

# CHILD FRIENDLY COURT PROCEDURES AND JUDICIAL ATTITUDES: ENSURING THE BEST INTEREST OF THE CHILD

**Prof. Dr Asha Bajpai**  
**TISS, Mumbai**

# Change in Approach



# RIGHTS OF THE CHILD

# Constitution of India and Children

- ▣ {15(3) }
- ▣ (Article 21 A)
- ▣ (Article 24)
- ▣ (Article 39(e))
- ▣ (Article 39 (f))
- ▣ Article 42:
- ▣ (Article 45)

# Constitution of India and Children

- ▣ **Article 46:** promote the educational and economic interests of weaker sections of the society with special care and therefore, the children therein.
- ▣ **Article 47:** duty-bound to raise the level of nutrition and the standard of living and to improve public health, including that of children.
- ▣ **Article 51 A (k):** It shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.
- ▣ **Article 243G** provides for the institutionalisation of child care by seeking to entrust programs of Women and Child Development to Panchayat (Item 25 of Schedule 11)

# Constitution of India (including children)

- ▣ Right to equality (Article 14)
- ▣ Right against discrimination (Article 15)
- ▣ Right to personal liberty and due process of law (Article 21)
- ▣ Right to being protected from being trafficked and forced into bonded labour (Article 23)
- ▣ Right of minorities for protection of their interests (Article 29)

# International Law- CRC-principles

- ▣ **Adopted by United Nations in 1989**
- ▣ **CRC international agreement legally binding on the parties signatory to it**
- ▣ **ratified by India on 11 December 1992.**

**Based on four basic principles:**

- ▣ **Non-discrimination (Article 2)**
- ▣ **Best Interest of the Child (Article 3)**
- ▣ **Right to Life Survival and Development (Article 6)**
- ▣ **Right to be Heard (Article 12)**

# CRC-basic rights

- ▣ The rights can be categorised as:
- ▣ **Survival Rights:**
- ▣ **Development Rights:**
- ▣ **Protection Rights:**
- ▣ **Participation Rights:**



# Child Rights



# Domestic Application of International Law

- ▣ Indian Constitution exhorts the State, in Article 51, to endeavour to “foster respect for international law and treaty obligations in the dealings of organized peoples with one another.”
- ▣ Article 253 of Constitution of India empowers the Parliament to legislate to fulfil its international obligations

# Use of CRC in Laws, Plans, Policies

- ▣ Protection of Children from Sexual Offences Act, 2012(POCSO) –CRC in its Statement of Objects and Reasons.
- ▣ The National Plans of Action for Children in 1992 and 2005 of referred to the CRC.
- ▣ 10<sup>th</sup> Five Year Plan (2002- 2007) CRC mentioned
- ▣ Eleventh and Twelfth Five Year Plans included a separate section on Child Rights.
- ▣ The Juvenile (Justice Care and Protection of Children) Act, 2015- CRC in preamble

# Use of CRC in Indian Courts

- ▣ **Sakshi v Union of India and Others, both the CRC and CEDAW were invoked.**
  - ▣ (AIR 2004 SC 3566 / 2004 (2) ALD Cri 504 (Date of Judgment: 26.05.2004))
- ▣ **Bachpan Bachao Andolan, in the wake of trafficking of children and serious violations and abuse of children employed in circuses.**
- ▣ **The Supreme Court in its order stated clearly, “India has ratified the UN Convention on the Rights of the Child in 1992. The Convention inter alia prescribes standards to be adhered by all state parties in securing the best interest of the child”.**
  - ▣ Bachpan Bachao Andolan vs. Union of India and Others. 2011 (5) SCC 1 ( Date of Order: 18.04.2011)

# Use of CRC in Indian Courts

- ▣ Expounding on Article 51, the Supreme Court of India has held, “Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”

Vishaka and others V. State of Rajasthan and others. (AIR 1997 Supreme Court 3011).

