



## FROM VOLUNTARY TO VULNERABLE, CONSENT'S CRUEL CHORUS: THE PARADOXICAL PROHIBITION AND CONSTITUTIONAL CHAOS IN INDIAN SEXUAL OFFENCES JURISPRUDENCE

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### ABSTRACT

*“A socially sensitised judge is a better statutory armour in cases of crimes against women than long clauses of penal provisions containing complex exceptions and provisos.”<sup>1</sup> In the Mahabharata, Draupadi's disrobing in the Kuru assembly, her cry of "Where is the dharma? "Asked whether law divorced from righteousness retained legitimacy.<sup>2</sup> Two millennia later, the paradox resurfaces in the contemporary Indian consent jurisprudence, with consent doctrines that reveal not coherence, but intentional stratification.<sup>3</sup> The “Bhartiya Nyaya Sanhita (BNS)” relies on the Aristotelian consent that rational choice is predicated on epistemological clarity.<sup>4</sup> It stipulates, from sections 25 to 30, that consent requires voluntary assent with cognitive capacity and knowledge of the consequences.<sup>5</sup> “The Protection of Children from Sexual Offences Act (POCSO)” completely shifts the paradigm and declares minors as incapable of consenting, not because they lack knowledge, but because the law protects them through presumptive incapacity.<sup>6</sup> It deals with consent as a dharmic obligation where the state's duty is to shield the vulnerable.<sup>7</sup> The “Sexual Harassment of*

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<sup>1</sup> Swati Bhattacharya, 'Rape and Consent' in Swati Bhattacharjee (ed), *A Unique Crime: Understanding Rape in India (Gangchil 2008) ch 3*

<sup>2</sup> Kaustav Agarwal, 'Draupadi Jeopardizing Jurisprudence: A Critical Analysis of Law, Dharma and Gender Justice in the Mahabharata' (2017) 9(1) *Rupkatha Journal on Interdisciplinary Studies in Humanities*; Ratna Kapur, 'Jurisprudence in and as Mahabharata: An Edifying Epic' (2010) *National Law School of India Review*.

<sup>3</sup> Satyabrata Kumar Moharana, 'A Constitutional Critique of Gendered Sexual Offences in India under the Bharatiya Nyaya Sanhita, 2023' (2025) *Social Science Research Network*; Aditi Parwani, 'Revisiting Consent under POCSO: From a "Fixed-Age" Rule to a "Competence-Based" Standard' (2023) 16(2) *NUJS Law Review*

<sup>4</sup> Justice KS Puttaswamy (Retd) v Union of India (2017) 10 SCC 1; *Bharatiya Nyaya Sanhita 2023*, ss 63–69.

<sup>5</sup> 'Bharatiya Nyaya Sanhita 2023', ss 63–69

<sup>6</sup> *Protection of Children from Sexual Offences Act 2012*, s 2(d), ss 3, 5, 6, 7, 8

<sup>7</sup> Ministry of Women and Child Development, *Study on Child Abuse: India 2007* (Government of India 2007); Shreya Magill, 'Puttaswamy World: Privacy, Dignity and Reproductive Choice' (2019) *Oxford Human Rights Hub Working Paper*.

*Women at Workplace (Prevention, Prohibition and Redressal) Act (POSH)*” highlights the interplay between power dynamics and hierarchical workplaces, where even explicit consent can be denied when power asymmetries exist.<sup>8</sup> All three laws do not harmonise but rather refract through different constitutional lenses. K.S. Puttswamy anchors all three in Article 21’s recognition and highlights how bodily autonomy is an inherent part. Still, POCSO’s absolutism repudiates adolescent agency; BNS’s voluntariness overlooks coercion; POSH’s affirmative model weighs the silenced. This article aims to highlight the core legislative issues and also aims to harmonise and reform to protect both life and life choices.

**Keywords:** Consent Jurisprudence, Intentional Stratification, Dharmic Obligation, Power Asymmetries, Bodily Autonomy.

## INTRODUCTION

The cornerstone of legal recognition of sexual offences has constantly relied on consent.<sup>9</sup> Consent acts as a juristic touchstone whose abuse can transmute a potential crime into a legally recognised act of love.<sup>10</sup> One of the integral basic rights of Article 21 is “bodily autonomy,” and consent aims to protect.<sup>11</sup> However, consent in the current Indian legal framework has not acted as a sovereign act of will but rather has been a theatre of shadows.<sup>12</sup> The evolution and the evolution of the legal framework took place with the enactment of the POCSO.<sup>13</sup> POSH and BNS each have the objective to protect vulnerable groups.<sup>14</sup> Though each one varies vastly in its interpretation of consent.<sup>15</sup> POCSO operates on the idea of “absolute protection through absolute Prohibition”; it negates the consent of minors in entirety, whereas BNS Recognises consent but has bounded its scope through various provisions and posits a

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<sup>8</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, ss 2(n), 3(2); *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

<sup>9</sup> *Deepak Gulati v State of Haryana* (2013) 7 SCC 675.; *State of Himachal Pradesh v Mango Ram* (2000) 7 SCC 224.

