



**Tanzania Women Lawyers Association
(TAWLA)**

AN ANALYSIS OF THE SITUATION OF
CHILDREN
IN THE JUVENILE JUSTICE
SYSTEM IN TANZANIA



TAWLA

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2018

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About TAWLA

Tanzania Women Lawyers Association (TAWLA) is a membership-based association founded in 1989 and officially registered in 1990 under the Societies Act (CAP 337 R.E 2002). The association was formed primarily as a guild for women lawyers in Tanzania geared to promote the professionalism of its member and cause to advance legal and constitutional rights of women through legal aid provision. Later the organization aims and objectives evolved towards advocating for gender equality, promotion of human dignity and gender justice through policy, legal and institutional reforms, community action and media engagement.

TAWLA's mission is, "A society that respect and upholds the rights of women." The current TAWLA's Strategic Plan running through to 2019 has four strategic objectives, which are;

1. Strengthen member's engagement in TAWLA for effective delivery of the mission.
2. Advocate for review of laws and policies hindering women and children from enjoyment of basic rights.
3. Create sustainable access to justice for vulnerable women
4. Build the capacity of TAWLA for sustainable services delivery.

ACKNOWLEDGEMENT

This study on “An analysis of the situation of children in the juvenile justice system in Tanzania” is part of the implementation of the project titled “Increasing Access to Justice to Juvenile Offenders Through Addressing Structural Challenges Within the Juvenile Justice System” coordinated by the Tanzania Women Lawyers Association (TAWLA) through the generous support of PORTCUS. It is in this regard that TAWLA expresses its heartfelt gratitude to PORTCUS for the support given to facilitate us to accomplish this work and in general execution of our mandate regarding the protection of children's rights.

Special thanks go to Mr. Jones John, a researcher in development, child rights activist and advocate of the High Court of Tanzania for his great work in researching, compiling, analyzing the information gathered as well as preparing this study report.

Moreover, the form and contents of this report would have not been in this shape without the valuable contribution of TAWLA members and key stakeholders in the field of child rights including Ilala Municipal Council's Child Protection Team, the Judiciary, Social Welfare Department and Police Gender Desk in Districts where TAWLA operates.

I would like to extend my sincere gratitude to TAWLA Staff involved in this program for their valuable contribution in the accomplishment of this work, their concerted efforts and ideas are much appreciated.

To you all, we say thank you very much!

Tike Mwambipile

Executive Director

LIST OF ACRONYMS

ACERWC:	African Committee of Experts on the Rights and Welfare of the Child
ACRWC :	African Charter on the Rights and Welfare of the Child
ACHPR:	African Charter on Human and People's Rights
CAP :	Chapter
CEDAW:	Convention on Elimination of All Forms of Discrimination Against Women
CHRAGG:	Commission of Human Rights and Good Governance
CJ:	The Chief Justice of the Judiciary of Tanzania
CJF:	Child Justice Forum
CJ Strategy:	Child Justice Strategy
CRC:	Convention on the Rights of the Child
CRP:	Community Rehabilitation Program
DSW:	Department of Social Welfare
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICRPD:	International Convention on the Rights of People with Disability
GCPD:	Gender and Children Police Desks
GN:	Government Notice
LCA, 2009:	Law of the Child Act, 2009
LGAs:	Local Government Authorities
LSI:	Legal Sector Institutions
MDAs:	Ministries Departments Agencies
MOCLA:	Ministry of Constitutional and Legal Affairs
MOJCA:	Ministry of Justice and Constitutional Affairs
MHCDGEC:	Ministry of Health, Community Development, Gender, Elderly and Children
NCPA-OVC:	National Costed Plan of Action for Orphans and Vulnerable Children
NPA-VAWC:	National Plan of Action on Elimination of Violence Against Women and Children

PGOs:	Police General Orders
JJ:	Juvenile Justice
R.E :	Revised Edition 2002
SOPs:	Standard Operating Procedures
S:	Section
Ss:	Sections
ss:	subsection
SWO:	Social Welfare Officer
TANLAP:	Tanzania Network of Legal Aid Providers
TAWLA:	Tanzania Women Lawyers Association
TLS:	Tanganyika Law Society
TPF:	Tanzania Police Force
UN:	United Nations
UNCRC:	United Nations Committee on the Rights of the Child
UNICEF:	United Nations Children's Fund
v.:	Versus
WLAC:	Women's Legal Aid Committee
LHRC:	Legal and Human Rights Center

Foreword

Tanzania Women Lawyers Association (TAWLA) is a non-profit, non-partisan, non-governmental and human rights organization registered in 1990 under the Societies Act, CAP . 337 R.E 2002. TAWLA's core values include: civil rights, social justice, highest moral principles, transparency, integrity, mutual respect, gender equity, accountability and lifelong learning. TAWLA's vision is a society that respects and upholds human rights and its mission is commitment to the professional advancement of its members and the promotion of women and children's rights and good governance.

As part of execution of its vision and mission, TAWLA has been implementing program endeavoured to increase access to justice to Juvenile Offenders through addressing structural challenges within the Juvenile Justice System in Tanzania. For that reason TAWLA aimed to make a thorough study of the situation of the Juvenile Justice System before and after enactment of the Law of the Child Act, No. 21 of 2009, analysing the mischief aimed to be cured as far as Juvenile Justice System is concerned and identifying gaps if any, in the law. It also aimed to make a comparison of the Law of Child Act and the regional and international best practices on how to addresses Juvenile Justice System challenges and provides recommendations thereof in a report form.

Therefore this report is written to stand firm as an advocacy tool as well as to be an educational material, it is highly expected that all issues discussed in this report in terms of the comparison, challenges as well as recommendations and a way forward shall be of a great assistance in planning strategies to improve the performance of the juvenile justice system and pave a way of amendment of unjustified laws that are not in favour of juvenile justice in the United Republic of Tanzania.

More broadly, it is also hoped that the report will help to engage and inform practitioners, policy makers and researchers about key governance on issues relevant to the situation of children in juvenile justice system in the United Republic of Tanzania.

Executive Summary

This is the study commissioned by the Tanzania Women Lawyers Association, TAWLA, to conduct an assessment, mainly based on the desk review, in order to establish the situation of children passing, and being served by the juvenile justice system in Tanzania. The study is conducted in Dar-es-salaam, by reviewing the existing information available on different practice reports, and applying action research techniques where through participating in various activities and consultations in order to gain access to wealth of existing information and processes. On top of it, the assessor is part of the CJF Technical Team that has participated in writing and finalizing the Evaluation of the Child Justice Strategy, which lends significantly to the content of the present report, with specific reference to the content of Chapter Six to this report.

This report follows a particular analytical framework that interrogates issues around the following:

- (i) Establish the Law of the Child Act, 2019, and its attendant Juvenile Courts Rules as a yardstick the provisions of which provides the context, for which juvenile justice is to be measured,
- (ii) Trace the status of juvenile justice from prior to the enactment of the Law of the Child Act, 2009, drawing from the Access to Justice Study and Juvenile Justice Study conducted in 2011 by MOJCA, now MOCLA, assumingly providing benchmarks prior to the operationalization of the LCA, 2009.
- (iii) Examining the impact of the National Child Justice Progressive Reform Strategy as a mechanisms and tool through which operationalization of the LCA, 2009 in part, and improvement to the Juvenile Justice system overall, was to be pursued and effected, and appraise information obtaining from the impending evaluation report,

- (iv) Examine the potential or limitations of optimizing the juvenile justice reform efforts by building upon the strengths yielding from the past 8 years since the operationalization of the LCA 2009, and the experience of an implementation of the Five Year Strategy for Progressive Reform of Child Justice 2013-2017 (hereinafter the CJ Strategy), especially through the alignment provided by the NPA-VAWC, and whether the momentum can be maintained with or without the newly defined follow up Child Justice Strategy or Plan or Action.
- (v) And through primary data, as far as is obtainable, examine system users perspective from the point of view of their own perception of change

While the report succeeds to provide an elaborate analysis on the first four questions (i-iv), it became practically impossible working with constraints of time and resources to answer the fifth (v) although an earlier attempt was made to collect data form juvenile justice professionals based TAWLA's project regions. Due to insignificance of the information obtained from the project area, primary data, analysis of primary data was discarded. Regardless, it is though with the depth of existing literature and secondary data, this omission does not occasion major setback to the assessment.

The report is organized around seven Chapters. Chapter I explains the rationale for the study and the objectives sought to be achieved through the findings, Chapter Two elaborates on the contextual background, and attempts at giving an initial update on the ongoing process of reforms, it also underlines the methodological approaches for the study. Chapter Three traces the change process by exploring the international juvenile justice related instruments, of which implication they are taken to influence the reform agenda, and informs much of the transition from the *Children and Young Persons Ordinance, CAP 13 R.E 2002* through to the *Law of the Child Act, Number 21/2009*.

Both Chapter Four and Five provides a comparative view of the before and after perspective. Drawing similarities and difference between the CYPA, CAP 13 and the LCA, 2009. The analysis of both scenarios gives the reader a fair amount of perspective on why it was critical to have a harmonized Child Statute, one of the reason being that CAP 13 had outlived and was indeed outdated to serve any useful purpose envisaged by the Convention on the Rights of the Child (hereinafter, the CRC) and other related international standards. Chapter Six mediates between the two positions, by analyzing and examining the progress in reforming the juvenile justice system. It carefully anchors this examination on the Child Justice Five Year Strategy for Progressive Reform (2012-2017). This necessitates studying the CJ Strategy and what it sought to achieve- and in the light of its on-going evaluation, the report helps us to grasp what has been achieved and what is the remaining work ahead.

Chapter seven draws a few conclusions that create demand for further progressive work. Based on this chapter, it appears that since the operationalization of the LCA, 2009 there has been quite incredible progress in reforming the juvenile justice system, and it is the work in progress. The recommendations points to some specific areas where further reform on the legislative framework may be needed; and there are also recommendations pointing to the further institutional alignment and CAP acity strengthening.

In fine, the overall finding of the report concludes that there have been significant efforts expended to improve the juvenile justice system and the CJ Strategy is something to thank for that shift forward. Ideally, that would be conceived as having improved the situation of children passing and being served by the Juvenile Justice system, and that should be the general understanding from this report. However, some anecdotal information from group discussions and other interviews, this general observation may not be assumed to children at individual levels. There are still evidence of children being tried along with adults, being put in detention facilities meant for adults and held for much longer periods, being tried without informing the parents, legal guardians nor being accorded support services such as legal representation and social

welfare services envisaged by the law.

Despite the Law of the Child coming into force, and the same being a key vehicle for which the juvenile justice system reforms should be pursued, and that, with that spirit, the CJ Strategy was offered as means to achieve this objective, the Law of the Child itself is still handicapped by noticeable lacunae. One such lacuna is its failure to provide, for example, a comprehensive guidance on the application of diversions and alternative measures that would work to keep children away from the mainstream criminal justice system. If approached with cross-sectional view from entry to exist, the existing law is still too fixed on the processes after the child is accused as having offended, and thus been brought before the court. Not much attention is paid to the pre-trial stage leaving it to either the discretion of the law enforcement institutions, or the applications of the same laws that the LCA, 2009 had intended to remedy. Broadly speaking, the juvenile justice system is yet to operate as the real system because simply, there still exists too many breaks.



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CHAPTER ONE

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CHAPTER ONE:

THE RATIONALE FOR ANALYSIS OF THE SITUATION OF CHILDREN IN CONFLICT AND CONTACT WITH THE LAW IN TANZANIA.

BACKGROUND TO THE PROJECT

Tanzania Women Lawyers' Association (TAWLA) has been implementing the project with the aim of building on the intervention to increase access to justice with a special emphasis on criminal justice for juvenile detainees as the vulnerable group. The assessment is a progression of the pilot project that has been running since 2013 and will come to closure in 2019.

The present study aims to build on the key learnings emanating from implementation experience of the Juvenile Justice Project. The project had showed an increasing need of legal representation to juvenile detainees as there was a number of pending criminal cases involving juvenile detainees whose cases were not determined within prescribed time.

This project has therefore endeavored to increase access to justice to Juvenile Offenders through addressing structural challenges within the Juvenile Justice System in Tanzania.

OBJECTIVES OF THE STUDY

The main objective of the study is to thoroughly assess the situation of children in the Juvenile Justice System before and after enactment of the Law of the Child Act, No. 21 of 2009. The study aims at analyzing the mischief sought to be cured by the Law of the Child Act, 2009¹ as far as Juvenile Justice System is concerned and, to the extent possible,

¹ Act No. 21 of 2009

identify gaps in the current law. It also aims to make a comparison of the Law of Child Act and the regional and international best practices on how to address Juvenile Justice System challenges and provide recommendations thereof.

SPECIFIC DUTIES AND RESPONSIBILITY;

- Conduct a benchmarking study to assess the current Juvenile Justice System in Tanzania in the context of the Law of The Child Act, 2009,
- Review available literature and documentation,
- Interview key stakeholders in the field of Child Rights in line with the objectives of the study,
- Deliver presentation on the study findings with stakeholders in forums prepared by TAWLA with the aim of getting input and validate the report, and
- Prepare the final study report.

DELIVERABLES

- Study report.

Given these terms of reference, the present report attempts to undertake a predominantly documentary analysis, focus primarily on the existing assessments and practice reports and statistics, as well as being informed by the anecdotal reference of the processes that as practitioners in the field, we are privy to.

The findings of the present study aims at feeding into the design and adjustment to an ongoing project as described above, and shall as well be used as a tool for engaging in advocacy efforts with policymakers and other stakeholders in ensuring that, the government enact sound policies and laws, on progressive basis, that aim to improve the juvenile justice delivery in Tanzania.

METHODS OF THE STUDY

As stated earlier, this is the documentary analysis, which is descriptive in nature, drawing mainly from the existing literature and experiential knowledge. Its data sources are therefore secondary and predominantly qualitative in nature. However, combinations of methods have been applied together to achieve the intended objectives, the main ones of which:

- i. Desk Review
- ii. Key Informant Interviews
- iii. Observations
- iv. Participating in the Child Justice Forum
- v. Inspection visits of the Juvenile Justice related.
- vi. Questionnaire used on only a limited scope intended to gauge the general practitioner's perspective, whose analysis was later made redundant.

