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## INTERPRETATION OF CONSENT IN RAPE

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Anthara N, VIT School of Law, Chennai

### ABSTRACT

Black defines consent as “voluntarily yielding the will to the proposition of another”<sup>1</sup>. While this seems to be a rather limited interpretation of consent, by contemporary standards, this article aims to look into the definition and interpretation of consent in rape laws. This paper begins by exploring the complex and evolving interpretation of 'consent' in Indian rape laws, highlighting how its definition has expanded over time. It looks into the factors that the judiciary typically consider, when assessing consent and critiques various landmark cases that illustrate the judiciary's failures, particularly in undermining women's bodily integrity and discriminating between married and unmarried women.

A detailed analysis of India's legislative framework is analyzed, with a further emphasis on the significance of the Criminal Law (Amendment) Act of 2013 in redefining consent. The article also addresses inconsistencies regarding the age of consent across different legal Acts and the contentious issue of marital rape in the new Bharatiya Nyaya Sanhita of 2023. Furthermore, it looks into international perspectives on consent and examines contemporary challenges and trends in its interpretation, including modern forms of sexual misconduct. Through this comprehensive analysis, the paper underscores the urgent need for reform in legal definitions and societal attitudes surrounding consent to ensure the protection of individual rights and dignity.

**Keywords:** consent, rape, sexual autonomy, marital rape, bodily integrity, stealthing

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<sup>1</sup> BLACK'S LAW DICTIONARY, 368 (10th ed. 2014)

## Introduction

The concept of 'consent' can be attributed to a person's autonomy, will, and independence, forming the foundation of their individual rights and freedoms. It signifies the power to make informed choices and is especially crucial in the context of sexual rights and sexual offences like rape.

Understanding how to interpret consent in various circumstances is important, as it delineates the line between lawful and unlawful sexual conduct. In rape laws, this interpretation becomes a central focus, shaping the legal framework that protects individuals from sexual violence. It is vital to recognize that consent must reflect more than just the absence of a refusal; despite what was held in most cases. Upholding this right safeguards a person's dignity and sexual agency in a free society. It is a reflection of a nation's commitment to individual rights and social justice. However, in this aspect, India faces significant challenges, very often falling short.

## Defining consent

To take a realistic approach, no standard definition can be universally acceptable for defining a term like 'consent'. In fact, it is often more straightforward to describe express consent as an act performed voluntarily, reciprocally, and explicitly, rather than defining what is not. Although the 2013 amendment<sup>2</sup> introduced an explicit definition of consent, challenges still persist in establishing clear and unambiguous consent in Indian rape cases. To give it a proper definition, consent, in classical liberal theory, can be defined as '*the expression of autonomy and free will by competent and rational individuals who are free from coercion and pressure.*'<sup>3</sup>

In this context, consent requires both parties to actively and willingly choose to engage in sexual activity. It is a critical prerequisite, particularly in cases involving a person's bodily integrity. Therefore, the focus must shift from merely asking whether the victim has consented, to examining whether the consent was mutual, informed, and given with a full understanding and respect for the other person's wishes. It should not be a result of manipulation or coercion aimed at obtaining a desired response.

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<sup>2</sup> Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

<sup>3</sup> Rosemary Hunter & Sharon Cowan, 'Introduction' in Choice and Consent: Feminist Engagements with Law and Subjectivity, 2007).

For instance, where a woman consented to sexual activity with her husband only on the condition that he used a condom. However, he proceeded without one, knowing she would not have agreed otherwise. Although the woman initially consented to the act, she was deprived of her choice regarding a central condition on which her consent was based. The court ruled that because the act was performed contrary to her wishes and violated her understanding of the act, it fell within the bounds of statutory definition of rape and the husband was found guilty<sup>4</sup>.

### **Key factors in evaluating consent**

When assessing consent, judges often interpret it by examining factors and circumstances that are frequently irrelevant to the case, focusing on those that align with preconceived notions of "ideal victim" behaviour. To be perceived as an ideal victim, a person's characteristics and the crime committed against them must align with established social norms and societal values.<sup>5</sup> Consequently, it can discourage other potential victims from coming forward due to the fear of victim blaming, re-traumatization, and the prospect of enduring lengthy and dehumanizing legal processes.