<sup>10</sup> Kshitij Sharma, 'Consent under Section 375 IPC' (2019) *Indian Law Institute Law Review*; Anup Surendranath, 'Revisiting "Consent" under Indian Rape Law' (2021) *NLS Journal*.

<sup>11</sup> *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1,

<sup>12</sup> Aparna Chandra and Mrinal Satish, 'Judicial Narratives and Rape Myths: The Farooqui Case' (2019) *Socio-Legal Review*.

<sup>13</sup> Protection of Children from Sexual Offences Act 2012; Criminal Law (Amendment) Act 2013; Law Commission of India.; Law Commission of India, 283rd Report: Review of the Protection of Children from Sexual Offences Act, 2012 (2019).

<sup>14</sup> Protection of Children from Sexual Offences Act 2012; Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013; *Bhartiya Nyaya Sanhita* 2023.

<sup>15</sup> Aditi Parwani (n 3); Seema Misra, 'Interpretation of Consent in Rape' (2024) 5(2) *Indian Journal of Integrated Research in Law*.

completely different angle.<sup>16</sup> It puts emphasis on the power dynamics and the subjective perception, rather than a concrete, rigid consent-based framework.<sup>17</sup>

These differences thus raise profound conceptual tensions, like whether a minor or a 17-year-old possesses the legal capacity to provide a valid consent or whether it stands in irreconcilable tension with POCSO's absolute refusal to recognise such consent.<sup>18</sup> This Article stands to answer these questions through doctrinal and constitutional review and interpretation.<sup>19</sup>

## CONCEPTUAL UNDERSTANDING OF CONSENT IN LAW

Consent can be conceptualised as a unilateral revocable grant of permission manifested through positive conduct or express communication, categorised by voluntariness, cognisance, continuity, and capacity.<sup>20</sup> The Supreme Court, time and again, echoed that consent must be unequivocal and voluntary.<sup>21</sup> *Qui tacet consentire videtur* finds no reservation in sexual offences; silence here signifies not agreement but ambiguity, which justice refuses to exploit.<sup>22</sup> Consent demands three cardinal elements: first, voluntariness 'nulla poena sine voluntate'; second, knowledge 'ignorantia non excusat'; third, continuity that consent is not a single act but a living revocable expression of ongoing will.<sup>23,24,25</sup> Despite this framework, the Indian jurisprudence applies and defines consent inconsistently.<sup>26</sup>

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<sup>16</sup> Protection of Children from Sexual Offences Act 2012, ss 3, 5, 6, 7, 8; *Bhartiya Nyaya Sanhita 2023*, ss 63–69; *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013*, ss 2(n), 3.

<sup>17</sup> *Vishaka v State of Rajasthan* (1997) 6 SCC 241 –; *Apparel Export Promotion Council v AK Chopra* (1999) 1 SCC 759

<sup>18</sup> Aditi Parwani, 'Revisiting Consent under POCSO: From a "Fixed-Age" Rule to a "Competence-Based" Standard' (2023) 16(2) *NUJS Law Review*.; 'Rethinking the Age of Consent in India' *The India Forum* (11 September 2025).

<sup>19</sup> H Jeffrey Powell, 'Revisiting "Consent" under Indian Rape Law' (2021) *NLS Journal*.

<sup>20</sup> Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2(2) *Legal Theory* 121; Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004).

<sup>21</sup> *Kaini Rajan v State of Kerala* (2013) 9 SCC 113; *State of Himachal Pradesh v Mango Ram* (2000) 7 SCC 224.

<sup>22</sup> *Bhartiya Nyaya Sanhita 2023*, s 63 Explanation 2.

<sup>23</sup> Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004).

<sup>24</sup> *Bhartiya Nyaya Sanhita 2023*, s 28; cf *Indian Evidence Act 1872*, s 90.

<sup>25</sup> *State of Himachal Pradesh v Mango Ram* (2000) 7 SCC 224.

<sup>26</sup> Seema Misra, 'Interpretation of Consent in Rape' (2024) 5(2) *Indian Journal of Integrated Research in Law*.; Anup Surendranath, 'Revisiting "Consent" under Indian Rape Law' (2021) *NLS Journal*.

