



## **Examining Consent Under the Indian Penal Code as a Defence**

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### **1.1 Overview**

The Indian Penal Code is the country's officially recognized criminal code. It aims to address every facet of criminal law. Consent is often expressed consciously and freely of choice. It requires a deliberate process of thinking utilizing one's intelligence based on awareness of the moral ramifications and significance of the deed. It consists of three components: the capacity to use them freely, mental toughness, and physical strength.

The legal principle known as "Volenti Non-fit Injuria" is the basis of the consent defence. It implies that a person waives his right to pursue legal action for any harm that may arise from his agreement to be hurt or exposed to danger. The victim who gave their agreement might have done so verbally or subtly by acting in a certain way. Theoretically, consent protects a person from all non-fatal crimes, even murder.

In every criminal case, the establishment of responsibility depends heavily on consent. Consent determines whether to lessen the gravity of an offence. "Sections 90, 91, and the explanation of section 92 provide the principles guiding these provisions, while sections 87, 88, 89, and 92 actually recognise this defence in various forms."<sup>1</sup>

This argument states that the injury caused by the Act in this way because of the consent is a criminal obligation to the offender if a competent adult freely consents to a crime against himself and understands that they have consented. The core of the defence is the great value that comes with an individual's autonomy in a free society. The argument concurs to support consent if a mentally competent adult wishes to become a victim of a crime. Nevertheless, fake consent allows the giver—who may be extremely young, inebriated, mentally retarded, or late—to make a rational choice about whether to assent based on knowledge and comprehension. It will be ineffective if it cannot be completed. When dealing with guardians or incompetent individuals, it may be essential to seek consent from a third party who has been legally prosecuted in relation to them, if the circumstances warrant it.

### **1.2 Literature Review**

1. Sushant Agrawal's essay on permission as a defence under the IPC provides a thorough explanation of the various forms of consent and the parameters of Section 89. Notable rulings have also been clarified by the author. Additionally, he has provided a thorough explanation of the situations in which Section 89 benefits cannot be claimed. Still, the study is limited to Section 89. The additional Indian Penal Code Sections that address the same subject have not been addressed by the author.
2. A thorough explanation of consent in cases of physical injury, consent in cases of rape or sexual assault, and the necessary components to prove consent are provided in an article titled Consent Defence in Criminal Cases<sup>4</sup>. The essay does not, however, address the parameters and application of Section 89.
3. Consent as a general exception: The Indian Penal Code's Sections 87, 88, and 89 are explained in full at Sections 87 to 89 of IPC<sup>5</sup>. The article provides a detailed analysis of each section, and it is made more engaging to read by using images to clarify each section. An overview of the situations in which permission is not a defence under the Indian Penal Code may be found in the article.
4. In an essay titled "Consent and Will with Emphasis on Section 375 of IPC," Darshit Vora<sup>6</sup> discusses consent as a defence under the Indian Penal Code, specifically mentioning Section 375. The author distinguishes between permission and volition and goes into great length about the many forms of consent. The essay is more engaging and useful to read because of the usage of case laws and examples.

### **1.3 Objectives of Study**

The goals of this investigation are as follows:

1. to understand the relevance of the Indian Penal Code's consent defence.

2. to comprehend the prerequisites for arguing the consent defence.
3. to comprehend the parameters and applicability of IPC Section 89.
4. to research the adjustment made to Section 375 of the IPC regarding consent.
5. Sections 87, 89, and 928 provide exceptions to the definition of consent.

#### **1.4 Questions for Research**

1. What does the Indian Penal Code's definition of consent mean in terms of defence?
2. Do consent and surrender have the same meanings?
3. Is it possible to raise permission as a defence in every situation?
4. What prerequisites must be met to use consent as a defence?
5. Does the term "consent" include any exceptions?

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## **2.1 TYPES OF CONSENT AND THE REQUIREMENTS FOR OBTAINING CONSENT**

### **2.1 Different Consent Types**

The issue of consent only comes up in relation to criminal law; explicit consent is defined as something that is basically legitimate whether it is provided vocally or in writing, whereas implicit consent demonstrates that implicit consent has been granted by an individual's behaviour. Although it is challenging, implicit permission often has a finite duration. For instance, the period of a subscription to any membership starts the day it is received.

### **2.2 Requirements for arguing the consent defence**

The Code's Sections 87, 88, 89, and 90 address several requirements that must be met to raise consent as a defence. The following is a list of these requirements:

1. a someone who has accepted the danger.
2. Unless the context suggests otherwise, the individual must be at least 12 years old and not insane. The legal guardian's or that person's responsible party's consent is then required.
3. Without fear or misinterpretation of the circumstances, consent can be granted.
4. It must be expressly or subtly consented upon.
5. It is not the intention of consent to cause death or serious damage.

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## **3.0 SECTION 375 AND THE CORRESPONDING AMENDMENT**

### **3.1 Assent Under Indian Penal Code Section 375**

It is described as "unambiguous voluntary consent" under Section 375 of the Indian Penal Code when a woman communicates her desire to perform through spoken or nonverbal cues.