Apart from the specific study tasks such as developing questionnaire and conducting key Informants Interview, it helps to also note that the assessor was already engaged in wide-ranging activities relating to the child justice agenda, including but not limited to being a participant in the national Child justice Forum where progress on the development of the overall child justice function is monitored through the Ministry for Constitution and Legal Affairs.

During the execution of the this Study, the report writer also engaged in the Juvenile Justice Task Force which is a specific Project Oversight Committee constituted for the purpose of guiding the project implementation of the TAWLA's supported – which Committee also organized the physical visitation to a number of juvenile justice related facilities in and around Dar-es-salaam, part of which information is also incorporated in the present report.

This being a non-quantitative research, its analysis follows the inductive and purposive approach-which seeks to inform where the country is at in reforming and improving the juvenile justice system in the country.



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CHAPTER TWO

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CHAPTER TWO: STUDY DESIGN AND METHODOLOGIES

DEFINING THE CONTEXT OF ASSESSMENT

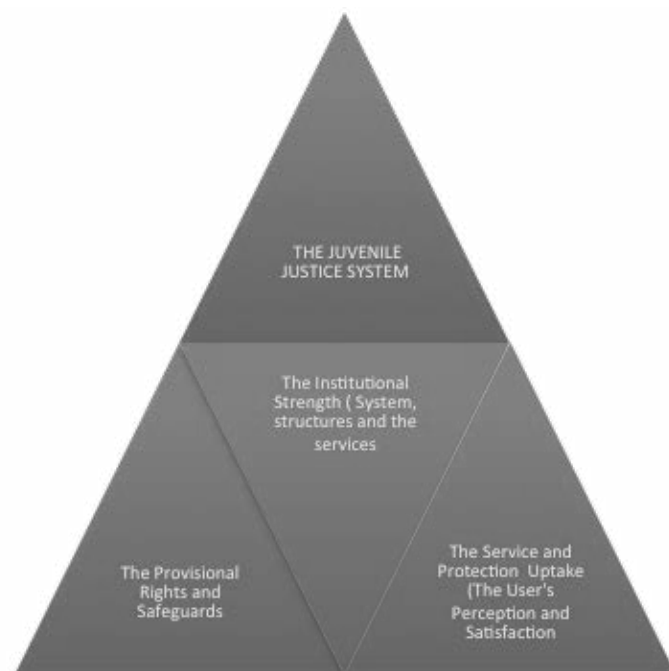
This is the predominantly desk review report that attempts to conduct a documentary analysis of the existing information, and the statistical analysis of available data from official government and other stakeholders' reports. It generally tackles the subject at the main three levels. At one level it is examining the country's legal regime relating to the administration of justice in Tanzania by the extent to which it substantively provides for the very specific mechanism, and rights commensurate with the established international human/child rights instruments. The second level is looking at the systems and structures vested with the mandate to administer juvenile justice in Tanzania, and the extent to which the services as provided satisfy the international ideals of effectiveness and efficiency of the working juvenile justice system. The third and last level examines the extent to which the juvenile justice recourse is invoked by looking at the general uptake of the juvenile justice route from the practitioner's perspective and everyone working the system on one hand, and the children in conflict and the contact with the law on the other hand, which can rightly be categorized as the user's experience. It is both a review of the state of institutional framework for the juvenile justice system in Tanzania, and the status of the substantive and procedural rights as are provided for by an existing legal framework, and the user's experiences, as shall be discussed in the following chapters.

Within these parameters, it is imperative to have a child-centered cross-sectional analytical view of the juvenile justice system from entry to exit. It is thus deliberately formulated to undertake a closer examination of the functioning of the system based on the key stages with which the child comes into contact with the law as a suspected offender by looking at the entire pre-trial processes, rights, duties and obligations and services available as of right; the second stage is when the child is subject to trial and the implication to the duty-bearers in terms of ensuring the child is treated in conditions humanly possible, that are consistent with the existing national and international standards; the third level shall address the sentencing aspects and options, and the last stage shall examine the existing services and options during the post-trial, which elements shall look into the rehabilitation and community reintegration. Along this chain, the study shall simultaneously examine the diversionary options, the extent to which there is recourse for diversions in both the law and practice in Tanzania.

Quite significant amount of information already exists most of which have been documenting the processes of reform regarding policy and practices in Tanzania. This reflects on the evolutionary nature of the juvenile justice in Tanzania from the pre-independence time to this day. However, the present study consciously chooses to take as a period of reference, the period running from 2010 to the present day. 2010 is chosen for its significance as the year when the landmark *Law of the Child Act, 2009* became operational in November 2010. The period running from 2010 to 2018 therefore serves as the main period of reference for this assessment.

The design of the study therefore seek to establish the situation of children as they are protected by the law governing the juvenile justice system, and the extent to which the juvenile justice system, and its attendant mechanism are designed to be responsive, friendly and empowering.

Fig 1: Conceptual Illustration:



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CHAPTER THREE:

EVOLUTION OF JUVENILE JUSTICE IN TANZANIA

AN INTRODUCTION: PRELUDE TO LAW OF THE CHILD ACT, 2009

In the year 2009, the Government of Tanzania through the Parliament, enacted the *Law of the Child Act 2009*² applicable for Mainland Tanzania³. Up until the enactment of this Act, juvenile justice was not clearly delineated from criminal justice. The Children and Young Persons Act (CAP 13),⁴ was based on the English juvenile justice laws of the colonial times,⁵ whose focus paid little attention to the need for the protection of children interacting with the law as offenders, victims or witnesses or otherwise, and treated them more like ordinary adult offenders. The LCA came into force in November 2010 after having been gazetted.

The enactment of the *Law of the Child Act, 2009* was a culmination of lengthy consultation among key stakeholders, agitating the government to enact the law that would domesticate the international child rights standards as have been promulgated through the celebrated United Nations' Convention on the Rights of the Child (CRC) in 1989⁶ and ratified by the government of Tanzania in 1991. At the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted in 1990 to address the African specific context that was ignored by the Convention on the Rights of the Child, equally ratified by the government of Tanzania⁷. The *Law of the Child Act* is the statute of reference regarding domestication of the two international

² Act Number 21 of 2009
³ Note that for Tanzania Zanzibar, which is self-governing entity and part of the United Republic of Tanzania, with its own Legislature, it had passed the Zanzibar Children Act, of 2011.
⁴ CAP CAP 13 R.E. 2002.
⁵ See the English Children Act (1908); the Prevention of Crime Act (1908); and the Probation of Offenders Act (1907).
⁶ Adopted by the UN General Assembly on 20 November 1989, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force in September 1990.
⁷ Tanzania ratified the ACRWC in 1993

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CHAPTER THREE

law instruments on children rights, and it is arguably, by implication, incorporating all other associated international child rights instruments in the body of laws of Tanzania Mainland. For Tanzania Zanzibar, similar endeavour is undertaken through the enactment of the Zanzibar Children Act, 2011 and it echoes significantly the same context that has been laid down by its predecessor in Tanzania Mainland.

The two international treaties introduced progressive standards for better protection of the child. They, together, cover wide-ranging human rights elements as are applicable to children, and these are widely validated through a near universal ratification by members of the United Nations. The CRC is driven by a set of key principles of non-discrimination, acting always in the best interest of the child, right to life, survival and development, and right to views. The Convention treats the child as a subject of rights rather than an object, and recognizes the fact that children are active actors of their own protections through their strong agency. Apart from the general provision for children rights across the childhood life cycle, the treaties calls for the humane treatment of children in conflict and/or in contact with the law among other things⁸.

Having been preceded by the United Nations Standard Minimum Rule on the Administration of Justice, commonly known as the Beijing Rules, article 40 of the CRC which justifiably be termed as a controlling article on juvenile justice demand state parties to recognize *“the right of child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming constructive role in the society”* Sub-article 2 of art. 40 prescribe a set of key procedural considerations when treating a child within the penal system. Article 37 of the CRC provides safeguards against inhuman and degrading punishment and guards against arbitrary deprivation of liberty.

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Article 37 and 40 of the CRC are the most useful provisions for the present discussion.

Sub article 3 to art. 40 of the CRC particularly places a requirement for state parties *“to promote the establishment of the laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law”*. Article 17 of the African Charter on the Rights and Welfare of the Child echoes similar requirements on the need to protect the child interacting with the penal system, commonly known as juvenile justice system.

Despite that Tanzania ratified the CRC and the ACRWC in 1991, juvenile justice continued to be guided by the archaic *Children and Young Persons Act, Chapter 13*, enacted by the colonial Legislature in 1937 for twenty (20) years on. In November 2009, the *Law of the Child Act, 2009* was enacted for Mainland Tanzania, and became operational a year later in November 2010.

In the next section, and based on an earlier mentioned contextual framework, regard shall be had in examining the extent to which the introduction of the Law of the Child Act succeeded to achieve the objectives of the international treaties, namely, the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).

THE EXPANSIVE VIEW WITHIN WHICH JUVENILE JUSTICE IS REGARDED

It is noteworthy at this point to highlight an important development at the practice level though, for it will help appreciate the context-appropriate approach being undertaken at the country level and the amount of efforts that had been put in place to reform the juvenile justice system. The concept of juvenile justice has increasingly been treated in a much wider concept of Justice for Children, or rather child justice. This is a result of unwinding of the implementation of the Law of the Child Act, 2009 as shall be discussed in the following sections. There is a recognition of the fact that children do not only get into contact with the law merely as offenders, but it applies a more holistic view of the child as potentially

a victim seeking legal protection or redress, or as witness of crimes who also needs to be treated with care and protection with a view of guaranteeing safety of a person and credibility of evidence. In the care context, children are often subjected to judicial processes such as matrimonial proceedings, adoption proceedings, custodial and other care and supervision proceedings without due regard to the specific needs and considerations offering greater protection for them.

There is a historical perspective to inform this shift which shall be discussed in detail in the next chapter. 'Child justice' or 'justice for children' however, is taken to refer to all situations 'where children are involved in both criminal and civil justice systems, including administrative or informal justice mechanisms.'⁹ For that matter, child justice in all its aspects is required to be child-friendly, which demands that justice systems should be 'designed or adjusted to be sensitive to the particular issues that children face when they come into contact with the law and courts (or legal proceedings) for any reason.'¹⁰

It is therefore necessary to keep this in mind in order to understand the more holistic nature of efforts juvenile justice reforms had been pursued with, while guarding against digressing farther away from the main focus of the present study, that is, juvenile justice¹¹.

THE ADVENT OF LAW OF THE CHILD ACT, NO. 21 OF 2009

The Law of the Child Act, 2009 came into force in November 2010. Part IX of the Act is the part of reference, which seeks to govern the conduct of juvenile justice in Mainland Tanzania. Section 97 provides for the establishment of the juvenile court, which shall have a role of hearing and determining all matters related to children. This Part also gives power to the Chief Justice to designate the Juvenile Court and promulgate the rules of procedure¹² that shall be applicable in the Juvenile Courts.

Although the Law of the Child Act, 2009 intends to harmonize and

⁹ African Child Policy Forum (ACPF) and Defence for Children International (DCI), *Achieving Child-friendly Justice in Africa* (Addis Ababa and Geneva: ACPF and DCI, 2012), p. iv.

¹⁰ Ibid.

¹¹ The concept of child justice has further been expounded in the impending General Comment Number 24, once adopted it will amend and replace General Comment Number 10, by the United Nations Committee on the Rights of the Child

¹² The Chief Justice has issues two consecutive rules already, the last such rule were issued in 2017.

consolidate procedure on matters relating to children, there remains a few areas of contest where a number of other laws intersect, and which may have somehow been addressed and integrated with the LCA through consequential amendments.

Section 98 describes the jurisdiction of the Juvenile Court by stating 98.

- (1) *The Juvenile Court shall have power to hear and determine-*
 - (a) Criminal charges against a child; and
 - (b) *Applications relating to child care, maintenance and protection.*
- (2) *The Juvenile Court shall also have jurisdiction and exercise powers conferred upon it by any other written law.*
- (3) *The Juvenile Court shall, wherever possible, sit in a different building from the building ordinarily used for hearing cases by or against adults. (underline provided)*

Further, under section 99, the Chief Justice is vested with the power to issue Rules of procedure to guide the Juvenile Courts, but the rules shall be informed by the general conditions as are prescribed with the same section that the court shall sit as often as possible; that the proceedings be in camera, that the identity of the child is protected; that the proceedings shall as far as practicable be informal and be held in a separate facility; that the child is accorded legal assistance and representation; that there shall be social welfare officer present; that the right of bail shall be explained, that the parent or next of kin shall have the right to be present; and that the child is afforded a chance to express him/herself.

Installing the new system is a matter of statutory mandate bestowed upon individuals and institutions carrying out specific statutory powers- such as the Chief Justice in this case. It is therefore necessary to assess the progress of the juvenile justice and its current status from the understanding with

which government institutions are created, particularly when taking into consideration that in such exercise of power, the Chief Justice may not be playing the function that is statutory unlike when he exercises role that is purely juridical in nature, and one that transcends in the realm of public policy, in which case, operational constraints abound.

TAKING*¹³ THE LAW FROM PAPER TO PRACTICE: AN OVERVIEW

With the operationalization of the Law of the Child Act, 2009 came many challenges that needed to be tackled from many different standpoints. Moving the law from paper to eventually be actualized in practice had to take a transformative approach for it affected not only the application of the law, but also the shifting in both the practitioner's mindset and organizational culture of conducting official matters related to children.

In 2011, the then Ministry of Justice and Constitutional Affairs with the help of UNICEF conducted parallel assessments¹⁴. Both studies served to provide the baseline information, based on erstwhile known indicators- that would help provide benchmarks for the operationalization of the *Law of the Child 2009* in its broadest sense.

In the ensuing advocacy that resulted from the findings and dissemination of the two studies, the Ministry of Constitutional and Legal Affairs conceived and adopted a comprehensive approach through what would be popularly termed as the National Five Year Strategy for Child Justice Progressive Reform 2013-2017 (the CJ Strategy) that proposed a multi-pronged strategic roadmap towards improving child justice delivery in Tanzania. Fair to say at this point that although the process towards adopting the Child Justice Strategy was conceived independently, its anchoring has a lot to do with seeing how child justice specific component of the Law of the Child Act 2009, could be addressed from an holistic system-wide based perspective. Thus, the consultations leading to developing and adopting the strategy was broad and multi-disciplinary, drawing from different government Ministries, Departments and Agencies (MDAs) vested with both the criminal and civil jurisdictions,

¹³ It is now formally known as the Ministry of Constitution and Legal Affairs since the 5th phase government coming in power in 2015.
¹⁴ Analysis of the Situation of Children in Conflict with the Law: Ministry of Constitutional and Legal Affairs/UNICEF 2011; and the Access to Justice Study for the Under 18, 2011.

civil society organizations, academia, the UN agencies and others all under the leadership and convening of the Ministry of Justice and Constitutional Affairs.

