

Raising the minimum age of criminal responsibility in Kenya

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Abstract

This paper investigates why and how Kenya reviewed its minimum age of criminal responsibility while enacting the Children Act of 2022. The Act creates a range; a lower level of the minimum age of criminal responsibility of 12 years and a higher level of 14 years. In the preceding regime of laws, the minimum age for criminal responsibility was 8 and 12 years, respectively. The paper interrogates how Kenya arrived at the ages of 12 and 14. In doing so, the paper will examine the foundations of the minimum age of criminal responsibility and some of the international legal instruments affecting the minimum age of criminal responsibility.

Keywords: children, criminal responsibility, minimum age, *doli incapax*, child rights

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Introduction

Under the Penal Code (Cap 63 Laws of Kenya), a child aged eight could be criminally liable for any act or omission.¹ Such a child was presumed to have understood that their actions were wrong. Thus, such a child could be subjected to investigations, tried and convicted, potentially resulting in them having a criminal record for life. This regime of law coexisted with the Children Act of 2001.²

However, Section 221(1) of the Children Act of 2022 prescribes the minimum age of 12 years for a child to be held criminally responsible for any act or omission, but not more than 14 years.³ This means that between the age of 12 and 14, there is a rebuttable presumption that the child was incapable of differentiating between a wrong and a right. Though the provisions on consequential amendments in the Act fail to list Section 14 of the Penal Code,⁴ the doctrine of implied repeal could be invoked to presume that Section 14 of the Penal Code was amended consequentially. Be that as it may, Section 4 of the 2022 Act which declares its supremacy over all other legislation on children's matters makes the provision in Section 221(1) outrank the Penal Code.

The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child encourage states parties to establish a minimum age for criminal responsibility.⁵ In General Comment No 10 of 2007, the Committee on the Rights of the Child (Committee) concluded that a minimum age lower than 12 years *to be internationally unacceptable*.⁶ Further, the Committee encouraged states parties to adopt 12 years as the absolute minimum age and continue

¹ Penal Code (Cap 63), Section 14(1).

² Children Act (No 141 of 2001).

³ Children Act (No 29 of 2022), Section 221(2).

⁴ Penal Code (Cap 63), Section 14.

⁵ Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, Article 40(3); African Charter on the Rights and Welfare of the Child, 1 July 1990, CAB/LEG/24.9/49, Article 17.

⁶ Committee on the Rights of the Child (Committee), General Comment No 10: Article 32 on Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, para 32.

increasing it to a higher age level. General Comment No 10 was later replaced by the Committee's General Comment No 24 of 2019, which set the minimum age at 14 and abandoned 12.

The Children Act of 2022, which was passed three years after General Comment No 24, affirmed 14 years as the internationally acceptable minimum age of criminal responsibility. This begs the question: did the drafters of the 2022 Act consider recommendations of international bodies seriously, or did they engage in empirical research and comparisons in law before setting the minimum age at 12 years?

This paper will interrogate the developments in the law that informed the drafters to revise the minimum age of criminal responsibility from 8 to 12 years. In doing so, the paper will interrogate domestic decisions before courts of law, international treaties and international treaty bodies' reports and recommendations that are relevant, and importantly, the preparatory documents of the drafters. It will adopt the structure below.

First, the paper will conceptualise the basis for the minimum age of criminal responsibility. Second, it will interrogate how the minimum age of criminal responsibility entered Kenya's legal system. Third, it will expose the existing acceptable standards on the minimum age of criminal responsibility. Fourth, it will document the path towards harmonisation of the minimum age of criminal responsibility and enacting the Children Act of 2022. Lastly, the paper will summarise its conclusions and give recommendations.

Basis of the minimum age of criminal responsibility: The *doli incapax* rule

The age of criminal responsibility can be conceptualised as the age at which the law considers that a person '*has the capacity and a fair opportunity or chance to adjust his behaviour to the law*'.⁷ This conceptualisation

⁷ Mathew Hale, *History of the pleas of the Crown*, Volume 1, 1736, 17-19.

presupposes three things, as summarised by Thomas Crofts.⁸ One, the age of criminal responsibility is when a child is considered old enough to be processed within the criminal justice system as an adult. Two, it is the age at which a child can be punished like an adult. Three, it is the age at which a child is thought to have the capacity required for criminal responsibility. This connotes that they could be charged, tried and convicted of a criminal offence.⁹ Notably, the base indicator is the specific treatment of children and adults in the criminal justice system.

The law treats adults and children differently when it comes to criminal responsibility. Andrew Von Hirsch fronts two arguments for this justification.¹⁰ First, children may be deficient in capacity to appreciate the consequences of their actions, unlike adults. Second, children may be less capable to resist impulses than adults. James Dold attributes the differential treatment to a scientific explanation. For instance, he made a submission that:

Studies have shown that children's brains are not fully developed. The pre-frontal cortex, which is responsible for the temporal organisation of behaviour, speech, and reasoning, continues to develop into early adulthood.

