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BEYOND CONSENT: RETHINKING DECEPTION AND SEXUAL AUTONOMY IN INDIAN MARRIAGE PROMISES

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Abstract

This paper critically examines the legal and jurisprudential complexities surrounding sexual intercourse obtained through deceitful means, particularly under false promises of marriage, within the Indian legal framework. It explores the evolution of this issue from its treatment under Sections 375 and 90 of the Indian Penal Code to its reclassification as a distinct offence under Section 69 of the Bharatiya Nyaya Sanhita (BNS), 2023. The analysis highlights the theoretical challenges in treating such cases as consent-vitiating, including the conflation of sexual consent with contractual obligations, the diminishing of female agency, and the risks of reinforcing regressive societal norms. Drawing on international perspectives, the paper critiques existing frameworks and advocates for selective criminalization based on objective dealbreakers to balance justice for victims with respect for individual autonomy. By addressing the shortcomings of Section 69 of BNS, 2023, it underscores the need for legislative refinement to ensure an equitable legal response that aligns with evolving societal values and preserves sexual autonomy.

Introduction

The term “rape” originates from the Latin word “rapere,” meaning “to seize”¹. Sexual intercourse conducted without consent constitutes rape, but consent obtained through fraud or deception is deemed invalid. Consequently, sexual intercourse obtained through deception regarding a woman’s consent should be classified as rape². In India, the emphasis is on sexual intercourse under the pretence of marriage, a specific form of sex by deception. The distinctive status of marriage in India, coupled with the societal discomfort over pre-marital sex, complicates judicial proceedings.

¹ rape, n.³ meanings, etymology and more | Oxford English Dictionary, https://www.oed.com/dictionary/rape_n3 (last visited Mar 18, 2025).

² Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 THE YALE LAW JOURNAL 1372, 1376 (2013).

Cases classified as “breach of promise to marry” or “promise to marry cases”³ involve scenarios where the plaintiff claims that the defendant misrepresented his intentions and assured her of marriage, despite lacking any genuine intention to fulfil such a promise, thereby invalidating her consent to engage in sexual relations with him. The debate that originates from the status quo is whether sexual intercourse predicated on a fraudulent promise of marriage is an offence warranting State involvement, or if such actions require a lesser sexual offence or a non-sexual civil remedy. This is particularly relevant in the current context, as Section 69 of Bharatiya Nyaya Sanhita, 2023, establishes a new class of offences that penalises “sexual intercourse by employing deceitful means.”

This genus of cases is not foreign to the Indian judiciary as they have encountered cases of rape by fraud of marriage for a considerable number of years. The contemporary judgement of *Anurag Soni v. State of Chhattisgarh*⁴, followed by the enactment of Bharatiya Nyaya Sanhita, 2023⁵, exhibited the need for research and analysis on the issue. The paradigm shifts in interpreting such an offence further elucidates that the issue at hand is much more complex.

This article attempts to do the same by providing the jurisprudential understanding of the offence and moves forward by addressing the paradigm shift in the legal position by contrasting the position ‘pre’ and ‘post’ with the enactment of BNS, 2023. The article also explores the position of the offence in consideration in foreign jurisdictions with the object of exploring an adequate remedy for the offence, the article also critically analyses Section 69 of BNS, 2023⁶ by highlighting the shortcomings of the provision coupled with the consideration of risk of potential misuse

Sexual Intercourse through Deceitful Means

The jurisprudential conceptualization of “sexual intercourse by deceitful means” refers to sexual encounters where consent is obtained through deliberate misrepresentation⁷. This deceptive conduct spans a diverse spectrum of misrepresentations employed to obtain sexual consent—including falsifications regarding gender, contraceptive usage, sexually transmitted

³ *Uday v. State of Karnataka*, (2003) 4 SCC 46; *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675.

⁴ 2019 SCC OnLine SC 509.

⁵ Bharatiya Nyaya Sanhita, No. 45 of 2023.

⁶ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 69.

⁷ Amisha Sharma, “*CONSENT*” IN FALSE PROMISE TO MARRY: DECEPTIVE SEX AND THE LEGAL KNOT (2023).

infection status, disingenuous romantic declarations, or fraudulent matrimonial commitments⁸. These circumstances generate significant jurisprudential inquiry regarding the appropriateness and theoretical justification for criminal sanctions⁹.

Jurisdictional responses to such conduct demonstrate considerable variation, with common law systems generally exhibiting a greater propensity toward criminalization, while certain European legal frameworks systematically avoid penalization¹⁰. This disparity reflects fundamental theoretical disagreements regarding the relationship between deception and sexual autonomy¹¹.

