

Chapter 5

An Analysis of the Gaps in the Legislative, Policy, and Institutional Frameworks for the Protection of Children in Conflict With the Law in Kenya

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ABSTRACT

This chapter analyzes the existing legislative, policy, and institutional framework for protecting child offenders within Kenya's Juvenile Justice System (JJS). The Kenyan JJS is undergoing numerous transformations, yet the current legislative and institutional frameworks for child protection do not comprehensively protect child offenders and require further reform. This chapter is divided into four parts: Part I introduces the Juvenile Justice System in Kenya. Part II examines the existing legislative, policy, and Institutional Framework for the Juvenile Justice System in Kenya. Part III summarizes the implementation gaps in the Juvenile Justice System in Kenya, while Part IV concludes the discussion and provides recommendations to enhance the protection of child offenders in Kenya.

INTRODUCTION

The Juvenile Justice System (JJS) refers to institutions and legal frameworks that handle children in conflict with the law. The institutions include the family, Children's

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Department, Probation and Aftercare Department, the Law Society of Kenya, the Courts, rehabilitation institutions as well as other corrective institutions. The system is meant to process cases of children in conflict with the law, separate from adults (Hamilton, 2011).

Children in conflict with the law are those whose behavior goes against stipulated laws of a country. This may start as deviant behavior that is against agreed social norms. Left unchecked, it graduates into a violation of the societal order. Any such violation of the laws is a crime against the state. Therefore, such a child would be apprehended and subjected to the justice system in search of the truth.

Unlike the formal justice system, which handles adults, the Juvenile Justice System aims at focusing on cases where children are suspected to have committed crimes. The aim is to have institutions, laws, and personnel who understand the developing needs of children and can offer the best services to help them abide by society's norms and laws.

An effective juvenile justice system must be child-centered and guided by the best interest of the child principle and whatever they do must consider the child's best interests so that the child avoids deviant behavior and criminality. The system must be child friendly and should focus on reforming the child under a restorative justice approach as opposed to punishing the child offender. It should give the child the opportunity to develop their full potential as opposed to destroying them through retributive justice (United Nations, 1990).

It is important at this stage to point out that Kenya lacks a structured Juvenile Justice System.

This is partly historical since Kenya inherited the system of handling child offenders from her colonial master, Britain, upon attaining independence in 1963 (Kercher, 1981). The criminal justice system focused on the adult offender and little focus was on the child offender, many of whom were young boys and girls perceived to be sympathizers of the *Mau Mau* uprising. They were rounded up and sent to approved schools or Borstal institutions for discipline (Ibid). At the institutions, they were trained on vocational skills to ensure that they did not engage in deviant behavior but were capable of earning from perceived descent living and income generation activities.

The applicable law was the Children and Young Persons Act (Cap 141)¹, now repealed. When arrested by the police, the child suspects were taken to the police stations and arraigned in the then Juvenile court, presided over by non-professional District Magistrates who had not trained as lawyers. Many of the children were boys and girls formed a small fraction. It was not until the enactment of the Children Act in 2001 following the ratification of the 1989 United Nations Convention on the Rights of the Child by Kenya, and the posting of the author of this book chapter, that

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