Constitutional Validity of Restitution of Conjugal Rights: Scope and Relevance

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SCOPE AND RELEVANCE

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1. INTRODUCTION :-

Family and marriage are the basic institutions of any society. Every society has certain norms and rules which have led to the development of key concepts such as usage and custom. Marriage as an important institution has been recognized in the personal laws of all the religions. With the passage of time, the complexities increased with areas such as divorce, judicial separation and conjugal rights came up in personal law and it became necessary to codify the laws relating to marriage in India. This led to the codification of marriage as in the Hindu Marriage Act, 1955, Indian Divorce Act, Parsi Marriage and Divorce Act, 1936 and various other acts. Interesting to note in the concept of marriage is the existence of rights between spouses. These rights may also be called Conjugal Rights. When there occurs a separation in marriage, then a remedy in the form of restitution of these conjugal rights is offered to the disadvantaged party. The guarantee given by the Indian Constitution to every citizen with respect to the protection of fundamental rights has left some scope for ambiguity in this provision. This has led in recent times to a heated debate as to the constitutional validity of the concept with regard to the personal laws existent in the society. This paper seeks to judge the constitutional validity of the restitution of conjugal rights and compares the relevant provisions with the various rights enshrined in part III of the Indian Constitution. Though this paper has sought to analyze this issue by referring to many cases, at certain stages opinions are also given which are based on facts.
2. Restitution Of Conjugal Rights: Meaning And Scope

The institution of Marriage is often regarded as a primary institution in this society of ours. An individual’s existence in the society is guided by institutions which are often regarded as established forms of procedure characteristic of group activity. Later on, a marriage between two individuals creates a set of rights and obligations between the parties involved. These rights may be called as “conjugal rights”. The word conjugal, in its essence means, “of relating to marriage or to married persons and their relationships”. So now we need to ask ourselves as to what exactly do we mean by the restitution of these conjugal rights.

2.1 Conjugal Rights Under Various Personal Laws:

Section 9 of the Hindu Marriage Act, 1955\(^1\) states,

*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, on being satisfied of the truth of the statements made in such a petition and that there is no legal ground why the application should not be granted, may decree the restitution of conjugal rights immediately.*

The restitution of conjugal rights is often regarded as a matrimonial remedy. The remedy of restitution of conjugal rights is a positive remedy that requires both parties to the marriage to live together and cohabit.\(^2\) The texts of Hindu law also recognized the principle “let mutual fidelity continue until death”. Hindu law enjoined on the spouses to have the society of each other. While the old Hindu law stressed on the wife’s implicit obedience to her husband, it did not lay down any procedure for compelling her return to her husband against her will. It must be noted that such a concept existed in England since the 19th century and was introduced in India in the case of *Moonshee Buzloor v. Shumsoonissa Begum*\(^3\), where such actions were regarded as

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\(^1\) Sec. 9, Hindu Marriage Act, 1955.
\(^3\) (1867) ii, Moo IA 551.
considerations for specific performance. This section in the Hindu Marriage Act is a reproduction of the sections 32 and 33 of the Indian Divorce Act. It is to be noted that similar provisions as to restitution of conjugal rights exist in other personal laws as well. Muslim equates this concept with securing to the other spouse the enjoyment of his or her legal rights. Earlier, it was also attached with the specific performance of the contract of marriage. In Abdul Kadir v. Salima, the Allahabad High Court decided that the concept of restitution must be decided on the principles of Muslim Law and not on the basis on justice, equity and good conscience. The laws relating to Christians and Parsis also deal with the concept of Restitution of Conjugal rights.

To sum up, under all personal law, the requirements of the provision of restitution of conjugal rights are the following:

- Withdrawal by the respondent from the society of the petitioner.
- The withdrawal is without any reasonable cause or excuse or lawful ground.
- There should be no other legal ground for refusal of the relief.
- The court should be satisfied about the truth of the statement made in the petition.

