MINIMUM AGE FOR CRIMINAL RESPONSIBILITY IN NIGERIA AND THE IMPLICATIONS OF SECTION 1(2)(A) OF VIOLENCE AGAINST PERSONS (PROHIBITION) ACT 2015

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Abstract

A person's mental fitness and ability to understand his[1] conduct at the time he is committing a crime is what is referred to as criminal responsibility. Where this ability is lacking, and where the law makes exemption, there is no criminal responsibility. Before the Violence Against Persons (Prohibition) Act (VAPPA) 2015 came into force, under the Nigerian criminal justice system, a child under the ages of 7 is not capable of committing crime and a child below the age of 12 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 he had capacity to know that he ought not to do the act or make the omission. A male person under the age of twelve years is presumed to be incapable of having carnal knowledge. Nonetheless, in 2015 the VAPPA came into force with a provision under its section 1(2) (a) that a person convicted of rape under subsection (1) of section 1 of the Act is liable to imprisonment for life except – "*Where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years*

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1 'His' as used herein is inclusive of the female gender.

imprisonment." The question is, what is the implication of the above VAPPA provision on the minimum age immunity principle under the Nigerian criminal justice system? Furthermore, is the VAPPA inconsistent with the Constitution of the Federal Republic of Nigeria 1999(Fourth Alteration), and does it override the Criminal Code, Penal Codes, Administration of Criminal Justice Act 2015 or the Childs' Right Act 2003 on the minimum age immunity principle by so providing? This article aims at examining the legal implications of section 1(2)(a) of the VAPP Act 2015. The research adopts entirely a doctrinal approach.

Keywords: Minimum Age, Criminal Responsibility, Child, Nigerian Restorative Criminal Justice System.

1. Introduction

The object of Criminal Law is always to protect the society against what is injurious and offensive to the citizens. It does this by punishing those who commit crime or break the law. That is the coercive power of the law. Yet, the same law is minded of man and his rational nature and the capacity to do or omit to do certain acts perhaps on grounds of age or with genuine reason for his actions in his daily interaction with his fellow man. Hence defences are made available for alleged offenders. Obviously man borrowed a leaf from God when, despite His omnipotence, omniscience and omnipresence nature, God allowed Adam the opportunity to be heard and state his defence, if any, notwithstanding his known guilt.[2] It is on this premise that one can axiomatically say that the

[2] Genesis 3:1-24.

jurisprudence of legal defences emanates from the Garden of Eden. Criminal responsibility therefore is the mental and legal capacity of an individual to understand what he was doing at the time he was alleged to have committed the act or make the omission that constitutes the offence. Where this capacity is present, he will be held criminally responsible for the act committed or the omission made and be punished accordingly. Under the Nigerian criminal justice system, a child under the age of 7 is not capable of committing a crime and a child below the age of 12 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 he had capacity to know that he ought not to do the act or make the omission. A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.[3] This has been the position in the criminal law in Nigeria under both codes.[4] However, the Violence against Persons (Prohibition) Act (VAPPA) emerged in 2015 with a significant shift on the emphasis both in the attempt to redefine the offence of rape and in expanding the scope of victims, offenders and sanctions on alleged offenders. It is the implication of this paradigm shift under section 1(2)(a) of Violence Against Persons (Prohibition) Act(VAPPA) 2015 that this article seeks to address. The article is in five parts. Part one is the introduction. Part two discusses the concept of criminal

[3] Criminal Code Act. Cap. C38 *Laws of the Federation of Nigeria (LFN) 2004*, applicable to Southern Nigeria, (to be herein referred to as the C. C) s 30; The Penal Code Cap. 89 *Laws of Northern Nigeria* 1963, applicable to Northern Nigeria (to be herein to as the P. C) s 50.

[4] The Criminal Code and the Penal Code.

responsibility, the jurisprudence of criminal defences and the rational for the defence of immature age. Part three examines the complexities in Section 1(2)(a) of Violence Against Persons (Prohibition) Act 2015. Part four highlights the absolute nature of minimum age for criminal responsibility in some African States. Finally part five is the conclusion.

2. Criminal Responsibility as a Concept

Criminal responsibility concerns the different mental states related to crimes, the ways in which those mental states are evaluated, and the variety of associated defenses. The Criminal Code defines it as the liability to punishment as for an offence.[5] For an act to constitute a crime, it requires the combination of the physical and mental elements and lack of a valid defence. Thus, criminal responsibility refers to a person's ability to understand his or her conduct at the time a crime is committed by the person. In other words, it involves his volitional act, plus knowledge of the surrounding circumstance and the desire to achieve the consequence of the act. Legally, crimes are defined in terms of an act or omission (*actus reas*) and a mental state (*mens reas*). Criminally responsible for a crime has to do with requisite legal capacity to understand the nature and consequences of one's unlawful conduct or omission, and the will to commit or omit to commit the crime with the requisite mental element. When a person is found criminally responsible for commission of a crime, he can be convicted of the offence and a penalty or penalties may be imposed upon him as provided for in the

[5] S 1

relevant statute. Both the Criminal Code and the Penal Code including the VAPP Act laid down the elements required for finding of criminal responsibility against a person although the VAPP Act is more detailed with respect to certain offences such as rape. That notwithstanding, the law would not convict an accused without giving him or her a hearing or an opportunity to defend himself in order to determine whether the accused lacked the requisite legal capacity and the mental element for the crime he committed and at the time of commission or omission. Any court assessing the criminal responsibility of an accused must among other things ascertain whether the physical element of the offence as set out in the provision that defines the offence was committed and whether the act was accompanied with the requisite voluntariness or otherwise. The court will also ascertain whether the accused has the requisite mental element for the commission of the offense. That is to say, did the accused intentionally commit the crime, or was he reckless as to the commission of the crime or negligent in committing the crime as defined by law? Did the accused acquire the specific or special intent required for such crime as prescribed by law? The same court will further ascertain whether there was any justification for the conduct of the accused person. If there is, he may on that ground satisfy the first two criteria mentioned above but still escape criminal responsibility because he has valid defence to the commission of the offence. Justification reduces the potency of a criminal act so much so that what was clearly a criminal conduct is deemed not to be so because the circumstances surrounding the act make the conduct

legally and socially acceptable in general or to an extent. Under lawful justification, if a person's conduct falls within any of the grounds for excluding criminal responsibility under the Nigerian criminal law he may escape criminal responsibility. Probably his acts were not voluntary or he did not have the required capacity to commit the offence. Finally, the court will ascertain whether there are other grounds that made the particular act criminal or not criminal or that impose more severe punishment. In this case there may be need to look at other relevant pieces of legislations. For example the age of criminal responsibility under the Criminal Code, Penal Code and the VAPP Act which is of moment to us in this article. Absence or otherwise of the above will determine an accused person's criminal responsibility or otherwise. These are otherwise called defences. It could be by reason of age, official capacity, statute of limitation, diminished responsibility, insanity, intoxication, self defence, duress, mistake of law or of fact. However, of moment to our present discussion is the defence of immature age in relation to age of criminal responsibility under the Nigerian criminal law, though reference may be made to other jurisdictions.

