# Child's Right to be heard in Criminal Cases: An Inductive Study in Anglo-American Laws(*)

**Dr. Ashraf Samhan**
Associate Professor of Criminal Law
College of Sharia and Law
Jouf University, KSA.

**Abstract**

In this research, we try to prove that the child has a right to be heard, especially because a lot of laws (like Arab laws), still do not recognize it, taking in consideration that most of these laws acknowledge by Convention the child's right to be heard. To prove the existence of this right, we will attest first that there are corroborations for the child's right to be heard, and there are legal measures established to protect this right.

The main objective of this article is to prove that a child has a right to be heard, and so it shows both the legal and material basis of this right, in addition to the legal measures established by law to enable a child to exercise his/her right to be heard. From this main objective, we -in this research- adopt an inductive method. The scope of this research is in the Anglo-American Laws.

To prove the right for children to be heard, we discuss first the corroborations for the child's right to be heard, to move after that to discuss the legal measures established to protect this right.

At the end of this research, we come up with a set of results, among which the child's right to actively participate in judicial proceedings which does not mean just hearing the child in principle, but also the extent to which the child's views are considered and given appropriate weight.

Also, we find that there are other objective corroborations, not related only to his personality, but to his rights themselves. This includes his right to equality and the necessity that ensues of prohibition of any arbitrary restrictions that could be imposed on him.

Besides that, we conclude that there is a legal distinction between competency of the witness and his credibility, and child's right to be heard related to his competency to testify, but not necessarily to be related to the credibility of his testimony. We also concluded that child's right to be heard

(*) Research Submission Date: 17 January 2022 & Research Acceptance Date: 29 August 2022.

requires imposing necessary amendments for these rules, including a balance between the interests of the child on the one hand and the rights of defense on the other hand, in the sense of balancing between the protection of vulnerable actors in criminal proceedings (such as children) and the principles of fair trial (from which the accused of assaulting them benefit), by providing a new dynamic measure for the legal status of the child's victims and witnesses in the context of criminal justice.

Finally, the child's right to express his or her point of view is not intended by the traditional way of speaking, because traditional-related rules are founded on the essential problem of the subject of children's testimony, that is the procedural criminal justice system designed originally for adults not for children, what makes any attempt to suit it very difficult, particularly in terms of the elimination of tension in the control of the child when taking his testimony, when facing the formal atmosphere of the court.

**Keywords:** Arab laws, Convention on the Rights of the Child, arbitrary restrictions, the interests of the child, and principles of fair trial.

## Introduction

The problem of children's testimony began, in common law, after the famous series of trials known as "Salem witch trials"; which took place in the state of Massachusetts in 1692, in which a group of civilians were sentenced to death, accused of practicing witchcraft and sorcery, against a group of young girls, as they did not first recognize the sorcerers who carried out their witchcraft, and then returned in the end to recognize them, which led accordingly to Executing them. Accordingly, the most difficult and sensitive issue in American law has arisen, namely the extent of recognition of children's testimony(1), as it remained the case precedent prevented children from testifying, over two hundred years later(2), where the traditional view, remained during that period, denies the right of the child to participate in the trial. The English proverb was fashionable states that "children look at them and not hear them"(3).

However, in recent decades , it began to shed light on the problem of the increasing incidence of sexual abuse of children , through statistics that demonstrated a significant increase in the proportions of these crimes, as reflected in its impact as decided by - for example - a Canadian committee called (Badgley) In 1984, this committee was created to study the problem and develop proposed solutions to address this problem. It decided in the end result that the criminal justice system failed to ensure the participation of children(4). It often happened that a child was the only witness. His testimony faced legal difficulties; either for the determination of its inadmissibility in principle, or for its failure to prove the charge, due to his inability to remember some of the subtle issues in it(5).

The trend in favor of the admission of children began growing following

(1) Matthew D. Anderson, Truth in Children's Testimony, American Journal of Criminal Law, School of Law, University of Texas, USA, Vol.25, (1998), p.653.

(2) Annemarieke Beijer & Ton Liefaard, A Bermuda Triangle? Balancing Protection, Participation and Proof in Criminal Proceedings affecting Child Victims and Witnesses, Utrecht Law Review, School of Law, Utrecht University, Netherlands, Vol.7, Iss.3, Oct.2011, p.84.

(3) Rhona Fun Brian Kearney & Kathleen Murray, Children's Evidence: Scottish Research and Law, a chapter in a book titled: International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law, Sage Publications, California, USA, 1996, p.2.

(4) Louise Dezwirek Sas & David A. Wolfe & Kevin Gowdey, Children and the Courts in Canada, a chapter in a book titled: International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law, Sage Publications, California, USA, 1996, p.7.

(5) The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations, Harvard Law Review, School of Law, University of Harvard, Vol.98, No.4, Feb.1985), pp.806-807.

the testimony gathered in the legal and psychological aspects, especially with the general trend in the protection of children which requires ensuring that child will not be deprived of the benefit of the justice system(6). So, the laws approach to children's testimony, influenced by the great development the research conducted in this regard in the psychological and social sciences(7), especially with the increasing calls for state legislators to rely on the existing development in the sciences of child development when developing related provisions(8).

So, the common law did not permit -in the beginning – children's testimony, as they are not qualified to perform it. However, with the development of common law, the testimony of children over a certain age, such as the age of seven, was accepted, provided that some of the requirements were met, on top of which they proved their understanding of the nature of the oath in general, even though an accurate understanding was not required(9).

The revolutionary change in the legal value of children's testimony and in the procedural system for it, aroused many concerns about the new rules(10), in addition to the crucial question, about whether legislative changes in the area of empowering children to participate in the trial, will make any difference in the prosecution of sexual violence against children(11), and to avoid miscarriage of justice(12).

Since the topic of this research is the right of children to testify, we will begin by presenting the corroborations for this right (Section 1) and then move on to discuss the legal measures established to protect this right (the second section). To prove that there is a right for children to testify, especially if we know that most of the states ratified by Convention the Rights of the Child, admitted the child's right to be heard.

(6) Brian R. Clifford, Methodological Issues in the Study of Children's Testimony, chapter (21) in a book titled: Children's Testimony: A Handbook of Psychological Research and Forensic Practice, Wiley series on the Psychology of Crime, John Wiley & Sons Ltd, New York, USA, 2002, p. 331.

(7) Mohamed Chande Othman, An Eclectic Paradigm in The Law of Evidence And its Reform in Tanzania: Competency of A Child Witness, Boston University International Law Journal, USA, Vol.33, (2015), p.109.

(8) Wallace J. Mlyniec, The Implications of Articles (37) and (40) of the Convention on the Rights of the Child for U.S. Juvenile Justice and U.S. Ratification of the Convention, Child Welfare, Vol.89, No.5, p.110.

(9) Annemarieke Beijer and Ton Liefaard, op.cit., p.84.

(10) Davies Graham, Protecting the child witness in the courtroom, Child Abuse Review, University of Leicester, UK, 1992, p.37.

(11) Louise Dezwirek Sas & David A. Wolfe & Kevin Gowdey, op.cit., p.7.

(12) Mohamed Chande Othman, op.cit., p.110.

## Section 1: Corroborations for Child's Right to be Heard

Child witness is a vital source of information for the judicial authorities, whether the child is a victim of crime or just a witness to it. This definition is meant in Article (12) of the Convention on the Rights of the Child, noting that the child is most often a victim and a witness at the same time(13). Also, the child's Right to be heard is derived from his right to participate in the trial, which is not only limited to the child's right to be heard, but also includes talking it into account, and giving them weight and appropriate consideration in the trial(14).

Anyway, we'll search first in recognition of the Anglo – American laws in Child's Right to be heard through a group of legislative and judicial corroborations (Chapter 1) and move after that into Juristic corroborations that may be also taken into consideration in legislations that have not yet recognized the child's right to be heard (Chapter 2).

### Chapter 1: Legislative and Judicial Confirmations for the Child's Right to be Heard

Many legal advocates support the child's right to be heard, starting with the confirmations of this right in legislations of the Anglo-American countries (Branch 1) and judicial precedents therein (Branch 2).

#### Part 1: Child's Right to be Heard in Anglo-American Laws

The Anglo-American laws were distinguished by their determination of child's right to be heard on a large scale. In Canada, for example, a committee called Badgley was created in 1981 because of concern about the spread of cases of sexual abuse and exploitation of children.
The committee recommended in a set of revisions to reform of criminal Law and the law of evidence in Canada. What concerns us in this regard, is the amendments made to the Evidence Act of the Canada Parliament by the Bill C-15 in 1988 and the Bill C-126 in 1991. In terms, these bills were aimed at modifying the rules of criminal evidence in order to increase the effectiveness of trials and criminal success in cases of sexual abuse of children, in addition to providing better protection for victims of child sexual abuse and witnesses(15).

Moreover, in 1993, the Canadian Department of Justice evaluated the

(13) Annemarieke Beijer and Ton Liefaard, op.cit., p.72.

(14) Ibid, at.77-78.

(15) Louise Dezwirek Sas & David A. Wolfe & Kevin Gowdey, op.cit., p.3.

1988 Bill C-15 to determine whether it has been applied successfully and effectively to reduce child sexual abuse. Studies have shown at the time that this percentage increased despite the aforementioned law, which was explained on the one hand by the criminalization of a larger group of inappropriate sexual behaviors towards children, in addition to the increased awareness of the police and other state agencies of the problem of child sexual abuse, and finally the increase in the percentage of complaints submitted by children due to allowing a new age group of those whose ages (from 4 to 9 years) are to file complaints to the judiciary regarding sexual assault(16).

In 2004, the Justice and Human Rights Commission of Canada developed further proposals for legislative reform in the cases of child victims and witnesses in the criminal justice system. It resulted in amending the 2006 Canada Evidence Act specifically in Section (16/1), which states that "a person under 14 years of age is presumed to have the capacity to testify. The test for the receipt of a child's evidence is simply that the child is to be able to "understand and respond to questions".

It is for the party challenging the child's capacity to establish that there is an issue as to capacity to understand and respond to questions (s. 16.1(4)). A child under the age of 14 is neither to take an oath nor make a solemn declaration but must promise to tell the truth. No inquiry is permitted into a child's understanding of the meaning of a "promise," or the meaning of concepts like "truth" or "lie" (s. 16.1(7)). The evidence given by a child after a promise has the same legal effect as if it were taken under oath (section 16.1(8))(17).

In England and Wales, Sections (53/1) and (53/3 / A and B) of the 1999 Youth Justice and Criminal Evidence Act decide that anyone is competent to testify in criminal cases regardless of their age, and that a young child may not be rejected as unjust Competent unless the court determines that the child is unable to understand the court›s questions and provide the court with understandable answers(18).

Also, we see section no. (96/2) of the Children Acts of 1989, titled by "Evidence given by, or with respect to, children" states that: "The child's

(16) Ibid, at 7.

(17) Nicholas Bala & Lee Kang & RCL Lindsay & Victoria Talwar, The Competency of Children to Testify: Psychological Research Informing Law Reform Canadian Tournaments, International Journal Unit of Children's Rights, Vol.18, (2010), p.64.

(18) Mohamed Chande Othman, op.cit., p.110. Also see: Nicholas Bala, Kang Lee, R.C.L. Lindsay and Victoria Talwar, op.cit., p.73.

evidence may be heard by the court if, in its opinion— (a) he understands that it is his duty to tell the truth; and (b) he has sufficient understanding to justify his evidence being heard"[19].

In the United States, Rule (601) of the Federal Rules of Evidence also states that every person has the competence to be a witness unless otherwise stipulated in these rules …[20].

