CHAPTER 5

JUVENILE JUSTICE VIS-À-VIS POCSO ACT 2012

“It is easier to build strong children than to repair broken men.” - Frederick Douglass

Children are the foundations of a society. They are the future generations of the world, who needs to be nurtured, cared, supported and protected. The protection of rights of children becomes immensely important when one realizes that they constitute one-third of the human population in a country and guaranteeing their rights is an obligation which every country owes to its succeeding generations. Ensuring basic human rights of the vulnerable sections of society are the cardinal principles of rule of law. One of the challenges that the contemporary world faces today is ensuring basic human rights of children. Child abuse is a social psychological phenomenon, which is present at present an epidemic rate in same or other forms throughout the world. The problems emerging from the child abuse are complex and multifaceted.

‘Millions of children have no access to education, work long hours under hazardous conditions and are forced to serve as soldiers in armed conflict. They suffer targeted attacks on their schools and teachers or languish in institutions or detention centers, where they endure inhumane conditions and assaults on their dignity. Young and immature, they are often easily exploited. In many cases, they are abused by the very individuals responsible for their care.’

---

1 Frederick Douglass (1818-95) was a prominent American abolitionist, author, orator and a world-renowned anti-slavery activist.
3 “Children's Rights”, Human Rights Watch, available online at https://www.hrw.org/topic/childrens-rights accessed on 15/03/2017
‘They are abandoned. They do not get a chance to step in a school. They are left to fend for themselves on the streets. They suffer from many forms of violence. They do not have access to even primary healthcare. They are subjected to cruel and inhumane treatments every day. They are children – innocent, young and beautiful – who are deprived of their rights.

In the history of human rights, the rights of children are the most ratified. The United Nations Convention on the Rights of the Child (UNCRC) defines Child Rights\(^4\) as the minimum entitlements and freedoms that should be afforded to every citizen below the age of 18 regardless of race, national origin, colour, gender, language, religion, opinions, origin, wealth, birth status, disability, or other characteristics.

These rights encompass freedom of children and their civil rights, family environment, necessary healthcare and welfare, education, leisure and cultural activities and special protection measures. The UNCRC outlines the fundamental human rights that should be afforded to children in four broad classifications that suitably cover all civil, political, social, economic and cultural rights of every child\(^5\):

- Right to Survival
- Right to Protection
- Right to Participation
- Right to Development

\(^4\)Etymologically, the term “child” comes from the Latin infans which means “the one who does not speak”. For the Roman, this term designates the child from its birth, up to the age of 7 years. This notion evolved a lot through centuries and cultures to finally designate human being from birth until adulthood. But this conception of the child was wide and the age of the majority varied from a culture to an another. The Convention on the Rights of the Child of 1989 defines more precisely the term “child”: “… a child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier”. The idea, through this definition and all the texts concerning child welfare, is that the child is a human being with rights and dignity.’ See “Rights of the Child”, Humanium (NGO), available online at http://www.humanium.org/en/child-rights/accessed on 15/03/2017

\(^5\)“Child Rights”, Smile Foundation, available online at http://www.smilefoundationindia.org/child_rights.htm accessed on 15/03/2017
These basic human rights of children which have been recognized in the UNCRC are part of the Constitution of India 1950 that stands as the basic premise of fundamental rights of the children in India. Apart from this, India has enacted Juvenile Justice Act, 2015 and Prevention of Children from Sexual Offences (POCSO) Act, 2012 to make a better place for children to live in. The aim of this chapter is to analyze the making of child laws in India and to address the conflict between the Indian Penal Code, Juvenile Justice Act and POCSO Act.

5.1 JOURNEY FROM IPC TO JUVENILE JUSTICE (JJ) ACT 2015 AND POCSO ACT 2012

Lord Macaulay’s Indian Penal Code, 1860 is the masterpiece of criminal law governing Indian Territory. ‘The Indian Penal Code (IPC) also has a list of offences against children including Sexual offences.

According to the sections 82 and 83 of the IPC a child who commits a crime and is below the age of seven is not considered to have committed a crime. A child who is between the ages of seven and twelve and is deemed to have immature understanding about the consequences of his/her actions is also considered incapable of committing a crime.

Section 315 and 316 discusses the offence of foeticide and infanticide. If a person commits an act with the intention of preventing the child from being born alive or an act that results in the death of the child after birth, that person is committing foeticide/infanticide as long as they do not do it in the interest of the mother's health or life. If a person does an act that amounts to culpable death which results in the quick death of an unborn child, he will be charged with culpable homicide.

Section 305 states that it is a crime for any person to abet the suicide of a child, i.e. a person who has not completed eighteen years of age.

Section 317 states that it is a crime against children, if their mother or father expose or leave a child in a place with the intention of abandonment.
This does not prevent the law from pursuing further if the abandonment results in the death of the child. The parents would then be charged with culpable homicide or murder.

Section 360 states that kidnapping from India is the defined as the conveyance of a person beyond the borders of India without their consent.

Section 361 states that if a male minor of not yet sixteen and female minor of not yet eighteen is taken from their lawful guardians without their consent it is termed kidnapping from lawful guardianship.

Section 362 defines abduction as compelling, forcing or deceitfully inducing a person from a place. Section 363-A states, it is a crime to kidnap or maim a minor for the purpose or employment of begging. If a person if found employing a minor for begging, and that person is not the legal guardian of the child, it is assumed that the child has been kidnapped for the purpose of employment in begging.

