

THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA
REPORT OF THE COMMISSION ON
THE LAW RELATING TO CHILDREN IN TANZANIA
PRESENTED TO THE MINISTER FOR JUSTICE
AND CONSTITUTION AFFAIRS
DAR ES SALAAM

APRIL 1994

The Law Reform Commission of Tanzania was established by Section 3 of the Law Reform Commission of Tanzania Act, 1980, to take and keep under review all the law of the United Republic with a view to its systematic development and reform.

The Commissioners are:-
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CONTENTS

PART I

PAGE NOS

Report Format.....

0.0, 01	Introduction and Terms of Reference.....	(i)
0.2	Working Group.....	(ii)
0.3	Methods of Work.....	(iii)
0.4, 0.5	Structure of Report and Acknowledgements	(iv)
0.6	Executive Summary.....	(vii)
<u>PART II</u>		
1.0	Definition.....	1-11
2.0	Care, Maintenance, Custody and Education Of Children.....	11-63
3.0	Juvenile Delinquency and Juvenile Justice System.....	64-89
	A. DIVERSION.....	89-91
	B. PREVENTION.....	91-93
	C. OBSERVATION AND RECOMMENDATIONS.....	93-109
4.0	Child Labour and Abuse.....	109-122
5.0	Adoption.....	122-155
6.0	Succession and Inheritance.....	155-166
<u>PART III</u>		
	<u>APPENDIXES:</u> List of Sources and Various Legislative Provisions on Children.....	167-183

REPORT FORMAT

PART 1

0.0	<u>INTRODUCTION:</u>
0.1	Terms of Reference
0.2	Working Group
0.3	Method of Work

- Field Visits
 - Meetings
 - Preparation of Report
- 0.4 Structure of Report
- 0.5 Acknowledgements
- 0.6 Executive Summary

PART 2

- 1.0 Definition
- 2.0 Care, Maintenance
- 3.0 Juvenile Delinquency and Juvenile Justice
- 4.0 Child Labour and Child Abuse
- 5.0 Adoption
- 6.0 Succession and Inheritance

PART 3

APPENDICES

(List of Sources and Extracts from various Legislative provisions on Children compelled separately)

PART I

0.0 INTRODUCTION

This report addresses itself on the need to reform the Law Relating to Children in Tanzania. It is a result of concerted efforts of the Law Reform Commission of Tanzania in conjunction with various government departments, the UNICEF, the Ford Foundation as well as other interested persons and institutions.

Before the take-off of the research, there were already general indications and fears that the present law and practice relating to children's problems in various socio-economic circumstance had been over-taken by the ever changing circumstances.

Out of this general concern, the Commission set-up a Working Group for the purpose of examining the problem in Tanzania in view of the existing legal provisions and similar experiences elsewhere. The compositor of the Working Group is shown on page V of this Report.

The Research into this branch of law has not been an easy task (It has taken about four years to complete). It involved, inter alia, a lot of consultations and study of various of complex statutes on "Child Law" To a greater extent, completion of this Report has been facilitated by the recent coming into effect of the UN Convention on the Rights of Children - (Year)

0.1 **TERMS OF REFERENCE**

The Terms of Reference of this Project are reflected in the Commission's letter to the then Attorney General and Minister for Justice , Hon. D.Z. Lubuva which reads as follows:-

5th July 1986

The Hon. Mr. Justice D. Z. Lubuva,
Minister for Justice and Attorney General
Ministry of Justice,
DAR ES SALAAM

Dear Minister,

INQUIRY AND REPORT ON THE LAW RELATING TO CHILDREN

Section 9(i) of the Law Reform Commission of Tanzania Act, 1980 provides:-

"The Commission may, subject to informing the Attorney General in that behalf, undertake the examination of any matter without waiting for a reference by the Attorney General"

THE COMMISSION BEING COGNIZANT OF THE FACT THAT:-

- (1) Legislation affecting children is of paramount importance and concern to the society;
- (2) The different definitions of the term "Child" in various enactments have resulted in depriving certain categories of children of their rights and protection under the law;
- (3) Various laws touching on inheritance, succession, maintain unnecessary discrimination based on status, nationality religious belief or lineage group that one belongs to;
- (4) The Adoption Ordinance needs to be re-examined particularly bearing in mind its rigid formalities and probable socio-economic difficulties that a prospective adopter may face as a result of his age or inadequacies with a child;
- (5) Child labour and juvenile prostitution is at present a real problem as a result of which children are exploited, maltreated or abused both physically and mentally;
- (6) The state of laws touching on children's Welfare as a whole as it is at present calls for review and change.

NOW THE COMMISSION HEREBY notifies you that is decided to inquire into and report to the Government and desirable changes legislative or otherwise on the existing child laws and any matter related to it.....

0.2 THE WORKING GROUP

The following is the composition of the Child Law Reform Working Group set up by the Commission for the purposes of this Report:-

- | | | |
|----|--------------------|--|
| 1. | Dr. R. W. Tenga - | Chairman of the Working Group
From the Universtiy of Dar es Salaam
Faculty of Law. |
| 2. | Mr. P. Mwangosi | - Co-opted member,
Social Welfare Department |
| 3. | Mr. G. Ngotolanyo | - Co-opted member, Administrator
General's Office. |
| 4. | Mr. E. Ng'maryo | - Co-opted member private Legal
Practitioner |
| 5. | Mr. A. Rwegalulira | - Co-opted member, Social Welfare
Department, |

6. Prof. R. L. Mbise - Co-opted member, Faculty of Medicine, Muhimbili,
7. Mr. A. Y. Shikey - (Substituted/replaced by Mr. A. Rutabanzibwa and Miss F. Mdachi From the Labour Department)
8. Mr. T. R. Mwanayongo- Secretary of the Working Group and member of the Commission's Law Research Officers.

0.3 METHODS OF WORK

The following methods of work were used:-

(i) Library Research

This method involved physical perusal and excavation of literature on the subject. A list of literature used in this study is contained under Item No. 7 of this Report.

(ii) Field Survey

Visits were made to twelve (12) selected regions. This provided an opportunity of observing different children situations and having discussions with various persons in relevant institutions, for example Remand Homes, Children homes, Approved Schools, Day Care Centres etc.....

(iii) Public Consultations

In addition to factual observations, some questionnaires were circulated to the courts, local authorities, Ministry of Education, Social Welfare and other institutions concerned.

(iv) Comparative Field Studies Outside the Country

In order to compare and contrast local circumstances with achievements or problems encountered elsewhere, visits were also made to Kenya and Zambia. Legal practitioners, social workers, universities, courts, contributions on the subject.

0.4 STRUCTURE OF THE REPORT

This Report is divided into three parts.

Part I is mainly an introductory part giving the background information and highlighting on the major areas covered. It also contains the Acknowledgements and Summary of Recommendations.

Part II is the main body of the Report. It focuses on the several topics covered by the Terms of Reference.

Part III contains the Appendices to the Report.

0.4 ACKNOWLEDGEMENT

The Commission acknowledges the tireless effort and dedication shown by the members of the Working Group and all other person and institutions whose contributions into this project have resulted into the production of this Report.

Special acknowledgement goes to UNICEF and the Ford Foundation for their kind financial assistance in the Project.

It must be noted that it is impossible to mention all the names of persons and institutions involved in this work. Suffice it to say that all their contributions are acknowledged...

0.5 EXECUTIVE SUMMARY A TERMS OF REFERENCE

The Terms of Reference are to the effect that the present state of laws touching on children's welfare as a whole calls for review and change. They have been reproduced at Page (iii) of this Report. However, the following specific areas were critically examined in view of their relevancy and importance.

1.0 DEFINITION OF A CHILD

2.0 PROVISION RELATING TO CARE, MAINTENANCE AND CUSTODY OF CHILDREN.

3.0 JUVENILE JUSTICE SYSTEM AS IT DEALS WITH JUVENILE DELINQUENTS AND OTHER CHILDREN. (A) DIVERSION (B) PREVENTION

4.0 PROVISION ON CHILD LABOUR AND ABUSE

5.0 PROVISIONS AND ADOPTION.

6.0 PROVISION ON SUCCESSION AND INHERITANCE AS THEY RELATE TO CHILDREN RIGHTS AND WELFARE

B RECOMMENDATIONS ON EACH SPECIFIC AREA

1.0 DEFINITION OF A CHILD

(A) Civil Statutes

Observation 1

Under the general statutes with regard to identity, citizenship, age of majority and other general statutory schemes, the child is defined as one below eighteen years of age in consonance with the International Conventions and standards.

Recommendation 1

The definition of a child should as far as possible adhere to the internationally set age criterion i.e. any person under the age of eighteen years unless it is clear for the purposes of a particular statutory scheme which of benefit to the children in terms of care, maintenance, protection and future advancement, a child can be defined otherwise.

Observation 2

In civil statutes, certain definitions of the child tend to deprive the individual so defined of certain rights and protection. Examples have been cited to include the definition of a child where a married women of fifteen years is excluded, or definitions of an adult where again such a married person is excluded.

It is unclear under what basis the married woman is excluded from the benefits of adulthood. If the major reason is that she is a potential mother why shouldn't the same be applied to unmarried mothers below eighteen?

Recommendation 2

Marriage age should be raised so that it mooches with the rights and benefits conferred to persons of the age of majority.

It is noted that the Commission's recommendations for the Law of Marriage Act 1971, include the raising of the marriageable age from 15 to 21 years. Should that be acceptable then our observation in relation to Recommendations 2 to 3 above would not be necessary.

Observation 3

The definition of the child in relation to contractual obligations is unclear. This is with regard to categorization of children between stages of maximum incapacity and later stages of childhood where the legal protection ought to be lessened. For example, under the law of Marriage Act, 1971 the Employment Ordinance, Cap. 366, a person of fifteen years of age may enter into a contract of marriage and employment respectively. However, under the Law of Contract. Ordinance, Cap. 433, a person is competent to contract if he is of the age of majority.

Recommendation 3

There is the need to re-consider the limits of contractual capacities provided in the Contract Ordinance, the Employment Ordinance and the Law of Marriage Act. in all these contractual relationships the age of majority should be applicable..

Observation 4

The distinction between legitimate and illegitimate children in a number of civil statutes e.g. those relating to affiliation and inheritance/succession rights, has denied legal protection to a large number of young people of this country.

Recommendation 4

The aforesaid distinction should be done away with and the laws should be enacted for the protection of children generally with no regard to the said distinction. However the distinction between children born in wedlock and out of wedlock can only be made with regard to the procedures and mechanism regulating care, maintenance and protection of the relevant child but the resultant legislative benefits should be as much as possible similar to all children if the starting point for all schemes is in the best interest and welfare of the child.

(b) Penal Statutes

Observation 5

The twelve years to sixteen years range of childhood (which invites criminal responsibility), as defined in Cap. 13 is in line with expert thinking on child psychology and development in early childhood. However, the present range is rather too strict while there is a whole transition period towards maturity covering about four years, i.e. from twelve to sixteen years. Examples from the neighbouring countries and some of the Commonwealth indicate that the age range of children and young person starts from fourteen years of age upwards (see page..9).

Recommendation 5

The definition of a child and young person should be changed so that child is defined to mean a person below 14 years and a young person to mean a person of 14 years and above but below eighteen years.

Observation 6

It has been recommended in this Report, that there is need to establish Borstal Schools to cater for young adults of eighteen years and above. Presently the said category is not covered under the Children and Young Persons Ordinance Cap. 13

Recommendation 6

To afford more protection to young adults, the present age categorization should be reviewed to accommodate the idea of establishing Borstal Schools for "Young Adults", that is persons between eighteen and twenty one years of age.

Observation 7

There are a number of definitions which refer to various social settings which relate to child's social reality. For example, "a home", "parent", a custodian", "dependent" etc.

Recommendation 7

More elaborate definitions from other legislative schemes be adopted, for instance the definition of "dependant" should be borrowed from the Workmen's Compensation Ordinance, Cap. 263 or the Law Reform) Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360, which cover the illegitimate children as well. Relevant provisions be borrowed from suitable legislative provisions like those of the New Zealand Bill 1981 on Children and Young Persons.

On Technical Childhood

Observation 8

There is a possibility of "technical childhood" or "statutory childhood" whereby a person's social or physical problems may prevent him or her from acquiring the natural attributes associated with adulthood.

Recommendation 8

For the children falling within the "technical childhood" other than those covered under the Disabled Persons Legislation, they should be protected by a distinct definition as that one of the Zambian Juvenile Act, whereby under section 2 a "juvenile adult" includes a person of twenty one years of age and upwards, but who has not attained the age of twenty five years.

2.0 CARE MAINTENANCE, CUSTODY AND EDUCATION OF CHILDREN

A CARE IN THE FAMILY SETTING

- (a) The Law of Marriage Act, 1971

Observation 1

When considering any question relating to the custody or maintenance of any infant, the court may, under section 136 of the Law of Marriage Act, 1971 take the advice of some person, whether or not be is a public officer trained and experienced in child welfare however, the court is not bound to follow such advice.

Recommendation 1

The role of the social Welfare Officers should be expanded so that complaints concerning maintenance and inadequate care of children are adequately handled. Apart from the role played by the Marriage Conciliation Boards, counseling by a social welfare officer should be expressed in the form of a certificate or award binding the parties, and upon breach of the same such award should be enforced by a court of law as a decree by the aggrieved party.

Legal Protection of Physical Home of the Child

Observation 2

Unlike provisions of the Civil Procedure Code, (S.4&(1)) whereby certain domestic property e.g. residential house is exempted from attachment for the purpose of sale in execution of a decree, the present provisions in the Law of Marriage Act, do not say anything concerning mismanagement or disposition of the family's residential property even where there is not alternative resources to cater for basic needs of children.

Recommendation 2

A mechanism should be devised to protect children against indiscriminate dispositions of the family's residential property. Procedure safeguards should be provided where disposition of such property is undertaken to the detriment of the children s.59 of the Law of Marriage Act 1971 should be amended to give effect to the protection of such interest of children of the marriage.

(b) Affiliation Ordinance, Cap. 278

Observation 1

The amount of Tshs. 100/= required to be paid by putative fathers is inadequate in view of the high costs of living today.

Recommendation 1

The amount payable by putative fathers should at least be 1/8 of putative father's gross salary or six hundred shillings (600/=) where income cannot be assessed.

Observation 2

Section 5 of the Affiliation Ordinance is to the effect that a putative father may be ordered by the court to pay to a mother or an appointed custodian a sum of money either monthly or in lump sum for the maintenance, education and expenses incidental to the birth of the child. However, section 5 is not elaborate enough as to whether the putative may be ordered to compensate such expense like pregnancy expenses and other expenses incurred by other persons or relatives of the applicant for an affiliation order.

Recommendation 2

Maintenance expenses and pregnancy expenses undertaken by mothers or relatives or any other persons should also be covered under section 5(i) of the Affiliation Ordinance, Cap. 278.

Observation 3

Presently, an order for payment of maintenance and other expenses in respect of a child may be discharged if an applicant (mother of the child has married or where she has a married woman living apart from her husband but has resumed cohabitation with her husband (section 5 (1) and 5(5)(a) and (b).

Recommendation 3

Putative fathers should be made responsible even when the marital status of the mother changes that is when she gets married.

Observation 4

Under section 5(4), variation order may be made either increasing or decreasing the amount previously ordered to be paid by a putative father (such amount not exceeding shs. 100/= per month)

Recommendation 4

On application for variation of maintenance order, section 5(4) of the Affiliation Ordinance should be amended so that the report of the Social Welfare officer is made a requirement to be taken into consideration. If the application is for the decrease of the amount erroneously ordered to be paid, such decrease should not affect the amount payable so that it becomes less than 1/8 of the putative father's gross salary or six hundred shillings where the income of the putative father cannot be assessed.

Observation 5

Section 5(5) provides for discharge of Affiliation Orders on application by a putative father not on the basis of the status of the child but on the basis of the status of the mother, i.e. when the mother of the child gets married.

Recommendation 5

An order for the maintenance of a child should cease only upon he or she attaining the age of majority.

Appointment of Custodian

Observation 6

Presently the term "custodian" refers to a person appointed to have custody of a child upon its mother's death or upon her becoming insane or of unsound mind. It has been noted that it does not specifically refer to an institution of childcare like a home etc. Although it may possibly refer to the Commissioner for Social Welfare. In appointing such a custodian, his or her suitability or integrity may be called in question. Moreover, experience has shown that sometimes it may be very difficult to find a willing (if not suitable) person or relative to look after a child when a mother dies.

Recommendation 6

In appointing a custodian upon the death of a child's mother, or upon her becoming insane or of unsound mind or being in prison, a magistrate should first receive advice of the Commissioner for Social Welfare or his representative with regard to the suitability of such an appointee having custody of the child. Where no such person is available and working on the same advice he should appoint a suitable institution for the custody of the child. Therefore the term "custodian" should be extended to include institutions like children's Homes. The application should be made within three years after the death of the child's mother.

Observation 7

Under Section 9 of the Affiliation Ordinance, a fine not exceeding two hundred shillings or imprisonment for one month are provided as penalty for neglecting and desertion of children.

The same amount of five and imprisonment is provided for the offence of misapplying moneys paid by a putative father or for ill-treating a child (section 10).

Recommendation 7

In replacement of Section 9 and 10 of the Affiliation Ordinance, which provide for a fine not exceeding shs. 200/= or imprisonment for one month against the custodian or mother of the child who in any manner ill-treats the child, there should be provision to the effect that where a person is guilty of mistreating a child he shall be liable to be placed under probation and where he fails to comply with probation order he shall be liable to a maximum fine of Tshs. 50,000/=, provisions as to imprisonment be struck - out and be replaced with a probation order requirement under which the guardian or the mother should be placed under a probation officer who shall see to it that the child is maintained properly.

Observation 8

It has been noted that the present penal provisions of the Affiliation Ordinance vary significantly and the criterion for such variance is not easy to reckon with.

Recommendation 8

The penal provisions of the Affiliation Ordinance should be standardized to a fine not less than shs. 5,000/= or to such sum as the Minister responsible for Social Welfare shall determine from time to time by order published in the Gazette.

Observation 9

In view of Section 9 and 10 of the Affiliation Ordinance which refer to neglect, desertion and misapplying moneys on ill-treating a child, there is a possibility that a putative father may abscond and leave the mother and the child without any support.

Recommendation 9

It should be made a mandatory condition that the putative father lodge his proper address in the court and any change of the address must be notified to the court failure of which would amount to fine not less than 5,000/=

Observation 10

Under section 2 of the Affiliation Ordinance, a definition of the term, "magistrate" is provided as referring to certain class of magistrates, i.e. District Magistrates.

Recommendation 10

Section 2 of the Affiliation Ordinance should be amended by deleting reference to a magistrate and in place of it reference be made to the court which will include primary court as defined in Magistrates court Act NO. 2 of 19 contrary to what it means now i.e. District Magistrate. A lot of people especially in the rural areas have easy access to primary court, as

such, limiting the meaning to District Courts would cause problems to those who do not have easy access to them, and it is worth noting that "justice delayed is justice denied"

Observation 11

It is not quite clear under the present provisions of the Affiliation Ordinance whether a child who is subject of the Affiliation Order may be placed on the same footing as other children born in wed-lock in certain aspects of child's care and maintenance. Also, the extent of care and maintenance benefits that they may get from their father as a matter of legally imposed duty is equally unclear.

Recommendation 11

Since the Ordinance is not clear on the effect of Affiliation order on the status of a child born out of wedlock, such child should be placed on the same footing as those born in wedlock once the court declares the putative father as such. The putative father should mandatory registered as the father of the child, under the births and Deaths Registration Ordinance, after having been so declared by the court. Where a child's recognized by the father as his under customary, procedures then such father should be entitled to register such child as well.

(c) Penal Code Cap. 16

(i) Provisions of Necessaries

Observation 12

Presently, section 206 of the Penal Code imposes duty to parents to provide necessaries to children.

Recommendation 12

A part from section of the Penal Code, there should be additional provisions on general duty for the provisions of necessaries of life and continuing duty for the parents and guardians of disabled children or those children in special circumstances which require continued care.

(ii) Cessation of Duty to provide for care and Maintenance

Observation 13

The extent of the duty to provide maintenance does not seem to take much account of the status of a child concerned, particular his minority.

Recommendation 13

Duty to provide for maintenance should in all cases cease at the age of majority (i.e) eighteen years except where the child is or will be engaged in education or training which will go beyond the age of majority.

B. CARE IN THE COMMUNITY SETTING

Observation 14

Research on the subject has revealed that the community is not quite well conversant with relevant child laws and the existing social framework of child care and maintenance. It has also been noted that the community has not been able to resolve various child-related problems.

Recommendation 14

- (i) Ways of involving the Community into childcare should be innovated, developed and fostered.
- (ii) The present level of tax remission to families with children should be increased to reflect the current costs of living.
- (iii) Estate duty and tax should be lowered in instances where doing so will be of direct benefit to the children in families or institutional care.
- (iv) A mechanism of providing supportive care where parents are unable to do so should be devised. The available administrative arrangement under the Social Welfare Department known as "the Presidential Bounty" whereby parents of triplets are provided with minimum government subsidy for nine months should be given statutory recognition, and if possible, widened to include other circumstances hindering parents from fulfilling their lawful duties.

(c) Education of Children

Observation 15

It has been noted that the overall school environment lacks adequate resources (including legal resources), for its betterment.

Recommendation 15

- (i) A scheme should be devised to assist parents who are unable to give uniforms to their children. Such scheme should be devised both at the local government level and at the national level.
- (ii) It should be the basic requirement that school attending children must be provided with food at school even if this will mean that parents take the responsibility of paying more.
- (iii) Penal sanctions against the children be used where probation and voluntary supervision have failed. This should be under the strict control of social welfare officers, police and community-based institutions.
- (iv) Provisions for probation order should follow by an order of approved school.

(v) Pregnant girls should be permitted to resume school one year after delivery.

(f) Day Care Centres and Children's Home

Experience has proved that Institutional care for children in Tanzania leave a lot to be desired. This is in view of the fact that the question of children in disadvantaged or care circumstances has not yet been adequately resolved.

Recommendations

- (vi) Day care centers and facilities should be expanded at places of work, in towns and especially in rural areas.
- (vii) The Children's Home Act should provide a specific definition and criterion under which a child might be described as abandoned and in need of care and specific procedures, be developed for declaring a child abandoned and as such in need of care.
- (viii) Forster-care programme ought to be strengthened by giving financial and material assistance to foster parents.
- (ix) The state should put more efforts in identifying abandoned children and providing institutions of care.
- (x) Cap. 13 should be amended so as to provide for situations under which and abandoned - child may be identified and a separate procedure should be provided for declaring a child as abandoned as well as a more elaborate procedure for registration and admission to relevant institutions.
- (xi) Basic provisions for development of children must include facilities for adequate health standards, education, recreation, filial love and security.
- (xii) Primary Scholl child clinics should be strengthened.
- (xiii) There should be established a Children's Care Fund to take care of of various children's problems and needs.
- (xiv) Taxation on children's goods should be reduced or removed altogether.

3.0 JUVENILE DELINQUENCY AND JUVENILE JUSTICE SYSTEM

(a) The Objects and Principles

Observation 1

It has been noted that presently, there exists what is know as "Sera ya Chama (CCM) juu ya Malezi ya Watoto na Vijana" as the ruling party's agenda on Children and Young Person. Although certain objects and principles on the agenda have been mentioned in the said CCM

document, they have not yet been incorporated in the Preamble nor in the definition section (section 2) of relevant law(s).

Recommendation 1

The specific objects and principles to be applied in the exercise of relevant powers on Children should be categorically mentioned, that is in terms of our constitutional requirements and policies. In this regard the following principles may be adopted.

- (1) The need to protect children and young persons from suffering physical and other forms of abuse and neglect is the responsibility of the Community as whole
 - (2) Intervention in the lives of children and young persons and their families should take the least disruptive form which is appropriate and that wherever possible, decisions affecting children and young persons and their families should be made on the basis of agreement by those affected.
 - (3) Parents and guardians and others having the care of children and Young Persons should so far as possible be consulted when decisions are made.
 - (4) Cultural interests should be protected.
 - (5) Decisions affecting children should be reviewed on a regular basis.
 - (6) As wide a range as possible of powers to deal with children and young persons should be available to the Courts when matters affecting children and young persons come before the Courts.
 - (7) Young persons who offend the law should be dealt with in a special court composed of specially trained magistrates and personnel to deal with relevant cases.
- (b) Distinction between Provisions for Protection Of Children and Disciplining of Children

Observation 2

The Children and Young Persons Ordinance - Cap. 13 (CYPO) does not distinguish the procedure for dealing with children needing protection and those procedure that must be followed when a child has committed an offence.

Recommendation 2

It is therefore recommended that the two sets of procedures should be distinguished and appear different parts of the piece of legislation. The part on protection should be clearly provided to protect children and it should not appear as if needing protection is an offence in itself. This is what seems to be the case with the present S.25 of the CYPO, Cap. 13. The part related to the procedure followed in cases where children have committed an offence, would be

distinct from the one on protection in as much as it will provide for apprehension, bail, detention pending appearance before the court, etc.

Observation 3

- (a) The Zambian Juvenile Act,(1995) provides in its Part II for procedure in the case of "Juveniles in need of care" but this is much the same as the CYPO and the Zanzibar Children and Young Persons Decree (CYPD).
- (b) The Kenyan Children and Young Persons Act, (CYPA), (1963) has this distinction where the procedure for protection and discipline to contained in the same part. (Part III).
- (c) The New Zealand CYPA is clearly divided into:- Protection of Children and Young Persons (Part I), Children and Young Persons in Need of Care (Part II), and Offences by Children and Young Persons (Part II),

Recommendation 3

For purposes of clarity in presentation and with regard to the procedure to be followed it is recommended that the format similar to the New Zealand one (See Para 155, Pg.93) be followed. Thus provisions of S.25 of the CYPC would have two parts: One on Protection and the other on Discipline.

- (c) On Bail

Observation 4

Bail provisions under section 4 are considered adequate in relevant children situations.

Recommendation 4

The present section of Cap. 13 should be maintained.

- (d) On Custody

Observation 5

Section 5 of Cap. 13 provides for the duty of the Commissioner of police to make arrangements for preventing so far as practicable, a child or young person while in custody, from associating with an adult, other than a relative charged with an offence.

Recommendation 5

In addition to the present provision of Cap. 13 on Custody, requirements as to consultation with Commissioner for Social Welfare regarding custody arrangements should be added under section 5.

- (e) On Juvenile Court, (S.3)

Observation 6

Presently, there exists a special court to deal with juvenile cases. However, it is not manned by specially trained magistrates to deal with children matters.

Recommendation 6

It is therefore recommended that there should be a Juvenile Court having specially trained trial magistrates and prosecutors. However, the trial magistrates should not be bound by the rules of procedure and evidence, and they should aim at encouraging mediation.

Observation 7

It has been recommended that the present definition of a child be raised from 12 to 15 years so that a person under the 14 is also covered and exempted from criminal liability. However, with regard to juveniles, (proposed to be defined to cover all persons under 18 years), they may be held similarly liable and consequently convicted, a fact which may hinder their chances to secure job opportunities. This is in view of the fact that the application forms usually seek to know whether the applicant for a job has ever been convicted-fact, which may disqualify the juvenile applicant.

Recommendation 7

It is further recommended that a child under fourteen years of age should not be held criminally liable for any criminal offence. Moreover, conviction of a person while a juvenile should not operate against the character and employment records of the juveniles.

(f) On Probation Service

Observation 8

Presently, there are not provisions in Cap. 13 on volunteer probation services, a fact which may deny volunteers to engage themselves in relevant tasks.

Recommendation 8

It is recommended that there should be provisions in Cap. 13 for the promotion of volunteer probation services for juveniles through Tanzania Mainland. All Districts should be declared probation areas for this purpose.

(g) On Conviction of Juvenile (S.10)

Observation 9

It has been noted that Cap.13 still maintains provisions on convictions whose effect to children could be damaging.

Recommendation 9

- (i) It is therefore recommended that all provisions suggesting conviction status, for example section 10, 14 and 23 as well as section 24 should be reframed to do away with the said status which give children and young persons a permanent criminal label. The conviction of any person while a juvenile should not be taken into account in his records during his adulthood.
 - (ii) Children and young persons who commit acts other than murder and manslaughter should not be liable to be prosecuted in any criminal court. Their conduct should instead, be immediate and resolved by his/her parents, relatives, police social welfare officer, a ten cell leader for the child/young person and the victim.
 - (iii) Where appropriate restitution of property involved or compensation where offence has been admitted by the child/young person should be agreed upon and enforceable by Primary Court.
 - (iv) Except for offences of murder and manslaughter where a criminal complaint has been filed with the police against a child or young person, the O.C.S. of Police should summons conciliatory conference to be attended by the offending child/young person, his/her parents, the victim, social welfare officer and the ten-cell leader parents, and proceed to resolved.
 - (v) Where the child/young person has denied the complaints filed with the police against him/her at such mediation conference, the matter should therefore be take to a juvenile courts in an appropriate case.
- (h) Attendance of Parents and Guardians (S.15)

Observation 10

Presently the court has discretionary powers under section 15 to require the attendance of parents and guardians where juveniles are charged with some offences.

Recommendation 10

It is recommended that except on very special circumstances, attendance of parents or guardians be mandatory.

- (i) On Determination of Age of Juveniles (S.16)

Observation 11

Under section 16 a court may make inquiry as to the age of a child or young person and make its findings. But any subsequent proof that the court has not correctly stated the age shall not invalidate an earlier order of the Court

- (j) Approved Schools (S.26)

Recommendation 11

Besides Approved Schools, it is recommended that there should be additional provisions empowering the Minister to establish the following institutions:-

- (1) Remand Homes;
 - (2) Borstal schools and Probation hostels for young adults, below 18 years.
 - (2) Institutions for socially deprived juveniles including street Children.
- (k) Powers of Managers of Approved Schools (Sections 28 and 29)

Observation 12

Under section 28(1)(a) of Cap. 13, the Board of Visitors may visit the Approved School "From time to time"

Recommendation 12

The Board of Visitors should be required to visit Approved Schools at least twice a year.

- (l) The Probation of Offenders Ordinance, Cap.247
Volunteer Probation Services

Observation 13

Under section 6(g) of the Probation of Offenders Ordinance, Cap.247, the President may make rules prescribing the duties of the probation officers etc.

Recommendation 13

It is recommended that the Government should promote the establishment of volunteer probation services so as to match with the increase wave of juvenile crimes. There should also be reconciled provisions in Cap. 13 to that effect. The power to make relevant Rules should be vested in the Minister concerned.

- (m) After Care Services

Observation 14

It has been noted that presently, approved school orders and other institutional care orders not helped much on the reformation of juvenile behaviour.

Recommendation 14

It is recommended that the Commissioner for Social Welfare should be in close contract with respective prison centers and should be given powers to exercise correction institutional care in Children in institutions as well as in prisons.

(n) Miscellaneous Recommendations

- (i) Definition section (S.2)
"Child" should mean a person under the age of fourteen (14)years.
- (ii) A "young Person" should be defined as a person of the age of fourteen years and above but not over eighteen years of age.
- (iii) The term "Juvenile" should consequently be defined covered all persons under the age of eighteen years.
- (iv) "Juvenile Court" should consequently be defined as a juvenile court constituted under section 3 for the purposes of hearing and determination of cases relating to children and young persons.
- (v) "Juvenile Remand Home" should refer to a home established for detention of prison less than eighteen years of age or an institution agreed to be used as a juvenile remand home.
- (vi) "Custodian" should be defined in view of presumption of custody of a child or a Young Persons and should cover parents, guardians and other relatives.
- (vii) "Probation Hostel" should refer to a place of residence for children under the care of the social welfare services Department.

In section 25 the following subsection should be including.

In Addition to a,b,c,d,e,f,h

1. "...has been left in the care of a child's home in Tanzania for more than one year by parents or relatives whose present whereabouts are unknown or who are unable or unwilling to provide proper care for the child within the family..."
2. "Any person having responsibility for the care or charge over a child who willfully abandons, deserts, neglects or fails to support such child or young person or who unreasonable inflicts cruelty upon him not constituting an assault or otherwise or

who fails to protect the child or young person, shall be guilty of an offence under this Ordinance".

3. "The Commissioner or his representative or Administrative Officer or Police Officer above the rank of Sub-Inspector acting on behalf of the commissioner may charge such a person and bring him before a juvenile court"
4. Upon the summary conviction for this offence, such person may be liable to:-
 - (i) Be placed on Probation for a period not exceeding three years.
 - (ii) A fine mpt exceeding 50,000/= shillings
 - (iii) Imprisonment for a maximum period of one year.
 - (iv) Or any other penalty as the court may deem fit

4.0 THE ADOPTION ORDINANCE

1. CONSENT: (SECTION 4(2) OF THE ADOPTION ORDINANCE)

Recommendation 1

The definition of the under mentioned words used in the Adoption Ordinance should bear the following meanings: -

- (a) Parent:
Does not include the natural father or a child born out of wedlock who is not at the same time a guardian or liable by virtue of child, adoption.
- (b) Residence
Physical presence in a given place and an intention to remain there for a sufficiently long period to make that presence more than fleeting or transitory.

1. CONSENT (SECTION 4(2) OF THE ADOPTION ORDINANCE)

Observation 1

Under section 4(a) of the Adoption Ordinance, an adoption order shall not be made except with the consent of every person who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant.

Recommendation 1

So as to ascertain that the consent given by parents, relatives custodian, guardian or guardians and item, is in conformity with the spirit of the Ordinance, the advice of the Commissioner for Social Welfare is necessary. It is therefore recommended that the

Commissioner for Social Welfare should be involved in counseling such parents before giving such consent for adoption.

Observation 2

Sometimes there might be some controversies with respect to religious persuasion in which the infant is to be brought up.

Recommendation 2

Where conditional consent is based on matters of religion or any other specified condition, under section 5(3) of the Adoption Ordinance, the court should direct the adopter to give his/her address of contact and residence to the court which in turn shall appoint and empower the Commissioner for Social welfare to be the supervising Officer.

Observation 3

It is possible that an adoption may deliberately reflect to fulfill the conditions prescribed in the adoption order

Recommendation 3

- (a) Where the Appointed Officer's findings have revealed that the adopter has not been fulfilling the conditions as prescribed in the adoption, order, then he should be duty bound to report to the court of his findings and the court should act upon such findings and should call upon the adopter to give his account for non fulfillment of the conditions attached to the Adoption order.
- (b) Where the adopter fails to give reasonable explanation against the finding of the supervising officer, the court should proceed to make an order as against the adopter relinquishing of his/her duties. When such order is made, the child concerned should be placed under the custody and care of the Commissioner for Social Welfare in children's home. Such a child should be subject to re adoption.

2. APPOINTMENT OF GUARDIAN AD LITEM

Observation 4

The law as it stands, under section 11(2) of the Adoption, Ordinance, it is the duty of the court to appoint a guardian ad litem who could have been a parent or relative or any other person versed with the facts that can help the court to arrive at affair decision. Such guardian ad litem is required to furnish such information to the court with a view to safe guard the interests of the infant.

The study made regarding the appointment of guardians ad litem is that, except in cases where the Commissioner for Social Welfare performs this function, the guardians-ad-litem appointed were private individuals who were suggested to the court by the applicants

themselves. In so doing, applicants have in many cases suggested people of their choice. This practice can hardly be overruled of partiality.

Recommendation 4

It is recommended that the expertise, skills and knowledge of the Commissioner for Social Welfare should be of most necessity so as to arrive at an impartial assessment, which will be of great help to the court in arriving at its decision. Thus, the Commissioner for Social Welfare should be involved in all cases for proper advice to the court.

