

## Legal Standards Of Consent In Indian Rape Laws:A Critical Examination

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### ABSTRACT

The legal standards of consent have emerged as one of the most contested and evolving dimensions of Indian rape jurisprudence. Historically shaped by patriarchal assumptions within the Indian Penal Code (IPC), the concept of consent long suffered from ambiguity, inconsistent judicial interpretation, and inadequate recognition of coercion, deception, and power imbalance. In recent years, however, heightened public awareness, judicial activism, and statutory reforms—most notably the Criminal Law (Amendment) Acts of 2013 and 2018 and the introduction of the Bharatiya Nyaya Sanhita (BNS) 2023—have transformed the legal understanding of consent. Despite these advancements, significant challenges persist, including the blurred boundary between consensual sexual relations and exploitative conduct, the rising misuse of “false promise to marry” allegations, the evidentiary burden placed on both parties, and the tension between protecting genuine victims and safeguarding the rights of the accused. This paper critically examines the statutory framework, judicial precedents, and socio-legal complexities that shape the contemporary consent standard in Indian rape laws. Through doctrinal analysis and comparative perspectives, the study highlights the need for clearer, gender-neutral, and context-sensitive definitions of consent, supported by scientific evidence, robust procedural safeguards, and balanced legal reasoning. Ultimately, the paper argues that consent must be interpreted not only as a factual element but as a nuanced social construct that demands both legal precision and a rights-based approach..

**Keywords:** Consent, rape jurisprudence, legal standards, criminal law, gender justice, Indian Penal Code (IPC), BNS, criminalization of non-consensual sex, judicial interpretation, misconceptions..

### 1. INTRODUCTION:

Consent constitutes the foundational pillar of modern rape jurisprudence and serves as the primary criterion for distinguishing lawful sexual relations from criminal sexual assault. In the Indian context, however, the legal understanding of consent has undergone a complex and often

contested evolution. Rooted originally in colonial legislation under the Indian Penal Code (IPC), 1860, the law drew heavily upon Victorian moral codes and patriarchal assumptions about women's agency, sexuality, and credibility. For decades, courts grappled with the ambiguity surrounding what constitutes “free and voluntary consent,” leading to inconsistent interpretations and judgments that often failed to reflect contemporary social realities. The inadequacies of these legal standards became increasingly visible as India witnessed changing gender relations, growing awareness of bodily autonomy, and rising public consciousness about sexual violence, particularly following landmark incidents such as the 2012 Delhi gang rape, which triggered widespread reforms.<sup>1</sup>

The legal definition of consent under IPC Section 375 historically attempted to define it negatively—by outlining the circumstances under which consent would be considered absent, such as fear, coercion, intoxication, or mistaken identity—rather than providing a positive, affirmative definition. Even though amendments in 2013 introduced the clarification that consent must involve an “unequivocal voluntary agreement,” the judiciary has frequently struggled to apply this standard consistently, especially in cases involving intimate relationships, socio-emotional dynamics, or long-term partnerships. The rise in cases categorised under “false promise to marry” further complicated jurisprudential clarity, as courts were compelled to differentiate between breach of promise, misunderstanding, and deliberate deception. In numerous instances, consensual relationships that turned sour were subsequently criminalised, placing male partners at risk of wrongful prosecution while simultaneously diluting the seriousness of genuine sexual assault cases.<sup>2</sup>

The introduction of the Bharatiya Nyaya Sanhita (BNS), 2023, represents one of the most significant legislative transitions in India's criminal framework. Although the BNS attempts to refine definitions of consent, coercion, and sexual acts, it retains the gender-specific victim–perpetrator model and continues to rely heavily on the

<sup>1</sup> Criminal Law (Amendment) Act, 2013; Sharma, R. (2022). Rape laws and social impact.

