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LEGAL RESPONSE TO INTRA-FAMILIAL CHILD SEXUAL ABUSE IN KENYA: A CASE FOR INFORMAL JUSTICE

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LEGAL RESPONSE TO INTRA-FAMILIAL CHILD SEXUAL ABUSE IN KENYA: A CASE FOR INFORMAL JUSTICE

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CONTENT

ABBREVIATIONS

ACRWC	African Charter on the Rights & Welfare of the Child
BIC	Best Interest of the Child
CoK	Constitution of Kenya, 2010
CPC	Criminal Procedure Code
CRC	Convention/Committee on the Rights of the Child
FJS	Formal Justice System
ICESCR	International Covenant on the Economic, Social and Cultural Rights
ICCPR	The International Covenant on Civil and Political Rights
ICRH	International Centre for Reproductive Health
IFCSA	Intra-familial Child Sexual Abuse
IJS	Informal Justice System
SO	Sexual Offences
SOA	Sexual Offences Act
UDHR	Universal Declaration of Human Rights

INTERNATIONAL CONVENTIONS, KENYAN LEGISLATION, BILLS AND CASE LAW

INTERNATIONAL AND REGIONAL CONVENTIONS

The Universal Declaration of Human Rights.
The International Covenant on the Economic, Social and Cultural Rights.
The International Covenant on Civil and Political Rights.
The United Nations Convention on the Rights of the Child.
The African Charter on the Rights and Welfare of the Child.

KENYAN LEGISLATION

The Children Act No 8 of 2001, Laws of Kenya
The Constitution of Kenya (2010)
The Criminal Procedure Code Chapter 75 Laws of Kenya
The Evidence Act Chapter
The Judicature Act Chapter 8 Laws of Kenya
The Penal Code Chapter 63 Laws of Kenya
The Sexual Offences Act No 3 of 2006, Laws of Kenya

PENDING BILLS

Protection Against Domestic Violence Bill, 2013
Victim Protection Bill, 2013

CASE LAW

Republic v GN (Mombasa Senior Resident Magistrate Case No 1765 of 2011)
Republic v Mohamed Abdow Mohamed (2013)eKLR

INTRODUCTION

> There was drama in Kilgoris when a group of women stormed the home of a middle-aged man believed to have impregnated his sixteen-year-old daughter. The women marched into the homestead of Samson Momposh whose daughter was nursing a one-month-old baby. Momposh is alleged to have slept with the standard six pupil and fathered her child, an allegation he denied. His wife and daughter fell pregnant at the same time and are both nursing babies of almost the same age, alleged to have been fathered by Momposh. The women, armed with pangas (machetes) marched Momposh to the Kilgoris police station six kilometers away and handed him over to the police officers. The man was remanded in custody and is set to appear in court next Tuesday. DNA samples have been collected from father and daughter and have been sent to the labs in order to establish the veracity of the allegations.[1]

The above news feature, though reported as any other sensational scoop by the media, chronicles a typical scenario of the circumstances surrounding cases of intra-familial child sexual abuse (hereinafter referred to as IFCSA). This includes the manner in which they are detected, reported, and processed by the formal justice system (FJS). As is evident in this story, the response of families immediately affected by IFCSA is often at variance with that of unaffected third parties. To the latter, it evokes outrage and a range of other strong emotions directed at the perpetrator whom they feel should be subjected to severe punishment. To the former, however, the situation is complicated by many conflicting interests and having the perpetrator punished may not be an immediate priority.

It is therefore not a wonder that 'a group of women' and not the primary victim or her mother reports the offence in the Momposh case. As to whether the two will cooperate with the justice process throughout the investigation and trial, and the extent to which they will do so, is anyone's guess. This story

[1] Standard Digital News report of 6th October 2013 on: http://www.standardmedia.co.ke/mobile/ktn/watch/2000070588/a-man-slept-with-her-standard-six-pupil-daughter-and-fathered-her-child. Accessed on 6th October 2013.

demonstrates the complexity of the dynamics of dealing with IFCSA cases. The nature of these cases is such that they not only give rise to legal issues but to equally important concerns of the victims' psychological and physical health, livelihood, and social security.

When child sexual abuse occurs within the home, it has the effect of breaching the child's legally recognised safety net from within and creates a complex state of affairs. Firstly, the perpetrator is often a male relative in a position of trust and vested with a duty to protect the child as a caregiver or benefactor. Any action taken against them has implications for the victim's livelihood and that of the family at large. Secondly, the other family members too, often have to play a role when the criminal justice process is set in motion. They may be called upon as witnesses either for the prosecution or for the accused, thereby taking sides. The process inevitably disrupts the family and has the potential to cause family break-up and loss of relationships. The family also has to deal with breach of their privacy and negative public exposure.

The existing FJS in Kenya, however, operates oblivious to the above specificities. Although the impact of IFCSA differs from that of abuse perpetrated by a stranger, the process does not make any distinction between the two. The case of Momposh's daughter will be processed under the same framework as would that of a victim sexually abused by a total stranger. The FJS framework focuses on only two perpetrator-centred issues that hardy prioritise the needs and livelihood of the victim and their family. Its first point of focus is the absolute ban on a negotiated conclusion to the case and the second one is the imposition of long and stiff custodial sentences on the perpetrator in proportion to the age of the victim. The victim of IFCSA is, at the end of the day, left at the mercy of the "winner takes all" adversarial system with the perpetrator fighting "tooth and nail" to escape the mandatory custodial sentence. In a jurisdiction where court cases take up to five years to conclude, coupled with the challenges of capacity on the part of police prosecutors, the victim ends up suffering more harm in pursuit of justice. Convictions for sexual offences are also few. Even where a conviction may be achieved, incarceration often results in substantial economic hardship to the victim and the family at large where the perpetrator was the breadwinner. This is more so in a society like Kenya, where state welfare is either unknown or unpredictable. With this state of affairs, it is no wonder that many IFCSA cases are "swept under the carpet" and a substantial number are finalised informally outside the FJS.

This study is an attempt to reckon with the reality that, in the wake of the many challenges and deficiencies inherent in the FJS, the community appears to have retained an affinity for IJS even in matters of IFCSA, albeit beneath the legal

radar. This affinity can no longer be wished away or handled by criminalising it. The study is based on the assumption that there must be some value in the IJS that can contribute in the formulation of a more victim centred response to cases of IFCSA. The study therefore delves into the hitherto uncharted waters of applying IJS in resolving serious offences including sexual offences. It is also timely as it provides a stepping-stone to the implementation of the letter and spirit of the Constitution of Kenya 2010, which advocates the promotion of alternative forms of dispute settlement. This is through the methods of reconciliation, mediation, arbitration and traditional resolution mechanisms.[2] The same constitutional provision also states that administration of justice should be without undue regard for procedural technicalities, which is a hallmark of IJS. If applied within the human rights framework, IJS may fill in the gaps and deficiencies of the FJS and alleviate prolonged trauma and re-victimisation of the victims of IFCSA. The purpose of this study is not to replace FJS with IJS but to come up with a victim-centred legal response through the incorporation of IJS into the FJS at appropriate stages and with due regard for the human rights principle of the best interest of the child.

The study seeks to answer the following research questions:

i. What are the specificities of IFCSA in terms of its impact on the victim?
ii. What is the legal framework within which the FJS and the IJS have responded to IFCSA cases?
iii. How does the response relate to relevant human rights standards and principles and the theory of restorative justice?
iv. What are the gaps and deficiencies in the FJS and IJS in their legal response to IFCSA?
v. What are the entry points for incorporation of IJS into the FJS in dealing with IFCSA cases?

This study will begin by laying out the methodology, which will include a profile of the respondents interviewed whose insight and experiences informed this study. Limitations of the study shall also be acknowledged. This will be followed by a discussion on the uniqueness of IFCSA and what differentiates it from child sexual abuse by a stranger. Chapter three will summarise the framework within which the FJS and the IJS respond to IFCSA cases. The efficacy of this framework will be interrogated against human rights principles and the values expounded by proponents of restorative justice. Chapter four will therefore discuss relevant human rights principles as well as expound on the theory of restorative justice. This will give way to a discussion on the gaps and challenges evident in both FJS

[2] The Constitution of Kenya, 2010, Article 159(2).

and IJS in responding to IFCSA cases. The study shall conclude with a proposal of a way forward in the form of recommendations.

CHAPTER 1

1 METHODOLOGY

The data used in this study was gathered over a nine-month period between February and November 2013 from multiple sources. This includes desk research and fieldwork. The latter involved participatory observation by the researcher together with qualitative in-depth interviews. The targeted respondents are persons on the frontline in the legal response to IFCSA in the two of the forty-seven counties in Kenya, namely Mombasa and Kwale counties.

1.1 DESK RESEARCH

This involved interrogating primary legal sources including relevant Kenyan domestic statutes and international legal instruments. Secondary sources considered include the works of various scholars and writers as published in various books, journals and electronic resources. Both primary and secondary sources were accessed through the electronic and manual resources at the libraries of the University of Nairobi and at the Danish Institute for Human Rights.

Literature on IFCSA was scarce. As acknowledged elsewhere, research on child sexual abuse within the local community has been neglected, as focus remains on commercial sexual exploitation of children.[3]

1.1.1 'HAKI YENU' STUDY REPORT

The researcher substantially relied on a yet to be published report of a recent study on barriers to accessing justice for survivors of sexual and gender-based violence in Mombasa, Kenya. The study involved a review of 165 sexual offence court files finalised in Mombasa court between August 2007 and December 2011, together with interviews with victims and key actors in SGBV.[4]

[3] Lalor, K. (2004). "Child sexual abuse in Tanzania and Kenya". *Child Abuse and Neglect*, vol. 28 (8), 2004 pp.833–844.

[4] ICRH Kenya (2013). *'Haki Yenu' An Access to Justice Study for Survivors of SGBV* (unpublished, on file with the author).

1.2 FIELD RESEARCH

1.2.1 GEOGRAPHICAL SET UP OF THE STUDY LOCATION

Kenya comprises 47 administrative regions known as counties, which are headed by a Governor. The field data collection of this study was confined to two counties namely Mombasa and Kwale. The reasons for this geographical delimitation were threefold. First was the issue of time constraints that made it impossible for the researcher to travel too far. Second was the sensitivity of the subject under research, which required the existence of confidence and trust with the respondents built over time. The researcher has a fifteen-year history of working with the community from these two counties on SGBV cases. It was therefore easier to win the respondents' confidence here whereas in other counties the researcher would have started from the unknown. Lastly, both counties fairly represent the two broad categories of the Kenyan populace, i.e. urban and rural populations respectively. Mombasa is an urban, multi-ethnic and multicultural port city and the second-largest city in Kenya. Though it occupies approximately 200 km^2, it has a dense population of about 1 million people. It has representation from all the 42 ethnic communities in Kenya who migrate there for work and business-related reasons.[5]

Kwale on the other hand is largely rural occupying about 8,000 km^2 with an approximate population of 750,000. It does, however, have a small urban population around the tourist resorts dotting the shoreline. The population comprises the indigenous Digos and Durumas and a significant number of migrants from the Kamba community.[6] The Digos and Durumas specifically still hold dear their traditional way of life in matters of health, childbirth, marriage, burial and dispute resolution.[7]

1.2.2 SAMPLING

The main aim of this study was to interrogate both the FJS and IJS legal responses to IFCSA with a view to identifying possibilities for incorporating IJS values and processes into the FJS. The focus of field data collection was therefore the users of the criminal justice system in IFCSA offences. These included the victims, witnesses, lawyers, judicial officers, probation officers, children's officers, the national police service, the office of Director of Public Prosecution and community leaders. The perpetrators were deliberately excluded from this list, as the focus of the study is the victim. The researcher interacted with the users through qualitative, in-depth interviews and participatory observation.

[5] https://www.opendata.go.ke/facet/counties/Mombasa, accessed on 10/10/13.
[6] https://www.opendata.go.ke/facet/counties/Kwale, accessed on 10/10/13.
[7] Information on the Digos and Durumas is available on http://www.joshuaproject.net/peoples.php?peo3=11557, accessed on 28/11/13.

The interview tool comprised different questionnaires for each category of respondents. The questionnaires were designed to capture the respondents' experiences, opinions and perceptions of their interaction with both the FJS and IJS. The gist of the questions for all, apart from victim, was on the prevalence of the offence, their perception of the legal response by the police, the court and entire legal process, challenges encountered in pursuit of justice, the number of unreported cases, the number and nature of cases finalised outside the FJS and their views on IJS and restorative justice.

The selection of the respondents was purposive owing to the sensitive nature of the topic under research. The professionals targeted were those who specialise in SGBV cases or have handled IFCSA cases.

1.2.3 PROFILE OF THE RESPONDENTS

Respondent #1 – a senior officer in the Kenyan National Police service holding the rank of Chief Inspector. At the time of the interview he was the officer commanding Makupa police station in Mombasa. He has vast experience in dealing with SGBV cases. He participated in the *'Haki Yenu'* study as a member of the project advisory team.
Respondent #2 – an adult in her early 30s who was sexually abused by her uncles as a child of four years.
Respondent #3 – the Chief Children's Officer, Mombasa county. She has worked at the children's department in Mombasa for over 15 years.
Respondent #4 – a senior Assistant Director of Public Prosecutions in charge of SGBV cases in the Office of the Director of Public Prosecutions in the Republic of Kenya.
Respondent #5 – an advocate of the High court of Kenya working with a non-governmental legal aid centre. He has experience in representing victims of IFCSA.
Respondent #6 – a lawyer heading the secretariat of the Federation of Women Lawyers, (Fida-Kenya) in their Mombasa Branch. She has a wide experience of handling SGBV cases. She was also a member of the project advisory team in the *'Haki Yenu'* study.
Respondent #7 – an officer in charge of the probation service in Mombasa. This is a department that carries out social inquiry for purposes of advising court on sentencing, victim protection, setting bail conditions and pre-release assessment.
Respondent #8 – a community elder based in Mombasa.
Respondent #9 – a teacher in a public primary school in Mombasa in charge of counselling. She had handled several IFCSA cases and had been called to give evidence in court in one of them.
Respondent #10 – a legal officer at the International Centre for Reproductive Health and attending to legal issues emanating from the gender-based violence

recovery centre (GBVRC) of the main referral public hospital in Mombasa, the Coast Provincial and General Hospital. She was the principal Investigator of the *'Haki Yenu'* study and a co-author of the study report.
Respondent #11 – a judicial officer holding the rank of Senior Principal Magistrate and based in Mombasa, Kenya. She is also a local of the geographical area under research.
Respondent #12 – the County Children's Director in charge of Kwale County, a position he has held for over ten years.
Respondent #13 – a practicing advocate of the High Court of Kenya based in Mombasa, Kenya He ordinarily represents the accused persons in the FJS. He has been involved in at least one IFCSA case that eventually found its way into the IJS.
Respondent #14 – a senior officer at the Kenya National Commission on Human Rights with experience of creating liaisons with various traditional informal justice mechanisms in Kenya.