Section 364 states that any person who kidnaps another for the purpose for murdering or disposing of in a way that will lead to murder is punishable by law.

Section 364-A defines ransom kidnapping as any person who kidnaps another to threatens to harm or kill that person in an attempt to get the government, or any other foreign or state organisation to do or not do any act.

Section 365 discusses kidnapping to secretly or wrongfully confine someone.

Section 366 states it is a crime to force or compel or abuse a woman to leave a place in order to force her to marry or seduce or illicit sexual intercourse from her by the kidnapper or another person.

366A specially outlines such a crime being committed against a minor girl who has not attained eighteen years of age.
Section 367 states it is a crime to kidnap a person in order to cause them grievous hurt, place them in slavery, or subject them to the unnatural lust of a person.

Section 369 is a specific crime of kidnapping a child under 10 years of age in order to steal from them.

Section 372 discusses the selling of a child (below the age of eighteen) for the purpose of prostitution or to illicit intercourse with any person, or knowing that it is likely that the child is being sold for such a purpose. Section 372 states it is a crime to buy a child for the purpose of prostitution or to illicit sex from any person.

Section 376 discusses the offence of rape. Under this section a man who rapes his wife, who is not below twelve years old is given a lesser punishment. The section also discusses special circumstances of rape such as rape committed by a civil servant or police man, rape of a pregnant woman, gang rape or rape of a child below the age of twelve.\(^6\)

However, the provisions of IPC were “inadequate” to protect the children who needed special care and protection or who are victims of sexual abuse. By 1960, many states started enacting their separate legislations establishing systems and laws for children/juveniles which varied in terms of definitions, and other procedural requirements and their implementation also varied. In 1960, Union government enacted The Children Act 1960, which was applicable to union territories which were directly administered by the Union government. In *Sheela Barse Vs Union of India*\(^7\), it was held by the Supreme Court:

> “Instead of each State having its own Children's Act in other States. it would be desirable if the Central Government initiates Parliamentary Legislation on the subject, so that there is complete uniformity in regard to the


\(^7\) 1986 SCALE (2) 230
various provisions relating to children in the entire territory of the country. The Children's Act which may be enacted by Parliament should contain not only provisions for investigation and trial of offences against children below the age of 16 years but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who are either accused of offences or are abandoned or destitute or lost. Moreover, it is not enough merely to have legislation on the subject, but it is equally, if not more, important to ensure that such legislation is implemented in all earnestness and mere lip sympathy is not paid such legislation and justification, for non-implementation is not pleaded on ground of lack of finances on the part of the State. The greatest recompense which the State can get for expenditure on children is the building up of a powerful human resource ready to take its place in the forward march of the nation.”

It was also said by the Court: “If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that child shall not be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society.”

This judgment played a crucial role in passing the uniform law on juvenile justice, i.e. Juvenile Justice Act, 1986. The Parliament invoked its power under Article 253 of constitution of India in making the juvenile justice system in India to conform the United Nations standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules 1985) to abide the International Obligation which India agreed by ratifying in 1985.

For the first time the law mandated care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and for adjudication and disposition of juvenile delinquency matters throughout
country. The act formulated separated procedures for the juvenile delinquents and neglected juveniles, by establishing separate juvenile courts and juvenile welfare boards. Juvenile courts handled the offences committed by girls under the age of eighteen years and sixteen years for the boys accused of committing crime.

Under the 1986 law, juvenile delinquents are persons below specified ages who committed certain acts that would be treated as crimes if committed by adults. Those juveniles would be processed through special courts following due process rules applied to adult offenders with exception that these proceedings are private and confidential and as far as possible be non-judicial in nature. The delinquents who are convicted could be fined or placed under supervision for a maximum of three years but they cannot be executed or imprisoned or jailed.

It has been observed that:

“Juvenile Justice Act, 1986 was applied uniformly throughout India except state of Jammu and Kashmir. Prior to this law each state had its own enactment on juvenile justice with there being differences in the way juveniles were treated by different state legal systems. In a landmark step, the Government of India, repealing the juvenile justice Act 1986, introduced juvenile justice (Care and Protection of Children) Act in 2000 and further, amended, it in 2006, so as to make it responsive to the emerging needs in the tiled of juvenile justice, and making it, compatible with UNCRC standards. The Juvenile Justice Act, 2000 aims at consolidating and amending laws relating to juveniles in conflict with law, and children in need of care and protection by providing proper care, protection and treatment by catering to their developmental needs, by adopting child friendly approach in adjudication and disposition of matters in the best
interest of children, and for their rehabilitation through various institutional mechanisms established."^8

As the Preamble of the Act (2000) clearly stated that the “object of the law relating to juveniles in conflict with law is providing proper care, protection and treatment by catering to their development needs and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through institutions established under this law”.^9

The law underlined a welfare approach by inclusion of non-criminal justice language (arrest is replaced by apprehension, act does not speak about Jail, court, police, trial), Age of juvenile in conflict with law made same for both boys and girls as eighteen years after the country ratified United Nation convention on child rights which mandates the age of criminality as eighteen years, more emphasis on rehabilitation, re-socialization and reintegration of juvenile in conflict with law rather than punishment, placing minimal intervention of the correctional authorities and police as the special provision for special juvenile police to handle the cases in inquiry and replacing juvenile courts by Juvenile Justice Boards so as to make more child friendly in adjudication.