Part of ensuring that the joint coordination and monitoring of the Strategy is maintained across its lifecycle- it was agreed that the Child Justice Forum be created which would also serve as the policy dialogue platform involving formal structures, i.e. the government ministries and legal sector institutions (LSIs), and the non-state actors such as the non-governmental organizations and civil society organizations in general. The Strategy has overran its lifespan at the end 2017 but the Child Justice Forum is still active, and efforts are underway to define the next steps in terms of whether the period for the existing strategy can be extended, or a second generation Strategy could be developed and adopted. This will depend much on the recommendation to be provided by an end line Evaluation of the Child Justice Strategy Implementation that is pending finalization and adoption¹⁵.

The Child Justice Strategy therefore, for the purposes of the present assessment, offers the reader the main reference tool and parameters, against which, on a broad scale, juvenile justice trajectory can be properly viewed and examined during the period after the LCA, 2009 became operational. Thus, any report examining and gauging the pace with which reform around juvenile justice had been approached, is an appropriate and indispensable reference to feed into the objective of the present assessment. This report does just that.

To understand it much more accurately, juvenile justice must also be examined in a much broader sense, by appreciating the fact that Child Justice Strategy was not being implemented in isolation, but complementing a rather whole set of reforms and planning frameworks that ran in concurrency with the Strategy, namely, the National Human Rights Action Plan¹⁶, which had guided mostly the work of the Commission for Human Rights and Good Governance (CHRAGG) on human rights in Tanzania, the implementation of the National Costed

¹⁵ The Evaluation of the Strategy is still in draft under the Ministry of Constitution and Legal Affairs and could not be finalized by the time of developing this report, however, the author of this report has been involved in various activities relating to compiling the Evaluation Report and is therefore privy to most of its content.
¹⁶ CHRAGG (2013). National Human Rights Action Plan, Dar es salaam

Plan of Action for Orphans and Vulnerable Children (NCPA-OVC)¹⁷, the National Plan of Action to Address Child Labour¹⁸, and work around developing the subsidiary legislation for the smooth operationalization of the Law of the Child Act, 2009¹⁹. Suffices here to say that most of the above mentioned frameworks are now streamlined and consolidated within the National Plan of Action to End Violence Against Women and Children (NPA-VAWC)²⁰, which yet again, merits the discussion on its own right, but which also shows that the present analysis can benefit from an understanding of the progression in terms of the convergences and divergences in the mind shifts defining juvenile justice for both practice purposes as well as for the intellectual debates.

Following that evolvement, the present assessment shall assess the situation of children in juvenile justice by developing the following as the analytical frame along which the assessment is guided:

- (vi) Establish the Law of the Child Act, 2019, and its attendant Juvenile Courts Rules as a yardstick the provisions of which provides the context, for which juvenile justice is to be measured,
- (vii) Trace the status of juvenile justice from prior to the enactment of the Law of the Child Act, 2009, drawing from the Access to Justice Study and Juvenile Justice Study conducted in 2011 by MOJCA, now MOCLA, assumingly providing benchmarks prior to the operationalization of the LCA, 2009.
- (viii) Examining the impact of the National Child Justice Progressive Reform Strategy as a mechanisms and tool through which operationalization of the LCA, 2009 in part, and improvement to the Juvenile Justice system overall, was to be pursued and effected; and appraise information obtaining from the impending evaluation report,

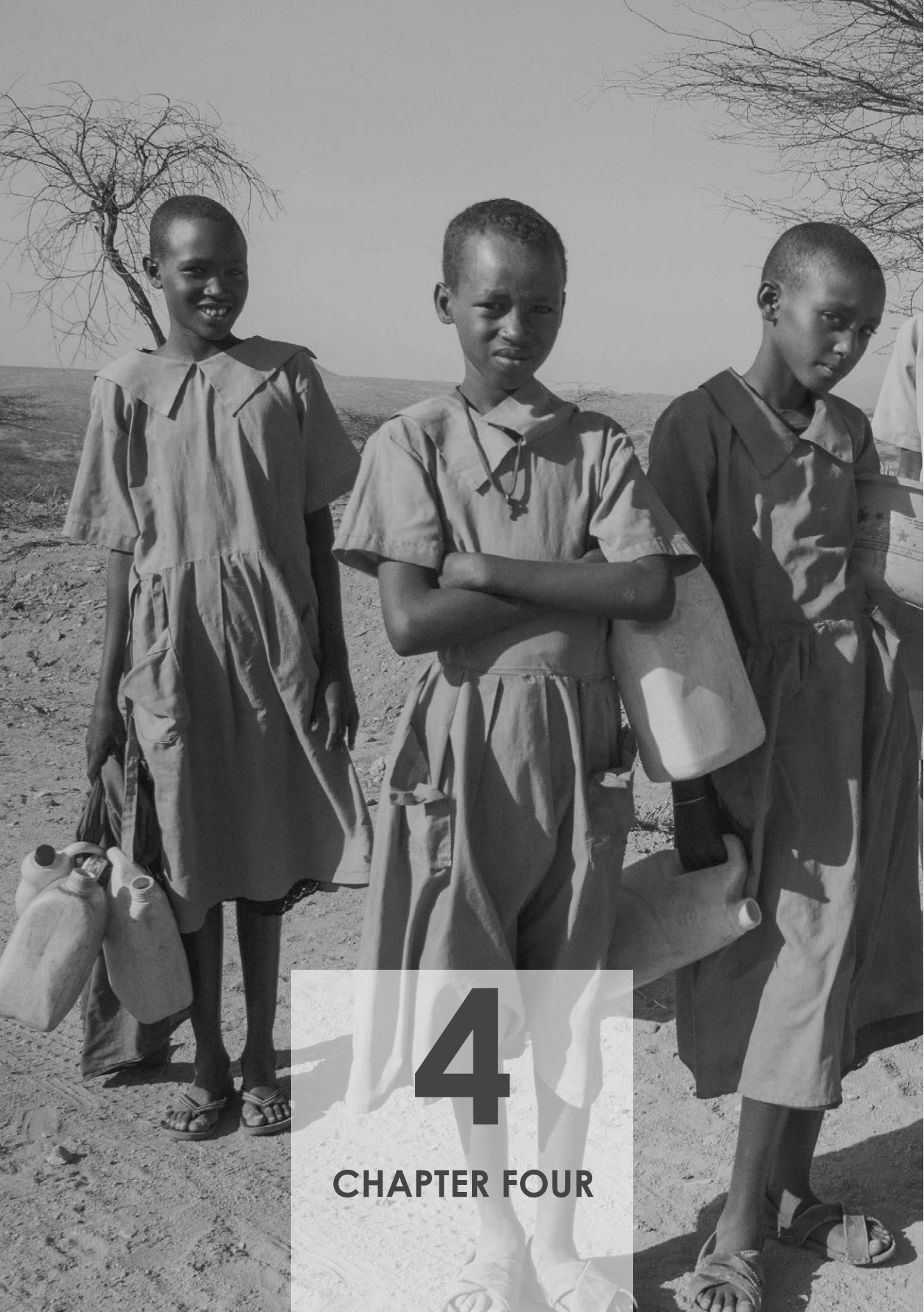
- (ix) Examine the potential or limitations of optimizing the juvenile justice reform efforts by building upon the strengths yielding from the past 8 years since the operationalization of the LCA 2009, and the experience of an implementation of the CJ Strategy, especially through the alignment provided by the NPA-VAWC, and whether the momentum can be maintained with or without the follow up generation of Child Justice Strategy or Plan or Action.

¹⁷ The Government of Tanzania. Second National Costed Plan of Action for Orphans and Vulnerable Children (MoHSW)

¹⁸ Plan by Ministry of Labour and Employment (as it then was known)

¹⁹ A number of Regulations were adopted as shall be discussed in the sections below

²⁰ Give a thorough background of the Plan including the first generation plan and the national survey/study against which this Plan spluttered.



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CHAPTER FOUR: THE HINDSIGHT:

THE LEGAL AND INSTITUTIONAL STATE OF JUVENILE JUSTICE PRIOR TO 2010

LEGAL FRAMEWORK ON JUVENILE JUSTICE PRIOR TO 2010

The year 2010 is regarded as landmark since it is when the *Law of the Child Act, Act 21 of 2009* came into force²¹ and among other things, wholly repealing and replacing the *Children and Young Persons Ordinance, Chapter 13 of the Laws of Tanzania*, which had been in effect since 1937. The *Children and Young Persons Ordinance, CAP 13* had passed through different epochs of Tanzania's history starting from the British colonial time through to when Tanzania, then Tanganyika, gained her independence, and continued in force for the most part of the Tanzania post independence period up until 2010. This same period overlaps for a little over 20 years with the adoption and near universal ratification of the United Nations Convention on the Rights of the Child (CRC)²², which was adopted by the UN in 1989, as well as the African Charter on the Rights and Welfare of the Child. Tanzania had ratified the CRC in 1991 but, owing to its duality of its legal system²³, the domestication was much delayed until when it was affected through the enactment of the *Law of the Child Act in 2009*.

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CHAPTER FOUR

²¹ The Act became operational in November 2010.

²² the CRC has been widely and universally ratified by the all members of the United Nations, with the only exceptions of the United States of America and the then Somalia whose system of government had nearly collapsed due to civil war.

²³ According to the Judicature and Application of Laws Act, Chapter 358 R.E 2002 of the Laws of Tanzania, under section 9, Tanzania applies both its local laws and the common law statutes as were applicable in the United Kingdom on the recognized date (i.e 22nd July 1920).

It perhaps is more sensible to ignore what the *Children and Young Persons Ordinance*, later renamed Act, provided in terms of specific provisions than examine the impact it has had in governing the juvenile justice overall now that it is defunct. However, to the extent that enables us to compare, and have a fair view of the context upon which the previous law was build on, will help in understanding the extent and reach of the changes that were brought up by the law seeking to overthrow it, its analysis remains therefore valid and justified.

The *Children and Young Persons Act* was enacted, as pointed out earlier, during the British colonial period. The Act was 'imported' to then Tanganyika territory from England through India in 1937. CAP13 was constructed in the context of the English *Children Act 1908*, the *Prevention of Crime Act 1908*, the *Probation of Offenders Act 1907* and the *Children and Young Persons Act 1933*, which were founded in welfarism rather than focusing on upholding the rights of the offending child with a view to rehabilitating and reintegrating such child back to society²⁴. The repealed CAP 13 emphasized on incarcerating children in conflict with the law right from the moment they were arrested and after being found guilty. This was mainly reflected in the creation of retention (remand) homes for remanding children whose cases were pending in the court and the approved school for placing children who were found guilty by the court. At worst, CAP13 did not have provisions for safeguarding the best interests of the child offender – for instance, the need to divert the children away from the criminal justice system and to have the deprivation of liberty as a matter of last resort and only in appropriate circumstances. In addition, CAP13 also did not have provisions for dealing with children in contact with the law – i.e. children who were victims of crime, child witnesses, children in need of protection, or children who were beneficiaries of judicial proceedings.

Thus CAP13 remained largely a controlling legislation governing juvenile justice, along with the application of other laws when conducting investigation, arresting procedures, searches and warrants, granting of bail both before and during trials, conducting trial, defining parameters

²⁴ Odongo, G.O., "The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context", LL.D. Thesis, University of Western CAP e, 2005;

of offences, and exercising discretion in applying different sentencing procedures in order to pursue the best interest applicable to children. Therefore, such laws as the *Penal Code*²⁵, the *Criminal Procedure Act*²⁶, the *Evidence Act*²⁷, the *Magistrates Court's Act*²⁸, the *Minimum Sentences Act*²⁹, the *Prisons Act*³⁰ and other related legislations within the realm of criminal law.

The entire juvenile justice administration was regarded largely as one that views a child as an offender that almost always stands accused, and had a little consideration for examining the social, cultural and psychological factors usually surrounding the delinquent behavior. It remained focused on criminal law realm, ignoring situation where children would interact with the justice system as witnesses, victims/survivors seeking judicial protection and guarantees.

Part II of CAP 13 under section 2 provided for the procedure to guide the 'juvenile courts as were defined by section 3 of the same part to mean "a district court sitting as prescribed in subsections (1) and (2) of section 3 for the hearing and determination of cases relating to children or young persons'. The two subsection provided for the court to sit in 'a different building or room from that in which the ordinary sittings of the court are held' when hearing the case involving a child or a young person and unless that child or young person is being charged along with the adults; and the court may withdraw the accused person if he is of the apparent age of sixteen years and above so that the provisions of the Criminal Procedure Act would apply. For the purposes of the CAP13, the child was defined as a person below the age of twelve years³¹. An extremely backward provision in CAP 13 is found under section 17 where it states that: 'Where it appears to the court that any person brought before it is of the age of sixteen years or more, that person shall for the purposes of this Act be deemed not to be a child or young person'.

Needless to go further, the citing of these age differentiations are sufficient to illustrate the confusing nature of the legal framework that

²⁵ Chapter 16 RE 2002
²⁶ Chapter 20 R.E 2002
²⁷ Chapter 6 R.E 2002
²⁸ Chapter 11 R.E 2002
²⁹ Chapter 90 R.E 2002
³⁰ Chapter 58 RE 2002
³¹ section 2 of CAP CAP 13.

existed prior to 2010. This clearly shows the age-old attempt by the law to draw the lines creating different 'age packets' for children for the purposes of determining which regime of the law would be applicable. This must have created confusion in practice so much so that not even the provisions of section of 16 of the Act that provided for the mechanism for age determination by the court would remedy, which mechanism could rightly be viewed as subjective to the court's discretion.

The differences in defining age meant that there would necessarily be inconsistency in the way CAP13 was administered, and consequently, affect the way juvenile justice overall was administered across board in Tanzania Mainland. Various studies point to these inconsistencies, not least the Access to Justice Study by the Ministry of Justice and Constitutional Affairs cited earlier shows that although the mandate for Juvenile courts were by the law vested on to the districts court, for example, the Chief Justice in 1964 extended such mandates to the primary courts- thus eroding the required degree of professionalism requisite to applying the child rights standards³².

