# CONSENT, CONJUGALITY AND CRIME: HEGEMONIC CONSTRUCTIONS OF RAPE LAWS IN INDIA


## Arushi Garg

University of Oxford, UK



## Abstract

‘Promise to marry cases’ are those in which a victim is deceived into having sex with the defendant, based on a dishonest promise of marriage. Rape laws in India are designed to punish such defendants. These cases represent a significant proportion of rape cases in the legal system but remain under-researched. Drawing from postcolonial feminism and intersectionality theory, this article provides a socio-legal exposition of ‘promise to marry’ cases. This analysis is based on the total population of judgments in promise to marry cases, which were issued by Delhi trial courts from January to June in 2014 and 2016. It is found that courts propagate a heteronormative, intracaste, intracommunal construction of marriage while enforcing seemingly neutral rape laws. Given the prejudicial application of law, it is concluded that the use criminal law in promise to marry cases is inappropriate.



## Key words

rape, consent, deception, marriage, India, postcolonial feminism, intersectionality


Legal understandings of rape are deeply influenced by socio-economic power structures. Since the 1980s, a particularly contentious area of Indian law is the criminalisation of the defendant in ‘promise to marry’ cases as a rapist. In these cases, the victim is deceived into having sex with the defendant, based on an insincere or dishonest (‘false’[1]) promise of marriage. Unsurprisingly, ‘men’s rights activists’ describe these cases as ‘relationships gone sour’ or ‘false rape cases’ (Pandey, 2017). Yet, some feminist lawyers and activists have also challenged the idea that such conduct should be punishable as rape, highlighting that this might feed into patriarchal conceptions of marriage as the only legitimate site for sexual expression (Johari, 2014). These conversations have saturated media coverage about rape prosecutions in India, but no academic study has yet focussed on this area. By drawing on postcolonial feminism and intersectionality, this article provides a socio-legal analysis of trial court judgments in ‘promise to marry’ cases in India.

Postcolonial feminism highlights that the scope and operation of law assumes fixed gendered, racial, religious, linguistic and other social hierarchies (Deckha, 2015: 177; Sa’ar, 2005: 683; Kapur, 2003: 6). It excavates, critiques and challenges these assumptions. By focussing on multiple oppressions, it exists in sharp contrast with strands of ‘dominance’ or ‘radical’ feminism that are premised on a strict ‘structure of male domination and female subordination in the context of sexuality’ (Kapur, 2015: 23). Radical feminism highlights the universality of violence against women and uses this

violence as an ‘equalizer’ to bring together women from various political and historical contexts (Kapur, 2015: 30). This serves to efface the differences in the social position of different women, since an acknowledgment of these differences could irretrievably fragment feminism (Stewart, 95: 271). It also heightens the emphasis on women’s victimisation, rather than their agency (Kapur, 2001). Postcolonial feminism shifts the conversation since it ‘integrates multiple differences into its analysis when examining the dynamics of cultural Othering’ (Deckha, 2015: 179; also see Boyd and Parkes, 2017: 739). By challenging stereotypical, monolithic and essentialist constructions of ‘third world’ women as victims of their culture (Kapur, 2002: 6; Pande, 2015), postcolonial feminism speaks directly to its twin framework, intersectionality theory (Deckha, 2015, 179). Emerging from black feminist thought, intersectionality theory suggests that human experience is a product of conjoined and intersecting patterns of oppression (Crenshaw, 1991: 1243). While gender is one aspect of this experience, gender intersects with class, caste, religion, disability, race, and many other attributes to produce unique forms of discrimination (Atrey, 2015: 1516). Drawing from these theories, this article exposes the manner in which seemingly neutral rape laws are implemented to sustain a range of existent social stratifications. It argues that the rape prosecutions in promise to marry cases draw from and reinforce a particular construction of marriage, as a conservative, patriarchal, heteronormative, intracaste, intracommunal institution. They presume, universalise and naturalise the proposition that sexual relationships are legitimate only when they are carried out within the bounds of such a marriage. This idea of marriage serves to solidify social hierarchies through the control of bloodlines.

