



Procedural Justice and Child Sexual Abuse Trial in Kenya.

Dr. Scholastica Omondi (Ph.D)

Department of Humanities and Social Sciences, Criminal Justice Studies, United States
International University-Africa, Nairobi, Kenya.

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ABSTRACT: *The concept of procedural justice implies that the trial procedure adopted in arriving at a court decision must protect and balance the interests and rights of both accused persons and victims of crime in criminal trials. This article examines the adversarial trial procedure of Child Sexual Abuse in Kenya within the context of procedural justice. The study concludes that the procedure protects the rights and interests of accused persons, but violates the rights of Child Victims of Sexual Abuse and ignores their concerns. The article recommends an ideal trial framework that balances the rights of both accused persons and child victims of sexual abuse within the context of procedural justice.*

Keywords: accused, child victims, sexual abuse, procedural, justice

I. INTRODUCTION

Justice as a concept is often used loosely to refer to fairness, equity and satisfaction by parties to a dispute. Procedural justice simply refers to steps that a court or tribunal or any judicial authority applies in arriving at a decision that is acceptable and fair to both parties to a dispute. If a procedure is known, understood and accepted by parties to a dispute, both of them are likely to accept the final verdict as fair. The party that loses the dispute will never the less accept the decision if the procedure was fair. This has the effect of bringing litigation to a close in a more authentic and civilized manner. However it is not always that the judicial authorities ensure that the procedure adopted is understood and acceptable to all parties before them, before commencing the dispute resolution process. As an example, in cases involving children, it is quite common to find that children do not understand the process in which they are expected to participate. Subsequently, legal processes involving children at times result in unfair decisions as the procedures fail to address the concerns of child participants in the dispute resolution process. This review paper is presented in the following thematic areas:

- i. Definition of Procedure.
- ii. Definition of Justice.
- iii. Defining Procedural Justice.
- iv. The relationship between Substance and Procedure.
- v. The objective of Criminal Procedure.
- vi. Procedural Fairness in Criminal Proceedings.
- vii. Limitation of accused persons' rights in criminal proceedings.
- viii. CSA Trial and Procedural Justice.
- ix. Ideal Procedural Justice Framework for CSA Trial.

II. DEFINITION OF PROCEDURE

According to Galligan,¹ procedures are simply steps leading to a decision, a means for reaching outcomes or legal decisions which have a goal to advance. According to Bentham,² the substance of a decision

¹ J D Galligan, *Due Process and Fair Procedures* (Oxford University Press, 1996) 12.

² Bentham's works as found in M Bayles, *Procedural Justice: Allocating to individuals* (Kluwer Academic Publishers, 1990) 79.

refers to the outcome sought, while procedures are the steps leading to the outcome. Galligan³ adds that such steps (procedures) must reflect and respect the society's values while fulfilling the expectations of a section of the society whose interests/rights are to be protected by them. The procedures must express the concerns of the society in ensuring fair treatment to all individuals who seek to be protected by the outcome. In respect of the study, certain societal values which need to be protected by the procedures are the rights of accused persons premised on the presumption of innocence to protect innocent people from being punished.

The traditional goal advanced by legal decisions is the finding of guilt/innocence of the accused according to Damaska⁴ and other scholars such as McConville and Wilson,⁵ Dennis⁶ and McEwan.⁷ Human rights advocates as well as victimologists would argue that another value to be recognized and respected by procedures is the need to uphold and protect victims' rights in the course of criminal trials. Such scholars include Batra⁸ and Zedner⁹ being human rights activists and victimologists respectively.

III. DEFINITION OF JUSTICE

Procedural justice theorists like Rawls, Solum and Galligan are all in agreement that justice is fairness and a process is fair if it grants equal opportunities and liberties to the parties in a dispute.¹⁰ Rawls further emphasizes that it is not enough to grant equal opportunities and liberties, but where there exists inequality or disadvantaged people in society, then the distribution of available resources must be done in such a way as to benefit the least advantaged section of the society.

IV. Defining Procedural Justice.

Procedural Justice Theory argues for fairness in the steps that are used to arrive at a decision if the outcome is to be viewed as just. There are two important concepts in the procedural justice arguments that must be satisfied for a process to be viewed as just and fair. The first concept is that it must of necessity uphold the principle of equal distribution of resources to all involved in it. In this respect, the resources may be construed to mean rights and liberties. Therefore, child sexual abuse (CSA) trial would be viewed as a fair trial according to procedural justice theory, if it safeguards the rights and liberties of accused persons and also ensures that child victims of sexual abuse (CVSA) have their rights equally protected during the trial.

The second principle of procedural justice is the difference principle which states that the distribution of resources must benefit the less advantaged members of society to bring them to an equal level with those more advantaged. In this respect, my argument is that in a CSA trial, the accused persons are already advantaged by the fact that they have procedural safeguards in the form of rights to fair trial which are constitutionally protected. On the contrary, the classical adversarial court procedure falls short of CVSA rights, making them less advantaged in CSA trial. According to procedural justice therefore, for the trial to be just, it must be fair to both accused persons and CVSA. In ensuring such fairness, there is need to enforce the rights of accused persons in a manner that benefits the less advantaged CVSA by striking a balance between the rights of CVSA and those of accused persons in a CSA trial.

V. THE RELATIONSHIP BETWEEN SUBSTANCE AND PROCEDURE

Rawls attempted to distinguish between substance and procedure in his notion of justice which he analyzed in three levels.¹¹ The first argument is that justice is based on a set of rules that establish basic rights and duties known to everyone in the society. Laws that declare basic rights are therefore substantive laws

³ Op. cit n 1.

⁴ M Damaska, *Evidence Law Adrift* (Yale University Press, 1997) 40.

⁵ J Smith, 'Evidence in Criminal Cases' in M McConville M and G Wilson (eds), *The Handbook of The Criminal Justice Process* (Oxford University Press, 2002) 183.

⁶ I H Dennis, *Law of Evidence* (Sweet & Maxwell, 2007) 604. .

⁷ J McEwan, *Evidence and the Adversarial Process: The Modern Law* (Blackwell Publishers, 1992) 128.

⁸ M Batra, *Protection of Human Rights in Criminal Justice Administration* (Devandra Printers, 1989) 88.

⁹ L Zedner, 'Victims' in M Maguire and R Morgan and R Reiner R(eds), *The Oxford Handbook of Criminology* (Oxford University Press, 2002) 419.

¹⁰ Rawls J, *A Theory of Justice*, page 50 <<http://plato.stanford.edu/entries/original.position>> accessed 4 March 2012.

¹¹ *Ibid.*

according to this notion of justice by Rawls. Examples of substantive laws therefore include the ICCPR,¹² UNCRC,¹³ constitutions, and statutes that declare rights of individuals or groups of people.

Rawls' second argument is that justice is the property of the implementation of the substantive laws. He argues that it is not enough to declare rights, but there must be provided mechanisms of enforcing the rights. The mechanisms are according to Rawl referred to as rules to be followed in implementing the declared rights. An example of rules to implement rights may be given as the Kenyan Criminal Procedure Code Cap 75 Laws of Kenya since it provides for the procedure to be followed in ensuring that accused persons' rights in a fair trial is upheld.

The third argument posits that there is need to distinguish the rules (substantive laws) and the strategies of implementation. The effectiveness or otherwise of the implementation of the rights determines the overall functioning of the court and the country's judicial system. The procedures are the strategies for the implementation of the rules. The need to be fair if the outcome is to be seen as just whether or not it is accepted by the parties is of paramount concern as unfair procedures may lead to unjust results.

Rawls' third argument is shared by Zappala¹⁴ who argues that criminal procedure is based on the idea that to punish the accused person, the charge must be proved in a fair process of discovering the truth through the accurate application and respect of rules of procedure. Galligan's perception of procedures as means, instruments or mechanisms for giving effect to values pertinent to each form of legal process therefore confirms Rawls' third level of justice notion as strategies of implementing substantive laws. Substantive laws declare rights and liberties while procedural laws spell out the steps that are to be followed in realizing the rights. Procedural laws are therefore pertinent for the implementation of substantive laws.

The distinction between substance and procedure in law may not be very clear as there are areas of overlaps. Whereas some laws provide substance; others provide procedures while still others provide both. The distinction is however important in an analysis such as this study which looks into various descriptions by different scholars. The importance of the distinction is relevant in that CVSA have rights to protection through the UNCRC,¹⁵ the accused persons have rights under the ICCPR¹⁶ and constitutions, but the procedures for their implementation under the adversary system do appear to be fair to the accused persons but not to CVSA leading to miscarriage of justice in some cases.¹⁷ The ICCPR is therefore an example of a situation where substance and procedure are found in one legal standard making the distinction between the two almost obscure. Rawls attempt to differentiate substance and procedure in law has been advanced further by other procedural justice theorists such as Galligan and Solum.

Unfair procedures according to all procedural justice theorists lead to unfair outcomes. The main argument is that the purpose of substantive law is directed towards ends and goals which are set by legal systems, but usually linked to important values within the society. Procedures must therefore ensure that such values in any society are respected if the procedure is to be seen as fair to all those who seek redress through it. Procedures have the objective of not only accurate application of substantive law to achieve its intended goal, but must respect and uphold societal basic values which influence the making of legal standards as the society's expression of its intention to protect all its members who seek redress through procedures.

¹² The ICCPR was adopted by the UN General Assembly in 1966 and came into force on 23 March 1976.

¹³ Convention on the Rights of the Child, adopted 20th November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN Doc. A/RES/44/25 (1989). Text also available in (1989) 28 International Legal Materials 1448 and (1990) 29 International Legal Materials 1340. CRC has been ratified by every state in the world except Somalia and the United States of America. See Office of the United Nations High Commissioner for Human Rights 'Status of ratifications of the principal international human rights treaties' <<http://www.ohchr.org/english/countries/ratification/11.htm>>The UNCRC is the first single universal document that provides for children's rights.

¹⁴ S Zappala, 'Balancing Rights of Accuseds and Rights of Victims; Human Rights in International Criminal Proceedings' [2010] *Journal of International Criminal Justice* Vol 8 Issue 1,137. <<http://www.oxfordjournal.org/content/8/1/137-64.full>> accessed 15 March 2012.

¹⁵ Op. cit n 13.

¹⁶ Op. cit n 12.

¹⁷ Abrams E D and Ramsey H S, *Children and the Law: Doctrine Policy and Practice* (Minn West Group, 2000) 541.

Galligan, like Abrams and Ramsey,¹⁸ recognized the fact that laws, procedures included, are not static, but dynamic, evolving over time and influenced by historical and prevailing conditions at any given time. Subsequently therefore, when they are found to be inadequate or unequal in their treatment of those who seek redress through them, then reforms become necessary so as to create equality in the process. In this respect, the study argues that as the perception about the objective of criminal trials change from the traditional focus of the guilt or lack of guilt of the accused person to include victims' and international community's interests, so must procedures be reformed to reflect and accommodate the changes as prevailing societal basic values.

VI. THE OBJECTIVE OF CRIMINAL PROCEDURE.

The purpose of criminal proceedings is to protect the citizen from wrongful treatment and wrongful conviction.¹⁹ The purpose of the criminal trial process is to establish the guilt or lack of guilt of the accused person, before those found guilty can be punished. An important feature of the adversarial system is that accused persons are not required to co-operate with the investigators or prosecutors in the building up of the case against them. That is, investigating and prosecuting authorities, must prove, according to well-established rules of evidence before court, all the required components of the charge. The system is founded on the presumption of innocence and requirement of proof beyond reasonable doubt. Over the years however, the traditional purpose of the criminal process has been modified to include the need to balance the interests of victims of crime and the community with the liberties of accused persons, so that parties are treated fairly.²⁰

Many countries therefore now require criminal trials to not only safeguard the rights of accused persons, but also the rights of victims as stipulated in international law. In England, for example, the Human Rights Act 1998 which domesticates the European Convention on Human Rights requires the protection of victims' rights as human rights as well. The ICTY provides another example. Thus in the case of *Prosecutor v Norman, Kallon and Gbao*²¹ it was held that in ensuring a fair trial, the court process needs not only to consider the rights of accused persons, but also interests of the victims and the international community.

