NAVIGATING THROUGH 'AGE' AND 'AGENCY' IN EERA V. STATE

—Arushi Garg[*]

This paper provides a critical analysis of the Supreme Court judgment in Eera v. *State. It then uses this assessment to initiate a broader discussion on the inaccessibility of the criminal justice system to disabled rape victims. It is found that to some extent, this inaccessibility remains embedded within the legal framework. In other respects, it is a consequence of the failure to implement progressive legislation. Drawing from intersectionality theory and the social model of disability, this paper argues that institutional failures to cater to the needs of disabled persons render the legal system discriminatory. Addressing these failures is, therefore, not merely a concession to be made to 'vulnerable' populations, but a matter of safeguarding the rights of disabled persons. It thus urges the adoption of a rights-based framework in determining the systemic changes that remain to be made to the legal system.*

I. INTRODUCTION

Eera, an intellectually disabled thirty-eight-year-old patient of cerebral palsy, was allegedly raped. Represented by her mother, she argued that she should be

allowed to avail herself of the more victim-friendly procedures accessible to child victims under the Protection of Children from Sexual Offences Act, 2012 (POCSO).[1] POCSO covers sexual assault cases of anyone who is a 'child', i.e., a person below the age of 18 years.[2] The petitioner's argument was that based on her mental age of six and eight years, she too should be regarded as a child under POCSO. The Division Bench of the Supreme Court ruled against the petitioner (Nariman J. concurring), holding that such an understanding would run counter to the current law on statutory interpretation. This article provides a critical appraisal of the judgement, underscores the conceptual limitations inherent in the petition, and ultimately argues in favour of using a rights-based framework to assess and improve the experience of mentally disabled victims in the criminal justice system.

II. AGE IS JUST A NUMBER: A CRITICAL SUMMARY OF THE JUDGMENT

This part analyses the arguments raised before the court, as well as the majority and minority decisions delivered in the case. While agreeing with the verdict to dismiss the petition based on principles of statutory interpretation, it draws attention to some of the more poorly reasoned parts of the decisions. Next, it provides a detailed legal assessment of the systemic gaps that gave rise to the petition, despite its weak foundation in law. Finally, it sharpens the focus on the conceptual framing of this petition, which was premised on a medicalised notion of disability. It argues that there is a need to deploy more empowering and intersectional frameworks for understanding and facilitating the interaction of disabled women with the legal system.

A. Arguments before the Court

To establish that her mental age was under eight years, the petitioner produced a certificate from a neurophysician and psychologist at the All India Institute of Medical Sciences (AIIMS).[3] On account of this mental age, she claimed that she

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1 While this comment recognises that those whose cases are prosecuted under POCSO may or may not be proved to be 'victims', it nonetheless used the term 'victims' in recognition of the fact that most of the procedural amendments discussed in this piece have been introduced to assist those who have, in fact, been victimised.

2 Protection of Children from Sexual Offences Act, 2012, No. 32, § 2(d), Acts of Parliament (2012).

3 *Eera* v. *State (NCT of Delhi)*, (2017) 15 SCC 133 : (2017) 3 MLJ (Cri) 452, ¶3 (hereinafter the Eera case). She suffered from cerebral palsy accompanied by an intellectual disability, as described in the petition: Aishwarya Bhati, Petition in the Matter of Ms. Eera through *Dr. Manjula Krippendorf* v. *State, Scribd*, 2016, available at https://www.scribd.com/doc/311869630/Manjula-Krippender-Final-1 (hereinafter the Petition).

should be allowed to avail herself of the child-friendly procedures under POCSO, as well as apply for compensation under POCSO.[4] She, therefore, argued for a liberal interpretation of the word 'child,' so as to include those of a mental age below 18 years. Before the judgement could be delivered, the accused died and the trial stood abated.[5] However, the petitioner successfully argued that the Court should still adjudicate on the petition on account of the important question of law involved, as well as the victim's need for compensation and rehabilitation.[6]

The petitioner's argument was based on a purposive interpretation of the statute and the characterisation of POCSO as a beneficent legislation.[7] The principle of purposive interpretation was invoked to argue that, "it would be an anathema that the law that has been brought in to protect the class, that is, child, leaves out a part of it though they are worse than the children of the age that is defined under the POCSO Act."[8]

Various provisions of the Indian Penal Code, 1860[9] were also drawn on to emphasise that the legislature understood issues of mental capacity as relevant to criminal justice.[10] Further, case law that emphasises dignity of the child was placed before the court.[11] These arguments were supported by the State.[12]

On the other hand, the *amicus curiae* for the accused referred to the meaning of the word 'child' in *inter alia* the United Nations Convention on the Rights of the Child 1989, which contains no reference to mental age.[13] He argued that if the legislature had intended to include a different procedure for those with a low mental age, it would have done so explicitly, as has been done in other statutes.[14] He also referred to other provisions within POCSO, where mental disabilities have been expressly referred to, when needed.[15] He, therefore, suggested that since the literal meaning of the provision was plain and intelligible, giving it any other interpretation would "lead to ambiguity, chaos and unwarranted delay in the proceedings and also it would have the effect potentiality *(sic)* to derail the trial and defeat the purpose of the Act, for the informant will have the option to venture on the correctness of the mental age."

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4 *See* LiveLaw News Network, Rape Accused Dead; But SC Keeps Case Alive To Decide Victim's Interests [Read Order], LiveLaw (Jan. 21, 2017), http://www.livelaw.in/rape-accused-dead-sc-keeps-case-alive-decide-victims-interests/ (hereinafter the LiveLaw Report); the Petition, *supra* note 3.

