
FROM RAPE FICTION TO STATUTORY DECEIT: A CONSTITUTIONAL AND EMPIRICAL CRITIQUE OF SECTION 69, BHARATIYA NYAYA SANHITA

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ABSTRACT

A unique legal paradox has been created by the intersection of the modern intimacy, digital dating app platforms and the traditional criminal jurisprudence. Earlier the criminal courts in India have adjudicated the matters relating to fallout in romantic relationships under the umbrella of Section 375 and Section 90 of the Indian Penal Code, 1860. They have utilized the legal fiction of consent vitiated by misconception of fact to adjudicate these matters. However, with the enactment of the Bharatiya Nyaya Sanhita (BNS), 2023, the Indian legislature has formally codified this offense under Section 69. This section thus, criminalizes 'sexual intercourse by employing deceitful means' including the false promise of marriage, employment or promotion also.

This article undertakes a comprehensive legal analysis of Section 69 BNS, consent jurisprudence and the changes that have occurred with respect to it and the autonomous decision-making powers of the adults who consent for consensual relationships. With the transition in the society there is an increase in the use of dating apps. There has been a statutory shift from Section 375/90 of Indian Penal Code, 1860 to Section 69 under Bharatiya Nyaya Sanhita, 2024. The new paradigm, dissects the delicate judicial distinction between a 'false promise at inception' and a 'subsequent bad-faith breach'. The paper also critiques the constitutional tension that is created due to the state-enforced morality and adult individuals' autonomy of decision making. Ultimately, this paper argues that the over-criminalization of romantic failures undermines the autonomy and independence of a woman. The criminal process is used as a weapon to take vengeance in failed relationships or enter into coercive settlements, and puts unnecessary burden on already overburdened criminal courts with policing heartbreak.

INTRODUCTION: THE CLASH OF MODERN INTIMACY AND TRADITIONAL MORALITY

The landscape of interpersonal relationships in urban India has undergone a profound structural shift over the past decade. The rapid increase and development of digital technology, urbanization and the shift in socio economic dynamics have given birth to a different culture. There has been an increase in more and more people opting for love-in-relationship, casual dating and non-traditional romantic arrangements. Platforms such as Tinder, Bumble, Hinge, Snapchat, Facebook and Instagram have democratized partner selection. It has enabled the adults to forge intimate relationships and connections that are different from the traditional purview of family arrangements and formal marital arrangements. The modern relationships are non-binding romantic commitments. These relationships are just exploring intimacy, have emotional boundaries and less responsibilities towards each other.

However, our legal system is still embedded in the conservative moral framework. In our society also the concept of female purity is still prevalent. the main problem starts to arise in these fluid relationships is when there is a breakup. When these relationships come to an end due to emotional incompatibility, family disapprovals, shifting personal or professional priorities or when there is a sudden ghosting from one individual, problems start to surface. The post break up friction frequently leads the private relationships into the criminal justice system.

Initially, Indian criminal law responded to this friction by treating sexual intimacy following an unfulfilled promise of marriage as rape under Section 375 of the Indian Penal Code, 1860¹, read along with Section 90², which invalidates consent given under a 'misconception of fact'. This approach was creating severe distortion in the criminal jurisprudence. It equated the severe trauma of non-consensual sexual violence with the breakdown of a consensual romantic relationship. The relationships were being put in an equal pedestal.

The legislature recognized that this kind of equalization between non consensual relationship with that of the consensual relationships was wrong and awkward. Categorizing broken promises as rape was incorrect. Thus, the legislature introduced Section 69 in the Bharatiya

¹ IPC

² Indian Penal Code, 1860

Nyaya Sanhita, 2023³. Through this section the legislature carved out a standalone offense titled ‘Sexual intercourse by employing deceitful means, etc.’. This provision formally codifies the states mandate to police romantic promises. It intends to separate deceitful intimacy from stigma and severe sentencing of rape.

However, this statutory shift raises following critical constitutional and sociological questions:

- i. **Legitimate Penal Interest:** Does the state have a legitimate penal interest in adjudicating emotional commitments made between two consenting adults.
- ii. **Safeguard vs. Patriarchal Trope:** Is Section 69 BNS safeguarding the vulnerable individuals from predatory fraud, or is it just reinforcing patriarchal rules that take away from women their sexual choices unless intimacy is tied to marriage.
- iii. **Evidentiary Distinctions:** On what parameters is the law going to distinguish genuine criminal deception from the ordinary failure of romantic relationships in the times of digital dating.

