

**A FEMINIST ANALYSIS OF MAHMOOD FAROOQUI V. STATE: THE ISSUES OF  
CONSENT, POWER AND REAL RAPE**

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### ABSTRACT

*The essay critically analyses the flaws in the Delhi High Court's interpretation of the rape law provisions in the Indian Penal Code, 1860 post-2013 Amendment, in the case of Mahmood Farooqui v. State, using the lens of Radical Feminism. While Section 375 envisions that consent should be ascertained from the woman's perspective, the Court excessively emphasized upon what had been communicated to the accused, thereby reinforcing the idea of 'man's objective standard' and using the male gaze to judge the prosecutrix's conduct. By adopting a purely performative account, the Court ignored her mental state and the convoluted power dynamics of man-woman and mentor-student relation between the parties. The Court's remark that a feeble 'no' may mean a 'yes', especially in 'acts of passion' between known people, indicates how it failed to recognise that passive acquiescence is not tantamount to meaningful consent. Lastly, by refusing to acknowledge that 'borderline' situations may constitute rape under Section 375, the Court reinforced the obsession with patriarchal conceptions of real rape and battered victim. Thus, in light of feminist jurisprudence, the judgment reinforced patriarchal norms, legitimized a masculine view of consent and ultimately, made the woman responsible for active resistance.*

### I. INTRODUCTION

The Delhi High Court, in the case of *Mahmood Farooqui v. State (NCT of Delhi)*,<sup>1</sup> interpreted the rape law provisions in the Indian Penal Code, 1860 post-2013 Amendment.<sup>2</sup> In this case, the prosecutrix and the accused were known to each other and had shared past physical intimacy. On the day of the alleged rape, they were alone at the accused's house. Since the accused was in an intoxicated state, crying bitterly, the prosecutrix hugged him and tried to console him. In turn the accused kissed her, disclosed his intention of sucking her and pulled her underwear down, despite her prompt denial and constant efforts to resist. The accused forced oral sex upon her and the prosecutrix, to prevent further harm, feigned an orgasm. The accused tried to repeat it, but the doorbell rang and their friends arrived, after which the prosecutrix left. On such facts, the accused was charged under the offence of rape under Section 376(1).<sup>3</sup>

On the basis of the evidence recorded, the Sessions Court observed that the prosecutrix was a 'firm, consistent, cogent and trustworthy' witness.<sup>4</sup> 'Consent' under Explanation 2 of Section 375 meant an *intelligent, positive concurrence* of the woman, given while she is a 'free and unconstrained' possession of her moral and physical power. Submission under fear would not amount to consent.<sup>5</sup>

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<sup>1</sup> Mahmood Farooqui v. State (NCT of Delhi) (2017) 4 JCC 2784 (India) [hereinafter Farooqui 2017].

<sup>2</sup> § 9, The Criminal Law (Amendment) Act, No. 13 of 2013

<sup>3</sup> Farooqui 2017, ¶¶1–6, at 81.

<sup>4</sup> State (Govt. of NCT of Delhi) v. Mahmood Farooqui (2016) Sc. No. 1590/2016 Saket Courts New Delhi, ¶1 [hereinafter Farooqui 2016].

<sup>5</sup> Farooqui 2016, ¶103: "A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical or moral power to act in a manner she wanted. Submission under the influence of fear or terror or false promise is not consent."

Since there was no definite consent to the alleged sexual act, the accused was held to be guilty.<sup>6</sup> However, the Delhi High Court reversed the order. The High Court recognised that a rape victim is not accomplice, and her testimony is of sterling quality,<sup>7</sup> thereby rejecting *Hale's warning*,<sup>8</sup> as per which evidence of unchastity and prior sexual conduct was used to reduce the relevance of her actual consent. Despite such observations, the Court held that there was still doubt as to whether the incident was without the consent of prosecutrix and whether the accused could discern her unwillingness,<sup>9</sup> gave the benefit of doubt to the accused and acquitted him.<sup>10</sup>

In my opinion, the judgment is inherently problematic because of the way it interpreted and ascertained the presence of 'consent' of the prosecutrix and failed to consider her mental state, her agency and the complex power dynamics between the parties. This essay critically analyses the flaws in the Court's verdict, using the lens of feminism, primarily Radical Feminism.

