

Evolution and Impact of the Best Interest Jurisprudence on Children's Rights with Special Reference to the State of Goa

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DECLARATION

I, Andryusha A D'Costa hereby declare that this thesis represents work which has been carried out by me and that it is not been submitted, either in part or full, to any other University or Institution for the award of any research degree

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CERTIFICATE

I, hereby certify that the above Declaration of the candidate, Ms. Andryusha A. D'Costa is true and the work was carried out under my/our supervision.

Dr. Kotagiri Srinivas Rao

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Every good and perfect gift is from above, coming down from the father of heavenly lights with whom is no variableness, neither shadow of turning" (James1: 17) This work could not have materialised without the grace of the Almighty. All praise and thanks to God the Almighty.

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“...in serving the best interests of children, we serve the best interests of all humanity.”- Carol Bellamy

Abstract

The principle of Best interest of the child is a paramount principle and creates an obligation to assess an individual child's well-being. This principle of best interest has created three kinds of rights substantive right, interpretative right and procedural application of the best interest. All these three rights try to ensure that in all situation the best interest of the child is upheld.

This thesis focuses on how the State of Goa has been successful in the implementation of the best interest of the child specifically with regards to victim children. This thesis looks into the implementation of the Protection of Children from Sexual Offences Act 2012 and the Goa Children's Act 2003 whether the said legislations are implemented in accordance with the best interest of the child. The objectives of both the Acts is to secure the tender age of the child, protect, promote and preserver the best interest of the child.

For the purpose of lucid presentation this research is categorized into various chapters. The concept of the principle of best interest of the child followed by the purpose of the said study, the formulation of hypothesis including the objective of the study and methodology adopted is mentioned in the first chapter.

Since the principle of Best Interest of the child as well as its evolution is of an international discourse the interpretation of the concept in various context including how the said concept is interpreted in the Indian context is elaborated in the second chapter.

The implication and international acceptance of the concept of best interest of the child is dealt in the third chapter. In this chapter the international as well as the national standard of the best interest of the child is brought forth. An in depth study of the Goa children's Act 2003 and Rules 2004 as well as the Protection of Children from Sexual Offences Act 2012 and how the principle of best interest of the child is applied and implemented is dealt with in the fourth chapter.

As the study is an intermixing interaction of doctrinal findings substantiated and supported by the use of empirical data the fifth chapter has taken into consideration practical factors and the operational systems currently functioning within the criminal justice process of India more specifically the State of Goa and the implementation of the principle of Best interest of the child. The final chapter provides recommendations with the hope that someday some authority would deem fit to implement it in the best possible way keeping in mind the best interest of the children of the State of Goa who come in contact with the criminal justice system.

This research has led to the conclusion that so far what is being done by various authorities is not enough in upholding the principle of best interest of the child, much more can be achieved in this area. Thus there is a need to enhance sensitivity, provide infrastructural requirements, provide speedy remedy, create greater awareness of rights among children and rehabilitation of victim child.

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Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AIR	All India Reporter
BIC	Best Interest of Child
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CPC	Civil Procedure Code
Cr. PC	Criminal Procedure Code
Cr. Rev.	Criminal Revision
CR.L.P	Criminal Leave Petition
CrI	Criminal
CrI.A.	Criminal Appeal
CrI.MP (M)	Criminal Miscellaneous Petition
CrLJ	Criminal Law Journal
CRPD	Convention on Rights of Persons with Disability
CSA	Child Sexual Abuse
CWC	Child Welfare Committee
DLSA	District Legal Services Authority
DLT	Delhi Law Times
DCPU	District Child Protection Unit
Ex.	Exhibit

FIR	First Information Report
FSL	Forensic Science Laboratory
GCA	Goa Children's Act
GSCPCR	Goa State Commission for Protection of Child Rights
ICPS	Integrated Child Protection Scheme
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant of Economic Social and Cultural Rights
IEA	Indian Evidence Act
IO	Investigating Officer
IPC	Indian Penal Code
JCC	Journal of Criminal Cases
JJ	Juvenile Justice
KB	Kings Bench
MLJ	Madras Law Journal
MLC	Meico Legal Case
NCT	National Capital Territory
NCPCR	National Commission for Protection of Child Rights
Ngo's	Non-Governmental organisations
No.	Number
NYT	New York Times
Ors.	Others

para	Paragraph
POCSO	Protection of Children from Sexual Offences
PW	Prosecution Witness
Ref.	Reference
SC	Supreme Court
SCALE	Supreme Court Almanac
SCC	Supreme Court Cases
SLSA	State Legal Services Authority
SJPU	Special Juvenile Police Unit
SPP	Special Public Prosecutor
U.S.A.	United States of America
u/s	Under Section
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the child
UNHCR	United Nations High Commissioner for Refugees
UOI	Union of India
v.	Versus
VCS	Victim Compensation Scheme
WP	Writ Petition
www	World Wide web

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CHAPTER 1

INTRODUCTION

1. Introduction

The most important development on rights of the child, at the International level was the United Nations Convention on the Rights of the Child 1989¹. This Convention laid down four principles and one such principle, is the principle of Best Interest of Child (BIC). This principle is an abstract concept, and it does not have a universal definition. Assessing the said principle while decision making it poses a challenge to judicial officers as well as practitioners. Various factors which affect and influence the interpretation and application of the said principle which is one of the major concepts under the United Nations Conventions on Child Rights 1989². This principle of ‘Best Interest of Child’ is embodied in Article 3 (1) of the United Nations Convention on Rights of the Child 1989³. It is the yardstick by which all actions, laws and policies of a state which affect children should be measured.

To safeguard and promote the welfare of the children and to protect them from significant harm entirely depends on the effective implementation of the legislation that is drafted and the mechanisms under these legislations whose main objective is the fulfilment of the principle “The best interest of the child”⁴.

In Goa, a separate system for dealing with children was put in place by the passing of the Goa Children’s Act, 2003 and Rules, 2004 ⁵ which made specific provisions for constitution of the Children’s Court⁶. Further to avoid re-victimization of the child at the

¹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20th November 1989. Hereinafter referred to as UN Convention on the Rights of the Child 1989.

² Ibid

³ Article 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

⁴ This principle is laid down under Article 3(1) of the United Nations Convention on the Rights of the Child 1989.

⁵ Goa Act 18 of 2003 (8-7-2003)

⁶ Section 27 Children’s Court (1) The State Government shall, after consultation with the High Court, by notification in the Official Gazette, constitute a Children’s Court for the State of Goa.

(2) In all aspects of its functioning, the Children’s Court shall be guided at all times by the best interests of the child and all its procedures, the office, the dress worn by the members of the legal profession and all the others shall be consciously and deliberately Child Friendly.

hands of the judicial system the Protection of Children from Sexual Offences Act 2012⁷ which deals exclusively with child sexual offences provides for Special courts⁸ to be established for the protection of children from the offences of sexual assault, sexual harassment and pornography, while safeguarding the interests of the child at every stage of the judicial process by incorporating child-friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences.

Any law enforcement action should be child centric and all measures should be taken at every stage to see that the victim of child abuse is not treated as an offender, nor re-victimized but should be extended all help and assistance as a matter of right.

1.2 The Best Interest Principle

The ‘Best Interest of Child’ principle was not in itself novel when the United Nations Convention on the Rights of the Child 1989⁹ was being drafted. It was included in several other international human rights instruments most notably the Declaration of the Rights of the Child 1959¹⁰. The principle of ‘Best Interest of Child’ was first seen in the year 1959 in the Declaration of the Rights of the child.¹¹ However, Article 3 (1) of the United Nations Convention on Child Rights states that the Best Interest of the child shall be a primary consideration in all actions concerning children. It emphasized that Government; public and private bodies must ascertain the impact on children of their actions, to ensure that the ‘best interest of the child’ is given primary consideration, proper priority and that ‘Best Interest of the Child’ shall be of paramount consideration. What is novel about this statement of the ‘Best Interest of the child’ principle was its scope. For the first time, it

⁷ Act No. 32 of 2012.

⁸ Section 28 of POCSO Act 2012

⁹ Ibid., 1

¹⁰ G.A. res.1386 (XIC), 14 U.N. GAOR Supp No. (16) at 19, U.N. Doc.A/4354.

¹¹ The same was found in Principle 2: “The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be the paramount consideration.

extends its reach to an obligation on States to ensure that children's interest is placed at the heart of the Government and of all decision making which impacts children.

In simple words 'The Best Interest of the Child' means considering the child before a decision affecting his/her life is made. It is a Common Law principle that has been used to assist primarily courts and other institutions in the decision- making process.

Within the United Nations Convention on the Rights of the Child 1989¹² there are various other Articles in the Convention that highlight the concept of 'Best Interest of the child'¹³. Neither the Committee on Rights of the Child¹⁴ nor the United Nations Convention on the Rights of the child 1989¹⁵ has proposed a criterion by which the 'Best Interest of the child' can be determined.

The only thing that the committee has stressed is that the United Nations Convention on the Rights of the child 1989¹⁶ should be considered. Thus, principles like non – discrimination, maximum survival and development and respect for the views of the child must be the relevant factors to determine what is in the best interest of the child in a particular situation as well as to determine the best interest of children as a group. The 'best interest of the child' principle must embrace both the short term as well as long term considerations for the child.

¹² Ibid.,1

¹³ Article 9.1 (Child Protection) a child shall not be removed from its family unless it is necessary for the best interest of the child; Article 9.3 (custody) child can maintain contact with both parents except it is contrary to the child's best Interest; Article 18.1 (parental decision making) parents have the primary responsibility for bringing up the child and that the best interest of the child will be the basic concern; Article 20.1 (deprivation of family environment) refers to situations where a child cannot be allowed to remain in a family in its own best interest; Article 21 (Adoption) in adoption systems the best interest of the child shall be of paramount consideration; Article 37(c) (deprivation of liberty) states a child in detention shall be separated from adults unless it is in the best interest of the child not to do so and Article 40 (2) (b) (iii) Right to have parents present in the court, unless it would be considered in the child's best interest for them not to be there.

¹⁴ The Committee on the Rights of children in its General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration which was adopted by the Committee at its sixty – second session (14- January- 1 February 2013) underlines that the child's best interest is a threefold concept: a) substantive right b) a fundamental interpretative legal principle c) A rule of procedure.

¹⁵ Ibid.,

¹⁶ Ibid.,

The functions of the ‘Best Interest of the child’¹⁷ as defined by the United Nations Convention on the Rights of the Child 1989¹⁸ as well as the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (Hague Adoption Convention)¹⁹ has two traditional roles to play one is the criterion of control²⁰ the other is the criterion of solution²¹. A decision-maker while making any decision concerning a child must bear in mind and consider the application of the ‘Best Interest of the child’ principle not only as a short term solution but should also take into account the interest of the child’s future. In general, the United Nations Convention on Rights of the Child 1989²² does not specifically define “best interest”, with a purpose to allow an appropriate balancing of considerations within a well-defined procedural framework.

1.3 Historical Background of the Children’s Court

The concept of Children’s Court has been the most recent area of deliberation in our country. If one goes through history the notion of having a separate Procedural Code while dealing with children can be found right from the Apprentice Act 1850²³. This Act was followed with another legislation which came into force on 11th March 1897 and was

¹⁷ Article 3 of the Convention on the Rights of the child The Best Interest of the Child prepared by Fatima Hassan Beshir for public Policies and Child Rights Diploma.

¹⁸ Ibid.,1

¹⁹ The said Convention was concluded on 29th May 1993.

²⁰ In this criterion the best interest principle must be applied to ensure that the rights and obligations of the child are enabled and fulfilled. This is found exclusively in family law, child protection services, situations of alternative care and cases of migration.

²¹ In this criterion the concept of the interest of the child can assist decision makers in finding the most appropriate decision in cases involving children. The decision maker must systematically look for solutions with the most positive or least negative impact on the child or children in question. The best interest of the child is the essential function of the decision making process because it represents a bridge between a theoretical concept and its direct application in reality.

²² Ibid.,

²³ Act No. 52 of 1961

known as the Reformatory Schools Act 1897²⁴. Both these legislations came to be repealed with the 1960 Children's Act²⁵ which included the term Children's Court²⁶.

If one analyses the above legislations, these legislations tried to incorporate the concept of having a different system for children separate from that of the adults. The thought of having a separate system for children leads to the presumption that the legislators had in mind the principle of 'Best Interest of Child' although no direct inference is made.

India did not stop with the 1960 Children's Act²⁷ the Government came up with the National Policy for the welfare of children on 22nd August 1974²⁸ this document primarily dealt with the needs of children and the duties towards them which were expressed in the Indian Constitution. This document dealt with policy measures to be adopted by states while dealing with children. One of the important measures which were highlighted is as follows "existing laws should be amended so that in all legal disputes whether between parents or institutions, the interest of children is given paramount consideration".²⁹

Moving further the government of India came up with The National Charter for Children 2003³⁰ wherein the Government of India reaffirmed that 'the Best Interest of Child' must be protected through the combined action of the state, civil society, communities, and families. This document further incorporated protection of children from economic exploitation and all forms of abuse and it specifically dealt with the protection of the girl

²⁴ Act No. 8 of 1897 (11th March 1897).

²⁵ Act No. 60 of 1960 (dated 26th December 1960)

²⁶ Section 2(f) defines the term Children's Court as a court established under Section 5 of the Act. Section 5 of Children's Act 1960 Children's Court 1) Notwithstanding anything contained in the (Code of Criminal Procedure, 1973), the administration may, by notification in the official Gazette, constitute for any area in the notification, one or more children's courts for exercising the powers and discharging the duties conferred or imposed on such court in relation to delinquent children under this Act. (2) A Children's Court shall consist of such number of Metropolitan Magistrates or Judicial Magistrates of the First class, as the case may be, forming a bench as an administrator thinks fit to appoint, of whom one shall be designated as Principal magistrate; and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the First Class. 3) Every Children's Court shall be assisted by a panel of two honorary social workers possessing such qualifications as may be prescribed, of whom at least one shall be a woman, and such panel shall be appointed by the Administrator.

²⁷ Ibid.,1

²⁸ Government of India Department of Social Welfare, New Delhi, 22nd August 1974 No. 1-14/74-CDD.

²⁹ National Policy of Children Government of India Department of Social Welfare dated 22nd August 1974.

³⁰ Resolution No. 6-15/98-C.W., Dated 9-2-2004, Issued by Ministry of Human Resource Development.

child. This document was the first document which pointed out that in all matters and procedures relating to children, viz. judicial, administrative, educational, or social, should be child friendly.

1.4 Goa Children's Act, 2003 and Rules 2004³¹

Till the Goa Children's Act 2003 and Rules 2004³² no other states in specific dealt with abuse against children. The Goa Children's Act, 2003 and Rules, 2004³³ was the first legislation in the Indian context which did not only investigate the judicial process but also identified abuse against children which was not dealt by any legislation national or state.

The Concept of 'Best Interest of child' principle vis-a vis the establishment of the Goa Children's Court³⁴ as well as the concept of burden of proof³⁵ gave a completely new dimension to the principle of 'Best Interest of child'.

The Children's Court³⁶ was established in Goa in the year 2004. The entire set up of the children's court differs to that of other judicial courts. Even the legal fraternity is barred to attend matters in the children's court with judicial attire thus making it child friendly. All matters pertaining to children are held in camera.

Prior to the establishment of the Goa Children's Court³⁷ for the state of Goa matters of child abuse were heard by judicial officers from different courts. Jurisdiction of these judicial officers depended on the seriousness of offences i.e., petty offences were dealt by the Judicial Magistrates while serious offences like rape and sodomy were dealt by

³¹ Goa Act 18 of 2003 (8-7-2003)

³² Goa Act 18 of 2003 (8-7-2003)

³³ Ibid

³⁴ A Court established under Section 27 of the Goa Children's Act, 2003 and Rules, 2004.

³⁵ Section 32 (f) states whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused (shall lie on the accused if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child, as the case may be.

³⁶ Ibid

³⁷ Ibid

Sessions Court. No specific procedures were followed neither any uniform procedure was followed by the judicial officers in cases of child victim's/child witnesses.

Now with the establishment of the Children's Court,³⁸ all matters of child abuse within the state of Goa are referred to this court.

1.5 Identification of Research Problem

Complexities of the criminal justice process often results in the rights and interest of the child becoming a secondary component and therefore it is strongly advocated that the need of the hour is to place the 'best interest of the child' as the central focus in implementing the law.

Goa is the first State which has witnessed the setting up of The Children's Court which was established in the year 2004 and the first Goa state Commission for protection of Child Rights (GSCPCR) ³⁹.

The criminal justice process concerning children needs to be looked at differently, the reason includes the vulnerability of children and hence a need for a supportive environment where children do not feel threatened, feel comfortable to express themselves where they can be understood and trusted.

The main goal of different authorities established under the Goa Children's Act, 2003 and Rules, 2004⁴⁰ and Protection of Children from Sexual Offences Act, 2012⁴¹ is to be child friendly, render dedicated service and give a speedy trial to the victims rather than re-victimizing them.

However, there is no effective protection of child victims, presently the State of Goa has set up only one Children's Court to deal with all offences against children registered in

³⁸ Ibid.,5

³⁹ This commission is constituted under the Commission for Protection of Child Rights (GSCPCR) 2005 vide notification No.2-125/DW&CD/1941 dated 15th April 2008 issued by the Goa Government initially.

⁴⁰ Ibid.,5

⁴¹ Act No. 32 of 2012 hereinafter referred to as the POCSO Act 2012.

the State of Goa it is evident that cases are equally registered from North Goa district as well as South Goa district. The setting of only one Children's Court has not only put victims into hardships but has also re-victimized them in their pursuit towards justice. Different authorities set up under the laws i.e. Child Welfare Committee, Goa State Commission for Protection of Child Rights lack resources, inadequate infrastructure as well as are not given any training with regards to dealing with issues of children in a sensitive manner.

1.6 Literature Review

This section would examine a variety of literature related to 'Best Interest of the Child' Principle (BIC). The researcher has tried to assess different countries including India which have been considering this principle for various decades and hence has looked into articles that have given an in-depth outlook towards the best interest principle. While in India the principle of 'Best interest of the child' (BIC) was looked in by the legislator's way before independence but this area is hardly considered or deliberated upon. Some of the publications are discussed below.

In the book *The Best Interest of the child, The Least Detrimental Alternative*⁴² the authors touch upon what principles should guide various professionals when it comes to decision-making in cases where children are abandoned, neglected or abused. It discusses how these professionals should conduct themselves in pursuing the 'Best Interest of the child'. This book has been a result of their three other books *Beyond the Best Interest of the child*⁴³, *Before the Best Interest of the Child*,⁴⁴ and *In the Best Interest of the Child*⁴⁵ which were published between 1973 and 1986. This book is a revised, updated and a

⁴² JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN, AND THE LATE ANNA FREUD Feb 8, 1998 The Free Press

⁴³ JOSEPH GOLDSTEIN, ANNA FREUD AND ALBERT J. SOLNIT The Free Press.

⁴⁴ JOSEPH GOLDSTEIN, ANNA FREUD AND ALBERT J. SOLNIT The Free Press New York, London, Toronto, Sydney, Tokyo, Singapore.

⁴⁵ JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN and the late ANNA FREUD The Free Press, New York, London, Toronto, Sydney Singapore.

combination of all these three books. In their book *Beyond the Best Interest of the Child* the authors main focus is on children who are caught up in the legal system – on contested placements arising in proceedings variously labelled as abandonment, abuse, adoption, divorce, foster care, neglect and separation. Where the authors have set guidelines based on the psychoanalytic knowledge and common sense for resolving such disputes.

In the book *Before the Best Interest of the Child*,⁴⁶ they focus on the circumstances of a child's relationship to her parents or other primary caregivers. In the said book they propose to respond to the following questions a) should there be a presumption in law that parents are free to determine what is 'best' for their children? b) What should justify state intrusion on the privacy of family relationships? c) What must happen to or in the life of child before the state should be authorized to investigate, modify or terminate a child's relationship to her parents- a child's membership in her family? d) should neglect and/ or abuse as grounds for state intervention be defined loosely or with specificity to enlarge or restrict the discretion of those authorized to intrude upon ongoing parent child relationship.

In the third book in the *Best Interest of the child*,⁴⁷ the authors touch upon the work of the professional participation in child placement process on the work of judges, lawyers, social workers, psychiatrist, psychologists and other experts. The purpose of the book was to help professionals to recognize and be sensitive to the boundaries of their knowledge and of their authority. The questions which the authors urge these professionals as well as those engaged or are exposed to such children are a) When do professional participants undertake tasks that are beyond their expertise. b) When do judges act as clinicians by making their own psychological assessments of parents or children. c) When do clinicians act as judges by withholding information because they are afraid the judges may 'misuse' their professionally informed findings or because they believe that they know what decisions is "right". d) When may or should professionals consciously and openly cross boundaries thus playing two roles in relation to the same

⁴⁶ JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT, The Free Press, New York London Toronto, Sydney, Tokyo, Singapore 24th February 1986.

⁴⁷ Ibid.,7

family or child, place a professional beyond her competence even though she may be qualified to perform either role alone. e) Do professional participants act beyond their own authority or professional knowledge by assuming a parental role. The said book which is based on the principle of primary care relationships, stresses that it is in the child's interest for all professional participants to keep in mind that they are not the child's parents, that they are specialist, not the parents who, as generalist, serve the child's need on a day to day, all day basis.

The Best interest of the children- An Evidence Based Approach⁴⁸. In this book, the author stresses that the best interest of the child principle is an overriding principle in all matters of family law, especially in child custody cases. In his findings he shows that the gender of caregivers is unimportant, family dynamics and parenting strategies are paramount: what matters is what parents do. The book provides important criteria for determining the best interest of the child and concludes that the role of law in the lives of children must be to preserve their connections with those that love them. In the book Human Rights in Child Protection Implications for Professionals and Practice and Policy⁴⁹. In this chapter the authors have examined how governments of 14 countries belonging to high income category interpret the vague and indeterminate principle of best interest of the child in legislation and instruct professional decision makes. The chapter states that there is a numerous dimension in relations to a child's best interest that a decision maker can (and must) consider, including expert knowledge about nutrition, attachment, brain development and the normative and cultural values for a good and meaningful life. It states that the decision about best interest of the child cannot be based solely on expert evaluations, but also on values and norms that hold meaning for human beings.

⁴⁸ PAUL MILLER Toronto University Press 2009 132 pages.

⁴⁹ This book was edited by Asgeir Falch- Eriksen and Elisabeth Backe- Hansen in the Chapter the Child's Best Interest principle across child Protection Jurisdiction written by Marit Skivens and Line Marie Sorsdal ISBN 978-3-319-94799-0 ISBN 978-3-319-94800-3 (eBook) Publisher Registered company Springer Nature Switzerland AG.

Two Dimensions of the Best Interest Principle: Decisions about children and decisions affecting children⁵⁰ in this article the author stresses that decision makers have to consider the best interest of the child along with other considerations. The author states that when considering the best interest of the child a distinction should be drawn between decisions that are directly about children and decisions that affect children indirectly. In the case of decisions that affect children indirectly the decision maker should focus on reaching the best solution to the issue to be decided rather than on what outcome would be best for the child. The child's interests are relevant and are a primary consideration though there may be others

The Best Interest of the child Principle: Literal Analysis and Function⁵¹. In this article the author provides a conceptual and literal analysis of the principle of best interest of the child within the framework of the United Nations Convention on the Rights of the Child 1989⁵². In this article the author associated three meanings to the concept of best interest of the child. First, in determining the child's best interest it can be seen, one hand, as a procedural matter according to which possible impacts (positive or negative) of decision involving children have to be taken into account in the decision making process. Second the best interest of the child is a basic right that has to be applied all the times and third, child's best interest is a fundamental legal principle with the aim of limiting adults uncontrolled power over children (practitioners work for children and with them, making decisions in children's name). the author states that the best interest of the child needs to be assessed by the decision makers with fixed procedures, considering the short, medium and long term perspectives of child's life.

Interpretation of the Principle of "Best Interests of the Child" in the context of Inter-parental Child Custody Disputed: Case of Estonia⁵³. In this article the authors have tried

⁵⁰ Article written by John Eekelaar edited by Elaine Sutherland, University of Stirling, Lesley Anne Barnes Macfarlane Publisher Cambridge University Press. Pg 99-111

⁵¹ International Journal of Children's Rights by Jean Zermatten online Publication Date 01 Jan2010

⁵² Ibid.,1

⁵³ Dr. Karmen Toros, Kati Valma and Dr. Anne Tiko (Journal of Social Welfare and Human Rights March 2014, Vol 2, No. 1, pp 289-303 ISSN: 2333-5939. Published by American Research Institute for Policy Development)

to provide an overview interpretation of the concept of 'best interest of the child; in child custody proceedings by child protection workers and attorney including child inclusion in the court practice.

The Best interest of the child: Decision- making Factors⁵⁴. In the said research the researcher has examined the factors that are considered by professionals working within the family court arena when they apply the standard of best interests of children to make a determination about where a child should reside. The findings of the research stated that the professionals rely on three domains to make decisions using the best interest standard: precipitating events, guiding principles and case variables. The findings further stated that the best interest of the child as a standard can be subjectively interpreted to the detriment of clear and unbiased decisions.

In the article Deciding Best interest: General Principles and the cases of Norway and the UK⁵⁵. In the article the author addresses the difficulties in interpreting the best interest of the child principle and offers advice for the legislators as well as decision makers.

The Standard of the Best interests of the child: a western tradition in international comparative law by Claire Breen ISBN 9041118519

Yvonne Dausab⁵⁶ in her research paper "The Best Interest of the child" has observed that the laws on children that are currently existing are either completely silent or specifically provide for the principle on the best interest of children, but the specifications are not adequate. The paper also showed that the 'Best Interest' principle cannot be cast in stone; and even though there is no attempt in the legislation to provide a list of factors to consider when deciding a matter affecting child, the list is not exhaustive and is simply a guiding framework. While specifically dealing with the Best Interest Principle in general she has referred that this principle means considering the child before a decision affecting his or her life is made. In the research paper the author has spoken about the best interest principle in connection to the courts wherein she states that the best interest principle has

⁵⁴ Mary Banach (First Published June 1, 1998 Research Article Families in Society: The Journal of Contemporary Social Services

⁵⁵ (journal of Children services (2010) 43 – 45.

⁵⁶ http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_h.pdf

been used to develop child care jurisprudence in Namibia since independence in 1990. Namibian Laws has developed an impressive corpus of jurisprudence on Constitutional matters and some legal principles on family law and persons the country has not laid down principles on the application of the Best Interest Principle. While discussing the best interest principle in the Namibian Context she states that Children's Rights⁵⁷ finds a place in the Namibian Constitution but there is no explicit provision in the Namibian Constitution with respect to the Best Interest Principle and the task to interpret the same is left to the legislators.

Fatma Hassan Beshir⁵⁸ in her research paper⁵⁹ states that in all actions concerning children taken by legislative bodies, the best interests of the child shall be primary consideration⁶⁰ she states that Article 3 sets out a rule of procedural nature and the best interest of the child must be taken into account as a primary consideration.

Lynne Marie Kohm⁶¹ in her article has stated that the doctrine of Best Interest affects the placement and disposition of children in divorce, custody, visitation, adoption, the death of a parent, abuse proceedings, crimes, and all forms of child protective services. And in every case the judge must decide what is "best" for any child at any time under any particular circumstance. The article tries to examine the deepest foundation for the best interest of the child as a legal standard. It discusses how the doctrine has developed and evolved over the course of American jurisprudential history.

Asha Bajpai in her article⁶² explores the principles set forth by the Indian Courts as they apply the best interest principle of the child with regards to custody matters. In her article she states that the aim of custody dispute is not to punish a parent but to ensure the welfare

⁵⁷ Article 15 (1) of the Namibian Constitution.

⁵⁸<https://dppcr.files.wordpress.com/2012/09/best-interest-of-the-child-fatma-beshir-cairo1.pdf>

⁵⁹ Article 3 of the Convention on the Rights of the Child the Best Interest of the Child

⁶⁰ The said research paper was prepared for Public Policies and Child Rights Diploma.

⁶¹ Tracing the foundations of the best interest of the child standard in American Jurisprudence Journal of Law and Family Studies, Vol 10, No 2 (2008) <http://epubs.utah.edu/index.php/jlfs/article/viewArticle/46>

⁶² Custody and Guardianship of Children in India Published in Family Law Quarterly, Vol 39, No.2, p.441, Summer 2005 (Published October 20, 2005)

of the child; Courts must ascertain the wishes of the child, if he or she can express them; she further states that visitation is the right of the child and not of the parent.

The Children's Rights Knowledge Centre Commission by the Flemish Government (Division for youth) Research by Hanne Op de Beeck, Katrien Herbots, Sara Lembrechts and Nele Willems in their study⁶³ 'Children's Best Interest Between Theory and Practice' the researchers have spoken about the 'best interest of the child' under International Human rights and also other International Instruments The study further states that although there is a reference of the best Interest principle but the same is not a clearly defined principle. The study considers the workability of applying this principle in each individual situation is a challenge.

"Research on Children's Court and flagging key issues for Discussion"⁶⁴ The researcher in her paper stated that children must face a complex maze of the legal process. The researcher recounted the multiple problems faced by the children i.e., lack of access, delay in getting justice, focus on deterrence and prosecution of the perpetrator instead of the child's healing and well-being fragmentation of services like lack of interdisciplinary perspectives and approaches to enable effective decision making and the lack of child rights friendly judicial proceedings. She highlighted that due to these problems it amounts to secondary victimization due to the system induced trauma. In her research and presentation, she strongly advocated for the need to place the interest of the child as the central focus of law and its implementation. She also identified various goals⁶⁵ of a child rights friendly court and the justice delivery system.

Children's Court, Goa⁶⁶ The Presiding Judge of the Children's Court Goa shared his experience as the Presiding Officer of the Children's Court as well as the problems faced

⁶³ This study was commissioned to the Children's Right Knowledge Centre by the Division for Youth of the Flemish Government in light of the preparations of the European conference "best Interest of the child" to celebrate the 25th Anniversary of the United Nations Convention on the Rights of the Child (Brussels, 9-10 December 2014).

⁶⁴ Paper presented by Arlene Manoharan, Fellow, CCL-NLSIU

⁶⁵ The various goals that were highlighted were quality life, dignity and respect, healing, justice, Reparation, normalization and re-integration.

⁶⁶ Paper presented by Mr. B.P. Deshpande, Registrar (Judicial) High Court of Mumbai at Goa and former President of the Children's Court, Goa.

by the Goa Children's Court. Some of the problems faced were that the Presiding Officer is not generally trained in child rights. Conviction rate is poor. The 2005 amendment has changed the burden of proof provision wherein now the burden on the accused is only in certain cases. He also stressed on the need that Children need to be prepared for facing the court which is an important support during the pre-trial stage.

“Jurisdiction”⁶⁷. The researcher highlighted that the preamble to the Commission for Protection of Child Rights Act, 2005⁶⁸ clearly states that “speedy trial of cases” is the very purpose of the Children's Court. The researcher further stated that right to speedy trial is a fundamental principle of a fair and just criminal justice system and the same if followed will help reduce the emotional, psychological, and physical stress of the child while going through the legal proceedings.

Procedures⁶⁹ that must be followed in the Children's Court the Researcher stated that we need to be sensitive when dealing with children as it has been proved by research that the system induced trauma and re-victimization of the child has become common in the Indian scenario. He stressed on the need to listen to people who have worked with children rather than following adhocism.

Child Victims and Witnesses⁷⁰ highlighted the realities of children's experience in the criminal justice system. She stated that the same was not designed keeping the child in mind. She listed the delays and gaps in the timeline of various procedures for each of the cases and the negative impact it has on the child victim. The same leads to non-disclosure of cases.

⁶⁷ Paper presented by Swagata Raha, Sr. Research Assistant, CCL-NLSIU

⁶⁸ Act No. 4 of 2006.

⁶⁹ Paper presented by Prof. S.V. Jogarao, Professor and Dean Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Karagpur.

⁷⁰ Presented by Vidya Reddy TULIR Centre from Prevention and Healing of Child Sexual Abuse Chennai.

1.7 Theme of the Study

The present research centres on evaluating the functioning of the authorities tasked under the Protection of Children from Sexual Offences Act, 2012⁷¹ and The Goa Children's Act, 2003 and Rules, 2004⁷² in terms of the Principle of Best Interest of the child.

The study aims to explore the factors that are considered by these authorities in implementing the best interest of the child. It seeks to identify barriers which deter the effective implementation or could deter the due application of the principle of 'Best Interest of Child' and give foundational guidance to the authorities with respect to the power they have in determining the best interest of the child in a most judicious and restorative fashion.

1.8 Objectives of the Study

The main objective of this research is to examine the application of the principle of Best Interest of the Child by the authorities under the Goa Children's Act 2003 and Rules 2004⁷³ and Protection of Children from Sexual Offences Act 2012⁷⁴ in the State of Goa. The research will also identify the push and pull factors which deter the implementation of the principle of 'Best interest of child' and smooth functioning of the authorities. The other objectives are:

To analyze the various provisions of International, national, and state laws with specific emphasis on procedures and child support in the criminal justice system. To deal with various judgments and judicial interpretations about the concept of best interest of the child as well as guidelines for the effective functioning of the Children's Court⁷⁵.

⁷¹ Act No. 32 of 2012

⁷² Goa Act 18 of 2003 (8-7-2003)

⁷³ Goa Act 18 of 2003 (8-7-2003)

⁷⁴ Act No. 32 of 2012. Hereinafter the said Act will be referred to as POCSO Act 2012

⁷⁵ Court established under the Goa Children's Act, 2003 and Rules, 2004.

To study the practical factors relating to functioning of the authorities with respect to availability of support mechanism and to comprehend the term ‘speedy justice. To offer recommendations that would make the children’s Court an effective means of delivering justice to children.

1.9 Hypothesis

1. The authorities established under the Goa Children’s Act 2003 have not been successful enough to implement the Best Interest of the child principle.
2. The authorities established under the POCSO Act 2012 have not been successful enough to implement the Best interest principle.
3. Lack of resources creates barriers for authorities in providing adequate support at the time of trial.
4. Failure in rendering speedy justice leads to violation of the principle of Best Interest of child.

1.10 Scope of the Study

There has been a rise in reporting of child abuse cases in Goa in the recent months. The charge sheets filed in the children’s court too has increased. Per day there are 60 cases listed for hearing.

Presently above 430 children are awaiting justice before the authorities which are given task of administration and adjudication under the Goa Children’s Act 2003 and Rules 2004 and Protection of Children from Sexual Offences Act 2012 i.e., Children’s Court, Child Welfare Committee and State Commission for Children. Thus, speedy justice for victims who enter the criminal justice system would be appraised keeping in mind that administration of justice is based on the Principle of Best Interest of Child (BIC).

1.11 Methodology

A topic like the best interest of the child has not only a wider implication but it is also subject to a wider interpretation. In order to undertake a comprehensible and useful research in this area, though limited to the state of Goa, the researcher felt the need to adopt a multimodal research technique.

For the purpose of understanding the concept of the 'Best interest of the child' the researcher has indulged into a doctrinal study of the concept. It is important that the idea of best interest is comprehended in the way in which it is understood Internationally, Nationally as well as locally.

It is a realization that a concept of wide import of this nature cannot be limited in its interpretation to mere academic exercise. It does have its impact on the life and well-being of the child in the way in which it is understood and applied by those who are dealing with the children.

Therefore, the researcher has undertaken an empirical study of the how and why of enforcement, failure for enforcement, partial enforcement as well as defective enforcement of this particular idea by many authorities especially those who are dealing with children in conflict with law as well as children in need of care and protection.

In addition to providing a lucid explanation of the concept through the study of journals, articles, case reports etc. For the purpose of the empirical study the researcher has used the methodology of questionnaires, interviews as well as personal interaction with those who are dealing in matters concerning the children. More specifically former and present Presiding Officers, Public Prosecutors, Police Officers, NGO's and other stake holders.

1.12 Chapterization

It is pertinent for the researcher that the researcher provides a complete and comprehensive idea of the underlying concepts of the Research and in this process a direction for the research is provided by the hypothesis enumerated as above.

For the purpose of a lucid presentation this study is categorized into various chapters. In order to provide the reader a basic idea or a bird's eye view the concept of best interest of the child followed by the purpose of this study, the formulation of hypothesis and the methodology of the study is presented in this chapter which is the first chapter of the research.

As mentioned earlier the underlying foundational idea is that the 'Best Interest' principle, its evolution its international discourse, its interpretation in various context as well as understanding of this concept in the Indian context is all elaborated in the second chapter of this research.

Any study of this nature requires a theoretical background because of its wider implication and its international acceptance of the concept of best interest of the child. The researcher has endeavored to bring forth the international as well as the national standards of the best interest and at the same time has provided a critical analysis of how the various authorities have interpreted and implemented this primal concept in their functioning in the third chapter of this research.

Any research of this nature in addition to providing the foundational basis needs to revolve around its application, its implementation and the consequence that are followed. It is for this purpose the researcher has undertaken an in depth study of Goa Children's Act, 2003 and Rules, 2004 and the Protection of Children from Sexual Offences Act, 2012 in the fourth chapter of this research study.

As mentioned earlier this study is not just a combination but intermixing interaction of doctrinal findings substantiated and supported by the use of empirical data. For all practical purpose the researcher has taken into consideration the practical factors and the

operational systems those are currently functioning within the criminal justice process of India and more specifically Goa and in their understanding as well as implementation of the principle of Best interest of the child in the fifth chapter of this research study.

Any research without an appropriate outcome in the manner of conclusion and viable and pragmatic recommendation for the future use would remain just a research in paper. The researcher having been deeply involved in the process of the implementation of the concept of best interest of the child within the state of Goa as well as elsewhere has endured to provide her conclusions based on the research study. At the same time drawing upon the conclusion and also on her personal experience in her field has provided recommendations in the final chapter of this research study with a sincere and heartfelt hope that some of these recommendations at least will capture the imagination of someone in authority who would deem it fit to implement it in the best possible way for the sake of children in Goa as well as other children which come in contact with the criminal justice system.

CHAPTER 2

THE EVOLUTION OF THE CONCEPT OF BEST INTEREST OF THE CHILD A JURISPRUDENTIAL APPROACH

2.1 Introduction

The concept of ‘Best Interest of Child’ has a long jurisprudential evolution, although contemporary writers tend to give the impression that the principle of the ‘best interest of the child’ is a 21st-century introduction to international law and subsequent local legislations. The principle owes its most aggressive development to American jurisprudence. To appreciate the concept, we must look into the historical background of the said principle.

2.2 Key Concepts of the Best Interest of the Child

Principle

The Best interest principle forms the crucial idea around which this research revolves. In understanding this principle one has to begin by understanding the meaning and import of the term ‘Child’.

‘Child’ is a term that is commonly used in the context of the family, of the community, of the society as well as the national context as well. The term child, therefore, has a wide import, understood contextually it can mean many things in many situations. It may not be limited to what we normally understand as the physical age, it could relate to psychological development and so on. For this study, the researcher intends to provide and clarify a specific meaning to the term child therefore the term child requires a wider elaborate discussion.

2.2.1 Child

The term child is a descriptive terminology for a natural person who is an offspring of another. The definition of child under the law has three features:

- (i) A child is a person who is yet to attain the chronological age of majority⁷⁶.
- (ii) A child suffers from the legal disability of infancy⁷⁷.
- (iii) The relationship with the child's caregivers⁷⁸ must be considered.

When it comes to the rights of the child three characteristics have to be considered. First, a child is dependent on another for protection, food, shelter, education and care. Second, a child is a person whose development of physical and intellectual capacities is required to be fostered and protected. Third, a child is a person whose intellectual competence to make decisions for himself or herself increases significantly during adolescence.

Child as defined under the United Nations Convention on the Rights of the child 1989⁷⁹ means “every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier.”

However, the United Nations Convention on the Rights of the Child 1989⁸⁰, has gone a step further and provided a wider import to the meaning of child wherein the word child refers to all children falling under the competence of the Office, including asylum-seeking children, refugee children, internally displaced children and returnee children assisted and protected by United Nations High Commissioner for Refugees (UNHCR) and stateless children.⁸¹

In the normal course, one understands a child in the context or the background of a family namely the existence of both the parents or maybe even one parent. At times this contextualization may not be possible or practicable while prioritizing the interest of the child. Two such situations are

⁷⁶ According to the Indian Majority Act, 1875, The age of majority in India is defined as 18 years.

⁷⁷ Law.com legal dictionary defines the term infancy as: though the popular use of the word means the early age up to seven, in law, it is under- age or minority. Historically this meant under 21 years, but statutes adopted in almost all states and minority and infancy at 18.

⁷⁸ Merriam Webster dictionary defines the term caregiver as a person who provides direct care (as for children, elderly people, or the chronically ill)

⁷⁹ General Assembly Resolution 44/25 of 20th November 1989.

⁸⁰ Ibid

⁸¹ UNHCR Guidelines on Determining the Best Interest of the Child www.unhcr.org/4566b16b2.pdf

2.2.1.1 Unaccompanied Children

These are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.⁸²

2.2.1.2 Separated Children

Those children are separated from both parents or their previous legal or customary primary caregiver, but not necessarily from other relatives. These may therefore include children accompanied by other adult family members.⁸³

2.2.2 Best Interest

The United Nations Convention on the Rights of the Child 1989 (UNCRC) does not offer any precise definition as to the Best Interest of the child principle. It is to be further noted, that neither any of the domestic legislation on children provides a clear or explicit definition of the best interest of child principle. Neither any of the local legislations offer a precise definition of the best interest principle or state explicitly common factors to be considered while applying the best interest principle. The ‘Best Interest of the child’ principle is a concept that has meant different things at different times

The term “best interest” broadly describes the well-being of a child. The same is determined by various individual circumstances like age, level of maturity of the child, the presence or absence of parents, the child’s environment and experiences.⁸⁴

⁸² United Nations Convention on the Rights of the Child General Comment No. 6 (2005) treatment of unaccompanied children outside their country of origin.

⁸³ Supra Note 5

⁸⁴ UNHCR Guidelines on Determining the Best Interest of the child (further reference) resolution or date.

2.3 Evolution of Best Interest of the Child Principle

In ancient times under Roman law, children were placed under the authority of both parents and country, in the ownership of their father⁸⁵. The low status and vulnerability of children during the Roman Empire were powerfully captured in the common practice of infanticide and the exposing of young children, especially girls. This position of the child under the Roman Law was opposed by the Jewish tradition and later by Christians but this opposition could emerge in Christianity in the New Testament of the Bible. This opposition became evident⁸⁶ in the teachings of Christ on children which showed a clear departure from the status quo of that time⁸⁷. Despite the influence of Christianity, the idea of childhood was lacking in medieval society.⁸⁸ The child belonged to adult society immediately after it could live without the constant care of his mother, his nanny, or his cradle rocker. It was the impact of religious reforms in culture and law that gave birth to a new concept of childhood by the 17th Century⁸⁹.

2.3.1 Emergence of a new concept of childhood (Innocence of Childhood)

During the reformation period in Europe with the emergence of Protestantism and the predominant of Protestantism in the then-dominant part of Europe namely the British nations, an evolution of common law tradition were evolving over a period it was then

⁸⁵ Lynne Marie Kohm *Tracing the foundation of the Best Interest of the Child Standard in the American Jurisprudence* copy available at <http://ssrn.com/abstract=1957143>

⁸⁶ Joan B. Kelly, *the Determination of Child Custody*, 4 *FUTUREXCHILD* 121, (1994)

⁸⁷ The value placed on children by Jesus Christ can be seen from the following scriptures: Ephesians 6:4 “And, ye father, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord.” Colossians 3:21” fathers, provoke not your children to anger, lest they be discouraged.” 1 Timothy 3:12 “let the deacons be the husbands of one wife, ruling their children and their own houses well.”

