A COMPARATIVE ANALYSIS OF THE INTERMEDIARY SYSTEMS IN SOUTH AFRICA, NAMIBIA, ZIMBABWE AND ETHIOPIA

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ABSTRACT

Prior to 1990, very few countries in the world offered special protection to child witnesses interfacing with the justice system. There were no legal provisions permitting testimonial accommodations for children in court. The courtroom experience was significantly traumatic for the children. With the international focus shifting from protecting and upholding the rights of the accused in the courtroom towards a more victim-centred approach, various international and regional instruments have strongly advocated that children deserve special protection because of their vulnerability. In order for the courts to be able to elicit accurate evidence from the child without further traumatizing the child, research has shown that the child needs assistance. An intermediary may be defined as a person who facilitates communication between the child and the courtroom in a manner that takes into account the child's cognitive and developmental limitations.

The thesis was prompted by the need to make a contribution to the currently limited body of literature on the intermediary systems in South Africa, Namibia, Zimbabwe and Ethiopia by investigating how the systems can be improved and sustained in a way that helps to protect the child witness in court. Despite the problems the South African courts have had in identifying the appropriate interpretation of its intermediary legislation, the country emerges as a clear leader for the steps it took by creating a positive legal framework within which child protection issues are addressed and introducing the concept of the intermediary. This concept proved to be an inspiration to its neighbours, Namibia and Zimbabwe. The influence of the South African intermediary legislation is evident in the Namibian and Zimbabwean legislation. Although

Namibian legislators have drafted laws that permit intermediary assistance in court, there are as yet no intermediaries appointed. In Ethiopia, although there is no discernible intermediary legislation, the country has managed to establish an intermediary system.

As a result of the analysis conducted, it is evident that the efficacy of the intermediary system is dependent on the presence of an enabling legislation, its clarity and ease of interpretation, the sensitisation of court role players on child vulnerabilities, the significance of intermediary assistance, and finally a government's commitment towards the implementation process.

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DEDICATION

THIS THESIS IS DEDICATED TO MY GRANDMOTHER

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WHOSE INTELLECT AND WISDOM KNEW NO BOUNDS

AND

MY THREE CHILDREN MUTEYA, HAMA AND TAKA

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"The Lord God is my strength and He will make my feet like hinds' feet, and He will make me to walk upon mine High Places"
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- The Director of the Child Witness Project Ontario Canada Ms. P. Hurley
- The Principal of the Justice College Zimbabwe Mr. R. Shana.
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CHAPTER

1

RESEARCH METHODOLOGY

1.1 INTRODUCTION

The criminal legal procedure prevailing in the four countries South Africa, Zimbabwe, Namibia and Ethiopia is based on the accusatorial system. It entails a conflict between the State and the person accused of committing a crime. The system pits the prosecutor against the accused or his or her defence attorney as a mechanism of arriving at the truth. Witnesses are expected to eloquently and comprehensively verbalise their memories of the crime within the confines of the criminal justice system.[1] They are expected to appear in person and present themselves for cross-examination by the accused or his or her defence lawyer.

The criminal court procedure creates "the most challenging, demanding, confusing and difficult environment for any witness".[2] The fundamental characteristics of the accusatorial system, which include confrontation, oral testimony and cross-examination, create particular difficulties for them.[3] In recent years, research has established that in order to protect child witnesses from re- traumatisation during the course of the trial, especially where matters involving abuse are concerned, child witnesses may need assistance.[4] The need to assist child witnesses and other vulnerable witnesses facilitated the introduction of intermediaries into the criminal court system. The intermediary system was identified as a mechanism through which child witnesses could avoid confrontation with the accused, giving oral testimony from inside the

[1] KJ Saywitz *Improving Children's Testimony: The Question, the Answer, and the Environment* in MS Zaragoza *et al - Memory and Testimony in the Child Witness - Applied Psychology* 1(10) (1995) 115.
NW Perry and LS Wrightsman *The Child Witness: Legal Issues and Dilemmas* (1991) 133.
[2] LM Copen *Preparing Children for Court: A Practitioner's Guide* (2000) 3.
[3] GM Davies and HL Westcott *The Child in the Courtroom- Empowerment or Protection?* in MS Zaragoza *et al - Memory and Testimony in the Child Witness - Applied Psychology* Vol 1(10) (1995) 199 and 200.
KD Müller and KA Hollely *Introducing the Child Witness* (2000) 78.
[4] Müller and Hollely *Introducing the Child Witness* (2000) 45.

courtroom and direct cross-examination. The intermediary is in a position to act as a form of protection for the child against any hostility implicit in questions posed during trial.[5]

An intermediary is as a person who facilitates communication between the child and the courtroom in a manner that takes into account the child's cognitive and developmental limitations. He or she is a person who conveys the meaning and content of the questions from the court to the child witness in a language and form understandable to the child witness.[6] The intermediary protects the child witness from any forms of age-inappropriate questioning. The intermediary's presence is not only reassuring and comforting to the child, thereby reducing the chances of re-traumatisation, but enables the child to understand the questions asked.[7] South Africa, Zimbabwe, Namibia and Ethiopia have, to varying extents, attempted to introduce some changes to their criminal court procedures in an effort to protect child witnesses when they testify. All four countries have considered the use of intermediary services for child witnesses during criminal trials.

South Africa, Zimbabwe and Namibia have created the necessary legislation permitting child witnesses to receive intermediary assistance. South Africa and Zimbabwe have managed to introduce and establish the intermediary system in their criminal justice systems. The situation is different for Namibia. Despite the creation of various pieces of legislation authorizing intermediary assistance for vulnerable witnesses in Namibia, the country still has to introduce intermediaries into its criminal courts to assist child witnesses during trial. In Ethiopia, there is no discernible legislation authorising child witnesses to receive intermediary assistance, however some courts have been providing intermediary services to child witnesses.

In South Africa the intermediary system was introduced into the criminal court system by the Criminal Law Amendment Act,[8] which inserted section 170A into the Criminal Procedure Act.[9] Although the South African intermediary system has been weighed down by various administrative challenges, the system is largely revered in the region and has been emulated by

[5] *Ibid.*
[6] Müller and Hollely *Introducing the Child Witness* (2000)47.
[7] *Ibid.*
[8] Act 135 of 1991.
[9] Act 51 of 1977.

other countries, including Zimbabwe and to a limited extent Namibia. In Zimbabwe, the intermediary system was created by the *Criminal Procedure* and Evidence *Amendment* Act[10] which inserted section Part XIVA into the Criminal Procedure and Evidence Act.[11] The Zimbabwean intermediary system is largely established throughout the major cities but its effectiveness has been negatively impacted by the economic downturn experienced by the country in the last ten years. Of the four countries, Zimbabwe is the only country that systematically uses interpreters as intermediaries.

The first instrument permitting the use of intermediaries in the Namibian courts was introduced in 2003 by the insertion of section 158A into the Criminal Procedure Act[12] through the Criminal Procedure Amendment Act.[13] Although section 158 does not use the word "intermediary" to refer to the person through whom a witness may be cross examined,[14] it was generally accepted that the person referred to was in fact an intermediary.[15] In the following year, the Criminal Procedure Amendment Act was replaced by a new Criminal Procedure Act[16] which included comprehensive provisions on how intermediaries were to be used to assist children and other vulnerable witnesses in the Namibian courts. The new Criminal Procedure Act was nevertheless withdrawn and replaced by the old Criminal Procedure Amendment Act. The latter was withdrawn on the grounds that the government lacked sufficient resources to fully implement it.[17]

Although Ethiopia has no legal instrument that either specifically authorises or regulates the use of intermediaries in the court system, some Ethiopian courts have been offering

[10] No. *8 of 1997.*
[11] Section 319A to section G. Chapter 9:07.
[12] Act 51 of 1977.
[13] Act 24 of 2003.
[14] Section 158 (5).
[15] D Hubbard "Children in Court: Protecting Vulnerable Witnesses". http://www.lac.org.na/projects/grap/Pdf/childcourt2004.pdf [accessed 15 January 2011]
[16] The Criminal Procedure Act No. 25 of 2004. See also P J Schwikkard "The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act". http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/09-1/schwikkard.pdf [accessed 15January 2011]
[17] Key informant interview with Prosecutor General of Namibia held at Windhoek 4th May 2010. See *addendum* 1.

intermediary services since 2004[18] through the victim friendly benches. Two instruments may be argued to provide the Ethiopian intermediaries with the legal backbone for their existence. The Constitution of the Federal Democratic Republic of Ethiopia[19] permits all courts of law to apply measures that are in the "best interests of the child".[20] In 2007, the Cassation Bench of the Ethiopian Federal Supreme Court passed a landmark decision that binds the lower courts to apply the Convention on the Rights of the Child principle that at all times the best interests of a child must be protected. In the absence of a discernible legal instrument authorizing use of intermediaries in the Ethiopian criminal courts, the federal Constitution and the 2007 court decision by the Cassation Bench combine to provide the essential legal backbone for the intermediary system to function in the country's criminal justice system.

In South Africa, Zimbabwe and Ethiopia the child sits with the intermediary in a special room with or without one way mirrors, depending on the proximity of the special room to the main courtroom. The child communicates with the courtroom occupants via the intermediary. The courtroom occupants are able to listen and view both the child and the intermediary via closed circuit television. This process precludes the child witness from giving oral evidence and from being directly cross-examined from inside the courtroom. Furthermore, the child does not have to see the accused person.

In this chapter, motivation of the choice of the study, the problem formulations, identification of the sites, the research methodology and the research limitations will be discussed.

1.2 MOTIVATION FOR THE SUBJECT

The motivation for the research emanated from the fact the researcher as a former public prosecutor noted that there is currently limited literature on the use of intermediaries in South

[18]The Federal Ministry of Labor and Social Affairs "Federal Democratic Republic of Ethiopia Country Response to the Questionnaire on Violence against Children." Submitted to the United Nations' Secretary General's Independent Expert on the Study on Violence against Children May 2005. http://www2.ohchr.org/english/bodies/CRC/docs/study/responses/Ethiopia.pdf [accessed 15January 2011]

[19]The Constitution of the Federal Democratic Republic of Ethiopia was adopted on 8 December 1994 and promulgated by the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 which entered into force on 21 August 1995.

[20] Article 36 (2).

Africa, Zimbabwe, Ethiopia and Namibia. This research is intended to make a contribution to the body of literature on the role of intermediaries by providing a comparative study of South Africa, Namibia, Zimbabwe and Ethiopia. The fact that the implementation of intermediary legislation is still pending in Namibia will be taken into consideration.

1.2.1 Problem Formulation

Before 1990, very few countries in the world offered special protection in the courtroom to child witnesses interfacing with the accusatorial justice system. There were no legal provisions permitting testimonial accommodations for children in court. The courtroom experience was significantly traumatic for the children. South Africa, Zimbabwe and Ethiopia introduced various legal reforms that took into account the cognitive limitations of children and the risk of re-traumatisation during trial proceedings. One of the significant measures was the introduction of intermediaries into their criminal courts. Although Namibia still has to introduce intermediary assistance for child witnesses in its criminal courts, the country's consistent attempts at creating the necessary legislation cannot be overlooked.

The efficacy of the intermediary system is dependent on the presence of enabling legislation, its clarity and ease of interpretation in terms of the duties and functions of the intermediary; the sensitisation of other court role players to the role of the intermediary and children's limited cognitive abilities and to re-traumatisation, and finally the government's commitment towards the implementation process.

The research problem can be formulated as follows: Following the attempts by South Africa, Namibia, Zimbabwe and Ethiopia to introduce intermediaries to assist child witnesses during trial, this is a comparative study of the four countries' attempts and efforts at using the intermediary system to protect child witnesses and to prevent re-traumatisation during trial proceedings.

1.2.2 Aim and objective

An aim may be defined as an anticipated outcome that is intended or that guides the researcher's planned actions.[21] The aim of this exploratory study is to provide information on intermediaries through a comparative analysis of the use of intermediaries in South Africa, Ethiopia, Zimbabwe and Namibia. The comparative analysis takes into account the fact that the intermediary system has not been fully implemented in Namibia.

1.3 SITES/DOMAINS

The sites or domain refers to the vital data sources and environments.[22] In the study, South Africa, Zimbabwe, Namibia and Ethiopia were the chosen sites. All four countries are part of sub-Saharan Africa. The criminal law of all four countries has largely been influenced by the English common law.[23] South Africa, Zimbabwe and Namibia share a solid common Roman and Roman-Dutch law background.[24] The criminal justice systems of these countries are accusatorial in nature. All four countries have, at varying levels and in distinct ways, identified intermediaries as a strategy for protecting child victims of sexual abuse in the criminal courts system. These factors helped provide the necessary aspects for comparison.

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[21] Manchester Metropolitan University "What are Aims & Objectives?".
http://www.hollings.mmu.ac.uk/index.php?option=com_content&task=view&id=45&Itemid=140
[accessed 15January 2011]

[22] Buckley *et al Research Methodology and Business Decisions* (1976) 23.

[23] "A 1961 criminal procedures code, drafted by a British jurist, augmented the 1930 penal code. and it reflected the influence of English common law".
The Library of Congress Country Studies "CIA World Factbook".
http://www.photius.com/countries/ethiopia/national_security/ethiopia_national_security_crime_and_punishment.html
[accessed on 15 January 2011]

[24] Because of the connection between the three countries, they share the Roman and Roman Dutch law background. As discussed later on in more detail, the common law with its roots in the English law of evidence largely determines the rules of evidence in all three countries.

1.4 NATURE OF STUDY

1.4.1 Descriptive

A descriptive research captures the specific details of a social setting by exploring existing identified phenomena.[25] Descriptive research aims to provide an accurate profile of persons, events or objects. The researcher does not only focuses on providing a profile of variables but also on events that are in progress or that have already taken place.[26] The researcher may use varying methods of observation and description. This study is mostly descriptive in nature. It describes the position of intermediaries in South Africa, Namibia, Zimbabwe and Ethiopia by looking at the legislation and the implementation process.

1.4.2 Cross-national and comparative

A study is deemed cross-national or comparative if one or more units in two or more societies, cultures, and countries are compared in respect of the same concepts or phenomena.[27] Hantrais indicates that comparative studies provide novel insights and clarity on issues that are of central concern to the countries involved.[28] This study is cross-national and examines the legal provisions relating to intermediaries in the four countries, namely South Africa, Namibia, Zimbabwe, and Ethiopia in order to explain various factors surrounding the use of intermediaries in the countries.[29] This study also aims at providing an understanding of the role of intermediaries and how it helps to keep the child out of the courtroom, and reduce secondary trauma.

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[25] VR Theron *The impact of the Namibian judiciary system on the child witness* (Master of Diaconiology thesis, University of South Africa, 2005)7.

[26] GR Adams and JD Schvaneveldt *Understanding research methods* (1991) 107.

[27] L Hantrais "Comparative Research Methods" *Research Social Update* 13(1995). http://sru.soc.surrey.ac.uk/SRU13.html [accessed 15January 2011]

[28] *Ibid.*

[29] A researcher in a cross-national study collects data on the object of study within the identified different contexts and makes comparisons that provide a greater awareness and significant understanding of the particular social issue.

1.5 RESEARCH METHODOLOGY

The research methodology comprises a desktop research of relevant legislation, journal articles, cases, policy documents, newspaper reports, bulletins and research material all available in hard copy or on the internet. As part of the fact-finding process, interviews were conducted with role players and officials regarding procedures in operation in the various countries in South Africa, Namibia and Zimbabwe.

The legislation applicable to intermediaries in these four countries was analysed. The role of intermediaries in assisting child witnesses was also examined. Other factors influencing the efficacy of the intermediary were also discussed. Again, the delay in Namibia at fully implementing its legislation permitting intermediary assistance in court was examined.

1.5.1 Literature review

Generally, the purpose of a review is to analyze critically a segment of a published body of knowledge through summary, classification, and comparison of prior research studies, reviews of literature, and theoretical articles. Hart defines literature review as follows:

> *"[A] selection of available documents (both published and unpublished) on the topic which contain information, ideas, data and evidence written from a particular standpoint to fulfill certain aims or express certain views on the nature on the topic and how it is being investigated, and the effective evaluation of these documents in relation to the research being proposed."*[30]

Literature review may thus include the review of books, journals, conference papers, dissertations, electronic databases, government publications and indexes and abstracts. In all four countries, information supplied by non-governmental organisations, government departments, academics and scholars, policy speeches, media reports, police records and statute books was examined. The Internet was a significant source of information. It was used to access newspaper articles, journals and other documents on intermediaries and the protection of child witnesses in the court systems.

[30] C Hart *Doing a literature review: releasing the social science research imagination* (1998) 13.

1.5.2 Historical sources review

Adams and Schvaneveldt point out that primary sources of data include constitutions, declarations, laws, court decisions, official minutes or records, research reports, contracts, deeds, wills, pictures, magazine accounts, autobiographies, genealogies, advertisements, letters, chapters, recordings and diaries.

In all four countries, various primary sources of historical information including the countries' constitutions, local and international legal instruments, court cases, legal records, statutory provisions, national initiatives and strategies, newspapers, bulletins and international development agency reports were examined.

1.5.3 Group interviews

Group interviews may be used to collect information on topics where individual responsible are not comfortable of speaking out openly. Aubel explains that:

> *"In a well facilitated group interview, participants usually feel at ease, are not pressured to answer every question, have the time to think about the questions asked and can often gain confidence to answer hearing the responses of other participants. ... In the group discussion interaction between the participants is encouraged. This tends to diminish the control which the interviewer has over the group and to establish a relaxed atmosphere in which the participants interact quite spontaneously with others in the group".* [31]

The strategy was mostly used in Zimbabwe. As most of the magistrates, prosecutors and intermediaries were not comfortable with the prospect of sharing information as individuals and giving their names, informal group interviews were used.

[31] J Aubel *Guidelines for studies using the group interview techniques* (1994)3.

1.5.4 Key informants

Key informants are usually selected for their experience and knowledge on the operations of the broader environment and the activities of the other persons in a study.[32] It is important that the key informants be not only willing but must possess in-depth knowledge of the subject in question. Persons may be interviewed about their experience because it also represents the experiences of a wider range of individuals in the situation being investigated. The researcher used this approach to interview key informants. In Zimbabwe, specific key informants were identified and interviewed in individual interviews. These were selected on the basis of their level of expertise and knowledge of the intermediary system in the country. In Namibia and South Africa single key informants were identified and interviewed.

1.6 CHALLENGES EXPERIENCED DURING STUDY

1.6.1 Absence of reliable statistics

The absence of relevant statistics from all four countries was problematic. It was particularly difficult to find reliable statistics on how many child victims of sexual abuse testify in the courts and how many receive intermediary assistance. This was mostly due to the absence of data bases. Although South Africa keeps centralized records and rape statistics - the records and statistics do not distinguish between adult and child victims of sexual crimes. The situation has probably changed.

1.6.2 Inconsistent information collection methods

In terms of collecting information from the four countries, it was impossible to maintain a single consistent method of information collection. A flexible approach which permitted country specific methods and which also took into account each country's socio-political sensitivities was chosen. In Ethiopia, it was particularly difficult to get a key informant on the use of intermediaries in the country.

[32] J Beebe *Rapid Assessment Process: An Introduction* (2001) 4.

1.6.3 Absence of published material

The absence of relevant published material from the three countries Ethiopia, Namibia and Zimbabwe was problematic. It was particularly difficult to find information on how child victims of sexual abuse testify in the courts. South Africa has more readily available information through books, journals and other publications. In the other three countries, relevant information was mostly sourced from internet based newspaper articles and articles by individuals and organizations.

1.7 SUMMARY

Under the accusatorial system the witness is expected to give evidence and be cross-examined in a public court. The essential element of the accusatorial system is the accused's right to cross examination. The intermediary protects the child witness from any forms of age-inappropriate questioning, thereby reducing the chances of re-traumatisation. South Africa, Zimbabwe, Namibia and Ethiopia have, to varying extents, considered the use of intermediary services for child witnesses during criminal trials.

The aim of this exploratory study is to provide information on intermediaries through a comparative analysis of the use of intermediaries in South Africa, Ethiopia, Zimbabwe and Namibia. Challenges experienced during the study include the difficult in maintaining a single consistent method of information collection thereby resulting in inconsistent information collection methods. The absence of relevant published material and statistics was challenging.

CHAPTER

2

INTERNATIONAL AND REGIONAL FRAMEWORK

2.1 INTRODUCTION

The period after 1980 has seen the emergence of certain international instruments directing governments to improve their child protection policies and to ensure that all children who come into contact with the criminal justice system, either as victims or as offenders, are afforded special treatment. However, the first declaration on the Rights of the Child was adopted by the League of Nations in 1924 and subsequently became international law.[1] The declaration highlighted the need to provide the child with "the means requisite for its normal development, both materially and spiritually."[2] In 1948, the United Nations Universal Declaration of Human Rights promulgated that every human being has the right to freedom from "degrading treatment".[3] The 1966 International Covenant on Civil and Political Rights restated that the United Nations standard and norm for children was that they must be protected from all forms of mistreatment.[4]

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[1] United Nations "Geneva Declaration of the Rights of the Child: Gathering a Body of Global Agreements". http://www.un-documents.net/gdrc1924.htm [accessed15 January 2011]

[2] See Article 1.

[3] United Nations "The General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights on 10th December, 1948". http://www.un.org/en/documents/udhr/ [accessed 15 January 2011]

[4] The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16 December 1966. It was enforced on the 23rd March, 1976, in accordance with its Article 49 which stated that:
A. "The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
B. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession".
See Office of the United Nations High Commissioner for Human Rights "The International Covenant on Civil and Political Rights". http://www2.ohchr.org/english/law/ccpr.htm [accessed15 January 2011]

As countries subscribed to the various international and regional policies, they also attempted to implement corresponding domestic policies in health, education and justice systems. Over the years, the desire to introduce child friendly programmes, initiatives and legislative reform in the four countries has been sustained partly by a desire to comply with the dictates of the international instruments the countries have subscribed to. The concept of the intermediary system in South Africa, Zimbabwe, Namibia and Ethiopia was albeit on varying levels, considerably influenced by international and policies requiring that a child's best interests be protected.

This chapter will provide synopses of various international and regional systems and instruments which have directly or indirectly influenced the introduction of intermediaries in South Africa, Zimbabwe, Ethiopia and to a limited extent Namibia. The synopses of the instruments provide a solid base for the framework within which intermediary systems shall be analysed.

2.2 INTERNATIONAL SYSTEMS AND INSTRUMENTS

Over the past fifteen years, the shortcomings of the criminal justice system with respect to the manner in which child witnesses and child offenders are treated have received substantial attention in sub-Saharan Africa. The inadequacies in the justice systems to treat children in an equitable manner have prompted a significant number of African governments to introduce novel changes to their justice systems. While most of the innovative changes made in the court systems may not be totally attributed to the current international and regional instruments, the former and the latter have substantially provided governments with a solid framework from which to implement substantive child-friendly policies. The Constitution of the Republic of Namibia[5] expressly provides for the recognition of international instruments by stating that:

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[5] "The Constitution of the Republic of Namibia".
http://www.orusovo.com/namcon/[accessed 15January 2011]
[accessed 15January 2011]

> *"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."*[6]

This means that whatever international instrument the country accedes to automatically becomes binding law in the country and is eligible to be recognized as such. In Ethiopia, like Namibia, the Constitution indicates that all "international agreements ratified by Ethiopia are considered an integral part of the law of the land."[7] The Constitution of the Federal Democratic Republic of Ethiopia[8] further states that:

> *"The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia."*[9]

In the absence of intermediary legislation, this posture has proved to be opportune in justifying the introduction of the Ethiopian intermediary system. In South Africa, since the change of government in 1994, the government has taken significant steps towards ensuring that the Constitution of the Republic of South Africa [10] and domestic legislation conform to international and regional instruments. Section 39(1) (b) of the South African Constitution posits that international law is instrumental in interpreting its Bill of Rights. This means that international law is used as the standard by which the Bill of Rights is interpreted.

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[6] Article144.

[7] Article 9 (4) of the Constitution of the Federal Democratic Republic of Ethiopia as translated from the Amharic language.

[8] "The Constitution of the Federal Democratic Republic of Ethiopia was adopted on 8 December 1994 and promulgated by the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 which entered into force on 21 August 1995".
United Nations "The Constitution of the Federal Democratic Republic of Ethiopia".
http://www.unhcr.org/refworld/country,LEGAL,,LEGISLATION,ETH,,3ae6b5a84,0.html
[accessed 15January 2011]

[9] Article 13 (2).

[10] The Constitution of the Republic of South Africa, 1996, was approved by the South African Constitutional Court on 4th December 1996 and took effect on 4 February 1997.
http://www.info.gov.za/documents/constitution/1996/index.htm
[accessed 15January 2011]

Section 111B of the Zimbabwean Constitution[11] states that any convention, treaty or agreement "acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations shall not form part of the law of Zimbabwe" unless it has been incorporated into the law by or under an Act of Parliament. Technically, Zimbabwe is not bound by any international and regional agreements including the ones the President has signed. The Zimbabwean government has used this self-serving strategy to consistently dodge compliance especially in issues involving political opponents and other human rights issues. Despite this, in Zimbabwe the intermediary system is largely perceived as an attempt by the government to comply with the international instruments on child protection.[12]

2.2.1 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

In 1985 the United Nations General Assembly (hereafter, the "General Assembly" adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereafter, the "Declaration of Basic Principles of Justice").[13] South Africa, Zimbabwe, Namibia and Ethiopia are all part of the General Assembly[14] which adopted the resolution for the Declaration of Basic Principles of Justice.[15] The latter defines a victim of crime as a person who, due to the

[11] The Constitution of Zimbabwe was published as a Schedule to the Zimbabwe Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom). As at the 1st February, 2007, it has been amended seventeen times.
http://www.kubatana.net/docs/legisl/constitution_zim_070201.pdf
[accessed 15January 2011]

[12] See *addendum* 1.

[13] United Nations General Assembly "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*"* The resolution was adopted by the General Assembly on 29 November 1985.
http://www2.ohchr.org/english/law/victims.htm
[accessed 15January 2011]

[14] The General Assembly is the main deliberative, policymaking and representative organ of the United Nations. Comprising all 192 Members of the United Nations including South Africa, Zimbabwe, Namibia and Ethiopia, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter. The Assembly meets in regular session intensively from September to December each year, and thereafter as required.
http://www.un.org/en/ga/
[accessed 15January 2011]

[15] All four countries were part of the United Nations General Assembly which adopted by resolution 40/34 of 29 November 1985, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which recognizes* that victims of crime and the victims of abuse of power, and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders.

criminal actions or omissions by other people, has experienced "physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights."[16]

The Declaration of Basic Principles of Justice sets out that every victim must be treated in a worthy and considerate manner. It urges governments to provide child victims with special provisions commensurate with their ages and needs.[17] It urges governments to supply all victims of crime with the appropriate assistance throughout the legal process, and to ensure that the police, justice, health, social service personnel are trained to handle victims of crime.

The South African Victims' Charter[18] complies with the Declaration of Basic Principles of Justice. The Zimbabwean National Coordinator for the Victim Friendly Courts[19] who is the overseer of the intermediary system acknowledges the significant role played by the guidelines provided by the Declaration of Basic Principles of Justice in the implementation of the country's intermediary system.

2.2.2 The Convention on the Rights of the Child (1989)

The Convention on the Rights of the Child was adopted in 1989 by the United Nations General Assembly.[20] The instrument sets child protection standards for governments in areas including justice, health and education systems. The Convention on the Rights of the Child implores all

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[16] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power- Article 1.

[17] Articles 3 and 17. [17] Article 6 (c).

[18] "In keeping with the cultivation of a human rights culture, the focus has gradually shifted from an adversarial and retributive criminal justice system to that of Restorative Justice. Central to the concept of Restorative Justice is the recognition of crime as more than an offence against the state, but also as an injury or wrong done to another person. This is in line with the National Crime Prevention Strategy's victim-centred vision for the criminal justice system. The ultimate goal is victim empowerment through meeting victims' needs, be they material or emotional," in a statement by the South African Minister of Justice and Constitutional Development.
"The Service Charter for Victims of Crime".
http://www.npa.gov.za/files/Victims%20charter.pdf
[accessed 15January 2011]

[19] See *addendum* 1.

[20] The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by the General Assembly resolution 44/25 of 20th November 1989. It was enforced on 2nd September 1990, in accordance with its article 49 which states that:

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

The Convention on the Rights of the Child.
http://www2.ohchr.org/english/law/crc.htm
[accessed 15January, 2011]

member States to commit towards appraising and improving legal frameworks for child protection in the justice sector and other areas.[21] It states that:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*[22]

Children must be protected from all forms of abuse including physical, emotional, sexual abuse and exploitation through the introduction of appropriate legislative, administrative and social mechanisms.[23] The Convention on the Rights of the Child has been pivotal in the implementation of child protection policies in most countries worldwide, including South Africa, Zimbabwe, Namibia and Ethiopia.

In Zimbabwe, despite the limitations imposed by the Constitution towards the recognition of international agreements, the Convention on the Rights of the Child forms part of the backdrop of the legal framework of the country's child-friendly courts and the intermediary system.[24] Zimbabwe and Namibia ratified the Convention on the Rights of the Child in 1990. The South African government ratified it in 1995.[25] Ethiopia ratified the Convention on the Rights of the Child in 1991, incorporated it into national law through the Proclamation 10 of 1992 and translated it into 11 languages.[26] The Ethiopian Constitution directs courts of law and other public and private institutions to give primary consideration to a child's best interests:

> *"In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child."*[27]

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[21] Article 4.
[22] Article 3(1).
[23] Article 19.
[24] Interview with the National Coordinator.
[25] See "Ratification dates by country". http://www.nationmaster.com/graph/peo_rig_of_the_chi_con_rat_dat-rights-child-convention-ratification-dates [accessed 15January 2011]
[26] See The Federal Ministry of Labor and Social Affairs "Federal Democratic Republic of Ethiopia Country Response to the Questionnaire on Violence against Children".
[27] Article 36 (2).

The Convention on the Rights of the Child stands as one of the legal crutches that the Ethiopian intermediary system stands on.

In order to enforce the objectives of the Convention on the Rights of the Child,[28] the largest gathering of world leaders in history assembled at the United Nation's World Summit for Children[29] and adopted the Declaration on the Survival, Protection and Development of Children.[30] Each country was encouraged to assess its national plans, programmes and policies in order to prioritise the welfare of children, provide for the special care of children in difficult circumstances and to make provision for the necessary resources. Governments were urged to seek capacity building assistance, not only from the United Nations external cooperation, but also from international developmental agencies and non-governmental organizations through strategic partnerships. South Africa, Zimbabwe and Ethiopia have used this route to secure funds for implementing child-friendly courts and training programmes for court personnel, including intermediaries. UNICEF and Save the Children have played a pivotal role in the provision of funding for the child protection projects.

2.2.3 The International Association of Prosecutors (1995)

The International Association of Prosecutors was established in 1995 at the United Nations offices in Vienna and was formally inaugurated in 1996. Its membership, which is open to individual prosecutors, prosecution services and associations of prosecutors, is drawn from sixty countries from every continent.[31] It has more than 130 organizational and individual members.[32]

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[28] World Declaration on the Survival, Protection and Development of Children.
"20. (1) We will work to promote earliest possible ratification and implementation of the Convention on the Rights of the Child. Programmes to encourage information about children's rights should be launched world-wide, taking into account the distinct cultural and social values in different countries".
http://www.un-documents.net/wsc-dec.htm
[accessed 15January 2011]

[29] See "The World Declaration on the Survival, Protection and Development of Children. Agreed to at the World Summit for Children on 30th September 1990".
http://www.un-documents.net/wsc-dec.htm
[accessed 15January 2011]

[30] See the "World Summit for Children 1990".
http://www.un.org/geninfo/bp/child.html
[accessed 15January 2011]

[31] The International Association of Prosecutors was established in June 1995 at the United Nations offices in Vienna and was formally inaugurated in September 1996 at its first General Meeting in Budapest.

South Africa's National Prosecuting Authority[33] and Namibia's Office of the Prosecutor General [34]are current members. One of the major objects of the International Association of Prosecutors is to protect human rights as laid down in the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948.[35] Prosecutors are urged to promote the effective, fair, impartial and efficient prosecution of criminal offences[36] and also to uphold high standards and principles in the administration of criminal justice, including procedures to guard against or address miscarriages, in support of the rule of law.[37]

2.2.4 The United Nations Guidelines on the Role of Prosecutors (1990)

The United Nations Guidelines on the Role of Prosecutors[38] were adopted at the Eighth United Nations Congress in 1990. The guidelines underscore prosecutors' responsibility towards the protection of human dignity and promotion of human rights.[39] Subsequently, in 1997 the United Nations Guidelines for Action on Children in Criminal Justice[40] reinforced the prosecutors'

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http://www.iap-association.org/ressources/IP_Standards_English.pdf
[accessed 15January 2011]

[32] See the "International Association of Prosecutors".
http://www.iap-association.org/
[accessed 15January 2011]

[33] *Ibid* .

[34] *Ibid* .

[35] The Constitution of the International Association of Prosecutors - Article 1.3 (b). International Association of Prosecutors.
http://www.iap-association.org/default.aspx
[accessed 15January 2011]

[36] See Article 1.3 (a).

[37] See Article 1.3 (c).

[38] See Office of the United Nations Human Rights Commissioner "Guidelines on the Role of Prosecutors as adopted by the Eighth United Nations Congress on the prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990".
http://www2.ohchr.org/english/law/prosecutors.htm
[accessed 15January 2011]

[39]"Article 12- Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
Article 13. In the performance of their duties, prosecutors shall: (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;"

[40] Guidelines on the Role of Prosecutors as recommended by Economic and Social Council resolution 1997/30 of 21 July 1997. "Article 8. In the use of the Guidelines for Action at both the international and national levels, consideration should be given to the following:
(a) Respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender-sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child;
(b) A rights-based orientation;

protective role towards child victims to ensure that children are not re-victimized by the exposure to the criminal justice system.

In 2001 the International Centre for Criminal Law Reform and Criminal Justice Policy prepared a guideline entitled "Model Guidelines for the Effective Prosecution of Crimes against Children".[41] A number of prosecution authorities, including the International Association Prosecution participated in developing the guidelines.[42] The Model Guidelines for the Effective Prosecution of Crimes against Children urged prosecutors to receive training on the operations of the child or victim-friendly court system.[43] The guidelines also recommended the implementation of the following measures:

(1) Intermediary services;
(2) Closed circuit televisions;
(3) One-way screens;
(4) Support persons; and

(c) A holistic approach to implementation through maximization of resources and efforts;
(d) The integration of services on an interdisciplinary basis;
(e) Participation of children and concerned sectors of society;
(f) Empowerment of partners through a developmental process;
(g) Sustainability without continuing dependency on external bodies;
(h) Equitable application and accessibility to those in greatest need;
(i) Accountability and transparency of operations;
(j) Proactive responses based on effective preventive and remedial measures".
Office of the United Nations Human Rights Commissioner "Guidelines on the Role of Prosecutors".
http://www2.ohchr.org/english/law/system.htm
[accessed 15January 2011]

[41] See the International Centre for Criminal Law Reform and Criminal Justice Policy "Model guidelines for the prosecution of crimes against children".
http://www.icclr.law.ubc.ca/Publications/Reports/Children2.PDF
[accessed 15January 2011]

[42] In developing these Guidelines, the Working Group members took into account the views expressed and the information provided by members of the International Association of Prosecutors (IAP). Twenty-eight responses to a questionnaire developed and submitted to members of the IAP were received from a wide range of prosecution services, including: the Office of the Director of Public Prosecution, New South Wales, Office of the Director of Public Prosecution, Malawi; Society of State Advocates of South Africa; and National Union of Prosecutors of South Africa.
http://www.icclr.law.ubc.ca/Publications/Reports/Children2.PDF
[accessed 15January 2011]

[43] The International Centre for Criminal Law Reform and Criminal Justice Policy "Model guidelines for the prosecution of crimes against children".
http://www.icclr.law.ubc.ca/Publications/Reports/Children2.PDF
[accessed 15January 2011]

(5) Reduce court room formality. [44]

2.2.5 World Fit for Children Resolution (2002)

The Special Session of the United Nations General Assembly held in May 2002 included 400 children from 150 countries. A document titled, "*A World Fit for Children",* was put together for the enhanced protection of children against abuse, exploitation and violence.[45] The document subsequently adopted as a resolution by the United Nations General Assembly in the same year was endorsed by 150 countries, including South Africa, Namibia, Zimbabwe and Ethiopia. The World Fit for Children Resolution reminds leaders to continue promoting and protecting the rights of all children and to uphold the legal standards set by the Convention on the Rights of the Child and its other protocols. It urges all countries to *inter alia* introduce witness support services in their justice systems[46] and to uphold the best interests of child victims.

2.2.6 The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (2005)

The United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime set out a practical framework for its member States.[47] The guidelines encourage member States to review domestic legislation and to develop policies, practices and programmes that address child witnesses' needs in the development of legislation, procedures, policies and practices and to assist each other in the implementation of the following:

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[44] The International Centre for Criminal Law Reform and Criminal Justice Policy "Model guidelines for the prosecution of crimes against children".
http://www.icclr.law.ubc.ca/Publications/Reports/Children2.PDF
[Accessed 15January 2011]

[45] The United General Assembly Resolution adopted by the General Assembly (S-27/2) 10 May 2002.
See "A World Fit for Children".
http://www.unicef.org/specialsession/docs_new/documents/A-RES-S27-2E.pdf
[Accessed 15January 2011]

[46] Article 7.

[47] Guidelines on Justice Matters involving Child Victims and Witnesses of Crime was adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005.
http://www.juvenilejusticepanel.org/resource/items/U/N/UNVictimsWitnessesGuidelines_EN.pdf
[accessed 15January 2011]

(1) Proper care and sensitivity towards a child witness or victim;
(2) Provision of a private room for child interviews or questioning;
(3) Proper training of professionals;
(4) Consideration of child's needs, thoughts and feelings by enabling children to express themselves freely and in their own way; and
(5) Provision of a child victim and witness specialist to assist the children during trial.

In the South African case of the *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development, Albert Phaswane and Aaron Mokoena (Centre for Child Law, Childline South Africa, RAPCAN, Children First, Operation Bobbi Bear, POWA and Cape Mental Health Society* as *Amici Curiae*) (hereafter, the "*DPP v Mokoena and Phaswane",*[48] the instrument was referred to as a guideline on how children should be treated.[49] Zimbabwe also confirmed its acknowledgement to the guidelines set by the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime in 2005.[50]

2.2.7 United Nations Children's Fund (UNICEF)

The United Nations Children's Fund (hereafter "UNICEF) implements the UN child protection policies. UNICEF has been transparently active in many countries throughout the world in its supports for the creation of a protective environment for children through partnerships with governments, national and international partners including the private sector and civil society.[51] UNICEF enables countries to improve the protection of children's rights mostly through provision of funding. In South Africa, Zimbabwe, Namibia and Ethiopia, UNICEF has been instrumental in facilitating child-friendly courts and training programmes for the justice personnel, including intermediaries.

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[48] [2009] ZACC 8.
[49] Paragraph 77.
[50] D Jusa "Protection of Victims of Crime and the Active Participation of Victims in Criminal Justice Process in Zimbabwe". UNAFEI - The Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power – Twenty Years after Its Adoption. http://www.unafei.or.jp/english/pdf/PDF_rms/no70/RESOURC_No.70%20.pdf [accessed 15January 2011]
[51] "UNICEF Child Protection Strategy". http://www.unicef.org/protection/files/CP_Strategy_English.pdf [Accessed 15January 2011]

2.2.8 The African Charter on the Rights and Welfare of the Child (1990)

The majority of African heads of States have sanctioned the need for Africa to collectively ratify the United Nations standards child protection rights and human rights. The African Charter on the Rights and Welfare of the Child (hereafter, the "African Charter") was created in 1990 and enforced in 1999.[52] It was created to complement the Convention on the Rights of the Child and to make the latter more culturally relevant for Africa by factoring in the socio-cultural and economic realities and values of the African states.[53] The African Charter is much broader than the Convention on the Rights of the Child in that it emphasises that in all matters involving children, their best interests are paramount. It states that:

> *"In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration"*

This posture has been used to further justify the appointment of intermediaries, despite that this move may be perceived as an inroad into the accused's rights.[54] The African Charter further states that during judicial and other proceedings, a child,,s views must be taken into consideration.[55] All States are urged to establish "special monitoring units" to provide *inter alia* necessary support for referral investigation, treatment, and follow-up of instances of child abuse and neglect." [56]

Namibia ratified the instrument in 2004.[57] Zimbabwe Ethiopia and South Africa have also signed the African Charter.[58] The South African Constitution adopted the wording used in the

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[52] Africa Union "African Union Charter on the Rights and Welfare of the Child". http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf [Accessed 15January 2011]

[53] I Chinyangara *et al* "Indicators for Children Rights - Zimbabwe Country Case Study". http://child-abuse.com/childhouse/childwatch/cwi/projects/indicators/Zimbabwe/ind_zim_intro.html [accessed 15January 2011]

[54] Article 4 (1).

[55] Article 4 (2).

[56] Article 16(1).

[57] Africa Union "African Committee of Experts on the Rights and Welfare of the Child". http://www.africa-union.org/child/home.htm [accessed 15January 2011]

African Charter that in all actions the best interests of the child shall be the primary consideration.

2.2.9 The Declaration on Gender and Development by the Southern African Development Committee (1997)

The Declaration on Gender and Development by the Southern African Development Committee (hereafter, the "SADC") Heads of States or Governments of 1997 outlined the region's commitment towards the prevention and eradication of violence against women and children.[59] Signatory countries undertook to enact laws that make various forms of violence, including other forms of sexual offences and domestic violence, punishable at law.[60] Member states were also urged to review criminal laws and procedures pertaining to sexual offences,[61] and to ensure effective prosecutorial services and other services that address violence against women and children.[62] Several governments including Namibia, South Africa and Zimbabwe have signed and ratified the SADC Declaration on Gender and Development and committed to addressing the increasing levels of violence against women and children.[63]

2.2 SUMMARY

This chapter sought to identify some of the international and regional instruments and guidelines that have played a significant role in providing a backdrop to child protection policies in various areas including child-friendly criminal courts. South Africa, Namibia, Zimbabwe and Ethiopia do recognize, albeit on different levels, the demands of the instruments that they have either signed or acceded to. In Ethiopia where there is no intermediary legislation, the Convention on

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[58] Africa Union "African Charter on the Rights and Welfare of the Child". http://www.crin.org/Law/instrument.asp?InstID=1015 [accessed 15January 2011]

[59] See the SADC "Declaration on Gender and Development". http://www.sadc.int/index/browse/page/174 [accessed 15January 2011]

[60] Article 8.

