

IMPLICATION OF CONSENT IN RAPE JURISPRUDENCE IN INDIA

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A feminine perspective of rape can be explained in a single sentence that if a woman does not desire to have proximity or physical contact with a specific man and still that man imposes himself and chooses to proceed against her will, it is a crime as heinous as that of rape, However, that is not and never has been the legally accepted definition of rape that too without any fault or accountability of women. The orthodox patriarchy came together and wrote their early covenants using the word rape of women to forge their self-attained male supremacy and power to take over, how then possibly, they could ever see rape to be a crime of a man against the very basic existence of a woman, that is her body autonomy. A woman was completely owned subsidiary and not someone who had an independent existence and hence the rape could not be seen or envisioned as a matter of consent of someone, who never existed and was referred as a commodity that is, women. In this pretext nor in any other, would there be a definition acceptable to these men be based on a man and his understanding of a woman's right to her bodily integrity. Rape entered the law through the gloomy corridors and the black doors as if it was a property crime of man against the other man whose property women of course were and viewed as.¹

Hence since late 1800s the international humanitarian laws always codified the prohibitions against sexual violence although such early prohibitions had a different etiologic exegesis of protecting women principally because of their status of being the property of men². Administered by the idea that women were owned by men and hence, were their property, rape of a woman was although, a violation of her honour but was considered to be an intrusion in the right of property of men.

The colonial courts till 19th century reflected a prejudiced attitude towards the rape victim. The famous 17th century English jurist Justice Matthew Hale described rape as reflection of dogmatism. Sir Matthew Hale propounds³ rape as an accusation easily to be made and heard to be proved and harder to be defended by the party accused though never so innocent the wrongful assumption about a woman's chastity and character generated out of patriarchal mindset was the reason that most of the 17th century codes were directed towards assessing the credibility of the victim instead

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¹ Susan B.; Against our Will: Men, Women and Rape, Fawcett Columbine, New York, 1975, P. 18.

² Patricia V. Sellers, The Prosecution of Sexual Violence In Conflict: The Importance Of Human Rights As Means Of Interpretation. Office of the High Commissioner for Human Rights (n.d.):7. Available at http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf.

³ Maija Jansson reopened consideration of these issues in M Jansson, "Matthew Hales on Judges and Judging" (1988) 9 R v Cullender and Dury (1665) 6 Howell's State Trials 647, Also see G Geis, "Lord Hale, Witches and Rape" (1978) 5 British Journal of Law & Society 26; D Lanham, "Hale, Misogyny and Rape" (1983) 7 Criminal Law Journal 148; G Geis, "Revisiting Lord Hale, Misogyny, Witchcraft and Rape" (1986) 10 Criminal Law Journal 319

of focusing upon the actions and the guilt of the accused women's past relationship virginity sexual involvement and behavior with men in general, were the facts taken into consideration while determining the outcome of a case of sexual violation. It is later that rape was acknowledged as a sexually violent behaviour that violates the honour of women and is articulated as a crime which violates bodily integrity and the human dignity of a female. Rape cannot be called merely an act of physical assault but it also disrupts the whole personality of the victim as it is said that a murderer destroys only the physical body of his victim but a rapist degrades the soul of a helpless female⁴.

The conventional definition of rape in India Penal Code 1860⁵ expounds it as an act of sexual assault with a woman against her will or without her consent or with a consent, where the consent is caused by misrepresentation or fraud or coercion or due to her unsoundness of mind, intoxication or if the woman is less than the age of 18 years⁶, kept 'the absence of consent' as the core determinative of the guilt. The seven descriptions given under Section 375 of IPC⁷ enlisting the circumstances wherein the sexual intercourse will amount to rape and are directly or indirectly based on consent or willingness of the victim. Law conventionally devised the act on three elements: Sexual invasion, willingness and force. Consent⁸ however is established as an agreement which is voluntary and unequivocal, established by the way of words or gestures or in any other verbal or nonverbal form of communication, vis-à-vis willingness of a woman to participate in any sexual act. Physical resistance, however, cannot be the exclusive determinant of lack of consent. The rape law in India remained unchanged for a century and it was the infamous Mathura case⁹ that created an uproar and eventually succeeded to lead for the Criminal Law (Amendment) Act of 1983. While the high court sentenced the accused and expounded that in the presence of persons, who were in authority, the girl felt helpless and reasonably her submission was a ramification of fear and could not be inferred as valid consent in the eyes of law and called it the case of "passive submission", Supreme Court reversed the judgment and reasoned it to be a peaceful affair between the parties on the ground that neither the girl raised any alarm nor there were any marks of injury on the body of the girl that could establish lack of consent. The verdict led to a lot of criticism and discussions over the distinction between submission and consent as, "Consent involves submission but the converse is not necessarily true nor is absence of resistance necessarily indicative of the