5 The LiveLaw Report, *supra* note 4.

6 *Id.*

7 The Eera case, ¶9.

8 *Id.*

9 Pen. Code, No. 45 of 1860, (1860) (hereinafter IPC).

10 The Eera case, ¶9.

11 The Eera case, ¶9.

12 The Eera case, ¶12.

13 The Eera case, ¶14; Preamble, POCSO.

14 The Eera case, ¶14.

15 The Eera case, ¶15.

The threat of ambiguity was highlighted as being particularly salient in a criminal context, which demands a high degree of legislative certainty in fairness to the accused.[16]

B. The Court's Ruling

In the majority judgment, Misra, J, relied on the 'text and context' of the provision, bearing in mind that a liberal interpretation would be more appropriate for a legislation that is intended to advance social welfare or human rights.[17] However, he found that to interpret age as including mental age would be "tantamount to causing violence to the legislation by incorporating a certain words [sic] to the definition" and would create "anomalous situations without there being any guidelines or statutory provisions."[18] Further, Misra, J, pointed out that the interests of disabled people had been expressly provided for where the legislature intended to refer to them.[19] His judgement is rooted in the principle of separation of powers.[20] While this forms the crux of the judgement, a few less persuasive arguments were also relied on in the majority opinion.

The court relied on the fact that the statutory age had been linked to the capacity to consent.[21] The reasoning was that, while POCSO requires us to assume that everyone below the chronological age of 18 years is incapable of consent, the same yardstick cannot be used for those with mental retardation, since this can range from mild to severe impairment.[22] However, consent is irrelevant in the case of those below 18 years of age because of the legal fiction that children below that age are unable to understand the nature and consequences of the sexual act. This legal fiction is created to safeguard the interests of an under-protected category (children), even though it may, on occasion, be over-inclusive of sexually mature persons who are below the age of 18 years. It could equally be argued that having a low mental age is analogously linked to the incapacity to consent to sexual acts. Thus, some of those with below the (chronological) statutory age may be sexually mature, as might some of those with a low mental age. However, if the legal fiction is sustainable in one case, then why not in the other? If the concept of mental age is accepted, the judge's claim that these situations are not analogous seems unpersuasive, though both positions remain problematic because of their underlying paternalism, over-inclusiveness, and clubbing together of persons who lie on a broad spectrum of sexual maturity. The

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16 The Eera case, ¶15.
17 The Eera case, ¶¶¶49, 56, 62.
18 The Eera case, ¶83.
19 *See* CODE CRIM. PROC., No. 2 of 1974 § 164(5A) (1973) [hereinafter CrPC]; The Eera case, ¶84.
20 The Eera case, ¶¶85, 86.
21 *See* Kyoung Soon Park, Requiring the Resistance of Mentally Disabled Women for Rape Charge to Stand (translated by Yoo-hyun Chung), 1 KOREA U. L. REV. 125, 128 (2007).
22 The Eera case, ¶82.

analogy ultimately collapses not for the reason highlighted by the judge, but for other reasons, as discussed in Section III of this article.

Misra, J, also emphasised upon the availability of a procedure to determine the age of a child, as has been provided for under the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJA).[23] He referred to this to reinforce that "the Parliament has deliberately fixed the age of the child and it is in the prism of biological age",[24] but the procedure he referred to has been posited in relation to a distinct statute. It is of tangential relevance to the interpretation of POCSO, since a similar procedure has not been provided for under POCSO. The victim's age is frequently a fact in issue before trial courts and is resolved through a reliance on evidence including birth records, school certificates, and radiological tests.[25] If mental age were to be a fact in issue, it would be similarly resolved by the court, with reliance perhaps being placed on medical expertise through Section 45 of the Indian Evidence Act, 1872. Neither the absence of a procedure for determining the victim's age under POCSO nor the presence of such a procedure under another statute provides a reason for or against the petitioner's argument.

In his concurring opinion, Nariman, J, engaged with the rule on strict construction of criminal statutes, finding that this rule no longer holds good and it is apposite to adopt a 'common-sense approach' while interpreting penal laws; those that have been enacted to combat 'social evils' such as dowry and corruption should, in fact, be liberally construed.[26] Nonetheless, Nariman, J, also found merit in the *amicus*' arguments, accepting that where the legislature had intended to refer to mental or physical disability, it had done so expressly, as under Section 5(k), which defines aggravated penetrative sexual assault.[27] He further referred to Section 13, which penalises the 'use of child for pornographic purposes', including the representation of children's sexual organs.[28] Since the provision specifically refers to a child's sexual organs, he concluded that POCSO clearly refers to biological age - the provision would otherwise penalise the representation of adult sexual organs (where the adult was mentally disabled), which could not have been the intention of the legislature.[29] Next, he referred to provisions under

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[23] The Eera case, ¶82.

[24] The Eera case, ¶82.

[25] Swagata Raha et. al., Centre for the Child, National Law School of India University, Bangalore, *Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), 40-43.

[26] Dissenting opinion in the Eera case, ¶¶25 – 28.

[27] Similarly, he referred to Section 39 which requires the State to prepare guidelines for the use of organisations or persons working on, among other things, the mental health of children, so they could provide assistance associated with the trial. The fact that mental health has been expressly referred to where needed is an indication that it is not a concept that is subsumed within the word 'child.'; the Eera case, ¶¶ 32, 35.

[28] The Eera case, ¶33.

[29] The Eera case, ¶33.

POCSO that require the child's medical examination to be conducted in the presence of a parent or another support-person, which indicated this was a reference to 'child' as is commonly understood.[30] This reasoning overlooks that there could be a legitimate interest in providing those with a low mental age with support from their parents during the medical examination.[31] Finally, Nariman, J, referred to other statutes, which draw a distinction between minors and those with mental illnesses.[32] This clarified that the legislature had been aware of this distinction when enacting POCSO, but had chosen not to include those with mental illness within the statutory ambit.[33] Ultimately, the petition was unsuccessful, but the court ordered the Delhi Legal Services Authority to award the victim 'maximum compensation' under the relevant scheme, consistent with Section 357A of the CrPC.[34]

While some of the court's arguments are stronger than others, on balance, both opinions lay down a persuasive case for the untenability of accepting the petitioner's case. Surprisingly, neither judgement speaks of how far-reaching the success of the petition could have been. An understanding of 'age' as 'mental age' would have ramifications that extend far beyond the issues of compensation and procedure. For example, it could open the door to extending the law on sexual violence to male victims to an unprecedented degree. Most sexual offences under the IPC can only be committed by a man against a woman;[35] for others, the perpetrator can be of any gender, but the victim must be a woman.[36] Notably, this means that intersex victims are likely excluded from the law on sexual offences altogether,[37] while male victims are not recognised under most provisions.[38]

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30 The Eera case, ¶34.