[61] Article 10.

[62] Article 17.

[63] See SADC "SADC members". http://www.sadc.int/index/browse/page/174&hl=en&prmd=ivns&ei=gisoTcbPHNWRnAfn_oXHAQ&start=10&sa=N&fp=ca05a7bb65e82229 [accessed 15January 2011]

the Rights of the Child has played a significant role in providing the country's intermediary system with some form of recognizable legitimacy. In Zimbabwe where international instruments are basically limited in their influence on local policies, international instruments have ironically played significant roles in mapping out positive child protection policies including the introduction of the intermediary system. In Namibia, despite the limited implementation of child protection policies inside the justice system, the international instruments that the country has signed and acceded to are a positive influence to the country's child protection policies as a whole.

The synopses of the various instruments show how the instruments have substantially provided governments with a solid framework from which to implement substantive child-friendly policies. The sturdiness of the framework and its unequivocal call upon governments to commit towards child convincingly portrays itself as a moral compass for subscribing countries. As discussed in following chapters, the influence of the instruments is mirrored in the objectives of the intermediary systems of South Africa, Ethiopia and Zimbabwe.

CHAPTER

3

THE INTERMEDIARY SYSTEM

3.1 INTRODUCTION

It has always been the focus of the prosecution to secure a conviction in a trial, and this has often been at the expense of the child witness. A significant amount of research internationally has established that the accusatorial system re-traumatises child victims of crime. Child witnesses who testify in court are more likely to exhibit disturbance behaviour than normal non-witness children.[1] Strategic legal interventions and protective measures effectively alleviate children's fear and stress and preserve their well-being whilst enabling them to provide reliable testimonies.

In terms of the accusatorial system, a child witnesses is expected to make a personal appearance in the courtroom and give oral testimony. The sight of the magistrate or judge wearing a robe, sitting on the bench in a severe looking and old fashioned courtroom petrifies most children.[2] Unmitigated exposure to litigation procedures increase the chances of poor performance in children as a result of their limited cognitive ability and perceptions which lead to fear and anguish. To most children, the courtroom environment is foreign and intimidating.[3]

A significant amount of a child witness's anxiety comes from their interaction with the accused, the prosecutor or the defense attorney. In sexual offence trials, child witnesses find it difficult to disclose intimate details of a sexual nature in public.[4] This makes it more difficult for young witnesses to handle cross-examination. On the other hand, child witnesses may become overly compliant and agree to everything when distressed and fearful, thus increasing the chance of

[1] A Cunningham and P Hurley *Testimony outside the courtroom: Using special accommodations and testimonial aids to facilitate the testimony of children*. Library and Archives: Ontario Canada (2007) 3.
[2] South African Law Commission *Protection of the Child Witness*. Working paper 28, project 71 (1989)3.
[3] JC Hammond and EJ Hammond "Justice and the Child Witness" (1987) 11(1) *SACC* 3.
[4] MP Toglia *et al Eyewitness memory: theoretical and applied perspectives* (1998) 55.

inaccurate testimonies[5] and increasing their chances of being discredited or humiliated in court. A growing number of presiding officers and child psychologists are in agreement over the fact that the accusatorial system can re-traumatise a child witness.[6] The intermediary system was introduced so as to shield child witnesses from stressful conditions in the courtroom by keeping children out of the courtroom, and by assisting them to understand the questions posed to them so that they can respond as accurately as possible.

This chapter will provide a brief discussion of those elements of the accusatorial system which most child witnesses struggle with, namely confrontation, oral evidence and cross examination. This is followed by a discussion on the role of the intermediary and how it assists in protecting the child from these problematic factors.

3.2 THE INTERMEDIARY

The person of the intermediary was introduced in the criminal court system to assist child witnesses to deal with the problems inherent in the accusatorial system. The most common elements of the accusatorial system that child witnesses struggle with the most are confrontation, oral evidence and cross-examination. [7] In terms of the accusatorial system, all witnesses, including child witnesses, are expected to do the following:

- Appear in person in an open court;
- Give evidence in person without the assistance of any aids or persons;
- Be clearly visible as a person and not be obscured by any means; and
- Be subsequently cross-examined on the evidence given.

An intermediary may be defined as a person who aims to significantly reduce secondary trauma by facilitating communication between the prosecutor, the accused person or his defense attorney, the court and the child-witness in a manner that is child-friendly and takes into account the child's cognitive and developmental limitations. Intermediaries must be able to

[5] Cunningham and Hurley *Testimony outside the courtroom* (2007)13.
[6] See Klink *v* Regional Court Magistrate NO and others 1996 (3) BCLR (402) SE.
[7] Müller and Hollely *Introducing the Child Witness* (2000)13.

communicate with children in a non-threatening manner.[8] They are usually expected to sit with the child witnesses in separate rooms, receive questions from the court room, strip cross-examination of all the harshness that is typical of accusatorial cross-examination questions and re-formulate the questions in a manner that takes account the child's age and cognitive limitations.[9] An intermediary may be a child specialist; psychologist; social worker, educator[10] or court interpreter.[11] In South Africa, more people including medical practitioners, family counsellors, child care worker and educators may act as intermediaries. An intermediary is expected to convey the general purport of the question and not to embark on his or her own course of questions. In Zimbabwe, however, as discussed later, an intermediary may embark on his or her course of question and alter questions.[12]

3.2.1 Confrontation

Under the accusatorial system, an accused is granted the right to a fair trial. This right includes the right to confrontation.[13] The accused must face his or her accusers,[14] observe their demeanor, facial expressions, body language, and inflections of their voices. In South Africa,[15] Zimbabwe,[16] Namibia[17] and Ethiopia[18] confrontation is an accused person's constitutionally protected right. Research has concluded that confronting the accused inside the courtroom is one of the primary causes of fear and anxiety to child witnesses.[19] The sight of the accused person is capable of re-awakening traumatic memories and feelings.[20] Although most child witnesses find

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[8] A Cunningham and P Hurley *Hearsay Evidence and Children: Overview of Issues Related to Child Testimony*. Library and Archives Canada Ontario (2007) 11.
[9] Müller and Hollely *Introducing the Child Witness* (2000) 44-48.
[10] J Plotnikoff and R. Woolfson *The „Go-Between': Evaluation of intermediary Pathfinder Projects* (2007) in Cunningham and Hurley *Hearsay Evidence and Children* (2007)11 .
[11] In Zimbabwe, court interpreters receive special training which enables them to act as intermediaries. See discussion in chapter 5.
[12] Zimbabwean interpreters are permitted to ask independent questions in order to seek clarification on what the child witness may have said. See discussion in chapter 5. See *addendum* 2.
[13] SE van der Merwe "Cross examination of the (sexually abused) child witness in a constitutionalised adversarial trial system: Is the South African Intermediary the solution?" (1995) in L Ellison *The Adversarial Process and the Vulnerable Witness* Oxford University Press: New York (2001)127.
[14] P Zieff "The child victim as witness in sexual abuse cases – A comparative analysis of the law of evidence and procedure" 1991 4(1) *SACJ* 35.
[15] The Constitution of the Republic of South Africa Section 35 (3).
[16] The Zimbabwean Constitution Section 13(3) (e).
[17] The Constitution of the Republic of Namibia Section Article 12 (1) (d).
[18] The Constitution of the Federal Democratic Republic of Ethiopia Article 20 (4).
[19] Müller and Hollely *Introducing the Child Witness* (2000)110.
[20] L Ellison *The Adversarial Process and the Vulnerable Witness* Oxford University Press: New York (2001)11-12.

the prospect of confronting the accused uncomfortable, it has been suggested that the process of testifying in court may be cathartic and beneficial to the child.[21]

Confronting the accused, giving oral testimony and undergoing rigorous cross-examination invoke the initial trauma in a child, giving rise to secondary victimization. In one study it was concluded that the disregard of victims' needs by service providers can significantly mimic victims' experiences at the hands of their assailants that secondary victimization is sometimes called "the second rape" or "the second assault."[22] Where the courts have permitted use of intermediary services, the child witness need not confront the accused. The child sits with the intermediary in a special room from where he or she testifies. The special rooms which are also known as intermediary rooms have been widely accepted in South Africa, Ethiopia and Zimbabwe. The special rooms are not necessarily attached to the courtroom.[23] They are furnished in an informal and child friendly manner.

A strategically placed video camera in the intermediary room captures and transmits the images of both the child and the intermediary to the courtroom.[24] The intermediary uses earphones to receive questions from the courtroom. While the accused, the defence attorney, the presiding officer and the prosecutor are able to see and hear both the child and the intermediary from the closed-circuit television, the child is precluded from seeing or hearing sounds from the courtroom

3.2.2 Oral evidence and cross-examination

Oral testimony is generally considered fundamental in the litigation process. The witness is expected to take oath and give evidence orally. All information elicited during trial must be questioned and tested in order to expose any dishonesty, inaccuracy and fabrication.[25] This is a constitutionally protected right of the accused. The accusatorial system permits an accused or

[21] L Berliner and MK Barbieri "The testimony of the child victim of sexual assault" (1984) 40(2) *Journal of Social Issues* 135.
[22] R Campbell and S Raja "Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence" *Violence and Victims* 1999 14 (3). http://www.musc.edu/vawprevention/research/victimrape.shtml [accessed 15January 2011]
[23] Cunningham and Hurley *Hearsay Evidence and Children* (2007)11.
[24] Müller and Hollely *Introducing the Child Witness* (2000)16.
[25] Ellison *The Adversarial Process and the Vulnerable Witness* (2001)11-12.

his or her defense attorney to test State witnesses on the evidence adduced against the accused *viva voce* without exception.[26] This is regarded as the cornerstone and guarantee of a fair trial.[27] Failure to allow cross-examination is a serious irregularity which may lead to the setting aside of a conviction.[28] The accusatorial system does not in itself provide special conditions for the cross-examination of child witnesses. Child witnesses are expected to be cross-examined in the same manner as adult witnesses. In South Africa, the right to cross examine is protected under the Section 35(3) (i) of the Constitution. In Ethiopia the right is protected under Section 20(4) of the Constitution, in Zimbabwe under Section 13(3) (e) and Namibia under Section 121(d).

Most child witnesses express fear at the prospect of appearing inside the courtroom. The children's limited knowledge on the role of judges, lawyers and prosecutors may contribute to their fears.[29] The impact of the fear and anxiety is said to emotionally and psychologically compare to the original abusive act.[30] Most importantly, the child's anxiety and fear may affect the accuracy and quality of his or her testimony.[31] Child-appropriate questioning and adducing evidence from a child are specialised tasks and most court professionals lack the training. During cross examination, most child witnesses find it difficult to respond to multi-part questions, age inappropriate questioning, distress questioning and other forms of questioning that place an unrealistic demand on their memory. It is not uncommon for children under unassisted cross-examination to feel angry, [32] frustrated, depressed, confused[33] and guilty[34] One of the primary roles of the intermediary is to protect the child witness from the distressful forms of questioning mostly found during cross-examination.

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[26] CR Snyman "The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and Continental systems" (1975) in Müller and Hollely *Introducing the Child Witness* (2000) 6.
[27] R *v* Cole [1990] 2 All ER 108; Douglas *v* Alabama 380 US [1965] 145; California *v* Green 399 US [1969] 149.
[28] S *v* Ndawo 1961(1) SA 16 (N); S *v* Mayiya 1997(3) BCLR 386 (C); Douglas *v* Alabama 380 US [1965] 415.
[29] Müller and Hollely *Introducing the Child Witness* (2000)262.
[30] *DPP v Mokoena and Phaswane* para 107.
[31] KJ Saywitz (1995) *Applied Psychology* 115.
[32] N Parker *The court experiences of survivors of child sexual abuse* (M. Psych thesis, University of Western Cape, 2006) 43.
http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_8806_1177058023.pdf
[accessed 15January 2011]
[33] LC Brennan and RE Brennan *Strange language: Child victims under cross examination* (1988) 64.
[34] Parker *The court experiences of survivors of child sexual abuse.*

When an intermediary has been appointed for a child witness, most communication including questions from the accused or his or her defence attorney during cross- examination may be communicated to the child through the intermediary. This entails translating the following listed forms of questioning into simple and child-friendly questions:

- Leading questions;
- Multi-part questions;
- Age-inappropriate vocabulary;
- Peripheral questions;
- Forced-choice questions;
- Repetitive questioning; and
- Use of double negatives.

In order to assist the child witness effectively, the intermediary is expected to possess more than a basic understanding of the legal proceedings, court procedures, child development and cognitive skills, child communication and the impact of child sexual abuse. The functions of intermediaries vary from country to country. The intermediary may have an extended role and may be expected to act as a front person who welcomes the child witness and his or her caregivers to court. He or she may be expected to prepare the child witness for court.[35] During trial the intermediary may be expected to point out the age- inappropriateness of a question.[36]

Below is a summary which best describes the extent to which the intermediary system has changed the court room procedure where child witnesses are involved:

[35]UCW Schoeman *A training programme for intermediaries for the child witness in South African courts* (Doctor Philosophiae thesis, University of Pretoria, 2006) 363.
[36] See *addendum* 3.
See discussion in chapter 5.

To What Extent Does The Intermediary Change Position?

	Prior to the intermediary system	*Intermediary system*
1	Child must be a competent witness.	Child must be a competent witness.
2	Child gives *viva voce* evidence.	Child gives *viva voce* evidence.
3	Accused is present in the courtroom.	Accused is present in the courtroom.
4	Child's evidence is held in camera.	Child's evidence is held in camera.
5	Court can observe the demeanour of the child.	Court can observe the demeanour of the child.
6	Accused has the right to cross-examine.	Accused has the right to cross-examine.
7	Counsel controls questions put to child.	Counsel controls questions put to child.
8	The child hears counsel's questions.	**The intermediary relays the question to the child. The intermediary may convey the general purport of the question. The intermediary cannot embark on his/her own course of questions, nor may s/he alter the question.**
9	The child is present in court.	**The child is usually not in the courtroom and cannot hear and see what takes place in the courtroom.**
10	The accused has a public trial. Adult witnesses, judgement and a conviction follows, sentence is in "open court".	The accused has a public trial. Adult witnesses, judgement and if a conviction follows, sentence is in "open court".

Adapted from "Respecting child witnesses and delivering justice"[37]

3.3 SUMMARY

In recent years the number of judges and magistrates, and child psychologists accepting the fact that the accusatorial system re-traumatises child witnesses has been steadily increasing. Strategic legal interventions and protective measures including use of intermediaries, closed circuit televisions and special rooms may effectively alleviate children's emotional distress. When an intermediary has been appointed for a child witness, most questions from the defence may be communicated to the child through the intermediary.

[37] R Blumrick "Adversarial System Can Change - The South African Experience". http://www.nspcc.org.uk/Inform/newsandevents/conferencereports/RespectingChildWitnesses_wdf56968.pdf [accessed 15January 2011]

The presence of the intermediary limits direct communication between the court-room occupants and the child. The intermediary may or may not communicate the child witness's responses back to the court. The manner in which the intermediary relays communication is generally child-friendly and is cognizant of the child's cognitive and developmental limitations. The intermediary should possess more than a basic understanding of the legal proceedings, court procedures, child development and cognitive skills, child communication and the impact of child sexual abuse and in some jurisdictions court preparation of child witnesses.

CHAPTER

4

THE INTERMEDIARY SYSTEM IN SOUTH AFRICA

4.1 INTRODUCTION

The South African legal procedure is accusatorial in nature.[1] Before the introduction of intermediaries, child witnesses were commonly expected to appear and testify in court in person. They were required to give *viva voce* evidence *in camera*[2]without the assistance of any aids or persons. Child witnesses were also expected to be cross-examined in the same manner as adult witnesses. Müller and Hollely concede that testifying in court is a stressful experience for any witness.[3] The court environment is alien, with role players clad in long black gowns and speaking in language not comprehended by lay persons. The process of cross-examination is designed to be frustrating to the witness.[4] The South African Criminal Procedure Act 51 of 1977 was amended to introduce novel child-friendly procedures into the South African courts systems.

As early as the 1940s and 1950s, some South African courts acknowledged that courtroom confrontation traumatised child witnesses. In the cases of *Horsford v De Jager* and *Another,*[5] *R v S,*[6] *Jabaar v South African Railways and Harbour*[7] and in the unreported case of *S v Basil Simmons*[8] the traumatic effects of confrontation on child witnesses were noted. These initial acknowledgements by the courts signaled the beginning of the process that would justify the introduction of intermediaries a few decades later.

In the last twenty five years, a majority of South African researchers, academics, psychologists and some courts have accepted that children who testify in an adversarial environment may be

[1] Müller and Hollely *Introducing the Child Witness* (2000)3.
[2] See the South African Criminal Procedure Act 51 of 1977, sections 153 and 154.
[3] Müller and Hollely *Introducing the Child Witness* (2000)41.
[4] JR De Maio Testifying in a legal proceeding in RB Schwartz et al Tactical Emergency Medicine (2008) 259.
[5] 1952(2)SA 152(N).
[6]1948(4)SA 419 (GW).
[7] 1982(4)SA 552(C).
[8] Unreported DCLD 84/88, 13th June 1988.

re-traumatised. They have openly criticized the system for its negative handling of child witnesses. Zieff compared an adversarial trial to a "gladiatorial contest between the parties", where children as participants are most likely to suffer and recommended that child witnesses testify in an informal setting.[9] Hammond and Hammond pointed out that children were being unfairly subjected to a system of procedures which disregarded their limited cognitive and linguistic competencies and their emotional vulnerabilities.[10] Davis and Saffy stated that the courtroom language and the demands of cross-examination made the process of giving evidence in court a traumatic experience for children.[11]

Even though child witnesses gave evidence *in camera* and presiding officers had the power under common law to prevent hostile questioning, this was not enough to alleviate the stress experienced by child witnesses. Researchers Coughlan and Jarman established that the cross-examination process can be embarrassing and severely distressing to any complainant and more so for a minor.[12] In such a situation, a child can become confused, scared and unable to understand questions. The continued dissatisfaction over the insensitive manner in which the system treated child witnesses made room for the acceptance of one of the recommendations by the South African Law Commission in 1989, that intermediaries be introduced into the court systems. The intermediary role was introduced in 1991. South Africa's intermediary system - was a significant influence to South Africa's neighbours especially Zimbabwe and Namibia.[13]

This chapter will discuss the findings in the investigations of the intermediary system in South Africa. The intermediary legislation will be discussed in detail. The implementation of the legislation by the courts will be examined. Factors affecting the efficacy of the intermediary system including shortages of intermediaries, child-friendly courts, and court equipment will be

[9] P Zieff "The child victim as witness in sexual abuse cases – A comparative analysis of the law of evidence and procedure" (1991) 4(1) *SACJ* 37.
[10] Hammond and Hammond "Justice and the Child Witness" (1987) 11(1) *SACC* abstract.
[11] L Davis and J Saffy "Young Witnesses: Experiences of Court Support and Court Preparation Officials" (2004) 17(1) *Acta Criminologica* abstract.
[12] F Coughlan and R Jarman "Can the intermediary system work for child victims of sexual abuse?" (2002) 83(5/6) *The Journal of Contemporary Human Services: Families in Society* 541.
[13] Both countries sent delegates to the Wynberg Sexual Offences Courts in Cape Town study the machinations of the child -friendly court system, including the use of intermediaries, special rooms, one-way mirrors and closed circuit television. See chapters 5 and 7.

analysed. The significance of the sensitisation of presiding officers and prosecutors to the role of the intermediary will also be examined.

4.2 SOUTH AFRICAN INTERMEDIARY LEGISLATION

The Victims' Charter testifies to the South African government's commitment towards a victim-centred approach in the criminal justice system. This is part of its recognition of the various regional and international instruments it has signed or acceded to.[14] The Victim Charter outlines the implementation process of measures aimed at promoting rights of victims of sexual offences and domestic violence in compliance with international obligations under the Convention on Rights and Welfare of the Child, Declaration of Basic Principles of Justice, the Convention on the Elimination of all forms of Discrimination Against Women, Prevention and Eradication of Violence Against Women and Children , Addendum to the 1997 SADC Declaration on Gender and Development, the African Charter on the Rights of the Child and the African Charter on Human and Peoples Rights.[15]

After the South African Law Commission concluded that the criminal legal system was confusing, perplexing and intimidating to children, the intermediary position was viewed as a possible solution.[16] The limited linguistic competencies of the child witnesses made it legally and morally acceptable for intermediaries to be used within the accusatorial court systems with the major objective of assisting them. This was achieved through the insertion of section 170A into the Criminal Procedure Act of 1977 by the Criminal Amendment Act 135 of 1991.

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[14] The Service Charter for Victims of Crime was approved in December 2004. It is compliant with the South African Constitution and the United Nations Declaration of Basic Principles of Justice. The South African Minister of Justice and Constitutional Development stated the following:
"In keeping with the cultivation of a human rights culture, the focus has gradually shifted from an adversarial and retributive criminal justice system to that of Restorative Justice. Central to the concept of Restorative Justice is the recognition of crime as more than an offence against the state, but also as an injury or wrong done to another person. This is in line with the National Crime Prevention Strategy's victim-centred vision for the criminal justice system. The ultimate goal is victim empowerment through meeting victims' needs, be they material or emotional".
http://www.npa.gov.za/files/Victims%20charter.pdf
[Accessed 15January 2011]

[15] African Charter on Human and Peoples' Rights "The African [Banjul] Charter on Human and Peoples' Rights was adopted on 27th June, 1981 and enforced on the 21st October, 1986".
http://www.hrcr.org/docs/Banjul/afrhr.html
[accessed 15January 2011]

[16] See the South African Law Commission *Protection of the Child Witness* (1989) Working Paper 28, Project 71.

4.2.1 The Criminal Procedure Act 51 of 1977 Section 170A

Section 170A of the Criminal Procedure Act introduces the intermediary in the court proceedings. The original section read as follows:

"Evidence through intermediaries:

(1) *Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue to mental stress or suffering if he or she testifies at such proceedings. the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.*

Section 170A (1) has subsequently been amended by the Criminal Law Amendment Act (Sexual Offences and Related Matters) of 2007 and now reads:

> *"Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress and suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as intermediary in order to enable such witness to give his or her evidence through that intermediary…"*[17]
> [Emphasis added.]

[17] The Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, came into effect on the 16th of December, 2007 after being signed into law by President Thabo Mbeki. Section 72 of the Act provides for the implementation of Chapters 1 to 4 and 7, which mainly deal with the creation of statutory sexual offences, special protection measures for children and persons who are mentally disabled, certain transitional arrangements and evidence related matters.
Department of Justice "The New Sexual Offences Act protecting our children from sexual predators".
http://www.justice.gov.za/docs/InfoSheets/2008%2002%20SXOactInsert_web.pdf
[accessed 15January 2011]

(2) *(a) No examination. cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary), under subsection (1). except examination by the court, shall take place in any manner other than through that intermediary.*

(b) The said intermediary may unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) *If a court appoints an intermediary under subsection (1). the court may direct that the relevant witness shall give his or her evidence at any place-*

(a) which is informally arranged to set that witness at ease:

(b) which is so situated that any person whose presence may upset that witness is outside the sight and hearing of that witness: and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) *(a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.*

(b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister with the concurrence of the Minister of Finance may determine.

(5) *(a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.*

(b) If in any proceedings it appears to the court that an oath, affirmation or admonition was administered or that evidence has been presented through

an intermediary who was appointed in good faith but at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be with due regard to-

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary: and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(6) *(a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.*

(b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed and in respect of which at the time of the commencement of that subsection-

(i) the trial court; or

(ii) the court considering an appeal or review has not delivered judgment".

(7) *The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of a child complainant below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings."*

4.2.1.1 Section 170 A (1)

The appointment of the intermediary is regulated by Section 170A (1) of the Criminal Procedure Act. The Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 (hereafter the "Sexual Offences Amendment Act") inserted into the act the words "biological or mental" before the words "age of eighteen years". Section 170A (1) therefore permits a court to appoint a competent person as an intermediary where the witness has a mental age under that of eighteen years.

> *(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress and suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as intermediary in order to enable such witness to give his or her evidence through that intermediary… (*Emphasis added*)*

a. "it appears to such court"

Section 170A (1) does not provide every child witness with automatic access to intermediary services. The law explicitly states that an intermediary may only be appointed if it appears to the court that a witness may experience undue mental stress if he or she testifies in court. The meaning of the phrase "it appears to such court" has created a significant amount of controversy in the South African courts as seen in the cases of *S v Aaron Mokoena*[18] and *S v Albert Phaswane.*[19] Both accused persons *Phaswane* and *Mokoena* were each charged in two different regional courts with rape of a child and were convicted. The two matters had been enrolled for confirmation and sentence or otherwise by the High Court in terms of section 52 of Act 105 of 1997. Both cases where decided by Judge Bertelsmann.

[18] See *S v Aaron Mokoena* Case No. CC 7 of 2007.
[19] See *S v Albert Phaswane* Case No. CC 192 of 2007.

In the High Court, non-governmental organizations[20] which had appeared as the *amici curiae* strongly argued that section 170A (1) should be compulsory as it best protects a child's right under section 28(1)(d)[21] and section 28(2)[22] of the South African Constitution. The *amici curiae* wanted every child witness to automatically receive intermediary assistance. According to Judge Bertelsmann, section 170A (1) required the trial court to exercise a discretion whether to appoint an intermediary or not,[23] and he ordered that section 170A (1) be declared unconstitutional.[24] The understanding was that the section did not do enough to compel the court to order intermediary assistance and that any other court may use its discretion to deny a deserving child witness intermediary services. This highlights the discretionary manner in which section 170A, in the absence of an interpretation guideline, may be perceived and interpreted.

Judge Bertelsmann's order clearly reflects the uncertainty and potential frustration for judicial officers surrounding the appropriate interpretation of Section 170A, even in the presence of a genuine interest to ensure that child witnesses are protected. In this order, it is unfortunate that Judge Bertelsmann by attempting to correct what had been a long standing vexing and bothersome issue ended up encroaching on the issue of constitutionality which as was later pointed out he was not entitled to do.

The Constitutional Court judgment overturning Justice Bertelsmann judgment in the appeal of both cases gave another perspective of how section 170A (1) maybe interpreted. In the case of *DPP v Mokoena and Phaswane*, the Director of Public Prosecutions sought confirmation of the orders of invalidity in the Constitutional Court while the Minister of Justice opposed the confirmation of the same. Both accused persons Mokoena and Phaswane also opposed the confirmation of the order of invalidity as it related to sections 170A (1) and (7).

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[20] Resources Aimed at the Prevention of Child Abuse & Neglect (RAPCAN), Bobbi Bear, Children First and Cape Mental Health Society (CMHS).
See 'Public Prosecutions, Transvaal v Minister of Justice and the Constitutional Development of Others'.
http://www.lrc.org.za/press-releases/941-2009-04-01-public-prosecutions-transvaal-v-minister-of-justice-and-the-constitutional-development-of-others-
[accessed 15January 2011]

[21] *"Every child has the right to be protected from maltreatment, neglect abuse or degradation".*

[22] *"A child's best interests are of paramount importance in every matter concerning the child".*

[23] See para 90.

[24] This was later addressed by Justice Ngcobo in the *DPP v Mokoena and Phaswane* para 92.

Justice Ngcobo explained that the discretion implied in Section 170A (1) is meant to allow the presiding officer to take into account the individual needs, wishes and feelings of a child witness and that it "must therefore be exercised with due regard to the objective to protect a child from undue stress or suffering that may arise from testifying in court."[25] Justice Ngcobo offered that:

> *"In my view, the answer to the problems identified by the amici and the DPP does not lie in making the appointment of an intermediary compulsory in every sexual offence case in which a child complainant is involved. It would not be in the best interests of the child who wishes to confront his or her abuser in court to impose an intermediary on that child. This would ignore the child's needs, wishes and feelings. Nor does the answer lie in making the appointment compulsory unless the circumstances of the child dictate otherwise."*[26]

Justice Ngcobo further explained that the answer was in the proper interpretation and application of section 170A (1) as read with section 170A (3). He added the following:

> *"These subsections contemplate that in all cases of sexual offences involving a child complainant, the court will enquire into the desirability or otherwise of appointing an intermediary. This enquiry must be conducted with due regard to the principle that the child's best interests are of paramount importance in criminal proceedings concerning a sexual offence against a child."*[27]

The court stated that the subsection contemplates that a child will be assessed prior to testifying in court in order to determine whether the services of an intermediary should be used. If the assessment reveals that the services of an intermediary are needed, then the State must arrange for an intermediary to be present in court when the accused goes on trial.[28] Further it was pointed out that the witness's needs determine whether the court permits the use of intermediary services or not. This means that where a child witness prefers not to testify through an

[25] Para 125.
[26] Para 126.
[27] Para 127.
[28] Para 110.

intermediary, the court has to take that into account and not impose intermediary services on the child.

While it is accepted that the introduction of the intermediary system has enabled most South African children to testify without getting re-traumatised, in the last five years, applications for intermediaries for deserving child witnesses were not made most of the time. Schoeman's findings in a study revealed that 41% of the prosecutors in the study erroneously believed that not all children under the age of eighteen need intermediary assistance. They considered the children to be either strong and or not likely to suffer trauma.[29] Some prosecutors believed that only children under the age of fourteen needed intermediary assistance. In some areas of South Africa where there were rampart shortages of intermediaries, the prosecutors did not bother to have a child assessed for intermediary assistance. In *S v Albert Phaswane,* Justice Bertelsmann stated that the impression is created that the prosecution had foregone investigating whether the child witness needed intermediary assistance because "there was no intermediary available at the Pretoria North Regional Court."[30]

b. "undue mental stress or suffering"

The phrase in section 170A (1) "undue mental stress or suffering" has been subject to different forms of interpretation, qualifying it as another source of troublesome controversy within the South African courts. It is important to note that the test is not just the presence of "undue mental stress or suffering" but that the child will suffer undue mental stress or suffering if she testifies in court. In *S v F*[31] the prosecution had argued that the child witness would experience undue mental stress or suffering if she testified and the judge's response was that the child would suffer that anyway if she testified with an intermediary. The court stressed that recalling and narrating the details of the alleged rape even through an intermediary was upsetting and difficult and that there was "very little difference between the complainant testifying in open court and testifying through an intermediary" and the application for an intermediary was refused.[32]

[29] Schoeman "A training program for intermediaries for the child witness in South African courts*"* (2006) 296.
[30] *S v Albert Phaswane* para 9.
[31] 1999 (1) SACR 571.
[32] Para 584 C-E.

Müller and Hollely point out that there are situations where the courts are not persuaded that a particular child is suffering from undue mental stress of suffering and therefore do not invoke section 170A and the child testifies from the main courtroom in the presence of the accused.[33] Müller and Hollely also point out that the term "undue" presupposes that the stress and the suffering have to be excessive.[34] In the matter of *S v Stefaans,*[35] it was stated that the mental stress must be beyond the norm. The interpretation used was as follows:

> *"In the first instance the use of the word „onredelik' (undue) connotes a degree of stress than the ordinary stress to which witnesses, including witnesses in complaints of a sexual nature, are subject"*[36]

As Müller and Hollely point out the question to be asked is how serious should the mental stress and suffering be before it can be defined as "undue". The authors indicate that the stress must be "more than ordinary stress experienced". This then creates the problem of how to quantify stress. In the case of *Klink v Regional Court Magistrate*,[37] before the applicant had pleaded, the prosecutor applied for intermediary services for the witness which was granted by the Regional Magistrate as envisaged in section 170A (1) of the Criminal Procedure Act. The accused, however, approached the former Supreme Court for an order, *inter alia*, that the criminal proceedings against him proceed without the application of section 170A. Judge Melunsky made the following observations:

> *"[I]t is sufficient to say that I am quite convinced that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of the courtroom and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate then to reveal the truth…."* [38]

[33] Müller and Hollely *Introducing the Child Witness* (2000)18.
[34] Müller and Hollely *Introducing the Child Witness* (2000)21.
[35] 1999(1)SACR 182 .
[36] *Para* 187B.
[37] 1996 (3) BCLR 402 (SE).
[38] *P*ara 411D-E.

Judge Bertelsmann's interpretation of the section in *S v Albert Phaswane and Aaron Mokoena* indicated that the requirement of "undue" stress or suffering in Section 170A (1) demands "an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon". The court's perception and interpretation of Section 170A (1) is reflected in the following statement:

> *It is therefore difficult to fathom why the Legislature should have seen fit to demand that the child victim should be exposed to "**undue**" stress and suffering before the services of an intermediary **may** be considered. This threshold provision places a limitation upon the best interests of the child that is neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest.*[39] [Emphasis added].

When the phrase "undue mental stress or suffering" was discussed in *DPP v Mokoena and Phaswane,* Justice Ngcobo rejected the narrow interpretation of the phrase which necessitates that a child first be exposed to undue mental stress or suffering before the provision may be invoked. Justice Ngcobo dismissed an interpretation of the subsection that requires the child to be exposed to undue mental stress or suffering first before an intermediary is appointed as "… inimical to the objectives of the both section 28(2) and section 170A(1). Indeed, it is inconsistent with Article 3(1) of the CRC. It must therefore be rejected."[40]

Justice Ngcobo asserted that any child witness who testifies in public disclosing the intimate details and nature of the offence in the presence of the alleged perpetrator is most likely to undergo undue stress or suffering. He further explained that the objective behind section 170A (1) was to protect a child from undergoing "undue" mental stress or suffering while giving evidence. The judge concluded that, correctly interpreted and applied, there was nothing to prevent the provisions from being applied in a manner that properly protected the interests of the child.

[39] Para 15.
[40] Para 109.

> *"A child complainant who relates in open court in graphic detail the abusive acts perpetrated upon him or her and in the presence of the alleged perpetrator, will in most cases experience undue stress or suffering. This experience will be exacerbated when the child is subjected to intensive and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the emotional and psychological well-being of the child complainant as the original abusive act was."*[41]

Justice Ngcobo further explained that:

> *"The object of section 170A(1) read with section 170A(3) is precisely to prevent this risk of exposure. It does this by making provision for the child to testify through the intermediary away from the accused and in a child-friendly room. Thus construed, the problem becomes one of implementation as the cases to which our attention is drawn demonstrate".*[42]

The decision by Justice Ngcobo is significant in that it provides clarity and definition. It is no longer necessary for courts to investigate or quantify a witness's mental stress or suffering before it can be classified as "undue". The case of *DPP v Mokoena and Phaswane* provides an overdue well-defined guideline and its adoption by the Department of Justice is a clear acceptance of their validity.

c. "enable such witness to give his or her evidence"

Section 170 A (1) grants that the appointment of an intermediary is to enable a witness to testify to take part in the trial. Müller and Hollely explain that the intermediary helps to assist a child witness to understand the questions posed.[43] The intermediary also plays a pivotal role of filtering difficult questions, thus enabling the child to testify more effectively.[44] In the *Klink* case, Justice Melunsky pointed out that the ordinary procedures of the justice system did not adequately protect child witnesses:

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[41] Para 107.
[42] *P*ara 108.
[43] Müller and Hollely *Introducing the Child Witness* (2000)47.
[44] Müller and Hollely *Introducing the Child Witness* (2000)48.

> *".. the forceful cross examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth. Moreover, criminal prosecutions may be thwarted because of unwillingness of young witnesses to subject themselves to the ordeal of the court hearing, even if the proceedings are in camera ….it seems to me to be obvious that the ordinary procedures of the criminal justice system are inadequate to meet the needs and requirements of the child witness"*[45]

In *DPP v Mokoena and Phaswane,* Judge Ngcobo indicated that provision of the intermediary person was to improve the elicitation of evidence from the child by enabling him or her to testify more "freely" and to provide a testimony that is "more likely to be true and better understood by the court."[46] While the wording of this part of the subsection appears to be straightforward in its objective and meaning, questions may arise as to how the intermediary may "enable" a child witness to testify. Vagueness and uncertainty may arise as to precisely what an intermediary is expected to do to "enable" a child witness to give evidence a way that takes into account the child's level of development and communication skills.

The Webster's dictionary defines "enable" as to provide with the means or opportunity, to make possible, practical, or easy, to cause to operate, to give legal power, capacity, or sanction to.[47] Taking into account these possible definitions of "enable" it may still be difficult to determine what an intermediary may or may not do to assist a child witness. Müller and Hollely point out that an intermediary's ability to rephrase question is limited. He or she may not comment on whether a child will be able to grasp a particular question or not.[48] The term "enable" is therefore subject to limitations and is potentially contentious.

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[45] *Klink v Regional Court Magistrate NO and Others* para 411D-E.
[46] *DPP v Mokoena and Phaswane* para 115.
[47] See Merriam-Webster's Collegiate Dictionary 11th ed. http://www.merriam-webster.com/dictionary/enable [accessed 15January 2011]
[48] Müller and Hollely *Introducing the Child Witness* (2000*)* 47.

4.2.1.2 Section 170 A (2) (a)

Section 170A (2) (a) points out that once an intermediary is appointed to assist a child witness, all examination, cross-examination and re-examination may only take place through the assigned intermediary.

> *No examination. cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary), under subsection (1). except examination by the court, shall take place in any manner other than through that intermediary.*

The court however, reserves the right to question the child directly, so the presence of the intermediary does not mean that the court may not question the child directly. The intermediary is expected to remain neutral and independent.[49]

4.2.1.3 Section 170 A (2) (b)

Section 170A (2) (b) sets out the intermediary's main function in trial proceedings. It provides that an intermediary may, unless the court directs otherwise, convey the general purport of any questions to the relevant witness.

> *The said intermediary may unless the court directs otherwise, convey the general purport of any question to the relevant witness.*

Müller and Hollely point out that the section is worded widely. Various interpretations ranging from narrow to wide interpretations have been used to interpret the section, leading to inconsistency. It is clear that the law mandates the intermediary to convey the general meaning of the questions. He or she must convey the substance and meaning of the question to the child. In the matter of *S v Gidi and Another*[50] it was held that questions should always be put in a form that is understandable to the witness. This presupposes that an intermediary must have the ability to understand the cognitive, communication and maturity levels of a particular child

[49] According to the tentative Intermediary Protocol, although this is not an official document, the researcher was able to obtain a draft copy.
[50] 1984(4)SA 537 C para 540 E.

witness in order for him or her to convey the content of any question in a manner that a particular child understands.

The intermediary has the authority to rephrase the questions in such a way that a child witness comprehends what is being asked. This was accepted in the *Klink* case:

> *"There are sound reasons why the conveyance of the general purport of the question might enable a child to witness to participate properly in the system. Questions should always be put in a form understandable to the witness so that he or she may answer them properly. Where the witness is a child there is the possibility that he may not fully comprehend or appreciate the content of a question formulated by counsel. The danger of this happening is more real in the case of a very young child. By conveying „the general purport' of the question, the intermediary is not permitted to alter the question. He must convey the content and meaning of what was asked in the language and form understandable to the witness.*"[51]

A significant factor that curtails the role and function of the intermediary in the courts system is the inadequate sensitisation of role players. Where role players are not sensitive to the cognitive limitations of children and their ability to understand legal language, the intermediary's effectiveness in protecting the child witness is significantly reduced. As the intermediary lacks the power to intervene or comment that certain questions should not be asked in a particular style, the intermediary effectively remains an interpreter. An earlier study revealed the disillusionment amongst the intermediaries who felt powerless as children were asked age-inappropriate questions as the courts sought to protect the accused's constitutional rights.[52] Regarding the number of role players who had received training on how to handle child witnesses, Judge Ngcobo stated the following:

> *"Finally, the facts suggest that only a very small percentage of prosecutors had sufficient training in dealing with child witnesses, with only 450 prosecutors by 2007 having*

[51] *Klink v Regional Court Magistrate NO and Others* para 411J-412A.
[52] *Ibid.*

received specialist training in these areas, a very low proportion of all working prosecutors". [53]

The Director of Public Prosecutions conceded that high staff turnover meant that it was difficult to retain adequately trained staff to deal with these issues. In an earlier study, some intermediaries were concerned about the lack of respect and appreciation of their services by the prosecutors, presiding officers and defense counsels.[54]

It is evident that the South African intermediary acts as a "form of protection for the child" and is expected to strip questions put to the child of all their intimidation.[55] The intermediary protects the child from antagonistic and aggressive cross examination.[56] He or she also enhances a child's comprehension of the questions asked[57]

4.2.1.4 Section 170 A (3)

Section 170A (3) provides that the court may permit the child to testify at some other place which is comfortable for the witness and prevents the witness from seeing or hearing the accused.

(3) *If a court appoints an intermediary under subsection (I). the court may direct that the relevant witness shall give his or her evidence at any place-*

(a) *which is informally arranged to set that witness at ease:*

(b) *which is so situated that any person whose presence may upset that witness is outside the sight and hearing of that witness: and*

(c) *which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.* (Emphasis added)

[53] *DPP v Mokoena and Phaswane* para 196.
[54] Coughlan and Jarman "Can the intermediary system work for child victims of sexual abuse?" (2002) 543.
[55] Müller and Hollely *Introducing the Child Witness* (2000)45.
[56] Müller and Hollely *Introducing the Child Witness* (2000)47.
[57] *Ibid.*

Section 170A (3) grants that a child witness may testify from a place other than the courtroom, which in most cases is a room separate from the main court room. Section 170A (3), however, may only be invoked after an intermediary has been appointed, which means that the appointment of an intermediary does not guarantee that a child witness will have access to the special room. The court must hear a separate application for the special room.[58]

In response to the application for use of the special room the court has discretionary powers to allow it or not. This has been a source of significant criticism from those contending that all children should be permitted to use the special room. In response to the dilemma, Justice Ngcobo suggested that section 170 A (3) must be read together with section 170A (1) and that the acceptable interpretation of the sections would be the one which offers the most protection to the child witness.[59] This then allows for more children to testify from the special rooms.

On the other hand, the fact that the special room may not be used in the absence of an intermediary is potentially contentious for those child witnesses who may not want to use the special room unaided by an intermediary. It should be noted that child witnesses may still use the special room and testify without an intermediary but then they will be using section 158 of the Act.

a. "informally arranged"

There is currently no clarity as to what this phrase entails and individual courts have simply decorated the special rooms in a way they consider to be "child friendly". This includes soft furnishings, decorations and paintings. [60] This is done to make the child relax and not associate his or her surroundings with the somber atmosphere of the court house in general. Some courts have simply left the rooms as they are.