## II. CONSENT THROUGH THE MALE GAZE

### A. Questioning the Objective Male Standard

According to Radical Feminists, patriarchy is the cause of oppression of women and rape is a pillar of patriarchy.<sup>11</sup> Under a patriarchal system, men occupy positions of power, owing to which, they become the standard from which the reality is judged.<sup>12</sup> Their perspective is deemed to be objective and credible.<sup>13</sup> Consequently, though 'rape is an injury from the women's perspective; it is a *crime from man's perspective*'.<sup>14</sup> Criticising the requirement of *mens rea* in rape, MacKinnon argues that '*the man's perceptions of the woman's desires determine whether she is deemed violated*,' even though men are 'systematically conditioned' to ignore what women want.<sup>15</sup> Rapists typically believe the woman loved it.<sup>16</sup> Moreover, a gender-neutral 'reasonable belief' standard, to ascertain whether the woman was violated, is also problematic since the objectivity is unachievable, owing to inherently unequal

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<sup>6</sup> *Id.*

<sup>7</sup> Farooqui 2017, ¶64.

<sup>8</sup> David Giacomassi & Karen Wilkinson, *Rape and the Devalued Victim*, 9(4) LAW & HUMAN BEHAVIOR 376 (1985).

<sup>9</sup> Farooqui 2017, ¶102.

<sup>10</sup> *Id.* ¶102-103.

<sup>11</sup> Igor Primorac, *Radical Feminism on Rape*, HEBREW UNIV. JERUSALEM 497 (1998); Sarbani Guha Ghosal, *Socio-Political Dimensions of Rape*, 70(1) IND. J. POL. SCI. 107 (2009).

<sup>12</sup> A. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 4-15 (2<sup>nd</sup> ed. 2005) as cited in R Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (Jun. 21, 2017), <https://plato.stanford.edu/entries/feminism-rape/>.

<sup>13</sup> *Id.*

<sup>14</sup> Catharine A. MacKinnon, *Rape: On Coercion and Consent*, in TOWARD A FEMINIST THEORY OF THE STATE 181 (1989) [hereinafter *MacKinnon-Rape*].

<sup>15</sup> *Id.*

<sup>16</sup> *MacKinnon-Rape*.

social positioning of men and women.<sup>17</sup> Since violence against women is eroticised,<sup>18</sup> the objective standard is inevitably based on upon pornographic and patriarchal assumptions.<sup>19</sup> Along with feminists, critical legal scholars also criticise the apparent neutrality and objectivity in law. Since law is entrenched within a network of social and historical relations,<sup>20</sup> it merely creates an illusion of neutrality and impartiality, while perpetuating the power relations and the conditions of inequality.<sup>21</sup> On similar lines, Estrich argues that criminal justice system normalises ‘male aggressiveness’ and ‘female passivity’, which are internalised by both men and women.<sup>22</sup>

Consent has often been understood as somewhere between what the woman actually wanted and what the man comprehended she wanted.<sup>23</sup> Feminists argue that consent is always communicated under conditions of inequality.<sup>24</sup> ‘The naturally superior, sexually aggressive man makes an initiative, to which a naturally subordinate, passive woman consents’.<sup>25</sup> Consent is thus seen as a woman’s form of control, different from the male initiative.<sup>26</sup> However, the law fails to capture this dynamic and legitimizes the man’s perspective.<sup>27</sup> The repetition of the dynamic, wherein the man is reinforced as the ‘subject’ and the woman as the ‘object’,<sup>28</sup> leads to its reification across the spectrum of social activity<sup>29</sup> and normalizes male domination over women in the sexual sphere. As a result, non-consent in law becomes a question of the man’s force or the woman’s active resistance or both.<sup>30</sup> Accordingly, the woman is required to unequivocally and assertively express her unwillingness.