THE EVOLUTION OF CONSENT JURISPRUDENCE: FROM IPC SECTION 375/90 TO SECTION 69 BNS

1. *The Judicial Framework Under the IPC*

There was no express statutory provision, under Indian Penal Code, 1860 that would penalize sexual intercourse obtained through a false promise of marriage. This would lead to a pile up of grievances, where women alleged that they were deceived into sexual intimacy by a partner, who later refused to marry them. To address this the prosecution relied on reading of two provisions:

- Section 375⁴ (Rape)- This section defined rape as sexual acts against woman without consent or against her will.
- Section 90⁵ (Consent known to be given under misconception)- This section stated that the consent is not valid if it is given under a ‘misconception of fact’,

³ BNS

⁴ Indian Penal Code, 1860

⁵ Indian Penal Code, 1860

where the perpetrator knows or has reason to believe the consent was so given.

So as per the above section it can be understood that if a woman has given consent for sexual intercourse based on the accused's representation that he would marry her, when the accused never intended to marry the woman, the consent would come under the 'misconception of fact'. This consent would be considered to be given under false representation, vitiating her consent ab initio. This would thus turn the consensual intercourse into rape. This legal reasoning was simple yet problematic.

This legal construct required courts to perform complex psychological inquiries into the state of mind of the accused at the exact moment when the intimacy occurred between the two partners. The Supreme Court of India, tried to curb the obvious potential of abuse by drawing a strict distinction between the two categories of cases that would occur, namely-

- i. Where the accused made the promise with a clear, fraudulent intent at the inception. He had no intention whatsoever of fulfilling that promise. He made it solely to induce the woman to engage in sexual relations.
- ii. Where the accused made the promise in good faith at the inception. Subsequently he failed to fulfill it due to unforeseen circumstances, family disapprovals, caste or religion barriers or mutual incompatibility.

In the landmark judgment of *Pramod Suryabhan Pawar v. State of Maharashtra*⁶, this jurisprudence was synthesized into a clear test by the Supreme Court. The Supreme Court said:

"To establish an offence under Section 375 IPC based on a false promise of marriage, the prosecution must establish that: (i) the promise of marriage was false, which the accused knew to be false at the time of making it; (ii) the promise of marriage was the immediate cause or direct inducement for the woman to engage in sexual intercourse; and (iii) there was a direct nexus between the false promise and the woman's decision to consent."

⁶ *Pramod Suryabhan Pawar v. State of Maharashtra*, (2019) 9 SCC 608

The court emphasized that a mere breakdown of a relationship or a failure to fulfill a promise due to subsequent events does not amount to a 'misconception of fact' under Section 90 IPC. This principle was further restated by the Supreme Court of India in Mahesh Damu Khare v. State of Maharashtra⁷ and Anurag Soni v. State of Chhattisgarh⁸. Herein, the apex court cautioned against turning civil breaches of personal commitments into severe criminal prosecutions for rape.

2. *The Legislative Shift: Section 69 of the Bharatiya Nyaya Sanhita, 2023*

The prosecution mechanism under Section 375/90 IPC remained flawed, despite judicial attempts. There were many attempts to narrow down the application of rape laws in romantic breakups. The accused would have to face the damage to his reputation and integrity with charge of rapist. They would even face arrests, prolonged pre-trial detention and face the social stigmas associated with such charges. All this was being faced by the accused even when it was clearly visible that these allegations seemed post breakup disputes or vengeance.

To address this problem and lacuna, the Parliamentary Standing Committee on Home Affairs evaluated the Bharatiya Nyaya Sanhita and recommended creating a standalone offense that would explicitly separate 'deceitful intimacy' from the crime of rape. Thus, Section 69 was introduced in Bharatiya Nyaya Sanhita in 2024.

Section 69, BNS 2023 states that-

“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 inducement of false promise of employment or promotion, or marrying after suppressing identity.’”

⁷ Mahesh Damu Khare v. State of Maharashtra, (2024) INSC 215

⁸ Anurag Soni v. State of Chhattisgarh, (2019) 10 SCC 145

Thus, through this new Section sexual intercourse by deceitful means was codified as not amounting to rape. Distinction was thus made through this section. It expressly codified false promises that are made for having sexual intimacy or relationship. The false promises include not only false marriage of promise but also false promise of employment, promotion and identity suppression. The evidentiary focus was now on proving 'deceitful means' or 'lack of intention at inception' as a standalone element.

