

# **PUNISHING SEXUAL INTERCOURSE BY DECEITFUL MEANS: UNVEILING THE COMPLEXITIES IN SECTION 69 OF BHARATIYA NYAYA SANHITA**

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## **Abstract**

This paper critically examines S. 69 of the Bhartiya Nyaya Sanhita (BNS), which criminalizes sexual intercourse induced by false promises of marriage, deceitful means such as false assurances of employment or promotion, or suppression of identity. While the provision seeks to protect individuals from exploitative deception, the paper evaluates the practical challenges posed by the judiciary's stringent evidentiary requirements, which place a heavy burden on victims to prove that consent was solely based on the deceptive promise, potentially undermining the section's effectiveness. It further examines ethical concerns surrounding the classification of false promises of employment or promotion as sexual offenses, which risks equating moral lapses with criminal conduct and invites potential misuse. The paper also addresses the vagueness of undefined terms, notably "identity," which renders the section susceptible to inconsistent judicial interpretations and possible abuse. Additionally, it assesses the provision's constitutional validity, scrutinizing its gender-specific framework that excludes men and third-gender individuals as victims, and evaluates its adherence to fundamental principles of criminalization, including fair labelling, the harm principle, and proportionality. Through this comprehensive analysis, the paper proposes reforms to enhance victim protection while ensuring fairness, inclusivity, and respect for individual autonomy, aiming to strengthen the law's efficacy and alignment with constitutional and ethical standards.

*Keywords:* Section 69, false promise to marry, deceptive sex, sexual autonomy, consent, marrying by suppressing identity, criminalisation

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## **I. Introduction**

IN INDIAN society, marriage is revered as a sacred bond that is deeply rooted in cultural, spiritual traditions. This institution is often perceived as a sacred union transcending physical

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and emotional bounds. From a young age, particularly for women, societal norms reinforce this idealized vision, with girls often socialized to aspire to married life and cautioned against any deviations that might jeopardize it. Consequently, the institution of marriage heavily influences social attitudes towards sexuality.<sup>1</sup>

### **Marriage, Morality, and Premarital Sex**

India continues to be a country where society is rooted in traditions, and people's sexual attitude is influenced by values and morals.<sup>2</sup> The premarital sex remains a largely unaccepted practice, with both families and the state, in its role as *parens patriae*, seeking to regulate it. Within this traditional framework, marriage is often considered the only legitimate space to fulfil sexual urges. The only way a woman's sexual urge can be fulfilled is once she enters the institution of marriage. However, such cases break this norm of marriage and sex. Because of this, it is often alleged that despite the consent of women to a physical relationship, the men in those relationships where they obtained the consent on some false or deceitful belief are often seen as accused of rape. The reasoning in false promise to marriage is also that the so-called consent of the woman to sex given on the grounds of marriage is vitiated since it was given under the assurance given by the accused that he would marry her, which remained unfulfilled. Yet, cases of rape based on false promises have sparked controversy, with allegations that consensual relationships are retroactively framed as nonconsensual when marriage promises remain unfulfilled, which highlights tension between legal accountability, cultural expectations, and gender dynamics.

### **Deconstructing Legal Consent**

In today's modern society, the consent threshold is frequently employed to distinguish between permissible and intolerable intrusions on property or bodies. It generally means permission or agreement obtained from someone or something having authority or

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<sup>1</sup>Chirodip Majumdar, "Attitudes Towards Premarital Sex in India: Traditionalism and Cultural Change" *Springer* (2017), *available at*:

[https://www.researchgate.net/publication/321495590\\_Attitudes\\_Towards\\_Premarital\\_Sex\\_in\\_India\\_Traditionalism\\_and\\_Cultural\\_Change](https://www.researchgate.net/publication/321495590_Attitudes_Towards_Premarital_Sex_in_India_Traditionalism_and_Cultural_Change) (last visited on May 06, 2025).

<sup>2</sup> Shri Kant Singh, Deepanjali Vishwakarma, *et.al*, "An Epidemiology of Premarital Sexual Behaviour in India: Exploring Gender Differences" 22(3) *Journal of Health Management* 1-24 (2020), *available at*: <https://journals.sagepub.com/doi/abs/10.1177/0972063420937938#:~:text=Results%20indicate%20that%20unmarried%20men,premarital%20sexual%20behaviour%20in%20India>. (last visited on May 07, 2025).

power.<sup>3</sup> Consent is important because it has the ‘moral magic’ to turn an otherwise impermissible act, something that would violate a person’s right, into a permissible one.<sup>4</sup>

### *The linchpin of Rape law*

Consent must be voluntary, which means not being induced by force and coercion; it should be informed that it is based on true information about the nature of the act and identity of the person requesting consent. Further, the consenting party must understand what they assent to and should be aware of the generally known consequences of partaking in the activity. However, it would not be reasonable to stretch the informed consent to the extent that one has to know everything about the type of act that one is consenting to and everything about the person requesting the consent.<sup>5</sup> In sexual activity, there is an affirmative standard of consent which requires voluntary, mutual, and explicit communication to the act. Despite introducing an explicit definition of consent (Explanation 2 of S. 375 IPC) by the 2013 amendment, multiple issues have been associated with determining consent. One such issue surrounding consent arises in the cases of “False promise to marry” cases, a crucial factor in such cases is that consent is being fraudulently obtained or given when lured by a false promise of marriage.

False promise to marry cases have posed a distinct conundrum to feminists, with strong detractors and supporters on both sides of the debate. These are cases that have a standard wherein the prosecutrix claims that the defendant misrepresented himself and promised that he would marry her. Based on such a promise, she entered into an act of sexual intercourse. But in reality, he had no such intention of doing so from the beginning, so her consent to have sex with him is vitiated. Before the enactment of the new act, the *Bhartiya Nyaya Sanhita*, the old legislation, had no direct provision dealing with such cases. Due to this, the promise to marry cases were turned into rape cases. This has been done by a judicial interpretation of what “sex without consent” would constitute rape through a joint reading of ss. 375<sup>6</sup> and 90<sup>7</sup> of the Indian Penal Code. Even though, for the purpose of the rape definition of consent has

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<sup>3</sup>The Cambridge Dictionary; Consent, available at: <https://dictionary.cambridge.org/dictionary/english/consent> (last visited on May 06, 2025).

<sup>4</sup> Heidi Hurd, “The Moral Magic of Consent” 2 *Legal Theory* 121 (1996).

<sup>5</sup>Amisha Sharma and Thejalakshmi Anil, “‘Consent’ in False Promise to Marry: Deceptive Sex and the Legal Knot” 16(2) *NUJS Law Review* 349-366 (2023), available at: <https://nujlawreview.org/wp-content/uploads/2023/11/16.2-Sharma-Anil.pdf> (last visited on May 05, 2025).

<sup>6</sup>Indian Penal Code, 1860 (Act no. 45 of 1860), s. 375.

<sup>7</sup>*Id.*, s. 90.

been set out in explanation 2 of s. 375<sup>8</sup> as “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”. But for purpose of false promise to marriage cases the court read the consent within the section 90 which defines the term consent in negative terms and list down factors for vitiation of consent on the grounds including fear of injury, or a misconception of fact and if the person committing the act knows or has reason to believe that consent was given as a consequence of such fear or misconception.

## II. From Rape to Deceit: The Birth of Section 69

On July 1, 2023, the government came up with three new laws replacing the erstwhile criminals, giving the earlier legislation tag of colonial legislation. However, it is a separate debate whether the new legislation is, in the true sense, indigenous legislation or merely old wine in a new bottle.<sup>9</sup> One thing the new legislation did well was to insert a separate section under the new criminal law, s. 69,<sup>10</sup> it somewhere made it clear that such cases of false promise to marry are not rape, hence we cannot give both the offence within one bracket.

### The Criminal Approach towards a Promise to Marry

The s. 69 IPC sets in motion with the words “whoever”, which may give an apprehension that the section is gender neutral, but from very next line “by making promise to marry a *woman*”, it elucidates that for the section, accused can be either man or woman or third gender but when comes to victim it can only be a woman.<sup>11</sup> Therefore, if a woman makes a promise to a man to marry or enters into sexual intercourse using deceitful ways, but later on, if she refuses to do so or deceives the man, then s. 69 is not providing any remedy to such a man. Similarly, if a third gender person is deceived into sexual intercourse by a false promise of marriage or other deceitful way, such a person will have no specific remedy under this provision.

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<sup>8</sup>*Id.*, s. 375 explanation 2.

