Ensuring Fair Trial in cases of Children in Conflict with the Laws: The Tanzanian Paradox’

Lucky Michael Mgimba, Mr.
ENSURING FAIR TRIAL IN CASES OF CHILDREN IN CONFLICT WITH THE LAWS:
THE TANZANIAN PARADOX

by

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DEDICATION

This article is a dedication to the long standing and tireless hard work of my lovely father Mr. Michael Mgimba and my mother Frida Mgimba, who not only kept my dream alive through financing it, but was, is and will forever be a great inspiration to every step i make in life.
LIST OF STATUTES AND INSTRUMENTS

National Laws

Adoption Act, Cap. 335, Revised Edition 2002

Children and Young Persons Act, Cap. 13 Revised Edition 2002


Employment Act, Cap 336, Revised Edition 2002

Evidence Act of 1967, Revised Edition 2002

Law of the Child Act, Act No. 21 of 2009

Penal Code, Cap. 16, Revised Edition 2002

Primary School (Compulsory Enrollment and Attendance) Rules of 1979


International Instruments


American Convention on Human Rights of 1969

Arab Charter on Human Rights of 2004

Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment of 1988

Children’s rights in Juvenile Justice, general Comment No. 10 (2007)

Guidelines for Action on Children in the Criminal Justice System (Annex to UN Resolution 1997/30 – Administration of Juvenile Justice (Vienna Guidelines of 1997)

Guidelines on the Role of Prosecutors of 1990

ILO Minimum Age Convention of 1973

ILO Worst Forms of Child Labour Convention of 1999

Indigenous Children and their Rights under the Convention General Comment No. 11 (2009)

International Covenant on Civil and Political Rights (ICCPR) of 1966


Right of the child to be heard, General Comment No. 12 (2009)

Standard Minimum Rules for the Treatment of Prisoners of 1955


The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 1950

The rights of children with disabilities General Comment No. 9 (2006)

The United Nations Guidelines for the Prevention of Juvenile Delinquency, Adopted and proclaimed by General Assembly Resolution 45/ 112 of 14th December 1990

UN Declaration of Basic Principles of Justice for Victims of crime and Abuse of Power.

UN Guidelines for Action on Children in the Criminal Justice System; and

UN Guidelines for the Prevention of Juvenile of Juvenile Delinquency (The Riyadh guidelines); UN Rules for the Protection of Juveniles Deprived of their Liberty

UN Standard Minimum Rules for Non-Custodian Measures (The Tokyo Rules);

United Nations Convention on justice and support for victims of crime and Abuse of Power Draft Convention, 08/02/2010


United Nations Rules for Protection of Juveniles Deprived of their Liberty (JDLs or Havana Rules of 1990)


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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>ACERWC</td>
<td>African Committee of Experts on the Rights and Welfare of the Child</td>
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<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<td>AU</td>
<td>African Union</td>
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<td>CPA</td>
<td>Criminal Procedure Act, Revised Edition 2008</td>
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<td>CRC</td>
<td>Committee on the Rights of the Child</td>
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<tr>
<td>IHRDA</td>
<td>Institute for Human Rights and Development in Africa</td>
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<tr>
<td>LCA</td>
<td>Law of the Child Act, No. 21 of 2009</td>
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<tr>
<td>NGO’s</td>
<td>Non Governmental Organization</td>
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<td>NOLA</td>
<td>National Organisation for Legal Assistance</td>
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<td>UN CRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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<td>UN</td>
<td>United Nations</td>
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<td>USA</td>
<td>United States of America</td>
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PREFACE

The Issue of managing or dealing with children coming into conflict with the law has historically haunted nations and Tanzania is no exception. Although there have already been important headways, much remains to be done in ensuring a child friendly justice system in Tanzania.

The problem has for ages risen when children come in contact with a justice system that is unresponsive to their needs, which not only deprives them of their liberty, but also accentuates or increases their vulnerability to abuse, violence, exploitation and health related risks such as injury and HIV infection.

This work comes in place to analyze the legal and institutional framework under the International, regional and national (Tanzanian) levels; with a view of determining as to how much consistent are they with the accepted legal standards. It however ends by recommending a Child friendly justice system which aims at restorative justice.
PART ONE

1. INTRODUCTION

1.1 Introductory note

The issue of managing or dealing with children coming in conflict with the law has historically haunted the global community,\(^1\) and Tanzania is no exception.\(^2\) Although there have already been important headways,\(^3\) much remains to be done in ensuring child justice in Tanzania, Africa and the world at large.

The term ‘children in conflict with the law’ has historically developed to refer to the situation whereby anyone defined by the relevant law as a child comes into contact with the justice system as a result of being suspected, accused or adjudged of committing an offence.\(^4\)

But the problem has for ages risen when children come in contact with a justice system that is unresponsive to their needs, which not only deprives them of their liberty, but also accentuates or increases their vulnerability to abuse, violence, exploitation and health related risks such as injury and HIV/ AIDS infection.\(^5\)

Often the basic rights of children are not respected by legal, social welfare and justice systems. Justice standards that are designed for, and mainly fits adults seldom cater to their needs.\(^6\) In one

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\(^6\) KHATIWADA Ishwor-Prasad (2005), ‘Ensuring Fair Trial in Cases Children in Conflict With the Law’, Research Partnership Programme, The Danish Institute for Human Rights, Copenhagen pp. 102-109
word, their basic human rights of access to justice are footnoted in a predominantly adult-oriented justice system.\textsuperscript{7}

In its concluding observations of 2006,\textsuperscript{8} the Committee on the Rights of the Child expressed its concern that Tanzania had made limited progress in establishing a functioning juvenile justice system throughout the country, children were being detained with adults, and children aged 16 to 18 years were being treated as adults. The Committee urged the Government to take steps to fully implement the international juvenile justice framework.\textsuperscript{9}

The Law of the Child Act,\textsuperscript{10} adopted in 2009, represents an important step in developing a child rights compliant juvenile system. However the challenge now is how to effectively implement the Law of the Child Act.

In 2009, The National Organization for Legal Assistance (NOLA) published a commentary on the new Law,\textsuperscript{11} which included a review of how the Law of the Child Act impacts on the Framework for the Juvenile justice system which includes both institutional and legal framework. However to date the practical impact seems more of a myth than a reality.

1.2 Methodology
1.2.1 Type of scholarly Work
This work combines both descriptive and analytical methods; this is because in descriptive method the author looks as to how the legal and institutional framework guiding children in

\textsuperscript{7} Loc. Cit.