# Use of CRC in Indian Courts

- ▣ Noticing that there was a void in domestic legislations on the issue, court relied on CRC to bind the state towards owning responsibility towards trafficked children and observed,
- ▣ “The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them.
- ▣ accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.”
- ▣ The Delhi High Court cited the CRC to direct Government to frame policies for ensuring care and protection of children who happen to be victims of crimes.
- ▣ *Brindavan Sharma vs State Criminal Appeal No. 927 of 2002, Delhi High Court ( Date of Judgment: 06.12.2006)*

# Use of CRC in JJB

- ▣ Order dated 12.12.2010, Principal Magistrate of JJB -Delhi used **Article 40 of the CRC**
- ▣ general rule that procedures laid down in CrPC are not suitable to be applied to children's inquiries
- ▣ put a prohibition on issuance of bailable / non-bailable warrants and proclamation of being an offender against juveniles.
- ▣ **Article 40 of CRC requires State Parties to take necessary steps to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children.**
- ▣ Holding that a publication of proclamation of being an offender under Section 82 and subsequent order of attachment of property under Section 83 of CrPC is not in consonance with CRC,
- ▣ ordered for immediate prohibition of using criminal law procedure in this regard.
- ▣ The order read , ***“ There is no doubt that issuance of process under Section 82 Cr.P.C. is violent interference with right of a juvenile guaranteed under the various provisions of the Delhi JJ Rules 2009 and the JJ Act 2000 including his right of privacy, dignity, confidentiality and non-stigmatization.*”**





# The principle –CRC-Article 3

- ▣ **In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**

# Best Interest of the Child - factors

- ▣ **Identity**
- ▣ **Preservation of family environment**
- ▣ **Care protection, safety of child**
- ▣ **Right to education, health**
- ▣ **Qualified multi disciplinary professionals**
- ▣ **Child friendly safe environment**
- ▣ **Balanced and weighted**

# CRC- Best Interest -Substantive Right

- ▣ Substantive Right –The right of a child to have his or her best interests assessed and taken as primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child or children in general (Article 3 para1)
- ▣ An intrinsic obligation for States

# CRC- Rule of Procedure

- ▣ Whenever a decision is to be taken that will affect a specific child or a group of children,
- ▣ the decision making process must go through the consideration of possible impacts
- ▣ (Positive or negative) on the child/children concerned and must give this impacts a primary(high) consideration in the appreciation of different interests at play
- ▣ procedural rule
- ▣ Obligation on judges to consider the best interest rule of procedure (short , long, medium term impact)

# General Comment 14 CRC Committee

- ▣ Best interest of the child , a principle , rule of procedure based on assessment of all elements of a child's interest in a specific situation
- ▣ Unique activity
- ▣ Each case has its own circumstances
- ▣ Every child has unique specific characteristics
- ▣ Age, sex, maturity level of child
- ▣ Physical, sensory intellectual disability
- ▣ Social, cultural context, environment

# Best Interest of child-JJ Act 2015

- ▣ Sec2 (9)
- ▣ 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

# The Child as Witness in Court

- ▣ On 15th of April 2013, the High Court of Delhi passed an order regarding the competency of a child testifying in court.
- ▣ Courts are required to apply the **principle of best interests** by considering how the child's rights and interests are, or will be, affected by their decisions. **The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings.**
- ▣ State Versus Rahul, Criminal L.P. 250 of 2012, Delhi High Court (Date of Judgment: 15.04.2013)

# CHILD FRIENDLY JUSTICE



# POCSO Act 2012

- ▣ Statement of Objects and Reasons
- ▣ Safeguarding the interest and well being of child in every stage of judicial process , incorporating child friendly procedures

# Child friendly- JJ Act 2015

- ▣ S 2(15)
- ▣ Means any behaviour , conduct, practice , process , attitude , environment or treatment that is humane , considerate and in the best interest of the child

# What is child friendly Justice?

- ▣ ...justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level,
- ▣ giving due consideration to the child's level of maturity and understanding and the circumstances of the case.
- ▣ justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.
- ▣ definition of "child-friendly justice" can be found in the *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010* that stipulate the ingredients of child-friendly justice before, during and after judicial proceedings.