1.3 PARTICIPATORY OBSERVATION

In the Kenyan adversarial criminal justice process, the victim of IFCSA is represented by the state through the office of the Director of Public Prosecutions. There is however a practice where the victim may get a lawyer to 'watch brief' on their behalf. The watching brief is a method of representing clients who are not strictly parties to the proceedings. It was developed early in England in the Coronial Courts as a device to put forward and protect the rights of persons who had an interest in the proceedings and its outcome.[8] The role of a lawyer watching brief is to observe the proceedings and advise the prosecution on the best strategies. Participation by the use of a watching brief in the proceedings is not a right but is at the discretion of the court. A lawyer watching brief has no automatic right of audience with the court. In the course of her 20 years of legal practice in Kenya, this researcher has offered pro bono services to many victims of IFCSA through watching brief. The researcher has also been recently appointed as a special prosecutor for SGBV cases. The role of a special prosecutor shall be discussed in chapter 5 of this study. The researcher's experiences and observations in court in both capacities shall be used to inform this study.

1.4 METHODOLOGICAL CHALLENGES

Data collection on an issue related to sexual offences comes with a lot of challenges because of the stigma associated with the subject. Sampling was therefore difficult as not many respondents, especially victims, were willing to

[8] Patmalar Ambikapathy, The Use of a Watching Brief as a Legal Tool for the Protection of Child Victims in the Criminal Justice Process in Children as Witnesses, (1991), http://www.aic.gov.au/media_library/publications/proceedings/08/patmalar.pdf accessed on 27/11/13.

share their experiences. Other victims had their cases still pending in court raising the question of the appropriateness of proceeding with the interview in the circumstances.

Other respondents, such as government officials, were uncomfortable with the use of a recording device lest they are caught on tape criticising the government. They tended to give the 'politically correct' responses, which may have had an effect on the nature of data collected.

The time frame for data collection was quite limited. Some targeted respondents, especially senior judicial officers, were unavailable as they gave appointments outside the available period. The researcher also had to manage respondents' expectations, especially regarding her ability to immediately influence government policy as a result of the research. This arose during the interview with the community elder who gave the researcher a wish list of what he wanted the government to do for community leaders. There was also a need to deal with cynicism and pessimism and negative attitudes from professionals, especially the lawyers, on the topic under research. The general feeling among the legal professional was close to dismissive, as they saw no need to address the role of the IJS when the FJS already provides for stiff custodial sentences for IFCSA cases.

The researcher also encountered unexpected responses to the interview questions that made it difficult to use the interview tool. Such responses included those outside the scope of this study. The unexpected responses have been useful in coming up with relevant recommendations in the final chapter of the study.

CHAPTER 2

2 SPECIFICITY OF INTRA-FAMILIAL CHILD SEXUAL ABUSE

In the course of the field data collection, the researcher found herself having to repeatedly respond to the question as to why she 'appeared fixated on IFCSA' instead of focusing on child sexual abuse in general. The answer lies in the fact that IFCSA is prevalent and it impacts its victim in unique ways. These two aspects shall form the gist of discussion in this part. It will however be important to clarify the terms that are the main subject of this chapter hence the need for definition of the said terms.

2.1 DEFINITIONS

2.1.1 CHILD

In this research a child shall mean and include anyone below the age of 18 years. This is the globally accepted definition.[9]

2.1.2 CHILD SEXUAL ABUSE

This study shall adopt WHO's definition which defines child sexual abuse as

> …the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person. This may include but is not limited to:
>
> - The inducement or coercion of a child to engage in any unlawful sexual activity.
> - The exploitative use of a child in prostitution or other unlawful sexual practices.
> - The exploitative use of children in pornographic performances and materials.[10]

[9] United Nations (1989) *Convention on the Rights of the Child (CRC)* Article 1.

2.1.3 INTRA-FAMILIAL CHILD SEXUAL ABUSE

This study specifically focuses on child sexual abuse within the household commonly known as intra-familial child sexual abuse (IFCSA). This has been defined as the use of a child for sexual satisfaction by family members i.e. blood relatives too close to marry legally.[11] Though abuse can be perpetrated by both female and male family members, the perpetrator is mostly a male family member.[12] These family members include fathers, stepfathers, grandfathers, uncles, brothers, stepbrothers, cousins, and the like. The Committee on the Rights of the Child has excluded sexual activities among children from the ambit of child sexual abuse. It has however been noted that such activities may amount to abuse where the child offender is significantly older than the child victim or uses power, threat, or other means of pressure.[13] This research shall confine itself to the said boundary.

2.2 FACTS AND STATISTICS ON THE PREVALENCE OF IFCSA

It is undeniable that sexual abuse in general is one of the gravest violations that can be committed against a child. Its effects are as widespread as they are long-term and complex. The most obvious take the form of the harm suffered by the victim which ranges from emotional and psychological trauma to serious and often irreversible medical complications including pregnancy and life-threatening infections. It has been described as a global health and human rights concern.[14] When one makes reference to child sexual abuse, it is likely to conjure the image of a stranger lurking on the street corner waiting to pounce on a child. This, however, is not often the case. There is a marked trend of children suffering from sexual abuse perpetrated by those closest to them including family members. The World Health Organization (WHO) has estimated that 150 million girls and 73 million boys under 18 years of age have experienced sexual abuse at the hands of people known to them including members of the household (emphasis mine).[15] The Committee on the Rights of the Child in its General Comment N^{o} 8 has also confirmed the trend by noting that in every place where sexual violence has been studied, a substantial proportion of children are

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[10] WHO, *Report of the Consultation on Child Abuse Prevention, Geneva, 29–31 March 1999, World Health Organization, Social Change and Mental Health, Violence and Injury Prevention (1999)* *www.who.int/mip2001/files/2011/childabuse.pdf accessed 16 July 2013*.

[11] Snyder H.N, *Child Sexual Abuse – The Perpetrators*. http://www.libraryindex.com/pages/1411/Child-Sexual-Abuse-PERPETRATORS.html, accessed 12/9/2013.

[12] *'Haki Yenu' (supra note 4),* p. 64.

[13] Committee on the Rights of the Child, *General Comment No 13: The Right of the Child to Freedom from all Forms of Violence (2011).*

[14] Felix Kisanga, Lennarth Nyström, Nora Hogan & Maria Emmelin (2013) "Parents' Experiences of Reporting Child Sexual Abuse in Urban Tanzania", *Journal of Child Sexual Abuse*, 22: 5, pp. 481–498, DOI: 0.1080/10538712.2013.800936 p. 482.

[15] UN Secretary General's Report on Violence Against Children (2006) *Violence Against children in the home and family*, paragraph 28, http://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf, accessed 27/11/13.

reportedly sexually harassed and violated by the people closest to them.[16] Statistics are not any different in Kenya where 43% of child sexual abuse in the country takes place within the home and is perpetrated by family members.[17] At the Kenyan coast region, a study analysis of a sample of 165 sexual offence cases concluded in Mombasa Law Courts revealed that the sexual assault in 80 of them took place within the home and over 80% involved child victims.[18]

This trend was also apparent during this study's in-depth interviews where various respondents gave the following estimates:
Respondent #5 estimated that IFCSA takes place in *"2 or 3 cases in every 10 households"* in Mombasa County;
Respondent #3 painted a grimmer picture by stating that her office handles an *"average of 6 child sexual abuse cases every week, 3 of which are on IFCSA"*.

These estimates are just the tip of the iceberg as many other cases go unreported. The *'Haki Yenu'* study revealed that only 33% of the victims attended to at the GBVR centre take their cases to court.. Respondent #12 estimated that only 4 out of 10 IFCSA cases in Kwale County are reported while respondent #11, commenting on the number of IFCSAs she handles in court, remarked that:*" Few cases come to us compared to the ones we hear people talk about out there."*

From the above data, it is clear that IFCSA is prevalent enough to deserve attention as a specific area of study.

2.3 DISTINGUISHING THE IMPACT OF IFCSA

The one question that was answered uniformly by all the 14 respondents in this study was on whether a victim of IFCSA is impacted differently from a victim of child sexual abuse by a stranger. All the respondents were of the view that the impact of the former is more grave, permanent, far-reaching and complex than that of the latter. This response is not surprising as it is reflective of the picture created by Ryan when he summarises the impact of IFCSA as "*complex in emotional and social aspects".*[19] It is this complexity that is unpacked in this

[16] Committee on the Rights of the Child (2006). *General comment No 8, The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* CRC/C/GC/8.
[17] Committee on the Rights of the Child (2006) *Written Replies by the GoK concerning the list of issues* **(***CRC/C/KEN/Q/2), received by the Committee on The Rights of the Child relating to the consideration of the second periodic Report of Kenya (CRC/C/KEN/2***)** http://daccess-ods.un.org/TMP/5596728.32489014.html, accessed 12 October 2013.
[18] *'Haki Yenu'* (supra note 4), p. 66.
[19] B. Ryan, et al. *Treatment of Intra-familial Crime Victims* (1998) <http://www.vcgcb.ca.gov/docs/forms/victims/standardsofcare/Chapter_6.pdf>, accessed 11 September 2013.

section with regard to the impact on the victim's livelihood, family, the problem of stigma and the resultant delay in disclosure.

2.3.1 THE VICTIM'S LIVELIHOOD

Livelihood refers to the means of securing the necessities of life.[20] This includes food, clothing, shelter, education, and other needs. Livelihood therefore goes hand in hand with economic empowerment. In Kenya, as in most of sub-Saharan Africa, women rarely have control of the means of livelihood. It is no wonder that poverty has been said to wear the 'face of a woman'.[21] The males within the family are often the providers and breadwinners. When the provider doubles up as the perpetrator, the victim's livelihood becomes a major concern, especially where the FJS results in incarceration. A piece of research by Lalor on child sexual abuse in Kenya and Tanzania[22] has hence observed that children are less likely to report where there is the question of the livelihood of the family should the perpetrator be imprisoned. The concern of the victim's livelihood is even more profound in a country like Kenya where state welfare is unknown or erratic.[23] It is no wonder that Kisanga observes that the protection of children from child sexual abuse within the family is closely tied to economic empowerment of women.[24] Respondent #6 summarised the connection between a victim's livelihood and the mother's economic position thus:

> In most cases where the child is abused within the home, unfortunately, the defiler is the breadwinner…. that leaves us in a difficult position because there are women who will tell you, "even if I report and he is convicted, what happens to me and my children…how do I feed the other children and how does it help the child who was defiled?"

It is common for issues of livelihood to come to the fore in court during the trial of IFCSA cases. In the course of the proceedings of a sample case in a Resident Magistrate's court in Mombasa, when asked by the prosecutor whether she had anything else to tell the court, 13-year-old Nadia[25] concluded her evidence in chief as follows:

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[20] Oxford Dictionaries, http://oxforddictionaries.com/definition/english/livelihood, accessed on 14/10/2013

[21] Alison Jaggger, "Does Poverty Wear a Woman's face? Some Mora Dimensions of a Transnational Feminist Research Project", *Hypatia, a Journal of Feminist Philosophy*, vol. 28, issue 2, pp. 240–256, Spring 2013.

[22] Lalor, K. (supra note 3) pp. 833–844.

[23] A National Plan of Action for Orphans and Vulnerable Children does exist, but this programme does not include victims of IFCSA < http://www.ovcsupport.net/s/library.php?lk=demographic+factors>, accessed on 17/10/2013.

[24] Kisanga, (supra note 14), p. 482.

[25] Pseudonym.

> I have no grudge against the accused. He is the only dad I have known since my parents died. He always paid my fees and bought me books and uniform. I do not know who will pay my school fees. I love him as my uncle but this has happened and I had to come to court to tell the truth.[26]

Nadia was testifying in a case where her uncle and guardian had been charged with repeatedly defiling her. She was recounting her evidence in chief for the third time as the magistrate who first heard the case had disqualified himself and the one who subsequently took over transferred to another station. Since the case was reported, Nadia had been living with her classmate's mother amidst a lot of uncertainty on her livelihood. The two-year trial eventually ended with an acquittal on a 'no case to answer for lack of sufficient evidence'.[27] By this time, the uncle's assistance was no longer forthcoming but by a stroke of luck, a maternal uncle volunteered to take over parental responsibility. Not all victims are usually as lucky as Nadia.

Respondent #10 indicated that, in the course of her at the GBVR centre she witnesses victims agonise over the dilemma of their livelihood when they are encouraged to report the sexual abuse to the FJS. It is often a statement along the lines of: *"Now if I report my dad, who will look after my mother…"*

Such victims, when pushed through the FJS, end up becoming 'hostile witnesses'. This is a witness who intentionally gives evidence totally different from what they initially recorded when reporting the offence in order to frustrate the case.[28] Evidence given by a witness who is declared hostile has no value. Where the victim, who is the usually the only eyewitness in an IFCSA case, is declared a hostile witness, then the whole prosecution case collapses and the perpetrator is acquitted.

The issue of livelihood was also a major reason why no action was taken when respondent #2 was abused as a child by her uncles. The uncles were truck drivers who supported her family financially. Raising the issue would have meant threatening the whole family's livelihood.

2.3.2 FAMILY STRUCTURE

The family unit is an important component in the enjoyment of certain child related human rights and freedoms. It is for this reason that it given due recognition by the major international declarations, covenants and treaties as

[26] Mombasa Senior Resident Magistrate Criminal Case Number 1765 of 2011 *Republic v GN* (unreported).
[27] Section 87 of the Criminal Procedure Code (Chapter 75), Laws of Kenya. The court is empowered to acquit an accused person without putting them on their defence where it is of the opinion that the prosecution has not made out a case against the accused.
[28] Section 161 of the Evidence Act, Chapter 80, Laws of Kenya.

the basic unit of society.[29] This recognition is also highlighted by Kenya's supreme law, the Constitution of Kenya 2010, which adds that the family is the necessary basis for social order.[30] When this legally recognised safety net is breached from within by the very people vested with the duty to protect the child, the impact on the child victim is magnified for the following reasons:

First, when the perpetrator is a stranger, the child victim has their family to fall back on for support during the time of detection, reporting, prosecution and sentencing. However, in the case of IFCSA, the child has to deal with the crisis of how to relate with the person that they previously trusted and probably loved, but who now has turned against them. As stated by respondent #6, *"…children look up to family for love, care and protection…when it (sexual abuse) happens in the home, they don't know who else to turn to…"*

Secondly, when the criminal justice process is set in motion in IFCSA cases, the other family members too, often have to play a role. They may be called upon as witnesses, either for the prosecution or for the accused. This creates opposing camps as some members side with the perpetrator while others sympathise with the victim. The process inevitably disrupts the family and has the potential to cause family break-up and loss of relationships. This tension often spreads to the extended family. During the hearing of Nadia's case,[31] the hostility between the two camps was so conspicuous that the court agreed to grant orders to protect Nadia from the perpetrator's 'camp' within the family. All through this, the family usually has to deal with breach of their privacy and negative public exposure as such stories attract a lot of media attention, as seen from the media excerpt at the beginning of this paper.

