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Under the Indian Penal Code, 1860 ("*IPC*"), the offence of '*rape*' criminalizes sexual intercourse by a man with a woman '*against her will*' or '*without her consent*'.[1] *It recognizes a woman's capacity, freedom and choice to exercise her will or consent to a sexual activity.*[2] *However, in order to account for the unequal, vulnerable or coercive circumstances*[3] *under which a woman may be compelled to consent, Section 375 of the IPC lists situations which may amount to rape even if the woman consents.*[4] *Further, Section 376 (2) of the IPC read with Section 114A of the Indian Evidence Act, 1872, creates a rebuttable presumption of non-consent in certain other situations, shifting the burden to prove consent on the accused.*[5]

Even though absence of consent is an integral component of 'rape', IPC did not define '*consent*' in positive terms prior to the Criminal Law (Amendment) Act, 2013 ("*2013 Act*").[6] Section 90 provided that consent under *any* provision of

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1 Pen. Code, § 375(1860) (This has been the case since 1837, when the draft Penal Code was submitted by the Law Commission headed by Thomas Macaulay. For a sexual intercourse to amount to rape, proof that the act was committed "*against the will*" of the complainant or "*without her consent*" was essential. Further, in certain circumstances, consensual sexual intercourse would amount to rape. The structure of section 375 has not changed much even after the Criminal Law (Amendment) Act, 2013). *See generally* Elizabeth Kolsky, *The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57*, 69 (4) J. Asian Stud. 1093, 1098-99 (2010); Rukmini Sen, *Law Commission Reports on Rape*, 45 (44-45) Econ.&Pol.Wkly., Oct. 30, 2010, at 81.

2 PSA Pillai's Criminal Law, 716 (K I Vibhute ed., 12th ed. 2014).

3 *See generally*Catherine MacKinnon, *Rape Redefined*, 10(2) Harv. L.& Pol'y Rev. 431, 443-449 (2016).

4 Pen. Code, § 375 (Thirdly to Sixthly)(1860).

5 Pen. Code, § 376 (2)(1860) read with Indian Evidence Act, § 114A (1872).

6 Ratanlal & Dhirajlal, Law of Crimes, Vol. 2 (C. K. Thakker ed., 2009), 2060. *See also* Mrinal Satish, Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India, 37 (2016).

the IPC would stand vitiated if given under a fear of injury or misconception of fact *and* the accused had knowledge or reason to believe that the consent was so given.[7] However, since the aforesaid circumstances of '*fear*' and '*misconception of fact*' were already covered under section 375 of IPC[8] (albeit in narrower terms), section 90 was of little assistance in interpreting consent.[9]

In the absence of a positive definition under IPC, the Courts relied on Punjab and Haryana High Court's exposition of consent in *Rao Harnarain Singh* v. *State.*[10] Thus, consent presupposed existence of "*physical power, mental power and free and serious use of them*"[11] and required proof of:

> "voluntary participation [...] after exercise of intelligence, based on knowledge of the significance and moral quality of the act, [and] having freely exercised a choice between resistance and assent…submission of her body under influence of fear or terror is no consent."[12]

This formulation was progressive, as it relaxed the requirement of explicit non-consent or resistance (modifying '*no means no*' standard) under conditions of fear or duress.[13]

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7 Pen. Code, § 90 (1860) 1860. *See* Ratanlal and Dhirajlal, *supra* note 6, at 2060. *See also* Pradeep Kumar Verma v. State of Bihar, AIR 2007 SC 3059 (holding that both these requirements ought to be "*cumulatively satisfied*").

8 Pen. Code, Clauses third and fourth to § 375 (1860).

9 Satish, *supra* note 6, at 37. *See also* Law Commission of India, 42nd Report on the Indian Penal Code, (June 1971) (Discussing the applicability of the general exceptions in section 90 to section 375, the Law Commission of India in its 42nd Report mentioned that it was possible to argue that third and fourth clauses of section 375 being special provisions excluded the application of general provisions under section 90, which were then couched in much broader terms. However, it chose not to clarify this point by an amendment, as there were no difficulties felt in practice.)

10 Rao Harnarain Singh v. State, AIR 1958 Punj 123. *See also* State of Himachal Pradesh v. Mango Ram, (2000) 7 SCC 224.

11 Stroud's Judicial Dictionary and Jowitt's Dictionary on English Law, *in* Pradeep Kumar Verma v. State of Bihar, AIR 2007 SC 3059; Uday v. State of Karnataka AIR 2003 SC1639.