After the tragic Delhi Gang Rape of December 16, 2012 where a juvenile was involved with other adult offenders in raping and torturing due to which the victim died, the issue raised a debate on reduction of age of Juvenile in conflict with law as debated that juvenile offenders are increasing.

Standing firmly against lowering of the age criteria for juveniles accused of heinous crimes including rape, the Justice J.S. Verma Committee report on ‘Amendments to Criminal Law’ has noted that “the Juvenile Justice Act has failed miserably to protect the children in the country. We cannot hold the child

^8 V Joshi, Juvenile Justice in India, Shodhganga, available online at http://shodhganga.inflibnet.ac.in/bitstream/10603/78096/06_abstract.pdf, accessed 15/03/2017
responsible for a crime before first providing to him/her the basic rights given to him by the Indian Constitution”.

However, the Juvenile Justice (Care and Protection of Children) Act, 2015 has now come into force which has repealed the Juvenile Justice (Care and Protection of Children) Act, 2000.

The Press Release from the Government of India stated that:

“The JJ Act, 2015 provides for strengthened provisions for both children in need of care and protection and children in conflict with law. Some of the key provisions include: change in nomenclature from ‘juvenile’ to ‘child’ or ‘child in conflict with law’, across the Act to remove the negative connotation associated with the word “juvenile”; inclusion of several new definitions such as orphaned, abandoned and surrendered children; and petty, serious and heinous offences committed by children; clarity in powers, function and responsibilities of Juvenile Justice Board (JJB) and Child Welfare Committee (CWC); clear timelines for inquiry by Juvenile Justice Board (JJB); special provisions for heinous offences committed by children above the age of sixteen year; separate new chapter on Adoption to streamline adoption of orphan, abandoned and surrendered children; inclusion of new offences committed against children; and mandatory registration of Child Care Institutions.

Under Section 15, special provisions have been made to tackle child offenders committing heinous offences in the age group of 16-18 years. The Juvenile Justice Board is given the option to transfer cases of heinous offences by such children to a Children’s Court (Court of Session) after conducting

---

preliminary assessment. The provisions provide for placing children in a ‘place of safety’ both during and after the trial till they attain the age of 21 years after which an evaluation of the child shall be conducted by the Children’s Court. After the evaluation, the child is either released on probation and if the child is not reformed then the child will be sent to a jail for remaining term. The law will act as a deterrent for child offenders committing heinous offences such as rape and murder and will protect the rights of victim.”

The basic principles governing juvenile justice have been summarized under Juvenile Justice Act, 2015 as:

i. Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

ii. Principle of dignity and worth: All human beings shall be treated with equal dignity and rights.

iii. Principle of participation: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child’s views shall be taken into consideration with due regard to the age and maturity of the child.

iv. Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

v. Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

---

vi. Principle of safety: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

vii. Positive measures: All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

viii. Principle of non-stigmatising semantics: Adversarial or accusatory words are not to be used in the processes pertaining to a child.

ix. Principle of non-waiver of rights: No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

x. Principle of equality and non-discrimination: There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

xi. Principle of right to privacy and confidentiality: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

xii. Principle of institutionalisation as a measure of last resort: A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

xiii. Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.
xiv. Principle of fresh start: All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

xv. Principle of diversion: Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

xvi. Principles of natural justice: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act."\(^{12}\)

Further, ‘it is a fact that millions of girls and boys worldwide are being sexually abused within homes and outside. They are abused by families and known persons. The perpetrator can be anyone who exploits the child's vulnerability to gain sexual gratification. It involves mental, physical and emotional abuse of a child through overt and covert sexual acts, gestures and disposition - when informed consent or resistance by the child victim to such acts is not possible. It can also include activities which do not involve direct touching. A form of child sexual abuse in India are child marriages.’\(^{13}\) The legal protection provided to children from sexual violence committed against them was not holistic before the enactment of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) by the Parliament of India and therefore with this objective in the mind the POCSO Act was passed. The objective of the Act is “to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.”\(^{14}\) The existing laws mainly had protection for female child only from the acts of sexual nature, and that too was inadequate. For example, the IPC addressed all the offences of sexual nature against women apart from

\(^{12}\) Section 3 of the Juvenile Justice Act 2015.


\(^{14}\)Preamble, POCSO Act 2012
rape under sections 354 and 509. Moreover, the Act has been enacted to fulfill India’s obligation under UNCRC which seeks to prevent\textsuperscript{15}:

\begin{itemize}
  \item[a)] The inducement or coercion of a child to engage in any unlawful sexual activity;
  \item[b)] The exploitative use of children in prostitution or other unlawful sexual practices;
  \item[c)] The exploitative use of children in pornographic performances and materials;
\end{itemize}

In the case of \textit{Ms. Eera Vs. State (Govt.NCT of Delhi)}\textsuperscript{16}

The Delhi HC held that The POCSO Act has identified minors and protected them by prescribing the statutory age which has nexus with the legal eligibility to give consent. The Parliament has felt it appropriate that the definition of the term “age” by chronological age or biological age to be the safest yardstick than referring to a person having mental retardation. It may be due to the fact that the standards of mental retardation are different and they require to be determined by an expert body. The degree is also different. The Parliament, as it seems, has not included mental age. It is within the domain of legislative wisdom. Be it noted, a procedure for determination of age had been provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2000. The procedure was meant for determination of the biological age. It may be stated here that Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) defines “child” to mean a person who not completed eighteen years of age. There is a procedure provided for determination of the biological age. The purpose of stating so is that the Parliament has deliberately fixed the age of the child and it is in the prism of biological age. If any determination is required, it only pertains to the biological age, and nothing else. The purpose of POCSO Act is to treat the