Where question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society. It must be realized that this concept is only secondary in nature. The primary object of showing proof or onus rests with the petitioner. This is further evident from Sec. 23(1) of the Hindu Marriage Act and other similar matrimonial statutes. Once the petitioner has proved his case, the burden of proof then shifts to the other party to prove the defence of a ‘reasonable excuse or cause’. The word ‘society’ here corresponds to cohabitation, and withdrawal signifies cessation of that cohabitation and bringing to end consortium. This must be a voluntary act of the respondent. In Sushila Bai v. Prem Narayan, the husband virtually dumped his wife and there after was totally unresponsive towards her. This behaviour was held sufficient to show that he

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4 Indian Divorce Act, 1929
6 Sec. 32, Indian Divorce Act, 1929.
7 Sec. 36, Parsi Marriage and Divorce Act, 1936.
8 Supra. n. 5 at p. 288.
9 AIR 1964 MP 225.
had withdrawn from the society of his wife, and therefore the wife’s petition for restitution of conjugal rights was allowed.

The defence to this principle lies in the concept of a ‘reasonable excuse’. If the respondent has withdrawn from the society of his spouse for a valid reason, it is a complete defence to a restitution petition. In *Gurdev Kaur v. Sarwan Singh*[^1^], the wife’s appeal against a decree of restitution of conjugal rights was given in favour of the husband. It was held by the Court that there was reason to believe that actions were taken by way of a ‘reasonable cause’ and thus conjugal rights had to be restored. The court has held in various cases that the following situations will amount to a reasonable excuse to act as a defence in this area;

i. A ground for relief in any matrimonial cause.

ii. A matrimonial misconduct not amounting to a ground of a matrimonial cause, if sufficiently weighty and grave

iii. Such an act, omission or conduct which makes it impossible for the petitioner to live with the respondent.

It is significant to note that unlike a decree of specific performance of contract, for restitution of conjugal rights, the sanction is provided by the court where the disobedience to such a decree is willful i.e., is deliberate, in spite of opportunities[^12^]. Also under Section 13 (1-A) of the Hindu Marriage Act, if the spouse fails to return to his home after such a decree, it can amount to a condition of divorce.

### 2.2 Enforcement Of The Restitution Decree

“The order of restitution of conjugal rights is observed by its breach rather than its abeyance.” When a person fails to comply with a decree of restitution the Court has a power to enforce the decree under Order 21 Rule 32 of Civil Procedure Code, 1908[^13^]. Under Rule 32(1), if

[^13^]: Order 21 Rule 32 (1) of the Civil Procedure Code, 1908 States; “Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity for obeying the decree and has willfully failed to obey it, the decree may be enforced in the case for a decree for the restitution of conjugal rights by the
the party wilfully does not comply with the decree, then the Court can attach the property of the
decree-holder. Under Rule 32 (3), the Court has the power to sell the attached property if the
decree holder has not complied with the decree for six months. The difficulty arises if the
judgement-debtor has no actual property in possession. In India, we find that in most cases and
especially in rural India that wives’ do not have actual possession over any property. In such
cases, if a restitution decree is not complied with, then the court is required to ascertain the share
of the wife in the property of her husband, when it is not divided and arrive at her share in the
property, but this involves cumbersome procedures. Difficulty also arises if the husband is a
property-less person—say, a daily wage labourer living in a slum—how will the Court execute
the decree in such cases? It is naive to think that coercing a person that his property would be
attached and sold away can change the attitude of the adamant spouse and make him obey the
decree. The aim of this remedy is the cohabitation of the spouses, but when the property is
attached and sold, it will lead to bitterness between the spouses and the purpose of the remedy is
frustrated

3. PERSONAL LAWS AND FUNDAMENTAL RIGHTS

It is understood from the previous chapter that the restitution of conjugal rights is a part
of the personal laws of the individual. That is, they are guided by ideals such as religion,
tradition and custom. But are personal laws, laws? Well first we must realize that ‘laws’ as such
are defined in the constitution of India under Article 13 (3),

“(a) ‘Law’ includes any ordinance, order, bye-law, rule, regulation or notification,
custom or usage having in the territory of India, the force of law,
(b) ‘laws in force’ includes laws passed by the legislature or any competent
authority in the Indian territory before the commencement of this Constitution and
not previously repealed, notwithstanding that any such law or any part there of may
not be then in operation either at all or in particular areas.”