# Elements to be taken into consideration

- ▣ **1. Child's views**
- ▣ **2. Child's identity**
- ▣ **3. family environment**
- ▣ **4. Care protection and safety of child**
- ▣ **5. Child's vulnerability**
- ▣ **6. Child's right o health**
- ▣ **7. Child's right to education**
- ▣ **Vary from child to child and case to case**
- ▣ **Non hierarchal non exhaustive**

# Why Special Courts?

- ▣ Traditional courts of law do not take into account developmental needs of children.
- ▣ Legal proceedings in a traditional court are stressful and time-consuming.
- ▣ Language used in legal proceedings can be difficult for a child to comprehend.
- ▣ Child-friendly procedures can make the legal process less daunting for a child and also enhance the quality of the child's testimony.
- ▣ Dedicated courts, judges, and prosecutors can ensure speedy and child-friendly trial.

# Child sensitive

- ▣ “an approach that balances the **child’s right to protection and that takes into account the child’s individual needs and views.**”
- ▣ In a criminal trial, the views of a child are rarely considered.
- ▣ The rights and needs of a child victim, however, should be considered by judges, prosecutors, and others while examining a child in court.

# Special Courts under POCSO

- Under the POCSO Act, responsibility is vested with the Special Court to create a child friendly atmosphere,
- by allowing a family member or a person of the child's choice to be present in the Court.
- The aspects of “child-friendly justice” that the POCSO Act emphasizes upon are:
  - speedy trial under Section 35
  - modified procedures to cater to the special needs of children under Sections 26(3), 33(4) and 38 of the Act.
- left to individual Judges to ensure that children are dealt with and questioned in an age-appropriate manner

# Child friendly courts in India

- ▣ Delhi High Court has taken the initiative to create child friendly courtrooms.
- ▣ 'The Vulnerable Witness Deposition Courts' established in Kakardooma in 2012, Saket in 2014, Dwarka in 2017 also serve as the Special Court under the POCSO Act.
- ▣ complex has waiting rooms for children and their families with items to keep young children occupied.
- ▣ In South India, the first child friendly Court was established in 2016 in Nampally, Hyderabad
- ▣ In Bengaluru a Child Friendly Special Court was recently inaugurated.



# Child Witness Room: Karkardooma Court Complex



# Accused Room and Court Room




## Play Room Refreshments



## Arrangements for Refreshments



# Child Friendly Procedures



Permit frequent breaks during the trial., if necessary.