By implication, while the judicial system is dedicated to bringing criminals to justice following all relevant laws and procedures, the prosecutor's burden is proving beyond all reasonable doubt that the accused bears criminal

responsibility for his alleged illegal acts.[6] One exception to this is in a case of proving insanity where the prosecution is not expected to prove anything and therefore has no burden to prove anything. This is because the whole burden of proving insanity lies on the accused who asserts that he was insane at the time of committing the crime. Where the accused fails to prove insanity, the court enters that he was sane at the time of committing the act and therefore criminally responsible for the act.[7] It is trite that he who asserts must prove[8] and in criminal trial, the burden of proof lies on the prosecution to prove the guilt of the accused beyound reasonable doubt. However, at all material time in cases of insanity, it is left for the defense to state reason(s) why the defendant should not be criminally responsible. This is the heart of the criminal justice system.

3. Jurisprudence of Criminal Defences and the Rational for the Defence of Immature Age

Defences are legal grounds or legal excuses for excluding criminal responsibility and which prevent the punishability or prosecution of a crime.[9] Whether under international criminal law or domestic criminal law, there are various forms of

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[6] Marry ville: Criminal Responsibility: Evaluation and Overview https://online.maryville.edu/blog/criminal-responsibility/May 25, 2021 accessed 10 June 2024

[7] Mohammed v The State (1997) 9 NWLR 169.

[8] S 131(1) and 132 of the Evidence Act 2011 as amended in 2023; see also *Agbakoba v First Bank* (2019) LPELR -48125 (SC).

[9] K. Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001) 258

criminal responsibility. These are the various ways one can incur criminal responsibility or be a party to a crime. In international criminal law, one can be criminally responsibility for a crime either by direct or indirect perpetration, co-perpetration, instigation- including ordering, soliciting, inducing, planning, facilitating, inciting and aiding or abetting a crime and even by attempting to commit a crime.[10] Although the Nuremberg charter did not recognize any defence to the crimes under its charter, and the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) Statutes are not all that detailed about defences for crimes under their respective jurisdictions, the International Criminal Court (ICC) Statute is more detailed in terms of defences for crimes. For example Article 26 of the Rome Statute excludes persons under eighteen years from the ICC's jurisdiction while Article 27 rejects official capacity as irrelevant to prosecution before the ICC. Also, non-applicability of Statute of Limitation is affirmed in Article 29 of the Statute while Articles 31, 32 and 33 list out other grounds.[11]

Under the domestic criminal law particularly under the criminal code[12] when an offence is committed, each of the following persons is deemed to have taken part in committing

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10 Rome Statute of International Crime Article 27.

11 On Diminished responsibility, intoxication, self defence, duress; Mistake of facts, Mistake of law and the extent to which superior order cannot be a defence.

12 S 7.

the offence and is to be guilty of the offence, and may be charged with actually committing the offence - (a) every person who actually does the act or makes the omission which constitutes the offence; (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; (c) every person who aids another person in committing the offence; (d) any person who counsels or procures any other person to commit the offence. Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, that act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission. A person can also incur criminal responsibility by committing an offence in prosecution of common purpose,[13] and by being an accessory after the fact to the offence.[14]

The Jurisprudence of some of these defences is traceable to the Biblical literature as already stated. Under various laws including Nigeria municipal laws childhood creates immunity in different fields of our laws. A child for example does not have the legal capacity to enter into a contract, to sue or be sued and in some cases except through his guardian *ad litem*. Nigerian criminal law mainly holds that a child under the age of seven is not criminally responsible for any act or omission,

[13] S 8 CC

[14] S 10cc

and a child under the age of twelve is not criminally responsible for an act or omission, unless it is proved that at the time of committing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. A male person under the age of twelve years is presumed to be incapable of having unlawful carnal knowledge.[15] Thus, section 30 of the Criminal Code provides a child under seven with a complete defence to any criminal charge. Under the 1946 Children and Young Persons Act[11] a child is described in section 2 as a person under 14 and a "young person" is defined as one who has reached fourteen years but still under seventeen. Thus, all young persons within this category are therefore, subject to the special procedure in juvenile courts. The rationale behind this principle is to accord children enough legal protection since they are presumed innocent.

In International Criminal Law, the Rome Statute adopts the minimum age principle. Thus, by virtue of Article 26 of the International Criminal Court (ICC) Statute, the ICC shall not have jurisdiction over any person who was below the age of eighteen at the time of commission of the alleged crime. The rationale is to treat children as victims, not as perpetrators of international crimes. In the traditional language of the

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[15] S 30 Criminal Code., s. 50 Penal Code, S 2 Children and Young Persons Act.

[11] Cap 32, 1958 Laws (modeled on the English Act of the some name passed in 1933).

common law such a child is *doli incapax.*[16] The reasons for this absolute rule are both ethical and pragmatic. It seems wrong to visit the sanctions of the criminal law upon a child of tender years who has had little or no experience of its meaning and application. Moreover, it might be argued that for such children the home discipline and that of school will generally provide the community with sufficient protection against their anti-social behaviour. Of course, the selection of the relevant age is not the result of any scientific analysis. Less than seven years had been the limitation at common law for centuries.[17]

4. The Complexities in Section 1(2)(a) of Violence Against Persons (Prohibition) Act 2015

Immunity principle is always child friendly and who is a 'Child' in law has been variously but categorically defined by different legislations of various States according to States' policy. For example The Convention on the Rights of the Child[18] 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 26 of the International Criminal Court Statute is of the provision that any person below the age of 18 years is regarded as a child and therefore not within the jurisdiction of the International Criminal Court. The Constitution of the Federal Republic of Nigeria 1999 (Fourth

[16] Incapable of crime or evil.

[17] R S O' Regan, Immature Age and Criminal Responsibility under the Griffith Code (1982) 14 (4) University of Western Australia Law Review volume 3, 354.