⁸⁸ Kohm, Lynne Marie, *Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence* (November 9, 2008). 10 *J. L. FAM. STUD.* 337(2008), Available at SSRN: <https://ssrn.com/abstract=1957143> or <http://dx.doi.org/10.2139/ssrn.1957143>Lynn Marie Kohm (*supra*)

⁸⁹ Lynne Marie Kohm *Tracing the foundation of the Best Interest of the Child Standard in the American Jurisprudence* copy available at <http://ssrn.com/abstract=1957143>.

that Calvinist⁹⁰ inspired reforms were the basis for the historical common law tradition. These religious reforms affected the culture and the law, and by the end of the 17th century “a new concept of childhood appeared”, where adults began to take a greater interest in children and in recognition and development of the idea that they were naturally innocent and ought to be protected from anything that might disturb their modesty, causing a great change in manners (to) take place in the 17th century.

An essential concept had won acceptance that of innocence of childhood. Framed by the writings of John Locke at its beginning and of the romantic poets at its end, and with the strident figure of Rousseau⁹¹ on center stage.

John Locke⁹² propounded the idea that children have natural rights and the same needs to be protected. He believed that children were not the property of their parents, but that of God, that they were destined to take their place in the moral and social order as individuals and parents had an obligation to bring their children to a state where they could be independent. He regarded children as a blank slate, neither good nor bad. In his school of thought, he stated that children needed the education to provide for the “best” way to produce “rational” adults out of immature children.⁹³

In the eighteenth century, there seems to be a degree of sensitivity to childhood which was lacking in the previous centuries. Childhood was seen as a preparation for something else, whether adulthood or heaven, but was said to be a stage of life to be valued in its own right.⁹⁴ These thoughts of great thinkers rooted in the European and American mind a sense of importance to the phase of childhood, and a belief that the stage of childhood should be happy. The qualities of childhood if they could be preserved in adulthood, might help to redeem the adult world. Common-Law recognized the father as the head of the family and he was conferred with absolute powers over the family.

⁹⁰ Calvinism is a major branch of Protestantism that follows the theological tradition and form of Christian practice set down by John Calvin and other reformation –era theologians.

⁹¹ He defined the concept of child as pure, yet corrupted by society. “God makes all things good; man meddles with them and they become evil.

⁹² John Locke, *Two Treatises of Government* 330 (1960).

⁹³ *Second Treaty of John Locke* www.johnlocke.net/two-treaties-of-government-book-ii

⁹⁴ Hugh Cunningham, *Children and Childhood in the Western Society since 1500* (1995)

2.3.2 Development of Custody Law

Custody Law began to develop in the 1600s, and the commencement of the same was with the concept of *patria potestas* (*paternal power*) as the father had complete power and control over their family's lives both pre and post-divorce. The same gradually shifted to *parens patriae* in the late seventeenth century where the state acted as the parent of the child. The same was replaced by the *Tender Years Doctrine* where custody was given to the mother and the same was made applicable to children of seven to eight years as they were considered to be highly dependent on the mother.⁹⁵ The latter half of the twentieth century saw the scrapping off of the *Tender Years Doctrine* and replacing the same with the *Best Interest of the Child Principle*.

2.3.2.1 Patria Potestas

The concept of *patria potestas*⁹⁶ (*paternal power*) is a natural law concept that gave the father absolute power over his children whom he viewed as chattel⁹⁷. Under this concept, the acquisition of a child became the property of the father. As Aristotle put it, a father 'rules his children as does a king his subjects'⁹⁸. This was used as the main pillar in arguments for the absolute government. But in the Roman world, *Patria potesta* was less awesome in practice than in theory. The exercise of the powers of life and death was extremely rare. The late age of marriage and low life expectancy meant that adult married

⁹⁵ *ibid*

⁹⁶ The institution of Patria Potestas is the typical expression of the power and privileges of the paterfamilias of the Roman Civilization and therefore may be exercised only with Roman citizenship. In Roman law the oldest living male in a family had far-reaching powers over all his descendants whatever their age and wherever they were living. These included not only rights over property, but also rights of life and death; it was he who decided whether a baby should be exposed, and it was he who could sentence and execute his own child.

⁹⁷ Kohm, Lynne Marie, Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence (November 9, 2008). 10 J. L. FAM. STUD. 337(2008), Available at SSRN: <https://ssrn.com/abstract=1957143> or <http://dx.doi.org/10.2139/ssrn.1957143>

⁹⁸ Understanding Aristotle's Account of the Relationship of the Household to the State (Part II) <https://thejosias.com/2015/02/11>

sons were comparatively and rarely under the theoretical jurisdiction of their fathers, in addition, Separate residences and allowances for sons helped this transition.⁹⁹ This concept can also be explained in the words of the institution of Gaius: “When children are born in lawful marriage, we have power over them.” This is the law of Roman citizens (in fact there are other men, who have power over their children, as we have)”¹⁰⁰

2.3.2.2 Parens Patriae Doctrine

The late seventeenth century in England transformed this *patria potestas* jurisprudence to *parens patriae* doctrine,¹⁰¹ and the same is said to be influenced by the idea of utilitarianism in Europe. The idea of *parens patriae* is that the state should act as the parent of the child and should not punish children for their criminal behavior or delinquency¹⁰².

As mentioned earlier until the 18th-century children had very little freedom. Social philosophers John Locke and Jean Jacques Rousseau challenged both the Roman laws¹⁰³ and the Code of Napoleon, and argued that children are innately innocent and susceptible

⁹⁹ Hugh Cunningham *Children and Childhood in Western Society* 1500 2nd Edition Published in 2014 Routledge.

¹⁰⁰ Gaius, Institutes of Roman Law URL of this E-Book:
http://oll.libertyfund.org/EBooks/Gaius_0533.pdf URL of original HTML file:
<http://oll.libertyfund.org/Home3/HTML.php?recordID=0533>

¹⁰¹ This doctrine recognized the state as a parent at times when the Kings bench was called to intervene in family matters. Literally the term means “father of his country” BLACK’S LAW DICTIONARY 1269 (4th Ed. 1951) states that *parens patriae* function in English common law had its origin in feudal times. The king acted as guardian of person’s *non sui juris* – those legally incompetent to act for themselves. It is an ancient English doctrine that the King as the father of the nation, has the power to act in protection of the nation’s weak and powerless, namely infants, idiots and lunatics. In the case of *R.v. Gyngall*. (1893) 2. QB 232 at 239 Lord Esher MR gave the following description of the *parens patriae* jurisdiction which the court of Chancery exercised over children “that was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in place of a parent, and as if it were the parent of the child. Thus superseding the natural guardianship of the parent.” Whereas for Lord Donaldson the jurisdiction did not stop by the fact that the state took place of the parent but the fact that the state had wider powers than those possessed by natural parents and permitting the judge to do more than just fill the shoes of the parent.

¹⁰² The Role of Parents and Parens Patriae: Developing views of Legitimacy and Justice in Juvenile Delinquency Court a dissertation presented by Liana J. Pennington to the law and Public Policy Program Northeastern University Boston, Massachusetts July 2013

¹⁰³ Jaime Gianoutsos Locke and Rousseau: Early Childhood Education Vol 4. No. 1. The Pulse

to social corruption. They further postulated that the state has to be the guardian of children and that it was the responsibility of the State to protect the overall economic welfare and moral values.¹⁰⁴

The *parens patriae* prerogative was defined in the case of *Eyre v. Countess of Shaftesbury*¹⁰⁵

“(T) King is bound by common right, and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the Kings protection, for which reason it is, that idiots and lunatics, who are incapable to take care of themselves, are provided for by the King as pater patriae: and this is the same reason to extend this care to infants. Infants as well as idiots and lunatics, are said to be under the care and protection of the Crown, as persons equally unable to take care of themselves.”¹⁰⁶

During this century like the Romans, the Philanthropists also viewed children as the ones who were not formed enough, to be saved as representatives of the future. This concern for children integrated with views on marriage. Lord Hardwick’s Marriage Act 1793 regarded marriage as a property interest to determine the legitimacy of heirs to that family property. Patriarchal rules prevailed in the courts of Equity in England in their *parens patriae* role “to protect the ‘best interest of the child’”. This rule subsided from a rule of a presumption that it would be in the best interest of the child to be raised by the father. Thus, this doctrine of ‘best interest of the child’ essentially was derived out of paternal authority.

2.3.2.3 Departure from paternal preference to maternal custodial powers (Tender Years Doctrine)

In the 19th Century, England departed from the paternal preference and allowed maternal custodial powers when appropriate via the Custody of Children Act 1839, the British law

¹⁰⁴ Obi N.I.Ebbe and Dilip K.Das *Criminal Abuse of Women and Children An International Perspective* CRC press 2009

¹⁰⁵ (England (1772) 2. P.Wms 103, 24 ER. 659.

¹⁰⁶ *Parens Patriae: The paternalist model of children’s rights* (doras.dcu.ie Adam_McAuley_2013061)

brought in the *Tender Years Doctrine*.¹⁰⁷ Initially, custody of children in case of divorce was granted to the father, as England due to the settlement of Colonial Americans followed English Law. But later due to the rise of the Industrial Revolution, more fathers left their farms and villages for work and left the mothers behind to take care of the kids. It was here that the image of fathers as wage earners and mothers as caregivers emerged and influenced custody decisions.

This doctrine of Tender Years originated because of a British feminist, Society beauty, journalist and social reformer author, Caroline Norton¹⁰⁸, who in the early part of the 19th century began a campaign for women's rights, wherein she proposed that women should be given the custody of their children in cases of divorce. Norton was deprived of custody of her children after having a divorce. She worked along with some politicians and successfully convinced the British parliament to pass a law that protects mothers' rights. Thus, there was the Custody of Infants Act 1839 which gave a certain level of discretion to the judges concerning proceedings of child custody, to initiate the presumption of maternal custody for young children (the age of seven and under).

The said presumption was later extended up to the age of 16 years by the British parliament in the year 1873. Due to the influence of the British Empire, the doctrine of '*Tender Years*' spread throughout many countries around the world. These English laws

¹⁰⁷ This is a late 19th century principle where in common law, it presumes that during a child's tender years (generally regarded as the age of four and under), the mother should have custody of the child. This doctrine often arises in divorce proceedings. Most states have held that this doctrine violates the Equal protection clause of the Fourteenth Amendment of the U.S. Constitution because it discriminates on the basis of sex. It is a doctrine rarely employed in Child Custody disputes that provides that, when all other factors are equal, custody of a child of tender years – generally under the age of thirteen years – should be awarded to the mother. This doctrine for more than a century was the primary determinative factor in the resolution of inter parental custody disputes. In some states, the tender year's doctrine has taken the form of a legal presumption, in most, it has been expressed as a "rule of thumb" or "natural presumption" both forms traditionally have dictated maternal custody unless the father could prove the mother an "unfit" custodian. (Extract from California Law Review Volume 70 Issue 2 March 1982 *The Tender Year Doctrine: A Defense* Ramsay Laing Kaif)

¹⁰⁸ She was an English social reformer and author active in the early mid-19th century. It was her intense campaign that led to the passing of the Custody of Infants Act 1839, The Matrimonial Causes Act 1857, and the Married Women's Property Act 1870.

were based on paternal and gender equality rather than being established on the concept of the best interest of the child.

Over the eighteenth and nineteenth centuries, the best interest of the child was not only a part of American family law jurisprudence but juvenile justice jurisprudence as well.

It was by this time that the Courts of Britain thought that or to say that they completely shifted their custody belief to presume that for a child of tender years being in the custody of the mother was in the best interest of the child. It was here that the “Tender year’s presumption” originated.¹⁰⁹

In the late 1800s, this concern for child welfare included illegitimate children as well as children suffering from the effects of the industrial revolution.

2.3.2.4. Replacement of Tender Years Doctrine by the principle of the Best Interest of the Child

By the latter part of the twentieth century, this Tender years’ doctrine was scraped off in most parts of the United States¹¹⁰ and Europe.¹¹¹ Most Courts and legislatures in the United States started to reverse their decisions. There was then repeal of laws that regarded the doctrine in favor of gender-neutral factors. Thus this doctrine was gradually replaced in many of the states in the United States of America by a new child custody law known as the Best Interest of the child doctrine.¹¹²

¹⁰⁹ Jaimeel Hartenstein Eastern Illinois University, USA Tender Years Doctrine

¹¹⁰ Few states of United States still practice the ‘Tender year’s doctrine’ but the same is noted only in certain cases. Whereas in other aspects or applications of the law, tender years may mean any law that initiates special rules for young children.

¹¹¹ With respect to the application of the doctrine in Europe originally the custody of young children was granted to the father and women had very few rights as individuals till the 19th century. No woman was given the right to raise her children/child after undergoing divorce. As time passed by the tender year’s presumption was taken off in majority of the European states. Presently the rule is joint custody legislation in cases of divorce or after separation of the parents and in all the said cases the tender year’s presumption was abolished. The European Family law clearly states that both parents have equal parental responsibility in the event of divorce and the same should not be affected merely because of an annulment or dissolution of marriage, i.e. parental responsibility should not be affected either by factual or legal separation of both parents.

¹¹² According to the said doctrine presently what is considered with respect to child custody proceedings is that the primary caretaker of the child is regarded as the best parent to be granted custody of a young child.

Thus, when one speaks about the Best Interest standard it is the American influence in English Jurisprudence that allowed the development of this standard in the western region, and one can describe the principle as being derived from Anglo- American family law.¹¹³ But at the same time, this is not the only interpretation that may be accorded to the said standard as the said principle of the best interest of the child varies from region to region and from culture to culture.

2.3.2.5. Law of Adoption in America and Best Interest Principle of Child

The concern for the best interests of children was more apparent in the development of adoption law in America. The statutes on adoption emerged in the 19th Century in America because of the Protestant movement¹¹⁴ and the same focused to provide for the welfare of dependent children as an alternative to pitiful alms-houses. The principle of Best interest was thus America's framework of adoption, and it set a completely new standard.¹¹⁵ It was based more on the best interest of the child. Under American law, adoption meant finding a family for a child rather than a child for a family. By the 19th century, this American view flavoured all actions taken concerning children.

2.3.2.6. Impact or evolution of Best interest in England

England in the meanwhile promoted the “tender year's doctrine” and viewed it as a product of natural law. Utilitarianism had a continued influence during the British period,

This doctrine gave the judges extraordinary discretion to determine what was in the child's best interest when it came to deciding the custody issue. The rise of the said standard of best interest also led to the birth of joint custody where parents shared custody of their children.

¹¹³ This is not the only interpretation that may be accorded to the standard of Best interest of the child principle. This principle varies from region to region and culture to culture.

¹¹⁴ The Protestant movement arrived in America in the early 17th century, it shaped the American culture in the 18th Century and grew dramatically in the 19th century. Further in the 20th century it continued to be the guardian of American religious life.

¹¹⁵ The same is evident as in contrast to Roman law, which emphasized adoption as a means of establishing family heirs. American law sought to establish an institution to ameliorate the condition of the neglected and dependent child. Inheritance rights were only incidentally considered. England still focused on the Roman legal concepts of adoption which focused more on inheritance.

Jeremy Bentham in the year 1840 organized the country's law to put the good above that of the individual. This influenced the law relating to children. Jeremy Bentham argued that children needed state protection.¹¹⁶

It was due to this Utilitarian jurisprudence combined with natural law foundation and America's development of the best interest a fresh jurisprudence concerning children developed in the West. It is because of this that many family law scholars view the Best interest of the child as a nineteenth-century tradition. Deeply imbued with the Romantic belief that childhood should be happy, throughout the nineteenth and twentieth century the reformers, as well as philanthropists, recognized that children had special needs as well as their concern for the welfare of the child increased.

Twentieth-century jurists continued the development of the best interest of the child in their case law across the nation and the Best Interest of the child concept became a permanent fixture in family law.

2.3.2.7. Recognition of Best Interest principle of Child Internationally

During the twentieth century, the best interest of the child spread internationally and for the first time, the rights of the child were brought together in one internationally recognized text in the year 1924, when the Assembly of the League of Nations passed a resolution endorsing the Declaration of the Rights of the child.¹¹⁷ The same was proclaimed the previous year by Save the Children International Union, which was a non-governmental body based in Geneva.¹¹⁸

¹¹⁶ In his work Theory of Legislation VOL 1, 248 he states that the State could and should intervene to promote the development of good citizens. In the words of Jeremy Bentham "the feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than of the laws.
https://archive.org/stream/benthamstheoryof01bent_djvu.txt

¹¹⁷ Adopted 26th September, 1924, League of Nations

¹¹⁸ Save the Children was established in the United Kingdom in 1919 to improve the lives of children through better education, healthcare, and economic opportunities, as well as providing emergency aid in natural disaster, war and other conflicts.

Before the codification of the United Nations Convention on the rights of the child, the rule of best interest was provided in the 1959 Declaration of the Rights of the child.¹¹⁹

The Convention on the Elimination of all Forms of Discrimination against Women¹²⁰ CEDWA against Women also states¹²¹ that the best interest of the child shall be of paramount consideration in ensuring that men and women have the same rights and responsibilities as parents in matters relating to their children, irrespective of their marital status; and the same rights and responsibilities concerning guardianship, ward ship, trusteeship, and adoption of children.¹²²

CEDWA being a convention primarily focused on discrimination against women the Principle of the best interest of the child is shifted from paramount to primary consideration as evident under Article 3 of the UN Convention on the Rights of the child 1989. This is because the application of this convention goes beyond mere judicial interpretation and includes in its ambit all the organs of the State. Therefore, the best interest of the child has a much wider application under the United Nations Convention on the Rights of the child 1989.

When it came to the United Nations Convention on the rights of the child the principle of the best interest of the child is reduced to primary consideration under Article 3¹²³ of the Convention, which declares involvement of more players other than the judiciary i.e. inclusion of the whole organs of the State.

¹¹⁹ ¹¹⁹ Principle 2 of the Declaration of the rights of the child 1959 states “... *the child shall enjoy special protection and shall be given opportunities and facilities by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for the purpose, the best interest of the child shall be the paramount consideration.*”

¹²⁰ Adopted and opened for signature and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with Article 27 (1)

¹²¹ Article 16 (1) (d) (f) The same rights and responsibilities with regard to guardianship, ward ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.

¹²² Establishing the Best Interest of the Child Rule as an International Custom Dina Imam Supaat. South East Asian Journal of Contemporary Business, Economics and Law Vol,I ISSN 2289- 1560 pg. 146- 149 year 2012.

¹²³ “In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”

The inclusion of the best interest principle of the child in Article 3 of the Convention makes it obligatory to apply the same into every action and decision taken by civil society and private provider of welfare services and all organs of the state and also reflects the extension of the same beyond certain boundaries i.e. beyond the national family law into the realm of international human rights law. Article 3 and Article 12¹²⁴ are the two Articles that together recognize the right of an individual child to express his opinions in all matters affecting him or her. And these two articles are considered to be the two of the four general principles of the Convention.

Since the United Nations Convention on the Rights of the Child 1989¹²⁵, has been ratified by almost all states except two, the Convention has become part of the customary international law¹²⁶. The Convention binds all states that have ratified it which includes India¹²⁷. States are responsible to ensure that all decisions and actions affecting children are made based on the principle of the best interest of the child. This is because children need special care as they have unique needs and for this reason, adults need to be aware of the concept of the best interest of the child while handling matters affecting children.

¹²⁴ Article 3 of the UNCRC states 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration. 2. State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end shall take all appropriate legislative and administrative measures. 3. States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. Further Article 12 states 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

¹²⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49.

¹²⁶ The best interest of the child is considered as a rule of customary international law because within one year of UNCRC coming into force all states ratified the same except Somalia and America thus showing that it was widely practiced and accepted universally by states. Thus ratification and incorporation of the same in State laws, clearly indicates acceptance and approval of a custom. The periodic reports submitted by the state parties to the Committee on the rights of the child clearly indicates that states are putting all efforts in embodying and implementing the said best interest standard of the child and at the same time ensuring that it is a primary consideration.

¹²⁷ India ratified the United Nations Convention on the Rights of the child on 11th December, 1992.

The tradition of the Best Interest of the child originated in western law, but the same was universally spread through the United Nations Convention on the Rights of the Child. It was from this doctrine of the Best Interest of the child that children's rights grew and developed and out of the said doctrine arose ardent support for children to be vested with the rights of their own and creating an extreme rift between children and their parents by presenting these rights in direct conflict with one another. Even as the courts and legislators created newly recognized rights of children the same were in consonance with the best interest of the child.

2.3.2.8. Two opposing Models of Child Custody in the mid-twentieth century

In the mid-twentieth century, Social science too simultaneously gained credibility and respect when it came to the legal determinations concerning children and families. An enlightened judiciary regarding psychological theories which were promulgated by social sciences along with the changing statutes gave rise to two opposing models of child custody, both of which were said to be in the best interest of the child. A landmark book built on the development of the best interest of child jurisprudence titled *Beyond the Best Interest of Child*¹²⁸ questioned the Best interest of the child standard with new promulgations of the psychological parent. The guidelines focused in the said book were based on psychoanalytic theory and were an attempt to direct judicial decision-making in all types of disputes involving child placement¹²⁹. These guidelines focused on the need to safeguard the physical as well as psychological needs of the child. The two opposing models of child custody, both of which were said to be in the best interest of the child

¹²⁸ This book is a product of three experts from different disciplines: legal scholar Joseph Goldstein, child Analyst Anna Freud and psychiatrist Albert Solnit, the book revolutionized child custody and the volume had a strong impact on the judges as well as the lawyers alike and built an attitude in law that completely focused on children. *The Best Interest of the Child: The Least Detrimental* Joseph Goldstein, Albert J.Solnit, Sonja Goldstein and the late Anna Freud. Alternative (<https://books.google.co.in/books>) The Free Press 1996.

¹²⁹ The term child- placement was envisaged by the authors to include legislative, judicial and executive decisions generally or specifically concerned with establishing, administering or re-arranging child- parent relations”.

were first being the primary caretaker¹³⁰ theory which asserted that the parent who fulfilled the primary child care functions, although it need not necessarily be the mother, should become the sole custodian of the child. This theory never received judicial acceptance. The other conflicting model that emerged was the Joint custody model¹³¹. This model stressed the importance of the presence of both parents in the child's development. The fact that these two opposing models were accepted and used and purported to be in the best interest of the child, left little doubt that there has and can be no clear-cut means of determining the best interest of a child. Although some states have provided a list of factors to be considered by the courts, other states have granted broad discretion to the judiciary in deciding what is in the best interest of the child. Thus, one can say that there is no agreement concerning what the words truly mean. The term, therefore, is subject to myriad interpretations and thus vague and elusive. But even then the term best interest of the child has become a universal standard that is used to adjudicate custody battles. Elizabeth J.Sher in her work titled *Choosing for Children: Adjudicating Medical Care Disputes between Parents and the State*, 58 N.Y.U.L Rev.157, 169 (1983) ¹³² has aptly characterized the best interest of the child application as a judicial or quasi-judicial determination of whether society's view of the best interest of the child (as represented by the state) outweighs the parental interest in making that determination. The present children's rights movement has recognized several new rights that were previously not necessary through legislation or judicial decisions¹³³.

¹³⁰ Primary caretaker was said to be a person who has had the majority of the day- to day interaction, companionship, and shared experiences with the child and could be a biological parent or an adoptive parent or any other caring adult but never by an absent, inactive adult whatever his biological or legal relationship to the child may be. This would be the person with whom the child has formed the closest bond.

¹³¹ This model was first introduced in California in the year 1980. It gained approval by the courts as it seemed to offer an ideal solution that judges could render decisions in the best interest of the child without appearing to favor one parent over the other.

¹³² The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity – John C.Duncan Jr. University of Oklahoma College of law Nebraska Law review Volume 83 Issue 4 Article 7 pg 1241 to 1295

¹³³ The same is obvious when the First Juvenile Court was established in 1899, it was founded upon the premise that it would be in the child's best interest if the state would operate specialized courts

2.4 Progression of the Concept of Best Interest through Case Law

When it comes to case laws the evolution of the principle of the best interest of the child was much smoother. The same was because of exercising of judicial discretion by the English Courts. The courts in England dealt with several cases that brought into question the legal rights of the children, their worth, and value. Lord Mansfield who was said to play a pivotal role ruled that Court was not required to order the children who were subjects of a habeas writ to be delivered to their father, but any decision concerning custody was left to the discretion of the judges, based on the circumstances of the case that appears before them.¹³⁴ In the case of *Blissett's*¹³⁵ Justice Mansfield allowed the child to remain with its mother based on the public's concern for the education of the child, thus doing what was best for the child. In another case¹³⁶ which was decided fifteen years later in the year 1789, the court reviewed guardianship of the child and his inheritance. In the said case the Court clearly distinguished the absolute paternal authority of parent over the child by considering the competing interest of parent and child and the parent's rights in the context of a child's provision of wealth. In the said case the best interest of the child heir prevailed over any parental authority. The said case is not discussed much when discussing the foundations of the best interest of the child as a legal standard as it occurred outside a custody context, but at the same time, it holds merit to the foundation of the said standard, as it assisted the decline of the unfettered absolute rights of parents. By the end of the 1700s, the perception that children were chattels weakened, and children came to be viewed as something much more and very different.

Although these cases used a new standard of welfare for children and created a spark they were quickly doused in the year 1804 by blanket judicial reinforcement of the paternal preference, regardless of the child's interest or needs in the historic case of *De Manneville*

¹³⁴ *Rex v/s Devall* (1763) 97 Eng.Rep913,914 (KB)

¹³⁵ (1774) 98 Eng. Rep 899 (K.B)

¹³⁶ *Powell v. Cleaver* (1789) 29 Eng. Rep 274

*v. De Manneville*¹³⁷ where the court was very clear that it could not interfere with a fathers right to his child. The trend set up in the case of Powell was negligible in the said case as the court at no time considered the interest of the child. Thus it could be stated that the best interest language was used as a disguise for coverture.¹³⁸

But across the Atlantic Ocean, the jurisprudence was forming much differently. In the case of *Prather v. Prather*¹³⁹ where a father of a five-year-old put his wife who he was living with for ten years out of their home to bring in his paramour, with whom he lived in open adultery the opinion of the court in its judgment did not use the language setting forth the child's best interests as the legal standard for its decision, but the court was disturbed that the fathers action were not those that warranted a court to believe and trust that the girl could remain the custody of her father. The said decision was a complete departure for the common law paternal preference.

Further in the year 1815, in a case where the father sought custody modification of his two daughters, nine and twelve as the custody of the children was with the mother initially on account of the tender age of the infants. The court in the said case exercised its discretion in determining the application of the rules of law at hand as it was persuaded by the father's moral argument that the children need to understand the sacredness of the marriage vow as he argued that the children's best interest and their future moral core would best be served by understanding that their mother's morals were corrupt in her adultery. Nonetheless in face of a change of custody to the father for the girl's "future welfare," the court recommended no "abrupt removal" from their mother "but to conduct the matter to avoid a violent shock either to them or their mother." This case was the first to use the best interest of the child as a legal standard. The court exercised its discretion to determine ultimately what would work to the greatest welfare of the children.

¹³⁷ In the said case the court had no problem in removing a eleven month old child from the custody of the mother and giving custody to the father, as a matter of law. Despite the fact that it might be best for the child to be in custody of the mother for the purpose of nursing. 5 East 221, 102 Eng. Rep. 1054 (K.B. 1804)

¹³⁸ This is a concept that "mother and children were under the cover of the husband/father and he reigned supreme." The same being stated by Joanne Ross Wilder, Religion and Best interest in custody cases.

¹³⁹ 305 S.E.2d 304 (1983) Supreme Court of Appeals of West Virginia

However, English courts strictly adhered to the paternal preference rule. The courts completely adhered to common law principles of paternal preference and concluded that the father had a right to take his child from the mother and the court had no authority to interfere in the case.

Simultaneously, across the Atlantic, the hard and fast paternal presumption was challenged in Rhode Island where the new and formidable standard of the welfare of the child emerged.¹⁴⁰ The court declared that the rights of the parent were subordinate to the welfare of the child when it was endangered as they existed for the benefit of the child. Thus the best interest of the child as a legal standard was gaining momentum by judicial discretion. Further in the year 1834, the courts stated that the good of the child is to be regarded as the predominant consideration and the same proclaimed that any parental right was based on the parent's duty to act in the best interest of the young child.¹⁴¹ By these judgments therefore it can be seen that the best interest of the child as a legal standard was not a new rule, but a purpose for applying the existing rules regarding children.

But the same could not be said concerning the England courts as there was a conflict when it came to applying the common law rules towards a common-sense reform of the rules.

The Kings Bench judges were reluctant to depart from precedent and contravene the father's right of custody even in a very compelling case and the same was concerning American Courts. The same is noticeable in the case of *Rex v/s Greenhill*¹⁴² wherein although it was obvious based on the facts of the case that the husband was using the children to force the wife to return to the marital residence without having to give up his extramarital liaison, the court granted the custody of the children to their father. The England courts continued to apply the paternal presumption to their discredit.

¹⁴⁰ The same emerged in the case of *United States v. Green* wherein a wide discussion arose as to the right of the father to have the custody of the infant under the circumstances of the case.

¹⁴¹ *Commonwealth v. Wales Briggs* Supreme Court of Massachusetts, Plymouth 33 Mass. 203; 1834 Mass. Lexis 105; 16 Pick. 203

¹⁴² (1836) 111 Eng.Rep.922, (K.B)

Meanwhile in America a year later the promising standard for children was setting deep roots. The New York Court reversed its decision on review which was based on the apparent application of the tender year's presumption being better for the child. The court further stated that the rights of the parents must in all cases yield to the interest and welfare of the infant. Thus the above cases of *Addicks*¹⁴³, *The United States v. Green*¹⁴⁴, *Briggs*¹⁴⁵, and *Mercein*¹⁴⁶ formed a foundation of cases that set the framework for the best interest of the child as the legal standard applied to cases regarding children. It was after the series of American decisions regarding children that the English courts seriously commenced in applying rules which were designed to work for the protection of children.

The case of *Baird v. Baird*¹⁴⁷ demonstrates how the Best interest of Child principle developed. In the said case the New Jersey Court not having abandoned the common law but rather upholding its value, at least in dicta, Court affirmed that the parental preference rule was subordinate to the best interest of the child.¹⁴⁸ It was in this case that the court took the opinion that strict law was not as important as the welfare of the child.

There were various other cases during this time that concentrated and transparently based its decision on the best interest standard of the child and thus one could state that the trend towards this new legal standard although took time to occur but was acknowledged.

Although the best interest standard developed through this chronicle of case law by the end of the nineteenth century however some scholars believed that it began to take away

¹⁴³ Pennsylvania Supreme Court year 1813. In the said case the Pennsylvania Supreme Court awarded custody of two young daughters to their (adulterous) mother on the theory that it was best for the girls, given their age. Interestingly, the same Supreme Court then transferred custody of the girls back to their father, once the girls were old enough to understand their mother's adultery. Wherein once again, the girls "best interests" was the key.

¹⁴⁴ Case no. 15,256 Circuit Court, D. Rhode Island Nov. Term, 1824 *supra* note 37

¹⁴⁵ Supreme Court of Massachusetts, Plymouth 33 Mass. 203; 1834 Mass. Lexis 105; 16 Pick. 203. The court in the said case declared "the good of the child is to be regarded as the predominant consideration." The court stated that the fact that the wife had separated from her husband without any justifiable cause, was the strong reason that the child was not restored to her.

¹⁴⁶ 46 U.S.5 How.103 (1847)

¹⁴⁷ 21 N.J.Eq.384 (1869)

¹⁴⁸ The Court in the said case has tried to balance the competing rights and the same is apparent in the opinion "On such an occasion it is not dry, technical right of the father, but the welfare of the child which will form the substantial basis of judgment. The legal right of the father will not be passed by, except when, in the opinion of the court the well-being of the child requires to be superseded.

the authority which parents had and in a way was responsible for the reduction of rights of parents generally.

It was in the case of *In re Gault*¹⁴⁹ which was a landmark judgment that came from the Supreme Court of the United States in the year 1967 which found constitutional rights for children and the most important case on Children's rights in American history. In the said case the courts attacked the juvenile courts by stating that the same though established as an institution to help children but rarely met the purpose.

Further, the claim of equal protection of gender preference brought about the demise of the tender year's doctrine wherein the court ruled that no preference would be permitted based on gender and the said concept was replaced with the presumption that custody in case of divorce would be to the primary caregiver of the child during the marriage. This abolished all the gender-based presumptions for custody. The tender year's doctrine however continues even today and the same is ardently fostered by some feminist family law scholars. But even then the Best Interest of the child doctrine remains the standard legal doctrine.

The exercising of judicial discretion in applying the standard of the best interest of the child led to many states¹⁵⁰ to codify their standards and the same was done by defining the standard or by stating guidelines and factors to be considered.

A balance between codification of the Best interest standard and case law with parental rights is also evident in some cases.¹⁵¹ In *In re New England Home for Little Wanderers*,¹⁵² it is stated "in invoking the 'best interest of the child' the Legislatures did not intend to disregard the ties between the child and its natural parent or to threaten a satisfactory family with the loss of children because the reason for placing them in foster care is temporary adversity. A parent cannot be deprived unless some affirmative reason

¹⁴⁹ *In re Gault*, 387 U.S. 1, 71- 72 (1967)

¹⁵⁰ Statutory codification of the Best interest standard occurred in West Virginia in 1908 which gave a definition but no guidelines.

¹⁵¹ In the case of *Bennett v. Jeffrey's*, it was stated that both the Best interest of the child and parents' rights are to safeguard stability and continuity for children.

¹⁵² (328 N.E.2d 854,861 (Mass.1975)

is shown for doing such as a finding of separation so long as to permit very strong bonds to develop between the child and the prospective adoptive parents.

The present position is that every state has a statute requiring that the child's best interest be considered whenever decisions regarding a child's placement are made. The foundations of the Best interest doctrine thus show how important this standard is to American family law, yet the application of the said principle has been and remains where the problem lies.

2.5 Application of the Doctrine

Not all family law scholars are convinced that this Best interest of the child standard is the best way when it comes to deciding legal matters regarding children. The arguments for the same are that it is too indeterminate to be of use in legal decisions, idealistic, virtuous, and a high-sounding self-deception that requires an individualized choice between alternatives. A further argument is that there is no consensus on what is the 'best, and it is very difficult to predict whether the judicial ruling will produce the best results for the child as the same is not possible because the court will always lack in gathering all the information necessary in passing an objective decision. Some state that the said best interest standard is unjust, self-defeating, neglecting the rights and needs of parents subjecting the interests of children to policy considerations, and leaving children worse off.

Claire Breen¹⁵³ on the other hand states that the best interest standard is as important not only to the foundations of jurisprudence surrounding children but appreciate the said standard.

¹⁵³ Claire Breen *The Standard of the Best Interest of the child A Western Tradition in International and comparative Law* Martinus Nijhoff Publishers ISBN 9789041118516

Thus the best interest standard rather than being considered as being of recent legal phenomena of the past few decades, the doctrine is said to be rooted in American family law jurisprudence for the past two hundred years.

It is true that the sparks of the best interest doctrine began in natural law and influenced the common law in England the standard is an American- grown concept. Thus the said doctrine is rooted in parental protection and manifested in a legal standard regarding children to assist judicial decision-making for what is ‘best for the child’.

2.6 Best Interest Standard in Indian Laws

The said principle finds its place in Indian laws, especially the law relating to custody and guardianship of a minor. In the Indian context, the terms guardianship and custody are separated, i.e. guardianship may vest in one person, whereas actual care and control may be transferred to the other.

Hindus are governed by the Hindu Minority and Guardianship Act, 1956¹⁵⁴ whereas others are governed by the Guardians and Wards Act, 1890,¹⁵⁵ or by personal law. In cases where the natural guardian is unfit to be one the Guardians and Wards Act provides the procedure and rules for appointing one.

The marriage laws like the Indian Divorce Act, 1869¹⁵⁶, the Parsi Marriage and Divorce Act, 1936¹⁵⁷, the Special Marriage Act, 1954¹⁵⁸, and Hindu Marriage Act, 1955¹⁵⁹ contain provisions for the custody of children.¹⁶⁰

¹⁵⁴ Act No. 32 of 1956, 25th August 1956.

¹⁵⁵ Act No. 8 of 1890, 21st March 1890.

¹⁵⁶ Act No. 4 of 1869

¹⁵⁷ Act No. 3 of 1936

¹⁵⁸ Act No. 43 of 1954

¹⁵⁹ Act No. XXV of 1955

¹⁶⁰ The order of custody is made on a temporary or permanent basis by the court. When matter is pending before a Court the judge makes arrangement allowing one parent to have custody of the children. Similarly, visitation rights or access is given to the other parent even if he or she is at fault. No rules for granting custody is laid. The court looks into the welfare and interest of the minor when granting custody. In most cases custody of younger children is given to the mother as she is considered necessary for nurturing the child.

When it comes to the best interest standard or the welfare principle the same is embodied in Section 13¹⁶¹ of the Hindu Minority and Guardianship Act, 1956¹⁶². Whereas section 17 of the Guardians and Wards Act, 1890¹⁶³ states that the court shall be guided by what appears in the circumstances to be for the welfare of the minor, 17 (2) enumerates what are the factors to be considered in determining the welfare of the minor and Section 17 (3) deals with the preference of the minor.

Since the Best Interest standard principle is a concept taken from American jurisprudence and the same was applied in custody matters the researcher would like to highlight in short the historical evolution of the concept of custody and guardianship under the Indian laws.

2.6.1 Historical evolution of the concept of custody and guardianship in Indian laws

It is observed that under the Indian laws, though the term ‘best interest of the child’ is not directly stated the laws in every aspect when dealing with matters of custody and guardianship have concentrated on keeping the welfare of the child as a paramount consideration.

The concept of guardianship in Hindu law dates back to the Vedic period where for all purposes Hindu families were patriarchal and powers were rested with the head of the family. Father was not called a guardian and infants were considered as the property of the father, they could not acquire property or hold property as the properties belonged to the father. Slowly the right of the sons to separate self-acquired property was recognized by law.

Under Hindu law supreme guardianship of all children was vested with the ‘king as parens patrie’. The following texts are references for the same A text of Manu states “The king

¹⁶¹ When declaring the guardian of a Hindu Minor, the welfare of the minor shall be of paramount consideration.

¹⁶² Act No. 32 of 1956.

¹⁶³ Act No. 8 of 1890

shall protect the inherited (and other) property of a minor until he has returned (from his teacher's home) or until he has passed his minority."¹⁶⁴ According to Vashistha "the King might entrust others with minor's affairs."¹⁶⁵ Narada stated that "the father has the first claim after he comes the elder brother."¹⁶⁶ His powers as guardian will be determined and may be deemed justly required for the benefit of the infant. All these texts do not speak about guardianship of a minor, but guardianship of the property of the minor.

The Hindu Minority and Guardianship Act, 1956¹⁶⁷ reformed and codified the Hindu law of guardianship and minority.¹⁶⁸ The law of guardianship was developed by the Courts during the British period. In the year 1890 the Guardians and Wards Act was passed and the same conferred power on the District Court/Family Court to appoint guardians of minor children belonging to any community. Under the present legal regime, the law of guardianship and custody of minors is governed by the followings Acts the Guardians and Wards Act,¹⁶⁹ 1890,

¹⁶⁴ www.hindubooks.org/scriptures/manusmriti/ch8/ch8_21_31.htm

¹⁶⁵ Kane P.V., History of Dharmashastras- 1975 (Pune: Bhandarkar Oriental Research Institute)

¹⁶⁶ Ibid

¹⁶⁷ Act No. 32 of 1956.

¹⁶⁸ The Act retained the supremacy of the paternal right during the lifetime of the father remained intact. And he was considered as the sole guardian as long as he was alive. After his death or in case he was unfit, the mother was said to be the natural guardian of her minor children.

¹⁶⁹ The said Act was amongst the earliest statutes enacted relating to minors. Before the said Act statutes pertaining to the said aspect were scattered. This Act consolidated the earlier scattered statutes. It is a complete code which defines the rights and remedies with respect to Wards. The Act deals with guardians of person as well as property of the minor. The court under the Act is also given the power under section 17 to appoint for the welfare of the child a guardian for the person as well as property of the minor. Thus under the said section guardian can be appointed only if it is necessary in the welfare of the child. Section 7 also mentions factors to be considered to ascertain what will be for the welfare of the child. Thus section 7 and section 17 of the Act together can be interpreted as that welfare of the minor should be in consonance with the personal law made applicable to the minor. Further it is clear that these sections have specifically mentioned that welfare of the minor is the paramount consideration. This shows that although the term of best interest is not directly used in the Act the Act in terms of welfare of the child covers the said principle.

The Hindu Minority and Guardianship Act, 1956¹⁷⁰ and the uncodified Muslim law¹⁷¹ of custody and guardianship, and the personal laws of Hindus, Parsis, and Christianity lay

¹⁷⁰ Under the said Act the father is said to be the natural guardian of both person and property of a legitimate minor and after him the guardianship vests in the mother. The father also cannot appoint a guardian for the minor child in case of his death through a will and deprive the mother of custody. Even during the lifetime of the father a child below five years the mother is entitled to custody. With respect to an illegitimate child the mother is said to be a natural guardian and after her death putative father is the natural guardian. In case of an adopted child the adoptive father and after him the adoptive mother is the natural guardian. Both parents are also given power of appointing testamentary guardians for all cases where they are competent to act as natural guardians. Under the said Act section 13 deals with the concept of best interest of the child once again in the terms Welfare of minor to be of paramount consideration. Section 13 (1) makes welfare of the minor as paramount or sole consideration in the appointment and declaration of the guardian.

¹⁷¹ Under the Muslim Law with respect to custody and guardianship there are certain verses in the Koran and the ahadis which speak very little about guardianship of the person of the minor but more on guardianship of property of the minor. Under the Muslim law guardians are of three kinds Natural, Testamentary, guardians appointed by the court and in case any of these fail the matter is governed by the Guardians and Wards Act 1890.

Mothers Right: The Muslim law considers the mother as having the first and foremost right to custody of children and the same is termed as the mother's right of Hizanat. This right is just the right to rear the child and thus is terminated at a very early age of the child and with respect to this the Muslim law makes a distinction between the son and daughter.

- a) **Son:** the son will remain or is entitled to be in custody of the mother until he is independent of her care and the same is until seven years of age. The said view is of the Hanafi. Whereas the Shias view that the mother is entitled to custody of her son until he is weaned i.e. until two years and custody cannot be deprived except with her own consent. The Maliki's on the other hand are of the view that the mothers right of hizanat continues till puberty and the same rule is with respect to the Shafis and Hanabalis but they also hold the view that when the son completes seven years of age he has a choice of living with either of the parent.
- b) **Daughter:** With respect to the daughter the view of the Hanafi is the mother is entitled to custody until puberty whereas the Maliki's and the Shafis as well as the Hanabalis state that the mother's right of custody over her daughters continue till their married. Under the Itna Ashari law the mother is entitled to custody of the daughter till they attain the age of seven and in all case of schools of Muslim law, the mother has a right to the custody of the married daughter below the age of puberty in preference to the husband. Since the right of Hizanat of the mother is a right of rearing the child and the same is given in the interest of the child the same cannot be surrendered to any person.

