

‘CONSENT’ IN FALSE PROMISE TO MARRY: DECEPTIVE SEX AND THE LEGAL KNOT

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Promise to marry cases involves instances where the prosecutrix alleges that her consent to sex is vitiated since it was given under a belief of the misrepresentation made by the defendant that he would marry her in spite of him having no such intention to do so from the start. This note adds to the discourse surrounding false promise to marry cases by assessing the harms inflicted by such deceptive acts and exploring whether a civil remedy could effectively center women's agency within this context. The note challenges the prevailing notion that ‘vitiating of consent’ should serve as the litmus test for addressing these cases as this criterion falls short in capturing the nuanced dynamics inherent to such situations and perpetuates harmful stereotypes and outdated norms. Furthermore, a careful analysis of Clause 69 within the proposed Bharatiya Nyaya Sanhita Bill, 2023, reveals potential shortcomings associated with criminalisation, such as intrusive legal proceedings and the possibility of misuse. The note then looks at the possibility of a civil remedy highlighting certain advantages and disadvantages. The overarching aim remains the elevation of women's subjectivity in both the perception of such conduct and the ultimate outcomes of these cases.

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I. INTRODUCTION

False promise to marry cases, also called as ‘breach of promise to marry’ or simply as ‘promise to marry’ is a body of case law¹ that has posed a distinct conundrum to feminists with

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¹ Uday v. State of Karnataka, (2003) 4 SCC 46; Deepak Gulati v. State of Haryana, (2013) 7 SCC 675.

strong detractors and supporters on both sides of the debate.² These cases follow a standard script wherein the prosecutrix makes the claim that the defendant misrepresented himself and promised that he would marry her, even though he had no intention of doing so from the beginning, so her consent to have sex with him is vitiated.

The debate occurs at various levels of analysis. Do we see such cases as a violation of sexual autonomy of women or as a State imposition of patriarchal norms which considers sex as legitimate only within the bounds of marriage? Is rape law the appropriate legal response or would such acts require a lesser sexual offence or a non-sexual civil alternative?³ Ultimately, the question can be foregrounded as – is a false promise to marry an act which warrants State intrusion? This becomes especially pertinent in the present context considering that Clause 69 of the new Bharatiya Nyaya Sanhita Bill, 2023, ('BNS Bill') creates a new category of offenses penalising "sexual intercourse by employing deceitful means".⁴

In this note, we have sought to argue that criminalisation is not the best way to deal with such cases. In Part II, we analysed whether these acts constitute harm by considering existing scholarship on 'sex by deception' and its relevance to the concept of 'false promise to marry'. Part III of the note investigates the current legal response to such cases, which involves categorising them as 'rape', while also considering how societal norms impact legal judgments in this area. The part also distinguishes the current response with the approach to criminalisation taken by BNS Bill in creating a new category of offences separate from rape and speculate what changes this could bring. Thereafter, under Part IV, the note seeks to examine alternative legal approaches and assess their respective merits and drawbacks when it comes to addressing promise-to-marry cases. Part V of the note offers concluding remarks.

II. SETTING THE STAGE: THE HARM THAT PROMISE TO MARRY INFLICTS

A promise to marry suit deals with a specific kind of deceptive encounter which has been penalised as rape in India in certain cases. However, such cases cannot be considered as rape unless it can be proven beyond reasonable doubt that the promise was false from the very start and that the woman's consent was thereby obtained deceptively. This part undertakes a critical analysis of the same by delving into the concept of 'sex by deception' offences, and the concept of consent therein.

A. UNDERSTANDING 'SEX BY DECEPTION' OFFENCES

² Neetika Vishwanath, *The Shifting Shape of Rape Discourse*, Vol. 25(1), INDIAN JOURNAL OF GENDER STUDIES, 1 (2018) (argues that cases on false promise of marriage hijack the rape discourse by patriarchal familial and legal forces); Flavia Agnes, *What Makes up the Majority of Cases of Rape under Promise of Marriage? Here's a Reality Check*, TIMES OF INDIA, February 12, 2016, available at <https://timesofindia.indiatimes.com/blogs/toi-edit-page/what-makes-up-the-majority-of-cases-of-rape-under-promise-of-marriage-heres-a-reality-check/> (Last visited on August 17, 2023) (argues in favour of this line of prosecution on account of the socio-economic vulnerabilities of the prosecutrix involved).

³ While there have also been instances where a false promise to marriage have been prosecuted under the provision of cheating under §417 of Indian Penal Code, 1860, our discussion on this regard will be limited to its prosecution as rape; *See*, Bipul Medhi v. State of Assam, 2006 SCC OnLine Gau 67; Ravi v. State, 2010 SCC OnLine Mad 1824.

⁴ The Bharatiya Nyaya Sanhita, 2023, 121 of 2023, Cl. 69.

‘Sex by deception’ is used to describe the sexual intercourse which occurs when one party is operating under a false belief, typically induced by the deceit of the other party.⁵ ‘Deceit’ can refer to an extensive range of lies that a person could make to obtain sex – from lies about gender,⁶ use of contraception,⁷ or having sexually transmitted diseases⁸ to even false professions of love or a false promise of marriage.⁹ Such acts raise questions amongst courts and commentators about whether or not it should attract criminal punishment and why. There is wide disparity between how different countries have chosen to deal with such acts with a tendency towards criminalisation of some such acts amongst common law countries and a tendency to avoid criminalisation altogether in some European jurisdictions.¹⁰

Those calling for all deception to be criminalised argue that ‘any’ deception would violate the sexual autonomy of the individual.¹¹ The idea that ‘all’ deceptions or failures to disclose information that could have a bearing on a person’s decision to have sex ought to be penalised is an unattractive proposition.¹² For instance, consider a scenario in which ‘D’ employs deceit to misrepresent their alma mater to ‘P’ with the intention of engaging in sexual activity. The contention that such a falsehood concerning one’s educational background merits criminalisation or any form of State intervention is likely to evoke discomfort among a majority of individuals. Apart from a few scholars who argue thusly, most argue that the law should proscribe only certain kinds of deception.¹³ Therefore, the scholarship in this area is not merely restricted to whether sex by deception constitutes a wrong or not but also considers questions like what ‘kind’ of deception constitutes a violation.

