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**THE KAMASUTRA, HINDU MARRIAGE AND  
RUKHMABAI'S CHALLENGE TO THE RULE OF LAW**

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**Introduction**

Rukhmabai was a Hindu woman born in 1862 and married by arrangement at age eleven. After reaching puberty, rather than move in with her husband, she continued to live with her mother and stepfather. By all accounts, Rukhmabai was bright, independent-minded and intellectually curious. Her husband, Dadaji, on the other-hand, embodied the opposite attributes and had no discernible redeeming qualities. A life with Dadaji would be one of misery.

In 1884, Dadaji decided to change the *status quo*. He sued then twenty-two year old Rukhmabai in the Bombay High Court, seeking an order compelling Rukhmabai to move in with him and to enforce his conjugal rights. A judge who found Dadaji and his request morally offensive, refused to issue the order, but the appellate court quickly reversed.

As more fully explained below, the litigation and arguments that ensued, offer a window into the problems occurring when a British court uses Western notions of what is right and wrong to decide a case involving Hindu religious practices. Any decision in favor of Rukhmabai, would invariably undermine the foundations of Hindu marriage. To show why the decision could not stand, this

paper discusses Hindu marriage in the Kamasutra and other sources, offers an historical perspective of Hindu women, reviews the facts, and then addresses the lack of legal support.

### **Hindu Marriage Rituals and Traditions**

One cannot understand a religion by defining it in terms of what it is not. For example, stating that Judaism is a religion that does not believe Jesus is the Messiah, is not too helpful. Knowledge and understanding should come from defining a religion in terms of its own principles.

The aims of a Hindu marriage are religious duty (*dharma*), progeny (*praja*) and conjugal love (*rati*). (*Basu at 24.*) Traditionally, the role of *rati* is regarded as very insignificant in Hindu tradition. (*Id. at 25.*) Personal pleasures like *rati* are not, however, to play a key role in life. (*Id. at 25.*) As it states in the Kamasutra, “*The man who is well-taught and expert in this text pays attention to religion and power; he does not indulge himself too much in passion . . .*” (*Kamasutra 7.2.59.*)

According to Hindu tradition, marriage is an instrument for the pursuance of higher goals of life. It is not a contract in the Western civil sense. A man has to perform various religious rites and ceremonies throughout his life, and these ceremonies would remain incomplete without the presence of a wife because they are to perform these religious obligations together. (*Basu at 24.*) In the Vedic period, marriage was regarded as a *sanskara*, which meant it was performed and undertaken with the aim of making the life and the personality of a person complete. (*Basu at 21 – 22.*) Marriage in the *shastras* was a sacrament. Also, critical to an understanding of the Rukhmabai case, is recognizing that the relationship of

husband and wife, once established through proper customs and rituals, is believed to be irrevocable. (*See id.*)

As stated in the Kamasutra and discussed at length in class, the three aims of human life, for both men and women, are religion (*dharma*), power (*artha*) and pleasure (*karma*). Fulfilling these aims, requires a man to find the proper wife. The Kamasutra states, *"In woman, who is of the same class, who has not been with another man before, and who has been taken in accordance with the texts, a man finds religion, power, sons [legitimate], connections, the growth of his fact, and straightforward sexual pleasures."* (*Kamasutra 3.1.1.*)

The Kamasutra makes it clear, then and in more modern times, a women's achievement of the aims of human life are dependent on a husband. Specifically, *"A woman's lack of freedom makes the pursuit of these goals dependent on men."* (*Kamasutra 1.2. Note 1.*) And, in the Kamasutra, the way a women achieves these aims - much to the consternation of my classmates - is to be fully attentive to her husband's needs and desires. *"An only wife who wishes for her man's welfare adapts herself to his behaviour, whether she is a woman of good family, a second-hand woman, or even a courtesan. Women of good behaviour achieve the goals of religions, power and pleasure, a firm position, and a husband without a co-wife."* (*Kamasutra 4.1.48.*)