This contribution is timely. There is a burgeoning body of literature that asks the normative question of how sexual consent ought to relate to deception, but it uses a philosophical or doctrinal lens, rather than viewing the law in context (for example, Herring, 2005; Gross, 2007; Herring, 2007; Williams, 2008; Laird, 2014; Sharpe, 2014; Sharpe, 2016). Further, most of the existent work is anchored in jurisdictions outside South Asia. This is important, since the types of deceptions that are prosecuted are closely linked to social norms that define the limits of acceptable sex – a theme drawn out later in this paper. Within South Asia, scholarship on this topic has called for greater clarity in dealing with cases of sexual deceit (Bronitt and Mishra, 2014: 47). Other writers have focussed on the theoretical underpinnings of prosecutions and verdicts in these cases. For instance, Sakhrani has suggested that judicial reasoning in promise to marry cases is heavily steeped in social norms about sexual morality (Sakhrani, 2016: 272). Similarly, Siddiqui, writing about analogous cases in Bangladesh, has suggested that rape complaints in these cases are filed for strategic reasons since ‘it is less dishonourable to claim to be a victim of rape than to admit to consensual sex’ (Siddiqui, 2012: 170). Finally, Vishwanathan has drawn out how the criminalisation of promises of marriage is used to propogate regressive ideas of women’s autonomy, reflecting ‘the premium placed on a woman’s chastity in Indian society’ (Vishwanathan, 2018: 19). Taking a cue from extant literature, this paper provides a socio-legal exposition of the development of Indian criminal law in promise to marry cases and hones in on how marriage is understood in these cases.

It starts by critically assessing the legal framework governing cases of deceptive sex in India. It then examines the implementation of this law in 79 recent trial court judgments from Delhi district courts. It concludes law enforcement in promise to marry

cases is deeply influenced by culturally dominant ideas that regard an intracaste, intracommunal marriage as the only legitimate site for sexuality. Thus, this paper provides an important account of how legal developments are deeply influenced by intersecting social stratifications, such as those along lines of religion, caste and gender.

## The legal position on promise to marry cases: What's love got to do with it?

This section introduces the general definition of rape, before engaging with the specific legal provisions that are relevant in promise to marry cases. It then draws out and critiques the judicial reasoning which has recognised the scope for rape prosecutions in promise to marry cases.

Section 375 of the Indian Penal Code 1860 ('IPC'), amended in 2013, defines rape as follows:

> 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:—
>
> First.—Against her will.
>
> Secondly.—Without her consent.
>
> Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
>
> Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

> Sixthly.—With or without her consent, when she is under eighteen years of age.
>
> Seventhly.—When she is unable to communicate consent.
>
> Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.
>
> Explanation 2.—Consent means 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:
>
> Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.
>
> Exception 1.—A medical procedure or intervention shall not constitute rape.
>
> Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Section 376(1) of the IPC provides for the punishment of rigorous imprisonment for rape, from a minimum of seven years to life. This may be accompanied by a fine. Section 376(2) provides that for certain aggravated forms of rape (for example, custodial rape), the minimum sentence is ten years. Notably, this statute defines rape in gendered and heteronormative terms, since according to it rape can only be perpetrated by a man against a woman (cf., Luts-Priefert, 2015: 98). Non-consensual sexual penetration of men is criminalised under Section 377 of the IPC (*Navtej Johar v. Union of India*) but is not regarded as rape; intersex people are unprotected even under this provision.[2]

It is clear from this account that sex[3] without consent is punishable as rape under Indian law. The definition of consent recounted above was introduced into Section 375 under the Criminal Law (Amendment) Act 2013. In addition to this, Section 90 provides a negative definition of consent (Gaur, 2009: 171). Under this provision, when consent is given under a misconception of fact and the person to whom consent is given knows that this is the case, this amounts to an absence of consent in law (IPC, s 90; Indian Evidence Act 1872, s 3). However, Section 375 also mentions at least one category of deception, where the wife mistakes the accused to be her husband, and the latter knows this is the basis of her consent. This creates the impression — based on the principle of *expressio unius est exclusio alterius*[4]— that this is the only category of misrepresentations that can vitiate consent under Section 375. This is not how the provisions have been understood as relating to each other in the case law, as demonstrated below. Courts have consistently operated on the assumption that Section 90 remains relevant to the interpretation of Section 375, even after the positive definition of consent was introduced in the latter provision in 2013.

Section 90 is neutral about the content of the victim’s misconception. No matter what the misconception, it is capable of negating consent as long as two conditions are met. First, there must be a but-for correlation between the victim’s misconception and

consent; secondly, the defendant must know or have reason to believe that the consent was thus vitiated. As long as this remains true, according to the text of Section 90, it is established that the victim had not given her consent.

It is a reliance on Section 90 that enables rape prosecutions in promise to marry cases. According to this line of reasoning, if:

the victim consents to sexual intercourse based on a misconception regarding the accused's intention to marry the victim; and

the accused knows or has reason to believe this was the case,

then his conduct amounts to rape. Thus, on this view, the word 'fact' under Section 90 includes the fact of the accused's intention. Initially, there were conflicting High Court judgments on whether this interpretation of law is tenable.[5] Following a period of legal uncertainty, the issue of whether promise to marry cases are prosecutable as rape first reached the Supreme Court in *Uday* v. *Karnataka*.

