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FROM RESISTANCE TO REQUIREMENT: ASSESSING AFFIRMATIVE CONSENT AS A CATALYST FOR JUDICIAL REFORM

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ABSTRACT

For decades, the lawsgoverning sexual offences have measured consent by the presence ofstruggle, often filled with assumptions that prioritise the perspective of the accused and overlook the realities of victims. However, the gravest violations occur in the silence between a 'NO' that was never heard and a 'YES' that was never given. This leaves a grey area as to how consent should be assessed: whether through a resistance model, which requires a clear refusal and the presence of resistance or should it be a “Yes means Yes” framework where only explicit and voluntary agreement constitutes consent.

The research employs a qualitative comparative legal analysis, examining jurisdictions of Sweden, Spain, and India that represent different stages of transition to the proactive consent framework. It compares global implementations of this framework and scholarly critiques to assess whether the affirmative consent framework yields improved judicial outcomes or merely changes the legal terminology. This normativeapproach furtherinvestigates the framework’s efficacy,particularly regarding evidentiary standards, the burden of proof, and trial outcomes, to assess its global scalability for adoption.

Furthermore, the findings of the research suggest that while the proactive consent framework stands strong in acknowledging the complexities of trauma, its success cannot be ensured by legislative changes alone. There is a need for procedural reforms, including codifying the affirmative duty to seek consent, introducing trauma-informed jury instructions and enhancing judicial sensitisation to bridge the gap between law and practice.

Ultimately, the research concludes by arguing that the shift to an affirmative consent standard is a significant step towards a “human rights-driven” legal framework that prioritises sexual

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autonomy, but also needs institutional and policy reforms alongside to support its fundamentals in the long run.

Keywords: *Affirmative Consent, Comparative Criminal Law, Consent, Sexual Offences, Burden of Proof, India, Sweden, and Spain.*

I. INTRODUCTION

In recent legal and academic debates, the "No Means No" approach is considered old-fashioned because it rests on outdated notions of force and resistance. According to academics, this passive approach fails to account for the neurobiological responses to sexual assault, particularly "tonic immobility" or the "freeze" response, in which a victim is physically incapacitated from resisting or refusing sexual contact. On the other hand, the affirmative consent or "Yes Means Yes" model is founded on the idea of sexual autonomy, which is also endorsed by international agreements like the Istanbul Convention. According to legal theorists such as Lois Pineau and Michelle Anderson, in a just society, sex should be a communication and a positive consent between the parties involved. Traditionally, laws surrounding sexual offences were based on the "doctrine of resistance", which defined rape based on the use of force. For over 100 years, it was thought that a "real" victim would have resisted. As a result, the law emphasised injury and resistance, rather than consent. But standards at the international level are now shifting towards a communicative understanding of consent. This emphasises a "force-based" approach to an "autonomy-based" approach. According to this new interpretation, rape is no longer seen as a form of violence, but also as a form of sexual autonomy. It is a consequence of the new understanding that sexual practices should be premised on voluntary consent and not just the absence of resistance. Despite this change, the "No Means No" model still presents problems because it doesn't take into account trauma responses. The resistance model is predicated on the wrongful assumption that victims will be able to resist or say no. In fact, many victims are paralysed by the "freeze" response during sexual assault, and are unable to verbally or physically resist. This results in a failure of law to recognise cases of non-violent coercion or cases where a victim did not resist, but also did not consent. The concept of the "ideal victim" who is supposed to resist at all costs can result in secondary victimisation in the justice system. This makes it difficult for many survivors to be granted justice because their response to the trauma doesn't align with what is considered "normal". The purpose of this research is to explore whether the "Yes Means Yes" approach can address these issues and enhance justice responses. The affirmative

consent law focuses on whether the victim consented, rather than whether they resisted. It seeks to better protect sexual autonomy and eliminate confusion about sexual assault. This paper aims to show that while the "Yes Means Yes" model is a step in the right direction to a more human rights-compatible legal system, it is not enough to secure justice. This research compares Sweden, Spain and India to find out whether the "Yes Means Yes" model really protects victims and makes the law simpler, or whether "rape myths" within the legal system simply transfer difficulties of the law to other issues, such as the alleged perpetrator's "reasonable belief" in consent.