From the foregoing, it follows that IFCSA cases as a whole cannot be effectively responded to without due regard for the effect of the response on the family unit.

2.3.3 TABOO AND STIGMA

Sex is generally considered a taboo subject in most communities in the sub-Saharan African region.[32] The subject is rarely discussed, even under normal circumstances. As simply put by respondent #2, *"you do not talk of such things"*. When this taboo subject is then placed in the context of prohibited degrees of consanguinity, the taboo tag attached to it is magnified and any party associated with such an incident is stigmatised. In fact, a number of communities in Kenya

[29] Article 16(3) of the UDHR; Article 23 of the ICCPR and Article 10 of the ICESCR.
[30] Article 45(1) CoK.
[31] Nadia's case (supra note 26).
[32] Lalor (supra note 3). See recommendations at the end of this unpaginated publication.

do not accept children born out of incestuous relationships into the community, as they are considered cursed and bring a curse on anyone who cares for them. Such children are usually abandoned or given up for adoption.[33] The human rights implication of this phenomenon shall be discussed in chapter 4 of this study.

According to respondent #10, the stigma towards IFCSA is reflected in the attitude of the service providers, whose initial reaction to reports of IFCSA is normally insensitive disbelief. She gave the example of a nurse who would ask a victim: *"Why are you telling such lies about your father?"* Or the police officer warning a victim: *"if this story ends up being false you shall be jailed"*.

The reality of the stigma attached to IFCSA cases must be acknowledged in responding to these cases.

2.3.4 DELAYED DISCLOSURE AND/OR DETECTION

IFCSA is less likely to be voluntarily disclosed by the victim and their family than child sexual abuse by a stranger. Reasons for non-disclosure are varied, ranging from the stigma discussed above, to fear and self-blame.[34] The urge to sweep the incident under the carpet is usually strong. The sexual abuse may therefore continue to take place over an extended period of time before detection. When detected, it is often by default. Respondent #7 best captured the issue of default disclosure when he said of IFCSA cases: *"They are rarely reported, they (family) expose without knowing when we conduct social enquiries for other offences then we discover the child is reacting to a 'bad adult'"*

A lot of other IFCSA cases are also unearthed at school by teachers as narrated by respondent #9:

> One time I went to class and I found that …one of my very bright students who I had raised from class four up to five and I was with her in class six…I found her crying and she looked in a bad state…during break I released the rest of the children to go out and I was able to talk to this girl…she confided in me that she was a victim of abuse…that her mother's boyfriend whom she called 'uncle' was having sex with her and her sister at night when the mother goes for prayers and then buys her yoghurt...

[33] In Western Kenya there is a home established specifically for the rescue of children born out of incestuous relationships http://www.janddchildrenscentre.org/what-we-do, accessed on 16/10/13

[34] Respondent #6 indicated that counsellors report that most child victims think the abuse happened because of their fault.

Curious neighbours may also figure out sexual abuse where a child gets pregnant and the rest of the family appears not keen on following up the issue of paternity, as in Momposh's daughter's saga.[35]

Late detection compromises the collection of forensic evidence which may be lost with time. As a result, a victim of IFCSA normally has an uphill task when it comes to proving the case beyond reasonable doubt.

From the foregoing, it is clear that the experiences of the victims of IFCSA are distinct from those of child sexual abuse by a stranger. The pertinent question is how, then, does the FJS respond to IFCSA cases in view of these distinctions? Since it is also known that some of the IFCSA are finalised informally, the same question will be asked of IJS. The next chapter shall therefore discuss how both the FJS and the IJS respond to cases of IFCSA.

[35] Supra note 1.

CHAPTER 3

3 THE LEGAL FRAMEWORK WITHIN WHICH THE FJS AND IJS RESPOND TO IFCSA CASES

"We shall not do you any harm", said the District Commissioner to them later, "if only you will agree to cooperate with us. We have brought a peaceful administration to you and your people so that you may be happy. If any man ill-treats you, we shall come to your rescue. But we will not allow you to ill-treat others. We have a court of law where we judge cases and administer justice just as it is done in my own country under a great queen"… Okonkwo and his fellow prisoners were set free as soon as the fine was paid. The District Commissioner spoke to them again about the great queen, and about peace and good governance. But the men did not listen. They just sat and looked at him and his interpreter.[36]

3.1 THE HISTORICAL BACKGROUND OF THE KENYAN LEGAL SYSTEM

It is impossible to effectively discuss the Kenyan legal system without considering it against the background of the country's colonial history. The above excerpt from the late Chinua Achebe's novel, *Things Fall Apart,* is set in a fictitious village in Nigeria, known as *Umofia,* at the advent of colonialism. The lecture by the colonial District Commissioner was given to the village elders shortly after their conviction and sentencing for leading the villagers in the demolition of a church building erected in the village by the colonialists. Though set in Nigeria, it summarises the manner in which the concept of the formal justice system (FJS) was imposed on the native inhabitants of British colonies including Kenya.

Before the advent of colonialism, different communities applied their respective customs and traditions to resolve disputes without necessarily distinguishing between civil and criminal disputes. All wrongs were harmonised as transgressions against the community.[37] With the advent of British colonialism, English laws were introduced into the colony primarily to serve the interests of the British settlers. Their applicability was later extended to the Africans through the concept of 'indirect rule', which involved rule by the colonialists through the

[36] Chinua Achebe, *Things Fall Apart*, pp. 142–146, 1st Anchor Books edition, 1994.
[37] S. Kinyanjui, "Restorative Justice in Traditional Pre-colonial 'Criminal Justice Systems' in Kenya", *Tribal Law Journal*, Vol. 10: 2009–2010, pp. 3.

African loyalist chiefs.[38] These English laws were crafted in England with the Englishman in mind and with no consultation of the African population. They were simply imposed on the latter. At independence, Kenya, like the rest of the former British colonies, retained a pluralistic framework. There was the FJS, based on English legal principles and common law, that was slavishly retained. [39] The African customary law was also allowed, but to the extent that it was applicable, not in conflict with written law, and not 'repugnant to justice and morality'. The former of course ranked higher in the hierarchical order of legal force.[40]

Though strictly speaking IFCSA is the preserve of the FJS, this and other, previous, studies have revealed that in reality a good number of IFCSA cases are handled informally, albeit beneath the legal radar. This chapter shall therefore discuss both the formal and informal legal framework within which IFCSA is responded to.

3.2 THE FORMAL JUSTICE SYSTEM (FJS)

Reference to the formal justice system (FJS) in this study shall mean the formal, state-based justice procedures and institutions like the judiciary, the office of the Director of Public Prosecutions, the National Police Service, Prisons Department, Children's Department, and the Probation and Aftercare Service Department.[41] An overview of all the FJS institutions and processes cannot possibly be exhaustively discussed in this study. An in-depth study and discussion of the same is, however, available in a recent study report on Kenya's justice sector and the rule of law.[42] This part shall therefore limit its focus to the statutory framework that comes into play as FJS responds to cases of IFCSA.

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[38] Peter O Ndege, *Colonialism and its Legacies in Kenya,* Lecture delivered during Fulbright – Hays Group project abroad programme: July 5th to August 6th 2009 at the Moi University Main Campus. http://international.iupui.edu/kenya...rces/Colonialism-and-Legacies.pdf, accessed on 28/11/13.

[39] Aronson S.I. *Crime and Development in Kenya: Emerging Trends and the Transnational Implications of Political, Economic, and Social Instability* http://www.studentpulse.com/articles/278/crime-and-development-in-kenya-emerging-trends-and-the-transnational-implications-of-political-economic-and-social-instability>, accessed on 19/10/13.

[40] Section 3, Judicature Act, Chapter 8, Laws of Kenya <www.kenyalaw.org/Downloads/GreyBook/3.%20Judicature%20Act.pdf >, accessed on 27/11/13.

[41] Ewa Wojkowska, *Doing Justice: How informal justice systems can contribute*, United Nations Development Programme – Oslo Governance Centre, December 2006.

[42] Patricia Kameri Mbote & Migai Akech: *Kenya: Justice Sector and The Rule Of Law*, Published by: Johannesburg: Open Society Initiative for Eastern Africa. <http://www.afrimap.org/english/images/report/MAIN%20Report%20Kenya%20Justice%20Web.pdf>, accessed on 24/10/13.

3.2.1 THE CONSTITUTION OF KENYA 2010[43]

The relevance of discussing the constitution in this part is two-fold. First, it creates the judicial framework within which cases of IFCSA are heard and determined and, secondly, it sets out the rights of the parties before, during and after trial. The judiciary is the most crucial of all FJS institutions as this is where the IFCSA cases are heard and determined. The Constitution of Kenya 2010 provides for a four-tier court system. At the apex is the Supreme Court presided over by the chief justice, the deputy chief justice and five other judges. The Supreme Court has appellate jurisdiction from the court of appeal and original jurisdiction in limited cases like the determination of election petitions arising from a presidential election. This court is still relatively young in Kenya, as it did not exist before the promulgation of the current constitution. At the time of this study, it was yet to make any pronouncement on matters relating to IFCSA. Immediately below the Supreme Court is the Court of Appeal. This was the highest court in Kenya before 2010. It only has appellate jurisdiction from the High Court in civil and criminal matters. It therefore only handles IFCSA cases when they are presented before the court on a second appeal from the High Court on matters of law. Beneath the Court of Appeal is the High Court officiated by judges. It has unlimited original jurisdiction in civil and criminal cases but its original jurisdiction in criminal cases is limited to homicide cases. It however has appellate jurisdiction over all civil and criminal decisions from the lower court. Finally, the lower court is the manned by magistrates and handles criminal and civil cases, the latter being subject to a pecuniary jurisdiction limit set from time to time by the Chief Justice. It is in these lower magistrate courts that IFCSA cases are heard and determined. Kenya has a total of 425 judges and magistrates against a population of 40 million.[44]

The constitution's relevance in IFCSA cases can also be perceived through the lens of the Bill of Rights as restated in the said constitution. Included in these rights are the right to access to justice to all and the right to fair trial.[45] These rights encompass several watertight principles which protect a suspect of an offence and, by extension, a perpetrator of IFCSA. This protection starts during arrest, through trial and incarceration. A perpetrator has the right not to answer any questions put to them during investigation in the exercise of their right to remain silent. They also have a right to legal representation and, once arrested, they must be presented before a court of law before the expiry of 24 hours.[46] They are also entitled to swift disposal of the case in a public hearing in which

[43] Available at : http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010, accessed on 28/11/13.
[44] Kenya National Bureau of Statistics, Kenya Facts and Figures, 2012 page 74, available on www.knbs.or.ke/downloads.php, accessed on 26/11/13.
[45] Article 48.
[46] Article 49.

they are also entitled to representation at the state's expense. During trial, the perpetrator is presumed innocent until proven guilty and has a right to be released on bail.[47]

The rights of the victims are not expressly laid out in the Constitution. Investigation and prosecution of crimes under the Constitution is a discretionary power of the Director of Public Prosecutions.[48] It is not therefore an express right. A victim does have a constitutional right to institute a private prosecution. This right is, however, watered down by an overriding right vested in the DPP to take over and even discontinue any privately instituted prosecution.[49] No doubt the constitutional protection in a case of IFCSA, as in all other criminal cases, is tilted in favour of the perpetrator. This gap will be discussed further in chapter 5 of this study.

3.2.2 THE CRIMINAL PROCEDURE CODE (CHAPTER 75, LAWS OF KENYA)[50]

This statute is one of the many colonial laws retained after independence, having first come into force in Kenya in 1930. It regulates the procedure for the conduct of criminal proceedings in Kenya. The dispute settlement procedure provided under this code is adversarial. On one side is the alleged perpetrator, referred to as the accused person, and who is often represented by a lawyer and on the other side is the prosecution representing 'The Republic of Kenya'. Prosecution of all criminal cases is vested in the Office of the Director of Public Prosecutions (ODPP) through state prosecuting counsels. Currently these state counsels ordinarily only handle high court cases; mainly homicide cases and criminal appeals from the lower court. Prosecutions in the lower court, where IFCSA cases are heard, are conducted by police prosecutors who are not lawyers.[51] The effect of this arrangement is discussed in chapter 5 of this study. In a more recent development, however, the DPP has exercised his powers under this code to appoint special prosecutors from among practicing lawyers to assist in the prosecution of sexual and gender-based violence offences including IFCSA. The appointment was made upon recommendation and nomination of the appointees by leading human rights organisations in Kenya. The main qualification was prior experience and commitment in dealing with victims of sexual and gender-based violence. There are only 16 special prosecutors in the entire republic and their impact is yet to be felt.[52]

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[47] Article 50.
[48] Article 157.
[49] Article 157 (6) (b) and (c).
[50] Available on http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075, accessed on 26/11/13.
[51] Plans are underway to absorb the police into the DPP office.
[52] Appointed vide GAZETTE NOTICE NO. 14724 on: dated the 10th October 2012. http://www.kenyalaw.org/newsletter1/20121019.php, accessed on 21/11/13.

Officiating over the two parties, the presiding magistrate is the neutral umpire during the trial. The victim's sole role in the trial is that of a witness alongside other prosecution witnesses. They narrate the events surrounding the offence as guided by the prosecutor in a process known as 'examination in chief'. They are then cross-examined by the accused or their lawyer, and may thereafter be re-examined by the prosecutor for any clarification. Their role in the FJS ends at re-examination. The prosecution is under no obligation to consult the victim or give them any update thereafter including informing them of the outcome of the case. The victim may however be represented by a lawyer who 'watches brief' on their behalf in order to safeguard their interests. However as discussed earlier, in the methodology part of this study, the extent of participation by the lawyer watching brief is at the discretion of the court and subject to the prosecutor's willingness to cooperate.

The code does have an extensive procedure for plea bargaining and negotiations.[53] It, however, expressly excludes the application of plea bargains and negotiations to offences under the Sexual Offences Act, under which IFCSA offences fall. A case of IFCSA once started cannot be concluded through negotiations or plea bargaining. It has to go the full hog unless otherwise withdrawn by the DPP through the powers vested in him by the code.[54]

3.2.3 THE EVIDENCE ACT (CHAPTER 80 LAWS OF KENYA)[55]

This statute was enacted just before independence in 1963 and it governs the manner in which evidence is adduced in court. In a criminal case like IFCSA, the burden of proving that the abuse took place is on the prosecution. The standard of proof is beyond reasonable doubt.[56] The Act gives the court wide powers to decide on what evidence is admissible depending on whether it is relevant and based on facts.[57] Evidence falling outside this guideline is either disregarded or disallowed altogether. Although as a general rule the evidence of a child must be corroborated by independent evidence, the Act exempts sexual offence cases[58] where the oral evidence of the victim may satisfy the court, especially where it is supported by forensic evidence.

