Article 40

THE DYNAMICS OF YOUTH JUSTICE & THE CONVENTION ON THE RIGHTS OF THE CHILD IN SOUTH AFRICA

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***Section 100(2), Law of the Child Act, No. 21 of 2009, Republic of Tanzania***

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

# The Mpofu case

# Sentencing of child offenders in serious cases

*by Ann Skelton, Professor of Law and Director, Centre for Child Law*

***Sentencing of child offenders in serious cases came under consideration by the Constitutional Court in the recent appeal of Mandla Trust Mpofu v the Minister of Justice and Constitutional Development and Others (Centre for Child Law as amicus curiae) CCT 124/11 [2013] ZACC 15. Mpofu had been sentenced to a term of life imprisonment, coupled with 28 years imprisonment (to run concurrently). His crime was a serious one - he had killed a man in the course of a house robbery. He also had a prior conviction for robbery. The sentence was handed down in 2001, and his appeal rested on his claim that he had been below the age of 18 years at the time of the commission of the offence, an issue to which the court had paid little attention. His appeal rested on a violation of his rights under section 28 of the Constitution. The Centre for Child Law entered as amicus curiae in the Mpofu case, in order to reiterate the different approach to sentencing of child offenders required by the Constitution and international law.***

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# EDITORIAL

*A warm welcome, dear reader, to the first edition of Article 40 for 2013!*

*This year marks the third anniversary of the implementation of the Child Justice Act of South Africa and the Child Justice Alliance continues to keep a sharp focus the impact of the Act on the administration of justice to children in South Africa.*

*This edition opens with an article on the recent judgment of the Constitutional Court in the appeal of Mandla Trust Mpofu v the Minister of Justice and Constitutional Development and Others (Centre for Child Law as amicus curiae) CCT 124/11 [2013] ZACC 15. The case addressed the question of sentencing of child offenders, taking into account section 28 of the Constitution. Prof Ann Skelton, Director of the Centre for Child Law sheds light on the reasoning of the majority and minority decisions of the Court. She then shows the significance of the judgment in guiding other courts in the appropriate sentencing of child offenders for serious offences and the future implications of the judgment on section 77(1)(a) of the Child Justice Act.*

*The second article presents the findings of a situational analysis conducted by the Civil Society Prison Reform Initiative (CSPRI) of the Community Law Centre on the state of children in prison in South Africa. Clare Ballard, Researcher at CSPRI and co-author of the research report, provides an overview of the research and its key findings.*

*Maintaining its spotlight on regional and global developments, the third article by Maria Assim, Researcher of the Children's Rights Project of the Community Law Centre discusses the implementation of article 40 of the United Nations Convention on the Rights of the Child, domesticated in the Law of the Child Act of Tanzania in the case of Elizabeth Michael Kimemeta Lulu v Republic. The article discusses the application of article 40 in determination of the age of the child for purposes of criminal proceedings in Tanzania.*

*The year 2013 dawned with the editorial team bidding farewell to Mr Lorenzo Wakefield, co-editor of Article 40, when he assumed a new position as Researcher for the Portfolio Committee of Parliament on Women, Children and People with Disabilities. During his 8-year stint with the Community Law Centre as a student and Researcher in the Children's Rights Project, Mr Wakefield worked assiduously for the advancement of children's rights in South Africa and beyond. The editorial team is grateful to Mr Wakefield for his work as editor and wishes him success in his new role and career. The team also welcomes Ms Usang Maria Assim, the newly-appointed Researcher as co-editor of Article 40.*

*Happy Reading!*
***Editorial Team***

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### *The majority decision*

Mpofu's appeal against his sentence of imprisonment for life was dismissed by the majority of the Constitutional Court. The majority judgment stressed that if he had been in a position to prove that he was below the age of 18 years at the time of the commission of the offence, the matter would have been very different because, as Skweyiya J (writing for the majority) put it, '[C]hildren's rights are of utmost importance in our society. Courts are required to distinguish between children and adult offenders when sentencing and children must enjoy preferential sentencing treatment' [para 58]. However, as the appellant failed to establish that he was indeed a child at the time of the commission of the offence, the constitutional basis on which he relied, namely section 28 of the Constitution, was not engaged at all [para 63]. In addition, the interests of justice did not favour the granting of leave to appeal. The majority found it difficult to believe that if Mpofu had indeed been a child at the time of the offence, this would not have been revealed to the sentencing court [para 66]. The fact that 10 years had passed impacted negatively on the possibility of establishing reliable evidence of his age at the time of sentence [para 69]. Furthermore, the majority took a dim view of the fact that Mpofu had twice unsuccessfully appealed, and had not raised the issue of his age on those occasions [para 77].