12 Rao Harnarain Singh v. State, AIR 1958 Punj 123. *See also* State of Himachal Pradesh v. Mango Ram, (2000) 7 SCC 224.

13 Stephen J. Schulholfer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond,* 11 L.& Phil.35 (1992) [hereinafter Schulholfer, *Sexual Autonomy*].

Detailed discussions on the substantive law relating to '*consent*' appeared in the 84th Report of Law Commission of India, following the infamous decision in the *Mathura Rape*[14] case, where the Supreme Court equated passive submission with consent. However, the Criminal Law (Amendment) Act, 1983, did not incorporate the Commission's recommendation on pre-fixing "*free and voluntary*" to consent under second clause of section 375 of IPC. Further, it restricted the rebuttable presumption of non-consent to cases of aggravated rape[15] instead of extending it to all cases of rape or attempt to rape as recommended by the Commission.[16] Thus, until 2013, the consent was neither defined nor its nuances recognized in IPC.[17]

In this backdrop, the definition of '*consent*' recommended by Verma Committee[18] and introduced as explanation (2) to section 375 of IPC by 2013 Act,[19] has been a belated but progressive step forward.

In the first part of this essay, the author assesses the standard of consent introduced by the 2013 Act and its application by the Courts. At the time of writing this essay in Nov. 2017, the author came across only two instances where a High Court has interpreted the new definition of '*consent*'.[20] Of these

14 Tukaram v. State of Maharashtra, AIR 1979 SC 185.

15 Indian Evidence Act,§ 114A (1872).

16 Law Commission of India, 84th Report on Rape and Allied Offences Some Questions of Substantive Law, Procedure and Evidence, ¶7.11 (1980) (The Commission recommended insertion of following as Section 111A to the Indian Evidence Act, 1872: "*In a prosecution for rape or attempt to commit rape, where sexual intercourse is proved and the question is whether it was without the consent of the woman, and the woman with whom rape is alleged to have been committed or attempted states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.*")

17 Sen, *supra* note 1.

18 J.S. Verma J., Leila Seth J., Gopal Subramanium, Report of the Committee on Amendments to Criminal Law (Jan. 23, 2013). The Committee comprising of J.S. Verma J., Leila Seth J. and Gopal Subramanium is, hereinafter, referred to as *Verma Committee.*

19 Hereinafter, referred to as "*consent definition.*"

20 This essay examines cases up to November 2017. A general search for the phrase "*unequivocal voluntary agreement*" and section 375 of IPC was conducted on Manupatra's Indian Law Legal Database for cases from the Supreme Court and High Courts where

two, *Mahmood Farooqui* v. *State (NCT of Delhi)*[21] *is significant due to its detailed and controversial engagement with the concept of consent.*[22] *A special leave petition against the High Court's decision was dismissed by the Supreme Court.*[23] *Examining the decision in Farooqui*, the author argues that the reforms introducing the consent definition couched in affirmative terms, without shifting the evidentiary burden of proof, were inadequate. In the second part of the essay, the author attempts to relook at the affirmative consent standard in the light of MacKinnon's recent statutory proposal for rape definition not based in consent.

I. STANDARD OF CONSENT POST 2013 ACT

Verma Committee recognized that every woman has the constitutionally guaranteed right to life, bodily integrity and sexual autonomy.[24] In recognition of her right to express and experience complete sexual autonomy in relationships, the 2013 Act introduced consent definition as:

> Consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication communicates willingness to participate in the

explanation (2) of section 375 had been cited. The search returned 20 such judgments between 2013 to 22 November, 2017, including Supreme Court's decision in *Independent Thought* v. *Union of India* (W.P. (Civil) 382 of 2013) regarding age of consent in context of marital rape exemption. Before the High Courts, interpretation of '*consent*' of the complainant was an issue in 6 breach of promise to marry cases; however, since the Courts did not interpret the new definition, these cases have not been analysed here. Other cases either included cases of statutory rape where consent is irrelevant or the alleged act was committed prior to 2013 Act. The two instances where the High Courts interpreted the new definition of consent are *Sachin Tukaram Muneshwar* v. *State of Maharashtra*; and *Mahmood Farooqui* v. *State (NCT of Delhi)*.

21 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi). The decision is hereinafter referred to as *Farooqui*.

22 Seema Rao, *A Troubling Precedent for Rape Cases*, LIVE MINT (Oct. 2, 2017, 3:47 AM), http://www.livemint.com/Opinion/aUWJYk8psY6PwbzWdrsKsI/A-troubling-precedent-for-rape-cases.html (last visited May31, 2019).

