

The Case for Affirmative Consent

What is the issue?

The present definition of consent is expressed in a language of contradiction and creates a problem in sexual assault cases.

What is consent?

- The **Nirbhaya act or Criminal Law (Amendment) Act, 2013** defines consent as the unequivocal voluntary agreement to participate in a sexual act.
- This means that there needs to be clear expression of willingness to participate.
- The act further clarifies that the absence of resistance will not imply consent.
- **Exception in the case of marital rape** - Even if the husband forces the wife to participate in any sexual activity, it is not a crime.
- **Exception is in the case of statutory rape** - In India, the age of consent is 18 and any consent given by a minor is not taken to be valid.
- Consent hinges on an active and conscious exercise of freedom and the ability to make a choice that is deprived of coercion.
- It is not a blanket immunity given to a series of acts but a form of reassurance given by you to your partner for each of the acts.

According to the Indian Penal Code (IPC), only woman can get sexually assaulted or raped. In case a man has been sexually assaulted or raped, he can file a case under criminal force or assault. However, boys under the age of 18 are protected under The Protection of Children from Sexual Offences Act, 2012.

What does the Law Commission report say on consent?

- The Law Commission of India's 84th report sheds light on why want of consent is a crucial determining factor in all prosecutions of rape.
- It elaborates how consent is the antithesis of rape.
- The report recommended substitution of the expression free and voluntary consent with an opaque consent as the law now holds.
- This would have helped in distinguishing consent from an assumption implied by silence.

What about the judiciary's view on consent?

- The Delhi High Court, in the **Mahmood Farooqui rape case** held that a "feeble no" may mean a "yes".
- The Supreme Court even upheld the Farooqui acquittal.

- It raised the question of “Would a woman’s passive silence be regarded as the absence of consent and accordingly, abolish the presumption of consent for future case laws to come?”

How about the issue in other countries?

- **CEDAW** - The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) has recommended that the definition of rape in domestic legislation be amended to make lack of consent a central requirement of the law.
- The report proposed a new definition of consent that mandates an unequivocal and voluntary agreement with proof of steps taken by the accused to ascertain whether the complainant was consenting and that the act did not take place under coercive circumstances.
- **California** - In 2014, California adopted an affirmative consent standard which is defined as “affirmative, conscious, and voluntary agreement to engage in sexual activity”.
- **Queensland** - In 2022, a government-appointed panel in Australia’s Queensland recommended a new law with affirmative consent laws.
- **India** - India is struggling to come to terms with the help of a statutory definition.
- It is time for India to move to an affirmative definition of consent to plug the loopholes that appear in the present definition of consent.

*Affirmative consent can be defined as “**informed, voluntary, and active** through the demonstration of clear **words or actions**” wherein a person has given their permission to engage in consensual sexual activity. Such affirmative consent can be **withdrawn at any time**.*

References

1. [The Indian Express | The case for affirmative consent](#)
2. [Legalserviceindia | All you need to know about consent under rape law](#)