Another irrelevant factor considered by courts, is the "immoral character" of the victim. Until 2003, courts frequently considered a woman's past sexual history, often influenced by stereotypes and societal beliefs about rape. This perspective leads to the erroneous assumption that a "promiscuous" woman or one perceived as having "easy virtue" is more likely to consent to sexual intercourse. This reasoning is both irrelevant and illogical, as it cannot be analysed who would be more likely to consent based on their sexual history. Stereotypes and gender biases can lead to misinterpretations of women's behaviour, unjustly undermining their autonomy over their bodies.

Before 2003, the defense could cross-examine the victim to demonstrate that she had an "immoral character" under Section 155(4) of the Indian Evidence Act, 1872. This could be established through medical evidence, including the invasive "two-finger test," which was purportedly used to determine whether the victim had previously engaged in sexual intercourse. This test along with other regressive practices under the Indian Evidence Act not only violated the dignity and privacy of rape survivors but also perpetuated harmful stereotypes in society

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<sup>4</sup> R(F) v A, 2013 EWHC 945 (Admin).

<sup>5</sup> Duggan, Marian, ed., *Revisiting the "Ideal Victim": Developments in Critical Victimology*. 1st ed. Bristol University Press, 2018. <https://doi.org/10.2307/j.ctv301ds5>.

and therefore, these provisions were repealed in 2013, affirming that a woman's prior sexual relationship—whether with the accused or any other man—is irrelevant in rape prosecutions.<sup>6</sup>

### Understanding Consent under the BNS

Under the Bharatiya Nyaya Sanhita (BNS) 2023, Section 63 defines the offense of rape, largely retaining the provisions of Section 375 of the Indian Penal Code<sup>7</sup> (IPC), which begins by specifying that "*a man is said to commit rape*". From a mere reading of the definition, it indicates that the offence of rape is recognized as being perpetrated by men, with women identified as the victims. This is further evident in the sub-clauses, which outline the specific acts constituting rape, such as penetration, insertion, and manipulation of body parts and so on. For years, society has been functioning under the assumption that rape is something that is exclusively committed by men against women, often viewed as a manifestation of patriarchal attitudes. However, the reality differs as various instances prove that men are also in the receiving end of rape and sexual assaults. Unfortunately, these cases are often overlooked and such male victims remain largely neglected due to societal norms that prevent their cases from being recognized.

Section 63 further enumerates seven descriptions under which an act is considered rape, including instances where it is committed against the woman's will, without her consent, or with her consent obtained through threats of death or hurt, etc.

When discussing this subject, it is essential to consider Explanation 2, which defines consent as: "*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.*"

The proviso further clarifies 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.*" The definition makes one understand that a woman's silence or the lack of an explicit "no" should not be mistaken for a "yes." It reinforces the principle that consent must be actively communicated, leaving no room for ambiguity or assumptions based on a woman's non-

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<sup>6</sup> The Hindu, <https://www.thehindu.com/news/national/woman-complainants-past-sexual-conduct-irrelevant-in-rape-trials/article5430848.ece>, (last visited on Oct. 2, 2024).

<sup>7</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

responsiveness or lack of resistance. While this provision appears to be comprehensive and well-defined, various judicial decisions suggest otherwise where the judges have passed certain judgements that have raised concerns.

The Supreme Court ruled that there is a presumption of lack of consent in rape cases if the victim asserts that she did not consent, under Section 114A of the Indian Evidence Act<sup>8</sup>. The Court rejected the argument that the victim's year-long silence implied consent, ruling instead that her silence was due to intimidation by the accused<sup>9</sup>.

A victim's reaction to such an act can sometimes be described as "frozen fright,"<sup>10</sup> where the victim becomes so overwhelmed by fear that they are unable to physically or verbally resist. In this state, the victim's silence and lack of resistance do not mean they are agreeing or participating willingly; it simply means they are unable to fight back. Therefore, silence should never be taken as consent, as it may actually indicate fear, disagreement, or forced submission quite contrary to willingness.

Furthermore, according to Explanation 2, consent is revocable. A woman can withdraw or revoke her consent at any point during the sexual act. This is evident as Explanation 2 states that consent has to be given 'to participate in the specific sexual act', indicating that consent must be explicitly granted for each individual act. This means that while consent may be given for one act, it can be withdrawn for another. The point from when the woman withdraws her consent, and the man continues beyond that point, constitutes rape.

