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CONSENT, AUTONOMY AND COERCION: INTERPRETING 'WILL' AND 'CONSENT' IN SEXUAL OFFENCES UNDER THE BHARATIYA NYAYA SANHITA

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ABSTRACT

The transition from the Indian Penal Code, 1860 to the Bharatiya Nyaya Sanhita, 2023 marks a significant moment in the evolution of India's criminal jurisprudence on sexual offences. This paper examines how the BNS conceptualises and interprets the twin pillars of sexual offence law 'will' and 'consent' through the prism of individual autonomy. While the BNS introduces certain progressive elements, including the criminalisation of sexual intercourse through deceitful means under Sec. 69, it simultaneously retains problematic colonial vestiges such as the marital rape exception. Through a doctrinal analysis of statutory provisions, judicial interpretations, and constitutional principles, this paper argues that the BNS represents a fragmented and incomplete engagement with sexual autonomy. The paper explores three critical sites of tension: the distinction between 'against the will' and 'without consent', the problematic construction of consent obtained through deceitful means, and the continued immunity granted to husbands within marriage. It concludes by proposing a reconstructive framework that places substantive autonomy rather than formal consent at the heart of sexual offence jurisprudence.

KEYWORDS: Consent, Autonomy, Bharatiya Nyaya Sanhita, Marital Rape Exception, Sexual Offences, Deceitful Means.

1. INTRODUCTION

On July 1, 2024, India ushered in a new era for its criminal justice system with the enactment of the Bharatiya Nyaya Sanhita, 2023, replacing the Indian Penal Code of 1860. This transition was ostensibly motivated by the desire to shed colonial influences and craft a legal framework responsive to contemporary constitutional values. Nowhere is this tension between colonial legacy and constitutional modernity more pronounced than in the law's treatment of sexual offences, where the concepts of 'will' and 'consent' operate as the critical fault lines along which liability is determined.

The BNS defines the offence of rape under Sec. 63 as encompassing various forms of penetration by penis, objects, body parts, or oral application when done under circumstances that negate consent or will. The provision enumerates seven circumstances that render sexual acts criminal, including acts done "against her will," "without her consent," or with consent obtained through fear, fraud, or under conditions that vitiate capacity. This framework, while elaborated with greater specificity than its predecessor, rests upon foundational questions about what it means to genuinely assent to sexual intimacy.

This paper argues that the BNS, despite its claim to modernity, embodies a fragmented understanding of sexual autonomy. It oscillates between recognising consent as an expression of individual agency and treating it as a formalistic hurdle to be overcome. This fragmentation manifests most starkly in three areas: first, the distinction between 'against the will' and 'without consent' carries unexamined normative assumptions about the nature of sexual agency; second, the introduction of Sec. 69 criminalising deceitful means of obtaining consent creates new conceptual puzzles about the relationship between fraud and autonomy; and third, the retention of the marital rape exception preserves a space where consent is legally presumed irrelevant, thereby contradicting the very premise of sexual offence law.

By examining these three sites of tension through the lens of constitutional jurisprudence on autonomy, dignity, and privacy, this paper seeks to illuminate the conceptual architecture of consent under the BNS and propose pathways toward a more coherent and rights-respecting framework.

2. Conceptual Foundations: Will, Consent, and Autonomy in Sexual Offence Jurisprudence

2.1 The Binary Structure: 'Against the Will' and 'Without Consent'

Sec. 63 of the BNS distinguishes between sexual acts done "against her will" and those done "without her consent." This binary structure, inherited from the IPC, carries significant

doctrinal implications that have received insufficient judicial or scholarly attention. The distinction suggests that 'will' and 'consent' occupy different conceptual registers the former referring to a deeper stratum of subjective orientation toward the act, the latter to its communicative expression.

The phrase "against her will" implies active opposition, resistance that has been overcome by force. It conjures an image of the prosecutrix as having expressed her dissent, which the accused has disregarded through physical compulsion. "Without her consent," by contrast, encompasses a broader range of situations where the affirmative agreement required by law is absent, regardless of whether active resistance was offered. The difference tracks the historical evolution of rape law from requiring proof of physical resistance to recognising that consent's absence suffices regardless of whether will was actively manifested through struggle.

