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The Gender-Neutral Approach of the Protection of Children from Sexual Offences (POCSO) Act, 2012 in Safeguarding Children's Rights

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ABSTRACT

The Protection of Children from Sexual Offences (POCSO) Act, 2012, is a landmark legislation in India designed to safeguard children from sexual abuse and exploitation. One of the most distinctive features of the Act is its gender-neutral approach, departing from traditional legal norms that often classify sexual offenses based on gender. This paper delves into the significance of gender neutrality within the POCSO Act, highlighting its implications, challenges, and potential for reforming the discourse on child protection. The paper utilizes a comprehensive review of scholarly research and legal literature to analyse the impact of gender neutrality on child protection within the Indian legal framework.

The Indian Penal Code of 1860 criminalises rape, wherein only men can be held liable for rape, and only women are recognized as potential victims. Conversely, laws concerning acid attacks are gender-neutral due to the use of the term 'whoever' in the relevant section, as stipulated by the Criminal Law Amendment Act of 2013. The paper further sheds light on the intricate legal landscape where these legislations coexist and aims to contribute to the ongoing discourse on harmonizing these legislative approaches for a more effective protection of children's rights in cases of sexual offenses.

Keywords: Gender-Neutral, Sexual Assault, Child, Rape, Consensual Relationship.

I. INTRODUCTION

The Protection of Children from Sexual Offences (POCSO) Act, 2012, is a response to the escalating concerns over child sexual abuse and the need for a comprehensive legal framework to address such offenses. In a remarkable departure from conventional legal norms, the Act adopts a gender-neutral stance, recognizing that both boys and girls can be victims of sexual

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abuse, and that perpetrators can belong to any gender.³ This paradigm shift towards gender neutrality holds profound implications for child protection, redefining societal perspectives and legal standards surrounding sexual offenses against minors. Ever since India's adoption of the United Nations Convention on the Rights of the Child in 1992, a commitment to safeguarding children from sexual crimes has been ingrained.⁴ To fulfil this commitment, the POCSO Act, was enacted as a gender-neutral law. This unique aspect of the Act is rooted in its definition of a 'Child' as stipulated within the legislation.⁵ Unlike the Indian Penal Code of 1860, which predominantly addresses sexual offenses against women, the POCSO Act emerged to address this gap comprehensively. However, recent analyses of crime data have unveiled a paradox: the Act can inadvertently criminalize consensual relationships, thereby introducing a gender-specific dimension. This unintended consequence has led to a departure from the Act's core objective, posing challenges.

II. CONFLICT BETWEEN THE PENAL LAW AND POCSO ACT

One of the most significant aspects of the POCSO Act, 2012, is its commitment to gender neutrality. Traditionally, legal systems have often treated sexual offenses as primarily perpetrated by males against females. However, the POCSO Act recognizes that sexual abuse can happen regardless of the gender of the victim or the perpetrator. This recognition reflects a broader societal understanding that child sexual abuse is not limited to any particular gender or sex.⁶

The Criminal Law Amendment Act, 2013 (2013 Amendment) has introduced a modification in the Protection of Children from Sexual Offences Act (POCSO) by revising section 42 of the Act. The primary aim of section 42 is to establish the overriding effect of penal provision which is greater in degree. In effect it establishes the superiority of the general provisions in the Indian Penal Code (IPC) over those in the POCSO Act when it comes to determining penalties, as the IPC outlines more severe penalties for rape. However, this applies only when the action or inaction amounts to an offense under both the IPC and the POCSO Act.⁷ For instance,

³ Chauhan, Damini. "An Analysis of POCSO Act, 2012." *Indian JL & Legal Rsch.* 3 (2021): 1.

⁴ Article 3 of the Convention:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

⁵ Sec. 2(d): "child" means any person below the age of eighteen years.

⁶ Yashwanth, Bellampalli. "Gender Neutral India." *Legal Lock J.* 1 (2021): 11.