The traditional approach taken is to distinguish between fraud *in factum* and fraud in the inducement.¹⁴ Fraud *in factum* refers to fraud in the very nature of the act, i.e., when the victim is unaware that sexual intercourse, any sexual act has taken place. For instance, when a gynecologist tells a patient he needs to insert a medical instrument into her vagina and then inserts his penis instead,¹⁵ or when a doctor misrepresents sex as a surgical operation to cure fits¹⁶ or cases

⁵ Chloe Kennedy, *Criminalising Deceptive Sex: Sex, Identity and Recognition*, Vol. 41(1), LEGAL STUDIES, 91 (2021).

⁶ 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.

⁷ Assange v. Swedish Prosecution Authority, [2011] EWHC 2849 (Admin).

⁸ Regina v. Cuerrier, 162 D.L.R. 4th 513 (1998).

⁹ Generally, in the Anglo-American jurisdictions, due to their strong anti-heartbalm sentiment, courts have been reluctant to criminalise sexual intercourse when it has been obtained under misconception about feelings of love. However, there have been several lawsuits brought seeking remedy from a ‘lying lover’; See generally, Parker v. Bruner, 686 S.W.2d 483, 485 (Mo. Ct. App. 1984) (sexual consent procured on repeated and false promises of marriage), State of Israel v. Kashur, CrimA 5734/10 (2012).

¹⁰ Amit Pundik, *Coercion and Deception in Sexual Relations*, Vol. 28(1), CANADIAN JOURNAL OF LAW & JURISPRUDENCE, 98 (2015).

¹¹ SUSAN ESTRICH, REAL RAPE, 103 (Harvard University Press, 1987); 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 Kennedy, *supra* note 5, 93.

¹³ *Id.*; STUART GREEN, CRIMINALISING SEX: A UNIFIED LIBERAL THEORY, 110-115 (Oxford University Press, 2020); David Bryden, *Redefining Rape*, Vol. 3(2), BUFFALO CRIMINAL LAW REVIEW, 468-475 (2000); SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE, 198 (Columbia University Press, 2009).

¹⁴ Nora Scheidegger, *Balancing Sexual Autonomy*, Vol. 22(5), GERMAN LAW JOURNAL, 775 (2021).

¹⁵ People v. Minkowski, 204 Cal. App. 2d 832 (1962).

¹⁶ R v. Flattery, (1877) 2 QBD 410.

of spousal impersonation.¹⁷ Fraud in the inducement considers cases where the plaintiff is aware of the nature of the act but has been induced into sexual intercourse on the basis of a lie.¹⁸ For instance, having sex by making a false promise to marry is generally taken under the umbrella of fraud in inducement.

Generally, common law jurisdictions such as Canada, England and the United States of America, which recognise the offense of sex by deception penalise only the acts falling under fraud *in factum*.¹⁹ Within the larger category of fraud in the inducement, there are different approaches taken by scholars as to what kind of lies would vitiate consent. This again can be broadly divided into those arguing that only certain enumerated false beliefs vitiate consent (objective dealbreakers)²⁰ and those arguing that deception about any information which would be material to a person's decision to have sex would *prima facie* vitiate consent (subjective dealbreakers).²¹ Applying the insights of the brief discussion above, the authors move on to the next argument that it is theoretically erroneous to state that consent is vitiated in promise to marry cases.

B. LEGAL DISTINCTIONS AND CONSENT

In promise to marry cases, the contention is that since consent was obtained on a fraudulent basis, which is the false promise to marry, this does not amount to consent. Within the framework of objective dealbreakers, many scholars do not regard a promise to marry as a form of deception that nullifies consent. This perspective is shaped by the perception of the harm involved as relatively insignificant, the challenges in providing evidence, and the concern of reinforcing regressive notions pertaining to female sexuality.²² Additionally, we argue that extending the reasoning of those advocating for subjective dealbreakers to promise to marry cases is faulty for three reasons. *Firstly*, it is based on a reductive understanding of consent. *Secondly*, these scholars merge consent in property offenses with consent in romantic relationships and *thirdly*, this reductive understanding does disservice to the agency of women.

Firstly, construing that consent stands negated in promise to marry is based on a reductive understanding of what consent entails. 'Consent' means voluntary informed consent. Consent is voluntary if not induced by force and informed if it is based on true information about

¹⁷ *Boro v. Superior Court*, 210 Cal. Rptr. 122 (Ct. App. 1985) 125 (stating that spousal impersonation is fraud in the factum and therefore rape).

¹⁸ Scheidegger, *supra* note 14.

¹⁹ *Id.*, 777; For a general description regarding England and the United States of America, see Jed Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, Vol. 122, YALE L. J., 1395-1399 (2013); Pundik, *supra* note 10, 98-99.

²⁰ Kennedy, *supra* note 5 (arguing that only acts which would result in identity non-recognition should be held to vitiate consent); GREEN, *supra* note 13 (advances a view of criminalising only those deceptions about a 'core matter' which includes, *first*, fraudulent medical procedure, *second*, spousal or other impersonation, and *third*, misrepresentations regarding the offender's sexually transmitted disease); R. Williams, *Deception, Mistake and Vitiating of the Victim's Consent*, Vol. 124, L. Q. REV., 158 (2008); A. WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* (Cambridge University Press, 2003) (applying adversarial, contractual, friendship and fiduciary models of sexual relationships to guide such cases).

²¹ Herring, *supra* note 11; Tom Dougherty, *Sex, Lies, and Consent*, Vol. 123(4), ETHICS, 719 (2013).

²² GREEN, *supra* note 13; Bryden, *supra* note 13 (argues against the revival of seduction in breach of promise to marry cases); WERTHEIMER, *supra* note 20 (argues that lying about intentions, as in promise to marry cannot easily be distinguished from those that are 'puffing' or 'storytelling').

the nature of the act and identity of the person requesting consent.²³ Further, the consenting party must understand what they assent to and should be aware of the generally known consequences of partaking in the activity. For instance, children are unable to consent to sex since they are not able to know what to expect from the encounter. An informed consent, however, does not require one to know everything about the type of act that one is consenting to or everything about the person requesting the consent.²⁴

Illustratively, consider consent to a surgical operation. While one may understand the risks involved, it is not possible for a layperson to understand the precise tools, procedures and techniques which would be used. This lack of perfect information, however, does not negate consent. Similarly, consent in cases of promise to marry is not negated simply because the prosecutrix is not aware what was on the mind of the deceiver when he made his promise since such information would be impossible to glean. Consent given in light of such imperfect information does not make it any less informed nor does it negate it. Just because one is not able to decisively understand the intention of person making the promise, i.e., whether its fraudulently intended or genuine, it does not make the consent any less informed since such information is almost impossible to glean.