<sup>2</sup> Supreme Court of India. (2013). Deepak Gulati v. State of Haryana; Singh, A. (2021). Gender neutrality in rape laws.

factual matrix of each case rather than establishing a universally applicable test. The shift from IPC to BNS demands a fresh examination of how consent is construed in law, how courts interpret the mental state and intention of the parties, and how socio-cultural realities influence judicial outcomes. For instance, the acknowledgment that consent can be withdrawn at any time is legally sound but practically difficult to evaluate, especially in private settings where corroborative evidence is minimal. Consequently, the judiciary's reliance on "circumstantial consent indicators"—such as relationship duration, communication exchanges, and behavioural patterns—raises further concerns about privacy, subjectivity, and judicial discretion.<sup>3</sup>

Another major concern in the Indian legal landscape is the tension between protecting vulnerable individuals and preventing misuse of stringent criminal provisions. While rape remains a deeply traumatic violation demanding robust legal protection, the criminal justice system also bears the responsibility of ensuring that accusations are truthfully made and legally substantiated. Recent NCRB reports indicate a notable proportion of rape cases falling under "lack of evidence" or "acquittal due to inconsistencies," highlighting gaps in investigation, evidentiary procedures, and sometimes deliberate misuse. Courts, including the Supreme Court, have repeatedly warned against the trend of using rape allegations as tools of retaliation, emotional coercion, or leverage in personal disputes. Yet, the challenge persists: how should consent be interpreted in a manner that is both victim-centric and just to the accused, without either trivialising assault or over-criminalising intimate relationships?<sup>4</sup>

A further dimension requiring critical engagement is the socio-cultural understanding of consent in India. Social norms, gender biases, and moral judgments concerning sexuality often influence not only the behaviour of citizens but also the attitudes of law-enforcement agencies, prosecutors, and even judicial officers. The traditional assumption that women are inherently truthful and men are inherently predatory has shaped legal discourse, sometimes at the cost of objectivity. Moreover, the absence of gender-neutral rape laws continues to perpetuate the belief that only women can be victims of sexual violence, ignoring documented cases involving men, transgender persons, and individuals belonging to LGBTQ+ communities. This structural limitation restricts India's capacity to build a more equitable and rights-based legal framework for interpreting consent.<sup>5</sup>

The increasing digitalisation of interpersonal relationships further complicates consent jurisprudence. Online communication, dating apps, and virtual interactions create new forms of evidence—such as electronic messages—and new forms of coercion, manipulation, or deception. Courts now frequently rely on digital records to infer consent, assess credibility, or determine the

motive behind allegations. While this can enhance accuracy, it also raises issues of privacy, selective disclosure, and over-reliance on fragmented datasets. Thus, the challenge of interpreting consent in a technologically connected society requires the law to be both adaptive and cautious.<sup>6</sup>

This paper, therefore, undertakes a critical examination of the legal standards of consent in Indian rape laws through doctrinal analysis, case-law review, and socio-legal reflection. It investigates the evolution of statutory definitions, evaluates judicial inconsistencies, explores misuse patterns, and compares Indian jurisprudence with global models of affirmative consent. Ultimately, the study argues that effective reform must combine legal clarity with contextual understanding, ensuring that the interpretation of consent aligns with constitutional values of equality, dignity, and fairness. Only then can Indian rape law adequately protect genuine victims, deter misuse, and uphold the integrity of the justice system.

### The Evolving Landscape of Consent in Indian Rape Law

The contemporary status of consent jurisprudence in India reflects a rapidly transforming legal landscape shaped by statutory reform, judicial interpretation, and socio-legal change. The transition from the Indian Penal Code (IPC), 1860 to the Bharatiya Nyaya Sanhita (BNS), 2023, which redefines rape provisions under Section 63, represents the most significant shift in recent decades. The BNS now describes consent as an "unequivocal voluntary agreement", acknowledging that lack of physical resistance cannot be equated with consent.<sup>7</sup> However, the preservation of the marital rape exception—excluding non-consensual intercourse by a husband with his adult wife—continues to draw criticism from scholars, activists, and courts.<sup>8</sup> This incomplete reform underscores persistent gaps in the protection of bodily autonomy, particularly within marital relationships.

### Comparative Table: Consent in Rape Law under IPC and BNS

| Aspect                    | IPC, 1860 (Section 375 & related provisions)   | BNS, (Section 63 & related provisions)   |
|---------------------------|--|--|
| Primary provision on rape | Section 375 IPC  | Section 63 BNS   |
| Definition of consent     | Consent explained through Explanation 2 to Section 375: consent means an unequivocal voluntary | Retains the same core definition: consent as an unequivocal voluntary agreement, |

<sup>3</sup> Bharatiya Nyaya Sanhita, 2023; Tripathi, S. (2020). Misuse of rape laws.

<sup>4</sup> NCRB. (2023). Crime in India Report; Supreme Court observations on false allegations.

<sup>5</sup> Yadav, A. (2021). Gender-neutral rape laws in India.

<sup>6</sup> Mishra, V. (2023). Digital evidence and sexual-offence trials.