5.0 CHILD LABOUR AND ABUSE

(A) CHILD LABOUR

Observation

In Tanzania, the exact dimension of child labour is not yet known although several cases are said to have been identified

Recommendations at Community Level

- (i) The most effective way to achieve abolition of child labour is through community decisions based on adequate information and full participation.
- (ii) The community should make efforts to identify what type of work the children are doing and identify relevant costs and risk factors involved. The information on control measures and on health care of children exposed to risks should be disseminated for educative purposes.
- (iii) Once the community is aware of the effects of child labour, steps should be taken to provide educational opportunities for working children and disseminate information to parents and employers on health hazards to which children are subjected to.

Recommendation at National Level

Issues which relate to appropriate Ministries should be seriously tackled by respective Ministries; for example, registration of working children, inspection of areas where the Ministry of Labour should deal with children work and enforcement of child labour laws. However, the Ministry of Education and the Ministry of Health, among others, should work hand in hand with the Ministry for Labour. Apart from labour inspectors social welfare officers should work hand in hand in the inspection and enforcement of laws against child labour.

- (c) The following additional recommendations should be seriously considered: -

PENALTY

- (i) The present fine not exceeding shs. 2,000/= under section 94 of the Employment Ordinance should be increased so that it carries a real meaning of a punishment for employing children. It is proposed to be raised to shs. 100,000/=

PROHIBITION OF CHILDREN IN HOTEL, BARS etc.

- (ii) A provision should be included which prohibits employment of children in hotels, bars and areas where alcohol is sold. (Kenya has a provision to this effect in the Employment Act of Kenya)
- (iii) Children under the prescribed age of employment or even young persons between 14-18 years) should be employed or allowed to participate for gain in artistic performance (entertainments) only if granted a special permit. This is in line with Article 8(1) of Convention No. 138.

CHILD WORK VERSUS EDUCATION

- (iv) Except under special circumstances, completion of compulsory primary education should be made a pre-condition for employment of children.
- (v) Taking into consideration the fact that the Government has acknowledged the failure of the formal sector to absorb an increasing population of the labour force, along with the increasing percentage of primary school and Form IV leavers, the informal sector needs to be given a helping hand by extending and strengthening Vocational Training for such School leavers.

(B) CHILD ABUSE

Observation 1

Various people concerned with children issues have cited child abuse as having hazardous effects on child's mental and physical development. Consequently, there has been various calls for concerted efforts to prevent or at least to minimize child labour.

Recommendation 1

In order for child abuse to be minimized, there is a need for the society to be educated on the effects of child abuse on the child's mental and physical development. Mounding a sound family where parents and children understand one another and the needs of the children taken care of can do this. Thus, the up bringing of the child should b through reasonable corrective measures and not through torture of any kind.

Observation 2

It has been observed that presently, there is one children home run by the government.

Recommendation 2

There is strong need to increase the number of children homes to take care of children who are abandoned or whose parents are dead and without any relative to look after them.

Observation 3

Child abuse has been noted as being hidden from the public eyes, or in some instances ignored.

Recommendation 3

It should be the duty of every person to co-operate in detecting child abuse in its early stages so as to assist the children's mental and physical development and to build up a "reformed" and not a "deformed" generation. It should be a legal duty to report cases of child abuse to Welfare Officers.

6.0 SUCCESSION AND INHERITANCE AS THEY RELATE TO CHILDREN'S RIGHTS AND WELFARE

(a) Discrimination of Sex in Inheritance

Observation 1

Most indigenous Africa families follow matrilineal system of inheritance and family property is divided to members of the male members of the family leaving the female members with a minimum share or empty handed.

Recommendation 1

There should be no distinction in inheritance on the basis of sex in relation to property. This takes into account equality between children regardless of sex.

(b) Freedom of Disposition of Property

Observation 2

Individual's rights to dispose of property as he/she wishes may at times block the child's rights.

Recommendation 2

Children must be protected from excess freedom of testator and specific provisions be made to curtail such problems.

(c) Children Born Out of Wedlock

Observation 3

Children born out of wedlock are often disregarded in inheritance of their parents.

Recommendation 3

The practice of legitimization should be harmonized under general Affiliation proceedings and once paternity is legally declared the right to inheritance for the child born out of wedlock should be equal as for all children of the deceased without distinction.

(d) Degrees as to Age, Seniority and Sex in Inheritance

Observation 4

There is a discriminatory practice noted in relation to age and seniority or degrees to children of the same sex and different sex.

Recommendation 4

Degrees in relation, to age and sex in inheritance should not be fixed by law instead each case should be determined on merits depending on the particular needs of the child whether he/she is studying, is a disabled or retarded.

P A R T II

1.0 DEFINITION

A. TERMS OF REFERENCE

1. The observation under terms of Reference reads as follows:-

"The different definition of the term of child in various enactments have resulted in depriving certain categories of children of their rights and protection under the law"

The Commission in attempting to gain clarity of the basis of this observation has perused through the relevant legislation and noted that few examples can be covered under the observation. A brief analysis of the relevant statutes is made and noted as here under.

B. ANALYSIS OF RELEVANT STATUTES

2. A Child is defined in various contexts depending on the nature and scope of relevant legislative schemes. It is a truism that a child by reason of his physical and mental immaturity, needs special safeguards and care from the community at large and from the statutory regime in particular

In International Law, for example, the UN Convention on the Rights of the Child. The age of majority is eighteen years (Art.1). This general rule is reflected in other general statutes on the age of Majority in many countries including Tanzania (see The Age of Majority Act Cap. 431) and the Interpretation of General Clauses Act, 1972. Yet even in the International Conventions, the child might be defined differently according to context, for example, The Hague Convention on International Child Abductions sets a lower age limit at sixteen for the definition of the child. Both the ILO Convention No. 138 on Minimum Age for Employment and the Recommendation on the Minimum Age for Marriage, set the age at fifteen. It is obvious then that a person may be considered a child in one context and not a child in another context at the same time.

3. In a paper submitted to UNICEF and the Defence of Child International (DCI) in January 1986 by Dr. Katarina Tomasevski of the University of Utrecht entitled, "Comparative Survey of the Draft Convention on the Rights of the Child" as survey was made on existing international instruments and different age limits applicable to children for various purposes were noted to be abundant. The following illustrative list was noted.

- Capacity to enter into contracts,
- Consent to medical treatment,
- Choice of residence,
- Property rights,
- Giving evidence in court,
- Bringing complaints to public, authorities in hi/her own right,
- Compulsory school age,
- Age limits for the purposes of protection of children in
Entertainment, consumption of alcohol, etc
- Minimum age of criminal responsibility,
- Minimum age for various kind of employment,
- Minimum age for the enjoyment of social security,
Benefits (related to full-time education),
- Minimum age for membership in trade unions
- Political parties, religious association, etc
- Age-limits for the compulsory military service,
- Minimum age for joining the armed forces,
- Minimum age for the child's opinion in decisions concerning
Parental custody, visitation rights etc.
- Minimum age for acquiring voting rights,
- Minimum age to stand for elections,
- Minimum age for full contractual capacity,
- Minimum age for full legal capacity.

Each particular state is enjoined to adhere to the internationally set minimum-age in various Conventions and offer the requisite legal protection, rights and duties.

4. The statutory schemes in Tanzania reflect the contextual definition relating to the particular purpose and context of each legislative scheme. The debate appears to be whether to increase or decrease a particular age minimum given internationally declared age-limits. It is also possible to specify references to a child by avoiding age criteria and refer to the actual status, situation and relations in which a child is subjected and in so doing, safeguard the context in which a particular individual may be protected. In the early stages of the Commission research, there were views to the effect that there should be omnibus code on children and common definition of a child such as "a person below the age of eighteen years". However, after various consultations and visits within and outside the country, it has been revealed that it is imprudent to have an omnibus definition of a child or young person to cover all legislative schemes and contexts. A... for omnibus code, the Commission considers this to be impractical at the moment up to such time that a cohesive national policy and institutional structures are built to sustain an omnibus legislative scheme particularly designed for children.

On the need for review, Tanzania is not alone. Even in developed states like the United Kingdom experts on child law comment "From any standpoint, the law as it relates to children is controversial, illogical and badly understood, Reform is long overdue" (Maggie Rae: P.1, 1986). The variety of definitions may be sought in three different categories, that is, General statutes, Civil Statutes and Penal Statutes. The latter two sometimes interact.

General Statutes:

5. There are statutes that give a general definition of the child in line with Article 1 of the Convention on the Rights of the Child whereby a child with mean every human being below the age of eighteen years. These include the Interpretation and General Clause Act 1972 which under section 3(1) defines a "minor" to be a person who has not attained the apparent age of eighteen years and the terms "infant" and "infant child" are according to the statute to be construed in the same manner.

Other general statutes include the Age of Majority Ordinance Cap. 431 which sets the age of majority at eighteen years and the Age of Majority (Citizenship Laws) Act, 1970, the Citizenship Ordinance, Cap. 452 and the Registration of Births and Deaths Ordinance Cap. 108.

6. These statutes provide the general legal Mechanisms under which a child is given an identify and its nationality or citizenship recognized. It is a first step whereby legal machinery recognizes the child as a member of the particular state.
7. Yet, as stated above, depending on various statutory schemes, the broad and general definition is further recategorised under such schemes and the definition of a child becomes restricted. For example in a statute for pre-school day care, a child will be defined as a person probably between two years of age up to five or six years of age since the statute deals with a scheme relating only to such children. See Day Care Center Act,1981, No.17 of 1981 section 2). But where a statute deals with say primary school

education a child will be defined as a person between the age of say seven years to fourteen years (see the Education Act, 1978 Rule 3). As such it may be of value to revisit such statutes which deal with various definition categories from the broad categorizations stated above.

Civil Statutes:

7. Civil statutes cover a wide range of social activities which have particular purposes peculiar to each scheme. As such, definition of a child are wide ranging. Separate assessment of each definition only makes sense within its own scheme but any comparative extrapolation will bear manifest absurd results.

In this respect, a good example is the Law of Marriage Act 1971, No. 5 of 1971. In this Act, an "infant" or "infant child" means a child who has not attained the age of eighteen years. Yet, the Act provides for minimum age of fifteen years where a female person becomes eligible for marriage (section 13). Other statutes regard any married person an adult. Under section 13 of the Citizenship Ordinance Cap, 452, any woman who has been married is deemed to be of full age; and this is the case also including married woman. However, under the Employment Ordinance Cap. 366, a "Woman" is defined as a female of and above the apparent age of eighteen years, and therefore a female person even if married at fifteen years of age as the Law of Marriage Act permits she is not a woman for the purposes of Cap. 366(1). The Employment Ordinance, does not define a "child" to be a person under the apparent age of fifteen years and "Young Person" to be a person of or over the apparent age of fifteen but under the apparent age of eighteen years. Furthermore, under section 10 of the Election Act, 1985, No. 1 of 1985, a person is eligible to vote. Definitely, each statute mentioned has its specific scheme, yet more may be said on status of the married women who is regarded as an adult under one law and not an adult in another. The commission proposes that in this particular aspect certain capacities which go with adulthood should be conferred on the married women e.g. eligibility to voting. However, the commission recognizes that adulthood carries also the burden of certain statutory duties e.g. with regard to taxation, which may not be positively demanded of a fifteen years old, yet as a potential mother she cannot be said to be unable to make a political choice. It is clear that here a mere definition does, tend to deny a person regarded by some other statutes as adult, certain rights and further consultation and discussion is necessary to harmonize the law.

8. Similarly, under the Contract Ordinance, Cap. 433, section 11(1), a person is competent to contract if he is of the majority. Yet under section 68, a child may enter into a quasi-contract for necessities suited to its condition in life. These necessities are not defined and presumably, depend on context. This provision has some analogy to section 64 of the Law of Marriage Act. 1971 where the wife can pledge her husband's credit the necessities for herself and the infant children of the Marriage. The "Wisdom of this kind of provision is obvious. The with regard to the child in contractual situations, differential treatment is necessary in terms of protections under the law and enforceability. An omnibus and general definition is not helpful. For example, under the Employment Ordinance Cap. 366, the status of Childhood is categorized between that of a "young person" i.e. between 15 and 18, and a "child", i.e. under fifteen years of age. It means, whilst a young person is capable of entering into some kinds of employment, a child

cannot. It is therefore quite pertinent for the Contract Ordinance to be more elaborative of the different stages of with a age and actual social abilities were made clearer. Definitely, exceptions in Law of Marriage Act, 1971, where with consent, a person of 15 years of age may enter into a contract of Marriage, and provisions in the Employment ordinance, where a person of fifteen years f age may enter into a contract of employment, render the general provision of the contract ordinance where a persona person of fifteen years of age may enter into a contract employment, render the general provision of the contract ordinance with regard to the age of contractual capacity contradictory capacity contradictory with the above mentioned statutes.

9. The Commission observes that the underlying theory in most Civil statutes that a "child" is one that is born in wedlock. Therefore, in statutes that refer to care, maintenance and post-humors provision, there is an unmentioned assumption that statutory regulation refers to children born in wedlock. There are neutral statutes such as the Day Care Centres Act 1981, the Children Homes (Regulation) Act, 1968, the Education Act, 1978, etc. Yet, others such as the Marriage Act, 1971, the Adoption Ordinance, Cap.335, the Succession Laws etc Manifestly retain a distinction between legitimate and illegitimate children. This distinction is most unfortunate children if the starting point for statutory regulation of children's well being is the interest of the child. The avenue left for the unfortunate children born out of wedlock is the Affiliation Ordinance, Cap. 278. The provisions of this statute would be analyzed later. Suffice to point out here that with reference to defining children as legitimate or illegitimate the law has denied protections to a large number of the Young of this nation and alas, It is a growing number. The Commission recommends that the distinction between illegitimate and legitimate children be done away with and that laws be enacted to protect children generally. Mechanism for protection might differed between children born in wedlock an those born out of wedlock but the resultant protection should be as much as possible similar.

Penal Statutes:

10. The Penal relating to children are mainly the following:-
 1. The Children and Young Persons Ordinance Cap. 13;
 2. The Penal Code, Cap. 16
 3. The Probation of offenders Ordinance, Cap. 247;
 4. Penal Provisions relating to Civil Statutes e.g.

The Education Act,1978. The Law of Marriage Act, 1971, The Affiliation Ordinance, Cap. 278, The Employment Ordinance, Cap. 366. The Children's Homes (Regulation) Act, 1968 etc.

11. Under the Penal Code, Cap. 16 the age of criminal responsibility is categorized in the following manner under section 15.

"A person under the age of seven years is not criminally responsible for any act or omission. A person under the age of twelve years is not criminally responsible for any act or omission, unless it is proved that at the time of doing

the act or making the omission he had the capacity to know that he ought not to do the act or make the omission."

Accordingly, a brief analysis of section 15 of the Penal Code will imply that a young person under the age of seven who may be termed "a child" or infant is not criminally liable whilst one above seven years but under twelve years of age who maybe termed a "juvenile" is only criminally liable under pre-conditions set in these section and one above twelve years of age but under eighteen years of age liable. This categorization is a much clearer guide for statutory schemes relating to panel legislation. The question is whether penal legislation it exists is in line with this basic criteria and whether the criteria as it stands is adequate.

12. The major penal legislation-covering children is the children and Young Persons Ordinance, Cap. 13. This statute categorizes children in two distinct groups of Young offenders. There is a child who is a person under the age of twelve years and a Young Person who is twelve years but under the age of sixteen years (see section 2).
13. Comparatively, the Kenyan Children and Young Persons Act Cap. 141 define a child ass a person under the age of fourteen years and the "Young Persons Ordinance, Cap. 13. Defines as child as a person under the age of fourteen years and the "Young Person" to be eighteen. The Zambian Juvenile Act, Cap. 217 defines a "child" as a person who has no attained the age of sixteen years of age but has not attained the age of nineteen years.
14. A brief comparison of various legislation on this item may be represented in the following table.

COUNTRY	STATUTE	DEFINITION	
Tanzania	Children and Young Persons Ordinance Cap. 13	CHILD	YOUNG PERSON
		Below 12 years of age	Under 16 years of age
Kenya	The Children and Young Persons Act, Cap. 141	Below 14 years of age	Under 18 years of age
Zambia	The Juvenile Act, Cap. 217	Below 16 years of age	Under 19 years of age
New Zealand	The Children and Young Person Bill 1981	Under 14 years of age	Under sixteen or seventeen years of age

From the above table it is clear that the Tanzania statute sets the age of the child relatively lower than the other countries. it is signification that the age of twelve years

fits squarely with the age of criminal responsibility as covered under the Penal Code. Yet, it is also true that a child of twelve years is strictly speaking one of tender years as recognized under the Evidence Act, 1967 (see section 27) that defines the child of tender years as the one below the apparent age of fourteen years. The Commission notes that since Cap.13 is rather penal oriented in that, the consequences of being found guilty of a penal offence include penal in some cases imprisonment, it would be prudent to protect children of tender years of age or above. The Commission observes that this is another areas were a definition of a child tends to impose a penal liability on a person who if otherwise defined might be termed to be a child and therefore subjected to protection commensurate to the status of childhood e.g. parental care, schooling or alternative programs aimed at attending the child of tender years.

15. The Commission further notes that there is need to harmonize penal created statutes when it comes to the definitions of the child. Under Cap. 13, a child is one below twelve years of age. Under the Evidence Act, 1967, a “child” is one below the age of fourteen years (section 127) i.e. for the purposes of testifying in court. Under the Criminal Procedure Act, 1985, a “child” is a person under the of sixteen years so is a “juvenile” much as it is can be argued that here each statute is dealing with a different aspect of criminal justice, it is a case whereby the Commission is convinced that harmonization will bring clarity and efficiency in the system of criminal justice. For example, under the Primary School (Compulsory Enrolment and Attendance) Rules 1979 (GN. 129 of 1979) “child” is defined as one who has attained the age of seven but not attained that age of thirteen. And where such a child fails to attend school to which he is enrolled regularly, is guilty of an offence under Regulation 4(3).
16. Observation and Recommendations concerning the Definition of a Child
17. Civil Statutes:

In civil statutes, certain definitions of the child tend to deprive the individual so defined of certain rights and protection. Example have been cited to include the definition of a child where a married woman of fifteen years is excluded or definitions of an adult where again such a married person is excluded or definitions of an adult where again such a married person is excluded. The Commission notes the need to explicitly confer certain beneficial capacities, which go with childhood to the married woman. It notes further that it is unclear under what basis the married woman is excluded from the benefits of adulthood. If the major reason is that she is potential mother why shouldn't the same be applied to unmarried mother below eighteen?
18. The Commission further notes that the distinction between legitimate and illegitimate children in a number of civil statutes has denied legal protection to a large number of illegitimate children of this nation. The Commission recommends that this distinction be done away with and that laws be enacted for the protection children generally with no regard to the said distinction. However, the distinction between children born in wedlock and out of wedlock can only be made with regard to the procedures and mechanisms regulating care, maintenance and protection of the child but the resultant legislative benefits should be as much as possible similar to all children if the starting point for all schemes is the best interest and welfare of the child.

Penal Statutes Observations and Recommendations:

19. The Commission notes that the criteria laid in the Penal Code, Cap.16 is in line with that recommended by experts on child psychology and development in early childhood. It is noted that the child is capable of abstract thinking at age of seven and reaches maturity in terms of conception thinking between the age of twelve and ends at sixteen for girls and for boys it is between fourteen to eighteen years of age. It is in this light that the Commission proposes that the twelve years minimum defined under Cap. 14 though in line with expert thinking, is rather too near while the covering about four years for each age group, i.e. Boys and girls. It is prudent to fix the age limit higher than to lower it. And examples from the neighbouring countries and some of the Commonwealth indicate that most countries put the limit from fourteen years of age upwards. Tanzania should follow this example.
20. The Commission notes that Borstal school in Tanzania are non-existent. It has been recommended further in this Report that there is need to establish Borstal schools to cater for young adults, between sixteen and eighteen. Presently, the said category is not covered under Cap. 13. According to expert opinions, young adults should be protected as well. If, therefore, the recommendation of establishing Borstal schools is given a blessing the Commission notes that it would consequently be necessary to review age categorization so that. "Young adults" between seventeen and twenty-one benefit from relevant legal scheme relating to children.
21. There are various definitions, which refer to social settings, which relate to child's social reality. For example, the definition of "the family", "parent" a "home" a "dependant" a custodian etc.. A comprehensive statute such as Cap. 13 leave a lot to be desired when it lacks such related definitions. A court order for the child to be taken to its "home or "family" or to its "custodian" may be found to be vague if these terms appears in other legislative schemes. For example, under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap.360 section 2 thereof defines "dependant" as follows:
- "Dependant" means the wife or, where the marriage was a polygamous marriage, each of the wives, husband, father, mother, grandfather, grandmother, stepfather, stepson, stepdaughter, brother, sister, half-brother, half-sister and includes an infant child whom the deceased had accepted as a member of his family and every other person who is on the death of the deceased been titled to succeed to his property (otherwise than under a will) in accordance with the Law of Succession applicable to the estate of the deceased, and a person shall be deemed not with standing that he or she was related to him illegitimately or in consequence of adoption according to the law"
- Similarly, the same definition as the above is adopted for the definition of member of the family under the Workman's Compensation Ordinance, Cap. 263, under section 3(1). Whilst the Marriage Act 1971 does not define whom a person's relative is the Income. Tax Act, 1973, No. 33 of 1973 defines a persons relative under the Marriage law must be those encompasses under "prohibited relationships" vide section 14 of the Law of Marriage Act, 1971. Further definitions exist in legislation of other countries such

as the definition of a "home" under Cap. 141 of Kenya, which defines a home as follows:

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"home means, in respect of any person under eighteen years of age, the place where, in the opinion of the court having cognisance of any case relating to them or in which he is concerned, his parent or guardian permanently resides, or if there is no parent or guardian living his, parent or guardian last permanently residence Provided that:-

- (i) in the case of a parent or guardian having or having had, more than one permanent place of residence, such parent or guardian shall be resumed to be, or to have been permanently resident at that place of his principal permanent residence.
- (ii) where the court is unable to determine the home of any such person he shall be deemed for the purposes of this Act to have his home in the area of jurisdiction of the local authority in whose areas he is found;

The Commission recommends that the definition of "dependent", "member of family", "relative" and "home" as defined in the referred statutes be incorporated in Cap.13. This should include the definition of a "parent" as stated in the New Zealand Bill to mean.

...in relation to a child or young person includes on adult member of the child's or young person's family group to whom the child or young person has significant psychological attachment and a step parent.

22. The Commission notes that childhood is actually a transitory stage where the child's natural abilities are continuously expanding to reach a certain threshold normally referred to as adulthood. By convention, this threshold is assumed to breach at eighteen years of age. Yet, due to physical retardation or social adjustment disabilities associated with childhood may at times continue beyond the conventional threshold of eighteen years of age, for example, "juveniles in need of care" can include even a person beyond the statutory age of nineteen years (The Zambian Act The juveniles act of Zambia Cap. 217 (section 2) defines a juvenile adult" as a person who has not attained the age of twenty one years and included a person above twenty-one years but who has not attained the of twenty-five years and whose classification as a juvenile adult has been expressly sanctioned by the Minister. Here there is a possibility of a "technical" or "statutory childhood" for person whose social or physical problems have prevented them to acquire the natural attributes associated with adulthood and as such in need of care, maintenance or protection of the law whichever is the case.

The Commission notes that for the physical disabled person, there is a specific legislation in Tanzanian disabled persons and their training etc. However, the point here which are not strictly speaking under the definition of disabled. The Commission recommended that in terms of care and maintenance there is still a need for special assistance and these should be covered by an umbrella definition relating to statutory or technical childhood. Without which some individuals who for all intents and purposes

are still children, might be denied the necessary protection and care just because there is a statutory definition, which puts the child's age limit at eighteen. The definition might cause extreme problems and denial of rights to individuals whose process of mental and physical developments have been hampered by factors beyond their control.

2.0 CARE MAINTENANCE AND CUSTODY OF THE CHILD

A. Terms of References:

23. The observation under this Terms of Reference covering a wide area, reads as follows:

“various laws touching on inheritance, succession, maintenance and custody of children still maintain unnecessary discrimination based on status, nationality religious belief, race of lineage group that one belongs to”

The Commission has assumed that the directive here is terms of reference. In doing so the laws concerning maintenance and custody of the child are treated separately. Under this heading the laws related to the care of the child in the family and the community as distinguished from institutional care arising from the correction provisions of Cap. 13 are covered secondly; the laws relating to succession and inheritance appear to comprise a separate category with regard to Property law. Therefore treatment of succession and inheritance legislation will be done in a separate part.

B. Care, Maintenance, Custody and Education of the Child

24. Care in the widest sense would mean the assurance by parents, the community and the state of the provision of basic necessities for the care of the child which would guarantee a reasonably secure development food, shelter and clothing, but would include facilities for health, education, research etc, and above all an emotionally conducive environment of filial love security and protection necessary for a balanced development of the child.
25. The care environment has different, although inter-related, settings. There is the parental/home setting, which involves parents, relatives or other family guardians. Also there is the community setting involving neighbourhoods, community institutions, such as day care centres, nurseries, pre-schools and in certain instances primary education care, lastly there is the state's care as assumed by public authorities.
26. In Tanzania today there are legal mechanisms at each level or setting which seek to regulate the relationship between the child and responsible parties. It is necessary to treat the family and community settings separately. The state setting seeks to influence decision and need not to treat separately.

NEED FOR A GENERAL DEFINITION OF GUIDANCE

27. At this level, statutory responsibility for the care of the child is focused on the parent or guardian. The term "parent" or "guardian" has been statutorily defined according to the term of each legislative scheme. Definitions are given under the National Education Act, Children and Young Persons Ordinance, Cap. 13.

- (a) Under the Education Act, 1978 (section 2(1) "parent" is defined to include a "guardian and every person who has the actual custody of child or pupil" this definition is repealed almost in the same terms under the Primary Schools (compulsory Enrolment and Attendance) Rules 1979 (GN. 129 of 1979) under Rule 2 where a "parent" is defined as

"Any person lawfully having charge of a young person who has no parents or whose parents are unknown and any person to whose care any child or young person has been committed even temporarily by a person having authority over him"

But under the Children and Young Persons Ordinance Cap. 13, the term "guardian" is defined under section 2 in such a way that it does include parents.

"guardian" in relation to a child or young person includes any person who in the opinion of the court having cognisance of any case in relation to the child or young person or in which the child or young person is concerned, has for the time being the charge of or control over the child or young person"

28. Firstly, it is noteworthy that no general definitions of "parent" or "guardian" exist. The value of such a definition cannot be underestimated since in terms of general criteria for guidance the definition would certainly prove invaluable. Second, it is also significant that the home is not defined. In other jurisdictions e.g. Kenya the Children and Young Person Act, (Cap. 14) the "home" is defined under section 2. This appears to be important since the home is the physical locus for the parent and the child. Different statutes regulate the parental responsibility for the care of the child. The Law of Marriage Act, 1971, The Affiliation Ordinance, Cap. 278. Adoption Ordinance Cap. 355, the Penal Code, Cap. 16, The Children and Young Persons Ordinance, Cap. 13, etc A brief survey of each statute is provided hereunder.

1. THE LAW OF MARRIAGE ACT 1971 (ACT NO.5 OF 1971) (LMA)

- (a) State of the Law

29. Under the provisions of this Act the general duty of caring for children is given to the parents. And the primary duty is entrusted to the man as head of the house as it were. Under section 63 and 64 of the LMA the husband has the basic responsibility of taking care of the family. In fact the wife in some circumstances can even pledge her husband's credit for "the purchase of necessities for herself and the infant children of the Marriage appropriate to the husband's means and of life".

30. As for the care of children part IV(h) of the LMA is specific. Section 129(I) provides for the general duty and it states;

Section 129(I)

“Save where an agreement or order of court of a man to maintain his infant children, whether they are in his custody or in the custody of any other person, eighteen by providing them with such accommodation, clothing, food, and education as may be reasonable having regard to his means and station in life or by paying that cost thereof”

31. The above duties may be enforced by court order, under section 130, which provides:

“130(I) The court may at any time order a man to pay maintenance for the benefit of his infant child”

- (a) If he has refused or neglected to adequately provide for him or her; or
 - (b) If he has deserted his wife and the infant is in her charge; or
 - (c) During the tendency of any matrimonial proceeding, or
 - (d) When making or subsequent to the making of an order placing the infant in the custody of any other person.
- (2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her infant child where it is satisfied that the having regard to her means it is reasonable so to order.
- (3) An order under subsection (1) or subsection (2) may direct payment to the person having custody or care and control of the infant or to the trustees of the infant”

The section 131-136 deal with different circumstances of enforcement of maintenance order.

The direct parental are envisaged in the LMA is implemented by duties arising out of Affiliation through Adoption.

- (b) Practice and Problems
 - (i) Enforcement of the Duty

32. Under section 130 of the law of Marriage Act, 1971, the spouse including children of the Marriage may apply for maintenance by way of a chamber summons supported by an affidavit. Under Rule 32 of Law of Marriage Matrimonial Proceedings Rules 1971 it is obvious that more often than not women are the majority in such applications and in most occasion women are disadvantage because of either illiteracy, embarrassment of bringing family matters in public, fear of discord of close relatives, poetry etc. This inability to initiate proceedings by majority of potential applicants is worsened in the case of children.

33. In that case it is recommended that the role of social welfare officer should be expanded beyond what is envisaged under section 136 of the Law of Marriage which requires the court to take the advice of some person whether or not a public officer who is trained and experience in child welfare. The court is not bound to follow that advise, and in fact, no proceeding is rendered invalid by reason only of non-compliance of this procedure. It is submitted that this is too passive a role for professionals concerned with child welfare.

34. First the investigation into complaints regarding the inadequacy of maintenance would be handled and counselled by non-court professionals at the first stage by social welfare officers, the result of which should be embodied in a certificate of award which the parties will sign and will be enforceable within a specific period of time. Failure of mediation and counselling or breach of commitments embodied in the certificate to award would permit the social welfare officer to initiate proceedings for maintenance order before the court of law with all consequences pertaining to such orders for example, distress, attachment of immovable properties etc.

(ii) Paental inability to provide care to Children

35. In the statutory schemes, there are no provisions for mechanism of providing supportive care where parents are unable to do so, for example, no provisions, exists for direct intervention of public authority in supplementing the efforts of parents where it is proved that failure of care supplementing the efforts of parents control. There is administrative arrangement under Social Welfare referred to as The Presidential Bounty, where parents of triplets are provided with minimum government subsidy for only nine months. Much as this is a commendable effort, it ought to be given a statutory recognition and may be widened to include other circumstances which hinder parents from fulfilling their lawful duties. For instance, in case of unemployment, especially in urban areas brings sudden changes in the family income and parents are forced to live below the poverty line and this also happens in case of the imprisonment of the family's bread winner, cases of long hospitalisation, death of parents etc.

(iii) Children Under Care

36. Care provisions exist due to the fact that childhood is characterized by the existence of certain inabilities, which must be protected. It is possible in certain cases, these disabilities continue beyond the statutory age of majority, for example in cases of mental disability physical disability or special circumstances connected with education etc.

37. The is no provision which provides for a continuing duty for the parents or guardians of such disabled children or those in special circumstances for them to get continuous parental protection. The only provision which gives general duty is section 206 of the Penal Code which concerns responsibility of every person who as the charge of another who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause, to provide such necessities of life. This general duty is reflected in the other statutes like the Law of Marriage Act 1971.

(iii) Maintenance Order

38. It is suggested, therefore, that maintenance in all cases should cease at the age of majority (eighteen years) except where the child is or will go beyond the age of majority. For the handicapped child, the state should assume responsibility without giving any further and undue burden to parents or guardians where the parents are unable to do so (cf Zambia Law Reform Report pg. 33 chapter v.)

(iv) Legal Protection of the Physical Home of the Child

39. The physical home has been the subject of disposition by parents to the detriment of children. One of the spouses especially the husband will dispose of he family's residential house and properly without notice and leave the children without shelter. This is of course contrary to the statutory duty of providing shelter to children. Nevertheless no mechanism to protect children against indiscriminate disposition of the family's residential property exists.
40. Other statutes like the Civil Procedure Code 1966, (section 48(1)(e) exempts the residential house or building or part of a house or building occupied by a judgement debtor, his wife and dependant children for residential purposes from attachment for the purposes of sale in execution of a decree. In fact, section 48 provides for other kinds of properly movable and immovable which is necessary for the family's ability to earn livelihood, which cannot similarly be attached. For instance wearing appeals, cooking utensils furniture, tools of artisans, implements of an agriculturalists, cattle and seed grain necessary for livelihood, building property of an agriculturalists, cattle and seed grain necessary for livelihood, building property of an agriculturalists occupied by him, agricultural land of an individual whose livelihood is wholly dependent upon the use of such land etc. it is suggested here that, procedural safeguards schools be provided where disposition of such property is undertaken to the detriment of children
41. For example, in the case of the granted rights of occupancy, disposition must be consented to by the Commissioner for Lands or the District Land Officer, such consent must be granted only when evidence is available that the disposition of such land is not to the detriment of the children, and that alternative resources exists for the provision of the basic needs of children including adequate shelter. Children here mean children below 18 years of age. Proof of the existence of such alternative resources must be dependant on the positive certification of Commissioner for Social Welfare or his representative of the district concerned. No consent to disposition shall be operative where the certification of the Commissioner for Social Welfare is negative.
42. Land and property subject to customary rights i.e. the "deemed right of occupancy" whose disposition is subject to the consent of the village Government, should not be disposed of where it would be detrimental to the interest of the children.

In granting such disposition the village Government must take cognisance of the opinion of:-

- (a) Appropriate party organs at the village level, that is the village Committee on Education and Social Welfare;
- (b) Opinion of the clan elders related to the family;
- (c) The opinion of the spouse or spouses and
- (d) The opinion of the children where they are capable of expressing their opinion on the matter. The village council must endorse that consent.

(vi) Recommendations:

- (i) A mechanism of providing supportive care where parents are unable to do so should be provided. The available administrative arrangement under the Social Welfare Department known as the Presidential Bounty for triplets should be given statutory recognition and widened to include other circumstances, which hinder parents from fulfilling their lawful duties.
- (ii) Apart from section 206 of the Penal Code, there should be such provisions on general duty for the parents, guardians of disabled children of those children in special circumstances, which require continual parental care.
- (iii) It is recommended that duty to provide for maintenance should in all cases cease at the age of majority (i.e. 18 years) except where the child is or will be engaged in education or training which will go beyond the age of majority.
- (iv) For the handicapped children the state should assume responsibility without giving undue burden to parents or guardians where they are unable to do so.
- (v) In order to protect children below 18 years of age against indiscriminate disposition of the family's residential property e.g. land, wearing, apparels, utensils, furniture, tools of artisan, farm implements, cattle or other property as provided under section 48 of the Civil Procedure Code, such property should be subjected to procedural safeguard under the LMA so that such disposition is not undertaken to the detriment of the children.
- (vi) In case of granted right of occupancy, such disposition must be consented to by the Commissioner for land or the District Land Officer and upon evidence that such disposition is not to the detriment of the children and that there exists alternative resources for the provisions of the basic needs of children including adequate shelter. It is further recommended that proof of the existence of such alternative resources must be

depended on the positive certification of the Commissioner for Social Welfare or his representative in the district concerned. Disposition should not be made where the certification of the Commissioner referred to above is negative. Any disposition in contravention of such requirements should expressly be rendered invalid.

