

## THE PARADOX OF PROTECTION: ADOLESCENT AUTONOMY VERSUS MANDATORY PROSECUTION UNDER THE BHARATIYA NYAYA SANHITA, 2023 AND THE POCSO ACT, 2012

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### ABSTRACT

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and the Bharatiya Nyaya Sanhita, 2023 (BNS) together constitute the primary legislative architecture governing sexual offences against children in India. While these statutes serve a compelling protective function, their categorical prohibition of all sexual activity involving persons below the age of eighteen years irrespective of consent, the nature of the relationship, or the age differential between the parties has produced a paradox: the law designed to shield adolescents from exploitation simultaneously criminalises consensual peer relationships, exposing young persons to the very harms of stigma, trauma, and systemic injustice that protective legislation seeks to prevent. This article undertakes a critical doctrinal and comparative analysis of the tension between adolescent autonomy and mandatory prosecution under the POCSO Act and the BNS. Drawing upon constitutional principles embedded in Articles 14, 19, and 21 of the Constitution of India, the evolving capacities doctrine of the United Nations Convention on the Rights of the Child (UNCRC), and the best interests of the child standard, the article demonstrates that the current framework is disproportionate in its application to consensual adolescent relationships. The absence of a proximity-in-age exception, the mandatory reporting obligation under Section 19 of the POCSO Act, the limited scope for prosecutorial and judicial discretion, and the weaponisation of these statutes in cases involving inter-caste or inter-religious relationships collectively reveal a structural lacuna in the Indian legal order. Through a comparative survey of the legal frameworks of the United Kingdom, Canada, the United States, the Netherlands, and South Africa, the article identifies best practices and proposes a set of targeted legislative, judicial, and institutional reforms aimed at reconciling the protective objectives of the existing legislation with the recognition of adolescent agency and the evolving capacities of young persons.

**Keywords:** POCSO Act, Bharatiya Nyaya Sanhita, adolescent autonomy, age of consent, mandatory prosecution, proximity-in-age exception, evolving capacities, child sexual offences, India, criminal law reform.

## I. INTRODUCTION

The enactment of the Protection of Children from Sexual Offences Act, 2012 represented a watershed moment in Indian child protection law. By extending the age of consent to eighteen years and imposing mandatory reporting and prosecution obligations, Parliament sought to erect a comprehensive bulwark against child sexual abuse. This protective architecture was subsequently reinforced by the Bharatiya Nyaya Sanhita, 2023, which replaced the Indian Penal Code, 1860, with effect from 1 July 2024, retaining and in certain respects amplifying the framework governing sexual offences against children.

Yet the legislative ambition of absolute protection carries within it an inherent paradox. Adolescence is a developmental continuum marked by the gradual acquisition of cognitive, emotional, and relational capacities. The World Health Organization defines adolescents as individuals aged ten to nineteen years, and developmental psychology consistently confirms that older adolescents possess increasingly sophisticated capacities for autonomous decision-making, including decisions about intimate relationships. By treating all sexual activity involving any person below eighteen years as categorically non-consensual and criminally prosecutable, the POCSO Act and the BNS fail to distinguish between the predatory exploitation of a young child and a consensual relationship between peers of comparable age a failure that generates disproportionate, counterproductive, and potentially harmful outcomes.

This article examines the nature, dimensions, and consequences of this paradox through a systematic doctrinal, constitutional, and comparative analysis. The central argument advanced is that the mandatory prosecution framework, as currently constructed, operates as an instrument of over-criminalisation in respect of consensual adolescent relationships, and that comprehensive legislative and judicial reform is necessary to restore the proportionality and

constitutional legitimacy of the regime. The article proceeds in eight parts: following this introduction, Part II establishes the conceptual and constitutional framework; Part III analyses the statutory provisions of the POCSO Act and the BNS; Part IV examines structural gaps in the current regime; Part V surveys relevant case law; Part VI addresses recent legislative developments; Part VII proposes specific reforms; and Part VIII presents concluding observations.

