
UNVEILING THE VEIL OF CONSENT: A COMPARATIVE DOCTRINAL ASSESSMENT OF LEGAL LOOPHOLES IN AGGRAVATED SEXUAL OFFENCES UNDER INDIA'S BHARATIYA NYAYA SANHITA AND THE UNITED KINGDOM'S SEXUAL OFFENCES ACT

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ABSTRACT

The criminal law in sexual offences depicts the true moral and constitutional direction of a society. This study is a comparative study of rape and aggravated sexual offence jurisprudence, and in this case, the study is the evaluation of the legal provisions in India and the United Kingdom. With the Indian legislature replacing the old Indian Penal Code, 1860, with the newly adopted Bharatiya Nyaya Sanhita, 2023, the Indian legislature would decolonize its criminal law and modernize it. Nevertheless, a critical analysis of the text shows that the BNS arguably reinforces the existing patriarchal standards. It harbours such critical loopholes as the exception of marital rape, subjectivity of deceit, and strict, gender-specific definitions of victims and perpetrators. Contrastingly, the Sexual Offences Act (SOA) 2003 in the UK is a paradigm shift in the European law. It creates a quasi-gender-neutral model and an objective statutory grid on affirmative consent and reasonable belief.

The paper critically analyses the BNS 2023 provisions on sexual violence to discover the loopholes in its operation and jurisprudence. It then compares these mechanisms with the developed jurisprudence of the SOA 2003. The study addresses the struggle of the Indian legal system against the complicated issues of the modern world by applying the comparative legal approach. These are the jurisprudential complexities surrounding consent obtained via a false promise to marry in the new Section 69, and the exclusion of non-consensual unnatural offences that were included in the old Section 377. On the other hand, the discussion examines how the UK dealt with intoxication, mental capacity and false sexual practices. It points out the best practices and the leftover uncertainties in the case such as *R v. Bree* and *R v. B*. Findings reveal that the BNS clearly criminalizes dishonest sexual

intercourse, but in reality, it is already below the international standards of human rights and constitutional morality. The paper ends with recommendations of wholesome changes in policies to seal the normative gap in Indian criminal jurisprudence. It supports the elimination of the marital rape exception, the use of entirely gender-neutral language, and the creation of an objective statutory basis of evaluating consent.

Keywords: Bharatiya Nyaya Sanhita, Sexual Offences Act 2003, Marital Rape Exception, Gender Neutrality, Statutory Consent, Rape Jurisprudence.

I. Introduction

The debate about the criminalization of sexual violence is always changing, being closely connected with the changing paradigms of bodily independence, human dignity, and gender equity. Rape has traditionally been seen not as an invasion of individual autonomy, but rather as an invasion of patriarchal property interests in the chastity of a woman, a theme that has been long embedded in the colonial law and has been much more difficult to reform.

The Indian Penal Code (IPC), 1860 of the colonial period was the foundation of the legal regime of sexual offences in India and stood more than a century. The law, despite the horrific 2012 Delhi gang rape, was still bound to some patriarchal concessions even after the watershed 2013 Criminal Law (Amendment) Act, notably, maintaining gender-specific language and marital rape exception, giving more weight to the sanctity of the family unit over the autonomy of the body. All this replaces the IPC, the Indian Evidence Act and the Code of Criminal Procedure¹, and, as it were, this is a historic move towards the modernization of the criminal justice system. The basic principles of rape regulation (mainly Sections 63 to 73 of the BNS) are subject to deep criticism in terms of gender neutrality, the problematic approach to sex based on empty promises (Section 69), and the support of marital rape immunity which provide considerable challenges to the equality before the law and individual freedom.

The legal system of the UK is in sharp contrast. The UK model has its own convoluted ambiguities to rectify low conviction rates and obsolete common law precedents with the Sexual Offences Act 2003 (SOA).² The SOA 2003 radically reconstituted sexual offences, giving them a statutory basis of consent on the first occasion in history and neutralizing gender binaries to a large extent on the perpetrators and the victims. The problem of voluntary

¹*Empowering Women Through Justice*, S3waas.

