

# CHILDHOOD UNDER MALAWIAN LAWS AS THE CONSTITUTION BECOMES OF AGE

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## ABSTRACT

*The year 1994 marked the beginning of a new constitutional era for Malawians in general but, most importantly, for children as the future custodians of the Malawi nation. Those who were born in 1994 by international standards became adults in 2012 as the Constitution itself became of age. Thus, the year 2012 marked a significant year for children in Malawi as the age of 18 is internationally recognised as the end of childhood. However, despite the Constitution attaining the age of 18, it offers very limited protection to children as far as the definition of a child is concerned as the only section providing for children's rights applies to persons aged below 16. Much as this position falls far below international standards, it has regrettably been replicated in the reform of child-related laws in Malawi wherein a child is defined as a person below the age of 16. Thus, children aged between 16 and 17 cannot benefit from the special protections for children heralded by the new constitutional era. As a result, although we may talk of the Constitution becoming of age in 2012, by Malawian standards it became of age at 16, in the year 2010. This article underscores the significance of expanding the definition of a child to include those aged between 16 and 18 years. It highlights the need for the enhanced protection of children by establishing minimum ages of childhood that are compatible with international, regional and comparative domestic standards. In particular, Malawi should expand the general definition of a child to 18, as well as revise and increase the minimum ages of marriage and of criminal responsibility, both of which are significantly low relative to international, regional and emerging comparative domestic standards.*

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## I INTRODUCTION

All over the world, the legal protection of children is not an issue that states have to debate about because there is a general understanding and acceptance that children deserve special care, attention and protection. How much legal protection to give children depends on the context in which children live, and thus differs from state to state. This is where the international and regional legal frameworks become important to guide states. Among the many issues on which there are variations amongst states is the legal understanding of a child when it comes to different aspects of life. The problem begins with the general definition of a child and extends to the categorisation of minimum ages of capacity to do certain things or bear certain competencies, such as the minimum ages of marriage and of criminal responsibility. As Olowu states, the adoption of the Convention on the Rights of the Child ('CRC')<sup>1</sup> by the General Assembly of the United Nations ('UN') in 1989 'signalled the beginning of an era of concrete efforts by nations of the modern world to give legal recognition and protection to the rights of children'.<sup>2</sup> The CRC 'brought about a paradigm shift in how we think of children and how we treat [them]'.<sup>3</sup> Within the African region, this legal recognition of children's rights was further enhanced by the adoption in 1990 of the African Charter on the Rights and Welfare of the Child ('African Children's Charter')<sup>4</sup> by the then Organisation of African Union ('OAU'), which was later superseded by the African Union ('AU'). The obligations imposed by both the CRC and the African Children's Charter on states parties include to recognise the rights, freedoms and duties enshrined in these treaties by, among other things, adopting legislative and other measures to realise these rights.<sup>5</sup> The African Children's Charter has been commended for granting greater protection to the rights of the child in some areas.<sup>6</sup>

In 1994, Malawi adopted a democratic Constitution<sup>7</sup> which, among its

1 GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force on 2 September 1990.

2 D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10(2) *International Journal of Children's Rights* 127.

3 BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Public Law* 1.

4 OAU Doc CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

5 Article 1, ACRWC and art 4 of the CRC.

6 See, eg, UNICEF Innocenti Research Centre 'Law reform and implementation of the Convention on the Rights of the Child' (2007) 17, available at [www.unicef-irc.org/publications/pdf/law\\_reform\\_crc\\_imp.pdf](http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf) (accessed 1 January 2012).

7 Act No 20 of 1994.

strengths, contained a Bill of Rights, a feature that was absent in the 1966 Constitution of Malawi. What is significant about this Bill of Rights is not just the fact that it brought about an era of recognition of human rights in Malawi, but also that it recognises various rights specific to children. Thus, as a state party to both the CRC and the African Children's Charter,<sup>8</sup> in keeping with the general obligations under these two instruments, Malawi embraced children's rights in section 23 and other sections of the Constitution. In 2010, Malawi adopted the Child Care, Protection and Justice Act.<sup>9</sup> This solidified the recognition of the rights of Malawian children who, prior to this Act, were mainly regulated under the Children and Young Persons Act of 1969<sup>10</sup> and several other statutes. As Chirwa and Kaime rightly note, the 1969 Act was 'not anchored within a human rights based approach to child justice'.<sup>11</sup> By contrast, the Child Care, Protection and Justice Act was founded on the underlying principle of the 'best interests of the child', and constitutes the first statute to expressly embrace this principle in Malawi.<sup>12</sup> This principle has now also been incorporated in section 23 of the Constitution.<sup>13</sup>

However, although the Constitution specifically protects children and the Child Care, Protection and Justice Act is supposed to be a single bank for matters related to children, providing them legal protection and for their welfare, there are some serious gaps in both these instruments pertaining to the definition of a child. The definition of a child is one complex aspect of children's rights which determines the category of persons to whom certain rights apply. This article explores the issue of childhood by looking at the general definition of a child, the minimum age of marriage and the minimum age of criminal responsibility under Malawian laws in the light of international, regional and emerging comparative domestic standards.<sup>14</sup>

8 Malawi ratified the CRC on 2 January 1991 and the ACRWC on 10 September 1999, both without any reservation.

9 Act No 22 of 2010.

10 Cap 26:03 of the Laws of Malawi.

11 DM Chirwa & T Kaime 'Where are the missing pieces? Constructing a mosaic of the CRC and the African Children's Charter in Malawi's law and policy' (2008) 2(1) *Malawi Law Journal* 85, 112.

12 This is also how the Bill was described by others. See A Stapleton 'The state of juvenile justice in Malawi', CYC-Online, April 2000, available at <http://www.cyc-net.org/cyc-online/cycol-0400-malawi.html> (accessed 20 November 2011); and Chirwa & Kaime, as above, 85.

13 See Constitution (Amendment) Act No 11 of 2010.

14 The minimum ages of employment and recruitment into the army are not discussed because both comply with international standards. The minimum age of employment is 14 years. See sec 21(1) of the Employment Act No 6 of 2000 (even though this Act does not apply to domestic labour). The minimum age of recruitment into the army is 18. See sec 14 of the Army Act, Cap 12:01 of the Laws of Malawi. Article 2(4) of the ILO Convention 138, Minimum Age Convention, 1973, prescribes 14 years as the minimum age of employment for developing countries.

## II GENERAL DEFINITION OF A CHILD

The Constitution does not provide a general definition of a child. However, in section 23(6), it stipulates that for purposes of that section, a child is a person aged below 16. This is not a general definition of a child because it pertains only to those rights listed under section 23. This section provides that children are entitled to equal treatment before the law and that the best interests shall be a primary consideration in all decisions affecting them. It further provides that children have a right to a name and nationality, to know and be raised by their parents, and to be protected from economic exploitation or any work that is likely to be hazardous, harmful to their health or to interfere with their education. This section has generally been understood as providing a general definition of a child, but this view is clearly not correct. For purposes of criminal justice, the Constitution recognises that persons aged below 18 are entitled to treatment consistent with the special needs of children.<sup>15</sup> Thus, there is no harmony within the Constitution itself regarding who a child is. This is not entirely problematic, as children may be deemed autonomous enough to do certain things and deserving of protection in other areas. However, it is reasonable to expect the Constitution to define the various specific ages of childhood in a rational and coherent manner.