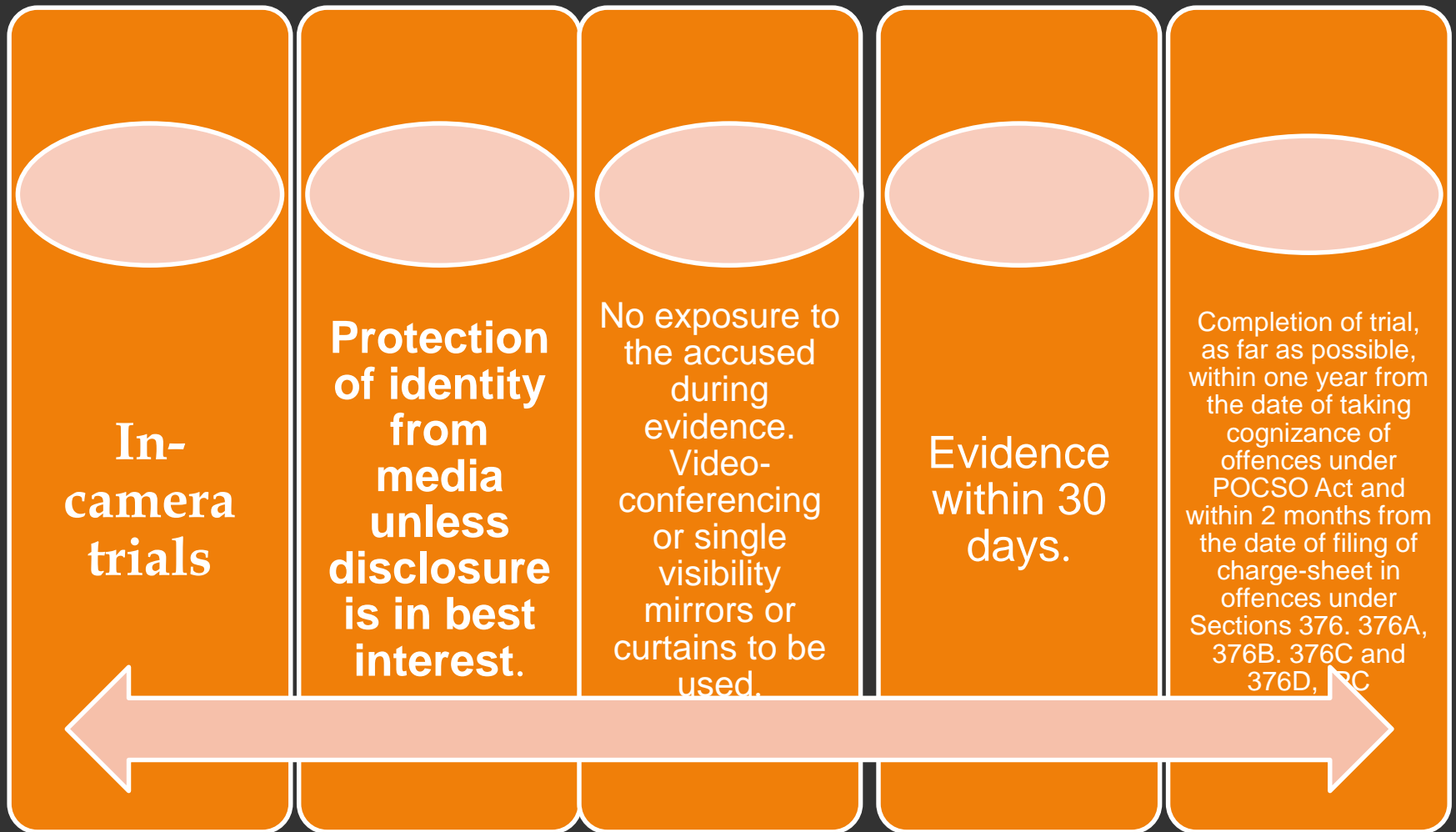
Check at appropriate intervals with the child if s/he is tired / hungry / thirsty / sleepy / scared.

Ensure that the child is not called repeatedly to testify in court.

No aggressive questions or character assassination of the child.

Questions to be posed by the judge and not the lawyer or prosecutor.

# Child Friendly Procedures



# Recording of Statement by Magistrate under POCSO

- Statement must be recorded in:
  - the exact language spoken by the child.
  - the presence of parents or any other person whom the child trusts.
- Assistance of a qualified translator or interpreter can be taken, if required.
- If required, assistance of qualified special educator or person familiar with the manner of communication of child with disabilities can be sought.
- Magistrate must try and ensure that statement is recorded by audio-visual means.
- Copy of documents being relied upon by the prosecution must be provided to the child, his or her parents or representative.

# Magistrates Recording of Statement under S 164 CrPC

- ▣ • Statements should not be recorded in presence of any police person.
- ▣ • Record the statement *in camera* and no stranger should be allowed inside.
- ▣ • The Magistrate should record statements in an informal and child friendly environment and by avoiding the judicial attire.
- ▣ • An oath should not be administered to any child below 12 years while recording statement as stated in the Indian Oaths Act 1969.
- ▣ • Do not make the child stand in the witness box to give her statement. A more friendly approach such as making the child sit next to the Magistrate should be adopted.
- ▣ • Take positive measures to reduce intimidation to the child while giving statement by recording the statement in the chambers and avoid a formal court setting.
- ▣ • In view of easing the child's fear and discomfort, it would be appropriate for the Magistrates to be sitting at the same level as the child.