### ***B. Amended Section 375: Encapsulating the Woman’s Perspective***

Owing to such patriarchal conception of law, wherein the woman’s perspective is ignored, feminists, including Bartlett, argue that it is necessary to ‘ask the woman question’.<sup>31</sup> They challenge

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<sup>17</sup> *Id.*

<sup>18</sup> CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 89 (1987) as cited in NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004).

<sup>19</sup> MacKinnon-Rape.

<sup>20</sup> Margaret Davies, *Critical Legal Studies: The Beginnings of a Dissolution*, in ASKING THE LAW QUESTION: THE DISSOLUTION OF LEGAL THEORY (2002).

<sup>21</sup> Robert Gordon, *Law and Ideology*, 3(1) TIKKUN 14 (1989).

<sup>22</sup> Susan Estrich, *Rape*, 95(6) YALE L.J. 1087 (1986).

<sup>23</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8(4) FEMINIST THEORY 635 (1983) [hereinafter MacKinnon-Feminism].

<sup>24</sup> Carole Pateman, *Women and Consent*, 8(2) POLITICAL THEORY 149 (1980).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> MacKinnon-Feminism.

<sup>28</sup> CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 124 (1987).

<sup>29</sup> Michael J. Clark, *Deconstruction, Feminism, and Law: Cornell and MacKinnon on Female Subjectivity and Resistance*, 12(1) DUKE J. GENDER L. & POL’Y 107 (2005).

<sup>30</sup> MacKinnon-Feminism.

<sup>31</sup> Katharine T. Bartlett, *Feminist Legal Methods*, 103(4) HARV. L. REV. 829 (1990).

the formulation of consent from the perspective of the man and what he reasonably comprehended, rather than the intentions the woman reasonably conveyed.<sup>32</sup> Thereby, several feminists demand for the adoption of a ‘reasonable woman standard’.<sup>33</sup>

As per the amended provision of Section 375, if a man commits any of the acts mentioned therein, without the consent of the woman, he is guilty of rape.<sup>34</sup> Consent is explicitly defined under Explanation 2 as “*an unequivocal voluntary agreement when the woman by ... verbal or non-verbal communication, communicates, willingness to participate in the specific sexual intercourse*”. As per the proviso, a woman is not required to prove ‘utmost’ physical resistance on her part to show her unwillingness.<sup>35</sup> Therefore, as per the codified law, consent has to be analysed from the women’s perspective. This places women as the subject of the law, giving recognition to their agency and control over their sexuality.<sup>36</sup> Thus, while the woman is supposed to express her willingness to participate in the act, the man is also required to make a responsible effort to decipher it.<sup>37</sup> Thus, Section 375 encapsulates the feminist ideologies which condemn the formulation of consent from the accused’s perspective.

### ***C. Male Gaze to determine Female Conduct***

However, in *Farooqui v. State*, the Court completely ignored such feminist formulation of ‘consent’, displaced the woman and placed the man as the centre of the law. It constantly focused on what the accused comprehended, not what the woman said. “*Even if the act was not with her consent, she actually communicated something which was taken as consent.*”<sup>38</sup> It even framed the issues from the accused’s perspective: “*whether the appellant mistakenly accepted the moves of the prosecutrix as consent, whether the feelings of the prosecutrix could be effectively communicated to the appellant and whether mistaking all this for consent by the appellant is genuine.*”<sup>39</sup> The Court relied upon Section 90 of the Indian Penal Code, 1860, observing that consent given under fear is invalid only if the accused *knew* that it was given under fear.<sup>40</sup> Thus, reading Section 90 read with Section 375, it held that since the accused did not

<sup>32</sup> *Id.*

<sup>33</sup> Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10(2) Columbia J. Gender & L.195 (2001) as cited in R. Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (Jun. 21, 2017), <https://plato.stanford.edu/entries/feminism-rape/>.

<sup>34</sup> § 375, The Indian Penal Code, No. 45 of 1860.

<sup>35</sup> § 375, proviso to Explanation 2, The Indian Penal Code, No. 45 of 1860.

<sup>36</sup> Latika Vasisht, *The Terms of Consent: on the Farooqui verdict*, THE HINDU (Oct. 4, 2017), <https://www.thehindu.com/opinion/op-ed/the-terms-of-consent/article19797667.ece>.