The general definition of a child in Malawi is to be found in section 2 of the Child Care, Protection and Justice Act, which provides that a child is ‘a person below the age of sixteen years’, and that the term ‘child’ shall, ‘if the age of the person is unknown, include a person who appears to be below sixteen years of age’. These provisions do not resonate with international standards and are also contrary to trends within Africa, where 18 is the overarching age of a child in a majority of countries.<sup>16</sup> In a nation like Malawi, where the birth registration system is ineffective and, as a consequence, a large majority of children are not registered, merely providing that a ‘child includes a person who appears to be below 16’ poses a serious threat to the legal protection of children who may appear to be above 16 when in fact they are not. The ‘appearance’ test is not in line with international standards, which require that in the absence of documentation relating to age, the bene-

Article 38 of the CRC prohibits the involvement of children aged below 18 years in directly in hostilities.

<sup>15</sup> Section 42(2)(g) of the Constitution, as amended by Act No 11 of 2010.

<sup>16</sup> See African Child Policy Forum *The African report on child well-being* (Addis Ababa: African Child Policy Forum, 2013, forthcoming).

fit of doubt must weigh in favour of the person claiming to be a child.<sup>17</sup>

In section 2 of the repealed Children and Young Persons Act, a child was defined as a person below the age of 14 and the appearance test prevailed for purposes of determining the age of a person where evidence was lacking. It provided that a child was 'a person who, in the absence of legal proof to the contrary, is, in the opinion of the court having cognisance of the case in relation to such person, under the age of fourteen years'. The same section also defined a 'young person' as 'a person who, in the absence of legal proof to the contrary, is, in the opinion of the court having cognisance of the case in relation to such person, fourteen years of age or upwards and under the age of eighteen years'. Furthermore, it defined a 'juvenile' as including a child and a young person, which meant that a juvenile was a person under the age of 18 years. Due to the negative connotations associated with the term 'juvenile', the tendency now is to use the term 'child', especially here in Africa. Archaic as the term may be, the fact that the Children and Young Persons Act had these different classifications of childhood – young person and juvenile – meant that it recognised special protections for all persons below the age of 18, who by international standards are regarded as children. In comparison, under the current Child Care, Protection and Justice Act, a child is a person below the age of 16, which is a step backward from the position tenable under the Children and Young Person's Act.

Article 1 of the CRC defines a child as every human being below the age of 18 years 'unless under the law applicable to the child, majority is attained earlier'. Article 2 of the African Children's Charter defines a child as 'every human being below the age of 18 years'. By acknowledging that the duration of childhood is viewed differently in different legal systems, the CRC allows states to determine a lower upper cut-off point for childhood whereas the African Children's Charter sets a uniform age at which childhood ends, thereby ensuring that young people enjoy favourable provisions in countries where adulthood is attained earlier.<sup>18</sup> Since the African Children's Charter sets a uniform age without any qualification, an African country that is party to both treaties is obliged to adopt a higher standard set by either treaty.<sup>19</sup> Thus, Malawi is obliged to adopt the general definition contained in article 2

17 See The Munyonyo Declaration on Justice for Children in Africa, adopted at the Global Conference on Child Justice in Africa, 7–8 November 2011, in Kampala, Uganda, available at [www.kamplaconference.info](http://www.kamplaconference.info) (accessed 1 June 2012).

18 DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10(2) *International Journal of Children's Rights* 157, 158; Olowu, above note 2, 127, 130.

19 As above.

of the African Children's Charter. This does not mean that the general definition of childhood must apply to all aspects of life. Children's rights recognise the autonomy of the child, which implies the capacity of the child to decide for himself or herself and to participate in decisions and matters affecting him or her. In setting specific minimum ages of capacity, an appropriate balance has to be struck between ensuring and respecting the child's autonomy, and providing protection to the child.

In 2006, the Malawi Law Commission, in its discussion paper, submitted that the Constitution does not provide a general definition of a child and, hence, it proposed that Malawi should adopt, in line with international standards, 18 years as the end of childhood.<sup>20</sup> In its report on the review of the Children and Young Person's Act, the Malawi Law Commission reiterated this recommendation.<sup>21</sup> However, in the subsequent consultations on and considerations of these recommendations, the age of 16 was adopted. It is not clear why Malawi opted for this definition but a preliminary inquiry suggests that two factors played an influential part. The first is that section 23(6) of the Constitution uses that age prescription, albeit for purposes of the rights of children enshrined in section 23. The second factor has to do with parallel discussions that were going on in Parliament seeking to set the minimum age of marriage at 16 (discussed in greater detail later).

At the age of 18, people are usually more mature both mentally and physically to handle the complexities of life. It is an age where the evolving capacities of children are said to have developed. That is why in most countries, Malawi inclusive, the voting age is also set at 18.<sup>22</sup> It does not make sense to say childhood ends at 16 but only adults from the age of 18 have the capacity, for example, to vote in national elections<sup>23</sup> or get a driving licence.<sup>24</sup> Where then are those aged between 16 and 18 years placed? There is no legal recognition of them as adults for purposes of performing activities prescribed for adult citizens, yet these persons do not qualify as children. This lacuna creates a two-year embargo where one is recognised neither as a child nor as an adult. Thus, the Constitution is deficient in that it defines a 'child'

20 Malawi Law Commission 'Human rights under the Constitution of the Republic of Malawi' (2006) 16–17, available at [www.lawcom.mw/docs/discussion\\_paper1\\_human\\_rights.pdf](http://www.lawcom.mw/docs/discussion_paper1_human_rights.pdf) (accessed 11 May 2012).

21 Malawi Law Commission *Report on the review of the Children and Young Person's Act* (2005).

22 See sec 77(2)(b) of the Malawi Constitution and sec 15 of the Parliamentary and Presidential Elections Act No 31 of 1993 (Cap 2:01 of the Laws of Malawi).

23 As above.

24 Section 21(1)(II) of the Road Traffic Act No 26 of 1996 (Cap 69:01 of the Laws of Malawi).

for very limited purposes and restrictively.<sup>25</sup>

### III MINIMUM AGE OF MARRIAGE

#### A The position in Malawi

The minimum age of marriage is the age below which a person may not be allowed to enter into marriage. In Malawi, the Constitution and the Marriage Act,<sup>26</sup> both of which allow for persons aged below 18 to marry with parental consent, provide for the minimum age of marriage. Section 19 of the Marriage Act, as amended by Act No 29 of 1997, provides:

If either party to an intended marriage, not being a widower, widow or divorced person, is not over eighteen years of age, the written consent of the father or mother, or if both be dead or of unsound mind or absent from Malawi, of the guardian of such party, must be produced annexed to such affidavit as aforesaid, before a licence can be granted or a certificate issued.

