

# REVISITING CONSENT UNDER POCSO: FROM A ‘FIXED-AGE’ RULE TO A ‘COMPETENCE BASED’ STANDARD

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*Under the Protection of Children from Sexual Offences Act, 2012, (‘the Act’) a minor cannot consent to sexual acts. This has brought minors in consensual relationships in conflict with the law by restricting their sexual autonomy and criminalising innocent juveniles. This paper examines the rationale for this law and explores its consequences on minors’ relationships. It argues that the judicial interpretations of the Act have distorted the notion of a minor’s consent, leading to adverse consequences for minors in conflict with the law. To address these issues, it proposes a novel approach to a minor’s consent. It shows that the existing law creates an overinclusive and rigid ‘rule’, and a standard grounded in the minor’s competence to consent is desirable vis-à-vis the existing rule. This paper justifies this standard by demonstrating how it better accomplishes the objectives of the Act while preventing consenting minors from falling afoul of the law. It then lays down the parameters and psychological underpinnings of this standard. To demonstrate its potential for just outcomes that align with the objectives of the Act, the paper applies this standard to case laws and offers alternative decisions.*

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## I. INTRODUCTION

The Protection of Children from Sexual Offences Act, 2012 ('POCSO or the Act')<sup>1</sup> was conceived owing to the insufficiency of the Indian Penal Code to curb certain forms of sexual abuse. The Act states that a 'child' is anyone under eighteen years of age.<sup>2</sup> Coupled with the substantive provisions of the Act,<sup>3</sup> this has the effect of criminalising any sexual interaction with or between minors without exception. This creates what this paper calls a 'fixed age' rule of consent. In this rule, a single age for consent is fixed and it applies uniformly - regardless of circumstance and voluntariness. Any sexual act under this age is criminalised.

Existing literature has recognised that the validity of the minor's 'consent' is legally unclear despite the POCSO.<sup>4</sup> This paper builds upon this by comparing judicial interpretations of consent under the POCSO and argues that conflicting interpretations have produced undesirable consequences. Further, while the literature covers the overinclusive criminalisation of the fixed rule,<sup>5</sup> and its effects on young adults' autonomy,<sup>6</sup> it falls short of offering a framework of consent under the POCSO that adequately protects minors from exploitation and simultaneously recognises their competence to consent. This is the gap that this paper addresses.

<sup>1</sup> The Protection of Children from Sexual Offences Act, 2012.

<sup>2</sup> *Id.*, §2(d).

<sup>3</sup> *Id.*, §§3, 5, 11, 13.

<sup>4</sup> CENTRE FOR CHILD AND THE LAW – NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues*, February, 2018, available at <https://feministlawarchives.pldindia.org/wp-content/uploads/Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues-1-1.pdf> (Last visited on June 19, 2023) ('CCL Implementation Report').

<sup>5</sup> Swagata Raha & Shruthi Ramakrishnan, *Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief*, JUSTICE HUB, available at <https://justicehub.in/dataset/2e62a54b-56f1-4e2c-996a-b898182465c8/resource/e1ef253b-fc95-4f9e-a07e-db960106bdbc/download/policy-brief.pdf> (Last visited on December 5, 2023).

<sup>6</sup> CENTRE FOR CHILD AND THE LAW – NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE, *An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children*, Feminist Law Archives, June 15, 2018, available at <https://feministlawarchives.pldindia.org/wp-content/uploads/Mandatory-Reporting-Paper-CCL-NLSIU.pdf> (Last visited on December 5, 2023) ('CCL Reporting Report').

To this end, Part II assesses the rationale of the fixed-age rule in light of the effects it has on young adult relationships. Part III shows how the fixed-age rule creates a ‘grey area’ in judicial interpretation that leads to a muddled notion of consent. Part IV is devoted to justifying why a ‘standard’ is normatively more desirable than the existing ‘rule’. Part V outlines the psychological underpinnings and the parameters of the competence standard. Part VI illustrates the utility of this standard by using two POCSO cases as test suites. Part VII concludes.

## II. YOUNG ADULT RELATIONSHIPS AT ODDS WITH FIXED AGE RULE

This section explores the POCSO’s rationale for the fixed-age rule and presents its detrimental effects on young-adult relationships. Part II(A) looks at the history of POCSO’s development to examine why the law criminalises young-adult relationships. Part II(B) further details numerous unintended consequences of this criminalisation. This sets the stage for the normative argument for a shift away from the fixed-age rule.

### A. *THE RATIONALE FOR CRIMINALISING YOUNG-ADULT RELATIONSHIPS*

Why is the law concerned with age when it comes to determining consent? The rationale of pegging consent for sexual activity to age is that a minor is not competent to consent since their mental capacities are not developed enough to understand sexual behaviour.<sup>7</sup> Given that the minor’s consent hinges on ‘competence’, it is useful to analyse what competence means here. The competence to consent is different from the act of consent itself. In psychological literature broadly, it has been understood to mean “giving informed consent, after taking in information, understanding it and balancing it”.<sup>8</sup> Other definitions along the same lines argue that children must demonstrate “maturity of judgement” to consent.<sup>9</sup> Provisionally, it can be said that the competence to consent is the underlying ability to consent effectively. For instance, a child of seven can “consent” to an act, but they may not have the underlying competence to do so. The 2007 study by the Ministry of Women and Child Development that formed the basis<sup>10</sup> of the POCSO (‘POCSO Study’) defines competence as the “understanding, wisdom and

<sup>7</sup> MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA, *Study on Child Abuse: India 2007*, 73, available at <https://www.streetchildren.org/wp-content/uploads/2013/10/study-on-child-abuse-india.pdf> (Last visited on June 19, 2023) (‘POCSO Study’).

<sup>8</sup> S.A. Parekh, *Child Consent and the Law: An Insight and Discussion into the Law Relating to Consent and Competence*, Vol. 33(1), CHILD: CARE, HEALTH AND DEV. (2007).

<sup>9</sup> Elizabeth Cauffman & L. Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents may be Less Culpable than Adults*, Vol. 18(6), BEHAV. SCI. LAW (2000).

<sup>10</sup> Esha Roy, *10 Years of POCSO: An Analysis of India’s Landmark Child Abuse Law*, THE INDIAN EXPRESS, November 18, 2022, available at <https://indianexpress.com/article/explained/explained-law/10-years-of-pocso-an-analysis-of-indias-landmark-child-abuse-law-8276030/> (Last visited on June 19, 2023).

autonomy to make decisions that lead to a reasonable outcome”.<sup>11</sup> It even goes on to recognise that minors may have the competence to consent despite being under-age.<sup>12</sup> However, POCSO still uniformly criminalises all sexual activity where a minor is involved. There is no exception for consensual relationships. What is the policy rationale behind this uniform criminalisation? On analysis, two key policy rationales emerge.

*First*, underlying this criminalisation is a protectionist rationale. Determining the competence of minors is a murky affair, even if the minor ‘freely’ consents to the relationship. Adults who are in a position of responsibility, power, or trust can manipulate a minor’s understanding to receive their ‘consent’.<sup>13</sup> Even where consent is not ‘manipulated’, the concern is that a mere difference in the competence of an adult and a minor can allow abusive or exploitative relationships to proliferate. In other words, the consent of a minor may not be informed. By criminalising sexual activities under eighteen, the law attempts to protect minors who may not have the ability to give informed consent due to their lack of competence. *Second*, an *ex-ante* rule of consent,<sup>14</sup> (which is what the POCSO’s fixed age rule is) is preferable to an *ex-post* application of a consent standard because the latter is prone to misuse. The legislators of POCSO were aware of the potential detriments of criminalising young adults engaging in consensual intimacy.<sup>15</sup> They realised that the criminalisation of all sexual activity under eighteen would bring innocent young adults within the ambit of the POCSO.<sup>16</sup> To this end, the initial draft of the POCSO recognised the possibility of consensual relationships for ages from sixteen to eighteen where the minor had the “capacity” to consent.<sup>17</sup> ‘Capacity’ here was not defined— it was left to judicial determination. However, this provision was removed in the final draft. Legislators were concerned that allowing a proviso due to which the ‘capacity’ of the minor is put on trial would open the doors for the victim’s behaviour to be put on trial.<sup>18</sup> They felt that this would result in ‘revictimizing’ the victim. In other words, the POCSO legislators opted for an *ex-ante* rule since they believed that the judiciary’s application of an *ex-post* capacity standard would be counterproductive. Both these rationales are grounded in legitimate concerns. However, the existing law is said to suffer from many infirmities concerning relationships involving young adults.