<sup>37</sup> *Id.*

<sup>38</sup> Farooqui 2017, at ¶43, 45.

<sup>39</sup> Vasisht, *supra* note 36.

<sup>40</sup> Farooqui 2017, at ¶80.

know about the fear in the minds of the prosecutrix, the feigned orgasm may have been taken as non-verbal communication of consent.<sup>41</sup>

In my opinion, by adopting such a perspective, the Court completely erased the woman's voice in controlling her sexuality and reinforced patriarchal standards and male gaze in determining the issue of consent.<sup>42</sup> Section 90 embodies the element of *mens rea* in rape. There are two possibilities for vitiating consent—knowledge or reasonable belief that the consent was given under fear or mistake of fact,<sup>43</sup> both of which are requirements which have been challenged by the feminists. However, in this case, in my opinion, it was not consent given under fear, it was lack of meaningful consent in its entirety and hence, Section 90 should have no application. Moreover, it can be argued that Section 90 can protect a negligent rapist, but not a reckless rapist. Here, the accused forced oral sex upon the prosecutrix with callous disregard of her desire and recklessly ignored her resistance, and thus should not be protected under this Section.

In this regard, faced with ambiguity as to the presence of consent, the Court employed an interpretation, wherein 'the male standard' was used to judge the 'conduct of woman victim'<sup>44</sup> and the entire issue of communication of consent was ascertained from the man's perspective. It completely erased the woman's voice in controlling her sexuality and reinforced male gaze in determining the issue of consent.<sup>45</sup>

### III. ACCOUNTS OF CONSENT AS PERFORMATIVE OR ATTITUDINAL

#### A. *Performative account of Prosecutrix's Consent*

The Court was not only mistaken in applying the codified law, which envisages that a woman's perspective should be considered, but also in assessing the presence of her consent. Feminists argue that there must be lack of meaningful consent. Consent can be analysed through either attitudinal or performative accounts.<sup>46</sup> Adopting a purely performative account ignores the context in which the relevant behavior occurs and the mental state of the victim. Owing to unequal power men possess over women, there may be several explicit and implicit threats that render a woman's consent less than meaningful.<sup>47</sup> "Women may be socialized to passive receptivity, may perceive no alternative, may prefer it to the escalated risk of injury and humiliation of a lost fight, and hence

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<sup>41</sup> *Id.*, ¶82.

<sup>42</sup> Vasisht *supra* note 36.

<sup>43</sup> § 90, The Indian Penal Code, No. 45 of 1860.

<sup>44</sup> Estrich, *supra* note 22.

<sup>45</sup> Vasisht, *supra* note 36.

<sup>46</sup> P. Kazan, *Sexual Assault and the Problem of Consent*, in VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES 27–42 (French et al. eds., 1998) as cited in R Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (Jun. 21, 2017), <https://plato.stanford.edu/entries/feminism-rape/>.

<sup>47</sup> *Id.*

they submit to survive”.<sup>48</sup> Thus, while determining the presence of consent, a hybrid of performative and attitudinal perspectives must be employed.

In this case, the Court took a purely performative account while determining the issue of consent, observing that the behavior of the prosecutrix, especially the feigned orgasm, may have been taken as willingness and non-verbal communication of consent.<sup>49</sup> The absence of any real resistance re-affirmed that the prosecutrix was okay with the act. Further, the fact that prosecutrix remained alone with the accused despite his intoxicated condition, the exchange of hugs and kisses, the playful banter were considered to be behaviour which communicated the prosecutrix’s consent to the accused.<sup>50</sup> However, such an analysis is incorrect since it completely disregards the mental state of the prosecutrix and the context in which the behaviour took place.

Even while just considering her behavior, it can be noted that the prosecutrix constantly hesitated, promptly denied his advance and tried to pull her underwear up.<sup>51</sup> Despite her resistance, the accused forced oral sex upon her,<sup>52</sup> with callous disregard of her protests. It has been recognised that a woman must be given sufficient space and time to formulate and communicate her consent for the specific act, which was clearly not done here.<sup>53</sup> Though it is accepted that consent to forms of physical intimacy such as kissing or hugging is no longer implied consent for oral sex, the accused considered it to be non-verbal consent.<sup>54</sup> However, the Court completely ignored these aspects of the prosecutrix’s behavior, merely focusing on the accused’s ability to decipher consent from her behaviour.

