

**BETWEEN THE WHIP AND THE GAVEL:****BDSM, CONSENT, AND THE INDIAN LEGAL SYSTEM**

*By Avni Chadha\**

**ABSTRACT**

*This article examines the legal status of BDSM (Bondage, Discipline, Dominance, Submission, Sadism, and Masochism) in India, with particular emphasis on the structural incapacity of both Indian criminal law and Indian contract law to accommodate consensual practices that involve the intentional infliction of bodily pain for pleasure. Drawing on the newly enacted Bharatiya Nyaya Sanhita, 2023, the Indian Contract Act, 1872, and the Supreme Court's evolving privacy jurisprudence, principally *K.S. Puttaswamy v. Union of India* (2017) and *Navtej Singh Johar v. Union of India* (2018), the article argues that India's current legal framework criminalises desire without distinguishing between violence and negotiated, consensual intimacy. The article situates this analysis within a comparative framework, surveying landmark jurisprudence from the United Kingdom (*R v. Brown*, 1993), Canada, the United States, and Germany. The article further traces the ancient Indian erotic heritage, from the detailed pain-play of the *Kama Sutra* to the temple rites of Mesopotamia, to expose the irony of a state that selectively invokes "Indian tradition" while simultaneously criminalising its most sophisticated erotic legacy. The article concludes by proposing six law reform pathways, including a consent-based exception to the hurt provisions of the BNS modelled on German §228 StGB, evidentiary recognition of BDSM consent agreements, and the judicial development of an "erotic consent" doctrine grounded in Article 21 of the Constitution of India.*

**Keywords:** BDSM; consent; bodily harm; Bharatiya Nyaya Sanhita; Indian Contract Act; sexual autonomy; privacy; constitutional law; comparative criminal law; erotic consent.

---

\* BBA LLB (Hons) – 3rd Year, Integrated Undergraduate Law Degree, Jindal Global Law School, O.P. Jindal Global University – Sonapat, Haryana, India. Email: [23jgls-avni@jgu.edu.in](mailto:23jgls-avni@jgu.edu.in).

## I. Behind The Velvet Curtain: An Introduction

Lights strobe across a dimly lit room. A low bass thrum of music pulses in synchrony with something older than law: desire, trust, and surrender. In one corner, a woman in a harness lifts a flogger and meets the eyes of the man kneeling before her. He nods, almost imperceptibly. The leather descends in a deliberate arc. He exhales, the breath carrying both the sensation and the release that the scene was designed to produce. Around them, onlookers in latex and denim are united by an unspoken code: in this room, the word “red” holds more authority than any statute. Everyone knows it.

This scene is representative of any organised BDSM gathering, a space in which participants negotiate terms in advance, establish limits, and engage in consensual power exchange within a framework of mutual agreement. Yet the moment these individuals step outside, a question of acute legal significance accompanies them: are they criminals under Indian law?

In India, that question admits no comfortable answer. The same intimate acts that feel liberating within a carefully negotiated BDSM scene may constitute criminal “hurt” or “grievous hurt” under the Bharatiya Nyaya Sanhita, 2023 (BNS), India's newly enacted criminal code.<sup>1</sup> Any “slave contract” or consent agreement signed between partners carries no legal force, rendered void as a contract with an illegal or immoral object under the Indian Contract Act, 1872.<sup>2</sup> And crucially, if one participant later changes their mind, or if an outsider becomes aware of bruises, the consensual nature of those injuries may be legally disregarded. Under the BNS's framework, consent is not a shield against a charge of causing hurt once the harm reaches the threshold of seriousness.

This article investigates that tension: between private freedom and public law; between ancient erotic heritage and colonial-era morality codes; between constitutional guarantees of privacy and dignity and a penal architecture still largely resistant to the idea that adults may lawfully choose to feel pain. The inquiry proceeds across five dimensions: the historical and cultural roots of erotic pain in India and globally; the specific provisions of Indian criminal law and contract law that render BDSM legally precarious; the constitutional framework that might, in

---

<sup>1</sup>Bharatiya Nyaya Sanhita, No. 45 of 2023 [hereinafter BNS], §§ 114–125 (offences against the body), § 25 (consent exception), § 73 (grievous hurt) (India). The BNS came into force on 1 July 2024, replacing the Indian Penal Code, 1860.

<sup>2</sup>Indian Contract Act, 1872 [hereinafter ICA], § 23 (India) (“Every agreement of which the object or consideration is . . . immoral, or opposed to public policy . . . is void.”). See also ICA § 2(e) (defining an agreement) and § 10 (requiring lawful object and lawful consideration).

principle, protect it; a comparative survey of how other jurisdictions have grappled with the same tension; and a set of concrete law reform proposals.

The argument is not that BDSM should be exempt from all legal scrutiny. It is a narrower and more fundamental claim: the law must learn to distinguish between violence and consent-saturated intimacy. Until it does, the Indian state remains an instrument of moral surveillance, one that refuses to look away, and refuses to understand what it sees.

## II. FROM INANNA TO THE KAMA SUTRA: A HISTORY OF EROTIC PAIN

### A. *Ancient Origins: Dominion, Desire, and the Sacred Whip*

Long before the acronym BDSM existed, the essence of erotic dominion thrived in the world's oldest cultures, often in unexpectedly sacred contexts. In ancient Mesopotamia, the Sumerian goddess Inanna embodied what Anne Nomis' foundational work describes as the primordial dominatrix figure.<sup>3</sup> Clay tablets inscribed in cuneiform describe ritual practices that involved pain, punishment, and ecstasy as a path to divine transformation. Inanna, called Ishtar in the Akkadian tongue, wielded fearsome powers over libido, allure, and battle prowess; her whip a symbol not of cruelty but of command over desire itself. The world's first recorded author, the high priestess Enheduanna (2285–2250 BCE), composed hymns praising Inanna's forceful passions, testifying to the deep entanglement of erotic domination and Sumerian spirituality.<sup>4</sup>

Across the ancient world, analogous patterns appeared. In Sparta, young men were ritually flogged at the altar of Artemis Orthia as an initiation rite, linking physical suffering with communal strength. Devotees of Dionysus in Greece engaged in ecstatic flagellation as an offering to the god of revelry. In Rome, erotic art and mythic narrative alike suggested that power exchange occupied a recognised, if discreet, place in the sexual imagination. What we now classify as “kink” was, in antiquity, frequently inseparable from worship, fertility ritual, and social ceremony, respected facets of sexuality thousands of years before a legal system thought to police them.

---

<sup>3</sup>Anne O. Nomis, *The History and Arts of the Dominatrix* 14–22 (2013). See also Tikva Frymer-Kensky, *In the Wake of the Goddesses: Women, Culture and the Biblical Transformation of Pagan Myth* 25–29 (1992).

<sup>4</sup>Enheduanna, Hymn to Inanna, in *The Literature of Ancient Sumer* 310–15 (Jeremy Black et al. eds. & trans., Oxford Univ. Press 2004).