As a result, children rely on a more primitive part of the brain known as the amygdala when making decisions. The amygdala is responsible for immediate reactions, including fear and aggressive behaviour. This makes children less capable than adults of regulating their emotions, controlling their impulses, evaluating risk and reward, and engaging in long-term planning. This also makes children more vulnerable, more susceptible to peer pressure, and heavily influenced by their surrounding environment.¹¹

The Committee notes the distinction between children and adults.¹² It comments that their physical and psychological development are

⁸ Thomas Crofts, 'The common law influence over the age of criminal responsibility in Australia' 67(3) *Northern Ireland Legal Quarterly* (2016) 4-6.

⁹ Crofts, 'The common law influence over the age of criminal responsibility' 4-6.

¹⁰ Andrew von Hirsch, 'Proportionate sentences for juveniles: How different than for adults?' 3(2) *Punishment and Society*, 223-226.

¹¹ James L Dold, Testimony in support of HB 2238 before the Hawaii House Committee on Human Services & Homelessness, submitted on 7 February 2020.

¹² Committee, General Comment No 10, Children's Rights in Juvenile Justice, Article 32 on 25 April 2007, CRC/C/GC/10.

different. Further, their emotional, educational and other needs are also distinct. Therefore, such differences act as basis for the lesser culpability of children in conflict with the law compared to adults.¹³

On the other hand, adults are deemed to make mature judgements, have reasoning, abstract thinking and planning, better impulse control, avoid risks likely to accrue by a commission of a crime, a rational process and avoidance of self-harm among many others.¹⁴

Therefore, physical, cognitive, and emotional development between adults and children is different, and so should their treatment regarding criminal liability.

Basis of the minimum age of criminal responsibility in common law

Under common law, the doctrine of *doli incapax* presumes that a child does not possess the necessary knowledge to have criminal intent.

The *Black's Law Dictionary* defines *doli incapax* as 'incapable of criminal intention or malice; not of the age of discretion; not possessed of sufficient discretion and intelligence to distinguish between right and wrong to the extent of being criminally responsible for his actions'.¹⁵ The capability to possess the intelligence to comprehend intention and malice is called *doli capax*.¹⁶

The doctrine had two approaches in its development: a lower age of criminal responsibility and a higher age of criminal responsibility.¹⁷ In the former, a child was excused from criminal responsibility and culpability. In the latter, criminal responsibility was a rebuttable

¹³ Committee, General Comment No 10.

¹⁴ Rolf Loeber and David P Farrington, 'Introduction', in Rolf Loeber and David P Farrington (eds), *From juvenile delinquency to adult crime criminal careers, justice policy, and prevention*, Oxford University Press, 2012, 4.

¹⁵ Black's Law Dictionary, Fourth Edition, 646.

¹⁶ Black's Law Dictionary, Fourth Edition, 646.

¹⁷ Crofts, 'The common law influence over the age of criminal responsibility', 4-6. Hale, *History of the pleas of the Crown*, 14-15.

presumption with evidence proving that the child knew what they did was seriously wrong in the criminal case.¹⁸

Common law set the lower age of criminal responsibility at 7 and 14 years on the higher side. England transferred the applicability of this doctrine to most of its colonies, for example, India and Australia. An example where the principle was tested in India was *Shyam Bahadur Koeri v State of Bihar*.¹⁹ In this case, the High Court determined that a child under the age of 7 years was incapable of bearing criminal responsibility. A highlight of the facts was that a child, Thomas, aged below 7 found a gold plate and did not report this to the Collector. The Collector knew the fact later. He prosecuted Thomas under the Indian Treasure Trove Act of 1878. Thomas' advocates filed an application to the High Court challenging the order of the Collector to prosecute him as he was below 7 years. The Court acquitted Thomas based on the doctrine of *doli incapax*.

Notably, in England, the *doli incapax* rule was abolished by the 1998 Crime and Disorder Act.²⁰ The Act marked a radical reorganisation of the English juvenile justice system, emphasising children taking more responsibility for criminal actions as its clarion call.²¹ The then Home Secretary Jack Straw spearheaded the juvenile justice system reform that led to the abolition of the *doli incapax* rule. Straw was evident in his agenda that the principle had to be abolished. Lord Williams of Mostyn published a White Paper titled 'No more excuses' supporting Straw's position. In his paper, he stated:

Young people, too, should face up to the consequences of their offending. The rule of *doli incapax* can stand in the way of holding properly to account 10 to 13-year-olds who commit crimes. Young people of that age know it is wrong to steal, vandalise or commit an assault. We will abolish this archaic rule to ensure they are answerable for their offences.