\textsuperscript{8} UN COMMITTEE ON THE RIGHTS OF THE CHILD (2006), ‘UN Committee on the Rights of the Child: Concluding Observations-United Republic of Tanzania’, UN CRC, CRC/C/TZA/CO/2 para. 9

\textsuperscript{9} Loc. Cit. para13

\textsuperscript{10} Act No. 21 of 2009

contact with the law exists, and in analytical method the author looks as to whether such application is conducive or needs to be further considered by the government of Tanzania.

1.2.2 Data Collection

1.2.2.1 Type of Data collected

The author utilizes both primary and secondary data. International and national court cases have been analyzed, and national legislations have also been scrutinized. Practice has further been searched for in various treaties, and in resolutions adopted by International Forum, such as the Security Council, the General Assembly, the International Committee for Rights of the Child, the African Committee of experts on the Rights of the Child and the African Union. To complement these resources consultations of literature such as legal books, journals, reports, articles, publications and databases on the subject have been employed.

1.2.2.2 Choice of Data Collection

In data collection, the author used the Documentary review and analysis method

**Documentary analysis and Review**

Documentary review was carried out in libraries, both physical and electronic. The physical libraries accessed include: The Library of the St. Augustine University of Tanzania in Mwanza, Tanzania; and the St. Augustine University of Tanzania Human Rights Centre Library in Mwanza, Tanzania.

The electronic libraries that the researcher was able to access are ‘Hein online’, ‘LexisNexis’, ‘West Law’, ‘Oxford University Press’, and ‘Mcgill guide research’.

Documentary review covered relevant statutes, case law, various reports, and books related to Children in Conflict with the Law and issues ancillary to it. The review of statutory and case law covered both domestic and international levels, and it generated primary data. Likewise, the review of reports and books generated secondary data.
1.2.3 Data analysis

The data collected was analyzed by using the exploratory procedures and qualitative method. The narrative method is used to report the information obtained.
PART TWO

2. GENERAL OVERVIEW

2.1 Children in Conflict with the Law

2.1.1 The Concept of Children on Conflict with the Law

The term ‘children in conflict with the law’ refers to the situation whereby a person defined by the relevant law as a child has come in contact with the justice system as a result of committing a crime or being suspected of committing a crime. Often prejudice, stereotyping and discrimination brings children into conflict with the law without a crime being committed.\(^\text{12}\)

It is estimated that there are over one million children worldwide in detention. The detention of children who have been accused of a crime but are awaiting trial (remand) continues to be the norm in a majority of countries and in some cases this accounts for over 90 percent of children being held in detention.\(^\text{13}\) Notably everyday thousands of children around the world get caught up in formal justice systems. Most of these children arrested have committed petty crimes or such minor offences as vagrancy, truancy, begging or alcohol use, however some have committed more serious offenses, they are then usually arrested and detained by police, tried by magistrates, and sent to institutions including prisons.\(^\text{14}\)

It is in these above stated situations where a child is considered to be in conflict with the law. In Tanzania statistics show that children constitute more than 46% of the population and that an average household has at least 6 children.\(^\text{15}\) However it is notoriously difficult to obtain official statistics on children who come into conflict with the law in Tanzania. The lack of appropriate data collection systems acts as one of the reasons, despite the fact that there exists a variety of reasons for lack of reliable information on children in conflict with the law.

\(^\text{12}\) KHATIWADA Ishwor-Prasad (2005), ‘Ensuring Fair Trial in Cases Children in Conflict With the Law’, Op. Cit.; Section 4 (e) of the Philippine ‘Juvenile Justice and Welfare Act of 2006’ Act No. 9344 which provides that “children in conflict with the Law refers to a child who is alleged as, accused of, or adjudged as, having committed an offense under Philippine laws ”

\(^\text{13}\) SAVE THE CHILDREN (2004), ‘Juvenile Justice: Modern Concepts of Working with Children in Conflict with the Law’, Save the Children UK, London p. 11


Alternatively, statistics of other nations and world regions show that in 2002, 136,000 children in the central and Eastern Europe and the Common Wealth of Independent states were found guilty of criminal offences, compared to 117,000 in 1990. Russia accounted for 65% of these cases. In India, the number of cases of juvenile delinquents has increased from 17,203 in 1994 to 30,943 in 2004. The crimes committed by juveniles have also seen an increase in the same period from 8,561 to 19,229.16

There are various reasons why children end up committing crimes. About 64% of cases in 2004 were children who had no education or only education up to primary level. Children living with parents/guardians accounted for 76.6% of the total juveniles arrested. The number of homeless children arrested for various crimes was only 7.5%.17 However, an important thing to note is that juveniles in Tanzania usually come from poor families earning less than a dollar in a day as they are usually used for begging, drug peddling and in rare cases prostitution.18

2.1.2 Children and the Law in Tanzania

The definition of a child in Tanzania is not incomparable. Before the enactment of the Law of the child Act in 2009, the definition of a child was provided diversely according to the context certain a statute sought to archive.19

For example, whereas for the purposes of establishing children’s criminal responsibility, the Children and Young Persons Act20 defined a ‘child’ as a person who had not attained the age of

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17 Loc. Cit. p. 2


20 Cap. 13 R. E 2002
12 years, the Adoption Act\textsuperscript{21} defined an ‘infant’ as a person under 21 years for the purpose of adoption. On the other hand the Penal Code\textsuperscript{22} under section 138 B(2), defines a ‘child’ as a person of age less than 18 years, which essentially accords with the Convention on the Rights of the Child, 1989. Under section 139(2) of the Penal Code also defines a ‘child’ as a person of the age of eighteen years or below.

However for the purposes of criminal responsibility of children in Sexual Offences under the Sexual offences Special Provisions Act (SOSPA), the Penal Code defines a ‘boy’ and a ‘girl’ as a male or female person of the age of less than 18 years. For the purposes of employment, the Employment Act\textsuperscript{23} defines a ‘child’ as one who appears to be under 15 years of age. In respect of criminal investigations, the Criminal Procedure Act of 1985 defines a ‘child’ as a person under the age of 16 years. In respect of evidence, the Evidence Act, 1967 defines a ‘child of tender years’ as one below the apparent age of 14 years. According to the Primary School (Compulsory Enrollment and Attendance) Rules of 1979, a child is defined as one who has attained the age of 7 years but not above the age of 13 years.

