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A critical analysis of the standard of consent in rape law in India

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Abstract

This article critically analyses the standard of consent in rape law in India by engaging in a doctrinal analysis of the current jurisprudence. It also analyses various extraneous circumstances influencing the determination of consent in Indian rape law. The article will then assess the status of consent jurisprudence and related issues in the English and Canadian jurisdictions for a comparative assessment. Thereafter, it will critically assess the arguments in favour of an affirmative standard of consent before concluding with possible solutions for better interpretation of the law in determining consent by courts during rape trials in India.

Key words

Indian Penal Code; Indian Rape Law; Affirmative standard of consent; complainant credibility

Resumen

En este artículo se analiza críticamente el estándar de consentimiento en la ley india sobre violación mediante un análisis doctrinal de la jurisprudencia actual. También se analizan diversas circunstancias ajenas que influyen en la determinación del consentimiento en la legislación india sobre violación. A continuación, el artículo evaluará la situación de la jurisprudencia sobre el consentimiento y las cuestiones conexas en las jurisdicciones inglesa y canadiense para realizar una evaluación comparativa. A continuación, se evaluarán críticamente los argumentos a favor de una norma afirmativa del consentimiento antes de concluir con posibles soluciones para una mejor interpretación de la ley a la hora de determinar el consentimiento por parte de los tribunales durante los juicios por violación en la India.

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Palabras clave

Código Penal de la India; ley india sobre violación; estándar afirmativo de consentimiento; credibilidad del denunciante

Table of contents

1. Introduction 1431
2. Contemporary status of consent jurisprudence in rape law in India 1432
3. Relevance of extraneous circumstances in the determination of consent by courts in India 1434
4. Standard of consent in England and Wales and Canada 1439
    4.1. England and Wales 1439
    4.2. Canada 1441
5. Critical analysis of the arguments in support of an affirmative standard of consent 1445
6. Possible solutions 1448
7. Conclusion 1450
References 1450
    Cases 1454
    Legislations 1456

1. Introduction

At the outset, it is essential to note that the rape law in India recognises only men as perpetrators and women as victims.[1] Rape is defined under section 375 of the Indian Penal Code, 1860 (IPC). Consent is defined under Explanation 2 as an unequivocal, voluntary, verbal or non-verbal communication by the woman to participate in the sexual act. However, the burden of proving that rape took place without the complainant's consent, beyond a reasonable doubt, remains on the prosecution. An exception to this under Section 114A of the Indian Evidence Act, 1872 (IEA) is if the perpetrator is in a position of authority or trust and sexual assault is proven, then the court will proceed with the assumption that the woman did not consent. The relationships where the accused is presumed to be in a position of authority over the complainant are defined under Section 376 of the IPC.

An affirmative standard of consent requires voluntary, mutual and explicit communication to sexual activity. Despite introducing an explicit definition of consent (Explanation 2 of Section 375, IPC mentioned above) by the 2013 amendment act, multiple issues have been associated with determining consent in rape cases in India. Judges often consider many irrelevant factors in determining consent, which amounts to expectations of an "ideal victim behaviour". These factors result in victim blaming and re-traumatisation through lengthy trials and humiliating cross-examinations, discouraging other potential victims from reporting the crime in the future. Establishing a standard of consent that removes legal ambiguity, as well as imposing a duty on the accused to undertake steps to seek consent affirmatively, is essential, especially in the case of rape by an acquaintance. The following sections explore this aspect in detail while discussing *Mahmood Farooqui*.

This article critically analyses the prevailing standard of consent in Indian rape law and examines how it can be interpreted in a victim-centric manner. This would further help in understanding whether an affirmative standard of consent will radically change the experiences of sexual assault victims while seeking justice or if it will just be a symbolic gesture. Rape is a crime that occurs in private spheres, such as within four walls or in secluded places, or it can involve the usage of alcohol and drugs, where it can be difficult to seek independent corroborating evidence (*Bharwada*, 1983, 226, Wertheimer 2000, 559). The knowledge of the offending act is between the accused and the victim, especially in cases of rape by an acquaintance. Therefore, in such situations, it would not be unreasonable to expect the accused to establish how they affirmatively sought consent before initiating sexual contact, failing which they would not be allowed belief in consent as a defence. Moreover, this is also in line with section 106 of the IEA, which says that the burden of proving a fact is on the person having special knowledge of the event. While this amounts to a reverse onus clause in rape cases, it is not entirely an alien concept in the Indian jurisdiction.[2]

[1] This paper will use the words victim, survivor, complainant, and prosecutrix interchangeably. However, victim and prosecutrix would be primarily used as these terms as used exclusively by courts in India.
[2] Some Indian statutes with reverse onus provisions are- Narcotic Drugs and Psychotropic Substances Act, 1985, Sections 34 and 54; Protection of Children from Sexual Offences Act, 2012, Sections 29 and 30; Unlawful Activities (Prevention) Act, 1967, Sections 43E; Prevention of Money Laundering Act, 2002, Section 24.

This article consists of five sections. The first section engages in a doctrinal analysis of the contemporary status of consent jurisprudence to understand how the Indian Judiciary understands consent. The second section explains the extraneous circumstances influencing the understanding of consent by the judiciary. These circumstances are entered into evidence under various provisions by lawyers to determine cases where independent evidence does not establish culpability or lack of it for the accused. These are often rape myths, stereotypes, and biases used to establish consent. The third section critically engages with the consent jurisprudence in the jurisdictions of England and Wales, and Canada in order to draw valuable lessons for the Indian jurisdiction, considering that these jurisdictions have a fair amount of experience in dealing with the interpretation of consent in sexual offences. These two jurisdictions have been especially chosen because the Indian legal system has adopted several features from them.[3] Further, both these jurisdictions give primacy to the laws enacted by the federal government vis-à-vis the provincial ones, similar to India, unlike jurisdictions such as the USA. The fourth section examines the strength of arguments in favour of an affirmative standard of consent and whether solely relying on affirmatively seeking consent by the accused can support a victim-friendly experience in the courtroom. The fifth section offers possible solutions for better interpretation of consent. Finally, the article concludes that not only is it important to have affirmative consent laws but there should be a legal duty imposed on the persons involved to seek consent affirmatively.

2. Contemporary status of consent jurisprudence in rape law in India

Before the Criminal Law Amendment Act of 2013, the Indian Penal Code had no explicit definition of consent in rape law. However, Section 90 of the IPC states in general terms that any consent given under fear of injury, a misconception of fact, or given by an insane person, an intoxicated person or a child is not considered valid consent.

In 2013, in the aftermath of the horrific Delhi gang rape and murder case (*Mukesh and Anr*, 2017), the Indian government established the JS Verma Committee to suggest reforms in sexual assault laws to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women, which culminated into the enactment of The Criminal Amendment Act, 2013 (JS Verma Committee 2013). The act made sweeping changes in the definition of rape law, procedural laws and evidence acts. The committee also referred to the legal position in Canadian and English laws and recommended framing the definition of consent as "*an unequivocal voluntary agreement when the woman, by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act*" (JS Verma Committee 2013, 71–74). Thus, an attempt was made to establish a progressive standard of consent which required a man to ensure unequivocal consent from the woman before initiating sexual contact.