Moreover, in such cases, the victim's sexual autonomy is also not negated. While to successfully exercise one's sexual autonomy, a person can always lay down conditions or various parameters which describe the bounds of her consent, this should not extend to 'future-facing parameters', i.e., where 'P' defines the object of her consent by reference to events subsequent to the sexual act, for instance that sex with 'D' will lead to marriage.²⁵ We would argue that allowing 'P' to make subsequent events dictate the validity of consent given beforehand is counter-intuitive. It seems absurd that consent which had been given could be revoked post fact just because a promise made prior is not carried out subsequently.²⁶ If 'D' can then escape punishment by upholding his side of the bargain, surely in such cases, one is not punishing deception but rather the non-happening of the event? As Bryden argues "The women were not averse to sleeping with the defendant provided that they received the agreed *quid pro quo*".²⁷ It then becomes counter-intuitive to argue that consent did not exist in such cases.

Secondly, consent in promise to marry cases cannot be conflated with consent in property offenses. In India, the Supreme Court is emphatic that the expression 'without her consent' in §375 of the Indian Penal Code, 1860 ('IPC') references "an act of reason, reached after deliberation".²⁸ But scholars of subjective dealbreakers borrow their understanding of consent from that in property offenses.²⁹ This argument is premised on the logic that if 'property' were to be substituted for 'sex', such a deception would be criminal in law.³⁰ Therefore an intentional misrepresentation of a material fact should vitiate consent for sexual relations just as it would vitiate consent for transactions involving property. For instance, if for person 'P', love is material

²³ Berit Brogaard, *Sex by Deception* in OXFORD HANDBOOK OF MORAL PSYCHOLOGY, 694 (Manuel Vargas & John M. Doris, 2022).

²⁴ *Id.*

²⁵ Mark Dsouza, *False Beliefs and Consent to Sex*, Vol. 85(5), THE MODERN LAW REVIEW, 1191 (2022).

²⁶ *Id.*

²⁷ Bryden, *supra* note 13.

²⁸ State of U. P. v. Chottey Lal, (2011) 2 SCC 550.

²⁹ ESTRICH, *supra* note 11, 102-103; Herring, *supra* note 11, 511.

³⁰ *Id.*

to consent, a false proclamation of love by ‘D’ would constitute a vitiation of consent to sex. But the understanding of property offenses should not inform what one understands this ‘act of reason’ to be. Such a transposition is faulty as the presence of sexual desire in sexual and romantic relationships go beyond what can be captured by such juridical models. As Butler characterises it,

“Sexual consent can involve much less active terms: being moved, being curious, finding oneself open to what is unknown, impressionable, vulnerable, surprised, intrigued or even moved along and drifting, wondering what will arrive, relinquishing, ceding.”³¹

While it is easy enough to prove that a person has been induced to part from their property solely on the basis of the fraud, there might be a wide array of motivations ranging from flattery to feelings of attraction and romantic love or even curiosity prompting the consent to sex. ‘P’ might consent to sexual intercourse because she is curious about sex, or because she is in love with the deceiver. It is not possible to establish conclusively that the deception is the sole reason why she has consented to sex. Therefore, using consent in the manner as proposed by scholars of subjective dealbreakers and juxtaposing it against the standard in property offenses as the touchstone to decide if a wrong has been done is clearly fallacious. This is because sexual activity is clearly different from commercial transactions and the same rules cannot be applied for both in the same manner.

Thirdly, the argument that consent is vitiated in promise to marry cases reduces the woman into an agency-less figure and does not provide recognition to her as a desiring subject. The statutory definition of consent as under §90 of the IPC recognises a certain degree of “relationality and mutuality in sexual contacts”.³² A relational view of consent means taking into account the subjectivities of both the men and women.³³ Promise to marry cases reduces the women’s subjectivity to passive helplessness while seeing men as the only responsible agent for the act. It constructs the female subject as an asexual being who has no interest in sexual intercourse other than as a means to secure marriage. This reductive logic proceeds on the assumption that deception has destroyed all value in the sexual intercourse which a woman has engaged in as a participant. Therefore, characterising consent in such scenarios as purely being elicited on a ‘promise to marry’ is a reductive understanding of consent which does disservice to the sexual agency of a woman. It is important to note here that categorising such instances as consensual does not mean that the deceived party suffered no significant violation or that the deception is morally permissible.³⁴

The authors acknowledge that the application of these principles can be complex, especially in contexts where individuals may not have the capacity or agency to articulate their boundaries. In more conservative backgrounds, rural areas, and even suburban spaces, the ability to establish such parameters may be limited due to cultural norms and social dynamics, which can hinder open discussions about sexual autonomy and consent. Additionally, the absence of a clear

³¹ Judith Butler, *Sexual Consent: Some Thoughts on Psychoanalysis and Law*, Vol. 21(2), COLUMBIA JOURNAL OF GENDER AND LAW, 19 (2011).

³² Latika Vashist, *Law, Violence and Sexual Consent* in RETHINKING LAW AND VIOLENCE, 283 (Latika Vashist & Jyoti Dogra Sood, 2020).

³³ *Id.*

³⁴ Emily C. R. Tilton & Jonathan Jenkins Ichikawa, *Not What I Agreed To: Content and Consent*, Vol. 132(1), ETHICS, 127 (2021).

study elucidating the specific remedies that women seek raises critical concerns. Attempting to speak for them without a comprehensive understanding of their diverse experiences could set a dangerous precedent. Instances such as family pressure influencing the decision to file a rape case, as highlighted in Rupal Oza's work titled 'Sexual Subjectivity in Rape Narratives: Consent, Credibility, and Coercion in Rural Haryana', underscore the need to recognise the multiplicity of voices within women's experiences.³⁵ It is imperative to place women's subjectivities at the forefront of these discussions. Therefore, in the absence of any empirical data, the authors sought to examine the theoretical underpinnings of such cases to specifically look at what harm results from this deception.

