
BEYOND THE BINARY: THE PSYCHO-LEGAL PARADOX OF CODIFYING CONSENT

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ABSTRACT

The legal system, in its demand for adjudicative certainty, has reduced consent to a binary proposition: it either exists, or it does not. The transition from the Indian Penal Code (IPC) to the Bharatiya Nyaya Sanhita (BNS) marks a shift in Indian criminal jurisprudence, yet the fundamental legal understanding of sexual consent remains deeply entrenched in a traditional and binary framework. Section 63 of the BNS, like its predecessor, demands a rigid, objective standard of consent, a definitive “yes” or “no” for the sake of judicial efficiency. However, behavioral and forensic psychology view consent as fluid, contextual, deeply subjective, and often ambivalent. This paper critically examines this tension through a psycho-legal lens. It argues that a “perfect” statutory definition of consent is illusory because human sexual decision-making is influenced by power dynamics, trauma responses, intoxication, coercion, and social norms that defy binary classification; the aspiration to achieve a “perfect” binary legal definition of consent is not merely incomplete but structurally impossible. Instead of attempting to rewrite the BNS definition to be perpetually “stricter,” this paper proposes a necessary shift in judicial and evidentiary mechanisms. It advocates departing from strict statutory literalism toward a holistic, behavioral-evidence-based approach that integrates forensic psychological evaluations to accurately assess a victim’s state of mind at the time of the incident, bridging the gap between rigid criminal statutes and the nuanced reality of human trauma.

I. INTRODUCTION

The legal machinery relies heavily on categorization. For the law to function efficiently, human behavior must be compartmentalized into neat, discernible boxes: legal or illegal, voluntary or coerced, consensual or non-consensual. There is a certain cruelty entrenched in the architecture of sexual assault trials. A survivor enters a courtroom already carrying the neurological wreckage of trauma, and the first thing the law demands of her is a clean, linear, and logically lucid account of her own subjective state at the precise moment of violation. The law asks: did you consent? And it expects an answer that behaves like a legal instrument, one that is unambiguous, communicable, and retroactively verifiable. Psychology, by contrast, knows that the human mind under acute threat does not produce clean answers. It produces fragmented memory, involuntary paralysis, dissociation, and submission without will. The gap between these two accounts is not merely academic. This gap is the space in which perpetrators walk free, and survivors are re-traumatized by the very system designed to protect them.

Consent is defined as an unequivocal voluntary agreement communicated through words, gestures, or any form of verbal or non-verbal communication. BNS explicitly clarifies that the absence of physical resistance does not constitute consent. This is an improvement on earlier formulations. But it is still, at its core, a checklist approach, one that asks whether a communicative act occurred, not whether a genuinely free psychological state existed. It is still, fundamentally, a legal answer to what is, at core, a psychological question.

The legal insistence on a binary definition creates a “Paradox of Codification”, the harder the legislature tries to codify a perfect, all-encompassing definition of consent, the further it strays away from the psychological reality of how humans actually process and respond to sexual trauma. The resolution to this paradox lies not in the refinement of statutory language but in the transformation of judicial methodology. This paper proposes that judges and judicial officers must be trained in trauma-informed reasoning, and that the evidentiary architecture of these trials must accommodate the behavioral and neurological realities that psychology has spent decades documenting.

II. THE LEGAL ARCHITECTURE OF CONSENT: THE STATUTORY ILLUSION

Under the original Section 375 of the Indian Penal Code, 1860, rape was defined primarily through the act of penetration against the will or without the consent of the woman, with six

specific exceptions carved out. The definition of consent itself remained largely absent for over a century. It was the Criminal Law Amendment Act of 2013, passed in the aftermath of the Nirbhaya gang rape case of 2012, that inserted an Explanation defining consent as an unequivocal voluntary agreement, while specifying that a woman who does not physically resist to the act of penetration shall not by reason only of that fact be regarded as consenting.

BNS, 2023 largely preserves this framework. Section 63 of the BNS defines rape in terms substantially similar to the amended Section 375 IPC, and the accompanying Explanation on consent retains the unequivocal voluntary agreement standard. The legislative intent is clear: to move away from a resistance-centric model toward a communication-centric one. But the fundamental lacuna remains. The statute still asks the court to identify, from a retrospective point, whether a particular psychological state existed at a particular moment in the past. It still demands that the interior world of a human mind be made legible to an exterior legal observer.

Consent, as psychology understands it, is not an event. It is a process, or more precisely, a psychological state that may evolve, diminish, be withdrawn, be given under conditions that compromise its voluntariness, or be absent even where external behavior seems to indicate its presence. The law's demand that this process be converted into a simple yes-or-no proposition creates what this paper terms the Paradox of Codification: the more precisely the law attempts to define consent, the more it distorts the psychological reality it is trying to capture.

