UNIVERSITY OF NAIROBI

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LEGAL RESPONSES TO INTRA-FAMILIAL CHILD SEXUAL ABUSE IN KENYA: A CASE FOR RESTORATIVE JUSTICE

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DECLARATION

This thesis is submitted in fulfilment of the requirements for the award of the degree of Doctor of Philosophy (PhD) in Law of the University of Nairobi. The thesis is my original work and has not been submitted for examination to this or any other University.

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Abstract

Children are more vulnerable to victimization than adults. It is for this reason that they are more prone to all kinds of abuse including sexual abuse. Statistics show that most perpetrators of child sexual abuse are persons closest to the child, including family members. This study focuses on child sexual abuse within the family, referred to as intra-familial child sexual abuse (IFCSA). This kind of abuse impacts its victim differently from child sexual abuse by an outsider. The criminal justice process in Kenya, however, responds to both uniformly without regard to this distinction. This means that an incidence of sexual abuse by a father or any other relative is dealt with in a similar way as that of sexual abuse by a stranger.

This study demonstrates the uniqueness of IFCSA by identifying and unpacking its specificities. The specificities include the influence of patriarchy and family set up, concerns of livelihood, associated stigma and taboos, community expectations, and the tension around the issue of ownership of the conflict. They present bottlenecks that have the cumulative effect of complicating the reporting, investigation and prosecution of IFCSA cases. The complications propel the victims and their families towards the path of least resistance. This may take the form of either covering up the abuse or outright complicity and acquiescence by those supposed to report the offence. These specificities therefore have the potential of impeding justice if left unacknowledged and unattended by the legal system. The research demonstrates that the bottlenecks cannot be resolved under the existing legal framework. It hence proposes the incorporation of restorative processes, values and ideals into the criminal justice system.

The study does not however seek to replace or overhaul the entire criminal justice system. It instead explores possibilities of incorporating the beneficial and constructive values of restorative justice to the extent that they are compatible with the existing criminal justice system. The possibilities identified by the study include re-designing the justice process in order to minimize its anti-therapeutic effects through the implementation of therapeutic jurisprudence throughout the criminal justice process; borrowing restorative processes and values from informal justice to enrich the criminal justice system; diverting a limited category of IFCSA cases especially those involving non coercive sexual encounter between teenage relatives; incorporating the participation of more non-professional players at all possible stages of the justice process; reforming existing laws to

accommodate restorative justice; and calling upon the executive to show political will by investing in institutions that are positioned to build resilience in victims and potential victims of IFCSA.

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List of Abbreviations

ACRWC - African Charter on the Rights and Welfare of the Child.

AJS - Alternative Justice System.

CEDAW - Convention on Elimination of all forms of Discrimination Against Women.

CRC - Convention on the Rights of the Child.

DANIDA - Danish International Development Agency.

DFC - Danida Fellowship Center.

eKLR - Electronic Kenya Law Report.

FJS - Formal Justice System.

ICCPR - International Covenant on Civil and Political Rights.

ICESCR - International Covenant on Economic Social and Cultural Rights.

ICRH - International Center for Reproductive Health.

IFCSA - Intra-Familial Child Sexual Abuse.

IJS - Informal Justice System.

SHUREA - Strengthening Human Rights Research and Education in Sub Saharan Africa.

SEARCWL - Southern & Eastern African Regional Centre for Women's Law.

SOA - Sexual Offences Act.

UDHR - Universal Declaration on Human Rights.

UNGA - United Nations General Assembly.

WHO - World Health Organization.

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UNGA Convention on the Rights of the Child (Adopted and opened for signature, ratification 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3.

CHAPTER ONE: INTRODUCTION

1.1 Background to the Research

Children are more vulnerable to victimization than adults.[1] The Constitution of Kenya acknowledges their vulnerability by including them in the list of vulnerable groups. This is alongside women, older members of society, persons living with disabilities, youth, members of minority or marginalized communities, and members of particular ethnic, religious and cultural communities.[2] Several reasons have been advanced to explain children's heightened vulnerability. The first is the obvious power imbalance between a minor a substantially older person which diminishes their agency.[3] Secondly, children are easily impressionable, physically weak, and dependent on adults or older children for protection, and provision.[4] The vulnerability makes the children susceptible to violence and abuse. The abuse occurs in different forms including neglect, psychological, physical and sexual.[5] Of all these forms, sexual abuse is one of the gravest violations. Its effects are as widespread as they are long term and complex. The most obvious take the form of the harm suffered by the victim. These range from emotional and psychological trauma to serious and often irreversible medical complications including pregnancy as well as life-threatening infections. For these and other reasons, it has been highlighted as a global health and human rights concern.[6] Despite being deplorable, child sexual abuse is rife and widespread throughout the world.[7] It is for this reason that this research focuses on this particular form of abuse.

[1] D Finkelhor and J D Leatherman, 'Victimization of Children' (1994), American Psychologist, 49(3). 173 <http://www.unh.edu/ccrc/pdf/hold.CV1.pdf> accessed14 October 2014.
[2] The Constitution 2010 (KEN) Article 21(3) <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> accessed 2 June 2018.
[3] L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (OUP 2010) 194.
[4] UNGA Convention on the Rights of the Child (Adopted and opened for signature, ratification 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3 (CRC) Preamble.
[5] WHO, (Report of the Consultation on Child Abuse Prevention), 'World Health Organization, Social Change and Mental Health, Violence and Injury Prevention' (1999) 13 <www.who.int/mip2001/files/2011/childabuse.pdf> accessed 16 July 2013.
[6] F Kisanga et al, 'Parents' Experiences of Reporting Child Sexual Abuse in Urban Tanzania (2013) 22(5) Journal of Child Sexual Abuse 481, 482.
[7] A Browne and D Finkelhor, 'Impact of Child Sexual Abuse: A Review of the Research' (1986) 99(1) Psychological Bulletin <http://psycnet.apa.org/journals/bul/99/1/66/> accessed 6 February 2014.

Though reference to child sexual abuse is more likely to conjure the image of a stranger abusing children, there is a marked trend of children experiencing sexual abuse perpetrated by those closest to them, including members of the family. The World Health Organization (WHO) has estimated that 150 million girls and 73 million boys below eighteen years have experienced sexual abuse at the hands of people known to them including members of the household.[8] Startling statistics from the Caribbean, for example, reveal that as high as 47.6% of girls and 31.9% of boys interviewed reported that their first sexual intercourse was forced or coerced by family members.[9] The Committee on the Rights of the Child has also confirmed the trend by noting that in every place where sexual violence has been studied, a large number of them are reportedly assaulted by those closest to them.[10]

Statistics are not any different in Kenya where 43% of child sexual abuse in the country reportedly takes place within the home and is perpetrated by family members.[11] In the Coast region, a study analysis of a sample of 165 sexual offence cases concluded in Mombasa Law Courts revealed that the sexual assault in 80 of them took place within the home and over 80% involved child victims.[12] These statistics do not necessarily tell the full story of the gravity of child sexual abuse within the home as a substantial number of sexual violation incidences are never reported.[13] They nonetheless suffice as a basis for the assertion that child sexual abuse does take place within the family. Child sexual abuse within the family is in this study referred to as Intra-Familial Child Sexual Abuse (IFCSA).

[8] UNGA Report of the Secretary General 'Violence Against children in the home and family' (2006), para 28 <http://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf>, accessed 27 November 2013 (emphasis mine).
[9] UNGA Report of the Special Representative of the Secretary General 'Violence Against Children With Respect to the Caribbean' (2006) < http://srsg.violenceagainstchildren.org> accessed 4 April 2012.
[10]UN Committee on the Rights of the Child, ' General comment No 8' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2 March 2007) UN Doc CRC/C/GC/8. <http://www2.ohchr.org/english/bodies/crc/comments.htm>accessed 4 April 2012.
[11]UN Committee on the Rights of the Child, 'Replies by the Government of Kenya concerning the list of issues **(**CRC/C/KEN/Q/2) Received by the Committee on The Rights of the Child relating to the consideration of the second periodic Report of Kenya (28 November 2006) UN Doc CRC/C/KEN/2 https://digitallibrary.un.org/record/589667/files/CRC_C_KEN_Q_2_Add.1-EN.pdf accessed 2 June 2018.
[12] ICRH Kenya (2013) *An Investigation of the Barriers to Accessing Justice Study for Survivors of SGBV in Mombasa, Kenya* (unpublished, on file with the author).
[13] Kisanga (n 6) 482.

The family unit has been given due recognition by the major international declarations, covenants and treaties as the basic unit of society.[14] This recognition is also highlighted by Kenya's supreme law, the Constitution of Kenya 2010, which states that the family is the necessary basis for social order.[15] In relation to the child, the family plays a critical role in the enjoyment of most child related human rights and freedoms. When this legally recognised safety net is breached from within by the very people vested with the duty to protect the child, the impact on the child victim is magnified. Children's inherent vulnerability is exacerbated by abuse by a family member. This impact has been summarized as 'complex in emotional and social aspects'.[16] Some of the factors that complicate child sexual violence within the home include the issue of the livelihood of the victim, their family life, and the associated stigma.

Livelihood refers to the means of securing the essentials of life like food, clothing, shelter, education, and other needs.[17] It therefore goes hand in hand with economic empowerment. In Kenya, as in most of sub-Saharan Africa, women rarely have control of the means of livelihood. It is no wonder that poverty has been said to wear the 'face of a woman'.[18] Though perpetrators of IFCSA may be male or female, they are more often the former.[19] The males within the family are often the providers and breadwinners. When the provider doubles up as the perpetrator, the victim's livelihood becomes a major concern, especially where the justice process results in incarceration. A research by Lalor on child sexual abuse in Kenya and Tanzania has hence observed that children are less likely to report where their livelihood may be threatened by the perpetrator's imprisonment.[20] The concern of the victim's livelihood is even more profound in a country like Kenya where state welfare is unknown or erratic.[21] It is no wonder that Kisanga

[14] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 16(3) ; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 23; and International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 10.
[15] The Constitution (n 2) Art 45(1).
[16] B Ryan, et al. *Treatment of Intra-familial Crime Victims* (1998). <http://www.vcgcb.ca.gov/docs/forms/victims/standardsofcare/Chapter_6.pdf> accessed 11 September 2013.
[17] Oxford Dictionaries, <http://oxforddictionaries.com/definition/english/livelihood> accessed o 14 October 2013.
[18] A Jaggger, 'Does Poverty Wear a Woman's face? Some Mora Dimensions of a Transnational Feminist Research Project' (2013) 28 (2) Hypatia, a Journal of Feminist Philosophy 240, 246.
[19] ICRH (n 12) 64.
[20] K Lalor, 'Child Sexual Abuse in Tanzania and Kenya' (2004) 28(8) Child Abuse and Neglect 833 Available at <https://arrow.dit.ie/cgi/viewcontent.cgi?article=1002&context=aaschsslarts> accessed 7 August 2018.
[21] A National Plan of Action for Orphans and Vulnerable Children does exist, but this programme does not include victims of IFCSA < http://www.ovcsupport.net/s/library.php?lk=demographic+factors>, accessed 17 October 2013.

observes that the protection of children from child sexual abuse within the family is closely tied to economic empowerment of women.[22]

The question of family ties complicates the response to IFCSA. Where the perpetrator is a stranger, the child victim has their family to fall back on for support throughout the process. Where the child is violated by a family member, however, they have to deal with the dilemma of how to relate with the person they previously trusted and probably loved, but who has now turned against them. Further, when the criminal justice process is eventually set in motion, the rest of the family members may play conflicting roles. They may be called upon as witnesses, either for the prosecution or for the accused. This creates opposing camps as some members side with the perpetrator while others sympathise with the victim. The process inevitably disrupts the family and has the potential to cause family break-up and loss of relationships. All through this, the family usually has to deal with breach of their privacy and negative public exposure as such incidences attract a lot of media attention.

Sex is a taboo subject that is seldom freely discussed in most communities in the sub-Saharan African region.[23] When it arises in the context of having taken place within the prohibited degree of consanguinity, the taboo tag attached to it is magnified and any party associated with such an incident is stigmatised. As a result of the stigma, IFCSA is less likely to be voluntarily disclosed by the victim and their family than child sexual abuse by a stranger. The urge to sweep the incident under the carpet is usually strong. The abuse may therefore continue to take place over an extended period of time before detection, which is often by default.[24] Late detection compromises the collection of forensic evidence which may be lost with time.[25] As a result proving an IFCSA case beyond reasonable doubt becomes an uphill task.

The above highlighted unique circumstances of an IFCSA victim are best illustrated in the proceedings of a case in the Resident Magistrate's court in Mombasa. When asked by the

[22] Kisanga, (n 6) 482.
[23] Lalor (n 20) 837.
[24] Kisanga (n 6) 482.
[25]WHO, 'Guidelines for Medico-Legal Care for Victims of Sexual Violence' (2003) 76 <http://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf> accessed 16 October 2014.

Prosecutor whether she had anything else to tell the court, thirteen year old NN[26] concluded her evidence in chief as follows:

> 'I have no grudge against the accused. He is the only dad I have known since my parents died. He always paid my fees and bought me books and uniform. I do not know who will pay my school fees. I love him as my uncle but this has happened and I had to come to court to tell the truth'.[27]

NN was testifying in a case where her uncle, who was her guardian, had been charged with repeatedly defiling her. She was recounting her evidence in chief for the third time as the magistrate who first heard the case had disqualified himself and the one who subsequently took over was transferred to another station. Since the case was reported to the police, NN had been living with her classmate's mother amidst a lot of uncertainty on her livelihood. The two year trial eventually ended with an acquittal on a 'no case to answer' for lack of sufficient evidence.[28] Though the fate that befell her case is common to all types of cases, NN's position as a victim related to the perpetrator summarizes the complex scenario created by cases of intra familial child sexual abuse. On the one hand is the child who deserves justice but who might still love, and in most cases, depend on the perpetrator. On the other hand is the perpetrator who deserves to be punished but who may also be the bread winner, not only of the child but also the extended family. In between is an adversarial criminal justice system that does not prioritize the best interest of the child victim and is riddled with serious structural and institutional deficiencies as well as procedural gaps in its response to IFCSA.

NN's case along with the predicament it creates for the victim is not an isolated incident. It is replicated frequently with varying degrees of gravity and complexity in Kenya. It is no wonder that findings have been made to the effect that many IFCSA cases go unreported while a good number of those that get reported are concluded informally under arrangements that are unrecognized and unsupervised by the criminal justice system.[29] The fact that people are seeking justice in informal social-legal orders outside the formal justice system signals the need for an alternative approach.

[26] Pseudonym.
[27] *Republic v GN* Mombasa Senior Resident Magistrate Criminal Case Number 1765 of 2011 (unreported).
[28] The Criminal Procedure Code Revised 2012 (KEN) 87.
[29] ICRH (n 12)17.

This research is an acknowledgment of the reality of sexual violations against children within the family, its unique impact on its victims and the resultant demand for a different legal response.

The current exclusively retributive response is reflective of the strong condemnation that child sexual abuse attracts from the community.[30] Any action that does not lead to retribution is therefore seen as tantamount to condoning the act. This research looks beyond the outrage to focus more on the interests of the victim. It explores possibilities of incorporating the beneficial and constructive standards of restorative justice into the existing criminal justice process to the greatest possible extent in order to achieve justice for the victim. This includes aligning the court towards more intentional embracing of therapeutic practices and jurisprudence throughout the criminal justice process; borrowing restorative processes and values from informal justice to enrich the criminal justice system; diverting a limited category of IFSCA especially non coercive sexual encounters between teenage relatives; incorporating the participation of more non- professional players at all possible phases of the justice process; reforming existing laws to accommodate restorative justice; and calling upon the executive to show political will by investing in institutions that are positioned to build resilience in victims and potential victims of IFCSA. Incorporation of restorative values and processes is meant to address the material, financial, emotional and social concerns of the victim.[31]

Though the criminal justice process is able to accommodate some restorative processes and values, the informal justice mechanisms that are often resorted to are largely restorative in nature.[32] It is for this reason that the study interrogates processes and values outside the formal criminal justice process with a view to finding innovative ways of achieving justice for the child victim. The extent to which these informal mechanisms adhere to restorative ideals is the subject of interrogation in this study. The study does not however seek to overhaul the entire existing criminal justice system. In line with O'Connor's suggestion, it seeks to achieve the injection of restorative justice both

[30] K Daly, 'Restorative Justice and Sexual Assault' (2006) 46(2) Br J Criminal 334,337.
[31] T Marshall, 'Restorative Justice: An Overview' (1999) in G Johnstone (ed.) *A Restorative Reader, Texts, Sources, Context* (WP 2003) 28.
[32] UNDP, UNICEF and UN Women, 'Informal Justice Systems, Charting the Course for Human Rights Based Engagement' (2013) 75.

alongside and within the criminal justice so that the option to invoke the latter fully remains available especially where the perpetrator fails to fully cooperate.[33]

1.2 Statement of the Problem

The criminal justice process in Kenya responds to IFCSA without giving due attention to the specificities of its impact on the victim. This means that a case of a victim sexually abused by her own father or any other close relative is dealt with under the same framework as that of another victim sexually abused by a total stranger. The underlying philosophy guiding the legal response in both scenarios is based on two hard line stances: First is the imposition of longer and stiffer custodial sentences on the perpetrator in proportion to the age of the victim.[34] Second is the absolute ousting of any opportunity for a negotiated conclusion of sexual offences.

This approach is almost always countered by a vicious response by the perpetrator. Having no incentive to concede to the offence, even in the most obvious cases, the perpetrator fights for an acquittal using all available means. In a jurisdiction where court cases take up to five years to conclude,[35] the victim is left at the mercy of the 'winner takes it all' adversarial system and ends up suffering more emotional, social and financial harm in pursuit of justice. Once set in motion, the process remains firmly under the control of the Director of Public Prosecutions.[36] Despite the recognition of victim's rights in the Victim Protection Act,[37] the victim plays a peripheral role in the justice process as the parties to the case remain the 'Republic of Kenya' and the perpetrator.

Convictions in sexual offences are also few.[38] Even where it is achieved, incarceration often results in substantial economic hardship to the victim and the family at large where the perpetrator was the breadwinner. Further, the prolonged rigid adversarial and punishment centered criminal justice system disrupts the family life of the child victim as it does not prioritize its restoration or

[33] R O'Connor, *Child Sexual Abuse: Treatment, Prevention and Detection*, (Center for Health program evaluation, Australia, 1991) para 5.5.
[34] The Sexual Offences Act 2006 (KEN) section 8.
[35] B Shadle, 'Sexual Offences in Kenya Courts, 1960s-2008'(2010) Previous versions of this paper were presented at the VAD/German Association of African Studies annual conference, Mainz, April 10, 2010, and the European Social Science History Conference, Gent, Belgium, April 14, 2010. < www.kenyalaw.org> accessed 29 March 2012.
[36] SOA (n 34) s 40.
[37] The Victim Protection Act 2014 (KEN) sections 8 - 26.
[38] ICRH (n 12) 18.

reconciliation. In its present state therefore, the criminal justice process is not responsive to the unique specificities of the circumstances, needs and interests of the victim of IFCSA.

1.3 Purpose and Objectives of the Study

The purpose of this study is to advance a victim centered legal response to cases of IFCSA through incorporation of restorative justice values and practices into the criminal justice system.

The specific objectives of the research are to:

i. Identify the specificities of the impact of IFCSA on its victim.

ii. Examine the statutory legal framework within which IFCSA has been responded to with a view to identifying the gaps therein.

iii. Explore restorative justice as an innovative legal response to IFCSA.

iv. Identify opportunities and entry points for application of restorative justice within the criminal Justice process with a view to providing a legal response which adequately responds to the realities and needs of IFCSA victims.

1.4 Research Questions

i. To what extent is the existing legal framework sufficient in protecting the interests of the victim of IFCSA in Kenya?
ii. In what unique ways does IFCSA impact its victim?
iii. To what extent can restorative justice provide an effective legal response to IFCSA?
iv. What can the criminal justice system learn from existing informal justice mechanisms in coming up with a more restorative approach in responding to IFCSA?
v. What entry points exist for the application of restorative practices and values within the Kenyan criminal justice system?

1.5 Hypothesis

This study is conducted on the hypothesis that the victim of IFCSA has unique interests and needs which are different from those of child victims of sexual abuse by non- family members. It is further hypothesized that the existing criminal justice system is deficient in sufficiently addressing these unique needs. Due to the challenges and deficiencies in the criminal justice system, many of these cases go unreported while others are terminated prematurely as parties seek alternative modes of justice away from the courts. The solution hypothesized by this research is the incorporation of restorative justice systems and values at appropriate stages of the criminal justice process.

1.6 Significance of the Study

As stated above, child sexual abuse within the home is a widespread problem in Kenya. The convictions arising from these cases are comparatively low and many more cases go unreported. This is suggestive of failure by the system to adequately respond to IFCSA. While not purporting to provide the panacea for all that ails the criminal justice process, the research gives pointers to a more effective justice process to victims of IFCSA.

The research is groundbreaking in the Kenyan criminal justice as it delves into the hitherto uncharted realm of applying restorative justice to serious offences including sexual offences. It will also contribute to the knowledge on child rights. This is because the guiding principle in securing the interests and needs of the child victim is the principle of the best interest of the child and the child's right to access to justice. It is also timely as it provides a stepping stone to the implementation of the letter and spirit of the Constitution of Kenya 2010 which enjoins the courts to embrace and encourage alternative methods of dispute resolution, including restorative justice processes.[39]

[39] Art 159(2) (c), section 2.

1.7 Terminologies

1.7.1 Child

In this research a child is, a person eighteen years. This is in line with the definition in the CRC which is also echoed in the Children Act.[40] The child victim referred to in this research is both male and female.

1.7.2 Child Sexual Abuse

There is no specific definition of child sexual abuse in the Sexual Offences Act. The research adopts the second limb of WHO's definition which defines child sexual abuse as,

> The involvement of a child in sexual activity that … violate the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person. This may include but is not limited to:
> 1. The inducement or coercion of a child to engage in any unlawful sexual activity.
> 2. The exploitative use of child in prostitution or other unlawful sexual practices.
> 3. The exploitative use of children in pornographic performances and materials.[41]

The above definition covers the whole range of acts described in sections 7 to 16 of the Sexual Offences Act. This research does not therefore limit itself to acts that cause penetration. It considers child sexual abuse in its broadest sense including any sexual activity with a child. The Committee on the Rights of the Child has excluded sexual activities among children from the ambit of child sexual abuse. It has however noted that such activities may amount to abuse where the child perpetrator is substantially older than the victim or exerts power, threat, or other means of pressure.[42] This research also considers sexual activity among children of the same household.

[40] UNGA CRC (n 4) Art 1.
[41] WHO (Report of the Consultation on Child Abuse Prevention, Geneva) (n 5) 16.
[42] UN Committee on the Rights of the Child, ' General comment No 13' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' 18 April 2011 <http://www2.ohchr.org/english/bodies/crc/comments.htm> accessed 6 May 2013.

1.7.3 Formal Justice System

The FJS here refers to the formal, state-based justice procedures and institutions like the judiciary, the office of the Director of Public Prosecutions, the National Police Service, Prisons Department, Children's Department, and the Probation and Aftercare Service Department. The institutions are governed by the constitution and the respective statutes that establish some of them.[43]

1.7.4 Informal Justice System

The IJS refers to 'the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law'.[44]

1.7.5 Intra-familial Child Sexual Abuse (IFCSA)

The research strictly focuses on child sexual abuse within the household commonly known as intra-familial child sexual abuse. This has been defined as the use of a child for sexual satisfaction by family members, that is, blood relatives too close to marry legally.[45]

1.7.6 Perpetrator

The perpetrator in this research refers to persons who sexually violate children. This includes adults and older children of a remarkable age difference with the victim.

1.7.7 Restorative Justice

Restorative justice is still an evolving concept yet to have a single agreed on definition.[46] A broad definition of restorative justice in this research refers to an approach that focuses on repairing the

[43] Office of the Director of Public Prosecution Act 2013 (KEN), National Police Service Act 2011(KEN), Prison Service Act 1962 (KEN), Children Act 2001 (KEN), Probation of Offenders Act 1981 (KEN).

[44] UN Publication, 'Informal Justice Systems: Charting a Course for Human Rights-based Engagement' (2013) 75 <http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/informal-justice-systems/> accessed 25 October 2013.

[45] H N Snyder, 'Child Sexual Abuse – The Perpetrators'. <http://www.libraryindex.com/pages/1411/Child-Sexual-Abuse-PERPETRATORS.html> accessed on 29 March 2012.

[46] D W Van Ness and K H Strong, *Restoring Justice: An Introduction to Restorative Justice'* (4th ed 2010 Lexis Nexis Anderson Publishing) 41.

harm caused by criminal behavior through cooperative processes that include all stakeholders. This concept is discussed in chapter two of this research.[47]

1.7.8 Victim

The scope of the term victim in this research is as broad as the one adopted in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[48] This includes the child who has suffered harm as a result of sexual abuse together with members of the immediate family and those who suffer harm in the course of intervention for the child victim. Similarly the definition in the Victim Protection Act encompasses any natural person who suffers injury, loss or damage as a consequence of an offence.[49]

1.8 Theoretical and Conceptual Framework

The thrust of this thesis is for victims of IFCSA to receive justice that is holistic and adequately meets their needs. This is through recognizing its unique specificities, and acknowledging the deficiencies inherent in the existing criminal justice framework in responding to the vice. The thesis therefore resonates with restorative justice upon which it is grounded. Restorative justice is discussed against the backdrop of vulnerability theory, feminism, legal pluralism and human rights standards for reasons that are stated here below. The concepts and theories are discussed in the following chapter.

Restorative justice is a much misconstrued concept. Reference to it often conjures a process where the victim and perpetrator are reconciled with the latter getting away with a slap on the wrist. The reason for the misconception is that restorative justice is conceived in diverse ways by its proponents and critics. Gerry Johnstone has summarized its breadth and width in the observation that restorative justice has been interpreted as a set of values, a process and as a lifestyle.[50] As a process, it provides the forum where all parties with a stake in the offence come together to resolve

[47] Ibid 43.
[48] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 96th plenary meeting of the General Assembly (29th November 1985) Para 1, 2 <http://www.un.org/documents/ga/res/40/a40r034.htm > accessed 14 October 2014.
[49] Victim Protection Act (n 37) s 2.
[50] G Johnstone (ed) *A Restorative Reader, Texts, Sources, Context (WP 2003) 1.*

collectively how to deal with its aftermath.[51] As a set of values, it calls for the injection of attitudes that make the criminal justice system more responsive to the needs of the victim.[52] As a lifestyle, it involves the application of restorative values and principles in everyday interaction with people even outside the realms of crime.[53] Whether perceived as a process, a set of values, or a lifestyle, the overriding concern of restorative justice proponents is the need to shift focus from punishment to the perpetrator to the victim's interests. They emphasize the need to mete out justice in a manner that is best understood and embraced by the victim. The proponents of restorative justice view it as less disruptive to the family as it advances values that are more re-integrative and constructive than the formal criminal justice system which is viewed as 'brutal, vengeful and hypocritical, humiliating and stigmatizing'.[54] Victims of IFCSA can benefit from this overall utility value advanced by restorative justice but missing in the formal criminal justice system.

When contrasted to the formal criminal justice system restorative justice is presented as one guided by principles of 'democracy, social support and love' while the former is deemed as 'stiff, distant and lacking in warmth'.[55] Olson and Dzor further contrast the informal nature of restorative justice with the conventional criminal justice process. They juxtapose the specialized roles of the criminal justice professionals with the informal human interaction between the victim, perpetrator and the community in restorative justice. The proposal in their work is that professionals may still have a role in restorative justice but as 'democratic professional' who operate as task sharers as opposed to being aloof to the unique circumstances of each case.[56] The strand of restorative justice that is of interest to this study is the one that focuses on the interests of the victim throughout the criminal justice process. The study does not therefore confine itself to one perception of restorative justice. It interrogates it as a process, a set of values and a lifestyle.

[51] T Marshall, *Restorative Justice: An Overview* (n 31) *28.*
[52] G Johnstone (n 50)5.
[53] Ibid 8.
[54] J Braithwaite, *Crime, shame and Reintegration*, (Cambridge university press 1989) 12.
[55] G Johnstone (ed), 'Introduction: Restorative Approaches to Criminal Justice*'* in G Johnstone (ed), *A Restorative Justice Reader Texts, sources, context*, (WP 2005) 5.
[56] S M Olson and A W Dzur, 'Revisiting Informal Justice: Restorative Justice and Democratic Professionalism' 2004) 28 1 Law & Society Review 139 <http://www.jstor.org/stable/1555115 > .accessed: 24 June 2013.

Restorative justice is not entirely an alien concept in Kenya. A lot of African traditional concepts of justice are grounded on restorative values focusing on reparation and reconciliation.[57] It is also not unknown to the formal criminal justice system as the main procedural statute the Criminal Procedure Code gives it recognition albeit a nuanced one. [58] This includes allowing for diversion of court fines to a victim as compensation for loss or injury.[59] It also allows the court to facilitate reconciliation and promote amicable settlement in cases of common assault and other misdemeanor offences.[60] The code also provides for plea bargain negotiations but excludes its application in sexual offences.[61] These opportunities are captured by Ombijah, J, in his article written before the promulgation of the Constitution of Kenya 2010.[62] This Constitution now provides as one of the guiding principles of judicial authority the promotion of alternative forms of dispute settlement.[63] This includes reconciliation, mediation, arbitration and traditional resolution mechanisms. The same provision states that administration of justice should be without undue regard to procedural technicalities which is also a running theme in restorative justice. The processes and values of restorative justice can be extended to cases of intra- familial child sexual abuse. If applied appropriately, they may alleviate prolonged trauma and re-victimization otherwise suffered by the victim of IFCSA.

Restorative justice is distinguishable from retributive justice though the two are not mutually exclusive. The latter's main concern is giving the offender their just deserts and using punishment to denounce the act. Retribution places minimal focus on the victim save that it is hoped that they derive some satisfaction from the fact that the perpetrator gets punished. [64] Of the two, retribution needs less justification as the sequence of crime and punishment has been compared to the natural sequence of stimuli and response.[65] The two cannot however be said to be entirely incompatible.

[57] S Kinyanjui, 'Restorative Justice in Traditional Pre-colonial 'Criminal Justice Systems' in Kenya' (2009-2010) 10 Tribal Law Journal 2, 3.
[58] The Criminal Procedure Code (n 28).
[59] Ibid s 175.
[60] Ibid s 176.
[61] Ibid s 137(N) (a).
[62] N R O Ombijah, 'Restorative Justice and Victims of Crime in Kenya : A Practitioner's Perspective '- Non-Peer Reviewed Articles< http://www.kenyalaw.org/klr/index.php?id=168> accessed 19 July 2013.
[63] Art 159 (2).
[64] Clarkson and Keating, *Criminal Law,* (7th edn, Sweet & Maxwell 2010) 3.
[65] N S Timasheff, 'The Retributive Structure of Punishment '(1937) 28 3 Journal of Criminal Law and Criminology 396.

There are cases for instance where restoration can only be brought about only through retribution punishment.[66] Similarly, certain procedures like victim inclusion in the retribution centered criminal justice system are restorative in nature.[67] This study seeks to find a balance between restorative and retributive justice as proposed by Barnet.[68] He advocates for a balance he refers to as 'punitive restitution'. This is where the benefits of restitution are sought while retaining the paradigm of punishment.

The positioning and needs of the vulnerable child victim is examined through the vulnerability theory. The theory is relatively new but steadily gaining momentum. Its main proponent is Martha Albertson Fineman in her endeavor to respond to the limitations encountered by sole reliance on equality.[69] The theory focuses on human beings' susceptibility to change.[70] It propounds that vulnerability is a universal state vested in everyone and only varying in degree and intensity. The converse of vulnerability is resilience. This is the ability to recover from the harm resulting from vulnerability. The theory expects the state to actively assume the of building resilience through the establishment and maintenance of institutions like schools, health facilities, courts, rehabilitation institutions, prisons and police stations.[71] The relevance of engaging vulnerability theory in this study is that it assists in positioning the victim in relation the state. This is important in ultimately laying expectation on the state as the ultimate facilitator of identified restorative values, processes and lifestyles needed to assist an IFCSA victim realize justice.

The victim of IFCSA is usually a female child while the perpetrator is in most cases male.[72] The gender dynamics inherent in the topic under research necessitates a discussion of feminism. Not unlike restorative justice, feminism lacks a universally accepted definition. This is because it presents itself in multiple strands. The general consensus among the proponents of the various strands is that women suffer injustices because of their sex and hence the need for the creation of

[66] D Van Ness (n 46) 52.
[67] Ibid 120.
[68] R E Barnett, 'Restitution: A New Paradigm of Criminal Justice' in G Johnstone (ed), *A Restorative Justice Reader Texts, sources, context,* (Willan publishing 2005) 50.
[69] M A Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo L. Rev. 133, 134.
[70] Ibid 142.
[71] M A Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale J.L. & Feminism 1, 10.
[72] ICRH (n 12) 6.

a social order in which women's experiences are brought to the fore as opposed to being suppressed.[73] They however part ways on the reason behind the injustices with each explaining their own reasons for gender inequality. They also have varying suggestions on ways out of the injustices. Classification of the strands also varies but the most prominent categories include the liberal feminist theory, the radical feminist theory, the Marxist feminist theory and the cultural feminist theory. The strands that are of relevance to this research are radical feminism and cultural feminism for reasons expounded in chapter two of this study.

Intra-familial child sexual abuse is, among many other things, a human rights violation. For instance, it is a violation of the right to protection all forms of sexual exploitation and sexual abuse and of freedom from torture or other cruel, inhuman or degrading treatment or punishment. Therefore, any meaningful legal response to IFSCA ought to have a human rights approach. The thesis is therefore informed by the principle of the best interest of the child and access to justice which are cardinal human rights standards in relation to children. Interrogating the two human rights principles has necessitated a discussion of the concept of human rights. This has been done through the lens of human rights theory. In a nut shell, the theory is concerned with the content, nature, origins and legal status of human rights.[74]

As stated above, human rights principles provide a standard that is useful in informing the discussion on what eventually constitutes holistic justice for an IFCSA victim. The Bill of Rights in the Constitution of Kenya is key in informing all policies including those specific to the criminal justice system.[75] The human rights principles and standards that are of the greatest relevance in this study are the right of access to justice and the principle of the best interest of the child, together with the attendant rights specific to the rights of the child including the right to dignity. The term best interest of the child broadly describes the well- being of the child as determined by their age and circumstances.[76] It is a running theme in major documents related to the rights of the child.[77]

[73] K Daly and M Chesney-Lind, 'Feminism and Criminology' (1988) 5 Just. Q. 497, 498.
[74] N James, *Human Rights, The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/spr2014/entries/rights-human/ accessed 15 October 2014.
[75] Art 19(1).
[76] UNHCR Guidelines on Determining the Best Interest of the Child (May 2008). <www.unhcr.org/4566b16b2.pdf > accessed 19 July 2013.
[77] The UN Convention on the Rights of the Child and the African Convention on the Rights and Welfare of the Child.

It emphasizes that in all actions concerning children, including those undertaken by public institutions, administrative and legislative authorities and courts of law, the best interest of the child shall be a primary consideration. The Constitution of Kenya 2010 also restates the concept by providing that a child's best interest is of paramount importance in every matter concerning the child. [78]

The study recognizes the fact that communities resort to use of informal mechanisms to resolve or cover up a good number of cases outside the legal framework. Since the informal mechanisms gravitate more towards restorative justice, the criminal justice system has something to learn from informal processes in as far as the use of restorative values and processes is concerned. This is not to say that restorative justice is untenable in the criminal justice process. It is for this reason that the research considers the theory of legal pluralism to explore the framework within which the criminal justice process can be enriched by the restorative values and processes in alternative informal justice systems. The use of the term legal pluralism in this research refers to the presence of more than one legal order based on a variety of certain common interests including geographical location, religion or ethnic affiliation.[79] The essence of legal pluralism as a theory is 'to validate and acknowledge the existence of alternative or co-existing forms of legal ordering within a particular domain'.[80] This concept has a constitutional basis in Kenya by dint of the provision sanctioning the use alternative dispute resolution mechanisms, including traditional justice mechanisms. The constitution clarifies that traditional dispute resolution mechanisms should be used in a way that does not contravene the bill of rights, is repugnant to justice and morality or is inconsistent with this Constitution or any written law.[81] Its relevance to this research is mainly in its versatility which provides space for creativity in coming up with a more victim centered legal response to IFCSA.

[78] Art 53(2).
[79] J Griffiths, 'What is legal pluralism?' (1986) 24 Journal for Legal Pluralism 3 http://www.jus.uio.no/smr/english/research/areas/diversity/Docs/griffiths_what-is-legal-pluralism-1986.pdf accessed 4 February 2014.
[80] A Griffiths, 'Pursuing Legal Pluralism: The Power of Paradigms in a Global World' (2011) **64** Journal for Legal Pluralism 174 <http://www.jlp.bham.ac.uk/volumes/64/griffiths-art.pdf> accessed 6 February 2014.
[81] Art 159 (2) (c).

1.9 Literature Review

1.9.1 General Child Sexual Abuse

A lot has been published on child sexual abuse generally both locally and at the international level. The United Nations has been a notable front runner and has commissioned substantial literature on the issue. In 2002, the UN General Assembly appointed an independent expert to report on violence against children.[82] The expert subsequently compiled a Report which included his findings on child sexual abuse.[83] The report states that most cases of child sexual abuse occur within the family circle. Of relevance to this study is the fact that the report suggested a judicial and legislative response to the abuse that shifts away from penalties to recovery, reintegration and redress. This recommendation is inclined towards restorative justice which is a central theme in this research. The UN Secretary General subsequently appointed a Special Representative to promote the dissemination of the study and ensure effective follow up to its recommendation.[84] The Special Representative makes annual and thematic reports to the Human Rights Council and the General Assembly on issues concerning violence against children, including sexual abuse.[85]

Locally, studies have been conducted on access to justice for sexual assault victims since the enactment of the Sexual Offences Act. Professor Brett Shadle has reviewed sexual offence cases handled by the Kenyan courts between 1960 and 2008.[86] The review was both statistical and qualitative designed to evaluate the impact made by the implementation of the Sexual Offences Act. The study focused mainly on adult sexual assault. In the study report's conclusion, he calls upon legal scholars and activists to pay close attention to trends in sentencing and in judicial attitudes in sexual offence cases. [87] This is partly what this research embarks on through the lens of restorative justice.

[82] Paulo Sergio Pinheiro, appointed pursuant to General Assembly Resolution 57/90 of 2002.
[83]UN Secretary General Document, *Report of the independent expert for the UN study on Violence against children* (n 9) 45.
[84] Marta Santos Pais appointed on 1st May 2009.
[85] SRSG on Violence against Children- Publications < http://srsg.violenceagainstchildren.org/publications> accessed on 6 February2014.
[86] B Shadle, (n 35).
[87] Ibid.

At the Kenyan coast region, ICRH, in conjunction with GIZ conducted a study of 165 out of a total of 286 cases concluded at the Mombasa law courts.[88] The broad objective was to contribute to improved access to justice for victims of SGBV in Mombasa. The study involved investigating access to justice for victims of Sex and Gender based Violence and examining the legal outcomes of sexual Offences cases. It specifically focuses on reasons for successful or failed prosecutions and reasons for filing or not filing cases in court. Among the recommendations made by the study is a proposal for consideration of use of traditional justice systems by the community.[89] This study again is on sexual offences in general with no special focus on the child victim. It will however provide a good background for this research on the experiences of victims of sexual offences in their pursuit for justice.

ANPPCAN has also compiled a report from their first conference in Africa on child sexual abuse which concludes with a host of recommendations on the best way to handle child sexual abuse. Among the recommendations is the need to re-orient towards a sensitive, innovative response that looks beyond punishing the perpetrator.[90] The report does not suggest how this is to be implemented; which is what this research will attempt to do. The leading child rights organization in Kenya, The Cradle[91] has also been monitoring trends on general child sexual abuse since 2002 with periodic reports.[92] These reports also confirm the fact that in Kenya, children are sexually abused mostly by persons known to them.

None of the above reports focuses on the legal response to IFCSA cases, which is the focus of this study.

[88] ICRH (n 12) Generally.
[89] W Bosire, 'Pre-dissemination of "Haki Yenu" Study' (Stake holders meeting, the Royal court Hotel. Mombasa, Kenya, 28 March 2013).
[90] ANPPCAN, 'Enhancing knowledge through research, practice and partnership to protect children against sexual abuse' (First international conference in Africa on child sexual abuse, Nairobi 24th – 26th September 2007). http://www.anppcan.org/files/File/Report%20of%20the%201st%20International%20Conference%20in%20Africa%20on%20Child%20Sexual%20Abuse.pdf accessed 27 June 2013.
[91] A leading non-governmental children foundation in Kenya on promotion of justice for children (est 1997).
[92] The Cradle Publications, < http://www.thecradle.or.ke/resources-publications/the-cradle-publications> accessed 12 May 2012.

1.9.2 Intra-familial Child Sexual Abuse

The unique specificity of the impact of IFCSA on its victim has been captured by Dickens in his survey of problems arising from legal response to child abuse within the family.[93] His concern is that law's intrusion into the family relationship may be at the cost of interests of both the parents and the child. His other concerns include the legal process's ability to deplete family resources, and depress rather than enhance the child victim's environment. He notes that a custodial sentence, while removing an immediate physical threat may damage home life and deny the child emotional security making the child a double victim. The point of departure between Dickens' work and this research is that Dickens deals with child abuse in general whereas the research is specific to intra familial child sexual abuse in the Kenyan setting.

Other proponents of the separate handling of IFCSA include Ryan Barbara, et al. who propose an alternative way of handling some IFCSA cases through treatment interventions.[94] Their focus is however mainly on the treatment of the perpetrator. As stated earlier, this study is focused more on achieving holistic justice for the victim than seeking treatment for the perpetrator. There are authors however like Ruby Andrews, who are of the view that cases of IFCSA abuse should not be treated as a distinct group.[95] To her, there is no significant difference between intra familial and extra familial child sexual abuse perpetrators. This study departs from Andrews' view and proceeds from the stand point that IFCSA is distinguishable from child excuse abuse by a non-family member. Feminists like S, Carolyne Taylor on the other hand, are for separate response of IFCSA cases but for different reasons. She deems the application of the law in such cases as being masculine and patriarchal hence discriminatory against women and recommends a different response.[96] The concerns of feminists in the topic under research are addressed in the next chapter.

[93] B M Dickens, 'Legal Responses to Child Abuse' (1978) 12 (1) Family Law Quarterly 1 <http://www.jstor.org/stable/25739204> accessed: 27 June 2013.
[94] B Ryan et al (n 16).
[95] A P Ruby, 'Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking '(2006) 39 (5) Davis Law Review <http://ssrn.com/abstract=904100 > accessed 19 July 2013.
[96] C S Taylor, 'Intra-familial Rape and the Law in Australia: Upholding the Love of the Father' (Keynote address at the Townsville International Women's conference, James Cook University, July 2002).

1.9.3 Restorative Justice

There is vast literature on restorative justice by both its proponents and critiques ranging from its content, scope, justification, to its implementation and practice. Some authors have published extensively on diverse facets of the topic. A leading author, Gerry Johnstone introduces and analyses the theory of restorative justice and traces its development in criminal justice jurisprudence over time.[97] As far as its critics are concerned, Acorn has argued that restorative justice lacks authenticity and fails to accommodate people's natural needs to give just desserts. She further states that restorative justice assumes that the participants are drawn from the ranks of morally supererogatory without appreciating the propensity of some bad actors to keep on being bad. [98] This negative attitude is anticipated in this research especially when restorative justice is recommended in such deplorable offences as child sexual abuse. This has been acknowledged as a limitation of the research and was dealt with in the manner specified in the methodology.

Other book authors have focused on the mode of implementation of restorative justice including conferencing[99], and use of indigenous as opposed to western type dispute resolution mechanisms as happens in many Indian communities,[100] and family group therapy.[101] This research has considered implementation through a combination of the above modes depending on the environment surrounding the community within which the offence is committed. The modes considered in this research include African traditional informal justice mechanisms, mediation and faith-based interventions especially Christian and Islam. This is akin to FitzGerald's recommended mode of supplanting parts of the formal system with existing informal institutions with the aim of mitigating the rigidity inherent in the formal system.[102]

[97] G Johnstone (n 50).
[98] A Acorn, *Compulsory Compassion: A Critique of Restorative Justice.* (Vancouver: University of British Columbia Press, 2004) 224.
[99] J Braithwaite, (n 54).
[100] R Ross, Returning *to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books 1996).
[101] E McNevin, 'Applied Restorative Justice as a Compliment to Systematic Family Therapy: Theory and Practice implications for Families experiencing Intra familial Adolescent Sibling Incest' (2010) 31 Journal Of Family Therapy 60.
[102] J M FitzGerald, 'Thinking about Law and Its Alternatives: Abel et al. and the Debate over Informal Justice' (1984) 9 American Bar Foundation Research Journal 3 637.

The works of various proponents and critics as compiled and edited by Johnstone have also been considered.[103] As far as the justification of the theory is concerned, authors offer diverse explanations. Zehr infuses religion in rationalizing the theory. He associates it with Christian principles such as accountability for the offender and restitution, and an experience of justice and forgiveness for the victim.[104] This research does not concern itself with the needs of the offender as the criminal justice system has focused on him for too long. With regard to applicability of restorative justice, the trend by its proponents is to stretch it even to serious offences. The only condition is that there should be an identifiable victim and an admission by the accused.[105] It has however been noted to have the potential for security concerns in case of serious offences and repeat offenders.[106] This again is noted as a limitation in the research.

The greatest criticism against restorative justice is hinged on the impression that it cheapens the impact of crime by letting off a perpetrator with a 'slap on the wrist'. When contrasted to retributive justice, the latter is deemed 'the natural sequence of stimuli and response', hence needs less justification.[107] Restorative justice has thus been accused of lacking authenticity and failing to accommodate people's natural need to give 'just desserts'. This argument is based on the presumption that it is natural for an aggrieved person to want the perpetrator to suffer for the offence.

Restorative justice has also been criticized for its tendency to reinforce the power imbalance inherent in a victim-perpetrator relationship which heightens possibilities of re-victimization. This is even more so in respect of child victims, who may be more vulnerable to a forced settlement because of their weak social standing, especially in the African society. It has further been presented as having the propensity to encourage vigilantism as opposed to encouraging adherence to the rule of law.[108] This fear arises from the belief that any process outside the western type of

[103] G Johnstone (n 50).
[104]H Zehr, 'Retributive Justice Restorative Justice' in G Johnstone (ed) , *A Restorative Justice Reader Texts, sources, context,* (Willan Publishing 2005) 69.
[105] R.A Duff, 'Restorative Punishment and Punitive Restoration' in G Johnstone (Ed) *A Restorative Justice Reader Texts, sources, context,* (Willan Publishing 2005) 382.
[106] L Walgrave, 'Restorative Justice for Juvenile' in G Johnstone (ed), *A Restorative Justice Reader Texts, sources, context,* (Willan publishing 2005) 255.
[107] N.S.Timasheff (n 65).
[108] Acorn (n 98) 223.

justice concept is outside the rule of law. Another gap highlighted by critiques of restorative justice is its potential for raising security concerns in case of serious offences and repeat offenders.[109] In this regard, it is charged with assuming that the participants in the restorative process are 'drawn from the ranks of morally superogatory without appreciating the propensity of some bad actors to keep on being bad'.[110] The argument here is that if the offenders are not put away from the society, its security remains at stake as restorative justice has no mechanisms to ensure that the perpetrator does not reoffend. Finally, restorative justice has been cited for assuming that the offender has already assumed responsibility and for its irrelevance where there is no identifiable victim or admission of guilt by the perpetrator.[111]

Braithwaite has dedicated time and effort to respond to the above criticism.[112] Suffice it to say that restorative justice begins from the disadvantaged point of having to explain and justify its very existence and relevance. This is the same negative attitude that is anticipated during the conduct of this research especially when the same is recommended in such deplorable offences as child sexual abuse. This negative attitude is acknowledged as a limitation and has been dealt with in the manner specified in the methodology part of the study.

Critiques of restorative justice have further been engaged in great depth by Morris J who has taken time to respond to various claims against the theory.[113] The main claim is on the tendency by restorative justice to trivialize crime. Braithwaite in his journal article also reacts to various claims against restorative justice and concludes that restorative justice is more useful for preventing crime in an acceptable way than the existing criminal law jurisprudence. [114]

As already stated, the purpose of this study is not to propose a replacement of the criminal justice system through a paradigm shift to restorative or informal justice. What is proposed is

[109] Walgrave (n106).
[110] Acorn (n 98) 224.
[111] R.A. Duff, (n 105).
[112] J. Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' in M Tonry (ed) *Crime and Justice A Review of Research* 25 (University of Chicago Press 1999) 1.
[113] A Morris: 'Critiquing the Critics: A Brief Response to Critics of Restorative Justice' in G Johnstone, (ed), *A Restorative Justice Reader Texts, sources, context* (Willan publishing 2005) 461.
[114] J Braithwaite (n 112).

incorporation of restorative values and processes within the criminal justice system in order to craft out a more victim centred legal response.

1.9.4 Restorative Justice in Sexual Abuse Cases

Despite its growing acceptance in the criminal justice system, existing literature reveals a concern on the feasibility of restorative justice in sexual offences. Sexual offences just like racial violence offences are said to involve huge imbalance of power between the victim and the perpetrator that may bring to question the viability of restorative justice. Hudson has however proposed that since the formal criminal justice system has not provided sufficient remedies to victims of these offences, restorative justice should be given a chance.[115]

There is a trend to the effect that restorative justice is more creditable in minor offences and less so for more serious offences. It is for this reason that its utility in the global arena in respect of sexual violations is still limited. It has for instance been utilized in a unique South Australian initiative. Under this initiative, young offenders of with sexual assault, and who do not contest their charges, are diverted to family conferences.[116] The literature around viability of restorative justice in sexual violations is however a growing steadily. Myers has, for instance, made an appeal to veer away from what he refers to as 'emotional and visceral' responses to sexual offences, which he warns as having the effect of 'impairing objectivity'. He promotes the role of restorative justice by contending that 'the social and legal issues engendered by child sexual abuse are too important to be obscured by adversarial rhetoric'.[117] Another bold proposition for suitability of restorative justice in sexual offences has been made by Wright.[118] In his conference paper, he argues that in the light of the inadequacies of the criminal justice process, restorative justice in form of mediation can be applied in rape cases. This is especially so where the victim and the perpetrator are

[115]B Hudson , 'Restorative Justice: The Challenge of Sexual and Racial Violence' in G Johnstone (ed) , *A Restorative Justice Reader Texts, sources, context* (Willan publishing 2005) 438

[116] M Doig & B Wallace, 'Family Conference Team, Youth Court Of South Australia' (Restoration for Victims of Crime Conference, Australian Institute of Criminology in conjunction with Victims Referral and Assistance Service, Melbourne, September 1999) <http://www.aic.gov.au/media_library/conferences/rvc/doig.pdf,> accessed on 30 November 2013.

[117] J E B Myers, 'The Child Sexual Abuse Literature: A Call for Greater Objectivity' (1990) 88 (6) Michigan Law Review Ass 1703.

[118] M Wright, 'Is Mediation Appropriate Even for Rape?' (International Conference on Restorative Justice, Winchester, March 2000). <www.restorativejustice.org/10fulltext/wrightmartin2000ismediation>, accessed on 2 November 2013.

acquainted. Wright however falls short of recommending restorative justice in cases of child sexual abuse as is being proposed in this study. The most promising indication of the future of restorative justice in sexual offences is however best demonstrated by McGlynn's exploratory study befittingly entitled, *'I Just Wanted Him to Hear Me'.* The aim of the study was to investigate experiences of a restorative justice conference involving an adult survivor of child rape and other child sexual abuse. The results of the study confirmed that there is room for application of restorative justice in sexual offences.[119]

With regard to the stage of the criminal justice process at which restorative justice is applicable, Miller recommends intervention at the post- conviction stage. In review of Miller's work however, McGlynn finds Miller's scope very limiting and calls for rethinking of the approach of what justice means for a rape victim beyond punitive state outcomes.[120] The approach taken by this research is that restorative justice should be applied at any stage of the criminal justice process, as long as opportunity presents itself, and it is in the best interest of the victim.

The literature review on restorative justice reveals that the proposition to extend restorative justice to sexual offences, especially child sexual abuse, is bound to be met with some resistance. This together with the concerns highlighted by the critics of restorative justice, have been acknowledged as limitations and concerns in this study. The concern is addressed by reiteration, through-out the study that the purpose of this research is not to replace the criminal justice system through a paradigm shift to restorative justice. What is proposed is incorporation of restorative justice values and processes within the existing criminal justice process.

From the foregoing, the global dialogue to extend restorative justice to sexual offences is evident. The possibility of its making inroads in the realm of sexual offences, including cases of IFCSA, cannot be ruled out. It is however clear that this is bound to be met with substantial resistance.

[119] C McGlynn et al., 'I Just wanted Him to Hear Me: Sexual Violence and the Possibilities of Restorative Justice' (2012) 39 (2) Journal of Law and Society 213-240, 239.
[120] C McGlynn, 'Feminism, Rape and the Search for Justice' (2011) 31 (4) Oxford Journal of Legal Studies 825, 842.

1.9.5 Best Interest of the Child

The importance of the best interest of the child principle has been highlighted by Freeman who argues that the fact that it appears in one of the earliest articles of the CRC may be interpreted as evidence that it underpins all other provisions of the CRC.[121] Few attempts have however been made to elaborate what the principle entails. The UNHCR has provided guidelines elaborating what the best interest of the child in their area of specialization entails.[122]The guidelines were compiled with input from international governmental and nongovernmental organizations including UNICEF and the Committee on the rights of the child, among others. Under the guidelines, the best interest of the child is mainly determined by the circumstances of the child. The Committee on the Rights of the Child has in its General Comment on the right of the child to freedom from all violence suggested that the interest of a child victim should encompass enforcement of judicial procedures in a child friendly way. The committee recommends a restorative approach as opposed to a purely punitive judicial involvement.[123] This research explores ways of implementing this restorative approach as a means of safeguarding the best interest of the child victim of IFCSA.

Alston brings out the issue of cultural relativism in the best interest principle by highlighting the variation in its perceptions across different cultural settings.[124] Elsewhere, the challenges of applying the principle in the context of the traditional African setting have been discussed. In this setting, children were deemed as belonging to someone, who was usually the patriarch of the home, and were not expected to have an opinion or interests separate from the patriarch. The traditional African child has thus been described as a 'victim of intergenerational power imbalance … in a gerontocratic structure' where the value of their opinion is directly proportional to their age.[125] The principle is by and large not altogether inconsistent with African customary norms as long as creative ways of applying it are sought. Ncube for instance brings out the scenario where an African child could sufficiently participate in decision making on matters of their welfare through

[121] M. Freeman, 'Article 3. The Best interest of the Child' in A, Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2007) 6.
[122] UNHCR Guidelines (n76).
[123] CRC General Comment No 13 (n 42).
[124] P Alston, (Ed) *The Best Interest of the Child; Reconciling Culture and Human Rights* (OUP 1994) 11.
[125] JW Wafula, 'African Values and the Rights of the Child: A View of the Dilemmas and Prospects for Change' in S Lagoutte & N Svaneberg (eds.), *Women and Children's Rights, African Views* (Karthala, 2011) 115.

an intermediary like a grandmother, without uttering a word.[126] This study has been sensitive to the cultural realities of the geographical areas under study and has resisted the imposition of the strict western conceptualisation of the rights of a child.