<sup>9</sup>Ranjit Bhushan, “New Criminal Laws: ‘Old Wine in New Bottles’ Says Retired SC Judge Justice Chelameswar”, *Hindustan Times*, Jul. 03, 2024, available at: <https://www.hindustantimes.com/india-news/new-criminal-laws-old-wine-in-new-bottles-says-retired-sc-judge-justice-chelameswar-101720009249309.html> (last visited on May 07, 2025).

<sup>10</sup>The Bharatiya Nyaya Sanhita, 2023 (Act no. 45 of 2023); s. 69: “Whoever, by deceitful means or by making promise to marry to a woman without any intention of fulfilling the same, 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” shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity.

<sup>11</sup>*Ibid.*

Hence, our society and legislature, making legislation for the society, are not ready to accept the reality that a woman can make the same false promise to a man. While men may not face the same social stigma as women regarding premarital sexual activity, they are not immune to emotional and psychological trauma, loss of trust, as social and emotional beings. The distress caused by betrayal or manipulation can be profound in the same way as it is to the woman, but the section offers no legal recourse for male victims. This exclusion reflects a societal bias that men are immune to such harms, perpetuating a patriarchal stereotype that undermines their vulnerability and denies them justice.

The legislation also excluded the LGBTQ+ section of society, reflecting the assumption of law makers that a hetero normative institution of marriage and their relational aspirations are not recognized. Non-binary, transgendered, or queer, are at heightened risk of coercion through false promises, yet the section's hetero normative framing renders their experiences invisible.<sup>12</sup> The unreasonable exclusion makes the section a potential violation of art. 14, 15, and 21 of the Constitution.<sup>13</sup> The section implies that only men hold positions of power, as it criminalizes men making false promises of employment or promotion to induce sexual intercourse, ignoring the reality that women can also hold positions of authority,<sup>14</sup> which will be dealt with in detail in the second part of the article.

### **The Judicial Maze of False Promise to Marry**

The judiciary has established a critical, although challenging, distinction between a criminal “false promise to marry” and a non-criminal “breach of promise to marry.” The offense is considered complete only when it can be proven that the accused had no intention of marrying the prosecutrix from the very beginning. This distinction hinges on proving that the accused's promise was fraudulent from the outset, which is a task fraught with evidentiary challenges for the promise being made years prior within the “four walls of a room” and the often-undocumented nature of such promises. From the outset, it is apparent that proving through concrete evidence will give rise to serious unease. This will come at the cost of massive state intrusion into the intimate lives of litigants, which is pried upon and dissected by the state.

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<sup>12</sup>Sukriti Mishra, “Discriminatory to Presume That Only Man Can Make Promise to Marry and Deceive: Kerala HC Issue Notice in Plea Challenging Constitutionality of Section 69 of BNS”, *Verdictum the Dictum of Truth*, Sept. 11, 2024, available at: <https://www.verdictum.in/court-updates/high-courts/vimal-vijay-v-union-of-india-ors-wpc-no-31598-2024-rape-false-promise-to-marry-1551006#:~:text=The%20PIL%20filed%20through%20Advocate,independent%20decisions%20regarding%20sexual%20acts.> (last visited on May 07, 2025).

<sup>13</sup>The Constitution of India, art. 14, 15, 21.

<sup>14</sup>*Supra* note 12.

The court interpreted “misconception of fact” as the promise to marry made by the accused to elicit the assent of the prosecutrix without actually having any intention to marry her.<sup>15</sup> Additionally, in *Deepak Gulati* case,<sup>16</sup> the court added a caveat that a false intention must exist from the beginning. Therefore, the accused would only be convicted if the court concludes that the intention of the accused was *malicious* and that he had clandestine motives. Therefore, it creates a distinction between two situations: “breach of promise” on one hand, where due to some intervening circumstance which he could not have foreseen or which was beyond his control. That is, despite having every intention of marrying, but not being able to marry. On the other hand, there is a “false promise to marry” where the accused has covert motives from the very beginning.

In *Dileep Singh* case,<sup>17</sup> The Court acquitted the accused, alleging a breach of promise to marry, holding that there was no evidence to establish that the accused lacked a genuine intention to marry the complainant at the outset of their relationship. It held that when the promise of marriage is made to break it, the consent obtained will be determined as “misconception of fact”. However, if the promise was made genuinely in the beginning, but later on, due to a change in intervening circumstances, such a case will be of “breach of promise to marriage,” and the case will not be established. Further, it was held

It needs to be clarified that a representation deliberately made to elicit the assent of the victim without having the intention or inclination to marry her will vitiate the consent. If on the facts it is established that at the very inception of the making of the promise, the accused did not entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause secondly.

To simplify further,

**Situation 1:** If Mr. D (Defendant) and Ms. V (Victim) get into a relationship. And the relationship develops over time, and they enter into sexual intercourse. Mr. D proposes to Ms. V to marry at a future date, but due to changes in circumstances, such as career paths, differences in cities, compatibility, and other social factors, Mr. D is forced to break up and is unable to fulfil his promise. Here, the Sexual relations between the two could not

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<sup>15</sup>*Uday v. State of Karnataka*, AIR 2003 SUPREME COURT 1639.

<sup>16</sup>*Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675.

<sup>17</sup>*Dilip Kumar v. State of Bihar*, 2005 SCC (CRI) 253.

be termed as done under “false promise to marry” or “misconception of fact”. In *Naim Ahamed*,<sup>18</sup> it was ruled that a genuine promise made in good faith, later unfulfilled due to unforeseen circumstances, does not constitute an offence.

However, conversely,

**Situation 2:** If Mr. D insists that Ms. V have sexual intercourse, she agrees when Mr. D promises to marry her. In reality, the promise made was without any intention to fulfil, rather for receiving sexual gratification without seriously committing to marriage is the case of a false promise of marriage.

### Judicial Subjectivity and Societal Norms

The ambiguity in the legal standards and evidence for determining whether a case constitutes a “false promise of marriage” or a “breach of promise” has led to a situation where the subjectivity of judges plays a major role. The question of what must be included in “circumstances” without a clear standard opens a Pandora’s box, where outcomes hinge on judges’ perceptions of evidence and societal norms, as well as the parties’ backgrounds, including gender, age, and the duration of their relationship. A judge’s personal biases, whether conscious or unconscious, regarding caste, religion, and gender, may significantly influence their rulings.

For example, the court acquitted the accused on the observation that the prosecutrix was a grown girl. She was aware of the fact that since they belonged to different castes, marriage was not possible.<sup>19</sup> Similarly, in a case involving a Muslim victim and a Hindu accused, the court observed that the prosecutrix was well aware that the accused’s family might not agree to their marriage because they belonged to different religions.<sup>20</sup> This line of reasoning has also been extended to ethnic and linguistic differences, where it was held that the victim should have known that the promise might not be fulfilled because they belonged to different communities/tribes and spoke different dialects.<sup>21</sup>

Such rulings are in stark contradiction to other judgments that emphasize an individual’s autonomy to choose their life partner irrespective of social barriers such as caste, class, and religion.<sup>22</sup> This gives rise to the concern about how far such logic can be stretched. Suppose

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<sup>18</sup>*Naeem Ahmed v. State of NCT of Delhi*, SLP(Criminal) No. 230/2024.

<sup>19</sup>*Supra* note 8.

<sup>20</sup>*State v. Gaurav Bhatia*, SC No. 7/15, (Special Fast Track Court, Patiala House Courts).

<sup>21</sup>*Supra* note 14 at 746.

<sup>22</sup> In *Shafin Jahan v. Ashokan K.M.*, AIR ONLINE 2018 SC 1136; the court observed that the right to marry a person of one’s choice is integral to art. 21 of the constitution, and society has no role to play in determining our choice of partners, available at: <https://privacylibrary.ccgnlud.org/case/shafin-jahan-vs-asokan-km-and->



getting married and does so under the guise of a bogus promise of marriage, is the behaviour deemed less severe? This establishes the assumption that misleading sex is desired sex.<sup>26</sup>

Age and education are indeed markers for the understanding of human interaction, but it cannot be denied that in offences, such as deception is so extensive that even better-qualified and experienced people can get into its trap. Such a presumption overlooks the emotional and psychological vulnerabilities that persist across age and education levels.

▪ *The “Incompatibility” Defense*

The issue of compatibility again becomes an issue.<sup>27</sup> It is plausible that an accused person may have initially intended to fulfill their promise of marriage, but over the course of the relationship, realized that they were incompatible with their partner, leading them to believe that the marriage would ultimately fail. This incompatibility can be based on various factors, including physical, emotional, or psychological differences. In *Safdar Abbas Zaidi*,<sup>28</sup> the court observed that under such circumstances, they cannot be compelled to marry just because they have had a sexual relationship. Hence, it is expected of a woman to have anticipated the infeasibility due to incompatibility.

