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Report of the Task Force Appointed to Review and Update the Law Relating to Children

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His Excellency the President,
Hon. Daniel T. arap Moi, C.G.H., M.P.,
President and Commander-in-Chief
of the Armed Forces of the Republic of Kenya,
State House,
Nairobi.

Your Excellency,

THE CHILD LAW TASK FORCE REPORT

Following the signing by Kenya of the U.N. Convention on the Rights of the Child pursuant to Your Excellency's directive and wish that all issues relating to children be given utmost priority, the Child Law Task Force was appointed—

“to review and update the then existing laws concerning the welfare of children; and

to make recommendations for the comprehensive new law relating to children taking into account prevailing local circumstances and encompassing the principles of the United Nations Convention on the Rights of the Child 1989.”

I am honoured to inform you that the Task Force has completed its work and submitted a report to my office in accordance with its terms of reference.

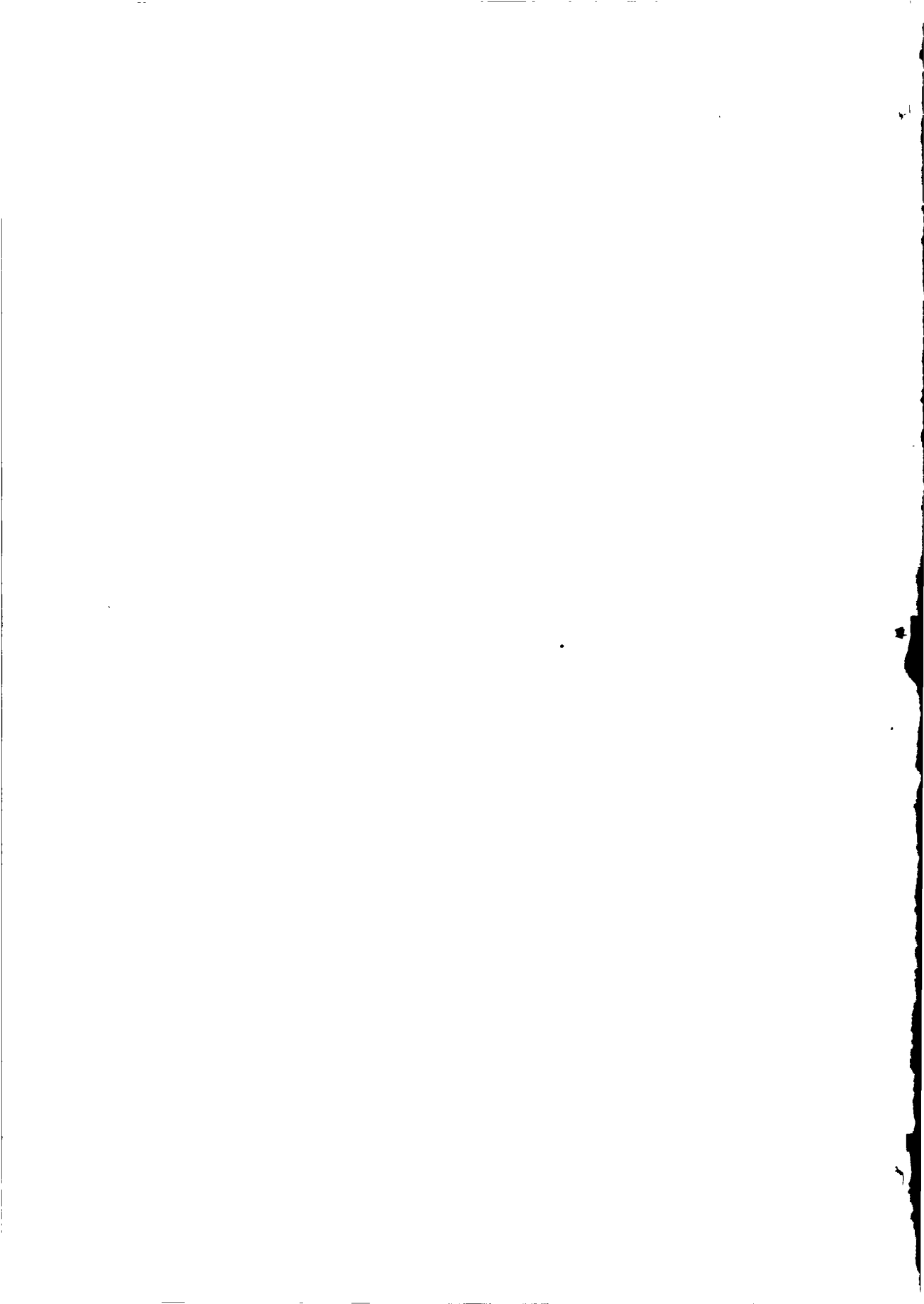
I humbly submit a copy of their Report to Your Excellency particularly in view of Your special interest and concern in matters affecting the welfare of the children.

The submission of this Report is historic in that it is the first report to be submitted by the Task Forces which have been set up by your Government to urgently and expeditiously make recommendation for the reform of key areas of our laws.

Your Most Obedient Servant,



S. AMOS WAKO, E.B.S., E.G.H., M.P.,
Attorney-General.



A NEW LAW ON CHILDREN

REPORT OF THE CHILD LAW TASK FORCE

Members of the Task Force

Lady Justice Effie Owuor (Puisne Judge and Commissioner, Kenya Law Reform Commission) (*Chairman*).

Mrs. Z. M. Wandera (Town Clerk, Nairobi; and Commissioner, Kenya Law Reform Commission).

Mrs. M. Nyaga (Director, Children's Department, Ministry of Home Affairs and National Heritage).

Mr. L. G. Muthoga (Advocate; Chairman, A.N.P.P.C.A.N., Kenya Chapter).

Dr. P. M. Onyango (Senior Lecturer in Sociology, University of Nairobi, Chairman, A.N.P.P.C.A.N. Africa).

Dr. F. Muli-Musiime (Secretary, A.N.P.P.C.A.N. Africa).

Dr. F. Manguyu (Chairman, Kenya Medical Women's Association).

Ms. R. Amadi (Principal State Counsel, Attorney-General's Chambers).

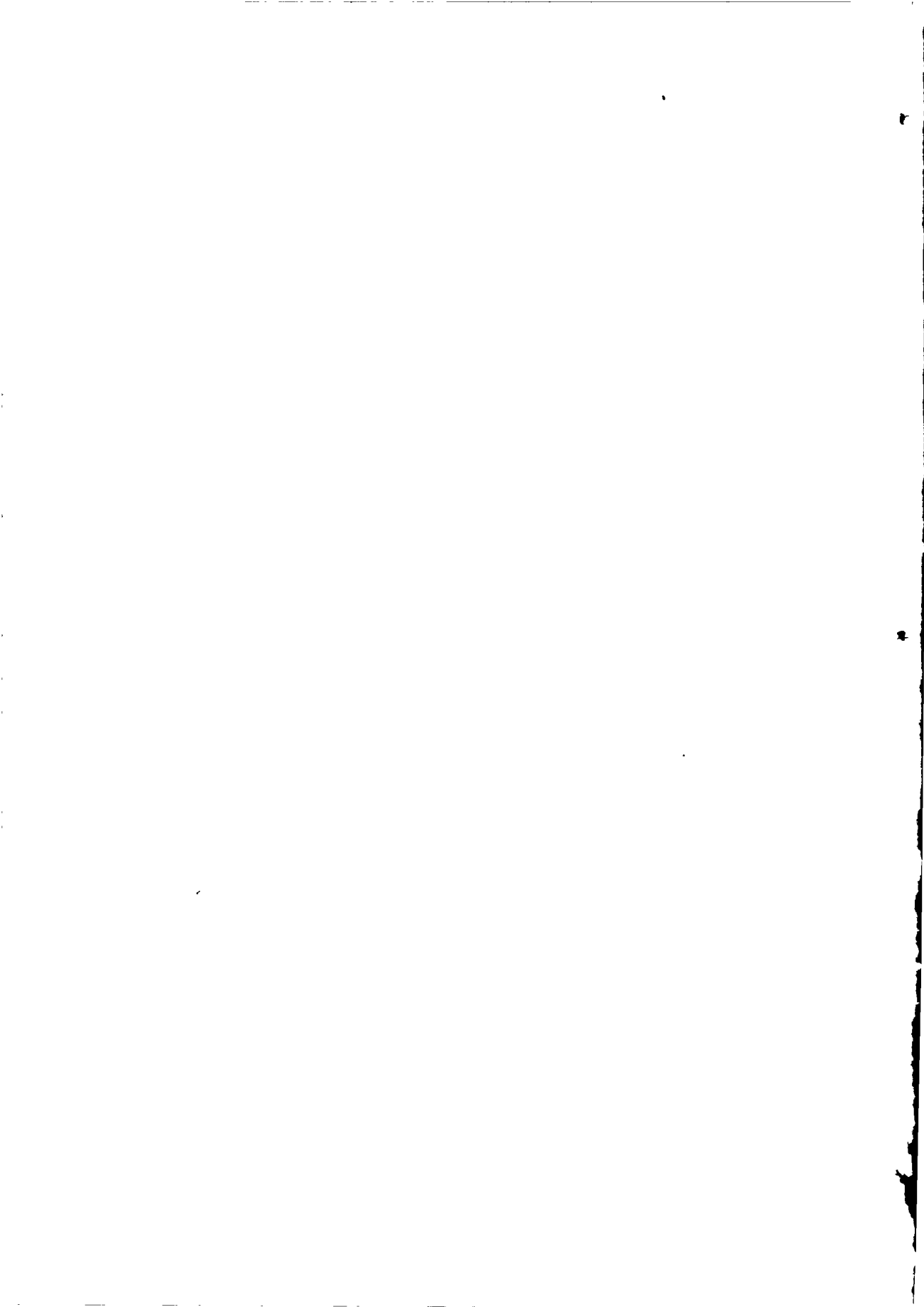
Mrs. E. Kisia (Counsellor, Nairobi City Council).

Mrs. E. Masiga (Deputy Inspector of Schools).

Mrs. C. Makasi (Adoptions Officer, Child Welfare Society of Kenya).

Prof. J. B. Ojwang (Professor of Law, University of Nairobi) (Research Team Leader).

Mrs. V. W. M. Kattambo (Senior Principal State Counsel, Kenya Law Reform Commission).



ACKNOWLEDGEMENTS

Although the conduct of the study leading to this Report was the responsibility of the Task Force on Child Law, it has benefited considerably from inputs by the Kenya Law Reform Commission as a whole. Mr. Justice E. O. O'Kubasu, who was then Chairman of the Commission, and other members of the Commission were able, on many occasions, to accompany the Task Force on visits to the provinces. The Commission, moreover, kept the subject constantly on its working agenda, and accorded the Task Force significant assistance, by continuously asking questions on the progress of the study. It was thanks to the Commission that a panel was able, in early October, 1992 to visit the Arab Republic of Egypt; Mr. Justice O'Kubasu was the leader of the visiting team. And at its final stages the Report has greatly benefited from meticulous perusal by and wise counsel of Mr. J. F. H. Hamilton, who succeeded Mr. Justice O'Kubasu as head of the Commission in December, 1992. The Task Force, thus, owes a profound debt of gratitude to the Kenya Law Reform Commission.

The Report is based on material that arose, firstly, from library research; secondly, from interviews; thirdly, from deliberations conducted at public meetings all over the country; fourthly, from memoranda submitted by various institutions and individuals; fifthly, from exchanges of views with experts and "practitioners" abroad; sixthly, from workshop deliberations; and seventhly, from structured essays submitted by primary and secondary schools.

To those who contributed in the respects mentioned, the Task Force is greatly indebted. While it is not possible to enumerate all the names of those who supported the study in one way or another, it is not out of order to mention the following: Mr. F. Waiganjo, the then Provincial Commissioner, Nairobi; Mr. J. Kobia, the then Provincial Commissioner, Nyanza Province; Mr. F. Lekoolool, the then Provincial Commissioner, Western Province; Mr. A. K. Bore, the then Provincial Commissioner, North-Eastern Province; Mr. S. P. Mung'ala, the then Provincial Commissioner, Coast Province; Mr. A. Oyier, Provincial Commissioner, Eastern Province; Mr. M. Y. Haji, the then Provincial Commissioner, Rift Valley Province; Mr. V. Musoga, Provincial Commissioner, Central Province. Not only did these Provincial Heads prepare memoranda and make formal presentations to the Task Force, they also made superb arrangements for the Task Force to meet and discuss children's matters with members of the public, Government staff, and representatives of children's institutions in their respective provinces; and through their initiative, the Task Force received a large number of highly valuable memoranda from each of the provinces. We thank, through the Provincial Commissioners, all those persons and institutions who came forward to assist with deliberations and information gathering.

The Task Force is most grateful to the Ambassador of the Arab Republic of Egypt in Kenya, H.E. Mr. Marawan Badr, for facilitating a visit to his country in October, 1992. We also thank our host while in Egypt, His

Eminence the Grand Sheikh of Al Azhar, Sheikh Gadul Hag Ali Gadul Haq, who, besides, kindly granted us audience, and discussed with us important aspects of the application of Islamic Law.* We are indebted to H.E. Mr. Ali Mohamed Abdi, the Kenyan Ambassador Extraordinary and Plenipotentiary, based in Egypt, for according to us the services of his staff, in the fixing of important meetings while we were in Cairo.

While in Cairo, we had the opportunity to meet and discuss with the following persons, whom we should like to thank sincerely: Mr. Farouk Sif El Narr, Minister for Justice; Prof. (Mrs.) Amal Osman, Minister for Social Affairs; Mr. Justice Abdi El Remin Emer; Mr. Asam Hossin, Deputy Secretary in the Ministry of Justice, Mr. Justice Kamal Anwar, Chief Justice of the Court of Cassation; Mr. Justice Awal Elmor, Chief Justice of the Constitutional Court; Ambassadors Mrs. Hoda Barakat, Under-Secretary for Social Welfare; Mr. Said Abd El Wahal Afify, Social Defence Expert; Mr. Enas el Khodary, Director of the Research and Translation Department; Mr. Effal el Katel, General Director of the Department of Family and Child; Maj-Gen. Dr. Salah al Dean Ali, Mrs. Monal, and Col. Wagih—all of the Wafa Amal Society; Prof. Sanna Eshnaa, Mr. Ibrahim al Shenaway, both of the SOS Children's village, Nasr City; Mrs. Emma Playfair; Prof. Abdullahi Ahmed An-Naim—both of Ford Foundation, Cairo; and Professors of the Faculty of Eslam and Law, at the University of Al Azhar: Dr. Mohamed Fargali; Dr. Tharwant Abdi El Rahim; Prof. Gafar Abd Elsalam; Dr. Abdi El Razek Hassan Farag, Prof. Abdi El Samei, Prof. Abou el Kair; Prof. Omar el Kadi; Prof. Mohamoud Ali.

Last but not the very least, the Task Force owes a big debt and deep appreciation to two colleagues whose assistance and devotion went beyond the call of duty, Professor Jackton Ojwang, who kindly accepted for almost no reward to be the chief consultant to the Task Force and Mrs. Victoria Kattambo, Senior Principal State Counsel with the Law Reform Commission, who acted as a sole secretary to the Task Force during a very difficult time for her. The production of this report which forms the basis of the draft Bill was an enormous task that fell upon both their shoulders.

Without their guidance, co-operation and highly professional input, this report would not have materialized.

The Task Force is grateful to a number of organizations which submitted memoranda on issues pertaining to children's rights and welfare. In this regard we should like to mention the following: Christian Children's Fund (C.C.F.); Undugu Society of Kenya; International Federation of Women Lawyers (FIDA), Kenya Chapter; SOS Children's Village; Jacaranda Special School for the Mentally Handicapped; and the Islamic Foundation.

**Al Ahram* (Cairo), 6th October, 1992; *Al Akhbar* (Cairo), 6th October, 1992.

Memoranda were also received from the Juvenile Court, and the Children's Department; and from Hon. Justice Mrs. Joyce Aluoch (Puisne Judge); Mr. N. Raballa (Advocate); Mrs. R. Obel (Child Welfare Society of Kenya); Miss Raychelle Omamo (Advocate); Mrs. J. K. Maangi (Advocate); Mrs. Patricia Mbote (Lecturer in Law, University of Nairobi); Mr. and Mrs. F. K. Itinga; Mr. G. Gakiri; Mr. J. Ngie, (Salvation Army, Nairobi); Capt. Joyce Mbungu (Salvation Army, Nairobi); Mrs. Teresa Ngala (Edelvale Home); Dr. Mohammed Saiyed (Islamic Foundation); Mr. M. A. Rao (Islamic Foundation); Mr. G. Muigai (Advocate).

We are most grateful to the examiners who assessed the school essays: Mrs. V. Ngibuini (Our Lady of Mercy Primary School, Nairobi); Mrs. A. Gichonge (Precious Blood Secondary School, Nairobi); Mrs. M. Gathiri (Nairobi Primary School); and Mr. F. Kamoni (Starehe Boys' Centre). And we appreciate the contribution of the students themselves, as conveyed in their essays.

In the conduct of the study and the interviews, the Task Force substantially benefited from the expertise of Prof. Mohamed Abdulaziz (Department of Linguistics, University of Nairobi); we should like to record our indebtedness to him. The critical task of studying and putting together the basic sociological and legal materials fell on the Research Team, and especially on our six highly motivated research assistants: Mr. P. M. Waruingi and Mr. C. O. Oyaya (both sociology graduates of the University of Nairobi); Mr. B. M. Sihanya and Mr. J. O. Wagara (both law graduates of the University of Nairobi); and Mrs. R. Lagat-Korir and Mrs. L. K. Munyi (both State Counsel at the Kenya Law Reform Commission).

We acknowledge the very special support we received from the Office of the Attorney-General. The Attorney-General, Mr. S. Amos Wako maintained a continuous interest in the progress of the study, and provided substantial moral support, even as he kept us on our toes in the discharge of the relevant tasks. Mr. Arthur Buluma, the Chief Parliamentary Counsel and Mrs. Margaret N. Nzioka, Senior Parliamentary Counsel in the Attorney-General's Chambers have been invaluable to the working of the Task Force; we greatly appreciate their precious assistance.

There are many other people who contributed in one way or another; we should like to mention in particular: Mrs. M. E. Kimani, University Librarian, University of Nairobi; Mr. E. N. Njoka, City Education Officer, Nairobi; Mr. L. Njagi, Principal, Kenya School of Law; and Mrs. J. Gitau and Mrs. A. Nyambura Njoroge, who placidly bore the tedium of reducing to neat typescript the copious materials which had been prepared in longhand.

The not-insubstantial expenses of the Task Force were met from funds generously donated by UNICEF (Kenya) and Ford Foundation (Kenya). We are greatly indebted to these two organizations, and we should mention in particular, in that regard, the names of Dr. B. Namazi, who was then the UNICEF Country Representative, and Dr. C. Bailey, the Ford Foundation Country Representative. We also record our thanks to the Kenya Medical

Women's Association, who have held the necessary funds on their account, and have written out cheques as necessitated by the work of the Task Force. In this regard, we thank Dr. F. Manguyu, during whose tenure at the Chair of the Association, such a financial arrangement was made.

May, 1994.

A handwritten signature in black ink, appearing to be 'Effie Owuor', written in a cursive style. The signature is positioned above the printed name.

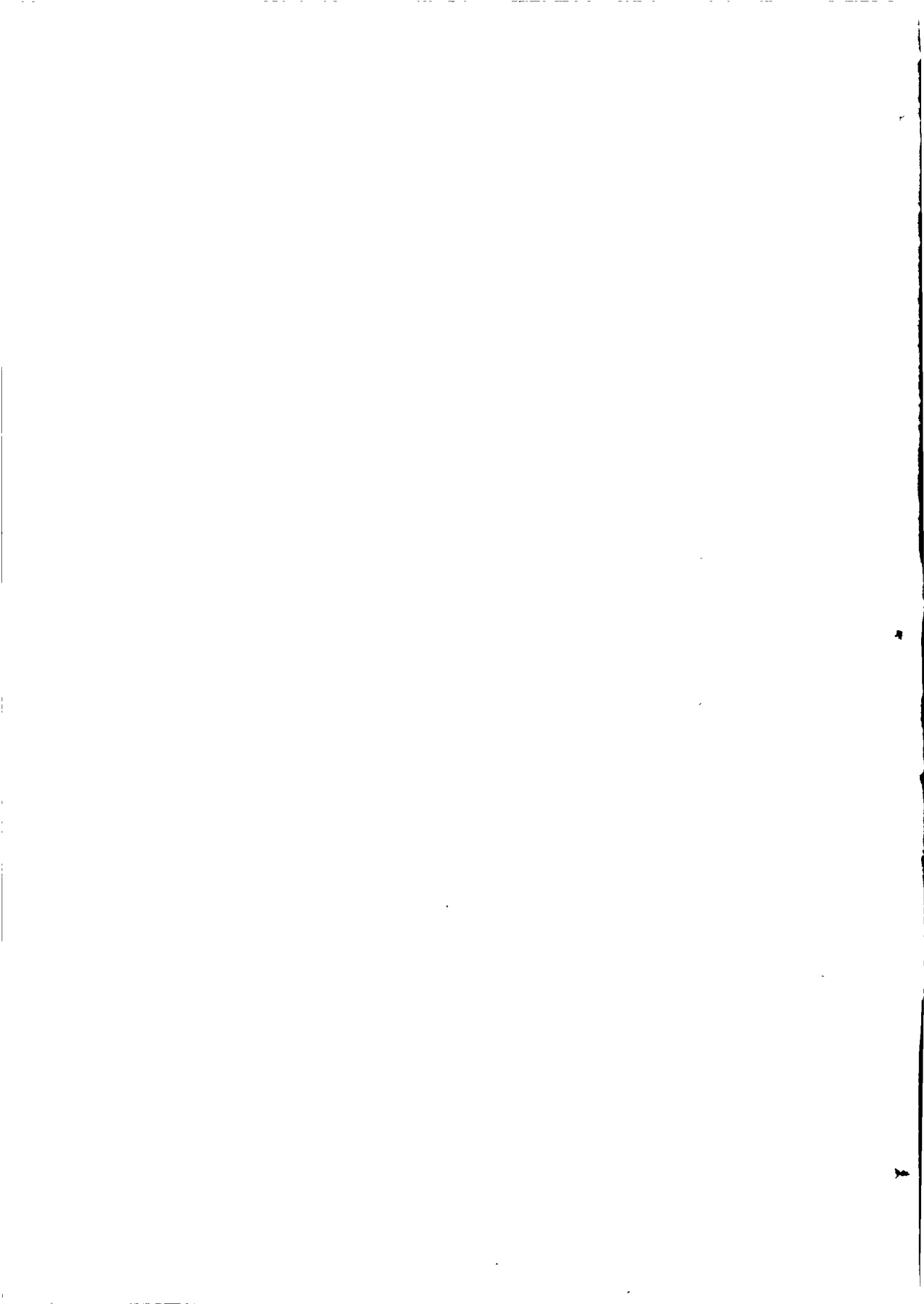
LADY JUSTICE EFFIE OWUOR,
Chairman, Child Law Task Force.

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CHAPTER ONE

BACKGROUND

Introduction

1.1 Special concern for the welfare of children, based on a recognition of their condition as the most vulnerable segment of humanity, has systematically been voiced at international forums since the Second World War. Among the dozens of international instruments so far passed, bearing on children's rights and welfare are: the Geneva Declaration on the Rights of the Child (1954); the Geneva Convention Relative to the Protection of Civilian Persons (1958); the Universal Declaration on the Rights of the Child (1959); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Rights of the Child (1989); and the African Charter on the Rights and Welfare of the Child (1990).

1.2 Such instruments incorporate the moral, political and legal responsibilities which States carry, in relation to the welfare of children. In the case of Kenya, such instruments provide the larger framework of obligations that underlie current endeavours to reform the existing body of law. And this Report is the product of a study which has been conducted since August, 1991, with the aim of introducing a new law on children. It seeks to provide relevant facts, identify relevant social and legal issues, and undertake appropriate policy appraisal, that may guide the process of legal drafting, the ultimate object being that of enacting a largely comprehensive law on children.

Establishment of a Task Force

1.3 It fell to the Kenya Law Reform Commission, with its mandate of keeping under review all the laws, to ensure their systematic development and reform "by facilitating unification, codification, repeal, simplification and modernization . . .", to re-appraise the state of children and to work towards substantial reform of the law. The urgency of this task arose firstly from the practical hardships so far experienced, in administering child law, and secondly from the current state of international legal obligations resting on Kenya—in particular on account of the Convention on the Rights of the Child (1989), and the African Charter on the Rights and Welfare of the Child (1990). Soon after Kenya ratified the Convention (in 1990), the Attorney-General requested the Kenya Law Reform Commission to undertake a study of the state of child law, and suggest ways of improving it, so as to give effect to the spirit of the Convention.

1.4 The Kenya Law Reform Commission took the decision to conduct the study through a Task Force, which originally had the following members: Hon. Lady Justice Effie Owuor (Chairman); Mrs. M. Nyaga (Director of the Children's Department, Ministry of Home Affairs and National Heritage); the Chairman of the Child Welfare Society of Kenya; Mr. L. G. Muthoga (Advocate; Chairman, A.N.P.P.C.A.N., Kenya Chapter); Dr. P. M. Onyango (Chairman, A.N.P.P.C.A.N.); Dr. F.

Muli-Musiime (Secretary, A.N.P.P.C.A.N.); Dr. F. Manguyu (Chairman, Kenya Medical Women's Association); Ms. R. Amadi (Principal State Counsel, Attorney-General's Chambers); Mrs. V. W. M. Kattambo (Senior Principal State Counsel, Kenya Law Reform Commission); Mrs. J. Kabeveri-Macharia (Lecturer, Faculty of Law, University of Nairobi), Mrs. C. Makasi served as the representative of the Chairman of the Child Welfare Society of Kenya. Mrs. Kabeveri-Macharia later took leave to undertake postgraduate studies abroad. The Task Force was later joined by the following members: Mrs. Z. M. Wandera (Nairobi Town Clerk, and Commissioner of the Kenya Law Reform Commission); Mrs. E. Kisia (Counsellor, Nairobi City Council); Mrs. E. Masiga (Deputy Inspector of Schools); and Prof. J. B. Ojwang (Professor of Law in the University of Nairobi), who was designated Research Team Leader. On a number of occasions, the Task Force co-opted Prof. M. Abdulaziz (Professor of Linguistics in the University of Nairobi), to serve as resource back-up in the field of Islamic Law. Participation in certain functions of the Task Force, in particular provincial and overseas visits, was more broad-based, and the Commissioners of the Kenya Law Reform Commission, in general, were able to participate as well.

Terms of Reference

1.5 The Task Force was assigned the mandate to undertake a comprehensive study on issues affecting the rights and welfare of children, with two important practical objectives: firstly, to bring together all crucial laws affecting children, which are at present scattered in scores of statutes, into a single, well conceived Bill; secondly, to provide in the new Bill, for the rights and welfare of children, taking into account the prevailing circumstances of the country, and bearing in mind the important international obligations which have, in the recent past, been assumed by the State, with regard to children.

Methods of Inquiry

1.6 Owing to funding difficulties (which, fortunately, were eased with the generous support of Ford Foundation (Nairobi) and UNICEF (Nairobi), the study did not commence until August, 1991. By this time, the research team had prepared a research agenda and work programme, which had the following components:

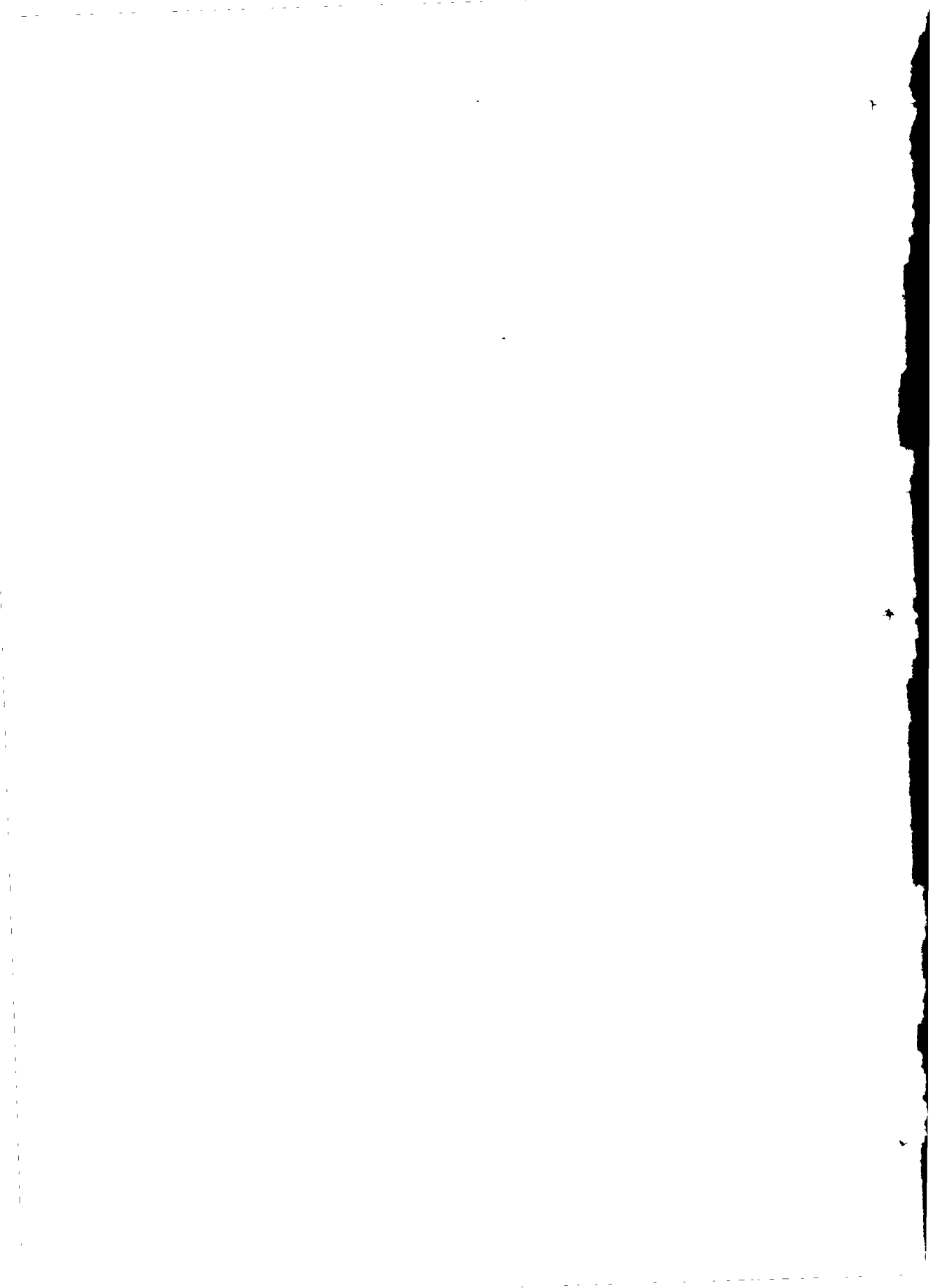
- (a) Library research.
- (b) Provincial visits—for the purpose of eliciting information and views, from administrators and managers of children's affairs, and from the general public.
- (c) The conduct of a school essay competition (for the views of students regarding their duties, rights, and welfare).
- (d) The preparation of a report, to guide the drafting process.
- (e) The preparation of a Bill on Children. Provision was also made for the use of seminars and panel discussions, at the various

stages of the work plan, for the purpose of thrashing out any matters of difficulty.

1.7 At the library research stage, all relevant literature, socio-economic and legal, was identified and perused, with the aid of guidelines which placed focus on specific issues pertaining to children's rights and welfare. This treatment addressed children in general, and African and Kenyan children in particular. It addressed itself to parliamentary enactments, subsidiary legislation, and Government policy. As many as 65 enactments, all dealing with the child in one way or another, were considered. Problems involved in the administration of such statutes have been identified, and attention has been given to the case law, with a view to seeing how it reflects the relationship between legislation and social practice.

1.8 The Task Force visited all the eight provinces, and in addition had the opportunity to benefit from a comparative lesson, by making a study visit to the Arab Republic of Egypt. The visits took place as follows: Nairobi (18th–21st September, 1991); Nyanza Province (21st–22nd October, 1991); Western Province (22nd–23rd October, 1991; and 19th–20th November, 1991); Coast Province (6th–8th November, 1991); North-Eastern Province (14th November, 1991); Rift Valley Province (18th–19th November, 1991); Eastern Province (9th December, 1991); Central Province (16th December, 1991); Arab Republic of Egypt (2nd–8th October, 1992). The visit to Egypt enabled the Task Force to obtain the views of this predominantly Islamic country on such issues as adoption and affiliation. Visits to a number of children's institutions, and discussions with Ministers and law officers who handle children's affairs, generated much enlightenment for this Report, which is for use in a country with a significant Muslim population.

1.9 The purpose of the school essay competition was mainly to elicit the direct input of the children, for a law that should be *their* law rather than a law *about* them. The topic for the primary schools was "My needs and duties as a child", while that for the secondary schools was "The place of the child in Kenyan society" essential points emerging from these essays have been synthesized and incorporated in the general tenor of this Report.



CHAPTER TWO

CHILDREN AND THE LAW: BASIC PRINCIPLES

Theoretical Issues

2.1 Children as subjects of social care, public policy and law making are marked by specific problems that are of general application in all societies, though their magnitude and character vary from one society to another. The 54 articles of the Convention on the Rights of the Child (to date the most authoritative body of international child law), have presented a framework for child rights which has four cornerstones: rights to *survival*; rights to *development*; rights of *participation* in the society's business; and rights of *protection* against abuse and harm.¹ Such an identification of the general spheres of child-interest will be of practical value in the preparation of this Report, as it helps to provide guiding principles, and policy orientation; but still more important, it will help to synchronize the Report's legislative projects with the Convention, as required by the original mandate of the Task Force.

2.2 The specific matters of concern to the law-maker, however, will largely be the same as they always have been-founded as they are on the common place situations of life. These, obviously will include: the discharge of parental duties of care and sustenance; poverty and conditions of hardship—the street-children phenomenon, child labour, displaced and refugee children, debilitating illnesses, physical handicap, children accompanying mothers to prison, child-prostitutes, orphaned children, etc.; children born outside the marriage institution, and lacking basic parental care; situations of adoption; problems associated with adjudicatory, corrective and rehabilitatory institutions.

2.3 The possibility of compiling inventories of such specific children's problems would give the impression that the law invariably holds the key to a solution. But this is not so, because at bottom, the plight of the child is a *socio-economic problem*, which can only be solved through the command of adequate material means, deployed in accordance with open and scrupulous administrative and political strategies. At a political level, enlightened communication between the Government and the governed, should reveal that the resources of a developing country such as Kenya, can only spread out to the whole population if effective family planning is practised with the result that the number of individuals claiming socio-economic advantage is well matched to the goods and services that may economically and sustainably be produced.² At the administrative level, the success of efforts to extend to all families good living conditions, will depend on a careful planning of social amenities, and their effective management, towards the goals of equity and social justice. Only with these preconditions fulfilled, would *law-making*, as the recognized device for the establishment of regular *procedure*, serve to remove most of today's hardships afflicting children and to radically advance the cause of survival, development, participation and protection for all children.

2.4 It, however, remains true that the goal of good administration in children's affairs will be well served by a rational law that is, as far as possible, comprehensive, responsive to local circumstances, and drawing lessons and guidance from new ideas such as those contained in the Convention on the Rights and Welfare of the Child and the African Charter on the Rights and Welfare of the Child. This is the premise on which this Report, and its law-making projects rest: that its recommendations will serve to enhance the administrative framework for the better management of children's affairs; and that such an attainment, it goes alongside genuine endeavours to enhance the national material wealth and its equitable application, will lead to a social setting in which the Kenyan child will have ready access to rights of survival, development, participation and protection.

2.5 It is obvious, therefore, that a simple check-list-based law would be unable to resolve the hardships of the Kenyan child; there ought to be a theoretical perspective, founded on lines of principle that bear a relationship to the Kenyan socio-economic reality, designed to guide the making of the proposed law.³

2.6 Given the developmental circumstances of Kenya, with multiplicity of distinct communities still attached in varying degrees to their cultures, religions and values—yet communities which are none-the-less competing for material advantage in an unfavourable economic set-up (the rules of competition being of foreign origin)—a laconic, sanction-type law, on the Western model, would be inappropriate. The general tenor and style of a Kenyan law on children should be open and facilitative. Its strength should lie mainly in the encouragement of positive kinds of behaviour, in the provision of incentives, in the discouragement of unconstructive choices, and in the establishment of public agencies, and the promotion of co-operative arrangements for the alleviation of the plight of children. This, of course, does not rule out punitive provisions for socially unacceptable conduct *vis-a-vis* the child. Such a hortatory characteristic may be the first basis of hope for success; but ultimately, real success must depend on the effectuation of concurrent economic and administrative programmes.

International Obligations

2.7 Recently (1990) Kenya assumed international obligations for children, under the Convention on the Rights of the Child (1989). Under these obligations, States which are parties are required to organize and manage their domestic legal machinery in such a manner as to give fulfilment to the terms of the Convention.

The obligations include—

(a) *Child Survival*

Treating age 18 as generally the age of majority;⁴ according to children their rights without discrimination;⁵ concern for the best interests of the child in public decision-making;⁶ State action to enhance the rights of the child;⁷ respect for parental

responsibility;⁸ ensuring survival and development for children;⁹ child's right to name and nationality;¹⁰ child's nationality and family ties;¹¹ parental care and non-separation;¹² family reunification;¹³ illicit transfer and non-return;¹⁴ free expression of opinion;¹⁵ freedom of information;¹⁶ freedom of thought, conscience and religion;¹⁷ freedom of association;¹⁸ protection of privacy;¹⁹ access to media and information;²⁰ parental responsibilities;²¹ protection against abuse and neglect.²² protection for children without families.²³

(b) Child Development

Regulation of the conduct of adoption;²⁴ protection and assistance for refugee children;²⁵ special care for disabled children;²⁶ right to health care;²⁷ periodic review of children's placement for protection and care;²⁸ right to social security or insurance;²⁹ right to an adequate standard of living;³⁰ right to education;³¹ aims of the education provided.³²

(c) Child Protection

Rights of children of minority groups;³³ right to leisure and recreation;³⁴ protection from child labour;³⁵ protection from narcotics and psychotropic drugs;³⁶ protection from sexual exploitation;³⁷ prevention of sale or abduction or trafficking in children;³⁸ protection from other forms of exploitation;³⁹ protection from torture, capital punishment and deprivation of liberty;⁴⁰ protection of children from situations of armed conflict;⁴¹ rehabilitation of children who have become victims of abuse, neglect, exploitation or activities of armed conflict;⁴² principles that should regulate juvenile justice;⁴³ possibility of applying higher standards in domestic law;⁴⁴ duty to create awareness on children's rights.⁴⁵

2.8 The majority of these obligations are not inconsistent with Kenya's approach to law-making; and thus they will be taken into account in the recommendations of this Report to the greatest extent possible. However, the entire section on child participation (Articles 43–54) (by which is meant the pursuit of the child's cause at international councils, through a sort of governmental accounting procedure) belongs essentially to the domain of international relations, and would not fit in with the scheme of a statute on children.

2.9. The provisions on child survival (Articles 1–20) also contain matters which, by Kenyan practice, would be covered in the Constitution rather than in an ordinary statute. These are the provisions on discrimination (Article 21), name and nationality (Article 7), identity (Article 8), freedom of expression (Article 12), freedom of information (Article 13), freedom of thought, conscience and religion (Article 14), freedom of association (Article 15), right to privacy (Article 16), right of access to media and information (Article 17). While the basic principles covered by those provisions are to be found in the Constitution,⁴⁶ it is true to say that the

Constitution's specific stipulations could do with a re-examination and reformulation, so as to give fuller expression to the obligations of the Convention. It is recommended that the "*Fundamental Rights*" Chapter of the Constitution⁴⁶ should be reviewed, and reformed, so as more squarely to address the concerns of the Convention on the Rights of the Child (1989).

2.10 The Convention's articles on child protection (Articles 33–42), similarly, contain public policy statements on relative standards in domestic law and in the Convention (Article 41), and on the propagation of public awareness (Article 42), which belong to the field of general legislation. These two aspects should not, therefore, appear in proposed legislation.

2.11 From the argument set out in paragraphs 2.3–2.6 above, it follows that, as the Articles of the Convention covering matters suitable for domestic legislation, seek to state ideal standards, a literal reproduction of their intent is likely to lead to a law that turns out to be a dead letter. The standards in question are unlikely to be attained in practice, especially in the developing countries, with large and rapidly growing populations, in a context of economic stagnation—and consequent inability to provide the material basis for such standards as may be ordained by legislation. Any domestic law seeking to give effect to the Convention's standards, therefore, must generally seek to provide incentives for the required conduct, gradually raise the cost of wrong choices (through selective penalties and disincentives), perform an advocacy function, and place reliance in prospects for parallel socio-economic programmes designed to enhance national productivity and to implement measures of distributive justice.

Treatment of Existing Domestic Law

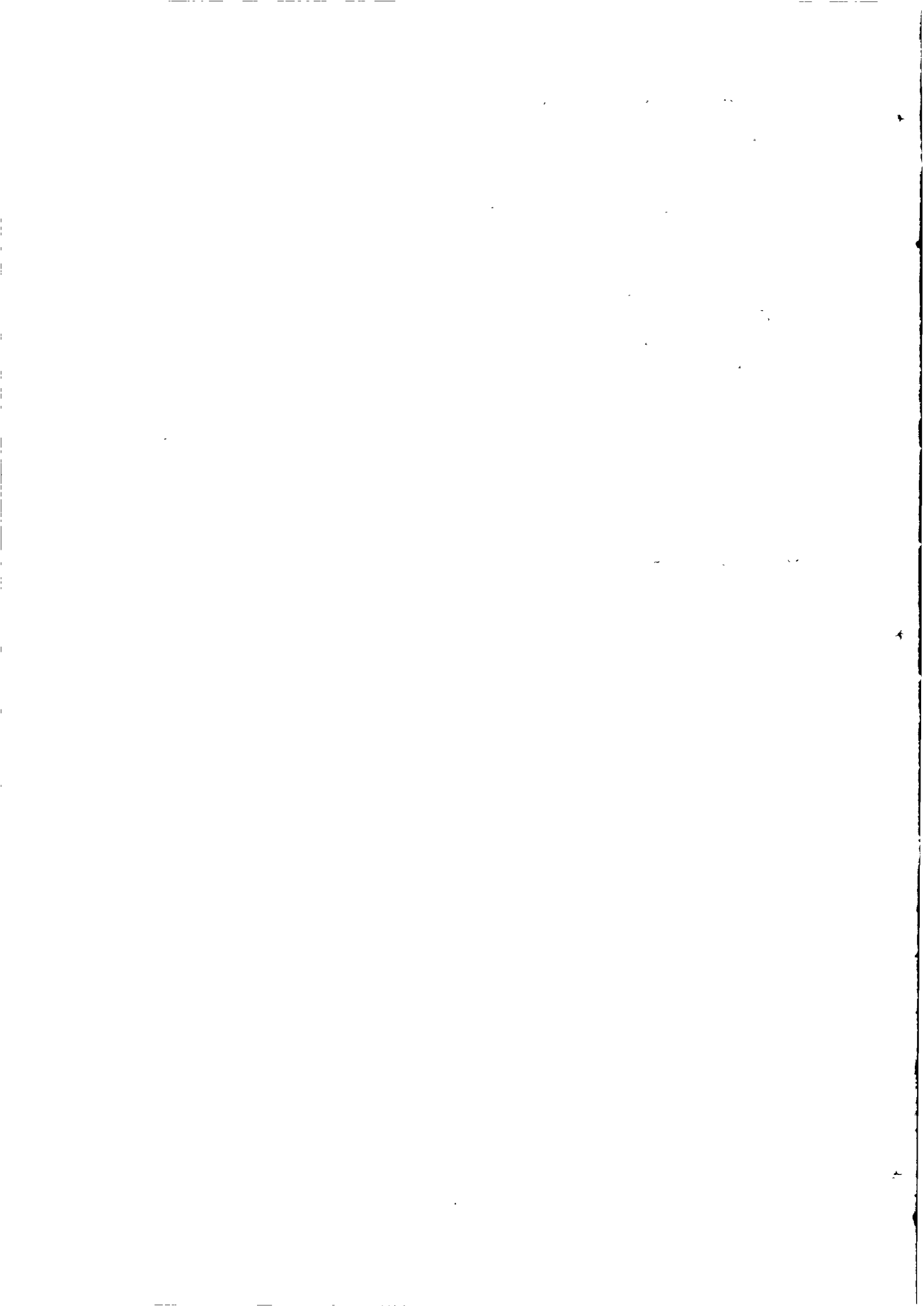
2.12 Much of the enacted law, since the colonial days, has had varied sectoral concerns; and the child's position has been largely tangential and incidental.⁴⁷ However, the following statutes are devoted to the child in their totality: the Adoption Act;⁴⁸ the Borstal Institutions Act;⁴⁹ the Children and Young Persons Act;⁵⁰ the Education Act;^{50a} the Guardianship of Infants Act;⁵¹ the Kenya Boy Scouts Act;⁵² the Kenya Girl Guides Act;⁵³ and the Legitimacy Act.⁵⁴ The following Acts devote substantial provisions to children's matters: the Asian Widows and Orphans Act;⁵⁵ the Births and Deaths Registration Act;⁵⁶ the Employment Act;⁵⁷ the Law of Succession Act;⁵⁸ the Matrimonial Causes Act;⁵⁹ and the Penal Code.⁶⁰ As the design and purpose of these statutes centre on wider public issues than just children, it will not be possible, nor desirable to extract all the references to children which they make, and to incorporate these into a new law. But it is possible, and indeed most desirable, to reconsider the basic child-law statutes, and to integrate them in a rationalized form, in a new body of child

law. The relevant enactments are the following—

- (a) the Adoption Act;⁶¹
- (b) the Children and Young Persons Act;⁶²
- (c) the Guardianship of Infants Act;⁶³
- (d) the Legitimacy Act.⁶⁴

It is these statutes that address most directly the legal issues that give juridical form to the rights and welfare of the child; and hence in principle, they should form one coherent body of law, and should provide the framework for the fulfilment of the ideals of child survival, development and protection. *Hence it is recommended that the substance of these central statutes of child law should be merged to form a new enactment which, besides, draws (as may be appropriate) on all statutes touching on children; incorporates relevant principles from the Convention on the Rights of the Child (1989); and attempts to resolve the various legal problems that have in the past affected the rights and welfare of children. The new law should, wherever necessary, incorporate provisions drawn from the many other statutes affecting children.*

2.13 The enactment of such a new statute will, unavoidably, necessitate the repeal of the basic enactments on children, as well as of sections of other Acts which deal with children's affairs more indirectly.