## B. *The Kama Sutra and the Indian Erotic Tradition*

The most sophisticated ancient engagement with consensual erotic pain comes from India itself. Vatsyayana's *Kama Sutra* (compiled between approximately 400 BCE and 300 CE) is routinely mischaracterised as a catalogue of sexual positions.<sup>5</sup> It is, in truth, a rigorous philosophical treatise on pleasure, desire, and, most significantly for the purposes of this article, consent. Book II, Chapter VII is devoted entirely to the “blows” (*prasritaka*) that may constitute part of erotic congress: eight varieties of nail-marking, eight kinds of biting, and calibrated classifications of slapping, scratching, and striking.<sup>6</sup>

What is remarkable, and what renders the *Kama Sutra* both legally and culturally significant for this article, is the text's insistent emphasis on mutuality. Vatsyayana is explicit: these acts are pleasurable only when both partners desire them. The text stresses the primacy of clear communication and the requirement of the partner's enjoyment as a condition precedent to any rough play. One passage describes a woman overcome with desire who “puts aside her natural shyness” and “playfully slaps and beats her lover, becoming hard and fearless, and dominates him at the peak of excitement.”<sup>7</sup> This is not a description of violence. It is a description of consensual power reversal, framed within an ethical philosophy of mutual pleasure, what contemporary BDSM communities call *Safe, Sane, and Consensual (SSC)* or *Risk-Aware Consensual Kink (RACK)*. The ancient Indian legal tradition itself, the *Manusmriti* and the *Arthashastra*, addressed bodily harm in private disputes without imposing criminal liability on mutually sought erotic injury.<sup>8</sup> The pursuit of *kama*, one of the four *purusharthas*, or recognised goals of human life, was a legitimate sphere of personal endeavour governed by its own norms, not subject to blanket state prohibition. The colonial intervention that would subsequently recast consensual erotic harm as a morality offence remained centuries away.

<sup>5</sup>Vatsyayana, *Kama Sutra* bk. II, ch. 7 (Sir Richard F. Burton & F.F. Arbuthnot trans., 1883). For the standard modern critical edition, see Wendy Doniger & Sudhir Kakar trans., *Kamasutra* (Oxford World's Classics 2002).

<sup>6</sup>Vatsyayana, *Kama Sutra* bk. II, ch. 7 (Doniger & Kakar trans., 2002) (“When passion is aroused in the course of sexual union, there is little distinction of what should or should not be done.”).

<sup>7</sup>Id. bk. II, ch. 7, verses 1–16 (cataloguing eight varieties of nail-marks and eight of biting as forms of erotic play, each conditioned on the mutual pleasure of both partners).

<sup>8</sup>Patrick Olivelle trans., *The Law Code of Manu (Manusmriti)* (Oxford World's Classics 2004); *Arthashastra* 3.3.1–3.3.10 (L.N. Rangarajan trans., Penguin 1992) (addressing bodily harm in private disputes without criminalising mutually sought erotic injury).

### C. *The Western Arc: From de Sade to the Dungeon*

The Western history of BDSM runs a different arc. The Marquis de Sade gave his name to “sadism” through a body of work that collapsed the boundary between consensual fantasy and coercive excess.<sup>9</sup> Richard von Krafft-Ebing's 1886 *Psychopathia Sexualis* codified both sadism and masochism as clinical pathologies, a medical framing that would dominate Western law and psychiatry for nearly a century. Sigmund Freud reinforced this pathologising view, treating sadomasochism as a developmental disorder rather than a variant sexual expression.<sup>10</sup>

The twentieth century brought slow but significant revision. Gayle Rubin's landmark 1984 essay “*Thinking Sex*” argued powerfully that BDSM was not pathological but simply a non-normative sexuality deserving of equal respect.<sup>11</sup> By 2013, the *DSM-5* had completed the trajectory of de-pathologisation, removing ego-syntonic BDSM from the diagnostic categories entirely.<sup>12</sup> The political backlash against this liberalisation found its most potent legal expression in India's colonial inheritance, a subject to which this article now turns.

## III. THE COLONIAL CAGE: HOW BRITISH MORALITY BECAME INDIAN LAW

### A. *The Penal Code as a Moral Project*

The Indian Penal Code, 1860, drafted by Thomas Babington Macaulay and his Law Commission colleagues, was not merely a criminal statute. It was a moral project, an attempt to impose Victorian English sensibility on a subcontinent with a far richer and more pluralistic erotic tradition. The IPC's offences against the body, its obscenity provisions, and its categorical indifference to consent in cases of serious hurt were shaped by the conviction that the state had a legitimate interest in the sexual and bodily conduct of its subjects, even in private.<sup>13</sup>

<sup>9</sup>Marquis de Sade, *The 120 Days of Sodom* (Austryn Wainhouse & Richard Seaver trans., Grove Press 1966); Richard von Krafft-Ebing, *Psychopathia Sexualis* (Franklin S. Klaf trans., Stein & Day 1965) (first coining “sadism” and “masochism” as clinical categories).

<sup>10</sup>Sigmund Freud, *Three Essays on the Theory of Sexuality* 16–20 (James Strachey trans., Basic Books 2000); Havelock Ellis, *Studies in the Psychology of Sex*, vol. 2, at 119–33 (1897).

<sup>11</sup>Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *Pleasure and Danger: Exploring Female Sexuality* 267, 277–80 (Carole S. Vance ed., 1984).

<sup>12</sup>Staci Newmahr, *Playing on the Edge: Sadomasochism, Risk, and Intimacy* 5–12 (2011); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (reclassifying ego-syntonic BDSM as a paraphilia, not a disorder).

<sup>13</sup>R.C. Srivastava, “India's Victorian Hangover: Colonial Morality Legislation and Its Contemporary Legacy,” 19 *Journal of Indian Law and Society* 47, 61–67 (2018); Usha Zacharias, “Constructing 'Indian' Sexuality: The

The most visible legacy of this moral architecture is the original Section 377, the anti-sodomy provision that criminalised “carnal intercourse against the order of nature” and which was wielded for over a century against any non-normative sexual expression. Though *Navtej Singh Johar* finally struck down Section 377 in 2018 as applied to consensual adult conduct,<sup>14</sup> the provision's spirit survives in the BNS's broader treatment of consent: the principle that one cannot consent to being seriously hurt is traceable not to Indian philosophical tradition but to Victorian public policy and its deep suspicion of pleasure that departs from the procreative norm.

### B. *The Anti-Romeo Squads and the Selective Invocation of Tradition*

The contemporary resonance of this colonial legacy is visible in a striking paradox. In 2017, Uttar Pradesh Chief Minister Yogi Adityanath created “Anti-Romeo Squads”, law enforcement units ostensibly designed to protect women from harassment. As Devgan and Mukherjee document in *Asian Studies Review*, these squads rapidly became instruments of moral governance, detaining and shaming couples in public spaces and policing consensual adult relationships in the name of “Indian tradition.”<sup>15</sup>

The paradox is acute. The political ideology that deploys “Indian tradition” to justify the criminalisation of consensual desire is simultaneously erasing one of India's most sophisticated erotic legacies. The *Kama Sutra*, a Sanskrit text that openly describes practices we would today classify as BDSM, framed within a philosophy of mutual pleasure and consent, is not a Western import. It is Indian tradition. The Anti-Romeo squads are not defending that tradition; they are suppressing its most sophisticated erotic dimensions. If the state cannot tolerate two adults sitting together in a park, it is unsurprising that it refuses to imagine a legal space for negotiated, consensual BDSM.<sup>16</sup>

---

Colonial Legacy in Contemporary Law,” in *Gender, Law and Sexuality in India* 34, 48–52 (Rachna Chaudhary ed., 2020).

