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When Protection Becomes Prejudice: A Constitutional Critique of Victim-Centric Sexual Offence Reform in India

MAYANKRAJ VIJAY KUMAR SHARMA[1]

ABSTRACT

This article examines India's new victim-focused reforms under the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS) and Bharatiya Sakshya Adhiniyam (BSA). While the author acknowledge the intention to recognize victims' dignity and remedy past injustices, the author contend that these reforms in the aggregate create a procedural imbalance in favor of victims against the accused—particularly because of Section 69 BNS, the limited defence procedures in the encoded BNSS, and the limiting definitions of evidentiary use in BSA. The author discuss how doctrines such as the concept of a "sterling witness" and selective use of forensic evidence reinforce this imbalance. To remedy this imbalance, the author propose a "Constitutional Counterweight" doctrine, borrowing from UK and Canadian jurisprudence, that allows judges as stewards of balance under the procedural reconstruction so that the rights of the accused under Articles 14 and 21 of the Constitution are never diluted in the pursuit of justice for the victim.

Keywords: *Victim-Centric Reforms, Procedural Imbalance, Accused's Rights, Constitutional Counterweight, Evidentiary Limitations*

I. INTRODUCTION: THE PENDULUM'S SWING – FROM SYSTEMIC NEGLECT TO SYSTEMIC PREJUDICE

The legal framework concerning sexual offenses in India has experienced a transformative change, moving from a past replete with patriarchal doubt and insensitivity. For decades primary victimization for survivors came in the form a legal system characterized by invasive and humiliating cross-examinations, the weaponization of victim's "character" in a defence strategy, and a judiciary too often awash in retrograde stereotypes of ideal victim behaviour. This shift was sparked in large part by a powerful civil society movement, and later by judicial activism, and was expressed in dramatic and public ways in the Justice Verma Committee Report (2013), and the subsequent legislative change.[2] The reform brought about the repeal of

[1] Author is a Student at Symbiosis Law School, India.

[2] Report of the Committee on Amendments to Criminal Law, 2013 (Justice Verma Committee Report) 23

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the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act and set in place the Bharatiya Nyaya Sanhita (BNS), the Bharatiya Nagarik Suraksha Sanhita (BNSS), and the Bharatiya Sakshya Adhiniyam (BSA).[3] The principles upon which these pieces of legislation are constructed do show a progressive perspective, which is to make the victim the centre of the Justice system, acknowledge her dignity, and allow her to participate in the proceedings without fear or trauma. This historic and vital correction aims to destroy and dismantle the very structures that engendered impunity.

Nonetheless, this timely and well-intentioned correction has created a serious jurisprudential paradox. The processes established to empower the victim, especially in relation to previous power imbalances, often now serve as an avenue for systemic injustice against the accused. This is the "Victim-Centred Paradox": a situation, often at the hands of those who think they are showing compassion, creates a process where the accused is deemed guilty until he proves otherwise. The fundamental principle of criminal law, that the Crown must prove its case beyond a reasonable doubt and which the accused has the right to rely on silence, is fundamentally being recalibrated and not in a way designed to enhance accuracy. The law risks, in its shifting sands to be more culturally sensitive, diluting the accuracy of the process in exchange for preferred accommodation. The constitutional principles of Article 21 to a fair trial for the worst to the innocent are carefully and even insidiously dissolving in the new ecosystem. [4]The presumption of innocence is not simply an evidentiary procedural rule; it is a critical moral obligation that the state must affirmatively prove its case.

This article provides a much-needed and bold counter-storyline to the pro-victim stories, claiming that uncritical adherence to a victim-centred approach—from rigid adherence to statutory presumptions, to the courts elevating victim testimony to a premise, and to limiting cross-examination—amounts to a de facto and often de jure presumption of guilt. The accused becomes at risk of being a party to the proceedings, and the accused's legitimate efforts at defending themselves will be self-stigmatized as attacks on the victim's character. To challenge - or scrutinize - the state's narrative may be framed not only as a defence of the abuse allegations, but as an assault on an already vulnerable person's dignity. This counter-storyline does not impugning the motive for victim protection. Rather, it is a constitutional articulation for equilibrium. This is based on the assumption that a justice system that disregards the rights of the accused for expediency, factual neutrality, or empathy is not serving anyone's interests.

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[3] The Bharatiya Nyaya Sanhita, 2023; The Bharatiya Nagarik Suraksha Sanhita, 2023; The Bharatiya Sakshya Adhiniyam, 2023

[4] The Constitution of India, arts 21

It diminishes the legitimacy of convictions, creates heartbreaking mistakes that ruin the lives of innocent people, and, ultimately, undermines the very rights it is trying to protect for victims by creating a system that is open to manipulation and mistakes. Any system perceived as unfair loses its moral authority, while wrongful convictions allow the real offenders to run free, thereby surely failing the real victims. This paper will identify this paradox through the prism of the new codes, the prevailing jurisprudence that has shaped their interpretation, and will ultimately propose a structured, manageable judicial solution to restore the constitutional balance, which is a hallmark of any mature democracy.

II. ANALYSING THE NEW LEGAL FRAMEWORK: PRESUMPTIONS AND PROCEDURES UNDER BNS, BNSS, AND BSA

The Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam (BSA) have maintained the pro-victim paradigm of the prior law, stated it in codified terms and systematically embedded victim-centered principles, creating a legal environment that prepositions defenders at a disadvantage. While drafted with a good intention of simplifying Justice and empowering victims, this new framework has a presumption that inherently disadvantages an accused, from the pre-trial phase to the final outcome. The codes create a procedural environment that undeniably shortens the time for the state to secure a conviction while radically extending the time for the accused, who is attempting to secure a defence, through misaligned new barriers which impairs a foundational precept of justice, the adversarial process.

