

## LAW ON CONSENT WITH RESPECT TO OFFENCES AGAINST WOMEN

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### ABSTRACT

*Consent is difficult to define but very easy to understand. Any attempt to define consent may demolish the entire structure of consent-base offences, especially rape-law. However, consent is defined under section 375 IPC. Plain reading of the definition makes it clear that, consent must be 'unequivocal', 'voluntary' and 'willing'; and the willingness must be 'communicated'. It is an attempt to elucidate the definition of consent under section 375 IPC, and to comprehend the essential concept of consent. Furthermore, the definition constitutes a self-contradiction, as well as a contradiction to the concept of consent. Initially, it is important to keep in mind that the concept of consent in criminal and civil law differs. The purpose of the current article is therefore to examine consent in criminal law, particularly when it comes to offences affecting the body.*

*The definition of consent, thus, gives birth to various questions of vital importance like, is there any relation between 'will' and 'consent'; whether consent means voluntary agreement; what is the meaning of the expression 'voluntary'; whether consent means unequivocal agreement; whether communication of agreement is must in every consent; what is 'capacity to consent'; etc. This paper is an attempt to answer all such questions; and concludes that, the definition is full of contradictions. It trivializes the offence of rape. The definition is unreasonable, irrational, arbitrary, discriminatory, and indistinct.*

**Keywords-** Consent, Voluntary, Rape, Offences

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## INTRODUCTION

An act done under a free state of mind is considered consent. In other words, a person's approval and assent constitutes an act. Consent has no different legal meaning than what we understand it to mean<sup>3</sup>. However, when it comes to rape, consent is often more of a sentimental matter than a matter of logic. Consent is all about choice rather than will. The Indian Penal Code, 1860,<sup>4</sup> Section 375, (hereinafter IPC) defines consent in such terms. According to section 375 IPC explanation 2, consent is described as follows:<sup>5</sup>

*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:*

By allowing penetration, a woman is not regarded, simply by virtue of that fact, as consenting to the sexual activity.

The definition of consent in plain terms states that it must be "unequivocal", "voluntary", and "willing", and that it must be "communicated".

Consent can be interpreted by proving:

- The consent can be given by the individual;
- The act has been accepted by the individual due to his free choice.

As an example, if A has agreed to complete the construction of B's house of his own free will that would constitute consent.

As a global epidemic, violence against women can lead to physical, psychological, sexual abuse and even death for the victims. In addition to their rights to fundamental freedoms,

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<sup>3</sup> R.C. Nigam, Law of Crimes in India: Principles of Criminal Law 408 (Asia Publishing House, Bombay, 1965).

<sup>4</sup> Introduced by the Criminal Law (Amendment) Act, 2013.

<sup>5</sup> Since the definition cited above is an explanation to the offence of rape, it is applicable only to the offence of rape, meaning thereby it is not applicable to any other offence, even if consent is an element of that particular offence, e.g., kidnapping, assault, use of criminal force, etc.

women are deprived of equality, security, dignity, and self-worth because of this violation.

During the last few decades, crime has flourished in India and has become one of the nation's problems, according to the paper written by V. K. Madan and R. K. Sinha (2013). Rape in India is the subject of this paper. Rape has existed across cultures for thousands of years. Unfortunately, it is too often overlooked and misunderstood. Rape is a multidimensional phenomenon. A controversial issue, this poses a challenge to modern thinking. Rape is probably the most non-reported crime across cultures. The number of rapes has been steadily increasing despite strong legislation to punish the perpetrator, procedures and practices in investigating crimes, high profile media coverage, and support for victims. The perpetrators are few and far between, and victims are often blamed for the crimes they committed. Unlike most other crimes, rape presents a very complex set of circumstances.

## **CAPACITY TO CONSENT**

In order for a person to give valid consent, they must be capable:

Firstly, Persons claiming this right should be of sound mind. It is their responsibility to prove it. Suppose A gave B his consent to sell his property to him while he was unsound of mind, and later retracted from the agreement, then the contract could not be enforced because consent was given to him when he was unsound of mind.