⁷ 42. Alternate punishment.—Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 2[376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in

considering the cases of ‘penetrative sexual assault’. While POCSO prescribes a minimum punishment of 7 years’ imprisonment, the parallel provision in the IPC dictates either 10 years (when the woman is between 16 and 18 years) or 20 years (when the woman is under 16 years old). In such instances, the convicted individual will receive a sentence based on the punishment set by the IPC. The amendment in the POCSO Act was necessitated due to the incorporation of new offenses in the IPC through the 2013 Amendment. To extend the enhanced penalties outlined in the IPC to cases falling under the POCSO Act, the amendment involved a revision of section 42 within the POCSO Act, with newly introduced offenses (such as section 376AB, 376B, 376DA, 376DB) taking their place.

However, during this process, the 2013 Amendment has overlooked a significant factor: the distinction between the gender-neutral nature of the POCSO Act and the gender-specific framework governing rape in the IPC.⁸ To illustrate, while the POCSO Act employs the term “person” to encompass both victims and perpetrators, sections 375, 376, and subsequent provisions in the IPC specifically employ the terms “woman” and “man” when referring to victims and perpetrators, respectively. Consequently, a situation emerges where individuals found guilty of committing penetrative sexual assault on a girl below 12 years of age would face a minimum sentence of life imprisonment or even the death penalty. This outcome results from the interaction of section 376AB in conjunction with section 42 of the POCSO Act.

Nevertheless, a reduced penalty, either 10 years or life imprisonment, would be imposed for perpetrating penetrative sexual assault on a boy, given the absence of a corresponding provision for male rape in the IPC. This inconsistency is further evident in provisions related to gang rape, where the same offense committed against a boy and a girl results in differing treatment. The manner in which the 2013 Amendment distinguishes between genders when determining penalties falls short of upholding the principle of equal protection, thereby infringing upon Article 14 of the constitution.⁹

Moreover, it is imperative to recognize the necessity of initiating public discourse to ensure justice prevails. This discourse is aimed at introducing gender-neutral criminal laws for sexual offenses, a development crucial for the equitable functioning of justice systems. Such legal frameworks should incorporate effective mechanisms to counter potential misuse. On a global

any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

⁸ Tyagi, Ayushi. “Inconsistency between Protection of Child from Sexual Offences and Indian Penal Code: Analysis of Child Sexual Abuse in India.” *Issue 4 Int’l JL Mgmt. & Human.* 4 (2021): 1409.

⁹ Desikan, G. V. “Sex Laws and Constitutional Rights in India: A Quintessential Paradox concerning Gender Neutrality.” *Issue 4 Int’l JL Mgmt. & Human.* 5 (2022): 1169.

scale, numerous countries have undertaken appropriate amendments to their criminal codes to include gender-neutral provisions. An emerging consensus acknowledges the significant prevalence of male and transgender individuals as victims of sexual offenses, underscoring the urgency for comprehensive reform.

The realm of criminal law serves as a crucial bridge that defines the intricate rapport between a state and its populace. It is, therefore, imperative for this relationship to be meticulously delineated within penal statutes, promoting clarity and precision. Given that criminal law is an authoritative tool employed by the state to regulate an individual's fundamental right to life and personal liberty, it is paramount for it to be devoid of any disparities or ambiguities.¹⁰

Nonetheless, in recent times, an unsettling trend of vagueness and ambiguity seems to have pervaded contemporary legislative interventions. The core virtues that Macaulay held dear in a sound legal code have, regrettably, been neglected in the realm of legislative drafting. The utilization of obscure phrasing within criminal laws indicates a dearth of precision in their formulation. Evident incongruities within India's criminal laws pose challenges for both ordinary citizens and legal experts in comprehending the exact purview of specific provisions. On one hand, the Indian Penal Code (IPC) and its subsequent amendments remain subjects of constant judicial interpretation, sometimes encroaching upon the domain of law-making due to the gradual pace of law reforms. Conversely, the legislature and the executive seem to have not heeded vital law reform recommendations presented by expert bodies and committees, thus displaying a concerning inertia in driving legislative progress.

