The rights of child witnesses versus the accused’s right to confrontation:
a comparative perspective

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Abstract
The article examines the question of whether the rights of child victims of sexual assault take precedence over the confrontation rights of the accused. Protective measures for child victims in South Africa and in foreign systems, such as the United States of America, Canada, United Kingdom and Australia are examined. The above examination reveals that the right to confrontation is not absolute. In exceptional circumstances, the accused's right to confrontation will yield to the greater public interest in protecting the rights of vulnerable child witnesses. The article recommends the development of alternative legal measures to achieve a balance between these competing interests.

INTRODUCTION
The right of an accused to face one's accusers is regarded as an old and venerable tradition. The history of the right to confrontation can be traced back to early Roman law, which recognised that the law does not convict a man before he is given an opportunity to defend himself face-to-face with his accusers.1 Indeed, the justice of bringing accusing witnesses before the accused has been acknowledged for at least 1 500 years.2 For centuries, the

1The Roman Governor Festus is reported to have made the following comments regarding a prisoner: ‘It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.’ See Jones ‘Testimony via closed-circuit television after Gonzales v State’ (1992) Baylor Law Review 960. Also see Coy v Iowa 487 US 1012 (1988). According to Natalie Kijurna, the Hebrews also endorsed the right to confrontation by requiring that the accused have the right to hear testimony from the witnesses in the offender's presence. This is reflected in the writings of the Hebrews in the King James Bible. See Kijurna ‘Lilly v Virginia: the confrontation clause and hearsay — “oh what a tangled web we weave!”’ (2001) 50 DePaul Law Review 1133 at 1138.
English also practised a form of confrontation that required an open and face-to-face system, described as ‘altercation’.

Section 35(3)(e) of the Constitution, Act 108 of 1996 provides that an accused has the right ‘to be present when being tried’. The right to confrontation has traditionally been regarded as entitling an accused to be present at trial. Thus, it is said to be closely related to the right to be present and the right to present one’s case. However, more is required than that an accused’s trial must proceed in his presence, and that conviction and sentence must be handed down in his presence. A confrontation must take place in that an accused must be able to observe witnesses at first hand. In this way, he can assess not only the content of their evidence, but also their demeanour, facial expressions, body language and inflections of the voice. However, the democratic concept that every man is entitled to confront and cross-examine his accusers is not designed to ‘coddle’ criminals. Rather, it is designed to ensure that those who must decide disputed factual issues will arrive at a correct decision.

After addressing the interpretation of the confrontation principle, protective measures for child witnesses in South Africa and foreign systems will be examined. The South African position will address section 170A of the Criminal Procedure Act 51 of 1977 (the ‘Act’), which deals with evidence given by child witnesses. Finally, the impact and influence of comparative law on South African law, will be considered and proposals and recommendations

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3The battle for confrontation rights was also fought in England during the treason cases of Sir Walter Raleigh and John Lilburne. Both men fought for civil liberties in England during the 17th century. See Kijuma n 1 above at 1139–1141.

4See s 158 of the Criminal Procedure Act 51 of 1977 (the ‘Act’), which encapsulates the right to confrontation by providing that all criminal proceedings in any court must take place in the presence of the accused, except where this has been expressly excluded by any other law. Indeed, it is a basic principle of criminal procedure that the accused is entitled to be present during the trial and to hear all the evidence against him, and consequently, to demand that the accusation be made face-to-face. Also see s 166 of the Act.

5Section 35(3)(i) of the 1996 Constitution provides that the accused has the right ‘to adduce and challenge evidence’. The right to challenge evidence includes the right to cross-examine evidence. Cross-examination is regarded as an example of confronting one’s adversary. Thus, the right to challenge evidence may well include the right to confrontation.

6See Joubert et al Criminal procedure handbook (5ed 2001) 79. It is the accepted opinion that a witness is less likely to lie in the accused’s presence; hence the need for witness confrontation. See Coy v Iowa supra at 1019–1020. Also see Conklin ‘People v Fitzpatrick: the path to amending the Illinois Constitution to protect child witnesses in criminal sexual abuse cases’ (1995) Loyola University Chicago Law Journal 325.

7The same principles apply to the accused’s adversaries, the prosecutor and the judge. The ‘impulses’ coming from these parties, may influence the way in which the accused conducts his defence.


9This article will only address s 170A of the Act, which is one exception to the confrontation principle. The other exceptions are s 171 of the Act, which provides for evidence on commission, and hearsay evidence.
The rights of child witnesses and the right to confrontation

THE INTERPRETATION OF THE RIGHT TO CONFRONTATION

Colman J made the following pertinent remarks regarding the rights of the accused in *S v Motlala*,

> The right to confrontation means more than that an accused person must know what the state witnesses are saying or have said about him, or that he shall be able to hear them saying it. There must be a confrontation in that he must see them as they depose against him so that he can observe their demeanour, and they for their part must give their evidence in the face of a present accused. (emphasis added.)

The importance of confrontation is that the witness is under oath and the court has an opportunity to observe him/her and determine if s/he is a credible witness. Thus, both the accused and the court must be given the opportunity to observe the witness. Any violation of the right to confrontation will result *per se* in a failure of justice. The denial of confrontation amounts to an irregularity which will lead to the conviction being overturned. Sometimes, it may happen that a trial will proceed in the accused's absence in terms of section 159 of the Act. However, s/he is later given the opportunity to question or to confront witnesses who testified in his/her absence.