However, the Malawi Law Commission proposed 18 years as the minimum age of marriage in its report on the review of marriage and divorce laws in Malawi.<sup>27</sup> This proposal was included in section 15 of the Marriage, Divorce and Family Relations Bill ('Marriage Bill').<sup>28</sup> The proposal deals away with the provision for persons aged below 18 to marry with parental consent. While this is a commendable development, it is worth noting that unless section 22 of the Constitution is amended to reflect this development, the Marriage Bill will have no effect.<sup>29</sup>

Section 22(6) of the Constitution provides that persons aged 18 years and above cannot be prevented from entering into a marriage. Section 22(7) of the Constitution states that persons aged between 15 and 18 years can marry provided that they obtain parental consent. However, the state is obligated actively to discourage marriages between or with children aged below

25 DM Chirwa 'Harmonisation of national and international laws to protect children's rights: The Malawi report' (2006), unpublished paper prepared for the African Child Policy Forum, 16.

26 Act No 3 of 1902 (Cap 25:01 of the Laws of Malawi). Before the 1997 amendment, only those aged 21 and above were allowed to marry without parental consent.

27 Malawi Law Commission *Report on the review of marriage and divorce laws in Malawi* (2006) 25, 36.

28 As above, 110.

29 Section 5 of the Constitution provides that any law or provision that is inconsistent with the provisions of the Constitution shall be invalid to the extent of such inconsistency.

15 years.<sup>30</sup> Section 22 presents problems, as it is open to varied interpretations. The Malawi government acknowledges that the Constitution is unclear on the minimum age of marriage.<sup>31</sup> Based on this section, to some the minimum age of marriage is 18 years<sup>32</sup> or 15 years,<sup>33</sup> and to others there is no minimum age of marriage in Malawi.<sup>34</sup>

However, it is argued that the minimum age of marriage in Malawi is 15 years because, pursuant to section 22(7) of the Constitution, a 15-year old boy or girl can get married with parental consent whereas section 22(6) merely establishes that upon attaining the age of 18, the requirement for parental consent falls out. Section 22(8), which provides that 'the State shall actively discourage marriage between persons where either of them is under the age of fifteen years', cannot be construed to mean that there is no minimum age of marriage in Malawi because, as already submitted by Chirwa, 'such a construction would not be in keeping with section 22 as a whole, and particularly the right of children in section 23 to be protected from economic exploitation or any treatment that is (likely) to be hazardous; interfere with their education; or be harmful to their health or physical, mental, spiritual or social development'.<sup>35</sup> Thus, as Chirwa further submits, the cumulative effect of sections 22 and 23 is that 'children under 15 years of age are unable to

30 Section 22(8) of the Constitution.

31 Committee on the Rights of the Child 'Consideration of reports submitted by states parties under Article 44 of the Convention: Initial periodic state party reports due in 1998: Malawi', CRC/C/MWI/2, 17 July 2008, para 12.

32 See, eg, LMwambene *The impact of the Bill of Rights on African customary family laws: A study of the rights of women in Malawi with some reference to developments in South Africa* (LLD thesis: University of the Western Cape, 2008) 176; Committee on the Rights of the Child 'Consideration of reports submitted by states parties under Article 44 of the Convention: Initial state party report due in 1993: Malawi', CRC/C/8/Add.43, 26 June 2001, para 64, wherein Malawi reported that the Constitution provides that the minimum legal age of marriage is 18 years for all persons (even though in para 66, the report submitted that the law does not expressly prohibit marriages of persons below the age of 15 years).

33 Para 62, Malawi's Draft Report of the Working Group on the Universal Periodic Review, Human Rights Council, A/HRC/WG.6/9/L.2, 5 November 2010. The report avers that anyone could marry at the age of 15 with the consent of his or her parents based on the constitutional provision. Thus, the Malawi government in its submission to the Human Rights Council adopts 15 as the minimum age of marriage.

34 World Vision International, in its report submitted to the first Universal Periodic Review, indicated in para 27 that the Malawi does not have a minimum age of marriage and that the state was only obliged to discourage rather than forbid child marriages. See extracts from the 'National Report', the 'Compilation of UN Information' and the 'Summary of Stakeholder's Information', available at <http://www.crin.org/resources/infoDetail.asp?ID=23512> (accessed 9 March 2011).

35 DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49(2) *Journal of African Law* 207, 215.



marry whether with or without their parents' consent'.<sup>36</sup> The Malawi government also recognises that, constitutionally, 15 years is the minimum age of marriage as indicated in its 2007 report to the UN Committee on the Rights of the Child ('CCR Committee') wherein the government submitted that it was considering a Marriage, Divorce and Family Relations Bill which sought to raise the minimum age of marriage to 18 years, as suggested by the constitutional review process which recommended the minimum age of marriage with consent to be raised to 18 years and the minimum age of marriage without parental consent to 21 years.<sup>37</sup>

Ordinarily, the Constitution, as the fundamental law of the land, should provide stronger protection. Thus, several calls have been made to increase the minimum age of marriage, the result of which was that, in 2008, the then President of Malawi, Dr Bingu wa Mutharika, sought to raise it to 16 years via Constitutional Amendment Bill No 13 of 2009. The amendment did not go through due to stiff opposition from civil society who claimed that 16 years was still too low an age for children to get married. Although Parliament had already passed the Bill, the President acting under public pressure refused to assent to it and referred it back to Parliament. At the time of writing, no further action had been taken on this Bill.

The Child Care, Protection and Justice Act does not stipulate a minimum age of marriage. Section 81 of the Act merely provides that no person shall force a child into a marriage or cause a child to be betrothed, the contravention of which attracts imprisonment of up to 10 years under section 83 of the Act. Thus, there are criminal sanctions for betrothing or forcing a child to marry. Related to the minimum age of marriage is the issue of sexual consent. Section 160A of the recently enacted Penal Code (Amendment) Act<sup>38</sup> also states that a 'child' means a child under the age of 16 years. Section 160B(1) of the same Act provides that 'any person who engages or indulges in sexual activity with a child shall be guilty of an offence and shall be liable to imprisonment for fourteen years'.<sup>39</sup> Thus, by implication, the minimum age of sexual consent is 16. This does not tally with the minimum age of marriage currently tenable under the Constitution, namely 15. Normally, the minimum age of sexual consent ought not to be higher than the minimum age of marriage; otherwise, the marriage will not be consummated until the minimum age of sexual consent is reached, which is impractical to police.