### ***B. Consent through the Attitudinal Account***

Moreover, as per the attitudinal account, the Court was incorrect in completely ignoring the mental state of the prosecutrix, the fear and hesitance in her mind. The prosecutrix had heard about the Nirbhaya incident and thus, she feigned an orgasm in order to prevent greater physical harm and to end the traumatic encounter.<sup>55</sup> Considering the fact that in India, women are often socialised onto passivity, the prosecutrix probably did not perceive any alternative or rather preferred it to the escalated risk of injury and humiliation. Such passive acquiescence, when analysed by both the

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<sup>48</sup> SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1976) as cited in MacKinnon-*Feminism*.

<sup>49</sup> Farooqui 2017, at ¶¶45, 82.

<sup>50</sup> *Id.*¶ 82.

<sup>51</sup> *Id.*¶2.

<sup>52</sup> *Id.*¶81.

<sup>53</sup> Shalu Nigam, *From Mathura To Farooqui Rape Case: The Regressive Patriarchy Found its Way Back*, SSRN 1 (2017), <https://ssrn.com/abstract=3049756>.

<sup>54</sup> Michelle Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1421 (2005) as cited in R Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (Jun. 21, 2017), <https://plato.stanford.edu/entries/feminism-rape/>.

<sup>55</sup> Farooqui 2017, at ¶¶3, 15-16.

performative and attitudinal account, cannot be deemed to be meaningful consent under any circumstance. However, ignoring such considerations, the Court gave the accused the benefit of doubt since he suffered from bipolar disorder,<sup>56</sup> notwithstanding the lack of medical evidence and argument that this condition impaired his comprehension.<sup>57</sup> Instead, in my opinion, since bipolar disorder may cause aggressive behaviour, this, along with his inebriated condition, could further justify that the accused had forced oral sex upon her despite her resistance, disregarding her unwillingness.

#### IV. POWER DYNAMICS AND THE NEED FOR RESISTANCE

##### *A. A Feeble 'No' may mean a 'Yes'*

With regard to the context in which the incident occurred, the Court remarked that the gender binary should be considered. Rejecting the affirmative model, it noted that in acts of passion, a 'no' may sometimes mean a 'yes'.<sup>58</sup> However, in my opinion, such an observation blatantly ignores the ground reality and power imbalance. Both Radical Feminists and Critical Legal Scholars have argued that law protects the interests of the powerful by fostering an illusion that power inequalities are just. It uniformly presumes a 'single underlying reality', conditioned by male supremacy, rather than recognising that the reality is 'split by divergent meanings'.<sup>59</sup> Therefore, instead of recognising that the prosecutrix might have actually communicated non-consent and the accused might have recklessly misunderstood it as consent, the Court held that the prosecutrix communicated something that was taken as non-verbal communication of consent by the accused, thereby clearly erasing the perspective of the powerless victim and reinforcing the powerful man's version of the reality.

By such an interpretation, the Court reinforced the patriarchal belief that if the accused thought there was consent, it doesn't matter if the woman isn't willing in reality. If she isn't able to display real and assertive resistance, the accused is given the liberty to assume consent.<sup>60</sup> However, such an interpretation clearly ignores the feminist position the codified law contemplates. The burden should be put on a man, to understand, decipher and respect, not assume consent on the part of a woman.<sup>61</sup> Further, instead of relying upon men's ability to interpret women's non-verbal

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<sup>56</sup> *Id.* ¶101.

<sup>57</sup> Shalu Nigam, *supra* note 53.

<sup>58</sup> Farooqui 2017, at ¶84-85.

<sup>59</sup> MacKinnon-Rape; MacKinnon-Feminism.

<sup>60</sup> Vasisht, *supra* note 36.