## II. THEORETICAL AND CONCEPTUAL FRAMEWORK

### A. Adolescence, Autonomy, and Evolving Capacities

The concept of adolescent autonomy occupies a contested space in legal theory, situated at the intersection of childhood vulnerability and adult agency. Autonomy derived from the Greek *autos* (self) and *nomos* (law) denotes the capacity of an individual to govern their own choices, including choices about the body, relationships, and intimate life. Within the developmental arc of adolescence, autonomy is not a binary attribute but exists on a continuum: younger adolescents possess more limited decision-making capacity, while older adolescents demonstrate capabilities for abstract reasoning, future-oriented thinking, and moral deliberation that approach, and in many respects replicate, adult cognitive function.

The evolving capacities doctrine, first articulated within the framework of the United Nations Convention on the Rights of the Child, provides the normative architecture for translating this developmental reality into legal principle. Article 5 of the UNCRC requires that states parties respect the rights and duties of parents to provide direction to the child "in a manner consistent with the evolving capacities of the child," while Article 12 guarantees the child's right to express views in all matters affecting them, with due weight given "in accordance with the age and maturity of the child." The UN Committee on the Rights of the Child, in General Comment No. 20 on adolescent rights, explicitly calls upon states to review

legislation that does not adequately reflect these evolving capacities, particularly in domains such as health and personal relationships.

In the Indian constitutional order, the doctrinal foundation for adolescent autonomy is anchored in Article 21, which the Supreme Court has interpreted to encompass the rights to privacy, dignity, bodily autonomy, and intimate decisional freedom. The landmark judgment in Justice K.S. Puttaswamy (Retd.) v. Union of India recognises privacy as a fundamental right and mandates that any restriction on it must satisfy the tripartite standard of legality, necessity, and proportionality. Article 14 further requires that legal classifications be founded on intelligible differentia bearing a rational nexus to the object of the legislation; the homogeneous treatment of all persons below eighteen as categorically incapable of consent, regardless of age, maturity, or relational context, invites scrutiny under this standard.

### **B. Protective Paternalism and Its Limits**

The protective rationale for the POCSO Act draws upon a model of state paternalism that is both legitimate and, in its extreme application, potentially counter-productive. The protective approach, represented in the scholarship of scholars such as Ved Kumari and Bharti Ali, holds that the age threshold of eighteen years represents a considered legislative judgment about the capacity of children to provide meaningful consent, and that any dilution of this standard risks creating exploitable loopholes. This view has strong empirical foundations: children and young adolescents are disproportionately vulnerable to grooming, coercion, and abuse by older persons who exploit power differentials.

However, a rights-based critique, advanced by scholars such as Mrinal Satish and Flavia Agnes, contends that the over-inclusive application of the POCSO framework to consensual peer relationships constitutes a form of paternalistic overreach that denies adolescents the agency and dignity they are

constitutionally entitled to. This critique is not a call for the abolition of child protective legislation but for its calibration: the criminal law should distinguish between exploitative conduct warranting severe sanction and consensual adolescent relationships that may be more appropriately addressed through education, counselling, and non-penal mechanisms. The principle of proportionality in criminal law

that the severity of the legal response must bear a rational relationship to the gravity of the harm provides the theoretical bridge between the protective and rights-based perspectives.

### **III. LEGAL ANALYSIS: POCSO ACT AND BHARATIYA NYAYA SANHITA**

#### **A. The POCSO Act, 2012: Protective Architecture**

The POCSO Act constitutes the primary legislation governing sexual offences against children and was enacted in fulfilment of India's obligations under the UNCRC and its Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography. The Act defines a "child" as any person below the age of eighteen years and adopts a gender-neutral approach, recognising that both boys and girls may be victims of sexual offences. The legislative architecture comprises a graduated hierarchy of offences: penetrative sexual assault under Section 3, aggravated penetrative sexual assault under Section 5, sexual assault under Section 7, and aggravated sexual assault under Section 9 graded by the nature of the act and the relationship between the parties, with prescribed mandatory minimum sentences ranging from three years to life imprisonment.

