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## **PROTECTION WITHOUT ACCESSIBILITY: DISABILITY, CONSENT AND CHILD PROTECTION LAW IN INDIA**

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Keertana Rajagopal, National Law University Odisha

### **ABSTRACT**

This article will critically analyze two laws—Protection of Children from Sexual Offences Act, 2012 ("POCSO") and Prohibition of Child Marriage Act, 2006 ("PCMA")—in relation to neurodivergence and disability justice. In particular, it argues that these two pieces of legislation persist in maintaining themselves within the "neuro-normative paradigm" which presupposes that children experience and express their trauma in uniform neuro-typical ways. Hence, such an approach leaves out the experiences of neurodivergent children. The paper criticizes the existence of the "chronological trap" that is characteristic of Indian child protection law since, despite the presence of a notion of functional and developmental vulnerability, Indian child protection law treats chronological age as the only factor in determining a child's vulnerable status. Using concepts and principles of disability jurisprudence, judicial pronouncements, and the principle of substantive equality, the paper demonstrates that contemporary legal framework does not take into consideration non-normative expressions of consent, distress, and communication. Beyond that, this article proposes three recommendations for improvement of existing laws to ensure that they address concerns of neurodivergent children.

**Keywords:** Neurodivergence, Disability Justice, Child Protection Law, Functional Consent.

## Section I: A Law That Was Never Really Written for Them

The Protection of Children from Sexual Offences Act, 2012 (“POCSO”) Act, 2012, and the Prohibition of Child Marriage Act, 2006 (“PCMA”), 2006, are commonly referred to as the cornerstones of the overall framework for the protection of children. As time moves forward, it is revealed that there has always been a neuro-normative bias implicit within the implementation of these Acts, detrimentally affecting Children with Special Needs (CwSN), especially those with intellectual, autistic, and psycho-social disabilities. These Acts normalize childhood as a homogeneous state of being vulnerable, they fail to account for the disadvantages that arise at the intersection of age and disability.<sup>1</sup>

In the Indian scenario, child protection legislation still retains a largely monolithic notion of the child. The current legal framework continues to operate on the assumption that harm, consent, and distress are conveyed in normalized and neurotypical ways. Disability scholars such as Anita Ghai have argued that disability is not merely a medical condition but is also shaped by social and institutional exclusion.<sup>2</sup> This ignorance of neuro-differences obscures the lived reality of disabled children within broader child protection mechanisms. It renders their communication of trauma effectively “invisible” before courts due to the lack of specialized procedures necessary to understand non-standard communication patterns, sensory distress, or atypical behavioral responses. This disregard for difference leaves these children highly vulnerable. In fact, many children are left confused and disbelieved during investigations because the system lacks evidentiary protocols capable of understanding neurodivergent expressions of trauma.

The judiciary’s lingering reliance on the medical model of disability aggravates the same. In many instances, disability continues to be treated as an individual limitation rather than recognizing that legal institutions themselves may operate in inaccessible and exclusionary ways. However, the Supreme Court in *Vikash Kumar v. Union Public Service Commission* recognized that reasonable accommodation is not a matter of charity but an enforceable right grounded in substantive equality.<sup>3</sup> This becomes particularly important in the context of criminal justice systems dealing with neurodivergent children. Even though the Rights of Persons with Disabilities Act, 2016 strongly emphasizes reasonable

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<sup>1</sup> Protection of Children from Sexual Offences Act, 2012; Prohibition of Child Marriage Act, 2006.

<sup>2</sup> Anita Ghai, *Rethinking Disability in India* 25–31 (2015).

<sup>3</sup> *Vikash Kumar v. Union Public Service Commission*, (2021) 5 SCC 370.

accommodation and supported decision-making, principles which are also reflected in Article 12 of the Convention on the Rights of Persons with Disabilities (“UNCRPD”), the “best interest of the child” standard continues to be applied inflexibly, often overlooking the reality that the child may also be disabled.<sup>4</sup>

This article suggests that POCSO’s strict liability framework and the PCMA’s broad criminalization can create a form of legal blindness, as they overlook the gap between a child’s chronological age and their actual functional capacity. The law often fails to recognize the ways in which neurodivergent children communicate discomfort, coercion, or lack of consent and, in the name of “protection,” may end up re-victimizing them through inaccessible procedures and institutional responses.

## Section II: The Birth Certificate Problem

The defining problem of the disability law in India is that of the judiciary’s adherence to the “safe yardstick principle,” where chronological age becomes the sole criterion of childhood. In *State (NCT of Delhi) v. Eera*, it was sought that the Court probe the statute by extending the protections under the Protection of Children from Sexual Offences Act, 2012 to a victim with a child-like mental age. However, this did not occur. The reason cited was that such an extension would amount to “judicial legislation.”<sup>5</sup> Birth-date, therefore, in this particular scenario, becomes the sole criterion of childhood.