## UNDERSTANDING CONSENT THROUGH LEGAL FRAMEWORKS

Consent is the linchpin to sexual sovereignty and individual liberty.<sup>27</sup> From a legal angle, consent refers to the consciousness of an individual, which features voluntary and informed agreement between people in order to participate in an act.<sup>28</sup> It calls for the active expression of volition and not solely for the lack of resistance, agreement and silence.<sup>29</sup> Present-day criminal jurisprudence believes consent is carved out of relations in terms of power, vulnerability, and choosing capacity instead of fixed standards.<sup>30</sup> The Indian law portrays the evolution and growth in the concept of consent by considering it as something that an individual should assess according to the situation, such as coercion, mental capacity standards, age, fear, inequalities, and deception.<sup>31</sup> Three legal structures regulate and govern sexual conduct in Indian society - “Bharatiya Nyaya Sanhita, 2023 (BNS)”;<sup>32</sup> “Protection of Children from Sexual Offences Act, 2012 (POCSO)” and the “Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH)”.<sup>32</sup>

**Consent under BNS:** Under the “Bharatiya Nyaya Sanhita, 2023(BNS)”, there are two sections that talk about the proposition of consent in sexual offences.<sup>33</sup> Section 63 of the BNS Consent as an antecedent of Rape, explains about rape and instances related to “absence of consent”.<sup>34</sup> Consent is explained as an unambiguous, definite, and voluntary agreement that can be communicated through any kind of words, gestures, verbal or non-verbal communication.<sup>35</sup> This section also clearly specifies a few instances wherein consent becomes legally ineffectual.<sup>36</sup> Consent is voided in circumstances where it is: Achieved under any instances like fear of injury or coercion; Given under misapprehension of fact; Given by an individual who is not capable of understanding the nature of the act due to unsoundness of

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<sup>27</sup> Justice KS Puttaswamy (Retd) v Union of India (2017) 10 SCC 1; Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998).

<sup>28</sup> Bharatiya Nyaya Sanhita 2023, s 63 Explanation 2; Seema Misra, 'Interpretation of Consent in Rape' (2024) 5(2) *Indian Journal of Integrated Research in Law*.

<sup>29</sup> Bharatiya Nyaya Sanhita 2023, s 63 Explanation 2 proviso; *State of Himachal Pradesh v Mango Ram* (2000) 7 SCC 224.

<sup>30</sup> Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), chs 7–9; Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, 1998).

<sup>31</sup> Law Commission of India, 283rd Report: Review of the Protection of Children from Sexual Offences Act, 2012 (2019).

<sup>32</sup> Bharatiya Nyaya Sanhita 2023; Protection of Children from Sexual Offences Act 2012; Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

<sup>33</sup> Bharatiya Nyaya Sanhita 2023, ss 63, 69.

<sup>34</sup> Bharatiya Nyaya Sanhita 2023, s 63

<sup>35</sup> Bharatiya Nyaya Sanhita 2023, s 63 Explanation 2.

<sup>36</sup> Bharatiya Nyaya Sanhita 2023, s 63.

mind or intoxication; Given by an individual under the age of 18 years.<sup>37</sup> This explains consent as an effect of free will, apprehension, and capacity.<sup>38</sup> Under section 69 BNS – Sexual Intercourse obtained by Deceitful Means, it explains how sexual intercourse is gained through deceit, which includes false promises regarding marriage or deception regarding intention and identity.<sup>39</sup> It proceeds with the assumption that consent that is obtained out of intentional deception is considered no consent in law.<sup>40</sup>

Indian courts have played a crucial role in translating the statutory language of consent to work-related standards.<sup>41</sup> In “Kaini Rajan v. State of Kerala”, the Supreme Court held that consent should be an act of reason followed by deliberation, and should not be mere submission because of fear or coercion.<sup>42</sup> It also emphasised that the absence of physical resistance doesn't mean consent.<sup>43</sup> Consent should come from a consciously informed decision that indicates free will was held in “State of Uttar Pradesh v. Chottey Lal.”<sup>44</sup> A clear difference between consensual sexual relationships and instances was brought up where the consent is obtained out of deception in “Deepak Gulati v. State of Haryana.”<sup>45</sup> Also, the court held that not every breach of promise to marry results in rape; consent is legally ineffective where the promise was fake from the very beginning.<sup>46</sup> In “Dhruvaram Murlidhar Sonar v. State of Maharashtra”, the judgment polished the law by providing a sense of caution against the criminalisation of consensual adult relationships just because the marriage eventually did not take place.<sup>47</sup> The court also restated that the intention at that provided time was consensual, which is the determining factor.<sup>48</sup>

**Consent under POCSO:** Under Section 2(d) of the POCSO, a child is said to be an individual who is below the age of eighteen years.<sup>49</sup> As long as the threshold of this age is not crossed,

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<sup>37</sup> *ibid.*

<sup>38</sup> Pranjal Rai, 'False Promise of Marriage' (2022) online article.

