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Date of publication: February 21st, 2019

Edition period: February 2019 - June 2019

To cite this article: Vidu, A., & Tomás Martínez, G. (2019). The Affirmative “Yes”. Sexual Offense Based on Consent. *Masculinities and Social Change*, 8(1), 91-112. doi: 10.17583/MCS.2019.3739

To link this article: <http://doi.org/10.17583/MCS.2019.3739>

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The Affirmative “Yes”. Sexual Offense Based on Consent

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Abstract

The gang rape case that occurred in Spain during a 2016 famous festival placed the trial against its five aggressors on an unprecedented media and social scale in Spain. The court that ruled for sexual abuse and not for rape sparked a huge and prompt social rejection of the current legislation. To overcome revictimization and give voice to survivors, the consideration of consent has been raised. This new paradigm has deeply spread in society and social networks to the point that the Spanish government has expressed its interest in modifying the Criminal Code to base sexual crimes on consent. In our duty to provide scientific knowledge for this issue, this article frames the debate on sexual harassment and focuses on the crime against sexual freedom and the context under which consent can neither be asked for nor conceived. This article analyzes the aggravating crime factors while basing consent on the intention of the offender. Starting from international approaches, this article emphasizes the current social opportunity needed to create awareness and transform laws with the aim of legislating on affirmative “yes”. This approach contributes to the challenge of overcoming gender violence and to the study of masculinities and their influence on social transformation.

Keywords: sexual consent, sexual harassment, affirmative consent, social mobilization.

El “Sí” Afirmativo. Delito Sexual Basado en el Consentimiento

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Resumen

El caso de violación colectiva que se produjo en España durante un famoso festival de 2016 colocó el juicio contra sus cinco agresores en un nivel mediático y sin precedentes en España. La sentencia del tribunal por abuso sexual y no por violación provocó un rechazo social enorme y rápido hacia la legislación actual. Para superar la revictimización y dar voz a los y las sobrevivientes, se ha planteado la consideración del consentimiento. Este nuevo paradigma se está extendiendo profundamente en la sociedad y las redes sociales hasta el punto de que el Gobierno español ha expresado su interés en modificar el Código Penal para basar los delitos sexuales en el consentimiento. En nuestro deber de proporcionar conocimiento científico sobre este tema, este artículo enmarca el debate sobre el acoso sexual y se centra en el delito contra la libertad sexual y el contexto bajo el cual el consentimiento no puede pedirse ni acordarse. Este artículo analiza los factores delictivos agravantes mientras basa el consentimiento en la intención del delincuente. Partiendo de enfoques internacionales, este artículo enfatiza la oportunidad social actual necesaria para crear conciencia y transformar leyes con el objetivo de legislar en un "sí" afirmativo. Este enfoque contribuye al desafío de superar la violencia de género y al estudio de las masculinidades y su influencia en la transformación social.

Palabras clave: consentimiento sexual, acoso sexual, consentimiento afirmativo, movilización social.

Two years ago, the Spanish population participated in the most controversial trial for a rape case. The situation occurred in 2016 during the celebration of Pamplona's regional festival called San Fermín. Everybody was waiting for the judicial sentence, and finally, the five aggressors were condemned for sexual abuse and not for rape. The issue to discuss is consent. During the sexual aggression, the 18-year-old victim did not say "no" at any moment. Her fear of being killed prevented her from negating the facts. On the same day of the judicial decision, six hours after the sentence went public, thousands of people demonstrated in the street all across the country in favor of the survivor (*The Guardian*, 2018)¹. Society took her side, we believed her, and citizens mostly defended her right to not show negation; we even understood her fear of being killed in case she dared to say "no". In Spain, we all remember Nagore², a 20-year-old woman who was killed during the same festival in 2008. Nagore acquiesced in being with a man, even going to his apartment. However, she said "no" to have sex with him and was killed.

