

# Restitution of Conjugal Rights—Should it Continue ?

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THE NEWLY cultured 'dharma' has given birth to many matrimonial remedies. It is needless to say that the remedy of restitution of conjugal rights is unique among them. Apparent difficulties and conflicts are to be countered with to reconcile between the revolutionary and static ideas. Legislators attempt to tune the slogan of Manu that "let fidelity continue till death" into the radically changing Hindu society has brought devastating results. The Law Commission in its *Fifty-ninth Report* while submitting reasons for deletion of section 9(2) of the Hindu Marriage Act, 1955 has referred to an important problem without proposing any solution. Even if the changes proposed by the commission are adopted, the present practice of dual proceedings would continue leading to waste of time by courts resulting into conflicting decisions. Hence, an attempt is made to submit the repercussions of this provision on the conjugal society in the light of the proposed changes by the Law Commission.

Inclusion of the provision of restitution of conjugal rights in the Hindu Marriage Bill was defended by Pataskar on legal and sociological reasons. Universality of application appears to be the criterion for its inclusion. Derrett's philosophy that in India most of the separated<sup>1</sup> spouses do so due to intrigues of relatives; lack of communications and mutual misunderstanding is sounding well in this proposition. Neither the amendment brought to section 13 of the Act in 1963, nor the subsequent adequate provision incorporated under the Hindu Adoption and Maintenance Act, 1956<sup>1a</sup> were perhaps anticipated in 1955. Despite the strong opposition expressed by the members, majority opinion prevailed over and the Bill was passed. The remedy of restitution of conjugal rights is embodied under section 9 of the Act.

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1. J. Duncan M. Derret. *A Critique of Modern Hindu Law*, 292 (1970).

1a. S. 18 of the Hindu Adoption and Maintenance Act, 1956,

It reads :

(i) When either the husband or the wife has without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the court being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

(ii) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

Sections 32 and 33 of Indian Divorce Act, 1869 have been reproduced in this section. This borrowing from the English concept does not appear to be realistic and technically it is questionable. The English concept introduced in the Act of 1869 was to govern the Christian British subjects residing in India. Hindu matrimonial concept cannot be put at par with the English concept and the reliefs available in 1869 to the society may not be apt to the radically changing Hindu society in 1955. Hence, certain issues spring up for consideration, viz., whether the provision was basically defective and unsuitable to Hindu society; whether it has achieved or can achieve its objectives even with the changes now proposed; and finally; whether this provision should continue to remain in the statute Book.

The first attempt made by the legislators to codify this sensitive area has not brought expected dividends for certain obvious reasons. Though the codification of Hindu customary law was most necessary to set at rest many of the prevailing uncertainties, it needs to be emphasised whether codification has well considered the behaviour and morality of Hindu society. Every country is proud of its religion and culture and India is no exception to it. Universality of religion has not reached its depth and diversity in religion and culture is a universal phenomenon. Both modern Hindu men and women would not approve Manu's verdict that neither by sale nor desertion, can a wife be released from her husband. Marriage was considered a sacrament (*samskara*) under the Hindu law and therefore, indissoluble.<sup>2</sup> Both parties to the marriage were to be made conscious of their duties and rites through the ceremonies. Atheists, who may not be convinced, may brush aside this notion with ease. Nevertheless, the fact remains that the modern Hindu wife who is conscious of her rights is more "traditional in her concept of marriage and possesses an immense capacity of toleration".<sup>3</sup>