<sup>14</sup>*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India) (five-judge Constitution bench striking down IPC § 377 as applied to consensual adult same-sex intercourse, holding that sexual autonomy is integral to dignity, liberty, and equality under Articles 14, 19, and 21 of the Constitution).

<sup>15</sup>Shruti Devgan & Debashree Mukherjee, “Policing Desire: Anti-Romeo Squads and Moral Governance in Uttar Pradesh,” 41(3) *Asian Studies Review* 377, 385–90 (2017) (documenting how the squads functioned not only against harassment but against consensual couples in public spaces, constituting “a form of everyday moral governance”).

<sup>16</sup>See generally Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 89–104 (1999) (discussing how colonial-era morality provisions survived independence and continue to regulate intimate

#### IV. CRIMINAL LAW AND THE BODY: THE BNS FRAMEWORK

##### A. *The Offences of Hurt and Grievous Hurt*

The primary criminal provisions relevant to BDSM in India are the offences of “hurt” and “grievous hurt” under the Bharatiya Nyaya Sanhita, 2023. The BNS came into force on 1 July 2024, replacing the Indian Penal Code, 1860, though the IPC continues to govern conduct occurring before that date.<sup>17</sup> The structural relationship between the two codes, for present purposes, is one of essential continuity: the BNS retains the IPC's fundamental approach to bodily harm and consent without meaningful reform. Causing “hurt”, defined as causing bodily pain, disease, or infirmity, is a punishable offence under BNS Sections 69 and 114.<sup>18</sup> The provision is sweeping: any intentional infliction of physical pain, irrespective of purpose or the victim's state of mind, satisfies the *actus reus*.

“Grievous hurt” is defined even more expansively under BNS Section 73, encompassing emasculation, permanent deprivation of sight or hearing, permanent privation of a joint or limb, permanent disfigurement of the head or face, fracture or dislocation of a bone or tooth, and, critically for BDSM contexts, any hurt that endangers life or causes the sufferer to be in *severe bodily pain for a period of twenty days*.<sup>19</sup> This last limb is notable for its breadth: extended bruising, rope burns requiring medical attention, or intense marks that cause discomfort exceeding three weeks could, on a liberal prosecutorial reading, satisfy this definition.

##### B. *The Consent Exception Under Section 25 BNS: Narrow, Contingent, and Inadequate*

The BNS does provide a consent exception, but it is a slender instrument. Section 25 (formerly IPC Section 87) provides, in material part, that nothing which is *not* intended to cause death or grievous hurt, and which is *not known* by the doer to be likely to cause death or grievous hurt,

---

conduct); Prabha Kotiswaran, “Born Unto Brothels: Toward a Sex Workers' Rights Jurisprudence,” 4 *Yale J.L. & Feminism* 17, 45 (2008).

<sup>18</sup>BNS § 69 (2023) (India) (voluntarily causing hurt); § 73 (grievous hurt). For the pre-2024 equivalents, see IPC § 323 (voluntarily causing hurt) and § 325 (voluntarily causing grievous hurt), carrying imprisonment of up to one year and seven years respectively.

<sup>19</sup>BNS § 73 (2023) (India). The definition includes: emasculation; permanent deprivation of the sight of either eye; permanent deprivation of the hearing of either ear; permanent loss of a member or joint; permanent disfigurement of the head or face; fracture or dislocation of a bone or tooth; and any hurt which endangers life or causes the sufferer to be in severe bodily pain for a period of twenty days.

is an offence by reason of any harm it may cause to any person above eighteen years of age who has consented to suffer that harm.<sup>20</sup>

*The provision is best understood through what it excludes rather than what it permits. Section 25 operates as a defence only where the injury was neither grievous nor intended to be grievous, and where the actor did not know that grievous harm was likely. The classic illustration given in the statute is consensual fencing for amusement: each participant implicitly consents to the risk of minor injury. This paradigm (trivial, incidental hurt arising from a broadly acceptable activity) sits at the furthest remove from deliberate, erotic pain-play.*

The limits of Section 25 become apparent when applied to even moderate BDSM practices. Flogging or caning that produces bruises lasting more than a day, a common outcome in consensual impact play, may not satisfy the requirement that the harm be “not likely to cause grievous hurt,” particularly if a prosecutor argues that prolonged pain was precisely what the parties intended. Erotic asphyxiation, commonly called breath play, almost certainly falls outside Section 25's protection because strangulation is inherently likely to create a risk of grievous hurt or death. Wax play producing burns, knife play producing superficial lacerations, and tight bondage producing temporary nerve impairment all present similarly difficult questions.

Section 26 BNS (formerly IPC Section 88) provides a related exception for acts done in good faith for a person's benefit with their consent, but this provision was plainly designed for medical procedures and cannot plausibly be extended to erotic BDSM activity without distorting its language beyond recognition. Section 28 BNS further restricts the availability of any consent defence by invalidating consent obtained under fear, misconception, or from a person whose capacity is impaired by intoxication or mental illness.<sup>21</sup> This provision is

---

<sup>20</sup>BNS § 25 (2023) (India) (“Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm.”). This section re-enacts IPC § 87 without material amendment.

<sup>21</sup>BNS § 28 (2023) (India) (“A consent is not such a consent as is intended by any section of this Sanhita, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or if the consent is given by a person who, from mental illness, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent.”). This section re-enacts IPC § 90.

potentially double-edged in BDSM contexts: it protects against false claims of consent, but it also creates procedural uncertainty wherever a participant was intoxicated at any level during a consensual scene.

### *C. The Complete Bar to Consent for Grievous Hurt*

The most significant constraint in the BNS framework is structural: the code draws a categorical line at grievous hurt. There is no provision whatsoever that permits a person to consent to grievous bodily harm inflicted for the purpose of sexual pleasure. The consent exception under Section 25 expressly carves out grievous hurt. The exception for medically beneficial acts under Section 26 requires that the act serve a therapeutic purpose, not sexual gratification. The code offers no third category.

This categorical bar reflects the same public policy logic that Lord Templeman articulated in *R v. Brown*: the state's interest in preventing violence is deemed to override individual autonomy when bodily harm reaches a threshold of seriousness. But the logic, exported from Victorian England to colonial India and now enshrined in the BNS, rests on a contestable premise, that pain deliberately chosen for pleasure is equivalent in moral and social terms to pain inflicted through aggression. The *Kama Sutra* articulated precisely this distinction two millennia ago.<sup>22</sup>

### *D. Other Relevant Criminal Provisions*

Beyond the hurt provisions, BDSM participants face exposure under several additional criminal provisions of the BNS. First, **wrongful restraint and confinement** (BNS §§ 126–127): bondage, by definition, involves restraining a person, and both provisions are potentially engaged. Second, **obscenity** (BNS § 296; Information Technology Act, 2000, §§ 67–67A): online communities sharing educational content or erotica related to BDSM practices face criminal exposure irrespective of any private consensual context.<sup>23</sup> The Supreme Court's partial modernisation of the obscenity standard in *Aveek Sarkar v. State of West Bengal* (2014), adopting a community standards test, at least moderates the risk for material possessing

---

<sup>23</sup>BNS § 296 (2023) (India) (criminalising obscene acts in public places); Information Technology Act, 2000, § 67 (India) (punishing publication or transmission of obscene material in electronic form); § 67A (sexually explicit material). These provisions may apply to BDSM-related images, videos, or educational content shared online, even between consenting adults.

genuine educational value,<sup>24</sup> but the protection is incomplete. Third, **outraging modesty and sexual harassment** (BNS §§ 74–75): these provisions could be invoked in BDSM contexts where consent is disputed or where activity takes place in a semi-public setting. The cumulative effect of these provisions is a legal environment in which consensual BDSM activity occupies a zone of chronic uncertainty.