²*Consent Matters: A Comparative Study of Rape Laws in India, UK...*, Int'l J.L. Mgmt. & Human.

intoxication and evaluating the reasonable belief of a defendant that consent has been given and the omission of the disclosure of sexually transmitted infections have spawned volumes of appellate jurisprudence that is contradictory and repetitive in nature.³

Such comparative evaluation is thus very applicable. This paper compares the new BNS 2023 with the old SOA 2003 and shows the loopholes in the statute and interpretation that plague the adjudication of aggravated sexual offences in India. The issue behind this is that even to this day, Indian legislative drafting is still largely based on societal moralisms as opposed to objective and rights-based jurisprudence. This would result in a normative deficit, which will lead to the unequal legal protection of vulnerable demographics. This study unravels these complications, and presents a scholarly critique that transcends the comparison of the statutes in order to comprehend the socio-legal dynamics of consent, coercion, and culpability.

A. Research Questions

- i. How do the statutory definitions of consent and aggravated sexual offences in the newly enacted Bharatiya Nyaya Sanhita 2023 perpetuate systemic legal loopholes when comparatively evaluated against the United Kingdom's Sexual Offences Act 2003?
- ii. To what extent does the retention of the marital rape exception and the enforcement of gender-specific victimhood in Indian penal law violate constitutional morality and international human rights norms?
- iii. What specific jurisprudential frameworks and statutory mechanisms can be adapted from the UK jurisdiction to address contemporary Indian legal challenges, particularly the adjudication of "promise to marry" cases and the complexities of impaired capacity due to intoxication or mental illness?

B. Hypothesis

The recently enacted Bharatiya Nyaya Sanhita 2023, despite its overt modernization objectives, acts largely as a linguistic repackaging of colonial law, retaining fundamental patriarchal and heteronormative loopholes—specifically the marital rape exception and gender-exclusive definitions of sexual violence—which the United Kingdom's Sexual Offences Act 2003 has

³R v. Bree, [2007] EWCA (Crim) 256 (UK).

successfully mitigated through the establishment of objective consent thresholds and comprehensive gender-neutral statutory provisions.

C. Research Objectives

- i. To critically dissect the substantive provisions of the Bharatiya Nyaya Sanhita 2023 concerning rape and sexual offences, explicitly identifying operational, gendered, and jurisprudential loopholes that hinder the equitable delivery of justice.
- ii. To contrast the Indian legal framework with the UK's Sexual Offences Act 2003, analysing complex judicial interpretations regarding statutory presumptions of consent, reasonable belief, and voluntary intoxication to extract comparative legal insights.
- iii. To formulate robust policy and legal reform suggestions aimed at harmonizing Indian sexual offence jurisprudence with progressive constitutional standards, international human rights directives, and global best practices.

D. Literature Review

The legal academia on the criminalization of sexual offences is a large, complex web of feminist legal theory, constitutional criticism, and comparative statutory interpretation. The current body of literature on the Indian legal system has traditionally been very critical of the deficiency of the Indian Penal Code, 1860, and the consequences of the 2013 Criminal Law Amendment Act. The controversies of gender neutrality have been widely recorded by scholars, who have frequently emphasized how the system has erased the male and transgender victims of traditional rape laws. As an example, the case of *Sudesh Jhaku v. KCJ* (1996) and *Sakshi v. Union of India* (1999) has attracted the intense academic interest of judicial dissatisfaction with the failure of the legislature to broaden the definition of sexual assault beyond peno-vaginal boundaries. They state that the marital rape exemption doctrine as reflected in laws is not the result of a wish to preserve the family, but a patriarchal wish to preserve fundamentally property interests of the dominant male, as stated by researchers like Kanaksha Kataria and Lalenya Weintraub Siegel (and many more), who argue that the doctrine of marital immunity is a direct relic of the colonial coverture principle, which is essentially incompatible with modern constitutional morality.

