CONSENT UNDER SECTION 375 IPC: STRIPPING THE MYTHS

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Abstract

Consent is difficult to define but very easy to understand. Any attempt to define consent may demolish the entire edifice of consent-base offences, especially rape-law. However, consent is defined under section 375 IPC. Plain reading of the definition makes it clear that, consent must be 'unequivocal', 'voluntary' and 'willing'; and the willingness must be 'communicated'. The definition of consent, thus, gives birth to various questions of vital importance like, whether consent means willing agreement; is there any relation between 'will' and 'consent'; whether consent means voluntary agreement; what is the meaning of the expression 'voluntary'; whether consent means unequivocal agreement; whether the 'unequivocal' aspect of consent in section 375 IPC is different from 'mistake of fact' under section 90 IPC; whether communication of agreement is must in every consent; what is 'capacity to consent'; is it different from ability to 'communicate' consent; *etc*. This paper is an attempt to answer all such questions; and concludes that, the definition is full of contradictions, fantasies and myths. It trivializes the offence of rape. The definition is unreasonable, irrational, arbitrary, discriminatory, and vague.

I. Introduction

CONSENT, ESPECIALLY in sexual offences, is a burning topic of discussion amongst the academicians, law makers and implementers. Consent is difficult to define, but very easy to understand, Nigam, therefore, rightly states: "You understand what "consent" means, so do I.

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The legal meaning of "consent" is not materially different from what we understand."[1] But when the issue of consent comes with reference to rape, many times, it becomes more a matter of sentiment than sense. On the issue of 'consent in sexual matters', like the *Jataka* tale of an elephant seven blind men, various persons hold different opinions. Some of such opinions are full of fantasies and myths, such as, 'consent means active will in the mind of a person to permit the doing of the act';[2] 'consent presupposes moral power of acting';[3] 'consent requires voluntary participation on the part of woman';[4] 'consent requires knowledge of significance and moral quality of the act';[5] 'consent requires mind weighing, as in a balance, the good and evil on each side';[6] so on and so forth. The definition of 'consent' in section 375 of the Indian Penal Code, 1860,[7] (hereinafter IPC) is a culmination of such views. Explanation 2 to section 375 IPC defines consent as follows: [8]

> 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:
>
> Provided that a woman who does not physically resist to the act of penetration shall not by reason only of that fact, be regarded as consenting to the sexual activity.

Plain reading of the definition makes it clear that, consent must be "unequivocal", "voluntary", and "willing"; and the willingness must be "communicated". The definition, therefore, gives birth to various questions of vital importance like, whether consent means 'willing agreement'; is there any relation between 'will' and 'consent'; whether consent means 'voluntary agreement'; what is the meaning of the expression 'voluntary'; whether consent means 'unequivocal agreement'; whether the 'unequivocal' aspect of section 375 IPC is different from 'mistake of fact' under section 90 IPC; whether 'communication of agreement' is must in every consent; what is 'capacity to consent'; is it different from 'ability to communicate consent'; *etc*.

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[1] R.C. Nigam, *Law of Crimes in India: Principles of Criminal Law* 408 (Asia Publishing House, Bombay,1965).
[2] *Vijayan Pillai @ Babu* v. *State of Kerala*, 1989 (2) K.L.J. 234.
[3] *Ibid.*
[4] *Rao Harnarain Singh Sheoji Singh* v. *The State*, AIR 1958 PH 123, [Para 7].
[5] *Ibid*; see also, the Supreme Court's decision in *Dhruvaram Murlidhar Sonar v. The State of Maharashtra & Ors.*, Criminal Appeal No 1443 of 2018 (arising out of S.L.P. (criminal) No 6532 of 2018), decided on 22/11/2018.
[6] Stroud's Judicial Dictionary.
[7] Introduced by the Criminal Law (Amendment) Act, 2013.
[8] Since the definition cited above is an explanation to the offence of rape, it is applicable only to the offence of rape, meaning thereby it is not applicable to any other offence, even if consent is an element of that particular offence, *e.g.*, kidnapping, assault, use of criminal force, etc.

The present paper attempt to answer these questions; it is an attempt to analyse the definition of consent under section 375 IPC, and to understand the core concept of consent. The paper also attempts to analyse the newly incorporated clause *seventhly* under section 375 IPC. The clause runs: "when she is unable to communicate her consent". And it concludes that, the definition is not only self-contradictory, but also contradictory to the basic concept of consent. So also, it is contradictory to the legislative policy under clause *thirdly* and *fourthly* of section 375, 376C and 493 IPC. So far as clause *seventhly* is concerned, this paper concludes that, the same is technically unsound and practically unnecessary.

At the outset, it must be kept in mind that, there is some difference between the concept of consent in civil law and in criminal law.[9] The scope of the present paper, therefore, is limited to the consent in criminal law, especially the consent in offences affecting human body.

II. Conspicuous Flaws

Before touching to the substance of the definition of consent in explanation 2, it is necessary to point out certain conspicuous flaws. First of all, since this definition is an explanation to the offence defined under section 375, it is applicable to the offence of rape only. And there is no justification as to why differential treatment is given to the concept of consent in rape and consent in offences other than rape. Meaning of the expression 'consent' is one thing and the legislative policy regarding consent is quite a different thing. The legislative policy

[9] The difference has been specifically noted in *R.* v. *Richardson*, [1999] Crim LR 62; [1998] 2 Cr. App R 200; [1998] EWCA Crim 1086. The court stated: "It was suggested in argument that we might be assisted by the civil law of consent, where such expressions as 'real' or 'informed' consent prevail. In this regard the criminal and the civil law do not run along the same track. *The concept of informed consent has no place in the criminal law*." [Emphasis added]. In civil law, the concept of "real" and "informed" consent appertains, *inter alia*, to the doctor-patient relationship; and it is meant to determine civil liability of doctors in case of medical negligence. The difference between these concepts lies in the 'extent of information to be furnished by a doctor to his patient, regarding medical treatment / examination / procedure, so that he can decide whether to undergo such medical treatment, etc. or to refuse it.' While in US the concept of "informed consent" is followed, in UK and India the concept of "real consent" is followed. For details see, *Samira Kohli v. Dr. Prabha Manchanda*, (2008) 2 SCC 1. However, Supreme Court in *Navtej Singh Johar* v. *Union of India*, WP (Cri.) No. 76 of 2016, judgment declared on 06/09/2018, completely ignores the above-stated legal position and stated that, 'absence of willful and informed consent is *sine qua non* in the offence of rape'. (para 207, 210, 216, Per Dipak Misra, CJI and A.M. Khanwilkar, J.). Thus, the civil law concept of 'informed consent' is brought by the court in criminal law; and that too without giving any reasoning, without any analysis. It is just a one line loose statement by the court, which unfortunately makes the rape-law imprecise. One can understand as to what kind of information a doctor is expected to disclose to his patient, so that the patient can give consent for medical treatment / examination, *etc.*; but it is completely unclear as to what kind of information a man is expected to disclose to a woman, so that she can give consent for sexual intercourse/act. Is it expected from a man to disclose to a woman that, he is illegitimate child of his mother; or that he suffering from a problem of 'early ejaculation', and therefore, may not satisfy her; or that his black hairs, in fact, are gray; or the impressive dress he is wearing actually belongs to his friend. Surely, such facts fall within the realm of his 'right to privacy', and he cannot be punished for their non-disclosure.

regarding consent may vary for different offences.[10] But the meaning of consent cannot vary, *i.e.*, one meaning for the offence of rape and another meaning for any other offence cannot be applied. Once a term is defined, it should have the same meaning everywhere in the legislation. Section 7 IPC clearly states that: "Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation." The differential treatment of the expression 'consent' is, thus, contradictory to the principle laid down under section 7 and is therefore, irrational and arbitrary.

Secondly, in the offence of rape, the terms "sexual intercourse" and "sexual acts" are treated differently,[11] but this definition speaks about "sexual acts" only. It means it is not applicable to "sexual intercourse". Thirdly, in the offence of rape, the terms "penetration" and "insertion" are treated differently[12], but the proviso clause of the definition speaks about "penetration" only. It means the proviso clause is not applicable to "insertion". There is no justification for such differential treatment also. And above all, if the definition is not applicable to "sexual intercourse", then the reference of the term "penetration", which is correlated to sexual intercourse, should not have occurred in the proviso clause of the definition. The legislative policy in defining consent under Explanation 2, therefore, is irrational, vague and arbitrary.

III. Rape's Journey from 'Against Her Will' to 'Without Her Consent'

> Man is the hunter; woman is his game:
> The sleek and shining creatures of the chase,
> We hunt them for the beauty of their skins;
> They love us for it, and we ride them down.
> (Lord Alfred Tennyson, "*The Princess*")

This poem depicts the sordid picture of male dominated social psyche. In the male dominated traditional society, there is a general belief that, in the act of sexual intercourse, women also

[10] For example, generally consent given by a child above 12 years is valid defence for a criminal action (s. 90, IPC), but in case of sexual intercourse consent of the woman below 18 is no defence; and in case of elopement (kidnapping) consent of the girl below 18 and boy below 16 years is no defence. Consent of a person for suffering grievous hurt, under certain circumstances, and for death, in any case, is no defence. The policy, thus, varies based on 'age' or 'sex' of the consent giver.

[11] "Sexual intercourse" means 'heterosexual intercourse involving penetration of the vagina by the penis'; whereas the expression "sexual acts" includes all the acts described in cls. (a) to (d) of s. 375, IPC, except sexual intercourse. For details, see, Dr. P.H. Pendharkar, "Expanded Definition of Rape under Section 375 IPC: A Critical Analysis" *Cri. L.J. 25 (Jour)* 123 (12017).

[12] The expression 'penetration', is correlated with 'penis'; while the expression 'insertion' is correlated with an 'object or a part of the body other than penis'. For details, see, P.H. Pendharkar, *Ibid.*

get pleasure, and therefore, they like it; and they want it. Due to this general belief, women's friendly behaviour, and even her appearance itself is taken to mean as invitation for sex.[13] And her non-resistance is taken to mean as her willingness.

The history of the offence of rape is aptly described by Justice Edward J. Greenfield in *People v. Evans.*[14] He states: [15]

> … since before the dawn of history men with clubs have grabbed women, willing or unwilling, by their hairs, to have their way with them. Techniques have become more varied and more subtle with the years. As we have become more civilized, we have come to condemn the more overt, aggressive and outrageous behaviour of some men towards women and we have labelled it 'rape'.

Traditionally, the factor of woman's willingness or unwillingness to sexual intercourse was the criterion to determine whether a particular sexual intercourse was rape. If the woman was unwilling, the sexual intercourse amounted to rape. And her resistance to it was the evidence of her unwillingness. It is in this context; initially, rape was defined as a 'carnal knowledge of a woman against her will'. The word 'rape' is derived from the Latin term '*rapio*', which means to 'seize'. Rape literally means a forcible seizure, and that was the essential characteristic feature of the offence. This concept of rape includes only those cases 'where the body of a woman is forced to act without the agreement of mind'. These are the cases of 'woman's unwillingness'. It does not include the 'cases where her mind is deceived into agreement', *i.e.*, the cases where the woman agrees, but the agreement is due to mistake—either self-induced or as a result of fraud played upon her. Such cases do not fit within the traditional criterion of 'woman's willingness or unwillingness to the act of sexual intercourse'. Therefore, sexual intercourse obtained by impersonation was not considered as a rape.[16]

In the mid of the nineteenth century, English judges started realising that it is not the willingness of a woman that should be the criteria to determine the offence of rape. They

[13] The purpose of the present paper is not to study the truth or falsehood of such belief, but the limited purpose is to show that such belief, in fact, exists.
[14] 379 N.Y.S. 2d 912; 85 Misc. 2d 1088.
[15] *Id*. at 914.
[16] *R.* v. *Jackson*, (1822) Russ. and Ry. 487 [168 E.R. 911]; *R.* v. *Saunders*, (1838) 9 Car. & P. 265 [173 E.R. 488]; *R.* v. *Williams*, (1838) 8 Car. & P. 286 [173 E.R. 497]. In both of these cases sexual intercourse was obtained from woman by impersonating her husband. In both of these cases, it was held that, the act does not amount to rape, since it was not against her will.

started giving emphasis on her consent rather than on her will.[17] This was a shift from 'against her will' to 'without her consent'. Lord Macaulay, the principal architect of the IPC, belongs to this period of transition. Therefore, while defining rape in the IPC he incorporated both these expressions, *i.e.*, 'against her will' and 'without her consent'. In modern definitions of rape in other jurisdictions, the expression 'against her will' do not find place. The expression 'against her will' in section 375 IPC, therefore, is a 'relic of the past', which must be done away with. It has now been realised and accepted by the other jurisdictions that, 'willingness or unwillingness of a woman should not be the determining factor in the offence of rape; rather consent should be the determining factor in the offence of rape.' On the contrary, Explanation 2 to section 375 IPC, which defines consent, *inter alia*, states that, 'woman's agreement to participate in the sexual act must be willing.' Though the offence of rape under section 375 IPC is based on lack of woman's consent, but the definition of consent is full of myths and fantasies to be discussed hereinafter.

IV. The Myth of Willingness in Consent

Whether Consent Means Willing Agreement: The expression 'will' and 'consent' are entirely different things. It has rightly been stated in *State* v. *Schwab*[18] that, "No lexicographer recognises "consent" as a synonym of willingness, and it is apparent that they are not synonymous." There may be a woman who may be willing to have sexual intercourse, but that by itself does not mean that she gave consent. And there may be another woman who gave consent for sexual intercourse, but that does not necessarily mean that she must be willing. There can be a valid consent even if unwillingly given. This can be explained with the help of an illustration: suppose a boyfriend made a request to his girlfriend for sexual intercourse; at first, she denies it for the reason that she is undergoing menstruation period. But still he continues to request her. She then tells him that, 'this is disgusting, and I don't like it.' He still continues to request her; and ultimately she says: "Ok, I don't like such disgusting things, but since I love you, I am allowing you this time." In this case, her participation in the sexual intercourse is unwilling, but it is childish to say that she did not

[17] *R.* v. *Young*, (1878) 38 L.T. 540; 14 Cox C.C. 114. In this case the court upheld the conviction of a man who had connection with a sleeping woman who, when she first woke, thought the man was husband, and then discovering it was not threw him up. *R.* v. *Flattery*, (1877) 2 Q.B. 410. In this case Flattery, a medical man, had sexual intercourse with a girl who was placed in his professional care in consequence of illness arising from suppressed menstruation. The girl submitted to him under the belief that it was a medical treatment. Flattery, in this case was convicted for rape.