¹⁸ Matthew Johnston, 'Doli incapax: The criminal responsibility of children' Presentation at Sydney for the Children's Magistrates' Conference, 1 February 2006, 1.

¹⁹ *Shyam Bahadur Koeri and others v State of Bihar*, Patna High Court, Judgement, 20 September 1965.

²⁰ United Kingdom Crime and Disorder Act (No 37 of 1998).

²¹ Leanne Munro Gibson, 'The abolition of *doli incapax* and the alternatives to raising the age of criminal responsibility', *Northumbria Legal Studies Working Paper Series* (2019) 4-5.

Final Warning: firm action is needed when young people begin to offend. But this has yet to happen. So we will replace repeat cautions with a new reprimand and final warning scheme to provide a consistent, graduated police response to youth crime, within a clear statutory framework.²²

The government at the time agreed with them. The stated reason was that the child had a much better education and could distinguish between right and wrong even at a very young age.²³ Therefore, they could be held responsible for the crimes that they commit. This led to the enactment of Section 34 of the 1998 Crime and Disorder Act that abolished the *doli incapax* rule.²⁴

Background on Kenyan law on the minimum age of criminal responsibility

When Kenya became a British protectorate, the Laws of England became applicable in Kenya.²⁵ When Kenya gained independence in 1963, the existing legal regime was retained through re-enactment.²⁶ Also, Kenya adopted into its legal system common law applicable in the United Kingdom as of 12 August 1897.²⁷ Consequently, since common law had a fixed age of criminal responsibility, it became applicable in Kenya.²⁸

Kenya adopted the *doli incapax* rule on the minimum age of criminal responsibility. Kenya needed comprehensive legislation on children's

²² Lord Williams of Mostyn, 'No more excuses: A new approach to tackling youth crime in England and Wales', Youth Justice White Paper, HL Deb 27 November 1997 vol 583 cc 1121-32, para 1123.

²³ Gibson, 'The abolition of *doli incapax* and the alternatives to raising the age of criminal responsibility', 4-5.

²⁴ Gibson, 'The abolition of *doli incapax* and the alternatives to raising the age of criminal responsibility', 4-5.

²⁵ Michael Nyongesa Wabwile, 'The place of English law in Kenya' 3(1) *Oxford University Commonwealth Law Journal* (2003) 1-3.

²⁶ Wabwile, 'The place of English law in Kenya' 1-3.

²⁷ Judicature Act (No 16 of 1967) Section 3.

²⁸ William Blackstone, 'Commentaries on the Laws of England' Clarendon Press, 1765, 58.

rights, specifically on juvenile justice. The Children Act of 2001 was the first comprehensive legislation. However, it failed to set a minimum age of criminal responsibility. This meant the age continued to be set by the Penal Code (Cap 63).²⁹

Section 14(1) of the Penal Code provides for the minimum age of absolute immunity from criminal responsibility to be 8 years. Section 14(2) sets 12 years as the age at which a child could be held criminally liable if proven otherwise. Notably, Kenya adopted the common law approach but reduced the upper limit from 14 to 12 while increasing the minimum age of criminal responsibility from 7 to 8 years.

The reason that propelled Kenya to modify the minimum and upper age limits is unclear. Mohammed Hussain and Clement Mashamba suggest the modification was because the United Kingdom had also changed their legislation. First in 1932, through the Children and Young Persons Act and later, the 1989 Children Act.³⁰

Regarding Section 14 of the Penal Code, children between 8 and 12 years old are considered immature. Under the provision, a court of law had an obligation to assess the child's capacity and knowledge of the subject and make a finding on the same.³¹

An example is the appellate case of *Republic v JO and another*.³² In the appeal, Justice Majanja reasoned that Section 14(2) of the Penal Code captures the common law rebuttable presumption of the *doli incapax* rule. He opined that the rule operated to deem a child between the prescribed age group incapable of committing a criminal act. The respondents, the accused persons, were between 9 and 12 years old. The trial court had rejected the charges because of the age of the accused persons. However, on appeal, Justice Majanja recognised the applicability of *doli*

²⁹ Penal Code (Cap 63), Section 14.

³⁰ Mohammed S Hussain and Clement Mashamba, *Child rights and the law in East Africa*, LawAfrica, 2014, 390.

³¹ *Republic v EM*, Criminal (Revision) Case 14 of 2015, Ruling of the High Court at Embu, 24 June 2015, [eKLR], para 4.

³² Criminal Appeals 135 and 136 of 2014 (consolidated), Judgment of the High Court at Homabay, 19 October 2015, [eKLR].

incapax rule, and that it meant that criminal responsibility is a question of fact. Given that the accused children were between 9 and 12 years old, the Judge ruled that the prosecution was entitled to disprove the presumption of a lack of capacity to commit an offence by marshalling appropriate evidence.³³

Therefore, under the *doli incapax* rule, an accused child aged between 8 and 12 years can only be held liable for an offence if the prosecution can rebut the presumption of incapacity by showing that, at the relevant time, the child had the requisite mental capacity.