<sup>39</sup> Bharatiya Nyaya Sanhita 2023, s 69.

<sup>40</sup> Anil Sharma, "'Consent' in False Promise to Marry: Deceptive Consent in Indian Rape Law' (2023) 16(2) *NUJS Law Review*

<sup>41</sup> Seema Misra, 'Interpretation of Consent in Rape' (2024) 5(2) *Indian Journal of Integrated Research in Law*; Anup Surendranath, 'Revisiting "Consent" under Indian Rape Law' (2021) *NLS Journal*.

<sup>42</sup> *Kaini Rajan v State of Kerala* (2013) 9 SCC 113.

<sup>43</sup> *Kaini Rajan v State of Kerala* (2013) 9 SCC 113.

<sup>44</sup> *State of UP v Chhotey Lal* (2011) 2 SCC 550 –.

<sup>45</sup> *Deepak Gulati v State of Haryana* (2013) 7 SCC 675.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Dhruvaram Murlidhar Sonar v State of Maharashtra* (2019) 18 SCC 191 –.

<sup>48</sup> *ibid.*

<sup>49</sup> Protection of Children from Sexual Offences Act 2012, s 2(d).

then the capacity to give consent is denied.<sup>50</sup> Sections 3 and 7 under the POCSO Act, which are named “Penetrative Sexual Assault” and “Sexual Assault”, intentionally omit any regard to consent, as the law works on the presumption that the children do not have the capacity to make informed decisions regarding sexual activity.<sup>51</sup> Section 29 of the POCSO Act explains that once the facts of a case are proved, then the law assumes the accused guilty, so the accused must prove itself innocent and consent as a defence cannot be used, as the law presumes a child is incapable of making decisions regarding sexual activities.<sup>52</sup>

The concept of permitting criminalisation of sexual intercourse with a minor wife who is under the age of eighteen years of age was upheld in “Independent Thought v. Union Of India”.<sup>53</sup> The judgment strictly held that the protection of the child prevails over the question of consent even in marriage.<sup>54</sup> In “Vijayalakshmi v. State”, POCSO is very often cited in cases where consensual adolescent relationships are not approved by the families.<sup>55</sup> In these cases, the court cannot change the law, so the observations explain that there is a huge gap between how the law applies and what the lived reality is.<sup>56</sup>

**Consent under POSH:** Section 2(n) of the POSH explains sexual harassment as unwelcome acts or behaviour of a sexual kind.<sup>57</sup> Section 3(2) highlights the conduct that includes sexual harassment in ways like abusing the authority, threats that are implied, or when a hostile environment is created.<sup>58</sup>

“Vishakha v. State of Rajasthan” is a case where it identifies sexual harassment as a violation of equality, dignity and individual liberty under Articles 14,15 and 21 of the Indian Constitution.<sup>59</sup> In “A K Chopra”, it was upheld that even conduct that does not amount to rape can violate the dignity of a woman at the workplace.<sup>60</sup> The court stressed the behaviour that

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<sup>50</sup> *ibid*; Aditi Parwani, 'Revisiting Consent under POCSO: From a "Fixed-Age" Rule to a "Competence-Based" Standard' (2023) 16(2) NUJS Law Review.

<sup>51</sup> Protection of Children from Sexual Offences Act 2012, ss 3, 7.

<sup>52</sup> Protection of Children from Sexual Offences Act 2012, s 29

<sup>53</sup> *Independent Thought v Union of India* (2017) 10 SCC 800 –.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Vijayalakshmi v State* 2021 SCC OnLine Mad 2324.

<sup>56</sup> *ibid*

<sup>57</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 2(n).

<sup>58</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 3(2).

<sup>59</sup> *Vishakha v State of Rajasthan* (1997) 6 SCC 241 –.