In *Uday*, the victim claimed to have consented to intercourse with the accused based on a promise of marriage (*Uday v. Karnataka*: para. 3). They had sex about 15 to 20 times, and she became pregnant with the accused's child (*Uday v. Karnataka*: para. 3). The accused kept assuring her that he would marry her but went on postponing the ceremony on one pretext or another (*Uday v. Karnataka*: para. 4). In the eighth month of her pregnancy, the victim lodged a rape complaint against the accused (*Uday v. Karnataka*: para. 4). The accused was convicted in the trial court and on appeal, the conviction was upheld by the High Court, leading to the appeal before the Supreme Court (*Uday v. Karnataka*: para. 1) Reviewing the High Court authorities before it, a Division Bench of Supreme Court held:

> …the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact (*Uday v. Karnataka*: para. 22).

While the Court seemed to initially indicate that Section 90 was inapplicable ('A false promise is not a fact within the meaning of the Code'), it nonetheless went on to assess the validity of consent based on Section 90 (*Uday v. Karnataka*: para. 26). Thus, it presumed that the sincerity of the promise could be regarded as a 'fact.' It then went on to break the causal link between the victim's misconception about the sincerity of the promise and her sexual consent (*Uday v. Karnataka*: para. 26). Subsequent decisions have understood *Uday* as accepting that the 'misconception of fact' under Section 90 can relate to the accused's intention to marry the victim (for instance, *Deelip Singh v. Bihar*).

In *Uday*, the Court was hesitant to lay down a general test for when consent will be negated under Section 90, but based on the following factors, it ruled that the intercourse was consensual: first, the victim was in love with the accused and probably consented to having sex with him on this basis (*Uday v. Karnataka*: paras, 24, 26); second, the victim was from a different caste to the accused and must have known that as a result 'marriage was not possible' (*Uday v. Karnataka*: paras. 2, 24); third, the victim

was a well-educated adult who had 'sufficient intelligence to understand the significance and moral quality of the act she was consenting to' and this was why she had concealed the sexual relationship from her family (*Uday v. Karnataka*: para. 24); fourth, it could not be said that the accused never intended to marry her (*Uday v. Karnataka*: para. 25); fifth, it had not been proved that the accused knew, or had reason to believe that she consented to have sex with him based on the promise to marry, rather than the fact that they were 'deeply in love' (*Uday v. Karnataka*: para. 26).

Four specific criticisms can be levelled against the judicial reasoning in *Uday*. To begin with, *Uday* unhelpfully views the victim's love for the accused, and the promise of marriage as two mutually exclusive criteria for consent. As per *Uday*, where sexual consent was partly motivated by the victim's love for the accused, it is irrelevant that it would have been denied without the promise of marriage. Thus, according to the Supreme Court, a false promise to marry negates the victim's consent only where it was the sole reason for such consent. Contrary to the Court's understanding, Section 90 requires that the consent be given 'in consequence of' the misconception, not that it be given 'solely' in consequence of' the misconception. To require that the consent be based exclusively on the promise of marriage is not justified according to the text of Section 90 and was not justified by the Court according to any other principle of statutory interpretation or causation. Indeed, victims are more likely to be convinced about an offer of marriage if they have an ongoing romantic relationship with the accused. The Court's narrative fails to accommodate the complexity of human decision-making, which is often prompted by mixed motivations. In particular, it views marriage either as a method of social organisation, or as a vindication of love, but never both simultaneously.

Second, the Court's ruling is premised on the impossibility of intercaste marriage (*Uday v. Karnataka*: para. 24). It is not disputed that intercaste marriages remain uncommon (Goli, Singh and Sekher, 2013: 194; Lokniti, 2017; also see Rao, 2005: 292). While the prohibition on caste exogamy has historically been used to maintain and reproduce the caste system, intercaste marriage remains a legal - though socially subversive - form of marriage (Chakraverty, 2005: 309; Dube, 2005: 242). The victim in this case was aware that the marriage might be opposed because she was from a different caste to the accused and pointed this out to him (*Uday v. Karnataka*: para. 24). However, given that the accused nevertheless assured her of marriage, this cannot automatically lead to the conclusion that she either knew, or should have known that the marriage was 'not possible.'[6] To suggest this is to legitimise, naturalise and universalise the principle of caste endogamy.

Third, the Court relied on the fact that the victim understood the 'significance and moral quality' of her act, and therefore hid the sexual relationship from her family (*Uday v. Karnataka*: para. 24). There is no reason that the victim should decide on the issue of intercourse without engaging in a conscious decision-making process which factors in the nature and significance of her acts.[7] In fact, only when such a decision-making exercise is carried out can it be said that the decision (to have sex) was a result of the misconception (regarding the accused's intention), as required by Section 90. Thus, a conscious decision-making process should not exclude the case from the ambit of Section 90; rather, it should be viewed as a necessary pre-requisite to the application of Section 90. Further, the presumption here, that a woman would notify her family about a self-arranged marriage, overlooks the context where marriages of choice are often punished

through social, and sometimes violent, sanctions (Chakraverty, 2005; Irudayam, Mangubhai and Lee, 2006: 13).