- **The Presumption as a Fortified Stronghold**: Section 69 of the BNS is a direct successor to Section 114A of the Indian Evidence Act. [5]It explicitly stipulates that in prosecutions for certain aggravated forms of rape, "the court shall presume" there was no consent. Although this is technically a rebuttable presumption at law, its de facto operation is immeasurably more draconian. The presumption is often used as a procedural shortcut, by which the prosecution has satisfied its initial burden on the most controversial and contentious element of the crime—consent—by simply establishing the objective act of sexual intercourse. The burden shifts immediately in a very rapid manner to the accused to disprove a negative, to prove consent. While this is a daunting task, it operates with many evidentiary and procedural barriers, particularly because the best form of evidence, the victim's testimony, is utilized against the accused. The accused is oftentimes put in a situation to do so without being able to fully explore the surrounding circumstances of their relationship or the conduct of the victim, as those ways

[5] The Bharatiya Nyaya Sanhita, 2023, s 69

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of examining evidence are often blocked under the extended protective mechanisms of the BSA. This reverses the golden thread of criminal law meaning, as the maxim states, *ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on he who asserts, not he who denies). The presumption not only helps the prosecution, it also works to construct its case, thus placing the accused in a defensive position from the very beginning, in a sense compelling him to prove that he was not the actual perpetrator on the determinative issue of consent, if he could. This structural disadvantage is further aggravated by the fact that the only evidence available of innocence, the accused's own testimony, is viewed with an inherent degree of scepticism making the rebuttal burden a monumental task.

- **Procedural Barriers and Harmless Disguise:** The BNSS and BSA implement procedures that, although created for compassionate reasons to protect victims, provide a context for any perceptible and practical lowering of the scales of justice against the accused often psychologically and procedurally in very understated ways.

- **The Sealed Courtroom:** Required In-Camera Trials (BNSS) While vital for safeguarding the victim's privacy and incentivizing truthful testimony, the in-camera trial may subconsciously shape the courtroom context and dynamics. The solemnity and seclusion of the trial, particularly the fact that it is closed to the press and public, may suggest to anyone in the courtroom that the trial is built to protect the victim from the accused - casting the accused in the role of the aggressor, as their mere presence is a threat that must be contained. This environment may subconsciously intimidate and pressure the defence to be moderate in cross-examination because, to be seen as violating this august forum may incite public censure from the court. The obligation of the defence counsel to vigorously test the evidence may be construed as cruelty at an in-camera trial that is designed to insulate the victim from all external distraction conditions, leading to a chilling effect with the potential to diminish the strength of the defence.

- **The Sanctified Statement: Recording by Magistrate (BSA/BNSS):** The procedure for the early recording of the victim's statement, made by a Magistrate, is an incredibly useful way to minimize coercion and preserve evidence. That being said, the jurisprudential development has practically honoured what is in essence, a statement taken when the accused was absent and without the benefit of cross-examination. It has usually become something like the original or pure version of events recorded close to the events occurring. Any subsequent deviation during cross-examination then becomes not only a tool for impeachment, but evidence in and of itself of the accused unlawful coercive attempts to manipulate what was a truthful witness.

The defence is left in an almost Kafkaesque spiral: a consistent witness is "sterling" - unimpeachable, while an inconsistent witness, traumatic to be sure, has any inconsistency explained away by the witness's own (prosecution-determined) psychological impacts. This takes away the defence's inherent opportunity to properly test credibility through the discovery of inconsistencies, a time-honoured and essential horn in the adversarial toolbox. In addition, the trial thus robs the defence of its central approach to raising reasonable doubt.

Instead of a level playing field accommodating the victim, this new architecture has a cumulative effect of a steeply sloping plane, on which the accused must surmount considerable procedural and substantive disadvantages before his treatment can be adjudicated on its merits. The codes have now institutionalized a process whereby the state began with significant advantages, not only in the resources available to it, but in the very rules of engagement, raising serious questions about the viability of a truly equitable adversarial process.

III. THE "IDEAL VICTIM" AND THE "STERLING WITNESS": THE JUDICIAL CONSTRUCTION OF AN IRREBUTTABLE QUALITY

Apart from the black-letter law of the new codes, the judiciary in India has devised a doctrinal jurisprudence that makes matters even more difficult for the accused: that of the victim as a "sterling witness" whose testimony cannot be questioned. The judicial construction of the victim as the "sterling witness," while motivated by a sincere desire to correct a historical wrong, has become substantial evidentiary barriers that validate the prosecution in advance, and stigmatize any non-conforming defence. This chapter argues, by the synergistic deployment of "sterling witness" and the selective reliance on forensic psychology, that the Court has established an evidentiary regime where the victim's testimony is imbued with an irrefutable quality that compromises the fundamental right of the accused to a defence**.**

- **History and Misapplication of the "Sterling Witness" Concept:** In cases beginning with *State of Punjab v. Gurmit Singh*[6], the Supreme Court correctly stated that the evidence of a victim of sexual violence should have great weight and is not a "hard and fast" requirement of corroboration. In *Rajoo & Ors. v. State of Madhya Pradesh*[7], the court said the prosecutrix "must not be in the same category as an ordinary witness" and she "is undoubtedly a witness who has an interest in the outcome of the case," but the court determined this reason for being a witness "was not the kind of interest that must, therefore, call her credibility into doubt." This language, while it attempts to counter historical prejudice, conjures a legal fiction creating an