[3] The Indian Constitution has adopted the features of parliamentary government, the rule of law, and legislative procedure, amongst others, from the English legal system. Similarly, vesting residual powers with the centre, central powers to appoint the governor, and advisory jurisdiction of the Supreme Court have been adopted from the Canadian legal system. Moreover, judicial precedents from both these jurisdictions are regularly cited in the decisions of constitutional courts in India.

The Delhi High Court, in 2017, put this new definition of consent to judicial test in *Mahmood Farooqui v. State* (2017). In this case, Farooqui, a writer, was accused of forcibly performing oral sex upon an American scholar, a known acquaintance. The victim admitted in her evidence that though she had kissed the accused in the past, she never intended to take it further as he was a married man. The alleged incident occurred at the accused's house, where he proposed to have oral sex upon her, which she refused, but the accused forced himself on her. The victim then remembering the Nirbhaya incident of 2012, fearing injury to herself, did not protest and even feigned an orgasm to end her ordeal quickly. Being in shock and trauma, the victim registered a case only after 3 months.

The sessions court convicted the accused of rape; however, the High Court of Delhi overturned the conviction. The court referred to the second requirement of section 90, where the accused needs to be aware that there is a fear of injury or misconception of fact in the victim's mind while giving consent, which the prosecution was unable to establish conclusively. The court opined that prior history of affection between the accused and the victim and lack of much resistance from the victim may have led the accused to have presumed consent on her behalf. In the court's words, "a feeble no may mean a yes". Here, the court's interpretation of consent was based on the nature of the prior relationship between the accused and the complainant. The court also completely failed to consider that the victim had unequivocally denied an earlier request for sex by the accused. It is pertinent to note that the judiciary should be sensitised to understand that it is not appropriate to expect every person to have the tenacity to tolerate someone who repeatedly badgers. The court, unfortunately, established a precedent where the onus is placed on victims to communicate their lack of consent adequately to the accused and communicated till the point where the accused is made fully aware of it, especially when there is prior intimate history between them. Thus, the court effectively translated the standard of consent from a proactive one to a presumptive one, which operates unfairly against women in relationships. This decision was criticised by several quarters of the public, but the position as of today remains the same for the jurisdiction of Delhi (Magill 2017).

Statistically, most rapes are committed by persons known to the victims (Ministry of Home Affairs 2017). Since rape usually occurs in private spheres (*Bharwada*, 1983), it becomes difficult to determine the culpability of an accused, especially in cases where there has been prior sexual contact between the victim and the accused. In order to resolve this conundrum, many countries have established an affirmative standard where the accused is expected to affirmatively seek the consent of the victim before initiating sexual contact.[4] However, studies from these jurisdictions show that expectations of coercion by the accused and active resistance by the victim still continue to feature in rape trials with respect to complainant credibility (DeShon 2016, Burgin 2019). Therefore, an affirmative standard of consent may not be sufficient to secure an empathetic victim

[4] Canada (Section 273.1(1) of the Canadian Criminal Code, 1985), Certain states in USA (Wisconsin Statutes and Annotations, Sections 940.225(4), Vermont Statutes and Annotations, Title 13, Section 3251(3)), Sweden (Section 1, Chapter 6, Swedish Criminal Code, 1965), Finland (Section 1, Chapter 20, The Criminal Code of Finland, 1889), and Certain States in Australia (Section 61HE, NSW Crimes Act, 1958) among others.

experience in courts or in issues of complainant credibility. This is where rape myths, stereotypes and biases influence the judicial mind in attacking the victim's credibility.

In *Mahmood Farooqui*, the court interpreted consent as a negative presumptive standard, relying on section 90 of the Indian Penal Code, especially in light of their prior romantic history. This, therefore, established a different interpretation of consent for victims who have had prior sexual contact with the accused person. The decision in *Farooqui* invited criticism from all quarters for being regressive and ultimately perpetuating a culture of victim shaming (Sagar 2019). The need for an affirmative standard of consent seems relevant in such cases, especially considering the feminist analysis of the power dynamics between men and women in relationships (Barn and Kumari 2015, Dhonchak 2019, 55–56). Further, the court failed to recognise that free and voluntary consent implies overt/covert actions on the part of the complainant, indicating wilful and equal participation in the sexual activity. This was clearly missing in the *Farooqui* case; in fact, evidence to the contrary in the form of categorical refusal for sexual contact earlier was clearly ignored (*Farooqui*, 2017, para 14). Despite this, the court held that the defendant's belief in the victim's consent was reasonable and was not negated by her "feeble" refusal. Therefore, the expected gains subsequent to the enactment of the explicit standard of consent in 2013 have not been realised. Let us now assess some extraneous factors that form the basis of determining complainant credibility and consent in rape cases in India.

3. Relevance of extraneous circumstances in the determination of consent by courts in India

The Farooqui case is a classic example of how prior affection and extraneous factors affect the court's determination of complainant credibility and her consent to the act. In the absence of independent corroborating evidence, courts prefer to first determine a complainant's credibility before proceeding to convict the accused, especially if it is based on the sole testimony of the complainant. This credibility is not legal credibility but moral credibility. This distinction was explained by Adrian Zuckerman, who said that legal credibility is about the truth value of testimony, whereas moral credibility is the social standing of a person, which would translate into the reliability of their testimony (Zuckerman 1989, 248–249). The point of attacking the moral credibility of the complainant is to suggest that it would be unfair to punish the accused based on the sole testimony of a morally bankrupt person, especially in the absence of independent corroboration of their account (McColgan 1996, 283). This lack of morality is then used to either suggest consent to the act or acquit the accused based on the benefit of doubt (Brown *et al.* 1993, 85).

The relevance of extraneous circumstances in the determination of consent can be traced to the decision of the Supreme Court of India in *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* in 1983. In this case, the court settled the legal position on conviction in rape cases based on the sole testimony of the victim. The court held that in Indian society considering the value placed on a woman's chastity, it is difficult to fathom a woman who would lie about the offence of rape. Moreover, unlike in cases of physical assault, it is not reasonable to expect eyewitnesses in rape cases, which occur in private spheres. Therefore, there is no need for corroborating a victim's testimony in a rape case unless it suffers from basic infirmity, and the probability factor renders her testimony unworthy

of credence. The Bharwada decision was a positive development for rape victims as convictions could now be based on their sole testimonies. However, the court did not offer any guidance on what kind of infirmity or probability factor would render a rape victim's testimony unreliable without corroboration. This glaring lacuna in the decision effectively allows judges to determine the credibility of complainants and their testimonies regarding consent based on patriarchal notions prevailing in Indian society. This also paves the way for judges to incorporate their personal moral convictions and assumptions about gender behaviour in determining consent. These are also used to determine whether the accused's belief in consent can be attributed in any way to the conduct of the victim. Such extraneous circumstances may be any form of past or present behaviour or sexual history of the complainant, thereby relying on traditional rules of evidence, which are inherently misleading, and reliance on these often lead to a miscarriage of justice. Let us analyse some of these considerations and their potential impact on issues of determination of consent:

a) Presence or Absence of injuries – It has been repeatedly mentioned by courts as a matter of principle that the absence of injuries in an allegation of rape should not lead to doubts regarding the credibility of the victim or inference of consent on behalf of the victim (*BC Deva,* 2007, 128; *Rajinder*, 2009, 79). Even in cases of rape against minors, absence of injuries should not lead to doubts regarding the credibility of victim's testimony (*Harpal Singh,* 1981, 561). However, the presence of injuries has often been used as a contra-indicatory marker by judges to maintain the conviction of the accused (*Akhlaq*, 2009, 230). Therefore, even if the absence of injuries is not fatal to the prosecution's case, the presence of the same does help strengthen it.