The centrepiece of the Act's enforcement mechanism is the mandatory reporting framework under Section 19, which imposes an obligation on any person who has knowledge or apprehension of the commission of an offence under the Act to report it to the police or the Special Juvenile Police Unit. Failure to report attracts imprisonment of up to six months, a fine, or both, under Section 21. This obligation extends to teachers, medical professionals, counsellors,

and any other person who comes into contact with children in a professional capacity. The Act also establishes a specialised adjudicatory framework through Special Courts under Section 28, with procedural safeguards including child-friendly recording of evidence under Section 33 and prohibition on disclosure of the child victim's identity under Section 23.

### **B. The Bharatiya Nyaya Sanhita, 2023: Continuity and Change**

The BNS replaced the Indian Penal Code on 1 July 2024 and introduced several modifications to the substantive criminal law governing sexual offences. Section 63 of the BNS defines rape and retains the basic structure of former Section 375 of the IPC while raising the age threshold within the rape provision from fifteen to sixteen years an incremental shift that represents a partial, if limited, acknowledgment of older adolescent agency. Section 64 prescribes punishment for rape, and Section 69 introduces a new offence of sexual intercourse by employing deceitful means, including false promises of marriage. The BNS also retains a marital exception, permitting sexual intercourse with a wife not below the age of fifteen years, a provision that continues to generate concern in light of the POCSO Act's blanket prohibition on sexual activity involving persons below eighteen.

The practical significance of the BNS's modification to the age of consent is constrained by the continued parallel operation of the POCSO Act. Since the POCSO Act applies to all persons below eighteen regardless of consent, the BNS's modified threshold of sixteen years operates as a largely academic distinction in the majority of cases. The interaction between the two statutes creates a complex dual framework in which prosecutors retain residual flexibility to proceed under either the BNS or the POCSO Act, but the mandatory reporting and prosecution obligations of the POCSO Act effectively foreclose any informal resolution of cases involving consensual adolescent relationships.

## **IV. STRUCTURAL ISSUES AND LEGISLATIVE GAPS**

### **A. Absence of a Proximity-in-Age Exception**

The most consequential structural gap in the Indian legal framework is the complete absence of a proximity-in-age exception sometimes referred to as a close-in-age exemption or Romeo and Juliet clause from both the POCSO Act and the BNS. Such a provision, common in the legal systems of Canada, the United Kingdom, Germany, Australia, and many American states, decriminalises or reduces the legal consequences of consensual sexual activity between peers who are close in age, typically where both parties are adolescents and the age differential is below a prescribed threshold. The absence of any such provision from Indian law means that a seventeen-year-old who engages in a consensual sexual relationship with a sixteen-year-old is exposed to the same penal consequences mandatory minimum imprisonment of three to seven years, sex offender stigma, and lifelong reputational harm as an adult who sexually exploits a young child. This outcome is not only disproportionate but represents a fundamental failure of legislative rationality.

### **B. The Mandatory Reporting Dilemma**

The mandatory reporting framework under Section 19 of the POCSO Act generates a structural dilemma for professionals who work with adolescents. Counsellors, healthcare providers, and educators who become aware of a consensual adolescent relationship are legally required to report it to the police, irrespective of their professional judgment that reporting would be contrary to the adolescent's best interests. This obligation has well-documented deterrent effects: adolescents avoid seeking advice on sexual health, contraception, and relationship safety for fear of triggering criminal proceedings, a phenomenon that paradoxically increases rather than reduces their vulnerability. The mandatory reporting framework also precludes the informal mediation, counselling, and family-based interventions that may be far better suited to addressing the underlying needs of the adolescents involved.