Thus, Section 69 successfully removes the 'rape' label from broken promises. It spares the accused individuals from the specific stigma of being categorized alongside perpetrators of violent sexual assault. But it introduces its own set of grave problems. The Section now includes even sexual intercourse with false promise of employment or promotion also. This somewhat gives the right to the state to interfere in the private space of the individuals. This will be against the fundamental right of privacy as stated by the Supreme Court of India in the landmark judgement of *K.S. Puttaswamy v. Union of India*⁹. The statute through Section 69 cements state intervention into the private romantic relationships of individuals.

THE MECHANICS OF DECEIT: INTENT AT INCEPTION V. SUBSEQUENT FAILURE

1. *The Evidentiary Dilemma of Mind-Reading*

The human nature, intention and emotions are subjective. This is the core legal struggle that is faced in prosecuting or defending the cases under Section 69¹⁰. To secure a conviction under Section 69 BNS, the prosecution has to prove beyond a reasonable doubt that the accused had a fraudulent intention at the very beginning. This means that at the precise moment when the two individuals engaged in sexual intercourse, the accused had already formed a firm, hidden resolve to never marry the woman.

It poses a real problem to establish the evidence of the negative mental state of the accused at the past moment when the accused had sexual relationship with the woman. In criminal law, mens rea (guilty mind) is inferred from overt actions, such as purchasing a weapon, breaking a lock, or transferring funds to an offshore account.

⁹ *K.S. Puttaswamy v. Union of India*, (2017) 10 SSC 1

¹⁰ *Bharatiya Nyaya Sanhita*, 2024

However, in romantic relationships, the overt actions surrounding physical intimacy are often identical, both in the case of genuine relationships and fraudulent ones. It can be words of endearment, discussions about future together, introduction to friends or family and shared travel or cohabitation. All these actions are same in both the situations.

2. Common Triggers for Relationship Breakdown

In the Indian society and culture, relationships often fail due to external pressures rather than initial deception or fraud. When such cases are brought in front of the court, the judges have to dissect, analyze and interpret complex social realities.

In many instances, young adults enter into romantic relationships with a pure and correct intention to marry. But Indian society is still more conservative specially when it comes to marital commitments. When the individuals communicate their choice to their parents, they face severe opposition from them. This is based on caste, religion, astrology or socio-economic disparities. Thus, when an individuals gives up to these family disapprovals and pressures, he would be guilty of emotional cowardice for breach of his promise but cannot be said to have acted with criminal intention from the beginning of their relationship.

Many a times, the individuals discover their incompatibility when they start living together in a live-in-relationship. Couples in urban area test their compatibility before marriage by living together before marriage. They discover domestic incompatibility while living together and decide to part ways by mutual consent. This is not criminal fraud.

Many a times the partners drift apart due to shift in professional and career goals, change in some personal value and due to long distance in relationship. The natural change in feelings cannot be treated as a penal offence. If such act is penalized than it would again be against the fundamental right to be in a relationship and even end the relationship.

3. Judicial Trends in Quashing Frivolous FIRs

The High Courts have been using their inherent powers under Section 482 Criminal

Procedure Code, 1973¹¹ to quash the frivolous FIRs involving broken relationships. They have understood that there are many who use the criminal justice machinery to avenge the post breakup bitterness.

Delhi High Court in *Sonu @ Subhash Kumar v. State of NCT of Delhi*¹² observed that “a long-term, ongoing consensual relationship spanning over years cannot suddenly be painted as a case of sexual intercourse under misconception of fact, merely because the relationship ultimately culminated in a breakup”.

A similar kind of interpretation was given by the Allahabad High Court in its judgement in *Veerendra Kumar v. State of U. P.*¹³. In this judgement the court highlighted that, “educated, adult women living in modern urban environments possess the capacity to understand the consequences of pre-marital intimacy”. The court went to caution that the “law cannot be converted into an instrument of harassment against a former partner when a relationship fails to result in marriage”.

Bombay High Court in *Dr. A.L. v. State of Maharashtra*¹⁴ held that, “where both parties were mature professionals who engaged in physical relations over an extended period, the mere fact that the male partner eventually married another woman under family pressure does not justify a presumption of fraudulent intent at the beginning”.