CHAPTER THREE

THE SOCIO-ECONOMIC CONTEXT

General Socio-Economic Issues

3.1 It is important to understand the social, economic and historical context of the child's place in Kenyan society, as the foundation of any legal structures that would claim to be helping the cause of child survival, development and protection. For, however, flawless any legal mechanism may be, which seeks to accommodate the principles and ideals of child welfare, it would be of no practical significance unless it addressed itself to the children this country knows, and to the realities of life with which such children have to contend.

3.2 Although it is often found convenient to view Kenyan social life in three epochs—the pre-colonial, the colonial and the post-colonial—it has to be appreciated that the process of socio-economic evolution is necessarily gradual, and the essence of social and cultural behaviour in the first epoch remains alive in many respects, right through to the post-colonial period.

3.3 Children in the traditional society, of the pre-colonial era “belonged” not only to the biological parents, but to the community as a whole. The communal “ownership” of children was not only a social phenomenon, but was directly linked to economic schemes of survival and welfare. Children were regarded as members of the economic production unit of the family. Throughout the three epochs of social history, children have been seen as a source of economic security for the aged, and a welcome help in day-to-day family chores.⁶⁵ However, the work children performed was not regarded as an exercise in the creation of surplus value, that could be appropriated by the family or the community. The tasks children performed were regarded as a critical element in their training/education/socialization for adult life in the community.⁶⁶

3.4 The advent of colonialism and of Western influence have introduced new economic social and cultural values that have significantly eroded the traditional perception of children. Gradually, the perception of children as the responsibility of the entire society is ceasing, and they are being regarded as the sole responsibility of their biological parents, irrespective of the parents' socio-economic capacity.

3.5 Colonialism was a direct factor in such change, by virtue of its devices of centralized territorial management, which enforced new pragmatic relationships; and by virtue of its subtle economic arrangements. Colonial legislation such as the Employment of Women, Young Persons and Children Ordinance (1933), and the Master and Servant Ordinance (1937),

and colonial administrative measures regarding hut tax and poll tax, gave force to the view that children were an essential source of labour for the general market. There being no universal framework for school attendance, children became commonly available for the labour market.

3.6 Although colonialism, as a system, had little concern with children's welfare in general, certain events came to pass which, in that epoch, resulted in some random measures taken in the interests of children. The years of turmoil and emergency, of the early 50s, a situation which disrupted family life among African, Asian and European communities, led to the establishment of the Federation of Social Services in 1951, with the responsibility of co-ordinating the efforts of the central government, local government and voluntary organizations, in matters of social development. The Federation's immediate tasks were: providing care for children; hostel accommodation for educated African women; and accommodation for the destitute, for discharged prisoners, and for chronic alcoholics.

3.7 In 1955, the Prevention of Cruelty to and Neglect of Children Ordinance was promulgated. It provided for a children's inspectorate, and conferred upon inspectors and courts the powers of investigation and removal of children, prosecution of cruel and negligent parents or guardians, and transfer of children in need of care to a more suitable place of custody. This was also the background to the formation of the Child Welfare Society of Kenya, a non-racial organization whose functions included: providing places of safety for children, in urgent cases, pending court directions; providing fit persons as custodians for children in need of care; promoting public interest in matters of children's welfare; providing permanent institutions of child care.

3.8 In broad strategy, the post-independence period has not brought about a policy approach on children that radically differs from the position in colonial times. Current approaches to children's welfare are still largely expressed in terms of legal prescriptions restricting one course of conduct or another. The law treats the child as an individual, and a member of the human family with indivisible and inalienable rights.⁶⁷ This legalistic approach appears to arise from the notion that children have their basic interest secured in a stable and well endowed family setting—and only a limited number of them will become delinquent, and in that event, their cases will be solved through sanction-orientated legislation. The weak link in Kenya's approach, is in the sphere of *policy and programmes*. Current policy which is to be found in documents such as National Development Plans, Economic Surveys and Sessional Papers, merely expresses the ideal that children should be provided with relevant education, medical care and nutritional intake. In their generality, such documents fail to specify *how* each and every Kenyan child is to gain assured access to education, medical

care, nutrition, etc. The reality is that most of the children live in a highly vulnerable economic or social condition. They are not able to benefit from such open-ended policies—policies which, however, are hard to correct so long as the state of the population and of resource planning, and the state of national productivity do not allow of an optimum level of socio-economic existence for the entire population.

Education Policy

3.9 As early as 1961, the Kenyan African National Union (which has been in charge of the Government since 1963) committed itself to the policy of free education for every child. This policy was implemented in two stages in the 1960s and 1970s, starting with lower primary education, then upper primary education. The commitment has been reiterated in practically all the national five-year Development Plans since 1963. In practice, however, not all the children have been able to benefit from the plan for free primary education;⁶⁸ some owing to the economic practices prevailing in the areas where they live (e.g. pastoralism and nomadic life); others due to a grim level of poverty that necessitates persistent engagement in activities for earning a living; etc. Moreover, the rapid rise in school enrolment soon compromised the public resources for running the schools and a cost-sharing policy became unavoidable. Most children accomplishing the primary school stage have not gained entry into secondary schools, and the few schools of vocational training can take no more than a limited number. The result is that many children have had no place in the schools system. *It is recommended that efforts be made to identify all the children falling in this category, with clear impressions on their geographical distribution, for the purpose of designing micro-level training schemes for them.*

3.10 In the Development Plans, children have been classified into: pre-school (under age 5); primary school (age 5–13); and secondary school (age 14–17) categories. This classification is for the purpose of implementing Government policy. In the pre-school category, nursery school education is currently run privately and is in general practised only in the urban areas. The present situation gives unfair advantage to urban children, as against their counterparts in the rural areas, in the preparation for primary education. *It is recommended that practical measures be taken to give full access to pre-school education for children living in the rural areas.*

Food and Nutrition Policy

3.11 It is estimated that about one-third of Kenya's population is exposed to the risk of deficient nutrition. This fraction includes pregnant mothers and children. Nutritional safety can only be assured by increased and diversified food production; the varieties of foods consumed (which in turn depends on the economic status of the household); the availability of other basic-need services, such as health and education; and the gradual change in cultural habits. Obviously, the many children who are affected by

unbalanced or inadequate nutrition have their commitment to schooling, and their performance rates compromised to varying degrees. It is true that hunger affecting school children has in many cases driven them out of school⁶⁹. Since 1979 the Government has provided free milk to primary school children. This arrangement, in its operation, does benefit children who go to school, and may be an encouragement to some of those who may have dropped out due to hunger. But in 1990, children under the age of 15 accounted for about 11 million. Less than 6 million were in primary schools; and about 3 million were not in nursery or primary schools⁷⁰. Such children who are not in the schools system do not benefit from the free milk programme. *It is recommended that the free-milk programme for children be strengthened, and its distribution widened to include children who are out of school, in the interest of their nutritional well-being.*

Health Policy

3.12 Kenya has made a policy commitment to provide primary health care, which is comprehensive in approach and is community-based. This kind of health care requires an integrated health system, with the following essential components: appropriate health education; provision of proper nutrition; basic sanitary facilities, including the supply of safe water and hygienic waste disposal; maternal and child health care—including family planning and immunization against infectious diseases, prevention and control of local endemic diseases, appropriate treatment of injuries and provision of essential drugs. The Ministry of Health has direct responsibility for undertaking immunization programmes, to reduce the prevalence or incidence of morbidity and mortality especially among children, due to measles, polio, whooping cough, tetanus and tuberculosis. It is not, however, clear, from the policy documents, how children who live in difficult circumstances would gain access to the various services of primary health care. Many families live in remote and inaccessible areas, even as others (especially in urban areas) live in conditions of squalor and lack of such essential provisions as clean water and sanitation. *It is recommended that concerted efforts should be made by the Government to phase out and substitute the large slum dwellings of the urban areas, and to provide clean water and sanitation in urban and rural areas.*

Employment Policy

3.13 Government policy does not favour the practice of child labour—as is shown especially by the restrictive provisions of the Employment Act⁷¹. But there is abundant evidence that child labour does occur with significant frequency, essentially on account of poverty and inability to afford normal socio-economic amenities. Child labour is rooted in poverty and underdevelopment. It can only be eliminated through increased productivity and improvements to the national economy. *It is recommended that all necessary measures be taken to enhance national economic productivity, for the purpose of enhancing the material condition of individual families, as an approach to the solution of the problem of child labour.*

Environmental Policy

3.14 In the last 20 years, Kenya has experienced escalating levels of urban pollution, arising mainly from the high rates of rural-urban migration. Slum dwellings have proliferated, extending up to the most inappropriate places. The result has been insanitary conditions, excessive noise—situations which cause different kinds of illness, for adults and children alike. Government policy has not succeeded in reversing these trends. *It is recommended that all urban accommodation and working premises be strictly planned; and all working and residential areas should be provided with essential water supplies, and given sanitary conditions.*

The Street-Children Phenomenon

3.15 Compromises to children's rights and welfare have varied origins; but one remarkable example, the case of street children, demonstrates that solutions have to be sought in the first place, in the domain of policies, programmes, and administrative arrangements.

3.16 The phenomenon of street children was first noticed in Nairobi in 1969, and since then their numbers have grown, in most urban centres of the country. In 1975 Kenya had some 115 street children. The number grew to 200 in 1976, and to 400 in 1977. It is estimated that the annual growth rate in the street-child population is currently 10 per cent. It is believed that by 1989, there were about 3,600 street children in Nairobi alone, while the national figure stood at about 16,300.⁷²

3.17 There are two categories of street children: those who go daily to beg for alms, or to hawk in the streets, and in the evening return to their families; and those who live in the streets, after abandoning their homes, or being abandoned by their families.⁷³ Those living in the streets, live a life of hardships and misery, and are under-nourished, denied affection, education or proper care.⁷⁴ They survive through dishonourable, or even criminal activities. They frequently coalesce into gangs and re-create odd "family" arrangements, to provide a group-basis for their survival struggles. Street children generally eat unhealthy food—often left-overs, found in dustbins. They face many risks that are likely to jeopardize their normal growth and development. Owing to the nature of their activities, they are often victims of in-fights, and abuse by adults—especially for purposes of crime, drug trafficking, and prostitution.⁷⁵

3.18 The main causes of the street-child phenomenon appear to be economic and social. Most of the children involved come from unstable homes, with single parents. Their parents generally live in abject poverty, mainly in overcrowded slum areas, where poverty prevails, and illicit modes of survival are in many cases the norm.

3.19 Not finding a decisive solution to the street-child problem, the public authorities have had to resort mainly to short-term measures, involving repeated recourse to institutions of law.

A large number of street children have, at one time or another, been brought before the Juvenile Court. Their breaches of law have included

assault; being a vagrant; stealing; possession of dangerous drugs; possession of illicit alcoholic drink; malicious damage to property, obtaining money by false pretences; trespassing upon property, hawking without a licence; handling stolen property; robbery; defilement; escape from lawful custody; creating a disturbance; indecent assault; preparation to commit a felony; etc. The Juvenile Court has no limitless access to institutions or programmes of rehabilitation, to which so many, often repetitive, cases can be committed and the problem solved for good. The court has had to take the easiest (and often the only available) course. The court, at its discretion, has ordered repatriation; corporal punishment; release to parents/guardians; commitment to approved schools; placement on probation; conditional discharge; acquittal, etc. After such orders have been carried out, the child still has to survive; and the street, once again, is the place of the struggle for survival. The law and the court, did *not* solve the socio-economic problem.

3.20 While specific legal measures will be recommended (Chapter 4) for dealing with factors that precipitate the street-child phenomenon, *it is to be emphasized that the problem is first and foremost a socio-economic problem, and conventional wisdom requires that the basic solution strategies be sought in the domain of policies, programmes, and administrative arrangements—this to serve as the foundation for specific laws conferring justiciable rights. In the absence of such measures, the law by itself is unlikely to safeguard the rights and welfare of the child, as required by the Convention on the Rights and Welfare of the Child (1989).*

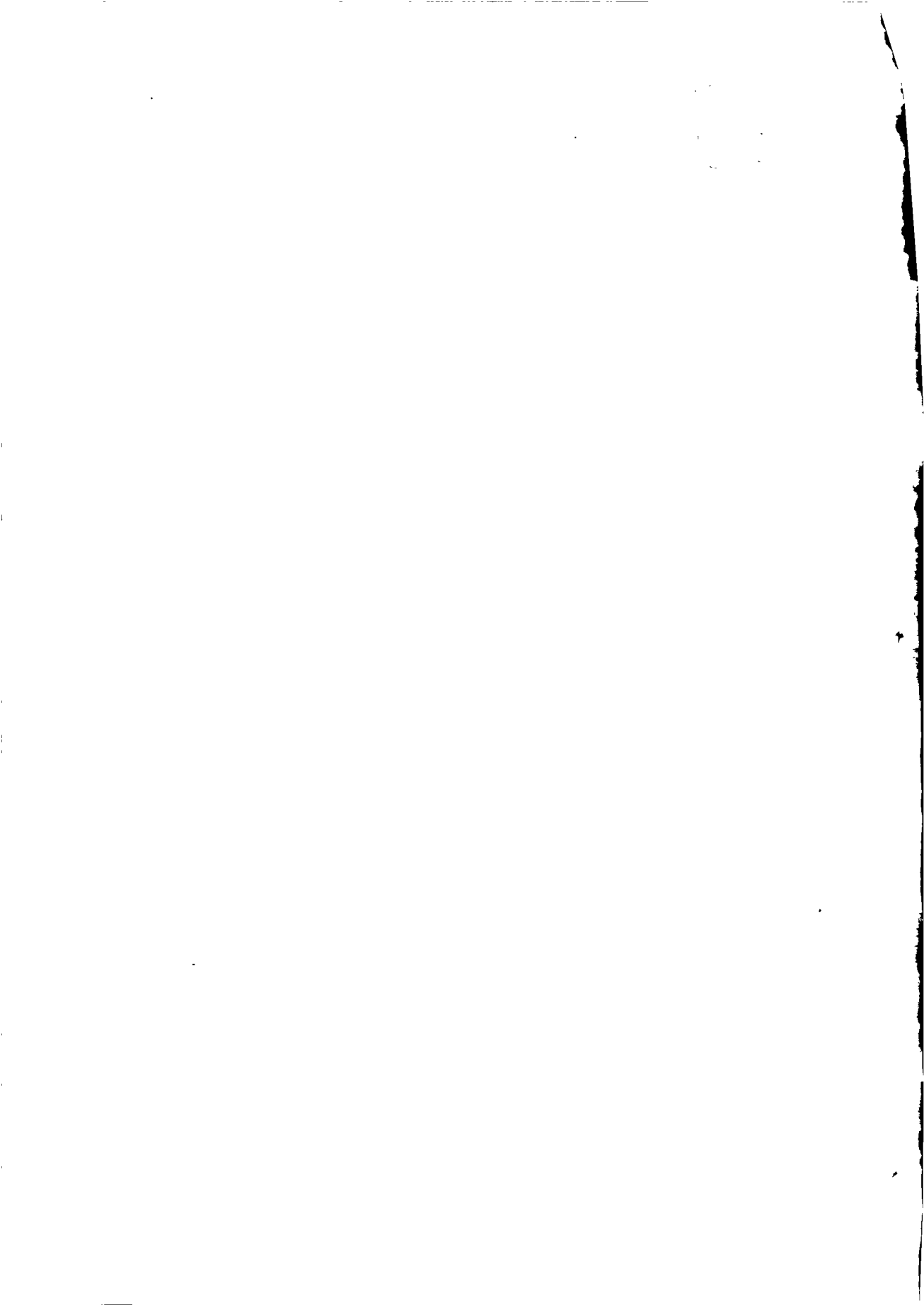
3.21. *It is recommended as follows:*

- (a) *Large-scale measures, in the form of preventive programmes, be undertaken, to prevent or lessen the magnitude of the street-children phenomenon.*
- (b) *Programmes for child-rehabilitation be maintained which have internal mechanism for generating income, to make them self-sustaining.*
- (c) *Effective co-ordination be kept, in relation to all rehabilitatory initiatives for children.*
- (d) *A policy of full and continuous accommodation of children on educational facilities be pursued in order to limit drop-out rates.*
- (e) *Long-term and short-term rehabilitatory and corrective strategies be instituted and maintained—as a solution to the problem of street-childhood.*

Young Children of Imprisoned Mothers

3.22 Young children of imprisoned mothers, at present, go into prison with their mothers. All the evidence we have suggests that hardly any special facilities to ensure the rights and welfare of such children have been

provided. We recommend that mothers in this category should in general be given some other sentence than imprisonment. However, in the event that it is unavoidable that they should go into prison, appropriate institutional arrangements should be made for proper care of their children.



CHAPTER FOUR

THE STATE OF THE LAW

General Observations

4.1 Before making our recommendations for an improved law on children, we must restate the special relationship which—as must constantly be remembered—legislation bears, to the dynamic economic and social situations that overwhelmingly dictate a people's pattern of life. In conditions of severe economic underdevelopment, any legal measures designed to alleviate social disadvantages, should travel together with serious public and private endeavours to enhance economic productivity, and to distribute the gains of economic activity equitably. The stability of the law, and its legitimacy as a redress mechanism, must be secured by the enhancement of access to economic and social advantages; for in the absence of such a parallel measure, legislation will give the appearance of a weak and threadbare obstacle to the dynamic motions of real life. Our recommendations for new legislation, therefore, cannot claim that such legislation, by itself, would truly safeguard the rights and welfare of the child—as required under Kenya's obligations. However, we believe that the lines of legal change to be proposed, will bring about a more rational legal framework, that lends itself to the fulfilment of the country's obligations in relation to children, in an ideal situation.

4.2 The various requirements, principles and ideals relating to children's rights and welfare, have to be related to specific legal issues capable of incorporation in a new body of law; and so this Chapter of the Report will proceed by practical situations, relating them to the law, and arriving at suitable recommendations. Such practical problems will be considered in the context of a statute law and case law.

Who is a Child?

4.3. Under Kenya's plurality of laws regulating children's affairs, no attempt is made to arrive at a common definition of "child". The general basis of definition, as set out in the Convention on the Rights of the Child (1989), is "under age 18".⁷⁶ Using that criterion for the moment, it will be seen that a child is referred to in Kenyan statute law by the terms "child", "infant", "juvenile", "minor", and "young person". The various statutes, moreover, ascribe to the various child-categories entirely different age categorizations—with special legal consequences.

4.4 Under the Age of Majority Act,⁷⁷ a person below the age of 18 is regarded as a minor; that is to say, children are minors. Persons in this category are limited in their capacity to enter into contracts, institute legal proceedings, or manage property; they are required to have the protection of the State, or a parent or guardian, in such matters. Since this is the statute by which the State regulates the age of minority, it follows that other laws have to take into account its prescription, when they make provisions regarding children.

4.5 The Children and Young Persons Act⁷⁸ gives different age-categories, to define different child—nomenclature. Section 2 provides that a “child” is a person under the age of 14 years; a “juvenile” is a person aged between 14 to 16 years; and a “young person” is a person aged between 16 to 18 years. The main reason for this categorization is that the Act accords differing modes of protection and discipline by the age-segment in which a particular child falls. This differentiation is probably due to a concern to correlate particular modes of treatment to the level of development and maturity of a child.

4.6 The Penal Code⁷⁹ also recognizes the different levels of a child’s development, in determining liability. Under section 14, a child below eight years of age is immune from criminal responsibility. Male children below 12 years of age are not responsible for any sexual offences that they may commit. Children are accorded special treatment in the criminal law process, and are not tried in ordinary courts; they are tried in Juvenile Courts, which are established under the Children and Young Persons Act.

4.7 Under the Employment Act⁸⁰ a person below the age of 16 years is a child for the purposes of being engaged in gainful employment, in any industrial undertaking.

4.8 Marriage laws are concerned about maturity for purposes of entering into a marriage relationship. These laws prescribe different ages for marriage. The differences arise from the fact that Kenya has four family law systems. Marriage age under African customary law is attained generally after undergoing an initiation ceremony (the particulars of which differ from one ethnic group to another). Under Islamic law, in general, puberty is the critical age for purposes of entering into a marriage relationship (generally 12 or 14 years of age). Under the Marriage Act⁸¹, the age requirement is 16 years, though a person below the age of 21 years requires the consent of the parents/guardians. The Hindu Marriage and Divorce Act⁸² prescribes 16 years as the minimum age of marriage for females, and 18 years for males.

4.9 The Traffic Act⁸³ provides that a driving licence may not be issued to persons below 16 years of age, or where the licence is sought for motor-cycles, below 18 years of age.

4.10 The Liquor Licensing Act⁸⁴ and the Traditional Liquor Act⁸⁵ both provide that no person shall knowingly sell or deliver liquor to be sold to a person under the age, or apparent age of 18 years. Liquor in this respect, includes all alcoholic beverages which are made by distillation.

4.11 Section 2 of the Adoption Act⁸⁶ defines a child as a person under the age of 18 years; but this does not include a person under that age who is or has been married. The implication is that the act of marriage confers adult status, irrespective of age. The Guardianship of Infants Act⁸⁷ has a similar definition.

4.12 The Matrimonial Causes Act⁸⁸ has different age-categories for different races. Section 2 provides that an African child is a person who has not attained the age of 16 years in the case of males, and 13 years in the case of females. In the case of other races, a child is an unmarried person who has not yet attained the age of majority.

4.13 It is clear that there is no uniformity in the existing statutes, as regards the definition of "child". This has practical implications for the observance and rendering of children's rights and welfare. The Convention's prescription of 18 years coincides with the position in the Age of Majority Act: except that this Act merely prescribes an upper limit (to which the Marriage Act moreover appears to have an exception) and leaves open many possibilities for lower-age as an entry-point into adulthood. In our discussions with the public and with officials in the eight provinces, it emerged that 18 years, as entry-point into adulthood, makes good sense and should be adopted in a new law. Since this agrees with the position of the Convention on the Rights of the Child, *it is recommended that the age of 18 years be adopted as the minimum age of adulthood, and all persons below that age, in general, be treated as children, and accorded all the protection of the law as children.*

4.14 *In the light of the recommendation that the age of 18 years be adopted as the general age of majority, the terminology currently used in the Children and Young Persons Act should be abrogated, and the term "child" be used in all the relevant cases, except that for purpose of differential remedial and rehabilitatory programmes suited to the stage of development of particular children, age categorization may continue to be used.*

4.15 *The title "Children and Young Persons Act" will no longer reflect the new concept of "child", and it is recommended that this Act be repealed, and those of its provisions that are not qualified in a fundamental sense, or rendered redundant by the recommendations set out in this Report, be made the basis of a new law, to be known as "THE CHILDREN ACT."*

4.16 *It is recommended that the Employment Act be amended, to provide for 18 years as the age of majority, and to accord appropriate protection to all children, either by restricting their engagement in certain kinds of employment, or by providing special safeguards for them in approved places of work.*

4.17 It is clear from the provisions of the Adoption Act and the Guardianship of Infants Act, that there are two ways of entering into adulthood: attaining the age of 18 years, or entering into a contract of marriage at an earlier age. While the first condition gives an objective criterion based on normal maturation, the latter condition embodies no control, and is open to abuse; though marriage, by its obligations, will confer a greater sense of maturity upon a child, it is important that good guidance be given to children who seek to get married in spite of young age.

It is recommended that a minimum age of marriage should be adopted and applied, as far as possible, for all family law systems.

4.18 As already noted, the Matrimonial Causes Act has different age-categories for different races, and for its purposes a female child from the African community attains majority at the age of 13, and a male one at the age of 16. In our view, these age prescriptions may have had their justification in years gone by; but they should no longer be maintained, as they are likely to lead to the impression that African children cease to deserve being accorded their rights and welfare at much earlier ages than children from other communities; and there is hardly any valid basis for such a proposition. *It is recommended that the Matrimonial Causes Act be amended to incorporate the basic principle that the age of majority is 18 years.*

Capacity

4.19 In virtually all societies, transactions of legal consequence (whether this fact arises out of their practical significance in economy or society, or out of religious or cultural ritual) require the parties to have the capacity to perform or consummate them. But the scale of values varies so much from one society to another; it follows that the exact yardsticks of capacity, similarly, do differ considerably. Differences of this kind are only to be expected in plural legal systems, such as those found in most African countries — including Kenya. In so far as such differences have a bearing on the dispensation of equity, rights and welfare towards children, they form an important sphere of inquiry in this Report, and in respect of them, specific recommendations should be made, for the purposes of improved legislation. In our consideration of this subject, we identify specific items of relevance to capacity: Marriage; contribution to labour; criminal liability; contract; tort; partnership; trust; parental liability for children's acts.

(a) Marriage

4.20 Under both African customary law and Islamic law,²⁸⁹ there is no fixed age of marriage, and the age of puberty is generally regarded as an appropriate marriage age. In Islamic law, the age of legal responsibility (*mukallaf*) is attached to the age of puberty for a child of either sex. The ages of 15–18 years for a male child, and 9–16 years for a female child are often treated as the periods from which the concept of legal responsibility (*taklif*) comes into operation. Thereafter marriage may take place, if it is auspicious for the girl, and is based on a “good” match, as seen by her parents. The Mohammendan Marriage and Divorce Act⁹⁰ sets no minimum age of marriage, but recognizes marriage arrangements under Islamic law.

4.21 The English law based statute, the Marriage Act,⁹¹ has a different rule as to capacity for marriage. The minimum age, for both males and

females, is 16 years.⁹² However, for those who have not attained the age of 21 years, consent is required to be obtained from parents or guardians.

4.22 The position in Hindu law is contained in the Hindu Marriage and Divorce Act.⁹³ This provides that the minimum age of marriage for females is 16 years, whilst that for males is 18 years. The consent of the parents is required, in the case of a girl who has not yet attained the age of 18 years.

4.23 While it is clear that all the four family law systems attach importance to some requisite age, as a condition of marriage, there are striking differences between African customary law, and Islamic law on the one hand, and civil law and Hindu law on the other hand, since the fact of being married is regarded in a number of statutes as conferring adult status, in spite of actual age, it has already been recommended (para 4.17) that the law should prescribe a general age of marriage. In our study visits to the provinces we got the impression that, for both males and females, marriage should ideally take place upon or after the attainment of adulthood. *Taking into account the strenuous responsibilities of marriage, which must be performed alongside other obligations being assumed by married couples, we consider it desirable to prescribe, in a new law, the age of 18 years as the age of marriage, for both males and females. But we recommend that such a law should allow for exceptions, to cater for situations which may be necessitated by factors beyond control. In general, even in such exceptional cases, the minimum age of marriage should be fixed at 16 years.* Our understanding, from the interviews we conducted in the two provinces with large Muslim populations, Coast and North-Eastern, is that provisions of this kind will not be in conflict with Islamic law. For Islamic law's secondary sources, in particular *Al-Masalih al-Mursalah* (public interest which is in conformity with *Sharia'h*),^{93a} *do allow of measures which are taken to enhance the public good. Islamic law seeks the good of the child; and this end will be served, we believe, by our recommendation. We also believe that this recommendation will not be in conflict with African customary laws, which, indeed, have changed significantly since independence in 1963, becoming progressive enough to accommodate new ideas.*

(b) Labour

4.24 From our study visits to the provinces, and to the Arab Republic of Egypt, we have learned that control of child labour is one of the most difficult tasks. We found that, in areas with large coffee plantations, one of the main sources of labour is school children; they attend school irregularly, or miss out altogether, as they have to work in coffee plantations, so as to earn money for family upkeep. Indeed, we were cautioned that this kind of labour was of such economic importance that, if a law were to be passed prohibiting it, enforcement of such a law would prove problematic. This pessimism is borne out by our experience in Egypt, whose situation is

poignantly described by Dr. Adel Azer and Dr. Nahed Ramzy in their work, *Child Labour in Egypt*.⁹⁴

“The Egyptian legislature has regulated child labour, banning all forms of employment for children under twelve years of age, and forbidding children under fifteen from work which is considered unsuitable for this age group. In addition, children under seventeen years of age are forbidden from working in any job which is considered hazardous to either their health or their morals.

“Nevertheless, not only does child labour persist, but it is on the increase. The number of working children between the ages of six and twelve years [had] risen from 265,400 in 1974 to 1,014,300 in 1984. By 1986, this figure had increased to 1.4 million children. Such a rapid increase in the number of Egyptian working children calls for urgent attention and for the formation of an integrated social policy. Child labour, especially in its more exploitative forms, violates basic human rights, and can threaten the child’s health and well-being.”⁹⁵

The Egyptian experience, which is a veritable illustration of the crisis of legal mechanisms in conditions of development, is graphically set out by Dr. Azer in his articles “The Rights of the Child in Egypt.”⁹⁶

“The law totally prohibits the employment of children under twelve years of age. This legal prescription illustrates how misleading the literal reading of a legal text can be in isolation from a parallel reading of the social reality. Sample surveys on employment, undertaken annually by the Central Agency of Statistics, reveal that in spite of this legal prohibition there are considerable numbers of six to eleven year old children who are actually employed. In 1976, 15.2 per cent of all children between the ages of six and eleven were employed.

“Two conclusions can be drawn . . .

- (i) A large number of parents are in need of financial contributions from their children’s employment. This social reality reveals *that the parents’ economic needs override any legal prohibition.*
- (ii) The situation reveals the fact that school curricula for a large sector of the population are not ‘functional’ in meeting its needs. Consequently, far too many parents prefer to send their young children to fields or to workshops to acquire training and earn a livelihood. In these workshops, children are trained for the practical needs of the market and at the same time, acquire jobs.

“The educational system needs to be planned within an overall policy for socio-economic development.”⁹⁷

Such an experience confirms our views as expressed earlier: that real success in rendering to Kenyan children the full scope of their rights and

welfare, will not depend on mere legislation; the legislation must go forth in tandem with effective policies and programmes for socio-economic development.

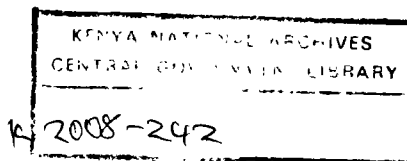
4.25 The Employment Act⁹⁸ sets the age of entry into employment at 16 years.⁹⁹ Excluded from this restriction are children undergoing apprenticeship, or indentured learnership entered into by virtue of the industrial Training Act.¹⁰⁰ This exception has inherent in it the danger that it becomes feasible to employ children of 16 years and below in industrial undertakings, under the guise of apprenticeship. It is to be noted that the Act also specifies no age limit for employment, in respect of children who are engaged in domestic labour, or agricultural labour. There are in Kenya today, and especially in plantation areas, and in the urban centres, child-workers who are as young as seven to ten years of age. The state of the laws, in our view, is wanting on principle; and moreover, it excludes a large section of the child-population from the scheme of legal protections. Although, as already noted, this inadequate state of the law requires major policy and programmatic developments and adjustments to correct, the State should provide guidance on the matter by instituting necessary legislation and monitoring capacity. *It is thus recommended that amendments should be made to the Employment Act, so as to provide for an age of employment for domestic undertakings, and agricultural work.*

4.26 Since the age of 18 years is recognized as the age of majority, it is desirable that public protection for children, especially from strenuous and often dangerous work, such as industrial undertakings, should be extended to cover all children who have not attained that age. *It is accordingly recommended that amendments be made to the Employment Act, to accord protection to all children under 18 years of age.*

4.27 As practice shows that ensuring observance of the safeguards of the law, in respect of child labour, is a highly elusive task, *it is recommended that the laws monitoring and policing machinery should be strengthened by making more detailed regulations, and by enhancing capacity in personnel and equipment.*

(c) *Criminal Liability*

4.28 In criminal matters, the law exempts the child from the full rigours of responsibility, but does not give the child complete immunity. Section 14 of the Penal Code provides that a child under the age of eight years bears no responsibility for any criminal act or omission. A child in this category whose act or omission would otherwise involve criminal liability, is at present dealt with under the Children and Young Persons Act,¹⁰¹ as a child in need of protection and discipline. Section 22 of the Children and Young Persons Act does not treat a child as a criminal, but rather as a person in need of help. Such a child would normally be placed by the Juvenile Court in some institution or under the strict care of the parent or guardian. *We consider that this is a reasonable and worthy state of the law, which should be incorporated in a new law on children.*



4.29 The case of children under the age of 12 years, but above eight years of age, is dealt with under section 14 (2) of the Penal Code. This section gives qualified protection. A child in this category will be liable for any criminal act or omission, if at the time of doing the act or making the omission, he had the capacity to know that he ought not to conduct himself as he did in other words, he did know the difference between right and wrong. Such a child is also subject to the supervision of the juvenile courts; but charges may be brought against him in a criminal court. *As we believe that children below the age of 12 years but above eight years of age, are still physically and emotionally tender, it is recommended that their cases should be considered exclusively in the Juvenile Courts, where they are likely to benefit from the practice of privacy and informal procedure.*

4.30 Section 14 (3) of the Penal Code provides that a male child under the age of 12 years is presumed to be incapable of having carnal knowledge; and hence such a child is immune from liability for any offence involving carnal knowledge. This is a reasonable presumption, and we recommend that this state of the law be retained.

4.31 Section 25 (2) of the Penal Code provides that a sentence of death shall not be pronounced or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed, he was under the age of 18 years. A person in this category shall be detained at the President's pleasure in any place, and under such conditions as the President may direct. This section, if read together with section 14 of the Penal Code, leads to the following legal positions:

- (i) That a person aged below 18 years, but 12 year or above can commit an offence which may be termed "murder".
- (ii) That a person aged below 18 years, but 12 years or above, can be detained in any place and under such conditions as the President may direct.
- (iii) That a person of the age of 8 years or above, but under the age of 12 years, can be detained in any place and under such conditions as the President may direct, if the court establishes that the person knew what he was doing at the time of a commission or omission that resulted in the death of another person.

There is a contradiction in tenor between certain aspects of these provisions, and the provisions of the Children and Young Persons Act.¹⁰¹ The latter does not allow for the use of terms "conviction" and "sentence."¹⁰² This states in section 15: "The words 'conviction' and 'sentence' shall cease to be used in relation to persons under eighteen years of age dealt with by Juvenile Courts . . ." *It is recommended that the position found in the Children and Young Persons Act, which seeks to remove from children any public stigma of criminality, be reaffirmed in a new law; and as a corollary, it is recommended that appropriate amendments be made to the Penal Code, to remove any terminology which appears to place upon children the stigma of criminality.*

4.32 It is apparent that the language of section 25 of the Penal Code, especially the words “shall be liable to be detained in such place and under such conditions as the President may direct”, in theory at least, may be applied to any child who has attained the age of eight years or above. The power to implement the provision is “delegated to the Minister and the Permanent Secretary of the Ministry for the time being responsible for prisons.”¹⁰³ *We do not consider such a position to provide the best conditions for the protection of rights and welfare of the child, and we recommend that an appropriate amendment be made, to provide for a more objective basis for determining the place and conditions of confinement for children in the relevant category. In particular, provision should be made for a full exercise of discretion by the court.*

4.33 In setting out the categories of protection for children, on the basis of age, the Penal Code¹⁰⁴ does not deal comprehensively with the issue of proof of age—in cases where the age of a child may not be readily ascertainable. This leaves it to the court to assure itself somehow that the age requirements are correctly applied. In *Mwangi Kamwaru V.R.*,¹⁰⁵ the court took the position that, in cases of capital offences, a sentence of death cannot be passed where there is doubt as to the age. *Although the court’s approach is highly commendable, there is need for more legislative guidance; and it is recommended that appropriate amendments be made to current legislation, to guide the courts on the manner of proof.*

4.34 Under section 21 of the Criminal Procedure Code,¹⁰⁶ a child is liable to arrest, like adults, on suspicion of the commission of an offence. *In our view, it is necessary to provide, in amended legislation, for differing procedures for bringing children before the court—based on apparent age, and on conduct and disposition at the material time. This is because an unduly formal or confrontational approach to children, depending on their ages, may prove to be of negative value, at a later stage when they are expected to express themselves in court.*

(d) Civil Liability

4.35 Kenya has borrowed substantially from the English common law and statutory law relating to contract.¹⁰⁷ The following principles drawn from English law apply in Kenya—

- (i) contracts may be entered into with infants, save where statute law states otherwise, and the consequences of such contracts may be determined by statute law;
- (ii) contracts by infants are voidable at the instance of the infant;
- (iii) certain contracts by infants are made void *ab initio*—by the Infants’ Relief Act, 1874 of England.

This Act, which is treated in Kenya as a statute of general application applicable as at 12th August, 1897, governs the major part of an infant’s contractual liability.¹⁰⁸ In the case of those contracts not covered by the

Act, principles of the common law apply. The Act renders void all contracts with infants, for the repayment of money lent, or to be lent; contracts for goods supplied, or to be supplied—save for necessities; all accounts stated; and it states that any purported ratification by an infant, upon attaining majority, of earlier contracts shall not form a basis of action against the infant. *While safeguards for children's rights under the foregoing arrangements are desirable, we consider it necessary that the whole scheme of protection should be revised, and a local enactment passed to replace the English Infants' Relief Act of 1874.*

4.36 In the law of tort, an infant bears liability for his own torts, from the time he is able to distinguish between right and wrong.¹⁰⁹ It seems that it is left to the courts to determine the cut-off age-point; and we suspect that courts will arrive at this through analogy with the age of criminal liability; but even so, there would remain considerable uncertainty as to the ideal criteria. There are other growth-points in the tort law affecting children; an example is the principle that the contributory negligence of an adult guardian does not preclude the right of an infant to recover damages.¹¹⁰ *Given the importance of protection for children in matters of tortious liability, we recommend that appropriate statutory provisions should be made, specifying comprehensively the legal consequences that should be attached to situations of delict.*

4.37 Under the Partnership Act,¹¹¹ infants may become partners in a firm. Sections 12 and 13 deal with the liability of partners who are minors. Section 12 provides that a partner who is a minor, as a person, is not liable for partnership obligations, even though his shares held by the firm may be committed collectively with the shares of the other partners, to the abatement of liabilities.¹¹² Where he draws a benefit from the partnership he becomes liable for past obligations, when he attains the age of maturity, unless he gives formal notice repudiating his position as a partner.¹¹³

4.38 It is to be noted that the criterion of age of majority used in the Partnership Act, is that based on the law "to which the minor is subject". It follows that if a minor is subject to African Customary Law or Islamic Law, and he has (let us say) attained the age of puberty and is regarded as an adult, he will be liable for partnership obligations, just like other partners. Thus, if some of the child-partners are subject to some other law under which the age of majority is 18 years, then inevitably a situation of inequity will result—to the detriment of those who by the laws to which they are subject, attained the age of majority earlier. *We recommend that the Partnership Act be amended to incorporate a uniform age of majority (preferably 18 years), so as to ensure protection for children on the basis of a uniform and objective age-criterion.*

4.39 The Trustee Act¹¹⁴ provides substantial protection for trusts held in favour of children. The courts have supervisory powers over all trusts where children are beneficiaries. The courts are empowered to approve family arrangements, and thus safeguard the interests of parties who are minors. The present state of the law provides a reasonable basis of protection for children's rights and interests.

4.40 In African custom, liability for children's acts in relation to outsiders was a communal and not an individual parental responsibility, whereas under modern statute law such liability is imposed upon and restricted to the parents of the child concerned. While this has obvious merits, it also has certain disadvantages, especially in the sense that it may prove difficult to fix liability where real harm has indeed been done. This is illustrated by occasional cases of motor vehicle accidents caused by infant drivers, and where insurance companies repudiate liability. *It is recommended that the subject of parental liability for children's torts, in certain cases, should be inquired into with a view to enacting appropriate legislation.*

Custody

4.41 The Guardianship of Infants Act¹¹⁵ is principal legislation that deals with the "guardianship and custody of infants."¹¹⁶ Under this Act, a child is an unmarried person below the age of 18 years. "Parent", under section 2 of the Act, includes the father, mother, or any other person appointed by the court to maintain the child, or to be responsible for custody. The term "father" does not include the natural father of a child born outside the institution of marriage; this is consistent with the position of English Law, where an unmarried father has no parental rights. Under Kenyan Law, an unmarried father is not liable to maintain the child, and only the mother is responsible. The Act contains provisions on custody in the event of the death of a parent, of the dissolution of a marriage, and of a parent being incapable of taking care of a child. In a situation where one parent dies, the surviving parent becomes the guardian of the child.¹¹⁷ If the deceased had appointed a guardian, then the appointee and the surviving parent become joint guardians. If the appointee is dead or refuses to comply with the terms of the appointment, the court may appoint a new guardian. The court will make such an appointment only if it is in the best interests of the child. The court may also appoint a guardian where the child is an orphan, or has been abandoned. In such circumstances, any interested person may apply to the court for a guardianship order. If the guardian appointed in a will considers that the surviving parent is unfit to have custody of the child, the guardian may apply to the court,¹¹⁸ to be made the sole guardian of the child or children. If the application is granted, the surviving parent may be granted access to the child or children, and shall also be required to make payments to the guardian, toward the maintenance of the child or children. Where both parents have appointed guardians, these guardians are to work jointly, in the event of the death of both parents.¹¹⁹

4.42 On divorce, section 6 of the Act gives either of the parents an equal right to apply to the court for custody. In making an order for custody, the court considers:

- (i) The welfare of the child.¹²⁰
- (ii) The conduct of the parents.
- (iii) The wishes (if any) of both parents.

The welfare of the child is the paramount consideration; and in this respect the court is generally concerned about several matters. The court

considers which parent will be able to provide the best shelter, health, education and upbringing for the child or children. In the case of a child of tender years, the court normally awards custody to the mother, who is considered to be best able to take care of the child. Abandoning a child by a parent, or allowing him to be cared for by someone else for considerable lengths of time, is treated as a sign of failure in the discharge of parental duties¹²¹—and it may determine the award of custody one way or the other. The parents could make an agreement between themselves on who should have custody of a child or children¹²²—but its being honoured by the court depends on how far it is for the benefit of the child. Where both parents are equally suitable as custodians, the court may make a split order by which one parent has physical possession, and the other has legal custody (the making of decisions affecting the child). The parent with the legal custody may be permitted to visit the child. Where physical custody (care and control) is granted to the mother, she is entitled to maintenance from the father until the child attains the age of majority.¹²³

4.43 *As we consider that the provisions of the Guardianship of Infants Act provide a reasonable basis for the protection of the child in matters of custody, we recommend that most of its provisions should be retained, but the Act itself should be repealed, and these provisions merged with the substance of the provisions of the current Children and Young Persons Act (as well as other relevant statutes to be identified further on), to constitute a new law, to be known as "THE CHILDREN ACT".*

4.44 There are other statutes which have a bearing on the issue of custody of children. Section 30 of the Matrimonial Causes Act¹²⁴ empowers the court, in divorce, separation or nullity proceedings, to make appropriate decisions regarding the custody, maintenance and education of children. The Act deals primarily with maintenance, but leaves the custody question to the Guardianship of Infants Act.

4.45 Under Section 3 (1) of the Subordinate Courts (Separation and Maintenance) Act,¹²⁵ a married woman may apply for separation and maintenance on grounds that the husband either has been guilty of persistent cruelty to her children, or has neglected to provide reasonable maintenance for her and her children. Under section 4 (b), the applicant may be awarded the custody of the children aged under 16 years. Such children are entitled to maintenance by the father until they attain the age of 16 years, or the mother dies whichever occurs first.

4.46 The provisions of the Subordinate Courts (Separation and Maintenance) Act give rise to a question regarding the rights and welfare of the children. The principle underlying the age of 16 years, as the cut-off point for according the applicant-mother custody, is unclear. It suggests that no special provision is being made for children who have attained 16 years of age, but are younger than the age of 18 years. *It is recommended that the Subordinate Courts (Separation and Maintenance) Act be amended, to recognize 18 years as the age of majority, and to make provision for the*

maintenance of all the children of the family, in a situation where the mother applies for separation and maintenance.

4.47 It is further recommended that the Subordinate Courts (Separation and Maintenance) Act be amended to specify how all the children who are placed under the custody of the mother, following an application for separation and maintenance, are to be maintained in the event that the mother dies before they attain the age of majority.¹²⁶ The amended law should also provide that any mother may apply for maintenance, regardless of the form of marriage she has contracted. At present only a mother married monogamously is allowed to seek maintenance under the Act.

4.48 Section 142 of the Penal Code makes it an offence to unlawfully take away an unmarried girl below 16 years of age, from the custody of her parents or lawful guardians. While we agree that this kind of protection for female children is desirable, *we would recommend that the law be amended to give protection to all unmarried girls below the age of 18 years.* This is necessary because many cases of abduction of school girls have been reported in recent times. And it is now known that the purposes of abduction are linked with actions that seriously compromise the rights and dignity of the affected children; such purposes include forcible marriage, prostitution, and cheap labour.

4.49 Under section 174 of the Penal Code, it is an offence for a person to deprive either a parent or a guardian of the custody of a child under 14 years of age. This offence of child stealing is punishable by imprisonment for up to seven years. While this is a desirable protection for the child, it is clear that the age of 14 as the cut-off point leaves many children unprotected; and *we recommend that the law be amended, to raise the age up to which the offence of child stealing applies.*

4.50 Kenya's condition of legal pluralism presents a potential challenge to the sanctity of the law governing child custody; for the subject of custody forms an integral aspect of personal law and personal law varies from one community to another. The position under Islamic law¹²⁷ is as follows:

“By Islamic law, the child is considered to be in need of female care and custody from birth until he or she is capable of caring for himself or herself. At this point, the *Sharia'h* deems that male care is more important. In accordance with these principles, the law (in Egypt) recently stipulated that a woman's right to custody of a child ends when the boy is ten and the girl is twelve years old. However, the court may decide to extend the mother's custody until the age of fifteen for boys and until marriage for girls, if this is deemed to be in their interest. In the event of the mother's incapacity during this period, preference is given to the nearest female kin. The relatives of the mother take precedence over relative of the father”.

“Further protection has recently been provided to the divorced mother who has custody of a child. She is entitled to retain occupancy of the

matrimonial dwelling or the husband must provide another suitable home. At the end of the period of custody, or if the wife remarries, the former husband has the right to recover possession of the dwelling".¹²⁸

Thus, among Muslims, the question of custody is tied up with profound religious precepts about obligations of child-upbringing; and hardly any room exists for secular law to make a variation.