It is evident from Section 90 of the IPC that permission cannot be interpreted in the manner specified by the section, particularly if consent is provided by someone under "misrepresentation of facts," assuming it is obtained at all. It is not legally recognised and is not referred to as genuine consent.

Rape can include consent in the following situations:

1. if the deed is done in accordance with her wishes.
2. if the action is taken without her permission.
3. if done with her permission, it doesn't matter if it was enforced or if she gave in out of fear of harm or death.
4. She feels that she has been legally married to someone else with her own consent—not her husband's.
5. When providing permission, the individual must not be under the influence of alcohol or other drugs, be mentally disoriented, or be allowed to offer consent at that moment. If not, we would not be able to comprehend the nature of conduct and its effects. She concurs as well.
6. Whether or whether she gives her permission, if the individual is under 16 years old. For instance, penetration is enough to initiate sex that may result in rape.

### 3.2 Section 375 has been amended.

In compliance with the 2013 Criminal Code Act (Amendment), this provision has been updated. Parliament then proposed this modification, sometimes referred to as the Nirbhaya Act, to alter Article 375. Removing the vagueness from the previous legislation and imposing harsh punishments for engaging in specific sexual acts were two of the primary drivers for the amendment. A definition of penile penetration into the vagina, anus, mouth, urethra, or any other item or body part put into a female by others was added to the statute during the amendment. Sexual assault resulted from applying on their body parts from what was performed. As a result, it was also stated that female mouthing or touching private parts constituted sexual coercion.

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## 4.0 SECTION 89'S SCOPE AS WELL AS SECTIONS 87, 88, 89, AND 92

### 4.1 Exclusions from the definition of "consent" under Sections 87 through 89 and Section 92

According to Section 87 of the Indian Penal Code, an act carried out with the knowledge or intent to cause death or serious injury will not be considered unlawful if the person providing the consent, which can be expressed or implied, is at least 18 years old and has suffered the harm.

Section 88 stipulates that an act carried out in good faith for an individual's welfare with that person's express or implicit permission must not be considered unlawful if the conduct produces or is likely to cause harm to a person.

According to Section 92, if an act is performed without consent, it must be done so in good faith or for the benefit of the individual, and the person for whom it is performed must be either incapable of giving consent or unable to understand it, or their guardian must be unable to obtain the consent of the individual in question.

### 4.2 The Indian Penal Code's Section 89 and Its Scope

This Section states that any act carried out by an individual that is likely to harm or has the potential to harm a child under the age of twelve or an insane person will not be considered an offence if it is carried out with the guardian's express or implied consent, in good faith, or for the benefit of the child or insane person.

Section 89 of the Indian Penal Code addresses minors under the age of twelve and those suffering from mental illness who lack the capacity to legally grant permission due to their inability to fully understand the nature and ramifications of their actions. Therefore, consent will be given on their behalf by a legal guardian or other responsible party. The offender must unavoidably behave in the injured party's best interest.

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## 5. LANDMARK DECISIONS

The following are a few historic rulings:

### 1. Dasrath Paswan v. State

This case concerned the defendant who had three years in a row of failing his test. He chose to take his own life because he was depressed over these setbacks. His spouse requested that he take his own life after killing her. But before he could commit himself, he was caught for murdering his wife. He was not, however, accountable because his wife's agreement was granted free from coercion or fear.

### 2. Empress Poonai Fattemah v. (1869)

In this case, the perpetrator—a snake charmer—convinced the victim to get a snake bite. In addition to convincing him, he had reassured him that the accusers could keep him safe. Because he thought the accused could heal snake bites, the dead provided his consent in this particular case. Because he didn't have the legal right to defend himself based on the permission of the deceased, the accused was thus pronounced guilty.

### 3. State v. Rao Harnarain Singh Sheoji Singh (1957)

The defendant in the previous instance served as both an additional public prosecutor and a counsel, demonstrating the distinction between consent and submission. In order to appease the sensual thirst of Rao Harnarain and his associates, he had his renter offer his wife. She gets ravished all night and dies suddenly as a result. The suspect claimed he shouldn't be found guilty as the wife arrived on her own and the husband gave his approval while he was being charged. The court reached the conclusion that "all consent entails submission, but not all submissions entail consent." In front of the accused in this instance, the deceased had submitted. The husband was also warned with dire consequences. The court judged Ham to be guilty.

### 4. The culprit in *Jayanti Rani Panda v. State* was a teacher who frequently went to the complainant's home. They eventually fell in love with one another and made a vow to wed. The two developed a sexual relationship as a result. The candidate found out she was pregnant and felt pressured to tie the knot quickly. The defendant broke his word and stopped going to her house when her applicant refused to consent to her abortion.

The defendant is the subject of a rape proceeding. Since the defendant freely consented to several sexual encounters and the public prosecutor's office could not conclusively demonstrate that the defendant had inadvertent sexual contact, the court did not apply Article 90. The defendant was not deemed responsible for marriage by the court.