II. LITERATURE REVIEW

The current legal sphere across a few countries globally shows a clear shift from the traditional standardof physical resistance to an emphasis on proactive consent in the law of sexual offences. This shift is from a "resistance-based" understanding of consent, which implies consent when there is no physical resistance to the sexual act, to an "autonomy-based" one where the agreement is explicit and voluntary and places the duty on the perpetrator to actively obtain consent. According to a 2026 report from UN Women, approximately 46% of countries across the globe define rape based on affirmative consent or the absence of consent, rather than the requirement of physical force or resistance. However, many other nations still follow the resistance-based model where consent is assumed unless the victim has shown some resistance.

At the international level, the Istanbul Convention is often used to measure this transition because it requires states to define consent as a matter of free will, regardless of whether the victim had resisted.[2] This "international shift" is considered not only a legal development, but also seen as a strategy to bring the criminal law in line with international human rights law on bodily integrity.[3]But the shift towards an affirmative "Yes Means Yes" approach is contested. Generally, scholars fall into two groups who see it as a valuable reform and those who are wary of how it's likely to affect due process. On one side, pro-reform scholars like Lois Pineau and Michelle Anderson contend that a standard of affirmative consent more accurately captures aspects of sexual violence, such as the neurobiological response of "freeze" and the

[2]*Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* art. 36, May11, 2011, C.E.T.S. No. 210 [hereinafter *Istanbul Convention*].
[3]*Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13.

power imbalances inherent in sexual encounters.[4]They recommend shifting to a more "communicative" notion of consent in the law to better protect victims. But, some argue, this may unintentionally place an onus on the accused, overlooking the presumption of "innocentuntil proven guilty".[5] This discussion raises a central dilemma in legal theory: balancing the need to better protect victims while upholding the legal rights of the accused.

While Sweden, Spain and India have introduced affirmative consent laws, recent research suggests there is still an "implementation gap".[6]Many researchers have observed that while statutes continue to evolve, judicial outcomes may continue to rely on "rape myths" and notions of the "ideal victim".[7] Research indicates that without systemic change, reforms to legal language do not necessarily result in increases in convictions and improvements in victim experiences.

Thus, while the current literature discusses the merits of the affirmative consent framework, there remains a need for an integrated analysis on a critical question: to what extent does switching from a "No Means No" to a "Yes Means Yes" framework improve criminal justice outcomes, and does this shift overcome the shortcomingsof the traditional approach to rape laws, or merely redirect the legal complexities to other areas of trial?

III. THE GLOBAL DIVERGENCE: CONTEXTUALISING CONSENT IN MODERN JURISPRUDENCE

Legal approaches to sexual consent are not monolithic; they reflect the core values of a society regarding bodily autonomy, gender inequality and the role of criminalisation. The international legal arena can primarily be divided into two camps. The older "Resistance-Based" approach, which has historically been dominant in both Civil and Common Law jurisdictions, is premised on a presumption of consent in the absence of physical resistance or a verbal "no". This approach criminalises "violence" rather than "non-consent", leaving a significant gap for the victims of psychological paralysis and non-violent coercion. On the other hand, the new "Affirmative Consent" or "Yes Means Yes" model upholds sexual

[4]Lois Pineau, *Date Rape: A Feminist Analysis*, 8 Law & Phil. 217, 232–34 (1989); Michelle J. Anderson, *Negotiating Sex*, 78 Wash. L. Rev. 719, 722–24 (2003).

[5] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 11 (Dec. 10, 1948).

[6] Sexual Offences Act (Svenskförfattningssamling [SFS] 2018:619) (Swed.); Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad sexual [Organic Law 10/2022 of September 6 on the Integral Guarantee of Sexual Liberty] (B.O.E. 2022, 215) (Spain); The Criminal Law (Amendment) Act, 2018, No. 22, Acts of Parliament, 2018(India).

[7]PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA 10 (2014).

autonomy as a positive right. Here, the law presumes that consent is not present without active and voluntary verbal or non-verbal communication of consent. This development is one of the most important developments in criminal law in the 21st century, as it shifts the focus from the victim's capacity to refuse to the perpetrator's duty to communicate.