This distinction carries normative weight. By maintaining both formulations, the BNS implicitly acknowledges that sexual violation can occur in two distinct ways: through the overpowering of a communicated dissent, and through the appropriation of a body without the affirmative agreement that alone renders sexual intimacy legitimate. Yet the provision fails to articulate the relationship between these concepts, leaving courts to navigate the conceptual terrain without statutory guidance.

2.2 Defining Consent: Between Communication and Capacity

The BNS defines consent through its negation. Sec. 28, following Sec. 90 of the repealed IPC, specifies when consent is not valid when given under fear of death or hurt, under a misconception of fact, by persons of unsound mind, intoxicated persons, or those unable to understand the nature and consequences of their consent. This definitional approach, while practically useful, avoids the more fundamental question of what consent affirmatively means.

The Supreme Court has, through successive judgments, developed a conception of consent as requiring "free and voluntary agreement." In the context of sexual offences, consent must be an active choice rather than passive submission. The Explanation to Sec. 63 reinforces this by providing that consent means "an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act." This formulation gestures toward an affirmative consent standard, requiring communication of willingness rather than mere absence of dissent.

2.3 Autonomy as the Normative Foundation

Underlying both will and consent is the constitutional value of autonomy. The Supreme Court's privacy judgment in *K.S. Puttaswamy v. Union of India* (2017) recognised that "the right to privacy depends on the exercise of autonomy and agency by individuals." Sexual autonomy the power to decide whether, when, and with whom to be sexually intimate represents a core dimension of the constitutional right to life under Article 21.

This constitutional anchoring transforms the interpretation of consent. Consent is no longer merely a factual question about what the prosecutrix said or did, but a normative inquiry into whether her agency was respected. As the Supreme Court observed in *Joseph Shine v. Union of India* (2018), which decriminalised adultery, familial structures cannot be regarded as private spaces where constitutional rights are violated. The same logic applies to sexual relationships: intimacy does not suspend autonomy, and consent must be understood as its continuing expression rather than a one-time transfer of entitlement.

3. Sec. 69 BNS: Deceitful Means and the Puzzle of Fraudulent Consent

3.1 The New Provision and Its Departure from Precedent

One of the most significant innovations in the BNS is Sec. 69, which criminalises sexual intercourse obtained through deceitful means. The provision targets situations where consent is induced by a false promise to marry without intention of fulfilment, or by deception concerning identity. Crucially, the Sec. specifies that such offences shall not amount to rape, instead attracting imprisonment extending up to ten years and a fine.

This represents a departure from the pre-existing legal position. Under the IPC, cases involving false promises to marry were typically prosecuted as rape, with courts treating consent obtained through such promises as vitiated by misconception of fact under Sec. 90. The leading case of *Uday v. State of Karnataka* established that a false promise of marriage could negate consent, though courts were required to examine whether the consent was given solely in reliance on the promise or for other reasons.

Sec. 69 thus carves out a distinct category of sexual offence, less grave than rape but nevertheless criminal. This bifurcation raises profound questions about the nature of consent and the relationship between deception and autonomy.

3.2 The Spectrum of Deception: False Promises and Broken Promises

The provision's operation depends on distinguishing between promises that were false *ab initio* and promises that were genuinely made but subsequently broken. As commentators

have noted, this distinction is conceptually necessary but practically elusive. A promise made with sincere intention may later become impossible to fulfil due to intervening circumstances familial opposition, changed financial circumstances, or simply the natural evolution of relationships. Criminal liability should not attach to such situations, yet the line between initial falsity and subsequent frustration is notoriously difficult to draw.

The Sec.'s phrasing "without any intention of fulfilling the same" directs attention to the accused's mental state at the time of making the promise. This focus on intention, while doctrinally appropriate, creates significant evidentiary challenges. Intentions are rarely directly observable and must be inferred from conduct. Courts must examine the communication between parties, the duration and nature of their relationship, and the circumstances surrounding the promise's non-fulfilment.

