



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Promise to Marry: Curious Cases of Context, Consent and Intent

Siya Jangir^a

^aNational Law University, Delhi, India

Received 10 February 2024; *Accepted* 11 March 2024; *Published* 14 March 2024

This article sheds light on the particular social problem of ‘promise to marry’ cases in India. The categorization of such cases under criminal law stems from an underlying conceptualization of rape. Therefore, the penological justification for punishment lies in the interpretation of rape laws that emphasize two factors: (i) intent and (ii) consent. Promise-to-marry cases consist of a convoluted relationship between consent and intent, placed in the context of a patriarchal Indian society. The article begins by setting out the social context of these cases focusing on women’s sexuality and the social construct of marriage, followed by an analysis of the conceptualization of intent and consent, as well as how it is relevant in ‘promise to marry’ cases. This is done in an endeavour to depict how the burden of proof is skewed against the victim, as well as to emphasize the need for re-evaluation of laws concerning ‘promise to marry’ cases in India.

Keywords: *consent, context, intent, marriage, sexuality, criminal law.*

INTRODUCTION

Promise-to-marry cases stem from the basic premise of a false promise to marry. Herein, the victim is deceived to enter into a sexual engagement at the behest of a false promise to marry. The discussion in this article focuses on how such cases came to be prosecuted under the Cr.P.C. with the underlying framework of rape cases. Since there is no independent

evaluation/study/understanding of such cases, they are deemed to fall under the category of rape on account of absence of free consent. As 'false promise to marry' is now set to become a separate category of crime under the Bharatiya Nyaya Samhita, it is crucial to understand the penological justification for punishment under criminal law for such cases. There may be a three-fold analysis of the same, with the first criterion being context. The roots of these cases are deeply embedded and entrenched in the social realities of a patriarchal Indian society. The social construct of marriage and the discussion on pre-marital sex for women play a pivotal role in the constitution of the primary circumstances of promise-to-marry cases. The second and third criteria are derived from the conceptualization of rape. The second criterion follows the aspects and key requirements of free and unqualified consent. The third criterion is the evaluation of intent, as to whether be a mala fide intent to not follow through on the promise of marriage. These three criteria help us better understand the legal framework for adjudication of promise-to-marry cases as well as the position of the victim.

THE CONTEXT OF MARRIAGE AND WOMEN'S SEXUALITY

Societal norms and ideals of morality, family, and sexuality encase women in carefully moulded sculptures of glass, and it is left up to them to either painstakingly shatter that glass or remain painfully bound. All institutions that enable human life- polity, society, family, religion- seek to regulate women's sexuality. Politics uses religion as a tool to manipulate the masses; women bear the brunt of the consequences of cultural attitudes and the impact of religion and politics in their particular milieu.¹ Women's sexual rights are considered to be a matter not within the confines of personal choice but are subject to large-scale societal and moral considerations. Even in the twenty-first century, premarital sex remains a taboo, and the discourse among women languishes in hushed tones for fear of judgment and exclusion. The particular social problem of 'promise to marry' cases lies in this social circumstance of women and taboos on their sexuality as well as the nature of marriage. The twin extraneous sociological factors that formulate the

¹ Aniruddha Babar, 'A Critical Examination of Feminist Discourse towards Marriage and Women', *Genos-Reimagining Gender Roles and Women's Spaces in the North-East India* (Department of Sociology, Tetso College, Dimapur, Nagaland 2019)

context of promise-to-marry cases in a discussion from a legal perspective are, therefore, as follows:

The imposed morality on women's sexuality - There are countless examples to show how the burden of a community or a society's honour is placed on a woman's sexuality. These include at the very least instances of honour killings and the extensive perpetration of violence against women in regions of territorial or community conflict. For ages, women have been bestowed with the concept of virginity that correlates with their body's purity. Women's sexuality is seen as a sacred space either to violate or to protect. This is a narrative that completely disregards women's agency and autonomy, a narrative under which premarital sex is a taboo, and even a sin, simply because it is indicative of a woman's choice. Concepts like virginity and chastity have not lost their prominence despite the feminist movements of the twentieth and twenty-first centuries and continue to dictate the lives of women in society. This is because the intent to control women's sexuality also arises from the idea of women as a commodity of men. It is essentially about a societal structure of power wherein power must emanate and flow from the male member of the family unit or the patriarch, thereby reinforcing patriarchy. This power structure based on the commodification of women thus exerts control on women with the precept of ensuring the dignity of the family unit and the patriarch, as opposed to an ideal of the protection of women.

The social construct of marriage - The arranged marriage system still dominates Indian culture, and chastity is highly valued within it.² Girls from a very young age are shown the dream of a married domestic life and the dangers arising from deviation from the path of the impossibility of the marriage dream. This mindset therefore both explicitly and implicitly guides the actions of young girls and women in so far as sexual relations are concerned. Moreover, marriage is seen as the foundation of the family unit that in turn is the rudimentary block in societal structures. It is also a sacrosanct space. Religious texts like the Manusmriti outline the types, elements, and aspects of marriage while still acknowledging that it is a private space, sacrosanct

² Lekha Subaiya, 'Premarital Sex in India: Issues of Class and Gender' (2008) 43(48) Economic and Political Weekly <<http://www.jstor.org/stable/40278237>> accessed 25 October 2023

yet sacred. Thus, there is clear and almost vehement intent on the part of both religious and political authorities to regulate the institution of marriage, one that relies on an inherently patriarchal framework and imbalanced power structure.