b) Aggressive resistance to rape – It is a common belief that an average victim is bound to resist any attempt leading to a violation of bodily integrity. Taking this thought forward, courts in India have often reflected on the relevance of aggressive resistance by victims to attempts of rape. The idea being that offering resistance may appeal to the conscience of the rapist or, at the very least, lead to physical injuries on both their bodies which would be helpful as medical evidence. For example, an absence of stiff resistance or shouting while being stripped of her clothes during the act was deemed as evidence of consent by the trial court in *Dilip v State of Madhya Pradesh* (2013, 334). Recently, in *Raja v State of Karnataka* (2016, 515), the court held that the victim's conduct during the ordeal was not that of an anguished and horrified victim but one of a submissive and consensual person and therefore acquitted the accused. Hence, an "ideal victim" behaviour of aggressively resisting rape has a bearing on the court with respect to the question of consent.

c) Sexual lifestyle of the victim – India is generally a sex-negative society with a conservative culture. Due to a largely patriarchal society, the expression of sexuality by a woman works negatively and affects her credibility in a rape case. Before 2003, the Indian evidence act contained a clause where the credibility of a rape victim could be impeached by proving that she is of generally immoral character.[5] This section resulted in humiliating cross-examination of women, which amounted to an assault on her mental health as well. However, even after the section was removed following an

[5] The Indian Evidence Act, 1872, Section 155(4); Omitted by Criminal Amendment Act 4 of 2003.

amendment in 2003, in several cases, courts have used female conduct both before and after the act as a measure of her credibility.

In a case for anticipatory bail against arrest in a rape charge, the Delhi High Court suggested that there is an onus on every woman to protect her dignity and modesty, not be casual with her chastity and maintain her virtues (*Arif Iqbal*, 2009: Para 8). Such a mindset reflects archaic, regressive and insensitive thinking on the part of judicial officers. Similarly, a 17-year-old was deemed indecent and habitual to inappropriate behaviour by the court while adjudicating an appeal for bail in a rape case even when the police had filed a charge sheet against the accused (*Dominic Rodrigues*, 2016). As part of the 2013 amendment act, the government introduced a rape-shied provision in the evidence act, which disallowed submission of any evidence of previous sexual experiences of a woman.[6]

However, not much seems to have changed (Kulshreshtha 2023). In the *Farooqui* case, one of the factors that the judge stated for determining consent was that on prior occasions, the victim had kissed and hugged the offender, despite him being a married man. The court also referred to the communication sent by the prosecutrix mentioning that she loved him and wished him well, however, she ignored the remaining part of the mail in which she had reiterated her lack of consent to the offending act. In the bail hearing of the accused in a gang rape of a university student, the court made comments regarding the victim's lifestyle and blamed her for inviting the rape upon her (*Vikas Garg*, 2017, Paras 12 and 27). These observations led to the inevitable conclusion that the sexual lifestyle of a woman continues to have a bearing on her moral credibility in rape cases.

d) Post Assault behaviour – There is considerable influence of media on creating a caricature of an "ideal rape victim" in the eyes of judicial officers. This idea stems from the belief that rape is a fate worse than death, a thought that courts have expressed in several decisions. In *State of Punjab v Gurmit Singh* (1996, 403), the court observed: "A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female". Similarly, in *Jakir Ali* (2008, 276) and *Bipul Medhi* (2007, 216), the court opined that rape robs an Indian woman of her chastity, which is her most valued possession. This line of thought diminishes the credibility of victims whose post-assault behaviour deviates from the script they have in their minds. In *Kamalanantha v State of Tamil Nadu* (2005, 209 and 217), the court noted that the victim cried on multiple occasions, implying that such behaviour renders credibility to the allegation of rape. In another case, the court granted bail to the rape accused based on the prosecutrix's post-assault behaviour (*Rakesh B*, 2020). The court noted that the testimony of the victim, where she indicates that she felt tired and fell asleep after being raped, is unbecoming of an Indian woman, thereby affecting her credibility. The court also engaged in victim shaming, where it commented on her behaviour of staying late at the office and having drinks with her offender as if she deserved what she got for being an outgoing person (*Rakesh B*, 2020, Para 3c and 3d). It is pertinent to note that none of the above considerations has any legal bearing for consideration in a bail hearing as per the judicial precedents of the Supreme Court on bail (*Ram Govind Upadhayay*, 2002, *Sitaram Popat Vetal*, 2004).

[6] The Indian Evidence Act, 1872, Section 53A; Introduced by the Criminal Law Amendment Act, 2013.

In the bail hearing of *Swami Chinmayanand* (2020, para 13), the court observed that it was absurd that during the 9–10 months of her alleged sexual harassment, the victim did not convey her ordeal to any of her family members, thereby leading to an inference that her credibility is questionable. Delay in bringing forth the offence was seen as evidence of afterthought or grounds to doubt the veracity of the allegations. Such opinions are in complete dissonance with earlier precedents established by the Supreme Court of India, which expressly state that delay in disclosing the offence will not amount to an afterthought on behalf of the victims (*Ravinder Kumar*, 2001). From the catena of judgments referred to above, it is clear that the post-assault behaviour of a victim continues to have a bearing on the determination of consent in a rape case.

e) Modern Women vs Traditional Women – Another issue that influences the decision-making of judicial officers is the profile and social standing of the female victim. There is a pattern of prejudice in doubting the testimony of an urban, educated, modern woman who openly expresses her freedom and individuality. In *Bharwada* (1983, 224–225), the court established that there is no need for corroboration of rape when the victim's testimony does not suffer any infirmities. The court then elaborated on the differences between the outlook and status of western women compared to Indian women to demonstrate that the former had several incentives to lie about an incident of rape compared to the latter. This decision seems to be a factor that led to questioning the credibility of the testimony of the American scholar in the *Farooqui* case. The decision suggests a biased mindset based on myths and assumptions about western society and cultures.

In *Rohit Chauhan v State* (2013, para 15), while hearing a bail petition for the offence of rape on the pretext of marriage, the court observed that the complainant was an ultra-modern lady who enjoyed alcohol with men, a fact she did not deny that in court. Therefore, she was not so vulnerable that she would not object to being exploited over a long period of time. The court did not explain the correlation between a person having a modern outlook and their vulnerability to being a victim of fraud. Without a sufficient factual foundation for such reasoning, it can only be assumed as a stereotype. Similarly, in a case of rape by deception, the Bombay High court opined that it would be difficult to fathom that consent for sexual relations can be obtained by fraud from a 25 year old educated woman (*Kunal Mandaliya*, 2016, para 6). Thus, the modern, empowered working woman invites prejudice from the courts, especially in cases where consent for sexual relations has been obtained through fraud.

The intersectional issues of caste, gender and class also seem to affect marginalised women as victims of sexual violence disproportionately. Multiple scholars have noted how the credibility of Dalit victims becomes the first hurdle to clear before they could seek justice for their violation (Kumar 2021, Wadekar 2021).[7] Judges tend to have developed certain parameters which if not attributed to the victim could result in denial of their experience of violation (Garg 2019).