Within the framework of the United Kingdom, the efficacy and the interpretive issues of the

Sexual Offences Act 2003 are largely deconstructed in the literature. It has been critically noted by academics like Jesse Elvin and Jonathan Herring that the statutory definition of consent under Section 74 of the SOA is inherently ambiguous, with the words of freedom and capacity being highly fraught, as is the issue of intoxication and consent and the ability of courts to create a consistent definition of capacity in the face of voluntary intoxication drinking.⁴ Equally, the objective criterion of reasonable belief in consent especially in cases where the defendant is mentally ill as determined in *R v. B*⁵ and *R v. Braham*⁶ has been criticized as being too rigid and poses an underlying philosophical issue of how mental illness and delusional beliefs intersect with criminal culpability in sexual offences.

Although this is a rich body of literature, there is a research gap that is glaring. Since the latest implementation of the Bharatiya Nyaya Sanhita, 2023, most of the existing comparative literature has become outdated to some extent. The literature on the topic has a strong lack of rigorous comparative scholarship that would directly juxtapose the new, untested provisions of the BNS 2023 against the previously established, judicially interpreted parameters of the SOA 2003. As history has shown, the revision of the legislation usually brings as many ambiguities as it eliminates; therefore, a new comparative framework is much needed. It is in this precise gap that the current paper aims to fill through the presentation of a comprehensive, up-to-date analysis that combines the most recent statutory changes with the current judicial mindset and with a critical legal theory.

E. Research Methodology

The research is a multidimensional and rigorous study, and it utilizes the doctrinal and comparative research methods. The doctrinal component is a textual and careful study of the black-letter law, which entails the interpretation of the statutory interpretation of the Bharatiya Nyaya Sanhita, 2023, the Bharatiya Sakshya Adhinyam, 2023, and the Sexual Offences Act 2003 of the United Kingdom. This is supplemented by a wide case law review of the Supreme Court of India, the different Indian High Courts, the UK House of Lords, and the Court of Appeal (Criminal Division).

To compare the two contrasting legal systems of India and Britain, the comparative

⁴*The Concept of Consent Under the Sexual Offences Act 2003*, Plymouth L. & Crim. Just. Rev.

⁵*B v. R*, [2013] EWCA (Crim) 3 (UK).

⁶*R v. Braham*, [2013] EWCA (Crim) (UK).

methodology is employed to contrast the various philosophies of jurisprudence that make up the two legal systems. The research points out the systemic loopholes by comparing the way the same human behaviours are criminalized or not criminalized in the different jurisdictions: sexual intercourse under false pretences, assaults made under the influence of alcohol, or violence in a marital relationship. The comparative approach is not just descriptive but very analytical as it aims at comprehending the socio-cultural situations that motivate the drafting of legislation in both countries.

The main sources of information are the bare texts of the statutes mentioned above, official reports of parliamentary committees (including the Justice J.S. Verma Committee Report and the report of the UK Home Office, Setting the Boundaries report), and binding judicial precedents. Secondary sources include high-impact and peer-reviewed articles published in journals, reference treatises to criminal law and autonomous legal policy reports.

II. The Doctrinal and Historical Evolution of Sexual Offences Jurisprudence

In order to be able to properly understand the structural loopholes that were incorporated in modern statutes, it is necessary to trace the genealogical development of the laws that regulate sexual offences. The Indian penal law was developed by the British colonial rulers through the writing of the Indian penal code in 1860 by Thomas Babington Macaulay. In section 375 of the IPC, the definition of rape was very regimented, physically constrained and concentrated on the physical act of peno-vaginal penetration as against her will or without her consent. It completely ignored the multitude of non-penetrative or other forms in which sexual violence could be committed, which is a symptom of the Victorian morality that understood rape as an offense to the honor of a woman and the property rights of her family, not to her personal bodily autonomy.

| Feature | Indian Penal Code, 1860 (Post-2013 Amendments) | Bharatiya Nyaya Sanhita, 2023 |
|---------------------|---|----------------------------------|
| Core Rape Provision | Section 375 | Section 63 |
| Punishment for Rape | Section 376 | Section 64 |

| | | |
|------------------------------|--|--|
| Marital Rape Exception | Exception 2 (Age threshold 15 years) | Exception 2 (Age threshold raised to 18 years) |
| Gender of Victim | Strictly female | Strictly female |
| Unnatural Offences | Section 377 | Omitted entirely |
| Deceitful Sexual Intercourse | Governed generally by Section 90 IPC (Misconception of fact) | Specifically codified under Section 69 BNS |

The shift between the IPC and the BNS, as the table indicates, is more of a numerical rearrangement and a focused refinement, as opposed to a theoretical jurisprudential change of the latter.