### **C. Limited Prosecutorial and Judicial Discretion**

The mandatory prosecution ethos embedded in the POCSO Act significantly constrains the ability of police, prosecutors, and courts to exercise the discretion that is ordinarily available in the criminal justice system. Once a complaint is registered under the Act, the authorities have limited ability to decline investigation or prosecution, even when the facts strongly suggest a consensual relationship rather than a genuine instance of exploitation. The Special Public Prosecutor is required to proceed on the basis of the police report unless there is no evidence of an offence, a standard that provides little room to consider contextual factors such as the consensual nature of the relationship, the minimal age differential, or the disproportionate harm that prosecution itself would cause. Judicial power to quash proceedings under Section 528 of the BNSS remains available as an exceptional remedy, but its exercise has been inconsistent and insufficiently principled to provide a reliable safeguard.

### **D. Weaponisation as a Tool of Family Control**

Empirical studies by child rights organisations, including the HAQ Centre for Child Rights, the Centre for Child and the Law at the National Law School of India University, and various High Court observations, have documented a pattern of POCSO complaints being filed by parents not because of genuine concerns about exploitation, but as instruments of family control particularly in cases involving inter-caste, inter-religious, or elopement-related relationships. The mandatory nature of the prosecution that follows such complaints means that the criminal justice system is mobilised against adolescents who have exercised the very autonomy and agency that the Constitution protects. This weaponisation reinforces patriarchal norms regarding female sexuality, enables the control of young women's intimate choices, and causes profound and

disproportionate harm to the adolescents involved.

## **V. CASE LAW AND REGULATORY ANALYSIS**

### **A. Supreme Court: The Independent Thought Judgment**

The case of Independent Thought v. Union of India remains the most influential Supreme Court pronouncement on the intersection of adolescent autonomy and the POCSO Act. In this landmark decision, the Court struck down Exception 2 to former Section 375 of the IPC insofar as it permitted sexual intercourse with a wife between the ages of fifteen and eighteen, holding that the marital exception was unconstitutional to the extent of its inconsistency with the POCSO Act and the constitutional guarantees of equality, dignity, and bodily integrity. The Court held that the POCSO Act's protective framework must extend to all children regardless of marital status, and that the distinction between married and unmarried girl children for purposes of the rape law was arbitrary and discriminatory. While the judgment advanced the cause of child protection, it simultaneously raised critical questions about the implications of extending the mandatory prosecution framework to married adolescents and about the Court's failure to address the absence of a proximity-in-age exception.

### **B. Protective and Contextualised Judicial Approaches**

A discernible trend in post-POCSO jurisprudence is the increasing willingness of High Courts to exercise inherent powers under Section 528 of the BNSS to quash proceedings in cases involving adolescent consensual relationships. The Madras High Court has been at the forefront of this development, holding in a series of decisions that the POCSO Act was not designed to criminalise consensual adolescent relationships and articulating criteria for the exercise of judicial discretion—including the age of the parties, the absence of coercion, the nature of the relationship, and the impact of proceedings on the adolescent's education and

well-being. The Delhi, Karnataka, and Bombay High Courts have adopted varied positions, reflecting the absence of a uniform national standard and underscoring the need for comprehensive Supreme Court guidelines.

### C. The Nipun Saxena Guidelines

In *Nipun Saxena v. Union of India*, the Supreme Court issued detailed guidelines on the protection of child victims' identities in POCSO proceedings and emphasised the importance of implementing the Act in a manner consistent with the best interests of the child. While the guidelines did not directly address the issue of consensual adolescent relationships, the Court's recognition of the best interests standard as a guiding interpretive principle has been invoked in subsequent High Court decisions to justify a more contextualised and proportionate application of the Act. The *Alakh Alok Srivastava* case similarly resulted in the Supreme Court issuing directions to expedite POCSO trials and strengthen institutional mechanisms, while implicitly acknowledging concerns about the over-broad application of the legislation.