⁴ State of Punjab v. Gurmit Singh, 1996 SCC (2) 384.

⁵ Section 375 of The Indian Penal Code, 1860

⁶ Section 90 of IPC Provides that a valid consent is not a consent as is intended by any section of this code that is IPC, if it is given by a person under any fear of injury or under a misconception of fact and if the person doing the act knows or has the reasons to believe that the consent was given in consequence of such a force said fear or misconception or in case of consent of an insane person, if it was given by a person, who from the unsoundness of mind or due to intoxication, is unable to understand the basic nature and consequence of the act, to which he gives his consent or consent Of a child unless any contrary intention appears from the context if the said consent is given by a person who is under the age of 12 years.

⁷ Section 375 of Indian Penal Code, 1860

⁸ Explanation 2 explains that Consent is an agreement which is unequivocal and voluntary when the woman by the way of words gestures or any other form of verbal or nonverbal communication effectively communicate her willingness to participate in the specific sexual act. However if a woman does not physically resist to the act of penetration it shall not be the only reason of the fact to be regarded as giving consent to the sexual activity.

⁹ Tukaram and others v. State of Maharashtra, 979 AIR 185 1979 SCR (1)

consent.¹⁰ Simultaneous increase in the cases of custodial outrage and rape like Rameez Bee¹¹ and Maya Tyagi¹² etc. finally led to the Criminal Law (Amendment) Act of 1983¹³. A rule of presumption in the favour of absence of consent was established, based on the sole testimony of the girl and also putting onus to prove the contrary on the accused.

A rather sensitized approach towards the rape victims reflected in the judicial pronouncements and it was opined that during the process of prosecution while every autonomy should be given to the accused to test the accuracy and the of the victim-prosecutrix and the credibility of her version using the process of cross examination, but simultaneously the court must also ensure that such cross examination is not used as a mean to harass or to cause humiliation to further traumatize the victim of the crime¹⁴.

In 2013 after Verma Committee's report subsequent to Nirbhaya case,¹⁵ the Criminal Amendment Act of 2013¹⁶ brought in some of the most noticeable amendments that widened the scope of rape and made certain new additions in IPC but still there was no consonance in the various legislations as to the concept of age, consent and presumption, therefor¹⁷.

The judgment in *Re Independent Thought* case¹⁸, was an attempt to create concerted provision for the non-consensual sexual intercourse of a wife by her husband and the element of consent therein. The court, emphasized that the Exception 2 of section 375 recognizes the sexual intercourse with a girl child between the age of 15 and 18 years by her husband as an act not amounting to be rape, but Section 5 (n) of the POCSO Act penalizes the same act as an aggravated penetrative sexual assault. This exception clearly granted the husbands of the girl children between 15 and 18 years of age a blanket liberty. They were given freedom to have a non-consensual sexual intercourse without any prohibition under IPC. The court held that section 375 needs to be made in consistence with the constitution of India and directed to strike down the Exception 2 as far as it relates to a girl child below 18 years¹⁹. However, the courts repeatedly refused to deal²⁰ with wider issue of marital rape in case of women above the age of 18 years. The court reasoned the refusal as

¹⁰ Professor Upendra Bakshi, Professor Raghunath Kelkar and Professor Lotika Sarkar teachers of the University of Delhi wrote an open letter to the honorable the then Chief Justice of India, Dated: September 16, 1979, available at <https://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf>

¹¹ The Rameeza Bee rape case was a controversial incident in Hyderabad, India in 1978: The incident Rameeza Bee, a 26-year-old woman, was allegedly raped by four police officers in the Nallakunta police station.