However, courts have had an unsettled interpretation of Section 14(3) of the Penal Code that relates to criminal responsibility for some sexual offences. The Section states, ‘a male person under the age of twelve is presumed to be incapable of having carnal knowledge.’

The Section could be interpreted in two ways: first, a male child under the age of 12 is incapable of having carnal knowledge. Therefore, an irrebuttable presumption that no criminal responsibility arises.³⁴ Second, it could mean that the presumption that a male child under the age of 12 is incapable of having carnal knowledge is a rebuttable presumption that can be disproved by evidence.

Majanja J supports the latter – that the presumption is rebuttable. He interpreted Section 14(3) of the Penal Code in the case of *Republic v JO and another*.³⁵ He reasoned that Section 14(3), just like Section 14(2), creates a rebuttable presumption. He supports his reasoning by introducing a conjectural scenario that only removing the phrase ‘presumed to be’ from Section 14(3) would have made it clear that the presumption was irrebuttable.³⁶

In the High Court case of *Republic v EM*,³⁷ Justice Muchemi supports the former, that Section 14(3) creates an irrebuttable presumption for

³³ *Republic v JO & another*, para 8.

³⁴ William Musyoka, *Criminal law*, LawAfrica, 2013, 100; *Republic v EM*, para 11.

³⁵ *Republic v JO & another*, para 8.

³⁶ *Republic v JO & another*, para 8.

³⁷ *Republic v EM*, para 11.

a male child under 12 relating to carnal knowledge. In the case, the respondent was charged with an unnatural offence contrary to Section 162(a)(i) of the Penal Code before the Magistrates Court (trial court). The trial court ascertained the age of the accused from the birth certificate. It established that at the commission of the crime, the accused was 11 years old.

It then made an order acquitting the accused while reasoning that Section 14(3) creates an irrebuttable presumption that any male under the age of 12 is incapable of carnal knowledge.

The prosecution decided to invoke the revisionary jurisdiction of the High Court. However, the High Court fully agreed with the trial court, upheld the acquittal, and held that Section 14(3) provided an irrebuttable presumption.

These divergent interpretations by courts of concurrent jurisdiction could be resolved by setting one minimum standard that will not be open to interpretation. In case of room for interpretation, then precise cannons in legislation should provide the parameters.

International standards on the minimum age of criminal responsibility

International law has several instruments that incorporate the minimum age of criminal responsibility. Kenya is party to both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and is bound by their obligations.

Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child

At the time of adoption of the CRC, there was a need to have a comprehensive statement on children's rights that bound states under international law. The CRC has four overarching principles to aid its interpretation as a whole and guide national implementation

programmes. The principles include, non-discrimination, the right to life, survival and development, the right to be heard and, most relevant to juvenile justice, the child's best interest.³⁸

The best interest of the child is founded on Article 3 of the CRC. It dictates that when state authorities make decisions which affect children, the best interests of children must be a primary consideration.³⁹ It relates to decisions by courts of law, administrative authorities, legislative bodies and public and private social welfare institutions. The principle of non-discrimination guarantees that every child, without exception, enjoys their rights without any distinction on status.⁴⁰ The principle of survival and development grants the child the right to life and guarantees their socio-economic rights.⁴¹ The principle of inclusion and participation dictates that every child can express their views and be respected.⁴²

Article 40(3)(a) of the CRC requires states to set a minimum age of criminal responsibility. The wording of Article 40(3)(a) is mirrored in Article 17(4) of the African Charter on the Rights and Welfare of the Child. However, both provisions fail to prescribe the minimum age of criminal responsibility among member states. Sharon Detrick and Godfrey Odongo have observed that during the drafting of Article 40(3)(a) of the CRC, there were no discussions on age and criminal responsibility. They note further that the only reference was the states' acknowledgment of 'the right of children accused or recognised as conflicting with the penal law not to be considered criminally responsible before reaching a certain age.'⁴³

³⁸ CRC Article 3; United Nations Child Fund (UNICEF), 'Four principles of the Convention on the Rights of the Child' *UNICEF*, 29 June 2019, --<<https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child>> on 3 March 2024 .

³⁹ CRC, General Comment No 14: Article 3 on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC /C/GC/14, para 1.

⁴⁰ Convention on the Rights of the Child, Article 2.

⁴¹ Convention on the Rights of the Child, Article 6.

⁴² Convention on the Rights of the Child, Article 12.