4.51 While the position under African Customary Law (a body of law which has been more susceptible to modifying external influences, than Islamic Law) is relatively flexible, it remains true that the majority of the natural population, who live in the rural areas, significantly adhere to cultural norms which, indeed, have their own rules concerning child-custody. Under African Customary Law, generally the father is given the custody of the children of the marriage, in the event of a divorce, so long as the divorced wife's parents have not returned the dowry which had been paid by the man at the time of marriage. Where the dowry is returned, the wife will then have the right of custody.¹²⁹

4.52 As section 17 of the Guardianship of Infants Act requires all courts to apply the rules therein set out, whenever child-custody issues arise, courts determining customary law issues will no doubt apply those rules.¹³⁰ However, in Kenya's present social circumstances, only a tiny minority of justiciable dispute do get litigated; the implication being that the rules and practices of African customary law, represent the law actually in force. It will be necessary therefore, that the machinery of grassroot administration be imbued with the approved standards, in respect of child custody. *It is recommended that the basic principles contained in the Guardianship of Infants Act, should be made part of the law governing grassroot administration.*

4.53 The various laws relating to child custody raise special difficulties with regard to children born outside marriage. The Guardianship of Infants Act, the Subordinate Courts (Separation and Maintenance) Act, and other laws bearing on child-custody, are primarily concerned with the consequences of a *marriage* breakdown. This means that the law's main concern is the child of wedlock, and children who do not fall in this category are not the subject of clear safeguards, as regards custody. Under the Guardianship of Infants Act, the term "father" excludes the natural father of a child born outside marriage. The unmarried father is, therefore, unknown in the scheme of legal obligations regarding custody, care and maintenance for the child. The custody has to be with the mother always (assuming she remains alive.)

4.54 In African customary law, generally, a child born outside the framework of marriage, obtains all requisite material support from the mother and her family. The mother has the custody and attendant responsibilities—unless she marries. But if she marries, then the husband

will be entitled to the legal custody of the child, provided he pays dowry at the time of marriage. This, however, is not always the case; for under some customary laws it is the natural father who is entitled to the custody of the child. The real source of security for children born outside marriage, in African customary law, is that the larger family will regard them as family members, and will care for them as they would do for any other member of the family. But it is to be noted that such a position is true only in the rural areas where relatives live close to one another, and agriculture, the main source of food and sustenance, is open to all. (This is true also of other economic activities such as pastoralism, or fishing). Such, however, is not the case in the urban centres, where extended family ties are weak, and where monetary economy is in full play. It may also be noted that customary practices, in the towns, have undergone substantial erosion, and it is unlikely that they will provide security for urban children born outside the marriage union.

4.55 The plight of children born outside marriage is no less marked under Islamic law. At the interviews we conducted in Cairo, we were advised that birth outside marriage should in principle be treated as a social and not legal problem, and it should be dealt with through religious, moral and social arrangements, rather than through legislation. Egyptian law, on matters of child care and custody, which incorporates *Sharia'h* principles, is stated as follows:

“The legitimacy of a child born during marriage is presumed. However, if the father refrains from registering the birth of the child or if he denies paternity, the mother is entitled to request a court hearing to establish paternity. The man has a similar right to seek a court hearing to prove his paternity if the mother denies it. However, the court will not entertain such an action in two circumstances—

- (a) if the husband proves that he had no physical contact with his wife since the marriage was contracted; or
- (b) if the wife gives birth to the child after the lapse of a year following divorce, absence, or death of the husband.

The court has discretionary power to evaluate evidence and seek expert advice. According to the Islamic *Sharia'h*, upon the father's declaration of paternity, the child acquires all legal rights pertaining to the status of a legitimate child. However, such a declaration is considered a nullity if the man admits that the child is the fruit of an illicit relationship.”¹³¹

Legitimacy of birth is a fundamental object of the *Shari'ah*, and in Islamic cosmology, it confers upon the child a fixed status in society, with important rights attached. Birth out of wedlock, therefore, is not in contemplation as a subject matter of legal arrangements; and so, when such a birth occurs, it is to be accommodated as an act of mercy, and the law will not place an obligation upon the custodian to provide to the child rights and privileges that stand on an equal footing with the rights and privileges due to the legitimate child.

4.56 We must draw the conclusion that the Kenyan legal system does not make adequate provisions for custody of the child born outside marriage. *We recommend that appropriate changes be made to all statutes which affect child-custody, so as to provide suitably for the custody of children born outside marriage. Provision should be made in a new law on children, for the custody of children born outside the institution of marriage.*

Maintenance

4.57 The person who has the custody of a child almost invariably bears duties of maintenance for the child. However, custody and maintenance are to be treated as different concepts, insofar as the one is narrower, whereas the other is wider and more complex; and insofar as custody by itself is more nearly a legal notion than maintenance, which incorporates a wide array of economic and social responsibilities. Maintenance entails the duty to support, assist and sustain, in respect of basic needs as well as normal wants—food, shelter, apparel, education, health, recreation, comfort, etc. We have treated the two concepts separately, so as to be able to point out clearly the state of the law in respect of each, and to express with specificity the kind of change to the law that needs to be effected.

4.58 The law affecting parental responsibility in Kenya is not well developed, for reasons that are easy to understand. Firstly, the majority of the population are Africans, who have matured and lived their lives under the general influence of customary laws, and these laws, as a central characteristic, have always placed the responsibility for children's maintenance upon the immediate *and* the extended family. Even though the conditions and necessities of maintenance have undergone considerable change, with the growth of urbanization, and with the advent of new economic and social values and priorities, the communalistic approach to basic maintenance for children has not entirely disappeared. Secondly, Islamic traditions (widely practised in the Coastal and North-Eastern parts of the country), which revolve around the *Shari'ah*, have always placed strict, well defined obligations of child-maintenance upon parents and wider-family members. This leaves only a small section of the Kenya population, to depend entirely on the prescriptions of English law, and English-law-based civil statutes, for principles and rules of child maintenance. However, with the increase of secularization in society, and with the modern economic trends which increasingly supplant traditional arrangements with market conditions, the old social safeguards for child maintenance, will be considerably undermined; and it is thus essential that the state should intervene by making adequate provisions for the maintenance of children. It is, moreover, the case that a good portion of the present laws of maintenance have not been sufficiently sensitive to the case of children born outside marriage; the civil law owing to its preoccupation with marriage; and Islamic law for doctrinal reasons (already explained in paragraph 4.55. *It is recommended that a new children's law be enacted which provides comprehensively for the maintenance of children whether born during or outside marriage.*

4.59 Kenya currently has no statute which sets out in any detail the duties of parents towards their children. Thus, one has to fall back on principles of the common law, for an impression of the nature of such obligations. Here, the duty of maintenance begins before birth, and runs through the period of early growth, to the time of attainment of majority. The duty stretches beyond the life of the parents; thus the child is a dependant, and is entitled to succeed to their state.¹³² There are, however, a number of statutes which provide, in certain respects, for the parental duty to maintain children. By section 239 of the Penal Code, a person having the charge of another (adult or child), is under a duty to provide that other with the necessaries of life: "Any person who, being charged with the duty of providing for another the necessaries of life, without lawful excuse fails to do so, whereby the life of that other person is or likely to be endangered or his health is or is likely to be permanently injured" is guilty of a felony, and is liable to imprisonment for three years. Section 23 of the Children and Young Persons Act makes it an offence for anyone having custody of a child to wilfully assault, ill-treat, neglect, abandon or expose such a child to be assaulted, neglected, abandoned or exposed to possible danger. For such an offence, a penalty of shillings 5,000, or imprisonment for not more than six months, or both, is imposed. By section 22 of that Act, children's officers are required to apprehend and bring to court the following categories of children who are the victims of a maintenance problem—

- (a) children who have no parent/guardian, or are destitute or vagrant;
- (b) children who cannot be controlled by their parents/guardians;
- (c) children who are not receiving proper care from their parents/guardians;
- (d) children who are falling into bad associations, or are exposed to moral or physical danger;
- (e) children who are kept in premises considered by a medical officer to be overcrowded, insanitary or dangerous;
- (f) children who are prevented from receiving compulsory education, or who are habitual truants;
- (g) children who frequent public bars or gambling houses;
- (h) children who are found buying or receiving or in possession of any drug which is deemed to be dangerous;
- (i) children who are found begging for alms.

4.60 The court, in cases of the kind enumerated in paragraph 4.59, may make any of the following rulings—

- (a) it may order that the child be returned to the parent/guardian, and require the parent/guardian to take out a bond as security for ensuring the proper upbringing of the child;

- (b) it may, where the parent is found unable to give proper maintenance, place the child under the custody of a fit and proper person;
- (c) it may order that the child be committed to an approved school—especially where the child has turned delinquent and uncontrollable.

4.61 Yet another aspect of child maintenance is found in the Public Health Act,¹³³ which makes direct provision for parental action to secure immunization of children against diseases such as whooping cough, polio, measles, tetanus, diphtheria. And the Education Act¹³⁴ makes institutional arrangements for school education; it merely provides a facility, but does not impose duties of child-maintenance.¹³⁵

4.62 We consider that when a new law on children is passed, it should have as its centrepiece the *obligation of parents/guardians to maintain their children*. The parent/guardians should strictly be responsible for the provision of food, shelter, clothing, education, health, and to ensure discipline, for their children. For in the present circumstances, the performance of these duties has appeared to be only a *moral* duty. And such judicial orders as may be made, on the basis of section 22 of the Children and Young Persons Act, merely serve to transfer responsibility (in most cases) from its natural and most appropriate locus—namely the family. Judge Rodney has underlined this point with memorable drama: "I am sick and tired of spanking someone else's children in court. This has to be done at home, where the moral fibre of a young person is woven. Until we place responsibility where it belongs, with the parents, our country will continue to see a rising incidence among teenagers of larceny. . ."¹³⁶ This, moreover, is the basic message we got from our provincial visits, and from our study visit to the Arab Republic of Egypt. The law ought to proceed on the basis that the fundamental duty of child-maintenance is with parents/guardians, and failure to perform this duty should be the subject of penal sanctions. We, however, recognize that the application of such sanctions should, for some time, be tempered with moderation and practical discretion; as the state of flux characterizing both economy and society has to be taken into account, and there should be much sympathy with the condition of parents and guardians who simply lack the material basis for providing for their children. It is important that such a legal project should proceed alongside certain policy and programme measures: firstly, for the realization of family planning and child-spacing, among most families; and secondly, for economic development, to enhance family living standards.

4.63 *We recommend that a new law on children be enacted, which places the burden of maintenance of children on their parents/guardians, and specifies the basic parental duties in respect of shelter, food, apparel, education, health, and discipline for children; and such obligations should have clear sanctions attached to them. Such a law should, however, be regarded as setting only minimum standards, and it should allow the retention of any higher standards such as may already be in force under particular systems of law recognized in Kenya.*

Adoption

4.64 Adoption, in the statute law sense, has the effect of terminating the natural bond between a child and its parents and substituting such parent(s) by adoptive parent(s). The act of adoption under the Adoption Act¹³⁷ creates a permanent legal relationship, and is to be distinguished from temporary foster care which is sometimes authorized, pending adoption. This is unlike the position which had prevailed under African Customary Law, where adoption could not be distinguished from fostering; customary adoption was not intended to break a child's attachment to his natural family or to provide him with an altogether new family. Adoption was no more than a social arrangement for providing custody and care to a child who needed these, or for any special reason—and it in no way compromised the relationship between such a child and his natural parents.¹³⁸ The position under Islamic law has to be understood in the context of the *Shari'ah*. Adoption in the civil sense described above, has no place in Islamic practice, as is shown by the following passage based on Egyptian law:

“Although an adoption system is not recognized by law because of religious considerations, the Ministry of Health has established a scheme whereby married couples may request custody of a child of unknown parentage. If the parents prove responsible, the wife may sue her husband to request an acknowledgement of paternity. Upon such acknowledgement, the child becomes their ‘natural’ son or daughter and enjoys all the rights of legitimate offspring.”¹³⁹

Since in Islamic tradition children are expected to be under the care of a lawfully-married couple, the adoption issue could only have arisen in respect of children born outside marriage; and for this category Egyptian law allows for the assumption of *custody* by a volunteering family—far from the concept of adoption, with its legal incidents regarding equal treatment, maintenance, etc. The Adoption Act, thus, represents a concept that is alien to Islamic law—though capable of being integrated with African customary law, as this evolves in the course of time.

4.65 The Adoption Act provides for—

- (a) the making and registration of adoption orders;
- (b) the registration and control of adoption societies;
- (c) the regulation of adoption arrangements made by adoption societies, and other persons concerned with the adoption of children; and
- (d) the restriction of pecuniary transactions in relation to adoption matters.

An adoption order may be made only in respect of a person who is aged under 18 years, and who is not married and has not at any time been married. From current information, and from information gathered from

our provincial visits, it is clear that children who are available for adoption fall in the following categories—

- (a) unwanted children who are either born outside marriage, or born to young girls who are unable to maintain them;
- (b) children born of incestuous relationship in respect of whom there are taboos against providing custody;
- (c) abandoned children who may be found dumped in a pit latrine or rubbish heap—a clear indication that the mother does not want the child;
- (d) orphans whose relatives are unable to take care of them;
- (e) ill-treated and neglected children, whose parents either refuse, or are unable to care for them;
- (f) children whose parents are either physically, emotionally or financially incapacitated, and are unable to care for them.

4.66 One notices that the common factor which leads to a child's falling for adoption, is some social fault, or economic handicap, or a combination of both—affecting the natural parents. It thus bears repeating that the problem underlying adoption situations is a socio-economic problem, which the law as such cannot solve. The "problem" must be addressed, in the first place—

- (a) through responsible upbringing, and good maintenance for children—to ensure that they grow up as responsible persons who will not want to contribute to the selfsame "problem", by optimum regulation of family size so that it does not outstrip the capacity for family care and maintenance;
- (b) by enhanced productivity to increase the national wealth;
- (c) by distributive justice—to guarantee a certain decent minimum of economic advantage, for families.

Only secondarily does the "problem" become a *legal* problem to be solved by legislation and judicial decision-making. However, it is desirable to have rational laws in place, as part of the endeavours to solve the "problem"; hence our concern to reconsider the law of adoption, and to make appropriate recommendations.

4.67 Section 4 of the Adoption Act lists three categories of persons who are eligible for an adoption order—

- (i) persons who have attained the age of 25 years, and are at least 21 years older than the child to be adopted;
- (ii) a relative of the child, who is at least 21 years of age;
- (iii) the mother or father of a child.

Where the child has been born outside marriage, and his parents are not subsequently married to each other.

These rules are qualified by the following restrictions—

- (i) a sole male applicant may obtain an adoption order only in special and exceptional circumstances;
- (ii) a spouse or spouses in a polygamous marriage may obtain an adoption order only in special and exceptional circumstances;
- (iii) an applicant who is of a different race from the child may obtain an adoption order only in special and exceptional circumstances;
- (iv) an applicant who does not intend to reside with the child in Kenya may be granted an adoption order in exceptional circumstances.

4.68 On 18th August, 1992, the Kenya Law Reform Commission, jointly with the African Network on Prevention of Child Abuse and Neglect (A.N.P.P.C.A.N.), organized a seminar on adoption, specifically for the purpose of assisting us to arrive at a fair recommendation in our Report. The seminar, which took place in Nairobi, brought together judges, magistrates, advocates, civil servants, social workers, NGO representatives and interested individuals. While the participants, in general, appreciated the merits of the conditions of adoption, in their present form, they proposed a number of changes which we would like to adopt—

- (i) *the law should prefer adoptions at an early age, preferably one to five years, and should provide for the adoption of older children only exceptionally, at the discretion of the court;*
- (ii) *the law should be changed to enhance the age qualifications of adopters-to-be, for a woman, between 28 to 50 years, and for men, between 28 to 60 years;*
- (iii) *that race, as a factor in the grant of an adoption order, should be abrogated, even though in practice, it should be a factor to be considered together with other relevant issues;*
- (iv) *that the law should require intending adopters to be in basically good health, and they should produce a medical certificate to this effect;*
- (v) *that the law should require intending adopters to produce evidence of their economic standing;*
- (vi) *that the law should include personal character as a relevant factor to be considered in making adoption orders;*
- (vii) *that the law should indicate age and sex of the child as factors to be specially considered, where application for an adoption order is being made by a single man, or a single woman.*

4.69 We adopt the consensus of the Kenya Law Reform Commission/A.N.P.P.C.A.N Seminar of 18th August, 1992, and recommend that the law be changed to strengthen and rationalize the conditions of adoption, with special reference to international adoptions in which Kenyan children are

involved. It is recommended that international adoptions should be allowed, firstly on the conditions set out under section 4 (1) of the Adoption Act (with the modifications we have proposed in paragraph 4.68 of this Report), and secondly, subject to the following conditions—

- (i) a single man may not be granted an adoption order;*
- (ii) if the applicant is married, the union must be a heterogeneous union;*
- (iii) the applicants must obtain authority from their home countries, and such authority is to be given by a recognized court;*
- (iv) the applicants must also produce immigration authority from their home countries, in respect of an adopted child;*
- (v) the applicants must produce a security bond from their home countries, for the safety of an adopted child in their hands;*
- (vi) the applicants must produce a certificate of moral fitness;*
- (vii) the applicants must produce a certificate of financial fitness;*
- (viii) the applicants must produce a home study report from a court in their country;*
- (ix) the applicants must produce recommendations from the diplomatic office of their country in the Republic of Kenya;*
- (x) the applicants must appear before a High Court judge for a preliminary hearing, before proceeding to an adoption society;*
- (xi) the applicants, if successful at the preliminary hearing should be required to remain in Kenya for at least three months, during which an interim order is in force, and in the meantime a Kenyan agency is to be appointed guardian ad litem;*
- (xii) the guardian ad litem must be able to visit the child freely and to make frank reports to the court;*
- (xiii) the court should have the power to reject any preliminary application summarily, the power to act on its own motion between the preliminary hearing and the final order, the power to rescind any orders made in the meantime, and the power to impose penalties, in accordance with the law (which should provide for the same);*
- (xiv) any appeals in such cases should be heard under certificate of urgency;*
- (xv) women over the age of 50 years, and couples where the older partner is above 60 years of age, should not be allowed to undertake such international adoptions;*
- (xvi) a register of international adoptions should be kept by the public officer in charge of adoptions;*

- (xvii) *Kenyan's adopting children abroad, complying with the governing laws of the country in question, should have such adoptions automatically registered in Kenya, and their legal incidents governed by Kenyan law.*

4.70. We are making the recommendation in paragraph 4.69 for four reasons. Firstly, international adoption is not necessarily undesirable, as it is liable to the same kind of difficulties that a local adoption would face. Secondly, we consider it unrealistic to deny a genuine foreign adopter the opportunity to adopt a Kenyan child, whom he is ready and willing to maintain from his own resources—a child who, if left alone in this country, might not receive equally good care. Thirdly, we are mindful of the fact that cases of such a nature have in the past come up before our courts, and have received approval—even though there were hardly any sufficient guarantees for the safety of the adopted child, given the deficient state of the law as it currently stands; we believe that a statutory prohibition of such adoptions is likely to lead to the mischief of honour in the breach, rather than in the observance. Fourthly, we believe that with the detailed recommendations set out in paragraph 4.69, adequate safety measures will have been taken to fully justify international adoptions.

4.71 Under Kenya's statute law, "fostering" means the temporary care of a child, over a period of any length of time, without any change to the status of the child, or any permanent separation from his natural relatives; and without any right of inheritance from the foster parents. Adoption by contrast, is the process whereby a child is separated finally and irrevocably from his natural parents and other relatives, and he becomes the child of the adopting parents in every sense of the word—with all legal rights including inheritance.¹⁴⁰ In the course of the interviews we carried out, and during the Kenya Law Reform Commission/A.N.P.P.C.A.N. seminar of 18th August, 1992, we learned that numerous adoption societies have been placing children for fostering, and there is no co-ordination or control in this exercise. The stand of these societies is that such children are being given custody in this way pending adoption, by adopters who will follow the prescribed judicial procedures. But we learned that many of such children have remained as foster-children for as much as ten years or more, some until they attained the age of majority. The practical effect is that unregulated fostering, without any order of court, or registration, or any guarantee of legal rights for the child, has become a substitute to adoption. What one cannot obtain through complying with the Adoption Act, one easily obtains through informal fostering. This seriously undermines the safeguards for children that should be built into the law of adoption. *We recommend that the law be changed, to make regulatory arrangements for fostering, through registration and court orders. We further recommend that all fostering cases should be subjected to time-limits, subject to periodic judicial review. The law should provide for specific rights in respect of custody, maintenance, and inheritance, for fostered children who do not succeed in getting adopted. A monitoring arrangement should also be provided for, in respect of fostered children.*

4.72 As regards the adoption of children born outside marriage the law currently is as follows: the mother or father of a child may adopt the child, where the father and mother are not married. For the adoption of such a child, the consent of the father is required, where he has acknowledged paternity. And for this kind of adoption, the consent of the parents of the unmarried mother is required, if she is below 18 years of age.

4.73 *We recommend that where a child is born outside marriage, and the father has not acknowledged paternity, the law should require specified members of the extended family to give consent, before an application for adoption is approved.*

4.74 Recommendation 4.73 is based on the belief that the child will, in most cases, in the first instance be the direct concern of the extended family; and the more steady judgement of the members of the extended family is likely to be more reliable than the opinion of the mother alone. It is moreover desirable that members of the extended family should have the first opportunity to adopt the child, if they so wish.

4.75 From our inquiries, we have come to learn that the adoption process has a number of legal and administrative shortcomings, that render it imperfect and frustrating to parties—

- (i) there is clearly a lack of co-ordination in the operations of the adoption societies;
- (ii) while a birth certificate is required for all adoption cases, securing it tends to be an interminable process, that greatly frustrates parties;
- (iii) the format of the adoption certificate is unsuitable, as it often subjects adopted children to psychological trauma, especially when its content gets known at the schools they attend;
- (iv) the institution of guardian *ad litem* is not working satisfactorily; the courts apparently have no reservoir of personnel, from which responsible and independent-minded persons can be drawn to perform this function.

The result is that prospective adopters, working with their advocates, have been nominating their friends to serve as guardians *ad litem*. Such guardians *ad litem* are unlikely to be of much real assistance to the court.

4.76 *We recommend that a special organ, perhaps an adoption council, should be established, to perform the following functions—*

- (i) *formulate governing policy in matters of adoption;*
- (ii) *effect liaison between adoption societies and the Government, and Non-Governmental Organizations (NGOs);*
- (iii) *consider and propose names of officers who may serve as guardians ad litem;*
- (iv) *monitor adoption activities in the country.*

4.77 *We recommend that all documentation required for the adoption process, should be processed with all due expedition.*

4.78 *We recommend that the format of the adoption certificate should be re-designed, with a view to giving adopted children greater personal privacy.*

4.79 *We recommend that adoption cases should be processed with dispatch, subject to the provisions of the law, and should not in any case take more than five months to accomplish.*

4.80 In paragraphs 4.15 and 4.43, we have made the recommendation that the Children and Young Persons Act, and the Guardianship of Infants Act, respectively, should be repealed, and their substance, with appropriate amendments merged into a new law. The Adoption Act, like those two Acts, is concerned with the rights and welfare of children, and moreover, many of the provisions of this Act criss-cross with the provisions of those Acts. For the sake of a holistic treatment of matters relating to children's rights and welfare, and in the interests greater consistency in substantive provisions and in use of terminology, *we recommend that the Adoption Act should be repealed, and its substance, taken together with appropriate amendments, be brought into a new Act, "THE CHILDREN ACT."*

Children Born Outside the Marriage Institution

4.81 In this Report, the most recurrent, and perhaps the most problematic field of children's hardship is, without doubt, children born outside marriage. Its socio-economic aspects have been dealt with in paragraphs 3.15-3.21; its relationship to child-custody has been considered in paragraphs 4.53-4.56; its maintenance implications have been dealt with in paragraph 4.58; and its relationship to the law of adoption has been considered in paragraphs 4.72-4.75. While we have treated parental responsibility for child-maintenance as the backbone of any ideal law for the protection and care of children (paragraphs 4.59-4.63), it must be noted that, in practice, and in the Kenyan experience in particular, the greatest challenge to the quest for such an end, is the phenomenon of children born outside marriage. Today, Kenyan law recognizes children born outside marriage only for limited and rather incidental purposes, but has no interest in the fundamental question concerning the day-to-day welfare of such children: namely, who has the imperative legal duty to give them custody and care, and is this duty being duly discharged?

4.82 The Legitimacy Act,¹⁴¹ "An Act of Parliament relating to children born out of wedlock", deals with situations of "illegitimacy" without even defining the term. The connotation of "illegitimacy" is impropriety and blameworthiness, obviously in relation to mainstream values which extol religious ethics and their precepts of chastity in sexual relationship. Since the Constitution¹⁴² guarantees freedom of conscience, including freedom of religion, it follows that a scheme of law which passes adverse judgement on secular personal choices, preferences and actions, would in principle be inequitable to some members of the society. Accordingly, *we recommend that the use of the term "legitimacy", in relation to family situations, should*

be abrogated, and a law should be passed which addresses itself to "birth during marriage", or "birth outside marriage".

4.83 At common law, which is part of the received law in Kenya,¹⁴³ a child born out of wedlock bore a stigma and was accorded minimal protection. England's attitude to such a child was stated by Denning, L. J. in *Re M*¹⁴⁴: "[The] law of England from time immemorial looked upon the bastard as a child of nobody, i.e. as the child of no known body except its mother". The mother, therefore, was the sole custodian, of such a child; but she had the right, by deed or will, to appoint a testamentary guardian for the child, to take over responsibility after her death. She also had the right to give or withhold consent to marriage for the child, in the event that she desired to marry before attaining the stipulated age of marriage.

4.84 Kenya's Legitimacy Act, which has its origin in the Legitimacy Ordinance of 1930,¹⁴⁵ was formulated on the basis of English law, and its object is not really to resolve problems affecting the normal child born out of wedlock; it is concerned with situations of *legitimation*, in respect of children who, though not born in wedlock, acquire the status of children born in wedlock by virtue of marital actions taken by their parents. In terms of children's rights and welfare, this Act elevates the status of a limited number of children born outside marriage, in respect of whom the parents have subsequently come together in wedlock, to the position of being entitled to full parental custody and care, and to full rights of succession. The Act, therefore, is an important element in this Report's concern with the rights and welfare of children in general. It in fact provides for the legal interests of a child born out of wedlock, who misses the opportunity to be legitimated owing to the death of his mother; the rights of such a child are to be rendered on the basis that he was born during marriage.¹⁴⁶

4.85 The Legitimacy Act falls squarely within the central area of State action, in the protection of children's right and welfare; and it touches substantially on the other core statutes, namely, the Children and Young Persons Act, the Guardianship of Infants Act, and the Adoption Act. In paragraphs 4.15, 4.43 and 4.80, we have made the recommendation that the Children and Young Persons Act, the Guardianship of Infants Act, and the Adoption Act, respectively, should be repealed and their substance, with appropriate amendments, merged into a new law. *We recommend that the Legitimacy Act should be repealed, and its substance, with appropriate amendments, brought into a new Act, "THE CHILDREN ACT."*¹⁴⁷

4.86 Since the Legitimacy Act is concerned with only a limited section of the numbers of children born out of wedlock, a major social and legal problem remains, in respect of all the remaining children of this category. And, so long as there is no appropriate legislation in this area governing care and maintenance, Kenya cannot rightly claim to be taking all appropriate measures to safeguard the rights and welfare of the child. After summarizing relevant historical material, we shall make a recommendation on appropriate legislation which should be brought into the framework of a new child law for Kenya.

4.87 As early as the colonial days, it became plain that the law affecting children born out of wedlock, had not taken into account the social reality obtaining in this country, as birth outside marriage became increasingly widespread, posing large-scale problems of social policy such as had not arisen in England. Thus in 1959, the Affiliation Ordinance¹⁴⁷ was passed, in an attempt to solve the custody and (especially) maintenance hardships associated with birth out of wedlock. At independence, this statute became the Affiliation Act.

4.88 The Affiliation Act enabled the mother of a child born out of wedlock to seek a court order, against the putative father, for the maintenance of the child, where a marriage between the father and the mother had not subsequently taken place. Section 3 of the Act provided for the institution of proceedings for an affiliation order, by a single woman who was with child, and by a single mother who had been delivered of a child. The proceedings could begin before the birth of the child; or at any time within twelve months after the birth of the child; or at any time after the lapse of twelve months, upon proof that the man alleged to be the father of the child had, within twelve months after the birth of the child, paid money for the maintenance of the child; or at any time within twelve months, after the return to Kenya of the man alleged to be the father of the child, upon proof that he ceased to reside in Kenya within the twelve months next after the birth of the child. The woman could start proceedings by complaint before a court having jurisdiction in the place where she resided—for a summons to be served on the man alleged by her to be the father of the child. By section 4 of the Act, the court would refuse to issue summons if—

- (i) there was reasonable cause to believe that the man alleged to be the father of the child was not, in fact, the father; or
- (ii) the application was made for the purpose of intimidation or extortion; or
- (iii) the application was made without *bona fides*. By section 5, the court would hear the evidence of both sides, and the evidence of the mother would be required to be corroborated to the court's satisfaction.

If the evidence showed that the alleged father was the father of the child, the court would make orders requiring him to—

- (i) pay a sum of money not exceeding two hundred shillings a month, for the maintenance and education of the child;
- (ii) pay all the expenses incidental to the birth of the child;
- (iii) pay the funeral expenses of the child, if the child had died before the making of the order;
- (iv) pay such costs as may have been incurred in obtaining such order.

Where the application was made before the birth of the child, or within two months of the birth of the child such monthly payment, could, if the court thought fit, be calculated from the date of birth. The court could order, in

lieu of monthly payments, that a lumpsum not exceeding 24,000 shillings be paid into court, to be expended in the maintenance of the child, in accordance with the court's directions. The court could also order that a portion of the payments, or any lumpsum awarded, be expended on the education of the child, in such schools as the court might determine. Where the court dismissed the complainant it could order that the complaint pay to the person alleged to be the father of the child the reasonable costs incurred by him in defending the proceedings. Section 6 of the Act provided that any monies ordered by the court to be paid could be paid to the child's mother or to the person who had the custody of the child, with the approval of the court. Payment could also be made to the court, which would then render it to the mother or the custodian. A custodian who had the right to receive such payment, had the same right to recover it as the mother would have if the money was payable to her.¹⁴⁸ An affiliation order, once made, lasted until the child attained the age of 16 years, or died before attaining the age.¹⁴⁹ The court had the power, at the instance of the mother, the custodian or the putative father, to vary affiliation orders.¹⁵⁰ The court could make an order of attachment of the pension or income of the putative father, after he had been given an opportunity to be heard, where the court was satisfied that he had without reasonable cause, failed to make any payment which he was required by court order to make.¹⁵¹ The pension or income would be attached on the basis of the weekly amount payable under the affiliation order, or of any lesser amount—and the attached amount would be paid by the court to the person entitled. Any sum ordered to be paid under an affiliation order was a civil debt recoverable summarily.¹⁵² Under section 11 of the Act, the court, in affiliation proceedings, had full powers in relation to custody. The court could, at the time of making an affiliation order, or thereafter, appoint a person other than the mother, to have the child's custody. This would be the case if the court was satisfied that—

- (i) the mother of the child was not a fit and proper person to have the custody of the child; or
- (ii) the mother had died, or was of unsound mind, or was in prison.

The application for such an order could be made by an administrative officer, or by the putative father, or by the mother (if she was alive); and the appointment made was subject to being revoked or varied, in a proper case. It was an offence to take such a child, unlawfully, away from the approved custody—punishable by a fine not exceeding 3,000 shillings, or imprisonment for three months, or both. A single mother who failed to maintain her child, or deserted the child, was guilty of an offence, punishable by fine not exceeding 1,000 shillings, or imprisonment for one month, or both.¹⁵³ A person against whom an affiliation order had been made was required to give notice of any change of address to the person entitled to receive payment under the order; failure to comply with this requirement constituted an offence punishable by fine not exceeding 1,000 shillings.

4.89 In the ten years that the Affiliation Act was in force, it filled a gap in the protection of the rights and welfare of children born outside marriage, which since 1969 has been left wide open. While the Affiliation Act had, for instance, imposed on single mothers a binding duty to care for their children (of course, with the financial assistance of putative fathers), since 1969, and for each of the 24 years ensuing, the position has been as curious as this:

“When children are born between married couples their welfare is catered for [by] both parents. If the parents disagree and part company, the welfare of the children is provided for by marriage laws. When children are born outside [marriage], however, *none of their parents is, strictly speaking, legally bound to provide for them.* It is true that mothers of such children find themselves bound by moral and natural love to cater for the children. They are not legally bound to maintain them, however; so if the mother is not legally bound to cater for the children, how far is the father legally bound?”¹⁵⁴

If our legislative delinquency could go with impunity for so long, it no longer can; because we have assumed international obligations to protect the rights and welfare of the child; and because we have domestic, social, moral and political obligations to our people, to provide social security and equity, and hope, for them. We recommend that in the new law, to be known as “*THE CHILDREN ACT*”, *provisions should be enacted which provide adequate protection to all children born outside marriage.*

4.90 From the detailed summary of the main provisions of the Affiliation Act, as set out in paragraph 4.88 of this Report, it will be appreciated that the Act was basically well-designed, from a professional standpoint, to respond to an acute social crisis which carried important legal consequences.¹⁵⁵ However, it did have its weaknesses, some of which gave occasion to the legislature repealing it in 1969.¹⁵⁶ Its main shortcomings, which should not be reproduced in any future legislation, were as follows.

- (i) The courts which applied the Act were the professionally deficient “African Courts”, which were established by the African Courts Ordinance of 1951, and manned by elders. The elders did not understand the provisions of the Act very well and generally drew largely from custom, and rather loose, non-legal material. As a result, they failed in many cases to render justice according to the law.¹⁵⁷
- (ii) The unprofessional approaches taken by the elders of the African courts, enabled some unscrupulous women to obtain affiliation orders.
- (iii) Under the Act, the same woman could, during her reproductive life, apply for affiliation orders any number of times; and this took away the legitimacy of the affiliation law.
- (iv) The affiliation Act had instituted no controls, for ensuring that monies paid under an affiliation order were actually applied in the upkeep of the child.

- (v) The Act was rather sketchy on the procedure required in the proof of paternity—giving rise to apprehensions that a man might be falsely fixed with responsibility.
- (vi) The Act did not make provisions for situations where the putative father is a “child” and thus still dependent on his own parents or guardians.
- (vii) The Act treated the age of 16 years as the age of majority.
- (viii) The Act did not attempt to apportion responsibility between the mother and the putative father of a child.
- (ix) The Act did not provide a free opportunity for either mother or putative father, at any stage during the minority of the child, to apply for custody, with the object that the apportionment of maintenance cost be reviewed.
- (x) The amounts of money payable under affiliation orders were fixed, and extremely conservative by today’s standards.
- (xi) The Act contained terminology that was alien to African culture, and that, even today, would be regarded as unbecoming, such as “bastard”, “legitimate child”, “illegitimate child”.¹⁵⁸

4.91 The legal argument for the enactment of legislation to provide for those children who were born out of wedlock, and have not been provided for by the Legitimacy Act, has been set out in paragraphs 4.84–4.89 of this Report. In our study visits to the provinces of Kenya, we found birth out of wedlock (especially affecting children) to be a major social problem. The members of the public whom we consulted, as well as social workers, Government personnel, judicial officers, and private individuals, were of the unanimous view that a law should be passed for the protection of the rights and welfare of children born outside marriage. From our own perception as set out in paragraphs 4.84–4.89 of this Report; from the representations of the people we consulted in various parts of the country; and bearing in mind the fact that many of the mothers of children born out of wedlock have not yet attained the age of 18 years, and are themselves the subject of parental care, *we are persuaded, and recommended accordingly, that the new law to be known as the “THE CHILDREN ACT” should incorporate the substance of the 1959 Affiliation Act, but with appropriate modifications which include the following—*

- (i) *the courts with jurisdiction should be either the Resident Magistrates’ Courts and the High Court, or a special set of Family Courts to be established by law;*
- (ii) *the law should limit the number of times one woman can apply for affiliation orders to two only;*
- (iii) *the law should provide machinery for ensuring that monies paid under affiliation orders are actually used for the maintenance of the child;*

- (iv) *detailed provisions should be made in the law, with regard to proof of paternity;*
- (v) *the new law should specify the mode of payment of maintenance dues, where the putative father is below 18 years of age;*
- (vi) *the new law should regard the age of 18 years as the age of majority, and payments for the maintenance of a child born out of wedlock should cover that duration;*
- (vii) *the new law should apportion the responsibility for maintenance of the child, whether in cash or in kind, between the mother and the putative father;*
- (viii) *the new law should allow either the mother or the putative father, at any stage before the child attains the age of majority, to apply for custody, and the court in determining such an application should have the power to vary the allocation of maintenance costs;*
- (ix) *the new law should provide for a flexible procedure for determining the costs of maintenance for a child born out of wedlock—this should take care of inflation;*
- (x) *the new law should avoid the use of such terminology as “bastard”, “legitimate child”, “illegitimate child”;*
- (xi) *the new law should provide that the court will honour a written contract, made in good faith, between the mother and the putative father of a child born out of wedlock, and making suitable arrangements for the custody and maintenance of the child.*

4.92 As already noted (paragraph 4.55), the Islamic tradition has special approaches, based on the *Shari'ah*, for dealing with situations where a child is born out of wedlock. But the position in African customary law varies from one community to another. Customary law was evolved in a condition of rurality and communality, and children born out of formal marriage did not lack custody and care. Such children, depending on the operative customary laws, might go with their mothers when the mothers later married some man, or they might remain with the parents and extended family of the mother. Either way, such children had normal access to the agricultural, aquatic or pastoral resources of sustenance which all able-bodied persons could win for themselves and for their families. Nonetheless, it was treated as a wrong, for a man to seduce a girl or make her pregnant, outside the framework of marriage, and a token compensation was payable to the father of the girl. Such a payment could not have sufficed to maintain a child born of the relationship; that would be true still more emphatically in this day and age. It is curious that when the Magistrates' Courts Act¹⁵⁹ was passed in 1967, it gave statutory force to this custom, which was no longer suited to the contemporary state of socio-economic development. It empowered the magistrates' courts to apply traditional customs in respect of seduction and pregnancy compensation. This meant that the courts would continue to enforce the rule of token compensation to

the girl's father, which did little for the girl herself, in the upkeep of the child—at least not in a direct sense. *We recommend that section 2 of the Magistrates' Courts Act should be amended, and its provision for seduction or pregnancy compensation be abrogated, and instead provided for in the form of maintenance for a child born out of wedlock, in the new law.*

Children and the Law of Succession

4.93 The law of succession is based on the marriage-model, to the extent that it draws a distinction between children born in wedlock and children born out of wedlock. The Commission on the Law of Succession had recommended in 1968¹⁶⁰ that a child born outside marriage should be entitled to inherit the property of his or her mother and of her kindred and vice versa, and for this purpose should rank equally with the mother's children born during marriage. The tenor of this recommendation is preserved in the Law of Succession Act.¹⁶¹ Section 29 of this Act defines "dependant" (that is, the category of persons that may challenge a will where it makes inadequate provisions,¹⁶² and who will be entitled to inherit from an intestate estate) as "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 his death." The notion of children contemplated would appear to qualify the rights of children born outside marriage, where the testator or intestate is a man, so long as he does not express recognition for such children. This interpretation arises from the content of section 3 (2) of the Act:

"References in this Act to 'child' or 'children' shall include a child conceived but not yet born (so 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".

The force of this interpretation may be appreciated in the light of section 3 (3) of the Act:

"A child born to a female person out of wedlock, and a child as defined by sub-section (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock".

Every child born outside marriage generally knows his mother, and the mother's acknowledgement of him is open for all to see. The law is using this open position of the mother to fix her with a constant inheritance liability to the child. By contrast, although every child born outside marriage has a father, in a great many cases the father has concealed himself, for reasons of self-interest. The law does not want to search out this father so as to fix him with inheritance liability; rather the law accords him the power and privilege of revealing himself at his own convenience, and owning up to liability. If this is a pragmatic course for the lawmaker, it nevertheless hurts the child born outside marriage, insofar as he must (in most cases) restrict his inheritance expectation to the generally puny estate

of the mother, whereas his counterparts who are born during marriage are inheriting generously from both father and mother. We are convinced that such a position works inequity for the child born outside marriage; and *we recommend that the provisions of the Law of Succession Act, regarding succession by children born outside marriage should be reviewed, and appropriate adjustments made, so as to bring this category of children as close as possible to the position of children born during marriage.*

Child Abuse

4.94 Child abuse has been defined as “the intentional, non-accidental use of physical force or the intentional, non-accidental acts of omission, on the part of the parent or other caretaker interacting with a child, aimed at hurting or destroying the child”.¹⁶³ Since the child relates not only to the family and the caretaker, but also to non-members of the family or of the caretaker, institutions of child administration, and society at large, the framework of abuse should be extended to include acts of persons other than family members, or caretakers. Kenyan law does not expressly define the term “child abuse”, but it deals with circumstances which give rise to it; such circumstances include assault, defilement, exploitation for labour or sex, incest, infanticide, neglect. *We recommend that a new law should be passed which defines the term “child abuse”, and such a definition should cover all aspects of that notion be they physical, emotional, or developmental.*

4.95 Child abuse takes many forms, and control of some of these has proved difficult, for the reason that they are bound up with certain deep-seated cultural practices. In certain communal traditions, for example, the birth of twin children was regarded as a bad omen, and the new-borns would be thrown away. In some communities, it was common to neglect children born outside marriage. In yet other communities, partial or total female circumcision has been, or still is, a mandatory practice. In still others, male circumcision is done in harsh and largely insanitary conditions. Such practices, many cases of which have now been discarded, cannot be reconciled with the Children and Young Persons Act, section 23 of which prohibits the wilful assault, ill-treatment, neglect, abandonment, or exposure to suffering or injury to health, of the child, by the person responsible for the child’s care and custody. Any person who by act or omission, knowingly or wilfully causes such a child to become, or conduces to his becoming in need of protection and discipline, shall be guilty of an offence punishable by imprisonment, or fine, or both.¹⁶⁴

4.96 *It is recommended that a law be passed which expressly outlaws those cultural practices which endanger the survival, safety or development of the child, wherever they may still be practised.*

4.97 Sexual abuse of children has become increasingly common in Kenya, as we learned from our provincial visits. In this category are defilement (ordinary and aggravated), sexual assault, and incest. The prevalence of these offences is generally concealed by the fact that they

tend to bring much shame to a family, and for this reason silence is kept around them, and the culprits remain protected.¹⁶⁵ This involuntary protection for criminals has helped crime to flourish. Sexual abuse is often committed by persons well known to the victims—a member of the family, a friend, the employer, etc.

4.98 The law imposes penalties against sexual offences, but as will be seen in the next paragraph, there is need to review the pattern of penalty, as it fails to take into account the expectations of society. It is an offence, under the Penal Code,¹⁶⁶ to unlawfully and indecently assault any woman or girl; the punishment prescribed is: "Imprisonment with hard labour for five years, with or without corporal punishment." This kind of assault includes physical acts, as well as words, sound or gesture that intrudes upon the privacy of the woman or girl. For a girl of 14 years of age or more, her consent to such assault would provide a defence. Defilement entails unlawful carnal knowledge of a girl aged under 14 years; the prescribed penalty is 14 years imprisonment with hard labour, together with corporal punishment—and it is immaterial that the victim gave consent, unless the offender shows that the girl was his wife, or that he had reason to believe that she was over 14 years of age and she had, besides, given consent to the act.

4.99 From the views expressed at our interview meetings, we got the clear impression that most people are not satisfied with the state of the law on sexual abuse of children. There was objection to the wide discretion which the courts have to award entirely lenient sentences for such offences. It was the general view that the law should proceed by prescribing minimum sentences. Secondly, it was recommended to us that a distinction should be drawn between the very young children (such as those aged under 11 years), and the older ones going up to the age of majority. It was recommended to us that a category of aggravated defilement be recognized in respect of very young children—to be punished with sharply deterrent sentences; as distinct from the category of older children going up towards the age of majority. It was also recommended to us that cases of incest, in which children were the victims, should be punished by firm, deterrent sentences. It was, moreover, felt by most of the persons we interviewed, that the current state of the law, which punishes the offence of rape with life imprisonment, with hard labour for life, with or without corporal punishment,¹⁶⁷ whilst at the same time punishing child defilement with "imprisonment with hard labour for fourteen years together with corporal punishment",¹⁶⁸ was upside down, as it was insensitive to the irreparable harm frequently caused to children of tender years, when they fall victim to defilement.

4.100 We recommend that the law should be changed to reverse the severity of sentence, as between rape and defilement; there should be a minimum sentence in defilement cases; we propose a minimum sentence of imprisonment with hard labour for fifteen years together with corporal punishment.

4.101 We recommend that the law⁶⁹ concerning unnatural offences be amended to provide that where the victim is a child, the minimum sentence should be fifteen years of imprisonment with hard labour, together with corporal punishment.

4.102 We recommend that the law be amended to give protection against defilement to all girls, unless they are married or have been married, who have not yet attained the age of 18 years.

4.103 We have made the recommendations in paragraph 4.100–4.102, firstly as part of our concern to have a rational legal framework for the promotion of children's survival, development and protection, and secondly because we believe that the realization of the objects of such new legislation, would also go to solve a number of primary social problems with an important bearing on child welfare—infection with disease; pregnancy and child-motherhood; debilitating psychological trauma; etc. Thus, what may be achieved through criminal legislation, would tend to enhance the main purpose and design of children's civil legislation—in such matters as custody and maintenance of children; the question of children being born outside marriage; discipline and responsible upbringing; etc. But ultimately, the most important result, in the best circumstances, would be the nurturing of children who are well-conducted and in good health, with hope and direction, and who are substantially masters of their plans on family matters.

4.104 A common type of child abuse is physical assault—sometimes so violent as to cause death. It involves ruthless beating, banging the child on hard objects, whipping the child, tossing him out of the window, or even setting him on fire. The culprits are mainly parents, caretakers, neighbours or relatives. Where such children end up in hospitals, they will be found to have fractures of the limbs, ribs, skulls; bruises on the face, limbs or trunk; or severe internal injuries. The pretexts for such assaults are often petty and inconsequential. Yet the sentence awarded are often trifling. For example, in *R. V. Fanuel Okwangu and Another*,¹⁷⁰ a nine-year old girl was staying with her aunt—the second accused. Upon the mere allegation that the complainant had been teaching bad manners to her aunt's son, the child was tied up with ropes, and ruthlessly whipped. She was locked up in a room, and allowed no food. The following morning, someone opened her door, and splashed boiling water over the child's private parts. Neighbours brought this matter to the attention of the police, and this led to the arrest of the two accused. They were prosecuted, but the second accused was acquitted, while the first accused was found guilty and fined 1, 500 shillings. In *R. V. Nzungile w/o Mwove*¹⁷¹ a woman hanged her two children, on the pretext that she had no food to feed them. She was placed on probation for two years, after she pleaded guilty to a charge of manslaughter.

