

From Promise to Punishment: Analysis Section 69 of BNS, 2023

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Abstract

This paper deconstructs Section 69 of the Bharatiya Nyaya Sanhita (BNS), 2023, that criminalizes sexual intercourse caused by false promises of marriage and frames it as an important legal provision for women's autonomy and redressing exploitation. Despite its protective intent, the section holds within it a possible danger. It brings obscurity to the definition of consent and adds complications to the interpretation of the law. This paper deals with the broad language of Section 69, which makes it difficult to prove intent and may lead to frivolous litigation, especially in consensual relationships.

Consent, a foremost requirement of any sexual intercourse, forms the bedrock of lawful intimate relations. In the context of Indian Law, the principle of consent is intricately linked to protecting individuals from exploitation. Section 69 of the Bharatiya Nyaya Sanhita, 2023 ('BNS') addresses the issue of making false promises of marriage to induce someone into sexual intercourse. It states

"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."

Prima facie appearing benign, this provision poses a significant threat by reinforcing patriarchal norms, undermining women's autonomy, restricting inter-caste and inter-religious live-in relationships, and introducing ambiguity in the law that necessitates progressive judicial interpretation. The prerequisites mentioned in Section 69 are firstly, there should be a promise to marry, secondly, that promise must be without intention of fulfilling the same, thirdly, there must be a sexual intercourse on the pretext of that promise and finally, such sexual intercourse must not be amounting to rape.

What is Consent?

For understanding the Section 69 better, the foremost thing which is required to be considered is what is Consent? The 'Consent' of a woman is directly correlated to her involvement in the sexual act. In *Stroud's Judicial Dictionary*¹ the term Consent is defined as '*[c]onsent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side*'.

Bharatiya Nyaya Sanhita, 2023 does not define the term consent but merely provides what doesn't amount to consent. The act provides for a negatively worded definition, where a consent given by a person doesn't amount to consent. Section 28 of the BNS defines '*[c]onsent known to be given under fear or misconception*'. According to BNS,

¹ *Stroud's Judicial Dictionary* (5th Edn.) p. 510

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

xxx xxx xxx”

According to this section for a consent to not be valid under this section, two elements are required to be proved i.e., the consent was given under misconception of fact or under fear of injury and the person obtaining the consent knew or had reason to believe that consent was given under such misconception or fear of injury. In *Kaini Rajan v. State of Kerala*², the Supreme Court of India, defined Consent as an act of reason coupled with deliberation. The Court stated, consent is an act of active will of the person who gives the consent. Consent is an expression of desire after knowing the significance of act and its consequences having the choice to choose between ascent and resistance.

The provision becomes relevant in cases where the consent to sexual intercourse is obtained under false promises of marriage. In the context of a false promise of marriage, such deceit undermines the woman's capacity to give genuine consent, aligning it with the broader definitions provided in Section 63 BNS. Therefore, under IPC, sexual intercourse obtained through a false promise of marriage should logically amount to rape, as it involves deceitful means that invalidates consent.

The paramount question which is now needed to be considered what constitutes Rape under BNS. Section 63 of BNS (Section 375 of IPC) defines rape and includes circumstances under which sexual intercourse would be considered as Rape. It states

“63. A man is said to commit “rape” if he—

- a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions: —

xxx xxx

ii. without her consent;

xxx

xxx

”

Section 63 of BNS defines rape as sexual intercourse, *inter-alia*, without valid consent. Under this section, consent obtained through deceitful means does not amount to a valid consent. This provision is particularly relevant in cases where consent is given based on a false promise of marriage. The deceit in obtaining a consent fundamentally challenges the validity of the consent and consequently such an act should be classified as Rape under Section 63 of BNS. Therefore, there is a dire need to reconcile Section 69 with the definition of Rape mentioned under Section 63 of BNS as the Section 69 of BNS will give rise to plethora of potential frivolous litigation.

For instance, if a person makes false promise to marry and the consequent sexual intercourse amounts to rape then the accused will be liable for rape under Section 63 of BNS but if such false promise or

² (2013) (9) SCC 113

consequent sexual intercourse does not amount to rape then the accused can still be made liable under Section 69 of BNS. The difference between the wording of Section 63 & 69 will give pose challenges, having far-reaching effects on not only on the already overburdened Courts but also on the society at large.