1.9.6 Access to Justice

In common parlance, justice means fairness.[127] In the context of access to justice, it includes the granting of equal opportunities and liberties to the parties to a dispute in a manner that benefits the least advantaged.[128].In discussing procedural justice, Omondi highlights explains that the essence of benefitting the least advantaged is to bring them to an equal level with those more advantaged.[129]Her concern is the positioning of a child victim of sexual abuse vis-à-vis an accused person. The juxtaposition in this study is an IFCSA victim vis-à-vis a child sexual abuse victim by a non-family member.

Access to justice has been given a broad definition by Penal Reform International as encompassing:

> access to a fair and equitable set of laws; access to popular education about laws and legal procedure; as well as access to formal courts and, if preferred in any particular case, a dispute resolution forum based on restorative justice (both subject to appropriate regulation in order to prevent abuse).[130]

The right to access to justice does not therefore merely mean physical access. The concept has been unpacked in detail by Mbote and Akech to include several incidentals.[131] This study adopts the broad view of access to justice in arriving at a standard for victims of IFCSA.

[126] C Himonga, 'The Right of the Child to Participate in Decision Making, A Perspective from Zambia' in Welshman Ncube (ed.), Law, *Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Dartsmouth Publishing Co 1998) 95.

[127] https://www.merriam-webster.com/dictionary/justice accessed 4 July 2019.

[128] S Omondi, *Balancing Rights of Child Victims of Sexual Abuse and Accused Persons: A Critique of the Adversarial Trial Process in Kenya* (LAP Lambert Academic Publishing 2014) 106.

[129] Ibid 107.

[130] Penal Reform International, 'Access to Justice in Sub-Saharan Africa: The role of Traditional and Informal Justice Systems' (2000) < www.penalreform.org> accessed 25 November 2013.

[131] P K. Mbote & Akech M, *Kenya: Justice Sector and The Rule Of Law* (: Johannesburg: Open Society Initiative for Eastern Africa 2011) 157 <http://www.afrimap.org/english/images/report/MAIN%20Report%20Kenya%20Justice%20Web.pdf>, accessed 24 October 2013.

1.9.7 Legal Pluralism

Legal pluralism is replete with easily accessible literature most of which is compiled in the Journal for Legal Pluralism.[132] The journal contains both book reviews and journal articles on the subject. Most of the books reviewed are on the application of legal pluralism in specific geographical areas across the world including Netherlands,[133] the African continent,[134] Japan,[135] and Australia.[136]

A number of journal articles address the meaning and scope of the theory of legal pluralism. It has been defined as the presence, in the social field, of more than one legal order.[137] It is contrasted to legal centralism where only the law of the state is recognized to the exclusion of lesser normative orderings existing within the community like the church, traditional models, the family or any other grouping. These groupings are however subordinate to state institutions and organs. Though the two may compete and even contradict, they can be mutually constitutive.

There is a trend by various authors to perceive legal pluralism in the broadest possible terms. In the African context, they warn against the risk of limiting the perception of legal pluralism to the European versus African customary law dichotomy. Merry refers to this dichotomy based on intersections between native and western law as the 'classic legal pluralism'. [138] She distinguishes it from the 'new legal pluralism' when the concept is applied to non- colonized societies.[139] This study interrogates legal pluralism in the broad sense by looking beyond the African customary systems in considering the restorative processes the community resorts to in settling cases of IFCSA. None of the books and articles specifically addresses the place of legal pluralism in response to IFCSA cases which is what this research will focus on.

[132] Journal for Legal Pluralism and Unofficial Law <http://www.jlp.bham.ac.uk> accessed on 20/1/14.
[133] K von Benda-Beckmann and F Strijbosch (eds.) 'Anthropology of Law in the Netherlands: Essays in Legal Pluralism' (1986) 24 Journal for Legal Pluralism 161.
[134] B E. Harrell-Bond and E. van Rouveroy van Nieuwaal (ed.) 'Disparity Between Law and Social Reality in Africa' (1975) 13 Journal for Legal Pluralism 162.
[135] M Yasaki (ed.) 'East and West. Legal Philosophies in Japan' (1987) 27 Journal for Legal Pluralism 145.
[136] P Sack and E Minchin (eds.) 'Legal Pluralism: Proceedings of the Canberra Law Workshop VII' (1986) 27 Journal for Legal Pluralism (1986) 173.
[137] J Griffiths, (n 79) 1.
[138] S E Merry, 'Legal Pluralism '(1988) 22 (5) Law & Society Review 869-896, 889. <http://www.jstor.org/stable/3053638> accessed: 20 January 2014.
[139] Ibid 873.

1.10 Research Methodology

The research methodology was informed by the overall objective of this research which is the advancement of a victim centered response to IFCSA through the incorporation of restorative justice values and processes in the criminal justice process. This necessitated an interrogation of the existing legal framework and the theory of restorative justice, and an inquiry into the phenomenon of IFCSA. This was done through a qualitative research where the data was sourced from both desk and field research.

1.10.1 Desk Research

Desk research was carried out in two main ways. The first involved interrogating primary legal sources including relevant domestic statutes and international legal instruments together with secondary literature. Both the primary and secondary sources were accessed through electronic and manual resources at the libraries of various institutions visited by the researcher including the University of Nairobi, the Danish Institute for Human Rights in Copenhagen, the Institute for Human Rights at the Abo Akademi University in Turku, Finland and the SEARCWL-UZ (South & Eastern African Regional for Women's Law – University of Zimbabwe. They include the works of various scholars and writers as published in various books, journals and electronic resources, reported case law, and qualitative data from previous studies.

The second way was through the perusal of a total of thirty most recently concluded court files on IFCSA cases. The thirty were evenly distributed in the three subordinate court criminal registries in Kwale, Naivasha and Mombasa. The rationale behind focusing on the most recently concluded was to target those decided after the enactment of the victim centered statute, the Victim Protection Act of 2016. The statute's intended impact is discussed in chapters three and five of this thesis. The justification of the choice of the three counties is discussed in the following part.

1.10.2 Field Research

The field research was conducted at two levels including in-depth key informants' interviews and focused group discussions. The interviews focused on four categories of respondents who have interacted with IFCSA cases at different levels in their various capacities. They included victims, perpetrators, non-professionals and professionals who have engaged with IFCSA as community

leaders or witnesses. The first three categories were interviewed with the aim of interrogating how different players perceive and interpret relevant issues pertinent to IFCSA. Difficulty in identifying and accessing respondents amongst perpetrators and victims was anticipated. With regard to the perpetrators, the researcher engaged closely with the prison authorities for a period of one year leading to the interviews as is evident from the timelines in Appendix Five. The engagement included a vetting interview process with the senior prisons officers. This was useful in the identification of inmates incarcerated for IFCSA offences who were willing to be interviewed. It was also useful in learning interview techniques of this unique category. The researcher was for instance advised to frame the interview questions indirectly in order to avoid the accusatory sounding direct questions. Instead of asking 'why did you do it?' the researcher was advised to frame the same as 'why do people do such things?' The latter version not only put the responding perpetrator at ease, it also provided him with an opportunity to answer an open ended question without necessarily incriminating himself. With regard to victims, the anticipated challenge of identifying and accessing them was overcome by the intentional choice of geographical locations of conducting the research as explained later in this part.

The professionals interviewed included legal practitioners, judicial officers, prisons officers, probation officers, police officers, and children's officers. The respondents under this category were identified on the basis of their frequent interaction with Sexual and Gender Based Violence cases in the course of their work. They were drawn from aforementioned three counties apart from three senior judicial officers who are based in Nairobi. The professionals were interviewed with a view to gathering details of their experiences and view- points from their day to day practice. The experiences included projecting and echoing the voices of the victims as narrated to them in their interaction. The judicial officers interviewed included a magistrate, a high court judge, the then Chief justice of the Republic of Kenya, and a Court of Appeal judge who had risen through the ranks over a span of over thirty five years from the magistracy. She therefore had vast experience in presiding over SGBV cases. The judge in charge of the judiciary task force on Alternative Justice System was also interviewed. His input was useful to this research as restorative values and processes have been sought in the informal justice system.

As noted already noted above and as confirmed in Kisanga's[140] and the ICRH[141] reports, disclosure of sexual offence is often a problem. This problem was anticipated during data collection from the victims. The researcher countered this by building confidence with the victims and/or their guardians in order to create a suitable environment for data collection in this sensitive subject. It is this reason that informed the choice of two of the three counties identified for research that is Kwale and Mombasa counties. The researcher has a fifteen year history of working with the community and the professionals from these two counties on SGBV cases. She therefore took advantage of the pre-existing networks and goodwill to identify and access the respondents.

Further justification for the choice of geographical delimitation is that Mombasa in particular has a well-established gender recovery center with good record keeping for SGBV cases under which IFCSA falls. The sample from these three counties is also sufficiently representative of both rural and urban population in Kenya. Mombasa is an urban, multi-ethnic and multicultural port city and the second-largest city in Kenya. Though it occupies approximately 200 km^2, it has a dense population of about 1 million people. It has representation from all the 42 ethnic communities in Kenya who migrate there for work and business-related reasons.[142]Kwale on the other hand is largely rural occupying about 8,000 km^2 with an approximate population of 750,000. It does, however, have a small urban population around the tourist resorts dotting the shoreline. The population comprises the indigenous Digos and Durumas and a significant number of migrants from the Kamba community.[143] The Digos and Durumas specifically still hold dear their traditional way of life in matters of health, childbirth, marriage, burial and dispute resolution.[144] This research is alive to the fact that many cases of IFCSA go unreported. It is for this reason that the research focused on community grass root gatekeepers in the two counties who are likely to be the first contact even before the involvement of the police. These gatekeepers are also involved in some form of alternative dispute resolution of all cases, including child sexual abuse cases, though outside the criminal justice system. The reason of focusing on this latter group was to seek the

[140] Kisanga (n 6) 482.
[141] ICRH study (n 12) 52.
[142]Kenya Open Data Survey; County Data Sheet – Mombasa, <https://www.opendata.go.ke/facet/counties/Mombasa,> accessed on 10 October 2013.
[143] Kenya Open Data Survey, County; County Data Sheet – Kwale, <https://www.opendata.go.ke/facet/counties/Kwale>, accessed on 10 October 2013.
[144] Information on the Digos and Durumas is available on http://www.joshuaproject.net/peoples.php?peo3=11557>, accessed on 28 November 2013.

extent to which informal justice is applied, whether it has any best practices that can be borrowed and whether it is possible to legalize and legitimize it in cases of intra-familial child sexual abuse. Naivasha' s choice was informed by its notoriety in sexual and gender based violence resulting in it being flagged out as a hotspot by various human rights bodies in 2015. It is also home to many flower farm workers from all over the country. The face of Kenya is therefore fairly well represented in that geographical region.

In total, forty six respondents were interviewed individually. They included five victims, six perpetrators, one teacher, one community leader, one social worker and manager of a shelter, five judicial officers, three probation officers, twelve police officers (three as separate individuals and nine in two separate groups of four and five in Mombasa and Naivasha respectively), five children's officers, three probation officers, one prison's officer and three legal practitioners**.** The perpetrators interviewed were more than the victims. This is because it was easier to access the confined perpetrators through the Department of Prison Services. |It was not as easy to identify IFCSA victims as they are not held in a common place. Even after identification, it was harder to get those who were willing to be interviewed. The disparity between the number of victims and perpetrators interviewed did not necessarily diminish the voices of the victims in this study. In addition to the voices of the five interviewed, their voices were also heard through the professionals who have the advantage of interacting with many victims in the course of duty.

The selection of the respondents was purposive owing to the sensitive nature of the topic under research. Purposive sampling was done to select the informants after which their interviews snowballed and presented additional informants who were also interviewed.[145] This began with a few respondents with a wide reputation of interacting with cases of child sexual abuse in case of professionals or those ready to share information in case of non-professionals. This method has been said to work well in sensitive research topics where the population is not readily identifiable.[146]The interviews were semi-structured based on open ended questions designed to suit the nature of information sought from each interviewee. In view of its flexibility, this method

[145] D K Kombo and D L A Tromp, *Proposal and Thesis Writing: An Introduction* (Paulines Publication Africa 2006) 83.
[146] Ibid.

enabled the researcher to obtain detailed information that led to a more comprehensive appreciation of the issue under research.[147] There are however two senior judicial officers who were not available for a face to face interview. For these two, the researcher forwarded a questionnaire to them by email and received their respective responses through the same means.

With regard to the focused group discussions, two of them were conducted. One targeted the mentioned professionals in the criminal justice process while the other target community gatekeepers, including community elders, religious leaders and Community Based Organizations. The community leaders targeted in this interview are those who in practice, work with the chiefs and are recognized by the national government organs at the grass root.[148] The aim of the discussions was to obtain feedback on experiences, perceptions and attitudes towards IFCSA and restorative justice in a controlled, structured environment. The two focused group discussions were held in Kwale and Mombasa counties. The one held in Kwale targeted community gate keepers. Those in attendance included community elders, religious leaders, teachers and grassroots Community Based Organizations. The focused group discussion held in Mombasa was attended by police officers from across the coast region, and legal practitioners.

The subject matter of this research is a minor. The research was therefore alive to the study's potential for ethical concerns throughout the study. These concerns were addressed in two ways. First and foremost, the field work was preceded by obtaining consents from the highest level of the concerned government agencies. Some of the agencies like the prisons department and the National Commission for Science, Technology and Innovation (NACOSTI) vetted the researcher before issuing her with the consent. Secondly, in appreciation of the ethical intricacies involved in interviewing minors, the researcher took advantage of the availability of adults who were abused as minors. Three of the victims were therefore adults. The two minors who were interviewed were wards of the state. Handwritten consent was obtained both from the department of children services Head office and from the persons in-charge of the institutions where they were held. The persons

[147] Ibid 93.
[148] FIDA Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya' 8 <http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf > accessed 15 October 2014.

were invited to be present during the interviews though none of them stayed throughout. All the consents obtained from the government agencies are annexed as appendices to this thesis apart from the consents from the department of children services with regard to the two minor victims. This is to protect their privacy.

1.11 Limitations of the Study

This research was conducted against a status quo whose usual response to crime is punishment to the perpetrator. A deviation from this response is frowned upon as a lenient slap on the wrist. This attitude is most prevalent amongst professionals and was an obvious limitation. This manifested itself through their very guarded responses especially at the commencement of the interviews. The guarded responses had the potential of hindering in-depth discussions with most respondents beginning the discussion on an argumentative tone. The researcher was however able to overcome the challenge through the use of open ended questions which gave room for the respondents to air their misgivings on the topic under research even as they answered the questions asked. The use of focused group also provided an appropriate forum for structured engagement devoid of emotional biases.

The study involved the relatively uncharted field of the use of restorative justice in sexual offences in Kenya. This comes with scarcity of relevant Kenyan literature in the area. This was overcome by reviewing literature from jurisdictions where restorative justice in sexual offences is already in place. This includes New Zealand and South Australia where restoratively justice is routinely applied in youth justice cases of sexual assault.[149]

Finally, sexual offences have a lot of stigma attached to them rendering the research by its very nature self- limiting. Sampling and therefore data collection was a challenge as not many victims were willing to share their experiences. As stated above, the researcher did not interview as many victims as she had hoped to. Particularly, it was not possible to interview child victims' immediate relatives especially the mothers. One mother whose child had been defiled by her father changed

[149] K Daly and J Stubbs, 'Feminist Theory, Feminist and Anti- Racist Politics, and Restorative Justice,' in G Johnstone and D W Van Ness (eds) *Handbook of Restorative Justice* (Willan Publishing 2007) 160.

her mind a week to the interview. The challenge posed by lack of cooperation from victims' immediate relatives especially the mothers was overcome in two ways. First by resort to interview adult victims who were abused as children and who did not therefore require parental consent. Secondly by dealing with child victims under the custody and guardianship of persons other than the parents including a children's officer in charge of a children's home and a manager in charge of a shelter. The researcher's prior engagement with sexual offences within the communities assisted in identifying the five victims interviewed. Further, random sampling was avoided in favor of purposive sampling targeting only those victims willing to participate in the research.

1.12 Organization of the Study (Chapter breakdown)

Chapter One lays the introduction to the research and summarizes its structure. It provides the background, it highlights the hypothesis, the research problem, questions and chapter breakdown. It also discusses the research methods and methodology and introduces the theoretical framework of the research which is unpacked further in chapter two. This chapter therefore provides a roadmap on how the research will be conducted.

Chapter Two sets out the theoretical framework. It analyzes the theories of restorative justice and legal pluralism. It interrogates their meaning, scope and relevance in responding to IFCSA cases. Since Kenya is a pluralistic society with the formal justice system (FJS) operating alongside the informal justice system (IJS), the chapter also interrogates the concept of legal pluralism with a view to identifying the values and processes that can enrich restorative justice, beyond the FJS. As child sexual abuse is a human rights issue, the relevant human rights principles and standards are imperative in addressing the concept if the best interest of the child and the extent to which it is accommodated by restorative justice. In summary, this chapter interrogates the theory of restorative justice against the backdrop of feminism, vulnerability theory, legal pluralism and human rights standards.

Chapter Three explores the extent to which the existing legal framework is sufficient in protecting the interests of the victim of IFCSA in Kenya. It analyses critically the legal framework within which IFCSA is responded to by the criminal justice system from the time of reporting to sentencing under the existing structures. The chapter discusses both the formal and informal legal

framework with a special focus on the statutory framework that comes into play as FJS responds to cases of IFCSA. The statutory framework is as drawn from the main sources of our laws enunciated in the Judicature Act and the Constitution. These include the Constitution itself, the Sexual Offences Act together with its Practice Rules, the Criminal Procedure Code, the Evidence Act, the Victim Protection Act, The Children Act, The National Police Service Act, the Protection Against Domestic Violence Act, and the relevant case law. Relevant international treaties, conventions, and other international legal instruments are also discussed. The scope of the framework includes investigation, identification of the offence, the trial process, adducing of evidence and sentencing. The role of the victim in the FJS is also discussed as well as the place of informal justice in the existing legal framework.

Chapter Four distinguishes IFCSA from child sexual abuse by a stranger by unpacking the various issues a victim of IFCSA has to contend with in pursuit of justice. The specificities under discussion are drawn from the analysis of the data gathered from the desk and field research. The chapter therefore sets the stage for a discussion in the next chapter on the entry points available for restorative justice as a way of offering a more comprehensive response to IFCSA.

Chapter Five wraps up the study by highlighting possible entry points for restorative justice in the criminal justice system's response to IFCSA. It identifies mechanisms, processes and values that give as much support as possible to the victim and addresses the specificities of IFCSA. The support includes enhancing their voice, visibility and participation in the criminal justice process while at the same time alleviating their suffering and restoring them as far as it is possible, to the pre abuse status. The proposed reforms are mainly to the court process but they will need the support of the legislature and executive by way of legislative and policy intervention respectively. The proposals call for synergy between the three arms of government for their impact to be realized.

Chapter Six consists of the recommendations and conclusion. This includes a summary of the research and findings together with pointers towards potential areas for further research.

CHAPTER TWO: THEORETICAL AND CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter establishes and analyzes the theoretical and conceptual discourses upon which the research is anchored. As already stated, the overall aim of the study is to identify modalities of delivering a more holistic justice to the victim of IFCSA. This aim resonates well with the theory of restorative justice which is the lens through which the study has been examined. Kenya, like many other nation states, is a pluralistic society with the formal justice system (FJS) operating alongside the informal justice system (IJS). Restorative justice has many attributes that resonate well with the IJS. It is for this reason that this study interrogates the concept of legal pluralism with a view to identifying the values and processes that can enrich restorative justice, beyond the FJS.

Any sound legal response to IFSCA must have due regard to relevant human rights principles. This is because the principles have been incorporated in the law and are hence law. They include the principle of the best interest of the child and access to justice which are both cardinal human rights standards in relation to children. Interrogating the two human rights principles necessitates a mention of human rights theories. The subject matter of this study is the victim of IFCSA who is largely female while the perpetrator is in most cases male.[150] The gender dynamics inherent in the topic under research necessitates a discussion of feminism. An appraisal of the vulnerable child victim's positioning and needs is done through the vulnerability theory. In summary, this chapter interrogates the theory of restorative justice against the backdrop of legal pluralism, human rights standards, vulnerability theory and feminism.

The chapter is divided into nine parts. Part one discusses the historical background and meaning of restorative justice as perceived by its various proponents. It also sheds light on the ongoing debate on what restorative justice is and what it entails. The second part addresses the question as to what or who is the subject of restoration. This is followed by the third part which looks at various ways in which restorative justice has been put into practice in different parts of the world over

[150] ICRH (n 12).

time. Part four discusses the justification given in favor of restorative justice and also looks at the shortcomings of the concept as raised in various critiques. An interrogation of the extent to which restorative justice has been applied to sexual offences takes place in part five, followed by a discussion on how restorative theory interacts with feminism and vulnerability theory, respectfully. This gives way to a discussion on the concept of legal pluralism in the next part. The relevance of legal pluralism in this part is to lay basis for interrogating the modalities of informal justice that are restorative in nature. Finally, the restorative processes and values to be applied in IFCSA must resonate with the exigencies incidental to it and be measured against human rights standards. The last part therefore discusses the conceptual basis of the human rights together with the rights of the victim. The human rights lens is appropriate in ensuring the protection of the victim's human dignity while in pursuit for justice.

2.2.1 Background and Meaning of Restorative Justice

Restorative justice is said to be as old as humankind.[151] It is believed to be the justice originally known to mankind in the acephalous society, predating even retributive justice. In this society, disputes were resolved through a restorative-based framework whose principal concern was to satisfy the victim's needs and restore their lost power and distorted status while at the same time being just and beneficial to the offenders.[152] The eclipsing of restorative justice by retributive justice is associated with the evolution of the modern state. This was when the interests of the victims began to be replaced by the interests of the state in conflict resolution. It is said that at this stage, the King hoarded all interests including those of a crime victim. He became the paramount crime victim, sustaining legally acknowledged, though symbolic, injuries and became entitled to restitution in form of fines. The victim was thus ousted from a meaningful place in the justice

[151] O O Elechi, *Doing Justice Without the State; The Afikpo (Ehugbo) Nigeria Model* (Taylor & Francis Group LLC 2006) 10.
[152] T Gavrielides, 'Restorative Practices: From the Early Societies to the 1970s' (2011) Internet Journal of Criminology 5.
<http://www.internetjournalofcriminology.com/gavrielides_restorative_practices_ijc_november_2011.pdf> accessed 16 July 2015.

process.[153] This is what Nils Christie later refers to as 'stealing the conflict' from the victim by the state machinery.[154]

In the local context, restorative justice is not a foreign concept as it existed under the African traditional framework. It is evident in the South African concept of '*Ubuntu*' which is Zulu for 'humanness' and was an important factor in the crystallization of perceptions that influenced all social interactions including within the justice system.[155] It is also the spirit behind the Uganda Acholi concept of '*Mato put*' which is a system of justice which aims at achieving forgiveness, justice, and healing while ultimately reconciling parties and re-establishing relationships broken due to a killing.[156] In Northern Kenya, the Somalis have the traditional '*maslaha*' system of dispute resolution. This is a community based approach of resolving conflict based on compensation.[157] Restorative justice therefore sat well with the African traditional communities as it resonated with the traditional belief that all aspects of life, including, the supernatural, human behavior, and justice, were interrelated. Justice therefore could not be dispensed in isolation but within the context of other aspects of life. Consequently, law was not intended to merely sanction guilt, but to ensure within the group.[158] Although a lot of traditional mechanisms were restorative in nature, retribution was not entirely unheard of. Some of the traditional dispute resolution mechanisms had punitive outcomes including ostracizing and even capital punishment.[159] However, like many other phenomena in pre-colonial Africa, practice and conceptualization of the same has not been

[153] A Skelton and M Sekhonyane, 'Human Rights and Restorative Justice' in G Johnstone and D Van Ness (eds) *Hand Book of restorative Justice,* (Willan Publishing 2007) 580.
[154] N Christie, 'Conflict as Property' in G Johnstone (ed) A *Restorative Justice Reader, Texts, Sources, Context* (Willan Publishing 2003) 59.
[155] A M Anderson, 'Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution' (University of South Africa School of Law, 2003) < http://www.isrcl.org/Papers/Anderson.pdf> accessed 16 July 2015.
[156] Liu Institute of Global Issues et al, 'Roco Wat I Acoli, Restoring Relations in Acholi-land: Traditional Approaches To Reintegration and Justice' (2005) 54 <http://www.ligi.ubc.ca/sites/liu/files/Publications/JRP/15Sept2005_Roco_Wat_I_Acoli.pdf> accessed 5 August 2015.
[157] C W Mwangi, 'Women Refugees and Sexual Violence in Kakuma Camp, Kenya Invisible Rights, Justice, Protracted Protection and Human Insecurity' (2012) M A in Development Studies Thesis, International Institute of Social studies the Hague, Netherlands, 2012) 21 <http://thesis.eur.nl/pub/13044/> accessed 24t July 2015.
[158] S Mancuso, 'African Law in Action' (2014) 58 1 Journal of African Law 1, 3.
[159] S Kinyanjui (n57).

documented. Reasons for the absence of records have been advanced as including lack of human, financial and technological resources.[160]

The application of restorative justice in modern criminal justice systems is fairly recent. The first use of the term in modern jurisprudence is traceable to Albert Eglash in 1958.[161] The concept has since rapidly attained global recognition. In Europe, the committee of Ministers of the Council of Europe adopted a recommendation on the use of mediation in penal matters. Mediation is one of restorative processes. In place now is a European Forum for Victim Offender Mediation and Restorative Justice.[162] The United Nations and its various agencies have also made substantial input in the advancement of restorative justice. The UN Declaration of Basic Principles on the Use of Restorative Justice Programs in Criminal Matters was adopted upon endorsement by the Economic and Social Council (ECOSOC).[163] The principles are designed to provide guidelines for application of restorative justice with due regard to human rights standards for the victims and perpetrators.[164]

The answer as to what exactly restorative justice is critical to this study. This is because its existence often requires justifying especially in sexual offences. Its justification can only succeed against a clear grasp of what it means. Van Ness and Strong have best described the complexity of arriving at a universal definition by stating that there are as many answers as people asked.[165] They compare it to the situation of a blindfolded man describing an elephant based on the part they happen to be touching. Similarly, each proponent and critique of restorative justice has been said to concentrate on the aspect that is of primary concern to them depending on the purpose for which they seek the meaning. [166] This is further confounded by the fact that restorative justice is a concept that is still evolving with new discoveries being made from time to time.[167] Thus, what it was

[160] J Sithole, 'The Challenges Faced by African Libraries and Information Centres in Documenting and Preserving Indigenous Knowledge' (2007) 33 2 IFLA Journal 117-123.
[161] Van Ness and Strong (n 46) 21.
[162] The Secretariat, 'European Forum for Victim Offender Mediation and Restorative Justice' http://www.euforumrj.org/publications accessed 14 March 2015.
[163]ECOSOC 'Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters' ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).
[164] Van Ness and Strong (n 46) 31.
[165] Ibid 41.
[166] Ibid 23.
[167] Ibid 41.

perceived as in the early seventies may not necessarily be what it is perceived as today.[168] Restorative justice may also mean different things over different geographical spaces and time with its proponents and critics objectifying it in diverse ways as influenced by their respective geographical settings. The upshot of the foregoing is that it is difficult to assign the term 'restorative justice' a universally acceptable definition.

Howard Zehr for instance bases his definition on the perception of crime as a violation of people and relationships. To him, restorative justice is the kind of justice that brings together the victim, offender and community in search of solutions which promote repair, reconciliation and reassurance.[169] Tony Marshall focuses on the procedural aspect and describes it as 'a process whereby all parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future'.[170] Martin Wright focuses on the utility value of restorative justice and describes it as a kind of response that does not add to the harm caused by imposing further harm on the offender but rather restores the situation. He states that restorative justice does not just focus on the outcome, but also ensures that the process is humane to both the victim and the offender.[171] There is however a consensus in all the above definitions in that they all have a component of a victim centered response to crime. This resonates to the overall aim of this study which is to center the needs of the victim in responding to IFCSA.

Gerry Johnstone, summarizes the various definitions by stating that restorative justice has been perceived as a set of values, a process and as a lifestyle.[172] As a process, restorative justice provides the 'forum where all parties with a stake in the offence come together to resolve collectively how to deal with its aftermath'.[173] As a set of values, it calls for the injecting of attitudes that make the criminal justice system more responsive to the needs of the victim. As a lifestyle, it advocates for a holistic approach to life and relationships in everyday relationships, beyond the realms of

[168] Ibid 31 – 38.
[169] H Zehr, *Changing Lenses; A New Focus for Crime and Justice* (Herald Press 1990) 181.
[170] Marshall (n 31).
[171] M Wright, *Justice for Victims and Offenders* (Philadelphia: Open University Press, 1991) 112.
[172] Johnstone (n 50) 1.
[173] Marshall (n 31) 28.

crime.[174] In this latter regard, it looks beyond the realms of law to culture, economics, and politics. The study interrogates all three perceptions of restorative justice as a process, set of values of restorative justice.

Whether perceived as a process, set of values, or lifestyle, the overriding concern of restorative justice proponents, which resonates with the overall aim of the study, is the need to spread out the focus of the justice system from the perpetrator, and include the victim. The main concern of restorative justice is that, once a crime is established, the focus should not be solely on punishing the offender, but on, inter alia, meeting the victim's needs.[175] The emphasis of restorative justice is therefore the need to mete out justice in a manner that is best understood and embraced by the victim. Van Ness and Strong define it as 'a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior and which is best accomplished through cooperative processes that include all stakeholders.'[176] This approach is viewed as having the potential of enriching ~~an appropriate alternative to~~ the formal justice system.

In a bid to reconcile and condense the multiple perceptions of restorative justice, Gerry Johnstone and Van Ness have identified its three specificities which they refer to as the three conceptions.[177] These include encounter, reparative and transformative conceptions which bring out the core features of restorative justice. The encounter conception focuses on the need for the victim to play an active role in the response to the crime instead of leaving the process to the professionals.[178] Encounter therefore calls for the direct and full inclusion of victims, offenders and community members who have been touched by crime in the procedures that follow a crime.[179] Inclusion involves informing the victim about the process; allowing them to observe the proceedings and make formal presentations in court during the proceedings.[180] The rationale behind including the victim in the justice process is that what the prosecutor may think is good for the public may be at odds with the victims' interest. According to Van Ness and Strong, 'giving victims a formal role

[174] Van Ness and Strong (n 46) 41.
[175] G. Johnstone, *Restorative Justice: Ideas, Values and Debates* (Willan Publishing 2002) 1.
[176] Van Ness and Strong (46) 43.
[177] G Johnstone and D W Van Ness, 'The Meaning of Restorative Justice' in G Johnstone and D W Van Ness(eds) *Hand Book of Restorative Justice* (WP 2007) 5.
[178] Ibid 9.
[179] Van Ness and Strong (n 46) 119.
[180] Ibid 121.

in the criminal justice system results in both an explicit recognition that crime is an offense against the victim and a distinction between the legal interests of the victim and the government'.[181] Van Ness proposes participation at all stages including investigation, plea bargaining, sentencing and even after sentencing. In the criminal justice system, participation would include allowing legal representation on behalf of the victim in form of watching brief. Inclusion has started taking root in Kenya as seen from the enactment of the Victim Protection Act [182] and in the rules issued by the Chief Justice with regard to procedures of prosecuting offences under the Sexual Offences Act.[183] The contents of the Victim Protection Act and the SOA rules are discussed in the following chapter.

The reparative conception is concerned with the need to go beyond merely inflicting pain to the offender to repairing the harm done to the victim.[184] The transformative conception on the other hand is broader and more generalized as it challenges the status quo of social relations and response to issues including crime. It advocates for use of restorative justice as a lifestyle. In this regard, it is argued that human beings are 'relational beings connected through intricate networks to others, to all humanity and to our environment. The restorative nature of those relationships is guided by a vision of transformation of people, structures and our very selves'.[185]

The encounter and reparative conceptualization address the concerns of restorative justice as a process and as a set of values and are of relevance to this study. The entry points available for encounter and reparation in the formal justice process are analyzed in in chapter five of this study.

2.2.2 Restoration

The principal goal of restorative justice is simply to restore something.[186] The pertinent question that naturally follows is what or who is being restored? The answer to this question addresses the issue of the subject of restoration. This is important as it assists in pin pointing what can possibly

[181] Ibid 132.
[182] Victim Protection Act (n 37).
[183] The Sexual Offences Rules of the Court, Legal Notice 101 of 2014.
[184] Van Ness and Strong (n 46) 12.
[185] Ibid 17.
[186] SRGS on Violence Against Children, 'Promoting Restorative Justice for Children' (New York 2013) 1 <http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/srsgvac_restorative_justice_for_children_report.pdf accessed 14 March 2015.

be restored for a victim of IFCSA. This question has been comprehensively answered by Duff.[187] One of the things to be restored according to Duff is the status quo of the victim before the commission of the offence. This entails returning the victim to the position they were before the harm was inflicted upon them. It also has to do with reintegration or assisting the victim and offender overcome stigma and re-enter back into their communities. As to what a re-integrative response entails, Van Ness states that firstly it includes prompt availability of services and resources which he refers to as restorative encounters.[188] This is intervention beyond the FJS to the victims' psycho-socio needs including their safety, recovery from the trauma and availability of resources to rebuild their lives. This approach of course gives rise to concerns of stretching the net of remedies too wide. Weitekamp refers to this concern as 'widening the net of social control'.[189] There is need for caution on remedial boundaries to ensure that the system does not result in taking over the victim's entire life.

Duff rightfully acknowledges that it may not always be possible to reinstate the victim back to the pre-harm status. This is especially so in instances where the wrong doing that occasions the victim emotional pain and suffering is impossible to wipe out. In this case, Duff states that one can only talk of reparation not restoration.[190] This is usually the scenario in IFCSA whose victim finds themselves in a unique situation which poses challenges in the application of restorative justice. These limitations are discussed later in this chapter.[191]

The other subject of restoration is the damaged relationships.[192] The relationships envisaged here include the one between the victim and perpetrator and between the community and the perpetrator and victims respectively. It would be ideal to interrogate the restoration of both the victim and the perpetrator from all possible angles. The limitation in the scope of this research does not, however, leave room for an interrogation of restoration of the relationship between the perpetrator and the community. As stated earlier, the focus of this study is limited to the interests of the victim of

[187] Duff (n 103) 382 - 397.
[188] Van Ness and Strong (n 44) 105.
[189] EGM Weitekamp, 'Restitution: A New Paradigm of Criminal Justice or a New Way to Widen the System of Social Control?' (1989) Dissertation, University of Pennsylvania.
[190] Duff (n 105) 384.
[191] Part 2.2.5
[192] Duff (n 105) 385.

IFCSA. As far as the damage to the relationship between the perpetrator and the victim is concerned, restoration is easier said than done. There is the question whether one is capable of restoring what never existed in the first place. If, for instance, the relationship between the victim and the perpetrator was imbalanced before the offence, then working towards restoring it to what it was before the offence would be a misnomer. Duff assists in resolving this dilemma by distinguishing empirical or factual damage from normative damage. With the latter, the relationship will be deemed to be in need of restoration even where those directly wronged do not behave as if they have suffered any damage. The restoration of normative damage is hence measured, not by what makes the parties feel better, but by what is normatively adequate. This he summarizes as follows:

> What needs restoring and what could conceivably be restored, is not so much any material harm that was caused, as the relationships that were damaged by the wrong doing; that damage must be understood in normative terms, as involving a flouting or denial of normative bonds by which the relationship was defined.[193]

This distinction is especially important in IFCSA where the victim is a child. The restoration in such cases is ordinarily negotiated on behalf of the child by an adult, who is usually the mother. With the position of the woman in the African society being generally disadvantaged,[194] the temptation to place the bar too low is a reality. There is therefore need to have a normative standard against which restoration of relationships can be measured. In this study, the standard has its basis on human rights as discussed in the last part of this chapter.[195] Dealing with a child victim also calls for creative ways of restoring the relationship between the victim and perpetrator like focusing on the future more than the present so that the child is empowered enough to attain a position where they can dictate the terms of engagement with the perpetrator in future.

[193] Ibid 389.
[194] Jaggger (n 18) 240.
[195] Part 2.2.7.

2.2.3 Practice of Restorative Justice

Restorative justice has been described as practice led.[196] The core focus of that practice is to place the victim of an offence at the center of the process. This has been referred to as 'civilizing justice'.[197] It has been practiced through the application of various approaches all geared towards healing the injury to the victim and community; facilitating active participation by the victims in the justice process, and rethinking the roles and responsibilities of the government and community.[198]This practice has taken various forms in different jurisdictions. Several proponents of restorative justice have synthesized its practice in four main categories of the practice. This includes Victim – Offender Mediation which has been used in North America, Norway, Finland and England.[199] The practice of mediation involves bringing the victim and perpetrator together in the presence of a trained mediator with a view to talking about the crime and agreeing on steps towards justice. Its expected outcome varies from an apology, restitution, to a mere explanation as to why the perpetrator committed the crime together with the impact of the crime to the offender.[200] The overall goal is to empower the participants, promote dialogue and encourage mutual problem solving. Mediation is the most flexible mode as it can be carried out at any time including before, during, and after trial. As in all mediation processes, its success or failure is largely dependent on the goodwill of the parties. This takes the discussion back to a weakness that is often pointed out by the critiques of restorative justice. It is claimed that restorative justice is based on the presumption that the perpetrator will accept responsibility making it irrelevant where there is no identifiable victim or admission of guilt by the perpetrator.[201]

Restorative justice is also practiced through conferencing. This is a procedure that was adopted by the New Zealand government from a Maori practice in 1989 and thereafter in Australia and elsewhere around the world. Conferencing involves a meeting of family members of the victim

[196] Hudson et al, 'Practice, Performance and Prospects for Restorative Justice' (2002) 43 3 The British Journal of Criminology 469, 475.
[197] D J Cornwell, J M Wright and J Blad, *Civilizing Criminal Justice: An International Restorative Agenda for Penal Reform (*Waterside Press Ltd 2013).
[198] Van Ness and Strong (n 46) 43.
[199] Ibid 27, 28.
[200] Ibid 26.
[201]Duff (n 105) 382.

and perpetrator and government representatives.[202] Unlike mediation, it is led by a facilitator. Circles is similar to conferencing. It has its root in aboriginal peace making processes and involves an informal conversation around a circle comprising the lay community and professionals. [203] The aim of the circle is to have the participants ventilate with a view to coming up with an appropriate response to the offence. Closely related to conferencing and circle is the victim- offender panels. This involves bringing together a group of victims and a group of offenders who are not each other's victims/offenders but linked to a common kind of crime. This is to assist the victim find closure and create awareness amongst the offenders on the damage caused by their action. As highlighted by Van Ness and Strong, it can be useful for a victim whose actual offender is either not caught or caught but never convicted or somehow escaped the justice system.[204]

Whether through mediation, circle, conference, victim offender panels, or any other traditional or customary aligned process, all the processes have a common focus; addressing and managing the harm caused to the victim by the perpetrator. This management is closely tied to the question answered earlier on what is being restored. It therefore usually includes restitution, apology, making amends, shaming, and even punishment. Since a victim of IFCSA has unique needs, some outcomes of restorative justice are more relevant to IFCSA than others. The most common outcome is restitution. This involves discharging the offender's debt to the victim through payment of money or services to the victim.[205] As a stand-alone remedy, it may give the wrong impression in sexual offences including that of payment being for sexual services rendered. The impropriety of such a conception is more pronounced where the victim is a child. Restitution may however be in conjunction with imprisonment. This scenario however raises the question as to how an incarcerated person can be able to raise funds to make any payment. It has been proposed that the imprisoned perpetrator may be ordered to work while in jail.[206] The arrangement so far in place in the Kenyan prisons is for payment of extremely meager pay for prisoners.[207] It would therefore take a very long sentence for an imprisoned perpetrator to raise a meaningful amount. The other

[202] A Morris and G Maxwell, 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study' in G Johnstone *A Restorative Justice Reader: Texts, Sources, Context* (Willan Publishers 2005) 201.
[203] G Bazemore and M Umbreit, 'A Comparison of Four Restorative Conferencing Models' in G Johnstone *A Restorative Justice Reader: Texts, Sources, Context* (Willan Publishers 2005) 233.
[204] Van Ness and Strong (n 46) 71.
[205] Johnstone, (n 50) 75.
[206] Van Ness and Strong (n 44) 15.
[207] Prisons Rules 1963 (KEN) Rule 19.

suggestion is for seizure of the imprisoned perpetrator's property.[208] This would make sense where the perpetrator is a person of means but would be unworkable where the perpetrator is a pauper. In IFCSA offences, restitution would be complicated by the relationship between the victim and the perpetrator. Where for instance it is a parent/child relationship, question arise on the interest of the siblings of the victim may have in relation to the payment.

Restitution alone is insufficient to heal wounds inflicted on a victim or to help them recover their personal power especially in IFCSA cases. Other suggested ways through which the victim's harm can be redressed include through the perpetrator showing remorse, being exposed to some shame, apologizing, or answering the victim's questions in a face to face meeting.[209] These, though restorative, may have a punitive element. Shaming may be in the context of public exposure designed to humiliate the perpetrator. Elechi gives an example of what Michalowski describes as 'ritual satisfaction'.[210] The essence is to take the perpetrator through some controlled public ridicule in a manner that satisfies all parties involved. The process ensures that the perpetrator is left bearing the stigma of the offence even as he is pardoned by the community. This is important for sexual offences which often have the effect of transferring the associated shame and stigma to the victim. Braithewaite[211] and Karp[212] however raise concerns on negative effects of shaming. They distinguish between the raw shaming and 'reintegrated shaming'. They recommend the latter where the perpetrator is required to perform positive tasks that show the community they are committed to positive behavior. He is therefore treated with enough dignity to enable him rejoin the society at the end of the process.

Apology on the other hand involves the perpetrator acknowledging the wrong and showing remorse. This has the effect of shifting the shame from the victim to the perpetrator.[213] The perpetrator may also undertake to change his behavior or to stay away from certain places.[214] This

[208] Van Ness and Strong (n46) 94.
[209] Johnstone, (n 50) 77.
[210] Elechi (n 151) 19.
[211] Braithwaite (n 54) 100-101.
[212] D R Karp, 'The New Debate About Shame in Criminal Justice: An Interactionist Account' (2000) 21 3Justice System Journal < http://www.restorativejustice.org/articlesdb/articles/2069> accessed 11 February/2015.
[213] Van Ness and Strong (n 44) 86.
[214] Ibid 87.

again resonates well with IFCSA where reconciliation may not be desirable.[215] In such a case, it may become crucial for the offending family member to be required to stay away from the victim or contact them in a limited and/or supervised environment.

What is proposed in this research is to have a model where restorative justice is applied within or closely with the FJS by interrogating aspects that are compatible with the system. This proposal is not new as it echoes Wesley Cragg's call for the retention of restorative conflict resolution within the FJS. He asserts that the formal process does not have to be inconsistent with restorative virtues of forgiveness, compassion, mercy and understanding. All he is opposed to is what he calls 'punishment for punishment's sake'. [216] This is the same position inferred by Duff who states that much as an offender may need to be punished, the essence of that punishment should be to achieve restoration. He talks of 'restoration through retribution'. He is against just desserts retributivism and asserts that restoration is not only compatible with retribution, it actually requires it.[217] Admittedly, there are some aspects of restorative justice that may be incompatible with both the formal justice framework and human rights standards. This is discussed in the next part.

From the foregoing, it is apparent that one does not have to choose between punishment and restoration. It is possible for restorative justice to find room in the punitive FJS and vice versa. A hybrid of the two, either a retributive process tempered with restorative values, or a restorative process with a retributive outcome, may result in a creatively favorable response. In Kenya, there has been legal reform towards this kind of response within the criminal justice process. This emerging legal framework is discussed comprehensively in the next chapter.

2.2.4 Why Restorative Justice?

The relevance of restorative justice to this research is borne from the fact that the FJS has certain shortfalls that work against the interests of the victims of crime.[218] A comprehensive discussion on the form and nature of the FJS is found in the following chapter. In summary, it has been described as 'authoritarian' in contrast to restorative justice, which has been presented as

[215] Daly (n 30) 336.
[216] W Cragg, *Towards a Theory of Restorative Justice* (Routledge 1992) 213 to 216.
[217] Duff (n 105) 382.
[218] Johnstone (n 50) 62.

'emotionally intelligent justice'.[219] This study does not however entirely agree with the juxtaposition as the two are not mutually exclusive. As discussed earlier, restorative justice processes and values are also found within the FJS.

One of the gaps in the FJS is its limitation with regard to the scope of victims, injuries and needs it respond to. With regard to the victim, the scope is often limited to the person directly harmed by the offender, also known as the complainant in the criminal procedure law in Kenya.[220] Many offences, including those related to IFCSA however involve both primary and secondary victims. The primary victim is the abused child while the secondary victims are usually others indirectly harmed by the child's sexual abuse like the non- offending parents and relatives, siblings, neighbors and friends. The injury suffered by these victims range from physical injury, financial loss to emotional trauma.[221] Victims of crime suffer psychological and relational damage as their sense of autonomy, order and relatedness is destroyed.[222] Repair to this damage should be an overriding interest in deciding what to do about a crime. These diverse injuries give rise to different needs which are identified by Zehr to include; the need for compensation, the need for answers to basic questions such as why the crime happened to them, the need for opportunities to communicate their emotions, the need for empowerment especially the return of their sense of personal power, and the need to recover their security. [223] These needs are unpacked in chapter four of this study. The FJS has limited room for emotions and does not prioritize attendance to those needs. The overriding interest of restorative justice on the other hand, includes considering the damage to both the primary and secondary victims and the needs arising there from in the response to crime.

The other need for restorative justice is understood by appreciating what a crime really entails. Nils Christie views conflict as property.[224] Christie states that the criminal justice system involves theft of that conflict by the state from the individual victim. Once taken away from the victim, the

[219] N Flynn, 'Advancing Emotionally Intelligent Justice Within Public Life and Popular Culture' [2013] Theoretical Criminology. <http://www.restorativejustice.org/articlesdb/articles/11049> accessed 4 March 2014.
[220] CPC (n 28) s 89.
[221] Van Ness and Strong (n 46) 43.
[222] Zehr (n 169) 195.
[223] Van Ness and Strong (n 46) 44.
[224] N Christie (n 154) 8.

offence is managed in a manner that best suits the state not the individual victim. The public dimension of the crime hence becomes more important than the private dimension. This has been referred to as the 'aggrandizement and edification of the state, rather than the satisfaction of the victims'.[225] Gerry talks of 'victim paternalism' where the formal system convinces the victims that what they expressly say they want is not really what they want, and that if they understood their needs better, they would probably go for something different.[226] Restorative justice plays the role of keeping the conflict to its rightful owner and bringing the interests of the victim at the fore.

A distinguishing feature of the FJS under common law jurisdiction is its adversarial nature where the prosecution and the defense are the protagonists while the judge is a neutral umpire. The role of the judge is to adjudicate the conduct and state of mind of the perpetrator based on the presentations by the two parties. Closely related to this adversarial orientation are the universally acclaimed and constitutionally enshrined due process rights.[227] These include the right to bail, presumption of innocence until proven guilty, the right to legal representation and even the right to remain silent. These rights create an advantage accorded to the perpetrator against the victim and the state. They are therefore, to a large extent, not in the interest of the victim and leave the perpetrator with little pressure or incentive to accept responsibility under the framework of the FJS. Again, with the consequences of being found guilty in the punitive system being quite severe, perpetrators are unlikely to 'own up' and instead go to enormous lengths to avoid being convicted.[228]

These rights are prone to abuse by professionals, especially defense lawyers, to polarize or frustrate criminal proceedings through delays, undue regard to technicalities, and weakening the prosecution's case. This is primarily done through discrediting the evidence presented by the witnesses including that of the victim and may effectively lead to what Zehr refers to as secondary victimization in the criminal justice process.[229] In this regard, Rapoport has propounded that it is impossible to achieve justice for the victim through the adversarial legal system. In his view, the

[225]D Cayley, *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives* (House of Anansi Press Inc 1998).
[226] Johnstone (n 50) 84.
[227] Constitution (n 2) Arts 48 to 51.
[228] M Wright, *Restoring Respect for Justice* (Winchester: Waterside Press 1999) 102.
[229] Zehr (n 104) 69.

practitioners of the system, with some exceptions, conceive of the system 'as a zero-sum game, where any gain by one side is balanced by a corresponding loss on the other'.[230] He compares the system to the concept of 'free enterprise' that conceive of social justice as based on the 'primacy of competition as a guarantee of a priori social equality'.[231] Reconciliation in the FJS is therefore less likely. Even where the process results in incarceration, sending the perpetrator to jail does not necessarily heal the victim's injury. Incarceration may aggravate the situation especially where it is compounded by issues of financial support, guilt and family breakdown.[232] The upshot of this is that there is a gap left by the legalism associated with the adversarial system together with the attendant due process rights that leaves the victim disadvantaged. Although restorative justice does not advocate for disregard of the due process rights, the absence of professionals in most restorative processes minimizes the chances of misuse of those rights. Even where professionals have embraced restorative justice, they do so voluntarily hence with due sensitivity without the urge to complicate the process with undue technicalities.

Restorative justice is also important in availing opportunities for victim participation in the justice process. As discussed earlier in this chapter, whether through mediation, conferencing, circles or Victim Impact Panels, restorative processes provide opportunities for a more engaging encounter between the victim and the perpetrator. This is usually missing in the FJS where the victim is relegated to a passive participant and at best in the membership of the rest of the witnesses. The victim's participation in the process is limited to what they know about the crime not on the impact the crime has had on them. The community is also totally left out of the process unless they have a legally sanctioned role to play as witnesses.[233] There has been progress towards entrenching restorative processes and values, especially enhancing victim participation within the FJS which is discussed in detail in the next chapter. Wright is however dismissive of those kind of reforms as he sees no hope of the victim's interests being addressed within a punitive system.[234] The position of this study is to embrace any response that would improve the victim's standing in the legal process.

[230] A Rapoport, *Theories of Conflict Resolution and the Law.* In *Courts and Trials: A Multi-Disciplinary Approach* by M. L. Friedland (ed.) (University of Toronto Press 1975) 28.
[231] Elechi (n 151) 36.
[232] Johnstone (n 50) 69.
[233] Van Ness and Strong (n 46) 46.
[234] Wright, (n 228) 102.

With regard to the appropriate stage for the application of restorative justice to FJS, Tony Marshall is of the view that the application should not be limited to any one stage but should be open to the time most suitable for the victim. He opines that the timing should depend on the personal characteristics of the victim especially in offences that are likely to involve intense emotions like rape.[235] This opinion is also shared by Mc Glynn et al who state that restorative interventions must be both flexible and varied in application for it to be deemed as truly victim-centered. [236] This is the same approach taken by this research as it explores entry points for application of restorative justice at various stages of the justice process including sentencing. The possible entry points include enhancing the victim's visibility and participation throughout the process, obtaining the commitment of the offender to restorative processes like reparation, and applying restorative justice as a parallel process during the subsistence of the formal justice trial but without prejudice to the outcome of the FJS. These entry points are identified in chapter five of this study which interrogates the feasibility of applying restorative justice in the FJS in Kenya. The use of restorative justice within the FJS is not entirely new. It is practiced in New Zealand, Canada and Australia where restorative conferencing held within the framework of the FJS has an impact on sentences meted out.[237]

Restorative justice is understood to be replete with certain values which are largely missing in the FJS. The values have been classified into two broad categories by Van Ness and Strong. These are operational values and normative values. The normative values include active responsibility to make amends, peaceful social life to build harmony, respect and solidarity. Operational values include amends, assistance, collaboration, empowerment, encounter, inclusion, moral education, protection, reintegration and resolution.[238] Of these, he highlights encounter, amends, reintegration and inclusion as key. All these values target the victim and are therefore appropriate for filling the gaps discussed above. Of importance to this study and therefore highlighted in chapter five, are the operational values that are easily entrenched within the formal justice system.

[235] Marshall (n 31) 25.
[236] McGlynn et al. (n 119) 20.
[237] Gavrielides, (n 152) 57.
[238] Van Ness and Strong (n 46) 48.

Finally, restorative justice sits well with the African traditional justice system. The now entrenched retributive justice was not a hall mark in African traditional system; restorative justice was the more natural response. As discussed in part 2.2.1 above, a lot of the traditional African justice concepts were guided by restorative values including restoration of relationships and reparation.[239] It has been proposed that the widespread use of retribution is for want of other options. If communities were offered an alternative that would guarantee moral vindication and security, they would readily consider it as that is what they are naturally inclined to.[240]

Restorative justice is however not the magic potion for all the gaps in the FJS. It in fact comes with concerns around its conceptual viability and its ability to sustain appropriate standards and in its implementation.[241] The above values and justification of restorative justice therefore exist against a backdrop of challenges and criticism. Theo Gavrielides refers to the challenges as 'fault lines' and summarizes the six main ones to include debates around: definition and meaning of restorative justice; which and how many stakeholders should be involved in the process; where the process should be implemented, whether it should be applied within or outside the FJS; whether it is a new paradigm or merely complementary to the FJS model; whether restorative justice is an alternative punishment or an alternative to punishment; and finally what the guiding principles of restorative justice are and their flexibility.[242] A major criticism of restorative justice, however, is that it goes against the natural human instinct for revenge or just desserts It is also said to fail to pay due regard to the proportionality of the offence and the response.[243]

Elsewhere, restorative justice has been criticized for merely being a set of high sounding ideals that leave questions on how they can be applied in practice[244] and for emphasizing on the outcomes as opposed to the process. [245]It has also been accused of making assumptions that every perpetrator

[239] Kinyanjui, (n 57) 3.
[240] Johnstone (n 50) 84.
[241] K BrunildaPali, S Madsen, 'Dangerous Liaisons?: A Feminist and Restorative Approach to Sexual Assault' (2011) 14 1Temida) 49, 56 < http://www.doiserbia.nb.rs/img/doi/1450-6637/2011/1450-66371101049P.pdf> accessed 27 January 2015.
[242] Gavrielides, (n 152) 36 – 42.
[243] Hudson et al (n 196) 470.
[244] A Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 3The British Journal of Criminology: 359, 360.
[245] BrunilaldaPali (n 241) 50.

is 'a generous, empathetic, supportive and rational human spirit'.[246] This presents a problem where there is no identifiable victim and/or admission of guilt by the perpetrator.[247] The application of restorative justice is hence limited to situations where both the victim and the perpetrator are able and willing to respond restoratively.

Another source of criticism is that it focuses on individual conflict rather than crime as a problem in the society. Harris particularly notes that placing emphasis on the need for the offender to make things right, rather than on socio-economic reforms makes it appear as if crime is solely an individual problem attributable to the weakness, sinfulness, or other deficiencies of individual lawbreakers. It does not address the role of society, of structural and institutional forces that promote crime and conflict.[248]

Finally, one of the most serious concerns raised about restorative justice revolves around its appropriateness in serious crimes like sexual offences under which IFCSA falls. This is discussed further in detail in the next part.