(vii) "Deemed Rights of Occupancy" under customary rights whose disposition is subject to the consent of the village government must take cognisance of the opinion of the appropriate village leadership organs i.e

(a) The Village Committee for Education and Social Welfare.

(b) The opinion of the Children where they are capable of expressing their opinion on the matter. Such opinion should be subject to the approval of the Village Council. But consent is recommended to be endorsed by the Village Council.

(viii) It is recommended that the role of the Social Welfare Officer should be expanded beyond what is envisaged under section 136 of the Law of Marriage Act under which the court may take advice of some person whether or not he is a public officer trained and experienced in child welfare. If there has been counselling the results of such counselling should then be put on record in the form of certificate or award binding the parties. Social Welfare officers should be given powers to investigate an institute proceeding against any such party for breaching the provision of the award or certificate.

(viii) Change of Address by Putative Father:

It is noteworthy that the whereabouts of the putative father is very important in the enforcement of maintenance orders. It should be a mandatory condition that the putative father lodge his proper address must be notified to the court promptly and without delay. Failure to do so he shall make himself liable on conviction to a fine exceeding five thousand shillings.

(ix) Appointment custodian"

In appointing a custodian for a child of tender years or a disabled one upon the death of a child's mother or upon her becoming insane, or unsound mind or where she is in prison, a magistrate should first receive advice of the Commissioner for Social Welfare or his representative with regard to the suitability

of such an appoint having custody of such a child or where no such person is available and working on the same advice appoint a suitable institution for the custody of the child. Thus the term "custody" should be extended to include institutions for example, the children homes.

(xi) Neglect and Desertion of Children:

Section 9 and 10 of the Affiliation Ordinance which provide for a fine not exceeding two hundred shilling or imprisonment for one month against the custodian or mother of the child who in any manner ill-treats the child should be amended to a maximum fine of fifty thousand shillings and the term of imprisonment be replaced with a probation order under which the guardian or the mother should be placed.

II THE AFFILIATION ORDINANCE CAP. 278

(a) The State of the Law

43. The basic scheme under this Ordinance is to take care of children born out of wedlock. Where there is neglect of duty to maintain the child either intentionally or through the denial of paternity in such instances, the unmarried woman (or married but separated from the husband) may make an application in court (under section 3) for the father of the child to be summoned. The application is made on oath to magistrate that the man is the father of the child, and other corroborates once the evidence of the mother in some material particulars by other evidence to the satisfaction of the court, then the magistrate shall adjudge the man as the putative father of the child. The finding by the court need not be interpreted as a verification of the biological father. The courts finding is merely legal.
44. The maintenance order is issued under section 5 against the putative father for payment to the mother of the child or to any person who may be appointed to have the custody of the child under the provisions of the Ordinance, not exceeding one hundred shillings. The sum is to cover expenses of the child if it has died before the making of such an order.
- (e)
45. In the alternative the magistrate has power to order that a sum not exceeding Tshs. 15,000/= be paid into the court in lieu of monthly payments and that such sum shall be expended on the maintenance of the child in such manner as shall be directed by the magistrate.
46. Under section 5(1). The order for maintenance shall be made if the applicant has married or if she was a married woman but separated from her husband, resumes cohabitation with her husband. And under section 5(2), where an order for maintenance has been made and the putative father fails to apply such maintenance within one month after having been ordered or refuses to do so, the magistrate may by warrant under his

hand direct the sum due together with other costs incurred to be recovered by distress and sale of goods and chattels of such putative father. Power of detention of the putative father is given to the court up to such time the sum due is recovered.

47. If not, under section 5(3), the father may be committed to prison for a term not exceeding three months. The maintenance order be varied upon an application by either the mother, putative father or the custodian of the child (section 5(4)). The putative father can also apply under section 5A for the discharge of orders where: -

- (a) The mother of the child has married;
- (b) If the order was made on the application of a married woman living apart from her husband where she has resumed cohabitation with her husband. The proviso to section 5A directs that where a custodian has been appointed for the child and a discharge order is still subsisting no discharge order shall be made.

48. The Time limit for maintenance orders in favour of the child is up to 16 years of age (section 6). In fact, where good cause is shown, the order for payment shall cease on the child attaining 14 years of age.

49. The law provides for the appointment of a custodian where the magistrate is satisfied that the mother of the child is not a fit and proper person to have custody of such a child (section 8). An indication of circumstance under which a custodian may be appointed are given as where:-

- (a) the mother die
- (b) the mother becomes non compos mentis
- (c) the mother is in prisons.

Both the mother and custodian are under obligation to take proper care of the child. Section 9 refers to the woman and provides:

“Every woman neglecting to maintain her child, being able wholly or in part so to do, or deserting her child, be liable, on conviction, to a fine not exceeding two hundred shillings or to imprisonment for one month or to both such fine and such imprisonment”

And section 10 refers to the custodian and provides,

“Every person having the custody of a child under any order as herein before provided who misapplies moneys paid by the putative father for the support of such child, or who withholds proper nourishment from such child, or who in any manner ill-treats such child, be liable, on conviction, to a fine not exceeding two hundred shillings or to imprisonment for one month, or to both such fine and imprisonment”

The Ordinance finally enacts for miscellaneous provisions concerning proceedings to be in camera of affiliation matters and confidentiality of reports (section 12A); the power to make rules relating to fees and costs (section 13) as well as conflict of remedies between the Ordinance and Customary Law (section 14).

(b) Practice and Problems Related to the Affiliation Ordinance

(i) Time limit in affiliation proceedings

50. Under section 3 of the Affiliation Ordinance, Cap 278, the statutory period within which the unmarried mothers can make an application for maintenance of the child are stated as follows:-

- (a) before the birth of the child or
- (c) any time within twelve months from the birth of the child; or
- (c) at any time within thereafter; upon proof that the man alleged to be the father of the child has within twelve months, next after the birth of the child paid money for its maintenance; or
- (d) at any time within the twelve months next after the return to Tanzania of he man alleged to be the father of the child has within twelve months next after the birth of the child.

51. Practical experience has shown that a significant number of such unmarried woman have failed to bring their applications to the court in time due to either ignorance of the law of cultural inhibition. In most of our society, taking a man to court in matter appertaining a child bearing out of wedlock is embarrassing. In such circumstances a mother may be caught by time limit an have no recourse to court notwithstanding that paternity is admitted. In view of the importance of securing childcare and maintenance, we area of the opinion that time limit in affiliation. Proceedings should be re-considered. As long as the evidence pointing to the alleged father to be the putative father of the child, and the mother gives reasons acceptable to the court as to why she did not make application when she was pregnant or soon after the child was born, then the mother should be allowed to file an application for an Affiliation Order. The Law Reform Commission of Tanzania made similar observation and recommendation.

(ii) Orders of Maintenance

52. Under section 5(1) of the Affiliation Ordinance the statutory amount required for maintenance of he child born out of wedlock can be made on two different categories:-

- (a) by making order to the putative father to pay to the mother of the child or to the mother of the child or to any person who may be appointed to have custody of the child.

- (b) by ordering the putative father to pay the court a sum of money not exceeding fifteen thousand shillings. Such sum shall be expended on the maintenance of the child in such manner as the magistrate may direct.

53 Experience shows that in the ever changing economy, it is difficult to determine the amount of money that can hold value all the time sufficient to purchase commodities and service that a child needs. In the instance case, the provision of the law is seriously lagging behind the purchasing power. Hence the amount awarded is nothing compared to the needs of the child. In order to overcome this problem, mechanisms have to be worked out by involving the professional advice of social welfare officers who are knowledgeable and skilled in matters pertaining to children's welfare. The intention of social welfare workers can be useful in securing mutual agreement between relevant parties as far as costs of maintenance of the child are concerned, such agreement when awarding maintenance order for the child.

(iii) Recovery of Maintenance Expenses:

54. The Affiliation Ordinance is not clear on the recovery of maintenance expenses from the putative father where these have been met by some other persons especially the expenses incurred by the mother or other relatives. Section 5(1) provides for recovery of expenses incidental to the birth of the child. Strictly speaking there might be expenses immediately connected with the birth of the child and may exclude other continuing expenses for example, regular maintenance and expenses connected with pregnancy.

55. Furthermore it is noteworthy that section 5(1A) provides for exclusion of liability for maintenance by the putative father where on the date of which the application was made either the applicant has married or where she was a married woman living apart from her husband. The obvious awkwardness of this provision is that it is not child centred in terms of the welfare of the child, instead it focuses on the status of the mother which has not changed the fact that the putative father is responsible for the welfare of the child.

(iv) Duration of Maintenance Order

56. Under the provisions of section 6 of Affiliation Ordinance the Maximum statutory period allowed for contribution towards relief of any child born out of wedlock is sixteen years; while the Minimum period allowed of such contribution is fourteen years. In practice and under the Education Act. No. 25 of 1978 (section 3) every child is by law required to attend Primary school by the time he/she attains the age of seven. The provisions of section 6 of the Affiliation Ordinance lags behind because it does not take into regard the interest of the child who by then will be in school, therefore he/she will need support. Similarly for the minimum period of sixteen years is inadequate since a child who might continue with higher education need longer period of support.

(v) Appointment of Custodian

57. The provision of section 8(I) of the Affiliation Ordinance last paragraph states that:-

“When the mother dies or becomes of unsound mind, or is in prison, the court shall from time to time appoint some person who is willing to have custody of the child”

There is no provision in the law which requires that such a person willing to have custody of the child is a suitable person and has the ability to undertake such a responsibility.

(iv) Neglect and Desertion of Children: Section 9 & 10

58. Section 9 and 10 of the Affiliation Ordinance relate to the Circumstances where the woman neglects to maintain her child or deserts her child. Whilst section 10 applies to the custodian who misapplies money paid by the putative father or withholds proper nourishment from such child or who in any manner ill-treats such child, both the mother (under section 9) and the custodian (under section 10) are liable to a fine not exceeding 200/= or for imprisonment for one month.

59. It is submitted that practical difficulties arise due to the penal orientation of this action much so, to the detriment of the child. Where the mother or custodian is imprisoned the Ordinance is silent on who should keep the child. Automatic institutionalisation of the child is not a ready solution where few or no institutions exist. The best alternative would be to retain the fine sentence which should be a maximum fine of five thousand and to abolish imprisonment similar to section 11 of the Affiliation Proceedings act of 1957 of England, which provides that on summary conviction, a guardian of an illegitimate child shall be liable to a fine not exceeding 10 pounds.

(vii) Matters to be taken into consideration in the Determination on Maintenance Orders and Custody

60. In making maintenance orders under section 5, the court is directed to have regard to all positive circumstances of the case before proceeding to make such an order against the putative fathers. Matters, which have to be taken into consideration, are not enumerated in the Ordinance. Under section 5(4), the court can also vary maintenance orders whether by decrease or increase after enquiring into the circumstance of the case. Again, matters, which must be taken into consideration, are not enumerated. This reference to circumstances of the case is apparently needed in the case of appointment of the custodian under section 8. The problems that might arise here are that, investigation of circumstances under which the putative father might afford a given amount of maintenance might involve a detailed investigation of facts which are not readily available to the court when acting on its own.

Sign by percentages but did not say what percentage

- (b) Observed that age limit for maintenance be raised to 21 years of age from 16 (if those who go to school are incapacitated)
- (c) The distinction between “illegitimate” and “legitimate” should be abolished. Once a putative father is declared by court, a further process should be initiated for adoption.

- (d) Noted also that extraordinarily punitive legislation in case of non-marital sex, results in the hiding of such children and legal protection might be difficult (e.g. Zanzibar).
- (e) Other side effects become more pronounced such as resort to abortion, infanticide, child dumping and other anti-social mechanism against the young. A child centred approach should rely on counselling and support rather than punitive measures.
63. (ii) Moshi/Arusha:
- (a) Arusha – Arusha Regional Social Welfare Officer:-
- 100/= far to little
 - Parental compensation where they have taken care of child mothers.
 - Address of the putative father difficult to get and often courts fails to pin him down (such a case was referred in Arusha Primary Court).
 - The incidence of Affiliation proceedings is rather low. Possibly because of (a) fear of exposure by the mother especially where the putative father is a married person.
 - Jurisdiction in Affiliation proceedings be extended to Primary Courts (Section 2 refers to the Magistrate as the District Magistrate).
 - The rate of illegitimate child births is sky rocketing and the society cannot avoid to address on the issue. Children are children and they cannot be made victims of adults behaviour.
 - The law is too lenient to men who impregnate children (kids) rampantly).
 - Role of social welfare officer should be made more (critical) Judge Mfalila Arusha)
- (iii) Mbeya:
- 100/= not enough. Percentage should be fixed. Condition of life of the father to be established.
 - Need to have alternative dispute processing mechanism for setting affiliation matters as court procedure are not appealing (attractive) to

many women who fear subjecting their lovers to public odium and scandal.

- Affiliation matters are of conciliatory character; hence social welfare officers are best suited to deal with them. Women are assured privacy, and the likelihood of men turning hostile is narrower than in court of law.
- That Social welfare Officers be given more powers similar to those of the Police Officers under the Traffic Ordinance.
- Welfare Officers should also be given powers to determine the rates of allowances etc. After determination of the proper rate and other matters incidental to it, the question of enforceability can subsequently be properly brought before the court.
- Affiliation matters are of conciliatory character; hence social welfare officers are best suited to deal with them. Many women are assured privacy and the likelihood of men turning hostile is narrower than in a court of law.
- Social Welfare Officers be given more powers similar to these of the police officers under the Traffic Ordinance.

65. Mtwara:

Ordinance should be retained except that maintenance allowances of shs. 100/= modified as a percentage of income.

66. Zanzibar:

No Affiliation ordinance. But the spinsters, Widows and female Divorcee (reduction) Act No. 4 of 1985, applies. Any woman below the age of 25 years who bears a child is dealt with under this law.

67. USTAWI/UNICEF workshop in the Rights of the Child 28th to 31st August, 1989, Morogoro.

- (a) Insufficient statutory maintenance amount: The law should be reviewed and percentage criteria are used.
- (b) Basic needs of each child ought to be met regardless of the Marital statutes of the parents. As such equality of all children (where in or outside wedlock) is basic.
- (c) Legislation should empower a specific authority to fix an review the amount payable from time to time.
- (d) The Commissioner for Social Welfare be empowered to provide counselling to unmarried parents, and agreement on maintenance reached upon by two parties

on maintenance and upbringing of the child be signed and registered in court for enforcements. The agreement should be subjected to review from time to time

- (e) Where the woman gets married the putative father should continue to maintain the child unless otherwise proved that the child has been adopted.
- (f) There should be provisions for amounts payable towards maintaining a pregnant woman.

Other Countries:

Kenya:

The Affiliation Ordinance Cap. 142 of Kenya no longer applies to Kenya.

Recommendation or Affiliation Law:

(i) Maintenance Order:

- (a) It is recommended that the amount of shs. 100/= required by the la as maintenance payable by the putative father be increased. The statutory amount provided for as maintenance is outdated due to the high cost of living.
- (b) it should be a condition precedent that no order for maintenance and custody or variation thereof should be made without a status report of the social welfare officer having been lodged in the court. The report shall include all matters listed as necessary indicated in section 12A of the Guardianship of minors (England).
- (c) It is also proposed that where the income and earning capacity of the prospective custodian is established being more than the current minimum wage then the maintenance order will grant a higher amount.

(ii) Recovery of Maintenance Expenses:

- (a) Section 5(1) of the Affiliation Ordinance should be amended to include maintenance expenses and pregnancy undertaken by mother or relatives or any other person(s)
- (b) Section 5(1)(a) should be repealed on grounds that it does not focus on the child in terms of welfare but rather on the status of the mother which has not changed the fact that the putative father is responsible for the welfare of the child.

It also allows the putative father to apply for discharge of orders on the marriage of the mother. Therefore, the maintenance order should subsist notwithstanding the marital status of the mother. Therefore, the maintenance order should subsist notwithstanding the marital status of the mother.

(iii) Duration of Maintenance Order:

It is recommended that the minimum age for the duration of maintenance order should be re-considered. If the child has not completed school or has physical or mental disability, then the age criteria should be extended.

(iv) Cessation of Maintenance Order:

It is recommended that maintenance order shall cease where the child has attained the age of majority and has completed school, or having physical or mental incapacity has other means of sustaining himself or herself, or the death of the child.

(v) Jurisdiction of the Court:

(a) The Affiliation Ordinance does not refer to the court but it refers to the magistrate and the magistrate is defined as district magistrate. This reference might have been due to the fact that by 1949 the court system was not as systematized as it is today and the magistrate could as well have administrative functions and reference to his office made sense. And also there was a distinct jurisdiction between customary and other courts. The law relating to customary affiliation was distinct from the general statute law. Hence the later amendments of 1964 (section 14 and the note there under) tried to resolve the conflict.

(b) Today matters are much different. There is a unified system of the judiciary under the magistrates courts Act 1984. The power to apply both customary, Islamic and the general statutory law is now vested in Primary Courts. The magistrate has a well-defined role in the court system and has not administrative function as his colonial counterpart. Further, for practical majority of Tanzanians are primary courts. It is therefore, rather restrictive to limit jurisdiction in matters of affiliation to the district magistrate as no sufficient reasons exist for the restriction.

(c) Consequently, section 2 ought to be amended by deleting reference to magistrate and in place of it reference be made to the court which will include a primary court as defined in the Magistrate court Act no.2 of 1984, and all such reference in the Affiliation Ordinance be deleted and the word 'Court' be substituted thereof.

(iv) Effects of Affiliation Orders:

(a) The Ordinance is not clear on the effect of the Affiliation Order on the status of the child. It is submitted that the Child born out of wedlock be placed on the same footing as those born in wedlock once the putative father is declared by the court as such. In effect the order should do away with existing disabilities conferred on the so-called illegitimate children.

The putative father should be mandatory registered as the father of the child after having been declared so by the court under the Birth and Deaths Registration Ordinance Cap. 108.

- (b) As such the child would have the right to use the putative fathers name as a surname. The child would have the right to maintenance and care as per courts order, and furthermore the right of giving his consent in cases of adoption or marriage for the purposes of he Adoption Ordinance and Law of Marriage Act, 1971.
- (c) In like manner, for the purposes of Registration of Birth and Deaths under the provisions of the Births and Deaths Registration Ordinance Cap. 108;(section 12) the putative father should be mandatorily registered as the father of the child by virtue of he court order declaring him as putative father, and the Registrar General of births and Death shall cause to be entered the full particulars of the birth of child where they the child has been registered without the particulars of he father then the Registrar General of births and deaths shall cause to be entered the full particulars of he births of the child where they have not been entered in the register, but where the child has been registered without the particulars of he father, then the Registrar General shall enter the particulars of the father by virtue of the courts order. Where limitation has already operated against registration by virtue of section 20A, the courts order declaring the respondent in the affiliation proceeding as putative father shall be deemed to be of the same effect as an order of the resident magistrates court granted under section 20A of Cap. 108. by virtue of these changes the father of the child should also be permitted to apply for a declaration of paternity where the father believes he is the parent of the child born by an unmarried mother.

The Case of Children Parents:

The Commission notes that there is the problem of children parents which is not covered in the Affiliation Ordinance. The Group submits that the parent or guardian should be responsible for the payment of maintenance up to such time that the male child parent reaches the age of majority.

BIOBLOGRAPHIES

1. Affiliation Ordinance
2. Affiliation Proceedings Act of Botswana
3. Affiliation Proceedings Act of UK.
4. Zambian LRC – Recommended on Affiliation
5. Kagera Statistics
6. Relevant Section of:-

- Marriage Act
- Adoption Ordinance
- Penal Code
- Education Act

7. The Day Centres Act

8. The Children Homes Act

9. Customary Law Declaration:

- Law of Persons (IV para)
- Law on Guardianship

III The Adoption Ordinance Cap. 3355

(a) State of the Law:

70. The process of adoption brings in the responsibility of adoptive parents to the same footing or degree as that of parents in wedlock. Section 12 of the Ordinance is rather comprehensive on the Effects of Adoption Orders. It provides that:

“upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardian of the infant in relation to the future custody, maintenance and education of the child shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in a lawful wedlock. And where two spouses are the adopters for the purposes of making orders on custody, maintenance of an right of access to children they stand in the same relation as they would had they been the lawful father and mother of the child, and for purpose of marriage, the adopters are to be deemed to be within prohibited degrees of consanguinity in relation to the child”

71. In the above sense therefore, all the obligations arising out of Marriage Act, 1971 relating to the care and parental responsibilities must then apply to the adopters as well as the responsibilities conferred on parents by any other laws (e.g. the Penal Code, Education Act).

(a) Practice and Problem

72. As far as the Adoption Ordinance on the question is concerned the position on problems and practice applies in the same manner as under the adopter on the same footing as that of parents in wedlock. More details of this Ordinance Cap. 335 is discussed in preceding chapter.

(IV) Education Act,1978:

(a) State of the Law

73. One of the fundamental duties of parental care is to ensure and provide for a child's education. In Tanzania education facilities are largely the states responsibility, especially for primary school education. Yet the law perceive a basic parental duty to ensure that children are enrolled and attend formal school.

74. The Education Act, 1978 provides for, compulsory enrolment and attendance of pupils in Primary Schools as per section 35 under which every child who is aged seven years but has not attained the age of thirteen years must be enrolled for primary education. Under the Primary School (Compulsory Enrolment and Attendance Rules 1979 (GN 129 of 1979), parents may be guilty of an offence if they fail to take reasonable steps to ensure that a child is enrolled and regularly attends primary school until the completion of primary education. This also applies to any other person who interferes with a child's attendance.

Care of Children under the Education Act 1978

(b) Practice and Problems:

75. As referred to above, the Education Act makes it compulsory for children above the age of seven years to attend Primary Schools. Problems connected with the provision of education to children in the home setting are largely connected with the economic factors, lack of parental control and supervision either due to laissez-faire attitude by parents or due to family discord. Also, sometimes problems can arise which contribute to truancy and dropping out of school due to over-anxiety by parents.

76. Firstly, economic factors have been noted widely as the major contributing factors which the family that discourage children to attend school, e.g. a visit that to Arusha Uhuru Primary School and the Regional Office in March 1990 revealed that a significant percentage of parents are not able to give the basis needs to their children e.g. uniforms school books etc. which makes the particular child feel dejected and inferior to her or his colleagues in school. Gradually the child progress is negatively affected and the resulting poor performance discourages them to attend to school. it is the same parents who more often than not assign the children to engage in petty business like hawking at the bus stop instead of encouraging them to go to school.

77. Secondly, parent at times do not care to monitor the progress of their children in school or cooperate with teachers in the control of children hence children do not see the need of not engaging in other time wasting activities such as games loitering etc. Parental supervision might also be affected by family discord.

78. Thirdly, over anxiety by parents has been noted to be a factor in cases where truancy arises as where the child's well provided for and supervised. Fear of disappointing parents and undue demands from parents who expect performance from their children may lead to truancy and deviancy.

79. The Minister of Education is empowered to make rules prescribing acts of things which shall be done by any person for the better carrying out contravention of these rules as noted above.

80. The Primary School (Compulsory Enrolment and Attendance) Rules of 1979 GN 129 of 1979 were made in pursuance of the power given under section 35 of the Education Act, 1978. It is not clear as to who is responsible for the enforcement of the rules. It seems the child may be expelled from school where he/she is guilty of persistent and deliberate misbehaviour as to endanger the disciplines of and the good name of the school. (See regulation 4(1)(a) of the National Education Expulsion and Exclusion of Pupils from Schools Regulations of 1979 GN.130 of 1979). Also any child who fails to attend school in which he/she is enrolled regularly shall be guilty of an offence and subject to provision of Cap.13, be liable on conviction to be confined to any approved school (section 4 of GN. 129 of 1979). Punishments are also provided for parents who are responsible for child truancy.

However, if the causes for high truancy and drop-out rates are social-economic or related to the quality of education the root cause of these problems are not to be assigned in any fairness to the individual parent or child and stiff penal sanctions will serve no purpose.

81. It is submitted that penal sanctions be used only where probation and voluntary supervision have failed. There is a need to co-ordinate efforts amongst the social welfare department, the police and community-based institutions such as the Local Government. Under section 118 of the Local Government (District Authorities) Act of 1982, sub section 2(i), every district council is empowered to provide for compulsory attendance at schools of pupils enrolled. That is to say, a local council can participate in the enforcement of compulsory attendance. Furthermore, section 39 of the National Education Act provides for the establishment of school committees which are empowered to advise local authorities in matters relating to management and conduct of schools and see how the schools are integrated in the life of the community it serves.

82. This means that, it is possible under provisions of the Act to involve the community in instilling a sense of discipline and duty on both parents and children at the community level. Furthermore it must be an essential pre-requisite in the establishment of any school that the learning environment encourages equality in material conditions as much as possible, and discourages disparities. Parents who are unable to give uniforms to their children ought to be assisted through a well-established scheme at both Local Government level and national. Also, it should be the basic condition that school-attending children must be provided with food at school even if this will mean that parents take the responsibility of paying more in terms of fees.

(c) FINDINGS FROM REGIONAL VISITS:

83. In Arusha urban schools, it was noted that, lack of breakfast in the morning at home was one of the reasons students/pupils decide to absent themselves from classes during school time. In Mtwara, the Commission was informed that the problem of lack of food (famine) in the region significantly contributes to increase of truants. During the

dry season in August, September, and October higher delinquency becomes more observable. The stop-gap solution of requiring parents to give lunch boxes to children is not feasible because some parents cannot provide food for their children with consequences of creating disparity amongst children. Hence, provision of food within the school is essential.

(d) RECOMMENDATIONS:

84. (i) A scheme should be devised to assist parents who are unable to give uniforms to their children. Such scheme should be devised both at the local government level and at the national level.
- (ii) It should be the basic requirement that schools should provide food for pupils, at least breakfast for those attends morning classes and lunch for those attending afternoon classes.
- (iii) Parents should be called upon to contribute in kind or money for the same.
- (iv) Government should remove all taxes on all goods for children so that the same could easily be affordable by parents.
- (v) As regards criminal sanctions provisions for probation order should be given priority over other punitive sanctions such as an order for an approved school.

(iv) The Penal Code, Cap. 16

(a) State of the Law

85. Under Chapter XVI of the code, duties are imposed with regard to offences Relating to Marriage and Domestic Obligations. Whilst Chapter XX of the code provides for Duties Relating to the Preservation of Life and Health. There is under the code a general duty to take care of another person who is under one's charge either by reason of age, illness, detention, etc.(Section 206). Yet the Code provides a specific duty with regard to heads of families or households in relation to children, section 207provides:

“It is the duty of every person who as head of a family has charge of child under the age of fourteen years, being a member of his households, to provide the necessaries of life for such child, and he shall be deemed to have caused any consequences which adversely affect the life or health of the child by reason of any omission to perform that duty whether the child is helpless or not”

It is then clear that when read together with the provisions of the Law of Marriage Act above as stated, the Ultimate duty of care is on the man. Failure to fulfil the above mentioned duties are an offence under section 299 of the Penal Code. Other provisions of the code create offences against desertion of children and against neglect in the provision of food, clothes, bedding and other necessities that might injure the health of the child. Section 166 provides: -

“Any person who being a parent, guardian or other person having the lawful care or charge of a child under the age of fourteen years, and being able to maintain such child wilfully and without lawful or reasonable cause deserts the child and leaves it without means of support, is guilty of misdemeanour”

And section 167 provides:

“Any person who, being the parent or guardian or other person having the lawful care or charge of on/child of tender years and unable to provide for (itself refuses) or neglects to provide (being able to do so) sufficient food, clothes, bedding and other necessaries for such child, so as thereby to injure the health of such child, is guilty of a misdemeanour”

86. A misdemeanour under section 35 of the Penal Code is defined as an offence punishable with imprisonment for a term not exceeding two years or with a fine or both such fine and imprisonment. It is noteworthy that the Penal Code provides general duties for the care of the children both by parents, guardians or any other person provided it is proved that such a person has the charge or control of the child. On failure to take the requisite care and the child is in danger of harm, then the possibility arises for making other statutory arrangements for the care of the child, vide, The Children and Young Persons Ordinance Cap. 13 (Section 25), and also the Children’s Homes (Regulations) Act, 1968. The latter Act shall be discussed under community responsibility.

(b) Practice and Problems:

87. As noted above the Penal Code provides for certain duties under section 206, 207, 166 etc. It also provides penal sanctions under section 229 where one fails or neglects to take care of children. Much as the commission did not have any particular reactions from the public on the efficacy of penal provisions with regard to care, it is not worthy that these general duties are subject to a theory of punishment which punishes the parent/guardian without taking regard of the welfare of the child. For example, the Penal Code does not provide for an intermediate assessment or inquiry through which the causes of neglect can be determined and proper solution sought. Neither does it provide for a specific enforcement authority, which would be responsible for the efficacy of the provisions of code.

88. It is therefore submitted that the provisions of the Penal Code be transferred to an appropriate chapter preferably under Cap. 13 to be entitled. “Offences against Children and Young Person” and a mechanism be set there under where various remedial measures geared to protect the child and the young person may be undertaken before the full force of penal sanctions can be released against a difficult parent. The powers of probation officers have to be increased to include arrest and prosecution, and mechanism for collaboration with the police and other law enforcement agencies should be provided for.

89. **Recommendation:**

The powers of probation officer have to be increased to include arrest and prosecution, and mechanism for collaboration with the police and law enforcement agencies be provided for.

(vii) Children and Young Persons Ordinance Cap. 13

(a) State of the Law

90. Under children and Young Persons Ordinance, parents or guardian of a child may be ordered by the court to pay fine, compensation or costs for offences committed by the child if the court is satisfied that the commission of the offence by the child was due to negligence on the part of the parent/guardian to exercise due care of the child or young person (see section 21). Such fine so imposed may be recovered from the parent or guardian by distress or imprisonment as the court may direct.

91. On the other hand, according to section 25 of Cap. 13 any administrative officer or a police officer above the rank of sub-inspector may bring before a juvenile court any child or young person who is found begging or receiving alms wandering and having no fixed abode, being a destitute or is under the care of a parent or guardian of criminal or drunken habits, frequents the company of reputed thieves or is being persistently ill-treated or neglected by his parents or guardian etc. where such conditions and circumstances are proved to surround the child, the court may order the child to be taken out of the custody or care of any person and be committed to the care of a relative or other person or institution.

(b) Practice, Problems and Recommendations regarding Cap. 13 are discussed in later chapter

V. THE DISABLED PERSONS (Care and Maintenance) Act No. 3 of 1983

92. The Act defines a disabled person under Section 2 as:-

“A person who on account of injury, old age diseases or congenital deformity, is substantially handicapped in obtaining employment, or in under taking work on his own account, of a kind which apart from that injury, old age, disease or deformity would be suited to his age, experience and qualification”

Under Section 14 of the Act, every relative of a disabled person has an obligation to care and provide for the maintenance of that disabled person, according to his means. Where there is more than one relative they are all bound to maintain their disabled persons. Any neglect in maintaining the disabled person is subject to rectification through a court's order for maintenance under section 15.

CARE IN THE COMMUNITY SETTING

1. Introduction:

93.

The participation of the community in the care of children has been an essential ingredient in the upbringing of children from time immemorial. The socialization of the child is preconditioned by the child's participation and acceptance in the community. It is a truism that social parenthood is a recognized character of Africa families and kinship system in Tanzania and a large part of Africa. Systems of Kinship operated in such a way that the child was always taken care of by the social group be it the extended family, the clan or the territorial unit where applicable. Modern states have endeavoured to encourage community participation and awareness in childcare. A report to the British government on the care and protection of children in Britain (1987), has the following to say on how parents are assisted by local authorities, private individuals and organisations in caring for the children.

"The Child Care Act 1980, and in Scotland the Social Work (Scotland) Act 1968, require local authorities to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive or keep them in care. Local authorities through, among other things, the day care services, exercise this preventive power, they provide or regulate for children under school age in general. Those take the form of day nurseries, which provide care for the whole day and often give priority to disadvantaged children, child minders who are private individuals providing care in their own home for reward; and play-groups must register with local authorities. In addition, intensive social work is undertaken to support individual children and families where difficulties have arisen. Home visiting schemes, often under the auspices, of the local authority, provide trained volunteers to befriend depressed mothers who benefit from this type of support

There has been a growth in recent years in the number of familiar centres set up by local authorities and voluntary organisations. These range from day nurseries providing care for under fives, which place emphasis on involving parents and developing parenthood skills, to 'drop in' centres and developing residential units providing family therapy in cases of child abuse (Page 2 of the Report issued by Reference Services, Central Information Office, London, October, 1989")

"The range of services provided here from day-nurseries, child minder, play groups, voluntary organisations, home visiting schemes, trained. Volunteers to befriend parents with young children, family centres, drop-in centres, specialist residential units providing family therapy, toy-libraries etc. shows a wide range of community and local government participation in cases of care. Britain, a wide range of voluntary organisations working as NGOs have established a strong base for the care of children and these include residential homes like Dr. Bardado's, the children's society and the National Children's Home. Other organisations like the British Association for the study and Prevention of Child Abuse and Neglect (BASPCAN) and Organisation for Parents Under Stress (OPUS) which assists parents who need special assistance in the care of children, and also, there are family service units which provide care and counselling for families with problems. The Save the Children Fund has worked out the scheme where family centres are established for socially deprived families and all these

bodies are co-ordinated under the National Council of Voluntary Child Care Organisation (CHILD CARE).”

94. The participation of the community in Tanzania has been very limited either because, it is assumed that the care system historically connected with the kinship system is still functioning or because no conscience effort has been undertaken to stimulate and encourage community participation in novel ways. The former cannot be true as the breakdown of the tribal system has been largely affected by urbanisation and modernisation, which has emphasized on territorial identify rather than tribal allegiance. Urbanization also has broken down parochial tribal identities and the village based organization are no longer working it is therefore very essential that new ways of incorporating the community into child care should be innovated, developed and fostered in order to retain the positive elements of social parenthood which were very much entrenched with success in our traditional societies. The present status of the law provides for children’s centres, education, children’s and limited participation of NGOs and Local Government, which will review briefly.

II THE DAY CARE CENTRES ACT 1981 (NO.17) OF 1981

(A) State of the Law and Practice:

95. This Act seeks to provide for the regulation of day care centres where children are received, cared for and maintained during the day. The definition of day care centre in the Act (section 2) excludes approved schools, children’s homes and nursery schools from its purview. And a “child” for the purposes of the Act is “person of the age of between tow and six years” (section 2) The Act establishes a Registrar of day care centres who is the Commissioner for Social Welfare (section 3). A process is provided for where Day Care Centres can be registered. In considering the registration of day care centre, the Registrar is directed to consider whether the proposed programmes for maintenance and care of the children take into consideration.
- (a) the promotion of the development of children into cultured and good mannered persons;
 - (b) the programmes provided a sound foundation for enabling the children to grow up into healthy and responsible citizens of the United Republic;
 - (c) the facilities of proposed day care centres are suitable for the preparation of children for primary education.

The Minister is empowered to make Regulations on the running of a day care centre in GN 108 of 1982. Regulations are made entitled, “Day Care Centres Regulations” of 1982 that make specific provisions for the running of a day care centre. The parents committee is established under Regulation 14, and its functions are to organise and supervise the implementation of projects and programmes of a day care centre, to initiate schemes and projects aimed at raising the income of the centre, to prescribe fees to be paid by the children attending at the centre and to advice the Registrar, Assistant Registrar or owner of the day care centre on such matters as may be required by the committee.