¹² Maya Tyagi was raped in a police station in Uttar Pradesh.

¹³ Sections 376B, 376C and 376D were inserted along with Section 114A in Indian Evidence Act

¹⁴ *State of Punjab v. Gurmit Singh*, 1996 SCC (2) 384

¹⁵ *Mukesh & Anr v. State of NCT of Delhi & Ors.* (Nirbhaya Rape Case), (2017) 6 SCC 1

¹⁶ 354A, 354B, 354C and 354D in Indian Penal Code, 1860

¹⁷ Protection of Children against Sexual Offences Act, 2012, Juvenile Justice (Care and Protection of Children) Act, 2015 and The Prohibition of Child Marriage Act, 2006

¹⁸ *Independent Thought v. Union of India*, AIR 2017 SC 4904

¹⁹ The nature of the exception is capricious, whimsical and arbitrary. It also violates the right of the girl child and hence is not fair, just and reasonable, creating a clear violation of Article 14, 15 and 21 of the Indian constitution. It is also discriminatory and violative of Article 14 of the Constitution of India and inconsistent with the provisions of the specific law given under POCSO Act, which must prevent.

²⁰ *Ruth Manorama v. Union of India*, 2022 (14) SCALE 59, *RIT Foundation v. Union of India*, (2022) 3 Del 572, *Abdulla Khan v. Union of India & Ors.*, W.P. (C) No. 6217/2016, *Farhan v. State & Anr.*, W.P. (C) No. 964/2017, *Khushboo Saifi v. Union of India & Anr.*, W.P. (C) No. 5858/2017

indorsement of right to privacy²¹ and of sanctity of the institute of marriage, which clearly indicates a deviation from the consent-based establishment of guilt in the cases of rape. Bhartiya Nyaya Samhita, 2023 defines rape²² as non-consensual sexual intercourse with a woman that includes penetration, insertion, manipulation of any part of her body to do so, including oral and rectal penetration. The new law had kept intact the element of consent as source of guilt and has prescribed seven descriptions to further elucidate it, However the sexual intercourse by a man his own wife is still kept out of the purview of this section, if wife is not less than 18 years of age²³. Rape can be reckoned as a crime in which, the intent is not merely to overtake bodily autonomy of a woman but further to humiliate and degrade her. Such sexual invasion, nowadays, is hardly restricted to genital copulation but it may occur orally or through rectum as well. Nevertheless, it executed mostly using penal penetration as an instrument of a vengeance but it might include any implement through objects like bottles and fingers etc.²⁴ The sexual humiliation suffered by a woman in the cases of rape is not only violation of the person and her private space but also an injury to her mind, spirit and the sense of self.

Rape is not exclusively a male to female bodily offense; it is profoundly a portrayal of proclamation of supremacy and assignment of no value to the consent of woman in comparison to the whims and impulses of a man.

Entire rape jurisprudence clutches onto the component of consent as the determining factor in the case of rape. Because of the core male against female nature of rape, it is a deliberate distortion of the primal act of sexual intercourse wherein male joins with female in mutual consent. Law has to sought measures of relative, qualitative and interrelated concepts as moral, character, authority, force, fear, age and resistance etc. to satisfy the requirement of consent as the overriding male concern that beyond the female testimony, there were no mutual intercourse and subsequent vindictiveness and wrath but an objective tangible crime.

CONSENT: JURISPRUDENTIAL CONSTRUAL AND CLASSIFICATION

Consent as defined under BNS²⁵ is an agreement between man and woman that is unequivocal & voluntary in nature and communicates willingness to participate in the specific sexual act. Willingness can be communicated in several ways like; by words or gestures or in any form of communication, verbal or non-verbal. It is the prosecutrix's consent to the act that has the utmost bearing on the guilt in the crime of rape. Rape is an act of perpetrating sexual intercourse with a woman, who is not one's wife against her consent, whether her consent has been an outcome of force or any threat of force or due to intoxication or any such mental deficiency that makes her incapable of exercising rational judgment or if the woman is less than the arbitrary age of consent.

