



# The Child Witness and the Law: The Truth (And Nothing But)<sup>1</sup>

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## **Abstract**

*This article tackles the issue of the need for a multidisciplinary approach to the treatment of sexually abused children in court. It highlights the problem of having children, as opposed to adults, on the witness stand due to the incompatibility of the court procedure to the sensitive nature of children. The paper discusses at length the justifications for the applicability of the RECW, or the Rule on the Examination of a Child Witness, a more child-friendly set of rules promulgated by the court and concludes with recommendations on further measures that may be undertaken to protect the rights of the Child witness.*

*Keywords: Rule on the Examination of a Child Witness, child abuse, sexual abuse, Philippine laws.*

## **Introduction**

One of the vital functions of law is its ability to transform complex situations involving intricate human relationships and an infinite permutation of possible causes and effects into a simple story which makes sense and holds a moral for everyone.<sup>2</sup> Every case of child sexual abuse, riddled with as many interpretations of truth as there are number of persons involved, must similarly be distilled into a simpler storyline so that justice is dispensed, the criminal act is punished, and the

child victim can move on and recover. This paper is ultimately about the sexually abused child and the recent efforts at multi-disciplinary intervention for the best interests of the child.

Until recently, lawyers who seek justice for the sexually abused child have harbored the myopic belief that redress can only be obtained by going to court and relying on more traditional court procedures which involve painfully extracting the truth from physical and testimonial evidence that more often than not reduces the child victim to tears, and trusting the wisdom of a legal decision to have adequately rectified matters for the hapless victim. Having been trained to believe in legal procedure as a fairly reliable fact-finder, lawyers generally appear to ignore or belittle the importance of a multi-disciplinary approach based on the developmental level of, and which takes into consideration the resulting trauma on, the sexually abused child.

It bears stressing that the case of a sexually abused child tends to be more complex, not only because the abuse has resultant debilitating developmental repercussions, but also because the evidence-gathering process that arises from an often privately-committed offense requires multi-disciplinary, efficient, inter-agency coordination to preserve evidence, effectively prosecute the case, and avoid the adverse effects of duplicating interviews which induce post-traumatic stress disorder.

Without denying the accused his right to a fair trial as well as his other fundamental, constitutionally-enshrined rights, the State must ensure that the remedial procedures employed are in the best interests of the child victim and are correspondingly sensitive to his or her special circumstances. Since children are still developing socially, mentally and physically, legal intervention and remedial procedures require safeguards against the intrusiveness of the investigation, examination and trial processes that could traumatize the child victim further and impede his or her natural development. Consequently, ordinarily applicable procedures and evidentiary yardsticks that would otherwise require physical evidence and the victim's frank testimony of sexual abuse must be re-evaluated in light of the child's best interests. Fortunately, Philippine law appears to have evolved considerably and grown more responsive to the "special circumstances" dilemma

of child victims, and has re-examined the necessity of subjecting the child to the rigors of direct and cross examination (considering that most sexual abuse cases happen in private, and are witnessed only by the child-victim and the perpetrator), directly confronting the accused, and requiring the presentation of physical evidence present in only a small proportion of cases.

This paper focuses, primarily, on the magnitude of the problem of sexually abused children, the inadequacy of a purely legal intervention, the corollary importance of a multi-disciplinary approach, and the necessity of a logistically-efficient and well-coordinated procedure for evidence gathering and case handling to advance the best interests of the child victim.

### Statement of the Problem

Child sexual abuse cases are often the most troubling ones we encounter in the criminal justice system. Few crimes seem to rattle our moral, ethical, and emotional foundations more than those which impact upon, and often forever destroy, a child's innocence.<sup>3</sup> It is thus equally disturbing to discover that the justice system has somehow failed to protect the sexually abused child by allowing him or her to be subjected to a secondary form of abuse arising from remedial procedures that were intended to enable redress and dispense justice.

Lack of nationwide awareness concerning the imperativeness of child-sensitive court treatment is also a problem. Although child sexual abuse cases have an 89% rate of conviction in the Philippines, the general insensitivity of the whole prosecution procedure involving the treatment of child victims<sup>4</sup> ought to put the pillars of the justice system on guard. How an interventionist, for instance, proceeds to extract information from the child victim, how participants of the judicial process treats the child witness during the entire criminal proceeding, and how much emphasis is placed on the effects of the sexual offense on the child<sup>5</sup> are matters that must be addressed.

One other problem that requires concerted logistical efforts to resolve is how to deal with the general disability of the child to accurately and completely articulate his or her recollection of events, particularly when beset by post-traumatic disorder

problems that could impair the court's ability to discover the truth and convict an offender. While the judiciary has recognized that criminal cases of child sexual abuse do have special features, it bears stressing that as these offenses are often committed in private (so there are seldom witnesses other than the child), there is rarely other independent confirming medical evidence.<sup>6</sup> Physical evidence may not always be available, and medical testimony given by a non-specialist may prove insufficient, thus constraining the courts to rely on the child's preliminary assertions on record and its assessment of the child's credibility.<sup>7</sup>

One other problem is the tendency of the criminal justice system to overlook, if not neglect, the importance of 'child focus.' For example, in therapeutic interventions - the crisis assessment, and medical and psychiatric counseling, for instance - every effort is made to take the responsibility off the child and back on the adults involved. Upon having disclosed the facts concerning his or her sexual abuse to these support people, the child no longer has to prove to them that he or she has been abused. It is this modality of 'child focus' and the avoidance of repeated reminders to the child of his or her sexual abuse that the justice system seem to overlook in the application of court procedures. Since certain principles of remedial law already work to the advantage of the accused, such as the hardships a child witness experiences when asked to respond to and testify in a language and manner evidently inappropriate to his or her developmental age (e.g. answering questions with double negatives, or which include several different concepts), and the erosion of the child's confidence and tendency toward heightened anxiety in the presence of the perpetrator,<sup>8</sup> this neglect of child focus tends to tilt the balance further against the child.

## Scope and Limitation

While a child may be involved in the judicial process in various ways, this paper will only deal with the sexually abused child as a witness constrained to turn to the judicial system for redress, and the necessity of providing intervention in a coordinated, systematic, and multi-disciplinary manner to protect the best interests of a child.

In order for the reader to appreciate the context in which this paper was drafted, we have also included a preliminary discussion on the magnitude and scope of sexual exploitation of children in the Philippines by citing certain relevant figures and statistics based on national surveys and studies on victims, offenders, and their respective demographics, and discussing certain localized factors which may account for the general hesitance of children in reporting their sexual abuse.

This paper will highlight the special circumstances that justify competency presumptions and special treatment given the child witness under the Rules on Examination of Child Witness adopted by the Supreme Court, considering the considerable disadvantage of the child victim when pit against the advantages afforded the adult perpetrator. It will conclude with a recommendation on additional protective measures that may still need to be undertaken not only to ensure the protection of substantive and procedural rights of the sexually abused child, but also to deter subsequent acts of child sexual abuse.

### **That Vile Monster: A Look into the Magnitude and Scope of Sexual Abuse of Children in the Philippines**

#### **The Unknown Factors**

In a study on the realities of family violence, it was noted that conditions such as those associated with extreme poverty, strained relationships among members of the victim's family, and a previous history of abuse all seem to contribute to the likelihood of sexual abuse being committed against children. The influence of alcohol or drugs is also a major aggravating factor, cited in one out of every four cases. Another factor is lack of sexual awareness, which was cited as the reason for which nearly two out of ten children did not report the abuse -they had no idea that they were being violated. This tragedy is compounded by the fact that the abuse was being inflicted by figures they look up to and depend upon for protection.<sup>9</sup>

Studies also show that 92% of sexual abusers are known to the victims, and about 39% are legal and common law relatives.<sup>10</sup> The most frequent abusers of children are actually their fathers, followed by their uncles. In a national study on

the situation, it was determined that four out of ten men who have victimized children and minors are in their thirties or forties. The abuser's average is thirty-six years, twenty-five years older than their victims, whose average age is eleven years. It was, however, alarmingly noted that perpetrators seem to be getting younger. Of these younger perpetrators, it was found that they tend to be less educated, and almost one-third of them do not have regular jobs. In cases where the offenders are known to the victims, it is commonly reported that the abuse takes place within the territory of the offender. The closer the relationship between the victim and the offender, the more likely the abuse will be committed more than once.<sup>11</sup> In addition, it was found that most domestic child abuse incidences take place in the home while the victim is alone. More than half of these sexual abuse cases occur at night, while a considerable one-third of them occur during the day.<sup>13</sup> These statistics further underscore the need for supervised childcare, in view of the fact that most of the perpetrators of sexual abuse against children are their male relatives. Even separate sleeping quarters or the presence of other family members appear to be no guarantee against sexual abuse.<sup>13</sup> The NBI theorizes that Filipino tradition partly accounts for this. Firstly, the extended family phenomenon usually has relatives and relatives of relatives crowding into one household. Secondly, the pervasive notion of Filipino pride can distort one's sense of justice, so that a mother may refuse to report an erring spouse for fear of destroying the family reputation.<sup>14</sup>