\textsuperscript{15}ibid.
\textsuperscript{16}2017 SCC On Line SC 787
minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well being of the children at every stage of judicial proceeding. It provides for a child friendly procedure. It categorically makes a distinction between a child and an adult. On a reading of the POCSO Act, it is clear to us that it is gender neutral. In such a situation, to include the perception of mental competence of a victim or mental retardation as a factor will really tantamount to causing violence to the legislation by incorporating a certain words to the definition. By saying “age” would cover “mental age” has the potential to create immense anomalous situations without there being any guidelines or statutory provisions. Needless to say, they are within the sphere of legislature. To elaborate, an addition of the word “mental” by taking recourse to interpretative process does not come within the purposive interpretation as far as the POCSO Act is concerned.

5.2 RELATIONSHIP BETWEEN IPC, JJ ACT AND POCSO

While IPC is a general law, Juvenile Justice Act and POCSO Act are special laws.

‘The Juvenile Justice Act has ensured that a delinquent child will be treated differently at every stage of the criminal justice system and there shall be no adversarial trial in the sense of the term. Instead, the case shall be ‘enquired’ by the Juvenile Justice Board (JJB), presided over by a First Class Judicial Magistrate.’\textsuperscript{17}

Section 15 of the Act (2015) states that: “In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he

\textsuperscript{17}KA Pandey, Principles of Criminal Law in India: Cases & Materials, Central Law Publication, 2014 Allahabad, page 298.
allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18”.

Section 18(3) states: “Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children’s Court having jurisdiction to try such offences.”

However, ‘a juvenile in conflict with law who was above the age of 16 years on the date of commission of crime, and the crime was serious in nature, such a juvenile might be kept in a place of safety; but in no case could the juvenile be committed to an adult prison system.’

Further, Section 23(1) of the Juvenile Justice Act 2015 states: “Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 or in any other law for the time being in force, there shall be no joint proceedings of a child alleged to be in conflict with law, with a person who is not a child.”

Moreover, “Even under the Juvenile Justice Act, 2015, no child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under its provisions or under the provisions of the Indian Penal Code or any other law for the time being in force.”

Section 42A of POCSO states: “The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”

**5.3 CONFLICT BETWEEN IPC AND JJ ACT**

Section 82 states that: “Nothing is an offence which is done by a child under seven years of age”.

---

19 Ibid, page 127
Section 83 states that “Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.”

Sections 82 and 83 afford protection to children under special circumstances. ‘This protection is based on the legal presumption as to the incapacity of infants to have mensrea. No person would be held criminally liable unless he has the necessary mensrea constituting the offence and children do not possess mensrea.’

However, it is stated that ‘the fact remains that under the existing Juvenile Justice Act, 2015 the provisions of the Code (Sections 82 and 83) on criminal responsibility of children are largely redundant as Section 3, Juvenile Justice Act 2015 retains the principle of presumption of innocence of a child under the age of 18 years.’

5.4 CONFLICT BETWEEN IPC AND POCSO

Before bringing POCSO Act, making amendments to the Indian Penal Code was also considered by the Government of India as an option, but it was considered time consuming and requiring larger consultations and therefore, consensus was for bringing a new legislation.

The POCSO Act of 2012 defines “children” as those aged below 18. It has specific provisions declaring that “penetrative sexual assault” and “aggressive penetrative sexual assault” against children below 18 is rape. However, an exception to Section 375 in the IPC does not find a man guilty to

---

20 Ibid, page 123
21 Section 3(i) of Act (2015) states, “Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.”
22 KA Pandey, BM Gandhi’s Indian Penal Code, Eastern Book Company, 2017, Lucknow, pg. 127
23 “Training Module for Public Prosecutors on Child Protection Laws”, prepared by Dr.RMLNLU, pg 35.
having sexual intercourse with his 15-year-old wife.\textsuperscript{24} This, when child marriage continues to be illegal under the Prohibition of Child Marriage Act.\textsuperscript{25}

Nobel prize winner Kailash Satyarthi, through his organisation Bachpan Bachao Andolan, while highlighting the conflict between the IPC and the POCSO Act, appealed to the Supreme Court to end the “statutorily backed” crime against children.\textsuperscript{26}

It was contended in the petition that:

“The cause for filing the present petition is that the Petitioner has observed in a large number of cases that despite being a child by definition (under the age of 18), provisions of POCSO are not being applied and the benefit of a special act is not being afforded to those children, who by definition fall under POCSO, but who are in a married relationship.”

The following provisions were referred to in the petition:

- Exception 2 to Section 375, Indian Penal Code, 1860 provides as follows:
  “Exception 2 – Sexual Intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

- Section 5 (n) of POCSO provides as under: “Whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative...

