

## BRIDGING THE PROXY LIABILITY GAP: THE SHIFT FROM IPC ABETMENT TO SECTION 95 OF THE BHARATIYA NYAYA SANHITA (BNS)

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### ABSTRACT

*This research paper critically examines the criminal liability of children within the Indian legal framework, tracking the evolution of statutory provisions from the Indian Penal Code (IPC), 1860, to the Bharatiya Nyaya Sanhita (BNS), 2023. It analyses the interpretative tension between the strict plain meaning of chronological age thresholds and the purposive construction championed by child rights jurisprudence. By evaluating the doctrine of *doli incapax* (IPC Sections 82 and 83) and the defence of triviality (IPC Section 95), the study highlights how modern socio-legal challenges such as organized proxy crimes—have exposed deep fissures in these colonial-era statutes. Through an analysis of landmark judicial rulings, the paper demonstrates the historical evidentiary failures in holding adult "handlers" accountable under traditional abetment laws, underscoring the significance of the new BNS Section 95 that explicitly criminalizes the hiring and engaging of children for offences. Furthermore, the research investigates the jurisprudential conflict between special legislations, particularly the paradox where the Juvenile Justice (JJ) Act permits trying 16-to-18-year-olds as adults for heinous crimes, while the Protection of Children from Sexual Offences (POCSO) Act simultaneously strips them of agency regarding sexual consent. The paper concludes that the Indian legal system must reconcile this dichotomy to adequately address the evolving capacities and autonomy of adolescents.*

**Keywords:** *Doli incapax*, Bharatiya Nyaya Sanhita (BNS), Proxy liability, Juvenile Justice Act, POCSO Act.

### 1.1 Introduction: The Theoretical and Statutory Conundrum

The criminal liability of children within the Indian legal framework constitutes a complex intersection of penal philosophy, developmental psychology, and social welfare jurisprudence. Research paper 4 of this dissertation provides an exhaustive critical analysis of the statutory provisions governing child offenders, with particular focus on the General Exceptions under the Indian Penal Code (IPC), 1860, and

their subsequent evolution under the Bharatiya Nyaya Sanhita (BNS), 2023. At the heart of this analysis lies Section 95 of the IPC, the defence of triviality (*de minimis non curat lex*) and its interplay with the doctrine of *doli incapax* enshrined in Sections 82 and 83.<sup>308</sup>

Historically, the IPC operated on a binary presumption of capacity: absolute immunity for children under seven and conditional immunity

<sup>308</sup> The Indian Penal Code, 1860 (Act 45 of 1860), ss. 82, 83, 95.

for those between seven and twelve based on their "maturity of understanding." However, the socio-legal landscape of the 21st century has exposed deep fissures in this colonial-era framework. The proliferation of organised crime utilising juveniles as "innocent agents," the enactment of stringent special laws like the Protection of Children from Sexual Offences (POCSO) Act, 2012, and the radical restructuring of juvenile justice under the 2015 Act have necessitated a re-evaluation of these core penal tenets.

This research paper dissects four critical dimensions: First, the textual interpretation of the statutes, contrasting strict plain meaning with the purposive construction advocated by child rights jurisprudence. Second, the judicial application of these principles, analysed through landmark rulings such as *Upendra Kumar v. State of Bihar* and *Bachpan Bachao Andolan*. Third, the systemic limitations regarding proxy liability, where adult "handlers" exploit children's immunity, and the legislative gap that the new BNS Section 95 seeks to bridge. Finally, the research paper examines the synergy and friction between the general penal code and special legislations, particularly the conflict between the "heinous offence" transfer provisions of the JJ Act and the protective mandates of POCSO in adolescent consensual relationships.

## 1.2 Textual Interpretation: The Conflict of Plain Meaning and Purposive Construction

The hermeneutics of criminal law demands a rigorous analysis of statutory text. In the context of child liability, the interpretative battleground lies between the "Plain Meaning Rule," which adheres strictly to the letter of the law regarding biological age, and the "Purposive Construction," which seeks to align domestic law with the "best interests of the child" principle found in international conventions like the UNCRC.

### 1.2.1 Section 82 IPC: The Absolute Shield and the Concept of *Mens Rea*

Section 82 of the IPC articulates a definitive prohibition: "Nothing is an offence which is done by a child under seven years of age".<sup>309</sup> This provision creates an irrebuttable presumption of law (*presumptio juris et de jure*) that a child in this chronological age bracket is inherently incapable of forming *mens rea*, or the guilty mind required to constitute a crime.