This defense becomes particularly relevant in the present day, where live-in relationships, which may not involve long-term commitments, are legally acknowledged. Introducing incompatibility as an intervening factor in cases of “breach of promise to marry” presents a new challenge, as it provides an unchecked defense for the accused to claim that they backed out of their promise due to a realization of unsuitability. This leaves little scope for the prosecution to proceed with charges against the accused. The victim may become an easy target for the accused, who can concoct a story of incompatibility, placing an extra burden on her to prove her compatibility on physical or psychological grounds. In such cases, the law and the judiciary are hamstrung, as they have neither the means nor the authority to delve into the real reasons behind a relationship’s failure. This failure could very well be induced by the accused after their goal of obtaining intercourse by deceit has been achieved, leaving the victim helpless and a mere spectator to the accused’s fabricated narrative.<sup>29</sup> It also makes the victim suffer double victimisation, first with the burden of social judgment, pressure, and expectation. Secondly, in the court during trial, the burden of proof if she chooses to file a

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<sup>26</sup> Riddhi Agarwal, “Forced Consensual Sex Based on False Promise to Marriage: An Analysis of Laws Relating to Rape and False Promise to Marriage” 3(2) *Jus Corpus Law Journal* 1028-1040 (2023).

<sup>27</sup> Nikunj Kulshreshtha, “Enacting a Law on Sexual Assault Using Deceptive Means in India” 45(2) *Liverpool Law Review* 281-313 (2024).

<sup>28</sup> *Safdar Abbas Zaidi v. State of Telangana*, CRIMINAL PETITION No.8407 of 2018.

<sup>29</sup> *Supra* note 27.

case. The processes and procedures in such instances exert an additional burden of proof on the woman.<sup>30</sup>

Hence, the legislation seems to indicate that it wants to protect women from false promise marriages and to provide justice to the victim for the sufferings the victim faced due to breach of trust and trauma that she suffered because of all such incidents. But in reality, the law does not take this situation into its ambit; rather, it is left to the court's interpretation. Due to the absence of clear legislative parameters, there has been a significant increase in judicial subjectivity. Far from empowering women, legislation inadvertently perpetuates harm by enabling state agencies, including the court, to reinforce patriarchal biases and social hierarchy.

### III. Crafting the “Credible” Victim

If at all, the prosecution succeeds in proving beyond a reasonable doubt, passing all the factors test laid down by the court for determining cases is of “false promise to marry” or “breach of promise”, that the case falls in the first category. The court puts another burden on its shoulder, setting another tough causation standard, i.e., to prove that the consent for sexual intercourse was given solely based on the promise of marriage made by the accused.

The causation standard laid down by the Supreme Court in *Deepak Gulati*,<sup>31</sup> for such an offence, is that the victim's consent should be solely based on the promise of marriage, with no role being played by romantic or sexual feelings. Therefore, in cases where the victim's love and attraction enter into the picture, it will debilitate the case for prosecution because of the high standard laid down in the abovecase that could not be met.

The judicial stance of making a “promise to marry” as the sole ground for consent oversimplifies the complexity of human emotions and relationships. It assumes a singular transactional motive, possible for a woman is only marriage, it is the sole driver for her consent, completely disregarding the natural interplay of love, affection, trust, or mutual desire that often coexists in romantic relationships. By reducing consent to a binary condition tied, i.e., exclusively to a promise, the ruling risks ignoring the nuanced, multifaceted nature of intimate decisions influenced by other factors. Moreover, it places an unrealistic evidentiary burden on the woman to demonstrate that no other emotions or factors influenced her decision, which is nearly impossible to substantiate objectively in a court of law.

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<sup>30</sup>*Ibid.*

<sup>31</sup>*Supra* note 16.

The legal framework inadvertently reinforces the patriarchal stereotype that women engage in sex only as a means to secure marriage, not as autonomous agents with their own desires. To succeed in court, the prosecution is often forced to construct the complainant as an “innocent” and “credulous” female who would never have consented to sex on any ground other than a promise of marriage. This mirrors the challenge in rape cases, where victims are often judged against the standard of a “reasonable victim” with no sexual history.

Let’s consider three possible scenarios and analyse whether they will be accepted as cases for further consideration based on the standard laid down by the *Deepak Gulati* case.

### **Scenario 1-The Classic Deception:**

V belongs to an economically poor section of society and has worked in D’s house (who belongs to a higher stratum of society) for a long time. D one day approaches her with his desire for sexual intercourse, but V refuses to do so. D pretends and frames the scenario in such a way that he has feelings for V and he will eventually marry her. Based on which V agrees to a physical relationship with D. After, few instances, D refuses to marry.

As here V’s consent was solely based on marriage and her apprehension that D would marry her, there is no factor of love and affection in this situation. Hence, here, the consent was solely based on the Promise made by D; she would not have consented if D had not made the Promise. Hence, this situation meets the standard of being “solely based on promise to marriage” under s. 69 of BNS.

In *Anurag Soni’s* case,<sup>32</sup> the accused proposed to marry the prosecutrix and had sexual intercourse with her. She initially objected to intercourse but consented on the assurance of marriage. It was revealed later that he already had plans to marry another girl, and this was known to his family as well. He kept the prosecutrix in the dark about his intention of marrying another girl. It was held that consent was given under a misconception of fact and does not amount to a valid consent under S. 90 of the Indian Penal Code. The accused had no intention to marry the prosecutrix right from the inception. He only had *mala fide* motives for using her to satisfy his lust. But for the promise, she would not have consented. This is a clear case of cheating and deception. The accused was proven to have had sexual intercourse without her consent and, hence, was convicted. The judgment call was relatively easier for the court. It was a lucid case of luring a woman into bed by giving her false assurance of marriage. Sufficient evidence was on record to show that the accused had already planned his

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<sup>32</sup>*Anurag Soni v. State of Chhattisgarh*, Criminal Appeal No. 629 of 2019.

marriage to another girl. This made it, prima facie, evident that there was no intention to marry the prosecutrix from the initial stage.<sup>33</sup> Hence, a case like *Anurag Soni*, where the court is looking at the plight of the victim and the message that may go to society through this decision. It takes into consideration the stereotypical understanding of society that a woman becomes impure if she engages in sexual intercourse pre-marriage. The case is trying to frame the image of a good woman, that a good woman is only one who gives consent for sex, only if marriage is going to take place. Again, indirectly forms a picture that commitment-free sex is impure for a woman and hence a crime.<sup>34</sup>

### **Scenario 2:**

V, having feelings for D, and D knowing the same, tries to take advantage of the situation. D asks V to have sexual intercourse and, by playing mind games, frames it in such a way that he also has feelings and he will marry V (in reality, neither does he have such feelings nor any intention to marry). Under the pretense of the said promise of marriage, the V established physical relations with D. After having sexual intercourse for one year, D refused to marry V.

### **Scenario 3:**

D and V have been in a live-in relationship. However, despite being in a long relationship and cohabiting together, they never engaged in sexual intercourse. One particular day, they both entered into sexual intercourse, during which the boy promised the girl to marry her, giving assurance for the future. Thereafter, they both entered into sexual intercourse for many. However, after 12 years of a relationship, the boy refused to marry the girl.

The two situations described above are paradoxical to the first situation. In the second scenario, although V had affection for D, D pretends to have affection for V solely to fulfill his sexual desires. In this context, two possibilities arise. First, while V loved D, she would not have engaged in sexual intercourse had such a promise not been made. Second, V had affection, and in that affection, she was willing to engage in sexual intercourse; however, the promise to marry played a secondary role in her consent. If we consider the standard set by the *Deepak Gulati* case,<sup>35</sup> it is possible that this case does not fall within the ambit of s. 69, as love and affection from V's side are present in both scenarios. Thus, the standard court expectation of the victim being asexual will not be met.

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<sup>33</sup>*Ibid.*

<sup>34</sup>*Ibid.*

<sup>35</sup>*Surpanote* 19.