\textsuperscript{24} “A chink in the colonial era Indian Penal Code (IPC), allowing a man to have sexual intercourse with his child wife, has led the Supreme Court to give a directive to the Central government.” This exception ensures that he will not be charged for rape even though child marriage is a crime.” See “Rape law: clear conflict between IPC and POCSO Act, SC tells govt.”, The Hindu, 5 January 2017, available online at http://www.thehindu.com/news/national/Rape-law-clear-conflict-between-IPC-and-POCSO-Act-SC-tells-govt/article16992085.ece, accessed 15/03/2017

\textsuperscript{25} “Examine Conflict Between POCSO & IPC: SC To Centre”, Live Law, 5 January 2017, available online at http://www.livelaw.in/examine-conflict-pocso-ipc-sc-centre/ accessed on 15/03/2017

sexual assault on such child is said to commit aggravated penetrative sexual assault.”

- Section 6 of the Act enunciates the punishment for aggravated penetrative sexual assault as rigorous imprisonment not less than 10 years to life imprisonment.

- The definition of “child” under Section 2(d) of POCSO is “any person below the age of 18 years.”

- Moreover, “shared household” is defined in Section 2(k) meaning “a household where the person charged with the offence lives or has lived at any time in a domestic relationship with the child”.

- Section 2(e) of POCSO states that the term “domestic relationship” will have the same meaning as assigned to it in clause (f) of Section 2 of the Protection of Women from Domestic Violence Act 2005.

It was then stated:

“A conjoint reading of the above provisions makes it apparent that where a child is below the age of fifteen, even if she is a wife and is subjected to sexual intercourse by her husband, the provisions of POCSO will apply, and the same will constitute aggravated penetrative sexual assault and accordingly the Exception 2 to Section 375 cannot be of any recourse to the husband, in as much as the same would qualify as “rape”.”

Before this petition was filed, Justice Vimala of Madurai Bench of Madras High Court had referred the issue of contradictions, controversies and conflict between various legislations, which touch upon the constitutional validity of POCSO Act to a Division Bench.”

Justice Vimala highlighted that in IPC, sexual intercourse by a man with his wife above 15 years of age is an

exception to rape, and that the Criminal Law Amendment Act, 2013, which raised the age of consent to 18 years but did disturb this exception, which implies that sexual intercourse with a wife above 15 years of age and below 18 years of age will not amount to rape under the IPC.\(^{28}\)

The Single Judge also observed: “The POCSO Act defines a ‘child’ to mean ‘any person below the age of 18 years’, which would mean that husband/wife can be prosecuted for engaging in a sexual act with his/her spouse below the age of 18 years. The Act also criminalises consensual sexual acts among children or between a child and an adult. Though the PCM Act, 2006, seeks to prohibit the solemnisation of marriages of girl below the age of 18 years and boys below the age of 21 years, it is, however, silent on sexual relations in a child marriage.”\(^{29}\)

It has been stated that Exception 2 is violative of Articles 14, 15 and 21 of the Constitution to the extent that it permits intrusive sexual intercourse with a girl child aged between 15 to 18 years only on the ground that she has been married.\(^{30}\) The Exception is contrary to the provisions of POCSO Act 2012, which has an overriding effect on IPC, by virtue of S. 42A of POCSO Act.

Therefore, ‘in all cases of child marriage where the bride or groom is below 18 years of age, a charge of aggravated penetrative sexual assault can lie against them under the POCSO Act.’\(^{31}\)

5.5 CONFLICT BETWEEN JUVENILE JUSTICE ACT AND POCSO

‘The offences prescribed under the POCSO Act are gender neutral both from the point of view of offender and the victim. Whereas, under the other existing penal statutes; generally the offences of sexual nature can only be

\(^{28}\)ibid.

\(^{29}\)The synopsis of the petition can be accessed at https://drive.google.com/file/d/0BzXilfcxe7yuYlloYjB5NTZ2OWM/view, accessed on 15/03/2017

\(^{30}\)KA Pandey, BM Gandhi’s Indian Penal Code, Eastern Book Company, 2017, Lucknow, pg 642.

\(^{31}\)“Child Marriage and the Protection of Children from Sexual Offences Act, 2012”, CCL-NLSIU Bangalore, available online at https://www.nls.ac.in/ccl/justicetochildren/poscoact.pdf, accessed on 15/03/2017
committed by a man against a woman. For example the definition of rape as an
offence starts with the expression “A man is said to commit rape”, and it also
mentions that the offence of rape can only be committed against the woman.
Under POCSO Act, the victim of all the offences is always a child who is
defined under section 2 (d) to mean any person below the age of eighteen
years. As it is evident, any person below the age of eighteen years regardless of
gender is a child under the Act. The Act does not recognize any legitimate
consensual sex or physical intimacy involving child, however, in case of
consensual sex or physical intimacy between two adolescents below the age of
eighteen years, or when the offender is child and the victim is an adult the case
will be dealt with under the Juvenile Justice (Care and Protection of Children)
Act, 2015.  

As stated earlier, special provisions have been made to tackle child
offenders committing heinous offences in the age group of 16-18 years. S. 376
IPC is a heinous offence under the Juvenile Justice Act, 2015. The act of rape
under 375 IPC can only be done by a man.

Therefore, the Juvenile Justice Act 2015 is in conflict with POCSO Act
as the Juvenile Justice Act is gender-biased while POCSO is a gender-neutral
Act and protects both male and female children from various sexual assaults
and offences.  