The concept of juvenile justice has evolved with time but the domestic legal regime on juvenile justice remained static way beyond the period when the set of conventions³³ and minimum standards³⁴ were long accepted as international acceptable universal normative values. Thus it is fair to say that the *Children and Young Persons Act, CAP 13* was not squarely compatible with the established international standards on juvenile justice until when it was repealed in 2009 which changes only came into force in 2010.

32 The power was contained in s.43 Children and Young Persons Act 1937. The Chief Justice extended jurisdiction to the primary courts to hear juvenile cases through Government Notice Number 640 of 1964 (The Children and Young Persons (Extension of Ordinance to Primary Courts) Order. The former Chief Justice reiterated the extension of jurisdiction to the primary courts in his article 'The Child and the Court' in the Tanzania Lawyer Journal February – May issue 1997, the Tanganyika Law Society.

33 The Convention on the Rights of the Child (CRC); as well as the African Charter on the Rights and Welfare of the Child (ACRWC)

34 A set of standards and guidelines govern the work of juvenile justice, namely, the United Nations Guidelines for the Prevention of Juvenile Delinquency of 1990 (otherwise known as Riyadh Guidelines); the UN Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) 1985; UN Rules for the Protection of the Juvenile Deprived of their Liberty (the Havana Rules) 1990; the Vienna Guidelines for Action on Children in the Criminal Justice System (1997); and the CRC Committee's own General Comments Number 10

THE INSTITUTIONAL FRAMEWORK FOR JUVENILE JUSTICE UNDER CAP.13

The Children and Young Persons Act, CAP 13 under section 3 established the Juvenile Courts to adjudicate over matters of criminal nature involving children of below the apparent age of 16 years. This courts were termed to be the districts courts in every district, and the procedure applicable to the courts were prescribed under the same section; that is first and foremost to sit in a different building other than where the court ordinary sits. Regarding this matter, the Convention on the Rights of the Child provides guidance to state parties in Article 40 (2) (iii) to ensure that the matter involving a child to be:

'... determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;(emphasis provided).

Although CAP 13 may have somehow aligned to the spirit of the CRC, that proved to be not the case in real practice as there were no separate facilities designed to cater for the children matters within the judiciary. The then Chief Justice commenting on the state of affairs admitted that the court facilities were designed with the adult offender in mind.³⁵ In practice therefore, it would appear that most district magistrates did not in most of the cases direct themselves to be guided by the minimum procedure that would allow the existing court building to have the atmosphere intended to cater for a competent authority envisaged by the CRC, or even by the CAP 13 own standards. In the case of **Mokamambogo v. Republic**,³⁶ 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

35 The late Chief Justice Francis Nyalali at a Seminar on 'The Child and the Law' 1996

36 (1971) HCD 63

sit in a place different from an ordinary court room. It was held that: the section provides that; “ a district court when hearing charges against children or young person shall, if practicable, unless the child or young person is charged jointly with other persons not being child or young person, sit in a different building or room from that in which the ordinary sittings of the court are held...” 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” This shows therefore that despite the mandatory nature of the provision of s. 3, the Court did not always follow the rule in matters involving children.

OUTLOOK ON THE JUVENILE JUSTICE PRIOR TO 2010

The foregoing discussion regarding the legal framework as analyzed from the perspective of the now repealed and replaced law, the CAP13 and how the same law had stipulated the separate institutional framework for juvenile justice in Tanzania, at the very least helps us to highlight two critically important variables, namely; the age of the child as determining factor for choice of law and procedure; and secondly, the district court as the identified competent authority to handle matters involving children offenders. These two factors are critical in the sense that they affected the way in which issues involving children in the law would eventually be handled through the system and come to finality.

The analysis regarding the age and differentiation created by the law has already been discussed above. Suffices here to point out that CAP 13 was at sharp conflict with the terms of the Convention on the Rights of the Child in that, whereas the CRC defines a Child as any person of the age below eighteen years, CAP 13 recognizes the Child as a person below the apparent age of 12 years for the purposes of determining criminality. The later considers a person between 12 years and sixteen years as a young person. Any person above sixteen years threshold is therefore deemed to be an adult and therefore outside the purview of the application of the juvenile justice legal regime. This ran counter to the spirit of the Convention on the Rights of the Child. It can be rightly

assumed that any persons of between age sixteen and eighteen was therefore precluded from the guaranteed created for the child as are highlighted in article 4 of the CRC and other associated standards. The ramification of this conflict would be exposed in the way children were treated in the criminal justice system.

This assessment will not delve into the discussion relating to age of criminal responsibility, however, it may be noted that the Penal Code recognizes the age of criminal responsibility to be above ten years. This is based on the argument that a child of ten years old has the ability to distinguish between right and wrong. The age of criminal responsibility is statute based and governed by two common law presumptions, which are based, either fully or partially, on physical age limits. First of all, a child who is below ten years of age is presumed to be *doli incap ax*, which is to lack criminal capacity³⁷. The child cannot therefore be held criminally responsible. The second presumption is that a child between the age of ten and twelve years is rebuttably presumed to be *doli incap ax*. This presumption of *doli incap ax* continues to apply but can be rebutted by the prosecution on proof “beyond reasonable doubt not only that s/he caused an *actus reus* with *mens rea* but also he knew that the particular act was not only merely naughty or mischievous, but seriously wrong”³⁸.

The debate had been on whether the age of criminal responsibility in Tanzania met the internationally acceptable standards, in which case, the CRC does not seem to offer any specific threshold and leaves that open for the state parties to decide until much later in the UNCRC General Committee No. 10 where the Committee recommended that the age of general criminal responsibility should not be lower than 12 years for countries³⁹.

Age being a decisive factor for application of juvenile justice laws, it appears that by a mere definition of the child as any person below the age of twelve, and that the child may be brought before the Juvenile Court, CAP13 did not address itself to the importance of considering the age thresholds in relation to criminal liability for children of the age below

³⁷ section 15 (1) of the Penal Code

³⁸ section 15(2) of the Penal Code

³⁹ Though the Committee leaves this requirement to the discretion of the individual state parties, it suggests that no country should enact laws to make age of criminal responsibility younger than 12 years.

10 years. It is for this reason for example, in the study alluded to⁴⁰, as a way of showing that child arresting and detaining children in remand facilities did not follow the laid down procedure, a total of 27 out of 179 children who were interviewed during the CHRAGG inspection visits said that they were under 10 years of age at the time of arrest. It was found that children as young as below ten years of age were being held in remand homes as the Table below shows the result of the investigation visit conducted at one point in 2012, when even the LCA was already in force:

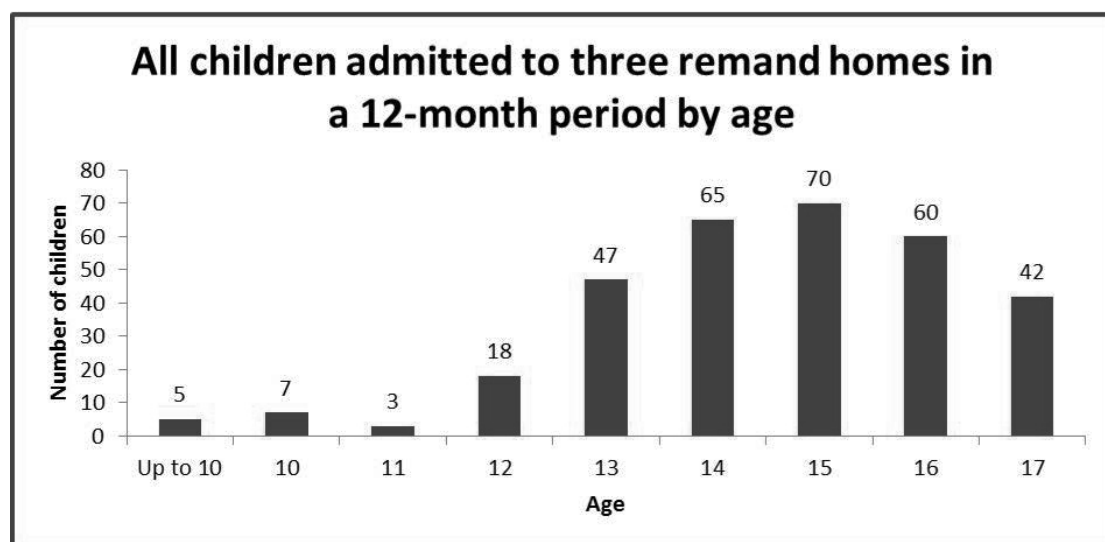


Table 1: adopted from the 2012 Study on Juvenile Justice Administration in Tanzania.

Regarding the amount of time children were being kept in the detention facilities before trial, citing an earlier CHRAGG Report, the MOCLA report found out that some children were spending long periods of time in police detention after committing very minor offences, mostly status offences, such as minor theft, loitering and minor disorder offences. It was found that police did not always adhere to the 24-hour time limit on police detention. Seventy-nine per cent of children interviewed (114 out of 145) reported the length of time they were held in police detention was beyond the 24- hour statutory maximum time limit, and 73 per cent were held beyond 48 hours. A significant number of children were held for very long periods of time. Twenty-three children were held for between seven days and two weeks, and 13 children reported being

⁴⁰ Analysis of the Situation of Children in Conflict with the Law: Ministry of Constitutional and Legal Affairs/UNICEF 2011.

held for one month or more in police detention.⁴¹

Although by law, CAP 13 precluded children from being imprisoned and had established an Approved school as the only institution where children may be retained post trial as a rehabilitative measure instead of committing them to prisons, the study, citing the Analysis of Situation of Children in Conflict with Law, found that more than 1400 children were at the time held up in adult prisons and remands prisons mixed with adult detainees⁴².

In Institutional terms, it is already mentioned that although CAP 13 did provide for the Juvenile Courts in theory, in practice, there were no separate courts constructed for children, except one that was installed at Kisutu Resident Magistrate Court with the external funding. There has consistently been an Approved School in Mbeya, however, in practice, by the time, not all children were committed to the school, rather, found themselves serving time in adult prisons, and impliedly condemned to the same fate that ordinary adult convicts would be subjected to. A cross-section of the child related juvenile justice related facilities by the time is shown in the table below:

Facility	Number
Retention Homes	5
Juvenile Court	1
Approved Schools	1
Total	7

Table 2: Number of institutions specifically for persons under 18, accused of, or recognised as having infringed the penal law.

It is therefore observed that the juvenile justice system in Tanzania, had challenges as were rightly captured and summarized by the study on *The Analysis of the Situation for Children in Conflict with the Law in Tanzania* which found that, in many places in the country, the juvenile justice system did not conform to international juvenile justice standards, leaving children vulnerable to rights violations at every stage of the

⁴¹ As quoted in the National Organization for Legal Assistance (NOLA) and Penal Reform International report titled 'A Review of Law and Policy to Prevent and Remedy Violence Against Children in Police and Pre-trial Detention Facilities in Tanzania.

⁴² This again, was based on the findings of the CHRAGG Inspection Reports conducted prior to the study.

process. Some of the specific findings concluded the following:

- There was lack of specialised juvenile justice institutions, procedures and systems;
- There was limited knowledge and coordination among criminal justice professionals on how to handle children's cases;
- Children were unlawfully and unnecessarily exposed to the juvenile justice system;
- The vast majority of children did not have legal representation or other appropriate assistance at the police station, in the preparation of their case or during court proceedings;
- Children were at risk of experiencing multiple human rights violations at the police station, including, in some cases, ill-treatment and forced confessions;
- There was no formal system of diversion of children in conflict with law away from the criminal justice system;
- Children continued to be placed in adult prisons and were eventually mixed with adults, both on remand and post-sentencing;
- There were limited alternatives to pre-trial and post-trial detention and an absence of community rehabilitation programmes; and
- Children were exposed to numerous human rights abuses in detention facilities.

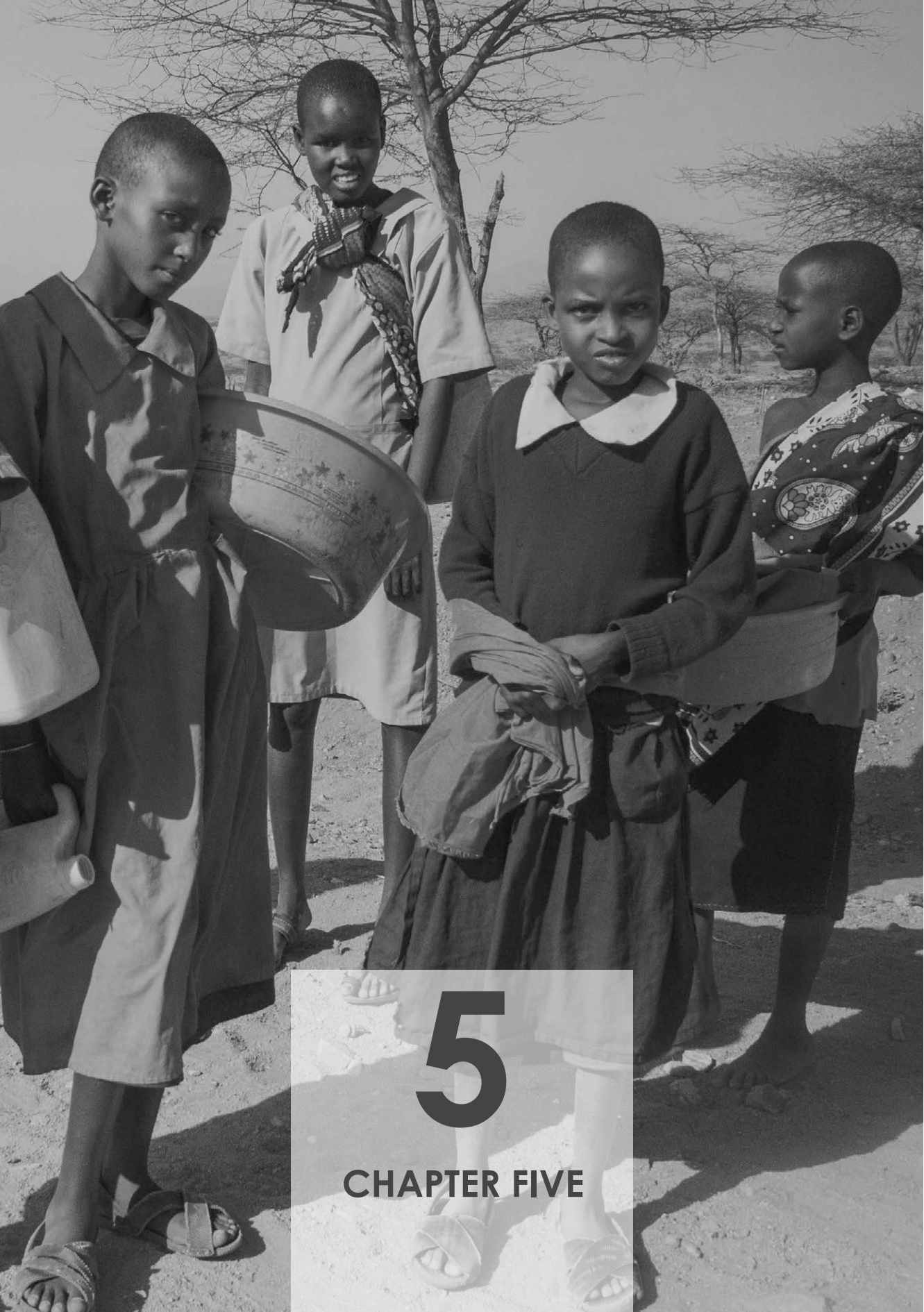
These major findings, together with the findings of the twin study *The Assessment of the Access to Justice System for Under-18s*, were subsequently endorsed by the Child Justice Forum and were made the basis for the adoption of a comprehensive reform strategy of

their entire child justice system⁴³.