### *The minority decision*

A detailed minority judgment written by van der Westhuizen J (Nkabinde J and Khampepe J concurring) posits the view that 'the sentencing of children is a constitutional matter of great concern and import for the criminal justice system, beyond and above the interest of a specific applicant' [para 18]. The minority would have allowed the appeal, and found that it was not necessary to have absolute certainty about the appellant's age to conclude that it is in the interests of justice to grant leave to consider the appeal [para 19]. The following passage penned by Justice van der Westhuizen provides the reasoning:

*"In the sentencing of a child, every court must take into account the contents of section 28. This includes treating as paramount the best interests of the child and imprisoning a child only as a matter of last resort and for the shortest appropriate period of time."*

> 'In the sentencing of a child, every court must take into account the contents of section 28. This includes treating as paramount the best interests of the child and imprisoning a child only as a matter of last resort and for the shortest appropriate period of time. Under the Constitution, childhood is not merely one mitigating factor to be balanced against factors in favour of a harsher sentence. Section 28 demands a different enquiry into sentencing. As the *amicus* helpfully phrased it, the starting point in sentencing may well be different. This does not mean that every sentencing court must expressly refer to section 28, but its contents cannot be ignored [para 22]'

Although the minority found that appellant's credibility was 'not above suspicion', the record showed that it was likely or at least possible that he was below 18 years at the time of the offence. The Court, without wanting to be overly critical of busy High Courts dealing with criminal matters, was very concerned that the sentencing court did not properly satisfy itself about the age of the accused at the time of the commission of the offence, which 'becomes extremely important when childhood is at issue, directly invoking the guidelines and demands of section 28 of the Constitution' [para 45]. The failure of the court to undertake a conclusive investigation into the age of the accused when childhood is at issue was a misdirection [para 47].

The minority would therefore have set aside the sentence of life imprisonment. Although at the time that Mpofu was sentenced life imprisonment had not yet been abolished for child offenders, it could only be used in 'very exceptional circumstances' [para 49]. The minority found that the crime, heinous though it was, and even coupled with the fact that the accused had a criminal record for robbery, did not amount to exceptional circumstances. The Court noted the *amicus* argument that there are no reported cases in which sentences of life imprisonment regarding persons below the age of 18 years at the time of the offence have been upheld on appeal. The DPP countered this with the claim that such sentences have simply not been taken on appeal, but brought no evidence in this regard [para 49].

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*... the judgment ... confirms the court's previous pronouncements that child offenders deserve special attention in sentencing, and that the departure point for sentencing child offenders must be different from that pertaining to adults.*

The minority judgment observed that the following competing interests had to be weighed:

> 'On the one hand, there is the Constitution's high regard for the interests of children and recognition that those under the age of 18 years are indeed children. On the other hand, there is the general principle that a court of appeal does not interfere easily with sentencing by a lower court, as well as the constitutional concern for the safety of all and the need to combat crime [para 52]'.

The minority would have set aside the sentence of life imprisonment and replaced it with a period of 20 years in prison. The concurrent sentence of 28 years would also have been reduced, resulting in a total cumulative sentence of 20 years.

However, as the minority judgment noted, the sentencing regime under which Mpofu was sentenced has now been eclipsed by the Child Justice Act which provides a maximum sentence of 25 years imprisonment for a person who was below 18 years when he or she committed a crime. A sentence of 25 years imprisonment is less than a life sentence, which is for life, and in which parole can only be considered after a person has served 25 years in prison. The court noted further that due to Mpofu being sentenced prior to July 2004, he falls under the old Correctional Services Act and its parole rules, which will make him eligible for parole earlier [footnote 35].

It should be noted that nothing said by the minority about the approach to sentencing child offenders is contradicted by the majority judgment, because the majority was of the view that as Mpofu had not proved that he had been a child, section 28 did not apply to him.

### *Relevance of the judgment for future cases*

Although the effect of the judgment seems limited as it relates to the pre- Child Justice Act era, the judgment read as a whole is relevant for the determination of child justice cases going forward in at least two respects.

Firstly, the case provides a starting guideline for how child justice courts should approach the consideration of an appropriate penalty for serious offences. The court determined that the circumstances of the crime, though serious, were 'not very exceptional', and that the maximum penalty meted out was thus not appropriate. They then settled on 20 years imprisonment, which is also not the maximum penalty under the Child Justice Act – a fact that the minority took into consideration. This approach suggests that, going forward, the maximum penalty of 25 years imprisonment under the Child Justice Act should be used only in very exceptional cases. This in keeping with the constitutional injunction that for child offenders, detention is not only a measure of last resort, but also for the shortest appropriate period of time.

The second aspect of the case that is relevant for future cases is the clear acceptance of both the majority and minority judgments that the relevant age for purposes of sentencing is the age of the commission of the offence. This may seem trite, as the courts have long followed that approach.