To go beyond a theoretical examination and assess whether this model is an improvement to the criminal justice system, this study focuses on three jurisdictions. These jurisdictions were selected not only for their recent law reform but also for the "legal narratives" they provide on the move to affirmative consent. The analysis of these three distinct legal cultures will help determine whether the model is effective in translating the law and practice. We will examine whether the "affirmative approach" is a one-size-fits-all or if its success is tied to the cultural and institutional readiness of the country that adopts it.

A. Sweden: The Pioneer of the “Voluntariness” Model

Sweden previously had a force-based system for dealing with sexual offences, with rape laws primarily focused on force, threat, or coercion. Under the previous system, a sexual act was typically treated as rape only if the victim demonstrated resistance or if there was evidence of force used against them.[8] This meant that consent was seen as something of a side issue, and indirectly required victims to demonstrate physical resistance. But on 1 July 2018, a new Sexual Offences Act (the *samtyckeslagen*or "Consent Law") was introduced, which marked a transition from a "No Means No" model to a "Yes Means Yes" or affirmative consent model.[9] Rape is now defined under Chapter 6, Section 1 of the Swedish Penal Code as having a sexual act with a person who is not voluntarily participating.[10] The law now uses the term "voluntariness" instead of "consent" to emphasise that the victim is actively participating in the sexual act. This new law was heavily influenced by public backlash to the previous legal definition in cases where victims froze in fear and were unable to physically resist.[11] This was also exacerbated during the global #MeToo movement. A high-profile 2013 case involved six men acquitted of raping a 15-year-old girl, as the court ruled that she had not physically resisted, despite being scared. This was not acknowledged in the previous force-based law. The concept of voluntariness was introduced by Sweden to recognise in law that "No" means

[8] *See* BROTTSBALKEN [BrB] [PENAL CODE] 6:1 (Swed.).
[9] Sexual Offences Act, *supra* note 5.
[10] *Id.* at ch. 6, § 1.
[11] Anna Möller et al., *Tonic Immobility during Sexual Assault – a Common Reaction of Women with Post-traumatic Stress Disorder and Severe Depression*, 96 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 932, 932-38 (2017).

"No" and silence is not consent. The new law requires voluntary participation to be demonstrated through words, actions or other behaviour, rather than the burden being on the victim to resist the sexual activity.[12] One of the most significant aspects of the Swedish law is the offence of "negligent rape" (oaktsamvåldtäkt).[13] This involves being convicted of rape even if there was no intention to commit rape, but being seriously negligent about understanding that the other person is not voluntarily participating in the sexual interaction.[14] 656, in which the court reiterated that silence and passivity is not consent.[15] This case demonstrated a judicial approach that prioritises sexual autonomy and the need to ensure consent. The reforms of 2018 have made a difference. The Swedish National Council for Crime Prevention (Brå) reports that when the law came into effect, rape convictions increased by about 75% in the following two years, from 190 convictions in 2017 to 333 in 2019.[16] Many of those convictions involved cases where the victim froze in fear or where there was no physical violence, cases that would not have led to convictions under the previous law.The law also shifted investigative processes, with police and prosecutors moving away from examining injuries to focusing on communication, behaviour, and other signs of voluntary participation during the encounter. While these changes have been positive, the Swedish approach is not without its critics and complications. Some legal experts and defence lawyers argue that the provision of "negligent rape" causes confusion and uncertainty as it relies on what the perpetrator "should have known". Others are concerned that the law may be hard to apply to "grey-area" cases, particularly among young victims, where communication is less clear and mature.[17]

In addition, while the law has changed, some judges and legal professionals still rely on traditional "rape myths", such as questioning a victim's clothing, behaviour or dating history.[18]This suggests that legal reform can't entirely shift societal attitudes. In general, Sweden is regarded as a successful implementation of the affirmative consent model. The 2018 reform represented a change from emphasising a victim's resistance to emphasising voluntary participation. While there are still evidentiary and practical challenges, Sweden's