This hindsight helps to inform the reader about the state of affairs before and immediately after enactment and coming into force of the Law of the Child Act No 21, 2009 which wholly repealed and replaced the old CAP13 among other laws. The situation of children in interacting with the juvenile justice system prior to the LCA 2009, were marred by the conflict, contradictions, inconsistencies and institutional malpractices and culture of impunity, which impacted on how children rights were being violated.

The advent of the LCA was meant to incorporate into the domestic law, the standards and principles enshrined in the international child rights instruments, and to follow in the government's commitment to uphold those standards. In the following sections, an analysis is made on how the LCA did manage to at least incorporate those standards and principles, and how it is making good on the promise to reform the juvenile justice delivery more towards upholding the best interest of the child.

⁴³ As CAP 13 featured in the Draft Evaluation Report for the Child Justice Strategy



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CHAPTER FIVE:

THE ADVENT OF THE LAW OF THE CHILD ACT AND SUBSTANTIVE GUARANTEES

INTERNATIONAL FRAMEWORK FOR JUVENILE JUSTICE

Eight years into the operationalization of the Law of the Child Act, 2009, and that the National Child Justice Strategy for Progress Reform 2013-2017 has overran its course, attest to the changes that have happened, and continue to happen to reform the juvenile justice system.

As stated above, until the enactment of the Law of the Child Act (the LCA) in 2009,⁴⁴ juvenile justice was not clearly delineated from criminal justice. The predecessor of the LCA, the Children and Young Persons Act (CAP13),⁴⁵ was based on the ancient English juvenile justice laws,⁴⁶ which did not give emphasis on the need to protect the rights of the child in conflict with the law, rather they treated an offending child as an adult.

This position was, however, reversed with the adoption of the United Nations Convention on the Rights of the Child (CRC) in 1989 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990. These two basic international child rights treaties, together with other relevant international human rights instruments,⁴⁷ introduced progressive provisions geared towards humane treatment of children who are in

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⁴⁴ Act No. 21 of 2009.

⁴⁵ CAP 13 R.E. 2002.

⁴⁶ See the English Children Act (1908); the Prevention of Crime Act (1908); and the Probation of Offenders Act (1907).

⁴⁷ Some of the international human rights instruments providing generally for children's rights are: the international Covenant on Civil and Political Rights (ICCPR) (1966); the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (1979); the African Charter Human and Peoples Rights (ACHPR) (1981); the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (2003); and the UN Convention on the Rights of Persons with Disabilities (2006).

conflict and/or in contact with the law.⁴⁸

Apart from providing for a long list of the rights of the child (particularly one in conflict and/or in contact with the law), the two treaties set obligations on States Parties to, *inter alia*, domesticate and implement the rights enshrined therein. Having ratified the two treaties without any reservations, Tanzania enacted the LCA in order to domesticate these treaties. One of the progressive elements of the LCA is the repeal and replacement of CAP13 with a comparatively progressive Part IX, which sets out the foundation of child justice in Tanzania.

The protection of the rights of the child in the current judicial context derives from the article 3(1) of the Convention on the Rights of the Child which states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The 'child's best interest' principle is therefore overriding guiding standard in any of the state's legislative, administrative or judicial action. Any law designed to offer protection for children must thus take into account how that proposed law is going to provide better environment for children.

Regarding the juvenile justice specifically, the CRC in its article 37 it provides for safeguards for children who are deprived of liberty, and, in article 40 it highlights the essentials of the juvenile justice system and states the rights element of the child interacting with that system. The full text of article 40 is reproduced below for the purposes of discussion and clarity:

“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's

respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

⁴⁸ See particularly Articles 37 and 40 of the CRC; and Article 17 of the ACRWC.

- (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

It is noteworthy at this juncture to state that the CRC works with accompanying minimum standards and generally accepted rules, which together form the international regime on juvenile justice. These are the United Nations Guidelines for the Prevention of Juvenile Delinquency of 1990 (otherwise known as Riyadh Guidelines); the UN Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) 1985; UN Rules for the Protection of the Juvenile Deprived of their Liberty (the

Havana Rules) 1990; the Vienna Guidelines for Action on Children in the Criminal Justice System (1997) and the CRC Committee's own guidance as articulated through the General Comments Number 10 in relation to juvenile justice. At the Africa regional level, article 17 of the African Charter on the Rights and Welfare of the Child (ACRWC) echoes most of the principles enshrined in the global instruments and emphasizes that the aim of such treatment shall be to ensure the child's 'reformation, re-integration into his or her family, and social rehabilitation'⁴⁹.

All the above set the juvenile justice context upon which any domestic legislation seeking to address the comprehensive system and mechanisms with which juvenile justice is administered ought to be directed. The assessment of the effectiveness the *Law of the Child Act 2009* should therefore be measured in that light.

THE LAW OF THE CHILD ACT, 2009

Part IX of the Law of the Child Act, No 21, 2009 addresses the subject of Children in Conflict with the Law. However, this Part is preceded by Section 4 which in its entirety recognizes the child as "a person below the age of eighteen years"⁵⁰ and underscores the principle of the best interest of the child as 'the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies'⁵¹. This overriding best interest principle pegged on the very section that seeks to provide a definition of who the child is, is an indication of the degree of seriousness the *LCA, 2009* places on the importance of applying the Statute with the child as a center of focus. Examination of the provisions of Part IX therefore is made in light of this broad understanding.

Section 97 of the LCA establishes the Juvenile Court 'for the purposes of hearing and determining child matters relating to children'⁵². The court is to be presided over by a resident magistrate. This is the clear departure from the earlier position of the Law under CAP13 in which it

⁴⁹ Mashamba, C.J., "A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa", Ph.D. Thesis, Open University of Tanzania, 2013; For a more comprehensive analysis, see Odongo, G.O., "The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context", LL.D. Thesis, University of Western CAP e, 2005;

⁵⁰ Section 4(1) of the LCA

⁵¹ Section 4 (2) of the LCA

⁵² Section 97(1) of the LCA

used to be the district magistrates and later extended to the primary courts magistrates by the Chief Justice's circular. This assumingly tends to address the need to elevate the level of professionalism in attending to child related matters⁵³, and strengthening institutional accountability.

Although established under the Part entitled 'A Child in Conflict with Law' the jurisdiction of the Juvenile Court is not limited only to matters of criminal charges against a child as per section 98(1)(a) but extends to matters relating to child care, maintenance⁵⁴ and any other matters as shall be conferred by any other written law⁵⁵. Thus, reading section 98 (1) in entirety, the Juvenile Court is vested with jurisdiction on both matters of criminal and civil nature relating to children. In assessing the CAP ability of the juvenile court to discharge its functions as an institution, regard must be had on how it is sufficiently able to combine criminal and civil jurisdictions both in terms of facility designation and physical access. Regardless, the focus for the present is based on the jurisdiction of the Juvenile Court stemming from section 98(1) (a) relating to criminal charges against a child, in which it helps with keeping in traditional understanding of the Juvenile Justice, which this report is all about.

Section 98(3) dictates that the Juvenile Court shall wherever possible sit in a different building from the building ordinarily used for hearing cases by or against adults. This section is further reinforced by section 100(1) which zeroes in on criminal charges specifically, and makes it mandatory. As shown above, there were no designated juvenile courts facilities other than one at Kisutu Juvenile Court in Dar es Salaam Region, then a CAP ital city. As a way of attending to this statutory requirement, the Chief Justice had in 2018 issued a Circular to designate selected primary courts facilities to serve as Juvenile Courts. The Circular has identified and designated a total 130 primary court facilities countrywide to serve as the Juvenile Courts⁵⁶, which presupposes that there is one designated Juvenile Court for each one district with the exception of Dar-es-Salaam where the Kisutu Juvenile Courts is supposedly to continue serving the entire region of five districts. This invites a different set of challenges with

⁵³ Initially, at the time of enacting the LCA, the Resident Magistrate cadre in the Judiciary was staffed by people with graduate qualifications, unlike the cadres below it that would ordinarily be staffed by diploma of law holders. This position has since changed.

⁵⁴ Section 98 (1) (b)

⁵⁵ section 98 (2)

⁵⁶ The Chief Justice designated the said court premises to be Juvenile Court through the Law of the Child (Designation of Juvenile Courts) Notice, 2016 (GN No. 314 of 9 December 2016).

regard to the accessibility of these courts by children. Dar-es-Salaam example illustrates the enormity of accessibility problem not because of the physical access but problems relating to the facility population ratio. In a region where its population borders 6 million people, and aggravated by the fact that this region represent the most populous, a multi-ethnic and urban complexity where affluence exist side by side with poverty, one facility seems to leave a lot to be desired. In other districts, the locations of the courts so designated presents logistical challenges for their extreme remoteness from the center making transport access very difficult, not only for children who appear as accused, but also for children who would appear for other courts protection. During validation discussions, it emerged that the designation of the juvenile courts did not present the courts with transitory measures for the children cases that were still pending In the rest of courts, a case in point being Kibaha Resident Magistrate Courts, in which there was no single Juvenile Court designated and thus were supposed to be attended by either Kisutu Juvenile Court or the Court in Mkurunga. In this interim period of non-clarity, children continue to be held up in the detain facilities.

The entire Part IX concerns the powers, procedures, safeguards and sentencing options for the Juvenile Court except with the distinguishable Section 101 which seems to address the question of bail for a child during apprehension of the child by the police. This is a pretrial stage in which there is yet an involvement of the Juvenile Court. Save for slippage in draftsmanship which make the provision appear as a result of patchwork and in which case this provision would have been better aligned for coherence, but that speaks of the gaps noticed in the entire Part of the Statute that seeks to install an independent system of the juvenile justice but still lacks comprehensiveness in the way it attends to the entire span from entry to exist, in that it only minimally addresses the pre-trial context of juvenile justice on only one element of bail. It does very little- if any to address the requirement of the international instruments that encourage states to create a system of diversion and do as much as practicable to create alternatives that would divert a child from the mainstream criminal justice system. In the General Comment Number 10

of the Committee on the Rights of the Child, states are urged:

22. Two kinds of interventions can be used by the State authorities for dealing with children alleged as, accused of, or recognized as having infringed the penal law: measures without resorting to judicial proceedings and measures in the context of judicial proceedings. The Committee reminds States parties that utmost care must be taken to ensure that the child's human rights and legal safeguards are thereby fully respected and protected.

23. Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society (art. 40 (1) of CRC). The arrest, detention or imprisonment of a child may be used only as a measure of last resort (art. 37 (b)). It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programs, and other alternatives to institutional care (art. 40 (4))

- The UNCRC further urges the states to ensure the law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination'. It recommends several tested programs and interventions aiming at restorative justice⁵⁷.
- The assessment opines that the LCA denied itself the opportunity to address providing provisions that would create measures of dealing with offending children without resorting to judicial proceedings; and has even in the case of judicial proceedings,

not availed itself the sufficient latitude to divert children at the point of criminal proceedings to resort to other alternatives. In this case, the principle of the best interest of the child is not better served by this flimsiness of the law. This, one would argue, leaves the doors open for most children, if not all, to pass through the mainstream judicial proceedings even where there matters were only minor and could have disposed of if the law had created enough room for such recourse.

- On a different note, in as much as the LCA 2009 sounds wanting in guiding the procedure and providing procedural safeguards for children during the pretrial phase of the child's interaction with the law, it leaves room for the continued application of the *Criminal Procedure Code, Chapter 20 R.E 2002*. Noting that there was only limited consequential amendment to CAP 20 by the LCA 2009, it would appear that the provision of the CAP 20 apply wholly to the child in procedure regarding arrests, searches, interrogations, investigations and any other pretrial element of justice save for the only exception regarding police bail for children that is created under section 101 of the LCA, 2009.
- On one of a few positive aspects of the LCA, despite its other shortfalls, is the room created for the Chief Justice to issue Juvenile Court Rules⁵⁸ of procedure to guide the conduct and business of the court in child related matters. The Chief Justice had issued a new Juvenile Courts Rule 2016 published as Government Notice 182/2016 following the repeal of the earlier Rules that had several hitches. The newer rules seem to, arguably, comprehensively address some of void which had not been made clear reading solely from the main Act. The Rules breaks down to the practical level the procedures and considerations to guide practitioners during the trial phase and, to a fair degree, on the post-trial processes. It is therefore assumed to be thorough.
- However, the focus of the present assessment is not more on

⁵⁷ Paragraph 27 of the UNCRC General Comment No. 10

⁵⁸ Section 99 (1).

examining the thoroughness of the Juvenile Court Rules that attends to matters of procedural rights and safeguards as they relate to child matters especially with regard to criminal proceedings than it is on interrogating the overlap of the LCA with other penal laws in determining the substantive nature of the offences. Thus, the *Penal Code, Chapter 16 of the Laws of Tanzania R.E 2002* remains the main sustentative penal law to define the nature and extent of offence. This is also to note the *LCA, 2009* consequential amendment, the *Penal Code CAP 16* has been extensively amended to align the age thresholds for the purposes of defining responsibility for different offences with the definition of the child as is provided for under the *LCA,2009*.⁵⁹ In other words, with regard to the degree and the burden of proving an offence, children are not spared of the same standards in substantive law, only that the impact of such proof will only lead to consequences different from ordinary adult offender.