It is distressing that only a fraction of these cases are ever reported. This social problem stems largely from the fact that the victims opt to remain silent, for a variety of reasons. It is also unfortunate that when they do tell, the information goes no further. The unequal relationship between adults and children seems to account for this. The power of adults is greatest when children are young and weak but much of it continues long after that stage. Power refers to the ability to enforce one's wishes through physical means, non-violent coercion or persuasion. Sadly, into this power is read the non-recognition of rights, which impinge on public morality and the law. Equally debilitating factor is the child's ignorance, which contributes to their weakness. They are more susceptible to believing that they are at fault for the abuse that has happened. It is, therefore, very easy to

convince them that if they report their sexual abuse, they who will be despised or punished for it.<sup>15</sup>

Studies also note that in almost 40% of sexual abuse cases, there was a significant time lag, ranging from a few months to years, between the reporting of the abuse and the initial occurrence of the abuse. All these cases involved multiple episodes of abuse, where the perpetrator was almost always a relative within the household. Only 20% of reported cases involved a single episode of abuse and were usually immediately reported. The primary reason cited for delay in reporting the abuse is the fear of what the abuser might do to the victim or his or her family. A secondary reason is the basic ignorance on how to go about reporting the case to the proper authorities/agencies.<sup>16</sup> Offenders and victims generally come from lower classes: 77% of the offenders and 90% of the victims. Though child abuse also happens among the middle and upper classes, many of these go unreported.<sup>17</sup>

In the book "Child Sexual Abuse" by Diane H. Schetky M.D., and Arthur H. Green, M.D.,<sup>18</sup> it was observed that there are three distinct conditions that manifest the tendency of men to sexually abuse a child: worsening poverty, chauvinistic character of the offender, and the lingering trauma of having been themselves subjected to physical, emotional and/or sexual abuse during the early stages of their lives.

Further studies have shown that in the interrogation of child sexual abuse case, gender relations and social hierarchies based on age and class are always implicated.<sup>19</sup> This supports the theory that the origins and meanings of sexual abuse are deeply rooted in the male-dominated base of authority and power in the family and in a wider context, the Philippine society. A survey of decided cases show that both perpetrators and victims come mostly from lower classes suggesting economic and political vulnerability. Most cases come from rural areas, indicating low educational background and lack of exposure and unfamiliarity with the operations of the legal system.

## Deterrents to Legal Intervention

### *1. Fear of the Court Process*

Although there is very little research on the issue, it is often assumed that many investigation and litigation procedures have a negative impact on children and thereby victimize and instill fear in them.<sup>20</sup> Before conviction can be obtained, the child-victim would necessarily be exposed to the criminal court system, which, based from experience and accounts, is not at all conducive to bringing security to the child.

As it is, testifying in a court of law can be a frightening experience even for adults, even though they have some of the skills needed to cope with this very serious and austere environment and personnel. When children are faced with the responsibility of this experience, they tend to find it too overwhelming, resulting in their refusal to testify or cooperate in the investigations, or their half-hearted participation. It is often the intense fear and negative emotions of the experience of testifying in court, as well as the ignorance of the basic purpose of investigation that get in the way of the child seeking refuge in the justice system.<sup>21</sup>

Children, apparently, have many misconceptions about the court process from the roles of the various personnel, the reason for the trial and the consequences of such. These concerns need to be discussed with children in order to clarify their misconceptions. Most children primarily fear the idea of seeing and confronting the offender. This fear is intensified by the misconception that the abused child will not be believed or listened to. The child-victim oftentimes also feels uncomfortable in relating the abuse to a stranger, although such stranger might in fact be the best person to interview the child. The child does not know what language to use in such interview. Often, the only way to recount sexual abuse is to use words which are not ordinarily used by the child and may cause embarrassment on his or her part.<sup>22</sup> The fear of the court process also stems from the child's lack of understanding of the technical language used in court, which makes him or her worry about whether he or she will understand what is going on and the implications of what are said in the course of the investigation or trial.



Furthermore, court set-up itself is often an unfamiliar and scary experience for the child. The typical Philippine courtroom is small, cramped and poorly ventilated. Trial for sexual abuse offenses against children are sometimes calendared with criminal trials of other offenses. Thus, the children are exposed to detention prisoners and other unsavory looking characters. While it is true that under the RECW, children who are witnesses are provided a waiting area where they can stay, the reality is that few judges, and lawyers even know where this waiting room is located, and that is if they know at all that a waiting room exists. Children are also concerned about what will happen to the offender, whether he or she will be imprisoned or will be set free, and whether the offender can hurt them or their family again.

## *2. Fear of Exposure or Labeling*

Often, a child is afraid of disclosing the sexual abuse inflicted upon his or her person for fear that exposure might draw censure from peers or parents. Peer group pressure, called the most influential motivating force in a person's lifetime, easily suppresses a report from a boy who fears the ridicule of his peers by being called a "fag." The same is true for a girl afraid of being called a "slut."<sup>23</sup>

This dilemma is worsened by the litigation of sexual abuse cases which often focus on discrediting the character, credibility and sexual innocence of the victim. Often, the victim's lack of sexual experience has been given undue importance and weight in the court's decision-making process. Most court proceedings focus on these issues rather than on the character of the accused or the fact that sexual abuse constitutes a violation of human rights and exploitation of the victim's body, regardless of the latter's sexual preference and orientation or the lack of it. The focus on the victim risking humiliation and scandal shows the importance of "family honor" and the role of the family in socializing the daughter to the "code" of conduct expected of women in Philippine society.<sup>24</sup>

Thus, most court proceedings seem to confirm the popular notion that in rape cases, the victim is subjected to another ordeal of proving her exemplary character and sexual purity. This, in fact, prevents a large number of victims from pursuing the matter in court. This assertion is further strengthened by the fact that

acquittals in rape cases have always been associated with the questionable character of the victim.

### *3. Fear that the Child will not be Believed*

Regardless of age, children fear that no one will believe what they say. Children are often brought up to perceive themselves as insignificant, and the size disparity between children and adults does not help to make them feel any more consequential. It is not uncommon for the offender to tell the child that no one will believe any accusations that the child might make. This is highlighted specially in situations where the child has had discipline problems in the past or has any history of difficulties with authority figures. This problem is aggravated in cases where the offender is a prominent member of the community or in a position where his integrity could not ordinarily be questioned.<sup>25</sup>

### *4. Threats and Intimidation*

One other factor deterring timely legal intervention is the fact the child often keeps the abuse secret because of the threats that the offender has made, whether expressly or impliedly. These threats are great stumbling blocks for investigators because the child, who is easily convinced, generally believes that the offender has the power to carry out these threats.<sup>26</sup>

Fear has been repeatedly used by perpetrators to prevent the children from reporting the abuse. They usually threaten the children with their lives and the lives of their family, usually siblings and mothers. This clearly shows that rape involves an issue of coercive power. It also manifests the grave inequality between victim and perpetrator in terms of physical strength, social status and moral ascendancy.

## **The Consequences of Abuse**

The consequences of sexual abuse in children depend, for the most part, on the age of the child when the abuse started, the nature of the abuse, and the relationship between the abuser and the victim. Other factors which affect the outcome are whether the abuse was long- standing or short-lived, occasional or

frequent and whether force or physical abuse accompanied it or not. Some sexual abuse is violent, in other cases it is a process of slow escalation from a gentle beginning, and although the victims are coerced, they are not physically abused. Nevertheless, sexual abuse which seems less serious is not necessarily less damaging.

In fact, the reasons for suspecting sexual abuse are in themselves indicators of the damage. Some of them are physical. There may be genital or rectal damage, bleeding, pain and infection. Children may show evidence of sexually transmitted diseases in the mouth, vagina or anus.<sup>27</sup> Mild to moderate cases of sexual assault result in the infection of sexual organs and genital injuries such as hymenal lacerations and extragenital injuries. In cases of severe attacks, the victim is oftentimes incapacitated due to rupture of the uterus or infection of lacerated anus. These injuries can lead to death.<sup>28</sup>

Sexual abuse can also trigger psychosomatic responses. Asthma, eczema and anorexia nervosa are common syndromes, but there may also be abdominal pains, headaches and illnesses of various sorts.<sup>29</sup>

Aside from the physical consequences, a host of psychological symptoms commonly appear after an occurrence of abuse. These problems are often long lasting and manifested in various ways at different ages. Younger children may show open and even compulsive sexualized behavior or regress to an earlier stage with wetting and soiling. School age children may manifest sexualized behavior less often but may have problems in school sleeping and eating disturbances, lack of self-esteem and nightmares. Adolescents may make suicide attempts, and generally display hatred of themselves and they may become promiscuous or aggressive.<sup>30</sup> Victims of repeated sexual abuse often develop poor relationships because of overwhelming feeling of distrust. As the victim grows up not liking themselves and not trusting others, there is greater possibility that they will adopt self-defeating, dangerous and suicidal behavior.<sup>31</sup>

All these symptoms show the effect of severe disturbance of normal patterns of development, the trauma, pain and lowered self-esteem which characterize the victims of sexual abuse. These unpleasant events and feelings all generally result in a feeling and emotional response called "posttraumatic acute-stress reaction" or "posttraumatic stress disorder." The ability of one to overcome stress depends

on his ability to cope, past experiences, perceptions of life, and stability of emotions. Children are unequipped to recover from stressful situations by themselves. They survive trauma only with the help and protection of support persons who can provide them with a sense of security.<sup>32</sup>

**Caring About the Same Truth: A Treatment  
on the Child-Victim as Witness**

“Don’t you remember — I am the victim here!  
Don’t make me the victim again!”<sup>33</sup>

For many children, testifying in court is a disturbing experience. They are made to give narrative accounts of the violence done to them, and this trauma is compounded by having to testify in the presence of the very same persons who violated them. They are also subject to thorough intimidation by the adverse party’s lawyers, who tend to employ tactics that unwittingly make children feel like they are the ones being prosecuted.