[12]*Id.* at ch. 6, § 1a.
[13] Linnea Wegerstad, *A Comparative Perspective on Sweden's Negligent Rape Law*, LUND UNIV. (2021).
[14]*See* NYTT JURIDISKT ARKIV [NJA] 2019 s. 656 (Swed.).
[15]*Rape Conviction Rates Rise 75% in Sweden After Change in Law*, GLOBAL CITIZEN (July 1, 2020), globalcitizen.org.
[16]*Large Increase in Convictions for Rape Since the Swedish Consent Act was Introduced*, NORDIC RESEARCH COUNCIL FOR CRIMINOLOGY (June 15, 2020), nsfk.org.
[17]*Sweden's Consent Laws Face Criticism — Many Teenagers Convicted*, SVERIGES RADIO (Dec. 8, 2025), sverigesradio.se.
[18]*Legislating the Path to Consent: Sweden's Experience*, 13 OÑATI SOCIO-LEGAL SERIES 1440 (2023).

approach demonstrates a greater emphasis on sexual autonomy and a human rights-informed approach to the justice system.

B. Spain: The "Only Yes is Yes" Reactionary Reform

Historically, the Spanish criminal law has separated sex crimes into two distinct categories: sexual abuse (abuso sexual) and sexual assault (agresión sexual). The previous Spanish Penal Code defined rape as a type of assault, requiring prosecutors to demonstrate violence, intimidation or threats.[19] This meant that the law emphasised the absence of consent rather than the need for consent. This approach overlooked the trauma response and the effect fear can have on victims. These issues were exposed by the 2016 La Manada ("Wolf Pack") case.The La Manada case was a catalyst for change in Spain. Five men gang raped an 18-year-old woman during the Pamplona San Fermín festival.[20] Even though the video footage showed the victim lying passive and frightened, the Spanish court initially ruled in 2018 that it was not rape because there was no direct violence or physical resistance.Instead, the offenders were convicted of sexual abuse, a lesser crime.[21] This decision sparked public outrage and protests across the country, with campaigns such as **#SisterIBelieveYou** and **#ThisIsNotAbuseItIsRape** calling for Spanish rape laws to be reformed.[7] In 2019, the Spanish Supreme Court overturned the initial ruling and recognised the act as rape, finding that the intimidation itself constituted a lack of consent.[22] Consequently, Spain has now implemented significant changes through the Organic Law 10/2022 on the Integral Guarantee of Sexual Liberty, also known as the "Only Yes is Yes" law.[23] It explains how silence or passivity cannot be considered consent, and how consent needs to be indicated through unambiguous and freely engaged actions of agreement.[24] Most notably, the law abolished the distinction between sexual abuse and sexual assault. Now, any non-consensual sex act is criminalised as sexual assault.[25] The emphasis of the law shifted from the victim's resistance to whether the defendant obtained clear consent from the victim.Spain's courts now focus less on physical resistance as a sign of non-consent and more on communicative consent.This was evident in the 2024 Dani Alves case, where the ex-footballer was convicted of sexual assault.The court made clear that the lack of injuries did not mean there was consent, linking

[19] *Case and the Reform of Sex Crimes in Spain*, 22 GERMAN L.J. 1060, 1062 (2021).
[20] *Spain's 'Wolf Pack' Gang-Rape Case: A Timeline*, THE GUARDIAN (June 21, 2019), theguardian.com.
[21] *Id.*
[22] *See* Tribunal Supremo [T.S.] [Supreme Court], June 21, 2019 (S.T.S., No. 344/2019) (Spain).
[23] Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad sexual [Organic Law 10/2022 of September 6 on the Integral Guarantee of Sexual Liberty] (B.O.E. 2022, 215) (Spain).
[24] *Id.* at art. 178.
[25] *Spain's Only Yes is Yes Law Explained*, BBC NEWS (Aug. 26, 2022), bbc.com.

it to the Manresa case, where men were initially convicted only of "abuse" after assaulting an unconscious 14-year-old girl because she could not resist and directed that under the current law, this would be considered rape.[26] Despite the improvements, Spain's affirmative consent law has been flawed. A major issue was that the 2022 law changed the sentencing structure while grouping abuse and assault.This meant that, due to the retroactive application of lesser punishments (*lexmitior*), more than 1,100 offenders applied to reduce their sentences and over 100 were released early.[27]This resulted in significant public criticism and required a 2023 law to amend the sentencing issues, while leaving the definition of affirmative consent untouched.[28]Critics argued that these issues harmed public confidence and caused legal uncertainty.However, the reform also had benefits. It adopted a more trauma-sensitive approach by acknowledging that victims may not physically resist but freeze instead.It also mandated the creation of 24-hour crisis centres for survivors and broadened the definition of sexual violence to include online harassment and street harassment.[29] More importantly, the law decreased the reliance of the justice system on physical resistance to prove non-consent and enhanced the protection of sexual autonomy.