[6] State of Punjab v. Gurmit Singh (1996) 2 SCC 384
[7] Rajoo v. State of Madhya Pradesh (2008) 14 SCC 522

implication of truthfulness. The evidence is rendered beyond the same level of scrutiny whether the witness is the victim or any other witness, including the accused. For the defence, this is significant because any efforts to demonstrate inconsistencies or improbabilities in their evidence or motives is interpreted, by the thinking of the trial judge, as offending a vulnerable victim and thus it is not a legal challenge but becomes immoral. As a result, the "sterling witness" designation serves to insulate against any meaningful cross-examination — precisely the process intended to facilitate a careful assessment of the truth of the testimony. This concept was firmly established in the state of *Himachal Pradesh v. Shree Kant Shekari*[8] *(2004),* when the Supreme Court stated that even when a prosecutrix is determined to be of "easy virtue," it is never appropriate to draw a conclusion regarding consent. This principle plays a key role in combating victim-shaming. Still, the extreme nature of its application in jurisprudence produces a chilling effect: it has been interpreted as having a severe, and sometimes complete, restricting effect on the defence's ability to inquire into the nature of the relationship between the accused and complainant, often relevant to the inquiry into whether there was consent or not in a contested incident.

- **The Tyranny of the "Ideal Victim" Stereotype and the One-Way Street of Forensic Psychology:** Courts often have an implicit, socially constructed idea of how a "real" victim should behave. She should look traumatized, report the crime immediately, physically fight off the assailant, and recite her story with perfect consistency. The science of forensic psychology knows a more complicated story that does not operate on an idealized theory of victim response. Trauma can be expressed in many different ways, including: emotional dissociation or flat affect (which can look like indifference), fragmented and nonlinear dreams or memories, and time delays due to shock or fear. It can also be experienced as a seemingly calm and distant retelling of events as a means of psychological coping. Courts have gradually come to understand these complexities in the guise of dismissing prosecution weaknesses after the fact—these may include delay and inconsistency in victim reports. Yet empirical psychological science is systematically restricted to the prosecution in allowing for alternative explanations for victim behaviour. For example, if the defence argues that a lengthy delay may indicate that the declaration was manufactured or that a very significant inconsistency goes to the core of the allegation and is more indicative of unreliability than trauma, that submission will most often be dismissed as a harsh and unscientific attack on a traumatized witness. The use of forensic psychology thus develops into a one-directional exercise. The various ways that behavioural science can support the prosecution's case can be used to negate the defendant's

[8] State of Himachal Pradesh v. Shree Kant Shekari (2004) 8 SCC 153

evidence, while efforts by the defence to use the same behavioural principles to provide a different explanation will be stigmatized as cruel and unscientific. A real asymmetry is created: the prosecution can use a behavioural scientist to ameliorate the evidentiary deficiency, while the defendant will not be able to rely upon the behavioural scientist to call into question the evidentiary deficiency relied upon by the prosecution. This asymmetry creates a privileged status for the victim's testimony: all evidentiary weaknesses will theorized away by science, while any weaknesses the prosecution's case is significant will be judicially glorified; which creates a perfect storm to which the accused must respond.

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IV. CROSS-EXAMINATION UNDER ATTACK: THE RIGHT TO A MEANINGFUL DEFENCE IN THE ERA OF VICTIM DIGNITY

The most significant casualty of a victim-centric paradigm has been the right to cross-examine one's accuser, which is such a fundamental right, that it is the very foundation of an adversarial justice system and is a core component of a right to a fair trial enshrined in Article 21 of the Constitution. Cross-examination is the locomotive of truth-finding in a common law system and has even been described as the "greatest legal engine ever invented for the discovery of truth." It calls upon the witness to rigorously defend and justify their perception, memory, truthfulness, and stability of narrative. However, modern jurisprudence in the context of sexual offences is progressively destroying the function and utility of cross-examination under the ruse of protecting victim dignity, rendering the accused a mere silent observer in a proceeding

that ultimately seeks to determine their liberty and reputation.

- **The Line that is not Clear: S.146 BSA and the Erosion of Relevance:** The BSA, much like its predecessor instrument, deems inadmissible questions put to a victim of sexual violence about her "general immoral character."[9] The purpose is to detour the concept of victim-blaming because a victim engages in any pernicious sexual practices prior to the incident in question, should not justify vilifying victims based on prior sexual history, and it was fairly and appropriately deemed prejudicial and irrelevant. However, in practice, the exclusion has been construed broadly and sometimes even indiscriminately, to rule out relevant evidence that does not meet the character threshold but is incredibly specific and material to the alleged facts. The most salient example of the difficulty in disentangling character from relevant evidence includes evidence that shows a previous consensual sexual relationship between the accused and the victim. From the defence's perspective, this evidence is not one of character but one that is directly probative of the issue of consent to the specific allegation. The evidence is relevant because it also assists to the heart of the defence case showing a pattern of conduct that establishes a context to present a more likely scenario of consent. A judge, under a wide and uneducated application of "rape shield" law could render a virtually impossible task for the defence to show that consent was a possible and viable explanation for the allegations. It prevents the fact-finder from having the most relevant context to assess the parties' interactions and leads to a treatment of the case as an ahistorical vacuum, where the only interaction between the parties is the alleged wrongdoing. To conflate "specific, relevant facts" with "general immoral character" is to rule the defence out, on the most important aspect of its case, from being able to present evidence at trial. In essence, this judicial reasoning turns the trial from a truth-seeking inquiry into a ritual to confirm the prosecution's version of events. This method of reasoning disregards the well-established logical distinction in the law of evidence, between propensity (generally excluded), and specific, transactional facts that are personally relevant to a fact in issue such as the parties' state of mind at the time of the alleged wrongdoing.