23 Ms. X v. Mahmood Farooqui & Anr., SLP (Cri) No. 281 / 2018 (Jan. 19, 2018) (Supreme Court of India).

24 VERMA ET AL, *supra* note 18, at 430.

> specific act. Provided that, a person who does not offer actual physical resistance to the act of penetration is not by reason only of that fact, to be regarded as consenting to the sexual activity.[25]

Thus, consent is an unequivocal and voluntary agreement, which comes into existence when a woman communicates her willingness to participate in a specific sexual act, either verbally or non-verbally. The requirement of '*communication of willingness*' indicates that consent must be *given* in '*affirmative*'. Thus, as a first step, the man should obtain a woman's consent for participating in the particular sexual act.[26] The consent definition is particularized and contains elements of the affirmative consent standard.[27]

While recommending the consent definition, Verma Committee referred to the consent standards recommended by United Nations[28] and as existing in Canada[29] and England & Wales, which are modeled on the affirmative consent standard, and noted that shifting the burden of proof on the accused to prove consent in rape cases was necessary to avoid secondary victimization of the complainant during the trial. It also took note of the recommendations in the 84th Law Commission Report in this regard.[30] However, in its final recommendations, it chose to retain the *status quo* placing the burden on the complainant to prove beyond reasonable doubt that she did not consent. Once

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25 Pen. Code, Explanation(2) to § 375 (1860).

26 Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of a Affirmative Consent Standard in Rape Law*, 58 V and. L. Rev. 1321, 1335, 1345 (2005).

27 *Id.* Discussed in Part IV of this essay.

28 Verma et al, *supra* note 18, at 73. *See* Dep't Econ & Soc. Aff., *Handbook for Legislation on Violence Against Women*, U.N. Docs ST/ESA/329, at 26-27(2010), http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf (last visited May 31, 2019) (An "*unequivocal and voluntary agreement*" is required to constitute consent. Additionally, the burden of proof is on the accused to demonstrate the steps taken to ascertain the complainant's consent.)

29 Verma et al, *supra* note 18, at 74 (noting the requirement under the Canadian Law to demonstrate that he took reasonable steps to ascertain the complainant's consent to the specific sexual activity).

30 Verma et al, *supra* note 18, at 307-308.

the complainant discharges the initial burden, the onus is on the accused to prove that some act on part of the complainant amounted to consent under the consent definition.[31]

Thus, even though the 2013 Act has clearly set out that '*consent*' cannot be presumed and must be obtained in affirmative, in effect the standard still ends up creating a "*rebuttable presumption of consent.*"[32] Similar to the *'no means no'* standard.[33] the burden is not on the accused to demonstrate (or seek) consent, but on the complainant to clearly and explicitly speak up, resist and convey her refusal[34] and then adduce proof to that effect when she is put on trial.

This burden may be easier to discharge in cases of simple rape by a stranger, but may be extremely difficult in case of acquaintance rape, with a history of physical intimacy between the parties.[35] As was seen in *Farooqui*, the progressive *'affirmative yes'* requirement then transforms into a requirement of an *'emphatic no,'* which must be powerful enough to avoid the *'no means yes'* trap.[36] This is especially problematic given that in 95.5% of the rape or attempt to rape cases in India, the offender is an acquaintance of the complainant.[37]

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31 Rupali Samuel, *The Acquittal in the Mahmood Farooqui Case: A Mirror to Us All*, Bar & Bench (Sept. 30, 2017), https://barandbench.com/acquittal-mahmood-farooqui-case/ (last visited May31, 2019).

32 David Bryden, *Redefining Rape*, 3 (2) Buff. Crim. L. Rev. 317, 400 (2000).

33 Schulholfer, *Sexual Autonomy, supra* note 13. One of the criticisms of a *'no means no'* standard is that by requiring an expression of refusal, it fails to account for passive submission or coercive pressures. However, explanation of consent takes care of this by laying down that absence of physical resistance by itself would not be treated as consent.

34 MacKinnon, *supra* note 3, at 446. *See* Stephen Schulholfer, *Reforming the Law of Rape*, 35 Law & Inequ. 335, 340 (2017) [hereinafter, Schulholfer, *Reforming the Law*].

35 Little, *supra* note 25, at 1331.

36 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi). *See* Susan Estrich, *Rape*, 95 Yale L. J. 1087, 1127(1996).

37 National Crime Records Bureau, *Crime in India 2015: Compendium* (2016), http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf (last visited May31, 2019).