In sum, Spain's adoption of the "Only Yes is Yes" model is a significant move towards a more consent-based and victim-centred approach. While the reforms had problems in implementation, particularly around sentencing, the new framework has shifted the focus from the resistance of the victim to whether there was genuine agreement. Spain has now shifted from asking questions about the victim's resistance to questions about the victim's agreement to sex. The success of the new framework will depend on the need for clearer interpretation by judges, the training of judges and prosecutors, and the continued work on removing rape myths from the justice system.

C. India: The Transitional Struggle of a Hybrid Framework

For more than a century, the law of sexual offences in India has been framed through the lens of morality and physical proof, in accordance with Victorian England's colonial scripts that found both their root and codification in the 1860 IPC.[30]For instance, for more than one hundred years, India's prosecution of rape was based on a rigorous "resistance-based"

[26]*Dani Alves Sentenced to 4.5 Years for Sexual Assault*, REUTERS (Feb. 22, 2024), reuters.com.
[27]*Spanish PM Apologises for Loophole in New Sexual Consent Law*, THE GUARDIAN (Apr. 16, 2023), theguardian.com.
[28]*Spain's Government Amends 'Only Yes Is Yes' Law After Outcry*, REUTERS (Apr. 20, 2023).
[29] Ley Orgánica 10/2022, *supra* note 5, at art. 33.
[30]*See* INDIAN PENAL CODE, 1860, § 375 (India).

framework that conflated the absence of consent with the presence of physical resistance or injuries.[31]

Historically, the legal principle of "No Means No" applied in Indian courts, which was interpreted so narrowly as to treat the passivity or minutes of silence from the victim as legal consent.[32] This archaic approach placed the focus on the "character" of the victim and the evidence of her "outraged modesty" rather than the underlying principle of sexual autonomy, failing to protect victims who did not fulfil the stereotype of the "ideal victim" who fought back at all costs.[33]The pivotal shift into an affirmative consent standard began with the Delhi Nirbhaya gang rape case in 2012 - a trauma that sparked national protests and the Justice Verma Committee.[34] Based on the committee's recommendations, the legislature passed the Criminal Law (Amendment) Act, 2013, which, for the first time in the history of Indian law, defined consent as an "unequivocal voluntary agreement" communicated through words, gestures or any other form of verbal or non-verbal communication.[35]More importantly, the 2013 amendment inserted an "Explanation 2" to Section 375, which expressly stated that a woman who does not physically resist an act of rape shall not, merely on that ground, be assumed to have consented to the sexual intercourse.[36]

This legislative journey has recently come full circle with the complete overhaul of the Indian criminal justice framework from the IPC and the Indian Evidence Act to the Bharatiya Nyaya Sanhita (BNS)[37] and the BharatiyaSakshyaAdhiniyam (BSA)[38] in 2024. Under the BNS, the definition of rape and the affirmative standard for consent remain substantially identical to the 2013 IPC reforms, now codified under Section 63.[39]While the BNS introduces specific offences for sexual intercourse by deceitful means or "promise to marry," it maintains the "unequivocal voluntary agreement" standard.[40]

[31] *A Critical Analysis of the Standard of Consent in Rape Law in India*, 13 OÑATI SOCIO-LEGAL SERIES 1440, 1442 (2023).
[32] *Id.*
[33] PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA 10 (2014).
[34] *Justice Verma Committee Report on Amendments to Criminal Law*, GOVERNMENT OF INDIA (Jan. 23, 2013).
[35] The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).
[36] INDIAN PENAL CODE, 1860, § 375, expl. 2 (India).
[37] The Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).
[38] The BharatiyaSakshyaAdhiniyam, 2023, No. 47, Acts of Parliament, 2023 (India).
[39] The Bharatiya Nyaya Sanhita, 2023, § 63 (India).
[40] *Id.* at § 69.