96. The Regulations further provide for the supply of toys Materials and equipment to facilitate recreation play and preparation of children for primary education (Reg. 10), and also provide for the employment of day care centre staff whose qualification are outlined under reg.12. The owner of the day care centre may be a local authority parastatal organization of the party or an individual and the owner must be registered under Part 2 of the Act.

97. The purpose for enacting legislation to regulate day care centres arose from the need of integrating the community in taking care of children while their parents are engaged in other socio-economic activities. A study conducted by the Tanzania Scientific Research Council in 1973 which was sponsored by UNICEF showed the urgency and need to extend day care centres as rapidly as possible particularly in the Ujamaa villages and to use them as a basis for a programme which includes social development, nutrition programmes for parents particularly for mothers. (See Proceedings of International Workshop on the Development of Teaching Materials, Equipment and Toys for Day Care Centres Activity held in Iringa from 24/11/75-5/12/75.

The target group was children between the age of 3-7 years whose mother mothers were engaged in, inter alia, cultivation, or other development activities. On the need to assist mothers in the care of children, it has been noted that in view of altered socio-economic conditions, women are increasingly taking part in productive and service sectors in both rural and urban areas which remove them from the house environment, an attitudes of relegating the woman to the domestic domains have been seriously justifiably questioned:

“The necessity of enjoining women’s efforts in the development process has gained wider recognition in many quarters of the world. Though this is socially and politically desirable, the side effects of the absence of mother at home is felt harder in the loss of care and attention tot he child for all the time the mother is away on various duties.

Hence day care centres which aim at supporting the family to fulfil its role of child care, need to be widely established. In the extended family, provision of day care was not necessary as there were many female relatives who assumed partial responsibility”

(B) Problems:

98. Nowadays, because of lack of day care facilities, young children are left at home without adequate care and attention which is necessary for the child’s development. Many mothers, especially urban working mothers, leave children with home-girls/boys who may be too young to handle a child. Care takers are not always willing to work for individuals and even if they do they are too expensive because they pay they demand is the same as that of employees (See Institutional Arrangements Supportive to both Legal and Social Cultural provisions related to the Rights of the Child presented in June 1989).

The entire burden however, or establishing and operating a day care centre is on parents themselves, parents committees and other organisations. The responsibility of

the Social Welfare division is largely supervisory. The success of the programme for day-care centre initiated as it were in the mid 70's and legislated upon in 1981 has been questioned and a Senior Social Welfare Officer has written about the programme as follows:-

“Unfortunately, day care centres have not been seriously considered by the Society despite their obvious necessity. The spirit of the Day Care Centre Act 1981 is to see that Day Care Centre facility is available and are there to be provided by local governments, village governments, parastatal organisations, Ministries and Voluntary Organisations, but it appears little is being done. It is estimated that 29% of Tanzania's population of 23 million are children who require day care centres but until 1988 only 177,051 children were being served in 1854 Day Care Centres” (IBID).

The rather bleak assessment stands in direct contrast with the original expectation in planning. The original planning for the programme was worked out and approved in 1974.

When by end of those years there were 740 day-care centres operating in Tanzania under the supervision of Social Welfare. Division; 284 of these centres were in Ujamaa Villages. The total number of children who were attending centres by end of 1974 was 78,681. There was a rapid increase in rate in 1975. Towards the end of 1975 there were altogether 996 centres in operation and increase of 256 from those numbered the previous year. Of these, 418 were in Ujamaa Villages. It was hoped to reach a little over 1,000 centres by the end of 1975. It was therefore anticipated that at least 500 new centres could be established yearly effective from 1976 and it was hoped that by 1980 we would have had in Tanzania 3,500-day care centres. The minimum numbers of children to be handled by one leader was 25 in a centre but an average intake per centre was 100 children; thus by 1980 there would have been 350,000 children attending day-care centres. The plan for leadership, equipment, food supplement, etc. had been worked out on the basis of those projected increases. (See the 1975 workshop Report, above) The Act basically reflected these plans.

The table below summaries the position of those centres as of March 1980.

CHILD CARE CENTRES AND ENROLMENT AS OF MARCH, 1980

REGION	NO. OF CENTRES	NO. OF CHILDREN
ARUSHA	62	13,647
DAR ES SALAAM	134	13,211
DODOMA	48	3,245
IRINGA	161	10,160
KAGERA	129	6,813
KIGOMA	34	2,278
KILIMANJARO	78	6,813
LINDI	49	1,475
MARA	41	3,428

MBEYA	68	6,246
MOROGORO	79	5,509
MTWARA	56	8,274
MWANZA	147	0,524
PWANI	26	1,119
RUKWA	85	2,975
RUVUMA	65	5,809
SHINYANGA	128	10,463
SINGIDA	81	5,479
TABORA	45	3,163
TANGA	192	9,443

Sources: Day Care Centres Section Social Welfare Division,
DAR ES SALAAM

Recommendations:

- (i) Day Care Centres and facilities should be expanded at places of work in towns and especially in rural areas.
- (ii) The burden of establishing the day care centres should not be left entirely on parents. In addition to the governments supervisory role though the social welfare department, the local government and other interested organisations and institutions should put more emphasis and positively participate in the establishment of the day care centres.
- (iii) The Day Care Centres Act, 1981, should provide for a scheme of service scheduled to the Act itself.

III THE NURSERY SCHOOLS

(a) State of the Law, Practice and Problems

99. Pre-school education involves the formation of nursery schools, which are the formal training and care institutions for the preparation of young children for primary school. The distinction between nursery schools and childcare centres appears to be that whilst the former are formal and education oriented, the latter are more informal and lay emphasis on care. Furthermore, nursery schools have more skilled work force responsible for the running of these schools while in the day care scheme the workforce need not have any specialised skill. In the former, the responsible institutions are usually not community-based whilst in the latter, the community is expected to be the base-line body responsible for centres.

100. The Education Act 1978 does not make any explicit provision for nursery schools, neither is there any existing legislative scheme for nursery schools, when the Commission made an inquiry with responsible Ministry of Education Officials, they claimed that the former Education Act. (i.e. the Education Act, 1969, No. 50 of 1969) did recognise nursery schools and since under section 62(I)(e) of the present Act, all registers

of schools and the registers of teachers maintained under the Education Act, 1969m are to be maintained as if those registers were provided for under the present Act, then it could be presumed that Nursery Schools are still regulated by the Education Act, 1978. This argument is reinforced apparently by the standing officials instruments entitled Allocation of Business to Departments and Assignment of Responsibilities to Ministers, made under section 55(I) of the Constitution of the United Republic of Tanzania, 1977. For example, G.N. NO. 204 of 1987 is a publication of he same Instrument and the schedule to the Instrument establishes the office of he Minister for Education, whose responsibilities include:

“Education Adult Education Nursery Schools, Library services, UNESCO, Parastatal Organisations Under the Ministry”

Nursery schools are including presumably because the Ministry 1sponsible for them is that of Education. It is therefore a clear anomaly that no law explicit regulates these institutions. It is also not understandable whether new nursery schools can be established under the Education Act, 1978. The Ministry of Education has concentrated efforts to the transformation of elementary school into schools that co-operate with the communities surrounding them i.e. community schools. (See Mwajombe R. “Education for self Reliance in Practice; Elementary Education since 1967”. Paper presented to the National Symposium on 20 years of Education for self-reliance in Tanzania, 1967-1987, 1988, Mimeo. Ministry of Education, also bureau of Statistics; National socio-economic Profile of Tanzania 1989 at p. 81. In this sense then, pre-school education must not be very different from the idea of community school. The day care centres reflect this ambition much more than the formalised nursery schools.

It is submitted that means should be worked out or harmonising efforts made towards the establishment of day care centres and those already made with regard to nursery schools. The anomaly as it exists today is unnecessary. The Ministry of Education may be responsible for curriculum development for pre-school children whilst the Social Welfare Division might be responsible for the Organisation of these centres together with communities concerned. Local Governments have been given specific powers to deal with matters related to general community education, for example Section 118(2)(I) of the Local Governments (District Authorities) Act, 1982 provides:

- (i) “in the exercise of its functions as a local education authority under Part III of the National Education Act, 1978
- (ii) build or facilitate the building, equipping maintenance and other educational institutions”
(Emphasis added)

And under the First Schedule to the Act, (item 25) the local authorities are empowered to “grant some of its money towards the establishment, equipment or maintenance of schools and educational institutions” Under these provisions it is advisable to seek the participation of Local authorities in community schools, including day care centres and nursery schools.

Recommendations:

101. (I) Efforts towards the establishment of day care centres and those already made with regard to nursery schools should be harmonised. The anomaly that exists today between the Ministry of Education be responsible for curriculum development for pre-school children whilst the Social Welfare Division be responsible for organisation of these centres together with communities concerned.
- (ii) Local authorities should positively participate in the building or facilitating the building maintenance and participate effecting in the granting of necessary equipment to day care centres and nursery school in terms of section 11(2) of the Local Government (District Authorities) Act: 1982.

IV CHILDREN HOME

(a) State of the Law:

102. Children Homes are institutions, which care for children who cannot be taken care of in the family environment for different reasons other than those, committed by court order to approved schools under the Children and Young Persons Ordinance Cap. 13 the legislative Scheme which regulates these homes is under the Children's Home (Regulation) Act, 1968. Section 2 of the Act defines a "child" to be any person under the age of 18 years and a "children's home" to be any premises other than an approved school where five or more children being orphans or children whose relatives or guardians are unable or unwilling to care for them, are received to be cared and maintained, either gratuitously or for payment for a period of longer than 7 days by a person who is not a relative or guardian of the child. The commissioner for social welfare (under section 3(7) is the responsible authority for the issue of licences free of charge to any person who applies to carry on the children's home. Under Section 5(7) of Cap. 13 it is an offence to manage unlicensed children's home.

(b) Practice and Problems

103. The Experience of Tanzania today is that most children's home are run by NGOs i.e. the Civil Society or the community rather than the government. Rwezaura and Wawitezek, writing in 1988, came up with the following:

"there are 32 children's homes in Mainland Tanzania in which about 900 children are accommodated. The largest number of homes is operated by the Christian Missions and other religious charitable organisations. Basing on the 1984 Report of the then Ministry of Labour and Social Welfare, the Lutheran Church operates twelve homes, followed by the Roman Catholic church with seven homes the Missionaries of charity with four and the Moravian Church with three other including the State-operated Kurasini Children's Home, Christian Missionaries to Many lands and Pentecost Church, Swedish Holiness, Bakwata and Sister home, each of which manages one children's home" (Journal of African Law 1988 footnote 138 at pg. 158)

104. According to information available to the Commission, the Bakwata Children's Home did not take off completely. The government runs only one children's home. Consequently it is a fact that institutions which substitute family care are expected to provide children with basic necessities of life such as food, shelter and clothing and also a conducive social environment which would enable them to become responsible adults. According to the available information, the actual situation in many homes is that the quality of care is not up to standard due to limited financial and material resources. The provisional food is not up to thought standards. There is lack of bedding, inadequate clothing and playing materials, etc (see Rwegalurira 1989 pg. 8 and 9). Institutionalisation of children's is often regarded as a last option. More often than not, institutionalised children are often stigmatised by being referred to with such labels "children on charity" or children in need" or "inmates" etc. This kind of paternalistic detention has far-reaching social and psychological effects on the personality of the children.

105. Furthermore, Tanzania legislation is not explicit on protection of children at risk that would involve protection of children from abuse by either parents or those in charge of them. Recently in countries like Great Britain, networks of voluntary organisations have been developed involving doctors, nurses, health visitors, teachers the police and probation officers wee strategies have been developed to protect abused children and children at risk of abuse. For example, on sexual abuse, the British government has this to report.

"The need to find ways of preventing child sex abuse and indeed all types of abuse is emphasised by the authorities who recognise that voluntary organisations offering counselling through "drop-in" Centres or helpshelers can be an effective means of securing early intervention. At the same time it is recognised that the most effective preventive measure is likely to be showing children how to protect themselves and, although the primary responsibility in this field is considered to rest with parents, a number of schools have sought ways of doing this.

The Children's Homes Act must develop criteria under which a child might be described as abandoned and in need of care and specific procedures be developed for declaring a child abandoned and as such in need of care. An international investigation in "The Rights of ABANDONED Children" by the Defence of Children International 1987 gives, four possible instances in which the child might be regarded as abandoned, neglected or destitute.

(i) Neglect:

This will include failure on part of parent or guardian to feed, clothe, accommodate the child and in case of failure to pay for the maintenance of a child in an institution. Also failures to provide a child with medical care necessary for his health or well being and with appropriate education. Failure to provide adequate supervision of the child and failure to show interest for the child who has been placed in the care of another person or institution after a specific time limit.

- (ii) Exposure to ill-treatment or assault:
This will involve ill-treatment or assault either by the parent or guardian or in cases where the letter causes or procures the child to be subjected to such treatment or exposed in a manner likely to cause suffering injury, or detrimentally affect his or her health or morals.
- (iii) Exploitation of Young People:
This will involve exploitation by adults who cause the abduction, seduction or prostitution of a child or the commission by the child of immoral acts.
- (iv) Unsuitability of parental care:
e.g. where parents or guardians have immoral behaviour or are mentally disabled or are involved in alcohol and/or drug abuse

106. Under the above four criteria, many children might be found abandoned and in need or care. The involvement of the state is therefore quite necessary to identify abandoned children and to provide an institution of care. It may be necessary to make amendments on Cap. 13 under which an urban borne child may be identified and clear procedures be provided for declaring the child abandoned and as well as clear procedure for admission to institutions and placements. Increasing evidence of the gravity of the problem of abandoned children is seen today through the manifestation of street children. Recent seminar on street children in Tanzania organised by social welfare department indicated that this problem is increasing and that institutions responsible for care are either unable to hand the problem or overwhelmed by it.

107. Lastly, Rwegalulira admits on pg. 9-10 of one of his papers that children's homes are the sources of fosters-care and adoption. Foster care involves location on behalf of an abandoned child eligible facilities but can provide adequate physical and emotional care forth child, while adoption occurs by order of the High Court, Adopting parents assume a legal status of natural parents over the child. A majority of those responsible for the institutionalisation have always sought alternatives for it. According or Rwegalulira, a foster care programme ought to be strengthened by giving financial and material assistance to foster parents. The NGOs which have emerged in Tanzania in support of these programmes, include, the Tanzania Society for Orphans (TASO), Mission for the Need, organisations are in their embryonic stage and have not penetrated many parts of the country.

**CHILDREN HOMES, STATISTICAL REPORT BETWEEN
1ST JANUARY 1989-1ST JANUARY 1990**

Total No. of Children on 1.1.1989.....	10,034
No. of children received during the year 1989.....	365
No. of Death during the year 1989.....	20
No. of children returned to their Homes.....	(366)

Total No. of children on 1.1.1989.....1,013

Source: Family and Child Welfare Service Section, Social Welfare
Division, Dar Es Salaam

108. As the table indicates, the number admitted for care in these institutions is very small country-wise if one takes into consideration police reports on the magnitude of juvenile delinquency. Miss R. B. Thomas in her paper entitled "Young Offenders and Correctional Services to Youth in Tanzania" (1987), reports that in 1986 alone, the total number of young prisoners over apparent age of 15-25 years admitted in all prisons in Tanzania Mainland were 14,676. It a majority is from conditions of abandonment then the total figure of abandoned children for all ages must be much higher than figures presented in the courts of law. The AIDS problem in Kagera alone has rendered parents 7,00 children by the end of 1989 (see Appendix Table obtained from the Social Welfare Division).

Recommendation:

- (i) The children's Homes Act 1968, should provide for a specific definition and criterion under which a child might be described as abandoned and in need of care and specific procedure be developed for declaring a child abandoned and as such in need of care.
- (ii) The state should put more efforts in tracing abandoned children and provide institutions of care at Regional and District Level.
- (iii) Cap. 13 should be amended so as to provide for situations under which an abandoned child may be identified and a separate procedure should be provided for declaring a child as abandoned as well as a more elaborate procedure for registration and admission to relevant institutional placements.

V. CUSTOMARY LAW AND CHILD CARE

- (a) State of the Law
- (b) Application of Customary Law:

109. The status of customary law generally is under critical assessment (see James and Fimbo, Customary Land Law of Tanzania a Source Book, ESLB.1973 at passim) it is nevertheless recognised under the laws of Tanzania as applicable. The Judicature and Application of Laws Ordinance, 1961 (No. 57 of 1961), Cap. 453, section 9 provides for the application of customary law generally. The 129 tribes of Tanzania have a variety of customary laws. A general attempt for systematisation was done with regard to Matrilineal Bantus tribes through Customary Law Declaration in 1963. The were made under section 9A of the JUDICATURE and Application of Laws Ordinance. Cap. 453, as amended by the Magistrate Courts Act, 1963, Cap. 537 (now repealed) which provides:

“Section 9A(I) A district council may, and where the Minister so requires, shall record in writing a declaration of what is the opinion of the council is the local customary law relating to any subject and submit such declaration to the Minister”.

110. According to James and Fimbo (Supra, p.450) this power was formally contained in section 53A of the Local Government Ordinance, Cap. 333, which were repealed by the Magistrates Courts Act 1963, Cap. 537. However, according to section 69(3) of Cap 537 it was provided that notwithstanding the repeal of section 53A of Cap. 333.

“Every order made thereunder and in the force immediately before the appointed day (i.e. 1st July, 1964), shall on and after that day be deemed to have been made under section 9A of the Judicature and Application of Laws Ordinance, Cap. 453”.

111. In effect the Customary Declaration Orders of 1963 are made as follows:

- (i) The Local Customary Law (Declaration) Order
1963 GN 279 of 1963
1st Schedule law of Persons.
- (ii) The Local Customary Law (Declaration) No. 4 Order
1963 GN 279 of 1963
1st Schedule: Rules of Guardianship
2nd Schedule: Rules of Inheritance
3rd Schedule: Rules of Wills.
The parts which are of concern here are under GN 297
Children and GN. 436 of 1963, Rules on Guardianship.

(II) DUTY OF CARE OF CHILDREN BORN IN
WEDLOCK UNDER CUSTOMARY LAW DECLARATION

112. Under paragraph 175 of GN 279 of 1963, The Law of Persons, children born in wedlock are considered to belong to their father, i.e. the male spouse. This is in line with the patrilineal leaning of the Declaration. A step child born by the mother cannot become one of the children of the stepfather (para. 176), however, if he male spouse has children of a former marriage the child shall be given priority over other children born in subsequent marriages (para 177). The male spouse has a general obligation to take care of a child within his family. Under paragraph 172, it is provided that even where there is a divorce, the court can prescribe conditions for the care and maintenance of the children, but the male spouse cannot be deprived of his children although he may be denied custody. It is not clear under what circumstances custody may be granted. Under Rules on Guardianship, only four situations are envisaged. Death absence of their a person who is disabled by poverty or mental illness a person who is on a long journey.

Presumably, similar principles used to grant custody in some other cases shall be use. The provisions of the general law on care of children presumably operates in the same manner as it does under general statute law. Care provisions discussed above are therefore of the same force under customary law.

III. DUTY OF CARE OF CHILDREN BORN OUT OF WEDLOCK UNDER CUSTOMARY LAW DECLARATIONS

113. Firstly, where the father of the child is unknown, the child belongs to its maternal grandfather (para.178). If the maternal grandfather has ones, the child shall be considered as coming after sons in seniority (para. 179). Where the child is a daughter, her dowry shall be receivable by the maternal grandfather or his heir. If the maternal grandfather has no child, then this child shall be a legitimate child of the maternal grandfather.
114. Second, where the father is known, the law of persons provides for a legitimisation process. This may be done by either;
- (a) Marrying the child's mother or
 - (b) Paying Tshs. 100/= to the child's maternal grandfather before the child is waned. This would depend on agreement between the parents and the court is enjoined to give a decision on custody where the parents fail to agree. Nevertheless it is the male parent, the father, who has the responsibility of caring for the child in whatever circumstances (para c).
115. It is not worthy that customary law is simple in its provision of care. Yet the simplicity might be misleading in the sense that in these matters enforcement may be difficult, and it is not clear what status the child gets once the legitimisation process ends. Furthermore it is provided that the person mentioned as the father by the mother at the time of birth of the child is the only person capable of legitimising the child (para 182).
116. Third, the man mentioned by the mother of the child as the father must accept responsibility unless he proves that he did not have sexual intercourse with the mother (para 183). Even where she had many lovers, the one she picks must accept responsibility (para 184). Nevertheless if the man brings forward irrefutable evidence that he is not the father then the child's mother's claims shall be dismissed and she will not be allowed mentioning another person (para 187). Presumably here child's position will be similar to one whose father is unknown. Paragraph 189 is firm that the man who is responsible for the pregnancy and all other expense connected with the childbirth.
117. Fourth, the Law of Person (para 190-199) provides for payment of a fine and compensation to the mother's parent where the mother is unmarried and is under 21 years of age. The payment of a fine and compensations does not in itself legitimise the child (para 193)

IV. DUTY OF CARE FOR CHILDREN UNDER GUARDIANSHIP CUSTOMARY LAW

118. As noted above, the Declaration, (under GN No. 436 of 1963) provides for Rules of Guardianship (1st schedule), and guardian is appointed by the Clan Council (Baraza la Ukoo) in four circumstances:

- (a) where the father is dead;
- (c) where a heir is not present to take care of matters entrusted to him
- (d) where a person responsible is unable to do so by virtue of poverty or mental illness.
- (e) Where it concerns the wife and children of person who has deserted.

119. The responsibilities enumerated are of a general nature but making it clear that the guardian in terms of care, maintenance and running the family's home takes the place of the father. The guardian is appointed by the Clan Council and can also be replaced by the same council where he neglects his duty. Presumably, this will be a person belonging to the clan and his functions are offered freely.

RECOMMENDATION:

120. It is desirable that the customary law declaration should be incorporated in the general statutory schemes. There is need of uniformity countrywide in matters related to care, custody and maintenance of the child. Decisions of the clan council should be lodged in court Ward Tribunals" where the parties have reached agreement. Where there are no agreement matters should be subject to the general judicial process and law of the land.

121. More views on Customary Law and Care:

- (i) With the rise of industries, cities and bureaucratic states came the clear-cut demarcation between the public domain and the domestic domain. Families which were independent socio-economic units in Africa kinship systems were split, and the man (father became part of the private (domestic) domain which was left to the man as "his own furl".
- (ii) Two prominent writers, David Kairy and Diane Pulan underscore the fact in their writings that the domestic domain is argyle unregulated by law and therefore the child law is one that is largely affected by conscious neglect. This may clearly and vehemently be said of most (if not all) customary laws in Tanzania and this ranges from care and education to inheritance.
- (iii) Under most customary laws on Tanzania Mainland, Care of the children falls squarely on the women's (mothers) laps, at most, man's (father) duty is to provide the basic necessities. In other areas there are instances in which the man is totally unconcerned with the on going around the household. In many cases, the mother has often raised the child single handily.

- (iv) Customary law is becoming less concerned with children in the sense that as long as the child remains within the domain of the private (domestic) realm, the child (and mother) remain at the mercy of the man.
 - (v) However, it mustn't be ignored that African customs tend to embrace/enhance community responsibility over children within that same community. A typical example is illustrated where the clan is concerned. E.g. it is typical of the Haya that where one member of a certain clan dies, his surviving brother (or male cousins) must take the responsibility of rearing the deceased children, that they are brought up on a manner that they shall cherish their cultural and traditional/customary value.
 - (vi) The same may be said where one dies and leaves behind children. The older ones e.g. those who are already employed, take upon the responsibility of educating bringing up/maintaining the younger ones.
 - (vii) It is not know whether this is the customary law practice of the Haya, but it certainly is the custom by virtue of Interpretation of laws and general clauses act, 1972, section 3. This practice, established by usage, fails on all forms within the meaning of "customary law".
122. (b) Views on Affiliation:
- (viii) The Law should specifically say that, if any person is willing to take responsibility of a child born out of wedlock, he should apply to the court for him to be considered as adopter/guardian

Different views on Affiliation

Putative fathers should be "forced" to marry girls with whom they ad affairs. On refusal, they should be fined, imprisoned or both depending on their co-operation In this matter.

122. Views on Adoption:

The law should specifically provide where a child or children should go after their parents die. If an orphan is mature enough, the law should give such person a freedom to consent to be taken care of by near relatives e.g. uncle, aunt etc. if an orphan cannot so consent then the clan council should decide where the child should go. For the purposes of fulfilling this recommendation, the clan council should be equally represented from both the female and male sides. Alternatively, there should be established a village committee in each village for the purpose of adoption

(ix) Rights of Widows and Children in Inheritance matters

The law should specifically provide for rights of widows after their husbands/fathers death.

124. (x) Education:

Some interview were of the view that, in order to avoid early marriage, schools enrolment age should be elevated to 10 years.

This is for the purposes of enabling children finish STD VII at the age of about 17. It was opined that at the age of 17 children may undertake meaningful activities to prepare themselves for the future

(x) Juvenile Delinquents:

It was remarked that unfair distribution of the results of rural labour contributes to the problem of the youths moving into urban centres to look for employment. Thus parents should bear full responsibility if, without sufficient cause, neglect to take appropriate legal social or economic measures to ensure their children's welfare.

CONCLUSION:

In almost all areas visited, there are notable similarities in customary practices and rules relating to children's rights, care and general up-bringing. However, as it has been noted earlier on, due to socio-economic differences, the approaches in certain matters differ from one area to another. This difference in approach may continue to be more significant depending on geographical proximate or whether a certain tribal group is patrilineal or matrilineal.

B. SUMMARY OF RECOMMENDATIONS:

I Care in the Family Setting:

- (i) There seems to be no elaborate definition of "parent" and "guardian". In most legislation in Tanzania, there is a need for such definition, since, in terms of setting general criteria for guidance, the definition would certainly prove invaluable.
- (ii) "Home" must also be defined as it is the physical locus for the parent and the child.

(a) The Law of Marriage Act, 1971

- (i) Having regard to care, the role of the Social Welfare Officer should be expanded beyond what is envisaged under section 136 of the Law of Marriage Act under which the court may take the advise of some person whether or not he is a public officer trained and experienced in child welfare. The fact that the court is not bound to follow such advise renders the role of a professional child Welfare Officer to be passive. Hence Social Welfare Officers should handle complaints concerning maintenance and inadequate care of the child. The results of such counselling should then be put on record preferably in the form of

certificate or award. Parties thereto should be bound by it and upon breaching the same, the Social Welfare Officer may institute proceedings against such part for breaching the conditions in the certificate

- (ii) Despite the existence of mechanisms to provide supportive care for parents who are unable to do so, when it is proved that such parent's failure to do so arises from poverty or other circumstances beyond the parent's control. The Presidential Bounty, with Minimum government subsidy for nine months, should be given statutory recognition and if possible widened to include other circumstances hindering parents from fulfilling their lawful duties.

- (iii) Legal Protection or Physical home of Children:

Mechanism should be devised to protect children against indiscriminate dispositions of the family's residential property, procedural safeguards should be provided where disposition of such property is undertaken.

(c) Affiliation Ordinance, Cap. 279:

- (i) The amount required by the Affiliation law as maintenance for the child by putative father is shs. 100/= or if paid in lumps is shs. 15,000/=. This amount should be increased to 1/8 of the putative father gross salary or shs. 600/= where the income of the putative father cannot be assessed.

- (ii) Order of Maintenance:

Where a maintenance order is made, mechanisms should be made by involving professional advise of a Social Welfare Officers in matters pertaining children's welfare especially in a time when the statutory amount provided for as maintenance is out-dated due to the high cost of living the amount so awarded must be at least of the putative father's gross salary or shs. 600/= where the income of the putative father cannot be assessed.

- (iii) Recovery of Maintenance Expenses:

So that such expenses can be recovered s.5 (1) of the Affiliation Ordinance should be amended to include maintenance expenses and pregnancy expenses undertaken by mothers or relatives or any other person(s) Furthermore, section 5(1)(A) should be repealed on the ground that, it does not focus on the child in terms of its welfare but rather on the status of the mother which has not changed the fact that the putative father is responsible for the welfare of the child. Therefore, the maintenance order should subsist notwithstanding the marital status of the mother section 5A of the same Act should also be repealed on the same grounds stated above as it allows the putative father to apply for

discharge of orders on the marriage of the mother or where she has changed the marital status.

(iv) Section 5(4) of the same Act should be amended so as read that, on application for variations of maintenance order, a status report by the Social Welfare Officer sought to be taken into considerations, and if the application is for the decrease of the amount erroneously ordered to be paid, such decrease shall not affect the amount payable to that it becomes less than the statutory amount.

(v) Let the status of the child only be reason of cessation of a maintenance order e.g. upon attainment of age of majority etc.

(vi) Appointment of Custodian:

In appointing a custodian upon the death of a child's mother, or upon her becoming insane or of unsound mind or is in prison, a magistrate should first receive advise of the Commissioner for Social Welfare or his representative with regard t the suitability of such an appointee having custody of such child or where no such person is available and working on the same advice, appoint a suitable institution for the custody of the child. Therefore the terms 'custodian" should be extended to include institutions e.g. Children Home.

(vii) Neglect and Desertion of Children:

In replacement of section 9 and section 10 of the Affiliation Ordinance, which provide for a fine not exceeding shs. 200/= or imprisonment for one month against the custodian or mother of the child who in any manner ill-treats the child, let the fine be increased to shs 5,000/= a minimum and provision as to imprisonment be struck out an replaced with probation order requirement under which the guardian or the mother should be attached to a probation officer who shall see to it that the child is maintained properly.

(viii) The penal provisions of the Affiliation Ordinance should be standardised to a fine not less than shs. 5,000/= or to such sum as the Minister responsible for Social Welfare shall determine from time to time by order published in the Gazette.

(ix) it should be made a mandatory condition that the putative father lodge his proper address in the court and any change of address must be notified to the court failure of which would render him liable to a fine not less than shs. 5,000/=

(x) Section 2 of the Affiliation Ordinance should be amended by deleting reference to a magistrate and in place of it reference be made to the court which will include primary court as defined in Magistrates court Act No.

2 of 1984. A lot of people especially in the rural areas have easy access to primary courts, as such limiting the meaning to District courts would cause problems to those who do not have easy access to them and it is worth noting that "Justice delayed is justice denied"

- (xi) Due to the fact that the Affiliation Ordinance is not clear on the effect of an order on the status of a child born out of wedlock, such child should be placed on the same footing as those born in wedlock once the putative father is declared by the court as such. The putative father should be mandatorily registered under the Births and Deaths registration Ordinance as the father for the child after having been declared so by the court.

II CARE IN THE COMMUNITY SETTING:

- (I) Ways of involving the community into childcare should be innovated, developed and fostered.
- (ii) The present level of tax remission to families with children should be increased to reflect the current costs of living.
- (iii) Estate duty and tax should be lowered where in instance where doing so will be of direct benefit to the children in families or institutional care.
 - (a) Nursery Schools, Day Care Centres and Children's Homes
- (i) Means should be worked out of harmonising efforts made towards establishing more Day Care Centres.
- (ii) The Children's Homes Act must develop criteria under which a child might be describe as abandoned and in need of care and specific procedures be developed for declaring a child abandonment and as such in need of care.
- (iii) Foster care programme ought be strengthened by giving financial and material assistance to foster parents.
- (iv) Basic provisions for development of child must include facilities for adequate health standards, education, recreation, filial love and security.
- (v) There should be established a children's care fund to take care of various children's problems and needs.
- (b) The Education Act, 1978
 - (i) Penal sanction be used (against the child) where probation and voluntary supervision have failed and this should be under the strict

control of a social welfare officer, Police and Community based institutions.

- (ii) it should be a basic condition that children attending school should be provided with food at school.

(c) Customary Law Care:

Customary Law should be incorporated in the general statutory schemes providing uniformity countrywide in matters, related to care, custody and maintenance of the child. Where a clan council has reached a decision, such decision be lodged in the court or Ward Tribunal where parties have reached an agreement.

3.0 JUVENILE DELINQUENCY AND JUVENILE JUSTICE SYSTEM:

- 125. "Juvenile" means a person below eighteen years of age. This age includes a "young person" (from twelve to sixteen years), and a "child" (below twelve years). In Tanzania Mainland, Criminal liability begins at the age of seven. So a child, that is, a person of seven years but below twelve years, may be or criminal responsible for his acts or omissions.
- 126. Causes of juvenile delinquency are many and therefore are it wrong t attribute it to only a single factor. Factors such as the economy and sociology play a significant part I this respect. The poor economic standing of parents, unemployment, underemployment, or generally having inadequate means of subsistence has much influence on behaviour of juveniles. Inadequate family provisions such as food, shelter, clothing education etc. May induce juveniles to build up anti-social behaviour. The anti-social behaviour, in this regard, is symbolised by criminal acts like theft, robbery, prostitution etc. Juveniles may also abandon school in search of jobs.
- 127. The socialising agents, that is the parents, neighbours, social institutions such as schools and the society as a whole have a bearing to behaviour formation of juveniles. The primary functions of family care are translated into food, shelter, clothing, care, custody, maintenance, psychological attainment as love, security etc. Another important and basic role of a family is socialisation of the child. The society's anticipated the family imparts behaviour from any juvenile onto him/her. Where the family fails to inculcate the required norms, anti-social behaviour may be created.
- 128. The family is note only institution where behaviour is learnt. Schools partly assume family responsibility as soon as children are enrolled. It is the duty of the school authority to instil good behaviour in children while schooling. Teachers, therefore, provide a model, indeed, where school authorities are of a laissez faire attitude on behaviour formation and reformation, juveniles will begin to demonstrate anti-social behaviour. Efforts of behavioural construction by family and schools is supplemented or destroyed by neighbours and juvenile peer groups. Neighbours and peer groups are socialising agents in their own right. On the other hand, they can be a negative force under socialisation of the juvenile. Juveniles learn good and anti-social behaviour from

the neighbours and peers. Peers or peer groups have very strong influence on their behaviour.

129. Indeed while the neighbours and the peers have influence over juvenile behaviour, equally true is the fact that the public at large has constructive or damaging influence.

I FINDINGS FROM SEMINARS, REGIONAL VISITS AND OTHER CONSULTATIONS:

130. There has not been carried out any deeply research or reliable statistical information on the exact dimensions of the problem of juvenile delinquency as it obtains in Tanzania.

However, available information acquired from experts and from consultative visits has revealed that the problem is increasing alongside the problem of urbanization and present socio-economic factors. Hence, a clear distinction should be made between children who may be found in streets but still maintaining family ties, and children whose presence in streets is a result of broken family ties. In one of his works, Dr. Chad of the Faculty of Law, University of Dar es Salaam, has used the terms "street children" and "children in street", the latter term referring to children whose presence in the streets is a result of broken family ties. Although this last category may be assumed to be more disadvantaged in terms of care, both categories of children need special attention.

131. During the Commission regional visits, it was observed that juvenile delinquency is also related to the problem of truancy. Many dropouts and truants do associate themselves with delinquents in the streets and consequently come to learn bad examples. According to research carried out by the Commission in various regions, it has been revealed that the most common offences that children or young persons are charged with are:-

- (a) Stealing C/S 265 of the Penal Code, Cap. 16
- (b) House breaking and Theft C/S 294&265 of Cap. 16
- (c) Assault C/S 24 of Cap. 16
- (d) Trading without License C/S 17&22 of Act No. 25 1972 i.e. Trade Licensing Act, 1972.
- (e) Stealing by public servant C/S 270 & 265 of Cap. 16
- (f) Being a rogue and vagabond C/S 177 of Cap. 16
- (g) Truancy Contrary to the provisions of the Education Act NO. 25 of 1978; etc.

132. The following data show the number of children and young persons dealt with under Cap. 13 in Ilala District alone from 1983 of 1988.

