

Consent, Female Agency and the Indian Judicial System: An Analysis of *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*

- Shalini Prem*

Abstract

Indian Rape laws as contemplated in the Indian Penal Code have undergone several waves of reform ever since its inception in 1860, the most recent one being the Criminal Law (Amendment) Act, 2013. Despite these progressions, when it comes to adjudicating on cases of rape, the Indian judiciary continues to adopt regressive interpretations of these laws. This paper aims to analyse how the Indian Judiciary through the *Mahmood Farooqui v. State (Govt. of NCT of Delhi)* violates the legal provisions in force for rape prosecution in India, particularly when it undermines the affirmative model of sexual consent as under section 375 of the Indian Penal Code, 1860. Moreover, the Court by, creating different standards of consent for different classes of women, focussing on the past sexual interactions of the prosecutrix, and introducing the idea of “assumed consent”, shifted the focus from the victim to the perpetrator consequently dismissing female agency and legitimising structural patriarchy.

Consent, Female Agency and the Indian Judicial System: An Analysis of *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*¹.

Agency is the expression of individual power through the ability to make choices using one's own thoughts and actions². Rape culture undermines women's sexual agency as it alienates them from their own sexual desires and turns them into objects to be used by men for sexual pleasure³. Since its inception, one of the major demands of the women's movement has been the need for reforms in rape laws⁴. The rape law reform movement challenged the regressive understanding of rape

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¹ *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*, (2017) 4 DLT (Cri) 328.

² Nicki Lisa Cole, *How Sociologists Define Human Agency*, THOUGHTCO. (Jan. 22, 2019), <https://www.thoughtco.com/agency-definition-3026036>.

³ Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, 34 BERKELEY J. GENDER L. & JUST. 29, 47 (2019).

⁴ Narayan, *supra* note 3, at 157.

laws, demanded for the "sexual autonomy of women"⁵, an end to the "patriarchal interpretation of consent"⁶, and a shift of focus in rape trials from the character and behaviour of the woman to her consent at the time of sexual intercourse⁷. As a consequence, Indian Rape Laws have undergone drastic waves of reform. One such reforms was the Criminal Law (Amendment) Act in 2013 following the Nirbhaya Rape Case in 2012, which redefined what constituted the offence of 'rape', and brought about progressive change for women. Despite the progressive amendments, the interpretation of consent by the Indian judiciary in the Mahmud Farooqui case in 2017 is indicative of how female sexual agency is still considered to be subordinate to that of men.

In 1837, Thomas Macaulay and the First Law Commission of India composed and presented the draft of the Indian Penal Code before the Government of India⁸. 'Rape' in this draft was defined as:

sexual intercourse by a man with a woman under one of five circumstances: against her will; without her consent while she is insensible; with her consent when it has been obtained by putting her in fear of death or hurt; with her consent when the man has tricked her into thinking he is her husband; or when the girl is under nine years of age.⁹

This definition was retained in the Indian Penal Code after its enactment in 1860. Prior to the 2013 amendments, the definition of rape was restricted to penile penetrations. The 2013 amendments broadened this definition of rape to include not only different forms of penetration but also oral sex, within the ambit of the non-consensual sexual acts that constituted rape under section 375 of the Indian Penal Code, 1860. In addition to this, what constituted 'consent' by a woman to engage in sexual intercourse was defined in absolute and unambiguous terms.

A positive and specific definition of what constituted sexual consent is provided for under Explanation II to Section 375 of the Indian Penal Code, 1860 (hereinafter IPC), which states that:

⁵ *Id.* at 158.

⁶ *Id.*

⁷ *Id.* at 157-158.

⁸ Elizabeth Kolsky, *The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57*, 69 JAS. 1093, 1098 (2010).

⁹ *Id.* at 1098-1099.

Consent means 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:

A reading of the above definition indicates the following: Firstly, consent as formulated under Section 375 requires a woman to express her willingness to participate in a specific sexual act, unequivocally. This expression of sexual consent should be through unambiguous words or conduct and hence provides for an affirmative model of consent¹⁰. Secondly, the consent has to be given for the specific sexual act engaged in and it can be subsequently withdrawn for another sexual act making sexual consent as under Section 375 of the IPC revocable. Furthermore, the proviso to Explanation II of Section 375 of the IPC, also clearly mentions that a lack of physical resistance, by itself would not amount to sexual consent. In a case of rape, as far as determining consent for a sexual interaction is concerned Section 375 will override section 90 of the IPC, which provides a general and negative definition as to what constitutes 'consent'.

In *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*¹¹, the accused allegedly committed forced oral sex on the prosecutrix, a research scholar from America who had met him a couple of times and had become well acquainted with him. The Delhi High Court on 25th September 2017, acquitted the accused of his earlier conviction for the offence of rape under Section 376 of the IPC, consequently challenging all the progress that had been made with respect to rape laws in India.

"The consent does not merely mean hesitation or reluctance or a 'No' to any sexual advances but has to be an affirmative one in clear terms.¹²" Under the affirmative model of consent, a woman's 'yes' would mean a yes and a woman's 'no' would mean a no for any sexual offer¹³. Further, this model presumes that the woman has not consented for any sexual activity until she is asked and she subsequently says "yes", clearly¹⁴. However, any subsequent act once a woman says no should be considered to be rape¹⁵. The court in the Farooqui case held that:

The traditional and the most accepted model would be an "affirmative model" meaning thereby that "yes" is "yes" and "no" is "no". There would be some difficulty in an universal acceptance of

¹⁰ Narayan, *supra* note 3, at 168.