Similarly, the BSA retains the vital presumption of non-consent previously found in the Evidence Act.[41]

Yet, legal scholars point out that while this shift brings contemporary language, it has not brought an entirely new approach to the concept of consent; instead, it has reaffirmed the current affirmative framework, while ignoring the judicial problems.[42]

Despite this progressive statutory stance, the current judicial climate in India is a clear example of an "implementation gap" where archaic rape myths continue to extinguish the flames of the legislation.

One recent example of this regressive trend is the 2017 Mahmood Farooqui v. State case, where the Delhi High Court acquitted a filmmaker of rape, suggesting that a "feeble no" from an intellectually proficient victim might be misinterpreted as consent by the accused.[43]This judgment effectively revived the requirement for "strenuous resistance," implying that a victim's refusal must be vocally and physically assertive, a direct contradiction of the legislative intent.[44] These cases indicate that while the law has evolved, the "judicial imagination" often remains stuck to the patriarchal assumptions regarding victim behaviour.

The impact of the Indian framework is mixed: more reporting and no change in conviction rates.[45] While the Indian system makes survivors happier due to the statutory endorsement of autonomy, the system remains hampered by delays and "character assassination".[46]The challenges centre on the fact that the reforms are more "symbolic" than "practically effective" because of the lack of trauma-informed training for the judiciary.

In summary, India's transition remains ongoing - a mixed system where a progressive law is in constant struggle with a conservative culture. The future of consent laws in India does not lie in further renaming of the law but in a radical "judicial sensitisation" and the abandonment of the "feeble no".[47]

IV. SCHOLARLY DEBATE: THE THEORETICAL FRICTION OF CONSENT

[41] The BharatiyaSakshyaAdhiniyam, 2023, § 118 (India).
[42] *BNS and the Definition of Consent: A Continuity of the IPC Legacy*, 12 J. LEGAL STUD. & RES. 45 (2024)
[43] *Mahmood Farooqui v. State*, (2017) 243 D.L.T. 209 (India).
[44] *Farooqui v. State: Confusing Consent*, OXFORD HUMAN RIGHTS HUB (Nov. 22, 2017).
[45] *National Crime Records Bureau (NCRB) Report 2023*, MINISTRY OF HOME AFFAIRS (India).
[46] *The Implementation Gap in India's Sexual Offence Laws*, 10 INT'L J. GENDER & L. 88 (2025).
[47] *The Future of Sexual Autonomy in India*, 13 OÑATI SOCIO-LEGAL SERIES 1460 (2023).

The shift from a resistance-based standard to a model of affirmative consent is more than a legal shift; it is a dramatic philosophical reappraisal of sex and the criminal law's role in private life. As international standards have increasingly gravitated towards the "Yes Means Yes" approach, scholarly debate has raged. This section delves into the academic debate, analysing the arguments in favour of sexual autonomy as opposed to those that favour the procedural protections of the accused, while ultimately exploring the limits of any legal framework to address systemic power inequalities.

A. Why Affirmative Consent is the Answer: Overcoming the "Ideal Victim" and Codifying Diligence

Advocates of the affirmative consent model argue that it is the only model that can end the myth of the "ideal victim" who is deemed ineligible for justice if she does not physically resist her perpetrator.[48] Feminist legal scholars argue that the shift from the "absence of a no" to the "presence of a yes" finally acknowledges the neurobiological reality of the "freeze" response.[49]As Michelle J. Anderson argues in her landmark book Negotiating Sex, a resistance standard implies that a woman's body is "initially available" until she physically reclaims it, whereas an affirmative standard accurately positions sexual access as something that must be actively granted.[50]

Also, scholars contend that "Yes Means Yes" promotes equality and mutual respect by legally obligating defendants to take "reasonable steps" to determine consent. This "duty of diligence" shifts the communicative burden from the potential victim to the sex initiator, thus turning the legal question from "what did she do to stop it?" to "what did he do to ensure she wanted it?"[51] By institutionalising this requirement, the affirmative consent model serves as an educational tool that reinforces the notion that sex is an egalitarian communicative act rather than a predatory pursuit.[52] Martha Chamallas notes that such reforms are necessary to purge the law of "gendered harms" that have historically considered a lack of resistance as an open invitation for sexual activity.[53] This reform is seen as a necessary step towards aligning domestic criminal law with international human rights standards, such as those outlined in the