[18] 143 N.E. 29, 109 Ohio St. 532; cited with approval in *State of U.P.* v. *Chhoteylal* (2011) 2 SCC 550.

give consent. It is, therefore, submitted that, the "willing" aspect of explanation 2 to section 375 IPC is contradictory to the core concept of consent.

Glanville Williams states: "Many decisions that we take in life are the result of choosing between evils. We opt for one course, which we dislike, because the alternative is more objectionable still. This unpleasantness of choice does not, in ordinary language, destroy the reality of choice or the existence of consent."[19] For example, when a doctor tells a patient that, he requires an urgent surgery. He also tells that, the surgery is complicated and involves a risk of life; he also tells that the surgery is too costly. In such circumstances when the patient gives consent for the surgery, it cannot be said that he gave the consent with his will, wish or desire, but still his consent is valid. It has been held in *Holman* v. *The Queen*[20] that, "… there does not necessarily have to be complete willingness to constitute consent. A woman's consent to intercourse may be hesitant, reluctant or grudging, but if she consciously permits it there is "consent". Therefore, consent, even if, given under protest, and in tears, is still consent. A prostitute, for example, gives consent for sexual intercourse not because of her will, but because of other constraints, but still her consent cannot be said to be invalid. Consent, therefore, is valid even if it is against the will. Will is immaterial in consent.

Section 376C IPC[21] is another example which recognizes that 'will is immaterial in consent'. It prohibits 'sexual intercourse by a person in authority' which is quite distinct from 'rape by a person in authority', that is dealt with in section 376(2) R/w 375 IPC. Section 376C prohibits and punishes those persons in authority who take undue advantage of their position /

[19] Glanville Williams, *Text Book of Criminal Law* 551 (Universal Law Publishing Co., Delhi, 2nd edn., 1983).
[20] [1970] W.A.R. 2; cited with approval in *State of U.P.* v. *Chhoteylal* (2011) 2 SCC 550.
[21] S. 376C: *Sexual intercourse by a person in authority*: "Whoever, being—

a. in a position of authority or in a fiduciary relationship; or
b. a public servant; or
c. superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
d. on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 5 years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2.—For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

Explanation 3.—"Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.—The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to sub-section (2) of section 376."

authority and causes a woman under their authority to submit and to have sexual intercourse with them. This section does not prohibit sexual intercourse between the man in authority and woman under his authority who come together with intent to satiate their sexual urge and have had sexual intercourse without there being any abuse of authority. The object of this section is to prohibit sexual exploitation of woman by persons in authority. In case of sexual exploitation, woman agrees to participate in sexual intercourse but her agreement is unwilling. But however unwilling she may be, if she agrees, she consents. Thus, the intercourse is with her consent, and therefore does not amount to rape. Will is, thus, immaterial in consent. Disregarding all these facts explanation 2 states that, 'woman's agreement to participate in the sexual act must be willing'. Explanation 2 to section 375 IPC, therefore, restricts the meaning of consent to 'willing agreement only'.

It is true that the Parliament is empowered to restrict the meaning of consent as a matter of policy; but the policy must be clear, and should not be contradictory. The definition of consent in explanation 2 is contradictory not only to section 376C IPC, but also to the policy under clause *thirdly* of section 375 IPC. Clause *thirdly* reads: "With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt."

Indian policy on consent *vis-à-vis* clause thirdly of section 375 IPC: Section 90 IPC, *inter alia*, states that, 'consent given under fear of injury[22] is no consent'. Section 90, thus, takes within its ambit a wide variety of fear, *i.e.*, fear of injury to body, mind, reputation or property; as well as a wide range of fear, *i.e.*, 'fears of insignificant consequences' to a 'fear of substantial / grave consequences / damage'. And any of such fear is sufficient to nullify consent. However, rape is a serious offence with severe punishment; therefore, the kind of fear that nullifies woman's consent for sexual intercourse/acts should be clearly defined. Any and every fear and/or constraint should not be sufficient to nullify woman's consent for sexual intercourse/acts. With this view, and as a matter of policy, clause *Thirdly* of section 375 IPC makes it clear that, the only fear that nullifies woman's consent for sexual intercourse/act is a 'fear of death or of hurt, to her or to any person in whom she is interested.' Because, in the absence of a clearly defined fear, any and every fear and/or constraint will nullify woman's consent for sexual intercourse / act. For example, fear of not

[22] Injury is defined under s. 44, IPC to mean: 'any harm whatever illegally caused to any person, in body, mind, reputation or property.'

taking to a party, fear of not giving lift home,[23] fear of transfer of service from one town to another, so on and so forth. And if fear of such insignificant consequences is allowed to vitiate consent, then the otherwise grave offence of rape will be trivialized. Clause *thirdly*, as a matter of policy, therefore, speaks about the 'fear of death or of hurt' only.[24] It means, in all 'other cases of fear', *e.g.*, 'fear of reputation, harm to her property, fear of arrest,[25] *etc.*', consent of a woman for 'sexual intercourse/acts described under section 375 IPC' do not get vitiated. In all such cases, her participation in the sexual intercourse/act is 'unwilling', but still, as a matter of policy; it is treated as a valid consent. Explanation 2 to section 375 IPC, therefore, is contradictory not only with the core concept of consent, but also with the Legislative policy on consent under clause *thirdly*. Explanation 2 to section 375 IPC, therefore, is arbitrary and vague.

[23] See, *R.* v. *Olugboja*,[1982] QB 320, [1981] 3 All ER 443, [1981] 3 WLR 585.

[24] It is interesting to note that, before the Criminal Law (Amendment) Act, 1983 (Act 43 of 1983), such fear was limited to the "victim woman" only. Therefore the Law Commission of India in its 42nd Report on Indian Penal Code (June, 1971) suggested that, the clause should be amended to include "anyone else present at the place". But the Parliament adopted this suggestion only partially. Clause *thirdly* was amended to include only those persons in whom "she is interested". [See, para 16.114 and 16.117 of the 42nd Report]. It is also to be noted that, a Bill, *viz.*, the Criminal Law (Amendment) Bill, 1980 (Bill 162 of 1980) was introduced in the Lok Sabha on August 12, 1980. In this Bill, clause thirdly were presented in this shape: "*Thirdly*—With her consent, when her consent has been obtained by putting her in fear of death or of hurt or *of any injury or by criminal intimidation as defined in section 503*." [Emphasis added] It was, thus, placed for consideration of the House that, the ambit of the offence of rape should be enlarged to include "any injury and/or criminal intimidation". But it is evident that, this suggestion is rejected. The policy, therefore, is not to enlarge ambit of rape so as to trivialize it. (Clause *Thirdly* in the Bill No. 162 of 1980 was adopted from the 84th Report of the Law Commission of India on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence, (April, 1980). See, Para 2.24 of the 84th Report.)

[25] For example in *Motiram Krishnarao* v. *State*, 1955 Cr. LJ. 819, it has been held that, fear other than that of 'death or of hurt' does not vitiate woman's consent for sexual intercourse. The relevant facts, in brief, of the case: Ashabi, a married woman, left her husband's house at Bombay and came to Amravati along with her friend Ramcharan, who was also from Bombay. After keeping Ashabi with his relatives at Amravati, Ramcharan returned back to Bombay. On July 6, 1952 Motiram and Kisan, who were police constables, went to the place where Ashabi was living. They pretended that they had a warrant for the arrest of Ashabi, and that they had come to take her to the police station. On the pretext of taking her to the police station, they took her to a circuit house at Amravati. At the circuit house, each of them had sexual intercourse with her against her will. The trial court convicted them for the offence rape. In appeal, the High Court of Bombay acquitted them from the offence of rape. Mudholkar, J. stated: "No doubt she says that Motiram and Kisan had sexual intercourse with her against her will but the Jury when questioned by the learned Additional Sessions Judge stated that these two persons 'put her in fear of warrant from Bombay and so seduced and had sexual intercourse with her.' The answer given by the jury clearly indicates that Ashabi did ultimately give her consent to the intercourse as she was afraid that she would be arrested and sent away to Bombay. No doubt, the consent of a woman to a sexual intercourse obtained by putting her in fear of death or of hurt is no defence to an accused person but in the present case the fear to which Ashabi was subjected was according to the jury neither of death nor of hurt." [Para 5]. See also, *Tukaram* v. *The State of Maharashtra*, AIR 1979 SC 185, (popularly known as *Mathura rape case*). In this case also the Supreme Court acquitted the accused, a police constable, of the charge of rape on the ground that, the prosecution failed to establish that, the fear under which the girl gave consent for sexual intercourse was the fear of 'death or of hurt'.

V. The Myth of Consent as a Voluntary Agreement

Whether Consent Means Voluntary Agreement: Explanation 2 to section 375 IPC, *inter alia*, states that, 'consent means voluntary agreement'. This expression is used with reference to woman's consent for sexual acts described under clauses (a) to (d) of section 375. Therefore, it implies that, a woman's agreement to participate in a sexual intercourse/act must be "voluntary". The High Court of Punjab and Haryana in clear terms states that, 'consent requires voluntary participation on the part of a woman'.[26] High Court of Delhi also states that: "In normal parlance, consent would mean voluntary agreement of a complainant to engage in sexual activity without being abused or exploited by coercion or threat."[27] These and several such decisions, as well as explanation 2 create confusion between an 'agreement freely made' and an 'agreement voluntarily made'. There is a fine difference between these two expressions. A person's agreement to an act can be said to be 'free', if it is not influenced/compelled by threat or coercion; but there cannot be a thing like 'voluntarily agreement'. The view that, 'consent means voluntary agreement', therefore, is fundamentally wrong. This can be established if the actual meaning of the expression "voluntary" is ascertained.

At the outset, it must be kept in mind that the ordinary meaning of the expression "voluntary" is different from its legal meaning. The expression "voluntarily" is defined in section 39 IPC. It is defined to indicate *mens rea* (in the form of intention or knowledge or recklessness) of the 'accused' in causing an effect. And it has nothing to do with the will/volition of the 'complainant'. Another thing that must be kept in mind is the basic rule of interpretation which states that, 'once any expression is explained/defined in one part of the IPC that expression must be used/understood in conformity with that explanation/definition everywhere in the IPC'.[28] Therefore, the expression "voluntary" in explanation 2 to section 375 IPC must be interpreted in conformity with its meaning under section 39 IPC.

Legal Meaning of the Expression 'Voluntary / Voluntarily': The expression "voluntarily" has been defined under section 39 IPC. It reads: "A person is said to cause an effect 'voluntarily'

[26] See, *Rao Harnarain Singh Sheoji Singh* v. *The State*, *supra* note 4.
[27] *Mahmood Farooqui* v. *State (Govt. of NCT of Delhi)*, CRL.A. 944/2016, judgment delivered on 25.09.2017. [Para 84]. In *Ms. X* v. *Mahmood Farooqui & Anr.*, Special Leave to Appeal (Crl.) No. 281/2018, the Supreme Court confirmed the judgment High Court of Delhi by its order dated 19/01/2018. See also, *Navtej Singh Johar* v. *Union of India*, *Supra* note 9, wherein Indu Malhotra, J. in her separate but concurring judgment states: "… consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion." [Para 21]
[28] See, s. 7, IPC. It reads: "*Sense of expression once explained*.— Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation."

when he causes it by means whereby he intends to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it." Illustration to section 39 explains: "*A* sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, *A* may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily." Section 39 is, thus, based upon the well-known rule of law that, 'a man is presumed to intend the natural and probable consequences of his act' Therefore, while doing an act if any natural or probable consequence of the act results, the person doing the act is presumed to intend those consequences.

The expression "voluntarily" is given a peculiar meaning which is different from the widely understood ordinary meaning of it. The section defines the expression "voluntarily" with reference to the 'causation of effects', *i.e.*, 'a material result of human conduct', and not with reference to volition. Illustration to section 39 IPC makes it clear by stating: "… and may even be sorry that death has been caused by his act". Meaning thereby, the death may be against his will, he may be sorry for that, but still the death is treated as voluntarily caused, if he knew or has reason to believe that, death may result by his act. Willingness/volition, therefore, is out of the scope of the expression voluntarily under section 39 IPC.

In IPC the expression "voluntarily" is used to determine as to whether the effects (*i.e.*, consequences / results) of accused person's conduct is voluntarily caused, or whether those effects are caused involuntarily. The effects are treated as voluntarily caused if they are intentionally caused, or that the accused person knew or had reason to believe that those effects will result due to his conduct.

It is true that, 'intention', 'knowledge' and 'reason to believe' are different conditions of mind. But in IPC, while defining the expression "voluntarily", the aspects of 'knowledge' and 'reason to believe' are treated as 'implied intention'. Because, when a man knows or has reason to believe that certain consequences may result by his conduct, and still he conducts in such a way that those consequences result, it is taken to mean that he intends those consequences. This may be artificial, but the legal meaning of the expression "voluntarily" is this only. In IPC, the expression "voluntarily" is, thus, used as an equivalent to 'intentionally; as opposed to 'accidentally'. Agreement cannot be classified into 'intentional agreement' and 'accidental agreement'; therefore, it cannot be classified into 'voluntary agreement' and

'involuntary agreement'. And therefore, consent cannot be said to be a 'voluntary agreement'. Consent simply means conscious permission / agreement for an act; it either exists or does not exist.

The expression "voluntary" is defined to indicate *mens rea* of the 'accused' in causing an effect; and the same cannot be applied to ascertain 'victim's willingness' (to participate in specific sexual act). Therefore, there cannot be a voluntary consent as envisaged by explanation 2.

