



BETWEEN CARE AND CONTROL: THE CONSTITUTIONAL DILEMMA OF CHILD PROTECTION UNDER POCSO

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ABSTRACT

The Protection of Children from Sexual Offences Act, 2012 (POCSO) was enacted to give a comprehensive legislative framework to protect children from sexual abuse and exploitation. It has an approach of caring for children, which is crucial in providing a framework to deal with the hidden nature of child sexual abuse, but also poses fundamental constitutional questions about privacy, dignity and personal autonomy. This article explores the constitutional conflict between the duty of the State to safeguard the rights of children and the rights of individuals, especially the right to privacy, which was established as a fundamental right in the case of Justice K.S. Puttaswamy v. Union of India. It states that children are not just 'vulnerable subjects' who need protection but are also 'people' with constitutional rights and maturing capacities. The article examines the nature of legal intervention, going beyond harm reduction to regulation, in the context of consent, protective paternalism, mandatory reporting, procedural safeguards and digital privacy. It argues that treating everyone below the age of eighteen in the same way may ignore differences in their maturity and ability to make decisions. The article concludes that the true success of child protection law lies not only in preventing abuse but also in protecting children without interfering unnecessarily with their growing autonomy, thereby maintaining the constitutional balance between care and control.

Keywords: POCSO Act, Child Protection, Privacy, Decisional Autonomy, Protective Paternalism.

INTRODUCTION

Is it possible for the law to safeguard the child without sacrificing the personal agency of the child entirely? The question seems simple, yet it reflects a contradiction within the Constitution

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itself. When we think of a child, they are unquestionably in need of safety; however, meaningful safety often requires intrusion. For this, the State has to intervene because the act of sexual abuse is not limited to the streets, nor is it committed out in the open. But it occurs within homes, schools, families and relationships of trust, which are the very spaces that are protected from legal interference. The Protection of Children from Sexual Offences Act, 2012,¹ is caught between these two duties: the duty of the State to protect the child and the duty of the Constitution to protect the autonomy of the individual.

This dilemma deepened after the recognition of privacy as a fundamental right in Justice K. S. Puttaswamy (Retd.) v. Union of India.² This case helped broaden the understanding of privacy as not just a secret, but as an essential condition for dignity and personal liberty. Yet to uncover abuse, the law must enter the child's personal life, communication and body. Therefore, POCSO operates in the very areas constitutional privacy seeks to protect. The real challenge is not whether children should be protected, but how to protect them while still allowing them to grow, make choices and develop their own independence.

NEED FOR A PROTECTIVE LAW

Any critique of POCSO must begin with an uncomfortable reality: child sexual abuse often remains hidden. Children are dependent on adults for care, and abuse may occur within relationships of authority. Emotions and social conditions such as fear, stigma and emotional attachment discourage reporting, and without legal intervention, many offences would never surface.

Children as Individuals and the Need for Protection: Before examining the balance between privacy and protection under the POCSO Act, it is important to ask a fundamental question: Can a child be regarded as an individual?

An individual is generally understood as a person with inherent dignity, legal identity and rights recognised by the Constitution. The Indian Constitution does not reserve these rights only for adults. By using the term "person," it extends these fundamental rights, such as life, dignity, equality, and privacy, to children as well. Therefore, a child is an individual with constitutional protections and personal interests that deserve respect.

¹ Protection of Children from Sexual Offences Act 2012.

² *Justice K S Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1 (SC) [297].

At the same time, childhood is a unique stage of life. Unlike adults, children are still developing emotionally, mentally and socially. Their ability to make informed decisions evolves with age and experience, making them particularly vulnerable to manipulation and abuse. Recognising children as individuals does not mean ignoring these vulnerabilities. Instead, it requires acknowledging that they possess rights while also needing additional safeguards to ensure those rights are not violated.

This is the rationale behind the POCSO Act. Any criticism of the legislation must begin with the reality that child sexual abuse often remains hidden. In many cases, the abuser is a family member, caregiver, or another person in a position of trust and authority. Without legal intervention, countless victims would be left without protection or justice, child-friendly procedures for investigation and trial, and protects the identity of child victims.

Therefore, this act adopts a welfare-oriented approach. It criminalises a wide range of sexual acts, mandates reporting³ of suspected abuse, provides child-friendly courts and prohibits disclosure of the victim's identity. The statute prioritises safety over silence. Its design reflects a protective understanding that is prevention through intervention. However, once the law begins to intervene, it inevitably intersects with personal autonomy. The law's protective power becomes inseparable from its capacity to intrude. It is this intersection that creates this constitutional tension that will be explored through this essay.