In a sharp contrast, the United Kingdom experienced a radical soul-searching at the beginning of the millennium. The British approach abandoned in favour of the Sexual Offences Act 2003 the old common law terms with the new specific, explicit and more or less gender-neutral terms of consent. It put consent itself in a definite statutory basis under Section 74. This developmental divergence brings out the main thesis of the report. As the UK was able to remove archaic structures in order to create a new structure on a new platform of sexual autonomy, the Indian legislature simply refurbished a colonial structure, unknowingly keeping all the structural vices intact.

III. The Constitutional Deficit of the Marital Rape Exception

The marital rape exception is, perhaps, the most heinous and the most hotly contested legal loophole that is still maintained in the Bharatiya Nyaya Sanhita, 2023. Exception 2 is provided under section 63 of the BNS that defines the offence of rape. This provision clearly stipulated that a man who engages in sexual intercourse or sexual acts with his own wife and the wife is not under the age of eighteen, not rape ⁷, which was slightly better than the IPC in that the age of the woman is raised to eighteen as it aligns with Protection of Children from Sexual Offences

⁷Offences Related to Women Under BNS 2023, ResearchGate, https://www.researchgate.net/publication/398862048_Offences_Related_to_Women_Under_BNS_2023 (last visited Mar. 29, 2026).

(POCSO) Act. It however, leaves no doubt as to preserving the legal immunity of a husband who forcibly has committed himself to his adult wife.⁸

This exemption is of jurisprudential origin in the English common law coverture doctrine. Chief Justice Sir Matthew Hale expressed this in his 1736 treatise, *History of the Pleas of the Crown*, in a famous way. The wife, according to Hale, renders herself to her husband by mutual consent and contract in marriage, something that she cannot take back. This colonial idea, erased by the mother country decades ago, was an archaic notion of a woman. The House of Lords gave a definitive ruling in the landmark case *R v. R*,⁹ that abrogated the marital rape exemption in English law. In giving the unanimous verdict, Lord Keith announced the irrevocable matrimonial consent to be an unacceptable fiction of common law. He made it clear beyond doubt that marriage is a union between equals in which a woman has a right to say no.

Its surviving in India is a critical constitutional deficit. Several petitions are presently opposing this exception on the highest ranks of the Indian judicial system on the basis of infringing the basic constitutional rights. There is the RIT Foundation Public Interest Litigation, and the devastating case of *Khushboo Saiji v. Union of India*¹⁰, which was the dilemma of preserving the institution of marriage and depriving female autonomy. The law provided her with no avenue in rape laws despite the fact that she was raped and imprisoned severally by her husband

Legal grounds used against such an exception are impressive. Most crucially, it undermines Article 21 (right to life and personal liberty) since it makes an unfair distinction between married and unmarried women and provides the power of legalization over male dominance in the home-based environment. In *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017), the Supreme Court of India unequivocally recognized bodily integrity and sexual autonomy as inherent facets of privacy and human dignity. By maintaining the marital rape exception, the state essentially reduces these fundamental rights to a conditional legal fiction within the matrimonial home. This landmark jurisprudential shift demonstrates that safeguarding bodily autonomy does not abrogate the sanctity of marriage, thereby rendering the traditional

⁸*Changes in Laws Against Sexual Offences in BNS - Its Legal Implications*, ResearchGate, https://www.researchgate.net/publication/396198847_Changes_in_laws_against_sexual_offences_in_BNS_-_its_legal_implications (last visited Mar. 29, 2026).