Now we need to address the point as to does a personal law come under this article.
While Article 13(3) (a) mentions that laws include customs and usages, there is a doubt as to

attachment of his property or, in the case for a decree for the specific performance of a contract, or for an
injunction by his detention in the civil prison, or by the attachment of his property or by both. “
whether personal law would amount to a custom as mentioned under this article. The Court in *State of Bombay v. Narasu Appa Mali*¹⁴, stated that the concept of law in Article 13(3) must be read with 13(2). If done so, then we see that a state cannot make a custom or create usage in the society. Customs and usages are a product of individual behaviour and no legislature can pass a custom. Though personal laws do consist of customs, their scope is not filled with them. That this distinction is recognized by the Legislature is clear if one looks to the language of Section 113, Government of India Act, 1915¹⁵. That section deals with the law to be administered by the High Courts and is provides that the High Court a shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom. Therefore, a clear distinction is drawn between personal law and custom having the force of law.

It was thus realized that personal laws do not mean customs as under article 13(3) of the Constitution and are distinct. Furthermore, if a personal law was to come under Article 13, then Article 17 of the Constitution which deals with untouchability would not have been included¹⁶. Justice Chagla thus concludes that the founding fathers of our Constitution did not intend that personal laws come under the scope of Article 13. However, it is to be mentioned that even if a personal law is to be held valid, it must not be in violation of any of the fundamental rights mentioned in part III of the Constitution¹⁷. When we have to look at the constitutionality of a provision, Article 13(2) must be looked at¹⁸;

“The state shall not make any law that takes away or abridges the rights conferred by this part and any law made in contravention of this clause, shall to the extent of the contravention be void”.

So we thus have an ambiguity in this provision. If a personal law is not to be regarded as a law, then the provisions of Article 13 must not apply to it. Even so, if it is a law, then it must not be in violation of any of the fundamental rights. But here we need to ascertain the validity of a provision of the Hindu Marriage Act, 1955. Though it is a personal law, we shall assume that is

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¹⁴ AIR 1952 Bom 84.
¹⁵ Section 113, Government of India Act, 1915.
¹⁶ Ibid. at para 13.
¹⁸ Article 13(2), The Constitution of India.
does come under Article 13(3) of the Constitution and see if it is in violation of any of the provisions of the Constitution as mentioned under Part III. Once again, Section 9 of the Hindu Marriage Act, 1955 states,

“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, on being satisfied of the truth of the statements made in such a petition and that there is no legal ground why the application should not be granted, may decree the restitution of conjugal rights immediately.”

4. CONSTITUTIONAL VALIDITY OF SECTION 9,

THE HINDU MARRIAGE ACT, 1955

As states earlier, to judge the constitutional validity of a section or act, we must see compare it with the fundamental rights mentioned under Part III of the Indian Constitution. Over the course of this chapter we shall compare section 9 of the Hindu Marriage Act with the fundamental rights that may be incongruent with this section and give a better understanding as to why and how the principle is or isn’t in violation of that particular article. There have also been many cases in this regard which have been dealt with in the chapter.

The Constitution of India is based on the principles of human dignity, equality and personal liberty. The marital relations are very intensively concerned with these fundamental rights. Our founding fathers drafted the Constitution keeping in mind the welfare of the people and saw to it that there were appropriate provisions such that a law was not misused so as to affect the people. This concept was given further force by the doctrine of Basic Structure laid down by a 13 judge bench in 1973.