Consequential Amendment to section 15 of the Penal Code that that sub-section (4) that states:

- *“Any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act,2009”.*

It is the impression of this assessment that this provision eliminates any likelihood for children to be dealt by any other court or tribunal other than the Juvenile Courts by making an absolute mandatory requirement, which is commendable. However, in further analysis, it tends to invite the possibility of justification for dealing with the child in conflict with the law, who is above the age of twelve years, by any other court or tribunal other than the juvenile courts, which may not have been an intention of the legislature. This procedural requirement of the law can be reviewed to make it universally applicable to include every child who falls in the construction of ‘the child’ as per section 4(1) of the *LCA, 2009*.

- However, on practice, this does not appear to be as easy as is said.

⁵⁹ Part XIII Sub-part IV Ss. 173-192 of the LCA, 2009.

The court officers involved in group discussions attest that children continue to face problems due to prosecution malpractices during the drafting of the charges. Quite often that non-juvenile courts receive charges involving children. It emerged that once the courts receives such a charge, the presiding magistrate, in an apparent error of judgment in the view of this assessment, considers themselves not bound to admit the appearance of the social welfare staff or probation officer, because in their opinion, that requirement only applies to the Juvenile Courts and not otherwise. Such a view, revealed during the consultation with the group of law enforcement personnel during the training organized by TAWLA on the 16th November 2018 in Dar es salaam was sharply contested by other participants of the group, but goes to reveal the discrepancy in practices by the courts caused by either ignorance, or low level of dissemination of laws relating to children by the court officers. Further expositions reveal that, during the pretrial stage, police officers conducting investigations and arrests, feel it convenient to raise the age of culprits children in order to avoid complications imposed by the invocation of the child related procedure, in which case they would have to tend to accommodations and upkeep of children if the child cannot obtain police bail. These few examples illustrate the scenario that the effectiveness of the law can only be effective if there is sufficient goodwill of the people tasked to make it work⁶⁰.

In summing up our examination of the framework provided by the *LCA, 2009* against the benchmarks created for the country by the sundry of the international juvenile justice frameworks, the assessment holds that the domestic law appears to be a mixed bag of both the progressive movement towards reforming the juvenile justice systems and putting in place the functioning institutions to attend to that need, and in some respects it offers no better options from the ones the predated it. It is therefore imperative that the area of juvenile justice in the interim, shall depend much on the development of the law through the application of the *LCA,2009* through the case law- to allow that arm of law making

⁶⁰ The Training workshop was a preliminary platform of validation of the present, whose inputs have been incorporated to this version of the report.

to bridge the lacuna that have been identified this far. We have taken note of an attempt by the Chief Justice, by the powers vested to him through the LCA, and through administrative pro-activeness- has already issues a series Circulars to clarify and provide for Practice Guidance to practitioners⁶¹ on the best ways of dealing with child related matters in the courts. Save for a few cases that have had the LCA tested in the court of law to interrogate some of its provisions such as the one challenging section 113 on the determination of age in the Elizabeth Michael versus Republic⁶² the area of case law is not yet sufficiently developed to serve as agent for change with regard to juvenile justice, but bears the greatest potential if applied with some sense of judicial activism.

In the next chapter, we shall examine the existing efforts that are geared towards reforming not only the law as we have seen in this Chapter, but the institutional strengthening and the steps taken to install the child friendly system of juvenile justice. The chapter shall be inspired by the practice evaluative reports on the subject matter.

⁶¹ For example the CJ's circular No. 2 of 2018 regarding the protection of identities before the court, of the parent, guardian of the child in the adoption proceedings, and victims of sexual offences of whatever age.

⁶² Criminal Application No 46 of 2012



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CHAPTER SIX:

JUVENILE JUSTICE REFORM PROGRESS IN THE ERA OF APPLICATION OF LCA: NINE YEARS ON SINCE ENACTMENT

INTRODUCTION:

This part assesses the ongoing reform efforts broadly with regard to juvenile justice, which efforts shall help with the overall understanding of the likely situation of children passing through the juvenile justice system in Tanzania. This follows on the analytical context already built under Chapter Three of this report that sought to interrogate the alignment of reform efforts with the aims of Part IX of the LCA, 2009, and to examine the potential for optimizing these reform efforts by building upon the strengths yielding from the past 8 years since the operationalization of the Statute. Further considering that this was intended to be achieved progressively through the implementation of the National Strategy for Progressive Reform of Child Justice, this assessment will look specifically into the progress- and whether the progress has successful set the moment on course towards having a child friendly juvenile justice system dreamed of by the drafters of the international instruments. In the course of that analysis, we shall also examine the role that is played by the present National Plan of Action for Ending Violence against Women and Children (commonly known as NPA-VAWC) in terms of coordination and structures and how well that sits with the juvenile justice reform agenda. This Section is inspired and draws fairly from the Evaluation of the Child Justice Strategy, with additional analysis provided.

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CHAPTER SIX

NATIONAL STRATEGY FOR PROGRESSIVE REFORM OF CHILD JUSTICE: AN OVERVIEW

The CJ Strategy was developed in 2012 following the recommendations of the National Child Justice Forum, which Forum was initially created to steer the execution of the two studies regarding the Access to Justice for the Under 18, and the Assessment of Children in Conflict with the Law conducted by the Ministry of Justice and Constitutional Affairs with the support from UNICEF. The outcome of the studies has fairly been discussed in the preceding sections. Suffices here to mention that the findings provided the basis upon which the CJ Strategy was conceived.

The Strategy was grounded on the overall child rights principles as were enshrined in the major child rights instruments including the CRC⁶³. Thus, the best interest of the child principle, the principle of non-discrimination, the child's right to view, the child sensitive and fully functional justice system, including the juvenile justice system that addresses prevention, separates children from the adult oriented judicial systems and processes, and as much as possible deploys measures that are alternative to judicial formal proceedings, that considers and uses deprivation of liberty as the matter of last resort, and that aims to rehabilitate and reintegrate instead of penalizing and deterring.

The objectives of the Strategy were divided into 8 broad sub-themes. Objective 1 focused on creating awareness for communities, parents and children for child rights and the need for their protection. Objective Two addressed itself strengthening the capacity of child justice system by focusing on both formal and informal system with regard to infrastructure, human capital and financial resources. Objective Three centered on aligning juvenile justice system to become child rights compliant along the lines created by the Law of the Child Act, 2009. Objective Four addressed the question of child victims and witnesses. Objective Five attended to the need to protect child from violence and abuse through enforcing the child protection systems. Objective Six sought to enforce non-discrimination for children through land rights and inheritance laws.

⁶³ Some of the international human rights instruments providing generally for children's rights are: the international Covenant on Civil and Political Rights (ICCPR) (1966); the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (1979); the African Charter Human and Peoples Rights (ACHPR) (1981); the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (2003); and the UN Convention on the Rights of Persons with Disabilities (2006).

Objective Seven sought to improve access to quality legal help for children by addressing legal representation and assistance for children in all civil and criminal matters, and finally; Objective Eight addressed the overarching subject of monitoring and coordination.

A number of actions were spelt out for each objective in order to realize the aims and goals of the strategy. The Strategy was intended to be multi-sectorial and multi-disciplinary in nature and would therefore be achieved by being implemented in the sector strategic plans and MDA's Medium Term Expenditure Frameworks for the period running from 2013 to 2017.

For the purposes of the present analysis, the most directly related subthemes are those in objective 2, 3, 4 and 7 with objective 3 being more dominant of all, to which we now turn to examine by just selecting a few aspects for discussing in detail for each objective.

REPORTED PROGRESS ON THE CJ STRATEGY AS OF 2018.

Improvement of the Regulatory Framework:

The Assessment notes that despite the foregoing discussion in Chapter Five, significant progress has been made on legal framework for juvenile justice since the adoption of the LCA 2009. Based on the evaluation of the CJ Strategy as source of information for this assessment, Objective 3 that had intended to ensure that all children in conflict with the law 'are treated in a manner that complies with international standards, is consistent with their dignity and worth, and focuses on their rehabilitation and reintegration into society.' One of the key actions of this objective was creating a specialist child friendly, child rights compliant juvenile justice system. The ensuing Juvenile Court Rules, first in 2013 and then replacement in 2016 are said to be informed by this ultimate goal.

Juvenile Court Rules 2016 works but in conjunction with other subsidiary legislations made under the same LCA, 2009⁶⁴ and shall as much as possible be read together.

⁶⁴ Numerous sets of regulations have been developed under the LCA, 2009, namely: Regulation on Children in Remand Homes 2017; Regulation on the Adoption of the Children 2017; Regulation of Children Residential Homes 2017; Regulation on Day care Centers 2017; Regulation on Foster Care Placement 2017; Regulation on Child Employment 2017; Child Protection Regulation 2017; Regulation on Apprenticeship 2017

Apart from the Juvenile Courts Rules and other set of Regulations supporting it, the LCA, 2009 was amended in 2016 through the Written Laws (Miscellaneous Amendment) Act, 2016⁶⁵ to provide tighter by designating the new section 100A to provide requirement for conduction Social Inquiry Report during hearing and before sentencing and to consider the opinion of the Social Welfare as a mandatory requirement. In the spirit of civilianizing the judicial proceedings, the role of the police officer under Section 103(1) was replaced by the public prosecutor, and demand for expeditious trial in accordance to amendment to Section 103 (2) and ss. (3) where it states:

- (2) Where a child is brought before the Juvenile court for any offence other than offences triable by the High Court, the case shall be disposed by the Juvenile Court on the same day.
- (3) The Juvenile court shall, subject to subsection (2), for any reason to be recorded in the proceedings adjourn the case to another day and may release the child on bail.

Previously, sub-section (2) was very narrow in scope: 'Where a child is brought before the Juvenile Court for any offence other than homicide, the case shall be disposed by that court on that day.' It did not provide a room of flexibility for the court to adjourn a case in any given circumstances and this brought about practical challenges particularly where the circumstances of a case requires that the court should have more time than one day to determine the matter.

Although Section 119 had previously prohibited imprisonment of children as a form of sentence, it was not tight enough as there was still possibility for any other written law to prevail over section 119. Thus, the amendment to Section 119 eliminated the possibility by adding to it 'Notwithstanding the provision of any other written law...'.⁶⁵

The Chief Justice under his administrative capacity has also issued a number of Circulars to clarify and provide guidance on a number of issues touching on the judicial practice- including the designation of

⁶⁵ Act No. 4 of 2016.

the courts mentioned earlier; and protecting the identities of children accused and children victims of child sexual exploitation.

Based on this Strategy, the Legal Aid Act was enacted in 2017⁶⁶ which has been followed by its Regulations gazetted in 2018⁶⁷ to operationalize the Law. Based on Objective Seven of the Strategy, the Act allows the access to legal representation and assistance to children in the conflict and contact with the under section 35 and 36, and also gives allowance to a new cadre of paralegals to provide legal assistance to the indigents and children. In particular to provision of legal aid in the child justice system, Section 35 obliges any person charged with the duty of supervising the welfare of a child, while in execution of his or her duties deals with a child who has come into conflict or contact with the law to 'cause such child to obtain legal aid immediately. 'Furthermore, where an accused person is in police custody or in a prison facility, the Police Force or Prison Service, as the case may be, is obliged to ensure that such person receives legal aid. In terms of Section 36(1) of the Legal Aid Act, the two law enforcement institutions are obliged to 'designate a mechanism for facilitating the provision of legal aid services by legal aid providers to accuse or convicts in custody in the manner to be prescribed in the Regulations.'⁶⁸

Given that the operationalization of the Act has just started, there are still scanty data⁶⁹ on the how this service has benefitted children although inquiry with the Ministry of Constitution and Legal Affairs confirmed that the Registrar for Legal Aid was in the process of preparing the statutory annual report.

These and other steps both legislative and administrative have showed the government commitment to improve, on an ongoing basis, the regulatory framework for juvenile justice environment in Tanzania. The situation is far from perfect as most of these improvements have just been adopted and it is still premature to assess their effectiveness, and there is still a long way to go, but for the fact that there is willingness to effect change raises a fair degree of optimism.

⁶⁶ Act No. 1 of 2017.

⁶⁷ GN NO. 44, published on 9 February 2018.

⁶⁸ In terms of Section 36(2), the Regulations envisaged in subsection (1) of Section 36(1) are to be made in consultation with the minister responsible for home affairs.

⁶⁹ See Chapter 6

STRENGTHENING THE INSTITUTIONAL FRAMEWORK AND SERVICE DELIVERY CAPACITY.

A wide ranging set of interventions and steps have been taken and efforts to reform are well underway. There is an increasing sense of putting child protection measures across board in the juvenile justice sector and to all child related services. This shall be discussed in the context of the ongoing implementation of the NPA-VAWC and see how the same supports the initial aims of reforming justice.

Drawing from earlier discussion, article 40(3) of the *Convention on the Rights of the Child* state that:

'States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law',

Elaborating on the requirement, the United Nation's Committee on the Rights of the Child in General Comment 10 clarified that the state parties, in ensuring there is coherent organization of juvenile justice within the justice structure, it must 'establish specialized units within the police, the judiciary, the court system, the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child'⁷⁰. The Committee further recommends to the countries to establish juvenile courts either as separate units or as part of existing regional/district courts⁷¹. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice. In addition, specialized services such as probation, counseling or supervision should be established together with specialized facilities including for example day treatment centers and, where necessary, facilities for residential care and treatment of child offenders. In this juvenile justice system, an effective coordination of the activities of all these specialized units, services and facilities should

70 Para 92 of the General Comment 10
71 Para 93 ibid

be promoted in an ongoing manner⁷². The Committee also proposes as a best practice, the involvement of non-government organization in organizing some of the service and involvement in the coordination, along with volunteer and United Nations Agencies⁷³.