III. THE PSYCHOLOGICAL REALITY OF CONSENT

A. Consent as a process

Consent is not a communicative act. It is a psychological state that may or may not be expressed through communication, and whose expression, when it occurs, may or may not accurately reflect the underlying state of that person. This distinction is not merely semantic. It has profound consequences for how courts should evaluate evidence in sexual assault cases.

Contemporary psychological literature understands consent as a dynamic, context-dependent, highly fluid process involving at least three distinct components:

- Cognitive- the individual understands what is being proposed
- Volitional- the individual is able to freely choose

- Affective- the individual's emotional state is not so compromised as to undermine the other two components.

Research by Hickman and Muehlenhard (1999) demonstrated that even in populations of college students, the communication of sexual consent is frequently ambiguous, non-verbal, and shaped by contextual cues that are highly individualized.¹

More significantly, consent given under conditions of intoxication, fear, relational power imbalance, or psychological coercion does not satisfy the volitional component, even if it satisfies the communicative one. A person may say yes. They may even appear to mean yes. But if their ability to freely choose has been compromised by any of these factors, the reality is that genuine consent did not occur. The law focuses on the communicative act rather than the psychological state underlying it, which indicates that these cases regularly fall through the cracks of the statutory framework.

B. Tonic Immobility: When the body betrays the law

Perhaps the single most important finding from trauma neuroscience for legal purposes is the phenomenon of tonic immobility, sometimes referred to as the “freeze response.” Tonic immobility is an involuntary state of physical paralysis that occurs as an autonomic response to extreme fear or perceived inescapability². When a victim is faced with imminent sexual violence, the brain’s amygdala may trigger a massive release of stress hormones, causing a complete shutdown of the motor system. The victim experiences a catatonic-like state characterized by muscle hypotonicity, trembling, an inability to vocalize, scream or shout, and a profound feeling of numbness or detachment from the environment. In these moments, the victim is entirely aware of the assault but physically incapable of resisting or articulating the word “no.” It is not a conscious choice. It is not a submission. It is not consent. It is the nervous system's last-resort defense mechanism when fight and flight have failed and all other avenues of self-protection have been exhausted.

This psychological phenomenon creates a profound psycho-legal paradox. The courts that rely

¹ Susan E. Hickman & Charlene L. Muehlenhard, “By the Semi-Mystical Appearance of a Condom”: How Young Women and Men Communicate Sexual Consent in Heterosexual Situations, 36 J. Sex Rsch. 258 (1999).

² Dandy D. Gbahabo & Sibongile E. Duma, “I Did Not Scream. I Could Not; I Was Terrified. I Just Followed Them. . . I Blocked My Mind. Then They All Raped Me”: A Narrative Inquiry on the Onset of Tonic Immobility Among Women Rape Victims in Nigeria, PLOS ONE, Jan. 12, 2024, at 1, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0278810>.

on the absence of physical resistance as a behavioral indicator of consent, or even courts that interpret the absence of verbal refusal as ambiguous rather than clearly non-consensual, are systematically misreading the neurological evidence available to them. The legal standard demands active communication of non-consent, but the victim's brain, prioritizing biological survival over legal evidentiary requirements, deliberately suppresses that very communication. The BNS's clarification that the absence of physical resistance does not constitute consent is a necessary but an insufficient fix to this problem. It tells courts what the silence of the body does not mean. It does not give courts the tools to understand what the silence of the body actually means.

C. Psychological Coercion: A False Choice

The binary definition of consent struggles immensely with the nuances of psychological coercion. Section 63 of the BNS rightly recognizes that consent obtained through fear of immediate physical injury is not valid. But where does the law stand on prolonged psychological manipulation, gaslighting, or grooming, particularly within relationships characterized by severe power imbalances? Can consent truly exist if the psychological environment has been meticulously crafted by the perpetrator to remove all safe alternatives? In cases of intimate partner violence or systemic abuse, victims are often subjected to a steady, long-standing degradation of their free will. The perpetrator may not use physical force but instead utilizes emotional blackmail, financial control, or threats against the victim's reputation or loved ones.

When a victim eventually "submits" to sexual acts under these conditions, it may appear as a "yes" on a superficial, binary level. The victim may not fight back or cry out because their cognitive appraisal of the situation has determined that resistance will lead to insurmountable psychological or social consequences. The law, with its focus on immediate physical threats, frequently fails to capture this "illusion of choice." It treats the victim as an independent agent making a rational decision, ignoring the forensic reality that the victim's psychological autonomy has been systematically compromised. This highlights the unattainability of a perfect statutory definition. No amount of legislative drafting can adequately grasp the infinite nuances of human manipulation. Attempting to codify every form of psychological coercion would result in a bloated, unworkable statute. Therefore, the solution does not lie in expanding the text of the BNS, but in changing how the judiciary evaluates the evidence of the mind.