The academic discourse surrounding sexual deception extends beyond simple questions of wrongfulness to address qualitative distinctions between various forms of deceit and their legal implications. The traditional analytical framework identifies two distinct types of fraud. Fraud in factum encompasses scenarios in which victims do not recognize that the act they are participating in is sexual. Illustrative examples of this include situations where medical practitioners falsely present penetrative acts as legitimate medical interventions¹² or cases involving the impersonation of a spouse¹³. Fraud in inducement encompasses situations where individuals comprehend the sexual nature of the interaction but consent based on fraudulent representations¹⁴. False promises of marriage typically fall within this latter category.

Common law jurisdictions including Canada, England, and the United States generally limit criminalization to fraud in factum scenarios¹⁴. Within the broader fraud-in inducement classification, scholarly perspectives diverge regarding which misrepresentations sufficiently vitiate consent. Proponents of comprehensive criminalization maintain that any deceptive act fundamentally undermines individual sexual autonomy¹⁵. However, the proposition that all instances of deception or information withholding that might influence sexual decision-making

⁸ State of Colorado v. Clark (Sean O'Neill), No. 1994 CR003290 (Colo Dist Ct, February 16, 1996); State of Washington v. Wheatley, No. 97-1-50056-6 (Wash Superior Ct, May 13, 1997); State of Israel v. Alkobi, (2003) ISR DC 3341(3); Gross v. State of Israel (2012), CrimC 2372/07; Julian Assange v. Swedish Prosecution Authority, 2011 EWHC 2849 (Admin); R. v. Cuerrier, (1998) 2 SCR 371: 162 DLR 4th 513 (1998).

⁹ Amit Pundik, Coercion and Deception in Sexual Relations, Vol. 28(1), CANADIAN JOURNAL OF LAW & JURISPRUDENCE, 98 (2015).

¹⁰ *Id.*

¹¹ Jonathan Herring, Mistaken Sex, CRIMINAL LAW REVIEW, 8 (2005); Matthew Gibson, Deceptive Sexual Relations: A Theory of Criminal Liability, Vol. 40(1), OXFORD JOURNAL OF LEGAL STUDIES, 94 (2020).

¹² Supra note 7.

¹³ Supra note 7, Boro v. Superior Court, 210 Cal Rptr 122 (Cal Ct App 1985) 125

¹⁴ Supra note 2.

¹⁵ Susan Estrich, REAL RAPE, 103 (Harvard University Press, 1987).

warrant legal sanction represents a problematic stance.

With the exception of a minority scholarly position, the predominant academic consensus advocates for selective criminalization of specific categories of deception¹⁶. These positions can be categorized as either advocating for objective dealbreakers¹⁷, which are enumerated false beliefs that categorically vitiate consent, or subjective dealbreakers¹⁸, which involve deception concerning any information material to the individual's sexual decision-making process. Utilizing this analytical framework, the authors proceed to contend that characterizing consent as vitiated in promise-to-marry cases represents a theoretical misconception.

In promise to marry cases, critical examination reveals several theoretical flaws in classifying such deception as consent-vitiating. Within objective dealbreaker frameworks, scholars generally reject characterizing false marriage promises as consent-nullifying due to perceived minimal harm, evidentiary challenges, and concerns about reinforcing regressive sexual norms¹⁹. The application of subjective dealbreaker theories to these cases manifests three significant deficiencies.

First, this approach employs a reductive understanding of consent. Voluntary informed consent requires freedom from coercion and awareness of the act's nature and the requestor's identity²⁰, but does not necessitate comprehensive knowledge of all circumstances²¹. Similar to surgical consent, where patients cannot comprehend all technical aspects but still provide valid consent, an individual cannot reasonably ascertain another's genuine intentions regarding future marriage. Furthermore, extending consent parameters to "future-facing" conditions contradicts foundational consent principles²². Retroactive consent invalidation based on unfulfilled promises creates logical inconsistencies²³, suggesting what is truly being punished is not deception but non-fulfilment of conditional agreements²⁴.

¹⁶ Stuart P. Green, CRIMINALIZING SEX: A UNIFIED LIBERAL THEORY, 110-115 (Oxford University Press, 2020)

¹⁷ R.A. Williams, Deception, Mistake and Vitiating of the Victim's Consent, Vol. 124, L. Q. REV., 158 (2008)

¹⁸ Tom Dougherty, Sex, Lies, and Consent, Vol. 123(4), ETHICS, 719 (2013).

¹⁹ Supra note 15.

²⁰ Berit Brogaard, Sex by Deception in THE OXFORD HANDBOOK OF MORAL PSYCHOLOGY, 694 (Manuel Vargas & John M. Doris, 2022).

²¹ *Id.*

²² MarkDsouza, FalseBeliefs and Consentto Sex, Vol. 85(5), THE MODERN LAW REVIEW, 1191 (2022).