⁴³ Sharon Detrick and others, *The United Nations Convention on the Rights of the Child: A guide to the "Travaux préparatoires"* Kluwer Academic Publishers, Dordrecht, 1992, 492-494. Godfrey Odongo Odhiambo, 'The domestication of international law standards

The failure to prescribe a uniform standard made different states have disparities in the minimum age of criminal responsibility. For example, Kenya maintained the minimum age of criminal responsibility at between 8 years and 12 years. However, Uganda had a different standard. Uganda depended on the *doli incapax* rule as it was a former British colony, just like Kenya, and set the minimum age of criminal responsibility at 7 and 14 years.

However, after the CRC came into force, Uganda became a party to the Convention and enacted the Ugandan Children Act of 1996. In this Act, the minimum age of criminal responsibility increased from 7 years to 12 years.⁴⁴ Consequently, the Act abolished the *doli incapax* rule.⁴⁵ Conversely, Kenya's minimum age of criminal responsibility at the time was 8 years and 12 years, a disparity within the same existing international standards. This demonstrates that the ability of children to understand and comprehend their actions differs widely across cultures and even within a given society.⁴⁶

The path towards a homogenous minimum age of criminal responsibility

The Committee is a treaty body of experts with the mandate to monitor and report on the implementation of the CRC.⁴⁷ Over the years, it has developed jurisprudence on the obligation of states to establish a minimum age for criminal responsibility.

First, the Committee has set out clearly that failure by a state to establish a minimum age of criminal capacity is a violation of the CRC.⁴⁸

on the rights of the child with specific reference to juvenile justice in the African context', LLD Thesis, University of the Western Cape, 2005, 146.

⁴⁴ Uganda Children Act (Chapter 59), Section 88.

⁴⁵ Hussain and Mashamba, *Child rights and the law in East Africa*, 390.

⁴⁶ Odongo, 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' 146.

⁴⁷ Convention on the Rights of the Child, Article 43.

⁴⁸ Esther Waittherero King'ori, 'Strengthening access to justice of a child in conflict with the law: A case for law reform' LLM Thesis, University of Nairobi, 2015, 50.

For example, in its concluding observations to Guatemala in 1996, the Committee noted that Guatemala had no national legislation that prescribed the minimum age of criminal responsibility, hence, it was incompatible with the CRC.⁴⁹ Second, the Committee has concluded that certain minimum ages set by states as very low and, hence, a violation of the CRC. For instance, in 2016, Kenya's minimum age of criminal responsibility was set at 8 years. The Committee lamented that the age was unacceptable by international standards.⁵⁰ Third, the Committee has maintained that abolishing the *doli incapax* rule would violate the CRC.⁵¹ Thus, it recommends a lower limit and an upper limit for the minimum age of criminal responsibility.

On the other hand, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), in Aspiration 8 of Agenda 2040 aspires that every member state, including Kenya, should adjust the minimum age for criminal responsibility to a minimum of 12 years. During its 35th Ordinary Session, the ACERWC considered the Second Periodic Report from Kenya on implementing the African Children's Charter. In its concluding observations,⁵² the ACERWC recommended that Kenya should amend its Penal Code and increase the minimum age of criminal responsibility to internationally accepted standards.⁵³ Thus, Kenya raised the minimum age of criminal responsibility from 8 years to 12 years.⁵⁴

⁴⁹ CRC, Concluding observations: Guatemala, 7 June 1996, CRC/C/15/Add.58, paras 15, 29.

⁵⁰ CRC, Concluding observations on the combined third to fifth periodic reports of Kenya, 21 March 2016, CRC/C/KEN/CO/3-5, paras 75-76.

⁵¹ CRC, Concluding observations: Isle of Man (United Kingdom of Great Britain and Northern Ireland), 16 October 2000, CRC/C/15/Add.134, paras 18-19.

⁵² Concluding observations and recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Second Periodic Report of the Republic of Kenya, 2020, para 12.

⁵³ Report of the African Committee of Experts on the Rights and Welfare of the Child, AU Executive Council 33rd Ordinary Session, December 2021, para 12.

⁵⁴ Concluding recommendations by ACERWC on the Kenya 1st Periodic Report on the status of implementation of the African Charter on the Rights and Welfare of the Child, 2014, para 13.

General Comment No 10 of 2007

In 2007, the Committee noted from reports submitted by states that there was a wide disparity in the minimum age of criminal responsibility.⁵⁵ The ages were as low as 7 years or 8 years, and as high as 14 years or 16 years.⁵⁶ The Committee also commended states' use of the two minimum ages of criminal responsibility. The Committee interpreted that if a child in conflict with the law, who at the time of the commission of the crime is at or above the lower minimum age, but below the higher minimum age, the child is assumed to be criminally responsible only if they have the required maturity in that regard.⁵⁷ Further, the assessment of this maturity is left to the court, often without the requirement of involving a psychological expert. The Committee pointed out a danger that when courts have discretion, it often results in using the lower minimum age in cases of serious crimes.⁵⁸

The Committee recommended that states parties refrain from setting too low the minimum age for criminal responsibility.⁵⁹ It also recommended that the low ages be increased to an internationally accepted minimum. It boldly concluded that 12 years should be the minimum age internationally acceptable.⁶⁰

At this point, states had a direction that the minimum age is 12 years. The silence and uncertainty that existed before were erased. States had a new obligation to set and adjust the minimum age for criminal responsibility to 12 years, not below.