4.105 Given their physical frailty, and their defencelessness, children are dangerously exposed to harm arising from violence, originating from adults.

This is a threat to their very survival, and to their personal and social development. Kenya's international and moral obligations require her to suppress these menacing acts which endanger children. Accordingly, we recommend the enactment of new laws enhancing penalties against persons who wilfully do violence to children, either with the intention of maiming or killing them, or with recklessness, not paying regard to the likely consequences of their acts. Deterrent punishment should be imposed—and we propose a minimum sentence of six years' imprisonment with hard labour.

4.106 We learned, from local and comparative literature, and from our study tours locally and abroad, that the control and suppression of child labour is a most elusive task; the main reason being the widespread state of poverty, which as most people see it, would justify reliance on their children to bring home some money for domestic sustenance. So obviously, if the law just prohibited the engagement of children in gainful employment, but in the absence of substantial economic and social programmes to enhance the general standards of living, it would be inevitable that the law would be dishonoured in practice. *Thus we can only recommend, from the lawyer's standpoint, that a law be enacted which endeavours to protect children, in relation to labour, on the basis of suitable age—categories, and of the specific kinds of occupation called in question. Such a law should also provide for an effective monitoring procedure it should treat all children as qualifying for protection, so long as they have not yet attained the age of 18 years. The law should take the form of amendments to the Employment Act, and should provide clear sanctions against those found to be in breach.*

4.107 The exploitation of children for illicit activities such as drug-trafficking, not only turns them into criminals, but also undermines their moral integrity, as they begin to use such dangerous drugs—to the detriment of their health and normal development. *We recommend that legal provisions be made which impose a deterrent sentence on those established to have used children for purpose of illicit trade or illicit use of drugs and similar material. We recommend a minimum sentence of ten years' imprisonment with hard labour.*

4.108 A notorious aspect of child abuse is child prostitution. There are cases in which parents or guardians have forced their children into prostitution, as a way of getting money. There are cases in which adults have employed children to serve them or their businesses, as prostitutes. Not only is this a serious violation of the rights and welfare of children, and contrary to our public obligations, but it is a moral outrage which the overwhelming majority of Kenyan people would not wish to see happen. We believe that society should not allow children to be ruined through prostitution, sponsored by adults as a source of money; such adults had better seek out some other avenue of economic activity. The law should set its face firmly against this mode of child abuse. *We recommend that a law be passed which imposes a minimum sentence of ten years' imprisonment, for any parent, guardian, employer or other person who is established to have facilitated child prostitution in any way.*

4.109 It is not possible to attain the desirable state of civil and criminal law, for strengthening of the state's capability in the enhancement of children's rights, in the absence of appropriate recommendations regarding the applicable adjectival law. Those who commit serious offences against children—particularly offences involving sex—in most cases conceal their conduct in such a way as to render it exceedingly difficult for anyone to witness the event. Thus, in the absence of unimpeachable circumstantial evidence, such criminal conduct tends to escape the sanctions of the law. The law needs to change, if the State is to live up to the important obligations placed upon it, to protect children and enable them to realize their rights and welfare.

4.110. Both the Oaths and Statutory Declarations Act¹⁷² and the Evidence Act have provisions regarding evidence given by children. It appears, however, that the state of the legal provisions on the subject is not entirely harmonious, and appropriate amendments should be made as will be detailed hereafter. But more seriously, the state of those legal provisions is unlikely to be helpful in attempts to prosecute to conviction those suspected especially of sexual offences against children.

4.111. Section 19 of the Oaths and Statutory Declarations Act¹⁷³ provides that even though a child does not, in the opinion of the court, understand the nature of an oath, his evidence may be received—so long as the court has satisfied itself that the child is possessed of sufficient intelligence, and understands the duty of speaking the truth. If such a child were wilfully to give false evidence, in such circumstances as would, if the evidence had been given on oath, have made him guilty of perjury, then the child would have committed perjury, and would be liable to be dealt with as if he had committed an offence punishable with imprisonment.¹⁷⁴ Considering that the offence of perjury is punishable by imprisonment for seven years,¹⁷⁵ it is clear that the provision of the Oaths and Statutory Declaration Act is, to that extent, contrary to the position taken by the Children and Young Persons Act which does not allow even the use of the word "guilty" in relation to children. The Children and Young Persons Act provides not for the imprisonment of children, but for their rehabilitation. *We recommend that the Oaths and Statutory Declarations Act, section 19, should be amended to relieve children of the rigours of a sanction that applies in the case of adults who have committed perjury.*

4.112. In the proof of offences, section 124 of the Evidence Act requires the testimony of children of tender years to be corroborated; it provides: "Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him". Since in many cases the child is the only witness to a sexual crime being committed in the privacy of the home or some other hidden place, the implication is that the most truthful evidence from the only person who beheld the happening, is apt to be

rejected. There is really no perfect rationale for this legal approach; it all comes from doctrine and history. As David P. H. Jones and Richard D. Krugman say: "Traditionally courts of law in the U.K. and U.S.A. have been reluctant to hear such testimony [of children of tender years], reflecting the popular view that children are unreliable witnesses and unable to relate the truth accurately. There have been gradual changes but there exists a serious concern among professionals that children, especially those younger than 6 years, may not be reliable historians."¹⁷⁶ Their study, entitled "Can a three-year-old child witness to her sexual assault and attempted murder?", which meticulously follows a particular case, however, comes to this outcome: "This child miraculously survived her ordeal and has made good recovery. She was able to relate accurately what had happened to her even though she was only 3 years old. Later, when the accused corroborated her account from his own perspective, it confirmed that a 3 year old child can be an accurate witness when interviewed with applied techniques."¹⁷⁷ This case is an example in favour of our view that there should be a change in the law. *We recommend that the law be changed to accord the courts a full discretion to receive evidence from a child of tender years, in sexual assault cases, and to rely on it with or without corroboration, as a basis for entering a verdict of guilty. The courts, in such a case, should take all necessary precautionary measures such as first determining the intelligence, memory and truthfulness of the child-witness.*

Juvenile Delinquency

4.113 Juvenile delinquency is a general term which denotes the anti-social conduct of children—whether such conduct be what would constitute an offence under the penal law, where an adult is responsible, or just lack of discipline or of good conduct. A number of factors have been identified as the primary causes of child delinquency—

- (i) impoverished home-life with little or no formal or informal education, and lack of moral or spiritual guidance;
- (ii) birth outside marriage—leading to children being left under the care of aged parents or third parties who are not in a position to bring them up properly;
- (iii) over-indulgence of children—this tends to happen with well-to-do families, where abundance of material comfort may be thought to be a reflection of love, when it actually leads to a compromise of personal integrity.

When, due to such factors (as well as others), children commit delinquent acts, the law comes into play, especially for the purpose of rehabilitation.¹⁷⁸ Indeed, rehabilitation is the main principle of the Children and Young Persons Act—and it should remain a central principle in the new law of children which is being recommended in this Report. The Juvenile Courts, which are established under section 3 of the Act, are primarily for disciplinary and rehabilitatory purposes. Children may be brought before the courts if it is established that they are neglected; or not under the proper control of their parents or guardians; or living in an environment which is

detrimental to their physical or mental well-being. Parents who neglect their children may be summoned to appear before the court. Depending on the nature of the case, a Juvenile Court may order that: the child be handed back to its parent or guardian; committed to the care of a fit person; committed to an approved school (when over ten years of age); committed to a Borstal Institution or Youth Corrective Centre.¹⁷⁹ Such measures do not necessarily produce positive results, though they have helped in the rehabilitation of delinquent children, quite considerably. There are a number of significant problems in the way of an effective solution: many parents are unco-operative when they find that their children are having trouble with the machinery of justice; cases calling for discipline do not always reach the court; the available institutions of rehabilitation are far too few to cope with the numerous cases; there is a severe shortage of personnel in the system of juvenile administration—probation officers, social workers, etc.¹⁸⁰

4.114 Notwithstanding the rehabilitatory orientation of the machinery of child administration, the court has a discretion to commit a child to jail. Section 16 (3) of the Children and Young Persons Act states: "No juvenile or young person shall be ordered to imprisonment 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." Where a child is committed to prison, there are other safeguards provided, such as that the sentence is to be confirmed by the High Court, and that the child is to be, "Where practicable", confined separately from adult prisoners. This leaves room for confinement of delinquent children together with convicted and imprisoned adult persons, in some cases. The provision for such an exception cannot work to the advantage of the child, especially with regard to character development and rehabilitation. *We recommend that the judicial discretion to commit a child to prison, should only be exercised after the court has been duly informed of the existing facility for separate custody for the child, in some particular prison.*

4.115 Essentially, the social problem of juvenile delinquency arises due to failure of parental care. *We recommend, therefore, that the new law proposed should lay the greatest emphasis on the parental duty of custody and maintenance, as the best way of dealing with the problem of child delinquency.*

Institutions of Juvenile Justice and Child-care

4.116 The Juvenile Court is the legal authority that adjudicates on disputes relating to children's rights and welfare; but the practical management of such matters passes on to a large number of institutions, public and private—with the former performing the necessary co-ordinating and regulatory functions. The administrative set-up commences with the Minister, who holds the portfolio covering the Children's Department. The Children's Department, currently in the Ministry of Home Affairs and National Heritage, is responsible for the day-to-day administration of the Children and Young Persons Act. It co-ordinates legal matters relating to all institutions involved in children's services. It processes appointments, registrations and gazettelements in connection with the management of

children's affairs. It undertakes supervisory responsibilities in relation to the care, protection, control, discipline, education and training of children who are in need. Officers and social workers in this Department are primarily responsible for bringing cases of child delinquency before the Juvenile Courts; for supplying to the courts any relevant information concerning such children; and for conducting any necessary follow-up investigation. Within this broad organizational framework, there are several public and a large number of private children's institutions. As regards the public ones, *firstly* there are statutory institutions of which there are two types, run by the Children's Department, namely the juvenile remand homes, and the approved schools. The juvenile remand homes, established under section 36 of the Children and Young Persons Act, offer safety and custody to children who are remanded, pending the judicial disposal of their cases. Approved schools, established under section 38 of the Act, offer residential corrective care, education and vocational training. Parallel to them are the Borstal Institutions, set up under the Borstal Institutions Act.¹⁸¹ The Borstal Institution is managed as an aspect of the Prisons Department,¹⁸² and is reserved for children (in fact, boys) who have attained ages of between 16 and 18 years. The institution gives more stringent management than is accorded children in the approved schools; and it gives training in vocational skills.¹⁸³ Secondly, as regards such "public" institutions, local authorities may, with the authority of the Minister, set up institutions for promoting the welfare of needy children in their areas of jurisdiction. Such approval takes the form of registration and gazettelement, under the Children and Young Persons Act. The first category of public institutions (considered above) are, in a way, agencies of discipline and correction.¹⁸⁴ This is in contrast to the orientation of children's institutions established by private societies and voluntary institutions. The institutions in this class may be differentiated by the category of children they have chosen to provide for—but on the whole, they cater for needy children who require care, protection, education and training. section 63 of the Children and Young Persons Act provides for the approval of societies and voluntary institutions working for the care, control and protection of children. Once approval is given, the society or voluntary institution may establish children's homes—and these are required to be registered with the Children's Department.¹⁸⁵ Such societies occasionally appoint their own co-ordinating or field staff in charge of children's affairs. Such staff may, by gazettelement under section 64 of the Act¹⁸⁶, be accorded formal authority to process cases through the courts.

4.117 The children's institutions, as they currently stand, should be strengthened through expansion, qualitative improvement, and the incorporation of innovative elements. During our visits to the provinces, we received a number of suggestions in this regard with many of which we agree and which we put forward in the form of recommendations.

4.118 *We recommend that the judicial capacity for handling children's cases be enhanced, through the establishment of Family Courts, one at least*

in each province. Such courts should have a jurisdiction similar to that of the Resident Magistrates' Courts and should handle all family cases which originate below the High Court. They should deal with all matrimonial cases, children's cases of all kinds and those civil and criminal cases which are likely to affect family privacy or family interests in a profound manner. Appeals from such cases should go to a special division of the High Court set up to deal with family matters. Since the basic source of children's hardship is the state of discharge of basic responsibility in the family, it follows that children's cases fall squarely within the framework of family situations; and the principles applicable in the solution of family problems, ought to apply uniformly to the protection of the rights of the child. In making this recommendation, we take into account the fact that family cases have a privacy which deserves to be securely protected. This can only be done in a special set of family courts which apply rules of privacy different from the rules of ordinary courts. A further reason for making this recommendation is that family cases are by their nature frequent in occurrence, and are urgent. The ordinary courts cannot keep up with the pace of adjudication required. Provision for a special family division in the High Court would similarly promote this object of expedition and would also give the benefit of specialized attention.

4.119 *We recommend that the number of approved schools and Borstal Institutions be increased, to at least one of each, for each province.*

4.120 *We recommend a more active role for the Children's Department, especially in the co-ordination of placings for the adoption and fostering of children. And to strengthen the Department's operations, we recommend increased appointment¹⁸⁷ of children's officers to exercise prosecutorial powers in children's matters.*

Citizenship Rights

4.121 Under section 90 of the Constitution, a child born outside Kenya becomes a citizen of Kenya only if at the time of his birth, his father was a Kenya citizen. Yet there do occur cases in which a woman who is a citizen of Kenya, while resident abroad, gets a child outside marriage, by a man who is an alien.¹⁸⁸ On the woman's return to Kenya with her child, the child is not considered to be a Kenyan citizen, and will, to all intents and purposes, be a stateless person for a number of years. If and when the child is accorded citizenship status, this will be citizenship by registration or naturalization—both being categories of citizenship whose legal consequences render them vulnerable to deprivation¹⁸⁹ in certain circumstances (as contrasted with citizenship acquired by birth or descent).¹⁹⁰

4.122 *As a basis for fulfilling Kenya's international obligations,¹⁹¹ in respect of citizenship status for the child, we recommend the amendment, of section 90 of the Constitution and of sections 4 and 5 of the Kenya Citizenship Act,¹⁹² to provide that a child fathered by an alien man, outside marriage, and born to a woman who is a Kenya citizen, shall be treated in the same*

manner as a child born outside marriage, in Kenya, to a woman who is a Kenya citizen, and such a child shall automatically acquire the mother's citizenship at birth.

CHAPTER FIVE

CONSOLIDATED LIST OF RECOMMENDATIONS

Preliminary Remarks

5.1 In this chapter we have compiled the various recommendations made in the Report, for ease of reference. The recommendations fall into two categories: policy, administrative and programmatic recommendations; and legal recommendations. The first category of recommendations do not fall squarely within the province of the legal draftsman, even though their realization would greatly facilitate the performance of the legal tasks set out in the second set of recommendations. It is to be hoped that such necessary non-legal arrangements will be made, as part of the State's endeavours to fulfil its obligations in the safeguarding of the right and welfare of the child.

5.2 However, our primary concern is with the legal recommendations which can immediately be turned into legislation, for the protection of the rights of the child. These recommendations propose four courses of action which should be taken at the same time. These are as follows—

- (a) a new law to be known as "THE CHILDREN ACT," should be enacted;
- (b) several existing statutes should be repealed, and their substance, taken together with adjustments which we have suggested, should be incorporated in the new statute;
- (c) amendments should be made to various existing statutes, so as to bring them in line with current obligations in relation to the rights and welfare of children;
- (d) certain amendments should be made to the Constitution, so as to protect more fully the rights of the child.

Policy, Administrative and Programmatic Recommendations

5.3 It is recommended that the Government should make efforts to identify all primary school children who have been unable to gain entry into secondary schools or vocational training institutions—identify them by their geographical distribution—for the purpose of designing micro-level training schemes for them.

5.4 It is recommended that all practical measures be taken to give full access to pre-school education, for children living in the rural areas.

5.5 It is recommended that, the free-milk programme for children be strengthened, and its distribution widened to include, in the interests of their nutritional well-being, children who are out of school.

5.6 It is recommended that concerted efforts be made by the State to phase out and substitute the large slum dwellings of the urban areas, and provide clean water and sanitation in urban and rural areas.

5.7 It is recommended that, as an approach to the problem of child labour, all necessary measures be taken, by both the public and private sector, to enhance national economic productivity, for the purpose of improving the material condition of individual families.

5.8 It is recommended that the State should ensure that all urban accommodation and business premises are strictly planned and that all working and residential areas are provided with essential water supplies and sanitary facilities.

5.9 While legal measures are essential for dealing with the problem of street-childhood, we recommend that it be publicly recognized that the problem is first and foremost a socio-economic problem; and basic strategies must be sought in the domain of policies, programmes, and administrative arrangements to serve in due course as the foundation for laws conferring justiciable rights. In the absence of such measures, the law by itself is unlikely to safeguard the rights and welfare of the child.

5.10 Consequently it is recommended that:

- (a) Large-scale measures in the form of preventive programmes be undertaken to prevent or lessen the magnitude of the street-child phenomenon.
- (b) Programmes for child rehabilitation which have internal mechanisms for generating income to make them self-sustaining be maintained.
- (c) Effective co-ordination be kept, in relation to all rehabilitatory initiatives being conducted for children.
- (d) As a way of lessening of school drop-out rates, the State should pursue a policy of retaining children continuously in school attendance, and it should keep accurate inventories on school attendance.
- (e) As a solution to the problem of street-childhood, long-term and short-term rehabilitatory and corrective strategies should be instituted and maintained.
- (f) Special facilities should be provided at or near all prisons where mothers with young children are serving for the provision of proper care for such children.

Legal Recommendations

5.11 Since the convention on the Rights of the Child attributes special rights and aspects of welfare to the child directly, it is recommended that Chapter V of the Constitution, which provides for the fundamental rights of the individual should be reviewed in the next constitutional reform initiative, so as to incorporate the intent of the convention more effectively.

5.12 It is recommended that the substance of the central statutes on child law, namely the Adoption Act,¹⁹³ the Age of majority Act,^{193a} the Children and Young Persons Act,¹⁹⁴ the Guardianship of Infants Act,¹⁹⁵ and the

Legitimacy Act,¹⁹⁶ should be merged in and form parts of the proposed Children Act, which draw (as may be appropriate) on all statutes touching on children, and incorporate all relevant principles from the Convention on the Rights of the Child (1989), in an attempt to resolve the various legal problems that the rights and welfare of children; and accordingly the above-mentioned statutes should be repealed. The new Act should also make special provision for the support and protection of children born outside marriage.

5.13 It is recommended that the age of 18 years should be adopted as the minimum age of adulthood, and that in general all persons below that age should be treated as children, and accorded all the protections of the law as children.

5.14 In the light of the recommendation in paragraph 5.13, the terminology currently used in the Children and Young Persons Act should be abrogated, and the term "child" should be used in all relevant cases, except that for purposes of differential remedial rehabilitatory programmes suited to the stage of development of a particular child, age categorization may continue to be used.

5.15 It is recommended that the Employment Act¹⁹⁷ be amended, to provide for 18 years as the age of majority, and to accord appropriate protection to all children, both by restricting their engagement in certain kinds of work, and by providing special safeguards for them in approved places of work. Amendments should be made to the Act, so as to provide for an age of employment for domestic undertakings, and for agricultural work. The Act should, besides, be made more effective in its application, by instituting and maintaining appropriate monitoring and policing machinery by enhancing capacity in personnel and equipment, and by providing more detailed regulation.

5.16 It is recommended that eighteen years be adopted as the minimum age of marriage for males as well as females, for all family law systems, and that, as a basis of common principles and standards in the marriage institution, active steps should be taken to enact the proposed Marriage Bill which is long overdue.

5.17 We recommend that the protective scheme of the Children and Young Persons Act¹⁹⁸ which regards delinquent children as being not criminals but in need of discipline, care of protection, should be preserved in the proposed new law on children.

5.18 As we believe that children below the age of 12 years but above eight years of age, are still physically and emotionally tender, it is recommended that their cases should be considered exclusively in the Juvenile Courts, where they are likely to benefit from the practice of privacy and in formal procedure.

5.19 Section 14 (3) of the Penal Code provides that a male child under the age of 12 years is presumed to be incapable of having carnal knowledge;

and hence such a child is immune from liability for any offence involving carnal knowledge. We believe this to be a reasonable assumption; and it is recommended that this state of the law be maintained.

5.20 Section 142 of the Penal Code makes it an offence to unlawfully take away an unmarried girl below the age of 16 years, from the custody of her parents or lawful guardians. It is recommended that the law be amended to give protection to all unmarried girls below the age of 18 years.

5.21 Under Section 174 of the Penal Code, it is an offence for a person to deprive either a parent or a guardian, of the custody of a child under 14 years of age. It is recommended that the law be amended to raise the age up to which the offence of child stealing applies, preferably up to the age of 16 years.

5.22 It is recommended that amendments should be made to the Penal Code, reversing the severity of sentence, as between rape and defilement; there should be instituted a minimum sentence which should carry more gravity than attaches to rape, for defilement.

5.23 The imposition of a minimum sentence should apply to defilement, incest involving children, and unnatural offences committed against children; and in all such cases fifteen years imprisonment with hard labour, and with corporal punishment, are recommended as minimum penalty.

5.24 It is recommended that the law be amended to give protection against defilement to all girls, unless they are married, or have been married, who have not yet attained the age of eighteen years.

5.25 We recommend the enactment of new laws enhancing penalties against persons who wilfully do violence to children, with the intention either of maiming or killing them, or with recklessness, not paying regard to the likely consequences of their acts. For such offences, a minimum sentence of six years imprisonment with hard labour is recommended.

5.26 It is recommended that a law be passed which imposes a minimum sentence of ten years imprisonment for any parent, guardian, employer, or other person who is shown to have directly facilitated child prostitution howsoever.

5.27 It is recommended that provisions be made in the relevant legislation relating to drugs, imposing deterrent sentence on persons established to have used children for purposes of illicit trade, or illicit use of drugs. A minimum sentence of ten years imprisonment with hard labour is recommended.

5.28 It is recommended that the position in Children and Young Persons Act¹⁹⁹ which seeks to remove from children any public stigma for criminality, be reaffirmed in the proposed law; and as a corollary, it is recommended that appropriate amendments be made to the Penal Code, to remove terminology which appears to place the stigma of criminality upon children.

5.29 From the language of section 25 of the Penal Code,²⁰⁰ it appears that a child may, in cases of homicide, be detained even in places that could compromise the chances of rehabilitation. We do not consider such a situation to provide the best conditions for the protection of rights and welfare of such a child, and we recommend that an appropriate amendment be made, to provide for a more objective basis being used in the place and conditions of confinement of such children. In particular, provision should be made for a full exercise of discretion by the court.

5.30 In setting out the categories of protection for children, on the basis of age, the Penal Code does not deal comprehensively with the mode of proof of age. Although the courts have adopted a commendable approach to this matter, there is need for more legislative guidance; and it is recommended that appropriate amendments be made to current legislation, to guide the courts on mode of proof.

5.31 Under section 21 of the Criminal Procedure Code,²⁰¹ a child is liable to arrest, like adults, on suspicion of having committed an offence. In our view, it is necessary to provide, in amending legislation for differing procedures of bringing children before the court—based on apparent age, and on conduct and disposition at the material time. This is because an unduly formal or confrontational approach to children, depending on their ages, may prove to be of negative value, at a later stage when they are expected to express themselves in court.

5.32 We recommend that in the administration of criminal justice, courts should generally give preference to extra-mural penal employment, of fines, binding over to keep the peace, probation, etc. for mothers who are nursing or nurturing children in the early period of their tender years.

5.33 We recommend that the scheme of protection for children's rights, under the Infants Relief Act of England, 1874, should be replaced by local legislation.

5.34 Given the importance of protection for children in matters of tortious liability, we recommend that appropriate statutory provisions should be made, specifying comprehensively the legal consequences that should be attached to situations of delict.

5.35 We recommend that the Partnership Act²⁰² be amended, to incorporate a uniform age of majority (preferably 18 years), so as to ensure protection for children on the basis of a uniform and objective age-criterion.

5.36 It is recommended that the subject of parental liability for children's torts, in certain cases, should be inquired into further, with a view to enacting appropriate legislation.

5.37 As we consider that the provisions of the Guardianship of Infants Act provide a reasonable basis for the protection of the child in matters of custody, we recommend that most of its provisions should be retained, but the Act itself should be repealed, and these provisions merged into the proposed new Act.

5.38 It is recommended that the Subordinate Courts (Separation and Maintenance) Act be amended, to recognize 18 years as the age of majority, and to make provision for the maintenance of all the children of the family, in a situation where the mother applies for separation and maintenance. It is further recommended that it be provided that claims under this statute may emanate from any mother, irrespective of the system of law under which she was married.

5.39 It is further recommended that the Subordinate Courts (Separation and Maintenance) Act be amended to specify how all the children who are placed under the custody of the mother, following an application for separation and maintenance, are to be maintained in the event that the mother dies before they attain the age of majority.

5.40 We recommend that appropriate changes be made to all statutes which affect child-custody, so as to provide suitably for the custody of children born outside marriage. And we recommend that provision be made in the proposed new law, for the custody of children born outside marriage.

5.41 It is recommended that the proposed new law should place the burden of maintenance of children, whether born inside or outside the institution of marriage, on their parents/guardians, and should specify the basic parental duties in respect of shelter, food, apparel, education, health, and discipline for children, and that such obligations should have clear sanctions attached to them. Such new law should, however, be regarded as setting only minimum standards, and should allow the retention of any higher standards such as may already be in force under any particular system of law recognized in Kenya.

5.42 With regard to adoptions, we recommend as follows:

- (a) The law should give preference to adoptions at an early age, preferably one to five years, and should provide for the adoption of older children only exceptionally, at the discretion of the court.
- (b) The law should be changed to enhance the age qualifications of adopters-to-be for a woman, between 28 to 50 years; for a man, between 28 to 60 years;
- (c) Race by itself, should not be made a factor in adoption, even though, in practice, it should be a factor to be considered together with other relevant factors.
- (d) The law should require intending adopters to be in basically good health, and they should produce medical certificates to that effect.
- (e) The law should require intending adopters to produce evidence of their economic standing.
- (f) The law should include personal character as a relevant factor to be considered in making adoption orders.

- (g) The law should indicate age and sex of the child as factors to be specially considered, where application for adoption is being made by a single man, or a single woman.

5.43 We recommend that the law be changed, to strengthen and rationalize the conditions of adoption, with special reference to international adoptions in which Kenyan children are involved. It is recommended that international adoptions should be allowed, firstly on the conditions now set out under section 4 (1) of the Adoption Act,²⁰³ and secondly, subject to the following specific conditions:

- (a) A single man may not be granted an adoption order.
- (b) If the applicant is married, the union must be a heterogeneous one.
- (c) The applicants must obtain authority from their home countries, as fit persons to adopt a child from Kenya.
- (d) Such authority is to be given by a recognized court which should if possible be a Juvenile Court.
- (e) The applicants must produce immigration authority from their home countries, in respect of the adopted child.
- (f) The applicants must produce a security bond from their home countries, for the safety of the adopted child in their hands.
- (g) The applicants must produce an authentic bank statement indicating their financial fitness.
- (h) The applicants must produce a home study report from a recognized court, which should if possible be a Juvenile Court in their country.
- (i) The applicants must produce recommendations from the diplomatic office of their country in the Republic of Kenya.
- (j) The applicants must appear in person before a High Court judge,
- (k) The applicants, if successful at the preliminary stage of the hearing, should be required to remain in Kenya for at least three months during which an interim order is in force, and in the meantime a Kenyan agency should be appointed guardian *ad litem*.
- (l) The guardian *ad litem* must be able to visit the child freely and to make frank reports to the court.
- (m) The court should have the power to—
 - (i) reject any preliminary application summarily;
 - (ii) act on its own motion between the preliminary hearing and the final order;
 - (iii) rescind any orders made in the meantime; and
 - (iv) impose such penalties as are provided for by law;

- (n) All hearings including appeals in such cases should be heard under certificate of urgency.
- (o) Women over the age of 50 years, and couples where the older partner is above 60 years of age, should not be allowed to undertake such international adoptions.
- (p) A register of international adoptions should be kept by the public office in charge of adoptions.
- (q) Kenyans adopting children abroad, complying with the governing laws of the country in question, should have their adoptions automatically registered in Kenya, and their legal incidence governed by Kenyan law.

5.44 We recommend a change in the law, to make regulatory and monitoring arrangements for the fostering of children, and in this regard provisions should be made for registration and court orders to apply. We further recommend that all fostering cases should be subject to time-limits, subject to periodic judicial review. The law should provide for specific rights in respect of custody, maintenance, and inheritance, for fostered children who do not succeed in getting adopted.

5.45 We recommend that where a child is born outside marriage and the father has not acknowledged paternity, the law should require specified members of the extended family to give consent, before an application for adoption is approved.

5.46 We recommend that a special organ, perhaps a council of adoption, should be established, to perform the following functions—

- (a) formulate governing policy in matters of adoptions;
- (b) effect liaison between adoption societies and the Government, and Non-Governmental Organizations;
- (c) consider and propose names of officers who may serve as guardians *ad litem*;
- (d) monitor adoption activities in the country.

5.47 We recommend that all documentation required for the adoption process, should be prepared and made available with all due dispatch.

5.48 We recommend that the format of the Adoption certificate should be re-designed, with a view to giving adopted children greater personal privacy.

5.49 It is recommended that the use of the terms “legitimacy” and “illegitimacy”, in relation to family situations, should be abrogated, and that the law should refer instead to “birth inside marriage”, or “birth outside marriage”.

5.50 We recommend that the proposed new law should incorporate the substance of the 1959 Affiliation Act, but with appropriate modifications which include the following:

- (a) The courts with jurisdiction should be either the Resident Magistrate's Courts and the High Court, or a special set of Family, or Children's Courts, to be established by law.
- (b) The law should limit the number of times one woman, in her lifetime, can apply for a child support order.
- (c) The law should provide machinery for ensuring that monies paid under child support orders are actually used for the maintenance of the child.
- (d) Detailed provisions should be made in the law with regard to proof of paternity, save where it is freely admitted by the putative father. Such provisions should refer specifically to genetic evidence, the production of which by the woman in question, should be compulsory and if necessary enforceable by a court order.
- (e) The new law should specify the mode of payment of maintenance dues, where the putative father is below 18 years of age.
- (f) The new law should regard the age of 18 years as the age of majority and payments for the maintenance of a child born outside marriage should cover that age-duration, in a proper case.
- (g) The new law should apportion the responsibility for maintenance of the child, whether in cash or in kind, between the mother and the putative father.
- (h) The new law should allow either the mother or the putative father, at any stage before the child attains the age of majority, to apply for custody, and the court in determining such an application should have the power to vary the allocation of maintenance costs. for a preliminary hearing, before proceeding to an adoption society.
- (i) The new law should provide for a flexible procedure for determining the costs of maintenance for a child born outside marriage in an endeavour to take case of inflation.
- (j) The new law should avoid the use of terminology such as "bastard", "illegitimate child", "legitimate child";
- (k) The new law should provide that the court will enforce with or without amendment any written contract, made in good faith between the mother and the putative father of a child born outside marriage, which makes arrangements for the custody and maintenance of the child.

5.51 We recommend that section 2 of the Magistrates' Courts Act²¹¹ should be amended, and its provision for seduction or pregnancy compensation, be abrogated, and instead provided for in the form of maintenance for the child born outside marriage, in the proposed new Act.

5.52 We recommend that the provisions of the Law of Succession Act,²⁰⁴ regarding succession by children born outside marriage should be

reviewed, and appropriate adjustments made, so as to bring this category of children as close as possible to the position of children born inside the institution of marriage.

5.53 We recommend that the proposed new law should define the term "child abuse", and that such definition should cover all aspects of that notion—be they physical, emotional or developmental.

5.54 It is recommended that the proposed new law should outlaw all cultural practices which endanger the survival, safety or development of the child, wherever they may still be practised.

5.55. We recommend that the Oaths and Statutory Declarations Act,²⁰⁵ section 19 be amended, to relieve children of the rigours of the sanctions which apply in the case of adults who have committed perjury.

5.56 We recommend that the Evidence Act be amended to give the courts full discretion to receive evidence from a child of tender years, in sexual assault cases, and to rely on it with or without corroboration, as a basis for entering a verdict of guilty. The courts, in such a case, should take all necessary precautionary measures—such as first determining the intelligence, memory and truthfulness of the child-witness.

5.57 We recommend that the judicial discretion to commit a child to prison, should only be exercised after the court has been duly informed of the existing facility for separate custody for the child, in some particular prison.

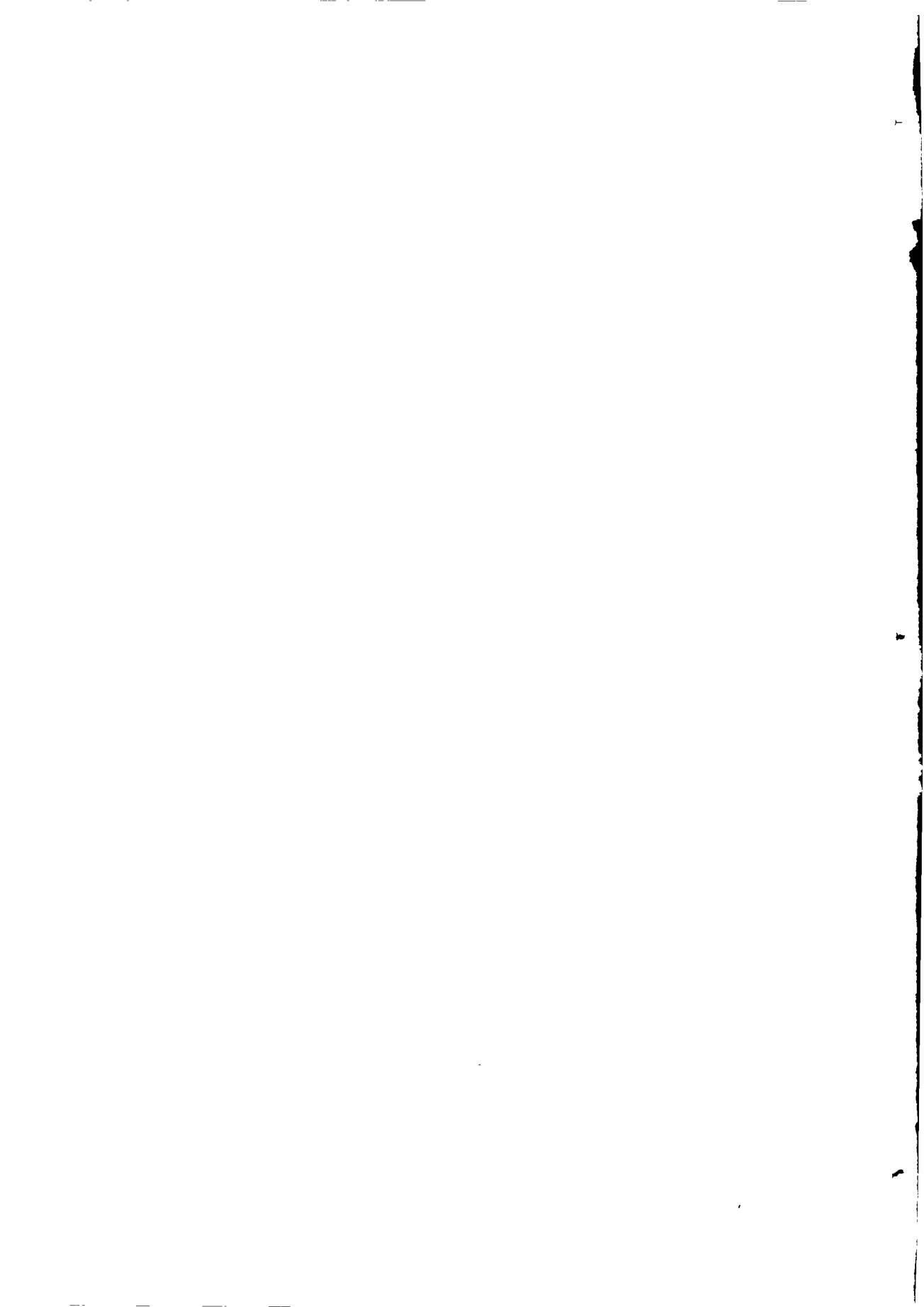
5.58 We recommend that the proposed new law should deal with child delinquency, and lay the greatest emphasis on the parental duty of custody and maintenance, as the best way of dealing with the problem.

5.59 It is recommended that the judicial capacity for handling children's cases should be enhanced, through the establishment of family courts. Such courts, which should be located in each province, should have a jurisdiction similar to that of the Resident Magistrate's Court, should handle all family cases which originate below the High Court. They should deal with all matrimonial cases, children's cases of all kinds, as well as those civil or criminal cases which are likely to injure family privacy in a profound manner. Appeals from such courts should go to a special Division of the High Court, established to deal with family matters. Since the basic source of children's hardship is the state of the family, it follows that children's cases fall squarely within the framework of family situations; and the principle applicable in the solution of family problems, ought to apply to the rights of the child. In making this recommendation, we take into account the fact that family cases have privacy which deserves to be securely protected. This can only be done in a special set of family courts which apply rules of privacy different from the rules of ordinary courts. A further reason for making this recommendation is that family cases are by their nature frequent in occurrence, and invariably are urgent. The ordinary courts cannot keep up with the pace of adjudication required. Provision for a special family division in the High Court would similarly promote this

object of expedition, and would also give the benefit of specialized attention. It is appreciated that it will not be possible immediately to establish such a division, but it is considered desirable that the framework be established now in the new Act with the provision that the relevant part of the Act should not come into operation until the circumstances of Kenya will be such as to ensure the viability of the proposal is assured both with regard to economics and personnel.

5.60 We recommend that the number of approved schools and Borstal Institutions in the country be increased, to at least one of each, for each province. We recommend an enhanced role for the Children's Department, especially in the co-ordination of placings for adoption and fostering of children. And to strengthen the department's operations, we recommend increased appointment of children's officers to exercise prosecutorial powers, in children's matters.

5.61 As a basis for fulfilling Kenya's international obligations to assure every child of citizenship status, it is recommended that section 90 of the Constitution, and sections 4 and 5 of the Kenya Citizenship Act,²⁰⁶ should be amended to provide that a child fathered by an alien man, and born outside Kenya and outside the institution of marriage, to a woman who is a Kenya citizen, shall be treated in the same manner as a child born outside marriage in Kenya, to a woman who is a Kenya citizen; and such a child should automatically acquire the mother's citizenship at birth.



NOTES

1. Christian Childrens Fund, *Rights of the Child* (Nairobi: CCF, 1992).
2. This is the general trend in many developing countries, and in particular those such as Kenya and India, where the rural population constitutes at least 80 per cent of the national population. B.S. Sehgal in his article "Welfare of Child—A Constitutional Commitment", in *Cochin University Law Review*, Vol. 6 (1982) graphically describes the common problem:

"The most important feature of India's growing population is that 42 per cent of it are in [the] 0.14 age group. India had relatively stable birth rates over a long period of time. Modern medicines and recent control of infectious diseases have caused a dramatic reduction in Indian mortality rates, particularly among infants and children. *Such an age structure with a disproportionately large number of children tends generally to slow down the socio-economic programmes of developing economies.* Specially marked is the rigour of this effect for developing nations like India which *suffer from a higher 'dependency burden'* than do nations with low fertility and mortality like England and America, a greater proportion of those populations are at their productive age" (p. 128, emphasis added.)

Sehgal further notes:

"As a predominantly rural country, [the] majority of India's children are in the rural areas where the infrastructure for health, nutrition and education is less endowed than in the urban areas. About 187 million children, constituting 81 per cent of the child population, are in the rural areas" (p. 129).

Much in the same vein, Dr. Adel Azer describes the situation obtaining in Egypt:

"According to the general census of 1976, Egypt's population was 36,626,204. The high fertility rate is evidenced by the fact that children below six years represented 17.3 per cent of the total population. The proportion of children under twelve years was estimated at 31.5 per cent of the total population. As a result *the dependency ratio of children is high (estimated at 48.6).* *This increase in the population reinforced by values which favour large families, drains the country's resources. Furthermore, the traditionally large size of the rural family adversely affects its standards of living*"—"The Rights of the Child in Egypt" (journal and date unidentified), pp. 317-318.

3. It is worthy of note that India's constitutional guarantees regarding child labour, education and related matters, have not given most children any social advantage that spares them from the practical dictates of bare survival. Sehgal (op. cit., p. 132) notes:

"A childhood spent in the classroom and playfield is denied to them because of the financial constraints on the family. The day the head of the family decides that his son is old enough to use his hands, he is put under the care of a motor mechanic or *dhaba* owner. It is here that the little one grows up learning the lessons of life, picking up his trade and chalking out his future. . ."

This is no less true of a large number of developing countries (see Adel Azer, op. cit.), including Kenya as will be evident from this Report.

4. Convention on the Rights of the Child (1989), Article 1.
5. Ibid., Article 2.
6. Ibid., Article 3.
7. Ibid., Article 4.
8. Ibid., Article 5.
9. Ibid., Article 6.
10. Ibid., Article 7.

11. *Ibid.*, Article 8.
12. *Ibid.*, Article 9.
13. *Ibid.*, Article 10.
14. *Ibid.*, Article 11.
15. *Ibid.*, Article 12.
16. *Ibid.*, Article 13.
17. *Ibid.*, Article 14.
18. *Ibid.*, Article 15.
19. *Ibid.*, Article 16.
20. *Ibid.*, Article 17.
21. *Ibid.*, Article 18.
22. *Ibid.*, Article 19.
23. *Ibid.*, Article 20.
24. *Ibid.*, Article 21.
25. *Ibid.*, Article 22.
26. *Ibid.*, Article 23.
27. *Ibid.*, Article 24.
28. *Ibid.*, Article 25.
29. *Ibid.*, Article 26.
30. *Ibid.*, Article 27.
31. *Ibid.*, Article 28.
32. *Ibid.*, Article 29.
33. *Ibid.*, Article 30.
34. *Ibid.*, Article 31.
35. *Ibid.*, Article 32.
36. *Ibid.*, Article 33.
37. *Ibid.*, Article 34.
38. *Ibid.*, Article 35.
39. *Ibid.*, Article 36.
40. *Ibid.*, Article 37.
41. *Ibid.*, Article 38.
42. *Ibid.*, Article 39.
43. *Ibid.*, Article 40.
44. *Ibid.*, Article 41.
45. *Ibid.*, Article 42.
46. Act No. 5 of 1969, Chap. V ("Fundamental Rights and Freedoms of the Individual").
47. Eg., the African Christian Marriage and Divorce Act (Cap. 151), ss. 8, 13, the Betting, Lotteries and Gaming Act (Cap. 131), ss. 28, 43, 48, 50, 52, 54; the Civil Procedure Act

(Cap. 21), rr. 1, 2, 3, 4,12; the Criminal Procedure Code (Cap. 75) the Evidence Act (Cap. 80), ss. 118, 124; the Films and Stage Plays Act (Cap. 222), ss. 2, 17; the Hindu Marriage and Divorce Act (Cap. 157), ss. 3, 4, 11; the Immigration Act (Cap. 172), ss. 2, 3, 4; the Industrial Training Act (Cap. 237), ss. 2, 8; the Law of Domicile Act (Cap. 37), ss. 3, 4, 5, 6, 9, 10; the Liquor Licensing Act (Cap. 121), ss. 14, 30; the Marriage Act (Cap. 150), ss. 11, 19, 21, 22, 35; the Magistrates' Courts Act (Cap. 10), ss. 2, 9; the Merchant Shipping Act (Cap. 389), ss. 53, 86, 89, 96, 97; the National Hospital Insurance Act (Cap. 255), ss. 5, 10; the National Social Security Fund Act (Cap. 258), ss. 2,19, 21; the Parliamentary Pensions Act (Cap. 196), ss. 3, 4; the Pensions Act (Cap. 189), ss. 15,17; the Public Health Act (Cap. 242), ss. 2, 46, 47, 103, 104, 105, 106, 107, 108, 109, 112; the Prisons Act (Cap. 90), ss. 66, 67; the Probation of Offenders Act (Cap. 64), s. 4; the Registered Land Act (Cap. 300), ss. 113, 114, 115; the Registration of Persons Act (Cap. 107), ss. 2, 9; the Trustee Act (Cap. 167), ss. 46, 47, 54; the Workmen's Compensation Act (Cap. 236), ss. 3, 11, 12.

48. Cap. 143.

49. Cap. 92.

50. Cap. 141.

50a. Cap. 211.

51. Cap. 144.

52. Cap. 219.

53. Cap. 220.

54. Cap. 45.

55. Cap. 193.

56. Cap. 149.

57. Cap. 226.

58. Cap. 160.

59. Cap. 152.

60. Cap. 63.

61. Cap. 143.

62. Cap. 141.

63. Cap. 144.

64. Cap. 145.

65. D. Kayongo — Male and P. Walji, *Children at Work in Kenya* (Nairobi: Oxford U.P., 1984).

66. *Ibid.*, pp. 56–82.

67. L. G. Muthoga, "The Rights of a Child", in Kenya Medical Women's Association, *Child Abuse and Neglect* (Nairobi: Initiatives Ltd., 1989) p. 96.

68. See *KANU Manifesto* (1983).

69. D. T. Moi, *Kenya African Nationalism: Nyayo Philosophy and Principles* (London: Macmillan Publishers, 1986), p. 14.

70. P. M. Onyango and K. Orwa, *Report of a Survey on Child Labour in Kenya* (submitted to ILO, May, 1991), p. 143.

71. Cap. 226.

72. A.N.P.P.C.A.N., *Report on a Study of Street Children in Kenya* (May, 1991).

73. P. M. Onyango, "Child Abuse and Neglect; Keynote Address", in Kenya Medical Women's Association, *Child Abuse and Neglect* (Nairobi: Initiatives Ltd., 1989), pp. 11-26.
74. F. Dalape, *An Experience with Street Children*; (Nairobi: Undugu Society of Kenya, 1987), p. 1.
75. A.N.P.P.C.A.N., op. cit. (n.72).
76. Art. 1.
77. Cap. 33, s. 2.
78. Cap.141.
79. Cap. 63.
80. Cap. 226.
81. Cap. 150.
82. Cap. 157, s. 3 (1).
83. Cap. 403, s. 33 (1).
84. Cap 121, s. 30 (2).
85. Cap. 122, s. 27 (1) (d).
86. Cap. 143.
87. Cap. 144.
88. Cap. 152.
89. This perspective comes from the Sunni school of thought.
90. Cap. 156.
91. Cap. 150; the same principles are contained in the African Christian Marriage and Divorce Act (Cap. 151).
92. S. 35.
93. Cap. 157.
- 93a. *Shari'ah* "encompasses moral and pastoral theology, ethics, high spiritual aspiration, and detailed ritualistic and formal observances; it includes all aspects of public and private law, hygiene, and even courtesy and good manners"—A. A. An-Na'im, "Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes", *The John Marshall Law Review*, Vol. 25 No. 2 (1992), p. 268n.
94. A. Azer and N. Ramzy, *Child Labour in Egypt* (Cairo: N.C.S.C.R. and UNICEF, undated), pp. 7-8.
95. Emphasis added.
96. Op. cit (n.2), pp. 338-339.
97. Emphasis added.
98. Cap. 226.
99. Ss. 2; 25.
100. Cap. 237.
101. Cap. 141, s. 22.
102. Cap. 141, s. 15.
103. L.N. 579/1963.