The Sixth Amendment of the US Constitution provides, *inter alia*, that 'in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him'. According to Drew Kirshen, the Sixth Amendment provides:

> 'in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him'.
Amendment was drafted to provide that the jury is 'impartial' and that witnesses are confronted. The Sixth Amendment right to confrontation has been interpreted in such a way that it is not a personal right of the accused. The confrontation clause is said to grant the accused the right to the most accurate truth-determining process, but no longer expressly safeguards him/her. In asserting his/her confrontation rights, the accused is no longer claiming a protection from the prosecution, but is seeking precisely what the prosecution can also claim. The confrontation clause is a protection which everyone in society, as represented by the prosecutor, can demand.

The right to confront an accuser under the Sixth Amendment is firmly rooted in federal jurisprudence. The court remarked in *Mattox v United States*, the earliest case to interpret the confrontation clause, that the Sixth Amendment grants accused individuals the right to be confronted by their accusers and to cross-examine the witnesses. Indeed, the court made the following comments:

The function of the Confrontation Clause is to provide the accused with an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

The Supreme Court has also concluded that the primary purpose of the Federal confrontation clause is to provide the opportunity for cross-examination, together with a preference for physical confrontation. In *Pointer v Texas* the accused's right to confront witnesses against him was held to be a fundamental right, and therefore applicable to the states through the Fourteenth Amendment. The court also remarked that the rights 'to

16Kirshen 'Vicinage' (1977) 30 *Oklahoma Law Review* 1 79 at 77. According to Kirshen, the draftsman of the Sixth Amendment were concerned about the possible abuse of personal knowledge of the case by the jurors. The demand is that jurors be impartial and decide the case on the evidence presented during the trial.

17See Jonakait 'Restoring the Confrontation Clause to the Sixth Amendment' (1988) 35 *UCLA Law Review* 557, 58–81. Also see Jonakait 'Foreword: notes for a consistent and meaningful Sixth Amendment' 1992 *The Journal of Criminal Law and Criminology* 713–746 at 746, where the author argues that to ensure a consistent and meaningful Sixth Amendment, courts must view the Sixth Amendment as holding a central place in the Bill of Rights. He maintains that the Sixth Amendment guarantees neither a fair trial nor a reliable outcome, but grants the accused a particular trial process, which is also intended to check governmental overreaching.


19According to the *Mattox* court, this constitutional provision stemmed from a concern that 'depositions or ex parte affidavits, such as were admitted in civil cases would be used against the prisoner in lieu of a personal examination'.

20See *Ohio v Roberts* 448 US 56, 63 (1980). It should be noted that this case addresses the hearsay rule regarding the right to confrontation. The admission of hearsay testimony is regarded as the other major exception to the right to confrontation.

21380 US 400, 403 (1965). The court held that the Sixth Amendment guarantee of confrontation and cross-examination was denied to the accused. Here, the prosecution had offered as evidence the transcript of a witness's testimony from a preliminary hearing, which the accused had attended. This transcript of the witness's statement prevented the accused from cross-examining the principal witness. The court held that the accused had a fundamental right under the Sixth Amendment
The rights of child witnesses and the right to confrontation

confront and cross-examine witnesses and to call witnesses in one's own behalf, have long been recognised as essential to due process'. These rights are fundamental to a fair trial, and therefore cannot be easily dispensed with. There are now statutes in all the states which define and guarantee the accused's right to confront witnesses. However, it may occur that an accused may have forfeited his/her rights to confront and cross-examine a prosecution witness under the law of evidence or constitutional law. To illustrate this, a witness may be unavailable for trial due to threats or misconduct of others to which the defendant (accused) acquiesced. Accused who are physically disruptive in the courtroom may also forfeit their right to be present.

The European Court of Human Rights (the 'ECHR') made the following pertinent remarks regarding the right to confrontation in Kostovski v The Netherlands:

If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations incriminating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.

The ECHR has given a number of decisions supporting the conclusion that the right to confront adverse witnesses in front of the trier of fact, is an important component of a fair trial. In Barberà, Messegue and Jabardo v Spain,

22Chambers v Mississippi 410 US 284, 294 (1973). Also see Barber v Page 390 US 719 (1965), where the court remarked that a witness is not 'unavailable' for purposes of the exception to the confrontation requirement, unless the prosecutorial authorities have made a good-faith effort to obtain his presence at the trial. The court found that the state had made no such effort to secure the presence of the witness. It also held that the right to confrontation includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanour of the witness. The court also remarked that the right to confrontation may not be dispensed so lightly.

23People v Geraci 649 NE 2d 817 (NY Ct App 1995).

24This is similar to s 159 of the Act, which provides that a trial will proceed in the accused's absence if he or she is disruptive in the courtroom.

25Appeal 11454/85 12 Eur HR Rep 434 (1989) (court report). In Kostovski, witnesses were allowed to give declarations against the defendant anonymously. The defendant did not have an opportunity to confront or question the witnesses themselves, and could only question at the trial those who took the witnesses' declarations. The defendant was convicted on the basis of this anonymous testimony. The ECHR held that this procedure was a violation of the Convention's fair trial right. The court also observed in Kostovski that because the trial judges are precluded from studying the behaviour of anonymous witnesses, they are unable to form an opinion regarding the witnesses' credibility.