Most important of all is the Law of the Child Act, 2009 which has brought about a very progressive definition of the child. The Law under section 4 (1) defines the child as any person below the age of eighteen years.\textsuperscript{24}

\subsection*{2.1.3 Delinquency and Children in Conflict with the Law}

According to the Encyclopedia Britannica, ‘delinquency’ means ‘criminal behavior especially that carried out by a juvenile. Depending on the nation of origin, a juvenile becomes an adult anywhere between the ages of 15 to 18 years, although the age is sometimes lowered for murder.

\begin{itemize}
  \item \textsuperscript{21} Cap. 335, R.E 2002
  \item \textsuperscript{22} Cap. 16, R.E 2002
  \item \textsuperscript{23} Cap 336, R.E 2002
  \item \textsuperscript{24} MASHAMBA Clement J. (2010), ‘Introduction to Family Law in Tanzania’, Institute of Public Policy and Law, Dar Es Salaam p. 81
\end{itemize}
and other serious crimes. Delinquency implies conduct that does not conform to the legal or moral standards of society.\textsuperscript{25}

In other states such as Nepal, the minimum age of criminal responsibility is fixed at 10 years, though they are treated as children, and the complete criminal responsibility as an adult is fixed at the age of 16 years.\textsuperscript{26}

In Anglo-American Justice System, the word ‘crime’ is used with reference to adults, while an offence committed by a minor or juvenile is referred to as ‘delinquency’. The office of the Juvenile Justice and delinquency Prevention in the USA has defined ‘delinquency’ as ‘an act committed by a juvenile that, if committed by an adult, would require prosecution in criminal court’.\textsuperscript{27} Juvenile in conflict with the law means ‘a juvenile who is alleged to have committed an offence.

There are two general views on the concept of ‘crime’ and ‘delinquency’. One maintains the narrow definition regarding delinquency as being no difference from adult offences. The other supports the broader meaning claiming that juvenile delinquency should be regarded as different from adult offences, which not only include offences in the ordinary sense, but also suppositional crime.\textsuperscript{28}

The Beijing Rules\textsuperscript{29} defines ‘an offence is any behavior (act or omission) that is punishable by law under the respective legal systems’. The Rules also defines ‘delinquency’ as ‘a child or young person who is alleged to have committed or who has been found to have committed an offence’.\textsuperscript{30}
However, the Riyadh Guidelines\textsuperscript{31} forwards a contrary viewpoint. The Guidelines has mentioned that ‘in order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person’.\textsuperscript{32}

What this work is concerned of, in this context is not with the suppositional or the status crime, but only to the crime defined by the law.

\section*{2.2 Juvenile Justice}

\subsection*{2.2.1 The Concept of Juvenile Justice}

Juvenile justice is essentially a wide concept which covers many different realities. Juvenile justice refers to the dealing with the children in conflict with laws. It relates to the rules governing the situation of alleged minor delinquents as well as convicted juveniles. It also relates to the rules governing the situation of alleged minor delinquents as well as convicted juveniles. It also refers all the interactions that a child may have with the legal system.\textsuperscript{33} Juvenile justice system also addresses the deviance causes, be it societal, cultural or economical. It has multi facet dimension. The way in which children, who have violated the law are approached, treated; rehabilitated, disciplines and punished is essentially a reflection of that society’s culture and value system. The Juvenile justice system has to look into all these societal and cultural aspects, too.\textsuperscript{34}

Traditionally, Juvenile justice systems have been taken as an essential and integral part of the criminal justice system. The modern concepts view it from different perspective. It has been widely believed that the juvenile justice system cannot be taken as a branch of the criminal justices system where the punitive approach is considered one of the important and indispensable elements. Application of the criminal law and criminal procedures as such to deal with children

\textsuperscript{31} The United Nations Guidelines for the Prevention of Juvenile Delinquency, Adopted and proclaimed by General Assembly Resolution 45/ 112 of 14\textsuperscript{th} December 1990 Para 56

\textsuperscript{32} Loc. Cit.

\textsuperscript{33} KHATIWADA Ishwor-Prasad (2005), ‘Ensuring Fair Trial in Cases Children in Conflict With the Law’, Op. Cit.;

\textsuperscript{34} Loc. Cit.
in conflict with law is disastrous to the child and also to the society. In fact, it is not the wrong committed, but the punishment imposed renders the child a ‘delinquent’. Psychologically, a child is destroyed by the punishment that results following a tedious procedural formalism under the criminal justices system. It is primarily understood that the procedures applicable in the criminal justice system are designed to ‘fairly and impartially’ deal with the adult offenders, but not necessarily for the children. The treatment and punishment make them a deviant to the values of the society.  

The studies conducted throughout the world unanimously conclude that the penal system has negatively contributed to the development of the children in conflict with laws. The main thrust of juvenile justice should be focused on rehabilitation, restoration and reintegration rather than mere punitive repression. Helping the child to understand the consequences of the act he/she has committed is a ‘fundamental object’ of the modern juvenile justice system. The education, rehabilitation and family or social reintegration are the desired and zealously protected goals. The notion of juvenile justice calls for responsible and psychological sensible institutions, procedures and outcomes. A child is, thus not investigated, prosecuted and adjudicated in the same way as an adult. The diversion in treatment of children in relation to matters of justice is an urgent need where children in conflict with laws are subjected to hardship of criminal justice process. Furthermore, the children in conflict with laws should be offered a chance to make a fresh start in the society without permanent stigmatization. The basic principle of juvenile justice is that the child should not be considered as a criminal, but as a person who need special care, love, protection and treatment for resolution of his or her problem. 

The main ration justifying a different system for juvenile offenders has two folds. Firstly, the age of minority is used as diminishment of guilt; this ‘excuse de minorite’ (as it is stated in French law) leads to the reduction of punishments compared to those applicable to adults. Secondly, it is believed that children are more adaptable than adult. They have bigger potential to evolve


37 Loc. Cit.
positively, if they are properly followed up. Measures adopted by the court in the event of juveniles’ cases should therefore strongly be pedagogically oriented.\textsuperscript{38}

The right based approach in the treatment of juvenile matters is another important aspect of juvenile justice. Children are treated in a restorative way not only because they need special protection, their best interest are protected because they deserve it. Every child has the right to be protected from family, society and also from the state.

**Dilemma between justice and welfare**

It is common for systems dealing with children and young people in trouble to be differentiated along the two broad dimensions of ‘justice’ and ‘welfare’. ALDER and WUNDERSITS\textsuperscript{39} have summarized justice and welfare models as follows:

‘The ‘welfare model’ is associated with paternalistic and protectionist policies, with treatment rather than punishment being the key goal. From this perspective, because of their immaturity, children cannot be regarded as rational or self-determining agents, but rather are subject to and are the product of the environment within which they live. Any criminal action on their part can therefore be attributed to dysfunctional elements in the environment.”\textsuperscript{40}

By contrast, the ‘justice model’:

“Assumes that all individuals are reasoning agents who are fully responsible for their actions and so should be held accountable before the law. Within this model, the task of the justice system is to assess the degree of culpability of the individual offender and apportion punishment in accordance with the seriousness of the offending behavior. In

\textsuperscript{38} DUMORTIER Sebastian (2003), *HMG/ UNDP Strengthening the Rule of Law and Reform of the Judiciary Programme*, Kathmandu p. 5

\textsuperscript{39} ALDER C. and WUNDERSITS J. (eds) (1994), *Family Conferencing and Juvenile Justice: The Way Forward or misplaced Optimism?*, Australian Institute of Criminology, Canberra

\textsuperscript{40} Loc. Cit.
doing so, the individual must be accorded full rights to due process, and state powers must be constrained, predictable and determinate’. 