<sup>7</sup> Government of India. (2023). Bharatiya Nyaya Sanhita, 2023. India Code.

<sup>8</sup> Delhi High Court. (2024). Judicial observations on marital rape exception. LiveLaw.

|   |   |   |
|---|---|---|
|   | agreement communicated through words, gestures, or any form of verbal or non-verbal communication   | expressed through words, gestures, or any form of communication   |
| <b>Absence of resistance</b>            | Explicitly states that absence of physical resistance does not imply consent  | Retains the same principle; absence of resistance cannot be construed as consent  |
| <b>Focus of consent inquiry</b>         | Primarily centred on the complainant's conduct and resistance (in practice, through judicial interpretation)  | Greater emphasis on voluntariness and communication of consent, with a gradual shift towards examining the accused's conduct  |
| <b>Marital rape exception</b>           | Exception 2 to Section 375 IPC: sexual intercourse by a man with his own wife, wife not being under 18 years, not rape  | Marital rape exception retained; sexual intercourse by husband with adult wife still excluded   |
| <b>Gender neutrality</b>                | Gender-specific: woman as victim, man as perpetrator  | Continues to be gender-specific in rape provisions  |
| <b>Overall approach to consent</b>      | Reactive and resistance-based in practice, despite statutory clarification  | Slightly more autonomy-centric in language, but substantively similar to IPC  |
| <b>Section 81 of BNS and 493 of IPC</b> | Section 493 IPC is a narrow provision. It applies only when a man, by deceit, induces a woman to believe that she is lawfully married to him and, on that belief, she cohabits or has sexual intercourse with him. Thus, the belief of lawful marriage is an essential ingredient, making the offence | Section 81 of the Bharatiya Nyaya Sanhita, 2023 and Section 493 of the Indian Penal Code, 1860 deal with sexual exploitation of women through deception, but they differ significantly in scope and legal requirements. |

|                          |                                   |   |
|--------------------------|-----------------------------------|---|
|                          | technical and difficult to prove. |   |
| <b>Section 69 of BNS</b> | New section added in BNS          | Section 69 BNS punishes sexual intercourse obtained through deceit or false promise of marriage, where consent is vitiated by deception. It adopts a consent-based approach to address sexual exploitation. |

Judicial interpretation has advanced the jurisprudence on consent by refining how courts evaluate coercion, deception, and voluntariness in intimate relationships. In a 2025 Supreme Court ruling, the Court clarified that a failed relationship or a changed intention to marry cannot automatically transform consensual sexual activity into rape, unless the prosecution proves deception at the very inception of the relationship.<sup>9</sup> This modern approach signals a shift toward contextual adjudication, where courts increasingly recognise the complexity of intimate partnerships, emotional dynamics, and long-term cohabitation. Concurrently, the Karnataka High Court reaffirmed that when the prosecution fails to prove rape, the accused has no legal obligation to demonstrate that consent existed, invoking fundamental criminal law principles of presumption of innocence and right to silence.<sup>10</sup>

Contemporary jurisprudence also reflects ongoing tension around special consent contexts, particularly involving minors and marital relationships. While the Protection of Children from Sexual Offences (POCSO) Act firmly states that a minor cannot legally consent to sexual activity, courts have simultaneously reaffirmed that Indian rape law does not criminalise marital rape, despite strong constitutional and gender-rights arguments urging reform.<sup>11</sup> This unresolved contradiction—protecting minors fully while excluding adult married women from the same protection—remains one of the most debated features of Indian criminal law.

Statistical data further illustrate the changing terrain of consent jurisprudence. The National Crime Records Bureau (NCRB) consistently reports that a significant portion of rape cases fall under categories such as breach of promise to marry, relationship disputes, and cases closed due to insufficient evidence.<sup>12</sup> These patterns reveal both systemic investigative gaps and the complex intersection of criminal law with interpersonal relationships. Scholars such as Kulshreshtha (2023) and recent doctrinal analyses (2024–2025) argue that courts

<sup>9</sup> Supreme Court of India. (2025). SC quashes rape charges; consensual relationship not rape. TaxGuru.

<sup>10</sup> Karnataka High Court. (2024). Accused not required to prove consent when prosecution fails. LiveLaw.

*Advances in Consumer Research*

<sup>11</sup> Delhi High Court. (2024). Legal provisions on consent and marital relationships. LiveLaw.