- **Over-Management by the Judiciary and its Chilling Effect on Defence:** A trial for a sexual offence - particularly an in-camera trial - is inherently charged with the mandate to preserve the dignity of the accuser. In this context, judges, often with the well-placed notion of being protective of the victim, morph from neutral decision-makers into active managers whose job has become to protect the accuser from harm. This management usually manifests in a

[9] The Bharatiya Sakshya Adhiniyam, 2023, s 146

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judge pre-emptively denying certain lines of questioning if the judge feels it is overly "aggressive", "harassing" or "irrelevant," even if the questions are legally relevant to the defence. The term "harassment" is dangerously malleable and stretched to include any effort to explore a line of questioning that is distressing to the witness - even though such distress is an unavoidable and natural part of subjecting oneself to examination of an account. It can raise considerable and palpable fear within defence counsel. A lawyer who examines the witness in a vigorous, persistent and lawful manner - all of which is expected of lawyers who have ethical and constitutional obligations to their client - they are, more often than not, branded either uncaring, cruel or misogynistic. This fear of judicial condemnation, without restriction to overt condemnation (such as judges commenting in their decision, or passive-aggressiveness displayed through demeanour) compels lawyers to soften their questioning, self-censor, and otherwise avoid What could alternately be a fruitful, but uncomfortable, line of questioning, often to the detriment of its own client .The presumption of a fair trial includes a right to the presentation of defence, and one cannot offer a defence unless the accused's agent is entitled to challenge the evidence against him through the asking of pointed, probing, and relevant questions. The upshot of this trend is a dangerous conflation of the precise and vigorous defence of one citizen accused by the state, and the harassing of another. This dismantles an element of due process, and risks transforming defence counsel from unapologetic advocates into complacent witnesses to a process that is inherently flawed. The accused is deprived not just of his right to cross-examine, but also of his right to effective assistance of counsel; the court rewrites the duty of defence counsel into a role that is less adversarial and, therefore, less effective.

V. A COMPARATIVE LENS: CORRECTIVE MEASURES IN THE UNITED KINGDOM AND CANADA

Challenges of a victim-centred approach are not limited to India, while other common law jurisdictions that paved their path have faced similar imbalances and importantly, have created jurisprudential and legislative correctives that may be useful for India to examine. These jurisdictions demonstrate it is possible to build a justice system that is empathetic to the victim and at the same time, completely just to the accused. The experiences of the United Kingdom and Canada are especially illustrative and show a conscious judicial effort to readjust the scales of justice when victim protective measures outstrip the fundamental rights of defence.

- **The United Kingdom: A Duty of Continuous Review and the Abuse of Process Doctrine:**

The Youth Justice and Criminal Evidence Act [10](YJCEA), 1999 of the United Kingdom provides a host of "special measures" to assist vulnerable and intimidated witnesses, up to, and including, victims of sex offences. The special measures available under this scheme, such as video-recorded evidence-in-chief, witness testimony by live-link, and the removal of wigs and gowns, are in many respects, significantly more favourable than those available in India. However, the UK system of law intentionally safeguards, and equally protects, the right of the defendant to a fair trial alongside a suite of special measures that provide a fair trial for witnesses and victims. In this respect, the system maintains a balance via two important pillars.

To begin with, the Crown Prosecution Service (CPS) must constantly review the prosecution. The CPS Guidelines are not only aspirational; they create a hard-edged obligation on the prosecutor to ensure that a prosecution is not only in the public interest, but also has "sufficient, reliable and admissible evidence" to provide a "realistic prospect of conviction." This means the prosecutor must objectively evaluate the strength of his or her own case on an ongoing basis, filtering out cases that lack prospects of conviction or that are weak or speculative, putting an innocent accused person through the trauma and stigma of a trial. This serves as a vital filter so that a case will never reach a stage where the mere stress involved in the trial process is its punishment.

Second, and in a more profound way, UK courts maintain and actively utilize a significant constitutional device: their inherent power to stay proceedings on the grounds of an abuse of process. This doctrine - in cases like R v. Maxwell [11]- enables a judge to halt a prosecution where it would be "unfair" or "oppressive" to put the accused on trial. This goes well beyond procedural technicalities. A court can stay proceedings, for example, where the analysis of the state, or the way in which the state has put the case to the accused, plaintiff or respondent - renders a fair trial impossible. For example, if pre-trial publicity has been so prejudicial that an impartial jury cannot be panelled, or if the delay in prosecution has been so severe that the defendants ability to answer the charge has been severely undermined. But most importantly for the context of India, the power to stay proceedings can be used where the cumulative impact of the procedural rules, such as the combination of tight rape shield laws and restrictions on cross-examination, denies the accused a realistic opportunity to plead a defence response to the allegations at issue. The doctrine serves as an important constitutional safety valve; a judge's

[10] Youth Justice and Criminal Evidence Act 1999
[11] R v Maxwell [2010] UKSC 48, [2011] 1 WLR 1837

declaration that the integrity of the justice system is paramount and the pursuit of a conviction even for structured offenses like sexual violence and/or domestic violence must bow to that requirement.