II. CONFUSING CONSENT IN FAROOQUI

Farooqui[38] is one of the first decisions where a High Court was tasked with interpreting '*consent*' under the new framework introduced by the 2013 Act. It was a case of acquaintance rape, where the penetrative act alleged was oral sex (section 375(d) of IPC).

The facts considered relevant by the Court related to the familiarity between the parties, the nature of their relationship which was beyond '*normal*' friendship, and acceptability of physical intimacy to certain extent between them.[39] Though the Court acknowledged that their past sexual conduct was irrelevant for determination of consent, it remained central to its reasoning.[40]

On the day of the incident, the complainant visited the accused and found him in a drunken-lachrymose state. The parties consumed alcohol in some measure and exchanged kisses. The complainant told the accused that she felt motherly affection towards him, the accused then expressed his desire to suck her, she said '*no*' and gave him a push. However, fear of physical hurt ultimately led her to continue without resistance, and she even feigned orgasm. She did not communicate her fear to the accused.[41] Other facts alleged by the prosecution indicating expression of non-consent[42] and presence of physical force component were given a miss by the Court.

Despite regarding the complainant a "*sterling witness,*"[43] the Court acquitted the accused for want of proof beyond reasonable doubt of the fact that:

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38 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi).

39 *Mahmood Farooqui*, at ¶ 77.

40 *Mahmood Farooqui*, at ¶ 77. Note that section 155(4) of Indian Evidence Act (1872) was omitted in 2003.

41 *Mahmood Farooqui*, at ¶ 81.

42 *Mahmood Farooqui*, at ¶ 42, 43, 47(These include the fact that after the victim denied consent to the accused to suck her, the *accused tried to pull down her underwear and she kept pulling it up*, and thereafter, the accused *immobilized* her and forced oral sex upon her).

43 *Mahmood Farooqui*, at ¶ 96.

- first, the incident alleged by the victim took place;
- second, if it did take place, it was without victim's consent or will; or
- third, if it did take place without the victim's consent, the accused could discern / understand that the victim did not consent.[44]

The verdict turned on the *third* ground. The Court considered it unnecessary to enquire into the *first* ground by delving into the timing of various events surrounding the incident, even though admissible secondary evidence was present. Further, the Court did not regard victim's non-consent as material and, instead, introduced an element of '*mens rea*' in rape.[45] It held that it was doubtful that the accused had the "*the requisite mental intent of violating the prosecutrix,*"[46] and whether the element of fear in her mind or non-consent was "*made known or communicated to*" him. This was in part the outcome of Court's misplaced reliance on section 90 of the IPC[47] for determining non-consent, which includes knowledge or reasonable belief requirement on part of the accused, when consent has been explicitly defined under section 375 of IPC.[48]

Aside from this glaring misapplication of law, the Court's interpretation of '*consent*', discussed below, is illustrative of how the affirmative elements of consent definition are of little consequence in reality. As mentioned above, in

44 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi), at ¶ 101.

45 *See* Schulholfer, *Sexual Autonomy, supra* note 13, at 41. This is similar to section 273.2, Criminal Code (Canada), 1985, which provides for a limited defense of mistaken belief of consent to the accused. However, the accused is required to at least show that reasonable steps were taken by him to ascertain consent and his willful blindness or recklessness are not considered defense.

46 *Mahmood Farooqui*, at ¶ 92.

47 *Mahmood Farooqui*, at ¶79.

48 Mrinal Satish, *The Farooqui Judgment's Interpretation of Consent Ignores Decades of Rape-Law Reform and Catastrophically Affects Rape Adjudication*, The Caravan (Oct. 7, 2017), http://www.caravanmagazine.in/vantage/farooqui-judgment-consent-ignores-rape-law-reform-catastrophically-affects-adjudication (last visited May31, 2019) (In fact, even section 90 does not place an obligation on the victim to communicate her fear or misconception to the accused. The emphasis is simply on whether the accused had knowledge or reason to believe that the victim consented under such fear or misconception).

this case an additional burden was put on the victim to make her non-consent known to the accused.