<sup>12</sup> National Crime Records Bureau. (2023). Crime in India Report.

must carefully differentiate genuine cases involving coercion or exploitation from relationship-based complaints that do not meet statutory elements of rape.<sup>13</sup> Such scholarship provides critical guidance for ensuring that legal standards remain both victim-centric and procedurally fair.

Another contemporary development is the increasing influence of digital communication—messages, calls, social media history—on consent adjudication. Recent legal research highlights how courts increasingly rely on digital records to infer voluntariness, emotional context, and relationship history.<sup>14</sup> This shift enhances evidentiary accuracy but simultaneously raises concerns about selective disclosure, privacy, and interpretive ambiguity. Courts have warned against reading consent solely through fragmented digital exchanges without considering broader relational dynamics.

Debates on gender-neutral rape laws also shape modern jurisprudence. While the BNS modernises many sexual-offence provisions, critics emphasize that it still retains a gendered model of rape, recognising only women as victims and men as perpetrators. As pointed out by multiple policy commentators and legal scholars, such a framework inadequately protects male and LGBTQ+ survivors and fails to align India's law with international human rights standards.<sup>15</sup> This structural limitation continues to fuel ongoing proposals for gender-neutral definitions that protect all individuals regardless of gender identity.

Finally, contemporary public discourse and media coverage frequently shape how consent jurisprudence evolves. Reports documenting alleged misuse—for example, cases involving deception, blackmail, or interpersonal disputes—have triggered renewed judicial scrutiny. Courts have increasingly emphasised that criminal law must not become a tool for retaliation or emotional coercion, particularly in consensual relationships that later deteriorate.<sup>16</sup> However, they simultaneously reaffirm that genuine sexual violence must be prosecuted with full legal rigor, ensuring that victims' rights are not diluted by concerns about misuse.

The judicial pronouncement in the *Mahmood Farooqui* case established a negative presumptive standard for consent, drawing heavily upon Section 90 of the Indian Penal Code. Significantly, the court's interpretation was influenced by the prior romantic association between the victim and the accused, effectively creating a differentiated, lower standard of consent for complainants who had a prior sexual relationship with the defendant.

This ruling attracted widespread condemnation for being regressive and for furthering the damaging practice of victim-blaming (Sagar, 2019). Critics argued that such judgments underscore the urgent necessity for an affirmative standard of consent, particularly when considering the inherent power imbalances between

genders within relationships, as highlighted by feminist legal scholarship (Barn and Kumari, 2015; Dhonchak, 2019, pp. 55–56).

Furthermore, the court failed to acknowledge that valid consent requires clear, overt, or covert actions by the complainant, demonstrating willing and equitable participation in the sexual act. This essential element was demonstrably absent in the *Farooqui* matter. In fact, the judgment overlooked clear evidence of the victim's earlier, categorical refusal to engage in sexual contact (Farooqui, 2017, para 14). Despite this, the court ultimately concluded that the defendant's belief in the victim's consent was reasonable, ruling that her "feeble" refusal was insufficient to negate that belief.

Consequently, the progressive potential anticipated following the 2013 legislative amendment that introduced a more explicit definition of consent has not been fully realized. We must now turn our attention to evaluating the **extraneous factors** that frequently influence the determination of complainant credibility and the finding of consent in Indian rape prosecutions.

### **The Impact of Extraneous Factors on Determining Consent in Indian Courts**

The judicial decision in the *Farooqui* case serves as a prime illustration of how factors like prior affection and other extraneous circumstances can unduly influence a court's assessment of a complainant's credibility and her consent to a sexual act.

#### **I. The Role of Credibility and the 'Moral' Standard**

In situations lacking independent corroboration, especially when a conviction relies solely on the victim's testimony, courts often prioritize determining the complainant's credibility before convicting the accused. This scrutiny goes beyond mere legal credibility (the truthfulness of the testimony) and delves into moral credibility (the complainant's social standing and perceived reliability) (Zuckerman, 1989, pp. 248–249).

The purpose of challenging moral credibility is often to suggest that punishing the accused based solely on the uncorroborated account of a person deemed "morally bankrupt" would be unjust (McColgan, 1996, p. 283). This perceived lack of moral standing is then frequently used either to infer consent to the act or to grant the accused the benefit of the doubt, leading to acquittal (Brown et al., 1993, p. 85).