²³ *Id.*

²⁴ *Id.*

Second, conflating sexual consent with property transaction consent represents a fundamental category error. While India's Supreme Court defines consent under §375 of India Penal Code, 1860, as "an act of reason, reached after deliberation"²⁵, subjective dealbreaker theorists inappropriately borrow property offense frameworks. This transposition fails to accommodate the complex motivational landscape of sexual relationships that transcends juridical models, as Butler notes²⁶. Unlike property transactions where fraud can be isolated as the sole inducement, sexual consent often involves multiple factors including attraction, curiosity, and romantic feelings, making deception's causal primacy difficult to establish conclusively.

Third, this conceptualization diminishes female agency. The statutory definition in §90 IPC acknowledges relational and mutual aspects of sexual interactions²⁷. Characterizing women as passive victims who engage in sexual activities solely to secure marriage reinforces problematic asexual stereotypes and neglects their autonomous desire and participation. This recognition of consent does not morally validate deception but preserves acknowledgment of female sexual subjectivity²⁸.

The authors acknowledge implementation complexities in environments where cultural norms restrict sexual autonomy discussions, particularly in conservative or rural settings. The absence of empirical data regarding women's preferred remedies³⁵ necessitates theoretical analysis to identify the specific harm resulting from such deception without presuming to speak for diverse female experiences.

Pre-BNS Position

Prior to the enactment of BNS, 2023, the offence of "Sexual intercourse by Deceitful means" was treated as "Rape" under IPC. The judiciary relied on the joint reading of Section 90 and Section 375 of IPC.

Section 375 reads –

Rape.—

A man is said to commit "rape" if he—

²⁵ State of U.P. v. Chhotey Lal, (2011) 2 SCC 550.

²⁶ Judith Butler, Sexual Consent: Some Thoughts on Psychoanalysis and Law, Vol. 21(2), COLUMBIA JOURNAL OF GENDER AND LAW, 19 (2011).

²⁷ Latika Vashist, Law, Violence, and Sexual Consent in RETHINKING LAW AND VIOLENCE, 283 (Latika Vashist & Jyoti Dogra Sood, 2020).

²⁸ Emily C.R. Tilton & Jonathan Jenkins Ichikawa, Not What I Agreed to: Content and Consent, Vol. 132(1), ETHICS, 127 (2021).

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

(First.)— Against her will.

(Secondly.) — Without her consent.

(Thirdly.) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt,

(Fourthly.) — With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly.) — With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly.) — With or without her consent, when she is under eighteen years of age.

(Seventhly.) — When she is unable to communicate consent.

Explanation 1.— For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.— A medical procedure or intervention shall not constitute rape.

Exception 2.— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Section 90 Reads –

Consent known to be given under fear or misconception.—

A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.— if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.— unless the contrary appears from the context if the consent is given by a person who is under twelve years of age.

According to Section 90, consent obtained out of “fear of injury” or “misconception of facts” is not valid, while Section 375 defines consent as an “unequivocal voluntary agreement when the women, by words, gestures, or any form of verbal or non-verbal communication, communicate a willingness to participate in the specific sexual act”²⁹. The Supreme Court, in 2003, pronounced the landmark judgement of *Uday v State of Karnataka*, that the culpability for rape in “false promise to marry cases” is to be decided on a case-to-case basis³⁰. The case of *Anurag Soni* revolves around the accused engaging in sexual activity with the prosecutrix under the false promise of marriage. Initially hesitant, she consented only because of this promise. However, it was later revealed that the accused had no intention of marrying her and was planning to wed someone else. The Supreme Court ruled that consent obtained through deception does not qualify as valid under Section 90 of the Indian Penal Code. Consequently, the accused was found guilty of rape under clause (2) of Section 375, as the prosecutrix’s consent was deemed invalid³¹.

Legal jurisprudence establishes that culpability cannot be established when an accused genuinely intended to marry but was prevented by factors beyond their control³², including family opposition³³ or financial constraints³⁴. The deceptive nature of the promise requires

²⁹ Saumya Kalia, *How Are ‘False Promise to Marry’ Cases Treated in the New Criminal Law Bill? | Explained*, THE HINDU, Sep. 7, 2023, <https://www.thehindu.com/news/national/how-are-false-promise-to-marry-cases-treated-in-the-new-criminal-law-bill-explained/article67213081.ece> (last visited Mar 19, 2025).

³⁰ *Uday v. State of Karnataka*, (2003) 4 SCC 46.

³¹ *Supra* note 4.

³² *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675, 121.

³³ *Abhoy Pradhan v. State of West Bengal*, 1999 SCC OnLine Cal 99, 116.