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[7] The two landmark cases which triggered large-scale reforms in women-related laws in India are *Tukaram Ganpat v. State of Maharashtra* and *State of Rajasthan v. Ramkaran & Ors*. In both these cases, tribal women were raped by multiple upper-caste men, and neither of them managed to secure justice from the legal system. Complaints of sexual violence by both victims were not believed.

From the extraneous circumstances and its related judicial precedents analysed above, it can be conclusively said that they do have a significant bearing on the question of determination of consent. Most of these circumstances tend to engage in victim blaming and shaming thereby negating the culpability of the accused. Their relevance to the offending act in question is very limited and it only serves the purpose of aggravating the traumatic ordeal of the victim. Unfortunately, the law of evidence in India permits a very wide discretion to judges in admitting evidence which they deem relevant to determine the issue, i.e., consent at hand.[8] Relevance, as pointed out by many scholars, remains a highly problematic and discretionary issue as it incorporates in itself notions about human behaviour in specific unknown situations where judges are induced to speculate on how a person would behave in such a situation, thereby forcing them to rely on stereotypes and myths (McColgan 1996, Young 2001, Firth 2005, McGlynn 2017). Relevancy is a very low threshold to admit evidence concerning the issue at trial. However, some definite reasons can be attributed to such judicial attitudes in India, one such reason being the judicial culture regarding the treatment of evidence. In *RM Malkani v State of Maharashtra* (1973), the Supreme Court of India unequivocally stated, "a document procured by improper even illegal means does not bar its admissibility provided its relevance and genuineness is proved". However, the court also held that in his discretion, a judge could disallow certain evidence if it can be proved that strict rules of admissibility would unfairly prejudice the accused. This approach to the admissibility of evidence was further cemented in *Pooran Mal v Director of Inspection* (1974, 366). In this case, the court observed that "It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out". Therefore, judicial officers in India have a default reflex to admit evidence relevant to the trial at hand, notwithstanding its prejudicial effect towards the victim.

To be fair to judicial officers in India, it is to be conceded that the growing number of false cases of rape allegations have got them concerned. This phenomenon is attributed to the fact that criminal law in India is typically misused to enforce individual and societal morality. In their studies, ethnographic researchers such as Zoe Brereton (2017) and Neetika Vishwanath (2018) have noted that the law on rape is used by different kinds of complainants to accomplish objectives not envisaged by the criminal justice machinery. For example, in cases of elopement by young girls, rape and kidnapping cases are registered by their male family members when they disapprove of their daughter's choice of partner and want to control her sexuality using legal machinery. Police officials encourage complainants to frame stories of rape by deception in such a way as to avoid them from being judged for engaging in premarital sex. This is done in situations where complainants engaged in premarital sex with the accused, who is now reneging on their promise to marry them. In the case of *Ajit Naharsingh Dasana* (2021), the Bombay High Court granted bail to a rape accused after the complainant admitted

[8] Sections 5-16 of the Indian Evidence Act 1872 provide all sorts of provisions to admit evidence by judges if they are relevant to the issue at trial. Apart from rape shield laws under Sections 53A and 146, the right to admit relevant evidence by a judge is largely unrestricted by the legal system in India. However, the rape shield provisions have been found to be largely ineffective. For a critical analysis of these provisions see Kulshreshtha (2023).

before the court that she was in an extramarital relationship with the accused and had lied about the rape allegation to her husband in a desperate attempt to save her marriage.

Similarly, in the cases of *Mukesh Bansal* (2022) and *Arshad Ahmed* (2022), the Allahabad and Delhi High courts noted that allegations of rape, sodomy and sexual assault are routinely being made in cases of matrimonial disputes. These cases are later brought before the courts for quashing after a settlement is reached between the parties. The use of rape law for controlling the sexuality of adult women, resolving relationship disputes and pushing settlement in matrimonial cases distorts the focus from the heinous crime and its offenders. These attempts undermine the plight of genuine victims of rape as well as the resources which are meant to be utilised for them, such as valuable police and judicial time and focus. Though these cases are very few, they tend to have a disproportionate effect on the minds of judicial officers regarding complainant credibility.

There is a definite need for formulating appropriate judicial guidelines for determining elements of consent in sexual offences while considering extraneous factors. For example, relying solely on the interpretation of post-assault behaviour as a marker of credibility can lead to erroneous conclusions for both the accused and the victim, as different people react differently to the same situation, which may not necessarily indicate their state of mind (Gotell 2008, Gavey 2019, Burgin and Flynn 2021). For example, consider a situation where a person has just come out of a long-term relationship. This person may react to the situation in different ways. They could be depressed for days, go out partying to numb the pain, or even engage in a series of sexual encounters with strangers to overcome the feeling of loss in the relationship. It is not appropriate or logical to assume that only the person feeling depressed is sad at the end of the relationship. Therefore, the courts need to be cautious in relying on traditional rules of deducing inferences in determining the culpability of the accused. Before assessing the effectiveness of an affirmative standard of consent, it is pertinent to critically analyse the standards of consent in England and Wales and Canada to understand the different jurisprudences that govern the law of consent and its interpretation. While there is a difference in the models of the criminal process and the social and legal cultures between the jurisdictions, these comparisons would nevertheless assist in determining methods for effective interpretation of standards of consent in India.

4. Standard of consent in England and Wales and Canada

4.1. England and Wales

In England and Wales, all sexual offences are defined and prosecuted under the Sexual Offences Act, 2003. The Act defines rape under section 1. Here, the perpetrator is presumed male, whereas the victim can be of any gender. As applicable to these sections, consent is defined in section 74: "a person consents if he agrees by choice, and has the freedom and capacity to make that choice" (The Sexual Offences Act, 2003). The courts have been clear that consent is a positive concept and does not require proof of active resistance. This is reflected in the mental element of rape, which requires proof that the accused did not reasonably believe in the victim's consent. In effect, this places a duty on the defendant to ensure they have reasonable grounds to believe the victim

consented. In addition, the jury members are instructed to take into account the steps taken by the accused to ascertain such consent.[9] It is unlikely that a jury will accept that the victim did not voice opposition and would give the accused reasonable grounds for his belief in consent. Section 75 provides for evidential presumptions wherein if certain circumstances prevailed when the act was committed and the accused was aware of those circumstances, then consent is presumed absent unless sufficient evidence is adduced to the contrary. Such circumstances include the complainant being under fear of violence, being unconscious, or being physically disabled, among others. Section 76 provides that if the act occurred by intentionally deceiving the victim or impersonating a person known to the complainant, then it is assumed that consent was absent and the defendant was aware of it.

Therefore, the 2003 Act provides a reasonable incentive to the accused to undertake steps to determine whether the complainant is consenting or not. There have been cases wherein failing to take adequate steps to ensure consent resulted in convictions for rape.[10] Nevertheless, the lack of such steps taken by the accused does not ipso facto amount to evidence of his culpability, as the law explicitly does not require the accused to affirmatively seek consent before engaging in the act. Baroness Scotland of Asthal moved an amendment to include taking affirmative steps for having a reasonable belief in consent, stating that having such a requirement in the law would induce police officials to focus their pretrial inquiry with both complainants and suspects on the steps taken by the accused before engaging in sexual activity (Hansard, 2003). This would be of tremendous help in determining the extent of the reasonableness of an accused's belief in consent by courts.