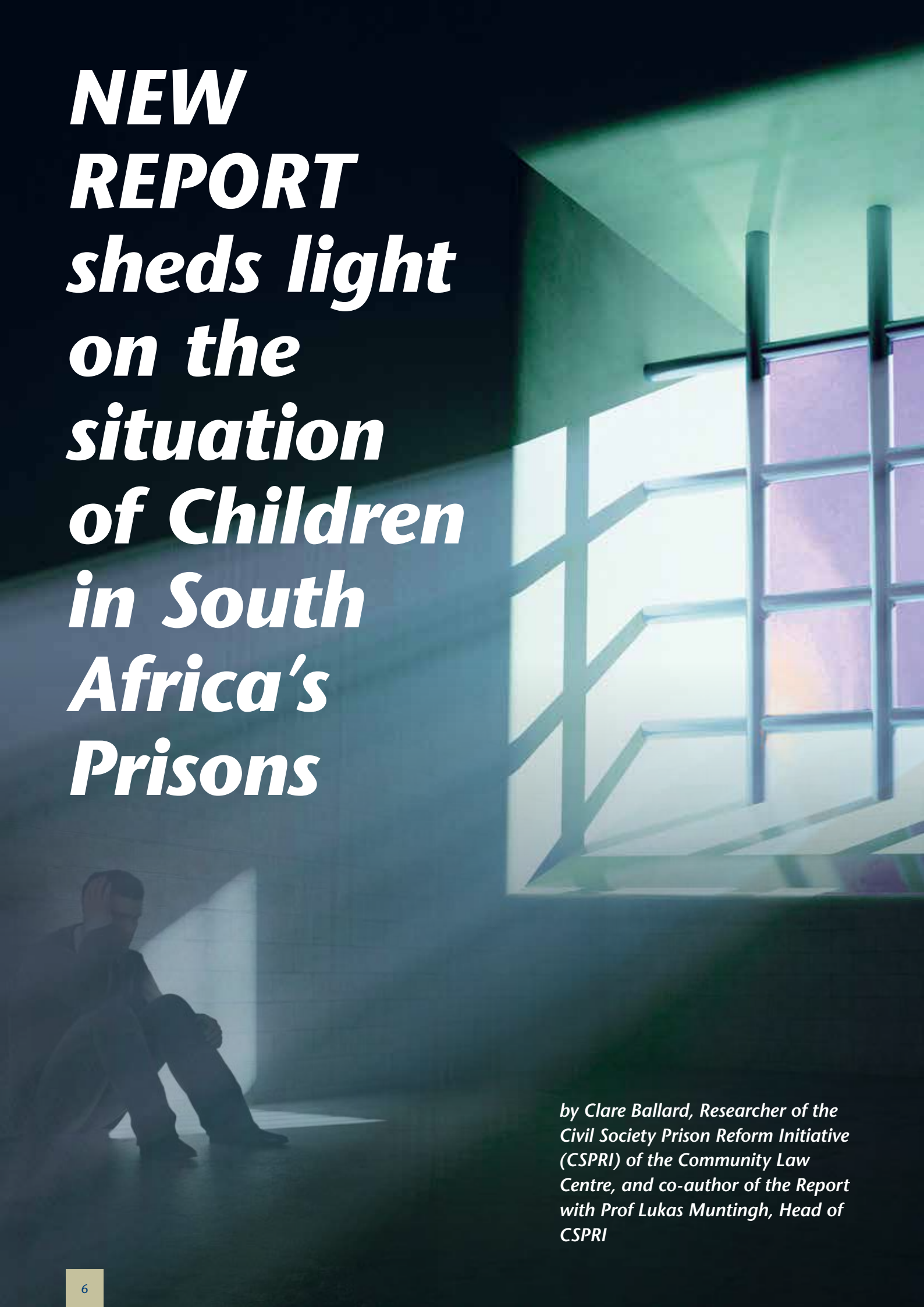
However, section 77(1)(a) of the Child Justice Act provides that a court may not impose a sentence of imprisonment on a child who is under the age of 14 years **at the time of being sentenced**. This change was made by parliament (the original clause had been 'at the time of the commission of the offence') despite arguments by civil society that this would be unfair on young accused who had no control over court delays. The *Mpofu* judgment may be a useful precedent should section 77(1)(a) come under judicial scrutiny in the future.

### *Conclusion*

The majority of the Constitutional Court found that Mpofu's failure to establish his age meant that the protections of section 28 did not apply to him. However, the judgment read as a whole confirms the court's previous pronouncements that child offenders deserve special attention in sentencing, and that the departure point for sentencing child offenders must be different from that pertaining to adults. The judgment reiterates that the relevant age for purposes of sentence is the age at which the offence was committed. The minority judgment in particular has relevance going forward regarding the approach of courts when sentencing very serious crime under the Child Justice Act. ●

*The minority judgment in particular has relevance going forward regarding the approach of courts when sentencing very serious crime under the Child Justice Act.*

# NEW REPORT sheds light on the situation of Children in South Africa's Prisons



*by Clare Ballard, Researcher of the Civil Society Prison Reform Initiative (CSPRI) of the Community Law Centre, and co-author of the Report with Prof Lukas Muntingh, Head of CSPRI*

***In 2012 the Civil Society Prison Reform Initiative (Community Law Centre) published the "Report on Children in Prison in South Africa." The report is a situational analysis of children in prison and arose from the perceived need to update domestic statistical information on children in conflict with the law as well as test and record compliance on the part of the Department of Correctional Services (DCS) with the prescripts of the Child Justice Act 75 of 2008 (the Act). The findings in the report are based on both qualitative and quantitative data from 41 DCS facilities and structured according to the "child justice indicators applicable to imprisonment" developed by the United Nations Office on Drugs and Crime.***

These indicators are:

1. Children in conflict with the law;
2. Children in detention;
3. Children in pre-sentence detention;
4. Duration of pre-sentence detention;
5. Duration of sentenced detention;
6. Child deaths in detention;
7. Separation from adults;
8. Contact with parents and family;
9. Custodial sentencing;
10. Pre-sentence diversion;
11. Aftercare;
12. Regular independent inspections;
13. Complaints mechanism;
14. Specialised juvenile system; and
15. Prevention.