<sup>60</sup> *Apparel Export Promotion Council v AK Chopra* (1999) 1 SCC 759.

was observed from the perspective of the woman who is aggrieved, but not through the assumptions made about consent.<sup>61</sup>

### **FRAGMENTARY CONSENT JURISPRUDENCE**

The POCSO Act, 2012, constructs consent in absoluta. It aims at Sections 3, 5, 6, and 8, which criminalise all sexual acts against children. This structure reflects a “fixed age rule”.<sup>62</sup> Since under sec 2(d), a child is defined as any person under 18 years of age, thus, under POCSO, age operates as a sole proxy for incapacity, applying ex-ante regardless of maturity, situation, or voluntariness.<sup>63</sup>

The 2007 Ministry of Women and Child Development study questions this framework by acknowledging that minors may be competent despite their chronological age and defines competence as "understanding, wisdom, and autonomy to make decisions that lead to a reasonable outcome".<sup>64</sup> The scheme of thought used in POCSO is the fear of the victim revictimization, i.e., a categorical prohibition that avoids the procedural trauma of examining the child's consent in the courtroom.<sup>65</sup>

Section 2(n) of the Posh Act 2013 provides no explicit definition of consent, but instead it enumerates “sexual harassment” as a direct or indirect unwelcome act or behaviour.<sup>66</sup> POSH specifically shifts its emphasis from consent's presence to unwelcomeness.<sup>67</sup> It centres more on the victim's subjective experience and perspective rather than the hardcore proof of consent.<sup>68</sup>

The POSH imbibes the reasonable woman standard from the American jurisprudence in the case of “Vishakha vs the State of Rajasthan”, which takes the vantage of a reasonable woman's experiencing the conduct and not the respondent's intent.<sup>69</sup> POSH also aims to integrate the

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<sup>61</sup> *Apparel Export Promotion Council v AK Chopra* (1999) 1 SCC 759.

<sup>62</sup> Protection of Children from Sexual Offences Act 2012, ss 3, 5, 6, 8.

<sup>63</sup> Protection of Children from Sexual Offences Act 2012, s 2(d).

<sup>64</sup> Ministry of Women and Child Development, *Study on Child Abuse: India 2007* (Government of India 2007)

<sup>65</sup> Law Commission of India, 283rd Report: Review of the Protection of Children from Sexual Offences Act, 2012 (2019).

<sup>66</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 2(n)

<sup>67</sup> *ibid.*

<sup>68</sup> *Vishakha v State of Rajasthan* (1997) 6 SCC 241.

<sup>69</sup> *ibid.*

power dynamics, where superconduct brings more scrutiny than the hierarchical vulnerability makes consent immaterial, even if technically given, in an asymmetrical relationship.<sup>70</sup>

Now consent under BNS is explained under explanation 2 a section 63 i.e. "Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity".<sup>71</sup> This takes an objective expressive standard which focuses more on the victim's communication of willingness and not the accused's subjective perception.<sup>72</sup> The foundational consent jurisprudence in India is "State of Himachal Pradesh vs Mango Ram," where consent for Section 375 of the IPC (BNS 63) requires voluntary participation, only after having fully exercised the choice between resistance and ascent.<sup>73,74</sup>

### **JUDICIAL INTERPRETATION OF THE GREY AREA OF CONSENT**

Justice Lokur, in the case of independent thought versus Union of India, observed that a girl aged 15 to 18, even if married, lacks the capacity to comprehend the consequences of any action performed, thus violating POCSO despite marital consent.<sup>75</sup> Courts have previously convicted, even though consent and maturity are irrelevant, as was held in "Sabari & Anr v. The Inspector of Police."<sup>76</sup>

Now the contrast arises in the case of "R.Parthiban v. State" Where a love relationship between a 24-year-old and a 17-year-old resulted in marriage upon attaining 18. The court quashed charges, noting that the victim's clear voluntariness and absence of overriding public interest in criminalisation.<sup>77</sup> Even in "Vijayalakshmi vs State", the courts refuse prosecution, relying on the ratio that adolescent relationships constitute biosocial dynamics integral to the development.<sup>78</sup> Even in the state vs Suman Das, a 22-year-old

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<sup>70</sup> *Vishakha v State of Rajasthan* (1997) 6 SCC 241; *Apparel Export Promotion Council v AK Chopra* (1999) 1 SCC 759

<sup>71</sup> *Bhartiya Nyaya Sanhita* 2023, s 63 Explanation 2

<sup>72</sup> Seema Misra, 'Interpretation of Consent in Rape' (2024) 5(2) *Indian Journal of Integrated Research in Law*

<sup>73</sup> Ministry of Women and Child Development, *Study on Child Abuse: India 2007* (Government of India 2007)

<sup>74</sup> *State of Himachal Pradesh v Mango Ram* (2000) 7 SCC 224

<sup>75</sup> *Independent Thought v Union of India* (2017) 10 SCC 800

<sup>76</sup> *Sabari v Inspector of Police* 2019 SCC OnLine Mad 1766.