Moreover, it remains unresolved which of the two, POCSO Act or
Juvenile Justice Act, will have overriding effect on the other, in cases of
consensual sex between adolescents below 18 years age as the new Juvenile
Justice Act 2015 was enacted after the POCSO Act or its amendments.

5.6 HARMONIOUS CONSTRUCTION OF CHILD
PORNOGRAPHY LAWS UNDER:

32“Training Module for Public Prosecutors on Child Protection Laws”, prepared by Dr. Ram
Manohar Lohiya National Law University, page 34
33“Age Debate: The amendment to the Juvenile Justice Act won’t act as a deterrent”, The Asian
Age, 24 December 2015, available online at http://www.asianage.com/debate/age-debate-
amendment-juvenile-justice-act-won-t-act-deterrent-395, accessed 15/03/2017
5.6.1 The POSCO Act

Section 13. Use of child for pornographic purposes:

Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes—

a) Representation of the sexual organs of a child;

b) Usage of a child engaged in real or simulated sexual acts (with or without penetration);

c) The indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes.

Explanation.-For the purposes of this section, the expression “use a child” shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.

Section 14. Punishment for using child for pornographic purposes:

1) Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine.

2) If the person using the child for pornographic purposes commits an offence referred to in section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.
3) If the person using the child for pornographic purposes commits an offence referred to in section 5, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and shall also be liable to fine.

4) If the person using the child for pornographic purposes commits an offence referred to in section 7, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than six years but which may extend to eight years, and shall also be liable to fine.

5) If the person using the child for pornographic purposes commits an offence referred to in section 9, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than eight years but which may extend to ten years, and shall also be liable to fine.

Section 15. Punishment for storage of pornographic material involving child:

Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or with both.

5.6.2 Information Technology Act

Section 67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form.-

Whoever,-

a) Publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or

b) Creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic
form depicting children in obscene or indecent or sexually explicit manner or

c) Cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or

d) Facilitates abusing children online or

e) Records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees: Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

   i. The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

   ii. Which is kept or used for bonafide heritage or religious purposes

Explanation: For the purposes of this section, “children” means a person who has not completed the age of 18 years.
5.6.3 Indian Penal Code and Intermediary guidelines under It Act

Provision of Indian Penal Code

Section 292. Sale, etc., of obscene books, etc.—

(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the pruri-ent interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.]

Whoever-

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

Exception - This section does not extend to—

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or (ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in—

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or (ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Section 79. Intermediaries Not To Be Liable In Certain Cases

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hasted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hasted; or
(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or authorise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation: For the purposes of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary.

5.7 RELEVENT CASES

Avnish Bajaj Vs State of Delhi

An IIT Kharagpur student Ravi Raj, who placed on the baazee.com a listing offering an obscene MMS video clip for sale with the username alice-elec. Despite the fact that baazee.com have a filter for posting of objectionable content, the listing nevertheless took place with the description, “Item 27877408 – DPS Girls having fun!!! full video + Baazee points.” The item was

34 (2005) 3 CompLJ 364 Del

203
listed online around 8.30 pm in the evening of November 27th 2004 and was deactivated, around 10 am on 29th November 2004. The Crime Branch of Delhi police took cognizance of the matter and registered an FIR. Upon investigation, a charge sheet was filed showing Ravi Raj, Avnish Bajaj, the owner of the website and Sharat Digumarti, the person responsible for handling the content, as accused. Since, Ravi Raj absconded; the petition was filed by Avnish Bajaj, seeking the quashing of the criminal proceedings.

Petitioner: Since the MMS was transferred directly between the seller and buyer without the intervention of the website, they can at most be responsible for the listing placed on the website which by itself was not obscene and did not attract the offence under Section 292/294 IPC or Section 67 of the Information Technology (IT) Act. Secondly, Due diligence was taken by the website to immediately remove the video clip once it was brought to its knowledge that it was objectionable. Thirdly, The scope of Section 67 of the IT Act is only restricted to publication of obscene material and does not cover transmission of such material.

State: Offence under Section 292 of Indian Penal Code (IPC) includes not only overt acts but illegal omissions within the meaning of Sections 32, 35 and 36 IPC. The failure to have adequate filter in a system which is entirely automated entails serious consequences and a website cannot escape such legal consequences. The fact that payment was made to the seller even as on 27th December 2004 shows that no attempt was made to prevent or stop the commission of the illegality by the website.

The Delhi High Court observed that a prima facie case for the offence under Section 292 (2) (a) and 292 (2) (d) IPC is made out against the website both in respect of the listing and the video clip respectively. The court observed that “by not having appropriate filters that could have detected the words in the listing or the pornographic content of what was being offered for sale, the website ran a risk of having imputed to it the knowledge that such an object
was in fact obscene”, and thus it held that as per the strict liability imposed by Section 292, knowledge of the listing can be imputed to the company.

However, as far as Avnish Bajaj is concerned, the court held that since the Indian Penal Code does not recognize the concept of an automatic criminal liability attaching to the director where the company is an accused, the petitioner can be discharged under Sections 292 and 294 of IPC, but not the other accused.

As regards Section 67, read with Section 85 of the IT Act, the Court however, observed that a prima facie case was made out against the petitioner Avnish Bajaj, since the law recognizes the deemed criminal liability of the directors even where the company is not arraigned as an accused. The judgement however did not declare Avnish Bajaj guilty.