Moreover, in Hong Kong, we find that Section (3) of the 1992 Evidence Act states that "the following persons are considered incompetent to present evidence in any of the proceedings: (a) Children under the age of 7, unless they appear to be able to receive impressions of the facts being examined that are genuinely related to them …"[21]. The Special Committee recommended the proposed amendments to the law to confront crimes of sexual abuse of children, that this section should be abolished, considering that the assumption of child incompetence to testify must cease, and that the court is given the authority to assess the child's competence to testify, as is the case with adults[22].

**Part 2: Child's Right to be Heard in Anglo-American Judicial Precedents**

Child's right to be heard was established in the Anglo-American judicial precedents long ago. One of the oldest provisions that determined a child's right to be heard and the absence of a minimum age for his eligibility was decided by the Supreme Criminal Court in Scotland in 1837, of accepting the testimony of a 3-year-old girl because she was able to pronounce, and the judges were satisfied with her understanding of the difference between truth and lies, and her understanding of the duty to tell the truth, as her testimony at that time would be of equal weight to the testimony of adults[23].

Also, in 1895, the US Supreme Court decided in the case (Wheeler v. United States, 159 US 523, 525 (1895)) that "excluding [a child] from the witness stand ... will sometimes lead to a loss of justice ..., and that the mere young age of a child cannot be, as a legal matter, a reason for determining his ineligibility to testify ... It is true that it is not possible to invite a child who is two or three

(19) https://www.legislation.gov.uk/ukpga/2004/31/contents.

(20) Ibid, at 112. Also see: Annemarieke Beijer and Ton Liefaard, op.cit., p.85.

(21) Ting-Pong Ho, «Children's Evidence: Mandating Change in the Legal System of Hong Kong», a chapter in a book titled: a chapter in a book titled: International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law, SAGE Publications, New York, USA, 1996, p.5.

(22) Ibid, at .9.

(23) Rhona Fun & Brian Kearney & Kathleen Murray, op.cit., p.3.

years old to testify, but nevertheless there is no specific age that determines the issue of competence, but it depends on the ability and intelligence of the child and his appreciation of the difference between truth and falsehood, as well as his duty to tell the truth ... and that it is possible for the judge to resort to any examination which tends to reveal his ability and intelligence, as well as his understanding of the obligations of the right(24). The court also decided that "Just because a child is young does not mean that he cannot be a reliable witness when interviewed with appropriate techniques"(25).

Moreover, in the case *(Rosen v. United States,* 245 US 457 (1918)), it was decided that the child should be assumed to be competent to testify, not to be incompetent for it and that the weight of the child's testimony after that is decided by the jury or the court(26).

In England as well, we find what has been decided in the case (DPP v M. (UK), 1988, c. 33, s. 33A), for which the defendant was convicted of unintentionally assaulting a four-year-old girl, based on her testimony, and the defendant contested the conviction by saying that the child was too young to testify because of his age. The Court of Appeals in England and Wales held that it was not in the interest of the case to exclude a child's testimony based solely on her age and that a young child is qualified to testify if he is able to present a clear testimony(27).

Also in 1990, a court of appeal in England and Wales ruled that the efficiency requirement was always being interpreted in a way that makes it impossible to hear evidence from a child under 6 years of age, but any child at any age can provide evidence, provided that the judge realized that he has sufficient intelligence and ability to understand the duty to tell the truth(28).

In Hong Kong as well, we find the case (Chan Chi v. R (1968)), where a 14-year-old boy was a witness to a criminal case, and the Court of Appeal ruled that no court can specifically draw the age line between a child who is qualified for testimony and a child who is not qualified for it, but can rely on matters other than age, depending on each case separately(29).

(24) Laurie Shanks, Evaluating Children's Competency to Testify: Developing A Rational Method to Assess a Young Child's Capacity to offer Reliable Testimony in Cases Alleging Child Sex Abuse, Cleveland State Law Review [Vol. 58:575- 2010], pp.581-582.

(25) Annemarieke Beijer and Ton Liefaard, op.cit., p.85.

(26) Ibid, at 84.

(27) Nicholas Bala Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.73.

(28) Ray Bull & Graham Davies, op.cit., p.3.

(29) Ting-Pong Ho, op.cit., p.6.

## Chapter 2: Jurisprudential Corroborations for Child's Right to be Heard

Jurisprudential corroborations for the child's right to be heard are varied in which some of them are personal derived from legal characteristics in child's personality that enable him to testify (First part), while other corroborations are objective ones based on the same rights of the child (Second part).

### Part 1: Personal Corroborations Related to the Same Child Witness

If the corroborations support child's right to be heard, the right to participate in trial in general, depends on his independent character and its ability to decision-making (First) and what ensues of stating criminal liability responsibility for lying about it (Second).

#### First: Child's Independent Character

The one who looks at a child's legal status finds it developed to a large extent in the past decades, based on the saying that there are two interrelated processes that contribute to the formation of child's character: individualism, which means the process of separation from parents, and the development of identity, which in turn means a process of "coherent creation of an integrated feeling of self[30].

The two previous considerations, ruling on the legal status of the child, conflict between a traditional tendency that favors the consideration of identity over individualism (A), and another modern trend that introduces - on the contrary to the first - the consideration of individuality as an identity (B).

**(A) Traditional Trend: Going to the Failure to Grant Child a Self Distinguish Opinion from the Opinion of his Parents**

In the 1920s, all Jurisprudential opinion was about "parental rights" in raising their children, without any primary focus on their "responsibility" for that. Since 1923, the US Supreme Court has repeatedly recognized the freedom that parents enjoy in raising and custody of their children. This confirms the wide authority of parents in controlling their children, which is affirmed by the agreement in part when it determines the importance of the family, respecting the convention, and its recognition of the role of the family in their child's life and the priority of the parents› role in it. However, this is not absolute, rather it overlaps and intersects with a child's right to participate in decision-making and take his opinion and be heard with seriousness and respect.

(30) Barbara A. Atwood, Representing Children Who Can›t or Won›t Direct Counsel; Best Interests Lawyering or no Lawyer at All? Arizona Law Review, College of Law, University of Arizona James E. Rogers, USA, [VOL. 53:381-2011], p.410.

The Supreme Court justified the reason why children do not enjoy the same rights as adults, the weakness of children and their need for protection by limiting their independence, and their inability to make some decisions in a rational and mature manner, in addition to the importance of the role and authority of parents in their upbringing(31).

This trend has been enshrined in the United Nations General Assembly Declaration of the Rights of the Child in 1959, which is regarded as a general rule for parents to decide on the basis that they have parental protection for children, meaning granting parental authority to protect children as individuals in society who cannot protect themselves(32). This acknowledges the view that was prevalent for a long time, which determined that a child is incompetent, lacking responsibility, and in need of protection. For example, the Declaration of the Rights of the Child of 1924, adopted by the League of Nations, did not contain any text establishing the right of the child to be heard, or to participate in trial in the first place(33).

This traditional viewpoint still has its effects even today, as some persons state that «the only child's right to participate, recognized under American law in general, is his right to be represented in court proceedings as in the case of whether child custody is a matter of dispute between parents during divorce proceedings or in the care and protection lawsuits filed by the state", bearing in mind that there are different methods used in determining the manner in which the views of children are taken during their custody procedures, even though they are not usually parties to these lawsuits(34).

**(B) Modern Trend: Going to give Children a Subjectivity that Distinguishes their Opinion from that of his Parents**

The importance of giving an independent autonomy to the child becomes even greater in cases in which lawsuits related to the separation of the child from his parents are heard, where all concerned parties must then be given the opportunity to hear their views (Article 9, Paragraph 2), what should be understood with, that this condition also includes the child, in If he was able to form a point of view on this issue (Article 21/a)(35).

Child Protection Convention highlights that the child is a human

(31) Soo Jee Lee, op.cit., pp.701-702.

(32) Ibid, at 695.

(33) Lothar Krappmann, op.cit., p.502.

(34) Soo Jee Lee, op.cit., p.708.

(35) Lothar Krappmann, op.cit., p.504.

being who has the right to be respected as a unique entity from a special perspective, whether by the rest of society or by the state and its institutions, which makes Article (12) of this Convention contradicts with the traditional perception of the child, which restricts the rights of the child with the rights of his parents and their responsibility towards him, where he created a kind of balance or correspondence between the rights of parents in their child on the one hand and the rights of self - child on the other hand(36).

The previous equilibrium formula ended the contradiction between the rights of parents and the rights of the child in the interest of reconciliation between them, so if it is true that children are vulnerable members of society, what makes them deserve the special protection that is due to them, but – however- they remain members of society, who have rights of their own, which necessitate going beyond the traditional concept of children as "purely passive beings who are absolutely subject to the authority of parents and governments"(37).

With reference to 1989 Convention on the Rights of the Child, we find that it considers the child as a rights holder entitled to enjoy human rights, while the child was only recognized as a person in need of special care and assistance (as is the case in Article (24) of the International Covenant on Civil and Political Rights). The Convention also recognizes three groups of child rights. The first can be called protective rights that aim to provide "protection," such as the right to respect privacy and family life (Article 16 of the Convention) and the right to protect from violence (Article 19 of the Convention).

The second can be called preferential rights that aim to establish provisions specific to children, such as the right to obtain an adequate standard of living (Article 27 of the Convention), the right to education (Articles 28 and 29 of the Convention) and to health care (Article 24 of the Convention). As for the third group - the subject of our interest in this research - is what can be called participation rights, which aim to enable the «participation» of child with his surroundings, such as the right to be heard (Article 12 of the Convention), the right to freedom of expression (Article 13 of the Convention) and the right to Obtain information (Article 17 of the Convention)(38).

The rights granted by the Convention on the Rights of the Child do

(36) Ibid, at, p.502.

(37) Soo Jee Lee, op.cit., p.687.

(38) Annemarieke Beijer and Ton Liefaard, op.cit., pp.72-73.

not mean that the child is considered fully independent; rather, the child is primarily recognized as a member of his family, according to the preamble to the Convention on the Rights of the Child, regarding the family as "the basic group of society and the natural environment for the growth and well-being of all its members, especially children". Likewise, in accordance with the provisions of Article (18) of the Convention for the status of the child's parents by stating that they are "those who bear the primary responsibility for the upbringing and development of the child".

The rights granted by the Convention are dynamic in nature, as it is linked to a child's development of his capabilities to reach full capacity as an adult, so Article (12/1) of the Convention. The child's right to express his or her views is limited to the child who is able to form his own opinions. Hence, «child's opinions» should be given appropriate weight according to the child's age and maturity. This has changed the concept of the child from being considered as a mere subject of special care and protection to a person with a right in the literal sense of the word, by recognizing that this child is a human being who has an independent personality and privacy from his personal perspective and intentions, and that his privacy must be respected by individuals on the one hand, and by the state and its institutions on the other hand(39).

Change in the cultural and social perception of the idea of parenting and parents' commitment to care for their children, have contributed to the increase in public concern about child abuse and neglect, in addition to psychological impact of divorce on children and obligations to support the child, which makes the recognition of child's right to be heard a necessary solution to counter this distress, by emphasizing the rule that "the teenager comes first"(40).

The foregoing imposed the necessity of granting the child's self-determination in participation in criminal procedures. In fact, most children live in a state of dependency and lack the ability to decide as adults do, but the lack of child's cognitive and emotional ability should not be a limitation of his constitutional rights to equality and non-discrimination. The Supreme Court in America adopted this point of view when it decided to introduce the child to his «self-definition» as a result of preventing factors including the language the child speaks, the identity he finds, and the culture and traditions he assimilates.