Apart from allowing evidence of facts, the Act also makes provision for the tendering of evidence based on opinions. This is however only limited to the

[53] Section 137 N (a) of the CPC.
[54] Sections 82 and 87 f the CPC.
[55] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2080, accessed on 28/11/13.
[56] Section 107.
[57] Section 144.
[58] Section 124.

evidence of experts, who are people skilled in a particular field. In an IFCSA this may include a medical practitioner, a psychologist or an education expert. Any other person who does not qualify as an expert but is in possession of non-factual information, however useful, may not be admitted as a witness in court.

Cases of IFCSA often involve the need for one spouse (usually the mother) to testify against the other. The general legal position in this regard is that a spouse is a competent but not a compellable witness. The Evidence Act, however, makes an exception with regard to sexual offences.[59] This means that an unwilling spouse in an IFCSA case can still be compelled by the court to give evidence.

Finally, the standard set by the Evidence Act for judging which of the perpetrator's statements made during investigation constitutes a confession, is very high. The confession is only admissible during the hearing where it is made in court before a judge, magistrate or before a senior police officer who must not be the investigating officer, and in the presence of a third party of the perpetrator's choice.[60] This stringent standard was put in place in 2003 to prevent the procurement of confessions from perpetrators through coercion or undue influence.

The Evidence Act in general consists of mandatory rules which bind the court and whose disregard often forms grounds of appeal against an otherwise straightforward conviction.

3.2.4 THE SEXUAL OFFENCES ACT CHAPTER 62A OF 2006 (SOA)[61]

Prior to the enactment of the SOA in 2006, sexual offences were codified in the Penal Code (chapter 63) of the laws of Kenya and categorised as offences against morality alongside offences like bestiality and prostitution.[62] The Penal Code recognised very few acts as amounting to sexual offences. The definitions of rape and defilement in the code were also antiquated and did not contemplate a male victim. In addition, sentencing was solely at the discretion of the magistrates and judges and it was often felt that the punishment handed down to the perpetrators did not match the gravity of the crime. The SOA therefore came into force on 21st July 2006 to fill in the gaps left by the penal code in respect of sexual offences.

The SOA contains progressive provisions geared towards better protection and access to justice for victims of sexual offences. A prominent feature of this act is

[59] Section 127 (3).
[60] Sections 25 to 27.
[61] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2062A accessed on 28/11/13.
[62] Penal Code, chapter 63, laws of Kenya, chapter xv available on www.kenyalaw.org

the imposition of stiff minimum sentences proportionate to the age of the victim. For instance, defilement of a child of 11 years or less attracts a minimum of life sentence. If the child is between 12 and 14 years, the minimum sentence is 25 years imprisonment while defiling a teenager of 16 or 17 years attracts a minimum sentence of 15 years imprisonment.[63]

The SOA criminalises all acts that amount to child sexual abuse as per the definition of WHO mentioned earlier. The acts include those that involve penetration into the child's genital organs or anus, unlawfully and indecently touching a child's sexual organs or manipulating their own or a third parties sexual organs. The act also criminalises child sex tourism, child prostitution, child pornography and child sex trafficking.[64]

As regards procedure, the act provides for the protection of vulnerable witnesses.[65] A child victim automatically falls into this category, and especially a victim of IFCSA by virtue of the relationship with the perpetrator. A person declared a vulnerable witness enjoys certain privileges including allowing them to give evidence under the protective cover of a witness protection box, or through an intermediary, or in camera as opposed to in open court.

3.2.5 THE CHILDREN ACT (CHAPTER 141 LAWS OF KENYA)[66]

This act was enacted in 2001 to consolidate all the previous statutes regarding children and to domesticate the CRC, which Kenya had signed and ratified in 1990. It is therefore the primary legislation setting down the obligations of all duty-bearers in the realisation of the children's rights.[67] The act established a children's court, presided over by special magistrates with exclusive original jurisdiction to hear and determine all criminal cases against child offenders apart from murder. This means that IFCSA cases perpetrated by persons less than 18 years are heard in these courts. The procedure in these courts is less adversarial than in the regular courts, but the child offender's right to due process is retained. It is important to note that these courts only handle cases of child offenders. Cases involving child victims of IFCSA are therefore handled in the lower courts unless the perpetrator is a minor.

The criminal justice process under the Act makes provision for a variety of methods of dealing with the offenders at the end of the trial. This includes

[63] SOA Section 8.
[64] SOA Section 8 to 22.
[65] SOA Section 31.
[66] Available at: http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20141, accessed on 28/11/13.
[67] Godfrey Odongo, "Domesticating International Children's Rights: Kenya as a case study", in Stéphanie Lagoutte & Nina Svaneberg (eds.), *Women and Children's Rights, African Views,* Karthala, 2011 p. 63.

discharging them with conditions, placing them on probation, committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake their care. Where the offender is above ten years and under fifteen years of age, they may be sent to a rehabilitation school suitable to their needs, and where they are sixteen or seventeen years, they may be sent to a borstal institution. The offender may also be ordered to pay a fine, compensation or costs, or all of them. They may also be placed under the care of a qualified counsellor, an educational institution or a vocational training programme, or a probation hostel. Finally, they may be ordered to perform community service. Corporal punishment is outlawed. The sentencing under the Children Act for child offenders is restorative in nature.

The Children Act has special provisions for children it refers to as '*children in need of care and protection*'. This term basically refers to children in distress like those who have been or face the threat of being abused in any way and those in conflict with the law.[68] Victims of IFCSA together with child offenders fall into this category. The Act provides for an elaborate mechanism and procedure on how the law should respond to these children. The first step is having a children's officer to present them before a children's court. A children's officer is an officer in the department of children's services mandated to implement the Act. The court in turn has the power to make an interim order for the temporary accommodation of the child in a place of safety or for their temporary committal to the care of a fit person during the hearing and determination of the case. It is the responsibility of the children's officer to get the child in need of care and protection medical attention if any is needed.[69] Where the court is satisfied that a child is in need of care and protection, it has wide powers on how to determine the issue. These powers range from returning the child to their parent or guardian to committing the child to the care of a person or institution suitable to the child's needs and with due regard for the child's best interest. In addition the court may issue a supervision order over the child which entails placing the child under the supervision of a children's officer or an authorised officer whilst allowing the child to remain in the care and possession of their parent, guardian, custodian or any other person or institution.[70]

Alongside the above orders, the court is empowered to order a parent whose child is in need of care and protection to seek the assistance of a professional counsellor.

[68] Section 119.
[69] Section 120.
[70] Section 130.

The Children Act criminalises any wilful act or omission by a person who has parental responsibility, custody, charge or care of any child that amounts to the child being in need of care and protection. Section 120 hence specifically states:

> Any person who is having parental responsibility, custody, charge or care of any child and who -
> (a) wilfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to health (including injury or loss of sight, hearing, limb or organ of the body, and any mental derangement); or
> (b) by any act or omission, knowingly or wilfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding five years, or to both:
> Provided that the court at any time in the course of proceedings for an offence under this subsection, may direct that the person charged shall be charged with and tried for an offence under the Penal Code (Cap. 63), if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature.

From the above provision, it is clear that some cases of IFCSA can be processed under the mechanisms provided for in the Children Act though the sentences are more lenient than the mandatory minimum sentences in the SOA.

3.3 INFORMAL JUSTICE

The term informal justice systems (IJS) in this study refers to *"the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law".* This is the broad definition given in the recent UN commissioned publication on the study of informal justice.[71]

3.3.1 STATUTORY FRAMEWORK OF IJS IN KENYA

The Constitution of Kenya 2010 recognises the role of IJS. Article 159 vests judicial authority in the people and goes on to lay down several guiding principles of judicial authority. One of these principles is the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The only limitation to traditional dispute resolution mechanisms is that they should not contravene the Bill of Rights or be repugnant to justice and morality or result in outcomes that are

[71] UN Publication (2013). Informal Justice Systems: Charting a Course for Human Rights-based Engagement.

repugnant to justice or morality or be inconsistent with the Constitution or any written law. The same article also states that justice should be administered without undue regard to procedural technicalities. The absence of procedural technicalities is a hallmark of informal justice.

Since the promulgation of the Constitution of Kenya 2010, courts have made attempts at embracing IJS, even in serious cases like homicide. In the recent case of *Republic v. M Abdow Mohamed* (decided in May 2013), the court allowed the withdrawal of a murder charge after the issue was settled informally. The IJS here involved the meeting of the two families of the deceased and the accused, followed by some form of compensation in the form of camels, goats and other traditional ornaments which was paid to the deceased's family. A ritual was also performed in payment of the blood of the deceased to his family as provided for under Islamic Law and customs. The family of the deceased was satisfied that the offence committed had been fully compensated and wanted the murder charge withdrawn. The application for withdrawal was presented in court by the prosecution who presented a written document from the deceased's family indicating that they were no longer interested in pursuing the case. The prosecutor also informed the court that relevant witnesses were no longer willing to cooperate with the prosecution because of the informal settlement. The judge noted that the ends of justice would be met by allowing rather than disallowing the application for withdrawal and went ahead to allow the withdrawal.[72]

Though the constitution allows leeway for the application of informal justice, particular statutes exclude its application in sexual offences. The Sexual Offences Act removes power from the victim in respect of the decision as to whether the prosecution or investigation of a sexual offence should be discontinued, and vests it in the DPP. A victim of IFCSA is therefore not legally at liberty to volunteer out of the FJS in favour of IJS once the abuse has been reported. This effectively bars diversion of an IFCSA case before it goes to court. Once the case goes to court, the victim again has no say over its fate as it is only the court that holds the ultimate power to allow it to be dealt in any other way other than as provided by the FJS, and this can only be done on the application by the DPP, not the victim. Further, as already discussed above, the exclusion of plea bargains from sexual offences means there is no legal entry point for diversion of an IFCSA case from FJS to the IJS.

The other statutory provision that makes it impossible for IJS to be legally tenable in IFCSA cases is the one that criminalises intentional interference with a

[72] *R v. Mohamed Abdow Mohamed* available at http://www.kenyalaw.org/caselaw/cases/view/88947/ accessed on 26/11/13.

scene of crime, or evidence relating to the commission of a sexual offence. Such interference is punishable by imprisonment of up to three years or to a fine of one hundred thousand shillings (about US $1,200) or both. The interference contemplated here includes tampering with a scene of crime and interference with or intimidation of witnesses.[73] In an IFCSA case, the victim is deemed as the principal scene of crime. Dealing with them outside the mandate of the DPP may be deemed as interfering with the scene of crime. The victim is also a witness. Engaging them in a process whose ultimate result is non-attendance in court in the name of having privately resolved the matter with the perpetrator would amount to a criminal offence.

The upshot of the above is that the field of the application of IJS in IFCSA is replete with legal landmines which shall be discussed further in chapter 5 of this study. This has not, however, deterred the community or removed their affinity to resort to IJS in IFCSA cases, albeit beneath the legal radar. In the course of data collection for this study, all the respondents confirmed that they were aware of this trend. Respondent #12 had an interesting observation about the local community's affinity for resorting to IJS in IFCSA. He stated that many people do not report such cases but *"They only go to police to report non-compliance with IJS orders".* The respondent was referring to situations where the IJS would arrive at a decision like a fine, which the perpetrator would refuse to comply with. The victims' family then goes to the police to report, not the original infraction, but the non-payment of the fine. This brings in the interesting scenario of the informal relying on the FJS's enforcement mechanisms. The IJS's weakness in the area of enforceability shall also be discussed elsewhere in this study as a challenge to the system.

It is estimated that up to 60% of cases are handled by the IJS. Since this is a process that takes place outside the formally recognised legal and institutional framework it is impossible to obtain official data on the same. The *Haki Yenu Report* found the practice pervasive enough to warrant a note in its final recommendations about the need to engage IJS to improve the response to sexual violence.[74]

IFCSA in Kenya is handled in variety of forums:

3.3.2 AFRICAN CUSTOMARY IJS

This is likely to take place where the community is ethnically homogenous like in Kwale County. As described by respondent #12, the forums are adjudicated by the tribal or clan elders. In Kwale county the elders are known as *'wazee wa*

[73] Section 37 of SOA.
[74] *'Haki Yenu',* p. 158

magogo' which can be loosely translated as 'the elders of the logs' in reference to the logs of wood they sit on as they hear and determine the cases. At times, the chief sits with the elders. The chief is usually a government officer, but in the rural areas he is a member of the same ethnic community as those he serves and usually participates in their customary activities. The proceedings are based on the cultural norms and values of the particular community and the determination of the IFCSA case equally depends on the same customs. Some determinations involve rituals, as is the case with the Rabai community of the Kenyan coast, as stated by respondent #11: *"In the Rabai culture, they do traditions that involve slaughtering sheep in the dead of the night…the parties are cleansed then that is all…to remove the curse."* [75]

Apart from rituals, compensation may also be ordered. A disturbing feature of IJS in IFCSA cases in Kwale is the shunning of any child born out of such incestuous abuse. Such forums usually declare them taboo children and hence outcasts. Such an outcome is repugnant as it is against the rights of the child. Its implication is discussed as a challenge in chapter 5 of this study.

3.3.3 COMMUNITY/ RESIDENTIAL FORUMS

This is common in urban settlements where the community is multi-ethnic. In the early 1980s a concept was introduced whereby respected members of the community were appointed by the administration to assist the chiefs with matters of security and administration within their locality. The positions are voluntary and they are known as *Wazee wa mtaa* which is loosely translated as village elders. They are not legally recognised but are left to the guidance of the chief. There may be as many as 20 within one locality. Respondent #9 described the kind of people who comprise the panel of community elders as follows: "*They are village elders appointed by the chief. They are normally good people who have lived there for long. They are not of the same tribe and they don't use traditions. They find common ground…"*

The elders usually meet weekly with the chiefs for updates on matters taking place in the locality. During some of these weekly meetings, they handle cases including some IFCSA cases. Determination is mainly through compensation, naming and shaming, 'tongue lashing', public rebuke or banishing the perpetrator from the community. As earlier mentioned, the enforceability depends on the goodwill and respect the leaders enjoy within the community. In some areas, the community leaders wield more authority and respect than the government agencies. Respondent #10 brought it out as follows:

[75] The Rabai, like the Digos and Durumas are one of the nine sub-tribes of the mijikenda community of the Kenyan coast. Whereas the Digos and Durumas are found in Kwale County at the Kenyan south coast, the Rabai are found at the north coast.