### D. Regulatory Framework: POCSO Rules, 2020

The POCSO Rules, 2020, issued under Section 45 of the Act, provide the regulatory framework for implementation, including procedures for the recording of statements, the functioning of Special Courts, and the provision of support persons and interpreters for child victims. The Rules emphasise child-sensitive procedures but do not address the specific challenge of cases involving consensual adolescent relationships. The absence of regulatory guidance on the exercise of discretion in such cases, the conditions under which diversion or alternative mechanisms may be employed, or the criteria for determining whether a case

constitutes a genuine instance of exploitation rather than a consensual peer relationship, represents a significant gap that the executive has not yet moved to fill.

## VI. RECENT DEVELOPMENTS

### A. The BNS and its Transitional Challenges

The enforcement of the *Bharatiya Nyaya Sanhita* from 1 July 2024 has introduced significant transitional challenges in the administration of sexual offence law, including the POCSO framework. Pending cases initiated under the IPC continue to be governed by the old law, while fresh offences are prosecuted under the BNS, creating a parallel legal universe that demands careful management by courts and prosecutors. The modification of the age of consent threshold in Section 63 from fifteen to sixteen years, and the introduction of the new deceit-based offence under Section 69, have generated interpretive debates about the relationship between the BNS and the POCSO Act, particularly in respect of persons between the ages of sixteen and eighteen.

### B. Parliamentary and Judicial Engagement with Reform

The Parliamentary Standing Committee on Home Affairs, in its examination of the BNS Bill, received representations from legal scholars and child rights organisations calling for the introduction of a proximity-in-age exception and the modification of the mandatory reporting framework. While the enacted BNS did not incorporate these proposals, the Committee's deliberations indicate a growing legislative awareness of the paradox of protection. At the judicial level, multiple High Court decisions in 2022–2025 have invoked the principles of proportionality and the best interests of the child to quash POCSO proceedings in cases of consensual adolescent relationships, signalling an accelerating judicial engagement with the need for reform that the legislature has not yet acted upon.

### C. National Commission for Protection of Child Rights Analysis

The National Commission for Protection of Child Rights (NCPCR) published an analysis of POCSO Act cases in 2021 that documented the significant proportion of complaints arising from

family disputes, elopement cases, and inter-community relationships rather than from incidents of genuine exploitation. The report highlighted the burden on Special Courts arising from the mandatory prosecution of such cases and recommended the development of institutional mechanisms for the early identification and differentiated treatment of consensual relationship cases. While the report stopped short of recommending a proximity-in-age exception, its acknowledgment of the problem represents an important step in the evolving regulatory discourse.

## VII. REFORM PROPOSALS AND SUGGESTIONS

### A. Legislative: Proximity-in-Age Exception

The most urgent legislative reform required is the introduction of a two-tier proximity-in-age exception in the POCSO Act. Drawing upon the Canadian model under the Criminal Code, this article proposes a first tier decriminalising consensual sexual activity between adolescents aged fourteen to fifteen years and persons not more than three years older, and a second tier for adolescents aged sixteen to seventeen and persons not more than five years older. Both tiers should be conditioned on genuine consent, absence of coercion, deception, or exploitation, and the younger party being at least fourteen years of age. The exception should expressly not apply where the accused is in a position of trust, authority, or dependency in relation to the adolescent, ensuring that the protective ambit of the Act is preserved against genuine exploitation.

### B. Prosecutorial Guidelines

The Ministry of Home Affairs, in consultation with the NCPDR and the Bar Council of India, should issue comprehensive prosecutorial guidelines for POCSO cases analogous to the Crown Prosecution Service guidelines in the United Kingdom. These guidelines should set out criteria for determining when prosecution is not in the public interest, including: the consensual nature of the

relationship, the minimal age differential between the parties, the absence of any prior criminal history or pattern of exploitation, the impact of prosecution on the adolescent's education and mental health, and the views of the child expressed through appropriate child-sensitive procedures. The guidelines should also clarify the obligation of the Special Public Prosecutor to consider the best interests of the child as a primary factor in every prosecutorial decision.