104. S. 14.
105. (1953) E.A.C.A. 251.
106. Cap 75.
107. Law of Contract Act (Cap. 3), s. 2.
108. Judicature Act (Cap. 8), s. 3.
109. It has been judicially held that a child of two years of age lacks the capacity for negligence: *Patel v. Uganda Commercial Co.* (1951) 18 E.A.C.A. 27; *Alio v. Mbarak* (1956) 23 E.A.C.A. 124.
110. *Patel v. Uganda Commercial Company* (1951) 18 E.A.C.A. 27.
111. Cap. 29.
112. *Lakha v. Standard Bank Ltd.* (1927–1928), 11 K.L.R. 1 (PC).
113. S. 13.
114. Cap. 167.
115. Cap. 144.
116. From the Citation of the Act.
117. S. 3
118. S. 4 (3).
119. S. 4 (4), (5).
120. S. 17; *Wambua v. Okumu* (1970) E.A. 578.
121. S. 14.
122. S. 11.
123. J. Kabeberi, *The Child: Custody, Care and Maintenance* (Nairobi: Oxford U.P, 1990).
124. Cap. 152.
125. Cap. 153.
126. M. K. Njoroge, *Maintenance, Custody and Legitimacy of Children in Kenya* (University of Nairobi, LL.B. dissertation, 1982).
127. As interpreted by the Honafi School.
128. Adel Azer, op. cit. (n. 2), p. 324.
129. J. Kabeberi, op. cit. (n. 123).
130. *Miller v. miller*, Nairobi High Court, Civil Case No. 4081 of 1990; *Wariara Mbugua v. Al Amin Mazrui*, Nairobi High Court, Misc. Civil Suit No. 209 of 1988.
131. Adel Azer, op. cit. (n. 2), p. 322.
132. J. Kabeberi, op. cit. (n. 123).
133. Cap. 242, s. 104.
134. Cap. 211.
135. See also the National Hospital Insurance Fund Act (Cap. 255); the Employment Act (Cap. 226), s. 7.
136. Quoted in *Plain Truth: A Magazine for Understanding* (Jan. 1966), p. 8 (Information obtained courtesy of Eric O. Ogwang, Esq., Juvenile Court Magistrate, Nairobi).

137. Cap. 143.
138. J. Kibeberi, *op. cit.* (n. 123).
139. Adel Azer, *op. cit.* (n. 2), p. 329.
140. Sir Humphrey Slade, "The Law of Adoption in Kenya", in S. B. O. Gutto (ed.), *Children and the Law* (University of Nairobi, I.D.S. Occasional Paper No. 35, 1979), p. 54.
141. Cap. 145.
142. Act No. 5 of 1969, s. 82.
143. Judicature Act (Cap. 8), s. 3.
144. (1955) 2 Q.B. 476 (C.A.).
145. No. 23 of 1930.
146. S. 10.
147. Then Cap. 142; originally Ordinance No. 12 of 1959.
148. S. 6.
149. S. 7.
150. S. 8.
151. S. 9.
152. S. 10.
153. S. 12.
154. S. N. Waruhiu, "Why we need Affiliation Law", *The Weekly Review* (Nairobi) 4th January, 1991, p. 18 (emphasis added.)
155. *Ibid.*, p. 20.
156. Affiliation (Repeal) Act, No. 11 of 1969.
157. S. N. Waruhiu, *op. cit.* (n. 154), p. 20.
158. *Ibid.*, pp. 20-21.
159. Cap. 10.
160. Republic of Kenya, *Report of the Commission on the Law of Succession* (Nairobi: Government Printer, 1968), Rec. No. 44.
161. Cap. 160.
162. S. 26.
163. T. Silweya, *Child Abuse vis-a-vis Juvenile Delinquency* (University of Zambia Law School, LL.B. dissertation, 1991), p. 4.
164. *R. v. Nzengila w/o Mwove*, Nairobi High Court, Criminal Case No. 63/1983.
165. P. Onyango, "Child Abuse and Neglect", in Kenya Medical Women's Association, *Child Abuse and Neglect* (Nairobi: Initiatives Ltd., 1989), p. 11.
166. S. 144.
167. Penal Code, s. 140.
168. Penal Code, s. 145.
169. Currently contained in the Penal Code, s. 162.

170. Makadara R. M.'s Court, Criminal Case No. 12467 of 1983.
171. *R. v. Nzengile w/o Mwove*, Nairobi High Court, Criminal Case No. 63/83.
172. Cap. 15.
173. Cap. 80.
174. S. 19(2).
175. Penal Code (Cap. 63), s. 110.
176. D.P.H. Jones and R. D. Krugman, "Can a three-year-old child bear witness to her sexual assault and attempted murder?" *Child Abuse and Neglect—The International Journal*, Vol. 10 No. 2 (1986), p. 253.
177. *Id.*, p. 257.
178. R. Sitati, "Juvenile Delinquency and the Law," in S. B. O. Gutto (Ed.), *Children and the Law in Kenya* (University of Nairobi: I.D.S. Occasional Paper No. 35, 1979), pp. 83–88.
179. A. H. Buluma, *The Treatment of Juvenile Delinquents in Kenya* (University of Nairobi, LL.B. dissertation, 1975).
180. Sitati, *op. cit.* (n. 178).
181. Cap. 92.
182. Prisons Act (Cap. 90).
183. Buluma, *op. cit.* (n. 179).
184. R. N. Walekhwa, "Background to Legislation", in A.N.P.P.C.A.N., *Working Together for the Rights of the Kenyan Child* (Nairobi: A.N.P.P.C.A.N., 1988), pp. 26–30.
185. L. N. 289/1965.
186. M. M. Akola, "Legal Aspects of Children's Homes and Institutions", in S.B.O. Gutto (ed.), *op. cit.* (n. 178), pp. 65–73.
187. By virtue of the Criminal Procedure Code (Cap. 75), s. 85.
188. The Constitution of Kenya, Act No. 5 of 1969, ss. 92, 93; the Kenya Citizenship Act (Cap. 170), ss. 4, 5.
189. The Constitution of Kenya, s. 94.
190. *Ibid.*, ss. 89, 90; see J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi Acts Press, 1990), pp. 197–209.
191. The Universal Declaration of Human Rights (1948), Art. 15; the International Covenant on Civil and Political Rights (1966), Art. 24(3).
192. Cap. 170.
193. Cap. 143.
193. (a) Cap. 33.
194. Cap. 141.
195. Cap. 144.
196. Cap. 145.
197. Cap. 226.
198. Cap. 141.

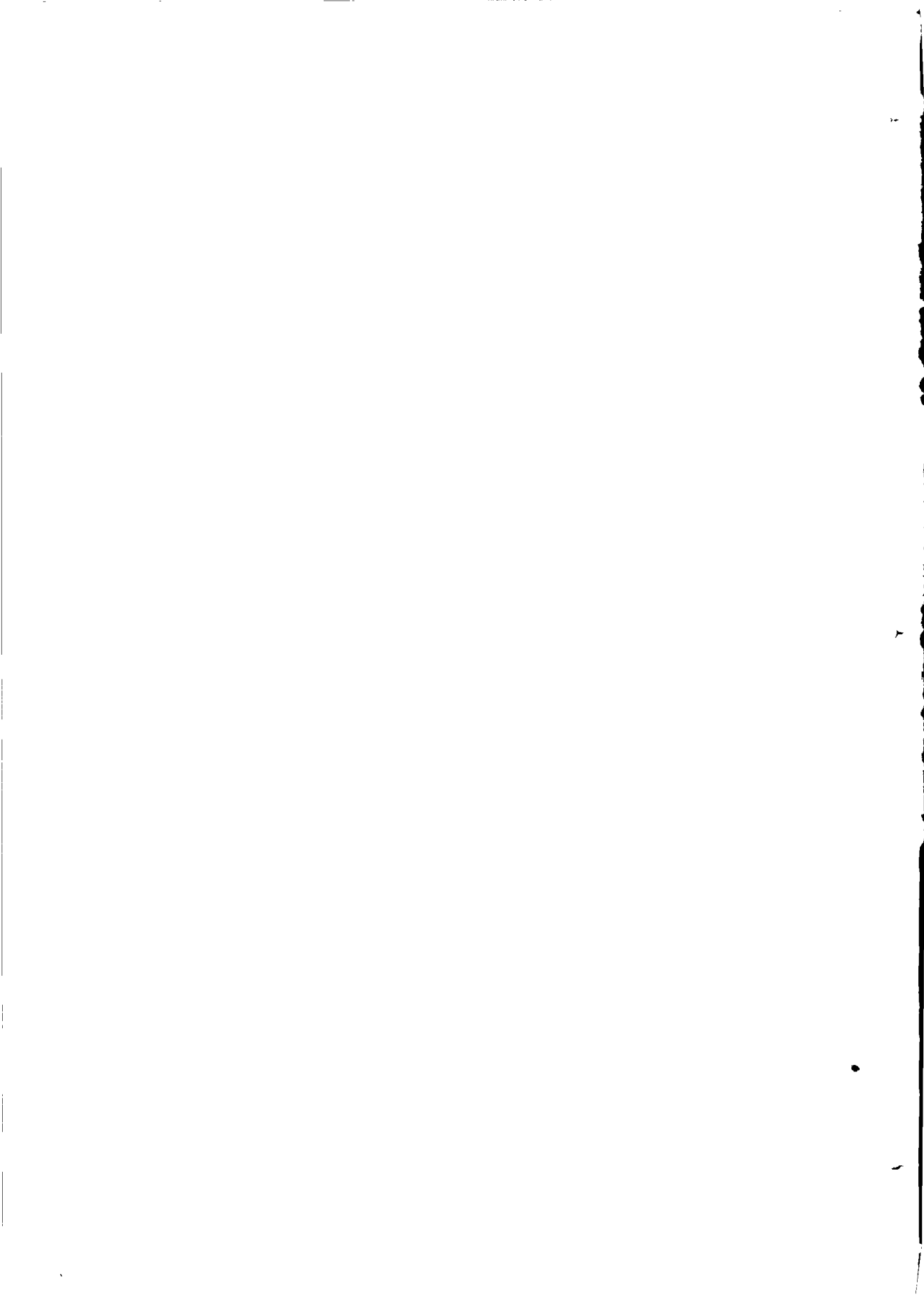
- 199. Ibid.
- 200. Cap. 63.
- 201. Cap. 75.
- 202. Cap. 29.
- 203. Cap. 143.
- 204. Cap. 160.
- 205. Cap. 15.
- 206. Cap. 170.

**KENYAN STATUTES WITH PROVISIONS REGARDING
CHILDREN**

<i>Act</i>	<i>Chapter</i>	<i>Date of Comme- ncement</i>	<i>Relevant Sections</i>	<i>Page</i>
1. Adoption	143	16-6-59	The whole Act (Sections 1-37)	
2. African Christian Marriage and Divorce	151	17-12-31	8,13	
3. Age of Majority	33	5-4-74	2,5	
4. Asian Officer's Family Pensions	194	1-5-42	2,7,13	
5. Asian Widows and Orphans	193	22-10-27	2,4,12,15,20,23,24 25,31,34	
6. Betting, Lotteries and Gaming	131	Part II-1-II-66 Remainder 1-1-67	28,43,48,50,52,54 28,43,48,50,52,54	
7. Births and Deaths Registration	149	9-6-28	2,7,8,9,10,11,12, 13,14	
8. Bills of Exchange	27	14-5-27	22	
9. Borstal Institutions	92	2-9-63	The whole Act (Section 1-52)	
10. Chief's Authority	128	24-3-37	15	
11. Children & Young Persons	141	31-12-63	The whole Act (Sections 1-79)	
12. Civil Procedure	21	31-1-24	Rule 1,2,3,4,12	
13. Constitution			34,43,70,75,78,82, 87,88,89,90,93,97, 98	
14. Co-operative Societies	490	31-12-66	14	
15. Contract	23	1-1-61	2	
16. Criminal Procedure	75	1-8-30	185,186	
17. Domicile	37	5-6-70	3,4,5,6,9,10	
18. Education	211	4-4-68	—	
19. Employment	226	3-5-76	2,7,24,25,26,27,28 29,31,32,33,34,35, 37,38,48,52,56	
20. Evidence	80	10-12-63	118,124	
21. Fatal Accidents	32	8-2-46	2	
22. Film and Stage Plays	222	1-10-63	2,17	

<i>Act</i>	<i>Chapter</i>	<i>Date of Commen- cement</i>	<i>Relevant Sections</i>	<i>Page</i>
23. Firearms		114	1-1-54	32
24. Geneva Conventions		198	22-11-68	—
25. Guardianship of Infants		144	5-5-59	The whole Act
26. Hindu Marriage and Divorce		157	19-7-60	3,4,11
27. Immigration		172	1-12-67	2,3,4,
28. Interpretation and General Provisions		2	11-12-56	3
29. Industrial Training		237	16-5-60	2,8
30. Judicature		8	1-8-67	3
31. Kadhis' Courts Act		11	1-8-67	5
32. Kenya Boy Scouts		219	23-8-35	The whole Act
33. Kenya Girl Guides		220	23-8-35	The whole Act
34. Kenya Citizenship		170	12-12-63	2,3,4,5,18
35. Legitimacy		145	10-6-30	The whole Act (Sections 1-11)
36. Limitation of Actions		22	1-12-67	2,42
37. Liquor Licensing		121	5-11-57	14,30
38. Marriage		150	29-11-02	11,19,21,22,35
39. Magistrates Courts		10	1-8-67	2,9
40. Maintenance Orders Enforcement		154	6-9-21	
41. Matrimonial Causes		154	1-1-41	2,26,27,28,30,32
42. Merchant Shipping		389	1-12-67	53,86,89,96,97
43. Mohammedan Marriage and Divorce Registration		155	8-6-06	9,
44. National Hospital Insurance		255	12-7-66	5,10
45. National Social Security Fund		258	23-10-65-LN 308/65 Sections 10-13-LN 47/67	2,19,21
46. National Youth Service		208	1-9-64	
47. Oaths and Statutory Declarations		15	Part VI 18-10-57	
48. Partnership		29	1-7-34	13,14
49. Parliamentary Pensions		196	1-7-84	3,14

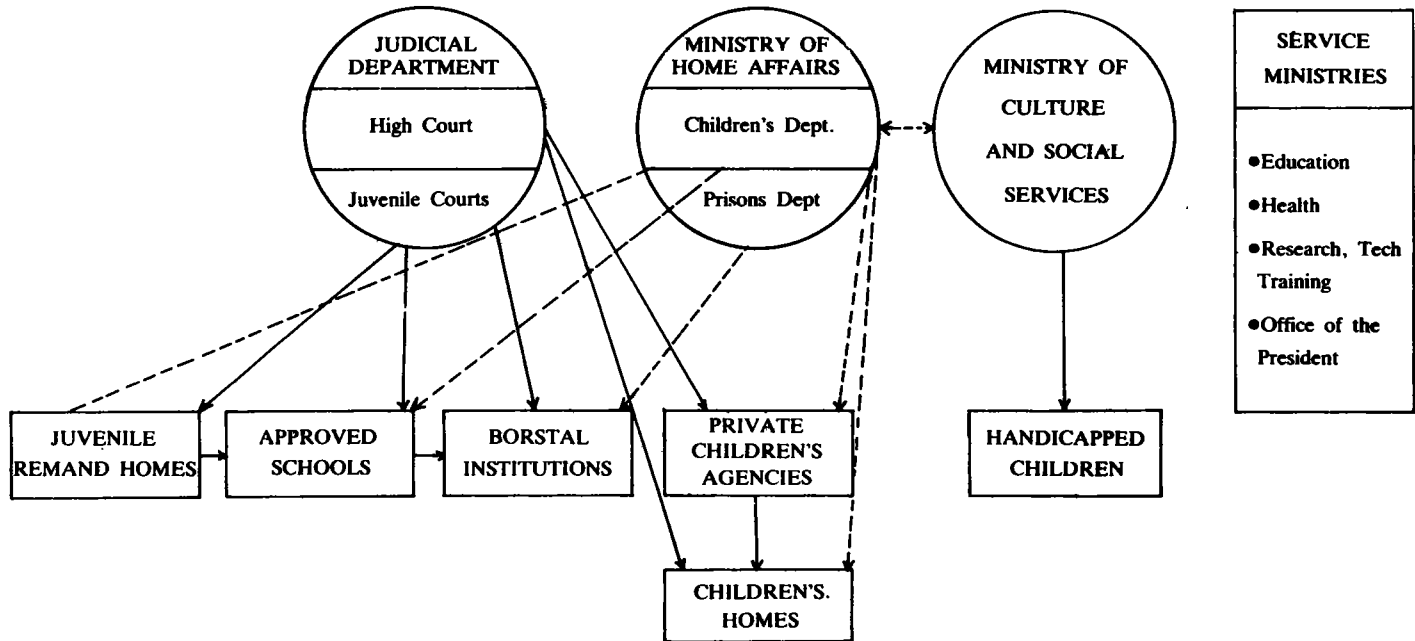
<i>Act</i>	<i>Chapter</i>	<i>Date of Comme- ncement</i>	<i>Relevant Sections</i>	<i>Page</i>
50. Penal Code	63	1-8-30	14,25,27,142,143, 145,146,147,148, 149,150,151,152, 153,154,155,157 158,159,160,161 164,166,167,174 210,211,214,216 217,227,255,257 262	
51. Pensions	189	1-2-63	15,17	
52. Public Health	242	6-9-21	2,46,47,103,104 105,106,107,108, 109,112	
53. Prisons	90	1-2-63	66,67	
54. Probation of Offenders	64	20-12-43	4	
55. Registered Land	300	16-9-63	113,114,115	
56. Registration of Persons	107	16-5-49	2,9	
57. Sale of Goods	31	1-10-31	4	
58. Succession	160	1-7-81	3,4,5,26,29 32,33,41,42	
59. Subordinates Court (Separation and Maintenance,	153	1-2-29	3,4,10,12,13,15	
60. Traffic	403	1-1-54	33	
61. Traditional Liquor	122	1-7-71	27	
62. Trustee Act	167	16-11-29	46,47,54	
63. Trust of Land	290	22-12-41	10,13	
64. Widows and Children's Pensions	195	1-1-66	2,10,11,12	
65. Workmen's Compensation	236	1-10-49	11,3,12	

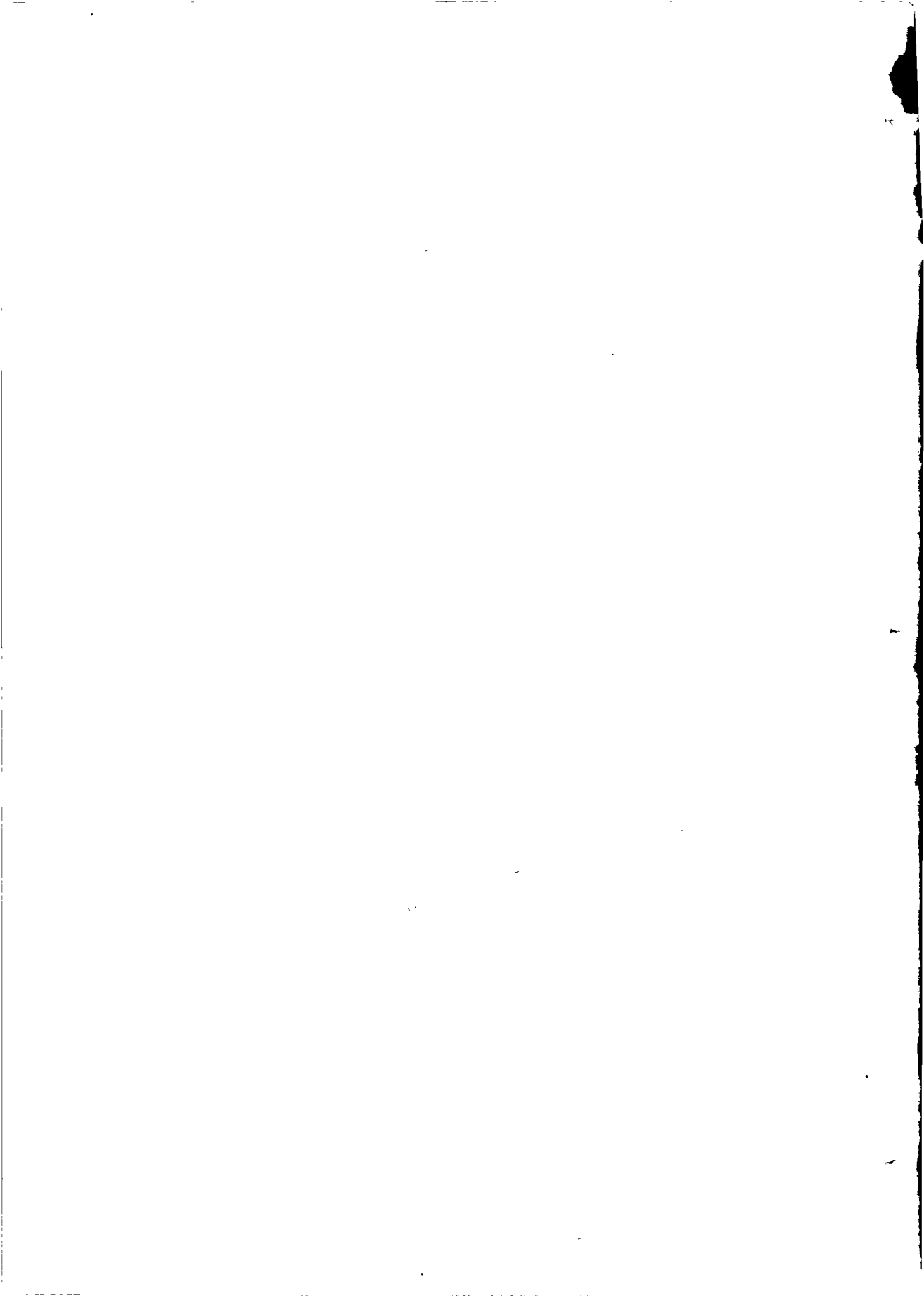


CURRENT STRUCTURE OF ADMINISTRATION FOR CHILDREN'S AFFAIRS

APPENDIX 2

Note.—In this structure, responsibility for children's affairs is essentially random in its allocation; and there is no provision for a family court system.

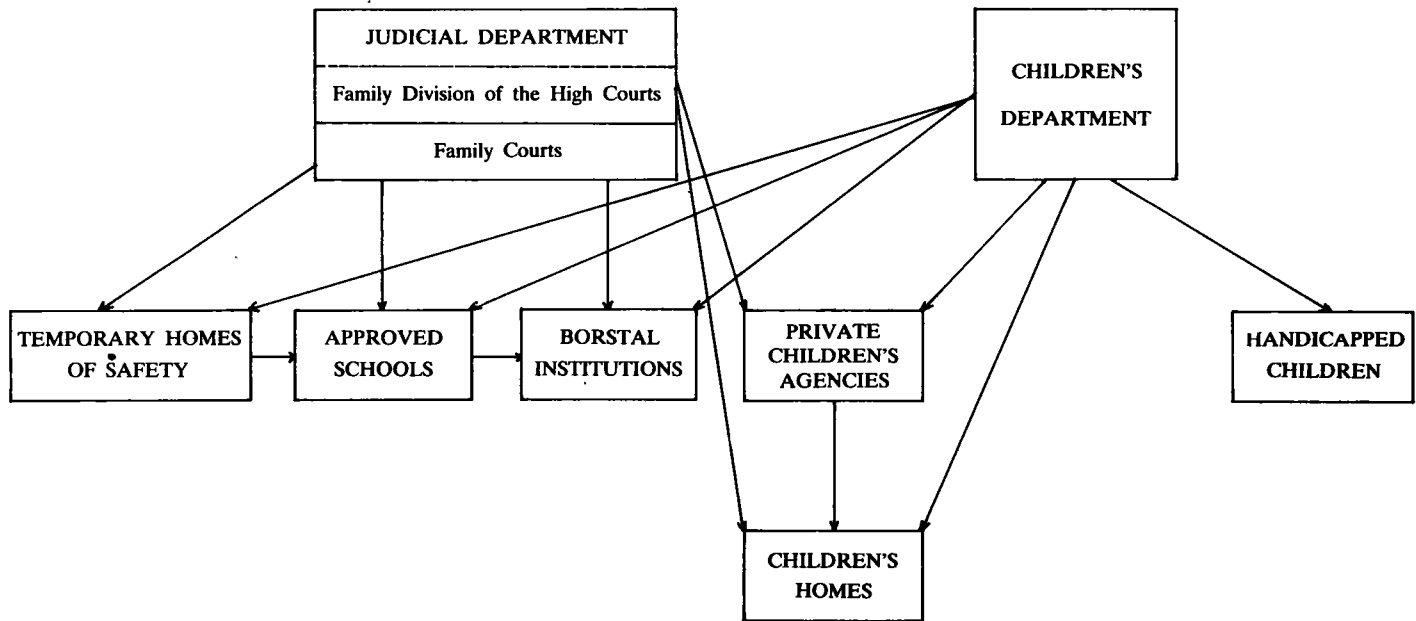


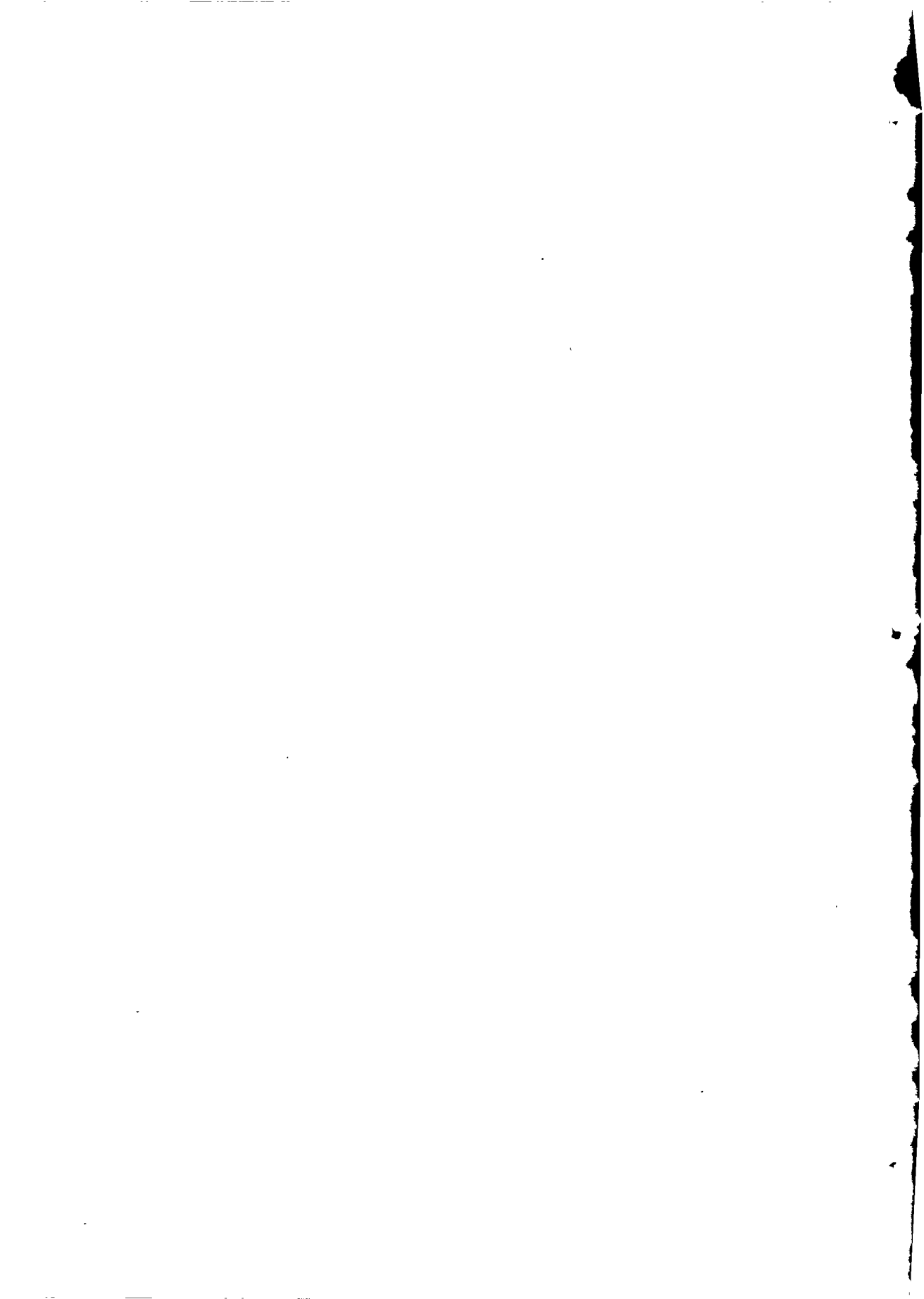


**PROPOSED STRUCTURE OF ADMINISTRATION FOR
CHILDREN'S AFFAIRS**

APPENDIX 3

Note.—In this structure, there would be a family court system; and the Children's Department would become squarely responsible for the administration of children's affairs.





COMMON HAPPENINGS ABOUT CHILDREN—REPORTS

(a) Child Abuse***Discarding of Babies******"Infant Saved from Pit"***

"A two-week-old baby survived after spending 17 hours in a half-filled pit latrine where the mother had dumped it at Kampi Thomas, Eldoret. Police and members of the Eldoret Municipal Fire Brigade had to demolish the mud-walled latrine to retrieve the baby. The mother is a victim of the tribal clashes at Burnt Forest who had taken refuge at Kampi Thomas, according to . . . her neighbour. A crowd threatened to lynch the baby's mother but the police restrained them.

Immediately after the baby was rescued, its mother was forced to suckle it before being frog-marched to the Eldoret Police Station.

Later, the baby was taken to the District Hospital.

A nurse at the hospital said the baby was out of danger—from *Daily Nation*, 18th January, 1993, p.5.

Physical Violence Against Children***"Man Strangled Girl, 9, to Death"***

"A man dragged a 9 year old girl into a coffee plantation and strangled her to death before dissecting her private parts with a *panga*, a Nairobi court was told yesterday.

A State Counsel, Miss Emily Kamau, told Mr. Justice Joseph Mango that the man, who is charged with murdering the girl, then had carnal knowledge of the dead girl before burying her in the farm.

Miss Kamau was reading an opening report in a case in which the court heard that on the fateful date, Gudakan left home to fetch water from a nearby river. On the way, she met X who talked to her for some time.

The man then suddenly grabbed the small girl and dragged her into a nearby coffee farm where he strangled her to death, the court was told. He hid her body under a coffee tree and went to Mji wa Huruma in Nairobi.

Later in the day X went to the girl's mother, Mrs. Anna Wanjiku Bavu and attacked her, after which he went into unoccupied house, and stole a bedsheet.

Miss Kamau said that X returned to the place he had left the girl's body, dissected her private parts, had carnal knowledge of her and buried her in a hole he had dug.

A doctor's report said the cause of death was severe haemorrhage following vaginal and chest injuries and loss of blood in the abdomen and chest cavity"—from *Daily Nation*, 29th October, 1991, p.28.

Sexual Assault on Children

(i) "Man Made Standard 4 Girl Pregnant"

"An elderly man who impregnated a Standard 4 girl at Jaribu Primary School in Garissa, has been ordered to pay the parents KSh. 12,000 in property.

The Garissa District Magistrate, Mr. David Nyagah, said the court had largely invoked the provisions entailed in the Somali customary law in passing the sentence.

Ibrahim Mahal listened to the magistrate as he ordered him to pay four camels, each worth shillings 3,000 to the parents or guardians of the child as compensation. He would also pay the cost of the case.

The court heard that on different dates early this year, the accused visited the girl's home (on the pretext) that he was teaching the girl.

The little girl told the court that she did not have cause to doubt the sincerity of the accused in teaching her since he was her neighbour. She said the accused finally proposed to her, but she refused, saying she was still a pupil and under-age, she said.

The court heard the accused finally lured the girl (to sleep) with him and that is how the unfortunate girl became pregnant.

The issue was taken before a court of elders, chaired by a local chief. The accused admitted the offence. He, however, failed to meet the demand for compensation, and the case was then taken to the law courts.

The magistrate said the accused had behaved contrary to the code of discipline governing African societies. He told the accused that, motivated by irresistible lust, he had ruined the life of a young girl who could otherwise have successfully pursued her education.

Said the magistrates: "The evidence before me is satisfying. It has also been corroborated by two elders who had been part of the court of elders. I find no reason to doubt them, in accordance with the Somali Customary Laws applicable in this case"—from *Kenya Times*, 30th September, 1978, p.3.

(ii) "Farmer on Sex Charge"

"A 28 year old farmer appeared before a Thika Resident Magistrate, Mr. Nyalima, charged with defiling a two year old girl.

X, a Kenyan of European origin, denied the charge and was remanded after the prosecutor, Inspector Harrison Wahogo, opposed bail. The accused faced another count. . . .

The first charge against X stated that on August 11 at Maydale Farm in Kiambu, he had carnal knowledge of a two year old girl.

The Magistrate fixed the hearing for October, 25 . . . In the same court a 42 year old man was charged with a defilement.

The accused Y, denied that on May 11, at Nguthuru Village in Murang'a District, he had carnal knowledge of a six year old girl.

The prosecutor opposed bail and the accused was remanded until September 4, when the case will be mentioned—from *The Standard*, 23 August, 1992, p.3.

(iii) "*Rapists Flogged Publicly*"

"Two men have been flogged publicly in the Southern Pakistan City of Hyderabad for raping a six year old girl, the official APP news agency said today.

Both men, who were found guilty by an Islamic Court, were lashed 30 times yesterday in front of hundreds of onlookers, it said. They have been sentenced to 25 years in prison.

The flogging was the first carried out in public since the death of Military Ruler General Mohammad Zia-Ul-Haq in 1988.

Zia introduced harsh Islamic punishments such as flogging and stoning to death"—from *The Standard*, 26th September, 1991, p.7.

(iv) "*Suspect Caught Defiling Girl, 6*"

"A man was seriously injured when an angry mob set on him after he was allegedly caught red-handed raping a six year old girl in Thika Town on Monday night.

Police sources confirmed the incident which occurred in Kiandutu Village and said suspect had been arrested.

The sources said the suspect pounced on the young girl as she led three blind women home at around 8 p.m. and carried her off to his hut.

The girl had been left waiting on a footpath while the three blind women stopped to answer calls of nature. When the trio called for the girl without response, they raised the alarm and villagers, together with KANU Youthwingers, went to help. The angry mob later forced their way into the hut where the rapist had locked the girl in and started defiling her. He was cornered and beaten severely before the Youthwingers rescued him and whisked him to the Thika Police Station.

The girl, who was bleeding profusely, was taken to the Thika District Hospital where she was admitted.

Police said the man would appear in court soon, facing a defilement charge"—from *Daily Nation*, 29th August, 1991, p.5.

(v) "*Rapist opts for Castration*"

A judge yesterday approved a child molester's request to be surgically castrated rather than go to prison on a charge of raping a 13 year old girl last year.

Steven Allen Butler, 28, volunteered for the operation after reading about state district judge, Mike McSpadden's support of castration for some

sex offenders. Bill Hawkins, an Assistant Harris County Prosecutor, said the victim's family, who knows Butler, approved of castration to spare the girl from testifying. The mother of the victim is not interested in having her child testifying in open court if there is another alternative, Hawkins said"—from *Sunday Nation*, 8th March, 1992, p.8.

(b) Child Neglect

"Abandoned Girls Facing Starvation"

"Six girls are facing starvation in the Kayole Estate after their parents deserted them more than three months ago.

Leah Kwamboka, 14, said their father left home in January this year, leaving them alone with their mother. However, Leah said, their mother's whereabouts are unknown since she left them alone on March 11.

When the *Nation* arrived at their squalid one-roomed house at Kayole, the six girls were huddled in a corner of the room waiting for a meal of a few miserable bananas cooking on a *jiko*. The youngest girl, three year old Yvonne Mora, was covered in a rash all over the body and had a running nose. Nothing her elder sister could do or say would stop her crying continuously for their mother.

Leah said neighbours who had been assisting them were fed up with us and some of them had started falsely accusing her and her sisters of stealing their property. Looking older than her 14 years, the Standard 7 pupil of Kayole One Primary School gave her father's name as X, a lorry driver who works in Eldoret, and their mother's name as Y, a housewife. The girls were fearful they may be evicted from their house as rent had not been paid for 18 months.

A woman who talked to the *Nation* by telephone at the Nairobi Children's Department said she could not speak to the Press about the children's case because 'we have not even heard of it'. However, she promised that officers from the department would be dispatched to investigate"—from *Daily Nation*, 8th May, 1992, p.3.

(c) Child Marriage

(i) "100 Year old Suitor for 10 Year old girl"

"A Standard 5 girl at Mosiro Primary School in Kajiado District is being offered for marriage to a 100 year old man who has already paid the dowry.

Naksenya Leparkion, aged 10, one of the only two girls at the school's upper level, was saved from the hatchet of marriage by her headmaster who reported the development to the area District Officer, Mr. William Kiprono. Mr. Kiprono, the District Officer for Ngong, reacted swiftly by going to the school where he convened a *baraza* to denounce the practice, which he blamed for low enrolment of girls in schools among the Maasai.

The D.O., during the meeting, warned parents to desist from coercing their school-going girls into early marriages. The school headmaster blamed early marriages on early pregnancies.

Meanwhile the issue was discussed at length at the Ngong Division Sub-District Development Committee meeting where members called for a solution to the prevalent practice. They observed that the practice was denying Maasai girls their right to education. They urged leaders in the district to address the issue with seriousness, as to save the situation.

During the Sub-D.D.C. meeting for Central Division, the area Assistant Education Officer, the Reverend Festus Murangiri, told stunned members that Kilonito, Mailwa and Torosei Primary schools have had their Standard 8 classes dissolved due to (shortage of) students. He said the classes had been deserted (at) the onset of the circumcision rites season"—from *Sunday Times*, 23rd June, 1991, p.3.

(ii) "100 Year old Suitor Wants Back His Cows"

In a dramatic turn of events the father of the Standard 5 girl at Mosiro Primary School who was to be married off to a 100 year old man has requested the Ngong District Officer to raise for him KSh. 10,000 to enable him to pay back the daughter's suitor who had already paid him a dowry of 40 cows.

Meanwhile, the Vice-President and Minister for Finance, Professor George Saitoti took swift steps to save the girl's education which was headed for doom, and had her transferred from the remote Mosiro Primary School to African Inland Church Girls' Primary Boarding School in Kajiado township.

According to the Ngong D.O. Mr. Kiprono, the 100 year old man, who intended to marry the school girl, has taken cover following revelations that the D.O. wanted to meet him"—from *Sunday Times*, 7th July, 1991, p.3.

(d) Children in Hardship

(i) "Mothers Abandon 60 AIDS Children"

Over 60 children said to be suffering from the dreaded Acquired Immune Deficiency Syndrome (AIDS) have been abandoned at the Kenyatta National Hospital and yesterday, the hospital's director, Fr. N. N. Agata . . . appealed to donors to assist the hospital to cope with the increasing number of such children. Dr. Agata said mothers who go to the hospital to deliver do abandon the infants when they discover they are suffering from AIDS, leaving the hospital with the burden of looking after them. He said the increasing number of such children had created a problem in the hospital since children's homes were not accepting them.

'Kenya, as a society, has to find a solution to this problem of abandoned Children'. Dr. Agata said . . ."—from *Kenya Times* 20th July, 1991, p.1.

(ii) "AIDS Orphans to Increase"

"A United Nations Children's Education Fund official said yesterday that UNICEF predicts 300,000 Kenyan children will be orphaned by AIDS in the next four years.

Mr. Nazar Memon said a recent UNICEF meeting recommended that comprehensive measures be taken to address the needs of children whose

parents die from AIDS, and children suffering from AIDS . . .”—from *Daily Nation*, 7th December, 1991, p.5.

(iii) “*Home for AIDS Babies Planned*”

Two American Catholic priests yesterday said they will start an institution to cater for babies who are infected with AIDS.

. . . (The) Rev. Angelo D’Agostino and the Rev. Thomas McDonnell said the institute would be called Children of God Relief Institute (COGRI). They said the organization plans to establish and operate a care facility called *Nyumbani* for as many as 50 babies by March, 1992.

The Rev. D’Agostino said there was an urgent need for the development of the institute as AIDS babies were already jamming orphanages and being abandoned at hospitals in large numbers. Recalling a World Health Organization study, the Rev. D’Agostino said 3,000 babies would be born with AIDS by 1996. There is a very vulnerable part of the society, that is the child born with AIDS, said D’Agostino, who is also a medical doctor and the institute’s medical director.

The Rev. McDonnell who will act as executive director of the COGRI, said mothers abandoned such babies because they did not know how to care for them. He said caring for the children was a crucial responsibility because between 30 and 50 per cent of the children who test positive for AIDS at birth will revert to negative status after 12 to 18 months.

He added that when neglected, they die of starvation while, in fact, they have a chance of surviving”—from *Daily Nation*, 14th December, 1991, p.4.

(e) Child Welfare and Economic Hardship

“*Africa can save its Children Despite Economic Difficulties*”

“Africa can save its children, despite the economic difficulties it is facing, and what it is actually lacking is better information and better understanding of the issues.

Dr. Nsanzimana, Assistant Secretary-General of the Organization of African Unity (O.A.U.), made the remark while addressing the opening sessions of the inter-governmental expert group meeting on the Draft African Charter on the Rights and Welfare of the Child . . . he spoke of the difficult situation Africa found itself in the 1980s, a decade characterized by a drop in raw material prices, external debt burden, famine, drought and desertification.

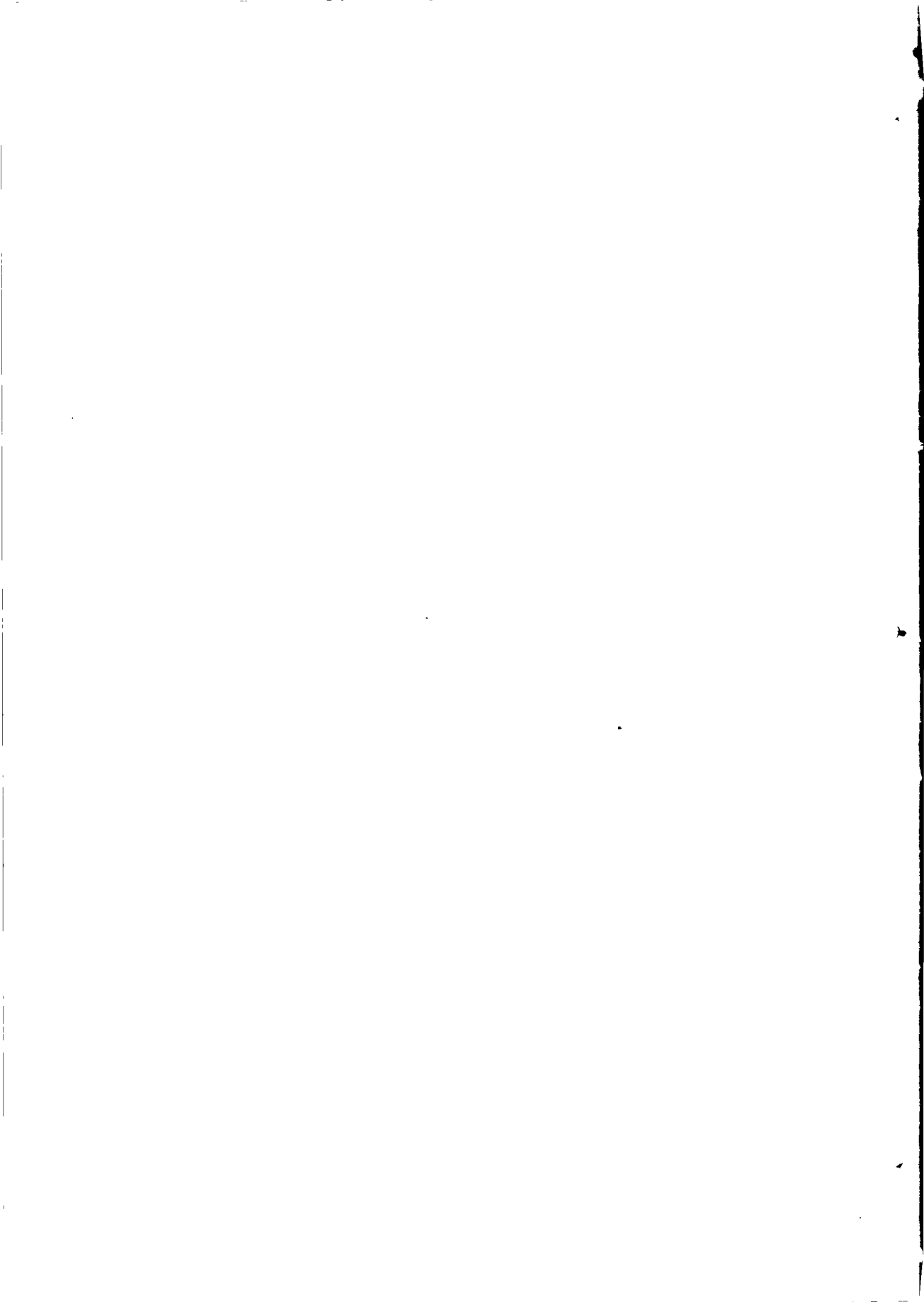
According to UN demographer, Africa will be the only continent that will have a higher rate of child mortality into the decade 1980-2000, compared to the last ten years. It is revealed that Africa, with 14 per cent of the world’s population, has an infant and child mortality rate of more than 40 per cent while the rest of the world accounts for 31 per cent.

Dr. Nsanzimana noted that in earlier times, health care, survival and development of the child remained the concern of the community and all efforts were made for the growth and happiness of the child. He said that

today, as a result of the break from the traditional community life and solidarity, parents have been left to face the hardships of a hostile environment as far as rearing the child is concerned.