This section appraises Mainland Tanzania's efforts in articulating measures, as were captured in Objective 4 of the Child Justice Strategy, geared towards achieving the above context in a number of areas. The Evaluation Report (read in draft) cites a number of achievements that includes designation of Juvenile Courts around the country; designation, training and deployment of Juvenile Court Magistrates; training of Juvenile Court Magistrates; designation and deployment of Social Welfare Officers; and establishment of the Cadre of *Guardian Ad Litem*. Other milestones include improving the prosecution of cases involving children; improving police work in the juvenile justice system; strengthening correctional services for children; and improving support services to children in the justice system (i.e. provision of legal aid services as well as undertaking diversion and community rehabilitation initiatives).

i. Designation of Juvenile Courts

Although it took a long time before an action was taken to designate the Juvenile Courts, in December 2016 the Chief Justice designated a total of 130 Primary Courts as Juvenile Courts, one in every district,⁷⁴ in terms of Section 97(2) of the LCA.⁷⁵ This brings the total number of juvenile courts to 131, including the ancient Kisutu Juvenile Court located in Ilala District, Dar-es-Salaam. The discussion in the preceding section had examined the adequacy of this action. Suffices here to roundly comment that although this a huge leap forward and certainly geared towards attaining the aims of the LCA, 2009 as per section 97(2) and the international framework for juvenile justice, there is still for improvement to attend to issues of access given that some of the designated Juvenile Courts are found in hard to reach remote locations.

72 Para 94 ibid
73 Para 95 ibid
74 The Chief Justice designated the said court premises to be Juvenile Court through the Law of the Child (Designation of Juvenile Courts) Notice, 2016 (GN No. 314 of 9 December 2016).
75 Section 97(2) of the LCA expressly provides that: 'The Chief Justice may, by notice in the Gazette, designate any premises used by a primary court to be a Juvenile Court.'

On another note, although a requirement of the law, the Primary Courts building designated for the Juvenile Courts have one notable flipside as do not bear much of the semblance of the standard Juvenile Courts in their architectural design, nor are they equipped with the necessarily facilities to ensure maximum privacy and protection of identities of children. Most of these courts have open plan layout and may render some of the proceedings, where for example, giving testimony in camera, may not be practically achievable.

Designation of Juvenile Court Magistrates

The designation of 130 Juvenile Courts went hand in hand with the designation and deployment of juvenile court magistrates as required by Section 97(3) for each designated Juvenile Court around the country⁷⁶ by 2017. In principle, Section 97(3) of the LCA provides categorically that: '(3) A Resident Magistrate shall be assigned to preside over the Juvenile Court.' This provision was extended paragraph 3 of the Law of the Child (Designation of Juvenile Courts) Notice, 2016, which stipulates that:

3. A juvenile court shall be duly constituted when presided over by:
 - (a) A Resident Magistrate having jurisdiction in the District Court of the district in which the premises of the Primary Court designated as the juvenile court are situated, or
 - (b) A Resident Magistrate of the Primary Court stationed at the court whose premises have been designated as juvenile court.

⁷⁶ This activity envisaged to have a 'certificated' juvenile magistrate to preside over each juvenile court. This was supposed to be accomplished in the period between 2014 and 2017.

Training of Juvenile Court Magistrates

There has been sustained effort to build the capacity of the Judiciary personnel on Juvenile Justice since 2013. By 2017 a total of 278 Juvenile Court Officers were provided training in 7 out of 14 Judiciary Administration zones. There are currently 638 officers in the 14 zones. These include the Resident Magistrates, the State Attorneys, the public prosecutors, Social Welfare Offices, and the private advocates as officers of the court. The trainings, initially administered directly by the Judiciary, were later commissioned to the Institute of the Judicial Administration (IJA) in Lushoto.

Officers are trained based on the manuals developed for the purpose. These manuals had been prepared collaborate by experts from all institutions in the legal sector and with specific technical support from UNICEF and Coram Children's Legal Centre. The Manuals address most of the context that is covered by the Juvenile Court Rules 2016.

Conducting training on an on-going basis is the progress that is worth noting. Some of the earlier recipients of the training were accorded refresher training once the Manuals had been reviewed in order to acclimatize them with on-going evolvement of the regulatory and practice framework.

Designation and Training of Social Welfare Officers/Probation Officers

Following the designation of 130 Juvenile Courts, the Department of Social Welfare, in collaboration with the respective local government authorities (LGAs), appointed Social Welfare Officers to work in 119 Juvenile Court out of 130 designated Juvenile Courts. A Circular has also been issued and circulated,⁷⁷ clarifying and setting out the roles of probation officers and social welfare officers in relation to juvenile offenders and those at risk of offending in regulating issued under the LCA, 2009. These SWOs have also been part of the training provided to the Juvenile Court Officers.

⁷⁷ The Circular was issued by the Commissioner for Social Welfare in early 2017.

Establishment of the Cadre of *Guardian Ad Litem*

In 2016 the Department of Social Welfare adopted a Guide for Guardian *Ad Litem* Scheme as well as Juvenile Justice Guideline for Social Welfare Officers. This Guide provides for the procedure and eligibility for being appointed as a guardian *ad litem*.⁷⁸ According to the Guideline, a guardian *ad litem* is appointed by the presiding magistrate in the Juvenile Court in terms of Rule 15(1) of the Juvenile Court Rules to represent a child where such child 'cannot afford to pay for legal representation, and it is not practicable to provide free legal assistance to a child, and a parent or guardian is not able to provide effective representation for the child.'

This rule, therefore, obliges the magistrate presiding at the hearing to 'ensure that a child who is charged with a criminal offence is provided with appropriate assistance in the form of a guardian *ad litem*.' Under Rule 15(3), a guardian *ad litem* must also be appointed for all children in civil or child protection proceedings. Additionally, the Court may permit victims and witnesses to be assisted by a guardian *ad litem* in terms of Rule 15(4).

Acting as a representative of a child where there is no advocate to act for the child, a guardian *ad litem* can assist the child with examination and cross-examination of witnesses. He or she can also submit documentary or other evidence on behalf of the child and to address the court in respect of the child's views wishes and best interests.⁷⁹

Notably, Rule 15(2) of the Juvenile Court Rules obliges the court to explain to a child that s/he may choose to be represented by a parent or that he may select and appoint a guardian *ad litem* or request that the court appoint such a person. This then presupposes an obligation imposed on the magistrate-in-charge, in consultation with the head of the social welfare department for the district in which the court is situated, to 'ensure that the district has an adequate number of qualified guardians *ad litem* able to assist a child.'⁸⁰ For that matter, the court is obliged to

⁷⁸ Rule 3 of the Juvenile Court Rules defines a guardian *ad litem* as 'a person who takes the responsibility or is appointed to represent and protect the interests of a child in a Juvenile Court proceeding.'

⁷⁹ *Ibid*, Rule 15(6).

⁸⁰ *Ibid*, Rule 15(9).

keep a list of guardians *ad litem* available in the district.⁸¹

The obligation to keep a list of guardians *ad litem* demands that the Department of Social Welfare should put in place a clear mechanism to enable heads of social welfare departments in each district to recruit persons fit to act as guardians *ad litem*; hence the adoption of the Guide for Guardian *Ad Litem* Scheme.

However, with the operationalization of the Legal Aid Act, where it makes it legal assistance and representation for children mandatory for children in both criminal and civil proceedings, the role of the Guardians *Ad litem* may increasingly seem more ancillary or outright redundant.

Strengthening the Prosecution Function for Cases Involving Children

The Office of the Attorney General, and the Directorate of Public Prosecution in particular had in 2013 established the special desk designated as the National Prosecution Services Gender and Vulnerable Groups (NPS-GVG). The desk was vested with the responsibility of handling prosecution matters involving vulnerable groups, including children. Some of its key functions include:

- (i) To supervise the prosecution of juvenile cases in the court;
- (ii) To follow up different incidents of violence against children reported and make sure the perpetrators are apprehended;
- (iii) To set strategies for enhancing access to justice for children in conflict with the law and those in contact with the law; and
- (iv) To ensure that all prosecutors are aware of the Law of the Child Act, 2009 and its regulations in relation to prosecution of cases concerning juveniles.

⁸¹ *Ibid*, Rule 15(10).

The function of this desk was further strengthened through the 2016 amendment⁸² to section 103 (2) of the LCA, 2009 to transfer powers of prosecution of juvenile cases to public prosecutors instead of police officers. As a result of this amendment and the designation of the Juvenile Courts, the Office of the Director of Public Prosecutions appointed State Attorneys/Public Prosecutors to conduct prosecution of cases in every designated Juvenile Court.

In addition to have a dedicated desk streamlining the roles with in the prosecution docket, there has been additional measures to ensure smooth running of the mandate which have included reviewing the Prosecution General Instruction to incorporate children issues; to develop the Standard Operating Procedures (SOPs) and Guidance for investigation and prosecution of cases involving child suspects and victims on child-friendly procedures for working with children in conflict with the law, the latter still being finalized and ensuring the availability of the translated laws and regulations in Kiswahili language⁸³. Public prosecutors form one of the cadres that have been exposed to regular trainings on Juvenile Justice.

Further to the measures undertaken as indicated above, the Office of the DPP conducts monitoring of children incarcerated in remand facilities (police lock-ups, prisons, retention homes and the approved school). During the life span of the Strategy, a total of 89 detention facilities were inspected in 23 regions. According to the latest monitoring statistics, and despite all the improvements made in the regulatory and institutional frameworks, some statistics are still startling. Here is a cross sectional overview of the stats coming from the DPP Prisons inspection visits from one of the exercise:

Table 3: Children Deprived of Liberty⁸⁴:

Type of detention	Number of Children	Males	Females
Children Found in Prisons	723	716	17
Children in pre-trial detention facilities	503	Data not available	Data not available
Children in Police lock-ups at the time of visitations	25	Data not available	Data not available
Children incarcerated with their mothers in prisons	37	Data not available	Data not available

Improving Police Work in the Juvenile Justice System

Due to its broad mandate and overall functions of preservation of peace, the maintenance of law and order, the prevention and detection of crimes, and the apprehension and safe keeping of offenders, the Tanzania Police Force (TPF) had undertaken to do wide ranging interventions -ranging from ensuring protection of children on arrest, apprehension and before the 2016 amendment, prosecution.

The police strived to establish Specialist Policing for children, and consequently, for juvenile offenders, among other things. To achieve this objective, the Police had received support to establish and model the Gender and Children Police desks responsible exclusively to dealing with issues related to children and women. As a result

A total of 417 GCD's were established countrywide. In 2012, the Guidelines for Establishing Police Gender and Children Desk were adopted and subsequently translated, printed and disseminated. The TPF, in collaboration with different stakeholders, have been constructed/renovated 33 GCPDs in 17 regions which are in line with the established guideline and any new construction of the police station is to include as per the Guideline, the Gender and Children Police desks. It is assumed currently that all matters were children are involved are referred to the GCPD.

⁸² Act No 4/ 2016 op. cit
⁸³ A Swahili version of the LCA was published and gazette by Government Gazette No. 134 Of 9 May 2014

⁸⁴ The data derives from the information furnished for evaluation of the Child Justice Strategy for the Inspection Report conducted in 2013. Additional response to interview suggest that the current trends show mixed picture, in some regions there is a notable increase of children deprived of liberty while in other areas the numbers are decreasing.

In 2013 the TPF developed Standard Operating Procedures (SOPs) for CAP acy building of its officer engaged in dealing with children in conflict with law. 5,400 police officers were trained on handling juvenile cases that now all matters relating to children in conflict with the law reported to Police Stations are handled by Gender Children's Desk available in the relevant stations. In addition, 500 police officers were trained on how to conduct interviews of child victims or witnesses consistent with international child justice norms

The Police had undertaken to implement prevention, diversion and rehabilitation Programs to respond to the needs of children in conflict or at risk of coming into conflict with the law and ensure the least possible use of judicial proceedings and detention. This programmatic intervention is being supported in 5 regions and plans for its scale up are still unclear. Order 240 of the Police General Orders (PGO) has been reviewed to stipulate the role of police officers when handling children conflict with law, including resorting to diversion. In addition, the SOP's for juvenile justice sets out proper procedures of arresting and providing bail to juvenile offenders; and collaboration between different actors and referrals. Training to police officers with regard to this intervention has been provided- and awareness raising are being implemented on an ongoing basis.

LINKAGES BETWEEN JUSTICE AND OTHER SUPPORT SERVICES

Reforming the Juvenile Justice system requires a multi-thronged approach, involving multiple disciplines and woven into different sector plans. A number of interventions, directly or indirectly, relating to juvenile justice deserve a mentioned.

Legal Assistance and Legal Aid

The Legal Aid had been discussed extensively in the foregoing sections, however, for the purposes of appraising the already implemented interventions, it is worth noting that the Legal Aid Act , 2017 is the relatively new introduction to the picture, and the operationalization through the Legal Aid Regulations , 2018 even more so. However, this law has provided

an impetus to hitherto voluntary legal aid providers and paralegals . It should be noted that since 2006 legal aid providers in Tanzania have been working under the umbrella of the Tanzania Network of Legal Aid Providers (TANLAP), which was mandated to further Objective Six and Seven of the CJ Strategy.

A number of activities geared towards capacity strengthening have been implemented including developing the training tools for paralegals and training a number of them across the country. Various legal aid providers have piloted and scaled up legal aid projects for children in conflict with the law, most notably the Women Legal Aid Committee (WLAC) and the Tanganyika Law Society (TLS) both in Dar-es-salaam and Mbeya Region. This has helped in reducing the number of children from the detention facilities in Dar-es-Salaam and Mbeya by 700 and 400 respectively; and a nearly 100 per centum reach of all 1,038 children who were in conflict with the law in just the two regions. The overall national data on the coverage of legal aid and support is yet to be available pending the annual report of the Registrar for Legal Aid, whose responsibility it is. However, data on general matters regarding legal aid to the public provide by TANLAP does exist. These statistics shows the incredible potential role the volunteer organizations can play on contributing to reform the juvenile justice sub-sector.

Community Rehabilitation Services

This refers to the establishment of a multi-disciplinary reintegration team with mandate to develop and co-ordinate the implementation of individualized rehabilitation programs and reintegration plans at the Approved School In realizing this goal, in 2012 the MoHCDGEC, through the Department of Social Welfare (DSW), launched a Community Rehabilitation Program (CRP) for children in conflict with the law and those at risk of offending in Dar-es-Salaam (Temeke and Kigamboni LGAs) and Mbeya (Mbeya City) regions. Numerous studies have confirmed that children who commit offences are influenced by various reasons such as parents or caregiver's behavior, communities and environments surrounding children, traditions and customs, peer groups and poverty in the family.