Kamlesh Vaswani Vs. Union of India35

A writ petition has been filed:

a) To issue appropriate directions to Ministry of Communication and Information Technology

   i. To take measures to promote the dissemination and improvement of filtering services.

   ii. To take strict measures to prevent distribution and access to pornography including measures regarding file sharing software.

   iii. To adopt various measures towards improvement in the effectiveness of blocking Child pornography on the Internet and to take measures to eliminate child pornography.

b) To issue appropriate directions to Ministry of Women & Child Development

35(2014) 6 SCC 705
i. For enhancement and to strengthening of protective measures to reinforce support for victims (both child and women).

ii. To take effective steps to promote public relations and awareness raising activities concerning risks and proper use of the Internet.

c) To issue appropriate directions to the Ministry of Human Resource Development

i. To direct that jammers be installed inside the school premises and in the school buses to prevent access of pornographic sites on the cell phones by the driver or anyone who is in charge of the children in the buses.

ii. To direct to have one male and female child counselor in every school and special workshop to be conducted in schools for awareness of sex education.”

The case has not been finally disposed of yet.

5.8 NEED FOR BALANCED APPROACH

The POCSO Act has conflated child sexuality with child sexual abuse. It has failed to consider nuances of age, age difference, and child development. Should we not challenge the provisions of the POCSO Act for having effectively criminalizing all forms of consensual sexual conduct among children without any regard for their autonomy and fundamental rights? Should the law not be amended to ensure that age-gaps are considered? Also, judicial blessings for marriages between perpetrators and their child victims, not only sanctions marital violence, but child marriage – both of which are illegal, and requires to be prohibited. It has been rightly observed that: “The age of consent is pegged at 18 years, sexual intimacies and interactions among or with children in the age group of 16-18 years has been criminalized. In this regard, the National Commission for Protection of Child Rights (NCPCR) Bill, 2010 is instructive. It proposed that that any consensual sexual act that may constitute
penetrative sexual assault should not be an offence when it is between two children who are both above 14 years of age and are either of the same age or the difference in age is not more than three years. It is imperative that the Act be amended to address this anomaly."

Perhaps, the POCSO Act is incomplete as it fails to address the issue of child sexuality, by mixing it with child sexual abuse. It is to be noted here that the balanced approach addresses the public need for sanctioning based on accountability measures. A balanced and restorative justice provides a framework for systemic reform and offers hope for preserving and revitalising the juvenile justice system. The development must begin with new roles for victims, citizens and offenders in the justice process. Implementation must begin with consensus building among key stakeholders and testing with small pilot projects to develop the model. The programmes should hold promise for achieving several goals, including increased community and victim involvement, greater satisfaction with the case outcomes, improved offender compliance, increased perceptions of fairness, and even recidivism reduction.

5.9 WEAK IMPLEMENTATION OF CHILD LAWS

Apart from various conflicts between the major child related laws, the non-implementation of these laws is also a major setback for human rights of children.

‘The Justice Verma Committee Report, in one of its conclusions on child sexual abuse, holds that “there is an urgent need to audit the performance of all institutions of governance and law and order”. We need to consolidate our efforts and focus our energies on existing laws rather than looking to amend more laws and making still further newer laws, alien to our culture, society, habits, lifestyles and harsh realities of the common man. Insofar as child sex abuse is concerned, POCSO is a wholesome law. The government

---

must create the machinery to implement it and educate its officers besides all stakeholders on what it contains. The state must not waste time exploring alternatives when the answers exist in a law made by Parliament for these special offences against children, the most vulnerable section of society.‘

‘The failure of statutory authorities in seeking to protect children is quite evident. The abject failure of the State to maintain proper protective homes for distressed women and children - homes and shelters where they are treated with love and affection and where a conducive climate of counselling and motivation for a better future is made available. If this failure is not remedied immediately, then such children might also not only slip back to crime, but they would feel that society has cheated them.‘

Even though there are salutary provisions in the subsequent Juvenile Justice (Care and Protection) Acts (2000 and 2015), they have not been implemented in the spirit for mainstreaming the child into the society. In other words, children have not been strengthened and made confident to lead a normal life in conjunction with their parents and society.

5.10 AUTHORITIES OBLIGATION FOR THE END OF JUVENILE JUSTICE UNDER POCSO ACT 2012

The fundamental principles to be followed in the determination of a case involving a sexual offence against a child have been laid down in various international instruments and in the Preamble to the POCSO Act, 2012 itself. The State Governments, the Child Welfare Committee, the Police, the Special Courts, all other Government functionaries as well as Non-Government organisations, and all professionals and experts assisting the child at the trial

37 “Strong provisions, weak implementation”, The Hindu, 8 December 2013, available online at http://www.thehindu.com/todays-paper/tp-opinion/strong-provisions-weak-implementation/article5472108.ece, accessed on 15/03/2017
and pre-trial stages are bound to abide by these principles. These principles are:

a) Right to life and survival - Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect; and to a chance for harmonious development and a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development.

b) The best interests of the child - Every child has the right to have his/her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development. Protecting the child’s best interests means not only protecting the child from secondary victimisation and hardship while involved in the justice process as victim or witness, but also enhancing the child's capacity to contribute to that process. Secondary victimisation refers to the victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim.

c) The right to be treated with dignity and compassion - Child victims should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity. Interference in the child's private life should be limited to the minimum needed and information shared on a need to know basis. Efforts should also be made to reduce the number of professionals interviewing the child. At the same time, however, it is important that high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice

