
EVOLVING JURISPRUDENCE ON CONSENT AND SEXUAL AUTONOMY UNDER BNS: A SOCIO LEGAL STUDY

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ABSTRACT

This paper explores the shift in Indian criminal jurisprudence from the Indian Penal Code to Bharatiya Nyaya Sanhita, specifically examining the evolution of “consent” and “sexual autonomy”. While the Indian Penal Code was deeply rooted in British authority and retributive punishment, the BNS focuses on citizen centric and promotes retributive punishment whose ultimate goal is the restoration of justice. The paper examines the widened the definition of “rape” and the shift from earlier the Indian Penal Code passed through Criminal Amendment Act of,1983 to Criminal Amendment Act of 2013 to Criminal Amendment Act of 2018 before reaching the final answerable approach to all circumstances i.e., Bharatiya Nyaya Sanhita, 2023. The passage includes various types of non-consensual penetration and emphasizes that lack of physical resistance does not imply consent. The paper further analyzes the legal protection of sexual autonomy through the lens of the BNS, which introduced a distinct offence involving obtaining consent and engaging sexual intercourse by giving false promise of marriage. By separating these acts from the traditional definition of rape, the law seeks to punish the predatory manipulation while distinguishing it from violent assault. Additionally, the paper describes how medical intervention such as the “two-finger test” indirectly characterizes victim and has been declared violative of fundamental rights under Articles 14 as well as 21 of Indian Constitution. It emphasizes the narrow interpretation arising from the orthodox mindset of the people regarding the “that habitual act of sexual act leads to give imply consent in a specific act”. It addresses one of the most controversial and grave issues regarding marital rape which has not been decriminalized and introduces sexual intercourse without consent of a wife by a husband during judicial separation. It restores the legal veto power of the woman during judicial separation. It shows the passage of marital rape cases to increase in the age of consent to 18years. It safeguards the subjective autonomy and freedom of mind of victims within the Indian legal system.

Keywords: Sexual autonomy, Bharatiya Nyaya Sanhita, Vitiated consent, Deceitful promise, Bodily integrity.

INTRODUCTION:

COMPARATIVE ANALYSIS: IPC VS BNS:

The Indian Penal Code¹ is drafted by Lord Macaulay in the mid-19th century, the IPC was designed to maintain the British's Raj authority. The primary objective of the Britishers is to enact retributive punishment in order to create and maintain fear in the minds of people. They are Danda-centric rather than being Nyaya-centric. The BNS claims to prioritize Nyaya². There is a shift towards the protection of the citizen's rights and victim welfare. It seeks to "serve people" by focusing on restoration and contemporary social values rather than suppression.

Section 375 of the IPC³ creates a narrow way and an easy escape for the accused from the sphere of punishment under rape. It states rape as a sexual intercourse with a woman under specific circumstances, such as against her will, or without her consent or consent obtained by fear of death/hurt, or consent obtained under a misconception of identity, or with or without her consent. Before the 2013 amendment, the act of rape was strictly limited to penile-vaginal penetration. In the case of *Sakshi vs UOI* it was held that the provision of Section 375 of IPC cannot be altered so as to include all forms of penetration, such as oral, insertion of an object, or manipulation of any organ, so as to insert such penetration. The term "sexual intercourse" has not been defined under Section 375 of the IPC. It remains as a narrow provision which made victim to escape when there is a change of situation and circumstances.

THE BHARATIYA NYAYA SANHITA FRAMEWORK:

The shift from IPC to BNS forms a wider scope and encroaches every sort of case and circumstance. It widens its periphery, which includes oral sexual act, insertion of any object, and manipulation of any part of the body, so as to penetration of the penis, which has been added via criminal amendment act, 2013. "Consent", the word creates a huge weight both in IPC⁴ and BNS⁵. In "*State of Maharashtra vs M.N. Mardikar*⁶ that right to privacy is included in the right to live as guaranteed by Article 21 of Indian Constitution⁷ and a woman is entitled

¹ Indian Penal Code, No. 45 of 1860, Acts of Parliament, 1860 (India).

² The Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

³ Indian Penal Code, § 375 (1860) (India).

⁴ Indian Penal Code, No. 45 of 1860, Acts of Parliament, 1860 (India).

⁵ The Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

⁶ *State of Maharashtra v. Mardikar*, AIR 1991 SC 207 (India).