26The ECHR found violations of the art 6.3 right to examine witnesses in Windisch v Austria app 12489/86 13 Eur HR Rep 281 (1990) (court report) and Delta v France app 11444/85 16 Eur HR Rep 574 (1990) (court report). This deprived the
the rights violated were those of a fair and public trial in general, and the right to confront adverse witnesses. The majority opinion recognised that the core problem was that the defendants were convicted on the basis of evidence, the credibility of which was untested by an adversarial examination. The ECHR decision recognised that Spanish criminal procedure also allows an investigating judge to convene a confrontation between an accused and the witnesses against him/her, and suggested that had such a procedure been used in this case, the resulting evidence would have been admissible.

Thus, the right to confrontation has been recognised as being a fundamental requirement of a fair trial. The right of an accused to be confronted with the witnesses against him is deemed to be one of his/her most valuable safeguards. Such a right protects the accused against the dangers of conviction on the basis of ex parte testimony or affidavits given in his/her absence, or when he/she is not granted the opportunity to cross-examine. Confrontation is essential because cross-examination is essential. It is only through cross-examination that the veracity of the testimony of witnesses can be tested. Any violation of the right to confrontation amounts to a failure of justice. This will lead to the setting aside of the conviction by a higher court.

PROTECTIVE MEASURES FOR CHILD WITNESSES

The position in South Africa: section 170A of the Criminal Procedure Act

Reason for introduction of section 170A

As a result of the severe hardships experienced by child witnesses who are victims of sexual abuse, the South African Law Commission undertook a research project entitled 'The protection of the child witness'. The commission concluded that the ordinary adversarial procedure, with its strong
emphasis on cross-examination, was insensitive and unfair to the child witness and recommended that an intermediary be appointed in certain cases, and that face-to-face confrontation be eliminated by using electronic or other devices. As a result of these recommendations, the Criminal Procedure Act 51 of 1977 was amended by the insertion of section 170A into the Act. Section 170A relates to evidence given by child witnesses. The witness may give evidence with the aid of an intermediary via closed-circuit television. Although the witness can be observed by the accused by means of technological aids, he/she or she cannot observe the accused. Confrontation between the accused and the witness is thus excluded in this way. The reason for this exclusion is to reduce trauma for youthful witnesses, and to reduce the stress and suffering of testifying in the accused's presence. Therefore, section 170A of the Act tries to protect child witnesses.

**Section 170A and the rights of child witnesses**

Section 170A(1) of the Act provides that the court may appoint an intermediary when it appears that it would 'expose any witness under the age of 18 years to undue mental stress or suffering if he testifies at criminal proceedings'. Therefore, section 170A provides for the screening of a child witness from the courtroom and his/her questioning through an intermediary. Section 170A(4) provides that the intermediary may be appointed from a list or categories of persons compiled by the Minister of Justice. The intermediary conveys the general meaning or significance of any question to the witness, unless the court directs otherwise. Where an intermediary is appointed, the court may direct that a child witness testify in a place which is situated far away from the presence of a person who may upset him/her.

The constitutionality of section 170A(2) of the Act was challenged in *Klink v*
The court held *inter alia*, that the ordinary procedures of criminal justice were inadequate to address the needs of a child witness. The aim of section 170A was to address this problem and to provide protection for young witnesses. The interests of the child witness had to be balanced against the accused's right to a fair trial. The court held that the use of an intermediary did not affect the fundamental fairness of the process, and therefore, section 170A was not unconstitutional.

The question arises whether an intermediary is necessary to overcome the stress and suffering which the child witness will experience by testifying in court. According to Steytler, section 170A could be interpreted to mean that the court may appoint an intermediary only if it is necessary to protect a child witness from undue mental stress or suffering which may result from being questioned by the accused personally or the defendant's lawyer. In *S v Stefaans* the Cape High Court laid down certain guidelines for the application of section 170A in light of the Constitution. Since the accused *prima facie* has the right to confront his/her accusers, section 170A was fairly narrowly construed by the court. It held that the section requires the court to be satisfied that the stress of being directly confronted by the accused will be 'undue', which is more than ordinary stress.

**The position in foreign systems**

Protective measures for child victims of sexual assault have also been introduced in foreign systems. The US Supreme Court has never held that the right to confrontation is an absolute right. In 1895, the Supreme Court first recognised an exception to a defendant's right to full face-to-face confronta-

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38 1996 3 BCLR 402 (SE). Also see *S v Matbebula* 1996 2 SACR 231 (T), which is instructive regarding the appointment of an intermediary. The court found that the magistrate had not considered the purpose of s 170A. The complainant sat in court after the close of the state's case. This would have been incomprehensible if the mere sight of the accused would have upset her to such an extent, that it would have caused her mental stress.

39 Also see Van der Merwe 'Cross-examination of the (sexually abused) child witness in a constitutionalized adversarial trial system: is the South African intermediary the solution?' 1995 *Obiter* 194, where the writer states that s 170A strikes a fair balance between due process and crime control. However, Müller & Tait argue that although the procedure in s 170A does not interfere with an accused's fundamental right to a fair trial, its application may in a specific case result in an unconstitutional interference with the right to a fair trial. See Müller & Tait 'The child witness and the accused's right to cross-examination' 1997 *TSAR* 519. Also see Müller & Tait 'Section 158 of the Criminal Procedure Act 51 of 1977: a potential weapon in the battle to protect child witnesses' (1999) 12 *SACJ* 59, where the writers make a very strong case for the use of s 158 as an improved alternative to s 170A.

