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# **FREE CONSENT IN MARRIAGE CONTRACTS: LEGAL, SOCIAL, AND ECONOMICAL PERSPECTIVES**

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## **INTRODUCTION**

Marital union is the most important social institution, deeply imbued into one's cultural, religious, legal and economic norms in society. Free consent in marriage is not only a stipulated condition under the law but also has to be an essential condition for garnering dignity for autonomy and equality in marriage contracts. The absence of free consent gives rise to abuses that include forced marriages, coerced agreements, and marriages of convenience for socio-economic reasons.<sup>1</sup>

This project generally explores free consent regarding marriage contracts in terms of the legal, social, and economic theories. It aims to analyze how consent is required legally for marriage contracts within many jurisdictions; look into the social dimensions of forced or coerced marriages; and attempt to assess the economic consequences of such marriages where free consent seems questionable. The study strives to fully comprehend what a lack of free consent in marriage contracts can lead to for the individual and, more importantly, to society as a whole.

## **RESEARCH QUESTION**

Are there any legal remedies available in regards to lack of free consent in contracts of marriages?

## **RESEARCH METHODOLOGY**

The research methodology used in this project combines both doctrinal and socio-legal analysis. The project undertakes a doctrinal review of the prevailing legal literature, statutes, and case laws in order to analyze the meaning, scope, and the aspect of enforcement in free consent marriage contracts under the auspices of various legal systems. This shall entail in-depth studies on national legislation within several countries, with particular focus on areas of law governing family rights, laws of marriage, and human rights laws.

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<sup>1</sup> Elizabeth S Scott and Robert E Scott, 'Marriage as Relational Contract' (1998) 84 Virginia Law Review 1225.

The study pursues a socio-legal approach thus, in addition to legal dimensions, social, cultural, and economic factors are integrated into the analysis. Based on this part of the methodology, scholarly articles, empirical studies will be examined with respect to incidents and impacts of non-free consent marriages, particularly in terms of economic coercion or societal pressures to marry.

## **INTRODUCTION OF PROJECT**

Marriage is a contract which may have legal as well as social implications through which two persons join together as partners. Today marriage is not only a traditional or even religious ceremony which can be changed arbitrarily, but the legal bond which is regulated by contract law principles. For this reason, it is necessary to give the meaning of marriage as a legally binding contract between two individuals in which one of the individuals makes an offer and the other person accepts it. As much as it is a contract like any other there are certain conditions that should be met so that it counts. Of all these requirements, the major requirement is that the consent should be given freely by both parties.

Free consent is also an important concept in marriage contract that means that nobody must force, coerce or deceive the other person to get into the marriage. Consent cannot be regarded as free if the person giving it was compelled by force or threats, deceived; or not informed correctly; or controlled by the power, or submitted to influence by the other party; or if the giving was based on a wrong information. If any of these elements are in existence then the marriage contract can be considered to be void, that is it can be set aside or even dissolved.

The doctrine of free consent can therefore not be regarded as new. It can be traced back to early legal systems particularly in Roman law where it was considered as one of the important elements in the process of creating a contract. In the process the principle of free consent has emerged as a cardinal concept in many of the most developed societies of the world. Today one of the important conditions that need to be fulfilled is the agreement of both parties in marriage.

This project will also look at the extent to which such consent in marriage contract is fair in reality. This will examine the legal measures that guarantee free consent as well as the legal compensation that is accorded when the option of consent is violated or not willingly provided. We will also examine some of major policy developments in this field of law to understand in greater detail on how the principle of free consent is implemented. In addition,

the project will examine how the principle of free consent in marriage has been implemented in various courts across the globe with special attention towards historical court cases. This project has the following objectives: to analyze the protection of a marriage contract with reference to the principles of free consent under the legal systems of selected countries. It will also examine the different ways through which people can complain in as much as they feel that their consent to marriage was obtained unlawfully. This research aims at assessing the role of the courts and legal systems in enforcing free consent in marriage whether there is a need for further extra protection or reformations.

Consent has to be free in marriage contracts as it is in any other contracts form all over the world. In Indian Contract Act, 1872<sup>2</sup>, section 13 defines the freedom in consent which implies absence of coercion(15), undue influence(16), fraud(17), misrepresentation(18) and mistake(20). This is a general principle which carries through to marriage contracts as it does with all other forms of contract. Free consent in marriage make both partners to go into that marriage willingly without any force or deception being put on them.

