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ZANZIBAR

THE CHILDREN'S ACT OF ZANZIBAR (2011): PROCESS, PROGRESS AND POTENTIAL

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Résumé

Ce texte traite de l'adoption et de la portée du Children's Act de Zanzibar, sanctionné et entré en vigueur en 2011. Il s'intéresse sommairement au processus de participation, notamment celle des enfants, ayant conduit à son adoption finale. Nous nous arrêterons plus particulièrement aux articles consacrés au domaine de la justice pour enfants (c'est-à-dire la protection de l'enfance, la délinquance juvénile et le témoignage des enfants). Le texte souligne l'interface entre la loi et l'Islam, qui est la religion dominante à Zanzibar. Il jauge l'impact que pourrait avoir cette nouvelle loi dans la construction d'un Zanzibar plus sensible à la situation des enfants.

I THE ZANZIBARI CONTEXT

Zanzibar comprises two islands (Unguga and Pemba) situated off the coast of mainland Tanzania. It has a brutal history as a central site from which slave traders plied their business. It had a long history under British colonial rule, which ended in 1963. A bloody revolution which led to the overthrow of the Sultan of Zanzibar and his Arab Government took place shortly thereafter in 1964, ending 200 years of Arab rule of Zanzibar as an overseas territory of Oman. The new President negotiated a merger of the archipelago merged with mainland Tanganyika to form the United Republic of Tanzania. However, Zanzibar maintains a separate legislative and parliamentary functional competence over areas which are not constitutionally a central function (these are areas such as police, defence and foreign affairs). Thus, the Revolutionary Government of Zanzibar has the authority to legislate for family law, child protection, and procedural law (amongst others). It also maintains a separate civil and criminal court system from that of mainland Tanzania.

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* University of the Western Cape and Leiden University. The chapter is substantially based on a chapter which appeared in Chris Maina Peter (ed) *The Zanzibar Yearbook of Law* vol 3 (Zanzibar Legal Services Centre, Zanzibar, 2013). It is reworked for publication here with the permission of the editor and publishers.

Zanzibar, better known for its idyllic beaches and spectacular tropical waters teeming with beautiful fish, has a population of around one million inhabitants; of these, around half live in the quaint and picturesque capital Stonetown (once home to David Livingstone). It is relatively poorer than mainland Tanzania, and within Zanzibar, Pemba island is relatively poorer than the larger Unguga island. Tourism is the main source of income, along with the export of exotic spices, for which the islands are also renowned.

A crucial historical determinant is the Muslim character of Zanzibar. Even whilst under British colonial rule, the functioning of the Khadi's courts to adjudicate personal law disputes was maintained by the colonisers,[1] and adherence to Islam is strictly observed by 95 per cent or more of the population.

After a long period of incubation, Tanzania mainland adopted the Law of the Child in 2009, to give expression to the norms and principles of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. With this, political support for drafting a Children's Act for Zanzibar also took root.

This chapter reviews the adoption and scope of the Children's Act of Zanzibar which was assented to and came into operation in 2011. It will dwell briefly on the participation processes, including participation by children, in the lead-up to the finalisation of the Act. The substantive provisions that relate (especially) to Justice for Children (ie child protection, children in conflict with the law and child witnesses) will be featured.[2] The strive towards institutionalising the groundwork for a 'child friendly' Zanzibar will be gauged.

II PROCESS OF DEVELOPING THE ACT

The Children's Act was developed over the period 2009 to 2011 in a consultative process led by the Ministry of Labour, Youth, Women and Children. Working with a 'zero draft' based on examples drawn from legislation in other countries in the region, including mainland Tanzania, South Africa, Malawi and Botswana, a series of workshops was held with government departments, civil society organisations, professional organisations (eg the Zanzibar Women Lawyers Association), national bodies (eg concerned with disability and with HIV), members of the judiciary of the High Court, and

[1] Abdulkader Hassim Abdulkader 'Reforming and retreating: British policies on transforming the administration of Islamic Law and its institutions in the Busa'idi Sultanate 1890–1963' Unpublished LLD thesis, University of the Western Cape, 2008.

[2] This chapter therefore does not deal with foster care, approved schools, residential establishments and day care centres, special measures of protection (mainly concerning child labour), consent to medical intervention, and kafalah and adoption. *Kafalah* is the Islamic institution for transferring the care of a child to an adult guardian, although legally the tie with birth parents is not severed, nor does the child adopt the name of the guardian. See Art 20 UNCRC and M Assim and J Sloth-Nielsen 'Kafalah as an alternative form of care' (2014) 2 African Human Rights Law Journal 322.

representatives of the Khadi's courts, which adjudicate Muslim personal law disputes. A key event to lay the ground work for eventual support of a child rights-based law was a dedicated one-day workshop which was convened with Muslim religious leaders in order to probe the intersections between Islam and children's rights. Drawing on texts from the Koran, a study on the topic undertaken by Al-Azhar University in Egypt for UNICEF, and other published work by Islamic scholars concerned with children's rights, the workshop led to the understanding that children's rights feature prominently in Islam, and that coherence between international treaty precepts and the Koran can be identified. This workshop was probably crucial to paving the way for the passing of the Act by the Revolutionary Government of Zanzibar.

A unique feature of the process was the far-reaching and dedicated child consultation process that took place, led by Save the Children Sweden on behalf of the Ministry responsible for spearheading the drafting of the law. This was to be the first time that children in Zanzibar had participated in law or policy processes.