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<sup>11</sup> Raha, *supra* note 5, 147.

<sup>12</sup> *Id.*, 145.

<sup>13</sup> *Id.*, 3.

<sup>14</sup> See *infra* Part IV(B); see also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, Vol. 42, DUKE L. J., 559 (1992).

<sup>15</sup> DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, Two Hundred Fortieth, *Report on The Protection of Children from Sexual Offences Bill, 2011*, ¶6.6. (‘Rajya Sabha Report’).

<sup>16</sup> *Id.*, ¶6.7.

<sup>17</sup> *Id.*, ¶6.5.

<sup>18</sup> *Id.*, ¶6.9.

## B. THE EFFECTS OF CRIMINALISING YOUNG-ADULT RELATIONSHIPS

The fixed age rule results in an overinclusive criminalisation of those relationships in which both parties have the competence to consent. This arises from the rule's use of age as the *only* proxy to determine the minor's competence to consent, since any intimacy under eighteen is criminalised. There are three ways in which this over inclusivity can be demonstrated.

*Firstly*, this has the well documented effect of criminalising innocent young adults and undermining their sexual autonomy.<sup>19</sup> Such criminalisation was never envisaged within the objectives of the POCSO.<sup>20</sup> In sum, scholars have argued that the law must punish coercion, not sex.<sup>21</sup> By punishing all sexual activities involving minors, it conflates the two and thus punishes innocent young-adults.

*Secondly*, criminalising consensual relationships gives guardians and parents a tool of harassment. Plaints are filed mostly by the guardians who disapprove of their child's relationship.<sup>22</sup> For instance, in *Ajay Kumar v. State (NCT of Delhi)* a complaint of rape was filed by the seventeen-year old victim's father. On further investigation, the child appeared before the court and requested his release since they were married.<sup>23</sup> Such instances are evidenced by the low conviction rate and the refusal of the minor to testify in a majority of these cases.<sup>24</sup> Consequently, guardians who disapprove of their relationships employ the fixed-age rule to drag consenting young adults to courts.<sup>25</sup> In multiple cases, it has even been used to legitimise caste-endogamy.<sup>26</sup>

<sup>19</sup> *CCL Implementation Report*, *supra* note 4, 141.

<sup>20</sup> *See* Gursimran Kaur Bakshi, *The Objective of POCSO is not to Criminalise Consensual Sexual Relations; It Needs Amendment: Justice Indira Banerjee*, THE LEAFLET, November 18, 2022, available at <https://theleaflet.in/the-objective-of-pocso-is-not-to-criminalise-consensual-sexual-relations-it-needs-amendment-justice-indira-banerjee> (Last visited on June 23, 2023); *see also* Vijayalakshmi v. State, 2021 SCC OnLine Mad 317, ¶16.

<sup>21</sup> *See* Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, Vol. 2, YALE JOURNAL OF LAW & FEMINISM, 303 (2016) (While the author's position here is not in reference to Indian law; it concerns the criminalisation of young-adult relationship).

<sup>22</sup> *CCL Implementation Report*, *supra* note 4; VIDHI CENTRE FOR LEGAL POLICY, Apoorva et al., *A Decade of POCSO: Developments, Challenges and Insights from Judicial Data*, November 17, 2022, available at <https://vidhilegalpolicy.in/research/a-decade-of-pocso-developments-challenges-and-insights-from-judicial-data/> (Last visited on December 5, 2023) ('Vidhi Report').

<sup>23</sup> *Ajay Kumar v. State (NCT of Delhi)*, (2022) 6 HCC (Del) 530.

<sup>24</sup> *CCL Implementation Report*, *supra* note 4, 45.

<sup>25</sup> *See* State v. Kaishar Ali, 2019 SCC OnLine Del 9875, ¶17 (The girl was in a relationship with the accused. She deposed before the court that if she did not testify against the accused, her parents would have him killed).

<sup>26</sup> *See* Pramod Kumar v. State of U.P., 2021 SCC OnLine ALL 883, ¶¶3, 32, 33 (Here, circumstantial evidence indicates that the prosecutrix's father had coerced the girl into testifying that she was raped by the accused, who belonged to a scheduled caste. However, a later cross-examination revealed that she eloped of her own free will and solemnised marriage with the accused); *see also* Jitender Kumar v. State of H.P., 2020 SCC OnLine HP 1461, ¶6 (Where the mother of the sixteen-year-old victim filed a complaint that was entirely contradictory to the victim's testimony).

*Thirdly*, this criminalisation suppresses romantic intimacy, which has been established as a developmental necessity for young adults. It is a fact of developmental neuroscience that healthy romantic intimacy during adolescence is crucial for shaping one's ideologies and sexuality.<sup>27</sup> One of the central objectives of POCSO is to promote the child's healthy emotional and social development.<sup>28</sup> This objective is hindered through criminalisation, which suppresses a child's social and emotional development. Further, there is sufficient evidence in India to indicate that this form of healthy intimacy amongst minors is commonplace.<sup>29</sup> A blanket criminalisation of sexual relationships places these minors within the realm of criminal law. *Finally*, the fixed-age rule has been interpreted by courts in a manner that has muddled the very notion of consent, creating a 'grey area' of consent, the consequences of which shall be explored in the subsequent section.

### III. THE GREY AREA OF CONSENT

This section aims to analyse a few case laws in an attempt to illustrate that the consent rule enshrined under the POCSO produces a 'grey area' of consent which has detrimental consequences as elaborated below

The 'grey area' here refers to the confused notion of consent which has emanated from a set of conflicting judicial interpretations. Broadly, the judiciary has taken two different approaches to consent, which has resulted in a grey area of consent.

The first perspective that courts have taken on POCSO is a formalistic one, which applies the fixed-age rule without considering circumstances, capacity, voluntariness or autonomy. §42, POCSO is an overriding provision which stipulates that in cases of conflicting law, POCSO would be a special law applicable.<sup>30</sup> Thus, even in instances where personal laws allow the consummation of marriages between minors, the provisions of POCSO prevail. The Karnataka High Court has upheld this approach, thereby criminalising relationships that both parties expressed voluntary agreement to.<sup>31</sup> This application of the fixed-age rule was

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The mother's plaint alleged rape, whereas the victim deposed that she eloped voluntarily with the accused, who was from a scheduled caste. The court held that the victim was entirely capable of understanding the consequences of her actions).

<sup>27</sup> Veenashree Anchan, Navaneetham Janardhana & John Vijay Sagar Kommu, *POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India*, Vol. 42(1), INDIAN JOURNAL OF PSYCHOLOGICAL MEDICINE (2020).

<sup>28</sup> Protection of Children from Sexual Offences Act, 2012.

<sup>29</sup> *CCL Reporting Report*, *supra* note 6, 16; Rohit Sharma, *More than a Quarter of India's Youngsters have Premarital Sex*, BRITISH MEDICAL JOURNAL, 575 (2001).

<sup>30</sup> Protection of Children from Sexual Offences Act, 2012, §42.

<sup>31</sup> *POCSO Act Overrides Muslim Personal Laws: Karnataka HC*, THE INDIAN EXPRESS, November 2, 2022, available at <https://indianexpress.com/article/cities/bangalore/pocso-act-muslim-personal-laws-karnataka-hc-8243288/> (Last visited on June 23, 2023) (The citations of these judgments are unavailable given that POCSO cases are generally unreported).

affirmed in *Independent Thought v. Union of India*.<sup>32</sup> Although this case dealt with marital rape, the court delved into whether sexual intercourse with a married girl from the age of fifteen to eighteen should be criminalised. Justice Lokur held that the mind of a child who falls in the afore-said age bracket is “not fully developed and cannot fully comprehend the consequences of any action performed”,<sup>33</sup> and thus such intercourse would amount to a violation under the POCSO Act. This approach was further upheld in *Maruthupandi v. State*,<sup>34</sup> in which the court said that the penalties under POCSO are attracted regardless of the consent of the minor. Similarly, the Calcutta High Court in *Ranjit Rajbanshi v. State of W.B.*,<sup>35</sup> held that the consent of the minor “is not material at all”.<sup>36</sup> All these cases affirm a circumstance-blind approach, a defining characteristic of the fixed-age rule. These cases have chosen to ignore the provisions of POCSO since owing to the perception that criminalising clearly consensual relationships would be a miscarriage of justice.