40 Steytler also suggests that the holding of the hearing *in camera* in terms of s 153(5), would address this concern about the intermediary. The witness should be removed from the presence of the accused, if his presence causes stress to the witness. See Steytler *Constitutional criminal procedure* (1998) 349.

41 1999 1 SACR 182.

42 This view has been endorsed by Karen Müller who also maintains that the mental stress or suffering experienced by the child will have to be more than the ordinary. Müller n 35 above at 54.
been criticised as not being supportive of child abuse victims who are called upon to testify in open court. However, in *Maryland v Craig*, the court came to an opposite conclusion. The court concluded that the interests of the child justified dispensing with face-to-face confrontation. The inference from *Craig* is that states are free to enact legislation to protect child-victim witnesses provided that the statute requires the state to show the following: the use of one-way closed-circuit television is necessary to protect the welfare of the child witness; the child witness would be traumatised by the presence of the defendant, and not just the courtroom generally; and the state is furthering an important public policy. According to Friedman, the procedure employed in *Craig* may be justified if the accused’s wrongful conduct has intimidated the child from testifying in the conventional manner. This brings the forfeiture principle into play. Although the *Craig* decision has been widely welcomed by some writers, it has also received a fair amount of criticism.

50 497 US 836 (1990). Here, the complainant in a sexual abuse case, the prosecutor and the defence counsel withdrew to a separate room where the witness was examined and cross-examined while a video monitor recorded and displayed the witness’s testimony to the judge, jury and defendant in a courtroom. The majority held that a confrontational clause in the Sixth Amendment did not absolutely prohibit this procedure.
51 However, dissenting judge, Justice Scalia indicated his preference for the originalist approach. This approach directs judges to enforce the constitutional provisions according to their original meaning, that is, as they were understood by those who proposed and ratified them. According to the judge, the purpose of the clause was to ensure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his/her accusers in court. *Id* at 860–861. This approach is supported by Cornelius Murphy, who maintains that Justice Scalia’s confrontation clause jurisprudence illustrates why originalism is the superior method of adjudicating individual rights, including those rights guaranteed to criminal defendants. See Murphy n 15 above at 1266.
52 See Conklin n 6 above at 331.
53 The basis for allowing the procedure would not be fear of trauma but rather forfeiture of the confrontation right by the accused, given the child’s refusal or inability to testify in court, and the court’s finding that this refusal or inability is attributed to the accused’s wrongful conduct. The forfeiture principle is now expressed in Fed Rule Evidence 804(b)(6). See Friedman ‘The conundrum of children, confrontation, and hearsay’ 2002 *Law and Contemporary Problems* 243 at 247 252–255.
54 See Bloe ‘*Maryland v Craig*: the court’s use as evidence of videotaped testimony of a child who has been sexually abused is declared not to violate a criminal defendant’s Sixth Amendment rights to confront his accuser’ 1991 *Southern University Law Review* 275–291, where the writer criticises the court’s approach. Robert Bloe believes that the Supreme Court was correct in holding that the defendant’s confrontation right is not violated by the videotaped testimony of a child abuse victim. However, he finds the court’s constitutional standard for determining the admissibility of closed-circuit testimony to be questionable. He maintains that the court should have laid down specific guidelines for defining necessary circumstances and the degree of psychological trauma necessary to trigger the exception. Murphy also criticises the majority opinion in *Craig*. He argues that the court’s departure from the original meaning of the confrontation clause and its explicit guarantee of face-to-face confrontation, leads to special protection being granted to child sexual abuse victims at the expense of the accused in such cases. The court also does not address the question of victims of other types of crimes.
The rights of child witnesses and the right to confrontation

Thus, exceptions to the right to physically face witnesses have been recognised where public policy considers the exception to be necessary to achieve more compelling goals. The right to confrontation can give way to important policy interests when strict adherence to the face-to-face confrontation requirement would provide only 'incidental benefit or unnecessary protection for the accused'.

The court recognised another exception to face-to-face confrontation in California v Green. Cross-examination of a witness who is not physically present in the courtroom is not the same as face-to-face confrontation, because a witness's demeanour cannot be observed as acutely on video monitor as in court. However, it may be justified to exclude a witness from the courtroom in certain circumstances. Sufficient reason should be advanced to exclude the normal practice of face-to-face confrontation, such as protecting child victims of sexual abuse.

As a result of the increased number of child abuse cases, many states have adopted laws designed to facilitate the prosecution of child abuse offenders and to protect children in the courtroom. Protective measures such as videotaping testimony, allowing testimony by way of one- or two-way closed-circuit television, and testifying outside the presence of the accused are available for child sexual assault victims in a number of states. Since the enactment of child protection statutes, the accused's right to confront his/her accuser (the child witness) has become a thorny issue at both state and federal levels. In Coy v Iowa, the court upheld the accused's contention that his rights had been violated. Its decision was based on the 'confrontation clause' of the Sixth Amendment, which, according to the majority, guaranteed an accused a face-to-face meeting with witnesses appearing before the court. However, the court objected to the fact that the legislation created a presumption that all juvenile victims of sexual abuse suffered from emotional trauma when testifying in the accused's presence. This prevented the trial court from making an individualised assessment of the case. This decision has

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43156 US 237 (1895). The court held that a criminal defendant's right to confrontation was not violated by the admission of testimony presented at a previous trial by government witnesses who had since died. The testimony in question had previously been subject to cross-examination. The court held that the testimony was admissible as an exception to the confrontation clause.