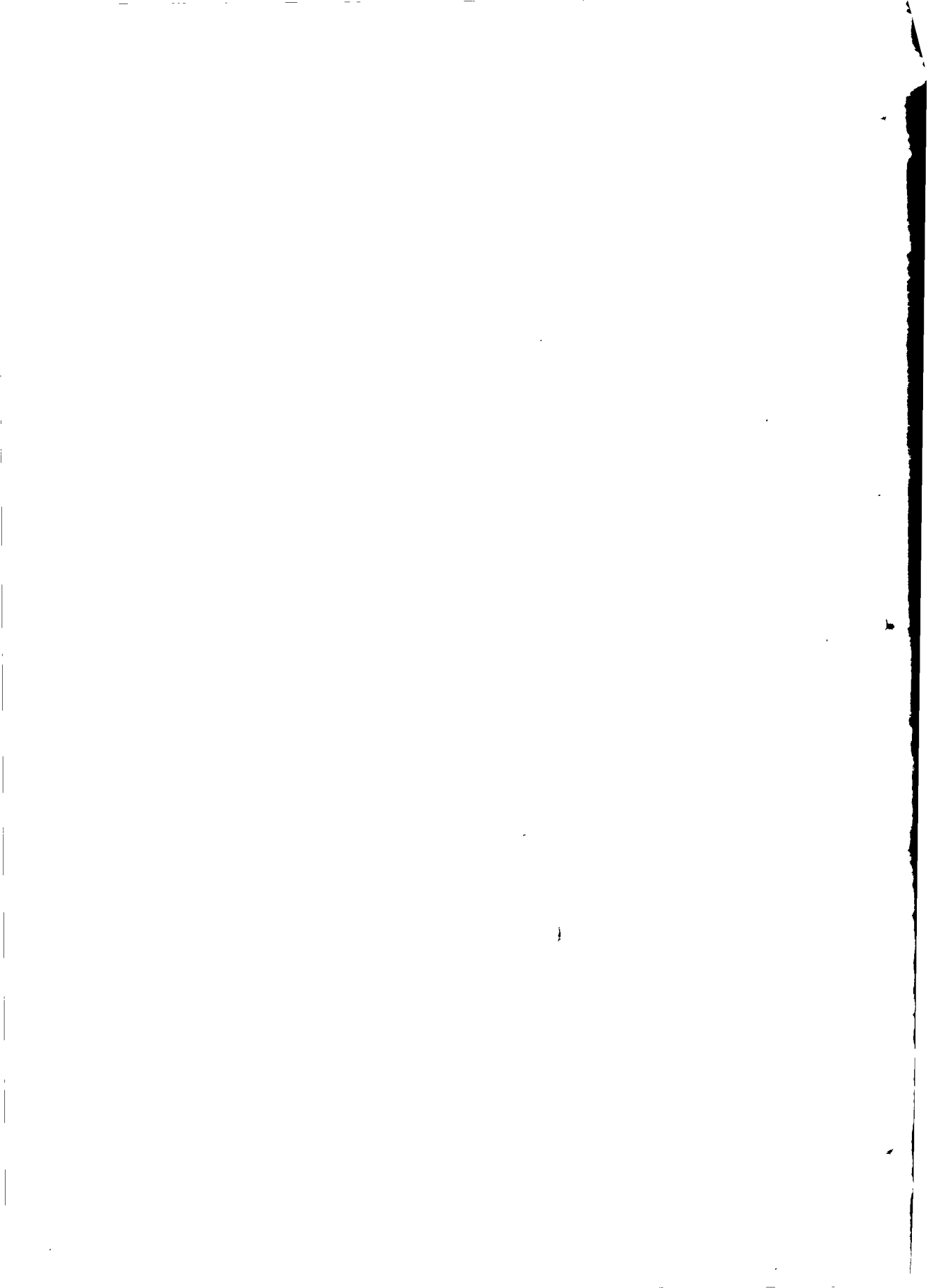
Dr. Nsanzimana further stated that the development of the African Charter on the Rights and Welfare of the Child is to supplement the United Nations Convention on the Rights of the Child, taking into account the specific cultural and social environment of African children. He stated that the African children have to be in constant touch with their community values as well as their country. They have to learn to preserve and enhance the qualities of the African personality, including being proud of the past and worthy of the present, and (ready) to build the future . . .

The Assistant Secretary-General said that in order to do so, African children have to be properly fed, educated, sheltered and protected against all abuse and must enjoy all the rights provided under the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights and other valid legal instruments"—from *The Ethiopian Herald*, 20th April 1990, p.1.



**LIST OF ORGANIZATIONS WHICH SUBMITTED
MEMORANDA**

1. Christian Children's Fund.
2. Undugu Society of Kenya.
3. International Federation of Women Lawyers (FIDA) Kenya Chapter.
4. SOS Children's Village.
4. Jacaranda Special School for the Mentally Handicapped.
6. The Islamic Foundation.



LIST OF PERSONS INTERVIEWED IN THE PROVINCES

NAIROBI PROVINCE

Mr. Fred Waiganjo, Provincial Commissioner, Nairobi.
 Mr. Agrey Mudinyu, Deputy Provincial Commissioner.
 Mrs. Margret Jobita, Deputy Director, Social Services and
 Housing Department, Nairobi City Commission.
 Mr. C. J. Mutei, Nairobi.
 Mr. P. A. K Mwaniki, Nairobi City Commission.
 Mrs. Lucy K. Kieria, District Officer, Nairobi.
 Mr. Lango Odhiambo, Nairobi.
 Ms. Carol Wanjau, Senior Labour Officer.
 Mr. Laban Korellah, District Officer, Pumwani, Nairobi.
 Mrs. C. A. Ochiel, Provincial Probation Officer.

RIFT VALLEY PROVINCE

S. M. Toyya, District Commissioner, Turkana.
 Mr. J. O. Anguka, District Commissioner, Nakuru.
 Mr. Paul S. Muthui, Provincial Planning Officer (R.V.P.).
 Dr. E. K. Terer, Provincial Director of Veterinary Services.
 H. S. Marwa, Provincial Personnel Officer.
 J. M. Kitonga, Provincial Registrar of Persons.
 E. G. Maina, Assistant Provincial Personnel Officer.
 Miss J. N. Mutahi, District Children's Officer (Narok).
 Mrs. A. N. Mwaura, Acting Provincial Childrens Officer.
 Miss Charity T. Maina, Social Development Officer.
 Mr. M. Morekwa, Provincial Housing Officer.
 Mr. D. N. K. Nthia, Provincial Training Officer.
 Mr. Sammy P. M. Kyungu, Provincial Education Officer.
 Mr. Kimani Wakahiu, Provincial Labour Officer.
 Mr. George O. Owino, Provincial Water Engineer.
 Mr. D. T. Machira, Provincial Police Officer.
 Mr. Gerald Kimani, Information Office.
 S. M. Nuguti, Department of Fisheries.
 Mrs. J. M. Oduya, Arap Moi Children's Home.
 Mr. P. O. Okoth, Arap Moi Children's Home.
 Mr. Jones Mburu, Nakuru Juvenile Remand Home.

COAST PROVINCE

Mr. P. M. Mungalla, Provincial Commissioner.
 Mr. A. Sheikh, Deputy Provincial Commissioner.
 Mrs. Fridah Njoroge, Provincial Children's Officer.
 Mrs. Beatrice Thurania, Resident Magistrate, Mombasa.
 Mr. Abdul R. Ngaje, Provincial Education Officer.
 Mr. Isiah Amwanzo, Deputy Provincial Water Engineer.
 Mr. J. Metho, Principal State Counsel.
 Mr. H. O. Kibanda, Provincial Trade Development Officer.
 Mr. L. Da Costa, Provincial Internal Aditor.
 Ms. Beatrice Nduta, Kenya Police Urban Division, Mombasa.
 Mr. Sabastian G. Wanjagi, Provincial Forest Officer.

Mr. Stephen W. Gitonga, Provincial Planning Officer.
 Mr. Stephen Kinga, Provincial Information Office, Mombasa.
 Mr. J. Ng'eno, District Commissioner, Mombasa.
 Mr. J. Kyanzi, Criminal Investigation Department, Mombasa.
 Mr. Onyore E. O. Versons, Provincial Police Office.
 Mr. W. I. Wesamba, Provincial Tourist Office.
 Mr. B. W. Oduor, Assistant Director of Fisheries.
 Mr. D. M. Jilani, Provincial Director of Livestock.
 Mrs. Aisha Bwady, Chairman, Maendeleo ya Wanawake.
 Mrs. Aisha Mohamed, District Field Officer, Maendeleo ya Wanawake Organization.
 Mr. A. Suleman Ngoma, Chief of Mtongwe, Mombasa.
 Thomas Khakala, Redeemed Gospel Church, Mombasa.
 Mr. Mohamed M. O. Mohamed, Imam, Likoni (Damul Ulum Mosque).
 Mr. Mohmud Welton, Chaiman, Jamii Iyatu Taalimil Quran.
 Mr. Mothoka, Manager, Likoni Approved School.
 Mr. Joseph Kagonga, Likoni Approved School.
 Mr. John Mariatha, Likoni Approved School.
 Mr. Benjamin Nodoro, Likoni Children's Remand Home.

WESTERN PROVINCE

Mr. F. Lekool, Provincial Commissioner.
 Mr. Adrian Mulama Shisunda, Administrator, Kakamega Juvenile Remand Home.
 Mr. Wilson Xavier Bokwango, District Probation Officer, Kakamega.
 Mr. Mark Augu, Juvenile Remand Home.
 Mr. H. O. Miyienda, Provincial Children's Officer.
 Mr. Mathias S. Wabwoba, Administrator, Kakamega Children's Home.
 Mr. Aggrey S. Litali, Acting Manager, Kakamega Approved School.
 Mr. Bismark Njoroge, Acting Officer-in-Charge of Vocational Training, Kakamega Approved School.
 Mr. James C. O. Olingu, Deputy Head-Teacher, Kakamega Approved School.
 Mr. D. N. Mutua, Acting Superintendent in Charge of Shikusa Borstal Institution.

NYANZA PROVINCE

Mr. F. S. K. Mbayah, Deputy Provincial Commissioner.
 Mr. J. M. Ogada Amumo, Provincial Veterinary Services.
 Mr. J. O. Marienga.
 Mr. M. Bwononga, Principal State Counsel.
 Mrs. R. A. Okumu, Acting Deputy Town Clerk.
 Mr. T. G. Omondi Luora, Director of Social Services and Housing.
 Mr. M. Mwangi, Provincial Commissioner's Office.
 Mr. F. M. Mangoli, Provincial Commissioner's Office.
 Mr. C. A. Oketch, Provincial Children's Officer.
 Mr. J. O. Ombuor, National Bureau.
 Mr. Robert Odingo, Department of Agriculture.
 Mr. Gwengi Oudia, Provincial Director of Livestock.
 Mr. E. William Ogala, Senior Education Officer.
 Dr. Digo M. O., Medical Officer, Ministry of Health.
 Mr. Alfred Osangir Osaw, Provincial Labour Officer.

Mr. E. E. Olwanda, Senior Administrative Officer.
Mr. Jonathan Kisengo, Deputy Municipal Education Officer.
Mr. Muthangaru, Provincial Water Engineer.
Mr. Philip Ong'ayo, Councillor, Siaya District.
Ms. Christine Josiah, Nominated Councillor, Siaya District.
Mr. Osoro, Councillor.
Mr. Jotham Kisengo, Deputy Municipal Education Officer.

NORTH-EASTERN PROVINCE

Mr. M. A. Saleh, Deputy Provincial Commissioner.
Jared M. Owiny, Provincial Children's Officer.
A. H. Ahmed, Chief, Children's Officer.
Abdi A. Aden, Provincial Technical Training Officer, Ministry of Technical Training.
Mr. G. O. Nyamwange, Provincial Co-operative Officer.
Mr. D. M. Kiletta, District Social Services.
Mr. A. A. N. Stanbal, Provincial Sports Officer.
Mr. N. S. Aden, Provincial District Education Office.
Mr. M. M. Bashir, Provincial Water Engineer.
Mr. Bernard Marondo, Department of Social Services.
Mr. Martin M. Tsuma, Provincial Planning Officer.
Mr. Idris M. Farah, Provincial Education Officer.
Mr. Maxwell Gicheru, Resident Magistrate.
Mr. J. K. Mboshe, Police.
Mr. J. C. L. Litunda, District Officer I, Garissa.
Mr. D. M. Jakaiti, A.O.I. Provincial Commissioner's Office.
Sheikh Moh'd H. Khalif, Religious leader.
Sheikh Hassan Ali, Kadhi, Garissa.
Zeynab Dahir, Housewife.
Ebla Abdi Shuria, Housewife.
Halima Gara Sow, Housewife.
Mohamad Adan Egal, Businessman.
Abdulahi Ali Abdi, Businessman.
Abdi Musa Madhar, Businessman.
Dagane Karur, Assistant Chief, Garissa Town.
Sahal Nunow, Chairman, Town Council.
Mr. Saina Adam Warsame, District Education Officer, Garissa.
Abdi Haji Moh'd, Civil Servant.
Sahal Hassan, Businessman.
Abdi Mahamud.
Hajir Abdi, Student.
Adam M. Isaak, Businessman.
Hassan Abdi, Businessman.
Ahmed Sheikh, Kenya African National Union Chairman.
Sahara Rage, Housewife.
Kaha Mohamed, Housewife.
Hisala Dimbil, Housewife.
Halima Bule, Businesswoman.
Mrs. Bilado, Councillor, Garissa County Council.
Mrs. Sulo Sheikh Abdullahi, Housewife.
Mrs. Halima Ibrahim, Chairman, Kenya African National Union, Women's League.
Mr. Ahmed Hussein, Herdsman.
Mr. Ismail Moh'd.
Mr. Tawane Abdi Haji, Kenya African National Union, Treasurer.

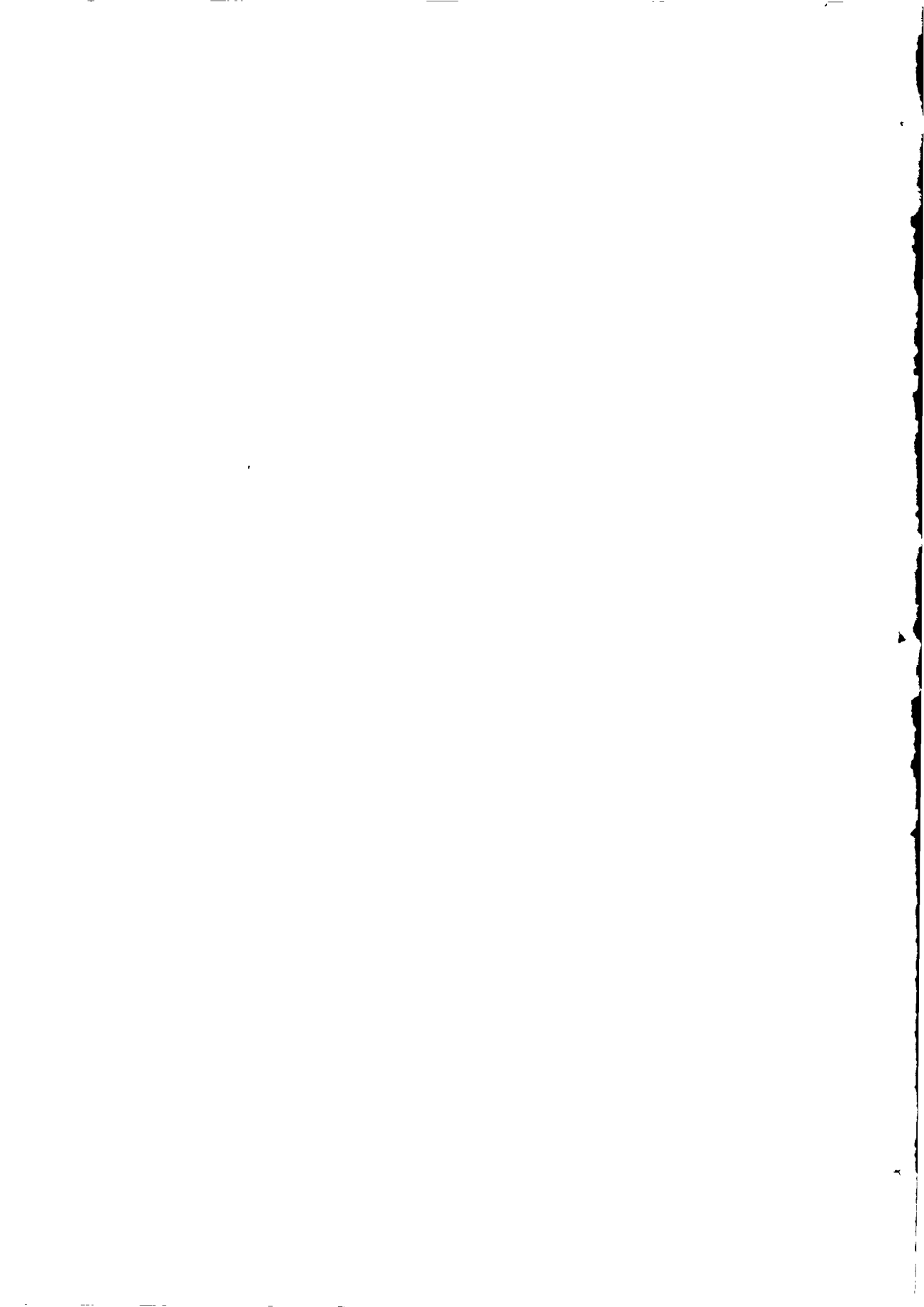
Mr. Said Hassan Bare, Businessman.
Mr. Adam Haji Mohamed, Councillor Sankuri/Korkora.
Mr. Ahmed Salah.
Mrs. Zeynab Dugow, Housewife.
Mrs. Hawa Umil, Housewife.
Khalif Salat, Assistant Chief, Korkora.
Hussein Ali, Chief, Korkora.
Adan Mohamed, Assistant Chief, Wagberi.
Kheir Abdi, Chief, Garissa Town.

CENTRAL PROVINCE

Kiambu District

A. N. Kenyoru, District Development Officer.
S. M. Nakitare, District Officer, Kiambu.
Mr. N. K. Mungathia, District Officer, Limuru.
Mr. S. O. Ojwang, District Officer, Kiambu.
Mr. J. M. Mwai, Civil Servant.
Mr. U. K. Miringu, Chief, Juja Location.
Mr. John M. Njoroge, Chief, Gatwanyaga Location.
Mr. D. M. Mbogo, District Water Engineer's Office.
Mr. J. K. Cherop, District Officer, Githunguri.
Mr. J. M. Ithiri, Personnel Officer, Kiambu.
Mr. E. Z. V. Odhiambo, District Agricultural Office.
Mr. W. K. Gatura, Ex-Police Officer.
Mr. E. Muriithi, Vice-Chairman, St. Paul's Mother Church, Kabete.
Mr. James Mwangi, Inspector of Roads.
Mr. Peter Munderu, District Works Office.
Mr. Harris E. Akwella, District Land Registrar.
Mr. Joseph Gituku, Church, Vice-Chairman, Kikuyu.
Mr. Dishon K. Mboi, Town Clerk's Office, Kiambu Municipality.
Ms. Florence Ombaso, Manageress, Kirigiti Approved School.
Ms. Anne Ikiara, Deputy Manager, Kirigiti Approved School.
Mr. Arthur Mungai, Acting District Children's Officer.
Mr. Boniface Muindu, Probation Officer, Kiambu.
Mr. Peter Kinuthia, Assistant Chief, Ruiru.
Mr. Francis N. Ngururi, Chief, Ndeiya Location, Limuru.
Mr. Isaac N. Nganga, Chief, Tigoni.
Mr. Peter N. Mwangi, Assistant Chief, Ithanji.
Mr. Stephen M. Mbugua, Chief, Karambaini.
Mr. Lawrence N. Kamau, Chief, Limuru Location.
Mr. John Goko Mungai, Assistant Chief, Thindigua Location.
Mr. L. Churu Chege, Deputy District Education Officer, Kiambu.
Mr. Francis K. Njihia, Senior Chief, Kiganjo Location, Gatundu.
Mr. L. N. Kamau, Thika.
Mr. Ali Mohamud, Thika.
Mr. Ngari Mugambi, Kiambu.
Mr. Stephenson K. Mganga, Councillor, Ruiru.
Mr. Tom Gesira, Nairobi.
Mr. Paul M. Kamatta, Assistant Chief, Kiriko Sub-location, Chania.
Mr. Henry Kamau, Assistant Chief, Thigio Sub-location.
Mr. Peter Kamau Mbugua, Kenya African National Union, Karura.
Mr. George K. Munyua, Chief, Kihara Location.
Mr. J. K. Kahuno, Chief, Kiambaa.
Mr. P. N. Karanja, Senior Assistant Chief, Cianda.
Mr. P. N. Gathungu, Acting Deputy Public Health, Kiambu.
Mr. F. M. Nyamamba, Kiambu.

Mr. Waweru Muturi Nganga, Businessman, Kikuyu.
 Mr. F. N. Kangethe, Koinange School, Kiambu.
 Mr. M. D. Gachigi, Kiambu.
 Mr. R. W. Mbai, Kiambu.
 David Kimani Njoroge, Assistant Chief, Thuita, Komothai Location.
 Mr. S. B. Kenii, Assistant Chief, Kiambu Township.
 Mr. G. N. Njenga, Assistant Chief, Kiambu.
 Mr. W. M. Mbugua, Assistant Chief, Nderu Sub-location.
 Mr. Joseph K. Ngugi, Assistant Chief, Kibichiku/Kabete.
 Mr. Henry K. Kangethe, Senior Chief, Kikuyu.
 Mr. Geoffrey Mwathi Marigi, KANU national.
 Mr. Patrick Mbiu Igamba, Assistant Chief, Rironi.
 Mr. J. P. K. Kamunyu, Assistant Chief, Ngecha.
 Mr. Gad N. Githire, Chief, Ngecha.
 Ms. Susan Njoki, Chairlady, Maendeleo ya Wanawake.
 Ms. Jane Wanjiru, Chairlady, District Development Committee, Githunguri.
 Hannah Wagichu, Kenya African National Union leader.
 Hannah Gacambi, Member, Kenya African National Union, Komothai Location.
 Samwel Njoroge Wanyoike, Assistant Chief, Kibichoi.
 James Mburuti Kinuthia, Kenya African National Union, Youth Leader, Githunguri Sub-branch.
 Mr. Jim Kinuthia Nyoro, Assistant Chief, Komothai.
 Daniel Kuria Gatembai, Assistant Chief, Karatina Sub-location, Komothai.
 Joseph K. Miringu, Chief, Komothai, Githunguri.
 Shephen N. Njuguna, Chief, Ikinu Location, Githunguri.
 Mr. Samwel G. Njuguna, Chief, Githunguri.
 Councillor Wilfred K. Gitau, Githunguri.
 Haman Iregi, Church Elder, Githunguri.
 Mr. Samwel Angote, Officer Commanding Police Station, Kiambu.
 Harun Waithaka, Orthodox Church, Kikuyu.
 James N. Githinji, Assistant Chief, Kikuyu Township.
 Moses Mukuru Kinyanjui, Chief, Kinoo Location.
 Mr. E. K. Nganga, Chief, Muguga Location, Kikuyu.
 Mr. S. N. Njau, Chief, Nyathuna Location, Kikuyu.
 Mr. I. W. Chege, Chief, Thika Location.
 Mr. F. M. Kinge, Acting Chief, Nduberi Location, Kiambu.
 John Cucu, Kenya African National Union Secretary, Kikuyu Location.
 Stephen Mbugua Njau, Sigona Sub-location, Kikuyu.
 Mr. Njihia Kamari, Kikuyu Location.
 Mr. Joseph Irungu, Gatwanyaga Location.
 Mr. James Nyandoro, District Officer I.
 Ms. Jennifer N. Nganga, Limuru.
 R. W. Wakibia, District Officer, Kikuyu.
 Mr. J. W. Kamau, District Officer, Limuru.
 Mr. J. W. Wangombe, District Commissioner's Office, Kiambu.
 Mr. P. M. Munyiri, Kiambu.
 Mr. A. W. Kahihia, Game Warden.



THE CHILDREN BILL, 1994

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SCHEDULES.

A Bill for

An Act of Parliament to amend and consolidate the law relating to children, to make provision for the adoption, custody, maintenance, guardianship, protection and discipline of children and for connected purposes

ENACTED by the Parliament of Kenya as follows—

PART I—PRELIMINARY

Short title and commencement.

1. This Act may be cited as the Children Act, 1994, and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint and different dates may be appointed for different provisions.

Interpretation.

2. (1) In this Act, unless the context otherwise requires—

“Adoption Council” means the Adoption Council established by section 103;

“adoption order” means an adoption order made under section 104 vesting the parental rights and duties relating to a child in the adopters;

“adoption society” means a society approved by the Minister under section 136 (1);

“age” where actual age is not known means apparent age;

“appointed local authority” has the meaning assigned to that expression by section 42;

“approved officer” means a person appointed under section 48;

“approved society” means a society approved by the Minister under section 47;

“approved school” means a school approved by the Minister under section 31;

“approved voluntary institution” means a voluntary institution approved under section 47;

“authorized officer” means a police officer, an administration officer, a children’s officer, an approved officer, a chief

appointed under the chief's Authority Act or any other officer authorized by the Director for the purposes of this Act; Cap. 128.

"body of persons" means any body of persons whether incorporate or unincorporate;

"borstal institution" means a borstal institution established by section 3 of the Borstal Institutions Act; Cap. 92.

"charitable association" means a body of persons which exists only for the purpose of promoting a charitable, benevolent or philanthropic object, whether or not the object is charitable within the meaning of any rule of law, and which applies the whole of its profits (if any) or other income in promoting the objects for which it exists;

"child" means a boy or girl under the age of eighteen years;

"child of tender years" means a child under the age of ten years;

"children's court" without prejudice to the powers and jurisdiction of the High Court, means a court constituted in accordance with section 5;

"children's home" means a children's home established under section 30 (2);

"children's officer" means a person appointed to be a children's officer under section 27;

"children's remand home" means a remand home established under section 30 (1) for the detention of children;

"Council" means the National Council of Children's Services established by section 22;

"Director" means the Director of Children's Services appointed under section 27;

"foster home" means the place of abode in which a foster parent is registered to receive and retain a child;

"foster parent" means a person registered under this Act to receive and retain a child for the purpose of caring for and maintaining him apart from his parents or guardian;

"guardian" in relation to a child includes any person who, in the opinion of the court, has charge or control of the child;

“home” in relation to a child means the place where his parent or guardian permanently resides, or if there is no parent or guardian living, his parents’ or guardians’ last permanent residence:

Provided that—

- (i) in the case of a parent or a guardian having, or having had, more than one permanent place of residence, the parent or guardian shall be presumed to be, or to have been permanently resident at the place of his principal permanent residence; and
- (ii) where the court is unable to determine the home of any such child 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 area he is found.

“interim order” means an order under section 121;

“medical practitioner” means a person registered as a medical practitioner under the Medical Practitioners and Dentists Act;

Cap. 253.

“National Council of Non-Governmental Organizations” means the National Council of Non-Governmental Organizations established by section 23 of the Non-Governmental Organizations Co-ordination Act, 1990;

No. 19 of 1990.

“non-Governmental Organization” means a non-Governmental organization within the meaning of the Non-Governmental Organizations Co-ordination Act, 1990;

“nursery” means any institution or place at which, for the time being, five or more children under the age of seven years are received and cared for regularly for reward;

“parent” means the mother or father of a child and includes any person liable by law to maintain a child or entitled to his custody;

“place of safety” means any institution, hospital or other suitable place, the occupier of which is willing to accept the temporary care of a child and where no such place is available, a children’s remand home or police station shall be deemed to be a place of safety for the purposes of this Act;

“relative” in relation to a child, means a grandparent, brother, sister, uncle or aunt, whether of the full blood, or the

half blood or by affinity, and—

- (a) where an adoption order has been made in respect of the child or any other person under this Act, any person who would be a relative of the child within the meaning of this definition if the adopted person were the child of the adopter born inside marriage; or
- (b) where the child is born outside marriage and the father has acknowledged paternity and is contributing towards the maintenance of the child, the father of the child within the meaning of this definition if the child were the child of his mother and father born inside marriage;

“spouse”, in relation to a wife of a polygamous marriage, means the wife applying for an adoption order either as the sole applicant or jointly with her husband or the wife into whose care a husband applying for an adoption order proposes to give the child;

“voluntary institution” means a home or institution for the care of children whether for reward or not, supported wholly or partly by voluntary contributions or endowments, not being a school within the meaning of the Education Act.

Cap. 211.

(2) Where proceedings under this Act are contemplated or taken in respect of a child, the age of that child for the purposes of the proceedings shall be his age at the date of the alleged offence or the incident in respect of which the proceedings are contemplated or taken.

3. The objects of this Act are—

Objects of
the Act.

- (a) to promote the well-being of children by assisting individuals, families and communities to overcome social problems with which they are confronted;
- (b) to implement the provisions of the United Nations Convention on the Rights of the Child, 1989;
- (c) to promote the welfare of the family, to reduce the incidence of disruption of family relationships, and to mitigate the effects of such disruption where it occurs;
- (d) to assist parents in the discharge of their parental responsibilities; and

(e) to establish and promote, and to assist in the establishment and promotion of services and facilities within the community designed to advance the well-being of children and to co-ordinate the use of such services and facilities.

Interests of child to be paramount.

4. A court which or a person who exercises in respect of a child any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest; and

(b) conserve or promote, as far as possible, a satisfactory relationship between the child and other persons, whether within his family, his domestic environment or the community at large.

PART II—PROTECTION AND DISCIPLINE OF CHILDREN

Children's Courts

Children's courts.

5. (1) For the purpose of hearing all charges against children, except in cases where they are jointly charged with a person or persons over the age of eighteen years, and for the purpose of exercising any other jurisdiction conferred on children's courts by this or any other written law, there shall be courts to be known as children's courts constituted in accordance with the provisions of this section.

(2) The Chief Justice may, by notice in the Gazette, in respect of any area appoint a magistrate to be chairman or deputy chairman, and such number of other suitable persons as he may think fit; to constitute a panel of persons to try children's cases.

(3) The Chief Justice may from time to time, by notice in the Gazette, revise the composition of any panel by adding persons thereto or by removing persons therefrom or by substituting one person for another.

(4) Every children's court shall consist of either the chairman or the deputy chairman and a number of members of the panel in the manner prescribed by rules made under section 77

of this Act, exercising jurisdiction within the area for which it is constituted, or of a magistrate sitting alone or in such other manner as may be so prescribed.

(5) Where in the course of any proceedings in a children's court it appears to the court that the person charged or to whom the proceedings relate is over eighteen years of age, or where in the course of any proceedings in any court other than a children's court it appears to the court that the person charged or to whom the proceedings relate is under eighteen years of age, nothing in this section shall prevent the court if it thinks fit from proceeding with the hearing and determination of the case.

(6) Where any conviction or sentence made or passed by a court other than a children's court is appealed against, or is brought before the High Court for confirmation or revision and it appears that the person convicted was at the time of the commission of the offence under eighteen years of age, the High Court shall have power to substitute for the conviction a finding of guilty in accordance with section 17 and to substitute for the sentence an order under section 19 of this Act.

6. A children's court shall sit in a different building or room, or on different days, or at different times, from those in which sittings of courts other than children's courts are held, and no person shall be present at any sitting of a children's court except—

Sitting of children's courts.

- (a) members and officers of the court;
- (b) parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case;
- (c) parents or guardians of any child brought before the court;
- (d) bona fide representatives of newspapers or news agencies;
- (e) such other persons as the court may specially authorize to be present.

7. (1) No person shall publish any report of proceedings before a children's court except with the permission of the court.

Prohibition of publication.

(2) Any person who publishes any proceedings contrary to subsection (1) commits an offence and is liable on conviction—

(a) in the case of an individual, to imprisonment for a term not exceeding two years; or

(b) in the case of a body corporate, to a fine not exceeding fifty thousand shillings.

Prevention of children associating with adult offenders.

8. Arrangements shall be made for preventing children while detained in a police station, or while being conveyed to or from any court, or while waiting to attend in or leave any court, from associating with adults charged with or convicted of any offence other than an offence with which a child is jointly charged or convicted.

Children not allowed in court.

9. 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.

Power to clear court.

10. Where in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, a person who, in the opinion of the court, is under eighteen years of age is called as a witness, the court may direct that all or any persons, not being members or officers of the court, or parties to the case or their advocates, or persons otherwise directly concerned in the case, shall be excluded from the court during the taking of the evidence of that witness.

Power to require attendance of parent.

11. Where a child is charged with any offence or is for any other reason brought before a court, his parent or guardian may in any case, and shall, if he can be found and resides within a reasonable distance, be required to attend at the court before which the case is heard or determined during all stages of the proceedings, unless the court is satisfied that it would be unreasonable to require his attendance.

Bail of arrested children.

12. Where a person apparently under the age of eighteen years is apprehended with or without warrant and cannot be brought forthwith before a court, the police or administrative officer to whom such person is brought shall inquire into the case, and may in any case, and unless—

(a) the charge is one of murder or manslaughter or other grave crime; or

(b) it is necessary in the interests of such person to remove him from association with any undesirable person; or

(c) such officer has reason to believe that the release of such person would defeat the ends of justice,

shall, release such person on a recognizance being entered into by his parent or guardian or other responsible person, with or without sureties, for such amount as will, in the opinion of such officer, secure the attendance of such person upon the hearing of the charge.

13. (1) A court, on remanding any child in custody, shall order him to be detained for the period for which he is remanded—

Remand in custody.

(a) if he is under sixteen years of age, in a children's remand home:

Provided that if there is no children's remand home within a reasonable distance of the court, the court shall make such order as to his safe custody as it deems fit;

(b) if otherwise, in a remand prison:

Provided that in the case of a child under fourteen years of age the court may commit him to custody in a prison if it is satisfied that he is of so unruly a character that he cannot safely be remanded in custody to a children's remand home or that he is of so depraved a character that he is not fit to be so remanded.

(2) A remand to a children's remand home under this section may be varied and, in the case of a child who is over the age of fourteen years and who proves to be of so unruly a character that he cannot safely be remanded in a children's remand home or to be of so depraved a character that he is not fit to be so remanded may be revoked by the court and the child remanded to prison.

14. (1) Notwithstanding the provisions of Parts II and VII of the Criminal Procedure Code, a children's court may try a child for any offence other than manslaughter or an offence punishable by death, except in cases where he is

Jurisdiction of children's courts.
Cap. 75.

charged jointly with a person or persons over eighteen years of age :

Provided that a child brought before a children's court for an offence which would, apart from the provisions of this section, be triable only by the High Court, other than manslaughter or an offence punishable by death, may nevertheless elect to be tried by the High Court.

(2) References to subordinate courts of any class, in the First Schedule to the Criminal Procedure Code, include a children's court.

Power to
remit cases
to children's
courts.

15. (1) Subject to any rules or directions made or issued by the Chief Justice, where it appears to a court other than a children's court at any stage of the proceedings that a person charged before it with an offence other than murder or manslaughter is under the age of eighteen years, the court may, and where within the area of a subordinate court's jurisdiction there is established a children's court having jurisdiction the subordinate court shall, remit the case to a children's court.

Provided that —

- (i) a charge made jointly against such person and a person who has attained the age of eighteen years shall be heard by a court other than a children's court;
- (ii) where a child is charged with an offence the charge may be heard by a court other than a children's court if a person who has attained the age of eighteen years is charged at the same time with aiding, abetting, causing, procuring, allowing or permitting that offence;
- (iii) nothing in this subsection shall be construed as preventing a court, if it considers in the circumstances (including the stage reached in the proceedings) that it is proper so to do, from proceeding with the hearing and determination of the charge.

(2) Where in accordance with the provisions of subsection (1) of this section a case is remitted to a children's court after a finding that the person charged is guilty of the offence, the children's court to which the case has been remitted may deal with the offender in any way in which it might have dealt with him if he had been tried and found guilty by that court.

(3) No appeal shall lie against an order of remission made under this section, but nothing in this section shall affect any right of appeal against the verdict or finding on which such an order is founded, and if a person has been found guilty by the High court and remitted to a children's court for an order under section 19 of this Act, he may appeal against such finding to the Court of Appeal.

(4) A court by which an order remitting a case to a children's court is made under this section may give such directions as appear to be necessary with respect to the custody of the offender or for his release on bail or bond until he can be brought before the children's court and shall cause to be transmitted to the clerk of the children's court a certificate setting out the nature of the offence and stating the stage reached in the case, and that the case has been remitted for the purpose of being dealt with under this section.

16. Every court in dealing with a child who is brought before it shall have regard to his welfare and shall, in a proper case, take steps for removing him from undesirable surroundings and for securing that proper provision be made for his maintenance, education and training.

Considerations
of welfare.

17. The words "conviction" and "sentence" shall not be used in relation to children dealt with by children's courts, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of children, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order made upon such a finding, as the case may be.

Words
"conviction"
and "sentence"
not to be used
of children.

18. (1) No child shall be ordered to imprisonment nor to detention in a detention camp.

Restrictions on
punishments.

(2) No child under the age of ten years shall be ordered by a children's court to be sent to an approved school unless there is no fit person or approved voluntary institution willing to take care of him, or unless for some other good reason the court considers that he cannot suitably be dealt with otherwise.

(3) (a) No child shall be ordered to imprisonment 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 therefor:

Provided that such order shall only be made upon the

court being duly satisfied of the existence of a facility for separate custody of the child in the particular prison.

(b) Any order of imprisonment made by virtue of this subsection shall be subject to confirmation by the High Court, and the offender shall be remanded as an unconvicted prisoner in a prison pending confirmation and may not elect to commence his term of imprisonment forthwith.

(4) A child ordered to imprisonment shall, where practicable, be confined apart from, and shall not be allowed to associate with, adult prisoners during his term of imprisonment.

(5) Where a child is ordered to imprisonment, the warrant of committal shall clearly show he is a child.

Methods of dealing with offenders.

19. Notwithstanding the provisions of any other law and subject to the provisions of this Act, where a child is tried for an offence, and the court is satisfied of his guilt, the court may deal with the case in one or more of the following ways—

- Cap. 63. (a) by discharging the offender under section 35 (1) of the Penal Code;
- (b) by discharging the offender on his entering into a recognizance, with or without sureties;
- Cap. 64. (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;
- (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 sixteen years of age, by ordering him to be sent to an approved school suitable to his needs and attainments;
- (f) subject to section 27 of the Penal Code, by ordering the offender in accordance with that section to undergo corporal punishment;
- (g) by ordering the offender to pay a 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 as hereinafter provided;

- (i) by ordering the parent or guardian of the offender to give security for his good behaviour as hereinafter provided;
- (j) where the offender is of the age of fourteen years or more but under the age of eighteen years, by ordering him to be imprisoned;
- (k) in the case of a child 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.

20. If it appears to the court on the evidence of a medical practitioner that a child, although not of unsound mind, requires or may benefit from mental treatment, the court when making a probation order against him, may require him to undergo mental treatment at the hands or under the direction of a medical practitioner for a period not exceeding twelve months, subject to review by the court, as a condition of the probation order.

Mental
treatment.

21. (1) Where a child is charged with an offence for the commission of which a fine, compensation or costs may be imposed, if the court is of the opinion that the case would be best met by the imposition of a fine, compensation or costs, whether with or without any other punishment, the court may in any case order that the fine, compensation or costs imposed or awarded be paid by his parent or guardian instead of by the offender, unless the court is satisfied that the parent or guardian cannot be found or that he has not concurred to the commission of the offence by neglecting to exercise due care of the offender.

Power to order
parent to pay
fine, etc.

(2) Where a child is charged with an offence, the court may order his parent or guardian to give security for his good behaviour.

(3) An order under this section may be made against a parent or guardian who, having been required to attend, has

failed to do so, but, save as aforesaid, no such order shall be made without giving the parent or guardian an opportunity of being heard.

(4) Any sums imposed and ordered to be paid by a parent or guardian under this section, or on forfeiture of any such security as aforesaid, may be recovered from him in like manner as if the order had been made on the conviction of the parent or guardian of the offence with which the offender was charged.

(5) A parent or guardian may appeal to the High Court against an order made under this section by a subordinate court.

The National Council of Children's Services

National
Council of
Children's
Services.

22. (1) There is established a Council to be known as the National Council of Children's Services which shall consist of—

- (a) the Permanent Secretary in the Ministry responsible for matters relating to home affairs who shall be chairman;
- (b) the Permanent Secretary in the Ministry responsible for matters relating to education;
- (c) the Permanent Secretary in the Ministry responsible for labour and manpower development;
- (d) the Permanent Secretary in the Ministry responsible for culture and social services;
- (e) the Permanent Secretary in the Ministry responsible for research, technical training and technology;
- (f) the Permanent Secretary in the Ministry responsible for local government;
- (g) the Solicitor-General or a person deputed by the Attorney-General;
- (h) the Permanent Secretary in the Office of the President;
- (i) the Commissioner of Police; and
- (j) nine persons representing non-governmental organizations engaged in child welfare activities to be nominated by the National Council of Non-Governmental Organizations.

(2) The members of the Council nominated under paragraph (j) of subsection (1) shall hold office for three years but shall be eligible for renomination.

(3) The conduct and regulation of the business and affairs of the Council shall be as provided for in the First Schedule.

23. (1) The object and purpose for which the Council is established is to exercise general supervision and control over the planning, financing and co-ordination of child welfare activities and to advise the government on all aspects thereof.

Functions
of the
Council.

(2) Without prejudice to the generality of subsection (1), the Council shall—

- (a) design and formulate all government policies on the planning, financing and co-ordination of child welfare activities;
- (b) determine priorities in the field of child welfare in relation to the socio-economic policies of the Government;
- (c) plan, supervise and co-ordinate public education programmes on the welfare of children;
- (d) participate in negotiations for donor funding of child welfare projects;
- (e) co-ordinate and control the receipt and disbursement of all funding of child welfare projects;
- (f) provide technical and other support services to agencies participating in child welfare programmes; and
- (g) prescribe the training requirements and qualifications of authorized officers.

(3) The Council shall have power, for the purpose of carrying out its functions, to do all such acts as appear to it to be requisite, advantageous or convenient for or in connection with the carrying out of its functions or incidental to their proper discharge and may carry out any activities in that behalf either alone or in association with any other person or body.

(4) The Council may co-opt members or appoint committees as it deems fit for specialized aspects of its functions.

Secretary.

24. The Minister shall appoint a public officer to be Secretary of the Council.

Regulations by the Council.

25. The Council may, with the approval of the Minister, make regulations for the purpose of giving effect to the provisions of section 23.

Expenses.

26. The expenses of the Council shall be defrayed out of moneys provided by Parliament.

*The Director of Children's Services and
Children's Officers*

Appointment of Director and children officers.

27. (1) The Minister shall, in consultation with the Council, appoint a Director of Children's Services and such number of children's officers as are necessary for the purposes of this Act.

(2) The Director shall perform the functions and exercise the powers conferred on him by this Act and shall exercise such supervisory and other duties as the Minister may from time to time direct.

(3) Children's officers shall perform the functions and exercise the powers conferred on them by this Act and shall, in addition, perform such duties as the Director may from time to time direct.

Powers of officers.

28. The Director and any children's officer may, after producing, if asked to do so, some duly authenticated document showing that he is so authorized, enter any voluntary institution, place of safety, boarding-out establishment, holiday home or nursery or the dwelling of any person in whose care a child has been placed under this Act, and may make such examination into the state and management thereof, and the condition and treatment of any child therein, as he thinks necessary.

Penalty for obstruction of officer.

29. A person who obstructs the Director or children's officer in the execution of his duties or powers under this Act commits an offence and is liable on conviction to a fine not exceeding ten thousand shillings.

*Children's Homes, Children's Remand Homes
and Approved Schools*

30. (1) Subject as hereinafter provided, the Minister may establish such children's remand homes as he considers necessary.

Establishment of children's homes and children's remand homes.

(2) The Minister shall by order establish sufficient children's homes within the meaning of this Act so as to provide adequate accommodation and facilities for children.

(3) The managers of any institution other than a prison or detention camp may enter into an agreement for the use of that institution or any part thereof as a children's remand home on such terms as may be agreed between them and the Minister.

31. (1) The manager of any school which is suitable for the reception, maintenance and training of children ordered to be sent to an approved school under this Act may apply to the Minister to approve the school for that purpose, and the Minister may by notice in the Gazette declare the school to be an approved school and issue a certificate of approval to the manager.

Approval of schools.

(2) If at any time the Minister is dissatisfied with the condition or management of an approved school, or considers its continuation as an approved school unnecessary he may give to the manager not less than six months' notice in writing of his intention to withdraw the certificate of approval, and upon the expiration of the notice the certificate of approval shall be deemed to have been withdrawn and the school shall cease to be an approved school:

Provided that the Minister, instead of withdrawing the certificate of approval, may, by notice served on the manager of the school, prohibit the further admission of persons to the school for such time as may be specified in the notice, or until the notice is revoked.

(3) The manager of an approved school may, after giving not less than six months' notice in writing to the Minister of his intention so to do, surrender the certificate of approval of the school, and upon the expiration of the notice (unless the notice is previously withdrawn) the certificate shall be deemed to have been surrendered and the school shall cease to be approved.

(4) No person shall be received into an approved school under the provisions of this Act after notice has been given of intention to withdraw or surrender the certificate of approval; but the obligations of the manager with respect to persons under his care at the date of the notice shall continue until the withdrawal or surrender takes effect.

(5) The Minister shall cause any notice of intention to withdraw or surrender a certificate of approval to be published forthwith in the Gazette.

Minister may establish approved schools.

32. The Minister may by notice in the Gazette, establish approved schools for the reception, maintenance and training of persons ordered to be sent to an approved school under this Act.

Obligations of managers.

33. The manager of an approved school shall be bound to accept every child who is duly sent or transferred to the school or otherwise committed to his care, unless—

(a) the school is a school for persons of a different religion or of a different sex from that of the child whom it is proposed to send or transfer there; or

(b) the manager of the school satisfies the Minister that it is undesirable that any more children should be admitted to the school or otherwise committed to his care.

Supervision of approved schools and children's remand homes.

34. The Director shall be responsible for the supervision of all approved schools and children's remand homes and for this purpose shall periodically visit them or cause them to be visited.

Leave of absence.

35. The manager of an approved school may, with the consent of the Director grant leave of absence to any child detained in an approved school for such period and on such conditions as he deems fit and may at any time terminate such leave and direct the child to return to the school.

Release on licence.

36. At any time during the period of a child's detention in an approved school, the Director may by licence in writing permit him to live with his parent or with any fit person who is willing to receive and take charge of him, and may at any time by writing under his hand revoke such licence and direct the child to whom it was granted to return to the school.

37. (1) The Director may in his discretion, if satisfied that a child who has been ordered to be committed to an approved school should not remain subject to the order, may, by further order in writing, revoke the committal order.