The judicial decision against the so-called "wolf pack"³ was so famous and so socially rejected that it advanced the debate regarding the *Spanish Criminal Code* and its definitions of the terms harassment, abuse and rape, which caused almost everyone to criticize the decision in an unprecedented manner in Spain. The Spanish Criminal Code defines in article 181 sexual abuse that a person commits this crime if, "who without violence or intimidation and without consent, [they] perform acts that attempt against the freedom or sexual indemnity of another person, will be punished, as responsible for sexual abuse"⁴. Considering the age of sexual consent in Spain, 16 years, this crime would be considered in this case for individuals below this age.

Within the *Crimes against sexual freedom and indemnity*, the Spanish Criminal Code also defines sexual harassment in article 184⁵

as one requesting favors of a sexual nature, for himself or for a third party, within the scope of an employment, teaching or service provision, continued or habitual, and with such behavior [that] will provoke [in] the victim an objective and seriously intimidating situation, hostile or humiliating.

Sexual assault is defined in article 178 as "one that attempts against the sexual freedom of another person, with violence or intimidation". The following article 179 further specifies that "when the sexual assault consists of sexual intercourse by vaginal, anal or oral route, or introduction of objects by one of the first two routes, the person responsible will be punished as a criminal of rape". Following such definitions, rape is shaped under the presumption of aggression.

Currently, the revision of the Spanish Criminal Code constitutes an important task for the Spanish government. Citizens' mobilization has very recently pressed the government to have the figure of a Vice President, the person in charge of equality affairs, to show up publicly to affirm that the new reform of the current Criminal Code will reframe sexual offense to include consent as the main pillar. Specifically, the lack of an explicit "yes" from the victim side will be considered a sexual crime. Legislative definitions manifest the age of consent in relation to the age of getting married. Rather than considering age or other determinants, in this article, we discuss the context in which sexual engagement occurs. In terms of dialogue and communicative acts to obtain agreements, the social sciences agree somewhat in defining context as the place where social interactions are manifested (Searle & Soler, 2004). Communications among people are influenced by context and the social determinants surrounding it, such as power and privilege.

The debate on sexual harassment turns on sexual consent and the conditions under which consent should be considered or behavior should be punished (Pérez Hernández, 2016). Citizens have already shown their rejection to the current legal aspects that address gender violence and harassment. Social mobilizations are increasing and legislators are now taking over the issue, which turns the current moment into a historic stage for gender violence and overcoming it. The problem is revealed, but many questions are still unanswered. Scholars have to provide knowledge about this reality and fill the gap of framing consent and the conditions under which it can or cannot be asked or conceived. Society, judges, policy makers, women and men need to know what sexual consent is, when consent is given, what the conditions are that imply consent, and how often we must reaffirm the consent. Above all, everyone must know what is not considered consent in any sexual engagement.

State of the Art

Policies and legislation are essential to make progress and to press social movements further and more broadly. For example, António Guterres, Secretary General of the United Nations, began a speech this way:

Let us declare in one voice: We will not tolerate anyone committing or condoning sexual exploitation and abuse. We will not let anyone cover up these crimes with the UN flag. [...] Let us make zero tolerance a reality.⁶

The reality of sexual harassment has been a struggle for decades. For Marx (1867: 2008), violence was instrumental power; for Weber (2012: 1904), violence was a way of legitimate coercion; and for Merton (1965), violence was an outcome of inequality. However, violence and gender-based violence have become visible in recent times and in multiple spaces (Abraham, 2015; Connell, 1987; Beck-Gernheim, Butler & Puigvert, 2001). The debate appears over the public spectrum. In current times, the #MeToo⁷ and #TimesUp⁸ campaigns have placed the problem on the social and political radar (Neill, 2017). Social networks spread the word and mobilizations have become global all across the world. Indeed, the fact that very famous women became involved by recognizing that they have suffered from violence similar to any other woman has highly contributed to the success of this movement.