<u>YEAR</u>	<u>NO OF CASES</u>
1983	120
1984	124
1985	125
1986	169
1987	191
1988	220

133. Children problems exist in other areas as well. One report compiled by social welfare sources in Sumbawanga show that in 1986, 160 youths were put under probation whereas 17 children were sent to approved schools. However, it is not very clear whether all of them were actually received or whether they all completed their terms successfully.

134. Generally, in various regions visited Children were seen or reported to engage themselves in petty-trading, marijuana smoking, alcoholism, brawls as well as prostitution. Some of these problems were considered to be more serious when schools get closed. The Commission was further told of various categories of children with problems including

- (i) Children whose parents are dead or have separated
- (ii) Children whose parents are incapacitated or seriously ill thus have no other reliable person to take care of them.
- (iii) Children whose parents especially mother are engaged in some activities outside the family.
- (iv) Children whose parents have economic hardships.
- (v) Children who are victims of misbehaving parents etc.

135. A part from the above, the Commission has also taken note of the fact that even among the relatively well off families, there has been several cases of delinquents. However, it has generally been agreed that relatively poor families are more susceptible to such problems.

136. The following data reflect the number of Children in the Mainland Tanzania who were apprehended and convicted in the year 1989 for having committed various offences:

Stealing.....	228
House-breaking and theft.....	92
Assault.....	55

Trading Without License.....	5
Rogue and Vagabond.....	188
Affray.....	3
Other Offences.....	<u>264</u>
Total	<u>864</u>

137. With regard to juvenile delinquents (including truants), it has been noted that, at the commencement of the year 1989 there were 158 cases.

138. The following is the summary of cases of juvenile delinquents dealt with by the Department of Social Welfare in the Mainland Tanzania for the year 1989. (This includes truants).

New Cases	223
Repeated Cases	5
Closed Cases	226
Cases Referred to Court.....	<u>24</u>

TOTAL CASES REMAINING AT THE
END OF 1989 136

II STATE OF THE LAW AND PROBLEMS RELATING TO ENFORCEMENT:

139. The state of the law relating to Children and Young Person in Tanzania has been identified as unsatisfactory in various respects.

In the first place, although the law was intended to deal with many problems of street children (both delinquent and non-delinquent), the methods of dealing with the said two categories of Children is mixed up. In other words, there is no clear provision on how to deal with deviant and non-deviant children. Children in streets is a many sided phenomenon and cannot be attributed to a single factor. The present law treats both categories of Children under one umbrella and thus leaves the ever-changing problems of children blurred in uncertain legal terms.

140. The circumstances which may lead a child to be brought before court are provided under section 25 of the Children and Young Persons Ordinance, (CYPO),Cap. 13 as follows.

25-(1) Any administrative officer or police officer above the rank of sub-inspector may bring before a juvenile court any child or young person who:

- (a) Is found begging or receiving alms (whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise), or being in any street, premises or place for the purpose of begging or receiving almost; or
- (b) is found wandering and not having any home or settled place of abode, or visible means of subsistence, or is found wandering and having no parent or guardian, or a parent or guardian who does not exercise proper guardianship; or
- (c) Is found destitute, not being an orphan or having both parents or his surviving parent, or in the case of an illegitimate child or young person his mother, undergoing imprisonment; or
- (d) Is under the care of a parent or guardian of criminal or drunken habits; or
- (e) Is the daughter, where legitimate, or illegitimate, of a father who has been convicted of an offence under section 158 of the Penal Code in respect of any of his daughters whether legitimate or illegitimate; or
- (f) Frequents the company of any reputed thief or common or reputed prostitute, or
- (g) Is being persistently ill-treated or reflected by his parent or guardian; or
- (h) is lodging or residing in a house or the part of a house used by any prostitute for the purpose of prostitution, or is other wise living in circumstances calculated to cause, encourage or favour the education or prostitution of the child or young person;

The court before which a person is brought as falling within one of those descriptions, if satisfied on inquiry of that fact, may order the child or young person to be taken out of the custody, charge, or care of any person, and to be committed to the care of a relative or some other person or institution named by the court (such relative, other person or institution being willing to undertake such care), until the child or young person attains the age of eighteen years, or for any shorter period and the court may of its own motion or on the application of any person, from time to time, by order renew, vary or revoke any such order.

Provided that the court may at any time on the application of the person or institution to whose care any female child or young person is committed under this section, and with the consent of such child or young person extend the period for which she was so committed until she attains the age of twenty-one years. Every order made under this section shall be in writing and the court may make any such order in the absence of the child or young person.

141. Then subsection (3) provides for a fine not exceeding five hundred shillings, or imprisonment for three months for any person or institution which infringes the provisions of the committal order so as to cause a child or young person to escape from legal custody

On the other hand, sub-section (4) provides for discretionary powers of the Minister to discharge a child or young person from the care of any person or institution either absolutely or conditionally as he may approve. He may also make rules in relation to children or young person so committed to the care of any person or institution, and to the duties of remuneration of such persons or institutions as he thinks fit

142. The Commission as increasing has generally noted cases of children or young persons. They range from, for example, cases of “traders” without licenses, rogues and vagabonds, truants to cases which do not strictly speaking amount to criminal conduct. Moreover offences or “trading without license, being rogue or vagabond and truancy, are offences under different pieces of legislation that is the Trade Licensing Act 1972, Penal Code, Cap. 16 as well as the Education Act, 1978, respectively. Thus, treating such cases under a more or less equal footing without much clarity can possibly lead to undue incrimination, thus there is need to consider incorporating relevant provisions in Cap. 13 with necessary safeguards for purposes of uniformity.

143. With regard to enforcement, the law is not very clear on various roles of officers concerned, that is, from apprehension stage until relevant orders are made. From the present provision it is difficult to get the exact ambit of powers and roles of various officers concerned, that is :-

- (a) The role of apprehension officer and matters relating to notification of arrest.
- (b) The role of social welfare upon apprehension during hearing, in remand homes and approved school(s)
- (c) The role of other persons for example, parent friends relatives, organisations, independent bodies or interested institutions.

144. From the present provisions, it seems that a social welfare officer, who is an expert in children matters, cannot intervene in the quoted circumstances until at a later stage of admission of offence under section 14 where past record of the child may be required by the court, or probably, in relevant children institutions like Remand Homes, Approved Schools etc. where such an officer performs his day to day duties.

145. Even in children institutions themselves, the exact roles of social welfare officers is not clear. It has also been observed that under the present arrangements, a social welfare officer is in-charge of the Approved School. On the other hand, section 28 of Cap. 13 provides for a “Board of Visitors which are usually performed by the social officer, for example, maintenance of discipline, inspections making recommendations to the Minister and “other powers as may be prescribed”. Thus, it is not clear what powers a social welfare in-charge of an Approved School qualified for the purposes of management has or whether the powers of running the Approved School is the responsibility of the Board of Visitors.

146. It is therefore felt that there ought to be elaborate provisions in Cap. 13 on, among other things, the exact roles of social welfare officers, the Board of Visitors and

- officers(s) in-charge of Approved School(s) instead of more administrative arrangements to that effect.
147. A part from the above-mentioned uncertainties, it has further been noted that institutional roles, for example, the role of the non-Governmental institutions are not elaborated. It has been noted that the law in other countries, for example, in Kenya, gives room for the individual and agencies to deal with rehabilitative programme of delinquent children. It is encouraging to note that, in Tanzania, some societies and institutions dealing with various aspects of problems have started their activities, for example TASO, FOCATA, WAMATA and others. However, their exact role in view of the present law is not clear.
148. Besides Cap. 13, there are other laws which are usually referred to in tackling children problems. Since Cap 13 is not only a single legislation which is resorted to in every case, there is danger of victimisation if there is not much clarity on how to handle children related cases. It has been noted that the present methods of dealing with children are rather tortuous. This problem may be solved by bringing together under one roof those care and penal provisions that are very closely related but scattered in other pieces of legislation.
149. There are additional procedural weaknesses in Cap. 13 relating to apprehension of children and young persons and bringing them to court. Presently, there is lack of requirements as to notification of parents or guardian after the child or young person is apprehended. Also, specific provisions as to attendance of witnesses, circumstances relating to legal representation, manner of giving evidence, conviction and sentencing, have been identified as not well presented and may attract resort to other treatment not specifically mentioned in Cap. 13. This may have detrimental effects on the children concerned especially where such procedure is basically meant for adults.
150. It has further been noted that presently, the starting point of handling children cases is through a court order. However, there have been some children cases, which have been dealt with outside the normal court procedure. This has always been happening since a very long time ago. There is only need to give legal recognition and supervision of such method.
151. To afford more protection to children it is considered that "diversion" (which is discussed later in this report) is a modern method which may also be used in settling appropriate children cases outside the normal court procedure. Although some International legal documents provide for "diversion" Cap. 13 is silent about it. In this regard, Cap.13 deprives Children of an alternative social method of protection and subject's categories of children within the ambit of Cap. 13 or some other uncertainty.
152. Under the present law and procedure, when a child is apprehended and brought before the court, the court has to constitute itself into a juvenile court. Presently, there is not separate juvenile court system with requisite expertise as is the case with some other Commonwealth countries. On the other hand, there has also been problems relating to fully and effective utilisation of Remand Homes and approved Schools. Children who are usually sent to these institutions are usually below sixteen years of age and to above.

Thus children and young adults above sixteen may not benefit from the present arrangement.

III COMPERATIVE EXPERIENCE AND INTERNATIONAL STANDARDS:

(a) Apprehension and Notification:

153. Upon apprehension of a juvenile, Cap. 13 do specifically provide for notification of parents or guardians. This is so notwithstanding the fact that notification is considered by the Budging Rules as an important requirement in the administration of juvenile justice. The Budging Rules provides a general guidance under Rule 10 to the effect those notification juveniles.

154. The Working Group as serving three major functions has noted notification;

1. it helps the police to get background information and to enable them to take appropriate action.
2. It helps the parents to know the whereabouts of the children and it may help them to bail their children out.
3. If notification is immediate, it may help any interested person to take necessary measures to protect children being maltreated or failing into dangerous circumstances.

155. Comparative protective provisions upon apprehension are contained under Part V of the New Zealand Bill. Section 114(1) of the said Bill provides that: -

“A member of the police force shall not, except pursuant to a warrant, arrest a child or young person unless that member of the police is satisfied for the purpose of the police is satisfied on reasonable grounds:-

- (a) That is necessary to arrest that child, or young person without warrant for the purpose of:
- (i) ensuring the appearance of the child or young person before the court; or
 - (iii) preventing the loss or young person from committing further offences;
or
 - (iv) Preventing the loss or destruction of evidence relating to an offence committed by the child or young person or an offence which the member of the police has reasonable cause to suspect that the child or young person of having committed; 114(2). Every member of the police who arrest a child or a young person shall, within 3 days of making the arrest, furnish a written report to.

- (a) A senior member of the Police in the district in which the child or young person was arrested designated for the purpose by the commissioner of police (Emphasis Added)

156. It can be noted from the above example that unlike Cap. 13, the New Zealand provisions are put in negative form so as to ensure that reasons for apprehension are reasonable and that there is least interference with the children's rights and privacy.

- (b) Judicial Process:

157. For the purposes of administration of juvenile justice, state parties to the UN Convention on the Rights of the Children are guided by Article 40.

158. The said Article states the need for the state parties to ensure the Children who've committed offences benefit from the due process of law including legal or other assistance in presenting their defence. The article states the need to protect Children's Human Rights and that resources to judicial proceeding and institutional placement should be avoided whenever possible and appropriate

159. Article 17(1) 2 and 3(2) of the African Charter reiterates the substance of the UN Convention in dealing with an accused child or a Child who has been found guilty. The cited articles contain provisions as to protection of inter-alia the Child's dignity, protection from torture, inhuman, degrading treatment as well as informing the Child promptly in a language that he understands and in detail of the charge against him. The said article has provisions as to appropriate legal assistance in the preparation of the child's defence and the right of appeal and prohibition of press.

160. According to Article 17.2© VII of the said Charter the child shall not be compelled to give testimony or confess guilt. Furthermore, Article 3 states that the essential aim of treatment of every child shall its reformation re-integration into its family and social rehabilitation.

161. Cap. 13 has special provisions as to procedure contained under section 3 to 17 however, in Comparison with similar legislative enactment's, it appears that Cap. 13 have short-cut provisions on procedure. For example, unlike Cap. 13, section 64 of the Juvenile Act of Zambia, Cap. 217, is more explicit on the procedure in juvenile courts. Among other things, the said section has provisions relating to the following matters.

- Explaining the substance of the alleged offence to the juvenile.
- Procedure as to hiring of the witnesses when the juvenile admits an offence: and when such juvenile is not represented.
- At the close of the evidence in chief of each witness, the magistrate shall, if the juvenile parent or guardian if present in court whether he wishes to put any questions to the witnesses.

- According to section 64, the court may also put necessary questions to witnesses on behalf of the juvenile (i.e. during cross examination and when the juvenile is not legally represented) section 63 (5).
- Where it appears that a prima facie case has been made hearing of witness for the defence may be allowed. The juvenile may also be allowed to give evidence or make a statement if the court is satisfied that the offence is proved, the juvenile may then be asked if he desires to say anything in extenuation or mitigation of the penalty or otherwise.

162. Before deciding how to deal with the juvenile, the court shall, if practicable, obtain such information as to his general conduct, home surroundings, school record and medical history as may enable it to deal with the case in the best interests of the juvenile, and may put to him any question arising out of such information.

163. In view of section 63(1) of the Zambia Act, hiring of a charge against a juvenile is assigned to juvenile courts with some exceptions for example:-

- When there is a joint charge of juvenile and a person who has attained the age of nineteen years (section 65(1)(i).
- The charge may also be heard by a subordinate court other than a juvenile court if a juvenile who has attained the age of the 19 years is charged at the same time with aiding, abetting, causing, procuring allowing or permitting that offence, (section 65(1)(ii)

164. Under section 65 however, magistrates are not restricted from proceeding with the hearing and determinational of proceedings relating to juveniles if the magistrate thinks fit so to do (section 65(1)(iii).

165. Under the Kenya law i.e. Cap. 141 there is Part II which is about “proceedings in juvenile court” under section 3(1), jurisdiction is conferred upon juvenile courts for the purposes of hearing all charges against persons under eighteen years (in Zambia, it is 19 years)

166. However, as is the case with the Zambian Act, nothing shall prevent the court from proceeding with the hearing and determination of the case if it appears that the person is over eighteen years of age.

(Note that: Under the Kenyan legislation, a juvenile means a person who is of he age of fourteen years or more and is under the age of sixteen years. A young person is defined to mean a person who is of the age of sixteen years, or more and is under the age of eighteen years, another term “child” means a person under the age of fourteen).

167. Under section 7 of the CYPA of Kenya (Zap. 141) no child except an infant in arms, unless required by the court shall be present in any court during hearing. The court has also power to clear court under section 8 i.e. to direct that any person (not being

- members or officers of the court or parties to the case or their advocates) to be excluded from the court during hearing.
168. Section 13(1) of the Kenyan act allows remission of the cases to juvenile courts from other courts. This section is almost similar to section 67 of the Zambian Act (Cap. 217)
169. For a person under 18 years the Kenyan Act has provisions under Section 14 on "Consideration of Welfare". The said section is to the effect that, when such person is brought before it, every court shall have regard to his welfare and shall in proper cases take steps for removing him from undesirable surrounding and for securing that proper provision be made for his maintenance education and training.
170. Under Section 15 of the Kenyan Act, there is prohibition of the use of the words "conviction" and "sentence" Instead, such child or young person shall be referred to as found guilty of offence.
171. It is worth opting that under Cap. 13 there is no specific emphasis t that effect. Neither are there provisions relating to consideration of welfare in terms of S. 14 of the CYPA, Cap. 141 of Kenya.
172. As far as Zanzibar is concerned the relevant law is Children and Young Person Decree, Cap.53. Provisions relating to judicial process are mainly contained in section 3 to 8, section 10 as well as section 56-58.
173. Under section 3, there are provisions, relating to sittings of a penal formed for the purposes of juvenile courts (section 3(1)(b).
- Clause (d) of section 3(1) is to the defect that, the Chief Justice may make rules with regard to the number of persons on the Penal who may sit as member of the juvenile court. Please Cf. 3(2) of Cap. 141 of Kenya where the C.J. may appoint a magistrate of any are to be a Chairman or deputy Chairman and such number of other suitable persons as he may think fit to constitute a penal of persons to try juvenile cases. Note also that during the working Groups, visit to Kenya, problems were noted with regard tot he formation of such a penal. It was observed that in practice, the requirements of the said provisions have proved difficult to implement.
174. Under section 58 of the said Zanzibar Decree, it is provided that:
Whenever a court deals with a case by:
- (a) making an approved school order under the provisions of the Approved Schools Decree, or
 - (b) by ordering a child or young person to be whipped, or
 - (c) by sentencing a young person to imprisonment,

It shall forthwith send a record of the proceedings or a Certificate copy thereof the High Court for perusal

175. Part V of the Children and Young Persons Decree, Cap. 58 of Zanzibar have provisions under section 56-60 which talk about records and Returns.

Section 56(1) provides that, subject to the other provisions on these Rules, the provisions of section 163,164,165 and 166 of the Criminal Procedure decree (which deals with the mode of taking and recording evidence). Shall mutatis mutandis apply to all proceedings before the court.

176. A close examination of provision of Cap. 13 reveals that it does not have some of the provisions considered above.

IV TREATMENT OF JUVENILE OFFENDERS

177. The budging Rules, which state general objectives of institutional treatment, is a good guidance on this are. Rule 26 is reproduced herein below:

- 26.1 The objective of training and treatment of juveniles placed in institutions is to provide care, protection education and vocational skills, with view to assisting them to assume socially constructive and productive roles in society.
- 26.2 Juveniles in Institution shall receive care, production and all necessary assistance social, educational, vocational, psychological, medical and physical that they may require based on their age, sex and personality and their interest of their wholesome development.
- 26.3 Juveniles in Institutions shall be kept separate from adults and shall be detained in separate parts of institutions holding adults.
- 26.4 Young female offenders placed in an institution deserve special attention as to their special needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.
- 26.5 Inter-ministerial and inter-department co-operation shall be fostered for purpose of providing adequate academic or as appropriate, vocational training to institutionalised juveniles, with a view to ensuring that they do not leave the institution with an educational disadvantage.

178. The New Zealand Bill (1986) on Children and Young Persons has provisions on the treatment of young offenders. Section 129 spells out disposal of juveniles in the following manners.

- (a) Admonishing the young person;
- (b) Discharging the young person from the proceedings without further order or penalty;

- (c) Fine;
 - (d) Ordering any parent or guardian to pay a sum towards the cost or the prosecution instead of the young person;
 - (e) An order to pay compensation;
 - (f) Making an order to place the young person under the supervision of social worker or such person or organisation as may be specified in the order for a period not exceeding twelve months.
179. Section 132 provides for a community care order, In this section, the Youth Court may, with the consent of the young person, order the young person to undergo a programme of community care for a period not exceeding 12 months.
180. It may be noted that in this Bill, a child means, a boy or girl under the age of 14 years. Young Person is defined as a boy or girl of over the age of 14 years but has been married. The New Zealand Bill provides the need to have two types of courts for juveniles. First, the Family Court System which deals with juveniles on matters of care control and protection, and "Youth Courts" which handle juveniles who are suspects of breach of law.
181. According to the juvenile Act of Zambia Cap. 217 courts are empowered under section 10 to dispose off cases of juveniles in need of care. The juveniles in need of care are defined under section 9(1) to include:-
- (a) A juvenile who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either failing into bad associations or is exposed to moral or physical danger or beyond control; or
 - (b)
 - (i) a person in respect of whom any scheduled offence has been committed; or
 - (ii) a member of the same household as a juvenile in respect of whom such an offence has been committed;; or
 - (iii) a member of the same household as a person who has been convicted of such an offence against a juvenile; or
 - (iv) a member of the same household whereof a member has committed an offence under section "one hundred and fifty-nine" of the Penal Code in respect of another female member of that household; or
 - (v) frequenting the company of any reputed thief or prostitute; or

- (vi) lodging or residing in a house of the part of a house used by an prostitute for the purpose of prostitution, or is otherwise living in circumstances calculated to cause encourage, or favour the education of the juvenile.

Requires care, control or protection section 9(2) For the purposes of this section, the fact that a juvenile.

- (a) is found destitute; or
- (b) is found wandering without visible means of subsistence, or
- (c) is found loitering for the purpose of so begging or receiving alms shall without prejudice to the generality of paragraph (a) of subsection (1), be evidence that he is exposed to moral danger.

182. Treatment for juveniles in need of care is contained in section 10 where powers of dealing with juveniles by police officer and juvenile inspector are explained. Subsection (10) is to the effect that, any police officer, or juvenile inspector may bring before a juvenile court any juvenile who is in need of care unless it is not in the juveniles interest or that proceedings are about to be taken by some other person.

Section 10(2):

If a juvenile court is satisfied that any person brought before it is a juvenile in need of care, the court may:-

- (a) Order his parents or guardian to enter into recognisance to exercise proper care and guardianship;
- (b) Commit him to the care of a fit person, whether a relative or not who is willing to undertake such care;
- (c) Without making any other order, or in addition to making an order either of the last-two paragraphs, make an order placing him for a specified period, not exceeding three years, under the supervision of a probation officer or some other person appointed for the purpose by the court, or
- (d) Order him to be sent to approved school

183. Having seen the way juveniles in need of care are dealt with, there is need to see the way juvenile offenders are dealt with under the same Act, i.e. Cap. 217 of Zambia.

184. in the first place, the law provides for abolition of the use of the words "Conviction" and sentence" (section 68) in respect of juveniles. On punishment, (section 72) no child shall be sentenced to imprisonment or to detention in a detention Camp. Also, no young person shall be sentenced to imprisonment if the can be suitably dealt with in any other manner. It is stated further in section 73(3) that, a court shall not order a child to be sent to reformatory unless the court is satisfied that having regard to his

character and previous conduct, and to the circumstances of the offence, it expedient for his reformation and prevention of crime that he should undergo a period in reformatory.

185. Generally, section 73 provides methods of dealing with offenders as follows:-
- (a) by dismissing the charge;
 - (b) by making a probation order;
 - (c) sending the offender to any approved school. The approved school order shall be confirmed by the High Court (section 79);
 - (d) be sending the offender to a reformatory;
 - (e) by ordering the offender to be caned;
 - (f) by ordering the offender to pay a fine, damages or costs;
 - (g) by ordering the parent or guardian of the offender to pay a fine, damages or costs. (If they conducted to the commission of the offence by neglecting to exercise due care-section 7(4);
 - (h) by ordering the parent or guardian of the offender to give security for the good behaviour of the offender;
 - (i) where the offender is a young person, by sentencing him to imprisonment;
 - (j) by dealing with the case in any other manner in which it may legally be dealt with.

In summary that is how juveniles in need of care and juvenile offender are treated in Zambia.

186. With the Zambian law in view, the Kenya statute, that is the Children and young Person Act, Cap. 141 of 1963, has provisions on the establishment of the juvenile court and prohibitions on miss-handling of juveniles.

187. The procedure provided under section 4(b) is that a juvenile court shall sit in different building or room, or on different days, or at different times, from those in which sittings of courts other than juvenile court are held, and no persons shall be present at any sitting of a juvenile court except:-

- (a) members and officers of the court;
- (b) parties to the case before the court, their advocates and witnesses and other persons directly concerned with the case;
- (c) parents or guardians of any person brought before the court;

- (d) bona fide representatives of newspapers or news agencies;
 - (e) such other persons as the court may specially authorise to be present.
188. However, the Act prohibits (under section 5) publication of any name, address, or address of any school which such person is or has been attending, photograph, nor any matter likely to land to identification of such person, save with the permission of the court (Cf. With section 123 of Zambian Law)
189. During hearing no child except an infant in arms shall, unless required by the court, be present in any court during the hearing of any case or during any proceedings preliminary thereto, save with the permission of the court. In this Act the juvenile is further protected since "Conviction" and "Sentence" shall cease to be used in relation to persons under eighteen years of age dealt with by juvenile courts, and any reference in any written law to a person convicted, a conviction or sentence, shall; in case of such persons, be construed as including a reference to a person found guilty of an offence, a finding or guilt or an order made upon such a finding as the case may be.
190. Regarding treatment, no child shall be ordered to imprisonment nor to detention camp. Furthermore, a child below ten years of age cannot be ordered o be sent to approved school unless there is no fit person or approved voluntary institution willing to take care of him, or unless for some good reasons the court consider that he cannot suitably be dealt with otherwise.
191. Besides approved school order, no juvenile or young person shall be imprisoned unless the court is of the opinion that he cannot be suitably dealt with in any other way permitted by law, and the court shall duly record such opinion and the reason therefore. If any imprisonment order is made in this respect, it must be confirmed by High Court, and the offender shall be detained as a un convicted prisoner in a prison pending confirmation and may elect not to commence his term of imprisonment forthwith. Where upon a juvenile or young person is ordered to imprisonment, he shall not be allowed to associate with adult prisoners. The warrant for his committal to imprisonment shall clearly state that he is a juvenile or young person as the case may be.
192. Methods of dealing with offenders have been stated in section 17 of the Act as follows: -
- (a) Discharge;
 - (b) Discharging the offender on his entering into a recognisance, with or without sureties;
 - (c) By making a probation order;
 - (d) By committing the offender to the care of a fit person, whether a relative or not or an approved society or approved voluntary institution, willing to undertake his care;

- (e) If the offender is under (16) sixteen years of age, by ordering him to be sent to approved school suitable to his needs and attainments;
- (f) Corporal punishment;
- (g) By ordering the offender to pay fine, compensation or costs, or any or all of them;
- (h) By ordering the parent or guardian of the offender to pay a fine, compensation or costs;
- (i) By ordering the parent or guardian of the offender to give security for his good behaviour.
- (j) Where the offender is juvenile or young person, by ordering him to be imprisoned;
- (k) in case of a person who has attained the age of fifteen years, to deal with him in accordance with any Act which provides for the establishment and regulation of borstal institutions;
- (l) in any other lawful manner.

Provided that a court committing an offender to an approved school shall not order him to undergo corporal punishment as well but a court may order a probationer to undergo corporal punishment for any breach of the probation order made against him without discharging the said order.

193. The very Act also provides for mental treatment at the hospital as condition of a probation order.

194. Part five of the Children and Young Persons Act relate to establishment of juvenile remand homes and approved schools and their administration.

195. Having a bird eye view of other countries laws on treatment of juveniles, the Tanzania laws may be re-visited. Drawing analogy to such relevant laws as the Children and Young Persons Decree Cap. 558 of Zanzibar where Treatment of juveniles in Zanzibar include the following: -

- (1) Probation order;
- (2) No child shall be sentenced to imprisonment;
- (3) No young Person shall be sentenced to imprisonment if he can be suitably dealt with in any other way whether by probation fine, corporal punishment or otherwise.

196. Unlike the Zambia and Kenya legislation, the Tanzania statutes still maintain provisions on conviction of children under section 10(Cap. 13). Various persons

consulted as undesirable since the future record of a juvenile is given a permanent criminal label have considered this. However, the solution to this criminal label concept is for the law to make provisions for the convict status of children and young persons not to be taken into account for the purposes of employment when they become of the age of majority.

197. In Tanzania mainland, the methods of dealing with juvenile offenders include the following:-

1. Probation order
2. Parent or guardian may pay fine, compensation or costs instead of the child or young person.
3. No child shall be sentenced to imprisonment.
4. Imprisonment. (That is in case of young person)
5. Discharging the child or young person without making any order.
6. An order that the child or young person be repatriated at the expenses of Government to his home or District of origin when such child or young person is within the confines of Tanganyika.
7. An order that the child or young person be handed over to the care of a fit person or institution named in the order, such person or institution being willing to undertake such care.
8. Approved school order.

198. In view of the above-cited comparative provisions, the Commission has noted that Cap. 13 lack some of the positive elements but also maintains some negative elements as well.

199. What Cap. 13 lacks, is for example, a special care treatment or arrangement to cater for children who are in need of care, such children need special care programme or arrangement as the one highlighted in the New-Zealand bill and the Zambian Act, (among others). The provisions of Ca. 13 as they presently stand, are much more penal oriented.

200. Another aspect that Cap. 13 lacks is after care treatment or programme. Once a child completes Approved School, it is as if everything has been taken care of. However, experience has shown that there have been a number of recidivists after staying in remand homes or completion of Approved school terms as the following tables indicate

201. T A B L E A

THE EXTENT OF RECIDIVISM AMONG JUVENILES AFTER PUNISHMEN

YEAR	TOTAL NO. OF JUVENILES REMANDED	TOTAL NUMBER OF RECIDIVISTS REMANDED	NO. OF RECIDIVISTS WITH PREVIOUS COPORAL PUNISHMENT	PERCENTAGE (%) OF PREVIOUS COPORAL PUNISHMENT TO TOTAL NO. OF RECIDIVISTS
1976	-	-	-	-
1977	-	-	-	-
1978	473	76	54	75.0
1979	352	73	61	83.0
1980	403	89	64	72.0
1981	434	72	70	76.0
1982	469	108	86	79.6
1983	495	103	78	75.7
1983	712	194	153	78.8
1985	914	230	172	75.0

Source: "Practical Approaches to juvenile Delinquency prevention"
 By Mutembei L.B. DAR ES SALAM
 12TH -13TH MAY, 1988

T A B L E B

202. COMPARISON OF APPROVED SCHOOL SENTENCES TO TOTAL NUMBER OF CONVICTIONS AND THE ENXTENT OF RECIDIVISM AFTER APPROVED SCHOOLS;

YEAR	TOTAL NO. OF VONVICTS	SENTENCE D TO APPROVED SCHOOLS	PERCETANGE OF APPROVED SCHOOLS SENTENCES	TOTOL NO. OF RECIDIVIST S	RECIDIVI STS WIT PREVIU S APPROVE D SCHOOL SENTENC E	PERCENTA GE OR PREVIOUS APPROVED SCHOOL SENTENCES
1976	-	-	-	-	-	-
1977	-	-	-	-	-	-
1978	-	-	-	-	-	-
1979	-	-	-	-	-	-
1980	310	23	7.4	89	02	2.2
1981	324	08	2.4	93	03	3.3
1982	333	14	4.2	108	06	5.5.
1983	341	12	3.5	103	04	3.9
1984	512	09	1.8	194	04	2.0
1985	829	18	2.5	230	05	2.1

TOTAL	2,549	84	-	816	24	-
AVERAGE	425	14	3.3	120.6	4	3.3

SOURCE: Mtembei I. M. (As above)

The general analysis of the above statistics by the authority is said to indicate ineffectiveness of approved school sentences, though generally more effective than Corporal Punishment, but very much less effective than probation.

203. With regard to probation, the compiler of the above figures notes on page 7 of his paper that, of all the 438 juveniles put under probation for the period 1976-1985 under the supervision of Dar es Salaam Social Welfare Officers only 17 (i.e. 3.9%) juvenile probationers failed to comply with the probation conditions.

204. Thus, it appears that, after care programme under the supervision of social welfare officers may prove worthwhile as opposed to other penal sanctions.

205. Finally, it has been noted that Cap. 3 has short cut provisions which are not elaborates enough to concept various roles, powers and methods of enforcement in various situations and institutions in which children are placed. Even the role of the head of Approved School or the Board of Visitors or the division of functions between the Ministry of Education and the Social Welfare is not clarified in the Ordinance.

206. The above mentioned shortcoming in the opinion of the Commission call for re-examination of Cap. 13.

A. DIVERSION

I INTRODUCTION:

207. Diversion is the settlement of cases out of the law courts. It is a new concept in the judicial system in Tanzania and the Working Group has noted that there is very little written about it in the available literature. However, it is known that some states in the USA. e. g Minnesota practice it. It is also known that some parts of Tanzania e.g. Arusha, Kilimanjaro, Mbeya and other Regions people were, and still resolve children dispute in a manner which may be considered as amounting to diversion, (that is Settlement out of court).

208. THE BUDGING RULES Provide for "DIVERSION", Relevant provisions have been quoted in "toto" herein below so as to give clear meaning:-

THE BUDGING RULES

Rule 11.0 Diversion:

- 11.1 Consideration shall be given whenever appropriate, to dealing with juvenile offenders without reverting to formal trial by the competent authority referred to in rule 14.1
- 11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at the discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principle considered in these Rules
- 11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile or, her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.
- 11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programs, such as temporary supervision and guidance, restitution, and compensation of victims

BUDGING RULE (CONTINUED).

RULE 14 Competent Authority to Adjudicate

- 14.1 Where the case of a juvenile offender has not been diverted (under Rule 11), she or he shall be dealt with by the competent authority (court, tribunal, boards, council etc) according to the principles of a fair and just trial.
- 14.2 The proceeding shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and express herself or himself freely.

II. ADVANTAGES OR DIVERSION:

Diversion as been considered to have several advantages, inter alia

1. It avoids unnecessary entry of juvenile into the juvenile court system whenever possible.
2. It avoids formal trial and convictions that are very traumatising experience to the juvenile.
3. With diversion, children of any age in need of care and protection should not normally be brought before the court but rather dealt with by social service agencies.

RECOMMENDATIONS:

209. The Commission feels strongly that "Diversion" should be incorporated in to the judicial system of Tanzania. It can be incorporated in the existing Social arrangements in the Country vs.: -

- Family organs (settlement),
- Ten Cell leaders,
- Ward tribunals,
- Social Welfare services.

210. In the case, Cap. 13 should clearly provide for diversion i.e. where the magistrate or Social Welfare Officer is satisfied that the case is fit for diversion, he should so direct. Where the Police has a department to hand juvenile cases with well trained offices in this field, the law should also clearly empower them to divert cases when it is deemed necessary.

B PREVENTION:

211. The question of prevention of juvenile delinquency encompasses both social and legal aspects which any state may take in order to enhance prevention of crime or antisocial behaviour. Prevention of crime requires a child or young person to be dealt with in a manner that does not constitute a threat to his/her well being. It would appear that section 5 of the Children and Young Persons Ordinance, Cap. 13 has overtones of incrimination.

212. However, the juvenile Act Cap. 217, section 9 of Zambia, also relating to prevention seems to be more elaborate. It categorises juveniles to be in need of care, control and protection.

213. Looking at the "UN Convention on the Rights of the "Child" Article 33, and 40 (to mention but a few), relate to protection of children in certain circumstances and administration of juvenile justice. On drug abuse, article 33 states the child's right o protection from use of narcotic and psychotropic drugs and from being involved in their production or distribution. The Convention states further (in article 34) the child's right to protection from sexual exploitation and abuse, including prostitution and involvement in pornography.

214. Regarding administration of juvenile justice, the UN Convention states the right of children alleged or recognised as having committed an offence to respect for their human rights and, in particular, to benefit from all aspects of the due process of law, including legal or other assistance in preparing and presenting their defence. The principle that recourse to judicial proceedings and institutional placements should be avoided wherever possible and appropriate.

This a mentioned principle implies that certain measures should be taken by state parties and not to wait until a Child comes into confrontation with the law"

215. In the above spirit, Cap. 13 should provide for: -

1. Suitable arrangements to deal with Children who have not offended the law but have certain social problems.
 2. Various roles – e.g. the role of parents, the role of the state and the role of other persons and organisation e.g. the NGOs
216. Children should not always be subjected to Approved Schools order.
217. On the whole, the state should create more jobs for the youths. Presently, there are certain measures, which the Government has taken to prevent the problems e.g. Nguvukazi etc. However, such measures seem to be lacking in some respects. In order to achieve the intended objectives, the present policies, should be reviewed to prevent children from engaging themselves in undesirable situations. Apart from the Central Government, there are measures which local Government should take in co-ordination with other agencies for preventive proposes e.g. reporting suspected cases to relevant authorities. etc.
218. During the regional visits, it was noted that some Local Government officials did not understand the present legal framework or the starting point of dealing with children under Cap. 13. One would expect that Local Government be the prime protectors of children's welfare at local level and its officers would be well versed with provisions on children's problems so as to prevent them from indulging themselves I delinquent activities.