If "the state has an interest in helping children develop the skills needed to

(39) Ibid, at 74.

(40) Soo Jee Lee, op.cit., p.698.

be independent from adults", this "cannot be an absolute and immediate goal", due to the fact that "most pre-teen children lack the cognitive and emotional maturity required for independent decision-making in legal terms". Rather, the law «deprives minors of their legal independence in some cases to protect them from the consequences of their choices, and this authorizes parents or guardians to make major decisions on their behalf."

This viewpoint is linked to a major premise state that "children are deprived of their constitutional rights due to their inability to think logically" and that they "lack a wide range of cognitive, emotional and imaginative skills necessary for independent decision-making". Some criticize the previous view by saying that the idea of childhood «has its broader conception in terms of social and economic terms and is linked to addressing the structural conditions of society that in turn produce inequality between children and adults".

So, between the notions of despotism and ability, these two concepts compete in the debate about child representation and the desire to enable them to have autonomy with the inability of children to self-determination. These two viewpoints were reconciled by granting the child a legal status closer to «limited self-determination» by giving them some freedom that enables them to grow and prosper, under the supervision of those who the law enforces their guardianship over them(41).

In addition to the Convention on the Rights of the Child, we find the judiciary in the United States granted the child a distinguished legal status with self-determination, after he/she was seen as an entity belonging to his family that decided the best way to care for him. For example, the US Supreme Court recognized what can be named as "limited self-government" for minors, in the case (Bellotti v. Baird, 443 US 622 (1979) when it decided that «the pregnant child has a constitutional right to obtain a judicial authorization to terminate the pregnancy without informing her guardians, and that judicial permission should be granted to her to do so if she proves that she is sufficiently mature to make the decision or that the abortion is in her (supreme) interest"(42).

Also, we find the case (Viragh v. Fordes, 612 NE2d 241, Mass. 1993), When a mother moved with her two children from Hungary to the United States, the mother refused to return to Hungary, the father -who had come to visit them- filed a lawsuit in the Massachusetts Family Court based on the Hague Convention on Child Abduction. The court judge rejected his request on

(41) Barbara A. Atwood, op.cit., pp.403-404.

(42) Ibid, at 405.

the grounds that father›s rights are «access rights» not «detention rights" [43].

According to the foregoing, some have argued that almost all children have the ability to communicate and express their desires, which means that children's attorneys must know their views and represent them in the most appropriate way, which means that child's lawyer must defend his declared desires if the child is able to make an «informed decision» and that child developmental psychology research proves that children generally possess this ability by reaching the age of seven. In general, there are a set of factors that can contribute to determine the nature of the relationship between a lawyer and his child client, including «child's age, maturity, intelligence, level of understanding he has, in addition to his ability to communicate"[44].

Back to the criteria of "AAML " (American Academy of Matrimonial Lawyers), which is a special organization for lawyers founded in 1969 and has established some professional code of conduct for the legal profession, we find that it developed greatly between its two publications issued in 1995 and 2009. In its standards included in its publication in 1995, we find that it was determined that children under the age of twelve are assumed to be weak and unable to represent themselves or become actively involved in court proceedings.

However, we find the 2009 Bulletin abandoned that presumption related to the age of the child, as its criteria adopted another view, which is that the participation of the child's lawyer is limited to the legal (procedural) process required to reach a specific goal, without specifying that goal, which is left to be determined according to the desire of the child himself. Prospectus standards of AAML For the year 2009, suggests that the child is treated as having sufficient decision-making ability if he is able to understand the nature and circumstances of the case, assess the consequences of each alternative course of trial, and be able to communicate with the attorney and discuss rationally and logically about the best course of the trial[45].

In the same context, the 2016 Model Rules of Professional Conduct established by the American Bar Association, urge lawyers to give weight to the opinions of some clients with diminishing capacity, such as minors,

(43) Sam F. Halabi, Abstention, Parity, and Treaty Rights: How Federal Courts Regulate Jurisdiction under the Hague Convention on the Civil Aspects of International Child Abduction, Berkeley Journal of International Law, Vol.32:1, 2014, p.158.

(44) Barbara A. Atwood, op.cit., pp.410-411.

(45) Ibid, at 411.

who often have the ability to understand, debate, and come to conclusions about issues affecting his interest, and that their opinions shall be considered as weight in the legal procedures related to them(46).

Finally, it might be useful to present the concerns of some about the Convention on the Rights of the Child in terms of its interference in the privacy of the family, especially in the authority of parents in choosing the most appropriate way to raise their children, if this remains within the framework of legality. They decide - in this context - that the abolition of parental authority over children harms «family values,» and that the best way to achieve children's well-being is by leaving them in the care of their parents. Perhaps it is appropriate to change the prevailing traditional attitudes about the role of children in social settings, rather than seeking to impose legal change in the form of rules that are enforceable(47).

**Second: Relationship between Child's Right to be Heard and the Determination of his Criminal Responsibility for Lying about it**

Laws of Anglo-American countries differed from the extent to which the criminal responsibility of the child was determined in case it was found to be false in the testimony, after it was, of course, recognized in those laws. In Canada, England and Scotland, children may testify without any responsibility, which was decided in the law of Helsberry for England and Wales 1992 as well as the Children Act 1989(48). This raises a problem about the nature of the responsibility that must be verified that the child is aware of the consequences of breaching the duty to tell the truth, in addition to the necessity of an objective link in our opinion between the reliability of the oath and the responsibility of the one who performs it for perjury.

Accordingly, a judge named «Anthony Kennedy» pointed out the effect of the difference in the way of performance between the performance of adults and children's brains, on decisions that are made differently between adults and children, which means that they should not have the same moral responsibility as adults for committing crimes, taking in consideration what this leads to inaccurate and ill-informed decisions and actions that adults do. The judge concluded from all of this that death penalty is no longer seen as

(46) Soo Jee Lee, op.cit., p.709.

(47) Ibid, at 700-701.

(48) John E. B. Myers, «A Decade of International Reform to Accommodate Child Witnesses: Steps toward a Child Witness Code», chapter in a book titled: International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law, 1996, Access Date: November 23, 2018, SAGE Publications, New York, p.6.

"appropriate for children"[49].

Also, psychological and social differences between adults and children have been taken as a basis in the case (Roper v. Simmons) when the Supreme Court of the United States noted that «children under the age of 18 lack maturity and a sense of responsibility and are also more vulnerable to negative influences and peer pressure"[50].

Some argue that giving appropriate weight to a child's opinions requires appropriate responsibility to be attributed to him, to make sure that he is seriously considering the topic on which he expresses an opinion. This means that if a child's statement or views are found to be incorrect, he or she will share with adults the legal consequences resulting from this. In addition to the above, there is a need to increase the participation of children in particular when the activity in question can be successfully implemented only when the best interest of the child is respected, and that parents should know the best ways to demonstrate their children's ability to govern more efficiently when transferring the responsibility of making decisions to them[51]. So, they conclude to determine child's ability to consent if he is "able to appreciate the nature, extent, and potential consequences of the behavior on his consent"[52].

On the legislative applications for this trend , we find the Article (4) of 1992 Evidence Act of the Province of Hong Kong, which states that "In any case against any person for a crime, a child does not understand the nature of the right, his statements may be accepted evidence, despite not being given at the oath, if he has, according to court's discretion, sufficient information to justify accepting evidence from him, in addition to understanding his duty to tell the truth".

However, the aforementioned article restricted the scope of its application, taking into account the provision of Article (82) of the same law, which is evidence in the case the child did not swear an oath before making his statement, incomplete evidence that must be supported by other material evidence, in addition to the report of child's criminal responsibility in the case he lied in his statement for the offense of perjury, in accordance with the provisions of the Juvenile Offenders Law (Cap. 226)[53].

(49) Wallace J. Mlyniec, op.cit., pp.105-106.

(50) Ibid, at 110.

(51) Lothar Krappmann, op.cit., pp.507-508.

(52) Soo Jee Lee, op.cit., p.712.

(53) Ting-Pong Ho, op.cit., p.5.

In our point of view, we support the position of the law of Hong Kong Province, if the child is eligible for criminal responsibility, it is worthwhile to be competent to testify in criminal cases. Besides, if criminal liability is determined based on the availability of both two components: cognition and freedom of choice, progress in the filming of Brain Parts has shown human brain, particularly those responsible for impulse control, rational decision-making, and self-awareness, take longer to mature than previously thought.

This has had the greatest impact in the field of juvenile justice because of its impact on the criminal responsibility of children and adolescents and their susceptibility to rehabilitation, through the desire to strengthen the independence of children. Even within these studies, it was found that children and adolescents differed in their individual maturity rates. It has been shown also that the crust frontal lobe Part of the brain is responsible for the organization, planning, risk assessment and other «executive functions», of the last areas that mature brain with age, which explains why usually teenagers dramatically lose their ability to govern through emotions or attitudes, or when a great deal of pressure imposed upon them, even though their thinking and understanding abilities closely resemble those of adults. Studies also show that the incomplete psychological development of adolescents affects their ability to make decisions in the manner required by criminal law and acceptable to criminal justice(54).

**Part 2: Objective Corroborations for Child's Right to be Heard**

In addition to the personal corroborations for the child's right to be heard, which is derived from the characteristics of his personality, we find that there are other objective corroborations, not related to his personality, but to his rights themselves. These include his right to equality (First) and the necessity that ensues of prohibition of any arbitrary restrictions that could be imposed on his right (Second) and finally the realistic necessity related to establishing crimes and reaching the truth, which imposes the necessity to grant him this right (Third).

**First: Child's Right to Equality**

This right does not mean only the mere child's equality in procedural treatment with adults. Rather, it is intended to give his statements -as a general principle- the same evidentiary power granted to adults. Likewise, a child's right to equality is not intended to treat children of the same age the

(54) Barbara A. Atwood, op.cit., pp.408- 409.

same treatment. In application of this, by referring to Article (12/1) of the Convention on the Rights of the Child, we find it refuses to set certain limits for the age of testimony despite the fact that such limits serve the principle of equality(55).

In applying the principle of equality and non-discrimination in the evidentiary value between children's testimony and others, the guidelines of Article (12) of the Convention on the Rights of the Child emphasized that age alone cannot be a justification for not giving appropriate weight to a child's testimony, nor an obstacle to testimony, as long as he is able to give trustworthy and credible testimony, whether with auxiliary means of communication or without(56).

Accordingly, some courts have reformed their approach to children's testimonies, on the basis of research in social sciences. In the case of (The Kingdom v WJF), the Canadian Supreme Court has explicitly recognized that the presumptions and doubts about children's testimonies are incorrect, especially with law›s refusal to recognize the problems of young witnesses, because they face difficulties when giving their testimony. Furthermore, child witnesses have been treated like adults, but more strict, as they not only had to take an oath, but they also, unlike adults, had to prove their competence to take the oath, which adults are exempted from(57).

Furthermore, we find the case *(R v. Barker* [2010] EWCA (Crim) 4, [40] (Eng.) in which the Court of Appeal in England and Wales decided that "children are like adults, some may provide an accurate and honest certificate while others may not. But children should be treated and judged for what they are, not for what they will be when they grow up. The evidence of children applies that implicit stigma, which considers the evidence presented by them in some way less reliable than adults. The purpose of the trial process is to determine evidence that is more reliable than others, whether it was provided by an adult or a child". The basic principle is that the child witness is governed by the rule of equality with any other witness(58).

On the forms of inequality in the probative value between the testimony of children and adults, is the so-called "Kidnall Warning", which requires the

(55) Annemarieke Beijer and Ton Liefaard, op.cit., p.76.