While this model does offer clarity, a standard is created whereby the birth certificate of the child takes precedence over the child’s genuine developmental requirements. Furthermore, this standard is even more harmful in the case of neurodivergent children who often fail to meet conventional benchmarks of maturity. Disability law scholars have repeatedly argued that formal legal standards frequently fail to account for the different ways in which disability affects autonomy, communication, and participation within legal systems.<sup>6</sup> The law’s reliance upon chronological age alone therefore risks ignoring the lived realities of children whose cognitive or psychosocial conditions shape their understanding of consent, coercion, and vulnerability differently.

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<sup>4</sup> *Convention on the Rights of Persons with Disabilities* art. 12; *Rights of Persons with Disabilities Act, 2016*.

<sup>5</sup> *State (NCT of Delhi) v. Eera*, (2017) 15 SCC 133.

<sup>6</sup> See 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, 438–41 (2007).

Many children with intellectual disabilities or autism spectrum disorders are also conditioned into behavioral obedience through therapies and educational programs aimed at promoting “acceptable” or “proper” social conduct. Consequently, passive acceptance or lack of physical resistance may be wrongly interpreted as consent or willingness. However, through a disability-sensitive lens, such behaviors can instead be understood as forms of masking, communication barriers and inability to grasp seriousness of sexual violation.<sup>7</sup>

### Section III: The Right to Be Heard

In addressing this marginalization, it is imperative for the Protection of Children from Sexual Offences Act, 2012 to be interpreted in conformity with the substantive equality principles set forth in *Vikash Kumar v. Union Public Service Commission*. Here, the Supreme Court made it clear that “reasonable accommodation is not charity; it is an enforceable right.”<sup>8</sup> In so far as criminal justice is concerned, this principle requires that the “right to be understood” be presumed as one of the mandatory prerequisites for a fair trial.

This requires the development of a functional consent jurisprudence. Rather than a limited “yes” or “no” analysis, courts must evaluate the active involvement of the child through standards that recognize their individual cognitive patterns and communication methods. Although Section 39 of the Protection of Children from Sexual Offences Act, 2012 enables the use of special educators and support persons, their involvement often continues to remain discretionary rather than mandatory.<sup>9</sup> The intermediary or mediator therefore plays an important “translation bridge” role for the judge by helping the Court recognize gestures, echolalia, sensory distress, and other non-conventional forms of communication that may otherwise be misunderstood within adversarial proceedings.

"In order to operationalize 'functional consent jurisprudence', a shift away from the simple 'yes/no' model towards a multimodal assessment of agency becomes necessary. This jurisprudence, which parallels that seen in jurisdictions such as the United Kingdom<sup>10</sup> and Australia<sup>11</sup>, requires that consent be assessed within the context of a child's specific 'functional'

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<sup>7</sup> Ghai, *supra* note 2, at 40–46.

<sup>8</sup> *Vikash Kumar*, *supra* note 3.

<sup>9</sup> Protection of Children from Sexual Offences Act, 2012, § 39.

<sup>10</sup> Youth Justice and Criminal Evidence Act 1999, c. 23, § 29 (UK).

<sup>11</sup> Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 13I (Austl.); *see also* Evidence Act 1995 (NSW) s 27 (Austl.)

capacity at the moment of the act. Instead of being viewed merely as an objective state, functional consent is best understood as a dynamic standard, wherein courts must establish whether or not the child had the ability to be 'functionally' capable of comprehending and communicating his or her decision.<sup>12</sup> In line with the 'reasonable accommodation' requirement in *Vikash Kumar*<sup>13</sup> this jurisprudence reimagines the role of the support persons under Section 39 as a mandatory 'communicative intermediary'. Communicative intermediaries play a crucial role in interpreting non-verbal cues such as echolalia, sensory avoidance, or even certain repetitive behaviors as expressions of the child's will. Rather than placing the burden of comprehension on the neurodivergent child, functional consent seeks to establish that the 'will and preference' of the child cannot be eclipsed by a paternalistic 'best interest' standard.<sup>14</sup>

Moreover, the need for an intersectional lens, as emphasized in *Patan Jamal Vali v. State of Andhra Pradesh*, can never be overstated.<sup>15</sup> The neurodivergent child witness finds themselves within a legal system that is fundamentally designed for a normalized neurotypical individual, thereby being compelled to “speak” trauma through a legal language they may not fully comprehend or communicate through. Without such supported decision-making practices, the “will and preference” of the child risks being overridden by paternalistic invocations of the “best interest” standard which may silence the child under the guise of protection. “best interest” standard, which may silence the child under the guise of protection.<sup>16</sup>

#### **Section IV: Who Will Care for Her When We Are Gone**

Although the Prohibition of Child Marriage Act, 2006, aims at banishing the practice of child marriage, the ground realities in the process of its implementation tend to disregard the socio-economic conditions prevalent within the families of children with special needs. For them, the spousal union is not merely a social preference or practice, but a “survival necessity,” which can only be understood through the prism of a “protective rationale.” After all, parents often believe that when they are no more, there shall be nobody left to look after their child, and thus the only safe haven left for them is spousal support. Disability scholars have repeatedly

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<sup>12</sup> *R. v. D.A.I.*, [2012] 1 S.C.R. 149 (Can.)