Fathers Right: With respect to the fathers right of Hizanat under all the schools of Muslim law the father is entitled to the custody of the minor child on the following grounds: a) on completion of the age by the child up to which mother or other females are entitled to his custody and b) in the absence of the mother or other females who have the right of hizanat of minor child. The father cannot be deprived of the said right. This right of the father continues when the minor attains puberty.

When the female is entitled to the custody of the child such a female should be free, adult, trustworthy and capable of bringing up the child and not married to a stranger. All the schools of Muslim law agree that a Hazina should be of

- a) Sound mind
- b) Good moral character
- c) Living at a place where there is no risk morally or physically to the child
- d) And of an age that will qualify her to bestow on the child the care it may need- the said point would not apply to mother.

The schools also agree that this right of hizanat will be forfeited in certain cases like insanity, apostasy, her marriage to a person not related to the child within the degrees of prohibited relationship, she going away

down the principles relating to the custody and guardianship of children during matrimonial proceedings.

Any legal concept especially the one best interest of the child has an international origin and international relevance. The fact that the best interest of the child is considered as the paramount principle of the United Nations Child Rights Convention 1989¹⁷² this kind of approach becomes all the more relevant. The Principle of Best Interest of the Child is also enshrined in several international treaties and documents¹⁷³ which the researcher will discuss and deal with in detail in Chapter III of her research.

and residing during the subsistence of marriage at a distance place from the father's place of residence and in case of removal of the child by that hazina.

Thus one can see that the cardinal principle of Hizanat in the Muslim law is solely welfare of the child and the same can be seen with respect to the following points where the mother is given preference over the father during his or her tender years, removal of the Hazina in certain cases i.e. she forfeits her rights in certain cases.

¹⁷² Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49.

¹⁷³ Hague Convention on Protection of Children and Cooperation in Respect of inter – country adoption 1993, UN Convention on the Rights of a Person with Disabilities 2006, etc.

CHAPTER 3

LEGAL FRAMEWORK OF THE BEST INTEREST OF THE CHILD PRINCIPLE

3.1 Introduction

Rights of the child as for a long time remained within the purview of the family and the domestic laws. Though child welfare has remained internationally a matter of concern there were no proactive or affirmative statements about children's rights. Traditionally, children's rights especially after the aftermath of the first world war came to be clubbed with women's rights, and therefore the usually used term during the early part of the twentieth century has always been women and children. The emergence of children having independent rights independent of their mother i.e. the parent came to be established after the aftermath of the First World War when there was an international concern for orphaned and abandoned children. The then international body the League of Nations¹⁷⁴ was at the forefront in taking up this issue and bringing out children's rights before the public dialogue ultimately culminating in the Geneva Declaration of the Rights of the child in 1929¹⁷⁵.

3.1.1 Declaration of the Rights of the child 1924

The first international document which promotes child rights was the Declaration of the Rights of the child, known as the Geneva Declaration of the Rights of the child.¹⁷⁶ Though this Declaration dealt elaborately with the rights of the child by enunciating five principles it has not yet coined specifically the term 'the best interest of the child'.¹⁷⁷ The text was endorsed by the League of Nations General Assembly on 26th November 1924 as the

¹⁷⁴ The League of Nations was founded on 10th January 1920 following the Paris Peace Conference that ended the First World War, it ceased operations on 20th April 1946.

¹⁷⁵ Adopted on 26th September, 1924, League of Nations.

¹⁷⁶ Ibid

¹⁷⁷ International Save the Children Union Geneva on 23rd February 1923, states the following five rights: the child must be given the means requisite for its normal development, both materially and spiritually. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored. The child must be the first to receive relief in times of distress. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

World Child Welfare Charter.¹⁷⁸ The Preamble of the Declaration provides that ‘mankind owes to the child the best it has to give’¹⁷⁹ and consequently, committed nations to the development, protection, and raising of children. The Declaration clearly states the duties of the Nations towards children and entitles that mankind should give children the best that they can. The said Declaration prepared the ground for ‘progressive development of international norms and standards concerning the rights and well-being of the child.’¹⁸⁰

3.1.1.1 Declaration of the Rights of the child 1959

The Declaration on the Rights of the Child 1959¹⁸¹ also emphasized that ‘mankind owes the child the best it has to give.’ But the scope of the said Declaration was much wider than that of the 1924 Declaration¹⁸².

Both these Declarations emphasized child protection and protecting the child rather than child rights. The Declaration lays down 10 principles in its preamble and the same are as follows. Of these ten principles it could be noticed that principle 1 of the declaration deals with non-discrimination,¹⁸³ Principle 2 deals with protection¹⁸⁴, principle 3¹⁸⁵ deals with the right to name and nationality, principle 4¹⁸⁶ deals with the right to benefits of social

¹⁷⁸ https://en.wikipedia.org/wiki/declaration_of_the_Rights_of_the_Child

¹⁷⁹ The preamble reads as follows ‘by the present declaration of the rights of the child, men and women of all nations recognizing that mankind owe to the child the best that it has to give, declare and accept as their duty....’

¹⁸⁰ Michelle Theresa Boyd *the Determination of the child’s Best Interest in relocation disputes* November 2015 <http://etd.uwc.ac.za>

¹⁸¹ G.A.res.1386 (XIV),14 U.N. GAOR Supp (No.16) at 19, U.N. Doc. A/4354

¹⁸² Declaration of the Rights of the Child 1924.

¹⁸³ Principle 1 of the Declaration states “The child shall enjoy all the rights set forth in this Declaration. Every Child without any exception whatsoever shall be entitled to these rights, without distinction or discrimination on account of race, color, sex, language, religion, political or other opinion, national or social origin, property or birth or other status, whether of himself or of his family.”

¹⁸⁴ Principle 2 The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity in the enactment of laws and for the purpose, the best interest of the

¹⁸⁵ Principle 3 The child shall be entitled from his birth to a name and nationality.

¹⁸⁶ Principle 4 The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre- natal and post – natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

security, principle 5¹⁸⁷ deals with special need of a special child, principle 6¹⁸⁸ states the requirement of a child for his or her harmonious development, principle 7¹⁸⁹ deals with the right to education, principle 8¹⁹⁰ deals with protection and relief to the child, principle 9¹⁹¹ deals with protecting the child from neglect and principle 10¹⁹² deals with protecting the child from all racial, religious and other forms of discrimination. What is significant of the said Declaration is that it is the first international human rights document that specifically refers to the ‘best interests of the child’.¹⁹³ This Declaration also lays down the best interest of the child principle as a guiding principle when it comes to education.¹⁹⁴

Michael Freeman in his book *Children’s Rights: A Comparative Perspective (1996)* regards the Declaration as moral rights, merely containing moral entitlements. He points

¹⁸⁷ Principle 5 the child who is physically, mentally, or socially handicapped shall be given the special treatment education and care required by his particular condition.

¹⁸⁸ Principle 6 the child, shall for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

¹⁸⁹ Principle 7 the child is entitled to receive education, which shall be free and compulsory at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society. The best interest of the child shall be the guiding principle of those responsible for his education and guidance; the responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavor to promote the enjoyment of this right.

¹⁹⁰ Principle 8 the child shall in all circumstances be among the first to receive protection and relief.

¹⁹¹ Principle 9 the child shall be protected against all form of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused to be permitted to engage in any occupation or employment which would prejudice his health or education or interfere with his physical, mental or moral development.

¹⁹² Principle 10 the child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universe brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

¹⁹³ Principle 2 states ‘the child shall enjoy protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be the paramount consideration’.

¹⁹⁴ Principle 7 of the Declaration states ‘the best interest of the child shall be the guiding principle of those responsible for the (child’s) education and guidance; that responsibility lies in the first place with his parents.

out, “there is no recognition of a child’s autonomy, no understanding of the importance of a child’s wishes and feelings, no appreciation of the value of empowerment, the child remains an object of concern rather than a person with self-determination”.

This Declaration finally recognized children as holders of rights rather than mere objects. The Declaration of the child in 1924¹⁹⁵ and The Declaration of the rights of the child in 1959¹⁹⁶ were declarations that brought about awareness of the rights of the child as well as the welfare of the child.

3.1.2 The Universal Declaration of Human Rights 1948 (UDHR)

The United Nations Declaration of Human Rights¹⁹⁷ which was drafted and adopted by the UN General Assembly addresses human rights in general, to which all are entitled. However, some generic provisions deal with the rights of the child. The provisions in the said Declaration are tailored in a way that will protect children.

(i) Everyone (including the child) is recognized to have the right to a standard of living adequate for the health and well-being of him/herself, including food, clothing, housing, and medical care, and other necessary social services¹⁹⁸.

(ii) “Motherhood and childhood are to be entitled to special care and assistance, and children born out of wedlock are to enjoy the same special protection.”¹⁹⁹

(iii) ‘Everyone is to have the right to education: this is to be free at the elementary level and compulsory, also at that level.’²⁰⁰

¹⁹⁵ Ibid

¹⁹⁶ ibid

¹⁹⁷ Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10th December 1948 on December 10 1948.

¹⁹⁸ Article 25.1 of the Universal Declaration of Human Rights 1948.

¹⁹⁹ Article 25.2. of the Universal Declaration of Human Rights 1948.

²⁰⁰ Article 26.1 of the Universal Declaration of Human Rights 1948.

3.1.3. The International Covenant on Civil and Political Rights 1966²⁰¹ (ICCPR)

The only specific Article on children is ‘ every child- there is to be no discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on a part of his family, society, and the State; to be registered and to have a name and the right to acquire a nationality.’²⁰²

Further, it states that a death sentence is not to be imposed for crimes committed by persons below the age of 18 years. It also makes provisions for a separate juvenile system of justice and different penal systems. Article 23 (4) makes a provision that in case of dissolution of marriage provision has to be made for the protection of any children, but it does not provide that the same is to be governed by any best interest principle.

3.1.4. The European Convention on Adoption of children 1968²⁰³

It is worth noting that the European Convention on the Adoption of children has specifically stressed the concept of the ‘Best interest of the child’ and has mentioned the same in not fewer than six Articles of the Convention. The main aim of the Convention is to take into account social and legal developments while keeping with the European Convention on Human Rights and bearing in mind that the child’s best interests must always take precedence over any other considerations. The Preamble of the Convention stresses that the ‘best interest of the child’ should be of paramount consideration. Further

²⁰¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16th December 1966, entry into force 23rd March 1976, in accordance with Article 49.

²⁰² Article 24

²⁰³ Registered by the Council of Europe on 24th April 1968.

article 4,²⁰⁴ Article 6²⁰⁵, Article 9²⁰⁶, and Article 14²⁰⁷ and Article 19²⁰⁸ incorporate the ‘best interest of the child’ principle.

3.1.5. The International Covenant of Economic, Social and Cultural Rights (ICESCR) 1976²⁰⁹

Children’s rights are recognized under this Covenant in several Articles. Children are provided special measures of protection as well as assistance and protection from economic and social exploitation²¹⁰, it further lays stress on the healthy development of the child,²¹¹ right to education for the development of human personality, and the sense of its dignity where primary education was to be compulsory and free; secondary education accessible to all.²¹²

Though the covenant does not refer to the best interest of the child or lays down any other guiding principle that is specifically child-oriented primarily because this Covenant is oriented towards economic, social, and cultural rights.

²⁰⁴ Article 4 Granting of an adoption: The competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child.

²⁰⁵ Article 6 states that the views and wishes of the child shall be taken into account having regard to his or her degree of maturity but the same will be dispensed with if it would be manifestly contrary to the child’s best interest.

²⁰⁶ Article 9 Deals with the difference of age between the adopter and the child that the minimum age should not be less than 18 years and more than 30 years and Article 14 further incorporate the best interest principles.

²⁰⁷ Article 14 Revocation and annulment of an adoption: it states that when it comes to revocation and annulment of the adoption the same has to be done by a competent authority and the best interest of the child shall always be the paramount consideration.

²⁰⁸ Article 19 Probationary period It states that The State Parties are free to require that the child has been in the care of the adopter before adoption is granted for a period long enough to enable reasonable estimate to be made by the competent authority as to their future relations if the adoption were granted. In this context the best interests of the child shall be of paramount consideration.

²⁰⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution 22001 (XXI) of 16th December 1966 entry into force 3rd January 1976, in accordance with Article 27.

²¹⁰ Article 10

²¹¹ Article 12 (2)

²¹² Article 13 (2) (b)

3.1.6. Convention on the Elimination of All Forms of Discrimination against Women 1979²¹³ (CEDAW)

The Principle of the ‘best interest of the child’ is included in two articles of the said Convention. Article 5 (b) requires that the State Parties to that Convention ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the child is the primordial consideration in all cases. Similarly, Article 16 (1) (d)²¹⁴ provides that in all matters relating to marriage and family relations the interests of the children shall be paramount²¹⁵.

3.1.7. European Convention on the Exercise of Children’s Rights 1996²¹⁶

The preamble of the Convention aims at promoting the rights and best interest of children and giving children the opportunity to exercise their rights especially in family proceedings that affects them. It further states that the views of the child should be given due weightage and the same must be considered in the best interest of the child. The object of the said Convention is, also in the best interest of children, to promote their rights, to grant them procedural rights, and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to

²¹³ Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18th December 1979, entry into force 3rd September 1981, in accordance with Article 27 (1)

²¹⁴ Article 16 (1) (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.

²¹⁵ www.unicef.org/publications/files/implementation visited on 11th March 2018.

²¹⁶ <https://www.reworld.org> the same was signed on January 25, 1996 and entered into force in Italy on November 1, 2003.

participate in proceedings affecting them before a judicial authority. Further, Article 6²¹⁷, and Article 10²¹⁸ also incorporate the best interest principle.

3.1.8. The African Charter on the Rights and Welfare of the Child 1999²¹⁹ (ACRWC)

This was the first Regional Treaty on Children’s Rights and the same was built on the 1979 Declaration on the Rights and Welfare of the African Child²²⁰. Most of the provisions of the said Charter are modelled in the same line as that of the Convention on the Rights of the child. The Preamble of the said Charter clearly states that “The child occupies a unique and privileged position in the African Society” and requires legal protection as well as “particular care concerning health, physical, mental, moral and social development.” The term child is defined in the Charter as “Every Human being below the age of 18 years”. It also sets forth the principles of non-discrimination and best interest principle²²¹.

²¹⁷ Decision making process: In proceedings affecting a child, the judicial authority, before taking decision, shall: a) consider whether it has sufficient information at its disposal in order to take a decision in the best interest of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities. b) in a case where the child is considered by internal law as having sufficient understanding – ensure that the child has received all relevant information; consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interest of the child;

²¹⁸ Article 10 states that in case of proceedings before a judicial authority affecting a child the representative shall, unless this would be manifestly contrary to the best interest of the child: a) provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding; b) provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative; c) determine the views of the child and present these views to the judicial authority. 2) Parties shall consider extending the provisions of paragraph 1 to the holders of parental responsibilities.

²¹⁹ This Charter is a regional human rights treaty adopted in 1990 and which came into force in 1999. It defines the rights and responsibilities of a child and mandates protection of the girl child from harmful cultural practices such as child marriage.

²²⁰ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

²²¹ Article 19 of the charter states that children should, wherever possible, have the right to live with their parents. No child should be separated from his or her parents against his or her will, except when authorities

Before the said Charter an aspirational document was the Declaration of the Rights and Welfare of the African Child 1979, this emphasized the unequal status of female children, referred to child marriage and female circumcision and urged member states to ratify the International Labor Organization Convention on the minimum age for employment. It also urged that attention has to be given to the needs of refugees and displaced children.

3.1.9. The United Nations Convention on the Rights of Persons with disabilities 2006²²² (CRPD)

The Principle of the ‘best interest of the child’ is reflected in the said Convention in various Articles. Article 7 (2)²²³ of the Convention incorporates the entire principle of the ‘best interest of the child’ as stated in the United Convention of the Rights of the child. Article 23 of the Convention speaks about Respect for home and family and Article 23 (2) clearly states that the best interest of the child should be of paramount consideration in all cases and state parties should ensure the rights and responsibilities of persons with disabilities, concerning guardianship, ward ship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation. That state party should render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities. Further, Article 23 (4) also mentions that when it comes to separating a child the state parties should ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, by applicable law and procedures, that such separation is necessary for the best interest of the child. In no case, a child can be separated from parents based on disability.

believe is would be in the child’s best interest. Further Article 20 also states that Parents or other persons responsible for the child should always act in the best interest of the child.

²²² United Nations General Assembly Session 61 Resolution 106. Convention on the Rights of Persons with Disabilities A/RES/61/106.

²²³ Article 7(2) in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3.1.10. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993²²⁴

The ‘best interest of the child’ principle is reflected in the objectives of the Convention. Article 1(a) establishes safeguards to ensure that intercountry adoptions take place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law. In Chapter II of the Convention Article 4 touches upon the principle of the ‘best interest of the child’. Article 4 specifically deals with the procedure for adopting a child wherein one of the requirements is the best interest of the child²²⁵. Chapter IV of the Convention deals with procedures that precede as well as those which follow the making of the adoption wherein the Central Authority and its delegates are entrusted with special responsibility. Article 16 (1) (d) states that when the Central Authority of the State of origin is satisfied that the child is adoptable it shall determine on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interest of the child. Further Article 21 (1) states that where the adoption is to take place after the transfer of the child to the receiving State it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child’s best interests, such Central Authority shall take the measures necessary to protect the child, in particular. Article 24 also states that the recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

²²⁴ Concluded on 29th May 1993

²²⁵ Article 4 The relevant portion of the Article: An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin 4(b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interest.

3.1.11. The 1989 Convention on the Rights of the Child (CRC)²²⁶

The Convention on the Rights of the Child was adopted by the United Nations General Assembly on November 26th, 1989. The first draft of the Convention contained the principle of the best interest of the child, which was on similar lines to the principle of the ‘best interest of the child’ embodied in Article 2 of the 1959 Declaration of the Rights of the Child. The Convention on the Rights of the child is the most comprehensive document on the rights of children. While the Declaration addresses the concept of ‘best interest’ concerning the development of the child and the enactment of laws to provide for special protection of the child, the Convention makes the best interest of the child a general principle that applies to the Convention as a whole.²²⁷ With the advent of the Convention on the Rights of the Child, children were recognized as the true subjects of law, and rights of the child under the Convention on the Rights of the child goes beyond mere protection, and the rights are framed as true fundamental individual rights.

The first draft of the Convention was in the form of a proposal submitted by Poland in 1978. The first draft of the Convention contained the principle of the ‘best interest of the child’ in the same lines as embodied in Article 2 of the 1959 Declaration of the Rights of the child. However, due to the opposition of some delegations, an alternative draft was submitted in 1980 to the working group of the Commission on Human Rights, which was responsible for drafting the Convention. Even then, there were debates wherein the question was whether the term “best interest” principle should be a “primary” or “the paramount” consideration or whether it should be described in some other way. During the debate, some delegates expressed that the term paramount was too broad, while many expressed that the draft should offer better protection to the child.

Finally, the proposal that “the best interest of the child should be a primary consideration” was adopted. The justification was also given for the adoption of the same that there could

²²⁶ Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20th November 1989 entry into force 2nd September 1990, in accordance with Article 49.

²²⁷ www.justice.gc.ca/eng/rp-pr/ The Convention on the Rights of the child By Jean – Francois Noel visited on 18th February 2018.

be instances, in which the competing interests of, inter alia, “justice and society at large should be of at least equal, if not greater, importance than the interests of the child.” Thus the main objective in formulating the principle in the said manner was to ensure that there is sufficient flexibility, at least in certain extreme cases, to enable the interests of those other than the child to prevail.

The Convention on the Rights of the child is concerned with four basic rights of the child which are considered as the Four ‘P’s. The same is participation by children in a decision affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; and provision of assistance to children for their basic needs.

The Convention on the Rights of the Child does not give a precise definition of the principle or even states the factors that can be taken into account when deciding what is best for the child, however, it broadly describes the overall well-being of a child. Thus each case has to be balanced concerning its context but within a well-defined procedural framework. The concept of the best interest of the child has made its way into almost all legislation around the world. Although in International law it has not yet achieved the degree of specificity that would limit the discretion of State parties in identifying what criteria or factors to consider. The best interest of the child principle is one of the general principles of the Convention on the Rights of the child alongside Article 2²²⁸, Article 6²²⁹, and Article 12²³⁰.

The best interest principle respects a) The importance of every child as an individual with opinions, b) The short-medium, and long term perspective of the life of the child, bearing in mind that the child is a human being in development. c) The global spirit of the CRC and d) an interpretation that is not “culturally relativist” or denies other rights of the CRC,

²²⁸ Article 2 of United Nations Convention on Rights of Child states that there shall be no discrimination on the grounds of race, color, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status.

²²⁹ Article 6 States that State Parties recognize that every child has the inherent right to life and shall ensure to the maximum extent possible the survival and development of the child.

²³⁰ Article 12 states that Children shall be assured the right to express their views freely in all matters affecting them, their views being given due weight in accordance with the child’s age and level of maturity.

for example, the right to protection against harmful traditional practices and corporal punishment²³¹

The concept of the best interest of the child is mentioned as a principle that is of primary consideration in Article 3 of the Convention. Article 3 of the Convention is the guiding principle of the best interest rule. Further, the Convention also provides a wider framework in the best interest determination process in the following Articles: Article ²³², Article 18²³³, Article 20²³⁴, and Article 21²³⁵ and when it relates to juvenile Justice Article 37²³⁶ article 40 (2) b(iii)²³⁷. In all these Articles wherever the phrase best interest is used the main focus is on deciding appropriate action for individual children in particular circumstances and requires determination of the best interest of the individual children, and in such situations, the child's best interest is the paramount consideration. Article 3 of the Convention states that the best interest of the child must be a primary consideration and the same must apply to all actions affecting children, whether undertaken by the public or private social welfare institutions, court of law, administrative authorities, or legislative bodies. It puts an obligation on all states to ensure that children's interests are placed at the heart of all decision – making which impacts children. There can be no set formula to determine what is best for a child thus the touchstone is what is best for the individual child in his or her particular circumstance.

²³¹ Literal Analysis, Function and Implementation working Report 2010

²³² Article 9 (1) and (3) The child shall not be separated from his or her parents against his or her will except when competent authorities subject to judicial review determine in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child; and the States must respect the right of the child to maintain personal relations and direct contact with both parents on a regular basis "except if it is contrary to the child's best interests.

²³³ Article 18 (1) both parents have primary responsibility for the upbringing of their child and the best interest of the child will be their basic concern

²³⁴ Article 20 Children temporarily or permanently deprived of their family environment or in whose own best interests cannot be allowed to remain in that environment are entitled to special protection and assistance.

²³⁵ States should ensure that the best interest of the child shall be the paramount consideration.

²³⁶ Article 37(c) unless it is considered in the child's best interest not to do so.

²³⁷ Court hearings of penal matters involving a juvenile: parents or legal guardian should be present unless it is considered not to be in the interest of the child.

3.1.11.1 The detailed analysis of Article 3(1) is as below

3.1.11.1. (i) In all actions concerning children

This phrase makes it clear that the best interest of the child should be affirmed in all findings and actions concerning children. The word action not only included findings but also includes conduct, actions, services, procedures, and other measures relating to children.

3.1.11.1. (ii) By public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies

This has been broadly construed to encompass all institutions wherein a child can come in contact with as well as those which will have an impact on the child.

3.1.11.1. (iii) Shall be a primary consideration

This expression implies that the best interest of the child should not be placed on an equal level as other considerations. It indicates that the best interest of the child will not be the only factor but there may be competing or conflicting human rights interests, for example between individual children, between different groups of children, and between children and adults. However, the child's interest must be a subject of active consideration. When taking any decision, it must be demonstrated that the interest of the child has been explored and taken into account as a primary consideration.

If one sees the wording of the principle it indicates that its scope is very wide and goes beyond state-initiated actions to cover private bodies too, and embraces all actions concerning children as a group. In its General Comment No. 5, the Committee

emphasized the importance of the reflection of the best interest principle as laid down in Article 3(1) in domestic laws²³⁸.

The second and third paragraphs of Article 3 are also of great significance. Article 3 (2) outlines an overall obligation of States, to ensure that in all circumstances children are given the necessary protection and care but at the same time respecting the rights and duties of parents. Further Article 3(3) requires that standards have to be established by 'competent bodies' for all institutions, services, and facilities for children and that the States should ensure that the standards are complied with through appropriate monitoring.

The main characteristics of Article 3(1) are the said Article 3 (1) does not constitute a subjective or substantive right in the strict sense, but rather is a principle for interpretation that must be used in all forms of interventions regarding children and which confers a guarantee to all children that any decision that will affect their lives will be examined by the principle of best interest. Secondly, the provision puts an obligation on the States that the best interest of the child/children should be an immediate consideration in the decision-making process, further one must note that the said Article cannot be considered in a vacuum as it belongs to a larger entity and establishes a new status on the child as an individual. The concept of the best interest of the child is an unspecified legal concept

²³⁸ The Committee states in para 22 of Comment No. 5 that the best interest principle ... requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interest principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision including those which are not directly concerned with children but indirectly affecting children. further the committee in the same comment when explaining the need for child impact assessment and evaluation states “ Ensuring that the best interests of the child are a primary consideration in all actions concerning children art 3(1), and that all the provisions of the Convention are respected in legislation and policy development and delivery at all levels of government demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation) this process needs to be built into government at all levels and as early as possible in the development of policy.” Self- monitoring and evaluation is an obligation for Governments. But the Committee also regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGO's, academic institutions, professional associations, youth groups and independent human rights institutions...” The Committee commends certain States which have adopted legislation requiring the preparation and presentation to parliament and/or the public of formal impact analysis statements. Every State should consider how it can ensure compliance with Article 3 (1) and do so in a way which further promotes the visible integration of children in policy – making and sensitivity to their rights.”

which when applied in practice must be clarified and should follow internationally accepted procedural rules of application. Further, it is stated that the said criterion of the best interest of the child is relative in space and time.²³⁹ One of the important characteristics of the said principle is that when any decision is reached with regards to a child the same must consider the mid and long term consequences to ensure that the aims of the application of the best interests principle not only consider a short term solution but also takes into account the interests of the child's future. Whenever any decision is taken concerning the child the said principle of best interest must be applied keeping in mind the evolutionary changes of our sociological situation, new situations that will arise, and new points of view.

The Committee on the Rights of the Child²⁴⁰ has developed the interpretation of the best interest of the child principle concerning various issues in its successive General Comments.

3.1.12 General Comments by United Nations Committee which include the principle of the best interest of the child.

The committee examined the implementation of the best interest principle in its various General Comments. In General Comment No. 7²⁴¹ which deals with early childhood, the Committee stressed various measures which have to be implemented concerning an

²³⁹ The said criterion is relative in time as it is dependent on scientific knowledge about the child and the pre-eminence of such theories in any given time period. It is relative in space as the said criterion should take into account the valid standards present in certain countries and the principle should not be threatened by arguments of cultural relativism that seeks to justify decisions which would have a negative impact when it comes to respecting the right and enjoyment of the substantive rights of the child/children.

²⁴⁰ The Committee on the Rights of the child is the body of 18 independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. It also monitors implementation of two Optional Protocols to the Convention on involvement of children in armed conflict and on sale of children, child prostitution and child pornography.

²⁴¹ Sixteenth session, 1997 contained in document E/1998/22, annex IV.

individual child and groups of children. ²⁴² General Comment No. 8 (2006)²⁴³, deals with the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment. In the said Comment the Child Rights Committee issued a very important statement on corporal punishment and linked the same to Article 3(1)²⁴⁴ of the Child Rights Convention. When examining the various reports submitted by States governmental representatives have suggested that some level of reasonable or moderate corporal punishment can be justified as in the best interests of the child. The Committee here stressed on Article 3(1) of the Convention on the Rights of the child as well as Article 18, Article 3(1) which states that the best interest of the child should be a primary consideration in all actions concerning children and Article 18 which states that the best interest of the child will be parents basic concern. The Committee further stated in the Comment that when interpreting the best interest principle, the same must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment which conflict with the child's human dignity and right to physical integrity. In its General Comment No. 9²⁴⁵ which deals with the rights of children with disabilities,

²⁴² General Comment No. 7 “The principle of best interest applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth and well- being, as well as measures to support and assist parents and others who have day to day responsibility for realizing children's rights. a) Best interests of individual children. All decision making concerning a child's care, health, education etc. must take account of best interest's principle including decisions by parents, professionals and others responsible for children. States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences; and (b) Best interests of young children as a group or constituency. All law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interest's principle. This includes actions directly affecting children (e.g. related to health services, care systems, or schools), as well as actions that indirectly impact on young children (e.g., related to the environment, housing or transport).” (General Comment No. 7 (2005), Implementing Child Rights in early Childhood.

²⁴³ E/C.12/1997/8, CESCR General Comment 8. (General Comments) adopted by the Committee at its Forty Second session Geneva 15th May -2 June 2006

²⁴⁴ Article 3 (1) of the Convention States Article 3 (1) in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, legislative bodies, the best interest of the child shall be of primary consideration.

²⁴⁵ E/C.12/1998/24, 3 December 1998, adopted at the Nineteenth Session of the Committee on Economic, Social and Cultural Rights.

the Committee provided that: “Article 3 should be the basis on which programs and policies are set and it should be duly taken into account in every service provided for children with disabilities and any other action affecting them. It further states that the best interest of the child is of particular relevance in all institutions which provide services for children with disabilities. These Institutions have to conform to all standards and regulations and should have the safety protection and care of children as their primary consideration, and this consideration should outweigh any other and under all circumstances.

In its General Comment No. 10 (2007)²⁴⁶ on Juvenile Justice, the committee in consonance with Article 3 (1) of the Convention on Rights of the Child while justifying the need for child and youth-specific justice stated that since children differ from adults both in their physical and psychological development as well as their educational needs all these form the basis for lesser culpability of children when they conflict with the law. Therefore, there is a need to have a separate juvenile justice system wherein these children in conflict with the law are treated differently. It further states that when it comes to children in conflict with law best interest would mean moving away from the traditional objectives of the criminal justice system such as repression and retribution and giving way to rehabilitation and restorative justice objectives. In its General Comment No. 11²⁴⁷ which deals with the rights of indigenous children, the committee remarked that the principle of the best interest of the child requires States to undertake active measures throughout their legislative, administrative, and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children’s rights and interests. To effectively guarantee the rights of indigenous children such measures would include training and awareness-raising amount relevant

²⁴⁶ Committee on the Rights of the child Forty Fourth Session Geneva, 15th January 2007. Citation document CRC/C/GC/10 available at <https://www.refworld.org/docid/4670fca12.html>.

²⁴⁷ General Comment No. 11 (2009): Indigenous children and their rights under the Convention (on the Rights of the Child) UN Committee on the Rights of the Child 12 February 2009 CRC/C/ GC/11, 15th session available at <https://www.refworld.org/docid/49f6bd922.html>.

professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interest of the child²⁴⁸.

3.1.13. Additional guidance regarding the best interest standard²⁴⁹

The present General Comment seeks to ensure whether the best interest principle is applied and respected by the State Parties to the Convention. The expectation of the Committee based on the said comment was to guide decisions by all those concerned with children including parents and caregivers.

In the said comment the Committee underlines that the child's best interest is a threefold concept:

- a) A substantive right b) a fundamental, interpretative legal principle, c) a rule of procedure.

The objective of the said comment was to ensure application and respect for the best interest of the child by State parties to the Convention, the main objective being to strengthen the understanding and application of the right of the children to have the best interest assessed and taken as a primary consideration or, in some cases a paramount consideration. Whereas the overall objective is to promote a real change in attitudes leading to the full respect of children as right holders. Specifically, this has implications for elaborating the implementation measures taken by the governments, individual decisions made by judicial or administrative authorities or public entities through their agents that concern one or more identified children, Decisions made by civil society entities and the private sector including profit and non profit organizations which provide services concerning or impacting on children and guidelines for actions undertaken by persons working with and for children including parents and caregivers. The General Comment provided a framework for assessing and determining the child's best interest

²⁴⁸ Literal Analysis, Function and Implementation working Report 2010

²⁴⁹ General Comment No. 14, the Committee on the Rights of the Child

although it does not attempt to prescribe what is best for the child in any given situation at any point in time.

The committee while discussing the nature and scope of obligations imposed on State parties' states that Article 3 outlines three different obligations on the State parties a) Ensure that child's best interests are appropriately integrated and applied consistently in all actions. b) Child's best interest must be taken as a primary consideration when it comes to judicial and administrative decisions as well as while making policies and legislations on children. c) an obligation that interests of the child have been assessed in decisions and actions taken by private sectors, including those providing services or any other private entity or institution making decisions concerning children and that which will have an impact on children.

3.2. Best interest of the child principle in the Indian Legal Framework

Internationally many attempts have been made to incorporate the best interest principle of the child as well as protect the rights of children. The Committee on the Rights of the Child has been very specific on how the principle of the best interest of the child should be incorporated into the domestic legislation. The Committee clearly states that the principle of the best interest of the child should be included in all relevant national legislation such as health and education and the same must be incorporated in a way that the courts can invoke it. Thus the researcher has attempted to state how the best interest of the child principle is applied in the municipal sphere, especially when India is a party to the international resolve to protect the rights of the child. The researcher has divided the national legal framework by first mentioning the relevant Articles which reflect the Best interest principle of the child from the Indian Constitution, then has dealt with the

National Policy for Children 1947²⁵⁰ and 2013²⁵¹, National Plan of Action 2016²⁵², and the National Charter for Children 2003²⁵³ further the researcher has also covered the Commission for protection of child rights Act 2005²⁵⁴. The principle of the ‘Best Interest of the child’ although not explicitly mentioned but reading of certain provisions under the criminal law as well as the Code of Civil Procedure 1908²⁵⁵ implies that the legislators had in mind the ‘best interest of the child’, thus the researcher has attempted to identify the provisions which are in the ‘Best Interest of the child’ under the Criminal law as well as the Code of Civil Procedure 1908²⁵⁶.

3.2.1. The Indian Constitution

The Indian Constitution was framed much before the International Conventions and the Constitution had already formulated provisions for the welfare of the child. Even before the Indian Constitution was adopted, The Constitution of India Bill 1895 (Home Rule Bill), Commonwealth of India Bill 1925, and the ‘Objective Resolution ‘adopted by the Constituent Assembly on 22nd January 1947 contained provisions for the protection of weaker sections. Starting from the preamble²⁵⁷ of the Indian Constitution the intention of the States to assure protection to children can be seen, either in explicit terms or implicit terms.

When it comes to the fundamental rights as stated in Part III of the Constitution the judicial interpretation of the said Part III has paved a way that assures protection of the

²⁵⁰ New Delhi, 22nd August, 1974 No. 1-14/74-CDD

²⁵¹ New Delhi, the 26th April 2013. Resolution No. 16-1/2012-CW-I.

²⁵² The National Plan of Action for Children (NPAC), 2016 was released by the Ministry of Women and Child Development on the 24th of January 2017.

²⁵³ Published in the Extraordinary Gazette of India, Part- I, Section – I, No.F6-15/98-CW, Government of India, Ministry of Human Resource Development, Department of Women and Child Development, new Delhi, the 9th February, 2004.

²⁵⁴ Act No. 4 of 2006.

²⁵⁵ Act No. 5 of 1908.

²⁵⁶ Act No. 5 of 1908.

²⁵⁷ The preamble of the Constitution clearly states that the state will secure to all its citizens social, economic and political justice, liberty of thought, expression, belief, faith and worship along with equality of status and opportunity. And when it states all citizens it comprises children.

rights of children. Article 14²⁵⁸ guarantees equality before the law and equal protection of law to all persons within the territory of India. This means that all including children are entitled to be treated equally and are to be given equal status, opportunity, and protection. Article 15²⁵⁹ of the Indian Constitution further prohibits discrimination on the grounds of religion, race, caste, sex, class, and place of birth, or any of them. Article 15(3) provides for protective discrimination in favor of children. It states “Nothing in this Article shall prevent the state from making any special provisions for women and children.” Thus in explicit terms, the said Article empowers the State to make special provisions for children whenever necessary for the well-being of children. Article 21²⁶⁰ which deals with the right to life encompasses all sections of society thus giving the child a right to live with human dignity. Article 21 A makes the State duty-bound to provide free and compulsory education to all children below the age of fourteen years. Further Article 23²⁶¹ and 24²⁶² also prohibit all forms of traffic in human beings and the beggar and other forms of forced labour as well as employment of children below the age of fourteen years in any factory, mine, or in any other hazardous employment respectively.

²⁵⁸ Article 14 of the Constitution states – The State shall not deny to any person equality before the law or equal protection of the law within the territory of India.

²⁵⁹ Article 15 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth- (1) the State parties shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to- (a) Access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing Ghats, roads and places of public entertainment; or wholly or partly out of State funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the State from making any special provisions for women and children. (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Schedules Tribes. (5) Nothing in this article or in sub- clause (g) of clause (1) of article 19 shall prevent the State from making any special provisions relate to their admission to educational institutions including private education institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

²⁶⁰ Article 21 Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

²⁶¹ Article 23 Prohibition of traffic in human beings and forced labour- (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

²⁶² Article 24 Prohibition of employment of children in factories etc. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

The said provision has been incorporated in the Indian Constitution for the safety of children.

Part IV of the Constitution which deals with the Directive Principles also clearly provides for policies that are directed towards the welfare of the child as the said Part IV is designed to 'strive to promote the welfare of the people by securing and protecting as effectively...' Article 39 (a)²⁶³, (e)²⁶⁴, and (f)²⁶⁵ specifically provide certain policies to be followed by the State for the welfare of the children. Article 39 (f) provides that children should be given opportunities and facilities to develop in a healthy manner and condition of freedom and dignity and that childhood and youth should be protected against exploitation and moral and material abandonment. Article 41²⁶⁶ further provides and asserts the responsibility of the State to make effective provisions for securing the right to education and public assistance in cases of sickness and disablement and other cases of undeserved want within the limits of its economic capacity and development. Article 45²⁶⁷ in explicit terms directs the State to endeavor to provide free and compulsory education to all children until they complete the age of 14 years within 10 years from the commencement of the Constitution. This direction thus reflects how much interest the framers of the Constitution had regarded the education of children as it's the main foundation for healthy and proper development.

²⁶³ Article 39 (a) The State shall in particular direct its policy towards securing (a) that the citizens, men and women equally, have the right to an adequate means of livelihood.

²⁶⁴ Article 39 (e) That the health and strength of workers, men and women and the tender age of children are not abused and the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

²⁶⁵ Article 39 (f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

²⁶⁶ Article 41 Right to work, to education and public assistance in certain cases- The state shall, within limits of its economic capacity and development, make effective provisions for securing that right to work, to education and public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want.

²⁶⁷ Article 45 Provision for early childhood care and education to children below the age of six years- The State shall endeavor to provide early childhood care and education for all children until they complete age of six years.

3.2.2. National Policy for Children 1947²⁶⁸

This was the first policy document concerning the needs and rights of children. The main goal of the policy was to ensure that the Constitutional Provisions for children and the UN Declaration of Rights are implemented. This policy thus aimed at the welfare of the children. The said policy was formulated on an understanding that children of the nation are supreme and an important asset, that their nurture and solitude are our responsibility. The Introduction to the National Policy for Children, 1974 states that children's programs should find a prominent place in our National Plans for the development of human resources so that children grow up to be robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society²⁶⁹. The National Policy further states that to reduce inequality and ensure social justice equal opportunities should be given to all children for their development during the period of growth.

3.2.3. The National Policy for Children 2013²⁷⁰

The Government of India adopted the said policy on 26th April 2013 to affirm its commitment to the rights-based approach in addressing the continuing and emerging challenges in the situation of children.

The Preamble to the said Policy recognizes the child as any person below the age of eighteen years and that childhood is an integral part of life with the value of its own, that children have different needs and need different responses due to multi-dimensional vulnerabilities experienced by them in different circumstances, and thus a long term sustainable, multi-sectoral integrated and inclusive approach is required to the overall and harmonious development and protection of children. The said policy also reaffirms the Preamble of the 1947 National Policy. The key priorities of the said Policy are Survival,

²⁶⁸ National Policy for Children 1947, New Delhi, the 22nd August, 1974.

²⁶⁹ Introduction to The National Policy of Children 1974.

²⁷⁰ New Delhi, the 26th April 2013 adopted by Government of India by Resolution No. 16-1/2012-CW-I

health, nutrition, development, education, protection, and participation and the Policy states that the same cannot be denied to any child.

The National Policy has 12²⁷¹ guiding principles and the seventh principle states that the best interest of the child is a primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative bodies, public, private, social, religious or cultural institutions thus affirming the principle as stated in the United Nations Convention on Rights of the Child 1989. The eighth guiding principle also states that the family environment is most conducive for the all-around development of the child and they cannot be separated from their parent's separation is permitted only if the same is necessary for the best interest of the child.

In its key priority²⁷² relating to protection over here the 'best interest of the child' is mentioned wherein the Policy states that when a child is either temporarily or permanently deprived of parental care the State has to ensure family and community-based care

²⁷¹ Guiding Principles (i) every child has universal, inalienable and indivisible human rights. (ii) the rights of children are interrelated and interdependent, and each one of them is equally important and fundamental to the well – being and dignity of the child. (iii) every child has the right to life, survival, development, education, protection and participation. (iv) right to life, survival and development goes beyond the physical existence of the child and also encompasses the right to identity and nationality. (v) mental, emotional, cognitive, social and cultural development of the child is to be addresses in totality. (vi) all children have equal rights and no child shall be discriminated against on grounds of religion, race, caste, sex, place of birth class, language and disability, social economic or nay other status. (vii) the best interest of the child is a primary concern in all decisions and actions affecting the child whether taken by legislative bodies courts of law administrative authorities, public, private, social, religious or cultural institutions. (viii) family or family environment is most conducive for the all-round development of children and they are not to be separated from their parents except where such separation is necessary in their best interest. (ix) every child has a right to a dignified life, free from exploitation. (x) safety and security of all children is integral to their well- being and children are to be protected from all forms of harm, abuse, neglect, violence, maltreatment and exploitation in all setting including care institutions, schools, hospitals, crèches, families and communities. (xi) Children are capable of forming views and must be provided a conducive environment and the opportunity to express their views in any way they are able to communicate, in matters affecting them. (xii) Children's views, especially those of girls, children from disadvantaged groups and marginalised communities, are to be heard in all matters affecting them, in particular judicial and administrative proceedings and interactions, and their views given due consideration in accordance with their age, maturity and evolving capacities.

²⁷² 4.10: To secure the rights of children temporarily or permanently deprived of parental care, the State shall endeavor to ensure family and community- based care arrangements including sponsorship, kinship, foster care and adoption, with institutionalization as a measure of last resort, with due regard to the best interests of the child and guaranteeing quality standards of care and protection.

arrangements etc. and as a measure of last resort adoption with institutionalization but the same must be keeping in mind the ‘best interest of the child’.

While discussing the point on advocacy and partnerships²⁷³ the Policy makes a mention that wide publicity has to be given to the Policy and it should be supported by focused advocacy measures to ensure that children’s best interest and rights are accorded the highest priority in different areas of policy, planning, resource allocation, governance, monitoring and evaluation, and children’s voices and views have to be heard in all matters and actions which impacts their lives.