[18] Art 1

Alteration), provides that 'full age' means the age of eighteen years and above.[19] By this constitutional provision it invariably means that, a minor is a person who is below the age of 18 years and an adult is a person who is 18 years and above. The Childs' Right Act 2003 also defines a child as a person under the age of eighteen.[20] Neither the Criminal Code nor the penal Code defines who is a child but both codes variously adopt the minimum age principle and state the ages for exemption from criminal responsibility. However, the procedural Statute for both codes, which is the Administration of Criminal Justice Act (ACJA) 2015 defines who is a child and states that a 'child' means a person who has not attained the age of eighteen years.[21] The Children and Young Persons Act which was the operational Statute in juvenile matters in Nigeria before the advent of the Child's Right Act, in its section 2 provides that a juvenile is a child and a young person. It defines a child as one under the age of 14years and a young person as one who has attained the age of 14 years but is below the age of 17years. The Violence against Persons (Prohibition) Act 2015 surprisingly did not define who is a child.

Strictly under the Criminal Code which is operative in the South[22] a person under the age of 7years is not criminally responsible for any act or omission. A person under the age of

[19] S 29(4)(a).
[20] S 277.
[21] S 494(1).
[22] S 30.

twelve 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 he had capacity to know that he ought not to do the act or make the omission.[23] A male person under the age of twelve years is presumed to be incapable of having carnal knowledge. Similarly the Penal Code[24] which is operative in the North provides that no act is an offence which is done (a) by a child under seven years of age; or (b) by a child above seven years of age but under twelve years of age who has not attained sufficient maturity of understanding to judge the nature and consequence of such act.

Ordinarily, the simple interpretation of section 30 of the Criminal Code and section 50 of the Penal Code is that a child below the age of seven has immunity for criminal responsibility *simpliciter* and a child below the age of 12 is not criminally responsible for an act or omission unless he knows and understands what he was doing at the time of doing the act or making the omission. Thus, where it is proved that a child below the age of 12 at the time of doing an act or making an omission exhibits the capacity to know that he ought not to do the act or make the omission, that child will be held criminally responsible. His criminal responsibility however, will be to the extent the Criminal Code and the Penal Code provide but in accordance with the relevant juvenile justice procedure. Also section 30 of the

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[23] There must be proof that knowledge of his act would result in the death of the deceased. *State v Nwabueze* (1980) 1 NCR 41.

[24] S 50.

Criminal Code and section 50 of the penal code both equally provide that a male person under the age of twelve years is presumed to be incapable of having carnal knowledge. The presumption though is a rebuttable one. By extension, under the Criminal Code and the Penal Code a male person under the age of twelve years is presumed incapable of committing rape unless he knows and understands what he was doing at the time he was doing the act or making the omission. This implies that a charge of rape under both Codes brought against a male person under the age of 12 years may or may not succeed depending on the child's level of understanding and capacity to know and understand that he ought not do the act or omission. Nonetheless, where a male child under the age of 12 years experiences praipism and succeeds in penetrating a girl, a combined reading of sections 6[25] and 357[26] of the Criminal Code will mean that an offence of rape has been committed by him. Also a child between ages 10 and 12 who had early maturity can actually exhibit the capacity to have carnal knowledge with a good understanding of what he is doing. If eventually such a child succeeds in having

[25] When the term **"carnal knowledge" or the term "carnal connection"** is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration. **"unlawful carnal knowledge"** means carnal connection which takes place otherwise than between husband and wife.

[26] Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.

unlawful carnal knowledge of a girl knowing that he ought not to do the act, he will be held criminally liable for rape. His liability will be in accordance with the mind and spirit of the statute that provides for the offence and under which he is charged. His liability will also be determined in accordance with the juvenile justice procedure. The Administration of Criminal Justice Act 2015 is the procedural Statute for criminal justice administration in Nigeria. In this case, the Administration of Criminal Justice Act 2015[27] provides that the provision of the Child Rights Act shall apply. Section 371 of the Administration of Criminal Justice Act 2015 further provides that where a child is proceeded against before a court for an offence, the court shall have regard to the provisions of the Child Rights Act 2003. The ACJA by way of expanding the powers of the court in criminal trials in Section 454 further provides that:

> (1) Where a defendant is charged before a court with an offence punishable by law and the court thinks that the charge is proved but is of opinion that having regard to: (a) the character, antecedents, age**,** health, or mental condition of the defendant charged, it is inexpedient to inflict a punishment or any order than a nominal punishment or that it is expedient to release the defendant on probation, the court may, without proceeding to conviction, make an order specified in subsection (2) of this section.

[27] S 452

> (2) The court may make an order under subsection (1) of this section:
> (a) dismissing the charge; or (b) discharging the defendant conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear at any time during such period not exceeding 3 years as may be specified in the order.
> (3) The court may, in addition to an order under subsection (2) of this section, order: (b) the parent or guardian of the defendant to pay the damages and costs specified in paragraph (a) of this subsection, *where the defendant has not attained the age of 18 years* and it appears to the court that the parent or guardian of the defendant has conduced to the commission of the offence.

A 'child' under the Administration of Criminal Justice Act (ACJA) 2015 means a person who has not attained the age of eighteen years.[28] Similarly, under the Childs Rights Act, a child is a person under the age of eighteen.[29] It is worthy of note that the age definition of who is a child under the Administration of Criminal Justice Act (ACJA) 2015 and the Child Rights Act 2003 is protective and among other things it is for the purpose of application of juvenile justice procedure in matters relating to persons within the age bracket of a child

[28] S 494(1).
[29] S 277

as therein defined. It does not necessarily mean that a person under the age of 18 is not capable of committing a crime, rather it implies that such persons, in criminal matters should be handled as juveniles in line with the juvenile criminal justice procedure. The Administration of Criminal Justice Act 2015 in section 371 states that when a child is proceeded against before a court, the court shall have regard to the provisions of the Child Rights Act. The Child Rights Act has extensively provided for juvenile criminal justice procedure in the matter of a child. Thus, in protecting the best interest of the child, he is entitled to fair hearing,[30] right to choice of counsel[31] and other necessary rights.[32]

Though the child offender may be tried in court but the trial must be conducted in the best interest of the child, hence a special procedure is employed. Section 209 of the Child Rights Act provides that (1) The police, prosecutor or any other person dealing with a case involving a child offender shall- (*a*) have the power to dispose of the case without resorting to formal trial by using other means of settlement, including supervision, guidance, restitution and compensation of victims; and (*b*) encourage the parties involved in the case to settle the case, as provided in paragraph (*a*) of this section. (2) The police, prosecutor or other person referred to in subsection (1) of this section may exercise the power conferred under that Subsection if the offence involved is of a

[30] S 214 CRA.