3.3 Autonomy, Deception, and the Limits of Consent

The deeper question raised by Sec. 69 concerns whether consent obtained through deception can ever be considered genuine. If autonomy requires accurate understanding of the circumstances in which one exercises choice, then deception that goes to a material fact undermines the very possibility of autonomous consent. This logic would suggest that such cases should indeed be treated as rape, not as a lesser offence.

Yet the BNS adopts a different view, creating a hierarchy of sexual violations based on the means by which consent is negated. Force, threat, and incapacity attract the full force of rape law; deception attracts a lesser penalty. This hierarchy implicitly judges the gravity of harm by reference to the mechanism of violation rather than the nature of the autonomy infringement.

The provision also raises concerns about gender asymmetry and exclusion. Sec. 69 is drafted in gender-specific terms, contemplating only male perpetrators and female victims. This excludes not only male victims but also members of the LGBTQ+ community who may suffer identical harms from deceitful partners. In an era where consensual same-sex relationships have been decriminalised, the failure to extend protection against deception to all persons represents a significant lacuna.

3.4 Vulnerability to Misuse and Social Context

The criminalisation of deceitful means must also be understood in its social context. As critics have noted, Sec. 69 is susceptible to misuse in a society where pre-marital sexual relationships remain stigmatised. Families discovering such relationships may initiate

proceedings against partners, transforming consensual intimacy into criminal accusation. The provision may thus become a tool for enforcing conservative moral norms rather than protecting genuine victims of deception.

This concern is amplified by the provision's ambiguous sentencing structure, which specifies only a maximum punishment without minimum threshold. Such ambiguity may lead to inconsistent application and, potentially, to its use as leverage in disputes that are fundamentally about relationship breakdown rather than criminal deception.

4. The Marital Rape Exception: Autonomy Suspended

4.1 The Provision and Its Colonial Origins

The most glaring contradiction in the BNS's treatment of consent is the retention of the marital rape exception. Sec. 63 explicitly exempts from the definition of rape "sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age." This provision immunises husbands from prosecution for rape committed against their wives, creating a legally protected zone of sexual coercion within marriage.

The exception traces its origins to the seventeenth-century pronouncement of Lord Chief Justice Matthew Hale, who declared that a husband cannot be guilty of rape upon his wife because by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract. This "implied consent" theory treated marriage as involving an irrevocable transfer of sexual property rights from wife to husband, rendering consent perpetually present and legally unchallengeable.

This doctrine has been abandoned in its place of origin. The House of Lords in *R v R* (1991) declared that "the old idea that a wife gives irrevocable consent to sexual intercourse is unacceptable today," recognising that marriage has evolved into a partnership of equals. Yet Indian law continues to enshrine this feudal relic, even in a code purportedly designed to eliminate colonial influence.

4.2 Constitutional Challenge and Judicial Fragmentation

The constitutional validity of the marital rape exception is currently pending before the Supreme Court in a batch of petitions challenging its compatibility with Articles 14, 15, 19, and 21 of the Constitution. The Delhi High Court delivered a split verdict in May 2022, with Justice Rajiv Shakdher invalidating the exception as a "firewall" that arbitrarily insulates one class of perpetrators while Justice C. Hari Shankar upheld it, invoking legislative competence and the putative risk of false cases.

The arguments against the exception are constitutionally compelling. As petitioners have submitted, the provision violates the right to equality by treating identically situated victims differently based solely on marital status. It discriminates on grounds of sex by denying married women the protection against sexual violence that unmarried women possess. And it infringes the right to life by denying married women their bodily autonomy and dignity within the private sphere of marriage.

The Supreme Court's privacy and autonomy jurisprudence renders the exception increasingly untenable. *Joseph Shine* struck down adultery law precisely because it treated women as chattel of their husbands. *Navtej Singh Johar* decriminalised homosexuality by affirming that sexual autonomy is integral to personhood. *Independent Thought v. Union of India* (2017) read down the exception to the extent it permitted marital rape of girls aged 15-18, harmonising the IPC with the POCSO Act. The logic of these decisions points irresistibly toward the exception's complete abolition.