¹¹ Mahmood Farooqui v. State (Govt. of NCT of Delhi), (2017) 4 DLT (Cri) 328.

¹² *Id.*

¹³ Narayan, *supra* note 3, at 167-168.

¹⁴ *Id.* at 168.

¹⁵ *Id.* at 176.

the aforesaid model of consent, as in certain cases, there can be an affirmative consent, or a positive denial, but it may remain underlying/dormant which could lead to confusion in the mind of the other¹⁶.

An analysis of the judgement reveals that the interpretation of consent by the Court goes against the affirmative model of consent when it attempts to justify why the prosecutrix's 'no' was a 'yes', and contradicting itself in the process. Consequently, the Court placed the burden on the prosecutrix to prove that she said "no" instead of asking the accused to prove that the woman said "yes".

However, According to Section 114A of The Indian Evidence Act 1872:

[W]here sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

As can be seen, in a rape prosecution as far as consent is concerned, the prosecution merely has to state that there was no consent and the onus is on the defendant to prove that consent did exist at the time of sexual interaction in accordance with Explanation II to Section 375 of the IPC. A defendant cannot disprove the case of the prosecution merely on the ground that the accused failed to understand the woman's verbal/ non-verbal expression¹⁷.

Furthermore, the purpose of the new definition of consent under Explanation 2 to Section 375 of the IPC was to make the woman the subject of law. It is the "woman's" communication of her "willingness to participate" leading to an "unequivocal voluntary agreement" that constitutes sexual consent. However, the Farooqui verdict by prioritizing what the accused understood over what was communicated by the prosecutrix, negated the idea of a woman as the subject of law and consequently undermined the agency that a woman has over her sexuality. This is clear when the court says:

[I]n the present case, ... the appellant has not been communicated or at least it is not known whether he has been communicated that there was no consent of the prosecutrix¹⁸

¹⁶ Mahmood Farooqui v. State (Govt. of NCT of Delhi), (2017) 4 DLT (Cri) 328.

¹⁷ *Id.*

¹⁸ Mahmood Farooqui v. State (Govt. of NCT of Delhi), (2017) 4 DLT (Cri) 328.

On the other hand, the man was not held responsible for his own sexual behaviour, nor was he held responsible for making assumptions about a woman's sexuality and interpreting her lack of consent as implied or presumed consent. He was also not held responsible for his lack of initiative to ensure that there was unequivocal consent from the woman before engaging in the sexual act. Instead, an unreasonable burden was placed on the victim to not be 'feeble', to show 'real resistance' and meet an outrageous threshold for communicating consent.

Previously, by stating that "intellectually proficient"¹⁹ women "of letters"²⁰ must make their "unwillingness known"²¹ to the accused, the Court placed an additional burden on educated women to meet a higher threshold while communicating sexual consent. An introspection of the judgement further indicates the creation of a spectrum of sexual consent by the Court, which differs based on the woman's relationship with the accused as well as her educational status. If the woman belonged to a class of women who were illiterate or "conservative"²², a "mere reluctance would also amount to negation of any consent"²³. However, if a woman was educated and not "naive"²⁴, involved in an extra-marital affair²⁵, or if there was past sexual history of "physical contact"²⁶, the woman is expected to communicate her lack of consent vehemently. A feeble no and a push would not meet this threshold and the accused may, in such cases assume consent.

The court's interpretation of a feeble hesitation as "assumed consent"²⁷ is reflective of the patriarchal appropriation of a woman's sexuality where men believe that they are entitled to a woman's sexuality. Moreover, the court observed that the flirtatious behaviour of the prosecutrix, her past sexual relationship with the accused, the fact that she "feigned an orgasm"²⁸ and the lack of "real resistance"²⁹ signified valid sexual consent. The very fact that the man is allowed to assume that the 'no' communicated by the woman is a 'yes' and being pushed away is an invitation to perform oral sex, clearly perpetuates the misogynistic idea that women are not really aware of or have control over their own sexual desires and covertly love being 'pleasured' by sexual acts,

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Pratiksha Baxi, *When 'No' is Not 'No' in Law*, THE WIRE (Sep. 29, 2017), <https://thewire.in/gender/law-no-may-not-actually-mean-no>

²⁶ Mahmood Farooqui v. State (Govt. of NCT of Delhi), (2017) 4 DLT (Cri) 328.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

irrespective of consent³⁰. This is linked to the notion expressed in the verdict that women are traditionally not the initiators of sexual interaction and hence play a passive role compared to men and it is this passivity that leads to a “confusion in the mind of the [man]”³¹ with regards to the consent of the woman and consequently diminishes her agency.

As can be seen from the above, the Farooqui judgment undid years of struggle by feminists who established the ‘principle of woman’s dignity’ and asserted that the words of women should not go unheard³². However, what the court failed to recognise is that the 2013 Amendments do not provide room for judges to apply their own standards of consent or presume consent based on the relationship between the parties or their educational status. Rather, it necessitates the application of the affirmative model of consent. Finally, the judgement by being more perpetrator centric defeated the object of a victim-friendly provision, subjugated female agency, and obscured the distinction between consensual and non-consensual sexual activity, resulting in the setting of an unsettling precedent for the future.

³⁰ Baxi, *supra* note 32

³¹ *Id.*

³² Narayan. *supra* note 3, at 168.