#### **II. Judicial Precedents and the 'Bharwada' Lacuna**

The consideration of extraneous circumstances can be historically linked to the Supreme Court's 1983 ruling in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*. This decision affirmed that conviction in rape cases could rest solely on the victim's testimony. The court reasoned that given the high value placed on a woman's chastity in Indian society, it was improbable a woman would falsely

<sup>13</sup> Kulshreshtha, N. (2023). Standard of consent in Indian rape law. *Journal of Legal Studies; JIER & IJIRL* (2024–2025).

<sup>14</sup> IJIRL Editorial Board. (2025). Digital evidence and consent jurisprudence.

<sup>15</sup> Navbharat Times. (2024). Male rape survivors overlooked under BNS.

<sup>16</sup> Times of India. (2024). Intercourse by deceit and legal debates on consent.

report rape. Furthermore, expecting eyewitnesses in private sexual assault cases is unreasonable.

While this was a positive step for victims, the court failed to provide clear guidance on what constitutes a "basic infirmity" or "probability factor" that would render a victim's testimony unreliable without corroboration. This omission—a **glaring lacuna**—has effectively allowed judges to rely on prevailing patriarchal notions and personal moral convictions when assessing a complainant's credibility and the issue of consent. These assumptions are also used to judge whether the accused's belief in consent was reasonable based on the victim's conduct.

Such extraneous circumstances often include the complainant's past or present behavior and sexual history, drawing on traditional, often misleading, rules of evidence that risk a miscarriage of justice.

### III. Specific Extraneous Considerations

#### a) Presence or Absence of Injuries

Courts have repeatedly stated, as a principle, that the absence of injuries should not automatically cast doubt on the victim's credibility or lead to an inference of consent (e.g., *BC Deva*, 2007, p. 128; *Rajinder*, 2009, p. 79). This applies even in cases involving minors (*Harpal Singh*, 1981, p. 561). However, the presence of injuries is often utilized as a counter-indicator that strengthens the prosecution's case and helps maintain convictions (*Akhlaq*, 2009, p. 230). Therefore, while the absence of injury is not fatal, its presence significantly bolsters the case for the prosecution.

#### b) Aggressive Resistance to Rape

There is a pervasive judicial expectation that an "average victim" will aggressively resist an attempt at sexual violation. Indian courts have reflected on the relevance of such resistance, believing it might appeal to the offender's conscience or, at least, produce helpful medical evidence in the form of physical injuries.

In *Dilip v. State of Madhya Pradesh* (2013, p. 334), a trial court deemed the lack of stiff resistance or shouting as evidence of consent.

More recently, in *Raja v. State of Karnataka* (2016, p. 515), the court acquitted the accused, holding that the victim's conduct during the ordeal was indicative of a "**submissive and consensual person**," rather than an "anguished and horrified victim."

Thus, adherence to the stereotype of the "**ideal victim**"—one who aggressively resists—is a significant factor influencing the court's view on consent.

#### c) Sexual Lifestyle of the Victim

India's conservative, patriarchal culture means a woman's expression of her sexuality often negatively impacts her credibility in a rape case. Before the 2003 amendment, the Indian Evidence Act permitted impeaching a victim's credibility by proving her "generally immoral character," which led to humiliating cross-examinations.

Although the provision was removed, courts still use a woman's conduct, both pre- and post-assault, to measure her credibility.

The Delhi High Court, in an anticipatory bail case (*Arif Iqbal*, 2009, Para 8), suggested an onus on every woman to protect her "dignity and modesty," implying that being "casual with her chastity" invites adverse judicial notice.

In the *Farooqui* case, the judge considered the victim's prior acts of kissing and hugging the married offender as a factor in determining consent.

In a gang-rape bail hearing (*Vikas Garg*, 2017, Paras 12, 27), the court made prejudicial comments about the victim's lifestyle, suggesting she invited the assault.

Despite the 2013 introduction of a **rape-shield provision** disallowing evidence of previous sexual experiences, these examples demonstrate that a woman's perceived sexual lifestyle continues to influence her moral credibility in rape cases.

#### d) Post-Assault Behaviour

Judicial thinking is heavily influenced by the media-driven caricature of an "**ideal rape victim**," stemming from the belief that rape is a "fate worse than death" (*State of Punjab v. Gurmit Singh*, 1996, p. 403). This view, which sees rape as degrading the victim's "soul" and robbing her of her "chastity" (*Jakir Ali*, 2008, p. 276), diminishes the credibility of victims whose post-assault conduct deviates from this script.