36 As above.

37 Committee on the Rights of the Child, above note 31, para 88.

38 Act No 1 of 2011.

39 The Penal Code (Amendment) Act No 1 of 2011, came into force on 28 January 2011.

While Malawi should be commended for having a uniform minimum age of marriage for both girls and boys, which is not the case in some African countries,<sup>40</sup> the fact that such age is lower than that of sexual consent remains a concern. Furthermore, 'by allowing persons aged between 15 and 18 to enter into marriage with the consent of their parents, the Malawi Constitution fails to categorically prohibit child marriage'.<sup>41</sup> Child marriage is a harmful practice that is prohibited by international and regional standards which peg the minimum age of marriage at 18.<sup>42</sup>

## B International, regional and domestic approaches

The African region has been instrumental in pioneering a high minimum age of marriage of 18. The African Children's Charter, which defines a child as a person aged below 18 years,<sup>43</sup> was the first treaty to peg the minimum age of marriage at 18 in its article 21(2).<sup>44</sup> Similarly, article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('African Women's Protocol')<sup>45</sup> sets the minimum age of marriage for women at 18 years and prohibits harmful practices.<sup>46</sup> The SADC Protocol on Gender and Development<sup>47</sup> defines a child in article 1(2) as a person aged below 18, and in article 8(2) sets the minimum age of marriage at 18.

Within the UN system, there has been a long history of standards for protecting children from early or forced marriages. The CRC, which also

40 See, eg, in Tanzania, sec 13(1) of the Law of Marriage No 5 of 1971 sets the minimum age of marriage at 18 years for boys and 15 years for girls; in Mali, sec 282 of the Code of Persons and the Family 2011 sets the minimum age of marriage at 18 years for men and 16 years for women.

41 Mwambene, above note 32, 177.

42 Paragraph 49, Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights (1993), A/CONF.157/23, urges states to repeal existing laws and regulations and to remove customs and practices which discriminate against and cause harm to the girl child.

43 Article 2 of the African Children's Charter.

44 It provides:

'(1) States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.'

45 Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, 13 September 2000; reprinted in (2001) 1 *African Human Rights Law Journal* 40, entered into force 25 November 2005.

46 Articles 6(b) and 5 respectively.

47 Available at [http://www.sadc.int/files/8713/5292/8364/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf) (accessed 15 July 2011).

defines a child as a person aged below 18,<sup>48</sup> does not expressly prohibit child marriages but protects the child from abuse, exploitation and harm, among other things.<sup>49</sup> This can be construed to preclude states parties from permitting or giving validity to marriages between or with persons who have not attained majority.<sup>50</sup>

Article 16(1) of the Universal Declaration on Human Rights ('UDHR')<sup>51</sup> provides: 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution'.<sup>52</sup> The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery<sup>53</sup> calls upon states to set a minimum age of marriage.<sup>54</sup> The UN Convention of Consent to Marriage, Minimum Age of Marriage and Registration of Marriages<sup>55</sup> does not set a minimum age of marriage but requires that states should do so.<sup>56</sup> Likewise, the UN Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')<sup>57</sup> does not specify the minimum age of marriage. It, too, requires states to take all necessary action, including legislation, to specify the minimum age for marriage.<sup>58</sup> However, in its General Recommendation No 21 on equality in marriage and family relations, the CEDAW Committee prescribed 18 as the minimum age of marriage.<sup>59</sup>

Marrying before the legally prescribed age bears different consequences in Africa. In some countries, such action constitutes a criminal offence.<sup>60</sup> In

48 Article 1 of the CRC.

49 See art 19.

50 See para 36 of the Vienna Declaration and Programme of Action.

51 GA Res 217A (III), UN Doc A/810 at 71 (1948).

52 Article 16(2) of the UDHR requires that marriage be entered into only with the free and full consent of the intending spouses.

53 226 UNTS 3, entered into force April 30, 1957.

54 Article 2.

55 521 UNTS 231, entered into force 9 December 1964.

56 Article 2.

57 GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981.

58 Article 16(2). See also CEDAW General Recommendation No 21, paras 36, 38, and 39.

59 Committee on the Elimination of Discrimination against Women, General Recommendation 21 'Equality in marriage and family relations', Thirteenth session, 1992, UN Doc A/49/38 at 1 (1994), para 36.

60 For example, Botswana, where sec 63 of the Children's Act 2009 makes it a criminal offence to marry a child which attracts a fine of not less than P30 000 but not more than P50 000, or imprisonment for a term of not less than seven years but not more than 10 years, or both.

others, the mere ban or nullification of such marriages suffices.<sup>61</sup> Yet in others, the minimum age of marriage is prescribed without expressly criminalising or banning it.<sup>62</sup> Malawi has adopted the first approach. Section 81 of the Child Care, Protection and Justice Act provides that no person shall force a child into marriage or cause a child to be betrothed, the contravention of which attracts imprisonment of up to 10 years.<sup>63</sup>

Thirty-two African countries have adopted 18 years as the minimum age of marriage for both girls and boys,<sup>64</sup> and four African countries above the age of 18 for both girls and boys.<sup>65</sup> In Guinea Bissau, Malawi, Sudan and Zambia, the minimum age of marriage is below 18 for both girls and boys.<sup>66</sup> The minimum age of marriage is discriminatory based on gender and sex in 14 African countries, with the girl child having a lower minimum age of marriage than boys do.<sup>67</sup> Such kind of differentiation does not accord with the African Children's Charter, the CRC and other international and regional instruments, which prohibit discrimination on grounds of sex or gender. Such provisions ought to be abolished because they 'assume incorrectly that women have a different rate of intellectual development from men or that their stage of physical and intellectual development at marriage is immaterial'.<sup>68</sup> Malawi has done well to adopt an approach that does not differentiate between girls and boys on the minimum age of marriage, the remaining

61 For example, The Gambia, where sec 24 of the Children's Act 2005 provides that 'subject to the provisions of any applicable personal law, no child is capable of contracting a valid marriage and a marriage so contracted is voidable'.

62 For example, The Comoros, where sec 14 of Family Code Act No 5 of 2005 provides that 'a man and woman who have not reached eighteen (18) years of age cannot contract marriage'.

63 Section 83 of the Child Care, Protection and Justice Act.

64 These are Angola, Benin, Botswana, Cape Verde, Central African Republic, Comoros, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, The Gambia, Ghana, Guinea, Kenya, Liberia, Madagascar, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, São Tomé and Príncipe, Sierra Leone, Somalia, South Africa, South Sudan, Swaziland, Togo, Tunisia and Uganda. See African Child Policy Forum, above note 16.

65 Algeria, Libya, Lesotho, and Rwanda. See African Child Policy Forum, above note 16.

66 Sudan has the lowest minimum age of marriage at 10 for boys or puberty for girls as stipulated in secs 34 and 40 of the Personal Status of Muslim Marriages Act 1991. For non-Muslim marriages, the minimum age of marriage is 13 for girls and 15 for boys as per sec 10 of the Marriage of Non-Muslims Act 1926.

67 Thus, in Cameroon, the DRC, Gabon, Niger, Seychelles and Tanzania, it is 15 for girls and 18 for boys; in Senegal, Swaziland and Zimbabwe 16 for girls and 18 for boys; in Chad 17 for girls and 18 for boys; in Burkina Faso 17 for girls and 20 for boys; in Congo Brazaville and Liberia, 18 for girls and 21 for boys.