### Judicial Assumptions about Victim Intent

It is implausible that a victim in a promise to marry case would be devoid of romantic feelings for the accused. The third scenario best fits this situation: a couple in a live-in relationship. In this situation, it would be difficult to prove that it was based solely on a marriage promise. As in the case, *Mahesh Damu*,<sup>36</sup> it was observed that when a woman has maintained a physical relationship with a man for a long period, it cannot be said with certainty that such a relationship was solely because of a promise made by the man to marry her. A woman may indulge in a physical relationship with a man for reasons other than the promise of marriage. In a situation where the physical relationship is maintained for a prolonged period knowingly by the woman, it cannot be said with certainty that the said physical relationship was purely because of the alleged promise made by the man to marry her. Thus, unless it can be shown that the physical relationship was purely because of the promise of marriage, thereby having a direct nexus with the physical relationship without being influenced by any other consideration, it cannot be said that there was a vitiation of consent under the misconception of fact.<sup>37</sup>

This gives rise to the question of how V in the second and third scenarios will prove that it was solely based on the promise to marry, and at that time, there was no love and affection when she entered into sexual intercourse. It's possible that V didn't feel love and affection at first, but after spending a lot of time with D, other factors might start to surface. This presents the conundrum of whether or not to accept such cases.<sup>38</sup> Proving it and meeting the standards of a "reasonable" victim would be arduous, especially in situations similar to the second and third scenarios.

The court in *Pramod Pawar*<sup>39</sup> and *Niam Ahmed*<sup>40</sup> case observed that when a woman has maintained a physical relationship with a man for a long period, it cannot be said with certainty that such a relationship was solely because of a promise made by the man to marry her. In between court is completely ignoring the possibility of the case where it was never the intention to have a physical relationship, even though they were in a long-term relationship, but the same being hard to prove, so her case will not be taken into account.

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<sup>36</sup>*Mahesh Damu Khare v. The State of Maharashtra*, Special Leave Petition (CRL.) NO. 4326 OF 2018.

<sup>37</sup>*Ibid.*

<sup>38</sup>"For Offence of Rape on False Promise to Marry, Physical Relationship Must Be Shown to Be Only Based on Marriage Promise: Supreme Court", *Live Law*, Nov. 27, 2024, available at: <https://www.livelaw.in/supreme-court/rape-on-false-promise-to-marry-requires-proof-that-physical-relationships-was-only-based-on-marriage-promise-supreme-court-276479?fromIpLogin=1537.3886110859437> (last visited on May 07, 2025).

<sup>39</sup>*Supra* note 24.

<sup>40</sup>*Supra* note 18.

This opens several situations where the court will assume that it was not solely based on a promise to marry. For instance, if the victim had stealthily let the accused into her house or voluntarily gone to visit him late at night, this would have been taken as proof of a romantic relationship between the victim and the accused, which would have prejudiced the prosecution's case.<sup>41</sup> Extending it further, testing based on awareness of the prosecutrix of the moral aspect of the relationship and the inherent risk involved in this kind of relationship. A question arises: which adult girl, other than a person of lunatic or unsound mind, irrespective of her educational qualification, would not be able to understand the consequences of the sexual intercourse for which she had consented? The Courts further test the number of times and for how long they indulged in sexual intercourse. In this connection, reference may be made to a decision of the Calcutta High Court in the case of *Jayanti Rani Panda*,<sup>42</sup> It was observed that if a fully grown-up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by a misconception of fact, and it was held that s. 90 cannot be invoked unless the court is assured that the accused never intended to marry her from the inception. The court itself made it further confusing. If the promise had been made to the girl for marriage and if her consent was solely based on such a promise, why does the number of times such an act matter? What court is expecting that every time she asks for such a promise before entering into a sexual act?

In the *Manish Yadav* case,<sup>43</sup> the accused befriended the prosecutrix over a social media website, which quickly bloomed into a romantic relationship, despite her allegation that the accused forced himself upon her on multiple occasions. The court neglected this fact, taking into consideration that despite her reservations about engaging in a physical relationship, she trusted him and had feelings for him. It was held that the relationship between the complainant and appellant had developed based on mutual attraction and affection; the same cannot, by any stretch of imagination, fall within the ambit of a relationship flowing from a promise to marry. Hence, the court's romanticized lens, love negated coercion. This reflects patriarchal bias, where women's agency is undermined by presuming that affection overrides coercion. Hence, diverting from its precedent laid down in *Deelip Singh*.<sup>44</sup> In both cases girl

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<sup>41</sup> *Supra* note 38, *State v. Mohd. Yunus*, *State v. Anuj Yadav*.

<sup>42</sup> *Jayanti Rani Panda v. State of West Bengal*, 1984 CRILJ 1535.

<sup>43</sup> *Manish Yadav v. State of Uttar Pradesh*, Criminal Appeal No (S). OF 2025.

<sup>44</sup> *Supra* note 19, where the court held that the accused and victim were neighbour, and one day the accused forcefully raped her. Later on, the accused consoled her by promising her to marry, and they continued having sexual intercourse.

was forcefully induced into sexual intercourse, and thereafter the accused promised her. But in the *Deelip Singh* case, the court convicted the accused, whereas in the *Manish Yadav* case, the court did not find him guilty, taking into consideration that the girl later trusted her and had feelings for him. The same facts, two cases, but justice conveniently changes its mood!

Although punishing “promise to marry” cases have penological justification, the trial process undermines the victim’s position. She bears a double burden: first, social humiliation for premarital sex, and second, the legal burden of proving that her consent was solely induced by the promise. The law effectively protects only the “naïve” woman who consents without love or affection, while excluding women in relationships by deeming them mature and thus responsible for their choices. This moralized distinction reinforces stereotypes, placing blame on women and denying equal protection under the law.

Hence, she bears the brunt of her actions. In the first scenario, the woman has less agency, as she cannot understand the consequences, and hence, she requires protection from the state. In the other two scenarios, the state is asking women to prove themselves to be agency-less and emotionless women, ones who cannot enter into sexual intercourse, influenced by other factors.

It is also argued that, due to such standards and *ratio* laid down by the courts, it has incentivised police officials to record the complaints in a scripted manner, attempting to build a “credible victim story”. This sometimes distorts the fact that such writing ensures that the complainant is absolved of any complicity in indulging in a “shameful act,” i.e., premarital sex with the accused, in front of the courts. Hence, creating a possibility where the complainant uses the criminal law to restore their status in society by marrying the accused. Such framing of the complaint is done to ensure that the culpable act of premeditation for conviction is fulfilled.<sup>45</sup>

### **Exclusion of Married Women**

In 20 out of 79 cases (25.3%) in the data set, either the victim, the accused, or both were still married to other people at the time of the incident(s).<sup>46</sup> Despite this, for accepting the case under the section, courts have consistently relied on myths of female sexuality. The main objective of the section is to sanction consensual sexual relationships outside of conjugal bonds through marriage. For the successful staging of this legal spectacle, it then becomes

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<sup>45</sup>Nikunj Khulshreshtha, “Enacting a Law on Sexual Assault Using Deceptive Means in India” 45(2) *Liverpool Law Review* 281-313 (2024), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4657232](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4657232) (last visited on May 07, 2025).

<sup>46</sup>*Supra* note 14.

necessary to project the victim as someone devoid of sexual agency. The Indian judiciary is not far from such discourse relating to women. Therefore, an ideal victim would be the one left after excluding married/divorced women or unchaste women who engage in premarital sex.

The possible reasoning given for such exclusion in the *Naim Ahamed* case,<sup>47</sup> that the prosecutrix, a married woman and the mother of three children, was mature and intelligent enough to understand the significance and consequences of the moral or immoral act she was consenting to. In the *Prashant Bharati* case,<sup>48</sup> the court held that it is impossible to convict the accused in a promise-to-marry case where either party is married. The court is looking at the married woman as an intelligent and mature person, and for the court, it is difficult to assume such a woman would be unable to discover the deceitful behaviour of the accused.

Here, the court is only scrutinising the moral character of the prosecutrix; it is disregarding the position of the accused and his misrepresentations otherwise, which could have been taken into consideration as evidence of intention to deceive from the outset. Hence, the courts invoked the disbelief that a married or divorced woman could not have believe an accused who promises to marry her. Since she does not fit the archetype of a chaste and “good woman”. It has been assumed automatically that she would consent to any sexual activity, as she lost her purity, which the state is here to protect for unmarried women. It seems on the same line as the exception given for marital rape under the provision of rape, as the societal notion is that once a woman is married, consent is automatically given with marriage for the rest of her life. Offences like rape are not possible to be assumed for a married woman.

