

Review Article

Consent in Indian Law : Analyzing Provisions in the Bharatiya Nyaya Sanhita 2023

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Abstract

Background : Consent is a cornerstone of legal and ethical frameworks, safeguarding individual autonomy and ensuring accountability. In 2023, the Bharatiya Nyaya Sanhita (BNS) introduced significant reforms to Indian criminal law, including provisions that redefine and strengthen the concept of consent in various legal contexts. This review article examines various sections related to consent in Indian Law, with a particular focus on its codification in the BNS. It explores key changes brought about by the BNS, comparing them to the provisions under the Indian Penal Code (IPC), and evaluates their implications for medico-legal practices, criminal justice, and individual rights. The article also explains various ethical considerations surrounding consent, including its role in protecting vulnerable populations. By analyzing these reforms, this article aims to provide a comprehensive understanding of the intersection of consent and Indian Laws in the context of evolving societal norms and legal standards.

Key words : Consent, Bharatiya Nyaya Sanhita (BNS) 2023, Medico Legal Practise, Age of Consent.

Consent is a fundamental principle in law and one of the critical issues in the area of medical treatment¹. In India, the concept of consent has been extensively addressed with significant updates in the recently enacted *Bharatiya Nyaya Sanhita (BNS) 2023*, which replaces the Indian Penal Code (IPC). The BNS introduces changes that redefine the legal interpretation of consent, particularly in cases related to sexual offenses, medical procedures and other criminal matters. This review article critically examines the various provisions on consent (section 25, 26, 27, 28 and 30) under the *Bharatiya Nyaya Sanhita 2023*² analyzing their implications, challenges, and the extent to which they align with contemporary legal and ethical standards.

Section 25 :

This section of BNS essentially explains legal principle of consent and age of consent for an act that might cause some risk or harm.

When a person does an act (a) without an intention to cause death or serious injury and (b) Does not know whether it is likely to cause death or serious injury, the act will not be a crime if done to another person who is above the age of eighteen years and has given consent for that act. Consent given can be implied or explicit.

Implied consent means it is understood from conduct or circumstances while explicit consent is consent which is clearly expressed in words or writing³.

Even if the person doing the act knows, it might cause some harm, the act is not considered an offence. This applies when both parties understand and agrees to the harm or risks involved. Here, the autonomy of an adult person is recognized to decide their own safety and well being provided the harm is not sure.

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Received on : 25/05/2025

Accepted on : 10/06/2025

How to cite this article : Consent in Indian Law : Analyzing Provisions in the Bharatiya Nyaya Sanhita 2023. Nair PK. *J Indian Med Assoc* 2026; 124(2): 59-60.

Editor's Comment :

■ Understanding any updates -here consent and BNS- related to medico legal practise is essential for ensuring ethical and legal compliance.

In medical practise patient gives consent to risky procedures including surgery knowing that complications may arise. The medical practitioner here lacks intent to harm and he is not criminally responsible if the procedure leads to injury or death.

Section 26 :

This section explains that an act that causes harm is not an offence if it is done with good intention and with the consent of the person.

An act done to a person in good faith for the benefit of that person with the consent is not an offence even if the act causes harm or intended to cause harm or likely to cause harm. The main requirement of this section is that there must be no intention to cause death. Consent given can be implied or explicit. Good faith here is assessed by considering whether reasonable precautions and care were taken. The act must be for the benefit of the person which means the intention is to protect the life and health of the person. Even if harm is the result from the act, it will not become an offence, if it meets all criteria of good faith, benefit and consent.

A doctor performing a medical procedure on a patient even if the procedure is risky or likely to cause death, the doctor is protected if it is done with the consent. But the person performing the procedure should not have an intention to cause death. In such cases consent given must be after understanding the risk and harm of the act.

Section 27 of BNS :

This section provides protection to perform actions for the benefit of minors or persons of unsound mind. Act done for the benefit of person below the age of twelve years or person of unsound mind is not a crime or offence

if it results harm if done (a) in good faith and (b) with the consent of legal guardian or person who is having lawful charge of the person.