The examples clearly demonstrate that the practice of many states and international law now require the balancing of the interests of accused persons on the one hand and victims of crime and the society on the other hand. The balancing is particularly required in the case of CVSA because of their vulnerability as children. The need for fairness and balancing implies that there is need for special procedures in CSA trials which take into consideration the special needs of CVSA while safeguarding the rights of accused persons. The question to be answered by this study therefore is; what kind of procedure will guarantee fairness to both CVSA and accused persons in CSA trials? This is answered in the ensuing discussions in this paper.

VII. PROCEDURAL FAIRNESS IN CRIMINAL PROCEEDINGS.

Galligan²² and Rawls both argue that procedures must not only be fair, but must be known and accepted by both parties to a transaction, if the results of the process are to be acceptable to both as fair. When required to testify in CSA cases, many CVSA often do not understand the court procedures and why they have to narrate the intimate details of the abuse in court.²³ The lack of understanding of the court procedures make CVSA describes the court process, especially if it results into an acquittal of the accused person as 'worse than the abuse itself.'²⁴

Herman and Hirschman observed that some accused persons do commit the offence of CSA with full knowledge of the court process and the difficulty in proving the case against them since it is their word against

¹⁸ Ibid.

¹⁹ Op. cit n 6.

²⁰ Senior, Crowther-Dowey and Long, *Understanding Modernization in Criminal Justice* (McGrawHill, 2007) 142.

²¹ *Prosecutor v Norman, Kallon and Gbao* [2003] ICTY Case No.SCSL-2003-09-PT.

²² Op. cit n 1.

²³ Op. cit n 5, 6,17 .

²⁴ J Temkin, *Rape and the Legal Process* (Oxford University Press, 2002) 4.

the less knowledgeable CVSA.²⁵ The lack of pre-trial procedures which can ensure CVSA have an orientation of the court and its procedures make the criminal process fall short of the requirements of procedural justice.²⁶

The criminal trial process appears to protect the rights of accused persons without balancing with the interests of CVSA. This therefore results into inequality in the distribution of rights and liberties as argued by Rawls. It is the lack of a balance between the rights of accused persons and concerns for the protection of CVSA which results into unfairness in the procedures which in some cases may lead to injustice in CSA trials.

Concern about the position of victims in the administration of justice is a reflection of the prevailing international community's basic values as concerns victims and the universal acceptance that their needs are legitimate.²⁷ Courts have therefore appreciated the need to uphold the rights of accused persons in criminal proceedings while attempting to protect the interests/concerns of victims of crime, including CVSA worldwide.

In his speech at an international forum on International Justice, Judge Robinson²⁸ pointed out that although the ICTY was obligated to comply with the international human rights instruments of fair trial, which the tribunal did, the circumstances of the trials, involving mass atrocities and crimes against humanity against a number of witnesses and victims who could not testify without protection, there was need to balance the rights of accused persons to fair trial with the concerns of witnesses to ensure fairness to both sides. What is important, according to him is that witnesses are protected to give evidence and the accused person is given an opportunity to challenge the evidence produced. Measures adopted by the ICTY to protect the witnesses/victims therefore had to pass the test of fairness for them to be legitimate. Fairness was thus the principal tool in construing the ICTY Statutes to ensure protection of witnesses /victims without compromising the rights of accused persons, but ensuring that the accused persons had an opportunity to challenge any evidence given against them. If at the end of the balancing exercise the conclusion is that the protective measure is fair, then it is legitimate and meets the test of fairness.

In 2008 while addressing the question as to whether it is permissible to convict a defendant based solely or to a decisive extent on the testimony of one or more anonymous witnesses, Lord Bingham summed up the concept of fairness in criminal trials in the case of *R v Davis* by stating that:

'...if in order to do justice, some adaptation of ordinary procedure is called for, it should be made, so long as the overall fairness of the trial is not compromised'.²⁹

The contemporary perception by jurists of fairness in criminal trials has slowly grown to accommodate flexibility in procedural fairness as indicated by Lord Bingham of the House of Lords, Judge Robinson of the ICTY, and the US Supreme Court in the case of *Snyder v Massachusetts*, all confirming Lord Diplock's celebrated *dictum* that:

'... The respect and protection of fundamental human rights is not to a legal system that is infallible, but one that is fair, not necessarily perfect'.³⁰

Lord Diplock's reference to a legal system that respects and protects fundamental human rights as one that is not infallible, but fair, is in conformity with the Concise dictionary's definition of fairness as being just and equitable, which is the essence of procedural justice as already discussed. The concept of fairness in a criminal trial was again expressed when Judge Shahabudeen of the ICTY stated that:

'...the fairness of a trial need not require perfection in every detail, but the essential question is whether the accused person has had a fair chance of dealing with the allegations against him/her'.³¹

²⁵ J L Herman and L Hirshman, *Father-Daughter Incest* (Harvard University Press, 2000) 129.

²⁶ One of the findings of the study from the Kenyan courts was that there is no pre-trial procedure to allow CVSA familiarize themselves with the court surroundings and learn the procedures they are expected to follow when testifying in CSA cases.

²⁷ Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, 2003) 47.

²⁸ Robinson P, *The Right to a Fair Trial in International Law* (2009) with specific Reference to the work of the ICTY. A paper presented by Judge Robinson at a Colloquium on International Justice in Rome on the 16th October 2009. Judge Robinson Patrick was the President of the United Nations International Criminal Tribunal for the former Yugoslavia.

²⁹ *R v Davis* [2008] UKHL 36, (HL) {26(2)}.

³⁰ *Maharaj v Attorney-General of Trinidad and Tobago Privy Council* [1979] AZ 385 [1978] 2 AER 670 ;(1978) 2 WLR 902.

Despite the above liberal approach and interpretation of legal principles and constitutional provisions to accommodate emerging need for procedural fairness, there has also been a conservative approach aimed at maintaining the status quo of the rights of accused persons in criminal proceedings not being limited in any way. In 1981, the Superior Court of California state in the USA overturned a magistrate's conviction of an accused person on the basis that the magistrate allowed CVSA to testify in court with her chair turned away from the accused person in contravention of accused person's right to be confronted by his accuser under the Sixth Amendment of the Constitution.³² The Superior Court's interpretation of the right to confront witnesses was that the confrontation must be face-to face.

The US Supreme Court equally took conservative approaches to any attempts to limit the rights of accused persons in order to protect CVSA, but gradually accommodated the need for procedural fairness in CSA prosecutions. In 1988, the US Supreme Court, in the case of *Coy v Iowa*³³ by a majority of six to two judges, quashed a conviction of an accused person on the basis that the trial court allowed two thirteen year old CVSA to testify from behind a translucent screen which blocked out their view of the accused person, giving him a rather fuzzy view of them. The majority decision held that the accused person's right to confrontation meant face-to face, not obscured contact in which witnesses could see him as well as he saw them.

The minority judges argued that the case raised procedural fairness issues and the need to protect CVSA. Some of the majority judges were however, only willing to accept an exception to the rule of confrontation in CSA cases only if it could be shown that such confrontation caused undue distress that made CVSA unable to testify, while some majority judges could not at all accommodate such limitation of the rights of accused persons. The accused person was subsequently set free, but this decision, amongst many others led to the use of child psychologists in CSA cases to determine the impact of the abuse on the ability of CVSA to testify and the need for special protective court procedures.³⁴

Two years later, the Supreme Court took a complete turnabout on the issue of procedural fairness to CVSA and the need to limit accused persons' rights in CSA prosecutions. In the case of *Maryland v Craig*³⁵ the court held that it was constitutional to allow CVSA to testify through a live video link, if it could be shown that the presence of the accused person would upset the CVSA as to make her unable to testify. The decision attracted many legal commentaries, some applauding it while others criticized it as a violation of the accused persons' fundamental rights to fair trial.³⁶

The US Supreme Court confirmed the need to ensure procedural fairness in CSA trials in 1992 in the case of *White v Illinois*³⁷ when it held that despite the confrontation requirement, in a case where CVSA was unable to testify, the court could properly convict on the basis of a collection of hearsay statements, each of which was admissible under some exception to the hearsay rule. The courts therefore slowly came to accept that CSA trials are challenging to prosecute under the classical adversarial legal system. Subsequently, the courts became flexible to limiting the rights of accused persons to fair trials such as right to confrontation, rule against hearsay evidence in order to ensure fairness in the trial to both CVSA and accused persons through a balancing act, without compromising accused persons rights, while protecting CVSA.

The situation in Britain as far as limiting the rights of accused persons in fair trial to balance the concerns of victims was different and did not present unconstitutionality arguments due to the fact that Britain lacks a written constitution.³⁸ Not only are the distinctive features of the adversarial system virtually without constitutional protection, but the courts are ready when circumstances necessitate, to allow significant departures from the adversarial system.

³¹ Prosecutor v Slobodan Milosevic, (ICTY) Case No IT-02-54-AR 73.4.

³² Herbert v Superior Court (1981)117 Cal App 3d 661.

³³ Coy v Iowa (1988) 108 S Ct 2789.

³⁴ B E J Myers and others, Expert Testimony in Child Sexual Abuse Litigation (Nebraska Law Review 1989) 68, 1-145.

³⁵ Maryland v Craig (1990)110 S Ct 3157.

³⁶ K D Vaillancourt , (1990) State v Thomas. Face to Face with Coy and Craig. Constitutional Invocation of Wisconsin's Child-Witness Protection Statute. [1990] Wisconsin Law Review, 1613-53 and Cecchetini-Whaley, G. D. (1992) Children as Witnesses after Marland v Craig. Southern California Law Review, 65, 1993-2037.

³⁷ White v Illinois (1992) 116 S Ct L Ed 2nd 851.

³⁸ R J Spencer and R Flin, The Evidence of Children, Law and Psychology (Blackstone Press Ltd, 1998) 75.

As an example, although parties call witnesses in court and examine them, special tribunals have at times deviated from the practice and sometimes adopted the inquisitorial approach in which the chairman of the tribunal conducts the interrogation of witnesses as was the case in *R v Commission for Racial Equality, ex parte Cottrell & Rothon*.³⁹ The British courts are so flexible to the reform of the adversarial system in pursuit of procedural justice that although it is the parties to call and examine witnesses, in England (not in Scotland), the judge in criminal proceedings has a right to call supplementary witnesses not called by the prosecution/defence and may ask supplementary questions to any witness in court.⁴⁰

In theory therefore, any aspect of the adversarial system's procedures in Britain could be changed by Parliament if it is contained in a statute, or by a court decision if found in court precedents. In practice however, any such changes must conform to the European Convention on Human Rights (ECHR)⁴¹ which does not give similar unqualified support to the adversarial system's rights to fair trial as the Sixth Amendment to the US Constitution. The ECHR⁴² provides for several minimum guarantees to accused persons such as a public hearing, examination of witnesses, in a fair trial, but excludes the public and the press in the interest of morality, public order, national security, interest of juveniles, protection of private lives, or if in the court's opinion, it is necessary to do so in special circumstances in the interest of justice. The ECHR therefore expressly provides a human rights basis for the limitation of the rights of accused persons in criminal proceedings under various circumstances.

While attempting to balance fundamental rights and freedoms of both accused persons and victims to ensure procedural fairness, the ECHR has ensured there is no compromise of the rights of accused persons to fair trial as provided by the ECHR under Article 6. In this respect the ECtHR condemned convictions based on witness statements obtained out of court which the accused persons had no opportunity to challenge.⁴³ However in the case of *Delta v France*⁴⁴ the ECtHR emphasized that the accused person's right to cross-examine witnesses does not insist on the witness being brought to court to give live evidence, but that the prosecution can use written statements obtained from witnesses in pre-trial interrogations, provided the accused person had an adequate opportunity to challenge and question the witnesses either at the time of making the statement or at a later stage in the proceedings. The right to examine witnesses may be satisfied not only by allowing accused persons/counsel to put questions to the witnesses as in Britain, but also in the continental system such as France and Germany where the judge or some court official is appointed to put questions to witnesses at the request of the accused persons.⁴⁵

In the next section, the study discusses views of contemporary scholars on the question of balancing accused persons' rights and protection of victims (CVSA included) in a fair trial. The discussion analyses arguments on whether or not the rights of accused persons to a fair trial can be limited to ensure a balance with the need to protect CVSA.