⁹*R v. R*, [1991] UKHL 12 (UK).

¹⁰*Challenges to the Marital Rape Exception | Day 1: The Law Is Patriarchal and Violates the Fundamental Rights of Married Women, Argue Petitioners*, Sup. Ct. Observer, <https://www.scobserver.in/reports/challenges-to-the-marital-rape-exception-day-1-the-law-is-patriarchal-and-violates-the-fundamental-rights-of-married-women-argue-petitioners/> (last visited Mar. 29, 2026).

legislative defense constitutionally untenable.

IV. The Illusion of Gender Neutrality and the Erasure of Minorities

A strong penal system in a modern democratic nation should theoretically safeguard all its citizens regardless of their gender or sexual orientation. However, the Bharatiya Nyaya Sanhita, 2023, is not passing the gender inclusiveness test, and it continues to leave millions of people out of its area of protection, which is a loophole. Section 63 of the BNS starts with an exclusionary and absolute premise: A man is said to commit rape if he...¹¹ This legal wording entraps the offence in a strict heteronormative dichotomy. The perpetrator can therefore only be a biological male and the victim can only be a biological female.¹²

The fact that male, transgender, and non-binary people do not consider an object of protection under the rape statute is a colossal failure of the criminal justice system. The BNS further aggravated the situation, with the legislature unexplainably leaving out Section 377 of the old IPC, in *Navtej Singh Johar v. Union of India*¹³, the Supreme Court interpreted Section 377 to decriminalize consensual same-sex relations. Nevertheless, the clause was important in prosecuting non-consensual unnatural acts, male rape, and bestiality. The BNS reworded the Section 377 without offering a gender-neutral sexual assault. As a result, the Indian state practically denied any particular statutory redress to male and transgender victims of non-consenting penetrative sexual assault. Nevertheless, the scholars observe that the penalties are grossly disproportionate in relation to the BNS imposed life sentence to rape a woman the hierarchy of victimhood is unbearable.

In contrast, United Kingdom followed a much more inclusive and, albeit, rather structurally convoluted strategy in the SOA 2003. Section 1 of the SOA defines rape as the intentional penetration of the vagina, anus or mouth of another person by a penis without consent,¹⁴ although technically the aspect that limits rape in Section 1 is the anatomical impossibility of the penetration of a penis. This has the same maximum sentence as rape (life imprisonment). Therefore, the UK framework practically nullifies the gender of the victim and offender on

¹¹*A Critical Examination of the Bharatiya Nyaya Sanhita's (BNS) Provisions on Rape: A Gendered Perspective*, Int'l J. Creative Rsch. Thoughts.

¹²*Neutralizing Gender: A Comparative Analysis of Sexual Offense...*, J. of Int'l & Compar. L.

¹³*Gender Neutrality in Sexual Offences: Need for Reform in Indian Rape Laws*, Int'l J. for Multidisciplinary Rsch. (2025).

¹⁴*Consent Matters: A Comparative Study of Rape Laws in India, UK...*, Int'l J.L. Mgmt. & Human.

severe penetrative assaults. Section 2 can be used to charge a female perpetrator and Section 1 as well as 2 to protect a male victim. It is a forward-looking political action that the BNS is essentially lacking, reflecting an entrenched patriarchal paradigm that statutorily assumes only women require protection.¹⁵

V. The Paradox of Consent: Deceit, Misconception, and the "Promise to Marry"

The idealization, meaning, and judgment of consent is the ultimate foundation of any sexual offence's jurisprudence. Another loophole, which is highly litigated in India and is a peculiarity of that country, is an agreement based on a misconception of fact, in particular, in the context of relationships with a promise of marriage. In a very controversial attempt to do so, the BNS added a new section, Section 69, which criminalizes sexual intercourse by deceitful means, expressly including false promise of marriage, employment, or promotion, or marrying after suppressing identity, as long as such act is not the more serious crime of rape.