- **Canada: *R. v. Seaboyer* [12]and the Constitutionalized "Rape Shield" Balance.**[13]

The case of Canada exemplifies the nuanced balance that a supreme constitutional document can compel a legislature and judiciary to achieve. The original Canadian "rape shield" statute, similar to section 146 of the BSA, mandated an almost complete ban on the evidence relating to the complainant's sexual history. In the important case of *R. v. Seaboyer* (1991[14]), the Supreme Court of Canada struck down that complete prohibition on evidence because it violated the accused's right to a full answer and defence under section 7 of the Canadian Charter of Rights and Freedoms. The Court recognizes, in an extremely pro-defence articulation, that there is a compelling and substantial objective, in protecting complainants in sexual assault cases from inappropriate and humiliating questioning - however absolute exclusion is excessive. It had the potential to exclude, in rare but critical situations, evidence that had 'probative value on an issue that is relevant to the defence... so compelling that it outweighs any potential prejudicial effect to the complainant.' The Court further noted that the right to make a full answer and defence means the accused must enable to provide evidence that is critical to defending him, regardless of how uncomfortable or embarrassing that evidence made the complainant feel.

Rather than challenging the ruling, Parliament passed a new, nuanced and constitutionally compliant process under Section 276 of the Criminal Code. The new process does not ban the admission of all evidence of other sexual activity, but rather affords a tight, court-monitored process. If the defence wants to admit evidence of other sexual activity, they must apply to the judge in a *voir dire* (a hearing within a hearing, before the jury), and they must satisfy the judge to proceed (not to the jury). In determining whether to admit evidence, the defence must demonstrate three things;

1) the evidence consists of specific events of sexual activity (not, for example, reputation);

2) the evidence is relevant to a specific and legitimate issue of the trial (e.g. identity (the act was done by someone else), or whether the accused honestly believed there was consent); and

3) the probative value of the evidence is not substantially outweighed by the danger of unfair

[12] R v Seaboyer [1991] 2 SCR 577
[13] Criminal Code, RSC 1985, c C-46, s 276
[14] R v Seaboyer [1991] 2 SCR 577

prejudice.

The process obligates the defence to clarify a rationale for the relevance of the evidence that is not merely a smear, while at the same time allowing the judge to admit only that evidence which is really required for a fair hearing.

The Canadian model Represents a nuanced balance. It understands that the victim's dignity and privacy matter to the extent that it should be the presumptive starting point. However, it wisely accepts that the presumptive starting point cannot be an absolute veto. It creates an open, principled and judicially managed framework that requires evidence to be tested in the case when evidence is genuinely relevant to the defence and preserves the accused's right to a fair trial. The Indian model is markedly different in that the blanket ban in the BSA, reinforced by judicial development, generally disallows any inquiry into particular relevance of evidence and creates a significant risk that an accused would be wrongfully convicted because they were not allowed to present a full defence. The Canadian model shows how a "rape shield" can be strong and fair - it protects the victim from harassment while preserving the constitutional guarantees of the accused.

VI. THE INDIAN EQUILIBRIUM: A NOVEL FRAMEWORK FOR JUDICIAL GATEKEEPING AND THE "CONSTITUTIONAL COUNTERWEIGHT" DOCTRINE

The lopsidedness in India’s new criminal justice structure invites an Indian solution. Comparative law offers useful patterns; however, there is an Indian legal DNA – an absence of a jury system, contextually, a unique reliance on the judge as the only finder of fact and law, and the legal text surrounding the BNS, BNSS, and BSA is a specific challenge - as a platform which needs indigenous doctrinal creativity. It will not come from the borrowed bearers of foreign legal traditions or the apprehensions of unmoored principles but from empowering and employing the Indian judiciary's pre-existing power as a legitimate and constitutional agent of active and balanced force. This paper proposes a radical but pragmatic two-part solution:

1.) a new interpretive principle for the new codes and

2.) a procedurally fettered 'Constitutional Counterweight' doctrine.

Part 1: A New Interpretative Principle - "Presumptions as Permissive Inference, Not Conclusive Proof"

The crux of the issue is the treatment of statutory presumptions by the courts - section 69 of the BNS in particular. It is presently considered to be or flipped into something approaching a de facto conclusive proof; rendering an accused all but unable to rebut. We propose a new,

constitutionally binding, principle of interpretation that all courts must apply: "A statutory presumption in a criminal statute is a means of assessing evidence, and not a substitute. It provides a permissive inference for the court to make, but it does not, and cannot, reverse the core, persuasive burden of proof, which remains on the prosecution the entire time".

It may be operationalized as follows:

- **Beginning with the Judicial Direction:** At the start of any S.69 BNS trial, the judge needs to make a direction on the record: "The presumption found in Section 69 is activated now. Notwithstanding, I am aware that the ultimate burden of proof of every element of the offence, including the absence of consent, is on the state beyond a reasonable doubt. This presumption is only one consideration, and the prosecution still has a duty to bring forward credible and reliable evidence to prove its case."
- **Changing the Nature of the Burden to Rebut:** The burden of the accused to "rebut" the presumption should not be to prove consent on a balance of probabilities. Rather, it should be to adduce or point to evidence - either from the prosecution's case or that of his own - that is capable of raising a "reasonable doubt" as to the absence of consent, which could include cross-examining the victim, referring to earlier communications, or demonstrating the circumstances of the relationship. Where there is a doubt created, the presumption loses its effect, and the case must be decided on the evidence of the prosecution alone and on the basis of proof beyond a reasonable doubt, without the support of the presumption.

This re-interpretation reconciles the application of presumptions with the intent of Articles 14 and 21 of the Constitution, making sure that they are not to be used as engines of conviction in weak cases.