C. HARMS AND DEBATING STATE INTERVENTION

Considering that consent here then becomes a fallacious standard in assessing if a harm has occurred, it is worth assessing if it is possible to conceptualise other kinds of injuries a deceptive promise to sex could inflict on the prosecutrix. One possible harm of such a deception could be an exposure to venereal disease or an increased risk of infection. For instance, suppose the 'P' consented to unprotected sex with 'D', who had misrepresented himself as unmarried, on his false promise of marriage. Subsequently, she comes to realise that 'D' is in fact married and had deceived multiple women in the same way. This exposes 'P' to not only a greater risk of contracting a sexually transmitted disease but also enormous anxiety, fear and distress. Another possible harm, which is much more common, is premarital pregnancy, the associated social stigma and attendant physical risks. While there is a considerable dearth of statistics on the subject, Flavia Agnes, a leading criminal lawyer, highlighted that many of the women who in such cases have been disowned for engaging in premarital sex, find themselves penniless and pregnant.³⁶

Another possible harm which is implicit in the prosecution of 'false promise to marry' cases is the lost opportunity for marriage for the prosecutrix resulting from the loss of virginity.³⁷ For instance, consider how the court in one instance invokes the consequence of such an act which "not only casts stigma on the reputation of a girl but spoils future prospects as well".³⁸ The prevailing social and sexual morality makes premarital sexual experience and/or single motherhood a devastating social injury constituting an obstacle to a women's chance to work and to marry.³⁹ Apart from problematic notions entwining honor and chastity of women, such prosecutions construct women as 'sexual property' with high purchase being placed on their chastity.⁴⁰ Compensation for this violation of sexual property then becomes restoration of women to married-ness. Instead of perpetuating such norms, law's function here should seek to delegitimise antiquated norms. Therefore, giving purchase to the idea that it is reprehensible to deceive to seduce a virgin outside the bounds of marriage is a highly misogynistic and anachronistic norm that must be discontinued in its present form.

³⁵ Rupal Oza, *Sexual Subjectivity in Rape Narratives: Consent, Credibility, and Coercion in Rural Haryana*, Vol. 46(1), SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY, 113-117 (2020).

³⁶ Agnes, *supra* note 2.

³⁷ Preeti Pratishruti Dash, *Rape Adjudication in India in the Aftermath of Criminal Law Amendment Act, 2013: Findings from Trial Courts of Delhi*, Vol. 4(2), INDIAN LAW REVIEW, 11 (2020).

³⁸ Arjinder Singh v. State of Punjab, 2016 SCC OnLine P&H 8606.

³⁹ *Id.*

⁴⁰ SRIMATI BASU, THE TROUBLE WITH MARRIAGE, 165 (Feminist Studies, 2011).

Apart from tangible physical harm one can also consider the serious emotional and psychological harm caused to a person who is tricked into having sex with another. For instance, some scholars argue that sex involves intimacy and trust, and therefore, heightened obligations of fiduciary nature.⁴¹ Indeed, it is argued that psychological and emotional injuries are the most harmful aspects of deception.⁴² Research and studies conducted in the West also shows how deception erodes trust and causes lifelong emotional scars and permanent pain.⁴³ It is certainly true that law, especially in India confers less importance to concerns of emotional security than financial or physical security. Moreover, as Posner argues, lies in other social contexts are not crime.⁴⁴ These arguments are absolutely hard to digest and they sit uneasily.

At this juncture, it is important to also understand the notion of ‘harm’ which becomes acceptable. It is not only the tangible harm that should be penalised or remedied with. The intangible harms depicted by promise to marry cases in the form of emotional damage and psychological wounds to a person is enough in itself to be qualified as ‘harm’. Does triviality of many social lies mean that her experience can be discounted? Moreover, does the widespread use of deception in sexual encounters justify or make it any more morally palatable? These arguments seem to suggest a recourse to the dictum of *caveat amator*, i.e., lover beware. But the question to ask here now also becomes, is this a loss which requires any redressal? More importantly, is this an area which we need to police via state intervention through criminal law? As commentators have argued, using the criminal law to reduce vulnerability can indeed lead to uncritical expansions in state punitivity.⁴⁵

In the next part the authors will explore how the prosecuting ‘promise to marry’ cases as rape have led to a whole host of problems and perpetuates misogynistic stereotypes and problematic narratives of honour and chastity.

III. THE CRIMINAL APPROACH TOWARDS PROMISE TO MARRY

In this part, we will delve into the existing legal framework and jurisprudence in India regarding cases involving deceptive promises to marry. This will involve an exploration of the legislation and case law that has shaped the current approach to addressing such situations. Subsequently, the part will focus on the proposed BNS Bill and assess its efficacy in dealing with such cases of deceptive promises to marry.

A. CURRENT LEGAL FRAMEWORK AND JURISPRUDENCE

In India, promise to marry cases have been prosecuted as rape. This has been done by a judicial interpretation of what sex “without consent” would constitute through a joint reading

⁴¹ Herring, *supra* note 11, 192.

⁴² JILL HASDAY, *INTIMATE LIES AND THE LAW*, 90 (Oxford University Press, 2019).

⁴³ Deana Pollard Sacks, *Intentional Sex Torts*, Vol. 77, *FORDHAM LAW REVIEW*, 1071 (2008); Bella M. DePaulo et al., *Serious Lies*, Vol. 26, *BASIC AND APPLIED SOCIAL PSYCHOLOGY*, 162 (2004); H. Dan O’Hair & Michael J. Cody, *Deception in THE DARK SIDE OF INTERPERSONAL COMMUNICATION*, 203 (William R. Cupach & Brian H. Spitzberg eds., 1994).

⁴⁴ RICHARD POSNER, *SEX AND REASON* (Harvard University Press, 1992).

⁴⁵ PETER RAMSAY, *THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW*, 212-233 (Oxford University Press, 2012).

of §375⁴⁶ and §90⁴⁷ of the IPC. The definition of consent has been set out in Explanation 2 of §375 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”.⁴⁸ In addition to this, courts have also read §90 to interpret consent which defines it in negative terms and lists down various factors vitiating consent which includes fear of injury, or a misconception of fact and if the person committing the act knows or has reason to believe that the consent was given as a consequence of such fear or misconception.⁴⁹

In *Uday v. State of Karnataka*,⁵⁰ the court interpreted ‘misconception of fact’ as the promise to marry made by the accused to elicit assent of the prosecutrix without actually having any intention to marry her. Additionally, in *Deepak Gulati v. State of Haryana*,⁵¹ courts have further added a caveat that a false intention must exist from the very beginning. Therefore, the accused would only be convicted if the court reaches a conclusion that the intentions of the accused were *mala fide* and he had clandestine motives. Hence, the court creates a distinction between a breach of promise, where the accused account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do and a false promise to marry where the accused have clandestine motives from the very beginning.⁵² Additionally, it must be proved that there must be a direct nexus to woman’s consent and the false promise.⁵³ This means that the consent given by the woman to engage in sexual intercourse was ‘solely’ on the promise made by the accused to marry her.⁵⁴

From the outset, one can see that criminalisation raises serious unease. Criminalisation comes at the cost of massive State intrusion into the intimate lives of the litigants which is pried upon and dissected by the State.⁵⁵ For instance in several cases, courts delve into factors such as text messages exchanged,⁵⁶ the number of times the parties had intercourse,⁵⁷ where

⁴⁶ The Indian Penal Code, 1860, §375.