<sup>77</sup> *R Parthiban v State* 2018 SCC OnLine Mad 9621

<sup>78</sup> *Vijayalakshmi v State* 2021 SCC OnLine Mad 2324

accused was acquitted despite a 15-year-old victim noting that there was a voluntary elopement and consensual marriage.<sup>79</sup>

This opens floodgates to a lot of debates regarding the conflicting rulings on identical Fact scenarios where courts have adopted ad hoc rationales that lack grounding in law. The paper would analyse this on two landmark judgments:

**Attorney General for India v. Satish & Anr:** In this case, the Bombay High Court has acquitted the accused under Section 8, that is, sexual assault POCSO, despite evidence of groping a 12-year-old child.<sup>80</sup> We show that skin-to-skin contact was a prerequisite to constitute sexual assault, which was missing.<sup>81</sup> Later, this decision was overturned by the Supreme Court, claiming that the ratio used by the Bombay High Court, the most important ingredient for constituting the offence of sexual assault under section 7 of POCSO, is the sexual intent and not skin-to-skin contact.<sup>82</sup> Thus, the principle suggests that courts must examine sexual penetration accompanied by sexual intent and mens rea, and not just verify the technical penetration.<sup>83</sup>

**Mahmood Farooqui v. State of NCT of Delhi:** This case uses a completely reasoned approach where, despite the victim's verbal "NO", the court reasons out that a feeble no may mean "YES," given the parties have prior intimacy and lack of physical resistance.<sup>84</sup> The BNS explicitly mentions that a woman who does not physically resist shall not be the reason for the fact to be regarded as consenting.<sup>85</sup> It was reaffirmed in the case of "State of Himachal Pradesh vs Mango ram," which emphasises that mere passive submission does not constitute consent, and calls out that there was an erroneous decision in "Mahmood Farooqui".<sup>86</sup>

In the concurrent reading of section 64 BNS and section 114A BSA, the provision shifts the burden; once the victim testifies that she did not consent, the accused must prove consent, then the presumption operates in the victim's favour.<sup>87</sup> Courts in the case of "Saturam Madhavi vs

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<sup>79</sup> *State v Suman Das* 2016 (1) SCC 412

<sup>80</sup> *Attorney General for India v Satish* (2021) 3 SCC 240

<sup>81</sup> *Satish v State of Maharashtra* 2020 SCC OnLine Bom 65

<sup>82</sup> *Attorney General for India v Satish* (2021) 3 SCC 240

<sup>83</sup> *ibid.*

<sup>84</sup> *Mahmood Farooqui v State (Govt of NCT of Delhi)* 2017 SCC OnLine Del 11821

<sup>85</sup> *Bharatiya Nyaya Sanhita* 2023, s 63 Explanation 2 proviso

<sup>86</sup> *State of Himachal Pradesh v Mango Ram* (2000) 7 SCC 224

<sup>87</sup> *Bharatiya Nyaya Sanhita* 2023, s 64; *Bharatiya Sakshya Adhinyam* 2023, s 120

State of Chhattisgarh” cautioned that the presumption under Section 114A is not absolute and courts must analyse the entire factual matrix before applying it.<sup>88</sup>

### CONSTITUTIONAL CRITIQUE

Section 63 of the BNS uses gender-specific language, “a man is said to commit rape.”<sup>89</sup> “Such linguistic nature in law takes away equal protection and brings no criminalisation to female-to-male offences, non-binary and same sex violence.”<sup>90</sup> On the other hand, the gender-neutral framing of the POCSO and the blanket prohibition entrenches male adolescents in more legal vulnerability, and on the flip side, controls female adolescent sexual autonomy.<sup>91</sup>

Quotes in the case of *Independent Thought v Union of India* struck down the exception to Section 375 of the IPC, where Justice Chandrachud reasoned that denying a woman the right to refuse to have actual intercourse violates the bodily integrity and dignity, which is an inherent part protected under Article 21.<sup>92</sup> Reasoning extends to adolescents, where the POCSO’s Absolute Prohibition shadows itself on article 21, adding the rights to autonomy and bodily self-determination of adolescents.<sup>93</sup> Justice Chandrachud further emphasised how dignity is not merely the freedom from sexual violence, but also the freedom to exercise the sexual choice.<sup>94</sup> A right equally applies to adolescents and protects their consent and bodily autonomy, which is in contrast to the legislative framework of POCSO.<sup>95</sup>