The textual finality of the phrase "Nothing is an offence" indicates that the immunity is absolute. Unlike other general exceptions where the burden of proof shifts to the accused (Section 105, Indian Evidence Act), Section 82 operates as a total bar to prosecution. The rationale, derived from English Common Law, posits that early childhood is a period of moral innocence in which the cognitive capacity to distinguish between law and lawlessness is physiologically absent.

However, the "Plain Meaning" of this section has faced challenges in the modern era. Critics argue that in an age of digital acceleration, where children are exposed to complex information and violence earlier, the rigid "under-seven" rule may be anachronistic. Yet the legislature has maintained this threshold (as mirrored in Section 20 of the BNS), prioritising the protection of the child over the state's retributive interests.<sup>310</sup> The text creates a "jurisdictional wall": no court can inquire into the mental state of a six-year-old, regardless of the heinousness of their act.

### 1.2.2 Section 83 IPC: The "Maturity of Understanding" Ambiguity

The interpretative complexity deepens with Section 83, which extends conditional immunity to children "above seven years of age and under twelve, who have not attained sufficient maturity of understanding to judge of the nature and consequences of their conduct on that occasion".<sup>311</sup>

<sup>309</sup> *Id.*, s. 82.

<sup>310</sup> The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), s. 20.

<sup>311</sup> The Indian Penal Code, 1860, s. 83.

**The Tripartite Textual Requirement:** A granular analysis of the text reveals three concurrent requirements for this defence:

1. **Chronological Age:** The accused must be strictly within the 7-to-12-year window.
2. **Maturity Deficit:** The core element is the *lack* of "sufficient maturity of understanding."
3. **Occasion Specificity:** The immaturity must be relative to the "conduct on that occasion."

**Plain vs. Purposive Interpretation of "Maturity":** The phrase "sufficient maturity of understanding" is textually ambiguous. A "Plain Meaning" interpretation restricts this to cognitive capacity. Did the child know that pulling the trigger would cause death? However, a "Purposive Construction," often championed by defence counsels, argues for a broader psychosocial interpretation. This view posits that "maturity" encompasses not just cognitive cause-and-effect but also moral agency, the ability to resist peer pressure, understand the societal gravity of the act, and appreciate the long-term legal consequences.<sup>312</sup>

In practice, courts have often defaulted to a conduct-based test. If a child commits a crime with sophistication, such as concealing a weapon or creating an alibi, courts interpret this conduct as evidence of "sufficient maturity," thereby rebutting the defence. This creates a paradox in which the "smarter" child is penalised more heavily than the "less intelligent" one, arguably penalising cognitive development rather than criminal intent.

### 1.2.3 Section 95 IPC: The Doctrine of Triviality (*De Minimis*)

Section 95 states: "Nothing is an offence by reason that it causes... any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm".<sup>313</sup> While

not age-specific, this section is a critical tool in juvenile jurisprudence, often serving as a secondary shield for minor offences (e.g., schoolyard scuffles or petty theft) that technically meet the definition of an offence but lack the requisite gravity for criminal prosecution.

**Purposive Exclusion in Sexual Offences: A significant interpretative limitation arises when Section 95 interacts with offences against modesty.** The judiciary has steadfastly refused to apply the "triviality" defence to sexual crimes, regardless of the offender's age. In *Raju Pandurang Mahale v. State of Maharashtra*, the Supreme Court held that an act outraging a woman's modesty cannot be considered "trivial" under Section 95.<sup>314</sup> This textual interpretation creates a rigid liability framework for juveniles accused of sexual misconduct (e.g., in school settings), where the "slightness" of the harm is rendered irrelevant by the nature of the offence, forcing these cases into the formal juvenile justice system rather than dismissing them as trivial.

### 1.2.4 The "Mental Age" Debate: *Ms Eera v. State of NCT of Delhi*

The tension between biological and mental age reached its zenith in *Ms Eera v. State of NCT of Delhi* (2017). The Supreme Court was tasked with interpreting the definition of "child" under the POCSO Act. The appellant argued for a purposive construction, suggesting that an adult victim with the "mental age" of a child should receive the protection of the Act.

**The Judicial Refusal of Purposive Expansion:** The Supreme Court rejected this argument, adhering to a strict "Plain Meaning" interpretation. It held that "age" in penal statutes refers exclusively to chronological, biological age.<sup>315</sup> Expanding the definition to include "mental age" would amount to judicial legislation, violating the separation of powers. This ruling has profound implications for IPC Section 83 as well: a 13-year-old with the

<sup>312</sup> Ved Kumari, *The Juvenile Justice System in India: From Welfare to Rights* 89 (Oxford University Press, 2010).