#### *E. The Absence of Indian Case Law Directly on Point*

It is a significant and telling fact that no reported Indian court decision directly and specifically addresses BDSM consent, the enforceability of a BDSM agreement, or the application of the hurt provisions to consensual erotic pain-play. This doctrinal silence is not evidence of legal permissiveness; it is evidence of the problem. The absence of reported cases reflects the reality that BDSM is practised underground in India, that participants are unlikely to report crimes arising from consensual encounters, and that the shame, stigma, and risk of prosecution attendant upon disclosure make formal legal engagement deeply unattractive. The law's message, communicated through silence, is: you are on your own.

What exists in Indian case law are analogues and principles. Courts have recognised consent as a defence to minor hurt in sporting contexts,<sup>25</sup> and the Supreme Court has affirmed the right to make decisions about one's own body.<sup>26</sup> The constitutional architecture of *Puttaswamy*<sup>27</sup> and *Navtej Johar*<sup>28</sup> provides grounding for an autonomy-based argument. But none of these cases squarely confronts the question of whether two adults may lawfully agree to the intentional infliction of bodily pain for erotic pleasure. That question remains, in Indian jurisprudence, entirely unanswered.

<sup>24</sup>IPC § 292 (India) (obscenity), the predecessor to BNS § 296, was applied in *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257 (India) (Supreme Court adopting the community standards test from *Miller v. California*, 413 U.S. 15 (1973) (U.S.), in preference to the Victorian *Hicklin* test), which at least moderates the risk of prosecution for BDSM content lacking prurient intent and possessing educational value).

<sup>25</sup>ICA § 10 (India) (requiring that agreements be made by parties competent to contract, for a lawful consideration, with a lawful object, and not expressly declared void by the Act). On the sporting consent analogy, see the Punjab & Haryana High Court's acquittal in a consensual wrestling-injury case noted in Doon Law Mentor, "Consent as a Legal Defence in India: IPC vs BNS Analysis" (2025) (citing *R v. State of Punjab*, 1980 Punjab & Haryana HC).

<sup>26</sup>*Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1 (India) (recognising "the right to make decisions about one's own body" as an integral component of personal liberty under Article 21 of the Constitution of India, in the context of reproductive autonomy).

<sup>27</sup>*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India) (nine-judge Constitution bench unanimously holding that the right to privacy is a fundamental right under Article 21, encompassing informational privacy, physical bodily integrity, and the autonomy to make intimate personal choices free from state interference).

## V. THE VOID IN CONTRACT LAW: WHY BDSM “CONTRACTS” ARE LEGALLY WORTHLESS

### *A. The Structure of BDSM Consent Agreements*

Within the practice community, BDSM relationships are frequently formalised through detailed written agreements, variously called “slave contracts,” “dominant/submissive agreements,” “scene negotiation documents,” or simply “consent forms.” A well-drafted agreement will typically specify the parties' respective roles; the activities that are permitted and those that are hard limits; the safe word or signal system that will function to halt the scene; the duration of any D/s dynamic; aftercare obligations; confidentiality provisions; and a mechanism for renegotiation or termination.

From a community governance perspective, these agreements serve a protective function analogous to informed consent documentation in medical practice. They are designed to ensure that both parties have genuinely considered and affirmed their consent, to provide a record that can be consulted during an intense scene, and to create accountability. Some documents run to multiple pages with granular categories of activities rated by intensity and detailed descriptions of negotiated limits. They represent, in practice, a more sophisticated model of consensual engagement than the law requires of almost any other intimate activity.

### *B. The Indian Contract Act's Voiding Provisions*

Under the Indian Contract Act, 1872, a valid and enforceable contract requires lawful consideration and a lawful object.<sup>29</sup> Section 23 of the ICA specifies that the consideration or object of an agreement is unlawful, and therefore the agreement void, if it is “forbidden by law,” of such a nature that, if permitted, it would defeat the provisions of any law, involves or implies injury to the person or property of another, or is “opposed to public policy.”<sup>30</sup>

A BDSM consent agreement fails this test at multiple points. The agreement's object, the consensual infliction of bodily pain, involves conduct that constitutes “hurt” under the BNS, a criminal offence. An agreement whose object involves commission of a criminal act cannot have a lawful object. Its consideration implies “injury to the person” in the literal and technical

sense contemplated by the statute. And if one characterises the agreement as a contract to consent to assault, it is void under the public policy principle, inherited from English common law and embedded in ICA Section 23, that a person cannot contract to be assaulted.<sup>31</sup> As legal commentators have observed, even where BDSM parties execute “contractual deeds” establishing the terms of their relationship, such documents are “unenforceable in a court of law.”<sup>32</sup>

### *C. What the Contract Can and Cannot Do: The Evidentiary Question*

The unenforceability of a BDSM agreement as an executory instrument does not render it entirely without legal significance. There is a critical distinction between enforceability as a contract and admissibility as evidence. A BDSM consent agreement, while it cannot compel performance of any obligation, may be admissible in a criminal trial as evidence of the parties' state of mind, of prior consent, and of the negotiated nature of the activities at issue. This evidentiary function, while limited, is not trivial.

The analogous use of email correspondence in the American case of *People v. Jovanovic*<sup>33</sup> illustrates this point precisely. When the trial court wrongly excluded the parties' prior email negotiations concerning sadomasochistic activity, the conviction was overturned on appeal; the emails were direct evidence of consent that should have been placed before the jury. In India, a detailed written BDSM consent agreement, specifying permitted activities, the safe word system, and bearing both parties' signatures, would similarly be relevant to the question of whether any harm was consensual and thus potentially within the Section 25 BNS exception. The document is legally inert as an enforcement mechanism; as evidence, it may make the difference between conviction and acquittal.

---

<sup>31</sup>*Pearce v. Brooks*, (1866) LR 1 Ex 213 (Eng.) (agreement for a purpose known to be immoral held void as contrary to public policy); applied in Indian courts through the common law inheritance of ICA § 23. See also *Gherulal Parakh v. Mahadeodas Maiya*, AIR 1959 SC 781 (India) (voiding wagering agreements on public policy grounds, confirming the breadth of the § 23 bar).

<sup>33</sup>*People v. Jovanovic*, 263 A.D.2d 182, 700 N.Y.S.2d 156 (N.Y. App. Div. 1999) (reversing conviction for sexual abuse and assault on grounds that trial court improperly excluded prior email communications between the parties detailing their mutual sadomasochistic fantasies and agreed limits, applying an overbroad construction of New York's rape shield statute, N.Y. Crim. Proc. Law § 60.42; the Appellate Division held the emails were not “sexual conduct” covered by the shield but direct evidence of consent).