Under the second perspective, the courts have attempted to recognise the minor’s competence to consent within POCSO. In *R. Parthiban v. State*,<sup>37</sup> a man aged twenty-four had a love affair with a girl aged seventeen. He impregnated her at this age. When she turned eighteen, they were happily married. On knowing that she was impregnated at the age of seventeen, the mother of the girl filed a case of penetrative sexual assault against the man. The court noted that the minor expressed clear voluntariness to the act of sexual intercourse, and was not in support of the plaintiff.<sup>38</sup> Thus, the court decided not to apply the provisions of POCSO because there was no “overriding public interest” that warranted criminalisation and the offences were “purely individual in nature”.<sup>39</sup> Many other cases have recognised this approach—in *Vijayalakshmi v. State*,<sup>40</sup> the court held that young-adult relationships were a natural part of “biosocial dynamics”, and criminalising them would run counter to the wider object of POCSO. In *Ranjit Rajbanshi v. State of W.B.*,<sup>41</sup> the court held that consensual sexual activity with a minor cannot be criminalised because the “interpretation of the statute cannot disregard practical realities.”<sup>42</sup>

Clearly, courts have approached the question of the validity of the minor’s consent differently. While courts have recognised this grey area of consent

<sup>32</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>33</sup> *Id.*, ¶176.

<sup>34</sup> *Maruthupandi v. State*, Criminal Appeal No. 258 of 2019 dated on 12-4-2019 (Madras HC) (Unreported).

<sup>35</sup> *Id.*, ¶27.

<sup>36</sup> *Ranjit Rajbanshi v. State of W.B.*, Criminal Appeal No. 459 of 2018 (Calcutta HC) (Unreported), ¶12.

<sup>37</sup> *R. Parthiban v. State*, Criminal Miscellaneous Petition Nos. 8645 and 8648 of 2022 dated on 7-7-2022 (Madras HC) (Unreported).

<sup>38</sup> *Id.*, ¶10.

<sup>39</sup> *Id.*, ¶¶11-12.

<sup>40</sup> *Vijayalakshmi v. State*, 2021 SCC OnLine Mad 317, ¶16.

<sup>41</sup> *Ranjit Rajbanshi v. State of W.B.*, Criminal Appeal No. 459 of 2018 (Calcutta HC) (Unreported), ¶33.

<sup>42</sup> *Id.*, ¶46.

in multiple cases, they have not dealt with its broader implications. Rather, they have merely taken case-specific measures without an articulation of the broader concerns associated with this enigma.<sup>43</sup> This grey area stems from the rule of consent itself—in the cases above, the courts have been conscious of the unfairness of criminalising evidently consensual acts. To reconcile this unfairness with their hesitation to penalise the accused, they have stretched the law by applying purposive interpretations, disregarding the literal provisions entirely. Part III(A) further highlights the undesirable consequences of this muddled notion of consent.

### A. THE EFFECTS OF THE GREY AREA

This grey area has significant undesirable consequences. *Firstly*, it sets a bad precedent. Even if the courts appreciate the competence of the minor to consent, their judicial interpretations fly in the face of the substantive provisions of the Act. A purposive interpretation is not justified in the present situation since the provisions of POCSO can neatly apply to the facts. There is no uncertainty about the applicable law. For cases to come, there are conflicting sets of precedents that apply to similar factual matrices. This may give the judge more leeway to exercise more discretion than the provisions of the POCSO allow for.

*Secondly*, the cases that choose not to criminalise relationships involving a minor effectively legitimise the minor’s consent without a sound legal-psychological framework. Any framework recognising the consent of the minor has to take into account well-known concerns of exploitation, manipulation, and the protection of youth. At the same time, such a framework must be grounded in well-developed notions of a minor’s competence to consent. If this is not done, courts risk militating the very objectives of POCSO, as evident in the decisions they take. For instance, they take ad-hoc measures which are unguided by set rules, standards, or psychological frameworks. For instance, in *Vijayalakshmi*, the plaint was quashed because the offences were “purely individual” in nature and there existed no “overriding public interest”.<sup>44</sup> In *Atul Mishra v. State of U.P.*, the court advocated for a “bio-social approach” that accounts for “mutual infatuation”.<sup>45</sup> In *Parthiban*, the court quashed the plaint and noted that “The POCSO did not intend to criminalise adolescent relationships”. Thus, it read the objective of the Act into the substantive provisions to reach a conclusion that ignored the substantive provisions altogether.<sup>46</sup> None of the above-mentioned considerations find justification in the letter of the law. By doing this, these courts effectively legitimise the consent of minors without a framework. This can prove to be problematic in cases where the competence of the minor is unclear, or where there is an alleged relationship of

<sup>43</sup> See *Praduman v. State (NCT of Delhi)*, 2021 SCC OnLine Del 4620, ¶22; See also *Arhant Janardan Sunatkari v. State of Maharashtra*, 2021 SCC OnLine Bom 136, ¶12.

<sup>44</sup> *Vijayalakshmi v. State*, 2021 SCC OnLine Mad 317.

<sup>45</sup> *Atul Mishra v. State of U.P.*, 2022 SCC OnLine All 420.

<sup>46</sup> *R. Parthiban v. State*, Criminal Miscellaneous Petition Nos. 8645 and 8648 of 2022 dated on 7-7-2022 (Madras HC) (Unreported).



trust/power. This lack of clarity on this rule of consent can lead to a miscarriage of justice.

There are two cases that illustrate these problems. *First*, in *State v. Suman Dass*,<sup>47</sup> the judge dismissed a charge of penetrative sexual assault against a twenty-two-year-old who was in a relationship with a fifteen-year-old. Without delving into the child's competence, the court noted that she eloped with him voluntarily and they were 'happily married', "so why put obstacles in their path?"<sup>48</sup> *Second*, in *State v. Rupesh*,<sup>49</sup> the court acquitted the accused because the girl was "mature enough" to understand the consequences of her actions "because she had attained puberty on the date of the incident".<sup>50</sup> It is well-known that puberty is not necessarily a sign of sexual maturity, let alone the final indicator of the competence to consent.<sup>51</sup> Such cases where the minor's consent has been legitimised on dubious grounds results from a confused and poorly articulated notion of consent in the judicial interpretations of POCSO. Thus, the lack of a cogent framework for the minor's consent can lead to a miscarriage of justice.

#### IV. JUSTIFYING THE SHIFT FROM A RULE TO A STANDARD

In this Part, the paper responds to the challenges that young-adult relationships pose to POCSO's consent framework. Part IV(A) argues that the mainstream suggestion of lowering the age of consent is not viable. Then, Part IV(B) will propose a 'standard' as opposed to the existing 'rule', which would be more effective in achieving the objectives of POCSO. Lastly, Part IV(C) will examine the concerns that may arise in the implementation of such a standard.

##### A. WHY LOWERING THE AGE OF CONSENT IS NOT A VIABLE SOLUTION

In response to the problem of criminalising young-adult relationships, many have advocated lowering the age of consent to sixteen.<sup>52</sup> However, this does not solve the underlying issue. As noted, the real issue at hand is competence, and not age. Lowering the age of consent to sixteen would legalise many consensual

<sup>47</sup> *State v. Suman Dass*, SC No. 66/13 of 2013 (Patiala High Courts) (Unreported).

<sup>48</sup> *Id.*, ¶21.

<sup>49</sup> *State v. Rupesh Banti Bajirao Mokal*, Case No. 302 of 2016 (Nashik Sessions Court) (Unreported).

<sup>50</sup> *Id.*, ¶10.

<sup>51</sup> CCL-NLSIU, *Study on the Working of Special Courts Under the POCSO Act, 2012 in Maharashtra*, HAQ: CENTRE FOR CHILD RIGHTS, September 7, 2017, available at <https://haqrc.org/wp-content/uploads/2017/12/study-on-the-working-of-special-courts-under-the-pocso-act-2012-in-maharashtra.pdf> (Last visited on December 5, 2023) ('Working of Special Courts Report').