31 For instance, Petersilia suggests it is desirable to have 'someone close to the victim who will assist the victim to understand what is being asked during the investigation' where the victim has a developmental disability; See Joan Petersilia, Invisible Victims - Violence against Persons with Developmental Disabilities, 27(1) HUM. RTS. 9, 10 (2000).

32 Dissenting opinion in the Eera case, ¶¶37 – 41. For instance, he referred to Sections 2(b) and (c) of the Medical Termination of Pregnancy Act, 1971, which define 'mentally ill person' and 'minor' respectively. To give another example, he referred to Sections 2(s) and (t) of the Mental Healthcare Act, 2017, which define 'mental illness' and 'minor' respectively.

33 Dissenting opinion in the Eera case, ¶34.

34 The Eera case, ¶88.

35 *See* IPC, §354 (assault or criminal force to woman with intent to outrage her modesty), §354A (sexual harassment), §354B (assault or use of criminal force to woman with intent to disrobe), §354C (voyeurism), §354D (stalking), §375 (rape), §376B (sexual intercourse by husband upon his wife during separation) and §376D (gang rape).

36 IPC, §376C (sexual intercourse by a person in authority).

37 *See* the definition of 'man' and 'woman' under Section 10 of the IPC; It is not clear what the understanding of this provision would be following the NALSA decision, where the principle of self-identification in respect of gender was recognised, and the state's duty to protect the rights of trans persons, including those of the 'third gender' was recognised; *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438.

38 A notable exception is Section 377, though this provision is broad enough to criminalise even consensual sex between male adults; IPC, §377; *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1; A curative petition against this provision is pending; Vishnupriya Bhandaram, Rainbow at End of the Tunnel? Curative Petition on Section 377, a Last Legal Remedy to

POCSO, on the other hand, is gender neutral. The success of the petition would have meant that a class of disabled people, regardless of their gender, would not only be covered by the broad array of substantive offences available under the statute,[39] but would also be able to avail themselves of the evidentiary rules thereunder. Some of these rules are quite far-reaching and reverse the presumption of innocence wholly or in part.[40] The application of these evidentiary and substantive laws to cognitively disabled adults may or may not be socially desirable, but it should certainly not be introduced by courts without due consideration of the issues at stake.[41]

It seems clear, in retrospect, that the weight of legal authority was against the petition from the outset. Had the petition been successful, the ramifications of the judgement would have been quite drastic compared to the benefits sought by the petitioner. Yet, as explored next, the institutional failures encountered by Eera ultimately led to the petition being filed before the court.

C. The Story of Many Failures: How Eera Reached the Supreme Court

This segment of the paper begins by distilling what gains were to be made by the petitioner through the filing of this petition. It compares the legal regimes in place under POCSO and the CrPC to conclude that most procedural modifications and support structures that would have been available to Eera under POCSO were already available to her under the CrPC. However, the success of the petition would have meant adequate compensation for her, as well as better recording of evidence at trial. The need for compensation and appropriate recording processes was made more acute because of the non-implementation of the guarantees that Eera was entitled to as an adult, disabled woman.

At first glance, it seems that the petition was necessitated because the procedures in place for child victims of sexual assault are more favourable than those available to adult, disabled women. This would explain why the petitioner sought to fit her case under the former, rather than the latter. However, this logic overlooks the several safeguards available to adult, disabled rape victims whose cases reach the criminal justice system, particularly following the Criminal

Toss Draconian Law Out, First Post (Feb. 1, 2016), www.firstpost.com/india/rainbow-at-the-end-of-the-tunnel-curative-petition-on-section-377-a-last-legal-remedy-to-toss-draconian-law-out-2605384.html.

[39] POCSO§§ 3 to 18.

[40] *Id*., at §§29 and 30.

[41] Benedet and Grant argue that the presumption of innocence should be reversed in respect of the consent element for certain sexual offences perpetrated against mentally disabled women.: Janine Benedet & Isabel Grant, Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief, 52 McGill Law Journal 243, 285 (2007).

Law (Amendment) Act in 2013.[42] The juxtaposition of the legal regimes governing mentally disabled adult women on one hand, and children on the other, shows that most rights available to victims of sexual abuse would be available in both cases (see Appendix). However, POCSO allows for greater supervision of the process by parents (or other trusted persons) in the victim's interaction with the police, Magistrate, and medical institution.[43] The investigation is also more carefully regulated, such as through the provisions on police attire,[44] or those allowing the presence of an interpreter or special educator while recording the child's statement.[45] Unlike the procedure laid down for adult victims, the medical examination in POCSO cases can only be conducted by a woman.[46] While both POCSO and the CrPC make provisions for the victim to be compensated, there is no cap on the amount of money that is awarded under POCSO.[47] At the same time, there remain rights that are available to disabled adult women, which are absent from POCSO. The identification procedure during investigation is more closely guarded for these women than it is under POCSO;[48] they are entitled have their case tried by a woman judge,[49] their statement to the Magistrate can be produced in place of their chief examination,[50] and they are entitled to free medical treatment.[51]

Since the trial proceedings had already begun in Eera's case, most of these differences were no longer relevant; what was relevant was that her compensation had been capped at three lakh rupees. The victim needed more money on account of the medical costs she incurred following the alleged sexual assault, which may have been on account of her disability. This would have been possible under the POCSO compensatory scheme. However, it is equally important to note that she should not have been charged for the medical procedures in the first place, since the CrPC entitles rape victims to free medical care. The second key issue was that at trial, the doctor treating her translated her 'child-like' testimony for the court, stating that the victim had, in her own way, told the story of her sexual

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42 Since the First Information Report (FIR) in this case was only filed in July 2014, the petitioner was entitled to all these measures.