The Kamasutra discusses several types of marriage with a Brahma wedding preferred. Specifically, *"According to the customs of the place and in keeping with the texts, a man should marry by a wedding in the manner of Brahma, of the Lord of Creatures, of the Sages, or the Gods. Those are the rules of courtship."* (*Kamasutra*

3.1.19.) *“The Brahma wedding is better than the love-match wedding, which is better than the wedding of the Demons, the Demons better than the Ghouls (taking a girl who is sleeping or drunk), and the Ghouls better than the Ogres (“forcible carrying off a girl out of her house screaming and weeping, after he has killed, wounded, and broken”).* (Kamasutra 3.5. Note 28.)

It is an oversimplification to suggest that the passages referenced herein mean simply that a man can always forcible takes a woman as his wife. It is not wrong, however, to state like in many religions, there is a male bias in enforcement of rights. And, men may use tactics to obtain a wife that we view as offensive and illegal, including forms of rape. For example, in Hindu tradition and in the Kamasutra, adultery was considered sexual relations with another man’s wife. It was not illegal or immoral for a male to have sexual relations with a woman outside of wedlock, unless the woman was married to someone else.

Vedic literature, however, generally endorsed monogamy and it was considered the “best practice of the highest virtue.” (*Basu at 28.*) Polygamy and suggestions for dealing with multiple wives are contained in the Kamasutra. (See Kamasutra 4.2.) It was also practiced especially among the nobles. Examples of when “a second wife” was appropriate, such as when the “first wife” was barren, failed to give birth to a son, or was unfit to participate with the husband in religious rites. (*Id. at 28; See also Kamasutra 4.2..*) Widow remarriage was permitted in certain circumstances and is discussed in numerous texts involving a wife taking on a new husband after the death of a first husband, when the marriage was not consummated, or when a wife leaves an “impotent, outcaste or lunatic husband.”

(*Id.* at 29.) In the Laws of Manu, however, widow marriage was strictly opposed.  
(*Id.*)<sup>1</sup>

It is also important to understand that a Hindu marriage is regarded as a critical means to establish relations between two families. In many important ways it has much more to do with social intercourse, than the availability of a partner for sexual intercourse. Accordingly, utmost care is to be taken to ensure “maximum cultural compatibility between the two.” (*Id.* at 25.) In choosing spouses, one must abide by a number of prohibitions and restrictions related to marriages within and outside of ones group and caste, which in the Kamasutra appear to us as absurdly complex, but did, and to some extent still do, serve important purposes of regulating proper relationships.

There are also numerous commentaries dealing with the degree of blood relationships to be avoided. (*Id.* at 26.)<sup>2</sup> The Kamasutra states, “*A man should engage in group games such as completing verses, and in marriages and alliances, only with his equals, not with people above or below him. When the man marries a girl and lives with her like a servant, they call this an ‘upward alliance’ and wise men avoid it.*” (*Kamasutra 3.1.20.*) “*Even when a man has made an ‘upward alliance’, he must later bow low among his in-laws; but he simply must not make a ‘downward alliance’, which*

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<sup>1</sup> The Laws of Manu are, “in sum, an encompassing representation of life in the world – how it is, and how it should be lived.” (*The Laws of Manu at xvii.*)

<sup>2</sup> See, “*In the South one can marry the daughter of one’s maternal uncle.*” See also, “*A girl outside the family would be someone other than the daughter of the mothers’ brother, and not related to the man’s parents at all.*” (See *Kamasutra 3.3. Notes 3 & 4.*)

*good people despise.” (Kamasutra 3.1.24.)<sup>3</sup> The wife was also expected to care for all members of the family. The common practice in a typical Hindu family was that as soon as the daughter-in-law stepped into the house, the mother-in-law and sister-in-law “retired.” (Basu at 3.)*