Although some celebrate it as a much-needed defense against exploitation and patriarchal manipulation, Section 69 has introduced a deep-seated jurisprudential anarchy and has created enormous possibilities of abuse. The essence of the challenge is whether or not the mens rea can be proven between a fraudulent intention at the time of the formation of the relationship and a simple subsequent breach of promise that occurred because of the altered circumstances of life. This is a thin line that the Supreme Court of India has fought on numerous occasions. The Court, in *Pramod Suryabhan Pawar v. State of Maharashtra*, (2019)¹⁶ decided that the promise of marriage should have been untrue in the first place, and it was only a way of securing sexual consent. More recently, in *Mahesh Damu Khare v. State of Maharashtra*, 2024.¹⁷

The UK approach to misleading sexual relations under the SOA 2003 offers an interesting counter-narrative in that it aims at pure sexual autonomy, rather than relationships policing. To deal with the issue of deceit, Section 76 has introduced a series of so-called conclusive presumptions under which consent is absolutely vitiated where the defendant misleads the

¹⁵*Neutralizing Gender: A Comparative Analysis of Sexual Offense...*, J. of Int'l & Compar. L.

¹⁶*The Thin Line Between Romance and Crime: Judicial Perspectives on Misuse of Rape Laws in Relationship Disputes in India*, Int'l J. for Multidisciplinary Rsch. (2025).

¹⁷*Rape on the Pretext of Marriage - Section 69 of Bharatiya Nyaya Sanhita, 2023 : A Provision Built to Be Abused*, Live Law, <https://www.livelaw.in/lawschool/articles/rape-marriage-section69-bharatiya-nyaya-sanhita2023-525866> (last visited Mar. 29, 2026).

complainant about the character or purpose of the act in question, or impersonates someone familiar to the complainant personally. The Court of Appeals in *R v. Jheeta*¹⁸ held that emotional deception or a trickery (e.g., the defendant posing as someone else, making threats of imaginary fines to force the victim into sex) did not always provoke the presumption that is conclusive under Section 76 unless the deception was directed at the very physical nature of the sexual. Therefore, the UK jurisdiction would in effect put a protective barrier around the heavy-handed criminal law apparatus against the untidy facts of broken emotional pledges. By contrast, the BNS of India forces the judiciary to litigate the subjective dissolution of private, intimate relationships, which generates a subjective loophole that can be exploited systemically and subject to endless lawsuits.

VI. Navigating the Murky Waters of Impaired Capacity and Intoxication

The issue of consent is exponentially compounded by the fact that the ability to give consent is affected by the impairment of the capacity to make the choice by intoxication or mental illness in the complainant. India and the UK have a serious issue with this intersection, but both of them use completely different mechanisms of jurisprudence to address the dilemma between the protection of victims and the rights of defendants.

The UK legislature has tried to codify impaired capacity in a systematic manner under the SOA 2003. Section 75 provides the statutory conclusive presumptions according to which, in case a complainant is asleep, unconscious or had been administered a substance that could have overpowered him or her without his consent, it is assumed that a complainant had no consent, which places an extremely heavy burden on the defendant in terms of evidence provision. In the case where a complainant voluntarily ingests more than the necessary alcohol, the presumption of evidence under Section 75(2)(f) does not apply; instead, they have to rely on the general and vague definition of capacity under Section 74¹⁹. In the case of *Bree* where a university student had drunk enormous amounts of alcohol and then had sexual intercourse, the trial judge did not give the jury sufficient guidance on capacity. The Court of Appeal reversed the conviction, and as a famous quote, a drunken consent is still consent. Although logically valid in retaining agency of the individual and preventing strict liability of sex through alcohol,

¹⁸Crown Prosecution Serv., *Rape and Sexual Offences - Chapter 6: Consent*, <https://www.cps.gov.uk/prosecution-guidance/rape-and-sexual-offences-chapter-6-consent> (last visited Mar. 29, 2026).

¹⁹*R v. Bree*, [2007] EWCA (Crim) 256 (UK).

the subjective standard under consideration involves the juries walking an extraordinarily grey physiological boundary that frequently leads to uneven convictions and extremely biased victim-blaming theories in court.