A team from Save the Children worked on developing a common set of questions and on training facilitators to the requisite standards and in the necessary techniques of focus group work with children. Facilitators drawn from local non-governmental organisations and communities were carefully selected and trained. The collaborative Zanzibari strategy for engaging children in the reform process commenced with utilising existing child participation structures, namely the Children's Advisory Boards (CABs), although these were rather new, having been established only slightly earlier in 2009. An ambitious plan was envisaged: that a group of children would be consulted in each and every shehia (the lowest administrative unit at village level) on the islands of both Unguga and Pemba – in other words, reaching to children in their own communities and on such a scale that a truly national picture could emerge. It was subsequently suggested that the consultation with children should be led by children. Consequently, the CABs trained children from the Children's Council to lead the consultations with the support of adults.

In total, 514 children drawn from the 100 shehias over 10 districts on the two islands of Unguga and Pemba took part in the consultations. The children were stratified in gender, age and vulnerable groups, though some were young adults of between 18 and 21 years. The children were consulted through either focus groups, featuring peer-to-peer awareness-raising and information-sharing activities, or through targeted individual interviews, capturing the testimony of 60 vulnerable and most-at-risk children in 13 groups. Three overarching themes guided the consultations, namely child protection, discrimination and participation.[3]

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[3] Save the Children et al *Capturing children's views on the Children's Bill 2010: National Child Consultation programme in Zanzibar* (Save the Children, Zanzibar, 2010) pp 12–13 (available at http://resourcecentre.savethechildren.se/sites/default/files/documents/3700.pdf, accessed 29 May 2015).

Some of the key conclusions reached at the end of the consultations with children, which informed the draft Bill were as follows:

- on child protection, 85 per cent of the children consulted were of the view that a law protecting their rights and interests was vital, while 92 per cent felt that the state had a responsibility to protect vulnerable children and children in need of care and protection;
- on corporal punishment, 77 per cent of the children described it as harmful, arbitrary and meaningless, while over 80 per cent recommended that it should be banned in schools and alternative forms of discipline promoted; and
- on the best interest of the child principle, most (90 per cent) of the children held the belief that every child in Zanzibar had a right to live free from discrimination. They also acknowledged that in addition to enjoying their rights, children had duties towards their families and communities; 82 per cent of the children were of the view that children had a right to participate in decisions affecting their lives.

The relatively small and geographically accessible population clustered on Pemba and Unguga islands undoubtedly contributed to the success of the strategy adopted in consulting children about the law, and the extensive consultation process in Zanzibar has been hailed in the region as a good practice example. Zanzibari children's voices were exposed to their own community for the first time, and the initiative gave a huge boost to the nascent CABs.

III SCOPE OF THE ACT AND FOUNDING PRINCIPLES

The Act comprises 139 substantive sections, some divided into many subsections, and these sections appear in eight parts. The first part, Part I, contains the short title and the interpretations section.

Substantively, the Act commences with the domestication of the most important children's rights derived from the international Convention on the Rights of the Child and the regional treaty, the African Children's Charter, in Part II, which is titled best interests and rights of a child.[4] These comprise 12 discrete rights, including the best interests of the child principle, the principle of non-discrimination, child participation and the right to be provided with certain conditions of living. The formulated rights are not on all fours, or copied directly, from traditional formulations, but are tailored to the needs and requirements of the Zanzibari community.[5] So in relation to the right to registration of birth (s 8(1)), s 8(2) continues to require health authorities and any other relevant person or agency to cooperate in measures to secure the

[4] Both treaties have been ratified by the United Republic of Tanzania.

[5] However, s 4 which provides criteria for the determination of the best interests of the child appears to draw largely for the formulation in the South African Children's Act 38 of 2005.

registration of all births. This provision holds the potential to advance the rate of birth registration in so far as it lays the basis for health authorities to play an explicit role in advancing notification of births. Section 9 provides for the child's entitlement to live with parents, guardians and families, and for the right to grow up in a caring and peaceful environment; a child separated from a parent shall have the right to maintain personal relations and direct contact with both parents on a regular basis, except where this is not in the best interests of the child.[6]

The provisions of section 10 establish children's right to (inter alia) nutrition, education (including religious education), shelter, appropriate clothing, appropriate care and protection, and sport, all of which are the duty of parents to secure within their available resources. However, in line with the provision of Art 20 of the African Charter on the Rights and Welfare of the Child (1990), s 10(3) provides that government may, in accordance with its national means, if needs be together with partners, provide assistance to parents in cases of need by providing material assistance and support. The last subsection in this part provides that a child of 16 years or older has the right to relevant information concerning health care and healthy development, including appropriate information related to HIV.[7] This age threshold for a right of access to health care information seems unusually high, and can be regarded as contrary to the advice of the Committee on the Rights of the Child in General Comment no 4 (Adolescent Sexual Health and the Rights and the Child, 2004) as well as General Comment no 3 (HIV Aids and the Rights of the Child, 2003). Subsection (6) of the same section provides (uncommonly) for the right of the child who has been sexually abused to be medically examined immediately after reporting the alleged commission of an offence to the police. Casting this as a right of the child is rarely encountered, though undoubtedly a wise and positive move.

Child abuse by any person having care of custody of a child is criminalised in s 15(a), with sexual abuse by any person also made an offence in s 15(b). Female circumcision is included expressly as a form of abuse. It is unclear the extent to which this overlaps with, or differs from, general sexual offences laws

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6 Section 9(4).