The above context has been outlined in an endeavour of constitutive explanation of 'promise to marry' cases. Constitutive explanations do not address events or behaviours, but causal capacities.³ 'Promise to marry' cases exist within the larger debate surrounding marriage and sexual relations for women. The general pattern of these cases is that consent was obtained through deception that invalidates said consent. The social context helps us understand the circumstances and consequences of these cases, thereby providing a basis for the debate regarding the penological justification for punishing such cases under criminal law. To understand crime, it is necessary to comprehend the relationships that coproduce it, as well as how crime contributes to the production of other parts and segments of society and to the production of the totality that is society.⁴ Penological justification for punishing 'promise to marry' cases therefore lies not only in the cases themselves but also in the larger societal framework, as well as the nature of criminal law. According to Blackstone, 'the latter (public wrongs) are breach and violation of public rights and duties which affect the whole community considered as a community; and are distinguished by the harsher application of crimes and misdemeanors.'⁵ The context helps us discern that such cases constitute public wrongs, for they are both an outcome and a cause of the social circumstances of women. Public wrongs, being under the ambit of criminal law, are met with punishment as opposed to the rule of compensation in the case of civil wrongs.

³ Petri Ylikoski, 'Causal and Constitutive Explanation Compared' (2013) 78 *Erkenntnis* 277-297 <[https://link.springer.com/article/10.1007/s10670-013-9513-9#:~:text=In%20contrast%20to%20constitutive%20explanations,an%20entity%20\(or%20system\).&text=Thus%20they%20can%20focus%20on,changes%20in%20a%20system%27s%20properties](https://link.springer.com/article/10.1007/s10670-013-9513-9#:~:text=In%20contrast%20to%20constitutive%20explanations,an%20entity%20(or%20system).&text=Thus%20they%20can%20focus%20on,changes%20in%20a%20system%27s%20properties)> accessed 25 October 2023

⁴ Bruce A. Arrigo and Dragan Milovanovic, *Revolution in Penology: Rethinking The Society of Captives* (Rowman & Littlefield Publishers 2009)

⁵ Dr. R. K. Bangia, *Law of Torts* (26th edn, Allahabad Law Agency 2021)

CASES UNDER S.375 AND S.90 OF THE IPC

The authoritative legislation on criminal law in India is the Indian Penal Code 1860 ('IPC'). 'Promise to marry' cases in India have so far been dealt with under this law, particularly Section 375⁶ and Section 90⁷. While the former pertains to the crime of rape, the latter states that consent given under misconception is invalid. A joint reading of the two has allowed for adjudication of 'promise to marry' cases in India. In *Deelip Singh v State of Bihar*⁸, the Supreme Court specified that consent given by the woman believing a 'promise to marry' which was false from its very inception would amount to rape under S.375⁹ whereas if it is mere non-fulfilment of a genuine promise then it would amount to a breach of promise redressable by compensation. In *Pramod Suryabhan Pawar v State of Maharashtra*, the apex court further elucidated that consent concerning S.375¹⁰ involves an active understanding of circumstances, actions, and consequences of the proposed act. In the promise to marry case, there is a misconstrued understanding of circumstances stemming from a false promise that thereby invalidates the consent of the woman and amounts to rape under S.375¹¹. The nature of consent was also reiterated in *K.P. Thimmappa Gowda v State of Karnataka*¹². While cases so far have been dealt with under S.375¹³ and S.90¹⁴, the proposed Bharatiya Nyaya Sanhita Bill in Section 69¹⁵ of Chapter 5 delineates false promises to marry as a crime distinct from rape. The false promise to marry will be attracted only when a man makes a promise to marry a woman, to break it, to get her consent, and sexually exploit her.¹⁶

⁶ Indian Penal Code 1860, s 375

⁷ Indian Penal Code 1860, s 90

⁸ *Deelip Singh v State of Bihar* (2005) 1 SCC 88

⁹ Indian Penal Code 1860, s 375

¹⁰ *Ibid*

¹¹ *Ibid*

¹² *K.P. Thimmappa Gowda v State of Karnataka* (2011) 14 SCC 475

¹³ Indian Penal Code 1860, s 375

¹⁴ Indian Penal Code 1860, s 90

¹⁵ Bharatiya Nyaya Sanhita Bill 2023, s 69

¹⁶ Saumya Kalia, 'How are 'false promise to marry' cases treated in the new criminal law Bill? | Explained' *The Hindu* (07 September 2023) <<https://www.thehindu.com/news/national/how-are-false-promise-to-marry-cases-treated-in-the-new-criminal-law-bill-explained/article67213081.ece>> accessed 25 October 2023