²¹ Puttaswamy v. Union of India, AIR 2018 SC (SUPP) 1841

²² Section 63 of the Bhartiya Nyaya Samhita

²³ Exception 2—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

²⁴ Mukesh & Anr v. State of NCT of Delhi & Ors. (Nirbhaya Rape Case), (2017) 6 SCC 1

²⁵ Section 63, Bhartiya Nyaya Samhita is *pari materia* with section 90 of the IPC.

The conventional approach based on involvement of force is no more a point of emphasis²⁶ and the paradigm has shifted on to the absence of consent²⁷ during the sexual intercourse being prosecuted.

CONSTRUAL OF CONSENT:

A woman's body is a part of her existence and not a plaything for a man and so it cannot be taken an advantage of by him, in order to satisfy his desires or his lust by fooling a woman or luring her into consenting to sexual intercourse because, it is he, who wants to indulge in it and if so happens, he, who commits this vile act of rape and in all sensitivity, deserves to be punished, suitably for the same²⁸. Consent always means a free will and voluntariness. It can hence be established using positive establishment of it or by exclusion of lack of it. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.²⁹

In case of *Hallman v. The Queen*³⁰ the court said that in order to constitute consent there did not necessarily have to be a complete willingness, even if a woman's consent to intercourse is hesitant, reluctant and grudging, if she consciously permitted, there was consent. Consent in the matters of rape includes the state of mind, which might range broadly from actual desire to a reluctant acquiescence³¹. In such criminal matters, the preposition of fraud vitiates consent and the consent obtained by fraud is considered no consent at all. But this needs to be applied beyond the fullest sense of words and with all the qualifications and allied factors³².

In the case of an adult female her understanding about the consequences and the nature of any sexual act must be reasonable and an intelligent understanding in order to constitute a valid component of consent³³. Consent, as per the implications created related thereto, in the penal provisions includes the application of mind and intelligence which is based on knowledge of its significance along-with the moral quality and a choice between the resistance and ascent.

A consent is valid in any given case, when it is accompanied with the capacity of a person consenting to understand and also appreciate the nature of the act committed and has a deep comprehension of the morality and the natural consequences which may attend it. Depending upon the facts and circumstances consent can be one and all; free, enthusiastic, reversed, informed and/or specific.

Hon'ble Supreme Court while discussing the question of interpretation of the element of consent said, that section 375 of IPC defines rape and indicates certain clauses; the first such clause operates where a woman is in the possession of her complete senses and hence is competent and capable of expressing her will the act was done against her will; the second clause deals with the

²⁶ After Mathura Case.

²⁷ Margaret T. Gordon & Stephanie Riger, *The Female Fear* 57-59 (1989). It is stated here that traditionally it puts the intense burden of prose on to the prosecutor to show that it was defendant who forced himself onto the victim and the victim asserted her lack of consent to her assailant's action.

²⁸ State of UP v. Naushad, AIR 2014 SC 384

²⁹ In Stroud's Judicial Dictionary (Fifth Edition) page 510.

³⁰ [1970] W.A.R. 2

³¹ R. v. Olugboja, [1981] 3 W.L.R. 585

³² Queen v. Clarence, (1888) 22 QBD 23

³³ Words and Phrases Permanent Edition Volume 8A at page 205

cases where it was done without her consent; while the third, fourth and fifth clauses talk about the consent, where it is ostensibly present but it does not create any valid defence in favour of the offender, because the consent present, was obtained by either putting her or any other person in whom she was interested in a fear of hurt or death. The expression against her will in the given section means that the act was done in spite of a clear opposition of the woman, an inference as to consent in such cases can be drawn on the basis of probabilities or evidences available in the case. Consent is also understood as an expression of an act of reasoning coupled with mindful deliberation and it denotes an active will, as a mental state of a person who permitted the doing of an act which is being complained of. IPC under section 90 deals with the expression consent although it does not define consent but it definitely gives an idea as to what cannot be interpreted as consent. Consent for the purpose of section 375 requires a voluntary participation which arises not only after contemplating the action after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercise the clear choice between resistance and assent. The question of the presence of consent or absence of consent is to be ascertained only after carefully going through all the facts and circumstances of a case³⁴.