### *D. The Impossibility of Contracting into Criminality*

The deepest structural problem with BDSM contracts under Indian law is not a gap that careful drafting can fill. It reflects a foundational principle: one cannot contract to commit a crime against oneself any more than one can contract to commit a crime against another. The BNS's treatment of consent as a limited and conditional defence to hurt embeds the principle that the state reserves an interest in physical integrity that no private agreement can alienate. The ICA's Section 23 gives this principle its contractual expression.

This framework has a paternalistic logic that courts have rarely questioned. The law treats the individual as, in a sense, incompetent to make binding agreements about the infliction of serious pain upon their own body, not because of legal incapacity in the conventional sense, but because public policy is deemed to prohibit such agreements. The difficulty, as this article argues, is that this logic cannot survive contact with the constitutional right to privacy as articulated in *Puttaswamy*, a matter addressed in the section that follows.

## **VI. THE CONSTITUTIONAL ARGUMENT: PRIVACY, DIGNITY, AND EROTIC AUTONOMY**

### *A. Puttaswamy and the Architecture of Privacy*

The nine-judge bench decision in *K.S. Puttaswamy v. Union of India* (2017) is the most significant constitutional development in India in a generation.<sup>34</sup> The Court's unanimous recognition of privacy as a fundamental right under Article 21, encompassing informational privacy, physical bodily integrity, and the autonomy to make intimate personal choices free from state interference, provides the constitutional scaffolding for a serious argument that the state cannot criminalise consensual BDSM activity without satisfying a stringent proportionality test.

Justice Chandrachud's concurrence in *Puttaswamy* articulated the proportionality test with particular precision: any state action interfering with privacy must be grounded in law, must serve a legitimate state aim, and must be proportionate, in the sense that the means deployed must be calibrated to the end pursued and must not be excessive.<sup>35</sup> Applied to the BNS hurt

---

<sup>35</sup>*Puttaswamy*, (2017) 10 SCC 1, ¶¶ 76–80 (Chandrachud, J., concurring) (articulating the three-part proportionality test: (i) legality — the action must have a basis in law; (ii) legitimate aim — there must be a

provisions as applied to consensual BDSM: the legality prong is satisfied. The state's legitimate aim is protecting individuals from bodily harm. But the proportionality prong is deeply problematic. A blanket refusal to recognise consent as a defence to any hurt crossing the grievous threshold, irrespective of the full, deliberate, and ongoing autonomy of the person who chose that hurt, is a very blunt instrument. It treats the consenting BDSM participant as if they were a passive victim of violence, denying them the agency that Article 21's protection of personal liberty exists to preserve.

### *B. Navtej Singh Johar and the Jurisprudence of Intimate Autonomy*

The five-judge Constitution bench in *Navtej Singh Johar v. Union of India* (2018) built explicitly on *Puttaswamy* in decriminalising consensual adult same-sex intercourse.<sup>36</sup> The bench held that sexual autonomy is integral to dignity, liberty, and equality under Articles 14, 19, and 21 of the Constitution, and that the state cannot use criminal law to punish individuals for consensual intimate choices made in private. Justice Chandrachud's concurring opinion was uncompromising:

*“The Constitution does not permit the state to penalize citizens for who they are or for what they choose to do in the private realm of their existence. To penalize them is to destroy their identity.”*<sup>37</sup>

The reasoning maps directly onto the BDSM context. If the state cannot penalise an adult for the intimate choices they make about sexual identity and sexual partners, it requires a compelling justification to penalise them for intimate choices about the manner and intensity of consensual sexual engagement, including the choice to experience pain as a form of pleasure. The Court's decisions in *Joseph Shine v. Union of India*<sup>38</sup> (striking down adultery as a criminal offence and holding that consensual adult intimate choices lie beyond the state's punitive

---

genuine public interest that the interference serves; (iii) proportionality — the means must be calibrated to the end and must not be excessive).

<sup>37</sup>Id. at ¶¶ 128–130 (Chandrachud, J., concurring) (“The Constitution does not permit the state to penalize citizens for who they are or for what they choose to do in the private realm of their existence. To penalize them is to destroy their identity.”).

<sup>38</sup>*Joseph Shine v. Union of India*, (2018) 2 SCC 189 (India) (five-judge bench unanimously striking down IPC § 497 (adultery) as unconstitutional, holding that consensual adult intimate choices within the private sphere lie outside the state's punitive reach and that the individual, not the state, is the sovereign of their own sexuality).

reach), *NALSA v. Union of India*<sup>39</sup> (affirming autonomy over body and identity as a constitutional right), and *Suchita Srivastava*<sup>40</sup> (recognising the right to make decisions about one's own body as integral to personal liberty) together form a constitutional tradition that is increasingly receptive to the argument that erotic autonomy, including the choice to experience consensual pain, is a constitutionally protected interest.

### *C. The Limits of the Constitutional Argument*

The constitutional argument for BDSM protection is powerful but not without limits. First, *Puttaswamy* and *Navtej Johar* both emphasised the “private” nature of the conduct. The constitutional protection for intimate choices does not extend without limit to activities causing significant physical harm, the state retains a compelling interest in preventing serious bodily injury even between consenting adults. Second, the argument operates at the level of principle and has not yet been tested against specific BNS provisions in a BDSM context. Third, the Supreme Court's jurisprudence remains a work in progress. Nevertheless, the constitutional architecture is available. The case awaits a petitioner and a court willing to carry this body of principle to its logical conclusion.<sup>41</sup>

## **VII. COMPARATIVE LAW: HOW OTHER JURISDICTIONS HAVE DRAWN THE LINE**

### *A. The United Kingdom: R v. Brown and the Public Policy Prohibition*

The foundational common law case on consensual BDSM is *R v. Brown* [1993] UKHL 19, decided by the House of Lords.<sup>42</sup> The facts arose from Operation Spanner, a police

<sup>39</sup>*NALSA v. Union of India*, (2014) 5 SCC 438 (India) (recognising the right of transgender persons to self-identification and bodily integrity under Articles 14, 19, and 21; affirming that autonomy over one's body and identity is constitutionally protected from state interference absent compelling justification).

<sup>40</sup>*Suchita Srivastava*, (2009) 9 SCC 1, ¶ 14 (“The right to make decisions about one's own body is an integral component of personal liberty under Article 21. We also recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating.”). The Court's reasoning extends, by analogy, to other deeply personal choices about the use of one's body in intimate contexts.

<sup>41</sup>Jack Donovan, “When Consent Is Never Enough: The Public Policy Exception in Sexual Assault Law,” 82 *Notre Dame L. Rev.* 1781, 1803–08 (2007); see also Claire McGlynn & Vanessa Munro eds., *Rethinking Rape Law: International and Comparative Perspectives* 211–29 (2010).