For the sake of argument, even if it is assumed that the expression "voluntary" can be applied to ascertain as to whether the woman's participation in the specific sexual act was willing or unwilling, still it will be a futile exercise; because, if she agrees to participate, whether willingly or unwillingly, she consents. It has already been stated that, consent whether willing or unwilling is valid. Therefore, explanation 2 to section 375 IPC which states, *inter alia*, that, 'consent means voluntary agreement' is not based upon sound understanding of law; and more so, it is contradictory to the legislative policy under clause *thirdly* of section 375 IPC. The policy under clause *thirdly* makes it clear that, the protection of law is not available to a woman who agrees to participate in sexual act, however unwilling she may be, if the fear of injury in which she agrees is not of the type specified in clause *thirdly*.

It has already been stated that, the expression 'voluntary' in section 375 IPC must be interpreted in consonance with its legal meaning under section 39 IPC. However, it is interesting to note that, even if the expression 'voluntary' is interpreted in the light of its ordinary meaning yet the view that, 'consent means voluntary agreement' does not stand.

Ordinary Meaning of the Expression 'Voluntary / Voluntarily': The expression "voluntary" is widely understood to mean "something done 'with one's own accord'."[29] The expression "voluntary", in this sense, can be found in section 15(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, which speaks about "voluntary confession"; and section 25(2) of the Indian Contract Act, 1872, which speaks about "something done voluntarily".

So far as "voluntary confession" is concerned, the Supreme Court in *Gurdeep Singh alias Deep v. State (Delhi Admn.)*[30] explained the expression 'voluntary' in this way: "Voluntary means that one who makes it out of his own free will inspired by the sound of his conscience

[29] See, Shorter Oxford English Dictionary.
[30] (2000) 1 SCC 498.

to speak nothing but the truth."[31] After referring various dictionaries and decided cases, the Court further stated: "the crux of making a statement voluntarily is, what is intentional, intended, unimpelled by other influence, acting on one's own will, through his own conscience."[32] Thus, only that confession can be called 'voluntary', which comes out of confessor's own free will, inspired by his own conscience to speak the truth; without impelled by any other outside influence.

In the Indian Contract Act, 1872, the expression 'voluntarily' occurs with reference to 'consideration', which is a *sine qua non* of a valid contract. As per section 2(d) of the Indian Contract Act 'consideration' must move "at the desire of the promisor". It means, consideration moved "voluntarily" is not consideration as per section 2(d). Section 25(2) is an exception to this rule. It states that, promise to compensate for anything which has been done "voluntarily" is valid consideration. Thus, in section 25(2) 'voluntarily' act means an act done without request of the promisor.

The two examples given above makes it clear that, the expression "voluntary", in its ordinary sense, means doing something with "one's own accord"; without any outside influence, like a promise or request. An act done on request, therefore, is not voluntary act.

If the ordinary meaning of the expression "voluntary" is applied to the proposition under section 375 IPC that, 'consent must be voluntarily given' or that 'a woman's participation in sexual act must be voluntary', it reveals that, the woman should participate in the sexual act 'with her own accord, without any request from a man for the same'. If this is so, the question of woman's consent does not arise at all; in fact, this is a case where she is requesting, or even forcing, the man to have sex with her and fulfill her sexual desire. On the other hand, if a man requests a woman for participation in a sexual act, even if she happily participates, her participation is not voluntary. The reason being clear, 'an act done on request is not voluntary act'.

Consent and voluntariness are entirely different concepts; these two concepts may not be contradictory to each other; but certainly they cannot stay together. Both these terms are like positive sides of two different magnates, which cannot come together. Consent is an agreement to a particular course of action. Agreement presupposes some request or

[31] *Id.*, para 17.
[32] *Id.*, para 20.

expectation of one person from the other person to agree on something requested or expected. How can a person agree voluntarily without there being any background like, request or expectation to agree! Realizing the difficulties in the concept of 'voluntary agreement', High Court of Delhi puts a rider before it. The court states: "*In normal parlance*, consent would mean voluntary agreement of a complainant to engage in sexual activity without being abused or exploited by coercion or threat."[33] Be that as it may, there cannot be voluntary agreement. An act can be voluntary, but consent is not an act; consent is merely a conscious permission / agreement to an act. Therefore, explanation 2 to section 375 IPC which states that, 'consent means voluntary agreement' is founded on a wrong notion of law.

Initiation in Sexual Matters and Legitimacy of Explanation 2: It is a general observation that, in the matter of sex, normally men take initiative. This has been judicially recognized. The High Court of Delhi in *Mahmood Farooqui's* case[34] observes:

> … Consent cannot also be analyzed without taking into account the gender binary. There are differences between how men and women initiate and reciprocate sexual consent. The normal construct is that man is the initiator of sexual interaction. He performs the active part whereas a woman is, by and large, non-verbal. Thus gender relations also influence sexual consent because man and woman are socialized into gender roles which influence their perception of sexual relationship and expectation of their specific gender roles with respect to the relationship. However, in today's modern world with equality being the buzzword, such may not be the situation. [Para 85]

Explanation 2 to section 375 IPC which speaks about 'woman's voluntary participation in sexual act', it actually means that her participation in the sexual act must be on 'her own accord'. It means only that sexual intercourse / act is legal wherein the initiative is taken by a woman. But if a man takes the initiative and requests a woman for a specific sexual act, even if she happily agrees and participates, her participation is not voluntary. Rule being clear, anything done on request is not voluntarily done. And since her participation in the latter case is not voluntary, law treats it as an offence of rape; and the man is guilty; and he is guilty for his initiative![35]

[33] *Mahmood Farooqui* v. *State (Govt. of NCT of Delhi)*, *Supra* note 27, (Para 84).
[34] *Ibid.*
[35] It is interesting to note that, Explanation 2 to s. 375, IPC 'impliedly' imposes ban on man's initiation in sexual matters, and S. 354A(1)(ii), IPC 'expressly' imposes outright ban on men from making request for sexual favours. Women, however, are free to initiate and to request to anyone of their choice for such favours!

Explanation 2 to section 375 IPC, therefore, is far away from the social realities; realities in human relations, especially intimate relations, depicted in the above judgment of the High Court of Delhi. Law's acceptance of a woman's initiative in sexual matters is a good sign; but prohibiting and punishing a man merely for his initiation is arbitrary. It denies equality, which is a buzzword in the modern world; it denies a man his sexual rights and freedom.[36]

VI. The Myth of Consent as an Unequivocal Agreement

Whether Consent Means Unequivocal Agreement: Section 90 IPC makes it clear that, 'consent is not such a consent as is intended by any section of the IPC, if it is given by a person under; *inter alia*, "misconception of fact".' Thus, consent given under misconception of fact is not a real consent. In spite of this, Explanation 2 to section 375 IPC separately defines the term 'consent' and states, *inter alia*, that, 'consent means an unequivocal agreement' (by a woman to participate in a specific sexual act). Shorter Oxford English Dictionary defines the expression "unequivocal" to mean "of unmistakable meaning; free from ambiguity". And according to Black's Law Dictionary, "unequivocal" means "unambiguous; clear, free from uncertainty". Plain reading of the expression "unequivocal" with reference to consent under explanation 2, thus, makes it clear that, while agreeing to participate in a specific sexual act 'there should be no misconception of any fact in the mind of woman'.

The expression "unequivocal" in explanation 2 is wider than the expression "misconception of fact" under section 90. "Misconception of fact" always means misconception of "relevant fact";[37] whereas the expression "unequivocal" takes within its ambit misconception of "any fact", whether relevant or otherwise. Therefore, according to explanation 2, woman's consent to participate in sexual intercourse/act is not real, if a man falsely tells her and thereby makes her to believe that, he is intellectual, influential, or rich person; or he belongs to her caste; or loves her; or will marry her; or will remain faithful to her; or will pay her; or will use standard quality contraceptive, so on and so forth; because in all such cases woman's agreement to participate in the sexual intercourse/act is under a wrong belief, and therefore, not unequivocal. And for this reason, the man in all such cases will be held guilty of rape.

[36] For sexual rights and freedom, see, P.H. Pendharkar, "How to Seek Her Consent: An Analysis of Sexual Harassment under Section 354A IPC with Special Reference to Sexual Rights and Freedom", *Cri. L.J. (Jour)* 97 (2017).

[37] The High Court of Calcutta in *Jayanti Rani Panda* v. *State of West Bengal*, 1984 Cri. L.J. 1535, rightly stated: "In order to come within the meaning of misconception of fact, the fact must have immediate relevance." The Supreme Court of India cited it with approval in *Uday* v. *State of Karnataka*, 2003 (2) Mah L R 46 [Para 16].

The aspect of 'unequivocal agreement' in the definition of consent in explanation 2 to section 375 IPC suffers from four defects: firstly, it distorts the core concept of consent; secondly, it widens the ambit of the definition of rape to the extreme level, and thereby trivialized the offence of rape; thirdly, it makes section 493 IPC redundant; and fourthly, it contradicts the legislative policy under clause *fourthly* of section 375 IPC.

First Defect: Distortion of the Meaning of Consent: It is perfectly within the legislative competence to restrict the legal effects of consent as a matter of policy; but there is a fine difference between "distorting the meaning of consent" and "restricting its legal effects". Distorting the meaning of consent implies attributing such a meaning to the concept of consent which is completely different from its natural meaning. Whereas restricting the legal effects of consent implies taking away the legal effects of otherwise valid consent, by way of adding various vitiating factors, like fear of certain kind, age, etc. In this case, the natural meaning of consent is not denied; but the consent is treated as ineffective. For example, sexual intercourse by a man with consent of a woman below 18 years of age is rape.[38] In this situation, the intercourse amounts to rape, not because there is lack of consent, but because law takes away the legal effects of her consent by adding 'less than 18 years of age' as a vitiating factor.

Explanation 2 to section 375 IPC, on the contrary, deviates from the core concept of consent, by giving an artificial meaning to it. It states: 'consent means, *inter alia*, an unequivocal agreement'. This meaning of consent, as stated above, takes within its ambit various kinds of mistakes that do not fit within the natural meaning of consent. This change could have been acceptable, if it would have been foolproof. On the contrary, this change leads to various defects as stated above. It is true that, the Legislature is empowered to restrict or expand the meaning of a word. It can define the word even artificially. But artificial does not mean arbitrary. The definition of consent in explanation 2 is arbitrary, unreasonable, and contradictory to the legislative policy on the offence of rape itself. Therefore, the meaning of 'consent' in explanation 2 is distortion of the core concept of consent. This can be better understood, if the core concept of consent is analyzed with necessary details; as well as the effects of the artificial meaning of consent in explanation 2.

The Concept of Consent: Broadly speaking, consent means a 'conscious permission / agreement for an act'. One cannot give consent to himself/herself or in vacuum. Consent,

[38] See Clause *Sixthly* of S. 375, IPC.

therefore, always means, consent to "someone" and for "something". "Someone" does not mean "anyone", and "something" does not mean "anything". "Something" indicates "nature of the act agreed upon", and "someone" represents "identity of the actor" who or with whom the agreed act is going to be performed. The essential precondition for consent, therefore, is that, a person agreeing to an act must be aware of the "nature of the act" as well as "identity of the person" who or with whom the agreed act is going to be performed. A person cannot be said to have agreed for an act when he/she is not aware, knowing, perceiving, or cognizant of that act.[39] Therefore, there is 'no consent' when knowledge of either or both of these facts is lacking. Thus, in law of consent, mistake regarding 'nature of the act itself'[40] and/or 'identity of the actor'[41] is relevant; and such mistake can be either self-induced, or as a result of fraud played by another. In law, it is the 'nature of mistake' that is relevant, and not the reason why the mistake has been made.[42] Consent, therefore, means 'conscious permission / agreement for an act'. Therefore, once a person agrees to an act with full understanding of both of these facts, *i.e.*, 'nature of the act' and 'identity of the actor', then the factors that induces him/her to agree cannot negate the reality of consent.

The "unequivocal" aspect of consent under explanation 2 to section 375 IPC traverse beyond the facts stated above. According to Explanation 2, any kind of mistake/fraud is sufficient to nullify a woman's consent to participate in a sexual act. The reason being clear, an agreement cannot not be said to be "unequivocal", if it is made under mistake/ignorance of "any kind". However, according to the core concept of consent, any mistake, any ignorance, any fraud is

[39] See, *R* v. *S.I.M.*, (1994) 158 A.R. 81 (Prov. Ct). Cited in, Mohamad Ismail Bin Hj Mohamad Yunus, "A Legal Analysis of Fraud Vitiating Consent in Sexual Assault Cases", INSAF: The Journal of Malaysian Bar, (2003) XXXII No 3, p 1.

[40] *R.* v. *Flattery*, (1877) 2 QBD 410, is an example of 'mistake as to nature of the act induced by fraud'. In this case John Flattery, a medical man, had sexual intercourse with Lavinia Thompson, a girl of nineteen years, who was placed in his professional care for curing her illness. The girl submitted to him under the belief that it was a medical treatment. Meaning thereby, she was not aware of the 'nature of the act', she believed that she was undergoing a medical treatment but what was done was a sexual penetration. Thus, 'she consented to one thing, but he did another materially different thing'. Flattery, in this case, was convicted of rape. Field, J., in this case, stated: "The question is one of consent, or not consent; but the consent must be to sexual connection. There was no such consent." See also, *People* v. *Ogunmola*, 193 Cal. App. 3d 278.

[41] The example of mistake as to the identity of the actor induced by fraud can be found in *R.* v. *Young*, (1878) 38 LT 540. In this case, the court upheld a conviction of a man who had connection with a sleeping woman who, when she first woke, thought the man was her husband, and then discovering it was not, threw him off. In this case, the victim was under the mistaken belief that the man performing sex with her is her husband, in fact he was a stranger. See also, *R.* v. *Elbekkay*, [1994] EWCA Crim 1;[1995] Crim LR 163 Court of Appeal, for mistake regarding identity of boyfriend; *People* v. *Crippen*, Docket No. 209859 Court of Appeals of Michigan, judgment delivered on 22/08/2000, http://caselaw.findlaw.com/mi-court-of-appeals/1053680.html for mistake regarding identity of fiancé.