³⁴ *Titun Kumar Banik v. State of Tripura*, 2014 SCC OnLine Tri 647, 17.

evidence that non-fulfilment was the accused's original intention, as subsequent failure to marry does not automatically indicate initial deceptive intent³⁵.

The landmark Safdar Abbas Zaidi decision³⁶ recognized that relationship withdrawal due to incompatibility cannot compel marriage despite previous sexual relations³⁷, affirming marriage as a matter of individual choice based on personal suitability assessments. This principle acknowledges that sexual relationships may naturally deteriorate due to psychological or physical incompatibility, requiring judicial caution against mischaracterizing relationship dissolution as deceptive promise³⁸. This consideration gains additional significance with legal recognition of non-marital cohabitation³⁹.

Courts have consistently held that post-breakup marriage refusal cannot transform previously consensual relations into criminal offences⁴⁰. Cases may also originate from frustrated mutual marriage plans¹⁸, further complicating culpability determinations.

Judicial reasoning frequently considers the prosecutrix's age and education as relevant factors for assessing both accused culpability and victim voluntariness⁴¹. Adult-educated women are presumed to understand sexual activity implications⁴² and pre-marital sex consequences⁴³. Similarly, socio-cultural considerations, including religious or caste differences⁴⁴, create presumptions regarding marriage probability awareness⁴⁵. Regular consensual sexual participation has been interpreted as indicating independent consent separate from marriage promises⁴⁶.

The prosecution must establish that consent was explicitly predicated on marriage assurances⁴⁷, requiring evidence that consent would have been withheld absent such promises⁴⁸. In Jayanti

³⁵ Dhruvaram Murlidhar Sonar v. State of Maharashtra, 2018 SCC OnLine SC 3100.

³⁶ Safdar Abbas Zaidi v. State of Telangana 2018 SCC OnLine Hid 179,

³⁷ *Id.*

³⁸ Mahesh Balkrishna Dandane v. State of Maharashtra, 2014 SCC OnLineBom 348.

³⁹ *Id.*

⁴⁰ Tejas Udaykumar Sarvaiya v. State of Maharashtra, 2016 SCC OnLineBom 6347.

⁴¹ Tilak Raj v. State of Himachal Pradesh, (2016) 4 SCC 140.

⁴² *Supra* note 31.

⁴³ Kunal Mandaliya v. State of Maharashtra, 2016 SCC OnLineBom 10600.

⁴⁴ Yedla Srinivasa Rao v. State of Andhra Pradesh, (2006) 11 SCC 61.

⁴⁵ P. Govindan v. State, 2008 SCC OnLine Mad 470.

⁴⁶ Shyamapada Tewari v. State of West Bengal, 2009 (1) CCLR (Cal) 266,

⁴⁷ S. Albert v. State, 2009 SCC OnLine Mad 382.

⁴⁸ *Id.*

Rani Panda, Section 90's application was limited to cases involving initial deceptive intent⁴⁹. Deceptive sexual encounters cause significant psychological trauma⁵⁰, potentially creating long-term intimacy difficulties, depression, panic attacks⁵¹, and persistent mental health impacts⁵². Marriage remains central to rape-by-deception frameworks in India, presuming women who consent based on marriage promises value their sexuality differently than those consenting on other grounds.

Critical analysis reveals several problematic aspects of current jurisprudential approaches. The focus on the prosecutrix's education and age⁵³ creates an illogical presumption that educated adult women are less susceptible to deceptive marriage promises. This presumption disregards the reality that marriage represents a legitimizing framework for sexual relationships across demographic categories regardless of educational attainment⁵⁴.

Comparisons between property offenses and bodily violations create inappropriate analogies⁵⁵, prioritizing action characteristics over victim impact. The presumption that educated women understand pre-marital sex implications does not logically negate the potential for consent vitiation through marriage deception⁵⁶. The presumption that intercultural relationships create inherent marriage improbability contradicts jurisprudence affirming individual autonomy in partner selection⁵⁷, constituting an inappropriate limitation on women's decision-making freedom.

The judicial characterization of deceptive sex as "wanted sex" inappropriately equates desire with consent. While acknowledging violent rape's distinct severity, both violence and deception violate sexual voluntariness⁵⁸. This reasoning erroneously conflates physical desire with comprehensive consent⁶⁵, disregarding that consent may be specifically conditioned on marriage expectations rather than sexual opportunity. Categorizing such violations merely as

⁴⁹ Jayanti Rani Panda v. State of West Bengal, 1984 Cri LJ 1535.

⁵⁰ Jennifer Temkin, Towards a Modern Law of Rape, 45 THE MODERN LAW REVIEW 399, 403 (1982).

⁵¹ Patricia J. Falk, Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking about the Riddle of Rape-by-Fraud, 123 THE YALE LAW JOURNAL 353, 361 (2013).