It is thus important to note that when thinking of the legal rights of children, it is useful to distinguish between welfare rights (welfare model) and liberty rights (under justice model).

2.2.2 Aims of Juvenile Justice
International law incorporates a number of basic principles upon which a juvenile justice system should be based. The first purpose is the encouragement of the well-being of children; the second goal is that children should be dealt with in a manner proportionate both to their circumstances and to the offence. Both the Convention on the Rights of the Child and the Beijing Rules emphasize the well-being of the child in administration of juvenile justice. The overriding right of the child to maintain regular personal relations and direct contact with his or her parents is one aspect of helping a child achieve this sense of well-being is that, in all cases where children are ‘alleged as, accuses of, or recognized as having infringed the penal law’ they should be treated in a manner consistent with the promotion of their sense of dignity and worth, and which reinforces their respect for human rights. Any treatment should take into account the child’s age and desirability of promoting their reintegration and their assumption of a constructive role in society.


44 Loc. Cit.
2.3 The Best Interest Principle

First and foremost, the UN Convention and the African Charter are promised on the ‘best interest of the child’ principle as a primary consideration in all matters concerning children. This principle guides the application of all other principles of the Conventions, including those relevant to juvenile justice. Its applications are not limited to decisions made by the court of law; the best interests of the child must be broadly applied to investigation, prosecution, administrative decisions, policy formulation and so forth.

The phrase ‘the best interest of the child’ appears in a variety of contexts throughout the Conventions. In particular, it is used in relation to: the separation of the child from the family setting; the upbringing and development of the child; adoption and comparable practices and the child involvement with the police and the justice system.

This phrase is of particular importance since this is an umbrella provision which purports to prescribe the approach to be followed ‘in all actions involving children’. It is for this reason that it will often be invoked in conjunction with other article of the conventions in order to support, justify or clarify a particular approach to issues arising under the convention. It will be of special relevance and importance whenever there is an apparent or a real conflict between two or more rights recognized by the convention and when a situation is not otherwise explicitly covered by the convention.

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45 UN CRC, Article 3; at the international level this principle has been included in the 1959 Declaration of the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 and the Declaration on Social and the Legal Principles relating to the Protection and Welfare of Children, 1986, with Special Reference to the Foster Placement and Adoption Nationally and Internationally. Article 4 of the Protocol to the African Charter on the Rights of the Child provides provision for the best interest of the child as a matter of primary consideration.

46 UN CRC Art 9

47 UN CRC art 18

48 UN CRC art 20 and 21

49 UN CRC 37 and 40

The principle has nevertheless been criticized by scholars and others, especially on the ground that it is open-ended or indeterminate. It is suggested that its application in a given situation will not necessarily lead to any particular outcome. The problem is how to identify the criteria that should be used to evaluate alternative options that are open to a decision maker seeking to act in the child’s best interest. Despite all these criticisms, the convention as a whole goes a long way towards providing the broad ethical or value framework that is often claimed to be the missing ingredient which would give a greater degree of certainty to the content of the best interest principle. It provides a carefully formulated and balanced statement of values to which states parties have formally subscribed.\textsuperscript{51}

PART THREE

3.0 LEGAL AND INSTITUTIONAL FRAMEWORKS

3.1 The International Legal and Institutional Framework on Children in Conflict with the Law

3.1.1 Introduction

States have an obligation to ensure that children in conflict with the law benefit from diversion and alternatives to the greatest extent possible, in the context of international co-operation where necessary.

The importance of diversion and alternatives to detention for children in conflict with the law is set out in numerous international human rights law instruments. At least 15 different international human rights instruments and related guidelines, dating from 1995 to 2009, contain a staggering total of 77 articles, rules, guidelines or provisions supporting diversion and alternatives for children in conflict with the law. 52

Of these 77 articles and provisions: 10 are largely binding on States which have ratified the relevant instruments (of which 4 are from the CRC – Articles 37 (b), 40.1, 40.3 (b) and 40.4); 22 paragraphs from the General Comments of the Committee on the Rights of the Child; and 45 are taken from the body of UN rules and Guidelines relevant to this area. Furthermore, 4 regional human rights instruments contain a total of 14 articles relevant to diversion and alternatives, all of which are legally binding on States which have ratified them. 53

3.1.2 International Instruments on Children in Conflict with the law (Juvenile Justice)

There are numerous International Instruments which provide for how situations where Children are in Conflict with the Law should be treated, a summary of these include the following:

International Instruments specific to children include: Convention of the Rights of the Child (1989); Committee on the Rights of the Child general Comment No. 10 (2007), Children’s rights in Juvenile Justice, General Comment No. 12 (2009), Right of the child to be heard, General Comment No. 9 (2006), The rights of children with disabilities, General Comment No. 11

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53 Loc. Cit.

International Instruments which apply to both Children and Adults include: International Covenant on Civil and Political Rights (ICCPR) of 1966; United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) of 1990; Standard Minimum Rules for the Treatment of Prisoners of 1955; Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment of 1988; and Guidelines on the Role of Prosecutors of 1990. A summary of all the above stated instruments can be found under the Convention on the Rights of the Child (CRC) which are legally binding on states which have ratified the instruments, these include: Deprivation of the liberty shall not be unlawful or arbitrary and shall be used only as a last resort and for the shortest appropriate period of time; Treatment of Children in conflict with the law shall respect their dignity and worth, reinforce the child’s respect for the rights and freedoms of others, and take into account their age and promotion of social reintegration; Diversion to be promoted where appropriate and respecting human rights and legal safeguards; and a Variety of proportionate alternatives to post-trial children are dealt with in a manner appropriate to their well-being.

3.1.3 The Role of the UN Committee on the Rights of the Child

The Committee on the Rights of the Child (CRC) is a body of independent experts that monitors and reports on implementation of United Nations Convention on the Rights of the Child by

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54 Article 37(b) of the CRC
55 Article 40.1 of the CRC
56 Article 40.3 (b) of the CRC
57 Article 40.4 of the CRC
governments that ratify the Convention. It also monitors implementation of the two protocols to the Convention, on involvement of children in armed conflicts and on sale of children, child prostitution and child pornography.