68 Para 38, Vienna Declaration and Programme of Action. Also see International Centre for Research on Women 'How to end child marriage: Action strategies for prevention and protection' (2007), available at <http://www.icrw.org/files/publications/How-to-End-Child-Marriage-Action-Strategies-for-Prevention-and-Protection-Brief.pdf> (accessed 30 November 2012).

concern being that the minimum age for both boys and girls is too low and needs to be increased.

### C Importance of the minimum age of marriage

It is important to have a high minimum age of marriage that is consistent with international and regional standards because such standards aim to protect children from harm and ensure their best interests, welfare and development. Marriage involves the assumption of important responsibilities. Hence, it should not be permitted before one has attained full maturity and capacity to act.<sup>69</sup> Once a person gets married, he or she loses the privilege of being treated as a child. When minors (persons below the age of 18) marry and have children, not only are their health and life threatened, their intellectual and physical development is endangered too. Not many are economic independent before the age of 18, and the lack of economic resources means that the lives of both the parties to the marriage and their children will most likely be one of hardship. If one party is an adult and the other a child, the dependence of the one on the other will most likely form a basis for abuse and oppression. At the age of 18, the evolving capacities of both girls and boys are said to be have matured generally. By this age, children will have completed both primary and secondary education. While persons of this age may not be economically autonomous, this serves not as an argument for abolishing or lowering the minimum age of marriage but rather for discouraging marriages between young persons until they have acquired tertiary education or vocational skills.

In most cases, gender-based factors are strongly at play in child or early marriages in Africa. Child marriages are associated with early childbirth, which leads to high rates of infant, and maternal mortality rates because, physiologically, children are not ready to give birth to fellow children. Gender factors contributing to girls getting married early include the lack of access to education, the demand for girls labour (especially domestic labour) and the preference for male children as the pillar of families.<sup>70</sup>

The issue of child marriage is difficult to deal with because most marriages are contracted under customary law where there is no prescribed minimum age of marriage; the only determining factor for capacity being

69 See paras 36 and 37, Vienna Declaration and Programme of Action.

70 S Tsegaye *Child poverty in Africa: An overview* (Addis Ababa: African Child Policy Forum, 2009) 72.

the attainment of puberty.<sup>71</sup> Customary marriages are hardly registered and this problem makes it difficult for authorities to check the age of those who are marrying.<sup>72</sup> It is therefore important that the registration of all forms of marriages, whether civil or customary, be promoted and that the government enforces the minimum age of marriage.<sup>73</sup>

#### IV MINIMUM AGE OF CRIMINAL RESPONSIBILITY

In his book entitled 'Criminal law', Colin Howard contends that 'no civilised society regards children as accountable for their actions to the same extent as adults'.<sup>74</sup> Harper J of the Supreme Court of Victoria has also expressed this point thus: '... the wisdom of protecting young children against the full rigour of the law is beyond argument. The difficulty lies in determining when and under what circumstances should it be removed.'<sup>75</sup> Thus, the minimum age at which a child cannot be held criminally responsible remains an important aspect of child justice. In prescribing a particular minimum age of criminal responsibility, states must consider the evolving capacities of a child.

##### A The position in Malawi

The Constitution and the Child Care, Protection and Justice Act do not provide for a minimum age of criminal responsibility. Insofar as criminal justice is concerned, however, section 42(2)(g) of the Constitution recognises that persons aged below 18 are entitled to treatment consistent with the special needs of children.<sup>76</sup> Section 122 of the Child Care, Protection and Justice Act, which is the application section for Part IV of the Act, states that 'the provisions of this Part shall apply to the determination of age for the purposes of criminal responsibility under section 14 of the Penal Code and for purposes of this Act'. Thus, the Act defers to the Penal Code<sup>77</sup> on the issue of the minimum age of criminal responsibility, a position that may be regarded

71 S Poulter 'African customs in an English setting: Legal and policy aspects of recognition' (1988) *Journal of African Law* 210.

72 Mwambene, above note 32, 182.

73 In line with para 39, Vienna Declaration and Programme of Action.

74 C Howard *Criminal law* 4th ed (Sydney: Law Book Company, 1982) 343.

75 *R (A Child) v Whitty* (1993) A Crim R 462, Supreme Court of Victoria.

76 Section 42 deals with the arrest, detention and fair trial. This section was amended by the Constitution (Amendment) Act No 11 of 2010.

77 Cap 7:01 of the Laws of Malawi.

as a setback in ensuring holistic consolidation of laws on children. Section 14 of the Penal Code, as amended by Penal Code (Amendment) Act,<sup>78</sup> prescribes 10 years as the minimum age of criminal responsibility, and creates a rebuttable presumption of criminal incapacity for children aged between 10 and 14 years. The Penal Code (Amendment) Act was passed by Parliament about 6 months after the Child Care, Protection and Justice Act was adopted, which means that in those six months, while child rights had already evolved in many different respects, the old position for minimum age of criminal responsibility (seven years with a rebuttable presumption of criminal incapacity between the ages of seven and 12) still applied.<sup>79</sup>

## B International, regional and domestic trends

Neither the CRC nor the African Children's Charter recommends a specific minimum age of criminal responsibility for states. Article 40(3) of the CRC provides that 'States Parties shall seek to promote, among other things, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. Article 17(4) of the African Children's Charter provides that 'there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'.

Rule 4 of the UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'), adopted before the adoption of the CRC and the African Children's Charter, recommended that the minimum age of criminal responsibility should not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.<sup>80</sup> Although both the African Children's Charter and the CRC do not prescribe the actual age by which the child must be presumed to have capacity to commit criminal offences, General Comment No 10 of the CRC Committee recommends 12 as an acceptable minimum age of criminal responsibility and urges states to set it as high as possible.<sup>81</sup> According to the Committee, a minimum age of criminal responsibility below the age of 12 years is not internationally acceptable.<sup>82</sup> States parties that have prescribed lower minimum ages of criminal responsibility are urged to increase it to 12 years as 'the absolute

78 Above note 38.

79 See the old sec 14 of the Penal Code.

80 GA Res 40/33, UN GAOR, 40th Sess, Supp No 96, UN Doc A/RES/40/33, 29 November 1985.

81 CRC/C/GC/10, 9 February 2007.

82 As above, para 16.

minimum age' and to continue to increase it to a higher age level. In this regard, General Comment 10 discourages a system of two minimum ages as it 'is often not only confusing but leaves much to the discretion of the court/judge and may result in discriminatory practices'.<sup>83</sup> Furthermore, the Committee has urged the states parties with higher minimum ages not to lower it to the age of 12, and emphasised that 'a higher minimum age of criminal responsibility, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40(3)(b) of the CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected'.<sup>84</sup>

In its concluding observations on Malawi's state party reports, the CRC Committee persistently criticised Malawi's minimum age of criminal responsibility reflected in the Penal Code before the 2011 amendment, arguing that it was 'too low'.<sup>85</sup> The Penal Code Amendment Act of 2011 is a welcome response to this criticism, although by setting the minimum age at 10 years, it still falls short of international standards.