⁵² Deelip Singh v. State of Bihar, (2005) 1 SCC 88; Joel Feinberg, Victims' Excuses: The Case of Fraudulently Procured Consent, 96(2) ETHICS 330, 337 (1986).

⁵³ Karthi v. State, (2013) 12 SCC 710.

⁵⁴ Supra note 30, 32, 40, 43.

⁵⁵ Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 BROOK. L. REV. 39, 146 (1998); Victor Tadros, Rape without Consent, 26 Oxford Journal of Legal Studies 515, 538 (2006).

⁵⁶ *Id.*

⁵⁷ Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368; Shakti Vahini v. Union of India, (2018) 7 SCC 192.

⁵⁸ Joel Feinberg, Victims' Excuses: The Case of Fraudulently Procured Consent, 96(2) ETHICS 330, 337 (1986).

fraud rather than sexual offenses⁵⁹ inadequately addresses simultaneous violations of dignity⁶⁰, bodily integrity, and sexual autonomy⁶¹.

Central legal questions include whether promises constitute “facts” under Section 90⁶² and whether courts can realistically determine if the accused knew consent was explicitly predicated on marriage promises⁷⁸. The practical difficulties distinguishing between affection-based and promise-based consent create problematic foundations for consent determination, potentially resulting in systematic injustice.

Post-BNS Position

Section 69 of BNS states:

“Whoever, by deceitful means or making by promise to marry to a woman without any intention of fulfilling the same, and has sexual intercourse with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.”

Explanation – “deceitful means” as including “false promise of employment or promotion, inducement or marrying after suppressing identity.”

Although the legislation criminalises deception in obtaining sexual consent, ambiguity persists regarding the specific forms of deception encompassed, despite the inclusion of an explanatory clause. This analysis focuses on false marriage promises, for which the proposed legislation establishes three essential elements: (1) the accused’s promise of marriage, (2) the promise made without the intention of fulfilment, and (3) subsequent sexual intercourse with the victim. This new offence would significantly alter marriage promises’ jurisprudence in several ways. First, it establishes a distinct offence separate from rape. Second, it prescribes substantially reduced sentencing parameters—whereas rape carries a minimum ten-year sentence, this offence designates ten years as the maximum penalty. Third, it eliminates the requirement for the man’s knowledge that consent was obtained under a factual misconception. Fourth, it removes the necessity for women’s consent to be predicated on deception⁶³. Consequently, the

⁵⁹ Surya Bala & Rahul Saha, Make No Promises and Tell Me No Lies: A Critique of Deelip Singh v. State of Bihar AIR 2005 SC 203, 1 NUJS L. REV. 149 (2008).

⁶⁰ Cf Ben A. McJunkin, Deconstructing Rape by Fraud, 28 COLUM. J. GENDER & L. 1, 19 (2014)

⁶¹ Stephen J. Schullhofer, Taking Sexual Autonomy Seriously: Rape Law and Beyond, 11 LAW AND PHILOSOPHY 35, (1992).

⁶² Supra note 59.

⁶³ Neetika Vishwanath, Controlling Women's Sexual Autonomy, The Hindu, August 31, 2023.

mere combination of a false promise followed by sexual intercourse constitutes an offence.

The implications for jurisprudence are substantial. According to the provision's text, the prosecution must prove beyond reasonable doubt that the accused knowingly and intentionally deceived the woman to engage in sexual relations. Notably, "lack of consent" becomes immaterial in this context. The provision thus centralizes "deceit" rather than consent's presence or absence. This shift may reduce reliance on fact-finders' assumptions and prejudices in determining guilt. Previously, courts relied on certain myths and stereotypes to conclude that deception was not the "sole" inducement for the prosecutrix's consent. By focusing on deceit, it becomes irrelevant whether deception was the exclusive reason or one among multiple considerations inducing the woman's consent.

Position in the foreign jurisdictions.

This analysis examines analogous provisions in the United States, Canada, and the United Kingdom, investigating how these jurisdictions approach the concept of "Deceptive Sex". In virtually every area of law except rape, consent obtained through deception is considered legally invalid⁶⁴. As noted in numerous court decisions, "consent obtained based on deception is no consent at all"⁶⁵ This principle applies consistently in cases of trespass, where entry obtained by pretending to be a meter reader constitutes illegal entry; theft, where property obtained through fraudulent schemes is considered taken without consent; and battery, where touching obtained through misrepresentation (such as posing as a doctor) is considered non-consensual. As Judge Learned Hand articulated, "Fraud will vitiate consent as well as violence."⁶⁶ This creates a theoretical inconsistency when applied to rape law, where most jurisdictions define rape as sex without consent, yet paradoxically reject the concept that deception invalidates sexual consent.