Consent in sexual affective relationships was first discussed in academic contexts, and college campuses led the struggle of considering consent in any sexual affective relationships. The academic context has some relevant features, such as power relationships that blur the line between consent and sexual harassment. Women's studies were introduced in universities across the United States and the United Kingdom at the same historical moment through the Women's Liberation Movement (Bird, 2002). Social movements have also played an important role in the configuration of legal definitions on rape and sexual violence. According to the research of Freedman (2013) on the importance of social movements to historical change, several social mobilizations have contributed to extend the definition of rape and sexual violence. The American Act embraced in its status the original definition of rape that came from British Law as "the

carnal knowledge of a woman when achieved by force and against her will by a man other than her husband” (Freedman, 2013, p. 4). In redefining rape, the author acknowledges rape as being an issue of power and privilege. Framing the frontiers of citizenship, she emphasizes women’s changing values in society against unfair situations with unprivileged communities. By describing the racial segregation period and women’s suffrage, Freedman emphasizes the importance of women’s rights advocates who struggle for expanding awareness of gaining legal protection for sexual abuse and assault, coercive sexual relations and any type of harassment, including the sexual abuse of children. Current feminist movements still grapple with the victories and limitations of the first reform efforts to keep redefining rape and sexual abuse within every law and culture.

Social movements were also demanding the raising of the age of sexual consent and the recognition of marital rape. To overcome gender violence, the line between consent and sexual harassment must be very clear for any sexual engagement in any context. When social interaction situations involve power relations, sexual harassment behavior tends to be easily identified, according to the research of Bursik and Gefter (2011) that involved students. To better address sexual harassment in any environment, social context and the consideration of power must be considered to frame the relationships that are pretended to improve them. Other researchers struggled to change US legislation (McMahon, 2008; Cantalupo, 2012) rather than advance it so that victims of gender violence received attention and response. In this research, they argued for further definitions of sexual assault that consider consent in a verbal and behavioral way. Within the field of higher education, the definition of gender violence already recognizes consent. Gender violence includes verbal violence such as sexist and humiliating remarks, undue or unwanted attention, inappropriate and offensive sexual advances such as kisses and caresses without consent, intimidation and leering, and bribery and physical violence including abusive and intrusive behavior (Schubert, 2015; Benson & Thomson, 1982).

Sexual harassment exists and is increasingly in the public eye. It subsists in universities (Valls et al., 2017), political parties (Mellins et al., 2017), the media, and in all social spaces (WHO, 2017). The latest study of the

Academy of Sciences shows this reality in scientific areas of knowledge (The National Academies of Sciences, Engineering, Medicine, 2018). According to a survey conducted by the USA TV channel CNBC (2017), 27% of women and 10% of men reported having experienced sexual harassment in the workplace. Recently, a World Bank internal survey on sexual harassment in the workplace, which was made public, indicated that 1 in 4 women suffer harassment at the World Bank⁹. Although all of these data suggest a problem of a stratospheric magnitude, they also show a path to make possible the issue becoming known so that it can be addressed from all the required perspectives. Answering affirmatively to a poll, 25% of women and 4% of men in all of these abovementioned contexts knew of and suggested that they had suffered from harassment. However, they did not say “no” at any moment, but still, they never consented. These type of scenarios are going to be addressed in this article. Student networks such as *End Rape on Campus*¹⁰ and the *Solidarity Network of victims of gender-based violence in universities* (Puigvert et al., 2017) have always given priority to victims’ voices. The inclusion of consent in the approach to sexual harassment is a very powerful way to give voice to victims and be on their side rather than supporting harassers or justifying their behavior under the idea of innocence prejudice.

There may also be a potential indirect decrease in harassment, since the empowerment of victims is removing impunity from harassers. Institutions are acting, and currently, it is not so easy to look the other way. Society is carefully watching. The complaints in the case of the biologist at the University of California, Irvine made the institution even change the name of its library, which had until that day the name of the accused biologist.¹¹ Coherence has greatly contributed to science and is necessary in the current academic world. Taking a position against harassers constitutes an act of solidarity with potential victims who may have abandoned their careers because of an uncomfortable environment in their workplace.