Further the court³⁵ held that the consent may be expressed, implied or forced and misguided, derived willingly or through deceit. The entire distinction between rape and consensual sex lies in of consent and hence a very careful examination of not only establishment of consent but also the means or mechanisms used to obtain the consent must be taken into the consideration. Any false promise by an accused to marry the victim or any other mala-fide motive such as to satisfy lust of the accused is to be demarked as cheating and deception. However, there is a difference between breach of promise and non-fulfilling of false promise, where the consent involved was based on understanding the nature and consequences of any sexual indulgence and the prosecutrix agreed to have sexual intercourse on account of her love passion and then the accused cannot be blamed solely because on the account of circumstances, which were not foreseen, reasonably or beyond his control, He still could not marry her even though he had all the good intentions do so. Such cases, and justifiably so, should be dealt with, in a different manner and accused can be convicted only if the court reaches a conclusion that there was never any intention to marry, it was always a mala-fide and clandestine motive to use the promise of marriage to extract the consent.

Form, reason, deliberations and the mindset of the parties behind contemplations of assent, sometimes gives rise to a derivational understanding of the element of consent, as it is mental, idiosyncratic and disposed to change the nature and implication depending upon the character and the intricacies of the facts involved in a matter of rape. Consent can be in many forms including affirmative, passive, consent in marital Relationships etc.

Affirmative Consent:

Affirmative consent is based on “no means no” standard and aids women in proving unwanted sexual intercourse by plummeting the room for ambiguity in sexual encounters. Such consent is a

³⁴ In the case of *Kaini Rajan v. State of Kerala* (2013) 9 SCC 113, the Supreme Court in para 12 of the said judgment explained the essentials and parameters of the offence of rape.

³⁵ *Deepak Gulati v. State of Haryana* (2013) 7 SCC 675, paragraphs 21 and 24

women's willingness and affirmation to the sexual activity in question and can be established by proving that the women either initiated the sexual intercourse or she was willingly involved in it, without any threat, coercion, fraud, promise to marry or any other reasons that might deviate from impression of the consensual involvement³⁶.

In rape cases is question always is; whether or not there was consent. Ascertaining consent further involves the questions like; whether mistakenly, the accused believed the moves of the prosecutrix as consent or whether the prosecutrix effectively and clearly communicated her feelings, also whether the mistaken belief was a genuine mistake or it was only a ruse to defend his wrongdoing. The recent trend suggests affirmative model to find answers to the question of consent and incidental, thereto. Affirmative model follows a straight rule of interpretation wherein yes means yes and no means no however, the universal application as held by the court in the matter of Mahmood Farooqui³⁷ can still be confusing as there can be an informative consent or a positive denial but they might remain underlying or dormant creating doubt in the minds of the others.

Sexual act may also be an act of passion activated by libido there is possibilities of myriads of circumstances affirmative understanding of consent may not be useful to analyse every little nook and corner of such act. Although it is to be understood that the core basis of sexual relationship is equality and consent. Such consent has to be given and must not be presumed but every individual is different in terms of exposing his or her feelings and more so, practically most of the sexual intentions are based on non-verbal communications to not only initiate but also to reciprocate consent.

It will be wrong to analyze the consent by ignoring the gender binary prevalent in the patriarchal societies like India. The difference between how men and women behave during sexual activities and express consent or reciprocate, is very evident. Men are mostly seen as more open and to be the initiators of the sexual actions it is them who performs the more active part whereas women mostly are nonverbal and passively involved. Such gender relations and the stereotypical behavior influence sexually consent and its communication. In the modern world however where equality seems to be the buzzword the situation might be analyzed in different light now it is not wrong to expect that consent is needed to be viewed in clear and unambiguous way to reflect an agreement and its explicit affirmation outwardly. It must also understandably include cohort of withdrawal of the consent at any point of time.