In the case of marriage the following are some of the circumstances that can negate consent: Force happens when one is compelled to go through the process of marriage under the influence of force or in threat of attack or threatened in any other way. Pride and prejudice is another form of mental pressure which leads to marriage pressure; it is where one party tends to overpower the other through his or her<sup>3</sup> authority. Misrepresentation and fraud have a close connection with a situation where one person/organization has been put in a wrong understanding about what the other is, where they are coming from or what they want. Lastly, mistake involve situations where either the man or the woman or both have some misunderstanding regarding the basic facts which have led to the marriage. Since the consent required to enter into a marriage is free consent, a marriage that has been entered into without such consent may be annulled where the partying has no consent to the marriage at the option of the party which has no consent to the marriage.

## **SOCIAL VIEWS ON FREE CONSENT IN MARRIAGE**

Free consent in marriage has in most Indian culture traditions, required couples to receive their consents before marriage, although with different amounts of requirements. While free

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<sup>2</sup> Wayne Courtney, 'Indemnities and the Indian Contract Act 1872' (2015) 27 National Law School of India Review 66.

<sup>3</sup> Orit Gan, 'Contractual Duress and Relations of Power' (2013) 36 Harvard Journal of Law & Gender 171.

consent would mean that the process was done without any compulsion and was rather voluntary, there is an exception in some marriages. Here, consent may be obtained while ignoring a degree of pressure originating from any family expectations and other forms of social pressure.<sup>4</sup> In general, India is a patriarchal society, so there is usually a family or community decisions rather than an individual choice regarding getting married. Nowadays, the women cannot express her choice or even dissent freely and this unfortunate bias is still very prevalent in both, rural and urban India. The caste has been a fundamental historical factor involved in the decision-making when it comes to the aspect of marriage; early marriages, especially, were not allowed to marry outside their caste. This may limit individuals' ability to exercise the free will to give their consent as they would be led to believe that they need to get married within the caste system or else their families or communities become offended. The idea of societal shame overpowered an individual's decision making with respect to their marriage and thus arises the question of true nature of free will.

Notions of family honour also feature very prominently in marital choices. Individuals may suppress personal desires and seem to accept marital choices that are under duress in an effort to protect their families' class status. This is why forced marriages are common in most cultures and remain a significant social problem. These forced marriages occur because of cultural, family, and economic factors. The strongest factor limiting free consent is gender inequality, especially for women. Women are married mostly due to the unavailability of an alternative source for their economic needs and because of a lack of educational and other relevant facilities. Sometimes they might not agree to marry because they were brought up within the limited walls of their houses, but the pressures from society, family push them towards marriage despite them having their own choices and opinions on the same.

Family expectations also define male consent, but men usually enjoy more autonomy in the exercise of the power of decision in marriage compared to women. Prohibited notions associated with marriages and family honour in rural communities prevent free consent in many aspects. Inter-caste marriages and inter-religious marriages are still faced with a taboo notion with considerable opposition from the people in many regions of India despite the fact that such marriages are provisionally protected by the laws. For instance, social pressure by family and the community to obey certain cultural or religious norms is at variance with

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<sup>4</sup> Siya Jangir, 'Promise to Marry: Curious Cases of Context, Consent and Intent' (2023) 4 *Jus Corpus Law Journal* 42.

free consent. The urge to seek obedience from others to these teachings and practices by extreme means, involving violence, explains "honour killings," where individuals marry someone considered undesirable according to religion or custom. Women suffer most from matters concerning free consent in the institution of marriage.

Many women in patriarchal societies have often been forced into marriages, often at an age when they were still children, or as a threat to family honour. Such lack of choice over their marital lives exposes them to several social and psychological problems, such as domestic violence, depressed mental health, and disconnection from the economy. In a few marriages, especially those which are contracted for the amalgamation of family fortunes or social positions, economics can be a means of force in and of itself. Economic security is often brought about by the pressure to marry, even though they are not willing participants.

Economic imbalance between the spouses could amplify the question of free consent once there is dependence between the two. Despite legal prohibition under the Dowry Prohibition Act of 1961, dowry still plays an important social role in many areas of India. The dowry burden on the bride's family could therefore, create pressure to marry quickly for a woman to accept, which leads often to a compromise over free consent in such marriages. In most societies, marriage is regarded not only as a personal union but also as an economic contract. This marriage contract includes property allocation, inheritance rights, dowry payments, and alimony payment. In this case, economic interest tends to deviate free will. People start to see marriage as a sheer economic contract to attain certain stability in monetary and social terms.