As far as the scientific literature shows, the first context in which the subject of consent was addressed was at North American university campuses (Benson & Thomson, 1979). The first struggle of the student movement began in the late 1970s in California. This movement achieved unprecedented goals, such as the approval of several policies of prevention and action against sexual harassment and breaking the silence about sexual

violence in universities and the power complicities that maintained it. The first complaints against harassing professors began to occur then, and little by little, victims found support to complain. In the 2000s, and the new millennium, a new wave of students were asking their universities to take charge of harassment and rape cases not only at offices, classrooms and halls but also at university parties, fraternities and sororities ([Armstrong & Hamilton, 2013](#)).

In 2004, the No means No legislation¹² was passed to clarify consent to sexual activity. The definition states as follows: "An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity". It is understood that, if anyone says "no" during any type of sexual engagement, the other person involved must understand the "no" as "no". A person must above all understand that if he/she does not pay attention to this denial, he/she is committing a sexual crime, a sexual contact with a person who has not given her/his consent. The California State Bill SB-967 also expresses that

It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.

¿How Hard is to Say “No”? Legislation Considering “Consent” for Sexual Engagement

The era of transformation follows. There is actually no need to say “no” to make other people understand that there is no consent for a specific act. Legislation is necessary, it provides freedom, but legislation must also change. Years ago, people and students verified that considering the “no means no” legislation had a great impact in breaking the silence and advancing the struggle against sexual violence in academia. Soon, they also became aware that in reality, consent means saying “no” is insufficient, simply because victims cannot always say "no" ([Muehlenhard, Humphreys, Jozkowski, & Peterson, 2016](#)). States of unconsciousness, alcohol and drugs make a person unable to consent. In addition, fear, intimidation,

power relations, academic evaluations, among other reasons, are situations that restrict the "no" of a victim or even nullify it.

The Campus Sexual Violence Elimination (SaVE¹³) Act was signed in 2013 by President Obama as part of the Violence Against Women Act (VAWA) Reauthorization. This federal law followed the approval of the No Means No Act, which was added to the Criminal Sexual Assault Act in 2003 and established "consent" as a prerequisite to any sexual activity. Consent must be affirmative and positive, according to the law. In the context of student activism and social mobilization, students pushed for the "Yes Means Yes" consent law for college campuses. In 2014, the student group Our Harvard can do Better¹⁴ argued that only "yes" means "yes" and claimed the "Yes means yes" law, which was passed the same year in the state of California and was passed a year later, in 2015, in the state of New York under the name "Enough is enough"¹⁵. According to Fox-Penner, Fournier, Mayopoulos & Goffard (2014) in their definition of affirmative consent on campus, which was published in September 2014 by the Harvard Political Review, they defied affirmative consent as follows: "Affirmative consent is not a conspiracy to persecute innocent students or mandate a single script for sexual activity. Affirmative consent is crucial to separate sex from devastating forms of violence and to make Harvard a safe community for everyone."

Thus far, in the United States, only two states have affirmative consent standards, namely, in California, "Yes Means Yes", and in New York, "Enough is Enough"; these laws apply to universities. The United States has nine¹⁶ universities with affirmative consent policies. Bringing these policies into the social sphere also implies thinking about which person and in what way he/she is responsible for the implementation of consent. "Yes means yes" is also called the Affirmative Consent Law because it defines consent as being based on an affirmative, conscious and voluntary agreement to any sexual contact. The law indicates that consent is required and requires institutions to take responsibility and implement affirmative consent policies. Although the first laws in favor of consent have begun to flourish on university campuses, sexual violence is still a reality that affects other spaces.