VIII. LIMITATION OF ACCUSED PERSONS' RIGHTS IN CRIMINAL PROCEEDINGS

There is no consensus amongst scholars as to the extent to which the rights of accused persons may be limited to accommodate the protection of victims of crime, or indeed whether there should be any limitation at all. Whereas some scholars agree that the rights of accused persons must be balanced with those of victims since both are human rights and indivisible,⁴⁶ others maintain that accused persons' rights are superior to those of victims and so any attempts to protect victims are secondary to the rights of accused persons and where any conflict occurs, the accused persons' rights prevail.⁴⁷ This section analyzes views of various scholars on this vital aspect of this study. The first section analyses supportive views while the second section deals with opposing views on the debate of balancing accused persons' and victims' rights within the context of procedural justice.

³⁹ *R v Commission for Racial Equality, ex parte Cottrell & Rothon* [1980]1WLR1580.

⁴⁰ *Op. cit* 38.

⁴¹ The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in 1950, entered into force in 1953.

⁴² *Ibid.* Article 6.

⁴³ *Unterpertinger v Austria* (Series A No 110) (1986); *Kostovski v The Netherland* (Series A No 166) (1989).

⁴⁴ *Delta v France* (1990) Series A No 191.

⁴⁵ J Doran, *The Judicial Role in Criminal Proceedings* (Oxford: Hart Publishing, 2000)145.

⁴⁶ *Op. cit* n 24, 38.

⁴⁷ S Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2003)73.

Arguments in support of the Limitation of the Rights of Accused persons to a Fair Trial.

According to Hoyano and Keenan,⁴⁸ fairness to victims and witnesses of crime can be accomplished through procedural fairness without jeopardizing fairness to accused persons. They emphasize the fact that the truth seeking purpose of the criminal trial can best be achieved by modifying the orthodox adversarial trial where its rigours impede that objective (as in cases of CSA). Hoyano and Keenan's argument is supported by Judge Jackson who argues that protecting witnesses need not be at the expense of accused persons and there is no need for choosing either the accused persons' or victims' rights over the other as the two are not in competition.⁴⁹

Appreciating that it is not possible to make the criminal proceedings entirely stress free for CVSA, it is however important to note that the very nature of CSA makes the experience of narrating it to court agonizing and therefore procedural reforms to enable CVSA testify is the only way of ensuring justice for both accused persons and CVSA, since the orthodox adversarial court procedures were not developed with the possibility of child victims' as participants in the process.⁵⁰

While referring to the set of procedural rights of victim participation in the ICC process under the Rome Statute⁵¹ and Rules of Procedure and Evidence (RPE),⁵² Zappala⁵³ supports the notion of victim interest protection and adds that there is nothing prejudicial *per se* to the rights of accused persons in allowing victims to participate in the international criminal process. Zappala however raises concern about apparent ambiguities in the ICC Statute and lack of clarity as to the procedural model adopted by the court. Probably the expectation would have been to choose between the adversarial or the inquisitorial models of criminal procedure. However, both models have their own disadvantages⁵⁴ and leaving the model open gives the judges an opportunity to draw from each model what is beneficial to the ICC in balancing the rights of accused persons and measures to protect victims. The lack of clear cut provisions in the RPE as to how victims are to present their evidence in court and the extent of their participation, are in the opinion of Zappala, causes for potential violation of the rights of accused persons since judges are left with the sole responsibility of determining appropriate measures of victim participation that are consistent with the rights of accused persons.

Although Zappala's argument is sound and valid, I take the view that leaving judges to exercise their discretion in determining how and to what extent the measures to protect victims is good in promoting development of jurisprudence in this area since it is the first time that victims' rights to participate in an international criminal process is recognized. Besides, it may not have been possible to envisage all ways in which victims may present their evidence considering the varied offences and types of victims that may appear before the court. In addition, the ICC has an appellate chamber where possible violations of the rights of accused persons can be challenged.

Another argument by Zappala is that legal uncertainty about the exact nature and extent of victims' participation has in practice seen some judges of the ICC being reluctant to recognize the primacy of the procedural rights of victims' participation, which in some cases weaken the same victims' participation in the process. Zappala's concern is that the grey area of the status of a witness and that of a victim further complicates the notion of victim participation in situations where it is not clear if one is both a witness and a victim leading to double status which may present situations of possible conflict with the rights of accused persons in an attempt to protect victims.

⁴⁸ L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press, 2010) 598.

⁴⁹ Judge Hal Jackson, 'Child Witnesses in the Western Australian Criminal Courts' (2003) 27 *Criminal Law Journal* 199.

⁵⁰ Rayner Moira, a barrister and founder Director of the Office of Children's Rights Commissioner for London who argues that rules of advocacy of accused persons' rights demand that the defendant's version of events be put to the victims/witnesses, but that if the process is inevitably stressful, it need not be inevitably abusive in and of itself.

⁵¹ The Rome Statute- U.N.DOC A/CONF.183/9 of 17 July 1998.

⁵² *Ibid*, Article 51 which provides for the adoption of Rules of Procedure and Evidence by the ICC.

⁵³ S Zappala, 'Balancing Rights of Accuseds and Rights of Victims; Human Rights in International Criminal Proceedings' [2010] *Journal of International Criminal Justice* Vol 8 Issue 1,137. <jicj.oxfordjournal.org/content/8/1/137-64.full> accessed 15 March 2012.

⁵⁴ *Op. cit* n 48.

The other concerns raised by Zappala are rights of victims in the light of the principle of due process, primacy of the rights of accused persons, victim participation and the right to expeditious trial, the presumption of innocence, the right to a fair trial and principle of equality and the right to be heard by an independent and impartial tribunal.

In addressing each of the above concerns as possible areas of conflict, Zappala argues that what is needed is fair balancing of the rights of accused persons with the measures of protecting victims by recognizing that there is no competition amongst the two and by giving the accused person adequate opportunity to challenge evidence against him/her. Zappala applauds the idea of victim protection as a step in the right direction, calling for the act of delicate balance in respect of the protection of accused persons' rights in the process. In order to ensure no conflict occurs in protecting victims while safeguarding accused persons rights, Zappala urges for clarity in the mode and boundaries of victim participation in the light of accused persons' rights and any potential conflict area must recognize the fact that the purpose of the criminal procedure is to establish the guilt/innocence of the accused person while protecting his/her rights in the due process. To this argument I add that the criminal process must, in protecting the rights of accused persons also ensure protection of victims' interests as provided by the Rome Statute.⁵⁵

As regards the primacy of the rights of accused persons, I take the view that accused persons' rights and victims' rights are both human rights and both need to be treated equally. Both accused persons and victims are entitled to equal treatment and protection of the law such as under the Constitution of Kenya 2010.⁵⁶ The right of accused persons to a fair trial is recognized and protected by the same Constitution⁵⁷ and so is the fact that children are vulnerable and need special protection and that courts must give children an opportunity to be heard while children's best interests must be the guiding principle in decision making in matters affecting them.⁵⁸ Both the accused persons' right to fair trial and need to protect CVSA are therefore constitutional rights under the constitution of Kenya 2010, hence the need to ensure that neither is compromised in the interest of the other, for that is the essence of striking a delicate balance.⁵⁹

As far as the accused persons' right to an expeditious trial is concerned, the possible conflict can be contained since the judges are deemed to be in control of the process and any application or measure that may cause delay of the proceedings needs to be decided on a balance of the interests of both victims and the accused persons. One such balancing act according to Zappala is releasing the accused person on bail pending trial to mitigate the effects of the delay if the accused person is in custody. However, such a release of the accused person on bail should give conditions attached to it so that the accused person does not intimidate the victim or interfere in any way with the trial process. Of importance is to ensure the safety of victims as the accused person is released on bail.

As regards the accused persons' right to be heard by an impartial tribunal Zappala argues that when judges actively get involved in the truth seeking process like the one at the ICC where they can question witnesses and make protective orders then they may at times be seen not to be impartial. Zappala counters this argument by noting that the most important test for impartiality is fairness to both the accused persons and victims while ensuring that the accused persons have every adequate opportunity to challenge any measure taken by the court in protecting witnesses. As Lord Diplock,⁶⁰ Judge Robinson⁶¹ and Judge Shahabudeen⁶² all observed, what is important in a fair trial is that the accused person has an opportunity to adequately challenge any evidence against him/her.

One last concern raised by Zappala is the principle of presumption of innocence in the light of victims' right to participate in criminal proceedings. Zappala clarifies that there is no conflict at all between the presumption of innocence and victims' procedural rights since the Rome Statute expressly states in Article 66(2)

⁵⁵ The Rome Statute- U.N.DOC A/CONF.183/9 of 17 July 1998.

⁵⁶ Constitution of Kenya 2010 Article 27.

⁵⁷ Ibid Article 50 provides for fair hearing to accused persons.

⁵⁸ Ibid. Article 53.

⁵⁹ Op. cit n 48.

⁶⁰ *Maharaj v Attorney-General of Trinidad and Tobago* Privy Council [1979] AZ 385 [1978] 2 AER 670 ;(1978) 2 WLR 902.

⁶¹ Op. cit n 29.

⁶² *Herbert v Superior Court* (1981)117 Cal App 3d 661.

that the burden of proof is on the prosecution and no reversal of the burden is envisaged or allowed. Victims' participation or measures protecting victims cannot in any way alter such a fundamental principle of criminal proceeding which remains as a hallmark of justice. Zappala concludes by dispelling the notion that victims' rights can compromise the rights of accused persons in criminal proceedings. Instead Zappala argues for progressive development of procedural reforms to ensure justice for both victims and accused persons.

While Zappala supports the supremacy of the presumption of innocence as do many other scholars, not all scholars share the same view. One such scholar, Kamlasabayson,⁶³ while not directly attacking the age old presumption of innocence argues that if not properly approached, the presumption of innocence could cause injustice, not to accused persons but to victims since it makes the criminal process focus on the guilt/innocence of the accused while placing a heavy burden of proof beyond reasonable doubt on the prosecution as the subject of inquiry, the accused person does not have a role in the discovery of the truth due to the right to remain silent. Kamlasabayson is however quick to point out that he does not criticize the presumption of innocence for the sake of it but, that his criticism is a demonstration that the presumption of innocence without a corresponding right of victims to seek effective justice for the wrong done to them has invariably led to a miscarriage of justice in some cases.

According to Kamlasabayson, the Sri Lanka CJS which is adversarial in nature is tilted in favour of the accused person who has constitutional safeguards as to fair trial rights. The victims of crime however have no sufficient and effective legal provisions to deal with their concerns and the lack of it in the constitution. He however argued that although the Sri Lanka constitution does not provide for victims' rights, the state has an inherent duty to protect all citizens and their property. Victims of crime therefore have legitimate claim for a criminal process that enables them to express their experiences as victims and witnesses of crime in order for the state to carry out its protective role of punishing the guilty.

Kamlasabayson was concerned that victims play two important roles in the CJS yet their concerns are not properly addressed. The first is that the victim is the person injured by the crime committed and so suffers personal injury, but in exposing the crime, enables the state to carry out its function of maintaining law and order. Victims are therefore in most instances also witnesses of crime and so the state must protect them. Kamlasabayson particularly singled out victims of sexual abuse, especially children as being in need of special consideration in the criminal process when they testify under what he called a secondary institutionalized re-victimization of victims by the CJS. He concludes that the CJS is permeated by the notion of balance as to ensure that no innocent person is unfairly prosecuted or convicted, so it should also strike a balance with the interest of victims to have suspects prosecuted/convicted.

Another proponent of the balancing between the rights of accused persons and those of victims is O'Connell⁶⁴ who recognizes the fundamental freedoms and liberties of the accused persons but notes that victims have for a long time been the 'forgotten party' in criminal justice. O'Connell argues that the recognition of victims' rights is a new development aimed at making victims integral players in the criminal process since victims' rights are not readily seen as human rights thereby creating a disconnect in the debate about victims' rights and the belief that such rights may interfere with accused persons' rights.