<sup>42</sup>*R v. Brown*, [1993] UKHL 19; [1994] 1 AC 212 (appeal taken from Eng.) (House of Lords, 3–2 majority). The minority positions of Lord Mustill and Lord Slynn — holding that consensual, private sexual acts not causing serious bodily harm should remain outside the criminal law — have been widely endorsed in academic literature.

investigation in the 1980s that uncovered videotapes of a circle of men engaging in consensual, extreme sadomasochistic activity. All participants had consented; none had complained; no medical treatment had been required. The question before the House of Lords was whether consent could operate as a defence to charges of assault occasioning actual bodily harm and unlawful wounding.

By a three-to-two majority, the House of Lords answered in the negative. Lord Templeman, for the majority, characterised the acts as unpredictably dangerous and degrading, and invoked public policy in terms that have been simultaneously foundational and intensely contested:<sup>43</sup>

*“Society is entitled and bound to protect itself against a cult of violence.  
Pleasure derived from the infliction of pain is an evil thing.”*

The majority's position was, in essence, that sadomasochism, unlike tattooing, surgery, contact sports, or ritual circumcision, had no social utility that could justify the state's recognition of consent as a defence to actual bodily harm. The minority, led by Lord Mustill, argued that the case concerned the criminal law's proper role in regulating private consensual sexual relations, and that “neither repugnance nor moral objection” were proper grounds for creating criminal liability.<sup>44</sup>

The *Brown* decision has been subject to sustained academic critique as an exercise in “autonomy-constricting moralism.”<sup>45</sup> It was upheld by the European Court of Human Rights in *Laskey, Jaggard and Brown v. United Kingdom* (1997),<sup>46</sup> and subsequent decisions, *R v.*

---

See Sharon Cowan, “The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochism,” in *Sexuality and the Law: Feminist Engagements* 133, 148 (Vanessa Munro & Carl F. Stychin eds., 2007).

<sup>43</sup>*Brown*, [1994] 1 AC at 236 (Templeman, L.J.) (“Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing.”). This passage has attracted sustained academic critique as paradigmatic moralism: see Matthew Wait, “Harm, Consent and the Limits of Privacy,” 14(1) *Feminist Legal Studies* 97, 112 (2006).

<sup>45</sup>Sharon Cowan, “The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochism,” in *Sexuality and the Law: Feminist Engagements* 133, 150–52 (Vanessa Munro & Carl F. Stychin eds., 2007) (characterising *Brown* as “autonomy-constricting moralism” that privileges majority sexual preferences over the liberty of those with minority sexual identities).

<sup>46</sup>*Laskey, Jaggard and Brown v. United Kingdom*, (1997) 24 EHRR 39 (Eur. Ct. H.R.) (holding, unanimously on the admissibility question, that the United Kingdom's prosecution of consensual sadomasochism was compatible with Article 8 ECHR, as the state's interest in preventing physical harm constituted a legitimate aim justifying the interference with private life).

*Wilson* [1996] (consensual branding held lawful)<sup>47</sup> and *R v. Emmett* [1999] (consensual BDSM burns and asphyxia held criminal)<sup>48</sup>, have produced an awkward and inconsistent body of precedent drawing distinctions that critics argue are explicable only by the courts' aesthetic preferences for certain “acceptable” forms of bodily modification.

### *B. Canada: The Rejection of Advance Consent and R v. J.A.*

Canadian law arrived at a similar destination by a somewhat different route. In *R v. Jobidon* [1991] 2 SCR 714, the Supreme Court of Canada held that consent was not a defence to common assault causing bodily harm, adopting a public policy analysis close to *Brown*.<sup>49</sup> The most doctrinally significant Canadian case for BDSM purposes, however, is *R v. J.A.* [2011] 2 SCR 440, in which the Supreme Court addressed advance consent in the context of erotic asphyxiation.<sup>50</sup> The Court held that valid consent to sexual activity requires the complainant to be conscious throughout; a person cannot in advance consent to acts performed while unconscious, because consent must be “ongoing, conscious and operating.” This ruling has direct implications for BDSM practices involving intentional loss of consciousness.<sup>51</sup>

### *C. The United States: A Decentralised and Ambiguous Regime*

American law presents neither the categorical prohibition of *Brown* nor the relative permissiveness of Germany, but rather a decentralised patchwork in which the legality of BDSM depends heavily on jurisdiction, prosecutorial discretion, the severity of injuries, and the credibility of consent evidence. In *State v. Collier* (Iowa, 1985), the court rejected the argument that BDSM punishment constituted a lawful “social activity,” finding that the severity

<sup>47</sup>*R v. Wilson*, [1996] 3 WLR 125 (Eng. C.A.) (declining to convict husband who branded his initials on his wife's buttocks at her explicit request, distinguishing *Brown* on the basis that consensual tattooing and branding serve a recognised personal expressive function and do not involve gratuitous violence).

<sup>48</sup>*R v. Emmett*, [1999] EWCA Crim 1710 (Eng. C.A.) (extending the *Brown* rule to heterosexual BDSM; holding that consent is no defence where burns and asphyxia caused actual bodily harm even between a married couple engaging in consensual erotic play). The contrast with *Wilson* remains doctrinally unresolved.

<sup>49</sup>*R v. Jobidon*, [1991] 2 SCR 714 (Can.) (Supreme Court of Canada holding, 4–3, that consent is not a defence to common assault causing bodily harm in a consensual fistfight; adopting a public policy analysis and restricting the common law defence to socially sanctioned activities). See also *R v. Welch*, (1995) 101 CCC (3d) 216 (Ont. C.A.) (Canada) (rejecting BDSM consent defence).

<sup>50</sup>*R v. J.A.*, [2011] 2 SCR 440 (Can.) (Supreme Court of Canada holding, 6–3, that valid consent to sexual activity requires the complainant to be conscious throughout; advance consent cannot authorise acts performed while the person is unconscious, because “the only way to ensure that consent is present throughout is to require the consent to be contemporaneous with the sexual activity”).

<sup>51</sup>*R v. Mabior*, [2012] 2 SCR 584 (Can.) (reaffirming that consent to sexual activity is activity-specific and that misrepresentation vitiates consent; foundational for understanding the limits of advance BDSM consent agreements in Canadian law).

of injuries and the employer–employee power imbalance negated genuine voluntariness.<sup>52</sup> In *People v. Jovanovic* (N.Y. App. Div. 1999), a conviction arising from a BDSM encounter was overturned because the trial court had excluded the parties' prior email negotiations as exculpatory consent evidence.<sup>53</sup>

Arizona Law Review scholars have argued that courts should admit evidence of whether parties followed established BDSM safety protocols, pre-scene negotiation, safe words, aftercare, as material to the issues of mutual consent and the absence of criminal intent.<sup>54</sup> Courts have so far declined to formalise this approach, but the academic argument is compelling, and it offers a model for Indian reform. The NCSF has documented numerous cases in which consensual BDSM participation was weaponised in child custody proceedings as evidence of moral unfitness,<sup>55</sup> demonstrating that legal risks for practitioners extend well beyond criminal prosecution.

#### *D. Germany: Consent as a Defence and the “Good Morals” Standard*

Of the major jurisdictions surveyed in this article, Germany offers the most permissive and conceptually sophisticated framework for consensual BDSM. Section 228 of the Strafgesetzbuch (StGB) provides that causing bodily harm with the victim's consent is unlawful only if, despite the consent, the act violates *gute Sitten*, good morals or public decency.<sup>56</sup> This provision reverses the common law default: in Germany, consent *does* operate as a defence to bodily harm, subject only to the qualification that the conduct not be contrary to public decency.