<sup>52</sup> *Vidhi Report*, *supra* note 23, 98; *Implementation of the POCSO Act, 2012 and Beyond 34 (2018)*, HAQ: CENTRE FOR CHILD RIGHTS; Deeksha Gujral & Nimisha Menon, *India Needs to Lower Age of Consent (and Stop Misuse of Child Protection Laws)*, THE QUINT, May 8, 2023, available at <https://www.thequint.com/gender/lowering-of-age-of-consent-reasons> (Last visited on June 23, 2023).

young-adult relationships, but still leave one with a similar issue. What happens when a fifteen-year-old is in a consensual relationship with a seventeen-year-old? Even if the age of consent was lowered, such a relationship would be criminalised. This raises the same concerns of criminalising innocent young adults. Lowering the age of consent repeats the same mistake of using age as the only determinant of competence. This is not to say that age as a factor in determining competence should be done away with altogether. Rather, it is to develop a framework where age is recognised as merely one of the factors affecting the competence to consent. This approach is psychologically sound and circumstance-cognisant. The importance of this approach can be seen in the contrasting outcomes that a strict interpretation of the fixed age rule leads to.

Recently, the Meghalaya HC dealt with a case where the Special Court convicted the accused despite the victim's insistence that they were in a consensual relationship.<sup>53</sup> While the High Court reversed the judgement and acquitted the accused, what of the cases that do not reach the High Court? This makes it important for the law to recognise circumstance and competence. Such an approach was also affirmed by the POCSO study.<sup>54</sup> Another approach that scholars have taken is to advocate for a certain amount of flexibility in the age of consent. However, this approach leaves many unanswered questions. If flexibility is allowed, where is the line drawn? On what bases would the minor be competent to consent? It is not viable for the interpretation of the minor's competence to consent to be flexible without guiding parameters or on a purely case-to-case basis. Such an approach risks legitimising abusive relationships. Thus, it is imperative to devise a framework that accounts for the competence of the minor while keeping the objectives of the POCSO in mind; primarily the prevention of child abuse. This is where standards become relevant. Standards would allow for more flexibility in determining whether a minor is competent to consent or not. The next section of this paper explores the difference between the existing rule and the proposed standard.

## B. RULES V. STANDARDS: WHAT ARE THEY AND WHY SHIFT TO A STANDARD?

What distinguishes a rule from a standard is the stage at which the law is imbued with content.<sup>55</sup> Rules are applied *ex-ante*, which means that they are advance determinations of what conduct is permissible and what is not. On the other hand, standards are applied *ex-post*, which means that whether or not the conduct is permissible is determined by an adjudicator after the conduct has taken place.<sup>56</sup> For example, "driving above 60km/h is prohibited" is a rule, whereas

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<sup>53</sup> John Franklin Shylla v. State of Meghalaya, 2023 SCC OnLine Megh 303, ¶9.

<sup>54</sup> POCSO Study, *supra* note 7, 145.

<sup>55</sup> Kaplow, *supra* note 14, 559.

<sup>56</sup> *Id.*, 560.

“driving at a harmful speed” is a standard. Here, ‘harmful’ is an *ex-post* determination, whereas driving 60km/h is already prohibited *ex-ante*.

The POCSO essentially creates a rule for sexual acts below eighteen, since the permissibility of the sexual act is determined *ex-ante*. Whether or not rules and standards are to be applied depends on the objective in mind.<sup>57</sup> In the context of POCSO, the aim is to achieve two objectives: enabling competent minors to consent while preventing the abuse and exploitation of minors. As such, it is important to resolve disputes such that these objectives are achieved. The author argues that standards are more suitable to achieve this resolution. The presence of *ex post* information makes effective resolution possible, and such *ex post* determinations are made possible using standards.<sup>58</sup> In other words, it is easier to achieve a desired objective when an event has already happened. This is because in standards, the content of the law can be shaped to fit in the event. In rules, the event aligns with the content of the law. An adjudicator gives content to the law in a standard, whereas in the rule the content is already fixed. When the content of the law is fixed, it may not be possible to shape the outcome such that the desired objective is reached. The application of a rule may even lead to an outcome that is contrary to the desired objective. For example, take the *Maruthupandi* case. It applies the rule “sexual acts under eighteen are punishable”, and penalises a romantic relationship between minors. Few would agree (and many have disagreed) that such a result achieves the objectives of the POCSO.<sup>59</sup> Nevertheless, it is a fixed rule and has *ex-ante* application. If provided with an *ex-post* standard that was tailored to the objective of recognising competent minors’ consent, the outcome of the case may have been different. The adjudicator (in this case, the judge) would then be allowed to give content to the law and come to a decision more suited to the objectives of the POCSO (perhaps where the accused was exonerated). If a judge has to follow a rule (as they did in *Maruthupandi*), then the desired objective may not be achieved. Thus, it is normatively desirable to shift to a standard.

However, why have standards in POCSO cases specifically— what distinguishes these cases from other offences, where standards can help achieve greater specificity? Kaplow’s framework envisages that the choice between a rule and a standard depend on the costs to the legal system. These costs are then balanced against the social desirability of deterring these offences.<sup>60</sup> Thus, a standard would not be an appropriate choice where the cost to the legal system of promulgating it (by legislators), enforcing it (by adjudicators) and obeying it (by individuals) outweighs the social desirability of the objectives it achieves. For instance, suppose that a lawmaker seeks to prevent environmental harm caused by littering in urban areas. Should they impose the rule “littering is disallowed”, or the

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<sup>57</sup> *Id.*, 606.

<sup>58</sup> *Id.*, 606.

<sup>59</sup> See the Vijayalakshmi and Parthiban cases where the courts refused to criminalise romantic relationships.

<sup>60</sup> Kaplow, *supra* note 14, 562.

standard “littering that harms the environment is disallowed”? Here, a rule may be preferable, even if the standard might result in greater accuracy for the objective sought. This is because standards are costlier— for individuals obeying them (how does one know what “harm to the environment” is?) and for adjudicators applying them (judicial resources are spent judging what “environmental harm” is and whether it is caused in the facts of each case). Weighed against the social desirability of preventing the little harm caused to the environment by littering, it may not be worth incurring those costs.

Similarly, the competence standard may be economically costlier— in the sense that it requires more time and resource investments in adjudication. In standards, the adjudicator repeatedly gives content to the law, whereas rule makers merely give content to the law once (at the time of drafting).<sup>61</sup> Thus, the decision-making and enforcement costs of a standard are higher. However, it is still in the State’s best interest to shift to a standard since the benefits from the achievement of the POCSO’s objectives outweigh the enforcement costs. To this end, Kaplow notes:

“If extremely harmful activities are to be permanently enjoined or dangerous individuals are to be removed from society, it is valuable to invest resources to make accurate determinations in adjudication[...].”<sup>62</sup>

In other words, the social desirability of preventing the recurrence of offences under the POCSO outweighs the costs that the legal system might incur in its pursuit. Now that it has been established why a standard would be more desirable to achieve POCSO’s objectives, the next section will address objections to the post-facto standard.

### C. WILL A STANDARD “REVICTIMIZE THE VICTIM”?

The rationale that the POCSO’s consultation report gives against adopting a standard goes as follows— if the minor’s competence is put to trial, the minor would be subject to “unnecessary questioning” and would make the entire process “central to the conduct of the victim rather than the accused”.<sup>63</sup> This would

<sup>61</sup> *Id.*, 577 (There are other factors at play here. The cost of standards can be mitigated if they are applied in similar factual scenarios because of precedents. However, assuming that the acts governed by the law (here, it is the abuse of minors) are not frequent (and would thus not mitigate decision-making costs) standards are costlier. For the purposes of the application of Kaplow’s framework to the POCSO, this paper is not concerned with the *ex-ante* effects of deterrence. Most of Kaplow’s framework primarily deals with the legal objective of deterrence. Our objective in the POCSO is different— to prevent the abuse of minors. This analysis is thus restricted that of *ex-post* adjudication where this objective is achieved. *See id.*, 606 where Kaplow considers objectives other than deterrence).

<sup>62</sup> *Id.*, 606.

<sup>63</sup> *Rajya Sabha Report*, *supra* note 15, ¶6.6.

lead to a “revictimization” of the victim during the judicial process.<sup>64</sup> This concern reflects the belief that the flexibility that standards offer to judicial adjudication can be abused or misused to the victim’s detriment. Indeed, such concerns were reflected in cases involving rape under the Indian Penal Code. In *Raja v. State of Karnataka*,<sup>65</sup> the court observed that “the victim was accustomed to having sexual intercourse”.<sup>66</sup> This was one of the considerations that led to the accused’s exoneration.<sup>67</sup> At its heart, this objection concerns the procedural implementation of a standard. While this objection echoes a valid concern, it does not justify discarding the use of standards.