Importantly, the indicators used in the Report are reflected well, for the most part, in the Act as well as the child-specific provisions of the Correctional Services Act 111 of 1998. At the outset, it is worth noting that in general, children-specific DCS facilities are not overcrowded, as is the case in many prisons in South Africa. They are also equipped with the necessary ablution facilities which function adequately. In addition, child facilities are, for the most part, clean. Many, however, are run-down and in need of infrastructural overhaul. The more problematic findings will therefore be addressed below. The full report can be accessed and downloaded at http://www.cspri.org.za.

## *Children in detention in South Africa*

### The law

When it comes to sentencing, the Act provides a range of available options designed to fulfil the 'objectives of sentencing.' These 'objectives' are firmly rooted in the idea that children benefit from rehabilitative, individualised treatment and, if at all possible, should serve their sentences in circumstances involving the family and the community. To this end, a presiding officer may impose a combination of sentences but must consider the recommendations of a probation officer. The Act imposes a number of conditions attached to the imposition of a sentence of imprisonment. First, a presiding officer may not impose a sentence of imprisonment on a child who is under the age of 14 years, and, echoing a principle well renowned in international and constitutional law, may only sentence those older than 14 years of age to imprisonment as a measure of last resort and for the shortest appropriate period of time. Second, it prohibits a sentence of imprisonment unless a child has been convicted of certain serious offences, or, if convicted of a lesser offence, the child has a record of relevant, previous convictions. Third, a child may not be sentenced to a period exceeding 25 years.

### The facts

The total number of children imprisoned in South Africa has declined rapidly. In 2003 the number of children in prison was 4500. In February 2011 it was 846. Expressed as a ratio per 100 000, the number of children in prison decreased from 24/100 000 to 4.63/100 000. This rate compares favourably in relation to other countries, including the United States (11.9), Argentina (39.3) and Botswana (37.5). Regarding offence profiles, there have been some substantial shifts. In 1995 the majority of children in prison were either charged or convicted of property offences. By 2010, this figure had dropped to 28%. Aggressive and sexual offences had, however, increased by roughly 12%. Narcotics-related offences have remained stable at around 1%. Importantly, the substantial decline in the number of children in prison does, potentially, mask some of the shifts that have taken place in offence and sentence profiles. Children are not committing more aggressive and sexual offences. Rather, children charged with and convicted of non-violent offences are now far less likely to be imprisoned. This may well be a result of the Act. It is not clear, however, whether the Act has had an impact on the decline in the number of children in prison, for the reduction in numbers mirrors the general decline in the general prison population. Sentence tariffs

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for children have increased, however, a trend reflected in the total prison population.

Over the years (1995 – 2011) there has been a notable shift in the age profile of 'un-sentenced' children, namely, a reduction in the younger age categories (7-16 years) in 2010 and a proportionate increase in 17 year-old children. This suggests that the legislative efforts and general advocacy in the child justice sector aimed at keeping very young children out of prison have been effective. It is also worth noting that there are 28 Child and Youth Care Centres (CYCC) nationally with a total capacity of 3272 beds. During 2010/11 a total of 8879 children were admitted to CYCCs and 4664 children were placed under home-based supervision. The profile for sentenced children, however, has remained virtually the same.

## *Conditions of detention*

### The law

When it comes to the implementation of custodial sentences imposed on children, it is clear that they have rights additional to those that they enjoy in terms of the Constitution and those enjoyed by the general adult prison population. The Correctional Services Act provides specifically that children are entitled to educational and recreational programmes, social and psychological services, religious care, and, where practicable, additional visitation opportunities. In addition, their specific accommodation and nutritional requirements must be met.

### The facts – 'un-sentenced' children

The overall impression from the information collected is that children awaiting trial in prison sit around for most of the day, either in their cells or in the courtyard, with very few constructive activities available to them. It is also apparent that they spend considerable periods of time locked in the cells. This is, at least in some prisons, a consequence of maintaining the segregation between children and the so-called juveniles (18-21 years) when they are let out of the cells.