Even though there were arranged marriages, it is not correct to state that women never had choices or that love is not a consideration. The Kamasutra states, *“But a virgin who is pursued chooses to marry the man who, she thinks, will support her and give her pleasure, who will do what she likes and is in her power. . . . One wooer should be wooed among suitors who have the same good qualities: this suitor is the best because his very nature is love.” (Kamasutra 3.4.48.)* Also, *“If she has fallen in love with him, she will marry him by herself in the love-match wedding that consists of nothing but desire.”<sup>4</sup>*

Historically, it was a common and acceptable practice for young women to be

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<sup>3</sup> See also, *“Pleasure enjoyed according to the texts, with a woman who is of the man’s own class and who has not been with another man before, is a means of getting sons, a good reputation, and social acceptance.” “These are legitimate sons.” (Kamasutra 1.5.1 and Note 1.)* In the chapter on Courting the Girl, Vatsyayana, states the man about town *“should cultivate a virgin of noble stock whose mother and father are living and who is at least three years younger than he. She should come of a family that is respectable, wealthy, well connected and rich in relatives who get along well with one another. Her mother and father should come from powerful factions.” (Kamasutra 3.1.1.)*

<sup>4</sup> Vatsyayana says that it is the opinion of some teachers that one should marry a girl with whom one falls in love. The *Apastambra dharmasutra* is of the same opinion. But before translating this scriptural injunction into practice, it is necessary to use one’s own judgment. If a girl is physically handicapped or does not belong to an equal cast-group, then one should not marry her even if one is in love.” (Kamasutra Appendix 3.1.)

married before puberty and to consummate the marriage after puberty. It should be noted, however, that under the Laws of Manu, it was desirable to give a girl in marriage after she reaches the age of puberty. (*Basu at 30.*) Under the Laws of Manu, a girl could be given in marriage before puberty “only if an exceptional suitor was available.” Yajnavalkya, Yama, Marichi and Parsara, however, viewed the marriage of a girl after puberty as sinful. (*Id.*) We also discussed in class, that marriage after puberty is often considered simply “too late” and it was a tragedy with consequences for a woman to die without every being married.

### **The Status of Women in a Historical Perspective**

To properly understand Rukhmabai and its relationship to the Kamasutra, in addition to viewing the Hindu religion from its own defining elements, one should attempt to view the facts within their historical context. Today, for example, it is almost unfathomable to think that seven justices of the United States Supreme Court in *Dred Scott v. Sanford*, 60 U.S. 393 (1856) - just a few years before Rukhmabai was born - held that slaves cannot be citizens of the United States and that it was unconstitutional to ban slavery in the Southern States.<sup>5</sup> To understand why they ruled as they did, however, one needs to delve into the political and economic conditions then existing in the North and South.

In the early periods of Indian History, some Hindu women were highly educated and played important parts in society. (*Basu at 1.*) In the pursuit of

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<sup>5</sup> Today, there are probably many who believe that the United States Supreme Court was wrong in ruling in 1967 that it was unconstitutional to ban marriages between persons of different races in *Loving v. Virginia*. Echoes of that debate are being heard today in the discourse involving gay and lesbian marriage.

knowledge and virtue, performance of rituals, composition of hymns and other activities, spiritual or temporal, women were considered the equals of men. (*Id.*) The condition of Indian women in general, and Hindu women in particular, began to deteriorate after the Muslim conquerors settled in India. (*Id. at 2.*) By and large, women lost opportunities and freedom, and became increasingly dependent on men. (*Id.*) Scholars believe this was largely due to a natural social response to the challenge posed by the disturbed conditions following foreign invasions, as well as internecine conflicts. (*Id.*) Stated differently, in many respects, women lost some freedoms because men thought it was necessary for “their own protection.”