2.2.5 Restorative Justice in Sexual Offences

The appropriateness of restorative justice in response to sexual assault cases is one area which remains contested and in which consensus is yet to be achieved.[249] Restorative justice has been applied in sexual offences in New Zealand and Australian State of South Australia but only in response to youth sexual assault offences.[250] Ardent proponents of restorative justice like Marshall limit their recommendation for restorative justice only to certain cases. He is of the view that restorative justice is unsuitable for serious violent cases.[251] Reasons for giving restorative justice a wide berth in sexual offences vary. It has been argued that offences involving a deeper conflict like murder and rape cannot be compared to, for instance, offences against property. It is therefore

[246] Daly, (n 30) 134.
[247] Duff (n 105) 382.
[248] M K Harris, 'Alternative Visions in the Context of Contemporary Realities' in P Arthur (ed), *Justice: The Restorative Vision: New Perspectives on Crime and Justice* (1989)Occasional Papers of the MCC Canada Victim Offender Ministries Program 32 Summarized at http://www.restorativejustice.org/articlesdb/articles/678 accesses 17 March 2015.
[249] BrunildaPali (n 241) 50.
[250] Daly (n 30) 336.
[251] Elechi, (n 151) 7.

assumed that reconciliation and rehabilitation in case of the former is too difficult and complicated to be left to restorative justice.[252]

The above assumption is not without logical basis. Ordinarily where a sexual offence is committed especially against a child, the natural instinct is to respond in a manner that Myers refers to as 'emotional and visceral' which has the effect of impairing objectivity as all energy is directed at punishing the perpetrator.[253] It is believed that serious offences call for serious punitive measures to censure behavior and protect the victim from further abuse, reduce likelihood of re offending and reintegrate offender back into the society. Closely related to this is the fear of trivializing serious crime. It is assumed that if cases are diverted from court to the informal systems, it will appear that offenders are being treated too leniently and that offences are not being taken seriously enough.

Annie Cossins' problem with the use of restorative justice in sexual offences stems from a conclusion that she draws to the effect that there is insufficient evidence to support the claim that restorative justice is a superior form of justice.[254] She draws this conclusion after analyzing two studies: the first empirical study reported by Daly on the use of conferencing for juveniles charged with a child sex offence, known as the Sexual Assault Archival Study (SAAS),[255] and secondly, restorative justice case studies reported by Daly and Curtis-Fawley that are used to support the use of restorative justice for child sexual assault cases; and a comparison of restorative justice with other reforms to the sexual assault trial.

Another concern for the application of restorative justice to sexual offences arises from the power imbalance between the perpetrator and the victim in most sexual offences and especially in IFCSA. This imbalance is said to expose the victim to the danger of having the offender manipulate the process through exerting undue pressure to participate or agree on certain conclusions. Cossins demonstrates the issue of the power imbalance by posing the question; 'how possible it is to

[252]UNGA Report of the Secretary General, 'Promoting Restorative Justice for Children'. (New York 2013) 22. < http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/srsgvac_restorative_justice_for_children_report.pdf> accessed 17 March 2015.
[253] Myers (n 117) 1703.
[254] Cossins (n 244) 359.
[255] Daly (n 30).

achieve the philosophical ideals of restoration when bringing together an offender and a victim in an informal meeting to deal with one person's exploitation of another?'[256] Her main concern appears to be with the process and especially its informal nature rather than the substance value of restorative justice. As stated earlier however, this study is premised on the basis that restorative justice can operate both within and without the FJS. Any power imbalance can be put in check by the FJS. Preoccupation with its informal nature or power imbalance should therefore not be reason to deter the application of restorative justice to sexual offences.

Other concerns of the use of restorative justice in sexual offences have to do with the risk of compromising the safety of the victim and its apparent incompatibility with the ideals of the women's movement goal of removing offences related to violence against women from the private to the public domain.[257]

This study has proceeded from a point of knowledge of the existence of the above stated concerns of the applicability of restorative justice in sexual violence cases like IFCSA. It is for this reason that the use of restorative justice is confined to the brand that can be accommodated within the formal justice system. This is to ensure that there is a mechanism in place to monitor any excesses that may result in the concerns discussed above.

Amidst the above criticism there is marked acceptance of the application of restorative justice in sexual offences. Gerry Johnstone engages the issue by presenting an analogous scenario where someone commits an indecent assault against a relative then offers a generous restitution, genuine apology and agrees to undergo therapy. This satisfies the victim, who subsequently declines to testify in court. Johnstone then poses the question whether the victim should be compelled to testify in order to satisfy the public interest. His answer is in the negative.[258] The victim in the analogy is however an adult. His conclusion may or may not have been different if the victim was a child as is the subject of this study.

[256] Cossins (n 244) 361.
[257] Brunildapali (n 241) 51.
[258] Johnstone (n 50).

As mentioned above, Daly undertook a study to compare the legal journey of nearly four hundred sexual offence cases finalized in court or by a conference in terms of the penalties imposed and the prevalence of reoffending. She concluded that the court is limiting in vindicating its victims and also found the conferencing process less victimizing than the conventional process in sexual offences.[259] This conclusion resonates with that of other proponents who acclaim restorative justice in sexual assault and domestic violence for the opportunity it avails to the victim to have their story validated. It also assists the offender and the community to take responsibility and repair the relationship respectively. Proponents also feature the general failure by the FJS to effectively respond to sexual offences. The failure is manifested in, among other outcomes, the low prosecution and conviction rates and the victim's exposure to re victimization during proceedings.[260] The requirement of proof beyond reasonable doubt for an offence that takes place in private particularly makes the justice process difficult for a victim of sexual offence. It is therefore clear that the mere application of FJS with its 'tough measures,' like the tough sentences, does not necessarily translate to an effective response to crime. On the contrary, Garland argues that the tough measures are a hallmark of politically weak governments who have a tendency to turn to 'strong' law even though the harsh penalties do not translate to less crime.[261] Hudson holds the same view as Garland on the failure by the FJS to respond effectively to sexual and racial crime and adds that it is only reasonable for restorative justice to be given a chance.[262] This analysis is useful in answering the research question on the extent to which the existing legal framework sufficiently responds to the needs of an IFCSA victim. This is discussed comprehensively in chapter three of this study.

Restorative justice is further credited with creating an atmosphere where crime is more easily addressed within the family unit or small community away from rules of evidence and procedure. Privacy, an important component of restorative justice resonates well with sexual offence victims who may avoid the FJS for fear of publicity. The issue of privacy has however been seen as a double edged sword due to the risk of privatization of gendered violence which would encourage

[259] Daly (n 30) 336.
[260] Brunildad (n 241) 52.
[261] D Galland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36 British Journal of Criminology 445, 462.
[262] Hudson (n 115) 438.

impunity.[263] It may also come with the risk of creating a scenario where families can trivialize the abuse or protect their males. Daly's aforementioned study found that the private setting of conferences was particularly useful for sexual offences between a victim and offender where there is (was) a relationship. She however falls short of fully recommending restorative justice in sexual offences as she remarks that 'one can neither fully endorse nor disparage restorative processes in responding to sexualized violence or other gendered harms'.[264]

From the foregoing, it is clear that the hurdles experienced by a victim of sexual assault in the FJS call for a restorative intervention.[265] There is therefore room, albeit limited, for considering broader views as far as the place of restorative justice in sexual offences is concerned. As stated above, this study explores opportunities for the entrenchment of restorative justice at all appropriate stages of the formal justice system.

2.2.6 Restorative Justice and Feminism

It is impossible to discuss a subject like child incest without taking into account the feminist view-point. Most of the IFCSA victims are female and the perpetrators are predominantly male.[266] Mothers also play a critical role in responding to child sexual abuse within the family. This role is discussed further in chapter four under the under the specificities of patriarchy and family impact. Any viable legal response to IFCSA must also be examined through the gender lens and women's experiences as espoused by various feminist theories. Feminism is both a political ideology and a legal theory.[267]

Like restorative justice and legal pluralism, feminism does not have a single definition. This is because it exists in different strands and means different things to different people. It has hence been said that 'to talk of the feminist analysis of a given social phenomenon is to talk nonsense.'[268]

[263] Brunildad (n 241) 54.
[264] Daly (n 30) 2.
[265] Brunildad (n 241) 53.
[266] CA Ahlgren, (n 48) 486.
[267] O M. Fiss, 'What is Feminism' (1994) 26 Ariz. St. L.J. 413, 414.
[268] Daly (n 73) 501.

Feminist theories primarily advocate for the creation of a social order in which women's experiences are brought to the fore as opposed to being suppressed.[269] The general consensus around feminism is that women suffer injustices because of their sex. Its proponents however part ways on the reason behind the injustices and gender inequality. They also have varying suggestions on ways out of the injustices. Classifications of feminist theories also vary. The most prominent categories include the liberal feminist theory, the radical feminist theory, the Marxist feminist theory and the cultural feminist theory. Each of them espouses a distinct strand which have been summarized as the difference, different voice and dominance strands.[270] The strands that are of relevance to this research are radical feminism and cultural feminism.

The radical feminist theory also known as the dominance theory attributes sexual violence to patriarchy that places women's bodies at men's dominion. Women and children are then deemed to be men's property available for, inter alia, sexual exploitation.[271] From this view point, incest is perceived as a social phenomenon brought about by inequalities between sexes and between adult and children at multiple levels including economic, social and physical. This perception resonates with the findings of this research on the impact of male domination in the patriarchal setting which ultimately influences the manner in which IFCSA is responded to. This is analyzed in chapter four of this research as one of the specificities of IFCSA.

The marked resistance by radical feminists against the use of restorative justice in gendered violence offences cannot be overlooked in this research.[272] As discussed in the previous part, the primary concern of radical feminists is the risk of restorative justice processes and outcomes to reinforce the power inequalities inherent in abusive relationships. They fear that this may lead to possible re-victimization.[273] They therefore deem retributive justice system as the only mode capable of demonstrating a serious response to sexual offences.[274]

[269] Ibid 498.
[270] CR Sunstein, 'Feminism and Legal Theory' [1988] 101 Harv. L. Rev. 826, 827.
[271] Ahlgren (n 48) 499.
[272] Sunstein (n 270) 826.
[273] Acorn (n 98) 224.
[274] B Hudson, 'Restorative Justice and Gendered Violence – Diversion or Effective Justice' (2002) 42 British Journal of Criminology 616–34, 629.

It is out of this concern that the entry points for restorative justice discussed in chapter five of this research are limited to those that complement rather than replace retributive justice.

Cultural feminism, also known as the different voice strand, equally challenges patriarchal social order. The main proponent of this strand is Carol Gilligan who presents a bifurcated lens in analyzing women's disadvantaged position. The first is the masculine voice characterized by rules and principles and the other is feminine voice with the instinct to preserve relationships. She contends that the masculine voice is the one that is recognized as the feminine one is suppressed and regarded as the 'other'. She advocates for placing greater value on feminine attributes of care and relationships in appreciating human experiences. [275] She states that women value relationships and connections which she refers to as the 'ethic of care'. This is unlike men who appreciate the abstract like justice, rights and formality.[276]

The main concern of the different voice strand is the non- recognition and down playing of the innate feminine approach to issues. It advocates for bringing women's concerns to the fore by giving equal attention to attributes that matter to women like relationships and care as is accorded the male centered attributes of power, privacy and independence.[277] The nurturing nature may also be the reason behind a woman covering up for her husband or choosing family cohesion over pursuing justice.

This strand resonates with the call in chapter five for the application of therapeutic jurisprudence and emotional intelligence through-out the justice process. These are identified as viable entry points for the application of restorative justice in the criminal justice process. The beneficiary of the therapeutic process is the victim of IFCSA, who is usually female. The different voice strand is therefore the thread that connects vulnerability theory discussed hereunder to restorative justice. This is to the extent that cultural feminism brings to the fore traits that expose the vulnerability of the victim of IFCSA.

[275] C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard 1982).
[276] Ibid.
[277] M Becker, 'Patriarchy and Inequality: Towards a Substantive Feminism' [1999] U. Chi. Legal F. 21, 50.

2.2.7 Restorative Justice and the Vulnerability Theory

There is a distinct difference between the dictionary meaning of the word 'vulnerable' and its use in the vulnerability theory discourse. In common parlance, vulnerability refers to 'particular susceptibility to physical or emotional harm, coercion or other external sources of influence'.[278] The term in the theory on the other hand is used to connote the continuous susceptibility to change in both the bodily and social well-being that all human beings experience.[279] Vulnerability theory propounds that whereas it is common to have various groups recognized as vulnerable, vulnerability is a universal attribute which affects everyone. The theory perceives human condition as one of 'continuous and universal vulnerability'.[280] The only aspect that varies from one person to another is the magnitude thereof. This is determined by an individual's experiences based on the quality and quantity of resources in their command.[281] Vulnerability is hence not an inborn quality of a person but a result of the relationship between an individual and their environment.[282]

The theory is relatively new but is steadily gaining momentum. Its main proponent is Martha Albertson Fineman in her endeavor to respond to the limitations of equality.[283] Fineman makes reference to embodied and embedded differences in people that play a part in varying individual vulnerability. The former refers to intrinsic variations among individuals like race and age while the latter has to do with the variations in positioning in relationships whether socially, economically or otherwise.[284] Both the embedded and embodied differences are relevant to this study. This is to the extent that the primary victim that is the subject of this study is a child who is likely to be a subordinate player in the home structural arrangement. The victim's vulnerability is therefore escalated by their age and position in the family. The research calls upon the state to be alive to this reality in responding to IFCSA at all stages of the justice system.

[278] L A Weithorn, 'A Constitutional Jurisprudence of Children's Vulnerability' (2017) 69 Hastings L.J. 179, 190.
[279] Fineman (n 69) 142.
[280] Fineman (n 69) 134.
[281] Fineman (n 71) 269.
[282] N A Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 Yale J.L. & Feminism 1, 23.
[283] Fineman (n 69) 134.
[284] VB Strand and I Ikdahl, 'Responding to Disadvantage and Inequality through Law' (2017) 4 Oslo L. Rev. 124, 128.

Vulnerability theory is distinguishable from human rights. Whereas the latter deals with 'vulnerable groups' making vulnerability an attribute limited to a certain category of people, vulnerability theory views it as inherent in all people.[285] Further international human rights prioritizes the concepts of equality and non-discrimination which are entrenched in all international, regional and domestic human rights instruments. Vulnerability theory, on the other hand, goes beyond the claim for equality to interrogate mechanisms and structures responsible for the inequality.[286] Martha Fineman summarizes vulnerability as focusing more on the 'human' part than the 'rights' part.[287]

The vulnerability approach as espoused in the theory is useful in answering two of the research questions in this study. These are with regard to the specificities of IFCSA and the entry points available for the application of restorative justice in IFCSA cases. Just like feminism, vulnerability theory is an important backdrop for the analysis of the specificities of IFCSA discussed in chapter four of this research. This is because it challenges the idea of sameness of treatment in the face of differences in context, differences in circumstances and abilities on the part of those whose treatment is compared is overlooked or ignored.[288] This echoes the research problem in this study which centers around the similar treatment accorded to victims of IFCSA and victims of child sexual abuse by a non- family member by the legal framework. The similar treatment is meted out without due regard to the specificities that are unique to IFCSA. The vulnerability approach facilitates the recognition of the distinctiveness in the social and economic positions of those affected by IFSCA. This is what Fineman refers to as 'inevitable inequality' as the victim and perpetrator are positioned differently in terms of bargaining power.[289] The specificities are therefore a direct consequence of the victim's vulnerabilities. The vulnerability approach shifts focus from the all too common group identity like race and gender to other forms of vulnerabilities, as a basis for targeting social policy.[290] This includes calling on the state to make policies and laws that are responsive to the vulnerability of the victim of IFCSA.

[285] Ibid 127.
[286] Ibid 124.
[287] Fineman (n 71) 255.
[288] Ibid 251.
[289] Fineman (n 69) 135.
[290] Kohn (n 282) 4.

Any meaningful participation of the victim, as envisaged by restorative justice, requires support of the victim which takes into cognizance their vulnerability. The relevance of vulnerability theory in answering the question on the entry points available for application of restorative justice in IFCSA cases is therefore found in its converse, which is resilience. This is the aptitude that an individual has that enables them to recover from harm and setbacks affecting them.[291] Building resilience in individuals starts by placing them in relation to each other as humans then calling upon the state to be responsive to their individual vulnerability. The theory of vulnerability therefore prioritizes human vulnerability and dependency within State responsibility.[292] It calls on the state to actively assume responsibility in ensuring equality for citizens and others to whom it owes some obligation.[293] The state must therefore be appropriately structured to respond to universal vulnerability. This is achieved through its institutions which must respond in such a way that those with low resilience are enabled to achieve real equality.[294]

The resilience building institutions include schools, health facilities, courts, rehabilitation institutions, prisons and police stations which are all established and maintained by the state.[295] The theory calls for an analysis of state institutions through which resources are channeled to ensure that the disadvantaged are not unduly privileged. It has been identified as an important tool to put pressure on the state where there is absence of political will in the state in securing the livelihood of certain categories of people.[296] It has been criticized for not offering a specific indication on how the state should share resources amongst individuals.[297]

The proposed restorative interventions discussed in chapter five of this study resonate with the vulnerability approach in as it places the duty of enhancing resilience on the state. The interventions are in three main areas first of which is aligning the entire justice process towards more intentional embracing of therapeutic jurisprudence. The second level of intervention is at the legislative level to facilitate the unlocking of any statutory barriers. Lastly are proposed policy

[291] Fineman (n 69) 146.
[292] Strand (n 284) 125.
[293] Fineman (n 71) 256.
[294] Ibid 269.
[295] Fineman (n 71).
[296] Strand (n 284) 130.
[297] Kohn (n 282) 1.

interventions that the state needs to prioritize both to protect potential victims and avail long term support to victims of IFCSA. The injection of restorative justice in IFCSA cases therefore requires synergy from institutions of all three arms of government. Vulnerability approach can be used as a basis for a form of welfare from the state. This could be useful in achieving the ideal of restorative justice as a lifestyle where potential victims are empowered to avoid the abuse while those who are unfortunate to fall victim have readily available support from relevant state institutions. This reinforces their resilience and thereby facilitates their restoration.

2.2.8 Restorative Justice and Legal Pluralism

This study is premised on the assumption that an IFCSA offence triggers responses that transcend the scope of the FJS. This assumption follows the commonly accepted view that the conventional state law is not the only relevant and effective legal order in people's lives.[298] Other existing institutions of normative ordering such as the home, neighborhood, workplace or business, also provide avenues through which people experience justice. These multi- pronged fora operate as alternatives to, parallel to, or at times alongside the FJS. For purposes of this study, these alternatives shall be referred to as informal justice systems. Informal justice system has been defined to encompass:

> The resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.[299]

Restorative justice shares various common aspects with informal justice. Firstly, informal justice practices are usually geared towards repairing harm even though they may have a component of retribution. This is an important feature of restorative justice. Secondly, several restorative processes have been said to have their roots in traditional informal justice.[300] Thirdly, in many non- western countries the memories of indigenous practices have given a thrust to acceptance of restorative justice theory and practice.[301] Informal justice is therefore able to facilitate restorative

[298] ICHRP, 'When Legal Worlds Overlap: Human Rights, State and Non-State Law' (2009) <http://www.ichrp.org/files/summaries/42/135_summary_en.pdf> accessed 20 February 2015.
[299]UNDP (n 32) 8.
[300] Kinyanjui (n 57) 1.
[301] Van Ness and Strong (n 46) 14.

justice. It has been said that victims resort to informal justice for want of alternatives due to delivery failure by the formal justice system for various reasons.[302] Recourse to informal justice systems is therefore more out of pragmatism and convenience rather than preference. In Kenya, IFCSA engages with the informal justice mechanism beneath the legal radar and without direct state approval. The next chapter discusses this phenomenon in greater detail.

This study is concerned with ways in which the FJS can be enriched by the informal justice's elastic and broad values and processes. For a clear understanding of the nexus between the informal and the FJS, the concept of legal pluralism needs to be examined. The relevance of legal pluralism at this stage is twofold. First, it serves to clarify that state law, which in this study is largely referred to as the FJS, is not the only relevant legal order in people's lives as it exists amidst informal systems.[303] Secondly, it provides a repository from which one can draw in constructing discourses of legitimacy that may be used to promote and justify other forms of normative and legal orders.[304]

Legal pluralism is traceable to 1772 in the promulgations by the East India Company when application of religious laws in personal legal matters was allowed subject to the repugnancy clause.[305] Despite the relatively long history, the question as to what constitutes legal pluralism is still an ongoing discourse. Its definition and scope is as contested as that of restorative justice. Ann Griffiths demonstrates the nebulous nature of the concept by referring to it with such terms as such as 'mobile' 'contingent', 'spatialized', ' multifaceted ' and 'constantly in the making'. It has generated a lot of controversy over the years and been used to defend various positions of interest.[306] The various perceptions of legal pluralism are hinged on differing definitions of what law is, who makes it, who implements it, and its relationship to the state. Eugene Ehrlich for instance holds that law is essentially social order and it can exist independent of the state.[307] Fernanda Pirie also has a diminishing perception of what law is. It is an intellectual system characterized by expressive and aspirational qualities and claims to promote order and justice. It

[302] Ibid 12.
[303] ICHRP, (n 298) s 2.7, 31.
[304] A Griffiths (n 80) 194.
[305] J Griffiths (n 79) 6.
[306] A Griffith (n 80) 174.
[307] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press) 24.

is delinked from government and can exist outside the state. [308] From his perception, it follows that legal pluralism is capable of existing outside the state run systems.

Where law is understood in simple terms as 'norms' and 'rules' and its initiator being the society, then the ultimate determinant of what is right and how to act, and what is wrong and how not to act; and the remedies for and consequences of such actions lies with the society. In this scenario, legal pluralism is said to exist when a specific dispute or subject matter may be governed by multiple norms, laws or forums that co-exist within a particular jurisdiction or country.[309]

For Salvatore, reference to law means state law. He however distinguishes this from the unofficial law which he refers to as 'spontaneous law'. The unofficial law may become 'underground law' under certain circumstances. He substantiates as follows:

> This spontaneous law is unofficial but is not necessarily 'underground'. It is unofficial because it is not recognized as a law introduced by the state; it may be prohibited or tolerated, but most of the time it is ignored. It becomes 'underground law' when it competes with a state law that claims supremacy.[310]

Salvatore then gives an examples of the circumstances under which 'underground' law may thrive:

> In rural areas, African customary law is applied. In areas closer to the cities and in capital cities, and especially in the densely populated suburbs comprising huts and shacks, state law is only partially enforced. Here traditional rules cannot be effectively applied even if people feel culturally linked to them, as the urban context is so different to that of the rural areas and thus does not permit a simple transposition of the traditional ruling system. (…) People living in the cities therefore tend to abandon their own native laws, but the official law does not address their needs effectively. Such a situation creates a gap in the social regulation system that is filled by the emergence of spontaneous legal orders designed to regulate urban relations outside the official state framework.[311]

He concludes that 'Underground' law does not come from practice but from a spontaneous state of affairs where people seek legal solutions that are all outside or in competition with the state

[308] F Pirie, 'Law before Government: Ideology and Aspiration' (2010) 30 2Oxford Journal of Legal Studies 207, 227.
[309] ICHRP (n 298) s 2.2, 2.
[310] Mancuso (n 158) 6.
[311] Ibid 9.

order, and which the state law is unable to control. Underground law is therefore prevalent in rural area where state law is not yet effective, and in informal settlements near the urban areas.[312]

The above state of affairs described by Salvatore is more or less similar to the one prevailing locally in response to IFCSA. Though a reading of the Sexual Offences Act[313] together with the Criminal Procedure Code[314] leaves no room for settlement of IFCSA cases through informal justice mechanisms, a lot of cases are reportedly finalized in the 'underground' law.[315] The underground law can hence not be ignored. This study therefore looks behind the veil of illegality to explore the possibility of picking out values that the 'underground' law may enrich the FJS with its restorative values and processes.

From his analysis of what law is, Salvatore perceives legal pluralism as 'the encounter between western legal culture based on written rules and the oral African tradition' resulting in a hybrid of western and subjugated African legal traditions.[316] He then equates legal pluralism to 'legal syncretism' which bears a nugatory overtone. Salvatore's confinement of legal pluralism to the western – African tradition dichotomy fails to address the existence of multiple plural systems outside the traditional African setting or in situations where the population does not share common traditional norms. In this regard Merry moves the conversation on legal pluralism from this dichotomy and creates two distinct versions she refers to as the 'classic legal pluralism' and the 'new legal pluralism'. The former is based on intersections of indigenous and European law while the latter applies to other non- colonized societies as 'plural normative orders' found in virtually all societies.[317] Legal pluralism can therefore exist in any society including a multi- cultural society as non- state law is not always cultural. In some places, it may arise from a combination of traditional and contemporary influences. The classical legal pluralism is of more relevance to this study by virtue of the fact that Kenya being a former colony inherited a plural legal system at independence.[318] African customary law is an important ingredient of the classical legal pluralism.

[312] Ibid 5.
[313] SOA (n 34) s 37.
[314] CPC (n 28) s 137 N (a).
[315] ICRH (n 12) 17.
[316] Mancuso, (n 158) 12.
[317] Merry (n 138) 873.
[318] W Kamau, 'Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom' (2009) 23 2 Int J Law Policy Family 133, 134.

Customary law is said to refer to 'a collection of elastic, fluid and flexible rules that can be changed quickly according to the circumstances'. A characteristic feature of these rules is that they are not implemented by institutionalized or special organs. They also focus on conciliation rather than on punishment.[319]

John Griffiths on the other hand examines legal pluralism with a societal lens. He sees the legal organization of a society not existing in isolation but being congruent with its social organization. From this stand point, he defines legal pluralism with reference to the social field as 'the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping social fields and in practice, dynamic conditions'.[320] Legal pluralism, according to John Griffith, is therefore a subset of normative pluralism. It has been said that:

> If normative pluralism refers to a situation in which different sets of norms or two or more institutionalized normative orders co-exist in the same time space context, then legal pluralism is the species which includes those kinds of sets of norms or normative orders that merit the appellation "legal" in a given context[321]

John Griffith's conceptualization of legal pluralism is however overly wide as it still encompasses aspects of normative pluralism. He includes 'all state of affairs for any social field in which behavior pursuant to more than one legal order occurs'.[322] Viewing legal pluralism as a social rather than merely a legal phenomenon as Griffith does has the tendency to go overboard to include every conceivable arrangement however insignificant. This study therefore heeds Merry's call on the need to distinguish between law and social life.[323]

A distinct feature in John Griffith's conceptualization is his aversion to the practice of analyzing legal pluralism against the backdrop of legal centralism. The latter refers to the framework that recognizes law when it is administered by state institutions; exclusive, systematic and hierarchically flowing from the sovereign to the bottom or vice versa.[324] Under this framework,

[319] Mancuso (n 163) 2.
[320] J Griffith (n 77) 38.
[321] W Twining, 'Legal Pluralism' (2010) World Bank Workshop on Legal Pluralism 4.
[322] J Griffith (n 77) 2.
[323] S E Merry (n 138) 880.
[324] J Griffith (n 77) 3.

recognition of the state law is done to the exclusion of lesser normative orderings existing within the community. These are orderings that may exist based on geographical, ethnic or religious features and include church/mosque based forums, traditional models, the family or any other grouping. They are subordinate to state institutions and organs. John Griffith finds the theory of centralism obstructing and frustrating observation and development of legal theory. He appreciates that the situation on the ground is more complicated and presents legal pluralism as 'the fact' and centralism as 'the myth'.[325]The role of legal pluralism according to John Griffin is therefore to deconstruct the above myth and

> To break the stranglehold of the idea that law is a single, unified and exclusive hierarchical normative ordering depending from the power of the state and from the legal illusion that the legal world actually looks like the way such a conception requires it to look.[326]

John Griffin acknowledges that not all law is state law.[327] This is the position held in this study. The study goes further to recognize even the 'underground law' that finds its way, albeit without state sanction, to be subject of interrogation in this study.

John Griffith's analysis introduces another distinction of legal pluralism that closely resembles the classical versus new legal pluralism. This is the 'weak' versus the 'strong' legal pluralism. The latter is said to exist in situations where not all law is state law. The law is therefore neither systematic nor uniform and it is not administered by a single set of state legal institutions. Weak legal pluralism on the other hand arises where parallel legal regimes may co-exist but depend for their legitimacy on the 'recognition' or accommodation accorded to them by the dominant state legal order. Weak legal pluralism therefore starts from the standpoint that state law or state-recognized law is the most important normative order, and all other norm-creating and enforcing social fields, institutions and mechanisms are, either insignificant, subordinate or irrelevant. In Kenya, legal pluralism mainly manifests itself as weak legal pluralism as the rest of the systems have state recognition under the Constitution.[328] It is said to be associated with colonial and post-

[325] Ibid 4.
[326] Ibid 38.
[327] Ibid 5.
[328] Constitution of Kenya (n 2) Art 159.

colonial legacies as opposed to co-existence within a social group of legal orders which do not belong to a single system.[329]

John Griffith highlights the common features under which legal pluralism in the weak sense exists. These include a politically superior national legal process, the existence of the alternative system at the pleasure of the national system, which has power to abolish it and, lastly, in the event of a conflict between the two, the state system prevails. The overall significant feature of legal pluralism in the weak sense is that it exists under the framework and at the pleasure of the state law. An example given of legal pluralism in the weak sense is where a system of religious law is formally recognized and integrated into the state legal system

With the strong legal pluralism, the alternative system functions as 'an institutionalized and stable normative order governing important social relations in a law-like way coexisting with, but separate from, state law'.[330]

The foregoing confirms what has been said of legal pluralism; 'It does not exist in a 'typical' form, it may or may not have a basis in culture and tradition; the state may or may not recognize it, and individuals may or may not be permitted to choose the law that is applicable to them by the state'.[331] This study finds Quane's definition of legal pluralism most appropriate as it encompasses all the above features. She defines it as 'the co-existence *de jure* or *de facto* of different normative legal orders within the same geographical and temporal space'.[332] The inclusivity of this definition is two- fold. First it includes the earlier mentioned 'underground' systems. It therefore qualifies those systems that are otherwise illegal, for discussion in this study by placing them under the aegis of legal pluralism. Secondly, it removes the burden of having to identify the place of the state in the concept of legal pluralism as the concept is described as being capable of existing independently from the state.

[329] J Griffiths (n 77) 8.
[330] H Quane, 'Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?' (2013) 33 4Oxford Journal of Legal Studies Oxford J Legal Studies 675, 680.
[331] ICHRP (n 298) section 2.5, 29.
[332] Quane (n 330) 676.

Regardless of the form legal pluralism manifests itself in; there are concerns around its viability when tested against human rights standards. Some arguments hold that human rights and legal pluralism are mutually reinforcing while others argue that they are inherently incompatible.[333] The spotlight is especially on traditional alternative dispute settlement where at times the line between cover up and conflict resolution in cases involving children can be rather thin. The place of human rights in legal pluralism and restorative justice in particular is addressed in the following part.

2.2.9 The Human Rights Perspective

Any discussion on the rights of a victim must begin with a clear conceptual understanding of who a victim really is.[334] The concept of victimology provides an appropriate framework for this discussion. Victimology has been defined as 'the scientific study of the physical, emotional, and financial harm people suffer because of illegal activities'.[335] Since the harm and the resultant needs of the victims are diverse, victimology has been described as an:

> Interdisciplinary field that benefits from the contributions of sociologists, psychologists, social workers, political scientists, doctors, nurses, criminal justice officials, lawyers, spiritual leaders, and other professionals, volunteers, advocates, and activists.[336]

The concern of this study is victimology in the legal and human rights context. In this regard, the study explores how victims are supposed to be treated by the professionals within the FJS including the police, prosecutors, judicial officers and the community at large. It also looks at ways to empower the victim in the adversarial system.[337]

Beniamin Mendelsohn referred to as 'the father of victimology'[338] campaigned for victims' rights from the standpoint of highlighting their plight in the criminal justice system.[339] The pertinent

[333] Ibid 677.
[334] J Dignan, *Understanding Victims and Restorative Justice* (Open University Press 2005) 15.
[335] A Karmen, *Crime Victims An Introduction to Victimology* (Wadsworth, Cengage Learning, 8th edn 2013) 2 <http://www.cengagebrain.com.au/content/9781285286624.pdf> accessed 15 July 2015.
[336] Ibid 16.
[337] Ibid 22.
[338] J P J Dussich, 'History, Overview and Analysis of American Victimology and Victim Services Education' in Proceedings of the First American Symposium on Victimology, (January 2003 Kansas City, Kansas) 4 <http://www.american-society-victimology.us/documents/SymposiumOnVictimologyJan2003.pdf> accessed 24 July 2015.
[339] A Karmen (n 335) 15.

rights identified for a standard victim include the right to bring a perpetrator to speedy trial, the right to appear throughout the trial including appeals, the right to be treated with dignity, respect, courtesy and sensitivity, to be notified in advance of scheduled and rescheduled court proceedings, to be provided with a separate waiting area from one used by the perpetrator at all stages of the proceedings, to be informed of their rights just as a perpetrator is entitled, be informed of any psychosocial assistance available, be entitled to restitution, be informed when the perpetrator is released or escapes, be heard in any probation or plea bargaining process, insist on offender undergoing a HIV test where bodily fluids capable of transferring HIV has been transferred.[340]

These above rights are all human rights and as stated earlier, they form the standard against which the suitability of restorative justice in IFCSA cases is measured in this study. One major issue that has dominated the discourse on human rights is the tension between the 'force and appeal of human rights, on the one hand, and their reasoned justification on the other'.[341] The former is more concerned with the need to embrace human rights for their utility value and finds details around its theory unimportant. The latter on the other hand calls for an interrogation of the theoretical basis of human rights. This includes addressing the question as to where these rights come from and where they draw their validity from. This question has been pertinent since Jeremy Bentham dismissed the concept of human rights being natural and God given as 'miserable nonsense'.[342] It is however not the intention of this study to get into the full discourse of theoretical foundations of human rights. This part therefore consists of an overview of human rights but with specific reference to the right to access to justice and its attendant rights, and the principle of the best interest of the child. It will also concern itself with three aspects; the relevance of human rights concept to this study; the perception of the universality of human rights and the viability of laying claim on social economic rights.

The pertinence of human rights is heightened by the fact that the subject matter of this study is a child within the family setting. Children are weak when it comes to bargaining for power within a

[340]A W Burgess and A R Roberts, *Crime and Victimology*, (Jones and Bartlett Publishers) 20 <http://samples.jbpub.com/9780763772109/72109_Ch01_Roberts.pdf> accessed 15 July 2015.
[341] S Amartya, 'Elements of a Theory of Human Rights' (2004) 32 4 Philosophy and Public Affairs 315, 317.
[342] J Bentham, 'Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution' (1792) para 100 < http://english.duke.edu/uploads/media_items/bentham-anarchical-fallacies.original.pdf>accessed 18 March 2015.

group. Concerns have been raised over the disadvantaged position of weak members of a group whose interests are more likely to be sacrificed in the event of a conflict between their interests and those of the rest of the group. It has been said that 'to sacrifice individual rights in the name of group rights is, in fact, to serve the interests of the most powerful within the culture or the society'.[343] The relevance of human rights is to lay the basis for protecting the weaker members of the group both within and without the conventional justice system in a legally plural setting. This is not a new phenomenon as human rights standards have been used by the Special Representative of the Secretary General on Violence against children (SRSG) in arriving at an appropriate restorative approach in children's cases. This is contained in her report on the application of restorative justice to children's cases.[344]

The report reiterates the importance of protecting the rights of the child accessing informal justice and of restoring the harm caused to the child. It asserts that resorting to restorative justice should not jeopardize children's rights or preclude their right to simultaneously access the formal justice system. These informal systems must be in line with international human rights standards, and recognize that, when a case cannot be resolved one can resort to the formal system. Secondly, the restorative process must avail a range of appropriate alternatives for the child's rehabilitation and reintegration. Thirdly, there must be a proper assessment of the processes and procedures used, including an assessment of power relations, such as who selects the individuals to sit on the mediation panel. Fourthly, the persons involved in the process must have capacity and knowledge relating to children's rights and child development and national legislation, including juvenile justice laws and procedures and lastly, the right to appeal must be guaranteed so that there is oversight by the formal system.[345]

The concerns of the SRSG are in line with the principle of the best interest of the child. This is one of the general principles of the CRC in Article 3. The other three include: freedom from discrimination in Article 12, the right to life in Article 6 and respect for the child's views in Article

[343] A Belden, 'Human Rights Theory: Criteria, Boundaries, and Complexities' (2009) 2 3International Review of Qualitative Research. 407, 416 < http://www.jstor.org/stable/10.1525/irqr.2009.2.3.407> Accessed 08 December 2014.
[344] UNGA Report of the Secretary General 'Promoting Restorative Justice for Children' (n 257) 26.
[345] Ibid 27.

12. The principle is a running theme in both the CRC and ACRWC.[346] It emphasizes that in all actions concerning children including those undertaken by public institutions, administrative and legislative authorities and courts of law, the best interest of the child shall be a primary consideration. The principle therefore essentially refers to the well-being of the child which is determined by due regard to the child's age and circumstances. The Constitution of Kenya 2010[347] and the Children Act[348] also restate the concept by providing that a child's best interest is of paramount importance in every matter concerning the child. The fact that the principle of the best interest of the child appears in one of the first chronological articles of the CRC has been interpreted as evidence that it underpins all other provisions of the CRC.[349] The essence of the best interest of the child principle has been explained as to remind adults that children are important, that their interests are different from those of adults, and that adults need to consider the impact of their decisions for children as a top priority.[350]

No checklist or catalogue exists against which one can check whether or not an act is in the best interest of the child. Each case is judged by its own circumstances with due regard to certain variables like the age of the child, the relationship of the child to the perpetrator, the gravity of the harm caused, the risk of future danger to the child, among many others. Of equal importance is the reality of the child's evolving interests with age. For instance, what may be in the interest of the child at six years of age might cease to matter by the time the child turns ten years. Again, mobility and exposure may alter a situation, such that what may be in the best interest of the child as they attend a rural school in Kwale County may cease to be so when the same child is transferred to a school in urban Mombasa County. That is why Ncube has proposed the need to distinguish between 'current interests' and 'future oriented interests' of a child, as the two are different and even capable of coming into conflict with each other. He clarifies that current interests are formulated in relation to experiential considerations while future-oriented interests focus on developmental considerations.[351]

[346] Article 4.
[347] Article 53 (2).
[348]The Children Act 2001 (KEN) section 4.
[349] M. Freeman (n 121) 6.
[350] K Vandergrift, 'Best Interest of the Child: Meaning and Application' (Placeholder1 Conference Report held at the University of Toronto, Faculty of Law, on February 27-28, 2009) 8.
[351] Ibid. 3.

The best interest principle is said to be evolving as opposed to static. The evolution is said to be hinged on 'social science research on child development, the increasing participation of young people in public life, and political and legal developments at all levels of government'.[352] The fluid nature of the principle arouses debate on the issue of universality of human rights. Questions are raised whether the standards of persons who are geographically far removed can effectively be applied to scrutinize local issues: Does a child in Kwale County, Kenya have identical 'best interests' to one, say, in Copenhagen, Denmark? This study is of the viewpoint that there is need to contextualize international standards to local realities as human rights can only be universal in some but not all ways. A norm should be held as acceptable and within the ambit of human rights as long as it does not constitute an offence under the particular jurisdiction. The researcher is aware that some domestic laws may themselves be perceived as falling short of international human rights standards especially on controversial topics such as abortion, euthanasia, same sex relations and polygamy. The proposed balance would probably be to accept all norms recognized by local jurisdictions to the extent that they are not in breach of *jus cogens*.

The vagueness and lack of a singular definition of the best interest principle avails the possibility of manipulation by those with power to decide its scope.[353] This gap is however curable by applying the principles of indivisibility and interdependence of the provisions of the CRC. This means that what amounts to the best interest of a child in every particular case ought to be understood within the context of the totality of the entire spectrum of rights in the CRC and other documents and instruments.

The issue of universality is further tested in respect of participatory rights of a child victim. In this capacity, they are rights holders and therefore subjects of both the conventional and informal justice systems as opposed to mere objects. The rights in Article 13 of the CRC advance this position. It provides for the right to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds. A child with ability to form their own views also has the right to freely express the same especially in matters affecting them. Once the views are expressed,

[352] K Vandergrift, (n 350) 6.
[353] Ibid 8.

they must be given due weight in accordance with the age and maturity of the child, especially in judicial and administrative proceedings affecting them. The representation may be either direct, or through a representative as may be allowed by the law. The concept of participatory rights of a child is however relatively new in Africa.

Traditionally, children were deemed to belong to someone who was usually the patriarch of the home. They were not expected to have an opinion separate from the patriarch. The traditional African child has thus been described as a 'victim of intergenerational power imbalance (...) in a gerontocratic structure' where the value of their opinion is directly proportional to their age.[354] This study shall therefore be sensitive to the cultural realities of the geographical area under study and will not strictly impose a western conceptualisation of the participatory rights of a child. As Ncube argues, an African child could for instance sufficiently participate in decision making through an intermediary like a grandmother without uttering a word.[355] The child's right to participate in the processes affecting them is therefore not altogether inconsistent with African customary norms as long as creative ways of incorporating the same are sought.

Apart from participatory rights, the other right that is of significant relevance to this study is the victim's right that binds the state to take all appropriate measures to promote physical and psychological recovery and social reintegration of the child victim of intra-familial child sexual abuse.[356] The Committee on the Rights of the Child, in its general comment on the right of the child to freedom from all violence, has suggested that the interest of a child victim should encompass enforcement of judicial procedures in a child friendly way.[357] This includes taking into account the child's personal situation, gender, disability and level of maturity, and handling the matter with sensitivity throughout the justice process. The committee has also suggested options for the regular criminal justice process including family conferences, alternative dispute settlement and restorative justice with a special focus on rehabilitation and compensation of the child victims. Even where the abuse is prosecuted through the regular criminal justice system, the committee proposes the establishment of specialized units and procedures for child victims including

[354] J W Wafula (n 125) 115.
[355] C Himonga (n 126) 95.
[356] CRC, Art 39.
[357] General Comment No 13 (n 42).

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

The Committee's above mentioned recommendations on the needs and welfare of child victims oscillate around the traditional second generation economic and social rights. These include right to medical attention, shelter and general livelihood. The other key right which is closely related and dependent on the realization of economic and social rights is the right to access to justice to all people. This is contained in Article 48 of the Constitution of Kenya. Children are entitled to this right as much as adults. The right to access to justice does not merely mean physical access. It has been unpacked in detail to include several incidentals.[358] It has been argued that people cannot access rights they have no knowledge of. Right of access to justice therefore includes the right to know one's rights. In the case of IFCSA, this would include the right for the child and/or their family to know what constitutes a violation and their procedural rights vis-à-vis government service providers as they seek intervention from various justice institutions. The victim, for instance, has a right to know that in their quest for intervention, they are entitled to the consumer protection enshrined in the constitution, which sets expectations from both public and private entities in terms of service delivery. [359] Victims of IFCSA often seek intervention from a point of vulnerability and disempowerment. The importance of their awareness of their procedural entitlements cannot be overstated.

Apart from knowledge of their rights, the other components of access to justice are the physical access to both conventional justice system institutions like the police service, the courts, and children's services, and the financial access to be able to shoulder the incidental costs like legal costs and transport costs. Lastly, justice should be accessible expeditiously and without unreasonable delay. Access to justice must of necessity encompass the right to access justice of one's choice, including restorative justice, whether through informal or conventional means. This is in line with the broad definition given by Penal Reform International:

[358] Mbote & Akech (n 131) 157.
[359] Constitution of Kenya (n 2) Art 46.

> Access to justice should be considered in its broad sense to encompass: access to a fair and equitable set of laws; access to popular education about laws and legal procedure; as well as access to formal courts and, if preferred in any particular case, a dispute resolution forum based on restorative justice (both subject to appropriate regulation in order to prevent abuse.[360]

Hindrances to access to justice have been said to be the kind "associated with time, manner and place restrictions.[361] Overcoming such hindrances involves financial implications which again revolves around enforceability of rights of socio economic nature.The feasibility of socio economic rights has been said to be highly contentious especially due to challenges of institutional capacity to deliver on the part of the state.[362] For instance, the main institution responsible for the welfare of all children, in Kenya, including child victims of IFCSA, is the Department of Children Services. This institution operates amidst a lot of human, financial and technical incapacities.[363] It is therefore unable to facilitate delivery of social economic related rights to the victim. Questions have been asked as to whether rights that are not deliverable are actually rights. Amartya has answered this question with the following reasoning:

> Current unrealizability of any accepted human right, which can be promoted through institutional or political change, does not, by itself, convert that claim into a *non*-right. Even where the rights cannot be realized because of inadequate institutionalization, then, to work for institutional expansion or reform can be a part of the obligations generated by the recognition of these rights.[364]

The approach in this study shall therefore be to use the provisions of all the human rights standards in the treaties, conventions, statutes and instruments that are legally binding to promote the rights of the victims regardless of the prevailing institutional capacity to deliver.

[360] Penal Reform International (n 130)
[361] J Stevens, 'A Review of Literature Prepared for Penal Reform International', *Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean*. 1998 (Penal Reform International) 6.
[362] Amartya (n 341) 317.
[363] National Council for Children Services, Summary of the Outcome of Mapping and Assessing Kenya's Child Protection System; Strengths, Weaknesses and Recommendations (2010) para 3.2.1 http://ovcsupport.net accessed 19 March 2015.
[364] Amartya (n 341) 320.

2.3 Conclusion

This chapter has demonstrated that restorative justice is a relevant field for the search of a comprehensive response to IFCSA. The key player in IFCSA is a naturally vulnerable child who is often female. This has necessitated an examination of restorative justice against the backdrop of vulnerability theory and feminism. The social context within which IFCSA occurs cannot be overlooked especially the community's affinity towards informal justice mechanisms. As long as the communities' needs and preferences play a role in determining how they respond to crime, the search for an appropriate legal response cannot possibly be confined within the FJS. Any comprehensive response must of necessity engage the informal justice mechanisms. The engagement is with a view to drawing lessons that are restorative in nature and diverting a limited category of cases to IJS. This proposal is discussed in chapter five of this thesis. The thread that ties the FJS and IJS is found within the concept of legal pluralism.

Finally, whether sought within the formal system or the informal justice systems, restorative justice values and processes must be congruent with the victims' needs as expressed in human rights standards. Restorative values are by and large compatible with human rights standard as they are concerned with giving the victim a voice and avoiding re-victimization. The said human rights standard need however to be understood with due regard to the local context and circumstances. The theoretical and conceptual foundation of this research is therefore restorative as examined against the backdrop of vulnerability theory, feminism, legal pluralism and human rights standards.

This chapter has laid the basis for an answer to three research questions. The first is on the extent to which restorative justice, as analyzed against the backdrop of feminism, vulnerability theory legal pluralism and human rights standards, can be used as a tool to contribute towards achieving an effective and innovative legal response to IFCSA. The discussion in this chapter has demonstrated that restorative justice values, processes and lifestyles have potential to enrich the legal response to IFCSA. The second question is on the specificities of IFCSA which is discussed in chapter four of this study. The current chapter, in discussing vulnerability theory, has laid basis to challenge uniformity of treatment between a child victim of sexual abuse by a stranger and an IFCSA victim. This uniform treatment in disregard to the specificities is at the core of the research problem of this study. The last foundation laid down in this chapter is with regard to the entry

points available for incorporation of restorative justice into the formal justice system in IFCSA cases. This chapter has given pointers to IJS as a reservoir for restorative practices and values that can enrich the FJS. It has also introduced the role of the state in the restoration of a victim of IFCSA. The entry points are discussed in chapter five of this thesis.

CHAPTER THREE: THE OPERATING LEGAL FRAMEWORK

> We shall not do you any harm", said the District Commissioner to them later, "if only you will agree to cooperate with us. We have brought a peaceful administration to you and your people so that you may be happy. If any man ill-treats you, we shall come to your rescue. But we will not allow you to ill-treat others. We have a court of law where we judge cases and administer justice just as it is done in my own country under a great queen"… Okonkwo and his fellow prisoners were set free as soon as the fine was paid. The District Commissioner spoke to them again about the great queen, and about peace and good governance. But the men did not listen. They just sat and looked at him and his interpreter.[365]

3.1 Introduction

The above excerpt from the late Chinua Achebe's novel, 'Things Fall Apart', is set in a fictitious village in Nigeria, known as *Umofia,* at the advent of colonialism. The lecture by the colonial District Commissioner was given to the village elders shortly after their conviction and sentencing for leading the villagers in the demolition of a church building erected in the village by the colonialists. Though set in Nigeria, it reflects the manner in which the African Natives were inducted into the current formal justice system (FJS) in the British colonies. An interrogation of the current formal justice system, as the one required by this study, necessitates an understanding of the country's colonial history. This is to bring out the genesis and the circumstances under which the system came into being and the effect it has had on the structure of the existing system.

As mentioned in chapter two, in pre-colonial Africa, different communities applied their respective customs and traditions to resolve disputes without necessarily distinguishing between civil and criminal disputes. All wrongs were harmonised as transgressions against the community.[366] With the advent of colonialism, European laws were introduced into the colonies. This was done without consultation of a large proportion of the consumer population, the natives, as they were primarily meant to facilitate the European settlers. In the British colonies, the laws were enforced within the African population through the concept of 'indirect rule' which involved rule by the colonialists through the African loyalist chiefs. These English laws and the criminal justice system were however crafted in England with the Englishman, and not the native African, in mind. Their

[365] C Achebe, *Things Fall Apart* (1st Anchor Books edition, 1994) 142.
[366] S Kinyanjui (n 57) 3.

primary aim was to enforce and promote the British supremacist ideology agenda, which was the bedrock of colonialism.[367]

The enforcement of the new legal order has been described as being representative of the harshest aspect of colonial rule enforced amongst the Africans.[368] African customary law was hence relegated to the periphery and applied in a limited way and only where it was not repugnant to justice and morality and any written law. This set the stage for legal pluralism and its ramifications on the structure of the existing legal framework. On one hand, and closely related to the English system, were magistrates courts where serious offences were tried, while on the other hand the African courts dealt with customary law matters including petty offences. Appeals from the African courts lay in the English type courts.[369] In summary therefore, the current Kenyan FJS and its jurisprudence is grounded on English common law which is the legal tradition that evolved in England after the Norman Conquest.[370] It was not tailor made for the needs of the African on the ground as aptly put:

> We are the heirs, albeit by what you might think of as a bastard route, to a tradition that gives a very powerful place to the judiciary: the common law system. It is a flawed inheritance because it came to us via the colonial route.[371]

At independence, Kenya, like the rest of the former British colonies, retained the pluralistic framework with the FJS operating alongside African customary law.[372] The application of the latter is however limited to the extent that it is applicable, not in conflict with written law, and not 'repugnant to justice and morality'. The former of course ranks higher than the latter in the

[367] S Coldham, 'Criminal Justice in Commonwealth Africa: Trends and Prospects' (2000) 44 (2) Journal of African Law 219.
[368] P O Ndege, 'Colonialism and its Legacies in Kenya' (2009) Fulbright – Hays Group Project Abroad Programme, Moi University Main Campus <http://international.iupui.edu/kenya...rces/Colonialism-and-Legacies.pdf> accessed on 28 November 2013.
[369] Coldham (n 367) 220.
[370] C Plucknett, *A Concise History of Common Law* (Liberty Fund 2012) 11-19 <https://muse.jhu.edu/books/9781614878902> accessed 19 September 2015.
[371] W Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (Inaugural Distinguished Lecture Series, University of Fort Hare, October 2014).
[372] S I Aronson, 'Crime and Development in Kenya: Emerging Trends and the Transnational Implications of Political, Economic, and Social Instability' < http://www.studentpulse.com/articles/278/crime-and-development-in-kenya-emerging-trends-and-the-transnational-implications-of-political-economic-and-social-instability>, accessed 19 October 2013.

hierarchical order of legal force.[373] Though, strictly speaking IFCSA is the preserve of the FJS, the community's affinity for resort to alternative dispute resolution under African customary law remains. A good number of IFCSA cases are handled informally, albeit beneath the legal radar. The informal therefore exists more in practice than in form and is more evident in chapter four from the data collected in this research.

This chapter therefore discusses both the formal and informal legal framework with a special focus on the statutory framework that comes into play as FJS responds to cases of IFCSA. The statutory framework is as drawn from the main sources of our laws enunciated in the Judicature Act.[374] These include the Constitution, the Sexual Offences Act together with its Practice Rules, the Criminal Procedure Code, the Evidence Act, the Victim Protection Act, the Children Act, The National Police Service Act, the Protection Against Domestic Violence Act, and the relevant case law. Relevant International treaties, conventions, Basic Principles and Guidelines are also discussed. The scope of the framework includes investigation, identification of the offence, the trial process, adducing of evidence and sentencing. The role of the victim in the FJS is also discussed as well as the place of informal justice in the existing legal framework. The interrogation is with a view to identify the gaps within the framework as it responds to IFCSA.

3.2 Investigation

Once an act of IFCSA has been detected, it is expected that the victim, or the person who first becomes aware of the act, will set the justice system in motion. This is formally done by lodging a complaint with the police. A complainant in any offence is ordinarily the victim of the crime. In IFCSA cases, however, the concept of a complainant is perceived more widely to incorporate persons other than the immediate victim including those not necessarily affected by the act. The question as to who is the rightful complainant in an IFCSA case was the subject of deliberation in *P M M v Republic*.[375] The case was an appeal from the lower court against a conviction of defilement of a ten year old girl by her father. During the trial the victim, in her unsworn statement denied that her father had defiled her. She claimed that she had been asked by one '*Mama Shiko*', a neighbor, to implicate her father so that she could be taken to see her mother in the maternity

[373] Judicature Act (1967) KEN
[374] Ibid s 3.
[375] *P M M v Republic* Nakuru High Court Criminal Appeal No 188 of 2010 [2011] eKLR.

hospital where she had gone to deliver a baby. In addition, the appellant and his wife (the victim's mother) both denied the allegations of incest against the appellant. The trial court nonetheless found the father guilty of defilement and sentenced him. On appeal, he raised the question of whether the case had a complainant and if so, who that complainant was. This was because both the victim and her mother had denied any knowledge of the defilement.

The court held that a complainant does not have to be the victim as any concerned citizen of good will, including a concerned neighbor, can be a legitimate complainant. In that case, the court noted that it had taken the diligence of the concerned neighbors to uncover the abuse and they were therefore the rightful complainants. The court further remarked that denial by the victim and the attempt by both parents to conceal the act were not surprising as the offence of incest invokes shame, and is taken to be a curse among most communities of Africa.[376] This wide conceptualization of a complainant is important in IFCSA cases where there is a high possibility of cover up within the family. This approach is important to an IFCSA case involving vulnerable child complainants who are prone to succumb to pressure from close family members to frustrate the reporting, investigation and prosecution of a case. It also addresses a concern by feminists on the inherent power imbalance between a victim of IFCSA and their perpetrator in a patriarchal society while responding to IFCSA cases. This concern is discussed in chapters two and four of this thesis.

Once a complaint is lodged, the next step in the FJS is the gathering of evidence through the process of investigation. This is a crucial make or break stage in the criminal justice process as the chances of a successful trial are determined by the nature and quality of the evidence gathered. Investigation involves, inter alia, visiting the scene of crime, interviewing the victim and other witnesses and taking samples for forensic analysis. The function of investigation is assigned to the police by the National Police Service Act which spells out the functions of the Kenya Police Service to include:

> 'provision of assistance to the public when in need; maintenance of law and order; investigation of crimes; collection of criminal intelligence; prevention and

[376] Ibid 4.

> detection crime; apprehension of offenders; and enforcement of all laws and regulations with which it is charged…'[377]

The standard that must be adhered to by the police while carrying out the investigation is specified in the Constitution and it includes 'high standards of professionalism and discipline, transparency and accountability, without corruption and with regard to human rights'.[378] Investigation and prosecution of crimes under the Constitution is a discretionary power of the Director of Public Prosecutions.[379] A complainant therefore has no express right to have their case investigated or prosecuted. Though the Constitution gives a victim the right to institute a private prosecution, this right is watered down by an overriding right vested in the DPP to take over and, subject to the court's approval, discontinue any privately instituted prosecution.[380] The upshot of this is that whether an IFCSA case is investigated and eventually prosecuted or not is beyond the control of the victim or complainant as it is totally in the hands of the police and the DPP.