In *Rakesh B.* (2020), the court granted bail partly because the victim's testimony—that she felt tired and fell asleep after being raped—was deemed "unbecoming of an Indian woman," thereby compromising her credibility. The court also engaged in victim-shaming by commenting on her behavior of staying late at the office and drinking with the offender.

In the *Swami Chinmayanand* bail hearing (2020, para 13), the court questioned the victim's credibility because she delayed disclosing the ordeal to family members for 9–10 months, inferring an afterthought, despite Supreme Court precedents that caution against such assumptions (*Ravinder Kumar*, 2001).

These examples confirm that a victim's post-assault conduct significantly impacts the judicial determination of consent.

#### e) 'Modern Women' vs. 'Traditional Women'

Judicial officers exhibit a clear pattern of prejudice, often doubting the testimony of an urban, educated, modern woman who displays independence.

In *Bharwada* (1983, pp. 224–225), the court differentiated between "western women" (who had incentives to lie about rape) and "Indian women," contributing to a biased mindset that was evident when questioning the credibility of the American scholar in the *Farooqui* case.

In *Rohit Chauhan v. State* (2013, para 15), the court, hearing a rape-on-pretext-of-marriage petition, called the complainant an "ultra-modern lady" who enjoyed alcohol, concluding that she was not so vulnerable as to be exploited, without explaining the logical link between a modern outlook and vulnerability.

Similarly, the Bombay High court suggested it was "difficult to fathom" that a 25-year-old educated woman

could be deceived into sexual relations (*Kunal Mandaliya*, 2016, para 6).

The modern, empowered working woman is frequently met with prejudice, especially in cases where consent is allegedly obtained through fraud. Furthermore, **the intersectional issues** of caste, gender, and class disproportionately affect marginalized women, such as Dalit victims, whose credibility often becomes the initial hurdle to justice (Kumar, 2021; Wadekar, 2021).

#### IV. The Problem of Relevancy and Discretion

The analysis demonstrates conclusively that these extraneous circumstances significantly influence the determination of consent, often leading to victim-blaming and shaming that negates the accused's culpability. Their legal relevance to the actual offence is minimal, yet they aggravate the victim's trauma.

The core issue lies in India's law of evidence, which grants judges wide discretion to admit evidence they deem relevant to the issue of consent. As legal scholars note, relevancy is highly problematic because it induces judges to speculate on human behavior in unknown situations, relying on stereotypes and myths (McColgan, 1996; Young, 2001).

Judicial culture in India tends toward admitting evidence if its relevance and genuineness are proven, even if improperly obtained, a principle cemented by the Supreme Court in *RM Malkani v. State of Maharashtra* (1973) and *Pooran Mal v. Director of Inspection* (1974, p. 366). This approach creates a default reflex to admit evidence relevant to the trial, often overlooking its prejudicial effect on the victim.

#### The Concern with False Cases

Judicial concern over a growing number of false rape allegations also contributes to this cautious approach. Ethnographic studies suggest that rape laws are sometimes misused—for instance, by families seeking to control a young woman's sexuality after elopement, or to secure leverage in relationship disputes (Brereton, 2017; Vishwanath, 2018). While such cases are few, they disproportionately affect judicial perceptions of complainant credibility, as seen in cases where allegations were made in the context of extramarital affairs or matrimonial disputes (*Ajit Naharsingh Dasana*, 2021; *Mukesh Bansal*, 2022).

#### V. Need for Judicial Guidelines

There is an urgent need for the formulation of **appropriate judicial guidelines** to govern the determination of consent when extraneous factors are considered. Relying on traditional assumptions, such as judging a person's state of mind solely by their post-assault behavior, is illogical and can lead to erroneous conclusions, as diverse individuals react differently to trauma (Gotell, 2008).

#### Critical Analysis of the Arguments Supporting an Affirmative Standard of Consent

The affirmative standard of consent, often expressed through the phrase "yes means yes," requires that consent

be actively communicated rather than inferred from silence or passivity. Comparative legal frameworks illustrate differing approaches to this model. In England and Wales, evidence that an accused took affirmative steps to seek consent may be considered by the jury while assessing whether the accused reasonably believed consent existed. In contrast, Canadian law adopts a stricter position: the failure to take steps to ascertain consent effectively bars the accused from invoking the defence of reasonable belief. Before assessing the viability of adopting such a standard within Indian rape law, it is essential to critically evaluate the arguments advanced in favour of affirmative consent.