One of the positive attributes of the judicial system of England and Wales is the Crown Court Compendium, which guides judges in directing the jury in Crown Court trials and other areas (Crown Court Compendium, 2020). It suggests that the judges make juries aware of the dangers of relying on unwarranted assumptions while deciding the case. This also helps ensure that juries and judges are reminded not to make summary judgments based on certain facts. For example, the compendium mentions that the existence of a long-term relationship between the accused and the complainant should not have a decisive bearing on the question of consent in a case of rape.[11] Apart from prior sexual history, judges often warn juries not to read too much into things such as delay in reporting the crime (Crown Court Compendium, 2020, ch. 20, para 3; *R v Doody* [2008]), demeanour of the victim in court (Crown Court Compendium, 2020, ch. 20, ex. 7, *R v Guy* [2018]), sexual orientation of the offender (Crown Court Compendium, 2020, ch. 20, para 11, ex 14; *R v Doody* [2008]) among others. Let us now assess the judicial treatment of consent.

The judicial treatment of the standard of consent is far more progressive in the English courts, as is evident from *R v Malone* [1998], where the court declared that there is no

[9] For example- The Sexual Offences Act, 2003, Section 1(2), 2(2) and 3(2).

[10] *R v Ivor and others* [2021]. In this case, the complainant's specific circumstances convinced the court that the absence of specific inquiry regarding consent by the accused persons could lead to their belief in consent was unreasonable.

[11] Crown Court Compendium, 2020, ch. 20.21, para 4, example 6; Also mentioned in *R v McAllister* [1997] and *R v CE* [2012].

onus on the complainant to communicate their lack of consent to the accused. This is in complete contrast to the position taken by the Delhi High Court in *Farooqui*, where the court established an onus on complainants, in cases of rape by an acquaintance, to communicate their lack of consent to the sexual act adequately. When determining whether the defendant's belief in consent was reasonable, the jury is expected to take into account all the circumstances, including any steps the accused took to ascertain consent. This will also include the specific characteristics of the accused, including mental disability, among others. However, this still does nothing to prevent society's norms and stereotypes about sexual relationships between men and women (Temkin and Ashworth 2004). The reference to "all the circumstances" to ascertain consent can still lead the jury to scrutinise the complainant's behaviour, including their previous sexual history, stereotypes regarding their dressing or drinking habits, or frequenting a particular place to determine if any of them could lead to a reasonable belief in consent. Jury members may accept a lower standard of consent or attribute lower culpability to an accused who assaulted a victim with a "deviant" sexual lifestyle (Finch and Munro 2007, Ellison and Munro 2013, Gurnham 2016).[12] Moreover, the law in England and Wales does not still impose a duty on the part of the accused to actively seek consent.

The need for affirmatively seeking consent can be understood from *DPP v Morgan* [1976]. Morgan was a case adjudicated before the enactment of the Sexual Offences Act, 2003. In this case, a husband asked three of his colleagues to have group sex with his wife and informed them that they should expect some resistance from her which is part of her fantasy. The men then had intercourse with the woman against her wishes and despite her protests. In the court, the men claimed honest belief in her consent based on her husband's words. The jury found all of them guilty of rape on the grounds that their belief in consent was not reasonable. However, upon an appeal, the House of Lords held that the belief in consent only needs to be honest and genuine; there was no requirement for it to be reasonable, even though the conviction was upheld. This position has been overruled by the enactment of the Sexual Offences Act, 2003, which explicitly stated that there had to be reasonable grounds for assuming consent. Express enactment in the law requiring steps taken to seek consent affirmatively can help measure the accused's conduct and reduce ambiguity in ascertaining the "reasonableness" of the belief in consent. Nevertheless, the use of the crown court compendium suggests a positive step that could be useful for the Indian jurisdiction to take note of. Let us now assess the standard of consent in Canada.

4.2. Canada

Consent for the purposes of sexual assault in the Canadian Criminal Code is defined under section 273.1(1) as the voluntary agreement to engage in the sexual activity in question. The code further mentions situations under which no consent would be assumed, such as an agreement being expressed by a person other than the complainant, the complainant being unconscious, or being unable to communicate consent, among others (Criminal Code, R.S.C. 1985, c. C-46, Section 273.1(2)). The code also mentions that

[12] The word "deviant" here is not being used to infer judgment on any person's sexuality or sexual preferences. It is being used to refer to sexual lifestyles which are not practised by major members of society such as BDSM, anal sex, group sex etc. There might be jury members who may judge such complainants when they complain of sexual violation and it may affect their ability to seek justice.

belief in consent by the accused is unacceptable under certain conditions such as self-intoxication, the accused's recklessness or wilful blindness, or if the accused took no proper steps to determine whether the complainant was consenting or not (Criminal Code, R.S.C. 1985, c. C-46, Section 273.2.). The standard of consent for sexual assault in Canada prima facie appears to be a positive, affirmative standard which also lays an onus on the accused to undertake definitive steps to seek active and unambiguous consent of the complainant. Let us now assess the judicial treatment and academic analysis of Canada's affirmative standard of consent.

R v Ewanchuk [1999] is the landmark case that firmly established the jurisprudence on the application of consent laws in cases of sexual assault. In this case, the Supreme Court held that implied consent would not amount to legal consent. The Court also reiterated the observation in *R v Park* [1995] that "*mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying 'no', but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying 'yes'". The Court further opined that the defence of honest belief does not arise in cases of recklessness or wilful blindness on the part of the accused. In cases where such a defence may be considered, the trial judge must first assess the "air of reality" of the evidence of such defence and then determine if the accused took "reasonable steps" to ascertain consent. Moreover, when a complainant expresses non-consent, the accused is obligated to take additional steps to ascertain consent. The Canadian Supreme Court thereby cemented the need for the accused in cases of sexual assault to seek active and unambiguous affirmative consent from the complainant before initiation of any sexual contact.[13]

However, after *Ewanchuk*, Gotell (2008) noted that sexual assault decisions are essentially reconstructions of good victimhood and idealised male perpetrators and remain gendered. The definition of an ideal female victim of sexual assault has shifted from the prerequisites of chastity and sexual virtue to one who practises risk safekeeping and follows the model of rational behaviour. What judicial discourses have made evident is that women whose behaviour is risk-taking or falls out of line with the average person are punished by discrediting and derecognition of their experience of sexual violation in cases of sexual assault (Stanko 1997, Walklate 1997). Elaine Craig (2018), in her analysis of trial court decisions post-*Ewanchuk*, noted that the application of affirmative standard consent is not as appropriate as it should be at the trial court stages across Canada.

Judges in trial courts continue to work with the reasoning that consent for sexual activities between acquaintances operates by default or by assumption unless a clear, unambiguous expression of lack of consent is stated by the complainant (Craig 2018, 2021). This reasoning rationalises male entitlement to female bodies and directly contrasts with the law on consent in Canada. For example, in *R v B(IE)* (2013), the complainant testified that she, along with her friends and the accused, were drinking at a tavern to celebrate her induction into the armed forces. The accused asked her to accompany him outside, where he took her behind a dumpster in a parking lot, forced her to perform fellatio on him, and went back to the tavern as if nothing had happened. The trial judge held that the complainant did not explicitly consent to sexual intercourse.

[13] Whether the impugned conduct in question is sexual or not is to be decided based on the test established in the case of *R v Chase* [1987].