O'Connell traces accused persons' rights to the *Magna Carta*⁶⁵ and argues that the case set out two important principles of justice, one that no one should be denied justice, including victims, and that if a presumed right is ignored or dispensed with, appropriate action should be taken to restore it. In this respect, O'Connell argues that crime is a violation of victims' human rights and consequently, steps must be taken to ensure their access to justice which they are entitled to on an equal basis as the accused persons.

⁶³ C K Kamlasabayson, *Balancing Rights of Accuseds and Rights of Victims* (2003). Available at <<http://www.alrc.net/doc/mainfile.php/documents/432/>> accessed 10 March 2012. Kamlasabayson, Kandapper Chinniah P.C. served as an Attorney General of Sri Lanka and spoke during a human rights activists memorial lecture in the year 2003 on the topic at the Asian Legal Resource Centre.

⁶⁴ Michael O'Connell is the Commissioner for Victims' Rights in South Australia and presented a paper towards the debate on Victims' Rights as Human Rights in Australia at Human Rights Construction, Parkinet House, and Canberra ACT in July 2009.

⁶⁵ Magna Carta is a Latin word meaning Great Charter. It is an important document signed in medieval England between King John and his subjects in 1215 promising good laws that respect everyone and treat everyone fairly.

O'Connell emphasizes that to allow supremacy of accused persons' rights over those of victims' is to perpetuate inequality in the administration of justice. O'Connell further proposes that the UNDBPJVCAP⁶⁶ which declares the rights of victims to crime and norms as well as standards on how they are to be treated by the courts, takes the same form of other international human rights instruments as it has been adopted by the United Nations High Commission for Human Rights and is expressed in other human rights instruments on fair treatment of victims. Indeed O'Connell argues that it is the international recognition of the need to provide justice to victims of crime as one of the objectives of setting up the ICC without prejudice to accused persons' rights to a fair trial. O'Connell concludes that balancing of victims' rights with those of accused persons is the beginning of transformation towards a fair system that recognizes the interests of both accused persons and victims.

Victims have also added their voice to the need for fair treatment in the administration of justice by balancing their interests with the rights of accused persons. According to research carried out by Young,⁶⁷ Wemmers,⁶⁸ Erez and Roberts,⁶⁹ victims want their rights recognized to the same extent as those of accused persons. They want a judicial process that treats them with respect and dignity where they can be informed of the process and their role in it as well as being enabled to effectively communicate their concerns.

According to Waterhouse,⁷⁰ the traditional adversarial system's trial procedures must be reformed to balance the rights of accused persons with the rights of CVSA because children were not anticipated as actors in the administration of justice. A balancing act is therefore necessary to ensure fair procedures that can assist CVSA in the recovery process as opposed to re-victimizing them.

Arguments Against the of the Rights of Accused Persons to a Fair Trial.

The debate on balancing accused persons rights with those of victims is not complete without views of those who oppose any attempts to limit the rights of accused persons. One such critic is Berlins⁷¹ who in his commentary on the Guardian, a British newspaper in an article entitled 'victims' rights are important but they should not impinge on the rights of accused persons argues that the criminal justice system has two sides in a trial. On the one hand is the state, represented by the prosecution and on the other hand is the accused. Berlins points out that the victim is not and should not be a separate entity with a separate say as their needs, whether cross-examination of witnesses or any other can be represented through the prosecution.

Berlins emphasizes that the role of victims in a criminal process is that of a witness of crime on the side of the prosecution. To give victims a more central role, is in Berlins' view, an act of 'unbalancing the scales of justice against the accused person which results into unfair contest with the prosecution and victim on one side and the accused persons on the other with a possibility of more innocent accused persons being wrongly convicted.' Berlins concludes that any attempt to limit the rights of accused persons by involving victims in the criminal process other than as witness amounts to a 'tripartite procedure' on a trial system meant for two parties only.

Some measures taken in Britain to protect victims have been viewed as giving false hope to victims while eroding important protection for accused persons.⁷² The critics argue that such measures to accommodate victims which include allowing evidence of previous misconduct, changes in hearsay rule and the rule against double jeopardy⁷³ have not enhanced victims' interests while pushing the accused persons away from the centre

⁶⁶ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (1985) (DBPJVCAP). UN doc. A/CONF.144/20, Annex, Guide for Practitioners.

⁶⁷ Allan Young, 'The Role of the Victim in the Criminal Process: A Literature Review' (Department of Justice 1989) <[http:// dsp-psd.pwqsc.gc.ca/collection j3-3-12001](http://dsp-psd.pwqsc.gc.ca/collection/j3-3-12001)> accessed 10 March 2012.

⁶⁸ Joanne Wemmers, *The Meaning of Justice for Victims*, In the International Handbook of Victimology (Boca Raton: CRC Press, 2010)37.

⁶⁹ Edna Erez and Julian Roberts, *Victim Participation in the Criminal Justice System: In Victims of Crime*. (Thousand Oaks: Sage Publication, 2007) 599.

⁷⁰ Waterhouse Samantha, *The Impact of Changing Criminal Justice Response to Child Victims of Sexual Abuse* (Criminal Justice Initiative of Open Society Foundation for Africa, 2008)35.

⁷¹ Berlins, Mercel is a lawyer and university lecturer who also does legal commentaries and is a journalist as well, writing for the British newspapers, the Times and the Guardian. In his commentary in the Guardian of the 17th May 2005, he sharply criticized attempts to limit accused persons' rights.

⁷² D E Cape, *Reconcilable Rights: Analyzing the Tension between Victims' and Defendants* (Legal Action Group, 2006) 245.

⁷³ The amendments are contained in the English Criminal Justice Act of 2003.

of the criminal proceedings. Lifting the restriction on allowing evidence of previous misconduct according to the critics, ignores the fact that judges may be unduly prejudiced by such information or that the evidence may be used to strengthen weak cases against accused persons by the prosecution and the police may unwisely arrest the usual 'suspects.'

The relaxation of the rule against double jeopardy allows for a retrial where the Court of Appeal finds that there is new compelling evidence. This change is criticized on the ground that if the Court of Appeal finds the new compelling evidence credible, then chances of a lower court acquitting the accused persons are limited. The hearsay rule, according to the critics, waters down the very essence of oral evidence and need to test its credibility, thereby making it easier to convict innocent people. They maintain that accused persons must remain at the centre of the criminal proceedings since the primary function of the criminal justice system is the conviction and appropriate punishment of the guilty and acquittal of the innocent, while the secondary aim is to ensure minimal pain caused to those involved. While the critics may have sound arguments about the need to ensure only guilty persons are convicted and punished, what is important in a fair trial is that whatever measures taken to protect the interests of victims, the accused persons must be given adequate opportunity to challenge evidence adduced against him/her.

The argument is that the accused person is the one whose conduct is being investigated and faces the possibility of a conviction with serious consequences. In their view, any measures that make it easier to convict innocent persons do not serve the interest of victims and must be avoided. The accused person must remain innocent until proven guilty and the prosecution must discharge the burden of proof beyond any reasonable doubt as required by Article 6(2) of the ECHR. Any other additional function of the criminal justice system must respect the rights and need to protect accused persons and ensure that the high standards and threshold of criminal trials are not undermined. This argument relegates the protection of the rights of victims as secondary to those of accused persons, whereas what is needed is a balance between the two to ensure fairness to both accused persons and victims. The argument also ignores the fact that procedures should reflect societal values of protecting the vulnerable and respecting the rights of all who seek legal redress as argued by Galligan, Bentham and other procedural justice theorists.⁷⁴

Evers,⁷⁵ one of the strongest critics of erosion of accused persons' rights in sexual offence trials argues that measures taken by the Australian government and courts to protect victims of sexual abuse have in fact overprotected them to an extent of making the accused persons vulnerable to conviction and calls for a rebalancing of the rights of accused persons and victims of sexual violence to ensure justice and fairness to both. Her argument is based on reforms that prevented the admissibility of evidence of past sexual activities of victims.⁷⁶ She argues that the judicial and legislative enthusiasm, media publicity and public sympathy have resulted into undue erosion of the rights of sexual offence suspects.

There are many arguments by different scholars on the balancing of accused persons rights with those of victims, but Beijer and Liefwaard⁷⁷ are more specific on the balancing of the rights of child victims and those of accused persons considering both the positive and negative implications of child witness protective measures. They argue that Article 12 of the UNCRC gives CVSA the right to be heard in matters affecting them which therefore implies that they must be heard under child friendly procedures in an environment that is not hostile or intimidating, but one that enables them to present their views articulately by being active participants in the criminal proceedings as elaborated by the 2005 United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, as discussed in details in the ideal framework for CSA trial at the end of this paper.

⁷⁴ Op. cit n 1.

⁷⁵ Evers Tania, a lawyer based in Sydney presented a paper titled Erosion of an Accuseds' Rights in Sexual Assault Cases at the 9th International Criminal Law Congress in 2004.

⁷⁶ Section 403 of the New South Wales Criminal Procedure Act 1986 (previously s 409B of the New South Wales Crime Act) introduced in 1981 to protect women who complained of sexual offences from being questioned on irrelevant sexual activity.

⁷⁷ Beijer, Annmarieke and Ton Liefwaard Ton, 'A Bermuda Triangle? Balancing Protection, Participation and Proof in Criminal Procedures affecting Child Victims and Witnesses' (October 2011) *Utrecht Law Review* Vol. 7 issue 3, 70.

Beijer and Liefwaard also argue that the General Comment No.12 of the UN Committee on the Rights of the Child⁷⁸ further emphasizes the fact that member states are obligated to take appropriate measures to ensure that child victims and witnesses testify under child friendly procedures. The state obligation and CVSA right to be heard under the UNCRC therefore necessitate the balancing of accused persons' rights to fair trial with CVSA right to be heard and participate in criminal proceedings. They conclude that measures to protect CVSA while testifying such as video link should be viewed, not as competing against the rights of accused persons, but as measures to enhance the truth seeking process of establishing the guilt or innocence of the accused, by enabling CVSA to tell their story of the sexual abuse and give their views which can only be respected if the process treats them with dignity.

IX. CSA TRIAL AND PROCEDURAL JUSTICE

Dworkin⁷⁹ argues that procedures must meet the test of whether they can effectively and efficiently lead to the implementation and enforcement of rights declared by substantive laws through accurate application of rules within society's social context of what constitutes basic values. Galligan identifies some basic societal values as non-discrimination, fair distribution of resources, equality and respect for other peoples' rights which are directly relevant to the trial of CSA under the adversarial legal system in the context of CVSA rights/interests.

The society values children and recognizes their vulnerability and need for special protection as expressed through the UNCRC,⁸⁰ ACRWC⁸¹ the Constitution of Kenya 2010⁸² and the Children Act.⁸³ Based on both Bentham's and Galligan's arguments therefore, CSA trial procedures need to recognize and respect, not only the need to protect innocent people accused of CSA. Both must also reflect and respect the fact that CVSA are children, vulnerable and need special protection by the procedures when they testify in court as argued by Mosteller.⁸⁴

Both substantive and procedural laws are concerned about fair treatment of individuals who seek redress through them. Procedures are therefore fair if they ensure fair treatment of all those who stand to benefit from fair treatment or lose from unfair treatment. Both the accused persons and CVSA have claims in procedures and stand to benefit or lose depending on the applicable procedures. Both of them must as of necessity be treated fairly by fair procedures which give each equal opportunity to be heard. Procedures must therefore guarantee the rights of both CVSA and accused persons in order to avoid a mistaken application of the law that may deny benefits to either party, for that may be detrimental to the society, taking the form of what Galligan calls loss of confidence in the ability of the judicial process to treat everyone fairly.

All procedural justice theorists are in agreement that legal processes are about fair treatment and that procedures are fair to the extent that they ensure fair treatment to all affected by them. This consensus is best captured by Hart who observed:

'...justice is concerned with how different classes of individuals in society are treated.'⁸⁵

As far as procedural fairness is concerned, the fact that legal standards declare rights of certain members of the society indeed confers to the same members procedural rights to enforce their entitlements under the recognized rights. Therefore, not only do accused persons have fair trial rights under the ICCPR⁸⁶ and other international, regional and domestic human rights instruments, they have procedural rights as well to enforce the fair trial rights. In the same line of argument, CVSA not only have rights under legal standards such

⁷⁸ General Comment No. 12 of the UN Committee on the Rights of the Child UN. Doc CRC/C/GC/12, 20 July 2009.

