

The Role of Consent in Rape Legislation: A Critical Legal Analysis of Judicial Interpretation and Societal Impact

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Abstract: Consent is the foundation of rape legislation, although its legal interpretation is contentious and laden with patriarchal prejudices. This paper critically analyzes the development of the notion of consent in Indian rape law, emphasizing statutory amendments, judicial interpretations, and societal discourse. Utilizing doctrinal legal research, feminist jurisprudence, and comparative analyses from jurisdictions such as the United Kingdom and Germany, the study examines how Indian courts have managed the conflicts between strict textual legislative compliance and survivor-focused methodologies. The findings indicate that, despite the post-2013 amendments incorporating affirmative wording highlighting "unequivocal voluntary agreement," substantial deficiencies persist, particularly the marital rape exception and the inconsistent judicial handling of consent acquired through fraudulent promises. Comparative findings indicate that international human rights treaties and foreign jurisdictions are progressively endorsing affirmative consent as the global standard, including addressing novel types of sexual assault, like stealthing and upskirting. This article contends that India's rape legislation must transition unequivocally towards a comprehensive affirmative consent framework that emphasizes autonomy, dignity, and equality. This kind of change is necessary to bring domestic law in line with constitutional norms and international human rights commitments, ensuring justice and bodily integrity for survivors.

Keywords: Consent; Rape Law; Judicial Interpretation; Indian Penal Code; Affirmative Consent; Feminist Jurisprudence; Comparative Law

Introduction

The notion of consent holds a fundamental although profoundly disputed role in the legal framework of rape. The legal question seems deceptively straightforward at first: did the victim give consent to the sexual behaviour in question? This binary framing of "yes" or "no" has been the main structure that courts have thought about consent in different cases, frequently based on the idea that consent in rape cases has a "normal meaning" that is easy to understand. However, this reductionist perspective does not adequately encompass the intricate moral, psychological, and relational aspects of human sexuality. Consent is not only the lack of opposition or the expression of agreement; it represents a demonstration of autonomy, agency, and the entitlement to self-determination over one's body. This simplicity hides major problems in rape law. Does the lack of physical resistance invalidate consent? Is silence the same as agreeing? Is consent obtained by deception, coercion, or societal pressure deemed valid? In India and other places, courts have gone back and forth between narrow definitions of consent based on patriarchal ideas of chastity, modesty, and "genuine resistance," and broader definitions that take into account psychological coercion, structural inequality, and the need for affirmative agreement. The Indian judiciary has faced challenges in reconciling textual adherence to Section 375 of the Indian Penal Code (now reformed in the Bharatiya Nyaya Sanhita) with the progression of feminist critiques and international human rights standards.

The importance of consent comes from the fact that sexual penetration is a *prima facie* wrong, unlike many other activities between people. In contrast to passing by an unknown person on the street, sexual access to another individual's body necessitates a moral and legal rationale. For a physician, the rationale for an intrusive procedure is its therapeutic intent, contingent upon patient permission. For a sexual partner, the sole legitimate justification is the other's voluntary and informed consent. Consent does not only authorize the act; it alters its moral and legal nature, transforming what would otherwise constitute a violation into a manifestation of mutual autonomy.

In India, the stakes of how the law defines and interprets consent are very high. Even though there were major changes to the law after the 2012 Delhi gang rape and the Justice Verma Committee's recommendations, the Indian legal system still has problems that need to be fixed. For example, the marital rape exception still exists, there is inconsistent case law on consent obtained under a "false promise of marriage," and judges still use stereotypes about how women act. These inconsistencies sustain a disparity between statutory law and its practical application, compromising the assurance of justice for survivors.