<sup>13</sup> *Vikash Kumar*, *supra* note 3.

<sup>14</sup> *United Nations Convention on the Rights of Persons with Disabilities*, art. 12, Dec. 13, 2006, 2515 U.N.T.S. 3

<sup>15</sup> *Patan Jamal Vali v. State of Andhra Pradesh*, 2021 SCC OnLine SC 343.

<sup>16</sup> *See Dhanda*, *supra* note 6, at 440–41.

emphasized that the failure to develop adequate community living options, support staff, and long-term caregiving structures has created a care-giving vacuum in which marriage begins to appear as the only available safety net.<sup>17</sup>

The existing legal framework in place to address this issue, however, often portrays child marriage solely as a crime in itself, while overlooking the deeper systemic failures that produce such conditions. Girls with disabilities frequently face extreme difficulties in reporting violence within such marriages due to fears of institutionalization and separation from familial care in the event of state intervention.<sup>18</sup> A situation where children in these marriages are “rescued” without an effective rehabilitation framework in place can therefore create another layer of trauma, as institutions managed by the state are often inaccessible and plagued with communication barriers, resulting in children being transferred from parental care into environments they themselves cannot properly access or navigate.<sup>19</sup>

### Section V: What the Courts Are Beginning to See

The recent judicial precedents highlight the need to shift from a punitive to a supportive approach in dealing with the problem of child marriage. In *Society for Enlightenment v. Union of India*, the Supreme Court held that tackling child marriage entails preventing and supporting the state from using only the “fear” of being incarcerated for its resolution.<sup>20</sup> This particular point is extremely relevant while considering CwSN because, in this case, the “best interests of the child,” which have been discussed in *Independent Thought v. Union of India*, should be considered along with the “right to live independently and be included in the community” guaranteed by Article 19 of the CRPD.<sup>21</sup>

For effective protection of disabled girls, it is important for the State to discharge its legal obligations according to the provisions of section 24 of Rights of Persons with Disabilities Act, 2016, wherein the government has to devise social security schemes with a view to allowing persons with disabilities to live independently and with dignity.<sup>22</sup> It cannot be assumed that

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<sup>17</sup> See Ghai, *supra* note 2, at 72–79.

<sup>18</sup> See Dhanda, *supra* note 6, at 438–41.

<sup>19</sup> See Enfold Proactive Health Trust, *Between Protection and Punishment: A Report on the Institutionalization of Children with Special Needs Under POCSO and PCMA* (2024).

<sup>20</sup> *Society for Enlightenment v. Union of India*, 2024 SCC OnLine SC 1120.

<sup>21</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800; *Convention on the Rights of Persons with Disabilities* art. 19.

<sup>22</sup> Rights of Persons with Disabilities Act, 2016, § 24.

merely the conducting of a raid operation by the police can solve a deep-rooted problem of care. The way the law is administered in this context often lacks sensitivity towards the dire conditions that many disabled girls find themselves in, especially when there is no provision by the State for providing them housing, caregivers, social networks, or means of accessing rehabilitation facilities. As a result, any attempt to enforce the law can result in an “unprotected rescue,” whereby disabled girls who have been rescued from the oppression of their families end up in institutional care.<sup>23</sup> For law to effectively protect children, the focus should not only lie on prosecuting criminals but should also encompass building support structures, including social benefits and independent living.

### Section VI: Flexibility for Some, Not for Others

"Judicial trends in India suggest that there is a steady trend towards moving away from the strict implementation of legislation designed to safeguard the welfare of children towards one that involves context. Recent cases, such as *Vijayalakshmi v. State (2021)*<sup>24</sup> and *Sabaree v. State (2022)*,<sup>25</sup> indicate that the courts are aware of the disruption caused by applying a 'robotic' approach to implementing the POCSO Act to consensual relationships involving adolescents. While the immediate consequence of this approach may seem negligible, the underlying message here is important since rigid implementation of criminal laws tends to disregard the reality of the situation faced by adolescents. This represents an important point where the needs of CwSN need to be addressed; if the judiciary can be flexible in handling the cases of neurotypical adolescents, then neurodivergent adolescents require the same amount of consideration."

