



## Review Article

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### LEGAL AND ETHICAL THOUGHTS ON ASSESSMENT OF CONSENT: A REVIEW

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#### ABSTRACT

In terms of ethics, "consent" gives a patient the freedom to choose which treatments to accept or reject. Such self-determination is protected by the law pertaining to medical consent, which permits treatment decisions to be made for patients who are incapable of making them for themselves. When a competent patient gives his or her consent voluntarily and in accordance with the information that has been given to them, it is considered valid. What needs to be done, why it needs to be done, and what the treatment's expected risks and effects are all need to be made clear. Patients who are competent comprehend the information given to them, retain it in their minds, and apply it to decide whether to accept or reject treatment. In the absence of a legal advance directive, medical care decisions made by third parties (doctors, defined proxies, or the courts) must be made and determined in the patient's best interests. Due to patients' lack of agreement or insufficient consent for various operations, there has been a rise in malpractice litigation in India in recent years. The clinical implications of consent in Indian medicine, as well as its legal and ethical constraints, are not well known to many doctors. In order to provide effective legal protection in a variety of situations, this paper addresses the ethical, legal, and salutary implications of consent in terms of indeed, false, perhaps situations.

**Keywords:** Consent, Legal and Ethical issues, Medico-legal care, Ayurveda

#### INTRODUCTION

In the last several decades, the paternalistic perspective of medicine—where the physician determined what was best for the patient—has given way to a conversation over whether, in some circumstances, complete disclosure might be harmful to the patient. In the past, there was an unequal bargaining partnership between the patient and the doctor in contracts for services, with the doctor's unique knowledge giving them the upper hand. With informed consent, the patient is supposed to be forced to provide the information that will enable them to negotiate on an equal footing with the doctor. Therefore, informed consent aims to change the nature of the doctor-patient relationship to one that is contractual in nature, since contractual partnerships are believed to foster personal autonomy and choice.<sup>1</sup>

"Two or more persons are said to have consent when they agree upon the same thing in the same sense," according to Section 13 of the Indian Contract Act. Though consent is commonly understood as permission, the law views it as an agreement that is enforceable by law. Consent delineates an agreement, in sentiment opinion, a course of action etc. The nature of consent varies according to need, and failure to obtain the same that can make the doctor liable for prosecution. One or more specific goals must be tied to the permission, and these goals must be adequately articulated. In order for the processing of special categories of personal data to be justified by consent, the data subject's information must specifically mention this. Information about

other contractual issues must always be clearly distinguished from the information required for informed consent.<sup>2</sup>

#### Consent: An Approach towards Medico-legal care

It is vital to consider the features and terms of permission. According to most consent-based theories of legitimacy and obligation, consenting parties need to be logical agents who can distinguish between moral concepts like right and wrong. Consent is significant only if it is understood that while people will naturally dispute on the nature, extent, and requirements of reason and morality, they must at least be aware of these distinctions. Consent must also fulfill a few requirements in order to be considered binding: it must be freely offered, and people giving consent must be adequately informed about the terms they are agreeing to.

Actual consent, whether expressed or implied, is crucial to establishing the legality of contracts and the weight of moral commitments in contemporary moral and legal philosophy. However, in political theory, the justification of specific conceptions of justice and legitimacy has come to rely heavily on hypothetical consent. Consent may be either implied or expressed which again can be oral or written.<sup>2,3</sup>

**Implied Consent:** When Consent is freely given, it need not be expressed or articulated. This includes consent by acts and conduct and consent presumed though never given. Thus, it is a question of fact dependent upon circumstances of case. Normally,

it is presumed that when a person approaches a doctor, he/she has implied consent for his/her physical examination, which is generally limited to inspection, palpation, percussion and auscultation. For rectal or vaginal examination expressed permission is needed.

**Expressed Consent (Informal Consent):** It could be orally expressed in the presence of witness (and needs to be proved in a subsequent trial by a witness) or in written form, when besides clearly stating who is consenting to whom and for what purpose it is also clarified that this is being freely and voluntarily being given having a clear understanding of the nature and consequences of the act, oral consent is enough for minor examination. This is relevant in all surgical operations or similar maneuvers undertaken by the doctor, which despite all the precautions do carry some risk.

**Informed Consent:** This is a rather new concept based on the patients' right to know what disease he/she is suffering from, how the diagnosis is arrived at and what treatment is being planned, the wishes involved and if any alternative treatment is available.