The statutory provisions in India concerning the subtleties of intoxication are much less precise. In relation to the consent of the victim, the BNS provides protection to acts committed by an individual who is not capable of judgment due to intoxication, however, it is strictly limited to acts committed by someone who has been intoxicated against his own will or under misapprehension of fact as in Section 63. Indian courts usually believe that in cases where a woman is in state of intoxication where she is entirely incapable of knowing the nature and effects of the act, consent is vitiated. But, as with the UK, voluntary intoxication is a large grey area. Defense counsels in India often take advantage of social prejudices to suggest that a woman drinking under her choice is promiscuous and therefore giving consent, which is made easier by the fact that there are no explicit, codified evidential presumptions on the issue of capacity and alcohol consumption. Although the new Bharatiya Sakshya Adhiniyam, 2023 (BSA) under Section 48 (in place of the Indian Evidence Act, Section 53A) tries to limit the application of prior sexual experience or character evidence in a consent case²⁰, the absence of a statutory mechanism to assess intoxicated capacity places the trial judges in the mode of archaic societal norms. The effort of codification in the UK, with the Bree loophole, is much more organised than the Indian dependence on broad judicial discretion.

VII. The Objective Standard of Reasonable Belief vs. Subjective Mens Rea and Extra-Jurisdictional Challenges

The case of sexual offences should be compared by looking at the mens rea (guilty mind) that the perpetrator needed. The UK SOA 2003 requires the defendant to be of the opinion that the complainant is consenting. Most importantly, such a belief should be reasonable as a result of objective evaluation of all the circumstances, which in *R v. B*, the defendant was actually severely tested as he was known to be a patient of severe paranoid schizophrenia and that he genuinely believed he had sexual healing powers and that his victim had agreed to it (Gilman 2011). The trial judge instructed the jury to disregard his mental illness in determining the reasonableness of his belief. In keeping with this belief, the Court of Appeal decided that mental illness delusions can never be construed as a legally reasonable belief of consent. It has

²⁰Bharatiya Sakshya Adhiniyam, 2023, No. 47, Acts of Parliament, 2023 (India).

to correlate with the norms of an average intelligent person without the mental deficiencies of the defendant²¹. Nevertheless, critics contend that it forms a quasi-strict liability relationship between mentally ill defendants and the subjective reality and obscure the boundary of criminal culpability.

The mens rea requirement in India is not clearly codified on the issue of reasonable belief. The BNS mainly examines the actual presence of the consent, and whether the accused had actual or should have known that the consent was made under fear or misrepresentation or not. As a result, the Indian system tends to be more lenient to the accused in borderline cases than the objective threshold in the UK.

As sexual relations in the twenty-first century are changing, criminal law needs to keep up with the need to criminalize the devious new types of sexual violation. In this case, the SOA 2003 has a high interpretive elasticity compared to the BNS. Another loophole that has been noted is stealth sex, or non-consensual condom removal during sexual intercourse. Both the BNS 2023 and the SOA 2003 do not directly codify stealth as a specific statutory crime, but with flexible drafting, UK courts can deal with it by interpreting the law. Using the principles of conditional consent in Section 74, the jurisprudence of the UK interprets the agreement to the sex under protection as the agreement to unprotected sex. This makes stealthing a type of rape²². The BNS, on the other hand, is quite silent regarding the nuances of conditional consent. Since the interpretation of Section 63 is rigid and penetrative-centric, it would be extremely hard to prosecute stealthing in India. The cases of this kind are probably not covered by the doctrine of misconception of fact, which was not intended to take care of prophylactic lying.

Also, the point of intersection between sexual consent and STD transmission demonstrates a point of divergence in legal philosophy. The UK has some of the landmark cases such as *R v. Dica*, and *R v. B*²³, which helped to set precedents. By ruling that misleading a partner into believing that he or she has been infected with HIV does not vitiate consent to a charge of rape, this case law eloquently leaves the definition of sexual consent intact but charges offenders with the grievous harm inflicted through a biological assault under Section 20 of the Offences Against the Person Act 1861. This is not a demarcation that is sophisticated within the Indian

²¹B v. R, [2013] EWCA (Crim) 3 (UK).