[58]Müller and Hollely *Introducing the Child Witness* (2000)19.
[59]*DPP v Mokoena and Phaswane* para 108.
[60]Section 170(A) (3) (a).

b. "outside the sight and hearing"

The special room must be so positioned or designed that a child witness does not hear or see any person who may upset him or her[61] The Department of Justice in South Africa accepts that testifying in court is significantly stressful and traumatic to an adult person and more so to a child victim of abuse including sexual abuse.[62] It acknowledges that compelling such child victims of abuse to testify in an open court can cause undue mental stress and trauma

c. "enables the court… to see and hear"

The facilities must be designed and equipped in such a way that the occupants of the main courtroom are able to see and hear the witness. A wall mounted video camera projects at the child and the intermediary and transmits the live recordings to the courtroom.[63] The intermediary is fitted with earphones which enable him or her to communicate with the courtroom. The section does not specifically mention use of closed-circuit television or video cameras but it states that electronic devices may be used. Other courts have the special courtroom separated from it by a wall of one-way glass through which they can observe the child.

4.2.1.5 Section 170A (4)

Section 170A (4) provides for the manner in which the Minister may determine the classes of persons who are eligible to work as intermediaries.

(4) *(a)* *The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.*

The Government Gazette 15024, 30 July 1993, as amended by Government Gazette no. 17822, 28 February, 1997 provides a list of the following persons as competent to act as intermediaries:

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[61]Section 170(A) (3) (b).
[62]Department of Justice "The Intermediary: Introducing an Intermediary in Court". http://www.justice.gov.za/cfw/2009child-law-kzn/day2_paper_The-Intermediary.pdf [accessed 15January 2011]
See a*ddendum* 10 – this is the draft copy which some intermediaries are using.
[63]Section 170(A) (3) (c).

- "*Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Services Professional Act, 1974 (Act No. 56 of 1974), and against whose names the speciality of paediatrics is also registered;*
- *Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Services Professional Act, 1974 (Act No. 56 of 1974), and against whose names the speciality of psychiatry is also registered;*
- *Family counsellors who are appointed as such under Section 3 of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), and who are or were registered as social workers under Section 17 of the Social Services Professions Act, 1978 (Act No.110 of 1978), or who are or were educators as contemplated in paragraph 2.2.6 hereunder, or who are or were registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Services Professional Act, 1974 (Act No. 56 of 1974)*
- *Child care workers who have successfully completed a two year course in child and youth care approved by the National Association of Child Care workers and who have two years experience in child care;*
- *Social workers who are registered as such under Section 17 of the Social Service Professions Act, 1978, and who have two year experience in social work, and persons who have obtained a masters degree in social work and has two years experience in social work;*
- *Persons who have four years experience as educators and who have not at any stage, as a result of misconduct, been dismissed from service as educator. For the purpose of this paragraph „educator' means a person who teaches, educates or trains other persons, or who provides professional education services, including professional therapy and educational psychological services at a public, independent or private school as contemplated in the South African Schools Act , 1996 (Act No 84 of 1996), including former and retired educators.*
- *Psychologists who are registered as clinical, educational or counselling psychologists Medical, Dental and Supplementary Health Services Professional Act, 1974 (Act No. 56 of 1974)."*

The list has since been branded as idealistic and impractical. Müller and Hollely indicate that pediatricians, family counselors, some teachers and even some psychiatrists and psychologists are "not trained nor experienced in communicating with children".[64] According to recent research, it is mostly former or retired teachers who are used as intermediaries.[65]

Section 170A (4) does not provide for the further training of intermediaries. In the matter of *DPP v Phaswane and Mokoena* it was pointed out that communicating with children about sexual abuse in a forensic environment is a specialized skill that requires intensive training. It was further held that intermediaries must, therefore, undergo relevant training before they are allowed to practice as intermediaries.[66] The Department of Justice has ordered that no intermediaries may assume intermediary duties before they receive training. The tentative Intermediary Protocol also insists that every intermediary must be undergo relevant training before commencement of duty.

a. The proposed Intermediary Protocol

Since section 170 A does not require intermediaries to receive training before assumption of intermediary duties, earlier untrained intermediaries encountered significant difficulties during trial.[67] Some intermediaries were fearful of changing questions coming from the courtroom as they were not sure of "how much leeway they would be allowed in this regard".[68] One of Müller and Hollely's earlier recommendations for the South African intermediary system was that, "rules of practice be formulated and implemented as to the procedure to be followed by intermediaries".[69]

[64] Müller and Hollely *Introducing the Child Witness* (2000)53.
[65] In a statement by the Director of the Institute of Child Witness Research and Training 5 May 2010.
[66] *DPP v Mokoena and Phaswane* para 104.
[67] Müller and Hollely *Introducing the Child Witness* (2000)53.
[68] *Ibid.*
[69] Müller and Hollely *Introducing the Child Witness* (2000)56.

There is a tentative Intermediary Protocol which although is not an official justice policy is being used to manage and regulate South African intermediaries.[70] Below are some of the regulatory aspects addressed in the intermediary Protocol:

- Where intermediaries are needed on a daily basis, they should be appointed on full time contracts. Where intermediaries are only required for shorter periods, they must be appointed on an *ad hoc* basis. The appointments are to be based on case-flow requirements and the, clustering of courts, amongst others considerations.[71]

- Each region is responsible for contractual arrangements with intermediaries and the same should be finalized by the court managers. Intermediaries are appointed on Level 7 or the equivalent thereof, depending on the nature of the contract.

- When appointing intermediaries, court managers must ensure that an applicant has the requirements as set out in the Government Gazette relating to qualifications and experience. Since intermediaries are appointed as officers of the court in much the same way as interpreters, intermediaries are to report directly to court managers.

- Court managers are responsible for the daily management of intermediaries. Neither prosecutors, judicial officers nor other role-players will be responsible for the management of intermediaries.

- Court managers are responsible for providing intermediaries with the necessary resources for the performance of their duties, including but not limited to, office space, access to computers and telephones and anatomically detailed dolls, where this is applicable.

- Court managers must ensure that while the best interests of the child must be considered at all times, intermediaries are to maintain their impartiality as officers of the court. They

[70] It was drafted and presented by an intermediary in 2009 based on the intermediary training curriculum being offered by the Institute for Child Witness Research and Training.
See *addendum* 10.
[71] The tentative Intermediary Protocol.

are not to display bias or favour to either party; and should not assume the guilt of any person.

- It is the Court Managers' responsibility to ensure that all intermediaries receive the appropriate intermediary training with the Institute for Child Witness Research and Training to ensure consistency.

- The Institute for Child Witness Research and Training is responsible for the certification and accreditation of the intermediaries. The intermediary training curriculum lays emphasis on child development, child communication, and the relevant provisions of both the Criminal Procedure Act and the Children's Act including the adversarial characteristics of a trial.

- Regional offices are responsible of maintaining a database of the details of persons competent and available to act as intermediaries.

4.2.1.6 Section 170A (4) (b)

Section 170A (4) (b) only makes provision for the intermediary who is not in the full time employ of the State including all *ad hoc* appointments.

> *(b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister with the concurrence of the Minister of Finance may determine.*

There are no remuneration provisions for either contractual or full-time intermediaries in section 170A.

4.2.1.7 Section 170A (5)

Section 170A (5) deals with oath, affirmation or admonition which has been administered through an incompetent intermediary.

(5) *(a)* *No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.*

This section came into existence because of a number of cases where the intermediary was afterwards found not to have complied with the criteria in the Government Gazette. [72] It is clear that the objective of this subsection was to protect child witnesses from having to undergo multiple processes of oath taking, affirmation, admonitions and testimonies on the ground that the appointed intermediary was incompetent. This subsection works to prevent the exploitation of the situation by defence counsels who may want to discredit the services of a particular intermediary.

(b) *If in any proceedings it appears to the court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be with due regard to-*

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

[72] See *S v Motaung* CC79/05 High Court (SECLD) and *S v Booi* 2005(1) SACR 599.

(ii) the mental stress or suffering which the witness in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary: and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

This subsection outlines the path the courts should follow in establishing the validity of an oath, affirmation, admonition and the admissibility of evidence. The interests of both the child witness and the accused person are part of the primary considerations the court should take into account. The court is expected to balance the possibility of exposing a witness to mental stress or suffering with the impairment of justice on the accused's part.

4.2.1.8 Section 170A (6)

Section 170A(6) deals with the resubmission of previously presented evidence by the prosecution. This is the evidence previously presented through the intermediary referred to in Section 170A (5).

(6) *(a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.*

The subsection prevents the defence from exploiting the situation by objecting to the resubmission of evidence. Subsection (b) refers to the timeline, the trial court or the court considering an appeal or review must not have delivered judgment.

(b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed and in respect of which at the time of the commencement of that subsection-

(iii) the trial court; or

(iv) the court considering an appeal or review has not delivered judgment".

After a trial court or the court considering an appeal or review has delivered judgment it may not be possible to invoke subsection (5).

4.2.1.9 Section 170A (7)

With the promulgation of the Criminal Law Amendment Act 32 of 2007, section 170A of the Criminal Procedure Act 51 of 1977 has been amended to impose a duty upon the court to provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary where the witness is a complainant below the age of 14. It states that:

(7) *The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of a child complainant below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings."*

The new subsection (7) contemplates that the court may refuse to appoint an intermediary even in the case of a very young child victim about to be called as a complainant witness. This section serves to create a new standard. The onus has now been shifted from the State to the defence. This consideration was incorporated in the proposed Intermediary Protocol.

4.2 THE CONSTITUTIONALITY OF THE INTERMEDIARY

The constitutionality of section 170A, which permits the use of intermediaries, has been challenged in a number of matters. The South African Constitution does not specifically mention the accused's right to cross- examine, but indicates in section 35(3) that every accused has a right to a fair trial including the right to "adduce and challenge evidence". The latter implies that the accused has the right to cross-examine his or her accusers. The South African judiciary is mandated to uphold and protect the Constitution. Section 165 of the Constitution

guarantees that judges shall uphold, promote and defend the principles and values enshrined in it.[73]

It has not been uncommon for courts to refuse child witnesses intermediary assistance on the grounds that it deprived the accused of his or her constitutional rights. In the unreported case of *S v Jurgens,*[74] the magistrate denied a child witness intermediary assistance and use of a special room on the grounds that it conflicted with the accused's constitutional rights. Van der Merwe purports that the use of an intermediary and any electronic device such as closed-circuit television may limit the right to challenge evidence in an adversarial context but that the limitation is justified in the context of a section 36 of the Constitution. [75] The Constitution states that:

> *"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors".*[76]

The South African Law Commission later accepted this limitation. It stated that the limitation was reasonable and justifiable when measured against the criteria prescribed in section 36(1) of the Constitution,[77]and is consistent with section 28(2) of the South African Constitution and the objective of Article 3 of the Convention on the Rights of the Child. Van der Merwe suggested that when deliberating between a child's right in terms of section 28(2) against and the accused's right to challenge evidence, the child's rights should be upheld.[78]

The constitutionality of Section 170A was discussed to a greater extent in the *Klink* case. An intermediary had been appointed and the defence argued that the presence of the intermediary

[73] Section 165(2) states that "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".
[74] (Unreported) RC 653/90 of 1990.
[75] Van der Merwe "Cross examination of the (sexually abused) child witness in a constitutionalised adversarial trial system: Is the South African Intermediary the solution?" (1995) 203.
[76] Section 36(1).
[77]See the South African Law Commission *Protection of the Child Witness* (2001) Discussion Paper 102, Project 383.
[78]Van der Merwe "Cross examination of the (sexually abused) child witness in a constitutionalised adversarial trial system: Is the South African Intermediary the solution?" (1995) 203.

limited and excluded a proper cross-examination of the complainant and that this amounted to a violation of his right to a fair trial.[79] Section 170A (2) specifically states that cross-examination must take place but through an intermediary. The accused alleged that the section "went too far in protecting child witnesses and resulted in unreasonable and unnecessary limitation of the fundamental rights of an accused person to a fair trial."[80] The accused felt that cross-examination through the medium of an intermediary interfered with the effectiveness of cross-examination because the intermediary only conveys the general purport of the question unless the court directs otherwise and allows the intermediary to "filter" out questions.[81] The issue at hand was whether the appointment of an intermediary and cross examination through an intermediary violated the accused's right to a fair trial.

The court accepted that cross-examination was an effective and useful tool in a trial court's decision.[82] It also pointed out that the object of cross-examination was two-pronged: to elicit information that was favourable to the conductor of the cross-examination and to cast doubt on the authenticity of the opposite party. The court conceded that the content of a question and the "intonations of voice and nuances of expression" were important factors during cross-examination and that the forcefulness and effect of cross-examination could be reduced when an intermediary was used. The court however, emphasized that because the court had to consider a child witness's interests that did not amount to an accused being denied the right to a fair trial.[83]

The court pointed out its obligation to intervene in order to prevent counsel from "conducting a bullying or intimidating form of cross examination" and from attempting to confuse witnesses.[84] Justice Melunsky indicated that the rights of the accused to a fair trial had to be balanced with the protection of the child's interests. In looking at the child's interests, the court noted that child abuse incidences had increased significantly in recent years and that child witnesses were experiencing significant difficulties during trial. Justice Melunsky accepted that a long

[79] *Klink v Regional Court Magistrate NO and Others* para 408 E-F.
[80] Müller and Hollely *Introducing the Child Witness* (2000)57.
[81] *Klink v Regional Court Magistrate NO and Others* para 409 I.
[82] Para 409J.
[83] Para 411J-412A.
[84] Para 410D-E.

protracted cross-examination of the witness amounted to secondary victimization, a condition that is as destructive as the original abusive act.

Justice Melunsky further pointed out that although criminal proceedings should be fair, that did not necessarily mean that any variations of the accepted rules of evidence and procedure would be automatically open to objection. The appointment of an intermediary to assist a child witness did not affect the fundamental fairness of the judicial process, since the witness would still be questioned on all aspects of his or her evidence. The court accepted that the objective of section 170A was to correct the imbalance and to provide protection to the child. Judge Melunsky accepted that Section 170A does not preclude the accused or his lawyer from asking questions in cross-examination as follows:

> *"This does not appear to me to be a limitation of the right to cross-examine. The intermediary acts, in a sense, as an interpreter, and interpreters are widely used in all of the trial courts in this country."*[85]

An intermediary's presence provides a balance between the interests of an accused with those of a child witness "by allowing the latter to be integrated into the criminal justice system without disturbing the fundamental fairness of the process".[86]

When the courts permit intermediary assistance, they are enabling the child witness to participate properly in the system and that it is in the interest of justice to ensure that children are questioned in a way that takes into account their age and development level. The intermediary role was very limited in that he or she is not permitted to change questions but only interpret them in a way that a child understands. On both accounts, the intermediary system does respect the constitutional rights of both the child witness and the accused.

[85] Para 411I.
[86] Para 412 E-F.

4.3 ANALYSIS OF SOUTH AFRICAN INTERMEDIARY SYSTEM

The South African intermediary system is the oldest in sub-Saharan Africa. Beyond doubt it has achieved what it set out to achieve which is to introduce a person who will assist the child witness as he or she gives evidence in court. The intermediary shields child witnesses from stressful conditions in the courtroom and assists them to understand the questions posed to them so that they can respond as accurately as possible. The presence of the intermediary person means that a child does not necessarily have to deal with confrontation, oral evidence and direct cross-examination. It establishes equality before the law and ensures equal protection of the parties. It achieves a balance between protecting the child witness and the rights of the accused to a fair trial. Despite the presence of the intermediary the court still ensures that the accused is able to cross examine his witnesses.

The Zimbabwean intermediary system was largely influenced by the South African system. Before the introduction of its own intermediary system, the Zimbabwean Victim Friendly Courts National Committee organised two study tours in 1996 and 1997 for its delegates drawn from the Zimbabwean Ministries of Health, Justice, Home Affairs and the Department of Social Welfare. The group of delegates visited the Wynberg Sexual Offences Courts in Cape Town to study the machinations of the child -friendly court system, including the use of intermediaries. After the study trips, the Victim Friendly Courts National Committee successfully advocated for the amendment of the Zimbabwean Criminal Procedure and Evidence Act[87] which authorised the use of intermediaries.

The interviewing of children, especially young children, is a highly specialised task. Interviewers require thorough training in cognitive development, child psychology, language acquisition and communication skills of children.[88] Questioning a child requires a special skill and a few judicial

[87] As disclosed in an interview with the National Coordinator held at Harare 29th April 2008. See *addendum* 1.

[88] Submissions by the Institute for Child Witness Research and Training as part of the *Amicus Curiae* in the matters of S v *Albert Phaswane and S v Aaron Mokoena*. The *Amicus Curiae* was admitted in this matter by the High Court of South Africa (Transvaal Provincial Division), who called for submissions by interested parties. The Institute for Child Witness Research and Training, Port Elizabeth, received notice of this order. 18 Section 6:50. See Centre for Child Law "Submissions by the Institute for Child Witness Research and Training". http://www.centreforchildlaw.co.za/index.php/cases [accessed 15January 2011]

officers have this skill, necessitating the presence of properly trained intermediaries.[89]

Before the appointment of the Institute of Child Witness Research and Training as the official training body of South African intermediaries, the training of intermediaries was sporadic and inconsistent. Various organisations, would on an *ad-hoc* basis offer training to intermediaries. By 2003 it was common knowledge in the country that some of the intermediaries appointed by the court lacked the proper skills to effectively assist children during trial. In 2009, the Director of Public Prosecutions confirmed that some intermediaries were unfamiliar with court procedures and were not equipped to offer comfort to a child witnesses.[90] In the matter of *DPP v Mokoena and Phaswane* it was concluded that there were not enough intermediaries who could discharge the intermediary duties in an effective manner. [91]

The tentative Intermediary Protocol insists that every intermediary must undergo relevant training before commencement of duty. The Department of Justice has also ordered that no intermediaries may assume intermediary duties before they receive training. Court managers are expected to ensure that intermediaries receive the training from an identified service provider to ensure "consistency and quality control." The curriculum for intermediary training as provided by the Institute of Child Witness Research and Training includes the following:

- Child developmental levels;
- Language acquisition framework for children;
- Effects of child abuse;
- Stress and Psychological effects of testifying ; and the
- Introduction to law with special emphasis on the Criminal Procedure Act and the accusatorial system.[92]

See also *DPP v Mokoena and Phaswane* para 195.

[89] *DPP v Mokoena and Phaswane* para 167.

[90] Para 195.

[91] Para 195.

[92] In an interview with a key informant a senior intermediary at the Pretoria High Court South Africa. See *addendum* 9.

The shortage of child-friendly courts was a significant challenge in the years between 2001 and 2007.[93] Despite what the SOCA unit of the National Prosecuting Authority has said that courts dedicated to sexual offences increased by 166.7% from 2003 to the end of 2007,[94] Judge Ngcobo indicated the following:

> *"The DPP in Pretoria also provided us with the results of several surveys undertaken to comply with the High Court's investigation into the constitutionality of the specific provisions of the CPA. These findings are the most disturbing. Only 14% of the approximately 450 Regional Courts nationwide are equipped with the necessary facilities to permit the use of intermediaries. Even for those courts with these facilities, a high percentage have continuing problems with broken or malfunctioning equipment."*[95]

The absence of the necessary equipment makes it impossible for most of the courts to be fully utilized. By ordering the Minister to provide an inventory of the Regional Courts, the current number of intermediaries in each court and an estimate of intermediaries needed in each Regional Court requires, Justice Ngcobo took the significant step of making the Ministry of Justice accountable towards providing the resources needed to make child-friendly courts a reality. The court also asked for information on what steps were being taken to ensure an adequate number of intermediaries servicing the courts.

4.3.1 Factors impacting upon the intermediary system

According to the international and regional guidelines, the duty to provide for victim services lies primarily with the state. In *DPP v Mokoena and Phaswane*, the court declared that the State is expected to provide the necessary resources needed to fulfill the objectives of the Constitution's Section 28(2) and Sections 170A (1) and (3). The shortage of child-friendly

[93] Coughlan and Jarman "Can the intermediary system for child victims of sexual abuse" (2002)542.
[94] See the Sexual Offences and Community Affairs "Annual Report 2006 and 2007".
PowerPoint presentation slide 5.
http://www.slideserve.com/presentation/27057/Offences-and-Community-Affairs-SOCA-Unit
[accessed 15January 2011]
See also National Prosecuting Authority "Section 2 Delivery, Programme 4: National Prosecuting Authority".
http://www.npa.gov.za/UploadedFiles/Section%202%20-%20Delivery.pdf
[accessed 15January 2011]
[95] *DPP v Mokoena and Phaswane* para 194.

courts was a significant challenge in the years between 2001 and 2007. In 2002 courts offering intermediary services were mostly found in main cities like East London, Durban, Pietermaritzburg, Cape Town, Pretoria, Johannesburg and Port Elizabeth and none in the rural areas.[96] However, the government has been significantly proactive in that area. There has been a significant increase in child friendly courts in the last three years. According to the SOCA unit of the National Prosecuting Authority, courts dedicated to sexual offences increased by 166.7% from 2003 to the end of 2007.[97] However, the number declined in 2010 because of the decision by most regional magistrates and presiding officers not to use dedicated courts.[98]

The South African civil society plays a significant role in providing services to the communities. The non-governmental organizations have the skill and knowledge mix required in crisis-intervention, counseling, advocacy, and public education on victim issues and to a lesser extent, crime and violence prevention.[99] The South African government generally appears to have a commendable working relationship with the civil society especially in the area of child protection. The government has openly outsourced varied services from the civil society including the child-friendly services to sexually abused children. Organisations like Rapcan, Childline South Africa, Rape Crisis, Lifeline, Institute of Child Witness Research and Training and National Institute for Crime Prevention and Reintegration of Offenders have been significantly active in providing for child-friendly services to sexually abused children. Before the Institute for Child Witness Research and Training was identified as the sole trainer of intermediary, most agencies were offering intermediary training.

4.3.1.1 Intermediary shortages

For the past ten years, the shortage of intermediaries has been cited by UNICEF[100] and the SOCA Unit as one of the causes of postponements and long delays. Prosecutors have expressed

[96] Coughlan and Jarman "Can the intermediary system work for child victims of sexual abuse?" (2002) 542.
[97] See also National Prosecuting Authority "Section 2 Delivery, Programme 4: National Prosecuting Authority".
[98] *Ibid*.
[99] Centre for Child Law, University of Pretoria Justice for Child Victims and Witnesses of Crimes ABC Press Cape Town (2008) 31.
[100] UNICEF "Child Protection, Key Systems and Legislation". http://www.unicef.org/southafrica/SAF_resources_systemsleg.pdf [accessed 15January 2011]

their frustrations in securing intermediaries upon request.[101] In the case of *DPP v Mokoena and Phaswane,* it was indicated that some prosecutors out of desperation had to rely on the more readily accessible but untrained interpreters.[102] According to surveys conducted by the Director of Public Prosecutions and provided to the court, intermediary shortage was cited as a major problem.[103]

Further to the intermediary shortage problem, there is significant shortage of intermediaries who speak child witnesses' vernacular languages.[104] Since 1997, the South African courts system has been criticized for its failure to address the cultural needs of child witnesses. [105] In one study, it was indicated that that some of the Zulu or Xhosa speaking child witness respondents indicated that during trial they were questioned in Afrikaans, a language they were not comfortable with.[106] When an intermediary does not speak the vernacular languages it means that the intermediary will need translation to understand what the child is saying, thus putting unnecessary strain on already limited resources.

Justice Ngcobo described the shortage of intermediaries as a "disturbing state of affairs" which is "inconsistent" with the statutory promise of an intermediary in section 170A(1) and the constitutional promise that the child's best interests shall be of paramount importance in all matters concerning the child. The intermediary shortage reduced "court orders giving effect to these promises to meaningless words".[107]

4.3.1.2 Inadequate management and supervision of intermediaries

In a study by Coughlan and Jarman, the absence of a systematic and orderly notification of intermediaries to come to court was noted.[108] This was true in the case of intermediaries who are not in the full time employ of the Department of Justice. Some of the intermediaries complained that they were always uncertain as to when they would be needed. The notification was often

[101] *DPP v Mokoena and Phaswane* para 195.
[102] *Ibid*.
[103] *Ibid*.
[104] Coughlan and Jarman "Can the intermediary system work for child victims of sexual abuse?" (2002) 545.
[105] *Ibid*.
[106] See N Parker *The court experiences of survivors of child sexual abuse.*
[107] *DPP v Mokoena and Phaswane* para 197.
[108] Coughlan and Jarman "Can the intermediary system work for child victims of sexual abuse?" (2002) 541.

unsystematic. Many intermediaries spoke of being called to court without notice despite that some of them had full time jobs. They complained of the subsequent long waits, frequent delays caused by long examination sessions while their own work would accumulated back in their offices.

Another significant factor that has contributed to diminished effectiveness of the intermediary system is the absence of supervision and debriefing sessions for intermediaries. In a study conducted in 2002, it was found that the children's trauma affected them more than they had anticipated.[109] Since they had no access to formal supervision or debriefing after their court appearances, the majority of intermediaries felt emotionally drained and overwhelmed, prompting some of them to resign.[110] It was indicated that the impact of acting as intermediaries increased with each experience and there was no way it could be constructively managed. Most intermediaries reported feeling overwhelmed, powerless and experiencing a lot of stress.[111] Furthermore, the Intermediary Protocol is not policy so is currently not binding.

4.3.1.3 Equipment shortage

Schwikkard pointed out that the use of intermediaries was "by no means common" partly because most courts did not have the necessary facilities.[112] From the time of the initial introduction of the intermediary services in 1996 to 2009, only an approximate 14% of the country's 450 Regional were found to be equipped with the necessary facilities to accommodate the use of intermediaries.[113] Malfunctioning equipment or broken equipment is a significant problem.[114] In the Director of Public Prosecution's report, respondents from Lehurutshe, in the North-West province indicated that the equipment had *never* worked in their courts.[115] In the conclusion of the *DPP v Mokoena and Phaswane* case, the Minister was ordered to provide a list of courts with child friendly equipment including one way mirrors, special rooms and closed circuit televisions.

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[109] Coughlan and Jarman "Can the intermediary system work for child victims of sexual abuse?" (2002) 543.
[110] *Ibid.*
[111] *Ibid.*
[112] *DPP v Mokoena and Phaswane* para 194.
[113] *Ibid*.
[114] *Ibid*.
[115] *Ibid*.

4.3.1.4 Inadequate sensitisation of role players

In the case of *DPP v Mokoena and Phaswane,* emphasis was laid on the need for training and sensitisation of South African role players on the issues surrounding the accusatorial system, trauma and child sexual abuse. A positive perception of the role of the intermediary by role players would lead to a better appreciation of the fact that child victims of sexual abuse who testify in court without the aid of intermediaries are likely to experience undue mental stress or suffering.[116]

Widespread constant training is particularly important in a context where high staff turnover is eminent because skills and experience are subject to disappearance. It is necessary for respective role players to be equipped with the right information to enable them to have the right attitudes and sensitivity towards sexual offences against children.

An integrated approach towards the training of magistrates and prosecutors will ensure that the role of the intermediary is given the proper acknowledgement it deserves. Coughlan and Jarman report that some intermediaries felt that there was a lack of appreciation of their services, even though some of them were volunteers. They mentioned that defence counsels and the court personnel showed lack of respect for the role they played. The proper training of magistrates and prosecutors would sensitise them to the role of the intermediary.

a. Prosecutors

Judge Ngcobo pointed out that the facts suggest that only a "very low proportion of all working prosecutors" had received sufficient training on how to handle child witnesses. Only 450 prosecutors by 2007 had received specialist training.[117] The high staff turnover drastically diminishes the number of adequately trained staff. While the National Directorate for Public Prosecutions has, through SOCA Unit, provided training to selected prosecutors and has conducted a number of training programmes for prosecutors and magistrates, the training for all the other role players appear to occur on an *ad-hoc* basis. It has been noted that prosecutors are not always aware that there is a list of persons who have been identified as potential

[116] *Ibid*.
[117] *DPP v Mokoena and Phaswane* para 196.

intermediaries, for example social workers and teachers. Childline South Africa has observed the following:

> *"…the blurring of roles between their own court support workers and intermediaries. It was noted that prosecutors are not always aware that there are certain criteria (i.e. social worker, teacher etc) that have to be met before a person can act an intermediary. They are often under considerable pressure to take cases forward and intermediaries are not always available. In this situation they often opt for the next available person (often the Childline Court Support Worker) to act as an intermediary without checking their credentials".*[118]

b. Presiding Officers

In order for role players to understand and appreciate the role of intermediaries they need education. The need for presiding officers to be educated on how to protect child witness' interests is reflected in Justice Ngcobo's statement:

> *"Judicial officers are therefore obliged to apply the best interests principle by considering how the child's rights and interests are, or will be, affected by allowing the child complainant in a sexual offence case to testify without the aid of the intermediary. It follows from this, therefore, that where the prosecutor does not raise the matter, the judicial officer must, of his or her own accord, raise the need for an intermediary to assist the child complainant in a sexual offence case in giving his or her testimony."*[119]

The emphasis is on the importance of training of judicial officers in child communication, particularly traumatised children.

[118] Open Society Foundation for South Africa "Minutes on Meeting on Models for the Management of Sexual Offences Johannesburg, 24 July 2006". http://www.osf.org.za/File_Uploads/docs/ManagementofSexualOffences.pdf [accessed 15January 2011]

[119] *DPP v Mokoena and Phaswane* para 112.

4.4 SUMMARY

Before the introduction of intermediaries, child witnesses were commonly expected to appear and testify in court in person but mostly *in camera.* The criticism of the accusatorial system's treatment of young witnesses began over 60 years ago. Over the years it has progressed significantly with a number of South African researchers, academics, and psychologists openly expressing their concerns. The continued dissatisfaction over the insensitive manner in which the system treated child witnesses made it easy for the recommendations by the South African Law Commission, that intermediaries be introduced into the court systems to be adopted. The intermediary role was introduced in 1991 through the amendment of the 1977 South African Criminal Procedure by section 170A.

Although the South African courts have struggled with the appropriate interpretation of section 170A, in the milestone case of *DPP v Mokoena and Phaswane* it was explained that any child witness who testifies in public disclosing the intimate details and nature of the offence in the presence of the alleged perpetrator is most likely to undergo undue stress or suffering. It was further stated that the objective behind appointing an intermediary in section 170A (1) was to protect a child from undergoing undue mental stress or suffering while giving evidence. The judge in *DPP v Mokoena and Phaswane* also addressed the contentious issue of the constitutionality of section 170A. It was decided that the intermediary's presence provides a balance between the interests of an accused with those of a child witness by permitting him or her to participate in the criminal justice system without disturbing the fundamental fairness of the process.

A few factors appear to impact the efficacy of the intermediary system in South Africa. These include intermediary shortages, the management and supervision of intermediaries and sensitisation of role players. The shortage of intermediaries was a significant problem in the first decade of the system's operation. It now appears that the Department of Justice is committed to effectively addressing the problem. The Institute for Child Witness Research and Training has recently been appointed as the sole national trainer for intermediaries.

The management and supervision of intermediaries at the courts however remains a problem. The role of Court Managers in this regard appears to be not as effective as intended. Although there is tentative intermediary protocol, it is not policy. It may however be adopted. It has been recommended that role players receive training on how to handle child victims of sexual abuse. In the milestone case of *DPP v Mokoena and Phaswane*, it was noted that prosecutors and presiding officers needed training and sensitisation on how handle child witnesses in court in a way that took into account the children's cognitive limitations and the abuse they had suffered.

On the overall, the South Africa government remains committed to addressing the effective participation of children in the courts system. Through the construction of more child-friendly courts and the training of more intermediaries, its commitment into the intermediary courts is manifest. South Africa emerges as the pioneer not only in creating a viable intermediary system but in inspiring other countries to follow suit. This is mostly evident in Zimbabwe.

CHAPTER

5

THE INTERMEDIARY SYSTEM IN ZIMBABWE

5.1 INTRODUCTION

Zimbabwe's legal system is closely linked to the South African legal system. The Constitution of Zimbabwe[1] indicates that the law to be administered by the country's Supreme Court, High Court and any other courts subordinate to the country's High Court shall be the law in force in the Colony of Cape of Good Hope on 10th June, 1891.[2] The Criminal Law (Codification and Reform) Act[3] effected in 2006, seeks to sever this historical tie but it is not yet clear whether it will succeed. The Zimbabwean legal procedure is accusatorial in nature with the presiding officer deciding the guilt or otherwise of the accused. As in any other accusatorial system, the accused has the right to cross-examine his or her accusers. The accused's right to cross-examine his State witnesses is protected by the Constitution.[4]

In the early nineties there was limited knowledge in the country on how to appropriately handle child sexual abuse victims. Sexual abuse reports were received and processed by police officers with neither training nor experience in the proper handling of such cases. In the courts child witnesses were treated like adult witnesses. Child witnesses were expected to give *viva voce* evidence, sometimes *in camera,* testify without the assistance of aids in the presence of the accused and court officials and respond to cross examination questions directly.

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[1] The Constitution of Zimbabwe was published as a Schedule to the Zimbabwe Constitution Order 1979 (Statutory Instrument 1979/1600 of the United Kingdom). As at the 30th October, 2007, it had been amended more than 17 times.

[2] Section 89 states that," the law to be administered subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force" of law. [Section as amended by section 13 of Act 25 of 1981 - Amendment No. 2].

[3] Act 23 of 2004 [Chapter 9:23].

[4] Section 18 of the Constitution of Zimbabwe.

> *"At the level of police and investigation process the data reflected that the police had no experience in handling minors who had been sexually abused. No privacy was afforded to the victim reporting the abuse and the investigations tended to be prolonged, with the child having to repeat his or her testimony several times to different people… Child victims of abuse were treated as if they were adults by the system. At the level of the courts children appeared in unfriendly courts and in confrontation with the abuser. The rules of evidence weighed heavily against the child. Overall these issues resulted in most abusers being acquitted since children could not talk freely about the abuse".*[5]

The young witnesses were subjected to intensive and sometimes protracted and aggressive cross examination by the accused or his attorney. Before the introduction of victim-friendly courts, criminal prosecutions in the country were mostly characterized by the unwillingness of young witnesses to testify in court even when the trials were held *in-camera*.[6] By the early nineties, the regular procedures of the criminal justice system were gradually being perceived as inadequate to meet the needs and requirements of the child witness. It was accepted that the prosecution of child sexual abuse matters was overtly overlaid by a range of emotional stress and fear flowing from the trauma of the offence.[7]

The introduction of intermediaries in the Zimbabwean criminal courts in 1997 was meant to counter the detrimental effects of the accusatorial system on the child witness. From the onset, the goal of introducing the intermediaries was to prevent secondary traumatisation of victims.[8] It was anticipated that the introduction of the intermediary system would ensure that a child witness would not have to confront the accused, give oral evidence from inside the main courtroom or be subjected to direct cross-examination by either the accused or the defence counsel.[9] Magistrates and prosecutors received training on the far-reaching psychological effects which the adversarial procedure, especially confrontation and cross-examination, had upon the

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[5] Chinyangara *et al* "Indicators for Children Rights - Zimbabwe Country Case Study".
[6] The 1997 Zimbabwe Intermediary Training Manual 1997 available at the Justice College of Zimbabwe.
[7] See *Daniel Phiri v S* ZHC 219 of 1993 and *Chidodo v S* HH 78 of 98.
[8] See Office of the Human Rights Commissioner for Human Rights "Legal recourse and availability of state protection to female victims of sexual and/or domestic abuse". http://www.unhcr.org/refworld/country,,IRBC,,ZWE,,3df4becf4,0.html [accessed 15January 2011]
[9] *Ibid.*

victim. Each group received training on how they would participate effectively in the victim-friendly courts initiative. Chinyangara states the following:

> *"The Ministry of Justice, Legal and Parliamentary Affairs, together with other government departments and NGOs, has taken the initiative of introducing victim friendly systems in all the institutions that deal with abused children. These institutions are staffed by experienced people and privacy is maintained through the establishment of separate interviewing and examination rooms. At the trial stage it is planned that the courts will be designed in such a way that the child does not see the abuser and other court personnel, such as defence lawyers and court orderly. This will involve the use of closed circuit televisions and an intermediary between the child and the trial process going on in the main court room".*[10]

Both groups were informed that their acceptance and endorsement of the role of the intermediary was integral to the success of the initiative.[11]

Unlike South Africa, Zimbabwe has significantly limited local published material on the accusatorial system and its effects on child witnesses. There is currently no published material on Zimbabwean intermediaries. Access to case law is very limited as most Magistrate Court cases are unreported. Due to the country's financial constraints even the High Court and Supreme Court law cases have not been published for over five years.[12] In the study most of the information was accessed through direct interviews of persons of influence, desk top research material including books and internet material and also handouts and training manuals from the Victim Friendly Courts Training Initiative.

The criticism of the system's treatment of children or sexual abuse victims was spearheaded by individuals who in the most intriguing of fashions were able to get not only the government's

[10] Chinyangara *et al* "Indicators for Children Rights - Zimbabwe Country Case Study".
[11] As disclosed in an interview with the Victim Friendly Courts' National Coordinator. See *addendums* 2 and 3.
[12] O Saki and T Chiware "The law in Zimbabwe". http://www.nyulawglobal.org/Globalex/Zimbabwe.htm [accessed 15 January 2011]

attention but also managed to get the government to commit towards reform in the justice system. Out of the four countries, Zimbabwe is the only country in the last ten years which has experienced significant negative changes in its economy and political structure. As discussed later in the chapter, the impact of these changes has been felt in the criminal courts systems.

This chapter will start by providing a brief background to the intermediary system in Zimbabwe. This will be followed by an examination of the intermediary legislation. Information provided by key informants, including the prosecutors, magistrates, intermediaries and interpreters will be used to analyse the intermediary role in the accusatorial system. The chapter will conclude with a discussion of the both the positive and negative factors impacting the role of intermediaries in the country.

5.2 BACKGROUND TO THE ZIMBABWEAN INTERMEDIARY SYSTEM

In the early 1990s, the increasing number of sexual offences against minors was a cause for concern within the Zimbabwean judicial system. Child witnesses were experiencing extreme difficulties testifying from inside the courtroom due to fear and stress.[13] The decreasing age of child victims was considered to be unacceptable and the high rate of acquittals arising from poor testimonies by child complainants was found to be equally disturbing.[14]

In 1993 the Zimbabwean High Court accepted that child sexual abuse traumatises children. In the case of *Daniel Phiri v S*, where an accused charged of raping a child was appealing against sentence, Justice Mubako pointed out that:

> "*It is important that the courts protect victims of sexual aggression who are usually women. Sexual assaults are a most reprehensible invasion of one's body, one's personality and dignity, the more so when it is perpetrated on young people."* [15]

[13] As disclosed in a key informant interview with the Principal of the Zimbabwe Judicial College, Mr. Shana, held at Harare on the 7th May, 2008.
See *addendum* 1.
[14] Key informant interview with the National Coordinator.
See *addendum* 1.
[15] *Daniel Phiri v S* ZHC 219 of 1993.

In another High Court case *Chidodo v S*[16], where the accused was charged with the rape of a child was appealing against sentence, Justice Blackie underscored the seriousness of sexual offences perpetrated against a minor as follows:

> *"Firstly and primarily, rape is a very serious offence. It is a gross violation of the rights, body and dignity of the complainant. The offence is aggravated when it is committed on a child. A severe penalty must be seen to have been given."*[17]

The traumatic effects of sexual assaults on victims were accepted by the court in the matter of *Nyamimba v S*[18], an appeal against the conviction and sentence imposed by the Regional Magistrate. The appellant had pleaded not guilty to one count of raping a six year old girl but had been convicted and sentenced to 9 years imprisonment of which 2 years were suspended on the usual conditions of good behaviour. Judge Guvava, citing Spencer and Flin,[19] emphasized the insidious nature of sexual crimes against victims and how they impacted the victims both socially and psychologically on victims. He stated that:

> *It is now accepted from studies of psychologists that complainants in sexual cases are traumatised by the act of rape. From the evidence before the court the complainant not only suffered the physical trauma of the rape itself … Studies have shown that this trauma has far reaching psychological effects on rape victims."*[20]

The impetus for reform in the manner in which the criminal justice system handled child witnesses is partly traceable to the individual efforts of Judge Malaba. As an outspoken advocate for the child-friendly court system in 1993, Judge Malaba spearheaded the formation of the Vulnerable Witness Committee which was also known as the "Justice Malaba Commission".[21] In the light of the Zimbabwean government's tendency to ignore or dispense with any judges or

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[16] *Chidodo v S* HH 78 of 98.
[17] *Chidodo v S* page 2.
[18] ZHC 204 of 2002.
[19] J R Spencer and R. Flin "The Evidence of Children" *The Law and Psychology,"* (1993) 2nd ed 317 – 318.
[20] Page 5 paragraph 3.
[21] Justice Malaba is now the Deputy Chief Justice of Zimbabwe.
See: "Deputy Chief Justice tough on impartiality". The Zimbabwean 22 September 2010. http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=34363:deputy-chief-justice-tough-on-impartiality&catid=72:thursday-issue
[accessed 15January 2011]

presiding officers that are deemed anti-government, the government was from the onset significantly receptive to Justice Malaba's initiatives.

When Justice Malaba expressed his concern over the plight of child witnesses in the criminal courts, the government responded positively. This therefore raises the question whether this initiative would have enjoyed the same positive reception by the government if it had been advocated for by some person the government considered in a negative light. Judge Malaba is report to have received a farm under the government's controversial reform programme.[22] The Vulnerable Witness Committee included representatives from various non-governmental organisations, the Zimbabwe Republic Police, the Law Society of Zimbabwe and the Ministries of Justice, Health, Public Services, Labour and Social Welfare. [23]

In 1995, the Vulnerable Witness Committee together with the Catholic Commission for Justice and Peace in Zimbabwe formed the multi-sectorial Victim Friendly Courts National Committee.[24] The latter was commissioned to facilitate the introduction of victim-friendly courts and intermediaries in the country's two major cities of Harare and Bulawayo. It was also mandated to identify the training needs of intermediaries, prosecutors, presiding officers and the police.