4.3 Doctrinal Evasion: Sec. 377 and 498A as Inadequate Substitutes

Pending final resolution of the constitutional challenge, courts have adopted fragmented approaches to marital sexual violence. Some have invoked Sec. 377 (which criminalises "unnatural offences") to punish husbands who force non-penile-vaginal sexual acts upon their wives. Others have treated marital rape as cruelty under Sec. 498A. Still others have extended the marital rape exception to Sec. 377, holding that marriage licenses all sexual acts regardless of consent.

This fragmented response produces what scholars term "mislabelled harm" the distortion of sexual violence into other doctrinal categories that fail to capture its nature and gravity. Forced oral sex becomes "unnatural offence" rather than rape. Coerced penile-vaginal intercourse becomes "cruelty" rather than the paradigmatic form of sexual violation. These recharacterisations not only diminish the seriousness of the harm but also deprive survivors of the legal recognition and social validation that accurate labelling provides.

The Allahabad High Court's decision in *Imran Khan v. State of U.P.* illustrates the conceptual confusion produced by this fragmented approach. The court held that non-consensual anal sex between husband and wife could constitute rape under Sec. 375 because such acts are "not a natural orientation of sex for the majority of women." This reasoning, while reaching a protective outcome, rests on deeply problematic assumptions about female sexuality and naturalness. It suggests that protection from sexual violence depends on whether the specific

act deviates from heteronormative expectations rather than on the fundamental absence of consent.

4.4 The Sex-Consent Matrix in Family Law

The marital rape exception does not exist in isolation but reflects what scholars term a "sex-consent matrix" embedded across family law. Marriage is constructed as a site of presumed sexual availability, where consent is legally fiction not because it has been given but because the institution itself is deemed to substitute for individual agreement. This construction treats wives as legal dependents rather than equal citizens, perpetuating the very hierarchy that constitutional equality principles were designed to dismantle.

The Supreme Court's observation in *Joseph Shine* that "familial structures cannot be regarded as private spaces where constitutional rights are violated" directly challenges this matrix. If constitutional rights apply within marriage as they must then the presumption of sexual availability cannot stand. Autonomy does not end at the bedroom door; it is precisely there that its protection matters most.

5. Evidentiary Architecture: Presumptions and Proof

5.1 The Presumption of Absence of Consent

The Bharatiya Sakshya Adhiniyam, 2023, which replaces the Indian Evidence Act, carries forward provisions that shape the adjudication of consent. Sec. 120 of the BSA corresponds to Sec. 114A of the old Act, creating a presumption as to the absence of consent in certain prosecutions for rape. Where sexual intercourse is proved and the woman states in her evidence that she did not consent, the court shall presume that she did not consent.

This presumption operationalises the evidentiary burden in rape trials. It does not shift the ultimate burden of proof, which remains on the prosecution, but it does require the accused to adduce evidence capable of rebutting the presumption. The provision reflects legislative recognition of the difficulties inherent in proving consent's absence, given the typically private circumstances in which sexual offences occur.

5.2 Character Evidence and Its Exclusion

Sec. 48 of the BSA, corresponding to Sec. 53A of the old Act, provides that evidence of character or previous sexual experience is not relevant in certain cases. The proviso to Sec. 149 further stipulates that where consent is in issue, it shall not be permissible to adduce evidence or to put questions in cross-examination about the victim's general immoral character or previous sexual experience for proving such consent.

These provisions embody the legislative judgment that past sexual history is irrelevant to the question of whether consent was given on the specific occasion. They protect complainants from invasive and irrelevant inquiries designed to suggest that a woman who has consented in the past is more likely to have consented on the occasion in question a logic that would be rejected in any other context but has historically infected rape trials.