⁷ INDIA CONST. art. 21.

to every sort of privacy as and in every sort she likes.

Section 63 of BNS defines rape:⁸

A man is said to commit rape:

- 1) Penetration of penis in vagina, urethra, mouth or anus
- 2) Inserts any object into the vagina, urethra or anus
- 3) Manipulates any part of the body in order to facilitate penetration into the vagina, urethra or anus
- 4) Applies his mouth in vagina, urethra or anus

Under circumstances such as:

- 1) Against her will
- 2) Without her consent
- 3) Obtained consent from the fear of death or hurt to her or any person related
- 4) With her consent making her believe to be her husband
- 5) With or without the consent of the unsound mind
- 6) With or without the consent of the women below the age of 18 years
- 7) With the victim who unable to communicate her consent

This also defines “consent” as an unequivocal voluntary agreement when the woman, by words, by gestures, or any form of verbal or non-verbal communication, communicates her willingness to participate in the specific sexual act. It also justifies that any woman who does not physically resist the sexual act shall not be referred to as corroborative evidence to prove for the implied consent.

⁸ The Bharatiya Nyaya Sanhita, 2023, § 63, No. 45, Acts of Parliament, 2023 (India).

EXCEPTION OF SEC 63 of BNS:⁹

There are 2 exceptions of Section 63 of BNS which states any sort of medical intervention or procedure shall not constitute rape. By explicitly exempting legitimate medical procedure, it establishes a clear distinction between mens rea or criminal intent and necessary professional conduct. This ensures that healthcare professionals conduct. but it ensures health care professionals can perform vital medical interventions without the fear of malicious prosecution, provided the act is a recognized medical procedure. Another exception states any sexual intercourse by the husband with her wife without her consent, provided that the wife shall not be less than 18years of age in order not to constitute rape. This exception is a massive evolution from Section 375 of IPC¹⁰, which decriminalized martial rape as young as 15 years old. It raises the immunity to 18 years old, which aligns and consistent with the child welfare statutes such as POCSO¹¹ and Prohibition of Child Marriage act¹². It shifts the orthodox mindset of the young brides as the permanent property of the husbands. In case of independent thought vs UOI, there is a shift of age from 15years to 18 years.

SHIFT OF EXCEPTION (SECTION 375 OF THE IPC VS SECTION 63(2) OF BNS):**THE ANALYTICAL SHIFT AND ADVANTAGE:**

Under Section 375 exception 2 of Indian penal code, decriminalized martial rape states any sexual intercourse by a husband to his wife, without, her consent does not amount to rape provided that the wife is not below the age of 15years.

In case of independent thought vs UOI¹³, it was held under exception 2, the exception age of women under the age of 15 years has replaced with 18 years of age as under Protection of children under sexual offences¹⁴, a person to be considered as major is 18years and under the Prohibition of Child marriage act¹⁵, the minimum age for a girl to marry is 18 years. This

⁹ Bharatiya Nyaya Sanhita, 2023, § 63, No. 45, Acts of Parliament, 2023 (India).

¹⁰ Indian Penal Code, § 375 (1860) (India).

¹¹ The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India).

¹² Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (India).

¹³ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).

¹⁴ The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India).

¹⁵ Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (India).

creates violation of article 14,15, 21 of Indian Constitution^{16 17 18} as the girls who are unmarried and under the age of 18 are protected by the law, but the girls who are between the age of 15-18 years and are married are not protected by the law in case of sexual intercourse without her consent with her husband. Marital tag has distinguished the age of same girls into different category and pushed them into different circumstances. Thus, the age of a married women in order to protect them from marital rape have increased the age up to 18 years.

AFFECTS SEXUAL AUTONOMY:

- 1) The exception is deeply and historically rooted in the “doctrine of covertures”, which states on marriage the women give a general and irrevocable consent to her husband. It replaces an active and ongoing consent with a legal assumption.
- 2) By denying a legal remedy for non-consensual acts within the marriage, the law creates a private sphere where the constitutional protections often prevent such act. It implies the women’s body is secondary priority to the preservation of marital institutions.

A lack of legal recourse can lead to a “silencing effect”, where women may feel their refusal is not valid or that the trauma they experience not “legitimate” in the eyes of society. This erodes the internal sense of power required to exercise autonomy

SECTION 64 OF BNS:¹⁹

Section 64(1) of BNS prescribes punishment for the commission of rape which shall not be less than 10 years of imprisonment of either description which may extend to life imprisonment and also liable to fine.