---


209
process. In order to avoid further hardship to the child, interviews, examination and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner in a child-friendly environment. All interactions should also take place in a language that the child uses and understands. Medical examination should be ordered only where it is necessary for the investigation of the case and is in the best interests of the child and it should be minimally intrusive.

d) The right to be protected from discrimination - The justice process and support services available to child victims and witnesses and their families should be sensitive to the child’s age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste and socio-economic condition, as well as to the special needs of the child, including health, abilities and capacities. Professionals should be trained and educated about such differences. Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, according to his/her age and level of maturity.

e) The right to special preventive measures – Children may already face twice as much risk of repeated victimisation as adults because they often are or are perceived by a potential offender as being vulnerable, unsure of how to defend themselves or unable to properly assert themselves and take a strong position against an adult. A preventive measure that could be used to protect children is to demand references and a criminal background assessment before hiring personnel likely to work with children, such as schoolteachers.

f) The right to be informed - There are two aspects of child victim and witnesses right to be informed. The first aspect is the more general one and consists of informing child victims and witnesses about the assistance they are entitled to, the way legal proceedings are organized
and the role they can play in those proceedings if they decide to do so. The second aspect is more specific and relates to information on the particular case in which the child is involved: it implies being informed about the progress of the case, about the scheduling of the proceedings, about what is expected of the child, about the decisions rendered, about the status of the offender, and so forth.

g) The right to be heard and to express views and concerns—Every child has the right to be heard in respect of matters affecting him/her. The child has a right to participate at all levels: being informed, expressing an informed view, having that view taken into account, and being the main or joint decision maker. When, for any good reason, the requirements and expectations of the child cannot be met, it needs to be explained to the child, in a child-friendly way, why certain decisions are made, why certain elements or facts are or are not discussed or questioned in Court and why certain views are not taken into consideration. It is important to show respect for elements that a child finds important in his/her story, but which are not necessarily relevant as evidence.

h) The right to effective assistance—The child must receive the required assistance to address his/her needs and enable him/her to participate effectively at all stages of the justice process. This may include assistance and support services such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's healing, as well as for justice and reintegration.

i) The right to privacy—The child's privacy and identity must be protected at all stages of the pre-trial and trial process. The release of information about a child victim or witness, in particular in the media, may endanger the child's safety, cause the child intense shame and humiliation, discourage him from telling what happened and cause him severe emotional harm. Release of information about a child victim or witness
may put a strain on the relationships of the child with family, peers and community, especially in cases of sexual abuse. In some cases it might also lead to stigmatization by the community, thereby aggravating secondary victimization of the child. There are two essential ways of protecting the privacy of child victims and witnesses: firstly, by restricting the disclosure of information on child victims and witnesses and secondly, by restricting the attendance of the general public or non-essential persons in courtrooms.

j) The right to be protected from hardship during the justice process - Throughout the justice process, child victims are exposed to hardship, also referred to as secondary victimization: this can occur while reporting the crime and recounting what has happened, while awaiting trial and while testifying in court. The judicial process is a very stressful one for the child; as far as possible, any stress the child may have as a result of the process should be minimized.

k) The right to safety - Where the safety of a child victim may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process. Professionals should be trained in recognizing and preventing intimidation, threats and harm to child victims and witnesses. Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child.

l) The right to compensation– The child victim may be awarded compensation for his/her relief and rehabilitation. This compensation may be awarded at an interim stage, during the pendency of trial, as well as at the conclusion of the trial. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive. Victims may be repaid for material losses and damages incurred, receive medical and/or psychosocial support and obtain reparation for ongoing suffering.
As per Section 33 (8) of POCSO Act, 2012 and Rule 7(3) of POCSO Rules, 2012 so as to commensurate with the short and long term negative impact on the child. Further, as stated in Rule 7 (4) of the POCSO Rules, 2012, the compensation is to be paid by State Government from the Victims Compensation Fund or other scheme or fund established by it under Code of Criminal Procedure, 1973 or any other law for the time being in force, and in the absence of such fund or scheme, by the State Government.

Thus in this chapter three main laws governing the child related issues are: the Indian Penal Code, Juvenile Justice Act 2015 and POCSO Act 2012 in detail have been discussed. However, there were few conflicts when it came to the provisions of these laws. An effort was made to resolve the issues

In this chapter, it has been made clear that the enactment of Juvenile Justice Act has made redundant Sections 82 and 83 of IPC. Moreover, the Juvenile Justice Act provided a new child rights framework. No child is still to be tried as an adult.

In reference to the conflict between Exception 2 to S. 375 of IPC and POCSO Act, it has been submitted with great emphasis that since POCSO Act has an overriding effect on any law related to the issue, Exception 2 to S. 375 IPC is redundant. The provisions of POCSO Act will prevail.

However, one issue which remains unresolved is whether Juvenile Justice Act of POCSO Act will have overriding effect on the other. Moreover, any act of consensual sex between an adolescent couples below 18 years will be governed by the provisions of Juvenile Justice Act, 2015.

Also, it has been stated firmly that the POCSO Act is incomplete as it fails to address the issue of child sexuality, by mixing it with child sexual abuse.
Therefore, it is concluded that a balance approach between the provisions of the discussed child related laws is the need of the hour. Without addressing the mentioned issues, the child rights regime will remain empty.

* * * * *