However, he acquitted the accused on the grounds of honest but mistaken belief in consent since the complainant accompanied him to a secluded parking lot, did not protest or scream when he unzipped his pants and did not cry or say anything after the act. Justice Moir’s reasoning completely contrasts with the law on consent in Canada which does not entitle the accused to assume consent based on a lack of protest by the complainant.[14]

A similar decision was made in *R v Adepoju* (2014). Here, the complainant allowed the accused to become her roommate but clearly specified that she wanted to be in a platonic relationship with him. However, on arriving at her flat, the accused forcibly kissed her and removed her pants and underwear. The complainant resisted these acts, but after about fifteen minutes, she gave in. When the charge of sexual assault was brought against the accused, the trial judge acquitted the accused because the prosecution failed to prove a lack of consent. A complainant who gave in after fifteen minutes of physical and verbal resistance was deemed to consent to the sexual act. Justice Sisson based his assessment of consent only in relation to the act of penetration itself and excluded all other actions preceding it, including groping and forcibly removing their clothes. Such an analysis reflects an archaic understanding of sexual assault, which occurs only on penetration. Further, he believed that mere acquiescence to a sexual act amounts to consent. Thankfully, the Alberta Court of Appeal overturned the decision, convicted the appellant and referred the case back to Justice Sisson for sentencing.

In *R v Al-Rawi* (2018), the trial court judge acquitted an accused as the prosecution failed to prove a lack of consent to the sexual act. In this case, the complainant was partying with her friends in a bar in Halifax and entered a cab in a highly intoxicated state. Eleven minutes later, the police found her in the back seat of the accused’s cab, naked from breasts down, and the accused was in between her legs facing in her direction. However, Judge Lenehan determined that the removal of the complainant’s clothes was not proved to be non-consensual. The judge completely failed to overlook multiple pieces of evidence which clearly indicated the culpability of the accused for sexual assault. For example, the fact that the complainant had a high level of alcohol in her blood, the fact that she was so intoxicated that she had lost bladder control and had urinated in her pants and underwear, and the cab was found in a secluded place which was not on the way to the complainant’s home. These circumstances collectively were sufficient to convict the accused of sexual assault; however, the judge failed to apply adequate legal principles to determine the complainant’s capacity to consent. The acquittal was ultimately quashed on appeal; however, the cases discussed above indicate a pattern of lack of understanding of consent in sexual assault cases (Craig 2018). These cases also indicate that the positive understanding of consent in sexual assault established by the Supreme Court of Canada is yet to percolate to the lowest levels of the judiciary in Canada.

Another point of consideration in the Canadian standard of consent is the influence of racism and colonial violence on the behaviour of sexual assault victims. Racialised and marginalised women are least likely to fit the description of an ideal rape victim. Hlavka and Mulla have noted that sexual assault cases are unique in that both jurors and the

[14] Canadian Criminal Code, 1985, section 273.2(b). It is important to note that till 2000, there was no through judicial analysis on this provision as noted in the decision of *R v Malcolm* [2000], para 16.

general public are forced to "consider questions of violence, sexuality, and consent" that often rely on their personal understandings of gendered, racialised, and sexualised norms (Hlavka and Mulla 2018). Rape myths and structures of blame attribution are heavily influenced by racism, which underlines how a perpetrator and a victim are portrayed in a particular case. This was explained in Donovan's research, where she explained the two main stereotypes of black women which govern them as sexual assault victims. They are either depicted as lustful, hypersexual, and promiscuous or as tough, aggressive, unfeminine, and strong (Donovan 2007). Both these stereotypes result in invalidating the trauma of black sexual assault victims by conveying the idea that either they are lying or that they have not suffered enough.

Similarly, in an analysis of the Canadian Inquiry into Missing and Murdered Indigenous Women, Palmater noted that "not only police forces, but many men in society have normalised the racist and misogynist views that indigenous women and girls can be violated and exploited with little fear of prosecution, many indigenous women and girls have normalised an expectation of racism and gendered violence from the police, without any hope of holding them accountable" (Palmater 2016). Lisa Gotell (2008) noted in her research how stereotypes regarding certain social groups could find their way into judicial discourse, which can be utilised to diminish the experience of a victim of sexual violation, as was in *R v Edmondson* (2005). This is similar to the prejudice women from marginalised communities in India face while seeking legal recourse for their sexual violations (Kumar 2021, Wadekar 2021). Therefore, the effect of an affirmative standard of consent remains under-utilised and out of touch with the ground realities of societal functioning.

From the cases and literature above, one can conclude that though an affirmative standard of consent has been firmly established through legislative intent and appellate judicial precedents since 1992, the *Ewanchuk* rules have been inconsistently applied by trial judges and many sexual assault decisions are marked by myths and stereotypes that continue to prevent legal recognition of unwanted sexual violations (Ruparelia 2006). Further, studies have indicated that judicial discourse on consent in cases where the complainant was married to, or was in a romantic relationship with the accused, is not in line with the decision in *Ewanchuk*, due to judges in trial courts noting the relevance of inherent free sexual availability in such relationships (Koshan 2010). Nevertheless, the standard of consent in sexual assault in Canada is a positive affirmative one and is proactively applied by the appellate judiciary in the determination of guilt. On the other hand, studies from the jurisdictions of New Zealand and Australia where affirmative consent is framed show that expectations of coercion by the accused and active resistance by the victim continue to feature in sexual assault trials concerning complainant credibility (Gavey 2019, Burgin and Flynn 2021). One is tempted to question if framing such standards in law can ever lead to major changes in societal attitudes. Let us now look at the arguments favouring an affirmative standard of consent.

5. Critical analysis of the arguments in support of an affirmative standard of consent

The affirmative standard of consent, colloquially known as the "yes means yes" rule, implies that consent is actively sought and communicated. In England and Wales, the act of affirmatively seeking consent is a circumstance that may be considered by the jury while determining the reasonableness of the accused's belief in consent. However, in Canada, not taking steps to ascertain consent denies reasonable-belief defence to the accused.[15] Before we look into the relevance of an affirmative standard of consent in the Indian legal system, let us analyse the strength of arguments in favour of such a standard.

Lisa Gotell (2008, 872) argues in favour of affirmative consent, stating that it challenges the patriarchal notion of undermining the sexual autonomy of women by contending that mere acquiescence is consent. Carol Smart (1989, 215) has labelled such occurrences as the "pleasurable phallocentric pastime" of pressing a woman until she submits, which is being disrupted by emerging legal standards of affirmative consent. Articulating an affirmative standard of consent through judicial discourse challenges a dominant (hetero)sexual script built upon forceful seduction (Wright 2001, 184–191). At the same time, Janet Halley (2016) observed that if affirmative consent works on the idea that the best way to seek consent before sexual contact is a question leading to a yes or no answer, it would be unrealistic. Such forms of behaviour can be expected as an ideal, but studies have proven that such behaviour is not the norm amongst couples (Gruber 2016, 689, Wall 2019, 306). However, it is important to note that violating consent or not seeking one in the name of an existing romantic relationship should still be treated as an offence in the eyes of the law. Much as offences such as domestic abuse occur quite often among romantic partners, it still is considered a criminal offence. While it is not within the realm of criminal law to dictate how sex should be conducted, it certainly may proscribe certain conduct. For instance, laws of assault and extortion prohibit forcible and coercive conduct because they are undesirable and wrong (Byrnes 1998, 287). Further, Halley (2016, 261) also states that applying criminal law to enforce a particular form of sexual conduct would turn the current legal system into a sex regulatory state. However, not acknowledging the inherent dangers of unwanted sexual contact is also a grave form of injustice towards any victim.