The Victim Friendly Courts National Committee organised study tours in 1996 and 1997 for delegates drawn from the Ministries of Health, Justice, Home Affairs and the Department of Social Welfare. The group of delegates visited the Wynberg Sexual Offences Courts in Cape Town to study the machinations of the child -friendly court system, including the use of intermediaries, special rooms, one-way mirrors and closed circuit television. After receiving positive feedback on the study trips to South Africa, the Victim Friendly Courts National

[22] "In July 2001, three High Court judges were appointed as judges of the Supreme Court. These were Ziyambi, Cheda and Malaba JJA. Of these new appointments, it has been reported that Cheda and Malaba JJA are also beneficiaries of the Government's commercial farm allocation schemes. In a report prepared from official statistics, former ZANU PF MP, Margaret Dongo, records that by 1999, Cheda J had been allocated 2,039.50 hectares of commercial farmland referred to as "Malaba 38" in Bulilalima Mangwe District, and Malaba J had been allocated 1,866.00 hectares referred to as "Malaba 35" in the same District. However, the holdings of all these judges is common knowledge in legal and judicial circles in Zimbabwe, as well as in the general public. This has an important effect on how these judges are regarded, by other judges and lawyers and by the public". Saki and Chiware "The law in Zimbabwe".

[23] Interview with the key informant the National Coordinator. See *addendum* 1.

[24] *Ibid.*

Committee successfully advocated for the amendment of the Criminal Procedure and Evidence Act[25] permitting the use of intermediaries, special rooms and closed circuit televisions.

Upon the introduction of the Criminal Law Amendment Act, the office of the National Coordinator for the Victim Friendly Courts ensured that most of the presiding officers and prosecutors received training on how to handle child witnesses and the new role of intermediaries. Presiding officers were urged to be flexible in adapting the rules of evidence in a manner more sympathetic to child witnesses and their testimonies. They were urged to show sensitivity to the psychological harm suffered by the child when assessing the severity of the offence. Prosecutors were urged to make use of alternative court procedures which included the use of intermediaries and special rooms. From the onset all three ministries, the Ministry of Social Services, the Ministry of Home Affairs and the Ministry of Justice showed significant enthusiasm and support for the introduction of the victim-friendly courts and the use of intermediaries.[26] There was even a marked struggle between three ministries over who would have monopoly over the project.[27]

5.3 RESEARCH TYPE AND APPROACH

The approach adopted in this section, as stated in chapter 1 is a combination of empirical research and explorative research. The researcher used both informal group and individual interviews together with key informant interviews. The researcher also employed unobtrusive observation, and a review of local literature and historical sources.

5.3.1 Selection of respondents

The group of magistrates interviewed was made up of six regional magistrates, four of them being senior magistrates with more than 15 years experience each. The prosecutor group included five regional prosecutors with three of them having more than five years experience each. All four intermediaries that were interviewed had more than five years experience each. The respondents that agreed to take part in individual interviews spoke on condition of anonymity. As the researcher spent six weeks visiting with the regional courts, she was able to

[25] *Ibid.*
[26] *Ibid*.
[27] *Ibid.*

prove the authenticity of what was revealed in the interviews. The researcher had exclusive key informant interviews with the following:

- The National Coordinator of the Victim Friendly Courts;
- The Chief Magistrate;
- The Head of Prosecution Services;
- The Senior Public Prosecutor;
- The Chief Interpreter who manages intermediaries;
- The Principal of the Judicial College of Zimbabwe;
- The Director of Justice for Children Trust; and
- The Director of Childline Zimbabwe.

5.3.2 Ethical aspects

In Zimbabwe fear of giving interviews is a significant problem. The respondents were more comfortable talking in informal group settings. All respondents were informed of the nature of the research through their head of departments and the Chief Magistrates office. All the respondents were provided with the opportunity to refuse to participate in the study. Some respondents agreed to individual interviews on condition of anonymity. The report was written as accurately as possible and all respondents have access to the final research results. The researcher was also aware that before the research report can be submitted it had to comply with the requirements of the Academic Administration of the Rhodes University.

The researcher was able to use the unobtrusive observation to confirm the data collected from interviews. The researcher also verified the accuracy of responses by double – checking with all respondents. The researcher would check with each respondent whether the information supplied by other respondents was accurate. Furthermore, the researcher attended trials, observed intermediaries, magistrates and prosecutors and spent a six week period at the country's largest Regional Court, the Harare Magistrates Court observing the day to day operations of the courts.

5.4 INTERMEDIARIES IN ZIMBABWE

5.4.1 The Criminal Procedure and Evidence Amendment Act [Chapter 9:07]

The Criminal Procedure and Evidence Amendment Act[28] Part XIVA section 319A to G deals with the appointment and regulation of intermediaries in the Zimbabwean courts.

Part XIVA "Protection of Vulnerable Witnesses" provide that:

Interpretation in Part XIVA

319A *In this Part –*

"intermediary means a person appointed as an intermediary in terms of paragraph (i) of section three hundred and nineteen B;

"support person" means a person appointed as a support person in terms of paragraph (ii) of section three hundred and nineteen B

"vulnerable witness" means a person whom any measure has been or is to be taken in terms of section three hundred and nineteen B

Measures to protect vulnerable witnesses

319B. *If it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is likely-*

(a) *to suffer substantial emotional stress from giving evidence: or*

(b) *to be intimidated, whether by the accused or any other person or by the nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully;*

The court may…., do any one or more of the following, either mero motu or on the application of a party to the proceedings: -

(i) *appoint an intermediary for the person;*

(ii) *appoint a support person for the person;*

(iii) *Direct that the person shall give evidence in a position or*

[28] Chapter 9:07.

place whether in or out of accused's presence, that the court considers will reduce the likelihood of the person suffering stress or being intimidated:

Provided that, where the person is to give evidence out of the accused's presence, the court shall ensure that the accused and his legal representative are able to see and hear the person giving evidence, whether through a screen or by means of closed circuit television or by some other appropriate means:

(iv) *Adjourn the proceedings to some other place, where the court considers the person will be less likely to be subjected to stress and intimidation;*

(v) *Subject to section 18 of the Constitution, make an order in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04] excluding all person or any class of persons from the proceedings while the person is giving evidence.*

Factors to be considered in deciding whether or not to protect a vulnerable witness.

319C (1) *When deciding whether or not to take any measure under section three hundred and nineteen B, the court shall pay due regard to the following considerations -*

(a) *the vulnerable witness's age, mental and physical condition and cultural background; and*

(b) *the relationship, if any, between the vulnerable witness and any other party to the proceedings; and*

(c) *the nature of proceedings;*

(d) *The feasibility of taking the measures concerned; and*

(e) *any views expressed by the parties to the proceedings, and*

(f) *The interests of justice*

(2) To assist the court in deciding whether to take any measures under section three hundred and nineteen B, the court may interview the vulnerable witness concerned out of sight and hearing of the parties to the proceedings:

Provided that at such an interview the merits of the case shall not be canvassed or discussed.

Court to give parties opportunities to make representations

319D Before taking a measure under section three hundred and nineteen B, the court shall afford the parties to the proceedings an opportunity to make representations in that matter.

Court may rescind measure to protect vulnerable witness

319E Without derogation from any other law, a court may at any time rescind a measure taken by it under section three hundred and nineteen B and shall do so if the court is satisfied that it is the interests of justice to do so.

Persons who may be appointed as intermediaries

319F (1) Except in special circumstances, which the court shall record, a court shall not appoint a person as an intermediary unless that person -

(a) is or has been employed by the State as interpreter in criminal cases, and

(b) has undergone such training in the functions of an intermediary as the Minister may approve.

(2) In appointing a support person for a vulnerable witness, the court shall select a parent, guardian or other relative of the witness, or any other person who the court considers may provide the witness with moral support whilst the witness gives evidence.

"Functions of the intermediary

319G (1) Where an intermediary has been appointed for a vulnerable witness, no party to the criminal proceedings

concerned shall put any question to the vulnerable witness except through the intermediary:-

Subject to any directions given by the court, an intermediary -

(a) shall be obliged to convey to the vulnerable witness concerned only the substance and effect of any question put to the witness:

(b) may relay to the court the vulnerable witness's answer to any questions put to the witness:

Provided that when doing so the intermediary shall, so far as possible, repeat to the court the witness's precise words."

(3) Where a support person has been appointed for a vulnerable witness, the support person shall be entitled to sit stand near the witness whilst the witness is giving evidence in order to provide moral support for the witness, and shall perform such other functions for that purpose as the court may direct.

Weight to be given to evidence of witness for whom intermediary or support person has been appointed

319H When determining what weight, if any, should be given to the evidence of a vulnerable witness for whom an intermediary or a support person has been appointed, the court shall pay due regard to the effect of the appointment on the witness's evidence and on any cross examination of the witness.

5.4.1.1 Section 319A

Section 319 offers an interpretation of the persons of an „intemediary', „support person' by making reference to Section 319B.

Interpretation in Part XIVA *319A* *In this Part –*

"intermediary means a person appointed as an intermediary in terms of paragraph (i) of section three hundred and nineteen B;

"support person" means a person appointed as a support person in terms of paragraph (ii) of section three hundred and nineteen B

"vulnerable witness" means a person whom any measure has been or is to be taken in terms of section three hundred and nineteen B

The section does not provide elaborate definitions of the intermediary, support person or vulnerable witness.

5.4.1.2 Section 319B

a. "if it appears to a court"

Section 319B implies that the court must be convinced that a person who is testifying or about to testify is likely to experience emotional stress in order for the court to grant the State with permission to bring in an intermediary. The inclusion of the phrase "*mero motu"* provides for the court's discretion in that the court may on its own initiative, in the absence of an application by the State for an intermediary, appoint an intermediary or a support person. In practice this particular portion of the Act is used by the courts to justify an automatic appointment of intermediaries, except in cases where a child witness prefers to confront the accused in the main courtroom. Section 319B does not stipulate any age limit for witnesses who may receive intermediary assistance. Furthermore, the permission to use intermediaries is not limited to sexual offence trials only.

In separate group interviews of presiding officers and prosecutors, both groups unanimously agreed that in practice the courts have opted for the wider interpretation of the legislation. This means that in sexual abuse cases, intermediaries are automatically granted to child witnesses and any other witnesses "deemed vulnerable". However, those children who chose to forego

intermediary assistance and prefer to confront the accused are permitted to do so. Both groups unanimously stated that most matters in the regional vourt were undefended. Because of the deteriorated infrastructure of the magistrates courts in Zimbabwe, most lawyers avoid taking on magistrate court cases. However, in the few cases that were defended, the majority of defence counsel rarely opposed intermediary assistance.

All prosecutors and presiding officers confirmed that they had received at least one training session on child development, child communication, vulnerability of child witnesses and the role of the intermediary prior to prosecuting or adjudicating in matters involving child victims of sexual abuse. This was later confirmed by the researcher during key informants' interviews. The respondents also indicated that, where they experienced shortcomings on how to handle the child witnesses, they "used common sense" as most of them were parents.

b. "Position or place"

Section 319B (b) (iii) by implication covers the use of a special room. The court may direct that the witness shall give evidence in "a position or place whether in or out accused's presence", in order to reduce the likelihood of the person suffering stress of being intimidated. Only one application is necessary for the application of an intermediary, support person and access to a separate "position or place". The court must at all times ensure that the accused and his legal representative are able to see and hear the witness testifying, either through a screen or closed circuit televisions.

Most of the courts use closed-circuit televisions and live-video recordings of the child and the intermediary. The intermediary wears ear-phones and uses them to communicate with the courtroom. The room is furnished and decorated in a child-friendly manner, with bright furniture and paintings on the walls. Section 319B (b) (iv) states that during trial the court may on its own initiative stop proceedings in order to relocate to a more convenient location if it appears that a witness will be less likely to be stressed.

c. "excluding all persons or any class of persons from the proceedings"

Section 319B (b) (iv) deals with *in-camera* proceedings. Subject to the Zimbabwean Constitution's Section 18, the court has power to exclude some persons from the proceedings while the witness is giving evidence. Section 18 of the constitution states that:

> *"all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public."*

Section 319B (b) (iv) complies with Courts and Adjudicating Authorities (Publicity Restriction) Act.[29]

5.4.1.3 Section 319C

Section 319C provides a guideline for the courts to follow in the exercise of their discretion as to whether or not provide protection to vulnerable witnesses. The guideline is significantly important in that it guides the courts as to what factors to take into account. The factors include the witness's age, his or her mental and physical condition and cultural background. The relationship between the vulnerable witness and the accused or any other person in the case will be taken into account too. The interests of justice should also be considered. This helps ensure consistency in court procedure. The inclusion of the "cultural background" factor means that courts must ensure that the intermediary appointed is culturally matched to the vulnerable witness. A majority of the intermediaries are multi-lingual and speak Zimbabwe's three main languages English, Shona and Ndebele. Half of the intermediaries can also speak Nyanja, a language used by Malawi immigrant workers in the farming communities.

Most of the intermediaries have acquired their multiple language skills, apart from English, from direct exposure to the communities that speak these languages.[30] Most intermediaries know and understand the main cultures and traditions of the witnesses. In order to ascertain whether a

[29] Chapter 7:04.

[30] As indicated in an interview with key informant Chief Interpreter Mr. Nyoni. The Chief Interpreter indicated that the major requirement in the hiring procedure for interpreters is that they must be able to read, write and speak in Shona, English and Ndebele fluently. See *addendum* 4.

witness needs intermediary assistance, the court may interview the witness. The interview must not refer to the merits of the case.

On the overall, the inclusion of section 319C in the intermediary legislation does not make much difference in the light of the fact that the norm is that an intermediary is almost appointed for any witness who needs one.

5.4.1.4 Section 319D

Section 319D authorises the courts to give any parties to the proceedings, including the accused or his legal representative, the opportunity to make presentations. Most lawyers shun the Magistrates' Court because of the courts' deteriorated infrastructure. The researcher observed that staff private toilets and public toilets at the Harare Magistrates Court were either in a state of disrepair or unusable due to the stench and unhygienic state they were in.[31] The situation was reportedly worse in the country's other cities and towns.[32] The maintenance personnel were blamed for allegedly removing and selling cleaning materials and disinfectants and selling them on the streets as the items were alleged to be in short supply in the country.[33]

5.4.1.5 Section 319E

Section 319E refers to the situation where it is established that the provision of an intermediary for a child is not in the interest of justice. The court may in the middle of a trial withdraw intermediary service. The Constitution states that the accused "shall be afforded facilities to examine in person or…by his legal representative the witnesses called by the prosecution before the court".[34] In the event that the use of intermediaries is seen to be interfering with the accused's right to "examine" a witness, this subsection may be invoked.

[31]Based on personal observations from the month of April to June 2008.
[32]Based on group interviews with magistrates and prosecutors.
[33] *Ibid.*
[34] Section 13(3)(e.

5.4.1.6 Section 319F

Section 319F identifies persons who may be appointed as intermediaries. An intermediary shall be a person who is a current or former State interpreter. He or she must receive intermediary training. Only in exceptional circumstances may a person, who is neither a current nor a former State court interpreter and has not received intermediary training, be appointed as an intermediary. Section 319F does not explain what the exceptional circumstances would be. In practice the combined function of interpreter and intermediary is known and accepted in most regional courts in the country.

The National Coordinator for the Victim Friendly Courts indicated that "the combined role of the interpreter and intermediary was a brainchild of the skills exodus". Faced with a dwindling source of social workers, the Victim Friendly Courts National Committee settled for using interpreters as intermediaries. The *Guardian (United Kingdom)* reported in 2003 that:

> "*Almost half of Zimbabwe's social workers now work in the UK following a dramatic rise in overseas recruitment over the past decade, which threatens to cripple the African country's welfare system. About 1,500 social workers have come to the UK from Zimbabwe as a result of the country's economic slump and poor working conditions, according to professional bodies. Christopher Chitireka, president of Zimbabwe's National Association of Social Workers (NASW), said: „Nearly half of the total workforce - 1,500 out of 3,000 - now work in the UK.' Dr Edwin Kaseke, president of the country's only school of social work, in Harare, said that the Department of Social Welfare had been worst hit by the exodus of staff."*[35]

The National Coordinator indicated that the Ministry of Justice wanted to avoid creating an *ad hoc* intermediary position. He revealed that one of the positive outcomes of the creation of the new role of the intermediary was the enthusiasm with which the interpreters embraced the dual role. The Chief Court Interpreter also informed the researcher that the combined role of the intermediary and interpreter was strategic and convenient. No court is permitted to sit without

[35] See "UK draining Zimbabwe of social workers" Society Guardian 19 February 2003. http://www.guardian.co.uk/society/2003/feb/19/publicsectorcareers.careers4 [accessed 15January 2011]

an interpreter, so this means that whenever the court sits the intermediary and the interpreter are there in the form of one person.

In separate interviews the Chief Magistrate and the Principal of the Judicial College confirmed that all intermediaries are educated and sensitised on how to properly handle victims of sexual abuse before assumption of duty in the child-friendly courts.[36] The Judicial College of Zimbabwe started offering child sensitive training programmes for intermediaries, prosecutors, presiding officers and the police in 1997. As all intermediaries are initially admitted into the system as interpreters, the initial requirement is for them to be multi-lingual and possess a minimum of three Ordinary level passes.[37] The Principal shared that the intermediaries are not trained to deal with children with special needs like deafness and impaired speech. When a child witness with special needs is testifying, the courts outsource from local special schools including Jairos Jiri, Danhiko or Emerald Hill schools.

All intermediaries that were interviewed agreed that they had received intermediary training prior to assumption of duty. The first intermediary training was in 1997. The curriculum included the following:

(1) Role of the intermediary;
(2) Court procedure;
(3) Introduction to child psychology;
(4) Child development;
(5) Communication skills;
(6) Recognizing stress in a child; and
(7) Establishing rapport with the child.

In developing the training programmes for intermediaries, prosecutors, magistrates and the police, the Judicial Training College consulted with Dr. Nyanungo[38] and Dr. Brakarsh.[39] The

[36] As disclosed in key informant interviews with the Chief Magistrate Mr. Mandeya and the Principal of the Judicial College Mr. Shana. See *addendum* 1.
[37] The Chief Interpreter indicated that this was the Zimbabwe Public Service Commission requirement.
[38] University of Zimbabwe's School of Social Services.

former and the latter made significant contributions with respect to the child psychology, child development, and memory and recall aspects of the programmes.[40]

Although Section 319F does not set any further requirements for the intermediary, in practice it is generally expected that he or she must possess the following attributes:[41]

- Sound interpretation skills;
- Proficiency in local languages and language skills;
- Demonstrated interest in children;
- Ability to communicate with children of all ages;
- Patience and emotional stability;
- No previous convictions of abuse;
- No record of having been a victim of abuse;
- Knowledge of the legal framework especially court proceedings;
- Knowledge of use of exhibits especially anatomically correct dolls;
- Ability to establish rapport with young children within a short time; and
- Demonstrated understanding of child psychology and child communication skills

Section 319F is silent on the aspect of intermediary remuneration. The reasonable assumption is that this is because the majority of intermediaries are already in the employ of the Public Service Commission as interpreters. The Chief Magistrates pointed out that the Ministry of Public Service would from 2008 re-grade intermediaries and create a complementary salary range for them. It is not clear whether this has come to pass. The second subsection of Section 319F provides for the appointment of a support person. The latter may be a parent, guardian or relative of the witness. His or her duty is to provide moral support to the witness.

[39] See *addendum* 4 part C.
[40] *Ibid.*
[41] *Ibid.*

5.4.1.7 Section 319G

Section 319G provides that where an intermediary has been appointed, all questions must be put to the witnesses through the intermediary, although the court reserves the right to put questions to the witness directly. When a support person is appointed in terms of section 319G (ii), it will be the duty of that person to provide moral support to the witness. The court is responsible for directing how the person should provide the moral support. In practice, the intermediary is not expected to provide moral support or comfort to a witness.[42]

a. "the substance and effect"

In terms of this section the intermediary does not have to convey questions using the same wording. In practice, the words "*the substance and effect"* mean that the intermediary may tone down questions which would have otherwise been aggressive and threatening if put directly to the witness. The intermediary communicates questions to the witness in a language that is familiar to the witness, meaning that the intermediary is permitted to use any slang, jargon, vernacular or colloquial speech that is peculiar to any witness because of his or her age or societal background. All this is meant to ensure that the witness understands the content of the questions posed and is protected from the discomfort of the accusatorial system's formal procedures including the language and aggressive questioning during cross-examination. During the course of the trial, the intermediary is permitted not only to rephrase questions, but to comment on a question and offer an opinion on whether the child understands it or not. He or she can make comments regarding the child witness's performance and call for an adjournment if the child appears tired.[43]

The Zimbabwean intermediaries are significantly confident of their role in the court system.[44] Their confidence is bolstered by the high staff turnover amongst Regional prosecutors and presiding officers, as a result of which the intermediaries often find themselves as the most experienced role players in the courts. Because they are more experienced, they may, if they feel that a question being asked by the prosecutor or the presiding officer is age inappropriate or

[42] The Criminal Procedure and Amendment Act section 319G (iii).
[43] See *addendums 2, 3 and 4*.
[44] *Ibid*.

insensitive to the witness, point this out to the court. On the other hand, if an intermediary notes that a witness's response is not clear, the intermediary may go off on an examination of his or her own. As everything during the trial is aimed at protecting the child and ensuring that the elicitation of evidence is accurate, the intermediary is rarely opposed when he or she seeks clarification. The intermediary has significantly assumed the role of an expert witness[45].

Section 319G does not in any way limit the accused's right to legal representation. Whether represented by legal counsel or not, the accused is entitled to cross-examine the witness. The intermediary is first and foremost an interpreter and is not expected to alter the essence of the questions put to the witness during cross examination. He or she is kept in check by the presiding officer. The latter has the authority to disallow irrelevant, unduly repetitive oppressive or otherwise improper questioning during cross examination.

b. "witness's precise words"

After a witness has responded to a question posed in the course of cross-examination, the intermediary is expected to as "*far as possible, repeat to the court the witness's precise words".* The intermediary simply relates back to the court what the witness has said. In a majority of the cases, the accused, the prosecutor and the presiding officer are able to understand the local vernacular languages spoken by the child witnesses.[46] As the child witness testifies or responds to any questions, the court room occupants are able to hear him or her through the closed circuit television. In reality, the intermediary is aware of the fact that the Presiding Officer, the prosecutor and the accused are able to understand the child witness, so he or she as much as possible tries to give an accurate interpretation of the witness's response.

c. Intermediaries' extended role

In Zimbabwe, practice has shown that outside of the parameters set out in the legislation, the intermediary acts as the frontline person and welcomes the child and her caregivers and provides emotional assistance and support.[47] Before the trial commences, the public prosecutor meets

[45] *Ibid*.
[46] See *addendum* 4 part A.
[47] *Ibid.*

with the intermediary in order to provide the latter with the essential background information such as a witness's age, family background, who the perpetrator is and when the incident occurred. The prosecutor then introduces the intermediary to the child witness. The intermediary is expected to spend some time alone with the child in order to establish some rapport. The intermediary also uses this time to explain his or her role to the child. Before trial the intermediary is expected to make any notes on the child developmental level. He or she interviews the child in order to assess the witness's developmental stage, intellectual abilities, and vocabulary and language skills and identify any physical or mental disabilities and notify the prosecutor.

The intermediary is responsible for preparing the child for court. The intermediary is commonly expected to achieve this in thirty minutes to an hour before trial. He or she is expected to calm the child down if the child is upset and reduce the child's anxiety. If the child is very young, then the intermediary may be allowed more time with the child. Although he or she receives a copy of the charge sheet from the prosecutor, the intermediary is not expected to refer to the charge during his or her interaction with the child. The court preparation by the intermediary includes giving the witness a tour of the court room and explaining to the child a detailed explanation of the various roles of court role players. At the Harare regional courts it is not uncommon courts to see an intermediary before trial walking around the corridors in the company of the young witness as part of the familiarization tour. The intermediary will also use this time to introduce to the child the anatomical dolls.

After trial proceedings are over, an intermediary may assist in the after-trial follow-up. He or she is expected to monitor the progress of the child. The Victim Friendly Courts project has secured some funding for the home visits by intermediaries to witness's homes. It was not clear whether this was done in all the provinces. The intermediary's visit to the witness's home is considered to be an effort to bring further comfort to the child and an opportunity to observe whether the child needs further psychosocial support assistance. It is not clear whether any children have been provided with any further support after trial. Intermediaries indicated that they look forward to visiting former child witnesses at their homes because they receive a small

allowance in American currency dollars for the task. However, it appears this only occurs in Bulawayo and Harare.

5.4.1.1 Section 319H

Section 319H refers to the validity of a witness's testimony where an intermediary has been used. Assuming the intermediary appointment is questionable or controversial in any way, the court will look at whether that may have affected the witness's evidence or performance during cross examination.

5.5 ANALYSIS OF ZIMBABWEAN INTERMEDIARIES

Section 111B of the Zimbabwean Constitution states that any convention, treaty or agreement "acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations shall not form part of the law of Zimbabwe" unless it has been incorporated into the law by or under an Act of Parliament. Technically, Zimbabwe is not bound by any international and regional agreements including the ones the President has signed.

The Zimbabwean government has used this self- exemption to consistently dodge compliance, especially in issues involving human rights. Previous attempts to hold the State accountable to any international or regional instruments ended in failure.[48] Even though the Zimbabwean government considers itself exempt from complying with the international or regional instruments it has signed, the introduction of intermediaries in the courts is generally perceived as a partial but genuine attempt to fulfill the Convention on the Rights of the Child and the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.[49]

Unlike the South African Constitution, the Constitution of Zimbabwe does not assign any special rights to children. Children's rights are instead addressed in the Children's Protection and

[48] Saki and Chiware "The law in Zimbabwe".
[49] See *addendum* 1.

Adoption Act,[50] the Guardianship of Minors Act[51] and the Education Act.[52] Although Zimbabwe has ratified various international and regional instruments, they do "not form part of the law of Zimbabwe unless incorporated into the law" as Acts of Parliament.[53] Amidst considerable human rights abuse controversies, Zimbabwe has managed to establish a somewhat visible legal and regulatory framework for the protection of the rights of child victims of sexual abuse.[54] It has also managed to introduce complementary initiatives and strategies.

That the Zimbabwean government has been able to show some significant consistent commitment towards the protection of vulnerable witnesses in court is augmented by other complementary programmes that have been established. Closely linked to the intermediary system is the Victim-Friendly School Initiative, which was established through the Secretary of Education, Sports and Culture's Circular Number of 5 of 2000. It is mandated to educate children and communities on child sexual abuse, the reporting procedure of sexual offences and the victim-friendly court procedures including the use of intermediaries.[55] The Victim-Friendly Protocol was created by the Victim Friendly Courts project. It outlines the appropriate steps and services available to the victim of sexual abuse from the time of the commission of the offence up to trial. Its purpose is to educate and guide the community.

5.5.1 Sustainability of the Zimbabwean intermediary system

Despite the impact of the economic hardships on the country, the intermediary system of Zimbabwe has enjoyed more than marginal success. The system's resilience in the face of historic adversity may be attributed to the following factors:

- The multi-role centralised office of the National Coordinator which has provided both the intermediary system and victim-friendly courts with stability and cohesion;

[50]Chapter 5:06.
[51]Act No. 34 of 1961 as amended through Act No. 9 of 1997, Chapter 5:08.
[52]Chapter 25:04.
[53] Section 111B.
[54]UNICEF "Children and Women's Rights in Zimbabwe, Theory and Practice. A critical analysis in relation to the women and children's conventions" http://www.kubatana.net/html/archive/chiyou/041111unicef1.asp?sector=CHIYOU [accessed 15January 2011]
[55]See *addendum* 1.

- The dual role of interpreters as intermediaries which has helped ease the shortage of intermediaries;
- Mandatory training of intermediaries on how to handle vulnerable witnesses in court;
- Management and supervision of intermediaries;
- Integrated training of role players on how to handle vulnerable witnesses in court;
- Wide interpretation of the law as most courts uniformly seek to uphold the best interests of the child; and
- The sensitisation of defence lawyers through the participation of the Law Society of Zimbabwe in the Victim Friendly Courts National Committee.

The inclusion of the Law Society of Zimbabwe in the consultations on the introduction of victim-friendly courts and use of intermediaries meant that most lawyers were able to empathize with victims of sexual offences.[56] From the onset, most defence counsels were able to embrace the presence of intermediaries in the criminal courts. The introductions of more victim friendly courts throughout the country especially in smaller towns is often received positively by lawyers and largely perceived as "a noble idea that needed support from all stakeholders including the private sector".[57]

5.5.2 The National Coordinator for Victim Friendly Courts

The National Coordinator is responsible for sustaining the use of intermediaries in the courts. The researcher had regular access to the National Coordinator for the Victim-Friendly Courts Mr. Magonga over a period of six weeks. The researcher was able to collect data regarding the National Coordinator through a combination of one -on-one interview and unobtrusive

[56] As disclosed in interviews with regional magistrates Mr. Bhila and Mr. Kumbawa. See *addendum* 2.

[57] See comment by a Mr. Chris Muvhiringi, a local lawyer, showing his support for the dissemination of Victim Friendly Courts across the country. He said it was "a noble idea that needed support from all stakeholders including the private sector".
"Victoria Falls community welcomes victim friendly court" Bulawayo24NEWS 14 October 2010.
http://bulawayo24.com/index-id-news-sc-regional-byo-21-article-Victoria+Falls+community+welcomes+victim+friendly+court.html
[accessed 15 January 2011]

observations. His streamlined multi-functions have provided the Zimbabwean intermediary system with relative stability over the past 13 years. The office of the National Coordinator originated from one of the recommendations by the Victim Friendly Courts National Committee. The National Coordinator was placed on secondment by Save the Children (Norway) within the Chief Magistrates offices in Harare in 1997. Although he works closely with the Chief Magistrate's office and the Ministry of Justice as a whole, the National Coordinator is accountable to the Save the Children. As of 2009, he was still on the Save the Children's payroll. This state of affairs has helped significantly to filter out interference from the government. The absence of government interference has meant less delays as most decisions are made by the National Coordinator.

The office of the National Coordinator works closely with other government ministries including the Ministry of Health, the Ministry of Home Affairs and the Ministry of Public Service and various civil society agencies. In the last seven years, the relationship between the government and the civil society has been characterised by distrust and suspicion and several incidences confirm that. The highly publicized 2004 Non-Governmental Bill which although did not become law, was meant to harness and control the country's non-governmental organizations. In 2008 the Zimbabwean non-governmental organizations s demanded that the Zimbabwe's cash-strapped power-sharing government return monies seized by the controversial central bank governor Gideon Gono, allegedly used to bolster President Robert Mugabe's government.[58]

The office of the National Coordinator has managed to rise above the fray and has emerged as a communication bridge between the government and the civil society. Through the office of the National Coordinator, the civil society continues to support the child-friendly courts and intermediary services without having to deal directly with the Ministry of Justice.

[58] "NGOs demand funds seized by Gono" Zimonline 15 July 2009. http://www.zimonline.co.za/Article.aspx?ArticleId=4853 [accessed 15January 2011]

5.5.2.1 Coordination of Intermediary Training Programmes

UNICEF[59] and Save the Children (Norway) are the Victim Friendly Courts' major funders. The close working relationships that exists between the National Coordinator's office and these agencies has brought in transparency and ultimately significant stability to the child-friendly courts system. The office of the National Coordinator, in consultation with its funding partners, plans and budgets for training of intermediaries and other role players, and the furnishing of victim-friendly courts.[60] The office is responsible for all the preparation of funding proposals, updates and progress reports to funders. The National Coordinator indirectly monitors the work and developments of all 17 victim friendly courts and acts upon recommendations from the Chief Interpreters and Senior Magistrates and Senior Prosecutors. The National Coordinator coordinates mandatory trainings for intermediaries, the police, prosecutors and magistrates on how to handle child-victims of sexual violence.

5.5.2.2 Media

The office is solely responsible for all media communications and community outreach. The office of the National Coordinator coordinates the nationwide Victim Friendly School Initiative. The office facilitates community education on child sexual abuse and the victim-friendly strategy through drama and presentations. Selected regional magistrates, prosecutors and intermediaries annually travel to selected rural area schools for the community awareness events. The office is also responsible for providing equipment to the seventeen child-friendly courts countrywide. In 2009, the National Coordinator reported that his office had secured enough computers to computerise all 17 regional courts to increase efficiency and accuracy. In another 2009 media report, the National Coordinator indicated that his office was introducing the first mobile victim friendly courts in Chipinge to prevent sexual abuse victims from travelling 250 km to Mutare Regional court to testify. [61] In December of 2009, some mobile courts were introduced aound the

[59] In "Victoria Falls community welcomes victim friendly court", Ms. Ndangariro Moyo, a child protection specialist with UNICEF, said they had decided to partner the Ministry of Justice to protect the vulnerable children especially children. "Children have the right to justice, health, education, water and sanitation and because of that they need special courts that are friendly so that they are not intimidated. "That is why we support the opening of a VFC in Victoria Falls," she said.

[60] Mostly UNICEF and Save the Children.

[61] "VFC National Coordinator Mr. Idine Magonga told the gathering his office and various stakeholders were exploring opportunities to introduce a mobile Victim Friendly Court in Chipinge to save victims from travelling

Beitbridge area.[62] National Coordinator informed the researcher that according to the Victim Friendly Courts records the conviction rates were at an all time high of 86% because of intermediary assistance. The respondent also indicated that the disclosure rate had significantly increased too because members of the public had confidence in the system.

5.5.2.3 Dual role of intermediary

The Zimbabwe legislation explicitly states that in special circumstances the courts shall not appoint a person as an intermediary unless that person is or has been in the employ of the State as a criminal court interpreter and has received training on the role of an intermediary[63]. The regional courts, where child sexual abuse matters are heard, do not commence proceedings without an interpreter. All regional court interpreters are trained intermediaries. Credit has to be given to the Zimbabwean legislators for their acknowledgement of the fact that the country was losing social workers to other countries and therefore needed to identify a group of people who were least likely to leave the country. They therefore settled for the interpreters who have proved to be the mainstay of the victim friendly courts.

5.5.2.4 Mandatory intermediary training

The 1997 intermediary training curricula was meant to educate the trainees on how to understand the language and mental processes of children of different ages that the court can clearly communicate to the child and the child can communicate clearly to the court. The curricula included the following[64]:

250km to Mutare Regional Court to testify in trials. He said cases such as rape were still being referred to Mutare for trial and that a mobile court would be ideal until a circuit court was formally set up in Chipinge".
See "Chipinge Tops in Child Sexual Abuse Cases" The Herald 26 May 2009. http://allafrica.com/stories/200905260330.html [accessed 15January 2011]

[62] Mr. Magonga said the mobile courts in Gutu, Tsholotsho, Chipinge, Beitbridge, Mutoko and Chiredzi were handling about 12 cases each per sitting with the State securing a 60 percent conviction rate. The courts were established to ensure that all people have access to justice after complaints were raised that some offences were being committed over 200km from local regional courts thereby discouraging prosecution of suspects.
See "Mobile Courts Hailed" The Herald 1 December 2009.
http://allafrica.com/stories/200912010490.html
[accessed 15January 2011]

[63] See the Criminal and Procedure Amendment Act section 319(f) (a) and (b).

[64] It is provided by the Judicial College.

- Developing rapport with child witnesses;
- Creating an environment in the intermediary room which encourages a child to speak;
- Using equipment in the intermediary room including anatomically correct dolls and drawings;
- Assessing a child's language and communication skills in order to facilitate age-appropriate communication with the intermediary;
- Identifying signs of distress in the child that may interfere with the child's ability to communicate;
- Comforting a child is in distress and who is not talking;
- Understanding the impact of an intermediary's personal responses to child sexual abuse and its effect on his or her work; and
- Developing performance objectives for the purpose of future guidance and supervision.

The 2003 upgraded Zimbabwean intermediary training curricula included the following[65]:

- Objectives of training
- Role of the intermediary
- Problems encountered in the court
- Relationship skills
- The first contact with the child and pre-trial preparation
- Use of the playroom
- Child development
- Assessment of language and memory
- Communication skills
- Identifying signs of distress
- Permissible actions
- Needs of special cases
- Personal responses to sexual abuse

In Zimbabwe, the National Coordinator for the Victim Friendly Courts stated that in order to prevent various civil bodies from creating and offering multiple and un-accredited intermediary training courses, the office appealed to funding bodies to refuse any small organisation's request for funding to train intermediaries. The funding bodies complied and channeled all the funding

[65] Prepared by Brakarsh in his capacity as the Victim Friendly Courts Trainer.

towards the Justice College. So this means that since its launch in 1997 the accredited intermediary training course has only been offered via the Victim Friendly Courts and the Ministry of Justice through the Justice College. This has provided the system with consistency and integrity.

5.5.2.5 Supervision and management of intermediaries

Establishing the appropriate supervision and debriefing sessions has not been complicated because of the presence of the pre-existing interpreter infrastructure[66]. Every morning the interpreters/intermediaries attend a debriefing session where they share their court experiences from the previous day, including new words, slang or jargon or expressions or special names used by some children to refer to body parts. All new intermediaries are monitored for six weeks. The intermediaries interviewed shared that they found the debriefing sessions cathartic and extremely helpful.

Before the introduction of intermediaries, all interpreters were managed, supervised and monitored by the Chief Court Interpreter. After the introduction of the intermediaries, the same management and supervision structure was maintained. This includes supervision during trials. The intermediary system was able to take advantage of the pre-existing structure originally meant for interpreters at no added expense and it has benefited significantly.

5.5.2.6 Integrated training for court role players

In an interview with a number of Harare Regional Court presiding officers and prosecutors, the participants unanimously indicated that they had received training on how to handle a child witness or victim of sexual abuse.[67] Both groups showed their appreciation of the fact that the prosecution of and presiding over cases involving child victims of sexual abuse children is a specialised skill that requires training. All participants indicated that in practice child witnesses are offered the services of intermediaries and access to the special room without an application. The procedure to apply for the service is no longer used as every vulnerable witness is deemed

[66] Interview with key informant the Chief Interpreter. See *addendum* 4.
[67] Mr. Mandeya, Mr. Kumbawa, Mr. Bhila, Mr. Magonga, Mrs. Tapfumaneyi, Mr. Murombedzi and Mr. Shana. See *addendum* 1.

entitled to intermediary service and access to the special room unless the witness indicates otherwise.

Three presiding officers expressed the view that they could not conceive of any circumstances where they would deny a child witness the use of intermediary services unless the child preferred to confront the accused. Even in defended matters, the few defence counsels that appeared in the Regional court rarely opposed the use of intermediaries. The mother body the Law Society of Zimbabwe is a member of the Victim Friendly Courts Committee and thus subscribes to the unconditional protection of children's rights both in and outside the court room. An integrated approach towards the training of magistrates and prosecutors has ensured that the role of the intermediary receives positive validation.

5.5.2.7 Liberal interpretation of legislation

It can be reasonably inferred that in Zimbabwe, the interpretation of the legal requirements surrounding the role of the intermediaries has been considerably casual, allowing the intermediary to perform actions that probably go beyond what was originally anticipated by the legislator.

The brain drain in Zimbabwe has resulted in qualified senior lawyers, prosecutors and magistrates leaving the justice system for other countries, including South Africa, Botswana and Namibia. In a desperate attempt to fill vacant positions, Ministry of Justice, Legal and Parliamentary Affairs has, in an unprecedented manner fast tracked new law graduates from the provincial courts to the regional courts.[68] This has led to a situation where inexperienced presiding officers and prosecutors who, after their often hasty move from the provincial courts, are instantly expected to preside over child sexual abuse matters in the regional courts. Because of their limited knowledge and exposure to cases of such magnitude as rape and other offences that are heard in the Regional courts, the presiding officers often resort to relying heavily on the more experienced and confident interpreters or intermediaries for guidance. This has helped to entrench the intermediaries' influence in the courts system in Zimbabwe.

[68] See "UK draining Zimbabwe of social workers".

5.5.3 Concerns surrounding Zimbabwean intermediary system

In 2005 UNICEF pointed out that Zimbabwe had a comprehensive legal framework for protecting children from violence, sexual and economic exploitation. However for any system to run effectively, the implementation process has to be planned and executed properly. While the intermediary system in Zimbabwe has generally enjoyed relative success, there are many factors that continue to impede its effectiveness in assisting and protecting young witnesses. A significant number of gaps exist in the effective delivery of this vital service.

5.5.3.1 Limited provisions for child witnesses

a. Food provisions

Intermediaries expressed concern over the limited food provisions for child witnesses. Half of the intermediaries admitted to having bought or shared their lunch with hungry child-witnesses more than once. They indicated that the general discomfort experienced by children either because of hunger or thirst was a major distraction and affected their overall performance. Children often find it hard to focus when they are tired or hungry. Intermediaries did not appreciate having to fend for witnesses without any form of re-imbursement.

b. Transportation

Three of the intermediaries pointed out that it was not uncommon for child witnesses to be brought to court by the police in the same vehicle as the accused. They also pointed out that child witnesses and accused persons have also been transported to court by the police in public taxis or "kombis". The intermediaries reported that child witnesses brought to court in this manner exhibited a higher level of stress and anxiety, making it almost impossible to calm them down before the commencement of the court proceedings. They stated that the more stressed a child witness was, the more time they needed with the child to help them relax and prepare for trial.

c. Waiting rooms

At the Harare Regional courts there are no special waiting rooms or places assigned for the child witness and caregivers. The researcher observed child witnesses walking in the corridors with

their caregivers or intermediaries or waiting outside the courtroom in the vicinity of the accused.[69] All intermediaries reported that it was not unusual for child witnesses to "bump" into those accused persons before the trial began thus frightening them. This concern was also confirmed by Childline Zimbabwe. [70]

d. Poor salaries and working conditions

Concerns over poor salaries have caused large numbers of magistrates and prosecutors to migrate to other countries, especially Botswana and Namibia. The relentless movement of new magistrates and prosecutors coming and going destabilises the smooth functioning of the intermediary system.[71] A lot of incomplete cases are left behind for other magistrates and prosecutors to pick up. This puts a strain on intermediaries in that, apart from dealing with new cases, they also have a series of multiple partly heard matters to deal with.

Poor working conditions and salaries affected the smooth operations of the courts dealing with child sexual abuse, thus mitigating the efficacy of the intermediary role. The magistrates' frustration over poor salaries reached its peak in December 2007 and it led to three month work stoppage and this resulted in a significant backlog of untried and partially-heard child sexual abuse matters.