A. SUBSTITUTING LEGAL CONSENT WITH NORMAL CONSENT

Referring to the consent definition, the Court noted that consent has to be "*categorical, unequivocal, voluntary*" signifying willingness to participate in the specific sexual act.[49] It acknowledged that '*mere hesitation*'; '*reluctance*'; or a '*no*' to sexual advances cannot be treated as consent. Consent has to be "*an affirmative one, in clear terms,*"[50] and is required for every sexual act, every time.[51] The Court was correct so far, and in acknowledging that basis of any sexual relationship is equality and consent.[52]

However, to answer the questions formulated by it,[53] the Court turned to the meaning of consent in normal parlance, stated as a voluntary and revocable agreement to engage in a sexual activity "*without being abused or exploited by coercion or threats.*" Thus, consent need not be (or is not) '*unequivocal*' in normal parlance. Further, it stated that the rule that consent has to be given and cannot be assumed, does not hold good in reality where gender binary operates (men as initiators of sex, women as mute receptors).[54] Accordingly, when parties engage in an act of passion, a 'yes' may not always mean 'yes,' and 'no' may not always mean 'no'.[55] Gender binaries, if strictly observed, are helpful for determining

49 *Mahmood Farooqui*, at ¶ 75-76.

50 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi), at ¶ 74.

51 *Mahmood Farooqui*, at ¶ 74-76.

52 *Mahmood Farooqui*, at ¶86.

53 *Mahmood Farooqui,*at ¶ 83 (The Court listed four points of inquiry: (i) whether or not there was consent; (ii) whether the accused mistakenly accepted the moves of the prosecutrix as consent; (iii) whether such a mistake was genuine; (iv) whether the feelings of the prosecutrix could be effectively communicated).

54 *Mahmood Farooqui*, at ¶ 85.

55 *Mahmood Farooqui*, at ¶ 85. *See* Schulholfer, *Sexual Autonomy, supra* note 13, at 41 ("*Courts and commentators...[insist] that a woman's attitude might be deeply ambivalent, that she would often say no meaning yes, and that a man could not be expected to accept verbal protests as genuine unless accompanied by loud screams...*")

consent in such cases. However, when "*equality [becomes] the buzzword*" and binaries are disturbed,[56] confusions arise.

B. FROM AFFIRMATIVE 'YES' TO DIFFERENT DEGREES OF 'NO'

The Court observed that both affirmative consent and *'no means no'* standards are inadequate for ascertaining consent in rape; more so, in cases of disturbed gender binaries.[57] Therefore, as a substitute, the Court proposed its own theory of different grades of *'no'* for such situations. The fundamental premise of this theory is that "*instances of woman behaviour are not unknown that a feeble 'no' may mean a 'yes.'*"[58] It does not claim universal application and excludes cases where:

- the parties are strangers;
- the parties are in a prohibited relationship;
- if one of the parties is a conservative person, who has not had any exposure to the ways and systems of the world.

In these cases, *'mere reluctance'* or a *'feeble no'* would amount to '*no*'. However, the theory creates a presumption of consent if the parties are known to each other, are persons of letters, intellectually and academically proficient, and have had history of physical intimacy. For negating consent in such cases, an "*emphatic no*" is required.[59]

The Court does not say that women lie, but it reinforces another myth that "*women do not know what they want or mean what they say - at least when they say no.*"[60] *Farooqui* undoubtedly was far away even from the *'no means no'* standard, as express refusal of the victim was not considered '*no.*' The Court regarded the

56 Pratiksha Baxi, *When No is Not No in Law*, The Wire (Sept. 29, 2017), https://thewire.in/182578/law-no-may-not-actually-mean-no/ (last visited May31, 2019).

57 Mahmood Farooqui v. State (NCT of Delhi), MANU/DE/2901/2017 (High Court of Delhi), at ¶ 84-85.

58 Estrich, *supra* note 35, at 1127.

59 *Mahmood Farooqui*, at ¶ 78.

60 Estrich, *supra* note 35, at 1129. *See* MacKinnon, *supra* note 3, at 445 ("*Sex has been considered rape when women said no to sex or otherwise expressed disinclination, making clear that women expressing their lack of desire for a sexual interaction has not necessarily been considered inconsistent with a finding of consent.*")

complainant's testimony which screamed of non-consent as '*sterling,*' however, was reluctant in believing it.

Further, even while hypothetically accepting that the victim did not consent, it failed to shift the onus on the accused to demonstrate that some act of the victim amounted to consent.[61] The reluctance of the Court to recognize the onus on the accused to act only after obtaining affirmative consent of the complainant illustrates that consent definition couched in affirmative terms without expressly shifting the evidentiary burden on the accused remains a weak and ineffective legal reform, especially in case of acquaintance rape.[62] For the focus of inquiry never shifts on to the accused's misconduct.[63]

III. RETHINKING CONSENT IN RAPE

As discussed, the current standard is similar to *'no means no'* standard and remains ineffective in guarding a women's sexual autonomy in the courtroom where the Judges are influenced by erroneous stereotypes and myths about the victim, accused and rape.[64] An alternative is proposed in the affirmative consent standard ('*yes means yes*') to give equal voice to women in sex and in Court.[65]