"In Majengo, people will throw rubbish without fearing the municipal council but if Mama Halima (a village elder) passes by, all she needs to ask is, 'who threw this rubbish here?' and it is picked immediately."

3.3.4 RELIGIOUS BASED FORUMS

The three main religions in Kenya are Christianity, Islam and Hinduism. Some IFCSA cases are reportedly also handled informally by religious leaders of these groups. The mode of handling the matter ranges from banishment to public exposure or confession. As respondent #8 said of what at times happens in the Islamic community:

> Exposure is enough punishment. After that they just have to leave the family and the rest of us look after his family…if he was the breadwinner, he is sent away with his money…we are a close knit society and the family is looked after by even neighbours.

3.3.5 FAMILY BASED FORUMS

Some of the IFCSAs are finalised within the privacy of the extended family involving the uncles and grandparents of the child. This is done to protect the privacy of the family. This is the mode respondent #2 at one point indicated that she would have preferred to have had applied to deal with the uncles who abused her as a child: *I would have wanted them to bear responsibility for what they have done, accept they have a problem and what they did was wrong and apologise…in the family. That would be enough unless they repeated.*

There is however a thin line between sweeping the abuse under the carpet and having an IFCSA case finalised within the family, as the whole idea is to keep the abuse a secret from the outside world. This happens behind closed doors. Respondent #13 described how he figured that the case in which he was representing the perpetrator, a grandfather who had sexually abused his granddaughter, had been settled within the family. Despite being the perpetrator's lawyer, he was not invited into the family forum that concluded the case:

> They never called me back; they adjourned because the mother said she cannot testify. After that it just ended. I heard they had finished at home because the grandfather was old… My client has never come back but I know he was never convicted. The case just went like that…

The common denominator in all the above IJS processes is the shift of focus from punishing the perpetrator to preservation of privacy, restoration of relationships, and reparation where applicable, with a priority to dispose of the case at the earliest possible opportunity.

From the foregoing, it is clear that though FJS has gaps and deficiencies in handling IFCSA cases, the IJS that is often resorted to is not perfect either. Before discussing the gaps and deficiencies in both systems, it is important to set out the human rights standards and the theoretical framework against which these gaps have been measured. This is what shall be discussed in the following chapter.

CHAPTER 4

4 THEORETICAL AND HUMAN RIGHTS FRAMEWORK

As indicated in the introduction, this study is an acknowledgment of the causal effect of the social realities of the prevalence of IFCSA. It recognises the unique impact it has on its victims, the difficulty of the FJS to effectively respond to it, and the fact that beneath the radar, the communities resort to the IJS to resolve the cases. The essence of the study is an attempt to reckon with the impact of the resultant legal pluralism evident in the manner in which IFCSA cases are responded to. Though the resort to IJS may be a bid to circumvent the shortcomings of the FJS, the IJS cannot be regarded as the panacea for the said shortcomings.

As discussed in the previous chapter, the IJS has the advantage of being inherently informal and familiar, and its outcomes are reparative and reconciliatory in nature. These features resonate well with the concept of restorative justice. As IFCSA is a serious human right abuse, a discussion on the human rights of child victims of IFCSA is inevitable. The conceptual bedrock of this study is therefore bifurcated into the theory of restorative justice and the human rights principle of the best interest of the child and the right to access to justice. These two shall be discussed in this chapter and shall form the basis on which the gaps and deficiencies in the two systems will be interrogated.

4.1 RESTORATIVE JUSTICE

4.1.1 DEFINITION AND MEANING OF RESTORATIVE JUSTICE

It is difficult to assign the term 'restorative justice' a universally acceptable definition because its proponents and critics objectify it in diverse ways. As noted by Gerry Johnstone, it has been perceived as a set of values, a process and as a lifestyle.[76] As a process, restorative justice provides the *"forum where all parties with a stake in the offence come together to resolve collectively how to deal with its aftermath"*.[77] As a set of values, it calls for the injecting of attitudes that make the criminal justice system more responsive to the needs of the victim. This study

[76] G Johnstone (ed.) *A Restorative Reader, Texts, Sources,* Context (WP 2003), p. 1.
[77] T. Marshall, "Restorative Justice: An Overview" (1999) in G Johnstone (ed.) *A Restorative Reader, Texts, Sources, Context* (WP 2003) p. 28.

does not intend to interrogate restorative justice as a lifestyle as it would call for an anthropological discussion beyond the scope of this study.

Whether perceived as a process or a set of values, the overriding concern of restorative justice proponents is the need to shift focus from the perpetrator, as is the case with the conventional formal criminal trial and judicial punishment, to the victim. Its interest is that once a crime is established, the priority should not be to punish the offender but to, inter alia, meet the victim's needs.[78] The emphasis of restorative justice is therefore the need to mete out justice in a manner that is best understood and embraced by the victim. This approach is viewed as an appropriate alternative to the conventional criminal justice system. For avoidance of doubt, this study shall not confine itself to any one perception of restorative justice. It shall perceive it as both a process and a set of values.

4.1.2 RESTORATIVE JUSTICE AND INFORMAL JUSTICE

This study is primarily on informal justice. The focus on restorative justice in this part is not an attempt to present it as a synonym of informal justice. There is however a common thread that interweaves the two concepts which are important to highlight. First and foremost, restorative justice principles have guided a lot of African traditional concepts of justice, which are inherently informal, hence it is not foreign to African traditional communities. Such concepts include the deliberate focus on reparation and reconciliation.[79] This is, however, not to say that all the outcomes of African traditional informal justice have been restorative in nature. Alice Armstrong, for instance, highlights retributive outcomes resulting from some traditional justice systems of some tribes in Zimbabwe in sexual offences.[80] These include tying the perpetrator to a tree full of black ants followed by compensation to the girls' parents, banishment of the perpetrator from the community, corporal punishment, confiscation of the perpetrator's possessions, vigilante style beating, or bearing the cost of relocating the family away from the perpetrator, especially where the perpetrator was a grandfather who could not be banished due to age considerations.

The informal nature of restorative justice has been contrasted with the conventional FJS by juxtaposing the specialised roles of the criminal justice professionals with the informal human interaction between the victim, offender

[78] G. Johnstone, *Restorative Justice: Ideas, values and debates* (WP, 2002), p. 1.
[79] S. Kinyanjui (supra note 38), p. 2.
[80] A. Armstrong, "Consent and Compensation: The Sexual Abuse of Girls in Zimbabwe", in W. Ncube (ed.), *Law, Culture, Tradition And Children's Rights In Eastern And Southern Africa*, Dartsmouth Publishing Co, 1998, Chapter 7, p. 129.

and the community in restorative justice.[81] FJS is deemed to be "stiff, distant and lacking in warmth" while the former is seen as guided by principles of "democracy, social support and love".[82] However, it is important to note that restorative justice has not been applied exclusively to IJS. There are situations where its values and processes are incorporated into FJS by statute, for example through plea bargains and provision for reparation and compensation in criminal assault as discussed below.

From the foregoing, it is clear that there is a thread that interweaves informal justice with restorative justice, which then makes the restorative justice the point of convergence between IJS and FJS.

4.1.3 RESTORATIVE JUSTICE IN SEXUAL ABUSE CASES

Restorative justice is more creditable when spoken of in the context of minor offences and less so for more serious offences. It is for this reason that its utility in the global arena in respect of sexual offences is at present far from widespread. It has for instance been utilised in a unique South Australian initiative. Under this initiative, young people charged with sexual offences, and who admit their behaviour, are diverted from court processes to family conferences.[83] There is however a substantial and growing body of literature on its viability in sexual offence cases. Myers has, for instance, made an appeal to veer away from what he refers to as *'emotional and visceral'* responses to sexual offences, which he warns as having the effect of *'impairing objectivity'*. He markets the role of restorative justice by contending that *"the social and legal issues engendered by child sexual abuse are too important to be obscured by adversarial rhetoric"*.[84] Another bold proposition for the application of restorative justice to sexual offences has been made by Wright.[85] In a conference paper he argues that in the light of the inadequacies of the criminal justice process, restorative justice in form of mediation can be applied in rape cases. This is especially so where the victim and the perpetrator are acquainted. Wright

[81] S.M. Olson and A..W. Dzur, "Revisiting Informal Justice: Restorative Justice and Democratic Professionalism" (March 2004) *Law & Society Review*, Vol. 38, No. 1, pp. 139–176, published by: Wiley on behalf of the Law and Society Association Stable, http://www.jstor.org/stable/1555115 , accessed 24/06/2013.

[82] G Johnstone (ed.), "Introduction: Restorative Approaches to Criminal Justice", in G Johnstone (ed.), *A Restorative Justice Reader: Texts, sources, context,* Willan publishing (2005).

[83] Marnie Doig & Ben Wallace, Family Conference Team, Youth Court Of South Australia, Paper presented at the Restoration for Victims of Crime Conference convened by the Australian Institute of Criminology in conjunction with Victims Referral and Assistance Service and held in Melbourne, September 1999 available at http://www.aic.gov.au/media_library/conferences/rvc/doig.pdf, accessed on 30/11/13.

[84] John E.B. Myers, "The Child Sexual Abuse Literature: A call for greater objectivity", Michigan *Law Review Assn,* vol. 88, No 6, (1990), pp. 1703–1733.

[85] M. Wright, *Is Mediation Appropriate even for rape?* Paper presented to the International Conference on Restorative Justice, Winchester, March 2000.
<www.restorativejustice.org/10fulltext/wrightmartin2000ismediation>, accessed on 2 /11/ 2013.

however falls short of recommending restorative justice in cases of child sexual abuse as is being proposed in this study. The most promising indication of the future of restorative justice in sexual offences is however best demonstrated by McGlynn's exploratory study befittingly entitled, *'I Just Wanted Him to Hear Me'.* The aim of the study was to investigate experiences of a restorative justice conference involving an adult survivor of child rape and other child sexual abuse. The results of the study confirmed that there is room for application of restorative justice in sexual offences.[86]

From the foregoing, it is clear that there is healthy ongoing dialogue on the extension of restorative justice to sexual offences and the possibility of its making inroads in the realm of sexual offences, including cases of IFCSA, cannot be ruled out. It is however clear that this is bound to be met with some resistance. Further points of criticism are discussed below.

4.1.4 CRITICISM OF RESTORATIVE JUSTICE

The greatest criticism against restorative justice is hinged on the impression that it cheapens the impact of crime by letting off a perpetrator with a 'slap on the wrist'. When contrasted to retributive justice, the latter is deemed '*the natural sequence of stimuli and response',* hence needs less justification.[87] Restorative justice has thus been accused of lacking authenticity and failing to accommodate people's natural need to give 'just desserts'. This argument is based on the presumption that it is natural for an aggrieved person to want the perpetrator to suffer for the offence.

Restorative justice has also been accused of reproducing and reinforcing the power imbalance entrenched in abusive relationships leading to possible re-victimisation. This is even more so in respect of child victims, who may be more vulnerable to a forced settlement because of their weak social standing, especially in the African society. The place of the child in African society is discussed later in this chapter under participatory rights.

Restorative justice has further been seen as having the propensity to encourage vigilantism as opposed to encouraging adherence to the rule of law.[88] This view is based on the presumption that process outside the western type of justice concept is outside the rule of law. Another gap highlighted by critiques of

[86] C. McGlynn et al., "I Just wanted Him to Hear Me: Sexual Violence and the Possibilities of Restorative Justice" (June 2012,) vol. 39, Number 2, *Journal of Law and Society,* p 213.
[87] N.S. Timasheff, "The Retributive Structure of Punishment*", Journal of Criminal Law and Criminology (1931–1951),* vol. 28, No. 3 (Sep–Oct.,1937 (Northwestern University Stable) URL: <http://www.jstor.org/stable/1136721>.Accessed: 14/07/2013 13:16), pp. 396–405.
[88] A. Acorn, *Compulsory Compassion: A Critique of Restorative Justice,* Vancouver: University of British Columbia Press, (2004).

restorative justice is its potential for raising security concerns in case of serious offences and repeat offenders.[89] In this regard, it is charged with assuming that the participants in the restorative process are *"drawn from the ranks of morally superogatory without appreciating the propensity of some bad actors to keep on being bad".*[90] The argument here is that if the offenders are not put away from the society, its security remains at stake as there is no guarantee that the offender will not reoffend. Finally, restorative justice has also been cited for assuming that the offender has already assumed responsibility, and for its irrelevance where there is no identifiable victim or admission of guilt by the perpetrator.[91]

Braithwaite has dedicated time and effort to respond to the above criticism which this study shall not delve into. [92] Suffice it to say that restorative justice begins from the disadvantaged point of having to explain and justify its very existence and relevance. This is the same negative attitude that prevails in respect of informal justice, especially when recommended in such deplorable offences as child sexual abuse. The negative attitude was anticipated in this study and acknowledged as a limitation and has been dealt with in the manner specified in the methodology part of the study.

As already stated, the purpose of this study is, however, not to replace the criminal justice system through a paradigm shift with restorative or informal justice. What is proposed is incorporation of restorative values and processes found in IJS within the existing FJS in order to craft out a victim centred legal response.

4.1.5 THE PLACE OF RESTORATIVE JUSTICE IN KENYA IN THE KENYAN LEGAL FRAMEWORK

The existing legal framework in Kenya gives room for the application of restorative justice. The main procedural statute in the criminal justice process, the Criminal Procedure Code, reveals a nuanced recognition of its values and processes. Firstly, it allows for diversion of court fines to a victim as compensation for loss or injury.[93] It also allows the court to promote reconciliation and encourage and facilitate amicable settlement in cases of common assault and other misdemeanour offences. The code also provides for

[89] Lode Walgrave: "Restorative Justice for Juveniles", in G Johnstone (ed.), *A Restorative Justice Reader: Texts, sources, context,* Willan Publishing (2005), p. 255.
[90] Acorn (Supra note 88), p. 224.
[91] R.A. Duff: "Restorative Punishment and Punitive Restoration", in G. Johnstone (ed.), *A Restorative Justice Reader: Texts, sources, context,* Willan publishing (2005), p. 382.
[92] J. Braithwaite, "Restorative Justice: Assessing optimistic and pessimistic accounts", *Crime and Justice A Review of Research,* vol. 25, edited by Michael Tonry, Chicago, IL: University of Chicago Press: pp. 1–127.
[93] CPC Section 175.

plea bargain negotiations, though as discussed earlier, its application to sexual offences is excluded.