PRIVACY AND CONSENT UNDER POCSO

The concept of Privacy can be understood as a three-tiered system. It includes bodily privacy, informational privacy and most importantly, decisional autonomy. Decisional autonomy here refers to the freedom individuals have to make personal decisions without unwanted interference. This includes whom to talk to, what to think, what to believe, relationships, marriage, sexuality and private conversations. When another private person violates one's privacy, it is often described as a horizontal violation, showing that privacy is not only a protection against the State but also against interference by others.

The recognition of privacy as a constitutional right in *Justice K. S. Puttaswamy (Retd.) v. Union of India*⁴ changed Indian constitutional law in a transformative way. The judgment understood privacy through three components: personal liberty, dignity and decisional autonomy. It

³ Protection of Children from Sexual Offences Act 2012, s 19.

⁴ *Justice K S Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1 (SC) [297].

recognised that intrusion into autonomous decision-making and mental life directly affects human dignity.

However, the privacy doctrine was largely articulated with consenting adults in mind. The POCSO Act states that anyone below the age of eighteen years is considered a child. The courts and the law therefore recognise an intelligible differentia between an adult and a child, creating a hierarchical understanding of who can consent based on age and presumed mental capacity. The difficulty arises in cases where an adolescent enters a relationship or engages in consensual sexual activity with another person. Should such situations be viewed as part of private life where there can be no interference, or from a protection point of view where roles of accused and victim are imposed, and the relationship is interpreted as grooming or coercion?

Empirical data highlight this complexity. An Enfold study⁵ of 7,064 POCSO judgments in Assam, Maharashtra and West Bengal (2016–2020) found that 24.3% involved romantic relationships, with 82% of victims refusing to testify against the accused. Another study by Enfold and P39A⁶ examining judicial trends in 264 cases under Section 6 of the Act found that 25.4% involved consensual relationships. These figures suggest that the statute often addresses not only exploitation but also adolescent intimacy.

At the same time, the need for protection cannot be denied. Violence against children remains widespread across socio-economic groups in India. In India, some children face early marriage, domestic abuse, sexual violence, trafficking, online violence, child labour and bullying, all of which have lifelong consequences.⁷ Many incidents that previously went unnoticed are now being reported, reflecting increased awareness of child sexual abuse. Thus, strong legal intervention remains necessary.

Yet certain aspects of the statute raise further questions. The 2019 amendment increased minimum punishment, and Section 4(2)⁸ now applies harsher sentencing for sexual abuse against children below sixteen years of age, even though the Act defines a child⁹ as anyone

⁵ Enfold Proactive Health Trust, *Implementation of the POCSO Act: Study of Special Courts in Assam, Maharashtra and West Bengal (2016–2020)*.

⁶ Project 39A, National Law University Delhi, *Judicial Trends in Child Sexual Abuse Cases* (2021).

⁷ UNICEF India, *Violence Against Children in India* (UNICEF Report).

⁸ Protection of Children from Sexual Offences (Amendment) Act 2019, s 4(2).

⁹ Protection of Children from Sexual Offences Act 2012, s 2(d).

below eighteen years of age. This creates ambiguity about the meaning of protection and whether such differentiation regulates adolescent choices or merely enhances safety.

This section is more or less based on the idea of maturity, which in itself is difficult to measure purely through age classification. Maturity is subjective and influenced by environment, exposure and social context. Even an eighteen-year-old may lack awareness of certain forms of harassment due to cultural conditioning. Conversely, a sixteen-year-old may demonstrate emotional understanding. The law's classification, therefore, produces a troubling inference: assault on a child below sixteen is treated as graver than assault on a sixteen- or seventeen-year-old, even if their maturity is comparable. Such classification raises questions of equality and reasonableness.

The tension between protection and autonomy becomes particularly evident in the way the law approaches consent and decision-making. The questions that arise are whether the survivors or their families truly give their informed consent to investigate and disclose details. Can parental consent substitute for the child's own wishes? Are parents aware of long-term consequences such as social stigma or misuse of shared information? Does consent extend beyond the trial when information remains publicly accessible? These questions indicate that protection may extend beyond safety into control.