[31] S 155 CRA.

[32] S.210 CRA.

non-serious nature and- (*a*) there is need for reconciliation; or - (*b*) the family, the school or other institution involved has reacted or is likely to react in an appropriate or constructive manner; or (*c*) where, in any other circumstance, the police, prosecutor or other person deems it necessary or appropriate in the interest of the child offender and parties involved to exercise the power. (3) Police investigation and adjudication before the court shall be used only as measures of last resort. While The Child Rights Act[33] provides for the trial of child offenders of cases that could be disposed without resorting to formal trial by using other means of settlement, including supervision, guidance, restitution and compensation of victims; section 213(2) provides that the terms 'conviction' and 'sentence' shall not be used in relation to a child dealt with in the Court. Thus, for adjudication of charges against a child under the criminal and penal codes section 30 of the Criminal Code, and section 50 of the Penal Code are read together with section 494 and 209 of the Administration of Criminal Justice Act (ACJA) 2015 and section 277, 213, 215 and any other relevant section of the Child Rights Act.

Section 215 provides a guiding principle in adjudication and thus states that (1) Where a child offender is brought before the Court, the court shall ensure that-(*a*) the proceedings is conducive to the best interests of the child and is conducted in an atmosphere of understanding which allows the child to participate therein and express himself freely; (*b*) the reaction taken is always in proportion not only to the circumstances

[33] S.213 CRA.

and the gravity of the offence but also to the circumstances and needs of the child and the needs of the society; (*c*) the personal liberty of the child is restricted only 'after careful consideration of the case, including the use of alternative methods of dealing with the child, and the restriction is limited to the possible minimum; (*d*) the child is not deprived of his personal liberty unless he is found guilty of- (i) a serious offence involving violence against another person; or (ii) persistence in committing other serious offences, and there is no other appropriate response that will protect the public safety; (*e*) the well-being of the child is the guiding factor in the consideration of his case.

According to the provision of section 215(1)(d) of the Child's Right Act stated above, a child offender may be deprived of his personal liberty if found guilty of a serious offence involving violence against another person; or persistence in committing other serious offences, and that is if there is no other appropriate response that will protect the public safety. It is note worthy that in pursuit of the best interest of the child, the Child's Right Act is very careful in the choice of words regarding the deprivation of the personal liberty of the child offender. Hence in section 218, the Act softly recommended remand and committal to State government accommodation. In section 221(1) (a)(b) and (c), the Act vehemently restricts any court from ordering a child to be imprisoned, subjected to corporal punishment or subjected to death penalty or have the death penalty recorded against it respectively.

Adjudication in the best interest of the child is more constant in murder cases so that often times, it is erroneously understood that age of criminal responsibility in murder cases is different from that of other offences probably because murder is a very serious crime. However, that is not the position. The true position is that a person under the age of 7 years is not criminally responsible for any act or omission and a person under the age of twelve 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 he had capacity to know that he ought not to do the act or make the omission. Again a male child under the age of 12years is presumed incapable of having carnal knowledge. Thus, any child of sound mind above 12 years but below 18 years will be held criminally responsible for any crime he commits but his criminal liability will be addressed under juvenile criminal justice. That is why in murder cases like in other offences, in determining the age for criminal responsibility the relevant age is the age at the time of commission or omission of the act and not the age at the time of trial or conviction or sentence.[34] A good number of Nigerian courts have given credence to the above statutory provisions. The Supreme Court in *Modupe v The State*[35] held that by virtue of section 368(3) of the criminal procedure Act[36] if the evidence on

[34] *R v Bangaza* (1960) 5 FSC 1; *Oladimeji v The State* (ibid n 86).

[35] (1988) 4 NWLR (Pt 87)130, See also *George v The State* (1991)1 NWLR (Pt 214)199.

[36] The criminal procedural Act that was operational in the south then that directs what the court should do when an offender is a child in the eyes of the court.

record shows that at the time the offence was committed, an accused charged with capital offence has not attained the age of 17years, it will be wrong of any court not only to sentence him to death but also to even pronounce such sentence. The court further held that if the trial judge felt that the accused put his age rather low, he was at liberty to adjourn the case and call a medical witness to testify to the age of the accused. Where a conviction for murder is recorded against a person who in the opinion of the court is below seventeen years, the offender shall not be sentenced but shall be detained at the pleasure of the crown/governor.[37]

More recently, the Supreme Court in *Guobadia v State*[38] only on grounds of uncertainty of the age of the accused person allowed the appeal and set the appellant off the hook of death sentence on his neck. The Supreme Court held:

> "…The offence was committed on 5th February 1987. Learned counsel for the appellant has reasoned that if the appellant was 18years old in April 1988, he would have been under 17 year old in February 1987 when the offence was committed. There was therefore a discrepancy as to the true age of the appellant. This in my view ought to have prompted the learned trial judge to conduct an enquiry to ascertain the actual age of the appellant at the material time

[37] See also: *Oladimeji v The State* (1964) NMLR 31; *Okara v The State* (1990) 3(pt.140) 536 at 547.

[38] (2004) 6NWLR (Pt869)360.

> as envisaged by section 208 of the Criminal Procedure Law. Learned counsel for the respondent has conceded quite rightly, that since it was doubtful that the appellant had attained the age of 17 years when he committed the offence, that doubt ought to be resolved in his favour. *On this score alone, this appeal succeeds with respect to the death sentence pronounced on the appellant. This appeal is allowed. The death sentence passed on the appellant is set aside and in its place, the appellant is ordered to be detained at the pleasure of the Governor of Edo State*.

By extension, where a child is used as an innocent agent by an adult to actualise the commission of a crime, the child will not be held criminally responsible but the adult who uses him even though he did not physically participate in the commission of the crime will be held criminally liable for the acts of the child. Under the English law though different from the position in Nigeria, a child under the age of 10 is conclusively presumed incapable of committing an offence, therefore, inciting such a child to do so must accordingly be deemed impossible.[39] Under the same English law, the presumption is that a child between seven and 14 years indicted for felony does not have the requisite guilty knowledge unless the contrary is proved by evidence.[40] Still

[39] *R v Pickford* (1995) QB 203.