Affirmative consent standard requires the man to first enquire whether the woman is desirous of engaging in the particular sexual act, and continue only upon receiving her "*freely given consent.*"[66] The consent definition incorporates this requirement.[67] A failure to seek consent would not *ipso facto* indicate absence of consent, if it can be shown that that consent was *expressed* in any other way. In order to prevent victim's trial, this standard shifts the burden

61 Samuel, *supra* note 30.

62 Schulholfer, *Sexual Autonomy, supra* note 13, at 42.

63 MacKinnon, *supra* note 3, at 452.

64 Little, *supra* note 25. *See generally* Jennifer Temkin, *And Always Keep a Hold of Nurse, For Finding Something Worse": Challenging Rape Myths in the Courtroom*, 13 (4) New Crim. L. Rev. 710, 714 (2010).

65 MacKinnon, *supra* note 3, at 454.

66 Little, *supra* note 25, at 1345.

67 Little, *supra* note 25, at 1345.

on the accused to prove that consent had been sought and was "*affirmatively expressed.*"[68] Therefore, it creates a "*rebuttable presumption of non-consent.*"[69]

Advocates of affirmative consent standard argue that it marks a shift from differentiated gender roles to equality,[70] prevents secondary victimization by requiring the accused to demonstrate the steps taken to ascertain the complainant's consent, provides an "*external test of consent*"; and eventually, instils rational behaviour among men and women.[71]

Little concedes that even with affirmative consent, in many cases, a trial may still result in a "*he said, she said*"[72] situation; however, the difference lies in the fact that the man's story would be the subject of scrutiny and cross-examination. The effectiveness of this standard is evident in case of aggravated rape under IPC.[73] Thus, affirmative consent is projected as the "*best way to legally recognize women [as] equal partners in any sexual interaction.*"[74]

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68 Bryden, *supra* note 32 ("*If" actions speak more loudly than words, "then perhaps the action of failing to signify consent affirmatively speaks even more loudly than the action of failing to resist*").

69 *Id.*

70 Schulholfer, *Sexual Autonomy, supra* note 13, at 85.

71 Bryden, *supra* note 31 ("*What is required of a man is simply that he behaves with a civilized regard for his companion's wishes...If she equivocates or gives no positive signal, he must wait*").

72 Little, *supra* note 25, at 1345.

73 In *Sachin Tukaram Muneshwar* v. *State of Maharashtra* (MANU/MH/1843/2015), the Court considered the consent definition while deciding on the anticipatory bail applications filed by various applicants charged under section 376(2) (n) of the Indian Penal Code, 1860 (aggravated rape) in cases pertaining to breach of promise to marry. Referring to the meaning of the term '*unequivocal*' in Black's Law Dictionary and Websters' English Dictionary, the Court said that even though there was reason to believe that the complainants, being major, voluntarily agreed to the intercourse, *prima facie* it was constrained to hold that the sex was non-consensual as the *accused* could not prove that consent was '*unequivocal.*' Chaudhari J. expressed his discomfort with the requirement of '*unequivocal consent*' as:
"*There is no manner of doubt that the major women in these cases, with full understanding and conscience, went ahead in entering into sexual intercourses which should not constitute rape. But then, the fact remains that personal opinion or feeling of this Court has no place in law, and the will of Parliament must be held to be supreme*."

74 Little, *supra* note 25, at 1363.

However, critics argue that, while affirmative consent standard is "*well-intentioned [and] ostensibly progressive,*" it does not work well in *all* sexual interactions.[75] In turn, it ends up fostering assumptions which are antithetical to effective reform, because it reinforces the expectation that "*"yes" does mean yes and a [woman] who says "yes" is [always] willing.*"[76] The difficulty then lies in determining when the circumstances are sufficiently constraining to invalidate ostensible consent.[77] Radical feminists call for rejection of the affirmative consent standard, as it fails to account for the social reality where under disparities of power resulting from gender inequality, a woman's consent to sex is never really '*free*'.[78]

In her recent statutory proposal on rape definition,[79] MacKinnon termed the concept of consent '*unequal,*' given its failure to account for gender inequality. She makes a powerful argument that presence of consent does not necessarily make a sexual interaction equal, it simply makes it "*tolerated or less costly of alternatives, out of the control or beyond the construction of the ones who consent.*" Consent standard does not place the "*proposal-(alleged)-disposal*" relation in its wider social context to account for the historically unequal power relations. Therefore, in prevailing conditions of social inequality, consent to sex is in fact "*acquiescence to power.*"[80]

Further, MacKinnon argues that despite "*creative attempts to rehabilitate [consent],*"[81] it remains a legally impractical tool which undertakes a subjective inquiry into internal psychology of a woman, focusing on "*what [she] has in her*

75 Schulholfer, *Reforming the Law*, *supra*note 33.

76 Schulholfer, *Reforming the Law*, *supra* note 33, at 336, 342 ("*Rape law could not justifiably assume [women's] ability to control [what is done to them] because under conditions of gender inequality, social constraints and pervasive disparities of power can be decisive*").