5.3 The Medical Evidence Conundrum

Medical evidence continues to play a complex role in consent adjudication. As commentators note, the absence of injuries does not negate rape, nor does their presence conclusively establish it. The timeframe between incident and complaint affects the nature of medical indicators, with delays potentially erasing physical evidence without diminishing the fact of violation.

The BNS and BSA do not fundamentally alter this evidentiary landscape, leaving courts to navigate the relationship between medical evidence, witness testimony, and circumstantial proof of consent's absence. The challenge lies in ensuring that evidentiary rules facilitate rather than frustrate the accurate determination of consent.

6. Judicial Interpretation: Mapping the Contours of Consent

6.1 From Mathura to the Present: The Evolution of Judicial Approach

The trajectory of judicial interpretation of consent in sexual offences reflects broader shifts in social attitudes and constitutional understanding. The Mathura rape case (1972) exposed the inadequacies of a framework that required proof of active resistance, leading to the Criminal Law Amendment Act of 1983. Subsequent decades saw gradual expansion of protective interpretation, culminating in the Criminal Law (Amendment) Act, 2013, which broadened the definition of rape and clarified consent's parameters.

The Supreme Court has consistently held that consent must be free and voluntary. In *State of Maharashtra v. Prakash*, the Court emphasised that submission induced by fear or coercion is not consent. In *Pramod Maurya v. State of U.P.*, the Court distinguished between false promises and broken promises, requiring that the promise be the sole reason for consent and that the accused had no intention of fulfilling it from the outset.

6.2 The Heteronormative Lens and Its Limitations

Despite progressive pronouncements, judicial interpretation remains shaped by heteronormative assumptions about sexuality. The reasoning in *Imran Khan* that non-consensual anal sex constitutes rape because such acts are not a "natural orientation for the

majority of women" reveals the persistence of this lens. Protection from sexual violence is made conditional on the nature of the act rather than the absence of consent.

This framework implicitly assumes that penile-vaginal intercourse is universally desired by women, such that its imposition without consent raises different questions than the imposition of other acts. It marginalises women whose sexual preferences may not include such intercourse and perpetuates stereotypes about female sexuality as essentially procreative and passive. The only coherent alternative is to recognise that all sexual acts require consent, regardless of their "naturalness," and that the gravamen of rape lies in the violation of autonomy, not the deviation from heteronormative expectations.

6.3 Navigating the False Promise Cases

Courts have developed a nuanced jurisprudence for cases involving false promises of marriage, balancing the need to protect genuinely deceived women against the risk of criminalising broken relationships. The distinction between false promises and broken promises requires examination of the accused's intention at the time of making the promise, the duration and nature of the relationship, and the circumstances of the promise's non-fulfilment.

The introduction of Sec. 69 BNS creates a new interpretive challenge. Courts must now determine not only whether consent was vitiated by deception but also whether the case falls within the category of deceitful means (attracting the lesser offence) or within the categories of force, threat, or incapacity (attracting rape). This requires judgments about the relative gravity of different mechanisms of consent-negation judgments that are conceptually fraught and practically difficult

7. Towards a Coherent Framework: Reconstructing Consent Through Autonomy

7.1 Beyond Formalism: Consent as Substantive Autonomy

The fragmentation identified in preceding Sec.s between will and consent, between false promises and force, between marriage and non-marriage reflects a deeper failure to ground sexual offence law in a coherent conception of autonomy. Consent is treated as a formal hurdle rather than an expression of agency, its absence determined by checklist rather than by inquiry into whether the complainant's autonomy was respected.

A reconstructive framework must begin from the premise that sexual autonomy is indivisible. It does not vary in strength based on marital status, does not admit of degrees depending on the mechanism of violation, and does not depend on whether the specific act

conforms to judicial notions of naturalness. Autonomy means the power to decide and the correlative right to have that decision respected.

This implies that consent must be understood affirmatively, as the communication of willingness, not merely as the absence of dissent. It implies that deception going to material facts undermines consent because it deprives the individual of the information necessary for autonomous choice. And it implies that marriage cannot operate as a standing consent, because autonomy is exercised continuously, not transferred irrevocably.