However, it must be noted that the woman cannot withdraw her consent after the act is completed, unless the consent was induced by factors mentioned in Section 90 such as coercion, misconception, etc. While Section 375 should be interpreted broadly to include instances where consent is withdrawn post-penetration,<sup>11</sup> its failure to expressly address such scenarios leaves the law unclear. This lack of clarity, particularly regarding withdrawal of consent during an ongoing sexual act, makes the law less accessible to victims of crimes like

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<sup>8</sup> Naim Ahamed v. State (NCT of Delhi), (2023) 1 S.C.R. 1061.

<sup>9</sup> Som Prakash v. State of Himachal Pradesh (2024) HP 0825 2024.

<sup>10</sup> Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial*, (University of California Press, 1997).

<sup>11</sup> Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, Vol. 34, *Berkeley Journal of Gender, Law & Justice*, 38, 2019.

date rape<sup>12</sup>—a largely unaddressed issue in India. This ambiguity creates significant barriers for victims seeking justice in such cases.

### **Redefining Consent: A Legal Evolution**

There was no proper definition for consent until the 2013 amendment. The closest was Section 90 of the IPC, which did not define consent but rather outlined what does not constitute as a valid consent: “any consent given under fear of injury, a misconception of fact, or given by an insane person, an intoxicated person or a child is not considered valid consent.” This lack of clarity led to significant challenges, particularly by the judiciary in interpreting cases involving consent, often resulting in serious legal consequences.

The Nirbhaya case in 2012 was one such unfortunate incident that led to significant changes in the interpretation of rape laws in India. It prompted the establishment of the Justice Verma Committee, whose recommendations led to revisions in the IPC and the enactment of the Criminal Law Amendment Act of 2013.

Prior to these reforms, Section 375 of the IPC primarily focused on penetrative sexual intercourse as the core definition of rape. Courts generally assumed that sexual intercourse strictly referred to penile-vaginal penetration, which excluded cases involving the insertion of other objects, oral sexual intercourse, or digital penetration from being classified as rape. This limited interpretation prompted the Justice Verma Committee to address the fundamental question: “What harm does rape cause?”<sup>13</sup>. The committee had to examine how courts were interpreting rape, often reducing it to an offense against a woman's chastity, virginity, or marriage prospects. This approach reflected deeply regressive societal and judicial views, reducing rape to a matter of shame and social standing rather than recognizing it as a violation of a person's sexual autonomy. Courts frequently failed to see that rape is not merely a threat to a woman's future marriage prospects alone but is also a fundamental breach of their right to control their own body and consent to any sexual acts.<sup>14</sup>

One such case is that of *Smt. Sudesh Jhaku V K.C.J. & ors.*<sup>15</sup>, where a six year old girl was raped by her own father and his colleagues in a hotel room and the court ruled that only penile

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<sup>12</sup> Cornell Law School, [https://www.law.cornell.edu/wex/date\\_rape](https://www.law.cornell.edu/wex/date_rape), (last visited September 29, 2024).

<sup>13</sup> The Wire, <https://perma.cc/F2SW-A5MP>, (last visited September 29, 2024).

<sup>14</sup> *Id.*

<sup>15</sup> [62 (1996) dlt 563: 1998 crilj 2428].

penetration of the vagina amounts to rape, making other forms i.e. through objects or fingers not to be considered as 'rape'. Furthermore, the court also stated that it was only the legislature that was enabled by law to interpret the words 'sexual intercourse' and 'penetration', and not the judiciary. This demonstrates that courts have often failed to grasp the true and real impact of rape, which fundamentally violates a victim's bodily autonomy and integrity. Instead, rulings are frequently based on a narrow, overly technical interpretation of the law, thereby limiting the scope of what constitutes rape and failing to address the broader harm inflicted on the victim.