<sup>61</sup> *Id.*



behavior, in my opinion, the Court should focus on reciprocal communication and active consultation before the sexual activity, similar to the Negotiation Model suggested by Anderson.<sup>62</sup>

### ***B. Power Imbalance and the Unequal Burden***

According to me, the Court's incorrect interpretation of consent and ignorance of power dynamics is blatantly explicit in the following lines: "*Instances of woman behavior are not unknown that a feeble 'no' may mean a 'yes'... If one of the parties to the act is a conservative person.., mere reluctance would also amount to negation of any consent. But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically proficient, and if, in the past, there have been physical contacts.*"<sup>63</sup>

Often a woman's appearance and previous sexual history with the man is used as substitute for consent, thereby rendering her actual consent irrelevant.<sup>64</sup> While the Court recognised that prior physical intimacy cannot be taken as consent for the specific act,<sup>65</sup> if the parties were known, a feeble 'no' is not denial of consent. Such an interpretation ignores the fact that women are mostly raped by men they knew and trusted and are equally traumatised when raped by them.<sup>66</sup> Moreover, the Court created different standards of for deciphering consent in cases involving "conservative" women and those involving "intellectually/academically proficient" women.<sup>67</sup> Merely because the prosecutrix was an intellectually proficient woman cannot be grounds for requiring a higher standard of resistance. Most importantly, the Court's opinion that a feeble 'no' may mean a 'yes' reinforces the patriarchal burden on women to show utmost resistance and communicate their unwillingness to the accused, while ignoring whether the accused even tried to ascertain it.

Moreover, the Court failed to recognise the complex power dynamics between the parties, within which the communication of the alleged 'consent' took place. While I agree the consent was communicated under conditions of patriarchy and gender inequality, such an interpretation reduces the women to the position of a sexualised object, 'a victim of someone else's fantasy'.<sup>68</sup> Such a reality is itself constructed through male gaze and oversimplifies the situation.<sup>69</sup> Isolating gender as a source of oppression deprives women of their agency within the structural constraints and ignores other material conditions and power dynamics involved.<sup>70</sup> For instance, apart from the imbalance between men and women, it was characterised by a power imbalance between a

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<sup>62</sup> Anderson, *supra* note 54.

<sup>63</sup> Farooqui 2017, at ¶79.

<sup>64</sup> MacKinnon-*Feminism*.

<sup>65</sup> Farooqui 2017, ¶74.

<sup>66</sup> MacKinnon-*Rape*, *supra* note 14.

<sup>67</sup> Shalu Nigam, *supra* note 53.

<sup>68</sup> Katharine Bartlett, *supra* note 31.

<sup>69</sup> Clark, *supra* note 29.

<sup>70</sup> Katharine Bartlett, *supra* note 31.

mentor and a student. The accused was the key contact for her research work.<sup>71</sup> Moreover, she had shared past physical intimacy with the accused, and was even attracted to him.<sup>72</sup>

However, in my opinion, desire cannot be equivalent to consent. Consent has to be expressed in concrete terms. Since she was alone in her mentor's house at night, she might not have been in a comfortable position to accept or deny sexual interaction. Despite that, she resisted his efforts and constantly tried pulling up her underwear, asserting her agency and control over her sexuality. Yet, owing to the accused's physical strength, he was able to force oral sex upon her. Such factors must be taken into consideration while analysing the power imbalance.

## V. THE IDEA OF BATTERED VICTIM AND REAL RAPE

### A. *Real Rape and Real Victim*

In addition to such interpretational errors, the Court also reinforced a certain patriarchal conception of violent forced sexual intercourse to be classified as rape. The Court was faced with a complex fact situation, which lacked brutal violence and use of aggressive force, along with ambiguity regarding the communication of consent. Traditionally, rape was characterised by penetration, violence or threat of violence i.e. *real rape*.<sup>73</sup> The woman was expected to be a *real rape victim*, a battered woman, like Nirbhaya or Mathura.<sup>74</sup> This not only forced the women to believe that certain identities of victimhood are natural,<sup>75</sup> it also legitimised male aggressiveness, female passivity and a violent perception of rape. Therefore, cases, where the woman's resistance was overcome by 'verbal and psychological' means, were termed as 'seduction' or as instances of 'male over-eagerness and female impropriety'.<sup>76</sup>