### FEMINIST CRITIQUE

To discuss from a feminist legal ideology, the distinctive context of consent under the BNS, POCSO and POSH Act explains an ongoing dispute between protection and self-government in Indian law.<sup>96</sup> It also highlights struggles within the law in India and explains the desires and

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<sup>88</sup> *Saturam Madhavi v State of Chhattisgarh* 2016 SCC (Cri) 727

<sup>89</sup> *Bharatiya Nyaya Sanhita* 2023, s 63

<sup>90</sup> Satyabrata Kumar Moharana, 'A Constitutional Critique of Gendered Sexual Offences in India under the *Bharatiya Nyaya Sanhita*, 2023' (2025) *Social Science Research Network*

<sup>91</sup> Aditi Parwani, 'Revisiting Consent under POCSO: From a "Fixed-Age" Rule to a "Competence-Based" Standard' (2023) 16(2) *NUJS Law Review*; 'Rethinking the Age of Consent in India' *The India Forum* (11 September 2025).

<sup>92</sup> *Independent Thought v Union of India* (2017) 10 SCC 800

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.*

<sup>95</sup> Seema Misra, 'Interpretation of Consent in Rape' (2024) 5(2) *Indian Journal of Integrated Research in Law*.

<sup>96</sup> Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) chs 7–9.

harms experienced by its own.<sup>97</sup> The theories, according to the legal feminists, consent is a concept that cannot be brought down to a definite formal expression of any agreement; instead, it should be understood within the formation of power, age, vulnerability and gender-related inequalities.<sup>98</sup>

Under BNS, consent is identified formally and is also regulated.<sup>99</sup> The statutory structure and system explain consent as a choice that has a proper reason and is voluntary in nature, also feminist critique analyses that the identification remains brittle and conditional.<sup>100</sup> The consent of a woman is usually examined and re-evaluated, where they are basically tested against the factors like expectations regarding consistency, rationality and how much socially it is accepted.<sup>101</sup> Even the judges try to support the women, but they still have definite expectations from women to prove themselves if they clearly consented or refused.<sup>102</sup> But the fact that the social pressures that exist in real life often restrict a woman from choosing is overlooked.<sup>103</sup> This is known as “conditional autonomy”, which explains that a woman’s will is only valid till it follows certain rules and regulations in the correct way.<sup>104</sup>

POCSO talks about an issue that is opposite, which says that there is complete negation of consent.<sup>105</sup> Even though this is introduced as a measure of protection, this ignorance amounts to a paternalistic feminist tension.<sup>106</sup> By stating the fact that there is a complete negation of consent, it means that the adolescents do not have the capacity to consent, wherein the law converts the theory of protection into dominance, which in turn treats sexual activity within adolescents as harmful.<sup>107</sup> From the feminist perspective, it says that adolescents being

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<sup>97</sup> Alexandra Dobrowolsky and Jane Jenson, 'A Critical Affirmation of MacKinnon's Unmodified Theory of the State' (1992) 37 McGill Law Journal 1.

<sup>98</sup> Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) chs 7–9; Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2(2) Legal Theory 121

<sup>99</sup> Seema Misra, 'Interpretation of Consent in Rape' (2024) 5(2) Indian Journal of Integrated Research in Law.

<sup>100</sup> Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) chs 7–9; Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998).

<sup>101</sup> Anup Surendranath, 'Revisiting "Consent" under Indian Rape Law' (2021) NLS Journal.

<sup>102</sup> Aparna Chandra and Mrinal Satish, 'Judicial Narratives and Rape Myths: The Farooqui Case' (2019) Socio-Legal Review.

<sup>103</sup> Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) chs 7–9 ; Alexandra Dobrowolsky and Jane Jenson, 'A Critical Affirmation of MacKinnon's Unmodified Theory of the State' (1992) 37 McGill Law Journal 1.

<sup>104</sup> Ibid.

<sup>105</sup> Aditi Parwani, 'Revisiting Consent under POCSO: From a "Fixed-Age" Rule to a "Competence-Based" Standard' (2023) 16(2) NUJS Law Review.; Law Commission of India, 283rd Report: Review of the Protection of Children from Sexual Offences Act, 2012 (2019).

<sup>106</sup> Girls Not Brides, 'Implication of the POCSO Act in India on Adolescent Sexuality' (2018) Policy Brief.