Instances of the police abdicating their investigating role are not uncommon. The legal implication of this state of affairs was discussed at length in the class suit filed in the High Court in Meru by several victims of defilement.[381] The victims that were the subject of this petition were all female which confirms the observation made throughout this research that a majority of sexual abuse victims are female. In this case, eleven of the petitioners were victims of defilement and other forms of sexual violence and child abuse which had taken place on diverse dates between the year 2008 and 2012. The first, sixth and eleventh petitioners were victims of IFCSA, having been sexually assaulted by their father, uncle and step father respectfully. The petitioners' case was that despite reporting the violations at various police stations within Meru County, the police officers had failed to conduct prompt, effective, proper and professional Investigation into their complaints. The petitioners contended that due to the failure by the police, they had suffered grave, unspeakable and immeasurable physical and psychological trauma as the perpetrators remained free.

[377] National Police Service Act (2011) KEN s 24.
[378] Article 244.
[379] Article 157.
[380] Article 157 (6) (b) and (c).
[381] *C.K. (A Minor) & 11 Others v. Commissioner of Police Inspector-General of the National Police Service & 2 Others* Meru High Court Petition No 8 of 2012 [2012] eKLR.

The high court while concurring with the petitioners held that the said failure of the police was a violation of a number of fundamental rights and freedoms enshrined in the Constitution of Kenya 2010. This includes right to special protection of the victims as members of a vulnerable group,[382] equal protection and benefit of the law and access to justice;[383] dignity,[384] security of the person,[385] freedom from discrimination;[386] and freedom from being subjected to any form of violence either from public or private sources or torture or cruel or degrading treatment.[387] The court went further to invoke several international treaties, conventions and standards including the Universal Declaration of Human Rights,[388] the United Nations Convention on the Rights of the Child;[389] the African Charter on the Rights and Welfare of the Child;[390] and the African Charter on Human and People's Rights.[391]

The court summarized the net effect of failure to investigate the child sexual abuse cases as follows;

> …failure to commence the criminal justice process through investigation created a climate of impunity for commission of sexual offences and in particular defilement. This would create a situation where the perpetrators know they can commit crimes against innocent children without fear of being apprehended and prosecuted. This erodes the deterrent effect of the criminal justice process. The psychological harm caused by failure to investigate was identified as self-doubt, self-loathe, self-blame, and low self-esteem. The abdication of the police from this crucial role inevitably hence deprived the claimant's access to courts and lead to miscarriage of justice or deny justice altogether.[392]

The court restated the position that once a report or complaint is lodged, it is the duty of the police to 'move with speed and promptly commence investigation and apprehend and interrogate the perpetrators of the offence and the investigation must be conducted effectively, properly and

[382] Article 20 (5) (b).
[383] Article 48.
[384] Article 28.
[385] Article 29.
[386] Article 27.
[387] Article 29 (c).
[388] Articles 1-8 and 10.
[389] Art 2, 4, 19, 34 and 39.
[390] Art 1, 3, 4, 16 and 27.
[391] Article 2-7 and 18.
[392] *CK (Minor) & Others* (n 381) 12.

professionally short thereof amounts to violation of fundamental rights of the complainant.'[393] Further, the court asserted that the duty to conduct prompt, effective, proper, corrupt free and professional investigations persists even where the police are faced with financial constraints. Consequently, any demand for payment by the police as a precondition for assistance, whether for fuel or P3 forms or for any other expense, was tantamount to unreasonably and unjustifiably impeding justice and in contravention of the constitutional right to access to justice.[394]

The court's decision in effect restated the proposition in vulnerability theory which holds the state responsible for the performance of the institutions it establishes that create an expectation of enhancement of resilience to the vulnerable. The importance of having functional resilience building state institutions is discussed in chapter five of this thesis.

The obligation to investigate is even more compelling where the victim of crime is a child as is the case in IFCSA due to their vulnerability. The Constitution enshrines the right for every child to be protected from, inter alia, abuse, neglect, harmful cultural practices, and all forms of violence, inhuman treatment and punishment.[395] The same provision also states that a child's best interest is of paramount importance in every matter concerning the child. This right can only be sufficiently enforced where mechanisms for prompt investigation are in place in case of infringement. This constitutional provision reiterates the provisions of the CRC which calls for protection of the child against torture and abuse.[396] Though in common parlance 'violence' denotes physical force, the Committee on the Rights of the Child has defined the term to mean 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.'[397] The CRC stipulates how violence against children should be responded to. While binding State Parties to take measures to protect children from all forms of abuse, including sexual abuse, the Convention includes investigation as one of the measures:

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental

[393] Ibid.
[394] Articles 48 and 50.
[395] Article 53 (1).
[396] Article 16 CRC (n 4).
[397]General Comment No 13 (n 42) para 1 (4).

> violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.[398]

The above is the core provision that addresses the manner in which violence against children should be responded to. The Committee on the Rights of the Child has explicated the above right by unpacking what an investigation of instances of violence against children should entail. The committee has emphasized that implementation of article 19 is an immediate and unqualified obligation of States parties. A State Party may therefore not be excused from its duty under this article on the basis of its economic circumstance as all available resources must be utilized to the maximum extent.[399] As a whole, the CRC committee requires State Parties to undertake all possible measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups.[400]

Further, the committee has underscored that the investigations must be undertaken in a child rights-based and child-sensitive approach by qualified professionals who have received role-specific and comprehensive training. The procedures applied must be rigorous but child-sensitive to ensure that violence is correctly identified and evidence gathered in support of the court proceedings. This calls for treatment of the child victims in a child-friendly way throughout the justice process, 'taking into account their personal situation, needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity'.[401] In this regard, States Parties are under an obligation to ensure that all persons who, within the context of their work, are responsible

[398] Article 19.
[399] General Comment No 13(n 42) para 65.
[400]UN Committee on the Rights of the Child (CRC) Gen Comment no 5 (2003) 'General Measures of Implementation of the Convention on the Rights of the Child' CRC/GC/2003/5 para 8.
[401] Ibid para 54 (b).

for the prevention of, protection from, and reaction to violence and in the justice systems are addressing the needs and respecting the rights of children.[402]

The need for extreme care in dealing with a child victim of violence is to avoid re-victimization during investigation. The standard imposed on the state by the committee with regard to investigation of child violence cases resonates with the core focus of vulnerability theory. This is the expectation from the state to build its citizen's resilience through its institutions. Child-sensitive approach to investigation enhances resilience in a child victim of IFSCA. The converse is true where the investigations are carried out without regard to sensitivities inherent in the child.

An important component of sensitive handling of a child victim during investigation is the need to give due weight to the views of the child.[403] This is accordance with the child's right to form and freely express their own views in all matters affecting them to the extent that they are able to do so.[404] According to the Committee, it is not for the child to prove their capacity to express their opinion. It should be presumed that a child has the capacity to form and express their own views.[405] Finally, in acknowledgment of the fact that much of the violence experienced by children, including sexual abuse, takes place within a family context the committee stresses the necessity of early intervention in families at the investigation stage where the children are exposed to violence by family members.[406] However, even in such situations, the obligation still rests on the State to support and assist parents and other caregivers to secure, within their abilities and financial capacities and with respect for the evolving capacities of the child, the living conditions necessary for the child's optimal development.[407]

The importance of the obligation of the police to investigate citizens' complaints has also been discussed in the case of *R v Commissioner of Police & 3 Others(ex-parte Phylis Temwai Kipteyo***)**. This was an application for habeas corpus for the applicant's husband, who had been detained and

[402] Ibid para 5.
[403] Ibid para 51.
[404] Article 12
[405] UN Committee on the Rights of the Child (CRC) Gen Comment No 12 (2009) 'The Right of the Child to be Heard' CRC/C/GC/12 Para 20.
[406] General comment No 13 (n 42) para 72 (d).
[407] Articles 18 and 27.

tortured by military personnel during a security operation against the Sabaot Land Defense Force in Mt Elgon. Though the court declined to issue the order for habeus corpus, it nonetheless stated that 'It is the duty of the state to inquire into any crime or suspected crime affecting any of its subjects.' It directed that the Attorney General, the Chief of General Staff and the Commissioner of Police (the equivalent of the current Inspector General) to initiate an inquest into the disappearance of the applicant's husband.[408]

The duty to investigate sexual offences and the legal standards related to a policeman's duty to investigate has also been deliberated in courts of other jurisdiction in cases that the Meru case made reference to. Though these foreign decisions are not binding on Kenyan courts, they are important in persuading the courts on the parameters within which the duty to investigate should be carried out. They also offer important standards against which the adequacy of the domestic legal framework regarding investigation can be measured.

The first decision is in the South African case of *Ghia Van Eeden (Formerly Nadel) v Minister of Safety and Security*. This involved a nineteen year old woman who had been sexually assaulted, raped and robbed in Pretoria by one André Gregory Mohamed. The perpetrator was a serial rapist who had escaped from police custody, during an identification parade, three months prior. At the time of his escape, he was facing over twenty charges, including indecent assault, rape and armed robbery. He resumed his criminal activities of violent sexual assault soon after his escape. One of his victims, the appellant, instituted an action for damages against the State. Her main ground was that members of the South African Police Service owed her a legal duty to ensure that Mohamed did not escape hence causing her harm. The court of first instance found that the police did not owe the appellant a positive legal duty to prevent harm. On appeal, the supreme court of Appeal of South Africa held that the appellant was owed an active positive legal duty by the police to ensure that Mohamed did not escape. In failing to do so and allowing him to escape from their custody, the police were in breach of the applicant's fundamental rights and freedoms.[409] Though this case was about escape from custody, the court's opinion was that it was the failure to

[408] *In the Matter of an Application by Phylis Temwai Kipteyo for Leave to Apply for an Order of Habeaus Corpus on Behalf of Patrick Kipteyo Sewui* [2011] eKLR < http://kenyalaw.org/caselaw/cases/view/66168> accessed 8 July 2015.
[409] *Ghia Van Eeden (Formerly Nadel) v Minister of Safety and Security* Case 194/2011 [2012] ZASCA 123 available at <http://www.justice.gov.za/sca/judgments/sca_2002/2001_176.pdf> accessed 6 July 2015.

investigate and hold Mohamed to account with respect to his previous offences that had exposed the applicant to harm.

The Inter-American Commission on Human Rights has also had the occasion to consider the scope of the obligation to investigate in the case of *Jessica Lenahan (Gonzales) et al v United States*. This was a petition against the government of the United States of America on behalf of Jessica Lehnan Gonzalez and her deceased daughters. It was alleged that the police had failed to sufficiently respond to her calls for help over several hours when she reported the abduction of her three minor daughters by her estranged husband in violation of a restraining order. The three girls were eventually found dead in the back of their father's truck after the exchange of gunfire where the father was also killed. The petitioners further accused the state of failing to investigate or clarify the circumstances of the death of the girls. It also failed to provide her with an adequate remedy for the failures of the police eleven years down the line. While considering the obligation of the police to enforce a restraining order, the Inter-American Commission on Human Rights found that there was broad international consensus that States 'may incur responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women'. The Commission went on to imply that this duty to protect is heightened in the case of vulnerable groups such as girl-children and it created a scenario of strict liability thereby rendering the state's intention in case of failure to comply is immaterial.[410]

The European Court of Human Rights has also severally deliberated on the importance of investigation. In the case of *MC v Bulgaria*, the applicant had complained that Bulgarian authorities had failed to effectively investigate the events surrounding her alleged rape at the age of 14. Her allegations had been dismissed on the ground that there was no evidence that she had resisted actively. The court made a finding that:-

> The investigation of the applicant's case, and in particular the approach taken by the investigators and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations-viewed in the light of the relevant

[410] *Jessica Lenahan (Gonzales) et al v United States* Case 12.626 [2011] Report No.80/11, August, 17, 2011. Available at< https://www.oas.org/.../USPU12626EN> accessed 6 July 2015.

> modern standards in comparative and international law-to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.[411]

In the case of *CAS Romania,* the complaint at the European Court of Human Rights was lodged by the victim and his father. The former had been repeatedly raped and sexually assaulted at the age of seven years. The gist of the complaint was on the nature, promptness and length of the investigation by the Romanian police. The Romanian authorities' defense included blaming the victim's parents for negligently failing to detect and report the abuse in time even after noticing behavior changes and blood in his underpants. They also claimed that the victim himself had not disclosed the abuse in time. The court found that the parents' alleged negligence had no major impact on the diligence of the police in their response to the reported facts. On the victim's delay in disclosing, the Court found that the authorities were not mindful of the particular vulnerability of young people and the peculiar psychological concerns incidental to cases involving violent sexual abuse of minors. These concerns may have resulted in the victim's hesitation to report or even describe the facts surrounding the abuse. In holding that an ineffective investigation of sexual assault charges violates the Human Rights convention, the European Court of Human Rights expounded on the duty to investigate as follows:

> It (the investigation) should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk failing foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context.[412]

Finally, the Inter-American Court of Human Rights is on record stating that poor investigation influenced by discriminatory attitudes towards women by state officials is tantamount to an infringement on the right to equality, non-discrimination, access to justice, and judicial

[411] *MC v Bulgaria* Case no 39272/98, 2003 available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-883968-908286# {"itemid": ["003-883968-908286"]}> accessed 6 July 2015.
[412] *CAS and CS v Romania* ECHR 26692/05 [2012]. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109741> accessed 6 July 2015.

protection.[413] This was in the case of *Gonzalez & Others (Cotton Field) v Mexica* based on a claim relating to the disappearance, torture, rape and subsequent murder of three young women nationals of Mexico, two of whom were minors. Evidence was adduced to the effect that the state had taken the disappearance lightly and at some point blamed the victims for their fate based on the way they had dressed, the fact that they were alone without parental control.

Alongside the victim's right to have their case investigated is the converse right of the perpetrator encased in what is commonly known as due process rights. They are protected by the Constitution as the right to access to justice to all and the right to fair trial.[414] This protection starts during arrest, through trial and includes several watertight principles which protect a suspect of an offence and, by extension incarceration. A perpetrator has the right not to answer any questions put to them during investigation in the exercise of their right to remain silent. They also have a right to legal representation and, once arrested, they must be presented before a court of law before the expiry of twenty four hours.[415] The consequences of failure to do the latter is however not necessarily fatal. This failure was deliberated in respect of a similar provision under the previous constitution where the court observed as follows:

> This court has noted that a delay of three days cannot be said to be inordinate taking into account the fact that the appellant is the father of the complainant herein and that there was also a need to secure medical report on the complainant. Further, this court notes that the appellant's rights to a fair trial were never prejudiced by the said delay.[416]

Where a perpetrator's due process rights are breached during investigation, the trial court is not duty bound to interrogate the violation. It is for the perpetrator to move the constitutional court in a separate claim for a remedy. The violations do not also influence the outcome in the determination of the perpetrator's guilt. This position has been summarized as follows:

> … it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the

[413] *Gonzalez & Others (Cotton Field) v Mexico* [2009] Inter-American Court of Human Rights Judgment of November, 16, 2009 < http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf> accessed 6 July 2015.
[414] Article 48.
[415] Article 49.
[416] *Paul Mwangi -v- Republic* Nakuru Court of Appeal Criminal Appeal No 35 of 2006 [2008] eKLR.

> violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important defense witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.[417]

The above position was restated by the court in reference to the current constitution *in Godfrey Oluoch Ochuodha v Republic*.[418] In this case, the appellant complained to the trial court that his constitutional rights had been violated after he was arrested on 15th June 2014 and taken to court two days later. The court held that such violations do not have any bearing on the innocence or guilt of the accused and may be vindicated by filing a separate petition under Article 22 of the Constitution.

From the foregoing, it is clear that investigation is a crucial stage of the FJS in the response to crime especially sexual crime. Where it is not carried out or carried out below the expected standards, it raises human rights issues which are challengeable in both the domestic and international courts. The investigations must however be carried out with due regard to the due process rights of the perpetrator. The tail end of an investigation is to establish whether the complaint gives rise to any offence and whether there is sufficient evidence to charge the perpetrator with the said offence.

3.3 Offences

The offences under which most IFCSA fall are codified in the Sexual Offences Act (SOA) and the Children Act. Previously, all sexual offences were embodied in the Penal Code.[419] Whereas the Penal Code has a category of offences known as 'offences against the person', like murder, manslaughter and assault, sexual offences under the code were classified under 'offences against morality' alongside offences like bestiality and prostitution. The classification had the potential of

[417] *Julius Kamau Mbugua -v- Republic* Nairobi Court of Appeal Criminal Appeal No 50 of 2008 [2010] eKLR.
[418] *Godfrey Oluoch Ochuodha* –v- Republic Migori High Court Criminal Appeal Number 17 of 2015 [2015] eKLR 5.
[419] Penal Code, 1930 (KEN) sections 139 to 145 and sections 147 to 150.

extending the stigma associated with victims of other crimes in that category to victims of sexual assault. Apart from this conceptual misnomer, there were other gaps in the legislation of sexual offences that necessitated the enactment of the SOA in 2006. First, the range of sexual offences under the Penal Code was very limited with most non-penetrative sexual acts against children not being criminalized. Secondly, the definitions of rape and defilement in the penal code were quite antiquated as some of the language used was archaic such as 'having carnal knowledge' for 'penetration'. Thirdly, the definition of rape under the penal code did not contemplate a male victim or female perpetrator. Lastly, the code only provided for maximum sentences leaving the lower limit to the unfettered discretion of judicial officers. There was also no legal framework to ensure that the punishment handed down to the perpetrators matched the gravity of the crime. The SOA which came into force on 21st July 2006 was therefore an improvement from the Penal Code's provisions on sexual offences as it has filled in the above gaps.

The SOA contains progressive provisions geared towards better protection and access to justice for victims of sexual offences. A prominent feature of this Act is the imposition of stiff minimum sentences proportionate to the age of the victim. For instance, defilement of a child of eleven years or less attracts a minimum of life sentence. If the child is between twelve and fourteen years, the minimum sentence is twenty five years imprisonment while defiling a teenager of sixteen or seventeen years attracts a minimum sentence of fifteen years imprisonment.[420] The challenge incidental to these minimum sentences is highlighted later in this chapter. The SOA criminalises all acts that amount to child sexual abuse as per the definition of WHO mentioned in chapter one. The acts range from those that involve penetration into the child's genital organs or anus, to unlawfully and indecently touching a child's sexual organs or manipulating their own or a third party's sexual organs.

There are many offences in the SOA that would amount to IFCSA. This part will however discuss the three more common ones which include indecent assault, defilement and incest. The three also encompass all IFCSA acts. The Act defines an indecent act as an unlawful and intentional act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, excluding an act that causes penetration; or the exposure or display of any

[420] Section 8.

pornographic material to any person against his or her will.[421] With regard to indecent act with a child, the element of consent is immaterial. Defilement on the other hand is defined as an act that 'causes penetration with a child.'[422] The penetration is by a genital to the genital organ including the vagina and/or anus. It may be complete or partial.[423] Defilement can therefore be said to be equivalent to what rape is to an adult, with the point of departure being the age and the element of consent. Defilement is essentially a strict liability offence as its definition does not include *mens rea.*

Incest is said to occur where a person who commits an indecent act or an act which causes penetration with a person who is to their knowledge, their daughter or son, granddaughter or grandfather, sister or brother, mother or father, niece or nephew, aunt or uncle , grandmother or grandfather. The scope of relationship includes half siblings, step parents and adoptive parents. The minimum punishment for incest with a minor is a life imprisonment.[424] For a charge of incest to be sustainable, the prohibited relationship between the victim and the perpetrator must be proved. The prohibited relationship is not so much biological as it is social. This was the inference made by the court in *BNM v Republic*. In this case, the complainant's mother had stated that the perpetrator was not the biological father of the victim father but someone whom she referred to as 'daddy'. He was hence the step father. While invoking the test of relationship outlined in section 22 (1) of SOA the appellate judge stated as follows:

> ..my own understanding is that 'half father' is a term which means exactly the same as 'step-father' – it means one who is not a biological father of the child. Therefore by dint of this S 22(1) of the Act the appellant being a step-father of the complainant and one who stood in *loquo parenthis* (Latin for 'in place of a parent) can legally be charged and indeed convicted of the crime of incest with her. [425]

This position was reiterated in *M.K v Republic* where a step father was convicted for the offence of incest.[426]

[421] Section 3.
[422] Section 8(1).
[423] Section 2.
[424] Sections 20, 21 and 22.
[425] *BNM v Republic* Mombasa High Court Criminal Appeal No 232 of 2009 [2011] *e*KLR 3.
[426] *MK v Republic* Embu High Court Criminal Appeal No 171 of 2010 [2014] eKLR.

From its definition, it is clear that the offence of incest overlaps both the act of defilement as well as an indecent assault. The courts have therefore held that where an indecent sexual assault is proved, then the offence of incest is automatically proved if the perpetrator and the victim are within the prohibited relationship. The court has further declared that it is superfluous to add an alternative charge of indecent assault to a charge of incest.[427] Charging a perpetrator with both offences does not however necessarily render the charge defective. The court often deems it as a mere irregularity curable under Section 382 of the Criminal Procedure Code.[428] This section provides that breaches of legal provisions that do not occasion a failure of justice are curable. What amounts to failure of justice is a question of fact that varies from case to case because what amounts to prejudice is a question of fact. The court has to look at the evidence and circumstances of each case and come to a finding whether or not the breach resulted in a failure of justice and caused prejudice to the accused. The bottom line, however, is that there should be no need of an alternative count or a second separate count given that the definition of incest encompasses the major act of penetration and the act of indecent assault.

The ingredients of the offences of defilement and incest have core similarities save that in the offence of incest the victim and the suspect must be within a certain degree of prohibited relationship. Where an abusive act involves penetration but there lacks a clear definition and proof of the relationship to the required standard then the court has stated that the appropriate offence is defilement.[429] Therefore, the fact that one is charged with defilement and not incest does not invalidate a charge or prejudice the accused person. In any event, both offences carry a mandatory sentence of imprisonment for life.

In summary, there are three main distinctions between defilement and incest. The first one is with regard to sentencing. As mentioned above, the age of the victim has a direct bearing on the mandatory sentences in defilement while the age of the minor in the charge of incest is immaterial. Once penetration or an indecent act is established, the material inquiry is the degree of kinship

[427] BNM (n 425) 5.
[428] J.O.D v Republic Kisumu High Court Criminal Appeal No 173 of 2008 [2010] eKLR 5.
[429] C N v Republic Muranga High Court Criminal Appeal No 60 of 2013 [2014] eKLR 3.

between the perpetrator and their victim and not the minor's actual age. The second distinction is that, whereas in the case of defilement the prosecution must prove penetration, in the case of incest, the prosecution does not have to do so as proving an indecent act is sufficient. It is the additional element of the relationship between the accused and the child, and not the penetration that makes the offence incest.[430] Thirdly, the offence of incest can be committed against both an adult and a child whereas the offence of defilement is strictly committed against a child.

As to the choice of offence to charge a perpetrator of IFCSA with, the courts have clarified that there is nothing to preclude a perpetrator who has committed an incestuous act against a child from being charged with defilement.[431] However, a single incident cannot give rise to both incest and defilement as it is impossible for one perpetrator to commit incest and defilement upon one and the same victim. Where a perpetrator is charged with the two offences on the same set of facts, the charge becomes bad for duplicity.[432] Finally, where any of the three offences is not sufficiently proved, courts have at times taken the liberty to convict a perpetrator for 'attempting' the offence. This is in line with the provisions of the criminal procedure code which provides that when a person is charged with an offence, they may still be convicted of having attempted to commit that offence without having been specifically charged with the attempt. This was the approach in *GMK v Republic*, where on examination, the victim was found with bruises on the *labia majora* which the medical officer classified as "harm". The court found the perpetrator guilty of the offence of attempted incest as he was also the victim's uncle.[433]

Apart from the SOA, the Children Act also creates some offences in respect of acts that constitute IFCSA. This statute was enacted in 2001 to consolidate all the previous statutes regarding children and to domesticate the CRC, which Kenya had signed and ratified in 1990. It is therefore the primary legislation setting down the obligations of all duty-bearers in the realization of the children's rights.[434] The Act criminalises any wilful act or omission by a person who has parental

[430] *F O D v Republic* Homabay High Court Criminal Appeal No 32 of 2014 [2014] eKLR 3.
[431] *J K K v Republic* Nairobi High Court Criminal Appeal No 443 of 2010 [2014] eKLR para 11.
[432] *A. S. S. v Republic* Malindi High Court Criminal Appeal No 64 of 2011 [2013] eKLR, paras 10 and 13.
[433] *GMK v Republic* High Court Criminal Appeal No 26 of 2010 [2012] eKLR.
[434] G Odongo, (n 135) 63.

responsibility, custody, charge or care of any child that amounts to the child being in need of care and protection. Section 120 hence specifically states:

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

From the foregoing, it is possible to charge some perpetrators of IFCSA under the Children Act. Though the procedure under this Act is restorative in nature, as discussed in chapter two, the sentences provided under the Act are way more lenient than the mandatory minimum sentences in the SOA. This gap is one of the basis for recommendation for legislative intervention discussed in chapter five of this study. Currently there are no policy guidelines on when to charge an IFCSA perpetrator under the Children Act or under the SOA.

Finally, it is clear from the unpacking of the offences above that all sexual acts against children result in strict liability offences. This raises an intricate scenario where the sexual act is done out of an agreement between two children of more or less the same age. Who between the two should be charged and should they also be subjected to the mandatory minimum sentences? The constitutional court has deliberated on the issue of sexual acts between consenting teenagers. This was in a public interest case filed on behalf of a sixteen year old boy charged with defilement of his sixteen year old 'girlfriend' with whom he had had consensual sexual intercourse. The constitutional court argued that one aim of the law criminalizing all sexual activity against and amongst children is to achieve a worthy or important societal goal of protecting children from engaging in premature and harmful sexual conduct. This is in view of the fact that children are vulnerable and therefore in need of legal protection. The court declined to declare the provisions

criminalizing sexual activity amongst teenagers unconstitutional. The presiding judge however remarked that it was important for child psychologists and other professionals to consider whether or not there are other more appropriate and desirable measures in dealing with children in these circumstances without having to resort to criminal proceedings.[435] These are some of the circumstances that are considered as entry points for the application of restorative processes in chapter five of this research.

3.4 Procedure

The principal statute that regulates procedure for the conduct of criminal proceedings in Kenya is the Criminal Procedure Code.[436] It is one among the many colonial laws retained after independence, having first come into force in Kenya in 1930. The dispute settlement procedure provided under this code is adversarial. The adversarial system has been described as:

> characterized by party control of the investigation and presentation of evidence and argument, and by a passive decision maker who merely listens to both sides and renders a decision based on what she has heard'.[437]

Under this system, on one side is the alleged perpetrator, referred to as the accused person. The Constitution guarantees the perpetrator the right to swift disposal of their case in a public hearing in which they are also entitled to representation at the state's expense. During trial, the perpetrator is presumed innocent until proven guilty and has a right to be released on bail.[438] On the other side is the prosecution representing 'The Republic of Kenya' as the power to prosecute all criminal cases is vested in the Office of the Director of Public Prosecutions (ODPP) through state prosecuting counsels.

Previously, prosecutions in the lower court, where all non- fatal IFCSA cases are heard, were conducted by police prosecutors who were not lawyers. The police prosecutors were phased out between 2009 and 2011 and replaced with trained lawyers employed full time in the office of the

[435] *CKW v AG & DPP* Eldoret High Court Petition No 6 of 2013 [2014] eKLR.
[436] Criminal Procedure Code (n 28).
[437] E E Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64 (2) (4) Indiana Law Journal 301. Available at:< http://www.repository.law.indiana.edu/ilj/vol64/iss2/4 > 302 accessed 1 October 2015.
[438] Article 50.

Director of Public Prosecution.[439] This has not necessarily improved standards. This is because the minimum requirements for prosecutors are very low. No post bar admission experience is required. Most of the prosecutors are recruited straight from law school.[440] The inexperienced prosecutors are often no match to the experienced defence counsel. This impacts quality of services rendered at prosecution in all cases including IFCSA cases. Apart from the low entry level, low salaries at the office of the DPP's office result in high staff turn-over. Most officers move for greener pastures with better paying government agencies after a brief stint at the DPP's.[441] The resultant shortage creates constant crisis as it is not uncommon to have one prosecutor man as many as three courts. This interferes with the administration of justice.[442]In a relatively recent development, the DPP has exercised his powers under this code to appoint special prosecutors from among practicing lawyers to assist in the prosecution of sexual and gender-based violence offences including IFCSA. The appointment was made upon recommendation and nomination of the appointees by leading human rights organisations in Kenya. The main qualification was prior experience and commitment in dealing with victims of sexual and gender-based violence. There are however only sixteen special prosecutors in the entire Republic and their impact is yet to be felt.[443]

Officiating over the criminal dispute is a presiding magistrate who is the neutral umpire during the trial. Traditionally, the victim's sole role in the trial has been that of a witness alongside other prosecution witnesses. They narrate the events surrounding the offence as guided by the prosecutor in a process known as 'examination in chief'. They are then cross-examined by the accused or their lawyer, and may thereafter be re-examined by the prosecutor for any clarification. Their role in the FJS ends at re-examination. Under the criminal procedure code, the prosecution is under no obligation to consult the victim or give them any update thereafter including informing them of the outcome of the case. The victim may however be represented by a lawyer who 'watches brief'

[439] ODPP, Strategic Plan (2011-2015) 3 <http://www.odpp.go.ke/images/docs/ODPP%20Strategic%20Plan%202011-2015.pdf> accessed 3 October 2015.
[440] Interview with Tabitha Oyuya, Senior Assistant Director of Public Prosecutions in charge of Prosecutor's training Institution on 3 January 2019.
[441] Editorial, 'Stem DPP Office Exodus' *(Daily Nation*, 16 November 2018) available at https://www.nation.co.ke/oped/editorial/stem-DPP-office-exodus/440804-485030-090kbe/index.html accessed 19 December 2018.
[442] *Republic v Alice Chepkorir Koech and Another* Kabarnet High Court Criminal Revision No 4 of 2018 [2018] eKLR.
[443] Appointed vide Kenya Gazette Notice No. 14724 dated the 10 October 2012. <http://www.kenyalaw.org/newsletter1/20121019.php> accessed 2 November 2013.

on their behalf in order to safeguard their interests. However, the extent of participation by the lawyer watching brief is at the discretion of the court and subject to the prosecutor's willingness to cooperate.[444] This traditional role has however been transformed by the Victim Protection Act.[445] The Act provides for the participation of the victim in court proceedings including during plea bargaining, bail hearing and sentencing through the victim impact statement. The victim is expected to be heard before decisions affecting them are made. Further, the victim is to be facilitated with legal and other relevant support services of his or her own choice. Where the victim is vulnerable, the services are to be given at the State's expense. The trial court is expected to set the parameters of the victim's participation. The victim is at liberty to either appear personally or obtain legal representation. These rights must however not be prejudicial to the rights of the accused person or be inconsistent with a fair and impartial trial. This was restated by the Court of Appeal in the now landmark case of *Veronica Gitahi and Another v Republic.*[446]

The SOA, however, provides room for a special procedure where the court is dealing with a vulnerable witness in need of protection.[447] A child victim falls under this category.[448] A person declared a vulnerable witness enjoys certain privileges including allowing them to give evidence under the protective cover of a witness protection box, or through an intermediary. An intermediary is defined as:

> any person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker'.[449]

In view of the possibilities of variance of interest of the child and that of their representative, the rules provide that where the opinion of the victim and that of the parent are in conflict, then the opinion of the victim prevails.[450] Where the child is heard through a third party, it is critical that the child's views are presented accurately to the decision maker.

[444] P Ambikapathy, 'The Use of a Watching Brief as a Legal Tool for the Protection of Child Victims in the Criminal Justice Process in Children as Witnesses' (1991) http://www.aic.gov.au/media_library/publications/proceedings/08/patmalar.pdf accessed on 27 November 2013.
[445] Victim Protection Act (n 37) section 9 (2).
[446] *Veronica Gitahi & Another v Republic* Mombasa Court of Appeal Criminal Appeal No 23 of 2016 [2016] eKLR.
[447] Section 31.
[448] Section 2.
[449] Ibid.
[450] Rule 6 (4).

A vulnerable witness may also be allowed to testify privately 'in camera' as opposed to publicly in open court. In addition, the Chief Justice has also developed rules pursuant to section 47A of SOA that provide a more practical framework for responding to the needs of vulnerable witnesses during court proceedings.[451] The rules highlight the need for the court to maintain the victim's privacy,[452] expeditious hearing of the case,[453] appointment of an intermediary, and other special considerations to a vulnerable witness.[454] The rules, by extension, substantially enhance the visibility of the victim in IFCSA.

The Criminal Procedure Code has an extensive procedure for plea bargaining and negotiations.[455] It, however, expressly excludes the application of plea bargains and negotiations to offences under the Sexual Offences Act, under which IFCSA offences fall. A case of IFCSA once started cannot be concluded through negotiations or plea bargaining. It has to go the full stretch unless otherwise withdrawn by the DPP through the powers vested in him by the Code.[456] The ousting of plea bargaining in sexual offences presents a statutory hurdle to the implication of restorative justice in IFCSA cases. This is discussed in further detail in chapter five where proposals for law reform are also made.

Where the perpetrator of an IFCSA offence is a minor, there is the option to follow the procedure provided in the Children Act. The Act has established a Children's Court, presided over by special magistrates with exclusive original jurisdiction to hear and determine all criminal cases against child offenders apart from murder. This means that IFCSA cases perpetrated by persons less than eighteen years are heard in these courts. The procedure in these courts is less adversarial than in the regular courts, but the child offender's right to due process is retained. The outcomes in the children's court include diversion for various interventions.[457] It is important to note that these courts only handle cases of child offenders. Cases involving child victims of IFCSA are therefore

[451] The Sexual Offences Rules of the Court, Legal Notice 101 of 2014.
[452] Rule 2.
[453] Rule 3.
[454] Rules 6 and 7.
[455] Section 137 N (a).
[456] Sections 82 and 87.
[457] Children Act 2001 (KEN) Section 191.

handled in ordinary courts unless the perpetrator is a minor. A child victim of IFCSA perpetrated by an adult does not therefore enjoy access to the child friendly environment of the children's court where victim centered restorative processes are more easily implemented.

In addition to the provisions for responding to child offenders, the Children Act has a special non-criminal procedure which is applied in respect of a category of children it refers to as 'children in need of care and protection'. This term refers to children in distress like those who have been or face the threat of being abused in any way, and child offenders.[458] Victims and child perpetrators of IFCSA fall into this category. The Act provides for an elaborate mechanism and procedure on how the law should respond to these children. This mechanism is outside the criminal justice system with the uniqueness of regarding both a child victim and offender as 'in need of care and protection' and refraining from treating a child offender as an ordinary suspected criminal. The first step in dealing with children in need of care and protection is having them presented before a children's court by a Children's Officer. A Children's Officer is an officer in the Department of Children's Services mandated to implement the Children Act. The court has the power to make an interim order for the temporary accommodation of the child in a place of safety or for their temporary committal to the care of a fit person during the hearing and determination of the case. It is the responsibility of the children's officer to get the child in need of care and protection medical attention if any is needed.[459] Where the court is satisfied that a child is in need of care and protection, it has wide powers on how to make a final determination on the issue. These powers range from returning the child to their parent or guardian to committing the child to the care of a person or institution suitable to the child's needs and with due regard for the child's best interest. In addition the court may issue a supervision order over the child which entails placing the child under the supervision of a children's officer or an authorized officer whilst allowing the child to remain in the care and possession of their parent, guardian, custodian or any other person or institution.[460]

[458] Ibid. Section 119.
[459] Section 120.
[460] Section 130.

Alongside the above orders, the court is empowered to order a parent whose child is in need of care and protection to seek the assistance of a professional counselor. This procedure resonates well with restorative justice as it focuses on addressing and managing the harm suffered by the victim. A major concern with the procedure is the manner in which it responds to the persons responsible for causing the child in need of care and protection. The sentence provided by the Act is a fine not exceeding Kenya Shillings two hundred thousand or imprisonment for a term not exceeding five years or both.[461] The sentence does not take into consideration the nature or extent of the abuse perpetrated. This means that an IFCSA processed under the Children Act would result in the lenient sentence provided for under the Act. This is a slap on the wrist compared to the stiff sentences provided under the Sexual Offences Act for similar acts.[462] The relevance of the response to abuse under this part of the Children Act to the search for entry points for restorative justice together with the proposed statutory reform are expounded in chapter five of this thesis.

3.5 Evidence

The general framework within which evidence is gathered and adduced in court is contained in the Evidence Act which was enacted just before independence in 1963. The Act consists of mandatory rules which bind the court and whose disregard often forms grounds of appeal against an otherwise straightforward conviction. It places the burden of proving that a particular offence has taken place on the prosecution. The standard of proof in all criminal cases including IFCSA is beyond reasonable doubt.[463] Although as a general rule the evidence of a child must be corroborated by independent evidence, the Act makes an exemption for sexual offence cases where the oral evidence of the victim may satisfy the court, especially where it is supported by forensic evidence.[464] The Act generally gives the court wide powers to decide on what evidence is admissible depending on whether it is relevant and based on facts.[465] This was the case in *DWM versus Republic* where the Court of Appeal sustained the conviction of a father for incest. The conviction was based on the uncorroborated evidence of his five year old daughter.[466] Evidence falling outside the boundaries set out in the Act is either disregarded or disallowed altogether.

[461] Section 127.
[462] SOA (n 34) Section 8.
[463] Section 107.
[464] Section 124.
[465] Section 144.
[466] *D W M v Republic* Kerugoya High Court Criminal Appeal No 185 of 2012 [2016] eKLR.

One issue that a trial court often grapples with revolves around the modalities of taking the evidence of a child of tender years. The Children Act defines a child of tender years as one of ten years or below.[467] The Court of Appeal has restated that a child of tender years for purposes of section 19 of the Oaths and Statutory Declarations is one below fourteen years. The age limit of ten years given by the Children Act in its definition for tender age has been held to be one of specific application to the Act and not of general application. Where such a child appears as a witness, the court is duty bound to conduct a *voire dire* examination on the child before they take oath. This is an examination conducted by the trial court in respect of a child witness to ascertain three things. First, it seeks to establish whether the child understands the meaning of oath; secondly, whether the child understands the duty to tell the truth and lastly whether the child possesses sufficient knowledge to testify.[468] Where a trial court forms an opinion that a child does not understand the meaning of an oath, the child is not necessarily rendered an incompetent witness or ineligible to testify. The child is allowed to give unsworn testimony especially where, in the court's opinion, they are sufficiently intelligent and understand the duty of speaking the truth.[469] This kind of evidence is however insufficient and cannot be the sole basis for conviction of a perpetrator if it remains uncorroborated by further material evidence.

Failure by the court to conduct the voire dire examination is almost fatal for the prosecution's case as the child's evidence is rendered inadmissible. [470] In *P.M.M v Republic*, the victim was a seven year old girl who had accused her father of sexual assault. The trial magistrate had failed to conduct the *voire dire* examination. The appellate court judge while noting that the trial magistrate never conducted *voire dire* examination of the complainant declared her evidence inadmissible and incapable of being acted upon. The appeal was allowed for that reason. A good number of IFCSA victims are children of tender years. The manner in which their evidence is adduced and taken presents a pitfall in prosecuting IFCSA cases and often forms the basis of many appeals.

[467] Section 2.
[468] *Muiruri v Republic* Mombasa Court of Appeal Criminal Appeal No 84 of 2003 (1983) KLR 445.
[469] *BNM v Republic* (n 425) 3.
[470] *PMM v Republic* Nyeri High Court Criminal Appeal No 148 of 2007 [2009] eKLR.

In IFCSA, language touching on sex and sexuality is usually unavoidable. As discussed in chapter four of this thesis, sex is perceived as a taboo subject in the sub-Saharan African region.[471] This notwithstanding, the child victim while giving evidence is required to describe private body parts and sexual activity that they are either unfamiliar with or are too shy to mention. This creates a degree of discomfort with the child preferring to use indirect language to describe the facts and circumstances around the abuse. The court normally takes judicial notice of this fact. In *BNM*'s case, the child had testified that the perpetrator had inserted his 'finger' in her private parts. The court noted that a child of three years is unlikely to have formed enough vocabulary to enable her use the word 'penis' and allowed the term 'finger' to mean and include 'penis'.[472] Similarly, In *G M K v R* the court was lenient to a child who described sexual intercourse as *tabia mbaya'* which is Swahili for 'bad manners'. The appellate judge remarked that:

> *tabia mbaya* is a common expression which courts need to take judicial notice of in sexual offences concerning minors, and more particularly in children of tender age who have no experience and are not expected to know or understand at that age, matters of sex, but have a general understanding that male adults or adolescents are not supposed to touch them in their private parts, and if they do so, they are "guilty" of 'tabia mbaya' behaving badly or 'having bad manners.[473]

In fact, courts are more receptive to oral evidence adduced in simple child- like language than where a child uses technical terms and hence appears coached. In *Godfrey Oluoch Ochuodha v Republic*, the court observed that it is unlikely that a young child would use the word 'sodomized'. The court recommended that it would have been appropriate for the trial magistrate to record the precise words uttered by the abused children during their evidence in chief to describe the acts which the perpetrator was accused of doing. This would enable the court to determine whether the act amounted to penetration within the meaning of the Sexual Offences Act.[474] Similarly in *Samson Aginga Ayieyo v Republic*, the learned magistrate had recorded that the child had stated in her evidence in chief that she had been 'defiled'. The Court of Appeal restated that the correct approach is to use the words used by the witness. It noted that the word 'defiled' is a technical term and it would therefore be improper to use such term when recording the evidence of a witness

[471] K Lalor, (n 20) 844.
[472] *BNM v Republic* (n 425).
[473] *G.M.K v Republic* (n 433).
[474] *Godfrey Oluoch Ochuodha v Republic* (n 418).

unless the witness himself or herself has used it.[475] This was reiterated in *Peter Kipchumba Too v Republic* where the appellate court became concerned that the trial magistrate had recorded one of the victims as having used the word 'defiled' during his evidence in chief. The appellate court noted that the term 'defilement' is a legal term connoting an offence and therefore not a statement of fact. The court remarked that:

> It is important for the trial court to avoid using legal terminologies and only record statements of facts as provided in evidence. From the record, I am unable to state with conviction that the evidence of PW-2 is explicit that there was penetration.[476]

As stated earlier in this chapter, the age of a victim of defilement and incest is material and evidence on the same must be adduced. Evidence of age may be either from a medical officer who examined the victim, or from oral evidence based on personal knowledge. The latter is acceptable coming from a close relative like a parent or a guardian.[477] In a charge of defilement, the specific age of the victim must be proved. This is because the sentence is commensurate to the age of the child with the punishment getting harsher depending on how young the child is.[478] In child incest, however, all that the prosecution needs to prove is that the victim was at the material times below the age of eighteen years. It is not uncommon to encounter child victims without a single document in proof of their age. This is often a hurdle for the prosecution in proving the case beyond reasonable doubt. In the case *of Edward Shivanji Makanga v Republic*, the prosecution was unable to produce a birth certificate or an age assessment report to prove the victim's age. The birth certificate was said to be in the custody of the victim's deceased mother. The victim gave oral evidence on oath to the effect that she was born in 1996 and that at the time of the hearing she was fourteen years old. This was corroborated by a letter written by the victim's head teacher. However, another prosecution witness testified that the victim was sixteen years old during the hearing. Notwithstanding this contradiction, the court noted that the aspect of age that was important in a charge of incest was that the victim was below eighteen years at the material time.[479]

[475] *Samson Aginga Ayieyo v Republic* Kisumu Court of Appeal Criminal Appeal No 165 of 2006 [2006] eKLR 4.
[476] *Peter Kipchumba Too v Republic* Eldoret High Court Criminal Appeal No 66 of 2012 [2014] eKLR 3.
[477] *A G v Republic* Meru High Court Criminal Appeal No 257 of 2009 [2013] eKLR paras 19 and 20.
[478] Section 8.
[479] *Edward Shivanji Makanga v Republic* Nakuru High Court Criminal Appeal No 313 of 2010 [2015] eKLR 6.

Proof of a victim's age through documentary evidence becomes more critical in border line cases between a child and an adult where it might not be easy to figure out whether a child is say sixteen or eighteen years old. However, in situations where the child is aged, say, three years, the fact of the victim being a minor is obvious. In *Wahome Chege v R*, the court held that the evidence adduced by the child victim and supported by the P3 form was sufficient to prove the age of the child victim.[480] This is further evident from the observations made by the court in the case of *Joel Sio Mwasi v R* where the court stated that where there is consistency on the age of the minor it was not necessary to call for a birth certificate or an age assessment report.[481]

Forensic medical evidence is crucial in sex offences. It is however difficult to procure in IFCSA cases due to the fact that many of the cases are detected and/or reported late. The late detection and its consequences have been discussed in chapter four. Where the medical evidence is unavailable, weak or where a medical examination reveals nothing due to late detection of the abuse, the court has tried as much as possible to rely on other available evidence. This includes the oral evidence of the victim and witnesses which is used as basis for a finding as to whether or not there has been a sexual act committed against the child victim.[482] In *Geoffrey Kioji v Republic*, the court remarked as follows:

> Where available, medical evidence arising from examination of the accused and linking him to the defilement, would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.[483]

In the earlier cited case of *Godfrey Oluoch Ochuodha* the court also had occasion to clarify the weight of forensic evidence in determining the success of a sexual offence. In relying on the case of *Geoffrey Kioji,* the court stated as follows:

[480] *Wahome Chege v Republic* Nyeri Court of Appeal Criminal Appeal No 61 of 2014 [2014] eKLR.
[481] *Joel Sio Mwasi v Republic* Voi High Court Criminal Appeal No 4 of 2014 [2014] eKLR.
[482] *FOD v R* (n 431).
[483] *Geoffrey Kioji v Republic* HC Criminal Appeal No 270 of 2010 (Nyeri) Unreported.

> I reject Mr Nyagesoa's suggestion that as spermatozoa were not taken from the complainants, the offence was not proved. The offence in question concerns penetration and not ejaculation. The absence of spermatozoa is not decisive in proving defilement. [484]

The above approach is favorable to IFCSA cases where abuse often takes place over a long period and detected long after the medical evidence has been washed off.

Where IFCSA results in pregnancy, DNA evidence showing paternity of the child born out of the act may be used to prove penetration. In this case, the evidence of paternity inescapably leads to the conclusion that the appellant is the perpetrator. It is argued that the fact of the child being born at the given time by the complainant indicates that there was penetration of her person at about the time she alleges the said offence was committed against her.[485] This approach is the rationale behind Rule 11 of the Sexual Offences Rules of Court, 2014 which provides that:

> where a person has been accused of committing an offence under the Act, and it is alleged that a child has been born alive as a consequence of the commission of the offence, the court may order the collecting of such samples in the form provided in the schedule as may be required from the accused person and such samples may undergo such tests as the court may order to determine whether or not the child is the result of the commission of the alleged offence.

Where there is insufficient forensic evidence to prove penetration, a perpetrator may be found guilty of indecent assault where it is not necessary to prove penetration.[486] For proof of indecent act with a child, medical evidence is also not mandatory.[487]

Apart from evidence of facts, the Evidence Act also makes provision for the tendering of evidence based on opinion. The only evidence that is admissible in this regard is that of experts skilled in a particular field. In an IFCSA case, this may include a medical practitioner, a psychologist or an education expert. Any other person who does not qualify as an expert but is in possession of non-factual information, however useful, may not be admitted as a witness in court. This provision

[484] *Godfrey Oluoch* (n 418) 3.
[485] In *M K v Republic* (n 426).
[486] *Thumi v R* Nakuru Court of Appeal Criminal Appeal No 36 of 1984 [2008] 1KLR (G & F).
[487] *Phidesio Nthiga Kithumbu v Republic* Embu High Court Criminal Appeal No 67 of 2011 [2014] eKLR 4.

ousts the participation of the community gate keepers who may be seized of some information that may be of indirect relevance to the case. Such information includes the family's history and their reputation in their society. Such information is however not admissible in the criminal justice process. The consequences of excluding the community leaders by limiting the players in the criminal justice process to the experts are discussed in chapter five of this study. The study considers the limiting of the participants to eyewitnesses and experts a hindrance to the use of restorative justice values and processes.

Cases of IFCSA often involve the need for one spouse (usually the mother) to testify against the other. The general legal position in this regard is that a spouse is a competent but not a compellable witness. The Evidence Act, however, makes an exception with regard to sexual offences.[488] This means that an unwilling spouse in an IFCSA case can still be compelled by the court to give evidence. Despite the removal of this legal barrier, the reality on the ground is such that family ties and issues of livelihood, the place of a wife in a patriarchal society and the power dynamics inherent in gender relations, all make it difficult for spouses to testify against each other. These specificities are unpacked and discussed in detail in chapter four of this study

Finally, the standard set by the Evidence Act for the admissibility of a perpetrator's confession, is very high. A statement may only be admitted as a confession during trial where it is made in court before a judge or magistrate or elsewhere before a senior police officer who must not be the investigating officer, and in the presence of a third party of the perpetrator's choice.[489] This stringent standard was put in place in 2003 to prevent the procurement of confessions from perpetrators through coercion or undue influence. Although it protects the perpetrator's due process rights, it makes the chances of having an IFCSA perpetrator admit to the act, in a manner that can lead to a conviction, even more remote.

3.6 Sentencing

Sentencing has been described as 'the process stage in the criminal procedure at which a court of law of competent jurisdiction makes an order, after convicting an offender as to the specific penalty

[488] Section 127 (3).
[489] Sections 25 to 27.

to be meted out.[490] The different kinds of punishments in the FJS are outlined in Part VI of the Penal Code. They include death, imprisonment, community service, detention, fine; forfeiture; payment of compensation; and finding security to keep the peace and be of good behavior.[491] The applicable considerations in determining the nature and severity of punishment vary depending on the circumstances of each case but they generally include the gravity of the offence, the offender, and the purpose of the punishment.[492] With regard to the purpose of punishment, the Kenyan courts are more inclined towards deterrence as observed by the remarks of a former Chief Justice:

> For my part, I am of the persuasion that all things being equal, it is in the very nature of things that Courts in Kenya should find themselves laying more emphasis on deterrence and on the protection of the public than on retribution and reformation. This is in my view what is likely to produce best results in the fight against the Criminal element.[493]

Sentencing Policy Guidelines have recently been put in place as a culmination of the work of a task force established in June 2014.[494] The Guidelines provide a 'framework within which courts can exercise their discretion during sentencing in a manner which is objective, impartial, accountable, transparent and which would promote consistency and uniformity in the sentences imposed'.[495] These Guidelines provide principles underpinning the sentencing process which include proportionality, equality, accountability, inclusiveness, respect for human rights and adherence to domestic and international law.[496]

Apart from the Guidelines, there are other statutory provisions that are useful in sentencing. The CPC for instance gives the court the liberty to call for evidence to assist in coming up with a sentence.[497] The court may also be guided by victim impact statements provided to the court under

[490] *Republic v Thomas Patrick Gilbert Cholmondeley* Nairobi High Court Criminal Case No 55 of 2006 [2009] eKLR 2.
[491] Penal Code (n 420) section 24.
[492] *R v Cholmondley* (n 491).
[493] Mwendwa, CJ, 'The Administration of Justice in Kenya' (1970) as in quoted *Kamaro Wanyingi v Republic* [2008] eKLR.
[494] Task Force on Sentencing, Gazette Notice Number 4087.
[495] The Judiciary, 'Sentencing Policy Guidelines' (2016) 2.1 p 11 Available at https://www.judiciary.go.ke/download/sentencing-policy-guidelines/ accessed 4 December 2018.
[496] Ibid p 13.
[497] Section 216.

the SOA and Rules.[498] The Penal code further provides that unless where it is expressly stated, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.[499] As a general principal, where a penalty is prescribed for an offence, unless a contrary intention appears, it means that the offence shall be punishable by a penalty not exceeding the penalty prescribed.[500] The SOA, however, only prescribes for minimum sentences which effectively removes the court's discretion to impose a shorter term. The sentences themselves are harsh with most IFCSA offences being punishable by life imprisonment. The prescription of minimum sentences under this Act was a direct response to the perceived lenient sentences given to offenders under the penal code.[501] This was rationalized in *Daniel Kyalo Muema v Republic* where the court stated that:

> The courts are under a duty to send a clear message to the accused, and to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. [502]

The court has on several occasions been required to decide on the constitutionality of mandatory sentences as a fetter of the decisional independence of judges and judicial officers. It has been argued that the principle is in contravention of Article 2(1) of the Constitution which asserts the position of the Constitution as the supreme law and Article 160(1) of the Constitution which provides that; 'In the exercise of judicial authority, the judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority'. In *Calvins Otieno Ochoo v R* it was argued on behalf of the appellant that the mandatory provisions in the SOA tie the hands of the judiciary in sentencing and it is tantamount to the legislature dictating to the courts the sentence that should be imposed. [503] The provisions were said to constitute an infringement of the independence of the judiciary and were hence unconstitutional. In its judgment, the court cited an earlier case *of Joseph Njuguna*

[498] Section 33.
[499] Section 26 (2) and (3).
[500] Interpretation and General Provisions Act 1956 (KEN) Section 66 (1**).**
[501] *Calvins Otieno Ochoo v Republic* HomaBay High Court Criminal Appeal No 48 of 2014 [2015] eKLR 6.
[502] *Daniel Kyalo Muema v Republic* Nairobi Court of Appeal Criminal Appeal No 479 of 2007 [2009] eKLR 3.
[503] *Calvins Otieno* (n 500) 5- 6.

Mwaura and Others v R[504] relating to the constitutionality of mandatory death sentences in murder cases and stated that 'the legislature, as an expression of the public policy, makes a decision on the penalty to be imposed for any offence and it was not for the judiciary to usurp that authority'. It held that the exercise by the court of its duty to apply the law and the issue of mandatory sentences was not an affront to the independence of the judiciary. In affirming the appellant's sentence, the court further held that it was bound by the holding in the *Joseph Njuguna* case especially where the court stated that:

> In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.[505]

The same issue arose in *Yusuf Gitau Githanga v R*[506] where the court restated that though sentencing is in the discretion of the court, where the minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. The Court of Appeal sitting in Eldoret also reiterated this position in *David Kundu Simiyu v R* where it was held, with respect to the minimum sentences provided under the Sexual Offences Act, that:

> Those are minimum sentences and parliament appears to give no discretion to the court's to impose sentences below those specified as the minimum. The provisions accord the prime objectives of the act which is prevention and protection from harm, from unlawful sexual act.[507]

The above position with regard to mandatory death sentence has however changed with the recent Supreme Court decision in *Francis Karioko Muruatetu & another v R.* with the court declaring mandatory death sentence unconstitutional.[508]Though the decision by the Supreme Court was with specific reference to mandatory death sentences in murder cases, the Court of Appeal has extended the principle of the unconstitutionality of mandatory minimum sentences to sentences under the Sexual Offences Act.[509]

[504] *Joseph Njuguna Mwaura and Others v Republic* Nairobi Court of Appeal Criminal Appeal No 5 of 2008 [2013] eKLR.
[505] Ibid 12.
[506]*Yusuf Gitau Githanga v Republic* Nairobi High Court Criminal Appeal No 99 of 2013 [2015] eKLR.
[507]*David Kundu Simiyu v Republic* Eldoret Court of Appeal Criminal Appeal No 8 of 2008 [2009] eKLR.
[508] *Francis Karioko Muruatetu & another v R* Nairobi Supreme Court Petition No 15 of 2015 [2017] eKLR.
[509] *Evans Wanjala Wanyonyi v R* Eldoret Court of Appeal Criminal Appeal No 312 of 2018 [2019] eKLR.