(56) Ibid, at 80-82.

(57) Mohamed Chande Othman, op.cit., p.109.

(58) Ibid, at 109.

judge to warn the jury about a weakness in child's evidence and that there are risks in the determination of a conviction based on evidence derived from the testimony of a child solely, even if it is taken under oath. This rule was decided in the case (*Regina v. Kendall* ,1962). As evidence of the rootedness of this rule in the judicial tradition, is that in spite of the issuance of the Amendment Law No. C-15 Canada›s Evidence Act of 1993, many judges continued to distinguish between children and adults evidence(59).

**Second: Prohibition of Arbitrary Restrictions that Prevent Children's Right to be Heard**

Among the forms of confronting arbitrary restrictions on a child's right to participate in the trial, until recently, is the abolition of competency test for those under a certain age of child witnesses, which were conducted despite the fact that these age limits are arbitrary and unrealistic, such an order necessitated the prohibition of asking any question, aims to prove the incompetency of children, especially in cases of sexual abuse against them(60).

If preventing children from testifying is a form of arbitrary treatment with them, then treating them in the same way as adult witnesses and without regard for their privacy is another aspect of the same arbitrary treatment. For example, a study conducted on the treatment of child witnesses in Scotland, showing that their testimonies are heard in a public trial, in the same way that adults are heard and discussed, was a very difficult and stressful experience for children, especially the crimes of sexual assault against them.

One Scottish lawyer even wrote: "Not only the lawyers, but everyone involved, are subjecting the child to intolerable harassment. It is as if everyone in the trial is involved in a plot to rape the child again." This requires searching for alternative procedures that satisfy the interests of justice and -at the same time- be fair to the accused. This was brought to the attention of the Royal Scottish Society for the Prevention of Cruelty to Children, which organized a conference in Edinburgh in 1985, entitled «The Child: Victim of Legal Action?", where the attendees expressed their deep concern about the welfare of child witnesses due to the legal system in place at the time(61).

(59) Louise Dezwirek Sas & David A. Wolfe & Kevin Gowdey, op.cit., p.4.

(60) Myrna S. Raeder, Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don›t Die and Ways to Facilitate Child Testimony, Widetter Law Review, Vol.16: 239, (2010), p.255.

(61) Rhona Fun & Brian Kearney & Kathleen Murray, op.cit., p.2.

### Third: Procedural Necessity as a Realistic Basis for Determining Child's Right to be Heard

The high incidence of child abuse led to a challenge to the legal system that was originally set up for adults, by accepting and interpreting children's testimonies accurately. To enshrine that, it was necessary to grant them the right to participate in the trial(62). A determination of the admissibility of children's testimony is necessary for the effectiveness of prosecutions, especially in cases where the child victim is the only witness(63). This makes the child's testimony an essential element in a criminal case(64).

If the principle is that the prosecution of child sexual abuse depends on physical evidence, then it is not available in most cases, which makes child's testimony vital in this regard. One study showed that despite the lack of physical evidence, the perpetrator was convicted in many cases of child sexual abuse. Physical evidence of sexual assault may include injury to the genitals or anus, detection of an STD, or the presence of semen. The availability and relevance of physical evidence was assessed in legally proven cases of child sexual abuse. Of the 115 cases of sexual assault registered over a 12-month period, 87 resulted in the perpetrator being convicted. There were allegations of vaginal rape in 88 cases, 60 cases of oral rape and/or anomalies.

However, only 23 percent of convicted sexual assault cases contained physical evidence. The percentage of cases leading to convictions was like those with or without physical evidence of abuse. Most of the cases without physical evidence did not lead to a conviction involving children under seven years of age. The conviction rate was lower in cases involving younger children regardless of the availability of physical evidence. These results indicate that physical evidence is not conclusive for a conviction, and that a successful prosecution relies on oral evidence presented in the child's testimony(65).

Because of traditional rules, which does not recognize child's testimony, the convictions in cases of sexual abuse of children is very difficult, not only because of the secret nature of the acts of aggression, but also because of the legal obstacles that govern the recognition of child's testimony(66).

(62) Annemarieke Beijer and Ton Liefaard, op.cit., p.104.

(63) Ibid, at 80.

(64) Margaret Bull Kovera & Eugene Borgida, op.cit., p.5.

(65) Allan R. De Jong and Mimi Rose, Legal proof of child sexual abuse in the absence of physical evidence, The Journal of the American Medical Association, Vol.267, Iss.23, June 1992, p.506.

(66) Louise Dezwirek Sas & David A. Wolfe & Kevin Gowdey, op.cit., p.3.

The evidence for this is that, because of the arbitrary imposition of the competency requirement for child testimony, many crimes of abuse or neglect do not reach the court. In a survey conducted in 1993, it was found that 41% of the surveyed group- which amounted to 600 public prosecutors who were interviewed -reported that the issue of children's competency to testify is a problem in most or all their children's cases(67).

**Section 2: Legal Measures to Protect the Child's Right to be Heard**

It is not sufficient to determine a child's right to be heard merely to report theoretical support for him. Rather, a child must be given realistic mechanisms that enable him to use this right. This necessitates the imposition of a set of practical measures for this. From the judicial rulings that can be drawn upon in this regard, what was decided by the New Zealand Court of Appeal in the case (*R. v. S.*, 1991) that «the interest of justice requires facilitating the presentation of evidence from the child, either in the manner in which it is done, or in making its acceptance easily accessible to the jury, and legal measures in this regard are designed to achieve both purposes, as important means to help reach the truth"(68).

In this section, we begin to discuss the measures relating to the procedures to prove the child's efficiency to testify and impacts resulting from them (Chapter 1) or relating to the burden of proof of child's efficiency to testify (Chapter 2) to move beyond this so as to determine the scope of corroborating measures for child's right to be heard, based on principle of balancing the interests (Chapter 3).

**Chapter 1: Measures Relating to the Procedures to Prove Child's Efficiency to Testify and its Implications.**

To establish the child's right to be heard, laws and jurisprudence of the Anglo-American countries sought to overcome the problems facing children in the course of examining their competence to testify. This includes measures related to procedures of proving child's competence for certification (Part 1) and others related to its implications (Part 2).

(67) John Gibeaut, Picture of competency: Illustrated tests assess child's ability to tell the truth in testimony, ABA (American Bar Association) Journal, Chicago, Vol.86, Apr.2000, p.24.

(68) Margaret-Ellen Pipe & Mark Henaghan, «Accommodating Children's Testimony: Legal Reforms in New Zealand», chapter in a book titled: International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law, 1996, SAGE Publications, New York, USA, p.3.

## Part 1: Measures Related to Procedures of Proving Child's Competency for Certification

Among the measures related to procedures of child's competence for certification, is to limit discussion of competency to judge only, so that none of the other parties exploit his role in discussing child to abuse or manipulate him (First) in addition to what some judicial jurisprudence has decided to determine child's competency for certification through experience rather than through discussion (Second).

### First: Limiting Discussion of Competency to the Judge Solely

In the case (*R. v. Wong Yat-tan* (1990), public prosecutor questioned if a 15-year-old witness understands the truth, but the Court of Appeal refused to let any party to ask the child questions to examine his competency to testify, given that the duty to determine whether the witness is competent to testify or not is only for the judge(69).

Also, we find what was decided in the case (*DPP v. G* (1998) QB 919, (1997) 2 All ER 755) of allowing the testimony of two young children - six and eight years old - and the refusal of defense's request to hear the experience to prove that these children were incompetent to testify, by saying that this is limited within the exclusive jurisdiction of the judge(70).

### Second: Determining a Child's Competency to Testify through Experience not through Discussion

In many cases, the judge or the jury may make a mistake in assessing child's answers to the questions directed to him, and it is decided that he is not competent to testify, as in the case of (M. v. Kennedy, 1993), when the court accepted the evidence relating to child's efficiency to testify without a proficiency test, but obtained from an independent source for the child, as a psychiatrist, for example(71).

In Florida, the Supreme Court accepted receiving expert testimony regarding a child's ability to understand the difference between truth and lies, in preparation for a decision on the child's competency to testify, his mother -at the time- requested not to take child's testimony directly in front of him, considering that this would cause unfixable harm(72).

(69) Ting-Pong Ho, op.cit., p.6.

(70) Nicholas Bala & Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.73.

(71) Rhona Fun & Brian Kearney & Kathleen Murray, op.cit., p.6.

(72) Amy L. Cosentino, «She Said What?» What To Do in Civil Domestic Violence Proceedings with Child Hearsay, The Florida Bar Journal, September/October 2013, p. 44.

## Part 2: Measures Related to the Effects of Child's Competency to Testify Requirement

The principle is that child's competency is a condition for accepting his testimony, but the seriousness of the error in determining child's competency for testimony and the loss of evidence, led to develop solutions to confront it, whether in the event that child's competency for testimony is proven (First) or if it is not proven (Second).

### First: Abolition of Duty to Warn the Jury of the Weakness Child's Testimony in the Event of Proving Competency to Testify

According to the traditional view of children's testimony, courts used -in the past- to warn jurors that a child's testimony is weak, even in cases where they pass the prescribed test to examine their aptitude assessment. This condition has been decided in the case (*Regina v. Kendall,* 1962), and this condition, which became known as warning Kendall, has directed the judges for this condition. It remained in practice by most courts. This was the warning about weakness of the evidence derived from children, even in the cases child testimony were taken under oath, and even after the amended Canadian law of evidence issued in 1993 (Law No. C-15), many judges still distinguish between evidence of children and adults(73).

Also, we find the case (*R. V. Parker*, 1968) where the Court of Appeal of New Zealand decided the need for judges to provide advice juries permanently to pay special attention to the testimonies of young children and to alert their attitude towards invention and distortion, and the wisdom requires continuing this tradition of judges. However, the Court of Appeal of New Zealand came back from this judgment in 1991 in the case ( *R. v. S.*, 1991a) where it decided that the interests of justice require children's evidence be facilitated, and that recent legal measures (the Evidence Amendment Act (1989) and the Summary Proceedings Amendment Act (1989) which obliged judges to alert the jury that children's testimonies are distorted and tainted by imagination) are -in fact- aids in reaching the truth and contribute significantly to the proper course of justice(74).

Likewise, Clause (1/8/16) of the law called The Youth Criminal Justice Act, SC 2002, the judge must even warn the jury about inconsistency or weak

(73) Louise Dezwirek Sas & David A. Wolfe & Kevin Gowdey, op.cit., p.4.

(74) Margaret-Ellen Pipe & Mark Henaghan, op.cit., p.3.

testimony because the witness is a child(75).

Besides, in the case (R v. B., [2010] EWCA (Crim) 4, [40] (Eng.), the Court of Appeal of England and Wales decided that measures which apply to children's evidence should not include an implied stigma implying judging their testimony is less reliable than adults(76).

**Second: Measures Prescribed in Case the Child is Incompetent to Testify**

Even in cases where it is decided that a child is incompetent to testify, it has not been decided to deprive him of his right to be heard, but solutions have been developed to confront this problem, including the distinction between competency and reliability of testimony (A) and finding alternatives to traditional testimony to enable the child to hear his evidence (B).

**(A) Distinguishing between Competency and Reliability of the Certificate**

Children's right to be heard is related to their competency to testify, but not necessarily related to the credibility of his testimony. It is noticed -in this regard- that there is a legal distinction between competency of the witness and his credibility. The competency of the witness includes "the general qualities that every witness must possess in order to allow him to testify," while the credibility of the witness refers to "the extent to which the judge or jury believes that the witness provides honest and accurate testimony(77), which means that there are fundamental differences between them, in our opinion, which are:

1- The issue of sufficiency relates to the witness himself, while the question of credibility relates to the testimony itself, even if some of the witness's qualities are included in its assessment.