The 2013 amendment significantly widened the definition of rape, extending it beyond penetrative sexual intercourse to include various other forms of sexual violations, such as inserting objects or manipulating a woman's body parts. This amendment not only changed the interpretation of rape laws but also introduced several new sections, including 354A, 354B, 354C, and 354D, which address different aspects of sexual offenses. It also expanded Section 376(2) to cover rapes committed by personnel of the armed forces deployed by the Central or State Government. Additionally, the amendment classified the rape of a woman under the age of 16 as aggravated, thereby increasing the severity of the punishment. The amendment also removed the provision that allowed courts to exercise judicial discretion to impose sentences below the minimum prescribed for specific offenses.<sup>16</sup>

### **Consent across other Indian Acts**

The concept of the 'age of consent' was first formalized through the Age of Consent Act of 1891, following public outrage over the deaths of young girls like Rukhmabai and Phulmoni Dasi<sup>17</sup>, who died at the age of 11 and 10 due to forceful physical intercourse. These cases raised significant concerns during the British colonial era, prompting the Act's introduction to raise the age of consent from 10 to 12 years. Subsequently, it was further increased to 14 years in 1925 and to 16 years in 1940.<sup>18</sup>

Under the BNS, Section 28 explicitly defines what does not qualify as valid consent. According

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<sup>16</sup>Rachit Bansal, Analysis of the Criminal (Amendment) Act, 2013, Manupatra Articles, (Sep. 30, 2024), <https://articles.manupatra.com/article-details/Analysis-of-the-Criminal-Amendment-Act-2013>.

<sup>17</sup> Dadaji Bhikaji v Rukhmabai (1886) ILR 10 Bom 301 & Queen-Empress vs Hurree Mohun Mythee (1891) ILR 18CAL49.

<sup>18</sup> Deccan Herald, <https://www.deccanherald.com/india/from-10-to-18-years-a-look-at-history-of-age-of-consent-2706535>, (last visited on Oct. 2, 2024).

to this provision, consent is considered invalid if it is given under fear or due to a misconception of fact, particularly if the person engaging in the act knows or has reason to believe that the consent was obtained under such circumstances. Additionally, consent is deemed invalid if it is provided by someone who, due to unsoundness of mind or intoxication, is incapable of comprehending the nature and consequences of their actions. Furthermore, the law clearly states that consent given by an individual under the age of 12 is not legally recognized as valid consent, acknowledging the vulnerability and lack of legal capacity in children below this age.

However, under the Protection of Children from Sexual Offences Act (POCSO) 2012, the age of consent is set differently. The age of consent is set at eighteen years, meaning any sexual act involving individuals under the age of eighteen is automatically criminalized, regardless of factual consent. The law operates on the assumption that persons under eighteen is incapable of understanding consent. This approach has faced significant criticism, as it denies bodily autonomy to individuals and assumes that minors are incapable of understanding the meaning and consequences of consent. Critics argue that the age and education level of many adolescents show that they are aware of what they are consenting to. The core issue is that POCSO conflates exploitative sexual activity with general adolescent sexual expression, criminalizing both. As a result, the law has become a tool to penalize or control non-exploitative, consensual sexual relationships involving minors, even when the relationship is voluntary.

Another significant criticism of the POCSO Act is that it overlooks the social reality that many adolescents today have a better understanding of consent than when the Act was framed, and voluntarily engage in sexual activities. Despite this awareness, the law disproportionately punishes the boy when a minor girl and boy are involved in a consensual relationship, creating a clear imbalance and discrimination in how it is applied. This one-sided approach has been widely condemned as unfair and out of step with the evolving understanding of adolescent autonomy and consent.

In 2017, the Exception 2 of the Criminal Law (Amendment) Act, 2013 was challenged<sup>19</sup>. Exception 2 considered sexual intercourse or acts between a man and his wife, if she was not under fifteen years old as not rape. The court held this exception as discriminatory and violative of the victim's fundamental rights Articles 14, 15 and 21 of the Constitution of India, and

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<sup>19</sup> Independent thought V Union of India, (2017) AIR SC 4904



highlighting the inconsistency between the age of consent under the POCSO Act, which sets it at eighteen and the IPC, which allowed a lower age of consent as fifteen for married girls. This exception was amended to raise the age of consent to eighteen years, after it was found to discriminate between married and unmarried. The court ruled that this differentiation in their bodily integrity lacked a reasonable basis, thereby justifying the change to ensure equal protection under the law for all minor girls, irrespective of their marital status.