The rigors of litigation, wrought by the adversarial nature of every criminal proceeding where life and liberty are at stake, are necessarily distressing. Cognizant of the testimonial difficulties that children encounter in telling their stories of abuse, the Supreme Court saw it fit to promulgate the Rules on Examination of Child Witnesses (RECW), a more child-sensitive set of rules that apply to, among others, child witnesses who are victims of crime.<sup>34</sup> These rules make the prosecution of child sexual abuse cases less difficult, and they pave the way for creating a criminal justice system that is more child-sensitive. To complement substantive law, the judicial process must be just as child-sensitive. Otherwise, substantive law would be rendered ineffective, and injustice would still be committed.

**Special Circumstance of the Child**

It would be wrong to have judges evaluate children’s testimonies based on criteria set for adults. Children perceive, remember, and communicate differently. Their age-determined developmental abilities account for their vulnerabilities,

needs, and limitations which are manifestly different from an adult's. Children's developmental constraints often translate into an inability to understand court proceedings, legal terminology, and complex questions during examinations.<sup>35</sup> Therefore, the criminal justice system ought not to disrespect the developmental capabilities of the child witness by pitting the mind of a child against the mind of an educated adult.

A child's perception is, necessarily a function of the child's limited knowledge, experience, and tendency to view the world egocentrically. This, however, only affects their manner of recalling the central and peripheral features of past events. Their capacity -for remembering extremely stressful events whose central features create a strong emotional impact on them, remain.<sup>36</sup> This difference in perceiving details naturally result in less detailed responses. It also affects their deductive ability and capacity to make inferences.

A child's memory process is also different from an adult's. Although their memory processes follow a practically similar pattern allow them to remember in correct temporal order, children may need chronological anchors, such as "before dinner" or "after school."<sup>37</sup>

Obviously, a child witness way of communicating perceptions is different from an adult's. For instance, children can only relate events within the limits of their language and understanding. Questions have to be broken down and explained more simply to them. Also, after a particularly harrowing experience, they have more difficulty talking about their upset than do adults, which is especially important to remember in cases of possible physical or sexual abuse.<sup>38</sup>

It is evident that the child victim's unique psychology, physical state and their physiological capacity should be considered and evaluated to ensure their protection once they enter the judicial process.

## The Question of Competency

Children, in general, are competent witnesses. Their report of events can be made accurate, provided they are interviewed by a trained interviewer who carefully follows protocols designed to assist the child in the recall of past events.<sup>39</sup>

Under the RECW, every child is presumed competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, not a matter of admissibility. This recommendation was one of many made by the Committee to improve the experience of, and minimize the trauma suffered by, children appearing before the criminal courts as either victims or witnesses. The thrust of the recommendations on competency was to do away with rules that reflected unjustified stereotypical assumptions about children, and to ensure their testimony was heard wherever possible by requiring only that they should be able to relate what happened and understand and answer simple questions.

Rule 130, Section 21 of the Rules of Court phrases the competency of a child witness in a circuitous manner, i.e. it establishes which witnesses are qualified to testify and then states which children are disqualified from testifying. This circuitous wording is simplified by the RECW, on the other hand, which remedied the rule by establishing beforehand that every child witness is presumed qualified to testify. This presumption of competence is a triumph for child rights advocates in the Philippines. Unlike the European, American, and Canadian judicial systems which warn their juries of the frailty of a child's testimony, our more recent decisions and the RECW are a radical departure from the perception that the testimony of a child witness is inherently infirm.

And yet, even before this presumption was expressly stated, jurisprudence has already tended to reject the belief that children's testimonies are inherently infirm. The following cases illustrate this. In the case of *People v. Abitona*,<sup>40</sup> the accused was convicted of murder on the testimony of nine-year-old Arcie. Arcie's testimony was given weight by the court, and sustained by the Supreme Court as follows:

The Court has constantly maintained that children make the best witnesses because of their power of observation and recall, as well as their innocence. As long as they fully understand the import of an oath, their narration of events they witnessed should be given absolute acceptance."

In the case of *People v. Tanduyan*,<sup>41</sup> the accused was convicted on the testimony of the lone prosecution witness, a thirteen year old boy. The Supreme Court sustained the credibility of the minor's testimony as follows:

Children of sound mind are likely to be more observant of incidents which take place within their view than older persons, and their testimony is therefore likely to be more correct in detail than that of older persons; and where once established that they understood the nature and character of an oath, full faith and credit should be given to their testimony.

These recent decisions manifest the insight that although children do not testify with the same clarity as adults, this does not mean that they are unable to sufficiently describe the crime committed against them, and who perpetrated it.

To rebut a child's presumption of competence, the RECW provides for a competency examination<sup>42</sup> to establish the capacity of a child to be investigated. This hearing is separate from the hearing of the main case, and is held solely to determine whether or not a child is competent to testify. Persons allowed to be present are limited to those enumerated in Section 6(c). In that hearing, only the judge is allowed to ask questions, with the end view of determining whether, in keeping with the developmental level of the child, *substantial doubt* exists regarding the ability of the child to perceive, remember, communicate, distinguish truth from falsehood, or appreciate the duty to tell the truth in court.<sup>43</sup> Counsels for the parties, may however, submit questions to the judge, which he may, in his discretion, ask the child. Finally, these questions should be developmentally appropriate, which, Section 6 (e) defines as those: (1) appropriate to the age and developmental level of the child, (2) not related to any of the issues at trial, (3) focused on the ability of the child to remember, communicate distinguish between truth and falsehood, and appreciate the duty to testify truthfully.

The party seeking a competency examination must first present proof of necessity of the competency examination.<sup>44</sup> Notably, the rule also provides that the tender age of the child, by itself, is *not* sufficient basis to hold a competency examination.<sup>45</sup> The party challenging the presumption of competence of the child, therefore, has the burden of proving substantial doubt.<sup>46</sup>

## In Defense of the Legal Measures for the Protection of the Child Witness

Substantive laws fall short if a child sexual abuse case cannot be won due to circumstances beyond the child victim's control, i.e. circumstances that go into the very make-up of a child witness. Prosecuting within the framework of a child-friendly remedial process is, therefore, the other half of the battle. This, the RECW undertook.

### *1. The Hearsay Exception*

The courts, to promote the “truth-seeking” goal of the criminal process, have focused at least in part on the protection of children as a reason for modifying the rule that prevented children's out-of-court statements to third parties from being admitted into evidence under the “hearsay” rule. Traditionally, courts did not admit such statements because they were considered not the best or most reliable evidence. Direct testimony from the victim under oath was preferred to testimony from a third party about what the victim said outside of court, mainly because the victim could be cross-examined.

The RECW changed this. Admission of hearsay evidence regarding statements of the child-victim made to a third party is one of the most controversial innovations of the RECW and has often been attacked as a deprivation of the accused's right to confront witnesses against him. Hearsay evidence has, however, been defended as necessary to promote the “truth-seeking” goal of the criminal process. In any case, this protection is not absolute since there are conditions which must be fulfilled before the benefits of the exception will inure to the side of the prosecution. This is deemed sufficient enough to protect the rights of the accused because the court will intervene to determine whether or not hearsay evidence may be properly admitted.

According to Deputy Court Administrator Zenaida Elepaño, a member of the committee that drafted the RECW, the shift in the procedural rule is also controversial because statements made by children are often more graphic than the testimonies they deliver in person.<sup>47</sup> When their disclosure of abuse is the most graphic and complete account of the sexual abuse incident, and they are



unable to recount the details afterwards without being severely traumatized by the testimony, their hearsay statement becomes even more significant. It becomes imperative to put forward the hearsay statement, the only available evidence when the child refuses to testify and is subsequently declared unavailable.