Section 64(2) deals with aggravated provision of either an act by a specific accused

- 1) Police officers
- 2) Act done by a public servant

¹⁶ INDIA CONST.art.21

¹⁷ INDIA CONST.art.15

¹⁸ INDIA CONST. art. 14.

¹⁹ Bharatiya Nyaya Sanhita, 2023, § 64 (India).

- 3) Members of armed force
- 4) Staff or management of the hospitals
- 5) Staff or management or superintendent of the jailer
- 6) Relatives/ guardians/ trusted authorities
- 7) Dominion or control over the women

Sexual intercourse suffered by a specific victim can be dealt under aggravated provision

- 1) Pregnant women
- 2) Disabled women (physical or mentally disabled)
- 3) Victim of regular rape
- 4) The woman who is incapable of giving consent

Action of sexual intercourse under specific circumstances:

While committing rape causes grievous hurt or maims or disfigures or endanger the life of the woman are the aggravated provisions of rape.

Without her consent does include when she is intoxicated by influence of drinks or drugs or in any other case as a result of which she is not capable of giving rational consent. When a man had knowledge of her state of intoxication and was not capable of giving rational judgement and without her consent, he performed sexual intercourse, it would amount “rape,” held in the case of *Fletcher*.²⁰

The victims of rape have been given with a free limitation in comparison with the others. In the case of *Ram Dev Singh vs the State of Punjab*²¹, the victim was a 14-year-old minor girl. But there was a delay in lodging the FIR due to severe illness of her father. This helps the accused to take a defense that delay in lodging an FIR is not a realistic offence as due to

²⁰ *R. v. Fletcher* [1859] 169 Eng. Rep. 1168 (Cr. Cas. Res.).

²¹ *State of Punjab v. Ramdev Singh*, (2004) 1 S.C.C. 421 (India).

financial instability; by misrepresenting the case, the victim wants to deceive the accused. It was held in this case that a delay in lodging a FIR due to satisfactory reasons does not mark the case, as invalid as the case of rape is a grave and cognizable offence. But the reasons need to be satisfactory and to be recorded in the FIR, and must be satisfactory and reasonable.

It has been further supported by the case of Gurmit Singh vs State of Punjab²², court led guidelines such as:

- 1) Delay in lodging FIR is immaterial, but the reasons must be appropriate, proper and reasonable and recorded in the FIR
- 2) Testimony of the victim in case of sexual assault is the most vital
- 3) Testimony of the victim is sufficient to convict an accused, until and unless there are compelling reasons in order to seek for corroborative reasons.
- 4) Trial should be done in-camera (far from public and media)
- 5) It should be done by a lady judge
- 6) Obligation on the court that the victim is not unnecessarily harassed or humiliated during the cross examination.

Section 114A of the Indian Evidence²³ act or corresponding to Section 118 of the Bharatiya Sakshya Adhiniyam 2023²⁴, states if a woman testifies herself in court that she did not consent to the sexual act, the court “shall presume” that the act was “without her consent,” and the burden of proof lies on the accused to prove their acquittal. This Section was added via the Criminal Amendment Act 1983²⁵. It states the victim’s word on consent is enough. Initially, it was applied more in the custodial rape cases, but now it lies in all cases. This Section provides a positive reflection on sexual autonomy. Most of the sexual assault or intercourse without consent is done in a private sphere, and laws demanding corroborative evidence regarding the consent of the victim make a way free for the victims. Before Criminal Amendment act 1983, the victims were put on trial to prove that they had resisted the “force” which signifies the

²² *State of Punjab v. Gurmit Singh*, (1996) 2 S.C.C. 384 (India).

²³ *The Indian Evidence Act, 1872*, § 114A, No. 1, Acts of Parliament, 1872 (India).

²⁴ *The Bharatiya Sakshya Adhiniyam, 2023*, § 118, No. 47, Acts of Parliament, 2023 (India).

²⁵ *The Criminal Law (Amendment) Act, 1983*, No. 43, Acts of Parliament, 1983 (India).

nonexistence of consent.

A woman who has been rape is not an accomplice. A woman who is ravished is the victim of an outrage, and if consented there is no rape. In the case of the girl below the age of giving consent, her consent will not matter so far as the offence of rape is concerned, but if she consented, her evidence would be looked upon with suspicion as that of an accomplice.