⁷⁹ R Dworkin, *Taking Rights Seriously* (Harvard University Press, 2000)150.

⁸⁰ Op. cit n 13. Article 3 provides for the best interest of children as a paramount consideration in matters concerning them. UNCRC

⁸¹ African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29th November, 1999) OAU Doc.CAB/LEG/24.9/49 (1990). ACRWC was also passed to give effect to the provisions of the African Charter on Peoples and Human rights in respect to child welfare, Article 4.

⁸² Op. cit n 56. Article 53(2).

⁸³ Children Act of 2001. Section 3.

⁸⁴ R P Mosteller, 'Remaking Confrontation Clause and Hearsay Doctrine under the Challenge of Child Sexual Abuse Prosecutions in Abrams E D and Ramsey H S(eds), *Children and the Law: Doctrine Policy and Practice* (Minn West Group, 2000) 215.

⁸⁵ A L H Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 155.

⁸⁶ Op. cit n 12.

as UNCRC,⁸⁷ ACRWC⁸⁸ and domestic human rights instruments, they equally have entitlements to procedural rights without which they cannot enforce their substantive rights.

Therefore, in order to ensure fair treatment of both accused persons and CVSA in a CSA trial, procedural justice dictates that there is need to balance the rights of accused persons and those of CVSA. The balancing action was endorsed by the Supreme Court of the United States in the case of *Snyder v Massachusetts*⁸⁹ when it ruled that ‘due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept.’ It is fairness with reference to particular conditions or particular results. This decision appeared to confirm that procedures must recognize and respect prevailing basic values of any society in which they apply as argued by Galligan. This is also in conformity with the Vienna Convention on The Law of Treaties⁹⁰ which supports contextual interpretation of conventions and demands that all human rights be treated equally.⁹¹ In the context of the study, accused persons’ rights are human rights and so are CVSA rights in administration of justice. Both must therefore be accorded equal treatment and respect, by protecting and promoting them as required by the Vienna Convention.

In order to ensure fairness to all parties in criminal proceedings, Solum’s arguments on procedural justice provide an avenue for ensuring a balance between the rights of accused persons and the need to protect CVSA. Solum identified three antecedents namely participation (having a voice), dignity and the trust that the judicial authority is concerned with one’s welfare.⁹² Whereas participation has to do with an opportunity given to the parties in a transaction to state their best case in a conducive environment, it reaffirms the right of CVSA to express themselves and be heard in matters involving them as stated by the UNCRC.⁹³ The dignity antecedent conforms to a child’s right to be treated with respect and dignity,⁹⁴ while the welfare antecedent directly expresses the best interest of the child principle under the UNCRC.⁹⁵

Solum’s four applications of the participatory model is relevant to this study. The first interpretation, the game interpretation is applicable in so far as it requires that a transaction must follow laid down rules, based on the assumption that ‘the playground is even.’ The shortcomings of prosecuting CSA under the classical adversarial system must therefore, according to the game interpretation be addressed before the game starts to ensure all parties have equal resources. In CSA trial therefore, the vulnerability⁹⁶ of the CVSA needs to be taken into account if the trial process is to be seen as fair.

The second application, the dignity interpretation reiterates the dignity principle as provided by the UNCRC.⁹⁷ The third application is the satisfaction interpretation which states that a process is fair if it provides an opportunity for parties to participate with the greatest level of satisfaction, such that even the loser accepts the outcome as a result of a fair process. The fourth application is the discourse interpretation which argues that an outcome of a process is fair and just only if it provides an ideal communication situation where parties can give their best evidence without intimidation or fear. The classical court procedure is, according to many scholars, not an ideal forum for CVSA to narrate their evidence confidently and coherently and as such may not be suitable for the trial of CSA.

⁸⁷ Op. cit n 13.

⁸⁸ Op. cit n 81.

⁸⁹ *Snyder v Massachusetts* (1934), 291 US 97 116-117.

⁹⁰ Vienna Convention on The Law of Treaties United Nations Treaty Series, Vol 1155 p.33. Done at Vienna on 23rd May 1969, entered into force on 27th Jan 1980.

⁹¹ Article 1(5) of the Vienna Declaration and Programme of Action provides that all human rights are universal, indivisible and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. States are obligated to protect and promote all human rights and fundamental freedoms.

⁹² B L Solum, ‘Procedural Justice Theory’ (2004) pg 240 <http://ian.bepres.com/sandiego/wps/pllt/art_2> accessed 20 February 2012.

⁹³ Op. cit n 13. Article 12(2).

⁹⁴ *Ibid* Article 39.

⁹⁵ *Ibid* Article 3.

⁹⁶ Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998) 37.

⁹⁷ Op. cit n 13.

The conceptualization of procedural justice in the trial of CSA cases therefore is that the procedure adopted should not only ensure procedural fairness to accused persons (for that is the traditional essence of fair trial rights and procedures), but it must also incorporate principles that ensure fairness to CVSA as well. The principles of fairness in the context of procedural justice can be summarized as, equality of liberties and differential principles, the best interest of the child, dignity and participation principle which ensures that the rules of procedure are known and acceptable to all parties who participate in the proceedings to their best satisfaction in a conducive environment that enables them to give their best evidence devoid of fear or intimidation.

Procedural justice's differential principle which argues that less fortunate members of society should benefit from the distribution of resources (rights/liberties) is supported by the psychoanalytic theory which explains the vulnerability of CVSA to CSA. The theory explains why CVSA at times may not even know that they are sexually abused especially at the stages referred to by Freud as oral, anal, phallic and latency when the CVSA do not have a properly developed *super ego* that alerts them that the actions by the accused persons amount to CSA.

The explanation offered by the psychoanalytic theory is further supported by Marty⁹⁸ who argues that the mode of trial should take into consideration the nature of the crime. Herman and Hirschman found that CSA is a crime mostly committed in secret away from the 'public eye' and so its prosecution may need to take into consideration the secret nature of its commission and subsequent difficulty in proving the same.⁹⁹ Both psychoanalytic theory and procedural theory converge at the point of the need for procedures that leave the CVSA feeling relieved of the trauma caused by CSA. Whereas the psychoanalytic theory argues that procedural fairness in court is important as a therapy to the CVSA, procedural justice theorists see the fair procedures as a satisfactory forum for the CVSA to tell their story to the judicial authorities in the hope that they will be believed and their welfare will be taken into consideration.

According to the labeling theory, the society labels individuals or acts as deviants while the same may not inherently be so. Labeling of CSA and CVSA as deviant behaviour and deviants respectively may in some cases invite social stigma on the CVSA and their families.¹⁰⁰ When this occurs, the CVSA may not be willing to testify, or in cases of incest, the family may impress upon the CVSA to withdraw the case to avoid family embarrassment.¹⁰¹ The labeling theory therefore explains the difficulties that CVSA encounter while testifying under the classical adversarial court system and the consequent challenge of prosecuting CSA under the same system.

Arguing that labeling has a devastating effect on a person's consequent action, Marty¹⁰² notes that the classical adversarial court procedures disable those already labeled as deviants from active participation in the process. The challenges in prosecuting CSA as explained by both the psychoanalytic and labeling theories therefore necessitate fair procedures in the context of procedural justice, to enable both accused persons and CVSA to participate in the process satisfactorily.

Fair procedure is not an end in itself, but a means towards the achievement of the goals of substantive laws.

In recognizing this fact, the United Nations issued a guideline in 2005 on how child victims and witnesses should be treated by the CJS when they appear as victims or witnesses in the criminal trial process. Known as the United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime (UNGMCCVWC). Although UNGMCCVWC is not binding on member states of the United Nations since it is merely a guideline and not a convention, it provides that the following principles must be observed in any trial process involving children either as witnesses or victims of crime;

- i. Dignity.
The dignity principle recognizes that children are unique and valuable human beings with their individual dignity, special needs, interest and privacy which should be respected and protected.
- ii. Non-discrimination.

⁹⁸ M D Marty, *The Criminal Process and Human Rights: Towards a European Consciousness* (Martinus Nijhoff Publishers, 1995) 9.

⁹⁹ *Op. cit* n 25.

¹⁰⁰ B C Little and S H Traub, *Theories of Deviance* (F. E. Peacock Publishers, 1968) 289.

¹⁰¹ *Op. cit* n 17.

¹⁰² *Op. cit* n 98.

- This principle provides that children have a right to be treated fairly in the criminal process regardless of any factor that may attract discrimination towards them.
- iii. Best interest of the child.
According to this principle, every child has the right to have his/ her own best interests given primary consideration in matters that affect them and that their welfare should be paramount in making any decision.
 - iv. Protection.
According to this principle, every child has a right to life and survival and to be shielded from any form of hardship or process that may result into their psychological, mental and emotional anguish.
 - v. Harmonious development.
This principle provides that every child has a right to a chance for harmonious development and must be protected from any process that may interfere with their harmonious development.
 - vi. Right to participation.
According to this principle, every child has the right to express their views in any matter affecting them in the judicial process. Such views must be taken into account depending on the child's age, intellectual maturity and evolving capacity.

The principles discussed above are in conformity with Solum's procedural justice participatory model which identified the game, dignity, satisfaction and discourse interpretations as being key to any fair and just process. The provisions of UNGJMCCVWC are therefore within procedural justice arguments on fair procedures in a trial process. From the study's conceptualization of justice, fairness and procedures, the study develops an ideal framework for CSA trial within the context of procedural justice as discussed in the following section.

X. THE IDEAL FRAMEWORK FOR CSA TRIAL

While attempting to protect the rights of CVSA, the protective measures undertaken by the courts should not infringe on accused persons' rights to fair trial and should ensure that the accused persons are given adequate and appropriate opportunity to challenge any evidence against them. The ideal CSA trial procedure should therefore possess the following five characteristic features.

- i. Protection of the rights of accused persons to a fair trial.
- ii. Detailed pre-trial investigation.
- iii. An expanded role of the judge in the trial.
- iv. Human rights approach to administration of justice.
- v. Procedural Mechanisms for Victim Protection.

The above characteristic features are discussed in details as follows;

Protection of the Rights of Accused Persons to a Fair Trial

The importance of the right to a fair trial is to ensure that the accused person is protected against arbitrary use of power by the state in the prosecutin process. It ensures that the trial process upholds the rule of law and the outcome of the process is fair. The first significant feature of the hybrid model of CSA trial procedure is the protection of the rights of an accused person in a fair trial. The model should retain the strengths of the adversarial system in ensuring protection of the rights of accused persons in regard to fair trial rights as contained in the ICCPR,¹⁰³ ECHR,¹⁰⁴ ACHR,¹⁰⁵ ACPHR¹⁰⁶ and most countries' constitutions.

Although the right to a fair trial has developed over time and almost attained the status of non-derogative rights, it is not listed among the non-derogable rights by the ICCPR¹⁰⁷ which only lists the right to life, protection against slavery and torture as non-derogable rights. Judge Robinson argues that the implication of excluding the right to fair trial from non-derogable rights by the ICCPR is that states parties can limit the right to fair trial in times of public emergency so long as the procedure put in place can ascertain some measure of fairness to accused persons.¹⁰⁸ The question as to whether the right to a fair trial can be limited remains a controversial issue although there are other scholars who think like Judge Robinson and argue for flexibility in certain situations to ensure procedural fairness to both accused persons and victims.

¹⁰³ Op. cit n 12.

¹⁰⁴The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in 1950, entered into force in 1953.

¹⁰⁵ Ibid.

¹⁰⁶ Op. cit n 104.

¹⁰⁷ Op. cit n 12 Article 4(2).

¹⁰⁸ Op. cit n 29.

Tham, Ronneling and Rytterbro¹⁰⁹ are in agreement that crime victims have gained prominence in the criminal justice system and this has affected traditional legal principles. They give the example of the right to equal treatment of the law which in their view implies that upholding the rights of accused persons to a fair trial should not confer undue advantage to the accused person at the expense of the victim. Based on this argument, the ideal hybrid procedure of trying CSA needs to balance the rights of accused persons to fair trial with the protection of CVSA.