The concern that applying standards would lead to “unnecessary questioning” is overstated, since cross-examinations are already routine under existing law. This is done to ensure that the victim’s testimony before the judicial magistrate is consistent with the testimony given in court. However, it is acknowledged that the nature of evidence required by the standard this paper proposes is centred on the victim’s state of mind. As such, it is a valid concern that trial-stage cross examination would be intrusive and would revictimize the victim.

To redress this concern, one may look to the procedural safeguards in existing law. In the investigation stage, the Apex court and the Delhi HC in *Virender v. State (NCT of Delhi)*<sup>68</sup> have laid down comprehensive guidelines to be followed for investigating cases of child sexual abuse. These guidelines ensure the integrity of the victim’s testimony without prejudicing the victim.<sup>69</sup> Further, the victim’s statements before the judicial magistrate are recorded under §164 of the CrPC,<sup>70</sup> which provides additional safeguards to protect the victim’s testimony. These investigation-stage procedural safeguards have been buttressed by *State of Karnataka v. Shivanna*,<sup>71</sup> where the apex court issued directions to expedite the investigation process under §164 for cases involving child sexual abuse.<sup>72</sup>

In the trial stage, there are safeguards built in specifically for minor victims. §33, POCSO mandates that the court create a “child-friendly atmosphere” for the cross-examination.<sup>73</sup> Any cross-examination or communication to the child

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<sup>64</sup> *Id.*, ¶6.9.

<sup>65</sup> *Raja v. State of Karnataka*, (2016) 10 SCC 506.

<sup>66</sup> *Id.*, ¶19.

<sup>67</sup> *Id.*, ¶37.

<sup>68</sup> *Virender v. State (NCT of Delhi)*, 2009 SCC OnLine Del 4413, ¶103; *See also* Court on its own Motion v. State, 2007 SCC OnLine Del 1983 for the Delhi HC guidelines.

<sup>69</sup> *Id.*, Urmi Chudgar, Bahuli Sharma & Bharti Ali, *Handbook for Public Prosecutors: Issues Under the POCSO Act: A Compilation of Legal Cases and Facts* (HAQ Centre for Child Rights, 2019) 45; (The guidelines include taking down the victim’s statement verbatim, ensuring the presence of a trusted parent/guardian the child, creating a child friendly environment, ensuring that the victim is distanced from the accused etc.).

<sup>70</sup> The Code of Criminal Procedure, 1973, §164.

<sup>71</sup> *State of Karnataka v. Shivanna*, (2014) 8 SCC 913.

<sup>72</sup> *Id.*, ¶¶2-3.

<sup>73</sup> The Protection of Children from Sexual Offences Act, 2012, §33.

has to be put to the court, which will then be conveyed to the child.<sup>74</sup> The POCSO even grants the court the power to punish in case the prescribed procedure is not followed.<sup>75</sup> This ensures that the child can give their testimony without undue pressure or harassment. These trial stage safeguards have also been supplemented by precedent. The apex court in *Sakshi v. Union of India*<sup>76</sup> laid down comprehensive guidelines for trial-stage procedure in cases of child sexual abuse. These guidelines ensure that the child is provided a safe atmosphere to testify in trials. Further, the Delhi HC has issued trial-procedure guidelines keeping in mind the “competence of the child witness” during their testimony.<sup>77</sup> It has also emphasized the need to conduct trials so that no stigma is cast on the victim’s character<sup>78</sup> and the “child’s feelings” are kept in mind.<sup>79</sup> In the same spirit, §53A of the Indian Evidence Act,<sup>80</sup> prohibits using the victim’s “character or sexual experience” as evidence in cases of sexual assault. Such procedural safeguards can be extended to the POCSO; §45(1), POCSO allows the government to notify additional rules for the Act’s implementation.<sup>81</sup>

In sum, the application of a competence standard is supplemented by the existence of these procedural safeguards. The response to the concern of procedural misuse must be a re-direction of resources into the enforcement of these procedural safeguards, not a change in the legislative standard. To discard the legislative standard on this basis would be akin to throwing the baby out with the bathwater. However, this is the approach that the drafters of the POCSO have taken. Thus, the detriments of the existing fixed-age rule can be addressed if a standard is adopted and procedural safeguards are enforced. The existence of standards does not in itself lead to a re-victimizing of the victim. If supplemented by existing safeguards, the victim’s safety and dignity can be preserved.

Now that it has been established that a standard does not necessarily revictimize the victim, the paper will proceed to excavate the competence standard and its parameters.

## V. EXCAVATING A COMPETENCE BASED STANDARD

This Part explores how a standard can be shaped based on the competence of the minor, rather than merely their age. Part V(A) explains what “competence” is and the role of its psychological underpinnings in the standard. Part V(B) lays down the parameters for the competence standard.

<sup>74</sup> *Id.*, §33(2).

<sup>75</sup> *Id.*, §33(8).

<sup>76</sup> *Sakshi v. Union of India*, (2004) 5 SCC 518, ¶34.

<sup>77</sup> *State v. Sujeet Kumar*, 2014 SCC OnLine Del 1952, ¶49.

<sup>78</sup> *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, ¶8.

<sup>79</sup> *Sudesh Jhaku v. K.C.J.*, 1996 SCC OnLine Del 397 : (1996) 62 DLT 563, ¶38.

<sup>80</sup> The Indian Evidence Act, 1872, §53A.

<sup>81</sup> The Protection of Children from Sexual Offences Act, 2012, §45(1).

## A. UNDERSTANDING COMPETENCE THROUGH A MODEL OF COGNITIVE DEVELOPMENT

This section explores what underlies and defines competence— a psychological framework of cognitive development. At the root of criminalising young adults lies the lack of a notion of competence that recognises a minor’s ability to consent and the circumstantial factors at play. Thus, what is required is a definition of competence that accounts for this ability while protecting minors from exploitative relationships. What “consent” is and how the law must define it has been a hotly debated issue of morals and ethics. The liberal view is that valid consent is enough for a sexual act to be morally legitimate.<sup>82</sup> It is in this sphere of morality David Archard, a British legal philosopher intervenes. In his book *Sexual Consent*, Archard proposes exploring the philosophical, and ethical nuances of what constitute consent by re-defining consent.<sup>83</sup> Archard’s notion of competence is suitable for our framework since its moral and ethical underpinnings suit to the objectives that POCSO seeks to achieve— it accounts for consenting minors while being cognisant of potential abuse and exploitation. This is evident when reading Parliamentary and Ministry Reports that went into shaping the POCSO along with Archard’s notion of competence.<sup>84</sup>

Under the POCSO, everyone under the age of eighteen lacks competence. Archard’s approach shows that age is not all that matters. He argues that what matters is the minor’s understanding and appreciation of what is involved in having sex, not merely their age.<sup>85</sup> This entails a certain degree of cognitive development. It involves not just the ability to understand what having sex means, but also the ability to choose sensibly in consequence of that appreciation. Archard’s model of competence can thus be summarised as having two components:

- Knowledge (of the sexual acts involved)
- Appreciation and understanding (of the consequence of such a sexual act)

Assessing these two factors requires one to gauge the minor’s cognitive development. To see if a minor can “appreciate or understand” something presupposes that one knows what such appreciation and understanding is. This is where a model of cognitive development is relevant. For example, certain cognitive models such as the “social learning theory” consider decision-making to be shaped by the reciprocal relationship between cognitive (internal) and environmental (external) factors.<sup>86</sup> Such a model may consider cultural and social factors such as the prevalence of young adult intimacy, sex education and the average age

<sup>82</sup> Igor Primoratz, *Sexual Morality: Is Consent Enough?*, Vol. 4, ETHICAL THEORY AND MORAL PRACTICE, 201 (2001).

<sup>83</sup> David Archard, *SEXUAL CONSENT* (1998).

<sup>84</sup> See *Rajya Sabha Report*, *supra* note 15.

<sup>85</sup> Archard, *supra* note 83, 124.