The standards developed by the AU expect no less. Paragraph O(d) of the 1999 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides:

States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law. The age of criminal responsibility should not be fixed below 15 years of age. No child below the age of 15 shall be arrested or detained on allegations of having committed a crime.

Thus, according to the African regional framework, 15 years is the recommended minimum age of criminal responsibility. As a 1999 standard, this was developed way before the 2007 UN Committee's recommendation of 12 years in General Comment No 10, although the latter has been more publicised than the former. The standards recommend by the AU and the

83 As above, para 16.

84 As above, para 17.

85 Committee on the Rights of the Child 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding observations of the Committee on the Rights of the Child: Malawi', 2 April 2002, CRC/C/15/Add 174, para 19(b) & (e). In the 2009, the Committee also reiterated that the minimum age of criminal responsibility be raised in accordance with General Comment No 10. See Committee on the Rights of the Child 'Consideration of reports submitted by states parties under article 44 of the Convention: Concluding observations of the Committee on the Rights of the Child: Malawi', 27 March 2009, CRC/C/MW1/CO/2, para 76(a).



UN are consistent with public perceptions of criminal responsibility in Malawi. In Malawi's state party report submitted to the UN Committee in 2000, it was reported that popular opinion in Malawi was in favour of 12 years as the minimum age of criminal responsibility because in practice children aged below 12 years were hardly taken to police when they committed criminal offences.<sup>86</sup>

At least 16 African countries, Malawi inclusive, still maintain a minimum age of criminal responsibility below the age of 12. In Mauritania,<sup>87</sup> Namibia,<sup>88</sup> Seychelles,<sup>89</sup> Swaziland<sup>90</sup> and Zimbabwe,<sup>91</sup> the minimum age of criminal responsibility remains at seven years; in Kenya<sup>92</sup> and Zambia<sup>93</sup> eight years; in Ethiopia<sup>94</sup> nine years; and in Cameroon,<sup>95</sup> Côte d'Ivoire,<sup>96</sup> Guinea,<sup>97</sup> Lesotho,<sup>98</sup> South Africa<sup>99</sup> and Tanzania<sup>100</sup> 10 years. On the other hand, in Angola,<sup>101</sup> Cape Verde,<sup>102</sup> Equatorial Guinea,<sup>103</sup> Guinea Bissau,<sup>104</sup> Liberia,<sup>105</sup> Mozambique,<sup>106</sup> and São Tomé and Príncipe,<sup>107</sup> the minimum age of criminal

86 Above note 32, para 56.

87 In Mauritania, the law has in fact been retrogressive. Until 2009, 16 was the minimum age of criminal responsibility under sec 161 of the Criminal Code 1990. Under the Law of the Juvenile Act 2009, the minimum age was reduced to seven, and a rebuttable presumption was introduced for those aged between seven and 15.

88 Committee on the Rights of the Child 'Consideration of reports submitted by states parties under Article 44 of the Convention: Second and third periodic reports of states parties due in 1997 and 2002; Namibia', CRC/C/NAM/2-3, 15 September 2011, para 222.

89 Section 15 of the Penal Code 1955.

90 Committee on the Rights of the Child, 'Consideration of reports submitted by states parties under Article 44 of the Convention: Initial report of states parties due in 1997; Swaziland', CRC/C/SWZ/1, 16 February 2006, para 79.

91 Section 6 of the Criminal Law Codification and Reform Act, Cap 9:23, Act No 23 of 2004.

92 Section 14 of the Penal Code of Kenya 2008.

93 Section 14(1) of the Penal Code, Cap 87 of the Laws of Zambia.

94 Article 52 of the Criminal Code of Ethiopia, Proclamation No 414 of 2004.

95 Section 10 of the Penal Code 1997.

96 Section 116 of the Penal Code 1995.

97 Sections 64 & 66 of the Penal Code 1988.

98 Section 83(1) of the Children's Protection and Welfare Act 2004.

99 Section 7(1) of the Child Justice Act No 75 of 2008.

100 Section 15(1) of the Penal Code 1945. Also see sec 4(1) of the Sexual Offence Special Provisions Act 1998.

101 Statute of Legal Aid for Minors, Decree No 417 of 1971.

102 Section 17 of the Penal Code 2004.

103 See Amnesty International Report 'Human rights in Republic of Equatorial Guinea', available at <https://www.amnesty.org/en/region/equatorial-guinea/report-2010> (accessed 10 May 2012).

104 Article 10 of the Penal Code Law No 4 of 1993.

105 Section 4.1 of the Penal Code 1963.

106 Section 42 of the Penal Code 1886.

107 Section 19 of the Penal Code 2012.

responsibility is 16 years, the highest in Africa. Thus, many African countries have already set a good example on the minimum age of criminal responsibility.

### C The rebuttable presumption of criminal incapacity

Also worthy of consideration is the rebuttable presumption of criminal responsibility.<sup>108</sup> The origin of this rule is traceable to the English legal system. Under the English common law, there was no separate child justice system for children and children aged up to seven years were thought to be incapable of committing crime because they were understood to be incapable of appreciating the consequences of their acts.<sup>109</sup> Between the ages of seven and 14 years, a child was presumed to be incapable of criminal intent unless it could be proven beyond reasonable doubt that the child possessed criminal intent at the time the offence was committed.<sup>110</sup> Thus, an irrebuttable presumption of criminal incapacity existed for children below the age of seven years and a rebuttable presumption existed between the ages of seven and 14 years. From the age of 14, children were considered to hold full criminal responsibility for their acts. This position was exported to common law jurisdictions across the world.

However, questions have increasingly been raised about this rule, whether the rebuttable presumption must be maintained, and when and under what circumstances the presumption must be rebutted.<sup>111</sup> Originally, the rebuttable presumption was intended to operate in favour of the child, but in practice, it has tended to work against the child. Evidence used to rebut the presumption of incapacity often includes evidence that is prejudicial to the child. The 'prosecution is allowed considerable evidentiary concessions whereby normally inadmissible, highly prejudicial material is deemed admissible'<sup>112</sup> such as admissions by the accused during police interviews, including admissions in relation to previous criminality and evidence of surrounding circumstances, like attempts to run from the police or hide the facts.<sup>113</sup> Such evidence has also included prior criminal history, the child's

108 Popularly referred to as the *doli incapax* rule.

109 F Reddington 'Age and criminal responsibility' (2002) 1 *Journal of the Institute of Justice and International Studies* 105, 106.

110 As above.

111 *R (A Child) v Whitty*, above note 75.