In the above legislation, consent is defined as affirmative, conscious and voluntary. None of these words is obvious and they should not be taken for

granted. All of them have a meaning full of content. The word “voluntary” leads us to defend sexual freedom without any external pressure. A victim cannot always manifest an express “no”; often his/her professional inferiority situation prevents this, such as a relationship of power (where one person has a higher job position than the other person in the relationship). Our current concern is to take the issue of consent further and apply it to all areas of society.

Some European countries have taken the lead on integrating consent into their policies. Germany changed its law on sexual assault and rape in 2006 (Hörnle, 2016). The change consisted of section 179 of the German Criminal Code that in considering the crime of sexual offense,

would eliminate the requirement of coercion by force or threat of use of force and would criminalize situations in which the victim does not suspect an attack, is defenseless, or makes a refusal to consent to the sexual act known either verbally or through his or her behavior (e.g., by crying or stiffening).¹⁷

In this way, the German model stiffens the penalties for offenses that are not based on consent and states that a physical or mental condition could prevent consent.

Belgium’s law considers that the crime for sexual offense consists of

any act of sexual penetration committed on a person who does not consent. Consent is deemed to be absent when the act is imposed by means of violence, force or by a trick, or if the victim is suffering from a physical or mental disability.

This is the definition of rape according to article 375 of the Belgian Criminal Code (passed in 1989).¹⁸ In this way, the Belgian Criminal Code defines rape as all acts of sexual penetration in any circumstance and in any way towards a person that are against her/his consent. In this case, consent is not given when there is coercion, deception and violence.

UK law also considers informed consent, which must be given freely, by both partners, enthusiastically, every time and for every sexual act.¹⁹

“An intoxicated person is legally unable to consent to sex and having sex with a person who is very drunk is rape or sexual assault”. The UK law also adds that “consent cannot be given if either partner is under the age of 16 – which includes vaginal, anal and oral sex”.

The crime is committed by the person who does not ask for consent or who does not respect it. In the same way, consent must be free and under the full capacity of the person who gives it.

In the case of Sweden, legislation that includes consent was recently passed in July 2018.²⁰ This legislation specifies that the requirement of consent is the basis of the new legislation, regardless of whether there has been violence or threats or whether a person has violated the vulnerability of the victim. A novel element of the Swedish law is the concept of *negligent rape* and *negligent sexual abuse*, which broadens the situations that are considered abuse. For instance, a person must be aware of when the other person does not participate voluntarily but is still performing sexual acts with that person.

Consent and Sexual Freedom

From the sexual freedom perspective, consent in sexual acts is also the most controversial issue. Criminal sexual assault acts need to assure that the parties involved truly wanted to be part of the sexual activity. Thus, a “no” by one of the people involved means a lack of consent, and the other person must fully understand and respect the right to say “no”. Consistent with seeking an express “yes” and legislating it, experts in the field of law, such as Professor Adela Asúa²¹, affirm how important is to configure a single crime of sexual assault whose axis is consent. We completely agree with her idea, since we are worried about the attacks against the honesty of women. Since 1989, crimes related to sexual violence in Spain have been called "crimes against sexual freedom"; this is the point we aim to reach. Besides the judicial issue concerning penalty and placing an aggressor in jail, our duty is also to analyze reality to improve it. Therefore, to contribute to overcoming gender-based violence and protecting women and men, their sexual actions must be based on freedom.

This article seeks not only to deepen the simple categorization of consent within the Criminal Code but also to evidence a more individual reality. The Spanish government intends to change its Criminal Code, which is indeed great progress. However, social relevance demands that the debate should be taken beyond issues such as the number of years in prison, according to any crime typology. Our aim places the discussion beyond the crime committed, it includes the acts committed. It is not our intention that the subject be articulated according to the years of imprisonment rather to determine the behavior and the repercussions it may involve for survivors. Sex crime narratives claim that there is lack of consent and lack of consideration of victims' feelings in legislation. According to Ventura's research, victims' feelings are not contemplated by law. Criminal laws do not consider feelings because they are not facts (Ventura, 2017). However, sexual violence has serious consequences for victims and for society.