The CRC is one of the eight UN human rights treaty bodies. States that have ratified the convention are required to submit initial and periodic reports on the national situation of children’s rights to the Committee for examination. The Committee examines each report and raises concerns or makes recommendations to the state party. It also issues general Comments on the interpretation of particular CRC obligations. The Committee examines each report and addresses its concerns and recommendations to the state party in the form of ‘concluding observations’.

Over two decades after its creation the CRC with regards to the situation of children in conflict with the law, the UN Committee has made clear “that many states parties still have a long way to go in achieving full compliance with CRC, a good examples is in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort”.

The Committee has often drawn the attention to the fact that a high number of European states have a low age of criminal responsibility, high rates of incarceration and disproportionate criminalization of children from minority groups as well as have failed to ensure that detention is used as a measure of last resort.

Based on the states parties performance reviewing in the field of juvenile justice the Committee has elaborated guidance and recommendations for states to help in establishing an administration of juvenile justice in compliance with CRC and therefore to improve the situation of children in conflict with the law.

According to the Convention and the role played by the Committee, states have been progressively adopting legislation regarding the administration of juvenile justice over the past two decades. Improvements made since the adoption of the CRC regarding the development of better juvenile justice systems differ from one region to another, depending on their approach to

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58 FOUSSAND Cedric (2009), ‘Two Decades of Juvenile Justice: Improvement since the adoption of the CRC’, International Juvenile Justice Observatory, Brussels p. 2
fundamental rights and their approach to fundamental rights and their legal and technical capacities. The Committee further stated that in many countries tools and means of effectively implementing the Convention provisions are missing. Professionals and staff working in youth institutions, judges, lawyers and social workers lack special training in the field of legal, psychology and fundamental rights, authorities have established specific courts for minors, adopted to children psychological and physical particulars. Lately new developments show that the international community is moving forwards and works to make the justice systems child friendly.  

3.2 The Regional Legal and Institutional Framework on Children in Conflict with the Law

3.2.1 Introduction

In his speech Dr. Benyam Dawit Mezmur the Vice Chair of the African Committee of Experts on the Rights and Welfare of the Child, indicated that the challenges and opportunities in regard to children in conflict with the law are similar across various regions. The world regional bodies including the African Union have put in place instruments that guarantee the Rights of the Children, the principle aim being to advance the respect of their rights and enhance better treatment which is solely based on their welfare.  

3.2.2 Regional Instruments on Children in Conflict with the Law (Child Justice)

Looking at the regional instruments on the Rights of the child, it is tantamount to analyze the various instruments put in place by the various world regions including Africa, these instruments include the following: The American Convention on Human Rights of 1969 which codifies

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59 *Loc. Cit.*

juvenile justice issues under its article 7(5)\textsuperscript{61} and article 19\textsuperscript{62}; The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 which codifies child justice under article 5(1)\textsuperscript{63}, and Article 5(3)\textsuperscript{64}; The Arab Charter on Human Rights also codifies child justice in its article 14(1) and 14(2)\textsuperscript{65}, Article 14(5)\textsuperscript{66}, Article 14(6)\textsuperscript{67}, Article 14(7)\textsuperscript{68}, Article 17\textsuperscript{69}, Article 18\textsuperscript{70} and Article 33(3)\textsuperscript{71}. The African Region has also adopted instruments that guarantee the rights of children. The principal instrument in this regard is the African Charter on Human and Peoples Rights (ACHPR). Although the ACHPR mentions the word child only once as seen in Article 18(3), where states are required to ensure the protection of the rights of the woman and the child, all the rights guaranteed by the Charter apply to children as much as they apply to everyone.\textsuperscript{72} The African Charter on the Rights and Welfare of the Child is another important milestone in the regional Systems, specifically the African Region. This convention provides for several

\begin{itemize}
  \item[61] “\textit{anyone detained shall be brought promptly to trial and may be released pending trial, although release may be subject to certain guarantees}”
  \item[62] “\textit{Children have the right to protection}”
  \item[63] “\textit{Right to liberty except in certain circumstances prescribed by law and legal detention must be reasonably considered necessary}”
  \item[64] “\textit{Anyone detained shall be brought promptly to trial and may be released pending trial, although release may be subject to certain guarantees}”
  \item[65] Protection from arbitrary and illegal detention
  \item[66] Right to speedy adjudication and promotion of alternatives to pre-trial detention, although release may be subject to certain guarantees
  \item[67] Right to challenge unlawful detention and to secure release if detention is deemed unlawful by a court
  \item[68] Right to compensation in the case of unlawful arrest or detention
  \item[69] “\textit{Children in Conflict with the law have the right to special treatment which promotes rehabilitation and reintegration}”
  \item[70] No detention for those who are unable to fulfill a contractual obligation
  \item[71] Children in Conflict with the Law have the right to protection, survival, development, well being, freedom, dignity and to have their best interests considered
\end{itemize}
provisions which guide the treatment and handling of children when in conflict with the law, a 
good example of these provisions include Article 17(1) which provides that children in conflict 
with the law should have special treatment, consistent with their dignity and worth which 
reinforces their respect for the rights and freedoms of others, and Article 17 (3) which provides 
that the aim of trial and sanctions is the rehabilitation and social re-integration of children in 
conflict with the law.

3.2.3 CURTIS FRANCIS DOEBBLER V SUDAN CASE

Indeed in the African jurisprudence developed by the African Commission on Human and 
peoples’ Rights (the Commission) has generated the respect to rights of children in conflict with 
the law, such rights including the right to liberty and fair trial which is indeed relevant to 
understanding child justice in Africa.

A good of example of this jurisprudence developed by the commission rests in the case of 
CURTIS FRANCIS DOEBBLER V SUDAN CASE\(^73\) which is a case of lashing done under the 
Sudanese law, the African Commission on Human Rights relied upon TYRER JUDGEMENT\(^74\) 
and declared all forms of corporal punishment as illegal because of being cruel, inhuman and 
degrading treatment thus amounted to torture. The African Commission in reaching its decision 
seems to have adopted a simple and expanded version of the reasoning in the TYRER CASE\(^75\) 
appearing quite unperturbed by the tensions inherent in that judgment. The Commission stated 
‘There is no right for individuals, and particularly the government of a country to apply physical 
violece to individuals for offences. Such a right would only be tantamount to sanctioning state 
sponsored torture under the Charter...’\(^76\)


\(^74\) TYRER V THE UNITED KINGDOM, ECHR Case No. 5856/72

\(^75\) CURTIS CASE, ACHPR judgment Para 38

\(^76\) Ibid Para 42
3.2.4 The Role of the African Committee of Experts on the Rights and Welfare of the Child on Child Justice

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) is a body of experts established by article 32 of the African Charter on the Rights and Welfare of the Child (ACRWC). It is a body which derives its mandate under article 42 of the ACRWC to promote and ensure the protection of the rights of the child enshrined in the ACRWC.