[42] In *R.* v. *Richardson*, *Supra* note 9, the court stated: "The common law is not concerned with the question whether the mistaken consent has been induced by fraud on the part of the accused or has been self induced. It is the nature of mistake that is relevant, and not the reason why the mistake has been made."

not sufficient to nullify consent. In law of consent, there is nothing like "unequivocal agreement". Knowledge of 'nature of the act agreed upon' and 'identity of the actor' is sufficient. And it is a mistake in either of these two facts that nullifies consent. Following decisions will make the point clearer.

Does Every Fraud Nullifies Consent: At the outset, it must be kept in mind the reason as to 'why fraud nullifies consent?' And the reason is plain and simple; it leads a person to commit a mistake. In law of consent, the cardinal point is not the fraud, but the mistake that is produced by the fraud.[43] It is on this philosophical background, the fraud-consent relationship should be viewed. On the aspect of 'fraud nullifying consent', Stephen, J., in *R.* v. *Clarence*[44] observes: "The proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification." In support of this view, Kenny in his "*Outlines of Criminal Law*" observes: "Fraud vitiates consent' is a well-known maxim but it must be interpreted cautiously."[45] In *Clarence*, the law on this aspect is settled by Stephen, J. He stated: "The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into rape are fraud as to the nature of the act itself, or as to the identity of the person who does the act."[46]

The High Court of Australia in *Papadimitropoulos* v. *R*[47] clarifies the entire law on this point. In this case, the court has drawn a distinction between a consent given under a deception or mistake 'as to the thing itself' and 'as to the matter antecedent or collateral thereto'. The first part covers the cases in which the woman is deluded into supposing that she is undergoing medical treatment and the cases where in the dark she is induced to assume that her husband is the man with whom she is having intercourse. The second part covers the cases where the consent is induced by fraudulent representations made by the man as to his wealth, position or freedom to marry the woman. And the court ruled: "Consent obtained by frauds of the latter character is nevertheless a consent." The court, therefore, stated:

> Rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration: it is the consent to that which is in question: such consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. *But once the consent is*

[43]The High Court of Australia in *Papadimitropoulos* v. *R*, (1957) 98 CLR 249, makes the point clear. The court stated: "In considering whether an apparent consent is unreal it is the mistake or misrepresentation that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself."
[44] [1888] 22 QBD 23.
[45] J.W. Cecil Turner (ed.), *Kenny's Outlines of Criminal law* 209 (Cambridge University Press, London, 1966).
[46]*R.* v. *Clarence*,*Supra* note 44.
[47]*Supra* note 43.

> *comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.* [Emphasis added.]

The American and Canadian courts make distinction between the "Fraud in Fact" and "Fraud in Inducement"; and held that "Fraud in Fact" vitiates consent, but "Fraud in Inducement" does not. In *People* v. *Cicero*[48] the Court of Appeal in California explains the difference in this way:

> On the issue of consent, from analytic standpoint, there are two kinds of fraud: fraud in fact and fraud in inducement. The distinction between the two is as follows: in fraud in fact, the victim is fraudulently induced to consent to the doing of act X; the perpetrator of the fraud, in the guise of doing act X, actually does act Y; in fraud in the inducement, the victim is fraudulently induced to consent to the doing of act X and the perpetrator of the fraud does commit act X. Fraud in fact, it has been said, vitiates consent. It appears equally reasonably that where there is fraud in fact, there was no consent to begin with. Consent that act X may be done is not consent that act Y be done, when act Y is the act complained of. [Internal citations omitted.]

The British decision in *R.* v. *Linekar*[49] is based on this philosophical background. In this case, Gareth Linekar, a 17-year-old unemployed boy, approached the complainant, a 30 year old woman who worked as an occasional prostitute. A fee of £25 was negotiated for sexual intercourse. Sexual intercourse took place shortly thereafter. After which Linekar, in breach of the agreement he had made with the complainant, made off without paying. He was subsequently arrested by police and charged with rape. At trial, evidence speaks for the fact that, Linekar had no money to pay; and the fact of his incapacity to pay was deliberately concealed from the complainant. The precise issue before the trial court was 'whether the sexual intercourse was with her consent, and if so, whether the consent was real'. The trial judge made distinction between 'breach of promise' and 'false promise' to pay the agreed money. It was accepted that, Linekar would not be guilty of rape, if he intended to pay the agreed money at the time when he penetrated her, even if he subsequently changed his mind and decided not to pay. But if he had intended, from the outset, not to pay for sexual intercourse with her, in breach of their agreement, then her consent was negatived and he should be convicted of rape.[50] The trial judge directed the jury accordingly. The jury found

[48] Court of Appeal, Third District, California, decided on June 21, 1984. *Available at* : https://caselaw.findlaw.com/ca-court-of-appeal/1836985.html (last visited on Aug. 12, 2019).
[49] [1995] 3 All ER 69.
[50] The trial judge's formulation of law in Linekar's case is similar to the ratio in *Deelip Singh @ Dilip Kumar* v. *State of Bihar* 2005 (1) SCC 88. In this case, sexual intercourse was obtained on the promise of marriage. The Supreme Court of India stated: "While we reiterate that a promise to marry without anything more will not give

him guilty. He was, therefore, convicted of rape. He appealed against the decision. The question before the Court of Appeal was 'whether the trial judge's direction to jury was correct?' The Court of Appeal concluded that, the trial judge's direction was not correct; and the conviction of Linekar was quashed. The court referred various landmark and historic decisions and concluded that, a mere fact that a man succeeds in seducing a woman by means of deception is not itself sufficient to render him guilty of rape. The crucial question is not whether the man duped the woman in some way, but whether the woman did or did not consent to have intercourse with him. The court stated: "[It] is the absence of consent and not the existence of fraud which makes it rape." And the court reaffirms the view that, 'only two kinds of fraud negate consent: fraud as to nature of the act itself or as to identity of the actor'.[51]

In *Boro* v. *Superior Court (People)*[52] the petitioner posed himself as a doctor and made a phone call to the victim woman and told her that, he is having her blood-test results and that she is suffering from a highly dangerous, infectious and fatal disease. He further told her that there are only two ways to treat that disease. The first way, as he told, was a costly and painful surgical procedure requiring long hospitalization. The second alternative, as he told, was to have sexual intercourse with an anonymous donor who has been injected with a serum which would cure the disease, and this alternative is less costly. The victim, being a poor woman, agreed to the second non-surgical alternative and consented to the intercourse believing 'it was the only choice she had'. He was charged for rape, but was acquitted on the ground that, 'she precisely understood the "nature of the act" therefore; her consent to intercourse was valid'. The court stated: "her testimony was clear that she precisely understood the "nature of the act", but, motivated by a fear of disease, and death, succumbed to petitioner's fraudulent blandishments."

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rise to 'misconception of fact' within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 Clause secondly." [Para 26]. This decision of the Supreme Court met with a severe criticism. See, P. H. Pendharkar, and B. V. Ahire, "Sex Obtained by Fraud: An Analysis of Consent *vis-à-vis* Rape-Law", *Cri. L.J. (Jour)* 113 (2015).

[51] For similar decision, on similar facts, see Canadian Court of Appeal's decision in *R.* v. *Petrozzi*, (1987) 35 C.C.C. (3d) 528.

[52] 163 Cal. App. 3d 1224.

In *R.* v. *EB*[53] the Court of Appeal in England held that, consent to sexual intercourse does not get vitiated merely because the consent was given in ignorance of the fact that the man was suffering from sexually transmissible disease. In *Bolduc* v. *The Queen,*[54] the Supreme Court of Canada held that 'consent to a genuine medical examination was not vitiated by the fact that, unknown to the patient, a man accompanying the doctor was not medically qualified.' Consent requires knowledge of the 'nature of act agreed upon' and the 'identity of actor'. The knowledge of each and every detail is, therefore, immaterial. What is important is that, 'the act done must be the act consented to'.[55]

[53] [2006] EWCA Crim 2945. Facts of the case, in brief, are: the appellant was aware that he is HIV positive. He had sexual intercourse with the complainant without informing her about his HIV status. Thus, he fraudulently obtained her consent for sexual intercourse. He was, therefore, convicted for rape. He appealed against the decision. His appeal was allowed by the Court of Appeal. The court stated: "Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexual transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include to infection by the disease." [Para 17]. It is but natural that the victim's consent is for sexual intercourse and not for suffering physical injury in the form of a disease. Therefore, contacting the disease is without their consent; and hence, the accused is liable for contacting disease. See also *R* v. *Dica*, [2004] EWCA Crim 1103. In this case also the appellant was aware that he is HIV positive. In spite of this, he had unprotected sexual intercourse with two complainants, without disclosing his HIV status. He was convicted of 'causing grievous bodily harm'. But the most important fact to be noted in this case is that, the prosecution accepted that the intercourse was consensual, therefore, no allegation of rape was made against him. See also, Supreme Court of Canada's decision in *R* v. *Cuerrier*, [1998] 2 R.C.S 371; *R.* v. *Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584.

[54] [1967] S.C.R. 677. Facts of the case, in brief, are these: Osborne was a patient of Bolduc, a licensed medical practitioner. As a part of treatment, he examined her on many occasions. The examination included close examination of her intimate parts and insertion of medical equipment in her vaginal canal. In October or November 1965 she again came to his clinic for the purpose of examination and treatment. At this time, Bird, friend of the doctor, was also present in his clinic. Bird was a professional musician and not a medical man. However, Bolduc falsely told her that Bird is "Dr. Bird", a medical intern. He further told her that, Bird had not obtained practical experience of this type during his internship, and asked if she would mind if Bird were present during the examination. She said that, because he was a medical intern, she did not mind. Accordingly, he remained present during the examination and observed the entire process of examination without actually touching her. They were prosecuted for indecent assault, since her consent was obtained by fraud. It was held that, the fraud of Bolduc was neither as to the nature of the act nor as to the identity of a person; he was, therefore, acquitted. As regards Bird, he did not actually touch her, but acted only as a 'peeping tom' which is not a crime in Canada; he was, therefore, acquitted.

[55] A case is recorded in Modi's *Medical Jurisprudence and Toxicology*, where one Sayaad Yusufalli @ Tekdiwalla Baba has been sentenced to three year's R.I. by Sessions Court, Bombay, for attempting to rape a girl. The Baba claimed of having divine power. He met one Rattanshaw Patrawalla, who invited him to his house. The Baba told all the women in the Patrawalla family that there is evil spirit in their stomachs, which could be driven out only by sexual intercourse. The women in the family consented for sexual intercourse with the Baba for the said purpose. Only one girl resisted. In the beginning, the girl shouted but none of her family members helped her. On the contrary, they reprimanded her. In this case, though the Baba was convicted for attempting to rape the girl, but he was not convicted for raping other women in the family. The reason being clear, the fraud was not as to the 'nature of the act' or as to the' identity of actor'. The fraud was merely as to the 'purpose of the act'. The women gave consent for sexual intercourse, and he did sexual intercourse. See, C.A. Franklin (ed.), *Modi's Medical Jurisprudence and Toxicology* 383 (N.M. Tripathi Private Limited, Bombay, 1988). It is interesting to note that, in *Kamalanatha* v. *State of T.N.*, AIR 2005 SC 2132, a self-styled Godman obtained consent of the girls by deceitful means, stating that: "sex with Godman is service to God". In this case the accused was convicted for rape on different grounds. But, it is surprising that, the court did not speak a single word as to whether the consent obtained by such fraud gets vitiated or not! For more details on this point,

It is, thus, a settled position that, consent requires clear knowledge of two facts: 'nature of the act agreed upon' and 'identity of the actor'. Mistake in either of these two facts negates consent. Such mistake can be self-induced or as a result of fraud by another. Mistake in understanding other collateral aspects of the act or the attributes of the actor does not negate the reality of consent. For this reason, various courts throughout the world consistently held that, "only two kinds of fraud nullify consent: fraud as to 'nature of the act itself' and/or the 'identity of the actor'."[56]

What Does the Nature of Act and the Identity of Actor Mean: Due to linguistic limitations, some things are difficult to define, but one can understand those things easily; 'nature of act' is one of those things. Every act is marked by some basic features, and those features determine its 'real nature', which can be called as 'basic nature of the act'. And there may be some other surrounding factors that are related to the act, but they determine only the 'cosmetic nature of the act'. Absence or presence of such factors does not change the 'basic nature of the act'. For example, 'penetration of vagina with penis' is a basic feature of the act of sexual intercourse, without which sexual intercourse is not possible. Ejaculation of semen, use of condom, satisfaction of sexual desire, pregnancy, etc. are the surrounding factors. Though these factors are related to sexual intercourse, they do not form its essential part; because the act of sexual intercourse can be performed irrespective of presence or absence these surrounding factors. Similarly, moral nature of sexual intercourse may be different in case of marital and non-marital intercourse, adulterous or incestuous intercourse; but the difference is 'cosmetic'. It does not change the 'basic nature of the act' of sexual intercourse, because in all such intercourses the fact of 'penetration of vagina with penis' remains the same.

It is possible for a person to commit a mistake in understanding the 'basic nature of the act' or the 'cosmetic nature of the act'. But the legal proposition that, 'mistake as to nature of act nullifies consent' only means 'mistake as to its basic feature'. Therefore, in principle, mistake / fraud as to the 'basic feature of the act' nullify consent; but this *ipso facto* does not make it a crime. In order to be a crime, the basic feature of the act must be 'relevant to the ingredients of the offence' with which the accused is charged, or can be charged. For example, in a crime of rape an act of 'sexual intercourse' is an ingredient. And the basic feature of the act is

see, P. H. Pendharkar, and B. V. Ahire, "*Sex Obtained by Fraud: An Analysis of Consent vis-à-vis Rape-Law*", *Supra* note 50.

[56] There are, however, some astonishing decisions that state, another fraud, *viz.*, 'false promise of marriage' vitiates woman's consent for sexual intercourse. See, *infra* note 78.