In striking the balance, protection measures taken by the court to protect CVSA need to respect the rights of accused persons to fair trial and where it becomes necessary in order to ensure fairness to CVSA, certain aspects of the right to fair trial may be limited. It can be argued that the serious circumstances of a public emergency that necessitates limitation of the right to fair trial may be equated to the seriousness of CSA and its devastating effects to the victim. The only difference is that a public emergency affects the entire public whereas CSA has localized effects on the victim, but nevertheless very serious and devastating, but which may result into situations where CVSA are unable to testify. Under such circumstances, limitation of the rights of accused persons to fair trial may be justified in order to obtain the evidence of CVSA which is crucial in arriving at the truth of the guilt or lack of guilt of the accused person. Where the limitation of the right to fair trial is deemed necessary, the court must ensure adequate and appropriate opportunity is availed to the accused person to challenge the evidence produced against him/her.

The Supreme Court of Canada, in holding that the rights of an accused person to a fair trial in CSA cases can be limited held in the case of *R v L (D.O)*¹¹⁰ that the admission of a videotaped statement of a 9 year old CVSA did not infringe on the accused person's right to fair trial. The admission of the videotaped evidence without having the CVSA testify in the presence of the accused person did not amount to hearsay evidence; neither did it deny the accused person the opportunity to cross-examine the CVSA. The Court observed that by allowing the videotaped evidence, the trial court protected the CVSA and made participation in the procedure less stressful and traumatizing in the presence of the accused person, while enhancing the discovery of truth. The court added that cross-examination does not need to be contemporary with the evidence, but the accused person could put questions to the CVSA either at the pre-trial stage during the interrogation of the CVSA by the investigators, or watch the videotape and ask questions afterwards. The court added that the questioning of CVSA can be conducted through the court or an advocate or some child expert appointed by the court so as to avoid direct face to face confrontation between accused persons and CVSA.

Whichever method is adopted by the court to protect CVSA in CSA cases, the aim must be to balance the rights of accused persons with the concerns of CVSA, while giving the accused person adequate and appropriate opportunity to challenge any evidence against him/her. The Supreme Court of Canada stressed that in seeking the truth in CSA trials, the law must provide a dignified, workable and decent environment for both accused persons and CVSA to tell their story. The emphasis was that the trial must be conducted within the context of recognition of existing power imbalance between accused persons and CVSA due to age and development stages. This observation by the court is consistent with the psychoanalytic theory which explains the vulnerability of the CVSA to CSA and Rawls' differential principle of procedural justice which stipulate that resources must be distributed in such a manner as to benefit the less advantaged in the society so as to ensure equal treatment to all. Admitting videotaped evidence in CSA trial not only preserves the early account of CVSA's version of the abuse, but provides a procedure for the introduction of the evidence to court, enhancing the truth seeking objective of the criminal trial, hence a balance of the rights of CVSA and that of the accused person to a fair trial.

In an unprecedented statement, the Supreme Court of Canada stated that;

...although the accused person's right to fair trial is protected under the Canadian constitution, the rules of evidence are not constitutional zed into unalterable principles of fundamental justice. These rules are not cast in stone and will evolve with time.

They should not be interpreted in a restrictive manner which may essentially defeat their purpose of seeking the truth and justice.

The modern trend in the field of CSA trial is to admit all relevant and probative evidence and allow the evaluation of facts to decide the weight to be given to that evidence in order to arrive at a just result.¹¹¹

¹⁰⁹ H Tham, A Ronneling and L L Rytterbro, 'Crime and Justice' (August 2011) Vol 40, No 1 JSTOR , 556-611.

¹¹⁰ *R v L (D O)* [1993]4 SCR 419.

¹¹¹ *Ibid.*

From the above quotation, the Supreme Court of Canada appears to support the fact that where necessary in CSA cases, there is need to re-think rules of evidence, including those protecting the accused persons' right to fair trial. As already discussed, the ICCPR does not include the right to a fair trial amongst the non-derogable rights, giving room for arguments on its limitation where necessary as in the cases of CSA. This is evident in jurisdictions that have limited the rights of accused persons to fair trial in order to protect CVSA during criminal proceedings.

As an example, the European Court of Justice (ECJ) ruled that national courts must enable CVSA to testify under procedures that guarantee them appropriate level of protection.¹¹² To effect the required protection of CVSA while testifying implies some measure of limitation of the rights of accused persons to a fair trial.¹¹³ The issue therefore remains the extent of the limitation of accused persons' rights that ensure protection for CVSA while safeguarding the interests of the accused person as well.

Several years after the Supreme Court of Canada's decision in *R v L. (D.O)*,¹¹⁴ the ECtHR confirmed in the case of *B v Finland*¹¹⁵ that the admission of videotaped evidence in a CSA trial where the CVSA is unable to testify does not infringe the accused person's right to have witnesses testify in his presence nor does it deny him the right to cross examine the witness since cross examination does not have to be contemporaneous with the testimony in court. Failure to avail an appropriate and adequate opportunity to the accused person to challenge the videotaped evidence however, amounts to a violation of the right of an accused person to a fair trial as was held by the ECtHR in the case of *W v Finland*.¹¹⁶

The English courts have equally taken measures to protect CVSA by limiting the rights of accused persons to fair trial. One such measure is through the introduction of 'rape shield statutes' such as the Youth Justice and Criminal Evidence Act of 1999 which limited the accused persons' right to cross examine victims of sexual assault. Such limitation ordinarily denies an accused person the opportunity to test the truth of the evidence and credibility of the witness which is an important component of the trial process. However, the Youth Justice and Criminal Evidence Act of 1999 allowed such limitation so as to ensure the protection of victims of sexual assault. It is, however, worth noting that since Britain has an unwritten constitution, even the most sacred of English traditions and human rights can be abrogated by an Act of Parliament due to parliamentary supremacy principle.¹¹⁷ This therefore made it easier for England to limit the rights of accused persons to a fair trial by balancing them with the interests and concerns of CVSA through the enactment of statutes by Parliament. However English common law traditions such as due process, rule of law, representative government, freedom of expression and judicial independence are immutable traditions equivalent to non-derogable rights that courts must uphold and protect despite parliamentary supremacy.¹¹⁸ The right to fair trial is not listed amongst such immutable English traditions.

Although the unprecedented statement in of *R v L. (D.O)*¹¹⁹ was made in 1993 by the Supreme Court of Canada in reference to the Canadian legal system, it is very relevant today in Kenya in as far as the need to balance the rights of accused persons and CVSA is concerned. The difficulty in doing so emerges from the fact that whereas the ICCPR does not include the right to fair trial amongst the non-derogable rights, the Committee of Experts that drafted the Constitution of Kenya 2010, found it necessary for whatever reason to include the right to fair trial under the non-derogable rights such as the right to life, protection from slavery, the right to an order of *habeas corpus* and protection against torture.¹²⁰

Despite the inclusion of the right to a fair trial under non-derogable rights, the Constitution of Kenya 2010¹²¹ provides that Parliament shall enact laws for the protection, rights and welfare of victims of crime.¹²² As

¹¹² *R v Maria Pupino* [2005] ECR I-5285. C-105/03.

¹¹³ M Groenhuijsen, 'Conflicts of Victims' Interests and Offenders' Rights in the Criminal Justice System: A European Perspective' (1988) < http://www.aic.gov.au/en/publications/previous_publications/%20series/proceedings/1-27/~//media/publications/27/groenhuijsen> accessed 10 March 2012.

¹¹⁴ *Op. cit* n 110.

¹¹⁵ *B v Finland* (App no 17122/02) (2007) ECtHR.

¹¹⁶ *W v Finland* (App no14151/02) (2007) ECtHR.

¹¹⁷ Dammer R Harry & Albanese S Jay, *Comparative Criminal Justice System* (4th edn Wadsworth, 2011) 62.

¹¹⁸ Dammer and Fairchild Erika, *Comparative Criminal Justice Systems* (3rd edn Wadsworth, 2006)213.

¹¹⁹ *Op. cit* n 110.

¹²⁰ *Op. cit* n 56, Article 25 read together with Article 50.

¹²¹ *Ibid*.

¹²² *Ibid*. Article 50(9).

already discussed, protection of victims of crime in the criminal process implies some measure of limitation of the rights of accused persons to fair trial which the Constitution of Kenya has clearly protected from any derogation unlike the provisions of the ICCPR. This study takes the position that what is important in striking the balance of protecting the CVSA and the rights of accused persons is a mechanism that does not infringe on the accused persons' right to fair trial, protects CVSA from stress and trauma associated with court testimony while giving the accused person adequate opportunity to challenge evidence against him/her. Such a mechanism meets the Kenyan constitutional protection of the rights of an accused person to fair trial as well as the protection of vulnerable witnesses such as CVSA as envisaged by Article 50(9) read together with Article 53 that obligates courts to uphold the principle of the best interest of the child.¹²³

Detailed Pre-Trial Investigation

The second important characteristic feature of the ideal hybrid trial model for CSA cases is an elaborate pre-trial investigation procedures, borrowed from the inquisitorial model of trial which according to Damaska,¹²⁴ results into very thorough investigation that ensures cases with weak evidence against the suspect do not proceed to the trial stage, while those that make it for trial have a higher chance of conviction. Although the suspect in the inquisitorial system is also presumed innocent until proved guilty, the detailed investigative pre-trial process has, according to Dammer and Albanese¹²⁵ led to the wrong perception of the inquisitorial system as one where the suspect is guilty until proven innocent.

Whereas the author does not support the distortion of the presumption of innocence based on the detailed pre-trial investigation of the inquisitorial system, the study finds such detailed investigation relevant and necessary in CSA as it enables the gathering of all probative evidence by the investigating authority. Of particular relevance to CSA cases is the power of the investigating judge/police under the supervision of a judge who interrogates everyone with relevant information to the offence including the suspect without violating the accused person's right to silence and privilege from self-incrimination while gathering as much probative information as possible to help in establishing the truth.¹²⁶ The advantage of such an elaborate system of pre-trial investigation if combined with the practice of plea bargaining may save CVSA from the stress and trauma of narrating the abuse in court, while involving the suspect in the discovery of truth without violating his/her rights. Likewise, an elaborate pre-trial investigation may reveal such amount of information as to encourage the accused person, on the advice of a legal counsel to enter a plea of guilty instead of a full trial. On the other hand, the elaborate investigation may reveal that there is no sufficient evidence to put the accused on trial. The elaborate investigation is therefore beneficial to both accused persons and CVSA if viewed objectively.

However, in order to ensure the impartiality of the trial court, it is important that the accused person is informed of every stage of the proceeding, and if possible be provided with legal counsel and that the pre-trial judge who is to be an impartial finder of truth does not become the trial judge. The practice is evidenced in the ICC procedure of the Pre-Trial Chamber conducting the hearings for confirmation of charges and if the charges are confirmed a Trial Chamber proceeds with the actual trial under Article 39 of the Rome Statute.¹²⁷

The pre-trial and trial procedure under the Rome Statute ensures fairness to both victims and accused persons by ensuring that accused persons against whom there are not sufficient evidence to sustain a trial is not prosecuted while it gives the court an opportunity to order for further investigations where crucial evidence is not collected by the prosecution. Unlike the trial process, the pre-trial is supposed to be a swift stage. Although the pre-trial proposal may be seen as prolonging the trial period, its advantage in determining whether there is a *prima facie* case against the accused person overrides the possible length of time taken to conclude it. In Argentina, pre-trial sessions are meant to last maximum four months and serve as a sieve/filter to cases without much chances of successful prosecution.¹²⁸ It is therefore crucial that an ideal framework for CSA trial procedure incorporates a detailed pre-trial process as happens at the ICC in order to ensure proper preparation for cases which proceed to full trial.

¹²³ Op. cit n 56.

¹²⁴ M Damaska, Evidentiary Barriers to Conviction and the Two Models of Criminal Procedure: A Comparative Study (University of Pennsylvania Law Review, 1973) 507.