More than anything else, people enter into a marriage contract with serious considerations of the financial interest. Family sees marriage as a financial transaction for securing the future wealth and status or at least an economic alliance. This transactional approach sometimes thwarts the ideals of free consent as the marriage becomes a mere transaction for economic gain rather than choice. In general, marriages that are entered into without free consent often characterize long-term economic consequences for the spouses affected. For instance, women end up becoming financially dependent on the spouses and cannot leave abusive marriages as they lack resources; thus, in marriages in Indian settings, the formal prenuptials are often unprovided, leaving women at the mercy of their spouses concerning property rights. When consent is not free, women are sometimes deprived of their share of marital assets when divorce or separation takes place.

## LEGAL PROTECTIONS FOR LACK OF FREE CONSENT

In India the Hindu Marriage Act, 1955<sup>5</sup> and the Special Marriage Act, 1954 contain express provisions in favour of the parties to a marriage where the marriage has been contracted without the free consent of any party. It is important to state that Section 5 of the Hindu Marriage Act demands free consent to make a marriage valid<sup>6</sup>. Section 12 of the same Act goes further to say that a marriage can be annulled if it took place with forced consent. Likewise the provisions related with annulment can be found in section 25 of the Special Marriage Act where it talk of coerced or fraudulent marriage. These protections are of essence to any person who finds his or herself trapped in marriages that he or she never intended to enter into.

On the international level Article 16 of Universal declaration of human Rights affirms that marriage must only be contracted with the prior and mutual consent of the parties to the marriage. Also of importance is the fact that the CEDAW 1997 treats free consent in marriage as a principle that state parties must ensure the compliance with. The above-international laws validate with this view emphasizing that free consent in the formation of marriage contract is a principle that has to be protected by domestic laws.

In other systems of law for example the common law systems of the United Kingdom and the United States of America voluntariness and autonomy also define marriage law. Forced Marriage Protection Order system in the UK for example offers strong tools that help in eradicating the cases of forced marriage, assists those who can be compelled to marriage. This is a common practice in other legal systems of the west with an aim of ascertaining that any marriage that occurs was willingly entered into.

## LANDMARK JUDGMENTS ON FREE CONSENT IN MARRIAGE CONTRACTS

Some of the historical decisions that have influenced the aspect of the free consent in marriage contracts include the following. One such case is the Shafin Jahan v Asokan K M 2018<sup>7</sup> and this is the marriage case of Hadiya, a woman who converted to Islam and then married Shafin Jahan. The girl's father claimed that she was forced into both conversion and marriage. The Indian Supreme Court however, upheld Hadiya's right to choose her faith

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<sup>5</sup> Uthara A Nair, 'Essentials of Valid Hindu Marriage Under Hindu Marriage Act 1955' (13 April 2021) <<https://papers.ssrn.com/abstract=3825419>> accessed 15 September 2024.

<sup>6</sup> 'Essentials of Valid Hindu Marriage Under Hindu Marriage Act 1955 by Uthara A Nair :: SSRN' <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3825419](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825419)> accessed 16 September 2024.

<sup>7</sup> AIR 2018 SC 1933

and partner thereby emphasizing on the principle of liberty and free consent in the matter of marriage. Here the Court reiterated that the right to choose whom to marry is within the domain of personal liberty which is a very important aspect of the individuals' freedoms. Some or most of the critics have opined and claimed that the judgment is given more weightage to individual rights than other significant issues that are likely to be violated regarding coercion in matters of marriage and religious conversions.

Another important example can be referred to the decision of the Indian High Court in the case of *Gurdeep Kaur v State of Punjab* 1994 which was about a minor girl who was forced to marry without her consent. She sought an annulment of the marriage on the grounds of non-consensus especially owing to her age and the inability to appreciate the impact of this marriage decision. This judgment saved the victim but it has been highly condemning for not providing solutions to other aspects related with the forced marriage of minors especially in rural areas.

In the case of *Saroj Rani v. Sudarshan Kumar Chadha* (1984)<sup>8</sup> the wife filed petition for restitution of conjugal rights and the husband on the other hand stated that he was forced to marry the wife. This led the Supreme Court to point out that there must be free consent for the restoration of conjugal rights; this is an indication that consent is a continuous factor in the marriage relationship. Some scholars have observed that this case shows how difficult it is to sustain mutual consent in marriage especially when the two have been tied to each other by strings that force them to be in the relationship against their wish.

### **CONTRACTS ON RESTRAINT OF MARRIAGE ARE VOID**

**General Rule:** Any contract that restrained the party contracting thereto from intermarrying absolutely, marrying within a specified time, or marrying a person in the contract is declared null and void. The clause does not apply if the person's age or gender was at the pertinent time or thereafter affected by the contract.