2- Sufficiency of the witness is a prerequisite. It must be verified before allowing the witness to testify initially, while the credibility of his testimony is a matter of appreciating the testimony itself after its performance.

3- Sufficiency of the witness is a formal issue to accept it from the original point of view, while the credibility of the testimony is an objective matter in assessing its validity and accuracy, which means that the sufficiency of the witness is superior to his credibility. Every honest testi-

(75) Nicholas Bala & Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.67.

(76) Mohamed Chande Othman, op.cit., p.109.

(77) Annemarieke Beijer and Ton Liefaard, op.cit., p.84.

mony must be from a competent witness, and vice versa, because not every person is competent, certification necessarily results in truthful testimony.

4- Sufficiency of the witness is a matter of law, and the court has no authority in its judgment, whereas the credibility of the testimony is a matter of reality that the court has the authority to verify according to the requirements of the principle of self-conviction of the criminal judge.

A distinction has been made between competency and reliability in children's testimony of the case (*Rosen v. United States,* 245 US 457 (1918)), where it was ruled that "the presumption that the child should be competent to testify and leave reliability of his statements and their weight to what the jury or court decides"(78).

**(B) Finding Alternatives to Traditional Testimony to Enable the Child to Hear his Evidence**

In England and Wales, the Criminal Justice Act of 1988 abolished the need to confirm testimony without an oath to be accepted as legal evidence, and also abolished provisions requiring proof of a child's understanding of the "oath", "truth" or "promise," other than the original containing the opposite. As Article (33) of it states the following:

(1) In any proceedings before a magistrates› court inquiring into an offence to which this section applies as examining justices— (a) a child shall not be called as a witness for the prosecution; but (b) any statement made by or taken from a child shall be admissible in evidence of any matter of which his oral testimony would be admissible, except in a case where the application of this subsection is excluded under subsection (3) below. (2) This section applies— (a) to an offence which involves an assault, or injury or a threat of injury to, a person; (b) to an offence under section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16); (c) to an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978; and (d) to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counseling, procuring or inciting the commission of, an offence falling within paragraph (a), (b) or (c) above…. (5) In this section "child" means a person under the age of 14.".

(78) Ibid, at 84.

Likewise, Clause (1/8/16) of the law called: The Youth Criminal Justice Act, SC 2002, state that in the event that the child is tested after giving a promise that tells him the truth, «it should have the same effect» as if the child was under oath, and it is not permissible for him to reduce the efficiency of the evidence derived from his testimony, simply because he did not take the oath, which is what transcribed the previous ruling included in the law promulgated in 1988, which used to distinguish between a child's testimony given with an oath and that given without an oath(79).

In court rulings, we find the Supreme Court in the United States set the rules governing alternatives for children's testimony, in the case (*Hicks-Bey v. United States*, 1994), it decided that as long as defendant›s right to a fair trial was protected, simple alternatives to accommodating children were valid(80).

The New Jersey Supreme Court also used the case (State v. GC, 902 A.2d 1174, 1182-83 (NJ 2006) a promising approach towards children's competency to testify that enhances the likelihood that they will testify, by allowing questions about whether the child will tell the truth or not, rather than asking for an oath or acknowledgment that the child understands the obligation to testify truthfully and may face negative consequences for lying(81).

On the certificate alternatives also, what was decided in the case (M. V. Kennedy, 1993) shows the ability to hear evidence from sources other than the child to support his non oath testimony(82).

## Chapter 2: Measures Related to the Burden of Proving Child's Efficiency to Testify which Ended with Total Abandonment of the Efficiency Requirement

To enable the child to exercise his right to be heard, it was necessary to reduce restrictions imposed by laws and judicial precedents on the exercise of this right, under the pretext of verifying his competency to testify. In this chapter we start with studying how laws and judicial interpretations differed about the question of efficiency, starting from transferring the burden to prove it from the party asking for the child's testimony to the party opposing it (Part 1), which ended with completely abandonment of the efficiency requirement

(79) Nicholas Bala & Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.67.

(80) John E. B. Myers, «A Decade of International Reform to Accommodate Child Witnesses: Steps toward a Child Witness Code», chapter in a book titled: International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law, Sage Publications, New York, USA, 1996, p.6.

(81) Myrna S. Raeder, op.cit., p.254.

(82) Rhona Fun, op.cit., p.3.

to hear child's testimony (Part 2).

**Part 1: Gradation of the Burden of Proving Child's Competency to Testify**

The rule of laws and judicial jurisprudence on the burden of proving child's competency to testify was graduated, between those who required to prove the child's competency perform it, considering that the general rule is the lack of child's competency to testify, unless the opposite is proven (First) and those who reflect this presumption, which is imposed on those who claim child's incompetency to testify have the burden to prove that (Second) and finally those who impose a conclusive evidence of a child's competency to testify and prevent proving its opposite (Third).

**First: Trend that States the General Rule is the Lack of Child's Competency to Testify, Unless the Opposite is Proven**

If the Anglo-American laws did not permit children**'s** testimony at the beginning, as they are not qualified to perform it, but with the development of the English common law, children**'s** testimony was accepted if they were over the age of seven years, provided that some requirements were met, on top of which they prove their understanding of the nature of the oath, in general, although they are not required to have a thorough understanding of it(83).

In its decision, in the case of (R. v. MacPherson, [2005] EWCA at para. 20. Crim 3605), the Court of Appeal of England ruled that "once the issue of competency has been raised, there is a burden on the party to call the witness, usually the prosecution, to prove that child is competent to answer the questions"(84).

Also, in the state of Florida we find the case (SC v. State, 837 So.2d 1159 Fla 1st DCA Feb. 21, 200), in which it was decided that "the trial judge must determine whether a child is able to observe, remember, and narrate facts, and also whether the child has a moral sense of duty to inform in this case. At the end, court decided that trial judge has failed to conduct an adequate investigation into the child's understanding of the duty to tell the truth, who was four years old only, before he found the child competent to testify(85).

Moreover, we find the case (*State v. Fulton* , 742 P. 2d 1208 (Utah 1987), where The Utah Supreme Court ruled that when a defendant plea of a child's incompetency to testify, the court must consider the "child's ability to

(83) Annemarieke Beijer & Ton Liefaard, op.cit., p.84.

(84) Nicholas Bala & Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.73.

(85) Annemarieke Beijer & Ton Liefaard, op.cit., p.85.

communicate with the court, that is to say, understand the questions directed at him, his ability to express the facts he knows before the jury, distinguishing truth from falsehood and reality from fiction(86).

Also, in New York State, we find what was decided in the case (People v. Nisoff, 330 NE2d 638, 641 (NY 1975)), was that there is a rebuttable presumption that the child who is under the age of nine years, is not qualified to perform the right, but if he was older than nine years, the presumption is reflected, where he can testify under oath unless the court is convinced that the child does not understand the nature of the oath(87).

**Second: the Trend that States the General Rule is Child's Competency to Testify, Unless Someone Proves that he is Incompetent**

This is by imposing a simple presumption that "every person has the competence to be a witness" without the need to prove that, but there is nothing to prevent court from conducting a preliminary competency test in the course of asking him questions, which is what was decided in the case of (The state v. Eldredge, 1989). This approach was also adopted in Rule (601) of the Federal Rules of Evidence issued in 1975(88).

In Hong Kong , too , we find the case of (Tarn Hoi-hon (1963)), when a court authorized the swearing-in of a 12-year-old girl who was working in the field of child prostitution, without prior investigation of her ability to understand the oath, and the Court of Appeal upheld the ruling issued on her oath, considering that the child had reached maturity to a large extent, so that it was not necessary for the judge to carry out any questioning before she was recently allowed to take the oath. However, this judgment was repealed in a murder case )R. V. Fung Kam-keung, 1991), where he appealed on the basis that the judge made a mistake when he did not question the 13-year-old witness to know whether he was mature enough to understand the nature of the oath.

The Court of Appeal rejected his appeal, considering that the issue of child's competency to testify is always according to the discretion of the court, if it wished to pay or otherwise not, on the grounds that there is no absolute rule stating that a child in Hong Kong under the age of 14 must be subject of

(86) Nicholas Bala & Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.71.

(87) Laurie Shanks, op.cit., p.582.

(88) John E. B. Myers, «A Decade of International Reform to Accommodate Child Witnesses: Steps toward a Child Witness Code», chapter in a book titled: International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law, Sage Publications, New York, USA, 1996, p.6.

questioning about his competency to testify, but when the decision appealed before the House of Lords in the United Kingdom, which overturned the ruling on the grounds that the investigation into the issue of child's competency to testify is an obligatory matter, not discretionary, for the court hearing the case(89).

**Third: The Trend that Establishes a Conclusive Presumption of a Child's Competency to Testify, Preventing any Party from Discussing it**

This trend paved the way for the final abandonment of the requirements of child's competency to testify, where many US states' laws ensure that victims of child abuse can testify, without any preliminary examination of competency, of that what was decided in the Alabama Code, 1994, § 15-25-3 (c), That: "Notwithstanding any other provision of law or rule of evidence, a child victim of a physical offense, sexual offense, or sexual exploitation, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony. The court may also allow leading questions of the child witnesses in the interest of justice"(90).

Also, in the state of Ota, we find that the Supreme Court ruled the case(91), that allowing a child to testify without testing is outweighed by the risk of unfair prejudice against the testimony of children, and that before excluding the child from testimony, it must be verified that he is able to communicate with the courtroom settings at the first place, and to understand questions that are also directed to him, in addition to his ability to discern the truth versus imagination or falsehood. This ruling still allows a form of inquiry about a child's competency to testify, although the burden of proof is placed on the defendant who seeks to prevent child from testifying(92).

In Canada, too, the Supreme Court rejected the assumption of the efficiency of children's testimony on the grounds that each person who gives a certificate must be assessed to verify his ability to understanding and communication, and that although children may not be able to testify as clearly as adults, but

(89) Ting-Pong Ho, op.cit., p.6.

(90) https://law.justia.com/codes/alabama/2006/14214/15-25-3.html. Also see: John E. B. Myers, "A Decade of International Reform to Accommodate Child Witnesses: Steps toward a Child Witness Code", chapter in a book titled: International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law, Sage Publications, New York, USA, p.6.

(91) State v. Fulton- 742 P. 2d 1208 (Utah 1987).

(92) Nicholas Bala & Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.71.

this does not mean they are unable by nature to describe what happened and who were the perpetrators(93).

In the case (*Queen v. WJF (* R. v. WJF, [1993] 3 SCR 569, 591 (Can.)), the Supreme Court of Canada recognized that "in the past, the law's refusal to recognize special problems of child witnesses made those trying to prosecute the perpetrators of crimes against children, face great difficulties in convicting them, because of treating child witnesses as adults or even more severe, because they must not only take an oath, but they also -unlike adults- have to prove their understanding of the religious basis of the oath. If they fail to do so, they lose hope that the perpetrators will be convicted; now we realize that this approach was not true"(94).

Finally, we find the decisions of the Court of Appeal in England and Wales in the case (*R v. Barker* [2010] EWCA (Crim) 4, [40] (Eng.)), which states that" none of the characteristics of childhood justifies measures that apply to children's evidence and that cause them to carry with them an implicit stigma that makes their testimony in some way less reliable than adults. The purpose of the trial process is to determine which evidence is more reliable than others, whether from an adult or a child"(95).