Low rates of remuneration were cited as the reasons why some prosecutors, magistrates and even clerk of courts were clandestinely accepting bribes from accused persons in exchange for favourable sentences.[72] This was also confirmed by the Regional Public Prosecutor - in-charge. The researcher was shown posters of warnings against bribery posted on several doors on prosecutors' offices.[73]

[69] See *addendum* 4 part B.
[70] *Ibid.*
[71] See *addendum* 1.
[72] Saki and Chiware "The law in Zimbabwe".
[73] Based on personal observations. See *addendum* 1.

e. Security

Due to inadequate security, theft and damage to court equipment is quite common. At the Harare Regional Courts, two of the special rooms could not be used because the video cameras, closed-circuit televisions including anatomical dolls had been stolen.

f. Record keeping

The record keeping at the magistrates' courts is significantly substandard.[74] Whilst attempting to obtain statistics on how many child victims of sexual abuse received intermediary assistance annually, the researcher confirmed that data input and management was done manually and the information was not up to date.

g. Under-resourced libraries

The researcher gathered that there was a significant shortage of reference books and law reports. Since 2002, the government has not been able to publish new law reports.[75] Both groups admitted that they do not have access to precedence on child sexual abuse cases.

5.6 SUMMARY

In the early 90s, after accepting that the child's interests and protection rights were being overlooked in the courtroom, it was agreed that there was a need for change. Reform in the courts system was spearheaded by Justice Malaba together with the Victim Friendly Courts National Committee. The liberal interpretation of the intermediary legislation has meant that intermediary services and use of the special room are readily accessible to any witness regardless of age. Most Zimbabwean intermediaries should be or must have been state employed as criminal court interpreters.[76] There is a mandatory training requirement for all intermediaries which has meant intermediary services are standardized throughout the country. There are also mandatory training programmes for prosecutors and presiding officers.

[74] Saki and Chiware "The Law in Zimbabwe".
[75] *Ibid.*
[76] The Criminal Procedure and Amendment Act section 319F(1)(a).

The intermediary is permitted to comment and offer opinion on the child's performance and the proceedings using his or her intermediary training knowledge and experience. All intermediaries receive direct supervision, monitoring and debriefing services through the Chief Interpreter. Because interpreters are used as the intermediaries, this has shielded the courts from intermediary shortage. The use of intermediaries has been credited with accelerating the conviction rates of child abusers. The role of the intermediary has been enhanced by the fact that due to high staff turnover most presiding officers in the Regional Courts are new and they rely heavily on the more experienced interpreter or intermediary for guidance on court procedure.

The office of the National Coordinator has helped streamline the functioning of the victim friendly courts. The office is responsible for budgeting and planning and coordinating intermediary and role player trainings. Other factors that have helped entrench the intermediary system in the justice system is the dual role of the interpreter and intermediary. The mandatory training of intermediaries has created a bold and confident participant in the overall protection of child witnesses. The supervision and management of intermediaries was not difficult to establish as the system took advantage of the pre-existing infrastructure originally meant for interpreters. The integrated training of presiding officers and prosecutors has meant that both groups are sensitised to the similar issues. This has helped create unity of purpose and consistency. As all trainings are offered by one body the Judicial College, this has greatly enhanced the consistency and integrity of the courses.

Even in the face of relative success, the intermediary system has been challenged by various factors including inferior working conditions, poor salaries, bribery and corruption, absence of adequate security for the special courts equipment. Despite all the challenges, the Victim Friendly Courts project maintains that use of intermediaries in the criminal courts has helped increase the conviction rates of child abusers.

CHAPTER

6

THE INTERMEDIARY SYSTEM IN ETHIOPIA

6.1 INTRODUCTION

Unlike most African countries, Ethiopia was never occupied by foreign interests, except for a brief Italian occupation in 1936, which lasted until 1941.[1] In the last fifty years Ethiopia has progressed from feudalism, to socialism, and subsequently to a more transparent political system in the 1990s.[2] The Ethiopian Constitution declares itself the supreme law of the land.[3] It bestows a status of national law on all international agreements ratified by Ethiopia.

All fundamental rights and freedoms enshrined in the Ethiopian Constitution are to be interpreted in conformity with the Universal Declaration of Human Rights, international human rights covenants and principles of other relevant international instruments, which Ethiopia has accepted or ratified. However, domestic application of international standards is reportedly still limited.[4] The Ethiopian Constitution identifies the country's legal system as accusatorial in nature. Special provisions have been included in the Constitution for the sole protection of the accused person's rights.[5] By the early 1990s the government could no longer ignore the rising number of cases involving sexual offences against children. Most significantly, child sexual abuse in the form of early marriages of young girls, some as young as nine years of age, was

[1] Country Studies Series by Federal Research Division of the Library of Congress "Ethiopia Mussolini's Invasion and the Italian Occupation".
http://workmall.com/wfb2001/ethiopia/ethiopia_history_mussolinis_invasion_and_the_italian_occupation.html
or http://countrystudies.us/ethiopia/19.htm
[accessed 15January 2011]

[2] A Muluneh "The Changing face of Ethiopia's Police Force" (2008).
http://www.issafrica.org/pgcontent.php?UID=13659
[accessed 15January 2011]

[3] The Federal Democratic Republic of Ethiopia Constitution article 9 (1).

[4] RM Aberra "Human Rights Report of Ethiopia".

[5] The Constitution's articles 19, 20 and 21 specifically address the accused's rights under the system.

common in some areas in Ethiopia.[6] In the remote Amhara region of Ethiopia, girls were reportedly getting married and giving birth from the age of ten.[7]

The Ethiopian government has accepted that child victims of sexual abuse need assistance in order to testify effectively whilst receiving the necessary protection. The first intermediaries in the Ethiopian criminal justice system were introduced in Addis Ababa in 2004. This was done despite the fact there was no specific legislation authorizing the use of such intermediaries. Although intermediaries have been increasingly introduced in a number of courts in the country, there is still no legislation authorising or permitting the use of intermediaries in the Ethiopian regional or federal courts.

This chapter will focus on the role of intermediaries in assisting child witnesses in the Ethiopian criminal courts. There will be an investigation of the legislative authority authorising the use of intermediaries, followed by a discussion on the work being done by intermediaries in the country. The effectiveness of the Ethiopian intermediary system will be examined as well as an assessment of the factors impacting Ethiopian intermediaries.

6.2 BACKGROUND TO THE CHILD-FRIENDLY COURTS IN ETHIOPIA

Ethiopia is made up of nine states comprising more than eighty ethnic groups. There are only two pieces of federal legislation which are wholly applicable to the entire nation and these are criminal and labour laws. Because the Federal Constitution permits legal pluralism, all nine states are permitted to have their own Constitutions and legislation in areas of family, customary and religious laws on condition that the said laws do not contradict federal laws. In Ethiopia an accused's right to a public trial is a constitutionally protected right.[8] The Constitution explicitly outlines the accused's right to confront and cross examine witnesses testifying against him or her as follows:

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[6] Aberra "Human Rights Report of Ethiopia" .
[7] M Katti "Child marriages: Still a tradition in Ethiopia".
http://www.stolenchildhood.net/
[Accessed 15January 2011]
[8] Article 20(1)

> *"Accused persons have the right to full access to any evidence presented against them, to examine witnesses testifying against them, to adduce or to have evidence produced in their own defence, and to obtain the attendance of/and examination of witnesses on their behalf before the court".*[9]

The Constitution also expressly prohibits the inhuman treatment of all citizens and directs that everyone has a right to be protected from "cruel, inhuman or degrading treatment or punishment." Regarding children, the Constitution directs that "the best interests of the child" must be applied:

> "*In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child".*[10]

While the Constitution does not necessarily distinguish between child witnesses or child offenders, Article 36 is clear in its instruction to courts of law that they must at all times prioritize the best interests of the child. In 2005 the government indicated that in the administration of justice the courts were to observe the principle of the "best interest of the child".[11] This has generally been perceived as the main guiding principle behind the introduction of child-friendly legal reform in the Ethiopian justice system. However, to date there is still no domestic definition of the "best interests of the child".

Before the introduction of intermediaries in any of the criminal courts in Ethiopia, all child witnesses gave evidence from the main court room.[12] The accused was expected to confront the young witness and cross-examine him or her on the evidence adduced during trial. UNICEF states the following:

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[9] Article 20(4).
[10] Article 36 (2).
[11] The Federal Ministry of Labor and Social Affairs "Response to United Nations Questionnaire on Violence against Children."
http://www2.ohchr.org/english/bodies/CRC/docs/study/responses/Ethiopia.pdf
[accessed 15January 2011]
[12] The Ethiopian Constitution article 20 (1).

> *"Most child victims/witnesses in Ethiopia are not only primary traumatised by their disharmonious development and/or the crime(s) committed against them or they have observed, but also secondarily traumatised by the professionals in the justice system and tertiary traumatised by the communication and general public".* [13]

Due to limited child-sensitive protection measures for child witnesses in Ethiopia, testifying in court was considered a very traumatizing experience for children.[14] Untrained prosecutors and presiding officers, lacking specialised skills on how to handle young victims of crime, were blamed for the increased risks of secondary traumatisation. It is still not uncommon for children to be asked "frightening, confusing and suggestive questions by the police, prosecutors and judges".[15]

In addressing the issue of secondary traumatisation, the government committed to reducing trauma by ensuring that child witnesses "need not personally appear before the formal settings of a courtroom".[16] This set the platform for the introduction of intermediaries. In 2003 the government established a Ministerial Committee to facilitate a project entitled „Protection, Prevention and Rehabilitation of Children Exposed to Sexual Exploitation." The Ministerial Committee's mandate was to improve the legal and social protection of sexually exploited and abused children as they interact with the justice system and to facilitate the introduction of child-friendly benches.[17] In line with these new principles of protecting children and women in the society, the Penal Code of Ethiopia was revised in 2004. The Penal Code became the Criminal Code of the Federal Republic of Ethiopia[18] (hereafter, the "2004 Criminal Code"). It

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[13] UNICEF "Pre-service workbook on justice for children for Judges and Prosecutors: UNICEF-Ethiopia Training Centre for Judges and Prosecutors July 2008". http://www.joptc.gov.et/Modules/21%20Modules%20on%20Juveile%20Justice/Workbook%20on%20JfC%20-%20Pre%20Service-Not%20final.pdf [accessed 15January 2011]

[14] *Ibid.*

[15] *Ibid*.

[16] The Federal Ministry of Labor and Social Affairs "Response to United Nations Questionnaire on Violence against Children."

[17] *Ibid.*

[18] The Criminal Code of the Federal Republic of Ethiopia Proclamation No. 414 of 2004 as published in the *Federal Negarit Gazetta,* May of 2005.

criminalized marriage by abduction,[19] the recruitment[20] of and trafficking of women and children for purposes of prostitution[21] and child pornography.[22] The intermediary system was simultaneously introduced through the victim friendly benches in selected courts in 2004 as an acknowledgement of the fact that the courtroom setting was not appropriate for child witnesses. This was also in fulfillment of the government's objective that children "need not personally appear before the formal settings of a courtroom".[23]

In order to enhance the work of victim-friendly benches, in mid-2007 the Ministry of Justice created new offices for the Federal First Instance Prosecution in Addis Ababa at Yeka, Menelik, Kera and Lideta.[24] With the cooperation of the police, social workers, counselors, victim-friendly benches, the three-pronged mandate of these offices was to upgrade the prosecution of cases involving violence against children, boost the prosecution and conviction rates and decrease the secondary victimisation of child-victims.

6.2.1 Legislative authority for intermediary use in Ethiopian courts

There is no specific legislation authorizing the use of intermediaries in the Ethiopian criminal justice system. In order to identify instruments which best validates the Ethiopian intermediary system and provides it with some form of legitimacy, it is necessary to search through existing legal instruments in the country. The first point of search is the Ethiopian criminal and criminal procedure laws. Ethiopian criminal laws are passed by the Federal government and are considered unconditionally binding on all Ethiopian states and regions.

An analysis of both 1961 Criminal Procedure Code[25] and the new 2004 Criminal Code of Ethiopia[26] reveal that both instruments barely contain provisions on how any witness may be

[19] Article 587.
[20] Article 637(b).
[21] Article 635(a).
[22] Article 644.
[23] The Federal Ministry of Labor and Social Affairs "Response to United Nations Questionnaire on Violence against Children."
[24] UNICEF "Pre-service workbook on justice for children".
[25] The Criminal Procedure Code Proclamation 1961 was drafted by a British jurist augmented the 1930 penal code. It was based on the Swiss penal code and many other secondary sources including the English common law. See the Country Studies Series by Federal Research Division of the Library of Congress "Ethiopia: Crime and Punishment – The Legal System".

handled during trial. The 1961 Criminal Procedure Code states that during the investigative stage:

> *"The investigating police officer may, where necessary, summon and examine any person likely to give information on any matter relating to the offence or the offender. Any person so examined shall be bound to answer truthfully all questions put to him. He may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge".* [27]

The 2004 Criminal Code, also known as the Penal Code, states that:

> *"Whoever being a witness in judicial or quasi- judicial proceedings knowingly makes or gives a false statement or expert opinion, or hides the truth whether to the advantage or the prejudice of any party thereto, is punishable, even where the result sought is not achieved, with simple imprisonment, or, in the more serious cases, with rigorous imprisonment not exceeding five years".*[28]

Both the 1961 Criminal Procedure Code and the 2004 Criminal Code simply make reference to a witness's obligation to speak the truth either during police investigations or during trial. There is no reference to how witnesses may be assisted during trial. The only reference to children in the 2004 Criminal Code states that:

> *Infants who have not attained the age of nine years shall not be deemed to be criminally responsible. The provisions of this Code shall not apply to them.*[29]

Again there is nothing in the criminal legislation to suggest that children should receive any form of assistance when they appear in the criminal courts.

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http://www.country-data.com/cgi-bin/query/r-4550.html
[accessed 15January 2011]

[26] The Criminal Code of the Federal Republic of Ethiopia Proclamation No. 414 of 2004 as published in the *Federal Negarit Gazetta,* May of 2005.

[27] Article 30(3).

[28] Article 453(1).

[29] Article 52.

The next point of search is the Ethiopian Constitution to determine whether it directly or indirectly reserves any special protection for children interfacing with the justice system. Article 36 (2) of the Constitution directs courts of law and other public and private institutions to give primary consideration to a child's best interests:

> *In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child.* (Emphasis added.)

It is important to note that the wording in the Ethiopian Constitution's Article 36 (2) closely resembles that of the Convention on the Rights of Children's article 3(1) states that.

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

The explanation in the similarity of the wording may be traced back to the fact that the then Transitional Government of Ethiopia unconditionally ratified the Convention on the Rights of Children in 1991, three years before the government adopted the current Constitution. The statement of accession of the Convention on the Rights of Children was published in 1992 in the official law gazette of the government known as the *Negarit Gazeta* as *Proclamation number 10 of 1992*.[30] The then transitional government proceeded to adopt the current Ethiopian Constitution in December of 1994.[31] In a way that can only be construed as the government's genuine intention to replicate the Convention on the Rights of Children's stance on children, the

[30] Save the Children Denmark "Child Labor in Ethiopia with special focus on Child Prostitution" . http://www.childtrafficking.com/Docs/sc_denmark_2004_child_labour_in_ethiopia_1.pdf [Accessed 15January 2011]

[31] The Transitional Government of Ethiopia was formed in 1991. The latter created a Constitutional Commission which in December of 1994 through a 547-member constituent assembly adopted the current constitution, establishing the Federal Democratic Republic of Ethiopia.
See ConstitutionNet "Constitutional History of Ethiopia".
http://www.constitutionnet.org/en/country/constitutional-history-ethiopia
[Accessed 15January 2011]

government adopted the Convention on the Rights of Children's wording in its Constitution and made it law.

The Constitution further points out that:

> *All international agreements ratified by Ethiopia are an integral part of the law of the land.*[32]

The Constitution thus makes provision for the incorporation into Ethiopian laws of international agreements the country has ratified or acceded to. As shown above, the Constitution makes a bold declaration that international agreements become laws upon ratification. The *Negarit Gazeta* further states that "All Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal *Negarit Gazeta*."[33] This is a direct order to the law makers and courts to consider and take into account all published instruments including the Convention on the Rights of Children. In compliance with one of the directives[34] of the *Negarit Gazeta*, the Convention on the Rights of Children has since been translated into *Amharic*, a chosen official language of the Federal Government, and ten other local languages for ease of reference.

By ratifying the Convention on the Rights of Children, adopting it and publishing it in the *Negarit Gazeta*, the Ethiopian government appears to want to hold itself accountable to the

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[32] Article 9(4).

[33] The Federal *Negarit Gazeta* Proclamation No. 3 of 1995.

[34] Proclamation No. 3/1995. Proclamation to provide for the establishment of the Federal Negarit Gazeta "2. Establishment of the Federal Negarit Gazeta.

1. The Federal Negarit Gazeta, a Federal Law Gazette published under the Umbrella of the House of Peoples' Representatives, is hereby established.
2. All Laws of the Federal Government shall be published in the Federal Negarit Gazeta.
3. All Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazeta".
4. The Federal Negarit Gazeta shall be published in both the Amharic and English languages; in case of discrepancy between the two versions the Amharic shall prevail.

http://www.ethiopar.net/type/Archive/Amharic/2term5y/2t5y/hopre/bills/bills/1995_96/procl3e.htm [accessed 15January 2011]

directives of the instrument. By emphasizing in the Constitution that courts of law must prioritize the best interests of the child, it is clear that the Ethiopian government intended to empower its courts with the ability to decide matters or even adopt measures that promote the best interests of a child. Article 50 (8) of the Constitution says that the States shall respect the powers of the Federal Government including the power to formulate and implement foreign policy and to negotiate and ratify international agreements.[35] That said, the Convention on the Rights of Children was transparently elevated to the level of an authoritative guideline and source of obligations for all Ethiopian courts seeking to enforce the rights of the children as directed by the Constitution. However, in reality, international instruments have not served much as a "direct source of legal rights and obligations" in the Ethiopian courts.[36]

There has been a distinct hesitation by courts in deciding matters based purely on the recognition of international agreements. This has since been blamed on the absence of an implementing legislation. According to the Committee on the Rights of the Child,[37] the Convention on the Rights of Children demands that governments commit to comprehensive appraisals of their domestic legislation and policy and establish the appropriate apparatus in order to bring them into conformity with the demands of the Convention on the Rights of Children. It states that:

> *"Ensuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental. In addition, the Committee on the Rights of the Child has identified a wide range of measures that are needed for effective implementation,*

[35] Article 51.

[36] ZB Zewdineh for Save the Children United Kingdom " A review of Legal and Policy Frameworks Protecting Orphans and Vulnerable Children in The Federal Democratic Republic of Ethiopia". http://www.africanchildinfo.net/documents/A%20review%20of%20legal%20and%20policy%20frameworks%20protecting%20orphans%20and%20vulnerable%20children%20in%20ethiopia_Save%20the%20Children%20UK.pdf
[Accessed 15January 2011]

[37] Office of the United Nations High Commissioner for Human Rights: Committee on the Rights of the Child. "The Committee on the Rights of the Child is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. It also monitors implementation of two optional protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography".
http://www2.ohchr.org/english/bodies/crc/
[Accessed 15January 2011]

> *including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels."* [38]

According to the Convention on the Rights of Children Committee, it is a government's duty to ensure that local legislation complements the Convention on the Rights of Children's "principles and provisions". The Ethiopian government does not appear to have fully discharged that duty. The government's desire to implement measures to protect children interfacing with the justice system was in line with the Convention on the Rights of Children and the Constitution. However, according to the dictates of the Convention on the Rights of Children, the government should have created specific legislation, including the law permitting use of intermediaries in the courts.

The question remains whether the application of the "best interests" of a child would include permitting child witnesses to use intermediaries as a way of preventing secondary traumatisation during trial. The challenge is in identifying the appropriate definition of a "best interest of the child". First of all, the Working Group that crafted the Convention on the Rights of Children did not provide a definition for the phrase "best interests of a child". [39] Secondly, the Convention on the Rights of Children Committee, whose mandate is to monitor the implementation of the Convention on the Rights of Children by its State parties, has also not outlined a distinct criterion in terms of which a child's best interests may be defined.

However, on 6 November, 2007, the Cassation Bench of the Ethiopian Federal Supreme Court passed a landmark decision that binds the lower courts, citing the "best interest of the child" as one of the cardinal principles of the Convention on the Rights of Children and a direct source of rights and obligations. The Cassation Bench stated that even if the Convention on the Rights of Children had not been published in the *Negarit Gazeta* as required by law, it could still be used to enforce all rights pertaining to children on national level.

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[38] Committee on the Rights of the Child - General Comments No. 5 CRC/GC/2003/5. http://www2.ohchr.org/english/bodies/crc/comments.htm [Accessed 15January 2011]

[39] *Kinderrechte* commentary "CRC on best interest of the child" (Translated from German). http://www.kinderrechte.gv.at/home/upload/crc_on_best_interest_of_the_child.pdf [accessed 15January 2011]

> *"[T]he Federal Supreme Court …. returned a verdict in which it cited a provision of the CRC as a direct source of rights and obligations. The Court invoked 'the best interest of the child,' which is one of the cardinal principles of the CRC, as a potent means of protecting a child from property grabbing. This is a giant stride in the right direction and moots the largely unconstructive stance that was held by many members of the legal community in the country. Since the decision of the Supreme Court is considered as a binding source of law (precedent) by virtue of a recent proclamation, the decision has definitely set an important precedent".*[40]

The court set a precedent by identifying the principle of the "best interest of the child" as the fundamental standard to be considered when deciding the issue of child custody and other concerns affecting the welfare of children. The Ethiopian African Child Legal Protection Centre indicated that the decision is a milestone in the Ethiopian legal history and that, among other factors, it provides a "unique opportunity for lower courts to follow suit and base their decisions upon the precedent set by the Cassation Court in applying provisions of the Convention on the Rights of Children or any other international human rights instrument in making decisions".[41] Still the question remains whether this alone is sufficient authority for intermediaries to be permitted to assist child witnesses, or whether there is still need for a government or legislature to create specific legislation which authorizes intermediary use.

According to the Convention on the Rights of Children Committee, all member States must ensure that all domestic legislation is fully compatible with the Convention and that the Convention on the Rights of Children's principles and provisions are capable of being applied directly and enforced appropriately. With specific intermediary legislation missing and a definition of the "best interest of the child" still lacking, the authority for intermediary use during

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[40] Zewdineh for Save the Children United Kingdom " A review of Legal and Policy Frameworks Protecting Orphans and Vulnerable Children in The Federal Democratic Republic of Ethiopia".

[41] The Ethiopian African Child Legal Protection Centre "A landmark decision invoking international human rights instruments in Ethiopian court". http://www.africanchildinfo.net/documents/Final%20press%20release%20for%20the%20Feb%20%2015%20media%20briefing%20_english_.pdf. [accessed 15January 2011]

trial must be determined by weighing the interests of the children against existing Constitution, relevant case law together with the Convention on the Rights of Children's principles.

The Convention on the Rights of Children's principles include promotion of a child's well being;[42] survival and development[43] and protection from harmful influences, abuse and exploitations.[44] Intermediary assistance protects a child witness from secondary trauma arising from the age-inappropriate demands of the accusatorial system, namely oral testimony, confrontation and cross-examination. Using an intermediary to shield a child from these demands is in line with the Convention on the Rights of Children's principles. Collectively, Ethiopia's ratification of the Convention on the Rights of Children, the subsequent recognition of the fact by the Ethiopian Constitution and the 2007 decision by the Cassation Bench provide the necessary and adequate authority for intermediaries to feature in the Ethiopian courts. It can thus be concluded that even in the absence of specific intermediary legislation, the use of intermediaries by Ethiopian child witnesses in the criminal courts Ethiopia is legitimate.

6.3 ETHIOPIAN INTERMEDIARIES

An Ethiopian victim-friendly bench describes a court-room setting where a child witness or any other person defined as a victim gives evidence from. He or she is sits in the separate room and receives assistance from the intermediary. UNICEF Ethiopia defines the objectives behind the introduction of the Ethiopian victim-friendly benches as to "protect child victims and child witnesses from secondary traumatisation" that may arise during judicial proceedings as well as enabling child victims or child witnesses to testify "freely and comfortably in a child-sensitive atmosphere".[45] Court sessions are held *in-camera* with only a few selected members of the public, including the parents or guardians in the gallery. When available, a child victim advocate may also be allowed in the courtroom.[46] An intermediary sits with the child in a separate room. By testifying from the special room, the child is precluded from confronting or

[42] Article 3.
[43] Article 6.
[44] Article 3.
[45] UNICEF "Pre-service workbook on justice for children".
[46] *Ibid.*

seeing the accused person.[47] A closed-circuit television and video camera provide the mode of communication through which the intermediary communicates with the court and through which the courtroom occupants are able to view the child and the intermediary. Cases involving child-witnesses from areas without child-friendly courts and intermediaries are transferred to areas which do have these facilities available.[48]

The first group of intermediaries was drawn from staff members of the supreme courts of Addis Ababa, Oromia and Tigray.[49] Following these pioneer trainings, victim-friendly benches were established for the first time within the Federal First Instance Court. Following their introduction in 2004, only four victim-friendly benches have since been established in the Federal First Instance Court in Addis Ababa, Mekelle, Awassa and Adama.[50]

6.3.1 Role of the intermediaries

The Ethiopian government reported that each child witness is to be "assisted by an intermediary to answer all questions from the courtroom".[51] An intermediary is considered staff and is appointed by the court.[52] With the aid of a closed-circuit television system, he or she acts as "a bridge" between the special room from which the child witness testifies and the main courtroom in which the presiding officer, the prosecutor, the accused and his or her defence attorney are present. The intermediary transmits questions posed from the main courtroom, be they from the judge, the prosecutor, the accused or the defence counsel to the child in "a child-sensitive language" and relays the answers provided by the child back to the courtroom.[53] In other words, the intermediary facilitates proper communication between the child and the courtroom in a way that is cognitively and developmentally appropriate for the child. All proceedings are recorded.[54]

[47] The Federal Ministry of Labor and Social Affairs "Response to United Nations Questionnaire on Violence against Children".
[48] *Ibid.*
[49] Save the Children Sweden "Training of Intermediaries" *Eastern and Central Africa Region Bulletin* 2004 /6 (10).
[50] UNICEF "Pre-service workbook on justice for children".
[51] The Federal Ministry of Labor and Social Affairs "Response to United Nations Questionnaire on Violence against Children".
[52] UNICEF "Pre-service workbook on justice for children".
[53] *Ibid.*
[54] *Ibid.*

6.3.2 Intermediary training

In 2004 UNICEF, in partnership with the government and other non-governmental organizations,[55] set up a Judiciary Training Centre for the first group of intermediaries, judges and prosecutors to train on the appropriate handling of child victims of sexual abuse. The first group of intermediaries was trained by training consultants from Zimbabwe.[56] The first intermediary training promoted a multi-sectorial approach in the handling of child victims and offenders.[57] The curriculum[58] was based on the following specifics:

1. The role of intermediaries
2. The effects of abuse on children
3. Child development and communication

There is currently only one qualified psychologist intermediary who is based in Addis Ababa.[59] The intermediaries in the other regions use court staff that has received one-week training on children's rights and national laws pertaining to children.[60] There is limited information on how intermediaries are monitored or regulated. However, UNICEF has reported that trial proceedings involving minors receiving intermediary assistance are all recorded.

6.4 FACTORS AFFECTING USE OF INTERMEDIARIES

Child protection requires adequate laws to facilitate its implementation, subsequent monitoring and evaluation. As pointed out above there is no intermediary legislation in Ethiopia. Although there is a significant dearth of information regarding intermediaries performance in Ethiopia, it is clear that the absence of intermediary regulatory laws is a major handicap to the intermediary system as there is no visible apparatus for management, monitoring and evaluation of intermediaries. In addition to an effective legislation that is properly enforced, a legal environment needs to be child friendly and sensitive to the needs of child victims of crime. A

[55] Save the Children Sweden "Training of Intermediaries".
[56] *Ibid.*
[57] *Ibid.*
[58] Interview with the National Coordinator for the Victim Friendly Courts in Zimbabwe. See *addendum* 1.
[59] UNICEF "Pre-service workbook on justice for children".
[60] *Ibid.*

committed and sensitised police force and judiciary are needed to facilitate the implementation process.

Adding to the problem that a high percentage of child witnesses are handled by judges and prosecutors who lack knowledge and experience in the sensitive handling of child victims of abuse, there is a shortage of courts in Ethiopia. Members of parliament have voiced their concern over the fact that the federal courts lack proper facilities resulting in only a "few number of benches and shortage of properly designed courtrooms."[61] As of 2007, courts offering intermediary assistance to child witnesses were only available in Addis Ababa, Mekelle, Awassa and Adama.

There is also a significant shortage of judges and prosecutors.[62] In order to address the staffing shortage, the government recruitment standards for legal professionals were deliberately lowered in order to expedite the engagement of younger and innovative professionals. A law degree is no longer a necessity for one to be appointed a Federal or State judge. An ideal candidate must be above the age of 25, loyal to the current Constitution and must have acquired legal skills through integrity and a sense of justice. Most law graduates end up not being hired because they are affiliated with the "wrong" political party.[63] The Judicial Administration Commissions responsible for the appointments and terms of employment has been accused of nepotism, inconsistency and arbitrariness.

Most judicial appointments are reportedly clandestine and judicial vacancies are not advertised.[64] A training college, the Ethiopian Civil Service College, was created to supplement legal training to judges and typically most state judges have three to six months of legal training. This training is simply not adequate. Most of the training programmes are sponsored by major development

[61] B.Shewareged "Poor Facilities, a Few Number of Judges Impeding Court Sessions" *The Ethiopian Reporter* 20 June 2009.
http://www.ethiopianreview.com/articles/9704
[accessed 15January 2011]
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*

agencies like CIDA and USAID and one underway sponsored by the French Embassy. This has resulted in an influx of inadequately trained and inexperienced judges to the bench.[65]

In a 2005 report to the United Nations, the government admitted that some judges lacked special training related to violence against children. In 2009, the Council of Judges suspended a Federal High Court judge on grounds that the judge had breached the Ethiopian Constitution and international law.[66] The judge had on appeal acquitted a father who had been charged of raping his own daughter on grounds that the girl had fabricated lies against the offender and commented that "Girls of that age walk around with fire hidden between their legs." The Ethiopian prosecutors have also been reported to lack the sensitivity needed to deal with child witnesses. It has been reported that the questions they pose to witnesses are unrealistic and insensitive.[67]

In the face of such insensitivity to proper ways of handling sexual abuse victims, the efficacy of the intermediary system is compromised. As shown by research, court role players who have a limited understanding of the negative impact of the accusatorial system on child witnesses are highly unlikely to empathize with child witnesses. They are least capable of appreciating the role played by intermediaries. Since it is up to the prosecutor and the judge to call for intermediary services, they may in most cases consider it not necessary to secure the presence of an intermediary. A limited understanding or appreciation of the intermediary system means that the system is either under- utilized or subjected to inconsistent application. The system's growth and efficiency are compromised. In a country like Ethiopia, which comes with independent states, the intermediary system faces a significant challenge in terms of credibility and growth.

[65] "Leading UK's Children's Judge Visits Ethiopia" Child World Spring 2008. http://www.everychild.org.uk/docs/13%20childworld_web.pdf [accessed 15January 2011]

[66] B. Shewareged "House dismisses judge" *The Ethiopian Reporter* 6 June 2009. http://en.ethiopianreporter.com/index.php?option=com_content&task=view&id=1175&Itemid=26 [accessed 15January 2011]

6.5 SUMMARY

The Ethiopian government accepted that child victims of sexual abuse needed assistance in order to testify effectively whilst receiving the necessary protection to do so. The introduction of intermediaries in the Ethiopian criminal justice system in 2004 was meant to achieve that objective. The absence of an enabling legislation for the intermediary system is problematic. However, the country's recognition of the Convention on the Rights of Children, the Constitution's directive to the courts to look out of for a child's best interests and the decision by the Cassation Bench in 2007 collectively appear to provide the Ethiopian intermediary system with adequate legitimacy.

Factors affecting the system's growth and efficacy include the shortage of intermediaries, appropriately designed courts, trained judges and prosecutors. The inconsistent use of intermediaries affects its and growth and credibility, especially in the light of the fact that Ethiopia is made up of independent states who may not be easily persuaded that the system is viable and worth implementing in their own states. Most importantly, the fact that there is no publication of any information relating to the use of intermediaries makes it difficult to monitor and evaluate. It compromises research in this area.

CHAPTER

7

THE INTERMEDIARY SYSTEM IN NAMIBIA

7.1 INTRODUCTION

The judicial structure in Namibia largely parallels that of South Africa. The seven decades after 1917 are characterized by Namibia's colonial domination by South Africa.[1] Prior to 1977, the country's criminal prosecutions took place in terms of the Criminal Ordinance which was similar to the Criminal Procedures Act 51 of 1977 of South Africa.[2] This explains why the Namibian Criminal Procedure Act 51 of 1977, which amounts to a literal replica of a South African Act, the Criminal Procedure Act 51 of 1977, bears the same name.

Child sexual abuse is a major problem in Namibia.[3] The magnitude of the abuse prompted the government to promulgate new child-friendly laws and to identify new strategies and initiatives that enhance the protection of children. Although the Namibian legislators have drafted legislation that permits the use of intermediaries, currently there are no courts offering intermediary services in the country. The absence of adequate funding for the project has been largely blamed for the delay in the introduction of intermediaries.

Despite the fact that there are no intermediaries in Namibia, the country was included in this study because of its genuine attempts at introducing novel changes in the manner in which child witnesses and other vulnerable witnesses are handled under the adversarial system. Most importantly, the fact that the Namibian legislators have essentially drafted noteworthy pieces of

[1] J Suzman "Minorities in independent Namibia".
http://www.minorityrights.org/1060/reports/minorities-in-independent-namibia.html
[accessed 15January 2011]

[2] N Horn "International human rights norms and standards: The development of Namibian case and statutory Law".
http://www.unam.na/centres/hrdc/7_nternational_human_rights_norms_and_standards.pdf
[accessed 15January 2011]

[3] See "LAC Concerned About Growing Child Sexual Abuse".
http://www.lac.org.na/news/pressreleases/pressr-sexabuse.html
[accessed 15January 2011]

legislation which in fact authorize the courts to order intermediary assistance for vulnerable witnesses must not be overlooked. This is what forms the basis of the discussion in this chapter.

In this chapter, the Criminal Procedure Amendment Act of 2003[4] which outlines novel special provisions[5] for vulnerable witnesses including the introduction of persons through whom children are cross-examined will be analyzed. The notable attempt by the Namibian government to replace the 1977 Criminal Procedure Act with a new Criminal Procedure Act of 2004[6] which among other factors lays out elaborate provisions[7] on the use of intermediaries in the Namibian courts will be examined. Although the 2004 Criminal Procedure Act was short-lived and was immediately withdrawn and replaced by the old 1977 Criminal Procedure Act,[8] it has been indicated that the 2004 Criminal Procedure Act will be fully re-instated. The possible explanations behind the delay in the implementation of the intermediary system despite the presence of enabling legislation will also be analysed.

7.2 BACKGROUND TO CHILD WITNESSES IN THE NAMIBIAN COURTS

Before 1989, the Namibian legal system overlapped in many instances with the South African legal system. After being colonized by Germany in 1885, the surrender of the Kaiser's military forces in German South West Africa to the Union Army of South Africa in 1917 marked the beginning of Namibia's domination by South Africa under the Covenant of the League of Nations. South Africa held all the legislative powers over Namibia, then known as South West Africa. A significant number of legal instruments from both countries contain the same wording and some Namibian Supreme Court decisions are found in the South African Law Reports.[9] Although the Criminal Procedure Act 51 of 1977 (hereafter, the "1977 Criminal Procedure Act 51 of 1977") is still applicable,[10] since the Namibian independence in 1990, amendments to the

[4] Act 24 of 2003. This is the legislation which amended the Criminal Procedure Act 51 of 1977.
[5] Section 158A – special arrangements.
[6] Act 25 of 2004.
[7] Section 193 which closely resembles the South African Section 170A.
[8] This means that the 2003 Criminal Procedure Amendment Act is currently effective.
[9] Crime and Society "A comparative criminology tour of the world: Namibia".
See also: N Horn "International human rights norms and standards: The development of Namibian case and statutory law".
[10] As amended by the Criminal Procedure Amendment Act 24 of 2003.

South African Criminal Procedure Act 51 of 1977 are no longer applicable in Namibia, unless amended in Namibia.

The Namibian criminal justice system is accusatorial in nature. The accused has the right to a fair and public hearing before an independent, impartial and competent court.[11] The accused is expected to confront and question his or her accusers. The Constitution protects this right by stating that:

> *"All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them".*[12]

Although the Namibian Constitution does not make specific reference to children's rights in the justice system, the provisions under the "Respect for Human Dignity" impliedly cover the children. The provision states the following:

> "1) *The dignity of all persons shall be inviolable.*
>
> (2) *(a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*
>
> *(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."*[13]

The post independent Constitution of the Republic of Namibia was adopted at independence in 1990 and it was from the onset, connected to international law. It states that:

> *Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.*[14]

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[11] AM Silungwe "High Court of Namibia Vulnerable Witnesses' Project". http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_r.pdf [accessed 15January 2011]

[12] Article 12 (1) (d).

[13] Article8.

The Namibian government has signed several child rights-based international and regional instruments which include the Convention on the Rights of the Child and the African Charter. Namibia is also part of the General Assembly[15] which adopted the resolution for the Declaration of Basic Principles of Justice.[16] It also signed the SADC Declaration on Gender and Development and the Addendum on Prevention and Eradication of Violence against Women and Children.[17] In Namibia no other laws are necessary to enact the international laws and other United Nations human rights covenants and treaties the country has ratified or acceded to. In other words, all international and regional instruments the country has ratified or acceded to automatically become part of the law of the country.

In the late 90s, the manner in which Namibian criminal procedure handled child victims and witnesses was typically like any other adversarial system. The system did not provide special protection to the children. Child victims of sexual abuse were required to be competent in order to testify[18] although some children would testify *in camera.* Child witnesses had to give *viva voce* evidence without assistance.[19] They were subsequently cross-examined by the accused or the defence counsel. The difficulties experienced by child witnesses in the courtroom were not unnoticeable. A significant number of judges and prosecutors expressed their concerns over the

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[14] Article144.

[15] The General Assembly is the main deliberative, policymaking and representative organ of the United Nations. Comprising all 192 Members of the United Nations including South Africa, Zimbabwe, Namibia and Ethiopia, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter. The Assembly meets in regular session intensively from September to December each year, and thereafter as required.
http://www.un.org/en/ga/
[accessed 6th January 2011]

[16] All four countries were part of the United Nations General Assembly which adopted by resolution 40/34 of 29 November 1985, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which recognizes* that victims of crime and the victims of abuse of power, and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders .

[17] SADC Declaration on Gender and Development was signed by most African Heads of States including Namibia in Blantyre on the 8th September 1997. See "Sadc Declaration on Gender and Development".
http://www.chr.up.ac.za/undp/subregional/docs/sadc6.pdf
[accessed 15January 2011]

[18] UNESCO "Towards Victim Friendly Sexual Offences Courts in Namibia".
http://unesdoc.unesco.org/images/0012/001241/124177eo.pdf
[accessed 15January 2011]

[19] Sections 153 and 154 of the *Criminal Procedure Act.*

manner in which children struggled to give evidence in court. In 1998, a Namibian prosecutor stated that:

> *"It is a standing rule that a complainant giving evidence must do so in the presence of the accused, despite her age. The complainant stands alone in the witness box and can be intimidated by the accused's presence, often a male parent or relative. The complainant becomes more anxious… the alien atmosphere of the court combined with other factors as mentioned above, have such an impact on the younger female witnesses that they are often reduced to silence… . This is one of the most important reasons why cases of sexual abuse are not officially reported."*[20]

In 2000, UNESCO highlighted the high levels of discomfort experienced by young children as they struggled to give evidence in the presence of the accused. The stress experienced by a child witness was said to rekindle a child's memories of the original traumatic act.[21] The courtroom attire worn by the judge and the other court officials was found to be intimidating to the vulnerable witnesses.[22] Judge Silungwe later addressed the issue of re-traumatisation of the Namibian child witnesses by pointing out the following:

> *"It is generally accepted that sexual crimes and criminal acts of domestic violence inflict psychological trauma on the victims… However, as previously shown, it is not easy for children and other vulnerable witnesses to testify in the physical presence of the alleged perpetrator, since the stress of a direct confrontation with the accused may result in such witness confusing events or details, recalling things incorrectly, or forgetting essential information and consequently losing credibility."*[23]

The judge further confirmed that some Namibian child witnesses did find the attire worn by the judge and other court officials to be intimidating. Regarding the stressful criminal litigation

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[20] D Hubbard "Children in Court: Protecting Vulnerable Witnesses". http://www.lac.org.na/projects/grap/Pdf/childcourt2004.pdf [accessed 15January 2011]

[21] Theron *The impact of the Namibian judiciary system on the child witness* (2005)51.

[22] Theron *The impact of the Namibian judiciary system on the child witness* (2005)89.

[23] This comment was made by Judge Silungwe in the "High Court of Namibia Vulnerable Witnesses' Project".

process, it was established that a child who was not prepared to handle the high level courtroom aggression would be "crushed".[24] The Namibian child witnesses were reported to struggle the most with the dread of testifying in public and fear due to their inability to understand complex legal procedures, confrontation and cross-examination.[25]

The origins of the Namibian intermediary system can be traced back to the work of the 1999 Victim-Friendly Sexual Offences Courts Project (hereafter the "Sexual Offences Project"). The creation of the Sexual Offences Project was largely an expression of discontent within the Namibian judiciary system that the accusatorial system was not equipped to address the developmental needs of child witnesses.[26] The increase in sexual offence matters served to highlight this anomaly. The Sexual Offences Project, comparable to the Zimbabwean Victim-Friendly National Committee, was multi-sectoral in nature.[27] Its main objective was to identify solutions towards the eradication of violence against women and children.