43 POCSO, §§26(1), 27(3), 27(4).

44 In fact, it can be intimidating for those with cognitive disabilities to see not just police personnel, but also judges dressed in formal attire; Joan Petersilia, Crime Victims with Developmental Disabilities: A Review Essay, 28(6) CRIM. JUST. & BEHAV. 655, 686 (2016).

45 POCSO, §§24(2), 26(2), 26(3).

46 POCSO, §27(2).

47 POCSO, §33(8); Rule 7, POCSO Rules.

48 The identification should be conducted in front of a Magistrate and should be videographed: CrPC, §54A. However, disabled children would be able to avail themselves of this safeguard: POCSO, §31.

49 CrPC, §§26, 327. A female child might be able to avail herself of this safeguard, if a rape charge has also been framed in her case, under the IPC: POCSO, §31.

50 CrPC, §164(5). A female child might be able to avail herself of this safeguard, if the relevant IPC charge has also been framed in her case, under the IPC: POCSO, §31.

51 CrPC, §357C. A female child might be able to avail herself of this safeguard, if a rape charge has also been framed in her case, under the IPC: POCSO, §31.

assault. This was not accepted by the trial judge, who wanted the child to express herself in terms more age-appropriate for her thirty-eight years.[52] It is likely that the matter would have been treated differently under POCSO, where the judge is expressly entitled to rely on a communications expert or special educator.[53] However, again, at least part of this problem could have been resolved if pre-trial procedures had been faithfully followed. Section 164(5A) of the CrPC mandates that the Judicial Magistrate shall record a disabled rape victim's statement as soon as the commission of the offence is brought to the notice of the police. In doing so, they have to take the assistance of an interpreter or special educator.[54] The statement made by the victim, with the assistance of an interpreter or a special educator, also has to be videographed.[55] This was not done in Eera's case. Had it been done, the recorded statement, including the assistance provided by her doctor, would have substituted her chief examination in court.[56] This would not only have resulted in capturing the interpreter's translation of her 'child like' language, but could also have mitigated the considerable distress caused to her by repeated questioning.[57] However, even in that case, the defence would have had to be given the opportunity to cross-examine her in court.[58]

Finally, the petitioner wanted her testimony to be video-recorded. On account of her disability, she used gestures to express herself and none of these would have formed part of the record unless the testimony had been videographed.[59] The CrPC does not provide for a way to videograph testimony in such cases.[60] Evidence in trial proceedings must be dictated and written down in narrative form and the most the judge can do is record remarks on the demeanour of the victim.[61] This would be a poor substitute for a victim (or any witness) who is attempting to give key parts of her testimony in gestures.[62] There is no provi-

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52 The Eera case, the Petition.

53 Notably, organisations representing the interests of mentally disabled rape victims have earlier recommended that a special educator be made available to these women on similar terms as under POCSO: Aarth Astha et al., Submissions to Justice Verma Committee by Women with Disabilities, Partners for Law in Development, (Jan. 4, 2013), pldindia.org/wp-content/uploads/2013/03/Submissions-by-Women-with-disabilities.pdf.

54 CrPC, §164(5A)(a).

55 *Id*.

56 *Id*., at §164(5A)(b).

57 The distress she underwent was a large part of why alternate procedures were sought by her through the petition: Petition, *supra* note 3.

58 *Id*.

59 The Petition, *supra* note 3; A witness who is unable to speak may testify in any manner, including in writing or through signs, as long as she makes her testimony intelligible to the judge: Indian Evidence Act, 1872, No. 1, §119.

60 It has been held before that where the testimony is in the form of signs, these signs should be recorded (for instance, *Kumbhar Musa Alib* v. *State of Gujarat*, 1964 SCC OnLine Guj 9 : AIR 1966 Guj 101). However, there is no provision to ensure that is recorded through videography.

61 CrPC, §§276, 280.

62 Similarly, in context of the freedom of speech and expression, Dhanda argues that, "provision has to be made for alternative and augmentative modes of communication, as without such provision the right would be meaningless.": Amita Dhanda, Constructing a New Human Rights

sion in POCSO that would have allowed for this either and it was a distinct relief sought in the petition. Given the abatement of the trial, there was no order passed in this respect, but this discussion highlights how ill-suited the law on criminal procedure can be for those with communication difficulties. While a videographed statement to the Magistrate under Section 164(5A) of the CrPC could serve as a substitute for the chief examination, there is no analogous provision for the cross-examination of the victim. This is a substantial shortcoming, since the cross-examination too forms a part of the case record and is used in ultimately making determinations of guilt and punishment. It is imperative for the cross-examination to be recorded such that it conveys the true sense of what the victim said. If verbal communication fails to capture a disabled victim's version with fidelity, then there is a need for the cross-examination to be recorded in other formats, such as through videography. This is all the more pertinent since there is often a time lag between the testimony of the victim and the date on which the judgment is passed. In many cases, this means that the judge who passes the judgement is different from the judge who recorded the victim's testimony.[63] Thus, the record needs to be made in such a way that the mode of recording does not prejudice the victim on account of her disability - any judge who subsequently refers to the file should be able to access the meaning and substance of what the victim expressed. Having just a written record will not allow for this to happen and will, therefore, discriminate against disabled victims who articulate a substantial part of their stories in a non-verbal way, with the aid of gestures. The forensic value of this statement is high in all trials, but is particularly high in cases of sexual assault where corroborating evidence is often absent, and the victim's testimony is the most important basis of conviction.[64]

In sum, it is clear that Eera faced many institutional lacunae. With reference to these, POCSO would have enabled her to get adequate compensation and would have facilitated the recording of her evidence with appropriate assistance. However, neither POCSO, nor the CrPC would have enabled the recording of her testimony in the appropriate format. Each of these issues was exacerbated by the failure of the relevant agencies to follow the CrPC. Collectively taken, these lapses explain why the petition was pursued despite a weak legal basis and the potentially drastic consequences highlighted in Section II.2. While the petition

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Lexicon: Convention on the Rights of Persons with Disabilities, 5(8) INT'L J. HUM. RTS. 46, 49 (2008).