Part 2: The "Constitutional Counterweight" Doctrine - A Necessary Procedural Safeguard

Acknowledging that even a re-interpreted presumption can lead to a psychological tilt, the second part of the framework posits a necessary, procedurally enforceable "Constitutional Counterweight" doctrine. This is a new solution that has not been previously discussed in the Indian or international context, and has been fashioned specifically for a judge-centric system.

The Doctrine: At any time a procedural rule or judicial order operates to restrict a fundamental defence right (like the right to cross-examine under Section 146 BSA, or the operation of a statutory presumption), the court has a constitutional duty to proactively implement a countervailing procedural safeguard to the accused, in order to maintain the overall fair trial right.

This is not merely a balancing tests; it is a positive obligation on the judge to create balance. The following are potential, specific, directly actionable counterweights:

- **Counterweight 1: The "Section 311 BNSS Plus" Power**. BNSS, like the old CrPC, gives judges the power to summon any witness "to discover the truth." In this case, we recommend a mandatory application of "Section 311 Plus." When a court limits the defence's line of questioning as to a relevant issue (for example, its specific nature regarding a previous relationship), the judge is required, on their own initiative, to invoke their power under Section 311 in order to summon a neutral, independent, court-appointed Forensic Psychologist or Psychiatrist. The court appointed expert would not be examining the victim directly, but would give the court a general scientific briefing on human behaviour. This expert would, for example, be able to report the full universe of possibilities related to a) how trauma can affect memory and behaviour, and b) how other motivations (interpersonal conflict, regret, external pressure, etc.) could also give rise to delayed reporting, inconsistencies, or particular behavioural indicators. This would effectively neutralize any monopoly on "trauma theory" by the prosecution, and provide the judge (as the trier of fact) with a balanced scientific framework from which to assess credibility.

- **Counterweight 2: The "Right to a Silent Cross-Examination."** In order to alleviate the chilling effect of cross-examination, we suggest a new procedural right. Where a judge has reason to believe that a line of questioning is relevant, but unduly traumatic, it should not simply be forbidden by the judge. Rather, the judge will allow the defence the option of a "Silent Cross-Examination." During this procedure, defence counsel will properly write out the proposed, particular questions and submit them in writing directly to the judge. The judge, after ensuring the legal relevance of the question or questions, will pose the questions to the witness directly. This offers two significant objectives: it protects the victim from the perceived experience of bearing unsupported aggression of a direct confrontation with defence counsel, while also protecting the accused's duty to call and put his defence as well as to test the evidence he is entitled; to seek the truth, and defend his dignity in the proceedings.

- **Counterweight 3: The 'Dual-Stage Reasoning' Mandate for Decisions.** This is an important innovation for establishing meaningful appellate review. For every decision where a statutory presumption was employed or a defence right curtailed v, the judge’s written decision must have a separate section titled, "Application of the Constitutional Counterweight Doctrine."

- In this section, the judge must note in particular detail:

1. The defence right that was constrained.

2. The reason for the constraint, as it relates to a specific identifiable harm.

3. The specific counterweights called upon (e.g., "The court invoked Section 311 to call Dr. X, whose testimony, regarding the range of behavioural motivations, is noted at paragraph Y").

4. The court must conclude with a final balancing statement: "Having considered the above evidence/considerations, and having applied the above counterweight to ensure fairness, the court, having reached its conclusion within the context of the significance of the counterweights, is of the view that the prosecution has/has not proved its case beyond reasonable doubt."

This mandated, structural process is beneficial as it records the balancing process specifically, forces judicial discipline, and renders the entire balancing process transparent and subject to meaningful review at the appellate level.

This two-tier approach, the reimagining of presumptions, and the obligatory Constitutional Counterbalance principle, has been put together for the Indian legal ecosystem. There is no need for legislative intervention, only judicial will is required. This will enable judges to use their inherent powers with greater intensity and inventiveness to undertake their ultimate responsibility: not to convict at all costs, and not to acquit reflexively, but to simply oversee a fundamentally fair process. It elevates the role of the judge from a passive arbitrator in a rigged contest to an active steward of constitutional equilibrium who ensures that the search for justice for the victim does not come as a catastrophic cost of forfeiting the rights of the accused. This is how we arrive at a justice system that is both humane and legitimate.

VII. The judicial blueprint: indian case law supporting the systemic imbalance

The theoretical critique of the victim-centred framework in India is best anchored in the actual legal framework of the Indian legal system. The rules that will soon be incorporated into the new BNS, BNSS, and BSA, are not appearing in a cohort; they are the formalization of a historical trajectory that has been actively concocted by the courts over the past two decades. This section will examine a small selection of key judgments of the Indian courts that can be seen as the "Judicial Blueprint" revealing how the systemic imbalance which has been identified in this paper is no longer a theoretical fear, it is a legal reality. In analysing these case law examples, a recurring narrative arc will emerge that procedural and evidentiary rules have been applied in an interpretive way to create a presumption of guilt, to actively endorse

victim evidence, and to reject the scope of meaningful defence.

A. The Presumption of Guilt: The Heavy Burden of a Judicial Construction

The practical reality of statutory presumptions, especially predecessor legislation to Section 69 of the BNS, has been clearly demonstrated in case law where courts have expressed a rebuttal standard approaching the impossible.