IV. THE PARADOX EXPOSED: WHERE LAW AND PSYCHOLOGY DIVERGE

What actually happens in most cases is that the survivor is required to narrate her own experience of the violation in a format that mimics the structure of a legal argument. She must establish first that her consent was absent, that its absence was communicated or objectively inferable by the perpetrator, and that she behaved throughout the incident in a manner consistent with non-consent. The psychological reality of the sexual assault is converted into a legal performance for an audience of adjudicators who have been trained to evaluate logical consistency, and not behavioral authenticity. This is not merely performative but inherently cruel to the victim, who has been advised to act in a certain way to present her arguments.

The moment a survivor is required to narrate her subjective state from memory, she is asked to translate a non-verbal, non-linear, neurologically disrupted experience into the most linear and verbal way, sworn testimony. The translation is, by definition, imperfect. And in that imperfection, the defense finds its ammunition for acquittal. This dynamic was examined critically by legal scholar Susan Estrich, whose foundational work on rape law argued that the legal system's demand for evidence of "real rape," characterized by stranger violence, physical injury, and forceful resistance, systematically discounts the psychological and behavioral reality of most sexual assaults, which occur in familiar contexts, without weapons, and with survivors who often do not resist in the ways the law expects.³

V. PROPOSING A SHIFT: EMBRACING HOLISTIC ADJUDICATION

A. Expert Testimony on Trauma Responses

Courts must consistently allow and encourage expert testimony from forensic psychologists regarding phenomena like tonic immobility and the neurobiology of trauma. Judges should not be left to interpret a victim's "frozen" state based on layman's logic or patriarchal cultural assumptions. There should be a systematic use of qualified forensic psychologists to assess, report on, and testify about the complainant's psychological state at the time of the alleged offence, as reconstructed through clinically validated psychological instruments, trauma assessment protocols, and behavioral analysis.

Such an evaluation would not, and should not, purport to determine definitively whether

³ Susan Estrich, *Real Rape* (1987).

consent was present or absent. That determination remains a legal one. What it can do is provide the court with a scientifically grounded account of the psychological and neurological conditions under which the alleged incident occurred. This is not a novel idea in comparative legal systems. The use of expert psychological testimony in sexual assault cases is established practice in several European jurisdictions. The United Kingdom's Crown Prosecution Service has issued guidance on the use of expert psychological evidence to explain behaviors such as delayed reporting, continued contact with the accused, and apparent calm demeanor in the aftermath of assault, all behaviors that jurors without psychological knowledge might interpret as inconsistent with victimhood.⁴

In the Indian context, incorporating forensic psychological evaluations would require, at minimum, three structural changes. First, the Bharatiya Sakshya Adhinyam, 2023, would need to be amended or judicially interpreted to clearly recognize the admissibility of forensic psychological evidence regarding complainant's state of mind as a category of expert evidence. Second, a steady cadre of trained forensic psychologists with expertise in sexual trauma would need to be developed and institutionally recognized, potentially through coordination between the National Institute of Mental Health and Neuro Sciences (NIMHANS) and the judiciary.⁵ Third, protocols governing the conduct of such evaluations, including provisions for the complainant's dignity, confidentiality, and the right not to be subjected to psychological examination by defense-appointed experts without judicial oversight, would need to be developed.

B. Trauma-Informed Judicial Reasoning

The second pillar of the proposed framework is the institutionalization of trauma-informed judicial reasoning. When applied to judicial proceedings, they require that judges understand how trauma affects behavior, memory, and communication, and that they apply this understanding when evaluating witness credibility, evidentiary weight, and the significance of behavioral patterns that might otherwise be misread.

The National Judicial Institute of Canada, which has been a leader in developing trauma-informed judicial education, found that even experienced judges held misconceptions about

⁴ Crown Prosecution Service, *Guidance on Expert Evidence* (2025), <https://www.cps.gov.uk/prosecution-guidance/expert-evidence>

⁵ Nat'l Inst. of Mental Health & Neuro-Scis. [NIMHANS] (Bangalore, India).

how sexual assault survivors typically behave, and that targeted training significantly improved their ability to evaluate evidence in these cases without importing rape myth reasoning.⁶ In India, the National Judicial Academy at Bhopal and various State Judicial Academies conduct periodic training programs for judges and judicial officers.⁷ It is proposed that these programs incorporate mandatory modules on the neurobiology of trauma, the behavioral science of consent, and the recognition of rape myths in legal reasoning. This is not a radical proposal. It is the minimum that scientific literacy requires of a modern judiciary.