The point of interest in this study with regard to the imposition of statutory minimum sentences in IFSCA offences is based on two concerns. First is whether these sentences translate into any additional benefit to the victim. Second is the extent to which they resonate with restorative values, processes and lifestyle which are the key focus of this research. This is unpacked later in chapter five of this study.

As mentioned earlier in this chapter, the court has wider, though less draconian powers with regard to sentencing under the Children Act. The court may invoke the Act in an IFCSA case to make orders on the custody, care and control of a child victim in addition to sentencing the perpetrator.[510] This is in line with the ACRWC which makes a proviso to the right for a child to live with their parent. A child may be separated from their parent 'upon a decision by a judicial authority determined in accordance with the appropriate law and where such separation is in the best interest of the child'.[511] Separation of a child from their family environment must be a decision of last resort and subject to the best interest principle.[512] The Committee on the Rights of the Child has also stated that, in cases of violence where a perpetrator doubles up as the primary caregiver, intervention measures focusing on social and educational treatment and a restorative approach are preferable to a purely punitive judicial involvement. This preference is however subject to the severity of the violation and other factors, The Committee recommends for more effective remedies, including compensation to victims and access to redress mechanisms.[513]

Where the offender is a child, the criminal justice process under the Children Act makes provision for a variety of methods of dealing with the offenders at the end of the trial. This includes discharging them with conditions, placing them on probation, committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake their care. Where the offender is above ten years and under fifteen years of age, they may be sent to rehabilitation suitable to their needs, and where they are sixteen or seventeen years, they may be sent to a Borstal Institution.[514] The offender may also be ordered to pay a fine, compensation

[510] *P M M v Republic* (n 469).
[511] Organization of African Unity (OAU) 'African Charter on the Rights and Welfare of the Child' (11 July 1990,) CAB/LEG/24.9/49 Article 19 (1).
[512] Article 9 and art 20 para 1.
[513] General Comment no 13 (n 42) para 56.
[514] SOA (n 34) Section 8(7).

or costs, or all of them. They may also be placed under the care of a qualified counselor, an educational institution or a vocational training program, or a probation hostel. Finally, they may be ordered to perform community service. Corporal punishment is outlawed. The Sentencing Guidelines places children under the category of offenders requiring further consideration before sentencing. This includes relying on a probation officer's report, seeking guidance from the Children's Act and paying due regard to the best interest of the child during the sentencing process.[515] The sentencing of child offenders under the Children Act and the Sentencing Guidelines offenders is therefore restorative in nature.

3.7 Victim Protection in the Criminal Justice Process

As indicated above, the traditional place of the victim in the FJS is peripheral. The system only regards the victim as a witness with no control over the process. The injured party is the state as represented by the Office of the Director of Public Prosecutions.[516] There has however been a marked shift away from this traditional position in both the international and municipal legal framework towards more focus on victim in the FJS.

In 1985 the United Nations (UN) General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[517] The Declaration defines 'victims' as

> persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.[518]

The Declaration provides for a broad category of persons who may be referred to as victims by clarifying that one may be deemed as a victim:

> ..regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and

[515] Sentencing Guidelines (n 495) 37.
[516] The Constitution of Kenya (n 2) Article 157(6).
[517] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (1985) A/RES/40/34 <http://www.un.org/documents/ga/res/40/a40r034.htm > accessed 25 April 2015.
[518] Ibid Annex 1.

> the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[519]

Although the guidelines are geared to crimes emanating from economic and political power, they are applicable to other offences as the above definition of a victim takes care of a broad spectrum of victims including IFCSA victims. This broad category is important in the response to IFCSA which produces both primary and secondary victims as discussed in chapter two.

The Declaration contains pragmatic provisions which are accommodative to the needs of the victims. The Declaration highlights four guiding principles compatible with the needs of the victims including access to justice and fair treatment, restitution, compensation and assistance. These principles resonate with the features of restorative discussed in chapter two.[520] Access to justice includes informing the victims of their role in and the status of the proceedings; allowing them to give their views; providing them with legal services throughout the proceedings, minimizing inconveniences, and delays and protecting their privacy and security.[521] Restitution is offered as an option during sentencing.[522] Compensation is by the state[523] while the assistance envisaged includes assistance for medical, psychosocial and handling by trained professionals.[524]

In addition, the UN's Economic and Social Council requested the Secretary-General to convene an intergovernmental expert group to develop guidelines on justice in matters involving child victims and witnesses of crime in 2004. This led to the adoption of the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime in 2005.[525] The Guidelines have been described as 'a useful framework that could assist member states in enhancing the protection of child victims and witnesses in the criminal justice system'.[526] The preamble to the Guidelines states

[519] Ibid Para 2.
[520] Chapter Two para 2.2.2.
[521] Basic Principles (n 517) Para 6.
[522] Ibid Para 8.
[523] Ibid Para 12.
[524] Ibid Para 14, 15, 16 and 17.
[525] UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Resolution 2005/20 https://www.unodc.org/pdf/criminal_justice/Guidelines_on_Justice_in_Matters_involving_Child_Victims_and_Witnesses_of_Crime.pdf accessed 5 October 2015.
[526]A Skelton (ed) Justice *for Child Victims and Witnesses of Crime*, (Pretoria University Law Press 2008) 1.

that participation of the child victim is crucial and asserts that justice for child victims and witnesses of crime must be assured while safeguarding the rights of the accused person. The Guidelines define child victims and witnesses as those below eighteen years irrespective of their role in the offence or its prosecution.[527]

The objective of the Guidelines is to consolidate practices that enhance protection for the child victim of crime in line with the CRC. This is to be achieved through a review of domestic laws, procedures and policies and, giving guidance to the relevant professionals and others who assist and support child victims especially those of sexual assault.[528] The Guidelines acknowledge the need to highlight certain special considerations including the vulnerability of children especially girls, and the possibility of them suffering further victimization in pursuit of justice.[529] They also emphasize the need for due regard to the core principles of non- discrimination, human dignity, best interest of the child and participation.[530]

The enhancement of the visibility of a child victim in the FJS resonates with the right of the child to be heard.[531] The Committee on the Rights of the Child has interpreted this right as exercisable in all judicial and administrative proceedings affecting the child, including those of child victims of physical and psychological violence, sexual abuse and other crimes.[532] This right has been expounded to include ensuring that the hearing is held in an environment that is not intimidating, hostile, insensitive or inappropriate for their age but in an accessible and child-appropriate setting. The Committee has particularized this to include 'provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms'.[533] It also calls for juvenile or family specialized courts, police and prosecutor's units, and criminal procedures for child victims of violence. All professionals working with the children and involved in such cases are expected to receive specific interdisciplinary training on the rights and needs of children of

[527] UN Guidelines (n 529) Para 9.
[528] Ibid Para 3 (9) (d).
[529] Ibid Para 7.
[530] Ibid Para 8.
[531] CRC (n 4) Article13 and The Constitution of Kenya (n 2) Article 33.
[532] General Comment No 12 (n 405) para 32.
[533] Ibid Para 34.

different age groups, as well as on proceedings that are adapted to them. The right of the child victim and witness is also includes the right to be informed about concerns such as availability of health, psychological and social services, the role of a child victim and/or witness, the ways in which "questioning" is conducted, existing support mechanisms in place for the child when submitting a complaint and participating in investigations and court proceedings. Other critical information useful to the victim includes the specific places and times of hearings, availability of protective measures, the possibilities of reparation, and the provisions for appeal.[534]

The above Principles and Guidelines are not binding and at best are only of a persuasive force. Basic Principles provide governments with overall guidance over a particular topic without addressing the implementation of the principles.[535] However, at the domestic level, Kenya has made steps towards heeding to the international standards as is evident from recent pieces of legislation that address the needs of the victim. This includes the Victim Protection Act[536] and the Protection Against Domestic Violence Act.[537] The Victim Protection Act was enacted to give effect to Article 50 (9) of the Constitution; particularly to provide for protection of victims of crime and abuse of power, by providing them with better information and support services to provide for their reparation and compensation. It was also meant to give protection to vulnerable victims.[538] The objects and purposes of the Act are stated as, to recognize and give effect to the rights of victims of crime by protecting their dignity through a combination of a number of restorative measures. This includes providing the victim with better information, support services, reparations and compensation from the offender. It also involves the establishment of programs for vulnerable victims, supporting reconciliation in appropriate cases by means of a restorative justice response, establishment of programs to prevent victimization at all levels of government including re-victimization in the justice process, and promotion of co-operation between government departments and other agencies involved in working with victims of crime.[539]

[534] Ibid para 36.
[535] D Van Ness 'Proposed UN Basic Principles on Restorative Justice' <http://www.restorativejustice.org/10fulltext/vanness7> accessed 17 August 2015.
[536] The Victim Protection Act (n 37).
[537] Protection Against Domestic Violence Act 2015 (KEN).
[538] Victim Protection Act (n 37) Preamble.
[539] Ibid section 3.

The Act provides for certain rights of the victims in the criminal Justice process including the right to compensation, information, special consideration to child and vulnerable victims, prompt release of their property held as exhibits, right to choose whether or not to participate in restorative justice, right to participate in the trial process, and the right to privacy and confidentiality.[540] Finally, the Act also creates for a Victim Protection Board to advise the Cabinet Secretary on inter-agency activities aimed at protecting victims of crime and the implementation of preventive, protective and rehabilitative programs for victims of crime. The Board has the mandate to run the Victim Protection Trust Fund to assist victims of crime.[541]

The Protection Against Domestic Violence Act generally provides for the protection and relief of victims of domestic violence. Its focus on the family resonates with the recognition given to the family in the constitution as the natural and fundamental unit of the society entitled to protection and recognition by the state.[542] The Act defines Domestic violence as violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship.[543] The domestic relationship envisaged by the Act is broad as it goes beyond a relationship acquired through an existing marriage to relationships based on a previous marriage, an engagement, co- parenting, close personal relationship, living in the same household and being a family member[544] A family member includes a spouse, a child including an adopted child, a step-child and a foster child, a parent, a sibling; or a relative like father, mother, grandfather, grandmother, stepmother, stepfather, father-in-law or mother-in-law; uncle, aunt, uncle-in-law or aunt-in-law nephew, niece; or a cousin.[545] The list of acts constituting violence includes defilement, incest and sexual abuse.[546] From the foregoing, it is clear that all IFCSA offences can be classified as domestic violence and the victims of IFCSA are entitled to protection under the PADVA.

[540] Ibid sections 8, 9 and 10.
[541] Ibid section 30.
[542] The Constitution of Kenya (n 2) Article 45 (1).
[543]Protection Against Domestic Violence Act (n 539) Section 3(2).
[544] Ibid Section 4.
[545] Section 5.
[546] Section 3 (1).

PADVA is also a victim centered statute. Under the Act, the victim of Domestic Violence is entitled to information on all relief measures available to them, including access to shelter, medical assistance and the mechanism of pursuing the same.[547] The Inspector General of Police is enjoined by the Act to pay special attention to victims of domestic violence including training police officers to deal with family related matters or domestic violence, facilitating the reporting process to enable victims report to the police without fear and ensuring that complaints are processed expediently and efficiently.[548]

Finally, the Act provides a mechanism where a victim, including a child victim, in a domestic relationship with the perpetrator can apply for a protection order.[549] A protection order on behalf of a child may be made by a large category of persons including a parent or guardian, a children officer, the Director of Children's Services, a police officer, a probation officer, a conciliator, social welfare officer, a person acting on behalf of a religious institution or an NGO that deals with the welfare of victims of domestic violence, a relative or a neighbor and any other person with the leave of the court.[550] This exhaustive list leaves no room for a situation where a child victim of domestic violence may lack someone to intervene on their behalf. The court has powers to make any order for the protection of the victim of domestic violence including an order restraining the perpetrator from continuing with the abuse, requiring the perpetrator to stay away from the victim make restitution to them in form of compensation.[551]

The above victim centered international standards and statutes, when appropriately woven into the FJS provide appropriate entry points for restorative processes, values and outcomes. These entry points are discussed in detail in chapter five of this study.

3.8 Informal Justice

From the discussion on legal pluralism in chapter two of this study, conceptualization of the justice process in a typical IFCSA case is wider than exclusive reference to the FJS. It includes alternative justice processes including the informal justice system (IJS). IJS in this study refers to 'the

[547] Section 6 (1) (a) and (b).
[548] Section 6 (4).
[549] Section 8.
[550] Section 9.
[551] Section 20.

resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law'.[552] This is the broad definition given in the recent UN commissioned publication on the study of informal justice.[553] The CRC's committee has set the stage for inviting the IJS into the legal responses to child abuse. The committee has clarified that judicial involvement envisaged in responding to cases involving child victims may consist of the following:

a) Differentiated and mediated responses such as family group conferencing, alternative dispute-resolution mechanisms, restorative justice and kith and kin agreements (where processes are human-rights respecting, accountable and managed by trained facilitators);
b) Juvenile or family court intervention leading to a specific measure of child protection;
c) Criminal law procedures, which must be strictly applied in order to abolish the widespread practice of de jure or de facto impunity, in particular of State actors;
d) Disciplinary or administrative proceedings against professionals for neglectful or inappropriate behaviour in dealing with suspected cases of child maltreatment (either internal proceedings in the context of professional bodies for breaches of codes of ethics or standards of care, or external proceedings);
e) Judicial orders to ensure compensation and rehabilitation for children who have suffered from violence in its various forms.[554]

Other international standards that accommodate the application of informal justice are the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters.[555] The preamble states that restorative justice initiatives draw from traditional and indigenous forms of justice. The Principles define restorative justice as 'any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and

[552] Chapter 2.1
[553] UN Publication on Informal Justice (n 44) 75.
[554] General Comment no 13 (n 42) para 55.
[555] Basic Principles on the Use of Restorative Justice Programs in Criminal Matters. ECOSOC Resolution 2002/12 http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf accessed 6 October 2015.

sentencing circles'.[556] A restorative outcome means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programs such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.[557]

The Principles state that restorative justice may be applied at any stage subject to national legislation.[558] Restorative justice is however to be used only where there is sufficient evidence to charge the offender and with the consent of both.[559] It must also be applied with due consideration to possible disparities due to power imbalance.[560] In cases where restorative justice is not achievable, the case is to be referred to CJS.[561] The Principles recommend that results of agreements emanating from restorative justice programs be judicially supervised or incorporated into judicial decisions and have the same effect as any other judicial decision or judgment. [562]

The standards enunciated by the Principles are not only applicable to the FJS but may be extended to processes under IJS including customary processes. The Principles are however clear that their application to the IJS is only limited to non- criminal fields.

At the domestic level, the Constitution of Kenya recognises the role of IJS. Article 159 vests judicial authority in the people and goes on to lay down several guiding principles of judicial authority. One of these principles is the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The only limitation to traditional dispute resolution mechanisms is that they should not contravene the Bill of Rights or be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality or be inconsistent with the Constitution or any written law. The same article also states that justice should be administered without undue regard to procedural technicalities. The absence of procedural technicalities is a hallmark of informal justice.

[556] Ibid Para 2.
[557] Ibid Para 3.
[558] Ibid Para 6.
[559] Ibid Para 7.
[560] Ibid Para 9.
[561] Ibid Para 11.
[562] Ibid Para 15.

There are growing structured initiatives to promote alternative justice systems pursuant to Article 159. The most recent is the Alternative Justice System (AJS) Task Force tasked to explore the viability of the institutionalization of AJS as a complementary source of dispute resolution.[563]The taskforce is working towards court annexed AJS which are semi- autonomous. The cases are referred by the courts to the community elders for hearing and disposal with the consent of the concerned parties. The system has been piloted in several court stations including Isiolo, Othaya, Kangema, Kericho, Lodwar and Kitui. The criterion for choosing the pilots was based on the interest of the individual judicial officers heading the court stations. Upon being referred to the elders, the cases proceed with minimum interference from the FJS. The relevance of this initiative in providing entry points for restorative justice in IFCSA cases is discussed in chapter five.

Apart from the above structured initiative, the courts have made attempts at embracing informal justice in various cases including those arising from serious infractions like homicide. In the case of *R v. M Abdow Mohamed*, the court allowed the withdrawal of a murder charge after the issue was settled informally. The IJS here involved the meeting of the two families of the deceased and the accused, followed by some form of compensation in the form of camels, goats and other traditional ornaments which was paid to the deceased's family. A ritual was also performed in payment of the blood of the deceased to his family as provided for under Islamic Law and customs. The family of the deceased was satisfied that the offence committed had been fully compensated and wanted the murder charge withdrawn. The application for withdrawal was presented in court by the prosecution who presented a written document from the deceased's family indicating that they were no longer interested in pursuing the case. The prosecutor also informed the court that relevant witnesses were no longer willing to cooperate with the prosecution because of the informal settlement. The judge noted that the ends of justice would be met by allowing rather than disallowing the application for withdrawal and went ahead to allow the withdrawal.[564] This decision was highly criticized especially by the legal profession who deemed it as overstretching the limits of Article 159 by applying it to a serious offence.[565]

[563] Established by the former Chief Justice Willy Mutunga, under the Chairmanship of Professor Joel Ngugi, J and gazetted on 4 March 2016.
[564] *Republic v Mohamed Abdow Mohamed* Nairobi High Court Criminal Case No 86 of 2011 [2013] eKLR.
[565] A Mboya, 'The Bar: Challenges and Opportunities' in YP Ghai and JC Ghai (eds) *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014) 251.

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

The other statutory provision that makes it impossible for IJS to be legally tenable in IFCSA cases is the one that criminalises intentional interference with a scene of crime, or evidence relating to the commission of a sexual offence. Such interference is punishable by imprisonment of up to three years or to a fine of Kenya shillings one hundred thousand shillings or both. The interference contemplated here includes tampering with a scene of crime and interference with or intimidation of witnesses.[566] In an IFCSA case, the victim is deemed as the principal scene of crime. Dealing with them outside the mandate of the DPP may be deemed as interfering with the scene of crime. The victim is also a witness. Engaging them in a process whose ultimate result is non-attendance in court in the name of having privately resolved the matter with the perpetrator would amount to a criminal offence.

The upshot of the above is that the field of the application of IJS in IFCSA is replete with legal landmines. The statutory barriers have, however, not deterred the community or removed their affinity to resort to IJS in IFCSA cases, albeit beneath the legal radar. It is estimated that up to 60% of these cases are handled by the IJS. Since this is a process that takes place outside the formally recognised legal and institutional framework, it is impossible to obtain official data on the same. The ICRH report found the practice pervasive enough to warrant a note in its final

[566] SOA (n34) section 37.

recommendations about the need to engage IJS to improve the response to sexual violence.[567] The proposal in this report is to adopt IJS values and processes that may improve the legal response to IFCSA and at the same time call for amendments to allow more meaningful engagement with IJS in specific limited categories of IFCSA.

Finally, the emergence of the '*Nyumba Kumi*' initiative might provide an additional forum for IJS. It is a security system designed to create security awareness amongst citizens from the grassroots level to the national level through 'know your neighbor policy.'[568] *'Nyumba Kumi*' is Swahili for 'ten households' though it is described more as a concept than as a number. The ultimate aspiration of the initiative is the welfare of its members achieved through fostering peace by tackling security concerns including gender based violence. The inclusion of gender based violence within the scope of the initiative creates room for the handling of IFCSA cases. However, only time will tell the role the '*Nyumba Kumi'* initiative will play in responding to IFCSA as it is still in its infancy.

3.9 Conclusion

This chapter set out to interrogate the legal framework within which IFCSA is responded to. It has analysed the statutory framework together with relevant case law. Relevant International treaties, conventions, Basic Principles and Guidelines have also been discussed. The interrogation is with a view to identify the gaps within the framework as it responds to IFCSA. The interrogation has disclosed that Kenya is replete with legislation, binding treaties and standards of persuasive force that are relevant in guiding a victim centered approach in the respond to sexual offences. Despite the growing trend towards a more victim centered response, the current legal framework has failed to facilitate the attainment of holistic justice to IFCSA victims. The institutions created by the legal framework also lack capacity to effectively respond to the vulnerability from which IFCSA victims engages them with the expectation of having their resilience built. The power relations incidental to gendered violations like IFCSA also render the implementation of some laws problematic. These gaps call for legislative intervention, more dynamic interpretation by the courts and interrogation of the institutions mandated to deal with IFCSA victims at every stage of the justice process.

[567] ICRH Kenya (n 12) 158.
[568] Nyumba Kumi Initiative < http://www.nyumbakumisecurity.com/index.php/about> accessed 14 August 2015.

Kenya being a pluralistic society, the place of the IJS in developing a more victim centered and restorative response cannot be down played or ignored. As already stated, the intention of this thesis is not to replace the formal with the informal justice system in seeking a restorative legal response. The form of restorative justice envisaged is the one that is largely reliant on the formal justice system to achieve a more holistic justice.[569] This is through borrowing from IJS victim centered restorative justice values and processes and considering the possibility of diverting a limited category of IFCSA to IJS. Both entry points would require statutory amendments. These are addressed in chapter five of this study.

[569] L D Ross, 'Paradigms Lost: Repairing the Harm of Paradigm Discourse in Restorative Justice' (2006) 19 (4) Criminal Justice Studies 397-422.

CHAPTER FOUR: SPECIFICITIES OF IFCSA

4.1 Introduction

As stated in chapter one, this research focuses on IFCSA as opposed to child sexual abuse by non-family members. The specific focus is based on a two prong hypothesis. The first is that IFCSA thrives more under certain peculiar circumstances. The second is that, once it occurs, it gives rise to equally peculiar interests and needs. These circumstances, needs and interests differ from those pertaining to child sexual abuse by a stranger. Most IFCSA victims are of the female gender. Being of tender years, they deal with the abuse from a point of low resilience from more than one front. The multiple vulnerabilities compound the scope of the harm to the victims and their resultant needs. This resonates with the theoretical underpinnings discussed in chapter two.

The greatest obstacle to access to justice by IFCSA victims is the failure by the legal system to acknowledge that IFCSA occurs within a unique context. This context has the ability to disempower a victim in pursuit of justice. It is this context that is unpacked in this part and discussed as specificities of IFCSA. These include the influence of patriarchy, family set up, livelihood, associated stigma and taboos, community expectations, and tension around the issue of ownership of the conflict. A victim of IFCSA navigates the path to access to justice amidst these specificities. This has been summarized as follows:

> The child trapped in an abusive environment is faced with formidable tasks of adaptation. She must find a way to preserve a sense of trust in people who are untrustworthy, safety in a situation that is unsafe, control in a situation that is terrifyingly unpredictable, power in a sense of helplessness.[570]

The above specificities have been identified by interrogating the sociocultural setting of IFCSA. This has mainly been through the deduction of the responses obtained from the field research and case law. The ultimate purpose of this chapter is to contextualize and characterize the salient features of IFCSA. Contextualizing the specificities of IFCSA has a twofold role. First, it lays basis to the proposition that IFCSA demands a more creative legal approach. Secondly, it contributes in the realization of the main objective of this research which is determining whether

[570] A Whittam and H Ehrat, 'Justice Response or Alternative Resolution' (Child Sexual Abuse: Conference convened by the Australian Institute of Criminology, Adelaide, 1-2 May 2003).

there are realistic and relevant entry points for restorative justice discussed in the following chapter.

From the outset, the obvious consensus observed from the data gathered across the board confirms the hypothesis that a child victim of IFCSA is impacted differently from a child sexually abused by a stranger. All the respondents interviewed were of the view that the impact on the former is graver, more permanent, far reaching and complex than on the latter. This consensus is reflective of the picture created by Ryan when he summarized the impact of IFCSA as 'complex in emotional and social aspects'.[571] It is this complexity that is unpacked in this chapter with regard to the circumstances under which it occurs, and the specificities that hinders an effective response.

This chapter begins with a general overview of the prevalence of IFCSA and the manner in which it presents itself. This is followed by a discussion on its specificities, which include the sociocultural factors under which it occurs, and the effect of the interaction of the socio cultural factors with the legal process. These sociocultural factors include the influence of patriarchy in the perception of IFCSA; complications around family ties; the question of the victim's livelihood; taboos and stigma around IFCSA; tensions around ownership of the conflict and who should have control over it; the expectations of the general community and whether they are always at par with those of the victim and/or their family; and the complications incidental to delayed detection or disclosure of the abuse.

4.2 Prevalence

The Committee on the Rights of the Child has observed that in every place where sexual violence has been studied, a substantial proportion of children are reportedly sexually harassed and violated by people closest to them.[572] Anyone with a propensity to abuse trust and cross boundaries, whether male or female can be a perpetrator and any child, whether boy or girl, who finds themselves under the care and control of such a person, may become a victim. On the demographics of both the victims and the perpetrators, though the abuse cuts across the gender

[571]B Ryan, et al (n 16).
[572] UN Committee on the Rights of the Child 'General comment 8' The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (2 March 2007) UN Doc CRC/C/GC/8.

divide, a majority of IFCSA victims are of the female gender.[573] For instance, out of the fifteen complainants in the finalized IFCSA cases sampled in Kwale, Naivasha and Mombasa court registries, only three were boys. The age of the complainants ranged from four to seventeen years. Of the thirty perpetrators encountered in this research in prison, police reports and case law, all but one was male. The sole female perpetrator was a grandmother reported to have sexually assaulted both her granddaughter and grandson.[574]

Though IFCSA cannot be categorized as rampant, most of the respondents interviewed confirmed that there is a marked trend of children suffering from sexual abuse perpetrated by those closest to them including family members. The officers from the Department of Children Services, Probation and After Care Services and the Judiciary each estimated prevalence of IFCSA cases at 30% of all the reported cases.[575] These statistics have to be perceived against a background of improved channels of communication resulting in rising reporting rates. A defense counsel who occasionally volunteers to defend sexual and gender based violence cases on pro bono basis estimated the regularity with which he encountered IFCSA related cases in the course of his work in the following terms:

> In court I've seen cases of this nature. Last week somebody was calling me to represent her grandfather who had been accused of incest with the granddaughter. Still last week I was in court when a very old man was doing his appeal before the court of appeal still convicted of incest with a grandchild. And the other week I saw a man of the same age defending himself before the Chief Magistrate's court over the same thing.[576]

The above estimation is not necessarily a true reflection of the reality on the ground as many IFCSA incidents remain undetected and/or unreported.[577] The bottom line however is that IFCSA is prevalent enough to cause concern.[578]

[573] Interview with Waswa, Sub County Probation Officer, Kwale County, (Kwale County Children's Department Office, 10 November 2016).
[574] Group Interview with Sergeant Rozet Kusimba, Constable Wanjiru and Constable Hanifa, (Nyali police station Gender Office, 30 November 2016).
[575] Interview with various professionals including Judges, Magistrates, Children's Officers, Probation Officers, Police Officers and Lawyers on diverse dates and venues particularized in various places throughout this chapter.
[576] Interview with Wahome Gikonyo, Advocate of the High Court of Kenya (Outspan, Nyeri, 10 December 2015).
[577] Interview with Chege, Sub County Children's Officer, Naivasha (Naivasha Children's Office, 15 November 2016).
[578] Interview with Okwengu, J, Judge of the Court of Appeal, Kenya (Supreme Court Building, 17 July 2017).

4.3 Complexity and Propensity for Misuse

A characteristic feature of IFCSA is its delayed detection. It has the propensity to persist for a prolonged period of time before detection or disclosure. This is mainly due to specificities discussed later in this chapter which hinder more than facilitate an expeditious response. Even when detected, it is often by default, either through pregnancy,[579] obvious difficulties in walking or sitting,[580] or change in their behaviour or performance in school[581] among other abnormal behaviour. Late detection has two overall effects. First it creates a wide gap in the delivery of justice due to the difference between the actual number of cases on the ground and those that are escalated to the authorities.[582] Secondly, and of more concern to this study, the late detection presents a nascent handicap that affects effective response to the case. This is because even after the abuse is eventually detected, there is unwillingness to escalate it to relevant authorities.

Most of the IFCSA cases find their way to the authorities by default. For instance, the police may receive a complaint for non-payment of a certain amount just for them to learn, in the course of their investigation, that the amount in question is in respect of compensation for defilement of a minor by a relative. The person making the report will be more concerned with the enforcement of the settlement than lodging a defilement complaint with the police. Similarly, IFCSA may come to the attention of a probation officer by default in the course of a social inquiry on the reasons behind a child's recidivism. In such cases, it may then emerge that the particular child is silently dealing with the issue of IFCSA having either been a victim or a witness of the same within the household.[583] Disclosure may also be made unintentionally in the course of discussions on an unrelated topic in a public forum. Okwengu, J shared her experience in women's forums where she would be addressing them on a topic like matrimonial property just for one woman to open up on the challenges she is facing in her home, including IFCSA.[584] Many other IFCSA cases are unearthed at school by teachers as narrated by one of the respondents, a primary school teacher:

[579] *P.M.M. v Republic* Nakuru High Court Criminal Appeal No 188 of 2010 [2010] eKLR 2.
[580] *S.N.T. v Republic* Nyeri Court of Appeal Criminal Appeal No 20 of 2012 [2013] eKLR) para 4.
[581] Interview with Chepkemboi, Primary School Teacher (Mombasa Cinemax 15 August 2013).
[582] D Carson, 'Therapeutic Jurisprudence and Adversarial Injustice: Questioning Limits' (2002) 4(2) Western Criminology Review, 124, 125.
[583] Interview with Mombasa County Probation officer, (Probation Office at Forestry Department, Mombasa, 22 July 2013).
[584] Interview with Okwengu, J (n 578).

> One time I went to class and I found that …one of my very bright students who I taught from class four up to five and I was with her in class six…I found her crying and she looked in a bad state…during break I released the rest of the children to go out and I was able to talk to this girl…she confided in me that she was a victim of abuse…that her mother's husband whom she called 'uncle' was having sex with her and her sister at night when the mother goes for prayers and then buys her yoghurt.[585]

Once an IFCSA is detected, there is a tendency to conceal it from the relevant authorities to avoid 'bringing shame to the family'.[586] In extreme cases, attempts to conceal might be through collusion of both parents as was the case in *PMM v Republic*.[587] Often times, one parent, usually the mother, may want to take up the case on behalf of the child but becomes incapacitated because of direct or indirect pressure from the extended family. Cover up is more likely where the victim is of tender age as such children have no role in decision making throughout the process. For instance, the child might be escorted to hospital or police station by the perpetrator himself. The perpetrator then hovers around the child throughout to ensure that they give as little information as possible to the professionals. Most of the times, perpetrators succeed in diverting investigations away from their direction. In some rare instances, the relevant authorities may succeed in unearthing an escorting perpetrator. This was the case in an incident reported at the Nyali Police Gender office. A father had escorted his sixteen year old daughter to report the defilement by a teenage neighbour's son. In the course of the interview by the investigating officer, the daughter innocently posed the question, 'So it is wrong when (the sexual intercourse) is between me and a person other than my father?' It then became apparent from the question that the father had also been having sexual intercourse with her. Further investigations revealed that the abuse had been going on since the girl's mother passed on when she was thirteen years old.[588] Such occasions are rare as most of the times, the offending adult family member is able to get away with the abuse by staying close to the victim during the investigations.

Failure to disclose may at times be attributable to the victim's own reluctance. This is especially so where the victim is old enough to anticipate the overall consequences of disclosing the abuse.

[585] Interview with Teacher Chepkemboi, (n 581).
[586] Bofa Community Focused Group Discussion, (Kasemeni Sub County Headquarters, Kwale County, 30 September 2016).
[587] *P.M.M v Republic* (n 579).
[588] Nyali Police Gender Office (n 574).

The cover up is easily achievable because the responsibility of having the primary medical document, commonly known as the P3 form, completed by a medical officer rests on the victim. Where the victim makes a decision not to pursue the abuse even after it has been reported, they simply collect the P3 form from the police station with no intention of having it completed by a doctor or returning it to the police station. Since no further intervention can take place without the P 3 form, the case collapses at that initial stage.

It is also possible for an older child victim to develop mixed emotions on how to respond to abuse by a family member. They may be torn between the personal desire to get justice and the socialized communal duty to appear loyal to the larger family no matter the cost. In *PMM v Republic*, the judge seating on appeal highlighted the dilemma often faced by older victims of IFCSA by reiterating the observation made earlier by the trial magistrate:

> Many a victim of sexual abuse by relatives, and those close to them suffer from trauma and self-denial. The victim is torn between denial of the occurrence in the presence of the relative or friends (the father and the mother in this case), while complaining quietly to third parties… that the father had serially defiled her.[589]

The internal conflict by the victim may also result in the delay of the institution of the case. The delay may be as long as thirty years as in the case of JG.[590] She made her disclosure by email, to the researcher, thirty years later as follows:

> I kindly wish to seek justice for myself for sexual abuse perpetrated against me when I was between 3-4 years old. This was done to me by a person who is related to my family (only my parents can explain our familial relations) as his home is an immediate neighbor to our rural home. I am 31 years old and I have suffered emotional stress over the years as a result of the sexual abuse. Unfortunately when this happened to me as a child, I could not tell right from left, but over the years I have been able to connect the evil actions done to me by this sex offender. My God given conscience though as a child would make me fear this man and I can remember trying to be disobedient but he would threaten me with his evil eyes and local insult and he was far much older than my four years, he probably could have been in his twenties then (my guess).[591]

[589] *P.M.M versus Republic* (n 579) 3.
[590] Pseudonym initials.
[591] Email from JG to Author (26 January 2017).

Feedback from the Gender Recovery Center at the Coast General Hospital was to the effect that many of the IFCSA reports were received long after the abuse. The frustration associated with the delayed reporting was expressed by the Center's legal officer in the following words.

> From what we see at the center, you will find for instance a child has been defiled for a period of say one year or six months but they are not speaking out… rarely will they speak to someone. It is either if someone pounces on the act going on or there is a pregnancy, or there is a Sexually Transmitted Infection, or for the boys … they have problems with their rectums. So when they come in, then they'll be able to say that I am this way because this abuse has been going on. It is in very few cases that they speak out and tell somebody what's been going on but then again even for those who speak out most of the time it is not to the parents, but to a teacher or a friend, or a parent to a friend or someone else. ….. I don't know why children are not speaking out. Very few will speak out especially in the first instance. What we've learnt is that most of them remain silent may be due to intimidation.[592]

Even after eventually disclosing an abuse to the medical personnel, few victims desire to move to the next level of reporting the same to the police. This has been attributed to a long standing culture of fear of the police by the citizens.[593] Most Kenyans prefer to maintain the rare essential contact with the police and only when they feel they have no alternative. A police station is still viewed by many as more of a place where criminals are taken than where victims go for assistance. Many victims hence need a lot of persuasion to engage the police even after disclosing to the medical personnel.[594]

From the discussion above, it is evident that many IFCSA cases are reported as a last resort and often after a substantial delay. The delay comes with its own disadvantages and false starts. The most prominent disadvantage is that the cases often have unwilling participants who reluctantly attend court to testify as witnesses against their wish. Where the main witness is a child, the unwilling adult participants may fail to produce the child in court and in some cases, ensure that the child leaves the jurisdiction of the court altogether. This is a common phenomenon in Kwale

[592] Interview with Elizabeth Aroka, Legal Officer, International Center for Reproductive Health (Coast General Hospital Gender Recovery Center, 22 July 2013).
[593] Ibid.
[594] Ibid.

and Naivasha where the children disappear to Tanzania through the nearest border points of Lunga Lunga and Namanga respectively. The children are only brought back when the case is finalized.[595]

When victims and their families feel overtly conflicted over reporting the abuse to the justice system, it becomes even harder for third parties prepared to press on with the case to successfully assist the prosecution procure a conviction. This was the case in *Republic v Kennedy Muthama* where the IFCSA was initially reported by a teacher after the victim confided in her. The case ended with an acquittal for insufficient evidence as the main witnesses, who were mainly family members, failed to cooperate with the prosecution. In other instances, the independent witnesses back off from the case for fear of intimidation by the immediate family members.

Other problems associated with late reporting include loss or compromise of evidence especially forensic medical evidence which becomes hard or impossible to gather or preserve with time. As a result, a victim of IFCSA normally has an arduous task in proving the case beyond reasonable doubt. The effects of the delay are aggravated by the fact that most government agencies suffer from underfunding which affects their capacity to effectively mitigate the delay. The most affected are the National Police Service and the Department of Children Services. In Naivasha, for instance, it is not an uncommon practice for the Investigating Officer to personally escort exhibits to the Government Chemist in Nairobi, by public means and at their own cost.[596]

Apart from delay in reporting, the other feature which interferes with the ability to respond to IFCSA objectively is its atrocious nature. This abuse usually presents itself in the most horrific manner. At the Gender Desk at Nyali Police Station, the incidences of IFCSA included a case of a two year old girl who sustained serious injuries after she was defiled by her biological father. In another case reported in the same station, a father of eleven confessed to having continuously defiled his fourth born daughter from the age of nine years until it was detected when she was fifteen years. He described how he would tie something around her arm to prevent her from getting pregnant. He later graduated to forcing her to take contraceptives under the guise that it was a

[595] (n 573) and (n 577).
[596] Group interview with Police Officers under Chief Inspector Mutinda, (Naivasha Divisional Police Headquarters, 15 November 2016).

doctor's prescription to treat a chest problem. In his confession, the father blamed the devil for misleading him. Unfortunately, the confession did not meet the statutory threshold and was not of any value in court after he pleaded not guilty.[597] In yet another atrocious act reported at the Coast General Hospital Gender Recovery Unit, a four year old had to have her uterus evacuated after a vicious sexual abuse by her biological father. Such atrocities create medical emergencies which relegate the need for a legal response to the tail end of the list of priorities. Under such circumstances, all the victim's family wants is for their child to recover. Justice may not be a spontaneous priority. They often have to be urged in that direction by a third party.[598]

In some cases, the abuse may result in the pregnancy of the child victim. In such instances, the priority becomes safe delivery and maintenance of the child and not necessarily recourse to law. The family may find itself unable to handle all the emerging issues simultaneously. Apart from realigning priorities, the atrocious nature has the potency to traumatize those who interact with the case at various levels, including the professionals. As confirmed by an officer manning the gender desk at Nyali police station, the trauma makes it difficult for the professional to handle the case objectively. This is seen for instance by the urge to immediately arrest and charge the suspected perpetrator before completion of the investigation. This often results in acquittals for lack of sufficient evidence.[599] All these difficulties are against a background of minimal budgetary allocation for psycho social support of the victim.[600] This is discussed in details in a later part of this chapter.

The constitutional due process rights of the perpetrator present yet another frontier of challenges in responding to IFCSA. As discussed in chapter three, bail pending trial is a constitutional right. The right however presents unique practical difficulties in IFCSA cases at two levels. First and foremost, the concept is not well understood by the public. When they hand over a suspect to the police, they expect him to be tried and sent to jail. They do not expect to see him walking freely

[597] Nyali Police Gender Office (n 574)
[598] Interview with E Aroka (n 592).
[599] Nyali police Gender Office (n 574).
[600] Interview with C Muinde, Deputy County Coordinator, Department of Children Services (Tudor, Mombasa, 16 July 2013).

without going through a trial. They attribute his freedom during trial to corruption.[601] This corrodes their trust in the justice system. Secondly, in an IFCSA case, granting bail pending trial means having the victim, the perpetrator and most of the witnesses under the same roof throughout the pendency of the case. This is often not viable as it creates opportunity for intimidation of the victim and the witnesses, which is a common reason behind the collapse of many IFCSA cases. All the three officers from the Department of Children Services interviewed in this research were of the opinion that bail pending trial in IFCSA cases presents a major challenge. The challenge was summarized by a senior judge as follows:

> On the issue of offences being bailable, in offences such as this one which involves someone within the same family, I think the magistrate should also be able to exercise their discretion. Much as there is right to bail, it is not something that should be given blindly… where there is a good reason. I know they are still innocent but where there is also this child who… like I came across a situation in Nakuru where there was a child who was said to have been molested by the father, then the child could not be taken back home because the father is on bond. Because they do not have rescue centers, the child was taken to a children remand home. The child stayed there and you know how these cases of ours, how they keep on dragging and dragging and dragging. The child is there for about nine months just waiting for this thing to end and acquiring odd behaviors and being treated like a criminal because you are there with all manner of people. And at the same time even when they are there, they can also be abused.[602]

A disturbing trend worth highlighting that was detected during data collection is the propensity to misuse IFCSA through fabricated cases in order to achieve a certain end. All the professionals interviewed reported having dealt with fabricated cases at some point in the course of their work. The most common victims of tramped up charges are those with the least bargaining power in the society including children, the aged and the poor.[603] In *Republic v D.K.* the accused, a sixteen year old minor had been charged with sodomizing his four year old brother. In the course of the proceedings, the clinical officer testified that he could not find any medical evidence in support of the alleged sexual assault. Upon cross examination, the four year old victim disclosed to the court that his mother had instructed him to lie that his brother had sodomized him but he had actually not done so. It then emerged that it was a case of a mother framing his teenage son, born out of

[601] Interview with Edith Njeri, Naivasha Deputy Sub County Probation Officer (Naivasha Probation Office, 15 November 2016).
[602] Interview with Okwengu, J (n 578).
[603] Interview with Inmate EHF (Shimo la Tewa Prison, Mombasa, 16 September 2016).

wedlock, so that he could be put away. The mother had remarried thrice and each of the husbands did not want the teenage son to live with them.[604] The prevalence of fabrication was further confirmed by a prison warder at the Shimo la Tewa prison, who remarked that though many inmates are rightfully incarcerated, there are many others who had been framed. He reasoned as follows:

> Initially, old people here at the Coast Region were branded as witches as a set up for lynching so that their property could be taken away from them. Nowadays, all they have to do is say that an old man has defiled the granddaughter. He is arrested and charged. Even if he is given bail, he cannot afford it so they are sure he will die in prison and they keep his property.[605]

The issue of fabrication of IFCSA is not within the scope of this study. The fact that it exists is important to acknowledge even as appropriate and effective responses are explored. It is also a pointer to an area in need of further research as identified at the recommendation section of this study.

4.4 Influence of Patriarchy

IFCSA, its subsequent detection, disclosure and response thereto, all take place against an external environment dominated by patriarchal norms. This reality forms the basis of discussion in this part. Like many concepts, there is no convergence on the meaning of patriarchy especially among feminists.[606] In common parlance, patriarchy simply means 'rule by the father'. It therefore refers to a social organization in which a male is the head of the descent with kinship and title being traced through the male line.[607] It is applied to refer to the male domination in both public and private spheres which ordains men as the ultimate decision makers. Feminists often use the term 'patriarchy' as a tool to describe the power relationship and parity between men and women in order to assist in contextualizing women's realities.[608] Patriarchy may hence be described as a

[604] *Republic v DK*, Naivasha Criminal Registry Sample case No 1 (details confidential but case summary on file with the author).
[605] Prison warden PW (Shimo la Tewa Prison, 16 September 2016).
[606] H Barnette, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Ltd, 1998) 57.
[607] Collins English Dictionary (3rd edition, HaperCollins, 1991) 1143.
[608] A Sultana, 'Patriarchy and Women's Subordination: A Theoretical Analysis' [July 2010- June2011] The Arts Faculty Journal 1, 2.

system which pervades both the structure of the society as well as the attitudes of the individual members of that society.

Whereas structures can easily be undone, renegotiated and remade, attitudes are harder to change or negotiate around as they have usually crystallized in people's mindsets over generations. Patriarchy is therefore a difficult status quo to alter or deal with. Patriarchal attitudes are, undeniably, key in determining how societal issues are responded to. The family, as the basis social institutional unit, has been described as 'a brewery for patriarchal practices' where its members are socialized to unquestioningly accept sexually differentiated roles.[609] The family setting is therefore one place where the effects of patriarchy are most felt. It then follows that IFCSA, being a kind of abuse that takes place within the home, is enveloped in patriarchal considerations in both the manner in which it is perceived by the society and the way it is ultimately responded to. This is a reality that has to be reckoned with as a suitable response to IFCSA is sought.

As discussed in the previous chapter, Kenya is a pluralistic society with the common law based FJS operating alongside the IJS. This is as a product of the country's colonial heritage. The state of pluralism has enhanced the role of patriarchy in the legal response to IFCSA. Though the traditional justice system hardly exists in its original unadulterated form, its remnant is still largely unfriendly to women especially victims of sexual violence. Whereas the African traditional system is inherently and unpretentiously patriarchal, the existing formal system has also been described as patriarchal by default. It is believed that the transition from the traditional to the western justice system proceeded without the input of women during decolonization. Instead, local customs were either transmitted through predominantly male tribal leaders or observed by male colonizers resulting in women losing even the minimal rights previously accorded to them by African customary law.[610] The long term result of the above is a situation where women who engage the justice system are trapped between formal western law and the African traditional cultural laws, both of which have patriarchal inclinations.

[609]M Kambarami, 'Femininity, Sexuality and Culture: Patriarchy and Female Subordination in Zimbabwe (2006) University of Fort Hare South Africa September (2006) 4 <http://www.arsrc.org/downloads/uhsss/kmabarami.pdf> Accessed 18 April 2017.
[610] K B Wester, 'Violated: Women's Human Rights in Sub-Saharan Africa', Topical Review Digest: (2013) Human Rights in Sub Saharan Africa 3.

The role played by patriarchy in IFCSA cases was evident in the case of YM, a fifteen year old child victim impregnated by her biological father in her interview from a shelter. She narrated how her father forcefully removed her from her aunt's custody who had been raising her from infancy since her mother's death. The father took her to his home where he lived with his two wives but defiled her every night for one year until she became pregnant. Her stepmothers knew of the abuse but did not intervene. She confided in her elder sister only to learn that her sister had also been abused by the same father resulting in the birth of her first born son. The sister was therefore also a victim and could not intervene. It was then that she went to inform her teacher who reported to the police.[611] The domination of the father in the homestead coupled with the power imbalance between the father and the females in the family kept the abuse from detection by relevant authorities.

Patriarchy plays the role of an indirect gatekeeper in the responses to IFCSA. Its influence determines whether an IFCSA case is reported or covered up. If reported, patriarchal considerations play a critical role in the choice of forum for determination of the issue. Patriarchy prefers handling IFCSA in a manner that assures the male in the family, including the perpetrator, retention of their dominant role in the management of the conflict. Joel Ngugi, J summarized a typical response to IFCSA in a patriarchal society as follows:

> It is the patriarchal system that operates and they would prefer a system where the actors feel they are in control so to that extent it is oppressive to women. They feel if we go to that system you have more of a say and you can control it. In many cases there is the issue of stigma especially for sexual offences cases and they feel that going to the formal system is like washing dirty linen in public so we would rather handle it in-house so they find their own mechanisms. It is oppressive because the procedures are all aimed at covering up rather than dealing with it.[612]

The problem with the patriarchy-oriented approach is that its priority is not justice but the preservation of patriarchal norms. A Child Rights Advocate described it as 'power play'.[613] The

[611] Interview with Y M, Minor (Kebene Baby and Day Care Shelter Diani Kwale County, 28 June 2019).
[612] Interview with Joel Ngugi, Judge of the High Court of Kenya and Chairman of the Task Force on Informal Justice System (Judge's Chambers, Kiambu Law Courts, 17 January 2017).
[613] Interview with Allan Nyange, Defense Counsel, Kituo Cha Sheria (School of Law, Mombasa Campus, 22 July 2013).

male perpetrator is often engaged from the status he has enveloped himself in over time. This is one of unquestioned authority characterized with fear by both the victim and those expected to intervene on her behalf. This usually results in an outcome that is usually sympathetic to the perpetrator. This is best illustrated by a mainstream media account of sixteen year old Clemence, a victim of IFCSA perpetrated by her biological father:

> In 2014, he defiled her again and again threatened to kill her if she ever informed anyone of what goes on at home. However it was too much for her and she decided to talk to her school headmistress, whose reaction made her regret opening up. Clemence said that the headmistress told her that there was nothing she could do because they feared her father. 'It broke my heart that the person whom I thought was going to protect and assist me turned me down. I felt like dying but remembered I had siblings to take care of.' She said. In a further bid to unshackle herself from being a sex slave to her own father, she went to the police station and filed a complaint. Instead of arresting her father, the officer in-charge called him and informed him of the charges her daughter had lodged against him. 'I think they later met and my father bribed him against investigating the matter because he was never arrested', she said. However, the father pounced on her that evening, beating her up to a point of temporarily losing her mind for three days.[614]

The ultimate fate of a woman and child who dares to assert their individuality in an IFCSA case against the grain set by patriarchy presents itself in a complicated and uphill state of affairs for both of them. Once in court, they have to give evidence against the male relative. This translates into a tussle between herself and the entire extended family. She is seen as fighting the clan who in turn ensure that she loses her place in the society. In the words of Okwengu, J, 'the mother not only stands to lose her means of livelihood, she also loses face'.[615] This is illustrated in the case of Machocho who had caught her husband defiling her daughter, as reported in the print media:

> Machocho says she was banished from her husband's family after declining to accept money they offered to drop the case. 'His family offered to do anything for me as long as I dropped the allegations against their son. But I could not sleep knowing I had sold justice for my daughter for some few coins.' Machocho said. She said her husband's family distanced itself and she has been forced to endure insults as long as the three daughters are safe.[616]

[614] Malemba Mkongo, 'Innocent Terrorized. I Wish I Could Kill My Dad For Raping Me: Rage of Incest Victims in Taita Taveta *The Star*, (Friday 2 June 2017) 20.
[615] Interview with Okwengu, J (n 578).
[616] *The Star* article (n 614) 21.

The isolation of a child alongside the mother may be more bearable than in situations where the child has no mother to look up to for social support. In such cases, going against patriarchal norms may result in permanent disruption of the child's life and total loss of their identity as in the following case narrated by the Mombasa Chief County Children's Officer:

> Maybe I give you a case that we did recently. There was this girl who was abused by the father. After the father abused her then the matter came to our office through the teacher and the father was arrested. Unfortunately he died while in custody at Shimo la Tewa Prison. So when he died, now the family does not want anything to do with that child. Like now that child, she has no family. She was an orphan, the mother had died, now the father has died and the family is accusing her of killing their father. They were saying there are some rites they could have done, they would have conducted these rites and the case would have ended there but now the fact that the child made the father go to *Shimo* (remand prison), the family feels that she is responsible for the death of their father and want nothing to do with her. She lives with the teacher. …She cannot even take an ID because she does not know where to get the supporting documents. They were from the Luhyia community.[617]

The issue of patriarchy is further compounded by the question of the place of children in the African society. The position is reflected in the ACRWC, albeit in good faith. The Charter places on the African child certain duties and responsibilities towards the family. These include the duty to:

> (a) Work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
> (b) Serve his national community by placing his physical and intellectual abilities at its service;
> (c) Preserve and strengthen social and national solidarity;
> (d) Preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
> (e) Preserve and strengthen the independence and the integrity of his country;
> (f) Contribute to the best of his abilities at all times, and at all levels, to the promotion and achieve.[618]

[617] Interview with C Muinde (n 600).
[618] Article 31.

The upshot of the above is that where the interests of the child conflict with those of the family or community, then the interests of the patriarchal family are likely to prevail over those of the child. The child is hence expected to abandon their personal interest in favor of those of the community.[619] Often times, whenever truth is sought on the occurrence of an IFCSA, it is the adult's version of events that is believed over that of the child.[620] Where the child is believed, the process that follows and the eventual outcome are anything but victim-centered as observed by Mumbi Ngugi, J:

> Judging by what I have observed in reconciliation of families of victims and perpetrators of homicides (through traditional processes and cleansing rites) the focus is on compensation to the family and clan of victims. It seems to me that in certain communities, sexual abuse of children is not perceived as a serious offence, and perpetrators may only be required to pay some compensation to the family of the victim, with no involvement of the victim in the matter.[621]

The patriarchal expectations of the girl child are anything but child centered. During the community forum discussion in Kwale, it came out clearly that the girl child in the African society has the additional responsibility of maintaining her virginity for the sole purpose of enhancing and preserving her value which ultimately accrues to her family. This standpoint was from participants drawn from all the four communities represented in the forum who are a majority in Kwale County. These include the Digo, Duruma, Kamba, and Taita.[622] A girl's chastity is therefore community property but its preservation is the sole responsibility of the girl. An adolescent girl who engages in sexual activity, regardless of the circumstances, is often deemed to have played a part in seducing the man. When virginity is lost within reprehensible circumstances such as those that pertain in IFCSA cases, the tendency is for patriarchy to take over and manage the conflict in a manner designed to mitigate the damage incidental to loss of virginity. In such a case, the child's interests are relegated or totally ignored.

The overall impact of patriarchy therefore is that a family's response to an incidence of IFCSA largely depends on how it is perceived by the dominant male in that particular family or

[619] J W Muyila, 'African Values and the Rights of the Child: A view of the Dilemma and Prospects of Change', in S Lagoutte and N Svaneberg (eds.), *Women and Children Rights, African Views* (Karthala, 2011) 97.
[620] Interview with E Aroka (n 592).
[621] Email from Mumbi Ngugi, J to author (16 June 2017).
[622] Bofa Community Group (n 586).

community. Patriarchy shelters the male perpetrator. Where an IFCSA case receives the full support of the father, it becomes easier for the rest of the family to cooperate fully thereby increasing the likelihood of having the case reported and successfully prosecuted. This was demonstrated in the case in *Bora v Chirima Mwingo*[623] where the accused had defiled his twelve year old niece and infected her with a sexually transmitted disease. The complainant's father was actively involved in the case to the extent of testifying against the perpetrator who was his biological brother. Support of the non-offending male relatives in IFCSA cases is therefore a key determinant of its outcome. Any response that disregards the impact of patriarchy is bound to be inadequate.

4.5 Family Set Up

Closely related to patriarchy is the question of family set up. The family unit is given due legal recognition by the major international declarations, covenants and treaties as the basic unit of the society.[624] This recognition is also highlighted by Kenya's supreme law, the Constitution of Kenya, 2010 which adds that the family is the necessary basis for social order.[625] The law therefore recognizes the family unit as an important safety net in the enjoyment of certain child related human rights and freedoms. The African traditional social set up is acclaimed for its deep sense of kinship.[626] The onus of ensuring that the family unit remains cohesive is largely placed on the mother. This cohesion is often attained at substantial sacrifice of individual rights. Those who sacrifice most for the family are the women whose mothering role positions them at the forefront in protecting and nurturing the children. Although it is incumbent on a mother to report when the child is abused, her dual duty of 'keeping the family together' and acting as the agent of the child is often in conflict. This gives rise to unique circumstances that call for an equally unique response.

The need to interrogate the family set up vis-a-vis IFCSA arises from the following two perspectives. The first one is with regard to the relationship between the prevalence of IFCSA and

[623] *Republic v Bora Chirima Mwingo* Kwale Resident Magistrates Court Criminal Case No 66 of 2015 (unreported).
[624] UDHR Article 16(3), ICCPR Article 23 and ICESCR Article 10.ICESCR.
[625] Constitution (n 2) Article 45(1).
[626] A I Kanu, 'Kinship in African Philosophy and the Issue of Development' (2014) 1(9) IJHSSE 1 <www.arcjournals.org> accessed 15 June 2017.

the stability and organization of the family unit. The second is on the impact a legal response to IFCSA has on existing family ties.

The correlation between prevalence of IFCSA and the stability of the family unit is borne from the fact that IFCSA, by its very nature, is more likely to be calculated than by chance. This is because it is perpetrated by someone already known to the child and not by a stranger waylaying a random victim at the street corner. As already stated above, a majority of the perpetrators are male while most of the victims are female. Certain fault lines within a family may affect the nature and quality of the relationship between the girl child and the male relatives living in the home. These are the kind of fault lines that disturb established structural organizations and boundaries. A disturbed set up presents opportunities for breach of boundaries between the child and the adult family member and presents a perpetrator to calculate how to take advantage of the weak boundary.