- *Tulshidas Kanolkar v. State of Goa* [15](2003) 8 SCC 590: This case is a linchpin of the pro-prosecution bias in presumptions. The Supreme Court was faced with the problem of how an accused can rebut the presumption of non-consent. The Court held that in a rape case, unless there are "compelling reasons" to look for corroboration, it must give weight to the sole testimony of the prosecutrix. It stressed that the accused carries a "heavy burden" to rebut the presumption. This is catastrophic from a defence view. It turns a rebuttable presumption into an almost conclusive one. The accused does not simply have to raise a reasonable doubt, the accused must present "compelling reasons" to get in the way of the prosecution proving its case. This tests and undermines the very notion of "proof beyond reasonable doubt," which puts the onus on the accused in the cosmic sense to prove his innocence with a compelling evidence. *Tulshidas Kanolkar* provides a judicial guide to how Section 69 BNS [16]will be applied: not as the trial procedure section it is meant to be used, but as a substantive cornerstone of the prosecution's case that the defence must disprove with compelling evidence, which in trial in the normal "Your word against mine" situation of sexual offences, is quite impossible to do.

- *Uttar Pradesh v. Munshi* [17](2008) 9 SCC 390 - This judgment seals this tilted playing field, as the Supreme Court held that evidence of a sexual assault victim is critical, and requiring corroboration is an unreasonable burden unless there are "compelling reasons" to require corroboration. The Court points out that even if the victim were an accomplice, her evidence does not require corroboration as a rule of law. While the purpose of squelching acquittals on a technicality may have a level of sympathy, its effect is to systematically devalue the need for independent evidence. By simply eliminating the requirement for corroboration and replacing it with "compelling reasons," the Court has created a self-reinforcing feedback loop where the prosecution's case is lifted by presumption, while the defence has to meet an extremely high burden to even challenge it. This case law is a snapshot of what has been referenced as the "Victim-Centred Paradox," where the victim's claim for justice morphs into

[15] Tulshidas Kanolkar v. State of Goa (2003) 8 SCC 590
[16] The Bharatiya Nyaya Sanhita, 2023, s 69
[17] State of Uttar Pradesh v. Munshi (2008) 9 SCC 390

a procedural advantage which pre-emptively accepts her account as someone with first hand knowledge of events.

B. The Sanctification of Testimony: Establishing the "Irrebuttable Aura"

In addition to the legal presumptions established, the Indian courts have developed a doctrine of credibility concerning witnesses that serves to protect the testimony of the victim from scrutiny and creates the "sterling witness" who is virtually unassailable.

- *State of Punjab v. Gurmit Singh*[18] (1996) 2 SCC 384: This was the leading case that gave rise to the "sterling witness" doctrine, with serious consequences. The Supreme Court rightly called for sensitivity in sexual violence cases, including in-camera trials for victim privacy. However, its statements on credibility led to a lasting imbalance. The Court determined that a sexual assault victim's account is deserving of great weight and can support a conviction without corroboration. It explained that a rape victim is not an accomplice but simply a victim of a crime, so their corroboration evidence falls into a new category. While necessary and forward-looking to address entrenched biases, the future application of the principles has been extreme. In establishing these new principles, it encouraged treating the sexual assault victim not as a witness whose evidence is to be tested, but a source of truth whose testimony is baselessly reliable. This pre-emptive sanctification means that any attempt on the part of defence counsel to engage in vigorous cross-examination looks less like a bona fide defence tactic than an assault on an innocent victim. As the paper reveals, this immediately creates a "chilling effect" on defence counsel.

- *Rajoo & Ors. v. State of Madhya Pradesh*[19] (2008) 14 SCC 522: This ruling marks the logical endpoint of the Gurmit Singh principle. The Supreme Court observed that according to the "doctrine of interested witness" a prosecutrix "cannot be put on par with an ordinary witness." It acknowledged that the prosecutrix is "undeniably a witness who is interested in the outcome of the case," but surprisingly, stated that a zealous interest, was "not of a kind to warrant any scepticism about her testimony." This is a legal fiction of great significance. The court invites the judge to ignore a fundamental rule of law of evidence, which states that the credibility of an interested witness requires examination. By judicially declaring the victim's interest in the outcome of the trial does not detract from her credibility, the court precludes the defence from conducting investigations into motive or bias. The *Rajoo* case illustrates an "irrebuttable aura," resigning the victim from her position in the truth-finding process to a

[18] State of Punjab v. Gurmit Singh (1996) 2 SCC 384
[19] Rajoo v. State of Madhya Pradesh (2008) 14 SCC 522

position of an anomalous status whose evidence's reliability cannot be challenged using the standards of adversarial practice

C. Restriction of Defence: Taking the Cross-Examination Out of Play

The last component of the map is cases where courts have consistently limited the opportunity for cross-examination, thereby preventing the defence from addressing contextually relevant information and fully answering the allegations.

- State of *Himachal Pradesh v. Shree Kant Shekari*[20] (2004) 8 SCC 153: This case is critical for understanding the erosion of cross-examination. The Supreme Court correctly observed that the fact that a prosecutrix is of "easy virtue" is not relevant, nor does it mean that an inference of consent can be drawn. This principle is crucial to curbing victim-shaming. However, the broad application of this principle has a catastrophic side-effect for the defence. Courts have often interpreted this principle to exclude all evidence related to the victim's sexual history or the nature of the relationship between the victim and the accused. This collapses "general immoral character" to "specific, relevant facts." To give an example, there is broad and pernicious evidence exclusion when evidence of a prior consensual sexual relationship between the accused and the victim is excluded despite being directly probative to the issue of consent in the specific instance alleged. The Shree Kant Shekari line of reasoning, while protecting against an irrelevant and a prejudicial attack on character, has and wilfully has nursing a blindfold to the context that may be integral to determining the truth in order to render the defence of consent inappropriately untenable in many cases.