¹²⁵ Dammer R Harry & Albanese S Jay, Comparative Criminal Justice System (4th edn Wadsworth, 2011) 62. .

¹²⁶ Op. cit n 124.

¹²⁷ The Rome Statute- U.N.DOC A/CONF.183/9 of 17 July 1998. .

¹²⁸ Op. cit n 45.

An expanded Role of the Judge in the Trial

The third significant feature of the hybrid model of CSA trial is an expanded role of the judge in the trial process to ensure fairness to both accused persons and CVSA. Under the adversarial system of trial, the trial judges' role is that of an impartial, passive umpire who ensures that the parties conduct their cases according to the rules of evidence, waiting to decide the case based on the evidence presented by the parties to court.¹²⁹ Although this is one of the strengths of the adversarial system of trial, in CSA cases, there is need for the trial judge to actively intervene during the proceedings and protect CVSA from intimidatory cross-examination by the accused person/counsel where that occurs.¹³⁰

The role of the trial judge in establishing the truth which includes asking questions to witnesses at trial including the accused persons for purposes of clarity under the inquisitorial system and as practised by the ICC and other international criminal tribunals, is advantageous in CSA trial as it ensures the judges are in control of the court environment to avoid it degenerating into an uncomfortable situation that stresses/traumatizes CVSA. According to Doran¹³¹ judges must be actively involved in the truth seeking process and control the conduct of any party, that is contrary to the dignity required of any court. Where there is need to protect CVSA from intimidating cross examination, the trial judge can play an effective role in asking the accused person/counsel to write down the questions on a piece of paper which is handed over to the judge who either reads it or appoints some court official to do so and the CVSA then responds to the questions.

In the absence of recognition and inclusion of an active but impartial participation of the trial judge in CSA trial, it may be difficult for a passive judge to ensure a conducive environment for CVSA to testify as envisaged by the Supreme Court of Canada in the case of *R v L. (D.O)*¹³² in a purely classical adversarial system since the judge may be perceived to be biased against the prosecution if they intervene to protect CVSA from intimidating cross-examination, which according to many lawyers is 'the greatest engine ever invented for the discovery of truth.'¹³³ If the judge is well trained in court communication with children, such skills would benefit the accused person especially when the judge gives direction on the framing of questions by the accused person to enable CVSA answer them with ease. A hybrid system that provides for an expanded role of the judge beyond being a mere referee in the trial of CSA may therefore have the advantage of enhancing the truth seeking objective of the criminal justice system without the judge being seen as biased towards either party.

Human Rights Approach to Administration of Justice

The fourth important feature of the hybrid system of trial for CSA cases is a human right's perspective of recognizing that victim rights are human rights just like the rights of accused persons to a fair trial, hence the need to balance both rights in accordance with Rawls' theory of justice. According to Groenhuijsen,¹³⁴ before the acceptance that victims' rights were human rights, the CJS was a battle between the accused person and the state, but that has since changed as victims now occupy a central place in the criminal process and they can no longer be ignored. They must be seen as human beings with rights, treated fairly with respect in order to restore an inequitable balance that has existed between the victims' and accused persons' rights.¹³⁵

Recognition and Protection of CVSA Rights during their Testimony

The ICCPR imposes obligations on the part of the child's family, society and state to give children such measures of protection as required by their status as minors.¹³⁶ The obligations have been reinforced and elaborated by the UNCRC which mandates States Parties to protect children from all forms of physical, mental, emotional and any abuse including sexual abuse.¹³⁷ Article 3(1) requires that in all actions concerning children undertaken by courts of law or administrative authorities, the best interests of the child be a primary consideration. Under Article 12(2), legal systems must respect children's rights to be heard in any judicial and

¹²⁹ Op. cit n 38..

¹³⁰ Op. cit n 24.

¹³¹ Op. cit n 45.

¹³² Op. cit n 110.

¹³³ Op. cit n 129.

¹³⁴ M Groenhuijsen, 'Conflicts of Victims' Interests and Offenders' Rights in the Criminal Justice System: A European Perspective' (1988) < http://www.aic.gov.au/en/publications/previous_publications/%20series/proceedings/1-27/~//media/publications/27/groenhijnsen> accessed 10 March 2012.

¹³⁵ Ibid.

¹³⁶ Op. cit n 12, Article 24.

¹³⁷ Op. cit n 13, Articles 19, 34 and 39.

administrative proceedings affecting them. Only Somalia and United States of America have not ratified the UNCRC, indicative of its wide acceptance globally.¹³⁸

While the rights of accused persons to fair trial are human rights under the ICCPR, CVSA rights to be treated with dignity, not to be discriminated but accorded equal protection of the law, to be heard in matters affecting them and their best interests taken as paramount consideration by courts are also human rights under the UNCRC. Human rights are indivisible and need to be equally enforced as none is more superior than the other, hence the need to balance CVSA rights and those accused persons.¹³⁹

Compliance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (DBPJVCAP 1985)

While there is no universal convention dealing with the rights of victims of conventional crimes such as sexual abuse, the United Nations General Assembly, in 1985, adopted the DBPJVCAP¹⁴⁰ which was approved by consensus by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.¹⁴¹ This was followed by a Guide for Practitioners Regarding the Implementation of the Declaration.¹⁴²

The DBPJVCAP defines the notion of a victim of crime to include victims of sexual violence, thereby recognizing CVSA as victims of crime who need protection and special measures specifically towards rights of access to justice and fair treatment, restitution, compensation and assistance to ensure their participation in the criminal process. The DBPJVCAP places corresponding responsibility on governments to ensure victims' concerns are addressed. Although the DBPJVCAP is a mere declaration and therefore not binding on member states of the United Nations, it is a universal recognition that criminal justice systems need to take into account the plight of victims of crime and lessen the stress associated with the criminal process.

At the regional level, the member states of the Council of Europe had in 1983 concluded the European Convention on the Compensation of Victims of Crime.¹⁴³ The Convention was in response to the increased awareness of the need for fair treatment to victims of crime in criminal proceedings. The Convention provided for measures to alleviate psychological distress and physical injuries. Recommendation No (85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure is very specific on the need to protect victims of crime who may suffer physical, psychological, material and social harm and whose needs "should be taken into account to a greater degree, throughout all the stages of the criminal justice process."¹⁴⁴

The preamble to the recommendation states that the operation of the criminal justice system 'has sometimes tended to add to rather than to diminish the problems of victims' that 'it must be a fundamental function of the criminal justice system to meet the needs and to safeguard the interest of the victim' and that it is also important to enhance the confidence of the victim in the criminal justice and to encourage his co-operation, especially in his capacity as a witness.¹⁴⁵ The recommendation emphasizes that efforts to assist/protect victims need not necessarily conflict with other objectives of criminal law and procedure, but may assist in their achievement.¹⁴⁶ The member States of the Council of Europe are encouraged to review their legislation and practice according to the guidelines in the Recommendation relating to victim treatment at different levels of the justice system which include the police, prosecution, questioning of witnesses, court proceedings, protection and privacy of victims. Other countries which have taken steps at national levels to ensure victim protection include Canada, USA and Australia which have strong victims' rights' legislation.

¹³⁸ Op. cit n 48.

¹³⁹ Ibid.

¹⁴⁰ Op. cit n 66.

¹⁴¹ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders UN doc. E/CN.15/1997/16.

¹⁴² Guide for Practitioners Regarding the Implementation of the Declaration. UN doc. A/CONF.144/20.

¹⁴³ European Convention on the Compensation of Victims of Crime. The Convention entered into force on February 1988.

¹⁴⁴ Paragraphs 5 and 7 of the preamble.

¹⁴⁵ Paragraphs 2, 3 and 4 of the preamble.

¹⁴⁶ Paragraph 6 of the preamble.

Compliance with the United Nations Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (UNGJMCCVWC, 2005)

Despite the lack of a universal convention on victims' rights, child rights issues in the administration of justice under the UNCRC is monitored by the Committee on the Rights of the Child, an independent body of experts that reports to the UN General Assembly through the Economic and Social Council. In 2002, the Committee criticized the UK for inadequate procedures and mechanisms to amongst others investigate and prosecute child abuse and for neglect to ensure child victims are not victimized in the criminal process.¹⁴⁷ In 2005, the United Nations considered that child victims of crime are particularly vulnerable in court and through the Economic and Social Council, adopted a specific guideline for the fair treatment of child victims of crime in the criminal process, building on foundation groundwork already laid down by the Canadian-based International Bureau of Children's Rights.¹⁴⁸

Although not binding on states, the Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime, appreciates the fact that the rights of child victims of crime have not been adequately recognized and as a result they may suffer additional hardship when in the criminal justice system.¹⁴⁹ This is a confirmation that CVSA are vulnerable as per the psychoanalytic theory according to Horney,¹⁵⁰ and therefore require special protection that is appropriate to their age, level of maturity and individual special needs. Further, the guidelines provide that while safeguarding the rights of accused persons, justice for CVSA must be assured in all countries.

The guideline reaffirms five fundamental cross-cutting principles which must be observed in accordance with the UNCRC,¹⁵¹ namely the dignity,¹⁵² non-discrimination,¹⁵³ best interest of the child,¹⁵⁴ protection¹⁵⁵ and right to participation principles¹⁵⁶ which are echoed by the Constitution of Kenya 2010¹⁵⁷ and the Kenyan Children Act.¹⁵⁸ The five principles are briefly discussed as follows;

i. The dignity principle/right

The dignity principle, derived from the right to be treated with dignity states that every CVSA is a unique and valuable human being whose individual dignity, special need, interests and privacy should be respected.¹⁵⁹ The principle of dignity is consistent with Solum's dignity interpretation of the participatory model of procedural justice which requires the court process to uphold the dignity of all those who seek redress from the courts. It also confirms arguments by scholars such as Temkin, Abrams and Ramsey, Hoyano and Keenan amongst others that the classical adversarial trial procedure robs CVSA of their remaining dignity which according to psychoanalytic theory is first taken away by the abuse itself. The dignity principle therefore supports procedural justice theory on the need for the process to respect the dignity of individuals.

ii. The non-discrimination principle/right

The non-discrimination principle stipulates that every CVSA has a right to be treated fairly and equally by the law.¹⁶⁰ Of particular relevance to the study is the discrimination of child victims/witnesses due to age as a result of the witness competence requirement. The common law rule which was adopted by Kenya is that all witnesses must give evidence on oath or if they object to an oath, make a solemn declaration as stipulated by the Oaths and Statutory Declarations Act.¹⁶¹ Those who take oaths or make solemn declarations must be competent to do so, and this means that they must understand the nature of an oath. While adults are presumed to have this

¹⁴⁷ Groenhuijsen, Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland (CRC/C/15/Add.188 4 October 2002) [38(e).

¹⁴⁸ Op. cit n 48.

¹⁴⁹ Ibid.

¹⁵⁰ K Horney, *Neurotic Personality of our Time* (Norton, 1937) 213.

¹⁵¹ Op. cit n 13.

¹⁵² Ibid Article 39.

¹⁵³ Ibid Article 2.

¹⁵⁴ Ibid Article 3.

¹⁵⁵ Ibid Article 32.

¹⁵⁶ Ibid Article 12.

¹⁵⁷ Op. cit n 31 Articles 28, 27 and 53(2).

¹⁵⁸ Op. cit n 83 sections 5, 19 and 4.

¹⁵⁹ UNCRC Articles 23, 25, 39; The Constitution of Kenya 2010 Articles 28, 31; Children Act 2001 section 19.

¹⁶⁰ UNCRC Article 2; The Constitution of Kenya 2010 Article 27; the Children Act 2001 s 5.

¹⁶¹ Oaths and Statutory Declarations Act Chapter 15 Laws of Kenya.

understanding, with children below age of 14, the presumption has been the other way and the trial judge/magistrate has to interrogate them on the subject before allowing them to testify. Section 19 of the Oaths and Statutory Declarations Act requires magistrates to interrogate children of tender years to establish their ability to understand the nature of an oath and tell the truth before allowing them to testify. If judicial interrogation reveals that the child does not understand the nature of an oath, the court can take the child's unsworn evidence 'if in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.'