⁴⁷ *Id.*, §90.

⁴⁸ *Id.*, §375 Explanation 2.

⁴⁹ *Id.*, §90.

⁵⁰ (2003) 4 SCC 46.

⁵¹ (2013) 7 SCC 675, ¶90.

⁵² *Id.*

⁵³ Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608.

⁵⁴ Deepak Gulati v. State of Haryana (“There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the Accused, and not solely on account of misrepresentation made to her by the Accused, or where an Accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently.”).

⁵⁵ Wing-Cheong Chan, *False Promise to Marry and Other Forms of Sex by Deception in India and Singapore*, Vol. 34(1), NATIONAL LAW SCHOOL OF INDIA REVIEW, 82 (2023).

⁵⁶ Rebecca Samervel, *Lewd Messages to Fiance Don’t Insult Modesty*, TIMES OF INDIA, November 20, 2021, available at <https://timesofindia.indiatimes.com/india/lewd-messages-to-fiancee-dont-insult-modesty/articleshow/87809775.cms> (Last visited on November 7, 2023); Radhakrishan Meena v. State of Rajasthan, 2022 SCC OnLine Raj 3228 (“Learned counsel drew attention of this court towards the messages exchanged in between the petitioner and the complainant on WhatsApp platform and submitted that a bare perusal of the same would fortify the plea of the petitioner that a false case has been foisted upon him and attention was also drawn on several messages where the complainant gave warning and threats to the petitioner, if the accused did not agree to marry her.”).

⁵⁷ Uday v. State of Karnataka, (2003) 4 SCC 46.

the parties used to meet,⁵⁸ details of what they ate and drank,⁵⁹ and their intimate letters⁶⁰ which then become privy to scrutiny of the State and accessible to the public domain through court documents. Such trials create a spectacle out of the lives and romantic relationships of those it ostensibly protects. Additionally, scholars have asked whether a rape conviction in such cases with life imprisonment is a much too high a price to pay for an alleged lie in their sexual encounters.⁶¹

While in the earlier part, we had argued that such cases raise serious doubts on whether one can say consent has been vitiated, there are also concerns about how societal norms influence the construction of consent in such cases. For instance, how is it to be proved that a man had false intentions from the start,⁶² or that consent has been premised ‘solely’ on the promise of sex?⁶³ To arrive at answers to these questions, courts have consistently relied on myths of female sexuality. Considerations of a ‘chaste’ prosecutrix being led astray from the path of virtue continue to operate as the underlying rationale in prosecutions of promise to marry cases.⁶⁴ While analysing an analogous set of cases⁶⁵ in Bangladesh, another South Asian country with similar socio-cultural understanding of gender and sexuality, it was argued that such cases are filed for strategic reasons

⁵⁸ State v. Rahul Sharma, 2022 SCC OnLine Dis Cr (Del) 27 (“[...] notice under Section 91 Cr.P.C. was served to the hotels where the accused made sexual relations with the complainant”).

⁵⁹ Jagannath Bithalu v. State of Odisha, 2023 SCC OnLine Ori 5390 (“The victim having taken water went with the accused in his motorcycle. On their way, they took cold drinks and ‘Kurkure’”).

⁶⁰ Maheshwar Tigga v. State of Jharkhand, (2020) 10 SCC 108 (“the prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.”).

⁶¹ Chan, *supra* note 55.

⁶² Anupriya Dhonchak, *Standard of consent in Rape Law in India: Towards an Affirmative Standard*, Vol. 34, BERKELEY JOURNAL OF GENDER LAW & JUSTICE, 4 (2019).

⁶³ Arushi Garg, *Consent, Conjugal and Crime: Hegemonic Construction of Rape Law in India*, Vol. 28(6), SOCIAL & LEGAL STUDIES, 737 (2019) (argues that Supreme Court’s interpretation of §90 to hold that the misconception must be the ‘sole’ reason of the victim’s consent is erroneous; however, for the purposes of this note, the authors will not be engaging with this interpretation and the focus is on how the courts have been applying the statute).

⁶⁴ Arjinder Singh v. State of Punjab, 2016 SCC OnLine P&H 8606; Nikhil Parasar v. The State Govt. NCT of Delhi, ILR (2010) Supp. (2) Delhi 1 (“It will result in unscrupulous and mischievous persons taking undue advantage of innocent girls by promising marriage with them, without having any intention to do so.”); *See also* Garg, *supra* note 63 (found that in 273 cases, where the victim was a widow or a divorcee, the accused was acquitted).

⁶⁵ Dina Siddiqui, *Blurred Boundaries: Sexuality and Seduction Narratives in Selected ‘Forced Marriage’ Cases from Bangladesh* in HONOUR AND WOMEN’S RIGHTS: SOUTH ASIAN PERSPECTIVES (1st ed., Masum Press, 2012) (Consider how Dina Siddiqui characterises the narrative of such false promise to marry cases in Bangladesh, which is strikingly similar to how such cases play out in the Indian setting,

“...a girl who is pursued by a suitor who wants to have sex. She refuses, insisting no sex before marriage. In many cases, the man shows up in the middle of night in the girl’s room, touches or recites Koranic verses, or touches the Earth, then declares to the girl they are married. Alternately, the couple takes part in what is known as a court marriage in local parlance. That is, they swear affidavits in the presence of a magistrate, but do not register the marriage or comply with other requirements that would be necessary to ensure legal validity of the marriage. The relationship is then consummated. The man promises to marry his lover formally in the future and take her into his family as his wife. In the meantime, he urges to keep the marriage a secret. The physical relationship continues until the girl/woman gets pregnant at which point the man refuses to acknowledge the relationship, let alone the marriage. The girl then is forced to tell her parents or guardians. At this point, the parents may choose to arrange to the girl’s marriage elsewhere or try to pressure the man into recognising the marriage/relationship. In the latter instance, the first move would likely be to turn to an informal tribunal or shalish for justice. If that is ineffective, the girl and her family are likely to take him to court for deception and/or rape.”).

to sanction consensual sexual relationships outside of conjugal bonds through marriage.⁶⁶ For the successful staging of this legal spectacle, it then becomes necessary to project the woman as devoid of all sexual agency and construct her as an “innocent” and “gullible” female who would not consent to “illicit sex”.⁶⁷ It is not hard to find such discourses permeating the judicial discourse in India. Therefore an ‘ideal’ victim would by definition exclude married/divorced women⁶⁸ or other ‘unchaste women’ who engage in premarital sex.⁶⁹ Consider the rationale of the court in *Naim Ahamed v. State*,⁷⁰ where the court acquitting the accused of charges of rape and held,

“The prosecutrix being a married woman and the mother of three children was matured and intelligent enough to understand the significance and the consequences of the moral or immoral quality of act she was consenting to.”⁷¹ (emphasis supplied).