In the case of Harnarayan Singh³⁸ the court held, that an act of a helpless resignation which is generated because of the presence of an unavoidable and inevitable compulsion, acquiescence passive giving-in and hence, non-resistance of volitional faculty is completely clouded by the fear or vitiated by any mean of duress, hen such submission cannot be deemed to be a valid consent as understood and intended by law. For women consent as a plea in any allegation of rape requires a voluntary participation after a careful exercise of intelligence based on the knowledge, significance

³⁶ Section 90 of IPC

³⁷ Mahmood Farooqui v. State (Govt of NCT of Delhi) decided on 25 September, 2017, by the High Court of Delhi, in CRL.A.944/2016.

³⁸ Rao Harnarain Singh v. State, AIR 1958 Punjab 123

and moral quality of the act. Bodily submission triggered due to a fear or terror cannot be equivalent to consent. There is an inherent difference between bodily submission and consent every consent involves an element of submission but the converse cannot follow in every case and hence a mere act of submission does not necessarily involve consent for a girl. Element of consent in order to relieve a person from an act of criminal character, like rape, must be present beyond bodily submission and must be based on reasoning along with deliberation after mindfully. The balance of good and evil on each side of the act were weighed. Also, with the capacity to willfully submit and give consent to an act inherently includes the power to withdraw such ascent according to ones well or pleasure or the incidental.

Passive consent:

In the case of *Tukaram v. State of Maharashtra*³⁹ the court said that there are possibly two kinds of consents: willing consent and passive consent. Willing consent is an extension of affirmative consent while passive consent is where there is no clear affirmation of the willingness but the pattern of involvement of the prosecutrix, itself passively reflects, the presence of consent. The reasoning was used in the case of *State Of Himachal Pradesh v. Pawan Kumar*⁴⁰, wherein the court said that the victim continued to visit the secluded area of the Char Kufri forest, where the alleged rape for four to five times happened with her and raised the factor only after the factum of pregnancy was disclosed. Lack of injury and absence of resistance also indicates towards the presence of passive consent. The court concluded that the previous and subsequent behaviour and conduct of the prosecutrix are the material factors and hence establish the presence of passive consent in the alleged rape matter as per the Indian Evidence Act of 1972⁴¹.

In the case of *Kenny Rajan v state of Kerala*⁴² the court while discussing the parameters of consent in the offense of rape said that the expression against her well means that the act must have been done in spite of the opposition of women. Presence of consent can only be established with a very careful monitoring and analyzation of facts, circumstances, behaviors and past conducts of the parties involved⁴³. Not all not all submissions can be construed as best of consent as it was held in the case of *Anurag Soni*⁴⁴ the victim agreed to develop sexual intimacy and had the sexual intercourse believing the promise of marriage as made by the accused. For none of such sexual behaviour the consent of the prosecutrix can be measured as a valid passive consent as it wasn't based on free will but was driven by the false promise of marriage. In the matter of *Vijayan Pillai*⁴⁵ While deciding the question as to whether the circumstances in the case were sufficient to spell out consent or not, the court said that consent must mean an active will in the mind of the person to freely permit the doing of the act of sexual intercourse and also the knowledge as to what is to be done and what is the nature of the act that is being done. Consent supposes a physical power, a

³⁹ AIR 1979 SC 185

⁴⁰ *State Of Himachal Pradesh v. Pawan Kumar Son of Sh Sanget Ram* on 7 January, 2015, by the High Court of Himachal Pradesh, in the Cr. Appeal No.485 of 2008

⁴¹ Section 8, Indian Evidence Act of 1972: Motive, preparation and previous or subsequent conduct

⁴² (2013) 9 SCC 113

⁴³ *State of H.P. v. Mango Ram* (2000) 7 SCC 224

⁴⁴ *Anurag Soni v The State of Chhattisgarh*, AIR 2019 SC 1857

⁴⁵ *Vijayan Pillai @ Babu v. State of Kerala*, 1989 (2) K.L.J.

moral power of acting and a serious, determined and free use of these powers. It is safe to say that every consent to act involves submission but this by no meaning infer that a mere submission involves consent.