Under Section 28 (c), the child witness shall be considered unavailable under the following situations:

1. The child is deceased, suffers from physical infirmity, lack of memory, mental illness, or will be exposed to severe psychological injury; or;
2. Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

The phenomenon of suggestibility is, of course, an issue to contend with, in light of the fact that a child is very suggestible, especially when children's testimonies are being used to shore up grounds. 'This should be taken into consideration and safeguards provided for.

The United States case of *Perez v. State*<sup>48</sup> is instructive in this regard. In that case, the Florida Supreme Court upheld a statute that permitted the introduction of a child's hearsay statement if the judge found that the child was unavailable to testify, there were indicia of reliability, and there was corroborative evidence of the abuse. In affirming a *nolo contendere* plea, it held that the judge could find the child unavailable based on testimony of a mental health professional and the child's parent that the child would be traumatized (without the judge having to question the child), and that the child's incompetence did not make the statements untrustworthy per se.

The judiciary has recognized that criminal cases involving harms to children have special features: the offences are often committed in private, so there are seldom witnesses other than the child, and there is rarely other independent confirming medical evidence. As a result, the outcomes of many trials depend almost exclusively on the court's assessment of the child's credibility and the ability of the child to provide as full and accurate an account as possible. The courts have come to appreciate that, in such cases, the best, most complete, and most accurate

account may be a description of the events which the child gave to another person closer to the time of the event in question.<sup>49</sup>

## 2. *The Sexual Abuse Shield Rule*

This is a child-specific variant RA 8505's Rape Shield provision.<sup>50</sup> It is now stated in Section 30 of the RECW. It rejects the admission of certain evidence offered to prove that the child victim engaged in other sexual behavior, or that tends to prove the sexual predisposition of the child. This is but proper, because the aforementioned inadmissible evidence is immaterial and irrelevant to the issue of whether sexual abuse occurred or did not occur.

The only exception to this rule is where a specific instance of sexual behavior is offered to prove that the rape or physical evidence introduced is attributable to some other person. For instance, evidence is offered to prove that the semen analyzed belongs to someone other than the accused.

To stress that the only issue being tried here is whether or not a child victim has been raped, the case of *People vs. Ritter*<sup>51</sup> may be cited as an example. In that case, an Austrian doctor named Heinrich Ritter was charged and convicted for the rape and death of a twelve-year-old street child named Rosario Baluyot. After engaging in sexual intercourse with Dr. Ritter, she started bleeding profusely because of a foreign object left inside her vaginal canal. She hemorrhaged to her death. An autopsy was conducted, and it was discovered that she had died from septicemia or blood poisoning, due to the dirty rags placed in her vagina by fellow-street children who had attempted to help stop the bleeding. One of the issues raised by the defense was that the sexual intercourse had been consensual, as in fact, evidence that she was a prostitute had been previously admitted. On that issue, the Supreme Court raised the countervailing doctrine that the fact of prostitution will not prove the commission or non-commission of the crime.

## 3. *The Use of Testimonial Aids*

The RECW makes use of a variety of testimonial aids. These include (a) anatomically correct dolls, and (b) emotional security items. On the more technologically advanced end are (c) live link television, (d) screens, one-way

mirrors, and other devices to shield the child from the accused, and (e) videotaped depositions.

(a) *Anatomically Correct Dolls*

The use of anatomically detailed dolls may also be allowed to improve the child's ability to communicate on the stand. This communication and demonstration aid is particularly helpful for very young children, whose language skills are limited.

The dolls are always introduced fully clothed. The child is then informed, in neutral fashion, that the anatomically correct doll is different from others because they have body parts under their clothes, "just like real people do." The child is then asked to name body parts as the interviewer points to them. Neutral body parts are labeled first, and the child's permission is requested before removing the doll's clothing. Non-leading questions are then asked, using the child's vocabulary. As reiterated by Deputy Court Administrator Elepaño, this provision was not intended to specifically favor the child, but to be sensitive to his or her developmental level as a child witness.<sup>52</sup>

(b) *Emotional Security Items*

Testifying in a court of law can be a frightening experience for adults, even though they have some of the skills needed to cope with this very serious and austere environment and personnel. When children are faced with the responsibility of this experience, it is often too overwhelming, which leads to children not wanting to testify, or not doing it to their full potential. It is often the intense fear and negative emotions of the experience of testifying in court that get in the way of the child being seen as a credible witness. Hence, the need for a veritable "Linus' blankie." Section 17 of the RECW provides that while testifying, a child is allowed to have an item of his own choosing, such as a blanket, toy, or doll.

(c) *Live-link Television*

Section 25 of the RECW provides for the use of a live-link television testimony in criminal cases where the child is a victim or a witness. To prevent further psychological trauma to the child, this provision keeps said child from facing or confronting the accused. The child's testimony is taken through closed circuit television, using a live link to televise the child's testimony taken outside the

intimidating environment of the courtroom, thereby separating the child from the witness.

Not all child witnesses are entitled to this method of taking testimony. An expert witness should first be presented to state that (1) the child will suffer serious emotional trauma if brought to court to testify and (2) the child is likewise prone to this psychological trauma when made to testify in the physical presence of the accused-perpetrator. It should be evident that the child is traumatized not only by the courtroom environment but more importantly, by the physical presence of the accused. The emotional distress of the child should be apparent, i.e. more than de minimis. It should be the kind of psychological traumatization that impairs one's capacity to testify.<sup>53</sup>

When this is established, the prosecutor, counsel, or guardian ad litem may file an application for an order that the testimony of the child be taken in a room outside the courtroom and televised to the courtroom by live-link television. Prior to their application, they should first consult with the defense counsel, the way they would for a competency examination. The court shall then determine, in a separate hearing for this purpose with notice to the parties, the need for taking the testimony of the child through live-link television. In granting or denying the order, it shall consider the following factors:

- (1) age and level of development of the child
- (2) ability and mental health, including any mental or physical disability
- (3) physical, emotional, or psychological injury experienced by him
- (4) nature of the alleged abuse
- (5) any threats against the child
- (6) relationship with the accused or adverse party
- (7) reaction to any prior encounters with the accused in court or elsewhere
- (8) reaction prior to trial when the topic of testifying was discussed with him by parents or professionals
- (9) specific symptoms of stress exhibited by the child in the days prior to I testifying
- (10) testimony of expert or lay witness

- (11) the custodial situation of the child and the attitude of the members of his family regarding the events about which he will testify, and
- (12) other relevant factors, such as court atmosphere and formalities of court procedure.

The court shall then grant the order upon a showing that there is necessity for the use of this modality, and that there is a substantial likelihood that the child would suffer trauma from testifying in the presence of the accused, his counsel or the prosecutor as the case may be. The trauma must be of a kind which would impair the completeness or truthfulness of the testimony of the child.

In ordering that the taking of the child's testimony be done through live-link television, the following mechanics shall be observed:

- (1) The child shall testify in a room separate from the courtroom, in , the presence of (a) the guardian ad litem, (b) one or both of its support persons, (c) the facilitator and interpreter, if any, (d) a court officer appointed by the court, (e) persons necessary to operate the closed circuit television equipment and (f) other persons whose presence are determined by the court to be necessary to the welfare and well-being of the child.
- (2) The judge, prosecutor, accused, and counsel for the parties shall be in the courtroom. The testimony of the child shall be transmitted by live-link television into the courtroom for viewing and hearing by the judge, prosecutor, counsel for the parties, accused, victim, and the public, unless excluded.
- (3) If it is necessary for the child to identify the accused at trial, the court may allow the child to enter the courtroom for the limited purpose of identifying the accused, or the court may allow the child to identify the accused by observing the image of the latter on a television monitor.
- (4) The court may set other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the best interests of the child.

Finally, the testimony of the child is preserved on videotape, digital disc, or other similar devices which shall be made part of the court record and shall be

subject to a protective order as provided for in the rules on confidentiality.<sup>54</sup> An expert is required to operate the camera, because in spanning the courtroom with the camera, he is directed to be very objective, to avoid the possibility of suggestibility. This means not focusing on faces longer than necessary.<sup>55</sup>

A test run on the mechanics of live-link television was conducted in Judge Rosalina Pison's Quezon City Regional Trial Court (QC RTC) Branch 107 courtroom, the only courtroom in QC RTC equipped with live-link television technology. Members of PHIL-JA and Bantay Bata were present and participated in the illustration of the mechanics. Inside the courtroom, there was a big TV screen, a TV camera. In another room outside the QC RTC, a child was also seated in front of a TV, with a camera facing the child.<sup>56</sup>

#### (d) Screens, One-way Mirrors. and Other Shields

Of course, not every court is not equipped with technology necessary for conducting a live link examination. In looking for pragmatic solutions, the RECW provides that the court resort to the use of screens, one way mirror, or a specific arrangement of chairs, still in keeping with the best interests of the child. Section 26 of the RECW states:

The prosecutor or the guardian ad litem may apply for an order that the chair of the child or that a screen or other device be placed in the courtroom in such a manner that the child cannot see the accused while testifying. Before the guardian ad litem applies for an order under this section, he shall consult with the prosecutor or counsel subject to the second and third paragraphs of Section 25 (a) of this Rule. The court shall issue an order stating the reasons and describing the approved courtroom arrangement.