<sup>86</sup> Albert Bandura, *SOCIAL LEARNING THEORY*, 7 (1977).

at which such intimacy begins in determining whether or not a minor understands and appreciates the consequence of an act.<sup>87</sup> Archard argues that the law should adopt a psychological model of cognitive development that is culturally neutral, psychologically sound and applied consistently.<sup>88</sup> In the context of the POCSO, the application of the competence standard falls in the judiciary's hands. To equip the judiciary's application with a sound model of cognitive development, cognitive psychologists and clinical professionals may be involved. Through deliberation with these medical professionals, a model of cognitive development can be placed within the law.

Potentially, this can be done through the promulgation of guidelines or the sensitisation of judges. Scholars in jurisdictions such as the US, where a competence standard has been applied have also suggested the presence of expert witnesses during trials.<sup>89</sup> The role of expert witnesses in such cases is to assist in evaluating the child's developmental maturity. For instance, in the US state of Virginia, the question of whether an individual "consented" to a sexual act is left entirely to judicial determination. In this process, an expert psychiatrist is appointed who administers certain tests to gauge whether the individual has the capacity to consent.<sup>90</sup> This process is not new to Indian law, since the Evidence Act allows the opinions of scientific experts to be considered as relevant facts.<sup>91</sup> Regardless of the approach, the goal is for the law to internalise a model of cognitive development. This can then be used to understand what the components of competence are, which can further help understand whether or not a minor has given informed consent. Exactly what model of cognitive development is adopted is a psychological enquiry that is out of this paper's scope.

## B. WHAT ARE THE PARAMETERS FOR ASSESSING COMPETENCE?

While assessing the first component of competence (knowledge) is easier, what is more challenging is the second component (appreciation and understanding). It is here that careful consideration of the minor's cognitive development is required. Cognitive development models essentially tell one whether a minor has appreciated and understood the consequence of the sexual act. To determine whether or not a minor is competent, Archard proposes four evaluative parameters upon which such appreciation and understanding can be assessed:<sup>92</sup>

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<sup>87</sup> These are illustrative factors. It is the objective of this paper to develop or choose a model of cognitive development.

<sup>88</sup> Archard, *supra* note 83, 125.

<sup>89</sup> Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, Vol. 58, CLEVELAND STATE LAW REVIEW, 601 (2011).

<sup>90</sup> Elizabeth J. Reed, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, Vol. 83, VIRGINIA LAW REVIEW, 799-, 813 (1997).

<sup>91</sup> The Indian Evidence Act, 1872, §45.

<sup>92</sup> Archard, *supra* note 83, 120.



Components of Competence	Evaluative Parameters
Knowledge (of the sexual act involved)	Factual enquiry; simple consideration of whether the minor knew whether they engaged in sexual activity
Appreciation and understanding (of the consequence of such a sexual act)	<ul style="list-style-type: none"> <li>i the nature of sexual activity</li> <li>ii the age of the consenting party</li> <li>iii the age differential between the parties</li> <li>iv the existence of a special relationship (if any) between the parties</li> </ul>

Before this paper outlines how these evaluative parameters can be used to understand competence, it is important to recognise that these parameters are not independent. Rather, each parameter plays into the other. For example, the age of the consenting party is a relevant consideration while judging if they are competent to consent to sexual intercourse. The final determination of whether or not a minor “appreciated and understood” the consequences of their actions is a cumulative one that weighs each of these parameters.

- i. **The Nature of Sexual Activity:** It must be seen whether the child understood the nature of the sexual activity they were engaged in. Few would say that a fifteen-year old’s consent to kiss is the same as their consent to penetrative sexual intercourse. To ensure that the child “appreciates and understands” the consequences of their activity entails that they appreciate and understand the nature of such activity as well. Thus, whether or not a minor has the competence to consent to the sexual act has to be seen in light of the sexual activity they are performing. However, determining ‘what’ the nature of this sexual activity is not an *a priori* social determination. There are no clear social rules as such that demarcate the nature of different sexual activities. This is where the model of cognitive development adopted is relevant. Cognitive models that see minors as shaped by their circumstances such as their education, culture and maturity can be used as pivots to make sense of the child’s understanding of the nature of sexual activity.
- ii. **The Age of the Consenting Party:** As it stands, this is the ‘only’ relevant legal consideration. Age as an evaluative parameter is justified since it is indicative of sexual maturity— both physical and emotional.<sup>93</sup> All other things being equal, a ten-year old will not have the same understanding and appreciation of sexual activity as a sixteen-year-old. This is a fact of developmental psychology. However, this does not mean that a single fixed-age is used as a rule to determine competence. Joseph J., a feminist-legal scholar adds that competence can be best understood on a spectrum<sup>94</sup>— as a

<sup>93</sup> *Id.*, 124.

<sup>94</sup> Fischel, *supra* note 21, 304.

minor grows up, they develop a better appreciation of the voluntariness and choice of their acts.<sup>95</sup> He adds that there is sufficient sociological evidence to say that there is no particular ‘moment’ when a person can finally possess the competence to consent.<sup>96</sup> A child does not suddenly become competent to consent on turning sixteen or eighteen. Rather, their competence is gradually moulded and developed as they age. When competence is understood this way, it can be seen how a fixed age cannot fully reflect competence. POCSO’s fixed-age consent fallaciously presumes what Archard would call a “clean division between the incapable child and the volitional adult.”<sup>97</sup> So how would age function in the competence standard? It would not function as a threshold below or under which a minor is competent to consent. Rather, it would serve as an evaluative factor in determining whether the minor is competent to consent. For instance, it is more likely that a sixteen-year-old is better equipped ten-year-old to understand the nature of her activities.

- iii. The Age Differential between the Parties: Unlike the other parameters, this parameter sees competence not only through the consenting party, but also via their relationship with the accused. The age differential between the parties reflects the gap between their respective competencies. A larger age differential (say sixteen and thirty-one) makes it likely that there would be a large difference in their understanding and appreciation of sexual activities. As such, even if consent were ‘voluntarily’ given by the minor, the mere difference in their ages can make the relationship exploitative or abusive, which POCSO seeks to prevent. Aside from the difference in understanding, a large age differential also creates a relationship of power which further undermines ‘consent’ – however voluntarily it may be given. Underlying this is the rationale that it is not sex itself that is dangerous, but the social relations that shape it.<sup>98</sup> The suggestion that age differentials must be accounted for is not new. This has been recommended on separate occasions by the NCPDR<sup>99</sup> and the Madras High Court.<sup>100</sup> A legal framework can take two approaches to account for age differentials.
  - a. A hard cap may be fixed, beyond which any age differential would mean that the minor’s consent was without competence. For example, certain US States criminalise any relationships in which age differential between the parties is more than three.<sup>101</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*, 305.

<sup>97</sup> *Id.*, 304.

<sup>98</sup> Archard, *supra* note 83, 128.

<sup>99</sup> *Working of Special Courts Report*, *supra* note 51, 105.

<sup>100</sup> Sabari v. Inspector of Police, 2019 SCC OnLine Mad 18850, ¶40.

<sup>101</sup> The Texas Penal Code, 1973 (USA); See also *What is the Age of Consent for Sexual Activity in Texas? Is there are “Romeo and Juliet” Law?*, TEXAS STATE LAW LIBRARY, 2020, available at <http://faq.sll.texas.gov/questions/41224> (Last visited on June 23, 2023).

- b. Age differentials beyond a certain threshold may create a rebuttable presumption that the consent was not voluntary. This may be useful in cases where the relationship is between two minors with a considerable age differential— say a girl of fourteen and a boy of eighteen. A hard cap may not be suitable in this case since it presumes that a larger age differential means a large difference in understanding and appreciation. Here, it may not be the case that there is a large difference between the appreciation and understanding of the fourteen and the eighteen-year-old. However, this approach has significant decision-making costs as well, since the applicability of the age differentials would be subject to judicial adjudication.<sup>102</sup> Here, the trade-off again lies between legal accuracy and adjudication costs.
- iv. The Existence of a Special Relationship (if any) between the Parties: This involves positions of power, trust, responsibility, dependence and so on. The objective here is to determine whether there is an unequal relationship such that the consenting party can be taken advantage of. This determination is similar to a determination of undue influence. Even if no ‘coercion’ is exercised, special relationships entail a vulnerability of the consenting party which compromises their competence. The rationale here is that it cannot be said that a minor understands and appreciates the consequences of their consent if their consent is shaped by their deference to authority or power. Establishing the procedural applications of this standard are not within this paper’s scope. For illustrative purposes, say that there is a default presumption of a special relationship and the accused would have the burden to prove its absence.