In 1999 and 2000 the Sexual Offence Project undertook two major study tours to the United Kingdom[28] and South Africa.[29] In the United Kingdom the delegates visited the Zero Tolerance Trust in Edinburgh, St Mary's Sexual Assault Referral Centre in Manchester, and the Leeds Inter-Agency Project in Leeds National Society for the Prevention of Cruelty to Children. The group also visited the Metropolitan Police Headquarters, St Alban's Crown Court, the Crown Prosecution Service Policy Directorate, the Home Office and the Stratford Police Station. The trip to the South African Wynberg Sexual Offences Courts occurred in 2000. The delegates observed how the courts were using intermediaries to protect vulnerable witnesses during trial. The group also observed the use of closed-circuit televisions, special rooms and one-way mirrors in the victim-friendly courts.

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[24] "*Child witnesses, „Crushed in Court'"* The Namibian 2nd June 2009. http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=55835&no_cache=1 [accessed 15January 2011]
See also Hubbard "Children in Court: Protecting Vulnerable Witnesses".
[25] Theron *The impact of the Namibian judiciary system on the child witness* (2005)52.
[26] UNESCO "Towards Victim Friendly Sexual Offences Courts in Namibia".
[27] UNESCO "Towards Victim Friendly Sexual Offences Courts in Namibia".
The Sexual Offences Project had a diverse membership.
[28] UNESCO "Towards Victim Friendly Courts in Namibia.
[29] *Ibid.*

The Sexual Offences Project used the study tours to justify its recommendations for change in the Namibian criminal courts system. The Sexual Offences Project's recommendations underscored the need for the amendment of the 1977 Criminal Procedure Act in order to make room for more protection for child witnesses as they interface with the criminal justice system. This was achieved in 2003 when the 1977 Criminal Procedure Act was successfully amended by the Criminal Procedure Amendment Act 24 of 2003 (hereafter, the "2003 Criminal Procedure Amendment Act").

The 2003 Criminal Procedure Amendment Act's section 158A introduced special arrangements for the protection of the vulnerable witnesses and section 166 introduced the concept of the intermediary. Although section166 does not use the term "intermediary" it is generally assumed that the person mentioned in the section through whom a witness may be cross-examined is essentially an intermediary. However in the following year in 2004, the government promulgated the Criminal Procedure Act 25 of 2004 (hereafter, the" 2004 Criminal Procedure Act") which was meant to replace the entire 1977 Criminal Procedure Act with all its amendments. The new 2004 Criminal Procedure Act's section 193 outlined elaborate provisions sanctioning the use of intermediaries in the Namibian courts. Section 193 was distinctly similar to South Africa's section 170A.[30]

Almost as suddenly as it had been promulgated, the 2004 Criminal Procedure Act was immediately with.drawn and replaced by its predecessor the 1977 Criminal Procedure Act. This meant that the 2003 Criminal Procedure Amendment Act was effectively re-instated and remains effective pending the re-instatement of the 2004 Criminal Procedure Act.[31] The theatrical withdrawal of the new 2004 Criminal Procedure Act was largely attributed to the fact that the Namibian government did not have the necessary resources to fully implement it. The government's position is that once it has secured adequate financial resources to fully implement the Criminal Procedure Act 25 of 2004, it shall reinstate it.

[30] The South African 1977 Criminal Procedure Act of 1977 as discussed in chapter 4.
[31] See Schwikkard "The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act".

Despite the delays in the implementation of the intermediary system, child-friendly courts exist in Namibia. Although the courts do not offer intermediary assistance, they have special rooms from where a witness can testify without confronting the accused. The first such court was established in Walvis in 2002 before the 2003 Criminal Procedure Amendment Act had been passed.[32]

7.3 LEGISLATIVE AUTHORITY FOR INTERMEDIARY USE

Since the year 2000, there are two significant pieces of legislation which have been passed in Namibia which are cognizant of the fact that child witnesses need special protection in order to testify effectively under the accusatorial system. The first one is the 2003 Criminal Procedure Amendment Act, and the second one is the Criminal Procedure Act 25 of 2004. Both legislations permit the courts to order intermediary assistance for deserving vulnerable witnesses. For the purposes of this study, the 2003 Criminal Amendment Act will be discussed first followed by the examination of the withdrawn 2004 Criminal Procedure Act.

7.3.1 The Criminal Procedure Amendment Act (24 of 2003)

The 2003 Criminal Procedure Amendment Act will be discussed in two parts. The first part comprises section 158A which focuses on the special provisions introduced for the purpose of protecting the vulnerable witness as he or she gives evidence. The second part which comprises section 166 focuses on the introduction of a person through whom a vulnerable witness may be cross-examined.

Section 158A is commonly referred to in Namibia as the "Vulnerable Witness Act" because of the way it explicitly outlines special provisions for vulnerable witnesses. Although section 158A does not make reference to intermediaries, it is still necessary to examine its provisions as they provide some important insight on why the Namibian government has still not introduced intermediaries in the courts.

[32] M Barnard "Vulnerable witnesses need protection: Facing your accused rapist in court must be the worst nightmare of any woman, let alone a five-year-old girl".
http://findarticles.com/p/articles/mi_hb281/is_3_14/ai_n28958280/
[Accessed 15January 2011]

Section 158A

(1) *A court before whom a vulnerable witness gives evidence in criminal proceedings, may on the application of any party to such proceedings or the witness concerned, or on its own motion make an order that special arrangements be made for the giving of the evidence of that witness.*

(2) *„Spœcial arrangements' means one or more of the following steps:*

(a) *The relocation of the trial to another location while the evidence of the vulnerable witness is being heard;*

(b) *the rearrangement of the furniture in a court room, or the removal from or addition of certain furniture or objects to or from the court room, or a direction that certain persons sit or stand at certain locations in the court room;*

(c) *notwithstanding the provisions of section 153 the granting of permission to any person (hereinafter referred to as a „support person') who is a fit person for that purpose to accompany the witness while he or she is giving evidence;*

(d) *the granting of permission to the witness to give evidence behind a screen or in another room which is connected to the court room by means of closed circuit television or a one way mirror or by any other device or method that complies with subsection (6);Act No. 24, 2003 Criminal Procedure Amendment Act, 2003;*

(e) *the taking of any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned.*

(3) *For the purposes of this section a vulnerable witness is a person -*

(a) *who is under the age of eighteen;*

(b) *against whom an offence of a sexual or indecent nature has been committed;*

(c) *against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship;*

(d) *who as a result of some mental or physical disability, the possibility of intimidation by*

the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence

(4) The support person is entitled to-

(a) stand or sit near the witness and to give such physical comfort to the witness as may be desirable;

(b) interrupt the proceedings to alert the presiding officer to the fact that the witness is experiencing undue distress:

Provided that subject to subsection (5), the support person shall not be entitled to assist the witness with the answering of a question or instruct the witness in the giving of evidence

(5) The court may give instructions to a support person prohibiting him or her from communicating with the witness or from taking certain actions, or may instruct the support person to take such actions as the court may consider necessary.

(6) When a witness gives evidence behind a screen or in another room, the accused, his or her legal representative, the prosecutor in the case and the presiding officer shall be able to hear the witness and shall also be able to observe the witness while such witness gives evidence.

(7) When a court is considering whether an order under this section should be made, it shall also consider the following matters –

(a) the interest of the state in adducing the complete and undistorted evidence of a vulnerable witness concerned;

(b) the interests and well-being of the witness concerned;

(c) the availability of necessary equipment and locations;

(d) the interests of justice in general."

7.3.1.1 Section 158A: Special arrangements

Section 158A (1) authorizes courts to order that "special arrangements" be made for a witness. The court may make this order in response to an application by an interested party or on the basis of its own motion. This means that where a prosecutor does not apply for an order for "special arrangements" for a deserving witness, the court has the power to make the order for that witness.

Section 158(2) provides a summary of what "special arrangements" entail. The subsection empowers the courts with the ability to order the relocation of a trial to another place.[33] The courts may also order that courtroom furniture or items be removed or rearranged.[34] Furthermore, the court may appoint a support person to assist a witness as he or she gives evidence.[35] This subsection makes it possible for courts to order that a witness testifies from behind a screen or one-way mirror.[36] The witness may also testify from a separate room by means of a closed-circuit television.[37] All this is done in order to enable a vulnerable witness to give evidence effectively.

The special rooms from which children may testify from must be comfortable and non-threatening. The child- friendly court at the Katutura Regional Magistrates' Court is conveniently furnished to suit children. It contains toys, children's books and colouring materials.[38] The latest child-friendly courtroom constructed in 2008 enables the child witness to see the judge. The closed circuit television in the special room can zoom in on the accused in a way that enables the child witness to identify the accused when necessary.[39] The special room is meant to accommodate the child witness and any other person including the interpreter.

[33] See subsection (2)(a).
[34] See subsection (2)(b). Some persons may be ordered to sit or stand at certain locations in the court room.
[35] See subsection (2)(c).
[36] See subsection (2)(d).
[37] *Ibid.*
[38] Hubbard "Children in Court: Protecting Vulnerable Witnesses".
[39] Silungwe "High Court of Namibia Vulnerable Witnesses' Project".

Section 158A (3) provides the definition of a vulnerable witness. The subsection provides several qualifying factors. The witness may be below the age of 18.[40] He or she may be a victim of a sexual offence or an indecent act.[41] The witness may also be a victim of violence perpetrated by a close family member, spouse or "partner in any permanent relationship".[42] The vulnerable witness may because of his or her mental or physical condition or background possibly suffer undue stress while giving evidence.[43] The witness may also because of the possible intimidation by the accused or any other person suffer undue stress which may interfere with his or her ability to testify effectively.[44] The qualifying factors are not cumulative in that they can stand alone. Effectively this means that a woman of 40 years of age, who is a victim of domestic violence at the hands of her spouse, may be classified as a vulnerable witness and may benefit from the special provisions mentioned in subsection (1).

Section 158A (4) and (5) addresses the use of a support person by a witness.

Section 158A (6) provides that in the event that a vulnerable witness gives evidence from behind a screen or from another room, the accused, his or her defence attorney, the presiding officer and the prosecutor must at all times be able to see and hear the witness.

Section 158A (7) provides an outline of factors which the court must take into account before making an order for "special arrangements. In each matter, the court must primarily consider the interests of the State towards obtaining an accurate and complete testimony from the witness.[45] The court must also consider the welfare of the vulnerable witness.[46] Before making an order, the court must consider the availability of the "necessary equipment and locations".[47] In other words, even when a vulnerable witness is likely suffer undue stress due to fear of the accused, if the court building is not equipped with one-way mirrors or special rooms, the vulnerable witness may be ordered to testify from the court room.

[40] See subsection (3)(a).
[41] See subsection (3)(b).
[42] See subsection (3)(c).
[43] See subsection (3)(d).
[44] *Ibid.*
[45] See subsection (7) (a).
[46] See subsection (7) (b).
[47] See subsection (7) (c).

Despite the brief the interruption when the 2004 Criminal Procedure Act was promulgated and then subsequently withdrawn, the 2003 Criminal Procedure Amendment Act has been effective for seven years. Although it could not be established how many victim-friendly courts there are in Namibia, Judge Damaseb in 2009 admitted that there was a significant shortage of child-friendly courts.[48] Child witnesses are still giving evidence from the main courtroom. Justice Damaseb pointed out how some judges have to "cast away their robes" in order not to frighten the young witnesses.[49] After being ordered to testify in a regular court, some children reportedly refuse to do so and the court has to relocate to the premises offered by the Child and Women Abuse Centre in Katutura.[50] This continued state of affairs is unjustifiable especially considering the fact that the section 158A which provides for special arrangements has been effective for almost seven years. It is not absurd to suggest that the Namibian government does not seem to have prioritized the full implementation of section 158A as shown by continuing shortage of victim-friendly courts. Schwikkard in commenting on the special arrangements in section 158A stated the following:

> *"This section can be viewed as ameliorating the inevitable disadvantages suffered by vulnerable witnesses in an adversarial criminal justice system. However, the effective protection of vulnerable witnesses will have significant resource implications, and it will be interesting to see how frequently these protections materialise. The legislature was clearly aware of the resource implications; this is reflected is section 158A, which requires the court to take the following factors into account before ordering that special arrangements be made for a vulnerable witness"*[51]

The availability of resources is the overall determining factor towards the fulfillment and effectiveness of section 158A(2). This unfortunately casts doubt on the government's sincerity towards the effective protection of child witnesses in the criminal justice system.

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[48] See Superior Courts "Address by the Honourable Judge President of the High Court of Namibia Mr. Justice P.T. Damaseb on the occasion of the inauguration of the High Court Vulnerable Witness Project High Court Windhoek 21 July, 2008." http://www.superiorcourts.org.na/high/docs/speeches/vulnerablewitnessproject.pdf [accessed 15January 2011]

[49] *Ibid.*

[50] *Ibid.*

[51] See Schwikkard "The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act".

Before making an order for special arrangements, the courts are called up to consider the interests of justice in general. This possibly means that the courts must also consider the rights of the accused.[52] There is significantly limited information on the experiences of child victims of sexual abuse in the Namibian courts. A 2005 study by Theron revealed that some child witnesses are denied access to child-friendly court facilities.[53] In the study, which involved seven children, it was reported that none of the child witnesses was permitted to use child-friendly court facilities. It was also reported that none of the parents of the children knew that such facilities existed. Only one out of the seven children had received court preparation. Six of the children found testifying in court to be a scary and frustrating experience. One child was made to testify whilst standing on a chair. Six of the children struggled with cross-examination. Only one child out of the seven found testifying in court to be beneficial.

It is therefore not uncommon for young witnesses to be ordered to testify from the main courtroom despite the availability of special rooms and other child-friendly facilities. It appears that the presence of subsection (7) has pre-conditioned some presiding officers into overlooking the special needs of vulnerable witnesses so much that even when the resources are available, they do not see the importance of granting them even to deserving witnesses.

Recently the Prosecutor General of Namibia has secured various training programmes for prosecutors both in the magistrates and high courts on how to handle child victims of sexual abuse. One of the training programmes was delivered by the South African based Institute for the Child Witness Research and Training.[54] However, the non-availability or shortage of resources in the Namibian criminal courts from 2003 to 2010 continues on unabated largely due to the presence of the permissive subsection (7).

[52] See subsection (7) (d).
[53] Theron *The impact of the Namibian judiciary system on the child witness* (2005)70.
[54] As indicated in an interview with the Prosecutor General. See *addendum* 7.

7.3.1.2 Section 166: Cross-examination and re-examination of witnesses

Section 166 was inserted into the 1977 Criminal Procedure Act to help improve the way vulnerable witnesses give evidence in the criminal courts.[55] It focuses on the cross-examination and re-examination of witnesses.

(3) (a) If it appears to the court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the crossexaminer to disclose the relevance of any line of examination and may impose reasonable limits on that cross-examination regarding the length thereof or regarding any particular line of examination.

(b) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.

(4) Notwithstanding the provisions of subsections (1) and (2) or anything to the contrary in any other law contained but subject to subsection (5), the cross-examination of any witness under the age of thirteen years shall take place only through the presiding judge or judicial officer, who shall either restate the questions put to such witness or, in his or her discretion, simplify or rephrase such questions.

(5) The court may allow the cross-examination of a witness referred to in subsection (3) to occur through a person other than the presiding officer if-

(a) that person has the qualifications determined by the Minister by notice in the Gazette; and
(b) that person is immediately available when the witness concerned gives evidence.

(6) If the person referred to in subsection (5) is not in the full time employ of the state, the relevant provision of section 191 shall apply to that person as if he or she is giving evidence

[55] As added by Act 24 of the Criminal Procedure Amendment Act of 2003.

for the party for which the witness concerned gives evidence".

Under subsection (3), a presiding officer has the power to limit the use of irrelevant cross-examination which serves to harass or intimidate a witness. The presiding officer can also set reasonable limits on the length of cross–examination. There is no age limit set for the witness.

Subsection (4) permits the cross-examination of child witnesses under the age of thirteen through a presiding officer or judicial officer. Although section 166 does use not the term "intermediary" to refer to the person through whom a witness may be cross examined,[56] it is generally accepted that the person referred to in subsection (5) is in fact an intermediary.[57] According to subsection (4), the intermediary is expected to paraphrase, simplify or rearticulate the questions put to the witness. As no intermediaries have been used in the courts, it is not possible to assess the applicability of this requirement.

Subsection (4) defines an intermediary as a person whose qualifications is supposed to have been gazetted by the Minister of Justice for this purpose but it could not be established whether it had been promulgated. As in South Africa, in Namibia it is the Minister who determines the classes of persons who may be appointed as intermediaries.

Subsection (5) (a) permits the use of an intermediary during the cross-examination of witness. Although subsection (4) mentions an age limit, subsection (5) (a) and (b) do not place age restrictions on the witness who may use an intermediary. Effectively, the use of intermediaries is not limited to children under the age of thirteen but may be also used for any child under the age of eighteen.[58] Hubbard comments that:

"Based on those facts and with the support of various Ministries and NGOs, the „Vulnerable Witnesses' Act was passed in parliament at the end of 2003. It is a very

[56] In subsection (5) of section 158.
[57] Hubbard "Children in Court: Protecting Vulnerable Witnesses". http://www.lac.org.na/projects/grap/Pdf/childcourt2004.pdf [accessed 6th April 2010]
[58] Hubbard "Children in Court: Protecting Vulnerable Witnesses".

> *important Act that will allow vulnerable witnesses, including children, people with disabilities, and victims of sexual offences or domestic violence to feel safer and more comfortable when reporting a case. The Criminal Procedure Amendment Act 24 of 2003 provides the following protections for vulnerable witnesses: …cross-examination through the presiding officer or an intermediary, to make sure that lawyers do not try to intimidate or confuse a witness."*

Subsection (5) (b) makes reference to the availability of intermediaries. The provision of intermediary services is not unconditional as it is entirely based on their availability. It is important to note that under this provision, the courts are under no compulsion to provide intermediary services even to deserving vulnerable witnesses. Again, this exemption for the courts makes it legitimate for them to order children to testify under conditions that re-traumatize them.

Inevitably, the real objective of the legislature and the government's commitment towards child protection in the justice system are subject to scrutiny. The presence of such an exemption as in section 166 (5) (b) implies that the legislature anticipated delays in either the launch of the intermediary system itself or the provision of an adequate number of intermediaries in the courts. The legislature then decided to preempt any future pressure by including subsection (5)(b). This seems to have worked because seven years after the promulgation of this law, there are no intermediaries in the Namibian courts. The government continues to blame the absence of adequate funding for the project.[59]

7.3.2 The Criminal Procedure Act of 2004

The Criminal Procedure Act of 2004 was short-lived as it was immediately suspended and withdrawn on the grounds that the government lacked adequate resources to fully implement it.[60] It was meant to replace the entire 1977 Criminal Procedure Act originally inherited from South

[59] See subsection (5).

[60] Interview the key informant Attorney General. See *addendum* 7. See also Schwikkard "The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act". http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/09-1/schwikkard.pdf [accessed 15 January 2011]

Africa. After its withdrawal the 2003 Criminal Procedure Amendment Act was immediately re-instated.

Despite its seemingly short life, it is necessary to analyse the 2004 Criminal Procedure Act because it stands to be re-instated once the government has secured the requisite resources and most importantly because it contains elaborate provisions on the use of intermediaries. There are two specific sections in the 2004 Criminal Procedure Act which relate to the protection of vulnerable witnesses as they testify in the criminal courts. The first one, contained in section 189, re-enacts the repealed provisions of section 158A's special arrangements for vulnerable witnesses.[61] Since section 189 is similar to the already discussed section 158A it will not be examined.

Section 193 of the 2004 Criminal Procedure Act makes special reference to the use of intermediaries in the protection of vulnerable witnesses as they interface with the criminal justice system.

7.3.2.1 Section 193: Evidence through intermediaries

(1) *When criminal proceedings are pending before a court and it appears to the court that it would expose a witness under the age of 18 years to undue mental stress or suffering if that witness testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary to enable that witness to give his or her evidence through that intermediary.*

(2) (a) *Notwithstanding section 187(1) and (2) or anything to the contrary in any other law contained, no examination, cross-examination or reexamination of a witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, may take place in any manner other than through that intermediary. No.3358 113 Government Gazette 24 December 2004*

(b) *The intermediary so appointed may, unless the court directs otherwise, convey the*

[61] This is section 158 A of the Criminal Procedure Act 51 of 1977 as amended by Act 24 of the Criminal Procedure Amendment Act of 2003. Section 158A is discussed above.

general purport of any question to the witness concerned

(3) If a court appoints an intermediary under subsection (1), the court may direct that the witness concerned gives his or her evidence at any place –

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the proceedings in question to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(b) An intermediary who is not in the full-time employment of the State must be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, in consultation with the Minister responsible for finance, may determine.

(5) (a) No oath, affirmation or admonition that has been administered through an intermediary in terms of section 186 is invalid and no evidence that has been presented through an intermediary is inadmissible solely on account of the fact that the intermediary was not competent to be appointed as an intermediary in terms of a notice under subsection (4)(a) at the time when that oath, affirmation or admonition was administered or that evidence was presented.

(b)

If in any criminal proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of the appointment, was not competent to be appointed as an intermediary in terms of a notice under subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence with due regard to –

(i) the reason why the intermediary was not competent to be appointed as an intermediary, and the likelihood that that reason will affect the

reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness in respect of whom that intermediary was appointed will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(6) Nothing in subsection (5) contained is to be construed as preventing the prosecution from presenting anew any evidence that was presented through an intermediary referred to in that subsection.

Section 193A (1) explicitly states that an intermediary may only be appointed if it appears to the court that a witness under the age of eighteen may experience undue stress and suffering if he or she testifies in court. There is no automatic appointment of intermediaries. It is important to note that section 193 (1) to (6) closely resembles South Africa's section 170A (1) to (6) as shown in addendums. In most parts of both sections, the wording used is similar. Below is an illustration of Namibia's section 193(1) and South Africa's 170A (1). The minor differences that exist in the text of the two parts have been have been highlighted.

Namibia's section 193 (1)

*When criminal proceedings are pending before a court and it appears **to the court** that it would expose **a witness** under **the age of 18 years** to undue mental stress or suffering **if that witness** testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary **to enable that witness** to give his or her evidence through that intermediary.* (Emphasis added)

South Africa's section 170A (1)

*Whenever criminal proceedings are pending before any court and it appears **to such court** that it would expose **any witness** under the biological or mental age of eighteen years to undue mental stress and suffering **if he or sh**e testifies at such*

> *proceedings, the court may, subject to subsection (4), appoint a competent person as intermediary in order* ***to enable such witness*** *to give his or her evidence through that intermediary.* (Emphasis added)

This would not be the first time that the Namibian government is borrowing from the South Africans after independence. Schulz and Hamutenya pointed out that the Namibian Child Justice Draft Bill has "not only borrowed from the South African law reform project on Juvenile Justice. But admittedly, it derived main ideas from the SA Law Commission proposed Child Justice Bill".[62]

In as much According to section 193 (2) the appointment of an intermediary means that all examination, cross-examination and re-examination may only take place through the assigned intermediary. The court, however, reserves the right to question the child directly, so the presence of the intermediary does not mean that the court may not question the child directly. Section 193 (2) (b) refers to the role of the intermediary. He or she is expected to communicate to the child witness the general meaning of a question. The intermediary must put across to the child the substance and meaning of the question to the child witness.

Section 193 (3) empowers the court after it has appointed an intermediary to further order that a child witness may testify from a place other than the courtroom. Subsections (3) (a) to (c) further describes the informal special room from which a child may testify from. The special room must be however equipped with a video camera to transmit the images and sound to a closed-circuit television in the main court room. From the special room, the child must not be able to see or hear the accused person unless it is for identification purposes. Occupants in the main court room must be able to see and hear the intermediary and the child witness at all times.

Section 193 (4) (a) directs that persons who may be appointed to act as intermediaries are those determined by the Minister through notice in the Gazette. Section 193 (4) (b) provides for the

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[62] S Schulz and M Hamutenya "Juvenile Justice in Namibia: Law reform towards reconciliation and restorative justice?".
www.restorativejustice.org/10fulltext/**schulzs**tefan/at_download/file
[accessed 15January 2011]

remuneration of intermediaries who are not full time State employees. Section 193 (5) and (6) seeks to protect child witnesses from having to testify more than once due to the fact the intermediary that swore them in or that assisted them during the course of the trial was incompetent.

Section 193 of the 2004 Criminal Procedure Act does, therefore, provides more detailed provisions regarding the use of intermediaries. Although the act does not mention the need for further training of intermediaries, the act does provide more regulatory measures compared to the current section 166 of the 1977 Criminal Procedure Act of.[63] The fact that section 193 closely resembles South Africa's already operational section 170A provides a more positive outlook on the effectiveness of the 2004 Criminal Procedure Act when it is finally re-instated.

7.4 PROTECTING THE CHILD WITNESS

7.4.1 Intermediary assistance

Whether one is looking at the currently operational section 166 of the 2003 Criminal Procedure Act or the temporarily suspended 2004 Criminal Procedure Act, each piece of legislation contains adequate legal provisions to sustain the operations of a viable intermediary system in Namibia. However, because the appointment of intermediaries is subject to availability[64] the Namibian courts have been permitted to order children to testify unassisted and as adults. There has been no pressure to facilitate the provision of intermediaries. As the government continues to cite funding problem as the major challenge towards the full implementation of the country's intermediary system, it can only be hoped that the delay is short-lived.

An investigation on whether the delay in the full implementation of the intermediary system was an isolated incident or is a trend identifiable in other projects is necessary. The introduction and withdrawal of the 2004 Criminal Procedure Act shows lack of adequate foresight, planning and commitment. When a government creates new laws to correct societal imbalances, it is expected that the same government has the ability to commit the necessary resources for the effective

[63] As amended by the 2003 Criminal Procedure Amendment Act.
[64] Section 166 (5) (b) states that "person is immediately available when the witness concerned gives evidence".

implementation of laws. The aspect of over-dependency on donors has been cited as one of the reasons why the Namibian government is in some instances slow in effectively implementing international laws and national laws. When a donor country decides for whatever reason to terminate funding, the State has been reported to indicate that "donors have failed us."[65] Several projects including the following indicate circumstances in which the government fell short in its implementation of such:

- In 2006, the Namibian government announced in a particular HIV-AIDS project that the orphans in the project may not have enough to eat because donors had not provided adequate funds.[66]

- In a Namibian Pilot Project on Community Corrections, the French government cooperation with the Namibian government was terminated before completion due to possible donor fatigue. The Namibian government had not made any financial contributions to the project and had left all funding responsibilities to the French government.[67]

- A Child Care and Protection Bill, introduced fifteen years ago, after "an embarrassingly long time".[68] It appears the Bill has not become law yet.

- A Child Justice Bill tabled in 2003 by funds donated by the Austrian government had still not culminated into law by 2009 almost six years later.[69]

- The first child-friendly courts' training for the justice personnel was launched in 2000. However, it was not until 2003 that the complementary legislation, the 2003 Criminal

[65] S Schulz "The Namibian Juvenile Justice in Limbo: Quo Vadis Namibia?". http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=37166&no_cache=1 [accessed 15January 2011]
[66] *Ibid.*
[67] *Ibid.*
[68] S Van Den Bosch "Rights – Namibia: New draft bill updates child protection" .http://www.allbusiness.com/government/government-procedure-lawmaking-legislation/12708062-1.html [accessed 15January 2011]
[69] Schulz and Hamutenya "*Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice".*

Procedure Amendment Act was enforced.[70] The first child-friendly court at Walvis Bay was launched in 2002 before the enabling legislation was passed in 2003.[71]

It is unfortunate that child witnesses, especially child victims of sexual offences, are not receiving the adequate protection they need in order to prevent their re-traumatisation. The inconsistent and rather discretionary orders by courts in granting child-friendly provisions to child witnesses are inexcusable. Whether the 1977 Criminal Procedure Act, continues to operate indefinitely or the 2004 Criminal Procedure Act is reinstated, there should be a more transparent commitment towards the provision of special arrangements including intermediaries for vulnerable witnesses. The government has to allocate the necessary resources towards the recruitment, training and placements of intermediaries in the courts dealing with child victims of sexual abuse.

7.5 SUMMARY

The judicial structure in Namibia is historically parallel to that of South Africa's. The Namibian criminal justice system is accusatorial in nature. The accused has a constitutionally protected right to a fair and public hearing before an independent, impartial and competent court. In the late 1990s a significant number of judges and prosecutors expressed their concerns over the difficulties surrounding child witnesses in the courtroom. The aspects of the adversarial system that Namibian child witnesses struggle with the most include fear of the public, fear due to inability to understand complex legal procedures, confrontation, cross-examination and inadequate court preparation.

According to the Convention on the Rights of Child Committee, it is a government's duty to ensure that local legislation complements the Convention on the Rights of Child's "principles and provisions" on the protection of children's best interests. As a subscriber to the Convention,

[70] UNESCO "Towards Victim Friendly Courts in Namibia". http://unesdoc.unesco.org/images/0012/001241/124177eo.pdf [accessed 15January 2011]

[71] Barnard "Vulnerable witnesses need protection: Facing your accused rapist in court must be the worst nightmare of any woman, let alone a five-year-old girl" .

the Namibian government does not appear to have fully discharged its duty to provide protection for child witnesses interfacing with the justice system.

The Sexual Offences Project meant to investigate the protection of child witnesses recommended among other things the amendment of the Criminal Procedure Act No.51 of 1977. This was achieved through the 2003 Criminal Procedure Amendment Act. The special provisions meant to provide the enhanced protection for vulnerable witness are not consistently granted by the courts. Section 166 which permits courts to appoint intermediary assistance to deserving vulnerable witnesses has not been realized due to non-availability of intermediaries. To date there are no intermediaries in Namibia.

The 2004 Criminal Procedure Act was meant to replace the 1977 Criminal Procedure Act. The 2004 Criminal Procedure Act's section 193 closely resembles South Africa's section 170A. It offered enhanced intermediary regulations in the criminal courts. However, the act was withdrawn and immediately replaced by its predecessor the 1977 Criminal Procedure Act. The 2004 Criminal Procedure Act will be re-instated once the requisite resources for its full implementation have been secured. If the government decides to introduce intermediaries anytime before the reinstatement of the 2004 Criminal Procedure Act, the current 1977 Criminal Procedure Act is adequate.

Further to the failure of the launch of the intermediary system, there are reports of child witnesses who are denied access to special rooms and are made to testify from inside the main courtroom. This shows lack of empathy for child witnesses by role players in the courts system. It is clear that the government did not adequately prepare for a court system that promotes the protection of child witnesses. The failure to fully implement the intermediary legislative provisions by the government does not appear to be an isolated incident. There are several circumstances whereby the government, citing lack of funding, has fallen short in its completion of projects. There appears to be an element of over-dependence on donors and general lethargy towards completing projects.

CHAPTER

8

THEMATIC ANALYSIS AND RECOMMENDATIONS

8.1 INTRODUCTION

The objective behind the creation of the role of the intermediary is to protect a child witness who testifies in the accusatorial system. The intention to protect the child comes as an acknowledgment of the fact that the accusatorial system re-traumatizes child victims and witnesses of crime. This was evident in the study of the four countries South Africa, Zimbabwe, Namibia, and Ethiopia. The need to shield child witnesses and other vulnerable witnesses from giving oral testimony, confrontation and direct-examination brought forth the intermediary system into existence. Of the four countries, Namibia is the only country which, although it has legislation permitting the use of intermediaries, has not yet introduced intermediaries in its courts. South Africa should be commended for the steps it took, from creating a positive legal framework within which child protection issues are addressed right up to the introduction of intermediaries. South Africa's model for intermediary was visionary and it provided an incentive for its neighbours to introduce changes within their own justice systems.

The study of the four countries reveals that in order for a justice system to establish a viable and effective intermediary system in the criminal courts, certain steps have to be realized. A country's complementary legislative framework must reflect the adoption of the principles of the international instruments the country has acceded to. The courts must adopt a flexible interpretation of the intermediary legislation in a manner that seeks to uphold the best interests of the child whilst balancing them with the rights of the accused. Role players must be educated and sensitised to particular issues including the role of the intermediary, cognitive limitations of children, child communication, child sexual abuse, trauma and re-traumatisation. Each government must commit the necessary resources in order to facilitate a proper implementation of the system. In this chapter these aspects will be used to provide a thematic comparison of South Africa, Zimbabwe, Namibia and Ethiopia.

8.2 THEME 1: THE INFLUENCE OF INTERNATIONAL AND REGIONAL INSTRUMENTS

Each of the four countries has acceded to a number of international and regional instruments, including the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. In Namibia[1] and Ethiopia[2] all international instruments that the governments have acceded to are self–executing, thus removing the necessity for domestic laws that endorse the accessions. South Africa, on the other hand, has explicitly stated that international laws and instruments are to be used in the interpretation of the South African Bill of Rights.

The overall acceptance of the dictates of international and regional instruments by the governments is generally reflected in the country's Constitutions. South Africa, Namibia and Ethiopia assign special rights to children in their Constitutions. Of the group, Zimbabwe is an exception in that technically, Zimbabwe is not bound by any international and regional agreements including the ones the President has signed.[3]

Under the South African Constitution every child has the right to be protected from maltreatment, neglect, abuse or degradation. The South African Constitutional Court used international instruments as a basis for reform to the accusatorial system and to justify the necessity for intermediary assistance in the courts. In the matter of *DPP v Mokoena and Phaswane,* Judge Ngcobo stated the following:

> *"Child complainants and witnesses should testify out of sight of the alleged perpetrator and in a child-friendly atmosphere. This means that, where necessary, child witnesses should be assisted by professionals in giving their testimony in court".*[4]

[1] Article144 of the Namibian Constitution.
[2] Article 9(4) of the Ethiopian Constitution.
[3] Section 111B of the Zimbabwean Constitution.
[4] In *DPP v Mokoena and Phaswane* para 78, Justice Ngcobo was referring to sections 10 and 11 of the Guidelines for Action on Children in the Criminal Justice System.

> *10 The importance of a comprehensive and consistent national approach in the area of juvenile justice should be recognized, with respect for the interdependence and indivisibility of all rights of the child.*

It was further stated that:

> *"It is apparent from the Convention on the Rights of the Child and the Guidelines (on Justice Matters involving Child Victims and Witnesses of Crime) that courts are required to apply the principle of best interests by considering how the child's rights and interests are, or will be, affected by their decisions. The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings".* [5]

Although Zimbabwe has ratified various international and regional instruments including the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice, they do "not form part of the law of Zimbabwe unless incorporated into the law" as acts of parliament.[6] Zimbabwe has also been a subscriber to the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime since 2005. The president of Zimbabwe Robert Mugabe personally attended the 1990 World Summit United Nation's World Summit for Children meant to enforce the objectives of the Convention on the Rights of the Child and promote the adoption of the Declaration on the Survival, Protection and Development of Children. However, in contrast to the other three countries, the Constitution of Zimbabwe does not reserve any special rights to children. Children's rights are addressed more specifically in individual acts that include the Children's Protection and Adoption Act,[7] the Guardianship of Minors Act[8] and the

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11. Measures relating to policy, decision-making, leadership and reform should be taken, with the goal of ensuring that:(a) The principles and provisions of the Convention on the Rights of the Child and the United Nations standards and norms in juvenile justice are fully reflected in national and local legislation policy and practice, in particular by establishing a child-oriented juvenile justice system that guarantees the rights of children, prevents the violation of the rights of children, promotes children's sense of dignity and worth, and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society;

(b) The relevant contents of the above-mentioned instruments are made widely known to children in language accessible to children. In addition, if necessary, procedures should be established to ensure that each and every child is provided with the relevant information on his or her rights set out in those instruments, at least from his or her first contact with the criminal justice system, and is reminded of his or her obligation to obey the law;

(c) The public's and the media's understanding of the spirit, aims and principles of justice centred on the child is promoted in accordance with the United Nations standards and norms in juvenile justice.

[5] *Ibid.*

[6] The Zimbabwe Constitution section 111B.

[7] Act No. 22 of 1971 Chapter 5 of 1996.

Education Act.[9] Despite the declaration in the Zimbabwean Constitution that no foreign laws or agreements shall form part of the domestic laws, under pressure from advocates the introduction of the intermediary system was partly seen as the country's genuine attempt at complying with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime and the Convention on the Rights of the Child.[10]

In Namibia international and human rights law are binding upon the country as part of its domestic laws. All the human rights instruments ratified by Namibia are directly applicable in the Namibian legal system. No enacting law is necessary to make the international instruments applicable. Children are constitutionally protected from hazardous environments and or situations that may affect their physical, mental, spiritual, moral and social development.
The Ethiopian Constitution provides for the incorporation into Ethiopian laws of international agreements the country has ratified or acceded to. The Constitution unequivocally states that all international agreements ratified by Ethiopia are an integral part of the law of the land.[11] The Ethiopian Constitution guarantees children protection from cruel, inhuman and degrading treatment.

All four countries have embraced the African Charter principles. Namibia ratified the African Charter in 1990, South Africa signed it in 1997 and ratified it in 2000. Zimbabwe signed and ratified the African Charter in 1992. Ethiopia is also a signatory to the African Charter. South Africa, Zimbabwe and Namibia are also members of the SADC Declaration on Gender and Development.[12] As member states the governments agreed to review their criminal laws and

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Provides for the protection, welfare and supervision of children and juveniles, as well as the establishment of juvenile courts. Part III deals, inter alia, with the prevention of exploitation of children and Part VII addresses adoption.

[8] Act No. 34 of 1961 as amended through Act No. 9 of 1997, Chapter 5:08.

[9] Chapter 25:04. Section 4(1) states that every child in Zimbabwe shall have the right to school education.

[10] See D Jusa "Protection of Victims of Crime and the Active Participation of Victims in Criminal Justice Process in Zimbabwe". Zimbabwe acknowledges the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

[11] Article 9(4).

[12] See SADC Declaration on Gender and Development.
http://www.chr.up.ac.za/undp/subregional/docs/sadc6.pdf
[accessed 18th January 2011]

procedures pertaining to sexual offences,[13] ensure effective prosecutorial services and address violence against women and children.

Without exception all four countries have been proactive in identifying child-friendly initiatives and strategies to improve the welfare of children. There is significant similarity between most of the initiatives and strategies launched in the four countries. This is probably due to the fact that most of these programmes are funded by the same international donor agencies. UNICEF has funded South Africa's child friendly programmes and has rolled out similar programmes in the other three countries. UNICEF and Save the Children (Norway) have considerably assisted all four countries by providing some of the funding for the child protection programmes.

The influence of international and regional instruments on South Africa, Namibia, Zimbabwe and Ethiopia is evident. All four countries appear to have embraced the international and regional instruments as a framework within which their own domestic child-friendly policies develop. The subsequent influence of this framework towards the introduction of the intermediary in the courts is apparent. This is more pronounced in Ethiopia. Ethiopia's ratification of the Convention on the Rights of Children, the subsequent recognition of the fact by the Ethiopian Constitution and the 2007 decision by the Cassation Bench provide the necessary and adequate authority for intermediaries to feature in the Ethiopian courts. In other words, the international instruments can help fill legislative gaps existing in a country. The milestone judgment in the case of *DPP v Mokoena and Phaswane* is mostly based on the principles reflected in the international instruments and it bases responsibility on these conventions.

8.3 THEME 2: INTERMEDIARY LEGISLATION

By identifying the role of the intermediary and creating the necessary legislation for the introduction and regulation of the intermediary system, South Africa was the pioneer in this area.

[13] Article 10 of the SADC Declaration on Gender and Development.

It broke new ground and led the way. The Zimbabwean intermediary legislation[14] has been largely influenced by the South African legislation. The suspended 2004 Criminal Procedure Act in Namibia significantly resembles South Africa's section 170A.

In South Africa, Namibia and Zimbabwe, the law governing the use of intermediaries was a direct outcome of recommendations made by a specially assigned body or a committee. In South Africa it was the South African Law Reform Commission which convinced the legislators to insert section 170A into the 1977 Criminal Procedure Act. The Victim Friendly Courts National Committee as led by Judge Malaba successfully advocated for the introduction of the intermediary in the Zimbabwean criminal courts which resulted in the amendment of the 1997 Criminal Procedure and Evidence Act through the insertion of section 319. In Namibia, the Sexual Offences Project was able to convince to government to introduce the role of intermediary and this was achieved through the insertion of section 166 into the 1977 Criminal Procedure Act. While Ethiopia does not have intermediary legislation, the introduction of intermediaries was recommended by the Juvenile Justice Project Office.

8.3.1 Intermediary appointments

In South Africa and Zimbabwe, the intermediary legislation provides courts with a guideline on how and when to appoint an intermediary. The legislative provisions of the two countries l are substantially similar. Both provisions require the likelihood of the witness suffering mental or emotional stress to be a key factor. In South Africa, the question as to whether a child has to appear in court first before his or her mental stress and suffering can be determined was settled in the case of *DPP v Mokoena and Phaswane*.[15] It was explained that the subsection contemplates that a child will be assessed for the likelihood of suffering mental stress prior to testifying in court in order to determine whether the services of an intermediary should be used. If the assessment reveals that the services of an intermediary are needed, then the State must arrange for an intermediary to be present in court for the trial. Judge Ngcobo stated that:

[14] Part XIV A Section 319A to G.
[15] Para110.

> *"A construction of the subsection that requires the child to be exposed to undue mental stress or suffering first, before an intermediary may be appointed, is therefore inimical to the objectives of the both section 28(2) and section 170A(1)".* [16]

In the Zimbabwean courts, the phrase "substantial emotional stress" has neither received any significant scrutiny nor has it caused any controversy. The Zimbabwean courts appear to have settled for the fact that any witness testifying in sexual offence trial from inside the court room, is likely to experience "substantial emotional stress"[17] and an intermediary is normally automatically appointed to sit with the witness in the special room.[18] The liberal interpretation of the phrase "substantial emotional stress" has pre-conditioned Zimbabwean courts to permit vulnerable witnesses to receive intermediary assistance most of the times.

As pointed out earlier, the suspended Namibian 2004 Criminal Procedure Act bears a striking resemblance to South Africa's section 170A. There is no automatic appointment of an intermediary. The currently operational 1977 Criminal Procedure Act, as amended by section 166, permits that children may be only cross-examined through the presiding officer or the intermediary. However, there are no intermediaries available in the courts.