# POCSO victims

- ▣ 94.8% of cases filed under POCSO the perpetrator is a person known to the child(NCRB 2015)
- ▣ 85.3% of victims – in cases charged under the (POCSO), turned hostile when the accused was someone they knew.
- ▣ **WHY?**



# Imagine...

- ▣ Stop for a minute and imagine yourself as that child.
- ▣ Imagine having to **summon up courage and find the words** to tell someone in your life that a person who they know, respect and trust has been hurting you.
- ▣ Imagine being a child riddled by the guilt of having to **'tell on' someone you know and maybe love.**
- ▣ Imagine being a child, so young, that you **do not yet have the words to talk about what is being done to you.**
- ▣ Imagine being a child so **horribly confused and ashamed** to being touched in a sexually manner that you can never tell anyone about it.
- ▣ Imagine being the child who tells – and the next thing you know your family has turned against you because of the shame you have brought; **your father, or grandfather or uncle who you accused is in jail**, and with his income gone your family is on the brink of ruin.
- ▣ **If you were that child, what would you be concerned with?**

# Imagine...

- ▣ Imagine being the child who has been violated and now has to repeatedly **recount to unfeeling strangers** what was done to you and how.
- ▣ Reliving the details of something dreadful, **not being allowed to forget** for however long it takes the wheels of justice to creak into motion.
- ▣ Having your **body inspected** for traces of your humiliation and terror.
- ▣ **emotional and psychological trauma** in almost every case of child sexual abuse.
- ▣ Child abuse is frequently couched in **love and affection**, requiring no brute physical force, leaving no outward physical markings.
- ▣ abuse relies heavily on coercion, threats and the **manipulation of an emotionally immature and vulnerable person** who is often in no position to resist or to defend herself, or to get help to stop it.

# Observations-Identity of child

- ▣ Poorly protected in Court
- ▣ when children are brought to Court to testify, they have to sit in the Courtroom in the presence of the police, lawyers, and accused people in POCSO cases, as there is no other place for them to sit and wait for their case to begin.
- ▣ When a victim of sexual assault has to openly sit in the Courtroom, his/her right to privacy and confidentiality is violated.
- ▣ Everybody who enters and leaves the Courtroom can see the child and identify them as victims of sexual abuse
- ▣ Waiting space outside the courts draws attention to the child and it is a natural assumption that children outside the Special Courts are either victims or related to the victim of a POCSO offence.

# Observations-exposure to accused

- S 36 POCSO mandates that child should not be exposed to the accused at the time of testifying.
- Special Courts employ screens, curtains, single visibility mirrors, cupboards etc., for this purpose.
- the child is compelled to sit openly in the Courtroom, they often do see the accused **before** and **after** the recording of their testimony.
- majority of child sexual abuse cases perpetrated by those known to the child and their family,
- child is exposed to **the relatives of the accused** who are accompanying the accused for the trial; who sometimes employ **intimidating facial expressions** to harass the child.
- creates great pressure and stress for the child, as well as their family, who are **forced to look** at the person who has violated them - right before they give their testimony to the Court.
- **Certain Special Courts do not use tools to prevent exposure to the accused. The mandatory provision is not adhered to sufficiently**

# Observation-Waiting ...

- ▣ Sometimes, when the child has to wait because there are other cases being heard in-camera, or during the lunch break, there is no place in Court for them to wait.
- ▣ seen children with their families sitting outside the Courtroom on the small, hard benches, without even a fan above their heads; that is if they get a place to sit at all.
- ▣ Child victims and their families often experience mental and physical distress because of all of this.

# Observations...

- ▣ In one court a teenage girl was called 3-4 times to give testimony
- ▣ when she was called the staff at the entrance stopped the relative saying only victim allowed you cannot go in
- ▣ In one case there was a mentally challenged victim girl.
- ▣ The defence lawyers were questioning her
- ▣ Unable to answer
- ▣ Nobody told them that special educators are allowed. Helped in drafting the application

# Observations

- ▣ The court agreed to special educator but on one condition- withdraw application
- ▣ In one case stenographer was seen asking questions to victims in chambers in presence of judge
- ▣ In JJB when you need to make an separate application for screen?
- ▣ Girl was cross examined - said she was in love
- ▣ *'filmi batein karne ki jaroratt nahin'*

# Some Suggestions

- ▣ The Presiding Judge enters the Courtroom through a separate passage; perhaps a child victim along with their family/support person, could also access the Court through a different entrance so that they are not compelled to see the accused persons while they enter the Court, and to maintain their privacy.
- ▣ A waiting room for victims and their families, which has basic facilities such as comfortable seating, a fan, and a toilet, would go a long way in ensuring the mental and physical comfort of the child so that they can testify calmly and with peace of mind, to ensure that the ends of justice are met.