The Federal Court of Justice (BGH) elaborated this framework in its 2004 decision arising

<sup>52</sup>*State v. Collier*, 372 N.W.2d 303 (Iowa Ct. App. 1985) (rejecting the argument that a BDSM session constituted a “social activity” within the meaning of Iowa's consensual-activity exception to assault liability; the court found the severity of the injuries, combined with the employer–employee power differential, negated any genuine voluntariness of the victim's consent).

<sup>54</sup>“BDSM, Kink, and Consent: What the Law Can Learn from Consent-Driven Communities,” 62 *Ariz. L. Rev.* 99, 118–24 (2020) (arguing that courts should admit evidence of whether parties followed established BDSM safety protocols — including pre-scene negotiation, safe words, and aftercare — as material to the issues of mutual consent and absence of criminal intent).

<sup>55</sup>National Coalition for Sexual Freedom, *BDSM Survey: Violence & Discrimination Report* (2008) (documenting cases in which consensual BDSM participation resulted in loss of child custody, employment termination, and housing discrimination, demonstrating that legal risks extend well beyond criminal prosecution).

<sup>56</sup>Strafgesetzbuch [StGB] [Criminal Code] § 228 (Ger.) (“Whoever causes bodily harm to another person with the latter's permission acts only unlawfully if, despite the consent, the act violates good morals.”). For commentary, see Claus Roxin, *Strafrecht Allgemeiner Teil* vol. I, §§ 13.75–13.90 (4th ed. 2006).

from consensual erotic asphyxiation that resulted in death.<sup>57</sup> The BGH held that sadomasochistically motivated physical injuries are not *per se* contrary to good morals. The threshold of indecency is crossed only when the act creates a concrete risk of death or severe harm. Where BDSM partners have pre-agreed on a safe word, the BGH reasoned, the submissive retains an effective exit option; they are not “unable to resist” in the sense required to establish coercion under German law. This approach, one that takes the practice community's own consent architecture seriously and integrates it into legal analysis, represents the most coherent model available for Indian reform.

### *E. Comparative Conclusion*

The comparative picture is this: India's treatment of consensual BDSM is not an anomaly among common law systems, the UK and Canada take broadly similar positions, but it is significantly more restrictive than Germany and Scandinavia, and increasingly difficult to reconcile with India's own constitutional jurisprudence on privacy and intimate autonomy. The direction of travel in comparative law, taken as a whole, is toward greater recognition of consent as a meaningful defence to consensual erotic harm. India's BNS points in the opposite direction. That dissonance demands a response from the legislature and, potentially, from the Supreme Court.<sup>58</sup>

## **VIII. THE UNDERGROUND COMMUNITY AND THE INFRASTRUCTURE OF CONSENT**

In jurisdictions where legal protection is limited or uncertain, the BDSM community has developed internal governance structures that function as a partial substitute for legal recognition. The Citadel in San Francisco operates through membership agreements, mandatory orientation sessions, and on-site dungeon monitors trained to intervene at the first sign of distress. Torture Garden in London operates within the constraints of *Brown* by strictly controlling activities at its events to exclude conduct likely to cause injury beyond transient

<sup>57</sup>Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 26, 2004, Neue Juristische Wochenschrift [NJW] 2375 (Ger.) (holding that sadomasochistic injuries are not *per se* contrary to good morals under StGB § 228; the threshold of indecency is crossed only when the act creates a concrete risk of death or severe harm to the consenting party). The BGH also reasoned that a pre-agreed safe word negates the element of coercion under StGB § 240 (Nötigung), because the submissive party retains an effective exit option.

<sup>58</sup>Matthew Weait, “Harm, Consent and the Limits of Privacy,” 14(1) *Feminist Legal Studies* 97, 112–16 (2006); Nicola Lacey, “Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law,” 11 *Canadian Journal of Law and Jurisprudence* 47 (1998).

marks, while maintaining elaborate dress and consent codes. Berlin's Schwelle<sup>7</sup>, founded as a hybrid of BDSM performance space and consent research laboratory, benefited from Germany's more permissive §228 framework to operate as an explicitly educational institution where BDSM consent agreements carry genuine legal relevance.

The contrast with India is stark. India's BDSM community operates almost entirely underground: play parties held in private apartments, rented hotel rooms, or secluded farmhouses, organised through encrypted messaging applications, niche internet forums, and invitation-only networks. This informality carries real costs. Without formal monitoring mechanisms, abuse may go unreported and unremedied. Without legal literacy, participants routinely misjudge the boundaries of criminal exposure. Without visibility, there is no pathway to advocacy or reform. The fear of exposure, of police intervention, media attention, or the weaponisation of BDSM participation in custody or employment disputes, enforces a culture of silence, and silence protects no one.

Indian BDSM activism is nascent, cautious, and operating in an environment of acute legal risk. Organisations such as Alternative Sexualities India (ASI) have begun the work of digital education, conducting online workshops on consent, negotiation, and legal awareness for practitioners who have no access to the kind of institutional support available to their counterparts in Western cities. In queer circles, particularly among Dalit, trans, and disabled communities, BDSM has begun to emerge as a site of political and embodied reclamation, a means of reasserting agency and pleasure in bodies that have historically been subject to state violence and social denial.

But no public interest litigation has been filed. No test case has been brought. No Indian court has been asked to rule on whether two consenting adults may lawfully agree to erotic pain-play in private. The legislative silence is matched by judicial silence, and the result is a legal void that exposes practitioners to blackmail, wrongful prosecution, and the complete absence of the legal frameworks, safe word recognition, evidentiary protection for consent agreements, protection from prosecutorial overreach, that could make consensual BDSM genuinely safer. Global organisations such as the National Coalition for Sexual Freedom have demonstrated that organised advocacy can produce real change in prosecutorial culture and public awareness. India's emerging kink community faces the challenge of building that infrastructure from scratch, in a legal environment significantly less hospitable.

## IX. A JURISPRUDENTIAL HYPOTHETICAL: THE CASE THE LAW MUST BE READY FOR

It is a cold January morning at the Delhi High Court. The marble steps are slick with dew. In the public gallery, a cluster of law students sits alongside activists from queer collectives and journalists from national legal publications. The case before the court (fictional but jurisprudentially plausible) represents the first in Indian legal history to directly challenge the application of the BNS hurt provisions to consensual BDSM.

The petitioner is a software engineer in his late thirties, charged under BNS Sections 69 and 73 (voluntarily causing hurt and grievous hurt), following a complaint lodged not by his partner but by a third party who observed visible injuries on the partner's body. The partner has filed a sworn affidavit affirming that the injuries were entirely consensual, the result of an agreed BDSM scene conducted with pre-negotiated limits, a safe word, and aftercare. Detailed written consent documentation bearing both parties' signatures is before the court. The State insists the law cannot condone bodily harm, consent or not. The question of whether the court can look behind the injuries to the agreement that produced them is before the bench.