3.2.4. The National Plan of Action for Children 2016

The Ministry of Women and Child Development, Government of India drafted the said Plan of Action to provide a roadmap that would link the 2013 National Policy objectives to actionable strategies under the four key priority areas. The main aim of the said Action Plan was to establish effective coordination and convergence among all stakeholders. Including Ministries and the Department of Government of India and civil society organizations to address key issues about the rights of children. The National Plan of Action 2016 defines the term child friendly as any behaviour, conduct, practices, process, attitude, environment, or treatment that is humane, considerate, and in the best interest of the child. In the key priority area 3, the National Plan of Action 2016 states that competent professional counselling service, guidance, and support to households and families –must focus on the security and best interest of the child in need or at risk. Further in its sub-objective 2.9.²⁷⁴ One of the strategies is to develop standards for regulating media and the internet in the best interest of the child so that the physical, cognitive, emotional, and moral development of any child is not adversely affected.

²⁷³ 5.3.: This Policy is to be given wide publicity and supported by focussed advocacy measures to ensure that children’s best interests and rights are accorded the highest priority in areas of policy, planning, resource allocation, governance, monitoring and evaluation and children’s voices and views are heard in all matters and actions which impact their lives.

²⁷⁴ 2.9. the heading of the sub- objective is to Develop and sustain age- specific initiative, services and programmes for safe spaces for play, sports, recreation, leisure, cultural and scientific activities for children in neighborhood, schools and other institutions.

3.2.5. The National Charter for Children 2003²⁷⁵

The intent of the Government when introducing the Charter was to secure for every child its inherent right to be a child and enjoy a happy and healthy childhood and at the same time to address the root causes that negate the healthy growth and development of children and awaken the conscience of the community in the wider societal context to protect children from all forms of abuse and at the same to strengthen the family, society and the Nation. The said charter affirms that the best interest of children must be protected through the combined action of the State, Civil society, communities, and families in their obligations in fulfilling children's basic needs. It also ensures that the State shall make appropriate rules concerning the implementation of services and to see that the same are drafted in a manner that is in the best interest of the child and that the regulatory bodies are set up to ensure the strict enforcement of the said rules.

3.2.6. Commission for Protection of Child Rights Act, 2005

The National Commission for Protection of Child Rights (NCPCR) was set up in March 2007 as a statutory body under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006), an Act of Parliament (December 2005). It was set up to protect, promote and defend child rights in the country. The best interest principle of the child reflects in the functions of the Commission as stated in Chapter III of the Act. It is clearly stated in the Act that one of the functions of the commission is to study treaties and other international instruments and undertake periodical review of existing policies, programmes, and other activities on child rights and make recommendations for their effective implementation in the best interest of children²⁷⁶.

²⁷⁵ This Charter was adopted on 9th February 2004 Resolution No. 6-15/98-CW, issued by Ministry of Human Resources Development.

²⁷⁶ Section 13 of the Commission for Protection of Child Rights Act, 2005.

3.2.7. Best Interest Principle of a child under the Criminal Law in India

When it comes to criminal law the best interest of the child principle may not have a direct mention but there are different provisions in the legal system that ensure that children and their rights are protected. In the Indian Penal Code 1860,²⁷⁷ the various Sections which look into the protection of children are Section 82²⁷⁸, Section 83²⁷⁹. Even a child en ventre sa mere is recognized under the penal law from Section 312 to 316 and 318²⁸⁰. Further, under Section 317²⁸¹ of the Indian Penal Code 1860, parents have a responsibility to take care of the child.

In cases of maintenance Section, 125 of the Criminal Procedure Code 1973²⁸² provides for maintenance to the minor child whether the minor child is legitimate or illegitimate and even in cases where such a legitimate or illegitimate child has attained majority and cannot maintain himself/herself because of any physical or mental abnormality or injury.

Another provision that needs a mention and can be said to be in line with the principle of the best interest of the child is Section 112 of the Indian Evidence Act, 1872²⁸³. Under the said section one can see that the law does not leave any child as a ‘bastard’. The said section states that if any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother

²⁷⁷ Act No. 45 of 1860. (6th October 1860)

²⁷⁸ Section 82 of the Indian Penal Code states that nothing is an offence done by a child under 7 years of age.

²⁷⁹ Section 83 states that where the offence is done by a child above 7 years and under 12 years, who has not attained the sufficient maturity of understanding to judge the nature and consequences of his conduct, he will not be liable for the same.

²⁸⁰ This section of IPC states that whoever voluntarily causes a woman with a child to miscarry shall be punished.

²⁸¹ The said section states that whoever being the father or mother of a child under the age of 12 years, or having the care of such child, shall expose or leave such child in any place with an intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to 7 years, or with fine, or with both.

²⁸² Act No.2 of 1974.

²⁸³ Act No. 1. Of 1872, 15th March 1872 substituted by Act No. 3 of 1951, Section 3 and Schedule, for “except Part B State”.

remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when it could have been done. Section 16 of the Hindu Marriage Act, also confers legitimacy on children who are born out of void marriages.

3.2.8. The Code of Civil Procedure 1908²⁸⁴

Under the Civil Procedure Code, certain orders deal with children to protect the rights of children. If any suit has to be instituted by the minor the same has to be instituted by his next friend²⁸⁵. Even in cases where the defendant is a minor, the court appoints a guardian who has to protect the interest of the minor and the interest of the said guardian appointed must not be adverse with the interest of the minor²⁸⁶.

It can be seen through the above exposition that the best interest of the child is underlying as well as the guiding principle in the formulation and the application of child-related laws. This concept of the best interest of the child is of course well reflected in the Goa Children's Act 2003²⁸⁷ as well as the Protection of Children from Sexual offenses Act 2012²⁸⁸ and the Juvenile Justice (Care and Protection of children) Act, 2015.²⁸⁹

3.3 Conclusion

Having thus established the predominance of the Best Interest of the child as the underlying principle the researcher would now move on to analyze certain specific legislations in the Indian context where this concept of the best interest of the child is enshrined. Since the study of the research is based on whether the best interest of the child principle is looked into by the authorities when they come in contact with a child the

²⁸⁴ *ibid*

²⁸⁵ Civil Procedure Code Order XXXII

²⁸⁶ Civil Procedure Code Order XXXII, Rule 4(1)

²⁸⁷ Act No. 18 of 2003 published in Official Gazette (Extraordinary No.5), series I, No. 15 dated 14-7-2003. This Act came into force on 8-7-2003.

²⁸⁸ Act No. 32 of 2012.

²⁸⁹ Act No. 2 of 2016. (31st December, 2015)

researcher in the next chapter would like to highlight the provisions which reflect the best interest of the child under The Goa Children's Act, 2003 and Rules, 2004²⁹⁰, the Protection of Children from Sexual Offences Act 2012²⁹¹, Juvenile Justice (Care and Protection) Act, 2015²⁹².

²⁹⁰ Goa Act 18 of 2003 (8-7-2003)

²⁹¹ Act No. 32 of 2012

²⁹² Act No. 2 of 2016

CHAPTER 4

**NATIONAL LEGISLATION AND THE
BEST INTEREST OF THE CHILD**

4.1 Introduction

The concept of the best interest of the child is enshrined in the international legal regime as well as the Constitution of India in the form of various child protection provisions. This chapter will provide an in-depth view of laws that directly affects children's best interest. While speaking about child-related laws one must understand that in essence, it is the point when the law intersects with the life of a child. It is the care and protection a child will need to meet their basic needs where the child has an assurance of protection, a safe place to live in, and services that are child friendly and in the best interest of the child. Laws about children encompass several issues. the various national child-related legislation as well as provisions of the said legislation which deal and reflect the principle of the best interest of the child as well as the procedures which are child friendly when the child comes in contact with the system forms the subject matter of the discourse

4.2. Position before The Protection of Children from Sexual Offences Act 2012²⁹³.

Before the enactment of the POCSO Act 2012 crimes related to child sexual abuse were dealt with under the Indian Penal Code 1860.²⁹⁴ The abusers were prosecuted under the Indian Penal Code 1860 under Section 375²⁹⁵, Section 376²⁹⁶ Section 354²⁹⁷, Section 377²⁹⁸, and Section 509²⁹⁹. When it came to obscenity and pornography the same was dealt with under the Young Persons (Harmful Publications) Act 1956³⁰⁰ and publication

²⁹³ Act No. 32 of 2012.hereinaftere referred to as the POCSO Act 2012.

²⁹⁴ Act No. 45 of 1860.

²⁹⁵ Definition of Rape

²⁹⁶ Punishment for Sexual Assault

²⁹⁷ Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than a year but which may extend to five years and shall be liable to fine.

²⁹⁸ Defines Unnatural offences

²⁹⁹ Section 509 Words, gesture or act intended to insult the modesty of a woman.

³⁰⁰ Act No. 93 of 1956.

and transmission of pornography through the internet was made an offence under Section 67 of the Information Technology Act, 2000³⁰¹.

The Indian Penal Code 1860 as well as the above-mentioned laws were found to be inadequate enough in protecting children and criminalizing non-conventional sexual abuses which were different from the abovementioned conventional crimes in the form of child trafficking, pornography, and sale of children. Further, there were several loopholes³⁰² in the Indian Penal Code 1860 as a result of which children were not effectively protected.

It was this inadequacy of the Indian Penal Code as well as the need for stringent legislation to effectively address and tackle heinous crimes the POCSO Act 2012 was enacted. The main intention of the Government was not only to protect children from offences like sexual assault, sexual harassment and pornography but also to facilitate adequate legal machinery in the form of Special Court for the trial of the said offence and any other matters incidentally connected with sexual abuse crime. The POCSO Act 2012 was in due compliance with the United Nations Convention on the Rights of the child 1959 which prescribes set standards to be followed by State parties in securing the best interest of the child as well as Article 15³⁰³ of the Constitution of India.

Before the POCSO Act 2012³⁰⁴, the Goa Children's Act, 2003 and Rules, 2004³⁰⁵ was the only specific legislation that dealt with child abuse.

³⁰¹ Section 67 Punishment for publishing or transmitting obscene material in electronic form.

³⁰² The loopholes in the Indian Penal Code were as follows: Section 375 the said section does not protect male victims from sexual acts of penetration other than the traditional peno-vaginal intercourse. Section 354 lacks a statutory definition of modesty it further carries a weak penalty and is compoundable offence. Further it does not protect the modesty of a male child. Further in section 377 the term unnatural offences are not defined it only applies to victims penetrated by their attacker's sex act and is not designed to criminalise sexual abuse of children

³⁰³ Article 15 (3) of the Constitution of India mandates the States to protect the children of this nation it states that nothing in this article shall prevent the State from making any special provision for women and children.

³⁰⁴ Act No. 32 of 2012.

³⁰⁵ Act. No. 18 of 2003

4.2.1 Prominent Cases Before the Protection of Children from Sexual Offences Act, 2012

Before the POCSO Act 2012, came into force some prominent cases came up before the Supreme Court and High Courts around the country which looked into the best interest of the child. Way back in the year 1956 the Orissa High Court in the case of *Ghanashyam Misra v. the State on 27th November 1956*³⁰⁶ recognised that the offence committed by a person in position and trust or authority for the child enhanced the sentence of a school teacher who raped a 10 year old girl in the school premises.³⁰⁷ Not only did the court enhance the sentence to seven years but also ordered the accused to pay compensation to the father of the child. Further in the year 1972 the Supreme Court in the case of *Guruchan Singh v. State of Haryana on 13 September, 1972*³⁰⁸ stated that the mere absence of marks of violence on the victim is immaterial because she was 16 years of age. More importantly it ruled that the victim cannot be considered as an accomplice to the act. In the case of *Gorakh Daji Ghadge v. The State of Maharashtra on 6 March, 1980*³⁰⁹ in the said case the father of a 13-year-old girl was accused of raping her the Bombay High Court prescribed stringent punishment because the victim was the daughter of the accused. The judgement reads “As crimes in which women are victims need to be severely dealt with and in extreme cases such as this where the accused, who is the father of the victim girl has thought fit to deflower his own daughter of tender years to gratify his lust, then only a deterrent sentence can meet the ends of justice.” In the case of *Harpal Singh & Anr v. State of Himachal Pradesh on 14 November, 1980*³¹⁰ while condoning the delay in filing FIR in the case of rape of a 16-year-old the Supreme Court mentioned that it is common that since the honour of the family is involved, family members took some time to decide

³⁰⁶ AIR 1957 Ori 78, 1957 CriLJ 469

³⁰⁷ The relevant part of the judgment states – “The circumstances are all of an aggravating nature. The victim is a young girl of 10 years and the culprit an adult of 39 years. He took advantage of his position by inducing her to come inside the School room and committed such an atrocious act, the consequences of which might as well be the complete ruin of the future life of the girl”.

³⁰⁸ AIR 1972 2661, 1973 SCR (1) 197

³⁰⁹ 1980 CrLJ 1380

³¹⁰ AIR 1981 Sc 361, 1981 CriLJ 1, (1981) 1 SCC 560, 1981 (13) UJ 63 SC

whether the matter needs to be taken to the court or not. It was also emphasized by the court that since the age of the girl was proved her consent in sexual activity was irrelevant. The court also ruled that delay in reporting of the case will not affect the case if a reasonable explanation can be given. In *Sheela Barse and others v. Union of Indian and others* on 13 August, 1986³¹¹ in the said the Supreme Court declared as a part of its ruling that right to speedy trial is a fundamental right implicit in Article 21 of the Indian Constitution. In the said case a Social worker Ms. Sheela Barse had taken up the case of children below age of 16 who were illegally detained in jails. Another case where the court granted stringent punishment as the victim was of tender age was *Imratlal v. State of Madhya Pradesh* on 27 January, 1986³¹² in the said case the Madhya Pradesh High Court stated that the accused can be convicted solely on the basis of the evidence of the victim if her evidence is worthy of credence. The judgment went on to state that when an offence of rape is proved on girls of tender age, the sentence of imprisonment should be severe. In 1989 the Supreme Court acknowledging the hardships faced by the victim throughout the judicial process delineated several guidelines³¹³ to be followed when dealing with cases of sexual offences in the case of *Delhi Domestic Working Women's Forum v. UOI and others* on 14 December, 1989.³¹⁴ In the case of *Bharwad Bhoginbhai V. State of Gujrat*,³¹⁵ there was no eyewitness to support evidence given by the victim. The Court held that even in such cases the accused could be convicted to secure justice for the victim. In the case of *State of Punjab v. Gurmit Singh*,³¹⁶ the Court recognized the need for sensitivity towards sexual abuse victims and opined for 'in-camera trial by

³¹¹ JT 1986 136, 1986 SCALE (2) 230

³¹² 1987 CRILJ 557

³¹³ In the said case six young domestic workers travelling on a train from Ranchi to Delhi were brutally harassed, assaulted and raped by army personnel. The guidelines laid down by the Supreme Court are: The complainants of sexual assault cases should be provided with adequate legal representation. Legal assistance will have to be provided at the police station. The police should be under a duty to inform the victim of her right to representation before any questions were asked to her. A list of advocated willing to act in these cases should be kept at the police station for the victims. The advocates shall be appointed by the court, upon application by the police at the earliest convenient moment. In all rape trials anonymity of the victim must be maintained, as far as necessary. Rape victims need to be given adequate and fair financial compensation. Compensation for victims shall be awarded by the court whether or not a conviction has taken place.

³¹⁴ 1995 SCC (1) 14, JT 1994 (7) 183

³¹⁵ AIR 1983, 753; 1983 SCC (3) 217; AIR 1983 SCR (3) 280.

³¹⁶ AIR 1996 SC 1393

stating that it would not only be keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of evidence of prosecutrix because she would not be hesitant or bashful to deposit frankly as she may be in an open court under the gaze of public this would save any further embarrassment being caused to the victim of a sex crime. In the case of *State of Andhra Pradesh v. Gangula Satya Murthy on 19 November, 1996*³¹⁷ in the said case the Supreme Court concluded that acquittal was an error³¹⁸ and displayed a lack of sensitivity. It categorically stated “the courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the witness. The justice system was forced to enter into a series of deliberations on various aspects of sexual abuse and assault and stated that there was a need to expand the meaning of the term “rape”, “penetration’ and according a higher punishment to sexual offenders who hold position of trust and authority in the case³¹⁹ of *Sudesh Jhaku v. K.C.J & Others, Delhi on 23 May, 1996*³²⁰ Further in the said case the court deliberated on precautions to be taken when a child is called to depose in court. The order makes a mention of several child friendly procedures like asking simple questions (avoiding double negative) when questioning the child and giving breaks to the child. It also highlights how the presence of a screen cannot just retain anonymity of the child and also make her/him uncomfortable when deposing. It also speaks of ‘support person or ‘neutral adults’ who can handhold and support the child during trial. In the case of *State v. Freddy Peats and others*³²¹ the Goa Bench in 2000 upheld the judgment of the Sessions Court Margao and stated “ after having personally heard the victim boys in this court and accesses the merits backing testimony which is overwhelming on record with absolute corroboration almost verbatim inter se

³¹⁷ Date of Judgement 19/11/1996

³¹⁸ In the said cases a 16-year-old girl was raped and throttled to death. The Sessions Court convicted the accused and sentenced him to imprisonment for life and rigorous imprisonment for 7 years. But on appeal, a Division Bench of the High Court of Andhra Pradesh acquitted him citing minor contradiction and discrepancies. This acquittal was challenged by the State of Andhra Pradesh.

³¹⁹ This was a sordid and shocking case of a father, a high ranking bureaucrat in the Ministry of Home Affairs, involving his six-year-old daughter in a series of sexualized games and orgies with himself and other adults.

³²⁰ 1998 CriLJ 2428, 62 (1996), DLT 563, 1996 (38) DRJ 22

³²¹ Criminal Appeal No. 44/2002 Bombay High Court (Aug 14,2003)

and almost illustrated in each one of those photographs coupled with various admissions and the scheming silence of accused No. 1, I am of the unshakable belief that the accused no. 1 deserved no leniency at all of any nature whatsoever. Quantum of sentence shall definitely be proportionate to the gravity of the crime.” In the *State of Karnataka v. Manjanna on 4 May, 2000*³²² in the said case the Hosadgura Hospital refused to medically examine a girl victim of 15 years of age as she had not been referred by the police. In the passing of the judgment, the Court put on record their disapproval of such conduct by Government Hospitals particularly in rural areas where hospital is few and far between citing the loss of evidence on account of the delay in conducting medical examination. The judgment also stated that the age assessment of the victim, when in doubt should be considered in favour of the victim. Further, in the case of *Sakshi v/s Union of India*,³²³ the Supreme Court although rejecting the plea raised in the PIL issued valuable guidelines in cases of the trial of rape and abuse that involves children. The same is termed *Sakshi* guidelines³²⁴. In the case of the *Court on its motion v. the State of Delhi*,³²⁵ the Delhi High Court laid down guidelines to ensure that the criminal justice system is sensitive towards victims of child sexual abuse. The guidelines laid stress on the responsibilities of the

³²² Criminal Appeal 1911 of 1996 judgment passed on 04/05/2000

³²³ AIR 2004 SC 3566

³²⁴ The guidelines laid down in the said case were as follows: special arrangements such as screen must be made to ensure that the victim or witness do not see the body or face of the accused, the question for cross examination must be framed and given to the Presiding Officer of the Court who must then put them to the victim or witness in a language that is clear and not embarrassing. Adequate breaks must be given to the victims of child abuse or rape while they give their testimony in court.

³²⁵ Decided by the Delhi High Court on 14th August 2007.

Police³²⁶, how medical examination should be conducted³²⁷, recording of the statement by the magistrate³²⁸ and the procedure to be followed by the trial court³²⁹. Further, the

³²⁶ The guidelines laid down for Police were as under:

1. On a complaint of a cognizable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately.
2. The investigation of the case shall be referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.
3. The statement of the victim shall be recorded verbatim.
4. The officer recording the statement of the child victim should not be in police uniform.
5. The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear.
6. The statement should be recorded promptly without any loss of time.
7. The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.
8. The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.
9. The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.
10. The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.
11. In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.
12. The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty-four hours (in accordance with Section 164A Cr.P.C) at the nearest government hospital or hospital recognized by the government.
13. The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.
14. The Investigating Officer shall promptly refer for forensic examination clothing's and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.
15. The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.
16. The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.

³²⁷ 1. In case of a girl child victim the medical examination shall be conducted preferably by a female doctor.

2. In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.
3. The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.
4. In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.
5. The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.
6. Emergency medical treatment wherever necessary should be provided to the child victim.
7. The child victim shall be afforded prophylactic medical treatment against STDs.
8. In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.

Supreme Court³³⁰ has also requested and urged the Chief Justice of each High Court to seriously consider the establishment of child-friendly courts and vulnerable witness courts in each district. The Supreme Court has also discussed in length the role of the Police Officer as they are the first person a child victim or child perpetrator comes in contact with.³³¹

³²⁸ With regards to recording of statements

1. The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.
2. In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital.
3. To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.
4. The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.
5. Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.
6. No Court shall detain a child in an institution meant for adults.

³²⁹ With regards to proceedings before the trial court

1. shall be endeavor of the Court to create a child friendly atmosphere while conducting its proceedings in respect of a sexually abused child.
2. Proceedings shall be conducted in camera and appropriate measures taken to ensure that the child victim is not confronted with the accused and the directions in this regard given by the Supreme Court in 'Sakshi v. Union of India' are enforced.
3. Wherever possible the Court may resort to the recording of statement through video conferencing.
4. The Court may, if it so thinks fit, direct that the questions to be put by the accused in cross-examination to the child victim be given in writing to the Presiding Officer of the Court, who may in turn put the same to the victim in a language which is neither embarrassing nor confusing.
5. The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the charge sheet.
6. The concerned authorities are directed to inform themselves of the guidelines laid down by the Supreme Court in '*Delhi Domestic Working Women's Forum v. Union of India and Ors.*' '*State of Punjab v. Gurmit Singh and Ors.*' as also '*Sakshi v. Union of India and Ors.*'

³³⁰ The same was decided on 9th February 2018 in the case of *Sampurna Behura versus Union of India and others*. WPC No. 473 of 2005.

³³¹ *Sampurna Behura v. Union of India*. (2018) 2 Scale 209 "it is important for the police to appreciate their role as the first responder on issues pertaining to offences allegedly committed by children as well as offences committed against children. There is therefore a need to set up meaningful Special Juvenile Police Units and appoint Child Welfare Police Officers in terms of the JJ Act at the earliest and not only on paper. In this context, it is necessary to clearly identify the duties and responsibilities of such Units and Officers and wherever necessary, guidance from the available expertise, wither the National Police Academy or the Bureau of Police Research and Development of NGOs must be taken for the benefit of children."

4.2.2. The Protection of Children from Sexual Offences Act, (POCSO) 2012³³²

The Protection of Children from Sexual Offences Bill 2011, was introduced in the Rajya Sabha on 23rd March 2011, the said Bill proposed to protect children from offences of sexual assault, sexual harassment and pornography and to provide for the establishment of a Special Court for trial of such offences and any other matters incidental thereto. The main reasons for the said Bill were Article 15³³³ and Article 39³³⁴ of the Constitution, The ratification of the UN Convention on the Rights of the child 1989³³⁵ which was ratified on 11th December 1992, as well as the data collected by the National Crime Records Bureau.³³⁶ There was a need to enact self-contained comprehensive legislation to protect children from offences of sexual assault, sexual harassment, and pornography as well as to safeguard the interest and well-being of the child at every stage of the judicial process, by incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provisions for the establishment of Special Courts for speedy trial of such offences. The main objective of the Bill was to contribute towards the enforcement of the rights of all children to safety, security, and protection from sexual abuse and exploitation.

³³² *ibid*

³³³ Article 15 of the Indian Constitution confers upon the State powers to make special provisions for children.

³³⁴ Article 39 provides that the State shall in particular direct its policy towards securing that the tender age of children is not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and integrity.

³³⁵ The United Nations Convention on the Rights of the Child requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent a) the inducement or coercion of child to engage in any unlawful sexual activity; b) the exploitative use of child in prostitution or other unlawful sexual practices; c) the exploitative use of children in pornographic performances and materials.

³³⁶ As per the Data collected by the National Crime Records Bureau it shows that there has been increase in cases of sexual offences against children. The same is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development. Further if one observes a large number of sexual offences against children were not adequately addressed by the extant laws. There was a need to protect the interest of the child, both as a victim as well as a witness. A need was felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

Various issues were brought to the attention of the Committee some of which were the percentage of cases against children below the age of 14 years and below the age of 10 years, the conviction rate of rape cases, the committee was also apprised about the study on child abuse which was conducted by the Ministry in 2007 which covered 13 states. The committee after taking note of the major existing laws³³⁷ that addressed sexual offences against children felt that these laws did not recognize many offences against children and further it was found that no effective laws were dealing with sexual abuse of male children. Thus taking into consideration the increase in cases of sexual offences against children, low conviction rates the Committee felt the need to have special legislation as children were more vulnerable and the scope for their exploitation was much more because of their tender age and innocence.

Thus the Standing Committee on Human Resource Development recommended that there was a need for an exclusive law that would protect children from all forms of sexual offences, a law that would ensure that all institutional arrangements should be fully functional. The committee further stated that there was a need to provide an effective mechanism for handling child-related sexual offences as well as an urgent need to initiate some preventive measures to ensure that chances of sexual exploitation of children are minimized.

The Protection of Children from Sexual Offences Act 2012 was a special law that was enacted to address the growing issue of child sexual abuse, till then there was little or one could say no specific legal provisions to prosecute those who committed sexual offences against children. The Protection of Children from Sexual Offences Act 2012 provides a strong legal framework in protecting the child from various sexual offences as well as safeguarding the interest of the child at every stage of the judicial process as it introduces child-friendly mechanisms for not only reporting but also recording, investigating as well as the speedy trial of offences through designated special Courts. it is comprehensive legislation that protects children from various kinds of sexual offences and an Act that

³³⁷ The major existing laws were Indian Penal Code 1860, Criminal Procedure Code 1908 and Indian Evidence Act 1872.

safeguards the interest and well-being of the child when the child comes in contact with the judicial system. The said Act, was enacted to give effect to India's obligations under the UN Convention on the Rights of the Child 1959 and was designed taking into account the vulnerability of children with regards to their specific developmental needs and to ensure that their best interest is protected.³³⁸

4.2.2.1. Establishment and Structural requirements of Special Court

The Protection of Children from Sexual Offences Act 2012 provides for the designation of a Session Court as a Special Court to try offences under the Act. The main purpose of designating a Court as a special Court was to facilitate the speedy trial of cases under the Act. In cases where a Sessions Court has been designated as a Children's Court under the Commission for Protection of Child Rights Act 2005³³⁹ or if any Special Court has been designated for similar purposes under any other law the same can be regarded as a Special Court under the POCSO Act

The designation of Session Court as a Special Court in the POCSO Act 2012 is mentioned under Section 28 (1)³⁴⁰. The main purpose of having a court designated as a special Court was the fact that children need special care and attention because of their distinct status cause when a child is a victim of any form of sexual offence it leaves an irreparable scar on the child not only physical but also on the mental state of the child. Secondly, there was a need to facilitate the speedy trial of cases under the Act.

Further Section 32 (1)³⁴¹ provides for the appointment of Special Public Prosecutors to conduct cases under the provisions of the POCSO Act 2012. Wherein the Special Public

³³⁸ The POCSO ACT was passed in order to secure the best interest of the child as the Government of India had acceded to the Convention on the Rights of the Child on 11th December 1992 as well there was a need that law operates in a manner that the best interest and well-being of the child are given paramount importance at every stage of judicial process to ensure the healthy, physical, emotional, intellectual and social development of the child.

³³⁹ Act No. 4 of 2006.

³⁴⁰ Section 28 (1) provides that the State Government should in consultation with the Chief Justice of the High Court, designate a Sessions Court as a Special Court and the important function of the said court would include facilitation speedy trial of cases under the Act.

³⁴¹ Section 32(1) The State Government shall by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act. (2) A

Prosecutor should exclusively handle cases under the Act.³⁴² The main purpose to have such Special Public Prosecutors was to have trained persons who would assist in achieving the object of the Act of a child-friendly justice system and speedy trial of cases under the Act.

Section 32 (2) prohibits direct questions being put to the child by the Special Public Prosecutor as well as the defence lawyer. All questions have to be routed through the judge of the Special Court.

Section 33 (4) of the Act provides that a child-friendly atmosphere must be created in the courtroom by allowing family members, a guardian, a friend, or a relative in whom the child places trust or confidence to remain present in the court. When it comes to the state of Goa an important aspect is that Goa has a Children's Court that has been established under the Goa Children's Act 2003 and the same Court is treated as a Special Court under the POCSO Act 2012.

When it comes to recording testimony the POCSO Act 2012 under Section 36 (1) requires the Court to ensure that the child is not exposed to the accused at any point of time when recording evidence, and thus to avoid such a situation the Act provides to record evidence using video conferencing, single visibility mirrors, curtains or any other device. The purpose of the said provision is to keep in mind the best interest of the child victim as exposure to the accused might hamper the process of trial of the case under the Act. A timeline is given for recording of evidence which is 30 days from the date of taking cognizance and trial in all cases must be completed within a year from the date to taking cognizance³⁴³. All trials have to be conducted in camera and the same must be in the presence of parents of the child or guardian if any. The assistance of an interpreter or an

person shall be eligible to be appointed as a Special Public Prosecutor under Sub- section (1) only if he had been in practice for not less than seven years as an advocate. (3) Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Pub Prosecutor within the meaning of clause (u) of Section 2 of the Code of Criminal Procedure, 1973 (2 of 1974) and provision of that Code shall have effect accordingly.

³⁴² The researcher in the chapter V will research on the aspect whether the Special Public Prosecutors are trained in the area of dealing with children as well as whether they exclusively handle cases under the Act.

³⁴³ Section 35 of Protection of Children from Sexual Offences Act 2012.

expert can also be taken by the Special Court when it comes to recording of evidence of the child.

4.2.2.2 Child-Friendly Procedures under the Protection of Children from Sexual Offences Act

The main object of the POCSO Act 2012 is to conduct all proceedings concerning a child survivor in a child-friendly manner and no case this should lead to secondary victimization of the child.

When it comes to questioning the child the Act prohibits questions being asked by the Special Public Prosecutor as well as the defence lawyer and all questions both during examination in chief as well as cross-examination have to be routed through the Special Court Judge³⁴⁴. The Act also prohibits aggressive questioning as well as character assassination of the child and provides that the dignity of the child is maintained throughout the trial.³⁴⁵

The Special Court has to create a child-friendly atmosphere by allowing family members, guardians, friends, or relatives in whom the child has trust or confidence to be present in the Court.³⁴⁶ Further, the Special Courts have to ensure that children are not repeatedly called to testify in the Court and also to provide frequent breaks during the trial if necessary³⁴⁷. The POCSO Act 2012 further requires the Special Court to protect the identity of the child during investigation and trial³⁴⁸. However, the Special Court can permit disclosure of the identity³⁴⁹ of the victim after recording reasons for the same and such disclosure should be in the best interest of the child. Concerning protecting the

³⁴⁴ Section 33 of the POCSO Act 2012.

³⁴⁵ Section 33 (6)

³⁴⁶ Section 33(4)

³⁴⁷ Section 33 (3)

³⁴⁸ Section 23 (2) Procedure for media; Section 24 (5) Recording of statement; section 33 (7) Procedure and Powers of Special Court. Under Section 33 The explanation to sub section (7) states for the purpose of this sub section, the identity of the Child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

³⁴⁹ The term identity is explained under Section 33 (7) as identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

identity of the child from media³⁵⁰ the POCSO Act 2012 prohibits the media from disclosing the identity of the child as well as all further details of a particular child. The Act further punishes breach of the said provision with imprisonment for a minimum term of six months which may extend to one year or fine or both³⁵¹.

The trial under the POCSO Act 2012 is to be held in camera and the duration of the in-camera proceeding is not confined only at the stage of evidence but the entire proceeding³⁵². When it comes to identifying the accused person by the child the POCSO Act 2012 does not lay down any procedure however the procedure and manner followed by the Special Court with regards to any procedure is child friendly and in the best interest of the child³⁵³. While scheduling the recording of testimony of the child by the Special court the court has to take into consideration the age and development stage of the child. The Special Court also has the discretion to examine the child at a place other than the court and to do the same the court has the powers to issue commission under Section 284 of the Criminal Procedure Code³⁵⁴. One of the most important provisions which reflect the object of the act in providing a child-friendly justice system to the child victim is in cases where the Special Court feels that the child is very young the court can seek the

³⁵⁰ Section 23 (2) of the POCSO ACT states that no reports in any media shall disclose identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure, if in its opinion such disclosure is in the interest of the child.

³⁵¹ Section 23 (4) of the POCSO Act states that any person who contravenes the provision of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

³⁵² Section 37 of the POCSO Act states that the Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence. Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provision of section 284 of the Code of Criminal Procedure, 1973.

³⁵³ In its 198th Report the Law Commission of India under the title 'Witness identity protection and witness protection programmes' formulated two recommendations when it came to identifying of accused person by the child survivor 1) two way closed circuit television or video link and two-day audio link. The same was to be followed whether the accused was known to the victim.

³⁵⁴ In cases where the child victim is not comfortable in court room the evidence of the child can be recorded in any other room within the court complex. In case the child has shifted to a different city he or she cannot be compelled to travel all the way in order to appear before the court however the special court has the powers to appoint a commission in whose jurisdiction the child resides for the purpose of recording his or her statement.

assistance of an expert³⁵⁵ either in child development or child psychology to frame the questions appropriately.

Though the victim has the assistance of a Special Public Prosecutor the Act does not prevent the child or his or her family to take the assistance of a lawyer of their choice. And in cases where they are unable to hire the services of a lawyer they can seek the help of a legal aid service. The Private lawyer can assist the Public prosecutor as well as make additional submissions on behalf of the child³⁵⁶.

If the judge believes that the child survivor needs counselling as well as mental health the same must be provided and the judge must look into the matter of whether services of counselling, as well as mental health support, is provided to the child³⁵⁷. When granting bail to the accused person, where the accused person is known to the victim or the family of the victim or resides in the same vicinity and the victim or the family of the victim will likely be threatened by his presence or in any way accused will influence the victim or family of the victim the judge has to include a no-contact clause while granting bail to the accused person. At the same safety of the victim as well as the family must be assured and they must be encouraged to immediately report any intimidation as well as threats made by the accused to the Special Court through the Special Public Prosecutor. The judges of Special Courts should also create a conducive and non-adversarial environment in their courtroom so the child can testify and to ensure that the child does not turn hostile. The judge should also ensure the completion of recording of evidence within 30 days

³⁵⁵ Rule 2 (1)(c) of the POCSO Act defines an expert to mean a person trained in mental health, medicine, child development or other related discipline, who may be required to facilitate communication with the child whose ability to communicate has been affected by trauma, disability or any other vulnerability. For which the Special Court has to maintain a list of experts whose assistance can be called for. And appointment of any expert should not involve any conflict of interest.

³⁵⁶ Section 40 of the POCSO Act.

³⁵⁷ The above said duty on part of the judge arises as section 19 (6) of the POCSO Act clearly states that the moment a case is received by the Police or the SJPU they are duty bound to report the case to CWC. Rule 4 of the POCSO Act further requires the CWC to take steps to ensure care and protection of the child. Further it provides that in cases where CWC is not functional, the judge can direct the District Child Protection Unit to facilitate the services of counselling and mental support. Interim compensation can also be ordered by the judge in cases where the family has to avail services of private entities.

however keeping in mind the best interest of the child³⁵⁸. In the same manner, steps should be taken to ensure that the charge sheet is filed within the period prescribed and avoid delays in filing the same.

It should be noticed that the Act also lays down procedures that have to be followed by the Special Court during the trial of cases under the Act. The Special Court is empowered to directly take cognizance of an offence either based on a complaint or upon the report of the Police and the same can be done without the accused being committed to the court for trial.³⁵⁹ Instead of initiating committal proceedings before the Magistrate, the Act states that the Police can directly bring the matter before the Special Court the intention is to facilitate the speedy trial of sexual offences against children. As the procedure of committal proceedings adds to the delay at the very first stage of recording of evidence of the child³⁶⁰. The coming into existence of the POCSO Act 2012 has indeed greatly enhanced the concept of the Best Interest of the child though however much needs to be done. The POCSO Act 2012 is an initiation in the correct direction towards the protection of children's rights.

4.2.2.3 Some important judgments decided before and after the enactment of The Protection of Children from Sexual Offences Act, 2012.

After the passing of the Protection of Children from Sexual Offences Act, 2012 there have been several judgments passed by various High Courts as well as the Supreme Court which silently enforce the best interest principle of the child and give paramount importance to the welfare of the victim child.

³⁵⁸ Section 35 POCSO Act 2012 Period for recording evidence of child and disposal of case (1) the evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. (2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

³⁵⁹ Section 33 (1)

³⁶⁰ Section 33 (1) A Special Court may take cognizance of any offence, without accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

The researcher would like to cite a few of judgments from the many judgments she read

4.2.2.3.1 Mandatory Reporting of Offences

The Supreme Court in the case of *Shankar Kisanrao Khade v. State of Maharashtra*³⁶¹ in the said case the Court held that it must be the duty of every citizen in the country to report a crime that has taken place in front of them. The Court further noted that non-reporting is most prevalent within the family, where family members do not report cases in order to protect children from social stigma, which causes even more psychological and emotional harm to the child. Several directions were also issued by the Court to stakeholders. Further in the case of *Dr. Sr. Tessy Joe v. State of Kerala*³⁶² the Supreme Court while interpreting the term ‘knowledge’ held that Section 19 (1) of the POCSO Act puts a legal obligation on a person to inform the relevant authorities if he/she has knowledge that an offence under POCSO has been committed. The court noted “the expression used under the section is knowledge, which meant that information was received by such person of the offence being committed, but does not extend to an obligation to conduct an investigation in order to gather knowledge”.

4.2.2.3.2 Meida

Section 23 of Protection of Children from Sexual Offences Act, 2012 deals with Procedure for media it states (1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child: Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the

³⁶¹ SCC (2013) 5 546,

³⁶² SCC (2019) CrI.164

interest of the child.(3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both. The Supreme Court in the case of *Nipun Saxena v. Union of India*³⁶³ released a set of guidelines in relation to the said provision. The guidelines state

1) No one may broadcast the victim's name in print, electronic, or social media, or even in a distant way to divulge any details that might lead to the victim's identification and should make her identity known to the general public.

2) in cases where the victim is deceased or mentally ill, the victim's name or identity should not be revealed even with the consent of the next of kin, unless circumstances justifying the disclosure of her identity exist, which may be decided by the competent authority which in the present cases is the Sessions Judge.

3) Firs for offences under Section 376, 376 A, 376B, 376 C, 376 D, 376 DA, 376 DB, or 376 E of the IPC as well as violations under POCSO, are not to be made public.

4) if the victim files an appeal under Section 372 Cr.PC the victim is not required to reveal his or identity and the appeal will be handled according to the law.

5) all papers in which the victim's identity is exposed should be kept sealed in a cover as much as possible and these documents should be replaced with similar documents in which the victim's name is deleted from all records that may be scrutinised in the public domain.

6) all authorities to whom the victim's name is provided by the investigating agency or the courts are likewise obligated to keep the victim's name and identity secret and not to divulge it in any way except in the report, which should be delivered to the investigating agency or the court in a sealed envelope.

7) An application by the next kin to authorise the disclosure of the identity of a dead victim or of a victim of unsound mind under Section 228 A (2) (c) IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228 A(1)(c) and lays down criteria as per our directions for identifying such social welfare institutions or organisations.

8) in the case of juvenile victims under the POCSO Act, 2012 the Special Court can only their identity to be revealed if it is in the child's best interest.

9) All the States and the Union Territories are requested to set up at least 'One- Stop Centre' in every district within one year for the date of the judgement of the present case.

4.2.2.3.3 Role of Special Juvenile Police Unit/Local Police

Police is said to be the first stakeholder who comes in contact with the victim child the moment an offence is committed. Thus while explaining the role of Police during the pre-trial stage the POCSO Act along with the Juvenile Justice (Care and Protection of Children) Act, 2015 have various provisions as to what steps need to be taken when they receive information relating to an offence committed. The Researcher would like to state some cases with regards to this aspect. In the case of *NCT of Delhi v. Laxmi Kant Tiwari*³⁶⁴ The Delhi High Court held that, " statement of the victim was not recorded in the police station but an isolated road at the place where the incident had occurred. At the cost of repetition, the purpose of engrafting the POCSO was to protect children from sexual assault and sexual harassment and as far as may be to facilitate investigations of such offences so that the victim is more comfortable in getting her/his version recorded. Section 24 and 25 of the said Act provide that as far as practicable the police officer should not be in a police uniform at the time when he records the statement of the victim. However, it does not mean that if the statement of the victim is recorded by the police officer when he was in uniform that the statement would be a ground for rejection from

³⁶⁴ CRL.P.469/2014 dated 19th August 2015

the otherwise cogent and coherent testimony of the victim. The Sessions Judge holding this as a ground to grant an acquittal to the respondent has committed a grave illegality (para 14)

4.2.2.3.4 Medical treatment and Examination

The POCSO Act under Section 27 provides steps to conduct medical examination of the child. with regards to this The Delhi High Court issued guidelines³⁶⁵ to be followed while conducting the medical examination of the child in the case of *Virender v. The State of Delhi*³⁶⁶. While issuing the said guidelines the court relied on cases³⁶⁷ prior to the passing of the POCSO Act, 2012.

In the case of *Dilip vs. State of Madhya Pradesh*³⁶⁸ In this case the Hon Supreme Court observed that: “It is an obligation on the part of the State authorities and particularly, the Director General of Police and Home Ministry of the State to issue proper guidelines and instructions to the other authorities as how to deal with such cases and what kind of treatment is to be given to the prosecutrix, as a victim of sexual assault requires a totally different kind of treatment not only from the society but also from the State authorities. Certain care has to be taken by the Doctor who medically examines the victim of rape. The victim of rape should generally be examined by a female doctor. Simultaneously, she should be provided the help of some psychiatrist. The medical report should be prepared expeditiously and the Doctor should examine the victim of rape thoroughly and give

³⁶⁵ The guidelines given in the case were: orientation to be given to Doctors, who prepare MLC’s or conduct post mortem to ensure that the MLC’s as well as the post mortem reports are up to the mark and stand judicial scrutiny in Courts. While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination. In case of a girl child victim the medical examination shall be conducted preferably by a female doctor. In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself. The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report to be provided to the parents/guardian of the child victim. In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report. The parents/guardian/person in whom child have trust should be allowed to be present during medical examination. Emergency medical treatment wherever necessary should be provided to the child victim. The child victim shall be afforded prophylactic medical treatment against STDs. In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.