'penetration of vagina with penis', therefore, it is the mistake in understanding this 'basic feature' is relevant. Queen's Bench Division (UK) in *R (on the application of F)* v. *The Director of Public Prosecutions*[57] rightly stated that: "Ejaculation is irrelevant to this

[57] [2013] EWHC 945 (Admin). In this case, claimant, a woman, was already a mother of a child and she did not want another pregnancy. Therefore, she gave consent to the intervener for sexual intercourse, but on a condition that he will not ejaculate inside her. However, he deliberately ignored the condition and ejaculated insider her before she could say or do anything about it. As a result, she became pregnant. There was a history of intervener's dominance and rude behaviour with her. The question before the court was: "whether ejaculation without consent could transform an incident of consensual sexual intercourse into rape." The court answered this question in affirmative; not for the reason that there was 'mistake as to nature of the act', but on a strange consideration of 'combination of circumstances.' The court itself raised a question: "Did the claimant consent to this penetration?" To this question, the court answers: "She did so, provided, in the language of s. 74 of the 2003 Act, she agreed by choice, when she had the freedom and capacity to make the choice." And taking into consideration the history of their relationship and the incident under scrutiny, the court concluded: "she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly her consent was negated." What transpires from the analysis of this decision is this: according to the core concept of consent, *i.e.*, 'conscious permission / agreement for an act', she consented. But this concept of consent is statutorily changed, and according to the statutory meaning of consent, her consent to the sexual intercourse is invalid. Be that as it may, if at all the core concept of consent is statutorily changed, but this changed concept of consent is applicable only to the 'sexual offences' as defined in the Sexual Offences Act, 2003, (UK). Their other consent-based offences, such as kidnapping, are still governed by the core concept of consent. And the object of the present paper is to understand the 'core concept of consent' and to analyse the definition of consent in Explanation 2 to section 375 IPC; the object is not to analyse the concept of consent in s. 74 of the 2003 Act. Analysis of UK's concept of consent in sexual offence is a subject-matter of a separate research. However, few things are necessary to say. S. 74 of the 2003 Act says: "For the purpose of this Part (*i.e.*, the part dealing with sexual offences), a person consents if he agrees by choice, and has the freedom and capacity to make that choice." It is true that, consent is a matter of choice: choice whether to agree or not to agree. It is also true that, a person must have "capacity" to make that choice. But the aspect of 'capacity to make choice' only mean that, a "person must be 'conscious' to know, understand, perceive the 'nature of the act' and the 'identity of the actor'." And this 'consciousness' can be impaired by the factors like, infancy, insanity, high intoxication, sleep, or even fraud. In the present, case the intervener off course played fraud upon the complainant by intentionally ejaculating inside her when she believed he will not do it; but this fraud was not as to the 'basic nature of the act of sexual intercourse' which is 'penetration of vagina with penis', to which she agreed. So far as her condition of not ejaculation insider her is concerned, the court itself admitted 'it is irrelevant to the offence of rape'. Coming to the aspect of 'freedom to make choice'; it is submitted that, the same is based on the myth that 'consent must be free'. A person either agrees to an act or does not agree; but if he agrees, he consents, however hesitant, reluctant or grudging he may be. However, the aspect of 'freedom to make choice' under s. 74 of the Act should be interpreted to mean: 'a person should have freedom to say 'no' or to withdraw his consent; and once he chooses to say 'no' or has withdrawn his consent, he should not be forced or coerced' thereafter. In the present case, however rude the intervener may be, but there was no allegation that, the sexual intercourse was "forcibly imposed" on the complainant, or that she was "compelled" to submit by using threat as a weapon. In this sense, her choice to submit was 'free'. For his dominating and rude behaviour he can be punished under the other provisions like domestic violence, *etc*.; but for that the law of consent should not be distorted. In law of consent, the expression "freedom" should not be interpreted in the same way as it is interpreted in the constitutional right regime. Similarly, the expression "capacity" should be restricted to mean the 'capacity of a person to know, understand, perceive the nature of the act he/she has chosen to agree, as well as identity of the person who is going to perform the agreed act'. Any wider interpretation of will demolish the entire edifice of the jurisprudence on consent. Wider interpretation will make the law imprecise. While interpreting consent under s. 74, one should not be oblivious of s. 75, 76 and 77 of the Act. If one interprets that, every deception impairs individual's 'capacity to make choice' then he/she must also explain as to why s. 76 of the Act speaks about two kinds of deceptions only: 'nature and purpose of the relevant act' and 'identity of person'. And if submission under fear or duress of any kind is interpreted as violation of individual's 'freedom', then fear of economic crises also violates individual's freedom. In this sense, consent given under fear of economic crises should be treated as no consent. But the kind of fear mentioned under s. 75 is 'fear of violence' only. This makes it clear that, the expressions "freedom" and "capacity" under s. 74 of the Act are used in a restricted sense. The decision in the present case, therefore, is misconceived.

definition (of rape): so is pregnancy. If ejaculation occurs it may be an aggravating feature relevant to sentence: it is irrelevant to proof of the offence of rape." [Para 21]

In *Barbara A* v. *John G.*[58] defendant, a lawyer, requested his client (plaintiff) for a sexual favour. She agreed, but before that, she expressly stated to him that she does not want pregnancy. He then told her: "I can't possibly get anyone pregnant". She took this to mean that, "he is sterile". In that belief, she gave consent for the sexual intercourse and became pregnant.' In this case, he was not held guilty of rape (though was held liable to pay compensation under civil law). The reason being clear, though she committed a mistake in understanding the surrounding factor, *i.e.*, 'his capacity to make pregnant'; but there was no mistake in understanding the 'basic nature of the act of sexual intercourse' which is 'penetration of vagina with penis'. Her consent to sexual intercourse, therefore, was valid.

So far as the 'identity of a person' is concerned, in ordinary language, it consists of so many factors like, his qualification, attributes, physical features, etc. But in law of consent, the concept of person's identity is used in a very restricted sense, that is, 'the condition of being the same'.[59] In law of consent, knowledge of 'identity' of a person does not require knowledge of his other details such as qualification, attributes, physical features, etc. There is a fine difference between 'mistake regarding identity' of a person and 'mistake regarding his other details'. "Mistake of identity occurs only where the person under the mistake confuses two real people, 'X' and 'Y', by supposing that 'X' is 'Y'."[60] It is not a mistake of identity

[58] Civ. No. 50953, Court of Appeals of California, First Appellate District, Division Three, judgment delivered on 26/07/1983, *Available at*:http://law.justia.com/cases/california/court-of-appeal/3d/145/369.html [145 Cal. App. 3d 373].

[59] See, *R* v. *Richardson*, *Supra* note 9. In this case the, defendant was a registered dental practitioner until 30 August 1996, but was suspended from practice by the general dental council. Whilst still suspended, she carried out dentistry on a number of patients in September 1996. A complaint was lodged against her, not because of the practice during suspension, but because the complainant thought that she performed surgical procedure under the influence of drink. She denied it, and said that the only drug she had taken had been prescribed by a doctor for psychiatric reasons. The police discovered that she had been practicing whilst disqualified. She was therefore, charged for assault. At the outset, it was accepted that, surgical procedure carried out without consent amounts to assault ('use of criminal force' according to Indian law). Contention of the defendant was that, the surgical procedure carried out was 'with consent' hence, does not amount to assault. Whereas the prosecution side contends that, the consent was given under 'mistake of identity', because the consent was given under the belief that the defendant is a qualified doctor, whereas in reality he was disqualified. The trial court convicted her for assault. She appealed against the decision. In the court of appeal, prosecution side contended that, the concept of the 'identity of the person' should be extended to cover the qualifications or attributes of the dentist on the basis that the parties consented to treatment by a qualified dentist and not a suspended one. The court strongly rejected this contention of the prosecution, and quashed the conviction. The court stated: "In all the charges brought against the defendant the complainants were fully aware of the identity of the defendant. *To accede to the submission would be to strain or distort the everyday meaning of the word identity, the dictionary definition of which is 'the condition of being the same'*." [Emphasis added].

[60] See, Glanville Williams, *Supra* note 19, at 567. The difference between clause *fourthly* of S. 375, IPC and S. 493, IPC makes it clear. For details, see *Infra*, 'Third Defect: Making Section 493 IPC Redundant'.

when one believes a poor man to be a rich, or thinks that a man is woman. Mistake of a latter kind is a mistake regarding the details of a person, such as his family background, caste, whether he is a unqualified person or a qualified doctor, etc. In law of consent, mistake regarding such details is not sufficient to nullify consent.

There are, however, some decisions which are apt to create imprecision in law.[61] The decision in *McNally* v. *R*[62] is an example of it. In this case, Justine McNally, the appellant, was from Scotland. She was female by her birth-designated gender, but was a gender non-conforming person. She felt herself comfortable in male role. At the age of 13, she met the complainant, a girl from London and almost of the same age, through a social networking site. On the social networking site the appellant used a male name "Scott". Around four years they used to talk to each other on phone considering them to be boyfriend and girlfriend. When they grew adolescent, they decided to meet personally and to have a sexual act. Shortly after the complainant's 16th birthday, the defendant visited her home at London. The appellant presented herself as a boy, and under her trousers, she was wearing a strap-on dildo which resembled a penis. The appellant's stay arrangement was made at a home of complainant's family friend. Over the following months, the appellant visited the complainant on four occasions. On the first visit, they watched a film together and kissed. Thereafter, they went to a bedroom where it was dark and the appellant rubbed the complainant's vagina with her fingers and performed cunnilingus. The complainant then went to get condoms which she had purchased intending that they have intercourse. She was nearly naked but the appellant kept clothing on. It was difficult to see, because it was so dark. The complainant offered to perform fellatio but the appellant refused the offer. On the second visit, the appellant penetrated the complainant orally and digitally on multiple occasions. On the third visit, they spoke about sex, but did not do so. On the final visit the complainant's mother realized that, the appellant is a girl and not a boy. She told this fact to her daughter, the complainant. It was shocking for the complainant; she fell physically sick, because the appellant had lied to her for four years and all that time she had been calling her Scott. On this factual position, the appellant was charged for 'assault by penetration' contrary to section 2 of the Sexual Offences Act, 2003, (UK). The complainant stated that, 'she considered herself heterosexual and had consented to the sexual acts because she believed she was

[61] For example, the decision in *State of Israel* v. *Kashour*, Cited in Jed Rubenfeld, *The Riddle of Rape-by-deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1373 (2013), at 1375.. In this case, a man was convicted of rape in Jerusalem, not for forcing sex on his victim, but for posing himself as a "Jewish bachelor" with a "serious romantic" interest in her. See also, *R* v. *Tabassum*, [2000] EWCA Crim 90.
[62] [2013] EWCA Crim 1051.

engaging in them with a boy called Scott.' The trial judge held that, the complainant's consent for sexual acts was vitiated due to defendant's active deception regarding her gender identity. She was therefore convicted. She appealed against the decision. The main ground of appeal was that, 'the elements of the offence were not made out'. Meaning thereby the act was consensual and the consent was valid. It was argued on her behalf that, 'deception as to gender cannot vitiate consent; in the same way deception as to age, marital status, wealth, other qualities or attributes cannot vitiate consent.' This analysis was rejected by the court of appeal, and her conviction by trial court was maintained. At the outset, the court accepted that, "some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent."[63] Thereafter the court stated: "depending on the circumstances, deception as to gender can vitiate consent."[64]

The court, thus, classified 'deception as to gender' into two classes: (1) that vitiates consent and (2) that does not vitiate consent. But it is unclear as to which kind of gender-deception would vitiate consent and which would not; and on what principle of law, such differentiation can be made. Another distinction that is made is between 'deception as to gender' and 'deception in other matters such as wealth'. Here also, the court has not given any cogent reason as to why some deceptions are not sufficient to vitiate consent, and why deception as to gender can vitiate consent. Leaving these questions unanswered, the court thereafter correlated the issue of 'gender-deception' to 'nature of act' and 'sexual autonomy' of the victim. The court stated:

> *Thus while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male of a female*, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male. Assuming the facts to be proved as alleged, M (complainant) chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception. [Para 26] [Emphasis added]

At the outset, it must be stated that, the present case is not dealing with the issue of fraud as to 'nature of the act'. The complainant was fully conscious of the nature of act done by the appellant. And the appellant did the same act for which the complainant had given consent. It would have been a different case, if she would have given consent for 'penile-vaginal

[63] *Id.*, para 25.
[64] *Id.*, para 27.

penetration' and the appellant would have penetrated her 'orally or digitally'. In that case, it could have been said that the 'sexual nature of the act' is different from that which is consented. But this is not the case here.

So far as deception as to gender is concerned, the same does not come within the four corners of 'identity fraud' as understood in the law of consent. The concept of 'identity', as stated-above, relates to 'the condition of being the same'. And the complainant gave consent to the same person who performed the agreed act. And there was no 'mistake of identity' because the complainant did not confuse two real people, 'X' and 'Y', by supposing that 'X' is 'Y'. There was, therefore, no fraud as to 'identity of the person' or as to 'nature of the act'.

As far as the issue of 'sexual autonomy' is concerned, the issue can be addressed from two approaches: superficial and fundamental. Superficially, only two things are sufficient to state. Firstly, if the victim's 'freedom to choose' a partner for sex gets violated due to 'gender-deception' then the same is applicable to other deceptions also. And if all the deceptions are allowed to vitiate consent then the law will become imprecise. Secondly, the court itself accepted that, some deceptions do not vitiate consent. It means, at least, in those cases 'sexual autonomy' is not absolute. 'Violation of sexual autonomy', therefore, is not the real answer to the questions raised above.

Fundamentally, it is wrong to contend that, victim's consent to sexual acts vitiates, if his/her 'sexual autonomy' is violated. In fact, the reverse is true. A victim's sexual autonomy violates, if sexual acts are done with the victim 'without consent'. Therefore, in cases of violation of 'sexual autonomy' it must, firstly, be proved that, whatever sexual act is done to him/her that was 'without his/her consent'. One should not assume initially that his/her 'sexual autonomy' is violated and contend that 'for this reason his/her consent got vitiated'. One should not put the cart before the horse. While deciding the issue: 'whether or not there was consent', the issue of 'violation of sexual autonomy' should be kept aside. Once the issue of 'consent' is decided, then only it can be decided 'whether or not sexual autonomy is violated'. The decision of the court, therefore, does not stand to the strict test of law.

With Consent, Without Consent, and Vitiation of Consent: The entire discussion made above makes it clear that, an act can be said to be done "with consent" when a person agrees to it with clear knowledge and understanding of 'its nature' as well as 'identity of the person' who or with whom the agreed act is going to be performed.