7 See also further Part X of the Act, titled 'Consent to medial intervention and HIV-Testing'. This part affirms the age of 16 as the age at which a child can consent to medical intervention upon him or herself, also for consent to surgical procedures (s 111(1)(a) and (b)) provided that in the latter case the child must be duly assisted by his parent or guardian. Section 111(2) permits a child who is 16 years or older to furnish consent for an HIV test upon himself or herself, or if the child is under the age of 16 years, he or she may consent provided that the child is of sufficient maturity to understand the benefits, risks and effects of such a test (s 111(2)(a)(i) and (iii)). Both for generalised consent to medical treatment and for consent to HIV testing, the age threshold of 16 is high in the modern era, where increasing recognition has been given to children's evolving capacity and ability to make reasoned decisions at a much younger age. It is, however, reflective of the conservative nature of the community of Zanzibar.

that apply in Zanzibar,[8] but as the provision is drafted, the offence created in the Children's Act is not limited to sexual offences committed by parents or care-givers, but by anyone.

Some of the other principles in this part are also accompanied by a penalty provision, which provides for a criminal sanction for the contravention of certain of its provisions, namely ss 6,[9] 11,[10] 13,[11] and 14(1).[12]

As is required by the African Children's Charter in its Art 31, the final principle concerns the general duties of the child. These are couched in words that are more or less identical to those found in the treaty, with one addition, namely the duty to respect and abide by the laws of the land. The Charter limitation in the preamble to Art 31 is included in a proviso to s 17: namely that a child's responsibilities are dependent on the age, maturity, stage of development and ability of the child, and that they are moreover subject to the limitations contained in the Act itself (eg for instance the part concerning child labour).

IV ESTABLISHMENT AND JURISDICTION OF THE CHILDREN'S COURT

Part III of the Act provides the legal framework for the establishment of a specialised justice for children system founded on a dedicated children's court for each region. A children's court has in fact been set up in Stonetown, with

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8 For instance in the Penal Code or in a dedicated Sexual Offences Act.

9 Section 6(1) provides for the child's right to live a life free of discrimination, and s 6(2) provides a series of listed grounds upon which discrimination is outlawed (gender, race, colour, disability, health status (including HIV status), rural or urban background, birth etc). This may be the first time that discrimination on the basis of HIV status as been expressly included in a non-discrimination clause.

10 Section 11(1) provides that no person, institution, authority or other body shall treat a child with a disability in a degrading manner. Section 11(2) provides for the right of the child with disabilities to special care and protection and to have effective access to and receive inclusive and non-discriminatory education, health services etc. The elaborate formulation of s 11(2)'s provisions concerning children with disabilities appears to be unparalleled in children's legislation in the subregion, including by comparison to the South African Children's Act 38 of 2005, which has been hailed as unusually disability-friendly.

11 Section 13 provides that (subject to s 18(2)), upon the death of a child's parent, a child shall not be deprived from the inheritance of his deceased parents.

12 Section 14(1) contains the well-known prohibition on torture, cruel and inhuman or degrading treatment or punishment. Added to the standard phrasing is the addition of a prohibition of violence (eo nomine), which accords well with the current thrust on ending all forms of violence against children (https://srsg.violenceagainstchildren.org). The wording also includes a prohibition on any cultural or traditional practice which dehumanises or is injurious to the child's physical and mental well-being. Section 14(2) however provides that the prohibition on all forms of violence against children does not encompass parental discipline, as the provision permits parents to discipline their children which 'shall not amount to injury to the child's physical or mental well being'. Equally, it is clear that corporal punishment in all other settings – alternative care facilities, education facilities – is now outlawed on pain of criminal sanction. Children's views on the effects of corporal punishment articulated during the child consultation process were clearly swept aside in the formulation of this provision.

effect from July 2013, and a regional magistrate designated by the Chief Justice to serve as presiding officer. Separate and child friendly facilities have been put in place: the court is separated from the usual courts in the building, with child friendly waiting areas and aids for giving testimony have been installed. There is a second children's court on Pemba island now.

The Act provides that the court shall have jurisdiction to make care and protection orders, maintenance orders, custody, guardianship and access orders, orders of parentage,[13] and additionally the court has jurisdiction to hear criminal charges allegedly committed by young persons under the age of 18, save for the offences of murder, manslaughter, treason or rape.[14]

An important exclusion from the jurisdiction of the children's court is contained in s 18(2), which preserves the jurisdiction of the Khadi's courts as set out in s 6 of the Khadi's Courts Act, no 3 of 1985; more specifically, this entails that Khadi's courts' determination of personal status, marriage, divorce and maintenance, and inheritance proceedings concerning children born of Muslim parents shall be unaffected by the equivalent provisions of the Children's Act. This does not exclude the jurisdiction of the children's court in all non-criminal matters, as is evident from the section which follows, s 18(2)(b). This subsection provides that where a non-criminal matter (ie the orders specified in s 18(1)(a), for instance a care and protection order) involves parents subscribing to the Islamic religion, the children's court must be assisted by a suitably qualified person of that religion to ensure that orders made are consistent with the Muslim faith.