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20 Keshavananda Bharti v. Union of India, AIR 1973 SC 1780.
4.1 Right to Equality and Restitution of Conjugal Rights:

The Indian society is often regarded as one with widespread discrimination based on gender. More often than not, there have been instances where women have been subdued to violence and injustice because of their gender. It is to be noted that there is an inequality in the Indian society with regard to conjugal rights because, “a suit for restitution by the wife is rare in the Indian Society”. This fact has been affirmed by Gupte\textsuperscript{21} who was quoted by the Court in \textit{T. Sareetha v. T. Venkata Subbaiah}.\textsuperscript{22} It is only the educational, economic and social factors which have made the life of women deplorable in our Country. In our social reality, this matrimonial remedy of restitution of conjugal rights if found used almost exclusively by the husband and rarely resorted to by the wife.\textsuperscript{23} So what exactly does Article 14 state? According to this article,

\begin{quote}
\textit{“The state shall not deny to any person equality before the law or the equal protection of laws within the territory of India”}\textsuperscript{24}
\end{quote}

The guiding principle is that all persons and things similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.\textsuperscript{25} All equals must be treated equally amongst themselves and unequals unequally.\textsuperscript{26} It must be realized that Gupte’s quote was concerning the old Hindu law and the provisions of the Hindu Marriage Act, 1955 and other personals do not have any provision of inequality existent in them. By amending act 44 of 1964\textsuperscript{27}, “either party to a marriage” is allowed to present a petition on the grounds given in Section 9 and Section 13(a). The concept of gender discrimination has not been incorporated in the Hindu Marriage Act and all are treated as equals under this section. It is opined by the author that there is no classification of sexes in Section 9 and all equals have been treated equally in this area. There is complete equality of sexes here and equal protection of the laws. Section 9 cannot be struck down as violative of Article 14 of the Constitution.

\textsuperscript{21} Gupte, \textit{Hindu law in British India}, 2\textsuperscript{nd} ed. 1947, p.99.
\textsuperscript{22} AIR 1983 AP 356.
\textsuperscript{23} Supra. n. 18.
\textsuperscript{24} Article 14, the Constitution of India.
\textsuperscript{25} \textit{Satish Chandra v. Union of India}, AIR 1953 SC 250.
\textsuperscript{27} Hindu Marriage (Amendment) Act, (Act no. 44 of 1964).
The object of the restitution decree is to bring about cohabitation between the estranged parties. So that they can live together in the matrimonial home in amity. That is the primary purpose of Section 9 of the H.M.A. Cohabitation has been defined in these words: Cohabitation does not necessarily depend upon whether there is sexual intercourse between the husband and the wife. 'Cohabitation' means living together as husband and wife. 28

4.2 THE DECISION IN T SAREETHA v. VENKATASUBBAIAH CASE:

The question of constitutional validity of S.9 for the first time came up in the case of T Sareeta v Venkatasubbiah29 where the husband had himself asked the Court to pass a decree of restitution of conjugal rights and after completion of a year he filed a petition for divorce on the ground that the decree has not been complied to. The wife challenged the constitutional validity of S.9 of the Act. Justice Chaudhary of the Andhra Pradesh High Court held S. 9 to be “savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution, hence void”.

Chaudhary J. stated that section 9 imposes "sexual cohabitation between unwilling, opposite sexual partners." He called it "forced sex", "coerced sex" and "forcible marital intercourse". He went on to hold that the state interference in personal rights destroyed the "sexual autonomy" and "reproductive autonomy" of the individual. A wife who is keeping away from her husband, because of permanent or temporary arrangement, cannot be forced, without violating her right to privacy, to bear a child by her husband30. A large number of English and American decisions have been cited in support of this view31.

This decision is the first of its kind to take this view. The decree for restitution does nothing of the kind. Under section 9 of the Hindu Marriage Act, 1955, the Court has power to make a decree of restitution of conjugal rights which is the remedy available to enforce the return of a spouse who has withdrawn from cohabitation. The decree, if granted, orders the respondent

29 AIR 1983 AP 356.
30 Ibid.
to return within a period of one year to the aggrieved party. This period is specified in section 13(l-A)(ii) of the Act. This remedy is aimed at preserving the marriage and not at disrupting it as in the case of divorce or judicial separation.