Fourth, the Court insisted that for consent to be negated, the promise of marriage should have been false from the very outset (*Uday v. Karnataka*: para. 25). As a matter of textual interpretation, there is no justification for requiring that the accused never intended to marry the victim. Suppose that the accused's promise was originally sincere, but over time he realised that he was no longer interested in keeping it. Following this realisation, if he was aware that the victim's consent to intercourse continued to be based on the promise of marriage, and continued a sexual relationship with her, he should still be liable for rape according to the text of Section 90.

The ruling in *Uday* was cited with approval by the Division Bench in *Deelip Singh*, where the Court reiterated that in theory, Section 90 could be invoked by a victim in a promise to marry case (*Deelip Singh v. Bihar*). Nonetheless, the accused was acquitted since the Court found that he had intended to marry the victim, but ultimately was unable to 'on account of the pressure exerted by his family elders' (*Deelip Singh v. Bihar*: para. 36; cf. *Yedla Srinivasa Rao v. AP*: paras. 2, 6). Importantly, *Deelip Singh* characterised *Uday* as an extension of an older decision of the Calcutta High Court, *Jayanti Rani Panda v. West Bengal* (*Deelip Singh v. Bihar*: para. 29). *Jayanti Rani Panda* was amongst the earliest High Court decisions to hold open the possibility that sex based on a false promise of marriage could amount to rape on a joint reading of Section 90 and Section 375. However, it held that the argument could not successfully be made in respect of the specific facts of that case. In *Jayanti Rani Panda*, the accused was acquitted *inter alia* because the promise was vague and for a 'future uncertain date' so the victim could not have seriously thought that the accused intended to marry her (*Jayanti Rani Panda v. West Bengal*: para. 7). This conclusion also stretches the words of Section 90, which does not require the accused to affirmatively make a deceptive representation at all.[8] While the accused must be aware of (or have reason to believe) at the time of intercourse that the consent is based on a misconception, he need not be the person responsible for having brought about the misconception. Even so, since this reasoning has received the Supreme Court's approval, it is now legitimate for trial courts to base acquittals on this reasoning.

The principles laid down in *Uday* and *Deelip Singh* have been supplemented over the years in a growing body of case law. The *Deepak Gulati* judgment added that the prosecution's case is weak where the accused is still willing to marry the victim when proceedings are initiated against him (*Deepak Gulati v. Haryana*: para. 24). Subsequently, in *Prashant Bharti* the Supreme Court quashed all proceedings against the accused in a promise to marry case, based on the complaint of a victim who was already married to someone else, saying that her claim was '*per se* false and as such, unacceptable' (*Prashant Bharti v. Delhi*: paras. 16, 20). The age of the victim can also be taken by the Court as an indication of how worldly wise she is, and to what degree she is judged to have given her consent based on the belief that the accused will execute his promise of marriage:

> Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the

> consequences of allowing a male friend into her bed room at night (*Tilak Raj v. HP*: para. 20).

In *KP Thimmappa Gowda*, one of the factors that led the Court to decide that sex was consensual, rather than based on the promise of marriage was that there were multiple occasions on which sexual intercourse took place (*KP Thimmappa Gowda v. Karnataka*: para. 13). However, if there is a romantic relationship between the victim and the accused, it is likely that there will be multiple sexual incidents (Stannard, 2015: 433). Each of these can realistically be linked back to the promise of marriage. The Court's one-line analysis on the point did not engage with unique nature of promise to marry cases in this respect. Perhaps the Court was motivated by its previous ruling in *Uday*, where it was held that if the victim based her consent on the twin motivations of love for the accused and his promise of marriage, Section 90 would anyway not apply.

These judicial developments reflect a continual narrowing of the circumstances under which a promise to marry case will yield a conviction. As is drawn out more fully in the following discussion of trial court judgments in promise to marry cases, this increasing list of restrictions is not arbitrary. It serves to reflect and propagate hegemonic ideas of marriage and sexuality, that are geared toward sustaining social stratifications.

## Applying the Law in Delhi District Courts: 'Real Rape' in Context of Promise to Marry Cases

This section provides an empirical, socio-legal analysis of promise to marry cases. It starts by providing a general profile of all the cases studied, and then narrows down the pool to discuss the more relevant ones in detail. Using Susan Estrich's concept of 'real rape' it unearths the stereotypical narratives that underpin judicial reasoning in promise to marry cases. Specifically, it argues that like their appellate counterparts, trial courts are operating on the presumption that an intracaste, intracommunal marriage is the only legitimate site for sexuality. The interpretation and application of appellate court judgments has been done so as to further entrench this idea within the law. Finally, there is a pervasive influence of Brahminical/Hindu ideas in understanding marriage in these cases.