However, since divorce and its aftermath for Muslim parents is to be determined by religious courts, equally guardianship, custody, access and maintenance will for the greater part not be dealt with in the children's court, given that the overwhelming majority of the population of Zanzibar is Muslim. However, the jurisdiction to deal with child protection matters involving Muslim children is evidently retained by the children's court, even if it involves the court making orders that affect care, custody and access to children. Parentage determination might also be the exclusive preserve of the children's court since this does not appear to be a function of the Khadi's courts, unless it is understood to be part of the determination of personal status.[15]

Section 18(3) lays the basis for the development of child friendly procedures and a specialised children's court, in so far as it enables the Chief Justice to promulgate regulations to designate premises used as a primary court to function as a children's court, and to designate district court magistrates to entertain cases involving children. Regulations are contemplated concerning the

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[13] Part V1 of the Act deals with parentage, custody, guardianship, access and maintenance. For reasons of space the details will not be discussed in this chapter. It must be borne in mind that the provisions will apply by and large only to persons not of the Muslim faith.

[14] Section 18(1)(a) and (b). These offences must be tried in the High Court.

[15] However, s 18(2)(c) clarifies that proceedings may be instituted in one court only where there is a choice of forum.

layout of the children's court or a court functioning as such, the informality of proceedings, the attire of court officials and any other measure aimed at contributing to putting children at ease. These regulations were developed in a consultative process in 2013, and have been submitted to the Chief Justice for consideration and gazetting.[16]

Section 18(4) provides that every children's court shall, in addition to the presiding magistrate, sit with at least two other persons (appointed by the Chief Justice) who have special knowledge in child welfare or child psychology, or who have been actively involved in health, education or welfare activities pertaining to children. In practice, officials from the Department of Social Welfare serve this role, and sit en banc with the regional magistrate in the children's court in Stonetown in both civil and criminal cases. The extended bench is, however, subject to section 18(5): according to this subsection the regional magistrate is empowered to sit alone when minor criminal charges concerning children are at stake. Children court proceedings are to be held in camera,[17] must take the best interests of the child as their primary concern, and are authorised to make a range of necessary orders and to vary or amend these or make auxiliary orders.[18] Appeals, which must be made within 30 days, lie to the High Court.[19]

V CARE AND PROTECTION OF CHILDREN

Part IV of the Act provides the first foundation for a child care and protection system, outlining in s 19(1) when a child could be regarded as being in need of care and protection. Examples include where a child is orphaned or abandoned or has insufficient care or support; or lives or works on the streets or begs for a living; is in a state of physical or mental neglect; is an unaccompanied migrant or refugee; is chronically or terminally ill including a child affected by or infected with HIV/Aids; who lacks a suitable care-giver and who is being or is likely to be maltreated, neglected or abused. A total of 11 situations are included. Section 19(2) provides for a list of circumstances in which a child may (after investigation) be found to be in need of care and protection (such as children living in child-headed households, child victims of child labour, and children living in a violent family environment, including a child named in a protection order issued by a court). The finding in these instances is, however, discretionary and dependent on the individual circumstances, as a care and protection order may not ultimately be warranted.

Section 20 sets up a system of mandatory reporting[20] of child abuse and neglect; this duty is imposed upon a list of obligated reporters who, in the

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16 The author was the consultant who oversaw the process of development of these regulations.

17 Section 18(8), with exceptions for parents or guardians and officials whose presence is necessary for the case.

18 See s 18(9) for a broad list of functions and powers.

19 Section 18(10), (11), and (12).

20 For a broad overview of the history of mandatory and community reporting systems, see J

course of the exercise of their duties, may encounter evidence of child abuse and neglect.[21] The statutory standard is a 'reasonable belief that a child's rights are being significantly infringed including abuse of a child or because a child's parent or guardian is able, but refuses or neglects, to provide the child with the conditions of living set out in section 10 of the Act'. The obligated reporters are then compelled to report this to the Director of Social Welfare, a welfare officer, a police station or the sheha.[22] This entrenches a response potentially at local level, as the sheha is the lowest level of district administration. Provision is made for an allegation of abuse or neglect made to a police station or a sheha to be reported in the prescribed manner forthwith (but not later than within 24 hours) to the relevant welfare officer.[23] This is to trigger a social welfare response to the report received.

In s 20(3), additional to mandatory reporting by professionals, provision is made for so-called community reporting, ie any member of the community (including a child) who reasonably believes that a child is or may be in need of care and protection may report this to a person mentioned above. No sanction for non-reporting is (obviously) provided.

Nor, for that matter, is a criminal sanction provided for professionals who fail to report under s 20(1), which may be unusual, as the threat of penal sanctions is the traditional way in which mandatory reporting laws have been given teeth (at least in theory).[24] Instead, s 20(5) provides that contraventions may render a professional subject to the disciplinary provisions of their respective professional codes of conduct.

Section 21 of the Act further entrenches the nascent child protection system, by providing that the welfare officer must, within 14 days of the receipt of the report made under s 20, conduct a risk assessment in relation to the child. Risk assessment is a process of investigation which is intended to determine principally whether the child is in need of immediate protective services requiring an application to the children's court.[25] If a court application is not required, other measures such as requiring the parents or guardians to comply with certain measures can be discussed.[26] The specific actions of the welfare officer acting with the consent of the parents or guardians include advice and

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Sloth-Nielsen 'Chapter 7: Child Protection' in A Skelton and CJ Davel, *Commentary on the Children's Act 38 of 2005* (Juta and Co, Cape Town, 2007 with looseleaf updates).

21 Mentioned are a school or madrassa teacher, doctor or medical officer, occupational therapist, staff at a pre-school or place of safety, legal practitioner and so forth.

22 Reports made in good faith are exempt from civil liability in case of mistake, and the identity of the reporter is confidential: s 20(4).