Here, only the moral character of the prosecutrix came under the scrutiny of the court and the court disregarded the fact that the accused was also married with children and had misrepresented otherwise,⁷² which could have been taken as evidence of intention to deceive from the outset. Thus, the judgment seeks to invoke the disbelief in the fact that a married or divorced woman could not have believed an accused who promises to marry her. Since she does not fit the archetype of a chaste, and therefore ‘good woman’, it is assumed that she would automatically consent to any sexual activity.

This stands in stark opposition to how the court interpreted the factual matrix in *Arjinder Singh v. State of Punjab*,⁷³ which involved a compromise petition between the accused and petitioner in a promise to marry case. The court here refers to the youth and inexperience of the prosecutrix to say that she was not ‘capable of understanding the complications and issues surrounding her marriage’. Therefore, a dichotomy between a supposed ‘ideal’ and ‘loose woman’ emerges – one who is young and chaste and the other who is older and sexually experienced.⁷⁴ This becomes the key in determining the credibility of the prosecutrix.

One can contrast this with the Israeli District Court decision in *State of Israel v. Kashur* where the defendant misrepresented himself to the plaintiff as unmarried, Jewish and interested in a serious romantic relationship. While sharply criticised for its racist overtones, the court reasoned that,

“The defendant interfered with [the victim’s] ability to object by means of misrepresenting the facts of his personal situation – that he was a single man interested in a serious relationship. Consequently, the defendant exploited the

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Garg, *supra* note 63.

⁶⁹ Malavika Parthasarathy & Rupal Oza, *Compromise in Rape Cases in Punjab and Haryana: Gendered Narratives Animating Judicial Decision-Making*, Vol. 11(1), JOURNAL OF INDIAN LAW AND SOCIETY, 72 (2020).

⁷⁰ *Naim Ahamed v. State* (NCT of Delhi), 2023 SCC OnLine SC 89.

⁷¹ *Id.*, ¶21.

⁷² *Id.*, ¶4.

⁷³ 2016 SCC OnLine P&H 8606.

⁷⁴ Parthasarathy & Oza, *supra* note 69.

accuser's desire for a deep emotional connection, for only on account of this did she agree to have intercourse with him."⁷⁵

This illustration is not to advocate the adoption of a similar approach in India. Rather this example was taken to illustrate how courts in India regress to the employment of patriarchal norms while determining causality. Thus, in such cases, rather than investigating whether a breach of trust has vitiated consent, the Indian courts investigate the 'female modesty'.

Studies have shown the impact of gendered stereotypes (such as the sexual history, relationship with the accused, among others) in the sentencing of the accused in rape trials.⁷⁶ Prosecutions in promise to marry cases suffer the same fate with the courts invoking an archetype of a 'reasonable' victim who should not have been deceived or should have exercised caution because of a range of extraneous considerations generally casteist or communal. The kind of reasoning which the court employs reflect a progressively shrinking number of circumstances under which these cases will lead to conviction of the accused. Thus, courts consider a range of extraneous factors from the age of victim,⁷⁷ caste considerations,⁷⁸ her educational status,⁷⁹ religious considerations,⁸⁰ how the court presumes the prosecutrix to be,⁸¹ the duration of the relationship⁸² among others to argue that the deceived party should have been more prudent.

All such considerations shift the focus away from the act of deception in itself to the identity of the victim, perpetuating problematic discourses. At first sight, these considerations might seem spurious arbitrary traits. However, this increasing checklist of traits that the prosecuterix must meet to win a successful conviction simply reflects and propagates hegemonic

⁷⁵ Sentencing Judgment, CrimC (Jer) 561-08 State of Israel v. Kashur (July 19, 2010), Nevo Legal Database, ¶13.

⁷⁶ MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA, 35-50 (Columbia University Press, 2016).

⁷⁷ Syed Shahid Hamdani v. State (UT of J&K), 2023 SCC OnLine J&K 116 ("prudence demanded that the prosecutrix, who is a mature girl of 38 years, should not have allowed the petitioner to stay with her once again and to have physical relationship with her."); Prashant Bharti v. State of NCT Delhi, 2013 SCC OnLine Del 4015.

⁷⁸ Ankit v. State of Gujarat, 2023 SCC OnLine Guj 1863; Deepak Gulati v. State of Haryana, (2013) 7 SCC 675; Uday v. State of Karnataka, (2003) 4 SCC 46.

⁷⁹ Kunal Mandaliya v. State of Maharashtra, 2016 SCC OnLine Bom 10600.

⁸⁰ State v. Gaurav Bhatia, SC No. 7/15 (Special Fast Track Court, Patiala House Courts) ("prosecutrix was well aware of the fact that the family of the accused might not be agreeable for her marriage because of their belonging to different religion[s]"), discussed in Garg, *supra* note 63, 9.

⁸¹ Santosh v. State of Maharashtra, 2018 SCC OnLine Bom 2956 ("At the outset, a fact is required to be noted that age of the prosecutrix was 24 years when she lodged the FIR. The occurrence of the incident was around 1 year prior to FIR. She was staying alone at Aurangabad and she was serving in marketing department of a Company at that time. That means she was independent and it can be presumed that she was having knowledge as to what she is good or bad to her. In other words, she had sufficient maturity; In the present case, it can be clearly seen that for prolonged period of 8 years, the relationship between the two continued and it cannot be said that, only because she was under misconception that he is going to marry her, she had consented for sex. The prosecutrix is sufficiently of matured age to be conscious of the relationship, both physical and mental, and merely because, the relationship had now turned sour, it cannot be inferred that the physical relationship established with her, on every occasion, was against her will and without her consent"); Sameer Amrut Kondekar v. State of Maharashtra, 2023 SCC OnLine Bom 765.