⁵⁵ Committee, General Comment No 10, para 30.

⁵⁶ Committee, General Comment No 10, para 30.

⁵⁷ Committee, General Comment No 10, para 30. The CRC also relied on United Nations Standard Minimum Rules for the Administration of Juvenile Justice 'Beijing Rules': Resolution adopted by the General Assembly, 29 November 1985, A/RES/40/33, Rule 4.1 stating that the minimum age 'should not be fixed at too low an age level, bearing in mind the facts of a child's emotional, mental and intellectual maturity.'

⁵⁸ Committee, General Comment No 10, para 30

⁵⁹ Committee, General Comment No 10, para 32.

⁶⁰ Committee, General Comment No 10, para 32.

General Comment No 24 of 2019

General Comment No 24 of 2019 replaced General Comment No 10. The Committee acknowledged developments since 2007 when General Comment No 10 was published. Such developments included trends and jurisprudence relating to the minimum age of criminal responsibility.⁶¹

In the General Comment, the Committee took a step further; instead of maintaining 12 years as the minimum age for criminal responsibility, it recommended that states increase the minimum age to 14 years. This was the second time the Committee set the minimum age of criminal responsibility after General Comment No 10 of 2007. The reasoning behind the recommendation was purely based on scientific reasons. In particular, the Committee reasoned that:

Documented evidence in child development and neuroscience indicates that maturity and the capacity for abstract reasoning are still evolving in children aged 12 to 13 years because their frontal cortex is still developing. Therefore, they are unlikely to understand their actions' impact or comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its General Comment No 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterised by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses.⁶²

Further, the Committee commented on states using a range of the lower and upper minimum age of criminal responsibility. The range has a rebuttable presumption that a child who is at or above the lower age but below, the higher age lacks criminal responsibility unless sufficient maturity is demonstrated.⁶³ This is similar to the *doli incapax* rule. It discouraged states from using the range and recommended that states set up one appropriate minimum age.⁶⁴ That range leaves courts with too much discretion and results in discriminatory practices.⁶⁵

⁶¹ Committee, General Comment No 24 of 2019, Children rights in the child justice system, 18 September 2019, CRC/C/GC/24, para 1.

⁶² Committee, General Comment No 24, para 22.

⁶³ Committee, General Comment No 24, para 26.

⁶⁴ Committee, General Comment No 24, para 26

⁶⁵ Committee, General Comment No 24, para 26.

Considerations in the enactment of the Children Act of 2022

In leading the debate on the Children Bill on 22 March 2022, the Leader of the Majority Hon Amos Kimunya appreciated the many reforms in Kenya's legal system after promulgating the Constitution of Kenya 2010.⁶⁶ The August House agreed that children's matters had been dragged and reform in the legislative and policy sector was overdue. The House also appreciated that the Children Act of 2001 failed to be at par with the new aspirations in the Bill of Rights of the Constitution of 2010 and in other progressive pronouncements and developing jurisprudence on children's matters. Thus, there was need for immediate reforms.

Report on the consideration of the Children Bill, 2021

The National Assembly published a Report on the consideration of the Children Bill, 2021. In the Report,⁶⁷ the United Nations Children's Fund (UNICEF) was among the stakeholders/proposers that were captured to have made proposals on the minimum age of criminal responsibility.⁶⁸ Nonetheless, there may have been other organisations and persons that made similar proposals that were not captured in the report specifically.

UNICEF offered the following proposals:

- a. That the minimum age for criminal responsibility be set at 14 years and the existing *doli incapax* rule in the Kenya legal regime be abolished.
- b. That Section 14 of the Penal Code be amended to align with its proposal in (a) above.

UNICEF justified its proposals by citing General Comment No 24 of 2019 that recommended states adopt 14 years as the minimum age for criminal responsibility and abandon the double range created by the *doli*

⁶⁶ National Assembly, 'Hansard Report' 22 March 2022, 22.

⁶⁷ National Assembly, Departmental Committee on Labour and Social Welfare, Report on the consideration of the Children Bill, 2021 (Vol I) April 2022.