**Part 2: Abandonment of Child's Competency Requirements**

In order to enable children to exercise their right to be heard, laws and judicial principles in the Anglo-American countries were not satisfied with transferring the burden of proving competency or exceeding it. Rather, they finally abandoned all competency conditions. This development did not happen once, but moved from partial abandonment of these conditions (First) up to the complete abandonment of it (Second).

**First: Partial Abandonment of Child's Competency Requirements**

Laws and judicial precedents in the Anglo-American countries began to degrade conditions of child's competency to testify, by narrowing these conditions and contenting themselves with some of them and dispensing with others of that what was decided in the case (R. v. JF -2006- AJ No. 972.), its subject, a sexual assault on a seven-year-old girl, stating that "Inability to provide a satisfactory definition of the difference between truth and falsehood, does not negate child's ability to present reliable

(93) Louise Dezwirek Sas & David A. Wolfe & Kevin Gowdey, op.cit., p.5.

(94) Mohamed Chande Othman, op.cit., p.109.

(95) Ibid, at 109.

evidence to the court"[96].

Also, in the case (Harris v. Thompson, 698 F.3d 609 (7th Cir. 2012)), the court of Illinois convicted a father called Nicole Harris with killing his four-year-old son named Jaquari. The testimony of his other son was then heard Diante (Five years old), Where the Illinois State Supreme Court ruled in this case that the testimony of the child must be heard even if he cannot distinguish between reality and fiction as required when the child is a decisive witness in a criminal trial. However, it is extremely important that the questions asked are clear and that the child understands the questions that are directed to him[97].

Also, it was decide in the case of (People v. Dist. Court *(Ruckriegle),* 791 P.2d 682, 685 (Colo. 19)), to accept a testimony of four-year-old child, even though he cannot understand the difference between truth and falsehood or what it means to take the oath, as long as he is able to identify the accused and describe the alleged sexual assault[98].

**Second: Total Abandonment of Child's Competency Requirements**

Laws and judicial precedents in the Anglo-American countries did not stop at the abandonment of efficiency requirements, but rather developed into more than that, as some of them were deliberately disintegrated from these conditions and finally abandoned, given the many negative effects that result from the interrogation process that aims to verify the efficiency of child testimony, and this reduces the conviction of the jury about the reliability and veracity of child's testimony. So, in a study, for example, it was found that young children are often reluctant to discuss the consequences of lying, which leads to looking at them wrongly as if they were unable to understand what the oath is[99].

As a proof of that, in a survey conducted by a center called ABA Concerned with children, 41% of nearly 600 prosecutors interviewed reported that competency was a problem in most or all of their cases[100], especially because of the difficult complex questions about honesty which were directed to children, which may even adults find them difficult to understand and

(96) Nicholas Bala & Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.68.

(97) Stephen A. Saltzburg, Child Testimony, and the Right to Present a Defense, Criminal Justice; Chicago, Vol.28, Iss.1, Spring 2013, p.62.

(98) Myrna S. Raeder, op.cit., p.255.

(99) Ibid, at 253.

(100) Gibeaut, John, op.cit., p.24.

answer, in addition to the need to verify the extent of the aptitude test effect the child and ensure that he will not suffer emotional shock as a result of them(101).

According to the foregoing, some laws intended to completely abolish the qualification requirements for testimony in the Criminal Justice Act of England and Wales 1988, which completely eliminated the need to confirm testimony without an oath in order to be accepted as legal evidence, and also abolished the provision requiring proof of child's understanding of the «oath» or the "truth" or "promise", as the Article (33/1) of that act, states the following: "(1) (a) a child shall not be called as a witness for the prosecution; but (b) any statement made by or taken from a child shall be admissible in evidence of any matter of which his oral testimony would be admissible, except in a case where the application of this subsection is excluded under subsection (3) below.

(3) The application of subsection (1) above is excluded— (a) where at or before the time when the statement is tendered in evidence the defense objects to its admission; or (b) where the prosecution requires the attendance of the child for the purpose of establishing the identity of any person; or (c) where the court is satisfied that it has not been possible to obtain from the child a statement that may be given in evidence under this section; or (d) where the inquiry into the offence takes place after the court has discontinued to try it summarily and the child has given evidence in the summary trial"(102).

Also, in the case (R v. *Barker*, [2010] EWCA (Crim) 4, [38] (Eng.)), it was decided that there are no assumptions or preconceived ideas about child's competency to testify, so the witness does not need to understand every single question or give an understandable answer to every question asked to him(103).

In the United States of America, abandonment of testing child's competency to testify, has gained special importance in cases of physical and sexual abuse committed against the child, due to the sensitivity of this type of cases, and the hidden nature it takes, which makes it difficult to detect it without evidence from the child himself. For this we find, for example, the law ALA. CODE § 15-25-3 (e) (2011) which states that "(e) Notwithstanding any other provision of law or rule of evidence, a child victim of a physical offense, sexual offense,

(101) Myrna S. Raeder, op.cit., p.256.

(102) Nicholas Bala & Kang Lee & R.C.L. Lindsay & Victoria Talwar, op.cit., p.72.

(103) Mohamed Chande Othman, op.cit., p.110.

or sexual exploitation, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony. The court may also allow leading questions of the child witnesses in the interest of justice"[104]. The same rule has been established in several laws. States like Connecticut, Georgia, Utah and West Virginia[105].

Likewise, the state of Michigan has abolished the requirement that all children under the age of 10 years undergo a competency hearing before they testifies, as it is now possible for anyone to accept his testimony, regardless of his age, if it is assumed that he is competent to testify, then the burden of proof of incompetency will be on the party which claims that[106].

The United States Supreme Court, in the case (Wheeler v. United States, 159 US 523, 524 (1895)) was the first which questioned the competency requirements for child's testimony, as it predicted the possibility of inviting a two or three-year-old child to testify[107].

Competency requirements for certification had been abandoned in the case of (United States v. Lameré, 337 F . App›x 669, 671 (9 Th Cir. 2009)), where it was ruled that the court did not make a mistake when it took from a child witness a promise to tell the truth without verifying his understanding of the consequences of lying[108].

Also, in the case of (*R. v. WJF, [1993] 3 SCR 569, 591 (Can.)*. (*Queen v. WJF*), we find that the Supreme Court of Canada explicitly recognized that presumptions and skepticism about children's testimonies are incorrect, especially with the law refusing to recognize problems of young witnesses that they face difficulties when giving their testimony, but more than that, child witnesses have been treated like adults, and even more strict than them. They do not only have to take an oath, but unlike adults they also have to prove their competency to take an oath, which adults are exempt from doing. [109]

(104) https://codes.findlaw.com/al/title-15-criminal-procedure/al-code-sect-15-25-3.html.

(105) Jules Epstein, Ruminations on an Ethical Issue When Examining the Child Witness: Zealous Advocacy or Destroying Evidence, Widener Law Review, Delaware Law, Widener University, Vol.19, Iss.165, (2013), p.173.

(106) Laurie Shanks, op.cit., p.582.

(107) Myrna S. Raeder, op.cit., p.255.

(108) Ibid, at 255.

(109) Mohamed Chande Othman, op.cit., p.109.

## Chapter 3: Balancing Interests as a Basis for Determining the Scope of Corroborating Measures for a Child's Right to be Heard

The most important problem facing the children**'s** participation in the trial is that legal systems are designed in general for adults, which requires imposing necessary amendments for these rules, that including a balance between the interests of the child on the one hand and the rights of defense on the other hand, in the sense of balancing between the protection of vulnerable actors in criminal proceedings (such as children) and the principles of fair trial (from which the accused of assaulting them benefits), by providing a new dynamic for the legal status of child victims and witnesses in the context of criminal justice. Two applications can be shown for this, namely, hearsay and videotaping statutes of children (Branch 1) and the effective judicial administration of the interrogation process (Branch 2).

### Part 1: Hearsay and Videotaping Statutes of Children

The Committee on the Rights of the Child emphasized the need to be able to hear the views of any children when examining the complaints submitted on their behalf, as it was stated in a report submitted to the Working Group of the Convention, urging it to indicate the draft text on the report of committee's authority to invite -when necessary- a child or children "to express their views in a manner consistent with the necessary speed of procedures and the spirit of the agreement". This means that the Committee on the Rights of the Child should be able to make the necessary arrangements for oral hearings, especially considering what is stipulated in Article 12 (2) of the Convention, which establishes the child's right to be heard in any judicial or administrative procedure affecting him(110). This means -therefore- that the convention did not determine how the child testifies, to be verbal or written, which can include hearsay and videotaping statutes.

In this part, we begin with researching the legal basis for hearsay and videotaping statutes of children (First), and the purpose of hearsay and videotaping statutes of children and their evaluation (Second).

#### First: The Legal Basis for Hearsay and Videotaping Statutes of Children

In the case of (Idaho v. Wright For the year 1990) the US Supreme Court of America ruled the unconstitutionality of the witness testimony as it does not meet the minimum requirements of the right to defense, however the Supreme Court placed an exception to this rule, by accepting the hearsay statutes in the

(110) Suzanne Egan, op.cit., pp.219-220.

above cases, if talking is surrounded by a certain amount of circumstances and evidence that guarantee its credibility, and specify its scope in cases of mental state of child, (which, in our opinion, makes it difficult to lie in a way that is difficult to detect), and clarification of some words and terms that are difficult for a child to understand by his age, to express what happened to him, what necessitates the use of hearsay statutes method to help him in making it, and finally that the child does not even have a motive to lie in his claim that the crime has occurred to him(111).

In the above-mentioned case, the Supreme Court clarified the legal basis for its previous ruling, by saying that the theme -according to one of its judges, John Stamos- is in the means of hearsay and videotaping statutes that guarantee the right of the accused to discuss and question the witness in his testimony. If it allows him to do so, then it is constitutionally valid. The court also stressed at the same time on the need to use this method to prevent the accused from influencing the child during the performance of his testimony, which requires granting him a special protection to the nature of child and his privacy(112).

Judicial development did not stop there, but we find that the Court of Appeal in the case of (State v. Sorensen for the year 1988) decided that the cases specified by the mentioned ruling of the US Supreme Court, were not exhaustive, but must be interpreted in a flexible manner, facing unexpected situations, in which there is an urgent need to resort to this type of hearsay statutes(113).

The indirect testimony of the child is represented in two applications: 1) the acceptance of indirect testimony from a child's relative or his doctor by transmitting from him what he described of the facts of the abuse against him (hearsay statutes), and 2) the acceptance of the testimony transmitted via indirect television broad casting (videotaping statute), that is decided as an alternative of direct testimony inside the courtroom, broadcasting his testimony through a documentary film(114).

Although the subject of indirect testimony has been criticized, (because the lack of clarity of the indirect testimony condition, besides the lack of clarity

(111) Mary Ann Mason, Social Workers as Expert Witnesses in Child Sexual Abuse Cases, Social Work, Oxford Academic, UK, Vol.37, Iss.1, Jan.1992, p.33.

(112) Reidinger, Paul, The Face of Sexual Abuse, ABA Journal, Sep.1989, p.102.

(113) Mary Ann Mason, op.cit., p.34.

(114) The Testimony of Child Victims in Sex Abuse Prosecutions, op.cit., p.808.

about the conditions that provide confidence and reassurance to support the credibility of the child's indirect testimony), however, these two methods remain, in all cases, necessary to ensure a balance between the various interests: the interest of the child and the interest of the accused, and when it is necessary to face the unusual difficulties that impede the trial of the aggressor on a child who is the only witness in the case, especially when he is young and afraid and does not have the ability to communicate enough to show the truth. This is in addition to preventing child from being exposed to the long and difficult trial period during which the child must remember the abuse in all its details(115).