[40] AIRM VOL 27 PG 838.

reasoning along the same line, the Childs' Right Act absolutely provides under unlawful sexual intercourse with a child, that (1) No person shall have sexual intercourse with a child.[41] The Act further states that (2) A person who contravenes the provision of Subsection (1) of this section commits an offence of rape and is liable on conviction to imprisonment for life. (3) Where a person is charged with an offence under this section, it is immaterial that- (*a*) the offender believed the person to be of or above the age of eighteen years; or (*b*) the sexual intercourse was with the consent of the child.[42] For the Childs' Right Act, it is very sacrosanct that nobody should have carnal knowledge of a person below 18 years of age whether she consents or not, whether the perpetrator knows she is below 18 years or not. It is not negotiable. The section sounds draconic though and overreaching. It did not consider the situation of children who enter maturity at early stage, as early as 17years. Nonetheless, the provision is still very protective of the female gender and indeed protective of the societal sanity. It is a welcome development.

However, it appears that the Violence against Persons (Prohibition) Act 2015[43] in re-defining rape went overboard and truncated or twisted the minimum age immunity principle under the Nigerian juvenile criminal justice administration known to us. Under the Criminal Code any person who has

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41 A child here means a person under the age of 18years.

42 S 31.

43 S 1(2)(a).

unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape. However, under the VAPPA among other things, both women and men can be a victim of rape, instrument of rape can be any part of the body, hand or an object. The Act is even emboldened to provide for conviction and imprisonment against the child offender. Hence, the VAPPA in section 1 provides *inter alia*:

> 1. (1) A person commits the offence of rape if- (a) he or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else; (b) the other person does not consent to the penetration; or (c) the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.
>
> (2) A person convicted of an offence under subsection (1) of this section is liable to imprisonment for life except – *(a) where the*

> *offender is less than 14 years of age, the offender is liable to a maximum of 14 years imprisonment;* (b) in all other cases, to a minimum of 12 years imprisonment without an option of fine; or(c) in the case of rape by a group of persons, the offenders are liable jointly to 10 or a minimum of 20 years imprisonment without an option of fine. (3) The Court shall also award appropriate compensation to the victim as it may deem fit in the circumstance. (4) A register for convicted sexual offenders shall be maintained and accessible to the public.

The Act in providing for consequential amendment further provides under general savings and repeal[44] that (1)Any offence committed or proceedings instituted before the commencement of this Act under the provisions of the –(a) Criminal Code, Cap. LFN, 2004, (b) Penal Code, Cap. LFN, 2004, (c) Criminal Procedure Code, Cap. LFN, 2004 (d) any other law or regulation relating to any act of violence defined by this Act shall as the case may require to be enforced or continue to be enforced by the provisions of this Act. (2) Any provision of the Act shall supersede any other provision on similar offences in the Criminal Code, Penal Code and Criminal Procedure Code.

[44] S 45.

First and foremost, there is no definition of who a 'child' is in the VAPPA, therefore for the VAPPA everybody or anybody is capable of committing a crime at any point in time. Furthermore, by the provision of section 45(2) of the VAPPA that 'Any provision of the Act shall supersede any other provision on similar offences in the Criminal Code, Penal Code and Criminal Procedure Code,' it implies that section 1(2)(a) of the VAPPA supersedes section 30 of the Criminal Code and section 50 of the Penal Code. Secondly, by providing that a person convicted of an offence under subsection (1) of this section is liable to imprisonment for life except – *(a) where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years imprisonment;* the VAPPA is saying that a child offender of less than 14years who had unlawful carnal knowledge contrary to section 1 of the VAPPA, will be committed to maximum of 14 years thereby stripping a child offender below the age of 14 of minimum age immunity he enjoys under section 30 of the Criminal Code and section 50 of the Penal Code. This is too harsh to be in the best interest of a child which is the hallmark of juvenile justice administration. According to Child's Right Act the terms 'conviction' and 'sentence' shall not be used in relation to a child dealt with in the Court.[45]

While we acknowledge that the Child's Right Act has a provision that the personal liberty of a child is not to be deprived him unless he is found guilty of a serious offence

[45] S.213 (2) CRA.

involving violence against another person; or persistence in committing other serious offences, and there is no other appropriate response that will protect the public safety.[46] The Act in section 218 softly recommends remand and committal to State government accommodation where his personal liberty must be deprived him. Yet, in the best interest of the child, the Act carefully avoids the use of such word as prison or imprisonment. Thus, no child offender is remanded in prison, because that will be too harsh and will not serve the interest of the child. They are kept in special custody or remand homes. Still in the best interest of the child, section 221(1) (a)(b) and (c) of the Child Rights Act vehemently restricts any court from ordering a child to be *imprisoned, subjected to corporal punishment or subjected to death penalty or have the death penalty recorded against it respectively*. Of what benefit then will it be that a child offender of rape less than 14 years is convicted to 14 years imprisonment? Fourteen years in prison custody is likely to worsen the behavioural development of the juvenile below 14 years of age. Our criminal justice administration is restorative for possible functional reintegration of the offender into the society. Section 1(2)(a) is too harsh and overreaching and should be repealed.

The VAPPA is a substantive statute, but the Administration of Criminal Justice Act 2015 remains the procedural statute for the implementation and administration of crimes contained in the VAPPA, the Criminal Code and the Penal

[46] S. 215(1)(d)

Code. In its section 371 the ACJA mandates that where a child is proceeded against before a court for an offence, the court shall have regard to the provisions of the Child's Right Act, therefore the CRA remains vital in the administration of VAPPA. That being the case, convicting a child offender below 14 years of age to a maximum of 14 years imprisonment is alien to the Child's Right Act and offensive to our juvenile justice system. It is an abuse of the minimum age immunity principle. Furthermore, the major international instruments on the right of the child are the Convention on the Right of the Child[47] and the AU Charter on the Rights and Welfare of the Child. The Child's Right Act 2003 is the brain child of the Convention on the Right of the Child. The Act without any ambiguity provides that in every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration. Committing a child offender of *less than 14 years of age, to a maximum of 14 years imprisonment* is not and will never be in the best interest of the child in accordance with the spirit and intendment of the Child's Right Act 2003. Immaturity or being a minor is actually a strong and valid defence in criminal jurisprudence all over the world and has saved many from the hook.[48] It is understandable that the prevalence of

[47] Adopted and opened for signature, ratification and accession by the General Assembly Resolution 44/25 of 20th November, 1989. It entered into force on 2nd September, 1990 in accordance with Article 49 thereto.