⁶⁸ Report on the consideration of the Children Bill, 406.

incapax rule. UNICEF pointed out clearly to the Departmental Committee that General Comment No 24 based its findings and recommendations on scientific grounds; adolescent development and neuroscience.⁶⁹

Although the Bill had raised the minimum age of criminal responsibility from 8 to 12 years, UNICEF criticised that the increase was still below the minimum of 14 years recommended by the Committee as the acceptable standard internationally.⁷⁰ It also lamented that the Bill retained the range maintained by the *doli incapax* rule by setting a lower age of 12 and a higher minimum age of 14.⁷¹ It based its lamentations on the fact that judges were given unchecked discretion regarding the criminal capacity of a child subjectively and without proper expert advice. It reiterated that this scenario breeds discriminatory practices.⁷²

When the Bill came up in the National Assembly for a second reading, the Leader of the Majority, appeared to have not benefitted from General Comment No 24 of 2019. The Leader of the Majority informed the House that the CRC and ACRWC provide that the correct age of criminal responsibility for a child is 12 years. True to his word, this was the standard between 2007 and 2019 when General Comment No 10 of 2007 was still effective. The General Comment had recommended 12 years. However, General Comment No 24 had replaced it with 14 years. The misinformation of the Leader of the Majority in the National Assembly may have steered the country to an outdated legal position. Moreover, the National Assembly failed to interrogate proposals by UNICEF, which were consistent with General Comment No 24.

A prosecutor's guide to children in the criminal justice system, 2020

The National Assembly was not the only government institution that was misinformed. The Office of the Director of Public Prosecutions (ODPP) seemed uninformed of General Comment No 24 when it

⁶⁹ Report on the consideration of the Children Bill, 2021.

⁷⁰ Report on the consideration of the Children Bill, 2021, 406.

⁷¹ Report on the consideration of the Children Bill, 2021, 407.

⁷² Report on the consideration of the Children Bill, 2021, 408.

developed a guide called *A prosecutor's guide to children in the criminal justice system* in 2020.⁷³ The Guide sets out what is expected of all prosecutors regarding how they should deal with children in conflict with the law and children who come into contact with it.

The Guide prescribes that the prosecutor should ascertain the child's age before deciding to charge. The purpose is to discern whether the child has attained the minimum age of criminal responsibility. However, the Guide relies on CRC General Comment No 10 which was replaced by General Comment No 24.⁷⁴ Therefore, prosecutors are likely to conclude that a child between 12 and 13 years is criminally liable instead of a child of 14 and above.

Status report on children in the justice system in Kenya, 2019

The National Council on the Administration of Justice (NCAJ), in its Status report on children in the justice system in Kenya,⁷⁵ may have needed to be made aware of General Comment No 24. The Report was launched on 20 November 2019, and it appraised that, at the time, the Children Bill 2018 had far-reaching reforms. These reforms included increasing the age of criminal responsibility from 8 to 12 years. This was the correct position at the time. However, if the Report had had the benefit of General Comment No 24, then it would have criticised the draft Bill. Section 221 of the Children Act 2021 could have been worded differently. The Report had an opportunity to appraise General Comment No 24 but failed to do so. General Comment No 24 was published on 18 September 2019. The Report was published on 20 November 2019. It referenced materials that were available as late as 10 November 2019.⁷⁶

⁷³ Office of the Director of Public Prosecution (ODPP), *A prosecutor's guide to children in the criminal justice system*, 2020, 14-22.

⁷⁴ ODPP, *A prosecutor's guide to children in the criminal justice system*, 14-22.

⁷⁵ National Council on the Administration of Justice (NCAJ) Special Task Force on Children Matters, *Status report on children in the justice system in Kenya*, 19 November 2022.

⁷⁶ NCAJ, *Status report on children in the justice system in Kenya*, (see page 63 when the Report referred to material available on 4 and 10 November 2019).

However, General Comment No 24 was reissued for technical reasons on 11 November 2019. Therefore, the NCAJ may not have had sight of it before publishing the Report. One could also question why the NCAJ failed to contribute to, as an interested party, the review of General Comment No 10 of 2007 on children's rights in juvenile justice. The Committee reported that only 65 entities contributed to the Comment.⁷⁷ None of them includes an entity from Kenya.

Implied repeal of Section 14(1) & (2) of the Penal Code

One of the mechanisms through which a provision of a statute ceases to have an effect is implied repeal. This is where a law is repealed by the enactment of a subsequent inconsistent provision in a new statute, even if there is no express provision in the new statute as to repeal of the former. It is a principle of construction of laws that if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act.

Schedule 6 of the Children Act outlines consequential amendments. Conspicuously missing are Sections 14(1), (2) or (3) of the Penal Code where the minimum age of criminal liability was housed. Technically, there exists a concurrent standard on the minimum age of criminal responsibility between Section 221 of the Children Act and Section 14 of the Penal Code. However, the doctrine of implied repeal could be invoked to presume that Section 14 of the Penal Code was amended consequentially.