Despite the amendment aligning the age of consent under the IPC with other criminal laws, a significant disparity remains. Under the law, consensual sexual intercourse with an unmarried girl under eighteen is deemed non-consensual. However, if the same act occurs with a married minor and her husband, it is presumed consensual. This legal presumption of consent for minor wives reveals an ongoing discrimination between married and unmarried girls, undermining their sexual autonomy. While children's rights are recognized, this distinction fails to acknowledge a girl's right to agency over her own body.

### **Judicial interpretations**

While there have been some landmark rulings that have attempted to redefine or clarify the legal interpretation of consent, many of these have faced significant criticism. These judgments, though sometimes groundbreaking, often fail to adequately address the complexities surrounding consent and instead reinforce outdated notions, limiting progress in establishing a more comprehensive understanding of sexual autonomy.

One such case is the landmark case that caused a nationwide outcry over the judiciary's decisions, *Tukaram & Anr v. State of Maharashtra*<sup>20</sup>, also known as the Mathura Rape Case. In its judgment, the Sessions Court acquitted the accused, asserting that the young girl's consent was voluntary because she was "habituated to sexual intercourse." The court claimed that although there had been sexual contact, it did not constitute rape, even going so far as to label the young victim as "a shocking liar." The case raised serious questions, especially revolving around "passive consent," and custodial rape. The Supreme Court stated that because there were no marks of injury on the victim's body, it indicated that there was "no struggle" on her part, and since she did not "raise an alarm", it was concluded that she had consented to sex.

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<sup>20</sup> (1979) 2 SCC 143.

Ideally, the police and the judiciary are regarded as protectors, institutions people rely on for safety and justice. However, in the wake of cases like this, the public, including young minds, have lost faith in these institutions, feeling abandoned with no reliable system to safeguard their rights.

One notable case that tested the ‘new definition’ of consent under Sec 375, was *Mahmood Farooqui V State (Govt. Of NCT of Delhi)*<sup>21</sup>. In this case, the accused being a famous writer, had subjected the victim, an American PhD student to oral sex. Despite the victim resisting his advances, the accused forcefully pinned her down. She later expressed in an email to him that she “didn’t want to” and that she said “no” multiple times but he became “forceful” and hence went along with the act under pressure and fear for her life. During the trial court proceedings, the defence denied the act to have even taken place and in the High Court, it was contended that the act occurred with the consent of the victim.

For an act to be considered rape, it must meet two essential conditions: it must be against the victim's will and without her consent—both of which were fulfilled in this case. She explicitly refused by saying “no”, resisted his act by stopping him from disrobing her, and even tried to push him away. Her eventual submission, driven by fear of harm, constitutes as consent obtained under fear, which, according to the legal provisions, should invalidate any claim of voluntary consent<sup>22</sup>. Despite these events, the court acquitted the accused.

The court made several erroneous considerations in this case. It argued that, given the victim's level of education, she should have more clearly communicated her “unwillingness” to the accused. The court also placed undue emphasis on the fact that there had been prior “physical contact” between the victim and the accused, suggesting that “*it would be really difficult to decipher whether little or no resistance and a feeble ‘no’, was actually a denial of consent*”.<sup>23</sup> Despite the 2013 amendment, the court misapplied the narrow interpretation of consent under Section 90 of the IPC, implying that a “feeble no” might still indicate consent, stating it is not “unknown that a feeble no could mean yes.” This approach, it unfairly places the burden on the victim to continue resisting physically, even after clearly saying “no” multiple times.

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<sup>21</sup> (2017) 243 DLT 310

<sup>22</sup> Severyna Magil, *Farooqui v State Government of Delhi: Confusing Consent*, Oxford Human Rights Club, (Oct. 6, 2024), <https://ohrh.law.ox.ac.uk/farooqui-v-state-government-of-delhi-confusing-consent/>.

<sup>23</sup> *id.*

In sensitive matters like this, it's important to recognize that a victim may not always be in a mental or emotional state to continuously resist or repeatedly say "no." Rape, being one of the most traumatic offenses, profoundly impacts how a victim responds during the act. It is not logical to expect the victim to actively ensure that the perpetrator understands the lack of consent. Instead, it is the responsibility of the accused to ensure the victim is comfortable and that her consent is clear, informed, and freely given.