Thus, the IPC and its recent amendments aimed at countering rape-related offenses remain ensnared by uncertainties, incongruities, and a notable lack of enthusiasm for reform. A hastily constructed legislation, conceived to appease public sentiments, may indeed yield positive optics and resonate in political discourse. Nevertheless, this approach inadvertently undermines the integrity of comprehensive legal reforms while inundating the judicial system with petitions that implore for definitive legal interpretations. Despite the opportunity presented by the 2013 amendment Act, the Parliament refrained from effecting crucial changes within the IPC, thus missing another potential chance for enhancement. By merely effecting surface-level changes, the State seems to have evaded its responsibility to address the more imperative necessity—a thorough overhaul of the penal code.

Furthermore, the State's narrative focused on deterrence appears as misguided institutional assertiveness, detached from the practical realities on the ground. What is expected from any

¹⁰ RB, Monesh. "Rape Laws in India: A Gender Perspective." *Available at SSRN 4309580* (2022).

governing body transcends the mere passage of laws; it necessitates rigorous research, meticulous assessment of findings, and the application of reason prior to enacting any legislation.

Without a comprehensive and research-driven approach, the legislature will continue to enact laws that are ambiguous and broadly encompassing, disregarding fundamental principles of criminal law jurisprudence and constitutional values. It is crucial for all stakeholders in the criminal justice system to bear in mind that respect for and adherence to laws can only be achieved when lawmakers recognize the need to reconcile individual rights with those of society, in tandem with the State's interest in upholding law and order.¹¹

III. IMPORTANCE OF GENDER NEUTRALITY

By acknowledging that both boys and girls can be victims of sexual abuse, and recognizing that offenders can be of any gender, the POCSO Act emphasizes that protecting children from sexual offenses transcends gender lines. This inclusive perspective ensures that the law does not inadvertently marginalize any group of victims based on outdated notions of gender, thus upholding the principles of equality and inclusivity.¹²

One of the fundamental aspects of the POCSO Act is its focus on protecting vulnerable victims. Child sexual abuse is a grave issue that affects children across the gender spectrum. The gender-neutral approach of the POCSO Act ensures that all children, regardless of their gender identity, are afforded the same protection under the law. This is crucial in preventing the marginalization of victims who do not conform to traditional gender norms. In a society where non-binary and transgender identities are increasingly recognized, it is vital that legal protections keep pace with social changes. By adopting a gender-neutral framework, the POCSO Act acknowledges the diverse experiences of all children and provides a legal recourse that is inclusive and just.¹³

Moreover, the POCSO Act's gender-neutral stance is instrumental in eliminating stereotypes and stigmas associated with sexual abuse. Traditionally, societal narratives around sexual abuse have often been framed within a gender binary, with assumptions that girls are the primary victims and boys the primary perpetrators. This narrow perspective overlooks the complex realities of sexual abuse and perpetuates harmful stereotypes. By treating sexual offenses as gender-neutral acts, the POCSO Act challenges these stereotypes and promotes a more nuanced

¹¹ Kumbharikar-Bhale, Arundhati, and Aishwarya Jadhav-Patil. "Gender Neutrality in sexual offences a Necessity." (2021).

¹² Chapman, Rachel. "Moving beyond 'gender-neutral': Creating gender expansive environments in early childhood education." *Gender and Education* 34.1 (2022): 1-16.