The courts through its various judgements have been giving the correct interpretation so that the woman involved in the consensual relationship does not take wrong advantage of the Section that has been introduced to protect the genuine sufferers.

THE IMPACT OF DIGITAL AUTONOMY AND DATING APPS

1. *The Dynamics of Modern Algorithmic Intimacy:*

With the changing times, there has been an emergence of dating platforms like Tinder, Bumble, Hinge, and Ray. They have structurally altered how individuals meet, communicate and get involved in the intimate relationship. These platforms operate on

¹¹ Bharatiya Nagarik Suraksha Sanhita, 2024, Section 528

¹² *Sonu @ Subhash Kumar v. State of NCT of Delhi*, (2021) SCC OnLine Del 1245

¹³ *Veerendra Kumar v. State of U.P.*, (2023) SCC OnLine All 412

¹⁴ *Dr. A.L. v. State of Maharashtra*, (2022) SCC OnLine Bom 1892

algorithmic matchmaking and encourage high-volume interactions, rapid relationship progression, and fluid, non-committing connections.

The dynamics of dating apps have created specific friction points among the traditional legal concept of consent. Traditional courtship or arrange marriage setup often progresses linearly, starting from the introduction by the parents or family to engagement and then marriage. Whereas dating app relationships are highly non-linear. Individuals meet through these dating apps as per their liking and within one or two dates get physically intimate while they are still in the process of getting to know each other and decide whether they want to pursue this relationship or not.

The whole communication process in these dating apps is based on digital communication. There is no real contact initially. Thus, this can create ambiguity in the communication. Digital communication happens through text messages, WhatsApp chats, emojis, late-night voice notes and is very open for subjective interpretation. A statement like 'I can really see a future with you' or 'I've never felt this way about anyone' can be viewed by one party as casual romantic banter and by the other as a solemn, legally binding promise of marriage.

In digital dating culture, the end to a connection or relationship often occurs through ghosting or disengagement i.e. suddenly ceasing all the communication without any explanation. One person can just vanish just like that abruptly. Ghosting can be emotionally tormenting and stressful but it does not amount to any crime. However, when a ghosted partner is left without closure, the resulting anger frequently drives them to seek accountability through law enforcement, framing ghosting as evidence of initial deceit.

2. Digital Evidence and the Reverse Burden of Misinterpretation:

In the newly introduced Section 69 BNS prosecutions involving dating apps, electronic evidence under Section 63¹⁵ of the Bharatiya Sakshya Adhiniyam¹⁶, 2023 plays a central role. The investigating authorities routinely seize mobile phones to extract WhatsApp chats, call logs, location data, and dating profile screenshots. This reliance

¹⁵ Formerly, Indian Evidence Act, 1872, Section 65B

¹⁶ BSA

on digital evidence presents severe challenges. There are complainants frequently submitted of curated screenshots showing romantic declarations and promises. While withholding preceding or succeeding chats that demonstrate mutual doubts, casual hookup agreements, or conversations acknowledging the uncertainty of their future are not referred in the complaint. The society has always created a stigma around pre-marital female intimacy. Thus, female users who engage in casual dating via apps many a times feel intense pressure to reframe casual intimacy as a 'promise of marriage' once the relationship ends just to escape social censure.

3. *The Weaponization of Criminal Law for Coercive Settlements:*

The offence under Section 69 BNS is a non bailable offence. It creates an immense power imbalance that facilitates the misuse of criminal process. For a young male professional an FIR charging him with deceitful sexual intercourse means immediate suspension, background check failures, visa cancellations, and irreparable social disgrace. Consequently, the criminal justice system is transformed into a coercive settlement desk. The accused individuals are frequently forced to choose between two non-legal outcomes i.e. either enter into a forced, resentful marriage under the threat of going to jail or they end up paying exorbitant financial sums to the complainant in exchange of a no objection affidavit to quash the FIR against them.

THE CONSTITUTIONAL & SOCIETAL CRITIQUE

1. *Judicial Paternalism vs. Female Sexual Agency:*

Section 69 BNS or the jurisprudence that was before this section came into force, all have fundamentally been based upon patriarchal assumptions about women. It deprives them of their status as an autonomous, independent, decision-making adults. The law treats an adult woman as incapable person to consent to physical relationship for her own pleasure, emotional connection or as her personal choice. It supposes that a woman's consent is conditional solely upon the commercial style consideration of a future marriage certificate. This legal logic infantilizes women. It reduces an educated, financially independent adult female citizens to passive subjects. They must be protected by the state from their own romantic choices.