In particular, the CRP promotes non-custodial sentences and focuses on preventing children from entering into the criminal justice system. Rehabilitation of adolescents is also prioritized and is both in the Health Sector Strategic Plan IV 2015 – 2020, and the National Plan of Action to End Violence against Women and Children in 2017- 2022.

The implementation of the CRP in Temeke, Kigamboni and Mbeya LGAs generated remarkable success. At the end of 2017, a total number of 406 referrals were received and processed through the Programme in Temeke and Kigamboni Municipalities in Dar-es-Salaam Region. In Mbeya, 313 children were referred to and assisted through the Programme facilities. Invariably, the Tanzania Police Force (TPF), as the leading referral body, has been diverting children as per the Police General Order No 240. Among the CRP graduates from the two piloting regions, only 6 children have been reported to have re-offended, so far; others have returned to the community (i.e. to their parents/families) and were made to pursue vocational training and attending mainstream schooling.

As a result of this success, the Government, through the Child Justice Forum (CJF), recommended that the CRP should be rolled out and implemented in all LGAs in the country. As a result of this recommendation, starting from July 2017, the CRP was to be scaled-up in five (5) more districts. However, it should be noted that the pre-condition for the proposed scale-up and establishment of this Program in other LGAs depends upon the need and existence of other child protection services, such as designated Juvenile Courts and Police Gender and Children Desks (GCDs) in order to complete an integrated approach.

The sustainability strategy include expanding on the government run-model of rehabilitation whereas plans are underway to review the Guideline for Establishment of Community Rehabilitation (2015) in order to incorporate the scope and standardize rehabilitation practices to be undertaken by either by Social Welfare Officers (SWOs), or an implementing body.

Enforcing Standards through Monitoring Mechanism on Juvenile Justice

The Commission for Human Rights and Good Governance (CHRAGG) is empowered to monitor the situation of child rights and this includes children the juvenile justice system especially with regard to detention standards, and ensuring access to complaints mechanisms by children. In discharge of this function the Commission has developed, translated and printed the Standardized Monitoring tools and provided training on how to conduct monitoring to the mandated inspection institutions. The tools have been used to guide the regular inspection missions to the detention facilities.

In addition, CHRAGG had increased its internal capacity to receive, investigate and handle complaints of children reporting abuses and violations through a series of trainings to its staff, and had established a child rights desks at each of its five zones, on top of other types such as online reporting, community and school based outreach programs to increase children access to complaints reporting.

OUTLOOK ON REFORM PROGRESS AND RAMIFICATION TO JUVENILE JUSTICE

From the discussion above, there appears to be a remarkably significant progress in putting in place regulatory framework(s) for juvenile justice, and aligning the institutional mandates to better comply with the requirements of the international standards. There is increasing evidence that changes are occurring both at the institutional and at the individual child level. It is therefore important to appreciate and take stock of the achievements, with a view of building upon them towards influencing even greater change. The Law of the Child Act, No 21 of 2009 has provided a scope with which to effect that said changes, and shown that the complementary nature of other statute, though such as the Legal Aid Act 2007, though still pretty much at its infancy, can work in tandem to create the juvenile justice system that is friendlier to children and which is more child rights respecting. It is further indicated from this analysis that there is sufficient guidance drawing from the international

standards. The subject is quite rich in Conventions and other international minimum standards. It takes the political will and professional courage to align our practices towards these research proven best practices and standards.

Nonetheless, this is the journey only half travelled. Operational challenges abound. There is some observed lacuna in the governing laws that must also be removed. Some of those have, against the convention of law making practices as one may be tempted to argue, been addressed by the subsidiary legislation although are visibly lacking in the Parent Act. A case in point is the requirement for diversionary measures during the trial. On this very point, inspiration to apply diversions during the pretrial is not drawn from the Parent Act, i.e. the LCA, 2009, rather the Police have, commendably, to invoke Order 240 from the Police General Orders to enable themselves apply diversion. This underpins the level of inspiration the Police Force have that they did not have to wait for the amendment of the LCA, 2009 and looked for a loophole in their own laws to be able to apply the standards. This is an example to help illustrate the nature of insufficient provisions of the law that relates to the particular subject matter.

The ongoing debate is whether there should be developed a second Child Justice Strategy or its equivalent to follow on the footsteps of the just expired CJ Strategy; or whether in keeping with the spirit of harmonization, child justice matters should be left under the realm of the NPA-VAWC. Until that consensus is found among the policy making forums of the government and her stakeholders, especially likely the Child Justice Forum- one might rightly conclude at this stage that juvenile justice agenda is mainstreamed within the coordination framework provided under the NPA-VAWC (and this is generally understanding anyway).

The next chapter attempts to synthesise the key findings, and puts forward some recommendations based on the information analysed during the assessment.

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CHAPTER SEVEN: CONCLUSIONS AND RECOMMENDATIONS

This report compares the two different epochs, one before the enactment of the Law of the Child Act, No 21/2009 and the other after the enactment, in order to draw the lines along which progress has been registered on the field of juvenile justice in order to draw conclusions on whether the situation of children in the juvenile justice system is getting better or otherwise. This analysis is both relating to assessing the legislative framework and policy and how its evolvement has had a bearing in which reforms on juvenile justice have been pursued.

The following is an attempt to synthesis the discussion in a few point-form conclusions with embedded recommendations upon which to build further progress:

- ii. There is, on the whole, significant shift towards progress in laying down coherent legal framework to govern juvenile justice in Tanzania. The Law of the Child Act, Number 21 of 2009 had domesticated the international law instruments and articulated the vision and context of child rights, and consequently, juvenile justice in the domestic legal system. These steps have created leverage with which follow up actions have been pursued and provide a promise towards progressively working towards perfecting the system. However, there remain concerns of interpretation that would tend to unfavourably view the 2009 enactment as not comprehensively incorporating the entirety of international juvenile justice standards to enable broad based reform to be undertaken.

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- iii. Although the LCA, 2009 had not comprehensively addressed the full extent as is required by the international legal instruments, such as in the case of failure to include opting for a non-judicial process and providing for diversionary measures as one of the examples, it has succeeded to provide a scope upon which the rules of practice have and will continue to be reviewed from time to time in order to address very specific emerging issues of concerns that can be dealt with without demanding full review of the law.
- iv. Further to ii above, there is evidence of culture of practice changing in favour the best interest of the child. Despite the absence of diversionary provision in the LCA prior to resort to judicial proceedings, the police, on their own accord, have found a loophole in the Police General Order 240 that allows for such diversion, and they are applying the Order to remedy the lacuna in the LCA, 2009. Such proactivity is exemplary and necessary to inculcate the child protection mentality in the law enforcement agencies such as police is. With the application and enforcement of this Order, many children stand a chance of being diverted successfully and resort to judicial proceedings only being used on only extreme of cases. To maintain this however, there is need for strengthening and supporting of the Gender and Children Desks established in major police stations, and providing training to more GCPD personnel. Further to training, GCPD may also be supported through developing manuals and guidelines for diverting children from the mainstream judicial system, along with such measures as mainstreaming juvenile justice component in the pre-service police training.
- v. Based on a number of interventions and reform actions, it can be rightly and justifiably summed up that the situation of children, viewed from the legislative and institutional perspective, has significantly improved today that it was prior to the enforcement of the LCA, 2009. Through designation of the Juvenile Courts, promulgation of the Juvenile Court Rules, coming into force of different regulations made under the LCA, 2009, Designation of the Juvenile Court Magistrates,

issuance of the series of circulars by the Chief Justice such as those designating guardians ad litem and protection of identity of children in contact with the Juvenile Courts as witnesses and victims of sexual violence and exploitation- which seek to provide greater protection to children, training of juvenile courts personnel, and other related actions are building up towards improving the juvenile justice system, and making it more child friendly to the extent that it is. This takes cares of the institutional outcomes of change that are easily measurable. The remaining challenge however, and which this assessment could not get at, is the child level outcomes that can only be accessed through measuring children's perceptions and experiences of passing through this system, which, in our opinion, should be designed and done.

- vi. Consequential Amendment to section 15 of the Penal Code that that sub-section (4) that states:

“Any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act,2009”. It is the impression of this assesement that this provision eliminates any likelihood for children to be dealt by any other court or tribunal other than the Juvenile Courts by making an absolute mandatory requirement, which is commendable. However, in further analysis, it tends to invite the possibility of justification for dealing with the child in conflict with the law, who is above the age of twelve years, by any other court or tribunal other than the juvenile courts, which may not have been an intention of the legislature. This procedural requirement of the law can be reviewed to make it universally applicable to include every child who falls in the construction of ‘the child’ as per section 4(1) of the LCA, 2009.

- vii. Children are now accessing and receiving better and more services based on the strengthening of the CAP acity of juvenile courts personnel, and introduction of new services such as the legal representation and support as according

the force of the Legal Aid Act, 2017, the guardian ad litem, social enquiry and social investigation report, placement to the care of a fit person or institutions and other related improvements. In particular to legal support to children during judicial proceedings, it is observed that the Juvenile Courts Rules 2017 predated the Legal Aid Regulations 2018. It may be helpful to review the former in order to integrate the requirements of the legal aid and representation for children during judicial proceedings. Further, as noted in the analysis, the provision of legal aid, has just been launched this year with the operationalization of the legal aid regulations, and it is premature to tell whether more children are accessing the service in the absence, yet, of the Annual Report by the Registrar of Legal Aid.

- viii. In addition, legal aid may not be readily available for children whose matters have not been brought before the juvenile Courts, in which case they may lack the provisions provided for by the Juvenile Court Rules. In this latter situation, it is recommended that steps be undertaken by the custodian ministry responsible for children, to develop, or move to be developed, regulations for access to legal support for children whose matters are either being diverted from the judicial proceedings and at every step of social integration and rehabilitation- so that children, who come into contact with the juvenile justice system, or diverted from it are both able to gain from the benefits of legal aid.
- ix. Contrary to the requirement of the United Nations Guidelines for the Prevention of Juvenile Delinquency of 1990 (otherwise known as Riyadh Guidelines) which directs the countries to address the prevention of the delinquency, the neither is the Law of the Child Act, 2009, nor any other law or regulations seem to guide themselves in the prevention aspects of juvenile delinquency. Section 15 of the LCA, 2009 which speaks of the duty and responsibility of the child as some may argue, no matter how liberally interpreted, cannot be said to offer any meaningful proposition to address prevention of delinquency. In addition and by the way, a

closer scrutiny of the section itself does not show ways with which this provision may be enforced- which renders it merely a cosmetic provision thus hollow. It is recommended that in further analyses and reforms, attention be paid to address the prevention of juvenile delinquency on the whole.

- x. Apart from the soft approach of refining laws and practices, there is a notable effort in investing on maintenance, rehabilitation, expansion and modernization of the juvenile justice related facilities across the country. There are a number of initiatives to construct a standard Juvenile Court in Mbeya and renovations of retention homes in different locations in Tanzania most of which are being supported through donor supported projects and other development partners. While this lauded as the positive step, it however must not ignore the ideal of keeping children outside the formal criminal justice system, and treating the deprivation of liberty as a matter only of the last resort as per the spirit of article 37 of the Convention on the Rights of the Child. Any approach that emphasizes installing more detention facilities must be guided by the desire to keep more children outside the institutions and encouraging community based programs.
- xi. The area of case law for juvenile justice is an on-going concern. There are yet to be developed a formidable reservoir of authorities through decided juvenile justice related cases, partly owing to the relatively newness of the law (although it is hard to maintain this argument). This may also have a connection with the minimal degree by which juvenile cases are preferred through an appeal process, either because of the limited capacity of children and their legal representative to pursue that course of action or, an inherently repressive system that discourages such actions. This line may be interrogated as a matter of academic interest. Meanwhile, the juvenile justice field will continue to suffer from the lack of precedents as long as only fewer and fewer cases filters through to the appellate courts for such authorities to form and consequently get reported.

Given that this field attracts interest of non-governmental actors- it is an area that more NGOs may be encouraged to work on through various public interest/ strategic litigations interventions.

- xii. Like in other areas of accountability, data relating to juvenile justice remains an area of concern. General Comment No. 10 of the UNCRC registers deep “concerns about the lack of even basic and disaggregated data on, inter alia, the number and nature of offences committed by children, the use and the average duration of pre-trial detention, the number of children dealt with by resorting to measures other than judicial proceedings (diversion), the number of convicted children and the nature of the sanctions imposed on them”. The Committee asks countries to urges “systematically collect disaggregated data relevant to the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and effective responses to juvenile delinquency in full accordance with the principles and provisions of CRC” The Committee further asks countries to “conduct regular evaluations of their practice of juvenile justice, in particular of the effectiveness of the measures taken, including those concerning discrimination, reintegration and recidivism, preferably carried out by independent academic institutions. Research, as for example on the disparities in the administration of juvenile justice which may amount to discrimination, and developments in the field of juvenile delinquency, such as effective diversion programmes or newly emerging juvenile delinquency activities, will indicate critical points of success and concern. It is important that children are involved in this evaluation and research, in particular those who have been in contact with parts of the juvenile justice system. The privacy of these children and the confidentiality of their cooperation should be fully respected and protected. In this regard, the Committee refers the States parties to the existing international guidelines on the involvement of children in research.”

While this study did not delve into collecting qualitative primary data, still we recommend that this guidance by the UNCRC be always taken into account and integrated in all future Juvenile Justice plans.

- xiii. While acknowledging that the introduction of the National Plan of Action to Prevent Violence Against Women and Children is a huge leap forward in terms of its ability to provide a coherent formal set up of coordination in relation to children rights matters, at least on paper, and its supposedly take-over and harmonize the functions and responsibility envisaged by the now defunct Child Justice Strategy, its success will depend much on its potential to galvanize and cause the government to allocate more financial resources to child rights both at the central budget level and sector specific financing. It has been noted elsewhere that children issues had not been on the list of development priorities and thus explaining failure to ring-fence resources going to children in the sector plans. NPA-VAWC provides that opportunity, at least theoretically. However, experience shows that committing financially to it has remained a subject of contention owing to its wide-ranging scope. Given this background, it is recommended that, in order not to water down and slow down the progress gained thus far on juvenile justice- planning for juvenile justice continues to be made at the thematic level- hence, the successor plan following the lapse of the Child Justice Strategy. However, juvenile Justice Stakeholders must continue to exploit the benefits of coordination provided through the NPA-VAWC for visibility and sustainability purposes.

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