³⁶⁶ CrI. A. No. 121/2008 dated 18th September 2009

³⁶⁷ *Sakshi Case and State of Punjab v. Gurmit Singh* 1996 Cr.L.J 1728 SC

³⁶⁸ (2013) 14 SCC 331

his/her opinion with all possible angles. The investigating officer must ensure that the victim of rape should be handled carefully by lady police official/officer, depending upon the availability of such official/officer.” The Court ruled that the State should issue guidelines for examination of cases of sexual violence including guidelines for medical examination, which should include physical and psychological treatment. It also emphasized the need for preparing the examination report without delay. Thus, health care providers have an important role to play in responding to survivors of violence, especially sexual violence. They are required to provide medical treatment and psychological support. This covers all medical care including immediate treatment of injuries, testing and treating for STIs, preventing HIV, preventing pregnancy, providing wound care, preventing tetanus and hepatitis and providing requisite emotional and psychological support. Another critical role of the health staff is to collect and maintain chain of evidence, as this can help the survivor get justice. Evidence should be collected without any delay in a scientific manner. Further, all evidence collected must be carefully stored and protected till it is handed over to the police for analysis by the hospital lab and forensic science lab.

In the case of *Lilu @Rajesh and Anr.v. State of Haryana*³⁶⁹ The court here referred to the International Covenant on Economic, Social and Cultural Rights 1996 and United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, which requires that medical procedures should not be carried out in a manner that constitutes cruel, in human or degrading treatment to the victim and which have the effect of causing unlawful interference with victims privacy, and held in the most authoritative and categorical words “ Undoubtedly the two finger test and its interpretation violates the right of the rape survivors to privacy, physical and mental integrity and dignity. The Court further stated in the said case that even if the report is affirmative it cannot ipso facto give rise to presumption of consent.” Thus in the said case the court in most unequivocal words condemned the practice of two finger test on the ground that it is not only inhuman and degrading but also violates the victims right of privacy, integrity and dignity.

³⁶⁹ MANU/SC/0369/2013

In the case of *State of Karnataka v. Manjanna*³⁷⁰ the Supreme Court observed “ Before parting with the case, we wish to put on record our disapproval of the refusal of some Government hospital doctors, particularly in rural areas, where hospitals are few and far between, to conduct any medical examination of a rape victim unless the case of rape is referred to them by the police. Such refusal to conduct the medical examination necessarily results in a delay in the ultimate examination of the victim, by which time the evidence of the rape may have been washed away by the complainant herself or be otherwise lost. It is expected that the State/appellant will ensure that such situations does not recur in future.”

4.2.2.3.5 Recording of Statements by Magistrate

The POCSO Act, 2012 prescribes safeguards to be followed while recording the statement of the child by the Magistrate under Section 164, Cr. Pc. The POCSO Act, 2012 under Section 26, further provides for additional safeguards. In the case of *Delhi Commission of Women v. Delhi Police*³⁷¹ the Supreme Court issued guidelines³⁷² to enable authorities to effectively tackle sexual offences. Further in the case of *Patan Jamal Vali v. The State of Andhra Pradesh*³⁷³ the Supreme Court deliberated on the interaction of disabled survivors of sexual violence within the criminal justice system and the judiciary. In para 41 of the judgment the Court stated “In the wake of the Nirbhaya rape incident that shocked the conscience of the nation, Indian Criminal law underwent a series of changes. The Justice J.S. Verma Committee, set up to suggest amendment to

³⁷⁰ (2000) 6 SC 188

³⁷¹ 2009 SCC Online Del 1057

³⁷² The Magistrate unless there are compelling reasons shall record the statement of the victim under Section 164 of Cr.P.C. on the day on which the application is moved by the Investigating Officer. The Magistrate before proceeding to record the statement shall ensure that the child is made comfortable and she is free from extraneous pressure.as far as possible chief examination and cross examination of the victim must be conducted on the same day. The additional sessions Judge/District Judge shall maintain a panel of psychiatrists, Psychologists and experts in sign language, etc. who would assist in recording the statement of witnesses as and when requested by the Sessions Court.

³⁷³ Cr.A. No. 452 of 2021 arising out of SLP (CrI) No. 1795 of 2021

the law, attached special emphasis to creating an enabling environment to enable women with disabilities to report cases of sexual violence and to obtain suitable redress³⁷⁴.

4.2.2.3.6 Filing of Charge sheet

On completion of investigation the Police officer has to file a complete charge sheet. This is then forwarded to the magistrate to take cognizance of the same. The IO has to file all the relevant documents pertaining to the offence as part of the charge sheet. With this regards the Supreme Court in the case of *State of Karnataka v. Shivanna*³⁷⁵ exercised its powers under Article 142 of the Constitution and issued interim directions in the form of mandamus to all police stations in the country to expedite the procedure under Section 164 Cr.P.C. in rape cases. The following directions were issued.

- 1) Upon receipt of information to the commission of offence of rape, the Investigating Officer shall take immediate steps to take the victim to any metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 CrPC. A copy of the statement under Section 164 CrpC should be handed over to the investigating Officer immediately with a specific direction that the contents of such statement under Section 164 should not be disclosed to any person till charge sheet/report under Section 173 CrPc is filed.

³⁷⁴ In the said case the court stated a special procedure for protecting persons with disabilities from rape and requisite procedures for access to justice for such persons is also an urgent need. Amendments of the Code of Criminal Procedure which are necessary have been suggested. The Committees suggestions translated into changes in the Penal Code 1860 and the Criminal Procedure Code some key changes were as follows : when the victim of the offences specified in the provision is either permanently or temporarily mentally or physically disable the FIR shall be recorded by the Police officer at the residence of the person seeking to report such offence or at a convenient place of such person's choice in the presence of a special educator or an interpreter as the case may be. Such information may also be video- graphed. The same accommodations as outlined above, have also been made as regards the recording of confessions and statements. Further as regards those who are physically and mentally disabled such a statement shall be considered a statement in lieu of examination in chief obviating the need for it to be recorded at the time of trial. The amendments also sought to put in place a framework to enable victims with disabilities to participate in a test identification parade. In such cases, a judicial magistrate will oversee the procedure to ensure the witness is supported in identifying the accused with a means they find comfortable. This process must be video graphed.

³⁷⁵ (2014) 8 SCC 913

- 2) The Investigating officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably lady Judicial Magistrate.
- 3) The Investigating officer shall record specifically the date and time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.
- 4) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the investigating officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.
- 5) Medical examination of the victim: Section 164 of Cr. PC, inserted by Act 25 of 2005 imposes an obligation on the part of the investigating officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who record the statement of the victim under the said section.

The Delhi High Court in the case of *Smt. Lavanya Anirudh v. State of NCT of Delhi*³⁷⁶ stated that “ Section 39 of POCSO Act provides that the State government shall prepare guidelines for use of non- governmental organisations, professionals and experts or other persons having a special knowledge to be associated at the pre-trial and trial stage to assist the child.” The case also mentions that “Article 39 of the Constitution of India casts an obligation upon the State to provide free legal aid. Section 40 of the POCSO, which is in harmony with Article 39A of the Constitution of India recognizes the right of the child to take legal assistance of legal practitioner. Thus, it casts an obligation on Courts to ensure that the child is provided legal aid. POCSO Rule, 2012 also provides that the concerned authority shall inform the child and his parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with section 40 of the POCSO Act.”

³⁷⁶ CRL.M.C.301/2017

4.2.2.3.7 Role of Special Public Prosecutor

The Special Public Prosecutor has a very crucial role to play in representing the best interest of the child before the Court. The Public Prosecutor must conduct himself or herself with utmost care and sensitivity and avoid further trauma or secondary victimisation to the child. The Act itself is very clear that the Special Public Prosecutor shall deal only with cases pertaining to the POCSO Act. The same was held in the case of *In Re: Alarming rise in number of reported Child Rape Incidents*³⁷⁷. In the said case the Supreme Court stated “The language of the Act leaves no manner of doubt that the Special Public Prosecutor under the Act should deal with other cases. Para 8 of the judgment states that there is a salutary reason for appointing Public Prosecutors exclusively for POCSO cases. Public Prosecutors must be trained to deal with child victims and child witnesses. They need to understand the psychology of children. They need to empathise with children. They need to know how to bring out the truth from children who are victims of sexual abuse and have to undergo the trauma again while recounting the traumatic experience. Further in para 9 the court states the job assigned to the Public Prosecutor for POCSO cases is very onerous one which must be carried out with great care and sensitivity. Therefore, not only is there a need to have exclusive Public Prosecutors but there is also a need to develop a training programme where these Special Public Prosecutors should be trained to deal with issues that will arise in their courts. These issues may not be confined to legal issues which otherwise Public Prosecutors may be trained to deal with. The issues may be psychological, health and other related issues.”

Further the Delhi High Court in the case of *Sudesh Jhaku v. KCJ and others*³⁷⁸ observed that the prosecutors need to be cautious of undervaluing a child’s feelings. In the said case the court made a reference to the Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada Reaching for Solutions, 1991. Where most of the guidelines delineated in the said case were drawn from the said report. In para 38 of the judgment the Court stated that the trial Judge should handle the

³⁷⁷ SCC (2020) (7) 130

³⁷⁸ (1996) 39 DLT 563

proceedings with considerable sensitivity and ensure that the trial is fairly conducted. It further states that care should be taken that the questions asked to the child should not be complex or confusing. Questions containing a negative or double negative should be avoided. The feasibility of giving breaks need not be long. If the prosecution establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined favourably to provide such a screen.

4.2.2.3.8 Speedy Trial of cases

In the case of *Alakh Alok Srivastava v. Union of India and others*³⁷⁹ The Supreme Court laid down guidelines to be followed by the Special Courts while trying a case under the POCSO Act, 2012 so as to complete trial of the case within a period of one year from the date of taking cognizance of the offence³⁸⁰ as aforementioned in the Act. The guidelines provided by the Supreme Court are enumerated below:

1. The High Courts are responsible for ensuring that cases filed under the POCSO Act are heard and decided by Special Courts and that the presiding officials of such courts are trained in child protection and psychology reaction.
2. If not previously done, the Special Courts should be constituted and given the role of dealing with matters brought under the POCSO Act.
3. The Special Courts should be given instructions to expedite cases by not granting superfluous adjournments and following the procedure outlined in the POCSO Act, allowing trial to be completed in a time- bound manner or within a certain period set forth in the Act.

³⁷⁹ Writ Petition No. 76 of 2018

³⁸⁰ Section 35 of the POCSO Act, 2012

4. The Chief Justices of the High Courts have been asked to form a three- judge committee to control and supervise the progress of the POCSO Act cases. In the event that three judges are not available, The Chief Justices of the respective courts will form a Judge Committee.

5. A special task force will be formed by the Director General of Police or a State authority of comparable rank to guarantee that the investigation is properly handled and witnesses are presented on the dates set before the trial courts.

6. The High Courts must take appropriate efforts to create a child friendly environment in Special Courts keeping in mind the requirements of the POCSO Act, to ensure that the spirit of the Act is upheld.

4.2.2.3.9 Interim Compensation and Rehabilitation

The POCSO Act, prescribes for direct payment of interim compensation to the child for any physical or mental trauma caused or for immediate rehabilitation of such child. Further Section 40 (2) 9c) provides that the Central Government shall make rules carrying out the purpose of the Act without prejudice to the generality of the provision of powers to pay compensation. When it comes to rehabilitation on reading the POCSO Act, 2012 the term rehabilitation is used thrice in the Act³⁸¹. The POCSO Rules 2020, in Rule 4 speaks about ‘procedure regarding care and protection of the child’. The POCSO Act is drafted in a manner that care and protection of the child also means rehabilitation that is in the best interest of the child. as stated earlier in the research the term best interest is a subjective term and thus the Courts can exercise their discretion in deciding what is best for the child. Thus in every case it becomes important that the Special Judge considers the aspect of compensation and rehabilitation in a serious manner.

In the case of *Bijoy v. State of West Bengal*³⁸² the Supreme Court held “Compensation envisaged under the provision of law may be awarded by the Special Court at the interim stage are also for immediate relief and rehabilitation of a child victim in light of the

³⁸¹ Section 333 (8), 4(3) and 6(2)

³⁸² CRA 663 of 2016

parameters laid down under Sub Rule (3) of Rule (7) of the aforesaid Rules. Such compensation payable by the State is independent of the compensation which may be directed to be paid by the convict upon conviction in terms of Section 357 (2) (3) of the Code. The philosophy of awarding compensation by the State is in the nature of reparation to the victim of crime on its failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime. I am informed that a Victim Compensation Fund has been notified by the State under Section 357A Cr. PC which inter alia, prescribes the minimum amount of compensation that may be awarded for various offences/injuries in the following manner as set in the schedule of the notifications. In the same case at para 34 the Court has stated that The Victim Compensation Fund is the vehicle through which the compensation may be paid by the State Government, and in no way limits the powers of the Special Court in determining the amount of compensation. the obligation of the State Government to make such payment is absolute; if no Victim Compensation Fund or other scheme exists, such compensation is payable by the State Government. Payment of compensation under the POCSO Act should not deny the child victim from claiming entitlement under any other scheme.

In the case of *In Re: Indian Woman says gang raped on orders of Village*³⁸³ Court published in *Business and Financial News* dated 23.1.2014 the Supreme Court held as follows “There is a statutory duty upon the State, under Section 357 A of Cr.PC to award compensation to the victims of crime. A new Section 357A was introduced to the Criminal Procedure Code in order to cast a responsibility on the State Governments to formulate a Schemes for compensation to the victims of crime in coordination with the Central Government. Unlike Section 357, the onus was not simply on the offender to pay the compensation, but had been put on the District Legal Service Authority to determine the quantum of compensation in each case.”

³⁸³ (2014) 4 SCC 786

In the case of *The Minor Through Guardian Zareen v. State (Govt of NCT of Delhi)*³⁸⁴ The Delhi High Court held that, “ the definition under Section 357 (A) is very wide and would in fact even cover cases which are covered under the Protection of Children from Sexual Offence Act, 2012 but then the reading of Section 33 of the Act would show that the power has been given to the Special Court to grant compensation and there is no outer lime which has been fixed while granting compensation.”

It is worth noting the recent judgment of the Delhi High Court *X v. State*³⁸⁵ . The Delhi High Court in para 33 has held that, “to understand the legal concept of ‘compensation’ and thereby of ‘interim compensation’ by referring to the words of the Hon’ble Supreme Court in *Yadava Kumar v. National Insurance Co.ltd.* (2010) 10 SCC 341 where, in the context of a motor accident claim, the Hon’ble Supreme Court has very pithily explained the concept of ‘compensation’ in the following words: “the High Court and the Tribunals must realise that there is a distinction between compensation and damages. The expression compensation may include a claim for damages but compensation is more comprehensive. Normally damages are given for an injury which is suffered, whereas compensation stands on a slightly higher footing. It is given for the atonement of injury caused and the intention behind grant of compensation is to put back the injured party as far as possible in the same position as if the injury has not taken place, by way of grant of pecuniary relief. Thus, in the matter of computation of compensation, the approach will be slightly broader based than what is done in the matter of assessment of damages. At the same time, it is true that there cannot be any rigid or mathematical precision in the matter of determination of compensation.”

The Sikkim High Court in *Deo Kumar Rai v. State of Sikkim*³⁸⁶ held that there is a mandatory duty on the special courts under Section 33 (8) of POCSO Act, to apply its mind to the question of awarding compensation. The court further held that Section 7(1) of POCSO Rules, the special court can, in appropriate cases, on its own or on an

³⁸⁴ (CRL) 798/2015, dated 21st March 2016

³⁸⁵ 2021 SCC online Del 2061

³⁸⁶ CrI.A.No.13 of 2016

application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation.

A common feature in most of the judgments cited above are the set guidelines delivered by the concerned courts which silently reflect the best interest of the victim child. They clearly bring out the importance of protecting the welfare and interest of the victim child.

4.3 Goa Children's Act, 2003³⁸⁷

4.3.1. Need for Special Legislation for the State of Goa

In the year 2003, the Government of Goa declared it as the year of the child. A series of consultations were initiated by the then Secretary of Women and Child Development in collaboration with non-governmental organizations to identify problems faced by children in Goa. The Non- governmental organizations further in collaboration with the government facilitated both taluka as well as district-level consultations and the same concluded in a State Level Consultation. It was the recommendations that were suggested during this State Level Consultation that were referred to in drafting the Goa Children's Act. In March 2003 the then Secretary of Women and Child Development invited the non-governmental organizations as well as the Salgaocar Law college to draft the Act.

The various problems that were taken into account while drafting the Act were Child sex tourism, child sexual abuse, children in difficult circumstances, issue of child trafficking, child labour, education, the health of the child and children's homes issues. There were a total of fourteen participatory and transparent consultations that were held to make the State of Goa a child-friendly State and the same aligned with the Resolution of the United Nations General Assembly a 'World Fit for Children'. The final State Level Consultations

³⁸⁷ Act No. 18 of 2003

culminated in the Goa Declaration on the Rights of the child and the same was adopted by the State Government as the State Policy for Children.

One of the major recommendations that were stated in the said Declaration was to enact legislation that would take care of all areas that were uncovered by the various Central Acts as well as legislation that would enforce provisions about children in consonance with the Directive Principles of the State Policy and the Convention on the Rights of the Child.

The Government of Goa passed the Goa Children's Bill, 2003. The said Bill was passed in the Legislative Assembly and finally we had the Goa Children's Act 2003 which came into force on 8th July 2003. The Act attempts to legally enforce the United Nations Convention on the Right of the Child which was acceded by the Indian Government.

The Act is a self-contained and comprehensive Legislation. The main object of the Goa Children's Act 2003 was to protect, promote and preserve the best interest of children in Goa and to create a society that is proud to be child friendly. The said Act was enacted by the Legislative Assembly in the fifty-fourth year of the Republic of India. The Act extends to the whole of the State of Goa. It covers all types of children in vulnerable situations and incorporates child-friendly procedures.

When it comes to defining the term child under the Goa Children Act the term child is defined as a person who has not completed 18 years of age unless any other law in force specifies otherwise or unless otherwise indicated in specific provisions of the Act. However, the proviso to the section states that in cases where the offence is of rape child shall mean any person who has not completed 16 years of age³⁸⁸. Besides this, the Act also defines the term child in cases of child labour.³⁸⁹

The Act has been amended twice. First Amendment is in the year 2004 and the second amendment is in the year 2005. The Amendment provides for the enhancement of

³⁸⁸ Section 2 (d) of the Goa Children's Act 2003.

³⁸⁹ Section 2 e states that a child in case of child Labour shall be a person who has not completed his fourteenth year of age.

punishment and makes all offences about children cognizable. It also provided for the appointment of special taluka level officers for effective enforcement of the Act.

4.3.2. Various Provisions under the Goa Children’s Act, 2003 and Rules 2004 that reflect the Best Interest of the Child Principle

Under the Act, provision is made for the establishment of a Children’s Court³⁹⁰ and it clearly states that when it comes to the functioning of the Court the court shall be guided at all times by the best interest of the child.

When it comes to the procedure that has to be followed by the Children’s Court great care was taken by the legislators that the procedure followed shall be child friendly and most importantly it stated the Principle of Best interest³⁹¹ which is one of the main principles under the Convention of the Rights of the Child. The procedure prescribed under the Act has to be child friendly and include the following: Avoidance of Harm, the principle of non-stigmatization, the principle of non-waiver of rights, the principle of equality, the principle of the right to privacy and confidentiality, the principle of fresh, start, the principle of last resort, the burden of proof, Procedure for children’s evidence, Cross-examination of a child witness and deposit of fine before trial. Further certain guidelines are provided which the Children’s Court has to follow³⁹².

³⁹⁰ Section 27 of the Act – Children’s Court – (1) The State Government shall, after consultation with the High Court, by Notification in the Official Gazette, constitute a Children’s Court for the State of Goa. (2) In all aspects of its functioning, The Children’s Court shall be guided at all times by the best interests of the child and all its [procedures, the office, the dress worn by the Members of the legal profession and all other members shall be consciously and deliberately Child Friendly.

³⁹¹ Section 32 of the Act – Procedure of the Children’s Court – (1) the Children’s Court shall follow such procedures as may be prescribed clause (d) Principle of best Interest – This principle seeks to ensure physical, emotional, intellectual, social and moral development of the child, so as to make him a useful and good citizen by ameliorating the impediments to healthy development.

³⁹² Section 32 (2) in all dealings with children, The Children’s court shall follow the following guidelines a) child victims/witnesses are informed of their role in regard to court proceedings; b) their views are to be allowed to be heard and respected; c) inconvenience to them is minimized and their privacy is respected; d) delays in the proceeding are reduced; e) aggressive questioning or cross examination of child victims is avoided and the same if necessary is done through the judge; f) provisions are made for trials in camera; g) the identity of the child victim is protected; h) child victims are prepared for the judicial process and prosecution of alleged abusers is not rushed if the child is not ready to go to the court; i) the investigator to ascertain the need for medical examination of the child victim and when examination is undertaken ensure

Further the Goa Children (Child Labour Vigilance Officer, Task Force, Victim Assistance Unit and other Authorities) Rules, 2004 provides for the setting up of the Victim Assistance Unit³⁹³.

4.4. Juvenile Justice (Care and Protection of Children) ACT, 2015³⁹⁴

Juvenile Justice (Care and Protection of Children) Act, 2015 besides defining the term ‘best interest of the child’ is the only legislation that lays down the meaning of child-friendly. To understand this concept of the best interest of the child the other provisions of the Act which reflect the best interest of the child are also considered in this study.

The Juvenile Justice Care and Protection of Children Act 2015 lay down in Section 2 (9) the meaning of “best interest of the child”³⁹⁵ .Further Section 2 (15) defines the term ‘child friendly’³⁹⁶, Chapter II of the Act under the title General Principles of Care and

that multiple re-examination is avoided; j) the medical examination should be conducted in presence of the parent/guardian and social worker/counsel or as far as possible; k) Childs testimony or as the case may be should be recorded in the presence of a social worker /counsellor as early as possible or after the abusive incident with other witnesses at hand; l) adequate translation interpretations and translators interpreters who are sensitive to the children’s needs should be provided wherever needed; m) in case of a mentally challenged child, the competent service provider should depose on behalf of the child; n) the special needs of the child victim/witnesses should be catered for and the same should include i) enable children to familiarise themselves with the court surroundings, ii) inform children of the different roles of the key persons at court such as the judge, the defence lawyer and the prosecutor, iii) inform the court of the special needs of children in general and of individual children in specific cases; iv) help children to be comfortable in proceedings; encourage questioning to be short and clear so as to not confuse child witnesses; vi) permit the children below the age of eight years to respond to leading questions facilitated by a social worker.

³⁹³ Rule 4 – Victim Assistance Unit – (1) There shall be set up one or more Victim Assistance Units in each district to facilitate the child, who is a victim of the child abuse, to deal with the trauma of abuse and also to appear before the Children’s Court or any other Authority before whom the child victim is to be produced. (2) the Unit shall consist of such co-ordinators and case workers as the Competent Authority may, after taking into consideration the nature of the case decide. (3) the Members of the Unit shall be entitled to such honorarium as the State Government may notify from time to time.

³⁹⁴ Ibid

³⁹⁵ 2(9) “Best Interest of the child’ means the basis for any decision taken regarding the child to ensure fulfillment of his basic rights and needs, identity, social well- being and physical, emotional and intellectual development.

³⁹⁶ Section 2 (15) Child Friendly means any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child.

Protection of children under section 3 (iv) deals with the Principles of best interest.³⁹⁷ Section 3 (xiii) when speaking about the principle of repatriation and restoration also makes a mention of the best interest³⁹⁸. Further Section 3 (xv) while dealing with the principle of diversion also makes a mention of the best interest of the child.³⁹⁹

Chapter IV of the Act deals with procedures concerning children in conflict with the law.⁴⁰⁰ Chapter VI of the Act dealing with Procedure relating to children in need of care and protection also makes a mention of the best interest of the child.⁴⁰¹ While dealing with the process of Rehabilitation and social integration again the Act mentions that the same has to be in the best interest of the child when placing siblings in institutional care or non-institutional care⁴⁰². When it comes to placing siblings in foster care Section 44 also considers the best interest of the child.⁴⁰³ Chapter IX of the Act which deals with

³⁹⁷ Section 3 (15) 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.

³⁹⁸ 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.

³⁹⁹ Section 3 (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.

⁴⁰⁰ Section 26(3) proviso Juvenile Justice Board can give additional directions regarding any special steps that may be deemed necessary, for the best interest of the child.

⁴⁰¹ Section 37(1) (c) placement of the child in Children's Home or fit facility or specialised adoption agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child.

⁴⁰² Section 39 (1) The process of rehabilitation and social integration of children under this Act shall be undertaken based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care: Provided that all efforts shall be made to keep siblings placed in institutional or non-institutional care together, unless it is in their best interest not to be kept together.

⁴⁰³ Section 44(3) all efforts shall be made to keep siblings together in foster families, unless it is in their best interest not to be kept together, further 43(5) In cases where children have been placed in foster care for the reason that their parents have been found to be unfit or incapacitated by the Committee, the child's parents may visit the child in the foster family at regular intervals, unless the Committee feels that such visits are not in the best interest of the child, for reasons to be recorded therefor; and eventually, the child may return to the parent's homes once the parents are determined by the Committee to be fit to take care of the child.

Other Offences against children Section 74⁴⁰⁴, Section 95 (1)⁴⁰⁵ and Section 96 (1)⁴⁰⁶ mention the term best interest of the child.

4.5. Interlinking application of Juvenile Justice (Care and Protection of Children) Act, 2015 and the Protection of Children from Sexual Offences Act, 2012.

The purpose of enactment of The Juvenile Justice (Care and Protection of Children) Act, 2015 and the Protection of Children from Sexual Offences Act, 2012 was to achieve India's obligation to the United Nations Convention on the Rights of the Child 1989. Both these Acts make a specific reference to the same in their respective Preamble.

4.5.1 Children who are victims under the Protection of Children from Sexual Offences Act are also children in need of care and protection.

In cases where the victim child who is sexually abused is also a child in need of care and protection Section 30 (xiii)⁴⁰⁷ is attracted. Further Section 19 (6) of the POCSO Act, states that the Child Welfare Committee should be intimated of every case of a sexual offence

⁴⁰⁴ Section 74 Prohibition of disclosure of identity of the child. The proviso states that disclosure of the identity of the child is permissible only if the same is in the best interest of the child. However, the Board or the Committee must record reasons in writing for the same by holding an inquiry.

⁴⁰⁵ Transfer of a child to place of residence 95(1) The same is applicable in cases where during inquiry it is found that the child hails from a place outside the jurisdiction of the Board or the Committee.

⁴⁰⁶ Section 96 (1) Transfer of child between Children's Homes or special homes or fit facility or fit person in different parts of India.

⁴⁰⁷ Section 30 (xiii) taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act 2012.

against a child within 24 hours of receiving information of the same. There are three situations mentioned under the POCSO rule⁴⁰⁸, 2012 wherein a child has to be produced before the Child Welfare Committee. The decision of whether the child has to be taken out of the custody of the family has to be taken by the Child Welfare Committee within three days and the child has to be placed either in a Children's Home or Shelter Home. To determine the same, the Child Welfare Committee can take the assistance of a social worker. Whether or not a child has to be removed out of the custody of the family has to be considered by the Child Welfare Committee based on seven factors that are specified in the POCSO Rules⁴⁰⁹ and the same must be along with preference and in the best interest of the child. The Child Welfare Committee also has to ensure that no inconvenience is caused to the child as well as the fact that the child should not be exposed to any injury during the inquiry.

4.5.2. Support Person

When a child victim is also termed as a child in need of care and protection based on the report received by the Child Welfare Committee from the Special Juvenile Police Unit the Child Welfare Committee has to provide a support person to assist the child and family during the investigation and trial of the case. the Special Juvenile Police Unit must inform the Special Court within 24 hours in writing that a support person is assigned to the child by the Child Welfare Committee.

⁴⁰⁸ Rule 4 (3) of POCSO Rules 2012, the three situations laid down are a) there is a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household; b) child is without parent support; c) the child is found without any home and parental support.

⁴⁰⁹

4.5.3 The Juvenile Justice Board should adhere to the child-friendly procedures prescribed under the POCSO Act, 2012

If a child commits any offence under the POCSO Act, 2012 the Juvenile Justice Act would apply. In such cases the proceedings of the Juvenile Justice Board have to be conducted in camera, the child victim should not be exposed to the child in conflict with the law during the inquiry and all procedures that are laid down under the POCSO Act, 2012 for child victims should be followed for ensuring that the child victim is protected at all stages of the proceedings.

4.5.4 Role of Juvenile Justice Functionaries under the POCSO Act

The Special Juvenile Police Unit (SJPU) have to record the complaint, assess whether the child needs care and protection, facilitate emergency medical care, medical examination and recording of the statement by the magistrate, report to the Special Court and Child Welfare Committee and provide information to the informant and victim. The District Child Protection Unit also have certain duties of maintaining a register which should contain the contact details of interpreters, translators and special educators in their district as mandated under the POCSO rules⁴¹⁰, and the same has to be shared with SJPU, local police, magistrate and Special Court so that the services are availed as and when required.

4.5.5. Age Determination

When it comes to age determination of the child the POCSO Act under Section 34(2) requires the Special Court to determine the same and in doing so the Special Court should record reasons in writing for the same. The process of age determination is provided under the Juvenile Justice Act, 2015⁴¹¹.

⁴¹⁰ Rule 3 (1) POCSO rules 2012.

⁴¹¹ Section 94 of the Juvenile Justice Care and Protection of Children Act, 2012.

4.5.6 Legal Representation

Every child victim has to receive the assistance of free legal counsel during trial.

4.6 Conclusion

The analysis of these three relevant legislation The Protection of Children from Sexual Offences Act, 2012, The Goa Children's Act, 2003 and Rules, 2004 and the Juvenile Justice Care and Protection Act 2015 was necessary for understanding the content and import of the concept of the 'Best Interest of the child' in the respective legislations as these are the three legislations that deals comprehensively with the concept of the best interest of the child in terms of child victims. Though the two legislations namely POCSO Act 201 and JJ Act 2015 are central legislations the state legislation is the Goa Children's Act 2003 and Rules 2004. The functioning of the criminal justice system in Goa especially in terms of child victims is oriented around the cooperative synthesis of the working of the three legislations. However, the researcher for the study has focused her attention and critical analysis on the functioning of the Goa Children's Act as the Children's Court as such came to be established under this path-breaking legislation.

The purpose of the analysis of these legislations in this chapter is oriented around understanding the concept of the best interest of the child. It is worthy to note at this point that the definition of best interest is more comprehensively dealt with under the JJ Act. Though the other two legislations do mention the best interest of the child to understand the extent and ambit of the concept of the best interest of the child one has to have recourse to the definition under the JJ Act.

After so understanding the extent of meaning and its import of the concept of the best interest of the child the researcher has ventured to examine the ground realities of its application in the state of goa in the next chapter which more or less looks at the actuality of situations vis a vis best interest jurisprudence.

CHAPTER 5

**EVOLUTION AND IMPACT OF BEST
INTEREST JURISPRUDENCE ON
CHILDRENS RIGHTS WITH SPECIAL
REFERENCE TO THE STATE OF GOA –
AN EMPIRICAL STUDY**

5.1. Introduction

Dr. A.P.J. Abdul Kalam⁴¹² in one of his messages to the nation stated, *“It’s when children are 15, 16 or 17 that they decide whether they want to be a doctor, an engineer, a politician or go to Mars or moon. That is the time they start having a dream, and that’s the time we can work on them. You can help shape their dreams”*.

Protecting the childhood of children as well as giving them fair and just treatment is of utmost importance to help children shape their interests and dreams. Protecting the best interest of the child has always been of paramount importance to both the legislative and judicial systems.

When it comes to defining the term best interest of the child there is no concrete definition. Thus to what is the best interest of the child depends on the decision-makers who at every point of time should be interested in the best outcome for the child.

The State of Goa was the first state to come up with legislation that incorporated the four principles of the United Nations Convention on the Rights of the Child i.e. Development, Participation, Survival and Protection. This Legislation was known as the Goa Children’s Act, 2003 and Rules 2004⁴¹³. The Legislation not only put the onus on the State towards health and education but also identified different types of abuses which were earlier not defined in any other legislation. The Legislators further provided for penal provisions for abuses identified in the legislation.

The Goa Children’s Act, 2003 and Rules 2004⁴¹⁴ also put the onus on the State to establish a separate children’s court that could deal with offences against children. However, it took the State Government a directive from the Hon’ble High Court of Bombay Goa Bench to establish the children’s Court. It was After almost a year of enactment of the legislation, the first Children’s Court was established in the year 2004. This Children’s

⁴¹² Former President of India

⁴¹³ Act No 18 of 2003

⁴¹⁴ Act No

Court was a court dedicated to looking into offences against children and by children (juvenile).

It is critical to evaluate the extent to which the ‘best interest of the child’ principle is implemented from the time the victim child comes in contact with the system i.e. the police or any other service provider. So far there is no data (collated and analyzed) which the researcher has come across which evaluates the impact of the ‘best interest of the child’ from the perspective of stakeholders i.e. law enforcement agencies, judiciary, and other stakeholders with regards to the State of Goa.

This empirical study will address the following research hypothesis⁴¹⁵ (footnote hypotheses have explained in detail in chapter, repetition at this point for clarity

1. The authorities established under the Goa Children’s Act, 2003 and Rules 2004 have failed to implement substantially the Best interest of the child principle in toto.
2. The authorities established under the Protection of Children from Sexual Offences Act, 2012 have failed to implement substantially the best interest of the child principle in toto.
3. Lack of resources creates barriers for authorities in providing adequate support to the victims before, at, and after trial.
4. Failure to render speedy justice amounts to a violation of the basic principle of the best interest of the child.

5.2. The Purpose

The main purpose is to evaluate the extent to which the criminal justice system operates in line with the best interest of the child as well as what are the areas that need reforms, the moment when a victim child comes in contact with the criminal justice system.

⁴¹⁵ The researcher has repeated the hypothesis in this Chapter for the purpose of clarity. However, a detailed explanation of the hypothesis is mentioned in Chapter 1 at page 15.

The stakeholders identified as research participants for this study include the President of the Children's Court, Public Prosecutors, Police officers above the rank of Police Sub-Inspectors (PSI), Child Welfare Committees, and Social service organizations.

5.3. Location of the study

The present study is to examine whether the best interest of the child inherently flows through the criminal justice system in cases of child abuse as well as when any child comes in contact with the criminal justice system. The state of Goa is divided into two districts namely North Goa and South Goa, for the said research, the researcher has collected data from various stakeholders of both these districts.

5.4. Sample Selection

The researcher used a random sampling method in the collection of empirical data from various stakeholders. The data for this study is collected from mainly the Children's Court, The Police Department, Child Welfare Committees and social service organizations. The data obtained from the Children's Court is from the year 2004 to the year 2021(April).

The respondents are selected from the categories listed below.

1. Police
2. President of Children Court
3. Public Prosecutors
4. Child Welfare Committee Members

The methodology of data collection was by questionnaire, by interview and by observations. The researcher used a structured questionnaire. The questionnaires so formulated are in Annexure A and B. The Researcher has also collected empirical data

through personal interviews and observation methods by visiting various police stations and the Children's Court.

5.5. Data Analysis

The findings of the researcher were subjected to appropriate statistical analysis. The data collected was compiled, tabulated, analyzed and depicted in the form of graphs, pie charts and bar diagrams wherever appropriate.

The purpose of the empirical study and the statistical analysis of the data is to highlight the lacunae and gaps which are creating a hurdle for reaching out to the objective of the legislation towards the best interest of the child.

The analysis of the data is carried out in three separate stages of the functioning of the criminal justice system in respect of the victim child. they are

1. Registration of offences
2. Pre-trial
3. Trial

5.6 Registration of Offences

To evaluate this first stage of registration of offences the researcher has interacted with the Police inspectors i.e. the Station house officers and the Police Sub-inspector who play a vital role as being the initial contact persons. These officers are empowered to register and investigate the offence and file necessary charge sheets before the competent court. During the visit to the police station for the collection of data the researcher also examined whether there was a specific place allocated, away from the public to interact with the victims and their families.

The researcher visited ten police stations in North Goa and ten police stations in South Goa. One of the objects of the research that the researcher wants to reach is the role of

the Police in the development of a child-friendly approach as they are the first and primary stakeholders, the moment a victim child comes in contact with the criminal justice system. The observations and the conclusion arrived at by the researcher at some of these police stations are as below.

5.6.1 Panaji Police Station

The police station is situated in an ancient building located behind the police headquarters at Panaji. This police station has a child-friendly space and also a waiting room. There is a separate place where the statement of the child victim is recorded. It is an air-conditioned room and has a computer and a printer. But during the interaction, it was found that this space is otherwise used by the police personnel for uploading their crime detail on the internet as well. Though there was no lady police officer at this center earlier now recently a lady police officer is posted at this police station. Unfortunately, before this posting male police officers were handling child abuse cases with the assistance of lady police constables.

5.6.2 Women Police Station (Panaji)

This police station has one Lady Police Inspector (LPI) and two Lady Police Sub-Inspectors (LPSI) and there are other officers of the rank of Assistant Sub-Inspector and Constables. This police station is located in a spacious room with cubicles. One to one interaction and private interaction was found to be possible at this police station.

5.6.3 Mapusa Police Station

The police station is located in a new building. This police station has a separate child-friendly room. However, it is not spacious and could barely accommodate three people at a time. This police station consists of one Police Inspector (PI), eight Police Sub-Inspectors (PSI) including one Lady Police Sub- Inspector (LPSI).

5.6.4 Vasco Police Station

This police station has a dedicated structure that is well-spaced. However, for recording the statement of the victim child there is no separate allotted space but the table and space of the concerned PSI are being used in the absence of a separate child-friendly corner.

5.6.5 Ponda Police Station

The police station is located in an old building. The PSI functions from a small room with inadequate space. The police station does not have a dedicated child-friendly space. Here also as elsewhere the table and space of the PSI were used for the recording of the statement of the child victim.

5.6.6 Margao Police Station

The police station is located at Margao Police headquarters. Being a town police station it was found to be a very congested police station with no proper table space for the PSI to do their work. To overcome this scarcity of space this police station is also occupying the space allotted by the Fire Service Department. There is no child-friendly space or a child-friendly corner at this police station.

Given the provisions under section 19⁴¹⁶, Section 24⁴¹⁷ and section 33⁴¹⁸ of the Protection of Children from Sexual Offences Act 2012 as well as the provisions of the Juvenile Justice Act 2015 and Juvenile Module Rules, 2016 the National Commission for Protection of Child Rights in their guidelines⁴¹⁹ for the establishment of child-friendly police station recommended that police stations should have either a child-friendly room or a child-friendly corner where children who are victims can be dealt with. Thus one of the questions posed to the Police officers while collecting data was whether the police station has a designated place to interact with the victims. 71 % stated in the negative and 29 % stated in the affirmative. The said analysis is depicted in **Figure 1**.⁴²⁰ However, it has to be noted that 29 % who answered in the affirmative stated that their police Station would create a place away from the public to interact and record the statement of the child as and when a case of child abuse came up. They further stated that the said room was mostly the office of the PSI's who would vacate the place to make provision for the victim during the recording of the statement. Thus besides the Mapusa and Panaji police stations none of the police stations has a designated place neither a child-friendly corner when it comes to interacting with the victim child at the police station or recording the statement of the victim child.

⁴¹⁶ See section 19 Reporting of Offences under POCSO Act, 2012

⁴¹⁷ See Section 24 Recording the Statement of the child (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub- inspector. (2) The police officer while recording the statement of the child shall not be in uniform. (3) The police officer making the investigation, shall, while examining the child ensure that at no point of time the child comes in contact in any way with the accused. (4) No child shall be detained in the police station in the night for any reason. (5) the Police officer shall ensure that the identity of the child is protected from the public, media, unless otherwise directed by the Special Court in the interest of the child.

⁴¹⁸ Section 33 Procedure and Powers of the Special Court in brief it states that the Special Court shall create a child- friendly atmosphere by allowing a family member, a guardian, a friend or relative, in whom the child has trust or confidence, to be present in the court.

⁴¹⁹ Guidelines for Establishment of child Friendly Police Stations. Laws Prescribing 'Child Friendly' procedures, processes, conduct and establishments 2017.

⁴²⁰ See Figure 1 at page 128

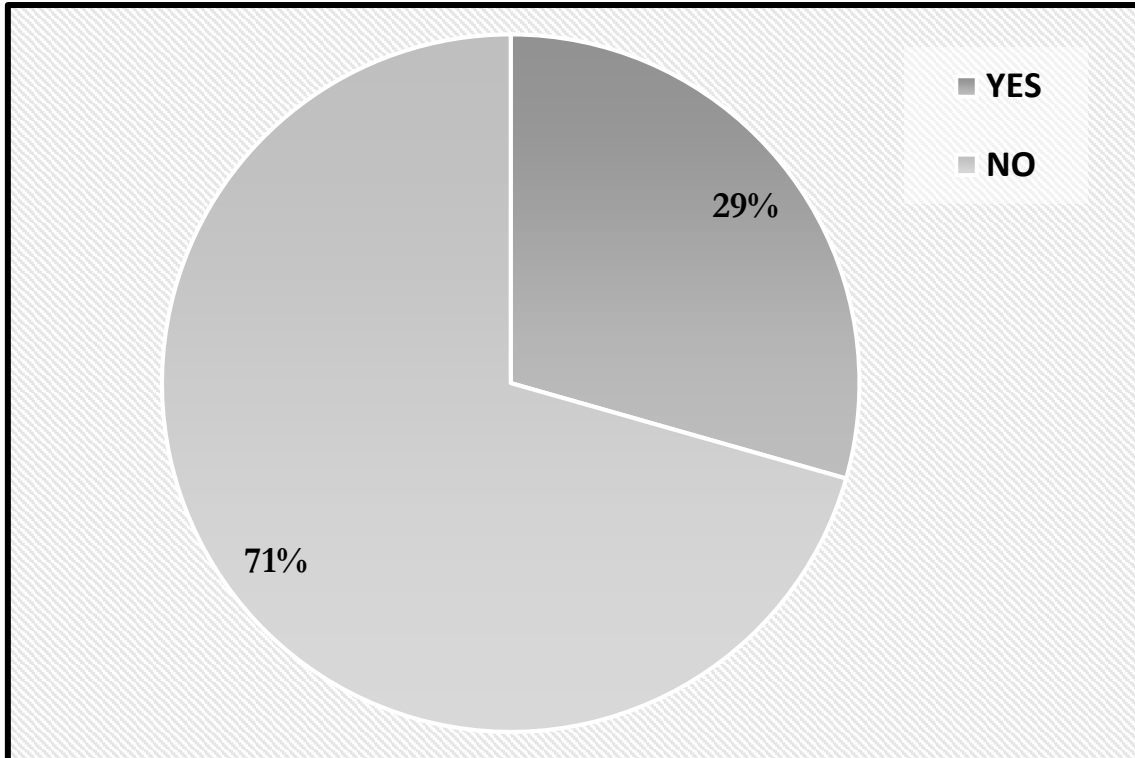


Figure 1 (Primary source) Is there a designated place at the police station to record the statement of the child

5.6.7 Data from the police

Like in any profession the Police Officers also become better skilled and knowledgeable with their services in the Department. Often such experience matters in the manner in which they handle sensitive cases. Especially when it comes to the victims of offences The amount of sensitivity and understanding very much depends upon the capacity of the Police Officer to handle human emotions and expressions. This is all the more important especially considering child victims of abuses or crimes as one of the areas of major concern is their capacity to communicate the nature of injuries they suffer and the circumstances under which they are victimized. In this sense understanding and considering the experience of a Police Official becomes relevant to this study of evaluating the practice of the principle of the best interest of the child by these frontline soldiers.