The total population of trial court judgments from Delhi over a period of 12 months was studied (n=273). This included all cases from January to June in 2014 and 2016. These judgments were accessed through the aid of a Delhi High Court judge involved in the digitisation of trial court judgments.[9] Of the 273 cases in the dataset, 79 (28.9%) were promise to marry cases. Of these, only one resulted in a conviction (1.3%).[10] There were two prominent factors that were associated with this remarkably high acquittal rate. In 51 of the 79 cases (64.6%), the acquittal was primarily based on the victim turning 'hostile' to the prosecution in court. This means that the victim testified in support of the accused and contrary to her previous statements to the police and/or the court. In the remaining cases (n=27; 34.2% of the promise to marry cases), the judgment was motivated by a stereotypical narrative of what a 'real' promise to marry case should look like. This article is concerned with the second category of cases, which will now be discussed in further detail.

It is not novel to suggest that judgments in rape cases are often motivated by prejudicial beliefs about women, or by rape myths more generally.[11] Estrich coined the

term ‘real rape’ to describe incidents which meet the socio-cultural expectations of what a rape is supposed to look like, *i.e.*, where a stranger perpetrates a violent rape against a woman he does not know and has not met before, and she physically resists this attack (Estrich, 1988, writing in the context of the USA). This ‘cultural rape fable’ has evolved over time to cover numerous factors including whether victims were wearing revealing clothes, or walking in obscure places (Orenstein, 1988: 675, 684). The further an incident deviates from this cultural fable, the harder it becomes to secure a conviction (Orenstein, 1988: 675). Related to this is the good victim/bad rapist dichotomy according to which only certain kinds of deviant men are considered capable of rape, and only certain kinds of women are regarded as capable of being raped. Nils Christie explored this idea in context of the criminal justice system generally, suggesting that some people fit more easily into public imagination as being ‘ideal victims’ of ‘ideal perpetrators’ (Christie, 1986). The ideal victim is described as weak, carrying on a respectable project and occupying a place she cannot be blamed for being in. The ideal offender is big and bad, and there is no prior relationship between the victim and the offender (Christie, 1986: 19). Any deviation from these characteristics makes the commission of crime less credible or worthy of prosecution (Christie, 1986: 19). It is likely that the ‘real rape’ scenario will be influenced by cultural factors. For example, *dalit* women in India are often considered ‘promiscuous’ (Gopal, 2012: 225; for analogous treatment of black women in the US, see Donovan and Williams, 2002: 97) suggesting that an Indian ‘real rape’ would involve a non-*dalit* victim.

In line with this literature, the judgments in the dataset demonstrated the use of stereotypical reasoning. However, the set of stereotypes that emerged from reading these judgments was distinctive, and unlike those that have been discussed so far in the wider literature – they related specifically to what counts as a socially acceptable marriage. Accordingly, the question sought to be answered is: What is a ‘real’ promise to marry rape? Based on the dataset, this scenario can be framed as having the following attributes:

The victim was impoverished, ill-educated, from a rural background and of the same religion, caste and or religious sect as the accused. She had never been married before.
The accused was unmarried when he made the promise of marriage.
The couple had informed and sought the blessings of their families.
The victim did not have any romantic or sexual feelings for the accused and had sex with him for no other reason than the promise of marriage.
There was only one incident of sexual intercourse, and it was reported without ‘delay.’

Thus, the data demonstrated how the appellate court rulings are understood and re-interpreted by lower courts to emphasise and amplify their hegemonic aspects. For instance, while the judgment in *Uday* assumed the impossibility of inter-caste marriage, lower courts mirrored a similar logic by assuming the impossibility of marriage across religious lines. In one case involving a Muslim victim and a Hindu accused, the court observed that ‘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]’ (*State v. Gaurav Bhatia*: para. 28). In another case, the court applied the same logic to ethnic and linguistic difference and held that the victim should have known that the promise ‘may not be fulfilled on account of [the] fact that they both belong to different community/tribe and they speak different dialect[s]’ (*State v. Thianmin Thang Tonsin*: para. 20). This logic of endogamy seeks to consolidate and maintain social hierarchies

through the control of sexual choices. It effectively suggests that a victim should expect to be discriminated against. It is also worth considering how far this logic can be stretched. Suppose that the accused refuses to marry the victim because she is 'too dark,' even though they otherwise belong to the same social group. Would the court be able to claim, analogous to the cases above, that the victim should have expected that the accused would reject marriage with her based on racist 'beauty' standards (Reddy, 2006: 72 to 77)?