In *Tulsidas v. State of Goa*<sup>24</sup>, the victim being mentally impaired was raped by the accused. In 1999, her parents noticed signs of advanced pregnancy, including swollen legs, which raised their concerns. When they asked her about the situation, the victim identified the accused, indicating that he had assaulted her on several occasions. Given the victim's mental condition, she was unable to give proper consent, making this a clear case of exploitation.

### Understanding Marital rape

Subsection (iv) of Section 63 of the BNS leaves some scope for the possibility of marital rape by failing to thoroughly address the concept of consent within the context of marriage. Exception 2 of the BNS expressly excludes sexual acts between a husband and his wife from being considered rape, which raises significant concerns about the very notion of consent.

Consent, as defined in most legal frameworks, has always been understood to be voluntary, mutual, and reciprocal. Yet, the recognition of marital rape as an exception to rape laws undermines this principle, as it implies that consent is either presumed or is deemed to be irrelevant within the confines of marriage. This legal gap challenges the widely accepted understanding of consent and leaves married women vulnerable to non-consensual acts.

The *Independent Thought v. Union of India*<sup>25</sup> case also avoided directly confronting the marital rape exception but instead, shifted its focus on the harmful effects of child marriage, particularly in relation to the violation of young girls' human rights.

However, in recent years, awareness around marital rape has grown, and the issue is now being challenged in the Supreme Court<sup>26</sup>, which will soon answer whether the marital rape Exception

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<sup>24</sup> (2003) Appeal (crl.) 298.

<sup>25</sup> id 18

<sup>26</sup> Challenge to the Marital Rape Exception- *Hrishikesh Sahoo v. State of Karnataka*, Supreme Court Observer, <https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception/>.

under Section 376 of the IPC (Sec 63 of the BNS) violates the fundamental rights of a married woman. Despite this growing momentum, the Indian government has opposed petitions seeking the criminalization of marital rape, arguing that doing so would be "excessively harsh."<sup>27</sup>

While the government acknowledges that "*a husband certainly does not have any fundamental right to violate the consent of his wife*"<sup>28</sup>, it has also maintained that applying the crime of rape to marriage would be an overreach. One of the main justifications for not criminalizing marital rape is due to the presumption that the State would excessively interfere with the institution of marriage, which is often seen as a sacred and foundational pillar of society.

There have been contentions that the State's reluctance to intervene in cases of marital rape is selective and inconsistent. For instance, in *T. Sareetha v. T. Venkata Subbaiah*<sup>29</sup>, the High Court struck down the constitutionality of the restitution of conjugal rights under the Hindu Marriage Act 1955, stating that it violated Articles 14, 19, and 21 of the Constitution. The court emphasized that by enforcing restitution, the State was transferring a woman's right to choose whether or not to engage in sexual relations to itself, thus infringing upon her fundamental rights.

However, the court departed from this in *Harvinder Kaur v. Harmander Singh Choudhry*<sup>30</sup>, where the court upheld the constitutionality of the restitution of conjugal rights. In this case, the court argued that the objective of the law was not to compel cohabitation, but to safeguard the institution of marriage. The court also introduced the notion of "marital privacy," suggesting that certain aspects of marriage fall within a private domain that the State and courts should not interfere with.

Despite this position, the State has intervened in other areas of private relationships, one such being the decriminalization in Section 377 of the IPC, which criminalized consensual homosexual acts<sup>31</sup>. Similarly, laws governing abortion often intrude upon a woman's personal decisions, with women routinely facing legal and societal harassment. These examples reveal

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<sup>27</sup> CBS News, <https://www.cbsnews.com/news/india-rape-in-marriage-government-opposes-update-law/>, (last visited on Oct. 9, 2024).

<sup>28</sup> *Id*

<sup>29</sup> AIR 1983 AP 356.

<sup>30</sup> AIR 1984 Del 66.

<sup>31</sup> *Navej Singh Johar v. Union of India* AIR 2018 SC 4321, (2018) 10 SCC 1.

a contradiction in the State's approach—while it hesitates to regulate marital relationships, it remains actively involved in other intimate matters, including consensual sexual activities and reproductive rights<sup>32</sup>.

## International approaches to Consent

### England

Although many Indian laws were enacted during the colonial period or are derived from British legislation, England has adopted a more progressive standard concerning consent in sexual offences. When assessing consent, judges make juries aware of the risks associated with relying on unwarranted assumptions during deliberation. For instance, the sexual history of the victim or the existence of a long-term relationship between the accused and the victim are not decisive factors in determining consent in a rape case.