Therefore in terms of years of experience of the Police Officers, it is found that 13 % have more than fifteen years' 9 % of police officers have ten to fifteen-year experience, experience and 36 % have five to ten years' experience 42 % have zero to five years' experience.⁴²¹

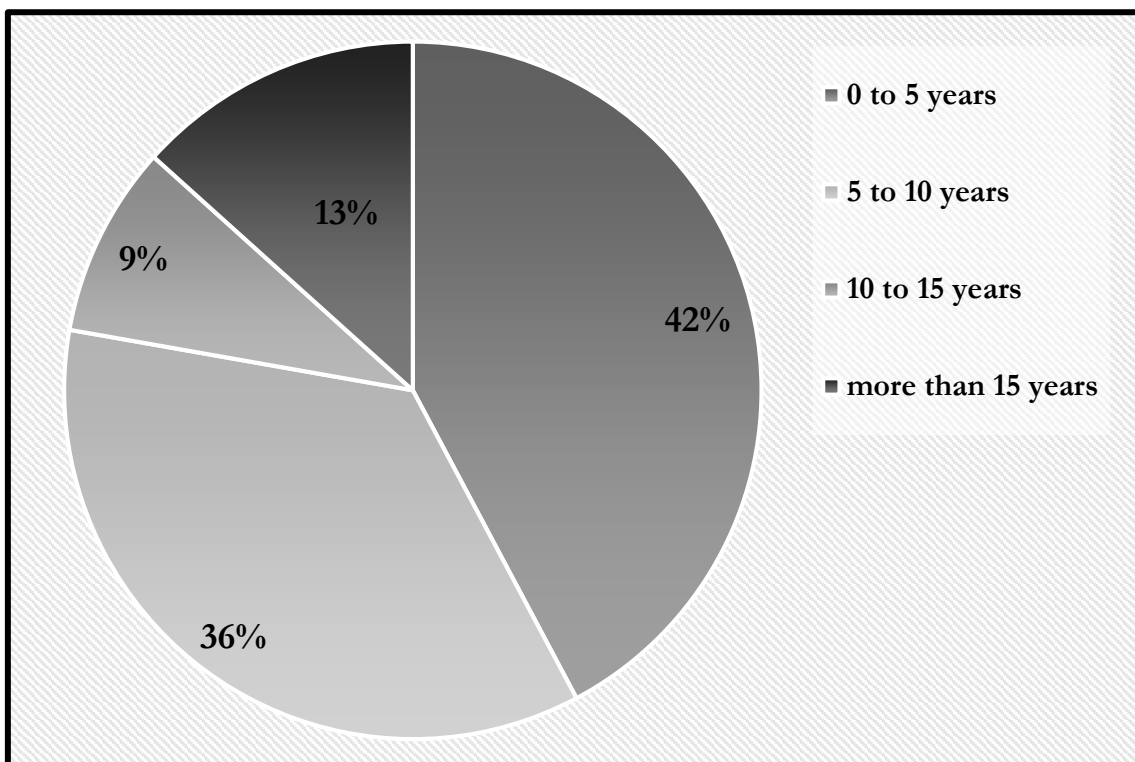


Figure 2 (Source Primary) Years of experience of Police Officers interacted with

It is also found important that in addition to the general experience of a Police Officer their experience in handling child abuse cases earlier becomes extremely relevant especially considering the issue of sensitivity, victim protection and the observation of best interest of the child principle by such officials. In this regard, it is found 82 % of Police officers have dealt with cases relating to child abuse and 18 % had no such experience.⁴²² The next issue of concern was regarding undergoing child abuse-specific training by these police officers dealing with such child abuse cases. It is found 57 percent

⁴²¹ See Pie Chart at figure 2 on page 129

⁴²² See Pie Chart at figure 3 on page 131

of the officers had some training or the other. However, unfortunately, 43 percent had no such training even though they were dealing with child abuse cases.⁴²³ These lacunae of course do affect their capacity to effectively observe the principle of the best interest of the child while handling child victims of such abuses.

It is to be further noted that there is a method and procedure of conducting training in the form of refresher courses to police officers on child-related issues and legislations. It is pertinent to note that at the time of their appointment they are not given any such training on how to investigate or deal with child abuse cases. It has been pointed out by most of them that such untrained police officers often merely seek guidance from their seniors when investigating such child abuse cases. It is a matter of grave concern that the police station or the Police officers are not updated promptly either on amendments to such child pertaining legislations nor are they given any prompt training. It is found that many of them even lack basic knowledge regarding the current Protection of Children from Sexual Offence Rules 2020.

⁴²³ See pie chart at figure 4 page 132

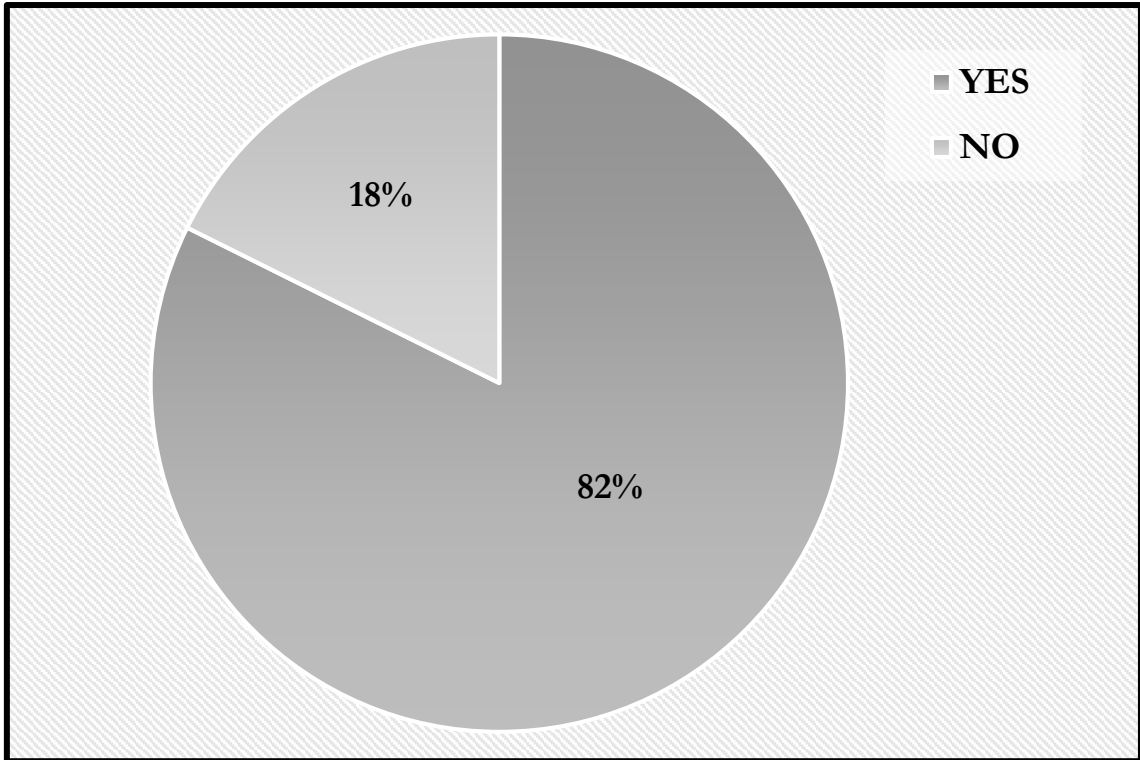


Figure 3 (Source Primary) Have you investigated child abuse cases

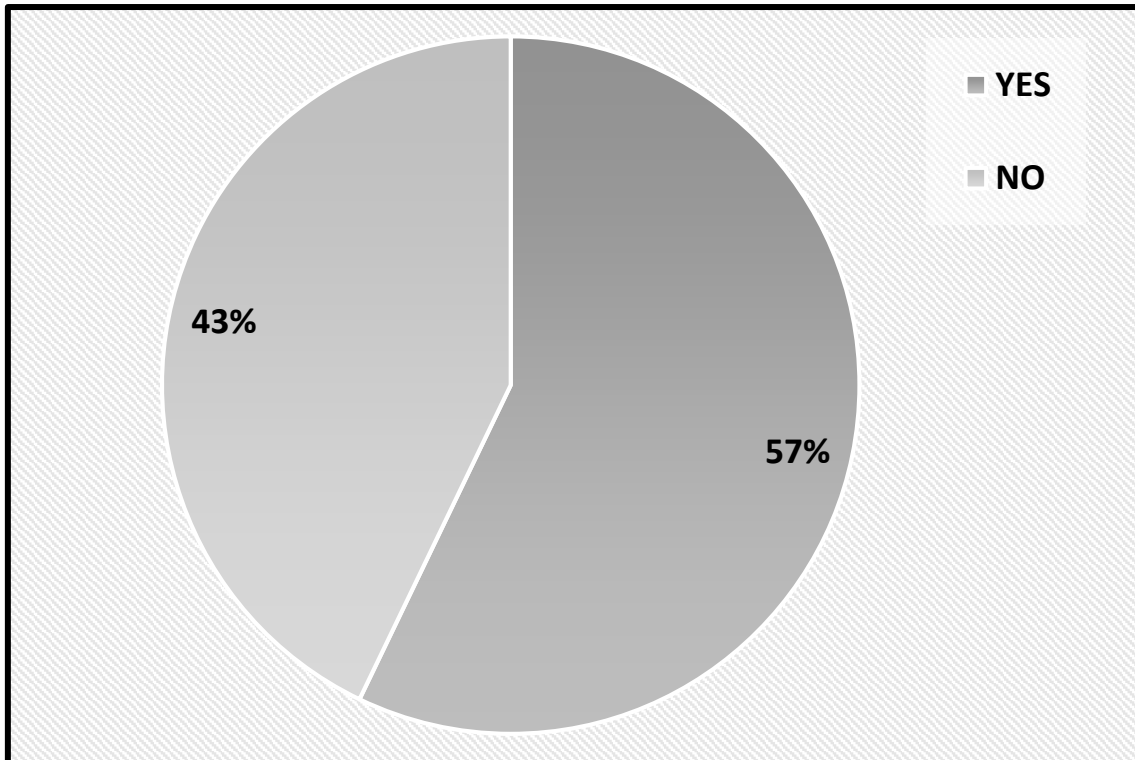


Figure 4 (Source Primary) whether the police are specifically trained to deal with child abuse cases as well as legislations.

The researcher was fortunate enough to carry out an analysis of cases investigated by the various police station regarding child abuse.

5.6.7.1 Nature of Child abuse cases

Goa is a state known for its tourism has always attracted outsiders for many of its economic and commercial activities including domestic services. There is a huge lacuna of labour force requirements in Goa. This lacuna has been filled from time to time by a large contingent of the migrant labour force. The existence of a large contingent of the migrant labour force with their families, dependents and children added to which are certain immoral and evil practices in the name and garb of tourism Goa has resulted in having much more child-related cases as compared to its resident population. It also

happens that most of the perpetrators, as well as the victims of child-related offences, are committed by this transient population.

Because of the nature of population composition where the larger proportion is belonging to the transient section namely migrants, tourists, and those in business operating temporarily the child-related crimes are of such peculiar nature. It is to be noted though unfortunately most of these relate to sex-related offences like rape, elopement, physical abuse, etc. though there are a variety of offences bordering around these areas the majority as recorded by the Police station seems to relate to the offence of kidnapping. This inference is drawn during my one to one interaction with the Police officers at different Police stations. However, there is no data maintained by the investigating authority whether the victim is of a Goan origin or otherwise.

In terms of the nature of offences, it is found that the second highest number of offences after sexual abuse were those of kidnapping.⁴²⁴ The police officers opined that most of these cases of kidnapping were not related to ransom or threat but were mainly cases of teenage elopement. The police officers justified the same based on the guidelines issued by the Hon'ble Supreme Court of India in the case of *Bachpan Bachao Andolan vs. Union of India (WP (Civil) 75 of 2012) 10th May 2013*.

⁴²⁴ See the bar graph Figure 5 at page 134

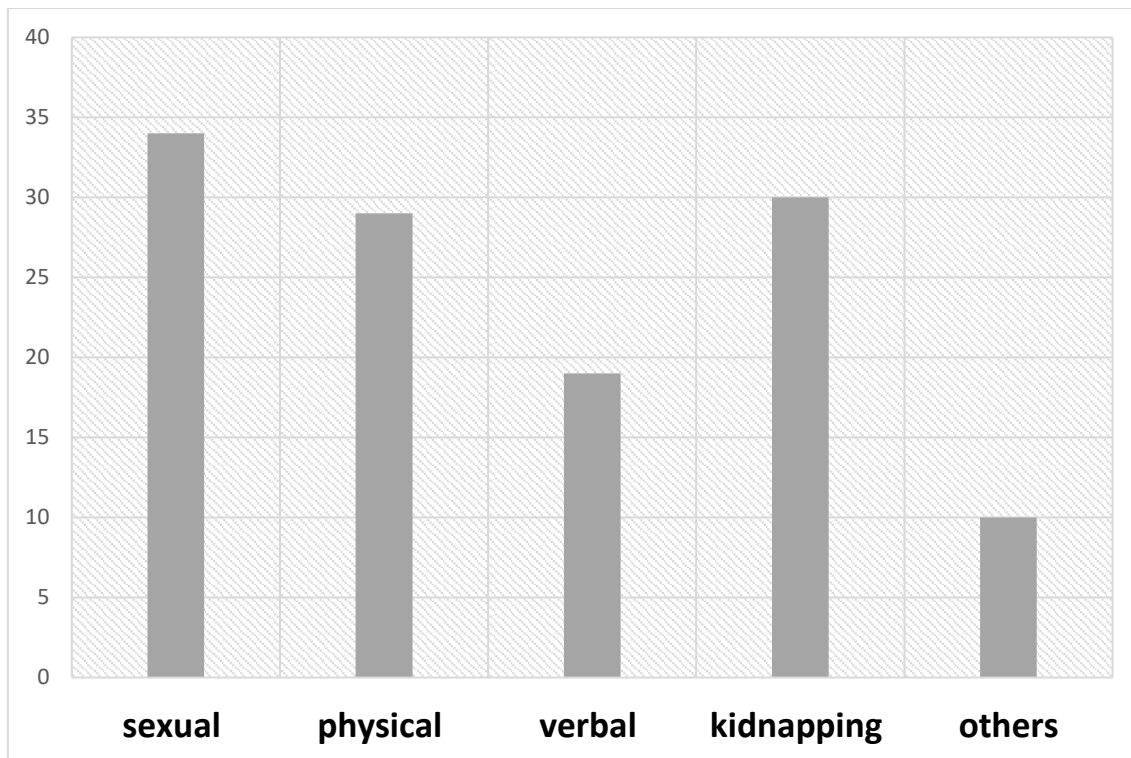


Figure 5 (Source Primary) Cases dealt with during their tenure

The Criminal Law (Amendment) Act, 2018⁴²⁵ mandates that charge sheets are to be filed within two months. To look into the practical implementation of the said provision at the grass-root level the researcher interacted with the police officers where 59 % of the police officers responded in affirmative while the remaining 41 % opined that it is often difficult to follow strictly this limitation of two months.⁴²⁶

It should be noted that most of the officers opined that they are rather compelled to file the charge sheet within the prescribed time limit mainly because the court would otherwise ask them to file an application explaining the cause for such delay and evade departmental action.

It is also pointed out that one of the major hindrances in filing a charge sheet complete in its format was mainly because these police officers were not exclusive for child abuse

⁴²⁵ No. 22 of 2018 An Act further to amend the Indian Penal Code, Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012.

⁴²⁶ See the bar graph 6 at page 135

cases but in the normal run of their duty they had to deal with many other issues and cases and therefore they found it extremely difficult and almost impracticable to complete the formalities to file a full proof and exhaustive charge sheet. The Presiding Officer of the court concurred with this view expressed by the police officer that there has to be a proper and appropriate division of duties for the effective functioning of the police in this regard. They further expressed that such activities are curtailing their efforts in providing quality charge sheets thereby leading to delay in speedy justice and many cases acquittals.

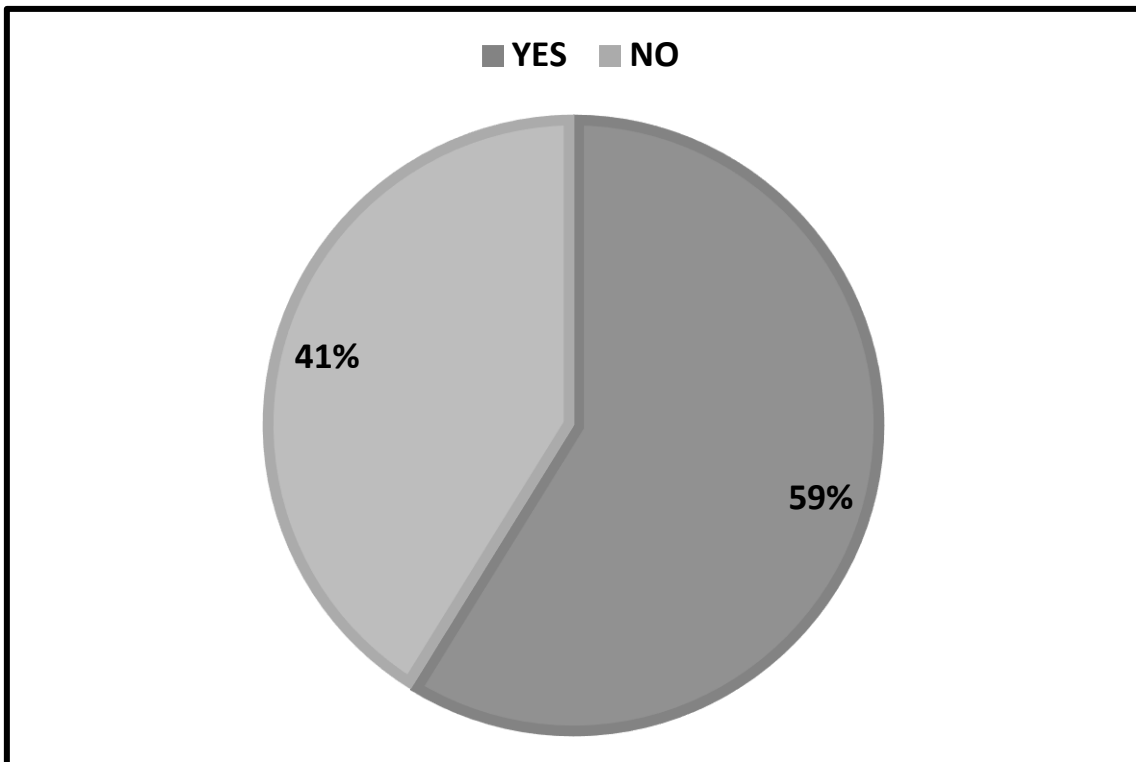


Figure 6. (Source Primary) Is it possible to file charge sheet within a period of two months.

5.6.7.2 Absence of Forensic Lab

Another pertinent ground pointed out by the police officers is that Goa does not have a forensic laboratory and hence they have to send specimens or evidence collected to other states like Hyderabad or Pune and in such cases, the reports come sometimes after a year.

Thus this was one of the reasons for the delay in filing charge sheets as well as concluding investigation within the time stipulated under the Acts to the questions as to how long does, it takes to investigate a child sexual abuse case as well as time to file a charge sheet in cases of child sexual abuse the police officers.⁴²⁷

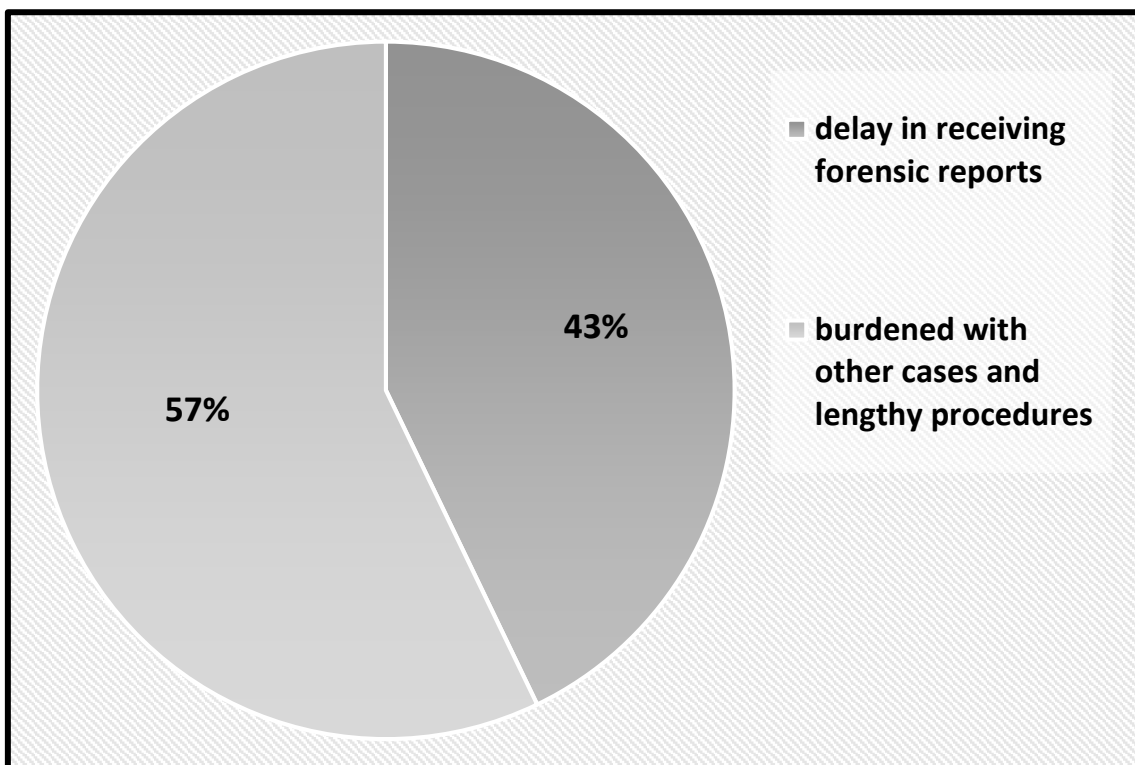


Figure 7 (Source Primary) Reasons as to why Charge sheet cannot be filed within two months

To look into the basic infrastructure, the researcher during her visit to the police stations inquired whether there is a dedicated/separate vehicle for victims to be taken to different agencies to this 83 % answered in the negative whereas 17 % answered in the affirmative. The said analysis is depicted in the form of a pie chart in **Figure 8**.⁴²⁸ While further interacting with the respondents who replied in the affirmative it was found that the arrangement of the vehicle was done as and when required and these vehicles were those

⁴²⁷ See Pie Chart at figure 7

⁴²⁸ See Figure at page 137

used to patrol. Hence it is summed up that there is no dedicated and separate vehicle assigned.

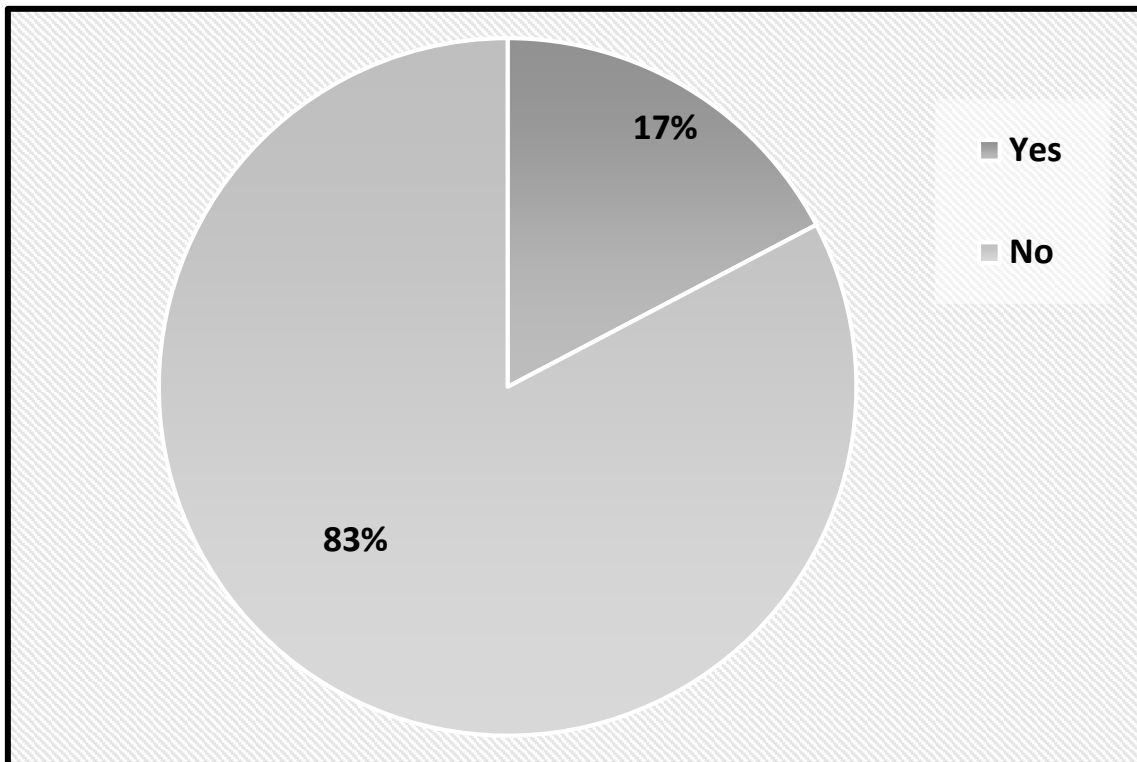


Figure 8. (Source Primary) Does your Police Station have additional vehicles to escort the victim and accused separately

5.7 Pre-trial stage

The pre-trial stage includes registering of First Information Report (FIR), recording of statements of the victim child under Section 161 of Criminal Procedure Code 1973 (Cr.

PC)⁴²⁹ and taking the child to different agencies i.e. medicals, recording of 164⁴³⁰ statements under Criminal Procedure Code (Cr. Pc) as well as the POCSO Act 2012⁴³¹ for investigation.

- a) FIR
- b) Recording of statement 161 of Cr. PC
- c) Medical Examination
- d) Scene of offence Panchanama
- e) Child Welfare Committee
- f) A statement under 164 Cr. PC

5.7.1 First Information Report

First Information Report⁴³² (FIR) is one of the most important ingredients for setting the criminal law in motion. Almost all cases of child abuse get initiated by registration of FIR upon receipt of information of abuse against children. The FIR empowers the police officer to investigate and arrest the perpetrator without any orders from the Magistrate or Court. This perhaps is due to the legislators treating all abuse against children as cognizable.

FIR is a basic document that provides the time place and date of the offence and the name of the perpetrator if available with the complainant. FIR is a document that also decides the jurisdiction which empowers the police to commence an investigation.

⁴²⁹ Section 161 Examination of witness by police (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special orders, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have tendency to expose him to a criminal charge or to penalty or forfeiture. (3) the police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each person whose statement he records.

⁴³⁰ See section 164 of Cr.PC. Recording of confessions and statements.

⁴³¹ Section 24 Recording of statement of the child and Section 25 Recording of statement of child by Magistrate.

⁴³² Hereinafter referred to in abbreviation form as FIR.

During my interaction with the police officers, I have observed that police officers have not shied away from registering zero FIR and then transferring the case to the police which has jurisdiction to investigate the matter. The same is evident from the data collected from various Police stations both in North Goa and South Goa.⁴³³

The researcher will first analyze cases registered in Police Stations District wise. The below graph in **Figure 9 and Figure 10** shows the number of cases registered with regards to child abuse in both the districts of the State of Goa. If one sees the graph it can be seen that Mapusa showed the highest number of cases being registered. However, Saligao was the lowest the second-lowest being Valpoi followed by Agaciam. Saligao shows less number of cases being registered as the said police station started only in the year 2015. One needs to note Mapusa is a town located in North Goa district and is close to the main centers of the Goa tourism industry. It is also known as a commercial town with a large resident population and slums. The jurisdiction of Mapusa police station on one side stretches to the coastal areas while on the other side it stretches to the villages and slums. Thus one could rationalize the number of cases being registered more at Mapusa police station rather than other police stations in North Goa. The jurisdiction of Mapusa police station is 112 square kilometers. One side is the coastal area and the other side is interior villages and slum areas.

However, when it comes to the South Goa district, Vasco shows the highest number of cases registered from the year 2010 to March 2021. One needs to understand that the reason for highest number of child abuse cases being reported in Vasco is the fact that being the port town, having a railway line and having never abandoned the claim to slum fame has a lot of migrants who come in search of economic opportunity thus making it unsafe for children. Fatorda Police Station shows the lowest number of registration of child abuse cases the same can be justified as the said police station was set up only in the year 2019⁴³⁴.

⁴³³ See Figure 9 and 10 at pages 140 and 142

⁴³⁴ See Figure 10 at page 142

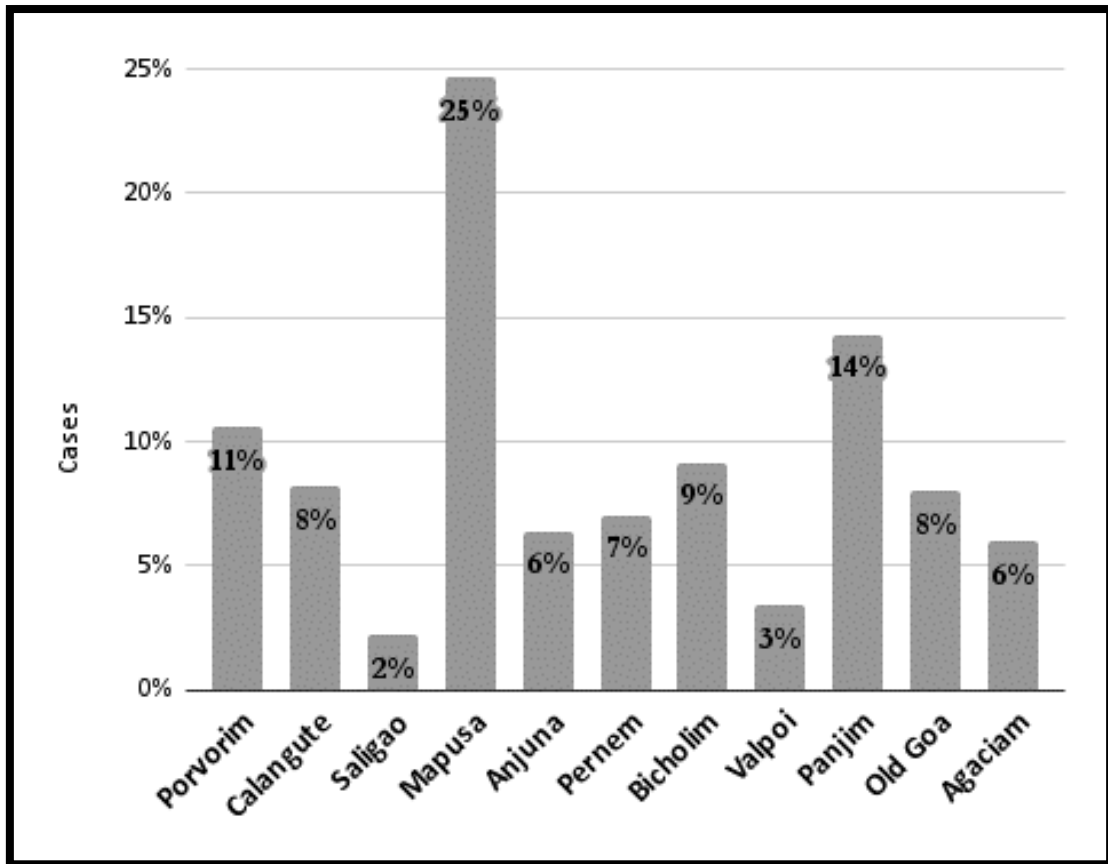


Figure 9. (Source Primary) Cases before North Goa Police Stations from the year 2010 to March 2021

North Goa	Number of Cases
Porvorim Police Station	11%
Calangute Police Station	8%
Saligao Police Station	2%
Mapusa Police Station	25%
Anjuna Police Station	6%
Pernem Police Station	7%
Bicholim Police Station	9%
Valpoi Police Station	3%
Panjim Police Station	14%
Old Goa Police Station	8%
Agaciam Police Station	6%

Table 1. (Source Primary) Cases reported at police stations located in North Goa District from 2010 to March 2021

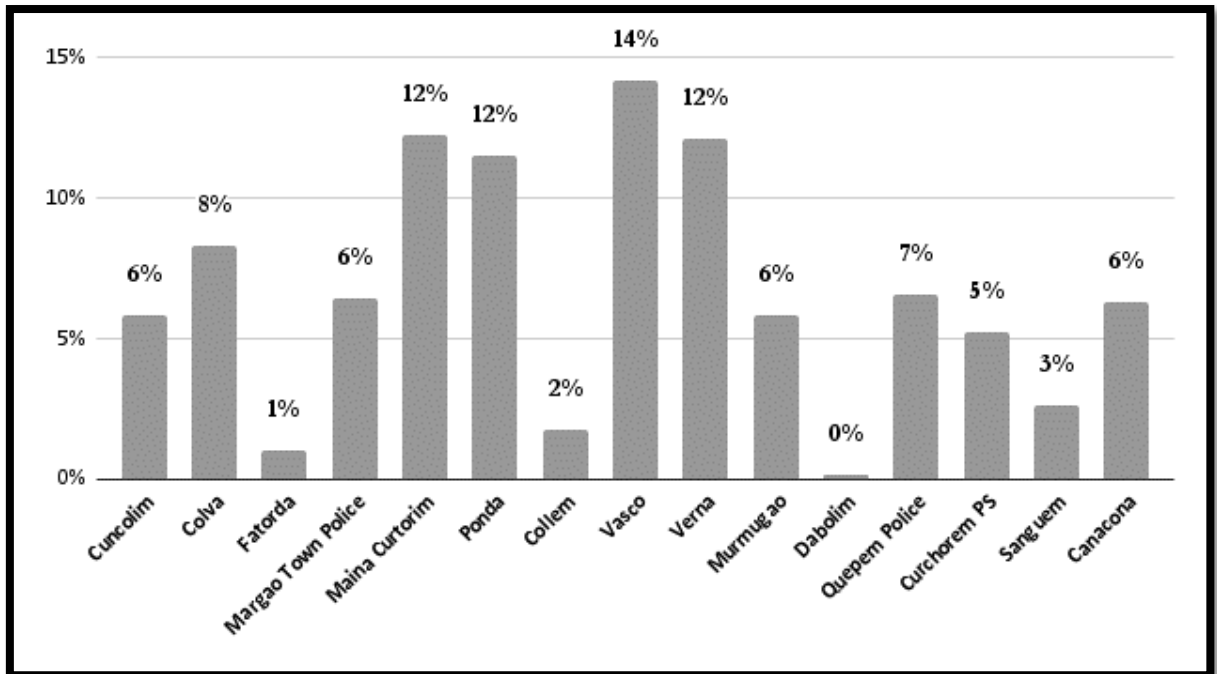


Figure 10. (Source Primary) Cases before South Goa Police Stations Year 2010 to March 2021

South Goa	Number of Cases
Cuncoim Police Station	6%
Colva Police Station	8%
Fatorda Police Station	1%
Margao Town Police Station	6%
Maina Curtorim Police Station	12%
Ponda Police Station	12%
Collem Police Station	2%
Vasco Police Station	14%
Verna Police Station	12%
Mormugao Police Station	6%
Dabolim Police Station	0%
Quepem Police Station	7%
Curchorem Police Station	5%
Sanguem Police Station	3%
Canacona Police Station	6%

Table 2. (Source Primary) Cases reported at police stations located in South Goa District from 2010 to March 2021

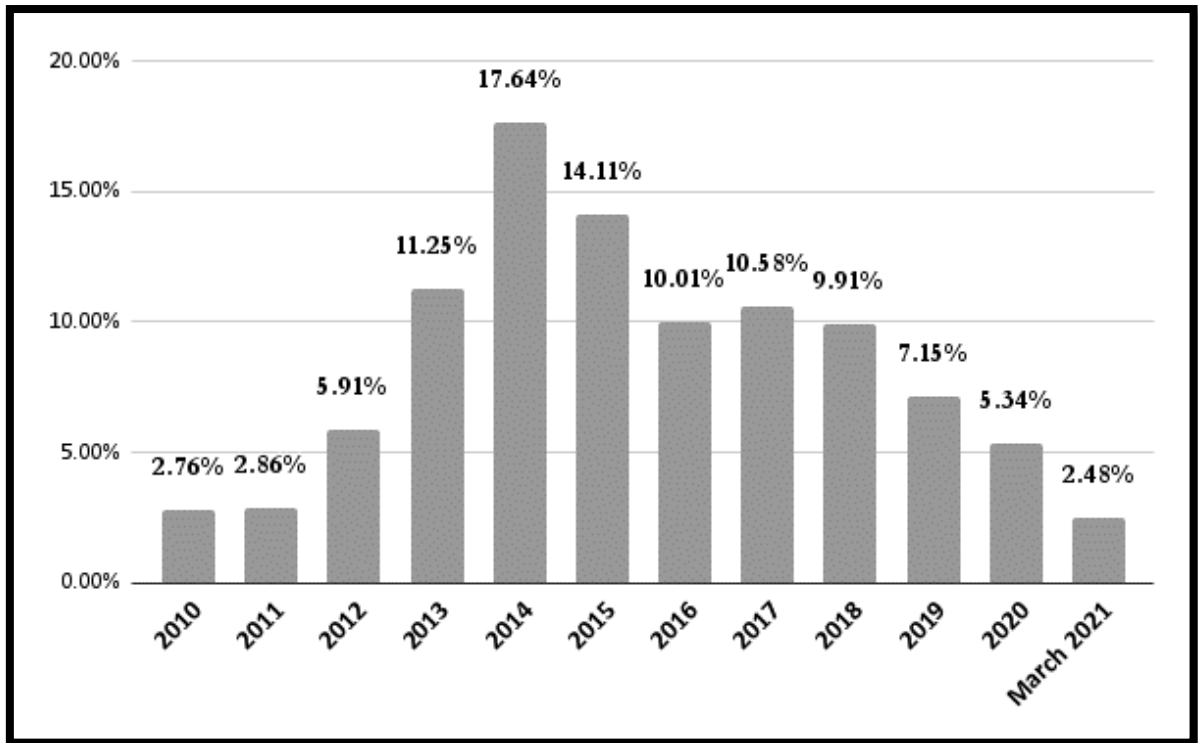


Figure 11 (Source Primary) Cases Reported in North Goa District from 2010 to March 2021

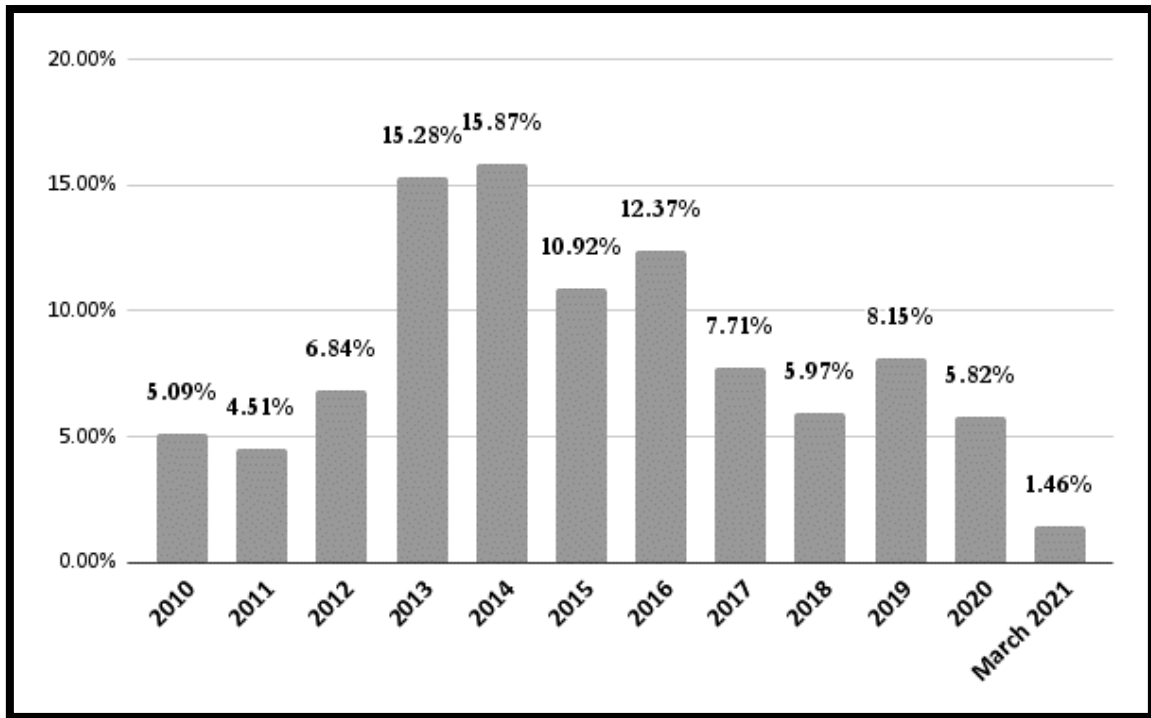


Figure 12 (Source Primary) Cases reported in South Goa District from 2010 to March 2021

5.7.2 Recording of Statement of Victim

During the interaction with the police officers, the researcher also got to know that many a times statement of the victim is not recorded at the Police Station however, the same is recorded sometimes at the Victim Assistance Unit or the residence/school of the victim. The Protection of Children from Sexual Offences Act 2012, as well as the Goa Children’s Act, 2003 and Rules 2004, lay down the statement of the victim has to be recorded at a place comfortable to the victim. Both the Acts have set provisions when it comes to recording the statement of the victim POCSO Act 2012 ⁴³⁵ and the Goa Children’s Act,

⁴³⁵ Section 24 Recording of statement of a child: (1) The Statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice as far as practicable by a woman police officer not below the rank of the sub- inspector. (2) the Police officer while recording the statement of the child shall not be in uniform. (3) the Police officer making the investigation, shall while examining the child, ensure that at no point of time the child comes in contact in any way with the accused

2003 and Rules 2004⁴³⁶ provides for an avenue of recording of the victim statement at a place comfortable to the victim. It was found that 38 % of the statements of the victim were recorded at the police station 52 % were recorded at the victim assistance unit, Forensic Department Bambolim while the remaining 10 % reported that the victim's statement was recorded at the residence/school of the victim. The said data is depicted in the form of a pie chart in **Figure 13**. On further interaction with the Police as to why the statements were recorded at the Victim Assistance Unit, the researcher was informed that the medical examinations of victims, as well as counselling, is provided at the same place hence recording of the statement of the victim at the unit helps in reducing the time and stress on the child victim

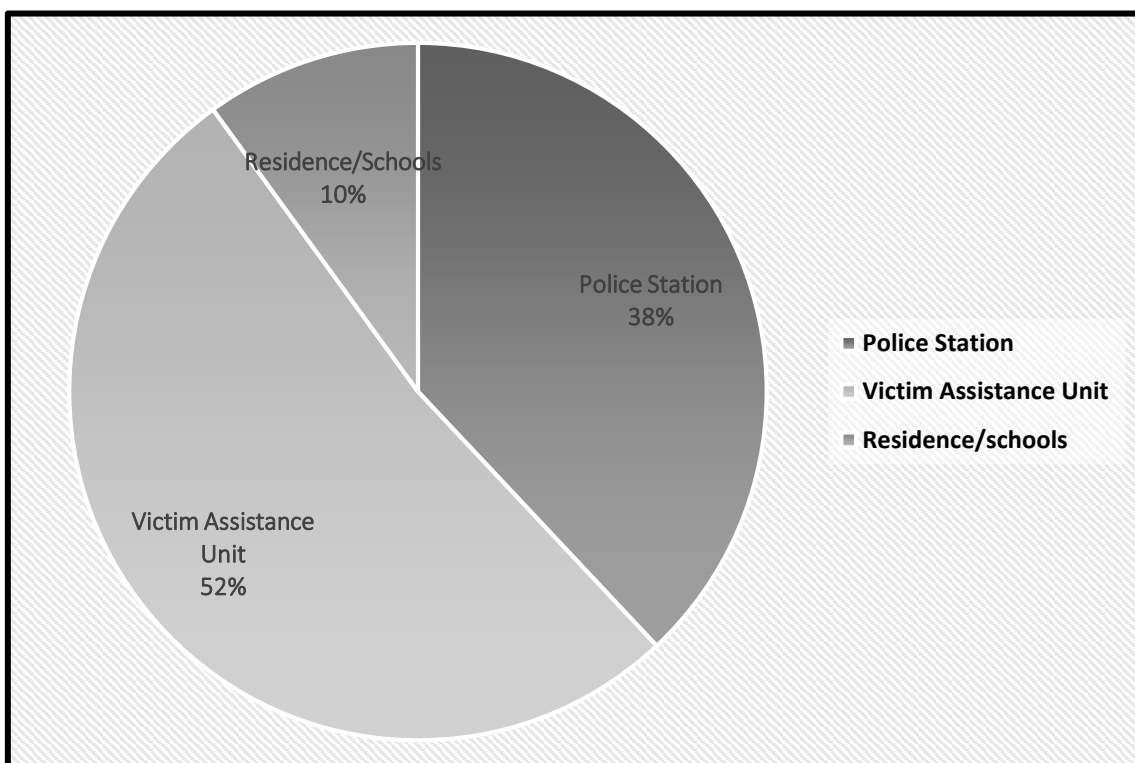


Figure 13 (Source Primary) Place of Recording of Statement of Victim

(4) No child shall be detained in the police station in the night for any reason. (5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

⁴³⁶ Section 32 (c) procedure of the children's Court Avoidance of harm: at all stages, from the initial contact till disposition, extreme care shall be taken to avoid any harm to the sensitivity of the child.