The core aspects of the ACERWC include: the promotion and protection of the rights enshrined in the ACRWC, particularly to collect and document information, commission inter-disciplinary assessment of situation on African Problems relating to rights and welfare of the child, organize meetings, encouraging national institutions working on the rights and welfare of the child, and where necessary give its views and recommendation to governments; Formulation of principles and rules aimed at protecting the rights and welfare of the child; Monitoring the implementation of the ACRWC; and Interpretation of the ACRWC at the request of a state party, institution of the AU or any other person or institution recognized by the AU.

In carrying out the above stated duty the ACERWC is empowered to receive and examine the reports submitted by state parties, and Receive complaints against states on child rights (it is the only body dealing with children which has power to receive complaints).

The ACERWC has to date made a great contribution to child justice in Africa, a good example being the research on the ‘Best Interest of the Child’ principle and on ‘Article 31’ of the ACRWC regarding the duties of children. The research findings were presented during the 10th and 12th Session of the Committee.

The Committee has also successfully worked a lot with NGO’s since its creation knowing their importance in better respect for child rights. To strengthen its relation with NGOs the Committee has adopted its guidelines on the Granting of Observer Status to NGOs. A good example being in the case of Nubian Children in Kenya V Kenya where the Committee successfully heard the matter after submission by the IHRDA (Institute for Human Rights and Development in Africa).

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77 In November 2007 and May 2008 respectively

78 The first NGO Forum preceding the Session of the Committee was held prior to the 13th Session held in Addis Ababa, Ethiopia from 17th to 19th April 2009

79 Nubian Children in Kenya Vs Kenya (merits hearing) ACERWC Communication
thus announced its first preliminary decision on communication 002/09 finding that Kenya was in violation of its obligations under the African Charter.

3.3 The Tanzanian Legal and Institutional Framework regarding Children in Conflict with the Law

3.3.1 The Tanzanian Justice System

The Judiciary is one of the three pillars of the state in Tanzania. Upon which rests the duty to interpret the law and also adjudicate over disputes in the society. Under the Union Constitution the Judiciary is not a Union Matter between former Tanganyika and Zanzibar. Therefore each part of the United Republic has its own judicial system. The only unifying factor being the Court of Appeal of Tanzania established in 1979 after the collapse of the former East African Community.  

There are four types of courts in Tanzania Mainland. Each has its own territorial and pecuniary jurisdiction. These courts are the Court of Appeal of Tanzania, The High Court, The Resident Magistrate Court, which also houses the District Court and the Primary Courts. Besides these there are also Quasi Judicial bodies which have been given powers to determine specific disputes under an Act of the parliament.

3.3.2 Domestication of International Human Rights and Child Rights Law

3.3.2.1 Domestication Concept

Despite the historic development of international law, which has focused on the relationships between states, it is the individual who is the ultimate beneficiary of any international legal system. The problem, however, is that for century’s international law was not concerned with limiting state’s power over individuals. Thus the transformation of the status of the individual in international law is one of the most remarkable developments in international Law. 

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81 Ibid p. 222

The protection and enforcement of human rights has evolved comparatively recently in five and half decades from a mixture of both principle and pragmatism. States have recognized that in order to be protected and respected basic needs of the people have to be transformed into rights. This understanding and recognition has made possible the transformation and domestication process of international human rights laws into national legal system.\textsuperscript{83}

In the Tanzanian Context the individual petitioning system of remedying human rights violation under international or regional mechanism has been practiced so far, a possibility which has risen basing on the fact that Tanzania has ratified Article34 (6) of the Protocol on the establishment of the African Court on Human and Peoples Rights allowing individuals and NGO’s to institute cases against it on violations of Human Rights.\textsuperscript{84}

### 3.3.2.2 Tanzania’s dedication to International Children’s Rights Instruments

As of to date, Tanzania has ratified the following international instruments relating to children’s rights.\textsuperscript{85}

(i) The convention on the Rights of the Child\textsuperscript{86} on 10\textsuperscript{th} June 1991 without reservations;

(ii) The African Charter on Human and Peoples Rights on 18\textsuperscript{th} February 1984;

(iii) The ILO Worst Forms of Child Labour Convention on 12\textsuperscript{th} September 2001;

(iv) The ILO Minimum Age Convention on 16\textsuperscript{th} December 1998; and


There are also other international instruments to which Tanzania is Committed in Relation to the Administration of Juvenile Justice. These Include.\textsuperscript{87}

\textsuperscript{83} *Loc. Cit.*

\textsuperscript{84} Until 2011, Tanzania was one amongst the 5 countries who have accepted the courts jurisdiction under article 34(6) of the Protocol.


\textsuperscript{86} Tanzania has also Ratified two Protocols to the CRC during the February 2003 Bunge

\textsuperscript{87} MASHAMBA Clement J. (2010), *Introduction to Family Law in Tanzania* Op. Cit. p. 84
a) The UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules);
b) The UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh guidelines);
c) The UN Rules for the Protection of Juveniles Deprived of their Liberty;
d) The UN Standard Minimum Rules for Non-Custodian Measures (The Tokyo Rules);
e) The UN Guidelines for Action on Children in the Criminal Justice System; and
f) The UN Declaration of Basic Principles of Justice for Victims of crime and Abuse of Power.

3.3.3 The Juvenile Justice System in Tanzania

3.3.3.1 The Juvenile Justice System: New Hope under the law of the Child Act of 2009

Children frequently get arrested by police and brought before courts where they are charged with criminal offenses or classified as being ‘in need of protection or discipline’. These Children are subjected to brief hearing on their cases whereby they may be deprived of their liberty and committed for years to juvenile correctional institutions known as approved schools.\(^8\)

Juvenile Justice System is made up of the legislations, processes, institutions and persons involved in the treatment of children accused of committing a criminal offence. In Some literature as stated in the previous sections, the term juvenile justice system is also referred to as ‘juvenile criminal justice system’, ‘child justice’ or ‘administration of juvenile justice’ or ‘simply juvenile justice’.

Essentially a juvenile is any ‘child’ who can be subjected to a criminal justice system or any person with the age of criminal responsibility. For example in Tanzania, section 15(1) of the Penal Code (Cap. 16) provides for children who cannot be criminally liable.