Indian woman, by and large, gradually were reduced to a state of perpetual bondage. (*Id.*) Gender separation and seclusion were pervasive. There was no organized system of education for girls who were often married without learning the alphabet and a cruel system of dowry developed. (*Id. at 3, 90.*)

### **The Rukhmabai Facts**

Rukhmabai was born in 1862 and was the daughter of Jayantibai from her first husband. (*Chadra at 15.*) Jayantibai remarried Sakharam Arjun, but before doing so, transferred her property to Rukhmabai, then a minor of eight and a half.<sup>6</sup> (*Id.*) Two and half years later, when Rukhmabai was eleven, she was married to Dadaji, a poor cousin of Sakharam. (*Id.*) It was agreed that Dadaji would stay as a *gharjawai* with Rukhmabai’s family and be fully provided for by them. (*Id.*) It was

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<sup>6</sup> Remarriage was permitted among the caste she belonged. (*Id.*) I also recognize that it was unusual and perhaps not legal for Rukhmabai to have received the money. The motive for doing this and whether Dadaji wanted Rukhmabai or her money created an interesting side issue in the case.



hoped that this arrangement would provide Dadaji “a decent life” and would result in Dadaji acquiring education and becoming “a good man.” (*Id. at 16 – 17.*)

Within seven months of marriage, Rukhmabai reached puberty. Customarily, this would herald *garbahdhan*, the ritual consummation of marriage.<sup>7</sup> Sakharam, a medical man known for reformist predisposition, would not permit early consummation. Dadaji, at twenty wanted to “partake of the pleasures of marriage” as are found in the Kamasutra and by all accounts he resented the regimen prescribed by the family to make him a “good man.” (*Chadra at 15.*)

After Dadaji’s mother died, Dadaji went “off the deep end.” He dropped out of school, defied Sakharam and began living with his uncle who reinforced in Dadaji “the ethos which permitted men to treat women, especially their wives, as simply means of domestic labour and carnal pleasure.” (*Id. at 16.*) Stated in terms of the Kamasutra, the uncle gave priority to his thirst for *pleasure* in disregard for the priorities of *religion* and *power*.<sup>8</sup>

Over the ensuing years, the lives of Dadaji and Rukhmabai could not have been more different. Dadaji’s life according to Rukhmabai went “through every course of dissipation into ways which a woman’s lips cannot utter.” (*Id.*) He was

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<sup>7</sup> The Kamasutra discusses in Book 3, Chapter 2 the elaborate ritual that should be followed before consummating the marriage. For example, the first three nights they remain “*sexually continent.*” And, then there is a seven day, they “*bathe ceremonially to the sound of musical instruments, dress well, dine together, attend performances and pay their respects to their relatives.*” (*Kamasutra at 3.2.25.*)

<sup>8</sup> The uncle also violated the social taboo of having his mistress live with the “first wife.” (*Id. at 16.*)

“attacked with consumption, confined to his bed for three years, in such a state that he was not expected to live another season.” (*Id.*) Dadaji also accumulated debts and received loans from his uncle. <sup>9</sup> (*Id.*)

Rukhmabai, on the other hand, became an intelligent and cultured woman who was exposed to Indian social and religious reformers and to European liberal reformists. She was also known for a “great liking of study.” Unfortunately, in her day, a girl’s marriage almost always resulted in the termination of a right to education. This occurred because the right to continue with an education required the permission of the in-laws, or when she was mature and independent of her husband. A decision was made not to seek permission for Rukhmabai as it was thought this might bring to the forefront the issue of early consummation of Rukhmabai’s marriage. (*Id. at 17.*) <sup>10</sup>

Eventually, however, at age 30 and knowing that Rukhmabai owned property worth twenty-five thousand rupees (substantial for those times), Dadaji sent a letter to Sakharam through his solicitors, asking that “my wife might be allowed to come and live with me, as I thought the probation period has lasted long enough.” (*Id.*) When Rukhmabai and Sakharam did not agree, the litigation ensued.