77 Schulholfer, *Sexual Autonomy, supra* note 13, at 42.

78 Little, *supra* note 25, at 1361. *See* Catherine MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence,* 8 (4) Signs 635, 647 (1983).

79 MacKinnon, *supra* note 3.

80 MacKinnon, *supra* note 3, at 441.

81 MacKinnon, *supra* note 3, at 442 (MacKinnon refers to Canadian Law which includes a provision stating 'what does not amount to consent' under section 273.1 of Canadian Criminal Code, 1985. Further, she argues that even when defined as 'agreement or permission' or accompanied by terms such as 'positive, affirmative, unequivocal' or requiring 'willingness,' consent remains unequal.)

mind or lets someone "do to" her body."[82] While her proposed inequality analysis starts with the man and inquires into what he does with his power, the focus in consent analysis never shifts from the woman.[83] Thus, whether defined positively or negatively, "*consent is the reason the rape complainant is put on trial.*"[84]

For MacKinnon, the primary issue of rape is gender inequality and *not* autonomy.[85] Rape defined in sex-equality terms focuses on unequal external circumstances, including gender, which make sex rape.[86] She argues that it is the only way social realities can be reflected in law and proposes the following definition of rape:

> "a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability."[87]

Workability of Inequality Analysis in Domestic Context

MacKinnon identifies the merits of her proposal in its *humane nature* and *workability* in legal practice.[88] She draws analogies from the decision in *Prosecutor* v. *Akayesu,*[89] *where the international tribunal defined rape in terms of coercive circumstances, while making a case for rejection of consent standard in domestic context.*[90]

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82 MacKinnon, *supra* note 3, at 441.

83 MacKinnon, *supra* note 3, at 441 ("*Like one wing flapping, consent analysis focuses endlessly on [woman], what she has in her mind or lets someone do to her body.*")

84 MacKinnon, *supra* note 3, at 441.

85 MacKinnon, *supra* note 3, at 436 (arguing that internationally rape is recognized as a crime of gender inequality; however, no domestic jurisdiction has defined rape in sex equality terms).

86 MacKinnon, *supra* note 3, at 469.

87 MacKinnon, *supra* note 3, at 474.

88 MacKinnon, *supra* note 3, at 469.

89 Prosecutor v. Akayesu, Case No. ICTR-96-4-T (1998) (International Criminal Tribunal for Rwanda).

90 MacKinnon, *supra* note 3, at 469.

An exclusive focus on unequal circumstances is workable in international criminal law context, where rape is often committed by strangers[91] *and under manifestly coercive circumstances in the background of war, homicide and physical violence. However, in the domestic context, where the majority of rapes are acquaintance rapes, manifestations of inequality may be complex and elusive.*[92] *Contrary to MacKinnon's argument, in seemingly equal relationships where "equality is the buzzword"*[93] elements of coercion may not leave "*forensic tracks in the real world.*"[94] The outcome of the trial will be contingent on the Judge's broad or restrictive interpretation of the circumstances surrounding rape, which will in turn be affected by the linguistic and cultural conventions and his stereotypical notions about rape.[95] The real challenge would be to design the definition in a way that aspirations are in fact translated into legal form.[96]

Additionally, as Munro argues, while in theory an exclusive focus on unequal or coercive circumstances may prevent the victim's trial, it may result in further alienating her experience from the legal process by focusing on the macro-level disparities in power.[97] She argues that retaining consent on the other hand would permit recognition of rape as "*both a personal and systemic attack.*"[98]

Remodeling Affirmative Consent

MacKinnon does consider affirmative consent standard an improvement from a sex-equality perspective, despite disagreeing that remodeling it can effectively

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91 Vanessa E. Munro, *From Consent to Coercion*, 17, 21 in Rethinking Rape Law (Clare M. Glynn and Vanessa E. Munro eds., 2010) (pointing out that in international criminal law scenario, parties are both literally and metaphorically strangers, when viewed in the light of their divergent ethnic identities).