The spirit of restorative justice can also be said to be entrenched in the Kenyan Constitution. This can be inferred from the fact that the principles of judicial authority enshrined in the Constitution of Kenya 2010 include the promotion of alternative forms of dispute settlement. These include reconciliation, mediation, arbitration and traditional resolution mechanisms. The Constitution further highlights that administration of justice should be without undue regard to procedural technicalities, which is also a running theme in restorative justice. It is noteworthy that unlike the Criminal Procedure Code, the constitution does not specifically exclude sexual offences from the realm of restorative justice. The only cautionary provision is that traditional methods of dispute settlement should not be against the constitution, or repugnant to justice and morality. This therefore means that the constitution gives a window of opportunity for the application of restorative justice to sexual offences. If applied appropriately, they may alleviate prolonged trauma and re-victimisation by providing an avenue through which the offender can acknowledge their wrong more speedily, with minimum injustice to the victim.

4.2 HUMAN RIGHTS FRAMEWORK

IFCSA is, among many other things, a human rights violation. Any meaningful legal response must therefore have a human rights approach. This involves using human rights principles and standards to inform the discussion on what eventually constitutes justice for an IFCSA victim. The human rights principles and standards that are of the greatest relevance in this study are the right of access to justice and the principle of the best interest of the child, together with the attendant rights specific to the rights of the child.

4.2.1 RIGHT TO ACCESS TO JUSTICE

Article 48 of the Constitution of Kenya guarantees the right to access to justice to all people in Kenya. Children are entitled to this right as much as adults. The right to access to justice does not merely mean physical access. It has been unpacked in detail to include several incidentals.[94] It has been argued that people cannot access rights they have no knowledge of. Right of access to justice therefore include the right to know one's rights. In the case of IFCSA, this would include the right for the child and/or their family to know what constitutes a violation and their procedural rights vis-à-vis government service providers as they seek intervention from various FJS institutions. The victim, for instance, has a right to know that in their quest for intervention, they are entitled to the consumer

[94] P K. Mbote & M. Akech, (supra note 42) p. 157.

protection enshrined in the constitution,[95] which sets expectations from both public and private entities in terms of service delivery. Victims of IFCSA often seek intervention from a point of vulnerability and disempowerment. The need for them to grasp their procedural entitlements cannot be understated.

Apart from knowledge of their rights, the other components of access to justice are the physical access to both FJS institutions like the police service, the courts, and children's services, and the financial access to be able to shoulder the incidental costs like legal costs and transport costs. Lastly, the justice should be accessible expeditiously and without unreasonable delay.

In this study it is proposed that this right of access to justice should include the right to access justice of one's choice, including informal justice. This is in line with the broad definition given by Penal Reform International:

> … access to justice should be considered in its broad sense to encompass: access to a fair and equitable set of laws; access to popular education about laws and legal procedure; as well as access to formal courts and, if preferred in any particular case, a dispute resolution forum based on restorative justice (both subject to appropriate regulation in order to prevent abuse).[96]

4.2.2 BEST INTEREST OF THE CHILD

The best interest of the child principle is one of the general principles of the Convention on the Rights of the Child in Article 3. The other three include: freedom from discrimination in Article 12, the right to life in Article 6 and respect for the child's views in Article 12. This principle is a running theme in all major documents related to the rights of the child.[97] It emphasises that in all actions concerning children including those undertaken by public institutions, administrative and legislative authorities and courts of law, the best interest of the child shall be a primary consideration. The principle therefore essentially refers to the well-being of the child which is determined by due regard to the child's age and circumstances. The Constitution of Kenya 2010 and the Children Act[98] also restate the concept by providing that a child's best interest is of paramount importance in every matter concerning the child. The fact that the principle of the best interest of the child appears in one of the earliest articles of

[95] Article 46, CoK.
[96] "Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems", p. 10, *Penal Reform International* November 2000. Available at: www.penalreform.org, accessed on 25/11/13.
[97] The UN Convention on The Rights of the Child and The African Convention on the Rights and Welfare of the Child.
[98] Article 53(2) and The Children Act No 8 of 2001, (Laws of Kenya) section 4 respectively.

the CRC has been interpreted as evidence that it underpins all other provisions of the CRC.[99]

No checklist or catalogue exists against which one can check whether or not an act is in the best interest of the child. Each case is judged by its own circumstances with due regard to certain variables like the age of the child, the relationship of the child to the perpetrator, the gravity of the harm caused, the risk of future danger to the child, among many others. Of equal importance is the reality of the child's evolving interests with age. For instance, what may be in the interest of the child at six years of age might cease to matter by the time the child turns ten years. Again, mobility and exposure may be a game changer, such that what may be in the best interest of the child as they attend a rural school in Kwale county might be against their interest when the same child is transferred to a school in urban Mombasa county. That is why Ncube has proposed the need to distinguish between 'current interests' and 'future oriented interests' of a child, as the two are capable of coming into conflict. He clarifies that current interests are formulated in relation to experiential considerations while future-oriented interests focus on developmental considerations.[100]

4.2.3 ATTENDANT RIGHTS

Closely related to the best interest principle are specific rights of the child that Kenya as a state party to the CRC and ACRWC is obliged to promote. Of significant relevance to this study is the victim's right that binds the state to take all appropriate measures to promote physical and psychological recovery and social reintegration of the child victim of intra-familial child sexual abuse.[101] The committee on the rights of the child, in its general comment[102] on the right of the child to freedom from all violence, suggested that the interest of a child victim should encompass enforcement of judicial procedures in a child friendly way. This includes taking into account the child's personal situation, gender, disability and level of maturity, and handling the matter with sensitivity throughout the justice process. The committee also suggested options for the regular criminal justice process including family conferences, alternative dispute settlement and restorative justice with a special focus on rehabilitation and compensation of the child victims. Even where the abuse is prosecuted through the regular criminal justice system, the committee proposed the establishment of specialised units and procedures for child victims including specialised units

[99] M. Freeman, "Artide 3. The Best interest of the Child", in A, Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2007), p. 6.
[100] Ibid. p. 3.
[101] CRC, Article 39.
[102] Committee on the Rights of the Child, *General Comment No 13 : The Right of the Child to Freedom from all forms of Violence (2011)*.

within the police, prosecution, and judiciary with staff well-trained in the needs and rights of children. It is clear that the committee favours a restorative and informal approach as opposed to a purely punitive one like the FJS in dealing with child victims of abuse.

Finally, it is important to place the child victim in their rightful place as rights-holders and therefore subjects of both the FJS and IJS processes as opposed to mere objects. Their participatory rights are therefore relevant to this study. Article 13 of the CRC provides that the child shall have the right to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds. A child who is capable of forming their own views also has the right to express those views freely in all matters affecting them. Once the views are expressed, they must be given due weight in accordance with the age and maturity of the child, especially in judicial and administrative proceedings affecting them. The representation may be either direct, or through a representative as may be allowed by the law.

This is a relatively new concept in Africa as, traditionally, children were deemed as belonging to someone who was usually the patriarch of the home, and they were not expected to have an opinion separate from the patriarch. The traditional African child has thus been described as a *"victim of intergenerational power imbalance … in a gerontocratic structure"* where the value of their opinion is directly proportional to their age.[103] This study shall therefore be sensitive to the cultural realities of the geographical area under study and will not strictly impose a western conceptualisation of the participatory rights of a child. As brought out by Ncube an African child could for instance sufficiently participate in decision making through an intermediary like a grandmother without uttering a word.[104] The child's right to participate in the processes affecting them is therefore not altogether inconsistent with African customary norms as long as creative ways of incorporating the same are sought. This shall be discussed further in the next chapter and in the recommendations.

It is therefore against the restorative and human rights standards and principles that the FJS and IJS frameworks discussed in the previous chapter shall be interrogated in the following chapter. This will be with the aim of highlighting the deficiencies and gaps of both systems in responding to IFCSA cases. It is hoped

[103] J.W. Wafula, "African Values and the Rights of the Child: A view of the dilemmas and prospects for change", in S. Lagoutte (ed,), supra note 67, p. 115.
[104] C. Himonga, "The Right of the Child to Participate in Decision Making, A perspective from Zambia", in Welshman Ncube (ed.), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa,* Dartmouth Publishing Co, (1998), chapter 6, p. 95.

that this will assist in coming up with a legal response that will be both restorative and in line with human rights standards and principles.

CHAPTER 5

5 GAPS AND CHALLENGES FJS AND IJS IN THEIR RESPONSE TO IFCSA CASES

The gist of this study is to interrogate the manner in which cases of IFCSA have been responded to by the justice process. As already established, although the impact of the abuse on an IFCSA victim differs from that perpetrated by a stranger, the FJS does not make any distinction in its response to the two. The case of a victim sexually abused by her own father or caregiver is processed under the same framework as that of another victim sexually abused by a total stranger. This wholesale legal response fails to achieve justice for victims of IFCSA. The IJS that the community often turns to as an alternative to the FJS is also not without challenges of its own. It is these challenges and deficiencies in both systems that shall be discussed in this chapter.

5.1 DEFICIENCIES AND GAPS IN THE FJS

The challenges that victims of IFCSA in Kenya face within the FJS essentially amount to a problem of access to justice. These kinds of problems have been said to be the kind "associated with time, manner and place restrictions". [105] For ease of discussion, the deficiencies in the FJS shall be classified into two categories: firstly problems arising from the weakness of its institutions and structures, and secondly problems emanating from its procedures.

5.1.1 WEAK STRUCTURES AND INSTITUTIONS

For the FJS to effectively respond to the unique needs of an IFCSA victim, it requires strong and efficient supporting institutions and structures. The relevant statutes discussed in chapter 3 specify and highlight the roles played by these institutions in the process of achieving justice for an IFCSA victim. The most crucial include the Department of Children Services, the National Police Service, the Court, the Probation Office and the DPP's office.

[105] J. Stevens, "A review of literature prepared for Penal Reform International", *Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean*. (Penal Reform International) 1998.

a) Department of Children Services

This is the most important institution as it facilitates the interaction of the IFCSA victim with the other FJS institutions. The department's mandate is wide and includes conducting social inquiries, advising the court on what action would be in the best interest of the child, providing counselling to the victim and their family, and enforcing court orders made in the interest of the child. In addition to this mandate, the department has an overall supervisory role over the management of statutory children's rehabilitation schools, rescue institutions, children's remand homes, and all charitable institutions and programmes for children.

When child abuse is perpetrated by a stranger, the child has the family to fall back on, but when it is within the family, the department of children services is expected to step in and ensure that the child's best interest is safeguarded throughout the FJS. In an ideal situation the department should be able to step in and serve the needs of a victim of an IFCSA and fill in the gap left by the breach of the home safety net. The ideal, as promised in the statute, is however worlds away from the reality. Despite its wide mandate, the department is crippled by a host of problems.

The children department was established in the early 20th century as a juvenile correctional institution to deal with African children found in conflict with the colonial laws restricting movement of Africans.[106] It became the children's department at independence. In the researcher's own assessment, the department of children services has not enjoyed much political goodwill from the various regimes that have been in power since independence. This is deduced from two facts. First, the department has never been allowed to settle permanently in any particular government ministry in the fifty years since independence. It has been jostled from one government ministry to another at the whim of the regime in power. The ministries in which the department has been housed include the Ministry of Home Affairs, the Office of the President, the Ministry of Gender and currently it is under the Ministry of Labour. Secondly, the ministry is grossly underresourced and underfunded. This fact is even acknowledged as a challenge on its official website.[107]

A children's officer based in Lamu county, at the Kenyan coast, once confided in the researcher that he is usually allocated as little as US$130 per month for transport expenses. This amount was confirmed by respondent #12, in respect of his area of jurisdiction, Kwale county. Respondent #3, also a children's officer, for her part decried the fact that the allocated sum is released after an inordinate

[106] http://www.gender.go.ke/index.php/listing/2012-11-05-15-22-15, accessed on 21/11/13
[107] Ibid.

delay. She gave an example of how the allocation for the first quarter of 2013 was released in October 2013. Apart from the underfunding, the department is understaffed. It has 696 children's officers against an approved establishment of 1277. Mombasa County has six children's officers against a population of 1 million people.

The institutions with which the children's department is supposed to work with are also either non-existent or insufficient. There are only three government sponsored Rescue Centres in the entire country. In Mombasa, respondent #3 confirmed that there is only one rescue centre which is run by the Catholic Church. This, however, only holds the children temporarily for a maximum of six months pending the finding of a permanent shelter. In Kwale, respondent #12 confirmed the existence of a rescue centre for teenage girls. This is a school with a special wing for teenage mothers together with their children. This, however, means that IFCSA victims who are male or not of schoolgoing age do not have access to this facility. The only option for them is the Likoni Children's Home and Remand Centre. As the name suggests, this centre is also a remand home for child offenders awaiting trial. Though the child victim of IFCSA would be kept separate from the child offenders, this arrangement is far from ideal.

With no resources to run the department, the IFCSA victim in Kenya is normally more or less on their own unless otherwise assisted by a good samaritan or some relative. A department without funds is as good as non-existent. The lack of resources also means that the department is unable to conduct social inquiries or file reports. Without the reports, it cannot competently advise the court on what orders would be in the best interest of an IFCSA and, most tragic, the department is helpless when it comes to intervening for the livelihood of the victims. The gravity of the inability of the children's department to effectively intervene was best illustrated by a case that the Mombasa chief children's officer (respondent #3) was handling as at the time of the interview. A 12-year-old girl whose mother had died a year earlier had confided in her teacher that the father had defiled her. The father, who was arrested and charged, died in custody pending trial, as he could not raise bail. The entire family had branded the girl a murderer as they held her responsible for the father's death. With nowhere else to go, and with the department of children services incapacitated by lack of resources, the teacher had volunteered to live with the girl, a responsibility that should otherwise be taken over by the department of children's services.

With such a crucial department unable to carry out its mandate, it becomes difficult for the IFCSA victim to navigate their way through the other FJS institutions in their quest for justice.

b) Probation office

The main work of the Probation Office is to make social inquiries in the community into the circumstances of offending for use in court during sentencing and the setting of pre-bail terms and conditions. Though their mandate is not specific to children, they none the less interact a lot with children in the course of carrying out these social inquiries. A great deal of IFCSA is detected during this exercise. As explained by respondent #7, probation officers often get to gather, by default, secret information that was otherwise never meant to be divulged. He explained that they frequently discover that the reason behind a subject child offender is a history of intra-familial sexual abuse that was never dealt with. It is also during these inquiries that the probation officer can give the court the picture of the circumstances prevailing in the victim's home to enable the court make relevant orders on the victim's livelihood and safety before releasing the perpetrator on bail pending trial. The capacity of the probation office to play its part in assisting an IFCSA victim is, however, also hampered by lack of resources.