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<sup>9</sup> Dadaji comes closest to what Vatsyayana calls a libertine. “*But the man called a libertine has no wealth, indeed has nothing but his body; his only possessions are his collapsible chair, his soap and his astringent. (Kamasutra, 1.4.31.) – “[H]e is said to have nothing but his body because he has no son or wife.” (Kamasutra 1.4.31. Note 31.)*

<sup>10</sup> The Kamasutra states, “*Scholars say: ‘Since females cannot grasp texts, it is useless to teach women this text.’*” [Book 1, Ch, 3, p.13.] As we discussed, when a sentence is preceded with “scholars say” we generally know that Vatsyayana disagrees. Then and in Rukhmabai’s day, women were not literate in a western sense but could and were taught without actually reading from texts.

### *The Legal Debate*

Under the existing rule of law, the British Court had to decide the case under Hindu law because that was the religion of the parties. In theory this approach was essential to the rule of law necessary to govern a colonized population. In practice, however, this was often very difficult.

The case in chief of Dadaji was straightforward. Rukhmabai is his wife and he has the right to an order “restoring” his conjugal rights. Rukhmabai, on the other hand, had to decide which defenses to offer, several of which put at issue the larger question of the right of a Hindu woman to choose not to live in a joint family of which, the wife becomes an inseparable part. (*Id. at 23 – 24.*) Some arguments challenged the “sanctity and integrity of the joint family as an essential unit of Hindu social organization.” (*Id. at 24.*)

First, she could without challenging Hindu law, refuse to live with her husband because a wife is permitted to do so if she can establish that her husband was incapable of providing for her lodging and maintenance. If this were the only issue, however, the case would be of little interest and of short-lived success for Rukhmabai. The reason is simply that due to practical life realities, the minimum standard of required lodging and maintenance in Hindu society was very low. As Dadaji’s counsel properly argued, “The poverty of the husband does not constitute a matrimonial offence so as to operate as a legal bar to the husband’s right to seek his wife’s society and assistance.” (*Chadra at 36 – 37.*) And, the ruling even if favorable would not be permanent. Rukhmabai and Dadaji would still be married and she would be obligated to move in with this family once she was unable to show he

could not provide the most minimal of “the basics.” (*Id.*) It did not matter legally or morally, as discussed in class and in the Kamasutra, that once she moved in with his family, she could become a virtual slave to his extended family.

Second, Rukhmabai made the unusual argument that Dadaji did not have “standing” to bring the suit because she had not “arrived at years of discretion” at the time of her marriage. In other words, she argued in a fundamental challenge to Hindu culture, that a marriage should not be binding on a spouse who had not consented to it. (*Id. at 23.*) If her consent was required and she was incapable of giving consent (when she was married at the age of 11), then Dadaji was not really her husband and therefore he could not bring the lawsuit.

This age of consent argument is one deeply steeped in our Western tradition. For example, if the age of consent for sexual intercourse is 18, a girl of 17 is what is often derogatorily referred to as “jail bait” because she is legally incapable of legally giving consent. Sexual intercourse with an underage girl is rape under the law and will result in jail for the male. As discussed previously, however, age of consent in a Hindu marriage does not exist. Under Hindu law, a marriage should (and arguably must) occur before “years of discretion.”

Accordingly, ruling in favor of Rukhmabai on this issue, would invalidate a multitude of marriages and make illegal this Hindu practice, which has existed for centuries. Such a ruling would be abhorrent to Hindus and unsustainable in that society. No judge, no matter how sympathetic to the plight of Rukhmabai, could issue such an expansive ruling.

Third, and the issue that became the real focus of the judge's decision was an attempt to craft a legal argument that denied Dadaji's request while also recognizing and respecting the traditions, rules and sanctity of Hindu marriages. The attempt here was to argue that Dadaji was not really attempting to "restore" his conjugal rights, which the court had the power and obligation to do, but rather to "create" them, which a court has never done and should not do.

Understanding this argument requires a basic knowledge of the role of precedent in English jurisprudence. A lower court judge is required to follow precedent. In England, there was precedent for suits for restitution in cases in which spouses left their husband for various reasons. And, in those cases the courts ruled that the husband has the right to compel them to return. Over the years, British society recognized the problems and consequences of such rulings. As such, a statute was passed removing the penalty for non-compliance, so that a wife could not lose her property or be incarcerated for refusing conjugal rights with her husband. In other words, a husband could go to court and get an order, but likely would not do so, because there would be no remedy for a breach.