What happens where the judicial interrogation determines that the child does not understand the duty of telling the truth as may be the case in CSA cases where the CVSA is below six years or has some mental disability? The implication is that the CVSA will not give evidence. If the CVSA fails to give evidence through incompetency or any other reason, then in theory, the evidentiary rule against the admissibility of hearsay evidence prevents the court from admitting in evidence what the child might have told another person about the abuse. This rule is so strictly applied in the adversarial system that if CVSA does not give oral evidence in court, the result is often that the court does not hear the child's version at all and this may lead to a miscarriage of justice.

Does the fact that a child is too immature to understand the difference between truth and falsehood, or explain it suggest that the court should not take their evidence, especially if they are the victims and the only probable eye witness? According to Spencer and Flin¹⁶² by the age of two, most children can talk a little, and by age three many children talk fluently and therefore can communicate potentially useful information whether or not they satisfy the competency test. In the words of the Pigot Committee the competency requirement appears 'to be founded on the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worthy listening to at all.'¹⁶³

According to Spencer and Flin, the attitude expressed by the Pigot Committee above is wholly at variance with what modern psychology reveals about abilities and qualities of children today as confirmed by Kail and Wicks¹⁶⁴ who observed that enormous upsurge of interest in cognitive psychology and in child development has resulted into the reappraisal of the child's intellectual strengths. According to research carried out by psychologists for over 20 years, children are not simply miniature adults, but their cognitive skills, particularly those relevant to giving evidence such as perceiving and remembering people, places and events may have been undervalued.¹⁶⁵ Rejection of children's' evidence based on their unreliability, suggestibility, egocentricity, fantasy, false allegations of sexual assault and inability to tell the truth from falsehood have been challenged by research that indicates that adults are not any better than children in some instances.¹⁶⁶

The rules on witness competence and hearsay evidence therefore tend to discriminate against some CVSA contrary to their right not to be discriminated against as stipulated by the Constitution of Kenya 2010, the Children Act 2001 and the UNCRC. An ideal framework for CSA trial should ensure equal treatment of both CVSA and accused persons in a fair process. The non-discrimination principle is consistent with the procedural justice theory that stipulates that the available resources or liberties must be distributed equally in a society if justice is to be attained according to Solum's satisfaction interpretation of the participatory model of procedural justice.¹⁶⁷

iii. The best interest of the child principle/right

According to the best interest of the child principle, whereas the interests of the accused persons should be safeguarded, every child has a right to have his/her best interests given primary consideration in order to ensure the child's harmonious development by courts especially after the CSA trial.¹⁶⁸ The court process therefore should not only safeguard the rights of accused persons, but balance them with the need to protect CVSA, by having as paramount consideration what is in the best interest of CVSA. As an example, although the classical adversarial trial procedure demands that all witnesses give oral evidence and be cross-examined, it is in the best interest of CVSA that the procedure considers the possible effect of such evidentiary rules on some

¹⁶² Op. cit n 38.

¹⁶³ British Home Office, Advisory Group on Video Evidence (1989) para 5.12

¹⁶⁴ R Kail and Wicks Nelson, *Developmental Psychology* (5th edn Prentice Hall, 1993) 459.

¹⁶⁵ Ibid.

¹⁶⁶ F E Loftus, N Korf and J Schooler, 'Misguided Memories: Sincere Distortions of Reality' in J Yuillie (ed), *Credibility Assessment* (Dordrecht: Kluwer, 1989) 134.

¹⁶⁷ Op. cit n 92.

¹⁶⁸ UNCRC Article 3; The Constitution of Kenya 2010 Article 53(2); The Children Act 2001 s 4.

CVSA's ability to testify. Where need be, the court process should enable CVSA to testify under special measures that protect them from intimidation by the accused person as it is in their best interest to narrate their story to court so that justice can be done. This principle is consistent with the participatory model of procedural justice by Solum and confirms the literature reviewed that if CVSA are to testify in CSA cases, then the court process needs to be reformed to accommodate their special needs. This principle is by far the most persuasive right for the protection of CVSA as it stipulates that the guiding principle to be observed in matters affecting children is their best interest which overrides any other considerations.¹⁶⁹

iv. The protection principle/right

Protection of CVSA implies shielding them from hardships, abuse, neglect which may result into not only physical, but psychological, mental and emotional abuse and neglect.¹⁷⁰ Scholars such as Spencer and Flin,¹⁷¹ Abrams and Ramsey,¹⁷² Saywitz¹⁷³ and Temkin¹⁷⁴ are in agreement that the court process does in some cases occasion emotional, mental and psychological distress while CVSA may be at risk of more physical harm by the accused person for testifying in court particularly in incest cases.¹⁷⁵ Protection of privacy of CVSA as a matter of concern implies restriction of information disclosure which could lead to their identity, including undue public exposure by conducting the trials in private chambers away from the open court. The protection principle is consistent with the psychoanalytic theory which explains the vulnerability of CVSA due to their age and psycho-sexual development. Procedural justice requires that such vulnerable members of the society be provided with special protection in a fair process that recognizes their disposition. According to Galligan,¹⁷⁶ procedures are a reflection of the social circumstances of a society and values of the community. Since the international community has recognized the vulnerability of children through the ratification of the UNCRC, court procedures should reflect this value in its CSA trial process. As argued by Bentham,¹⁷⁷ procedures are steps towards the attainment of goals and objectives of substantive laws. Therefore, in order to achieve justice for CVSA, the trial procedure must protect the interests of CVSA.

v. The participation principle/right

CVSA right to participation¹⁷⁸ implies provision of professional support throughout the court process right from detection, investigation, prosecution and particularly to; ensure that CVSA are certain about the criminal process, their role and what is expected of them as concerns their participation in the process, that trial takes minimum period possible by avoiding unnecessary delays (the principle of immediacy), use of child-sensitive¹⁷⁹ procedures such as specially designed interview rooms, modified court environments and court sitting hours appropriate to the age of individual CVSA, limitation of the number of interviews with CVSA and reduction of unnecessary contact with the criminal process. Such measures include video recording of initial interviews, protection of the CVSA from direct examination by the accused person himself/herself, interview and examination of the CVSA in court should be out of the sight of the accused person, while the questioning of the CVSA should be in a child-sensitive manner, allowing for supervision by judges and measures to facilitate testimony and reduce intimidation by use of testimonial aids or appointed psychological experts as provided by part X and XI of the UNGJMCCVWC.¹⁸⁰

The European Convention of Human Rights

Apart from the UNCRC, the other influential human rights instrument for CVSA is the European Convention of Human Rights which provides for a fair trial under Article 6, which has been interpreted by the

¹⁶⁹ Op. cit n 48.

¹⁷⁰ UNCRC Article 32; The Constitution of Kenya 2010 Article 53(1) (d); The Children Act Section 13 and 15.

¹⁷¹ Op. cit n 38.

¹⁷² Op. cit n 17.

¹⁷³ J K Saywitz et al, Children's Knowledge of Legal Terminology in Language and Human Behaviour (1990) 14, 523-35.

¹⁷⁴ Op. cit n 24.

¹⁷⁵ Op. cit n 25.

¹⁷⁶ Op. cit n 1.

¹⁷⁷ Bentham's works as found in M Bayles, Procedural Justice: Allocating to individuals (Kluwer Academic Publishers, 1990) 79.

¹⁷⁸ UNCRC Article 12; The Constitution of Kenya 2010 Article 53(2); Children Act section 4.

¹⁷⁹ Defined as 'an approach that balances the CVSA's right to protection and that takes into account the child's individual needs and views'[Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime(n121)Guideline IV(d).

¹⁸⁰ Part X and XI of the UNGJMCCVWC.

ECtHR as encompassing the interests of victims, which are a legitimate consideration in devising fair trial procedures.¹⁸¹ In 1985, the Council of Europe Committee of Ministers endorsed a recommendation that victims' needs must be taken into account to a greater degree throughout the CJS so as to enhance the victims' confidence and encourage their participation and co-operation as witnesses.

The council further recommended the taking of video-recorded evidence from vulnerable witnesses at the earliest opportunity in the criminal process to avoid repetition and loss of crucial evidence.¹⁸² Such recording, in order not to violate accused persons' rights is required to be conducted by or in the presence of a judicial authority, giving the accused person sufficient opportunity to challenge the testimony, but without face- to- face confrontation.¹⁸³ The trial judge must closely supervise the cross-examination to avoid intimidating CVSA.

The international human rights instruments discussed above provide persuasive reasons and at times legal obligations, for initiatives in common law to mitigate against the rigours of the classical adversarial trial process in CSA cases.¹⁸⁴ They recognize and acknowledge that CVSA are rights holders in their own right and not passive participants in the trial process and should not be perceived as such.

Procedural Mechanisms for Victim Protection

The last important feature of the ideal framework for CSA trial model is the provision of measures to protect CVSA during the criminal process in conformity with procedural justice theorists such as Galligan's argument that the vulnerable, less advantaged members of the society need to benefit from equal distribution of liberties and resources.¹⁸⁵ Such protective measures as provided by the Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime provide a roadmap on how to balance the rights of accused persons with protection of CVSA in CSA trial. They include taking the evidence of CVSA in advance of trial, use of intermediaries, control of the cross-examination by the trial judge/magistrate, use of live television links and use of video recorded evidence of CVSA to supplement/replace live testimony of CVSA. The ideal framework identified in this for the trial of CSA forms the reference point for examining the court procedures used to take the evidence of CVSA in Kenya.

The rights of CVSA to be protected from a human rights perspective therefore are;

- i. The right to be treated with dignity and compassion.
 - ii. The right to protected from any form of discrimination in the justice process.
 - iii. The right to be informed about the justice process at every stage, including their rights in the justice process, obligations and expectations.
 - iv. The right to effective assistance that ensures their participation in the justice process.
 - v. The right to be protected from any hardships during the justice process.
 - vi. The right to safety during and after the court process.
 - vii. The right to compensation for injuries occasioned by the abuse.
 - viii. The right to special protective measures during their participation in the justice process.
- Likewise, the relevant rights of an accused person to a fair trial provided by Article 50(2) of the Constitution of Kenya 2010 which must be protected include the following:
- i. The right to be presumed innocent until the contrary is proved.
 - ii. The right to be informed of the charge, with sufficient detail to answer it.
 - iii. The right to have adequate time and facilities to prepare a defence.
 - iv. The right to a public trial by a competent and impartial court.
 - v. The right to have the trial begin and conclude without unreasonable delay.
 - vi. The right to be present at his/her trial, unless the conduct of the accused person makes it impossible for the trial to proceed.
 - vii. The right to legal representation by a lawyer of his/ her own choice and the right to prompt information to this right.

¹⁸¹ *Doorson v Netherlands* (1996)22 EHRR 33(ECtHR); C L Hoyano, *Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?* (Crim LR 927 2000).

¹⁸² Council of Europe, Recommendation No R(85)11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure (adopted 28 June 1985) guideline 8.

¹⁸³ Council of Europe, Recommendation No R(97)13 of the Committee of Ministers to Member States concerning Intimidation of Witnesses and the Rights of the Defence (adopted 10 September 1997) guidelines IV 23-29.

¹⁸⁴ *Op. cit* n 48.

¹⁸⁵ *Op. cit* n 1.

- viii. Where the accused person cannot afford the services of a lawyer, the right to be provided with the services of a lawyer at the expense of the state and the right to prompt information as to this right.
- ix. The right to remain silent during the trial proceedings.
- x. The right to be informed in advance, of the evidence which the prosecution intends to rely on for purposes of preparing his/her defence in advance.
- xi. The right to cross-examine prosecution witnesses and challenge their evidence.
- xii. Protection against self-incrimination.

XI. CONCLUSION

In conclusion, an ideal framework for CSA trial should safeguard the accused persons' right to a fair trial, include detailed pre-trial procedures, an expanded role of the trial judge, protect the rights of CVSA and include special measures to protect CVSA in the justice system. The framework must balance the rights of accused persons and those of CVSA to ensure a fair trial within the context of procedural justice. Kenya must therefore carry out its constitutional obligation of protecting CVSA by putting in place an ideal framework for CSA trial within the context of procedural justice.

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