This research aims to critically analyze the progression of consent in Indian rape law. It examines the legislative evolution of Section 375 IPC and its subsequent modifications; evaluates significant Supreme Court and High Court rulings that have influenced the jurisprudence of consent; and contextualizes these within comparative international frameworks. By integrating doctrinal legal research with a critical feminist and socio-legal perspective, the study examines whether Indian rape legislation sufficiently embodies the ideals of autonomy and dignity that are foundational to the constitutional framework of gender justice. The argument posited is that Indian rape law, notwithstanding reforms, continues to adhere to patriarchal notions of consent, necessitating a transition to an affirmative consent standard that prioritizes free, voluntary, and informed agreement to reconcile the disparity between legal principles and actual experiences. This change is not just doctrinal but also revolutionary, bringing India's rape laws in line with international human rights duties and the real-life experiences of survivors.

Methodology

This study employs a doctrinal legal research design complemented by socio-legal and feminist critical analysis to interrogate the conceptual and practical role of consent in rape law. At its core, the doctrinal method relies on the systematic examination of statutes, judicial precedents, and legislative reports, including the Indian Penal Code (IPC), the Bharatiya Nyaya Sanhita (BNS), the Criminal Law (Amendment) Acts, and landmark judicial pronouncements such as *Tukaram v. State of Maharashtra*, *State of Punjab v. Gurmit Singh*, *Uday v. State of Karnataka*, *Farooqui v. State*, and *Independent Thought v. Union of India*. These primary sources are supplemented with secondary materials such as Law Commission reports, the Justice Verma Committee Report, academic commentaries, and international instruments like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the UN Model Law on Violence Against Women, which collectively provide the legal and normative framework for analyzing how consent has been conceptualized and operationalized in the Indian context. The socio-legal dimension situates these texts within the wider cultural, political, and societal structures that shape gendered experiences of sexual violence, while the comparative dimension examines how jurisdictions such as the United Kingdom and Germany have embraced affirmative consent standards, expanded the ambit of sexual offences to include new harms such as stealthing and upskirting, and emphasized the centrality of autonomy and dignity in adjudicating sexual crimes. This comparative perspective functions as a benchmark against which India's reforms can be critically evaluated. The feminist jurisprudential lens is indispensable to the methodology, as it interrogates how patriarchal stereotypes, socio-economic inequalities, and structural coercion often reduce "consent" to a formal or superficial construct, rather than a genuine expression of sexual agency. The theoretical foundations of the analysis are anchored in philosophical notions of autonomy and bodily integrity as articulated by John Stuart Mill and Martha Nussbaum, and in feminist critiques advanced by Catharine MacKinnon, Flavia Agnes, and Kimberlé Crenshaw, which foreground the need to dismantle systemic inequities that distort women's ability to say "yes" or "no" freely. By combining doctrinal rigor with socio-legal insight, comparative analysis, and feminist theory, this methodology enables a holistic and critical evaluation of Indian rape law, assessing whether it meaningfully protects the ideals of dignity, equality, and bodily autonomy.

Discussion

Conceptual and Theoretical Foundations of Consent

Black defines consent as "voluntarily yielding the will to the proposition of another". Consent is fundamentally grounded in the principles of autonomy and physical integrity. John Stuart Mill's *On Liberty* stressed the importance of individual sovereignty over one's own body. This idea is at the heart of modern liberal legal systems. Autonomy in this context refers to the individual's right to self-determination, unencumbered by external force.

Martha Nussbaum has contended that sexual agency is an indispensable component of human dignity: the capacity to autonomously determine when, with whom, and under what conditions to partake in sexual activity.

The Supreme Court observed in *Justice K.S. Puttaswamy v. Union of India* (2017) that privacy and the ability to make decisions are important parts of dignity. This directly relates to the idea that sexual consent is a way to show that you have the right to physical integrity. In the same way, U.S. courts in *Planned Parenthood v. Casey* (1992) connected autonomy to personal decisions about intimacy and bodily control. The challenge with consent stems from its dual nature: it is both a legal obligation and a moral standard. Psychologists such as Lois Pineau differentiate between psychological consent, which refers to an individual's internal and subjective willingness, and legal consent, which denotes the external and communicable expression of that willingness. The law requires clarity, frequently simplifying consent to mere words or actions, yet human experiences of intimacy are inherently nuanced and multifaceted.