<sup>313</sup> The Indian Penal Code, 1860, s. 95

<sup>314</sup> *Raju Pandurang Mahale v. State of Maharashtra*, (2004) 4 SCC 371.

<sup>315</sup> *Ms. Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133.

mental maturity of a 6-year-old cannot claim the immunity of Section 82 or 83. They are legally an adolescent offender, subject to the Juvenile Justice Act, and potentially transferable to adult court if the crime is heinous, despite their cognitive deficit. This underscores the rigidity of the Indian penal text regarding age boundaries.

### 1.3 Judicial Interpretations: The Oscillating Pendulum of Protection and Accountability

The judiciary plays a pivotal role in breathing life into the static text of the IPC. Through landmark judgments, Indian courts have navigated the delicate balance between protecting the "innocent child" and ensuring accountability for serious crimes.

#### 1.3.1 Retrospective Benevolence: *Upendra Kumar v. State of Bihar (2005)*

The case of *Upendra Kumar v. State of Bihar* represents a watershed moment in the "benevolent construction" of juvenile laws.<sup>316</sup>

- **Factual Matrix:** The appellant was convicted under Section 302 IPC (murder). The offence occurred on March 10, 1995. At that time, the age of juvenility for boys under the 1986 Act was 16 years. The appellant was estimated to be between 17 and 18 years old and was therefore treated as an adult during the trial.
- **Legal Conflict:** During the pendency of his appeal, the Juvenile Justice (Care and Protection of Children) Act, 2000, came into force, raising the age of juvenility to 18 years. The core legal question was whether this benefit could be applied retrospectively to a case that had already been adjudicated under the old law.
- **The Supreme Court's Reasoning:** Relying on the precedent of *Bhola Bhagat v. State of Bihar*,<sup>317</sup> The Court adopted a

purposive interpretation of the 2000 Act's "transitory provisions" (Section 20). It held that the "beneficial legislation" must apply to all pending cases.

- **The Outcome:** The Court sustained the *murder conviction* but quashed the *sentence* of life imprisonment. Since the appellant was retrospectively deemed a juvenile and juveniles may not be imprisoned in adult facilities, he was ordered released forthwith.
- **Implication:** This judgment established that in the conflict between the penal code's retributive mandate and the juvenile justice act's reformatory goal, the latter prevails. It cemented the principle that a child's right to protection extends even after a finding of guilt for a heinous crime.

#### 1.3.2 Assessing Culpability: *Hiralal Mallick v. State of Bihar (1977)*

While *Upendra Kumar* dealt with age determination, *Hiralal Mallick* focused on the substantive test of "maturity" under Section 83 IPC.<sup>318</sup>

- **Factual Matrix:** A 12-year-old boy, along with his adult brothers, attacked a victim with a sword, resulting in death. The defence asserted immunity under Section 83, contending that a 12-year-old could not fully comprehend the gravity of his actions.
- **The "Sword Attack" Test:** The Supreme Court rejected the defence. Justice Krishna Iyer, in his concurring opinion, emphasised that the *conduct* of the child participating in a coordinated attack, wielding a lethal weapon (sword), and inflicting targeted wounds demonstrated a "mischievous discretion" (*malitia supplet aetatem*).
- **Legal Principle:** The Court clarified that Section 83 is not a blanket immunity. The

<sup>316</sup> *Upendra Kumar v. State of Bihar*, (2005) 3 SCC 592.

<sup>317</sup> *Bhola Bhagat v. State of Bihar*, (1997) 8 SCC 720.

<sup>318</sup> *Hiralal Mallick v. State of Bihar*, (1977) 4 SCC 44.

burden is on the defence to prove immaturity. When the *actus reus* (guilty act) is performed with the precision and ferocity of an adult, the *mens rea* (guilty mind) is inferred. The court distinguished between "childish mischief" and "criminal malice," holding the latter punishable as a crime.

### 1.3.3 Systemic Protection vs. Exploitation: *Bachpan Bachao Andolan v. Union of India* (2011)

Shifting from the child-as-offender to the child-as-victim-of-exploitation, this Public Interest Litigation (PIL) addressed the rampant trafficking of children for circus performances.<sup>319</sup>

- **Judicial Activism:** The Supreme Court invoked the "Parens Patriae" jurisdiction, asserting the state's duty to protect children. It went beyond the narrow text of labour laws to address the criminal aspect of trafficking.
- **Directives:** The Court ordered a ban on employing children in circuses and mandated simultaneous raids to rescue them. Crucially, it linked the definition of "child" to international standards (UNCRC) and directed that rescued children be handled under the JJ Act rather than as mere labour violations.
- **Significance for IPC:** This judgment highlighted the inadequacy of the existing IPC provisions (Sections 370, 372, 373) in dealing with the *organisers* of exploitation. It underscored that while the child performer might technically be immune from prosecution for their acts in the circus (under Sec 83 or 95), the adults employing them were operating in a legislative gap regarding "organised exploitation," paving the way for future amendments.