C. OBSERVATIONS AND RECOMMENDATIONS

The Objects and Principles:

Recommendation 1:

The specific objects and principles to be applied in the exercise of relevant powers on children should be categorically mentioned, that is in terms of our constitutional requirements and policies, in this endeavour, the following principles may be borrowed: -

1. The need to protect children and young persons from suffering physical and other forms of abuse and neglect is the responsibility of the Community as a whole.
2. Intervention in the lives of children and young persons and their families should take the least disruptive form which is appropriate and that wherever possible, decisions affecting children and young persons and their families should be made on the basis of agreement by those affected.
3. Parents and guardians and others having the care of children and young persons should so far as possible be consulted when decisions are made.
4. Cultural interest should be protected.
5. Decisions affecting children should be reviewed on a regular basis.

6. As wide a range as possible of powers to deal with children and young persons should be available to the Courts when matters affecting children and young persons come before the courts.
7. Young persons who offend the law should be dealt with in special court composed of specially trained magistrate and personnel to deal with relevant cases.

Distinction between Provisions for Protection of Children and Disciplining of Children:

Observation:

The Children and Young persons Ordinance – Cap. 13 (CYPO) does not distinguish the procedure for dealing with children needing protection and those procedures that must be followed when a child has committed an offence.

Recommendation:

It is therefore recommended that the two sets of procedures should be distinguished and appears in different parts of the piece of legislation. The part on protection should be clearly provided to protect children and it should not appear as if needing protection is an offence in itself. This is what seems to be the case with the present S.25 of the CYPO, Cap. 13. The part related to the procedure followed to cases where children has committed offence (i.e. procedure for disciplining) would be distinct from the one on protection in as much as it will provide for apprehension, bail, detention pending appearance before the court, etc.

Observation:

The Zambian Juveniles Act, (1965) provides in its Part II for procedure in case of “juveniles in need of care” but this is much the same as the CYPO and the Zanzibar Children and Young Persons Decree (CYPD).

Observation:

The Kenyan Children and Young Persons Act, CYPA, (1963) has this distinction but both the Procedure for protection and discipline are contained in the same part.

PART III

Observation:

The New Zealand CYPA is clearly divided into protection of Children and Young Person (Part I); Children and Young Persons in Need of Care (Part II), and offences by Children and Young Persons (Part II).

Recommendation:

For purposes of clarity in presentation and with regard to procedure to be followed it is recommended that the format similar to the New Zealand one be followed. Thus, instead of the

inadequate provisions of section 25 of the CYPO there would be two parts. One on Protection and the other on discipline.

The part on protection of children will have provisions for:-

- (a) Presumption Regarding Custody, Charge and Care of Children and Juveniles (CYPA-KENYA section 21): Provisions can be borrowed from section 21 of the Children and Youth Persons Act of Kenya, CYPA, Cap. 14 as follows:

21. For the purpose of this part:

- (i) Any person who is the parent or guardian of a child or juvenile who is legally liable to maintain him shall be presumed to have the custody of him, subject to any provision made under the Law of Marriage Act,.....or any other written law;
- (ii) Any person to whose charge a child or juvenile is committed by any person who has the custody of him shall be presumed to have charge of him;
- (iii) Any other person having actual possession or control of a child or juvenile shall be presumed to have care of him.

- (b) Children in need of Care:
The Zambian Juveniles Act has this provision.

Juvenile in Need of Care:

9(1) For the purposes of this Act a juvenile in need of care means a person who:

“If a juvenile who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations or is exposed to moral or physical danger or beyond control”

On the other hand section 22 of Kenya Act reads as follows:-

“For the purposes of this part a child or juvenile is in need of protection or discipline:

- (i) Who has no parent or guardian, or has been deserted by his parent or guardian, or is destitute or a vagrant; or
- (ii)
- (iii) Whose parent or guardian does not, or is unable or unfit, to exercise proper care and guardianship; or
- (iv) Who is falling into bad associations or is exposed to moral or physical danger; or

(v) Who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, insanitary or dangerous; or

(vi) Who is prevented from receiving compulsory education, or is a habitual truant.

Recommendation:

219. The above quoted provisions may then be re-arranged with the present provisions or section 25(b),(c),(d),(e),(f) and (g) excluding provisions of section 25(a) which have already been covered by the borrowed provisions. (see relevant provisions under the heading "state of the Law and Problems Relating to Enforcement" page 83)

219. Other protective provisions apart from those mentioned in paragraph (a) and (b) above are provisions on:-

(c) Reporting of Cruelty to and neglect of Children:

Recommendation:

Under this heading provision of section 17 of the Children and Young Person Bill of New Zealand is relevant. The said section mentions a number of persons, whose duty is to report cruelty and neglect of children, for example:-

- (i) A member of the Police
- (ii) A Social Worker
- (iii) A registered Medical practitioner
- (iv) A public health nurse
- (v) A registered psychologist
- (vi) A kindergaten teacher
- (vii) A teacher in a register school
- (viii) A probation officer
- (ix) A barrister or solicitor engaged in private practice, and others.....

221. In relation to the above mentioned provisions under section 17(I) of the New Zealand Bill, Subsection 2 of the same further provides that:

17(2) Notwithstanding any enactment or rule of law, every person to whom this section applies, who in the cause of carrying out that persons professional duties, has reasonable grounds for believing that any child or Young Person has been or is likely to be harmed either physically or emotionally or sexually, ill treated, abused, neglected or deprived, shall report the matter to a Social Worker or a member of the Police or a member of a child Protection Team.

Insuance of Warrants: Recommendations:

222. With regard to issuance of warrants for search for children or juveniles; provision of section 29 of the CYPA of Kenya are worth adopting. The relevant part is quoted below:-

29-(I) If it appears to a magistrate on information laid by at least two persons who, in the opinion of the magistrate, are acting in the interests of a child or juvenile that there is reasonable cause to suspect.

(a) The one of the offences specified has been or is being or is about to be committed against the child or juvenile; or

(b) The he is in need of protection or discipline, the magistrate may issue a warrant authorising (an officer)..Named therein to search for the child or juvenile or and if it appears to such (officer)..That any offence as aforesaid has been or is being or is about to be committed against the child or juvenile or that he is in need to and detain him in place of safety until he can be brought before a court.

29-(2) Any (such officer).. Authorised by warrant.. to search for any child or juvenile may enter (if need be by force) any house, building or other place specified in the warrant, and subject as aforesaid may remove him there from.

29-(3) (Such Officer).. shall take with him any person laying or joining in the laying of the information who desires to accompany him, unless the magistrate issuing the warrant otherwise directs, and may also, if such magistrate so directs, be accompanied by a medical practitioner.

29-(4) It shall not be necessary in any information or warrant under this section to name the child or juvenile.

29(5) A magistrate issuing a warrant under this section may by the same warrant cause any person accused of an offence against the child juvenile to be apprehended and brought before a court, and proceedings to be taken against him according to law.

On Arrest without Warrant:

Recommendation:

223. Provisions which are worth adopting are those under section 30 of the Kenya CYPA which reads:

“Section 30 (A Police Officer) may arrest without warrant any person who has reason to believe has committed any offence under this Part or any other offence involving bodily injury to a child or juvenile, if the police officer) has reasonable ground for believing that the person will abscond or if he does not know and is unable immediately to ascertain the persons name and address”

Cruelty and Neglect of Children:

Recommendation:

224. With regard to procedure for and powers of court regarding cruelty to a neglect of children, section 23 of the Kenyan CYPA is worth adopting. It read that: -

Section 23(1) if any person, who has the custody, charge or care of any child or juvenile: -

- (a) Wilfully assaults, ill-treats, neglects, abandons or exposes him, or causes, or permits him to be assaulted, ill-treated, neglected, abandoned or exposed, in any manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, hearing, limb or organ of the body, and mental derangement; or
- (c) By any act or omission, knowingly or wilfully causes that child or juvenile to become, or conduces to his becoming, in need of protection: he shall be guilty of an offence..(liability of a fine not exceeding five thousand Kenyan shillings or imprisonment for a term not exceeding six months or to both such fine and imprisonment may be omitted. Instead, alternative provisions of Penal Code provisions (Cap. 16 may be incorporated under this Part)

Section 23(2): For the purposes of this section, a person having custody, charge or care of a child or juvenile shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him.

225. The part for disciplining Children, i.e. action which is taken after the child commits an act prohibited by the law, would thus contain the following:-

- (a) Arrest of a Child or Young Persons without Warrant:

226. Such arrest should only be done on reasonable grounds and for the purposes of :-

- (i) Ensuring the appearance of the child or young person before the court; or
- (ii) Preventing commission of further offences by a child or young person.
- (iii) Preventing the loss or destruction of evidence relating to an offence committed by the child or young person or an offence which the member of the police has reasonable cause to suspect that child or young person of having committed etc. (Borrowed from Section 114 of the New Zealand Bill).

- (b) Information to parents or guardians:

227. This has to be done as soon as practicable after arrest for questioning or in relation to commission of offence. (This requirement is borrowed from section 115 of CYPA of New Zealand).

(c) Legal Representation:

228. Some provisions of Section 116(2) of the said New Zealand Bill are worth borrowing as thus:-

Every member of the police who arrests a child or young person shall, on arresting the child or young person, inform the child or young person that ...he/she... is entitled to consult with..(an advocate) at the police station to which he or she is to be taken after arrest, or if the child or young person is arrested at a police station, at that police station.

On Bills:

Recommendation:

229. The present section 4 should be maintained:

On Bills:

Recommendation:

230. In addition to the present provision, or Cap. 13 on custody, a provision should be added on section 5 requiring the approval of a social worker regarding custody arrangement should be added under section 5.

(Note that) the present provisions empowers that Inspector General of Police (GN.1965 No. 73) to make arrangements for preventing, so far as practicable, a child or young person while in custody, from associating with an adult, other than a relative, charged with an offence).

On Probation Services:

Recommendation:

231. It is recommended that there should be provisions in Cap. 13 for the establishment of probation services for juveniles throughout Tanzania Mainland. All districts should be declared probation areas for this purpose.

Attendance of Parents and Guardians (Section 15)

Observation:

232. Presently, the court has discretionary powers under section 15 to require the attendance of parents and guardians where juveniles are charged with some offence.

Recommendation:

233. It is recommended that except on very special circumstances, attendance of parents or guardians be mandatory.

On Determination of Age of Juveniles (section 16)

Observation:

234. Under section 16, a court may make inquiry as to the age of a child or young person and make its findings, but any subsequent proof that the court has not correctly stated the age shall not invalidate an earlier order of the court.

Recommendation:

233. It is recommended that except on very special circumstances, attendance of parents or guardian be mandatory.

Observation:

234. Under section 16, a court may make inquiry as to the age of a child or young person and make its findings, but any subsequent proof that the court has not correctly stated the age shall not invalidate an earlier order of the court.

Recommendation:

235. It is recommended that, subsequent proof as to the exact age of child should be seriously considered for the purposes of determining whether the earlier court order was valid. If need be, a juvenile should be examined his or her state of mind if it appears that the requested age does not match with his or her mental ability. Thus, section 16 should be amended to this effect.

Recommendation:

236. In order to make proper distinction between children, young persons and "young adults" section 17 should be amended so that even young adults are covered under the recommended institutional arrangements for example Borstal Schools recommended age requirement of between seventeen years of age up to twenty one years of age. This, section 24, which provides for Approved School order should also contain sub-section 3 on Borstal Schools.

Apprehension of Children (Section 25)

Recommendation:

237. Besides the powers vested to police officers and administrative officers, powers of apprehension and of bringing juveniles to court should also vest other agencies, for example, probation officers for the sake of preventive measures. The Commissioner for

Social Welfare should be given mandate to deal with non-deviant children without necessary waiting for court order.

Recommendation:

238. Besides Approved Schools, it is recommended that there should be additional provisions empowering the Minister to establish the following institutions:-

1. Remand Homes;
2. Borstal Schools and Probation hostels for young adults.
3. Institutions or socially deprived juveniles including streets children.

Powers of Managers of Approved Schools (section 29(2))

Recommendation:

239. The powers of the managers of Approved Schools should be elaborated and distinguished properly from the powers of the Board of visitors (section 28(I)).

The Probation of Offenders Ordinance. Cap. 247
Volunteer Probation Services

Observation:

240. Under recommended the volunteer probation service be ordinance, Cap. 247, the President may make rules prescribing the duties of the probation officer etc.

241. It is recommended the volunteer probation service be promoted so as to match with the increasing wave of juvenile crimes. There should also be reconciliation provisions in Cap. 13

After Care Services:

Observation:

It has been noted that presently, approved school orders and other institutional care orders have not helped much on the reformation of juvenile behaviour.

Recommendation:

242. In this regard it is recommended that the Commissioner for Social Welfare should be given powers to exercise correctional institutional care in Children institution as well as in prisons.

FURTHER OBSERVATION AND RECOMMENDATIONS:

Observation 1

There is not uniform, elaborate and well-developed non-court procedure were by a juvenile offender is dealt with.

Recommendation 1

Diversion should be incorporate in the judicial system of Tanzania under the Children and Young Person Ordinance Cap. 13.

Observation 2

Cap. 13 do not have adequate procedure for dealing with children needing protection and the procedure to be followed where a child commits an offence

Recommendation 2

There should be two separate procedure one on protection of children and another for the procedure to be followed where children have committed offences (i.e. discipline)

Observation 3

In some cases there is no proper distinction between, children young persons and “young adults”

Recommendation 3

Section 17 should be amended so that even young adults are covered under the recommended institutional arrangement for example Borstal Schools recommended age requirements of between seventeen years-up to twenty one years of age.

Observation 4

Police Officers and Administrative Officers have powers of apprehension and to bring juveniles to court.

Recommendation 4

The law should also vest powers to other agencies like probation.

Observation 5

The law should also vest powers to other agencies like probation officer for preventive measures.

Recommendation 5

More Remand Homes, Borstal Schools, probation hostels, and other institutions for socially deprived juveniles including street children need to be established and strengthened.

MISCELLANEOUS RECOMMENDATIONS:

- (i) Definition section (section 2)

("Child" should be defined to mean a person under the age of fourteen years.

- (ii) "Young Person" should be defined as a person of fourteen years of age or upward but under the age of eighteen years.
- (iii) The term "Juveniles" should be defined to cover all persons under the age of eighteen years.
- (iv) "Juvenile Court" should consequently be defined as a juvenile court established under section 3 for the purpose of hearing and determination of cases relating to children and young person.
- (v) Juvenile "Remand Home" should refer to a home established for detention of persons under eighteen years of age or an institution agreed to be used as juvenile remand home.
- (vi) "Young Adults" should cover persons from eighteen year of age up to twenty-one years of age.
- (vii) "Custodian" should be defined in view of presumption of custody of a child or young person and should cover parents, guardians and other relatives, and even institutions of care.

(b) In section 25 the following subsection should be included:-

In addition to a,b,c,d,e,f,g,h,:

- (i) "Has been left in the care of Children Home in Tanzania for more than one year by parents or relative whose present where about are unknown or who are unable or unwilling to provide proper care of the child within the family.
- (ii) "any person having responsibility for the care or charge over a child who wilfully abandons, deserts, neglects or fails to support such child or young person or who inflicts unreasonably cruelty upon him not constituting an assault or otherwise fails to protect the child or young person shall be guilty of an offence under this Ordinance"
- (iii) "the Commissioner or his representative or Administrative Officer or Police Officer above the rank of sub-inspector acting on behalf of the Commissioner may charge such a person and bring him before a juvenile court"
- (iv) Upon the summary conviction for this offence such person may be able to:-
 - (a) be placed on probation for a period no exceeding three years.
 - (b) a fine not less than five thousand shillings.
 - (c) imprisonment for a maximum period of one year.

(d) Or any other penalty as the court may deem fit.

(e) The out-dated rules and provisions of Cap. 13, should be deleted.

PROBATION OF OFENDERS ORDINANCE CHAPTER 247 OF LAW

(f) Sub-section 2 of section 4;

The word "Principal Probation Officer" should read the "Commissioner for Social Welfare"

Sub-section 3 of section 4

Should read "The court by which a probation order is made shall furnish four copies of the order.."

One copy for the probationer

One copy for the probation officer

One copy for the prosecutor

One copy for the court file

(g)(I) sub-section 3 of section 10 of the Ordinance should be amended as follows: The court shall, it is satisfied on the application of the Commissioner for Social Welfare that the Probationer has changed or is about to change, his residence from one district to another, by order vary the probation order by substituting for the probation order by substituting for the reference to the District or village where the probation is residing or is about to reside and shall submit to the District Court or Primary Court all documents relating tot he case, and the last mentioned court shall be deemed for all the purposes of this Act to be the court by which the probation order was made.

(b) Su-section of section 10 should be amended as follows: where an order is made under this section for the variation, insertion, or cancellation of a provision requiring a probationer to reside in a village or any other area.

(Relevant modifications have been underlined).

These modifications should be made in order to make the ordinance more practicable by making use of officials, institutions an situation which will facilitate the proper supervision of a probationer.

(vii) section 12 of the Ordinance should be amended in view of the proposed changes in section 4(2)

(ix)(a) Sub-section 1 of section 13 of the Ordinance should read "The probation Officer who is responsible for the supervision of any probationer shall be

appointed by the Commissioner for Social Welfare. The underlined title should replace the "court" because the Commissioner for Social Welfare is one who should really be well informed about the competence, skill and commitment of probation officers to be charged with the responsibility of supervising probationers.

- (b) Sub-section 13 of the ordinance should read "where a woman or girl is placed under the supervision of a probation officers ,the probation officer should be a woman.

- (x)(a) Sub-section 1 of the section 15 should be rectified so that the Commissioner for Social Welfare is given power to appoint a sufficient number of probation officers, qualified by character, training and experience to be Probation Officers as the case may be, who shall perform such duties as may be prescribed by rules made under this ordinance"
this proposed amendment should serve to strengthen the position of the Commissioner for Social Welfare in selecting/appointing Probation Officers, who can really take up the challenge relating to provision of Probation service seriously.
 - (b) Under sub-section 2 of section 15, the words "The Ministry of Education" should read "The Minister responsible for Social Welfare matter"

- (xi) Section 16-of the Ordinance should be amended as follows:- "The Minister may make rules prescribing the duties of the Commissioner for Social Welfare in relation to the execution of this Ordinance".

- (xii) Section 17 – should be added to the Ordinance to provide for:
 - (a) The duties of probation officers.
 - (b) The Constitution and duties of Probation Committee or Probation Committees.
 - (c) The forms of records to be kept under this Act.
 - (d) Matters relating to remuneration of any person appointed to carry out any duties under this Ordinance and the fees and charges to be made for any act, matter or thing under this Act to be done or observed.
 - (e) Generally for carrying out the purposes and provisions of the Ordinance.
 - (f) What shall be a probation institution for the purpose of this Ordinance.

Suggested changes in section 16 leading to the inclusion of section 17 will empower the Commissioner for Social Welfare to exercise greater control and guidance over the duties and performance of Probation Officers.

4.0 CHILD LABOUR AND ABUSE

243. The Terms of Reference being considered under this heading are framed as follows:

244. It is true that several cases of child labour and abuse have been identified although the exact dimensions of the said twin problems are still controversial. This is in view of the fact that many offences connected with child labour and abuse have been noted to be committed in secret corners and sometimes with the parents or guardians connivance. Indeed, this state of affairs may affect children's development if certain measures are not taken.

I. THE NATURE AND CAUSES OF CHILD LABOUR

Child labour may be regarded as an important element in maturation, securing the transition from childhood to adulthood or essential for family survival. From the above views, the concept of child labour has different meaning according to different societies and at different times.

In short, child labour has been defined by the ILO as work or employment situation where children are engaged on a more or less regular basis to earn a livelihood for themselves or the families. It should be recognised that due to child labour, a child has been a victim of exploitation because he or she is a cheap form of labour. Moreover, the child when exposed to work without any protection measures is subjected to dangerous conditions for its health, and mental development.

245. Children who can be found working in agricultural activities for example playing, weeding, clearing and the like, or in various forms of crafts, petty trade or as house-servants are forced to do so mainly due to poverty. Other causes of child labour may be pointed out as inadequacy of schools in village as well as poor quality of education and rural-urban migration.

246. It must also be noted that children in both urban and rural areas are regarded as part of the unity of production. In all of these areas, child labour is a means of family income. For household survival a child is forced to be a breadwinner irrespective of its age. This fact came out clearly during the research visits in various Regions where some villagers emphasised that child labour is training in itself. However, this point has been taken with caution.

II. LAW AND PRACTICE

(a) Child Labour During the Colonial Era

247. Child labour in Tanzania has its roots to the colonial era. During those days, children were employed so as to facilitate the expansion of the colonial economy. Professor Issa Shivji in his paper on Law and Conditions of Child Labour in Colonial

Tanganyika. (between 1920-1940), point out the exploitative nature of work done by children.

He illustrate how in number of mines juvenile labourers were employed to break-era by hand at a standard task for the job of one standard cement drum full of broken era per day at the 2 perm month.

(ii) One of the first pieces of legislation on child labour was the Employment of Women and Young Persons Ordinance of 1940. It has been remarked as being a good illustration of how the colonial legislative and administrative machinery worked to protect the interests of capital. Although the Ordinance prohibited employment of children in industrial undertakings, (section 91, in other sectors, children could be employed provided they were employed on daily wage, on a day to day basis provided that each night they returned to the place of residence of their parents or guardian (section 4).

(iii) The above prohibition was not totally protective to the child because the Governor was given power to exempt any industrial undertaking from the provisions of he law. Moreover the interest of the colonial power which was based on the agricultural sector was safeguard due to the fact that employment of children in agriculture the (the main area of concentration of child labour), was not restricted.

(b) Child Labour after Independence:

248. Even after independence, child labour was and still is a serious issue because the majority of the populations live in rural areas. There are few industries in the country and the economy depends heavily on agriculture. Professor B. C Nindi, (in his PhD. Thesis on Agricultural change and Rural Class Formation in Iringa District-1977 in Iringa tobacco plantations). He points out that recruitment of child labour in the plantations was seen as a means of cutting down costs of production.

Children were paid as little as shs.2 per day and they made the prints in registers showing they have received full-required rates of 7.60. Moreover once an inspector's car was seen heading towards a farm, farmers contacted each other by telephones and child labourers were hidden.

249. The Njombe District Development and Planning Committee expressed great concern over the alarming rate at which pupils were deserting school to seek employment in tabocco farms in Iringa District. The law enforcement of child labour has been observed as being complicated by presence of a problem, which is in a form of a vicious circle. The circle starts with willing parents who send their children to work and when taken to court, they may repeatedly pay fines for neglecting their children education under relevant by laws. There are also will children who hide when inspectors approach the scene or lie about their age and completion of primary education. To close the circle, we end with willing employers who forge their registers on employment of children, underpayment and even hide children during inspections. We can only break the vicious circle by a planned social change.

250. In September 1977, reports from Njombe District indicated that twenty-seven children aged between 11 and 13 had been taken out of Iringa buses when they were being taken to tobacco estate. The children were returned to their parents and the Iringa Police were checking all vehicles carrying children for inspection.
251. During visits by members of the Child Law Reform Working Commission, it was observed that in Mtwara Region, a number of children are employed as house-servants. They are often paid in kind that is by being given food shelter and second hand clothes. In Mbeya Region children are mostly engaged in petty trades especially on the Tanzania/Zambia boarder. This is also true in other Regions as well including the City of Dar es Salaam.
252. The employment Ordinance of 1956, Cap 366, Originates from the colonial era, but with amendments made from time to time it is still in existence. It reflects provisions of child labour, which are not different from the 1940 Ordinance. Provisions of the employment of Children and manner of payment, requirement, requirement to return to place of residence of parent or guardian still exist. The above mentioned provisions were in section 4 of the 1940 Ordinance which is section 78, Cap. 366 at present.
253. For the purpose of inspection, employers who employ children are obliged under section 85 of Cap. 366 to keep registers which indicate age, condition and nature of employment, commencement and termination of employment along with other particulars in any subsurface workings which are entered by means of a shaft or edit,(Section 82). However, there is not restriction of employing children in agriculture activities as remarked before. Even the restriction of employing children between the hours of 6.p.m and 6 a.m. has no significant meaning whereas the majority of children work in agricultural activities which are mainly done during the permitted hours.
255. There is evidence that children are more liable to suffer occupational injuries than adults owing to inattention, fatigue, insufficient knowledge of work process and even because machinery and tools of most workplaces are designed for adults. It is a common problem that children cut themselves with tools like hoes which are not of their size or react to chemicals of different sorts for example insecticide and fertilisers used in agriculture.

(b) Offence and Penalties on Child Labour

256. In view of the fact that employers prefer cheap labour, and having regards to the need to eliminate child labour, the Employment Ordinance provides for penalties. There are a number of offences in Part VII of the Ordinance, which deals with Women, Young Persons and Children. These are aimed at a determined future occurrence of child labour. We will however examine the problems facing the enforcement machinery and how the penalties do not correspond to the seriousness of the move to combat child labour.
257. In short, child labour offences under Part VII range from employing a child under the prescribed age; in work injurious or dangerous to his health or otherwise

unsuitable, continuing to employ children against their wishes, employing a child or young person in any industrial undertaking, in night work or underground work, and even failure to keep a register where children are employed. For all the above mentioned offences a general penalty is provided under section 94. The offence attracts a fine which fine does not exceed shs. 2,00/= or 3 months imprisonment or both. As for subsequent offences, the penalty is shs. 4,000/= or 6 months imprisonment or both.

III SCHEMES AND POLICIES ON CHILD LABOUR

258. Perhaps it would be important to take note of schemes, policies and other steps taken by Tanzania to assist in the combat against child labour. In 1977, The Universal Primary Education (UPE) was introduced so that every child of the age of seven years and above attends schools. This was a progressive step because it limited the number of children who were roaming around without going to school. In spite of the full swing of this campaign, shortcomings like the poor quality of education poor training of teachers, work-load of teachers etc. can be regarded as reasons for some parent's decision to send their children to work rather than to school especially where costs of schooling are high, compounded by the brisk cost of living.
259. Schemes, projects and activities have been introduced to engage children in the informal sector so as to fill the shortage of employment opportunities in the formal sectors. The Rural Youth Settlement Scheme was established so that the youths that have failed to continue with further studies are engaged in agriculture and other projects. The settlements which accommodate 1000 families are situated in Mela (Morogoro Region), Kihuhusi (Muheza District) and Madale (Kinondoni District –Dar es Salaam).
260. We must also mention the Human Resources Deployment Act of 1983 which provides for introduction of informal sector activities for youths so that they are engaged in income generating activities. The projects help the youth to earn a living at the same time increasing productivity. The Tanzania Youth Development and Employment Foundation (TYDF), a non-governmental organisation, assist youth in income generating projects.
261. It has been noted that the informal sector has serious limitations with respect to the factors which effect expansion, development, quality and volume of constraints facing the informal sector will increase the type and quality of products and will lead to better answer on employment.

IV EXPERIENCE FROM OTHER COUNTRIES ON CHILD LABOUR

262. Let us now examine legislation from different countries with regard to child labour. In this context we will deal with legislation from Zanzibar, Kenya and Zambia. We will also refer to the provisions from International standards under Convention No. 138, The minimum age Convention 1973 and the Convention on the Rights of the Child, 1989.

- (a) Age For Employing A Child

263. The age threshold and the scope of application of child labour varies among countries. While the minimum age of employing in Kenya is 16 years, it is 15 in Zanzibar, Tanzania and Zambia. We should take note of (Article 2/3) of Convention No. 138 which provides that the minimum age of employment shall not be less than the age of completion of compulsory schooling and in any case shall not be less than 15 years. Thus, completion of compulsory school is made a precondition for employment unlike many countries legislation, which touch only on the age of employment.

(b) Employment of Children in Training Institutions:

264. It is further observed that most country's legislation has feature in common, which is allowing work by children in training institutions.

(i) Tanzania

In Tanzania work done by children in technical schools is allowed provided it is approved by the Director of Education (section 81(2) of Cap.. 366(. On Kenya's side, section 25 of the Employment Act of Kenya 1976 prohibits the employment of a child under 16 in any industrial undertaking unless such employment is under deed of apprenticeship or indentured leadership as governed by their Industrial Training Act.

(ii) Zambia

According to Zambia's position, work done by children in technical or similar institutions as approved by the Minister of Education is allowed. This is provided for under section 4(2) of Employment of Women, young Persons and Children Act Cap. 505. Section 7 of the same Act goes further to allow exceptional employment of young persons under a contract of apprenticeship as authorised by a labour officer.

(iii) Zanzibar

Section 3(3) of the Employment of Decree of Zanzibar of 1952, allows the Director for Education approves work done by children which. It also mentions work done under a lawful contract of apprenticeship as an exception to the general rule of restriction of employment of children (section 5).

(iv) UN Convention

For the purposes of harmonising work and education requirements, Article 28(1)(d) of the Convention on the Rights of the Child encourages general and vocational education. Article 6 of the ILO Convention No. 138 reflects on the exception of allowing work don by Children and Young Persons for general Vocational of technical education or in any other training undertaking.

(c) Protection of the Child's Health and Safety

(i) ILO Convention

265. Article 3(3) of ILO Convention No. 138 points out relevant international standards on the issue of protecting the Child health, safety and normal conditions.

Article 9(3) of the same Convention highlights on registers to be kept by employers in particulars of persons employed less than 18 years. Furthermore, Article 32 of the Convention of the Rights of the Child stresses on the protection of Child's health, physical and mental and social development.

(iii) Zanzibar

In line with the above International Standards, young persons in Zanzibar are required to be medically examined before employment. There are also restrictions on employment of children and young persons in work injurious to their health, dangerous or immoral. On the issue of employers keeping registers of children by employers and the need to indicate particulars of their age, nature of work done, and other information, section 11 of the Employment of Children Young Persons and Adolescents (Restriction) Decree provides for this.

(d) Offences and Penalties:

266. Where one contravenes the requirements of the already mentioned decree or Zanzibar by employing a child, a general penalty of a fine not exceeding shs. 1,000/= or six months imprisonment is provided for under section 18(1). If an employer does not keep a register, he shall be guilty of an offence and liable on conviction to a fine not exceeding 500/= or imprisonment not exceeding three months or both (section 18(2)). The penalty for offences committed by parents or guardians by wilful default or neglect of children is a fine not exceeding shs. 1,000/= or 6 months imprisonment or both fine and imprisonment as provided under section 19.

267. On Kenya's side, the Chiefs Act 1982 protects children by "not permitting work to be done from 6.30 p.m. to 6.30 a.m. insisting on medical examination, and providing powers of labour office to cancel contract of employment of a child"

Children are also restricted to work in bars, hotels or ships unless it is a family undertaking. On the question of participation in artistic performance, Article 8(1) of Convention No. 138 protects children in this area. As far as children participating in acrobatics, singing, dancing and other artistic performance are concerned, adequate safeguards are required. International standards reflecting measures to ensure effective enforcement including penalties are mentioned in Article 9(1) of ILO Convention No. 138 and Article 32(2)(c) of the Convention of the Rights of the Child.

(c) Education Versus Child Labour

268. According to Article 28 of the Convention of the Rights of the Child, the child has a right to education. Every member state is obliged to ensure that primary education is free and compulsory. Many countries have complied with the introduction of Universal Primary Education. While in Tanzania, Universal Primary Education (UPE) was introduced in 1977, in Kenya since 1974, steps have been made to ensure that all children attend school and free education has been provided. On Zambia's side, similar efforts have

been made. With regards to Zanzibar, the Education Act No. 6 of 1982 provides for basic primary and secondary education as a right to every child and the Government is bound to provide education to every child.

(e) Scheme and Policies in Neighbouring Countries.

269. On question of offering services to child workers, Kenya established the Undugu Society of Kenya in 1973. This began as youth club and later it became a Vocational Training Centre aimed at assisting young people who were unable to attend school and were roaming the streets or were idle at home. The society, which assists Children by providing them with skills so that they become self-reliant, has 119 workers and embraces 22 activities. Activities like vocational training special education, school sponsorship income generation and the provisions of loans are carried out by the society. Other related organisations are child welfare society of Kenya, which provides training for the young in Urban Kenya. The Christian Children's Fund and Save the Children Fund both run sponsorship programmes for children who have difficulties in paying school fees.

270. In Zambia, Church sponsored Organisations and other Charitable and social groups help the Government in educating and assisting children to secure loans and engage in income generating activities.

272. In order for parents, guardians, employers and children themselves to understand the effects of child labour and to support the campaign against, the following issues must be examined.

1. The identification by the community of types of work that children are doing.
2. The identification of risks involved in different occupations.
3. Dissemination of information on control measures.
4. Health care of children exposed to risks and costs thereof.
5. Other social costs like failure to proceed with further education should also be explained and assessed.

273. Once the community is aware of effects of child labour steps should be taken to provide educational opportunity for working children and disseminate information to parents and employers on health hazards to which children at work are subjected to

(b) Recommendation at National Level

274. At national level, the Commission has noted that respective Ministries should deal with issues, which relate to appropriate Ministries. For example, registration of working children, inspection of areas where children work, and enforcement of child labour laws community Development, Women and Children, but other organisations

dealing with education, health, employment and welfare should work hand in hand on matters concerning the protection of children at work.

The following additional reconditions should also be considered:-

(c) Penalty

The present fine not exceeding shs. 2,000/= under section 94 of the Employment Ordinance should be increased so that it carries a real meaning of a punishment for employing children. It is proposed to be shs. 100,000/= for the first offence.

(d) Children under the prescribed age of employment or even young persons (between 14-18 years) should be employed or allowed to participate for gain in artistic performance (entertainment's only if granted a special permit. This will help to reduce room for underpayment and interference with their education. This is in line with Article 8(1) of convention no. 138.

(e) Prohibition of Children in Hotels & Bars etc.

A provision should be included which prohibit employment of Children in hotels, bars and area where alcohol is sold.

(f) Child Work Versus Education

As far as education is concerned, a child needs basic education to prepare for its future adult life. In order to ensure that a child gets basic education, the appropriate Ministry should prosecute those who prevent children from going to school by strictly monitoring attendance of children (of 7years – 9 years). This will reduce the loophole to engage children in jobs. Taking into consideration the fact that the Government has acknowledged the failure of the modern sector to absorb an increasing population of the labour force, along with the increasing percentage of primary school leavers and including Form IV leavers, informal sector needs to be encouraged and developed.

IV CHILD ABUSE

275. Child abuse can be defined as an act or omission by parents, guardians or any other person upon a child who has adverse effects on the child's physical and mental being. Child abuse can be divided into four main categories:-

(a) Physical abuse

This is in terms of causing external injuries such as bruises, broken bones, burns etc... It can be called child battering.

(b) Child Neglect/Desertion

This mount to omission by irresponsible person to provide for the child's well being for example, denial of food, clothing, shelter personal needs etc.

- (c) Sexual Abuse
 - (i) This includes for example, incest by parents or other sexual evidence e.g. defilement etc.
 - (iii) At present a number of cases of sexual abuse have surfaced, for example the notorious Maumba case where young schoolgirls were sexually abused and given money or sweets as enticement for sexual acts.