It is important to keep in mind that the existence of a special relationship does not automatically mean that the minor was not competent to consent. Like established, the minor’s appreciation and understanding of the act consented to have to be seen in light of all the four evaluative parameters. The existence of a special relationship is not a final, conclusive factor in determining whether or not the minor is competent to consent. It may merely buttress this case.

To reiterate, these parameters are not seen disjunctively. For instance, the age of a child will be evaluated by also considering the age differential between the consenting parties. Thus, a fourteen-year-old may consent to a sixteen-year-old given the small age differential between them. However, each parameter still carries its own weight since they are grounded in different rationales. A younger age indicates lesser competence, while a higher age differential indicates potential of

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<sup>102</sup> Creating a rebuttable presumption rather than a hard cap means that the age differential is applicable *ex-post*, which means that the applicability of the age cap is determined by the law enforcer (in this case, the judiciary) and not the law promulgator. Leaving the applicability of the age differential to judicial adjudication increases the cost of enforcement. See Kaplow, *supra* note 14, 569-570.

exploitation and abuse. For example, the consent of a ten-year-old with a fourteen-year-old will not carry the same weight as the consent of a fourteen-year-old with an eighteen-year-old, even if the age differential remains the same.

It is important to note here that a consideration of these parameters require the courts to broaden (and perhaps alter) the nature of the evidence they consider. However, there is no bar as such on the admissibility of such evidence. For example, in most of the cases discussed in this paper—very few delved into the relationship between the accused and the prosecutrix.<sup>103</sup> Further, some courts even disregarded the minor's testimony altogether.<sup>104</sup> Evidence of this nature is necessary to establish the parameters that have been discussed above.

To summarise, the competence standard of consent is:

A minor has the competence to consent if that they have the knowledge, appreciation and understanding of the sexual activities they engage in. "Appreciation" and "understanding" may be evaluated through a model of cognitive development, using which the following factors are considered: the nature of sexual activity, the age of the consenting party, the age differential and the existence of a special relationship between the parties.

In the next part, this paper applies the competence standard to test suites to explore its practical implication

## VI. APPLYING THE COMPETENCE STANDARD TO TEST SUITES

### A. LIMITATIONS OF A TEST SUITE ANALYSIS

To illustrate the application of this standard, three POCSO cases have been chosen to act as test suites. Test suites in this context are samples to which the proposed standard is applied. The objective is to illustrate how this standard would function when applied to case law. These test suites are not perfect applications of the competence framework. Rather, they go to show how these different considerations can allow one to look at how a minor is "competent" to consent. Thus, there are four limitations to the test-suite application.

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<sup>103</sup> *Vijayalakshmi v. State*, 2021 SCC OnLine Mad 317, ¶16; *Ranjit Rajbanshi v. State of W.B.*, Criminal Appeal No. 459 of 2018 (Calcutta HC) (Unreported), ¶33; *Maruthupandi v. State*, Criminal Appeal No. 258 of 2019 dated on 12-4-2019 (Madras HC) (Unreported), ¶27.

<sup>104</sup> CENTRE FOR CHILD AND THE LAW— NATIONAL LAW SCHOOL OF INDIA UNIVERSITY BANGALORE, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam*, 81 (2017); see *State v. Krishna Sahu*, G.R. Case No. 3087 of 2016 (Assam HC) (Unreported).

*First*, the considerations in the test suites are incomplete without a cognitive model that situates the consentor's maturity, education and understanding—all of which are relevant factors to determine her competence. Thus, they proceed on a layperson's understanding of the kinds of factors that would be relevant to judging a minor's competence. These are not laid down with psychological rigour.

*Second*, most existing POCSO cases do not document the nature of evidence that would be relevant for the competence standard. This is largely owed to the fixed-age rule; it is often not relevant to gather the victim's maturity or understanding of the relationship, since what is relevant is merely their age. For instance, merely knowing whether the accused and victim are married is insufficient to gauge the voluntariness of their relationship. It is also important to know what the circumstances of such a marriage are, what the child's understanding is of such marriage is and so on. Given this lack of evidence, it is not possible to present a neat application of the competence standard in existing case law.

*Third*, it is ultimately the judges who apply standards. There is a valid concern that this would lead to biased and inconsistent application. Nevertheless, this concerns stands for most standards that exist in law today; including offences such as rape, where the judge must consider whether "consent" existed.

*Finally*, the test-suite application ignores procedural matters such as the burden of proof, which is reversed in POCSO.<sup>105</sup> This may be relevant, but only as a matter of adducing evidence during judicial proceedings. As such, the test-suite application ignores this. Nevertheless, these cases provide a useful footing to understand the practical applicability of this standard.

## B. *SADDAM HUSSAIN V. STATE OF ASSAM*<sup>106</sup>

In this case, a boy aged fifteen years eloped with a girl aged fourteen.<sup>107</sup> The couple had eloped previously as well.<sup>108</sup> Both of them claimed to have carried out *nikah* and consummated their marriage out of love and affection.<sup>109</sup> The boy was charged under POCSO's §4<sup>110</sup> for penetrative sexual assault since the victim became pregnant. During cross-examination, the victim testified that the accused never coerced himself upon her. She said that she loved him, and wished to reside with him in the future. The court recognised this evident voluntariness on behalf of the girl<sup>111</sup> but did not delve into her competence to consent. It even recognises that she had "sufficient maturity" and fled with the accused on

<sup>105</sup> The Protection of Children from Sexual Offences Act, 2012, §§29, 30.

<sup>106</sup> 2017 SCC OnLine Gau 1003.

<sup>107</sup> *Id.*, ¶10, ¶15.

<sup>108</sup> *Id.*, ¶11.

<sup>109</sup> *Id.*, ¶12.

<sup>110</sup> The Protection of Children from Sexual Offences Act, 2012, §4.

<sup>111</sup> *Id.*, ¶17.

her volition. The boy was charged with kidnapping under IPC and penetrative sexual assault under POCSO. The court dismissed the charge of kidnapping, but applied POCSO's fixed-age rule and held the accused liable for penetrative sexual assault.<sup>112</sup>

Applying the competence standard can lead one to the conclusion that the accused is not liable.

The central issue in this case is whether the girl "understood and appreciated" the consequences of the actions she undertook in relation to the four parameters in the competence standard.

- i. Knowledge: Given that the girl claimed that she married the accused and consummated their marriage out of love, it is evident that she knew she engaged in a sexual act.
- ii. Nature of Sexual Act: While this is not a straightforward determination (due to an absence of evidence that adduces the girl's state of mind), the facts indicate that the girl understood the nature of the sexual activity involved. She testified that she "intended to live as husband and wife" and thus continued to have sexual relations with the boy.<sup>113</sup> Further, the court repeatedly referenced her "sufficient maturity" and her "volition" in escaping with the boy.
- iii. Consenter's Age: The age of the girl is fourteen at the time of the sexual act. While it may be argued that she was too young to understand and appreciate the sexual act due to her age, the court has repeatedly emphasized from her testimony that she was mature and acted volitionally. While her age is relatively low, this also has to be seen in light of the age differential. Also relevant to this determination is the ancillary consideration of kidnapping, where the court held that she was not 'enticed' by the boy because she knew 'and' had the capacity to know the "full import" of what she was doing.<sup>114</sup> This further buttress the argument that the relationship was not exploitative.
- iv. Age Differential: The age differential between the parties is merely one year. The boy was fifteen years of age.<sup>115</sup> Thus, it cannot be said that there was a large difference in their respective competencies.
- v. Special Relationship: *Prima facie*, no special relationship of authority existed between the parties. They both were students of roughly equal age.<sup>116</sup>

<sup>112</sup> *Id.*, ¶23.

<sup>113</sup> *Id.*, ¶22.

<sup>114</sup> *Id.*, ¶19.

<sup>115</sup> *Id.*, ¶10.

<sup>116</sup> *Id.*, ¶11.

The weight of these parameters tilts strongly in favour of the conclusion that the minor appreciated and understood the sexual act in which she partook. Thus, it can be said that the parties were competent to consent. Thus, this case shows how the application of the competence standard result in an alternative outcome where the sexual autonomy of the minor is recognised. The next test suite will illustrate how the competence framework also protects the minor from abusive/exploitative relationships.