7.2 The Case for Abolishing the Marital Rape Exception

The constitutional case for abolishing the marital rape exception is overwhelming. It violates Article 14 by treating married women differently from unmarried women without rational justification. It violates Article 15 by discriminating on the ground of sex. It violates Article 21 by denying married women their bodily autonomy and dignity. And it violates India's obligations under international human rights law, which requires states to criminalise all forms of sexual violence, including within marriage. The arguments against abolition that it would destabilise marriage, that it would be misused, that it would intrude into the private sphere have been repeatedly rejected by courts in other jurisdictions and by the logic of India's own constitutional evolution. As the Supreme Court observed in *Joseph Shine*, stability purchased at the cost of constitutional rights is not stability worth preserving. And as petitioners in the pending challenge have argued, criminalising marital rape does not create a new offence but merely removes an unjustified immunity from an existing one.

7.3 Reimagining Sec. 69: Deception, Autonomy, and Harm

Sec. 69, despite its flaws, represents an important recognition that deception can undermine consent as fundamentally as force. The challenge lies in developing a framework that captures this insight without collapsing into moralism or over-criminalisation.

A reconstructed approach would focus on whether the deception went to a matter material to the complainant's decision to engage in sexual activity. This requires attention to the specific circumstances: what information did the complainant consider important, and was she deprived of accurate information about that matter? The distinction between false and broken promises remains relevant, but the inquiry should centre on the complainant's autonomy rather than solely on the accused's intention.

Such an approach would also require gender neutrality. If deception undermines autonomy, it does so regardless of the gender of the deceived or the deceiver. Extending protection to all

persons including men and members of the LGBTQ+ community is not merely a matter of formal equality but of recognising that autonomy is a universal human attribute.

7.4 Harmonising Criminal and Family Law

The fragmentation of sexual offence law cannot be fully addressed without attending to its relationship with family law. The marital rape exception is not an isolated anomaly but part of a broader legal construction of marriage as involving the suspension of individual autonomy. This construction appears in maintenance law, in matrimonial remedies, and in the very conception of conjugal rights.

Harmonising these bodies of law requires a fundamental reorientation: treating marriage as a relationship between autonomous individuals rather than as a status that subsumes personhood. This does not mean denying the significance of marriage or the commitments it entails. It means recognising that commitment does not entail surrender, and that intimacy requires consent as its continuing foundation.

8. CONCLUSION:

The Bharatiya Nyaya Sanhita, 2023 represents an important moment in the evolution of India's criminal law an opportunity to reshape legal frameworks in alignment with constitutional values. Yet in the crucial domain of sexual offences, the BNS presents a picture of fragmentation and incompleteness. It introduces progressive elements like Sec. 69 while retaining regressive vestiges like the marital rape exception. It elaborates the circumstances that negate consent while failing to articulate consent's affirmative meaning. It gestures toward autonomy while preserving spaces where autonomy is legally suspended.

This fragmentation is not merely a technical defect but a substantive failure. Sexual offence law exists to protect the most intimate sphere of human life from violation. Its effectiveness depends on its coherence on its capacity to articulate clearly what autonomy requires and to enforce that requirement without exception or evasion. The current framework falls short of this standard.

The path forward requires legislative reform to abolish the marital rape exception, to render Sec. 69 gender-neutral, and to embed an affirmative consent standard in the definition of sexual offences. It requires judicial interpretation that centres autonomy rather than heteronormative assumptions about sexuality. And it requires a broader societal conversation about the nature of consent and the conditions under which genuine autonomy can be exercised.

The unfinished project of autonomy in Indian sexual offence law is ultimately a project of constitutional fidelity. The Constitution promises dignity, equality, and liberty to all persons. Those promises cannot be fulfilled so long as the law continues to treat some violations as less serious because of the identity of the perpetrator, or some persons as less entitled to autonomy because of their marital status. Completing this project is not merely a matter of legal reform but of realising the constitutional commitment to a society where every person's bodily autonomy is respected.

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