The United States presents a complex and inconsistent landscape regarding rape-by-deception laws. While most jurisdictions don't recognize general fraud as vitiating sexual consent, several states have enacted limited statutory provisions. Tennessee explicitly defines rape to include "sexual penetration... accomplished by fraud." Idaho, under a 2011 amendment, establishes that a man commits rape when he has sex with a woman who, because of his "artifice, pretence

⁶⁴ Supra note 2; *People v. De Leon*, 16 N.E. 46, 109 N.Y. 226, 230 (N.Y. 1888).

⁶⁵ *Id.*

⁶⁶ *NLRB v. Dadourian Export Corp.*, 138 F.2d 891, 892 (2d Cir. 1943) (L. Hand, J.)

or concealment,” believes him to be “someone other than” who he is⁶⁷. In Massachusetts, a bill was proposed (as of 2010) that would impose life imprisonment for anyone who “has sexual intercourse... with a person having obtained that person’s consent by the use of fraud, concealment or artifice”⁶⁸. Despite defining rape as sex without consent, American courts have generally been reluctant to extend this definition to include deceptive practices⁶⁹. This creates what the legal scholar Jed Rubenfeld terms “the riddle of rape-by-deception” - why deception that would invalidate consent in any other context doesn’t invalidate sexual consent⁷⁰. This reluctance may stem from several factors, including concerns about the overcriminalization of common romantic behaviours, historical focus on force rather than consent in rape law⁷¹, and difficulty in distinguishing between permissible “seduction” and impermissible fraud⁷².

Canada has taken a more expansive approach to recognizing deception as potentially vitiating consent in sexual contexts. A Canadian Supreme Court Justice has stated that rape is committed whenever sex is procured through “dishonesty”⁷³. This reflects a broader willingness in Canadian jurisprudence to recognize that deception can negate sexual consent. In *R v. Cuerrier*, the Canadian Supreme Court addressed the issue of when fraud vitiates sexual consent, suggesting a more expansive approach than most American jurisdictions⁷⁴. While comprehensive details on Canadian law are limited, they indicate that Canadian courts are more willing to consider dishonesty as undermining consent in sexual contexts.

The United Kingdom has established a relatively structured framework for addressing sexual consent obtained through deception. The UK’s primary legislation governing sexual offenses, the Sexual Offences Act 2003⁷⁵, specifically addresses circumstances where consent may be vitiated. The Act appears to take a more defined approach than US law by articulating specific circumstances where consent might be invalidated by deception, though comprehensive details on the UK’s approach are not fully elaborated in the available information.

⁶⁷ IDAHO STAT. 18-6101(8) (Supp. 2011).

⁶⁸ House Bill No. 1494, House Docket No. 631, 186th Gen. Ct. Comm. of Massachusetts, filed January 9, 2009

⁶⁹ Rape by Fraud or Impersonation, 91 A.L.R.2d 591 § 2 (2009)

⁷⁰ Supra Note 63.

⁷¹ *Suliveres v. Comm.*, 449 Mass. 112, 112, 865 N.E.2d 1086, 1087 (2007).

⁷² “Seduction was not a crime at common law, but is quite generally made so by statutes in the United States. The essence of the crime consist[s] primarily in an inducement to sexual intercourse under promise of marriage.” 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS 288 (1931).

⁷³ *R v. Cuerrier*, [1998] 162 D.L.R.4th 513

⁷⁴ *Id.*

⁷⁵ Sexual Offences Act, 2003, c. 42, § 1(1) (Eng.); Sexual Offences Act, 2009, asp 9, § 1 (Scot.); MONT. CODE ANNO. § 45-5-503; UTAH CRIM. CODE § 76-5-402(1).

These different jurisdictional approaches reveal distinct legal philosophies regarding sexual consent and deception. While general legal principles hold that “consent obtained by fraud is equivalent to no consent,” jurisdictions differ significantly in applying this principle to sexual offenses. This creates a theoretical inconsistency where rape is defined as sex without consent, deception invalidates consent in other legal contexts, yet most jurisdictions don’t recognize rape-by-deception as rape. Jurisdictions that do recognize forms of rape-by-deception vary in how broadly they define punishable deception: a narrow approach limits criminal liability to specific forms of deception (e.g., identity impersonation); a moderate approach recognizes deception about the “nature of the act” as vitiating consent; and an expansive approach potentially criminalizes any sexual activity procured through dishonesty. The differences in approach reflect varying cultural contexts and legal traditions. Section 69 of BNS specifically addresses false promises of marriage - a deception that carries particular significance in Indian society. Western jurisdictions have generally been more reluctant to criminalize deception in romantic contexts, particularly regarding relationship intentions.