Secondly, the consent should have been given by someone who has reached the age of majority. In law, minors are believed to be incapable of consenting. The act of sexual activity is consensual between A and B, even if B is a minor, so that it still classifies as rape even if it is consensual.

## **TYPES OF CONSENT**

According to Indian Penal Code section 90, free consent is defined. When a person is frightened of injury or misled by the facts, their consent is not free.

There are two types of consent:

1. Consent implied by actions: Consent implied by the actions of the person. Gestures or non-verbal communication can be used to convey consent. Legal dictionary definitions define implied consent as a consent that is implied from signs, actions, or facts, or from inaction or silence. Take the example of A, who owns a firecracker shop. Upon entering his store, B implies that he is interested in purchasing products from him.
2. An express consent is one that has been given by a person either orally or in writing. In a court of law, it becomes easier to prove if it is an express consent. When A asks B to purchase a property for him, if B agrees and says yes, then this is expressed consent.

## **OFFENCE OF RAPE UNDER SECTION 375**

### Essentials of rape -

- Against her will;
- Without her consent;
- Consent is obtained by force or putting a person of her interest under fear of death;
- Consent obtained by a misconception;
- Consent was obtained when the person was unsound, intoxicated, or under undue influence;
- Women under the age of eighteen with or without her consent;
- A woman who is unable to communicate her consent.

The two prominent essentials of rape are:

- **Act committed against the will**

The concept of will plays a large role in proving rape. A sexual act performed against another person's will constitutes rape under Section 375(1). The Supreme Court explained the concept in *State of Uttar Pradesh v. Chhotey Lal (2011)*<sup>6</sup> by stating that an act committed by a man against a woman despite her opposition or resistance qualifies as an act against her.

*Himachal Pradesh v. Mango Ram (2000)*<sup>7</sup> - In this case, the prosecutor was Jagia Ram, the eldest daughter of Mango Ram. She was accompanied by the accused, seventeen-year-old. From behind, the accused caught her and forced her to lie on the cowshed while committing a sexual act. According to the Supreme Court, the girl tried to resist the accused, but the accused overpowered her and committed the act against her will, thereby committing the rape.

- **Act committed against the consent**

A sexual act committed against the will of a woman is classified as rape under Section 375(2) of the Penal Code. It is a criminal offense for the other party to impose criminal liability if the consent was not freely given. According to the 2013 amendments, if women claim there was no consent while having sexual relations, then the court must presume the same.

*Queen vs flattery (1877)*<sup>8</sup> - This case involved a girl who was ill and visited the accuser's clinic, where she had been advised to undergo surgery, for which she consented, during which the accused had sexual relations with the girl. In the court's opinion, consent was obtained through a misconception rather than a valid one. Consequently, the defendant was guilty of rape.

- **Exceptions to section 375**

Rape is an offence excepted by the following two exceptions:

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<sup>6</sup> *State of U.P. v. Chhotey Lal*, (2011) 2 SCC 550.

<sup>7</sup> *H.P. v. Mango Ram (2000)* 7 SCC 224.

<sup>8</sup> *R v Flattery (1877)* 2 QBD 41.

Exception 1 - An act of treatment, intervention, or procedure performed by a medical professional does not constitute rape. A medical intervention against a woman may not be prosecuted as a rape offense in a court of law if it complies with this exception clause.

Exception 2 -The act states that a husband cannot be held responsible as a result of sexual contact with his wife. The section assumes that the wife is giving her husband an implied consent in marriage. In this exception, there is a provision that mentions that sexual intercourse with a wife under the age of 15 is not a criminal offense. From 15-18 years of age, the court increased the age in *Independent thoughts vs Union of India*<sup>9</sup>.