Further, *Prashant Bharti* has made it almost impossible to convict the accused in a promise to marry case where either party is married. In 20 out of 79 cases (25.3%) in the dataset, either the victim, or the accused, or both were still married to other people at the time of the incident(s). In two of these cases, the victim had been divorced through 'informal' proceedings, which had no legal authority, though she thought they did because she had misunderstood the law. In one case, the victim had already initiated formal divorce proceedings against her husband when she had sex with accused based on a promise of marriage. In three cases, the victim and/or the accused were married, but lived separately from their spouse, albeit without undertaking any formal or informal divorce proceedings. All these cases resulted in an acquittal. In some of these cases, the fact that the victim and/or accused were married to other people had been raised by the victim, and the accused had assured her of marriage nonetheless. However, even in these cases, the genuineness of the claimant's belief was disbelieved since 'nobody can be said to have misconception on account of an uncertain event like divorce which may or may not happen' (*State v. Phaninder Singh Gulia*: para. 12).

While these decisions often refer to the ratio in *Prashant Bharti*, they overlook the host of factors on which that decision was based, most of which are absent in routine promise to marry cases: the victim had falsely indicated in the police complaint that she was unmarried, and lied to the Court about being divorced on the date of the incident; she had filed a writ petition in High Court to quash her own complaint; she made no pleadings before the court despite being given many chances to do so, and her allegations in respect of related incident of sexual harassment were disproved.[12] In spite of its specificities, *Prashant Bharti* is now often used to suggest that if either the victim or the accused is married, a promise to marry could not have been regarded as sincere by the victim. This is a Brahminical/Hindu idea of marriage, in which marriage is regarded as an indissoluble sacrament (Mandal, 2014: 259).[13]

There were also five cases (6.3%) in the dataset where the victim was a widow or a divorcee, and all of them resulted in acquittal of the accused. Again, it is a Brahminical/Hindu ideology that suggests that women can only be ritually married once since traditionally, it is 'only the marriage of a virgin with full rites within the acceptable limits of connubiality which sacralizes and sanctifies the girl's sexuality' (Dube, 2005: 235).[14] While in certain 'lower' castes, dissolution of marriage and remarriage of widows and divorcees might be permitted, these secondary unions are of a lower status, since they cannot be associated with female virginity, and consequently, female purity. Rather, they are a 'concession to human weakness: a woman's need to satisfy sexual desire' (Dube, 2005: 237). However, while it is possible that there was subconscious stereotyping happening in this respect, this was not the stated reasoning in the judgments. The total number of cases in which the victim was a widow or divorcee was quite low, making it difficult to ascertain the extent to which this factor is relevant.

Further, the Supreme Court's causal requirement that the victim's consent be based solely on the promise of marriage, with no role being played by romantic or sexual feelings came up frequently in the dataset (*Deepak Gulati v. Haryana*: para. 18). Any expressions of the victim's love or attraction typically weakened the case for the prosecution, since this meant that the standard laid down in *Deepak Gulati* had not been reached. To illustrate, evidence that the victim had stealthily let the accused into her house (*State v. Mohd. Yunus*: para. 17) or had voluntarily gone to visit him late at night (*State v. Anuj Yadav*: para 25) was taken as proof of a romantic relationship between the victim and the accused, which prejudiced the case for the prosecution. In keeping with *Uday*, if the victim had not disclosed the accused's promise of marriage to her family, it was treated as evidence that 'the prosecutrix was aware of the moral aspects of the relationship and the inherent risk involved in this kind of relationship' (*State v. Sandeep*: para. 38). It is implausible that a victim in promise to marry cases would be totally devoid of romantic feelings for the accused. Requiring this in law makes it practically impossible to ever convict the accused in such cases.

Finally, the courts' assessment of delay in reporting is also complicated by the nature of these cases. Since consent in these cases is granted based on the promise of marriage, as long as the promise persists, the victim will not frame the sex as rape. In many instances, the accused will continue to assure the victim of marriage for long periods of time but say that he needs time before he can execute his promise - to find a job (*State v. Deepak*: para. 1), so his siblings can get married first (*State v. Muddassir Khan*: para. 4), so he can graduate (*State v. Firoz Ahmed*: para. 1). In many such cases, the delay is still counted from the first incident, which is a misunderstanding of the nature of delay in promise to marry cases (for example, in *State v. Saleem Khan*: para. 35). Further, when the refusal is made, the victim's first response will be to try and salvage the situation. Victims might spend several weeks or months trying to persuade the accused to reconcile because what they want is marriage with the accused, rather than punishment for him (for instance in *State v. Vikul Bakshi*: paras. 10 to 12). They might also be experiencing feelings of shame, which are common to the experience of women who have been sexually violated in other contexts (Engle and Lottman, 2010). Thus, there are often plausible and justifiable reasons to expect delays in these cases, even after the accused has first refused to marry the victim. In other cases, there is no outright refusal, but an unrealistic demand for dowry which cannot be met (as in *State v. Gaurav Verma*: para. 1). It is unclear how much of the elapsed time between the accused's first refusal and victim's police complaint should be classified as unexplained or unjustified delay.