Similarly, submission of the body under the fear of terror cannot be construed as a consent for the sexual act consent in the rape matters requires voluntary participation in which can be categorized as exercising the choice between resistance and ascent whether consent is there or not cannot be construed passively, on the basis of submission only but need to analyzed carefully on the basis of the relevant circumstances⁴⁶. The court upheld the presence of consent in the case of Uday Singh⁴⁷ and held that Consent of the prosecutrix is based on the deep love for the accused. She permitted him liberties and stealthily went out with the appellant to lonely places and had physical relationship, which is very usual in the cases where two people are in love. The court further stated that there were several times promises made by both of them to get married but it was difficult to impute that the appellant had knowledge that the prosecutrix was consenting as the consequence of the promise of marriage. She willingly involved to have sexual intercourse due to the love she had for him and not because of the said promise to marry establishing consent in a passive manner.

Consent In the Marital Relationships:

As per the Chief Justice of England Sir Matthew Hale⁴⁸ a husband cannot be held guilty of a rape committed upon his lawfully wedded wife because their mutual matrimonial contract builds an irrevocable matrimonial consent wherein the wife gives up herself to the husband which she cannot retract later.

The philosophy⁴⁹ behind the immunity given to the husband in the case of marital rape was that there could be no crime of rape by a husband since the consent of the wife to her husband was a permanent consent established perpetually as part of the marriage bows and could not be withdrawn at any point of time.

In the matter of Re Independent Thought case⁵⁰ the court while discussing the issue of sexual intercourse between a man and his wife where the wife is a girl between the age of 15 and 18 years held that Exception 2 of the then rape law under Section 375 of IPC answered this in negative creating an unnecessary and artificial distinction between a married girl child and an unmarried girl child which was a clear violation of Article 14, and 21 of the Constitution. The court while referencing to the Verma Committee report⁵¹ stated that rape is rape, irrespective to the

⁴⁶ State of H.P. v. Mango Ram (2000) 7 SCC 224.

⁴⁷ Uday v State of Karnataka, AIR 2003 SC 1639, Yedla Srinivasa Rao v. State of A.P, AIR ONLINE 2006 SC 40

⁴⁸ Supra Note 3.

⁴⁹ BBC news, "Calls for change in Westminster's Culture"; November 1, 2017

⁵⁰ Independent Thought v. Union of India, AIR 2017 SC 4904

⁵¹ The Verma Committee in its report stated that it is an outdated concept and notion that a wife is nothing more than a servant of the husband. The committee gave reference to the decision made by the European Commission of Human Rights which endorsed a very progressive conclusion that a rapist would remain a rapist regardless to his relationship with the victim. The report asserts on certain points given below:

There is a long-outdated notion of marriage that regarded that wives are no more than the property of their husband and hence the exemption to marital rape was embedded in the concept of rape according to the principle of converter in the common law a wife was always deemed to have consented for the sexual consummation of marriage

relationship. Women no more can be considered as chattel of men and marriage is not ownership but a partnership between two equal human beings and hence immunity to the rape based on marital relationship was held to be unreasonable. However, the court refrained from making any observation on the marital rape of women of the age of 18 years or more and focused on the age of consent vis-à-vis marital rape of a minor wife. The court agreed that the age of consent for any sexual intercourse definitely was 18 years and there was no dispute about the validity of consent and the significance of age therein. If a child less than 18 years of age cannot comprehend and give a valid consent, how reasonably a married girl of less than 18 years of age can understand the nature of sexual acts, comprehend and understand the implications on her body and give a valid consent for the same. The distinction established in Exception 2 on the basis of marital status was held to be unreasonable and court struck down the exception from section 375. The Bhartiya Nyaya Samhita 2013 incorporated Exception 2⁵² granting all the sexual intercourse and acts immune between a husband and his wife if the wife is 18 or above 18 years of age.

Consent is an act of reason that encompasses three things; mental power, physical power and a free and serious use of both of them⁵³. Any consent which is derived by coercion, intimidation, force, mediated-imposition, undue influence etc. is to be treated as an allegory or delusion and in no case can be called a deliberate and free act of a mind.