Therefore in the Tanzanian context, a juvenile is a child between ten (10) to eighteen (18) years, noting the fact that the Law of the Child Act has harmonized a child as a person under the age of 18 years. In that regard, the term ‘juvenile’ becomes a subset of a term ‘child’. It is true to say that Juveniles are subjects of juvenile system, but not all children are as such.

A. **Juveniles as an offender or a Victim**

Juvenile Justice System is designed to deal with children who are in conflict with the law (Juvenile offenders), and those who have been affected or injured by criminal acts of others (juvenile victims).

**Juvenile as an offender:** This means a situation where a child is actually a perpetrator of an offence, therefore may come into contact with the juvenile/ criminal justice system. Offences committed by juveniles are in most cases directed to members of the peer age groups, especially where a juvenile engages into criminality for survival. Generally, children are likely to commit offences such as chronic, persistent truancy, running away, being incorrigible, and violating curfew laws, possessing alcohol / tobacco and various others. Therefore if a child finds himself/herself in any of the above circumstances becomes a law breaker and therefore a subject of juvenile justice system.

89 Section 4 of the Law of the Child Act ‘defines a child as a person below the age of 18 years’

90 1) a person under the age of ten years is not criminally responsible for any act or omission

2) A person under the age of twelve years is not criminally responsible for any act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do that act or make the omission.

3) A male person under the age of twelve years is presumed to be incapable of having sexual intercourse…

**Juvenile/ Child as a victim**: The United Nations Convention on justice and support for victims of crime and Abuse of Power\(^2\) under Article 1(1)(2) define and explain the term `victim` to mean:

1) Natural persons who, individually or collectively, have suffered harm including physical or mental injury, emotional suffering or economic loss or violations of fundamental rights in relation to victimizations identified under scope

2) A person is a victim regardless of whether the crime is reported to the police, regardless of whether a perpetrator is identified, apprehended, prosecuted, prosecuted or convicted and regardless of the familial relationships between the perpetrators and the victim. The term ‘victims’ also includes, where appropriate, the immediate family or dependants of the direct victims and persons who have suffered in interviewing to assist victims in distress or to prevent victimization.

Simply a victim of a crime is an identifiable person who has been harmed individually and directly by the perpetrator, rather than by a society as a whole.

In regard to a juvenile or child victim, it denotes a child and adolescent, under the age of 18, who is a victim of a crime, witnesses to crime regardless of his or her role in the offence or in the prosecution of the alleged offender or groups of offenders. Generally, offenders in juvenile or child victimization are likely to be family members (siblings or parents), neighbors, acquaintances (school mates, teachers and friends) law-enforces (police, private security personnel) and strangers. In most cases juveniles/children are victims of offences such as rape, sexual assaults, simple and aggravated physical assault, defilement, commercial and sexual exploitation (illegal prostitution, child labour and trafficking in children), abduction and kidnapping, child pornography, exposure to sexual materials via internet, unnatural offences, indecency, incest, child stealing, theft, neglect, cruelty, desertion, burglary, murder, robbery and various others.\(^3\)

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\(^2\) Draft Convention, 08/02/2010

\(^3\) CENTRE FOR CHILD LAW (2008), *Justice for child victims and witnesses of crime*, Faculty of Law University of Pretoria, PULP, Pretoria
B. Juvenile Courts

On the Mainland, Under the Law of the Child Act of 2009 under its Section 97 (1) it provides for the establishment of Juvenile Courts for purposes of hearing and determining child matters relating to children. The Court is given the power to use any premises of a primary court which will be presided over by a Resident Magistrate. However the Court in carrying out its duties may wherever possible sit in a different building from the building ordinarily used for hearing cases against adults.

Formerly under the Children and Young Persons Act, every district court hearing juvenile cases converted into a ‘juvenile court’ and applied the procedure stipulated under the C&YPA. However the law further stipulated that once the accused is found to be a child or young person it is mandatory that the court should immediately sit as a juvenile court and proceed to hear the case, unless it is not practicable in a room or building which is different room from that ordinarily used as a court room or court house. This point was also emphasized in the case of MOKAMAMBOGA V REPUBLIC, in which the accused was a child or a young person but there was no indication in the records that the proceedings were held in a place different from an ordinary court room nor was there any indication that it was not practicable for the court to sit in a place different from an ordinary court room. It was held that “In order to comply with the above provision therefore the trial magistrate in hearing the case should if practicable, have sat in a place different from an ordinary court room”.

C. Jurisdiction of Juvenile Courts

Jurisdiction of Juvenile Courts on the Mainland Tanzania and in Zanzibar is very broad and extends to any offence from as far as petty offenses to serious offences committed by that respective child facing justice are concerned.

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94 Section 97 (2) and (3) of the Law of the Child Act (LCA)

95 Section 98 (3) and 100(1) of the LCA of 2009

96 (1971) H.C.D 63

However under the Current Law of the Child Act of 2009\textsuperscript{98} Jurisdiction of Juvenile Courts is vested on hearing and determining any criminal charges against a child,\textsuperscript{99} applications relating to child care, maintenance and protection,\textsuperscript{100} but most of all Juvenile courts possesses the jurisdiction and can exercise powers conferred upon it by any other written law.\textsuperscript{101}

In situations where a child is brought before the Juvenile Court for any offence other than homicide, the law requires that the Juvenile Court in carrying out its duties should ensure that the case is be disposed by that court on that day.\textsuperscript{102}

The Law of the Child Act has indeed brought a new development to the issue of child rights when in conflict with the law, the Act goes further to provide for provisions concerning Juvenile Court and its proceedings, situations of a child as a witness, custodial sentence, alternative sentences, and so many others, however the most important thing is that the Act conform to the principles and guidelines put in place under the international and regional law.

### 3.3.4 Tanzanian Constitutional and Procedural Guarantees on Fair Trial and Child Rights

It is important to note that there exists a series of Constitutional and Procedural guarantees in the 2009 Law of the Child Act and the Tanzanian legal framework under which a child in conflict with the law is protected. Every person including a child who is arrested for allegedly committing an offence has:\textsuperscript{103}

- The right to remain silent. It include also the right not to be compelled to make any confession or admission that could be used in evidence against him/her, Sections 52(1), 53(c) (i) of CPA, RE: 2008.