For a conviction for rape, corroboration is not necessary. In the Indian climate, emphasis and expectation of corroborative evidence should not be there. No girl or woman would like to throw light on any incident which would affect her chastity; she is always afraid of being outdated or outstated in society. In the presence of state if the offence is brought before the court, then it must be accepted as true and not fabricated. In principle the evidence of the victim of rape stands on the same footing as of the evidence of an injured witness. But the evidence of the rape woman should be given the most importance. If the evidence or the victim does not suffer from basic infirmity and the probabilities factor do not render it unworthy of credence. Corroboration may be insisted upon when the women attained the age of majority is found in a compromising position there is likelihood of her of labelling such accusation on account of the instinct of self-preservation or when the “probabilities factors” is bound to be out of tune.

REMEDIES AVAIL TO THE VICTIMS:

It added Section 228A of BNS ²⁶which protects from social ostracism which prevents the identification of the victim by any sort of publishing or printing without specific legal authorization. Added 114A of BSA ²⁷regarding the presumption of non-consent and legal mandate for the courts. Section 327 of CrPC²⁸ prescribes punishment to be dealt under in camera trial proceedings which prevents the identification of the victim away from the public and media which encourage her to testify without any public humiliation. This case gave priority to the physical evidence rather mental and physical state of the victim.

By creating provisions such as accused being public servant or hospital staffs etc, protected the autonomy of the most vulnerable women those who are under the control of the states and in such cases by assuming the sexual acts in such settings are inherently coercive.

²⁶ The Bharatiya Nyaya Sanhita, 2023, § 228A, No. 25, Acts of Parliament, 2023 (India).

²⁷ The Bharatiya Sakshya Adhinyam, 2023, No. 47, Acts of Parliament, 2023 (India).

²⁸ Code of Criminal Procedure, 1973, § 327 (India).

114A of BSA²⁹ upheld the principle of “subjective autonomy”.

Prior to Criminal Amendment act, 1983³⁰, the lack of injuries would indicate implied consent but its enactment states that mere passive submission do not indicate implied consent. It recognized that women implied consent. It recognized that women could be mentally coerced into submission. Autonomy does not only determine physical strength; it is about freedom of mind to choose. By guarantee of not publishing or printing of the proceeding which prevents the social stigma and humiliation promotes true autonomy which includes right of seeking justice without being socially destroyed. Section 228A of CrPC³¹ upholds Right to privacy under Article 21 of Indian constitution³² which is the absolute component of autonomy. Sexual intercourse without her consent during judicial separation restored veto power to the wife which states women’s marriage contract does not give permanent conditional right to the husband if they are living apart

FROM PASSIVE SUBMISSION TO VITIATED CONSENT: THE LEGACY OF TUKARAM VS STATE OF MAHARASHTRA³³:

The word “consent”, has given the most authoritative position, which holds great antiquity. It has been given significance since from the drive of both Indian Penal Code and Bharatiya Sakshya Adhinam.³⁴

The Mathura gang rape case plays a vital role that gives valid advantage to the victims and different actions of the victim during the non-consensual action. The victim was a 14-year-old girl and got abducted by her boyfriend and paved her way while seeking for justice went at the police station where the constables perform sexual intercourse without her consent and took a plea regarding her involvement in sexual intercourse with her consent and she did not resist the actions of such act, as a result of which the constables acquitted both of them.

It termed as “national shame”. It creates a dark side of Indian jurisprudence. The court called victim as “shocking liar” and held that as she was already habituated to sexual intercourse, she

²⁹ The Bharatiya Sakshya Adhinyam, 2023, No. 47, Acts of Parliament, 2023 (India).

³⁰ The Criminal Law (Amendment) Act, 1983, No. 43, Acts of Parliament, 1983 (India).

³¹ Code of Criminal Procedure, 1973, § 327 (India).

³² India Const. art. 21.

³³ *Tukaram v. State of Maharashtra*, AIR 1979 SC 185 (India).

³⁴ The Bharatiya Sakshya Adhinyam, 2023, No. 47, Acts of Parliament, 2023 (India).

must have consented. The court gives non-factual determination; the non-resistance act of victim proves her implied consent. This case made the country rise in fire and questions regarding the judgments of the Hon'ble SC against the victim and used the evidence in favor of the accused. Such judgments lead to the enactment of Criminal amendment act, 1983 which increased the punishment of such heinous and grave crime and added aggravated provisions along with their aggravated punishments.