[48]*See* Lois Pineau, *Date Rape: A Feminist Analysis*, 8 Law & Phil. 217, 221 (1989).
[49] Anna Möller et al., *Tonic Immobility during Sexual Assault*, 96 Acta Obstetricia et GynecologicaScandinavica 932 (2017).
[50] Michelle J. Anderson, *Negotiating Sex*, 78 Wash. L. Rev. 719, 722 (2003).
[51]Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* 102 (1998).
[52] Pineau, *supra* note 1, at 234.
[53]Chamallas, *Introduction to Feminist Legal Theory* 234 (3d ed. 2012).

Istanbul Convention, which privileges the "free will" of the individual over archaic evidentiary standards, such as the requirement for physical bruises.

B.The Case for "No Means No": Due Process and the Presumption of Innocence

On the other hand, a large body of legal scholarship warns that affirmative consent models risk undermining fundamental criminal due process.Critics suggest that the "No Means No" framework - while certainly not ideal - is more consistent with the "presumption of innocence" and the government's obligation to prove every element of a crime beyond a reasonable doubt.The main worry is that a "Yes Means Yes" standard, by necessity, tips the scales of justice in favour of the prosecutor by inadvertently placing the onus on the defendant to prove they secured affirmative agreement to avoid conviction.

Scholars such as Stephen Schulhofer point out that in cases without physical evidence, trials may become a "credibility contest" in which the evidentiary disadvantage of the defendant is compounded if the starting point is a presumption of non-consent.[54]

Finally, critics fear that affirmative models may lead to "over-criminalisation" by criminalising non-violent but poorly communicated, non-affirmative sex acts. If a "yes" is not defined by the law, there is a concern that "clumsy" or "unclear" sexual encounters - which are common in many real-life situations - would be treated equally to a predatory assault.[55] Donald Dripps shares this concern, noting that broadening the definition of rape to include all non-affirmative encounters risks trivialising the seriousness of the crime and eroding public support for rape laws.[56]

C. Theoretical Dilemmas: Power Imbalances and the Limits of "Choice"

A third, more critical, line of scholarship questions whether either approach could capture the power disparities that often undergird sexual encounters. Even in an affirmative framework, feminist scholars such as Catharine MacKinnon have long argued that a "yes" might still be coerced by social, economic, or patriarchal pressures that the law cannot see.[57] This "theoretical dilemma" suggests that in a society where gender inequality exists, it may be impossible to distinguish between "voluntary agreement" and "acquiescence". If a victim says "yes" due to a fear of employment retaliation or social ostracism, an affirmative consent law

[54] Schulhofer, *supra* note 4, at 115.
[55] Alan Wertheimer, *Consent to Sexual Relations* 142 (2003).
[56] Donald A. Dripps, *Beyond Reporting: The Role of Sexual Consent in the Law of Rape*, 92 Cornell L. Rev. 1, 15 (2006).
[57] Catharine MacKinnon, *Toward a Feminist Theory of the State* 174 (1989).

may still hold an encounter to be "consensual", thereby legitimating a non-autonomous sexual encounter.[58]

This argument suggests that the law's emphasis on "individual choice" ignores the "lack of choice" that is present for many marginalised groups.Kimberlé Crenshaw's intersectionality further complicates this analysis, as women of colour might face multiple forms of coercion that can't be reduced to a "yes/no" binary.[59] Robin West argues that by reducing consent to a one-off communicative act, the law ignores the "ongoing" coercion that exists in long-term relationships or unequal workplaces.[60] Moreover, there is a question as to whether the "reasonable steps" requirement simply allows defendants to "perform" a search for consent without actually respecting the victim's true will.