276. The rate of child abuse is not very certain due to unreported cases and some parents prefer to go to private physician rather than public hospitals. Their children are those who fall victims of abuse without public knowledge.

VII CAUSES OF CHILD ABUSE

1. Poverty
Poverty imposes psychological problems upon parents, resulting into, child neglect and child abandonment.
2. Matrimonial Conflicts
Where parents do not have a peaceful marriage, children are the most advisedly affected victims and are invariably neglected by their parent.

VII THE LAW TERMS OF CHILD ABUSE

277. Under the Penal Code Cap. 16, there are provisions which prohibit child abuse in terms of sexual abuse, child neglect as well as child stealing..

278. Section 136 of the penal code provides for imprisonment of fourteen years with or without corporal punishment to any person who carnally knows a girl under the age of fourteen years. There is also section 141, which provides for punishment of five years imprisonment for any householder occupier of premises who assists or permits defilement of a girl less than twelve years of age on his premises.

279. Where a boy is sexually abused, the person involved, if found liable, will be imprisoned for seven years. The relevant section here is section 156, which deals with indecent assault of a boy under fourteen.

280. Chapter xvi of the Penal Code deals with offences relating to marriage and domestic obligations. Under this part, it is an offence for any parent, guardian or other person having the lawful care or charge of a child under the age of fourteen years to desert the child and leave it without means of support.

281. It is also an offence for parents or guardians to refuse or neglect to provide sufficient food, clothes, bedding and other necessities for such child so as to injure the health of the child.

282. The Affiliation Ordinance has also been noted in previous chapters as taking care of aspects of child neglect by empowering the court to order a putative father to pay to

the mother of the child or some other custodian a sum of money on monthly or lump sum basis for the maintenance of the child. However, there has been views to the effect that the amount of money required to be paid by putative father, i.e. shs. 100/= is not sufficient and that there is need to review the formula for computing relevant maintenance allowance.

IX WAYS OF PREVENTING CHILD ABUSE

283. In order for child abuse to be minimized, there is a need for society to be educated on the effect of child abuse on the child's mental and physical development. Moulding a sound family where parents and children understand one another and the needs of the children taken can do this. Thus, the up bringing of the child should be through positive corrective measures and not through abuse.

284 Thus, the police, the social welfare authorities and other relevant institutions should help to detect child abuse in its early stages so as to assist the child's development mentally and physically.

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5. Employment of Women, Young Persons and Children's Act-Cap. 512.
6. ILO Convention 138, Minimum Age.
7. UN Convention on the Rights of the Child.
- 5.0 ADOPTION ORDINANCE, CAP. 335 OF 1955

285. As far as this topic is concerned, the Terms of Reference are as follows:-

“The adoption Ordinance needs to be re-examined particularly bearing in mind its rigid formalities and probable socio-economic difficulties that a prospective adopter may face as a result of his age or inadequacies with a child”

286. The Commission has proceeded in the general assumption that what is required by the Terms. Of Reference is to identify the inadequacy of the adoption law as a whole.

I Introduction

287. The Adoption Ordinance lays down the legal foundation and procedures for Adoption of infants. The Ordinance prescribes a number of conditions to be fulfilled before such a grant is meted out by a court of competent jurisdiction. In this instance, it is the High Court. Furthermore, the Ordinance charts out the qualification of the need to be adequately clarified. They will be revealed in the course of this discussion.

II Effects of Adoption Order

288. The Adoption order has the effect of permanently transferring parental rights and obligations from the consenting parties to the adopter. Nevertheless, before the court grants such order, other procedural undertaking has to be fulfilled to the satisfaction of the presiding court. This could briefly be narrated as follows:-

“Age of the child, consent of the parents or Guardians, consent of the child if he/she is able to express his/her opinion, residence of the applicant, foster care period etc. Having made a critical observation of the entire law on adoption matters, it has been noted that the law has the following shortcomings namely”

(a) Adoption

289. For the purpose of this Ordinance, the word “adoption” has not been defined nor has its legal connotation been explained. It is felt that the Ordinance should give an interpretation as to the legal meaning of that word so as to avoid ambiguity.

290. The word “Adoption: in the context of this ordinance should be defined to mean “a legal process by which the court creates new parental relationship between the child and his/her natural parents where the child was born out of wedlock or with other persons by order of the court.

(b) Who can Adopt and be adopted

According to the Adoption Ordinance, adoption can be generally applied for by any person who is of age as specified in the Ordinance under section 4. The law states that adoption shall not be granted unless the applicant or in the case of joint application, one of the applicants has attained the age of 25 years and is at least 21 years older than the child. In case where the applicants or one of them is a relative of the child (other than the parents), the age limit is lowered to 21 years. Under this law, a person can be adopted only if he/she is under 21 years and has never been married. Where the applicant is the mother or father of the child, age restriction is not imposed.

(c) Age limit of the Child to be Adopted

The maximum age of an infant to be adopted as stated under the Ordinance is 21 years. This appears to be in contradiction with the Interpretation of laws and General Contradiction with the Interpretation of laws and General Clauses Act. No.30 of 1972, which defines “infant” as a person below 18 years.

For the purpose of interpretation in the Adoption Ordinance, the meaning assigned to an infant should equally by extend to the interpretation of laws and General Clauses so as to maintain consistency. (Under the Majority Age Act).

(d) Residence of applicants of adoption

291. Regarding the applicant's residence as provided for in section 4(5) of the Ordinance it is stated that no adoption shall be granted to an applicant or applicants who are not residents of Tanganyika. Unfortunately, the meaning of the word "residence" is not defined under the Ordinance, hence, giving too much wide scope of different interpretations.
292. Under section 10(1) of the immigration Act No.8 of 1972, it is stated that, no person whom this section applies shall enter from any place outside Tanzania or remain in Tanzania unless he is in possession of a valid passport and (a) he is a holder of, or his name is endorsed upon, a residence permit issued under the provisions of this act, or..(b)..he is the holder of, or he is name is endorsed upon, a pass issued under the provision of this Act. This same section 10(1)(1) gives the power to the Minister of Home Affairs to exempt any person or class of persons from the requirement of possessing Passport.
293. For the purposes of the Immigration Act, the provisions that require a person entering or staying in Tanzania to have a residence permit does not define the meaning of the word "residence". It is not clear therefore, whether "residence" means permanently dwelling in Tanzania or temporarily remaining the Tanzania. Due to lack of definition of the word Residence in the Adoption Ordinance, untold numbers of adoption orders have been granted to applicants who have had no intention of permanently remaining in the country, except for the purpose of processing their application for adoption only (see Rwezaura (1988) J.A.L. page 148)
294. The spirit of section 4(5) of the Adoption Ordinance is purely for the purposes of safeguarding the interests of the child and not the one who is giving consent for adoption nor that of the applicant. We feel that the paramount intention of adoption should be to bring up the child within the geographical locations of his birthplace. So far, the available evidence shows that there has been a tendency to regard inter-country adoption as better assurance of the best interests of the child adopted.
295. Equally true, there is dissenting evidence among a sizeable portion of population that, inter-country adoption should not be permitted altogether; instead in country adoption should be encouraged. Many researchers have revealed that more often than not, inter-country adoption end up with discrimination on grounds of race and colour in certain countries. Although the family may be suitable one, one is worried about the child's adjustment and acceptability in that society.
296. Thus it is suggested and recommended that the principle to be in Tanzania mainland when dealing with this section 4(5) is that

- It should be desirable for every child or young person to live in association of a complete family setting that provides the Child with cultural identity.
- Much as it is practicable, once the child is moved from one place of residence to another for whatever reasons, the Principle should be that such child or young person should be placed to a more or less familiar geographical environment, with familiar social institutions and with familiar people in a locality that the child or young person knows. This will certainly solve the various problems auxiliary or connected there with and it will preserve the children's cultural identity.

297/. For the purposes of Adoption Ordinance the interpretation of the word residence should mean. "physical presence in a given place and an intention to remain there for a sufficiently long period to make that presence more than fleeting or transitory"

298. For the above reasons, it is submitted that no adoption shall be granted to applicants who are not permanent residents of East Africa, except:-

- (a) Where one of the applicant or applicants is the parent/s or relative/s of the child and is citizen of Tanzania who intends to reside outside the country.
- (b) Unless the court is satisfied that there are special circumstances, which justify an exceptional measure, an adoption order shall not be made in favour of an applicant who is of different race from the infant.
- (c) Consent to the Making of Adoption Order

299. Section 4(a) of the Ordinance provides that the court shall not make an adoption order in respect of an infant unless and until the parents or guardian of such an infant agree to the making of the order. For the parent, the guardian, and relatives, or any other person who is liable by virtue of any order or agreement to contribute to the upkeep of infant must clearly understand the effects of adoption order in that the natural parents obligations and rights are permanently transferred from him/her to the applicant once she/he gives consent.

300. The law at this juncture however, does not provide for advisory mechanism to those who give consent to adoption. There are instances, which have shown that some consents have been given under ignorance (Dodoma case).

- (d) Consent by Parents

301. Under section 2(I) of the Adoption Ordinance, the terms "father" and "relative" are defined to include the illegitimate father of the infant for the purposes of consent when this section is given legal interpretation, there is a reflection that a person who is not the father but being a guardian e.g. grand parent. This is a direct conflict of the law..

302. It is proposed that the word "parent" for the purpose of this ordinance be defined as follows: "Parent". Does not include the natural father of a child born out f

- wedlock who is not at the same time a guardian or liable by virtue of any order or agreements to contribute to the maintenance of the child.
303. Where the child is under the sole custody of a guardian, (the guardian here means grandparents, uncle or any other relative or persons having custody of such child), such consent to adoption should be regarded to be legally binding.
- (e) Condition for Consent
304. Section 5(3) provides that consent can be given either unconditionally or subject to conditions regarding the religious upbringing of the child and can be given without the adoptive parent's identity.
305. The logic behind the provisions of section 5(3) leaves much to be desired in that:-
- (i) Once the order has been pronounced by the court, there is no established mechanism by which the fulfillment of the conditions provided in the section mentioned above can be effectively monitored.
 - (ii) There is no provision that requires the adopter to make periodical contacts with any institution regarding the progress of the adopter child, or infant.
 - (iii) It is equally true that the adopter may not be interested in bringing up the child in specified religious beliefs.
 - (iv) It may be possible that the adopter might have left the country and therefore his whereabouts may not be known. As a result the condition Precedent to adoption becomes impossible to invoke.
306. It is recommended that for the purpose of maintaining closer contact with the development of the infant, the law should make it mandatory for the adopter to give his address of contact and residence to the court which in turn shall appoint the Commissioner for Social Welfare to be the supervising officer.
307. Such appointed supervisor shall from time to time as need be, report his findings to the court. Where the findings of the appointed supervising officer reveals that the adopter has not been fulfilling his duties as provided for in the Ordinance, say by neglecting to maintain the child wholly or partly or deserting the child or ill treating the child and the court is satisfied with that report then such grant of adoptions shall not be revoked but that such child shall be placed under the custody and care of the Commissioner for Social Welfare for care in the children's home.
308. While at children's home the child could be re-adopted by any other applicant, and in that case, the existing adopter shall give the consent for adoption. Where the

previous adopter unreasonably withheld such consent, the court may dispense with such consent.

Immediately after giving such consent, then the person consenting shall cease to have legal responsibility and obligations over the child.

(h) Restrictions on Making Adoption Order (foster Care period)

309. Section 4(6) states that “an adoption order shall not be made in respect of any infant unless the infant been continuously in the care and possessions f the applicant for at least three consecutive months immediately preceding the date of the order”

310. What is a envisaged, therefore, is that the applicant has full charge of the infant even before the application is made so that the infant is given the opportunity to establish a reasonable degree of contact; and that the court and particularly the guardian and litem are able to ascertain the suitability of the applicants and the ability to develop parental attachment towards the particular infant or infants (Rwezaura – pg. 131 (1987 J.A.L. Adoption of Children in Tanzania).

311. It is recommended that the three months period which is provided for by this section is quite insufficient for any proper and valid assessment, it is felt that a period of not more than two years and not less than one year should be adequate for a proper and meaningful assessment.

(I) Appointment of Guardian ad litem

312. According to section 11(2) of the Adoption Ordinance, the court has the duty to appoint some persons to act as guardian ad-litem of the infant upon hearing of the application with the duty of safeguarding the interests of the infant before the court. In fact, Rule 13 of the Adoption Ordinance Rules states that, it shall be the duty of the guardian ad litem to investigate as fully as possible all the circumstances of the infant and the applicant and all other matters relevant to the proposed adoption with a view to safe guard the interest of the infant.

313. The purpose of such an appointment is to get impartial and independent assessment and opinion on all relevant facts relating to the application so that the court may arrive at a fair decision when making an adoption order.

314. According to Rwezaura and another, pg. 146, Journal of African Law, 1988, “The Existing practice of appointing the guardian ad litem, except in cases where the Commissioner for Social Welfare performs this function, leaves much doubt as to whether the protection of the child’s special interest and the impartially of this office can be assured. The study of 140 adoption applications heard between 1975 and 1986, in Dar es Salaam shows that in 115 cases 82% of the guardian’s ad litem were private individuals. These include the child’s relatives, the applicant’s neighbors, friend or colleagues, the community or religions leaders and other categories of private individuals. In nearly all 115 cases the name of the guardian ad-litem was suggested to the court by the applicants and nearly on all cases the court approved the nomination

without any discussion. All the reports prepared by the guardian ad-litem were positive and always similar following the format suggested in the statute”.

315. Although such appointees could have acted in a bona fide spirit, it cannot be guaranteed with certainty that impartial reporting, or that the interests of the child could always be protected. It is worthy to note that the relationship that exists between the applicant and guardian ad litem who was initially suggested by the applicant to the court cannot be relied upon all the time

316. Moreover, it is highly doubtful as to whether such appointees could have the experience and expertise of assessing the socia-cultural needs and interests of both the applicant and the infant. Conclusively, it can be said that such guardian's ad litem are likely to be partial as a result of their existing friendship or relationships. It is obvious therefore that the interests and welfare of the child may be sacrificed on the altar of the applicant's and guardians ad litem friendship or relations

317. Following the past trend of adoption cases as pointed out above, there is more than ample evidence to substantiate that non-involvement of public/state institutions like the Social Division in procurement of guardians ad litem is rare and thus the law has been left behind the reabilities as to the requirement of expert opinion.

318. In the light of the foregoing reasons. The Commission recommends that the service of the social welfare officers should be provided in the ordinance under section 11(2), and such services should be made mandatory in adoption matters. Private guardians ad litem should be dispensed with and in lieu thereof, to be replaced by the Commissioner for Social Welfare or his representative who shall be the only guardian ad litem appointed in law in all matters of adoption.

319. Whilst in the process of executing these duties as provided for under section 11(2), the Commissioner for Social Welfare shall investigate the adopter's motive for adoption, his/her social integrity family status interest to children, income and earning capacity, property and other financial resources, the financial needs, obligations and responsibilities which si likely to have in the foreseeable future; social needs of the child, physical or mental disability and financial needs of the child which is likely to have in the foreseeable future.

III APPOINTMENT OF PROVISIONAL GUARDINA

320. The Adoption Ordinance provides among other things the provision of the appointment of guardian ad litem by the court. His duties, among others, are to investigate all matters regarding the infant vis-a-vis the applicant's character and economic capabilities before adoption order is made by the court. Such guardian ad litem is expected to make a most fair assessment of the applicant's suitability for adoption.

As the law stand today, the responsibility of the guardian ad litem stops and ends immediately the court makes an adoption order. It is clear therefore, that the duty of care for this child thereafter remains squarely in the hands of the adopter, no further

mechanism is provided for to safeguard the interests of the child should unforeseeable tragedy fall upon the adopter.

321. For the purposes of safeguarding and ensuring that proper and continuous care is readily available to the infant of child, we take it necessary to provide alternative measures by allowing the adopter to suggest to the court a guardian who shall act in his place in times of unforeseeable events such as sudden death or other incapacitation. Where such a guardian has been introduced to court then the court shall proceed to make such orders of appointment. Where such a guardian has been appointed he/she may relinquish his/her appointment, or the court may do so on its own motion where it has been proven that such guardian has not discharged his duties as required of him. A similar provision exists in Kenya legislation on adoption and it is recommended that the same provision should be introduced in our legislation on adoption matters.

IV ADOPTION UNDER THE CUSTOMARY LAW DECLARATION ORDER, NO. 279/63.

322. While in the course of general observations relating to matters of Adoption under the statutory law, we equally paid attention to the customary law that is currently existing.
323. We observed that under GN.279 of 1963 of First Schedule on Rules of Guardianship (Sherpa z Ulinzi), the law provides among other things, a mechanism and procedure under which guardianship may be appointed by a Clan Council or Primary Court it need be, as an overseer of such infant or infants where the father has died or is of unsound mind or is no where to be seen.
324. Such guardian is normally appointed by the Clan Council from the paternal or maternal relatives of the deceased whichever the case may be. Where there are no such relatives available, then the rules allow any other person to make an application to the Primary Court with a view of being appointed as a guardian.
325. In any case, the guardian so appointed will have the duties of maintaining the infants and to protect all the available property of their father. (See Section 11,15,17, and 18 of Rules of Guardian-ship GN. 279/63, Local Customary Declaration Order No. 4/63.)
326. The role of the guardian appointed under the said rules shall be deemed to have ceased after the infant has attained the age of 21 years or has married and has shown the ability to Madge the affairs of such family all in all, there is nothing in these Rules which can be equated with the provisions of the Adoption Ordinance in as far as adoption of children is concerned. The rules provide only a guardianship mechanism and nothing more.
327. Although these Rules do not reflect the same effect as that in the Adoption Ordinance yet, they cater for the interest and welfare of the infants in as far as care of the disadvantaged children, are concerned. Hence such practice should be maintained.

RECOMMENDATIONS:

A. DEFINITION

328. The definitions of the under mentioned word used in the Adoption Ordinance should bear the following meaning:-

(a) Adoption

A legal process by which the court creates new parental relationships of a child between the child and hi/her natural parents where the child was born out of wedlock or with other person(s) by an order of the court.

(b) Parent

Does not include the natural father of a child born out of wedlock who is not at the same time a guardian or liable by virtue of any order to contribute to the maintenance of the child.

(c) Residence

Physical presence in a given place and an intention to remain they're for a sufficiently long period to make that presence more than fleeting or transitory.

B AMENDMENT OF VARIOUS SECTIONS OF ADOPTION ORDINANCE AND OTHER RELATED LAWS

1. WHO CAN ADOPT AND BE ADOPTED

Observation

For the purpose of Adoption, the maximum age of an infant is 21 years. This however, seems not to have been reflected in the Interpretation of Laws and General Clauses Act. No. 30 of 1972 which defines "infant" as a person below 18 years.

2. CONSENT SECTION 4(2) ADOPTION ORDINANCE

Consent by Parent Relatives Guardians etc.

Recommendation

A natural father of a child born out of wedlock and who does not contribute to the maintenance of the child and is not custody of such child, should be excluded from giving consent for the purpose of adoption of such child.

Recommendation

So as to ascertain that the consent given by parents, relatives, custodians, guardians or guardians ad litem, is in conformity with the spirit of the Ordinance, the skills of the Commissioner for Social Welfare are of ardent need. The Commission recommends that the Commissioner for Social Welfare should be involved in counseling such parents before giving such consent for adoption.

3. CONDITION CONSENT

Recommendation

Where conditional consent is based on matters of religion or any other specified conditions, under section 5(3) of the Adoption Ordinance, the court should direct the adopter to give his/her address of contact and residence to the court which in turn shall appoint and empower the commissioner for social Welfare to be the supervising Officer.

Recommendation

Where the adopter fails to give reasonable explanation against the findings of the supervising office, the court should proceed to make an order against he adopter relinquishing him/her of his/her duties. When such order is made, the child concerned should be placed under the custody and care of the Commissioner for Social Welfare in a Children's Home. Such a child be subject to re-adoption.

4. APPOINTMENT OF GUARDIAN AD-LITEM

Observation

The law as it stands, under section 11(2) of the Adoption Ordinance, it is the duty of the court to appoint a guardian ad-litem who could have been a parent or relative or any other person versed with the facts that can help the court to arrive at a fair decision. Such guardian ad-litem is required to furnish such information to the court with a view to safeguard the interests of the infant.

Observation

The study made regarding the practice of such appointment is that, except in cases where the Commissioner for Social Welfare performs this function, the guardians ad-litem appointed were private individuals who were suggested to the court by the applicants themselves. In so doing, applicants have in many cases suggested people of their choice. This practice can hardly be overruled of partiality.

Recommendation

The Commission recommended that the expertise, skills and knowledge of the Commissioner for Social Welfare should be of utmost necessity so as to arrive at an impartial assessment which will be of great help to the court in arriving at its decision. Thus, the Commissioner for Social Welfare should be involved in all cases and must always act as guardian ad litem for the infant.

5. APPOINTMENT OF PROVISIONAL GUARDIAN

Recommendation

At the time of making the adoption order, the court should require the adopter(s) to provide a provisional guardian who shall be appointed by the court for the purpose of maintaining the child in case of sudden death or incapacitation of the adopter(s) before the child attains the age of majority.

Such guardian should give his/her consent in writing. Where such consent has been obtained, the court should on its own motion or on the application by the adopter or guardian, revoke such appointment of guardian and appoint any other person to be the guardian of the infant.

FIELD REPORT

ADOPTION LAW

A. SINGIDA

1. Adoption procedure in the High Court is too technical to be utilized by ordinary persons.
2. The adopter should be old enough to effectively Undertake the obligation vested in him by the Law. Suggestions were given that adoption should be granted to a person who is above 35 years and not more than 55 years.
3. The present law does not provide for supervision of Adopters. Thus mistreatment of the adopted child cannot be detected
4. Foreign Adopters should be supervised by our Embassies abroad.
5. Presently, it is the High Court Judges who handle adoption cases. High Courts are far away from the people. Resident Magistrates Courts should be allowed to hear petitions of adoption and make rulings. Their rulings or orders should be endorsed by the High Court.
6. On inter-country Adoption, two different views were expressed:-
 - (a) Foreigners should not be allowed to adopt any child from Tanzania for fear of possible mistreatment and loss of identity in a foreign country.
 - (b) Foreigners should be allowed to adopt children from Tanzania because it may be advantageous to such children and may be to the nation as well but the element of surveillance must be provided to ensure better security for children.

FOSTER CARE

B. ARUSHA

1. Foster Applicants should be subject to three months period of investigation as to whether they can manage to foster children without problems and in accordance with accepted standards to be set by the Commissioner for Social Welfare.
2. It was normally taking too long for the High Court to dispose of applications on adoption. In some cases it take more than two years. This would lead to state of despair by the applicants and at the time subjecting unnecessary hardships to the would be adopted children.
3. Adoption should remain in the High Court's jurisdiction mainly because erroneous decisions which can be made by subordinate courts may take long a time before they are reviewed by the High Court During this period, the adopter could leave the country with the adopter child.

C. MOSHI

1. Foster care period should be raised from 3 months to two years so as to ascertain suitability to care for the child.
2. Adoption of a child should be given to a permanent resident and a national only.

D. DODOMA

1. The minimum period of foster care should be increased to one year so as to fully assess the suitability of the family proposing to adopt the child.
2. Most parents do not understand the legal implications of giving consent to other persons for adoption of their children. In order to make sure that parents do act under such misconceptions the skills of the Commissioner for Social Welfare in counseling such parents should be sought for in all adoption cases.
3. Foreigners should be allowed to adopt a child form Tanzania only if they have been in the country for a period of more than five years.
4. The law should provide for revocation of the adoption order when it has been proved that an adopt is mistreated or neglected by the family which adopted his or her. The law should fix the maximum age for which a person may be allowed to adopt a child.

E. IRINGA

1. According to past experience, it was suggested that as far as adoption is concerned. It is more convenient to look for nearest reliable relatives for that purpose.

2. The present 3 months period of foster care before a child can be adopted is too short a time to assess the ability of the adopter.
3. Adoption by foreigners should be stopped, as it is unsafe to consider them suitable adopters especially where their life history cannot be easily ascertained. There should be elaborate restriction on incorporating African children into foreign families especially when a foreign adopter seeks to take a child outside the country.
4. Qualifying age for one to be good adopter may be at 25 years and above.
5. Problems relating to adoption arise because some relatives do not want to take the task due to:
 - (a) Lack of commitment;
 - (b) Financial deficiency;
 - (c) General behaviour of shying away from taking charge in respect of abnormal children
 - (d) Other souci-economic problems
6. Adoption of a child by a foreigner may be a relief to the child's parents. On the other hand it has the effect of degrading African values. There is a danger of abusing human values for monetary consideration.

H. ZANZIBAR (ADOPTION DECREE CAP. 55)

1. Zanzibar is a dominantly Islamic society. Consequently, the Adoption Decree is not applicable, instead the Holy Koran is the main guidance. It can clearly be said that the Decree is solely there for Non-Muslims. But so far there is no evidence of its use.
2. Holy Koran does not recognize adoption in the spirit of in the case of children born out of wedlock, or in wedlock. However, foster-care allowed provided such care carries no implication of adoption.

1	2	3	4	5	6	7	8	9
Country	Adoption Act	Minimum Age of Adopter	Maximum of Age of Adopter	Marital Status	Consent's	Granting Authority of Addition	Inter Country	Adoption Counseling Service
ZAMBIA	Ad. Act Cap. 218	21 years and single	Married single	Parents	High Court,	Permissible		

				guardian or relatives	subordinates court of first class			
TANZANIA	Ad. Ordinance Cap. 335	25 years and 21 years when adopter is a relative	21years	Married / single	Parent Guardian or relatives	High Court	Permissible	Not provided for in the law
SWEDEN	Social Service Act (1980-620)	25years or 18 years where the adopter is a parent of the child or where there are special circumstances		Married / single	Parents Spouses, Guardian, adopter who has attained the age of 12 years Social Welfare Board	The court where the adopter is resident or court of Stockholm	Permissible	Parish Court Councils of the Adopts or adopter
DENMARK	Adoption Act No. 279/1972	25 years or 20 years on a special circumstances		Married / single	Parents, child if he his attained the age of 12 years National Board of Children and Youths Welfare Service	Prefecture (court)	Permissible	Not provided for

BIBLIOGRAPHIES

1. The Adoption Ordinance, Cap. 355 of the Laws of Tanzania
2. The Adoption Rules.

3. The Law Development Commission of Zambia's Report on the Law and the Rights of the Child in Zambia by Geoffrey Haamaundu & Research (UNITAR) Lusaka, Zambia, Dec. 1981.
4. The Zanzibar Adoption Decree, 55
5. The Adoption Act of Kenya, Cap. 143.
6. Prof. B. Rwezaura and Ulrike Waniteeke, "The Law and Practice Relating to the Adoption of Children in Tanzania" (1988)
7. The International Convention on the Rights of the Child.

6.0 SUCCESSION AND INHERITANCE (LAW OF SUCCESSION)

329. Relevant Terms of Reference have partially been examined under the topic on Care, Maintenance and Custody.

330. The said Terms of Reference suggest that the present laws on succession and inheritance place the right of claim on the bias of degree and contain undue elements of discrimination against females and illegitimate children.

331. The Commission has observed that the problem in question is complicated, since it also involves religious and customary conviction some for which emanate beyond the national boundaries (e.g. from India)

332. Notwithstanding the aforesaid difficulty, the Commission puts forward what it considers to be a fair approach to the problem.

1. State of the Law

333. It has been said that rules of law which determined the re-allotment of a dead man's property constitute the law of inheritance. In Tanzania today, we note two major systems of law of inheritance, i.e. the general law (Indian Law of Succession in Patrilineal tribes. There are other legislative Su-systems of inheritance related to Non-Christian Asiantics Mohammedan and those related to small estates.

334. The Commission notes that the whole law of succession in Tanzania is far from satisfactory. The succession Act of India, 1865 apart from being a very ancient statute, created largely for the ex-partial English Community in India and "saved, natives", hardly applies to the specific needs of a modern African national such as Tanzania

The African Conference on Local Courts and Customary Law

335. Meeting in Dar es Salaam in 1963 under the Chairmanship of the then Minister of Justice of Tanganyika, Sheikh Amri Abedi, noted, "The existing laws of Succession in a number of African Countries were not satisfactory in various particulars" (pg. 28 of

Proceedings). These particulars included conflict between customary law and other laws. Absence of unified procedure for administration of estates; lack of general powers of testamentary disposition for Africans and non African alike; and very important for us, they noted the need to:

“Incorporate family protection provisions (such as are found in many national laws outside Africa), limiting the amount of property which could be disposed of by will and ensuring that those who were dependent on the deceased during his lifetime are adequately provided for notwithstanding any will or change of personal law which may have been made by the deceased” (p.29 of the Proceedings, emphasis added).

336. Hence the Conference suggested a programme under which a progressive statutory scheme would be enacted under which the unification of statute and personal law would be undertaken taking into consideration diversities between existing systems of customary and religious laws.

337. The Complexity of the statutes of the law of succession is noted by delegates to the 1963 Conference where in the Proceedings they write.

“In Tanganyika, the Indian Succession Act 1865, which is based on the English System of Succession, is not generally applicable to Africans though the Administration (Small Estates) Ordinance, Cap. 30 and the Probate and Administration Ordinance, 1961 do make both oral and written wills with requirements as to Capacity, execution, revocation and optional registration. The Declaration also covers administration of Estates and in those District where applied it would appear to be “the law of the tribe”.(In section 19(a) Administration (small estates) Ordinance, Cap. 30”(ff.No.1p.29 of the Proceedings).

To-date, several statutes and the Declaration exist in relation to succession.

- (i) Indian Succession Act, 1865 (No. X of 1865) as Amended by the Probate and Administration Ordinance, Cap. 445 (Parts XXIX to XL-inclusive And section 333 of the Indian Succession Act are repealed).
- (ii) Mohamedan Estates (Benevolent Payments) Ordinance, Cap. 29.
- (iii) Administrator General’s Ordinance Cap. 27
- (iv) Administration (Small Estates) Ordinance Cap.30 as amended by the probate and Administration Ordinance Cap. 445 (sub-section 3-18 inclusive repealed and sub-section 19-20,21, and 22 amended accordingly per sch. 2 of Cap. 445).
- (v) The Widows and Orphans Pensions Ordinance Cap. 54.
- (vi) The Pensions Ordinance, Cap. 317

(vii) Succession (Non-Christian Asiatics) Ordinance Cap. 112(as amended by the law of Marriage Act. 1971 Second Schedule).

(viii) The Law Reform (Fatal Accidents and Miscellaneous:

(Provisions) Ordinance Cap. 360 (Esp. The Definition of a “dependent” under section 2 as amended by the Law of Marriage Act 1971)

(ix) Probate and Administration Ordinance, 1961 Cap. 445

(x) *Rules on Inheritance

*Rules of Wills.

338. The legislative schemes which invite comment from the Commission are mainly the Indian Succession Act, 1865; The probate and Administration Ordinance, Cap. 445 and the Customary Law Declarations. Reference shall be made to the other statutes where the context makes it necessary so to do. The treatment here with regard to succession focuses mainly on the child. A review of the laws of succession is being undertaken as a separate reference. This commission therefore shall limit its commentary on succession to aspects related to the child.

A. THE SUCCESSION ACT OF INDIA, 1865

349. The Indian Succession Act of India, 1865 is to apply generally in cases of intestate or testamentary succession. The Act was applied to Tanganyika by the Indian Acts (Application) Ordinance Cap. 2 (First Schedule).

340. However, parts XXIX to XL (inclusive) and section 333 of the Act were exempted by the Probate and Administration Ordinance Cap. 445.

341. The Indian Succession Act was to apply to Europeans and natives of India other than Hindus, Buddhists and Mohammendans; and of course other than non-native of Indian e.g. Jews, Armenians, etc simply stated, the act was to apply generally to Christians foreigners and Indians. Its application here was largely to cater for the same non-native Christians and Christian native who had abandoned their customary mode of life (See Re-innocent Mbilinyi 1969 HGD 283). The act is actually quite specific that the group of kindred who may inherit from the deceased are only those whose relationship the law recognizes following from lawful wedlock (see E.Smith T. Massy I.L.R. 30 Bom 500) and this has been taken to mean a monogamous family (See section 20 of the Act referring to kindred and consanguinity (section 21) and collateral consanguinity (section 22). While the former is defined as that relationship subsisting between person descended in a right one such as grandfather, father, son, grandson, etc. the latter is defined as the relationship where the parties descend from the same stock of ancestors as the lineal relation, but so not descend from each other e.g. the sons or daughters of two brothers. It is these persons who are similarly related to the deceased that the Succession Act deals with. Illegitimate children are not taken into the preview of the Act in cases of intestacy.

342. According to section 25 of the Act, a man is considered to die intestate in respect of all property of which he has not made a testamentary disposition (a will) which is capable to taking effect and such property is said to devolve upon the wife or husband or upon those who agree of the kindred of the deceased in the order and according to the rules prescribed in the Act.
343. Section 27 of the Act provides for the situation where the intestate has left a widow and lineal descendants or a widow only and kindred only, or a widow and no kindred. The section provides:
- “Where the intestate has left a widow, if he has also left any lineal descendants, one-third of this property shall belong to this widow, and the remaining two-thirds shall go to this lineal descendants according to the rules herein contained. If he has left no lineal descendants, but has left persons who are of kindred to him, one-half of his property shall belong to his widow and the other half go to those who are of kindred to him, in the order and according to the rules herein contained, if he has left none who are of kindred to him the whole left none who are of kindred to him the whole of his property shall belong to his widow”
344. Under part V of the Act, the mode of distribution of the intestate’s property is provided for section (a) provides for circumstances where he has left lineal descendants; section 30 specifically provides for the situation where the intestate has left a child or children only; it provides:
- “Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the Property shall belong to his surviving children”
345. Notes under the section in the 1922 edition of Testamentary Succession and Administration of Estate in India, edited by Alexander Kinney, point out that in dealing with the question of children, the act contemplates legitimate children only and it is only these who can inherit. A child legitimate by the law of domicile but illegitimate according to English law, is entitled to a share as one of the next of him in the personal estate of an intestate to a share as one of the next of him in the personal estate of an intestate dying domiciled in England (Re. Goodman’s Trust 17 CD p. 266). This means that, strictly speaking, children born out of wedlock are not covered by the Act but only as next of kin. In the case of the post humors child, he has same rights as a child born during the lifetime of the father (Re: Welmer’s Trust 1903 2Ch.P.411).
346. However, it is noted that in certain jurisdictions, an illegitimate child might be subsequently legitimized. Much in order that this may have legal effect, the father must be domiciled both at the child’s birth and his marriage to its mother in a country, which allows such legitimization. This seems to be a case law interpretation (see Voucher C. Solar to the Treasury 40 ch. 216 and Re: Goodman’s Trust 17 CD 266).
347. If this interpretation is correct, the situation in Tanzania leaves much to be desired, since, under the general law there is not legitimization under the statute apart from the indirect use of the Affiliation Ordinance and the extraordinary procedure under

the Adoption Ordinance. However, under customary law, legitimization is recognized and consequently, it seems to the Commission that there is a necessity of filling the lacunae left by the Succession Act.

348. In studying the Kenya Succession Act, it seems a method has been provided whereby the cultural and traditional peculiarities relevant to African contexts with regard to legitimization of children and distribution of property have been taken care of. We shall deal with the Kenyan Act in a moment.