CRIMINAL AMENDMENT ACT, 1983,

Under Section 375 of the IPC³⁵, it includes consent obtained from putting the victim or any person to cause death or hurt. Under Section 376(1) of IPC³⁶, prescribes a minimum imprisonment of 7 years. It includes the aggravated form of punishment of minimum 10 years or more and in case where the accused is a public servant or jail superintendent or management of hospitals or hospital staffs or the accused is a pregnant woman or with or without the consent of the (accused) child under the age of 12 years unsound mind and when the accused or the husband performs sexual intercourse with her wife without consent during her separation which prescribes punishment for imprisonment for a period of 2 year.

In the case of *Queen vs Flattery*³⁷, a 19-year girl was suffering from illness, in name of medical intervention the doctor obtained the consent and performed sexual intercourse which proved accused performed rape.

In the case of *R vs William*³⁸, the victim was a 16-year minor was advised by her music teacher to perform any act which would develop her vocal skills, obtain consent and perform sexual intercourse it would amount to "rape".

In the case of *Tulsi Das Kalonkar vs State of Goa*³⁹, here the victim was of unsound mind as a result the accused took an advantage and perform sexual intercourse by obtaining her consent. It was held the consent obtained from an unsound mind would not be considered as "free consent".

³⁵ Indian Penal Code, § 375 (1860) (India).

³⁶ Indian Penal Code, § 376(1860) (India).

³⁷ *Regina v. Flattery*, (1877) 2 Q.B.D. 410 (Eng.).

³⁸ *R v. William*, [1922] 2 K.B. 249 (Eng.).

³⁹ *Tulsi Das Kalonkar v. State of Goa*, (2003) 8 S.C.C. 590 (India).

In case of *Rao Harman Singh vs state*⁴⁰, the accused who was an advocate general at that time and his friends through his influence of their power, coerced Kalluram, forced and pressurized him to hand over his wife, she was gang raped brutally as a result of which she died. The accused took a defense that the victim and her husband gave consent for the action. The court convicted all of them and held mere act of passive surrender along with not physically resisting, the act does not amount to consent.

Consent of the part of the women as a defense for the allegation of rape must be voluntarily participation along with a free choice between assent and resistance. Submission of women's body under the fear or terror, does not constitute rape

TWO FINGERS TEST:

The above stated test is performed by medical practitioners to determine the virginity of the victim. It gives an assess about the looseness of the vaginal muscles and whether the hymen intact or ruptured. This test does not constitute rape rather than a professional misconduct and a violation of article 21 of Indian Constitution⁴¹ i.e., right to dignity, privacy and bodily integrity as held in case of *State of Jharkhand v. Shailendra Kumar Rai (2022)*.⁴²

In eyes of human rights jurisprudence, it is considered as grave violation of dignity and a form of cruelty, inhuman and degrading treatment. This test is performed by medical practitioner in guise of "medical treatment". In this case there is an absence of temporary mens rea put hold on sexual assault conviction. This test needs to be termed as a useless test which states if victim had already lost her virginity that determines her that she is habituated in the performance of sexual act and probability increases of giving implied consent. The test directly character assassinate the image of the victim. This test involves non-consensual or coerced consent of invasion of the same body organ which gets traumatized recently. When the state mandates such test impractically the state became the secondary aggressor. Section 166 of BSA, 2023⁴³ states such test (two fingers test) as inadmissible and thus its reports do not hold any value and thus struck down. The ministry of health and family welfare gives a mandate of such test must not be performed.

⁴⁰ *Rao Harnam Singh v. State*, AIR 1952 Punj 56 (India).

⁴¹ INDIA CONST. art. 21.

⁴² *State of Jharkhand v. Shailendra Kumar Rai*, 2022 SCC OnLine SC 1494 (India).

⁴³ The Bharatiya Sakshya Adhiniyam, 2023, § 166, No. 47, Acts of Parliament, 2023 (India).

Lilu vs State of Haryana (2013)⁴⁴ held that two finger tests violated the Right of privacy, dignity and bodily integrity of the rape victims under article 21 and directed the state to provide better medical procedure.

In case of State of Jharkhand v. Shailendra Kumar Rai (2022), the court held the two-finger test, do not hold any scientific presence and certainty. It does not prove or disproves whether the women are actually sexually assaulted. It creates re-traumatization and re-victimizes the rape victim and such practice by any medical professionalism must be made liable under medical or professional misconduct.