[48] *Modupe v The State.*Ibid.

rape, the callousness of rape offenders and the negative effect of rape on victims prompted the VAPP Act which is a good law. However, going too extreme will defeat the aim and bastardise the effort. Praipism can happen to a male child below the age of 12years. Biology also tells us that penile erection is normal with males and that "nocturnal penile tumescence" affects all males even males in the womb and male children.[49] Thus, a male child under 14years of age can have an erection. Such penile erection occurs in response to complex effects of the nervous system and endocrine system (that secrets hormones into the system) on the blood vessels of the penis. According to Sergio,[50] It also has a female counterpart in the less frequently discussed nocturnal clitoral erection. However, notwithstanding the possibilities of these erections and reactions, where possibly a male child below 14 years penetrates a girl of same age or less, with the combined reading of sections 6 and 357 of the Criminal Code it is rape which is complete upon penetration by the provisions of section 6 CC. Nonetheless, it could be treated as juvenile mischief that could be better handled by careful parents, counselors or at most at a juvenile borstal institution for correction.[51] On the other hand, if the child is tried in court for rape, section 454 of the ACJA empowers courts in certain cases and considering the situations on ground not to

[49] Siegio Diez Alvarez,(2020) 'Why men wake up with erections 'newcastle.edu.au accessed 5 June 2024.

[50] Ibid.

[51] As recommended by section 218 of the CRA 2003.

pronounce conviction and sentence but to employ alternative measures. Hence, the section provides that:

> (1) Where a defendant is charged before a court with an offence punishable by law and the court thinks that the charge is proved but is of opinion that having regard to: (a) the character, antecedents, age**,** health, or mental condition of the defendant charged, it is inexpedient to inflict a punishment or any order than a nominal punishment or that it is expedient to release the defendant on probation, the court may, without proceeding to conviction, (2) The court may make an order (a) dismissing the charge; or (b) discharging the defendant conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear at any time during such period not exceeding 3 years as may be specified in the order.
>
> (3) The court may, in addition to an order under subsection (2) of this section, order: (b) the parent or guardian of the defendant to pay the damages and costs specified in paragraph (a) of this subsection, *where the defendant has not attained the age of 18 years* and it appears to the court that the parent or guardian of the defendant has conduced to the commission of the offence.[52]

[52] S 454.

It will be overreaching to commit such a child to 14 years imprisonment as the VAPPA provides with all the harshness of prisons in Nigeria. Though a child below 14 may commit such an act, obviously his mental capacity can never equate to that of an adult by virtue of the mental capacity and level of maturity required for such criminal responsibility. Again, such punishment is not restorative, it will be counterproductive. It will mar the child's mental development and still not be beneficial to the society.

The Court of Appeal in *NPF v Omotosho*[53] while adopting the fact that a child may not be held culpable for offenses held that " in both civil and criminal law, the legal capacity/ criminal responsibility of a minor is diminished and can never equate to that of an adult by virtue of the mental capacity and level of maturity. But in *Yusuf Musa v The State*,[54] the Supreme Court upheld the judgment of both the High Court of Jigawa State and the Court of Appeal which held that the accused, an eleven years old minor who struck machete on a person for multiple times thereby killing the deceased is guilty of culpable homicide despite the fact that he is less than twelve years old. This is because the court observed convincingly that at the point of committing the act, the 11year old child understood what he was doing and that it was wrong, yet he went ahead and did it. This is one of those exceptional cases.

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[53] (2018) LPELR- 45778 (CA)

[54] (2022) Tekedia mini NBA 2024.

5. The Absolute Nature of Minimum Age for Criminal Responsibility in Other African States

Under the minimum age principle, the minimum age of criminal responsibility adopted in each nation is a matter of public policy of that State. According to the Jewish religion/culture for example, a Jewish boy becomes a man on attaining twelve years of age. Then he becomes a son of the law (bar Miswah) and from then takes the obligations of the Law upon him including sacred rituals.[55] It was at this age twelve that the boy Jesus for the first time went to celebrate the Passover with his parents. Under the English Common Law the Court of Chancery in effort to protect the rights of children developed the *"parens patriea*" system where the State acts as parents towards the less privileged and neglected children.[56]

In Africa countries have their minimum age of criminal responsibility. In Algeria for instance, children under the age of 13 can only be sentenced to protection and education measures.[57] However, the measures applicable to children under the age of 13 include those that amount to deprivation of liberty for children as young as 8 in re-education centres administered by the Ministry of Justice. In Angola, no person can be held criminally responsible for an offence allegedly

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[55] William Barclay: *The Daily Study Bible/Commentary on Lukes* Gospel 2:41-52) (Edinburgh: Saint Andrew Press 1974) 23 – 24.

[56] James Incardi – *criminal justice system* (Boston: McGrawhill 2004 – 05) 638

[57] Penal Code Algeria, Art 49.

committed while under the age of 14.[58] The minimum age was lowered from 16 when the Penal Code 2006 came into force despite criticism from the UN Committee on the Rights of the Child.[59] No child under the age of 13 can be convicted of a criminal offence in Benin, though guardianship or education measures may be taken against younger children.[60] In Botswana, Children under the ages of 14 are presumed incapable of committing a criminal offence unless it can be proved that at the time of committing the offence, 'the child had capacity to know that he or she ought not to do so.'[61] No one can be held criminally responsible for an act or omission carried out while under the age of 8. Under their penal code, a person under the age of 12 is presumed incapable of having "carnal knowledge" which prevents the prosecution of younger children for certain sexual offences.[62] No person can be held criminally responsible in Burkina Faso if they were under the age of 13 at the time of the alleged criminal offence. A child older than 13 but younger than 18 cannot be subject to educational and safety measures if he or she acted without discernment.[63] In Burundi 'No one can be held criminally responsible for an offence committed while under

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58 Penal Code Angola Art 17(1).

59 UN Committee on the Rights of the Child, Concluding observations on Angola's combined second, third and fourth periodic reports, CRC/C/AGO/CO/2-4, 19 October 2010, paras. 73 and 74.

60 Ordonnance No 69-23 PR/MJL du 10 juillet 1969 relative au jugement des infractions commises par des mineurs de dix huit ans, Article 23.

61 Children's Act 2009, S 82(1).

62 Penal Code, S 13.

63 Code Pénal, S 74(1) and (2).

the age of 15. [64] In Cameroon, Children younger than 10 years old cannot be held criminally responsible. The relevant age is that at which the alleged offence was committed.[65]

Similarly, under the Criminal Code of Cape Verde, persons under the age of 16 cannot be held criminally responsible.[66] In Central African Republic 'A child under the age of 14 can only be subject to reform measures set out by a law specifically for younger children.[67] Children under the age of 13 in Chad cannot be convicted of any criminal offence.[68] The minimum age of criminal responsibility in Comoros is said to be complicated by the overlapping of the Penal Code and Sharia law. Under the Penal Code, no child under the age of 13 can be held criminally responsible, but under Sharia law, legal majority is achieved for boys when they reach physical maturity 14 to 15.[69] Children under the age of 10 in Cote

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64 Code Penal du Burundi, Loi No. 1/5 du 22 Avril 2009 portant revision du code penal, Art 28.