The physician explains everything in detail in the patient's language and the signature of patient/attendant should be obtained along with that of neutral witness. Finally, the doctor should countersign it.<sup>3,4</sup>

#### Lawful and Moral facets of Consent

- a. Criminal Liability and Consent: Section 87 of the Indian Penal Code states that nothing is illegal if it is done without the actor's knowledge or intention of causing death or serious harm, provided that the act is carried out with the injured party's consent—who must be at least eighteen years old—to suffer such harm, whether explicitly stated or implied.

This provision specifies that 18 years old, which is also the age of majority under the Majority Act of 1875, is the legal age of consent, particularly to risk damage. The phrase "by reason of harm it may cause" (Sec. 321) further qualifies this action by stating that even if death was caused, it was not intended or known to be likely. This phrase has also been used to define culpable homicide (Sec. 299), voluntarily causing hurt (Sec. 321), and voluntarily causing grievous hurt (Sec. 322).

- b. According to section 88 of the Indian Penal Code, an act that is not meant to cause death is not illegal based on any harm that it may cause: or harm that the doer intends to cause; or harm that the doer knows is likely to cause to any person for whose benefit it is done in good faith; or harm that the person has given either expressed or implied consent to suffer. This section goes on to further elaborate on the idea that it is acceptable to attempt to help a patient in good faith, even if doing so means taking a fatal risk with that patient's knowledge and permission.
- c. "Nothing done in good faith for the benefit of a child under the age of twelve or insane shall be considered an offense if done with the express or implied consent of the guardian or other person having lawful charge of that person," according to Section 89 of the Indian Penal Code.
- d. Section 90 of the Indian Penal Code makes it clear that permission provided by a mad person, a child under the age of twelve, or out of fear or misinformation is not valid.
- e. Sec. 91 makes it clear that unless the conduct results in harm, the victim's permission is required for the act to be considered unlawful, and hence protection under sections 87, 88, and 89 IPC does not apply.

- f. Acts performed in good faith for an individual's benefit are covered by Sec. 92, which does not regard their consent as illegal if: (1) the individual was unable to give consent, (2) his guardian or other legal caretaker was not available in time for the individual to give consent, or (3) the individual was unavailable.
- g. Similarly u/s 93, no communication made to a person in good faith for the benefit of that person would be an offence, if by reason of that communication the person come to harm (e.g. information that this life is critical and likelihood of his not being alive next year by the physician results heart attack- not liable because told in good faith in response to the patients request for a frank answer so as to settle his affairs).<sup>3,4,5</sup>

#### The Indulgent of Consent Instigate in Classical Treatises

Without a woman's spouse or legal guardian's consent, Charaka cautions against prescribing drugs. Physicians should enter a patient's home with a known individual whose entry is authorized, head down, well-remembered, motionless, and thoughtfully considering their next move. The doctor's voice, thoughts, and senses should be focused only on the patient's condition and treatment once they are inside. The other bodily entities of the sufferer shouldn't be entertained by him. Towards female patients, he ought to show respect. According to bioethical principles, it is therefore improper for someone to have fun in a patient's home when they are ill.<sup>6</sup>

According to Charaka, there is a caveat to revealing the truth about a condition if doing so puts others or the afflicted in danger. Consequently, whether or not a doctor tells the truth, Ayurvedic ethics give them precedence. The underlying moral principles of Ayurveda are expressed ethically in this manner.<sup>7</sup>

Do not damage or risk injury to others, according to the principle of non-maleficence. Thus, appropriate training and developed abilities enable health care providers to provide the best possible medical treatment to their patients. Pain, dysfunction, or even death may be considered harm in the context of health care. But when it comes to ethical considerations, a more expansive definition of injury is typically needed. Preventing harm, avoiding harm, and eliminating hazardous conditions are all included in this principle. Ineffective treatments carry risk and have little potential of reward; thus doctors shouldn't give them to patients because they run the danger of damaging them. Because many medications have both negative and positive side effects, a doctor cannot intentionally hurt a patient without also providing benefits.<sup>8,9</sup>

The surgical book Sushruta Samhita states that when circumstances dictate that "if surgical intervention is not done then the patient will die and after surgery it is not certain if surgery will be beneficial," the king's consent should be requested. The Charaka Samhita, a traditional medical treatise, makes similar statements. Another third-century B.C. document called Artha Shastra even cites the death penalty for doctors who conduct major surgery without first obtaining authorization, which could be fatal. This represents a form of defensive medicine in which the doctor is supposed to protect himself in the event of unfavorable consequences.<sup>10,11</sup>