The circumstances surrounding *Tulshidas Kanolkar* and *Munshi* illustrate how the courts reinforce pre-existing assumptions of guilt into a barrier that cannot be overcome. The principles elaborated in Gurmit Singh and extended in *Rajoo* indicate the creation of a "sterling witness" whose testimony is difficult if not impossible to contest. The helpful but excessive proposition in Shree Kant Shekari has been employed to restrict the defence's ability to cross-examine on matters relevant in the extreme. Together, this series of decisions is not merely an occurrence or event process, but a functioning agent that has shaped the very ecosystem in which BNS, BNSS, and BSA have been born. Taken together these decisions provide a clear and disturbing forecast of how the provisions of the new codes will be applied, solidifying the systemic imbalance that is the subject of this paper, and making the proposed framework of "Constitutional Counterweight" needlessly clever, but ultimately an incredibly important concept.

[20] State of Himachal Pradesh v. Shree Kant Shekari (2004) 8 SCC 153

VIII. Conclusion: restoring the presumption of innocence in an age of compassion

The notion of a justice system that treats those impacted by sexual offences in a fashion that reflects dignity, respect, and sensitivity represents an absolute moral and legal obligation. The helpful changes found in the Bharatiya Nyaya Sanhita (BNS), the Bharatiya Nagarik Suraksha Sanhita (BNSS) and the Bharatiya Sakshya Adhiniyam (BSA), indicate a substantial societal willingness to redress past harms and to challenge patriarchal components of the justice system itself. Such change is both welcome and necessary in the shared work towards a more equitable society. The route towards "real" justice must begin with the element of constitutional values which are global, inseparable, and non-negotiable. The presumption of innocence, the right to fair trial as per Article 21, and the right to have an adequate defence are not just procedural nuisances, but they are the structural possessor that anchors every person, regardless of the accusations claimed against them, from some potentially tyrannical exercise of power by the state. If we strip the presumption of innocence from the accused, we weaken the entire premise of our criminal process and risk slipping from a just system of law to a system of sanctioned prejudice.

This article has methodically demonstrated that the conservation of the current implementation of India's victim-centric framework is creating a precarious systemic imbalance, undermining the foundational rights of the accused, even as they remain well-intentioned. This paper has uncovered a complicated situation: the prescriptive and regulatory features of the new legal framework, in conjunction with its statutory assumptions, like Section 69 of the BNPS, begin a proceeding with, in effect, a presumption of guilt and thus often places an insurmountable obligation on the defence. It becomes worse when understanding the jurisprudential trend that provides for the verification of the testimony of the victim as a "sterling witness," affording them de facto immunity from rigorous cross-examination, which is paramount to the adversarial case. Moreover, the various protections created in the BNS and BCA, particularly the expansive interpretation of Section 146 of the BCA, have led to significant limitations on cross-examination, which is practically the only engine of truth-finding. The end result is a procedural maze in which the accused cannot be viewed as a co-equal in the search for the truth, but rather a presumptive criminal obligated to prove his innocence against a state armed with considerably more vast resources and procedural advantages.

The comparative experiences of both the United Kingdom and Canada are illustrative in this regard as they are a known and expected risk of reform of the law in a progressive fashion.

Indeed, these jurisdictions have shown a conscious and corrective recalibration is not just possible, but necessary, for the justice system to retain its integrity. The United Kingdom's developing doctrine of abuse of process and Canada's contextual, constitutional, and compliant laws concerning rape shield after *R v Seaboyer* are all impactful guides for balancing competing rights. However, India's specific context - including its absence of a jury system and the singular role of the judge, presiding as the authority on law and fact - calls for an Indian solution. We cannot pay rote homage to other nations described doctrines; we must develop a distinctly Indian one.

It is in this spirit that the paper has proposed a new, two-part framework, The "Constitutional Counterweight" doctrine, This is not a theoretical exercise but a practical, actionable framework for the judiciary to begin using today. The first part, the re-characterizing statutory presumptions as "permissive inferences" as opposed to "conclusive proof" is a meaningful first step towards restoring intellectual honesty to the fact finding process. It reinforces that the golden thread of the presumption of innocence is not going to be severed by a legislative presumption. The second, and more innovative portion, places a positive obligation on the judiciary to actively create balance. The designated counterweights - to follow, "Section 311 Plus" power to call neutral forensic experts who may be impartial to either party, the "Right to a Silent Cross-Examination," and the mandate for judges to engage in "Dual-Stage Reasoning" when conducting their judgment - all serve the purpose of assisting the judge in making the transition from a passive observer of an uneven contest to an active protector of constitutional balance. The framework encourages judges to maximize their existing judicial authority to protect rights and, compassion, without compromising constitutional integrity.

In the end, we should measure the real strength and legitimacy of the justice system, not by the conviction rates it achieves, but by its steadfast commitment to procedural fairness and the fundamental rights of every person who comes into the system, especially the accused person, who stands alone, in front of the vast power of the state and the contempt of society.

A justice system that compromises the rights of the accused person for reasons of expedience or sympathy can never deliver justice. A flawed justice system creates wrongful convictions, undermines public confidence in the rule of law, and most importantly, allows ID offenders to escape accountability, while punishing the innocent.. With fidelity to the tenets of the Constitutional Counterweight doctrine, the Indian judiciary can re-establish its role as caretaker of liberty, and demonstrate that this new age of empathy during the trial of sexual offences is matched by an age of unimpeachable fairness and constitutional fidelity. Upholding the rights of the accused is not a pro-defendant or anti-victim position, it is the only pro-justice position

in a system that guarantees it to be the truth; the truth alone, that prevails.

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