Challenges

Broadly worded

Section 69 BNS is a double edged sword where the intention of both the Accused as well as the Complainant would be difficult to prove. The foremost challenge during the implementation of the act would be to prove the Accused's intent to marry. '*Intention to marry*' is broadly defined term which could potentially be used to settle personal scores or in cases of consensual relationships gone sour. In the country where the conviction rate of the cases involving consensual relationship is less than 30% would give rise to even more litigation to already overburdened courts.

For instance, in *XXX v State of MP*³, the Supreme Court quashed an FIR against the accused, where the complainant herself being married, indulged into sexual intercourse and claimed her consent was obtained under misconception that the accused would marry her.⁴ The Court observed that the complainant was a grown up lady and matured enough to understand the consequences of the acts for which she consented during the subsistence of her earlier marriage. Similarly, in *S. Rajadurai v. State (NCT of Delhi)*⁵, the High Court of Delhi held that a case of rape on false pretext of marriage cannot be made out when the complainant, being aware that the accused is married, knowingly signed a document stating that she entered into a live-in relationship without being influenced in any manner whatsoever.

Ambiguity in the Language

The other significant challenge is in the language of Section 69 of the BNS which poses a significant problem. Although it covers situations where sexual intercourse occurs under deceptive promises, including promises to marry, it does not classify such cases as rape. However, there remains criminal liability even though it is not categorized as rape under Section 69. The ambiguity lies in the fact that if consent is obtained through deceitful means or a promise to marry without genuine intent to fulfil it, logically, it should invalidate the woman's consent and constitute rape. The challenge lies in clarifying under what circumstances deceit or lack of intent to fulfil promises indeed constitutes rape. This overlap requires clear judicial interpretation to prevent ambiguity and ensure consistent application of the law.

Sexual intercourse by deceitful means and on false promise to marry amounts to absence of consent and thereby constitutes rape. In *State of UP v. Naushad*⁶, while dealing with issue of sexual intercourse under false pretext of marriage, the Supreme Court clearly held that obtaining consent for sexual intercourse under the false promise of marriage or deception of a fact cannot be treated as consent and it amounts to rape.⁷

Difference between False promise and Breach of promise

Another significant challenge would be the potential difference between the consent under false promise or breach of promise. For instance, in case of Consent under false promise, if it is proven that at the time of making the promise, the accused never intended to marry the victim, then the consent given by the victim would be under a misconception of fact. According to Section 90 IPC, such consent is not valid, as

³ (2024) SCC OnLine SC 241

⁴ Supra; see also: *Naim Ahamed v. State (NCT of Delhi)*, [(2023) SCC OnLine SC 89]

⁵ (2023) SCC OnLine Del 5919

⁶ (2013) 16 SCC 651

⁷ Supra; see also: *Yedla Srinivasa Rao v. State of A. P.* [(2006) 11 SCC 615]

the accused knew or had reason to believe that the consent was given under a misconception. Therefore, in such cases, despite the absence of rape, the act would still be considered an offense due to the absence of valid consent.

On the other hand, in case of Breach of Promise, if a promise to marry is made genuinely but not fulfilled later, it does not necessarily amount to rape. For instance, if the accused was engaged with another person at the time of making the promise, this does not automatically imply deceit unless proven that the promise was fraudulent from the beginning.

In *Uday v. State of Karnataka*⁸, the Supreme Court differentiated between a false promise of marriage and a breach of promise. The Court opined that a breach of promise does not necessarily amount to rape unless it is established that the promise was made with no intention of being kept. Similarly, in *Pramod Suryabhan Pawar v. State of Maharashtra*⁹, the Supreme Court clarified that a breach of promise cannot be classified as rape unless it is proven that the promise was false from the beginning.

The precedents mentioned above along with multiple cases are important to establish that intent is the distinguishing factor to make a man culpable under BNS, be it consent obtained under misconception of fact or consent obtained under a genuine promise which was later breached.

Conclusion

While Section 69 of the Bharatiya Nyaya Sahita, 2023, is a step towards protecting women from exploitation, its successful implementation requires clear judicial interpretation, robust evidence, and societal support. These elements are crucial to balance protecting individuals and preventing the misuse of the law. The ambiguous wording of Section 69 BNS still raises questions about its necessity and justification. Clearer legislative language and a well-defined scope are essential to ensure this section effectively serves its intended purpose without leading to unwarranted legal complications.

⁸ (2003) 4 SCC 46

⁹ (2019) 9 SCC 608