief of restitution of conjugal rights violates the very essence of equalities in realities and shadows the patriarchal gender stereotype i.e. the dominance of men in a marital relationship.

V. ASSAULT ON THE FUNDAMENTAL RIGHT OF FREEDOM OF ASSOCIATION

The Constitution of India guarantees an individual the freedom of forming associations under Article 19(1) and such a right also protects the individual's right to disassociate oneself from an association. Accordingly, if a spouse does not want to remain a part of matrimonial association, he/she has constitutional right to not be forced into it. The US courts, for the purpose of freedom of association, have considered that matrimonial relations fall within its ambit.[51] The existence of this concept was never directly recognized by the Andhra Pradesh High Court[52] but the Supreme Court interpreted this judgment as recognizing such a concept[53]. The Court observed that the High Court of A.P. held that Article 19(1)(c) would take within its sweep the matrimonial association. However, this case was later overruled by this Court in ***Saroj Rani v. Sudarshan Kumar Chadha***[54]**.**

[48] T. Sareetha. T. Venkatta Subbiah, AIR 1983 AP 356 (India).
[49] SHANKAR VINAYAK GUPTE, HINDU LAW IN BRITISH INDIA 929 (2nd ed. 1955).
[50] Joseph Shine v. Union of India, (2018) 2 SCC 189
[51] Kathryn R. Roberts v. United States Jaycees, 1984 SCC Online US SC 182
[52] T. Sareetha. T. Venkatta Subbiah, AIR 1983 AP 356 (India).
[53] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).
[54] Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 SCC 90 (India).

Reference w.r.t the same has to be made to the case of ***Sukhram Bhagwan Mali* v. *Mishri Bai Sukhram Mali***[55], wherein the wife had complained to the Court that her father-in-law has an evil eye on her and her husband ill-treated her. But the Court granted the decree for restitution of conjugal rights in the husband's favour. This case is a perfect example of a forced union of spouses which is contrary to the right guaranteed under Article 19(1)(c). This does not satisfy any reasonable restriction mentioned in Article 19(6) in the form of public order, morality and health. Thus, it can be contended that the Sec. 9 of HMA violates Article 19.

VI. CONCLUSION AND SUGGESTIONS

To conclude, I would like to highlight that Post Independence, there was a debate as to whether or not this remedy should be included in the HMA. The inclusion of this remedy was expressly opposed by Mr. Khardekar who opined that, *"to say the least this particular cause is uncouth, barbarous and vulgar. That the government should be abettors in a form of legalized rape is something very shocking…".*

Furthermore, Sir J. Hannen in ***"Russell v. Russell"***[56] had also opposed the remedy by stating, *"I have not once known a restitution petition to be genuine, that these were merely a convenient device either to enforce a money demand or to obtain a divorce."* Subsequently, in 1969, the UK Law Commission in its Report titled, ***"Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights"*** recommended that this matrimonial relief should be abolished as, *"a court order directing adults to live together is hardly an appropriate method of attempting to effect a reconciliation."*[57] Based upon the same, UK Parliament abolished the impugned remedy.

Similarly, many countries including Scotland have abolished this remedy after their Law Commission[58] had recommended against it. Soon, Ireland[59], Australia[60] and South Africa[61] followed the same trend and abolished the remedy.

Therefore, it is interesting to note that this matrimonial remedy has long since been abolished in most of the common law countries. However, in India, despite the recommendations of the

[55] Sukhram Bhagwan Mali v. Mishri Bai Sukhram Mali, AIR 1979 MP 144 (India).
[56] Russell v. Russell, (1897) AC 395.
[57] GOV.UK, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228673/0369.pdf (last visited October 3, 2021).
[58] SCOTTISH LAW COMMISSION, (Dec. 29, 2021, 11:12 AM), https://www.scotlawcom.gov.uk/files/1112/7989/7341/rep76.pdf.
[59] Family Law Act, 1988, § 1, No. 31, Act of Parliament, 1988 (Ire.).
[60] Family Law Act, 1975, § 8(2), No. 53, Acts of Parliament, 1975 (Aus.).
[61] Divorce Act, 1975, §14, No. 70, Acts of Parliament, 1975 (S. Afr.).

Law Commission of India in its Consultation Paper on 'Reforms on Family Law'[62] and also of the High-Level Committee on the 'Status of Women in India' instituted by the Ministry of Women and Child Development of the Government of India[63], towards the abolition of the said remedy, the Parliament has failed to abolish the same and it continues to be upheld and implemented by Indian courts.

Moreover, it is worthwhile to mention that even though Sec. 9 of HMA dealing with restitution of conjugal rights, appears to be gender neutral in as much as it allows both the husband and the wife to approach the Court, it is submitted that the impugned provision is greatly discriminatory against women. This is because the impugned remedy more often than not is mis-utilized by the husband[64] and is mostly based on the patriarchal conception of a woman being dependent on a man and not having her own autonomy and thus, entrenches gender stereotypes.

Therefore, in lieu of the negative aspects associated with this remedy, the author suggests that it is high time that we give effect to the suggestion made by Mrs. Renu Chakravarty (a member of Parliament) w.r.t to doing away with Sec. 9 of HMA. It was suggested by her that the remedy of restitution of conjugal rights should be substituted with the remedy of reconciliation, which contrary to the remedy of conjugal rights has a more empathetic connotation attached to it.[65] The effective implementation of this substitute remedy can further be ensured by observing the following:

1. A committee for reconciliation must be appointed by the competent Court and such a committee must consist of the judge himself, the parties to the marriage, and one or two relatives or friends, for each side as selected by the spouses.
2. The committee must act as a conciliator and mustn't adjudicate the dispute.
3. The Committee may appoint an expert such as a psychiatrist, if it feels that the guidance of such an expert is necessary to attain reconciliation between the spouses.
4. This procedure should be termed as, counselling.

[62] Law Commission of India, <http://www.lawcommissionofindia.nic.in/reports/CPon ReformFamilyLaw.pdf> (last visited May 19, 2019).
[63] Ministry of Women & Child Development, <https://wcd.nic.in/sites/default/files/Vol%20I.compressed.pdf> (last visited May 17, 2019).
[64] Annapuranamma v. Appa Rao, AIR 1963 AP 312 (India); Kusum Lata v. Kampta Prasad, AIR 1965 All 280 (India); Chander v. Pomilla Ahluwalia, A.I.R. 1962 Punj 432 (India); M.P. Shreevastava v. Mrs. Veena, A.I.R. 1965 Punj 54 (India).
[65] Mrs. Renu Chakravarty's observation on the deletion of § 9 from the Hindu Marriage Bill (as it was then). *Lok Sabha Debates*, pt. 2, session 9th 1955 vol. 4. p. 7625.

5. It this process of reconciliation fails then the parties' claim for maintenance should not be barred.
6. And most importantly, the failure of the process of reconciliation/counselling shall not be" considered as a ground for divorce.

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