65 Code Pénal, Article 80(1).

66 Criminal Code, Article 17

67 Loi No. 10.001 Portant Code Penal Centrafricain, Art 9.

68 Loi No 007/PR/99 Portant procédure de poursuites et jugement des infractions commises par les mineurs de treize (13) à moins de Dix huit (18) ans, Art 22.

69 See Cipriani, Children's Rights and the Minimum Age of Criminal Responsibility, Ashgate, 2009, 194-5. See also ChildsRightInternational, networhttps://archive.crin.org/en/home/ages/africa.htmlpersonunderthe0ageseven%20can accessed 17 June 2024. See also; Summary record of 1057th meeting of the UN Committee on the Rights of the Child, 14 September 2005, CRC/C?SR.1057, 31 July 2013, para. 91.

d'Ivoire cannot be held criminally responsible.[70] Under the Democratic Republic of Congo Law on Protection of the child, children's courts cannot hold children criminally responsible for an offence committed while under the age of 14.[71] No child under the age of 12 in Egypt can be held "criminally responsible" as defined in national legislation, but under the Child's Law, the Child Court is empowered to order children to be "reproached"; delivered to parents/guardians or custodians; placed in a specialised hospital; or placed in a social care institution from the age of seven if the child has committed a felony or misdemeanour.[72] Children under the age of 12 in Eritrea cannot be held criminally responsible for their actions.[73] Also in Gambia the minimum age of criminal responsibility is 12.[74] No person under the age of nine can be held criminally responsible in Ethiopia.[75] A child under the age of 12 years in Ghana is considered incapable of committing a criminal offence,[76] but children can be held criminally responsible from the age of 13 in Gabon.[77] In Guinea, children under the age of 10 cannot be subject to criminal prosecution and children under the age of 13 may

[70] Loi No. 60-366 du 14 November 1960 portant code de procédure pénale, Art 116.

[71] Loi No. 09/001 du 10 janvier 2009 portant protection de l'enfant, Art 95.

[72] Childs Right International Network , Ibid.n.29.

[73] Transitional Penal Code, Art 52. See also, Combined second and third periodic report of Eritrea to the UN Committee on the Rights of the Child, CRC/C/ERI/3, 23 October 2007, para 335.

[74] Children's Act 2005, S 209.

[75] Penal Code, Art 52.

[76] Criminal Code, S 26.

[77] Code Penal, Loi No. 21/63 du 31 mai 1963, Art 57

only be subject to protective measures, educative and supervision measures,[78] but a child between the ages of 13 and 16 can only be sentenced to imprisonment where he or she is judged to have acted with discernment.[79]

Furthermore, in Guinea-Bissau, the minimum age of criminal responsibility is 16.[80] According to the Child's Right International Network, it is not yet clear whether children under this age can be subject to measures that amount to deprivation of liberty. In Kenya, no one under the age of eight can be held criminally responsible, and a child over the age of eight but younger than 12 can only be held criminally responsible where he or she had the capacity to know that he ought not to do the act or make the omission at the time of the alleged offence. A male person under the age of 12 is presumed to be incapable of having carnal knowledge.[81] This provision prevents the prosecution of younger boys for certain sexual offences. This is similar to section 30 of the Nigerian Criminal Code.

In Lesotho, no child under the age of 10 can be prosecuted for a criminal offence. A child aged 10 to 14 can only be prosecuted where an inquiry magistrate is satisfied that "the child possesses the capacity to appreciate the difference between right and wrong and has the ability to act in

78 Code Penal, Art 64.

79 Code de L'Enfant Guinéen, Loi L/2008/011/AN du 19 Aout 2008, Art 345.

80 Código Penal Guineense, Decreto Lei No. 4/93, Artigo 10.

81 Penal Code, S 14(1) and (2).

accordance with that appreciation." The onus is on the prosecution to prove beyond reasonable doubt that a child has this capacity.[82] According to the Liberia Juvenile Court Procedural Code[83] a juvenile delinquent is a juvenile who has attained the age of seven but is younger than 18 and a child under the age of seven is considered incapable of being 'a delinquent.' However, in national terminology, a person is not considered 'criminally responsible' for his or her behaviour while under the age of 16.[84] Thus, a 'juvenile' is defined as any person under the age of 18.[85] In Libya, children can be held criminally responsible for all offences from the age of 14, though only if capable of discernment. A child aged over seven but younger than 14 cannot be held criminally responsible in the same way as an older child, but can be subject to 'preventive measures' which include detention in a juvenile education and guidance centre.[86] Also in Madagascar, a child under the age of 13 cannot be held criminally responsible but children aged 13 to 16 can be held criminally responsible. However, the court has discretion in this regard.[87] In Malawi, a child under the age of seven is not criminally responsible for any act or omission. A child older than seven but younger than 12 can only be held criminally responsible if it can be proved that at the time of the alleged

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82 Children's Protection and Welfare Act 2011, No 7 of 2011, S 79(1) - (4).

83 S 11. 11(b).

84 Penal Code, S 4.1.

85 Juvenile Court Procedural Code, Section11.11(a).

86 Penal Code, Arts 80 and 81.

87 Ordonnance Nos 2-038 and 62-038 du 19 Septembre 1962 sur la protection de l'enfance, Art 35, 44 and 46.

offence he or she had capacity to know that he or she ought not to do the act or make the omission. A male person under the age of 12 is presumed to be incapable of having carnal knowledge. This provision also prevents the prosecution of younger boys for certain sexual offences.[88] In Mali, children under the age of 13 are conclusively presumed not to have the capacity to commit a criminal offence. A child aged 13 to 18 can only be held criminally responsible where he or she acted with discernment.[89]

No one can be held criminally responsible for an offence committed while under the age of seven in Mauritania, [90] but in Mauritius, there is no clear or overt minimum age of criminal responsibility. The Criminal Code Act allows for children under 14 to be subject to criminal measures if they have "discernment" but no lower age limit is set. Children who do not have discernment can be subject to deprivation of liberty, but not criminal conviction.[91] A child under the age of 12 at the time of an alleged offence cannot be held criminally liable in Morocco,[92] but there is no clear minimum age of criminal responsibility in Mozambique. Children under the age of 16 are subject to the jurisdiction of the Juvenile Court which is empowered to impose penalties amounting to