The problem in this case, is that British precedent for restitution cases was to be applied by the Bombay High Court, meaning that under the law (applicable to Hindus and non-Hindus) claims for restitution of marital obligations could be brought in the Bombay court. However, there was no statute limiting the remedy (or perceived need for such statute) because no court in India had ever dealt with this type of case before. Accordingly, if the conjugal order was entered and Rukhmabai did not comply, the remedy could be incarceration for "contempt of

court” or a monetary penalty.

In an attempt to avoid this binding precedent, the judge accepted the creative argument that a marriage (even a Hindu marriage) is not complete until it is consummated. He then reasoned that since Rukhmabai and Dadaji had not consummated their marriage, the action could not be for “restitution” of marital rights and therefore the precedent was not binding. The judge could properly refuse to issue the order, or so he thought, because it was really a case seeking “institution” of conjugal rights. In the judge’s words, an order requiring “institution” of conjugal rights would be “*morally outrageous*” because “*the relief prayed would produce consequences revolting not only to civilized persons, but even to untutored human being possessed of ordinary delicacy of feeling.*” (*Id. at 39.*)

Besides giving the impression to Hindus that the judge believes their religious practices are barbaric and the obvious problems this creates in a colonial society, a fundamental problem with this decision is that under Hindu traditions, consummation has nothing to do with marriage formation. As mentioned, the marriage was complete from the very moment the ceremony was performed and was irrevocable. (*See id. at 31, 75.*) In other words, consummation might be relevant if the litigants were of a faith where the marriage is complete upon consummation, but is irrelevant to the formation of a Hindu marriage.

Finally and most interesting to me as a lawyer, is that the implementation of a British court system in colonial India, actually gave Dadaji a forum to obtain an order compelling the relief requested, which would not have been entered without access to the British legal system. The reason is simply that Hindu law, as opposed

to British law, did not admit a suit for the restitution of conjugal rights. Rather the decision to act upon a refusal of conjugal rights was left to the caste. The remedy appropriate following religious, historical and cultural issues discussed herein, was excommunication – not compelling conjugal rights. (*Id. at 93.*)

### **The Resolution**

It is worth noting for the curious that the case was then sent back to the lower court where Rukhmabai was ordered to “go to return” to Dadaji’s house within one month and inform the court accordingly.” (*Id. at 104.*) There was a flurry of efforts to pass a law, similar to the one that already existed in England, to prevent her incarceration. Few know of this case, however, because it came to an un-climatic end when Dadaji accepted money for agreeing not to execute the decree against her. (*Id. at 162.*)

### **Epilogue**

In many respects, the judge in the Rukhmabai case was viewing her plight in a similar manner as my classmates view the sexist and demeaning treatment of women in the Kamasutra. We know much of it is wrong and we wish we could make it right.

One must recognize, however, that whenever positive changes were made in the advancement of women and their rights, it occurred in stages. As frustrating as it may be, significant changes in the common law cannot occur without the development of a body of precedent supporting it. Otherwise the decision will be reversed. Similarly, changes in statutory law, such as protections against sexual harassment in the workplace and marital rape laws, did not occur without a

corresponding change in attitudes among the population. Although it might not have helped Rukhmabai, a decision based on Hindu law compelling the order, might have helped other women by at least creating the debate for enactment of a law limiting the remedy for enforcement.

Finally, we should always keep in mind that the Kamasutra reflects, to the best of our knowledge, the role of women in society at the time it was written. Indian women, like people elsewhere, are the product of their culture and religious upbringings. No better evidence of this is found in the fact that when Dadaji died, Rukhmabai donned the traditional Hindu widow's garb. (*See Chadra at P. 202.*) She was a Hindu woman married at eleven despite being exposed to more progressive ideologies and a harsh life, but remained a Hindu woman throughout her life.



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