44See United States v Farley 992 F 2d 1122, 1124 (10th cir 1993).

45See Mattox v United States n 18 above at 244.

46399 US 149 158 (1970). The issue in Green was whether a defendant's constitutional right to confront the witnesses against him was violated when the extrajudicial statement made by the witness, the events which the witness was unable to recall, was admitted as substantive evidence. The court found that although the witness failed to remember the content of the extrajudicial statement, the fact that the witness was available for cross-examination alleviated any constitutional violation. The court identified three purposes of confrontation namely, that it ensures that the witness will give his/her statements under oath; that it forces the witness to submit to cross-examination and that it allows the jury to assess his/her credibility.

47Brannon n 23 above at 440.

487 US 1012 (1988). The question arose whether a large screen, which separated the complainant from the accused, violated the accused's right to a fair trial.
The rights of child witnesses and the right to confrontation

In *Spigarolo v Meachum* the court held that the accused's right to confrontation was not violated by the use of the child victim's videotaped testimony. Exclusion of the accused from the videotaping of the testimony was found to be a compelling state interest because children would be too intimidated by the presence of the accused to ensure reliable and trustworthy testimony. However, in *Cumbie v Singletary* the court held that the defendant's right to confrontation had been violated because there was insufficient evidence that the victim was afraid of the defendant or that she would be traumatised by his presence during the testimony. The Child Victim's and Child Witnesses' Rights (CVCWR) Statute was enacted by Congress after the ruling in *Craig*. The statute provides for two-way closed-circuit television and videotaped depositions. The constitutionality of the CVCWR statute was upheld in *US v Farley*. The above case law demonstrates that the public interest in protecting child witnesses overrides the accused's right personally to confront the witnesses against him.

However, in *Gonzales v State*, the Texas Court of Criminal Appeals departed from precedent by allowing a child witness to testify via closed-circuit television when the child was not itself the victim of the offence about which it was testifying. The court held that the use of the closed-circuit television procedure in lieu of face-to-face confrontation did not violate Gonzales's right to confrontation under either the Federal or State constitution. According to Stacey Jones, the procedures in *Coy* and *Craig* were aimed at protecting minor victims, whilst in *Gonzales*, the closed-circuit procedure tried to protect a minor witness. The *Gonzales* decision raises questions such as rape victims or witnesses who participate in the witness protection programmes. See Murphy n 15 above at 1243. Also see Fuhriman 'State v Foster: Washington State undermines confrontation rights to protect child witnesses' 2000/01 *Gonzaga Law Review* 7 at 32, where the writer criticises the Washington Supreme Court for adopting *Craig* in *S v Foster* 957 F2d 712 714 (Wash 1998), when it permitted a child witness to testify via one-way closed-circuit television, in lieu of face-to-face confrontation. Fuhriman further argues that the *Craig* ruling weakened the constitutional guarantee of face-to-face confrontation, in that the court failed to differentiate the confrontation rights hearsay exceptions and non-hearsay exceptions. In so doing, it mistakenly applied the *Craig* rule as a hearsay exception. He maintains that the *Foster* court should not have dispensed with established modes of confrontation until steps were taken to alleviate anxiety factors for child witnesses, such as moving proceedings out of the courtroom or recommending other trauma reducing measures.

55*934 F2d 19 (2d cir 1991).*
56*91 F2d 715 (11 cir 1993).*
57*92 F2d 1122 (10 cir 1993).*
58*818 SW 2d 756 757 (Texas Criminal Appeals 1991). Gonzales was convicted of the murder of a five-year-old on the basis of testimony of a witness, the deceased’s sister.
59Jones n 1 above at 969. However, Alaska’s statute may be used to protect child witnesses who were themselves not the victims of crime. See *State v Blume* (Alaska Superior Court), (3 ANS-86–2547 Cr, 3 ANS-86–1847 Cr), Appeal Docket A–1799, A–1902 (Alaska ct app Sept 19, 1989), where the judge allowed the child, a sister of the victim (not herself a victim of the alleged abuse), to testify while her parents watched from behind a one-way mirror. According to James Rowe, the fact pattern in *Blume*, in which the child was to testify against her parents, and there had been evidence that her parents had instructed her not to testify, presents a compelling case for the appropriateness of protecting certain non-victim witnesses. See Rowe
about where the court will draw the line in allowing non-victim witnesses to use the closed-circuit procedure in lieu of face-to-face confrontation. Therefore, Jones recommends that when an individual’s constitutional rights are at stake, the courts should proceed cautiously so as not to allow the exceptions to swallow the rule.

American writers also support the introduction of protective measures for child sexual assault victims. According to Brannon, protective measures such as videotaping interviews, can reduce the number of times a child must relate its story, thereby reducing the emotional distress for the child. However, these protective measures are often resisted by the accused because they prevent face-to-face confrontation between the accused and the witness, and thereby violate the accused’s constitutional right to confrontation. Such protective measures are not only necessary for the child’s benefit, but also to ensure that the truth is not obscured. There is a greater chance that the child will provide accurate and complete testimony if it testifies away from the accused’s presence. The negative feelings that child witnesses experience about facing the defendant in court, support the use of protective measures in which the child is able to testify away from the defendant’s presence. The use of screens, shields, videotaping and one or two-way television can improve the trustworthiness and accuracy of a child’s testimony by reducing the trauma present in the legal process. However, Brannon maintains that there is insufficient research to determine which methods best protect the child victim, so case-by-case determinations are necessary to protect both the


60Jones n 1 above at 970. The Craig exception has already been extended to allow an adult male robbery victim to testify by closed-circuit television. See Gilpin v McCormick 921 F2d (9 cir 1990). It is noteworthy that s 170A of the Act refers to ‘... any witness under the age of 18 years ...’. This section does not specify whether the witness must also be a victim. It is not restricted to charges of sexual abuse or physical abuse, and extends to all child witnesses. Therefore, the interpretation of ‘any witness’ may well include non-victim witnesses. This would include a child who has witnessed an attack on a parent, and is not herself a victim of the crime. See Muller n 35 above at 53.