23 Section 20(2).

24 B Mathews 'Exploring the contested role of mandatory reporting laws in the identification of severe child abuse and neglect' in M Freeman (ed), *Current Legal Issues Volume 14: Law and Childhood Studies* (Oxford, Oxford University Press, 2012) pp 302–338.

25 Section 21(2)(a). If the commission of an offence is suspected, this must be reported to the police: s 21(4).

26 The Regulations on Child Protection, developed in 2012, provide for the convening of a case conference with relevant stakeholders by the welfare officer in order to develop a plan to advance the protection of the child.

counselling, placement in foster care or in an institution, organising medical care (including mental health care), organising disability aids, and the provision of education or training for the child.

The children's court, when seized of the matter, is empowered to make a variety of orders, including requiring parents or guardians to give an undertaking to exercise proper care and guardianship.[27] An emergency protection order issued in terms of s 22 can be utilised to authorise a welfare officer (if needs be accompanied by a member of the police) to enter premises to search for and remove a child who is in need of immediate emergency protection or is exposed to a 'substantial risk of imminent harm'.[28] In such instances, the child must appear before a children's court as soon as possible,[29] but not later than within 7 days of the emergency removal.[30] A child's parent or guardian is to be informed as soon as possible about the removal of the child, and the child shall be permitted to have contact with them unless that is not in the best interests of the child.[31] Emergency protection orders may be renewed for 7 days at a time, but the finite period for such extension is 30 days.[32]

A third order that the children's court can make is a supervision order, which does not interfere with the legal rights of parents, but which aims to prevent harm to the child and to take reasonable steps to promote the best interests of the child whilst enabling the child to remain in the family home and community.[33] Such supervision order can only be made after consideration of a social welfare report as provided for in s 27 of the Act. The order can place the child under the supervision of a welfare officer or any fit and proper person in the community;[34] where the placement is with a member of the community, the welfare officer must satisfy himself or herself on a regular basis that the supervision is in the best interests of the child, and must take responsibility for all reports, applications and reviews that are required.[35] The normal period of a supervision order is envisaged to be one year, although extensions are possible on receipt of a written social worker's report to the effect that the child continues to be at risk and that further extension of the order is in the child's best interests.[36]

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27 Section 21(2)(b)(ii).
28 Section 22(1).
29 Section 22(4).
30 This is in line with Art 25 of the UN Convention on the Rights of the Child, which provides for periodic review of placement of children who have been removed by the competent authority.
31 Section 22(5).
32 Section 22(6). The child's parent or guardian is entitled to be heard during any application for renewal of an emergency protection order: s 22(7).
33 In line with the UN Guidelines on Children in Alternative Care (2009), which emphasise prevention of children entering alternative care in the first place.
34 Section 23(7).
35 Section 23(6).
36 Sections 23(7) and (8).

A fourth possibility is a care order in circumstances where a supervision order would not be sufficient to secure the care and protection of that child.[37] Such an order removes the child from any situation where the child is suffering (or is likely to suffer) harm; such an order then also transfers the parental rights to the welfare officer or to such other person determined by the court. In line with the suitability principle of the UN Guidelines on Alternative Care (2009), provision is made for placement with another parent, guardian or relative; an approved foster parent; a prospective adoptive parent; a fit and proper person; and finally an approved residential establishment.[38] However, the criteria for issuing a care order are strict: s 24(4) confirms that all possible and practicable methods of protecting the child must have been tried without success, that the child is suffering from or is likely to suffer from harm, and transferring parental rights is necessary to protect the child (the 'necessity principle' of the UN Guidelines on Alternative Care).[39]

Care orders have an inbuilt limitation, in so far as the initial order may not be imposed for a period of more than 3 years, to allow for the possibility of reunification of the child with his or her family, or for permanent placement.

Prohibition orders are provided for next, in s 25. These can be part of proceedings for a supervision or care order, and prohibit a named person (including potentially a care-giver) from having contact with a child. Such order must be necessary for the protection of the child and to safeguard the child's best interests and its duration should be specified. Contravention of the terms of a prohibition order is a criminal offence.

Section 26 provides for a wide variety of additional orders that a children's court is empowered to make, such as an order instructing a parent or guardian to undergo professional counselling or participate in mediation or another appropriate problem-solving forum; instructing the child to participate in a professional assessment; and instructing a person to undergo a specified skills development, education, training, treatment or health rehabilitation programme, to cite a selection of the variety provided for.

Social welfare reports are mandatory before a children's court can make a care order, a supervision order or a prohibition order. They must be undertaken after home visits and interviews with the appropriate persons (parents' guardians or relatives), and the views of the child capable of forming a view must be ascertained and reflected in the report, whether the welfare officer agrees with the views of the child or not. Motivated solutions to the action recommended to be adopted by the court must be included in the report, and

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[37] Section 24.

[38] Section 24(3). There are dedicated Parts of the Act which regulate residential establishments and foster care; Part XII and Part VII respectively. They are not discussed in detail in the body of this work.

[39] Section 24(5). A number of further guiding principles are provided, such as the desirability of keeping siblings together, the desirability of continuity in a child's upbringing, and importantly, the views of the child: s 24(6).

the court is obliged to take into account the information contained in the report. If the court is not satisfied with the recommendation of the welfare officer, it must record reasons for deviating from these recommendations.

Where a child is as a last resort separated from his or her parents, guardians or care-givers, the parental responsibility for that child is transferred to the person in charge of the approved residential establishment or foster parent with whom the child is placed. This does not mean that parental rights have been transferred, however (s 32(2)). It means that the child's well-being and development must be promoted by the duty bearer, including planning for reunification where this is consistent with the child's best interests, encouraging the child to have contact with parents, relatives and friends, and encouraging independence and self-reliance where the child is unable to return to his parents. Removing a child without reasonable cause from a location where a child has been placed by order of court constitutes a criminal offence.