There are diverse reasons why a family may find its original structure disrupted. This includes the death of the mother, leaving the father as the primary care giver of his children,[627] the need for one parent to work abroad,[628] divorce or separation,[629] or hospitalization of the mother.[630] In *Republic v A.N.N.*, a case in Naivasha, the mother had left her two children aged five and ten years old under the care of their father as she went to work in Qatar. The father took advantage of the wife's absence and sexually abused the two children. An inmate serving his sentence at Shimo la Tewa Prison for defilement also attributed the events that led to his incarceration to the fact that his wife had left the matrimonial home:

> My wife ran away and left the children with her co wives. Then rumors started going round that I was sleeping with my daughter. The witnesses who came to court to testify were my wife, the sub chief, the Investigating Officer and Doctor. My daughter also testified in camera and told the court that I had abused her. My brothers are now taking care of my family.[631]

[627] *Republic v Omari Juma* Kwale Resident Magistrates Court Criminal Case No 660 of 2014 (unreported).
[628] *Republic v A.N.N* Naivasha sample case No 5 (details confidential but case summary on file with the author).
[629] Interview with K H, Inmate Shimo la Tewa GK Prison (Shimo la Tewa Prison Premises, 16 September 2016).
[630] *P.M.M versus Republic* (n 579).
[631] Interview with inmate K H (n 629).

Matrimonial conflict within the family may also contribute to breach of boundaries ultimately leading to IFCSA. In extreme cases, there are fathers who have been reported to defile their daughters as a way of revenging against the wife for leaving him. S N narrated how after her mother left the matrimonial home due to domestic violence, her father got her from her grandparents' home and started living with her in a single room with the intention of making her play the wife's role. He attempted to sexually assault her but she screamed and ran away in the middle of the night. A Good Samaritan took her to the police station who took her to the children's court as a minor in need of care and protection.[632]

Where the conflict ends in divorce and remarriage, it introduces the concept of blended families. This results in a situation where men increasingly live in the same household with close family members who are not their blood relatives such as step children, step parents and step siblings. This is another contributing factor to the prevalence of IFCSA.[633] Closely related to the phenomenon of blended families is the social set up where people live with their extended family members like grandparents, uncles and cousins. This comes with sharing spaces and facilities including the sleeping quarters leading to corrosion of boundaries between the child and the adult relative.[634] In one case reported at the Nyali police, the children were living with their grandparents as their mother went to work abroad. The investigating officer explained the case as follows:

> We also have another case where a grandmother has sexually assaulted an 11 year old girl. The grandmother is fifty six years old. She used her fingers. The girl has a younger brother. We decided to rescue both the boy and the girl. The girl is HIV positive. We are suspecting it is not just the fingers. The grandfather might also be abusing them. We have obtained an order for the grandfather to go for testing. The mother works in the Middle East.[635]

For families living in the rural areas, many homes are in traditional African village set ups where they share a compound or boundaries with their uncles, cousins, brothers, grandfathers. This creates additional opportunities for covert liaisons. These liaisons are escalated by such communal nocturnal village activities like weddings and *matangas* (funeral vigils).[636] They create

[632] Interview with S N, minor (Likoni Children's Remand Home Likoni Mombasa, 28 June 2018).
[633] Group Interview, Nyali Police (n 575).
[634] Interview with Kwale Probation Officer (n 574).
[635]Group Interview, Nyali Police (n 575).
[636] Interview with Kwale Probation Officer (n 574).

opportunities and atmosphere to lure the younger members of the family, especially the females in their teens, into sexual activity. In some communities at the Kenyan coast, intermarriage between cousins is allowed. This has an effect in the way cousins relate to each other during adolescence.[637] The organization of the family set up is hence visibly a key factor in the incubation of IFCSA and must be a consideration in framing an appropriate response to the abuse.

It is impossible to legally respond to IFCSA without unsettling the structure of the concerned family. The degree and extent thereof will vary from case to case. When a child is abused by a stranger, they most likely have their family to fall back on for support, love, care and protection. The support is available from the time of detection, reporting, prosecution until sentencing and thereafter. However, in case of IFCSA, the child has to deal with the crisis of how to relate with the person that they previously trusted and probably loved but who now has turned against them. It therefore follows that IFCSA cases cannot be effectively responded to without due regard to the effect of the response to the family unit. Y N narrated how her father warned her that if she told anyone about the abuse, he would delete his name from her birth certificate and she would have to look for another father.[638]

When the criminal justice process is set in motion in IFCSA cases, the other family members too, often have to play a role. They may be called upon as witnesses, either for the prosecution or for the accused. This creates opposing camps as some members side with the perpetrator while others sympathize with the victim. The process inevitably disrupts the family and has the potential to cause family break up and loss of relationships. This tension often spreads to the extended family. During the hearing of Nadia's case,[639] the hostility between the two camps was so conspicuous that the court agreed to grant orders to protect Nadia from the perpetrator's 'camp' within the family. All through this, the family usually has to deal with breach of their privacy and negative public exposure as such incidences attract a lot of media attention.

[637] Ibid.
[638] Interview with Y M (n 611).
[639] *Republic v GN* (n 27).

The tension around family ties does not end at sentencing. The kinship between the victim and the perpetrator of IFCSA, being filial and permanent, cannot be erased by a jail sentence. Whereas a divorce can legally terminate matrimonial ties, there is no known legal method of severing other kinship relations. It is even more complex where the perpetrator is a father and the victim has other siblings who have not been abused. The latter may side with the perpetrator creating more strain in the family.[640]

The impact that a legal response has on the marriage is even more pronounced. A mother's cooperation with the legal system often marks the end of her marriage. Women often have to weigh between the value they place on their children vis-à-vis their marriage. Often times, the subsistence of the marriage is prioritized over seeking justice for the abused child. It is not uncommon for the mother herself to hide the perpetrator from justice especially where he is her husband. Most mothers prefer not to 'spoil their home' as observed by a Probation Officer:[641]

> Some mothers are simply cold about it; as if nothing happened. They say, it could have been worse, the child could have died. She has not died. She is still alive, why should I make things worse by destroying my marriage? In that particular case, the girl was an imbecile who had been defiled by her biological father.[642]

Pressure exerted on the woman by her in laws and the rest of the extended family also plays a significant role in the manner in which IFCSA is responded to. Some women are evicted from their homes by the extended family.[643] This often follows the narrative in *S.N.T. v Republic*:[644]

> At around 5:00 p.m. on the same day, while J, the complainant's mother, was cooking, she observed the complainant was having difficulties while in a sitting position. Upon inquiring, the complainant informed her that the appellant had sexual intercourse with her. J examined the complainant and noticed she had some spermatozoa on the vagina. J told the court that when she confronted the appellant, he refused to take the child to the hospital. J informed the appellant's mother and other elders about the sexual assault. The appellant's mother forbade J from disclosing the sexual assault to anybody else.

[640] Interview with Kwale Probation Officer (n 573).
[641] Interview with Naivasha Probation Officer (n 601).
[642] Ibid.
[643] Group Interview Nyali Police (n 574).
[644] *S.N.T v Republic* (n 580).

The issue of family ties is complicated further in a polygamous setting. Apart from the now magnified extended family pressure, the family members ordinarily take sides. The main division is along the line of those who support the victim and those who support the perpetrator. The division plays itself out even during jail visits. Pastor A, serving a prison sentence for an IFCSA offence, confirmed that his two wives did not see eye to eye on the issue of his incarceration. The wife who was the mother to the victim would never visit him. Her co wife and her son, on the other hand, visited him regularly.[645]

The children of a family responding to IFCSA particularly suffer hardship both during trial and where the perpetrator is incarcerated. The intricacies around concerns of family ties and the hardship suffered by the children is well demonstrated in *Republic v A.N.N*.[646] The children were left in the sole custody of the father after the mother travelled to Saudi Arabia for greener pastures when he routinely defiled them. They first reported to their paternal grandmother who told them that the act was a secret and they should not tell anyone. The father continued to defile them every night and morning before they left for school. He would defile one and make the other watch. In addition, he showered and dressed in front of the children. In order to avoid further obstruction of justice by perpetrator's family, the children were relocated from their home in Kiambu to their maternal home in Gilgil. This caused disruption of a life they had always known though it was out of necessity. In addition, the request by the prosecution to have their father's bond suspended was granted. The suspension was upheld until the minors gave their testimony. The trial itself took place in Naivasha and it therefore necessitated the children travelling severally from Gilgil to Naivasha. The accused was eventually sentenced to life imprisonment.

In extreme cases where a father is incarcerated and the mother is deceased, the family unit disintegrates completely and the children are left without a fixed address of abode. An IFCSA inmate serving his sentence at the Shimo la Tewa Prison narrated the plight of his daughter as follows:

[645] Interview with M W Y, Inmate Shimo la Tewa GK Prison (Shimo la Tewa Prison Premises, 16 September 2016).
[646] *Republic v ANN* (n 628).

> When I was jailed, she (victim/daughter) was living with a teacher. She then left to a friend's in Nairobi, then she went to Nakuru to her maternal grandparents and then back to Nairobi. I hear she is now in Malindi. We do not talk. My children are suffering. Their mother is dead. They live in different places but I am not sure where. They have no one to guide them. They dropped out of school. [647]

Often times, IFCSA against older girls may result in pregnancy. The children born out of this incestuous relationship complicate the dynamics of the family further. In the African tradition, such children are generally unwanted. In the Luhya community a child of incest is a taboo child and cannot be raised within the family. This was the case in *Re Baby GTO alias Unknown Male Child* where the child case was voluntarily given up for adoption by his birth parents. The birth mother, who was only fifteen years when she bore the child, had been defiled by her uncle leading to conception of the child.[648]

Some effects of IFCSA on family ties are at times irreversible especially where the victim is an adolescent girl and the perpetrator is her father. Where it goes on for a long period without detection, the child may be irreversibly traumatized and even reach a stage where she accepts it as a new 'normal'. The ultimate impact of IFCSA on family ties is as brought out by a judicial officer:

> Where one is violated by a stranger, they may overcome quickly through counseling but this one who was being violated within the home doesn't even know how to relate to the mother. You see at times we even have the problem of the mother blaming the child. There are some mothers who blame the children for example, 'you took my man', *'enda utafute wako'* (go and look for your own man).[649]

The impact IFCSA has on family unit explains why its response is often shrouded in a conspiracy of silence within the family. It is more likely to be covered up or dealt with away from the glare of the open criminal justice system. This reality needs to be a primary consideration in crafting out an appropriate restorative response. Victim WA acknowledged that on hindsight, she appreciates that had her mother reported the abuse she went through in the hands of her uncles; there would have been serious repercussions on her standing in the family:

[647] Interview with Pastor A, Inmate Shimo la Tewa GK Prison (Shimo la Tewa Prison Premises, 16 September 2016).
[648] *In Re Baby GTO alias Unknown Male Child* Mombasa High Court Adoption Cause No 14 of 2013 [2013] eKLR.
[649] Interview with Okwengu, J (n 578).

> My mother would have ended up being the black sheep of the family. Nobody would have accepted her anymore as a member of the family. Most people would have been like why are you doing this to your cousins? Because they were really her cousins.[650]

In the words of Willy Mutunga, CJ, 'preserving amity and cohesion in the family is paramount whenever one faces the two choices of retributive justice or restorative justice'.[651] Though family cohesion is important, it has to be seen as one of the many other needs and interests that a victim of IFCSA has. It can therefore not be a reason for trouncing the other rights of the victim. Responding to IFCSA is therefore a delicate balancing act as far as managing family ties is concerned.

4.6 The victim's livelihood

Closely related to family ties is the question of the livelihood of the victim and their family. Livelihood refers to the means of securing the necessities of life including food, clothing, shelter, education, and other needs.[652] Livelihood therefore goes hand in hand with economic empowerment. A child falls in the position described as 'dependency based vulnerability' where they rely on others to meet their needs.[653] They lack independence as far as livelihood is concerned. Livelihood therefore has a strong bearing on the trajectory of an IFCSA. This includes whether and when it will be disclosed, to what extent, and whether the family will submit itself to and cooperate with the institutions of justice.

As is apparent from the discussion on family ties above, the parent who is more affected by the ramifications of IFCSA is the mother. It is her livelihood therefore that calls for interrogation. Despite being amongst the most hardworking in the world, two thirds of the world's poor are women.[654] Patriarchal structures and attitudes discussed above have been identified as great

[650] Interview with WA (pseudonym), victim of IFCSA (Rainbow Estate, 3 July 2013).
[651] Email from Willy Mutunga, then Chief Justice of the Republic of Kenya, to author (13 May 2016).
[652] Oxford Dictionaries, http://oxforddictionaries.com/definition/english/livelihood, accessed on 14 October 2013.
[653] L A Weithorn, (n 283) 185.
[654] L Maloiy, 'Patriarchy and the Control of Resources: Contributing Factors to the Feminization of Poverty in Kenya' (African Economic Conference, Kinshasa DRC (2-4 November 2015) 1 https://www.afdb.org/uploads/tx_llafdbpapers/Patriarchy_and_the_control_of_resources-_Contributing_factors_to_the_feminization_of_poverty_in_Kenya_.pdf accessed 23 August 2017.

contributors to the feminization of poverty.[655] In Kenya, as in most of sub Saharan Africa, women rarely have control of the means of livelihood. It is no wonder that poverty has been said to wear the 'face of a woman'.[656] The males within the family are often the providers and bread-winners. A lot of women also owe their access to basic necessities like the roof over their heads and medical insurance to their husbands. This may be due to the fact that the home is in the husband's ancestral home where the wife's interest over the matrimonial home is more complicated than clear, or by virtue of the fact that the husband is the one who pays the rent. In a place like Naivasha, many families, especially in the flower farms, are housed by the employer. Where the man is the one assigned the house by his employer, the mother enjoys the shelter at the pleasure of both her husband and his employer.[657]

When the provider doubles up as the perpetrator, the victim's livelihood becomes a major concern especially where the criminal justice system results in incarceration. A research by Lalor on child sexual abuse in Kenya and Tanzania[658] has hence observed that children are less likely to report where they are anxious of the effect incarceration of the perpetrator on the family's livelihood. The concern of the victim's livelihood is even more profound in a developing country like Kenya where state welfare is unknown or erratic.[659] It is in this light that Kisanga observes that the protection of children from child sexual abuse within the family is closely tied to economic empowerment of women.[660]

A child rights advocate working at the Coast General Hospital Gender Based Violence Recovery Center (GBVRC) narrated how she frequently witnessed victims and their mothers agonize over the dilemma of their livelihood upon being advised to report the sexual abuse to the police. This would be verbalized in statements such as, 'even if I report and he is convicted, what happens to me and my children…how do I feed the other children and how does it help the child who was

[655] Ibid 7.
[656] A Jaggger, (n 18) 240.
[657] Group Interview Naivasha Police (n 596).
[658] K Lalor, (n 20) 833.
[659] There exists a National Plan of Action for Orphans and Vulnerable children but this program does not include victims of IFCSA < http://www.ovcsupport.net/s/library.php?lk=demographic+factors> accessed on 17 October 2013.
[660] F Kisanga et al, (n 6) 482.

defiled?' or a child will be heard wondering aloud, 'Now if I report my dad, who will look after my mother…' [661]

When a victim of IFCSA is forced to engage the formal justice system against their deeply entrenched concerns about their livelihood, their likelihood of turning into a hostile witness is high. This is a witness who intentionally gives evidence totally different from what they initially recorded when reporting the offence in order to frustrate the case.[662] Evidence given by a witness who is declared hostile has no value. Where the victim, who is the usually the only eye witness in an IFCSA case, is declared a hostile witness, a likely result is the collapse of the case and subsequent acquittal of the perpetrator.

The issue of livelihood was also played a major role in WA's family's decision not to report her sexual abuse as a child by her two uncles. The uncles were truck drivers who supported her family financially. Reporting the abuse would have meant threatening the whole family's livelihood. WA was left to deal with the abuse the best way she could as a child. She rationalized the family's situation as follows:

> IFCSA is very common but I think the problem is mainly because the family also depends on those same … it could be a stepfather….if a woman who is desperate gets married and the stepfather takes advantage of her daughter…she cannot kick out the man because maybe she needs the man….. For example with us it was really tight when we were growing up and so when my uncles used to come they would bring something. They used to be truck drivers. So they would bring food and all that stuff. I have a feeling like right now when I sit back I have feeling they were taking advantage of that because my mum could not like tell them off because they were like really helpful. …My mother relied on his cousins who were abusing me for financial support. When I complained, nothing was done to them. I developed my own coping mechanisms. Whenever they came to visit, I hid away from them.[663]

It is common for issues of livelihood to come to the fore in court during the trial of IFCSA cases such as the case of thirteen year old NN discussed at the introductory part of this thesis.[664] Fortunately for NN, the Department of Children Services was able to trace a maternal uncle in

[661] Interview with E Aroka (n 592).
[662] Evidence Act, 1963 (KEN) Section 161.
[663] Interview with WA (n 650).
[664] *Republic v GN* (n 27).

Tanzania who volunteered to take over parental responsibility. The issue of livelihood however necessitated the transplanting of NN from her friends and life she had always known, to a foreign country. Not all victims have traceable benefactors. For them, responding to IFCSA is usually at a very high cost to them and their families.

Pursuing the prosecution of a criminal case also comes with some financial cost for any victim. The cost is both hidden and direct and it impacts on the victim's livelihood. The Legal Officer at the Gender Recovery Center expounded on the financial implication of pursuing justice as follows:

> A majority of cases you are seeing here are from victims in the low economic strata. …getting that transport to come and report this matter is a challenge. So you can imagine a situation where they still have to go to probably a police station and to court and all that. And at times they are told *enda urudi, enda urudi.* (go then come back later). Sometimes they just decide, what is in it for me? So they decide to give up because they are looking at what they are putting in terms of their finances what they are losing out in the process of walking up and down. You can imagine if it is someone who sells *viazi karai* (deep fried potatoes) in the streets. They are thinking, 'when I am out am pursuing my case, my business is at a stand-still.' In any case, most of them still do not have much faith in the justice system. So they look at it and say, 'after all I might do all these things and in the end I might not get justice. Why should I follow it up as much as I should?' So the person abandons the case.[665]

Just like family ties, the concern of livelihood is equally magnified in a polygamous setting where the offending father is the primary bread winner of a large family. A case in point is that of HK, incarcerated at Shimo la Tewa prison for an IFCSA offence. His family of three wives and nine children were suffering with most of the children dropping out of school. The family was largely left under the care of the perpetrator's brothers who were also struggling to look after their own polygamous families.[666]

In an ideal situation, the concern of IFCSA's livelihood is cushioned by the state's intervention. In the Kenyan situation, however, there is no demonstrable goodwill from the State. Despite the enactment of the Victim Protection Act that establishes the Victim Protection Fund, the reality on

[665] Interview with E Aroka (n 592).
[666] Interview with inmate K H (n 629).

the ground is that the state has no budgetary allocation for victims.[667] The Witness Protection Agency established under the Witness Protection Act may also play a part in alleviating the livelihood needs of the mother in her capacity as the witness.[668] However, despite the decentralization of the Agency to the Coast region, none of the professionals interviewed in the three regions were familiar with the office or the workings of the Agency. The Department of Children Services, in whose docket IFCSA victims primarily fall, is underfunded and neglected by the state. Where funds are allocated, they are supposed to be released from the consolidated fund quarterly in advance. It is however not uncommon for funds to reach the regional offices after an inordinate delay. The Children's Officer in Naivasha, for instance, confirmed that they had received their 2016 second quarter allocation in October and painted a gloomy picture of their state of funding as follows.

> We have no money for emergencies. We usually mobilize resources from partners like Red Cross like for resources needed for transportation and reintegration. As for vehicles, we share with the Probation Department….. We are not consulted when the budget is prepared in Nairobi. Money is supposed to be sent every quarter but it always arrives late.[669]

The upshot of above is that the price a mother and child victim pay to maintain their autonomy and pursue formal justice in cases of IFCSA is normally very high. Most therefore prefer not to pursue the cases as demonstrated by the experiences of a judicial officer with over thirty years' experience on the Kenyan bench, Okwengu, J:

> You find that many times these cases are not reported because at times the woman is in a dilemma. At times the woman is not working; she depends on the man and if you report, the only thing they are aware of is that the man will be arrested and taken to court and jailed. Then what? You are there with the child and you also have no one to take care of you. So it is sort of a catch twenty two situation where you really want to do something but you don't know what to do……I've had a situation where the woman was asking me, 'what do I do?' and I could not really answer her. I knew that it is something that should be reported but then given all these other dynamics, I couldn't tell her to report. I told her, '…you just have to think, these are the options but you just have to decide on what to do because I know what you are going through and I know it is not an easy decision to make'.[670]

[667] Interview with Kwale Probation Officer (n 601).
[668] Section 31.
[669] Interview with Naivasha Children Officer (n 577).
[670] Interview with Okwengu, J (n 578).

There are few privately sponsored Rescue Centers which have been established in Naivasha, Kwale and Mombasa. None has the capacity of holding more than one hundred children at a go. Their existence has however not totally ameliorated the problem of livelihood. This is because IFCSA, by its very nature, generates multiple victims with diverse and at times conflicting interests. Apart from the abused child, there is the mother and the victim's siblings. The rescue centers' sole concern is the safety of the primary victim. This therefore means that even where a child victim is accommodated in a Rescue Center, the livelihood of the mother and the non-affected children remains outstanding.[671] Other livelihood issues that are not catered for by the Rescue Centers include the victim's education. The Centers are also provisional in nature pending a permanent intervention by the state and do not take up the children on permanent basis.[672] In Mombasa County, the longest period the rescue center can house a child is six months after which they must leave.[673]

At the core of the issue of the victims' livelihood is the government's over reliance on the goodwill of Non-Governmental Organizations at many levels. This has resulted in the privatization or total neglect of state facilities designated to cater for children in need of care and protection. Many of them exist only by name. Services are only available in private institutions which are few and often beyond the reach of most victims.[674]

The gap left by the state as far as the livelihood of an IFCSA victim is a key concern of the proponents of vulnerability theory as discussed in chapter two of this thesis. The solution is discussed in chapter five under the discussion on the possible entry points of restorative justice. Suffice it to say, the issue of the victim's livelihood is a primary consideration in crafting an appropriate restorative response to IFCSA.

[671] Ibid.
[672] Group Interview Naivasha Police (n 596).
[673] Interview with C Muinde (n 600).
[674] Ibid.

4.7 Beliefs, Taboo, and Stigma

Sex is generally considered a taboo subject in most communities in the sub Saharan African region.[675] The subject is rarely openly discussed and has many myths associated with it. The mystery around sex as a subject impacts IFCSA in two ways. First, some myths around it are used to instigate or justify IFCSA and secondly, other myths act as a hindrance to an objective response to IFCSA.

With regard to taboo as an instigator, the most common myth is the cultural belief that one can find solutions to a myriad of problems by having sex with children. The most accessible children are those within the family which makes them easy prey to adults within the homestead.[676] For instance, in *R v Nyawa Dongoi Mvurya* the accused was charged with defilement of his two daughters, aged fifteen and seventeen years old respectively. The defilement was pursuant to instructions from a witchdoctor, as part of a prescription for various problems in the family. The first problem was financial. One of the daughters had been sent home from school as she did not have a geometry set. The father, who was unemployed, believed the local witchdoctor could offer a solution and went to consult him in the presence of his daughter. The witchdoctor advised the father to have sex with the daughter and thereafter bath with water spiked with some herbs. This was guaranteed to help him find money to buy the geometry set. The other problem sought to be solved through the incest was the need to perform well in school. Upon further investigation, it was discovered that the father had also sexually assaulted his other daughter, on the same witchdoctor's advice, in order to guarantee a good performance in her examinations.[677]

Other common myths include the belief in some communities that the father must be the first to enjoy the 'first fruits' of the daughter's virginity before she loses it to anyone else.[678] There is also the unfounded belief that sexual intercourse with a child cures a myriad of chronic diseases especially HIV. This has been one of the reasons behind grandparents preying on their

[675] Lalor (n 20) see recommendations at the end of the unpagenated publication.
[676] Bofa Community Focused Group Forum (n 586).
[677] *Republic v Nyawa Dongoi Mvurya* Kwale Resident Magistrates Court Criminal Case No 1262 of2014 (unreported).
[678] Interview with Naivasha Probation Officer (n 601).

granddaughters.[679] Absurd as the association of child incest with witchcraft may seem, it is still a fact that cannot be ignored in seeking an appropriate response.

As earlier mentioned, the fact that sex as a topic is associated with taboo and secrecy in the African culture, has an impact on the manner in which IFCSA is responded to. This taboo hallmark is magnified where sex has to be discussed in the context of deviation from social and moral norms. IFCSA represents one of the highest forms of such deviation. IFCSA's association with mystic beliefs and taboos translates into the stigmatization of all the parties involved. These include the unborn. In a number of communities in Kenya any child born out of an incestuous relationship is considered cursed and capable of bringing bad luck on anyone who raises them. Such children are usually abandoned or given up for adoption to be raised away from the community.[680] The stigmatization in turn has the potential to impede an objective response. In the words of the presiding judge in *PMM v R,* 'the offence of incest invokes shame, and is taken to be a curse among most communities of Africa'.[681] When faced with the reality of stigma, most victims and/or their families prefer to keep the abuse to themselves. It is therefore no wonder that none of the three adult victims of IFCSA interviewed in this research had the courage to immediately report the abuse to anyone including their family members. Victim DSB was repeatedly defiled by her older cousin who lived with them for a period of five years since the age of six years. This happened while her mother slept in the adjoining room. She stated that she chose to remain silent as she felt that the mother could not handle this grave taboo issue as she was at the time battling schizophrenia and HIV related ailments.[682] Victim JG was severally defiled by a cousin who lived in the same neighborhood in the village. She too never reported as she feared that the mother would 'collapse' if she learnt of the abuse. This was despite the fact that she had the opportunity to inform the mother when she complained of pain while taking a bath.[683] Victim WA, on the other hand was defiled by her uncles who frequently visited her home. On the reason why she failed to tell anyone about the abuse, she simply stated that 'you do not talk of such things'.[684]

[679] Interview with Kwale Probation Officer (n 573).
[680] In Western Kenya, there is a home established specifically for the rescue of children born out of incestuous relationships <http://www.janddchildrenscentre.org/what-we-do> accessed on 16 October 2013.
[681] *PMM v Republic* (n 583).
[682] Interview with DSB (Pseudonym), victim of IFCSA (Nairobi, 20 February 2016).
[683] Interview with JG (Pseudonym), victim of IFCSA (by phone, 26 January 2017).
[684] Interview with WA (n 650).

The stigma is not confined to the community. It is detectable even at the level of professionals. This is discernable from the attitude of the service providers. Upon receiving the report of an IFCSA incident, their initial reaction often betrays their deep seated attitudes. This usually takes the form of insensitive expressions of disbelief designed to discourage the victim from pursuing the shameful issue further. The Mombasa based child rights advocate gave the example of a nurse who would ask an IFCSA victim, 'Why are you telling such lies about your father?' or the police officer warning another IFCSA victim, 'if this story ends up being false you shall be jailed'.[685] The community and professionals are therefore more enthusiastic about abuses by strangers than those by members of the family because the former has less stigma.[686] The reality of the increased stigma attached to IFCSA must be acknowledged in developing a viable restorative response to these cases. This calls for a rethinking of the scope of application of restorative justice, not just as a process or set of values, but as a lifestyle.

4.8 Community Expectations

A typical response by the larger community of an IFCSA incidence usually takes the form of the following media report:

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

[685] Interview with E Aroka (n 592).
[686] Ibid.

> father and daughter and have been sent to the labs in order to establish the veracity of the allegations.[687]

There is a general assumption that the expectations of victims of IFCSA and their families correspond with those of the larger community. The above account, though reported as any other sensational news feature by the media, chronicles a typical scenario of the differentiated way in which IFCSA cases are perceived by the family and the community at large. As is evident in this story, the response of families immediately affected by IFCSA is often at variance with that of unaffected third parties. To the latter, it immediately evokes outrage and a range of other strong emotions directed at the perpetrator whom they feel should be subjected to severe punishment. IFCSA is usually less likely to be voluntarily disclosed by the victim and their family than child sexual abuse by a stranger. As discussed earlier, the more natural response by the family is to manage it in a way that will best mitigate incidental loss and damage. This may include sweeping the incident under the carpet altogether. These multiple interests relegate the punishment of the perpetrator lower on the list of priorities. It is therefore not a wonder that the offence in the Momposh case above was reported by 'a group of women' and not the primary victim or her mother. This was after curious neighbors figured out a sexual abuse following a pregnancy whose paternity the rest of the family appeared not keen on following up. [688]

The expectation of the general community, on the other hand, is inclined more towards an overt public condemnation of the act followed by severe punishment to the offender. [689] This resonates more with the FJS whose main goal has been described as to 'serve and visit opprobrium and moral reprehensions on offenders who engage in morally impermissible exploitation of gullible children'.[690] The expectation of the community is therefore often at cross purposes with the immediate interests of the victim and their family. The family may not be too eager to escalate the case to the FJS as the system does not come with economic or social support for the family. It is

[687] Standard Digital News report of 6th October, 2013 on http://www.standardmedia.co.ke/mobile/ktn/watch/2000070588/a-man-slept-with-her-standard-six-pupil-daughter-and-fathered-her-child. Accessed 6 October 2013.
[688] Ibid.
[689] B Naylor, 'Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways' (2010) 33(3) UNSW Law Journal 662, 666. http://www.unswlawjournal.unsw.edu.au/sites/default/files/28_naylor_2010.pdf accessed 22 February 2017.
[690] Email from Willy Mutunga, CJ (n 651).

therefore a specificity of IFCSA that they are often disclosed and reported by persons other than the concerned family members. The outsiders therefore usually appear more zealous in having the case prosecuted than the family members. The effect of the disparity between the expectation of the family and that of the outsiders complicates the trial process as discussed earlier in this chapter. This leads to the pertinent question discussed here below on who really owns an IFCSA conflict.

4.9 Whose Conflict?

As discussed in the previous chapter, there has been a notable shift with regard to the place of the victim of crime in the justice process.[691] The parties in a criminal case have however remained the state and the perpetrator, the place of the victim and their family in an IFCSA setting often creates tension vis-a-vis the role of the state. In the words of Joel Ngugi, J, a conflict such as IFCSA does not exclusively belong to the state but is an 'inclusive dialogic decision making process in which the judicial officer is taking part'.[692] The tendency, however, is for the state to claim total ownership of the conflict. As discussed in chapter two of this research, Nils Christie, a proponent of restorative justice, perceives conflict as property capable of being stolen. He argues that the criminal justice system plays the role of facilitating the taking away of the conflict from the parties who are directly involved to other parties.[693] He reckons that the state steals the conflict from the complainant. The confiscation of the conflict is not only at the conceptual level. The location, venue and setting where the conflict is ultimately designated are usually alien and far removed from the world of the victim and their families. As state organs of dispute resolution, they are designed to mechanically resolve compartmentalized disputes between private parties whether on property, contract, tort, or between the government and an individual concerning allegations of criminal wrongdoing or regulatory violations.[694] They are, by their very nature, incapable of resolving complex issues that give rise to claims that cut across the various compartments of the formal court system in one sitting. This is the nature of most conflicts in any given society. For instance, a land dispute may give rise to a murder case or defilement case give rise to child maintenance and custody dispute. However the compartmentalized formal court system only deals

[691] *Veronica Gitahi v Republic* (n 447) and VPA (n 37).
[692] Interview with Joel Ngugi J (n 612).
[693] N Christie, 'Conflict As Property' (n 154).
[694] B J Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', (2002) 30 (3) Fordham Urban Law Journal 1055.
http://aupa.wrlc.org/bitstream/handle/11204/4218/Therapeutic%20Jurisprudence%20and%20Problem%20Solving%20Courts.pdf?sequence=1 accessed 22 February 2017.

with single issues presented before it in a legally cognizable way and in a singular manner without going deeper to interrogate underlying social problems. The formal system is also tedious and provides limited opportunities for participation by the protagonists of the conflict.[695]

Faced with the above circumstances, a natural reaction by the protagonists is resistance to handing over the conflict to the formal justice system and an inclination to hoard it. Upon retaining the conflict, they deal with it in their own way. This includes sweeping it under the carpet or resulting to traditional dispute resolution mechanisms which they deem 'free from lawyers, their law, and the law system of the capital'.[696]

Other factors that incline the victim and their family towards retaining the conflict within the informal circles include the assurance of more direct participation both in the process and in designing the final settlements, and the opportunity for more direct dialogue and reconciliation. The children's officer in Mombasa gave the example of the case where the perpetrator died in remand prison awaiting trial for sexually assaulting his sixteen year old daughter. The family immediately blamed the victim and declared her an outcast. They were convinced that the perpetrator's death would have been avoided had they been allowed to resolve the issue their own way, away from the formal justice system.[697]

Other factors that favor retention of the conflict by the family include the need to control the flow of confidential information since no public records are kept and the informal system has no mechanism to subpoena a lot of information. Further, the end result of the informal process is more likely to translate to more flexibility in designing creative settlements that are more familiar to the victim's family than the one meted out by the courts. The fact that the outcomes are not backed by enforcement mechanisms like incarceration puts the family more at ease. For these reasons, they may be more resistant to surrendering the management process and the outcome of the conflict to the formal system that does not only resonate with their priorities. Whereas the state's ultimate

[695] Interview with Joel Ngugi, J (n 612).
[696] W Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (n 377).
[697] C Muinde, Children's Officer Mombasa (n 600).

goal is to punish the perpetrator, the family's priority is to retain custody and control of the conflict in order to manage it in a way that is meaningful and beneficial to them as a family unit.[698]

The tension around the ownership of the conflict between the state and the concerned family is therefore bound to be more pronounced in IFCSA cases. Where, for instance, the child is of tender years, the family may feel that jailing the perpetrator may result in no direct satisfaction to the child victim.[699] The family may then opt to spare the child victim from the rigorous court process and instead exclusively focus on the healing of the child through psycho-social and medical support. Thirteen year old SN who was interviewed from a children's home where she was being sheltered after a stranger picked her from the stranded in the streets while on the run from her abusive father, had no interest in having her father prosecuted . All she was interested in was reuniting with her grandparents.[700] An adult victim of IFCSA who gets a belated opportunity to report an IFCSA incident in their adulthood may also opt to keep the conflict away from the formal justice process. In a discussion between the writer and DSB on whether JG should seek formal justice against the relative who had defiled her during her childhood thirty years earlier, DSB advised that JG should consider concentrating on healing instead of having the perpetrator investigated and prosecuted as it would not add much direct value to JG.[701]

The question of ownership of the conflict was indirectly discussed by the court in *PMM versus Republic.*[702] The court was called upon to make a determination on the consequences of lack of cooperation by the immediate victims of IFCSA during trial. This was an appeal against a conviction where the appellant had been charged with defiling his ten year old daughter. The appellant's main ground of appeal was that the case was not sustainable as it had no complainant. He based this ground on the evidence of his daughter, the victim, who during trial gave an unsworn statement and denied that her father had defiled her. She stated that she had been asked by their neighbor, 'Mama Shiko' to say that her father had defiled her so that she could be taken to see her mother in the hospital. Her mother had gone to the maternity hospital to deliver a baby. The court

[698] Interview with Joel Ngugi, J (n 612).
[699] Interview with Naivasha Children's officer (n 577).
[700] Interview with SN (n 632).
[701] Interview with DSB and JG (n 682 and n 683 respectively).
[702] *PMM versus Republic* (n 579).

observed that, many victims of sexual abuse, by relatives, and those close to them, suffer from trauma and self-denial. Such a victim is hence torn between denial in the presence of the relative or friends (the father and the mother in this case), while complaining quietly to third parties, (Mama Shiko). The appellant further raised the question of who the actual complainant in the case was in the light of the fact that the victim had denied having been defiled by him. In answer to this question, the court found that the complainant does not have to be the victim. It identified a complainant as follows:

> The complainant is any concerned citizen of good will. A neighbor concerned with the fact the child or children are habitually locked in the house by a single parent, or parents without food, or denied to go to school, or that they are battered. Such neighbors, or witness to a hit and run accident, are all legitimate complainants. In this case, the complainants were the victim\'s and the appellant\'s neighbors, ladies who were concerned that a child was being defiled by the father, the appellant.[703]

The above finding is a clear demonstration of the formal justice system's attitude towards ownership of the conflict. It does not belong to the protagonists or the family. The conflict belongs to the system. This position does not always resonate well with that of the immediate family. This tension is often the cause of the difference in expectation the community and the immediate family as discussed above.

4.10 The Up Shot

Interrogating IFCSA with regard to its prevalence, and its interaction with patriarchy, family set up, livelihood, taboo and stigma, community expectations, and the question of ownership of the conflict, is useful in the exploration of a more comprehensive response to the abuse. The specificities in particular assist in the identification of the handicaps that come in the way of an effective response. These are the same handicaps that propel victims and their families towards the path of least resistance. This may take the form of either sweeping the incident under the carpet, or outright complicity and acquiescence by those supposed to report the offence. The handicaps have the overall effect of complicating the reporting, investigation and prosecution of IFCSA

[703] Ibid 3.

cases. This justifies more the need to explore restorative justice both within the formal and informal systems.

From the discussion throughout this chapter, it is no wonder that one question answered uniformly by all the respondents in this study was on whether a victim of IFCSA is impacted differently from a victim of child sexual abuse by a stranger. All the respondents were of the view that the impact on the former is graver, more permanent, far reaching and complex than on the latter. This response is reflective of the picture created by Ryan when he summarized the impact of IFCSA as 'complex in emotional and social aspects'.[704] Professor Ngugi summarized it as follows:

> There are three dangers for child victims especially in familial settings. There is of course the re victimization by the justice system which everybody talks about and that we can mitigate through how we handle court though you cannot eliminate it. It's a fact. Then there is re victimization through the stigma. The third one is re victimization through denial of livelihood or abandonment that happens as a result of the offender being incarcerated. Because it has implications for not just the victim but for the victim's family etc. So when you look at it through the lens of the formal justice system it seems that justice has been done but it is done from a very narrow perspective; a state-centric perspective.[705]

This chapter has distinguished IFCSA from child sexual abuse by a non-family member by unpacking the various issues a victim of IFCSA has to contend with in pursuit of justice. It is clear from the foregoing that an IFCSA victim encounters unique experiences. Whereas the shock effect of abuse by a stranger is likely to trigger an immediate and seamless resort to the formal justice process, the specificities discussed above have a cumulative opposite effect. The pertinent question then is, whether the elasticity of restorative justice can adequately accommodate these specificities. This chapter has therefore set the stage for a discussion in the next chapter on the entry points available for restorative justice as a way of offering a more comprehensive response to IFCSA.

[704]B Ryan et al (n 16).
[705] Interview with Joel Ngugi, J (n 612).

CHAPTER FIVE: ENTRY POINTS FOR RESTORATIVE JUSTICE IN IFSCA CASES

5.1 Introduction

There are three discernible deductions that stem from the last three chapters. The first and most obvious is that IFCSA possesses peculiar specificities that distinguish it from child sexual abuse by a non- family member. Secondly, the legal framework under which IFCSA is responded to, is riddled with structural and institutional flaws that have led to notable deficiencies and procedural gaps. The framework is hence incapable of delivering holistic justice to the victim of IFCSA. The third is that IFCSA occurs within the context of a pluralistic legal and normative order. The communities' notable enduring affinity for IJS in IFCSA cases is a reality.

The deficiencies and gaps in the FJS are not the sole reason for the community's affinity to IJS. It is therefore not the intention of this study to advance IJS as the panacea for all the shortfalls in the justice system. The study does not also propose the replacement of the FJS with IJS since the latter also has its own challenges. The point is that the level of confidence IJS enjoys from the community, even amidst the question of its legitimacy and legality, cannot be overlooked. This study considers IJS as a viable organic ground for prospecting restorative responses to IFSCA. The prevailing legal pluralism discussed in chapter two, lays a basis for interrogating the modalities of IJS that are restorative in nature. The discussion on the opportunities available for restorative justice is therefore not limited to the FJS.

This chapter wraps up the study by highlighting possible entry points for restorative justice in the formal criminal justice system's response to IFCSA. It identifies mechanisms, processes and values that give as much support as possible to the victim by addressing the specificities of IFCSA. The support includes enhancing their voice, visibility and participation in the criminal justice process while at the same time alleviating their suffering and restoring them as much as possible. The proposed reforms mainly relate to the court process but they require the support of the legislature and executive by way of legislative and policy intervention respectively. The proposals therefore call for synergy between the three arms of government for their impact to be realized.

The chapter comprises three main parts. The first part discusses specific opportunities in the justice process that would lead to a more restorative response. These primarily include aligning the court

towards more intentional embracing of therapeutic jurisprudence, and candidly incorporating certain IJS values, processes and outcomes that are restorative in nature. It also discusses the possibilities of diverting certain categories of IFCSA to IJS and the need to continuously engaging with community at all possible phases of the justice process.

The last two parts of the chapter discuss the support systems that need to be put in place to facilitate the more substantive proposals in the criminal justice process. One part addresses the legislative intervention that will be required to unlock the barriers to restorative justice in IFCSA. The last part of the chapter discusses policy interventions that the resilience building state institutions need to prioritize both to protect potential victims and avail long term support to victims of IFCSA.

5.2 The Justice Process

The hallmark of restorative justice envisaged in this study is the centering of the victim's role and interests throughout the criminal justice process. This resonates with Tony Marshall's conceptualization of restorative justice as 'a process whereby all parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future'.[706] The process, from investigation to sentencing, is therefore as important as the outcome. This position is supported by the feedback of all the respondents interviewed in this study and those that attended the focus group discussions, who unanimously confirmed that they all aspired to a holistic justice process in IFCSA cases. The holistic approach was unpacked in different ways by various respondents. Some felt it entailed going beyond the simple goal of working towards the incarceration of the perpetrator.[707] It was also perceived to include 'giving a listening ear and getting a true picture about the whole thing to enable one make a decision'.[708] Others were in favor of a situation where the two parties, the victim and the offender 'go away satisfied with the victim getting real justice by recovering what they lost'.[709]

The above aspirations resonate with the aspect of restorative justice that is concerned with the value added to the victim beyond the lengthy prison sentence meted out to the perpetrator. This includes incorporating restorative justice through the intentional infusion of values, attitudes and ideals that make the criminal justice system more responsive to the needs of the victim. These are

[706] T Marshall, 'Restorative Justice: An Over View' (n 31).
[707] Interview with Advocate A Nyange (n 613).
[708] Interview with Teacher Chepkemboi (n 581).
[709] Interview with Advocate Wahome Gikonyo (n 576).

what Van Ness and Strong refer to as operational values as they impact both the process and outcome of the justice system. They include initiatives to make amends, extending assistance and empowerment to the victim, facilitating encounter between victim and perpetrator where necessary, participation of the victim in the justice process, protection of the victim, and their reintegration, among others.[710] All these values target the victim and are therefore appropriate for filling the gaps discussed in chapter three and thereby assist the IFCSA victim experience justice.

This part begins with a discussion on the place of therapeutic processes in applying restorative justice in IFCSA cases. It then highlights restorative attributes that the justice system can learn from informal justice system including accessibility, quick disposal of cases and dispensation of restorative outcomes. The section also makes a case for the possibility of diverting a limited category of IFCSA to restorative informal systems. It concludes with a discussion on the need for the justice system to widen its circle of engagement beyond the professionals to community gatekeepers for enhancement of restorative justice.

5.2.1 Therapeutic Processes as Instruments of Restorative Justice

From the specificities discussed in chapter four of this study, it is evident that IFCSA is an infraction that is bound to be accompanied by heightened emotions at all stages. For a start, responding to it demands a cultural and attitudinal shift by all the professionals involved. This shift must be evident throughout the entire process. The response should in particular deliberately avoid appearing 'as disempowering as the sexual abuse itself'.[711]

Unfortunately there is hardly any room for emotions in the traditional FJS. If anything, it is more likely to impede rather than facilitate a victim's emotional recovery through secondary victimization. There is therefore need for a carefully thought out and crafted process devoid of the negative effects of the rigid conventional adversarial system. One way of fostering sensitivity to the victim's circumstances is through the application of what has been described as 'inter personal

[710] D W Van Ness and K H Strong (n 46) 48.
[711] G M Spies, 'Restorative Justice: A Way to Support the Healing Process of a Child Exposed to Incest'(2009) 22(1) Acta Criminologica 1, 21.

and intra personal skills for understanding and managing emotions'.[712] This refers to the use of 'emotional intelligence' in the FJS which acknowledges the role of emotions in problem solving.[713]

The practices that amount to emotional intelligence vary with the circumstances of each case. In general however, they include 'the verbal and nonverbal appraisal and expression of emotions, the regulation of emotions in the self and others, and the utilization of emotional content in problem solving'.[714] Emotional intelligence is encapsulated in the emerging concept of therapeutic jurisprudence which is largely perceived as 'an approach rather than a theory'.[715] It is for this reason that it is discussed in this part rather than in chapter two under theoretical framework. The therapeutic jurisprudence approach is premised on the observation that the way the law is implemented and operates can either, increase, decrease, or have a neutral effect on a victim's psychological wellbeing. Simply put, it acknowledges that law can affect wellbeing. It therefore proposes that social scientists should identify laws, processes and procedures that enhance wellbeing.[716] Christopher Slobogin expounds further that the emphasis of therapeutic jurisprudence is to study 'the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects'.[717] The main concerns of therapeutic jurisprudence are said to include inter alia:

> the nature and role of the interactions between the judge and the parties to the conflict, the role of empathy, the psychology of procedural justice and behavioral contracting, the forms of coercion and their effect on defendants' behavior and treatment outcomes, the role of counsel and their ambivalent relationship to the courts.[718]

Therapeutic justice is traditionally mainly practiced in drug treatment courts, juvenile drug courts, teen or youth courts, domestic violence and mental health courts.[719] It is however an ideal model

[712] M S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 34 32(3) MelbULawRw 1096.
[713] Ibid 1097.
[714] Ibid 1099.
[715] Ibid.
[716] A Birgden, 'Therapeutic Jurisprudence and "Good Lives": A Rehabilitative Framework for Corrections' (2002) 37(2) Australian Psychologist 180, 182.
[717] C Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder," in Wexler and Winick, eds., *Law in a Therapeutic Key,* (Durham, North Carolina: Carolina Academic Press 1996) 775.
[718] A Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism' (2002), 20 Law Context: A Socio-Legal J. 6 11-12 (accessed 9 April 2018).
[719] Ibid 12.

of responding to vulnerable persons in the FJS such as IFCSA victims. Its place in restorative justice was highlighted by one of the respondents in this study as follows:

> There is some empirical evidence that suggests that when you have certain kinds of hearings that are therapeutic, overall, though difficult to quantify, it leads to certain improvements in the system. One, it is more likely that a restorative system is going to lead to a less stigmatization of the mother and the immediate family because the goals of the restorative system will become clear rather than that the mother and the victim are ganging up to send the offender/ our son to jail. Restorative justice is about feeling what has happened as a social conflict, so harm has happened and someone needs to be restored for the harm and the relationships to be restored. It does not exclude retribution but it provides for the restoration of the relationship with the offender, victim and community. For me that process is an important one in terms of re-centering the relationships of those who are left behind even if the offender goes to jail. This should be done by the criminal justice system. This should be during the trial. It is part of the process. In fact if it is done correctly, it is the process.[720]

The common denominator between therapeutic jurisprudence and restorative justice is their common goal of practical problem solving as opposed to focusing on a pre-determined result of say incarceration or other punishment. Use of therapeutic processes guarantees a restorative outcome as most restorative values are therapeutic in nature.

The implementers of therapeutic justice are the professionals involved in IFCSA. Whether aware of it or not, they are called upon to be 'therapeutic agents, affecting the mental health and psychological wellbeing of the people they encounter in the legal setting'.[721] There is therefore need to pay due attention to and invest in relevant training of these professionals. Those on the front line in the response to IFCSA include officers from the police service, probation and aftercare service, department of children services and the judiciary. The training should focus on empowering them to consider all the dimensions of an IFCSA conflict and handle it with the requisite emotional intelligence. IFCSA cases can take their toll on professionals involved. For this reason, the training should also include regular debriefing to avoid the scenario described by a judge:

> When the professionals are ignored, they will not be able to focus on applying the relatively new restorative justice. They operate on auto pilot or avoid the cases

[720] Interview with Joel Ngugi, (n 612).
[721] M S King (n 712).

> altogether. They therefore need continuous and structured counseling. I used to avoid sexual offences involving children because most of the times they cannot talk, cannot express themselves. Their evidence many times has already been interfered with. I used to find it very frustrating because at the end of the day many times you find that one way or another the perpetrator is escaping. And the person is escaping and you are so sure they did it. But then you know the law is the law. Honestly I just used to avoid them. When I'm in a position where I can allocate I just avoid them. It is traumatizing to handle them. It's traumatizing especially when it involves a family member.[722]

Application of therapeutic justice is expected to benefit the victim by giving them more voice and agency and being taken seriously by all the professionals they encounter. Ultimately, the resultant therapeutic process should be one where the victim's voice is heard especially with regard to what happened to them and the impact it has had on them, while at the same time bringing the perpetrator to censure and condemnation for the wrongful act.

Equally important to therapeutic practices is the need for the courts to acknowledge the low resilience of an IFCSA victim under the emerging concept of vulnerability jurisdiction. This is the jurisdiction that empowers the courts to use its powers to disrupt exploitative relationships by invoking its inherent jurisdiction. The disruption is aimed at safeguarding individual autonomy rights of the victim in situations where failure to intervene would hinder effective exercise of those rights.[723] Such intervention is critical in IFCSA cases which usually take place in a situation of unequal power play between the perpetrator and the victims due to the existing familial and age relationship. When the court remains far removed in the strict adversarial setting, the victim's rights remain unsafeguarded.

In a nutshell therefore, embracing therapeutic practices and the resultant shift in mindset and attitude by the professionals is a feasible entry point for restorative justice in IFCSA cases. It also addresses a primary concern of radical feminists which is the potential for restorative justice processes and outcomes to reinforce the power imbalance inherent in abusive relationships like IFCSA.[724]

[722] Interview with Okwengu, (n 578).
[723] M Hall, 'The Vulnerability Jurisdiction: Equity, Parens Patriae, and the Inherent Jurisdiction of the Court' (2016) 2 Can. J. Comp. & Contemp. L. 185, 186.
[724] Acorn (n 98) 224.

5.2.2 Lessons on Restorative Justice Discernible from IJS

Restorative justice must of necessity address the question as to what is to be restored. The view point of Duff and Van Ness on the subject of restoration are discussed in chapter two of this thesis. The main issues for restoration include the victim's status quo to the pre abuse state, overcoming the associated stigma, and where possible, restoration of relationships.[725] These levels of restoration require an interrogation, of both the process and value system involved in responding to IFSCA, beyond the FJS. The general idea of involving IJS in responding to IFCSA is repulsive to many especially feminists as admitted in chapter two of this study. This however does not mean that IJS is entirely without anything to offer to the FJS as not all IJS systems are repugnant to justice and morality. In fact, when it comes to processes, IJS offers useful lessons for the FJS. As pointed out in chapter three of this thesis, the community has an affinity to informal justice mechanisms. A major factor of this affinity is the restorative orientation of most informal systems in terms of processes and outcomes. It is in these restorative processes and outcomes that this study sees a learning opportunity for the FJS.

The proposition made in this study is for the need to isolate and adopt IJS attributes for purposes of infusing them into the FJS with a view to crafting a response that is more victim-centered. The adoption and infusion of attributes from IJS was described by one of the respondents in this research as a process that 'will involve a blend of loosening and fastening; formalizing the informal while informalizing the formal'.[726] In identifying these attributes, resort has to be made to the reasons for attraction of IJS by the community. These are discussed in chapter four and categorized into benign and oppressive. The latter include those that leave the victim's family with no choice but to engage the IJS. The main ones under this category are the influence of patriarchy and the stigma associated with IFCSA. It is the benign attractions, however, that this part shall focus on. These are the attractions based on their convenience. They include accessibility, quick disposal of cases, familiarity with the system, and desirable outcomes.

With regard to accessibility, IJS resonates more with the populace because it is geographically closer to them than the courts and other FJS institutions. This is evidenced by the fact that every

[725] Duff (n 103 382-397 and Van Ness & Strong (n 44) 105.
[726] Interview with Joel Ngugi, J (n 612).

time a new court is established in a particular geographical location, the number of reported crimes from that area rises. [727] The rise is attributed to the close proximity of the court. It is safe to assume that the conflicts still existed before the construction of the court but they were resolved elsewhere. A starting point for restorative justice for victims of IFCSA would be therefore to take justice as close to the people as possible. This includes the granting of equal opportunities and liberties to the parties to a dispute in a manner that benefits all including the least advantaged.[728] Access to holistic justice is all encompassing and goes beyond the provision of physical buildings. The design, facilities and operating times of the institutions must be user friendly to IFCSA victims.[729] An institution's image is therefore an important aspect of access to justice. All the institutions of justice have a duty to ensure that their institutional image, ambience and operations are non-intimidating and in touch with the people. Institutional image is especially important for courts and police stations which are historically deemed as oppressive places to be avoided and far removed from people's experiences.[730]

Access to justice also demands that the justice system must as much as possible be presented in a manner familiar to the community and resonates with what is known to them, especially the language and the rituals. Where justice is presented in an elitist manner, there develops mistrust between the organs of justice and the community. It is for this reason that most people still regard the state with a lot of skepticism and only deal with it when it is absolutely necessary. They look for every opportunity to resolve their issues without having to interact with the state. The more formal the system is the more skeptical they are about it. This explains why most people feel more comfortable going to the Chief, or the County Commissioner as opposed to the court as they find the processes of the former more informal compared to those of the latter.

It is no wonder that WA, who was abused as a child was somehow glad that her case was never taken to court. She explained that 'attending court for me would have been traumatizing… for me it's more like rehearsing a lie every single day. Different people would be there joining in and everybody gets to know what's happening. For me privacy is very important'.[731] The possibility of hearing the perpetrator deny what she knew to be the truth over and over again is what was

[727] Ibid.
[728] S Omondi, (n 128) 106.
[729] Ibid.
[730] Interview with Naivasha Probation Officer (n 601).
[731] Interview with Victim WA (n 650).

unbearable. Availing easily accessible institutions of justice that resonate with the reality of the victims of IFCSA is the starting point of restoring the victim. IJS provides insight into an ideal model of institutions of access to justice especially the courts.

The factor of better time management and swift disposal of cases in the IJS is evidenced by the fact that most of its cases are concluded in a single sitting. Though it is not practical to expect courts to finalize all IFCSA cases in one sitting, the efficiency of IJS is an attribute the FJS can aspire to for a more restorative outcome of IFCSA cases. On average, an IFCSA case takes about two years to conclude. It often takes longer as explained by a defense counsel:

> Length of time taken varies from case to case and from one magistrate to another. Like now I'm handling one, though not a relative, an immediate neighbor; it has taken the last five years. The magistrate was transferred. The one who took over ordered the proceedings to be typed which took long. Then it was done wrongly and court ordered it be corrected. The reason given for typing to take long was shortage of staff. The moment they were typed, the magistrate was vetted out.[732]

Prolonged court attendance has its adverse effects as the child victim is said to be constantly reminded of the wrong instead of concentrating on recovery.[733] IFCSA cases should be heard and determined within the shortest time possible. It may not be heard in a single sitting but it should be prioritized and heard back to back. This is not alien to the formal justice system. It has already been applied in the hearing and disposal of Election Petitions.[734] In addition, in the wake of public outcry on the inordinate delay in prosecuting corruption cases, the Chief Justice of the Republic of Kenya issued a Practice Direction for back to back hearing of all corruption related cases.[735] The prioritization given to election and corruption cases should be extended to IFCSA cases.