In general, the children wake up between 5am and 6am and eat breakfast at 7am. Those attending court, however, will eat breakfast earlier. Lunch is served between 11am and 12pm. At some prisons dinner is served at 5 pm. At others, however, six extra slices of bread are provided at lunch, which are to be consumed for dinner later. This is a clear violation of the Correctional Services Act, which requires that "food must be served at intervals of not less than four and a half hours and not more than 14 hours between the evening meal and breakfast during each 24-hour period." Apart from the meals provided, there appears to be little variation to the children's routine and a very limited array of constructive activities. Most of the day is spent watching television in the cells or wandering around the courtyard area of the section. Some prisons provide board games for entertainment. Others, however, had nothing with which the children could amuse themselves or pass the time. At the majority of prisons surveyed, children are let out of their cells, usually into a courtyard for one hour per day, thus amounting to seven hours per week. At a small sample of centres, it was found that 'un-sentenced' children are permitted outside for exercise for five hours per week, which amounts to less than one hour per day. This is a violation of section 11 of the Correctional Services Act, which states that every inmate "must be given the opportunity to exercise sufficiently in order to remain healthy and is entitled to at least one hour of exercise daily…"

With the exception of a few prisons, 'un-sentenced' children are not provided with access to any educational services despite the requirement in the Correctional Services Act that all children of compulsory school-going age must have access to education. Regarding access to social services, there is little consistency in practice across the centres surveyed. At some centres 'un-sentenced' children have access to DCS social workers while at other centres it was reported that DCS social workers only provide services to sentenced inmates. Social workers from the Department of Social Development (DSD) provide services to detained children in some instances but this is also not a consistent practice. Social work services by NGOs are also provided at some prisons. The more consistent response was that social work services were available upon request, although it was not always clear whether the services would then be rendered by DSD or DCS social workers

The suitability of available recreational infrastructure also varies greatly. Of the total number of prisons surveyed, 34% reported that the infrastructure was not suitable and 46% were described as suitable (the balance being unknown). Children awaiting trial are generally not permitted to go out to, for example, the sports field. Their physical exercise is thus limited to the internal courtyards, where available. These are often extremely small. A variety of board games are available at most centres, but some are better stocked in this regard than others. Across all prisons surveyed, it was reported that although soccer is available, it is restricted to the availability of a soccer ball and the availability of staff to accompany children to the sports field. At some prisons the responsibility of arranging recreational activities for 'un-sentenced' children had been assigned to different individuals, institutions or individual officials.

### Sentenced children

The daily programme of sentenced children appears to be very similar to that of their 'un-sentenced' counterparts. At a few centres there are functional education programmes and sentenced children attend school for four or more hours per day during the week. At other centres there

appeared to be a very narrow range of constructive activities in which sentenced children could partake. The main reason for this appears to be a lack of adequate staff supervision. There was, however, a disturbing trend emerging, indicating that only children serving sentences longer than two years are admitted to the education programmes at the centres.

Regarding social services, it was found, generally, that social workers are available every day. This should not be interpreted to mean that sentenced children have immediate and unrestricted access to social work services, for, in practice, it appears that access to a social worker is gained upon request and this may take several days.

In general there appears to be available a wide variety of sport activities, board games and other recreational activities available to sentenced children. Thus, compared to their 'un-sentenced' counterparts, recreational services for sentenced children appear to be substantially better organised. Designated DCS officials are assigned to arrange recreational activities and are in some instances assisted by NGOs. The times that children are engaged in recreational activities appear to vary between 7 and 14 hours per week. Over weekends most centres allow additional time but the overall impression gained is that recreational time is fairly limited.

Of the centres housing sentenced children, 77% reported that there are classrooms, 81% reported that there is a library, 66% reported that there is a multi-purpose hall, 75% reported that the centre has a sports field and 87% reported that there is sports equipment. However, sports equipment for inmates, where available, appears to be limited and there are problems with replacing damaged and worn-out equipment.

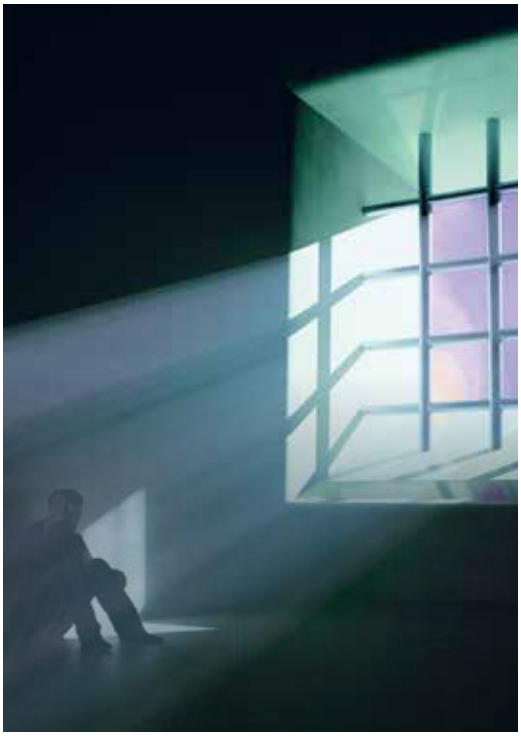
## *Community contact*

### The law

The Correctional Services Act makes provision for inmates to remain in contact with the community and in particular their families and next of kin. Moreover, it requires DCS to ensure, if practicable, that children remain in contact with their families through additional visits or "by any other means". The Act also states that there are no limitations placed on the number of visits that 'un-sentenced' inmates may receive, save for what is necessary for the good management and order of the prison.