UNQUALIFIED CONSENT, FREE WILL, AND FALSE PROMISES

Therefore, even as the proposed legislation seeks to delineate ‘promise to marry’ cases as separate crimes rather than categorizing them under a form of rape, the underlying understanding of consent and intent is the same as envisaged in the conceptualization of rape. The word consent appears repeatedly in S.375¹⁷ of the IPC and is a critical determining factor in cases of rape. The nature of consent and what constitutes consent is a crucial element of both rape cases as well as a promise to marry cases. In *Rao Harnarain Singh v State of Bihar*¹⁸, it was observed that, “Consent, on the part of a woman as a defense to an allegation of a rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.” In *Anthony alias Bakthavatsalu v State*¹⁹, the apex court stated that, “Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.” From the aforementioned ‘promise to marry’ cases as well as rape cases, one can glean the basic prerequisites that formulate consent. There must be clear communication of consent through verbal or nonverbal means. Consent must be based on judicious consideration of the circumstances as well as the consequences. Consent obtained under coercion or duress is vitiated. In promise-to-marry cases, consent is obtained under pretenses. An important factor here is also to determine whether the promise to marry was a primary basis for giving consent. This becomes particularly challenging and cannot be legislated upon generally but can only be decided based on the particular facts of a specific case. Based on previous judgments of the apex court, it is evident that the promise to marry must be established as the basis of consent for it to be vitiated upon disclosure of the promise being false. Thus, it can be seen that while the broad contours of the constituent elements of consent have been outlined in judgments as well as legislation, both being authoritative sources of law in a mixed legal system as that of India, nonetheless neither has been able to provide specific tests

¹⁷ Indian Penal Code 1860, s 375

¹⁸ *Rao Harnarain Singh v State of Bihar* AIR 1958 P&H 123

¹⁹ *Bakthavatsalu v State* AIR 1960 Mad 308

for consent, particularly in promise to marry cases. Consent in promise-to-marry cases thereby becomes a function of subjective consideration as well as specific objective facts.

THE BURDEN OF PROVING INTENT

The next important element underlying rape and ‘promise to marry’ cases is intent. As emphasized by the apex court in the aforementioned judgments regarding ‘promise to marry’ cases, it is necessary to establish that the ‘promise to marry’ was, in fact, false from its very inception. The mere inability of the accused to fulfill a promise to marry would amount to a breach of trust for there was no mala fide intent. It is significant also to note in this context that mens rea is generally a crucial aspect of criminal trial procedures. According to Farrar and Dugdale, criminal trial principles embody the ‘presumption of innocence’.²⁰ This presumption of innocence is substantially countervailed by the establishment of mens rea or, simplistically put, mala fide intent. Since promise-to-marry cases are under the ambit of criminal law, the establishment of proof of intent becomes important. Moreover, it must be proved beyond a reasonable doubt. This again becomes a highly complex exercise. In all three cases listed before *Deelip Singh v State of Bihar*²¹, *Pramod Suryabhan Pawar v State of Maharashtra*²², and *K.P. Thimmappa Gowda v State of Karnataka*²³ - the accused was held not guilty of rape but only breach of promise because intent of false promise from its very inception could not be established by the prosecution. This exemplifies the issues that exist with intent as a constitutive element of rape and ‘promise to marry’ cases.

CONCLUSION - THE VICTIM’S POSITION

While there is valid penological justification for punishing ‘promise to marry’ cases under criminal law owing to social context, consequence, and nature of criminal law, the criminal trial process undermines the victim’s position in such cases. The victim, the woman, comes to knuckle under two primary burdens: (i) the burden of societal judgment, pressures, and

²⁰ John H. Farrar and Anthony M. Dugdale, *Introduction to Legal Method* (3rd edn, Sweet & Maxwell 1990)

²¹ *Deelip Singh v State of Bihar* (2005) 1 SCC 88

²² *Pramod Suryabhan Pawar v State of Maharashtra* (2019) 9 SCC 608)

²³ *K.P. Thimmappa Gowda v State of Karnataka* (2011) 14 SCC 475

expectations; and (ii) the burden of proof if she chooses to file a case. These burdens arise from the underlying conceptualization of rape in which consent and intent are formative elements. In 'promise to marry' cases, the woman must put up with humiliation and degradation in Indian society owing to premarital sex and the absence of marriage to the person with whom sexual relations were established. Societal morality imposes a far greater burden on the woman in 'promise to marry' cases. Moreover, the processes and procedures of 'promise to marry' cases exert an additional burden of proof on the woman. She must prove that the promise was false from its very inception and establish intent, for it is this intent that then forms the basis for vitiating consent. Both are intrinsically interrelated and only in the proof of intent does the vitiation of consent lie. The women carry the burden of both ignominy and testament even as they are the victims of the crime themselves. Hence, there is a pressing need to reimagine consent and intent in 'promise to marry' cases for adequate adjudication under criminal law.