## **LAW AGAINST THE WILL AND WITHOUT CONSENT**

'Will' and 'consent' are two very different things. "No lexicographer regards "consent" as a synonym of willingness, and it is obvious that they are not equivalent," as stated correctly in *State v. Schwab*<sup>10</sup>. Although a woman may be willing to engage in sexual activity, this does not imply that she has given consent. And while another woman may have consented to sexual intercourse, this does not necessarily imply that she is willing. Even if it is given voluntarily, permission can be legitimate. As a result, it is argued that the "voluntary" part of section 375 IPC explanation 2 is incompatible with the essential concept of consent.

Another example is Section 376C of the IPC<sup>11</sup>, which recognizes that the *will is irrelevant in*

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<sup>9</sup> *Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013.

<sup>10</sup> 143 N.E. 29, 109 Ohio St. 532; cited with approval in *State of U.P. v. Chhoteylal* (2011) 2 SCC 550.

<sup>11</sup> S. 376C: *Sexual intercourse by a person in authority*: "Whoever, being—

- a) in a position of authority or in a fiduciary relationship; or
- b) a public servant; or
- c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
- d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 5 years, but which may extend to ten years, and shall also be liable to fine.

*consent.* The purpose of this clause is to make it illegal for people in positions of power to exploit women sexually. When a woman is sexually exploited, she agrees to engage in sexual activity, but she is unwilling to do so. But, no matter how hesitant she is, if she agrees, she consents. As a result, the intercourse is with her consent and hence does not constitute rape. As a result, in consent, will is irrelevant. Regardless of these facts, explanation 2 claims that a woman's willingness to participate in a sexual act is required. As a result, section 375 IPC's Explanation 2 limits the meaning of consent to "voluntary agreement."

Not only does the meaning of consent in explanation 2 contradict section 376C IPC, but it also contradicts the policy set forth in clause third of section 375 IPC. "With her consent, when her consent has been acquired by putting her or any person in whom she is concerned in risk of death or harm," says the third clause.

Indian policy on permission in relation to section 375 IPC clause three: 'Consent provided under fear of damage or injury<sup>12</sup> is no consent,' according to Section 90 IPC. As a result, Section 90 encompasses a wide spectrum of fear, including dread of injury to one's body, mind, reputation, or property, as well as a wide range of fear, ranging from "fears of negligible repercussions" to "fear of large / severe consequences / damage." And even a smidgeon of such anxiety is enough to void permission. However, because rape is a serious crime with severe consequences, the type of fear that renders a woman's agreement for sexual contact/acts null and void should be explicitly defined. Clause thirdly of section 375 IPC (as a matter of policy) is amended to reflect this viewpoint, the sole fear that nullifies a woman's consent for sexual intercourse/act is a 'fear of death or of harm, to her or to any person in whom she is interested,' according to section 375 IPC. Because, in the absence of a clearly stated fear, any fear and/or constraint will render a woman's agreement to sexual intercourse / act invalid. For

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<sup>12</sup> Injury is defined under s. 44, IPC to mean: 'any harm whatever illegally caused to any person, in body, mind, reputation or property.'

example, dread of not being invited to a party, fear of not providing a ride home, fear of not giving lift home,<sup>13</sup> fear of service transfer from one place to another, and so on. And if such little effects are permitted to vitiate consent, the otherwise serious crime of rape will be trivialized. Clause three, as a matter of policy, exclusively refers to the 'fear of death or bodily harm.' It means that permission of a woman for 'sexual acts mentioned under section 375 IPC' is not vitiated in all 'other circumstances of fear,' such as 'fear of reputation, injury to her property, fear of arrest, etc.' In all of these circumstances, her involvement in the sexual intercourse/act is 'unwilling,' yet it is nonetheless considered as legitimate consent as a matter of policy. As a result, Explanation 2 to section 375 IPC contradicts not only the essential idea of consent, but also the Legislative policy on consent under clause third. As a result, Explanation 2 to Section 375 IPC is arbitrary and ambiguous.