### 1.4 Limitations: The Proxy Liability Gap and the Failure of IPC Section 108

A profound limitation of the IPC's general exceptions is the "Innocent Agent" problem. When an adult uses a child to commit a crime, the legal framework has historically struggled to hold the adult effectively accountable.

#### 1.4.1 The "Innocent Agent" Doctrine and Its Practical Failure

Under IPC Section 108 (Explanation 3), a person can be liable for abetment even if the person abetted (the child) is "incapable by law of committing an offence" (e.g., is under 7 years old).<sup>320</sup> In theory, this should allow for the prosecution of adults who use children as proxies.

**The Theory:** If Adult 'A' gives a loaded gun to 6-year-old Child 'C' and tells them to shoot Victim 'V', 'C' is immune under Section 82, but 'A' is liable for murder as if they pulled the trigger themselves.

**The Practical Failure (The "Handler" Problem):** In reality, the evidentiary burden for "abetment" is extraordinarily high. Prosecution must prove *instigation, conspiracy, or intentional aiding*. In organised crime scenarios such as stone-pelting mobs in conflict zones or organised begging rings, the link between the adult "handler" and the child "executor" is often indirect and obscured by layers of intermediaries. The adult does not hand the gun to the child; they create an environment of radicalisation or coercion.

- **Low Conviction Rates:** This evidentiary gap is reflected in NCRB data. In 2022, the acquittal rate for human trafficking cases (IPC Section 370) was approximately **81%**.<sup>321</sup> For bonded labour, specifically involving child exploitation, the acquittal rate reached **94%**.<sup>322</sup> These statistics indicate a systemic failure to pin liability on the adults who orchestrate crimes using juvenile hands.

#### 1.4.2 The Legislative Gap: "Hiring" vs. "Abetting"

<sup>320</sup> The Indian Penal Code, 1860, s. 108, expl. 3.

<sup>321</sup> National Crime Records Bureau, *Crime in India 2022* 123 (Ministry of Home Affairs, 2023).

<sup>322</sup> *Id.* at 125.

<sup>319</sup> *Bachpan Bachao Andolan v. Union of India*, (2011) 5 SCC 1.

The IPC lacked a specific substantive offence for the mere act of *recruiting* or *hiring* a child for criminal purposes. Abetment required a nexus to a particular criminal act. If a gang leader recruited ten children to be "available" for drug running, but no specific drug run could be proven linked to one particular order, the abetment charge often failed. This "legislative gap" allowed handlers to operate with impunity, treating children as disposable, low-risk assets.

#### 1.4.3 The Solution: Section 95 of the Bharatiya Nyaya Sanhita (BNS), 2023

Recognising this failure, the BNS introduced a paradigm-shifting provision in Section 95, specifically designed to address the "hiring" loophole.

**Textual Analysis of BNS Section 95:** "Whoever hires, employs or engages any child to commit an offence shall be punished with imprisonment... which shall not be less than three years but which may extend to ten years, and with fine..."<sup>323</sup>

#### Key Innovations:

1. **Substantive Offence: The act of "hiring, employing, or engaging" is now a crime in itself, independent of whether the underlying offence** (e.g., theft, murder) is successfully committed or proven against the child.
2. **Definition of Child:** It applies to any person under 18, aligning with the JJ Act and POCSO, removing the ambiguity of the IPC's 7-12 age bracket for this specific purpose.
3. **Specific Intent:** The Explanation clarifies that "using a child for sexual exploitation or pornography" falls within this section.<sup>324</sup> This directly targets the "handler" in trafficking rings, simplifying the prosecutorial burden from proving "abetment of rape" (which is complex) to proving "engagement for exploitation".

#### 1.5 Synergy and Conflict: The JJ Act, POCSO, and General Exceptions

The interaction between the general penal code (IPC/BNS) and special laws (POCSO, JJ Act) creates a "synergy of protection" but also a "conflict of procedure," particularly with respect to the age of consent and the definition of heinous offences.