However, the means of videotaping statutes of the child has the advantage over the means of hearsay statutes of him (indirect testimony transmitted from the child), because videotaping statutes allows the accused the opportunity to discuss the child in his testimony, unlike hearsay statutes allow more of the constitutionally protected principle of confrontation. In spite of some technical obstacles that may stand in the way of respecting the principle of confrontation, because of the lack of contemporary in the videotaping statutes for the trial(116).

Therefore, we find in Britain, for example, the two criminal justice act laws 1988 and 1991 canceled hearsay statutes (the indirect testimony transmitted on the child). However, the testimony transmitted on television was recognized, considering the very negative effects of the witness testimony with the aggressor on the child's mental health. Furthermore, the criminal justice act 1991 legalized displaying the previously recorded video as evidence for proof, provided that the child has the opportunity to discuss contents of it later through live television broadcasting(117).

**Second: Purpose of the Hearsay and Videotaping Statutes of Children and its Evaluation**

The main purpose behind the means of videotaping statutes of children and its philosophy is in fact to provide the opportunity and create conditions for the victimized child to tell his own story about the incident of his abuse without interruption, influence or even asking suggestive questions that disperse of his thinking or his orientation for purposes other than reaching the truth(118).

(115) Ibid, at 817.

(116) Ibid, at 824.

(117) Graham Davies, Protecting the child witness in the courtroom, Child abuse review, 1992, p.33.

(118) Ibid, at 40.

When children are presenting their testimonies in the courts about the assault on them, they are exposed to extreme psychological pressure, especially in their confrontation with their aggressors (the accused), as well as judges and lawyers, in addition to the pressure resulting from interrogating them in the precise details of the accusation. Not only that, but many symptoms were observed after their appearance in court, including distraction, lack of focus, and low rates of post-traumatic stress recovery(119).

Furthermore, we found that the means of hearsay statutes (written testimony) to remedy problems arising from the fact that the case takes a long time to decide on it. Correspondence may generally be dealt with within 1-2 years. It is crucial that their communications be processed in the fastest manner possible, but hearsay statutes are only accepted if other "remedies" have been exhausted, or when the process is "unreasonably long". In all cases, it must be taken into account the special situation of children and consider the impact that this delay may have on the best interest of the child(120).

However, if videotaping statutes (television transmission of the child's testimony to the courtroom from another room separate from it), was one of the most recent developments in the judicial system to harmonize the testimony of children, by keeping them away from the atmosphere of tension in the courtroom, as well as what the recordings lead to approximating the circumstances of the crime to the child, to motivate him to remember .This means was criticized because of the fear of asking some leading questions on the child throwing it, (which thus means losing an essential guarantee of the trial).

So, to overcome this difficulty, some have suggested the imposition of controls on dialogue with child, which means the questions that punctuated this dialogue, by linking what to be said to the child with some concepts known to him, without asking any questions directly. For example, toothbrush is known to all children(121).

**Part 2: Effective Judicial Administration of the Interrogation Process**

Concerning the corroborative measures for the child's right to be heard, we see the effective management of the judicial process of questioning him.

(119) Irvine S. Gersch & Adam N. Gersch & Ruth Lockhart & Shirley A. Moyse, The Child Witness Pack: An Evaluation, Educational Psychology in Practice, Educational Psychology in Practice, Association of Educational Psychologists, Routledge, UK, Vol.15 Iss.1, Apr.1999, pp.45- 46.

(120) Yanghee Lee, Communications procedure under the Convention on the Rights of the Child: 3rd Optional Protocol, International Journal of Children's Rights, Brill, Netherlands, Vol.18, (2010), p.575.

(121) Irvine S. Gersch & Adam N. Gersch & Ruth Lockhart & Shirley A. Moyse, op.cit., p.46.

In this part, we begin by studying the legal basis for the effective judicial administration of the interrogating child witness process (First) and the aspects of this effective judicial management of interrogating child witness process (Second).

**First: Legal Basis for the Effective Judicial Administration of the Interrogating Child Witness Process**

With reference to General Comment No 7, on the implementation of the Convention on the Rights of the Child in early childhood, we find that child's right to express his or her point of view is not intended by the traditional way of speaking, but rather the child has the right to express his point of view in other ways such as crying, gestures, and other reactions like a physical act, which the child looks at as a means of meaningful communication, as the Committee decides that it is not the duty of the child to prove his ability to communicate. Rather, it is the adults who must understand how to communicate with children.

If the child's views are not always or only partially useful (because of his lack of ability to communicate and understand due to his lack of age, maturity, and ease of exposure to fear and influence), they may sometimes contribute to finding good solutions to the issue in question. Therefore, the person in charge of questioning the child must ensure that this child is protected from negative influences on his testimony and other forms of intimidation, while psychologists decide that a child can provide useful testimony if he is allowed to respond in his own way.(122)

Likewise, one of the corroborations of Article (12) of the Convention on the Rights of the Child is the prohibition of any pressure, restriction, or influence that may prevent the child from expressing his views freely, in a manner or even in a way that leads to tampering with his/her feelings.(123)

All previous rules are founded on the essential problem on the subject of children's testimony, that the procedural criminal justice system designed originally for adults not for children, what makes any attempt to suit it very difficult, particularly in terms of the elimination of tension in the control of the child when taking his testimony, when facing the official atmosphere of the court(124).

(122) Lothar Krappmann, op.cit., p.507.

(123) Soo Jee Lee, op.cit., p.694.

(124) Irvine S. Gersch & Adam N. Gersch & Ruth Lockhart & Shirley A Moyse, op.cit., p.45.

Moreover, the child witness (particularly the victim) is a weak party in the criminal case. This requires the court to grant him wider powers in managing the interrogation of the child witness process, by all parties, in order to ensure maintaining a balance between explaining the case to the court and to prevent manipulation of the witness(125).

Anyway, the legal issue represented by the balance between the previous interests is how to reconcile the image of children, as vulnerable and dependent persons need protection, with the need to extract reliable information about them on the one hand, and the legal obligation to allow them to participate effectively in a criminal process on the other hand(126).

Where achieving the balance between previous interests linked to determining the extent to which the child is qualified to conduct the required evaluation and express his views accordingly, by giving him a fair opportunity to hear his testimony in an environment that enables him to express himself (127).

**Second: Aspects of Effective Judicial Management of Interrogating Child Witness Process**

There are many aspects of effective judicial management of the process of interrogating a child witness. Two of these aspects are the cognitive interview with the child (A) and the legal aid provided for him (B), which will be discussed in the following:

**(A) The Cognitive Interview as One of the Aspects of Effective Judicial Management of Interrogating Child Witness Process**

It is scientifically proven that children remember the events that take place with them in successive and prolonged stages in time. Such a fact is of great importance in reaching the truth, and therefore it must be taken into consideration in determining the mechanism by which the process of interrogating children takes place(128).

That fact follows that the process used to help a child to recover, remember and gather the largest amount of information, which is called a cognitive interview, was developed by two psychologists (Fisher and Geiselman), who

(125) Emily Henderson, op.cit., p.287.

(126) Annemarieke Beijer & Ton Liefaard, op.cit., p.72.

(127) Ibid, at 76.

(128) Peter A. Ornstein, Monographs of The Society for Research in Child Development, Monogr Soc Res Child Dev.; Vol.61, Iss.4-5, (1996), p.216.

focused on the need to change the way in which the child is questioned with what psychologists use specifically in the field of memory, which states that the information stored in child's memory is encoded and called upon when stimulated by restoring the physical environment and the circumstances in which the crime took place and the victim›s mood during it (weather and mood (in addition to the place, time, sounds, and smells.

During that, some random questions are addressed to the child about what happened to him at the beginning of the assault or when it ended or during it, or at prominent and distinct points in it. Anyway, what is important is that the questions should be from different aspects of the abuse, not to be installed on a specific side of it(129).

Besides, before giving his testimony, children should be prepared to be in a court atmosphere, by presenting some illustrated booklets and models to them, to make them familiar with the situation and reduce psychological pressure and anxiety resulting from fear of the court, as well as preparing them before they testify so as to teach them the concept of oath and the importance of telling the truth, in addition to determining how to answer the questions directed to them(130).

Finally, corresponding cognitive interrogation is a promising way, because it is flexible, in addition to its medical value in making a child recover from the suppression of shock assault reality, in addition to prevention of interrupting the child on what is contained in the risk of confusing the child and distracting his attention, and preventing asking any useless questions(131).

**(B) Giving Legal Aid for Child during Interrogation**

To enable children to practice their right to be heard, their voices require sometimes effective legal assistance, not only in criminal case hearings, but also in all judicial and administrative procedures affecting them, from those hearings on the expulsion of the child from the school, and their eligibility to get some advantages, in addition to some decisions related to medical and mental health(132).

Accordingly, courts must, when possible and needed, provide the child with a legal representative to facilitate expressing of his opinion, which

(129) Irvine S. Gersch & Adam N. Gersch & Ruth Lockhart & Shirley A Moyse, op.cit., p.46.

(130) Ibid, at 46.

(131) Ibid, at 47.

(132) Soo Jee Lee, op.cit., p.696.

leads to practical benefits for both children and the courts, especially since it would allow to protect children, not as a mere property of their parents, but as individuals with intellectual abilities and interests that are not simply subject to parental authority, taking into account the positive effects of participation, and the negative effects of not participating on the psyche of children(133).

**Conclusion**

Children have the right to be heard, which has corroborations, and there are legal measures established to protect this right. In addition to the personal corroborations for the child's right to be heard, which is derived from the characteristics of his personality, we find that there are other objective corroborations, not related to his personality, but to his rights themselves. This includes his right to equality and the necessity that ensues of prohibition of any arbitrary restrictions that could be imposed on his right and finally the realistic necessity related to establishing crimes and reaching the truth, which imposes the necessity to grant him this right.

But the child's right to actively participate in judicial proceedings does not mean just hearing the child in principle, but also the extent to which the child's views are taken into account and given appropriate weight, and it also means, in essence, not to allow the judiciary without enabling children to participate effectively in judicial procedures.

There are two interrelated processes that contribute to the formation of a child's character: individualism, which means the process of separation from parents, and the development of identity, which in turn means a process of «coherent creation of an integrated feeling of self", which created a conflict between a traditional tendency that favors the consideration of identity over individualism and another modern trend that introduces - on the contrary to the first - the consideration of individuality as an identity.

However, the child's right to be heard raises a problem about the nature of the responsibility that must be verified that the child is aware of the consequences of breaching the duty to tell the truth, in addition to the necessity of an objective link in our opinion between the reliability of the oath and the responsibility of the one who performs it for perjury, which determines child's ability to consent if he is «able to appreciate the nature, extent, and potential consequences of the behavior on his consent".

Besides, of the forms of inequality in the probative value between the

(133) Ibid, at 722.

testimony of children and adults, is what so-called «Kidnall Warning", which requires the judge to warn the jury about weakness in child's evidence and that there are risks in the determination of a conviction based on evidence derived from the testimony of the child only, even if it is taken under oath.

To enable the child to exercise his right to be heard, it was necessary to reduce restrictions imposed by laws and judicial precedents on the exercise of this right, under the pretext of verifying his competency to testify, by transferring the burden to prove it from the party asking for child's testimony to the party opposing it or even complete abandonment of the efficiency requirement to hear the child's testimony. Also, among the forms of confronting arbitrary restrictions on a child's right to participate in the trial, until recently, is the abolition of competency test for those under a certain age of child witnesses, which were conducted despite the fact that these age limits are arbitrary and unrealistic. Such an order necessitated the prohibition of asking any question which aims to prove the incompetency of children, especially in cases of sexual abuse against them.