Critical Analysis of Section 69

Section 69 of the Bharatiya Nyaya Sanhita (BNS) establishes three essential criteria for an act to constitute an offence: (i) obtaining consent through deceitful means, (ii) making a false promise to marry without intention to fulfil it, and (iii) engaging in consensual sexual intercourse with a woman. This provision presents problematic implications for several reasons. Primarily, establishing this as a separate sexual offence distinct from rape would result in excessive intrusion into intimate relationships throughout society. Additionally, practical enforcement questions arise, such as whether multiple sexual encounters following a false marriage promise would constitute multiple offences.

This raises significant concerns regarding case management and evidentiary standards. Furthermore, criminalization introduces numerous potential harms and abuses before trial proceedings commence⁷⁶. For instance, parents might exploit this provision to restrict their daughters’ sexual autonomy by filing cases against their partners upon discovering pregnancy⁷⁷, potentially resulting in arrest and extended detention periods.

The codification of this offence creates substantial interpretive challenges. While “deceitful

⁷⁶ Sharma, *supra* note 7.

⁷⁷ *Id.*

means” may be demonstrable through the accused’s actions, proving mala fide intention—the core ingredient—remains legally problematic. Criminal jurisprudence has yet to provide a definitive definition of intention, making it exceptionally difficult for litigants to establish in court. This narrowed interpretation disadvantages genuine victims of such offences.

Section 69 of the BNS contains numerous ambiguities that undermine its effectiveness. While Section 68 provides a clear definition of “sexual intercourse” to include acts beyond penile-vaginal penetration, Section 69 remains unclear regarding this terminology. Moreover, Sections 68 and 69 appear to overlap, with the former criminalizing the exploitation of fiduciary relationships or authority to coerce women into sexual intercourse, and the latter criminalizing sexual intercourse obtained through deceit and false marriage promises. Additionally, Section 69 fails to specify a minimum punishment, prescribing only a maximum imprisonment of 10 years—reflecting colonial penal philosophy through over-reliance on imprisonment and mandatory minimum sentencing to instil public fear.

Feminist scholars have argued that such laws permit the terrorization and sexualization of women’s bodies⁷⁸. The courts previously interpreted false promise to marry cases under rape provisions when these cases peaked in 2016, primarily affecting women from educationally and socially disadvantaged backgrounds or those unable to seek legal remedies. These interpretations aimed to punish offenders with rape-equivalent sentences since consent was not freely given, thus creating deterrence through fear.

Feminist scholarship also critiques judicial interpretation of false marriage promises under the IPC, wherein women’s consent undergoes intense scrutiny. Precedent demonstrates that consent violations are evaluated based on a woman’s age, previous sexual experiences, marital status, education, and social background⁷⁹. Women satisfying these criteria are presumed mature enough to provide valid consent. This interpretation significantly impairs women’s autonomy and reinforces patriarchal norms.

While courts have exempted accused parties when promises were broken for genuine reasons, this constitutes merely circumstantial evidence and fails to conclusively prove mala fide

⁷⁸ Frug, Mary Joe. “A Postmodern Feminist Legal Manifesto (An Unfinished Draft).” *Harvard Law Review* 105, no. 5 (1992): 1045–75.

⁷⁹ Garg, A. (2018). Consent, Conjuality and Crime: Hegemonic Constructions of Rape Laws in India. *Social & Legal Studies*, 28(6), 737-754.

intentions⁸⁰. In such cases, the man's intentions become central, shifting the burden of proof to the woman to establish consent violation. The codification of this offense creates further ambiguity in proving intentions while simultaneously undermining women's autonomy to provide free consent or engage in consensual sexual intercourse⁸¹. The law effectively re-victimizes women regardless of their educational or social standing.

India has historically followed endogamous marriage practices, and significant struggles have ensued to abolish these restrictions and enable free partner choice. Section 69 of the BNS potentially curtails this freedom, threatening to revive past struggles and oppressions that have exploited both women and men from lower castes or marginalized communities. This provision could promote endogamy under the guise of protecting women from sexual exploitation, particularly in situations where guardians discover premarital sexual relationships and initiate criminal proceedings under Section 69⁸². The fear of criminal prosecution—not for lack of consent but because of consent—becomes a mechanism for promoting endogamy.

Conversely, proponents argue that Section 69 protects women from sexual exploitation through unlawful religious conversion by deceitful means. Some suggest this law prevents “love jihad” cases⁸³, protecting women lured into sexual intercourse with false marriage promises followed by conversion to different faiths—situations that judicial interpretation has failed to adequately address.

However, these concerns about coerced conversion and sexual exploitation potentially restrict interfaith marriages and target couples based on religious or caste identity. Critics argue that “love jihad” lacks empirical foundation, as the government has failed to provide supporting data⁸⁴. Adult men and women possess the fundamental constitutional right to marry freely and to convert religions. Criminalizing “a promise to marry” without establishing requisite intention potentially infringes upon privacy rights.