This difference is quite clear in the case of *State of Maharashtra v. Madhukar Narayan Mardikar* (1991), when the Supreme Court said that even a lady with "easy virtue" has the right to say no to sexual advances. This shows that consent must be clear no matter what the woman's past is. The moral and psychological profundity of consent surpasses the stringent criteria of legal evidence; still, the law must convert it into a standard applicable in courts.

Affirmative consent and implicit consent are two paradigms that are at odds with each other in legal arguments. Affirmative consent, which is typically shortened to "only yes means yes," states that someone has to actively, willingly, and knowingly agree to anything. This strategy has become popular on college campuses in the U.S. and in certain European countries as a way to help victims of sexual assault. Implied consent, on the other hand, depends on things like past closeness, silence, or lack of opposition. The latter has been harshly condemned for making coercion seem okay and keeping preconceptions about men being persistent and women being passive alive.

Historically, the Indian Penal Code favored the implied consent framework, evidenced by problematic provisions such as the marital rape exclusion in Section 375. But court actions have begun to change this area. In *Independent Thought v. Union of India* (2017), the Supreme Court ruled that having sex with a minor wife was rape, rejecting the idea that spouses might give consent without saying so. This was a step toward acknowledging affirmative consent as an important part of sexual freedom.

Feminist scholarship has become the foremost critique of the notion of consent. Catharine MacKinnon famously stated that "consent frequently amounts to mere submission under the influence of male power." In patriarchal institutions marked by economic dependency, cultural norms, and the menace of violence that influence women's "choices," the voluntariness of consent is significantly compromised. Indian feminists, including Flavia Agnes, contend that the law often conflates consent with the absence of physical opposition, failing to acknowledge the intricate coercions women face in their everyday experiences. Significant rulings such as *Tukaram v. State of Maharashtra* (1979) (the notorious Mathura rape case) exemplified the occurrence of this failing. The Supreme Court initially released the accused, believing that the victim's absence of "resistance" indicated agreement. The public outrage that followed ultimately resulted in the 1983 amendments to rape legislation, demonstrating how feminist critique may influence legal definitions. The feminist approach illustrates that consent cannot be understood in isolation; it requires analysis within the framework of social inequalities. Genuine consent, as articulated by MacKinnon and later by Kimberlé Crenshaw's intersectional analysis, requires the dismantling of coercive power structures that obscure the clarity of women's "yes" or "no."

Evolution of Rape and Consent in Indian Statutory Framework

The Criminal Law (Amendment) Acts that followed the December 2012 public outcry materially altered the statutory language around consent. The modern wording of Section 375 (as consolidated on official portals) frames rape by enumerating seven factual circumstances and then supplies explanations that define certain terms. The most important explanation for contemporary debates is Explanation 2, which now defines consent in affirmative terms:

“Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.”

This statement conveys a concept that emphasizes "unequivocal voluntary agreement" and clarifies that the absence of physical resistance does not equate to consent. The legal action is more accurately termed partial affirmation, as it acknowledges forms of consent that encompass communication (verbal, gestural, and non-verbal), however it raises unresolved issues regarding their interpretation and substantiation (what constitutes a "unequivocal" agreement?). How to manage contextual pressures?

The practical meaning of “consent” has been shaped dramatically by Supreme Court decisions. The infamous Mathura litigation offers a paradigmatic illustration of how courts historically equated lack of visible injury or absence of vocal protest with consent. In that case the Supreme Court famously reversed a High Court conviction, reasoning (in part) from the absence of injuries and the victim’s conduct; the judgment contains passages that were widely criticized by feminist scholars and activists for construing the complainant’s behaviour as inconsistent with non-consent. The Court iterated the orthodox principle of criminal law that “the onus is always on the prosecution to prove affirmatively each ingredient of the offence”, and it concluded that the prosecution had failed to prove that the intercourse in question amounted to rape. The Court stated, for example, that the available circumstances were “capable of being construed in a way different from that adopted by the High Court” and therefore acquitted the accused.