4.3 The Right to Life and Restitution of Conjugal Rights:

The Right to Life of a person is regarded as the most important aspect of a person’s fundamental rights. It is stated in the Constitution as follows

“No person shall be deprived of his life or personal liberty except according to the procedure established by law”.

Article 21, though couched in the negative language, confers on every person the fundamental right to life and personal liberty. These rights have been given a paramount position by the Supreme Court. Over the years, this right has also included within its scope, the right to education, the right to privacy, the right to speedy trial, the right to travel etc...

It is argued that Section 9 of the Hindu Marriage Act, 1955 that provides for the restitution of conjugal rights, violates the right to privacy of an individual. Section 9 denied the spouse his/her free choice whether, when and how her/his body was to become the vehicle for the peroration of another human being. A decree for restitution of conjugal rights deprived, according to the learned Judge in Sareetha’s case, a woman of control over her choice as and when any by whom the various parts of her body should be allowed to be sensed. Our Constitution embraces the right to privacy and human dignity and any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child bearing. It is to be noted that the restitution of conjugal rights, unlike specific performance, is only willful in nature and the courts must treat it only as an inducement in times to come. The institution of marriage has been inherent in the Indian Society and all must

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32 Article 21, The Constitution of India.
36 Hussainara Khatoon v. Home Secretary of Bihar, AIR 1976 SC 1360.
37 Satwant Singh v. A.P.O. Delhi, AIR 1967 SC 1836.
be done to protect it. Furthermore, if a spouse does not wish to stay with his/her partner then he may make use of remedies such as judicial separation and divorce. Leaving a partner without a reasonable excuse cannot be justified.\textsuperscript{40} This is against the concepts of justice, equity and good conscience which are the basis for laws made in our Country. Thus it must be observed that Section 9 of the Hindu Marriage Act is not violative of Article 21 of the Indian Constitution.

\textbf{4.4 Right to Freedom and Restitution of Conjugal Rights :}

It is believed that the restitution of Conjugal rights violates the freedom of expression, association and other freedoms guaranteed under Article 19 of the Constitution. Article 19 (1) of the Indian Constitution prescribes for the freedom to form associations and reside in any area in India,\textsuperscript{41} the freedom to practice any profession\textsuperscript{42} and the freedom of free speech and expression\textsuperscript{43}. But this right is not an absolute right. There are restrictions mentioned in the form of Article 19(6) which are in the form of public order, morality and health.

It may be believed that to a certain extent, that the restitution of conjugal rights concept under Section 9 of the Hindu Marriage Act, 1955 is in violation of Article 19(1)(c) of the Indian Constitution. This is may be because by this decree, a wife is compelled to stay with his husband or vice-versa against her will. In \textbf{Huhharam v. Misri Bai}\textsuperscript{44}, the wife complained to the Court that her father-in-law has an evil eye on her and her husband ill-treated her in response to the husband’s claim for a restitution decree the court granted it in the husband’s favour. This 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 is contended that the restitution of conjugal rights violates this Article.

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\textsuperscript{40} \textit{Saroj Rani v. Sudarshan Kumar Chadha}, AIR 1984 SC 1652.
\textsuperscript{41} Article 19(1) (g), The Constitution of India
\textsuperscript{42} Article 19(1) (c), The Constitution of India
\textsuperscript{43} Article 19(1) (a), The Constitution of India
\textsuperscript{44} AIR 1979 MP 144.
\end{flushright}
There have been instances where the restitution of conjugal rights violates the right to live and travel anywhere. Such a situation is seen to arise in urban areas where both the spouses before marriage work and after the marriage a decision has to be made as to who will shift and lose the job where they were employed\(^\text{45}\). In these cases, the husband has, while claiming a decree of restitution, requested the Honorable Court to order the wife to resign her job and live with the husband under his roof and protection. Asking such a relief is primitive in nature and an immature decision by the law executors of our country. Such a provision is to be held violative of Articles 19(1)(e) and 19(1)(g) of the Constitution. The Court has held in numerous cases\(^\text{46}\) that the refusal by a spouse to give up his/her job and live with the other does amount to ‘withdrawal from the society of the other’.