92 *Id.*

93 Farooqui, *supra* note 21.

94 MacKinnon, *supra* note 3, at 469.

95 Stephen Schulholfer, Unwanted Sex: The Culture of Intimidation and Failure of Law, 90 (1998) as cited in Victor Tardos, *Rape Without Consent*, 26(3) Oxford J. Legal Stud. 515, 516 (2006)("*Flexibility almost inevitably results in under-enforcement and non-compliance*").

96 Schulholfer, *Reforming the Law*, *supra* note 33, at 346.

97 Munro, *supra* note 89, at 26.

98 Munro, *supra* note 90, at 26.

account for unequal circumstances.[99] While it is true that consent becomes meaningless in coercive circumstances,[100] it is an important expression of sexual autonomy which enables persons to define boundaries of personal intimacy and deserves equal protection in its own right.[101] Treating autonomy as a lesser concern in rape undermines the merits of the affirmative consent standard in giving women's voice equal validity in a sexual interaction and affecting social consciousness.[102] Further, it is submitted that accounting for historical imbalances does not necessarily require denying recognition to sexual autonomy.[103]

Both equality and autonomy should be central to any discussion on rape law reform. This is not to say that affirmative consent should be the norm in all cases irrespective of the circumstances. What must be explored is the possibility of designing a model, placing consent in context, possibly by starting with an inequality analysis of the external circumstances, followed by consent analysis.

It is important that such a model is educative in its application and enactable and, therefore, would require care in listing of coercive circumstances. As Schulholfer argues, enlisting circumstances in this manner may leave out some unequal circumstances out of the bounds of law; however, it would be helpful in setting the clear and specific boundaries of law.[104] While he agrees that rape law ought to account for gender-inequality, he is cautious of the fact that "*to propose at this juncture a visionary concept of mutual respect of sexuality, and a massive expansion of criminal law to enforce it, could conceivably divert attention from issues of implementation that make the real difference.*"[105]

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99 MacKinnon, *supra* note 3, at 454 (She criticizes it on the ground that it shields all situations where women consent in unequal circumstances. Further, she disregards its potential for reform by referring to the model proposed by American Law Institute for the Model Penal Code, where it attempts to contextualise consent vaguely, and rejects affirmative consent requirement).

100 MacKinnon, *supra* note 3, at 463.

101 Schulholfer, *Sexual Autonomy*, *supra* note 13, at 94.

102 Little, *supra* note 25.

103 Little, *supra* note 25, at 1362.

104 Schulholfer, *Reforming the Law*, *supra* note 33, at 346.

105 Schulholfer, *Sexual Autonomy*, *supra* note 13, at 36.

CONCLUSION

Verma Committee regarded full expression of sexual autonomy of women as integral to her right to equality.[106] Following its recommendations, the consent definition was incorporated in IPC; however, it remains midway in the affirmative consent standard and is ineffective in practice.

As discussed in the previous section, dismissing consent standard from rape law and treating all unequal sex as sexual assault may not entirely be desirable for both theoretical and practical reasons. As Little argues, affirmative consent standard is indeed required to treat women as equal partners in a sexual interaction, especially in an acquaintance rape scenario, like *Farooqui*, where inequalities may not be manifest.[107] In such cases, affirmative consent standard provides an unambiguous standard for the offense of rape.

Therefore, it is submitted that an affirmative consent standard should be adopted in full by shifting the evidentiary burden on the accused in all cases of rape. This is necessary to give effect to the changes aspired through the consent definition, that is, to reduce secondary victimisation of the complainant (as observed by Verma Committee), as well as bringing in social consciousness that a woman's permission is a minimum requirement before any sexual act, irrespective of the nature of relationship shared by the parties.

At the same time, it is important to not lose sight of MacKinnon's argument that consent standard alone cannot account for the economic, psychological and hierarchical inequalities or threats that affect women's choices in relationships. IPC reflects this consciousness, and consent analysis in rape under certain coercive circumstances, as MacKinnon notes, either places the burden on the accused to prove consent or disregards the consent question as irrelevant.[108] It is essential that these provisions are revisited to carefully delineate most (if not all) unequal circumstances which constrain a women's sexual choices, in a manner that is enactable, educative in implementation and progressive.[109]

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106 Verma et al, *supra* note 18, at 126.

107 Schulholfer, *Reforming the Law*, *supra* note 33.

108 Pen. Code, §§ 375, 376 (2) (1860). Indian Evidence Act, § 114A (1872).

109 Munro, *supra* note 90. *See* Schulholfer, *Reforming the Law*, *supra* note 33.