SPECIFIC OFFENCES AND CONTROVERSIES:

CONSENT DERIVED FROM FALSE PROMISE TO MARRY;

In case of Deelip Singh vs State of Bihar⁴⁵, victim was a minor girl of 16 years of age, was in relationship with the accused, performed sexual intercourse with each other by obtaining consent. She became pregnant when her father knew he was later on asked the accused to marry the victim and the victim accepted such proposal in front of the whole village, but flew away. The father of the victim filed a case against the accused for committing sexual intercourse with a minor and any such act consent of the minor is immaterial. The court acquitted the accused on the following grounds:

As the mala fide intention on the part of the accused was not from the very beginning as derived from the circumstantial evidence. An act to be term as “rape” there must be an malafide intention from the very beginning. The accused could be sued for breach of contract rather from acquisition of “rape”. Though the age of minor is unreliable still the consent given by her is not irrelevant. The accused can be sued for “breach of promise”.

In case of Anurag Shoni vs State of Chhattisgarh⁴⁶, both the accused and victim are pharmacy students connected through live-in-relations, performed sexual intercourse with each other, the victim have given consent on the basis of “false promise to marry”, on the other side he was in negotiations with the other girl to marry her constantly, the court held that it would amount to

⁴⁴ *Lilu @ Rajesh v. State of Haryana*, (2013) 14 S.C.C. 643 (India).

⁴⁵ *Deelip Singh v. State of Bihar*, (2005) 1 S.C.C. 88 (India).

⁴⁶ *Anurag Soni v. State of Chhattisgarh*, AIR 2019 SC 1857 (India).

rape as the “malafide intention” was from the inception.

Section 69 of Bharatiya Nyaya Sanhita⁴⁷ which is a new offence which states the essential ingredients such as

- 1) Whoever deceits
- 2) Making a false promise to marry
- 3) Not intending of fulfilling the same
- 4) Obtains consent

It would not amount to rape and prescribes punishment of imprisonment which may extend to 10years of either description and fine.

The law acknowledges that while a man’s behaviour which plays as a manipulative instrument and obtains consent with false promise to marry is criminal and predatory, it is qualitatively different from a violent sexual assault. By separating both of them the law protects the victim from “social stigma” often attached to the word “rape” while still ensuring the perpetrator to be punished.

AFFECTS SEXUAL AUTONOMY:

For an autonomy to be real, consent must be informed. If a man hides his intention or identity, he is stealing a women’s right to make an informed choice about her body.

The Hon’ble Supreme Court often worried that “breach of promise” (where a couple genuinely intended to marry but broke up) was being confused with “false promise” It provides a clear boundary; it requires proof of deceit from the very beginning.

There is a difference in opinion lies under Section 69, some activist argues that consent obtained by deceitful means shall not be considered as consent and therefore it should be classified as “rape”. Some might argue that Section 69 might be used to police moral behaviour or romantic relationships that simply went wrong, potentially infringing the privacy of adults.

⁴⁷ The Bharatiya Nyaya Sanhita, 2023, § 69, No. 45, Acts of Parliament, 2023 (India).

In case of *Dhruvaran Murlidhar vs State of Maharashtra*⁴⁸, the victim who was a widow is in live-in-relation with the accused. They acted as a married couple and travel together a lot. They cohabit from a longer period of time and continues as a married couple from a society point of view. They performed sexual intercourse. The accused had promised to marry her. The victim had clearly stated that she is in love with him. But due to certain circumstances the accused was not able to marry her. As a result, the victim had filed a case against him that obtaining consent by false promise to marry. The court acquitted the accused stating that the accused was not holding malafide intention from the inception. Living as a married couple, framing a social image in the society, travelling together consider an intention to made up to marry but due to certain circumstances the promise breached but it won't amount to rape. And as the victim clearly stated she was in love with her, the consent obtained for the act comes from the false promise to marry as well as from the emotionally attachment she was carrying for the accused which is a voluntary act did not peruse from any influence.

SEXUAL INTERCOURSE BY ABUSE OF AUTHORITY:

SECTION 68 OF BNS:⁴⁹

It fundamentally shifts the legal focus from “physical force” to the vitiation of consent through abuse of power. Under general rape laws, the prosecution typically looks for the evidence that sexual intercourse occurred against the will or without the consent of the victim. Section 68 recognizes that the person in position of power can “induce” or “seduce” a woman into intercourse without using physical violence.