### The facts

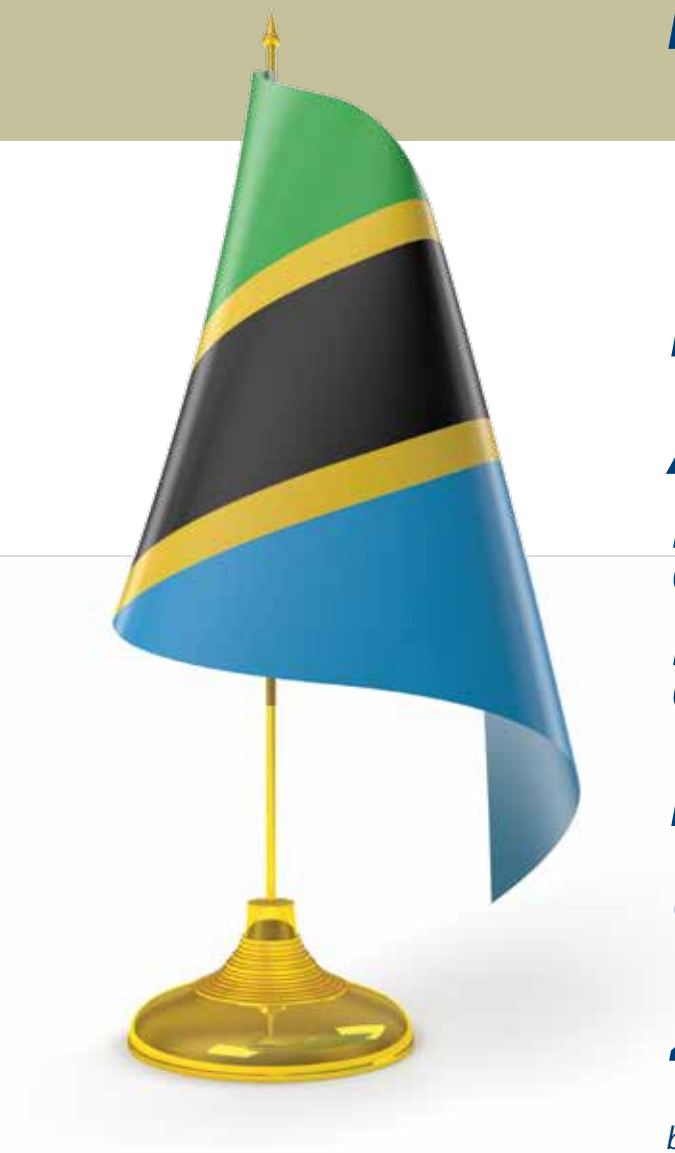
Several of the children interviewed explained that they are imprisoned far away from home and that it is not possible for their families to visit on a regular basis, or visit at all. Sadly, for some children it was not a case that their families are unable to visit them, but it appears that they choose not to visit them. Given the challenges of distance and cost, it is hardly surprising that a telephone card is one of the most important resources in any prison. Unfortunately, however, DCS does not provide telephone cards to children or adult inmates. They are reliant on their own resources for this, or on their families to supply them a phone card, or pay money into their account at the prison that they can then use to buy a phone card from the prison shop. However, several children reported that they have no money as their families are unable (or unwilling) to support them. They therefore rely on friends to give them a phone card. It was also apparent that several children have lost contact with their families and did



not have phone numbers for them. Despite the provisions of the Act, it appears that little effort is being made to facilitate contact between children and their families. If DCS were to provide every imprisoned child (846 as at February 2011) with a R50 phone card per month, it would cost R507 600 per year, a cost that can easily be absorbed by the DCS's R15 billion budget.

## *Conclusion*

Despite the overall number of children in prison having declined over the years, there are, as the report indicates, a number of significant problems relating to children in prison that need to be addressed. It is of enormous concern that the provision of services to children occurs in a largely ad-hoc and inconsistent fashion. Many of the issues that the report highlights, however, could be better addressed were DCS staff to receive training on child care, sexual victimization and bullying. For the overwhelming majority of centres surveyed, this was not the case, unfortunately. The DCS should therefore identify inconsistencies in practice and bring these into line with the requirements of the Correctional Services Act and the Child Justice Act, particularly where they involve constitutional rights, such as education, exercise and visitation opportunities.



# Fulfilling Article 40 of the CRC under the Tanzanian Law Of The Child Act 2009

*by Usang Maria Assim, Researcher of the Children's Rights Project of the Community Law Centre*

### *Introduction*

States Parties obligations under the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) include the harmonisation of all laws concerning children, to ensure their compatibility with the provisions of both the CRC and the ACRWC. Many African states including Tanzania have in recent years embarked on a law reform process in response to the recommendations of the CRC Committee in terms of Article 4 of the CRC, which provides: 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.' Similarly, the ACRWC in article 1 obliges States Parties to 'adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.'