## **CONSENT AND VOLUNTARY AGREEMENT**

'Consent indicates voluntary agreement,' according to Explanation 2 of section 375 IPC. This term refers to a woman's permission for sexual conduct mentioned in Section 375 clauses (a) through (d). As a result, it indicates that a woman's consent to engage in sexual activity must be "voluntary." The Punjab and Haryana High Court stated unequivocally that "permission implies voluntary involvement on the side of a woman".<sup>14</sup> "In common language, consent would entail a complainant's voluntary willingness to participate in sexual activity without being abused or used by compulsion or threat," the Delhi High Court adds.<sup>15</sup> These and other similar rulings, as well as reason 2, confuse the terms "freely made agreement" with "voluntarily made agreement." The distinction between these two phrases is subtle. If a

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<sup>13</sup> *R. v. Olugboja*, [1982] QB 320, [1981] 3 All ER 443, [1981] 3 WLR 585.

<sup>14</sup> *Rao Harnarain Singh Sheoji Singh v. The State*, AIR 1958 PH 123.

<sup>15</sup> *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*, CRL.A. 944/2016, judgment delivered on 25.09.2017.



person's agreement to an act is not influenced/compelled by fear or coercion, it is considered to be 'free;' nonetheless, there is no such thing as 'voluntarily agreement.' As a result, the belief that "consent" signifies "voluntary agreement" is fundamentally incorrect. This may be determined by determining the true meaning of the term "voluntary." It's important to note right away that the conventional use of the term "voluntary" differs from its legal meaning. Section 39 of the IPC defines the term "voluntarily." It is described as the 'accused' having mens rea (in the form of purpose, knowledge, or recklessness) in creating an effect. And it has nothing to do with the 'complainant's' will or decision. The basic rule of interpretation stipulates that "once any term is explained / defined in one portion of the IPC, that expression must be used/understood in line with that explanation/definition everywhere throughout the IPC".<sup>16</sup> As a result, the term "voluntary" in section 375 IPC Explanation 2 must be understood in accordance with its meaning under section 39 IPC.

## **CONSENT AND UNEQUIVOCAL AGREEMENT**

As stated in section 90 of the IPC, 'consent is not such consent as is intended by any section of the IPC when given under misconception of fact.' Therefore, a consent given under misconception of fact is not a valid consent. While this is true, Explanation 2 to section 375 IPC defines the term consent separately and states, among other things, that consent is an unambiguous consent (for a woman to engage in a specific sexual act). Black's Law Dictionary defines "unequivocal" as "clear; free of ambiguity". The plain reading of "unequivocal" in relation to consent under explanation 2 indicates that 'there should be no misunderstanding in the mind of the woman about any fact' while participating in a specific sexual act.

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<sup>16</sup> S. 7, IPC. It reads: "*Sense of expression once explained.*— Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation."

In explanation 2, the expression "unequivocal" extends beyond "relevant fact"<sup>17</sup> in section 90. Whenever "misconception of fact" is used, it refers to a misconception of "relevant fact"; however, unequivocal takes into account misconception of "any fact", pertinent or not. Consequently, explanation 2 says that if a man falsely tells woman that he is intellectual, influential, or rich, or that he is part of her caste, or is going to marry her, etc, her consent to participate in sexual activity is not genuine. It is in all such cases wrongly believed that the woman is agreeing to participate in the sexual intercourse/act, and thus the consent cannot be considered unequivocal. For this reason, all such cases will result in the man being convicted of rape.

## **COMMUNICATION OF AGREEMENT**

As explained in explanation 2, under Section 375 IPC, a woman must express her desire to take part in a specific sexual act. As for other forms of communication, they may take the form of words, gestures, or any other form of verbal or non-verbal communication. We have already discussed the issue of "willingness"; we need only emphasize here that 'willingness' is not the key to consent; it is the choice-whether to agree or not to agree-that counts. What is required of communication of agreement?" Answer: 'Yes' if you have 'express consent', but 'No' if you have 'implied consent'. In simple terms, 'express consent' implies a transaction in which a person proposes to perform a particular act, and the person to whom the proposal is made 'communicates' his agreement for it. An agreement to perform an act before it is actually performed. There is no prior agreement for implied consent. As mentioned, implied consent is defined as the approval of an act 'at the time that the act is being executed' without a formal