63 District court judges are routinely transferred from one courtroom to another. In Delhi, the posting of district court judges is decided by the Lieutenant Governor of Delhi, in consultation with the Delhi High Court:INDIA CONST. art. 233. Also See Sudhir Krishnaswamy et al.,, Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches, 2 J. NAT'L L. U., DELHI 1, 5 (2014).

64 Jennifer Temkin, Prosecuting and Defending Rape: Perspectives from the Bar, 27 J. L. & SOC'Y 219, 224 (2000). However, Mandal observes that the Court will often disregard the mentally disabled victim's testimony almost entirely in rape cases: Saptarshi Mandal, The Burden of Intelligibility: Disabled Women's Testimony in Rape Trials, 20(1) INDIAN J. GENDER STUD. 1, (2013).

was conceived as a way to provide immediate relief to a disabled rape victim, the next part of this paper argues that its underlying conceptual premise runs the risk of reinforcing a disempowering notion of mentally disabled persons.

D. Medicalising Disability: The Need for a New Framework

This segment urges the exercise of caution while using a medicalised notion of disability, as the petition sought to do. It is remarkable that neither the judgement nor the petition define what they mean by 'mental age', or explain how this is to be determined, in spite of the centrality of this concept to the petition.[65] If the assessment of mental age is to be based solely on a doctor's certificate, this amounts to a complete outsourcing of the judicial function.[66] This seems to be the thrust of the judgment, which speaks of the determination of mental age as something that can only be carried out by an 'expert body'.[67] However, as Amita Dhanda has highlighted, deciding on mental age is "not as straightforward as reading temperature from a thermometer."[68] In her words, the determination of mental age is:

> a deduction, which is made by measuring the deviation from standard performance expected of persons of similar chronological age. The standard performance is constructed by relying on intelligence quotient tests. These tests themselves have been subjected to criticism for the factors they include and exclude and how, contrary to lived experience, they look at human development in static terms.[69]

Janine Benedet and Isabel Grant also reject the notion that mentally disabled women should be equated with children, since this infantilises these women.[70] As these authors emphasise, "[i]t is impossible to relate one's inability to read novels or do fractions to one's expected responses to sexual pressure or manipulation".[71] In light of these observations, it is surprising that the judges seem to

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[65] For instance, in the Canadian case of *R.* v. *T*, 2011 ONCJ 213 it seems the 'mental age' assessment of the mentally disabled victim was just an approximate figure suggested by her mother, challenged by the accused. The court stated that it would have been helpful to have the guidance of experts in the matter. *R.* v. *T*, 2011 ONCJ 213 ¶ ¶ [9], [20], [24], [26], [41], [47].

[66] Similarly, James draws a distinction between the medical and legal tests for disability: Grace James, The Meaning of Disability - Physical and Mental Impairment, 31 Indus. L. J. 156, 157 (2002).

[67] The Eera case, ¶88.

[68] Amita Dhanda, On Protecting the Rights of Women with Disabilities, The New Indian Express, May 6, 2016, www.newindianexpress.com/opinions/2016/may/07/On-Protecting-the-Rights-of-Women-with-Disabilities-933711.html.

[69] Janine Benedet & Isabel Grant, Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities, 22 Feminist Legal Stud. 131, 154 (2014); *Id.*

[70] Janine Benedet & Isabel Grant, A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law, 43 Ottawa L. Rev. 1, 9-12 (2012).

[71] *Id.*

unquestioningly adopt a medicalised notion of 'mental age', in a context where a purposive approach would undoubtedly be more suitable.[72] To leave the decision on mental age solely or predominantly to medical professionals would obscure the heated disagreements that persist among experts on the boundaries of biomedical categories.

It is possible that the bench would have put forward a more nuanced understanding of mental age if the petition had ultimately been allowed. Even so, there remains a pressing need to turn to alternate paradigms for understanding and facilitating the interaction of mentally disabled persons with the legal system.

E. Intersectionality and the Law

The preceding analysis highlights the relevance of adopting an intersectional approach to law and legal reform. First explicitly articulated by black feminist writer Kimberlé Crenshaw, intersectionality theory suggests that human experience is a product of conjoined and intersecting patterns of oppression.[73] While gender is one aspect of this experience, gender intersects with class, caste, religion, disability, race, and many other attributes to produce unique forms of discrimination. What this means for the present essay is that a disabled woman experiences the criminal justice system not just as a disabled person, or as a woman, but as a disabled woman. Some aspects of her experience may be shared with other women, but others are distinct and produced by the simultaneous operation of their gender and disability. Reforms aimed at making the prosecution of sexual violence more victim-friendly do not adequately reflect this.[74] This is why mentally disabled women, including Eera, continue to slip through the cracks. Their disability will make them likelier targets of sexual violence, yet the inadequacy of the criminal justice system will prevent the effective prosecution of their perpetrators.[75] Further, it should be noted that 'disability' itself is not an 'unchanging, undifferentiated' category and there remains a need to recognise the heterogeneity that exists within the broader classification of mentally disabled women.[76] The success of the legal system will lie in recognising "that women with disabilities need both sameness and difference."[77]

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[72] Similarly, James argues in favour of a purposive approach for judges deciding on cases related to disability, since such an approach would acknowledge the socially constructed nature of disability.: Grace James, *supra* note 66, at 159-161.