The *Mathura* outcome prompted widespread social protest and legislative response. Parliament’s Criminal Law (Second Amendment) Act, 1983 (and later reforms) sought to correct the evidentiary and doctrinal tendencies that the judgment had exposed; notably by creating statutory presumptions and by strengthening safeguards for complainants in custody or position of vulnerability.

The Justice Verma Committee; appointed in the immediate aftermath of the Delhi gang rape (December 16, 2012); performed comprehensive doctrinal, procedural and policy work. The Committee’s report begins with a stark observation of the public outrage and situates the legislative project within constitutional commitments to dignity and equality: “*The immediate cause was the brutal gang rape of a young woman ...*” and the Committee stressed that “strict observance and faithful implementation of the constitutional mandate... is sufficient to prevent, and if need be, to punish any sexual harassment or assault; and the improvement needed in the laws, if any, is marginal”.

Importantly, the Committee’s draft recommendations explicitly attempted to reframe consent and to remove presumptions that entrenched marital immunity. Among the Committee’s draft formulations (included with the report’s recommended text) are explanations that emphasize that “consent will not be presumed in the event of an existing marital relationship between the complainant and the accused,” and that “consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific act.”

The Criminal Law (Amendment) Acts and subsequent statutory consolidation incorporated much of the Committee’s influence. In statutory practice the most visible gain was the *inclusion of a more muscular explanation of consent*: the phrase “unequivocal voluntary agreement” (quoted above) now anchors Section 375’s interpretive frame. The 2013 law also revised the age thresholds and added clauses to address custodial rape, gang rape and other graded sexual offences. A crucial operational effect of Explanation 2 is its explicit disavowal of “physical resistance” as the sole or decisive marker of non-consent: a doctrinal correction to earlier jurisprudential outcomes like *Mathura*. Nonetheless, the explanation does not entirely resolve complex pathologies: the statutory definition still leaves the court to decide what counts as “unequivocal” and how to weigh non-verbal versus verbal communication¹. Those evidentiary and contextual questions continue to occupy litigators and judges.

The statutory architecture also relies on the interplay between the special offence-definition (Section 375 IPC) and the general doctrine of consent in Section 90 IPC (which states that consent given under fear, misconception, incapacity, or by children under twelve, is not valid consent). Courts have sometimes grappled with whether the narrower circumstances listed in Section 375 (e.g., consent obtained by fear of death or hurt; consent when induced by a false identity) exhaust the modes in which consent can be vitiated, or whether Section 90's broader tests apply by way of general principle. Academic commentary observes that the Supreme Court has occasionally left this question open in its judgments, generating doctrinal uncertainty about the reach of "misconception of fact" and whether Section 90 should be read into every consent-based offence. This interpretive friction continues to shape litigation on "consent by deception" (false promise of marriage, false identity, deceit regarding sterilization/treatment, etc.).

A key judicial intervention after the reforms is *Independent Thought v. Union of India* (2017), where the Supreme Court read down the marital exemption *to the extent of protecting minor wives*. The Court held plainly:

"In our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not."

The judgment thus removed the anomaly that had allowed husbands to have non-consensual intercourse with wives who were child brides (between ages 15–18): a significant constitutional and egalitarian move that acknowledged bodily autonomy even within traditional marital constructs. Yet the Court stopped short of a comprehensive elimination of the marital exemption for adult wives, leaving the legal regime for marital rape of adult spouses unsettled. *Independent Thought* therefore represents a partial judicial recognition of consent's primacy within marriage while also signalling the limits of judicial action on politically sensitive reforms.

Most recently, the *Bharatiya Nyaya Sanhita* (BNS, 2023), the government's replacement text for the IPC, retained a marital exception in its formulation of rape/sexual offences, though with updated age thresholds. The BNS modernizes and reorganizes offences but (critically for consent analysis) preserves an exception stating that "sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." The retention of such an exception in a new penal code drafting exercise is legally and normatively significant: while the statutory language of consent has been strengthened elsewhere (the "unequivocal" formula), the persistence of a marital carve-out preserves a zone in which a wife's criminal remedy for forced intercourse remains constrained by statutory immunity. This statutory continuity (in a new Code) raises hard questions about the State's commitment to bodily autonomy inside marriage and invites constitutional challenge. Indeed, the Supreme Court has taken cognisance of petitions challenging the marital-exception provisions in the new criminal code.