In these cases, the law presume that the inequality of power makes genuine, free consent nearly impossible. The “consent” is considered legally tainted because it was obtained by leveraging a fiduciary or authorise relationship.

Under Section 68 of BNS that sexual intercourse does not amount to rape as there might be a verbal or an absence of physical struggle but that consent is invalidated because it was procured through the abuse of a specific professional or legal standing.

The primary reason of the Section is to protect woman in all sort of vulnerable situations. By

⁴⁸ *Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra*, (2019) 18 SCC 191 (India).

⁴⁹ The Bharatiya Nyaya Sanhita, 2023, § 68, No. 45, Acts of Parliament, 2023 (India).

penalizing inducement or seduction by those in power, the statute emphasizes that true consent must be voluntarily and free from pressure of authority. If a person in such a position has intercourse with someone under their charge or custody, the law would look it as a “mutual consent” focusing on whether the accused used their position to facilitate the act. The law recognizes submission rather than consent. The “women” may agree to the act, but only because of the influence, inducement or seduction tied to the perpetrator’s authority. While the law considers as “vitiating consent”, it treats the nature of crime as an abuse of authority rather than crime of violence.

This Section includes the phrase “such sexual intercourse not amounting to the offence of rape” the legislature created a distinct offence. Under this Section acts as a “catch-all” for situations where the strict legal definition of rape might be harder to prove, but a clear abuse of power is still occurred.

If a prosecution cannot prove “lack of consent” beyond a reasonable doubt, Section 68 allows the court to still punish the offender because the mere existence of the custodial/authorities relationship makes the act illegal.

Sexual intercourse with a woman by a person

- 1) A person in position of authority or in fiduciary relationship
- 2) Superintendent or manager of a jail
- 3) A public servant
- 4) Management of staff of the hospital

Shall not be punished for not less than 5years or which may extend to 10years of imprisonment of either description and shall also be liable to fine.

Affects sexual autonomy:

This Section reinforces the idea that consent must be affirmative and voluntary. If consent is obtained through inducement or seduction (exploiting a trust-based relationship), the law deemed the sexual autonomy to be bypassed. If suggests consent to be legally valid the parties must stand on relatively equal footing. When one party hold other’s freedom, health livelihood,

the law presumes that subordinate party's autonomy is compromised.

Autonomy is often at its most fragile when an individual is in a state of dependency. Section 68 of BNS acts as a "protective shield" for sexual autonomy in "total institutions". In this situation law essentially states "because your autonomy is already restricted by the state or circumstances, there would be an existence of extra-legal protection to ensure that bodily autonomy is not exploited. Historically, autonomy calculated upon how the victim resisted. Section 68 eliminate the requirement and assessment of resistance. It shifts the focus to the integrity of the decision-making process. If the process of deciding to engage in intercourse was influenced by the accused position of authority, the victim's sexual autonomy has been violated.

It is not just about absence of now but also with the absence of "truly yes"

CRIMINAL AMENDMENT ACT, 2013:⁵⁰

Nirbhaya gang rape⁵¹ case fired the whole country, Justice Verma committee had framed this amendment. This case made up tears in every citizen of the country. Questions raised regarding woman's safety and whether the infliction of grave and heinous punishment to such predators. The Criminal Amendment Act, 2013, expanded the definition of "rape" which was no longer strictly restricted to penile vaginal penetration. It was expanded to include oral sex, the insertion of objects into the vagina, urethra or anus and manipulates any part of body in order to facilitate such penetration.

The amendment clearly determines and clarifies that women's lack of physical resistance should not be used evidence to prove her implied consent. This shifted the focus from the victim's physical struggle to their subjective willingness.