In comparison to South Africa, Zimbabwe's Criminal Procedure and Evidence Amendment Act in section 319 C of the provides the court with a detailed guideline on what to consider before appointing an intermediary. The South African intermediary legislation and Namibian legislations do not have such a guideline. The conditions include the witness's age, his or her mental and physical condition and cultural background. The relationship between the vulnerable witness and the accused or any other person in the case should be taken into account. The interests of justice should also be considered. The guideline states the following:

> *When deciding whether or not to take any measure under section three hundred and nineteen B, the court shall pay due regard to the following considerations -*
> *the vulnerable witness's age, mental and physical condition and cultural background; and*
> *the relationship, if any, between the vulnerable witness and any other party to the*

[16] Of the South African Constitution.
[17] Section 319 B(a).
[18] As disclosed in interviews and researcher's own personal observations.

proceedings; and
the nature of proceedings;
The feasibility of taking the measures concerned; and
any views expressed by the parties to the proceedings, and
the interests of justice

The latest amendment to the South Africa's section 170A (1) which orders the court to address the witness's mental age, is fundamentally similar to section 319 C where the court is mandated to consider a witness's "mental… condition".

Even though in reality the Zimbabwean courts do not really use this guideline because intermediaries are almost always appointed for vulnerable witnesses, it is still important to reckon that Zimbabwe has these considerations in its legislation. Assuming that intermediary appointments were difficult and controversial in Zimbabwe, such a guideline would have been useful in assisting courts to decide on whether to appoint an intermediary or not. The inclusion of the witness's cultural background is of significant importance because it ensures that each witness is appropriately matched to the ideal intermediary. In South Africa, problems caused by cultural and linguistic differences between a child witness and his or her intermediary have been noted.[19] However, addressing this problem is neither easy nor inexpensive. More intermediaries, who not only speak the witnesses' languages but also understand their culture, need to be recruited.

In Zimbabwe this problem never emerged because interpreters in Zimbabwe are usually multi-lingual and are fluent in the country's vernacular languages. Most of the interpreters acquired these multi-language skills through living in the communities where the languages are spoken. Thus most Zimbabwean intermediaries are not only familiar with the language and culture of witnesses but are also well informed on the societal changes and trends in the local communities.

8.3.2 The intermediary

Of the four countries, Zimbabwe is the only country that uses court interpreters as intermediaries. Section 319F (1) is explicit in its requirement that an intermediary must be or must have been a

[19] Coughlan and Jarman "Can the intermediary system work for child victims of sexual abuse?" (2002) 545.

criminal court interpreter. The dual role of the intermediary as an interpreter is meant to counter the shortages of social workers who would have been the ideal intermediaries.[20] The creation of the dual role of the intermediary has its advantages. It is cost effective and time efficient. The recruitment of intermediaries and their assimilation into the justice system is expedient in that most of them are already public service employees. Having participated in the criminal litigations as interpreters before their appointment, most intermediaries do not need intensive training in court procedures or trial proceedings. Having acted as interpreters in matters involving child witnesses, most of the intermediaries are already aware of the inbuilt communication problems found in cases involving young children.

The disadvantage of the dual role is that the intermediary, apart from his or her regular interpreter duties, is expected to perform other functions. He or she is responsible for the child before trial and during breaks, making it impossible for the intermediary to relax in between breaks. As most Zimbabwean courts do not provide refreshments and food for the young witnesses, the intermediaries find themselves in the company of hungry witnesses and often end up sharing their own provisions with the young witnesses.

Compared to Zimbabwe, the path to identifying the ideal intermediary has not been a smooth one for South Africa. The South African Government Gazette which provides an exhaustive list of persons who act as intermediaries has over the years been branded as impractical.[21] Practice has shown that the list is idealistic and unfeasible, in that some of persons do not necessarily have experience in child psychology or child communication. However, in practice South African courts appear to have settled mostly for social workers, youth care workers and educators, including retired educators.[22]

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[20] It was reported in 2003 that: "Almost half of Zimbabwe's social workers now work in the UK following a dramatic rise in overseas recruitment over the past decade, which threatens to cripple the African country's welfare system. About 1,500 social workers have come to the UK from Zimbabwe as a result of the country's economic slump and poor working conditions, according to professional bodies".
See "UK draining Zimbabwe of social workers". The Guardian 19 February 2003.
http://www.guardian.co.uk/society/2003/feb/19/publicsectorcareers.careers4
[accessed 15 January 2011]

[21] Müller and Hollely Introducing *the Child Witness* (2000)4.

[22] Schoeman *A training programme for intermediaries for the child witness in South African courts* (2006)303.

Ethiopia's choice of intermediaries is comparable to that of Zimbabwe. While Ethiopia did not settle for interpreters, its first group of intermediaries were employed at the Supreme Courts of Addis Ababa, Oromia and Tigray.[23] It can be logically assumed that these persons are already familiar with the court procedure and criminal litigation. Ethiopia intermediaries are considered to be members of staff and therefore do not come in as consultants. There is a considerable dearth of further information regarding intermediaries in Ethiopia.

The Namibian 1977 Criminal Procedure Act as amended by the section 166 and the suspended 2004 Criminal Procedure makes mention of intermediaries' qualifications as those determined by the Minister in the Gazette. The similarity of the requirement to that of South Africa regarding intermediary qualifications cannot be overlooked.[24] This was probably a deliberate attempt to emulate the South African procedure. However, the practicality of this requirement has not been tested in Namibia as no intermediaries have been appointed yet.

8.3.3 Intermediary training

In South Africa, section 170A makes no mention of intermediary training. Schoeman indicates that this leads to people with neither training nor experience to carry out intermediary functions.[25] Unlike in Zimbabwe it was not uncommon for untrained intermediaries to be working with children in the criminal courts systems. A directive from the Department of Justice has recommended that intermediaries must receive training before commencement of duty. The intermediary training in South African has been fully funded by the Department of Justice itself.[26] The 2008 appointment of the Institute for Child Witness Research and Training as the national training body has brought with it certainty and consistency. The South African Department of Justice there is a practice guideline that an intermediary may not appear as such until he or she has been trained. This was upheld in the case of *DPP v Mokoena and Phaswane*

[23] Save the Children Sweden "Training of Intermediaries" *Eastern and Central Africa Region Bulletin* 2004 /6 (10).
[24] This would not be the first time that after independence the Namibian legislators would borrow from South Africa. The Namibian Child Justice Draft Bill borrowed from the South African law reform project on Juvenile Justice.
See Schulz and Hamutenya "Juvenile Justice in Namibia: Law reform towards reconciliation and restorative justice?".
[25] Schoeman *A training programme for intermediaries for the child witness in South African courts* (2006)344.
[26] The stance was confirmed in the case of DPP v Mokoena and Phaswane.

that intermediaries must, therefore, undergo relevant training before they are allowed to practice as intermediaries.[27]

Out of the four countries, Zimbabwe is the only country whose legislation explicitly states that all intermediaries should receive intermediary training prior to assumption of duty. Almost all intermediaries are trained before they commence their duties. Funded by UNICEF and Save the Children, intermediary training is offered by the Judicial College of Zimbabwe. From the onset, intermediary training has been uniform and standard throughout the country. In Ethiopia, all intermediaries receive at least one week training before assumption of duty. The Ethiopian intermediary training is funded by UNICEF.[28] The initial Ethiopian intermediary training was offered by trainers from Zimbabwe.

8.3.4 Management and supervision of intermediaries

The Zimbabwean and South African intermediary legislation do not identify who is to manage or supervise the intermediaries. From the onset, Zimbabwe has been the only country out of the group that has been able to offer consistent direct supervision and monitoring of its intermediaries on an almost day-to-day basis. This may only be credited to the fact that the intermediary system took advantage of the pre-existing interpreter management structure.[29]

Zimbabwean interpreters have always been supervised and monitored by the Chief Interpreter. Before courts commence for the day, all interpreters/intermediaries meet up with the Chief Interpreter and are assigned and matched with courts that need their services. Debriefing also occurs in the morning before courts start. So Zimbabwean intermediaries are supervised, managed and monitored the same way as interpreters were and are managed.

In South Africa, the situation is relatively similar. Courts in South Africa have court managers. These existed before the advent of intermediaries. After the introduction of intermediaries, the

[27] *DPP v Mokoena and Phaswane* para 104.

[28] The first group of intermediaries drawn from the Federal Instance Court of Addis Ababa, Oromia and Tigray supreme courts were trained by trainers from Zimbabwe.
See Save the Children Sweden "Training of Intermediaries" *Eastern and Central Africa Region Bulletin* 2004 /6 (10).

[29] As indicated in the interview with the Chief Interpreter. See *addendum* 1.

court managers assist in the management of intermediaries. The court managers are responsible for providing intermediaries with the necessary resources they need to perform their duties, including but not limited to, office space, access to computers and telephones and anatomically detailed dolls, where this is applicable. There are reports however, that not all intermediaries in South Africa may receiving direct supervision.[30] Some intermediaries are operating at courts by themselves without anyone supervising them. Despite these shortcomings, it is still safe to conclude that in terms of intermediary management both Zimbabwean and South African intermediary systems have managed to tap into existing structures and benefit significantly.

In Ethiopia, although there is limited information on how intermediaries are monitored or regulated, a report by published by UNICEF states that all trial proceedings in which intermediaries assist minors, are recorded. This makes it easier to monitor progress and effectiveness. In the report it was not stated who assesses these recordings.

8.3.5 The witness

Although Zimbabwe and Namibia both use the term "vulnerable witness" in their criminal legislation to describe child victim or witnesses in sexual offences, the definition of the term differs significantly. Under section 319A in Zimbabwe, a vulnerable witness is defined as likely to suffer emotional stress during trial proceedings to an extent that he or she may not able to testify effectively. He or she may also be intimidated by either the presence of the accused, the nature of the proceedings or the venue of the trial. If the court assesses the witness by using these benchmarks then the witness is deemed vulnerable. Age is not a determining factor in deciding whether a witness is a vulnerable witness or not. Child and adult witnesses are eligible for intermediary assistance in Zimbabwe.

In Namibia the definition of a "vulnerable witness" appears in section 158A (3) of 2003 Criminal Procedure and Amendment Act. In terms of this section, a vulnerable witness is a victim of a sexual offence or violent act who is below eighteen years of age. He or she must because of either mental disability or intimidation from accused likely to suffer stress to an extent that he or she may not be able to testify effectively. The difference of this definition is that in Namibia age

[30] *Ibid.*

is a determining factor. The type of the offence is also defined. In Zimbabwe, neither the age nor the type of offence is a determining factor.

South Africa does not use the term "vulnerable witness" to describe child witnesses. Only children below the age of eighteen are eligible for intermediary assistance. In Ethiopia, the absence of relevant legislation makes it difficult to determine how child witnesses are referred to. However, in Ethiopia, intermediary assistance is commonly provided to children under the age of eighteen. It is not clear whether adult victims of rape and other sexual offences are permitted to use intermediaries.

8.3.6 Intermediary functions

The Ethiopian intermediary is a communication conduit between the child witness and the courtroom occupants namely the presiding officer, the prosecutor, the accused and his or her defence attorney. The intermediary puts questions to the child in a language that takes into account the developmental and communication level of the child and relays the child's responses back to the courtroom.[31]

The Zimbabwean intermediary is permitted to as far as possible use his or her own words to convey to the witness the substance and effect of the questions asked from the main courtroom.[32] It is important to note that because the Zimbabwean courts have always opted for the liberal interpretation of the legislation, the intermediary has been empowered to perform acts which may not have been envisaged by the legislator. The intermediary is permitted to use language that is familiar to the witness, including slang, jargon, vernacular or colloquial speech peculiar to the witness because of his or her age or societal background.[33]

During the course of the trial, the intermediary may comment on a question and offer an opinion on whether the child understands a particular question or not. It is not unusual for the intermediary in pursuit of clarity to go off on an examination of her own with minimal

[31] UNICEF "Pre-service workbook on justice for children for Judges and Prosecutors: UNICEF-Ethiopia Training Centre for Judges and Prosecutors July 2008".
[32] Section 319G.
[33] See a*ddendums* 2, 3 and 4.

interruption from the presiding officer.[34] In this way, the intermediary is considered an expert. The powers of the Zimbabwean intermediary have been justified in that in most situations because of high staff turnover amongst presiding officers and prosecutors, it is not uncommon for the intermediary to be the only person well versed in court procedures. Another important factor is that because role players receive training and are sensitised on the issues surrounding child sexual abuse, secondary trauma and the harshness of the accusatorial system on witnesses, most of them will permit things they think will afford the most protection to the child witness. As already pointed out, there are significantly few lawyers who take on cases of the magistrates' court and the few that do appear are receptive to the role of the intermediary, so there is significantly little opposition to the role of the intermediary. The Law Society of Zimbabwe was one of the pioneer members of the Vulnerable Witness Committee.

The South African intermediary may only convey the general purport of a question. He or she must convey the substance and meaning of the question to the child.[35] The intermediary however is limited in his or her function in that he or she cannot change the meaning of questions even if he or she can see that the child has not grasped a particular question. Even though an intermediary has the authority to rephrase questions to enable a child witness to understand them, it is doubtful whether the intermediary would be allowed to go off on an examination of his or her own as the Zimbabwean intermediary would. The South African intermediary has less powers compared to the Zimbabwean intermediary. He or she is nothing more than an interpreter and this was established in the *Klink v Regional Court Magistrate* case.[36] When a child gives a wrong answer, the South African intermediary may not comment or rephrase the question to the child. He or she may only inform the court of the child's discomfort or need for a break but may not insist on a break.[37]

The basic functions of the intermediary in three countries Ethiopia, Zimbabwe and Ethiopia is basically the same, the intermediary facilitates proper communication between the child and the courtroom in a manner that is cognitively and developmentally appropriate for the child.

[34] *Ibid.*
[35] Müller and Hollely *Introducing the Child Witness* (2000)47.
[36] *Klink v Regional Court Magistrate* paragraph 411I.
[37] Müller and Hollely *Introducing the Child Witness* (2000)50.

8.3.7 Intermediary remuneration

Zimbabwe's section 319B of the Criminal Procedure and Amendment Act makes no mention of the remuneration of intermediaries. This is because before their recruitment as intermediaries, Zimbabwean intermediaries are already employed and are on the government payroll as interpreters. In South Africa section 170A (4) (b) only makes provision for intermediaries who are not full time employees of the State and make specific reference to traveling allowance and subsistence. Most South African intermediaries are on contract with their salaries pegged at level 7.

The suspended Namibian 2004 Criminal Procedure Act contains the same provision as South Africa's section 170A (4) (b) on intermediaries who are not full time employees of the State. The assumption is that once the act is re-instated and intermediaries have been placed in the courts, the provision will be fully invoked. A UNICEF report states that Ethiopian intermediaries are considered staff so the logical assumption is that they are already on the government payroll as full time employees. Most of the Ethiopian intermediaries before their recruitment are already in the employ of the government.

8.3.8 Special rooms

In all four countries, special rooms from where vulnerable witnesses may testify from are basically the same. They are equipped with video cameras and connected to the closed-circuit television in the main courtroom. The child and any other person may not see what is happening in the main courtroom. However, the people in the courtroom are able to see at all times the occupants of the special room. Even in Namibia where intermediaries are not yet functioning, the currently operational section 158A permits use of the special room by the vulnerable witness and a support person.[38] However, the act explicitly states that the provision of the special room is not an unconditional right and is subject to availability. A Namibian vulnerable witness may use the special room with or without a support person. A study in Namibia revealed that it is not uncommon for child witnesses to be denied access to the special room and this has been

[38] See Hubbard "Children in Court: Protecting Vulnerable Witnesses"

attributed to some role players' lack of knowledge on the effects of the accusatorial system child victims of sexual abuse.[39]

In Zimbabwe, unless the witness prefers otherwise, intermediary assistance and use of the special room are automatically granted by the courts. For those child witnesses who prefer to testify from inside the court room and confront the accused, they are permitted to do so. In comparison the conditions attached to the use of the special room under the South African system are significantly stricter. South Africa's section 170A (3) grants that while a child witness may testify from the special room, the section 170A (3) may only be invoked after an intermediary has been appointed, which means that the appointment of an intermediary does not guarantee a child witness with permission to use the special room. The court must hear a separate application for the special room.[40] However, in reality section 158 permits a child witness to use the special room without an intermediary.[41]

In Ethiopia there is a decided effort to ensure that all children testify from special rooms. A government report states that cases involving child-witnesses from areas without child-friendly courts and intermediaries are transferred to areas which have these facilities.[42] It is not only the intermediary who sits with the child witness in Ethiopia, but also child advocate when available, may sit in the special room.

8.4 THEME 3: ROLE PLAYER TRAINING AND SENSITISATION

Internationally most law schools have not always offered law students education on child cognition development and communication. It is quite possible to say most court role players in South Africa, Zimbabwe, Namibia and Ethiopia did not study child witness cognition, development and communication when they studied law. It is difficult for anyone who has

[39] Theron *The impact of the Namibian judiciary system on the child witness* (2005)70.
[40] Müller and Hollely *Introducing the Child Witness* (2000)19.
[41] The South African 1977 Criminal Procedure Act.
[42] "All pending cases of violence against children that are scattered in the different courts are being collected so that the special bench can handle them".
See the Federal Ministry of Labor and Social Affairs "Response to United Nations Questionnaire on Violence against Children".

neither received prior education nor training on these complex subjects to have the proper understanding. Most presiding officers and prosecutors admit that without the sensitisation trainings, they would have neither understood nor properly perceived the impact of the demands of the accusatorial system on witnesses.[43] A positive perception of the role of the intermediary by role players leads to a better appreciation of the fact that child victims of sexual abuse who testify in court without the aid of intermediaries are likely to experience undue mental stress or suffering.[44]

In all four countries, training and sensitisation of presiding officers has been carried out, albeit at varying levels. In a 2002 study, some South African intermediaries complained about the absence of respect for their role by other role players. It appeared then that the courts were more focused on protecting the accused's rights rather than those of a child witness. The situation has improved significantly. The SOCA Unit has been providing training on an *ad-hoc* basis to selected prosecutors and magistrates.[45] A 2006 study however revealed that 41% of the prosecutors in the study still believed that most child witnesses did not deserve intermediary assistance because they believed that not all child victims of sexual crimes are traumatised, only children under the age of fourteen or simply that older children do not suffer trauma.

It was stated in the case of *DPP v Mokoena and Phaswane* that training and sensitisation of South African role players on the issues surrounding the accusatorial system, trauma and child sexual abuse was a necessity. However, the constant high staff turnover makes it challenging to ensure that every prosecutor is trained before assumption of duty in the child-friendly courts.[46]

After receiving initial role player sensitisation and trainings in South Africa, role player training in Zimbabwe is now consistently provided through the National Coordinator's office at the local Judicial College of Zimbabwe. The training of the presiding officers, prosecutors and intermediaries are synchronized. Despite the high staff turnover, the trend towards the acceptance and acknowledgement of the intermediary role is already established. The

[43] Müller and Hollely *Introducing the Child Witness* (2000)47.
[44] *DPP v Mokoena and Phaswane* para 196.
[45] Sadani *et al*: The Sexual Offences Court in Wynberg & Cape Town and Related Services.
[46] *Ibid.*

recognition of the role of the intermediary by role players was more rapid compared to that of South Africa's because the Zimbabwean intermediary was not considered an outsider but an insider as a former interpreter. Credit of the success of the synchronized sensitisation programmes should be given to the National Coordinator. Because of the significantly high staff turnovers, the success of this strategy may have been compromised. Mostly newly appointed magistrates fast-tracked from the provincial courts into the regional courts, rely on the more experienced intermediary for guidance during trial. The relationship between most role players and intermediaries is an amicable one.

The limited knowledge on how children think and function is responsible for the continued traumatisation of child witnesses. Where role players have not been sensitised to the vulnerability of children, communication limitations, the tendency is to unrealistically expect more from children as they testify. Role players need to be properly educated on how the demands of the accusatorial system impacts on children and how they re-traumatize child victims of sexual abuse.

Since the early 2000s there has been a drive to educate Namibian role players on the negative impact the accusatorial system has on vulnerable witnesses. While these trainings were initially not offered consistently, the situation has improved for the better with magistrates and prosecutors receiving consistent training.[47] The problem that remains is still the continued absence of the intermediary in the criminal courts. It can be safely assumed that as long as these sensitisation training programmes are being offered in the country, by the time the intermediary role is introduced all role players will be ready to embrace the role.

In Ethiopia, most judges and prosecutors are inexperienced and lack knowledge on how to appropriately handle child victims of sexual offence.[48] In 2005 the Ethiopian government admitted that most of the role players lacked the sensitivity needed to deal with child witnesses. There is limited information on the role players' attitude towards the role of the intermediary.

[47] As indicated in interview with the Prosecutor General. See *addendum* 7.
[48] UNICEF "Pre-service workbook on justice for children for Judges and Prosecutors: UNICEF-Ethiopia Training Centre for Judges and Prosecutors July 2008".

But it appears as if when an intermediary is available, he or she is usually assigned to assist a child witness.

8.5 THEME 4: GOVERNMENT COMMITMENT

A government's commitment to a programme is usually measured by the amount of resources the government invests in it. The normal procedure is firstly the creation of legal provisions for the programme followed by the implementation thereof. The implementation process's success is dependent on adequate resources being invested in the programme. South Africa was the first country in sub-Saharan Africa to introduce the intermediary system, making it the pace-setter in terms of child protection and child-friendly courts in the justice system.

In terms of resources, the South African government takes the lead. Not only was it the first one out of the group to initiate child –friendly courts but it has relentlessly created various strategies and initiatives meant to protect the child. South Africa was the first country in the sub-Saharan Africa to introduce sexual courts. The South African government has to date rolled out 54 sexual offences courts with equipment.

Since the early 1990s, the government has progressively created an extensive legislative framework which consolidates the rights of victims of crime and children. Since the amendment of the 1977 Criminal Procedure Act which inserted the intermediary legislation section 170A, the government has also introduced various other child-friendly legislations. The Prevention of Family Violence Act[49]and the Domestic Violence Act[50]were meant to provide mandatory reporting of any ill-treatment of children. The South African Schools Act of 1996 outlawed corporal punishment in schools and the Children's Act[51] provided for children appearing in a children's court must be questioned through an intermediary. The introduction of the Sexual Offences Act[52]broadened sexual crimes against children to include sexual grooming, sexual exploitation, use of and exposure to pornography. The Films and Publications Amendment Act

[49] Act 133 of 1993.
[50] Act 116 of 1998.
[51] Act 38 of 2005.
[52] The Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007.

was meant to protect children from pornography.[53] The Prevention and Combating of Trafficking in Persons Bill of 2009 ordered the use of intermediaries for child complainants in cases of trafficking. The extent of the child-friendly legal framework proves the commitment the South African government had over children

The South African government has also introduced various child protection programmes, strategies and initiatives. The first sexual offences court based at Wynberg was established in 1993.[54] Though not established exclusively for sexual offences against minors, the specialised sexual offence courts sought to improve the prosecution of sexual offences and reduce the trauma experienced by complainants during the investigations and prosecution.

Both Zimbabwe and Namibia in 1999 and 2000 respectively sent delegates to study the system which in turn inspired them to introduce innovations in their own court systems. In 1999, the National Director of Public Prosecutions established a Specialised Directorate called SOCA. Its mandate was to deal with sexual offences and other offences which particularly affect women and children and to specifically monitor the prevention of secondary victimisation of victims during the investigation and prosecution processes.

In 1999 the National Prosecuting Authority issued a national policy directive to all prosecutors to adopt a victim-centred approach that takes into account the physical, emotional and psychological well-being of the victim in all sexual offences matters.[55] In the same year, the

[53] Act 3 of 2009.

[54] See Sadan *et al* Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and Related Services Wynberg Sexual Offences Court.
The Sexual Offences Court – Court G – was established in 1993 and deals with both children and adult victims of sexual offences. According to the control prosecutor, A Minaar, child complainants make up approximately 50% of the cases in Wynberg. Subsequently, courts F and J were opened in Wynberg Regional Court. Court L, which was opened in 2000, deals specifically with cases from the Thutuzela Project. The courts are located on the fifth floor of the Wynberg Magistrates Court building and all the SOC staff is located on the same floor.

[55] "The SOCA Unit was established in October 1999 with the main objective of eradicating all forms of gender-based violence against women and children. Since its establishment the Unit has made an extremely valuable contribution in this regard. Its mandate is to establish an efficient and effective Unit which strives to reduce the victimization of women and children by:

- Enhancing the capacity to prosecute sexual offences and domestic violence cases;
- Reducing secondary victimization of complainants and raising public awareness of the scourge of sexual offences and domestic violence;

National Prosecuting Authority together with the Departments of Health, Social Development and Justice and Constitutional Development, as well as the South African Police Services established the Thutuzela Care Centres. These centres were introduced as an innovative mechanisms that remove the reporting of sexual assault cases and the initiation of interventions in rape cases from police stations to victim-friendly centres situated within a hospital.[56] In 2001 the National Prosecuting Authority created the post of the court preparation officer whose sole function was to prepare witnesses for court. The 2005-2010 South African Police Services Strategic Plan laid special emphasis on combating crime against women and children especially rape, child abuse, domestic violence and assault.[57]

The introduction of intermediary legislation in South Africa followed by its implementation was a relative success. Even though intermediary shortage has been cited as a significant problem in South Africa, a high percentage of children have been assisted by intermediaries as they testify against their offenders. The training of all intermediaries in South Africa has now been standardized and is being offered through the Institute for Child Witness Research and Training. This will ensure that all intermediaries in the country are trained on the same content. The management and regulation of intermediaries is still unresolved issue. It can only be hoped that this is achieved soon. On the overall, the South African government has shown commitment to the intermediary system. Although the regulation and management of intermediaries appears not to be a settled issue, the intermediary system is assisting a lot of children in South Africa.

In Zimbabwe the situation is comparably different. The Zimbabwean government has in the last ten years experienced the worst economic conditions ever experienced since the country got its independence thirty years ago. The economic downturn experienced in the country from 1999

Ensure the proper management of young offenders.
See National Prosecuting Authority "Sexual Offences and Community Affairs (SOCA) Unit".
http://www.npa.gov.za/ReadContent412.aspx

[56] UNICEF "Thutuzela Care Centres".
http://www.unicef.org/southafrica/hiv_aids_998.html
[accessed 15 January 2011]

[57] South African Police Services "The Strategic Plan for the SA Police Service 2005 -2010".
http://www.saps.gov.za/saps_profile/strategic_framework/strategic_plan/2005_2010/strategic_plan_2005_2010.pdf
[accessed 15 January 2011]

has been felt throughout most government ministries. Government funded public institutions like hospitals, schools, prisons, transportation have felt the impact.

Admittedly the Zimbabwean government received the concept of child-friendly courts positively right from the onset. The positive reception of the concept of child-friendly courts by the Zimbabwe government should not be seen as a reflection of the government's overall attitude towards children. In April 1996, the Zimbabwean government expropriated funds from the Trust Funds and the Guardian Fund for orphans administered by the magistrates' courts and the High Court including to fund a presidential election.[58] Prior to the controversial land reform programme, there was an estimated 320 000 to 350 000 commercial farm workers. The total number of the farm workers and their dependents was pegged at 2 million, an estimated 20 percent of the national population.[59] When the government authorised the farm invasions which resulted in lost incomes and housing, it did not provide a back-up plan to protect the displaced children,[60]and most of these children were considered destitute.

In 2005 when the government carried out the controversial campaign "Operation Murambatsvina" comprising forced evictions in urban areas, [61] an estimated 700,000 adults and children were displaced just before cold season began. Again the government had no back-up plan to protect the displaced children. Children's rights have been negatively impacted by these omissions.

That the joint efforts of Judge Malaba and the Victim Friendly Courts National Committee assisted in the fast-tracking of intermediary legislation and introduction of intermediaries factual

[58] See A Deke "The Judiciary – open to abuse".
http://ospiti.peacelink.it/anb-bia/nr337/e23.html
[accessed 15January 2011]
[59] See "Zimbabwe: Land reform omits farm workers" IRIN News July 2003.
http://www.irinnews.org/InDepthMain.aspx?InDepthId=26&ReportId=69842&Country=Yes
[accessed 15January 2011]
[60] See "Farm Workers Lose Livelihoods in Zimbabwe's Land Reform" Voice of America 5 May 2009.
http://www.voanews.com/english/archive/2009-05/2009-05-05-voa53.cfm?moddate=2009-05-05
[accessed 15January 2011]
[61] "Zimbabwe: Evicted and Forsaken" Human Rights Watch 30 November 2005.
http://www.hrw.org/en/node/11512/section/2
[accessed 15January 2011]

recognized fact. It is also valid that the international framework including the Convention for the Rights of the Child helped streamline the country's reform in child protection policies. What is doubtful is whether the Zimbabwean government would have had the commitment and the complementary resources to introduce and sustain child-friendly courts in all provinces of the country. Taking into account the poor salaries already paid to prosecutors and presiding officers and the deterioration of standards at the country's regional courts, it is highly improbable that the government would have had not only the commitment but the resources to invest in the programme.

In Zimbabwe, reports that presiding officers and prosecutors are resorting to bribery and corruption in order to supplement their meager salaries have surfaced.[62] Inferior working conditions and low remuneration have prompted to presiding officers and prosecutors to resort to strikes and job stay-aways. Absence of adequate security to courts has led to thefts and vandalism of court equipment ranging from door handles, video recorders, closed-circuit televisions stationery to anatomical correct dolls.[63] In 2008 most of the regional courts in the country had no recorders. Because there were no computers, most of the record keeping was done manually in note-books.

The introduction of the child-friendly courts system together with the child-friendly system was made possible by the funding provided by international development agencies namely UNICEF and Save the Children. The office of the National Coordinator for Victim-Friendly Courts manages and regulates the intermediary system and also oversees the training of the police, presiding officers and prosecutors. The National Coordinator is a former Save the Children employee whose salary continues to come from Save the Children. The National Coordinator maintains a close relationship with the funders. He has helped boost the funders' confidence in the fact that donated funds would be not be misused and would be used solely for the establishment of victim-friendly courts. The working relationship between the National Coordinator and the funders has lent credibility and consistency to the project.

[62] See Deke "The Judiciary – open to abuse"
[63] See *addendum* 1.

Most of the corresponding initiatives in Zimbabwe are funded through the National Coordinator's office. The victim-friendly Family Support Units were set up at police stations to facilitate a non-threatening environment for sexual offence complainants reporting crime.[64] The Victim Friendly School Initiative was established in partnership with the Secretary of Education, Sports and Culture's Circular.[65] This initiative helps educate children and communities on child sexual abuse, the reporting procedure of sexual offences and the victim-friendly court procedures including use of intermediaries.[66] There are also Victim-Friendly Clinics which were placed mostly in public hospitals. The nurses have been trained to carry out forensic observations on victims of sexual abuse.[67] The Victim-Friendly Protocol created by the through the National Coordinator's office, outlines the appropriate steps and services available to the victim of sexual abuse from the time of the commission of the offence up to trial. Its goal is to educate and guide the community.

It is highly unlikely that if the Zimbabwean government was solely in charge of funding the special courts, they would have been created at the time they were created and lasted for the time they have. While it is highly commendable that the Zimbabwean government lent moral support to the victim-friendly courts, it is highly unlikely that the support would have culminated into financial support and commitment to the programme. The victim-friendly courts in Zimbabwe programme are a success.

Since the beginning of the 1990s, the Ethiopian government has shown relative commitment towards the improvement of children's welfare in the country. The Ethiopian government has initiated various policy changes in both its criminal and civil laws towards the enhanced protection of children. The country has also put in place a significant number of strategies and initiatives to assist with the protection of children of which courts offering intermediary service is one of them.

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[64] See D Jusa "Protection of Victims of Crime and the Active Participation of Victims in Criminal Justice Process in Zimbabwe".
[65] Circular Number 5 of 2000.
[66] The Zimbabwe Victim Friendly Court System Protocol.
[67] "SRN evidence now admissible in court" The Herald 11 October 2010.
http://allafrica.com/stories/201010110212.html
[accessed 15January 2011]

The introduction of the Ethiopian Cultural Policy was meant to facilitate the removal of harmful traditional practices and protect young girls from female genital mutilation, early marriages and marriages by abduction.[68] The National Task Force on Orphans and Vulnerable Children was intended to address[69] the nation's rising numbers of street and unaccompanied children.[70] The National Plan of Action for Children was mandated to protect children against abuse, exploitation and violence. Child Rights Committees were introduced in communities to guard against child rights violations in the communities. The National Plan of Action against Commercial Sexual Abuse and Exploitation of Children in Ethiopia was set up to oversee the training of judges and prosecutors on how to handle child witnesses as they interface with the justice system.[71] Child Protection Units were established in selected city police stations throughout Ethiopia. The units are run by police and social workers who were trained to handle child victims and offenders. There are ten Child Protection Units in Addis Ababa alone.[72]

Since its introduction in 2004, the intermediary system does not have regulating intermediary legislation. This raises questions on the earnestness of the government towards the intermediary system and assisting child witnesses in the criminal courts system as a whole. Further to the problem, the inability by the government to ensure that properly qualified judges and prosecutors are recruited raises more questions. Judges' salaries are pegged at an equivalent of US$100 per month, unbefitting of the title and position. Most law graduates use the position as a training base and leave for more lucrative opportunities elsewhere. As discussed in chapter 6, the Convention on the Rights of the Child, the country's Constitution and the 2007 decision by the Cassation Bench of the Ethiopian Federal Supreme Court addresses the legitimacy of the Ethiopian intermediary system.

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[68] UK Ethiopian Embassy "The Federal Democratic Republic of Ethiopia Cultural Policy". http://www.ethioembassy.org.uk/fact%20file/a-z/culture.htm [accessed 15January 2011]

[69] See UNICEF "UNICEF receives Sweden's donation for AIDS orphans" 12 September 2005. http://www.irinnews.org/report.aspx?reportid=56254 [accessed 15January 2011]

[70] The Federal Ministry of Labor and Social Affairs "Response to United Nations Questionnaire on Violence against Children."

[71] *Ibid*.

[72] Aberra "Human Rights Report of Ethiopia".

There is a shortage of intermediaries in Ethiopia. This shortage means that a significant percentage of child witnesses appear unassisted in courts. This problem is further compounded by the overall shortage of courts. Ethiopian members of parliament have raised concern over the inadequate number of benches and properly designed courtrooms."[73] It is evident that when it comes to the child-friendly courts system, the government has compromised on the resources needed to make the system viable.

Despite the presence of legislation permitting the use of intermediaries in the Namibian courts to assist child witness, there are no intermediaries in Namibia. There is a significant gap in the implementation of existing policies. The gap underscores a discord between the promises that the various government policies, initiatives and strategies make and their actual implementation. As discussed in chapter 7, several projects including the 2006 HIV-AIDS orphans project, Pilot Project on Community Corrections, and the delays in the completion Child Care and Protection Bill, show a trend of long delays or half-finished projects. Most of the programmes were jointly funded by external funders, the Namibian government would in some cases neglect to make any financial contributions to the project and would leave all the funding responsibilities to the external funder. The main reason advanced for why neither legislation, the amended 1977 Criminal Procedure Act and the suspended 2004 Criminal Procedure have not been fully implemented especially the sections that deal with intermediaries in the courts is because the government lacked the necessary financial resources to do so.

In 2009, Namibian Judge Damaseb indicated there was a shortage of child friendly courts in the country. The shortage of children's courts has since been cited as one of the barriers to the effective protection of children's rights inside the justice system.[74] The shortage of special courts has led some presiding officers to improvise by removing their robes and descending from the bench and sitting closer to the child in an effort to make the child witness more comfortable.[75]

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[73] Shewareged "Poor Facilities, a Few Number of Judges Impeding Court Sessions" .

[74] L Ambunda and WT Mugadza "The protection of children's rights in Namibia: Law and policy". http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Children_d.pdf [accessed 15January 2011]

[75] See comments by Silungwe in "The inauguration of the High Court Vulnerable Witness Project in Windhoek". http://www.superiorcourts.org.na/high/docs/speeches/vulnerablewitnessproject.pdf [accessed 15January 2011]

One study revealed that parents of child witnesses complained there were no food and refreshment provisions for children at the courthouses.

8.6 SUMMARY

This chapter sought to compare the legislative frameworks of the four countries within which child protection in the justice sector exists. The countries' intermediary laws and the manner in which the courts perceive and interpret them were addressed. The functions of the intermediary and the attitude of the other role players were examined. The government's commitment to the intermediary system and the protection of child witnesses within the courts' system was discussed.

South Africa emerges as the pioneer not only in creating a viable intermediary system but in inspiring other countries to follow suit. This is mostly evident in Zimbabwe. Efforts in Ethiopia to protect child witnesses in court are commendable in the light of the fact that there is no intermediary legislation. Namibia already has the legal instruments it needs to set up a viable intermediary system, all that is left is the implementation of the laws.

CHAPTER

9

CONCLUDING REMARKS AND RECOMMENDATIONS

9.1 INTRODUCTION

The intermediary system came about as a recognition of the fact that child witnesses need assistance when they give evidence. This apparently was in line with various international instruments the countries had either signed or acceded to. The instruments included the Convention on the Rights of the Child, the Declaration of Basic Principles of Justice and the African Charter. In South Africa, Zimbabwe and Ethiopia, it was established that when an intermediary is used, the child witness does not have to appear in the courtroom. He or she does not have to confront the accused, and most importantly does not have to be cross-examined either by the accused himself or by his defence counsel. However, in South Africa the courts reserve for itself the rights to question the witness directly.

In all three countries South Africa, Zimbabwe and Ethiopia, the intermediary is generally expected to communicate with the child witness and rephrases all the questions in an age-sensitive and appropriate manner. The child is protected from mental stress and secondary trauma arising from the following:

- Confrontation with the accused;
- Giving oral evidence under stressful conditions;
- Sharing intimate and embarrassing details in public;
- Hostile cross-examination;
- Comprehending complex court procedures;
- Dealing with unskilled court-role players; and
- Inadequate court preparation.

Testifying outside the courtroom enables the child to give more accurate evidence and also prevent re-traumatisation. The system protects the child and makes it possible for the child witness to recall events freely. In Zimbabwe the intermediary is also responsible for preparing the child witness for the trial.

9.2 RECOMMENDATIONS

9.2.1 Recommendations for South Africa

South Africa has over the last 20 years developed a legal and regulatory framework to advance and protect the rights of the South African children to fulfill its obligations towards the Convention on the Rights of the Child and the African Charter. By endorsing the said instruments, South Africa agreed to comply with such and to implement ways to provide children with protection. Since section 28(2) of the South African Constitution and section 170A of the Criminal Procedure Act are the backbone of the intermediary system, there is a reasonable assumption that the government will continue to commit the necessary resources in order to fulfill the objectives of the law.

9.2.1.1 Intermediary management, supervision and monitoring

The most significant barrier towards the efficacy of the intermediary system in the South Africa is the absence of management of intermediaries and the sustainability of the position. To date, intermediaries are recruited only on a contract basis. Their management and regulation has not been clearly defined. Even thought there is a tentative Intermediary Protocol in place, it is necessary, first of all, that the intermediary position be upgraded to a permanent position with all corresponding benefits. This is only befitting for a position whose function is necessary for as long as child witnesses continue to come to court. Secondly there is need for regulatory provisions addressing the management, training, supervision and monitoring of intermediaries. Whilst creating an office similar to that of the Zimbabwean National Coordinator who coordinates and streamlines intermediaries may be considered late, it may be in itself a worthwhile consideration. The National Coordinator would work with the current court managers in managing, monitoring and supervising the intermediaries. The systematic

monitoring would introduce the much needed opportunity to regularly measure performance and effectiveness of the system.

9.2.1.2 Uniform interpretation of intermediary legislation

South Africa needs uniformity in the basic interpretation of section 170A. All courts need to accept that the accusatorial system is hostile to children and that courts have a constitutional obligation to protect every child witness as he or she comes into court to testify in an adversarial environment in line with Section 28(2) of the Constitution.

The guidelines provided by Justice Ngcobo are clear and well expounded as they uphold the best interests of the child in a way that is consistent with the constitutional requirements. If these guidelines are uniformly adapted to and are applied consistently by all courts dealing with child victims of sexual abuse, these would significantly reduce the uncertainty factor which has been tailgating the application of Section 170A (1).

Courts must embrace the novel interpretation of the problematic phrase "undue mental stress or suffering" as provided by the Constitutional Court. It is simply logical to expect that protecting a child would entail that a child witness need not be exposed to severe stress before he or she is permitted to use an intermediary. Judicial discretion must not be viewed negatively but must be embraced as a mechanism by which each court is enabled to treat each case according to its own merits while looking out for the child's best interests and balancing them with the accused's rights

9.2.1.3 Extended intermediary functions

The core function of intermediaries should be re-assessed. It is recommended that in the child's best interests, subject to the intermediaries' level of expertise and training on aspects of child development and trauma, the functions of the intermediary must be extended. An intermediary could act as a frontline person in all cases involving child witnesses. This will help expedite the building of rapport between the child and the intermediary. The South African intermediary should if he or she lacks the skills be trained to assess the child's communication skills and developmental and emotional level before trial and alert the prosecutor. This should not be

problematic because according to research as most South African magistrates recommend it. In Zimbabwe, it is the intermediary's duty to perform this function.

Intermediaries must be permitted to prepare child witnesses for court. Most importantly this should not pose any significant problem as research has confirmed that South African magistrates want intermediaries to provide court preparation to child witness. It has been established that since prosecutors do not have the time to perform this function. Although child witness court preparation is done by court preparation officers, this function could be easily assumed by intermediaries. In Zimbabwe, the intermediaries prepare child witnesses for court.

During trial the intermediary must be permitted to comment on a child's capacity on whether a child has understood a question or not. The intermediary must point out inappropriate questions which are beyond a child's cognitive and developmental levels. Most intermediaries who have received intermediary training are able to undertake this responsibility. Intermediaries need to provide after-care services advising parents or caregivers of after-care services, referrals and agencies. In Zimbabwe, the intermediaries perform these tasks with relative success. The South African intermediaries should be able to inform the child's parents or caregiver of the next court dates and developments. This is already being practiced with impressive results in Zimbabwe. Finally as part of the monitoring exercise to measure effectiveness and viability of the system, South African intermediaries must systematically collect information and data. In the United Kingdom the intermediary is expected is expected to collect information and data.

9.2.1.4 Training and sensitisation of role players

There should be mandatory training and sensitisation of the police, the prosecutor and the presiding officer on the role of the intermediary, child development, child language skills, the psychological effects of sexual abuse and testifying in court and child trauma. This will ensure a smoother working relationship between the intermediary and the court role players. Acceptance of the role of the intermediary and what it represents means that role players will not consider him or her as an outsider seeking to usurp part of their authority. The engagement of support from law societies and other relevant legal bodies must be considered. This will enable defence

counsels to understand more the context in which the intermediary operates. The intermediary's presence should not be perceived as detracting from the accused's constitutional rights.