If the court grants an application to shield the child from the accused while testifying in the courtroom, the courtroom shall be arranged to enable the accused to view the child.

#### (e) Video-taped Depositions & Investigative Interviews

Videotaped depositions are the output of in-depth investigative interviews that occur in child friendly studios. These in-depth investigative interviews are conducted with the goal of reducing the number of investigative interviews to

prevent retraumatization of the child. In most cases of child abuse, there are no witnesses and no other evidence except the child's testimony; it is particularly damaging to the child's psyche, however, when he or she is asked to recount again and again the lurid details of a sexual abuse as heinous as rape. It can even happen that after a single, exhaustive interview, the debilitating effects of PTSD may set in and expose the child to severe psychological injury if made to recount the details of the crime. Thus, the importance of an in-depth investigative interview and videotaped deposition cannot be overemphasized. Eliciting accurate information in light of the child's developmental stage will protect the child from further trauma, and, when declared admissible, can possibly secure a conviction. Recently, the UNICEF released a protocol for conducting investigative interviews that adheres to the precepts set by the RECW, with the goal of having the videotaped interview admissible in court.

Section 27 states that the prosecutor, counsel, or guardian ad litem may apply for an order that a deposition be taken of the testimony of the child and that it be recorded and preserved on videotape.

If the court finds that the child will not be able to testify in open court at trial, it shall issue an order that the deposition of the child be taken and properly preserved by videotape. The judge shall preside at the videotaped deposition of a child. Objections to deposition testimony or evidence, or parts thereof, and the ground for the objection shall be stated and shall be ruled upon at the time of the taking of the deposition. The other persons who may be permitted to be present at the proceeding are: (1) the prosecutor, (2) the defense counsel (3) the guardian ad litem, (4) other persons whose presence is determined by court to be necessary to the welfare and well-being of the child, (5) one or both of his support persons, the facilitator, and the interpreter, if any, (6) the court stenographer, and (7) persons necessary to operate the videotape equipment.

The accused may be present unless the court makes an order that based on evidence, the child is unable to testify in the physical presence of the accused. Even if the accused is not physically present, a representative of his may nevertheless present in the same room where the child is testifying, if that representative's presence does not frighten or scare the child.

Under the RECW, the court may admit videotape and audiotape in-depth investigative or disclosure interviews as evidence, under the following conditions<sup>57</sup> :

a. The child witness is unable to testify in court on grounds and under conditions established under Section 28 (c). The child witness shall be considered unavailable under the following situations:

1. Is deceased, suffers from physical infirmity, lack of memory, mental illness, or will be exposed to severe psychological injury; or;
2. Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

b. The interview of the child is conducted by duly trained members of a multidisciplinary team or representatives of law enforcement or child protective services in situations where child abuse is suspected so as to determine whether child abuse occurred.

c. The party offering the videotape or audiotape must prove that:

1. The videotape or audiotape discloses the identity of all individuals present and at all times includes their images and voices;
2. The statement was not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the, statement of the child and not the product of improper suggestion;
3. The, video tape and audiotape machine or device was capable of recording testimony;
4. The person operating the device was competent to operate it;
5. The videotape or audiotape is authentic and correct, and;
6. The videotape or audiotape has been duly preserved.

The individual conducting the interview of the child shall be available at trial for, examination by any party. Before the videotape or audiotape is offered in evidence, all parties shall be afforded an opportunity to view or listen to it and shall be furnished a copy of a written transcript of the proceedings.

The Rule also defines an “in-depth investigative interview” or “disclosure interview” as “an inquiry or proceeding conducted by duly trained members of a



multi-disciplinary team or representatives of law enforcement as child protective services for the purpose of determining whether child abuse has been committed.”

“Every community needs to have a few professionals available who are both skilled and experienced in interviewing child victims of sexual assault for investigative purposes. xxx. This includes observing the child’s emotional style, establishing interviewer credibility, developing and then proceeding with the “request concept,” and assisting and supporting the child in remembering facts and details that will aid the prosecution to establish a case against the perpetrator.”<sup>58</sup>

Section 8 of the Rules and Regulations on Reporting and Investigation of Child Abuse cases pursuant to Section 32 of RA 7610 states that “whenever practicable ... to minimize the number of interviews of the child victim, his statement shall be transcribed or recorded or videotaped.”

The Court’s major focus was the interest in receiving the most reliable evidence. The Court recognized that taking steps to minimize the child witness’s trauma in order to allow the child to present testimony as effectively as possible could help a court’s goal of seeking the truth. However, minimizing the witness’s stress is not in itself an objective of the legislation. Even where testifying in front of the accused could be psychologically damaging, the witness is not entitled to testify behind a screen or by closed-circuit television if he or she is still capable of furnishing the court with a “full and candid” account of what occurred.

There are two different policy-based rationales for supporting the consistent use of screens and closed-circuit television for very young children and for adolescents. The rationale for young children is that they need special consideration so that the court can receive as full an account of their stories as possible. The current understanding of the psychological and emotional development of older children and adolescents suggests that their trauma may focus not only on fear of the accused, but also on the shame and embarrassment involved in making the kinds of “public” disclosures sometimes required during courtroom proceedings. However, because some courts focus on fear of the accused and the interpretation of the term “necessary” in deciding whether to permit testimonial supports, this trauma suffered by adolescents may be seen by the courts as insufficient to meet the current test.

Either of two grounds is satisfied: that it would assist the child to give a full and candid account of the events in question or that it would be in the best interests of the child. Fear of the accused or trauma about testifying in open court would be two factors among others that might support an application on one or both of those grounds.<sup>59</sup>

#### *4. The Courtroom Environment*

In protecting the child witness from further trauma, the RECW goes as far to provide for courtroom environment and procedure.

A child, particularly one who has been the victim of maltreatment or who must testify against a family member or friend, may become anxious, upset, or afraid when testifying in court, especially in the presence of his/her abuser. Accordingly, judges have the authority to take steps to assist the child witness through the process. The child may feel more comfortable if the courtroom itself looks less formal and imposing. For example, providing the witness with a child-size chair, rearranging the furniture, or hanging the child's drawings on the wall may put the child at ease. Having the judge wear street clothes instead of robes may also help the child feel more relaxed. Before trial, the judge may also want to introduce him/herself to the child and allow the child to explore the courtroom, sit in the witness chair, and try out the microphone. Judges have more latitude to take these or similar steps in civil cases than in criminal cases.

Section 12 speaks of a waiting area that is practically a playroom. This waiting area is separate from the waiting areas used by other persons, and is furnished so as to make a child comfortable. The Family Courts of the Quezon City have a waiting area on the third floor of the Hall of Justice that resembles a nursery, replete with toys, books, a soft cot, and a variety of knick-knacks that would preoccupy a child any time.

Section 13 provides for the courtroom environment. Judge Lilia Lopez of RTC Branch 109 in Pasay City has, what is probably the most child-friendly courtroom in the Philippines. Every two months, she and different NGOs bring abused children to court for exposure orientations dubbed "Kids' Court." The exposure lasts an entire morning and consists of short lectures familiarizing child

witnesses with court procedure. The child witnesses are introduced to the different persons involved in each court hearing such as the interpreter, the stenographer, the PAD lawyer or adverse counsel, and the different roles they play. Among other things, the child participants also get an explanation of what the gavel is what it is for, and are also encourage to test how it feels to sit on a witness chair (One child exclaimed “Not scary!”).<sup>60</sup>

### *5. Reliance on Support Persons*

Special persons involved in primarily safeguarding the best interests of the child include : (a) the guardian ad litem, (b) support persons, (c) interpreter, and (d) facilitator.

A young witness may need the presence of some familiar person to make the child feel more comfortable when testifying. Without the support of such a person, the foreign and often confusing experience of testifying in court may become terrifying. This may make the child virtually unable to communicate and may actually injure the child emotionally as well.

The child can never have too many advocates. His/her best interests require that every step possible be taken to minimize stress associated with the courtroom experience.

#### *a. Guardian Ad Litem*

The guardian ad litem assists the child by familiarizing him or her with the court system, and acting as the child’s “voice” during trial.<sup>61</sup> Although previously provided for by RA 7610 and Article 222 of the Family Code, the role of a guardian ad litem has been redefined in Section 5 of the RECW. Today’s guardian ad litem is tasked with the following duties, in keeping with the mandate to promote the best interests of the child in court: (1) to conduct independent investigation as regards the child, (2) facilitate or find services that the child can avail of, (3) advocate for the child during the hearing such as helping the child learn about the court, petitioning to the court to allow a child victim to testify through live-link television to minimize trauma or allow child testimony by means of videotaped deposition when unable to be in court during trial, and (4) monitor the status of the child and case subsequent to the court decision.<sup>62</sup>

The appointment of a guardian ad litem is optional, as seen by the use of the term “may”. In making the appointment, the court first determines if the appointment of one will be in the best interests of the child. In doing so, it gives preference to the parents of the child victim, with the caveat that these parents are “qualified.”