VI CHILDREN IN CONFLICT WITH THE LAW

As is the case with a number of recent African children's statutes (Malawi, Lesotho, Sierra Leone), the Zanzibar Children's Act combines the protection of children from abuse and neglect with detailed provisions concerning children in conflict with the law. Setting a minimum age of criminal responsibility at 12 years,[40] but retaining a rebuttable presumption for children aged between 12 and 14 years,[41] the Act provides for the possibility of an evaluation of the criminal capacity of the child by a suitably qualified expert at the behest of the Director of Public Prosecutions or the child's legal representative.[42] Section 36 of the Act provides for the determination of age where it appears to a court that the person appearing before the court is a child. Documentary evidence may be called for, and medical examinations ordered for this purpose.

The Act contains limits on the use of deprivation of liberty (arrest) – unless there are compelling reasons justifying an arrest or the offence is in the process of being committed, arrest may not be used where the offence in question is one contemplated in Sch 1.[43] Furthermore, the conduct of police officials effecting the arrest of the child must include informing the child of his or her rights, including the right to obtain legal assistance, explaining the procedures to be followed in terms of this Act, informing the child of the right to parental assistance and notifying the child's parent or an appropriate adult of the arrest,

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[40] This is consistent with the age proposed in CRC Committee General Comment no 10 (Child Rights in Juvenile Justice) (2007).

[41] To rebut the presumption it must be proved that at the time of the act or omission, the child had the capacity to know that he or she ought not to have acted thus or made the omission.

[42] Section 35(3).

[43] Schedule 1 offences include theft, fraud, robbery where not aggravating circumstances exist, malicious injury to property, common assault, blasphemy, crimen iniuria and defamation, trespass, and any statutory offence where the maximum penalty determined by statute does not exceed one year of imprisonment.

where circumstances permit and they can be located.[44] This must happen as soon as practicable after arrest, but parents and a probation officer must be notified no later than 24 hours after such arrest.

Where an offence listed in Sch 1 is at stake, the police are empowered, instead of initiating a prosecution against a child, to issue a caution to the child not to re-offend. Such a diversionary caution may be used as evidence against a child should the child later re-offend.

Section 39(2) contains provisions providing for the release of a child who has been apprehended into the care of parents, guardians or family members, with or without sureties. This again promotes the principle of restriction of liberty as a last resort and for the shortest period of time, as provided for in Art 37(b) of the United Nations Convention on the Rights of the Child. If not released, the child may be detained in a children's remand home or place of safety (but not in a police station), unless the police official certifies that it is impracticable or that it would place the child at risk to be so detained in that alternative setting.[45] A certificate that it was necessary to detain the child in police custody must be produced to the children's court, following the example of South Africa's Child Justice Act no 75 of 2008 which provides similarly. The rights of children who are detained in police custody to be kept separately from adults, and to have access to adequate food, water, bedding and medical care are enshrined in s 40(2).

It is also mandated that the child be released into the care of a parent, guardian or other responsible person (with or without sureties) after the child appears in court.[46] A child may also be remanded to await the finalisation of charges in a children's remand home or a place of safety, and, only if a child is 16 years or older and poses a threat to any person, can the child be remanded to an Offender Re-education Centre to await completion of the criminal matter.

It must be pointed out that, as matters stand at present, there are no (formal) alternatives to detention of children in police custody or in the local Offender Re-education Centre, which is a actually the local (adult) prison. An assessment of the child justice system in Zanzibar conducted in December 2013[47] notes that in practice custodial measures (both pre-trial and post-conviction) are utilised for children, frequently because of their family background or lack of a fixed address, rather than due to the seriousness of the offence.[48] In 2011, 15 children were sentenced to detention upon conviction, whilst nearly five times that number were detained on remand. For 2012, the equivalent figures were 11 sentenced, and 61 detained in the pre-trial phase. However, it was also recorded in early 2014 that, since the establishment of the children's court in

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44 Section 37(3) and s 38(a).
45 Section 40(1)(a)-(c).
46 Section 45.
47 Ministry of Empowerment, Social Welfare, Youth, Women, and Children, UNICEF and Save the Children (draft of December 2013 on file with the author).
48 Draft Report (note 47 above), p 69.

Unguga, no child had been sentenced to imprisonment: the court has utilised alternatives through referrals to social welfare services. At the same time, whilst welcoming the introduction of a more child friendly justice system, it is true that:[49]

> 'significant attention needs to be focussed on providing support to the Department of Social Welfare in building the financial technical and human resources required to provide appropriate alternatives to detention for children in trouble with the law if this is to be sustained.'