### C. Supreme Court Guidelines for Judicial Discretion

This article urges the Supreme Court, either in an appropriate pending matter or on its own motion, to issue comprehensive guidelines for the adjudication of POCSO cases involving adolescent consensual relationships. The guidelines should include a principled framework of criteria for distinguishing genuine exploitation from consensual peer relationships, a rebuttable presumption in favour of quashing proceedings where the age differential is minimal and consent is established, a requirement to consider the best interests of the child as a primary consideration, and a framework for the deployment of restorative justice, counselling, and diversion mechanisms as alternatives to criminal prosecution.

### D. Restorative Justice and Diversion

The development of restorative justice and diversion programmes as statutory alternatives to prosecution is a reform of foundational importance. Drawing upon the South African Child Justice Act model and the diversion provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, the government should enact enabling legislation providing for the diversion of POCSO cases involving consensual adolescent relationships towards programmes of counselling, sex education, and community-based mediation. These programmes should be voluntary, confidential, staffed by trained facilitators, and sensitive to the social, cultural, and economic diversity of adolescent experiences across India.

### **E. Comprehensive Sex Education and Counselling Services**

Legislative and judicial reform must be accompanied by institutional investment in comprehensive, age-appropriate, and culturally sensitive sex education for all schools in India. Drawing upon the Dutch and Canadian models, the curriculum should cover anatomy, contraception, consent, healthy relationships, legal rights and responsibilities, and the recognition and reporting of abuse. Equally critical is the establishment of accessible and confidential counselling services for adolescents, with a statutory exception from mandatory reporting requirements for counsellors who provide services to adolescents in consensual relationships, modelled on the therapeutic privilege exception in several comparable jurisdictions.

### **F. Data Collection and Periodic Statutory Review**

The NCRB and the NCPCR should disaggregate POCSO case data by the age of both parties, the nature of the relationship, the disposition of proceedings, and the outcomes for the adolescents involved. This data infrastructure is a prerequisite for evidence-based policy reform and judicial engagement. The government should additionally establish a mechanism for periodic statutory review of the POCSO Act and related provisions of the BNS, involving the judiciary, legal scholars, child rights advocates, medical professionals, educators, and—critically the voices of adolescents themselves.

### **VIII. CONCLUSION**

The paradox of protection lies at the heart of the Indian legal framework governing adolescent sexual autonomy. The POCSO Act and the Bharatiya Nyaya Sanhita, enacted to shield children from exploitation, have in their categorical rigidity become instruments that criminalise and penalise the consensual relationships of older adolescents—precisely the population that Indian constitutional law,

international human rights norms, and the evolving capacities doctrine recognise as possessing a significant and growing degree of autonomy and agency. The mandatory prosecution framework, the absence of a proximity-in-age exception, and the weaponisation of the POCSO Act as a tool of family control have produced outcomes that are disproportionate, constitutionally questionable, and antithetical to the best interests of the children the law seeks to protect.

The comparative analysis presented in this article demonstrates that India is an outlier among comparable democratic legal systems in its failure to provide any mechanism for distinguishing between exploitative sexual conduct and consensual adolescent peer relationships. The United Kingdom, Canada, the United States, the Netherlands, and South Africa have each, in their distinct ways, developed legal frameworks that maintain robust protection against exploitation while recognising the evolving autonomy of older adolescents. India can and should draw upon these comparative experiences to develop a more calibrated, proportionate, and constitutionally grounded approach to the regulation of adolescent sexual activity.

The reform agenda proposed in this article—a two-tier proximity-in-age exception, comprehensive prosecutorial guidelines, Supreme Court directions on judicial discretion, restorative justice and diversion mechanisms, investment in sex education and confidential counselling, and a robust data collection and periodic review framework—represents a coherent and implementable programme for resolving the paradox of protection. These reforms do not weaken the legal safeguards against child sexual exploitation; they strengthen them by ensuring that the criminal law's considerable coercive power is deployed where it is genuinely warranted and withheld where it would cause greater harm than benefit. The measure of any child protection statute is not the severity of its prohibitions but the fidelity with

which it serves the best interests of the children in whose name it speaks.

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