While discussing consent and its significance between the marital sexual acts in Marital Rape case⁵⁴, Justice Y. Chandrachud questioned that does a woman or a man loses her/his sexual autonomy just because they are married. He further answered the question in no and said that the right to say no to sex with the husband or the wife should always be there, even after marriage. However, the task of making or amending the law with progressive interpretation of the word consent was left onto the government.

at the time of wedding with her husband at his moreover it was a consent which was irrevocable. The report quoted Sir Matthew Hale and said husband could not be guilty of rape her own lawfully wedded wives for their mutual matrimonial consent and the sacred contract between the husband and the wife in which the wife willingly gave up herself in this kind to her husband and now she could not retract from it.

The Committee further stated that this immunity in many major jurisdictions has now been withdrawn. In the countries like England in 1991 the women and their status had changed and there is a remarkable alteration from the concept established to buy hail. Lord Keith declared that in the modern times marriage should be regarded as the partnership amongst the equals and no longer could it be understood as an alliance wherein the wife is considered as mayor subservient shatter of the husband.

74. The view is backed up by the judgment of European Commission of Human Rights in the case of C.R. v UK Publ. ECHR, Ser.A, No. 335-C, in which it was concluded that relationship does not change the character of an act a rape will be a rape irrespective or regardless to the relationship of a rapist with the victim which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Significantly it was all acknowledged that common law has changed in sync with the fundamental objectives of the convention of human rights not only in letter but in very essence because no human right is possibly existent Without dignity and freedom the statutory recognition to the same principle is given in the Criminal Justice and Public Order Act of 1994.

⁵² Exception 2—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

⁵³ In Jowitt's Dictionary of English Law II Edn. Vol. 1

⁵⁴ RIT foundation & Ors. v. The Union of India & Ors, Men Welfare Trust (Intervenor/Respondent, WS filed on 02-03-2022, in the case of, RIT Foundation v. The Union of India & Ors., Writ Petition (Civil) No. 284 of 2015 available at https://www.menwelfare.in/wp-content/uploads/2022/03/final_ws_jsd_mwt_02mar22-1.pdf

CONCLUSION:

Assessment of consent is an intricate issue regulating sexuality and a close assessment indicates that still there are myths, stereotypes and prejudices amongst the people present in the courtrooms reflecting, in the way consent is being interpreted, even after so many decades and amendments in the law related, there too. There is definitely a need of change in the mindset and the principles of interpretation so that an in-depth understanding can be created with respect to not only the elements of the consent but also the philosophy behind consensual sex between two adults. Taking affirmative standard of consent as the only way of ascertaining the consent would further create havocs, if not corroborated with the social normative and cognitive behaviours. An effective deterrence can be created by appropriate awareness and training for familiarizing people about the laws, penalty, related victimology. A sensitized approach, if adapted by the key criminal justice players of the society, a major paradigm shift can be created.

REFERENCES:

- Barn, R. & Kumari V., (2005): Complaint Credibility in Rape Appeals British Journal of Criminology, Vol 55
- Bhagwati, P. (2020): Awareness and Attitude Towards Reproductive and Sexual Health Rights and Practices Among College Student: An Empirical Study, Indian Journal of Science and Technology, Vol.13(25), 2502.
- Burgin, R. (2019): Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform: British Journal of Criminology, 59(2), 296.
- Byrnes, C. (1998): Putting the Focus Where it Belongs: Mens rea, Consent, Force, And the Crime of Rape. Yale Journal of Law and Feminism, vol. 10, 277, 287.
- Craig, E. (2021): Private records, Sexual Activity Evidence, and the charter of Rights and Freedoms. Alberta Law Review, 58(4), 773.
- Curtis, J., & Burnett, S. (2017): Affirmative consent: What do college student leaders think about “yes means yes” as the standard for sexual behaviour? American Journal of Sexuality Education, vol, 12, 201.
- Datta, A. (2021) French Court Rejects Migrant Afghan Rapist’s ‘Culture’ Defense. Vision Times 7 July.
- Ellison, L., & Munro, V. (2013): Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations. The International Journal of Evidence & Proof, 17(4), 299.
- Garg, A. (2019): Consent, Conjugalinity and Crime: Hegemonic Constructions of Rape Laws in India. Social & Legal Studies, 28(6), 737.
- Justice Verma Committee (2013) Justice Verma Committee Report on Amendments to Criminal Law