[73] Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1243 (1991).

[74] Shreya Atrey, Lifting as We Climb: Recognizing Intersectional Gender Violence in Law, 5(6) OÑATI SOCIO-LEGAL SERIES 1512, 1515 (2015).

[75] *See* Kriti Sharma, "Treated Worse than Animals": Abuses against Women and Girls with Psychosocial or Intellectual Disabilities in India, HUMAN RIGHTS WATCH, Dec. 3, 2014, www.hrw.org/report/2014/12/03/treated-worse-animals/abuses-against-women-and-girls-psychosocial-or-intellectual.

[76] Saptarshi Mandal, *supra* note 64, at 21.

[77] Amita Dhanda, Sameness and Difference: Twin Track Empowerment for Women with Disabilities, 15(2) INDIAN J. GENDER STUD. 209, 222 (2008).

To sum up, this case highlights some of the lacunae that remain in the criminal process for mentally disabled victims. It also reinforces the importance of following the procedural modifications that have already been introduced, so as to reduce the trauma faced by these victims. The petition sought to plug some of these gaps by emphasising on the incapacity and developmental immaturity of the petitioner, using highly contested medicalised ideas of disability. In the next part of this article, I argue that a more empowering paradigm can be used to seek the same result, by focussing on the rights of disabled victims.

III. CONCLUSION: 'RIGHT'-ING THE WRONG

The Convention on the Rights of Persons with Disabilities, 2006 (CPRD) was ratified by India in October 2007.[78] It puts India under an obligation to guarantee the right to equality and non-discrimination of persons with disability, and to provide reasonable accommodations to realise this right where needed.[79] In particular, the State must:

> ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[80]

The CPRD further puts States under a specific obligation to counter the 'multiple discrimination' faced by women with disabilities.[81] These international obligations can be used to give meaning to the domestic guarantees of equality and non-discrimination within the Indian context.[82] If, as demonstrated above, Indian legal procedures presume that the persons accessing it will be non-disabled, and fail to take the needs of disabled people into account, such provisions should be understood as discriminatory.[83] There is, thus, a need to dismantle the barriers

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[78] Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S.3 [hereinafter CPRD]; *Status of the Convention on the Rights of Persons with Disabilities*, United Nations Treaty Collection, Oct. 9, 2017, treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

[79] CPRD, art. 5.

[80] CPRD, art. 13(1).

[81] CPRD, Preamble & art. 6.

[82] Dhanda, *supra* note 68; *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241, ¶7; India Const. arts. 14, 15 & 51. For an overview of how constitutional litigation has been deployed to realise the rights of disabled persons, see Amita Dhanda, A Participative Evaluation of the Rights of Persons with Psychosocial Disability, Human Rights Centre, University of Padova, unipd-centrodirittiumani.it/public/docs/34078_mental_health.pdf.

[83] *See* Hughes on how modern systems normalise and universalise the experience of non-disabled persons, thereby marginalising and excluding persons with disability.: Bill Hughes, Bauman's Strangers: Impairment and the Invalidation of Disabled People in Modern and Post-modern Cultures, 17(5) Disability & Soc'y 571, 572 (2002).

within the 'disabling environment' of the criminal justice system, *inter alia* through the introduction of options to videograph testimony, and to allow special educators or communicators at trial, if needed.[84] Failing this, disabled people cannot access the procedure on an equal basis with their non-disabled counterparts, as is mandated by the CPRD.[85]

There are several advantages of adopting a rights-based lens to understand the ableist presumptions of the Indian legal system. Such a perspective does not equate disabled people with children; hence, it does not perpetuate negative stereotypes about persons with disabilities, who are often infantilised and treated as being "permanently weak, childlike, suffering and needy—no matter how autonomous they might actually be."[86] On the contrary, it will reinforce the idea that the rights of disabled people are entitlements, and not charity that they need to be afforded through 'beneficent' or 'benevolent' legislation.[87] Further, it could initiate a more nuanced dialogue on the ways in which the criminal justice system fails disabled victims and how specific disabilities need to be accommodated within criminal procedures, rather than trying to stretch and adapt procedures that have been set up with a different demographic (victims of child sex abuse) in mind. In fact, making certain victim-friendly procedures available to some disabled persons (who have a low mental age) over others (who do not have a low age, but nonetheless need the said procedures) without a rational basis would itself be a move of doubtful constitutional validity.[88] For instance, many witnesses with communication difficulties would benefit from having their testimony videographed and there is no good reason to confine this provision to only those who can demonstrate a low mental age.[89]

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[84] To borrow Barnes' phrase, there is a need to "shift attention away from the real or imagined functional limitations of individuals with perceived impairments and on to the difficulties caused by disabling environments both physical and social." Colin Barnes, A Working Social Model? Disability, Work and Disability Politics in the 21st Century, 20(4) CRITICAL SOC. POL'Y 441, 444 (2016). Also see Stephanie Tierney, A Reluctance to be Defined 'Disabled': How Can the Social Model of Disability Enhance Understanding of Anorexia?, 16(5) DISABILITY & SOC'Y 749, 754 (2001).

[85] Amita Dhanda, *supra* note 68; For a similar argument in the Canadian context, *see* Janine Benedet & Isabel Grant, Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases, 50 OSGOODE HALL L. J. 46 (2012).

[86] Nilika Mehrotra and Shubhangi Vaidya, Exploring Constructs of Intellectual Disability and Personhood in Haryana and Delhi, 15(2) INDIAN J. GENDER STUD. 317, 319 (2008).