For Tanzania, the outcome of this process is the Law of the Child Act (LCA) which became operational in 2009 after being passed into law on the 1st of April 2009. The effectiveness or importance of any such statute is tested by court actions based on the provisions of the statute. The full title of the LCA indicates that it merges virtually all aspects of children's rights and welfare including child justice and child protection:

> *'An Act to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child; to provide for affiliation, foster care, adoption and custody of the child; to further regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters.'*

By consolidating all provisions concerning children, the LCA has repealed

previous laws such as: the Affiliation Act, the Adoption Act, the Day Care Centres Act, the Children and Young Persons Act, and the Children Home (Regulation) Act. However, some provisions in relation to children are retained in other statutes, with some of them having been amended in conformity with the provisions of the LCA.

### *Article 40 of the Convention on the Rights of the Child (CRC)*

Article 40 of the CRC (from which this publication derives its name) provides for the dispensation of child justice in sub-section 1 as follows:

> *States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*

Article 40 of the CRC, together with article 37 form the pillars of child justice in international law, principles upon which States Parties are to hinge their domestic child justice legislation, policy and practice. The ACRWC also provides for child justice in article 17. Flowing from these provisions, the starting point for properly dispensing justice to children in conflict with the law is to rightly ascertain their age and work towards the goal of ensuring their reintegration into society.

'Children in conflict with the law' generally refers to persons below the age of 18 years who come into contact with the justice system as a result of committing a crime or being suspected of committing a crime. It is a generic term which in international legal terms, replaces the old and pejorative expression, 'juvenile delinquent'. The expression 'children in conflict with the law' or 'child offenders' has contributed to a more child rights-based or child-focused approach in the criminal justice system which incorporates the principles of restorative justice while also ensuring accountability and responsibility for crimes committed. The expression 'juvenile justice' is however still in use in various jurisdictions, including Tanzania. Even article 17 of the ACRWC on child justice is titled: 'Administration of Juvenile Justice'.

The goal of the CRC is a justice system for children which places an emphasis on the rehabilitation and reintegration of child offenders while balancing their interests and those of society, having due regard to the rights of the victims of crime. Consequently, the justice system for children must ensure among others, the presumption of innocence, the protection

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# THE CASE OF ELIZABETH MICHAEL KIMEMETA LULU v REPUBLIC (OF TANZANIA)

of the child's privacy throughout the proceedings, and the determination of the matter before a competent body, 'unless it is considered not to be in the best interest of the child, *in particular, taking into account his or her age or situation…*' (Article 40(2)(b)(iii)).

## The case in brief

The case of *Elizabeth Michael Kimemeta Lulu v Republic* is the first decision of a higher court in Tanzania based on the LCA, testing its application and applicability. The ruling which was delivered on the 11th of June 2012 dealt with the ascertainment of the correct age of the child-applicant, in conflict with the law. The determination of childhood (based on age) is a fundamental provision as it concerns the determination of the scope of the application of a legal instrument. As succinctly put by Fauz Twaib, J: 'Its resolution would assist the Courts and all concerned in determining whether the applicant is entitled to be treated as a child and therefore to the protections afforded by the Law of the Child Act, No. 21 of 2009.' (*Lulu v Republic*, pg. 1)

*Once the age of the accused is ascertained, and if it is proved that the accused is a child …the applicable rules and procedures would be different in compliance with the provisions of the CRC, the ACRWC, the LCA and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.*

The matter centred on a charge of murder contrary to sections 196 and 197 of the Tanzanian Penal Code, for which the applicant, whose actual age was not ascertained, was in April 2012 arraigned before a Resident Magistrates' (RM) court in Dar-es-Salaam, to be dealt with in terms of the Penal Code. The LCA provides for the establishment of a Juvenile Court, 'for purposes of hearing and determining child matters relating to children', including 'criminal charges against a child' (sections 97 & 98, LCA). The Juvenile Court shall however be presided over by a Resident Magistrate (section 97(3), LCA). The applicants in the instant case sought for a stay of proceedings at the RM court and a committal of the matter to a Juvenile Court in terms of sections 100(2) and 113 of the LCA. The three main prayers of the applicants were as follows:

- That the High Court should order a stay of proceedings at the Resident Magistrates' Court of Dar-es-Salaam and ascertain the actual age of the accused;
- Alternatively, that the High Court stays all committal proceedings pending before the Resident Magistrates' Court of Dar-es-Salaam and ascertain the age of the accused.
- Upon such ascertainment, all committal proceedings with respect to the accused be conducted under the auspices of the spirit and provisions of the Law of the Child Act, 2009. (*Lulu v Republic*, pg. 2)

As with the international law on child justice, the LCA provides for approaches different from the mainstream law or general Penal Code when dealing with children in conflict with the law.