\textsuperscript{98} Section 98(1) to (3) provides for Jurisdiction of a Juvenile Court

\textsuperscript{99} Section 98 (1) (a) of the LCA

\textsuperscript{100} Section 98(1) (b) of the LCA

\textsuperscript{101} Section 98 (2) of the LCA

\textsuperscript{102} Section 103 (2) of the LCA

\textsuperscript{103} SHADRACK Jaba (2011), ‘Legal Protection of a Child in a conflict with the Law in Tanzania: Constitutional and Procedural Rights’, Department of Public Law, UDSM-School of law, Dar Es Salaam
The right to be informed promptly of the charges by the police: communication of the charge (i.e. the police must, as soon as possible after arrest, explain the nature of allegations in a language and manner the child can understand), Sections 23(1)(2) & 53(b) of CPA, RE: 2009. The Juvenile Court is also duty bound to explain to the child, in simple language, the particulars of the alleged offence (Section 105 of the LCA, 2009).

- The right to prompt notification of arrest: arrest and notification of parents and guardians, (a parent or guardian should be notified immediately after the child is apprehended or, if this is impossible, “within the shortest possible time thereafter”), section 56(1) of CPA). This includes also the right of a child to communicate with parent, relative, friend, lawyer after being arrested under sections 53(c) (ii), & 54(1) of CPA.

- Right to be separated from adult offenders: Separation from adults during transportation (or transportation with supervision), and in police custody/detention/prisons/facilities (see, Section 102 of the LCA).

- The right to be released on bail (or his recognizance) with or without surety (Sections 101, 104, 111(2), 116, 125, and Section 131 of the LCA)

- The right to be brought before a Court of law as soon as (reasonably) possible, sections 32 (1) and 33, 118 of the CPA. However, section 103(1) of the LCA requires a child to be brought to Court only after investigation is complete.

- The Right to legal assistance: to have the assistance of a lawyer/advocate or next of kin (legal representation): Once arrested or detained, a child is to be advised immediately his/her right to counsel (Section 99(1)(f) of LCA).

- The right to be heard or to show cause (audi alteram partem): the child shall have a right to give an account and express an opinion (Article 13(6)(a) of the URT Constitution, Sections 99(1)(h)(2)(a)(b), 106 & 110 of LCA).

- The right to informal procedures/proceedings (Sections 99(1)(c), 103(2) of LCA). See, also section 187 of CPA).

- The Right to Privacy: trials in camera [Section 99(1)(b)(2) of LCA], trial/proceedings to be conducted/held in a different building or room from that which the
ordinary proceedings of the court are conducted [MUKAMAMBOGO V. R. (1971) HCD 63; Sections 98(3), 100(2)(3) of LCA], law reports should not have names of minors (this is not the case in Tanzania), no criminal records or disregard of such records (destruction after trial). Again, Sections 33(1)(2) & 158(1)(d) of LCA prohibit publication (or cause to be published) any information (or photograph) which is prejudicial to the best interest of a child without court’s order. See, also Article 16(1)(2) of the URT Constitution.

- The right to free assistance of an interpreter (not expressly provided under Tanzanian laws)
- A right of a parent, guardians or a next of kin to be present during trial (parent presence in the Juvenile Court) as per Sections 99(e) & 112 of LCA.
- The right to appeal: the right to appeal shall be explained to the child (Article 13(6)(a) of the URT Constitution, Section 99(1)(g) of LCA).
- The right to be tried in a Juvenile Court, section 100(2) of the LCA which provides that:

  “Where in the course of any proceedings in a court it appears to the court that the person charged or to whom the proceedings relate is a child, the court shall stay the proceedings and commit the child to the Juvenile Court.”

- The right of not to be incarcerated/imprisoned (sections 116, 119(1) & 120(1) of LCA).

Again, the law requires a juvenile offender to be remanded to the care of the Commissioner for social welfare or fit person or institution, not in prison or police custody (section 104 (1) of the LCA).

- The right to be protected from torture, inhuman and degrading punishment or treatment:

  Minimum force should be used in dealing with children (Section 13 of LCA, Article 13(6) (e) of URT Constitution, 1977, section 55(1) of CPA).

- The right to give evidence or testify or act as a public witness in Court where a child is a victim of an alleged offence, subject to the law (Sections, 115(1)-(4) of LCA, & 127(1)-(8) of the Evidence Act, RE: 2007).
The right to be presumed innocent until charged and convicted as such by the Court of law, Article 13(6)(b) & 15(2)(a)(b) of the URT Constitution.

Protection of child’s rights and dignity in all activities pertaining to criminal investigations and process, restraint/detention, or in the execution of a sentence (see, Article 13(6) (d) of the URT Constitution.

The police officer should confirm the age of the child. Likewise, the court is also obligated to make an inquiry as to the age of the child (section 113(1) of LCA).

However it is also important to note that Sections 59(6)-(10) of CPA which establishes the Criminal Records Office is silent as to the exclusion of children criminal records from the police database. Again, Section 100(1) of LCA violates the principle of privacy as it waives the right of a child to be tried in a Juvenile Court where charged jointly with an adult offender.  

PART FOUR

4. CONCLUSION AND RECOMMENDATIONS

4.1 CONCLUSION

It’s evident from the latter chapters that a Juvenile Justice System including that of the United Republic of Tanzania is made up of a series of components some of which include the legislations, processes, institutions and persons involved in the treatment of children accused of committing a criminal offence.

Recognizing that the Tanzanian system indeed possessed enormous number of weaknesses when it comes to situations of Children in conflict with the Law, the Law of the Child Act\(^1\) adopted in 2009, represents an important step in developing a child rights compliant juvenile system. However the challenge now is how to effectively implement the Law of the Child Act.

In 2009, the National Organization for Legal Assistance (NOLA) published a commentary on the new Law, which included a review of how the LCA impacts on the framework for the juvenile justice system. However, to date, there has been no comprehensive assessment as to how the system operates in practice and how it will operate under the new LCA. In particular, there has been no study to determine the obstacles and opportunities for implementation of the LCA and the international juvenile justice framework.

4.2 RECOMMENDATIONS

Analytically there are essentially several notable weaknesses even in the present Law of the Child Act, a good example being under Section 100(1) of LCA which violates the principle of privacy as it waives the right of a child to be tried in a Juvenile Court where charged jointly with an adult offender.\(^1\)

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\(^1\) Act No. 21 of 2009

However alternative sanctions to deprivation of liberty represent an important opportunity to ensure that the rights of some of the most vulnerable people in our societies which are our Children are further protected.

The LCA under its section 119 provides for alternatives sentence to include: discharging the child without an order, order the child to be repatriated or order the child to be handed over to the care of a willing fit person or institution. This scope covered by the Act is indeed narrow in essence, unlike the international standard which requires that children in conflict with the law to be given priorities to diversion, pre-trial alternatives and alternatives sanctions being the main response to offences committed by juveniles.

It is thus evident that there is an urgent need to develop new tools and better ways providing for restorative justice to help States like Tanzania adopt their justice systems to the situation of children, thus bring their procedures up to speed with international standards, and to properly implement them.
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