The general rule is that all parents are considered qualified. However, this should be read in light of the best interests doctrine. No specific qualifications are enumerated to describe when a parent should be considered qualified, to allow the court to use its sound judgment in passing upon the issue of whether or not the parents of the child victim are, indeed, qualified. Thus, to attack the qualification, the party objecting should raise matters that disqualify the parent, i.e. matters that show that the parent cannot perform the duties of a guardian ad litem as stated.

In her lecture, Hon. Zenaida Elepaño illustrated this with the case of a six year old child who was raped by her father. The mother and the child’s relatives all sided with the father, and sought to get the case dismissed by filing an affidavit of desistance. The DSWD, which, by then, had acquired protective custody over the child, pursuant to the authority granted it by RA 7610, objected. Their objection was overruled by the MTC Judge who said the DSWD lacked personality to pursue the case. This was overturned, in reference to RA 7610.<sup>63</sup>

#### b. Support Person

Section 11 of the RECW provides for support persons. They are those who, chosen by the child, accompany him/her at a judicial proceeding to provide him/her with emotional support.<sup>64</sup>

The theory behind having support persons is simple. A child wants to see a familiar, trusted face in the courtroom—that of the support person’s. The support person’s presence assuages the child witness’ fears in a courtroom where tension and adversity is oftentimes too palpable. The presence of a support person lessens the trauma of the experience.

Way before the RECW was implemented, the theory of having support persons accompany a child witness was already being tested in the courtroom of Judge

Rosalina Pison. Judge Pison noticed that a child appeared more willing to testify when a support person was within reach. For instance, a child of tender years was more willing to tell her story when she was allowed to narrate it while, on the witness box, she was seated on her mother's lap.<sup>65</sup>

c. Interpreter

A child needs a special interpreter whenever special words that the child cannot understand have to be interpreted. Court proceedings are conducted in English and in the event, for instance, that a child cannot understand the English language, an interpreter may be requested.

The interpreter may be the child's parent or one whom the child is comfortable with. He or she may sit beside the child and translate to him or her not only the question and answer during examination, but also what is happening. This keeps the child witness from feeling alienated during the proceeding.

d. Facilitator

As differentiated from an interpreter, a facilitator explains to the child the technical terms used in the course of questioning. The facilitator also explains the importance of this question to the child, so the child can truthfully and accurately answer.

**6. Courtroom Deportment**

These include: (a) prohibiting counsel from approaching the child witness, if it appears that the child is fearful or intimidated by the counsel; (b) mode of questioning; (c) asking leading questions; (d) making objections to questions; (e) corroboration; (t) excluding the public, and; (g) prohibiting persons from entering and leaving the courtroom.

(a) Prohibiting counsel from approaching the child witness

Section 18 states that the court may prohibit a counsel from approaching a child, if it appears that the child is fearful or intimidated by counsel

(b) Mode of questioning

Section 19 states that the court shall exercise control over the questioning of children so as to (1) facilitate the ascertainment of the truth, (2) ensure that the

questions are stated in a form appropriate to the developmental level of the child, (3) protect children from harassment or undue embarrassment, and (4) avoid waste of time.

In mandating a child-sensitive mode of questioning, the RECW addresses the problem of a child witness who does not disclose the full incident or who retracts statements made.

This provision insists that counsel adopt a child-sensitive manner of eliciting facts from child witnesses and proving allegations pertinent to the crime without sacrificing the psychological and social well being of the child.

This provision likewise allows the child witness to testify in narrative form.

### (c) Leading Questions

A child may have trouble recalling events spontaneously and may need some cuing of his/her memory. This is sometimes done, both in court and during out-of-court interviews with the child, with leading questions. While the propriety of using such questions with children is highly controversial, the Supreme Court, in the *Wright*<sup>66</sup> case, has recognized the need for using leading questions when interviewing child abuse victims in some cases. The Court held that a child's response to a leading question in an interview should not be considered unreliable automatically; rather, all of the circumstances surrounding the child's statement should be taken into account.

Section 20 provides that the court may allow leading questions in all stages of examination of a child, if the same will further the interests of justice.

"In the best of all possible worlds, it would be advisable not to ask children leading questions, in order to avoid the concern that children are responding to suggestions that certain things occurred or that they are being compliant and acquiescent to an adult authority figure. But, in the best of all possible worlds, children are not sexually assaulted in secrecy, and then bribed, threatened, or intimidated not to talk about it. In the real world, where such things do happen, leading questions may sometimes be necessary in order to enable frightened young children to respond to and talk about particular subjects."<sup>67</sup>

### (d) Objections to questions

Section 21 states that objections to questions should be couched in a manner that does not mislead, confuse, frighten or intimidate the child.

(e) Corroboration

Section 22 provides that corroboration shall not be required of a testimony of a child. The child's testimony, if credible by itself, shall be sufficient to support a finding of fact, conclusion, or judgment subject to the standard of proof required in a criminal case which is proof beyond reasonable doubt.

(f) Excluding the public

Including the public, the RECW took into consideration the effect that a hearing open to the public has, on the physical and emotional condition of the child. This provision reiterates Section 22 of the IRR of RA 7610 in requesting a hearing in the judge's chambers.

(g) Prohibiting persons from entering and leaving the courtroom

The RECW addresses the issue that key actors in the courtroom ought to exhibit more sensitivity to child-victims. Specifically, Section 24 provides that the court may order that persons attending the trial shall not enter or leave the courtroom during the testimony of the child.

## *7. Confidentiality of Records*

These records are kept highly private and strictly confidential, because of the likelihood that they will be a source of much shame to the child victim, if made public. Child sensitivity includes preserving the identity of the child from stigma, untold shame, and ridicule.

Section 31 (a) of the RECW reiterates Section 23 of the IRR of RA 7610 on protection of victims from undue publicity, which addresses the problem of court records being open to the public once the case is filed in court.

## **The Question of Credibility**

Some considerations in assessing the credibility of a child's disclosure of abuse are the following: (1) Children cannot fantasize about sexual acts of which they have no experience; (2) Children do not learn distinguishing sensorimotor details (such as the bitter taste of semen) from watching sexually explicit material on television or seeing pornographic materials; (3) The more details that children

recall, the more likely that the disclosure is truthful; (4) Children may be silenced by fear, coercion or anxiety; and (5) Children do realize that their disclosure of abuse precipitates a crisis for the family, and this may keep them silent until the situation becomes unbearable.<sup>68</sup>

Another consideration is, what Calhoun and Atkeson term “outward adjustment”.<sup>69</sup> This refers to a stage in the pattern of the victim’s reaction to the trauma, whereby the child victim may appear to be functioning normally, in an attempt to suppress the emotional pains brought about by the abuse. This coping mechanism is a palliative that expels the trauma from the victim’s consciousness, but results in maladaptive ways of dealing with the problem. The child’s environmental and cultural situation is also a consideration. Filipino children are discouraged from reasoning out and arguing with adults. They are dependent on them for sustenance and will easily succumb to authority, making them, more often than not, submissive and easy prey for sex perverts and molesters.<sup>70</sup> These traits, should, therefore be considered because in undergoing judicial proceedings, the child victim witness is tasked to renege on her culture and training by articulating and reasoning out against an adult —the adverse counsel.

Also, judges, police, prosecutors and lawyers have to understand that children usually have different levels of disclosure, depending on the person interviewing them or propounding questions. The very nature of a child’s disclosure of abuse may give the appearance of inconsistencies, but this should not affect their credibility as witnesses. As noted by the Child Protection Unit of the Philippine General Hospital (CPU-PGH), a child victim may initially give only a partial disclosure and tell a trusted adult the least invasive or least explicit details. Shame, embarrassment, and confusion account for the partial and halting disclosures. Over time, with support, understanding, and reassurance that they are not at fault, a child may be able to give a more complete disclosure and reveal explicit details.<sup>71</sup>

Finally, consideration must also be given to a child’s normal reactions to sexual abuse, such as denial, retraction, etc. These reactions may account for such instances as the child victim’s not having cried out for help, not having disclosed the abuse for over a year or the fact that sexual abuse was done repeatedly.