Scholars advocating affirmative consent argue that it fundamentally challenges entrenched patriarchal assumptions embedded in traditional understandings of sexual relations. Lisa Gotell contends that affirmative consent disrupts the deeply rooted notion that women's silence or submission constitutes valid consent, thereby reaffirming women's sexual autonomy. Similarly, Carol Smart critiques conventional sexual scripts in which persistent pressure is normalised until a woman yields, describing this dynamic as a pleasure-centred, male-dominated practice that affirmative consent standards seek to dismantle. Judicial articulation of affirmative consent further contests dominant heterosexual narratives that frame sexual interaction as an act of forceful persuasion rather than mutual participation. By requiring active affirmation, such standards aim to destabilise coercive norms that have historically been legitimised within both social and legal discourse.

However, critiques of the affirmative model caution against its practical limitations. Janet Halley observes that framing consent as a clear verbal exchange—typically a question eliciting a "yes" or "no"—does not reflect the realities of most sexual encounters. Empirical studies demonstrate that such explicit consent-seeking behaviour, while normatively desirable, is rarely practised even in healthy, consensual relationships. Nonetheless, the absence of explicit consent cannot be justified solely on the basis of an existing romantic relationship. Much like domestic violence, which frequently occurs within intimate partnerships yet remains criminalised, violations of sexual autonomy cannot be excused by relational proximity. While criminal law cannot prescribe ideal sexual behaviour, it retains the authority to prohibit conduct that is coercive or exploitative. Laws governing offences such as assault and extortion illustrate that certain forms of pressure and force are deemed inherently unacceptable. At the same time, concerns have been raised that excessive reliance on criminal law to regulate sexual conduct risks transforming the legal system into a mechanism of moral surveillance. Yet, failing to acknowledge the profound harm caused by non-consensual sexual contact would equally constitute a serious injustice to victims.

In the Indian context, Anupriya Dhonchak has argued in favour of incorporating an affirmative consent standard into rape law, particularly to address power asymmetries in sexual relationships and to mitigate the retraumatisation of victims during adversarial trials. While her argument rightly foregrounds structural inequalities and procedural

harms, attributing these concerns primarily to deficiencies in substantive criminal law may be misplaced. Scholars have long cautioned against using criminal law as an instrument for correcting deep-seated social inequalities, noting its limited success in reshaping societal attitudes. India's historical reliance on penal reforms to appease public sentiment has often failed to produce meaningful change, as evidenced by persistent insensitivity within policing practices toward survivors of sexual violence. Research increasingly suggests that addressing rape myths and gender stereotypes requires sustained sensitisation and education rather than repeated statutory amendments.

Empirical evidence further indicates that reforms to criminal law alone have not significantly improved institutional responses to sexual violence. For instance, although Section 53A of the Indian Evidence Act, 1872 explicitly bars the introduction of a complainant's prior sexual history, courts have continued to permit invasive and humiliating cross-examinations. Such practices persist due to a combination of patriarchal attitudes, judicial indifference, and an exaggerated concern for safeguarding the accused's right to a fair trial. Meaningful reform, therefore, demands comprehensive training and sensitisation across all actors within the criminal justice system, including police officers, prosecutors, judges, and legislators. Without such efforts, even an affirmative consent standard risks being undermined by judicial resistance, as comparative studies have demonstrated.

Another influential argument for adopting a higher threshold of consent is advanced by Michelle Madden Dempsey and Jonathan Herring, who challenge the foundational assumptions underlying rape law. They posit that sexual penetration should be viewed as inherently harmful and therefore requiring justification, rather than being presumed lawful unless proven otherwise. Their reasoning rests on three premises. First, they argue that penetration necessarily involves force, as it requires physical intrusion into bodily spaces that are not naturally receptive. Consequently, such force should be justified through consent. This approach, however, conflicts with the fundamental criminal law principle of presumption of innocence, which under Indian law treats sexual activity as consensual unless lack of consent is established by the prosecution.

Second, Dempsey and Herring emphasise that sexual penetration exposes individuals to inherent risks, including sexually transmitted infections, pregnancy, and physical injury. Although these harms do not manifest in every instance, their potential presence, they argue, necessitates justification. Critics counter that where consent is present, it would be unduly intrusive for criminal law to scrutinise such risks unless excessive or abnormal force is employed. Moreover, these factors are more appropriately addressed at the sentencing stage as aggravating considerations rather than as determinants of consent itself.