Under the armpit of this section a medical practitioner can perform a procedure on a child with the consent of parents or legal guardians even if there are risks for the procedure. It has to be proved that, act is done in good faith for the benefit of the child. Same way a procedure can be done on a person having mental illness too with the consent of parents or legal guardians.

This section will not give protection: If (i) the act done has an intention to cause death or attempting to cause death. (ii) The person doing the act is aware that act is likely to cause death and the purpose of act is (a) not to prevent death or serious injury and (b) not cure any serious disease or injury. Section will not give protection to any act which voluntarily causes serious injury or attempt to cause serious injury for a purpose other than preventing death or hurt.

Section 89 refers to the former equivalent section of the Indian Penal Code. The word "insane person" appears in section 89 of the IPC, while "person of unsound mind" appears in BNS section 27⁴.

Section 28 of BNS :

Section 28 of BNS describes what are the situations where consent is invalid. (i) Consent is not valid if it is given under fear of injury or misunderstanding. (ii) If the person doing the act is aware that consent was given due to fear or misunderstanding, then that consent is also not valid. (iii) Consent is invalid if the person who gives consent is unable to understand the nature and consequence of act for which he gives consent because of unsoundness of mind or intoxication. (iv) Consent provided by children below twelve years is not valid.

Purpose of this section is to ensure protection for vulnerable section of society such as children and persons with mental incapacity.

Section 30 of BNS :

Act done in good faith, even without consent is not an offence (a) If it is impossible for that person to give consent (b) If the person is incapable of giving consent and (c) No guardian or no person lawfully in charge is available to give consent. The act done must be for the benefit of that person.

This section will not give protection: If (i) the act done has an intention to cause death or attempting to cause death. (ii) the person doing the act is aware that act is likely to cause death and the purpose of act is (a) not to prevent death or serious injury and (b) not cure any serious disease or injury. Section will not give protection to any act which voluntarily causes serious injury or attempt to cause serious injury for a purpose other than preventing death or hurt.

When a patient is unconscious after a road accident and doctor performs an Emergency Surgery to save the life,

the doctor is protected under this section. Here it is impossible for that person to give consent. If a doctor administers a life saving treatment, the doctor will be legally protected, when the patient is having severe intellectual disability and is incapable of giving consent. A child is found alone and severely injured, emergency medical team can provide treatment legally without waiting for consent from guardian or person lawfully in charge of child.

Section 25 and 27 of BNS :

According to Indian majority act 1875 section 3, every person domiciled in India will attain the age of majority on completion of eighteen years⁵. From this it is understood that a person attains full legal capacity to give contract or consent for any medical procedures when attaining eighteen years of age. Section 25 of BNS essentially explains this legal age of consent as eighteen years for an act that might cause some risk or harm. At the same time section 27 BNS states that Act done for the benefit of person below the age of twelve years is not a crime or offence if it results harm if done (a) in good faith and (b) with the consent of legal guardian or person who is having lawful charge of the person. Thus gap between 12 years and 18 years remains a grey area and clarity is required especially when they seek medical procedures without the support of parents or guardians.

CONCLUSION

Consent plays a fundamental role in Indian Law, shaping legal provisions across various domains, including medical practice. The Bharatiya Nyaya Sanhita (BNS) 2023, replacing the Indian Penal Code, retains and refines several consent-related provisions to align with contemporary legal and societal needs. BNS upholds the essential principles of voluntary, informed, and legally valid consent. The legal framework surrounding consent in India strikes a balance between individual autonomy and the state's responsibility to protect vulnerable individuals from coercion, fraud, and exploitation.

However, evolving societal norms and technological advancements such as telemedicine, digital consent, and data privacy necessitate continuous legal adaptation.

Funding : None.

Conflict of Interest : None.

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- 5 The Majority Act, 1875 (9 of 1875), Section 3(1).