5. The complainant in *Bishambher v. Roomal* had sexually assaulted a girl. A crowd of two hundred gathered to punish him. In order to identify a different route, three municipalities got involved. When the plaintiffs consented to follow the Panchayat's ruling, the throng gathered in front of the Panchayat. The complainant was ordered by the panchayat to do a dark face tour of the hamlet. All intervenors were detained and charged under sections 323 and 502 of the IPC. The defendant acted in good faith and without any criminal intent to escape the serious repercussions of the applicant's prior activities, and the court determined that the defendant was allowed to seek relief under Section 87 of the IPC.
6. In *Udaya v. State of Karnataka*, the petitioner was granted approval to engage in sexual relations by the office of the public prosecutor. Defendant Udaya professed his love and allegedly made a commitment to wed the prosecutor later. She fell pregnant after making the intentional decision to move in with him. Prosecutors subsequently accused the defendant of rape, claiming that she consented under false pretences that defendant Udaya would wed her.

The prosecution refutes the argument that defendant Udaya was not at fault for the rape; rather, it is her intention to live with the defendant and have a child. The prosecution is aware that the two are from different castes, and the family turned down their request. In this instance, consent to a sexual encounter cannot be predicated on a misinterpretation of the circumstances. In terms of criminality, the fraudulent promise of marriage is not a fact.

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## 6. Case law analysis under Section 493/496

### 1. Sri Parag Buragohain v. Sri Jintu Buragohain

It was alleged that Sri Jintu Buragohain married the complainant's daughter in a fictitious deed. The complainant also claimed that the accused had forced his daughter to think she was legally married to him and that he had given her instructions to engage in sexual relations with her as part of the marriage.

The accused abandoned her without telling her while they were living together. Furthermore, it was discovered that the accused had purposefully married his daughter to have sex. Bail was granted to the accused. The Indian Penal Code's Sections 493 and 496 were used to create formal charges.

Section 496 of the IPC pertains to this specific case since the estimates pertain to the entire case and the plaintiffs who married the accused who had committed illegal marriage abuse generated insufficient proof.

In light of the foregoing debate, the prosecutor was thus promptly condemned to jail under Section 493/496 of the IPC for his failure to establish the accused's innocence beyond a reasonable doubt.

### 2. Sukaroo Kaviraj v. The Empress 1887

A skilled physician performed surgery on his patient. Internal piles were causing the patient's distress. With just a regular knife, the surgeon performed surgery on the crucial organ. Following surgery, the patient in question passed away from severe haemorrhage. Following the ruling, the cause of death was an act of negligence and premature death. The court determined that because Mr. Scallou acted without good faith, he was accountable for his demise.

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## 7. CONCLUSION

The study leads to the conclusion that consent is a defensive mechanism. Nonetheless, there are circumstances in which submission and consent serve different purposes, and both implicit and explicit consent have their advantages. The Indian Criminal Code's Sections 87, 88, 89, and 92 are closely linked. The Criminal Code's Section 357 emphasises the value of consent, whereas Section 90 is practical. Under the idea of consent, criminal culpability may be expressly taken into account based on the particular facts and circumstances of each instance. A suitable definition of consent may be found in Section 375 of the Indian Penal Code. On the other hand, the will is still vague. Because consent and will are not clearly defined, they are taken to mean the same thing. As a result, the court's ruling is unclear and fails to provide the victim the justice they deserve. Consequently, it is imperative that the term of a will be formally established under Indian criminal law. The Indian Penal Code's Section 375 is one of the most hotly contested parts because of the recent amendments that have increased the frequency of rape cases in India and significantly altered this section, however there are still many. In summary, consent is a defence that can be employed, but not always. The distinction between consent and surrender is rather evident.

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## REFERENCES

### Statutes

Indian Penal Code

### Books

1. KD Gaur Indian Penal Code
2. Dr. T. Padma and K P C Rao, Legal Research Methodology, 31(1st ed. Asia Law House, Hyderabad 2011)

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**Articles**

1. Consent as a general exception – Section 87 to 89 IPC, Writing Law, <https://www.writinglaw.com/consent-as-general-exception-ipc/> ( Last Visited 10th November, 2021 6:00 PM)
2. Darshit Vora, Consent and will in emphasis with section 375 of IPC, I Pleadings, <https://blog.ipleaders.in/consent-will-emphasis-section-375-ipc/> ( Last Visited 11th November, 2021 6:00 PM)
3. Sushant Agarwal, Consent As a Defence Under IPC, I Pleadings, <https://blog.ipleaders.in/consent-as-a-defence-under-i-p-c/>, (Last Visited 12th November, 2021 7:00 PM)
4. Defence of Consent, Law University of Kashmir [.http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/DEFENCE%20OF%20CONSENT.pdf](http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/DEFENCE%20OF%20CONSENT.pdf) (Last Visited 13th November, 2021 6:00 PM)