This will entail the development of diversion options, as well as the sourcing of placement options for children in conflict with the law who do not have families to whom they can be released. That these should be foster placements or small cottage type facilities with minimal deprivation of liberty seems obvious, given the relatively low numbers of children in conflict with the law in Zanzibar likely to need such accommodation. The lack of current facilities should not be seen as an invitation to build expensive prison-like facilities.[50]

As is the case in comparable new children's laws in the region,[51] pre-trial assessment by a probation officer or a social welfare officer is mandatory (see s 41). The objectives of the assessment are fully detailed, such as establishing whether the child in conflict with the law is potentially a child in need of care and protection, gathering background information on the child, his or her family and on other material circumstances likely to be of relevance to the court, and formulating recommendations on release, detention or placement and on diversion. At workshops held in Zanzibar in November and December 2013, it was established that such pre-trial assessments are not yet taking place, although background information about the child's circumstances and the circumstances pertaining to the commission of the offence are collated and presented as pre-sentence reports to the presiding officer. Failure to implement pre-trial assessment will inevitably limit access to diversion and the avoidance of formal criminal proceedings, which has now become firmly entrenched as a norm of international law.[52]

Diversion is indeed comprehensively provided for in the new legislation, and a long list of possible diversion options, modelled on the South African legislation, are provided for. These include an apology, a caution, restitution, community service, referral to a family group conference or for victim offender

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[49] Draft Report (note 47 above), p 70.

[50] See for an overview of some current debates around alternatives for youth incarceration J Sloth-Nielsen 'Deprivation of Liberty as a "Last resort" and for the "shortest appropriate period of time": How far have we come? And can we do better?' 2013 (3) South African Journal on Criminal Justice 316–336.

[51] Notably the South African Child Justice Act 75 of 2008.

[52] See Art 40(3) of the Convention on the Rights of the Child, and General Comment no 7 (Child Rights in Juvenile Justice) of the Committee on the Rights of the Child (2010).

mediation and referral for a counselling or therapy.[53] The child and, if available, his or her parent or guardian must consent in writing to the diversion option to be imposed.[54]

Several sections detail at length the due process or fair trial rights applicable in children's court proceedings, as well as the manner in which information must be furnished to the child in order to ensure his or her participation in the proceedings.[55]

Finally, s 47 spells out the sentencing regime available to judicial officers where a matter involving a child has not been diverted. An impressive array of options is provided: these include dismissing the charges after advice or admonition to the child;[56] dismissing the charge and directing the child to participate in group counselling or similar activities (such as life skills programmes); discharging the child and releasing him or her into the care of parents, guardians, a responsible person or charitable institution able to take care of the child; supervision or probation (which is also accompanied by a discharge) for a period not exceeding 3 years;[57] employing any diversion options previously listed; ordering the payment of a fine, damages, or compensation if the child is in a position to do so;[58] ordering the child to perform community service; ordering the parent or guardian to give an undertaking that will secure the child's good behaviour; and ordering the child to be placed in an educational institution or on a vocational training programme.

More restrictive than the above orders – which seek to minimise deprivation of liberty which result in the child being discharged, thereby ensuring that the child will not have a permanent criminal record against him or her[59] – are the

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53 Section 42(2).

54 This is to ensure that the right to plead not guilty and have the criminal matter proved by the state is respected.

55 See the important role accorded the provision of information in the Council of Europe Guidelines on Child Friendly Justice (2010), echoed in the Guidelines for Action on Children in Justice Systems in Africa (2011) (available at https://sgsrviolence.org), which were endorsed by the African Committee of Experts on the Rights and Welfare of the Child in 2012.

56 It is clear that this option must be accompanied by an assessment or pre-sentence report; counsel may also be provided to the parent of the child.

57 In practice probation seems to be an option that the children's court prefers, as its first three sentences involved periods of probation (2 years and 1 year respectively). The Draft Assessment Report (note 47 above at p 68) points out that the exact role of the probation officer in monitoring good conduct is not yet clear. How many visits must take place, what the role of the probation officer is in working towards rehabilitation and providing support services, and so forth must still be fleshed out.

58 It is worthy of note that a significant proportion of the non-economic offences coming to the attention of the children's court seem to involved consensual sexual activity between young people, which is charged as the offence of abduction. These offences (which in the view of the author could be tantamount to status offences, in so far as they criminalise acts which are not criminal if committed by persons over 18 years) could ideally be resolved through one of these alternatives already referred to. For a recent South African decision in point, see the Constitutional Court decision in *Teddy Bear Clinic and others v Minister for Justice and Constitutional Development* 2013 ZACC 35.

59 See s 47(3): 'an order contemplated in subsection 1 of this section amounts to the diversion of

orders which follow. These include placement in an Approved School, if such a school is established in terms of Part XI of the Act,[60] and as a last resort, a sentence of imprisonment in an Offender Re-education Centre, provided that the child has attained the age of 16 years and has been convicted of the commission of an offence listed in the second schedule to the Act, or is a repeat offender in respect of a Sch 1 offence.[61] Referral to an Approved School, where a child is above 16 years of age, is for a period not exceeding 2 years, whilst in the case of any other child, the order ceases when the child ceases to be a child, ie at 18 years.[62] The order may not be made unless there is a vacancy, and the committal must be reviewed by the Court annually to determine whether detention continues to remain necessary and in the child's best interests.[63] This annual review must include reports from the Responsible Officer of the Approved School and from the social welfare officer.[64]

In full compliance with international law, both corporal punishment as a judicial sanction and the death penalty are outlawed.

It is clear that the legislation sets a solid framework for the development of a child justice system for children in conflict with the law that is appropriate to the economic and prevailing socio-political conditions in Zanzibar. What now needs to happen is a concerted effort to upskill all stakeholders, commencing with the police who are the point of first contact with the criminal justice system, and who can play a valuable role in developing front line diversion. Training for probation officers is also warranted. An appropriate case

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the child away from the criminal justice system, except for an order that involves the payment of a fine or the orders contemplated in subsections (g) [community service], (j) [placement in an Approved School] and (k) [sentencing to imprisonment]'. See further s 52(1) which provides that no child shall incur a criminal record for a diversion or a conviction and sentence imposed in terms of this Part other than for a conviction and sentence imposed in respect of an offence listed in the second schedule of the Act. This in practice moves Zanzibar quite close to the current call to separate the concept of responsibility from the concept of criminalisation (see www.crin.org/docs/Stop_Making_Children_Criminals.pdf) in so far as only a highly limited number of children in the system will get a criminal record.