Recently, an argument for framing an affirmative standard of consent in the Indian Rape law was made by Anupriya Dhonchak (2019). She affirms the need for a consent standard which accounts for power imbalances in sexual relationships and addresses issues of victim traumatisation through lengthy trials and humiliating cross-examinations. However, such issues are attributed to inherent societal problems that criminal remedies alone have not successfully resolved. Nevertheless, assessing consent, keeping in mind the power imbalances and gendered relations, would certainly assist in better interpretation of consent by the judiciary (Gotell 2008, Gavey 2019, 43–47). However, her primary argument that laws need to correct such imbalances is an erroneous approach, as academics have long baulked at using criminal law to achieve changes in societal behaviour (Kotiswaran 2018). This strategy has been encouraged by

[15] England and Wales- Section 74 of Sexual Offences Act, 2003; Canada- Section 265 of the Canadian Criminal Code, 1985 (Section 265 is about assaults in general and includes the definition of a sexual assault).

the Indian government since decades to appease various interest groups, which never bore fruit, as evident from recent studies on the attitudes of police towards female victims of sexual violence (Kulshreshtha 2020). Researchers have also highlighted the need to address rape myths and stereotypes through sensitisation training and discourse rather than through the reformation of criminal law (Dash 2020).

Changes to criminal law have not yielded the expected results, whether in police sensitivity or judicial sensitivity, as noted in studies recently (Kulshreshtha 2019). For instance, there has been an enactment of a provision in the Indian Evidence Act, 1872, to prevent defence lawyers from bringing the prior sexual history of the complainant into evidence (Indian Evidence Act, 1872, Section 53A). However, without proper training and sensitisation, judicial officers continue to allow such humiliating cross examinations to be conducted either due to patriarchy, indifference or overreaching in their zeal to safeguard the right to fair trial of the accused (Kulshreshtha 2023). True reform will only be achieved through sensitisation and training members of the criminal justice machinery, be those police officers, judicial officers, prosecutors or even legislators. Otherwise, even with affirmative consent, judicial resistance can derail this progress, as we have noted earlier (Temkin and Ashworth 2004).

Another argument for an affirmative or a higher positive standard for consent has been made by Michelle Madden Dempsey and Jonathan Herring (2007). They argue that criminal law's response to the offence of penetration is misguided and erroneous. The starting point of their argument is that sexual penetration is generally harmful, and justification for the same would require consent and other reasons. They substantiate this argument based on three reasons. Firstly, when force is used upon another person, it is prima facie wrong unless it is justified. Sexual penetration requires force since penetration is achieved through pushing the muscled walls of the vagina or anus, both of which are not default resting places for penises. Thus, sexual penetration requires force; ergo, it requires justification. Over here, Dempsey and Herring are looking for a change in the law's approach towards sexual penetration. The issue is that criminal law in India assumes the presumption of innocence on behalf of the accused, including in sexual offences. This means that a sexual act remains a consensual one unless proven otherwise. Dempsey and Herring argue for this position to be changed to one where sexual penetration by itself should be considered prima facie harmful unless proven otherwise.

Secondly, Dempsey and Herring contend that harming or exposing someone to the risk of harm requires justification. Sexual penetration carries the risks of sexually transmitted diseases, pregnancy and injuries ranging from tearing to lacerations of the vagina or anus. The authors admit that such harms may not exist in all cases of sexual penetration, but they remain inherent in all situations; hence it should require justification. While this may seem reasonable, Bergelson (2014) argues that if there is consent, it may be too invasive for the law to engage in such an overreaching analysis unless excessive force is used that exposes the individual to risks which extend beyond what is inherent in sexual intercourse. Further, the issues of risks of sexually transmitted diseases or pregnancy or injuries have limited bearing on the question of the standard of consent in rape (Ferzan 2016). These situations form the basis of aggravating factors to be considered during the sentencing of the accused if convicted of the offence. The last reason they mention is that

acts have social meaning. They claim that the social meaning attached to sexual penetration of a woman's vagina or anus is negative, thereby rendering the act prima facie wrong. Let us consider the colloquially used terms for sexual intercourse with women – "fuck, bang, screw, nail, hit it, poke" among others. Most of these terms depict males in a dominant role and women in a submissive role. The idea becomes apparent that through sexual penetration, women become less powerful and less human, whereas men become more powerful and more human. Therefore, a strong justification is required for penetration. However, it is difficult to correlate the effect of the language argument with the justification for sexual penetration. Community standards and understanding of sexual acts evolve based on time and can be readjusted based on sensitivity and sexuality education. This will be discussed in detail in the solutions section of this paper. Further, the use of criminal law to change societal behaviour is a path that has not ended well, as we note from the literature discussed earlier in this section.

Dempsey and Herring suggest adopting the consent plus model recommended by many feminist researchers in the UK (Munro 2011). It is apparent from their reasoning that they have imported medical jurisprudence into their rationale. In medical law, mere harmful touching or contact with a patient without consent would result in a charge of battery against the doctor, even though in such cases, it is presumed that the doctor's intentions are bona fide and that they usually work in the best interests of patients. However, one should adhere to higher standards when initiating sexual contact with a person. However, the proponents of affirmative consent do not comprehend the challenges in implementing this standard in real-life situations. For example- Let us consider two different scenarios. In Scenario 1, we have a boy "B" and a girl "D" in a romantic teenage relationship. D wishes to wait till she joins a university to lose her virginity to B. However, B wants to consummate their relationship now. Therefore, he repeatedly asks her numerous times to have sex, and she keeps refuting him. B starts hinting that his interest in her will fade if she does not initiate sexual contact. D finally decides to give her consent to B to engage in sexual intercourse to save her relationship.

In the second scenario, G, a man and H, a woman, have been married for the past 10 years. G likes to have sexual intercourse every other day, but H does not feel interested in doing the same. However, H does not voice her lack of interest to G because she thinks G may react poorly or seek sex elsewhere if she refutes him, even if no such thing has happened in the past. Now, in both these two scenarios, D and H are consenting for the purposes of rape law, and B and G are seeking consent affirmatively before sexual contact. Yet, the decision to consent to sex is based on coercive factors rather than due to their enthusiastic interest in the sexual activity. These are complex situations which are neither envisaged nor any solutions proposed by the proponents of an affirmative standard of consent. Further, in most rape cases involving partners with a long previous sexual history, and no medical or physical evidence to support the assault, it becomes challenging to determine the culpable act. Judges are forced to conduct roving inquiries and speculate on what would have happened for the lack of a better solution. Though Herring (2014) has attempted to solve this conundrum, his solution seems more idealistic than practical. Therefore, although an affirmative standard may assist in better communication between sexual partners, it does not help legal inquiries in complex cases such as those mentioned earlier.