So, it is not sufficient to determine the child's right to be heard merely to report theoretical support for him, because the child's right to express his or her point of view is not intended by the traditional way of speaking, but rather the child has the right to express his point of view in other ways such as crying, gestures, and other reactions of physical act which the child look at as a means of meaningful communication. All these rules are founded on the essential problem about children's testimony that the procedural criminal justice system designed originally for adults not for children, what makes any try to suit it very difficult, particularly in terms of the elimination of tension in the control of the child when taking his testimony, when facing the official atmosphere of the court.

Rather, a child must be given realistic mechanisms that enable him to use this right. This necessitates the imposition of a set of practical measures for this. Among that, measures related to procedures of child's competence for certification, imposed to limit discussion of competency to judge only, so that none of the other parties exploit his role in discussing child to abuse or manipulate him, in addition to what some judicial jurisprudence has decided to determine the child's competency for certification through experience not through discussion. Thus, the child's right to be heard is related to his competency to testify, but not necessarily related to the credibility of his testimony.

There is a legal distinction between competency of the witness and his credibility. The competency of the witness includes "the general qualities that every witness must possess in order to allow him to testify," while the credibility of the witness refers to "the extent to which the judge or jury believes that the witness provides honest and accurate testimony, which means that there are fundamental differences between them, in our opinion, such as: the issue of sufficiency relates to the witness himself, while the question of credibility relates to the testimony itself. Also sufficiency must be verified before allowing the witness to testify initially, while the credibility of his testimony is a matter of appreciating the testimony itself after its performance. Besides, sufficiency of the witness is a formal issue to accept from the original point of view, while the credibility of the testimony is an objective matter in assessing its validity and accuracy.

The rule of laws and judicial jurisprudence on the burden of proving a child's competency to testify was graduated, between those who required to prove the child's competency perform it, considering that the general rule is the lack of child's competency to testify, unless the opposite is proven, and those who reflect this presumption, which is imposed on those who claim the child's incompetency to testify have the burden to prove that, and finally those who provide conclusive evidence of child's competency to testify and prevent from proving its opposite.

But the most important problem facing the children's participation in the trial is that legal systems are designed in general for adults, which requires imposing necessary amendments for these rules, that include a balance between the interests of the child on the one hand and the rights of defense on the other hand, in the sense of balancing between the protection of vulnerable actors in criminal proceedings (such as children) and the principles of fair trial (from which the accused of assaulting them benefit), by providing a new dynamic for the legal status of child victims and witnesses in the context of criminal justice. Two applications can be shown for this, namely, hearsay and videotaping statutes of children and the effective judicial administration of the interrogation process.

Although the subject of indirect testimony has been criticized, (because the lack of clarity of the indirect testimony condition, besides of lack of clarity about the conditions that provide confidence and reassurance to support the credibility of child's indirect testimony), but –however- these two methods remain, in all cases, necessary to ensure a balance between the various interests: the interest of the child and the interest of the accused, and when it is

necessary to face the unusual difficulties that impede the trial of the aggressor on a child who is the only witness in the case, especially when being young and afraid and does not have the ability to communicate enough to show the truth. This is in addition to preventing child from being exposed to the long and difficult trial period during which the child must remember the abuse in all its details.

However, the means of videotaping statutes of the child has the advantage over the means of hearsay statutes of him (indirect testimony transmitted from the child), because videotaping statutes allows the accused the opportunity to discuss the child in his testimony, unlike hearsay statutes, which allows more of the constitutionally protected principle of confrontation, besides the need to change the way in which the child is questioned with what psychologists use specifically in the field of memory, which states that the information stored in child's memory is encoded and called upon when stimulated by restoring the physical environment and the circumstances in which the crime took place and the victim›s mood during it (weather and mood (in addition to the place, time, sounds, and smells.

During that, some random questions are addressed to the child about what happened to him at the beginning of the assault or when it ended or during it, or at prominent and distinct points in it. Anyway, what is important is that the questions should be from different aspects of the abuse, not to be concentrated on a specific side of it.

**List of References**


- Allan R. De Jong and Mimi Rose, "Legal proof of child sexual abuse in the absence of physical evidence", The Journal of the American Medical Association, Vol.267, Iss.23, June 1992.
- Amy L. Cosentino, "She Said What?" What To Do in Civil Domestic Violence Proceedings with Child Hearsay, The Florida Bar Journal, USA, Sept./ Oct.2013.
- Andrew W. Eichner, "Preserving Innocence: Protecting Child Victims in the Fost-Crawford Legal System", American Journal of Criminal Law, Vol.38, Iss.1, (2010).
- Annemarieke Beijer & Ton Liefaard, "A Bermuda Triangle? Balancing Protection, Participation and Proof in Criminal Proceedings affecting Child Victims and Witnesses", Utrecht Law Review, School of Law, Utrecht University, Netherlands, Vol.7, Iss.3, Oct.2011.
- Barbara A. Atwood, "Representing Children who can›t or won›t Direct Counsel; Best Interests Lawyering or no Lawyer at All?", Arizona Law Review, USA, Vol.53, Iss.381, 2011.
- Brian R. Clifford, "Methodological Issues in the Study of Children's Testimony", a chapter (21) in a book titled: *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, Wiley series on the Psychology of Crime, John Wiley & Sons Ltd, 2002.
- D. Stephen Lindsay, "Autobiographical Memory - Eyewitness Reports, and Public Policy", Canadian Psychology, Vol. 48, No.2, (2007).
- Dap Louw & Pierre Olivier, "Listening to Children in South Africa", a chapter in a book titled: *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, SAGE Publications, New York, USA, 1996.
- Graham Davies, "Protecting the Child Witness in The Courtroom", Child Abuse Review, 1992.
- Emily Henderson, "Persuading and Controlling: The Theory of Cross-examination in Relation to Children", (18) in a book titled: *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, Wiley series on the Psychology of Crime, John Wiley & Sons Ltd, 2002.

- John Gibeaut, "Picture of competency: Illustrated tests assess child's ability to tell the truth in testimony", ABA (American Association Bar) Journal; Chicago, Vol. 86, Apr. 2000.
- Irvine S. Gersch & Adam N. Gersch & Ruth Lockhart & Shirley A. Moyse, "The Child Witness Pack: An Evaluation", *Educational Psychology in Practice*, Association of Educational Psychologists, Routledge, UK, Vol.15 Iss.1, Apr.1999.
- John E. B. Myers, «A Decade of International Reform to Accommodate Child Witnesses: Steps toward a Child Witness Code», chapter in a book titled: *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, SAGE Publications, New York, 1996.
- John EB Myers, "Investigative Interviewing regarding Child Maltreatment", chapter in a book titled: *Legal Issues in Child Abuse and Neglect Practice*, Sage Publications, New York, USA, 1998.
- Jules Epstein, "Ruminations on an Ethical Issue When Examining the Child Witness: Zealous Advocacy or Destroying Evidence", Widener Law Review, Delaware Law, Widener University, Chester, Pennsylvania, USA, Vol.19, Iss.165, (2013).
- Laurie Shanks, "Evaluating Children's Competency to Testify: Developing A Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse", Cleveland State Law Review, Vol.58, Iss.575, (2010).
- Lothar Krappmann, "The Weight of The Child's View" (This article was 12 of the Convention on the rights of the child), International Journal Unit of Children's Rights, Vol.18, (2010).
- Louise Dezwirek Sas & David A. Wolfe & Kevin Gowdey, "Children and the Courts in Canada", a chapter in a book titled: *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications, New York, 1996.
- Margaret Bull Kovera & Eugene Borgida, "Children on the Witness Stand: The Use of Expert Testimony and other Procedural Innovations in US Child Sexual Abuse Trials", a chapter in a book titled: *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications, New York, 1996.

- Margaret-Ellen Pipe & Mark Henaghan, "Accommodating Children's Testimony: Legal Reforms in New Zealand", a chapter in a book titled: *International Perspectives on Child Abuse and Children's Testimony*: Psychological Research and Law, SAGE Publications, New York, 1996.
- Mary Ann Mason, "Social Workers as Expert Witnesses in Child Sexual Abuse Cases", Social Work, Oxford Academic, UK, Vol.37, Iss.1, Jan.1992.
- Matthew D. Anderson, "Truth in Children's Testimony", American Journal of Criminal Law, School of Law, University of Texas, USA, Vol. 25, (1998).
- Mohamed Chande Othman, "An Eclectic Paradigm in The Law of Evidence and Its Reform in Tanzania: Competency of A Child Witness", Boston University International Law Journal, USA, Vol.33, (2015).
- Myrna S. Raeder, "Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don›t Die and Ways to Facilitate Child Testimony", Widener Law Review, Delaware Law, Widener University, Chester, Pennsylvania, USA, Vol.16, Iss.239, (2010).
- Nicholas Bala & Lee Kang & RCL Lindsay & Victoria Talwar, "The Competency of Children to Testify: Psychological Research Informing Law Reform Canadian Tournaments", International Journal Unit of Children's Rights, Vol.18, (2010).
- Ray Bull & Graham Davies, "The Effect of Child Witness Research on Legislation in Great Britain", a chapter in a book titled: *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications, New York, 1996.
- Paul Reidinger, "The Face of Sexual Abuse", ABA Journal, Vol.9, (1989).
- Rhona Fun, Brian Kearney & Kathleen Murray, "Children's Evidence: Scottish Research and Law", in a book titled: *International Perspectives on chapter Child Abuse and Children's Testimony: Psychological Research and Law*, Sage Publications, New York, 1996.
- Stephen A. Saltzburg, "Child Testimony and the Right to Present a Defense", Criminal Justice; Chicago, USA, Vol.28, Iss.1, Spring 2013.
- Sam F. Halabi, "Abstention, Parity, and Treaty Rights: How Federal Courts Regulate Jurisdiction under the Hague Convention on the Civil

Aspects of International Child Abduction", Berkeley Journal of International Law, Vol.32, Iss.1, (2014).

- Soo Jee Lee, "A Child's Voice Vs. A Parent's Control: Resolving a Tension Between the Convention on The Rights of The Child And Us Law", Columbia Law Review, Vol.117, Iss. 687, (2017).
- Suzanne Egan, "The New Complaints Mechanism for the Convention on the Rights of the Child", International Journal of Children's Rights, Brill, Netherlands, Vol.22, (2014).
- "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations". Harvard Law Review, Vol.98, No.4 (Feb. 1985).
- Ting-Pong Ho, "Children's Evidence: Mandating Change in the Legal System of Hong Kong," a chapter in a book titled: *International Perspectives on Child Abuse and Children's Testimony*: Psychological Research and Law, SAGE Publications, New York, 1996.
- Wallace J. Mlyniec, "The Implications of Articles 37 and 40 of the Convention on the Rights of the Child for US Juvenile Justice and US Ratification of the Convention", Child Welfare, Vol.89, No.5, (2010).
- Yanghee Lee, "Communications procedure under the Convention on the Rights of the Child: 3rd Optional Protocol", International Journal of Children's Rights, Brill, Netherlands, Vol.18, (2010).

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# الوسيط في النظام الدستوري الكويتي ومؤسساته السياسية

## دراسة للنظام في إطاره النظري وتطوره التاريخي وتطبيقاته العملية والتعقيب على ممارسات السلطتين والتعليق على أحكام القضاء الدستوري


تأليف

الأستاذ الدكتور/ محمدعبدالمحسن المقاطع

أستاذ القانون العام - كلية القانون الكويتية العالمية

أستاذ القانون العام بكلية الحقوق - جامعة الكويت سابقاً



2020