[87] Similarly, Dhanda writes that it is important for 'persons with disabilities to move from systems of welfare to regimes of rights.': Amita Dhanda, Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future, 34 SYRACUSE J. INT'L L. & COM. 429, 457 & 462 (2007). The timely reminder that human rights are not charity is borrowed from a speech delivered by Professor Sandra Fredman : Sandra Fredman, Educating for Empowerment, RHODES HOUSE: FORTY YEARS OF RHODES WOMEN, Sept. 16, 2017.

[88] *Deaf Employees Welfare Assn.* v. *Union of India*, (2014) 3 SCC 173.

[89] Temkin highlights that communication difficulties can result from 'deafness, deaf blindness, learning disability, language disorders, cerebral palsy, spina bifida and hydrocephalus.': Jennifer Temkin, Disability, Child Abuse and Criminal Justice, 57(3) MOD. L. REV. 402, 404 (1994).

In fact, the success of the petition could, counter-intuitively, have had certain adverse consequences. Equating mentally disabled people with children may distort the probative value of their testimony in either direction, particularly in cases of sexual assault. To quote Shirley Smiley and Graham Jenner:

> …the analogy [between children and adults with a low mental age] can cause an observer to perceive a mentally disabled adult's prior sexual experience as inappropriate and indicative of 'hyper-sexuality', thus undermining her credibility. Alternatively…a mentally disabled witness's credibility could be bolstered by the perception that children are largely incapable of constructing a lie about sexual assault.[90]

Secondly, given that 'mental age' seems to have been understood as a primarily medical concept, its acceptance could encourage "reductionist views about the abilities, capacities and potential of the disabled".[91] As elaborated upon in Part II above, a more purposive and context-sensitive approach needs to be used for adjudicating cases involving disability, giving due recognition to the social model of disability.

To conclude, this article provides a critical account of the decision in *Eera* v. *State*. It highlights the limitations of the conceptual framework used in the petition and argues that it is important to steer clear of crude legal classifications that club children with intellectually disabled adults. However, it uses this case to focus attention on how a lot more needs to be done before the legal system becomes equipped to handle intersectional claims of sexual violence. Drawing upon the social model of disability, this article ultimately argues that a rights-based framework should be used to make the system accessible for disabled people, in general, and disabled women, in particular.

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[90] Shirley Smiley & Graham Jenner, What's in a Promise? *R.* v. *D.A.I. and the Competency of Adult Witnesses with Mental Disabilities*, 33(4) For the Defence: The Criminal Lawyers' Association Newsletter F3.

[91] Renu Addlakha & Saptarshi Mandal, Disability Law in India: Paradigm Shift or Evolving Discourse?, 44(41-42) Econ. & Pol. Wkly. 62, 64 (2009).

APPENDIX: RIGHTS AVAILABLE TO VICTIMS OF SEXUAL ASSAULT – A COMPARISON BETWEEN MENTALLY DISABLED ADULT WOMEN AND CHILDREN

Measure	***Availability for Mentally Disabled Adult Rape Victims***	***Availability for Children under POCSO***
Pre-trial Rights		
A woman police officer is to lodge the complaint.	Section 154(1), Code of Criminal Procedure 1973 (herafter CrPC)	There is no such provision, although POCSO provides for the recording of complaints by Special Juvenile Police Units (Section 19(1)).
The complaint is to be recorded in a place convenient to the victim.	Section 154(1), CrPC	-
The complaint is to be recorded in the presence of a special educator or interpreter.	Section 154(1), CrPC	Sections 19(3) and (4) - The complaint should be recorded in a simple language to make it comprehensible to the child. If this is not done, or it is otherwise necessary, a special educator is to be appointed.
Videographing of the complaint is to be carried out.	Section 154(1), CrPC	-
There is a prohibition on the overnight detention of victim at the police station.	*Delhi Commission for Women* v. *Delhi Police* (unless the offence is reported at night)[92]	Section 24(4)
The victim's identification of the accused is to be supervised by a Judicial Magistrate to ensure that it is carried out using methods the victim is comfortable with.	Section 54A, CrPC	-
The victim's identification of the accused is to be videographed.	Section 54A, CrPC	-
The victim's statement to the police is to be recorded at the victim's home or another convenient place.	Section 160(1), CrPC	Section 24(1)
The victim's statement to the police is to be recorded by a woman officer.	Section 161(3), CrPC	Section 24(1) – This is to be done "as far as possible".
A parent or another trusted person is to be present at the time of the victim's statement to the police.	-	Section 26(1)

[92] *Delhi Commission for Women* v. *Delhi Police*, 2009 SCC OnLine Del 1057, ¶1 (hereinafter the DCW case). This order only covers areas that fall within the jurisdiction of the Delhi High Court.

A translator or interpreter is to be present during the victim's statement to the police.	-	Section 26(2) – Such assistance "may" be taken.
A special educator or communications expert is to be present during victim's statement to the police.	-	Section 26(3) - Such assistance "may" be sought in case of disabled children.
Members of the police investigating the case are to be dressed in plain clothes.	-	Section 24(2)
The victim's statement to the police is to be videographed.	Section 161(3), CrPC – this "may" be done.	Section 26(4) – This shall be done "wherever possible".
A parent or another trusted person is to be present at the time of the victim's statement to the Magistrate.	-	Section 26(1)
A translator or interpreter is to be present during the victim's statement to the Magistrate.	Section 164(5A), CrPC – the Magistrate may rely on an interpreter or special educator.	Section 26(2) – Such assistance "may" be taken.
A special educator or communications expert is to be present during the victim's statement to the Magistrate.	Section 164(5A), CrPC – the Magistrate may rely on an interpreter or special educator.	Section 26(3) - Such assistance "may" be sought in case of disabled children.
The victim's statement to the Magistrate is to be videographed.	Section 164(5A), CrPC	Section 26(4) – this shall be done "wherever possible"
The defence counsel is not meant to be present during a recording of any statement by the Magistrate.	-	Section 25(1)
Rights at Trial		
A woman judge is to preside over the trial.	Sections 26 and 327(2) ('as far as practicable')	-
The judge is to ensure that the victim is not confronted by the accused at trial, for instance, by the use of screens.	Section 273 ('as far as possible'), CrPC; *Sakshi* v. *Union of India*[93]	Section 36
The victim's pre-recorded statement to the Judicial Magistrate can be produced in lieu of her chief examination.	Section 164(5), CrPC	-
The trial is to be carried out in camera.	Section 327(2), CrPC, although such persons may be allowed to stay as the judge deems fit.	Sections 37 and 33(4) - A family member or other trusted person is to be allowed to stay in court pursuant to the court's duty to create a child-friendly environment.