60 There is not one at the moment. See J Sloth Nielsen et al 'Surveying the research landscape for child law reform in Africa', African Child Policy Forum, 2007 for a plea that trenchant discussion about the need for, purposes and objects of such alternative institutions need to take place prior to their establishment. Their relevance in the African context seems dubious, and the skills they impart are often reminiscent of colonial times and unsuited to the modern era. Furthermore, their potential to becoming sites of violence and abuse is legendary, and often, governments lack the fiscal means to maintain them and cover running costs on an ongoing basis.

61 Schedule 2 offences include serious offences such as murder, manslaughter, abduction, kidnapping, robbery with aggravating circumstance or a firearm, rape and the commission of any unlawful sexual offence, trafficking of persons, offences relating to arms, ammunition, firearms and explosives, and statutory offences with a maximum penalty in excess of one-year imprisonment as provided by that statute.

62 The Court is empowered to impose a shorter period if it deems it expedient to do so: s 47(7).

63 This is a particularly welcome provision, as it allows a court to maintain an ongoing oversight role in the well-being of the child, and which fulfils Art 25 of the UN Convention on the Rights of the Child which requires periodic monitoring of orders placing a child in alternative care.

64 It would be ideal if it was specified, too, that the Court must hear the voice of the child in conducting any such annual review of placement.

management system must be instituted in the children's court to expedite the finalisation of cases which cannot be diverted. Basic diversion options – at minimum a life skills programme and community service – would be useful in dealing with cases in Stonetown where sufficient numbers of children pass through the system to warrant the investment. Judicial officers in other regions, having been sensitised to the details of the Act's provisions, can be encouraged to develop local diversion options building on the variety permitted in the Act. Finally, a coordinating committee (comprising all stakeholders including staff at the Offender Re-education Centre) should meet at least quarterly, and have at their disposal up-to-date data indicating progress towards implementation.[65]

VII CHILD WITNESSES

In line with international best practice,[66] the Act contains some crucial new provisions aimed at reducing the hostile environment of the court for child witnesses. These provisions must be seen in conjunction with the Zanzibar Evidence Act, which at the time of writing this chapter was under review. The provisions are not contained in a separate part, but appear in s 49 at the end of Part V on children in conflict with the law.

No minimum age is set for children to provide testimony: a child may testify provided such a child is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible. In lieu of taking an oath, a child may be admonished to speak the truth.[67] Every child is presumed competent to testify and may not be a priori excluded from providing evidence unless he or she is found at any stage of the proceedings not to have the ability or mental capacity to respond to questions in an understandable way.[68] In criminal proceedings, the court must attach such weight to the child's evidence as it deems fit,[69] and may convict upon that evidence without corroboration if fully satisfied that the child is telling the truth.[70] The Act confirms that this is also the case for child witnesses in prosecutions for sexual offences.[71]

Although the above provisions may be considered fairly limited in elaborating a 'child friendly justice' regime for child witnesses, they do represent an important starting point to develop further (practical) modes of assistance, such as aides to giving evidence, one way mirrors, and child-adapted places from which children can testify.

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65 Some of these are indeed part of the Children's Court Rules developed under the Act.

66 See the Council of Europe Guidelines and Guidelines on Action for Children in Justice Systems in Africa (note 55 above) and the UNODC Model Law on Child Victims and Witnesses (2010).

67 Section 49(1).

68 Section 49(2).

69 Section 49(3).

70 This provision thus abrogates the evidentiary cautionary rule that applied to the evidence of child witnesses.

71 Meaning those created by the Penal Act No 6 of 2004. See s 49(6).

VIII CONCLUSIONS

Zanzibar's Children's Act was developed in a fully consultational ambience, with obvious support from many stakeholders, including the organised legal profession and officials of the Revolutionary Government of Zanzibar. It contains provisions that have clearly been shaped by law reform in nearby countries in Southern and Eastern Africa, but with some home-grown adaptations and novelties (including the clear recognition of the Islamic faith to which most citizens adhere, and a detailed section aimed at the protection of children in respect of whom an application for kafalah is made).[72]

The most important aspects of the Act (arguably) concern child protection and children in conflict with the law. There has been a demonstrated need to improve responses to children experiencing violence in Zanzibar,[73] and the nascent child protection system and specialised services that the Act establishes provides the bedrock from which major improvements can be made. Similarly, although the number of children in contact with the law annually is relatively small, the present detention scheme, lack of diversion opportunities and lack of specialised, speedy and rights oriented justice services all violate international law. However, equally, the fact that the numbers of children are not overwhelming signals that system reform can be achieved with fairly moderate resources. Again, the Children's Act provides the necessary legal framework within which this can occur.

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[72] These applications must be made to the Khadi's court and not the children's court: s 75(1). See further n 1 above.

[73] The Draft Assessment Report (note 47 above) records that 480 cases of rape against children were reported at the One Stop Centre at Mnazi Moja hospital in July 2012–June 2013, as well as 273 molestation, 53 sodomy cases, and 22 cases of abduction. These figures obviously only reflect sexual matters, and to these must therefore be added instances of physical and other abuse of children.