Though the researcher did not get access to information about the resources available to this office, a cursory observation of the circumstances under which they operate revealed an atmosphere seriously lacking in hope and encouragement. For example, at the time of the interview with respondent #7, his office was housed within the Forestry Department whose entrance is accessible past a wooded tree nursery. The office was barely furnished and had no support staff. This means that whenever the probation officer is out either in the community carrying out social inquiries, or in court presenting his reports, the office remains locked. This atmosphere is outright unwelcoming to a traumatised victim of IFCSA or their equally traumatised non-offending family members.

Though the officers in the department work passionately and zealously, they are unlikely to be able to effectively intervene fully as allowed under their statutory mandate when so grossly under-resourced.

c) The National Police Service

These are the gatekeepers in the criminal justice process. It is where the offence is reported and they are the ones who decide the way forward, including whether or not to commence investigation of an IFCSA case that may be reported to them. They have been said to have wide discretionary powers including

> … to arrest or not arrest, the power to detain or not detain, the power to investigate or not investigate, the power to charge a person with committing an offence or not to charge, the power to charge that person

> with committing a grave offence or minor offence, and to a certain extent, the power to prosecute or not prosecute.[108]

The institution however does not always deliver, especially to its vulnerable clientele like victims of IFCSA.

The deplorable work conditions and terms of service under which the Kenya police work have been the subject of a lot of studies and much literature.[109] The lowest paid police officer earns as little as US$ 220 per month.[110] This state of affairs has not been a morale booster and of course affects their service delivery. It is not surprising that the police do not exactly mind when some IFCSA cases fall through the gaps and fail to make it to the FJS. It is not uncommon for the police to interrogate the victim in a manner that leaves them feeling intimidated and with little desire to pursue the case. Respondent #9 explained her experience at the police station where she had escorted her student who was a victim of IFCSA. The police officer started by warning them that they would be locked up if it was found that they had 'cooked up' the story against the victim's stepfather.

Apart from the poor pay and terms of service, the Kenya police has for many years topped the relatively publicised national bribery index.[111] As a result, the relationship between them and the ordinary citizens is one of suspicion and dread. The public prefers not to engage the police unless they absolutely have to. It is not surprising that they are often not seen as an option in IFCSA cases.

There has been an attempt to facilitate better reporting of gender-based violence and children's cases by introducing gender desks. These are simply ordinary workstations within a police station but they are manned by mostly female officers with some experience of handling gender-based violent offences. These officers have no special training as confirmed by respondent #1, and they also handle other cases and are subject to transfers to other stations and departments. The desks themselves are normally not located in a private location within the station. This poses a challenge when the child victim is being interviewed or when recording their statement. This is the same statement that is used in court during examination in chief. It is not uncommon for a victim to give a substantially different version in court from the one given at the police station as a result of having recorded the statement in an undesirable environment. The gender desks have therefore not been very effective. The

[108] Mbote & Migai Akech, (supra note 42) p. 119.
[109] Ibid. p. 128.
[110] *"Match better pay for police with reforms"*, available at: http://www.standardmedia.co.ke/?articleID=2000089160&story_title=match-better-pay-for-police-with-reforms, accessed on 12/11/13.
[111] http://www.tikenya.org/index.php/kenya-bribery-index, accessed on 12/11/13.

solution might lie in the establishment of specialised units to deal with sexual offences.

Apart from receiving the victim, the other role that the police play in dealing with an IFCSA case is the investigation of the alleged offence. Here again the police service lacks resources to carry out this mandate. An IFCSA case heavily relies on forensic evidence. There is no forensic laboratory in Kenya. Other facilities like DNA laboratories are only found in the capital city, Nairobi. Results take a long time to be processed and released, especially those on cases from places that are far-flung from the capital city, like Kwale. Chances of the quality of evidence being compromised are also high as samples are transported over long distances. Many IFCSA cases are lost on account of lack of evidence.

There are however extensive plans underway for police reforms.[112] It is hoped that the reforms will accomplish a lot, including dealing with the malady of corruption, making the police service more approachable to the public, and raising their competence levels in the area of investigations. Until this is achieved, the institution becomes one of the least approachable institutions for a victim of IFCSA to engage with.

d) The judiciary

As discussed in chapter 3, IFCSA cases are heard in ordinary magistrates' courts. They are only heard in the children's court when the perpetrator is below 18 years. The ordinary courts have scanty physical facilities including toilets.[113] There is no waiting room and all parties, perpetrators and victims together with their witnesses and spectators, wait in open court. As explained by respondent #10, it is not uncommon for the prosecutor to call out in open court, "If you are here for the defilement case, please step out. "This has the potential to cause the victim embarrassment. The court premises are therefore least conducive to an already traumatised victim of IFCSA and this increases their chances of absconding from court attendance.

Another aspect in the judiciary that comes in the way of the IFCSA victim's right to access justice are the prolonged trials. Most of the respondents interviewed in this study estimated the average time taken to conclude an IFCSA case to be between two and three years. The most common reasons given for the delay were summarised by respondent #11 as the heavy workload and frequent transfer of magistrates. When a magistrate is transferred midway through a case, the incoming magistrate has the discretion to order that the case starts afresh. In

[112] http://www.unodc.org/unodc/en/frontpage/2013/October/unodc-launches-police-reform-project-in-kenya.html, accessed on 22/11/13.
[113] Mbote & Migai (supra note 42), p. 90

the earlier-mentioned case of Nadia, where the researcher was watching brief for the victim, the case was heard by a total of four magistrates over a span of two years because two of the magistrates were transferred midway through the case.[114]

The long delays mean a lot of adjournments and multiple court attendances. Most victims and their families have to commute or walk long distances to the courts. Kwale county, for instance, has only one courthouse serving an area of 8,000 km^2. Most of the adults who ordinarily accompany the child victim to court are self-employed or work as casual laborers on a daily wage. Staying away from work may mean going without the day's wage. As respondent #10 aptly put it, the back and forth of court attendance eventually leaves the victim with the limited choice between earning their daily bread and pursuing justice for the IFCSA victim. The situation is aggravated where the perpetrator was the breadwinner and is either placed in custody awaiting trial, or is otherwise alienated from the family pending trial.

From the foregoing, the very setting of the court and its mode of operation become barriers to access to justice of the vulnerable IFCSA victim.

e) DPP's office

IFCSA cases are usually prosecuted by police prosecutors on behalf of the DPP. As earlier stated, these are not lawyers and they are therefore no match for defence lawyers. The prosecutors also have a heavy workload and barely have time to arrange for pre-trial conferencing or to effectively engage their colleagues investigating the cases. From the researcher's own observations made in the course of representing the victims, it is up to the victim, through their lawyer, to take the initiative to avail themselves for pre-trial briefing with the prosecutor. Where the victim is unrepresented the case proceeds without any prior briefing between the prosecutor and the victim and the rest of the witnesses. It is no wonder that the '*Haki Yenu'* study cited the prosecutor's incapacity as one of the reasons for acquittals in sexual offences.[115]

The DPP's office has recently established a sexual and gender-based violent offences division to give special attention to this category of offences.[116] This division, however, only exists in the headquarters in Nairobi and is yet to devolve to the counties. Its impact is therefore unfelt in Mombasa and Kwale.

[114] Nadia's case, (supra note 26).
[115] '*Haki Yenu*' (supra note 4), p. 25.
[116] http://www.odpp.go.ke/index.php/2012-05-19-08-04-51/offences-against-the-persons/96-sexual-and-gender-based-violence-offences-division, accessed on 21/11/13.

The DPP's office has also taken the unique initiative of appointing special prosecutors to assist in the handling of sexual and gender-based violent offences.[117] The special prosecutors serve on a voluntary basis and are only 17 in number, countrywide. Their impact, in the researcher's assessment, will take a long time to be felt.

With the above five institutions operating way below their optimum, justice for an IFCSA victim exists only in the unrealised theory.

5.1.2 PROCEDURAL GAPS

The procedure applied in all criminal cases in Kenya including IFCSA cases is the 'winner takes it all' adversarial system where the perpetrator, of necessity, fights 'tooth and nail' to avoid conviction. This procedure presents a number of problems for the victim.

a) The role of the victim

Despite being the subject and protagonist in an IFCSA, the adversarial system relegates the victim to the back burner of the FJS and deflects attention from them to the perpetrator. The victim's entry point into the FJS is usually at the police station where they record the statement on the events that are relevant to the offence. As already stated, this is done in an environment devoid of privacy or any empathy to the grave condition that a victim of IFCSA may find themselves in. The statement is recorded in a traditional standard form and the narrative is guided by the investigating officer. The victim's sole role throughout the process is that of a passive witness as parties to the case of 'Republic of Kenya' versus the perpetrator. After recording the statement, the victim then waits to be bonded to attend court as a witness with no consultation on the most appropriate date for their court attendance. Once the court process commences, it remains firmly under the control of the Director of Public Prosecutions.[118] The opinion and feelings of the victim and the family are largely inconsequential. In fact, neither the court nor the prosecution has a duty to inform the victim of the outcome of the case at the end of the trial.

The victim is therefore left disempowered in so far as deciding the direction their case should take is concerned. The only way they can have their way is through absconding trial when they feel they can no longer cope, which is not a rare phenomenon.

[117] Appointed vide The Kenya Gazette Notice No. 14724, dated 10 October 2012. http://www.kenyalaw.org/newsletter1/20121019.php, accessed on 21/11/13.
[118] SOA (2006), section 40.

b) Evidence taking

The parameters under which evidence is given in an IFCSA case are set out in the Evidence Act, discussed earlier. This means that the court focuses on facts and experts' opinions. Anything else that the victim might wish to tell the court is only admissible at the discretion of the presiding magistrate. The FJS does not, therefore, provide a forum for the victim to 'tell their story' in their own words and to the depth and breadth that they would wish to. The victim's narration is restricted to the statement recorded at the police station. At the end of the process, what goes on record is what the prosecutor and the court allow.

One of the most difficult times in the trial process for an IFCSA victim is the cross-examination. This is when the defence lawyers, or at times the perpetrator, ask the victim questions on their evidence. This is usually traumatising to the victim and has often been said to amount to a re-victimisation.[119] Furthermore, witnesses in an IFCSA case may include family members. In such cases it is common to find camps within the household, with some sympathising with the plight of the child victim and others disbelieving them. When these divisions are extended to court, they become disruptive to the family and may result in permanent breakdown of relationships within the family.

A major procedural disservice to a victim of IFCSA is the disconnect between the Sexual Offences Act and the Children Act. The Children Act was enacted in 2001 while the SOA was enacted five years later without making any reference to the Children Act. Although the Children Act has an elaborate mechanism on how to deal with abused children, as discussed in chapter 3, there is no mention of the mechanism in the Sexual Offences Act. The role of the department of children's services is not very clear in the Sexual Offences Act. It normally takes a very proactive judicial officer or prosecutor to tie the two together. The upshot of this disconnect is that whereas a child offender of an IFCSA offence is tried in the more conducive environment of the children's court, a child victim's case is heard in the ordinary magistrates court. It therefore follows that the FJS accords a child victim less protection and consideration than a child perpetrator.

c) The rights of the accused to bail and information

To the common man, justice is normally an emergency to be dispensed with at maximum speed without delay. When a perpetrator is taken to court and released on bail pending trial, it does not resonate well with the victim or the community. They are unable to understand the delay and the apparent 'freedom.' All the offences that would constitute IFCSA are bailable. The right to bail is closely related to the universal right of presumption of innocence until the perpetrator is proven guilty. Where the perpetrator is out on bond, it is not

[119] '*Haki Yenu*' (supra note 4), page 126.

uncommon for the perpetrator and the victim to continue living in the same house throughout course of the trial. This presents an awkward situation for the victim and the non-offending members of the family. Though a witness protection agency was established in 2011 it appears to have only envisaged protection of witnesses who have no family ties with the perpetrator.[120] Its effectiveness in IFCSA cases is therefore not applicable.

d) Sentencing

Sexual offences attract stiff minimum sentences proportional to the tender age of the victim. This ranges from life to 15 years.[121] The long sentences are meant to be deterrent and they are also based on the notion that once the perpetrator is jailed, the victim will receive their healing though there is no evidence to show that the perpetrator's incarceration has anything to do with the victim's restoration or recovery. The fixed minimum sentences effectively fetter the discretion of the presiding magistrate. This means that no incentive in the form of a reduced sentence can possibly be offered to the perpetrator in order to have him concede to the offence, even in the most obvious cases. IFCSA cases must therefore go the full hog, which takes two to the years. Convictions for sexual offences are few and far between. The '*Haki Yenu*' study made a finding of a conviction rate of 12%.[122] This means that a high majority of perpetrators of IFCSA who are processed through the FJS get off scot-free. Even where a conviction may be achieved, incarceration often results in substantial economic hardship to the victim and the family at large, where the perpetrator was the breadwinner. This is more so in a society like Kenya where state welfare is either unknown or unpredictable.

5.2 LOOPHOLES AND CONCERNS IN THE IJS

The resort by the community to IJS for the determination of IFCSA cases does not mean that the system is free of challenges. The challenges range from its legitimacy or soundness in the realm of sexual offences, to concerns about the composition and competence of its adjudicators, how it measures up to human rights standards and its outcomes. These challenges shall be discussed in this part.

5.2.1 CONCERNS OF ITS LEGITIMACY IN SEXUAL OFFENCES

The most acceptable reaction to sexual offences like IFCSA is one that involves retribution, which is the preserve of the FJS. The fact that the law excludes plea bargaining in offences under the sexual offences act is an indication of its lack of tolerance for any intervention that may result in anything less than the minimum

[120] http://www.wpa.go.ke/programme/vulnerable-witness, accessed on 21/11/13.
[121] Section 8, SOA.
[122] '*Haki Yenu*' (supra note 4), page 18.

punishment provided. Though the Constitution does not exclude the application of alternative justice mechanisms in sexual offences, there is a strong belief that the same should never be handled by the IJS. Respondent #11 gave an example of the message the judiciary had for members of the public during the judiciary 'march' that took place in August 2012.[123] The aim of the march was to, inter alia, demystify the judiciary in the eyes of the public and to promote the principles of judicial authority in the Constitution, which includes use of alternative dispute settlement methods. Respondent #11 confirmed that during this event, the judicial officers specifically advised the public against settling sexual offences outside the FJS.

Indeed, all the professionals interviewed in this study were against the idea of IJS handling IFCSA cases. This position was taken even while acknowledging that they were aware that many of these cases are settled by the IJS anyway. They also conceded that the FJS had failed to offer IFCSA victims justice. Respondent #12 in particular had nothing good to say about the IJS traditional forums in Kwale which he referred to as 'backward', 'primitive' and 'kangaroo courts'. All these are derogatory terms, presenting the forums as lacking in credibility. With this kind of a reputation, it is obvious that much as the IJS may have approval from the community, it suffers a legitimacy crisis amongst the professionals in respect of IFCSA cases. This legitimacy gap cannot be wished away.