2. Mayne, *Hindu Law* 101 (11th ed.).

3. Raj Kumari Agrawala, *Matrimonial Remedies* (1974).

No statistical data is available nor any attempt appears to have been made to collect it, before codification to visualise the interests of the Hindu spouses to treat the concept of marriage a legal contract. The submission that the mutual relationship between wife and husband was not well balanced under the *shastric* concept is a wrong notion and it is due to misinterpretation of the texts. The subsequent social conditions made the male member to play a vital role but he never became the dictator. When this change in the society was noticed, judiciary had stepped in on many occasions, to repair the ruptures to the conjugal cohabitation,<sup>4</sup> recognising the *shastric* concept that spouses must live together. The median role played by the judiciary during these days cannot be the satisfactory answer for the inclusion of this provision in the enactment. The product of mixture of law and morality is still difficult to be digested by the Hindu matrimonial home. The progressive sect of the Hindu society is well prepared to adhere to the changes brought out in the enactment, when there is a complete 'breakdown' but their mental environment may not welcome the intervention for 'petty-repairs'. The court is not a workshop and the human mind is not a machine. The adversary procedure followed by the courts in restitution proceedings either by compromising the matter or by decreeing the application has rarely brought any change in the attitude of the contending parties. The provision may speak of progressive outlook but lacks in maintaining liaison in the matrimonial home. It is too difficult to set apart the 'private' and 'public' spheres in the institution of marriage though the institution is both public and private in nature.

The tie between the spouses is strong but the relations between them are equally delicate, especially among the modern educated spouses. Mutual understanding, respect and self-realisation are the prevailing characteristics of this unit and seldom there is a scope for puzzles. Perplexing problems are seriously viewed and the intervening figure can never influence the mind to change the opinion. There is a larger gulf between this so-called modern educated class and that of uneducated rural mass among the Hindu society. The question remains to be seen how far this uneducated rural mass would accept the 'punishment' in good spirits and set right the things. Human mind is emotional and may not welcome external 'violences'. Repairing the human mind through judicial process can hardly be achieved.

In Hindu society law and religion are so often blended that demarcation between the two is apparently difficult. Institution of marriage is more religious in character, though legal control is instrumental in enforcing social canons. Auto-limitations of behaviour established by legal control

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4. *Binda v. Kaunsilia*, (1891) I.L.R. 13 All 126.

in this sensitive area amount to encroachment on personal morality. The legal control in spheres of personal morality is still a debated question and the enforcement of morality by law, without providing adequate remedies may not be a welcome decision. The prevailing social conditions would show that the approach by one of the parties to the court is very detrimental to future reconciliation.

The provision under section 9 of the Hindu Marriage Act gave at the first instance wide discretionary powers to the court to decide on merits, the withdrawal by one of the parties from the society of the other as to one with or without reasonable excuse. Two aspects might have influenced the inclusion of the words, 'without reasonable excuse' viz., the reproduction of section 32 of the Act of 1869 or the matrimonial remedy earlier provided to the Hindu wife, *vide*, section 2(7) of the the Act of 1946. For argument's sake, even if provision under section 9(1) is accepted, (as similar provision has been made in the Special Marriage Act<sup>5</sup>) controlling provisions, *vide*, section 9(2), appear to be barbaric. Apart from the conflicts now arisen as to read the section as a whole,<sup>6</sup> or treat section 9 (1) as independent of section 9(2),<sup>7</sup> it is to be seen, whether the initial trial and decree for one of the grounds provided for seeking other matrimonial remedies would really reconcile the situation. Further, by virtue of section 9(2) read with section 13(2)(i), the husband who has married again before the commencement of the Act ceases to have right to claim restitution of conjugal rights, when the other wife is 'alive'.<sup>8</sup> It means, when one of the two wives earlier obtained a divorce, the husband cannot enforce his right of 'restitution' against the second wife, even when other justifiable grounds exist for a decree, and he has to loose the company of both. Though a very few cases of this type may come for scrutiny hereafter, this penal provision cannot be considered as an apt legislation.

The decree would be without a proper enforcing remedy. The minister had admitted, while moving the Bill that a decree cannot be forcibly enforced against the unwilling spouses.<sup>9</sup> The remedial provision for disobedience of restitutional decree<sup>10</sup> and the resultant effect of keeping the spouses within the enclosed net for a period of two years have given an opportunity to strengthen the ground subsequently provided under section 13(1A)(ii). The Law Commission has recommended the deletion of section 9(2) mainly to

5. S. 22 of the Special Marriage Act, 1954.

6. *Annapurnamma v. Appao Rao* A.I.R. 1963, A.P. 312.

7. *Shanti Devi v. Balbir Singh*, A.I.R. 1971 Delhi 294.