Therefore, if the doctrine is to be applied, Section 14 of the Penal Code could be presumed as amended and ceases to have an effect. However, one can easily argue that if the doctrine of implied repeal is to go by, then only Sections 14(1) and 14(2) of the Penal Code stand to be amended and not 14(3). This is because the wording of Section 221 of

⁷⁷ CRC, General Comment No 24 of 2019, Office of the High Commissioner for Human Rights, 18 September 2019.

the Children Act 2022 only affects Sections 14(1) and 14(2) of the Penal Code. The minimum age of criminal responsibility for a male child regarding carnal knowledge was not altered by the Children Act of 2022. This means that confusion and differential treatment will persist unless the issue is clarified.

Conclusion

This paper has achieved four objectives. First, it conceptualised the basis for the minimum age of criminal responsibility. Second, it interrogated how the minimum age of criminal responsibility was incorporated into Kenya's legal system. Third, it outlined the existing acceptable standards on the minimum age of criminal responsibility under international law. Lastly, it documented the path towards harmonisation of the minimum age of criminal responsibility and enactment of the Children Act, 2022.

The differential treatment between adults and children regarding criminal liability is justified. This paper concludes that the basis for differential treatment is scientific, universally. Their physical, cognitive and emotional characteristics are still under development. And at the development period, they are less capable than adults of regulating their emotions, controlling impulses, and evaluating risks. Further, they are more susceptible to peer pressure and heavily influenced by the surrounding environment. Therefore, they should be given preferential treatment compared to adults regarding criminal liability.

The paper also put forward that preferential treatment regarding criminal liability is an old concept. It is as old as common law. Common law anchored it under the *doli incapax* rule, which presumed a child incapable of possessing the necessary knowledge to have a criminal intent. When common law developed the rule, it set a lower and a higher minimum age for criminal responsibility. The lower minimum put an absolute immunity from criminal liability while the higher minimum left room for presumption provided that the facts support that the child knew what they did was seriously wrong.

However, the paper noted that England abandoned the *doli incapax* rule. Even international bodies such as the Committee preferred a single minimum age of criminal responsibility to the range created by common law.

The paper also documented how the common law rule of *doli incapax* traced its way to Kenya's legal system. When Kenya gained independence, it retained the existing legal regime at the time but re-enacted them. Therefore, many legislations were modelled to be similar to those of England. Section 14 of the Penal Code was no different. That is where the minimum age of criminal responsibility was housed.

However, the paper also noted a challenge in Section 14 of the Penal Code. It introduces the minimum age of criminal responsibility for a male child to have carnal knowledge. The paper notes that the High Court has been unsettled on whether the presumption that a male child under the age of 14 cannot have carnal knowledge is rebuttable or not.

Further, the paper identified that, under international law, instruments such as CRC and ACRWC do not provide for an actual minimum age of criminal responsibility. This uncertainty led to different states imposing different measures on children. However, General Comment No 24 of 2019 rescued the situation by recommending to member states that 14 years should be the minimum age of criminal responsibility for children. The Committee arrived at this age based on scientific research.

The Committee has criticised having a range on the minimum age of criminal responsibility, a system that Kenya uses. Its lamentations are pegged on the reasoning that courts will have too much discretion to determine criminal responsibility, resulting in differential treatment. This is contrary to the principle of non-discrimination under the CRC.

Lastly, the paper documented how Kenya arrived at a minimum age of 12 and 14 on the lower and higher side of criminal responsibility, respectively. The paper notes that Kenya has maintained the range in the *doli incapax* rule, a range that the Committee has abandoned and criticised. Parliament had an opportunity to implement the recommendations of

the Committee, abolish the range, and set the minimum age of criminal responsibility at 14 years. However, it failed to do so despite meaningful contributions from stakeholders at the drafting stages.

Parliament should not carry the cross alone. Other vital stakeholders had an opportunity to capture and publicise General Comment No 24 in their reports and guiding documents. This could have influenced Parliament to legislate according to internationally-accepted standards. They also appeared to be silent on the recommendations of General Comment No 24 at the time.

The paper summarises its recommendations as follows:

- a Kenya should abandon the range under Sections 221(1) & (2) of the Children Act, 2022, as per the recommendations of the Committee, to avoid judicial officers' unchecked discretion that could lead to discriminatory treatment.
- b Kenya should work on a legislative amendment to Section 221 of the Children Act 2022 and adopt age 14 as the absolute minimum age for criminal responsibility.
- c To avoid differential interpretations of Section 14(3) of the Penal Code, one minimum standard of criminal responsibility should be used to determine criminal responsibility even in sexual offences.
- d Alternatively, Parliament should repeal Section 14(3) of the Penal Code.
- e Another option is that the High Court, properly moved, should seize jurisdiction and issue an interpretative statement of the position of Section 14(3) of the Penal Code in light of the Children Act, 2022.