This reveals a troubling dichotomy in assessing the credibility of the prosecutrix, as exemplified in *Arjinder Singh* case,<sup>49</sup> the Supreme Court, while addressing a compromise petition, emphasized the youth and inexperience of the prosecutrix, suggesting that she could not understand the complexities and social implications of her marriage promise. This reasoning constructs a binary between the “ideal woman,” seen as young, chaste, and naïve, deemed worthy of protection, and the “loose woman,” as older, sexually experienced, and presumed capable of navigating rational deceit. Such a complexity is due to patriarchal stereotypes, which undermine the prosecutrix’s autonomy, shift focus from the accused’s fraudulent intent, and perpetuate discriminatory biases.

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<sup>47</sup>*Supra* note 26.

<sup>48</sup>*PrashantBharti v. State ofNCT of Delhi*, AIR 2013 SUPREME COURT 2753.

<sup>49</sup>*Arjinder Singh v. State of Punjab*, 2016 SCC OnLine P&H 8606.

However, it is important to highlight the key difference in the framing of the two provisions. Unlike section 63 of BNS,<sup>50</sup> i.e. *Rape*, which retains the marital rape exception under exception 2, s. 69 BNS,<sup>51</sup> does not explicitly exclude married or divorced women from its ambit, which raises critical questions about its scope, application, and remedies.

The expression of one thing implies the exclusion of the other. That is, the presence of one thing in one provision suggests that it is intentionally excluded from the other unless there is a clear indication otherwise. If we apply this principle to s. 69 of BNS, when marital rape has been explicitly excluded in the s. 63 of BNS in its explanation, but no such explanation is made with s. 69 of BNS, this necessarily implies that the legislation had no intention to exclude the married or divorced women from the ambit of S. 69. The judiciary also creates precedent and rules for prioritizing marital sanctity, which leaves a remedial gap for deceit within marriage. If legislation has such an intention, it made a blunder in framing the section!

For the exclusion of married women from the ambit of s. 69 reasoning stated is that a married woman cannot be lured to give consent for sex on the false promise of marriage, as such a promise is illegal. Even assuming that promise by the petitioner for marriage, she knew that she was a married woman and the marriage would not take place, and despite that, if she had established a relationship, that promise would be illegal. The court here neglects the fact that adultery is no more a criminal offence; the only remedy available is the civil remedy of getting divorced. It is not factoring divorce or remarriage as realistic possibilities. This reasoning also ignores situations where a woman may act in good faith, relying on a promise of marriage, initiates and completes divorce proceedings, and subsequently, post-divorce, the defendant refuses to fulfil the promise. The present gap in judicial reasoning leaves such a woman who acts on such promises vulnerable as s. 69 excludes such a woman.<sup>52</sup>

The possible concern that which judiciary is failing to take into account is the cultural practices like polyandry, which is prevalent in certain regions and communities, particularly in the Himalayan regions of Himachal Pradesh, Uttarakhand, and Jammu and Kashmir. In these societies, a woman may legally and socially have multiple husbands; hence, a promise

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<sup>50</sup> The Bharatiya Nyaya Sanhita, 2023 (Act No. 45 of 2023), s. 63, exception 2; Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

<sup>51</sup>*Id.*, s. 69.

<sup>52</sup>Sebin James, “Married Woman Cannot Prosecute Accused for Rape on False Promise to Marry, Her Consent Not Based on Misconception: MP High Court”, *Live Law*, July 1, 2024, available at: <https://www.livelaw.in/high-court/madhya-pradesh-high-court/madhya-pradesh-high-court-ruling-married-woman-consent-and-false-marriage-promise-case-261867> (last visited on May 12, 2025).

to marry does not inherently conflict with an existing marriage. The Hindu Marriage Act, 1955, generally mandates a monopoly<sup>53</sup>, but s. 2(2) of the Act excludes members of the Schedule Tribes from its ambit unless the central government otherwise directs. Proper customs, traditions, and personal laws of STs are provided in this exclusion. Similarly, in Ladakh, Buddhist personal laws permit polyandry under customary frameworks.<sup>54</sup> By excluding married women from S. 69's protections, the law overlooks these cultural contexts, leaving women in polyandrous communities without recourse if deceived by a false promise to marry.<sup>55</sup>

#### IV. Criminalizing Deceptive Sex: Legal Boundaries

Deception has long been the subject of conceptual debate in the philosophical and legal literature. In criminal law, interpretation often finds expression in those offences to which deception is conceptually central: property offences such as obtaining property, money, or services by deception.

Unlike the deception that occurs in scenarios of fiduciary relations, such as doctors and patients, employers and employees, or spiritual leaders and their followers, that takes place within ordinary contexts tends neither to involve the clear-cut exploitation of vulnerability nor the corrosion of trust in important institutions. Deceptive sex, i.e., sex that occurs where one party is operating under a false belief, which the other party's deceit has typically induced.

One of the longest-standing forms of deception that counts as deception relates to the nature or purpose of the sexual act. For example, this includes deceiving someone that the sexual activity is a form of medical treatment,<sup>56</sup> or a way of improving one's singing ability.<sup>57</sup> For such a form of deception, it would not be difficult to count it as an offence, indeed, if either the physical or sexual character of the conduct is obscured, then the consent of the party is no consent. Similarly, the category of impersonation also invalidates consent to sex, such as impersonating a woman's husband under the criminal law is an offence of rape. However, there are other possible ways of deception in the physical aspect of the encounter,

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<sup>53</sup>The Hindu Marriage Act, 1955 (Act No. 25 of 1955), ss. 5(i), 17.

<sup>54</sup>*Id.*, s. 2(2).

<sup>55</sup> Mihika Poddar, "Love, Lies, and the Law: The Quandary of Criminalising False Promise to Marry in India", *Oxford Human Rights Hub*, Apr. 15, 2024, available at: <https://ohrh.law.ox.ac.uk/love-lies-and-the-law-the-quandary-of-criminalising-false-promise-to-marry-in-india/> (last visited on May 12, 2025).

<sup>56</sup>*R v. Flattery*, (1877) 2 QBD 410.

<sup>57</sup>*R v. Williams*, (1923) 1 KB 340.

for instance, the risk of disease transmission,<sup>58</sup> or the use of a condom,<sup>59</sup> or an attribute of a person with whom one has sexual intercourse, such as age,<sup>60</sup> marital status,<sup>61</sup> mental state,<sup>62</sup> ethnic or religious background.<sup>63</sup>

The offence, explicitly recognized as one form of deception under the Indian Penal Code, 1960, was the consent of the woman obtained by “impersonation as husband of the complainant” under s. 374 sub-clause 4. Apart from these, the offence of rape under the IPC does not explicitly prescribe what forms of deception can negate consent.

S. 69, apart from false promise to marriage, also provides the offence relating to deceptive sex, in which a woman’s consent for a sexual relationship is obtained by making use of some deceitful means. In explanation, it provides what is included in the ambit of “deceitful means”; it provides three possible ways of deceptive sex, i.e., false promise of employment or promotion, inducement, or marrying after suppressing identity.

### **False Promise of Employment or Promotion**

One common tactic used by unscrupulous employers is making false promises of promotion, employment, or granting a share in the business to prospective employees and exchange for some favor to the employer. However, once such a promise turns out to be empty, employees may feel betrayed, frustrated, and negatively impact the employer.<sup>64</sup>

S. 69 criminalizes sexual intercourse induced by deceitful promise, including those of employment or promotion, targeting an exploitative power imbalance in a professional setting where career advancement is leveraged to coerce consent. However, its male-centric framing, challenges in proving deceitful intent, and potential to legitimize transactional relationships raise significant legal, ethical, and practical concerns, necessitating a critical examination of its alignment with constitutional principles and other ethical principles.

The section presumes that only men possess the authority to deceive women with promises, implying women lack the agency or authority to make such inducements. Such an assumption is outdated in a society where women increasingly hold positions of power, such as corporate executives, government officials, or academic leaders.

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<sup>58</sup>R v. *Mabior*, (2012) SCC 47; R v. *DC*, (2012) SCC 48.

<sup>59</sup>*Assange v. Swedish Prosecution Authority*, (2011) EWHC 2849.

<sup>60</sup>*State of Israel v. Mehadakar*, 522/07 Nazareth District Court (2007) 38.

<sup>61</sup>*Papadimitropoulos v. R*, (1957) HCA 74.

<sup>62</sup>R v. *Jbeeta*, (2007) EWCA Crim 1699.

<sup>63</sup>Mathew Gibson, “Deceptive Sexual Relations: A Theory of Criminal Liability” 40(1) *Oxford Journal of Legal Studies* 82-109 (2020), available at: <https://academic.oup.com/ojls/article/40/1/82/5658543> (last visited on May 07, 2025).