8. *Mst. Deepo v. Kehar Singh*, A.I.R. 1962 Punj. 183.

9. Lok Sabha Debates.

10. O. xxi, r. 33 of the Civil Procedure Code.

avoid the deadlock between section 9(1) and section 9(2) and to prevent the husband as far as possible, from filing a petition for restitution of conjugal rights as to restrict the rights of the Hindu wife under section 125 of the Criminal Procedure Code. Even after deletion of section 9(2) nothing can prevent the husband from filing the application under section 9 of the Act. The intention of the legislature to safeguard the interests of the Hindu wife can be fulfilled by virtue of section 18 of the Hindu Adoption and Maintenance Act or section 125 of the Criminal Procedure Code, and it may not be wise to bank upon this deceptive remedy. Hence, it is submitted that this provision is unsuitable to Hindu society.

This remedy, defective in its origin, has not succeeded in achieving the desired objectives. Deretts' view<sup>10a</sup> that the moral qualities of Hindu spouses will, given a chance, reconcile them to the shortcomings of their partners, whom they have after all deserved through their merits or demerits in previous births cannot be appreciated in the radically changing Hindu society. Modern husband can no longer expect the forbearance, patience and complete servitude from their wives<sup>11</sup> as dignity and self-respect are the progressive features of the day. Persuasion by either of the parties, in confidence, may at times reconcile the situation but external intervention may stimulate the subconscious feelings and lead to spurious results. This is what has been happening especially due to the part played by inexperienced lawyers to change the facts. It is true that the aggrieved wife could not succeed in *Annapuramma's* case<sup>12</sup> due to the factual interpretation of section 9, but the remedy does not lie in deleting sub-section (2). It can be enforced by making suitable changes in section 10 to meet such eventualities. Though the insincerity of the husband in filing the application for restitution has been very often checked by the courts, the fact remains that this provision is misused for achieving other ends.<sup>13</sup>

The enforcement measure for the decree of restitution of conjugal rights is ineffective. There is no compulsory measure to force the parties to come together, even after the decree. It is again doubtful, how far it would be possible to achieve the reunion of minds even with compulsion. Anyway, that is not the objective of the legislature as expressed by the minister while moving the Bill.<sup>14</sup> Further, there is no need for the decree holder

10a. *Supra* note 1 at 351.

11. *Kanna v. Krishnaswami*, A.I.R. 1972 Mad. 247.

12. *Supra* note 6.

13. *Kamlesh Kumari v. Kartar, Chand* A.I.R. 1962 Punj. 156; *Gulab Kaur v. Gurdev Singh* A.I.R. 1963 Punj. 493; *Kamala Bai v. Rathnavelu*, A.I.R. 1955 Mad. 88,

14. Lok Sabha Debates.

to take steps for its compliance.<sup>15</sup> It is difficult to believe that the person who has gone out of the conjugal society with or without reasonable excuse, would return with sportive spirits, after accepting a defeat in the legal battle. On many occasions, restitution proceedings have become rehearsals for the main drama under section 13.<sup>16</sup> The Law Commission has thought it feasible to delete section 9(2) in order to avoid dual proceedings in this regard as the commission felt that the husband invariably files a petition for restitution of conjugal rights as a counter blast to the claim made by his wife for maintenance under section 488 of the old Criminal Procedure Code.<sup>17</sup> Apart from the fact that sub-sections (3) and (4) of section 125 of the new Criminal Procedure Code give ample room for dilatory tactics, even after deletion of sub section (2) of section 9, the problem which frequently occurs is not solved.

When the court is satisfied beyond reasonable doubt under section 23,<sup>18</sup> after determining the respondent's state of mind in the particular circumstances of each case, it may decree the petition for restitution for conjugal rights under section 9(1), even after deletion of section 9(2), when the reconciliation measure has eventually failed. Further attempts are possible by the courts for the compliance of the decree by attachment and sale of the property.<sup>19</sup> Since the execution is governed by order xxi, rules 32 and 33 of the Civil Procedure Code, it is for the judgment creditor (decree holder) to move the matter. The situation speaks well that the decree holder, husband is never particular in carrying out the verdict of the court in restitution proceedings. Further, the wife cannot insist upon the execution of the decree by the decree holder husband and cannot avail of any benefit for non-execution.<sup>20</sup> Secondly, if the husband is the decree holder, it may not be possible for him to execute effectively when the wife is not having any property of her own. Hence, there is hardly any case, where the decree is effectively executed.