112 P Blazey-Ayoub 'Doli incapax' (1996) 20 *Criminal Law Journal* 34, 35.

113 B Fisse *Howard's criminal law* 5th ed (Sydney: Law Book Company, 1990) 476, quoted in G Urbas 'The age of criminal responsibility' (2000) 181 *Trends & Issues in Crime and Criminal*

background, and the testimony of parents, teachers and psychologists.<sup>114</sup>

The CRC Committee has expressed concern about the practice of allowing exceptions to the minimum age of criminal responsibility 'which permits the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible'.<sup>115</sup> The Committee has instead strongly recommended that states 'set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age'.<sup>116</sup> This clearly shows that the Committee is against the rebuttable presumption of criminal incapacity and in favour of raising the minimum age. The Committee's jurisprudence is silent on how to ensure that where it is still used, the rebuttable presumption of criminal incapacity 'sufficiently protects children falling under its rubric'.<sup>117</sup> However, it has recommended that, '[i]n the event that there is no proof of age and it cannot be established that the child is at or above the minimum age', the prosecution of such a child should be prohibited.<sup>118</sup>

Many states have recently confronted the issue of the criminal responsibility of children. Amongst these are Australia, Hong Kong, the United Kingdom, and many countries in Africa.

In Australia, the minimum age of criminal responsibility is 10 years and between the ages of 10 and 14 years, the rebuttable presumption of criminal incapacity applies.<sup>119</sup> Criminal liability is imposed according to rules intended to take into account the level of maturity of the particular young accused.<sup>120</sup> The presumption applies by statute in some states<sup>121</sup> or as part of the common law in other states.<sup>122</sup> The presumption is stated differently in different jurisdictions as requiring proof either of 'actual knowledge'<sup>123</sup> or of

Justice Australian Institute of Criminology 1, 4.

114 M Johnston 'Criminal capacity of children', revised paper based on a joint paper presented with Julie Morgan Legal Aid Commission in May 1999 (unpublished).

115 Para 16 of General Comment No 10.

116 As above.

117 GO Odongo *The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context* (LLD Thesis: University of the Western Cape, 2006) 140.

118 Para 19, General Comment No 10.

119 Above note 113, 2. Urbas explains that until 2000, the Australian Capital Territory and Tasmania had their minimum ages at eight and seven respectively.

120 As above.

121 For example, the Commonwealth, the Australian Capital Territory, Tasmania, Northern Territory, Western Australia and Queensland.

122 For example, New South Wales, South Australia and Victoria.

123 For example, sec 4N of the Commonwealth Crimes Act 1914 and sec 7.2 of the Criminal Code

‘capacity to know’.<sup>124</sup> The standard of ‘actual knowledge’ refers to the child’s appreciation of the wrongfulness of his or her conduct. The standard of ‘capacity to know’ is proven by considering different but comparative classes of misconduct.<sup>125</sup> In order to deal with this divergence, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission proposed that the presumption should be consistently applied in Australia and the prosecution should be required to ‘prove that the child defendant knew that the criminal act for which he or she is charged was wrong at the time it was committed’, thereby endorsing the ‘actual knowledge’ standard and dropping the ‘capacity to know’ criterion.<sup>126</sup> The presumption was retained on the ground of the recognition of the child’s evolving capacities, as it (the presumption) was said to allow for a gradual transition of the child to full criminal responsibility.<sup>127</sup> The presumption, it was argued, has ‘the merit of making the police, prosecutors and the judiciary stop and think, however briefly in some cases, about the degree of responsibility of each individual child’, and has the purpose of protecting children between 10 and 14 from the full force of the criminal law’.<sup>128</sup> Thus, in Australia, the presumption of criminal incapacity can be rebutted by the state by adducing evidence showing that the child had sufficient appreciation of the wrongness of the act. Such evidence must be ‘strong and clear beyond all doubt and contradiction’ and it must not consist merely of evidence of the acts amounting to the offence itself.<sup>129</sup>

In Hong Kong, section 3 of the Juvenile Offenders Ordinance<sup>130</sup> was repealed in 2003 to raise the minimum age of criminal responsibility from

Act 1995 provide: ‘(1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.’

124 For example, sec 29(2) of the Queensland Criminal Code Act 1899 states that ‘A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.’

125 Urbas, above note 113, 4.

126 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission *Seen and heard: Priority for children in the legal process* (1997) para 18:20, available at [www.alrc.gov.au/publications/report-84](http://www.alrc.gov.au/publications/report-84) (accessed 15 July 2012).

127 As above.

128 As above, quoting Cavadino, who further states that in the UK, the presumption ‘should not be abolished unless such a change is also accompanied by a substantial raising of the UK’s unusually low age of criminal responsibility’, see P Cavadino ‘Goodbye *doli*, must we leave you?’ (1997) 9 *Child and Family Law Quarterly* 165, 170.

129 T Crofts ‘Rebutting the presumption of *doli incapax*’ (1998) 62 *Journal of Criminal Law* 185, 186.

130 Cap 226.

seven to 10 years. Between the ages of 10 and 14, a rebuttable presumption of criminal incapacity operates. Hong Kong follows the test for rebutting the presumption laid down in the English case of *R v Gorrie*, where it was said that the prosecution must prove beyond reasonable doubt that at the time of the alleged offence, the child knew that the act constituting the offence was gravely or seriously wrong and not just that the child was naughty or mischievous.<sup>131</sup> Generally, courts in Hong Kong consider the background, age and other circumstances of the child, as well as the unique facts of the case, and what the child said or did both before and after the crime.<sup>132</sup>

According to the Law Commission of Hong Kong, the general view in Hong Kong is that full criminal responsibility should apply to a child aged 14 and above as it is generally assumed that 'by 14 years of age, a person would have reached a degree of social and mental maturity sufficient to make him accountable for his own deeds, including criminal deeds'.<sup>133</sup> However, the Commission also noted that the presumption 'enables criminal sanctions to be applied to young children who are aware of the nature of their conduct, while protecting from prosecution those of a similar age who have not yet reached a sufficient level of maturity'.<sup>134</sup> In the end, the minimum age was increased from seven to 12 years and the rebuttable presumption was maintained for ages between 12 and 14.

In Scotland, children under the age of 16 are prosecuted only on the advice of the Lord Advocate.<sup>135</sup> Until 2010, the minimum age was eight in Scotland even though in 1964, the Committee on Children and of Young Persons recommended the removal of children under the age of 16 from the jurisdiction of criminal courts.<sup>136</sup> However, the Scottish Law Commission took the view that there were enough safeguards against the improper exercise of the Lord Advocate's discretion on the prosecution of children below the age of 16. As a result, the provision was retained. The safeguards are as follows: the Crown must always prove that the child had the requisite *mens*

132 [1918] 83 JP, at 136, per Salter J. This test was further examined in *JM (A Minor) v Runeckles* [1984] 79 Cr App R 255, where it was held that knowledge that his conduct was seriously wrong went beyond being merely naughty or mischievous and knowledge on the part of the child that his conduct was seriously wrong 'was not necessarily an appreciation on the part of the child that the act was morally wrong'. Both cases were discussed in Law Reform Commission of Hong Kong 'Consultation paper on the age of criminal responsibility in Hong Kong' (1999) 6.