61Jones n 1 above at 971.

62Brannon n 23 above at 442. Also see Watkins n 49 above at 33 and Rowe n 59 above at 231. Rowe suggests that child witness protection statutes advance two important public policies which would suffice to override the defendant’s right to face-to-face confrontation, such as reducing the trauma child witnesses may suffer as they testify in the defendant’s presence, and providing an atmosphere in which the child witnesses may communicate effectively to the jury.

63Id.

64According to Rowe, the intimidation or fear created by the courtroom may be cured by remedies which do not compromise the defendant’s right to confrontation, such as reducing the degree of courtroom formality or allowing the child to sit in an appropriately sized chair. He refers favourably to the Alaskan statute which grants the trial court significant discretion to adjust courtroom procedures in a number of ways which do not effect the defendant’s right of confrontation, such as, the court may control the spatial arrangements of the courtroom and the location, movement and deportment of those present in order to minimise emotional harm or stress to the child. See Rowe n 59 above at 231.

65Brannon n 23 above at 443.
child and the confrontation rights of the accused. 66 Studies have indicated that viewing a child’s testimony through a television will not diminish a jury’s ability to assess the credibility of the witness, allowing the primary check on false testimony to remain intact. 67 The medical profession has also endorsed the practice of testifying away from the presence of an alleged attacker, as a more productive method of seeking the truth in child sexual abuse cases. 68 Therefore, the purpose of the confrontation clause which is to reveal the truth, should be enhanced by the use of protective measures such as screens, videotapes and closed-circuit television.

The Canadian courts have also wrestled with the question of whether the rights of child victims of sexual assault should take precedence over the confrontation rights of the accused. Legislation was introduced in Canada in 1988 to reform some of the substantive offences and procedural rules that apply to child abuse cases. These reforms contained provisions which allowed the use of testimonial aids such as videotaped statements, screens and closed-circuit televisions. These testimonial aids facilitate the giving of evidence by children and reduce the trauma of the legal process for children in sexual offence cases. The Supreme Court of Canada upheld the constitutional validity of these provisions in 1993, and emphasised that they facilitate the truth-seeking function of the criminal justice process without compromising the rights of the accused to a fair trial. 69 Thus, the Canadian courts have also come out in favour of protecting the rights of youthful witnesses. 70

66 Id at 446. However, Rowe believes that the more desirable approach is to allow an individual showing of necessity to be made without an initial confrontation between the defendant and the child. See Rowe n 59 above at 245.

67 Conklin n 6 above at 349.

68 Id.

69 See R v L (DO) (1993) 85 CCC (3d) 289; R v Levogiannis (1993) 85 CCC (3d) 327 (SCC) and R v F (CC) (1997) 120 CCC (3d) 225. The question arose in Levogiannis whether s 486 (2.1) of the Canadian Criminal Code violated any section of the Canadian Charter of Rights and Freedoms. Section 486 (2.1) provides that a judge, can in certain circumstances, order that a complainant under the age of eighteen years testify outside the courtroom or behind a screen or other device that would allow the complainant not to see the accused, if the judge believed that the exclusion was necessary to obtain a full and candid account of the acts complained of from the complainant. The court held that where an order is made pursuant to the section of the code, the requisite elements of confrontation, that is, the accused’s rights to face his/her accusers in court, were limited. According to the court, the screen between the accused and the complainant did not undermine the presumption of innocence or operate unfairly against him and hamper cross-examination. The court remarked that even in a case of jury trial, a jury would follow judicial instructions and would not be biased by the use of a screen. (It should be noted that s 486 (2.1) can be compared to s 170A of the Criminal Procedure Act 51 1977, which provides for the screening of a witness under the age of eighteen years from the courtroom, and the questioning of that witness through an intermediary).

70 For a more detailed discussion of the Canadian experience with testimonial aids, see Bala et al ‘Testimonial aids for children: the Canadian experience with closed-circuit television, screens and videotapes’ (2001) 44 The Criminal Law Quarterly 461. Bala argues for a continued reformation of the justice system to find a better balance between the rights of the accused and the interests of children and society. He believes that statutory reform will only play a limited role in increasing the use of testimonial aids. Professional training, attitudes and access to resources also play
A similar approach has been followed in the United Kingdom where protective measures for child witnesses have also been introduced. A measure of anonymity may be achieved in the courtroom by the use of a screen, where the witness, although known to the accused, is unwilling to face him/her directly. A television link may be used where the witness is outside the court's jurisdiction or is a child witness. In *R v Lynch*, the eighteen-year-old victim of an indecent assault was so distressed that the judge allowed her to testify behind a screen, and have a representative of victim support present with her in the witness box. The court of appeal rejected the appellant's submission that this would have prejudiced the accused in the eyes of the jury. It has been held that the judge must warn the jury not to read anything into the use of screens, but the court rejected the argument that screens were *per se* prejudicial to the accused. Thus, the British courts have also endorsed protective measures for youthful witnesses.