### C. *ARHANT JANARDAN SUNATKARI V. THE STATE OF MAHARASHTRA*<sup>117</sup>

In this case, a girl aged fifteen was in an allegedly consensual sexual relationship with her first cousin brother aged twenty-two. She was living with her paternal uncle and thus residing under the same roof as the accused.<sup>118</sup> In her statement before the judicial magistrate, she disclosed that she had ‘consensual’ sexual activity with the accused four-five times.<sup>119</sup> However, one of the victim’s witnesses testified that the victim “complained of stomach pain” and expressed symptoms of depressive behaviour.<sup>120</sup> However, the court accepted the victim’s statement that the acts were consensual and granted bail to the accused.<sup>121</sup>

The central issue on the application of the competence standard is whether the victim “understood and appreciated” the consequences of the sexual acts, and was thus competent to consent.

- i. Knowledge: Given that the victim herself admitted to ‘consenting’ to the sexual act, it can be said that she had knowledge of the act.
- ii. Nature of Sexual Act: Given the nature and quantum of evidence collected on the victim’s perspective, this determination is not straightforward. The victim claimed that her acts were ‘consensual’. However, given her later complaints of stomach pain and depressive symptoms, it may be said that even if she ‘consented’ to sexual acts with the accused, she did not fully understand the consequences of her sexual acts.
- iii. Consenter’s Age: The victim’s age was fifteen. She was a student in the eighth grade.<sup>122</sup> As such, she is relatively younger. However, like it was seen in the previous test-suite, this does not mean that she is entirely incapable

<sup>117</sup> Arhant Janardan Sunatkari v. State of Maharashtra, 2021 SCC OnLine Bom 136.

<sup>118</sup> *Id.*, ¶5.

<sup>119</sup> *Id.*, ¶8.

<sup>120</sup> *Id.*, ¶5 (This case suffered from evidentiary issues, where the minor later retracted her statement where she gave “consent” to the accused’s acts. Nevertheless, the court accepted the initial testimony and granted bail to the accused on the grounds that there was a consensual relationship. The test suite proceeds with the evidence that the court accepted).

<sup>121</sup> *Id.*, ¶14.

<sup>122</sup> *Id.*, ¶5.

of consenting. Thus, the nature of her competence has to be seen in light of the other parameters.

- iv. Age Differential: There is a significant age differential of seven years between the accused and the victim. As such, it becomes difficult to say that they are equally competent in their appreciation and understanding of sexual activity. This parameter may lead one to believe that that there was an unequal relationship between the accused and the victim, makes the victim more vulnerable to exploitation.
- v. Special Relationship: The accused is the victim's elder cousin brother and they resided under the same roof. Thus, there are strong grounds to say that a special relationship of trust or dependence exists between them. This special relationship compromises the victim's competence to consent.

The weight of these parameters tilt in favour of the conclusion that the minor was not competent to consent. While it is evident that she had knowledge of the sexual act and she testified that the act was 'consensual', such voluntariness on her part does not arise from an appreciation and understanding of the consequences her the act (parameter ii). Further, her competence to consent was affected by the presence of a large age differential and the existence of a special relationship. These factors lend strong support to the conclusion that there is a large different in the parties' competencies. Thus, this case demonstrates how the competence standard can be used to protect young adults from abuse and exploitation.

#### D. *STATE V. SUMAN DASS*<sup>123</sup>

In the above case, a girl aged fifteen was allegedly in a consensual relationship with a man aged twenty-two.<sup>124</sup> They both left home together, after which the girl's mother filed a case of kidnapping and sexual assault against the man. The girl was said to have a "friendly relationship" with the accused, and testified to getting married to him. Further, she admitted to having sexual intercourse with him, but testified that it was consensual. On facts, there is nothing else on the girl's state of mind and her relationship with the accused. Ideally, this would be relevant in determining the existence of her competence to consent.

When it came to the judgement, the court acquitted the accused. Interestingly, it emphasized repeatedly that the marriage between the accused and the victim was "acceptable to the community".<sup>125</sup> This was used as one of the central thrusts to acquit the accused. Further, it referenced consent as an exception to rape in the IPC,<sup>126</sup> and effectively read them into the POCSO. In doing so, the

<sup>123</sup> State v. Suman Dass, SC No. 66/13 of 2013 (Patiala High Courts) (Unreported).

<sup>124</sup> *Id.*, ¶21.

<sup>125</sup> *Id.*, ¶21, ¶16.

<sup>126</sup> *Id.*, ¶19.



court entirely ignored the very purpose of having a special law. Finally, it notes that “there was clearly no assault or force used upon the girl” as a reason to acquit the accused.<sup>127</sup> Clearly, the court believes that the threshold of competence is the mere lack of force or assault. As seen, this is a slippery slope that allows children can be emotionally exploited in clearly uneven relationships. It is thus important to pay attention to the larger psychological and social factors at play.

Applying the competence standard, it is seen that:

- i. Knowledge: On facts, the victim clearly knew that she was engaged in sexual activity.
- ii. Nature of Sexual Act: One of the central reasons that the court uses to acquit the accused relies on a “voluntary” marriage between the two. As such, it enquires very little into the girl’s understanding. There is no effort made at a psychological assessment of whether she understood the activity she was involved in, or what the nature of relationship was between her and the accused. As such, this determination is inconclusive.
- iii. Consenter’s Age: Here, age is a major turning point. The girl was merely fifteen years of age. While this not ipso facto an issue (like seen in the *Saddam Hussain* case), due regard must be paid to the other circumstances. The judge repeatedly notes that “marriage (and by extension, intercourse) at such a tender age is fraught with several complications”, but the law must “not prohibit teens from experimentation”. The court clearly failed to appreciate the implications of her tender age. A girl of fifteen may not be emotionally equipped to understand the consequences of a sexual act, even if she understands that what she is engaging in is sexual. This is particularly important when read with the age differential.
- iv. Age Differential: The age differential between the two was seven years. At the tender age of fifteen, this differential casts a huge doubt on whether the child was indeed “competent” to consent. Like noted while detailing Archard’s framework, larger age differentials present huge scope for power imbalances, manipulation, and emotional exploitation.
- v. Special Relationship: There is no special relationship as such between the two. However, it is important to note that they resided alone together for one month before sexual intercourse took place.<sup>128</sup>

The weight of these parameters tilts towards the conclusion that the girl was not competent to consent. Unlike the other cases, age here plays a central factor in determining the existence of competence. The court appeased the girl’s

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<sup>127</sup> *Id.*, ¶24.

<sup>128</sup> *Id.*, ¶2.

community and the mother in holding that her acts were “voluntary”. These circumstances do not go to show the victim’s competence to consent, since they make no reference to her ability or psychology. Given the circumstances of her “living in” with the accused, her tender age, and their significant age differential of seven years, it would be difficult to hold that she was entirely capable of understanding the nature and implications of the sexual act. Such a case goes to demonstrate the how POCSO can balance autonomy considerations with its protectionist function.

## VII. CONCLUSION

This paper has made the case for the adoption of a competence standard of consent in place of the existing fixed-age rule. This is done by demonstrating how the fixed-age rule affects young-adult relationships by restricting their autonomy, harming their developmental needs, and serving as tools to harass young adults in consensual relationships. Further, it shows how the fixed-age rule of consent has created a grey area of judicial interpretation, where the notion of consent is muddled, and how this grey area can lead to miscarriages of justice. Finally, this paper fleshed out a standard of consent based on the competence of the minor and showed how it is normatively desirable in comparison to the existing fixed-age rule. Assessing the competence of the minor requires a consideration of a variety of parameters. These parameters can be considered through a model of cognitive development, which our legal framework must produce and apply consistently. While incomplete, the test suites show how the competence standard can function as a viable alternative to the fixed-age rule.

While existing literature focuses solely on the ineffectiveness of the existing law, proposed alternatives are scarce since they lack engagement with the protectionist rationale underlying POCSO. To overcome this challenge, this paper sought to engage with this rationale and demonstrate the potential for legal alternatives. However, there is much scope to flesh out the potential of such a framework. Such research may be psychological— for instance, ‘what’ cognitive model must underlie our understanding of competence? It may even be approached from an evidentiary perspective; how will judges apply psychological evidence to evaluate competence? This paper sets the stage for the framework within which such questions may be explored. As it stands, it is hoped that POCSO goes beyond the existing fixed aged rule, such that young adults are not unnecessarily criminalised.