¹³ Rumney, Philip, and Martin Morgan-Taylor. "Recognizing the male victim: Gender neutrality and the law of rape: Part one." *Anglo-Am. L. Rev.* 26 (1997): 198.

understanding of sexual abuse. It shifts the focus from gender to the dynamics of power and control that underpin such crimes. This broader perspective is essential in changing societal attitudes and fostering a more supportive environment for all victims of sexual abuse.¹⁴

The impact of gender-neutral legislation on reporting rates of sexual offenses cannot be overstated. One of the significant barriers to reporting sexual abuse is the fear of not being believed or taken seriously, particularly for male or non-binary victims who may not fit the stereotypical image of a sexual abuse victim. Gender-neutral legislation can contribute to a higher reporting rate of sexual offenses by ensuring that all victims, regardless of their gender, know they are equally protected by the law. This knowledge can empower more victims to come forward and report the abuse they have experienced. Increased reporting is crucial in addressing and preventing sexual offenses, as it leads to greater accountability and justice for perpetrators and provides a pathway to healing and support for victims.¹⁵

IV. JUDICIAL APPROACH ON THE GENDER NEUTRALITY OF THE POCSO ACT

The pivotal hallmark of the POCSO Act was to establish an environment conducive to child victims throughout the legal proceedings and beyond. A noteworthy instance highlighting the gender-neutral nature of this legislation occurred in the Delhi High Court during an appeal that contested the conviction order of a Trial Court. The appeal was lodged by the defendant and was heard by a Bench comprising Justice S. P. Garg and Justice C. Hari Shankar. The appeal challenged the conviction order handed down by the Additional Sessions Judge, under the purview of Section 6 of the POCSO Act. In adherence to the statutory provisions, the Act defines ‘child’ under Section 2(1)(d), encompassing victims under the age of 18 years, irrespective of their gender. The Bench’s perspective was influenced by the precedent set in the case of *Alakh Alok Srivastava vs U.O.*¹⁶, which underlined the legislation’s gender-neutral character. Notably, it was observed that the POCSO Act, which is gender-neutral in its essence, eliminates discrimination based on gender between male and female victims of sexual offenses. The legal precedents that have evolved concerning the testimony of female victims as witnesses apply, with necessary adjustments, to male victims within the framework of the POCSO Act. In its emphasis on the act’s gender-neutral application, the Court not only confirmed the conviction but also adjusted the sentence of the defendant from life imprisonment to 15 years of rigorous imprisonment, substantiated by the rationale that the inherent right to live freely, in

¹⁴ Gupta, Vishal K., Daniel B. Turban, and Nachiket M. Bhawe. "The effect of gender stereotype activation on entrepreneurial intentions." *Journal of applied psychology* 93.5 (2008): 1053.

¹⁵ Goldscheid, Julie. "Gender neutrality and the “Violence Against Women” frame." *University of Miami Race & Social Justice Law Review* 5.2 (2015): 307.

¹⁶ 2018 SCC 478.

the open air, is constitutionally assured to every Indian citizen, and this guarantee is reinforced by Article 21 of the Constitution of India. Consequently, a permanent deprivation of this right, for a lifetime, should be reserved for only the most severe of transgressors in the gravest of cases. In pursuit of justice, compassion must consistently balance the rigid tenets of the law, enabling a harmonious equilibrium.

In a recent legal precedent, specifically the case of *Rakesh v State of NCT of Delhi & Anr*¹⁷, the Delhi High Court made a significant observation regarding the inclusive nature of the POCSO Act. The court's deliberation centered on the principle that the Act extends its protection to all genders, demonstrating its commitment to equitable justice. The Act is gender neutral and it is 'most insensitive' and misleading to suggest that the legislation is being misused. Justice Swarana Kanta Sharma, presiding over the case, underscored a fundamental truth – that any legal framework, irrespective of its gender orientation, can be susceptible to misuse. However, she emphasized the paramount importance of the legislature's continued enactment of such laws and the judiciary's resolute commitment to upholding and enforcing them.

Justice Sharma's discerning perspective aligns with a broader understanding that the existence of laws promoting gender-neutral and inclusive justice is indispensable in contemporary society. The judiciary's role in maintaining the integrity of these laws through careful interpretation and implementation is essential to ensuring that they serve their intended purpose, which is to provide justice and protection to individuals of all genders. In essence, this case not only upholds the gender-neutral essence of the POCSO Act but also serves as a reminder of the larger societal imperative to focus on the constructive potential of legislation rather than dwelling on hypothetical misuse. This stance reinforces the judiciary's dedication to the equitable application of laws and its proactive role in cultivating a just and balanced legal landscape for all individuals, regardless of their gender.