Petitioner's counsel rises:

*“My Lords, the question before this Court is not one of morality but of constitutional mandate. Article 21 protects not only the right to life but the right to live with dignity, and dignity includes the right to determine for oneself what one does with one's body, including in the most intimate reaches of private life. If this Court accepts that two adults may not choose the manner of their own consensual pleasure, it does not merely restrict behaviour; it amputates autonomy.”*

The State counters:

*“My Lords, the law exists to protect individuals from harm, including harm they may invite in a moment of vulnerability. No contract, however detailed, can convert assault into intimacy. The legislature has drawn the line, and it is not this Court's function to redraw it.”*

The judgment remains to be written. But the arguments are already assembled in the constitutional jurisprudence of *Puttaswamy*, *Navtej Johar*, and *Suchita Srivastava*; in the

comparative frameworks of German §228 and the dissents in *Brown*; and in the philosophical tradition of the *Kama Sutra* itself, which understood two millennia ago that the line between violence and chosen vulnerability is drawn not by the state, but by consent.

## X. TOWARD REFORM: SIX PATHWAYS FOR INDIAN LAW

The reforms proposed below do not require the wholesale decriminalisation of all bodily harm in sexual contexts. They require something more modest: that Indian law develop the capacity to distinguish between inflicted pain and chosen vulnerability, between violence and consent-saturated intimacy. Each proposal mirrors measures already implemented in comparable democracies, adjusted for India's constitutional and socio-cultural context.

### A. A Statutory Consent Exception to the BNS Hurt Provisions

The most direct reform would be an explicit consent exception within the BNS hurt provisions, modelled on Germany's StGB §228.<sup>59</sup> The exception should provide that the consensual infliction of hurt that does not amount to grievous hurt, and that is not contrary to public decency, is not an offence, extending the existing Section 25 framework to clearly encompass consensual erotic pain-play between adults in private settings. The exception should not extend to grievous hurt, thereby preserving the state's protective function at the upper end of the harm spectrum while decriminalising the vast majority of consensual BDSM activity.

### B. Evidentiary Recognition of BDSM Consent Documentation

A targeted reform of the Bharatiya Sakshya Adhiniyam (BSA) should clarify that written BDSM consent agreements, digital consent records, and prior communications establishing the terms of a BDSM arrangement are admissible in criminal proceedings as evidence of consent and as evidence relevant to the accused's state of mind. This would not render such documents enforceable as contracts but would give them the evidentiary dignity they deserve and would protect defendants from the injustice illustrated by *Jovanovic*.

### C. Safe Word Recognition as a Legal Standard

Drawing on the German BGH's reasoning, Indian courts should be guided to treat the existence and operational effectiveness of a pre-agreed safe word as a relevant factor in assessing:

whether consent was genuine and ongoing; whether the defendant exercised reasonable care; and whether activities fell within any applicable consent exception. This is achievable without legislation, through judicial guidance or detailed training guidelines issued by the Ministry of Law and Justice.

#### D. Police and Judicial Training

The Justice Verma Committee Report of 2013 demonstrated that structured training of police and judiciary can transform the quality of engagement with sensitive sexual conduct cases.<sup>60</sup> A similar initiative is needed for BDSM: training that equips law enforcement to distinguish consensual kink from genuine assault, that provides prosecutors with guidance on prosecutorial discretion, and that educates the bench on the practice community's consent architecture and safety norms.

#### E. Decriminalisation of Private Consensual Obscenity

BNS Section 296 and Information Technology Act Sections 67 and 67A should be reformed to exclude consensual activities conducted in private between adults and consensual private communications from the scope of obscenity criminalisation.<sup>61</sup> The current formulations expose online BDSM communities and educational resources to criminal liability, creating a chilling effect on the advocacy and education the practice community requires.

#### F. The Development of an “Erotic Consent” Doctrine

Building on the constitutional foundations of *Puttaswamy* and *Navtej Johar*, the Supreme Court is well-positioned to develop a doctrine of “erotic consent”, a category of protected sexual expression encompassing the consensual infliction of mild to moderate harm in the course of genuinely negotiated intimacy. Such a doctrine, developed through constitutional interpretation rather than legislation, would hold that the state's interest in preventing bodily harm, while compelling at the level of grievous injury, is insufficient to justify the criminalisation of

---

<sup>60</sup>Report of the Committee on Amendments to Criminal Law [Justice J.S. Verma Committee] (Jan. 23, 2013) (India) (recommending comprehensive reform of sexual assault law, centring consent, and urging sensitivity training for police, prosecutors, and the judiciary; the report led directly to the Criminal Law (Amendment) Act, 2013).

carefully negotiated erotic pain-play between autonomous adults in private. To treat such activity as equivalent to violence offends the constitutional right to dignity and personal liberty.

## XI. CONCLUSION: THE RIGHT TO CHOOSE ONE'S PAIN

The whip cracks. The rope tightens. A mark blooms on skin, deliberate and agreed upon, the product of trust and negotiation, of safe words rehearsed and aftercare prepared. This is not violence. It is intimacy at its most exacting, conducted within a framework of consent more rigorous than most of what the law recognises in any other intimate context.

Indian law does not see it that way. To Indian criminal law, the mark is hurt, a cognisable offence, irrespective of the consent of the person who bears it. To Indian contract law, the agreement that produced it is void, illegal in object, unenforceable, legally inert. To Indian public discourse, the people who made it are, at best, deviant, and at worst, criminal.

This article has argued that this position is constitutionally precarious, historically inconsistent, and practically harmful. It is constitutionally precarious because *Puttaswamy's* right to intimate autonomy and *Navtej Johar's* protection of consensual adult sexual choice do not terminate at the bedroom door when the activity involves pain. It is historically inconsistent because the *Kama Sutra*, the most sophisticated erotic text produced by Indian civilisation, recognised two millennia ago that consensual erotic pain is a dimension of human intimacy deserving of ethical engagement rather than blanket prohibition. And it is practically harmful because the legal void it creates exposes practitioners to blackmail, wrongful prosecution, and the complete absence of legal frameworks that could make consensual BDSM genuinely safer.

The reform proposals advanced in this article are modest in scope and defensible in principle. A statutory consent exception to the BNS hurt provisions, limited to non-grievous harm and modelled on German §228, would decriminalise the vast majority of consensual BDSM activity without opening the law to dangerous extremes. Evidentiary recognition of consent documentation, judicial training, and the decriminalisation of private consensual expression are incremental improvements well within the competence of India's existing legal institutions.

The deeper reform is jurisprudential. The law must develop the conceptual vocabulary to distinguish between inflicted pain and chosen vulnerability, between the assault that violates a person and the negotiated intimacy that, paradoxically, honours them. The *Kama Sutra* knew the difference. Vatsyayana wrote it into his taxonomy of blows: each strike calibrated by consent, each mark an agreement made in pleasure. Indian law has not yet assimilated what

Vatsyayana codified two thousand years ago. The jurisprudential and legislative gap is real, consequential, and remediable.

The law that refuses to draw this distinction does not protect autonomy; it negates it. Constitutional jurisprudence, comparative precedent, and India's own philosophical inheritance converge on a single proposition: the state cannot be the arbiter of consensual pleasure. It is time for Indian law to recognise what the Kama Sutra articulated two thousand years ago that consent is the only morally and legally coherent boundary between intimacy and violence.

\*\*\*\*\*