Hearing cases on reserved, less busy days, like over the weekends when the rest of the courts are not in session may also enhance quicker disposal of IFCSA cases, amongst other possible adjustments.[736] Having the cases on Saturdays may however raise some issues with those who regard it as their day of worship. This is in the light of the Court of Appeal decision declaring

[732] Interview with W Gikonyo (n 576).
[733] Group interview with Naivasha Police Officers (n 596).
[734] The Elections (Parliamentary and County) Petition Rules, 2017.
[735] CJ Practice Direction, Kenya Gazette Vol. CXX—No. 85 dated 20th July, 2018 Gazette Notice No. 7262 dated the 26th June, 2018.
[736] Saturday courts for SGBV cases were successful in Sierra Leone. http://www.undp.org/content/undp/en/home/presscenter/articles/2012/03/07/sierra-leone-saturday-courts-tackle-gender-based-violence-case-back-log-.html accessed on 27/11/13.

compulsory Saturday classes in public schools unconstitutional. The court found that it amounted to discrimination of Adventists.[737] Other adjustments that might enhance expeditious disposal might include transferring all IFCSA cases to Children's courts which are less busy. This would require legislative intervention as discussed later in this chapter. A more long term solution would be building more courts closer to the people and, where possible, establish mobile courts. This measure is however less attainable in the light of often cited budgetary constraints within the judiciary.[738]

Another restorative attribute of the IJS that makes it more attractive than FJS in the eyes of the community is its ability to resolve complex matters as a whole without splitting them into different disciplines of law. This is much unlike the FJS which deals with issues singularly in a legally cognizable way. It does not bother to go into the core of the issue or deal with incidental issues if they do not belong to that particular area of law. For instance, an IFCSA may first be presented in court as a matrimonial case with the abuse mentioned as one of the grounds for divorce. Where this happens, the two issues are immediately separated and taken to different courts to go through different processes. The outcomes may even be different. In IJS however, the matrimonial issue and the abuse would be dealt with simultaneously. This is something that FJS can learn from IJS for a more restorative and victim centered response. Though it would not be reasonable to expect a family court to hear and determine an IFCSA case during a divorce hearing, courts should not overlook such circumstances. The least they can do is to have synergy between the two or more involved courts in order to minimize inconvenience to the victim for instance in terms of court attendance.

Lastly, though restorative outcomes like, reconciliation, apology, and compensation exist in FJS, they are more replete in IJS. They are a main attraction to the community in IFCSA cases. This is because they are more meaningful to the community and resonate more with them than the incarceration of the perpetrator. It has also been argued that where the child victim is too young, no direct benefit accrues to them in jailing the perpetrator. This is because the child might not be

[737] *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* Nairobi Court of Appeal Civil Appeal No 172 of 2014 [2017 eKLR.
[738] S Namusyule and L Mueni. , Impact of Judiciary Budget Cut' available at https://www.judiciary.go.ke/impact-of-judiciary-budget-cut/ accessed 18 December 2018.

mature enough to appreciate the value of incarceration.[739] One of the respondents highlighted the difference in the two outcomes by lamenting:

> Unfortunately for most of these people (professionals), their expectation is only one, conviction. But even after sentencing the accused to twenty years, this minor goes away with nothing. But for me a conviction should not be the only expectation or goal of justice.[740]

Reconciliation is particularly relevant in IFCSA because the infraction involves family ties that cannot be wished away or dissolved through a legal process. Even where the perpetrator is jailed, they are eventually released back to the same family at the end of their jail term. Reconciliation is a significant aspect of restorative justice as it addresses restoration of relationships by dealing with hatred and enmity. The success of reconciliation in FJS depends on how it is structured. The most viable way is to organize for it within the criminal trial process under the court's supervision. The reconciliation should not be limited to the victim and the perpetrator. It should involve the entire family who will most likely have taken sides with some siding with the perpetrator and others with the victim. The court's role can be to receive reports of any initiative of supervised reconciliation. Such reports may, should the courts deem appropriate, inform sentencing.

This study is well aware of the fact that reconciliation in IFCSA cases may be frowned upon owing to the assumption that it is geared towards giving the perpetrator a soft landing. For avoidance of doubt, the study does not advocate for reconciliation as an alternative to the perpetrator's incarceration. Reconciliation does not also necessarily imply that the victim and the perpetrator must continue to live under the same roof. This study recommends reconciliation alongside retribution.

The timing of the reconciliation is critical. It should not be embarked on when the event is still fresh in mind of the victim and their family. It should only be considered when the victim, the perpetrator and the entire family are ready for it. An even more appropriate case for reconciliation is where the victim has grown to adulthood and there is no bad blood between them and the perpetrator. In one case encountered in this study, the relationship between the perpetrator and the victim was such that the latter was even visiting the former, her biological father, in prison where

[739] Interview with Probation Officer Naivasha (n 601).
[740] Interview with Wahome Gikonyo (n 576).

he was serving a fifteen year jail term for defiling her.[741] Reconciliation should therefore be embraced in appropriate cases. It does not have to take place during the pendency of the court case. It may take place after incarceration under the supervision of prison officers or counselors attached to the prisons department. Supervision is important as reconciliation has potential for abuse through coercion and undue influence due to unequal power balance between the two parties. This study however concedes that reconciliation might not be possible in all cases.

Closely related to reconciliation, as a restorative outcome, is apology. Many victims long to hear the perpetrator own the violation and say 'I am sorry'.[742] This was expressed by one of the victims who was sexually assaulted by her uncles as a child. The perpetrators were long dead as of the date of the interview but she had this to say of the outcome she would have desired:

> If they did stay alive...for me, them to bear that responsibility would be the biggest, biggest factor for me. To accept that they have a problem, to accept that what they did was wrong and apologize. To look at me and the tell me and to really mean what they say. I think that would be enough unless they repeat it.[743]

Apology is a common outcome in IJS but rarely provided for in FJS. It is however possible to still inject it in the FJS process. Like reconciliation, it can be introduced at any stage of the justice process. This may be in court, at the police station, or even in prison during incarceration. The form and setting should depend on the parties. In the court room, an appropriate time might be immediately after the victim impact statement. It may also be made at sentencing especially during mitigation. The apology can be considered when computing the sentence. The apology may be given in writing, by hand or electronically or made orally. It can be made by the perpetrator directly or through a third party like a community or religious leader. Some IFCSA victims have received their apologies publicly through the media over the radio. A Kenyan Vernacular Radio Station, *Kameme Fm*, aired a program every Saturday morning in 2016 and 2017 by the name *Muiguithania* which is a kikuyu word for *Conciliator*. Part of the show focused on mending relationships of family members ripped apart by intra-familial crime resulting in the incarceration of some of the family members. The role of the Radio Station was to facilitate an encounter between the victim, or their representative, and the perpetrator either physically or on air. A discussion on the

[741] Interview with Inmate K H (n 629).
[742] Interview with WA (n 650).
[743] Ibid.

circumstances surrounding the crime would then take place live on air. Most of the encounters ended with an apology by the perpetrator. Many of the cases involved child sexual abuse by family members. The child victims' identity was concealed to protect their privacy. The initiative was geared towards healing relationships and bringing closure even as the perpetrator continued serving their sentence.[744] Such an initiative may however not be appropriate in all cases as some victims may prefer their apologies tendered in private or even want none at all.

The ultimate attraction of IJS in IFCSA cases is the outcome of compensation which is typically absent from the formal FJS.[745] This often takes the form of monetary compensation. Compensation, as a form of reparation is an important restorative value. It eases financial burden where the victim incurs monetary loss especially through medical expenses. It can also be applied towards the victim's future needs. Compensation goes beyond infliction of pain to the perpetrator by answering the question, 'What does the system have for the victim?' It therefore attempts to, as much as possible, restore the victim back to the pre violation status. Given between a system that simply incarcerates and one where some payment is made, the community prefers the latter. This is another outcome that FJS may wish to consider in IFCSA cases.

Certain concerns have been raised on the viability of compensation as an outcome in IFCSA cases. First and foremost, it may not always be to the detriment of the perpetrator. For instance it may make a difference to an impecunious perpetrator but have little or no effect to a wealthy one. Again, some compensation may be paid by relatives from a community kitty leaving the perpetrator free of the expected weight of the financial burden.[746] Secondly, there is a valid fear of compensation in IFCSA cases being commercialized as has happened to other cultural fines and payments like *Malu* and dowry. *Malu* is a traditional fine payable, among the Mijikenda community of coastal Kenya, by a man found guilty of seducing another man's wife. There are instances where it has been abused through set ups and extortion.[747] Lastly, the line between an out of court settlement in an IFCSA case, and blackmail can at times be thin. This was explained by an incarcerated convict who had been offered a chance by the family to pay compensation as consideration for not

[744] Ruiru, 'Gathoni WaMuchomba' http://www.ruiru.co.ke/places/kenya/kiambu-county/ruiru/people/gathoni-wamuchomba/ accessed 24 January 2019.
[745] Interview with Stephen Gitau, Kwale County Coordinator of Children Services (Author's office in Mombasa on 14 April 2013).
[746] Interview with Probation Officer, Naivasha (n 601).
[747] Waki J in *Ngoka v Madzomba* Mombasa High Court Civil Appeal No 49 of 1999 [2002] eKLR.

reporting the case. He reportedly declined because he felt that what he was being asked for was a bribe yet he knew he had not done anything.[748]

The concept of compensation in sexual offences is all the same not unheard of. It is practiced in the United States under the head of Civil Settlement in rape cases. In this case, a complainant in a rape case files a separate case in tort for sexual assault. When the tort case is settled, it is normally on condition that the criminal case is withdrawn. [749] It however mainly applies to adults. It remains untested in IFCSA cases where it may present practical challenges. For instance where the perpetrator is the father, requiring him to transfer his money to the child victim by way of civil compensation may impoverish the family and secure no immediate restitution for the child. It may even disproportionately favor the child in relation to other children in the same family, and disturb family cohesion no less than the family economy.[750] Such a scenario would negate the very essence of restorative justice. The perpetrator may also not have the ability to pay any compensation. In the light of these complications the most viable option is to draw the compensation from the Victim Protection Fund.[751]

Compensation would however be less complicated to implement where the IFCSA perpetrator is someone other than the parent or guardian of the victim. In such a case, it can be paid into a trust managed by the court or Department of Children Services until the child attains the age of eighteen years. Periodic payments may however be released to cater for needs such as medical treatment or education, or any other need that may serve the best interest of the child. Payment of the compensation may then be used as a mitigating factor in sentencing.[752] Currently, the Department of Children Services has no mandate to manage any funds on behalf of child victims. The realization of this proposal requires intervention at policy and statutory level. The establishment of the nexus between compensation and length of custodial sentence would also require amendment of the Sexual Offences Act which prescribes minimum sentences in sexual offences.

[748] Interview with A K, Inmate Shimo la Tewa GK Prison (Shimo la Tewa Prison Premises, 16 September 2016).
[749] W Hubbard, 'Civil Settlement During Rape Prosecutions' (1999) 66 University of Chicago Law Review 1231, 1232.
[750] B. M. Dickens, 'Legal Responses to Child Abuse' (n 91).
[751] Victim Protection Act (n 37) Sections 23-28.
[752] Sentencing Policy Guidelines (n 495).

The nature of these statutory and policy interventions are discussed in the second and third parts of this chapter respectively.

5.2.3 Diversion of Certain Categories of IFCSA

As mentioned in chapter three of this research, the Task Force on Alternative Justice System established by the judiciary has commenced several pilot initiatives for diversion of cases to the informal justice system. The degree of success in the use of alternative justice varies from one region to the other. In regions where traditional dispute resolution systems are on the decline, the authority of the elders is not always assured. Use of alternative justice in such regions is usually challenging. On the other hand, in regions where traditional dispute resolution systems are deeply entrenched, the courts are easily able to use the pre-existing panel of elders. The down side of this arrangement is that the pre-existing panels are more difficult to monitor, guide or train. The general test used by the courts to determine whether the elders can assume jurisdiction over a case or not is whether the referral is in the interest of the victim. Where the victim of a crime does not either voluntarily accept to participate in the process or cannot legally consent to participation then the elders do not have jurisdiction.

Generally, the very thought of handling IFCSA cases in any other forum other than the court is frowned upon and deemed as tantamount to letting the perpetrator get away crime. In particular, any association of a legal response to IFCSA that involves IJS invokes a serious backlash. The backlash is from diverse quarters including the FJS, the governance system, and the political system. The issue of expanding diversion to any new area needs to be approached cautiously as advised by the chairman of the Taskforce on Alternative Justice Systems:

> If today there was a headline, RAPE CASE TAKEN TO *WAZEE* (elders), the next day the Chief Justice will be saying, 'No, you cannot do this.' There would be demonstration by (Federation of Women Lawyers, (FIDA). The next thing you would be having parliamentarians making noise. We would have done a disservice to the Alternative Justice System (AJS). In the short term, we need to seek to avoid the backlash so that we do not nip it in the bud before it is fully developed and before people have understood because many people have not taken the time to understand, first and for most the reality that is the lived reality of a majority of our people so that even when you formally deny it and come up with laws that formally say that it should not operate, it just goes underground, and when it goes underground often, it exists in a way that is more oppressive to a majority of people especially women and children. And if you want to protect women and children, we need to regulate them. When they are underground we cannot see them so we

> cannot regulate them. For me the strategy would be to cultivate them in a way that it will bring more understanding to more people so that it can intersect with FJS in ways that are much more understood.[753]

The closest the Task force has gone in involving the elders in sexual offences is through the impartation of knowledge and skills in capacity building trainings. The elders are trained on basic issues like principles of human rights and the Constitution. The rights of women and children are emphasized in these trainings as they are generally not prioritized in the traditional African setting. Traditionally, these two categories are expected to follow proceedings passively. Emphasizing on their rights creates awareness for the elders and enables them to take a human rights approach in responding to cases on women and children brought to their attention.[754] When these players are seized of the relevant information, they are able to have more informed, frank and constructive conversations around any subject including IFCSA. When persons who are esteemed in the society openly discuss a subject that is seen as taboo, it has the added advantage of minimizing the stigma around the issue. This may eventually translate into influencing the community to more freely engage the FJS in matters of IFCSA.

This study has identified two types of IFCSA with the potential for possible diversion to IJS with minimal backlash. The first one is where the victim and the perpetrator are both below eighteen years. The second is where the IFCSA takes place between two related youths without a substantial age difference between them and without use of coercion. The two considerations are therefore absence of coercion and age difference. The second one is referred to by Kisanga et al as the 'curious consenting youth'.[755]

With regard to the first type, where for instance a thirteen year old defiles his twelve year old cousin, the case is usually handled under the Children's Act as opposed to the Sexual Offences Act. The former has entry points for diversion as seen from the variety of orders the court is empowered to make as discussed in chapter three of this study. The Children Act gives wide discretion to the court when dealing with child offenders including options of discharging, probation, rehabilitation, parental guidance and counselling. These options are flexible enough to

[753] Interview with Joel Ngugi, J (n 612).
[754] Interview with C Muinde, Children's Officer, Mombasa (n 600).
[755] F Kisanga et al, (n 6).

involve informal justice players especially in rehabilitation and counselling. This would eventually benefit the victim by avoiding the protracted adversarial process which often leads to re-victimization.

With the curious consenting adult, the perpetrator may or may not be a minor but the age between the perpetrator and the victim must not be substantial. For instance, there may be a case of a nineteen year old having non-coercive sexual intercourse with their seventeen year old cousin or niece. The use of the term 'non-coercive' as opposed to 'consensual' is deliberate as strictly speaking, a child below eighteen years is incapable of consenting to sexual activity in Kenya. This study proposes that such cases should be diverted to alternative justice for determination in a manner that will result in a restorative outcome without incarceration. The rationale is that it is improper to take the minor through the criminal justice process for applying their discretion to participate in a developmental process of misguided discovery. What the two lack is direction and sometimes understanding but should not automatically be submitted to the criminal justice process.

Outside the above two categories, there should be room for IJS processes to run alongside FJS in appropriate cases provided it is not against the best interest of the child victim. An example of an ideal scenario is where the perpetrator admits the offence or some elements of it and is willing to submit themselves to both systems. They may for instance desire to engage the IJS for rituals to accept them back to their community after engaging in IFCSA. The resort to IJS may also be necessitated by the need to conduct rituals over a child borne out of the incestuous relationship. Such collaboration should be embraced by the courts as it has the potential for a restorative outcome. The outcome of the IJS can then be submitted to the FJS and used as a basis for plea bargain and in arriving at a reduced sentence. This recommendation would necessitate amendment of the criminal procedure code to extend the application of plea bargains to sexual offences. It would also necessitate the amendment of the Sexual Offences Act in respect of imposition of minimum sentences. The amendments would grant greater discretion to the presiding magistrate in deciding the value of the IJS outcome vis-a-vis the sentence. The widening of the discretion might result in quicker disposal of IFCSA cases and shorten the FJS process.

The process of having IJS working alongside FJS would result in a fluid and hard to define system. It is however more progressive than the dogmatic hard stance of totally shunning the role of IJS in IFCSA cases. The only consideration is that the same should, at all times, fall within the parameters

set out in Article 159 of the Constitution on the applicability of alternative dispute settlement methods.

At a practical level, the main players in determining whether an IFCSA case should be diverted would be the Sexual and Gender Based Violence Division of the Office of the Director for Public Prosecutions (ODPP) in consultation with the Director for Children Services. The role of the latter would be to carry out a social inquiry to ascertain the circumstances surrounding each incident. It would be important to have a policy guideline from the DPP's office directing investigators to work in consultation with the children's department right from the beginning in all IFCSA cases.

This study is alive to the limitations of IJS. First and foremost, it operates without reference to other agencies that are core in responding to IFCSA. For instance IJS is not always keen on the medical component of sexual abuse as they prefer to proceed silently. The study further confirmed that the IJS representatives are people with no prior training in any field relevant to adjudication of cases. Their propensity to occasionally come up with repugnant outcomes can therefore not be ignored.

The other limitation is lack of uniformity in IJS within the country. It varies from one region to another and it depends on whether it is in a multi ethnic urban setting or a mono ethnic rural setting. There are some societies where IJS is deeply entrenched and therefore clear. Such societies know before-hand exactly what happens in case of a certain infraction. There are some however who may talk about customary settlement of disputes but no one is exactly sure what those customs are. This has the potential for generating contradicting jurisprudence. The other danger of informal justice system is its tendency to prioritize the interests of the community above those of the individual. Whereas FJS is state centered, IJS is community centered. The best interests of the child in IFCSA are hence not necessarily prioritized.[756]

The above limitations should however not be reason to totally dismiss the role of IJS in resolving IFCSA cases. This is especially so since IJS is recommended to the extent that it is compatible to FJS and not as its substitute. The solution to these limitations lie in having IJS closely supervised by the courts and the interests of the child victim represented by a guardian throughout the process

[756]Interview with Hon J Gandani, Principal Magistrate, (Mombasa Law Courts, 27th July 2013).

in the same way as is the case in adoption proceedings.[757] The supervision includes ensuring that any rituals and other outcomes are not in conflict with the best interest of the child. In this way, the victim will be able to enjoy the restorative values and processes peculiar to IJS with the patriarchal concerns validly raised by feminists under close supervision.

In conclusion, diversion of any category of IFCSA needs to be preceded by policy and law reform. As highlighted in chapter three, the dogmatic legal terrain within which IFCSA is responded to impedes any form of creative intervention like diversion in appropriate cases. The legal bottlenecks that need to be opened up in order to facilitate restorative responses include amendment of the laws that have the effect of removing discretion to judicial officers with regard to sexual offences specifically on minimum sentences. In need of amendment too is the law on plea bargain, age of consent, the law limiting the jurisdiction of the |Children's Court and the law and policy on the mandate of the Department of Children Services. These amendments are discussed in the second part of this chapter.

5.2.4 Need for Continuous Engagement with the Community

A key specificity discussed in chapter four is the tension around the issue of ownership of the conflict in IFCSA cases. This is not peculiar to IFCSA cases as seen from the discussion in chapter two of this study regarding Nils Christie's presentation of conflict as property capable of being stolen by the state.[758] It is however more pronounced in IFCSA cases where, once reported, it becomes strictly a matter between the state, the victim and the perpetrator. Every other person, apart from witnesses and professionals, is excluded from the process. The main professionals include lawyers, police, probation officers, children officers and judicial officers who usually outnumber the victim and their families in any particular case. The problem is that these professionals are often persons unknown and unfamiliar to the victim. The child victim therefore goes through the criminal justice process closely surrounded by strangers. This arrangement ignores the fact that IFCSA like other crimes, takes place within a pluralistic society where more than one normative and legal orders co- exist. This study proposes the need to give more room for participation of persons, other than the professionals, who are familiar to the victim. Such persons

[757] Section 164.
[758] N Christie (n 154) 8.

can be drawn from the IJS in regions where the role of community elders is recognized. As the study has revealed, IJS is managed by persons of high repute and social influence within the community. Apart from their presence offering a familiar front to the victim, these persons can be of invaluable assistance within the FJS at various stages. They have the advantage of being able to interact more closely with the victims, and hence more easily win their confidence than the professionals are able to. They can, for instance, play a role in gathering the much elusive evidence for use in the FJS, in procuring relevant witnesses to attend court, in inputting the sentencing and in assisting in having the victim restored.

It is important for the immediate community to feel they have a stake in a conflict through active recognition of their role and where possible, inclusion in the justice process. For a start, their role in the identification of the perpetrators, arrest of the suspect and investigation of the IFCSA offences can be more acknowledged and recognized. When a community feels involved from the word go, they more readily volunteer information which often leads to the arrest and successful prosecution of the perpetrator. The converse is true. When a community does not identify with a process, they can resort to a conspiracy of silence. This makes it harder for the professionals to successfully prosecute the case in court. In the isolated cases where the community has been involved, the results have been useful to the FJS. In one case, a community elder explained with pride the role he played in the arrest of a perpetrator of child sexual abuse by setting a trap for the perpetrator who was a person known to the victim:

> We gave the boy three pairs of trousers to wear and advised him to undress slowly. When he was called upstairs, he started removing the trousers one by one slowly as we had advised him. We caught them red handed when the boy had just removed the third trouser.[759]

Community leaders also played a role in *Republic v Nyawa Dongoi Mvurya*. The IFCSA case had been reported to the village Chairman. On weighing its complexity, he referred the victim's family to a local Child Rights Organization which in turn involved the Department of Children Services who reported the case to Lunga Lunga Police Station and referred the victim to Msambweni District Hospital.[760] This is a perfect example of the benefit of IJS working closely with the FJS.

[759] Interview with village elder, Old Town Mombasa (At Author's office 22 July 2013).
[760] (n 577).

Community leaders can also assist the FJS in understanding the harm caused by a particular IFCSA act to the individual victim, their family and the community at large. This information can assist the court in the victim impact assessment before sentencing. Although section 33 of the Sexual Offences Act does not specify who should produce victim impact statement report, traditionally, the court only considers the reports by professionals or the child victim. The court can take advantage of the non- specification in the statute to bring on board community leaders and gate keepers to give their input. The report by IJS can be oral or written highlighting the social impact of the abuse on the victim, the state of the victims' livelihood, their family situation and how the abuse has been perceived by the community. Such a report can then be considered alongside any that may be filed by professionals like children officers, probation officers, and counselors. This would leave the court with a bigger and more credible picture of the issue before it and pronounce an outcome that resonates with the needs of the victim and the community they belong to.

Involving the community in the FJS has other benefits beyond creating a familiarized atmosphere for the victim. It makes it easier for the victim to be integrated into the community and publicly assigns the shame and blame rightfully to the perpetrator at the end of the trial process. This was well captured by the Judge:

> The rest of the community may not even sympathize… the way they talk and look at you thereafter it becomes like you are now like an outcast. But if communities are involved…the taboo related stigma will be to the rightful person, the perpetrator who will be treated as an outcast and if the IFCSA results in a pregnancy, the child born in that kind of situation is taken elsewhere as the child cannot be brought up in that same family. This can help people stop engaging in it because they know that if this comes out, it is such a taboo that I'll be an outcast in the community. So being an outcast in the community is such a big punishment that it is a big deterrent.[761]

Involvement of community leaders might also create pressure to a perpetrator to acknowledge their wrongdoing and take responsibility for their actions. This may lessen the psychological burden on a victim who often condemns themselves as somehow to blame for the violence against them. [762]

[761]Interview with Okwengu J (n 578).
[762] Email from Mumbi Ngugi, J (n 621).

At a practical level, a good entry point for identifying non- professionals who can assist the FJS is through the court users committee. These are organs of the National Council on the Administration of Justice created under section 34 of the Judicial Service Act. They comprise all court users including non- legal community players. They provide an avenue for consultation on issues around administration of justice in order to improve performance and service delivery. This is in response to the need to coordinate responses to criminal and other justice issues by the Judiciary. Community leaders are represented in these committees which provide an entry point for participation of ordinary members of the public in the justice processes. They form a ready pool and point of contact for non- professionals whenever their input is needed in an IFCSA case.

5.3 Legislative Intervention

As mentioned severally in this thesis, accommodating restorative justice practices and values will require rethinking the criminal justice legislative framework. This resonates with the goal of therapeutic jurisprudence which is to redesign law in order to minimize its anti-therapeutic effects and increase its therapeutic potential.[763] The need for legislative intervention is best captured by the immediate former Chief Justice when expounding on the entry points available for restorative justice during the interview with the author:

> These extra-judicial methods may have a role to play in the expeditious resolution of the family conflicts without the trammels and formalities that characterize the inherited legal tradition. It should be remembered that a laborious and drawn out court process itself may stigmatize and traumatize a child victim. There is therefore need for a mental shift and a rethink of criminal justice processes as a business between the state and the offender only. So we must rethink all the laws in our statute books and their common law provenance to reformulate them to comport with our national values and principles.[764]

The following part discusses the legislative intervention required to make the criminal justice more amenable to the application of restorative justice.

5.3.1 The Children Act

[763] B J Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (n 694) 1063.
[764] Email from Willy Mutunga, (n 651).

The Children Act establishes a children's court which has limited jurisdiction. In criminal cases, the court has jurisdiction to handle all cases where the perpetrator is a minor, apart from instances where they are charged with murder or alongside an adult.[765] The only instance where adult perpetrators are tried in the children's court is where they are charged for an offence under the Children Act.[766] All other cases including those involving child victims are tried in the ordinary courts. The children's courts are more child-friendly. They are obligated by the law to sit in a separate building or rooms, or at different times, from those in which other courts are held. They also maintain privacy by excluding third parties from the proceedings.[767] IFCSA cases only fall under the jurisdiction of the children's court where the perpetrator is below eighteen years. The rest are handled in the ordinary courts. This therefore means that a lot of IFCSA victims miss out on the much needed protection when their cases proceed away from the children's courts. They equally miss out on having their cases heard by a judicial officer who is appointed, and often trained, to handle children's cases as is the case with the judicial officers in the children's courts.[768]

An amendment of the Children Act to expand the jurisdiction of the children's court to include all cases involving child victims would therefore be useful in enhancing protection of IFCSA victims. The children's court would also be an ideal setting to apply the therapeutic values discussed at the beginning of this chapter. An alternative amendment would be to restate all offences in the Sexual Offences Act involving children as victims, in the Children Act. This would then place them directly under the jurisdiction of the Children's court. Even with the amendment, the benefit of a children's court would only be optimized if it is manned by judicial officers whose appointment is well thought out. This was well unpacked by Okwengu, J:

> With courts, I belong to the old school. I do not agree with what has been done in the judiciary where every magistrate is a children's magistrate. I don't think that works very well. Children's magistrates need to be specialized magistrates who really understand issues of children and are really able to relate to children and have a heart for it. For example there is a magistrate in Nakuru who is doing very well in the children's court there. We also have two or three here who are in the children's court who are doing very well. They exhibit that passion. That's the kind of thing I would expect of the children's court. But where you are having this business of every magistrate being a children's magistrate, they are not interested

[765]Section 73.
[766] Section 73 (c).
[767] Section 74.
[768] Section 73 (d) (2).

> in those cases. They are more interested in the big cases which either have interesting legal issues or provide more exposure for them or they are like me and find them frustrating and would rather give them to someone else. In Nakuru they had a very good system whereby any matter involving a child would go to a particular court even when the accused is an adult and victim is a child. The system was working very well then another Chief Magistrate went there and decided that all serious offences will go to court number one. The advantage of specialized courts is, one, they move faster there so you are not keeping them for too long; whether they are offenders or witnesses. Secondly, there is that professional way of approaching the issue. It is child centered. In case of child incest cases, they can be heard in these children's courts with specialized magistrates/personnel and a child friendly environment.[769]

A more far reaching statutory intervention would be the creation of special courts for IFCSA cases only. This would be something akin to the existing anti- corruption courts that deal specifically with economic crimes and maritime courts. The general feeling, as captured by a legal practitioner, is that this is well overdue:

> We have a children's court, we have an anti- corruption, we have a land judicial, we have a labor but we don't a special court that is sensitive to the issues or factors that are of concern to the victim or even to the perpetrators. For me the purposes of for example having a labor court is to expeditiously determine cases but then we do not have a court that would expeditiously determine sexual related cases or such like cases. So for me I think that is one thing that I think needs to be put in place.[770]

It has however been argued that the work load of IFCSA cases does not justify the establishment of special courts.[771] This study therefore proposes the amendments that will allow all IFCSA cases to be heard in children's courts as opposed to creation of specialized IFCSA courts.

Once the IFCSA case is in the children's court, recognition of the child victim as a vulnerable person can give them additional protection. Though both the Victim Protection Act and Sexual Offences Act provide for vulnerable victims/witnesses, the identification of the same is left purely to the discretion of the court.[772] There is need for statutory intervention to confer an automatic right to an IFCSA victim the status of a vulnerable witness. This will allow the court to treat them as such right from the time of plea and to avail them benefits they are entitled to.[773] The

[769] Interview with Okwengu, J (n 578).
[770] Interview with Allan (n 613).
[771]Interview with Okwengu J (n 578).
[772] S 17 VPA and s 31 SOA.
[773] SOA (n 34) Section 31 (4).

presumption should be that they need protection and support unless the children's department states otherwise. Having IFCSA cases heard and determined in the children's court would guarantee their privacy which is an important component of restorative justice.[774]

This study has divulged that due to the influence of patriarchy and associated stigma, many IFCSA cases are detected and/or reported by non- family members like teachers and neighbors. It is reasonable to imagine that many cases go unreported. There is no mandatory obligation on anyone with knowledge of the existence of a case of child abuse to report the offence. The Children Act provides that 'any person who has reasonable cause to believe that a child is in need of care and protection may report the matter to the nearest authorized officer'.[775] Making reporting of IFCSA cases a mandatory duty would contribute in assisting IFCSA victims access justice as those who deal with the children more closely like teachers, will be more cautious as they will not have the luxury of opting to ignore the abuse. The mandatory duty to report has been enacted in other jurisdictions where relevant statutes impose a duty on all public authorities that work with children and families to support parents and custodians and must refer the child and the family to the child welfare services where necessary.[776]

Attaining the uniformity of having all IFCSA cases heard in the child friendly children's court will require harmonization and synchronization of offences in the Children Act with similar ones under the Sexual Offences Act. As discussed in chapter three of this study, the Children Act classifies abused children like IFCSA victims as 'children in need of care and protection'.[777] The penalty for cruelty to and neglect of children under the Children Act is a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding five years, or to both. This is too lenient compared to sentences for similar acts in the Sexual Offences Act which range between ten years and life imprisonment. The harmonization will be achieved through amendment of the Children Act to enhance the sentences the Children Act.

[774] Daly (n30) 2.
[775] Section 120 (1).
[776] Child Welfare Act, 2007 (FINLAND) section 2 (2).
[777] SOA section 119 (1) (n).

5.3.2 Age of Consent

Whereas IFCSA is undeniably an extremely reprehensible act, the circumstances under which it takes place vary. In practice, therefore, it is possible to unpack various categories of victims based on the gravity and circumstances of the act. The main variants as far as gravity is concerned are the relationship between the victim and the perpetrator, their age difference, and the use or absence of force, coercion or undue influence. Some categories of IFCSA may be more amenable to a restorative response than others. Unfortunately, the legal framework makes no recognition of these variations. The law is particularly rigid on the age of consent as anyone below the age of eighteen years is deemed a child. The age of consent is the minimum legal age at which a person is considered to possess the necessary maturity to competently consent to sex. Just like the minimum age of criminal responsibility, there is no universally accepted age of consent. In Kenya it is eighteen years. Any person below the age of eighteen years is a child hence incapable of giving consent to sexual activity. Whenever it happens, one of them, usually the male, is charged with a sexual offence. According to Ngugi, J, this is based on strict dogma that does not add value:

> I feel strongly that our justice system is oppressive in denying agency to people who actually have agency because we are very categorical and dogmatic about it. We say a child under eighteen years cannot give consent and therefore we assume that because they cannot give consent they have no agency whatsoever but those are two different things. We have to loosen on dogmas.[778]

In the context of IFCSA, the complication arises where adolescents or young adults who are related, mutually agree to have sex. This category of non- coercive adolescent sex between close relatives needs to be isolated and responded to separately. Much as, legally speaking, a person under eighteen years is incapable of consenting to sexual activity, it is critical to acknowledge that some of the IFCSA may be carried out pursuant to an agreement between the parties concerned. It is not unheard of for say, a sixteen year old engaging in non- coercive, 'consensual' sexual activity with their nineteen year old uncle or cousin. Under the FJS, this amounts to defilement punishable by a minimum sentence of fifteen years imprisonment as the sixteen year old is deemed to be legally incapable of consenting to sexual activity.[779] When such a case is processed through the

[778] Interview with Joel Ngugi J (n 612).
[779] SOA (n 34) Section 8(4).

FJS, chances of procuring the cooperation of a victim who perceives the act as having been 'consensual' are minimal. A reasonable approach in this case would be to divert the case to the IJS as proposed earlier in this chapter. This is however is not possible within the rigid legal framework that is categorical on the legal capacity of a person below eighteen to consent to sex. There is hence need to unpack and categorize IFCSA based on the age of the child and the circumstances surrounding the sexual encounter. The legislative intervention above will, inter alia, create more opportunities for diversion as proposed in part one of this chapter.

The recommendation to unpack and categorize IFCSA is not original to this study. A similar approach was alluded to in respect of general child sexual abuse by Kisanga in his report on *'Parents' Experiences of Reporting Child Sexual Abuse in Urban Tanzania.*[780] In his study, he came up with four categories of victims of child sexual abuse. These include 'the innocent child', who is the vulnerable young child exposed to an adult perpetrator; 'the forced sex youth' who is an older child who finds themselves in a compromising situation then gets overpowered by the adult perpetrator, 'the consenting curious youth', who finds themselves engaging in sexual activity with a peer, and 'the transactional sex youth' who engages in sexual activity for favors. He calls for a more reconciled notion of childhood when dealing with 'the consenting curious youth'. When confronted with the facts, the youth denies the occurrence of the sexual abuse and often refuses to participate in the court process.[781] He opines that when it comes to the curious consenting youth, having a law forbidding sex before the age of eighteen can be perceived as too rigid, especially if the perpetrator is of an age mate. The decision to prosecute in these circumstances usually comes from the parents of the girl who rush to the law for fear of losing parental control.

Using the above categorization, the example of the sixteen year old child would fall in the category of 'the curious consenting youth' in respect of which this study proposes a diversion to the IJS. It is with regard to the curious consenting youth that the age of consent should be interrogated. The Court of Appeal has also posed the question as to 'whether it is proper for courts to enforce with mindless zeal that which offends all notions of rationality and proportionality' in reference to

[780] F Kisanga, et al (n 6).
[781] Ibid 487.

imprisonment of a young man for discretional sexual intercourse with her slightly younger teenage girlfriend.[782]

Some respondents in this research proposed that the age should be revised within the range of fourteen to sixteen years.[783] This is however a sensitive topic in Kenya and it has previously raised public outcry and should hence be approached cautiously.[784] It is for this reason that Okwengu J cautioned that:

> It is not about going to parliament and presenting a law. You need first to make people understand that we have a problem and what the problem is before you come up with the law. When it is rejected, going back to convince people will not be easy.[785]

This particular amendment should hence be preceded by intense civic education in the community followed by consensus building. In the alternative, a more acceptable approach would be to grant wider discretion to the courts dealing with two children engaging in discretional sexual activity intercourse and even extend to 'perpetrators' aged up to twenty one years. The discretion would allow the court to avoid the unfair consequences that are inherent in n critical enforcement of the Sexual Offences Act by considering the circumstances of each case. This would of course require amendment of the Sexual Offences Act.

5.2.3 Plea Bargain and Minimum Sentences

The implementation of restorative outcomes discussed above in part 5.2.2 above requires the application of wide discretionary powers by a judicial officers at the time of sentencing. This brings to the fore the twin issues of plea bargain and minimum sentences. Although addressed in different statutes, the two are interrelated as a plea bargain is meant to lead to a reduced sentence. Unfortunately, the use of both in sexual offences is fettered by statute due to historical reasons. One mischief that necessitated the enactment of the Sexual Offences Act was the meting out of very lenient sentences that were not proportional to the gravity of the sexual offence. This was remedied through the imposition of minimum sentences. The minimum sentences do therefore

[782] *Eliud Waweru Wambui v Republic* Nairobi Court of Appeal Criminal Appeal No 102 of 2016 (unreported)
[783] Group Interview Nyali Police Station (n 574).
[784] R Odhiambo, 'Law Proposes Reduction of Consensual Sex Age from 18 to 16' http://www.the-star.co.ke/news/2016/12/20/law-proposes-reduction-of-consensual-sex-age-from-18-to-16_c1476072 accessed 30 January 2017.
[785] Interview with Okwengu J (n 578).

have their place and are justifiable in extreme cases for example involving children of tender years defiled by those much older adults. Imposition of minimum sentences however extinguished the judicial officers' discretion in sentencing offences under the Sexual Offences Act.[786] Plea bargaining is, on the other hand, prohibited by the Criminal Procedure Code with regard to sexual offences for similar reasons.[787] The combined effect of ousting plea bargain and imposing mandatory minimum sentences in sexual offences has been viewed as counter- productive by some critics:

> The categorical exclusion of sexual offences from plea bargaining and sentencing is part of our dogmatic thinking and thinking that the more dogmas we have the more effective our legal system will be but time has proved us wrong. It does not necessarily bring efficiency or effectiveness in our systems.[788]

The two have the effect of denying courts the opportunity of intervening in deserving circumstances like the above discussed consenting curious youth who engages in non-coercive sexual acts with a relative of the same age group. These have been referred to as 'victims who are not really victims'. The Sentencing Guidelines encourage judicial officers to infuse restorative justice values in the sentencing process.[789] This however remains out of reach for IFCSA and other offences under the Sexual Offences Act as they are insulated by the minimum mandatory sentences. Removal of the legal barrier to discretion in sexual offences will avail the court opportunities to respond to IFCSA creatively as discussed in part one of this chapter. One victim proposed that the punishment should be calibrated around such considerations as the gravity of the offence, the age of the victim and the surrounding circumstances.[790] This view is strongly supported by Okwengu, J who argued as follows:

> It is the court that gets to understand the circumstances of the offence and it is the one to weigh and decide the right sentence to impose. Removing discretion from the court and handing it over to the legislature is tantamount to interfering with the court system. I have come across many young people serving sentences of twenty years and more because of sexual offences. Many of them are young adults, eighteen, nineteen, twenty to twenty one years and the girl may be seventeen, sixteen. At times even a fifteen year old can look big. Those are the people who are

[786] N Ndungu, 'Legislating Against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndungu.' Available at https://www.ncbi.nlm.nih.gov/pubmed/17512386 accessed 7 May 2018.
[787] Section 137.
[788] Interview with Joel Ngugi J (n 612).
[789] Sentencing Policy Guidelines (n 495).
[790] Interview with WA (n 650).

> landing in prison with those long sentences. If we are not careful we might end up losing some age group there that is landing in prison. And now, what is the purpose of those sentences? It is just to lock them up and completely forget them or are we trying to rehabilitate them when they are in prison or are we trying to protect the victims? I do not quite understand those long sentences. I think there should be some measure of discretion.[791]

There is therefore need for amendment to enable the court distinguish the various categories of child abuse as proposed by Kisanga. It will then consider such issues as the age difference and absence of coercion in some IFCSA cases that may then benefit from restorative outcomes beyond incarceration.

5.3.4 Bail

Bail is a constitutional right in Kenya.[792] Any attempt at limiting this constitutional right would be null and void *ab initio*. The victim on the other hand also has an equally important right to protection from re-victimization during the trial process. There is therefore need to ensure that the legal framework sufficiently balances the two rights. A major apprehension by radical feminists with regard to use of restorative justice in sexual offences is the possibility of re-victimization.[793] One of the ways in which a victim of IFCSA may feel re-victimized is through constant encounter with the perpetrator during trial. The rest of the community including potential witnesses may also feel intimidated and conflicted when they see the victim and the perpetrator in the same environment soon after taking plea and during the pendency of the case. It would be important for the victim and the community to be sufficiently involved in the proceedings preceding bail decisions in IFCSA cases. One of the possible channels of involving them victim is through a social inquiry. Unfortunately this is not a mandatory requirement. A statutory amendment to make social inquiry a mandatory precondition for every bail determination in IFCSA cases would rectify this concern.

The Bail/Bond Policy Guidelines provide for bail hearings where the prosecution opposes a bail application or where the court deems it fit.[794] The bail hearing involves enquiring into the

[791] Interview with Okwengu, J (n 578).
[792] Article 49 1(h).
[793] Acorn (98) 224.
[794] Judiciary, Bail and Bond Policy Guidelines, Policy Direction 4.25 available at https://www.judiciary.go.ke/download/bail-and-bond-policy-guidelines/ (accessed 7 May 2018).

circumstances of the accused. Bail can then be denied if the court makes a finding that there are compelling reasons to do so. One of the compelling reasons is where the accused is found capable of endangering the safety of the victim, any individual or the public.[795] In IFCSA cases, the accused normally has the opportunity and means to endanger the life of the victim as they are often members of the same household. This study therefore proposes statutory intervention that makes bail hearing compulsory in all IFCSA cases.

The other area in need of statutory intervention in bail procedure is the role of the Department of Children Services. This study proposes a more central role for them than the peripheral one they currently play. In the policy, the department only features with regard to the single duty of supervising remand homes and places of safe custody.[796] The Bail Report for instance is solely prepared by Officers of Probation and After Care Services without necessarily the input of children officers even in cases involving children. Statutory intervention making it compulsory for probation officers to procure the input of children's department in pre bail hearings involving IFCSA cases will ensure that the child's best interests are well captured in the bail report. This is because the child's interests are not always represented by the adults in the family who are usually the target respondents in the enquiry by probation officers.

On the issue of bail terms and conditions, the court has power to require an accused person to move from their usual residence duration of the trial as a bail condition.[797] This power is exercised at the discretion of the judicial officer. This study proposes that the condition should be mandatory in IFCSA cases. This will ensure that the child victim is not burdened with the inconvenience of being relocated away from the home to avoid being in the same household with the perpetrating relative. This is especially important because it is not unusual for child victims to be kept in police stations or remand homes together with children in conflict with the law without arrangements for formal education. When the case drags on for long, they miss school for a long time.[798] This was the plight suffered by child victims YM and SN who could not continue staying at home during the pendency of their case for their own protection.[799] The Department of children services should also play a statutorily recognized role in bail supervision in IFCSA cases to ensure there is no

[795] Ibid Policy Direction 4.26 (a) d
[796] Ibid, Policy Direction 6.27.
[797] Ibid Policy Direction 4.31.
[798] Interview with Probation officer, Kwale (n 573).
[799] (n611) and (n632).

interference. For example a perpetrator may be excluded from a residence he shares with a victim but still pursue them in school.

The impact of the statutory intervention will ultimately depend on the support given to these resilience building institutions by the executive through budgetary allocations, policies and overall political will. This is the gist of the discussion in the following part.

5.4 Executive Intervention

As highlighted in chapter four of this study, IFCSA is an atrocious act that leaves in its trail great harm to the victim and their families. The harm ranges from physical bodily harm, psychological harm, compromised security and deprivation of livelihood. It is not possible to comprehensively discuss restorative justice without prioritizing the need to redress the harm to the victim. There has been a trend of moving away from entirely focusing on punishing the offender towards consolidating the rights and interests of the victim. This is the spirit behind the recently enacted Victim Protection Act which has a plethora of restorative rights for victims. It provides a blanket right to be secured from further harm at the earliest possible stage. This includes sheltering the victim in a safe house, providing them with food and shelter until their safety is guaranteed, providing them with urgent medical treatment and psychosocial support.[800] The Act also creates a Board that is mandated to advise the Cabinet Secretary concerned on inter-agency activities aimed at protecting victims of crime and the implementation of preventive, protective and rehabilitative programs for victims of crime.[801] As far as the implementation of the rights of the victims is concerned, the Board is mandated to provide support services to the victim to enable them deal with physical injury and emotional trauma, access and participate in the criminal justice process, participate in restorative justice to obtain reparations, and cope with problems associated with victimization.[802]

On the face of it, the courts are now substantially equipped with a legal framework together with a body to give directions to for the protection of the rights of all victims. It is however apparent

[800] Section 11.
[801] Section 32.
[802] Section 14.

from this study that restoring a victim of IFSCA requires much more than a legal framework and institutions. There is need to strengthen institutions responsible for building and sustaining the resilience of IFCSA victims. This need resonates with the goal of vulnerability theory which calls on the state to make policies which focus on people on the basis of their vulnerability to a specific threat.[803] There is also need for political will which is should be evident from the budgetary allocation, prioritization and by the policies put in place by the executive on matters regarding the health, security and welfare of victims. Actualizing the restoration of an IFCSA victim therefore requires both creativity and commitment of resources by the state.

Article 19 of the CRC already mandates Party States to:

> take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

The Convention goes further to unpack the measures to include provision of effective procedures for the establishment of social programs to support the child and for those who have the care of the child, as well as treatment and follow up. A call to the executive to take up the role of supporting the legal framework by providing the necessary resources is hence not far- fetched, or out of order. These are the kind of interventions that Dignan refers to as restorative justice practices and policies'.[804] They are the subject of discussion in this part through addressing the policy gaps in the health, safety, lifestyle and institutions needed to restore IFSCA victims.

5.4.1 Restoration of Health

IFCSA commonly carries with it substantial psychological and physical suffering to the victim. The common denominator in all IFCSA cases is the health concerns arising from each case. They vary in degree of gravity but they are a certain corollary. This study perceives the concept of health broadly as per the definition of the World Health Organization (WHO). It describes health as a state of complete physical, mental, and social well-being and not merely the absence of disease or

[803] N A Kohn (n 282) 23.
[804] J Dignan, (n 334) 3.

infirmity.[805] The health of an IFCSA victim that is the subject of restoration in this study includes their physical, mental and psychological wellbeing.

IFCSA victims usually require immediate medical attention as their health concerns often involve grievous bodily harm and pregnancy. The most accessible institutions to them are government sponsored health facilities. These are usually poorly maintained and in less than satisfactory condition.[806] They are also understaffed which prolongs the waiting period before they are eventually attended to. As much as the treatment in the public health facilities is free or affordable, accessing treatment is bedeviled by many challenges. Taking the example of the main public health care facility in the coast region, the Coast General, it is not uncommon to find an IFCSA victim referred for medical investigation or surgical procedures that are not immediately available in that institution. The reason for the non- availability ranges from breakdown of equipment to delayed procurement of laboratory agents. In such cases, the victim must go to a private hospital at their own cost. The many who cannot afford go home unattended and at times live with life-long complications.[807]

The issue of inadequate medical facilities and personnel is compounded by the fact that IFCSA cases compete for attention with other health issues which are rated as more of emergencies. IFCSA health cases are therefore relegated on the priority list as explained by a staff member of a Gender Based Violence Recovery Center:

> If an accident victim is wheeled to a casualty and finds a child who has been sexually abused by the father being attended to, most likely the child will have to step out. It is not considered an emergency although urgent medical treatment is important even for preservation of evidence.[808]

Apart from the physical health, psychosocial support is critical in IFCSA cases. Some of the psychological harm of IFCSA may remain unnoticed for years only to be detected later on in adult hood through change in personality or character.[809] When provided, the victims have to travel long distances, at their own cost, to access the services. The services are also not available until full

[805] Available at http://www.who.int/governance/eb/who_constitution_en.pdf accessed 7 May 2018.
[806]R Muga, P Kizito, M Mbayah, and T Gakuruh, 'Overview of the Health System in Kenya' (2005) Demographic and Health Surveys Available at https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf accessed 7 May 2018.
[807] Interview with C Muinde, Children's Officer Mombasa (n 600).
[808] Interview with Elizabeth Aroka, (n 592).
[809] Interview with Advocate Allan Nyange (n 613).

recovery due to the need for the same support to be offered to new cases. The major challenge however is the fact that trauma counseling at the public facilities is only available to the primary victims. This means that in case of IFSCA, the affected parents and siblings are left out. This is despite the fact that there may be instances where a family member's trauma may be even more pronounced than the primary victim's. Often times the mother and the siblings of the victim naturally get traumatized. Due to the gendered nature of the abuse and the influence of patriarchy, the mother is usually more affected especially where the perpetrator is her husband or a relative from the husband's side of the family. When the mother is affected psychologically, the entire family is impacted. This category is left out of the recovery process due to omission by the state.

Isolated initiatives have been made to improve access to medical health through private public partnerships between the government and private entities. One success story is the partnership between the Ministry of Health, and the International Center for Reproductive Health. This has resulted in a Gender Based Violence Recovery Center (GBVRC) at the Coast Referral and General Hospital in Mombasa established in 2006. This single unit serves a population of over two million residents. It was, however, an initiative of the International Center for Reproductive Health not the government of Kenya. The Ministry of Health only provided an old kitchen for renovation and use and also seconded some staff. The facility was otherwise fully equipped by ICRH. Save for these kind of initiatives, it is clear that the government does not, on its own, prioritize sexual offences including IFCSA.[810]

The primary responsibility to provide health care for victims of violence including IFCSA rests on the state. It is incumbent on the state to ensure that health facilities are accessible to all residents on need basis. Relying on the goodwill of donors for healthcare of IFCSA has resulted in unplanned haphazard centers. Whereas they are useful in serving victims within their immediate reach, it does very little in addressing the health restoration needs of IFCSA victims at the national level. Without commitment by the executive to provide adequately equipped and accessible health facilities, the journey of restoration and holistic justice for an IFCSA victim can hardly commence.

[810] Interview with Advocate Elizabeth Aroka (n 592).

5.4.2 Restoration of the Victim's Safety

When presented with the question, 'According to you, what is justice for the victim?' two of the respondents stated that it is securing the safety of the IFCSA victim by taking them to a shelter so that they are never abused again.[811] The situation regarding the state's commitment towards ensuring the safety of an IFCSA victim is as wanting as the health situation discussed above. By virtue of the fact that IFCSA takes place within the home, the place ceases to be a safe haven especially for the victim during the pendency of the case. The very person who was expected to protect the child becomes the violator. There is therefore need for innovation of creative ways to guarantee the safety of the child victim. For now, state owned shelters for IFCSA victims are non-existent and wishful thinking as wished for by a senior judge:

> I wish the government had something like we have in developed countries whereby the child will be given some kind of protection and completely removed from that environment, taken to some other place and given a second chance to overcome that problem and start afresh somewhere else. When the child is in a rescue center she finds others and gets comfort as you find others who are like you, you are not alone, you are able to share with them and hopefully when you get that help to be able to get back on your feet, you are able to develop some confidence in yourself and you can move on. This is of course at the expense of family ties.[812]

The lack of Safe Houses and Shelters becomes problematic immediately an IFSCA offence is detected and/or reported. When thirteen year old SN escaped from her abusive father's house, she met a stranger whom she asked for direction to the bus station. The stranger instead took her to the police station. The police kept her locked up in the cells for two days as they had nowhere else to take her. She shared the cell with adult female suspects, one of whom she learnt was alleged to have stolen.[813] Fifteen year old YM was also held in a police station for four days as she could not go back home after her father's arrest. Though she was five months pregnant, she slept on the bare floor and shared her cell with among others, an adult female murder suspect:

> We were two girls and one woman in that police cell. This woman had two children. The girl in the cell had also been defiled by her father. The woman with

[811] Group Interview at Nyali Police Station (n 574).
[812] Interview with Okwengu J (n 578).
[813] Interview with SN (n 632).

> two children was there because she had killed her husband. I used to pray that I be released from the cells.[814]

The few children's homes that exist are privately owned and only offer short term accommodation to children found to be in need of care and protection most of whom are those found begging.[815] In fact, many IFCSA victims like SN are placed in remand homes where they share facilities with children in conflict with the law.[816] Just as in the case of healthcare, the state relies on private organizations, churches and charitable Non- Governmental Organizations for provision of shelters and safe houses for IFCSA victims. The problem of relying on the private sector is that their homes can close down with little or no notice as they do not rely on government funding. The ideal situation is that every county should have at least one rescue center. Where none exists, a proposal for partnership with existing privately run centers has been found to be a viable option as explained by a children's officer:

> The government should provide existing centers with financial support pending the construction of one. Government should ensure either there is a rescue center or they support existing rescue centers and also ensure that the capacity is expanded…. like the one we have here in Tudor, '*Mahali Pa Usalama*' (place of safety) can have even more than one hundred children. There are enough facilities but the funds also become a challenge. They are supported by the Catholic Church and the church can only support up a certain level. So the government can decide that they are not going to develop a facility but they will be supporting them. Like for every child who comes they will take care of one, two, three for example education etc.[817]

Another viable proposal made in this study for the safety of IFCSA victims, in lieu of shelters, is a system of fostering as explained by a judge:

> But even in the absence of rescue centers, we could have a situation where we have some kind of foster homes. Foster homes in the sense that I volunteer. I as a mother whose children are gone and I have room in my house, if there is such a child, I can volunteer. We have a register where people can volunteer to give such services free of charge, pro bono. So that you give this child the assistance that she needs, the protection that she requires at that point in time, and you have people who are actually vetted and whom you know you are sure of and will not expose the child to further abuse. That would help.[818]

[814] Interview with YM (n 611).
[815] Interview with C Muinde, Children's Officer Mombasa (n 600).
[816] Ibid.
[817] Ibid.
[818] Interview with Okwengu, J (n 578).

Just like in the case of restoration of health, restoration of security goes beyond that of the primary victim. The gendered nature of the offence and the influence of patriarchy often places the mother and the rest of the siblings in need of protection from the extended family especially where they are required to attend court as witnesses. There is therefore need for the state to also provide for the safety of secondary victims of IFCSA.

There is hence need for the state to take up its responsibility to provide enough shelters, safe houses or set aside a budget to support privately run homes or individuals willing to shelter IFCSA victims. This will address the concern that associates the use of restorative justice in sexual offences to the risk of compromising the safety of the victim. The provision of state funded shelters is also compatible with the ideals of the women's movement's goal of removing offences related to violence against women from the private to the public domain.[819]

5.4.3 Investing in Restorative Lifestyles

The impact that IFCSA has on livelihood calls for the incorporation of a restorative justice as a lifestyle in the society. The perception of restorative justice as a lifestyle involves the application of restorative values and principles in everyday interaction with people even outside the realms of crime. This includes addressing what Van Ness and Strong refer to as 'structural impediments to wholesome, healthy relationships'.[820] These impediments are the cause of structural imbalances in the society which act as a double edged sword. They first present a fertile ground for IFCSA to thrive and secondly, they eventually come in the way of an effective legal response. There is therefore need to address the underlying socio economic factors that contribute to IFCSA. There is also need for promotion of a social environment that will enable victims manage IFCSA more effectively if it occurs. This calls for an approach of intentionally viewing the interaction between child welfare and related social phenomenon with a restorative lens even when there is no conflict.