The RECW was promulgated specifically to address the special circumstances of the child, to favor children and accord them the basic respect due their age and developmental level. They were adopted to suit the child's inherent characteristics and rights. They bring law closer to the children's situation. Even before the RECW was enacted the credibility of a child witness reporting a sexual abuse committed against her has rarely been disputed. In a study conducted by the Ateneo AKAP, it was found that based on 374 convictions of child sexual abuse cases from 1902 - 1998, 283 of those convictions relied on the testimony of the child.<sup>72</sup>

With regards rape, the case of *People vs. David*<sup>73</sup> likewise names four well-entrenched Supreme Court doctrines. These are:

1. Crying instead of answering when asked by authorities is not a denial of rape. x x x When the victim cries while testifying this is evidence of credibility.
2. The testimony of a rape victim as to who abused her is credible where she has no motive to testify against the accused.
3. Inconsistencies and contradictions referring to minor details do not destroy the credibility of the witness.
4. Failure to report an incident immediately does not cast doubt on the credibility of the witness when delay is attributable to the threats of death given by the accused to the victim.

CPU-PGH lists the following as features of a child's account that increase credibility: (1) Explicit and/or sensorimotor details, (2) Idiosyncratic and/or contextual details, (3) Description from child's point of view, perspective, (4) Vocabulary, sentence structure congruent with child's age and typical speech, (5) Affect either appropriate or predictable, given child's age and coping style, (6) Consistency in the core elements, (7) Psychological response to abuse (e.g. fear, guilt, low self-esteem), (8) Disclosure to a trusted individual when child feels safe from perpetrator; (9) Element of secrecy, and (10) Coercion and threats by the alleged abuser.<sup>74</sup>

They also list the following as indicia that corroborate a child's oral disclosure of sexual abuse: (1) Physical findings consistent with abuse, (2) Sexualized themes

in drawings and play (e.g. with anatomically correct dolls), (3) Behavioral changes consistent with abuse (eg. Nightmares, fear of men), (4) Child statements to others about the abuse, (5) Pecocious and/or explicit knowledge of sexuality, (6) Sufficient access of alleged perpetrator, (7) Evidence of violence, substance abuse, etc. in perpetrator's background, and (8) Absence *of* motivation or undue influence to fabricate.<sup>75</sup>

While a sexually abused child's credibility is rarely doubted, this should not exempt their lawyers from adducing proof to back up their claims and counter all doubts, in order to meet the reasonable doubt threshold mandated in criminal convictions.

### **Caution: The Confrontation Clause and Other Rights of the Accused**

Under the Constitution, the accused in a criminal proceeding is afforded certain vital rights:

Sec. 14. (1) No person shall be held to answer for a criminal offense without due process of law. (2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved and shall enjoy the right to be heard by himself and counsel, to be formed of the nature and cause of the accusation against him, to have speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.<sup>76</sup>

The aforementioned rights of the accused stem from his right to be presumed innocent until the contrary is otherwise proved. The Constitution apparently provides for these corollary rights to ensure that the accused is given every opportunity to defend his alleged innocence and be heard at his own trial. The right to be heard covers three specific rights: the right to present evidence and to be present at trial, the right to counsel and the right to compulsory process to compel attendance of witnesses. To properly prepare his defense, the accused is also afforded the right to be informed.

The accused is likewise guaranteed speedy, impartial and public trial to safeguard against any attempt to make the courts instrument of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.<sup>77</sup>

### Reconciling the Accused's Right of Confrontation and the Best Interests of the Child

The constitutional right of confrontation which guarantees to the accused the right to cross-examine the witnesses for the prosecution is one of the most basic rights of the accused person under our system of justice.<sup>78</sup> The right of the accused to confront and cross-examine witnesses against him at trial has a two-fold purpose: (1) to afford the accused an opportunity to test the testimony of the witness by cross-examination and (2) to allow the judge to observe the deportment of the witness.<sup>79</sup> Thus, the right to cross-examination is a substantial right, the preservation of which is essential for a proper administration of justice, and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy.

It aids in the truth-finding process by allowing the fact finder to look at the witness and judge by the demeanor on the stand and the way of giving testimony whether what such person says should or should not be believed. The confrontation clause has also been interpreted as encouraging truthful testimony. It is assumed that it is more difficult to tell a lie about someone in his or her presence. Therefore, by requiring the witness to testify in front of the accused, the untruthful witness may find it more difficult to lie. The profound effect of having a witness stand in the presence of the person accused can hardly be underestimated. Unfortunately, this face to face presence may upset the truthful rape victim or abused child; but by the same token, it may confound and undo the false accuser, or reveal that the child had been coached by an adult.

The RECW champions the child witness' cause by protecting his or her emotional and psychological well-being by doing away with the compulsion that

he or she testify in the accused-perpetrators physical presence. This is effected in at least three ways: (1) through the use of live-link television, (2) by utilizing one way mirrors and screens, etc., and (3) through the taking of videotaped depositions.

Meanwhile, the right of the accused to counsel and to physically confront the witness is not unduly prejudiced by these provisions, since effective safeguards that guarantee the accused the essence of said rights are provided for.

Reconciling the right of the accused to confrontation under the US Constitution (on which our Bill of Rights is based) with the aforementioned testimonial devices, Justice Bowman of the Illinois Appellate Court aptly observed that:

“When this protection was included in the Bill of Rights, the assumption probably was that most defendants would be confronting complainants of equal capacity. It is doubtful that our constitutional folders envision situations in which children would be testifying against adults, particularly instances in which the adults would have a history of power and control over the children.”<sup>80</sup>

The aforementioned testimonial devices directly address the problems faced by child advocates concerning court procedures requiring the child to testify in the presence of the accused perpetrator, which understandably aggravates the already turbulent emotional condition of the child, the solutions of (1) coming up with an arrangement whereby the child testifying is seated in such a way that he or she does not see the it accused, or (2) exploring the possibility of using a one way mirror or teleconferencing which were incorporated into the RECW, and may be justified by the severe disadvantages that arise when the child witness constrained to testify is fully aware of the physical presence of the perpetrator. In these instances, the rights of the accused remain protected by the following conditions: (1) retention by the accused of full opportunity for contemporaneous, adversarial cross examination, via live link television, (2) the judge, the accused, and the accused’s counsel being able to view, thru video monitor, the demeanor and body of the witness as he or she testifies, the reason being that body language reveals more than a wireless says, and has always been the basis for the essence of the right to confrontation i.e. being able to see and hear the witness testify.

Although children are still subject to cross-examination, the use of videotape can save them from having to narrate the entire story in the courtroom. The videotape is played in court before the child is asked whether he or she remembers making it and adopts it.

Once the videotaped statement is ruled to have been adopted, it becomes evidence of the events described as if the child had made the statements in court. Any questions about the circumstances of the video, the truth of the statements, and their overall reliability are matters to be weighed by the court. If the witness makes statements during testimony contradicting the videotape, the videotaped statement may be given less weight but is not inadmissible.<sup>81</sup>

### 1. *The Hearsay Exception*

When a child's hearsay statement is used in court under a special statutory hearsay exception, the accused abuser is also denied the opportunity to confront the child victim face-to-face. However, the admission of a child's hearsay statement will not be unconstitutional as long as the judge finds it to be especially reliable. Specifically, reliability of a hearsay statement will be evaluated based on all of the circumstances surrounding the making of that statement. The Supreme Court rejected the notion that any one factor or test makes a statement untrustworthy.

For example, in the *Wright*<sup>82</sup> case, the fact that the child's statements were elicited by leading questions and that the interviewer failed to videotape the interview, did not automatically invalidate the statements. The Supreme Court took all of the circumstances surrounding the child's statements into account in determining whether the hearsay violated the confrontation clause.

### 2. *The Confrontation Clause*

As previously discussed, the right of the accused to confront his accuser is intended to aid in the truth-finding process by allowing the judge to observe the witness and judge, based on by his or her demeanor on the stand. It is assumed that it is more difficult to tell a lie about someone in their presence. This was addressed in the US Case to *Coy v. Iowa*<sup>83</sup>, where Justice Scalia stated:

“The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the

very phenomenon it relies upon to establish the potential “trauma” that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.”

### 3. Challenges

Indeed, the tug of war in interests is more apparent than real. The committee drafting the RECW relied on US jurisprudence to show that the rights of the accused would not be violated. Justice Reynato Puno cited the case of *Maryland vs Craig*<sup>84</sup>, to support this. That case involves Sandra Craig, a day care operator, who was convicted of sticking a five-year-old girl with thumbtacks on her hands and arms, and inserting a stick in her vagina. Based on the testimony of the mental health professionals, the judge had allowed the four child witnesses, who experienced significant levels of emotional distress whenever the accused was physically present to testify over closed-circuit television, pursuant to the procedure, provided for in the Maryland statute.

Like Section 25 of the RECW, the live-link procedure described in that case permitted the defendant’s lawyer to be present and to cross-examine the child and provided for electronic communication between lawyer and defendant<sup>85</sup>. The Court based its decision on its finding that the statute’s closed-circuit television procedure had built-in safeguards for ensuring the testimony’s reliability (e.g., by cross-examination), and that the statute required a showing of necessity before the special procedure could be used.

Necessity, in that case, meant proving the following: (1) the procedure is necessary to protect the welfare of that particular child; (2) the child would be traumatized by the defendant’s presence during his/her testimony (not merely by the courtroom experience); and (3) the level of the child’s emotional distress from testifying in the defendant’s presence would be significant (i.e., more than just nervousness, excitement, or reluctance to testify).