<sup>107</sup> Aditi Parwani, 'Revisiting Consent under POCSO: From a "Fixed-Age" Rule to a "Competence-Based" Standard' (2023) 16(2) NUJS Law Review.

vulnerable is not invalid.<sup>108</sup> A question that arises is why vulnerability means that the views of the adolescent do not matter.<sup>109</sup> The laws not following a balanced and nuanced approach may result in a sense of silence within the adolescents, specifically girls, by giving an identity to the experiences only when they fit the standards of victimhood.<sup>110</sup>

POSH provides a different feminist view wherein it talks about conduct that focuses on the idea of unwelcomeness within different unequal power structures instead of consent.<sup>111</sup> This approach points towards a central feminist interest, which is that consent that is provided within this unequal power structure can exist on paper, but does not help or exist in the lived real life.<sup>112</sup>

When analysed together, these legal structures and frameworks result in a feminist paradox which is not between protection and consent, but instead it is between listening to the lived real experiences and managing them.<sup>113</sup>

## REFORMATION TOWARDS HARMONISATION

Currently, the reformation is taking place through the Law Commission's 283<sup>rd</sup> report, which recommends lowering the age to 16.<sup>114</sup> Though it would resolve only some of the cases, it leaves the unreserved question beyond that certain age group.<sup>115</sup> Age reduction treats the symptoms and does not address the underlying disease.<sup>116</sup> Even this blanket age reduction requires proper empirical research, which the system lacks.<sup>117</sup> Courts in the case of "State of Uttar Pradesh v. Anurudh & Anr." explicitly notified of the introduction of the Romeo Juliet

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<sup>108</sup> Anup Surendranath, 'Revisiting "Consent" under Indian Rape Law' (2021) *NLS Journal*. ; Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) chs 7–9;

<sup>109</sup> Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) chs 7–9; Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2(2) *Legal Theory* 121

<sup>110</sup> Aparna Chandra and Mrinal Satish, 'Judicial Narratives and Rape Myths: The Farooqui Case' (2019) *Socio-Legal Review*. Girls Not Brides, 'Implication of the POCSO Act in India on Adolescent Sexuality' (2018) Policy Brief.

<sup>111</sup> *Vishakha v State of Rajasthan* (1997) 6 SCC 241 –. ; *Apparel Export Promotion Council v AK Chopra* (1999) 1 SCC 759 .

<sup>112</sup> Anup Surendranath, 'Revisiting "Consent" under Indian Rape Law' (2021) *NLS Journal*.

<sup>113</sup> Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) chs 7–9; Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998).

<sup>114</sup> Law Commission of India, *283rd Report: Review of the Protection of Children from Sexual Offences Act, 2012* (2019).

<sup>115</sup> Law Commission of India, *283rd Report: Review of the Protection of Children from Sexual Offences Act, 2012* (2019); Aditi Parwani, 'Revisiting Consent under POCSO: From a "Fixed-Age" Rule to a "Competence-Based" Standard' (2023) 16(2) *NUJS Law Review*.

<sup>116</sup> Anup Surendranath, 'Revisiting "Consent" under Indian Rape Law' (2021) *NLS Journal*.

<sup>117</sup> Law Commission of India, *283rd Report: Review of the Protection of Children from Sexual Offences Act, 2012* (2019).

clause, which exempts consensual relationships between adolescents from POCSO. This is introduced to prevent the prosecution of young people in consensual relationships where the age gap is minimal.<sup>118</sup> Henceforth, it protects children from judicial abuse.<sup>119</sup>

## CONCLUSION

The article thus proposes an ex-post Competence-based standard rather than an ex-ante fixed age rule, which would help the judges to weigh the evidence post events and help them tailor their outcomes to the POCSO genuine objectives.<sup>120</sup> Developmental neuroscience proves that prefrontal cortex maturation continues until the mid-20s, yet some 16-year-olds demonstrate greater cognitive sophistication than some adults.<sup>121</sup> Thus, assessing competence should incorporate evaluation parameters based on facts such as the chronological age differential, the nature of the relationship, the demonstrated understanding, or the economic or social vulnerability of both the victim and the accused.<sup>122</sup>

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<sup>118</sup> *State of UP v Anurudh* 2014 (2) SCC 1.

<sup>119</sup> Ibid; Girls Not Brides, 'Implication of the POCSO Act in India on Adolescent Sexuality' (2018) Policy Brief.

<sup>120</sup> Aditi Parwani, 'Revisiting Consent under POCSO: From a "Fixed-Age" Rule to a "Competence-Based" Standard' (2023) 16(2) *NUJS Law Review*.

<sup>121</sup> National Institute on Alcohol Abuse and Alcoholism, 'Understanding Adolescent Brain Development' (2015).

<sup>122</sup> 'Between Consent and Crime: Rethinking Legal Responses to Adolescent Sexuality' (2024) NLUO Working Paper.