C. Holistic Behavioral Evidence Assessment

Currently, Indian courts evaluate a complainant's behavior primarily through the lens of consistency: was her behavior before, during, and after the alleged assault consistent with that of someone who did not consent? This lens, as has been argued throughout this paper, is scientifically illiterate. The behaviors associated with non-consent, as psychology understands them, include exactly the behaviors courts have historically read as consistent with consent: silence, passivity, delayed reporting, continued interaction with the perpetrator, and apparent calm. So, the indicators which the court mistakes as a sign of consent are the very same indicators which psychology associates with non-consent. The court must not evaluate the case on an intuitive cultural standard of how a rape survivor “should” behave, but against an empirically grounded account of how sexual assault survivors actually do behave. This means treating expert psychological testimony about trauma responses not as a peripheral add-on but as a primary component of the evidentiary architecture.

It draws conceptual support from the victim-centered evidentiary models developed in international criminal tribunals, including the International Criminal Court's Rules of Procedure and Evidence, which include specific provisions protecting complainants in sexual violence cases from cross-examination tactics that import rape myth reasoning.⁸

VI. THE INSTITUTIONAL CASE FOR AN INTERDISCIPLINARY REFORM

The proposed framework for interdisciplinary reform finds strength, due to the inadequacy of a pure statutory reform in solving the issue. Legislation operates at the level of general rules.

⁶ Nat'l Judicial Inst. (Can.). <https://www.nji-inm.ca/index.cfm?langSwitch=en>

⁷ Nat'l Jud. Acad. (Bhopal, India), <https://nja.gov.in/>.

⁸ ICC Rules of Procedure and Evidence r. 70–71, <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>

It can tell courts what consent is not- it is not the absence of resistance; it is not silence; it is not submission under coercion. It cannot tell courts what consent is in any particular case, because what consent is in any particular case is a function of the specific psychological circumstances of a specific human being at a specific moment in time. The generality of statutory language is a feature, not a bug. But that feature is precisely what makes pure legislative reform inadequate to the problem of consent adjudication.

Moreover, the history of Indian rape law reform suggests that legislative amendment, without corresponding changes in judicial culture and evidentiary practice, produces limited change in outcomes. The 2013 amendments to the IPC following the Nirbhaya case were among the most comprehensive criminal law reforms India had seen in decades. They were introduced against a backdrop of intense public demand for accountability and systemic change. Yet conviction rates in rape cases in India have remained low, and reporting rates, while difficult to assess with precision, remain far below the estimated incidence of sexual violence. According to data compiled by the National Crime Records Bureau, the conviction rate for rape cases in India in 2022 was approximately 27.4 percent, a figure that reflects not the rarity of actual sexual violence but the structural incapacity of the current adjudicative system to translate it into legal accountability.⁹

VII. CONCLUSION

The law's demand for a binary definition of consent is not an act of intellectual indolence. It is the product of a genuine institutional necessity: the need to convert the infinite complexity of human experience into decisions that are finite, certain, and cogent. That necessity is not going away. Courts will continue to issue verdicts. Verdicts will continue to require findings of fact that are either proved or not proved. The binary is not the enemy. The enemy is the illusion that the binary is self-sufficient. That illusion has driven decades of well-intentioned reform. It has produced improvements, genuine and important ones. But it has not produced justice, at least not consistently and not for those whose experience of sexual violence diverges from the law's internal picture of what such experience should look like.

Therefore, the future of Indian criminal jurisprudence does not lie in endlessly revising the text of Section 63 of the BNS. Instead, it lies in the courtroom. By embracing forensic psychology,

⁹ Nat'l Crime Recs. Bureau, *Crime in India 2022*, (2023), <https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1701607577CrimeinIndia2022Book1.pdf>.

admitting behavioral evidence, and prioritizing the analysis of a victim's cognitive autonomy over their actions, the Indian legal system can transcend the illusion of binary consent.

None of this is simple. Building the institutional capacity for forensic psychological evaluation in Indian courts will require resources, training, and sustained political will. Changing judicial culture, which is among the most durable and resistant of all institutional cultures, will require persistent and systematic flow of investment in legal education. But the alternative, continuing to adjudicate the most intimate and devastating violations of human dignity with tools that the behavioral sciences have shown to be inadequate, is not a neutral choice. It is a choice to keep the legal system's administrative convenience over the experiential reality of those who have survived sexual violence. The binary will persist. But it need not persist in ignorance.