In the end, these dilemmas reveal that while the shift to "Yes Means Yes" is a procedural improvement, it cannot be a panacea for the larger issues of socio-economic inequality that govern sexual relations. The law can define the "standard" for consent, but as Carol Smart suggests, it cannot, on its own, resolve the "phallocentric" power structures that inform the very meaning of the word.[61]

VI. CLOSING THE IMPLEMENTATION GAP: NORMATIVE REFORMS

The "implementation gap" studied in Sweden, Spain and India and the scholarly arguments, suggest that the criminal justice system has a distinctive institutional momentum. Paper-based law reform does not necessarily challenge the "resistance-based" norms of the gatekeepers of the law. In moving towards substantive equality, the following five procedural changes should be made:

A. Moving towards an Objective "Duty of Diligence":

The key loophole in the current affirmative models is the "misinterpretation" defence in which an accused asserts a "reasonable belief" in consent even in the face of passivity. The law should shift away from the accused's subjective belief to an objective Duty of Diligence. This means that the court should not ask if the defendant believed there was consent, but what positive steps he or she took to determine if there was consent. By criminalising

[58] Robin West, *The Harms of Consensual Sex*, 94 Am. Phil. Assoc. Newsl. 52 (1995).
[59] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan. L. Rev. 1241 (1991).
[60] West, *supra* note 18, at 55.
[61] Carol Smart, *Feminism and the Power of Law* 26 (1989).

negligence in not seeking to ascertain consent, we end the "feeble no" defence in acquaintance rapes.

B. Judge's Education on the "Neurobiology of Trauma":

In the jurisdictions examined, the failure to appreciate the "freeze" arises at the judicial level. The judges and forensic police investigators should have specialist training in tonic immobility. This is not a case of "sensitisation" but rather an evidentiary redress. Once magistrates and judges recognise that silence is a product of terror, rather than a form of "passive assault," the "ideal victim" (who fights back in all circumstances) can be banished from the law.

C. Mandatory "Presumption of Non-Consent" directions:

To help juries and magistrates to "break" resistance-based reasoning, there should be an implementation of mandatory Bench Guidelines. These guidelines should make clear to the fact-finder that the lack of physical resistance is irrelevant, and should not be used to infer consent. By legally excluding the "lack of struggle" as a proof of fact, the trial can proceed solely on the communicative interaction between the parties, and the jury can apply the affirmative standard while deliberating.

D. Absolute immunity of prior sexual history:

Although there are "rape shield" laws, these are often avoided through the pretext of arguing "relevancy" to consent. It would be recommended to have a more absolute ban on the admissibility of the victim's sexual history (even with the accused). The focus must be solely on the time of the incident in question. This gives victims the right to privacy, and stops the trial from becoming one of character; and it ensures that "sexual autonomy" is protected, on an encounter-by-encounter basis, regardless of prior encounters.

E. Decentralising Police Response through Special Response Centres

Finally, the "second victimisation" that takes place at general police stations often erases the "first" evidence in consent cases. There should be a nationwide establishment of Integrated Response Centres for forensic, legal and psychological support in a non-confrontational environment. By changing the mode of investigation from a conventional police station to a trauma-sensitive centre, the collection of "communicative evidence" (such as body language

and digital traces) is afforded the forensic attention it demands to satisfy the affirmative consent standard.

VII. CONCLUSION

This study demonstrated that the harmonisation of the intrinsic value of sexual self-determination through the move from "No Means No" to an affirmative "Yes Means Yes" framework throughout the world is not simply a shift in the wording of statutes, but a transformation of sexual subjectivity within criminal law frameworks. Through examination of the legal regimes of Sweden, Spain and India, it is clear that the affirmative standard offers a theoretically better approach to upholding the fundamental human right to sexual self-determination.

To answer the key question addressed by this research, it can be concluded that the move towards affirmative consent is a necessary but insufficient step on the path to a human rights jurisprudence. The "Yes Means Yes" approach does not solve the problems of conventional consent laws in isolation; it points to the place where the next legal battle for justice will be waged. The focus of the legal battle has taken us from text-based to judicial thinking. In a world where the affirmative standard will not live up to its promise without the normative interventions proposed in this research - that is, trauma-informed protocols and the objective "duty of diligence" - the movement to enact progressive sexual offence laws is not enough. The next step in the evolution of international sex laws is to connect progressive words to regressive deeds. As a growing number of countries adopt the affirmative standard, efforts should turn towards breaking down the patriarchal "rape myths" that permit the misinterpretation of silence as consent. The criminal justice system must first acknowledge that sexual autonomy is not merely the absence of physical resistance, but also a positive right, if we are to uphold the dignity of all persons. The "Yes Means Yes" paradigm is not the last, but the next step in communicative justice.