⁸⁰ Make Women's Voices Central to False Promise to Marry Cases | NewsClick, <https://www.newsclick.in/make-women-voices-central-also-promise-marry-cases>.

⁸¹ Surbhi Karwa, *Criminal Law Bills: The Section on “False Promise to Marry” Aids Victim Blaming*, THEQUINT (2023), <https://www.thequint.com/opinion/new-criminal-law-bills-ipc-crpc-evidence-act-false-promise-of-marriage-section-analysis>.

⁸² Neetika Vishwanath, *Controlling Women's Sexual Autonomy*, THE HINDU, Aug. 30, 2023, <https://www.thehindu.com/opinion/op-ed/controlling-womens-sexual-autonomy/article67251409.ece>.

⁸³ Opinion: Will Proposed Criminal Laws Curb Marriages Through Deceit?, WWW.INDTV.COM, <https://www.ndtv.com/opinion/will-proposed-criminal-laws-curb-marriages-through-deceit-4600106>.

⁸⁴ Sonkar, S. (2022) ‘Policing Interfaith Marriages: Constitutional Infidelity of the Love Jihad Ordinance’, *Journal of Law and Religion*, 37(3), pp. 432–445.

Government initiatives such as Maharashtra's resolution to track inter-faith/inter-caste marriages—ostensibly targeting “love jihad” or seeking to “reconcile” “estranged” women with their families—reflect endogamous positions that discourage marriages outside one's faith. With Section 69 in effect, the government appears to promote endogamy while denying women sexual agency and the freedom to engage in relationships outside their caste, religion, or culture.

Interfaith couples face additional obstacles under Section 6 of the Special Marriage Act, 1954, which mandates a 30-day publication period for marriage intentions, during which couples often encounter societal pressure, harassment, or violence (Bhandare and Karwa 2020). Honor killings resulting from interfaith marriages remain an unfortunate but frequent occurrence, and courts have sometimes failed to provide adequate protection to interfaith couples. In this context, Section 69 of the BNS could become a mechanism for the executive to suppress interfaith marriages.

From a practical perspective, Section 69 rests on paradoxical premises: it assumes women are simultaneously conservative enough to be profoundly affected by premarital sexual relations—warranting 10-year incarceration for male partners—yet unable to wait until marriage despite awareness of these risks. This logic requires the dubious assumption that women are both conservative and naive. Even accepting this stretched reasoning, the provision creates vulnerability to false accusations because false promises are conceptually straightforward but evidentially challenging to prove. Unlike other crimes where mental state can be reasonably inferred from circumstances, the emotional nature of romantic promises complicates rational assessment. Promises made under the influence of romantic feelings may not reflect calculated deception but rather impetuous commitments that the promisor lacks the capacity to fulfil.

Conclusion

The issue of sexual intercourse obtained through deceitful means, particularly under the false promise of marriage, presents a complex intersection of legal, societal, and cultural considerations. Historically, Indian jurisprudence has grappled with the classification of such acts under rape laws, relying on interpretations of consent as defined by Sections 375 and 90 of the Indian Penal Code. The enactment of Section 69 of Bharatiya Nyaya Sanhita, 2023, marks a significant shift by introducing a distinct category for these offences, yet its provisions remain fraught with ambiguities and potential for misuse.

Critical analysis reveals several theoretical flaws in treating false promises of marriage as consent-vitiating. The reliance on subjective dealbreaker frameworks risks undermining foundational principles of consent and conflates sexual autonomy with contractual obligations. Furthermore, this approach inadvertently diminishes female agency by portraying women as passive victims rather than autonomous participants in sexual relationships. The judiciary's emphasis on factors such as education and age further complicates the issue, creating presumptions that fail to account for the broader sociocultural significance of marriage in legitimizing sexual relationships.

While deceptive sexual encounters undeniably cause psychological harm and trauma, the current legal framework struggles to balance the need for accountability with the preservation of individual autonomy and agency. International comparisons suggest that selective criminalization based on objective dealbreakers may offer a more nuanced approach to addressing such offences. However, cultural sensitivities and societal norms in India necessitate careful consideration to ensure that legal remedies do not inadvertently reinforce regressive stereotypes or restrict sexual autonomy.

In conclusion, while Section 69 of BNS, 2023, represents progress in recognizing deceitful sexual conduct as a distinct offence, its shortcomings highlight the need for continued jurisprudential refinement. A balanced approach that prioritizes both justice for victims and respect for individual autonomy is essential to address the complexities surrounding sexual deception effectively. Future legislative efforts must clarify ambiguities, mitigate misuse risks, and foster an equitable framework that aligns with evolving societal values.