**Void Nature:** These are not enforceable in court as they run counter to public policy, which respects the freedom to marry according to choice.

Exceptions are confined only to minors. Agreements that restrain minors from marriage may at times be strictly valid for their protection. But such agreements seldom appear and have to be strictly scrutinized.

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<sup>8</sup> (1984) 4 SCC 90 (SC)

A contract entered into by a person would be void if he/she agreed not to marry anybody else in the rest of his life. A condition in an employment contract requiring an employee not to marry during the term of the employment would be held as impliedly void, as this violates personal liberty. A contract whereby a person agrees not to marry a particular individual or a member of a particular caste, religion, or class will also be declared to be impliedly void, as this is a restriction on personal liberty.

**Shrawan Kumar v. Nirmala (Allahabad hc):** <sup>9</sup>In this case, the court dealt with a case where a contract that restricted the right to remarriage of a widow was held to be void as it contradicted public policy.

**Bai Vijli v. Nansa Nagar:** A contract whereby the woman was restrained from marriage after the death of her husband was declared to be void by the court.

In **Anurag Anand v. Sunita Anand** <sup>10</sup>, the Supreme court held that caste, income, age, nationality, religion, educational qualifications, marital status, family status, financial status, would be considered as material facts and circumstances.

Therefore, where the consent of one of the parties to the marriage is induced by fraud in respect of some material fact relating to the other party, it is voidable at the option of the said first party. With a decree of nullity, the marriage annulment can also be sought.

## LEGAL REMEDIES FOR LACK OF FREE CONSENT

Notably, where consent is lacking in a marriage contract, several legal remedies exist under the Indian law and others. The most typical and used solution is the annulment which is a legal pronouncement that a marriage was never valid because of the absence of the consent. For an annulment to be granted, the two acts say that one party had not agreed to the marriage willingly. On one hand, divorce ends the marriage, but on the other hand annulment nullifies the existing marriage, leaving no taint for the accounts of those involved.

In cases that coercion or fraud have been used, criminal provisions may also be used too. The India Penal Code, for example, outlines situations in which a party can be charged criminally – for example if kidnap, traffic or otherwise force a person into marriage (366 IPC). Also, under the Prohibition of Child Marriage Act, 2018<sup>11</sup> and the Protection of

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<sup>9</sup> ‘Search Result’ <<https://www.scconline.com/Members/SearchResult.aspx>> accessed 16 September 2024.

<sup>10</sup> ‘Search Result’ <<https://www.scconline.com/Members/SearchResult.aspx>> accessed 16 September 2024.

<sup>11</sup> Ankita Jain, ‘Prohibition of Child Marriage: A Myth’ (2018) 4 *Supremo Amicus* 46.



Women from Domestic Violence Act, 2005<sup>12</sup>, the victims of forced marriages can protect themselves and can go for legal proceedings. Protection orders and restraint orders might be issued in order to stop people to be forced into marriage, as the UK Forced Marriage Protection Order system.

Further, victims may institute a claim for compensation or restitution in cases where his/her rights have been infringed. In some occasions the courts have provided compensation in terms of financial reward for the punitive affects on individuals forced or coerced into marriage. These civil remedies also provide individuals an extra layer of protection of their interest in seeking compensations for the violation of their consent.

## CONCLUSION

It is a basic principle of the law, social, and economic well-being of the individual to enter into marriage with free consent. The concept of free consent is fundamental to the integrity of marriage as a legal and social institution. Ensuring that individuals can marry without coercion not only protects their rights but also inculcates a healthier society by promoting equality and reducing the prevalence of forced marriages. This calls for continued work towards legal protection, although the practice of marriages and the underlying cultural and economic elements would need to be corrected to avert the actual barrier that will be raised by consent in marriages. A combination of both efforts towards reaching this level of individual autonomy and dignity inside marriage relations will work to promote other expectations by the international community towards human rights and gender equality.

When marriages are contracted without actual consent, the autonomy and dignity of the parties concerned are consequently affected. In more significant ways, it has broader social and economic effects, which may increasingly lead to violation of human rights, embed the vicious cycle of gender inequalities, and breed economic dependency. Free consent marriage will require protection not only through legal enforcement but also through a larger social and cultural transformation. This construction of legal protection and consciousness to the role of autonomy in a marriage contract requires the participation of the government, international organizations, and civil society.

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<sup>12</sup> 'Domestic Violence In India: Cases Under The Protection Of Women From Domestic Violence Act, 2005 - Manjeet Bhatia, 2012' <<https://journals.sagepub.com/doi/abs/10.1177/0262728012453489>> accessed 16 September 2024.