²²Amanda Clough, *Conditional Consent and Purposeful Deception*, Liverpool John Moores Univ. Rsch. Online.

²³Crown Prosecution Serv., *Rape and Sexual Offences - Chapter 6: Consent*, <https://www.cps.gov.uk/prosecution-guidance/rape-and-sexual-offences-chapter-6-consent> (last visited Mar. 29, 2026).

legal system. In cases of prosecution against STD transmission, Indian officials have a false perception of law, which compels them to improperly subsume the offense within the rape statute. This creates twisted standards of charging and infrequent convictions.

Lastly, extra-territoriality is specifically adopted in the SOA 2003. This enables the UK government to criminally prosecute British citizens perpetrating sexual offences in foreign countries just like they would be done in their own country. The general provisions of the BNS (Section 1) apply to the offences committed by the Indian citizens in foreign countries. This exclusion creates a gap in enforcement.

VIII. Findings and Suggestions

This comparative study provides unequivocal on the structural integrity of the new penal code in India. Instead of a progressive decolonial victory, the Bharatiya Nyaya Sanhita, 2023, is mostly a conservative reenactment of the archaic structures of the IPC. Preservation of the marital rape exception and the application of an exclusionary gender-binary system of sexual violence is a massive legal loophole. These exclusions are in violation of the basic constitutional rights of equality, dignity, and bodily autonomy which are provided in Articles 14, 15, and 21. Moreover, to establish Section 69 as a crime to have sex through a false promise to marry is morally overbearing on the legislative side. It is a mistake that is very easy to fall into by confusing vitiated sexual consent and the emotional violation of relational contracts, which is something the UK has been keen to avoid.

The Sexual Offences Act 2003 of the UK on the other hand offers a much better, rights-based model although there are difficulties with voluntary intoxication and inflexible objective limits. Its codified assumptions reduce the arbitrary judicial discretion that afflicts Indian courts. Also, its broad interpretation of the term of assault by penetration is effective in protecting the victims regardless of their gender identity.

In order to address this normative gap in the Indian criminal jurisprudence, the following reforms are highly recommended:

- i. **Absolute Abolition of the Marital Rape Exception:** The Indian legislature should repeal the Indian exception to Section 63 (2) of the BNS. Based on the case of *R v. R* in the UK House of Lords, the status of marriage should never be used as an unfalsifiable

permit to rape. Married women must have the right to bodily autonomy without any conditions, which would imply that the domestic law would be in line with the CEDAW requirements.

- ii. **Enactment of Gender-Neutral Statutes:** The BNS should be broadly changed to use gender-neutral terms to describe both the perpetrators and the victims. Section 63 should be changed to include the term person instead of man and woman. At the same time, the legislature should reintroduce a statutory clause that is a clear criminalization of non-consensual unnatural offences. This will fill the gap created by the absence of Section 377 that would safeguard male, transgender, and non-binary individuals with punishment equal to rape.
- iii. **Codification of Consent and Objective Presumptions:** India needs to discard the 19th-century doctrine of the misconception of fact, which is highly subjective. A specific section of the BNS outlining affirmative consent squarely, in line with Section 74 of the SOA 2003, combined with an objective reasonable belief test should be included. Moreover, making the evidential assumptions on intoxication and capacity expressly codified will streamline trial processes and shield victims against unnecessary character defamation.
- iv. **Re-evaluation and Clarification of Deceitful Intercourse (Section 69):** The legislature needs to radically reduce Section 69 to avoid the use of the penal code in civil relationship conflicts. The vitiating consent must be in relation to the nature, purpose or identity of the sexual act, which is in line with Section 76 of the SOA 2003. This is in line with the best practices in the international community that emphasizes on sexual autonomy as opposed to the control of romantic morality.

These are specific, institutional measures that, in the long run, will help the Indian legal system to finally leave behind its patriarchal protectionist approach and adopt a new legal approach based on human dignity and free will.

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