This has far-reaching implications for Children with Special Needs (“CwSN”). If the judiciary is capable of showing a certain degree of flexibility in its approach even for neurotypical adolescents, then neurodivergent children would ideally require and deserve an equally, if not more, empathetic judicial approach, especially because their perception of consent, social boundaries, and interpersonal interaction is often shaped by cognitive and psychosocial differences.<sup>26</sup> Any failure to recognize these differences would amount to enabling exclusion in the name of protection.

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<sup>23</sup> See Ghai, *supra* note 2, at 72–79.

<sup>24</sup> *Vijayalakshmi v. State* (2021) 1 Mad. W.N. (Cri) 407 (India).

<sup>25</sup> *Sabaree v. State (NCT of Delhi)* 2022 SCC OnLine Del 317 (India).

<sup>26</sup> See Dhanda, *supra* note 6, at 438–41.

Concerns along the same lines have also characterized public policy discussions. The discourse on disability law has continually stressed that child protection procedures will continue to function only if intersectional issues surrounding disability, gender, and age are incorporated into the response frameworks.<sup>27</sup> Within this perspective, growing importance has also been accorded to the process of supported decision-making, as well as the use of laws that consider the "will and preference" of the child, especially when the disability is one of an intellectual and invisible nature. It appears that recent trends in India's child protection jurisprudence point towards a paradigm shift that privileges accessibility and contextual justice over punishment.

## Section VII: Conclusion

What this article has attempted to show is that the problem with POCSO and the PCMA is not one of intent but of imagination. Both the statutes were built around a particular kind of child, one who communicates distress in recognizable ways, whose vulnerability is legible to neurotypical institutions, and whose experience of harm fits neatly within the evidentiary categories that courts know how to process. Children with intellectual disabilities, autism spectrum disorders, or psychosocial conditions were never really part of that picture. The consequences play out in courtrooms where a child's silence is mistaken for consent. In rescue operations that deliver disabled girls into institutions they cannot navigate, and in investigations that mistake behavioral compliance for willingness.

The judiciary has begun, slowly, to notice. The recognition in *Vikash Kumar* that reasonable accommodation is an enforceable right, the intersectional sensitivity signaled in *Patan Jamal Vali*, the Court's discomfort in *Independent Thought* with mechanically punitive approaches. These suggest that the doctrinal foundations for a more disability-inclusive framework already exist. What is missing is the willingness to build on them consistently and the institutional infrastructure to make them real.

The three reforms this article proposes are mandatory intermediaries, functional vulnerability assessment, and genuine investment in community-based care that follow directly from commitments India has already made under the RPwD Act and the UNCRPD. The honest question is not whether these reforms are legally justified. It is why they have not happened

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<sup>27</sup> See Ghai, *supra* note 2, at 25–31.

yet.

Probably the most difficult reality to confront that this article brings to light is that protection, in its current practice, itself constitutes a form of violence. A neurodivergent child unable to communicate in front of the court is not being protected by it, but merely processed through it. An impaired girl moved from a marriage to a similarly inaccessible institutional setting has not received any salvation at all; the legal system has merely relocated her without improving her condition.

There is a moral issue at stake here rather than a technical one regarding the difference between the guarantees of the RPwD Act and the realities of life for disabled children within criminal courts. All children have the right to be heard in their mother tongue. Until this is recognized as an essential aspect of child welfare legislation, the legal regime will ensure the protection of some children but not of others.

## BIBLIOGRAPHY

### Primary Sources: Cases

- *Independent Thought v. Union of India*, (2017) 10 SCC 800.
- *Patan Jamal Vali v. State of Andhra Pradesh*, 2021 SCC OnLine SC 343.
- *R. v. D.A.I.*, [2012] 1 S.C.R. 149 (Can.).
- *Sabaree v. State (NCT of Delhi)*, 2022 SCC OnLine Del 317 (India).
- *Society for Enlightenment v. Union of India*, 2024 SCC OnLine SC 1120.
- *State (NCT of Delhi) v. Eera*, (2017) 15 SCC 133.
- *Vijayalakshmi v. State*, (2021) 1 Mad. W.N. (Cri) 407 (India).
- *Vikash Kumar v. Union Public Service Commission*, (2021) 5 SCC 370.

### Primary Sources: Statutes & Treaties

- Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S.
- Evidence (Miscellaneous Provisions) Act 1958 (Vic) (Austl.).
- Evidence Act 1995 (NSW) (Austl.).
- Prohibition of Child Marriage Act, 2006 (India).
- Protection of Children from Sexual Offences Act, 2012 (India).
- Rights of Persons with Disabilities Act, 2016 (India).
- Youth Justice and Criminal Evidence Act 1999, c. 23 (UK).

### Secondary Sources: Books & Journals

- 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 (2007).
- Anita Ghai, *Rethinking Disability in India* (2015).

- Enfold Proactive Health Trust, Between Protection and Punishment: A Report on the Institutionalization of Children with Special Needs Under POCSO and PCMA (2024).