Several studies target teens and boys in pursuing gender equality (Foley et al., 2015) and manifest the importance of programs and preventive protocols for their training in pursuing consensual sexual relations. The study of alternative and egalitarian masculinities are influencing sexual affective relationships to achieve a deep and crucial transformation of society and social roles (Rios-Gonzalez et al., 2018). Scholars such as Connell (2012) aim to configure a powerless masculinity. She claims that power has been an important issue in understanding masculinities, but she advocates for power roles and hegemonic masculinities that are not equated with violence. On the global scale, power structures and incoherence in gender relations still exist; nevertheless, the politics of gendered institutions are being elaborated in terms of equality and change. This article persists on raising global awareness about this crucial changing moment in which freedom and consent are becoming influential in the most intimate sphere of our relational engagements.

Social and Political Opportunity

Legal sociology studies the processes and mechanisms through which a social claim obtains the necessary strength so that a citizen's claim gets to be legislated. The sociology of law has the power to enhance justice, and citizens, politicians, legislators, might create social awareness about an

issue (Volkov, 2018). The social rejection of judicial decisions similar to the decision in the “wolf pack” case is what legal sociology considers a social opportunity to legislate social concerns. Therefore, how does a social claim become a law? The role of any legislator is to identify the political opportunity, the point of social consciousness, which generates a social movement that is sufficiently strong to engage people in social struggle. This change of mentality is what will contribute to impact and change legislation. Without the struggle for women's rights, we would not have legislation on gender issues.

On his struggle to return knowledge back to society to improve social problems, Michael Burawoy (2005) discusses elevating private problems to become public issues. Civil society improves at the point when evidence and science are considered to be both a social movement and a scientific discipline that calls for a critical engagement across the world. From its very beginning, Burawoy's claim focuses on the public, in the sense of counting on public voices and research oriented towards public action. Analyzing people's mobilizations from below involves the voices of the people who are studied on the central point and emphasizes the desire to return knowledge back to society. If consent is not achieved towards this end, Burawoy suggests creating the space and the appropriate context to engage the public in dialogue, based on the Habermas communicative action criteria (Burawoy, 2005).

The punishment decision against the "wolf pack" and above all, the social rejection that provoked represents a social and political opportunity for the revision of the concepts of harassment, aggression and sexual abuse in legal terms. In fact, the Spanish government is already analyzing the case, and a commission was created for this purpose. Female and male experts in the field will prepare a report to include the matter of consent for any sexual engagement. Scientific research from social and legal perspectives should provide knowledge on what consent means and how it should be asked, assured and reaffirmed. The issue of communicative acts emerges at this point.

Communicative Acts for Ensuring Consent

The case of the "wolf pack" embodies the example of abiding consent. No one has doubts about what occurred that night: the sexual act occurred. Five men pushed an 18-year-old girl into an enclosed place for multiple penetrations. The scenes were video recorded and spread via Internet and social networks. It could be affirmed that almost nobody doubts what happened and that these events occurred. The debate is whether these acts constituted sexual assault and where the line for consent is placed. When in 2014, the group of students *Our Harvard Can Do Better* referred to the “No means No” law as being insufficient legislation, they were raising the need to convert consent into an affirmative expression and above all, to shed light on the reality that in many situations, saying "no" is not a real option. Explicit consent implies ensuring the freedom of the person who gives it, lack of coercion and, no power relations, which is sufficiently strong to be successfully accomplished by our social structure itself. As it has been mentioned in the case of the laws stated above, for consent to be voluntary, enthusiastic and repetitive, a series of social circumstances need to be ensured.