It is too difficult to stress the retention of this remedy to provide relief to the Hindu spouses, in the above circumstances. However, before justifying the abolition, it may be necessary to give a second thought to see whether the necessary changes to the present law can be made useful to the Hindu society. The deletion of section 9(2) would not bring the desired results, though it may be possible to give opportunities to erring spouses to knock at the door of the court before there is a major break-down. As submitted earlier, the present practices would continue to prevail, unless the entire law and procedure are changed. The author is of the opinion that the entire matter must

15. *Gulab Kaur v. Gurdev Singh*, A I.R. 1963—Punj. 493.

16. *Kamlesh Kumari v. Kartar Chand*, A.I.R. 1962 Punj. 156.

17. The Law Commission, *Fifty-ninth Report* 54 (1974).

18. *Smt. Hirakali v. Dr. R. A. Awasthi*, A.I.R. 1971 All. 201.

19. O. xxi-r, 32 & 33 of the Civil Procedure Code.

20. *Sudra* note 15.

be left in the moral sphere and the legal control must as far as possible, be avoided. Though 'external interventions' have always proved fatal to future reconciliations, persuasions and the consequential bridgeups are not rare phenomena. A suggestion for appointing a committee for reconciliation by the court has earlier been made.<sup>21</sup> Although the matrimonial court is not a criminal court but the mere approach by the other spouse to the court has culminated into devastating results. If the remedy of reconciliation is to continue, the following suggestions are made to consider as alternative suggestions.

In the Hindu society, where the marriage is celebrated according to the customary rites, relatives, friends and such other respected persons of the area do take part in the ceremony of marriage or witness the marriage and if the parties have adopted any other mode, friends and close relatives are kept informed either before or after the marriage. It would be possible for these persons to play a vital role in reconciling the situations, by constituting a committee when the occasion demands. However, differences between husband and wife may eventually lead the relatives or friends to take one of the two sides. To avoid the future deadlocks, reconciliation officer's intervention would be necessary. The state governments should be permitted to appoint adequate numbers of reconciliation officers in each and every area and such appointments should be notified in the state gazette. The number of reconciliation officers to be appointed may depend upon population and literacy, *etc.*, of the area. Requisite qualifications may be prescribed for the appointment of reconciliation officers and they may be treated as public servants. Reconciliation officers may be empowered to make enquiries, on information or *suo motu* into the unhappy relation between husband and wife in that area. If the reconciliation officer has reason to believe that the grounds exist for intervention or if he receives any requests either from the husband or wife, or from any of the close relatives of the husband and wife, he must set up a 'reconciliation committee' consisting of such of the relations as father, elder brother, mother, paternal uncle, maternal uncle, and major sons, if any. If the reconciliation officer of the area happened to be the relative of the parties to the settlement, the parties may be permitted to choose the reconciliation officer of the adjoining area or of any other, acceptable to both. It would be the responsibility of the reconciliation officer to take necessary action to set up the committee on each occasion and make every effort to reconcile the situation. Necessary control may be exercised by making suitable provisions to prohibit the committee in its attempts, if any to bring

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21. *Supra* note 3 at 33.

out any agreement between the parties, which is immoral, illegal or detrimental to any of the spouses. The proceedings of the committee and its findings should be considered as a piece of evidence in subsequent matrimonial proceedings between the spouses. The spouses may be required to exhaust this remedy before they claim divorce, on the grounds, which are separately provided under the Act where lapse on the part of any spouse may be considered by the court on merit in the subsequent proceedings.

The application of this provision to all classes of Hindu society would not be certainly without any difficulties. The English matrimonial law has already given quietus to this deceptive remedy. However, earlier the better for Hindu society to get rid of this illogical provision rather to move for obtaining a stultifying decree.