In **Gaya Prasad v. Bhagawati**\(^\text{47}\), the Hon’ble Court observed,

> “According to ordinary customs of the Hindu Society, the wife is expected to perform a marital obligation at her husband’s residence and she could not impose her unilateral decision on the husband by merely stating that she has no objection to allow the husband to live with her at the place where she has accepted her service”.

The rationale behind this decision is the same cliché that Hindu Marriage is a sacrament and all must be done to preserve that holy union between the husband and the wife. But we see that the Courts have failed in most circumstance to understand the oppressed position of a woman in the society. In today’s society, the woman is understood to work and move up the ladder and marriage must not act as a hurdle in this area. In some new decisions\(^\text{48}\), the Court has decided that mere refusal by the spouse to resign his/her job and move with her husband is not a ‘withdrawal from the society’ of the other. But the mystery of constitutional validity in this area still remains as this question did not come up before the Court in these cases. However, the issue of coercion is proved and we can conclude that such a provision under Section 9 of the Hindu Marriage Act does violate the relevant Constitutional Provisions.


\(^{47}\) AIR 1966 MP 212.

4.5 *The Decision in Saroj rani v. Sudarshan Kumary*:

In this case, the wife petitioned for restitution of conjugal rights. She was married in 1975 and had given birth to two daughters during her brief married life. She was turned out of her matrimonial house in 1977 and subsequently filed a petition to which she was granted an interim maintenance by the Court. The husband later filed a consent memo for the passing of the decree and the decree of restitution of conjugal rights was accordingly passed in favour of the wife. One year later, the husband applied for a divorce under Section 13 (1-A) of the Hindu Marriage Act, 1955 on the ground that he and his wife had lived separately during the one year period. The question of cohabitation arose where in the spouses stayed together for a period of two days after the decree was passed.

It was submitted that the ground for divorce was unjustified and the husband was getting away with his ‘wrongs’. This argument was based on the principles of natural law, i.e. justice, equity and good conscience. It was further argued that the concerned section, that is Section 9 of the H.M.A. violated Articles 14 and 21 of the Indian Constitution. The Hon’ble Court under Justice Sabyasachi Mukhatji observed:

“We are unable to accept the position that Section 9 of the Hindu Marriage Act is violative of Art. 14 and 21 of the Indian Constitution. Hindu Marriage is a sacrament and the object of section 9 is to offer an inducement for the husband and wife to live together in harmony. If such differences may arise as in this case, it may be a valid ground for divorce after a period of one year. Hence Section 9’s validity is upheld.”

Thus the Court granted the divorce but at the same time understanding the situation of the wife and daughters, ordered the husband to pay a prescribed maintenance to the wife until she re-marries. The Hon’ble Court has thus considered the interests of both parties and maintained harmony in this area.

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49 AIR 1984 SC 1652.
5. CONCLUSION AND SUGGESTIONS

It is thus understood from what has been written above that the concept of Restitution of Conjugal Rights has left enough ambiguity as to whether it is in violation of any of the fundamental rights guaranteed under part III of the Indian Constitution. It can be noticed that this provision is violative of articles 19 and 21 of the Constitution and not violative of other articles. After Sareetha & Saroj Rani’s cases, the issue of constitutional validity has taken a new dimension. Today, one views this as a highly volatile area where there is a clash between personal laws and fundamental rights altogether. As mentioned earlier, personal laws do not come under the ambit of Constitutional Review, but the author has used an in arguendo in stating that even if they do come, they are not violative of some provisions of the Constitution. As we understand, this concept introduced in England now stands abolished.

In my opinion, the concept of restitution of conjugal rights is a farce and must not exist in India. It is however hoped that we may foresee that in the near future, India too will progress towards realization. Realization that the rights of an individual are important and must be protected at all costs and the Courts must detach themselves from considering preservation of marriage as a social obligation which the law executors must protect. The author has done his best to present this paper in the best manner possible and deeply regrets if any loophole arises in the same.