Revocation of approved school order; duration of order.

(2) A children's court may at any time, of its own motion or on the application of any person, revoke an order committing a child to an approved school, but before doing so it shall call for all the relative records of the court which made the order, and all relative records of any court which may previously have considered an application under this section.

(3) Notwithstanding anything in this Act, an order committing a child to an approved school shall not remain in force beyond the date on which the child attains the age of twenty years, nor shall any such order remain in force for longer than three years at a time except by order of the court.

(4) On an application for an order under subsection (2) or subsection (3) of this section, the manager of the approved school where the child shall cause the child to be brought before the court, unless the court otherwise orders.

38. (1) The Director may at any time order a child to be transferred from one approved school to another, but so that the period of his detention shall not be increased thereby.

Transfers and supervision after release.

(2) A child committed to an approved school shall, after the expiration of the period of his detention, be under the supervision of such person as the Director shall appoint, for a period of two years or until he attains the age of twenty-one years, whichever shall be the shorter period.

39. (1) Where the Director is of the opinion that a child committed to an approved school is a persistent absconder, or is exercising a bad influence on the other inmates of the school, he may apply to the children's court having jurisdiction in the place where the school is situate—

Treatment of absconders and children of bad character.

(a) in the case of a child under the age of sixteen years to have the period of committal increased by a period not exceeding six months; or

(b) in the case of children over the age of fifteen years, to have the child sent to a borstal institution.

(2) Where the Director is of the opinion that a child over the age of fourteen years committed to an approved

school is of so depraved and unruly a character that he cannot benefit from approved school training, he may apply to the children's court having jurisdiction in the place where the school is situate to vary the whole or part of the unexpired portion of the child's term to one of imprisonment.

Removal to hospital.

40. (1) In the case of serious illness of a child detained in a children's remand home or an approved school, the manager, on the advice of a medical officer or medical practitioner, may make an order for his removal to a hospital.

(2) Whenever the medical officer in charge of a hospital considers that the health of a child removed to a hospital under the provisions of this section no longer requires treatment therein, he shall notify the manager of the approved school from whence he was removed to hospital, who shall thereupon cause such child to be brought back to the school if he is still liable to be detained therein.

(3) Every reasonable precaution shall be taken by the medical officer in charge of the hospital to prevent the escape of any child who is confined therein under this section:

Provided that nothing shall be done under the authority of this section which in the opinion of the medical officer in charge of the hospital is likely to be prejudicial to the health of the child confined.

Authority for confinement in children's remand homes, approved schools and hospitals.

41. The order committing a child to custody in a children's remand home or ordering him to be sent to an approved school shall be sufficient authority for his confinement in that place in accordance with the tenor thereof, or in a hospital under section 40 of this Act, and a child while so detained and while being conveyed to or from a children's remand home or an approved school, or to or from a hospital, as the case may be, shall be deemed to be in lawful custody.

Appointed Local Authorities

Appointment of local authorities.

42. (1) The Director may from time to time, with the agreement or at the request of a municipal or county council, or group of such councils, by order appoint such council or group of councils, to be an appointed local authority for the purposes of this Act, and a council or group of councils so appointed shall, subject to the provisions of section 43 of this

Act, perform the duties imposed and have the powers conferred upon appointed local authorities under this Act.

(2) A local authority either by itself or jointly with other local authorities may make welfare schemes for children embracing any or all of the items set out in the Second Schedule to this Act and the Director may by order appoint such local authority or joint local authorities to be an appointed local authority for the purpose and to the extent set out in such schemes.

(3) No other provision of this Act shall operate to impose any duties or confer any powers, other than those imposed or conferred by section 46 of this Act, upon any local authority which is not for the time being an appointed local authority.

43. (1) Where any powers or duties are by this Act conferred or imposed on an appointed local authority as such, those powers and duties shall, in the case of a child who has his home—

Application
of powers
and duties.

(a) within a municipality or township, be powers and duties of the municipal council or the District Commissioner as local authority of the township, as the case may be;

(b) in a county outside a municipality or township, be powers and duties of the county council.

(2) Where, for any district, there is for the time being no appointed local authority having jurisdiction therein, the Minister may, with the concurrence of the Treasury, by order appoint the District Commissioner of the district to have the functions of an appointed local authority under this Part, and have the powers imposed and conferred upon appointed local authorities by this Act in respect of all children having their homes within the district.

44. (1) A county council which is an appointed local authority may with the concurrence of the council of any county division within the county, delegate to such council, with or without restrictions or conditions, any of its functions as an appointed local authority.

Delegation of
functions of
county councils.

(2) Where functions are delegated to the council of a county division under this section, such council, in the discharge of those functions, shall act as agent for the county council.

Delegation of certain powers and duties by appointed local authorities.

45. An appointed local authority may, with the approval of the Director, delegate its powers and duties relating to investigations under section 53 (11) of this Act to an approved society or an approved officer.

Powers of local authorities to incur expenditure in temporary care.

46. Any local authority, whether an appointed local authority or not, and any District Commissioner, may incur expenditure in or about the temporary care of any child in need of care including his maintenance in a place of safety or in the return of any such child to his parent or guardian or the area of the appointed local authority, if any, notwithstanding that in the case of an appointed local authority such child has not been committed to its care under the provisions of this Act.

Approved Societies and Voluntary Institutions

Approval of approved societies and voluntary institutions.

47. (1) The managing committee or governing body of any society of persons working for the care, protection or control of children or of any voluntary institution, may apply to the Director for the society or voluntary institution to be approved for that purpose, and the Director, after making such inquiries as he thinks fit, may approve the society or voluntary institution for that purpose and issue a certificate of approval accordingly.

(2) If at any time the Director considers that the continuance of any approved society or approved voluntary institution as an approved society or approved voluntary institution is unnecessary or undesirable, he may give to the managing committee or governing body of the society or voluntary institution not less than three months' notice in writing of his intention to withdraw the certificate of approval, and upon the expiration of the notice the certificate shall be deemed to have been withdrawn and the society or voluntary institution shall cease to be an approved society or approved voluntary institution.

(3) The managing committee or governing body of an approved society or approved voluntary institution may give to the Director not less than three months' notice in writing of its intention to surrender the certificate of approval, and upon the expiration of the notice (unless the notice is previously withdrawn) the certificate shall be deemed to have been surrendered and the society or voluntary institution shall cease to be an approved society or approved voluntary institution.

(4) No child shall be committed or received into the care of an approved society or approved voluntary institution under this Act after notice has been given of intention to withdraw or surrender the certificate of approval, but the obligations of the approved society or approved voluntary institution with respect to children under its care at the date of the notice shall continue until the society or voluntary institution ceases to be an approved society or approved voluntary institution.

(5) The Director shall, within one month after the date thereof, cause every grant of a certificate of approval and every notice of intention to withdraw or surrender a certificate of approval to be published in the Gazette.

48. (1) An approved society or approved voluntary institution may with the approval of the Director, by notice in the Gazette, appoint one or more officers to be approved officers, to further those purposes of the society or voluntary institution which relate to the care, protection and control of children;

Appointment and powers of approved officers.

Provided that no approved officer shall enter upon the exercise of his functions as such in the area of any appointed local authority without the concurrence of such authority.

(2) The appointment of an approved officer may be revoked by the approved society or voluntary institution or by the Director and any such revocation shall be published in the Gazette.

(3) Approved officers shall have such powers as the Director may prescribe.

Children in Need of Protection or Discipline

49. A children's court shall have jurisdiction to make an order or give a judgment under this Part notwithstanding that any act, matter, thing or circumstance giving rise to such order or judgment did not occur or arise within the area of jurisdiction of the court.

Jurisdiction under Part.

50. For the purpose of this Act—

(a) any person who is the parent or guardian of a child or who is legally liable to maintain him shall be presumed to have the custody of him, subject to any provision made under section 30 of the Matrimonial Causes Act or under any other written law;

Presumptions regarding custody, charge and care of children.

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- (b) any person to whose charge a child is committed by any person who has the custody of him shall be presumed to have charge of him;
- (c) any other person having actual possession or control of a child shall be presumed to have care of him; and
- (d) any person employing a child who is not resident with his parent or guardian shall be deemed to have care of that child.

When child is in need of protection or discipline.

51. For the purposes of this Act a child is in need of protection or discipline—

- (a) who has no parent or guardian, or has been deserted by his parent or guardian, or is destitute or a vagrant;
or
- (b) who cannot be controlled by his parent or guardian; or
- (c) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (d) who is falling into bad associations or is exposed to moral or physical danger; or
- (e) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, insanitary or dangerous; or
- (f) who is prevented from receiving education, or is a habitual truant; or
- (g) who frequents any public bar or gambling house, or who is found buying or receiving or in possession of any drug which is deemed to be dangerous or habit forming; or
- (h) who is found begging or receiving alms or inducing the giving of alms, whether or not there is any pretence of singing, playing or performing; or
- (i) if any of the offences mentioned in the Third Schedule to this Act has been committed against him, or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child.

52. (1) If any person who has the custody, charge or care of any child—

Penalty for cruelty to and neglecting children.

- (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 any mental derangement); or
- (b) by any act or omission, knowingly or wilfully causes that child to become, or contributes to his becoming, in need of protection or discipline,

he commits an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding four years or to both:

Provided that the court, at any time in the course of proceedings for an offence under this subsection, may direct that the person charged shall be charged with and tried for an offence under the Penal Code, if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature.

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(2) For the purposes of this section, a person having custody, charge or care of a child 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.

(3) (a) Any person charged under this section may be charged before the same children's court as that before which the child is brought as being in need of protection or discipline, and at the same time.

(b) Both issues shall be tried simultaneously and the same court shall sentence the person charged, if convicted, and make an order under section 55 of this Act if the child is found to be in need of protection or discipline.

(4) A person may be convicted of an offence under this section notwithstanding that—

- (a) actual suffering or injury to health, or the likelihood of actual suffering or injury to health, of the child was obviated by the action of another person; or
- (b) the child in question has died.

(5) If it is proved that a person convicted of an offence under this section was directly or indirectly interested in any property or sum of money accruing or payable in the event of the death of the child, and had knowledge that that property or sum of money was accruing or becoming payable then he shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding five years or to both.

(6) For the purposes of subsection (5) of this section, a person shall be deemed to be directly or indirectly interested in any property or sum of money if he has any share in or any benefit from that property or the payment of that money, although the money or property is not legally payable to him.

(7) Nothing in this section shall affect—

(a) any right conferred on any person by a written law to administer lawful punishment on a child; or

(b) the right of any parent or other person having the lawful control or charge of a child to administer reasonable punishment on him.

Proceedings in respect of children in need of protection and discipline.

53. (1) Any person who has reasonable cause to believe that a child is in need of protection or discipline may report the matter to the nearest authorized officer.

(2) Any authorized officer having reasonable grounds for believing that a child is in need of protection or discipline may apprehend him without warrant and in such case shall without delay bring him before a children's court; and a children's officer shall bring before a court any child who appears to him to be in need of protection or discipline unless proceedings are about to be taken by some other person.

(3) Any authorized officer may take to a place of safety any child who is about to be brought before a court as being in need of protection or discipline, and a child so taken to a place of safety, or who has taken refuge in a place of safety, may be detained there until he can be brought before a court.

(4) If it appears to an authorized officer exercising powers under this section that a child is in need of medical care, he shall forthwith take him to a medical officer or a gazetted hospital, and such medical officer or gazetted hospital shall provide the appropriate treatment, care and necessary hospital accommodation for the child.

(5) Any expenses incurred in connection with the medical treatment or hospital accommodation of a child under subsection (4) shall be defrayed out of public funds.

(6) Where an application is to be made to a court for an order under section 55 of this Act and the child is not in a place of safety, the court may issue a summons requiring him to be brought before the court, and thereupon the provisions of subsection (3) of that section shall apply for enabling the court to make an interim order for the temporary custody of the child in a place of safety or for his temporary committal to the care of a fit person.

(7) Where under this section a child is taken or ordered to be taken to a place of safety, the person who so takes him shall forthwith notify the parent or guardian of the child who may apply to the Director for the release of the child from a place of safety into his care:

Provided that if the Director refuses an application under this subsection, he shall notify the parent or guardian, in writing of the decision and the reasons therefor and the parent or guardian may apply to the court for the discharge of the child from the place of safety concerned into his care.

(8) In any case where the parent or guardian of a child cannot be found after all reasonable diligence has been exercised to find him, the child shall be kept in the place of safety in which he is held under this section and the provisions of section 55 as to parental responsibility for the child shall thereon apply.

(9) Where under the provisions of this section a child is taken to or ordered to be taken to a place of safety, the person who so takes him, or as the case may be, the person bringing him before the court, shall forthwith send a notice to the court specifying the grounds on which the child is to be brought before the court, and shall send particulars to his parent or guardian warning him to attend at the court before which the child will appear.

(10) Where any application is to be made to a court for an order under section 55 of this Act, the person intending to make the application shall forthwith notify the appointed local authority, if any, of the name and address of the child and the day and hour when, and the nature of the grounds on which, he is to be brought before the court.

(11) A local authority having received a notice under subsection (5) of this section shall make such investigations and render available to the court such information as to the home, circumstances, age, health, character and general antecedents of the child as may be necessary to assist the court.

(12) When it appears to an appointed local authority or approved society that a child in its area is in need of protection or discipline and that its intervention is necessary, the local authority or approved society may receive him into its care and need not bring him before a court:

Provided that—

- (a) a monthly report is rendered to the Director of all children received and held;
- (b) all cases are investigated by the local authority or approved society;
- (c) the local authority or approved society shall not retain the child in its care if his parent or guardian seeks to assume the care of the child;
- (d) the local authority or approved society shall, when it appears to be in the interests of the welfare of the child, endeavour to secure that the care of the child is assumed by a parent or guardian, or by some relative or friend who should, if possible, be of the same religion, race, tribe or clan as the child.

(3) A local authority or approved society which receives a child into its care under the provisions of this section shall be entitled to recover the cost of maintenance of such child from his parent or guardian.

Parental
responsibility
in places
of safety.

54. When a child has been taken to a place of safety under section 53, the authorized officer shall have parental responsibility for the child during the period he is held therein.

Powers of court
in respect of
children in need
of protection
or discipline.

55. (1) If a court is satisfied that any child or in the case of paragraph (d) of this subsection any child brought before it is in need of protection or discipline the court may—

- (a) order him to be returned to his parent or guardian; or
- (b) order his parent or guardian to execute a bond with or without sureties to exercise proper care and guardianship; or

- (c) commit him to the care of a fit person, whether a relative of the child or not, or an approved society, willing to undertake his care; or
- (d) commit him to the care of the appointed local authority, if any, where there does not appear to the court to be any fit person, approved society or approved voluntary institution willing to undertake his care; or
- (e) without making any other order, or in addition to making an order under paragraph (a), (b) or (c) of this subsection, make an order placing him for a specified period, not exceeding three years, under the supervision of an approved officer, a children's officer, or some other person appointed for the purpose by the court; or
- (f) where it is satisfied that it is in his best interest, commit him to an approved school suitable to his needs and attainments.

(2) (a) The court may from time to time of its own motion or on the application of any person, review, vary or revoke any order made under this section.

(b) The court may order that a child remain in the custody of an appointed local authority, an approved society or fit person until the age of eighteen years or such lesser age as the court may decide.

(3) (a) If a court before which any child is brought is unable to decide whether any order, or what order, ought to be made in respect of him, it may make such interim order as it thinks fit for his detention or continued detention in a place of safety not being a police station, or for his committal to the care of a fit person, whether a relative or not, who is willing to undertake the care of him.

(b) An interim order under this subsection shall not remain in force for more than twenty-eight days; but if at the expiration of that period the court deems it expedient so to do, it may continue to make further interim orders.

56. (1) Where a child is brought before a court as being in need of protection or discipline, the court shall allow his parent or guardian to be heard on any application made in relation to the child.

Parent or guardian may be heard in any application.

(2) Where the parent or guardian cannot be found or cannot in the opinion of the court reasonably be required to attend, the court may allow any relative or other responsible person to take the place of the parent or guardian for the purposes of this section.

Application of trusts for maintenance of children.

57. (1) Where a child is, by an order of the court made under this Act, removed from the care of any person, and that person is entitled under any trust to receive any sum of money in respect of his maintenance, the children's court may order the whole or any part of the sums so payable under the trust to be paid to the person, approved society or appointed local authority to whose care the child is committed, to be applied for his benefit in such manner as the court, having regard to the terms of the trust, may direct.

(2) A person who defaults in complying with an order of the court made under this section shall be punished in the prescribed manner, or if no punishment is prescribed may in the discretion of the court be ordered to pay a sum not exceeding five hundred shillings for every day during which he is in default or to be imprisoned or dealt with under section 72 (5) of this Act until he has remedied his default.

(3) An appeal shall lie to the High Court from an order made under this section.

Determination of court as to child's home, etc., to be final.

58. Whenever a child is brought before a court as being in need of protection or discipline and the court determines that he has his home or, as the case may be has been found within the area of jurisdiction of a particular local authority, such determination shall, for the purposes of this Act, be final and conclusive:

Provided that a court may, wherever it thinks convenient so to do, remit any such case to another court to be dealt with by that court, without prejudice, however, to the provisions of section 43 of this Act.

Warrants for search for children.

59. (1) 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 that there is reasonable cause to suspect—

(a) that one of the offences specified in the Third Schedule to this Act has been or is being or is about to be committed against the child; or

(b) that he is in need of protection or discipline,

the magistrate may issue a warrant authorizing any police officer of or above the rank of Assistant Inspector and named therein to search for the child, and, if it appears to such police officer that any offence as aforesaid has been or is being or is about to be committed against the child or that he is in need of protection or discipline, to take him to and detain him in a place of safety until he can be brought before a court.

(2) Any police officer of or above the rank of Assistant Inspector authorized by warrant under this section to search for any child may enter (if need be by force) any house, building or other place specified in the warrant, and subject as aforesaid may remove him therefrom.

(3) A police officer executing a warrant under this section 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.

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

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

(6) A refusal to allow the Director or children's officer or an approved officer to enter any place or dwelling in the exercise of his powers under this Act shall for the purposes of subsection (1) of this section be deemed to be a reasonable cause to suspect that a child therein is in need of protection or discipline.

(7) The provisions of this section shall be in addition to, and not in derogation of, those of the Criminal Procedure Code in relation to entry of premises and arrest of persons.

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60. A police officer may arrest without warrant any person who he has reason to believe has committed any offence under this Part or any other offence involving bodily injury to a child, if the police officer has reasonable ground for believing that the person will abscond or if he does not

Arrest without
warrant.

know and is unable immediately to ascertain the person's name and address.

*Committals to Fit Persons and to
Approved Schools*

Provisions as
to orders of
committal to
fit persons.

61. (1) A children's court making an order committing a child to the care of a fit person or approved society shall, if practicable, select a person or society of the same religion as the person committed.

(2) Every such order shall be in writing, shall contain a declaration as to the age and religion of the child committed and may be made in his absence; and the consent of the fit person or approved society to undertake such care shall be proved in such manner as the court may think sufficient to bind that person or society.

(3) The court making an order committing a child to the care of a fit person, approved society or appointed local authority shall cause to be delivered thereto a record, in the prescribed form, of such information regarding the person committed as the court thinks is necessary.

(4) Every such order shall be made so as to commit the child to such care until he attains the age of eighteen years or for such shorter period as the court thinks fit.

(5) The person, society or authority to whose care a child under eighteen years of age is committed under this Act shall, while the order is in force, have the same rights and powers and be subject to the same liabilities in respect of his maintenance as if he or it were the parent, and the child so committed shall continue in his or its care notwithstanding any claim by a parent or any other person:

Provided that such powers shall not include power to give consent to the marriage, or to deal with the property, of the child committed.

(6) An order committing a child to the care of a fit person, approved society or appointed local authority may, on the application of the parent or any other person, be varied or revoked by the court having jurisdiction within the district within which the person committed is residing.

(7) If, on application made by the parent or guardian or any near relative of a person committed by any such order as aforesaid, any court having power to vary or revoke the order is satisfied that the child is not being brought up in his own religion, the court may, unless a satisfactory undertaking is given by the fit person, society or authority to whose care he has been committed, either revoke the order or vary it in such manner as the court thinks will best secure that he is thenceforth brought up in that religion.

(8) If, on application made by a fit person, society or authority to whose care a child has been committed, the court is of the opinion that it is desirable in his interests to do so, it may order that he be sent to an approved school.

(9) The Minister may, in any case where he considers that it would be for the benefit of a child authorize the fit person, society or authority to whose care he has been committed to arrange for his emigration but the Minister shall not authorize such arrangements unless the child and his parents or guardian consent:

Provided that where the parents or guardian cannot after reasonable inquiry be found it shall not be necessary to secure their or his consent to such arrangement.

62. Where an order of committal to an approved school has been made by a court against a child on a finding of guilty of an offence, the committal order shall specify the grounds of committal, contain a declaration as to the age and religion of the offender, and specify the school to which he is first to be sent and the person or authority which is to convey him to the school.

Contents of committal order.

63. The court making an order of committal to an approved school shall send it, together with a record in the prescribed form of such information regarding the child committed as the court thinks necessary, to the manager of the school.

Transmission of order.

64. Where a person authorized to escort a child to an approved school is unable to find or obtain possession of him, the court may, if satisfied by information on oath that some person named in the information can produce the child

Production of child.

issue a summons requiring the person so named to attend at the court on a certain day and produce the child and if the person so summoned fails without reasonable cause to attend, in addition to any other liability to which he may be subject under the provisions of any law including this Act, he commits an offence and is liable on conviction to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both.

Harbouring
or concealing
child.

65. Where a child has been committed to an approved school, any person who harbours or conceals him after the time fixed for him to enter the approved school commits an offence and is liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand shillings or to both.

Escapes

Escapes
from fit
persons,
etc.

66. A child who runs away from a fit person, approved society or appointed local authority to whose care he has been entrusted under this Act, or from any person or institution with whom he has been placed by an approved society or appointed local authority under any regulations made under this Act, may be apprehended without warrant and brought back to that person, society, authority or institution if he or it is willing to receive him, or may be brought before a children's court having jurisdiction in the place where he was residing immediately before he ran away, and that court may—

- (a) in the case of a child committed under this Act—
 - (i) commit him to the care of some other fit person or approved society; or
 - (ii) order him to be sent to an approved school; or
 - (iii) make any order which a court may make under section 39 of this Act;
- (b) in the case of a child committed under section 53 of this Act—
 - (i) where he was committed to the care of an appointed local authority, order that he be returned to such care; or
 - (ii) make any order which a court can make under section 55 of this Act; or
 - (iii) order him to be sent to an approved school.

67. Whenever a child runs away from any person or institution with whom or with which he has been placed by an approved society or appointed local authority as aforesaid, it shall be the duty of the secretary, clerk or other appropriate officer of such society or authority, within forty-eight hours of such occurrence coming to his knowledge, to notify the Director thereof; and any secretary, clerk or other officer as aforesaid who contravenes the provisions of this subsection commits an offence and is liable on conviction to a fine not exceeding five thousand shillings.

Approved societies and appointed local authorities to report escape.

68. (1) Any child who escapes from a children's remand home or while being conveyed thereto or therefrom, may be apprehended without warrant and brought back to a children's remand home.

Escapes from children's remand homes and approved schools.

(2) Any child who has been committed to an approved school and who—

- (a) escapes from the approved school or from any hospital, home or institution in which he is receiving medical or other treatment, or while being conveyed to or from any such place; or
- (b) being absent from his school on leave of absence or on licence, runs away from the person in whose charge he has been placed, or fails to return to the school upon the expiration of his leave or upon the revocation of his licence,

may be apprehended without warrant and shall be brought back to the approved school and may be brought before a court having jurisdiction where the approved school is situate to be dealt with under the provisions of section 39 of this Act.

(3) Where a child is brought back to his approved school under subsection (2) of this section, whether or not he is brought before a court, the period of his committal shall be increased, over and above any increase ordered by the court, by a period equal to the period during which he was at large and should have been at the approved school.

Assisting
escape, etc.

69. If any person knowingly—

(a) assists or induces a child—

(i) to run away from a fit person, approved society or appointed local authority to whose care he has been committed, or from any person or institution with whom or with which he has been placed by an approved society or appointed local authority under or by virtue of this Act or any regulations made thereunder; or

(ii) to do any of the things specified in section 68(2) of this Act; or

(b) harbours or conceals a child who has so run away or has done any of such things as aforesaid; or

(c) prevents such a child from returning, or induces such a child not to return, to the care of the person to which he has been committed, or to any place in which he should be,

he commits an offence and is liable on conviction to imprisonment for a term not exceeding one year, or to a fine not exceeding ten thousand shillings or to both such imprisonment and such fine.

Production
of escaped
person.

70. If a children's court is satisfied by information on oath that there are reasonable grounds for supposing that a child has run away or done any of the things specified in section 68(2) and that some other person named in the information can produce him the court may issue summons requiring that other person to attend at the court and produce the child and, if the person fails to do so without reasonable excuse, he commits an offence, and in addition to any other liability to which he may be subject under this Act, is liable on conviction to a fine not exceeding ten thousand shillings.

Miscellaneous Provisions on Protection and Discipline of Children

Presumption
and
determination
of age.

71. (1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is under eighteen years of age, the court shall make due inquiry as to the age of that person and for that purpose

shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

(2) A certificate purporting to be signed by a medical practitioner as to the age of a person under eighteen years of age shall be evidence thereof and shall be receivable by a court without proof of signature unless the court otherwise directs.

72. (1) A court making an order committing a child to the care of a fit person, approved society or appointed local authority or ordering him to be sent to an approved school may also, at the same time or subsequently, make an order (hereinafter referred to as a contribution order) requiring either or both of the parents or the guardian, or, in the case of a child aged sixteen years or more but under eighteen years, the child himself if he is engaged in remunerative full-time work, to contribute such sums for such periods as the court shall think fit towards the maintenance of the child concerned.

Contribution
order.

(2) The contribution order shall name the person to whom the sums are to be paid.

(3) A contribution order may be made on the complaint or application of the fit person, approved society or appointed local authority to whose care the child has been committed or the manager of the approved school to which he has been ordered to be sent, and may require that contributions shall be made from the date of the committal of the child; and every sum contributed in accordance with the order shall be applied to or towards his maintenance.

(4) A court which has made a contribution order under this section may at any time vary, suspend or rescind the order, or revive the order after it has been rescinded, but no contribution order shall be made, varied, suspended, rescinded, or revived unless the court is satisfied that the person liable to make payments under the order and the person, approved society, appointed local authority or manager of the approved

school to whom such payments are due, or are to become due, has received due notification of the complaint or application and had an opportunity to appear before the court on the hearing thereof.

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(5) Arrears of contributions shall be recovered in the manner provided in sections 334 to 342 of the Criminal Procedure Code for the levying of fines imposed by a court in criminal proceedings, and the court shall be empowered to make an attachment order against the defaulter's salary or other source of income, subject always to any written law protecting pensions or other sources of income from attachment.

(6) A person against whom a contribution order has been made shall, if he changes his address, forthwith give notice thereof to the person entitled to receive the contribution and if he fails to do so shall be guilty of an offence and liable to a fine not exceeding two hundred shillings.

(7) For the purposes of this section, "parent" includes step-father, step-mother and adoptive parent.

International
reciprocity.

73. (1) It shall be lawful for the Minister, with the consent of the National Assembly, to enter into an agreement with the Government of any other country or territory on such terms and conditions as he may think fit, whereby a child who has been ordered by a court under the provisions of this Act to be sent to an approved school or other institution or committed to the care of a fit person may be received into that country or territory and there detained in an approved school or other institution approved under the relevant legislation of that country or territory, or received into the care of a fit person or returned to his parent or guardian.

(2) It shall be lawful for the Minister, with the consent of the National Assembly to enter into an agreement with the Government of any other country or territory on such terms and conditions as he may think fit whereby a child who has been ordered by a court of such country or territory to be sent to an approved school or other institution or committed to the care of a fit person may be received in Kenya and there detained in an approved school or other institution or received into the care of a fit person, or of his parent or guardian.

(3) Any child who has been ordered under the provisions of this Act to be detained in an approved school or other institution, or committed to the care of a fit person, may, while still subject to such order, by warrant signed by the Minister, be removed in custody into any other country or territory with which an agreement has been concluded under subsection (1) of this section, and there detained in an approved school or other institution, or placed in the care of a fit person, or of his parent or guardian, in accordance with the law in force in the country or territory authorizing such detention, until the expiration of the order or until he is sooner released according to law.

(4) An order of a court of a country or territory with which an agreement has been entered into in accordance with the provisions of subsection (2) of this section which could lawfully have been made by a court in Kenya if the person had been within its jurisdiction shall upon the person being received in Kenya have the same effect and be enforceable as if the order had been made by a court in Kenya.

74. The provisions of the Criminal Procedure Code with respect to bonds for good behaviour (including the provisions as to their enforcement) shall apply to bonds entered into under this Act.

Bonds.
Cap. 75.

75. (1) In appeal to the High court from an order of a court under this Act may be made in the following cases and by the following persons—

Appeals.

- (a) in the case of an order committing a person under eighteen years of age to the care of a fit person, approved society or appointed local authority or placing a person under supervision, a probation order or an order of committal to an approved school, by the person himself or his parent or guardian on his behalf;
- (b) in the case of an order requiring a parent or guardian to give security for the good behaviour of a person under eighteen years of age, by the person required to give security, or, where a person under eighteen years of age is himself required to give such security, by him or his parent or guardian;

- (c) in the case of an order requiring a person to contribute in respect of himself or any other person, by the person required to contribute;
- (d) in the case of an order requiring all or any part of the payments under an affiliation order to be paid to some other person, by the person who would but for the order be entitled to the payments.

(2) Nothing in this section shall restrict the rights of appeal to the High Court conferred by Part XI of the Criminal Procedure Code.

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Legal aid.

76. (1) Where a child is brought before a court in proceedings under this Act or any other written law, the court may, where the child is unrepresented order that the child be granted legal representation.

(2) Any expenses incurred in relation to the legal representation of a child under subsection (1) shall be defrayed in accordance with section 79.

Regulations under Part.

77. The Minister may make Regulations generally for the better carrying out of the provisions of this Part, and without prejudice to the generality of the foregoing, such regulations may make provision—

- (a) for the remuneration of persons to the care of whom children are committed;
- (b) for the prevention of infectious and contagious diseases in approved schools, children's remand homes and for the medical examination of their inmates;
- (c) for causing photographs or fingerprints to be taken of children in children's remand homes and approved schools, and for recording them;
- (d) for the control and management of approved societies in relation to the care of children, including the inspection of premises maintained by such societies wholly or partly for the care of children;
- (e) for the compulsory registration of voluntary institutions, nurseries, children's homes, boarding out establishments, holiday homes, places of safety and

other institutions, not being schools, hospitals, convalescent homes or similar institutions, where children are received and cared for reward;

- (f) for the inspection of voluntary institutions, children's homes and nurseries, boarding out establishments, holiday homes and places of safety.

78. The Chief Justice may make rules—

Rules

- (a) for regulating the manner in which children's courts shall be constituted under this Part and for providing a chairman thereof;
- (b) to provide for the transfer of proceedings to children's courts;
- (c) to provide for the procedure to be followed by children's courts and in particular as to the recording of evidence and the manner of arriving at and recording findings and orders;
- (d) prescribing the punishment which may be imposed under section 57 (2) of this Act;
- (e) providing for appeals against any order imposing any such punishment;
- (f) providing for the appointment of suitable persons to assist and advise the court in the exercise of its jurisdiction under this Act and for the functions of such persons, regard being had to the desirability of securing that in any case concerning a child belonging to a particular community such persons as aforesaid shall be persons belonging to the same community.

79. There shall be paid out of moneys provided by Parliament—

Grants, and expenses of the Minister.

- (a) such sums on such conditions as the Minister may authorize towards—
- (i) the expenses of the manager of an approved school;
- (ii) the expenses of the manager of a children's remand home;

- (b) such sums as grants or grants-in-aid to appointed local authorities or approved societies as may be authorized by the Minister from time to time;
- (c) such sums as may be authorized by the Minister for the relief of destitute or vagrant children or for the boarding out of children with fit persons;
- (d) any other expenses incurred by the Minister in the administration of this Act.

PART III—MAINTENANCE AND CUSTODY OF CHILDREN

General principles in deciding questions concerning children.

80. (1) Subject to this Act, in matrimonial or other proceedings before a court where a matter concerning or affecting a child is in question, the court shall, in deciding that question, regard the welfare of that child as the first and paramount consideration, but subject thereto shall have regard to—

- (a) the conduct and wishes of the parents of the child and of any other person who the court is satisfied may properly be regarded as acting in place of the parents of the child;
- (b) the wishes (if any) of the child; and
- (c) the customs of the community to which that child and his parents or other person, as the case may be, belong.

(2) A child of tender years shall ordinarily remain with his mother unless the court, for reasons to be recorded in writing, otherwise orders.

(3) Children belonging to one family shall ordinarily remain together unless the court, for reasons to be recorded in writing, otherwise orders.

Duty to maintain children.

81. Except where an agreement between the parents of a child or a court order otherwise provides, each parent of a child shall have a duty to maintain that child, whether or not in his custody, by providing or paying for such accommodation, food, clothing, healthcare and education as is reasonable having regard to his means and way of life.

82. (1) Subject to this Act, a children's court may make orders for the maintenance of a child as it thinks fit and may by subsequent order discharge or vary or suspend the whole or any provision thereof.

Power of court to make maintenance orders.

(2) An order under subsection (1) may be made on the application of either of the parents of the child or by such other person as may be prescribed—

(a) during the course of or after the conclusion of proceedings for divorce or nullity of marriage or judicial separation of the parents of the child; or

(b) at anytime if either of the parents of the child has failed to maintain the child as required by section 81.

(3) An order under this section may direct that any payments for the maintenance of a child be paid to the person having custody of the child or to a trustee on the child's behalf.

(4) The provisions of the Enforcement of Maintenance Orders Act shall apply to maintenance orders under this section.

Cap. 154.

83. The court may, when ordering the payment of maintenance for the benefit of a child, order the parent paying maintenance to secure the whole or any part of it by vesting property in trustees upon trust to pay maintenance or part thereof from that property and subject thereto in trust for the child.

Power of court to order security for maintenance of child.

84. (1) Subject to subsection (2), where a court is satisfied that a disposition of property has been made within the preceding three years with the object on the part of the person making the disposition of reducing the means to pay maintenance for a child, the court may, on application, set aside that disposition, and if the court is satisfied that any such disposition is intended, it may, on application in the prescribed manner, grant an injunction to prevent it.

Power of court to set aside and prevent dispositions to defeat claims for maintenance of a child.

(2) No order setting aside a disposition of property under subsection (1) shall be made against a purchaser for value without notice.

Orders for custody, care, control and access to a child.

85. (1) A children's court may, at anytime on the application of either of the parents of a child, or on the application of such other person as may be prescribed, make an order regarding the custody or care and control of, or the right of access of either parent to the child.

(2) An order under this section may be made subject to any conditions which the court thinks fit to impose.

(3) In particular, and without prejudice to the generality of subsection (2), an order for custody under this section may contain conditions—

- (a) relating to the place of residence and education of a child;
- (b) regulating the frequency and duration of visits to or by a child with reference to either of his parents or any member of their respective families; or
- (c) providing for the care and control of the child to be entrusted to any relative of the child or to any association or body prescribed by the Minister for the time being responsible for social services, the objects of which include child welfare.

Declaration of unfitness.

Cap. 152.

86. (1) On or after the determination of proceedings for separation or dissolution of a marriage—

- (i) in the case of proceedings under the Matrimonial Causes Act, after the pronouncement of a decree absolute; or
- (ii) in the case of a marriage dissolved under any customary or religious law, after the conclusion of such proceedings,

the court may declare either parent to be unfit to have custody of the child.

(2) A person declared unfit to have custody of a child under subsection (1) shall not, unless the order has been rescinded, be entitled to the custody of the child, whether on the death of the other parent or otherwise, unless the court so directs.

87. (1) A children's court may, on application, grant an injunction restraining any person from removing from Kenya a child who is ordinarily resident therein.

Power of court to restrain the removal of a child from Kenya.

(2) An application under subsection (1) may be made at any time by either of the parents of a child or by any person who satisfies the court that he may reasonably be regarded as being entitled to exercise parental rights in relation to a child to the exclusion of either parent.

(3) The court may, instead of granting an injunction under subsection (1), grant leave for the removal of the child from Kenya either unconditionally or subject to such conditions or undertaking as may appear to be reasonably required.

88. The court may vary the terms of an agreement between the parents of a child for the custody or maintenance of a child if satisfied that the variation is reasonable and in the best interests of the child.

Power of court to vary agreements for custody or maintenance of a child.

89. (1) Subject to subsection (2), no order in respect of the periodical payment of money towards the maintenance of a child, except in relation to any arrears due under it, and no order for the custody of a child shall continue in force after the date when the child to whom it relates attains the age of eighteen years.

Duration of orders for maintenance and custody.

(2) Notwithstanding the provisions of subsection (1), a court may, for reasons to be recorded in writing, extend the duration of orders for maintenance or custody of a child for a period not exceeding seven years.

(3) Subject to subsection (4) no order for the custody or the periodical payment of a child shall, unless the court otherwise directs, be enforceable and no liability thereunder shall arise, so long as the parents of the child are residing together and the order shall cease to have effect if for any period of not less than three months after it is made, the parents continuously reside together.

(4) The court may, notwithstanding that the parents of a child are residing together at the date of an order under subsection (3), order that the father of the child shall pay to the mother of the child such periodical sums towards the maintenance of the child as it deems fit.

(5) No order made under this Act during the course of matrimonial proceedings and concerning or affecting a child the marriage of whose parents is the subject of those proceedings, shall continue in force after the date of pronouncement of a decree or the dismissal of the proceedings unless the court when, or before pronouncing the decree or dismissing the proceedings declares the order to be final or adjourns consideration of arrangements with regard to the welfare of the child to chambers.

Saving.
Cap. 152.
Cap. 153.

90 Nothing in this Act shall be deemed to affect the provisions of the Matrimonial Causes Act or the Subordinate Courts (Separation and Maintenance) Act.

Rules of court
under Part.

91. The Chief Justice may make rules for regulating proceedings under this Part.

PART IV—SUPERVISION OF CHILDREN PLACED IN FOSTER CARE

Application of
Part IV.

92. (1) Subject to the provisions of subsection (3), this Part shall have effect where arrangements are made for placing a child in the care and possession of a person who is resident in Kenya and is not a parent, guardian or relative of his, and another person, not being a parent or guardian of his, participates in the arrangements.

(2) For the purposes of this Part, a person shall be deemed to participate in the arrangements for placing a child in the care and possession of another person—

- (a) if he enters into or makes any agreement or arrangement for, or for facilitating, the placing of the child in the care and possession of that other person; or
- (b) if he initiates or takes part in any negotiations of which the purpose or effect is the conclusion of any agreement or the making of any arrangement therefor,

or if he causes another to do so.

(3) The provisions of this Part shall not have effect where possession of a child has been, is or is proposed to be taken—

- (a) by any person for a purely temporary purpose;

(b) by a fit person, approved society or appointed local authority to whose care the person has been committed under this Act;

(c) by a school, hospital, convalescent home or other similar institution;

(d) by an institution to which a child has been committed under the provisions of the Mental Health Act; or

Cap. 248.

(e) by an approved school or remand home.

(4) The provisions of this Part shall cease to have effect in relation to a child---

(a) if an adoption order or an interim order is made in respect of him under this Act, upon the making of such order; or

(b) if no such order has been made, on the date on which he attains the age of eighteen years.

93. (1) Not less than seven days before possession is taken of a child pursuant to any arrangements made under this Part, every person who participates in the arrangements, not being a parent or guardian of the child, shall give notice in writing of the arrangements to the Director.

Notification
of taking
possession
of child.

(2) A notice under subsection (1) shall state the name and sex of the child, his date of birth and the name and address of the person in whose care and possession he is placed.

94. (1) No person to whom this Part applies shall receive or retain in his care or charge a child for the purpose of caring for or maintaining him unless he is registered under this section as a foster parent.

Registration
of foster
parents.

(2) A person who wishes to register as a foster parent shall apply to the Director in the prescribed form.

(3) If after such inquiry as the Director deems necessary, the Director is satisfied as to the character and fitness of the applicant and the premises proposed to be used by the applicant as a foster home, he shall register the applicant as a foster parent.

(4) A person registered under subsection (3) shall be issued with a certificate of registration in the prescribed form, and shall be entitled to receive and maintain on the premises specified in the certificate any child for the purposes of caring and nurturing him.

Duration and revocation of registration certificate.

95. (1) Every registration certificate issued under section 94 shall continue in force for a period of twelve months beginning on the date it is issued and shall then expire:

Provided that where an application for the renewal of a certificate is made prior to the expiry of a current certificate, the current certificate shall continue in force until a decision on the application for renewal is made.

(2) Subject to subsection (3), the Director may at any time revoke a certificate of registration issued under section 94.

(3) Where it is intended to revoke a certificate of registration under subsection (2), the Director shall give notice of the intended revocation to the foster parent in the prescribed form.

(4) Upon the issue of a notice under subsection (3), the Director shall make such arrangements as may be necessary for the removal of any child residing in the foster home concerned.

Agreement of maintenance of fostered child.

96. The Director may, on the request of the foster parent or the parent or guardian of a child, arrange an agreement between the foster parent and the parent or guardian of a child placed in foster care, stipulating the maintenance payable for the child's care.

Power of inspection.

97. (1) An authorized officer may at any time enter any foster home or any premises in which he has reason to believe a child is being maintained contrary to the provisions of this Act, and may inspect every part of the foster home or premises and examine the state and condition of the child therein.

(2) The authorized officer may, if upon inspection under subsection (1) he is dissatisfied with the quality of care a child is receiving (of which he shall be the sole judge) remove the child from the foster home or other premises and place the

child in a place of safety until the wishes of the parent or guardian are known, or until alternative arrangements for the care and maintenance of the child can be made.

(3) The period during which a child remains in a place of safety under this section shall not exceed three months.

98. (1) Where a child leaves the care of any person who has possession of him under this Part, the person shall, within forty-eight hours after the child leaves, notify the Director in the prescribed form of the fact that the child has left.

Notification where child leaves.

(2) A notification under subsection (1) shall specify the circumstances in which the child left, and if known, the address where the child is to be found.

99. Where a child placed in foster care under this Part dies, the foster parent shall, within twenty-four hours of such death, notify the Director in the prescribed form.

Notification where child dies.

100. A person who, without reasonable cause, contravenes the provisions of this Part commits an offence and is liable on conviction to a fine not exceeding twenty thousand shillings or to a term of imprisonment not exceeding two years or both.

Penalty for contravening provisions of Part.

PART V—ADOPTION

Preliminary

101. For the purposes of this Act, a person shall be deemed to make arrangements for the adoption of a child if, not being a parent or guardian of the child, he enters into or makes any agreement or arrangement for, or for facilitating, the adoption of the child by any other person, whether the adoption is effected, or is intended to be effected, in pursuance of an adoption order or otherwise, or if he initiates or takes part in any negotiations of which the purpose or effect is the conclusion of any agreement or the making of any arrangement therefor, or if he causes another to do so.

Presumption as to participating in adoption arrangements.

102. In reaching any decision relating to the adoption of a child, the children's court shall have regard to all the circumstances, the first consideration being the need to safeguard and promote the welfare of the child throughout his childhood, and shall so far as is practicable ascertain the wishes of the child regarding the decision and give due consideration to them having regard to his age and understanding.

Duty to promote welfare of child.

Adoption Council

Establishment
and functions
of the
Adoption
Council.

103. (1) There shall be established an Adoption Council which shall comprise such members as may be prescribed by the Minister.

(2) The functions of the Adoption Council shall be—

- (a) formulating the governing policy in matters of adoption;
- (b) effecting liaison between the adoption societies, the Government and non-governmental organizations;
- (c) considering and proposing names of officers who may serve as guardians *ad litem*; and
- (d) monitoring adoption activities in the country.

(3) The conduct and regulation of the affairs of the Adoption Council shall be as prescribed by the Minister, but subject thereto, the Council shall regulate its own proceedings.

Adoption Orders

Power to make
adoption orders.

104. (1) Subject to this Act, a children's court may, upon an application made in the prescribed manner, make an order (in this Act referred to as "an adoption order") authorizing the applicant to adopt a child.

(2) An adoption order may be made on the application of two spouses authorizing them jointly to adopt a child.

(3) An adoption order may be made authorizing the adoption of a child by the mother or father of the child, either alone or jointly with her or his spouse.

(4) All proceedings under this Act shall be heard and determined in chambers.

(5) Any officer of an adoption society may draw or prepare any document relating to any proceedings under this Act and may carry on any such proceedings on behalf of an applicant for an adoption order:

Provided that no fee, gain or reward other than a voluntary contribution to the adoption society may be accepted or received directly or indirectly thereafter.

105. (1) A children's court shall have jurisdiction to to hear and determine applications for adoption orders in cases where all consents required by this Part have been signified in the prescribed manner and where the making of an order does not require justification as an exceptional measure under this Part.

Jurisdiction
under Part.

(2) If in the course of an application for an adoption order in a children's court any consent is withdrawn or it appears to the court that for any other reason it is desirable to do so, the court shall adjourn the application and transfer it to the High Court which shall proceed from the point at which the application was transferred.

106. (1) Where—

(a) the applicant or one of the applicants for an adoption order is a parent, step-parent or relative of the child; or

(b) the child in respect of whom an adoption order is sought, is placed with the applicant or applicants by an adoption society or pursuant to an order of the High Court,

Child to live
with adopters
before order
is made.

an adoption order shall not be made unless the child is at least nineteen weeks old and at all times during the preceding thirteen weeks lives with the applicant or in the case of an application by more than one person, with one of the applicants.

(2) In cases where the provisions of subsection (1) do not apply, an adoption order shall not be made unless the child is at least twelve weeks old and lives with the applicant, or in the case of an application by more than one person, with one of the applicants.

(3) An adoption order shall not be made unless the court is satisfied that sufficient opportunities to see the child with the applicant or, in the case of an application by a married couple, with both applicants together in a home environment have been afforded—

(a) where the child was placed with the applicant by an adoption society, to that society; or

(b) in any other case, to the local authority within whose area the home is.

Restriction of adoptions to children under five years of age.

107. (1) Subject to subsection (2) an adoption order shall not be made in respect of a child unless the child is below five years of age.

(2) Notwithstanding the provisions of subsection (1) the court may, in exceptional cases, order the adoption of a child aged five years or more at its absolute discretion.

Adoption by married couple.