9.2.2 Recommendations for Zimbabwe

The Zimbabwean government needs a more comprehensive approach towards providing children with the protection they need. This necessitates constitutional changes, where the government commits itself to uphold the protection of a child rights, and to embracing of all international instruments that promote children's rights. The government must remove the menacing section 111B and re-commit the government to all the international and regional instruments the country has acceded to.

9.2.2.1 Increased direct government input

The Zimbabwean government needs to take full responsibility for mobilizing sufficient resources to implement its own laws. The danger of over-dependency on donors is that it may lead to donor-fatigue. The role of the National Coordinator has given the Ministry of Justice a false sense of security. With the office of the National Coordinator having assumed so many functions, the government may not see the need to do more for the victim-friendly courts. The government needs to gradually increase its direct involvement and the facilitation of child-friendly procedures inside its own courts.

9.2.2.2 Upward revision of salaries

Salaries and working conditions need to be reviewed across board for presiding officers, prosecutors, and intermediaries. Poor salaries lead to corruption and bribery and this compromises the effectiveness of any system. The intermediary system is not an exception. Children need to be protected from corrupt presiding officers and prosecutors.

9.2.2.3 Improved court structures

The government needs to invest in the construction of appropriate court structures. Separate waiting rooms that prevent the child witness coming into contact with the accused in the court corridors must be introduced for children. The intermediary will meet up with the child there.

He or she will establish rapport with the child and also prepare the child from court from the waiting room.

9.2.2.4 Provision of transportation, meals and accommodation

As discussed in chapter 5, the way most child witnesses from rural or remote areas are brought to court is traumatic in itself. They are brought to court sometimes in the same car as the accused. The government must commit to providing the necessary transportation for child witnesses from the rural areas. Proper accommodation and meals must be provided for the child and his or her care-givers.

9.2.3 Recommendations for Namibia

The government must increase its commitment towards fulfilling the rights of children as indicated by its endorsement of international and regional instruments. The government needs to reprioritize the implementation of child protection laws. The over-dependence on donor agencies has to be reduced. When a government promulgates laws, it must ensure that it has the adequate resources to fully implement them.

9.2.3.1 Intermediary introduction

The suspended Criminal Procedure Act of 2004 does provide a more effective framework for the use of intermediaries compared to the 2003 Criminal Procedure Amendment Act. The suspended 2004 Criminal Procedure Act section 193 closely resembles South Africa's section 170A. The government must ensure that it secures the necessary resources needed for its reinstatement. Section 193 would provide a more viable intermediary legislation. Adequate special courts with the necessary equipment need to be installed. Intermediaries need to be recruited and trained appropriately.

It has been reported that most female rape victims from rural Namibia prefer to have their rape trials in traditional courts as they find these courts more empathetic to their situations. This means that the courts must provide a service that is not only empathetic but also culture-sensitive. This entails matching the background and needs of the witness with a particular intermediary. It has also been suggested that using an interpreter who speaks the language of the

child motivates the child to speak and muster confidence in the system. By inference, an intermediary who speaks the child's language may achieve the same results in a child witness.

9.2.3.2 Training and sensitisation of role players

Namibia should from the onset educate its judges and magistrates to interpret the child-friendly legislation in a way that best serves the interests of child witnesses. This is not to say that the rights of the accused should be overlooked. With reports of child witnesses being refused access to the special rooms, there is need for training and sensitisation of role players. Educating role players on the effects of the accusatorial system on child witnesses will assist role players to have a better appreciation the role of the intermediary when the intermediaries make their appearance in court.

9.2.3.3 Accessing regional support

The United Nations Guidelines of Justice Matters involving Child Victim and Witnesses of Crime recommends that member states assist each other in providing the proper care towards child witnesses or victims through the appropriate training of professionals and providing the child victims with witness specialist to assist them during trial.

Namibia is well placed to tap into the experiences of the other countries that have introduced intermediaries, namely Zimbabwe, Ethiopia and South Africa. Namibia could take advantage of other countries' experiences and avoid the pitfalls already experienced by these countries. It should take advantage of relevant case law, especially from South Africa. The recent South African case of the *DPP v Mokoena and Phaswane* does offer important pointers on a government's obligation towards providing the necessary resources and it recommends a legislative interpretation that upholds the child's need for protection due to their vulnerability and the insensitivity of the accusatorial system.

Namibia could follow what Zimbabwe has done in identifying an intermediary with multi-functions. He or she may act as a front-line person, who welcomes the child witnesses and also prepares child witnesses for trial, records information and collect statistics and data to aid with the monitoring and evaluation of intermediaries and provide after care services.

Namibia may need to duplicate Zimbabwe's creation of the centralized role of the National Coordinator to coordinate the functions of the victim-friendly courts including intermediaries. The office would be responsible for their recruitment, training and supervision of intermediaries. Further, it would also be responsible for the repairs and upkeep of victim-friendly court equipment. This would ensure efficiency and increase accountability. The introduction of mobile victim-friendly courts may be necessary to access those areas where there are no victim-friendly courts and intermediaries. This strategy has been considered as a viable option in Zimbabwe.

9.2.4 Recommendations for Ethiopia

The Ethiopian government must increase its commitment towards fulfilling the rights of children as indicated by its Constitution and through the endorsed international and regional instruments. The government must ensure that it has enough resources to fully implement its child-friendly programmes especially the intermediary system. Adequate court structures need to be constructed and role player salaries need to be revised upwardly.

9.2.5 Intermediary legislation

Information on the use of intermediaries in Ethiopia was considerably challenging to obtain. The Ethiopian legislature must address the proper drafting of the necessary legislation needed to modify the court systems to include use of intermediaries, separate rooms and closed circuit televisions. The government must also ensure that these laws, especially the Penal Code and the upcoming Criminal Procedures Code, get the appropriate national recognition. There is an overall need for the introduction of uniform child protection laws to facilitate the introduction of child friendly courts and use of intermediaries countrywide.

9.2.5.1 Intermediary training and management

The Federal Ministry of Justice should ensure that all intermediaries and role players who get into contact with vulnerable witnesses including victims of child sexual abuse receive the necessary education and sensitisation. It is clear that the government should provide for the necessary resources needed for the effective functioning of the courts including the creation of intermediary legislation, the recruitment of adequately trained, intermediaries, judges and prosecutors.

The Ministry should also ensure that the use of intermediaries is properly regulated by an identified office. The office should aim for ensuring that all federal States recognize the role of the intermediary. The office must administer the work of intermediaries including monitoring and evaluating their effectiveness.

9.2.5.2 Cultural considerations

In Ethiopia, rape victims are often ostracized as rape is seen to bring shame to their families or communities. For this reason victims and their families do not usually report rape and other sexual offences the police. The use of intermediaries in the courts must take this into account this value and ensure that intermediaries are culturally sensitive to the witness's backgrounds.

The intermediaries should be multi-lingual or be able to speak the language of the witnesses brought to their courts. Although the Ethiopian working language is *Amharic*,the other States have their own working languages for example Tigri has chosen Tigriana, Harari has chosen Harari, Oromia has chosen Oromifa.

9.3 CONTRIBUTIONS OF THE STUDY

This was an exploratory study which aimed at providing new information on intermediaries through a comparative analysis of the use of intermediaries in South Africa, Ethiopia, Zimbabwe and Namibia. This study was mostly descriptive in nature. It described the situation regarding

intermediaries in South Africa, Namibia, Zimbabwe and Ethiopia by looking at the legislation and the implementation process thereof. It also took into account events that have not yet taken place which include the absence of intermediary legislation in Ethiopia and the absence of intermediaries in Namibia. The study investigated the legitimacy of the Ethiopian intermediary system and was able to establish that the Convention on the Rights of the Child, the country's Constitution and the 2007 decision by the Cassation Bench combine to give the intermediary system the necessary legitimacy it needs to function. The comparative analysis took took into account the fact that the intermediary system has not been fully implemented in Namibia. Although Namibia still has to introduce intermediary assistance for child witnesses in its criminal courts, the country's consistent attempts at creating the necessary legislation cannot be ignored.

The study, being cross-national, compared the legal provisions relating to intermediaries in the four countries, namely South Africa, Namibia, Zimbabwe, and Ethiopia in order to explain various factors surrounding intermediaries in the countries. A researcher in a cross-national study collects data on the object of study within the identified different contexts and makes comparisons that provide a greater awareness and significant understanding of the particular social issue. There was limited literature on the use of intermediaries in South Africa, Zimbabwe, Ethiopia and Namibia. This study will make a significant contribution to the body of literature on the role of intermediaries by providing a comparative study of South Africa, Namibia, Zimbabwe and Ethiopia.

It is recommended that further studies be conducted on the use of intermediaries in the four countries, South Africa, Namibia, Zimbabwe and Ethiopia. The future studies must include in them statistics on how many child-friendly courts are in a given country, the number of intermediaries, the number of children passing through the intermediary system and the effectiveness of the system in protecting child witnesses as they give evidence.

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ADDENDUMS

The following addendums are based on key informant interviews and group sessions. The questioning was generally unstructured, which means that the participants were free to respond to the questions in any way they preferred. The researcher was seeking to establish the truth of fundamental questions and thus would record information generally agreed to by the respondents:

ADDENDUM 1

Background to the intermediary system in Zimbabwe

There is no recorded information on the history of the intermediary system in Zimbabwe. The researcher had to conduct key informant interviews to get the vital information. In order to get the background information, the National Coordinator, the Principal of the Justice College of Zimbabwe and senior prosecutors and magistrates were interviewed as key informants as follows:

The National Coordinator – Mr. Magonga
The Principal of the Justice College of Zimbabwe – Mr. Shana
Senior Regional Magistrate - Mr. Bhila
Senior Regional Magistrate - Mr. Kumbawa

All five key informants agreed on the events and timelines and these are the ones used in the thesis. Apart from Mr. Magonga who is not a court official, each of the key informants had, at the time of the interview, more than 15 years experience working in the Ministry of Justice and was in a position to know what transpired. Mr. Magonga has more than 13 years experience as the National Coordinator.

The all agreed on the following facts:

- The Zimbabwean intermediary system was largely influenced by the South African system and they in turn have inspired other countries like Ethiopia where a Victim Friendly Courts team went to train role players in 2004.

- The Zimbabwean Victim Friendly Courts National Committee was made up of delegates drawn from the Zimbabwean Ministries of Health, Justice, Home Affairs and the Department of Social Welfare.
- The Zimbabwe the intermediary system is largely perceived as an attempt by the government to comply with the Convention on the Rights of the Child. The Zimbabwean National Coordinator for the Victim Friendly Courts who is the overseer of the intermediary system acknowledges the significant role played by the guidelines provided by the Declaration of Basic Principles of Justice in the implementation of the country's intermediary system.
- The government has implemented a Victim-Friendly School Initiative, which was established through the Secretary of Education, Sports and Culture's Circular Number of 5 of 2000.
- The Victim Friendly Courts National Committee successfully advocated for the amendment of the Zimbabwean Criminal Procedure and Evidence Act which authorised the use of intermediaries.

The Victim-Friendly Courts National Committee

- Ministry of Justice (Judges, magistrates and prosecutors)
- Ministry of Home Affairs
- UNICEF,
- Save the Children Sweden,
- Childline,
- Connect Counseling Agency.
- The Law Society of Zimbabwe,
- Redd Barna
- Ministry of Health,
- Public Service Commission,
- The Catholic Commission for Justice and Peace, and
- The Musasa Project (a group advocating against domestic violence and child abuse),

The fact that, initially, social workers were earmarked to act as intermediaries is proven by the fact that there is study tour by social workers from Department of Social Welfare which took place from 22nd -27th September 1997 to the South African Wynberg courts.

The group of social workers intended to study the operations of the victim-friendly courts. The study-tour was undertaken by the following persons, Director Mrs. TW Mhiribidi, Deputy Director Mr. Dhlembeu; Provincial Social Welfare Officer Matabeleland North Mrs. J Mutombeni; and Provincial Social Welfare Officer Mr. J. Myamusara. However the idea was abandoned when it was realized that there were not enough social workers in the country. The court interpreter was then earmarked for the position of the intermediary. The strategy of using interpreters has proved to be cost effective as it takes advantage of pre-existing structures. The intermediary system benefits a lot from the pre-existing interpreter management and regulation structures.

- Concerns over poor salaries have caused large numbers of magistrates and prosecutors to migrate to other countries, especially Botswana and Namibia. The relentless movement of new magistrates and prosecutors coming and going destabilises the smooth functioning of the intermediary system.

- Low rates of remuneration were cited as the reasons why some prosecutors, magistrates and even clerk of courts were clandestinely accepting bribes from accused persons in exchange for favourable sentences.

- The office of the National Coordinator for Victim-Friendly Courts manages and regulates the funding of the intermediary system, victim friendly courts, and also oversees the training of the police, presiding officers and prosecutors. The National Coordinator is a former Save the Children employee whose salary continues to come from Save the Children. The working relationship between the National Coordinator and the funders has lent credibility and consistency to the project.

ADDENDUM 2

The role of the intermediary according to presiding officers in Zimbabwe

The key informants were:

The Chief Magistrate – Mr. Mandeya
Senior Regional Magistrate – Mr. Bhila
Senior Regional Magistrate – Mr. Kumbawa

All respondents agreed on the following:

- He or she facilitates communication between the prosecutor, the accused person or his defense attorney, the court and the child-witness in a manner that is child-friendly
- He or she is trained to communicate with children in a non-threatening manner by taking into account the child's cognitive and developmental limitations.
- An intermediary may embark on his or her course of question and alter questions in order to seek clarity as long as it is not prejudicial to the accused.
- Most intermediaries know and understand court procedures as they are former interpreters and are able to refrain from asking leading questions.
- They felt that the intermediary was an integral component of the justice system especially in the protection of child witnesses.
- The more experienced intermediaries are even able to help out inexperienced prosecutors and even presiding officers on court procedures.

- Most regional prosecutors and magistrates have that had received training on how to handle a vulnerable witness during trial proceedings.

How does the role of the intermediary affect the accused?

All respondents agreed on the following:

- The intermediary role did not in any way detract from the accused's rights in court.
- The accused has the right to cross –examine and this is done through the intermediary.
- Most accused persons are aware of the fact that an intermediary will be used during trial and they rarely object.
- Most cases in the magistrates' courts are undefended, and even if they are not, it is rare for defence counsels to object to the use of an intermediary.
- The inclusion of the Law Society of Zimbabwe in the Victim-Friendly Courts National Committee consultations on the introduction of victim-friendly courts and use of intermediaries meant that most lawyers were able to empathize with victims of sexual offences.

ADDENDUM 3

The role of the intermediary according to prosecutors?

The following persons were interviewed as key informants:

Area Public Prosecutor – Mr. Murombedzi
Regional Public Prosecutor –in-Charge – Ms. Tapfumaneyi
Regional Public Prosecutor– Ms. X (spoke on condition of anonymity)
Regional Public Prosecutor– Ms. X (spoke on condition of anonymity)

The respondents agreed on the following:

- An intermediary plays an important role in ensuring that a child witness is not re-traumatised.
- He or she acts as a front person and is in charge of the child before and during trial.
- Although the intermediary has a copy of the charge sheet , he or she may not refer to the elements of the case when communicating with the child or his or her caregivers before trial.
- He or she is expected before trial, to build some rapport with the child and to take the child around the relevant court rooms on a familiarization tour.

- The intermediary is expected to prepare the child for court and to determine the maturity level of the child in less than an hour.
- During trial the intermediary is expected to re-formulate questions from the court in a manner that takes account the child's age and cognitive limitations.
- The intermediary may ask questions in order to seek clarification as long as they are relevant and do not prejudice the accused.
- Most intermediaries are experienced and avoid leading questions.
- An intermediary may advise the court to adjourn when a child is tired or needs a break.
- Point out age-inappropriate questions
- Break down long questions into small multiple questions the child understands.
- Intermediaries are multi-lingual and that is very convenient.

ADDENDUM 4

Part A:

The functions of the intermediary according to intermediaries in Zimbabwe

The following persons were interviewed as key informants:

The Chief Interpreter - Mr. Ncube
Senior intermediary/interpreter – Ms. Zvanyanya
Intermediary/Interpreter – Mr. Uriri
Intermediary/interpreter – Ms. Z (spoke on condition of anonymity)

The respondents agreed on the following functions of the intermediary:

- To receive the initial intermediary training and to receive periodic training sessions.
- Act as a front-person as directed by the prosecutor in charge of the case.
- Prepare the child for court.
- Take the child on a familiarization tour of the court.
- Ensure the child is calm before trial.
- Determine the development and communication level of the child.
- Find out whether the child uses any special terms for body parts without going into the merits of the case.
- During trial to facilitate communication between the court and the child.
- Interpret all questions in a way that the child understands, including use of slang or any special jargon the child understands.

- To relate back to the court what the witness has said knowing that in a majority of the cases, the accused, the prosecutor and the presiding officer are able to understand the local vernacular languages spoken by the child witnesses.
- Refrain from using leading questions.
- Alert the court when the child is tired or needs a break
- Advise the court of any age-inappropriate questions.
- Attend daily meetings with other intermediaries to debrief and share new ideas, slang words .
- To assist in bringing "closure" to the child by visiting the child witness at least once after trial.
- To use ability to speak different languages to assist witnesses effectively.

Part B:

What are the challenges in the role of an intermediary in Zimbabwe?

The respondents indicated the following:

- Because of transport shortages, the police may bring the child and the accused in the same police car traumatizing the child.
- There are no waiting rooms, if the accused is not in custody, the child usually sees the accused in the corridors.
- In most cases there is not enough time to prepare the children for court.
- Broken down , malfunctioning or stolen equipment closed-circuit televisions and video cameras means that intermediaries have to share the few courts that have the equipment and this may mean waiting long hours before the court can sit.
- The courts no longer give witnesses "witness expense" money so that means the child may not have food for the day, so the intermediary may out of pity share his or her lunch with the child.

- There are a lot of new inexperienced regional prosecutors and presiding officers who are not really acquainted with the system who need some form of guidance.
- Child witnesses from rural area are more fearful and may not talk as much as compared to urban children so they need more time for court preparation.
- Some parents coach their children on what to say making it harder for the intermediary to get the truth out of the children.

Part C:
What does the intermediary training entail in Zimbabwe?

The intermediary respondents indicated the following:

- Child communication and development.
- Evaluating a child's maturity level.
- Identifying the correct way to communicate.
- Identify non-verbal communication.
- Assisting the child with chronology and sequencing.
- Basic court procedures.
- Identifying inappropriate forms of questioning like leading questions.
- Learning the difference between open-ended, closed, and multiple choice questions.
- Handling personal emotions.
- Avoiding negative gestures and body language.

- How to ascertain facts without being pushy.
- How to avoid being suggestive in manner or speech.
- How to avoid unfriendliness or vagueness.

The psychological component of the training was the responsibility of one of the founding members of the Victim Friendly Courts Initiative and therapist. Dr. Jonathan Brakarsh

Part D

What is the attitude towards intermediary training?

- The training is very informative and it is helping intermediaries understand own children more at home.
- Training increases our confidence.
- More "refresher courses" are needed.

ADDENDUM 5

What is the attitude of role players towards intermediaries in Zimbabwe?

The respondents were made up of the following persons:

The National Coordinator – Mr. Magonga
The Principal of the Justice College of Zimbabwe – Mr. Shana
Senior Regional Magistrate - Mr. Bhila
Senior Regional Magistrate - Mr. Kumbawa
Area Public Prosecutor – Mr. Murombedzi
Regional Public Prosecutor –in-Charge – Ms. Tapfumaneyi
Regional Public Prosecutor– Ms. X (spoke on condition of anonymity)
Regional Public Prosecutor– Ms. X (spoke on condition of anonymity)

The respondents' responses included the following:

- The need to protect the child is the main goal so the role of the intermediary is easy to embrace.
- The training received by all on how children think and communicate reveals how insensitive the accusatorial court system was towards child witnesses before the introduction of the intermediary system.
- By having an intermediary present, a child is being protected from secondary trauma.
- An intermediary is automatically appointed for every child unless the child wants to confront the accused in court.
- Use of the special room is also automatically appointed unless the child indicates otherwise.

- Stolen closed-circuit televisions and video cameras and shortage of suitably furnished courts are affecting the effectiveness of the intermediary system.

ADDENDUM 6

What is the attitude of role players towards intermediary legislation in Zimbabwe?

The respondents were made up of the following persons:

The Principal of the Justice College of Zimbabwe – Mr. Shana
Chief Magistrate – Mr. Mandeya
Senior Regional Magistrate - Mr. Bhila
Senior Regional Magistrate - Mr. Kumbawa
Principal of the Judicial College – Mr. Shana
Area Public Prosecutor – Mr. Murombedzi
Regional Public Prosecutor –in-Charge – Ms. Tapfumaneyi
Regional Public Prosecutor– Ms. X (spoke on condition of anonymity)
Regional Public Prosecutor– Ms. X (spoke on condition of anonymity)

The respondents agreed on the following:

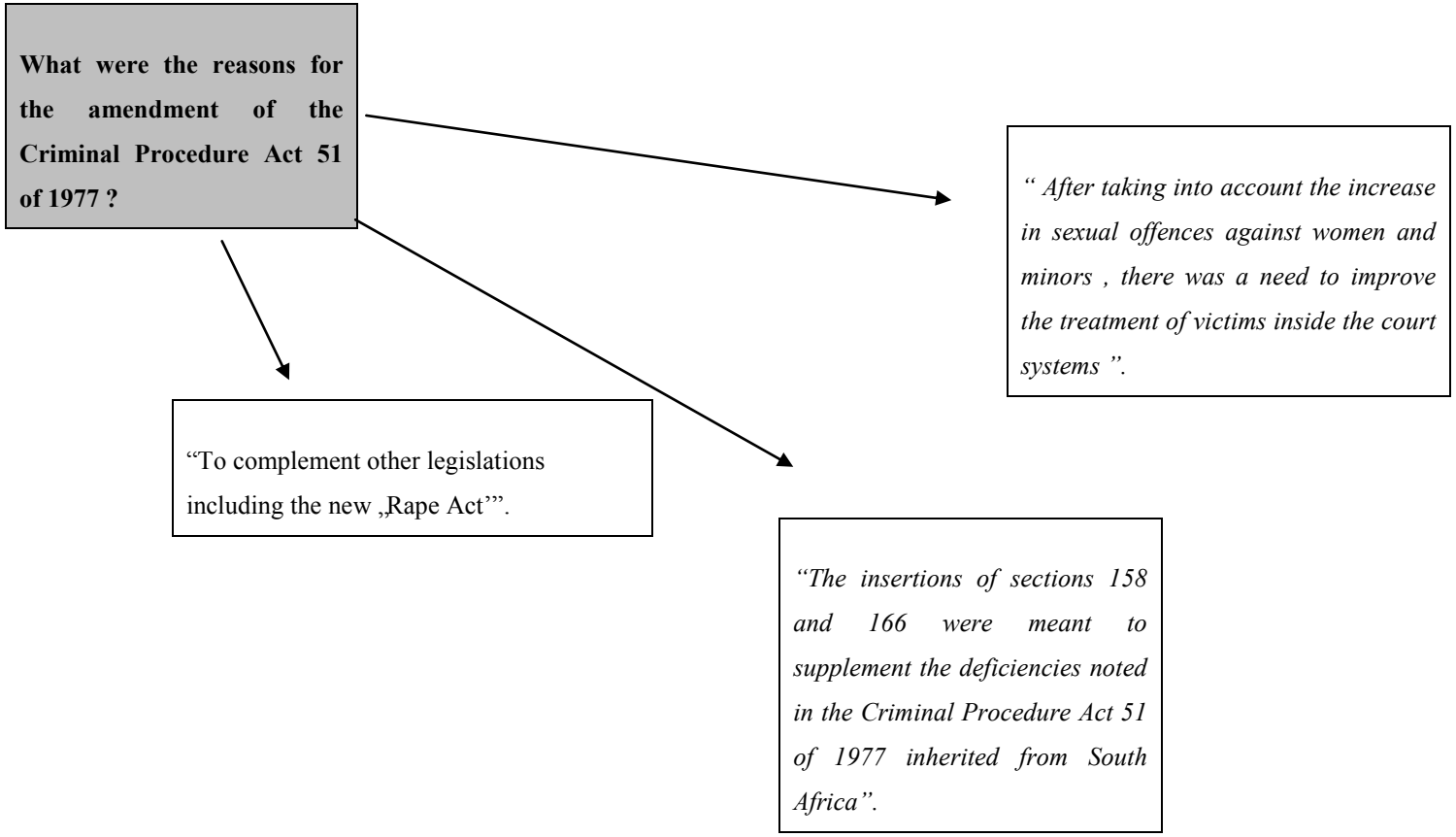
- The intermediary legislation is easy to understand and straightforward.
- Implementing the law in the courts has not been difficult to achieve.
- All vulnerable witnesses (victims of rape or sexual assaults) of all ages are given access to intermediary services and the special room.

- It is rare to see a defence counsel arguing his or her case on the interpretation and application of that legislation. It is rarely referred to as most defence counsels are already comfortable with the presence of intermediaries in the courts.

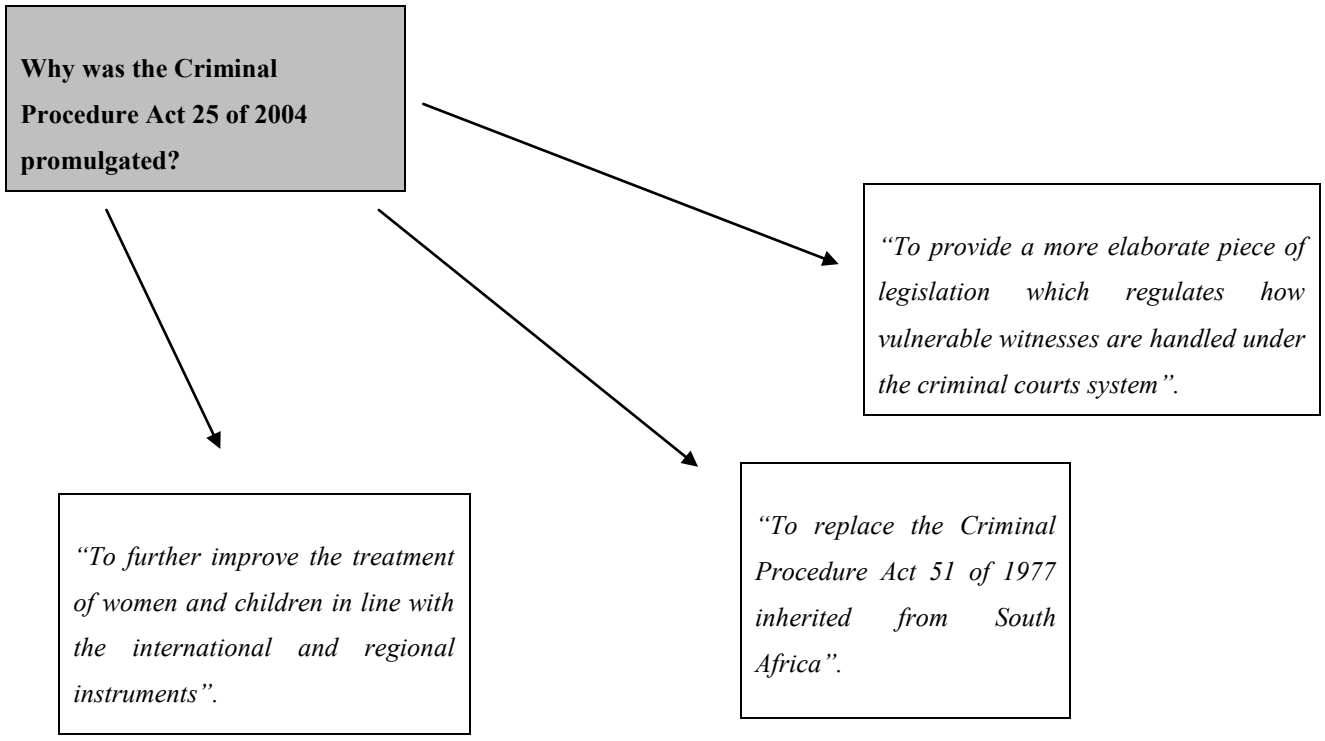
- Apart from the training we get, it is hard to find reading material on the intermediary law, the libraries are under-stocked and access to law reports even more challenging.
- The training sessions we attend assist us in understanding child sexual abuse trauma and it makes easy to understand the goal of the legislation.

ADDENDUM 7

Part A Key informant: The Prosecutor General of Namibia

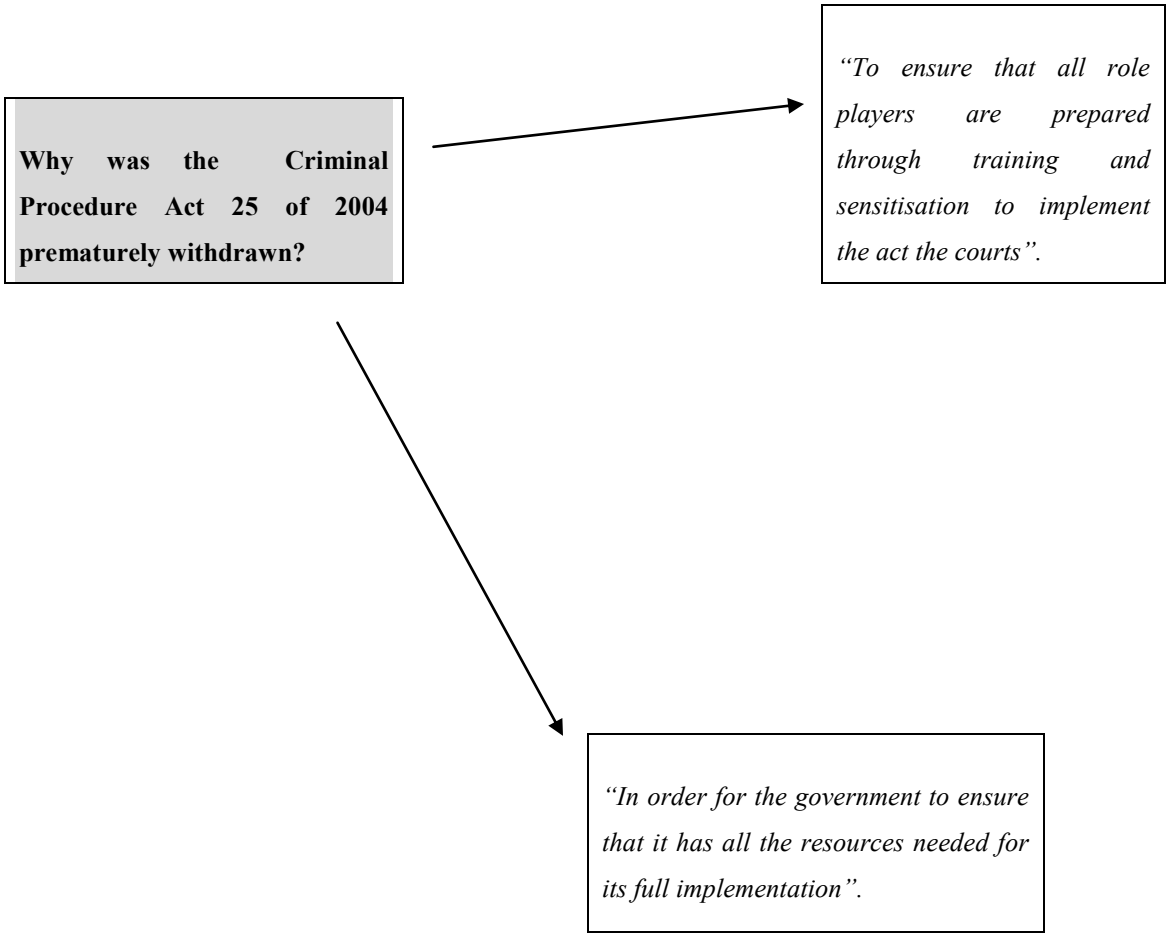


Part B Key informant: The Prosecutor General of Namibia



ADDENDUM 8

Part A Key informant: The Prosecutor General of Namibia



Key Informant: The Control Social Worker on the Namibia Ministry of Gender Equality and Child Welfare

Q What is the spread of victim-friendly courts in Namibia as of January 2009?

A. There are 3 child friendly courts specially built to be child friendly courts, 2 in the capital city (Windhoek), and 1 at the High Court and 1 at the Regional Court in Katutura.

There is one that was built in the capital city in the north (Oshakati) but still needs to be furnished and equipped. So currently it is not in use yet.

The whole court in Oshakati was build recently and they could include the structure in the bigger plan, the 2 courts in capital city is fully equipped (CCTV and all). There is a child friendly court in Walvis Bay (Coastal town in Erongo region). Here they make use of a separate office and a one way screen. So it was not built for that purpose but the staff tried to make it child friendly.

Q In anticipation of the future role of the intermediary in Namibia, what are the general expectations from the role?

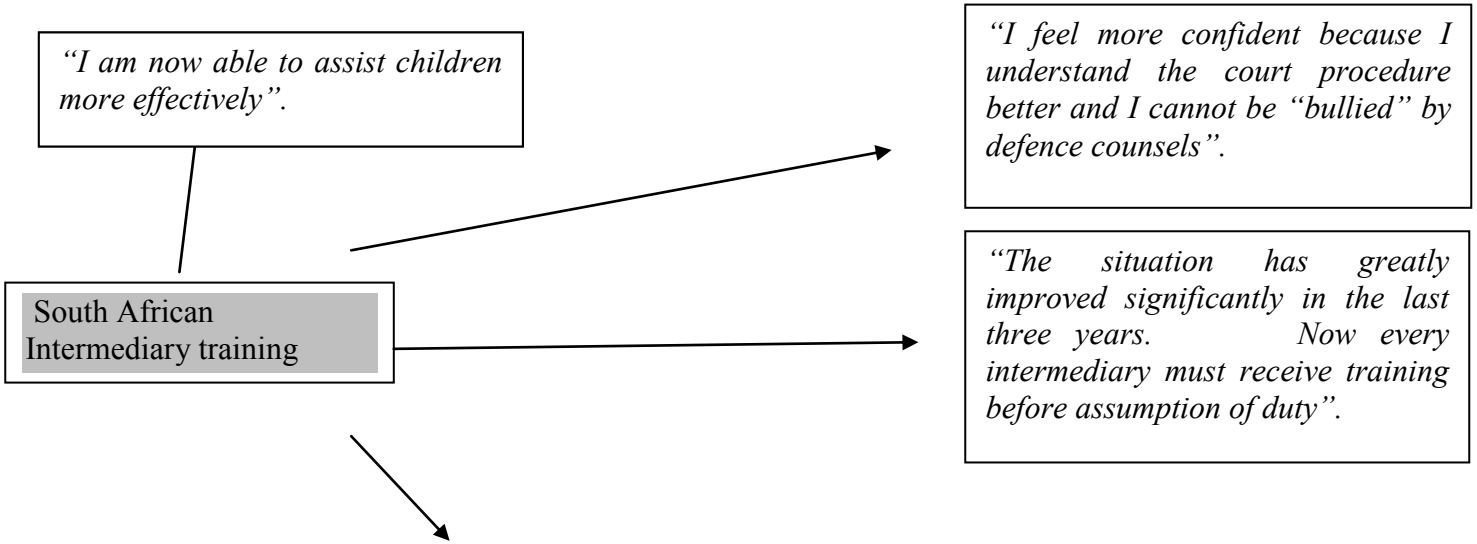
A: The intermediary role is welcome. The following is a list of the reasons why the role of the intermediary is welcome:

- Witness intermediaries can help vulnerable witnesses to communicate more complete, more accurate and more coherent evidence in court, leading to better evidence and better justice.

- Some vulnerable witnesses need assistance with communication and understanding in order to give their best evidence and intermediaries can assist them in communicating during investigating or trial.
- Witnesses are key to the success of the criminal justice system. Too often people who have difficulty communicating have not been able to give evidence and as a result wrong doers have not been brought to justice.
- Intermediaries help to make the justice process accessible to vulnerable people in our society and in some cases an intermediary will be the difference between a witness being able to testify or not.
- Intermediaries are selected for their specialist communication facilitation skills and experience, and may include speech and language therapists.

ADDENDUM 9

Key Informant: Senior intermediary at the Pretoria High Court South Africa (Former educationist).



The new national intermediary training includes the following:

- Child developmental levels;
- Language acquisition framework for children;
- Effects of child abuse;
- Stress and Psychological effects of testifying ; and the
- Introduction to law with special emphasis on the Criminal Procedure Act and the accusatorial system.

ADDENDUM 10

THE DRAFT PROTOCOL FOR THE MANAGEMENT OF SOUTH AFRICAN INTERMEDIARIES

1. Legal Framework

Since the introduction of the Criminal Law Amendment Act 135 of 1991, which inserted s170A into the Criminal Procedure Act 51 of 1977, intermediaries have become an essential feature of the courts. This has become even more entrenched with the use of intermediaries in children's courts in terms of the Children's Act 38 of 2005 and the introduction of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, which has extended the use of intermediaries to mentally disabled persons, as mentioned above. Intermediaries have thus become a permanent addition to many courts.

To summarise, the services of intermediaries are required in the following instances:

- In terms of s170A of the Criminal Procedure Act 51 of 1977, the courts have the discretion to appoint an intermediary where it would appear that a child under the age of 18 may suffer undue mental stress or suffering should he or she testify in the courtroom.
- *With the promulgation of the Criminal Law Amendment Act 32 of 2007, s170A of the Criminal Procedure Act 51 of 1977 has been amended and there is now a duty upon the court to provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary where the witness is a complainant below the age of 14.* This further entrenches an approach of making greater use of intermediaries, especially for young children.

- In addition, subsection (1) has been amended to include all witnesses under the biological or mental age of eighteen years. This amendment also extends the use of intermediaries to those witnesses who, despite their biological age, have a mental age under that of eighteen. The provision of intermediary services will thus have to be made available to this category of persons as well, which will obviously have an affect on the proposed training and skills of intermediaries.
- Section 61(2) of the Children's Act 38 of 2005 provides that a child who is a party or a witness in a matter before a children's court must be questioned through an intermediary as provided for in s170A of the Criminal Procedure Act 51 of 1977, if the court finds that this would be in the best interests of that child. This provision has thus also increased the need for the availability of intermediaries.
- Section 36(7) of the Prevention and Combating of Trafficking in Persons Bill 2009 also makes reference to the use of intermediaries for child complainants in cases of trafficking.
- The case of DPP v Mokoena and Phaswane (Case CCT 36/08 2009] ZACC 8 has laid down guidelines for a court's approach to the appointment of an intermediary, which will have implications for the use of intermediaries.

2. Appointment of intermediaries

The process of appointing intermediaries is guided by the following:

Where the services of an intermediary are required to be available on a daily basis, a person must be appointed on a full-time contract. Where the services of an intermediary are required for shorter periods, then an ad hoc appointment must be made.

Regional Offices of the Department of Justice and Constitutional Development will be responsible for the appointment of additional intermediaries for the interim period up until the end of March 2010. The appointments will be dependent on case flow requirements, clustering of courts, amongst others.

The contractual arrangements will be the responsibility of the Regions and should be finalized by the court managers. Intermediaries must be appointed by court managers. In making such an appointment, court managers should take into account the following:

- *whether the applicant complies with the requirements as set out in the Government Gazette relating to qualifications and experience;*
- *whether the applicant has experience as an intermediary; and*
- *current performance*

As intermediaries will be appointed as officers of the court in much the same way as interpreters, intermediaries must report directly to court managers. Court managers will be responsible for the daily management of intermediaries. By implication this means that intermediaries will take their instructions from court managers and not other role-players, such as prosecutors.

Court managers will be responsible for providing intermediaries with the necessary resources to perform their functions, including but not limited to, office space, access to computers and telephones and anatomically detailed dolls, where this is applicable.

Intermediaries are appointed on Level 7 or equivalent thereof, depending on the nature of the contract.

A database of the details of persons competent and available to act as intermediaries must be kept at the regional office (a template will be provided) so that there will be a pool of persons available for this function.

3. Training

Communicating with children about sexual abuse in a forensic environment is a specialized skill that requires intensive training. Intermediaries must, therefore, undergo relevant training before they are allowed to practice as intermediaries. The specialization of the training is emphasized.

It is the responsibility of court managers to ensure that intermediaries attend the necessary training through the service provider identified to ensure consistency and control quality. To this end, the Department has approved the service provider to conduct the training until the appropriate institutionalization and accreditation is completed.

In order for intermediaries to carry out their functions, they will be provided training on the following:

- Developmental stages through which children progress so that they can assess at what stage any particular child is. v Framework in terms of which children acquire language so that he or she will be able to communicate with the child of a particular age in a manner which the child will understand.
- Psychological effects of testifying and the stress which the child is experiencing, in addition to the effects of abuse where the child witness is a victim of abuse.

- Insight into the law namely the relevant provisions of both the Criminal Procedure Act, Children's Act and the adversarial nature of a trial.

With the expansion of the Criminal Procedure Act to witnesses below the mental age of eighteen, the role of the intermediary will be expanded to communicating with people who have developmental delays.

4. Guidelines

The following rules of practice or guidelines have been formulated with respect to the procedure to be followed by intermediaries.

Suggested guidelines would include the following:
Best interests of the Child must be considered at all times;
Intermediaries are impartial officers of the court and do not represent or favour any party;
Intermediaries should not assume the guilt of any person;

Undue mental stress assessment:
When requested to make an assessment as to whether a child will experience undue mental stress, intermediaries must meet with the child.

- *A file should be opened for each child and a written report filed on the assessment.*
- *When assessing the child, the intermediary may not discuss the details of the offence.*
- *Intermediaries must develop rapport with the child:*
- *Intermediaries must at all times remain neutral.*

- *Intermediaries must not discuss the details of the case with the witness before the latter testifies.*
- *Intermediaries must make sufficient time available to develop rapport with the child before the trial.*
- *Intermediaries must provide support for victims and their families:*
- *Intermediaries must at all times treat the child and his or her family with respect and dignity.*
- *Intermediaries should provide emotional support and assistance.*
- *Emotional support and assistance refers to the giving of information about court and procedures to allay fears and concerns, providing food and water where necessary and where possible, accompanying the child, distracting the child with play and offering emotional empathy.*
- *Intermediaries may not discuss the case with the child or the family nor become personally involved in the dynamics of the case.*