It introduced specific categories for the other sexual harassment and assault that was not previously clarified, aimed at women's privacy and dignity. The amendment introduced "aggravated" categories for the offences committed by the individuals in position of trust or authority, prescribing harsher punishments for this breach of power. The exception age of sexual intercourse with a wife was raised, eventually leading to standard that any

⁵⁰ The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

⁵¹ *Mukesh & Anr. v. State for National Capital Territory of Delhi & Ors.* (2017).

nonconsensual act with a woman under 18 is protected by law, regardless of marital status. It enforced Section 114A of Indian Evidence Act, states if the victim testifies in the court, then it is a mandate by law to the courts, that court shall presume the absence of consent during that specific act

SHIFT FROM PHYSICAL RESISTANCE TO SUBJECTIVE WILL:

Prior to criminal amendment act, 2013⁵², courts often required evidence of physical injuries to prove a lack of consent, effectively it puts the victim on the trail to fought back. Autonomy determined not just as physical strength, but as the freedom of mind to choose. The transition from a narrow focus on penile vaginal penetration to including oral acts and insertion of objects recognizes autonomy violated by any non-consensual invasion of the body. The laws designed in such a way it includes all sort of cases and circumstances without escaping a single narrow way for the victim in order to exempt from liability. By criminalizing the acts such as sexual intercourse through deceitful means, the legal system acknowledges that hiding “intentions” or identity “steals” a woman right to make informed choices about her body. Article 21 of Indian Constitution⁵³ is the foundation of sexual autonomy, encompassing right to privacy and dignity.

OTHER CASES IN GENERIC:

In case of *Wahid Khan vs State of MP*⁵⁴, there was no absolute penetration only the hymen was intact. The court held depth of penetration is immaterial. Even the slightest penetration does amount to rape, was also supported in case of *Mukesh Khan vs Delhi NCT*.

In case of *Nanak Chand vs State of UP*⁵⁵, a young girl is raped by Nanak Chand but the medical test indicates the absence of external as well as internal injury in the private parts of the victim which the accused took the defence, but the court held that absence of injury in the private parts do not result as corroborative evidence against the victim, the rape may have been committed.

In general, “will” and “consent” are synonyms to each other but are different. “Will” carries consent but consent does not carry will, which has been supported by the case of “State of Uttar

⁵² The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

⁵³ India Const. art. 21.

⁵⁴ *Wahid Khan v. State of M.P.*, (2010) 2 S.C.C. 49 (India).

⁵⁵ *Nanak Chand v. State of U.P.*, AIR 1955 SC 274 (India).

Pradesh vs Chotelal⁵⁶” where it held the term “against her will” and “without her consent” may sound synonyms but both are distinct terms. Any act done with a woman “against her will” amounts to “without her consent”, but if any act done without her consent, it will not always show it is “against her will” and also this case supported that even if a girl is habitual to sexual act, it does not amount to give her consent in a specific act.

CONCLUSION:

The shift from the colonial era Indian Penal Code to Bharatiya Nyaya Sanhita, 2023, marks a profound shift in Indian criminal justice system. By shifting from Danda centric framework in order of state suppression, the BNS established a Nyaya centric jurisprudence that prioritizes fundamental rights, constitutional rights, bodily integrity and subjective autonomy of citizens. This socio-legal evolution is clearly visibly reflected in the re-imagined landscape of this sort of offences, where “consent” has a broader meaning and definition widened. It transformed from an inquiry into physical resistance to an absolute recognition of women freedom of mind and choice. All the statutory frameworks have learned lessons from previous judicial failures. One of the most legacy of Mathura gang rape case which reflects the dark side of Indian jurisprudence by equating a lack of injuries and passive resistance as an implied consent. Through the evolution of Section 63 of BNS and the preservation of statutory presumption of non-consent under Section 118 of BSA and states passive submission is not an agreement and the word of woman is paramount and concluded. Furthermore, the procedure of two-finger test has been made inadmissible through Section 166 of BSA by aligning article 21 of the Indian Constitution, which ensures the victim’s past history can no longer be used to prove the presence of implied consent which characterize the woman’s dignity.

Sexual autonomy has been inflicted through the demonstration of trust and abuse of power not merely through physical violence. Section 68 of BNS protects vulnerable individuals by punishing of obtaining vitiated consent through the abuse of power and authority. Section 69 of BNS is a distinct and new offence introduced, which prescribes punishment obtained through deceitful means such as a false promise to marry, that warrants strict penal accountability.

The evolving jurisprudence under the BNS represents a significant legislative leap forward. It successfully shifts the judicial spotlight away from how aggressively a victim fought back,

⁵⁶ *State of Uttar Pradesh v. Chhoteylal*, (2011) 2 S.C.C. 550 (India).

focusing instead on the systematic integrity of her decision-making process. For sexual autonomy to be truly valued in the Indian democratic, the consent is never merely calculated on the basis of saying no or physical resistance but is consistently safeguarded by the presence of truly free, informed and affirmative “yes”.