132 Law Reform Commission of Hong Kong, as above, 6–7.

133 As above, 38.

134 As above, 30–31.

135 Scottish Law Commission *Report on age of criminal responsibility* (2002) 6.

136 As above; C Badenhorst *Minimum age of criminal capacity* (PhD thesis: University of South Africa, 2006) 23.

rea for the offence; the discretion is subject to the guidelines contained in the Prosecution Code; and the court has to consider the capacity of the child to fully understand and participate in the proceedings against him or her.<sup>137</sup> In Northern Ireland, the Minister of Justice has made an official recommendation to raise the minimum age of criminal responsibility to 12.<sup>138</sup>

In England and Wales, there have been two adjustments to the minimum age of criminal responsibility, first from seven to eight years, by section 50 of the Children and Young Persons Act 1933, and secondly from eight to 10 years by section 16(1) of the Children and Young Persons Act 1963. The rebuttable presumption of incapacity was abolished by section 34 of the Crime and Disorder Act 1998, because the rule was believed to be out of touch with modern English societal conditions.<sup>139</sup> Before the abolition, the presumption had been much criticised by the courts and legislators. For example, in *C (a minor) v DPP*,<sup>140</sup> Laws J held that the presumption was no longer necessary and incoherent. It was not in step with the general law because it required proof that the child knew that his or her actions were seriously wrong whereas under the general law, the fact that a defendant thought that his or her action was justified was not relevant to proving his or her guilt.<sup>141</sup> As a result, the presumption was held to be invalid.<sup>142</sup> The House of Lords overruled this decision on appeal in 1995.<sup>143</sup> However, the House of Lords observed that the doctrine had problems and, due to the political dimensions of the juvenile justice policy, it deferred to Parliament to determine whether the presumption should remain part of English law. Not surprisingly, Parliament abolished it in 1998 as has been noted above.

Although the presumption was abolished in England and Wales in 1998, the debate in support of increasing the minimum age of criminal responsibility from 10 years has been ongoing. In 2010, the Children's Commissioner, Maggie Atkinson, announced a proposal to increase the minimum age of criminal responsibility to 12, which will make it uniform across the Great Britain.<sup>144</sup> The proposal is yet to be effected.

137 Scottish Law Commission, above note 135; Badenhorst, as above, 35.

138 S Lipscombe 'The age of criminal responsibility in England and Wales', Standard Note SN/HA/3001, 18 April 2012, available at [www.parliament.uk/briefing-papers/SN03001.pdf](http://www.parliament.uk/briefing-papers/SN03001.pdf) (accessed 20 July 2012).

139 Badenhorst, note 136 above.

140 *C (a minor) v DPP* [1994] 3 WLR 888 (the Divisional Court).

141 As above, 894.

142 As above, 898.

143 *C v DPP* (1996) 1 AC 1.

144 M Berlins 'Venables: Age of criminal responsibility in the spotlight' *Guardian Newspaper*, 14 March 2010, available at <http://www.guardian.co.uk/uk/2010/mar/14/>

In Africa, the rebuttable presumption of criminal incapacity has been abolished in Uganda,<sup>145</sup> and Ghana,<sup>146</sup> both of which set the minimum age of criminal responsibility at 12 years. A number of African countries, especially those with the minimum age below 12, still maintain the rebuttable presumption of criminal incapacity. However, some of these countries are already debating the possibility of removing the rebuttable presumption. The main problem with the doctrine lies in the lack of proper standards for its rebuttal, which then makes judicial officers place undue emphasis on the child's actions (like running away from the scene of crime) and not the child's state of mind or capacity to act as he or she did.<sup>147</sup> The Child Law Reform Committee in Kenya in its review of Kenyan child law decided to retain the presumption for children aged between eight and 12 years.<sup>148</sup> At eight years, the minimum age of criminal responsibility in Kenya is one of the lowest in the world and the CRC Committee has continuously recommended that Kenya should raise it.<sup>149</sup> In South Africa, the rebuttable presumption operates between the ages of 10 and 14 years, whereas in Namibia, it operates between the ages of seven and 14 years.<sup>150</sup> In South Africa, from which Malawi borrowed most of its provisions on child justice, debates are underway to remove the rebuttable presumption and settle for an upper cut off minimum age of criminal responsibility.<sup>151</sup>

It is thus argued that Malawi should revisit the minimum age of criminal responsibility to reflect not only the emerging trends in international law and comparative child law in Africa, but also to reflect local perceptions on child offending. In addition, Malawi needs consider whether it has the capacity to make expert assessments and evaluations that are necessary to deciding whether the presumption should be rebutted.

venables-age-criminal-responsibility-society (accessed 8 March 2011).

145 The Ugandan Children's Act 1996.

146 Section 26, Criminal Code 1960 as amended in 1998.

147 Odongo, above note 117, 162.

148 African Child Policy Forum 'A case for raising minimum age of criminal responsibility' (2007) [www.africanchildforum.org/Documents/age\\_of\\_cri\\_response.pdf](http://www.africanchildforum.org/Documents/age_of_cri_response.pdf) (accessed 7 March 2011).

149 Committee on the Rights of the Child 'Consideration of reports submitted by States Parties under article 44 of the Convention: Concluding observations of the Committee on the Rights of the Child; Kenya', CRC/C/15/Add.160, 7 November 2001, paras 22–24; Committee on the Rights of the Child 'Consideration of reports submitted by States Parties under article 44 of the Convention: Concluding observations of the Committee on the Rights of the Child; Kenya', CRC/C/KEN/CO/2, 19 June 2007, paras 67–68(a).

150 S Schulz 'Restorative justice – the case for a Child Justice Act' (2009), available at [www.restorativejustice.org](http://www.restorativejustice.org) (accessed December 2010).

151 L Wakefield & V Odala 'The activities of the Child Justice Alliance during 2011' (2011) 13(2) *Article* 40 10–12.

## V CONCLUSION

The issue of age remains a serious gap in the legal protection of children in Malawi, thereby limiting access to justice for some age groups depending on the issue in question. While the democratic Constitution celebrated 18 years of age in 2012 which, by international standards, is the age of majority, the child-related laws in Malawi do not adequately and coherently define a child, and provide for very low minimum ages of marriage and criminal responsibility, contrary to international, regional and comparative domestic standards. The Constitution does not provide for a general definition of the child, save in a restricted manner. It was expected that the Child Care, Protection and Justice Act would cure some of these problems, but its application is limited to children aged below 16 and it does not provide for the minimum ages of marriage and criminal responsibility. Thus, the Constitution and the Child Care, Protection and Justice Act fail to deal comprehensively with the general and specific definitions of a child in Malawi.

There is therefore an urgent need to review child-related laws in so far as age is concerned. Malawi must define a child as a person below the age of 18, in order conform to international and regional standards. The minimum age of marriage must also be raised to 18, while the minimum age of criminal responsibility should be raised to 14-15, with no provision for the rebuttable presumption of criminal incapacity.