⁸² Jagannath Bithalu v. State of Odisha, 2023 SCC OnLine Ori 5390 (five years held to be too long for the prosecutrix to realise a false promise had been made); Amar Singh Rajput v. State of M.P., 2023 SCC OnLine MP 2078 ("Near about more than one year time is sufficient time for a prudent woman to realize as to whether the promise of marriage made by the petitioner is false from its very inception or there is a possibility of breach of promise."); Mayank Tiwari v. State of M.P., 2023 SCC OnLine MP 673 ("Near about five years are more than sufficient time for a prudent woman to realize as to whether the promise of marriage made by the petitioner is false from its very inception or there is a possibility of breach of promise.").

ideas of marriage and sexuality.⁸³ For instance, in multiple cases,⁸⁴ the fact that the parties belonged to different castes was a decisive factor for the court in ruling that a reliance by the prosecutrix in the promise was not justifiable. These cases therefore reinforce a specific construction of marriage as heteronormative, patriarchal, intra-caste and communal institution.⁸⁵ To suggest this is to then legitimise and naturalise caste endogamy.⁸⁶

Apart from the perpetuation of harmful narratives and stereotypes, persecution of such cases carry a strong undertone of condemnation of premarital sex.⁸⁷ Consider the harsh indictment of the prosecutrix in *Jayanti Rani Panda v. State of West Bengal*,⁸⁸

“If a full-grown 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 misconception of fact.” (emphasis supplied).

This is keeping in line with the arguments of legal feminists who deplore the heavy-handed usage of criminal law to intrude into and at times police the sexual choices of women.⁸⁹

B. EXPLORING THE BHARTIYA NYAYA SANHITA

The proposed BNS Bill would bring about changes in this regard which merits a closer scrutiny. Clause 69 of the said bill 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” shall include the false promise of employment or promotion, inducement or marrying after suppressing identity.”

While proposing to criminalise deception in the procurement of sex, there is still a lack of clarity as to what ‘kind’ of deception this would include since there is persisting vagueness even after the insertion of the explanation. Moving to the central focus of this note, which is a false promise of marriage, the proposed legislation lays down three ingredients to be fulfilled:

1. The accused makes a promise to marry,
2. The promise is without any intention of being fulfilled, and
3. The accused has sexual intercourse with the victim.

⁸³ Garg, *supra* note 63.

⁸⁴ Dhruvaram Murlidhar Sonar v. The State of Maharashtra, AIR 2019 SC 327; Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608; Maheshwar Tigga v. State of Jharkhand, (2020) 10 SCC 108; Jagannath Bithalu v. State of Odisha, 2023 SCC OnLine Ori 5390.

⁸⁵ Garg, *supra* note 63.

⁸⁶ *Id.*

⁸⁷ *Id.*; Parthasarathy & Oza, *supra* note 69.

⁸⁸ *Jayanti Rani Panda v. State*, 1983 SCC OnLine Cal 98.

⁸⁹ Garg, *supra* note 63.

There are significant changes this new offense would make to the jurisprudence on promise to marry. *Firstly*, this would create a new offense which is separate from ‘rape’. *Secondly*, the proposed punishment would be significantly lower; while a rape charge carries a minimum sentence of ten years, the same is the maximum sentence prescribed under this new offence. *Thirdly*, it does not require knowledge on part of the man that the consent has been given under a misconception of fact. *Lastly*, it throws out the requirement for the consent of women to be based on the deception.⁹⁰ Therefore, if there is a false promise and sex subsequently, an offense is established.

What does this mean for jurisprudence in this regard? According to the text of the provision, what needs to be proved beyond reasonable doubt is that the person knowingly and intentionally deceived the woman to have sex with him. Significantly, ‘lack of consent’ here does not become material in this regard. Therefore, the provision centralises the ‘deceit’ rather than the presence or absence of consent. What this might mean for the promise to marry jurisprudence in India is that it could lead to a reduced reliance on assumptions and prejudices of the fact finder in the finding of guilt. One must recall the earlier discussion on how the courts placed reliance on certain myths and stereotypes to hold that the deception was not the ‘sole’ inducement for the consent of the prosecutrix. Shifting focus to deceit means that now it becomes irrelevant whether the deception is the sole reason or amongst many other considerations inducing the consent of the woman.

However, irrespective of how the courts will ultimately decide such cases, the authors argue that even creating a separate offense from rape is not the appropriate solution for three reasons. *Firstly*, like what was argued against prosecuting such cases as rape, creating a separate sexual offence in this regard would also lead to a situation of an overwhelming intrusion into the intimate relationships of many in the society. *Secondly*, consider the situation where ‘D’, on making a false promise to marry ‘P’, has sex with her on multiple occasions. Would ‘D’ now be liable for multiple counts of sexual offenses? This raises additional questions of how such offenses should be dealt with and what kind of proof is to be considered. *Thirdly*, criminalisation also opens up the door to a litany of possible harms and abuses that could arise even before such cases reach the trial stage.⁹¹ For instance, the provision could be used by parents to police the sexual autonomy of their daughters by lodging cases against their lover when they find that she is pregnant.⁹² This could then result in arrest and detention for a significant period if not conviction. Considering the wide array of harms which a criminalisation poses, it is worth looking at whether an answer lies in a civil remedy.

IV. POTENTIAL CIVIL REMEDIES TO BREACH OF PROMISE TO MARRY

The possibility of a civil remedy for a breach of promise to marry is not unprecedented.⁹³ But can an argument be made for a compensatory remedy for such acts in the

⁹⁰ Neetika Vishwanath, *Controlling Women’s Sexual Autonomy*, THE HINDU, August 31, 2023, available at <https://www.thehindu.com/opinion/op-ed/controlling-womens-sexual-autonomy/article67251409.ece> (Last visited on September 2, 2023).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Historically civil remedies compensating for dignitary or emotional harm have existed in United States of America (known as the ‘heart-balm’ or ‘amatory’ torts) and United Kingdoms before being ultimately scrapped from the law books.

Indian legal context? Why might such an action be desirable? We propose three reasons as to why such an action might be desirable.