Therefore, the best argument in favour of an affirmative standard of consent would be to ensure adherence to the fundamental principles of sexual autonomy and bodily integrity of an individual. As per the latest jurisprudence on the law of privacy in India, the right to be left alone is included (*Puttuswamy*, 2017). Thus, sexual contact with any individual should involve the highest considerations of bodily integrity, and the prior relationship between the accused and complainant should have limited bearing on it. Further, an affirmative standard is a sincere attempt to ensure that the scope of miscommunication or mistake on behalf of the person initiating sexual contact is eliminated. From the plethora of literature assessed above, it can be said that while an affirmative standard may have its limitations, it is definitely a positive step in the direction of granting greater sexual autonomy and personhood to victims. It would also assist in shifting the focus of the inquiry from the complainants' actions to the defendant's actions during the act. Let us now discuss some solutions which could assist in better outcomes of sexual assault cases without unfairly affecting the rights of the accused or the complainant.

6. Possible solutions

After carefully analysing the arguments against and in support of affirmative consent, it seems evident that solely framing affirmative consent in the Indian Rape law may not achieve the desired results in providing justice to victims of sexual violence. This is because affirmative consent does not impose a legal duty on the accused to seek consent. If the accused does not affirmatively seek consent, they should not be allowed the defence of belief in consent. The defence should be expected to affirmatively establish the steps undertaken by the accused for secure consent, and the judiciary needs to be adequately trained to implement rape shield laws to establish a victim-friendly trial process. Further, free and voluntary consent should be interpreted by courts as implying an overt act by the complainant, constituting active participation in the sexual activity.

It is important for both the legislature and the judiciary to ponder over the fact that in a patriarchal society like India, men are raised with the idea that women are subservient and beneath them, and this forms part of their perceptions regarding women. Therefore, such men do not consider the need to seek the woman's consent before initiating sexual contact. In such cases, can knowledge or conscious *mens rea* for committing the offence of rape even be attributed to them? A patriarchal chauvinistic man believes his desire for sexual contact is of primary importance, and his partner's sexual consent is of limited relevance. Therefore, in such a situation, if one goes by the strict interpretation of consent as a defence for rape, then no man can reasonably be held liable for having the conscious knowledge of violating their partner's sexual autonomy. A serial killer may not believe that slashing somebody's wrists is ending their life or even hurting them, but they will be convicted of murder nonetheless. A reckless speeding driver would be convicted of causing death by negligence even if he had no specific intention to run over somebody. An example of how cultural norms of sexual behaviour may not be compatible with the contemporary discourse of human rights was noticed in a rape case in France. In this case, on conviction for molesting a young boy, the lawyer on behalf of the accused during the sentencing hearing tried to negate the accused's culpability by mentioning that child molestation is a norm and acceptable practice in Afghan society (Datta 2021). The court rejected this cultural argument. Therefore, it is important to apply the concept

of wilful blindness while determining the culpability of the accused for rape, especially in the Indian jurisdiction.

As noticed in the second section of this article, courts often interpret prior sexual contact as evidence of consent. It is very important for judicial officers to understand that prior consent for sexual contact may not be related to the act being complained of. Further, proof of a romantic relationship does not decrease the requirement of affirmatively seeking consent for an individual. Finally, active consent communication should be encouraged to reduce incidences of assumed consent (Curtis and Burnett 2017). Promoting healthy sexual practices among young adults and the general populace is key to reducing the large-scale prevalence of sexual violence in society. Multiple studies have indicated that sexual consent education programs must be adequately respectful of the different sexual experiences based on individual preferences (Willis and Smith 2021, 20–21). Then there is also the need to emphasise the sexual agency of an individual, which is to be respected (Herbenick *et al.* 2019). This is particularly important in light of the biggest drawback of promoting an affirmative standard of consent, as discussed below. The proponents of an affirmative standard of consent assume that sexual assault is due to miscommunication or misinterpretation of one party's intention by the other (Jozkowski 2017). Therefore, enforcing or promoting an overt unambiguous seeking of consent by the initiator of the sexual activity would remove all such issues arising from miscommunication. The result of this should have been reduced incidents of sexual assaults; however, this goal was not realised. This failure of affirmative consent to achieve these results was explained by Kristen Jozkowski (2017).

Jozkowski (2017, 750) suggests that policy makers need to be careful while promoting affirmative standard of consent as a game changer, because it could result in a situation where perpetrators would seek a coerced or ambiguous yes to complete the requirement of the law. This becomes particularly contentious when the accused claims a reasonable belief in consent based on the complainant's actions. Jozkowski explains that there is a need for lawmakers to understand that consent is affected by situational and contextual factors between individuals. Individuals may consent to sex even when they do not feel fully committed to it due to social contexts or repercussions. Jozkowski explains this in the context of American college culture concerning young adults and their attitudes toward sex. She notes that college girls feel socially obligated or pressured to consent to sex when they allow boys to buy them drinks or when they attend a frat house party (Jozkowski 2017, Jozkowski *et al.* 2018). Similarly, college men felt obligated to have sex with girls if they showed interest in them in social settings such as frat houses, as refusal would make their peers question their masculinity and lower their social standing. Therefore, consent in sexual intercourse is affected by socio-cultural factors such as gendered norms, social constructs, and perceptions of gender behaviour based on sexual scripts, amongst others. An affirmative standard of consent would not help reduce instances of sexual assault. Studies into the knowledge and attitudes towards the sexual practice of college students in India over the past decade also reveal similar issues (Kumar and Mittal 2015, Dutt and Manjula 2017, Mukherjee *et al.* 2019, Bhagwati 2020, Lahari and Abhinaya 2021).

These studies argue that attitudes among youth concerning sex and reproductive health in India remain conservative, largely due to the general conservative societal views

towards premarital sex. It was also discussed that most young adults find information about sex, and the opposite gender from informal discussions with friends, researching on the internet and watching movies. However, mediums such as movies continue to present outdated views on romance and normal adolescent sexuality, sexual performance and male and female sexuality. Further, attempts to introduce sex education in schools invite severe backlash from policymakers, parents, and legislators alike as they believe that it has the potential to corrupt innocent minds at a young age (Ismail, 2015). This ultimately leads to a sex-negative attitude and repressive sexuality, which eventually translates into unhealthy sexual attitudes in young adults. Therefore, in the absence of comprehensive sexual education, which would foster a change in the attitude of these young persons, the grassroots effects of changes in laws, such as an affirmative standard, would remain toothless. Comprehensive sex education coupled with enthusiastic support by institutions such as workplaces and educational institutions would help end the issue of sexual violence in society.

7. Conclusion

We have referred to a plethora of literature above concerning the standard of consent and its issues. There is no denying that an assessment of consent is riddled with issues such as undue regulation of sexuality, the continued impact of rape myths, and stereotypes amongst judges, juries and others. It is also evident from the various studies referred to in multiple jurisdictions that unless there is a major change in the interpretation and framing of laws with respect to the elements of consent, it will be difficult to secure convictions in rape cases. However, merely framing an affirmative standard of consent is insufficient unless it involves an express duty on the accused to affirmatively seek consent, which also needs to be enacted in the laws involving consent. As noted from the analysis conducted in the first part of this article, criminal law reform remains largely ineffective because the various members of the criminal justice machinery have their own convictions based on societal conditioning. Therefore, promoting affirmative consent as part of sex education in schools and colleges needs to be combined with changes in criminal law, which would then go a long way in establishing the right attitude to consent in young minds. Appropriate training for judicial sensitisation and training in sexuality education would also help establish appropriate and accommodative views towards the general public and sexual minorities in India.

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