[93] *Sakshi* v. *Union of India*, (2004) 5 SCC 518 : AIR 2004 SC 3566, ¶¶ 32, 34 (hereinafter the Sakshi case).

The trial judge is to act as intermediary relaying the lawyers' questions to the victim	*Sakshi* v. *Union of India*[94] (extends only to the accused's lawyer)	Section 33(2)
There is a time limit on completion of trial.	Section 309(1), CrPC- The trial must be concluded within two months of the chargesheet being filed; day-to-day trials must be conducted.	Section 35 – The evidence of the child is to be recorded within 30 days of the court taking cognisance of the offence; as far as possible, the trial is to be concluded within a year of the court having taken cognisance of the offence.
The judge is to give breaks to the victim during the testimony, as needed.	*Sakshi* v. *Union of India*[95]	Section 33(3)
The judge is to ensure the victim is not repeatedly called to court.	-	Section 33(5)
Aggressive cross-examination or character assassination of the victim is prohibited.	*State of Punjab* v. *Gurmit Singh*[96]	Section 33(6)
The court is to be assisted by a translator or interpreter.	None, though the judge can request for "psychiatrists, psychologists and experts in sign language etc."[97]	Section 38(1) - This "may" be done "wherever necessary".
The court is to be assisted by a special educator or communications expert.	None, though the judge can request for "psychiatrists, psychologists and experts in sign language etc".[98]	Section 38(2) - This "may" be done in case of a disabled child.
The victims are to have the option of testifying without entering the court premises.	Sections 284 to 290, CrPC – The court may dispense with the attendance of any witness and issue a commission to record their evidence, but only in case of "unreasonable delay, expense or inconvenience".	*Sheeba Abidi* v. *State*[99] allows for the recording of evidence through video-conferencing.
Rehabilitation and Protection		
Free medical treatment is to be provided to victims.	Section 357C[100]	-

[94] *Id*.

[95] *Id*.

[96] *State of Punjab* v. *Gurmit Singh*, (1996) 2 SCC 384, ¶23 (hereinafter Gurmit Singh).

[97] The DCW case, *supra* note 92, at ¶1.

[98] *Id*.

[99] *Sheeba Abidi* v. *State*, 2004 SCC OnLine Del 536 : (2004) 113 DLT 125. This order only covers areas that fall within the jurisdiction of the Delhi High Court.

[100] This section has been in force since 2013, though attention has subsequently had to be drawn to it via circulars. For instance, see S.B. Shashank, Circular on Immediate and Free Treatment to the Victims of Acid Attack (Health & Family Welfare Department Government of National Capital Territory of Delhi ed., 1st ed. 2013).

There is a witness protection programme that victims can avail themselves of.	*State (GNCT of Delhi)* v. *Sidhartha Vashisht*[101]; *Delhi Commission for Women* v. *Delhi Police*[102]	Protecting the victim from the accused during investigation - Section 24(3)
Measures to rehabilitate the victim are to be initiated by the police.	-	Sections 19(5) and (6)
The identity of the victim to be kept protected.	Section 327(3), CrPC; *Delhi Domestic Working Women's Forum* v. *Union of India* [15]; Section 228A, IPC; *Punjab* v. *Gurmit Singh* [26]	Sections 23, 24(5), 33(7)
The victim's medical examination is to be carried out by a woman doctor.	-	Section 27(2)
The victim's medical examination is to be carried out in the presence of a parent, trusted person or other woman nominated by the medical institution.	-	Sections 27(3) and (4)
The victim must be compensated.	Sections 357 and 357A, CrPC read with the Delhi Victims Compensation Scheme 2015;[103] under Article 32 as part of a writ petition[104]	Section 33(8) read with Rule 7 of the Protection of Children from Sexual Offences Rules 2012
The victim is entitled to assistance from a legal practitioner.	*Delhi Domestic Working Women's Forum* v. *Union of India*[105]	Section 40
The victim is entitled to assistance from non-legal experts.	*Delhi Commission for Women* v. *Delhi Police*[106]	Section 39

[101] This judgment only covers such area as falls under the jurisdiction of the Delhi High Court.: *State (GNCT of Delhi)* v. *Sidhartha Vashisht*, 2013 SCC OnLine Del 2118 : (2013) 201 DLT 657 ¶113.

[102] The DCW case, *supra* note 92, at ¶1.

[103] Compensation for adults can be claimed through the Delhi Legal Services Authority under Section 357A, which had set the compensation for rape between 2 and 3 lakh rupees at that time as laid down in the Delhi Victims Compensation Scheme 2012: Delhi State Legal Services Authority, Delhi Victims Compensation Scheme 2012 (Home Police (II) Department ed., 1st ed. 2012). The compensation currently payable rests between 3 and 5 lakh rupees as per the Delhi Victims Compensation Scheme 2015. Delhi State Legal Services Authority, Home Police (II) Department (Delhi State Legal Services Authority ed., 1st ed. 2016).

[104] *Railway Board* v. *Chandrima Das*, (2000) 2 SCC 465.

[105] *Delhi Domestic Working Women's Forum* v. *Union of India*, (1995) 1 SCC 14, ¶14.

[106] The DCW case, *supra* note 92, at ¶1.