<sup>64</sup>Antonella Cossu, “The Pitfalls of Employer Deception: False Promises, Ethical Dilemmas, and Legal Consequences” Mar. 30, 2024, available at: <https://www.linkedin.com/pulse/pitfalls-employer-deception-false-promises-ethical-dilemmas-cossu-dpogc/> (last visited on May 07, 2025).

Moreover, the provision's hetero normative and binary framework excludes transgender and non-binary individuals, exacerbating their vulnerability to sexual violence. In 2017, the National Legal Service Authority (NALSA) highlighted in its report during the national consultations on access to justice for transgender persons.<sup>65</sup> It recognized that transgender individuals are particularly vulnerable to sexual violence, and the lack of explicit legal recognition of such violence adds to their marginalization. Reflecting on the need to have gender neutral laws to ensure true gender justice.<sup>66</sup> The new laws recognize all three classes of gender, namely male, female, and transgender, in s. 2(10)<sup>67</sup>, however, there is no equivalent of the offence of s. 377 IPC. Making this section also only women-centric means there will be no penal offence for the sexual assault of a trans person in the BNS.

The section's failure to recognize women as potential perpetrators or transgender individuals as victims reinforces patriarchal and misogynistic stereotypes. For instance, the female employer could promise a male or transgender subordinate a promotion in exchange for sexual favors, later reneging on the promise. Such victims would have no recourse under s. 69, as the provision does not recognize women as potential perpetrators. The assumption that only men hold authority ignores real-world dynamics. Although such cases are less common, but are plausible in modern workplaces where women occupy leadership roles.<sup>68</sup> Senior lawyer Mahalakshmi Pavani finds this section "outrageously derogatory," as it would also mean that women are "willing to jump into bed" on the promise of marriage or jobs or promotions. Implying women are passive recipients of promises, incapable of initiating deceit.<sup>69</sup>

Hence, the section is reinforcing stereotypes while ignoring women's agency, both positive (as leaders) and negative (as potential exploiters). Also, excluding nonbinary individuals as victims.

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<sup>65</sup>"Gender Neutral Rape Laws in India: A Necessary Step Towards Justice Protecting All Victims of Sexual Violence", *available at*:

<https://www.mondaq.com/india/employee-rights-labour-relations/1468194/gender-neutral-rape-laws-in-india-a-necessary-step-towards-justice-%7C-protecting-all-victims-of-sexual-violence#:~:text=In%202017%2C%20the%20National%20Legal,vioence%20adds%20to%20their%20marginalization.> (last visited on May 07, 2025).

<sup>66</sup>*Ibid.*

<sup>67</sup>The Bharatiya Nyaya Sanhita, 2023 (Act no. 45 of 2023), s. 2(10); "gender". —The pronoun "he" and its derivatives are used of any person, whether male, female, or transgender.

<sup>68</sup>Shemin Joy, "Are Indian Men in Trouble Because of New Criminal Laws? Experts Feel Section 69 of Bharatiya Nyaya Sanhita a perfect "Recipe for Misuse", *Deccan Herald*, July 03, 2024, *available at*: <https://www.deccanherald.com/india/are-indian-men-in-trouble-because-of-new-criminal-laws-experts-feel-section-69-of-bharatiya-nyaya-sanhita-a-perfect-recipe-for-misuse-3091245>(last visited on May 05, 2025).

<sup>69</sup>Sandhya Ram, "Shamefully Misogynistic Section 69 of Bharatiya Nyaya Samhita- Is This the Way Forward? *Live Law*, July 02, 2024, *available at*: <https://www.livelaw.in/articles/shamefully-misogynistic-section-69-bharatiya-nyaya-sanhita-262052> (last visited on May 07, 2025).

## Weaponizing Immorality

S. 69 provides a legal mechanism that can transform consensual but unethical agreements into criminal complaints, particularly for women, creating an asymmetry that protects their actions while penalizing men. No denying that there are many desperate women out there looking for jobs to maintain their family economy. Despite this, the labor force participation rate among females is 32.8% while among males it is 77.1%. The Hema Committee Report, released on August 19, 2024, by the Kerala Government, also exposes systemic exploitation, sexual harassment, and gender discrimination faced by women in the Malayalam Film industry, particularly in promotion and employment. However, all such challenges and issues require some structural changes on the part of the government, covering proper rules and regulations for such an industry and ensuring proper checks, proper implementation of the present legislation, and providing remedies for sexual harassment in the workplace.

But through the insertion of such an explanation, it indirectly legitimizes transactional sexual relationships by framing them as acceptable if the deceitful promise of employment or promotion is fulfilled. The Section provides a legal mechanism for women to weaponize unfulfilled promises. If a woman consents to sex expecting a promotion and the promise is not fulfilled, she can file a case under s. 69, alleging deceit. This transforms a mutual, albeit unethical, arrangement into a one-sided offence, protecting the woman's actions while penalizing the men. This creates a moral paradox, as it tolerates behavior that violates ethical norms while criminalizing only the failure to deliver on the promise. The Provision's framing assumes women as victims and men as perpetrators, ignoring diverse gender dynamics. This can overburden the court with several such cases where a woman who consensually engages in a sexual act expecting employment, but later feels cheated, might claim deceit to gain leverage, even if no explicit promise was made.

Moreover, by criminalizing only the unfulfilled, it also contradicts the Protection of Women from Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act)<sup>70</sup>, which was enacted in India to safeguard women against sexual harassment in the workplace, ensure the prevention of such incidents, and provide a mechanism for the redressal of complaints related to sexual harassment, along with addressing associated matters. One of the key forms of sexual harassment recognized under the POSH law is "Quid Pro Quo Sexual Harassment," which violates the core principle of

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<sup>70</sup> The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act No. 14 of 2013).

workplace ethics and dignity.<sup>71</sup> While s. 69 indirectly legitimizes such transactions, the law protects women who indulge in quid pro quo acts.

### Suppressing Identity

Wendy Doniger observed that sexual activity can be understood as an extension of the self, and it can be understood as a way of defining oneself. Some deceptions or failures to disclose identity prevent a person from being able to decide by their sense of self; indeed, deception might be a means of manipulating a person into deciding a way that contradicts their sense of self. Sometimes in such cases of deceptive sex, the physical intimacy is merely a pleasure giver to the deceiver, while it has a severe impact on the other partner.<sup>72</sup>

When a person has expressly stated that something matters deeply to their decision to have sex, as they do when they give explicit conditional consent, any deception or failure to disclose that relates is an instance of identity non recognition. Jonathan Herring has asserted very clearly and consistently that nondisclosure of information, considered material to the complainant, ought to vitiate consent, and liability is appropriate in circumstances where the defendant appreciated the importance of the information to the complainant.<sup>73</sup> Wertheimer also claims that “if we were to think of sexual relations along the lines of medical procedures or the sale of a house, then the person must disclose information that might be material to the other party’s decision.”<sup>74</sup>

The explanation of s. 69 includes within deceitful means “marrying after suppressing identity”. The key reasoning here is that the consent of the victim under pretenses relating to the identity of the person cannot be termed voluntary. The term “identity” in explanation is undefined, creating ambiguity about what constitutes “suppressing identity” and whether all nondisclosure vitiates consent, making the scope excessively wide, encompassing attributes like religion, caste, marital status, profession, gender, sexual orientation, or even personal beliefs. Can all identity nondisclosures have equivalent impact on consent?

Excessive extension of criminal law to reduce vulnerability of one section can lead to the unnecessary expansions of state intrusion, and, in context of deceptive sex, trying to secure from all form of deception and interferences in decision making seems, not only will it create challenges in application and concerns about privacy, but also poses a danger that extending

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<sup>71</sup>Anuradha Gandhi and Isha Sharma, “What is Quid Pro Quo Sexual Harassment?” *SS Rana & Co.*, Dec. 6, 2024, available at: <https://ssrana.in/posh-law/articles/what-is-quid-pro-quo-sexual-harassment/> (last visited on May 12, 2025).

<sup>72</sup>Chloë Kennedy, “Criminalising Deceptive Sex: Sex, Identity and Recognition” 41(1) *Legal Studies* 91-110 (2021).

<sup>73</sup>*Ibid.*

<sup>74</sup>*Supra* note 63.

criminal liability this far would, perversely, serve to increase individuals' feelings of vulnerability. Not all "active" identity deceptions produce the same effect because some deceptions will, as a matter of "commonsense", not have the effect of vitiating consent.