Their third argument concerns the social meaning attached to sexual penetration, particularly of women's bodies, which they claim carries connotations of dominance and subordination reinforced through language and cultural norms. While such critiques

highlight the gendered dimensions of sexuality, linking linguistic representations directly to criminal liability remains problematic. Social meanings evolve over time and are better addressed through education and cultural reform rather than penal regulation. The historical record further cautions against deploying criminal law as a tool for reshaping social behaviour, given its limited efficacy and unintended consequences.

Dempsey and Herring ultimately advocate a "consent-plus" model, drawing inspiration from medical jurisprudence, where any non-consensual bodily contact constitutes battery regardless of benevolent intent. While sexual interactions may warrant heightened ethical scrutiny, proponents of affirmative consent often underestimate the difficulties of applying such standards in complex, real-world scenarios. Situations involving emotional pressure, relational dependence, or fear of abandonment—common within romantic and marital relationships—demonstrate how consent may be formally expressed yet substantively compromised. In such cases, affirmative consent offers little guidance for legal adjudication, particularly where no physical evidence exists and parties share an extensive sexual history. Judges are frequently compelled to speculate, leading to inconsistent outcomes. Although theoretical solutions have been proposed, they often lack practical viability.

Ultimately, the most compelling justification for an affirmative consent standard lies in its commitment to safeguarding sexual autonomy and bodily integrity. Indian privacy jurisprudence, particularly following the *Puttaswamy* decision, recognises the right to be left alone as a core constitutional value. From this perspective, any sexual contact demands heightened respect for individual autonomy, irrespective of prior relationships. Affirmative consent seeks to minimise miscommunication and shifts the focus of legal inquiry from the complainant's conduct to the accused's actions. While the model is not without limitations, it represents a meaningful step toward recognising the personhood and agency of individuals subjected to sexual harm. The following section explores alternative solutions that may enhance justice in sexual assault cases without unduly compromising the rights of either party.

## Conclusion

The legal standards governing consent in Indian rape law remain at a critical juncture, reflecting both progressive transformation and enduring structural limitations. Legislative reforms, judicial interpretations, and evolving social consciousness have collectively expanded the understanding of consent beyond mere physical resistance to encompass voluntariness, autonomy, and contextual evaluation. The shift towards recognising consent as an unequivocal and voluntary agreement represents an important departure from archaic and patriarchal constructs that historically governed sexual offence jurisprudence. However, the persistence of ambiguity in statutory language, inconsistent judicial application, and unresolved exceptions—most notably marital rape—continue to undermine the promise of meaningful legal protection.

This study demonstrates that consent cannot be treated as a purely factual or mechanical inquiry. Rather, it is a nuanced legal and social construct shaped by power relations, cultural expectations, and institutional practices. While contemporary jurisprudence has rightly moved towards contextual assessment—particularly in cases involving deception, long-term relationships, and alleged misuse—this approach also exposes the judiciary to the risk of subjectivity and inconsistency. The challenge, therefore, lies in balancing the protection of sexual autonomy with procedural fairness and the constitutional rights of the accused. Over-criminalisation of intimate relationships, especially through vague or expansive interpretations of consent, risks diluting the legitimacy of rape law and may inadvertently harm both genuine victims and the justice system itself.

The debate surrounding affirmative consent further highlights the complexity of regulating sexual behaviour through criminal law. While the affirmative model offers a principled commitment to bodily integrity and shifts focus toward the conduct of the accused, its practical limitations in deeply relational and coercive yet non-

violent scenarios cannot be ignored. Criminal law, by its very nature, is an imperfect tool for addressing deeply embedded social and gendered inequalities. Expecting statutory reform alone to dismantle patriarchal norms or eliminate misuse is both unrealistic and counterproductive. As this paper has argued, sustainable reform must extend beyond legislative change and include judicial sensitisation, evidentiary reform, and structural training across the criminal justice system.

Ultimately, the future of consent jurisprudence in India depends on adopting a rights-based and evidence-driven framework that respects sexual autonomy without compromising due process. Clearer statutory guidance, consistent judicial reasoning, gender-sensitive yet balanced interpretation, and meaningful institutional reform are essential to achieving this equilibrium. Consent jurisprudence must evolve not as a reactionary response to social outrage or political pressure, but as a carefully calibrated legal doctrine grounded in constitutional values, human dignity, and justice. Only through such an approach can Indian rape law fulfil its dual mandate of protecting victims while upholding the rule of law...

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