In consent, 'choice' and 'knowledge' (of the above-stated two facts) are crucial; therefore, an act can be said to be done "without consent"—

i. When the person, with whom the act is done, lacks the required mental faculty to make a choice/agreement (due to insanity, intoxication, infancy, unconsciousness, etc.); or
ii. when the person, agreeing to the act, lacks necessary knowledge of either or both of the above-stated facts (due to fraud or self-induced mistake); or
iii. when the act is done in spite of refusal / resistance to it.

In the first case, there is no agreement at all. In the second case, there is an apparent agreement, but it is not agreement in real sense of the term (*i.e.*, there is no *consensus ad idem*); while in the third case, there is actual disagreement. This is a case where the act is done forcibly.[65] Without consent therefore means "no consent".

The entire discussion made above speaks about the 'core concept of consent'. Consent in its core means, a 'conscious permission / agreement for an act'. At this juncture, it must also be kept in mind that, consent to an act is consent to its natural and probable consequences also. Up to this, law of consent is same everywhere in the world: 'once a person consciously permits to an act, he consents to it'.[66] However, on the aspect of "vitiation of consent" laws of various countries vary.

Legislature of various countries considers that, consent given under certain circumstances as offensive to their public policy; therefore, as a matter of policy, consent given in those circumstances is treated invalid in those countries. Consent in those circumstances exists in fact, but law denies giving legal effect to it. For example, consent given under fear of certain kind, or by a person below certain age, etc. Such circumstances can be called as 'vitiating elements'; and consent in those circumstances gets vitiated. Law in such circumstances does not deny the existence of consent, but only denies giving legal effect to it. Such circumstances (vitiating element) may vary from country to country depending upon their norms of morality and policy.[67] Such vitiating elements work like 'provisos' to consent, but

[65] Clause *Firstly* of s. 375, IPC, *i.e.*, "against her will", deals with the aspect of forcible sex. Clause Secondly, *i.e.*, "without her consent" is wide enough to cover the circumstances when sex is obtained by force. Clause *Firstly*, therefore, is unnecessary; it creates confusion between 'will' and 'consent', and their relation between each other.
[66] *Holman* v. *The Queen*, *Supra* note 20.
[67] Therefore, while applying decisions of foreign countries, one should be cautious. It should be strictly scrutinized as to whether the decision is based upon the core concept of consent or merely upon the vitiating elements described in their laws.

that does not mean they change the meaning of consent. Such elements only 'restrict the legal effects of consent'. Like the legislative policy on the aspects of 'vitiating consent', the policy also varies with regard to the 'rules of evidence' relating to consent. The meaning of consent in explanation 2 to section 375 IPC, on the contrary, is changed. Such change gives birth to various defects discussed below.

Second Defect: Trivialization of the Offence of Rape: Rape not only stigmatizes the offender, but also to its victim. It is a serious offence punishable with severe punishment. In India, under certain circumstances, it leads to death punishment.[68] Various courts throughout the world, therefore, are keen not to enlarge the offence of rape to the extreme level where men can be charged with this offence in seemingly trivial cases. Citing an example from the Criminal Law Revision Committee on 'Sexual Offences'[69], the Court of Appeal (UK) in *R.* v. *Linekar*[70] stated that, 'a man who promises a woman a fur coat in return for sexual intercourse, with no intention of fulfilling his promise, should not be guilty of rape'. This view is strongly supported in a Canadian decision in *R.* v. *Cuerrier.*[71] McLachlin, J., in this case, stated that, the approach that supports any mistake/fraud to vitiate consent suffers from 'imprecision and uncertainty'.[72] In this case, Cory J., in her separate decision, concurs with this view. She stated: "To say that any fraud which induces consent will vitiate consent would bring within the sexual assault provisions of the *Code* behaviour which lacks the reprehensible character of criminal acts." She explains it by giving an example of a man who lied about his age and had consensual sexual act on that basis. She stated: if the approach that, 'any fraud vitiates consent' is followed, then the man in the above example is guilty of sexual assault.[73] She further stated:

> The same result would necessarily follow if the man lied as to the position of responsibility held by him in a company; or the level of his salary; or the degree of his wealth; or that he would never look at or consider another sexual partner; or to the extent of his affection for the other party; or as to his sexual power. The evidence of the complainant would establish that in each case the sexual act took place as a result of the lie and detriment was suffered. In each case consent would have been obtained by fraud and a conviction would necessarily follow. The lies were immoral and reprehensible but should they result in conviction for a serious

[68] See, S. 376AB and 376DB, IPC, introduced by the Criminal Law (Amendment) Act, 2018 (Act 22 of 2018).
[69] Rep No 15 (London, HMSO, 1983).
[70] *Supra* note 49.
[71] *Supra* note 53.
[72] *Id*., para 51 – 54, 68, 69.
[73] *Id*., para 133 – 134.

> criminal offence? I trust not. It is no doubt because of this potential trivialization that the former provisions of the *Code* required the fraud to be related to the nature and quality of the act. This was too restrictive. Yet some limitations on the concept of fraud as it applies to s. 265(3) (c) are clearly necessary or the courts would be overwhelmed and convictions under this section would defy common sense… [Para 135]

It has already been stated that, India's policy on rape law is clear: "not to trivialize it".[74] However, like the 'willing' aspect of consent in explanation 2 to section 375 IPC, the 'unequivocal' aspect also contradicts the legislative policy on rape. It says, 'consent means an unequivocal agreement' (by woman to participate in a specific sexual act). An agreement to participate in a specific sexual act cannot be said to be 'unequivocal', if there is misconception of 'any' fact, such as age of sexual partner, his financial position, caste, religion, so on and so forth. In all such cases, the man will be guilty of rape. The aspect of 'unequivocal agreement' under explanation 2 to section 375 IPC, therefore, enlarges the offence of rape to the extreme level to include mistake of 'any' fact. This is trivialization of the otherwise grave offence of rape.

Third Defect: Making Section 493 IPC Redundant: Under section 493 IPC,[75] it is an offence, if a man by deceitful means causes any woman, who is not lawfully married to him, to believe that she is lawfully married to him, and thereafter has sexual intercourse with her. This is a case where the consent given by the women is under the belief that the man is her lawfully married husband. Her agreement to participate in the sexual intercourse, therefore, is not 'unequivocal'. And for this reason, the man should be guilty of rape. But then, section 493 IPC will become redundant.

The very existence of section 493 IPC is a clear evidence of the fact that, 'each and every fraud does not negate consent'. It has already been stated that, mistake/fraud as to 'identity of person' negates consent. It has also been stated that, 'mistake of identity' means confusion between two real people, 'X' and 'Y', by supposing that 'X' is 'Y'. And 'identity' of a person does not mean his 'attributes'. Fraud as to 'attributes' of a person, therefore, does not negate consent. Keeping this in mind, the offence under section 493 has been designed.

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[74] See, *Supra*, note 24.

[75] S. 493, IPC: *Cohabitation caused by a man deceitfully inducing belief of lawful marriage.*– Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Under section 493, a woman's participation in sexual intercourse is under a wrong belief that the man is her lawfully married husband. But the point is: there is no confusion between two real people, 'X' and 'Y'. The fraud played by the man, therefore, is not as to the 'identity of person'.[76] The fraud is as to his 'attribute' that he is her 'lawfully wedded husband'. Her consent to sexual intercourse, therefore, is valid; and hence the consent-based offence of rape is not made out.[77] The architects of the IPC were fully aware of the concept of consent. But at the same time, they were of the view that such kind of conduct is reprehensible and should be prohibited. Therefore, they preferred to create a separate offence under section 493 rather than to distort the law of consent and bring such conduct in the scheme of rape law.[78] There is, thus, a fine difference between the offences under section 375 and 493 IPC. While the offence under section 375 is 'consent-based', the offence under section 493 is 'fraud-based'. The aspect of 'unequivocal agreement' under Explanation 2 to section 375 IPC, on the contrary, distorts the concept of consent and as a result, the offence of rape is enlarged to the extreme level to swallow down the offence under section 493. Therefore, according to the

[76] It would be a fraud as to 'identity of person', if the woman would have been the wife of 'Y' and another man 'X' would have deceived her to believe that he is 'Y', her husband. This is a case of confusion between two real people, 'X' and 'Y', by supposing that 'X' is 'Y'. Clause *Fourthly* of s. 375, IPC deals exactly with the same situation.

[77] On the same reasoning sexual intercourse obtained under the circumstances contemplated under s. 495, IPC does not amount to rape. s. 495, IPC prohibits and punishes 'concealed bigamy'. Here also the woman participates in sexual intercourse under the belief that the man is her lawfully wedded husband. And this is due to the fraud played by the man. But the point is same; the fraud is as to his 'attribute' that he is her 'lawfully wedded husband'. The man, therefore, is not guilty of rape. The High Court of Australia in *Papadimitropoulos* v. *R, Supra* note 43, rightly observed: 'in the history of bigamy the most heartless bigamist has not been considered guilty of rape.'

[78] For the same reason, in Common Law, there was separate and lesser offence called "seduction". It was designed to prohibit and punish men who lured women into bed though promise of marriage. Notably, this was not an offence of rape. In complete ignorance of the difference between these two offences, and the philosophy that distinguishes them, our courts are now saying: 'sexual intercourse obtained on false promise of marriage is rape'. Meaning thereby, they are enlarging the offence of rape to include 'seduction' also. See, *Deelip Singh @ Dilip Kumar v. State of Bihar, Supra* note 50; *Yedla Srinivas Rao* v. *State of A.P.*, (2006) 11 SCC 615; *Pradeep Kumar Verma* v. *State of Haryana*, AIR 2007 SC 3059; *Karthi alias Karthick v. State Rep. By Inspector of Police, Tamil Nadu*, AIR 2013 SC 2645; *State of U.P.* v *Naushad*, AIR 2014 SC 384. In this unfortunate series of decisions, there are other equally unfortunate decisions that states, 'if the parties are in "deep love", and in a weak moment, if the girl submits, the promise of marriage loses all its significance'. See, *Uday* v. *State of Karnataka, Supra* note 37; *Deepak Gulati* v. *State of Haryana*, AIR 2013 SC 2071; *Yogesh s/o Sadu Palekar* v. *State*, Criminal Appeal No 16/2015, judgment delivered on Feb.17, 2018 in the High Court of Bombay at Goa. The judges only know which scale they have to measure the depth of love, and what is the line, below which the love is deep, and above it the love is shallow. The dichotomy of these decisions is that, at one hand, they state that, 'consent is an act of reason, accompanied with deliberation, after the mind has weighed as in balance, the good and evil on each side'; and on the other hand, quite contrary to this, they recognize the validity of consent given in a "weak moment". It is a matter of common knowledge that, in that "weak moment", men and women are overpowered by 'instinctive feelings'. Their reasoning power, capacity to distinguish between good and bad, knowledge of moral or immoral character of the act, everything gets melted in the fire of that "weak moment". Consent in that "weak moment", of course, is valid; but then one should avoid the allegories and hyperbolism while stating the meaning of consent.

definition of consent in explanation 2 to section 375 IPC, the offence under section 493 becomes redundant.

Fourth Defect: Contradiction between Clause Fourthly and the Aspect of Unequivocal Agreement: It is a well-acclaimed principle of law that, fraud as to identity of person nullifies consent. But in India, this principle has a very limited application so far as the offence of rape is concerned. Though this principle is already covered in Clause *Secondly* of section 375 IPC, *i.e.,* 'without her consent'. But Clause *Fourthly*, is a special provision, and it acts as a proviso to Clause *Secondly*. According to Clause *Fourthly* a man is said to commit rape, if he has sexual intercourse or sexual acts described under clauses (a) to (d) of section 375 IPC under the circumstances falling under any of the seven following descriptions:

> *Fourthly*,— With her consent, when a man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Clause *Fourthly* of section 375, thus, covers only those cases where a man induces a married woman to have sexual intercourse with him by impersonating her 'husband'.[79] Therefore, due to application of Clause *Fourthly*, it is not rape if a man induces a woman to have sexual intercourse with him by impersonating her 'friend, fiance or lover'. This is off-course a case of fraud as to 'identity of the person', and therefore, the intercourse is 'without her consent' under Clause *Secondly*, but Clause *Fourthly* restricts the principle to 'impersonation of husband only'. Clause *Fourthly* covers also the cases of self-induced mistake by the woman, provided the man is aware of her mistake.

By incorporating Clause *Fourthly*, the Legislature has drawn a clear-cut line of distinction between a genuine mistake committed by a woman regarding identity of her husband, and an act of promiscuity. Though Promiscuity is not made an offence, it is certainly deprecated. Sexual intercourse between husband and wife is an essential aspect of married life. A situation may arise, though rare, wherein a woman may participate in sexual intercourse with a man, mistaking him as her husband, who approached her during sleep or in the dark or under circumstances when recognition is impossible. Such genuine mistake, of course, cannot be equated with promiscuity. And therefore, as a matter of policy, Clause *Fourthly* gives special protection to a genuine mistake by a woman regarding identity of her husband. But a woman who took lovers and committed mistake in their identity is not considered worthy of

[79] See, *Sunil Vishnu Salve* v. *State of Maharashtra*, 2006 Cri. L.J. 587 (Bom H.C.).

such protection. Therefore, the cases where a woman commits mistake of identity of persons other than her husband are excluded from the ambit of rape law. On the contrary, as stated above, the aspect of 'unequivocal agreement' in Explanation 2 to section 375 IPC broadened the offence of rape to such an extent to take within its ambit such excluded cases also. The reason being clear, however promiscuous the woman may be, she committed a 'mistake' in identifying her sexual partner, therefore, her agreement to participate in sexual intercourse/act is not 'unequivocal'. The aspect of 'unequivocal agreement' in explanation 2 to section 375 IPC, therefore, contradicts Clause *Fourthly*.[80]

VII. Kinds of Consent and Requirement of Communication

Consent and Communication: According to explanation 2 to section 375 IPC, 'woman's willingness to participate in a specific sexual act must be communicated.' And so far as 'mode of communication' is concerned, the same may be 'by words, gestures or any form of verbal or non-verbal communication'. The aspect of "willingness" has already been dealt with; here it is enough to say that, 'willingness' is not crucial in consent; the crucial aspect is 'choice'—whether to agree or not to agree. Now the question is: 'whether communication of agreement is must?' The answer is: 'Yes' in case of 'express consent', but 'No' in case of 'implied consent'.