For instance, concealment of marital status during marriage negotiations fundamentally alters consent. As mentioned by the standing committee in its recommendation to include concealing one's marital status. This seems to have been influenced by a significant number of court cases where individuals have deceived multiple women into marrying them or engaging in sexual intercourse by hiding the fact that they are already married.<sup>75</sup>

But should the deception relating to education qualification or financial status, or, let's say, nowadays, the person also identifies with a political or religious view, be counted? Similarly, deception as to the age, race, nationality, or ethnicity? Someone with a strong racist or xenophobic nationality or ethnicity may look at it as identity suppressing and feel deceived? John Rason Spencer argues that recognizing deception based on race or religion could encourage racist tendencies. However, he concludes that even racists are entitled to the protection of their sexual autonomy. Gross argues that protecting the sexual autonomy of women is a worthy goal to pursue. However, he ponders over the fact that the state's punitive power could also be used in such a situation to reinforce dominant narratives of hetero normativity, heterosexuality and loyalty to the state.

In the context of drawing an objective line about deception, considering so much of individual subjectivity within the law seems problematic to countenance such a perspective. Minor omissions, like educational qualification or financial status, age, etc., which are less likely to negate autonomy, may not be appropriate for criminalization. By leaving the term "identity" undefined, the explanation under the section will broaden the scope and risk criminalizing trivial deceptions.

Hence, an important question that arises is what kind of deception should generally be punishable. This line-drawing effort is important to limit the kinds of deception that may lead to criminal liability; it operates to restrict the categories of deceptive sex that are deemed punishable on an objective basis.<sup>76</sup>

### **Distinguishing Deception from Mistake**

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<sup>75</sup>"Parliamentary Panel Proposes Making Concealing Marital Status for Sexual Activity an Offence", *The Law Advice*, Oct. 27, 2023, available at: <https://www.thelawadvice.com/news/parliamentary-panel-proposes-making-concealing-marital-status-for-sexual-activity-an-offence> (last visited on May 12, 2025).

<sup>76</sup>*Supra* note 72.

Another debatable question left by the section for academic discussion and discourse, other than its broad scope, is that in scenarios where the accused remains silent about their identity and the victim infers it from their actions without deceptive intent. Whether in such a situation it is to be seen as deception on the part of D or a mistake on the part of V. Before understanding the difference between deception and mistake, it must be clear that deception by the accused can be either active or passive. Active/direct deception involves misinforming, misleading, or otherwise manipulating a participant's perception of reality, while Passive/indirect deception occurs when certain information or identity facts are not given to participants intentionally.<sup>77</sup> In active and passive contexts, Herring argues that 'sexual partners' owe each other heightened standards of obligation of a fiduciary nature.<sup>78</sup>

What makes mistakes different from deception is that in deception, D is thereby culpably involved in bringing about V's false belief, a belief which D knows is not true, and then D exploits, producing a gain for D and a loss to V. In contrast, in mistake V holds a false belief; that belief is not caused by D, but rather formed by V unilaterally. The question that arises is whether D will be liable for not disclosing some of his facts. The key boundary that differentiates passive deception and mistake is very thin; ignorance of that boundary can lead to erroneous conclusions of deception in such cases.

For instance, if hiding the gender identity is covered under the section. If D is biologically female, identified as a transgender boy, during the sexual intercourse with V (a cisgender girl), if represented as transgender. Following the acts of penetration and subsequent disclosure of birth sex by D, V, files cases against D on the ground that she consented to the acts because she believed D to be a boy. In such a situation, when D, who is simply living as transgender boy, it was V who believed him to be a cisgender boy, but it was not D's behaviour that caused that belief. Should it be treated as a case of deception by suppressing identity or a mistake? In this situation, if mistaken sexual relations had been criminalized, liability would be turned on D, whether D knew or ought to have known about the V's mistaken belief about him. In *Mc Nally*<sup>79</sup> case, having the same facts where D in his appeal contended *inter alia* that deception as to gender identity does not undermine consent. The Court of Appeal rejected his claim. In doing so, the court failed to adequately address the

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<sup>77</sup>Deception in Psychology: Definition, Types & Research, *available at*:<https://study.com/academy/lesson/deception-definition-meaning-quiz.html> (last visited on May 12, 2025).

<sup>78</sup>Matthew Gibson, "Deceptive Sexual Relations: A Theory of Criminal Liability" 40(1) *Oxford Journal of Legal Studies* 82-109 (2020).

<sup>79</sup>*R v. McNally*, [2013] EWCA Crim 1051, (UK).

contrast between deception and mistake, where in its finding held that D had perpetrated active deception as to gender identity.

Even if in both deception and mistake V's autonomy is undermined but D cannot be held blameworthiness in both the scenario to the same extent. Deception is thus a more egregious basis for criminal liability than mistake. Hence, lack of clarity in the section regards what type of suppressing identity, whether active/ passive deception only, or also the mistaken belief of identity. Penalizing silence risks unfair accountability, violating the principle of intent-based liability. This is creating an assumption that there is no responsibility of the victim to verify facts, hence the explanation neglects the mutual duty of both parties.<sup>80</sup>

The vagueness and shortcomings of the legislation relating to the definition of "identity" and the lack of clarity on the aspect of "silence-based claims" enable misuse. It is also not in line with the Harm principle, which requires that criminal law is justified only for the conduct causing or risking significant harm to others or society.<sup>81</sup> Not all identity suppression meets this threshold. This gives rise to significant concerns about over criminalization. Ashworth points out that laws should be precise, enabling individuals to understand what conduct is prohibited.<sup>82</sup> An undefined term "identity" fails this test, as individuals cannot predict whether withholding minor details or significant facts constitutes a crime. The principle of minimalism posits that the criminal law should be the last resort, reserved only for conduct causing significant harm that civil or regulatory mechanisms cannot address. If some wrongful act can be addressed through a civil remedy, then it should not be criminalized unnecessarily, as making an act criminal in nature cannot be the solution; rather, it only increases the number of criminals in society.<sup>83</sup>

The Hindu Marriage Act, 1955,<sup>84</sup> provides comprehensive remedies for identity-related misconduct in marriage. Under S. 12(1)(c)<sup>85</sup> of the act allows annulment of marriage where the consent as to the performance of marriage was obtained by force or by fraud. In cases of

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<sup>80</sup>*Supra* note 78.

<sup>81</sup>The British philosopher John Stuart Mill (1806 - 1873) framed what is the harm principal definition to coincide with Mill's utilitarianism philosophy. The harm principle is the principle that only those actions that create harm should be prevented.

<sup>82</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, UK, 10<sup>th</sup> edn., 2022).

<sup>83</sup>Andrew Ashworth, "Is the Criminal Law a Lost Cause" in Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, Oxford and Portland, 2013).

<sup>84</sup>The Hindu Marriage Act, 1955 (Act no. 25 of 1955).

<sup>85</sup>*Id.*, S. 12 (1)(c); Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely: that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent.

fraudulent representation due to which consent was obtained, it includes the two aspects, one relating to the nature of any of the ceremonies performed during such marriage. Secondly, any material or significant fact or circumstance concerning the other party to the marriage, who will be a respondent in the petition. The presence of a civil remedy for any wrongful act relating to civil life.

Such an extension of criminal liability violated the principle of fair labelling, which ensures that offenders are labelled and punished in proportion to their wrongdoing. According to Ashworth, this principle requires that “widely felt distinctions between kinds of offences and degree of wrongdoing are respected and signaled by the law, and the offences are subdivided and labelled to represent fairly the nature and magnitude of law breaking”. The vague terminology used under S. 69 explanation risks mislabeling minor acts as serious crimes. For instance, misrepresenting age or profession potentially actionable under the Hindu Marriage Act, does not warrant criminal censure, as it lacks the public harm justifying state coercion.

Apart from the framing issue in the explanation, it is gender specific language, framing men as perpetrators and women as victims, that raises significant ethical and constitutional concerns. This assumption is rooted in patriarchal norms, excluding male, transgender, or non-binary victims and assuming that females cannot be perpetrators. Ignoring the very possible scenario where a woman can conceal her identity relating to marital status or religion, caste, or class for inducing a man’s consent, despite the ethical equivalence. Similarly, making the transgender individual void of any remedy if he/she is being deceived about a partner’s gender identity.

Similar scenarios are equally possible for other genders. For instance, a married woman can hide her identity from her male partner or her caste, religion, or another important identity from him. The law is based on the wrongful presumption that it is impossible from the other side. As John Locke said, law should be egalitarian, but extending this protection only to women defeats the whole purpose of art.14 of the Indian Constitution.<sup>86</sup>

## V. Conclusion

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<sup>86</sup> Soorya Gayathri, “A Call for Gender Inclusivity in Criminal Laws” *Legal Service India*, available at: <https://www.legalserviceindia.com/legal/article-19457-a-call-for-gender-inclusivity-in-criminal-laws.html#:~:text=Like%20%5B3%5DJoh%20Locke%20said,that%20is%2C%20right%20to%20equality.> (last visited on May 12, 2025).