# Some suggestions...

- o Reduce waiting time for children outside the court. Children's examinations should be scheduled for a specific time, either in the forenoon or afternoon session.
- • Invest in an electronic intimation mechanism that will alert victims and their families at least 24 hours in advance, if the hearing is being rescheduled.
- Replace robes and formal clothes with non-formal attire for the Presiding Officers, PPs and the lawyers while hearing POCSO matters to create an informal environment.

# Recommendations for Special Courts

- ❖ Complete the examination-in-chief on the same day. Breaks should be allowed if necessary.
- ❖ Do not allow the defence or the prosecution to question the child directly.
- ❖ Admit the statement of a child with disability recorded under Section 164(5A)(a) as examination-in-chief.
- ❖ Do not delay or deprives child victim in need of interim compensation by linking the decision toward to their testimony.
- ❖ Proactively consider compensation application and not hesitate from exercising their *suo motu powers in this regard*.
- ❖ Direct the DLSA to file a compliance report within 30 days of the award of compensation.
- ❖ Examine the child in the chamber or any other room in the court complex, if the courtroom intimidates the child.
- ❖ Apply the rulings of the apex court in *Jarnail Singh v. State of Haryana and Ashwani Kumar on the point of age determination*.

# Interview Guidelines

- ▣ **Scheduling Interviews**
- ▣ **Making the Child Comfortable**
- ▣ judge conducting the interview must introduce themselves.
- ▣ important to allay their fears.
- ▣ verbal consent of the child
- ▣ often misinterpret touch.
- ▣ not guess what the child might have said.

# Interview guidelines

- ▣ language well understood by the child.
- ▣ normal adult tone and pronunciation
- ▣ Actively listen to the child using minimal encouragers,
- ▣ No Multiple questions
- ▣ non-judgmental attitude- no disbelief
- ▣ words such as “abuse”, “rape” or “bad” etc., when asking about the experiences as these are adult interpretations.

# Their future

- ▣ courts and judges can be a powerful tool in positively shaping children's future lives.
- ▣ Great responsibility

- ▣ **Thank you**
- ▣ **[bajpaiasha@gmail.com](mailto:bajpaiasha@gmail.com)**

# Child friendly Quiz

- ▣ How child friendly is your Court ?
- ▣ Yes or No

# Yes or No

- ▣ Have Special Courts been designated?
- ▣ Have Special Public Prosecutors (SPPs) been appointed?
- ▣ Are these SPPs exclusively dealing with POCSO cases?
- ▣ Have any initiatives been taken to make the design of the courtroom child-friendly?
- ▣ Are tools and facilities available to prevent exposure of the child to the accused?
- ▣ Are Special Courts exclusively trying cases under the POCSO Act?
- ▣ Has there been any change in the location and ambience after being designated as Special Courts?
- ▣ Is there a separate entrance for children in the Courtroom, to ensure the child does not encounter the accused or the public?
- ▣ Have any measures been taken to provide space for children and families waiting for the hearing?
- ▣ Are basic amenities such as drinking water, toilets and lifts available in the vicinity of the courtroom?
- ▣ Is there a separate room in which the evidence of the child can be recorded?



# Yes or No

- ▣ Are all questions to the child routed through the Judge of the Special Court?
- ▣ What is the extent to which aggressive questions are prohibited?
- ▣ Are frequent breaks usually permitted by Special Courts?
- ▣ Are children called repeatedly to court?
- ▣ Are trials being held *in camera*?

# Yes or No

- ▣ **Is the assistance of experts, special educators, interpreters and translators taken?**
- ▣ **Is a Support Person provided to the child?**
- ▣ **Is evidence recorded within 30 days?**
- ▣ **What is the extent to which the trial is completed within 1 year?**
- ▣ **Reasons for adjournment in the best interest of child?**
- ▣ **have your Courts /JJBs taken measures to protect victims from threats or intimidation by the accused and children in conflict law?**
- ▣ **Are private lawyers allowed to participate in the proceedings?**
- ▣ **Is exposure to the accused prevented at all times?**
- ▣ **Are the children oriented to the Court complex and processes prior to the Court hearing?**
- ▣ **Are the support systems in place?**