'Express consent' presupposes a transaction wherein a person makes a proposal for doing a particular act, and the person to whom such proposal is made 'communicates' his agreement for the proposed act. It is a case of an agreement to an act prior to its actual performance. 'Implied consent' is not founded on prior agreement. Implied consent consists of a 'silent approval' (*i.e.*, without there being a formal proposal and communication of agreement) to an act 'at the time when the act is in process'. This is completely different from 'subsequent ratification of past act'.[81]

Every case of consent, especially in sexual matters, is not founded on prior proposals or requests. There are circumstances where a person, without ensuring agreement, actually initiates an act with an expectation that the same should be approved. He is, of-course, in a

[80] In the modern world, sexual right is considered as an important human right, it is considered as a part of individual autonomy; whereas the policy in Clause *Fourthly* is a reflection of those orthodox views where sexual relations outside marriage are considered as immoral. This old and out-dated policy should be reconsidered; and since the cases protected in Clause *Fourthly* are already covered in Clause *Secondly* of s. 375, IPC, Clause *Fourthly* should be removed. But till then, the contradiction, as stated above, will continue to misguide the people and the law enforcement agencies.

[81] An act, which was without consent at the time when it was done, cannot become consensual merely because of subsequent ratification of it. Consent cannot be given with retrospective effect.

danger zone: the act will be consensual, if it is approved; but it will be a crime, if the same is refused/resisted. This can be explained with the help of an illustration: a man and a woman are sitting on a same berth/seat in a public transport bus for overnight journey. The man clandestinely put his hand on the thigh of the woman. After few seconds, she perceives the movements of his hand on her thigh. She did not take any objection to this. He continued to move his hands on her thighs and other parts of her body. She, in spite of raising any objection, keeps quiet. In such a situation, it will be childish to jump at a conclusion that, the act which the man has done is 'without her consent'. It can be a case of 'implied consent', *i.e.*, 'silent approval to the act at the time when the act was in progression', provided all of the following circumstances were present—

i. She was fully aware of the nature of the act and the identity of the actor, and
ii. The circumstances were such where she was expected to resist, if she would have thought to resist, and
iii. She fails to signify her resistance. Mere withholding of consent or even token resistance is not enough to signify real resistance.[82] (This aspect relates to the 'mode of communication', and the same will be discussed at appropriate place.)

Proviso to explanation 2 to section 375 relates with the above-stated three circumstances. It reads: "Provided that a woman who does not physically resist to the act of penetration shall not by reason only of that fact, be regarded as consenting to the sexual activity." Since the Proviso clause is a part of the offence of rape, it speaks about 'penetration and sexual activity' only; but the rule is same even for an act of simple touch. And the rule is: an inference of consent cannot be drawn 'only for the reason that complainant did not resist'. The complainant may have failed to resist due to mistake in understanding the nature of the act or the identity of the actor; or may not have been able to resist due to factors like, infancy, insanity, intoxication, etc.; or may be due to fear of grave consequences.[83] But if such is not the case, and all the above-stated three circumstances are present, inference of consent can be drawn. Meaning thereby, communication of agreement is not a must in every case of consent. Consent can be inferred.

The entire discussion made above makes it clear that, express consent presupposes agreement to an act and communication of the same prior to its actual performance; whereas implied consent consists of a silent approval to an act at the time when the act is in process.

[82] See, Glanville Williams, *Supra* note 19, at 550.
[83] *State v. Schwab*, 143 N.E. 29, 109 Ohio St. 532

Communication of agreement is essential in express consent, whereas implied consent is based on inference only. Ignoring this difference, Explanation 2 to section 375 speaks about the cases of 'communication of agreement/willingness'. It, therefore, covers the cases of 'express consent' only; and excludes the cases of 'implied consent'. It is a matter of common knowledge that, sexual relations are generally governed by implied consent. It will be very rare and artificial when a man actually stands before a woman with folded hands requesting her for sexual favour. Explanation 2 to section 375, which denies 'implied consent', therefore, is unreasonable, irrational and arbitrary.

The definition is vague, since the main part of it deals with 'express consent', whereas its Proviso clause deals with a completely different aspect of 'implied consent'. There would have been some sense, if in the main part of the definition there would have been a general rule stating: "inference of consent can be drawn"; and thereafter, the proviso would have been appended to the general rule stating: "provided mere non-resistance cannot be inferred as consent".

Mode of Communication: Communication of agreement, as stated-above, is not essential in every case of consent; but wherever communication is expected (*i.e*., in express consent and in case of refusal) it may be signified symbolically (*i.e.*, by words or gestures). Refusal may also be signified by physical resistance. However, mere withholding of consent or even token resistance is not enough to signify real resistance. In *Mahmood Farooqui's* case[84] it was argued that: "It is not unknown that during sexual acts, one of the partners may be a little less willing or, it can be said unwilling but when there is an assumed consent, it matters not if one of the partners to the act is a bit hesitant. Such feeble hesitation can never be understood as positive negation of any advances by the other partner." The court agreed with this view. This is a sensitive subject; on which feminist understandably hold strong views. Byron, however, has a poetic license to speak on such sensitive subject. In his poem *Don Juan*, he stated:

> A little still she strove, and much repented,
> And whispering "I will ne'er consent"—consented. (Canto – I)

Human relations are complex. Different persons act and react differently with different persons and in different set of circumstances. Actions and reactions in human relations cannot be explained with mathematical precision that suits all the persons in all the

[84]*Supra* note 27.

circumstances. Therefore, there cannot be a set formula like, "Yes" means "Yes" and "No" means "No". A bashful "No" may mean "Yes". On this point Delhi High Court's observation in *Mahmood Farooqui's* case[85] is worth to note. The Court observes:

> Instances of (woman) human behavior are not unknown that a feeble no may mean a yes. If the parties are strangers, the same theory may not be applied. If the parties are in some kind of prohibited relationship, then also it would be difficult to lay down a general principle that an emphatic no would only communicate the intention of the other party. If one of the parties to the act is a conservative person and is not exposed to the various ways and systems of the world, mere reluctance would also amount to negation of any consent. But the 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. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble no, was actually a denial of consent. [Para 78]

***Mens Rea* and Consent:** Before parting with this discussion on the point of communication and consent, an aspect of *mens rea* needs to be discussed; though this aspect is not directly related to the law of consent, yet it has relevance in determining criminal liability. There are circumstances where a person submits due to fear, or mistake of fact, but such submission is not treated as consent. Similarly, the act is without consent, if it is done in spite of refusal / resistance. Similarly, an act done after withdrawal of consent is without consent. But if the accused is not aware that such submission is under fear or mistake; or if he commits mistake in understanding the refusal / resistance, or withdrawal of consent, etc. he is entitled to the defence of 'lack of *mens rea*'.[86]

VIII. Clause *Seventhly* of Section 375 IPC *vis-à-vis* Capacity to Consent

When one says that, he is 'unable to communicate his feelings', it is implicit that he has some feelings, but due to one or the other reasons he is unable to communicate those feelings. Existence of feelings and inability to communicate those feelings are, thus, two different things. Keeping this difference in mind, the meaning of Clause *Seventhly* of section 375 IPC can be analyzed. According to Clause *Seventhly*, it is rape, if a man does any of the acts specified under clause (a) to (d) of section 375 with a woman "when she is unable to communicate consent". Plain reading of Clause *Seventhly*, thus, makes it clear that, the

[85] *Ibid.*

[86] See, S. 90, IPC. It reads: "A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under misconception of fact, and *if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception of fact*; …." [Emphasis added]. See also, *DPP v. Morgan*, [1976] AC 182; [1975] UKHL 3; *People v. Evans*, *Supra* note 14; *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*, *Supra* note 27

woman is consenting but she is unable to "communicate" her consent. Clause *Seventhly* suffers from two technical defects, firstly, it treats "consent" and its "communication" as two different things; and secondly, it creates a confusion between a woman's "inability to communicate consent" and her "inability to consent".

Express consent is founded on 'communication' of agreement, and without this foundation it cannot come into existence. Communication is; thus, implicit in express consent; and they cannot be two different things. So far as implied consent is concerned, as stated above, it is based on 'inference' of consent and not on 'communication' of consent. Clause *Seventhly*, therefore, excludes the cases of implied consent.

So far capacity to consent is concerned, the statement that a person is 'unable / incapable to consent' is materially different from the statement that, he is unable / incapable to 'communicate consent'. While the former is a correct statement of fact, the latter is unsustainable. Clause *Seventhly*, therefore, is vague.

Consent, of-course, requires ability/capacity to consent. 'Capacity to consent' merely means capacity to understand the nature of the act and identity of the actor. A person can be said to be 'incapable to consent' when he is incapable to understand the nature of the act and identity of the actor. This incapability may occur due to various factors such as, infancy, insanity, high level of intoxication, sleep, or when a person is unconscious. The persons who come under these categories are incapable to consent. Therefore, any act done with them is 'without their consent'. For the purpose of the offence of rape under section 375 IPC, Clause *Secondly* takes care of such situations. Therefore, it is unclear as to which kind of situation Clause *Seventhly* intends to cover.There is, however, a reason to believe that Clause *Seventhly* intends to cover the cases where a woman can be sexually exploited by way of hypnotism or mesmeric influence.

Dr Hari Singh Gour observes that, 'cases where will of a woman is completely subjugated by the mesmeric influence are not covered in the circumstances contemplated in section 90 of the IPC'.[87] He cites a case recorded in Taylor's *Medical Jurisprudence* wherein a girl, aged 18, who consulted a therapeutic magnetizer as to her health. She visited him daily for some days. Four-and-a-half months afterwards she discovered that she was pregnant, on which she complained to the authorities against the magnetizer. They directed her medical examination,

[87] Dr. Sri Hari Singh Gour, *Penal Law of India* 3611 (Law Publishers (India) Pvt. Ltd., Allahabad, 1999).

and the medical inspectors were satisfied that the pregnancy did not extend further back than the period mentioned by her. One more example on this point is worth to note which is recorded in B.N. Sharma's *Forensic Science in Criminal Investigation and Trials*.[88] Here, a Tantric inveigled a rich widow to become his disciple. With the passage of time, he not only won her complete confidence, but became intimate also. The Guru had an eye on her property. He hypnotized her so well that she got his name entered as the authorized person to operate her bank lockers also. In addition, he got a sale deed of her flat executed in his favour without paying any money. Later, he persuaded her to create a trust of her vast landed property. He got himself as nominated as the chief executive of the trust. And when the hypnotic spell went off, she filed a complaint against him.

It is important to note that, in the case reported in Taylor's book, it is specifically stated that: "They (medical inspectors) reported that a person in magnetic sleep is insensible to every kind of torture and sexual intercourse might then take place with a young woman without the participation of her will and without her being conscious of the act, and consequently, without her being able to resist the act consummated on her."[89] It is also important to note that: "Hypnosis is a process in which the subject (person under interrogation) accepts the suggestion of the hypnotist non-critically. The reasoning faculty of the individual is suppressed."[90]

The legal position stated by Dr Hari Singh Gour, on this point, is incorrect. It is true that the circumstances nullifying consent as stated in section 90 IPC do not expressly cover the cases of hypnotic spell or mesmeric influence. But it can be inferred from the expression 'misconception of fact' under section 90 IPC. Be that as it may, it must always be kept in mind that, section 90 does not define the concept of consent. Consent means 'conscious permission / agreement for an act'. The person is said to consent, if he chooses to agree to an act with full knowledge and understanding of its nature, and also the identity of the actor. A woman under the hypnotic spell or mesmeric influence lacks reasoning faculty, she lacks the ability to understand. She mechanically follows the suggestions / orders given to her without understanding the nature of the act she does, or allows the hypnotizer to do with her. Sexual intercourse/act done with a woman under such circumstances is without her consent and the case falls under Clause *Secondly* of section 375 IPC. Thus, if at all there is any lacuna in

[88] B.R. Sharma *Forensic Science in Criminal Investigation and Trials* 203 (Universal Law Publications, Co. Pvt. Ltd. 2009).
[89] See, Dr. Sri Hari Singh Gour, *Supra* note 87.
[90] See, B.R. Sharma, *Supra* note 88.

section 90, the same is taken care of by the expression "without her consent" in Clause *Secondly*. Clause *Seventhly*, therefore, is irrelevant and unnecessary. On this point, it is important to note the observation of the Law Commission of India in its 42nd Report on Indian Penal Code. The Commission observes:

> It was suggested that the consent obtained from a person by putting him under hypnotic or other occult influence should be specifically mentioned in the section. We have little doubt that if ever a concrete case of this sort come up, the court would have no difficulty in holding such consent to be insufficient even under the existing provision. The influence on the mind could be regarded as having produced either a misconception of fact or an inability to understand the nature and consequence of that to which the person gives consent. [Para 4.41]

IX. Section 90 *vis-à-vis* Section 375 IPC

Section 90 IPC is a general provision on consent. It says, 'a consent is not such a consent as is intended by any section of the IPC, if it is given by a person under a fear of injury, or under a misconception of fact; or by a person who is of unsound mind, or intoxicated; or by a person below 12 years of age.' For the purpose of the offence of rape, section 375 IPC also describes certain circumstances when consent is not real. Therefore, in *Uday v. State of Karnataka*[91] it was argued that, 'while determining the validity of consent for sexual intercourse the provisions of section 375, which is a special provision, alone has to be taken into consideration, and not the general provision of section 90.'[92] On this issue, the Supreme Court observed:

> In view of our findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 Fourthly and Fifthly, or whether consent given under misconception of fact contemplated by Section 90 has a wider application so as to include the circumstances not enumerated in Section 375 IPC. [Para 26]

It is unclear as to why the Court refrained from deciding such an important issue. The duty, therefore, falls on the academicians to clarify the mist around the issue of consent in section 375 IPC.