Judicial Interpretation of Consent in Indian Courts

In *State of Punjab v. Gurmit Singh* (1996), the Supreme Court significantly prioritized the experiences of survivors in the case. The prosecutrix's testimony alone could suffice for a conviction without the necessity of additional proof. This decision acknowledged the societal circumstances that often hinder women from fighting or promptly reporting sexual violence. The Court, by dismissing the limited focus on physical resistance or conventional assumptions of victim behavior, implicitly acknowledged that consent cannot be merely defined by the lack of injury or the timing of a complaint, thus broadening the evidentiary framework for adjudicating sexual offenses.

Subsequent instances addressed the more complex matter of consent obtained under false pretenses. In *Uday v. State of Karnataka* (2003), the Court clarified that an agreement procured through a "misconception of fact" is invalid under Section 90 of the IPC; however, this interpretation was limited to cases where the deception was intentional and evident from the beginning. This intricate methodology seeks to harmonize the principle of human autonomy with the necessity to prevent exploitation, illustrating the judiciary's effort to distinguish between ordinary relational disappointments and deliberate violations of trust. The Court emphasized in *Kaini Rajan v. State of Kerala* (2013) that consent signifies an active, intelligent volition. By dismissing the notion that passivity

equates to consent, the Court enhanced the victim's moral and legal agency, transcending previous formalistic interpretations.

The Farooqui v. State (2017) ruling highlighted the complexities associated with assessing consent, particularly within the framework of extended intimate relationships. The Delhi High Court, later affirmed by the Supreme Court, recognized that an agreement may be revoked at any time, and that the absence of opposition should not be interpreted as consent. This approach aligns the law with the affirmative permission model; yet, it has sparked criticism regarding potential ambiguity in intimate contexts. This illustrates the difficulty of translating normative concepts into practice inside the judiciary.

At the High Court level, divergent interpretations persist, especially in cases involving promises of marriage. Some courts have treated deception as vitiating consent under Section 90 IPC, while others have resisted criminalizing failed relationships, concerned about the potential misuse of rape laws. These inconsistencies reveal the broader challenge facing Indian courts: reconciling the protection of individual autonomy with evidentiary demands, social realities, and the prevention of abuse of the law. Across these cases, a clear trend emerges; the courts are gradually moving toward recognizing consent as an expression of agency and choice, yet the application remains uneven, highlighting the ongoing struggle to embed both moral and legal clarity in the adjudication of sexual offences.

Comparative and International Perspectives

The Sexual Offences Act, 2003 in England elucidates the concept of consent. Section 1 of the Act delineates rape as a sexual act perpetrated by a man against an individual who has not consented, and if the male lacks a reasonable belief that consent was given. This places the burden on the accused to demonstrate that their belief in consent was reasonable. Section 74 of the Act delineates that consent exists when an individual willingly accepts and possesses the autonomy and capacity to make that decision. Section 75 establishes presumptions on situations in which consent cannot be deemed authentic, such as instances of unconsciousness, fear of violence, or physical impairment. This is contingent upon the accused's ability to provide sufficient evidence to the contrary.

The courts in England explicitly state that prior intimacy or a long-term relationship does not constitute consent. In certain Indian contexts, such as the Mahmood Farooqui case, vigorous opposition is required to establish that an individual did not provide consent. The court in *R v. Malone* clarified that a complainant is not required to verbally express "no," so reinforcing the notion that consent must be unequivocal and ongoing, rather than merely inferred from actions or circumstances. Section 177 of the Criminal Code constitutes the principal legislation in Germany addressing sexual offenses. It renders sexual activity unlawful if the victim did not grant consent or was incapable of providing consent. The Act explicitly addresses agreements obtained through coercion, exploitation, or the victim's bodily or psychological incapacities. It also addresses instances in which an individual is compelled to engage in sexual acts with a third party, underscoring the paramount importance of consent in all circumstances.