5.2.2 INFLUENCE OF MONEY ECONOMY

The money economy was unknown in pre-colonial African customary dispute settlement.[124] The outcomes of the justice processes involved reparation in kind and rituals. Animals were paid to the victim or their family, and the number was often symbolic and not representative of any value. The advent of the money economy has affected the informal justice systems. The reparations are often in the form of cash. In IFCSA, the very thought of finalising a case upon payment of a certain amount of money does not resonate well with morality, good sense, and the human rights of the child. It may create the impression of cheapening a child's life.

The other angle at which the money economy affects IJS is that of the remuneration of the panel of arbiters. Ordinarily, these were voluntary roles but, with time, the pressure for an allowance has built up. During the researcher's interaction with respondent #8 he complained that the volunteer work was taking its toll on him as he is often called upon to arbitrate cases, even in the middle of the night, and he also makes telephone calls at his own cost. He made

[123] http://www.judiciary.go.ke/portal/assets/files/NEWSLETTERS/MarchesWeek%20PDF.pdf, accessed on 21/11/13.
[124] S. Kinyanjui (supra note 37), generally.

an appeal to the government during the interview for some allowance. Respondent #12 on the other hand confirmed that in Kwale, it is common for the traditional elders to ask both the perpetrator and victim to foot any costs incidental to the process.

The entry of money into the IJS has given rise to what Dr Tanja Chopra[125] refers to as 'fake Elders". These are persons in the community who elevate themselves to the status of elder for the monetary benefit attached to it. This has the overall effect of diluting the institution and the IJS process.

5.2.3 LACK OF CAPACITY AND DISREGARD FOR HUMAN RIGHTS STANDARDS

As earlier discussed in chapter 3, the IJS panellists' only claim to their positions is usually their age or the respect they command in the community. They have no known qualifications in dispute settlement and none in sexual and gender-based violence issues or human rights of the child. It is not unheard of for them to make declarations and arrive at settlements way distant from statutory and human rights standards. For instance they may apply norms and traditions that discriminate against women and children. Respondent #8 for instance explained that a perpetrator of IFCSA outside the Islamic boundaries of consanguinity e.g. an uncle or cousin can be forced to marry the victim. Such an outcome is in disregard of the victim's right to education or to choice of a marriage partner.

5.2.4 REPUGNANT MODES OF SETTLEMENT

Although IJS is lauded for its restorative outcomes, some of its verdicts may raise concerns. As respondent #11 stated, some of the known outcomes include cleansing rituals of both the perpetrator and the victim. This has the implication of labelling the victim as 'unclean', which is a form of re-victimisation. It has been argued that

> … the appearance of consensus may well be a mask for domination; members of some sections of the community – for example women or young people – are likely to be put at a disadvantage in relation to more powerful members, such as elder men, particularly as the arbitrators themselves may be chiefs, elders, and religious leaders. This is the major weakness of the informal. [126]

Other modes may be outrightly unconstitutional and against human rights. For instance, respondent #12 explained that in the indigenous communities in Kwale, any child born as a result of IFCSA is considered a curse and is not accepted in

[125] Consultant, World Bank, Nairobi, Kenya, on *"The Political Economy of Informal Justice",* delivered during a public seminar on 25/10/13 at the Danish Institute for Human Rights.
[126] Supra note 96.

the community. Such a child is usually either abandoned or given up for adoption to a person outside the community. This is irrespective of the birth mother's wish.

5.2.5 LACK OF COERCIVE FORCE

Finally, the IJS lacks the backing of the coercive force of law. This means that only willing perpetrators can engage in it. Where a perpetrator declines to cooperate, the IJS is totally powerless as it lacks the means to force the perpetrator to either participate in the IJS process or comply with any orders made with a view to having him purge the offence.

From the above, it is clear that there are glaring gaps in both the FJS and IJS as far as providing justice to a victim of IFCSA is concerned. On the one hand, is the FJS, which promises to deliver but is structurally and procedurally unable to rise to the occasion. On the other hand is the IJS that is resorted to, but it is unable to pass the legitimacy test amongst the professionals and also raises certain human rights concerns. The question then is whether there is anything that can be borrowed from the seemingly popular IJS and grafted into the FJS in order to realise a more victim centred process and outcome for the victim of IFCSA. This is the question that the following, final chapter shall attempt to answer.

CHAPTER 6

6 RECOMMENDATIONS AND CONCLUSION

This study commenced by highlighting the uniqueness of IFCSA through identifying the specificities that distinguish it from child sexual abuse perpetrated by a stranger. It then interrogated the legal response offered by both the FJS and IJS. The gaps and challenges in both systems are then addressed against the standards set by relevant human rights principles and the theory of restorative justice.

The most obvious finding is that FJS is riddled with serious structural and institutional deficiencies and procedural gaps in its response to IFCSA. It is therefore reasonable to deduce that it is unable to deliver justice to the victims of IFCSA in its current state. While this study does not confirm that the deficiencies and gaps are the reason why the community resorts to the IJS in IFCSA cases, it does bring out the fact that the community's affinity with the IJS is a reality. It is, however, clear from the study that IJS has not been the panacea for all the shortfalls of the FJS as it has challenges of its own. The IJS does not enjoy the same confidence among professionals as it does in the community. It has therefore existed amidst a legitimacy and, to a certain extent, a legality crisis. The upshot of the above is the possibility that between the two imperfect systems justice has remained beyond the reach of the IFCSA victim, with neither system able to deliver it.

As stated in the introduction, it was not the intention of this study to recommend the replacement of the FJS with IJS. It is however evident from the community's constant engagement with IJS that it must have something to offer. The scope of this study did not allow it to delve deep into the nature of attraction that specifically draws parties to settle IFCSA cases through the IJS. There are however some obvious features of the IJS response that can add value to the FJS. In this regard, this chapter will conclude the study by offering certain proposals for consideration as a way forward. These includes the possibility of diverting a limited category of IFCSA to IJS, utilising IJS members in FJS, having IJS processes run parallel with FJS, borrowing useful IJS values and processes for use in FJS and investing in continuous education for IJS players. Some of these proposals may require amendment to existing statutory law and policy on SGBV

prosecution, while others would require bold and creative interpretation and implementation of existing legal provisions.

6.1 POSSIBILITY OF ALLOWING IJS TO HANDLE CERTAIN CATEGORIES OF IFCSA

The definition of IFCSA in this study perceives potential victims as all persons under 18 years. In practice, however, it is possible to unpack various categories of victims on the basis of the gravity of the act. This would be determined by a combination of factors including the age difference between the victim and the perpetrator and the use or absence of force, coercion or undue influence. Much as, legally speaking, a person under 18 is incapable of consenting to sexual activity, it is none the less important to acknowledge that some of the IFCSA may be carried out pursuant to an agreement between the parties concerned. This can be the case for instance where a 16-year-old engages in non-violent, 'consensual' sexual activity with her 19-year-old uncle or cousin. Under the FJS, this amounts to defilement punishable by a minimum sentence of 15 years imprisonment as the 16-year-old is deemed to be legally incapable of consenting to sexual activity.[127] When such a case is processed through the FJS, chances of procuring the cooperation of a victim who perceives the act as having been 'consensual' are minimal. A reasonable approach in this case would be to divert the issue to the IJS. This is because IJS has a more restorative approach to the matter and handles it with the flexibility required in balancing family interests with the need to deal with the infraction.

At a practical level, the main players in determining whether an IFCSA case should be diverted would be the SGBV division of the DPP's office on the advice of the children's department. The role of the children's department would be to carry out a social inquiry to ascertain the circumstances surrounding the incident. It would be important to have a policy guideline from the DPP's office directing investigators to work in consultation with the children's department right from the beginning of all IFCSA cases.

Apart from the consideration of the absence of force and consent, another consideration in deciding whether a case is appropriate for diversion can be the age of the perpetrator. Where for instance a 16-year-old forcefully defiles his 13-year-old cousin, the case can be handled under the Children Act as opposed to the Sexual Offences Act. The former has entry points for diversion as seen from the variety of orders the court is empowered to make as discussed in chapter 3 of this study.

[127] Section 8(4) SOA.

The recommendation to unpack and categorise IFCSA is not original to this study. A similar approach was alluded to in respect of general child sexual abuse by Kisanga in his report on *"Parents' Experiences of Reporting Child Sexual Abuse in Urban Tanzania"*.[128] In his study, he came up with four categories of victims of child sexual abuse. These include 'the innocent child', who is the vulnerable young child exposed to an adult perpetrator; 'the forced sex youth' who is an older child who finds themself in a compromising situation then gets overpowered by the adult perpetrator, 'the consenting curious youth', who finds themself engaging in sexual activity with a peer, and 'the transactional sex youth' who engages in sexual activity for favours. Using this categorisation, the example of the 16-year-old child would fall in the category of ' the curious consenting youth' in respect of which this study proposes a diversion to the IJS.

6.2 POSSIBILITY OF UTILISING THE OF IJS MEMBERS IN THE FJS

As the study has revealed, IJS is managed by persons of high repute and social influence within the community. These persons can be of invaluable assistance within the FJS at various stages. They can for instance come in handy in the identification of the perpetrators, their arrest and investigation of the IFCSA offences. Respondent #8 demonstrated the community elders' capacity in this regard in his explanation on how they set a trap to nab a religious leader who was sexually abusing boys attending religious lessons ('madrassa'):
We gave the boy three pairs of trousers to wear and advised him to undress "slowly. When he was called upstairs, we caught him red handed when the boy had just removed the third trouser…"

The community leaders are able to interact more closely with perpetrators and victims than the police. They would therefore have an important role to play in gathering the extremely elusive evidence for use in the FJS.

During trial, the IJS members can assist the court in the task of victim impact assessment in evaluation of the extent to which the abuse has affected the child victim. Under normal circumstances, the court only considers the reports by professionals, although section 33 of the Sexual Offences Act does not specify who should make the report. IJS members can play a part in this regard on the invitation of the court through the prosecution. The report by IJS can be oral or written, highlighting the social impact of the abuse on the victim, the state of the victims' livelihood, their family situation and how the abuse has been perceived by the community. Such a report can then be considered alongside any that may be filed by professionals like children's officers, probation officers, and counsellors. This would leave the court with a bigger and more credible picture

[128] Felix Kisanga, et al. (supra note 14).

of the issue before it, and able to make orders that are more relevant to the victim's needs.

6.3 POSSIBILITY OF IJS RUNNING PARALLEL WITH FJS

Possibilities of allowing the IJS process to run alongside FJS can also be explored. This would be possible where the perpetrator admits the offence or some elements of it and is willing to submit themselves to both systems. The outcome of the IJS can then be submitted to the FJS and used as a basis for plea bargaining and arriving at a reduced sentence. This recommendation would necessitate amendment of the criminal procedure code to extend the application of plea bargains to sexual offences. It would also necessitate the amendment of the Sexual Offences Act in respect of imposition of minimum sentences. The amendments would grant greater discretion to the presiding magistrate in deciding the value of the IJS outcome vis-à-vis the sentence. This widening of discretion might result in quicker disposal of IFCSA cases and shorten the FJS process.

6.4 POSSIBILITY OF LEARNING FROM THE IJS VALUES AND PROCESSES

The fact that the community persistently resorts to IJS is proof that there must be aspects of the system that attract them to it. Borrowing constructive and beneficial aspects of IJS and applying them to FJS to the greatest possible extent may achieve better justice for the victim. The values include confidentiality and privacy, which are important in combatting the stigma attached to IFCSA. FJS can also relax its procedural rules to the extent that the rights of the accused are not infringed in the same manner as happens in IJS. For instance, the FJS trials on IFCSA could be held on Saturdays when the courts are not in session, amongst other possible adjustments.[129]

6.5 POSSIBILITY OF CONTINUOUS EDUCATION FOR IJS PLAYERS

The study confirmed that the IJS representatives are people with no specific training in any field relevant to adjudication of cases. Their propensity to occasionally come up with repugnant outcomes was also exposed. This gap in their knowledge and capacity is indicative of the need for continuous empowerment with necessary knowledge. This includes training them in relevant concepts such as human rights of the child, especially the need to bring the best interests of the child to the fore of their processes and outcomes. When these players are seized of the relevant information on the dynamics of IFCSA, they will have more informed, frank and constructive conversations around the subject.

[129] Saturday courts for SGBV cases have been successful in Sierra Leone. http://www.undp.org/content/undp/en/home/presscenter/articles/2012/03/07/sierra-leone-saturday-courts-tackle-gender-based-violence-case-back-log-.html, accessed on 27/11/13.

When persons who are esteemed in the society openly discuss a subject that is seen as taboo, it may minimise the stigma around the issue and influence the community to engage the FJS in matters of IFCSA.

6.6 IN CONCLUSION

This study is a substantial addition to the literature on IJS, children's rights and IFCSA from a legal perspective. This will especially be useful in the uncharted waters of attempting to apply IJS to an offence like IFCSA, whose sole response has largely been assumed to be retribution. The study is groundbreaking as it hopes to stir the professionals into reckoning with the harsh reality that the official abhorrence of the idea of IFCSA cases being settled outside the FJS has not stopped the community from approaching the IJS for solutions in that very area. Any reckoning must involve more than the current barring of IJS from handling IFCSA, and include open and continuous conversations between the professionals and the community in order to understand and appropriately respond to this affinity. For the time being, the study reveals that the magnitude of the affinity to IJS in IFCSA cases is great enough not to be ignored or wished away using the coercive force of the law. The professionals envisaged here are lawyers, judicial officers, children's officers, probation officers, the police and prosecutors.

Due to its scope constraints, the study did not interrogate all areas of IFCSA. It can however act as a base for future studies as it has thrown up questions in need of further investigation. This includes an investigation of the reasons for the affinity towards the IJS in IFCSA cases. Further work also needs to be done to bring out more on the processes and frameworks under which different IJS forums operate in responding to IFCSA. A deeper anthropological study on the issue of stigma around IFCSA and the most appropriate ways to take stigma into consideration in crafting an appropriate legal response would also be necessary.

This study is of a particular relevance in a Kenyan context. The new constitutional dispensation in Kenya is necessitating substantial legal reform. It is hoped that the contents of this study can make significant contributions to legislative bills that are relevant to IFCSA pending at different stages in the legislative process. This includes the Protection Against Domestic Violence Bill of 2012 and Victim Protection Bill of 2013.[130] In addition, the study can be of use to the Division of Sexual and Gender-Based Violence Offences, especially in informing policy.

Finally, both IFCSA and IJS in general are emerging as major challenges in other parts of the African continent and elsewhere throughout the globe. The information in this study is hence bringing new practical knowledge in the field of

[130] http://www.cickenya.org/index.php/legislation/bill-tracker, accessed on 27/11/13.

IFCSA. It is at the same time an element in constructing a larger and more cogent framework to support the role of IJSs where they are relevant.

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