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<sup>17</sup> The High Court of Calcutta in *Jayanti Rani Panda v. State of West Bengal*, 1984 Cri. L.J. 1535, rightly stated: "In order to come within the meaning of misconception of fact, the fact must have immediate relevance." The Supreme Court of India cited it with approval in *Uday v. State of Karnataka*, 2003 (2) Mah L R 46 [Para 16].

proposal or communication of agreement. 'Subsequent ratification of the past act' is entirely different.<sup>18</sup>

## **WITH CONSENT AND WITHOUT CONSENT**

An act can be deemed to be done "with consent" if a person agrees to it with clear understanding and knowledge of "its nature" as well as "the identity of the individual" performing it.

The two facts (knowledge and choice) that make up consent are crucial; therefore, when an act is performed "without consent" -

- 1) As a result of insanity, intoxication, infancy, unconsciousness, etc., the person who performs the act lacks the required mental faculties to make a choice or agreement; or
- 2) An act is willingly committed by a person who lacks any or both of the above-stated facts (either due to fraud or a self-inflicted mistake); or
- 3) Despite opposition or refusal, an act is carried out.

A first agreement does not exist. Hence, there appears to be a real agreement in the second case, but it doesn't amount to true agreement in the real sense (i.e., there is no consensus ad idem); whereas in the third case, there is actual disagreement. In this instance, the act has been performed forcibly. Without consent therefore means "without consent". We have discussed a number of topics related to consent, and the topics are discussed in detail above. In its simplest form, consent means a conscious agreement for an act to take place. Furthermore, it should also be remembered that consent to an act is consent to its natural and probable consequences as well.

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<sup>18</sup> An act, which was without consent at the time when it was done, cannot become consensual merely because of subsequent ratification of it. Consent cannot be given with retrospective effect.

## **CONCLUSION**

Consent does not revolve around will. The crucial aspect of consent is the choice one makes regarding whether to agree or not to agree. Any time a person decides to consent, regardless of how unwilling he is to consent, he does so consciously. Consequently, even against his will, consent is valid. According to Explanation 2 of section 375 IPC, defining 'consent' for rape offences, inter alia, a woman must be willing to engage in an act or participate in sexual relations with another person. In light of Explanation 2, when a woman refuses to participate in a sexual act/interaction, the act/interaction is rape, since it is 'without consent'. Explanation 2 defines consent as a "willing agreement". Using this narrow definition of consent, rape is defined more broadly. It includes all sexual acts in which the woman was unwillingly involved. The third clause of Sections 375 and 376C of the IPC contradicts the notion of consent and also the legislative policy.

According to Explanation 2, "unequivocal consent" implies that consent is invalid if given under mistaken assumption of "any" fact, whereas for the true sense of consent, mistake of any two facts nullifies consent. The existence/nonexistence of consent is not affected by any mistake of any other fact.

"Consent" means voluntary agreement, according to Explanation 2 for section 375 IPC, among other things. This is where an individual decides to follow a certain course of action. The concept of agreement implies a request or expectation of one party from the other to agree on a request or expectation. Thus, voluntary agreement is not possible. While a voluntary act is possible, consent is not one; consent is merely a conscious permission / agreement to participate in a voluntary act. This is why the explanatory statement in section 375 IPC which states that "consent means voluntarily agreeing to something", is incorrect. This statement is simply incorrect, unreasonable, and discriminatory.

As explained in Explanation 2, the expression "communication / communication" excludes the concept of implicit consent. Expressions of agreement to an act are required for express consent, whereas implied consent arises from the approval of an act without any formal proposal and without any communication of agreement.

In the past few years, Section 375 of the Penal Code has undergone considerable changes due to the rise in rape cases in India. However, there are still quite a few shortcomings in the section which need to be fixed.