In all, the dataset showed the tendency of courts to construct marriage in a way that solidifies social hierarchies. Judicial imagination presumes an idea of marriage that is intracaste, intracommunal and carried out with the family's blessings. It also seems influenced by Hindu/Brahminical ideas of marriage, such as where it regards the remarriage of widows and divorcees to be impossible. Further, the refusal to engage honestly with the nature of promise to marry cases has led to a distorted understanding of causation and delay in these cases, leading to unconvincing judicial reasoning on these points. In the concluding section that follows, I use intersectionality and postcolonial feminism to draw out the more general implications of this discussion for understanding the judicial development of law.

## Conclusion

The study of promise to marry cases undertaken herein illustrates how neutral concepts like ‘misconception’ become heavily loaded proxies for culturally salient issues. Nothing in Section 90 suggests that the only misconception that will vitiate sexual consent is one that relates to marriage. Indeed, a brief glance at other jurisdictions shows that similar provisions have been used to prosecute the defendant in a wide variety of situations with varying degrees of success. Examples include where the defendant lied about wearing a condom (as in *R v. Assange*), or about withdrawing before ejaculation (as in *R(F) v. DPP*), or about performing a medical procedure on the victim (as in *R v. Flattery*), or about paying her a specified sum of money for the sex (as in *R v. Linekar*). The merits of these arguments could be separately assessed, but the fact that none of these varying situations have ever been brought to court in India – at least before appellate courts – is important. It indicates the ease with which the facial neutrality of the law yields to interpretations that are heavily influenced by the context.

The context influencing judicial interpretation is often constituted by social stratifications. Within India, marriage has routinely been used not just to control women’s choices, but also to thereby sustain and reproduce other hierarchies, such as those of caste and religion. The particular meaning that marriage has been imbued with in promise to marry prosecutions, is also shaped by dominant discourse on the limits of acceptable marital and sexual unions. In this conception, an acceptable conjugal union is one that does not disrupt the current political, social and economic order, and is duly endogamous in respect of caste, religious, ethnic or linguistic identity. Sex is acceptable only when it is experienced within the bounds of this union. If there is a transgression from these boundaries, this is enough to mark the victim as a suspect witness. The subversive idea that the marriage could have been sought or promised outside these constraints is considered a judicial impossibility. Thus, it is only the text of the law that suggests that any misconception can vitiate consent. In legal practice, this negation of consent is unlikely to result where the misconception operates to destabilise a well-entrenched system of socio-economic stratifications.

The data reveals a construction of marriage that is embedded in India’s history as a postcolonial nation, where ‘sexuality and culture have been sutured together as a result of the 19th-century colonial encounter and nationalist resistance’ (Kapur, 1999: 357; also see Mullally, 2005: 342). A key plank of the nationalist struggle was to protect sexuality as a ‘pure space of Indian culture’, free from colonial contamination (Kapur, 1999; Kapur, 2000: 55). The dominant sexual ideology was one which legitimated sexuality only within the bounds of a heteronormative marriage characterised by caste and religious endogamy. In independent India, the ‘longing for a strong cultural identity’ continues to exert its influence, along with its associated ideas of legitimate and illegitimate sexuality (Kapur, 1999: 356 to 360). Kapur describes the Hindu Right as key players in this movement, who ‘continue to degrade sexuality and banish any overt expression of it outside the model of the good Hindu wife and heteronormative arrangements’ (Kapur, 2009: 386). Specifically at a time when the Hindu Right is on the

rise, there is a need to rethink strategies that rely on using criminal law to address all sexual wrongs.

Many legal feminists have been sceptical of a heavy reliance on criminal justice to ensure the physical safety of women (Kapur, 2013; cf. Baxi, 2016). They argue that such a strategy locks women into a perpetual state of victimisation, while preventing a positive articulation of sexual rights for women and other sexual minorities (Kapur, 2013) It consolidates carceral power in the hands of the State, which can ultimately be used to persecute marginalised populations, or even to police women's sexual choices.[15] In the same vein, relying on the criminal justice system in cases of deceptive sex has contributed to solidifying hegemonic ideas of marriage and sexuality. While these legal developments are ostensibly for the protection of women, they produce a static conception of conjugality and limit the space to renegotiate its meaning over time. The more emancipatory alternative will be to shift the focus away from carceral justice and towards a less stigmatised social space for subversive sexual choices.