The procedure was evidently in harmony with the sixth amendment right to, confrontation, which, as previously stated, does not necessarily call for absolute

physical confrontation. The right to physical confrontation, when seen in the light of society's interest in the accurate fact-finding fails in the face of a higher and more sublime interest. In the accommodation of societal interest, said right to physical confrontation is not an indispensable requirement.

Society has the objective right to search for the truth. Like the *res gestae* argument, which allows the accused to be confronted with a dying declaration, one asks - if a dying declaration can be admitted, why preclude the admission of a child victim's declaration that has already passed the test exempting the child victim from being present? The fact, moreover, that an opportunity for cross-examination is still afforded the accused, by this process, dispels all notions of reading the right to confrontation otherwise.

### **Responding to Children's Needs: The Law's Social Function**

#### **The Promotion of Public Interest**

The degree to which the legal system has a responsibility for maintaining social order and promoting public interest over and above its responsibility towards the parties to a legal dispute is a matter of much discussion. In practice, the public interest as interpreted by Judges tend to prevail over the private interests of litigants and witnesses. This, however, can conflict with the principle that children's welfare shall be paramount.

A balance has to be made between the harm likely to be caused to the child and the interests of law, order and public safety. Where the crime is child sexual abuse and the suspected perpetrator is a stranger, the same balancing exercise applies, only this time it may well be that the harm to the child in appearing as a witness outweighs the benefit

Where the crime is child sexual abuse and the suspected perpetrator is a stranger, the same balancing exercise applies, only this time it may well be that the harm to the child in appearing as a witness outweighs the benefit to the society from prosecuting the abuser.

to the society from prosecuting the abuser. Our position is that where there is a serious risk of harm to me child through me use of me legal process, everything possible should be done to minimize the risk. This would involve not only such measures as video links and the admissibility of previously recorded video evidence but more importantly, a greater sensitivity to children’s needs throughout the criminal justice system.<sup>86</sup>

### The Protection of both Substantive and Procedural Rights

There are important issues to be raised concerning the courts’ role as protector of rights. There is a need to consider the concept of legal rights by differentiating between substantive and procedural rights. Substantive rights provide the holder with the power, enforceable by law, to take action affecting others or to resist action taken by others against them. Procedural rights, on the other hand, exist only to ensure fairness during the process of decision-making, in whatever tribunal. Unlike substantive rights, they do not determine the outcome of the decision, but only the form of the decision-making process.

The legal process works relatively well as a protector of substantive rights when it is asked to rule upon issues of contractual arrangement, such as vendor-vendee relationships. It may also work well when faced with such quasi-contractual arrangements as trustee-beneficiary. However, it works far less for those

The legal process works far less for those relationships which are based upon a more complex interweaving of emotional and economic factors such as one finds in sexual abuse cases.

relationships which are based upon a more complex interweaving of emotional and economic factors such as one finds in sexual abuse cases. To reduce the complexities to issues of rights and their infringement may be the only viable way that the legal process can deal effectively with such conflicts.

It must be emphasized that the courts should view the child as having individual rights which are not dependent on family honor, reputation, personal values and qualities



of the victim. However, in a number of decided cases, the court chose to rule not on the basis of the child's rights but rather on external circumstances surrounding the child's values, to wit:

When a young and decent Filipina testifies that she was raped, she says all that is necessary to show its commission. Considering the inbred modesty and antipathy of a Filipina to airing in public things that affect her honor, it is hard to conceive that the complainant would assume and admit molestation and ignominy she had undergone, and "endure the ordeal of testifying to all its shameful details, if she had in fact not been raped."<sup>87</sup> [Emphasis supplied]

Still, in another case, the court ruled that,

It would be highly improbable for a barrio girl of tender age and definitely inexperienced in sexual matters to fabricate charges for no reason at all, that will put herself and her family in a very compromising situation which could even invite reprisal.<sup>88</sup>

The following phrases describing the child's qualities and values have been consistently used by the Court: young barrio lass; naive and inexperienced; chaste; good reputation; young virgin barrio-girl; decent; innocent and guileless.<sup>89</sup> It is evident from these sampling cases that although the court, through a verdict of conviction, has recognized the grave wrong committed against the child, there has been scant recognition of the latter as an individual person possessing the right against abuse and the right to the protection of the state and law.<sup>90</sup>

In essence, children's substantive rights may be summarized as follows:

- (a) the right to be free from any conduct or situation likely to cause them harm; and
- (b) the right of self-determination, autonomy or the power to make choices about their own lives.

Unfortunately, the enforcement of these rights are often outside the powers of any court, depending instead on the availability of resources to meet the children's needs. The courts may deal with harm caused by individuals but they are relatively powerless when it comes to harm resulting from government policies or poor administration.

The concern over the use of the courts and the legal system to protect children's substantive rights may be summarized as follows:

- (a) the rights of children are not necessarily the same as needs of children;
- (b) In many instances the courts are unable to protect children's rights because they have no control over the resources on which those rights depend; and
- (c) In some cases the use of the legal system to force others to take account of children's rights may cause the child more harm than leaving matters as they are.<sup>91</sup>

In analyzing child sexual abuse cases, it must be remembered that the child victim has to be protected and vindicated on the basis of her individual rights as a child as enshrined in the constitution, and the victim must not be viewed only on the limited and narrow context of Filipino family and community values.

### **The Law as a Deterrent**

Some victims may think that the support and legal protection currently provided by the government and the law are insufficient. It is not easy for any law to have a deterrent effect vis-a-vis a person who has no regard for the law in any event. It is true that the law cannot provide immediate, on the spot, protection for anyone facing imminent abuse. Nevertheless, in the long term and for the well being of our community, legislation is essential for deterring and penalizing crimes of sexual violence. To legislate is to send a strong message against sexual violence, to indicate that neither the community nor the government would condone such behavior and to deter such behavior. Legislation also lays down clear guidelines and provides for a mechanism for law enforcement agents to tackle these cases quickly and effectively.

It is regretful that immediate protection for individual victims may not be possible at the time it is most needed. This increases the awareness of the necessity to work even harder to strengthen education against sexual violence and to amend the law to provide better protection for children vulnerable to abuses.<sup>92</sup>

## The Quest for Truth, in the Light of the Best Interests of the Child

It is to society's interest to discover the truth and to safeguard children's mental and physical well being. The Best Interests of the Child doctrine has always provided policy makers and legal practitioners and advocates with a guide in all actions affecting children. This legal yardstick has been applied extensively in domestic law practice. There is, however, no hard and fast rule on the application of this principle. And, as one commentator readily observes: "[t]he list of factors competing for the core of best interests is almost endless and will depend on each particular factual situation x x x the opinions of the child and members of the child's family, the child's sense of time, the heed for continuity, the risk of harm, the child's needs."<sup>93</sup>

The best interests doctrine is, notably, case specific. Still, all efforts and actions taken by the State consider, at all times, the best interests of the child. And even though the interpretation of the phrase differs in application from case to case, it is evident that the bottomline is, to ensure the total physical, emotional, moral, spiritual, social and intellectual growth and development of the child.<sup>94</sup>

The Best Interests of the Child Principle is the basis for the RECW. The Rule upholds the best interests of the child and promotes accommodation of child witnesses without prejudice to the constitutional rights of the accused. The objectives of the rule are to: (1) create and maintain an environment that will allow children to give reliable and complete evidence, (2) minimize trauma to children, (3) encourage children to testify in legal proceedings, and (4) facilitate the ascertainment of truth.<sup>95</sup>

The best interests of the child remain primordial, and should be invoked when the child witness who is afraid and apprehensive about testifying in the presence of her attacker will suffer severe psychological injury by testifying in his physical presence. When these and similar circumstances exist, these societal interests should be recognized.

In this context, the words of Prof. Nicholas Bala<sup>96</sup> ring true: "Such accommodations could enhance the ability of the courts to ascertain the truth from child witnesses and need not violate the fundamental rights of the accused."<sup>97</sup>

### **Chasing the Rainbows's End: Some Recommendations and Our Conclusion**

“The tide of reform appears irreversible and, in the end, beneficial to children and the search for truth”. -Myers

Clearly, legal intervention in cases of child sexual abuse is decidedly multi-disciplinary, requiring efficient logistical efforts for effective evidence gathering and case handling. Little by little, we have come to realize that legal advocacy of children's rights means going the extra mile for the child not only through aggressive prosecution of the case but also ensuring that the child receives the necessary psycho-social therapy. Inter-agency coordination has taught us a new brand of legal advocacy — one that is holistic and consequently, more child-sensitive. We are now captive to the truth that caring for a client goes far beyond winning the case. It involves ensuring the child victim's rehabilitation and reintegration into society. In the child sexual abuse milieu, the pragmatic solution is unwittingly that of simultaneous prevention, reactionary and rehabilitation.

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