##### 1.5.1 The "Heinous Offence" Conflict: JJ Act Section 15 vs. IPC Section 83

The Juvenile Justice Act, 2015, introduced a provision (Section 15) allowing children aged 16-18 accused of "heinous offences" (punishable by 7+ years) to be tried as adults.<sup>325</sup>

##### The Friction with IPC Section 83:

- **The Conceptual Clash:** IPC Section 83 presumes that a child (up to 12) lacks maturity. The JJ Act assumes that a child (16-18) *may* possess adult-like maturity. The gap years (12-16) are clearly juvenile. However, the assessment process under Section 15 of the JJ Act uses a "Preliminary Assessment" of mental and physical capacity.
- **The Paradox:** A 16-year-old might be assessed as "mature" enough to be tried for murder (adult court), but if they are a victim of sexual assault, they are deemed a "child" incapable of consent under POCSO (under 18). This creates a jurisprudential schizophrenia where the law views the adolescent's "evolving capacity" differently depending on whether they are the perpetrator or the victim.

##### 1.5.2 The "Romeo and Juliet" Dilemma: POCSO vs. Adolescent Autonomy

A critical area of conflict involves consensual relationships between adolescents, often termed "Romeo and Juliet" cases.

<sup>323</sup> The Bharatiya Nyaya Sanhita, 2023, s. 95.  
<sup>324</sup> *Id.*, expl.

<sup>325</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s. 15.

### The Statutory Gridlock:

- **POCSO Act:** Section 3 defines sexual assault as any sexual act with a person under 18. Consent is legally irrelevant.<sup>326</sup>
- **IPC Section 375 (Pre-2013/BNS):** Previously contained a "marital rape exception" for wives over 15. The interaction with POCSO Section 42A (Override Clause) theoretically nullifies this exception for any sexual act under 18, although the legal status of "child marriages" remains a complex grey area.
- **The Conflict:** In cases where two 17-year-olds engage in consensual sex, the male is technically liable for aggravated penetrative sexual assault (POCSO Section 6), punishable by a minimum of 20 years. This draconian application ignores the "maturity of understanding" principle found in IPC Section 83, which recognises that older children *do* have agency.

**Judicial Response and Limitation:** Courts have struggled with this rigidity. The Madras High Court in *Sabari v. Inspector of Police*<sup>327</sup> and other High Courts have frequently quashed proceedings in such cases, invoking the "ends of justice." However, the Supreme Court has clarified that strict liability under POCSO cannot be bypassed by judicial discretion regarding consent.

- **Advocacy for Reform:** Legal experts like Indira Jaising have argued for a "close-in-age" exception, suggesting that sex between consenting adolescents (e.g., 16–18) should not be criminalised.<sup>328</sup> The Law Commission (283rd Report) has reviewed this but has not recommended a lower age of consent.<sup>329</sup> leaving the

BNS to essentially replicate the status quo, failing to resolve this conflict between protectionism and adolescent autonomy.

### 1.6 Conclusion

The critical analysis of Section 95 of the IPC and its related provisions reveals a legal system in transition. The journey from the colonial doctrine of *doli incapax* to the modern statutory framework of the BNS and POCSO reflects a fundamental shift in how the state perceives the child: no longer just a subject of "welfare" or "immunity," but a bearer of rights and a potential agent of harm.

1. **Textual Rigidity vs. Judicial Flexibility:** While the text of IPC Sections 82 and 83 remains grounded in biological age, the judiciary has had to employ creative interpretations, sometimes strictly literal (Ms Eera) and sometimes retrospectively benevolent (Upendra Kumar), to navigate the complexities of modern childhood.
2. **Closing the Liability Gap:** The introduction of Section 95 in the Bharatiya Nyaya Sanhita is a landmark development. By criminalising the "hiring and employing" of children, it finally provides the statutory teeth needed to prosecute adult handlers, addressing the failure of the IPC's abetment provisions and the high acquittal rates in trafficking cases.
3. **Unresolved Conflicts:** The tension between the protective rigidity of POCSO (criminalising all under-18 sex) and the punitive flexibility of the JJ Act (trying 16–18s as adults) remains a significant jurisprudential challenge. The law currently treats the 17-year-old as an adult criminal in a murder trial but as a helpless child in a consensual relationship, a dichotomy that defies the psychological reality of the "evolving capacities" of the adolescent.

<sup>326</sup> The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), s. 3.

<sup>327</sup> *Sabari v. Inspector of Police*, (2019) SCC OnLine Mad 38580.

<sup>328</sup> Indira Jaising, "Sexual Autonomy and the Law" in *Child Rights in India 45* (Oxford University Press, 2018).

<sup>329</sup> Law Commission of India, *283rd Report on Age of Consent under the Protection of Children from Sexual Offences Act, 2012* (2023).

As India proceeds with the implementation of the Bharatiya Nyaya Sanhita, the judiciary will likely be required to harmonise these conflicting statutes, potentially necessitating a new "General Exception" that accounts for the nuances of adolescent agency in both criminal responsibility and sexual autonomy.

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