In England, what constitutes as rape is outlined in Section 1 of the Sexual Offences Act (the 2003 Act), 2003. This section states that in a rape case, the perpetrator is presumed to be male, and the crime occurs when the victim does not consent, and the perpetrator does not reasonably believe that consent was given. Consequently, the burden rests on the accused to demonstrate that they had reasonable grounds to believe that the victim consented.

Additionally, consent is defined in Section 74 of the 2003 Act as “*a person consents if he agrees by choice and has the freedom and capacity to make that choice.*” Section 75 of the 2003 Act introduces evidential presumptions similar to that of India: if certain circumstances, such as fear of violence, unconsciousness, or physical disability, existed at the time of the act and the accused was aware of these conditions, then consent is presumed to be absent unless sufficient evidence to the contrary is presented.

In contrast to many Indian cases, such as the Mahmood Farooqui case, English courts do not require active resistance to establish that sexual intercourse was non-consensual. In *R v. Malone*<sup>33</sup>, the court asserted that the complainant is not obligated to explicitly communicate

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<sup>32</sup> Raveena Rao Kallakuru & Pradyumna Soni, Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact, NUJS Law Review, 134, 2018, <https://nujlawreview.org/wp-content/uploads/2018/01/11-1-Raveena-Rao-Kallakuru-Pradyumna-Soni.pdf>.

<sup>33</sup> (1998) 2 Cr App R 447.

their lack of consent to the accused.

## Germany

In Germany, sexual offenses are governed by Section 177 of the Criminal Code (StGB), which focuses on acts committed without the consent or the capacity to consent of the victim. This provision takes a comprehensive approach, addressing a wide range of non-consensual sexual acts, such as consent obtained through threats, exploitation, victim's physical and mental impairments or disabilities, etc. The law also covers situations where a person is forced to engage in sexual acts with a third party, highlighting the significance of consent in all circumstances.

With the rise of new technological trends, various forms of sexual misconduct, such as upskirting, stealthing, and revenge porn, have emerged. These crimes have highlighted the need for new criminal laws to address the evolving nature of these violations. As these crimes become more prevalent, there has been growing demand for new provisions to ensure that sexual criminal law keeps pace with these modern-day challenges. These offences, particularly in the digital age, have gained attention due to the rapid expansion of circulating non-consensual sexual or intimate images. Recognizing the seriousness of these cases, the German legislature criminalized the offence of upskirting as of 1 January 2021 under Section 184k of the German Criminal Code.

Similarly, stealthing is a form of sexual misconduct that has recently gained attention. According to the Federal Court of Justice in Germany, it occurs when "*sexual intercourse carried out secretly without a condom against the recognizable will of the sexual partner.*"<sup>34</sup>

In a landmark ruling in 2023<sup>35</sup>, the German Federal Court of Justice reinforced this interpretation by holding that stealthing constitutes sexual assault under Section 177 of StGB. The court clarified that when a person consents to protected sex, neither does it imply consent nor can it be extended to unprotected intercourse. The judgment emphasized that protected and unprotected intercourse are distinct sexual acts, and agreeing to one does not grant permission

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<sup>34</sup> Library of Congress, <https://www.loc.gov/item/global-legal-monitor/2023-03-02/germany-federal-court-of-justice-holds-stealthing-punishable-as-sexual-assault/>, (last visited on Oct. 10, 2024).

<sup>35</sup> *id.*

for the other. This ruling underscored the importance of respecting clear boundaries and consent in all aspects of sexual activity.

## **Conclusion**

While the interpretation of consent in rape laws has evolved over time, India's progress remains limited in comparison to global trends. Many developed countries, such as Canada, Germany, and England, have already criminalized more nuanced forms of sexual misconduct like stealthing. In contrast, India continues to focus on fighting the most blatant forms of rape and sexual violence, highlighting the significant gap in addressing evolving forms of non-consensual acts. As India navigates these issues, it is critical to remember that consent is not merely the absence of a "no" but an active, voluntary, and informed agreement to engage in specific sexual acts. To truly protect the rights and autonomy of women, the legal framework must be updated to reflect a more comprehensive understanding of consent, in line with international standards.