Justice Sharma further remarked that any law, whether gender-based or not, has the "potential of being misused" but that does not mean that the legislature will stop enacting such laws as they have been enacted to "curb the larger menace of commission of such offences and getting justice to genuine victims".

V. CONCLUSION

The gender-neutral approach of the POCSO Act signifies a shift from the traditional binary

¹⁷ CRL. M.C. 5032/2023.

understanding of sexual offenses to a more inclusive and progressive framework. Historically, sexual offenses have been conceptualized primarily as acts committed by males against females. This oversimplified classification not only perpetuates stereotypes but also excludes male victims and female perpetrators. The Act's gender-neutral stance rectifies this imbalance by acknowledging the diverse realities of sexual abuse.¹⁸

Gender neutrality in the POCSO Act is a manifestation of the principles of inclusivity and equality. By treating all children, regardless of their gender, as potential victims of sexual offenses, the Act underscores the universal vulnerability of minors. In a society that has historically marginalized male victims and downplayed the capacity of females to be perpetrators, this legal shift challenges traditional notions and fosters a more equitable understanding of child protection.

A significant advantage of gender neutrality is its ability to challenge stereotypes and stigmas surrounding child sexual abuse. When society associates sexual offenses exclusively with a particular gender dynamic, it obscures the fact that abuse is driven by power imbalances, rather than being a manifestation of gender norms. The POCSO Act's gender-neutral stance exposes these power dynamics, enabling a more nuanced analysis of the motivations behind sexual abuse and promoting broader societal understanding.¹⁹ Gender neutrality within the POCSO Act goes beyond recognizing that boys can be victims and girls can be perpetrators. It also accounts for transgender, intersex, and non-binary individuals who can experience sexual abuse. Traditional legal frameworks often overlook the unique vulnerabilities faced by these individuals. The gender-neutral approach embraces a more comprehensive perspective that accommodates a wide spectrum of identities, thereby ensuring that no child is left unprotected.²⁰

While the gender-neutral approach of the POCSO Act is commendable, it has not been without challenges and criticisms. There is still a lack of awareness about the gender-neutral provisions of the Act. Many people continue to associate child sexual abuse primarily with female victims and male perpetrators, which can lead to misunderstanding and misinterpretation of the law. Societal attitudes and prejudices might hinder the effective implementation of the gender-neutral provisions. Some segments of society may be resistant to acknowledging that males can be victims of sexual abuse, or that females can be perpetrators. Moreover, the practical implementation of gender neutrality in the legal system can be complex. Legal practitioners,

¹⁸ Nath, Ameya. "Gender Neutrality in Rape Laws: Looking beyond the Gender Binary." *Supremo Amicus* 21 (2020): 716.

¹⁹ Tyagi S, Karande S. Child sexual abuse in India: A wake-up call. *J Postgrad Med* 2021;67:125-9.

²⁰ Pathak, Harshad. "Beyond the binary: Rethinking gender neutrality in Indian rape law." *Asian Journal of Comparative Law* 11.2 (2016): 367-397.

judges, and law enforcement officials need to be sensitized to the nuances of gender-neutral offenses to ensure fair and just legal proceedings. Further, the absence of comprehensive data on gender-neutral cases can impede research and policy development in this area. Accurate and detailed data is essential for creating effective intervention strategies and support systems.

It's important to note that initiating a conversation about implementing gender-neutral laws for sexual offenses and establishing effective strategies to prevent their misuse aligns with the broader societal benefit. Across the world, nations have recognized the need for adjustments in their legal frameworks by incorporating gender-neutral provisions. Furthermore, the increasing recognition of the substantial number of male and transgender individuals who experience sexual assault is becoming more widespread.