According to Kate Warner, there is no constitutional right to confront witnesses in Australia, although a common law right to do so exists. However, the prosecution's failure to call a child victim of assault as a witness in a criminal trial, may in some circumstances be regarded as a failure to conduct the prosecution fairly amounting to a miscarriage of justice. Thus, a balance is required between the rights of the accused and the interests of the child victim. However, in some Australian jurisdictions, closed-circuit television or 'live-link' provisions are now the normal method by which children in child sexual abuse cases may testify. It has also been recognised that comprehension problems frequently arise when child witnesses are

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71 See s 32(1) of the Criminal Justice Act 1988. Also see Spencer 'Child witnesses, video-technology and the law of evidence' (1987) *Criminal Law Review* 76, where the writer argues that the use of videotapes in child abuse cases is a step in the right direction towards the protection of child witnesses. However, see McEwan 'Child evidence: more proposals for reform' (1988) *Criminal Law Review* 813, where the writer prefers the examination of a child witness to be conducted by an experienced judge rather than a lay intermediary or video recording. The judge is an ideal person because he is a practised interrogator and has no preconceptions or preference. The judge could sit with an assessor or have the benefit of expert evidence to ascertain the child's credibility.


73 See *R v Foster* (1995) crim LR 333. The issue of screens was also raised in *X v UK* (1982) 15 EHRR CD 113, where the commission rejected the complaint, finding that the decision to screen witnesses did not interfere with the accused's rights under Article 6, which pertains to the examination of witnesses.

74 See Warner 'Child witnesses in sexual assault cases' (1988) 12 *Criminal Law Journal* 286, where the writer argues that in reforming the law in the area of child abuse, the challenge is guard against over reaction and maintain a balance between the rights of suspects and the protection of victims. The broader issues of the social structure which gives rise to child abuse must also not be ignored.

75 See *Whitehorn v The Queen* (1983) 152 CLR 657.

The rights of child witnesses and the right to confrontation

examined. In Western Australia, the court may appoint someone to act as a 'communicator' for the child. The communicator’s task is to communicate and explain to the child the questions put to it, and to communicate and explain to the court the evidence given by the child. Therefore, the use of the communicator or the intermediary will reduce the trauma of testifying. However, unlike South Africa, the Western Australian provisions provide no guidance on when a communicator might be used. Thus, protective measures for child witnesses have also been introduced in certain Australian jurisdictions.

The above discussion on protective measures demonstrates that the court’s most sensitive and hotly contested area of law concerning the right to confrontation, involves the testimony of child sex abuse victims. Many victims endure great trauma and unease when forced to testify in the physical presence of the accused who is often a family member or trusted adult. The right to confrontation is regarded as fundamental to a fair trial. However, this right is not absolute. In exceptional circumstances, the rights of child victims of sexual offences will prevail over the accused’s right to confrontation. However, the court must be of the opinion that the child witnesses will suffer severe emotional stress and trauma if they confront the accused face-to-face. Then only, will the right to confrontation be limited. American states have enacted statutes which seek to shield child sexual abuse victims from these anxieties. The introduction of section 170A in South African law has also been lauded as a step in the right direction.

CONCLUSION

It is a requirement of a fair hearing that the trial should take place in open court, and the accused has the right to see and know his/her accusers. Therefore, any violation of the right to confrontation amounts to an irregular-

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77 Therefore, in the Northern Territory, the court may disallow any question which is 'confusing, misleading or phrased in inappropriate language'. See s 21B of the Evidence Act 1939 (NT).
78 See s 106F of the Evidence Act 1906 (WA). Also see Palmer n 76 above at 193.
79 Palmer n 76 above at 198.
80 The constitutionality of these measures have been addressed in the American courts in Coy v Iowa n 48 above and Maryland v Craig n 50 above.
81 According to Karen Müller, s 170 A goes further than its American and British counterparts in that it attempts to afford protection to children up to the age of 18 years, and does not appear to have the restrictions which the American courts have imposed upon their equivalent section, which reads as ‘unreasonable and serious mental and emotional harm or trauma’. In South Africa, the courts have not interpreted this phrase as strictly as the American courts. Rather, they have held that the application to use an intermediary will only be granted if the witness is going to suffer any mental stress beyond the norm. The South African courts also do not require a finding that the child will experience undue mental stress or trauma. It is sufficient that the expert witness believes that the child will. See Müller n 35 above at 54–55, and S v Klink n 38 above.
The right to confrontation entails that the accused must be able to observe the witness whilst he/she is giving evidence against him. The accused can thus test the recollection of the witnesses testifying against him through confrontation. The right of confrontation is said to be important to the fact-finding process because most courts presume that witnesses are less likely to lie in the presence of the accused. Indeed, a fact which can be primarily established only by witnesses cannot be proved against an accused except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorised by the established rules governing the trial or conduct of criminal cases.

Reliable results are said to be more likely when there is confrontation, as the court can observe the witness' demeanour as they face the accused, and judge the witness' credibility.