At the outset, it must be kept in mind that section 90 is a general provision on consent, while section 375 is a specific/special provision.[93] And it is a well-known rule of construction that,

[91] *Uday*, *Supra* note 37.
[92] *Uday*, *Ibid*, Para 10.
[93] The Law Commission of India admitted this fact, though hesitantly. The Commission stated: "It seems possible to take the view that the third and fourth clause of section 375 relating to fear of hurt and misconception are special provisions and hence exclude the application of the corresponding general provision

'general provisions yield to special provision'. The Supreme Court in *J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of U.P.*[94] lays down that, "in case of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision."[95] The courts are always vigilant of this rule of construction; when they deal with the issue of 'age of consent' in section 375 IPC. They never ever have stated that, the age of consent is 12 years in section 90, and the same is applicable to section 375 also. But while dealing with the issue of 'misconception of fact' in section 375 IPC, in complete disregard to the above rule of construction, they frequently relied upon section 90 IPC. This, it is humbly submitted, is a double-standard.

Unless contrary appears from the context, section 90 is applicable to all consent-based offences. Broadly speaking, an act can be said to be done "without consent", if any of the circumstances under section 90, that denies the reality of consent, is present. Section 90 and Clause *Secondly* of section 375 IPC, therefore, are two sides of a same coin; and they are not materially different. In this sense, both these provisions are 'general provisions' on consent. But, in an offence of rape, these general provisions are restricted by clauses *Thirdly*, to *Sixthly* of section 375,[96] which are special provisions.

Section 90 and 375 are guided, partly by the core concept of consent and partly by policy matters. The aspect of 'fear of injury' that vitiates consent is a matter of policy. On this aspect, section 90 says that, consent vitiates, if it is given under 'fear of injury'. Thus, section 90 gives emphasis on 'free consent'. Clause *Thirdly* of section 375 though does not deny the policy of 'free consent'; but certainly it restricts that policy. The emphasis of Clause *Thirdly* is more on the policy of 'prevention of trivializations of the otherwise grave offence of rape' than to the policy of 'free consent'. Therefore, Clause *Thirdly* speaks about 'fear of specific injury' only. It, thus, recognizes the seriousness of the offence of rape; and therefore, intends to prevent its trivialization by disallowing any and every kind of fear to vitiate consent.

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in the first paragraph of section 90...". See, 42nd Report of the Law Commission of India on Indian Penal Code, (June, 1971), at Para 16.113. This fact is endorsed by the Law Commission of India in its 84th Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence, (April, 1980), at Para 2.22.

[94] AIR 1961 SC 1170.

[95] *Ibid*, Para 9 and 10.

[96] Clause *Seventhly*, as stated-above, is meaningless and useless; whereas Clause *Firstly* is a relic of the past, and serves no useful purpose, as the situation contemplated in Clause *Firstly* is already covered in Clause *Secondly*.

'Age of consent', in both these sections is again a matter of policy. Consent requires clear knowledge of the nature of the act agreed upon and identity of the actor. Infants lack such knowledge; therefore, they are incapable to consent. Section 90 conclusively assumes that, children below 12 years of age have not attained sufficient degree of maturity of understanding, to judge the nature and consequences of that to which they permit; therefore, they are incapable to consent. Section 90, therefore, as a general rule, prescribes 12 years of age as an 'age of consent'. But Clause *Sixthly* of section 375 IPC prescribes 18 years of age as the 'age of consent' for sexual intercourse. The policy here is not to consider that, a woman under 18 is incapable to consent; but the likelihood that, by reason of tender age or immaturity of understanding cannot appreciate the facts of life. The policy of law, therefore, is to protect children of such immature age against sexual intercourse. Clauses *Thirdly* and *Sixthly* are, therefore, exceptions to the general rule contained in section 90 IPC.

The aspect of 'misconception of fact' under section 90 is guided by the 'core concept of consent'; whereas, under section 375, this aspect is guided by the mix consideration of the 'core concept of consent' as well as 'policy matter'. Section 90 emphasizes the rule that, consent given under 'misconception of fact' is null. And as stated initially, misconception must be of 'relevant fact'.[97] And in consent only two facts are relevant: knowledge of the 'nature of the act' and 'identity of the actor'. And when a person lacks knowledge of either or both of these two facts, any act done or attempted with him/her is 'without his/her consent'. Under section 375, this aspect is covered in the form of Clause *Secondly*, *i.e.*, 'without her consent'.[98]

However, on the aspect of mistake regarding 'identity of the actor', the legislative policy is different. Therefore, keeping the other aspects intact, only this aspect is removed from Clause *Secondly*, and is given a separate treatment in Clause *Fourthly*. Clause *Fourthly*, therefore, is in the nature of a 'proviso' to Clause *Secondly*. It says, consent given under 'mistake of identity' is null, provided the mistake is 'by a married woman regarding identity of her husband'.

On principle, 'mistake as to identity of a person' nullifies consent, irrespective of the fact that the person is her husband, friend, fiance or lover. But the legislative policy under Clause

[97] See, *Supra* note 37.

[98] Acts done with a person who is 'incapable to consent'; or acts done in spite of refusal or resistance are also covered in the expression "without consent". See, *Supra*, 'With consent, Without Consent, and Vitiation of Consent'.

Fourthly is to deny the protection of law to those women who took lovers and committed mistake in their identity. Clause *Fourthly*, thus, deprecates promiscuity. One may like it or not, but clauses *Thirdly* to *Sixthly* of section 375 are the special provisions with specific legislative policy. Under the law, one is free to criticize or appreciate the policy. But while deciding the issue of consent in section 375 IPC, the above-stated rule of construction must be followed. Meaning thereby, while determining the validity of consent for sexual intercourse, the provisions of section 375, which is a special provision, alone has to be taken into consideration, and not the general provision of section 90.

X. Clause Fifthly of Section 375 IPC

Clause *Fifthly* is incorporated in section 375 by way of Criminal Law (Amendment) Act, 1983. It deals with the cases where sexual intercourse is done with a woman who, due to intoxication or unsoundness of mind, is unable to understand the nature and consequences of what is being done with her. The clause also covers the cases where sexual intercourse is done with a woman who, due to 'voluntary' consumption of stupefying or unwholesome substance, is unable to understand the nature and consequences of what is being done with her. Clause *Fifthly* says, consent in both these situations is null.

First of all, Clause *Fifthly* is unnecessary, because an act is always 'without consent', if a person with whom the act is done, is unable to understand the nature of the act and/or identity of the actor, "for whatever reasons". Therefore, the situation contemplated in Clause *Fifthly* is already covered in Clause *Secondly*. And it is because of this, the same was not separately specified in the initial scheme of section 375.

Furthermore, since Clause *Fifthly*, at present, is separately specified in section 375, it becomes a special provision; and the general provision on this aspect, both in Clause *Secondly* and in section 90, goes out of the picture. Clause *Fifthly*, therefore, becomes another exception to Clause *Secondly*. As a result, the classification of voluntary and involuntary consumption of stupefying or unwholesome substance in Clause *Fifthly* becomes a special provision. Clause *Fifthly*, therefore, gives a license to every man, to sexually violate any inebriated woman, if he is not responsible for her inebriation (though he will be guilty of outraging her modesty). The classification of voluntary and involuntary consumption of stupefying or unwholesome substance in this clause, therefore, is unscientific, unreasonable and arbitrary.

XI. Conclusion

According to the core concept of consent, will is not crucial in consent; but the crucial aspect is a 'choice'—whether to agree or not to agree. Once a person consciously chooses to agree, he consents; however, unwilling his choice may be. Consent, therefore, is valid even if it is against will. Whereas, Explanation 2 to section 375 IPC that defines 'consent' for the purpose of the offence of rape, *inter alia*, states that, a 'woman's agreement to participate in sexual intercourse/act must be willing'. Therefore, according to Explanation 2, when a woman's agreement to participate in a sexual intercourse/act is unwilling, the sexual intercourse/act is 'without consent', and hence rape. Explanation 2, thus, restricts the meaning of consent to 'willing agreement' only. This restricted meaning of consent, in fact, expands the definition of rape. It takes within its ambit, every sexual intercourse/act where the woman was an unwilling participant. This is contradictory to the basic concept of consent, and also to the legislative policy in Clause *Thirdly* of Section 375 and 376C IPC.

Clause *Thirdly* makes it clear that; the only kind of fear that vitiates a woman's consent for sex is the 'fear of death or of hurt, to her or to a person in whom she is interested'. Meaning thereby, other kinds of fear, such as, fear of injury to property, mind, and reputation are insufficient to vitiate sexual consent. Consent in such cases, of-course, is unwilling, yet it is valid. Clause *Thirdly* recognizes the seriousness of the offence of rape; and therefore, intends to prevent its trivialization by disallowing any and every kind of fear to vitiate consent. The "willing" aspect of consent in Explanation 2, therefore, is contradictory to the core concept of consent, as well as the legislative policy in Clause *Thirdly*.

Section 376C IPC deals with sexual exploitation of women by men in authority (sextortion). In this offence also, a woman's participation is unwilling, but since the intercourse/act is consensual, it is kept out of the boundaries of rape. The "willing" aspect of consent in Explanation 2, therefore, is contradictory to section 376C also.

The aspect of "unequivocal consent" in Explanation 2 is also contradictory to the basic meaning of consent, as well as legislative policy under Clause *Fourthly* of section 375 and 493 IPC. The "unequivocal" aspect of consent indicates that, consent given under mistake of "any" fact is invalid; whereas, according to the true notion of consent, mistake of two facts only nullifies consent—mistake as to 'nature of the act' and/or as to 'identity of the actor'. Mistake of any other fact is irrelevant in determining existence/non-existence of consent.

The legislative policy under Clause *Fourthly* is to protect a married woman, if she commits mistake regarding "identity of her husband", and under that mistaken belief, she participates in sexual intercourse/act with a person, who is not her husband. In that case, her consent is treated as invalid. However, legislative policy under Clause *Fourthly* is not to protect those women who took lovers and commit mistakes in their identity. Mistake in identifying friend, fiancé, lovers cannot be said to be "unequivocal", but still such a mistake is excluded, by incorporating Clause *Fourthly*. But when Explanation 2 speaks about 'unequivocal agreement', it actually contradicts the legislative policy on Clause *Fourthly*.

Section 493 IPC prohibits and punishes a man for obtaining cohabitation and/or sexual intercourse by deceit. In this case also, a woman's participation in sexual intercourse is under a wrong belief that the man is her lawfully wedded husband. But there is a fine difference between this section and Clause *Fourthly*. Clause *Fourthly* deals with 'mistake of identity', whereas section 493 deals with 'mistake as to the attributes' of a person. Mistake of identity nullifies consent, but mistake of attributes does not. Therefore, though in both these provisions, a 'woman's participation in sexual intercourse is not unequivocal', they are treated as distinct offences. But according to Explanation 2, every sexual intercourse/act wherein woman's agreement to participate is not unequivocal is rape. This aspect, therefore, contradicts section 493 IPC.

Explanation 2 to section 375 IPC, *inter alia*, states that, 'consent means voluntary agreement'. Ordinary meaning of the expression 'voluntary/voluntarily' is different from its legal meaning. The expression 'voluntarily', in its legal sense, is defined in section 39 IPC. Therefore, the expression 'voluntary' in Explanation 2 must be interpreted in conformity with its legal meaning under section 39 IPC; but then the expression 'voluntary agreement' will be reduced to absurdity. The reason being clear, the expression 'voluntarily' is defined to indicate *mens rea* of 'accused'; and it has nothing to do with a will/volition of 'complainant'.

Even if the expression 'voluntary' is interpreted in the light of its ordinary meaning still the view that, 'consent means voluntary agreement' does not stand. The expression 'voluntary', in its ordinary sense, means doing something with 'one's own accord'; without outside influence, like a promise or request. An act done on request, therefore, is not a voluntary act. If this meaning is applied, then only that sexual intercourse/act will be legal, wherein the woman's participation is 'on her own accord', without any request by the man. But, if a man requests a woman for participation in a sexual act, even if she happily participates, her

participation is not voluntary. The reason being clear, any act done on request is not voluntary act. In this sense, the 'voluntary aspect' of Explanation 2 is a violation of equality.

Consent is an agreement to a particular course of action. Agreement presupposes some request or expectation of one person from the other person to agree on something requested or expected. Therefore, there cannot be voluntary agreement. An act can be voluntary, but consent is not an act; consent is merely a conscious permission / agreement to an act. Therefore, Explanation 2 to section 375 IPC which states that, 'consent means voluntary agreement' is founded on wrong notion of law. It is absurd, unreasonable and discriminatory.

The expression "communication / communicates" in Explanation 2 arbitrarily exclude the concept of 'implied consent'. Communication of agreement to the act proposed is a requirement of express consent; whereas implied consent consists of 'silent approval' (*i.e.*, without there being a formal proposal and communication of agreement) to an act at the time when the act is in process.

The definition of consent in Explanation 2 to section 375 IPC is full of contradictions, fantasies and myths. It trivializes the offence of rape. The definition is unreasonable, irrational, arbitrary, discriminatory, and vague. Be that as it may, within the four walls of section 375 IPC, the definition is a 'general provision' and Clauses *Thirdly* and *Fourthly* are 'special provisions'. And the rule on this point is clear—"special provision prevails over general provision". Therefore, though the definition of consent speaks about 'unequivocal consent', yet, so far as 'mistake as to identity' is concerned, Clause *Fourthly* limits it to the 'mistake of a married woman regarding identity of her husband' only. So also, however unwilling a woman may be, her agreement to participate in sexual intercourse/act does not make the intercourse/act a crime, if the unwillingness has no relation with the 'fear specified in Clause *Thirdly*'.

> So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time. But there comes a point at which one must desist. It is not a criminal conduct for a male to make promises that will not be kept, to indulge in exaggeration and hyperbole, or to assure any trusting female that, as in the ancient fairy tale, the ugly frog is really the handsome prince. Every man is free, under the law, to be a gentleman or a cad. But take heed. Violence, force, and

threats are totally out of bounds. Their employment will transform a heel into a criminal.[99]

[99] Justice Edward J. Greenfield, in *People v. Evans*, *Supra* note 14.