349. The Indian Act provides further for the situation where the intestate has left no child but a grandchild or grandchildren (section 31) and the situation where the intestate has left no lineal descendants and covers the children of brothers, sisters and other collateral kindred. Suffice it to point out that, the immediate problem here appears to be:-

1. The definition of a child is restricted and excludes the child born out of wedlock, and
2. The question of what kind of property should be the subject of inheritance if children born out of wedlock are included in the definition of a child.

(a) Definition of a child for the purposes of succession

350. The standard definition of a "child", we believe, may be construed in parametrical to that of Kenya Succession Act where a child is defined as follows:

3(2) Reference in this Act to 'child' or "Children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

This provision clearly covers children born out of wedlock for purpose of Succession in Kenya. Section 3(3) is specific on the issue:

"A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other person, through her or him as though the child had been born to her or him in wedlock"

351. The definition of a child is not without inherent problems, where certain presumptions, cultural, religious or otherwise form the backdrop of the definition. It is noted that in certain religions, a family is monogamous (e.g. Christians) or may be polygamous (e.g. Islam) and in both traditions, a member of the family must be one born in wedlock. Here there is no recognition of illegitimate Children. Yet, the problem of children born out of wedlock is a concrete one notwithstanding the interest of society in protecting formal family units. In customary Law Declarations, a process of legitimization is recognized. The Law of Marriage Act, 1971 is silent on the Status of

Children born out of wedlock on matters of rights to family estate except on matter of prohibited relationships (see s.14 (5) of LMS).

352. The Affiliation Ordinance provides for maintenance orders against the putative father but does not provide for circumstance connected with inheritance or provision of maintenance posthumously where this is possible

353. The ambivalence of specific provision for children born out of wedlock in matters of inheritance is also noted in the National Party Policy on the Care and Upbringing of Children and Youth in Tanzania (1987), CCM, Dodoma) under part IV of the Party Document, certain generalizations are made in relation to children born out of wedlock. No comment is made on their rights to the family estate although para 15 of the Document directs the Government to enact laws, which shall regulate the allotment of dead person property for benefit of the family as a whole. The gist of the problem appears to be what constitutes the family.

354. (I) It is noteworthy that although the Law of Marriage Act 1971, recognizes children born out of wedlock as relatives (and therefore within prohibited relationship) to those born in wedlock (section 14(5); it does not provide a direct definition in the body of the Act for "family" or "dependent"

(ii) However, under the same Act, the Workman's Compensation Ordinance Cap. 263, and The Law Reform (Fatal Accidents and Miscellaneous Provisions Ordinance, Cap. 360 were amended in such manner that their definitions of "family members" or "dependent" were to include children born out of wedlock.

355 (I) Under Schedule 2 of The Law of Marriage Act, Section 3(1) of the Workman's Compensation Ordinance Cap. 263, is Amended to include the definition of " member of the family" in the following terms:-

"Member of the family" means, the wife or where the Marriage was a polygamous marriage, each of the wives, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son daughter, brother, sister, half-brother, half-sister, and includes an infant child whom the workman had accepted as a member of his family and every other person who would on the death of the workman be entitled to succeed to his property (otherwise than under a will) in accordance with the law of succession applicable to the estate of the workman in the event of his death; and a person shall be deemed to be the father or mother or son or daughter of the workman notwithstanding that he or she is or was related to him illegitimately or in consequence of adoption according to the law"

(ii) Similarly, the same schedule 2 of the Law of Marriage Act amends section 2 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, and does widen the definition of "Dependant" in the following terms.

“dependent” means the wife or, where the marriage was a polygamous marriage, each of the wives, husband, father, mother, grandfather, grandson, grand-daughter, step-son, step-daughter, brother, sister, half-brother, half-sister, and includes an infant child whom the deceased is entitled to succeed to this property (otherwise that under a will) in accordance with the law of succession applicable to the estate of the deceased; and a person shall be deemed to be the father or mother or son or daughter of the deceased notwithstanding that he or she was related to him illegitimately or in consequence of adoption according to the law”

356. The legislative tone of these amendments seems to cover children born out of wedlock as a matter of social policy. The Kenyan Succession Act does legislate the wider concept of the family.

357. The second aspect concerns the question of property automatically inheritable by the family in cases of intestacy. Most indigenous African families follow a patrilineal system of inheritance and strictly speaking family property devolves around family members of the male line. As a consequence of this, two problems occur in relation to children.

358. (I) One, in relation to the children born out of wedlock and two, in relation to female children. First, assuming the wider definition of the child is accepted as referred to herein above, then the child born out of wedlock must be taken to be one of the members of the family entitled to inherit the property of the deceased. The problem seems to be whether such a child can inherit the property under the terms of customary law and practice. In Kenya, agricultural land and crops thereon or livestock, is property which is not subject to distribution on intestacy under the succession Act and is distributed according to the law and custom applicable to the deceased’s community or tribe. This saving provision for certain categories of property is applicable in areas, which have been gazetted by the Minister (sub-section 52 and 53). It is submitted that, a saving provision of this nature is wise to provide for circumstances where traditions still holds and any radical departure by the law would be a source of confusion

(ii) Yet, it would seem there is a general trend in Tanzania towards the harmonization of ethnic usage’s and customs Urbanization and inter-ethnic marriages have minimized the authority of customary practice. It should therefore be a general principle of the law of succession that, all the children of the deceased whether born in or out of wedlock, should be entitled to an allotment of the deceased’s property equally.

359. On the question of daughters inheriting this appears to be largely a problem of customary law and shall be discussed separately in a moment. The emphasis here being made on the general law is that no distinction should be made on the basis of sex in relation to property. This obviously, offends civilized norms on the children’s rights.

360. Thirdly, this relates to the freedom of testator. It is a well-known principle that an individual has a fundamental right to own property and the Tanzania constitution entrenches the right through its Bill of Rights. It follows that an individual’s right to dispose of the property as he wishes, is also one of the entrenched rights and this individual may do this by will. The debate surrounding the freedom of testator involves issues far beyond the Terms of Reference of the Commission, but whatever the resultant

position, our guide here has been the best interests of the child and perceiving the child as a subject of rights, in which events children must be protected from the excesses. In this event the protection for dependants as covered in Kenyan Act, (sub-section 26,27,28 and 29) should be adopted.

“26 Where a person has after the Commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by the will, or by gift in contemplation of death or the law relating to intestacy, or the combination of the will, gift and law,.. Reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate”

27” Provides thus:

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependent, or to make such other provision for him by way periodical payments or a lump sum and to impose such conditions, as it thinks fit”.

Further:

“Section 28- In considering whether any order should be made under this part, and if so, what order the court shall have regard to:-

- (a) the nature and amount of the deceased’s property;
- (b) any past, present, or future capital or income from any source of the dependent;
- (c) the existing and future means and needs of the Dependent;
- (d) whether the deceased had made any advancement Or the gift to the dependent during his lifetime;
- (e) the conduct of the dependant in relation to the deceased;
- (f) the situation and circumstances of the deceased’s other dependents and the beneficiaries under any will;
- (g) the general circumstances of the case, including so far as can be ascertained, the testator’s reasons for not making provision for the dependant”

“Section 29-For the purpose of this part, “dependant” means:-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to this death.
- (b) such of the deceased’s parents, step-parents, grand-parents, grand-children, step-children, children whom the deceased had taken into this family as his own, brothers and sisters, and half-brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and

- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death”

B. THE CUSTOMARY LAWS OF SUCCESSION AND THE CHILD

(a) The Law

361 The general definition of Customary Law is that given under section 3 of the Interpretation and General Clauses Ordinance, 1972 which defines it in the following terms:-

“Customary law means any rule or body of rules whereby rights and duties are acquired or imposed established by usage in any Tanganyika African community and accepted by such Community as having the force of law including any declaration or modification of customary law made or deemed to have been made under section 9A of the Judicature and Application of Laws Ordinance 1961 and reference to “native law” or native law and custom” shall be similarly construed”

362. As discussed elsewhere above, the customary law declarations were enacted in 1963 for patrilineal tribes. These are to date referred to as the standard statements on customary law. With regard to succession, the customary law is restated in the Local Customary Law (Declaration) (No.4) Order, 1963 (GN. 436 of 1963, 2nd Schedule: Rules of Inheritance; 3rd Schedule; Rule on Wills).

363. With regard to Children, the customary law on inheritance is generally no different in terms with the general law on succession. In certain particulars however, customary law is embarrassingly discriminatory to children (on the basis of seniority or primogeniture, on the basis of sex). In other regards, for example on the question of illegitimacy, customary law provides for processes whereby equality of treatment of children may be achieved by providing means of holding parents responsible for the welfare of their children. A brief discussion is undertaken here with regard to the law of succession and children, that is, the problem of children born out of wedlock, the problem of discrimination of children, and the protection of dependents in cases of testate succession.

(b) Children born out of wedlock

364. The rules regarding illegitimate Children are specific:-

“Section 38- An illegitimate child (to with living with maternal grand parents) will Inherit his mother’s property and if his mother predeceased the grandfather without leaving any legitimate children this illegitimate child will inherit his mothers degree as regard his grandfathers property.

- “Section 39- if the mother of the illegitimate child left other legitimate children the illegitimate child will inherit its mother’s Property with the other children, according to its age.
- “Section 40- if the illegitimate child’s grandfather had no other children except the Child’s mother, and if the mother is dead the illegitimate child’s mother, and if the mother is dead the illegitimate child will be the legal heir of his grandfather.
- “Section 41 - Children legitimized by their parent’s marriage are counted as children born legally, only a child legitimized by marriage cannot be first in inheritance, though he was born first, if there is another child from another house whose mother was married by the deceased before the mother of the legalized child.
- “Section 42 - Children legitimized by special payments (mentioned under para 181 of the Rules Concerning the Law of Person); will inherit after the legally born children or those legitimized by marriage, in the second degree if they are females.
- “Section 43 - Illegitimate children cannot inherit partilineal except under a will”

365. Thus it is clear from the rules that Children born out of wedlock are only entitled to that portion of property which devolves on their mother matrilineal and where they have been properly legitimized and not otherwise. In so far as the customary law provides for a process of legitimization of children born out of wedlock, it is different from the general law. Yet, it does not go far enough in the sense that where legitimization is not possible, the child is still subject to the complex seniority placement in terms of “degree” which may bring the Child’s heritable interests to nothing vis-à-vis other legitimate children or children of other sexes.

365. It is submitted that the practice of legitimization should be harmonized under General Affiliation proceedings and once paternity is legally declared, the right to inheritance for the child born out of wedlock should be equal to all the children of the deceased without discrimination. Unless extraordinary circumstances exist, it should be the duty of the child’s mother or guardian to initiate Affiliation proceedings at the earliest possible opportunity in order to protect the rights of the child to parental care and, in addition, in order to protect the rights of the child to parental care and, in addition, in order to posthumous claims to paternity which are often embarrassing and difficult prove as no opportunity is given to the deceased to accept or deny paternity.

(a) Discrimination of Children in Inheritance

367. The major forms of discriminatory practice are noted; those related to seniority or “degrees” in relation to children of the same sex and those related to children of different sex.

368. (I) First, amongst reasons justifying principles of primogeniture and distinctions of rights to inheritance in accordance with ‘degrees’ or seniority are the fact that, a certain class of heirs, e.g. the older children, are expected to take care of the younger ones or that they are the principal guardians of the corporate property and also that, in the interests of avoiding unnecessary divisions of fragmentation of property,

fewer heirs should be entitled to the same. These principles may be justified where the corporate family unit, e.g. a family, a lineage or clan, is domiciled in a distinct place and has a definite and continuous interest in the control, care and development of the said property.

(ii) The modern trends of urbanization and territorial identity work against kinship based activity and identity. The first son, for example, is no less the future patriarch of the family as the daughter is no less an active member of the family. The tribal heartache and clan based culture has no reality at all. The Customary Law Declaration is elaborate on the hierarchical arrangement. Rules 19-37 of the Inheritance Rules are very tallying Rule 19 provides:-

“Section 19 - The main heir is the eldest son of the first house. If the deceased left no son in the first house, the main heir is the eldest son of any other house”.

369. Now this Rule is worked out in greater specifics in the other rules and the relevant one provide:-

“Rule 21 – Inheritance is in three degrees:
1st, 2nd and 3rd Degrees”

22- The Person in the first degree is the first heir and he gets a bigger share than any of the other heirs.

23- Those in the 2nd degree will each get a share of property that is bigger than any of the other heir in the 3rd degree.

25- Normally the first son is in the 1st degree, other sons are in the second degree and daughters are in the third degree

30- The mode of distribution of property among people in the 2nd and 3rd degrees is according to their ages, to wit, the older will get more than the younger, and males will get more than females.

370. Consequently an example is given in the rules on how any property consisting of 24 cattle only may be distributed:-

371. The Commission notes that the arrangement into degree without considering the interest and future development of the child might work against some of the child. A good example might be where the first son is adequately provided for in terms of employment or otherwise, and is of majority while the other child are minors. Or where the younger children suffer from other forms of continuing disabilities how can they be taken care of from the deceased's estate? It is submitted that these degrees should not be fixed by statute and that each case be determined on merits depending on particular circumstances of the children. Discrimination on the basis of sex should be abolished and all children be considered as equal.

372. Second, discrimination in inheritance on the basis of sex has received critical judicial assessment. No only judges, but academic writers, politicians and women

activities have decried this appalling state of affairs. The law has remained immutable and insensitive to this public outrage. A review of these concerns is made here as under.

(I) Case Law

373. In the early case of *Bi Verdiana Kyabuje v. Gregory Kyabuje* (1968) HCD 499 (in *James & Fimbo PP.202-204*) per Hamlyn, J. the Appellants had sought to contest decision whereby female heirs were denied inheritance and in their Memorandum of Appeal Claimed that:-

“The Magistrate in his judgement was influenced by a theory that women are of inferior complex to men, by depriving the appellants of their share of shambas..that such decision is against Universal justice and prejudicial to the dignity of women, who have a right of equality to men.”

374. The court was not sympathetic and Hamlyn, Noted that:-

“If customary law draws a distinction in a matter of this nature between males and females, it does not fall to this court to decide that much law is inappropriate to modern development and condition. That must be done elsewhere than in the courts of law”

375. This conservative view by Judge Hamlyn was countered by Said, J. in the new very famous case of *Ndewa Wiosia d/o Ndeamtzo V. Immanuel s/o Malasi* (1968) HCD 127. The case concerned inheritance rights of a daughter over clan land where Chagga law did not allow this Said, J. Wrote:-

“The idea of preserving clan land for clan members would appear to be a good principle, but it depends on the circumstances in which that principle is preserved”

376. I would not be prepared to go the extent of saying that principle is good in all circumstances and at all times. In Tanzania, as in all other places in Africa and elsewhere, the idea of equality between men and women has gained much strength. Women had for a long time in the past been considered inferior to men and women not surprising to find disability placed on women amongst the Wachaga tribe and other tribes in Tanzania as far as the right of inheritance over a property of their father is concerned:

“Even where there are sons the daughters are terribly neglected. They may get something ex gratia, but not by right whereas the sons, their brothers, not only take the lion’s share but also sometimes take the whole lot. The time has now come when the rights of daughters in inheritance should be recognized. It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all humans”

(ii) Academic Writers

377. Professors, R. W. James and G.M. Fimbo in their book Customary Land Law of Tanzania: A Source Book (1973) at p.193 comment that the rule that daughter should not inherit arose in patrilineal societies from the fact that a woman in marriage had to live with her husband the marriage being exogamous.
378. They note however that this discrimination against female has been broken down in many areas either because of (I) the impact of Mohammedasim (Sic') with its insistence on the equal division of property among the deceased's children. Being irrespective of their sex, creed, race or colour. On grounds of natural justice and equality, daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin on the basis of equality. (Emphasis added).
379. The interpretational problem with holding of Said J. is that, the case may be per incuriam in view of the fact that it is against enacted law if the Declaration is of such status.
380. It is noteworthy that, case law has not been following Said J. holding. Only recently, Mwalusanya J. In Mwanza had to deliberate over the issue of females included or (ii) the effect of statute passed with the purpose of removing the disability against females (e.g. Bukoba Chiefs passed Rules Governing the Inheritance of Holdings by Female Heirs, 1944. Under authority of Section 15(I) of the Native Authority Ordinance, 1926).
381. They note that, although changes in attitudes are fast developing and restrictions against females inheriting their father's self acquired property are breaking down, yet, their exclusion from inheriting clan land is still tenacious. However, at page 209 they opine that, equality of the sexes is the thrust of the modern secular state based on Socialism and the background of Christian tradition.
382. Dr. Zebron Stephen Gondwe, writing in 1985 in a paper entitled, "Female Intestate Succession to Land in Rural Tanzania: Whither Equality" notes the difficulty which has countered reformers in the attempt of changing traditional attitudes. Dr. Gondwe argues that, changes should not be in the Rules only, but interested organizations should campaign to change attitudes. He argues that "Both sex and age should be dropped as criteria for the determination of shares of children in a deceased's inheritance. Age should be dropped for two reasons: first, it is also discriminatory; and, secondly, because it overlooks the fact younger children eventually grow up and assume burdens similar to those which are held to justify larger shares for elder children, e.g. family responsibility.

SUCCESSION

1. REPORT FROM SINGIDA

It was stressed during interview that there exists inequality in succession between males and females. Customary law favours males more than females in matters of succession. Even where they were of the same siblings. There was a

call for the laws (customary laws) to treat siblings equally on matters of succession.

2. REPORT FROM ZANZIBAR

The local people of the Island are mostly Moslems and therefore on matters relating to succession are governed by Islamic law according to which, children born out of wedlock have no right of inheritance- under Islamic law such rights are non-existent.

The same applies to children of non-Moslems born out of wedlock.

“Children born in wedlock whether of Moslems or non-Moslems do have a right to inheritance. Under Islamic law, the male is entitled to 2/3 and the Female 1/3 of the property of the deceased. Non- Moslems conform to state law obtained from the Mainland. Treatment is different in regard to birth status. As stated above, children born in wedlock inherit while those born out do out.

3. REPORT FROM ARUSHA - KILIMANJARO

In matters of inheritance most Christians who were married under Christian rites are normally governed by the Indian Succession Act 1865 which includes all children born out of wedlock. Children whether legitimate or illegitimate are a product of society, hence society must take responsibility over them. This attitude of double standards is incompatible with the present mechanization of advancement of society.

4. REPORT FROM KENYA

Legitimate and illegitimate connotations deprived children of their rights and protections e.g. in inheritance/succession. Usually the property is apportioned according to age of and his/her status. In the absence of a clear safeguard, younger children and/or illegitimate children may not benefit from the property concerned. In accordance with customary law and general law of succession:

- There are some gaps allowing outsiders to take property of the deceased to the detriment of children.
- Relations can contest the will and divide property.

5. REPORT FROM IRINGA

Customary Law leaves much to be desired due to the fact that women and children may not dealt with properly on matters of inheritance and succession e.g. if the mother dies leaving behind some property, due to patrilineal or matrilineal considerations, her children may not benefit from her property. Customary law and general law should provide more provide more protection for children after their parents die.

GENERAL VIEW

The general view of the law is that it should be adequate to meet the child's basic needs after his parents, death.

S. 5 Law regulating Succession to a deceased person's immovable and movable property respectively.	5.4 (1) Law Applicable to Succession.
S. 6 One's domicile only affects Succession to Movable Property.	
S. 7 Domicile of Origin of person of legitimate birth.	
S. 8. Domicile of Origin of illegitimate child	
S. 9. Continuance of domicile of origin	
S. 10. Acquisition of new domicile.	
S. 11. Special modes of acquiring domicile in British India.	
S. 12. Domicile not acquiring by residence in a country merely as the representation of a foreign government; or by residence with him as a part of his family or as a servant.	
S. 13. Continuance of new domicile.	
S. 14. Minor's Domicile "The domicile of a Minor follows the domicile of the parent from whom he derived his domicile of origin.	
S. 15. Domicile acquired by Woman in Marriage.	
S. 16. Wife's domicile during Marriage S. 17. Except in Cases Stated Minor Cannot acquire a new domicile, "This confirms a rule that a domicile cannot be acquired by a dependant person-through his own act"	
S. 18. Lunatic's acquisition of new domicile.	
S. 19. Succession to a person's movable property in (British India), in absence of proof of his domicile elsewhere.	

<p>IN OF CONSANGUINITY</p> <p>S. 20. Kindred or consanguinity defined (The Act only contemplates those relationships which the law recognizes:</p> <p>i.e. those following from:</p> <p>1. lawful wedlock E.A.Smith V.T. Marry I.L.R, 30 Bom; 500</p> <p>“Kindred or Consanguinity is the connection or relation of persons descended from the stock or Common ancestor”.</p>	
<p>S. 21. Lineal Consanguinity: (It may be defined as that relationship which subsists between persons descended in a right line, as grandfather, father, sons, grandsons).</p>	
<p>S. 22. Collateral Consanguinity: (This may be defined as that which descended from the same stock ancestor as the lineal relations, but do not descend from each other, as the issue of two sons)</p>	
<p>S. 23. Persons held for purposes of Succession to be similar related to the deceased.</p>	
<p>S. 24. Mode of Computing Degrees of Kindred: (4)-Great Grandfather’s Father.</p>	<p>(5) Son of the Causing German (4) Son of the Nephew or Brother’s</p>

<p>(3)-Great (5) Great uncle (2)-Grandfather (4) Great uncle (1)-Father (3) Uncle (5)-Great Uncle's Son</p> <p>The Person (2) Brother</p> <p>Brother (4) causing German</p> <p>(6) Second causing Whose Relatives are to be reckoned (the deceased).</p> <p>(1) Son (3) Nephew</p> <p>(3) Great Grandson.</p>	<p>(6) Grandson of causing German.</p>
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INDIA	KENYA
PART IV OF INTESTACY	PART V OF INTESTACY
S. 25. As to what property deceased person is considered to have dies intestate.	S. 34 "A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect" (The Kenyan Act excludes: (a) Ag. Land & Crops or (b) Livestock in Gazetted areas, from the Appication of the Act on intestacy and for such excluded property the law applicable is the law or custom of the deceased's Community or tribe as the case may be (SS.32 and 33)
S. 26. Devolution of such property.	S. 35. Where the intestate has left one surviving spouse and child or children.
S. 27. Where the intestate has left a widow and lineal descendants, or a widow and no kindred.	S. 36. Where the intestate has left on surviving spouse but no children.
	S. 37. Powers of spouse during life interest.
	S. 38. Where intestate has left a surviving child or children but no spouse.
S. 28 Where the intestate has left no widow, and where he has left no kindred	S. 39. Where intestate has left no surviving spouse or children.
PART V OF THE DISTRIBUTION OF AN	

INTESTATE'S PROPERTY	
(a) Where he has left lineal Descendants.	
S. 29. Rules of Distribution	
S. 30. Where the intestate has left a child or children only.	
S. 31. Where the intestate has left no child but a grandchildren.	
S. 32. Where the intestate has left only great grand children or lineal descendants in a remote degree.	
S. 33. Where the intestate leaves lineal descendants not all in the same degree of kindred to him, and those through whom the more remote descent are dead.	
(b) Where the intestate has left no lineal descendants.	
S. 34. Rules of distribution where the intestate has left no lineal descendants.	
S. 35. Where intestate's father is living.	
S. 36. Where intestate's father is dead, but his mother, brother and sisters are living.	
S. 37. Where intestate's father is dead, and his mother, a brother or sister, and children of any deceased brother or sister are living.	
S. 38. Where intestate's father is dead, and his mother and the children of any deceased brother or sister are living.	
S. 39. Where intestate's father is dead but his mother is living, and there is not brother, sister nor nephew.	
S. 40. Where intestate has left neither lineal descendants nor father nor mother.	
S. 41. Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister.	

S. 42. Children's advancement not to be brought into hotshot.	
S. 43. Rights of Widower and widow respectively.	
S. 44. No rights to property not comprised in an antenuptial settlement acquired by marriage between a person domicile and a person not domicile in British India.	
S. 45. Settlement of Mino's property in Contemplation of Marriage.	
PART VII OF WILLS AND CONDICILS	PART II WILLS
S. 46. Persons capable of making wills	S. 5. Persons capable of making wills and freedom of testation.
S. 47. Testamentary guardian	S. 6. Appointment by will of executor.
S. 48. Will obtain by fraud, coercion, or importunity.	S. 7. Wills caused by fraud, coercion, importunity of Mistake
S. 49. Will may be revoked or altered.	S. 8 Will may be revoked or altered (SS. 17-21).
PART VIII OF THE EXECUTION OF UNPRIVILEGED WILLS	S. 8. Form Wills S. 9. Oral Wills. S. 10. Proof of Oral Wills. S. 11. Written Wills
S. 50. Execution of Unprivileged will.	
S. 51. Incorporation of papers by reference	S. 12 Incorporation of papers by reference.
PART IX OF PRIVILEGED WILLS	
S. 52. Privileged Wills	
S. 53. Mode of making, and rules for executing privileged wills.	
PART X Of the Attestation Revocation, Alteration and Revival of Wills.	
S. 54. Effect of gift to attesting witness	
S. 55. Witness not disqualified by interest inferenscor by being executor	
S. 56. Revocation of will be testator's Marriage.	
S. 57. Revocation of unprivileged will or codicil.	
S. 58. Effect of obliteration, interlineation, or alteration in unprivileged will.	
S. 59. Revocation of privileged will or codicil.	
S. 60. Revival of unprivileged will.	

PART XI CONSTRUCTION OF WILL	
S. 61-98	S. 22
Requests and Legacies SS.99-166	
Election SS. 99-177	S. 24
Gifts in Contemplation of Death S. 178	S. 31
Grant of probate and letters of Administration SS. 179-330	
Miscellaneous SS.331-333	

INDIAN SUCCESSION

ACT. 1865

(ACT X OF 1865

INDIAN	KENYAN
S. 1 Short title	S. 1 Short title and Commencement
S. 2. The Act to constitute the Law of British Indian in Case of Intestate or Testamentary Succession Note: The Act was to apply to Europeans; East Indians; National of Indian other than Hindu, Buddhist, and Mohammedan Natives or Indian Christians; Jews; Americans etc	S. 2 Application of the Act, Universal application to all cases of intestate or to the state of deceased persons
S. 3 Interpretation Clause. "Minor means any person who shall not have completed the age of eighteen years, and "minority" means the status of said person.	S.3 Interpretation: "Minor" means any person who is not of full age. "wife" includes a wife who is separated from her husband and terms "Husband" and widowed" shall have a corresponding meaning. 3(2) 3(3) Child Defined

	3(4)
S. 4 Interest and powers not acquired, nor lost by Marriage.	

PART III – APPENDICES

LIST OF SOURCES:

A. VISIT REPORTS

1. Mtwara/Lindi Visit Report
Dr. R. W. Tenga (Appendix “VR”)
2. Iringa/Mbeya/Rukwa visits Reports
P. Mwanagozi
T.R. Mwanayongo (Appendix “VR-3”)
3. Mbeya Re-visit Report
P. Mwanagozi
T.R. Mwanayongo (Appendix “VR”)
4. Dodoma/Morogoro visit report
Prof. R.L. Mbise
A.A. Rwegalulira (Appendix “VR-4”)
5. Tabora visit report
Y. Shikelly
T.R. Mwanayongo (Appendix “VR-5”)
6. Arusha/Kilimajaro visit report
Commissioner G. Liundi
G. Ngotolainyo

7. Dar es Salaam/Dodoma/Iringa/Morogoro Court and other Institutions visits report
T.R. M wanayongo (Appendix "VR-7")
8. Zanzibar visit report
Dr. P.M. Mwangosi
A.A. Rwegalulira (Appendix "VR-8")
9. Kenya visit Report
Dr. R. W. Tenga
T.R. M wanayongo (Appendix "VR-9")
10. Zambia visit report
Hon. Justice H. Msumi, Chairman LRCT
P.M. Mwangosi (Appendix "V-0")

B. STATUTES

B* TANZANIA

(a) MAINLAND

1. The Children and Young Persons Ordinance Cap. 13.
2. The Adoption Ordinance, Cap. 335
3. The Affiliation Ordinance, Cap. 278
4. The Day Care Centres, Act 1981 (No. 7 of 1981)
5. The Law of Marriage Act. 1971 (No. 5 of 1971)
6. The Education Act. 1978
7. Prisons Act. 1978
8. The Penal Code, Cap. 16.
9. The Probate and Administration Ordinance Cap. 445
10. Resettlement of Offenders Act No. 8 of 1969.
11. The Customary Law Declaration Orders, 1963
12. The Evidence Act, 1967

13. The Criminal Procedure Act, 1985
14. The Probation of Offenders Ordinance, Cap. 247
15. The Age of Majority Act. 1960
16. The Interpretation and General Clauses Act, 1972
17. The Law of Contract Ordinance, Cap. 433
18. The Employment Act Ordinance – Cap. 366
19. Registration of Births and Deaths Ordinance Cap. 106.
20. The Local Government Acts, 1982 (No.7 and 9 of 1982).
21. The Administration – General Ordinance, Cap. 27
22. The Children Homes (Regulation) Act, 1968
23. Indian Succession Act, 1965
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4. The Employment Act of Kenya 1976
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7. The Matrimonial Causes Ordinance, Cap. 152
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2. The Probation of Offenders Act, 147
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16. Custody of Children Act. 1891
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(b) NEW ZEALAND

- The Children and Young Persons Bill 1986

(c) CANADA

C. INTERNATIONAL CONVENTIONS

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F. LIST OF MODEL QUESTIONNAIRES

- General Questionnaire.
- Questionnaire for Local Government Authorities.
- Questionnaire for the Education Authorities
- Questionnaire for Social Welfare Authorities.
- Questionnaire directed to selected Courts, Registry Section.
- Questionnaire for selected Rural Areas.
- Questionnaire for Labour Officers
- Questionnaire proposed by DCT on Abandonment of ChildCare.

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2. Mr. Kaduri, State Attorney, Mtwara
3. Mr. Mkillanya, Z.U. Regional Welfare, Mtwara
4. Mr. Liso, Resident Magistrate, Mtwara.
5. Mr. Ndimu, A.P.M. Regional Social Welfare, Lindi.
6. Ms. Mungoye, Primary Court (Urban) Magistrate Mtwara
7. Mr. Twende, A, Social Welfare Officer, Lindi.
8. Sister Agatha Kyenye.
9. Mr. Mwihave, Resident Magistrate, Lindi.
10. Mr. Nelson Mwakingwe, Advocate, Iringa.
11. Mrs. Mkusa, Lutheran Day Care Centre, Iringa
12. Mrs. Ro Kumbe, Lutheran Day Care Centre, Iringa
13. Mr. P. Kadunda, Lutheran Dar Care Centre, Iringa
14. Mrs. Ningo, Iringa Railways Nursery School.
15. Mr. Shumbusho, R. M. Iringa.
16. Mr. Kanyama, R.M. Iringa
17. Mr. Mwanja R. M. Iringa.
18. R. M. Madambwe, Senior Primary Court Magistrate.
19. Mr. M.G.C. Kajeri, Senior Resident Magistrate, Mbeya.
20. Mr. J.E. Kayange, Senior Resident Magistrate, Mbeya.
21. E.B.G. Safari, Resident Magistrate, Mbeya.
22. J.B. Mhagama (Mrs) District Magistrate, Mbeya.
23. S.K. Pakilosa.
24. C.P.Lunjombe.
25. R.G.Nyato.
26. M.Kanyopa.
27. E. Mwaibipile.
28. R. John.
29. N.Z.Mcharo-Ag. RAO Mbeya.
30. Mrs. R.J. Mbise-Administrative Officer Mbeya.
31. F.Lyakurwa-DAO, Mbeya.
32. E.E.ME.Nkwama-Registry Clerk, RDD's Office, Mbeya.
33. S. Sawe.
34. B. Matabili.
35. Patrick Kinana, An Evengelista, Utengule-Usangu.
36. Jairas M. Mwambeja.
37. L. Materu
38. A. Mwankusye
39. J.H.Mtande
40. Lazaro Mtamagile
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42. S.M.Mhanginonya
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46. A. Mwakisongo.
47. M.R.Kikossa.
48. H.H. Mwahalila.
49. L.N.Mwahalila.

50. R.R. Mjengwa.
51. E.Mahmele.
52. E.P. Shintindi.
53. J.Mwambete.
54. B.Mwalitageta.
55. S.Mwakalindile.
56. Obel Mwampale
57. Anyegile Kilalanga
58. Busiku Mboma.
59. Matai Syabopela.
60. Asumwisye Maahula.
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67. A.Hau.
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70. G.P. Mwanjebela.
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75. F.J. Mashua.
76. F. Foya.
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78. H.Mwailunga
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80. R. Bahari.
81. C.P.Amlima.
82. R.J. Kaimiaru.
83. J.Chisanehe.
84. Sister Swera, Katandala Children's Home.
85. Sister Luciana, Katandala Children's Home.
86. Local Government Councillors, Mazwi Sumbawanga.
87. M. Massanja.
88. E.R. Mahungu.
89. R.A.Mwajeha.
90. E.N.Chibona.
91. F.Z.Kifunda.
92. S.M.Kanondo.
93. R.A. Kisesa.
94. D.T.Kahondele.
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96. M. Kalenzi, Social Welfare Officers, Sumbawanga.

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102. Mary Chakudikma.
103. Mrs. L. Msuya Sisimba Primary School, Mbeya.
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105. Beti Mkumbe "do"
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116. A.T. Lema – Asst. Reg. Supper. Prison Officer, Arusha.
117. Emmanuel Mrita – Prison Officer Arusha.
118. Tabwa Haruna – Prison Officer Arusha.
119. Mohamed Matimba – Prison Officer, Arusha.
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121. Asheri Sabugo "do"
122. H.S. Mangare – Senior Primary Court Magistrate, Arusha.
123. Mr. Maziku, Labour Inspector
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133. Mr. Mohamed Abdallah-Asst.-Probation Officer
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136. Mrs. Rahima Mohamed Maan-Child Care Officer, Nyumba ya Waded Forodhani.
137. Mrs. Fatuma Abdalah Mohamed - Director, Pre-school Dept.
138. Mrs. Hamida Hassan, Headteacher Kidutani Pre-school
139. Sheikh Omari Musa, Executive Secretary, Wakf and Trustee Commission.

140. Mr.
141. Sheikh Musa Makongu, Kadhi, Kadhi's Court.
142. Mr. Iddi Napuri, Director, Labour Department
143. Mr. Moh'd A. Salum, Labour Relation Officer.
144. Mr. Juma R. Juma, Planning.

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153. Mrs. Theresia Alban Ali-MP.
154. Mr. Mohamed Abdi Mohamed-Regional Secretary (Mjini Magharibi)
155. Madiba Farid Ali-Accountant, UWT
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163. N.N. Chuulu-Asst Senior Research Fellow
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165. F.Mwambu-Deputy Commissioner for Social Welfare
166. K.W. Kamalata-Asst. Commissioner
167. W.Mwanguku-Asst. Commissioner
168. J.M.Chitunami-Asst. Commissioner
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183. P.S. Ndalama - Executive Officer.
184. S. Sinkala-Child Care Officer (Pre-school)
185. Grace Ndilla-National Executive Secretary, Child Care and Adoption Society (CCAS)
186. Collins J. Mhando-Executive Member (CCAS)
187. Exidah Mutonwa-Executive Member (CCAS)
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190. Frank-Principal, Makambala Approved School
191. M.B. Mulendago-Vice Principal, Makambala Approved School.

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198. Head of Mama Ngina's Home
199. Head of S.O.S. - Children's Village
200. Mrs J.K.Umbina-National Executive Officer, Child Welfare Society of Kenya (C.W.S.)
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