#### Conditions under which consent is waived

Certain scenarios exist when getting consent and mandating disclosure could be harmful to the patient. For example, in an emergency or when the patient will be harmed by the disclosure, informed consent is not necessary. Patients may also relinquish

their right to agree and/or to be informed. Promoting autonomy is more important in this case than promoting health principles. In a fourth category of situations, legally mandated treatment, informed consent may not always be necessary because doing so would harm other significant societal interests more than the patient or the patient alone (e.g., civil commitment of the dangerous mentally ill).<sup>11, 12</sup>

As per the law, no consent is required in the following conditions:

- a) When person (patient) is brought for medical examination by police e.g. alcoholic intoxication, assault etc. However, such cases, no treatment can be enforced without consent.
- b) In case of arrested person brought by the police for obtaining sample (blood, hair etc) required for evidence, no consent is required.
- c) In case of persons directed by court for medical examination, no consent is required.
- d) No consent is required if medical examination is a statutory requirement e.g. armed forces etc.<sup>13</sup>

## DISCUSSION

The equitable allocation of the health care system's risks and benefits among all societal groups is known as justice. Justice dictates that everyone ought to be accorded equal treatment and moral standards. The Ayurvedic concept of sadachara (Sadvruttapalan) refers to hoping for everyone's well-being and demonstrating compassion for those who are suffering. Good behavior, both mentally and physically, is referred to as a renewing cure in Aachara Rasayana. It suggests actions that are moral, ethical, and charitable, such as living a yogic lifestyle, truthfulness, nonviolence, cleanliness, mental and personal hygiene, dedication, and compassion.

To stop the illness from progressing and maintain a state of equilibrium, we must alter our behavior. There are four norms of ethics: truthfulness, secrecy, privacy, and loyalty. Truthfulness, autonomy, and informed consent are all components of veracity. The freedom to keep oneself hidden and not to divulge information is known as privacy. Only those who "need-to-know" are permitted to access private information in a confidential manner. Maintaining the obligation to look out for everyone is fidelity. In Ayurveda, all of these are described. So, in laying the foundation for bioethics, Ayurveda deserves to be credited as a pioneer.

Negligent lawsuits are frequently sparked by a lack of empathy and communication. In an effort to standardize the procedure, the Medical Council of India has established guidelines that become regulations and mandate obtaining consent prior to surgery. Therefore, a crucial component of modern medical practice is legitimate consent. In order to protect oneself from potential medical litigation, consent should be sought before doing diagnostic testing, therapeutic interventions, treatments, or operations on a patient.

Eligible consent-givers must be twelve years old. Regarding criminal culpability, nonetheless, this is accurate. According to the Indian Contract Act, consent must be obtained before the age of eighteen in situations involving civil liability. India urgently needs legislation governing the age of consent for medical treatment in light of this unclear stance. In this sense, this will significantly help the doctors avoid moral and legal ambiguities. A signed consent should always be obtained. There are also no definitive rules on whether the patient and physician should sign the consent document. In this regard, legislative bodies like the Medical Council of India ought to release definitive guidelines. Just prior to the procedure, a personalized and situation-specific

consent should be obtained. Throughout the course of treatment, consent ought to be possible to revoke and be subject to open discussion. One crucial right protected by the law is the ability of patients to accept or reject medical treatment. There are significant ethical, legal, and practical exceptions to this norm in the field of psychiatry. Acting in the best interest of those who lack the mental capacity to make an educated decision is morally acceptable in some situations. Since basic treatment must still be conveyed to the patient, the concept of therapeutic privilege simply permits physicians to alter the extent of disclosure. Details regarding long-term side effects may be temporarily withheld and therapeutic privilege may be invoked in psychotic disorders. When a patient's condition improves, such cases ought to be thoroughly documented and properly disclosed.<sup>14, 15</sup>

## CONCLUSION

For clinicians, getting consent from the patient is crucial in real-world situations. Without a patient's legitimate consent, a doctor cannot perform anything for or with them. This idea is true for all medical treatments, including surgical procedures, as well as diagnostic methods that intentionally interfere with the patient. The moral predicament of upholding autonomy, personal integrity, and self-determination gives rise to the idea of consent. A vital component of modern medical practice is valid consent, as every adult human being with sound mind has the right to decide what should be done with his body. A surgeon who operates on a patient without that patient's consent is committing assault and may be held financially responsible. Upon examination for diagnosis, therapy, treatment, and surgery, patients should give their consent in order to protect themselves from potential medical malpractice. The medical goal of "do no harm" must be upheld. We can't do harm to the patient by aiding in their healing in any aspect of life related to indeed, false and per chance situations.

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