108. (1) An adoption order may be made on the application of a married couple where each of them has attained the age of twenty-one years but an adoption order shall not otherwise be made on the application of more than one person.

Adoption by one person.

109. (1) Subject to this Act, an adoption order may be made on the application of one person where he has attained the age of twenty-one years and—

(a) is not married; or

(b) is married and the court is satisfied that—

(i) his spouse cannot be found; or

(ii) he is separated and living apart from his spouse and the separation is likely to be permanent; or

(iii) his spouse is by reason of ill health, whether physical or mental, incapable of making an application for an adoption order.

(2) An adoption order shall not be made on the application of the mother or father of the child alone unless the court is satisfied that—

(a) the other natural parent is dead or cannot be found; or

(b) there is some other reason justifying the exclusion of the other natural parent,

and where such an order is made the reason justifying the exclusion of the other natural parent shall be recorded by the court.

(3) In considering an application for an adoption order by one person, the court shall specially consider the age and sex of the child as factors in determining the application.

Parental agreement.

110. (1) An adoption order shall not be made unless—

(a) the child is free for adoption; or

(b) in the case of each parent or guardian of the child the court is satisfied that—

(i) he freely, and with full understanding of what is involved, agrees unconditionally to the making of the adoption order (whether or not he knows the identity of the applicants); or

(ii) his agreement to the making of the adoption order should be dispensed with on a ground specified in subsection (2).

(2) The court may dispense with the agreement of a parent or guardian of a child under subsection (1) (b) (ii) if it is satisfied that the parent or guardian—

(a) cannot be found or is incapable of giving his agreement; or

(b) is withholding his agreement unreasonably; or

(c) has persistently failed without reasonable cause to discharge his parental duties in relation to the child; or

(d) has abandoned or neglected the child; or

(e) has persistently ill-treated the child; or

(f) has seriously ill-treated the child.

(3) An agreement shall be ineffective for the purposes of subsection (1) (b) (i) if given by the mother less than six weeks after the child's birth.

(4) Subsection (2) (f) shall not apply unless due to the ill-treatment or for other reason the rehabilitation of the child within the household of the parent or guardian is unlikely.

111. (1) Subject to this Act, an adoption order may be made in favour of an applicant who is not a citizen of Kenya.

Adoptions by
non-citizens.

(2) An order under subsection (1) may be made where the applicant, in addition to any other requirement of this Part—

(a) if single, is not male;

(b) if married, the marriage union is heterogeneous;

- (c) has obtained the authority of a recognized children's court in his home country as a fit person to adopt a child in Kenya;
- (d) has obtained immigration authority from his home country in respect of the adopted child;
- (e) has executed and duly produces a security bond from his home country for the safety of the adopted child;
- (f) is certified morally fit to adopt a child;
- (g) produces evidence of sound financial standing;
- (h) produces a satisfactory home study report from a recognized children's home in his home country;
- (i) is recommended by his home office in Kenya to adopt the child.

Religious upbringing of adopted child.

112. An adoption society shall, in placing a child for adoption, have regard (so far as is practicable) to any wishes of the child's parents and guardians as to the religious upbringing of the child.

Freeing child for adoption.

113. (1) Where, on an application by an authorized adoption society the court is satisfied in the case of each parent or guardian of the child that—

- (a) he freely, and with full understanding of what is involved, agreed generally and unconditionally to the making of an adoption order; or
- (b) his agreement to the making of an adoption order should be dispensed with on a ground specified in section 110 (2),

the court shall, subject to subsection (5), make an order declaring the child free for adoption.

(2) No application shall be made under subsection (1) unless—

- (a) it is made with the consent of a parent or guardian of the child; or
- (b) the adoption society is applying for dispensation under subsection (1) (b) of the agreement of each parent or guardian of the child, and the child is in the care of the adoption agency.

(3) No agreement required under subsection (1) (a) shall be dispensed with under subsection (1) (b) unless the child is **already placed for adoption or the court is satisfied that it is likely that the child will be placed for adoption.**

(4) An agreement by the mother of the child shall not be effective for the purposes of this section if given less than six weeks after the child's birth.

(5) Before making an order under this section, the court shall satisfy itself that each parent or guardian or relative of the child who can be found has been given an opportunity of making, if he so wishes, a declaration that he prefers not to be involved in further questions concerning the adoption of the child; and any such declaration shall be recorded by the court.

(6) Before making an order under this section in the case of a child born outside marriage whose father is not his guardian, the court shall satisfy itself in relation to any person claiming to be the father that he has no objection to the adoption.

114. (1) The provisions of this section and section 115 shall apply to any person (hereinafter referred to "the former parent") who was required to be given an opportunity of making a declaration under section 113(5) but did not do so.

Progress reports to former parent.

(2) Within the fourteen days following the date twelve months after the making of an order under section 113, the adoption society in which the parental rights and duties were vested on the making of the order, unless it has previously by notice to the former parent informed him that an adoption order has been made in respect of the child, shall by notice to the former parent inform him—

- (a) whether or not an adoption order has been made in respect of the child, and
- (b) whether the child has his home with a person with whom he has been placed for adoption.

(3) If at the time when the former parent is given notice under subsection (2) an adoption order has not been made in respect of the child, it shall be the duty of the adoption society to give notice to the former parent of the making of an adoption order (if and when made), and meanwhile to give

the former parent notice of wherever the child is placed for adoption or ceases to have his home with a person with whom he has been placed for adoption.

(4) If at any time the former parent by notice makes a declaration to the adoption society that he prefers not to be involved in future questions concerning the adoption of the child—

- (a) the society shall secure that the declaration is recorded by the court which made the order under section 113; and
- (b) the society shall be released from the duty of complying further with subsection (3) as respects that former parent.

Revocation of order made under section.

115. (1) A former parent of a child may, where twelve months or more after the making of an order under section 113—

- (a) no adoption order has been made in respect of the child; and
- (b) the child does not have his home with a person with whom he has been placed for adoption,

apply to the court which made the order for a further order revoking it on the ground that he wishes to resume his parental rights and duties.

(2) While the application is pending, the adoption society having the parental rights and duties shall not place the child for adoption without the leave of the court.

(3) Where an order freeing a child for adoption is revoked under this section—

- (a) the parental rights and duties relating to the child shall vest in the individual or, as the case may be, the individuals in whom they vested immediately before that order was made;
- (b) if the parental rights and duties, or any of them, vested in a local authority or voluntary organization immediately before the order freeing the child for adoption was made, those rights and duties shall vest in the individual, or as the case may be, the individuals

in whom they vested immediately before they were vested in the authority or organization; and

- (c) any parental duty extinguished under this Act shall forthwith be revived.

but the revocation shall not affect any right or duty so far as it relates to any period before the date of the revocation.

(4) Subject to subsection (5) if the application is dismissed on the ground that to allow it would contravene the principle embodied in section 102—

- (a) the former parent who made the application shall not be entitled to make any further application under subsection (1) in respect of the child; and
- (b) the adoption society shall be released from the duty of complying further with section 114 (3) as respects that parent.

(5) Subsection (4) (a) shall not apply where the court which dismissed the application gives leave to the former parent to make a further application under subsection (1), but such leave shall not be given unless it appears to the court that because of a change in circumstances or for any other reason it is proper to allow the application to be made.

116. (1) Where in an application for an adoption order in relation to a child under the age of five years the court refuses to make the adoption order then—

Care, etc., of
child on
refusal of
adoption order.

- (a) if it appears to the court that there are exceptional circumstances making it desirable that the child should be under the supervision of an independent person, the court may order that the child shall be under the supervision of an appointed local authority or under the supervision of a probation officer; or
- (b) if it appears to the court that there are exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parents or to any other individual, the court may by order commit the child to the care of an appointed local authority.

(2) Where the court makes an order under subsection (1) (b), the order may require the payment by either parent to the local authority, while it has the care of the child, of such

weekly or other periodical sum towards the maintenance of the child as the court thinks reasonable.

Evidence of consent of parent or guardian.

117. (1) Where any person whose agreement to the making of an adoption order is required does not attend in the proceedings for the purpose of giving it, then, subject to subsection (3), a document, in the prescribed form and attested by a person of any such class as may be prescribed, signifying his consent to the making of such an order shall, if the person in whose favour the order is to be made is named in the document or (where the identity of that person is not known to the consenting party) is distinguished therein in the prescribed manner, be admissible as evidence of that consent whether the document is executed before or after the commencement of the proceedings.

(2) Any such document, whether executed in or outside Kenya, shall be admissible without further proof of the signature of the person by whom it was executed; and, for the purposes of this subsection, a document purporting to be attested as aforesaid shall be deemed to be attested, and to be executed and attested on the date and at the place specified therein, unless the contrary is proved.

(3) A document signifying the consent of the mother of a child shall not be admissible under this section unless—

(a) the child is at least six weeks old on the date of the execution of the document; and

(b) the document is attested on that date by a person of a class prescribed for the purpose of subsection (1).

Functions of court as to adoption orders.

118. (1) The court before making an adoption order shall be satisfied—

(a) that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent, understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;

- (b) that the order if made will be in the best interest of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child, and to the ability of the applicant to maintain and educate him;
 - (c) that the applicant has not received or agreed to receive, and that no person has made or given or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption;
 - (d) that any person whose consent is dispensed with on the grounds of incapacity is still incapable of giving his consent at the date of making the order; and
 - (e) where the applicant is not himself a relative of the child, that reasonable steps have been taken to inform the relatives of the child of the proposed adoption and that no relative able to accept the care of the child has expressed willingness to do so.
- (2) The court on making an adoption order may impose such terms and conditions as it may think fit and in particular and without prejudice to the generality of foregoing, the court may—
- (a) require the adopter by bond or otherwise to make for the child such provision as in the opinion of the court is just and expedient;
 - (b) order that the child shall not be removed from the jurisdiction of the court without the consent of the court for such period not exceeding two years as it may specify;
 - (c) require the adopter to accept supervision by and advice from an adoption society specified by the court for such period not exceeding two years as the court may specify;
 - (d) where consent to the making of an adoption order is conditional upon the child being brought up in a particular religious persuasion, require the child to be brought up in that religious persuasion; and
 - (e) require the adopter to furnish such security by bond or otherwise as the court may think fit for the due performance of any condition the court may impose.

Appointment of
provisional
guardian.

119. (1) The court may, on the application of the adopter or of its own motion, at the time of making an adoption order appoint any person approved by the adopter and whose prior consent thereto has been given in writing to be the guardian of the child in the event of the adopter or both adopters where two spouses have applied for the adoption order, dying before the child is of full age.

(2) The court may, at any time before the child is of full age, on the application of the adopter, or of a guardian appointed under subsection (1), or of the child, revoke any such appointment and appoint any other person to be guardian of the child.

Consent to
future adoption.

120. (1) Where a child is in the care and possession of an adoption society, consent to the future adoption of the child by an adopter approved by such society may be given by those persons where consent to the making of an adoption order is required under this Act.

(2) In the event of the adoption society being unable to find a suitable adopter within twelve months of the date of the last consent given under the provisions of this section, the society shall notify the persons whose consent has been given as aforesaid of such failure and may request them to remove the child from the care and possession of the society.

(3) If within one month of any such request the child has not been removed from the care and possession of the society, the child shall be deemed to be in need of protection or discipline and on the application of the adoption society the court may commit the child to the care of a fit person under this Act.

Interim orders.

121. (1) Subject to this section, the court may, upon any application for an adoption order, postpone the determination of the application and make an interim order giving the custody of the child to the applicant for a period not exceeding two years by way of a probationary period upon such terms as regards provision for the maintenance and education and supervision of the welfare of the child and otherwise as the court may think fit.

(2) All such consents as are required to an adoption order shall be necessary to an interim order but subject to a like power on the part of the court to dispense with any such consent.

(3) An interim order shall not be made in any case where the making of an adoption order would be unlawful by virtue of this Part.

(4) An interim order shall not be deemed to be an adoption order within the meaning of this Act.

122. (1) An adoption order or an interim order may be made in respect of a child who has already been the subject of an adoption order under this Act or under any Act or Ordinance for the time being in force in any country in the Commonwealth.

Adoption order in respect of children previously adopted.

(2) In relation to an application for an adoption order in respect of such a child, the adopter or adopters under the previous or last previous adoption order shall be deemed to be the parent or parents of the child for all the purposes of this Act.

123. If the court refuses to make an adoption order or an interim order, the court may make such order for the custody of the child as the court may think fit.

Custody of child when order refused.

124. Any person aggrieved by the making of or the refusal to make an adoption order or an interim order, or by any order for the custody of the child, may appeal therefrom in the same manner as if the application were a suit instituted under the Civil Procedure Act.

Appeals.

Cap. 21

125. The Rules Committee may make rules of court in regard to any matter to be prescribed under this Part and providing generally for all matters of procedure and for carrying this Part into effect.

Power to make procedure under Part.

126. (1) For the purposes of any application for an adoption order, the court shall appoint an independent person or body to act as guardian *ad litem* of the child upon the hearing of the application, with the duty of safeguarding the interests of the child before the court and having for the purpose such powers and duties as may be prescribed by the rules.

Appointment of guardians *ad litem*.

(2) Where arrangements for the adoption of any child have been made by an adoption society neither that society nor any member thereof shall be appointed guardian *ad litem* of that child for the purposes of its adoption.

(3) For the assistance of the court, and without prejudice to the discretion in the power of appointment given to the court by subsection (1), the Minister may, after consultation with the Adoption Council by the notice in the Gazette, nominate a panel of persons whom he considers suitable for appointment as guardians *ad litem* and may from time to time add or remove names to or from the panel.

(4) The Minister may by order published in the Gazette provide that in all cases where arrangements for an adoption have not been made by an adoption society the guardian *ad litem* appointed shall be an adoption society or a member of any such society.

Registration of Adoption Orders

Adopted
Children
Register.

127. (1) The Registrar-General shall maintain a register to be called the Adopted Children Register, in which shall be made such entries as may be directed to be made therein by adoption orders, but no other entries shall be made therein.

(2) A certified copy of an entry in the Adopted Children Register, if purporting to be sealed or stamped with the seal of the Registrar-General's Office, shall, without any further or other proof of that entry, be received as evidence of the adoption to which it relates, and, where the entry contains a record of the date of the birth or the country of the birth of the adopted persons, shall also be received as aforesaid as evidence of the date or country in all respects as if the copy were a certified copy of an entry in the Registry of Births.

(3) The Registrar-General shall cause an index of the Adopted Children Register to be made; and every person shall be entitled to search that index and to have a certified copy of an entry in the Adopted Children Register upon payment of such fee as may be prescribed.

(4) The Registrar-General shall, in addition to the Adopted Children Register and the index thereof keep such other registers and books, and make such entries therein, as may be necessary to record and make traceable the connexion between any entry in the Register of Births which has been

marked "Adopted" pursuant to section 14 or section 15 of the Adoption Act (now repealed) and any corresponding entry in the Adopted Children Register; but the registers and books kept under this subsection shall not be, nor shall any index thereof be, open to public inspection or search, nor, except under an order of a court of competent jurisdiction, shall the Registrar-General furnish any person, other than an adopted person of full-age who has proved his identity to the satisfaction of the Registrar-General and who requests information with respect to his own adoption, with any information contained in or with any copy or extract from any such registers or books.

Cap. 143 (1988).

128. (1) Every adoption order made by a court shall contain a direction to the Registrar-General to make an entry in the Adopted Children Register in the prescribed form.

Registration of adoption orders.

(2) For the purposes of compliance with the requirements of subsection (1)—

(a) where the precise date of the child's birth is not proved to the satisfaction of the court, the court shall determine the probable date of his birth and the date so determined shall be specified in the order as the date of his birth; and

(b) where the country of birth of the child is not proved to the satisfaction of the court, the particulars of that country may, notwithstanding anything in that subsection, be omitted from the order and from the entry in the Adopted Children Register.

(3) Whereupon an application to a court for an adoption order in respect of a child (not being a child who has previously been the subject of an adoption order made by the court under this Act or the Adoption Act (now repealed)) there is proved to the satisfaction of the court the identity of the child to whom an entry in the Register of Births relates, any adoption order made in pursuance of the application shall contain a direction to the Registrar-General to cause the entry in the Register of Births to be marked with the word "Adopted".

(4) Where an adoption order is made by a court in respect of a child who has previously been the subject of an

adoption order made by such court under this Act or the Adoption Act (now repealed), the order shall contain a direction to the Registrar-General to cause the previous entry in the Adopted Children Register to be marked with the word "Re-adopted".

(5) Where an adoption order is made by a court, the court shall cause the order to be communicated in the prescribed manner to the Registrar-General, and upon receipt of such communication the Registrar-General shall cause compliance to be made with the directions contained in the order both in regard to marking an entry in the Register of Births with the word "Adopted" and in regard to making the appropriate entry in the Adopted Children Register.

Amendment
of orders and
rectification
of registers.

129. (1) The court by which an adoption order has been made under this Act or the Adoption Act (now repealed) may, on the application of the adopter or of the adopted person, amend the order by the correction of any error in the particulars contained therein; and, where an adoption order is so amended, the court shall cause the amendment to be communicated in the prescribed manner to the Registrar-General, and any necessary correction of, or addition to, the Adopted Children Register shall be made accordingly.

(2) Where the adoption order was made before the commencement of this Act, the power of the court under subsection (1) shall include power to amend the order—

(a) by the insertion of the country of the adopted person's birth; or

(b) (where the order does not specify a precise date as the date of the adopted person's birth) by the insertion of the date which appears to the court to be the date or probable date of his birth,

and the provisions of that subsection shall have effect accordingly.

(3) Where an adoption order is quashed or an appeal against an adoption order allowed, the court which made the order shall give directions to the Registrar-General to cancel any entry in the Register of Births and any entry in the Adopted Children Register which was effected in pursuance of the order.

(4) A copy of, or extract from, an entry in any register being an entry the marking of which is cancelled under this section, shall be deemed to be an accurate copy or extract and only if, both the marking and the cancellation are omitted therefrom.

Effect of Adoption Order

130. (1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child, including all rights to appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the child were a child born to the adopter inside marriage, and in respect of the matter aforesaid the child shall stand to the adopter exclusively in the position of a child born to the adopter inside marriage.

Rights and duties of parents and capacity to marry.

(2) In any case where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the child in the same relation as they would have stood if they had been the lawful father and mother of the child and the child shall stand to them respectively in the same relation as to a lawful father and mother respectively.

(3) For the purpose of any written law relating to marriage for the time being in force in Kenya, an adopter and the person whom he has been authorized to adopt under an adoption order shall be deemed to be within the prohibited degrees of consanguinity; and the provisions of this subsection shall continue to have effect notwithstanding that some person other than the adopter is authorized by a subsequent order to adopt the same child.

131. For the purposes of the Workmen's Compensation Act, a child whom a deceased workman has been authorized to adopt under an adoption order shall be deemed to be a member of the family of the workman and an adopter shall be deemed to be the parent of a deceased workman whom he has been authorized to adopt.

Workmen's compensation. Cap. 236.

Orders and agreements respecting children born outside marriage.

132. (1) Where an adoption order is made in respect of a child born outside marriage then subject to this section, any order, decree or agreement whereby the father of the child is required or has undertaken to make payments specifically for the benefit of the child shall cease to have effect, but without prejudice to the recovery of any arrears which are due under the decree, order or agreement at the date of the adoption order.

(2) Where a child to whom any such order, decree or agreement as aforesaid relates is adopted by his mother, and the mother is a single woman, the order, decree or agreement shall not cease to have effect by virtue of the foregoing subsection upon the making of the adoption order, but shall cease to have effect if she subsequently marries.

(3) Where an adoption order is made in respect of a child committed to the care of a fit person, an approved society or an appointed local authority by an order in force under this Act, the last mentioned order shall cease to have effect; and in any such case any contribution order made in respect of the child shall cease to have effect, but without prejudice to the recovery of any arrears which are due under that order at the date of the adoption order.

Intestacies, wills and settlements.

133. (1) Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any movable or immovable property (other than property subject to an entailed interest under a disposition made before the date of the adoption order), that property shall devolve in all respects as if the adopted person were the child of the adopter born inside marriage and were not the child of any other person.

(2) In any disposition of movable or immovable property made, whether by instrument *inter vivos* or will (including codicil), after the date of an adoption order—

- (a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person;
- (b) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention

appears, be construed as not being, or as not including, a reference to the adopted person; and

- (c) any reference (whether express or implied) to a person related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born inside marriage and were not the child of any other person.

(3) Where under any disposition any movable or immovable property or any interest in such property is limited (whether subject to any preceding limitation or charge or not) in such a way that it would, apart from this section, devolve (as nearly as the law permits) along with a dignity or title of honour, then whether or not the disposition contains an express reference to the dignity or title of honour, and whether or not the property or some interest in the property may in some event become severed therefrom, nothing in this section shall operate to sever the property or any interest therein from the dignity, but the property or interest shall devolve in all respect as if this section had not been enacted.

134. (1) For the purpose of the application of any written law for the time being in force in Kenya to the devolution of any property in accordance with section 133 and for the purposes of the construction of any such disposition as is mentioned in that section, an adopted person shall be deemed to be related to any other person being the child or adopted child of the adopter or (in the case of a joint adoption) of either of the adopters—

Provisions
supplementary
to section 133.

- (a) where he or she was adopted by two spouses jointly and that other person is the child or adopted child of both of them, as brother and sister of the whole blood; or
- (b) in any other case, as brother and sister of the half-blood.

(2) Notwithstanding any rule of law, a disposition made by will or codicil executed before the date of an adoption order shall not be treated, for the purposes of section 133, as made after that date by reason only that the will or codicil is confirmed by a codicil executed after that date.

(3) Notwithstanding anything in section 133, trustees or personal representatives may convey or distribute any movable or immovable property to or among the persons entitled thereto without having ascertained that no adoption order has been made by virtue of which any person is or may be entitled to any interest therein, and shall not be liable to any such person of whose claim they have not had notice at the time of the conveyance or distribution; but nothing in this subsection shall prejudice the right of any such person to follow the property, or any property representing it, into the hands of any person, other than a purchaser for value without notice, who may have received it.

(4) Where an adoption order is made in respect of a person who has been previously adopted, the previous adoption shall be disregarded for the purposes of section 133 in relation to the devolution of any property on the death of a person dying intestate after the date of the subsequent adoption order and in relation to any disposition of property made after that date.

Effect of
overseas
adoption.

135. (1) Where a person has been adopted (whether before or after the commencement of this Act) in any place outside Kenya according to the law of that place, and the adoption is one to which this section applies, then, for the purposes of this Act and all other written laws, the adoption shall have the same effect as an adoption order validly made under this Act, and shall have no other effect.

(2) Subsection (1) shall apply to an adoption in any place outside Kenya, if—

- (a) the adoption order was made by an order of any court of law in any country in the Commonwealth;
- (b) in consequence of the adoption, the adopter had, or would have had, immediately following the adoption, according to the law of that country a right superior to that of any natural parent of the adopted person in respect of the custody of the person; and
- (c) in consequence of the adoption, the adopter had, immediately following the adoption, according to the law of that country a right superior to or equal with that of any natural parent in respect of any property of the adopted person which was capable

of passing to the parents or any parent of the person in the event of the person dying intestate without other next-of-kin and domiciled in the place where the adoption was made and a national of the country which had jurisdiction in respect of that place,

but not otherwise.

Adoption Societies

136. (1) No body or persons shall make any arrangement for the adoption of a child under the provisions of this Act unless that body is approved as an adoption society under this Part.

Restriction
on making
arrangements
for adoption.

(2) The Minister may, by order published in the Gazette, prohibit the making of arrangements for the adoption of a child under this Act by any individual person other than the parent or guardian of a child or such persons or classes of persons as may be prescribed, and any person who contravenes the order commits an offence and is liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand shillings or to both.

(3) Any corporate body of persons, or any person who takes part in the management or control of an unincorporate body of persons, which makes arrangements for the adoption of a child in contravention of subsection (1) commits an offence.

(4) Any corporate body which commits an offence under this section shall be liable on conviction to a fine not exceeding twenty thousand shillings.

(5) Any person who takes part in the management or control of an unincorporated body of persons which is guilty of an offence under this section shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand shillings or to both.

(6) In any proceedings under this section, proof of things done or of words written, spoken or published (whether or not in the presence of any party to the proceedings) by any person taking part in the management or control of a body of persons, or in making arrangements for the adoption of children on behalf of the body, shall be admissible as evidence of the purpose for which that body exists.

**Approval of
adoption
societies.**

137. (1) The managing committee or governing body of any body of persons which exists wholly or in part for the purpose of making arrangements for the adoption of children may apply to the Minister for that body to be approved by him as an adoption society, and the Minister may, after making such inquiries as he thinks fit, approve that body for that purpose and issue a certificate of approval accordingly.

(2) The Minister shall not approve an adoption society under this Part unless he is satisfied, by such evidence as he may reasonably require, that the society is a charitable organization.

(3) The Minister may refuse to approve an adoption society under this Part if it appears to him—

(a) that the activities of the society are not controlled by a committee of members of the society who are responsible to the members of the society;

(b) that any person employed or proposed to be employed by the society for the purpose of making any arrangements for the adoption of children on behalf of the society is not a fit and proper person to be so employed;

(c) that the number of competent persons proposed to be employed, or employed by the society for the purpose aforesaid is insufficient having regard to the extent of the activities of the society in connexion with that purpose;

(d) that any person taking part in the management or control of the society or any member of the society has been convicted of an offence under this Act, or of a breach of any regulations made under this Act;

(e) that it would not be in the public interest to approve the same, having regard to the number of adoption societies already approved and functioning in the particular locality.

(4) The Minister may at any time cancel the certificate of approval of an adoption society, on any ground, except that mentioned in paragraph (e) of subsection (3), which would entitle him to refuse an application for the approval of the society, or on the ground that the society is no longer a charit-

able organization and the Minister may at any time cancel the certificate of approval of any adoption society if he is satisfied that it is failing or has failed to discharge properly its functions under this Act.

(5) The managing committee or governing body of any adoption society may, on giving three months' notice to the Minister of their intention to do so, surrender the certificate of approval of the society, and at the expiration of three months from the date of the notice (unless the notice is previously withdrawn) the surrender of the certificate shall take effect and the society shall cease to be an adoption society.

(6) The Minister shall, within one month from the date thereof, cause any grant of a certificate of approval and any notice of the withdrawal of, or intention to surrender, the certificate to be published in the Gazette.

138. (1) Where the Minister proposes to refuse an application for a certificate of approval made to him by or on behalf of any body of persons or to cancel the certificate of approval of an adoption society, he shall give to it not less than fourteen days' notice in writing of his intention to do so.

Procedure.

(2) Every notice under subsection (1) shall state the grounds on which the Minister intends to refuse the application or to cancel the certificate of approval, as the case may be, and shall contain an intimation that, if within fourteen days after the receipt of the notice, the body of persons or the adoption society, as the case may be, informs him in writing that it so desires the Minister will, before refusing the application or cancelling the certificate of approval, as the case may be, afford an opportunity of causing representation to be made to him by or on its behalf.

(3) If the Minister, after giving to the body of persons or the adoption society, as the case may be, an opportunity of causing such representations as aforesaid to be made, decides to refuse the application for a certificate of approval or to cancel the certificate of approval, as the case may be, he shall give to it the same notice in writing of his decision.

(4) The decision of the Minister shall be final.

Functions of
adoption
societies.

139. The functions of an adoption society shall be—

- (a) whenever required by an applicant or a prospective applicant for an adoption order, or by the court or the Minister to conduct negotiations with any person who, having the care and possession of a child, is desirous of causing the child to be adopted, and in particular, to secure that the parent or guardian of the child understands the effect in relation to his rights as a parent or guardian, of the making of an adoption order in respect of the child;
- (b) subject to its having the facilities to do so, to take care and possession of any child whose parent or guardian is desirous of causing the child to be adopted, pending arrangements for adoption;
- (c) in the case of every child to make such inquiries and cause such reports to be obtained as the society may think fit, or as the court may direct, for the purpose of ensuring so far as may be, the suitability of the child and the person proposing to adopt him respectively and, in particular, to obtain a report on the health of the child signed by a medical practitioner;
- (d) to nominate a member or officer of the society to act as guardian *ad litem* to the child for the purpose of any adoption proceedings relating to the child, but without prejudice to the power of the court to appoint any other person to act as guardian *ad litem* to the child in the proceedings;
- (e) insofar as the funds at its disposal permit, to make provision for the care and supervision of children who have been placed by their parents or guardians at the disposition of the society; and
- (f) to perform such other duties as may be prescribed.

Arrangements
by adoption
societies for
adoption.

140. (1) It shall not be lawful for an adoption society by whom arrangements are made for the adoption of a child to place the child in the care and possession of a person resident in Kenya who proposes to adopt him, whether in pursuance of an adoption order or otherwise, if an adoption order in respect of the child could not lawfully be made in favour of that person.

(2) At any time within three months from the date on which a child is delivered into the care and possession of a person resident in Kenya in pursuance of arrangements made by an adoption society for the adoption of the child by that person—

- (a) that person may give notice in writing to the society of his intention not to adopt the child; or
- (b) the society may cause notice in writing to be given to that person of their intention not to allow the child to remain in his care and possession.

(3) If at the expiration of the period of three months mentioned in subsection (2) no such notice as is mentioned in that subsection has been given, the person into whose care and possession the child was delivered shall, within six months after the expiration of that period, either—

- (a) apply to the court for an adoption order in respect of the child; or
- (b) give notice in writing to the society of his intention not to apply for such an order.

(4) Where any notice is given to an adoption society by any person, or by such a society or any person, under subsection (2) or subsection (3), or where an application for an adoption order made by any person pursuant to subsection (3) is refused by the court, that person shall, within seven days after the date on which the notice was given or the application refused, as the case may be, cause the child to be returned to the society, and the society shall receive the child accordingly:

Provided that it shall be sufficient compliance with the requirements of this subsection if the child is delivered by the said person to, and is received by, a suitable person nominated for the purpose by the society.

(5) Any person who contravenes this section shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand shillings or to both; and the court by which the offender is convicted may order any child in respect of whom the offence is committed to be returned to his parents or guardian or to the adoption society.

Inspection of books, etc., of adoption societies.

141. (1) The Minister may at any time give notice in writing to any adoption society, or to any officer of such a society, requiring that society or officer to produce to him such books, accounts and other documents relating to the performance by the society of the function of making arrangements for the adoption of children as he may consider necessary for the exercise of the powers conferred on him by subsection (4) of section 137.

(2) Any such notice may contain a requirement that any information to be furnished in accordance with the notice shall be verified by statutory declaration.

(3) Any person who fails to comply with the requirements of a notice under this section shall be guilty of an offence and liable to imprisonment for a term not exceeding three months or to a fine not exceeding one thousand shillings or to both.

General Provisions on Adoption

Information to be confidential.

142. (1) Every member or officer of an adoption society, and every person having any official duty under or being employed in the administration of this Act, shall regard and deal with all documents and information relating to the adoption or proposed adoption of any child, or to any such child, or to the parent or guardian of such child, or to the proposed adopter of such child, as secret and confidential.

(2) Every person having possession or control over any such documents or information who at any time communicates any such information or anything contained in any such document to any person—

(a) other than the court, the Minister, the Registrar-General or any other member or officer of the society;
or
any other member or officer of the society; or

(b) otherwise than for the purposes of this Act,

commits an offence and is liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand shillings or to both:

Provided that nothing contained in this section shall apply to the communication of any document or information made

in good faith in the interest or intended interest of such child as aforesaid or of the parent or guardian of, or proposed adopter of the child.

(3) No officer or member of an adoption society, and no person having any official duty under or being employed in the administration of this Act, shall be required to produce in any court any such document as aforesaid, or to divulge or to communicate to any court any such information as aforesaid, except as may be necessary for the purpose of carrying into effect the provisions of this Act, or in order to bring or assist in the course of a prosecution for any offence under this Act

(4) The Minister may by order exempt any person, by name or office from the provision of this section.

143. (1) Subject to subsection (2)—

- (a) any adopter or any parent or guardian of a child who receives any payment or other reward in consideration of the adoption of a child under this Act; or
- (b) any person who makes or gives or agrees to give to any adopter or any parent or guardian of a child any payment or other reward in consideration of the adoption of any child under this Act; or
- (c) any person who makes arrangements for the adoption of a child and receives or makes or gives any payment or other reward in connection with the making of the arrangements,

Prohibition
of certain
payments.

commits an offence and is liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand shillings or to both.

(2) Subsection (1) shall not apply—

- (a) to any payments the making or receipt of which is sanctioned by the court to which an application for an adoption order in respect of a child is made;
- (b) to any payments made by or on behalf of an adoption society in respect of the maintenance of a child who has been placed at the disposition of the society;
- (c) to any payments made to an adoption society by the parent or guardian of a child or by any other person in respect of the maintenance of the child, so long as the child is not in the care and possession of a

person who has adopted or proposes to adopt him, whether under the adoption order or otherwise, being payments made weekly and at a rate not exceeding such rate as may be prescribed;

(d) to any payments made to an advocate who acts for any party in or in connection with an application for an adoption order, being payments made in respect of such application; or

(e) to any voluntary contribution made by an adopter or any parent or guardian to an adoption society.

Restriction on advertisements.

144. (1) It shall not be lawful for any advertisement to be published indicating—

(a) that the parent or guardian of a child desires to cause the child to be adopted; or

(b) that a person desires to adopt a child; or

(c) that any person (not being an adoption society) is willing to make arrangements for the adoption of a child.

(2) Any person who causes to be published or knowingly publishes an advertisement in contravention of this section commits an offence and is liable on conviction to a fine not exceeding ten thousand shillings.

Offences under Part.

145. Where any offence under this Part or any regulations made under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributed to any neglect on the part of, any director, manager, member of the committee, secretary or other officer of the body, he as well as the body corporate shall be deemed to have committed that offence and shall be liable to be proceeded against and punished accordingly.

Regulations under part.

146. The Minister may make regulations for the better carrying out of the provisions and purposes of this Part and, without prejudice to the generality of the foregoing, for either of the following purposes—

(a) for regulating and maintaining supervisions over the activities of adoption societies and persons or bodies of persons purporting to assist in making arrangements for the adoption of children; or

(b) for regulating the making of international adoptions and prescribing safeguards therefor; or

(c) for prescribing any matter authorized or required to be prescribed under this Part.

147. The Minister shall have power, from time to time, by order, either retrospectively from the passing of this Act or prospectively to exclude from the operation of all or any of the provisions of this Part the members of any race, tribe or sect in Kenya, or any part of such race, tribe or sect, to whom he may consider it impracticable or inexpedient to apply such provisions, and may also from time to time revoke any such order, but not so that the revocation shall have any retrospective effect.

Exemption.

148. The Chief Justice may make rules of court directing the manner in which applications to court have to be made and generally providing for matters of procedure and incidental matters arising under this Part.

Rules of court under Part.

PART VI—GUARDIANSHIP

149. (1) On the death of the father of a child, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the child, either alone or jointly with any guardian appointed by the father; and when no guardian has been appointed by the father, or if the guardian appointed by the father is dead or refuses to act, the court may appoint a guardian to act jointly with the mother.

Right of surviving parent as to guardianship and powers of court.

(2) On the death of the mother of a child, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the child, either alone or jointly with any guardian appointed by the mother; and when no guardian has been appointed by the mother, or if the guardian appointed by the mother is dead or refuses to act, the court may appoint a guardian to act jointly with the father.

(3) Where a child has no parent, no guardian and no other person having parental rights with respect to him, the court, on the application of any person, may appoint the applicant to be the guardian of the child.

Power of parent to appoint testamentary guardians.

150. (1) Either parent of a child may, by deed or will appoint any person to be guardian of the child after his death.

(2) A guardian so appointed shall act jointly with the surviving parent of the child so long as that parent remains alive, unless that parent objects to his so acting.

(3) If the surviving parent so objects, or if the guardian so appointed considers that the parent is unfit to have the custody of the child, the guardian may apply to the court, and the court may either—

- (a) refuse to make any order (in which case the parent shall remain sole guardian); or
- (b) make an order that the guardian so appointed shall act jointly with the parent; or
- (c) that he shall be sole guardian of the child,

and in the latter case may make such order regarding the custody of the child and the right of access thereto of its parent as, having regard to the welfare of the child, the court may think fit, and may further order that the parent shall pay to the guardian towards the maintenance of the child such weekly or other periodical sum as, having regard to the means of the parent, the court may consider reasonable.

(4) Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly.

(5) If under section 149 a guardian has been appointed by the court to act jointly with the surviving parent, he shall continue to act as guardian after the death of that parent; but if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly with the guardian appointed by that parent.

Powers of guardians.

151. A guardian under section 149 or section 150 shall have the same powers over the estate and the person, or over the estate, as the case may be of a child as a guardian appointed by will or otherwise under the Law of Succession Act.

Cap. 160.

Equal rights of mother to apply to court.

152. The mother of the child shall have the same right to apply to the court in respect of any matter affecting the child as are possessed by the father.

153. (1) The court may, upon the application of either parent of a child, make such order as it may think fit regarding the custody of the child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge that order on the application of either parent, or, after the death of either parent, or any guardian under this Act; and in every case may make such order respecting costs as it may think just.

Power of court to make order as to custody.

(2) The power of the court under subsection (1) to make an order as to the custody of a child and the right of access thereto may be exercised notwithstanding that the mother of the child is then residing with the father of the child.

(3) Where the court under subsection (1) makes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable.

(4) No such order, whether for custody or maintenance, shall be enforceable, and no liability thereunder shall accrue, while the mother resides with the father, and any such order shall cease to have effect if for a period of three months after it is made the mother of the child continues to reside with the father.

(5) Any order so made may, on the application of either the father or the mother of the child, be varied or discharged by a subsequent order.

154. The court may, on being satisfied that it is for the welfare of the child, remove from office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if the court deems it to be for the welfare of the child, appoint another guardian in place of the guardian so removed.

Power of court to remove guardian.

Disputes
between joint
guardians.

155. Where two or more persons act as joint guardians of a child and they are unable to agree on any question affecting the welfare of the child, any of them may apply to the court for its direction, and the court may make such order regarding the matters in difference as it may think proper.

Guardianship in
cases of judicial
separation
and divorce.

156. In any case where a decree for judicial separation, or a decree either *nisi* or absolute for divorce, is pronounced, the court pronouncing the decree may thereby declare the parent by reason of whose misconduct the decree is made to be a person unfit to have the custody of the children of the marriage, and, in that case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of the children.

In case of
separation deed
between mother
and father.

157. No agreement contained in any separation deed made between the father and the mother of a child shall be held to be invalid by reason only of its providing that the father of that child shall give up the custody or control thereof to the mother:

Provided that the court shall not enforce any such agreement if it is of opinion that it will not be for the benefit of the child to give effect thereto.

Power of court
as to production
of child.

158. Where the parent of a child applies to the court for a writ or order for the production of the child, and the court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the child, the court may decline to issue the writ or make the order.

Power of court
to order repay-
ment of costs of
bringing up
child.

159. If, at the time of the application for a writ or order for the production of the child, the child is being brought up by another person, the court may, if it orders the child to be given up to the parent, further order that the parent shall pay to that person the whole of the costs properly incurred in bringing up the child, or such portion thereof as shall seem to the court to be just and reasonable having regard to all the circumstances of the case.

160. Where a parent has—

- (a) abandoned or deserted his child; or
- (b) allowed his child to be brought up by another person at that person's expense for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties,

Court in making order to have regard to conduct of parent.

the court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.

161. Upon any application by the parent for the production or custody of a child, if the court is of opinion that the parent ought not to have the custody of the child and that the child is being brought up in a different religion to that in which the parent has a legal right to require that the child should be brought up, the court may make such order as it may think fit to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up.

Power of court as to child's religious education.

162. Any person for the time being under an obligation to make payment in pursuance of any order for the payment of money under this Act shall give notice of any change of address to such person (if any) as may be specified in the order, and any person failing without reasonable excuse to give such a notice commits an offence and is liable on conviction fine not exceeding ten thousand shillings.

Enforcement of orders for payment of money.

(2) Where the court has made any such order, it may, in addition to exercising any other powers for enforcing compliance with the order, in any case where there is any pension or income payable to the person against whom the order is made and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard, order that such part as the court may think fit of that pension or income be attached and paid to the person named by the court; and that further order shall be an authority to the person by whom the pension or income is payable to make the payment so ordered, and the receipt of the person to whom the payment

is ordered to be made shall be a good discharge to the person by whom the pension or income is payable.

Principles on which questions relating to custody, upbringing, etc., of children are to be decided.

163. Where in any proceedings before any court the custody or upbringing of a child, or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of the custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

Saving.

164. Nothing in this Act shall restrict or affect the jurisdiction of the court to appoint or remove guardians.

Rules of court under Part.

165. (1) The Rules Committee may make rules of court directing the manner in which applications to the court are to be made and generally providing for matters of procedure and incidental matters arising under this Part.

(2) Rules of court may provide for applications being heard and determined otherwise than in open court.

PART VII—MISCELLANEOUS AND GENERAL

Appeals to the Minister.

166. (1) A person aggrieved by any act of the Director or an authorized officer in exercise of powers conferred by this Act may appeal to the Minister within fourteen days.

(2) An appeal under subsection (1) shall be made in the prescribed manner.

General penalty.

167. A person convicted of an offence under this Act for which no other penalty is prescribed shall be liable to a fine not exceeding twenty thousand shillings, or to imprisonment for a term not exceeding two years, or to both.

General power to make regulations.

168. The Minister may make regulations—

- (a) for prescribing anything that may be prescribed under this Act; or
- (b) generally for the better carrying out of the provisions of this Act.

169. (1) The laws specified in the Fourth Schedule are repealed.

Repeal of
written laws.

(2) Without prejudice to the generality of the application of subsection (3) of section 23 of the Interpretation and General Provisions Act, the transitional provisions set out in the Fifth Schedule to this Act shall have effect upon the repeal of the Acts specified in the Fourth Schedule.

Cap. 2.

FIRST SCHEDULE

(s. 22 (3))

PROCEEDINGS OF THE NATIONAL COUNCIL OF CHILDREN'S SERVICES

1. The chairman shall preside at every meeting of the Council at which he is present, and in the absence of the chairman at a meeting the members present shall elect one of their number who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairman.

2. The quorum of the Council shall be nine.

3. At any meeting of the Council the chairman shall have a casting as well as a deliberative vote and subject thereto, the decision of the majority of the members present and voting at any meeting of the Council shall be deemed to be the decision of the Council.

4. Subject to paragraph (2), no proceedings of the Council shall be invalid by reason of a vacancy among the members thereof.

5. The chairman of the Council shall at any time of his own motion convene a meeting of the Council and shall in any case convene a meeting within fourteen days of the receipt by him of a written request signed by at least three members.

6. All instruments made by, and all decisions of the Council shall be signified under the hand of the chairman or the secretary.

7. Except as provided by this Schedule, the Council may regulate its own proceedings.

SECOND SCHEDULE

(s. 42 (2))

Welfare Schemes

PART I

Provision for the assumption by local authorities of the care of persons including—

- (a) provisions for persons who are orphans or have been deserted or are in need of protection and discipline;
- (b) provisions for persons already subject, or becoming subject to orders of court; and

- (c) provisions requiring parents of persons committed to the care of local authorities to maintain contact with such authorities.

PART II

Treatment of Persons in Care of Local Authorities

1. Furtherance of the best interest of persons in their care.
2. Provisions for the accommodation and maintenance of persons.
3. The establishment and maintenance of institutions or day-nurseries.
4. The accommodation of persons in voluntary homes including foster homes set up by voluntary societies.
5. The provision of hostels and youth organizations.
6. The provision of financial assistance towards expenses of maintenance, education or training of persons.
7. The defraying of expenses of parents, etc., visiting persons or attending funerals.

PART III

Voluntary Homes and Voluntary Organizations

1. The appointment of voluntary organizations to act as agents of local authorities.
2. Provision of the after-care of persons formerly in the care of local authorities or voluntary organizations.

PART IV

Administrative and Financial Provisions

1. Establishment of a children's committee.
2. Appointment of children's officers and appropriate staff.
3. Grants for training in child care.
4. Grants to voluntary organizations.

PART V

Miscellaneous and General

1. Provision of places of safety.
2. Any other provisions which may be approved by the Minister.

THIRD SCHEDULE

Offences Against Children with Respect to which Part VII Applies

1. Offences under sections 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 157, 158, 162, 163, 164, 165, 166, 167, 250 and 251 of the Penal Code.
2. Offences under this Act.

FOURTH SCHEDULE (s. 169 (1))

3. Any other offences involving bodily injury.

Written Laws to be Repealed

- Cap. 141 The Children and Young Persons Act.
- Cap. 143 The Adoption Act.
- Cap. 144 The Guardianship of Infants Act.

FIFTH SCHEDULE (s. 169 (2))

TRANSITIONAL PROVISIONS

1. The juvenile courts established by section 3 of the Children and Young Persons Act (hereinafter referred to as "the repealed Children and Young Persons Act") shall be deemed to be the children's courts for the purposes of this Act. Cap. 141.

2. The juvenile remand homes established, and the approved schools approved or established, as the case may be, under Part V of the repealed Children and Young Persons Act shall be deemed to be the children remand homes and approved schools for the purposes of this Act.

3. A person who immediately before the commencement of this Act is detained in a juvenile remand home or an approved school under the provisions of the repealed Children and Young Persons Act shall be deemed to be detained in a children's remand home or approved school for the purposes of this Act.

4. Every person in whose care and possession a child is placed under the provisions of Part VI of the repealed Children and Young Persons Act shall within 90 days of the commencement of this Act apply for registration as a foster parent under section 94.

5. The chief inspector and inspectors of children appointed under section 54 of the repealed Children and Young Persons Act shall be deemed to be the Director of Children's Services and children's officers, respectively, for the purposes of this Act.

6. The local authorities appointed by the Minister under section 58 of the repealed Children and Young Persons Act shall continue to be appointed local authorities for the purposes of this Act.

7. The societies and voluntary institutions approved by the Minister under the repealed Children and Young Persons Act shall continue to be approved societies and voluntary institutions for the purposes of this Act.

8. A person who, immediately before the commencement of this Act is an approved officer under section 64 of the repealed children and Young Persons Act shall continue to be an approved officer for the purposes of this Act.

FIFTH SCHEDULE—(Contd.)

Cap. 143.

9. The Adopted Children Register maintained by the Registrar-General under section 13 of the Adoption Act (hereinafter referred to as "the repealed Adoption Act") shall continue to be the Adopted Children Register for the purposes of this Act.

10. (1) An Adoption society other than a local authority approved under section 23 of the repealed Adoption Act shall continue to be an adoption society for the purposes of this Act.

(2) The Minister shall, forthwith on the commencement of this Act arrange for the transfer of the functions of any local authority as an adoption society to an appropriate adoption society.