In their pioneering research on gender violence, Benson and Thomson (1982) framed the first steps of the struggle as naming situations of sexual violence that result in a lack of specific vocabulary to verbalize episodes of sexual harassment. Specific words are necessary to help identify, analyze and report the problem. In addition, specific words are necessary to clarify further research steps to address the problem (Benson & Thomson, 1982). The consent debate therefore reverts to communicative acts, which have many characteristics; such as communication can be verbal or nonverbal. Habermas (1987), in his theory of communicative action, raises the difference between communicative acts based on pretensions of validity and communicative acts based on pretensions of power. Although this difference is useful for advancing equality in the communication between people, it is necessary to go further. Some scholars (Searle & Soler, 2004) argue that the validity pretensions are also surrounded by a series of contexts that do not always guarantee the correct way for the arguments to truly be in conditions of equality. For instance, a situation of fear as

coercion in a close space or an academic relationship with the prospect of a better worse grade, are situations that limit any type of freedom.

Communicative acts can also be based on gestures. Body language may settle a sign of denial. The enthusiasm to which the German law refers can be manifested through body language. Speech acts are also a basis of the German law because a person can deny consent with words or with tears. Another aspect that laws include is the responsibility of the people involved in the action to ensure that they obtain consent. In this line of research, Weber's perspective leads us to consider what the author calls the ethics of responsibility (Weber, 2012: 1904), which is based on the consequences and not on the intentions of the action. That is, if the consequence of the action conducted between two or more people has not been the desired outcome, even considering the best initial intention, something should have occurred in between that mostly has been omitted.

Discussion and Conclusion

Prior to considering the issue of consent and affirmative consent as necessary for any sexual engagement, programs to prevent gender-based violence started to be raised. Burn (2008) together with other colleagues made efforts to prevent and intervene in sexual violence by identifying the bystander intervention, which means that victims' peers, mates and friends are becoming "allies" and creating opportunities for support, assistance and solidarity. Cases of sexual harassment that were reported and became public are striking for their mobilization of other peers and the involvement of more than only the people who are directly affected. This apparently spontaneous reaction embraces an organized civil society, which is also shaped by brave survivors whose courage is advancing changes in the judicial system by strengthening our democratic state of law. This supportive mobilization clearly shows the importance of creating a context in which sexual harassment is not tolerated.

Pioneering regulations in this sense are aimed at defining consent as a common agreement for permission to engage in a sexual encounter. However, reality shows an absence of this premise. The debate on consent is still vivid. Even the definition of consent is currently open; rather, the focus should be on how to build a space in which consent, and a definition

of consent, can be freely agreed upon. The scientific community, policy makers and society as a whole are discussing what it means and what we intend by analyzing and legislating consent. Drawing from this standpoint, this article contributes to this collective knowledge by considering several legislative items and social movements as crucial for overcoming the worldwide epidemic of gender-based violence. This community building is achieved within a context of an egalitarian dialogue, which provokes the construction of knowledge in a reflexive and intersubjective way and is what people get after reflecting on their reality (Habermas, 1987).

Power relations are a part of any conversation and interaction; therefore, it is necessary to be aware of this and consider it in every context (Searle & Soler, 2004). An imbalance in any relationship has an influence on the decision to provide consent or not. Concrete communicative acts are needed to overcome the power difference and provide a better context for consenting or not consenting. Governments and legislators are gaining the fruitful paths made by prior social struggles to take responsibility and approach affirmative consent as the basis for sexual offenses.

The current Spanish government has proposed new legislation on sexual consent based on voluntary sex to ensure an explicit “yes”. Following previous legislation, an offense based on consent includes a response manifested through verbal or nonverbal language in an affirmative, free, and voluntary manner that is repeated throughout the entire sexual activity. The “No means No” statement is still valid; it is in fact the root of the “Yes means Yes” regulation that only applies in some states. Other state acts continue to use the “No means No” law with a similar interpretation regarding consent.