The dilemma resembles overprotective parenting. In this sense, the State assumes the role of a legal parent, exercising authority in the child's perceived best interest. Protection can be understood as care, yet when it imposes total restriction, it harms growth.

The working of POCSO¹⁰ may be understood through the lens of protective paternalism. Paternalistic laws restrict liberty to prevent individuals from suffering harm, even where the individual appears to consent. Child-protection legislation is inherently paternalistic because children are presumed vulnerable to coercion and manipulation. Mandatory reporting, parental supervision and criminalisation of sexual activity below a fixed age are therefore justified as preventive safeguards. However, the difficulty arises when paternalism is applied uniformly across childhood and adolescence. While a young child clearly lacks decision-making capacity, an adolescent occupies an intermediate position between dependence and autonomy. When the law treats all minors identically, it risks converting protection into control. The objective of

¹⁰ Protection of Children from Sexual Offences Act 2012.

POCSO¹¹ is to shield children from exploitation, yet in certain contexts, its paternalistic structure regulates behaviour rather than preventing harm.

PROCEDURAL INTRUSION AND THE LIMITS OF PROTECTION

Procedural aspects of the Act illustrate this difficulty. The Special Juvenile Police Unit records the child's statement¹² through a trained officer, preferably a woman officer not in uniform, to reduce fear. While this aims to create comfort, it also raises concerns about whether such structured questioning alters the child's natural expression in pursuit of evidence.

Medical examination is conducted with parental consent. However, if the alleged offender is a parent, whose consent governs and even if there is another legal guardian, the act predominantly considers the parent as the holder of the consent. The statute, therefore, treats parental authority as supervisory, but this may in turn create a conflict with the child's autonomy.

Media attention introduces another concern. Public disclosure of identity is sometimes justified as creating awareness and mobilising outrage against sexual crimes. Yet focusing on the survivor's identity often shifts attention to personal details, encourages victim-blaming, and undermines dignity. Protection of the larger public interest may therefore further weaken the privacy of the child even after the original violation.

These issues demonstrate that the Act simultaneously safeguards and intrudes. The core problem is not the existence of protection but its extent. The law must determine how far privacy should be respected before actual harm occurs, and whether every intervention truly serves the child's welfare.

DIGITAL PRIVACY AND MODERN CHALLENGES

Childhood today also exists within digital communication. Investigations increasingly involve mobile phones, chat records and images. Personal conversations may become legal evidence. In certain situations, adolescents exchange messages or photographs without anticipating legal

¹¹ Protection of Children from Sexual Offences Act 2012.

¹² Protection of Children from Sexual Offences Act 2012, s 24.

consequences. Therefore, the statute, which has been designed to punish predatory behaviour,¹³ may regulate peer interaction.

This produces another paradox wherein the same individual may simultaneously become a victim, witness and accused. Information privacy or the management of personal communication is compromised when the need for safety necessitates the examination of personal information. Thus, the protective role of the law intrudes into the personal realm.

The difficulty exposed by this act is not merely a conflict between privacy and protection but a limitation of protective paternalism when applied to adolescence. The statute treats every person below eighteen as equally incapable of understanding how to and what to consent, while constitutional privacy recognises that dignity involves developing decision-making capacity; this creates a child in law vs. the child in reality match. The child-in-law is a fixed category; the child in reality is a changing individual. By imposing uniform incapacity, the legal framework risks conflating vulnerability with the absence of agency. Protection is essential where power imbalance exists, yet the same protective framework, when applied without context, may regulate behaviour rather than prevent harm. The constitutional challenge is not merely one of balancing safety and privacy, but it is one of recognising the evolving capacity that is protecting children from exploitation without negating the gradual development of autonomy, which is a major component of dignity.

CONCLUSION

The POCSO Act reflects a necessary commitment to child safety, yet its functioning reveals a deeper constitutional challenge. Protection requires intervention, while privacy requires restraint. Therefore, the question is not whether the State should act but how exactly it should act.

A child-protection law ultimately safeguards more than the present moment; it safeguards the future of the child and the individual he or she will become. If protection eliminates all agency, the law may prevent immediate harm but undermine long-term dignity. The success of POCSO lies not only in punishing abuse, but in ensuring that the child it protects does not grow up under a system that treats care as control. True justice is achieved when the law protects vulnerability while allowing autonomy to gradually emerge.

¹³ Protection of Children from Sexual Offences Act 2012, s 23.