Technological advancements have rapidly introduced new forms of sexual misconduct, such as upskirting, stealthing, and the unauthorized distribution of personal images. This necessitates the enactment of new legislation. Germany has amended its legislation to address these issues. Section 184k of the Criminal Code, effective January 1, 2021, criminalizes upskirting. The Federal Court of Justice has characterized stealthing as the removal of a condom without the consent of one's partner. It is now classified as sexual assault pursuant to Section 177. In 2023, the court rendered a significant ruling clarifying that consent to protected sexual activity does not equate to consent for unprotected intercourse.

The cases from England and Germany illustrate the significance of a legal system that upholds individual liberties, endorses affirmative consent, and addresses contemporary forms of sexual assault. They establish a standard for Indian law, highlighting the imperative for reforms that go beyond superficial notions of consent, integrate environmental and psychological considerations, and safeguard individual autonomy in all dimensions of sexual conduct.

International law and policy instruments enhance the robustness of these concepts. The Convention on the Elimination of All Forms of Discrimination Against Women consistently urges countries to criminalize all forms

of sexual violence and to adopt victim-centered definitions of consent. The UN Model Law on Violence against Women stipulates that consent must be perceived as an active, voluntarily given agreement. It states that coercion, deception, or incompetence nullifies consent. India can derive significant insights from these international examples. Despite India's social and cultural conditions differing from Western perspectives, global best practices underscore that consent must be viewed as an active, ongoing, and informed decision.

Results

The results of this study show that Indian rape legislation still has problems with deeply held patriarchal ideas about consent, even if there have been positive changes to the law and the courts are starting to recognize survivor-centered methods. The doctrinal trajectory indicates that the Criminal Law (Amendment) Act, 2013 represented a partial transition towards affirmative consent by instituting the necessity of “unequivocal voluntary agreement” and discarding the physical resistance standard. The ongoing existence of the marital rape exception, extending into the Bharatiya Nyaya Sanhita (2023), illustrates the law's enduring reluctance to completely acknowledge women's bodily autonomy inside marriage. An analysis of case law shows that the judicial landscape is not consistent. For example, the decisions in *State of Punjab v. Gurmit Singh* and *Kaini Rajan v. State of Kerala* expanded the definition of consent by putting agency and volition first. On the other hand, the earlier cases of *Mathura* and *Uday v. State of Karnataka* show how restrictive approaches that equated silence or lack of resistance with consent. More recent rulings, such as *Independent Thought v. Union of India* and *Farooqui v. State*, demonstrate progressive judicial acceptance of affirmative consent and the idea that consent can be revoked at any moment. A comparative analysis shows that countries like the UK and Germany have adopted clearer and more comprehensive consent standards. For example, they have made stealthing and upskirting illegal and put more of the burden on the accused to prove that they had a reasonable belief in consent. International human rights documents, notably CEDAW and the UN Model Law, offer normative advice that underscores voluntary, informed, and continuous consent as the worldwide benchmark.

Conclusion

India has made significant advancements in delineating and interpreting consent within rape legislation; yet, it remains inadequate compared to international standards. Countries such as Germany and England have broadened the legal definition of sexual offenses to encompass more nuanced and contemporary forms of misconduct, including stealthing and the unauthorized dissemination of intimate images. India's legal system requires substantial reform to effectively ensure women's rights and bodily autonomy. Integrating affirmative consent standards into Bharatiya Nyaya Sanhita would clarify that consent must be explicit, continuous, and context-dependent. Judicially, courts should adopt trauma-informed, stereotype-free approaches, recognizing the psychological and social factors that affect survivors' ability to consent. It is essential to establish complete victim care networks encompassing counseling, legal assistance, and witness protection. This will enable survivors to participate in the court process securely and efficiently.

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