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## Notes

[1] While case law from Indian courts repeatedly uses the phrase 'false promise of marriage', a promise, as an undertaking for the future, cannot be true or false. Only a factual assertion can be true or false. The phrase 'false promise' is used in the case law - and consequently in this article - to mean an insincere or deceptive promise. I am grateful to Laura Hoyano for this insight.

[2] Section 377 forbids ‘carnal inter-course against the order of nature with any man, woman or animal.’ Under the s 10 of the IPC ‘The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.’
[3] Henceforth, references to ‘sex’ will be deemed to include all sexual acts that are specified in clauses (a) to (d) of Section 375 of the IPC.
[4] The expression of one thing is the exclusion of the other.
[5] For instance, in some High Court decisions, it was accepted that a prosecution in a promise to marry case could result from a joint reading of Section 90 and Section 375 of the IPC (*Jayanti Rani Panda v. West Bengal*, upheld in *Hari Majhi v. West Bengal*: para. 9*; Araj Sk v. West Bengal*, para. 12; *Sukumar Ghose v. West Bengal*: para. 2). In others, this interpretation was rejected: *Mir Wali Mohammad v. Bihar*; *Sarimoni Mahto v. Amulya Mahto*. In a third category of High Court decisions, no reference was made to Section 90 at all (*Sudhamay Nath v. West Bengal*; *MC Prasannan v. State*; *Baldhari Odhar v. Bihar*; *Thepar Singh v. UP*; *Lingam Govindarao v. AP*).
[6] Dalit women frequently report exploitation based on false promises of marriage by caste Hindu men (Irudayam, Mangubhai and Lee, 2006: 4). In fact, since 26 January 2016, Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 recognises that an upper caste man may be specially situated to dominate the will of a woman from a Scheduled Caste or Tribe. Scheduled Castes and Tribes are notified by the Parliament under Articles 341 and 342 of the Constitution of India 1950. They are historically oppressed groups and the State is under a duty to protect them from ‘social injustice and all forms of exploitation’ under Article 46 of the Constitution.
[7] This is how *Uday* was interpreted in subsequent cases (*Deelip Singh v. Bihar*: paras. 31 to 34; *Kaini Rajan v. Kerala*: para. 14).
[8] Similarly, in the English context, Alex Sharpe has challenged the view that the difference between ‘active’ and ‘passive’ deception is a meaningful one (Sharpe, 2016; also see Williams, 2008: 145).
[9] This is because under Article 235 of the Constitution of India 1950, the Delhi High Court has administrative control over the courts that are subordinate to it, including all trial courts in Delhi. This paper is based on my doctoral research on rape prosecutions in Delhi. Two six month blocks were chosen for this larger study, rather than one calendar year, in order to assess the impact of the recent Criminal Law (Amendment) Act 2013 over time.
[10] Notably, like most other criminal cases in India, prosecutors are highly unlikely to apply for judicial permission to withdraw these cases, though they are technically entitled to do so under Section 321 of the Code of Criminal Procedure 1973. Even if the case is judicially weak, prosecutors are averse to discontinuing prosecutions because their performance, particularly in rape cases, is heavily scrutinised by higher officials.
[11] Rape myths are defined as ‘prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists’ that contribute to ‘creating a climate hostile to rape victims’ (Burt, 1980: 217).
[12] She alleged that she had been called by the accused, administered an intoxicant and sexually harassed in his car. However, the phone records of the two proved that they had not interacted with each other on that date and time, and that she had in fact been

interacting with her other friends at the time she claimed to have been harassed. Both the victim and the accused were found to be in different parts of town instead of at the location of the alleged incident at the given date and time (*Prashant Bharti v. Delhi*: paras. 20, 21).

[13] However, note that divorce is now allowed under Hindu personal law, as codified in Sections 13 to 15 of the Hindu Marriage Act 1955. The reason I use 'Brahminical' as interchangeable with Hindu is because the control of female sexuality within Hinduism is used to perpetuate the caste system, which ultimately preserves Brahminical hegemony. Hindu ideas of marriage have therefore long been controlled and propagated by Brahmin communities who have historically been vested in preserving them

[14] However, note that under Section 5 of the Hindu Marriage Act 1955, there is no legal bar to the remarriage of Hindu divorcees and widows.

[15] These criticisms are extensively developed by those who challenge the uncritical acceptance of 'governance feminism.' Broadly, governance feminism refers to the incorporation of feminists in positions of legal or institutional power (Kotiswaran, 2017: 81, 84; Iyer, 2016: 22 though these authors differ on the extent to which the Indian women's movement can be classified as endorsing governance feminism).

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