Civil society mobilizations against consent are raising awareness about a key historical moment. The bottom-up approach that emphasizes the potential of student and social communities who claim from below that silence is not consent and that consent needs to be affirmative, frames a debate in which sex is not taken for granted (Pérez Hernández, 2016). Scholars are discussing the environmental conditions surrounding consent; however, a broad agreement is shared regarding its necessity by all parties engaged in any sexual activity who consent in a conscientious, voluntary and enthusiastic way. There is also a shared agreement on situations under which consent can neither be asked nor offered, such as situations with not

only alcohol and drugs but also power, fear, strength and superiority. Regarding international approaches, some states in the USA and some European countries have already seriously considered the issue in legal terms. In the Spanish case, the court's sentence of the "wolf pack" expresses a reality socially known as deliberate ignorance, which means that considering an assumption, such as asking for consent knowing that the answer would be "no", the question should never be asked to the victim. Considering consent as a basis for sex, this deliberate ignorance must be overcome. This specific ruling in the Spanish case has promoted the need for a legal change because of its social rejection.

Drawing from this, the present article contributes to the study of masculinities and the diversity of masculinities, by enhancing a powerless masculinity in words of Connell (2012); meaning with no violence, in which gender relations pretend to be equal, coherent and free of the hegemonic structure. It indeed means a step forward to free desired relationships and to the challenge of overcoming gender-based violence. To that extent, legislation is important; however, changing the mentality about sex is crucial for achieving social change to open a path for an inclusive discourse on sexual freedom. When society rejects any type of abuse and a discourse of supporting survivors prevails, more people tend to dare to denounce sexual violence and more cases are approached at a legal level. The scientific community also agrees on the fact that, if punishment and legal intervention are necessary for a successful social organization, it means that other structural mechanisms have failed; prevention and social responses have also failed. Educational policies advising youth to engage in sexual relations based on affirmative consent are also pending issues for further research and practice.

Notes

¹ For more information, see <https://www.theguardian.com/world/2018/apr/26/protests-spain-five-men-cleared-of-teenagers-gang-rape-pamplona>

² For more information, see https://elpais.com/elpais/2018/07/12/videos/1531410179_304241.html

³ This refers to the five aggressors of the Pamplona festival in 2016.

⁴ For more information, see <https://www.boe.es/buscar/doc.php?id=BOE-A-1999-9744>

⁵ For more information, see <https://www.boe.es/buscar/doc.php?id=BOE-A-1999-9744>

⁶ For more information, see <https://www.un.org/preventing-sexual-exploitation-and-abuse/>

- ⁷ For more information, see <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>
- ⁸ For more information, see <http://time.com/time-person-of-the-year-2017-silence-breakers/>
- ⁹ For more information, see https://elpais.com/elpais/2018/07/12/inenglish/1531406914_225623.html
- ¹⁰ For more information, see <http://endrapeoncampus.org/>
- ¹¹ For more information, see <https://www.nytimes.com/2018/06/29/science/francisco-ayala-sexual-harassment.html>
- ¹² For more information, see https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967
- ¹³ For more information, see <http://thecampussaveact.com/>
- ¹⁴ For more information, see <http://www.ourharvardcandobetter.com/>
- ¹⁵ For more information, see <https://www.nysenate.gov/legislation/bills/2015/S5965>
- ¹⁶ These universities are the following: University of Minnesota, University of California, Texas A&M, University of Virginia, Indiana University, Stanford University, Yale University, University of Illinois, Urbana-Champaign and University of New Hampshire.
- ¹⁷ For more information, see <http://www.loc.gov/law/foreign-news/article/germany-overhaul-of-criminal-law-relating-to-sexual-offenses/>
- ¹⁸ For more information, see https://www.womenlobby.org/IMG/pdf/2714_belgium_lr.pdf
- ¹⁹ For more information, see <http://sexpression.org.uk/consent-in-sexual-contact/>
- ²⁰ For more information, see <https://www.government.se/information-material/2018/04/consent--the-basic-requirement-of-new-sexual-offences-legislation/>
- ²¹ For more information, see https://politica.elpais.com/politica/2018/05/09/actualidad/1525886000_192925.html

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