Firstly, we had argued earlier why seeing such cases as vitiating consent is counter-intuitive. If ‘P’ gives consent to sex on the premise that a subsequent event should come to pass, she is wronged by the non-happening of the subsequent act and not by the sex.⁹⁴ This might give rise to an action under fraud, misrepresentation or even battery,⁹⁵ but not intuitively rape. In this manner, the civil framework looks more suitable as the category of civil actions that a victim can pursue is itself very broad.⁹⁶ Indeed, even avenues such as creating an altogether separate ‘sex fraud’ tort can be looked into.⁹⁷

Secondly, it is important to accord recognition to the fact that people’s subjective experience with the same conduct can be different. For instance, suppose ‘P’ has consented to sex with ‘D’ on promise to marriage which ‘D’ later refuses to carry out even as ‘P’ becomes pregnant. ‘P’ might feel cheated because of this encounter, but might not regard this as a violation of her sexual autonomy and certainly would not call it 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 current legal framework does not give recognition to this subjectivity of women. For instance, in *Bodhisattava Gautam v. Chakraborty*,⁹⁸ the petitioner had asked for maintenance against a partner with whom she had had a long relationship, been through two abortions at his behest, and yet was abandoned despite a longstanding promise to marry.⁹⁹ Here the claim was only for maintenance and yet the Supreme Court constructed this as a case of rape.¹⁰⁰ The fact that a claim of maintenance for breach of promise to marry was interpreted as ‘rape’ shows how in constructing consent in promise to marry cases in this manner, what the women actually wants gets sidelined. However, of course, if civil remedies/compensation eventually rolls back into the criminal law and get sexualised, the purpose of prosecuting such cases under the ambit of civil law itself gets defeated.¹⁰¹

Thirdly, a civil remedy may prove to be of help to more people. Studies of conviction rates in such cases reveal that most cases end with acquittals.¹⁰² In light of this trend, the long drawn-out trial process only ends up making 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 did not foresee and did not directly cause. While the

⁹⁴ See discussion *supra* Part II(B) on “Legal Distinctions and Consent”.

⁹⁵ Sacks, *supra* note 43.

⁹⁶ Ellen Bublick & Jessica Mindlin, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, VAWNET, September, 2009, available at <https://vawnet.org/material/civil-tort-actions-filed-victims-sexual-assault-promise-and-perils> (Last visited on September 15, 2023).

⁹⁷ Jane Larson, *Women Understand so Little, They Call My Good Nature ‘Deceit’: A Feminist Rethinking of Seduction*, Vol. 93(2), COLUMBIA LAW REVIEW, 374 (1993).

⁹⁸ (1996) 1 SCC 490.

⁹⁹ Shreya Atrey, *Feminist Constitutionalism: Mapping a Discourse in Contestation*, Vol. 20(2), INTERNATIONAL JOURNAL ON CONSTITUTIONAL LAW, 611-641 (2022).

¹⁰⁰ *Id.*

¹⁰¹ Nivedita Menon argues that the even a civil remedy would not lead to a just solution for the woman since the trial is bound to be ‘sexualised’, see NIVEDITA MENON, RECOVERING SUBVERSION, 124 (Permanent Black, 2004).

¹⁰² Vidhi, *Evaluating Judicial Interpretation*, September 15, 2023 available at <https://crimesagainstwomen.in/judicial-interpretation/> (Last visited on September 15, 2023); BBC News, *Does India have a Problem with False Rape Claims?*, February 8, 2017, available at <https://www.bbc.com/news/magazine-38796457> (Last visited on September 15, 2023); Dash, *supra* note 37.

evidential burdens under a criminal liability may be too onerous leaving women bereft of recourse, a civil remedy could provide compensation for a harm suffered irrespective of additional requirements like proof of false intent from the beginning.

A civil law also requires a lower burden of proof only requiring a preponderance of probabilities. One of the evidential problems in criminalisation was the inability to prove that consent was premised solely on the misrepresentation of the accused. 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. Consider a case where ‘P’ consented to sexual intercourse with ‘D’ after months of dating on his promise of marriage. The fact finder here would not have to discount her reliance on this promise on the basis that ‘P’ might have also consented because of feelings of love or attraction or curiosity, as long as there is a proof that the promise substantially influenced her decision. Naturally an argument might arise that this does not solve the problem of the fact finder delving into characteristics such as education, caste, religion, etc. to determine the ‘reasonableness’ of such a reliance. This might be an area where there could be a legislative intervention pushing the courts towards a presumption that belief rather than distrust is ‘reasonable’ in intimate relationships.¹⁰³

The recognition of a civil remedy in the absence of criminal liability for complete justice to be carried out can be seen in the Supreme Court’s decision in *Deelip Singh @ Dilip Kumar v. State of Bihar*,¹⁰⁴ where the court awarded a compensation of INR 50,000 to the plaintiff despite acquitting the defendant of rape acknowledging how “the act of the accused left behind her a trail of misery, ignominy and trauma”.

However, the problem with civil law addressing the questions of sexual misconduct is one that requires strict scrutiny and is a rather, bumpy road when the Indian courts must deal with it. For the longest time, the courts in promise to marry cases have been relying on unwanted reasonings which eventually results in the victimisation of the victims. These reasonings, as stated earlier, arise from the very understanding of ‘sex is only allowed after marriage’ making marriage central to sexual intercourse.¹⁰⁵ Translating the harm caused by promise to marry to compensation that is of financial nature is one which the civil law system in India will have to provide answers for.

V. CONCLUSION

In this note, we have sought to traverse the complicated legal landscape of ‘promise to marry cases’. While attempting to locating the harm caused by such cases, we reasoned that while such conduct does not vitiate the ‘consent’ of the victim, and hence, any judicial reasoning on such grounds is faulty. However, such cases can indeed cause a range of other harms to the victim, of which emotional injuries need a much more deeper inquiry to understand how one can compensate such injuries. Furthermore, the note argued that criminalisation as ‘rape’ is a faulty approach to such cases, not only because of its erroneous reliance on ‘consent’ but also because of gendered stereotypes relied upon by courts to negate consent. Further, such cases perpetuate the

¹⁰³ HASDAY, *supra* note 42, Chapter 8.

¹⁰⁴ (2005) 1 SCC 88.

¹⁰⁵ Garg, *supra* note 63.

hegemonic construction of sex as only legitimate within bounds of marriage. Ultimately, the women's subjective experience is lost amidst all of this and her agency to decide the perception of harm done to her is ripped away from her.

The note then proceeded to look at whether a civil alternate could address these problems that we believe is desirable because of three reasons. *Firstly*, such cases do not actually vitiate consent as understood in the criminal context. *Secondly*, a civil suit would prioritise the subjectivities of women, and *thirdly*, a civil remedy might also be more useful to more people. Throughout this whole process, the note attempted to centralise the woman and her perspective as the focus of our inquiry and attempt to show how the State's construction of consent and seemingly 'neutral' and 'objective' standards ultimately fail her. The note's purpose is to induce more discussions on promise to marry cases and the trivalising of the phenomenon by the Indian Courts. In arguing against criminal, civil and an altogether new action for promise to marry cases, the authors have tried to keep intact the focus on a woman's understanding of how she wants to perceive such cases and its consequences thereto.