This newly introduced section reinforces the regressive societal conditioning against which the women have been raising their voices. It puts woman's sexual purity as a commodity that is lost or damaged if intimacy does not lead to marriage. The law steps in to protect a woman as soon as her relationship ends. It jumps in to restore woman's moral standing in the society by declaring that she was tricked or deceived. It does not acknowledge that a woman could voluntarily choose to engage in an intimate physical relationship and that that relationship can be ended by her due to any reason.

2. *Constitutional Infringements: Articles 14, 19, and 21:*

A nine-judge bench of the Supreme Court of India, in *K.S. Puttaswamy v. Union of India*¹⁷, affirmed that, “the personal choices, romantic associations, and bodily autonomy lie at the absolute core of the fundamental right to privacy under Article 21¹⁸”. Furthermore, in *Navtej Singh Johar v. Union of India*¹⁹, the apex court recognized that the “constitutional morality protects individual self-determination over sexual intimacy between consenting adults”.

The threat of 10 years in prison if a person does not marry their partner violates the Right to Autonomy and Choice of an individual. The person is being criminalized just for ending a consensual relationship. The right to enter a relationship necessarily encompasses the Right to Decouple. The freedom to fall out of love, change one's mind, and exit a relationship without facing state-sponsored penal consequences are the basic elements of the Right to Decouple.

Under Article 14²⁰ the doctrine of 'manifest arbitrariness' articulated in *Shayara Bano v. Union of India*²¹ said that, “a law can be struck down under Article 14 if it is unreasonable, lacks determined principles, or gives unbridled power to executive authorities”. Section 69 BNS fails the test of statutory clarity. The term 'deceitful means' is left open-ended for any interpretation. It sets no boundary, guideline or any kind of rule and provides no objective standard for investigating officers to differentiate

¹⁷ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1

¹⁸ The Constitution of India, Article 21

¹⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

²⁰ The Constitution of India, Article 14

²¹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1

between an innocent change of heart and an initial fraudulent and deceptive intentions.

3. *Over-Criminalization and the Burden on Criminal Courts:*

India's criminal justice system faces severe structural challenges. There are millions of pending cases across all the trial courts in the country. In this context, using the states penal machinery to adjudicate such romantic breakups is a severe misallocation and waste of judicial resources. The police spend its precious time going through the WhatsApp chats, calls and mapping the dating profile. The trial courts are flooded with the bail applications related to this section and the High Courts are spend their significant time in evaluating the petitions to quash these frivolous FIRs.

CONCLUSION

The criminalization of broken relationships under Section 69 of the Bharatiya Nyaya Sanhita represent a troubled intersection of legal paternalism, statutory vagueness, and social anxiety over the modern dating culture. The legislature did succeed in separating deceitful intimacy from the offence of rape. However, it codified a provision that continues to distort the criminal jurisprudence. It infantilizes women and uses the criminal process for emotional retribution.

There needs to a statutory narrowing of Section 69 BNS. The legislature needs to amend Section 69 BNS and remove the phrase 'making by promise to marry to a woman without any intention of fulfilling the same' from the scope of criminal law. Deceitful means must be restricted strictly to objective, verifiable frauds, such as identity impersonation or suppression of an existing legal marriage.

The police also need to conduct a preliminary inquiry before taking concrete actions under this Section and registering FIR. If the record shows a long-term consensual relationship or casual dating through dating app profiles, police must refuse criminal case registration. Applying Arnesh Kumar²² guidelines (Section 35 BNSS, 2023), arrest must not be the default response. Notice of appearance under Section 35(3) BNSS should be mandatory, limiting arrest solely to exceptional risks of absconding or witness tampering.

The transition in the Indian society is accelerating. The society is transitioning from its

²² Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273

traditional marriage concept to adapting the new concepts of live-in-relationships and finding relations through dating apps. The legal system needs to recognize this. They need to understand that an adult citizen has full independence and autonomy to enter and exit from such relationships. We need to remove the ending of civil romantic breaches from penal sanctions. There is a need to create a separation between relationships that started genuinely and ended due to natural drifting from those that were actually created to deceive a person with false promises. This is necessary so that the fundamental right of life and liberty of individual is maintained and protected.