Having established in this study that IFCSA is prevalent enough to cause concern, it is incumbent upon the state to come up with policies that are geared towards anticipating it and addressing it in advance. A question posed to all the IFCSA inmates interviewed was why they engaged in IFCSA in the first place. On the advice of the advice of the Deputy Commissioner of Prisons, the question

[819] Brunildapali (n 241) 51.
[820] Van Ness and Strong (n 46) 42.

was posed indirectly as, 'why do people do it?' None of the seven inmates interviewed took responsibility. Most blamed witchcraft. Only one came close to taking responsibility by claiming that his was caused by temptation by the devil. No wonder it has been said that parents who sexually abuse their children are rarely exclusively motivated by sex but by behavioral problems produced by circumstances. It is therefore argued that unless this 'Achilles' Heel' is recognized, then the cycle of offending is likely to start again under similar stresses and circumstances.[821]

When a person serves a jail term without owning up to the abuse or taking responsibility, chances of them repeating the offence are high. As long as incarceration remains the only outcome in our legal system for IFCSA perpetrators, the problem will persist indefinitely. Though the perpetrator is not the focus of this study, the state may need to consider intervening on behalf of the perpetrator beyond incarceration. The benefit eventually accrues to the victim especially since they go back to the same family at the end of the jail term. The jail term by itself does not, in any event, erase kinship.

What this study proposes is for the state to invest in narrowing the power gap between the perpetrator and the potential victim by empowering the victim. The empowerment can be done through existing institutions. A good place to start would be in the education sector. Entrenching sex education in the school curriculum can go a long way in creating awareness. There are examples to borrow from. In Finnish schools, for instance, sex education starts at year four. In Kenya, the idea would require deep reflection and wide consultation in view of general public response to the stalled Reproductive HealthCare Bill. The Bill provides for sex education for adolescents whom it defines as anyone between ten and seventeen.[822] It proposes, inter alia, that:

> The government facilitates the provision of adolescent- friendly reproductive health and sexual health information and education develop policies to protect adolescents from physical and sexual violence and discrimination including cultural practices that violate the reproductive health rights of the adolescents; and facilitate adolescents' access to information, comprehensive sexuality education and confidential services.[823]

[821] G McKeever, 'The Punishment of Parent-Child Sexual Abuse' (1996) 47 N. Ir. Legal Q. 81, 85.
[822] Draft Reproductive Health Care Bill Section 2.
http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/ReproductiveHealthCareBill2014__1_.pdf (accessed 7 May 2018).
[823] Section 34.

The inclusion of provision of reproductive health care services to children as young as ten years old has been met with a lot of hostility from a considerable segment of the society.[824] There is need to find middle ground between the draft and the society's concerns to facilitate the rolling out reproductive health services to children in a socially acceptable way. Empowered children will be less likely to be taken advantage of by those close to them. They will also be confident enough to report abuse when it happens.

Sex education may be strengthened further by regular free school based health care provided at least once a year. This may present an opportunity for the children to discuss with trusted adults anything that may be happening to them at home including IFCSA. This again is practiced in other jurisdictions. In Finland for instance, the school health nurse sees children for regular check-ups once a year. First-year, fifth-year and eighth year pupils are provided with a more extensive but non- intrusive medical examination to which parents are also invited. Parents are also notified of the yearly check-ups and are at liberty to attend if they wish. Personalized health advice is given to support and promote mental health, independence, a healthy lifestyle and physical fitness.[825]

Lastly on the issue of lifestyle, there is need to interrogate a belief that was restated severally during the field research. This is to the effect that IFCSA was rare or unheard of in the traditional African households. If the belief is true, it would be useful to find out the reason behind it. At a glance however, one aspect that existed in the traditional African family setting that is almost becoming rare today is the enforcement of boundaries through the force of taboos.[826] From the discussion on livelihood under specificities of IFCSA, it is clear that IFCSA thrives where there has been disturbance of certain social balances and boundaries. This may be through death, divorce, relocation for work purposes, and shared housing. One victim more circumspect on why she was abused by her uncles as a child, 'Well I guess if I had been close to my mum I don't think anything would have happened to me but I think it happened because I was actually on my own'.[827]

[824] G Gathura, A Oduor and F Kibor, 'Fury Over Bill on Reproductive Health' *The Standard*, (Nairobi, 20 June 2014).
[825] Ministry of Social Affairs and Health, Child and Family Policy in Finland (2013) available at https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/69916/URN_ISBN_978-952-00-3378-1.pdf?sequence=1 accessed 27 April 2018.
[826] Interview with Advocate Wahome Gikonyo (n 576).
[827] Interview with WA (n 650).

She was effectively blaming the abuse on under-parenting caused by the living arrangement in the home.

Investing in restorative lifestyles has long term and far reaching impact. The Committee on the Rights of the Child has remarked that preventing violence in one generation reduces its likelihood in the next. It has gone on to assert that research shows that children who have not experienced violence and who develop in a healthy manner are less likely to act violently, both in childhood and when they become adults. Implementation of article 19 is therefore a key strategy for reducing and preventing all forms of violence in societies and for promoting "social progress and better standards of life" and "freedom, justice and peace in the world" for the "human family" in which children have a place and a value equal to that of adults.[828] This includes the child victim of IFCSA.

The state must therefore go beyond the constitutional declaration of the place of the family in the society and invest more on its stability especially with regard to parenting and provision of economic and social rights. The state should be able to anticipate and make provision for various occurrences that affect the family like death, divorce, and relocation for work. Where poverty forces families to disregard basic boundaries like on sleeping arrangement, it remains the duty of the state to ensure access of the economic and social rights enshrined in the constitution especially right to decent housing. This leads to the discussion below on the importance of strengthening child related institutions.

5.4.4 Strengthening Child Related Institutions

The Nordic welfare states are generally considered to be responsive to vulnerability, through systems where the state has the primary responsibility for the welfare of the population.[829] The primary institution that deals with the welfare of the child in Kenya is the Department of Children Services. Since independence, the department has been relocated from one ministry to another at the whims of the regime in power. It has been a department in each of the ministries, including the Ministry of Home Affairs, National Heritage and Social Services, Ministry of Gender, Children and Social Development, Ministry of East African Community, Labor and Social Protection, and

[828] CRC General Comment No 13 (n 42) para 14.
[829] V Strand & I Ikdahl, (n 284) 130.

currently in the Ministry of Labor and Social Protection. The constant translocation is demonstrative of the level of political will the state has in prioritizing children's matters. It is also clear from the names of the various ministries that children issues are not their core function. This is reflected in their budgetary allocations as discussed in chapter four. It is difficult for the department to deliver on its mandate without sufficient support from the state. It needs a permanent home positioned in a ministry that will prioritize its core mandate. If well positioned and funded by the state, it will be able to play its role as a resilience building institution. This resonates with the demands made by the vulnerability theory in calling for an analysis of state institutions to ensure that the disadvantaged are not unduly underprivileged. This essentially puts pressure on the state where there is absence of political will in securing the livelihood of certain categories of people.[830]

A well- equipped and supported Department of Children Services will be able to play a bigger role in child protection. Currently, the only social protection intervention carried out by the department is the World Bank funded Cash Transfer Program for Orphans and Vulnerable Children (CT-OVC).[831] It is meant to assist the government provide a safety net for households living with or taking care of orphans and vulnerable children. Currently, IFCSA victims do not fall in this category. This study proposes extension of the category of vulnerable children to include IFCSA victims even where they do not come from a needy family. This is especially where the bread winner has been jailed because of committing an IFCSA offence.

Finally, there is a need for synergy between the Department of Children Services and other government agencies in order to reduce trauma for an IFCSA victim. The absence of this synergy was demonstrated in a case narrated by a children's officer. The case involved an IFCSA victim who had turned eighteen years and needed an Identity Card. She had been sexually assaulted by her father who was arrested and remanded in custody as he could not raise bail. Unfortunately he died while in custody and the family blamed her for his death. They banished her from the family and burnt all her possessions so she could not get the relevant documents needed for her registration. The children's officer narrated her frustration in trying to assist the victim:

[830] Strand (n 284) 130.
[831] http://projects.worldbank.org/P111545/kenya-cash-transfer-orphans-vulnerable-children?lang=en&tab=overview (accessed 8 May 2018). Or http://labour.go.ke/ovcsecretariat.html.

> Now when this child wants a birth certificate, the same government says we need documents of the parent and yet the family does not want anything to do with that girl. Actually they burnt everything that belonged to that girl. So you will find that the same government is exposing that girl to some more pain because they are saying we cannot register you because we need your documents from your parents and the family says no, we don't want anything to do with her. So the government systems need to….the ones who are working with children's issues, they need to work together. Especially if they are dealing with sexual abuse cases, they need to work together. They need a birth certificate, they need an ID, they need a P3 all those things because sometimes they are forced to pay for the P3 and they are people who've been abused. So we need to have a proper coordination of the government institutions.[832]

The synergy can be accelerated if the profile of the department of children services is elevated to a point that it is taken as seriously as other government agencies. This cannot happen without the support of the executive.

5.5 Conclusion

This final chapter has summed up the study by seeking to answer the question as to what entry points exist for the application of restorative practices and values within the Kenyan criminal justice system. These are only identifiable through creative engagement with the justice system in order to come up with what has been described as 'a midway process that is a product of the dialectical process'.[833] The resultant ideal process includes both retributive and restorative justice. Such a system would focus, not just at the harm caused to the victim, but on how to restore the victim for posterity. This midway system acknowledges the place of censure and condemnation of the act done. It also calls for the need to put into consideration the context of the familial circumstances in crafting the restorative response. This demands resource mobilization and sufficient goodwill from all arms of government. The process and ultimate benefits of incorporating restorative values, processes and lifestyles in IFCSA was summarized as follows:

> Attempts could be made to do it creatively within the available means because it is just about re allocation of resources through stakeholder collaboration. It would take training and reformulating and creating an understanding but that would be repaid by reduced costs downstream in terms of reduced time and overall cost to

[832] Interview with C Muinde, Children's Officer Mombasa (n 600).
[833] Interview with Joel Ngugi, J (n 612).

> the system it is all about reallocation of resources in the criminal justice system. If we reallocated our resources with stakeholder collaboration, the kind of new model victim centered method can happen. Initially there will be foregrounded intensive course in terms of training and in terms of reformulating and in terms of creating an understanding and so forth but I think that will be repaid by quite some reduced costs downstream in terms of reducing time that it actually takes to deal with a lot of these cases and in terms of overall costs to the system. A child whose human rights are secured or guaranteed through this kind of a hearing whose victimization is prevented and livelihood ensured is a child who is going to be less costly to the system; less likely to cause trouble in school and less likely to have other psycho social problems. The same thing with other members of that family. So in terms of overall costs to the system, incorporating restorative justice is doable and it can be beneficial.[834]

The effective incorporation of restorative justice in the formal justice system's response to IFCSA demands a paradigm shift that places the victim at the center of the justice process and ensures they remain there throughout the process and thereafter. It should also be able to surmount all the valid concerns evident in the specificities of IFCSA as well as those raised by feminists around the issue of unequal power balance between the victim and the perpetrator. This is only achievable through the active input of the three arms government in playing their respective roles to restore, build and sustain the resilience of the victim of IFCSA through holistic justice as discussed in this chapter.

[834]Ibid.

CHAPTER SIX: RECOMMENDATIONS AND CONCLUSION

6.1 Overview

This study set out to interrogate the effectiveness of the legal framework within which IFCSA is responded to in Kenya from the victim's perspective. This has necessitated the unpacking of IFCSA with the aim of distinguishing its impact from that of child sexual abuse by a non-family member. The study has been carried out by interrogating restorative justice against the backdrop of vulnerability theory, feminism, legal pluralism, and human rights standards. This has been useful in realizing the overall goal of the study which is to explore entry points of restorative justice values and processes in the criminal justice system. These values and processes have been drawn from both the formal and informal justice system. The study has demonstrated that restorative justice is a possible means of delivering a more victim-centred and holistic justice to the victim of IFCSA.

The study was based on a four prong hypotheses as stated in chapter one. First, that IFCSA is prevalent enough to cause concern and be accorded specialized attention. Secondly, that IFCSA possesses peculiar specificities that distinguish it from child sexual abuse by a non- family member and hence has a unique impact on its victims. Thirdly, that the legal framework under which IFCSA is responded to is deficient and incapable of delivering holistic justice to the victim of IFCSA. Lastly, there is a notable enduring affinity within the community for IJS in IFCSA cases with communities enduringly resorting to it to resolve or cover up a good number of IFCSA cases. IJS can therefore neither be ignored nor wished away in the search for a restorative response to IFCSA. The study has therefore given due consideration to IJS values and processes capable of adding value to the search for a victim centered restorative response.

The five research questions that this study set off to answer include the extent to which the existing legal framework adequately protects the interests of IFCSA victims; the unique ways in which IFCSA impacts its victim; the extent to which restorative justice may provide an effective legal response to IFCSA ; the lessons FJS may learn from IJS in consolidating a restorative response to IFCSA; and the entry points available for the application of restorative practices and values in IFCSA cases.

The theoretical and conceptual basis of this study has been laid through a comprehensive discussion of restorative justice. It has been discussed against the backdrop of vulnerability theory,

feminism, legal pluralism and human rights standards. This has involved discussing the historical background of restorative justice and the meaning assigned to it by its various proponents. Though restorative justice means different things to different proponents, the meaning that is relevant to this research is the one with the component of a victim centered response to crime. This resonates to the aim of the research which seeks to place the victim's interests at the center of the response to IFCSA.

The study has adopted Gerry Johnstone's scope of the theory as a set of values, a process and as a lifestyle.[835] As a process, it provides the 'forum where all parties with a stake in the offence come together to resolve collectively how to deal with its aftermath'.[836] As a set of values, it calls for the injection of attitudes that make the criminal justice system more responsive to the needs of the victim. As a lifestyle, it advocates for a holistic approach to life and relationships in everyday relationships, beyond the realms of crime.[837] The study has interrogated restorative justice from the three perceptions. These three perceptions have also formed the basis of identifying entry points for restorative justice in the criminal justice system as it responds to IFCSA.

The subject of this study is a child who is sexually abused within the home. The child is, more often than not, female while the perpetrator is in most cases male. The gender and power dynamics inherent in this scenario has necessitated a discussion of restorative justice in the light of women's experiences as espoused by various feminist theories. The positioning and needs of the vulnerable child victim has also made it necessary to examine restorative justice against the backdrop of vulnerability theory.

The study has highlighted the nexus between restorative justice and legal pluralism in appreciation of the fact that there exists more than one legal order in Kenya; the formal and the informal justice systems. IFCSA offences often generate concerns that transcend the scope of the formal justice which is not the only relevant and effective legal order in people's lives. Informal justice is exercised in existing institutions of normative ordering like the home, neighborhood, workplace, and schools, which also provide avenues of conflict redress.[838] The thread that ties the formal and informal justice systems is found within the concept of legal pluralism. This study has therefore

[835] G Johnstone (ed.) *A Restorative Reader, Texts, Sources* (n 50) 1.
[836] T. Marshall, 'Restorative Justice: An Overview' (n 31) 28.
[837] D W Van Ness and K H Strong, (n 46) 41.
[838] ICHRP (n 298).

interrogated the concept of legal pluralism as a basis for identifying the values and processes outside the formal justice system that can enrich restorative justice.

Any sound legal response involving a child victim must have due regard to relevant human rights standards. This includes the principle of the best interest of the child and the right to access to justice both of which are cardinal human rights standards in relation to children. The study has demonstrated the importance of aligning all restorative processes and values applicable in IFCSA to these human rights standards. The maintenance of the standard is important in ensuring the protection of the child victim's human dignity while in pursuit for justice.

In answer to the question on the extent to which the existing legal framework suffices in protecting the interests of the victim of IFCSA, the study has extensively analyzed the relevant statutory and case law together with international standards. The analysis has covered the law applicable from the time the abuse is detected, through investigation, arrest, bail, hearing, and sentencing. The discussion of the legal framework has been with a view to identify the gaps that impede justice for an IFCSA victim.in the legal framework. The research has shown that Kenya is replete with legislation, binding treaties and standards of persuasive force that are relevant in guiding a victim-centered approach in the respond to sexual offences. The jurisprudence around the victim's rights is also on an upward trend. The legal framework is however blind to the specificities that are peculiar to IFCSA. It ignores the context and circumstances and presumes equivalence of the victims. This has resulted in the delivery of justice that is not holistic and essentially impedes access to justice to the victim of IFCSA. There is also a lingering gap between international standards on the place of the victim and the existing domestic framework. This provides room for utilization of restorative justice through legislative intervention, more dynamic interpretation of existing laws by the courts and more facilitation for implementation of the restorative laws.

With regard to the question on the uniqueness of the impact of IFCSA, the study has unpacked the context within which IFCSA occurs and engages the legal process. This undeniably differs from that which pertains to child sexual abuse by a non-family member. The context within which the former takes place is more fragile and its after-effect is graver, more permanent, far reaching and complex than the latter. The specificities identified in the research include of patriarchy, family set up, concerns of livelihood, associated stigma and taboos, community expectations, and the tension around the issue of ownership of the conflict.

The discussion of specificities of IFCSA has highlighted the bottlenecks that diminish the chances of the victim of IFCSA accessing justice within the formal justice system. The handicaps have the cumulative effect of complicating the reporting, investigation and prosecution of IFCSA cases. The complications propel the victims and their families towards the path of least resistance. This may take the form of either sweeping the incident under the carpet, or outright complicity and acquiescence by those supposed to report the offence. They therefore have the potential of impeding access to justice if left unacknowledged and unattended by the legal system. The research has proved that the bottlenecks cannot be resolved by the traditional thinking around the formal justice system. It is for this reason that a restorative approach is explored.

The ultimate research question is on the entry points that exist for the application of restorative practices and values within the Kenyan criminal justice system. This has been answered together with the question on the lessons the formal justice system can learn from the informal. The proposed restorative entry points are sourced from both the formal and informal justice system. The study does not however recommend restorative justice as a stand-alone alternative. It recommends it to the extent that it renders support to the existing justice system for the benefit of the victim. The findings of this study have disclosed several opportunities for entry points of restorative justice in the response to IFCSA in the following areas:

6.2 Opportunities for Restorative Interventions

a) Opportunities in the Use of Therapeutic Practices

This has to do with the implementation of the law, at all phases of the justice process, in a manner that does not impact negatively on the victim's well-being. It is in acknowledgement of the heightened emotions that accompany IFCSA. The study calls on all professions who interact with the victim of IFCSA to be intentional about empathizing with them and placing them at the center of the case at hand. Implementation of therapeutic processes requires a shift from the traditional adversarial mindset. This is achievable through skills training to enhance the professionals' emotional intelligence.

b) Opportunities to Learn from the Informal Justice System

While admitting that informal justice is neither perfect nor a panacea for the shortfalls in the formal justice system, the study has made two observations concerning the same. First, is the community's undeniable affinity to it and second, the fact that it is replete with restorative processes and values that the formal justice can learn and possibly adopt. These include the fact that it is easily accessible, it has settings and processes that resonate with the community's lived reality, and the cases are disposed of swiftly and expeditiously. In addition, IJS, unlike the FJS, endeavours to resolve complex issues wholesomely without isolating them into demarcations of civil and criminal or splitting them into various other disciplines. These are aspects that FJS may borrow from IJS to make it more restorative. The other aspect that the FJS can adopt from the IJS is the incorporation of restorative outcomes that are of direct benefit to the victims like reconciliation, apology and compensation. The search for a restorative response to IFCSA will therefore always be incomplete without recognizing the role of the IJS.

c) Opportunities to Divert some IFCSA Cases to IJS

There is general official resistance against the use of IJS in IFCSA cases. The study has however identified two categories of IFCSA that may possibly be diverted to IJS with minimal backlash. The first one is where the victim and the perpetrator are both below eighteen years. The second is where the IFCSA takes place between two youths without a substantial age difference between them and without use of coercion. The key considerations are therefore absence of coercion, the age of the perpetrator and the difference in age between the two.

d) Opportunities to Law Reform

Many of the opportunities identified above are unachievable without the support of the requisite legal framework. This is mainly in form of law reform and amendment of existing legal provisions. The jurisdiction of the Children's Court needs to be expanded to include all cases involving child victims. The mandate of the Department of Children Services as prescribed in the Children Act needs to be expanded to accommodate more meaningful intervention on behalf of IFCSA victims. The sentence for sexual abuse under the Children Act equally needs to be enhanced with a view to

harmonize it with the sentences for related offences in the Sexual Offences Act. The study has also recommended the rethinking of the statutory age of consent for the sake of non- coercive sexual encounters between related teenagers which is currently criminalized. The other recommendation is the removal of the mandatory minimum sentences in sexual offences together with the bar against plea bargain in sexual offences. This will facilitate the better use of discretion on a case by case basis and facilitate the operationalization of combining incarceration of perpetrators with other victim centered restorative outcomes. The study has also made recommendations for amendment of the law and policy on bail and bond. This is with a view to specifically address the unique circumstances of IFCSA where both the victim and perpetrator may be living under the same roof during trial.

The study has also identified the need to amend the Victim Protection Act to give the Department of Children Services a role in the management of the Victim Protection Trust Fund on behalf of IFCSA victims. Finally, it is clear from the discussion in chapter four of this study that the intersectionality between childhood and abuse by a family member creates certain specificities which increase the vulnerability of the child victim. Though children are generally classified as vulnerable under the Constitution, the Children Act, the Sexual Offences Act and Victim Protection Act, specific recognition of IFCSA victims as a vulnerable category in all the statutes will draw the much needed attention to this intersectionality.

e) Opportunities in Executive Intervention

The most obvious finding to emerge from this study is that the ultimate solution to the research problem lies beyond the mere letter of the law. It is a problem whose solution lies in a multi-sectoral approach to the issue. The study has called on the executive through its agencies to invest in both the implementation of laws that have the effect of restoring the victim and promote restorative justice as a lifestyle. This requires political will which is demonstrated by adequate budgetary allocation and prioritization of institutions that are positioned to build the resilience of both the victims and potential victims of IFCSA. These include department of children services, health institutions and schools. The use of therapeutic processes in responding to IFCSA requires training of all the professionals who interact with IFSCA victims from detection to sentencing and thereafter. This is to ensure that the victim is handled with the requisite emotional intelligence

throughout to avoid re-victimization and contribute to the recovery process. The training will only succeed with support from the executive in terms of prioritization, political will and budgetary allocation.

6.3 Need for Further Research

This research marks the beginning of a conversation on the need to distinguish child sexual abuse that takes place within the home on the basis of the unique circumstances surrounding it. It not only contributes to a deeper understanding of the intricacies surrounding IFCSA, it also adds to existing literature on the relatively unbeaten path of applying restorative justice to a taboo offence like IFCSA whose standard response has assumed to be swift retribution. Due to its scope constraints, the study did not interrogate all areas comprehensively. It can however act as a base for future studies as it has thrown up legal and anthropological questions in need of further investigation. These findings provide insights for future research hence the recommendation that further research be undertaken in the following areas:

The first area that needs further investigation is a claim that was echoed by several respondents in this study. This is to the effect that IFCSA was unheard of in traditional African families. There is need for a social cultural study to establish the veracity of this claim. If it is established to be the case, a study on the structures that insulated the family from such infractions and the possibilities of replicating the same in the present day, may be necessary. If the claim is found to be untrue, it would be useful to find out how IFCSA was responded to in the traditional African setting especially on the restoration of the victim.

The second area in need of further investigation is with regard to the propensity to misuse IFCSA through fabricated cases in order to achieve a certain end. As pointed out in chapter four this disturbing trend was identified in the course of data collection. All the professionals interviewed confirmed having dealt with fabricated cases at some point in the course of their work. The most common victims of tramped up charges are those with the least bargaining power in the society like children, the aged and the poor.[839] The issue of fabrication of IFCSA falls outside the scope of this research. If however left unattended, it can have the effect of undermining official response

[839] Interview with Inmate E. H. Fondo (Shimo la Tewa Prison, Mombasa, 16 September 2016).

to the genuine cases. A study research on the prevalence of the fabricated cases and the manner in which they present themselves would be useful to enable a quick identification of the same at the earliest time possible.

Thirdly, there is need for more information on non- coercive sexual activity amongst teenagers both within and outside the family. In most of the cases, it is the male who is seen as the aggressor and hence taken through the criminal justice process as a sex offender. When found guilty, they end up serving long sentences. Research in this area will assist in coming up with a more constructive approach than the indiscriminate punishment based response that has no regard to the existing relationship between the two teenagers.

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APPENDICES

Appendix One: Consent Form

Introduction

My name is **Mercy Mwarah Deche.** I am carrying out a PhD research under the working title: **Legal Responses to Intra-Familial Child Sexual Abuse in Kenya: A case for Restorative Justice.** This study is in response to the now widespread problem of child sexual abuse within the home, also known as intra-familial child sexual abuse (IFCSA). It is informed by the hypothesis that the existing Formal Justice System does not sufficiently achieve justice for these victims. The purpose of this study is to come up with a victim centered legal response for cases of IFCSA through incorporation of restorative justice into the criminal justice system.

I am going to give you information and invite you to be part of this study. This is to make sure that you understand the study well. Please ask me to stop and give clarification at any point. If you have any questions later, you can also ask me.

Why is this study being done?

This study will form part of my thesis for the Doctorate degree in law I am currently undertaking at the University of Nairobi. It is hoped that the study will contribute greatly to the criminal justice process in Kenya in the specific area of responding to IFCSA. The information gathered in this study will assist all players in this field to highlight the hurdles and gaps and also give pointers to possible solutions including the incorporation of restorative justice. The overall effect will be a more effective legal response to intra familial child sexual abuse.

What does the study involve?

This study will involve focused group discussions with community leaders and professionals, participation in some of the IFCSA court cases and interviews. The interview shall be both in depth and Key informants' interview targeting the following respondents:

1. Judicial officers at all levels (judges and magistrates);
2. Legal practitioners ;
3. Children's officers;
4. Probation officers;
5. Police Officers;
6. Community leaders;
7. Victims of IFCSA;
8. Convicted offenders

The Respondents will be drawn from the Mombasa, Nakuru and Kwale counties.

Procedures to be followed:

a) If you consent to participate in the study as a respondent in the interview, you will be asked questions on the topic under research for about 20 to 30 minutes. The interviewer will record your response. If you need time to think through your answers, the questionnaire may be emailed to you and you may respond on email. You do not have to disclose your name.

b) If you consent to participate in the group discussion, your contribution shall be noted and used in the research. Your name shall however not be disclosed unless you want it. If you are not comfortable, you may abstain from signing the consent form.

Benefits

The study may not directly benefit you as an individual. However it will make a great contribution to the criminal justice system. It will form a basis for possible ground breaking legal reform in dealing with intra familial child sexual abuse cases.

Risks

Only negligible risk is anticipated. This risk relates to the expected discomfort incidental to discussing an issue as horrific and disturbing as child sexual abuse. The researcher is however experienced and shall conduct the interview professionally and with due sensitivity.

Confidentiality

Privacy and confidentiality shall be ensured through- out the study process. All information from this study, for data entry and analysis, will be transmitted only in a form that cannot be identified with the subject.

Right to refuse or withdraw

Your participation in this study is voluntary. If at any time you do not want to answer any interview question, you may skip that question. You are free to withdraw from the study at any time.

Consent certificate

I have read the foregoing information. I have had the opportunity to ask questions about it and any questions that I have asked have been answered to my satisfaction. I consent voluntarily to participate as a participant in this study and understand that I have the right to withdraw from the study at any time without affecting any treatment that I may require.

Signature of Participant: _____

Name of Participant (optional)_____

Date: _____

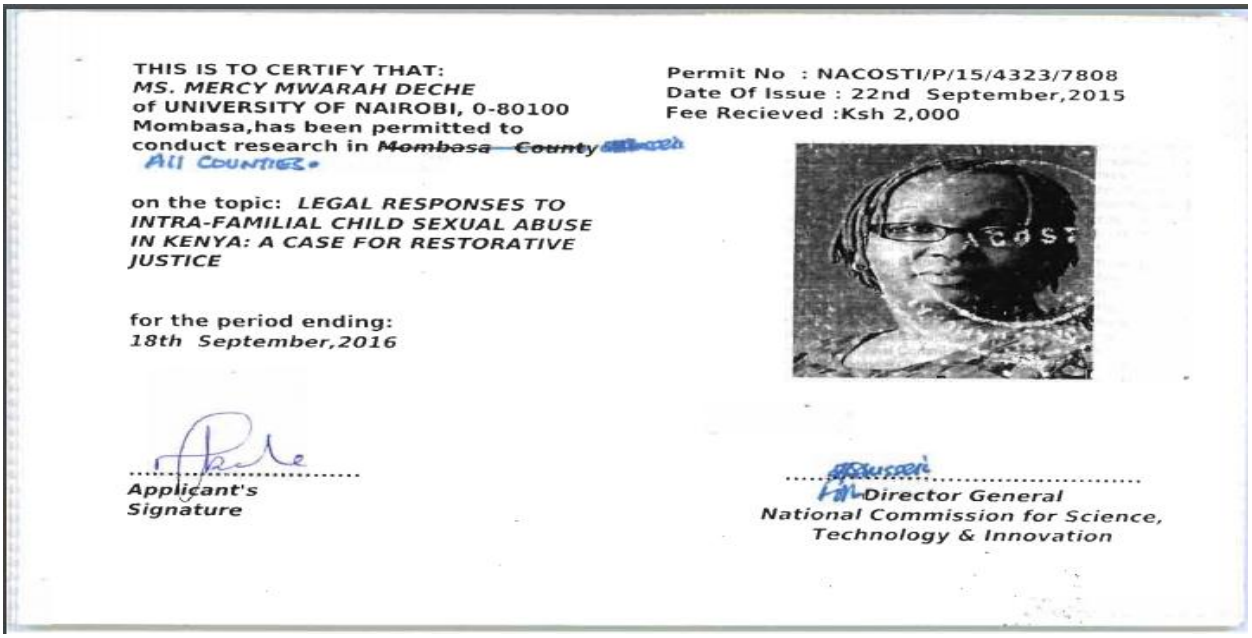
I have accurately read or witnessed the accurate reading of the consent form to the potential participant, and the individual has had the opportunity to ask questions. I confirm that the individual has given consent freely.

Print name of researcher: _____

Signature of researcher: _____

Date: _____

Appendix Two: Authorization from National Commission for Science, Technology & Innovation.



THIS IS TO CERTIFY THAT:
MS. MERCY MWARAH DECHE
of UNIVERSITY OF NAIROBI, 0-80100
Mombasa,has been permitted to
conduct research in ~~*Mombasa County*~~ All Counties

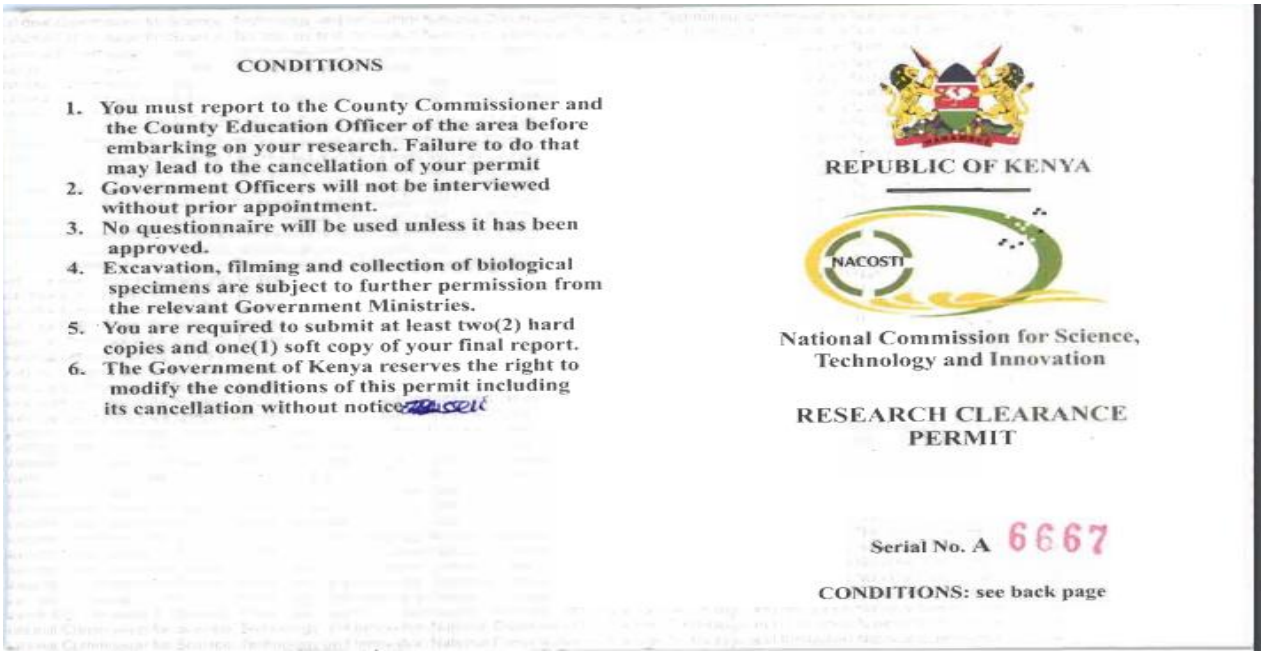
on the topic: *LEGAL RESPONSES TO INTRA-FAMILIAL CHILD SEXUAL ABUSE IN KENYA: A CASE FOR RESTORATIVE JUSTICE*

for the period ending:
18th September,2016

Permit No : NACOSTI/P/15/4323/7808
Date Of Issue : 22nd September,2015
Fee Recieved :Ksh 2,000

.....
Applicant's Signature

.....
Director General
National Commission for Science, Technology & Innovation



CONDITIONS

1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit
2. Government Officers will not be interviewed without prior appointment.
3. No questionnaire will be used unless it has been approved.
4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.
5. You are required to submit at least two(2) hard copies and one(1) soft copy of your final report.
6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice

REPUBLIC OF KENYA

NACOSTI

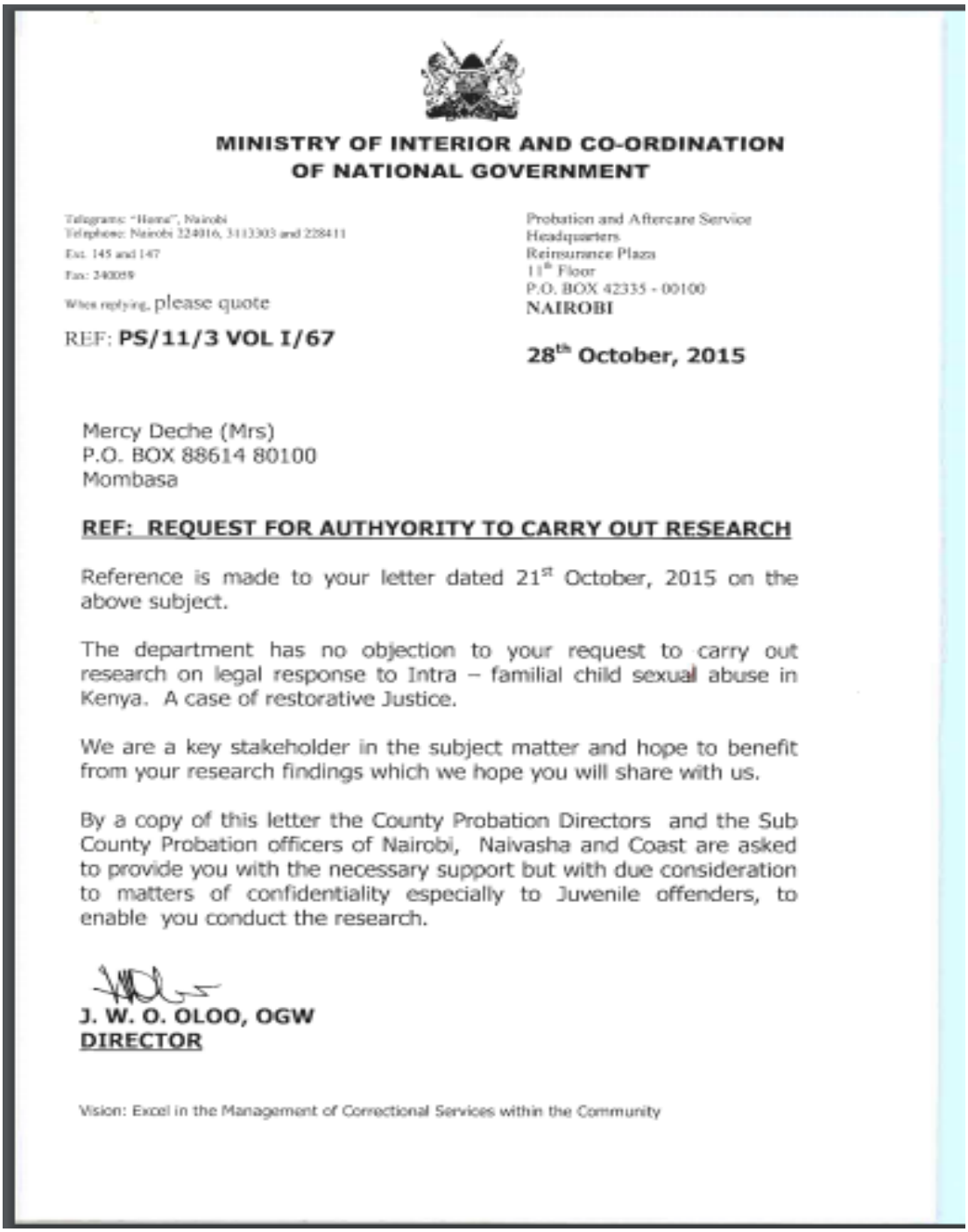
National Commission for Science, Technology and Innovation

RESEARCH CLEARANCE PERMIT

Serial No. A 6667

CONDITIONS: see back page

Appendix Three: Consent from Probation and Aftercare Service Directorate



MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT

Telegrams: "Harna", Nairobi
Telephone: Nairobi 324016, 3113303 and 228411
Ext. 145 and 147
Fax: 240059
When replying, please quote

REF: **PS/11/3 VOL I/67**

Probation and Aftercare Service
Headquarters
Reinsurance Plaza
11th Floor
P.O. BOX 42335 - 00100
NAIROBI

28th October, 2015

Mercy Deche (Mrs)
P.O. BOX 88614 80100
Mombasa

REF: REQUEST FOR AUTHYORITY TO CARRY OUT RESEARCH

Reference is made to your letter dated 21st October, 2015 on the above subject.

The department has no objection to your request to carry out research on legal response to Intra – familial child sexual abuse in Kenya. A case of restorative Justice.

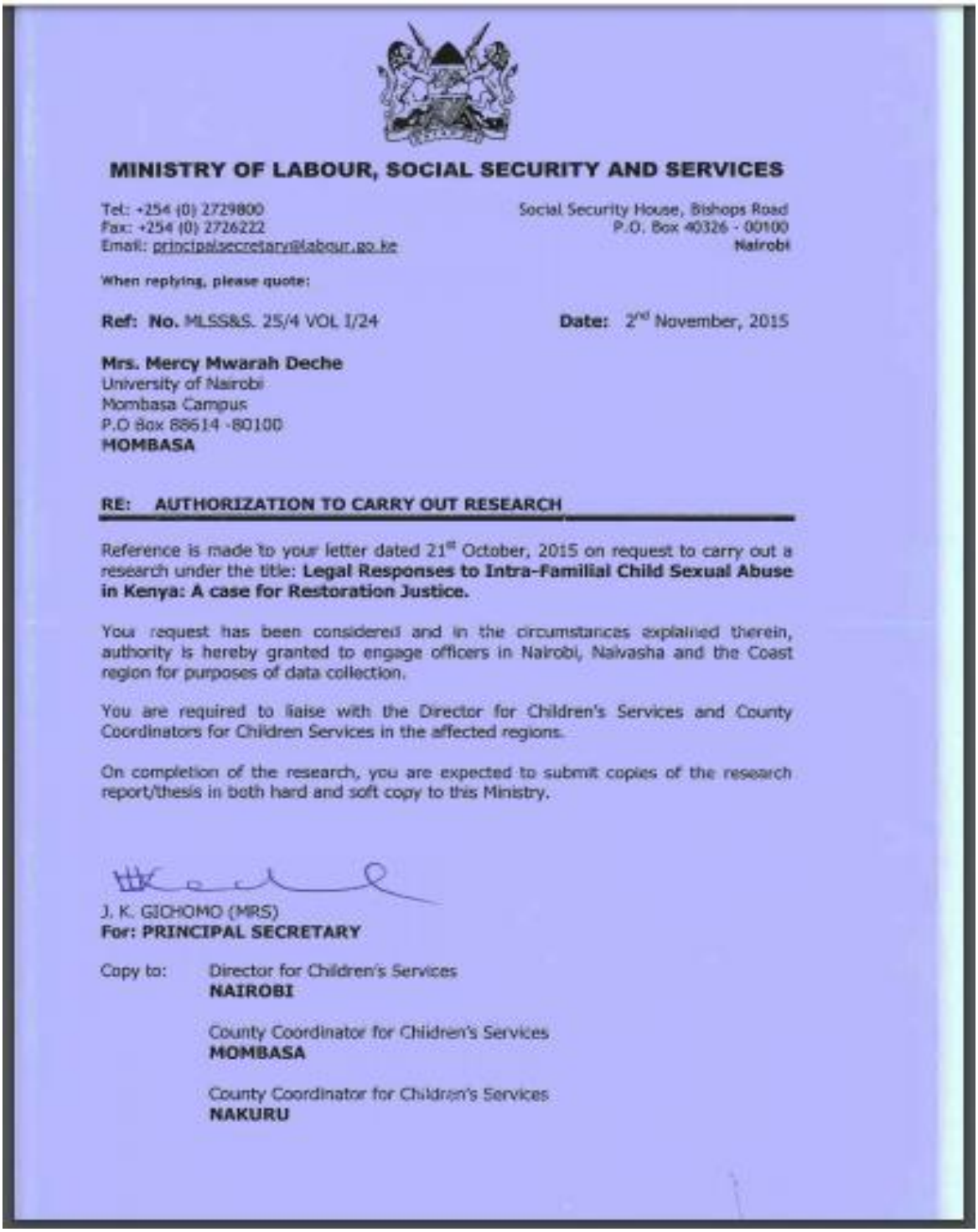
We are a key stakeholder in the subject matter and hope to benefit from your research findings which we hope you will share with us.

By a copy of this letter the County Probation Directors and the Sub County Probation officers of Nairobi, Naivasha and Coast are asked to provide you with the necessary support but with due consideration to matters of confidentiality especially to Juvenile offenders, to enable you conduct the research.

J. W. O. OLOO, OGW
DIRECTOR

Vision: Excel in the Management of Correctional Services within the Community

Appendix Four: Authorization from Directorate of Children's Services



MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES

Tel: +254 (0) 2729800
Fax: +254 (0) 2726222
Email: principalsecretary@labour.go.ke

Social Security House, Bishops Road
P.O. Box 40326 - 00100
Nairobi

When replying, please quote:

Ref: No. MLSS&S. 25/4 VOL I/24

Date: 2nd November, 2015

Mrs. Mercy Mwarah Deche
University of Nairobi
Mombasa Campus
P.O Box 88614 -80100
MOMBASA

RE: AUTHORIZATION TO CARRY OUT RESEARCH

Reference is made to your letter dated 21st October, 2015 on request to carry out a research under the title: **Legal Responses to Intra-Familial Child Sexual Abuse in Kenya: A case for Restoration Justice.**

You request has been considered and in the circumstances explained therein, authority is hereby granted to engage officers in Nairobi, Naivasha and the Coast region for purposes of data collection.

You are required to liaise with the Director for Children's Services and County Coordinators for Children Services in the affected regions.

On completion of the research, you are expected to submit copies of the research report/thesis in both hard and soft copy to this Ministry.

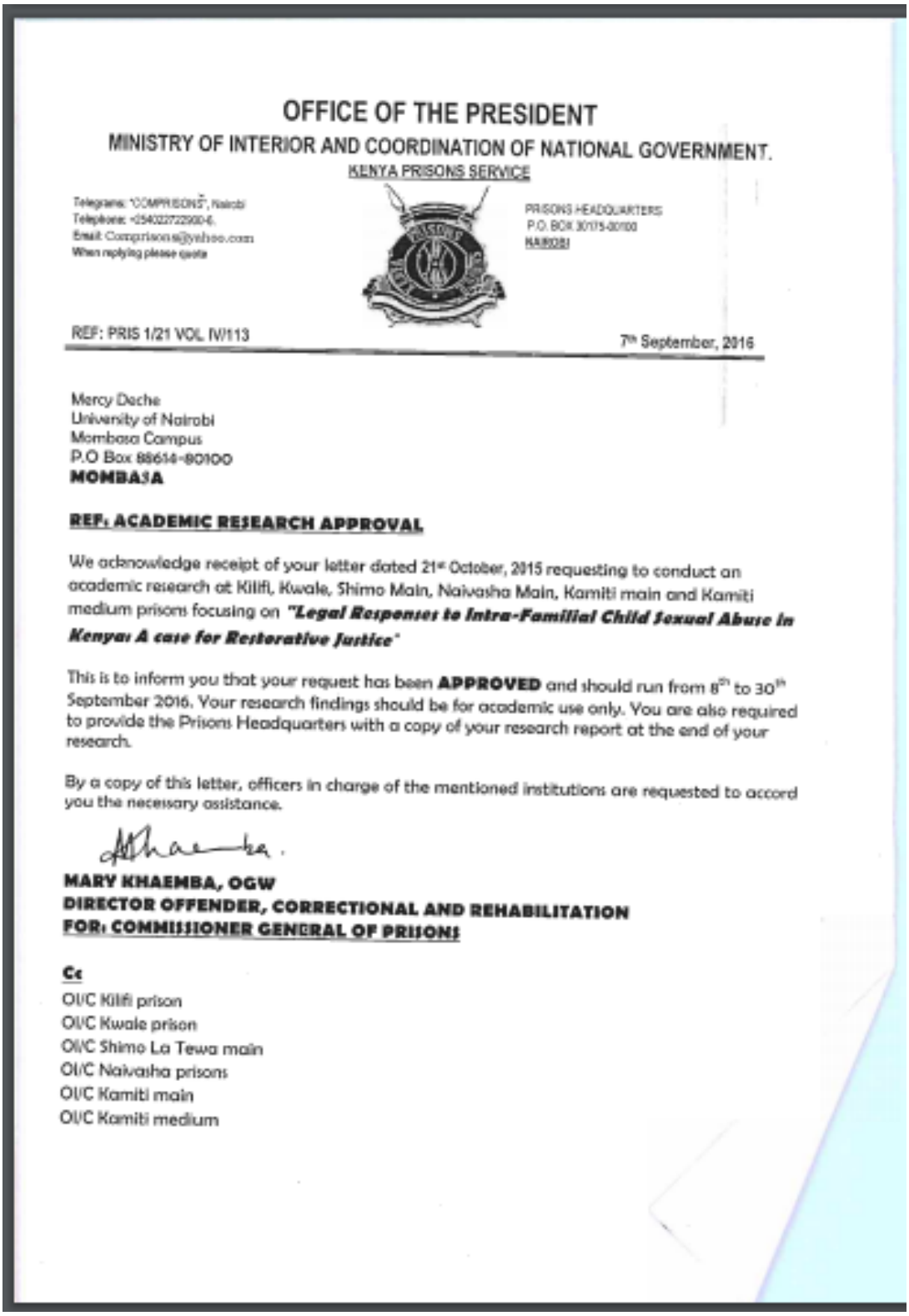
J. K. GICHOMO (MRS)
For: PRINCIPAL SECRETARY

Copy to: Director for Children's Services
NAIROBI

County Coordinator for Children's Services
MOMBASA

County Coordinator for Children's Services
NAKURU

Appendix Five: Consent from Commissioner General of Prisons



OFFICE OF THE PRESIDENT

MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.

KENYA PRISONS SERVICE

Telegrams: "COMPRISONS", Nairobi
Telephone: +254022722000-6
Email: Comprisons@yahoo.com
When replying please quote

PRISONS HEADQUARTERS
P.O. BOX 30175-00100
NAIROBI

REF: PRIS 1/21 VOL IV/113

7th September, 2016

Mercy Dache
University of Nairobi
Mombasa Campus
P.O Box 88614-80100
MOMBASA

REF: ACADEMIC RESEARCH APPROVAL

We acknowledge receipt of your letter dated 21st October, 2015 requesting to conduct an academic research at Kilifi, Kwale, Shimo Main, Naivasha Main, Kamiti main and Kamiti medium prisons focusing on ***"Legal Responses to Intra-Familial Child Sexual Abuse in Kenya: A case for Restorative Justice"***

This is to inform you that your request has been **APPROVED** and should run from 8th to 30th September 2016. Your research findings should be for academic use only. You are also required to provide the Prisons Headquarters with a copy of your research report at the end of your research.

By a copy of this letter, officers in charge of the mentioned institutions are requested to accord you the necessary assistance.

MARY KHAEMBA, OGW
DIRECTOR OFFENDER, CORRECTIONAL AND REHABILITATION
FOR: COMMISSIONER GENERAL OF PRISONS

Cc
OI/C Kilifi prison
OI/C Kwale prison
OI/C Shimo La Tewa main
OI/C Naivasha prisons
OI/C Kamiti main
OI/C Kamiti medium

Appendix Six: Consent from Kenya Police Service

TO: REGIONAL COORDINATOR RIFT VALLEY (R) COAST (R)
COUNTY POLICE COMMANDER NAIROBI (.)

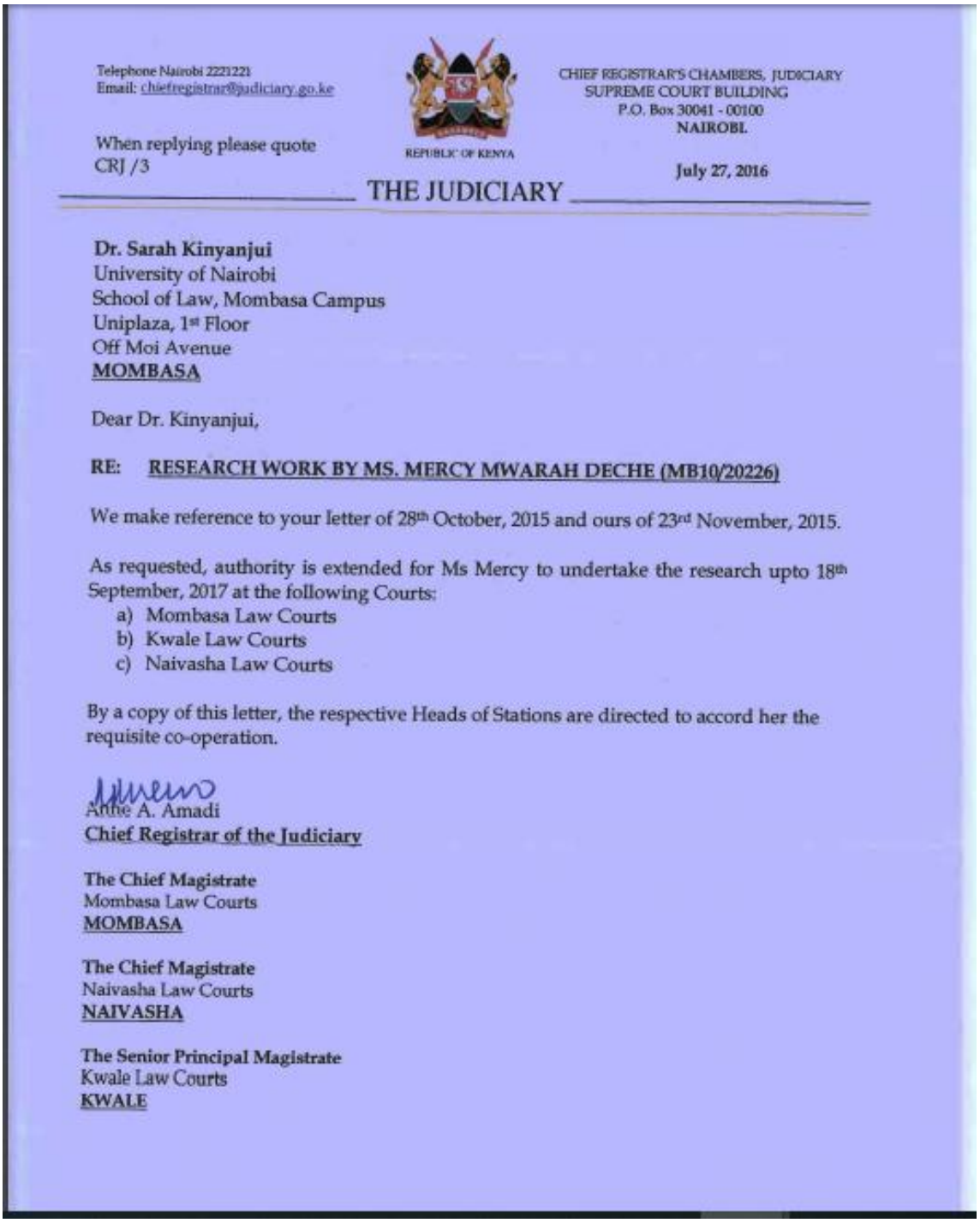
SEC.POL.2/1/35/VO.XII/83 **2/8/2016**

REQUEST TO CARRY OUT RESEARCH - MRS MERCY DECHE

THE ABOVE SUBJECT (MRS MERCY DECHE **)** IS A STUDENT OF PHD IN THE UNIVERSITY OF NAIROBI (MOMBASA CAMPUS) SHE HAS REQUESTED TO ENGAGE OFFICERS IN NAIROBI, NAIVASHA AND COAST REGION WHEN CARRYING OUT A RESEARCH ON` **LEGAL RESPONSES TO INTRA-FAMILIAL CHILD SEXUAL ABUSE IN KENYA: A CASE FOR RESTORATIVE JUSTICE.'** ACCORD HER ANY NECESSARY ASSISTANCE BUT WITHIN THE FRAME WORK OF THE LAW.

(JOEL M. KITILI), MBS
DEPUTY INSPECTOR GENERAL
KENYA POLICE SERVICE

Appendix Seven: Consent from Judiciary



Telephone Nairobi 2221221
Email: chiefregistrar@judiciary.go.ke

When replying please quote
CRJ /3

REPUBLIC OF KENYA

CHIEF REGISTRAR'S CHAMBERS, JUDICIARY
SUPREME COURT BUILDING
P.O. Box 30041 - 00100
NAIROBI.

July 27, 2016

THE JUDICIARY

Dr. Sarah Kinyanjui
University of Nairobi
School of Law, Mombasa Campus
Uniplaza, 1st Floor
Off Moi Avenue
MOMBASA

Dear Dr. Kinyanjui,

RE: RESEARCH WORK BY MS. MERCY MWARAH DECHE (MB10/20226)

We make reference to your letter of 28th October, 2015 and ours of 23rd November, 2015.

As requested, authority is extended for Ms Mercy to undertake the research upto 18th September, 2017 at the following Courts:

a) Mombasa Law Courts
b) Kwale Law Courts
c) Naivasha Law Courts

By a copy of this letter, the respective Heads of Stations are directed to accord her the requisite co-operation.

Anne A. Amadi
Chief Registrar of the Judiciary

The Chief Magistrate
Mombasa Law Courts
MOMBASA

The Chief Magistrate
Naivasha Law Courts
NAIVASHA

The Senior Principal Magistrate
Kwale Law Courts
KWALE