5.7.2.1 Presence of others while recording the statement

The POCSO Act, 2012⁴³⁷ as well as Goa Children's Act, 2003 and Rules, 2004⁴³⁸ mandates for a support person during the recording of the child's statement to validate the implementation of these provisions, through the interaction with the police officers it was found that in 100 % of cases NGO/Social worker was present during the recording of the child's statement while in few of the cases where the child was below 9 years it was found that one of the parents is allowed to remain present along with the social worker during the recording of the child's statement. This is one of the good practices which the Goa children's Act mandated which truly shows the silent flow of the implementation of the Best Interest of the child principle.

5.7.3 Medical Examination

When it comes to medical examination of the victim child Section 8 (3)⁴³⁹ of the Goa Children's Act, 2003 and Rules, 2004 and Section 32 (2) (i)⁴⁴⁰ and 32(2) (j)⁴⁴¹ are clause (3) are attracted.

Further, the Protection of Children from Sexual Offences Act, 2012 under Section 27 of the Act lays down the procedure for conducting medical examination of the victim

⁴³⁷ See Section 26 of the Act Additional provisions regarding statement to be recorded.

⁴³⁸ See Section 32 (2) (k) Child's (testimony or statement) should be recorded in the presence of a social worker/counsellor as early as possible after the abusive incident with other witnesses at hand.

⁴³⁹ Section 8 (3) (In cases of sexual assault on a child, the investigating authorities shall ascertain the need to medically examine the child victim in consultation with the medical authority. In cases of child abuse or grave sexual assault on a child, such medical examination of the victim child shall be compulsorily done)

⁴⁴⁰ Section 32(2) (i) The investigator ascertains the need for medical examination of the child victim and when examination is undertaken, ensures the multiple re- examination is avoided.

⁴⁴¹ Section 32 (2) (j) the medical examination should be conducted in the presence of the parent/guardian and social worker/counsel as far as possible.

child.⁴⁴² The Act in its rules⁴⁴³ further states that as soon as the police receive a report of the commission of an offence against the child has to be taken to the nearest hospital or medical care facility. This may be a government facility or a private one. If one reads the Criminal Law (Amendment) Act, 2013⁴⁴⁴ which inserted Section 357C⁴⁴⁵ in the Code of Criminal Procedure, 1973 it provides that all hospitals are required to provide first- aid or medical treatment, free of cost, to the victims of a sexual offence. Thus when it comes to medical examination of the victim child of sexual abuse the same must be conducted as per the provisions of Section 27⁴⁴⁶ of the POCSO Act, 2012 and Section 164A of Criminal Procedure Act, 1973.⁴⁴⁷

Before 2014, medical examination with regards to child sexual abuse cases was conducted by the forensic department in the State of Goa which involved male doctors. Presently

⁴⁴² Section 27 – Medical Examination (1) Medical examination of a child in respect of whom any offence has been committed under this Act, shall notwithstanding that a First Information Report or complain has not been registered for the offences under this Act, be conducted in accordance with Section 164A of the Code of Criminal Procedure, 1973. (2) in case the victim is a girl child, the medical examination shall be conducted by a woman doctor. (3) the medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence. (4) where, in case the parent of the child or other person referred to in sub – section (3) cannot be present for any reason during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

⁴⁴³ Rule 5 Emergency medical care – (1) Where an officer of the SJPU, or the local police receives information under Section 19 of the Act that an offence under the Act has been committed, and is satisfied that the child against whom an offence has been committed is in need of urgent medical care and protection, he shall, as soon as possible, but not later than 24 hours of receiving such information, arrange to take such child to the nearest hospital or medical care facility centre for emergency medical care:

⁴⁴⁴ Criminal Law (Amendment) Act, No13, of 2013.

⁴⁴⁵ Section 357C states that both private and public health professionals are obligation to provide treatment. Denial of treatment of rape survivors is punishable under Section 166 B of Indian Penal Code with imprisonment for a term which may extend to one year or with fine or with both. It states that health professionals need to respond comprehensively to the needs of the survivors. Section 357C Treatment of Victims: All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first- aid or medical treatment, free of cost, to the victims of any offence covered under Section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code, and shall be immediately inform the police of such incident.

⁴⁴⁶ Ibid 28.

⁴⁴⁷ Section 164 A (1) where during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within 24 hour hours from the time of receiving the information relating to the commission of such offence.

the process of medical examination is transferred to the Department of Gynaecology wherein a team of female doctors are involved in conducting medical examinations on victims of sexual abuse. When the victim of sexual abuse is a boy the medical examination is conducted by a male doctor from the forensic Department.

As far as consent for medical examination is concerned for medical examination, the medical jurisprudence provides for; that in case of a child victim below the age of 12 years a parent is required to consent for the medical examination⁴⁴⁸ and that in case of a child victim above 12 years the victim herself can consent for medical examination.

5.7. 4 Trial Stage

The researcher has analysed the following points at the trial stage.

1. Structure of the Court (when the court was established, are there special public prosecutors appointed do they exclusively deal with cases related to children. Is the court child-friendly are facilities available to prevent exposure of the victim child to the accused?)
2. The procedure followed by the Children's Court

5.7.4.1 Establishment of Children's Court and Special Court under the Protection of Children from Sexual Offences Act 2012

The Goa Children's Act 2003 and Rules, 2004 states that the State Government shall, after consultation with the High Court, by notification in the Official Gazette, constitute

⁴⁴⁸ The medical term used for this kind of consent is termed as informed consent i.e. child's agreement to medical procedures in circumstances where he or she is not legally authorized or lacks sufficient understanding for giving consent competently. The ethical basis for an informed consent is that it respects the autonomy of the individual and protects the patient from any form of physical or psychological harm, thus ensuring active participation of the individuals in treatment intended to restore their health. It is also considered as a legal document to protect the practitioner from claims associated with miscommunication.

a Children's Court for the state of Goa.⁴⁴⁹ It further provides that in all aspects the functioning of the Children's Court shall be guided at all times by the best interest of the child and the attire of the staff as well as the members of the legal profession and all others shall be consciously and deliberately Child Friendly.

According to Section 28 (1) of the Protection of Children from Sexual Offences Act 2012, the State Governments in consultation with the Chief Justice of the High Court are required to designate a Sessions Court as a Special Court in each district to try offences under the Act. The main objective of establishing such courts is to facilitate the speedy trial of cases. The Act⁴⁵⁰ further provides that where a Sessions Court notified as a Children's Court under the Commission for Protection of Child Rights, 2005 or a Special Court designated for similar purposes under any other law, such court is to be regarded as Special Court under the POCSO Act, 2012.

Goa is the first state in India to have a separate children's court hence there was no need to designate a Sessions Court as a Special Court.

5.7.4.2 The procedure followed by the Court

The Goa Children's Act, 2003 and Rules, 2004 under Section 32 states the procedure to be followed by the Children's Court.⁴⁵¹ Further the Protection of Children from Sexual Offences Act, 2012 also states how the Special Court should function.⁴⁵² Thus, when it comes to the trial of child abuse cases the needs of the victim child as well as the rights of the victim child have to be considered by the President of the Children's Court, the prosecutors, and others.

⁴⁴⁹ Section 27 of the Goa Children's Act 2003 and Rules, 2004

⁴⁵⁰ Section 28 (1) of the POCSO Act, 2012.

⁴⁵¹ Section 32 (1) The Children's Court shall follow such procedures as may be prescribed: provided that the procedure so prescribed shall be child friendly and shall be deemed to include point a to n.

⁴⁵² Section 33 (4) The Special Court shall create a child- friendly atmosphere by allowing a family member, a guardian, a friend, or a relative, in whom the child has trust or confidence, to be present in the court.

If one tries to analyse the aspects of child-friendly justice under the Acts i.e. The Goa Children's Act, 2003 Rules, 2004 and the Protection of Children from Sexual Offences Act 2012 both these acts emphasize speedy trial⁴⁵³. Further, the procedures are modified to cater to the special needs of children⁴⁵⁴.

It is to be noted that from the year 2004 to the year 2014 the Children's Court did not have a permanent Presiding Officer. During this time the judges appointed to the Sessions Court acted as presiding officers as an additional responsibility to their normal function as a sessions court judge. This has of course hampered the effective way in which a Children's court of this nature was expected to function. It was only in the year 2014 that the Goa government deemed it fit to appoint a full-time regular presiding officer for the Children's Court in Goa. Undoubtedly this was a boost in protecting and upholding the best interest of the child namely that of the victim child. It is surprising to note that the Government of Goa came with a notification⁴⁵⁵ designating Additional Sessions Judge as full time special judge for Children's Court.

⁴⁵³ Section 28 of the POCSO Act provides for establishment of Special Courts for the purpose of providing speedy trial. Further Section 35 of the Act provides that evidence of the child shall be recorded within a period of thirty days of the special Court taking cognizance of the offence and reasons for delay if any, shall be recorded by the Special Court. Further the section states that the Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence. Section 35 of POCSO Act, 2012 states Period for recording of evidence of child and disposal of case (1) the evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, of any shall be recorded by the Special Court. (2) The Special Court shall complete trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

⁴⁵⁴ Section 26 Additional provisions regarding statement to be recorded 26 (3) The Magistrate or the police officer, as the case may be, may in case of a child having mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child. Section 33 Procedure and powers of Special Court 33(4) The Special Court, shall create a child friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the Court. Section 33 (6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that the dignity of the child is maintained at all times during trial.

⁴⁵⁵ Notification No.12-14-2014/LD(Estt) dated 27/08/2014

5.7.4.2.1 Speedy Trial

The right to a speedy trial is said to be an inalienable right under Article 21⁴⁵⁶ of the Indian Constitution. Though the said right to a speedy trial is not specifically enumerated as a fundamental right under Article 21 of the Indian Constitution, however, it is said to be implicit in a broad manner in the content of Article 21 of the Constitution. The purpose of speedy trial in the criminal justice system is twofold one to ensure justice to the victim and second to protect the accused from unnecessary captivity before the final decision. In the present research, the researcher will analyse the concept of speedy trials when it comes to victims. Section 32 of the Goa Children's Act, 2003 and Rules, 2004 lays down the procedure to be followed by the Children's Court. However, Section 28 of the Protection of Children from Sexual Offences Act states that the main purpose of designating special courts to try offences under the act was for providing speedy trials.

Speedy trial minimizes the anxiety a victim has to go through about their testimonies, anxiety as to when the trial will come to an end, anxiety when they will be able to move on with their lives and the anxiety whether the perpetrator will be convicted or not and thus unable to cause any further harm to them.

The Goa Children's Act, 2003 and Rules, 2004 as well as the Protection of Children from Sexual Offences Act 2012 emphasize a child-friendly justice system. One of the aspects it emphasizes is a speedy trial as well as procedures that are child-friendly to cater to the special needs of the child. To ascertain this aspect, the researcher collected first-hand data from the Children's Court. This data is collected from the year of inception of the Children's Court till April 2021.

5.7.4.2.2 Review of cases filed before Children's Court

With the establishment of the Children's Court, there was indeed a new awareness regarding child-related offences in the State of Goa. This is amply evident in the graphical

⁴⁵⁶ See Article 21 of Indian Constitution

representation of the same at **Figure 10** one can notice that the filing of cases reached its peak in the year 2012. It is not that child abuses were rampant in Goa but one needs to consider this relative vis the population of Goa. One could understand that this high proportion is mainly because of the unaccounted population of Goa namely tourists and to greater extent migrant workers.

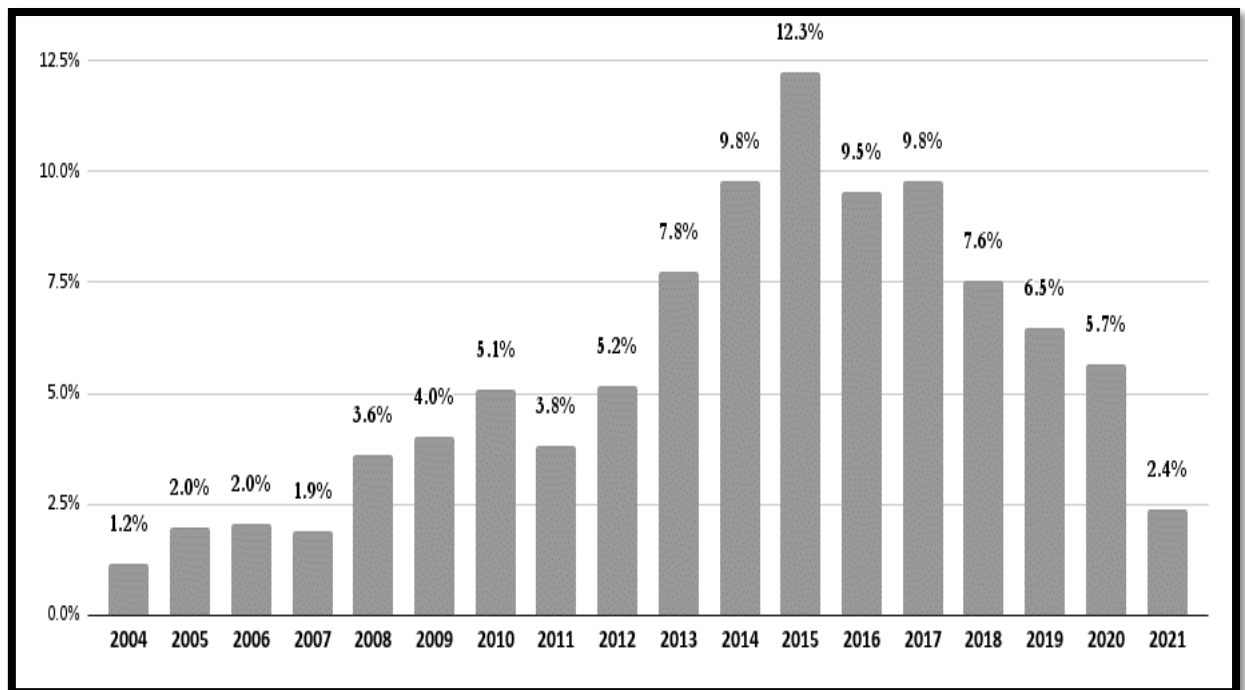


Figure 14 (Source Primary) Cases filed before the Goa Children's Court from 2004 to April 2021

Figure 14 shows the number of cases that have been filed before the Children's Court from the time of inception to April 2021. If one observes the highest number of cases is in the year 2015 with a total 180 cases 180. Further, the rise in cases is from the year 2013 to 2018. This shows that greater awareness was created in the area of reporting offences.

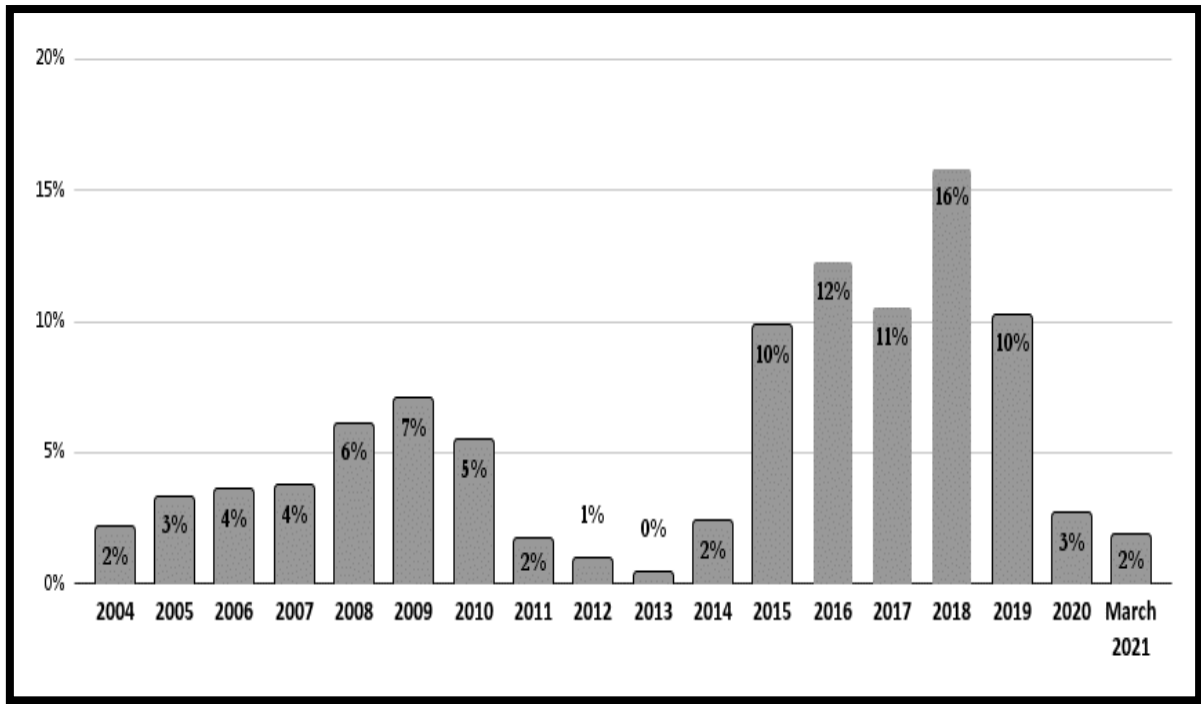


Figure 15 (Source Primary) Cases Disposed of by the Goa Children's Court from 2004 to April 2021

5.7.4.2.3 Disposal of cases

The figurative depiction of the number of cases and their variation from year to year is depicted through **Figure No. 14**

5.7.4.2.4 Periodicity of Court Sittings

The highest number of disposals is shown in the year 2018. However, the lowest disposal is between 2012 to 2013. Upon analysing the data, the researcher has come to the finding that from the year 2004 till the year 2014 as there was no permanent presiding officer for the Children’s Court and the sittings of the court differed from thrice a week, twice a week, once a week and ultimately when a permanent Judicial officer was appointed in the year 2014 it was sitting on all working days. From the time of inception of the children’s

court in the year 2004 to 2005, the Court used to function only once a week. During this time the rate of disposal of cases was less. However, when it was thrice a week i.e. from 2006 to September 2011 the disposal rate increased. Again from the year 2011 to 2014 (September) when the sittings were once a week the rate of disposal dropped and it was only in the year 2014 after several efforts were made by the Victim Assistance Unit for the state of Goa that a Permanent Presiding officer was appointed for the Children’s Court.

Year	sittings of the Goa Children’s Court
2004 to 2005	once a week
2006 to 2011 (Sept)	Thrice a week
2011 (Oct) to 2014	once a week
2014 (September) to 2021	permanent

Table 4. Source Primary Sittings of the Children’s Court

5.7.4.2. 5 Infrastructure

For a Children's Court which deals with children their emotions, pains, sufferings and the law which affects their well-being it is pertinent that the Court atmosphere and the accompanying infrastructure are suitable and adequate in every sense of the term. Keeping this aspect of the necessity of making the children comfortable especially the victim children the Goa Children’s Act under Section 27⁴⁵⁷ has made it mandatory by appropriate words that the Court shall be guided by the principles of the best interest of the child and procedures to be a child- friendly.

⁴⁵⁷ Section 27 provides The State Government shall constitute a Children’s Court for the State of Goa. It further provides that the said court at all times shall be guided by the best interest of the child and all its procedures shall be child friendly”.

Thus the Act is clear and specific terms imposes an obligation of upholding the best interest of the child in the functioning of the Children's Court and all its accompanying procedures and processes.

The Children's Court established under the Goa Children's Act, 2003 and Rules 2004 is set up in a commercial building which has other offices such as employment exchange, Labour Department, Department of Prosecution, etc. This setting of a court in a commercial building does play a very important role as people do not feel stigmatized entering the commercial building. Until 2015 the Children's Court functioned irregularly i.e. sometimes twice a week and sometimes once a week this lead to huge pendency of cases of child abuse in the children's Court. The Children's Court was also a court on par with the sessions court hence empowered to deal with offences which included life imprisonment to death.

A representation made by SCAN Goa was taken by the then Law minister Mr. Francisco D'Souza who moved the Government's decision to the Hon'ble High Court thereby leading to the appointment of a permanent judge. A lady judge Smt. Vandana Tendulkar was appointed solely for the functioning of the children's court and since then the children's court started to function throughout the week. Having a permanent judge has shown an increase in the number of disposal of matters before the Children's court the same is evident in **Figure 15**⁴⁵⁸.

The State Government took various initiatives thereafter and one which is worth noting is that the Children's Court has two permanent lady public prosecutors designated as Special Public Prosecutors.

During my visit to the court and my interaction with the stakeholders therein, it was observed that the children's court lacks space for its functioning. The mudamal/ storage room was seen overstored with crucial evidence in cases pending before the court. Similarly, the staff functioned in a congested space. The two Public Prosecutors sit in a small cabin and do not have a dedicated table or space for themselves this does not give

⁴⁵⁸ See Figure 15 at page 128

the space to the Public Prosecutors to interact with the victim or the family members who come as witnesses in cases before the children's court. No waiting room nor a separate sitting space was observed for being dedicated as a waiting room for victims or witnesses. While the children's court staff have a very friendly approach while dealing with witnesses or any person visiting the children's court but it was found that this staff are transferrable to the Department of women and child upon their promotion as desired by the administration of the Director of Women and Child Department (DWCD) and do not come under the appointments of the Hon'ble High Court as stated in the manual of the High Court. This has led to an increase in pendency as every new staff appointed in the children's court has to be trained by the President of the Children's Court.

During the perusal of records on the establishment of the children's court, the researcher came across a Report⁴⁵⁹ submitted by the then Law Commission in 2010 wherein it was proposed to establish children's court in each district. This recommendation was proposed by the Law Commission, which had then Mr. Ramakant D. Khalap as Chairman and Shri. Cleofato Coutinho and Shri Mario Pinto Almeida were the members.

“Section 13 (14)⁴⁶⁰ provides for the formulation of an exclusive Child Code. During the interaction with the police, it has been found that no such code is formulated however awareness programmes on child-related laws are conducted on yearly basis for the police.

5.7.4.2.6 Special Public Prosecutors

The POCSO Act, 2012 (Section 32 (1) and The Goa Children's Act, 2003 Rules 2004 and provide for the appointment of Special Public Prosecutors for conducting cases under the provisions of the Acts. The Special Public Prosecutor is expected to exclusively handle cases under the Act.

⁴⁵⁹ Law Commission Goa, (Report No.11) dated 6th August 2010.

⁴⁶⁰ Section 13 Other Provisions (14) The Police Department shall formulate an exclusive Child Code including issues of Child Friendly Police Stations, interaction and behaviour with children, mandatory sensitizing programmes etc.

5.7.4.2.7 Layout of the Courtroom

Section 27(2) of the Goa Children's Act, 2003 and Rules, 2004 and Section 33 (4) of Protection of Children from Sexual Offences Act, 2012 lays down that the functioning of the Children's Court should always be guided by the principle of the best interest of the child and all procedures should be child friendly.⁴⁶¹ These provisions provide ways in which the courtroom can be made child-friendly. Both these provisions do not mention any physical dimension of the courtroom. The external looks of the Children's Court are similar to other courts. There is a single entrance to enter the courtroom. However, at all times it is ensured that the victim child is prevented from being exposed to the accused person in any way whatsoever.

There is no waiting room for the child victims and family members. Though there is no waiting room for the child victims and family members the court staff is specially instructed to ensure that in the movements of the victim child under no situation they should come in contact with the accused person.

The absence of necessary toilet facilities specifically for the use of such victim children or a physically challenged victim is a matter of concern since the building as a whole has only one single toilet set up which is under lock and key and the keys are available only with respective department officials.

⁴⁶¹ Section 27 (2) In all aspects of its functioning, the Children's Court shall be guided at all times by the best interest of the child and all its procedures, the office, the dress worn by the Members of the legal profession and all others shall be consciously and deliberately Child Friendly. Section 33 (4) The Special Court shall create a child friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust confidence, to be present in the court.

5.7.4.2.8 Facilities to record testimony and prevent exposure

POCSO Act Section 36 (1)⁴⁶² and Goa Children's Act, 2003 and Rules, 2004 under Section 32(m)⁴⁶³ these provisions ensure that during the stage of the trial the victim child is not exposed to the accused at the time of recording of evidence or otherwise throughout the proceeding. The following alternative modes like video conferencing can be used, curtains to separate the accused and the victim child, use of a single visibility mirror, or any other appropriate device.

All efforts are made to minimize any kind of exposure of the victim child to the accused. Before the child is called in the accused is asked to come and sit behind the curtain. The child is also not made to stand in the witness box however is made to sit right next to the Presiding Officer who ensures that he or she is comfortable at all times of the proceedings. the victim child or witness is at no point of time allowed to see the accused or is made aware of the presence of the accused person.

5.7.4.2.9 Examination of the Child Victim

Section 32(n)⁴⁶⁴ of the Goa Children's Act, 2003 and Rules, 2004 and Section 33 (2)⁴⁶⁵ of POCSO Act, prohibit the Special Public Prosecutor and the defence lawyer from

⁴⁶² Section 36 (1) of POCSO Act, 2012 Child not to see accused at the time of testifying 36(1) the Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate. (2) for the purpose of the sub- section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

⁴⁶³ Section 32 (m) Procedure for Children's evidence: whenever a child who is a victim of a crime or witness to a crime is required to depose before any authority including this Court, the child shall not be exposed to the presence of the accused or the perpetrators of the crime but the Advocate for the accused shall be allowed to be present.

⁴⁶⁴ Section 32(n) cross examination of child witness: Whenever there is a need to cross examine a child witness, care shall be taken to see that the tender age or in case of a victim, the psychological condition of the child is taken into consideration and the Children's Court may adopt such procedures which are fair and suitable to the child.

⁴⁶⁵ Section 33 (2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in- chief, cross examination or re- examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

putting direct questions to the victim child. Questions during examination in chief as well as cross-examination must be routed through the Special Court Judge. Further, Section 33 (6) POCSO Act, 2012 also states that aggressive questions cannot be posed to the child⁴⁶⁶ and at all times dignity of the child must be maintained. Mostly all questions were posed through the Judge. At times the Judge permits the defence lawyer or the prosecutor to ask some direct questions. The Judge intervenes whenever insensitive questions were asked.

5.7.4.2.10 Courts effort at Victim Comfort some Illustrations

Section 33(4) of the POCSO Act, 2012⁴⁶⁷ and Section 27 (2) ⁴⁶⁸state that sufficient time is given to the child to relax during the cross-examination.

In cases where the child directly came from school, food was offered to the child as well as snacks and water too was offered to the child. The child is made very comfortable during her visit to the court. The Presiding Officer also opined that the facility of availability of toys and other smaller things would help in comforting the victim child. The Court is in the process of using an existing scheme to achieve this.

The researcher is happy to note that efforts were being made by the Presiding officer to make the atmosphere child-friendly. The Presiding officer believed that the facility of availability of a medical doctor would greatly enhance the comforting of child victim at times as there were previous instances where the child developed some symptoms of anxiety and the court officials were at a loss as to how to handle such a situation not only that the cross-examination was abruptly stopped but the court had to summon the emergency services by calling the number 108.

⁴⁶⁶ Section 33 (6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during trial.

⁴⁶⁷ Section 33 (4) The Special Court shall create a child friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

⁴⁶⁸ Section 27 (2) In all aspects of functioning, the Children's Court shall be guided at all times by the best interest of the child and all its procedures, the office, the dress worn by the Members of the legal profession and all others shall be consciously and deliberately Child Friendly.

5.7.4.2.11 The assistance of interpreters, experts, and special educators

The Protection of Children from Sexual Offences Act under Section 38 states that the special court may take the assistance of a qualified translator, interpreter, special educator, or a person familiar with the manner of communication of a child. This section gives discretion to the judge to seek the assistance of an expert. However, Section 119 of the Indian Evidence Act which was amended by the Criminal Law Amendment Act 2013 makes it mandatory for the court to take the assistance of an interpreter or special educator when recording the statement of a witness who cannot communicate verbally and to video graph the statement. The Goa Children's Act 2003 and Rules 2004 under Section 32 (2) (l) provide that adequate translation/interpretations and translators/interpreters who are sensitive to the children's needs should be provided wherever needed. Further, under Section 32 (2) (m) it states that in the case of a mentally challenged child, the competent service provider should depose on behalf of the child. section.

Section 32 (2) (n) of the Goa Children's Act 2003 and Rules 2004 states that the special needs of the child victims/witnesses should be catered for.⁴⁶⁹ When it comes to familiarizing the child with the court proceedings we have the ' going to court programme wherein the law students of V.M. Salgaocar college of law accompany these children to the court and assist the victim child and their families with the process of the court.

⁴⁶⁹ The elaborate sub clause 2(n) states the following special needs of the child victims i) enable children to familiarize themselves with the court surroundings; ii) inform children of the different roles of the key persons at court, such as judge, the defence lawyer and the prosecutor; iii) inform the court of the special needs of the children in general and of individual children in specific cases; iv) help children to be comfortable in the proceedings. v) encourage questionings to be short and clear so as to not to confuse child witnesses; vi) permit children below eight years of age to respond to leading questions facilitated by social worker.

5.7.4.2.12 Protection of Identity of the child

The Protection of Children from Sexual Offences Act, 2012⁴⁷⁰ and the Goa Children's Act, 2003 and Rules, 2004⁴⁷¹ state that the identity of the victim child should be protected throughout the proceedings. No reports in print media should disclose the identity of the child which will lead to identifying the victim child.

5.8 Conclusion

In conclusion, one would like to summarize that one thing the Government of Goa should be applauded for bringing the interest of the child to the center stage by enacting unique legislation of the nature of Goa Children's Act. Goa is the first state in India to do so this is pathbreaker legislation through the efforts of many child rights NGOs and the educational institutions like the Law college has played a pivotal role in bringing into being legislation of this nature. This initial enthusiasm in the enactment of a law of this nature would expect one further proactive and natural step by the Government in the establishment of the required machinery i.e. the Children's Court. The researcher notes this personal apprehension at the great reluctance of the authorities despite the legislative requirement in creating the necessary infrastructure conducive to the best interest of the child. The researcher would indulge in further analysis of this aspect in the next and the final chapter which deals with the conclusions and suggestions while deeply exploring

⁴⁷⁰ Section 23 Procedure for media (1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy. (2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child: provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child. (3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omission of his employee. (4) Any person who contravenes the provisions of sub- section (1) or sub – section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

⁴⁷¹ Section 32 (2) in all dealings with children, the Children's Court shall follow the following guidelines (g) The identity of the child victim is protected.

and x-raying how and to what extent the Government was successful/reluctant in creating and realizing the best interest of the child.

CHAPTER 6

**CONCLUSION SUGGESTIONS AND
RECOMMENDATIONS**

6.1 Introduction

“Children are nations future and tomorrows citizens”. Pandit Jawaharlal Nehru,⁴⁷² further said children are like buds in a garden and should be carefully and lovingly nurtured.... This statement was not made in a casual manner or a vacuum it underlined India’s ethos and concern for its children. The same concern for children and the philosophy of care and concern is underlined in the various provisions of the Indian Constitution, to begin with, the very fundamental rights under Articles 14, 15, 17, 19, 20, 21, 21A, 23, and 24. (each article give the footnote) In addition to this, an obligation has been cast on the State under the Directive Principles of State Policy namely Article 39, 45, 46, 47, 51, etc. and added to this is the recent addition of Article 51 A the Fundamental Duties under (k) regarding the obligation of the parents to provide education to children under 14 years. All these Articles read to gather created an underlying web of India’s commitment to children. The Adoption of the National Policy for children in 1974 was one of the manifestations of India’s concern for the welfare of its children.

Added to this strong philosophical and ideological background of child protection Article 3 of the Convention on the Rights of the child merely spelled it specifically as the best interest of the child. This principle of the best interest of the child has created three kinds of rights for children namely the substantive right of best interest, the interpretative legal principle of best interest, and the principle of procedural application of best interest. This threefold application of the best interest of the child is mainly to ensure that in all situations and in whatever condition the children are considered in terms of their best interest. This is of course one of the primordial reason that the Goa Children’s Act has incorporated the application of child rights conventions in its interpretation. The Act finds and specifically spells the need to apply and implement the Best interest of the child principle. In its application to child victims.

⁴⁷² First Prime Minister of India from 1947- 1965

This specific thrust is the cause for the researcher's dissertation which examines how far and to what extent the Government of Goa has been successful in applying and implementing the Best Interest principle for the benefit of child victims. Since the Goa Children's Act 2003 and rule 2004 has enabled the establishment of the Children's Court to deal with all cases where the child is a victim. The researcher has focused her attention on the functioning of the children's court in terms of fulfilment of this paramount principle of the Best Interest of the child.

Since this study in addition to doctrinal analysis and exposition of the best interest of the child did undertake empirical research in Goa in terms of application of this concept in the day-to-day functioning of the criminal justice system in its impact on child victims.

The researcher has undertaken to lay down the road map of this research in the first chapter by laying down the research problems including formulation of the relevant hypothesis for the study. To lay down a sound foundation as to the understanding of the concept the researcher used jurisprudential tools to examine this concept in terms of its origin and the international law before coming to an in-depth analysis of the national legislations especially the Goa Children's Act 2003. Having thus laid down a sound foundation as to the understanding of the concept the Researcher then undertook a focussed and scientifically planned empirical study to critically evaluate the ground realities in the application of this concept concerning child victims.

This endures on the part of the researcher has enabled her to critically examine and validate the hypothesis formulated by her for this study for clarity of understanding and for a clear and lucid presentation these findings are juxtaposition in terms of the hypothesis⁴⁷³. For convenience and of course clarity the hypothesis is enumerated once again.

⁴⁷³ see hypothesis mentioned in Chapter 1 at page 18

1. The authorities established under the Goa Children's Act 2003 have not been successful enough to implement the Best Interest of the child principle⁴⁷⁴.

For the study, the researcher did an interview as well as an administered questionnaire to the authorities under the Goa Children's Act, 2003 who have the responsibility to ensure the best interest of the child especially child victims. In this regards the researcher had the opportunity to interact with the presiding officers of the Goa Children's Court. These presiding officers opined that in the scheme of the criminal administration system they are expected to function within the available resources and manpower be it the structural layout of the court or additional facilities for child victims etc. In this regard as already discussed in Chapter 5, the presiding officers have tried to manage their best within what is allotted to them. However, they opined that what is done is certainly inadequate much more could be achieved in this area provided they are so sanctioned and approved by the higher governmental authorities.

The second run of authorities who would deal with child victims is the Police officers and their respective police stations. It should be recorded that most of the police officials were sympathetic and concerned with the welfare and well-being of child victims however, they are expected to function within the precincts of their respective police station and within the authority so endowed to them. In this sense, there were indeed many lacunae in terms of observing and upholding the best interest of the child.

Therefore, it could be concluded that the hypothesis stands proved in the sense that what is being done is not enough in upholding the principle of the best interest of the child. Much more could have been done in this area. The Researcher has endured presenting some suggestions at the end of this chapter.

⁴⁷⁴ See page 18

2. The authorities established under the POCSO Act 2012 have not been successful enough to implement the Best interest principle.

The researcher should admit in para matri the reasons for failure to implement the best interest of the child principle are the same as given above under hypothesis 1. However, it should be noted that this is central legislation therefore one could expect greater action and greater concern by the central government in this regard. Since the authorities are the same the only difference in terms of charging offenses upon the culprit is the availability of additional legislation is always advantageous to the investigating and prosecuting officials. However, this advantage has not trickled down to benefit the child victim in terms of guarding their best interest which would have been much more commendable if the authorities were to utilize this legislation to ensure that the best interest of the child victim is safeguarded. Therefore, the Researcher would like to assert that this second hypothesis also stands proved.

3. Lack of resources creates barriers for authorities in providing adequate support at the time of trial.

It is part of the common practice of law-making in India that along with the introduction of any new bill for legislation there is a process of submission of financial memorandum.⁴⁷⁵ This in term implies that for every new legislation which gives additional power to the government and in turn to governmental authorities there is always a component of additional expenditures. Legislation like Goa Children's Act 2003 certainly calls for additional financial outlets first in terms of improved and adequate infrastructure keeping in mind the requirements to uphold the best interest of the child

⁴⁷⁵ Chapter X Legislation I. Bills originating in the House Introduction and publication of Bills 64. The Speaker, on request being made, may order publication of any Bill (together with the Statement and Objects and Reasons, the memorandum regarding delegation of legislative power and the financial memorandum accompanying it.) in the Gazette, although no motion had been made for leave to introduce the Bill. In that case, it shall not be necessary to move for leave to introduce the Bill, and, if the Bill is afterwards introduced, it shall not be necessary to publish it again.

and secondly additional personnel to deal with offenses affecting child victims. Thirdly and most importantly there is a need for a financial outlet in training and suitably equipping these officials dealing with child victims. No doubt there is also a need to employ additional external expertise in terms of psychologist, social workers NGOs dealing with child welfare, etc. It is sad to state though the government may have its justifications it has of course failed to prioritize the welfare and interest of the child and has not therefore provided any noticeable and substantial amount in its exercise of annual budgeting.

The researcher has endured scrutinizing from her limited facilities of examining the budgetary provisions of the state of Goa and finds that there is no such resource allocation. The authorities with whom the researcher interacted were also of the opinion that the availability of limited resources is not possible to provide additional facilities or additional manpower to uphold the best interest of the child. The researcher did investigate this aspect of financial outlay in her questionnaire and it is to be noted all the officials with whom the researcher interacted either by interview or questionnaire opined that no such financial outlay is made available to promote or implement the best interest principle.

This further could be substantiated as the only Victim Assistance Unit for the State of Goa constituted under the Goa Children's Act 2003, and Rules, 2004 has not been funded since 2014⁴⁷⁶ and the personnel is working voluntarily.

It is therefore stated that hypothesis number three also stands proved in the State of Goa especially in terms of the criminal proceedings which involve a child victim.

⁴⁷⁶ Notification No.F.No.2-61(1)-97/VAU/DWCD/02858; dated 25/02/2014.

4. Failure in rendering speedy justice leads to a violation of the principle of the Best Interest of the child.

When the legislators enact special legislation the generally accepted idea is that the legislation is so enacted to focus on a particular area of concern on the one part and on the other part the legislation is enacted to remove or circumvent the maladies or obstacles in the implementation of a law. In terms of Children's rights within the meaning of the Criminal justice system, the very underlying purpose can be spelled out as two, one that of providing speedy justice and avoiding unnecessary procedures and other delays which would normally happen in a criminal proceeding, secondly and more importantly to protect the best interest of the victim child so that the child is protected against the trauma and pain of undergoing a criminal trial system.

Keeping in mind that these are the two underlying aims of the establishment of a children's court specifically designed to exclusively deal the child-related offenses one would normally expect that these cases are dealt with promptly and efficiently and that the victims are given the best available protection and care religiously following the best interest of the child.

The ground reality the researcher found is not very palatable in the sense of achieving the above-pronounced objectives in terms of speedy justice the researcher has analysed the whole justice delivery system in terms of time taken in chapter five and has found that the idea of speedy justice is not being implemented in the way it is expected to be implemented. There seem to be so many administrative and procedural hiccups that one often tends to think that the children's Court is just another court embroiled in its procedural wrangles often forgetting the very purpose of its existence. Blame it on no one but the systems and procedures of appointment of Presiding Officers and other officials, their terms and conditions of employment all go to add to this procedural laxity. The same could be said in the implementation of the principle of the best interest of the child firstly in the absence of specific financial grants, secondly, in terms of infrastructural facilities and training of personnel dealing with child victims, they are made to think and of course

act as if they are dealing with any usual criminal case. The urgency and the specialty of the occasion don't seem to be relevant or a matter of concern for any of them working within the system. It is only for an external observer or a concerned interested citizen who feels that there is a total lack of interest in ensuring speedy trial or upholding the best interest of the child. This research has thus proved the fourth hypothesis proposed by the researcher.

Thus this research has proven beyond doubt that in terms of the best interest of the child the criminal justice system in Goa needs to do much more than what it is presently doing. Having observed the working of the law, meaning the Goa Children's Act 2003 and Rules, 2004 in its actual implementation, the researcher would now like to present from her personal experience and of course in the general understanding of the principle involved certain suggestions which the authorities may consider it fit to implement or at least consider before proper forum and authority.

One should not fail to appreciate that Goa has taken a unique and path-breaking step in the enactment of the Goa Children's Act 2003 and the establishment of the Children's court. Having achieved this the society especially the victim children looks forward to Goa government and the judicial system in Goa to culminate this reform into its logical end by providing those facilities and appointing such personnel so that the aim and objectives of the Act are fulfilled at least partially if not in toto. Towards this end, the researcher would like to propose the below-given suggestions to be considered by the authorities at appropriate times and situations.

6.2. Suggestions

1. Enhancing sense and sensitivity. The researcher would like to elaborate on this idea as follows. Sense comes from knowledge and awareness therefore the various officials handling child victim-related issues need to have the necessary knowledge of the law and awareness regarding the required

procedures and processes. This can be achieved only by a suitable training of these personnel's. There has to be a defined training module to train all those who are officially handling issues relating to child victims. The training should consist of appropriate knowledge of law followed by training in the procedures and processes involved in the legal process, where a child victim comes in contact with the law, in this case, the criminal justice administration system. Such a module formulated should be able to bring in the required expertise and of course sensitivity.