Although the traditional law in particularly in cases of sexual offences, often assumes a male perpetrator and female victim, potentially excluding non-binary, transgender, or male victims. However, reports and cases provide those other genders, including men and third gender persons, can also be victims in cases involving false promises of marriage, deceitful means through false promises of marriage and marrying by suppressing identity. Although the registration of such cases remains negligible due to several factors, adopting a gender-neutral approach ensures that the law acknowledges and protects all potential victims, irrespective of gender. Several nations have adopted gender neutral laws to address sexual offences, including deceptive sex, reflecting a commitment to inclusivity and equality. For instance, the UK has made significant strides towards gender neutral laws, particularly in its Sexual Offences Act 2003, which defines sexual offences in gender neutral terms.

This inclusivity not only reinforces the state's commitment to safeguarding every individual but also promotes gender equality by recognizing the vulnerabilities of all genders. Furthermore, gender gender-neutral framework may reduce the potential misuse of the legislation by broadening its scope and preventing biased application, thereby enhancing the law's credibility and effectiveness.

S. 69 was enacted to safeguard women from being deceived by deceptive promises, particularly related to marriage. However, marred by some legal infirmities, mainly the judicial standards for availing the benefit of the section, pose significant challenges for the victims. The causation as discussed in the paper, requires proving the consent obtained solely based on promise, which is exceedingly difficult except in cases where the victim had no emotional attachment or affection towards the accused and was induced solely by the promise and the accused had no intention to fulfill, merely for purpose of sexual gratification (as seen in scenario first). Such cases are appropriate to be labelled as sexual offences and labelling the accused as a sexual offender, as the victim in such cases not only suffers emotional and mental harm due to the breach of trust, but also her sexual autonomy was not exercised, and her agency was undermined by such a deceptive promise.

Conversely, in cases where love, affection, or mutual emotional bonds exist, the higher standard often renders it inapplicable. Moreover, when marriage is not fulfilled, and the court looks at some social factors such as caste, religion, status, complexion, etc., as intervening circumstances and calls such an act a "breach of promise". In such cases, it is not appropriate to label the accused as a sexual offender as the consent and act was mutual; here cannot say that the victim's agency and sexual autonomy were undermined. labelling the accused as a sexual offender will be against the principle of fair labelling and proportionality. However, in

such cases, the victim had emotional and mental damage due to the breach of trust and felt cheated.

For the second type of scenarios, the offence covered under s. 69 can also satisfy the criteria for cheating under BNS. Even though the offence of cheating is situated in chapter XVII,<sup>87</sup> it is not restricted to offences where there is delivery or retention of property. The offence can be used as an alternative charge in cases of false promise to marriage or deceptive sex, if D intentionally tricked V into doing or omitting to do anything that V would not do or omit to do otherwise, which causes or is likely to cause damage or harm to V in body, mind, reputation or property.

For instance, in *Bipul Medhi* case,<sup>88</sup> the court held that when a woman is induced to part with her chastity or virginity, which is her most valued possession, the person who so induced the woman by making false representations would be liable for punishment under s. 417 IPC<sup>89</sup>. To put it differently, had such a victim not been deceived, she would not have permitted a sexual act or would have refrained from allowing such a sexual act. In *Mir Wali Mohammad* case,<sup>90</sup> where the petitioner consented to have sexual intercourse with the petitioner based on the alleged false promise of marriage. However, her petition for rape allegation was not made out based on the reasoning that although she gave her consent due to the false promise of marriage, she knew what was being asked from her and what she was giving her consent for, therefore, it amounts to cheating.

At the outset, after looking at all the cases, the reasoning of courts while determining whether the case is “false promise to marriage” or “breach of promise”, is using prisms of public morality, decency, and modesty, social factors to adjudicate sexual offence. There is a need to train judicial officers to adjudicate sexual offences based on an unbiased assessment of facts to determine whether consent was vitiated based on such deception or promise. This is to be done while keeping in mind that the goal of such laws is to uphold the concept of individual sexual autonomy and bodily integrity. Judicial officers must be dissuaded from using their courtroom as a bully pulpit to propagate their personal beliefs regarding society and sexuality or seek to protect societal values or morality through their decision.

It is important to recognize that people’s subjective experience of the same conduct can be different. For instance, in all three scenarios where the act can be brought under the said

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<sup>87</sup> The Bharatiya Nyaya Sanhita, 2023, Chapter XVII, Offences Against Property.

<sup>88</sup> *Bipul Medhi v. State of Assam*, (2007) 2 GLR 200.

<sup>89</sup> The Indian Penal Code, 1860 (Act No. 45 of 1860), s. 415, Now in The Bharatiya Nyaya Sanhita, 2023 (Act No. 45 of 2023), s. 318.

<sup>90</sup> *Mir Wali Mohammad @ Kalu v. The State of Bihar*, 1991 (1) BLJR 247.

provision, the victim might feel cheated but might not regard it as a violation of her sexual autonomy, and certainly will not call it an offence of rape. She might want some sort of compensation or even recognition of her feelings of being deceived, which need not be translated into the incarceration of the deceiver. The present provision does not give recognition to this subjectivity of women. For instance, in the *Bodhisattwa Gautam* case,<sup>91</sup> the petitioner had been in a long relationship on the pretext of a promise to marry. Despite her petition only asking for maintenance against her partner, yet the supreme court constructed this as a case of rape. The court is eventually rolling back the civil remedy into criminal law and is getting sexualized.

The conviction rate in “promise-to-marry” cases is almost negligible, partly because of how courts have interpreted the law. In light of this trend, the long, drawn-out trial process only makes a spectacle out of the intimate relationship of the parties to the proceedings. A civil remedy opens up a possibility whereby a person can be held responsible for harm or damage they cause did not foresee and did not directly cause. While the evidential burdens under criminal liability may be too onerous, leaving women bereft of recourse, a civil remedy would provide compensation for a harm suffered, irrespective of additional requirements like proof of false intent from the beginning. As in civil law, the burden of proof is lower, requiring a preponderance of probabilities. For the deceitful sex or marrying by suppressing identity, where in a tort of intentional misrepresentation, while there exists a requirement of materiality and justifiable reliance, for the misrepresentation to be material, it need only be a substantial factor which influences the reliance.

One of the most severe criticisms of s. 69 is that it is vague on the definition of key terms such as “concealment of identity” and “deceitful conduct.” What is meant by “identity” is not defined; is it their religious identity, social status, economic status, or something else? Vagueness of this sort leaves the law vulnerable to abuse and arbitrary application, with room for legal inconsistency and discriminatory treatment. Such vagueness invites subjective interpretation, and with the consequences, results in potential misuses. Under the explanation of the section, it criminalises sexual intercourse induced by false promises relating to employment or promotion. However, here the term “employment” in the provision is narrowly construed, primarily encompassing traditional job offers or promotions within a formal employment structure. This limited interpretation excludes deceptive promises related to tenders or contracts for service work, which are increasingly common in a modern

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<sup>91</sup>*Bodhisattwa Gautam v. Subhra Chakraborty*, 1996 SCC (1) 490.

economic context. As we saw based on the recent Hema Committee Report, such false promise cases are increasing in the film industry, but in the film industry, it is not an employer-employee relationship; it is contractual basis. Due to such ambiguity and lack of proper explanation, it raises a question whether the section deals with such false promises or not. To address this lacuna, the legislature must broaden the definition of ‘employment’, or either the explanation can be removed in entirety.

Revising s. 69 is essential to address critical ambiguities that could undermine its intended purpose. The following proposed draft is an attempt to establish a clear and distinct offense for sexual intercourse obtained by deceit which ensures it is differentiated from rape while closing the problematic loophole related to an individual’s marital status.

**S.69- Sexual intercourse by employing deceitful means etc.**

Whoever, by deceitful means or by making a promise to marry another person without any intention of fulfilling the same, has sexual intercourse with such person, 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.

Exception: For the purposes of this section, this offense shall not apply to persons who are lawfully married.

Thus, the path forward requires courage to move beyond traditional assumptions and embrace inclusive, nuanced approaches to justice. The victims of deceptive conduct, regardless of gender, deserve nothing less than comprehensive legal protection that respects both their experiences and their agency.