However, the right to confrontation is not absolute. In exceptional circumstances, compelling reasons of public policy will prevail over the right to confrontation. Where there is a conflict between the protection of a vulnerable witness and the requirement of a face-to-face confrontation, the latter must yield to the greater public interest in the protection of the witness. Similarly, the right may be waived, but it must be an informed and voluntary waiver. One such exception is section 170A of the Act, which relates to evidence given by child victims of sexual abuse. Section 170A was introduced to protect child witnesses. The witness may give evidence with the aid of an intermediary via closed-circuit television. Confrontation between the accused and the victim is thus excluded. The reason for this exclusion is to reduce the emotional stress and suffering of the child witness. The constitutionality of this section was challenged in Klink v Regional Magistrate NO. The court held that a proper balance can be achieved between the protection of a child witness and the rights of an accused to a fair trial by allowing the witness to testify in congenial surroundings and out of sight of the accused. However, the court found that section 170A was not unconstitutional, and that the use of an intermediary did not affect the fundamental fairness of the
The rights of child witnesses and the right to confrontation

The rights of child witnesses and the right to confrontation. Thus, the interests of the child witness prevailed over the accused's right to a fair trial.

In the United States, the confrontation clause has been interpreted by the Supreme Court as guaranteeing a criminal defendant the right to come face-to-face with adverse witnesses at trial. The Sixth Amendment guarantees the accused the right, not only to be present during the trial, but also to be seen by the witnesses for the prosecution. Therefore, the use of a one-way screen or closed-circuit video image, preventing a child sex abuse witness from seeing the defendant, violates the Sixth Amendment unless the trial court specifically finds that the full face-to-face confrontation would cause the child serious emotional distress. Thus, Maryland v Craig and subsequent case law have established that when a judge determines that a child witness will be traumatised by the presence of the accused in the courtroom, the court should allow the child to testify away from the accused's presence. The court should also decide whether the particular child witness requires protection. This case law has established that the public interest in protecting child witnesses overrides the accused's right personally to confront the witnesses against him. The decision in Craig led to the introduction of the Child Victims' and Child Witnesses' Rights statute. This statute has been interpreted to guarantee the same constitutional mandates set forth in Craig. Many states in the United States, are said to have similar statutes to the Child Victims' and Child Witnesses's Rights Statute. The Canadian and British courts have also come out in favour of protecting the rights of youthful witnesses. Thus, our law conforms to international trends by introducing

89 Also see S v Mathebula 1996 2 SACR 231 (T) and S v Stefaans 1999 1 SACR 182. These cases are instructive regarding the appointment of an intermediary in terms of s 170A. Similarly, in R v Levogiannis (1993) 85 CCC (3d) 327 (SCC), the court held that s 486 (2.1) of the Canadian Criminal Code, which contains protective measures for child witnesses and prevents face-to-face confrontation between the witness and the accused, did not violate the Canadian Charter. The wording in s 486 (2.1) is also similar to s 170A.

90 See Coy v Iowa n 48 above where the court held that it must find that the child will be traumatised not simply by giving evidence in court but by giving evidence in the presence of the accused. The trauma suffered by the child must also be more than mere nervousness or excitement or a reluctance to testify.

91 Id. Also see Maryland v Craig n 50 above.

92 See inter alia, Maryland v Craig n 50 above; Spigarolo v Meachum 934 F2d 19 (2 cir 1991) and Cumbie v Singletony 991 F2d 715 (11 cir 1993). However, in Gonzales v State 818 SW 2d 756, 757 (Texas crim apps 1991), the closed-circuit procedure was used to protect a minor witness rather than a minor victim. This decision has been rightly criticised by Stacey Jones. See Jones n 1 above at 969. Also see State v Blume n 1 above and Gilpin v McCormick n 60 above, where protective measures were used to protect minor witnesses and adult witnesses respectively. It is noteworthy that s 170A refers to 'any witness'. It leaves the door open for the courts to appoint an intermediary even in the case of minor witnesses rather than minor victims.

93 See Coy v Iowa n 48 above and Maryland v Craig n 50 above.

94 Brannon n 23 above at 460.

95 See inter alia, R v Levogiannis (1993) 85 CCC (3d) 327 (SCC), and R v Lynch (1993) Crim LR 868 respectively. In both these cases, the use of screens between the accused and the complainant, was found not to be prejudicial to the accused. Some Australian jurisdictions have also introduced protective measures for child victims of sexual abuse. See Palmer n 76 above at 185-187.
protective measures for child witnesses. Such measures are not only necessary for the child's benefit, but also enhance the truth-finding process which is part and parcel of the confrontation principle.

Thus, South Africa's law is in line with foreign international law. It recognises that although the right to confront adverse witnesses in court is not absolute, it is nevertheless an important component of a right to a fair trial. However, one should proceed cautiously when an individual's constitutional rights are at stake, so as not to allow the exceptions to swallow the rule. The courtroom process should be reformed by introducing judicial procedures which are more sensitive to the needs of the child victim, but at the same time preserve the rights of the accused. The courts should look into alternatives to avoid abridging the accused's right to confrontation, such as moving proceedings out of the courtroom or recommending other trauma reducing measures. The broader issues of the social structure which give rise to child abuse must also be addressed. It is important to develop legal measures that can achieve a sensitive balance between these competing interests. Indeed, one must strive to ensure that the right to confrontation remains a venerable tradition for generations to come. After all, it has long been recognised that the right to confrontation is 'one of the fundamental guarantees of life and liberty ... long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action ...'.

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96 See Jones n 1 above at 971.
97 See Fuhriman n 54 above at 46–47.
98 See Warner n 74 above at 286.
99 See *Kirby v United States* n 85 above at 55–56 (1899).