Sensitivity is a term of cultural import. One gains sensitivity through the cultural melee. In brief, a person can look at a child not of his own with the eyes and sense as if the child is his own. Sensitivity surpasses the barriers of creed, culture, and of course the caste. Once the officials can develop such sensitivity towards the victim child, certainly, the best interest of the child would automatically get implemented. This suggestion may at the outset look to be impossible but proper education, proper value inculcation be it in the family or the legal institution and the proper representation of children in the mass media can achieve this objective. It may be a long-drawn suggestion but worth its consideration for the outcomes, it can achieve.

2. It has been amply pointed out in this research findings, that one area which could be easily achieved in ensuring the best interest of the child is in terms of the infrastructural requirements at the Children's Court and in all venues where a child victim is expected to be present and interact with the officials. The basic idea is that to enable a child victim to communicate effectively and freely the child victim has to feel safe and comfortable. It is only then there could be unhindered communication. In this regard, proper facilities, basic amenities, avoidance of contact with the perpetrator are of pivotal relevance in the effective administration of criminal justice. It would be easier for anyone to spell out the requirements but it is important that the authorities especially the government consider what is best and ensure such requirements are fulfilled.

3. In dealing with child victims the officials may not be equipped to deal with all kinds of traumas that a victim might undergo. It is therefore important that the criminal justice system employs either regularly or on case-to-case basis persons who have gained expertise by knowledge and practice to deal with children undergoing traumas. It may be a child psychologist, or a child psychiatrist, or an NGO deeply immersed in dealing with children under trauma. This would not only help the child victim in overcoming or circumventing traumas but will greatly help in the justice administration system mainly in terms of collecting, analysing, and understanding evidence of the abuse, because a child may not be able to communicate in a way expected by the adults but a child will effectively communicate through expressions of its emotions, physical movements or hyper or hypo activities. Such communication can be understood better by persons who have expertise and experience in communicating with children under trauma.
4. One of the main purposes, as mentioned in the earlier chapters of this study, for the establishment of children's court is the speedy disposal of cases thereby limiting the duration of the child victim being in touch with the criminal justice administration. One area regarding this which out of experience many have pointed out, Goa lacks, is the availability of a suitable Forensic lab. The non-availability of a fully functional forensic laboratory as in many ways hindered the progress of proceedings which could very well have been avoided if a forensic lab suitable for the purpose existed in Goa.
5. One of the major concerns that of the Presiding Officer has been that of the quality of the charge sheet in such offenses involving child victims. The charge sheet is of course a basic foundational document for framing of charges and the conduct of the proceedings. It is therefore of extreme importance that the charge sheet is properly framed. Therefore, the investigating officer who is often burdened with other menial and sundry duties tends to undertake this responsibility of framing charge sheets lightly, or as a matter of day-to-day duty. The officer preparing this charge sheet must be given the required input

and time from other sundry duties to focus on the essentials of the charge sheet especially how it is worded and the sighting of relevant sections of law and even enumeration of facts in the correct chronological order. In this regard, it is suggested an officer involved in the preparation of the charge sheet needs to be exempted from the other menial and day-to-day activities while doing this function of charge sheet framing.

6. It has been pointed out in the earlier chapters that there are situations of undue delay in the investigation of the case. The police officials always end up giving some reason or the other justifying the delay. But one should note more often than not these reasons or delays are not connected with the case therefore there has to be proper machinery and system to fix the time required for investigation and framing of charges in every such case, this is so, especially keeping in mind that there is a child victim whose traumatization is likely to be enhanced by such delays.
7. It is to be noted that though the children's court is situated in the capital city of Panjim, which of course comes within the geographical area of north goa there have been situations where many cases of child abuse happen in the extreme southern region of Goa. Commuting the child victim may be his or her parents and of course the investigating officials for every such hearing to the city of Panjim thus causing inconvenience, hardships, and delay. In the event of the authorities being unwilling to set up another children's Court in the South of Goa, it would be advisable that the present Children's Court schedules its sittings on different days of the week at a suitable venue in South Goa as well. This will not only reduce the trauma and the inconvenience of the child victim but will create better awareness and accessibility to professionals as well as the public in the State of Goa. Such awareness can always be hoped to certainly augur well with the interest of the child victim.
8. The Goa Children's Act 2003 and Rules 2004 are comparatively new legislation and the act was intended to promote a new concept regarding criminal justice administration when children are involved, the profession, as

well as the public as such, is not fully aware of the purpose and import of such legislation. Therefore, it is incumbent upon the administration to create a necessary awareness and sensitivity to those areas where children are affected more specifically in cases where the child becomes a victim and the accompanying procedure to prove or disprove such guilt or innocence. There has to be a well-planned approach in creating such awareness, seminars, conferences, training programs, publicity competitions like quiz programs, essay competitions, photography and video exhibitions will all move in a long way in creating such required awareness. Though there are some half-hearted attempts and some sporadic publicity ventures there is a need to entrust such a task to some specific agencies like an NGO who should undertake a result-oriented approach like organizing and sponsoring street plays, public campaigns, etc.

9. In continuation of the researcher's plea for greater awareness of children's rights and child abuse in the State, there are at the local body governance stage the Village Child Committee which has to be constituted by each Village Panchayat⁴⁷⁷. This process has to be started in right earnest. If presently existing needs to revitalize to create greater awareness on rights of children, duties, and responsibilities and as a tool towards prevention of child abuse. This mechanism is also boosted through the Integrated Child Protection Scheme (ICPS)⁴⁷⁸. This initiative is yet to start in the State of Goa.

⁴⁷⁷Section 13 other provisions of the Goa Children's Act, 2003 and Rules 2004 13 (8) there shall be a Village Child Committee which shall be constituted by each village panchayat. The committee shall comprise not less than five persons of whom one shall be a child above the age of 15 years and the other members shall comprise representatives from the village panchayat and social workers of whom at least 2 should be women. The Village child committee shall ensure the best interest of the child and will pay particular attention to providing recreational and play facilities for children. The Village Committee will also interact with the departments of the State Government in the implementation of the plan of action for elimination of child illiteracy, children on the streets, child prostitution and child labour and will carry such functions as may be laid down from time to time. Further section 13 (5) (b) states preparing and implementing a systematic plan for spreading awareness amongst different groups, mobilization action and dialogue within civil society on Child Rights.

⁴⁷⁸ The Integrated Child Protection Scheme (ICPS) is a centrally sponsored scheme aimed at building a protective environment for children in difficult circumstances, as well as other vulnerable children through Government- Civil Society Partnership. This scheme was proposed in the year 2006 and implemented in 2009.

10. Whenever an act or event involves a child victim an undeniable fact of the matter is that the child has been disturbed or snatched away from its normal safe living situation as a child. Therefore, rehabilitation of the child in addition to punishing the guilty should be an equally important aim of the criminal justice jurisprudence. In this context, the researcher would like to make it clear that mere financial compensation, if at all, given to the child will suffix such rehabilitation. The law and justice system should therefore go beyond the mere application of victim compensation ideology. Such an approach requires, along with the criminal proceedings necessary investigation to ascertain the extent of loss or injury suffered by the child victim be it physical, psychological, or loss of solace or loss or injury to financial circumstance. There has to be a system to ascertain the actual loss to the child in all these above terms and thereafter suitable machinery to recuperate or rehabilitate the child.

There is of course a Victim Compensation scheme 2012⁴⁷⁹. Under the said scheme interim compensation is granted to the victim of child sexual abuse. The fact of the matter is only four child victims as of date have been awarded such compensation. no child victim as of date has been awarded any such compensation. Is it laxity or lack of sensitivity or procedural hurdles in the grant of compensation is not clear. A scheme of course requires the child victim to apply for such compensation which itself is an onerous task that normally one cannot expect the child to know ought to comply with. There are of course other issues like this facility for compensation is being handled by The District Collectors office who is otherwise an unconcerned person in the transaction of child victim which adds to further insensitiveness to the issue.

⁴⁷⁹ This scheme was notified vide notification dated 20/12/2012 under No. 2/91/2010- HD(G). The purpose of the said scheme is to provide funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who need rehabilitation.

The researcher undertook this study on the implementation of the best interest of the child especially the child victim in the State of Goa. For the predominantly empirical study, the researcher undertook to scrutinize and evaluate the functioning of the criminal justice administration authorities in the state of Goa on the yardstick of observation of the best interest of the child.

This study on the best interest of the child is of course not content-based. This is mainly because the best interest of the child is not a static but a dynamic concept and therefore needs to be contextualized in every situation of child abuse and the proceedings thereafter. If the study were to be content-wise it would have been subjective and would have lesser relevance in the general application of the principle. It may be because of this that many laws both national as well as international and acclaimed jurists as well as other writers on child rights have consciously refrained from spelling out what would constitute the best interest of the child. To cite a simple illustration, it is an accepted fact that a child remaining with its natural parents would serve the best interest of the child but then what happens when such natural parents themselves turn out to be the abusers? It is for this specific reason like many others the researcher has also refrained from dwelling on what constitutes or what are the contents of the best interest of the child.

Therefore, the study of best interest in this research is on the nature of best interest rather than on the content of best interest. Having stated so the researcher would like to assure that the study has not been in a Bohemian sense but is strictly Aristotelian. The researcher has therefore given due relevance and weightage to the empirical findings to prove the hypothesis and draw the conclusions. The suggestions the researcher has endured to provide are also based on this Aristotelian reasoning to make them as pragmatic as possible with a sincere hope deep in her heart that someday some authorities would make note of these suggestions for the benefit of the children of Goa especially those helpless innocent, abused children.

This research into a sensitive area on children's rights has made the researcher much more sensitive and concerned about the need to protect children as they are the future of the State and the Nation.

ANNEXURES

ANNEXURE – I

Questionnaire – Presiding Officers and Public Prosecutors

Impact of Best Interest Jurisprudence on children rights (Goa)

The purpose of this research is for completion of my Ph.D. thesis titled “Evolution and Impact of Best Interest Jurisprudence on children rights with special reference to the state of Goa” Responses to the said questionnaire will be solely used for the purpose of Research. Name and personal information will not be shared. Humbly request your participation as this would help me to get ground level facts, which would help me to advocate for a change to make the criminal justice system child friendly.

Name:

Your answer

Contact No. (optional)

Your answer

Number of years in services.

Less than 5 years

More than 5 years

Above 10 years

Designation

Judicial officer

Prosecutor

Have you dealt with cases involving children?

Yes

No

Are the safeguards contained in the Goa Children’s Act 2003 and Protection of Children from Sexual Offences Act 2012 good enough to determine the best interest of the child?

Yes
No

Can the best interest of the child be applied with precision?

Yes
No

Are the Courts / Boards equipped with infrastructure which is child friendly.

Yes
No

Is there a need for video linked cross examination in case of child victims?

Yes
No

Are questions always addressed to the child through the judge?

Yes
No

Refresher and regular trainings on child development, psychology a need while appointing /designating Judicial officers to deal with cases concerning children.

Yes
No

Is there a need to look into the Recuperation of child victims?

Yes
No

Is it feasible to record statement of the child within 30 days of filing the charge sheet?

Yes
No

Do you think 60 days are sufficient for police investigation in grave cases of child sexual abuse.

Yes
No

Does child friendly infrastructure in Courts / Boards puts children at ease during their deposition.

Yes

No

Is there a need to increase Special Courts to try offences against children in the State of Goa?

Yes

No

How many cases are heard by the court on day to day basis

less than 20

more than 20

What are the best practices followed by you when examining children in Court?

Your answer

Could you mention some reasons for the delay concluding trials in cases of child abuse?

Your answer

What parameters are required to be looked into while considering the best interest principle of child. (eg. age, parental status etc.)

Your answer

What is your understanding about the Best interest of the child principle?

Your answer

Can the best interest principle be standardized or differ from case to case basis?

Your answer

Your suggestions to make the criminal justice system child friendly.

Your answer

Thank You

ANNEXURE - II

Questionnaire to Investigating Officers

Name: _____

Dated:

Designation: _____

1. How long have you been in the force?
0 TO 5 YRS 5 TO 10 YRS 10 TO 15 YRS MORE

2. Have you investigated child abuse cases?
YES NO

3. Have you been specially trained in dealing with child abuse cases as well as various legislations pertaining to children?
YES NO

4. Are there refresher courses organised for you'll pertaining to children's issues?
YES NO
 - a. If yes how often?
Quarterly One a year Other

5. What type of child abuse cases you have dealt with? Rate the same from 1 to 5.

Sexual abuse Physical Verbal Kidnapping others _____

6. Do you'll have a designated place to interact with the victims at your station?

YES

NO

7. What are the different child friendly procedures adopted during investigation?

8. How long does it take to file a charge sheet in a child abuse case?

2 months

6 months

1 yr

others _____

9. Is it possible to investigate a child abuse case within two months: if not kindly explain the time frame required and reasons for the same?

YES

NO

If no the reasons for the same.

10. Have you faced case where you have not been able to trace the victim or her family?

YES

NO

11. Do police have mechanisms of follow ups in cases of child abuse?

YES

NO

if yes kindly elaborate.

12. Is there any financial/budgetary allocation done to cater to the needs of the child at the initial stage of stage of intervention?

YES

NO

13. Have any of your victims in the case turned hostile?

YES

NO

If yes what was the reason been identified?

14. Does your Police station have additional vehicles to escort the victim and accused separately?

YES

NO

15. How long does it take for a case to conclude one you file the charge-sheet.

1 to 2 yrs 3 to 4 yrs 4 yrs and more other _____

16. What measures would you suggest for improving child protection mechanisms in Goa?

ANNEXURE – III

Reg. No. GR/RNP/GOA/32

RNI No. GOAENG/2002/6410

Panaji, 20th December, 2012 (Agrahayana 29, 1934)

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OFFICIAL GAZETTE GOVERNMENT OF GOA

PUBLISHED BY AUTHORITY

NOTE

There is one Extraordinary issue to the Official Gazette, Series I No. 37 dated 13-12-2012, namely, Extraordinary dated 14-12-2012 from pages 1501 to 1502 regarding Value Added Tax Act, 2005 Not. — No. 4/5/2005-Fin (R&C) (103) from Department of Finance (Rev. & Cont.) Division.

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2

3

Notification

2/91/2010-HD(G)

In exercise of the powers conferred by subsection (1) of Section 357 A of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), the Government of Goa in co-ordination with the Central Government hereby frames the following Scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation, namely: —

1. *Short title and commencement.* — (1) This Scheme may be called the Goa Victim Compensation Scheme, 2012.

(2) It shall come into force on such date as the Government may, by notification in the Official Gazette, appoint.

2. *Definitions.* — (1) In this Scheme, unless the context otherwise requires, —

- (a) “Act” means the Code of Criminal Procedure, 1973 (Central Act 2 of 1974);
- (b) “District Legal Services Authority” means the District Legal Services Authority constituted under Section 9 of the Legal Services Authorities Act, 1987 (Central Act 39 of 1987); for a district of the State of Goa;
- (c) “Form” means a form appended to this Scheme;

Suggestions are welcome on e-mail: dir-gpps.goa@nic.in
OFFICIAL GAZETTE — GOVT. OF GOA

- (e) "Government" means the Government of Goa;
- (f) "Offence" means any of the offences mentioned in the Indian Penal Code (45 of 1860) or in any other law for the time being in force;
- (g) "Official Gazette" means the Official Gazette of the Government;
- (h) "Schedule" means Schedule appended to this Scheme;
- (i) "State" means the State of Goa;
- (j) "State Legal Services Authority" means Legal Services Authority constituted under Section 6 of the Legal Services Authorities Act, 1987 (Central Act 39 of 1987), for the State of Goa;
- (k) "Victim" means a person who has suffered loss or injury as a result of the crime and who requires rehabilitation.
- (2) Words and expressions used in this Scheme and not defined, shall have the same meaning as assigned to them in the Act.
3. *Victim Compensation Fund.* — (1) The Government shall constitute a fund called Victim Compensation Fund. There shall be credited into the said fund an amount allocated for the same by budgetary provision every year.
- (2) Compensation from the said fund under this Scheme shall be paid to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
- (3) The said fund shall be operated by the Secretary of the Legal Services Authority for the State of Goa.
4. *Eligibility for Compensation.* — Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation if, —
- 1504
- (1) he has not been compensated for the loss or injury under any other Scheme of the Central or State Government, insurance company or any other institution;
- (2) the loss or injury sustained by the victim has caused substantial loss of income to his family making it difficult to meet their both ends without any compensation.
5. *Procedure for making application before the State or District Legal Services Authority.* — An application for the award of compensation shall be submitted in form "I" hereto along with a copy of the First Information Report (FIR)/complaint, medical report, death certificate, complaint made to the Court (in case where the police have not registered the FIR) newspaper report if any, to the State or District Legal Services Authority.
6. *Reliefs that may be awarded by the State or District Legal Services Authority.* — The State or District Legal Services Authority may award compensation to the victim or his dependent to the extent as specified in schedule hereto.
7. *Rejection of the application.* — The State or District Legal Services Authority may reject an application where it is of the considered opinion that, —

- (1) the applicant has failed to take all reasonable steps to inform the police or other body or person considered by the State or District Legal Services Authority to be appropriate for the purpose about the circumstances giving rise to the loss or injury; or
- (2) the applicant failed to co-operate with the police or the Court to bring the accused to justice; or
- (3) the applicant has failed to give all reasonable assistance to the State or District Legal Services Authority for deciding the application; or
- injury caused to the victim and arising out of the reported crime. It may call for any other relevant information in order to determine genuineness of the claim. After verifying the claim and after due inquiry, the State or District Legal Services Authority shall award compensation within a period of two months from the date of such recommendation or application as the case may be, in accordance with provisions of this Scheme.
- (2) The award of compensation under this Scheme shall be subject to the condition that if later on the trial court while passing the Judgment orders the accused person to pay any amount by way of compensation under

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- (4) the applicant has previously filed an application, in respect of the loss or injury suffered as a result of the same crime under this Scheme, for compensation and such application is already granted or rejected or pending adjudication;
- (5) the applicant, after having filed the complaint, wilfully turned hostile in the trial and has not supported the case of the prosecution;
- (6) the alleged crime prima-facie is collusive in nature and not based upon verifiable facts.
- (7) any other reason deemed fit by State or District Legal Services Authority.
- sub-section (3) of Section 357 of the Act, the victim shall refund the amount of compensation awarded under this Scheme, or the amount of compensation received in pursuance of the order passed under sub-section (3) of Section 357 of the Act, whichever is less. An Undertaking in Form "II" hereto shall be obtained from the victim before the disbursal of the compensation amount under this Scheme.
- (3) The State or District Legal Services Authority shall decide the quantum of compensation to be awarded to the victim or to his dependents on the basis of the loss or injury caused to the victim as a result of the crime and his/their requirements of rehabilitation.
- (4) The compensation awarded under this Scheme shall be disbursed to the victim or his dependents, as the case may be, from the fund, by remitting the same into the bank account specified in the Application by the victim/dependents.

8. *Procedure for Grant of Compensation.* — (1) Whenever a recommendation is made by the Court or an application is made by any victim or his dependent to State or District Legal Services Authority, the State or District Legal Services Authority shall examine and verify the claim made with regard to the loss or
- (5) In case where the victim or dependent is a minor, the amount of compensation shall be

released to the guardian or whoever has filed the application on behalf of such minor after the State or District Legal Services Authority is satisfied about the proper utilization of funds in the best interest of and for the welfare of such minor.

- (6) The compensation already received by the victim or his dependents from the Insurance Company or from the Government in relation to the crime in question, including ex-gratia and/or other payment received under any law or under Central or State run Scheme, shall be treated as the compensation awarded under this Scheme, and if the amount of compensation to be received under this Scheme exceeds the payment already received by the victim from the sources mentioned above, the balance amount shall be paid out of fund to the victim.
- (7) The cases covered under the Motor Vehicles Act, 1988 (Central Act 59 of 1988) wherein the compensation is to be awarded by the Motor Accidents Claims Tribunal, shall not be covered under this Scheme.
- (8) The State or the District Legal Services Authority, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate

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of the area concerned, or any other interim relief as it may deem fit.

9. *The order to be placed on record.*— Copy of the order of compensation passed under this Scheme shall be placed on record of the trial Court so as to enable the trial Court to pass an

appropriate order of compensation under sub-section (3) of Section 357 of the Act.

10. *Limitation.*— An application for compensation under sub-section (4) of Section 357 A of the Act shall be made within one hundred and eighty days from the date of Commission of the Crime:

Provided that the State or District Legal Services Authority may entertain the application received after the expiry of said period of one hundred and eighty days if it is satisfied that the applicant was prevented by sufficient cause from filing the application in time.

11. *Appeal.* — (1) Any victim or his dependent if aggrieved by the Order of the District Legal Services Authority may file an appeal before the State Legal Services Authority within a period of ninety days from the date of such Order:

Provided that the State Legal Services Authority may admit the appeal after the expiry of the period of ninety days if it is satisfied that the victim or his dependent was prevented by sufficient cause from filing the appeal in time.

(2) The decision or order of the State Legal Services Authority on all matters shall be final.

12. *Accounts and Audit of the Fund.* — (1) The Secretary of the Legal Services Authority

of the State of Goa shall maintain proper accounts and other relevant records and prepare an annual statements of accounts including the income and expenditure account and the Balance sheet in respect of said fund. These accounts shall be audited by an auditor appointed by the Government.

(2) An audited statement of Accounts shall be submitted by the Secretary of the Legal

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Services Authority of the State of Goa, to the Government, every year.

By order and in the name of the Governor of Goa.

Sd/- (Neetal P. Amonkar), Under Secretary (Home).

Porvorim, 17th December, 2012.

SCHEDULE

(See Clause 6)

- (1) In case of death of the sole earning member of the family where children are minor and or unemployed Upto Rs.
2,00,000/-
- (2) Loss of any limb or part of the body resulting 80% or above disability including acid attack Upto Rs.
50,000/-
- (3) Loss of any limb or part of the body resulting in 40% and below 80% disability including acid attack Upto Rs.
25,000/-
- (4) In case of death of non-earning Member..... Upto Rs.
25,000/-
- (5) Loss of any limb or part of the body resulting below 40% disability including acid attack Upto Rs.
10,000/-
- (6) In case of injury causing, severe mental agony to women and child Upto Rs.

10,

00,000/(e.g. in human trafficking and rape cases, Acid cases)

Form "I"

Application for the award of compensation

- (1) Name of the victim:
Name of the Dependent:
- (2) Age of the victim/dependent:
- (3) Name of the parents (a) Father:
(b) Mother:
- (4) Address:
- (5) Date and time of the incident:
- (6) Name of the Applicant:

- (7) Relationship with the Victim (Legal Heir or NGO):
- (8) Whether FIR has been lodged? If 'Yes', enclose a copy of the FIR.
If 'No' give reasons thereof.
- (10) Whether a complaint has been filed in the Court?: If Yes,
Enclose a copy of complaint.
- (11) Whether medical examination has been done?
If yes, enclose Medical report/death certificate.
- (12) Details of Bank Account:

Date: *Signature of Applicant*

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Department of Personnel

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ANNEXURE IV

Panaji, 10th January 2019 (Pausa 20, 1940)

SERIES I No. 41

OFFICIAL GAZETTE GOVERNMENT OF GOA

PUBLISHED BY AUTHORITY

Panaji, 8th January, 2019.

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Department of Women & Child
Development

Directorate of Women & Child
Development

Notification

1-981-Writ Pet (C) 565 of 2012–DWCD-2018-
Part I

Sub.:- The Goa Compensation Scheme for
Women Victims/Survivors of Sexual
Assault/other Crimes, 2018.

The Government of Goa in exercise of its Executive Powers is pleased to frame the following Scheme as per the directions of the Hon'ble Supreme Court of India in W.P. (C) No. 565/2012 titled Nipun Saxena Vs. Union of India for providing funds for the purpose of compensation to the women victims or her dependents who have suffered loss, injury, as the case may be, as a result of the offence

committed and who require rehabilitation namely—

1. Short title and commencement. — (1) This Scheme may be called “The Goa Compensation Scheme for Women Victims/ /Survivors of Sexual Assault/other Crimes Scheme, 2018.

2. It shall come into force with effect from date of notification.

3. It shall apply to the victims and their dependent(s) who have suffered loss, injury, as the case may be, as a result of the offence committed and who require rehabilitation.

2. Definitions. — (1) In this Scheme, unless the context otherwise requires—

(a) “Code” means the Code of Criminal Procedure, 1973 (2 of 1974);

(b) ‘Dependent’ includes husband, father, mother, grandparents, unmarried daughter and children of the victim as determined by the State Legal Services Authority or District Legal Services Authority on the basis of the report of the Sub-Divisional Magistrate of the concerned area/Station House Officer/ /Investigating Officer or on the basis of material placed on record by the dependents by way of affidavit or on its own enquiry.

(c) “District Legal Services Authority” means the District Legal Services Authority (DLSA) constituted under section 9 of the Legal Services Authorities Act, 1987 (Act 39 of 1987) for a District of the State of Goa.

(d) ‘Form’ means form appended to the Scheme as applicable to this Chapter.

(e) ‘Fund’ means State fund i.e. victim compensation fund constituted under the State Victim Compensation Scheme.

(f) ‘Central Fund’ means funds received from CVCF Scheme, 2015.

(g) ‘Women Victim Compensation Fund’— means a fund segregated for disbursement for women victim, out of State Victim Compensation Fund and Central Fund.

[Within the State Victim Compensation Fund, a separate Bank Account shall be maintained as a portion of that larger fund which shall contain the funds contributed under CVCF Scheme by MHA, GOI contributed from Nirbhaya Fund apart from funds received from the State Victim Compensation Fund which shall be utilised only for victims covered under this Chapter].

(h) ‘Government’ means ‘Government of Goa’ wherever the State Victim Compensation Scheme or the State Victim Compensation Fund is in context and ‘Central Government’ wherever Central Government Victim Compensation Fund Scheme is in context.

(i) ‘Injury’ means any harm caused to body or mind of a female.

(j) ‘Minor’ means a girl child who has not completed the age of 18 years.

(k) ‘Offence’ means offence committed against women punishable under IPC or any other law.

(l) ‘Penal Code’ means Indian Penal Code, 1860 (45 of 1860);

(m) ‘Schedule’ means schedule applicable to this Chapter/Part of the scheme.

(n) “State Legal Services Authority” means the State Legal Services Authority (SLSA), as defined in section 6 of the Legal Services Authorities Act, 1987 (39 of 1987).

(o) “Sexual Assault Victims” means female who has suffered mental or physical injury or both as a result of sexual offence including Sections 376 (A) to (E), section 354 (A) to (D), Section 509 IPC.

(p) ‘Woman Victim/survivor of other crime’ means a woman who has suffered physical or mental injury as a result of any offence mentioned in the attached Schedule including sections 304 B, section 326A, section 498A IPC (in case of physical injury of the nature specified in the schedule) including the attempts and abetment.

(q) ‘State’ means the State of Goa.

(2) Words and expressions used in this Chapter and not defined here, shall have the same meaning as assigned to them in the Code of Criminal Procedure, 1973 or/and the Indian Penal Code, 1860.

3. Women Victim Compensation Fund. —

(1) There shall be a Fund, namely, the Women Victims Compensation Fund from which the amount of compensation, as decided by the State Legal Services Authority or District Legal Services Authority, shall be paid to the women victim or her dependent(s) who have suffered loss or injury as a result of an offence and who require rehabilitation.

(2) The ‘Women Victims Compensation Fund’ shall comprise the following: —

(a) Contribution received from CVCF Scheme, 2015.

(b) Budgetary allocation in the shape of grants-in-aid to SLSA for which necessary

provision shall be made in the Annual Budget by the Government;

(c) Any cost amount ordered by Civil/Criminal Tribunal to be deposited in this Fund.

(d) Amount of compensation recovered from the wrong doer/accused under clause 14 of the Scheme;

(e) Donations/contributions from International/National/Philanthropist/Charitable Institutions/Organizations and individuals permitted by State or Central Government.

(f) Contributions from companies under CSR (Corporate Social Responsibility).

(3) The said Fund shall be operated by the Secretary of the State Legal Services Authority (SLSA) for the State of Goa.

4. Eligibility for Compensation. — A woman victim or her dependent (s) as the case may be, shall be eligible for grant of compensation from multiple schemes applicable to her. However, the compensation received by her in the other schemes with regard to section 357-B Cr.P.C., shall be taken into account while deciding the quantum in the such subsequent application.

5. Procedure for making application before the State or District Legal Service Authority.— Mandatory Reporting of FIRs:— SHO/SP/DCP shall mandatorily share soft/hard copy of FIR immediately after its registration with State Legal Services Authority/District Legal Services Authority qua commission of offences covered in this Scheme which include Sections 326A, 354A to 354D, 376A to 376E, 304B, 498A (in case of physical injury covered in this Schedule), so

that the SLSA/DLSA can, in deserving cases, may suo-moto initiate preliminary verification of facts for the purpose of grant of interim compensation. An application for the award of interim/final compensation can be filed by the Victim and/ /or her Dependents or the SHO of the area before concerned SLSA or DLSA. It shall be submitted in Form '1' along with a copy of the First Information Report (FIR) or criminal complaint of which cognizance is taken by the Court and if available Medical Report, Death Certificate, wherever applicable, copy of judgment/recommendation of court if the trial is over.

6. Place of filing of Application. — The application/recommendation for compensation can be moved either before the State Legal Services Authority or the concerned District Legal Services Authority or it can be filed online on a portal which shall be created by all State Legal Services Authorities. The Secretary of the respective SLSA/DLSA shall decide the application/recommendation moved before him/her as per the Scheme.

Explanation: In case of acid attack victim the deciding authority shall be Criminal Injury Compensation Board as directed by Hon'ble Supreme Court in Laxmi vs. Union of India W.P. CRML 129/2006 order dated 10-04-2015 which includes Ld. District & Sessions Judge, DM, SP, Civil Surgeon/CMO of the district.

7. Reliefs that may be awarded by the State or District Legal Services Authority. — The SLSA or DLSA may award compensation to the victim or her dependents to the extent as specified in the scheduled attached hereto.

8. Factors to be considered while awarding Compensation. — While deciding a matter, the State Legal Services Authority/District Legal Services Authority may take into consideration the following

factors relating to the loss or injury suffered by the victim:

(1) Gravity of the offence and severity of mental or physical harm or injury suffered by the victim;

(2) Expenditure incurred or likely to be incurred on the medical treatment for physical and/or mental health including counselling of the victim, funeral, travelling during investigation/inquiry/trial (other than diet money);

(3) Loss of educational opportunity as a consequence of the offence, including absence from school/college due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(4) Loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(5) The relationship of the victim to the offender, if any;

(6) Whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(7) Whether victim became pregnant as a result of the offence, whether she had to undergo Medical Termination of Pregnancy (MTP)/give birth to a child, including rehabilitation needs of such child;

(8) Whether the victim contracted a sexually transmitted disease (STD) as a result of the offence;

(9) Whether the victim contracted human immunodeficiency virus (HIV) as a result of the offence;

(10) Any disability suffered by the victim as a result of the offence;

(11) Financial condition of the victim against whom the offence has been committed so as to determine her need for rehabilitation and re-integration needs of the victim.

(12) In case of death, the age of deceased, her monthly income, number of dependents, life expectancy, future promotional/growth prospects etc.

(13) Or any other factor which the SLSA//DLSA may consider just and sufficient.

9. Procedure for grant of Compensation.
— (1) Wherever, a recommendation is made by the court for compensation under sub-sections (2) and/or (3) of section 357A of the Code, or an application is made by any victim or her dependent(s), under sub-section (4) of section 357A of the Code, to the State Legal Services Authority or District Legal Services Authority, for interim compensation it shall prima-facie satisfy itself qua compensation needs and identity of the victim. As regards the final compensation, it shall examine the case and verify the contents of the claim with respect to the loss/injury and rehabilitation needs as a result of the crime and may also call for any other relevant information necessary for deciding the claim.

Provided that in deserving cases and in all acid attack cases, at any time after commission of the offence, Secretary, SLSA or Secretary, DLSA may suo moto or after preliminary verification of the facts proceed to grant interim relief as may be required in the circumstances of each case.

(2) The inquiry as contemplated under sub-section (5) of Section 357A of the Code, shall be completed expeditiously and the

period in no case shall exceed beyond sixty days from the receipt of the claim/petition or recommendation:

Provided that in cases of acid attack an amount of Rs. One lakh shall be paid to the victim within 15 days of the matter being brought to the notice of DLSA. The order granting interim compensation shall be passed by DLSA within 7 days of the matter being brought to its notice and the SLSA shall pay the compensation within 8 days of passing of the order.

Thereafter, an amount of Rs. 2 lakhs shall be paid to the victim as expeditiously as possible and positively within two months of the first payment*.

Provided further that the victim may also be paid such further amount as is admissible under this Scheme.

(3) After consideration of the matter, the SLSA or DLSA, as the case may be, upon its satisfaction, shall decide the quantum of compensation to be awarded to the victim or her dependent(s) taking into account the factors enumerated in Clause 8 of the Scheme, as per schedule appended to this chapter. However, in deserving cases, for reasons to be recorded, the upper limit may be exceeded.

Moreover, in case the victim is minor, the limit of compensation shall be deemed to be 50% higher than the amount mentioned in the Schedule appended to this chapter.

[* Victims of Acid attack are also entitled to additional compensation of Rs. 1 lac under Prime Minister's National Relief Fund vide memorandum No. 24013/94/Misc./2014-CSR-III/Gol/MHA dated 09-11-2016].

[Victims of Acid Attack are also entitled to additional special financial assistance up to Rs. 5 lacs who need treatment expenses over and above the compensation paid by the respective State/UTs in terms of Central Victim Compensation Fund Guidelines-2016, No. 24013/94/Misc/2014-CSR.III, MHA/Gol].

(4) The SLSA/DLSA may call from any record or take assistance from any Authority/Establishment/Individual/Police/Court concerned or expert for smooth implementation of the Scheme.

(5) In case trial/appellate court gives findings that the criminal complaint and the allegation were false, then Legal Services Authority may initiate proceedings for recovery of compensation, if any, granted in part or full under this Scheme, before the Trial Court for its recovery as if it were a fine.

10. The Order to be placed on record. — Copy of the order of interim or final compensation passed under this Scheme shall be placed on record of the trial Court so as to enable the trial Court to pass an appropriate order of compensation under Section 357 of the Code. A true copy of the order shall be provided to the IO in case the matter is pending investigation and also to the victim/dependent as the case may be.

11. Method of disbursement of Compensation. — (1) The amount of compensation so awarded shall be disbursed by the SLSA by depositing the same in a Bank in the joint or single name of the victim/dependent(s). In case the victim does not have any bank account, the DLSA concern would facilitate opening of a bank account in the name of the victim and in case the victim is a minor along with a guardian or in case, minor is in a child care institution, the bank account shall be opened with the Superintendent of the Institution as Guardian.

However, in case the victim is a foreign national or a refugee, the compensation can be disbursed by way of cash cards.

Interim amount shall be disbursed in full. However, as far as the final compensation amount is concerned, 75% (seventy-five percent) of the same shall be put in a fixed deposit for a minimum period of three years and the remaining 25% (twenty-five percent) shall be available for utilization and initial expenses by the victim/dependent(s), as the case may be.

(2) In the case of a minor, 80% of the amount of compensation so awarded, shall be deposited in the fixed deposit account and shall be drawn only on attainment of the age of majority, but not before three years of the deposit.

Provided that in exceptional cases, amounts may be withdrawn for educational or medical or other pressing and urgent needs of the beneficiary at the discretion of the SLSA/ DLSA.

(3) The interest on the sum, if lying in FDR form, shall be credited directly by the bank in the savings account of the victim/dependent(s), on monthly basis which can be withdrawn by the beneficiary.

12. Interim Relief to the Victim.— The State Legal Services Authority or District Legal Services Authority, as the case may be, may order for immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief (including interim monetary compensation) as deemed appropriate, to alleviate the suffering of the victim on the certificate of a police officer, not below the rank of the officer-in-charge of the police station, or a Magistrate of the area concerned or on the application of the victim/dependents or suo moto.

Provided that as soon as the application for compensation is received by the SLSA/DLSA, a sum of Rs. 5000/- or as the case warrants up to Rs. 10,000/- shall be immediately disbursed to the victim through preloaded cash card from a Nationalized Bank by the Secretary, DLSA or Member Secretary, SLSA.

Provided that the, interim relief so granted shall not be less than 25 per cent of the maximum compensation awardable as per schedule applicable to this Chapter, which shall be paid to the victim in totality.

Provided further that in cases of acid attack a sum of Rs. One lakh shall be paid to the victim within 15 days of the matter being brought to the notice of SLSA/DLSA. The order granting interim compensation shall be passed by the SLSA/DLSA within 7 days of the matter being brought to its notice and the SLSA shall pay the compensation within 8 days of passing of order. Thereafter an additional sum of Rs. 2 lakhs shall be awarded and paid to the victim as expeditiously as possible and positively within two months.

13. Recovery of Compensation awarded to the Victim or her Dependent(s). — Subject to the provisions of sub-section (3) of section 357A of the Code, the State Legal Services Authority, in proper cases, may institute proceedings before the competent court of law for recovery of the compensation granted to the victim or her dependent(s) from person(s) responsible for causing loss or injury as a result of the crime committed by him/her.

The amount, so recovered, shall be deposited in Woman Victim Compensation Fund.

14. Dependency Certificate. — The authority empowered to issue the dependency certificate shall issue the same

within a period of fifteen days and, in no case, this period shall be extended:

Provided that the SLSA/DLSA, in case of non-issuance of Dependency Certificate, after expiry of 15 days, may proceed on the basis of an affidavit to be obtained from the claimant.

15. Minor Victims. — That in case the victim is an orphaned minor without any parent or legal guardian the immediate relief or the interim compensation shall be disbursed to the Bank Account of the child, opened under the guardianship of the Superintendent, Child Care Institutions where the child is lodged or in absence thereof, DDO/SDM, as the case may be.

16. Limitation. — Under the Scheme, no claim made by the victim or her dependent(s), under sub-section (4) of section 357A of the Code, shall be entertained after a period of 3 years from the date of occurrence of the offence or conclusion of the trial. However, in deserving cases, on an application made in this regard, for reasons to be recorded, the delay beyond three years can be condoned by the SLSAs/DLSAs.

17. Appeal. — In case the victim or her dependents are not satisfied with the quantum of compensation awarded by the Secretary, DLSA, they can file appeal within 30 days from the date of receipt of order before the Chairperson, DLSA.

Provided that, delay in filing appeal may be condoned by the Appellate Authority, for reasons to be recorded, in deserving cases, on an application made in this regard.

18. Repeal & Savings. — (1) In case this Chapter is silent on any issue pertaining to

Victim Compensation to Women, the provisions of Victim Compensation Scheme of the State would be applicable.

(2) Nothing in this Scheme shall prevent Victims or their dependents from instituting any Civil Suit or Claim against the perpetrator of offence or any other person indirectly responsible for the same.

Explanation: It is clarified that this Chapter does not apply to minor victims under POCSO Act, 2012 in so far as their compensation issues are to be dealt with only by the Ld. Special Courts under section 33(8) of POCSO Act, 2012 and Rules (7) of the POCSO Rules, 2012.

19. Accounts and Audit of the Fund. — (1) The Secretary of the Legal Services Authority of the State of Goa shall maintain proper accounts and other relevant records and prepare an annual statements of accounts including the income and expenditure and the Balance sheet in respect of the said fund.

(2) A statement of Accounts, Utilization certificate and SOE shall be submitted by the Secretary of the Legal Services Authority of the State of Goa, to the Directorate of Women and Child Development, every year.

By order and in the name of the
Governor of Goa.

Dipak Desai, Director & ex officio Jt.
Secretary (Women and Child Development).

Panaji, 7th January, 2019.

ANNEXURE-I

SCHEDULE APPLICABLE TO WOMEN VICTIM OF CRIMES

Sr. No.	Particulars of loss or injury	Minimum Limit of Compensation	Upper Limit of compensation
1.	Loss of Life	Rs. 5 Lakh	Rs. 10 Lakh
2.	Gang Rape	Rs. 5 Lakh	Rs. 10 Lakh
3.	Rape	Rs. 4 Lakh	Rs. 7 Lakh
4.	Unnatural Sexual Assault	Rs. 4 Lakh	Rs. 7 Lakh
5.	Loss of any Limb or part of body resulting in 80% permanent disability or above	Rs. 2 Lakh	Rs. 5 Lakh
6.	Loss of any Limb or part of body resulting in 40% & above and below 80% permanent disability	Rs. 2 Lakh	Rs. 4 Lakh
7.	Loss of any limb or part of body resulting in 20% & above and below 40% permanent disability	Rs. 1 Lakh	Rs. 3 Lakh
8.	Loss of any limb or part of body resulting in below 20% permanent disability	Rs. 1 Lakh	Rs. 2 Lakh
9.	Grievous physical injury or any mental injury requiring rehabilitation	Rs. 1 Lakh	Rs. 2 Lakh
10.	Loss of Foetus i.e. Miscarriage as a result of Assault or loss of fertility	Rs. 2 Lakh	Rs. 3 Lakh
11.	In case of pregnancy on account of rape.	Rs. 3 Lakh	Rs. 4 Lakh

Note: If a woman victim of sexual assault/acid attack is covered under one or more category of the schedule, she shall be entitled to be considered for combined value of the compensation.

ANNEXURE-II

FORM – I

APPLICATION FOR THE AWARD OF COMPENSATION UNDER COMPENSATION SCHEME FOR WOMEN VICTIMS/SURVIVORS OF SEXUAL ASSAULT/OTHER CRIMES, 2018 FOR INTERIM/FINAL RELIEF FOR WOMEN

1. Name of the Applicant Victim(s) or her Dependent(s)
2. Age of the Victim (s) or her Dependent (s)
3. (a) Father's Name (b) Mother's Name (c) Spouse's Name
4. Address of the Victim(s) or her/their Dependent(s)
5. Date and time of the Incident
6. Whether FIR has been lodged? (enclose copy)
7. Whether medical examination has been done? If yes, enclose Medical Report/Death Certificate/P.M. Report.

12. Victims of Burning:		
(a) In case of disfigurement of face	Rs. 7 Lakh	Rs. 8 Lakh
(b) In case of injury 50% & above	Rs. 5 Lakh	Rs. 8 Lakh
(c) In case of injury less than 50%	Rs. 3 Lakh	Rs. 7 Lakh
(d) In case of injury less than 20%	Rs. 2 Lakh	Rs. 3 Lakh
13. Victims of Acid Attack-		
(a) In case of disfigurement of face.	Rs. 7 lakh	Rs. 8 Lakh
(b) In case of injury 50% & above	Rs. 5 Lakh	Rs. 8 Lakh
(c) In case of injury less than 50%.	Rs. 3 Lakh	Rs. 7 Lakh
(d) In case of injury less than 20%	Rs. 3 Lakh	Rs. 4 Lakh

8. Status of trial, if pending. If over, enclose copy of judgment and order on sentence.
9. Has the applicant been awarded any compensation by the trial court or any other Govt. agency If, yes give details.
10. Give details of financial expenditure/loss incurred
11. Has the applicant instituted any civil suit/claim against the perpetrator of offence. If yes give details.

Signature of the Victim/Dependent.

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