According to section 100(2) of the LCA:

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

Section 113(1) of the Act further provides:

> *'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 a child, the court shall make due inquiry as to the age of that person.'*

These provisions are safeguards to ensure that children in conflict with the law are not dealt with in terms of the same criminal justice system applicable to adults, in tandem with international obligations under child justice. Consequently, against the background of the above provisions, the High Court ruled that 'it would be fair to assume that "the best interests of the child" principle, enacted through section 4 (2) of LCA, is to be applied presumptively to any person whose age is to be determined, the applicant being no exception.' (*Lulu v Republic*, pg. 11)

Accordingly, and considering the seriousness of the nature of the offence for which the accused was charged, the High Court ruled in favour of the applicant by exercising its supervisory powers over the Resident Magistrate Court and choosing to proceed with the determination of the age of the accused, ruled thus:

> *'Consequently, I order the applicant's counsel to present or cause to be presented, by way of affidavits and supporting documents, evidence as to their client's age, and the Respondent Republic to present or cause to be presented, any evidence it may have to support its position. The dates for compliance with these orders shall be fixed by the Court.' (*Lulu v Republic*, pg. 14)*

Once the age of the accused is ascertained, and if it is proved that the accused is a child, that is, a person below the age of 18 years, the applicable rules and procedures would be different in compliance with the provisions of the CRC, the ACRWC, the LCA and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty. All these make provision for children in conflict with the law to include principles of diversion, keeping child offenders separate from adult offenders and general measures for rehabilitation and reintegration, all functioning as part of an effective child-friendly justice system, provide for in the LCA. The importance of this lies in the fact that the fundamental principle of the best interests of the child applies to all children, including those found to be in conflict with the law.

## *Conclusion*

The purpose of this piece is not to do a detailed analysis of the case but to give a glimpse into the direction in which Tanzania is heading in the dispensation of child justice, in accordance with the country's international, regional and national legal obligations. It also serves to raise public awareness and increase knowledge about the LCA to further enhance the effective monitoring of the implementation and application of the Act to secure the protection of the rights of children in conflict with the law. It is important to promote and uphold the standards enacted in the LCA that is, ensuring that the LCA is fully relied upon, as intended, for adjudicating in matters concerning children in conflict with the law rather than attempting to return to an era of lumping children together with adults in the criminal justice system.

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The Arican Child Law Reform website is an initiative of the Community Law Centre at the University of the Western Cape and UNICEF, Eastern and Southern African Regional Office. It has information on law reform initiatives that are taking place in respect of children's rights in the Eastern African and Southern African regions and contains downloadable legal documents such as Acts, Bills, International Law and Case Law on the subject of children's rights. The purpose of this website is to inform the debate around children's rights, it is an excellent electronic resource for activists, researchers, legal specialists, students and many others.

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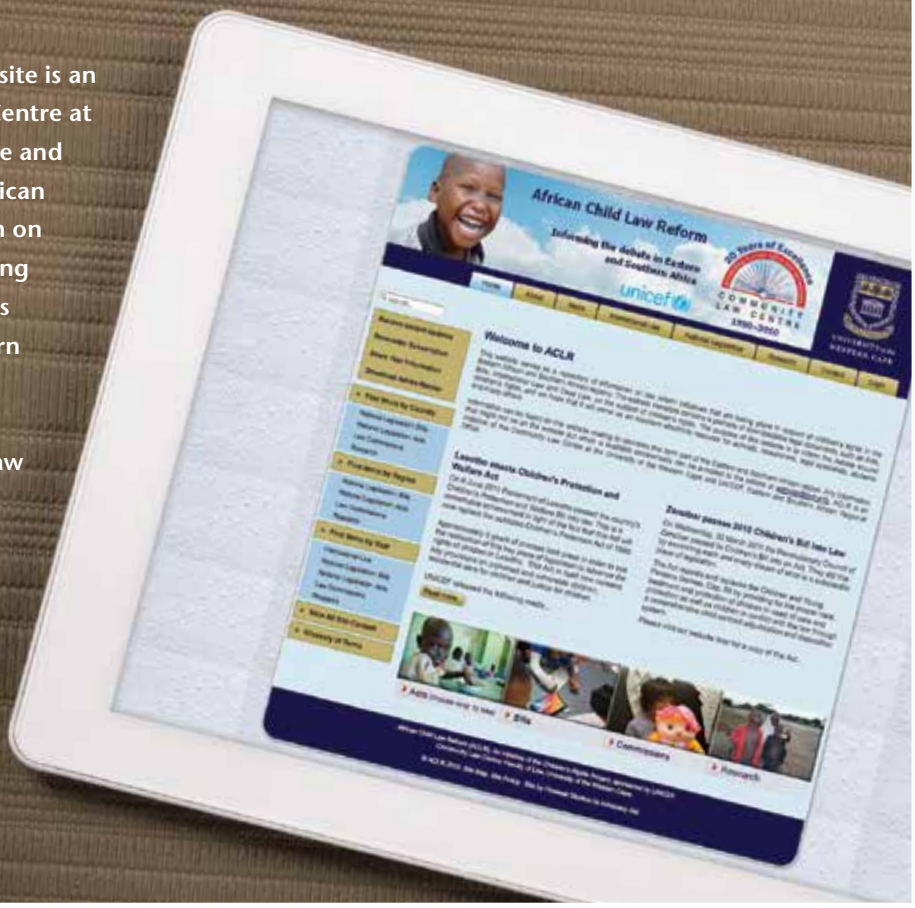



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