### B. *Need for Expanding the Definition of Rape*

However, over the years, by introducing the women's perspective, there have been attempts to expand the definition of rape to include various 'borderline' cases. Pineau describes an interesting incident of 'date rape': "*even when the woman voiced her disinclination, the man told her how desirable she was and pressurized her to have sex with him. He became overbearing and engaged in 'aggressive body contact'. Despite wanting to escape, the woman could not disengage their bodies. However, given 'his aggression' and 'her queasy fatigue', the only option visible to her was to go along with him to end it.*" Thus, women are forced to submit

<sup>71</sup> Farooqui 2017, at ¶74.

<sup>72</sup> Farooqui 2017, at ¶16.

<sup>73</sup> Estrich, *supra* note 22.

<sup>74</sup> Debolina Dutta & Oishik Sircar, *India's Winter of Discontent: Some Feminist Dilemmas in the Wake of a Rape*, 39(1) FEMINIST STUDY 293 (2013).

<sup>75</sup> Eric Reitan, *Rape as an Essentially Contested Concept*, 16(2) HYPATIA 43 (2001).

<sup>76</sup> *Id.*

due to the man's aggression and manipulative tactics, not her own free will.<sup>77</sup> According to Pineau, this should be classified as *rape*. The man asserted his 'right' to sexual access, as if the woman was 'supposed' to submit. Denial of such 'right' would be a 'cruelty akin to breaking a promise'.<sup>78</sup>

This situation bears uncanny similarity with the fact situation *Farooqui v. State*. Though such an example has no precedential value, in my opinion, the Court also needs to overcome its obsession with the patriarchal notions of rape and acknowledge that even in the absence of *real rape*, there may be a lack of 'consent' and such a situation may be punishable under Section 376. Rape should not be restricted to sexual harm to the physical body of the woman, but also include a violation of her personhood and dignity.<sup>79</sup> By not convicting the accused, the Court almost excused this situation as male over-eagerness and seduction. In my opinion, the Court must recognise when a man demands his right to sexual access, the woman is forced to submit to man, despite her unwillingness, such 'forced passive acquiescence' cannot be consent. The Court should overcome the restrictive perception of '*real rape*', take into consideration the prosecutrix's loss of control over her sexuality and dignity and hence, hold the accused guilty.

## VI. CONCLUSION

To conclude, the Court was mistaken in applying the codified law to the complex fact scenario. While Section 375 envisions that consent should be ascertained from the woman's perspective, the Court wrongly relied upon Section 90 and excessively emphasised upon what had been communicated to the accused, thereby using the male gaze and perception to determine whether the prosecutrix was violated. It also wrongly assessed the presence of consent through a purely performative account, completely ignoring her mental state, her agency and the convoluted power dynamics of man-woman and mentor-student between the parties. By observing that a feeble 'no' may mean a 'yes', especially in 'acts of passion' between known people, the Court failed to recognise that passive acquiescence is not tantamount to meaningful consent, thereby placing a disproportionate burden on woman to unequivocally and not-feeblely express her unwillingness, while ignoring that the man is required to make a reasonable effort to decipher consent. Lastly, by refusing to acknowledge that 'borderline' situations, which deprive women of their agency, dignity and control over their sexuality, may constitute rape under Section 375, the Court reinforced the obsession with patriarchal conceptions of *real rape* and *battered victim*. Such a stance is a 'stark illustration of law's resistance to change'.<sup>80</sup> In light of the feminist theory, the judgment reinforced

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<sup>77</sup> Lois Pineau, *Date Rape: A Feminist Analysis*, 8(2) L. & PHIL. 217 (1989) as cited in Reitan, *supra* note 75.

<sup>78</sup> *Id.*

<sup>79</sup> Pratiksha Baxi, *Carceral Feminism' as Judicial Bias: The Discontents around State v. Mahmood Farooqui*, 3 INTERDISC. L. 18 (2016).

<sup>80</sup> Vasisht, *supra* note 36.

patriarchal norms, legitimised a masculine view of consent, made the woman responsible for active resistance, protected the power of men and hence, is severely flawed.