88 Child's Right International Network, Ibid.n.29.

89 Ordonnance No. 02-062 /P-RM du 5 juin 2002, Art 98.

90 Ordonnance No. 2005-015 portant protection pénale de l'enfant, Art 2

91 Criminal Code Act, Sections 44 and 45.

92 Penal Code, Art 12; Criminal Procedure Code, Arts 138 and 458.

deprivation of liberty.[93] In Namibia, before the Child Care and Protection Bill, Children under the age of seven cannot be held criminally responsible. A child older than seven but younger than 14 can only be convicted of an offence if the State can prove that the child knowingly intended to do wrong and understood the consequences of the wrongful act.[94] However, in Niger, children can be held criminally responsible from the age of 13, but can only be subject to protection, assistance or re-education measures where they lack discernment.[95] While in Rwanda children can be subjected to criminal penalties from the age of 14,[96] in Sao Tome and Principe children under the age of 16 cannot be held criminally responsible.[97] In Senegal there are no provisions permitting criminal penalties for children under the age of 13.[98]

In Seychelles a person under the age of seven cannot be held criminally responsible for any act or omission. A Child older than seven but younger than 12 can only be held criminally responsible if he or she "had the capacity to know that he or she ought not to do the act or make the omission." A male under the age of 12 is presumed to be incapable of having

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93 Penal Code, Art 42 in conjunction with the Statute of Legal Aid to Minors.

94 First periodic report of Namibia to the UN Committee on the Rights of the Child, CRC/C/3/Add.12, January 1993, para. 40.

95 Penal Code, Art 45.

96 Penal Code, Art 77.

97 Penal Code, Art 19.

98 Penal Code, Art 52.

carnal knowledge, a provision that prevents the prosecution of younger boys for certain sexual offences. [99] This is another provision that is similar to the position in Nigeria. The State reported to the UN Committee on the Rights of the Child that the minimum age of criminal responsibility is 12, but this provision remains in force, so it is possible for younger children to be subjected to criminal penalties.[100] Furthermore, in Sierra Leone, 'No child can be held criminally responsible for his or her actions while under the age of 14.'[101]

According to Child's Right International Network report, Somalia's legal system is divided between that of Somaliland, which unilaterally declared its independence in 1991, and the rest of the country. This legal divide significantly affected sentencing provisions for child offenders, so that the two regions are treated separately. In South/Central Somalia and in Puntland, the Somali Penal Code 1962 sets the minimum age of criminal responsibility at 14 and provides for reduced punishments for persons aged 14 to 17, but it also authorises sending children under 14 to reformatories. The Juvenile Courts and Reformatories Law 1970 defines a child as a person under 14 and a young person between ages 14 to 17. It gives a juvenile court exclusive jurisdiction to hear and determine cases relating to children and young people in

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[99] Penal Code, S 15.

[100] See: Initial Report to the UN Committee on the Rights of the Child, CRC/C/3/Add.64, 3 May 2002, at IX.A.1. and The administration of juvenile justice. See also: Child's Right International Network, Ibid.n 29.

[101] Child Rights Act, S 70.

relation to any offence except murder, it repeals inconsistent laws. In Somaliland, the Juvenile Justice Law 2007 puts the age of criminal responsibility at 15 and harmonises the provisions of secular, Sharia and customary laws.[102] Under South Africa Child Justice Act, a child who commits an offence while under the age of 10 is not considered to have criminal capacity and so cannot be prosecuted. A child who is older than 10 but younger than 14 is presumed to lack criminal capacity unless the State proves otherwise. In order to prove that a child has criminal capacity, the State must demonstrate beyond reasonable doubt that the child was able to appreciate the difference between right and wrong at the time of the commission of the alleged offence and to act in accordance with that appreciation.[103]

Generally in Sudan, no child under the age of seven can be held criminally responsible. Children aged seven to 15 can be held criminally responsible if they have reached puberty,[104] though, the Narcotic Drugs and Psychotropic Substances Act 1994 can be applied without a lower age limit.[105] However, under the South Sudan Penal Code, A child under the age of 12 cannot be held criminally responsible. But a child aged 12 to 14 is presumed to be able to be held criminally liable unless it can be proved beyond reasonable doubt that he or she lacked the capacity to form the intention necessary to

[102] Reported at http://www.unicef.org/somalia/reallives_5434.html, accessed 21 February 2011, accessed 20 June 2024.

[103] Child Justice Act 2008, Ss 7 and 11.

[104] Criminal Act 1991, Ss 3 and 9.

[105] Narcotic Drugs and Psychotropic Substances Act 1994, Arts 15 and 20.

commit the offence or, where negligence is an element of the offence, he or she lacked the capacity to behave in the way that a reasonable adult would have behaved in the circumstances.[106]

The minimum age of criminal responsibility is seven in Swaziland. A child aged 7 to 14 can only be held criminally responsible if he or she "knew the difference between right and wrong, knowingly intended to do wrong and understood the consequences of the act." [107] Similarly under the United Republic of Tanzania Criminal Code, no person under the age of seven can be held criminally responsible for any act or omission. A child aged seven to 12 can be held criminally responsible where at the time of alleged offence he or she had the capacity to know that he ought not do the act or make the omission.[108] Under Togolese Penal Code, children under the age of 13 could be held criminally responsible before the Juvenile Court.[109] However, the introduction of the Children's Code 2007, has effectively increased the minimum age of criminal responsibility to 14 by providing that children under this age are 'criminally irresponsible.'[110] In Tunisia Persons under the age of 13 cannot be held criminally responsible.[111]

[106] Penal Code, Ss 30 and 31.

[107] Initial report of Swaziland to the UN Committee on the Rights of the Child, CRC/C/SWZ/1, para 79.

[108] Criminal Code, S 15.

[109] Code de Procedure Penale, Art 455.

[110] Children's Code 2007, Art 302.

[111] Child Protection Code, Art 68.

Nonetheless, in Uganda the minimum age of criminal responsibility is 12 years.[112]

Furthermore, in Zambia 'No person under the age of eight is criminally responsible for any act or omission. A child older than eight but younger than 12 is not criminally responsible for an offence unless it is proved that 'at the time of doing the act or making the omission he or she had the capacity to do the act or make the omission'. A male person under the age of 12 is presumed incapable of having carnal knowledge, a provision that prevents the prosecution of younger boys for certain sexual offences.[113] However, in Zimbabwe 'No child can be held criminally responsible for an offence allegedly committed while younger than seven years of age. A child older than seven but younger than 14 can only be held criminally responsible where it is proved that he or she has the capacity to form the intention necessary to commit an offence or, where negligence is an element of the relevant offence, where he or she has the capacity to behave in the way that a reasonable adult would have behaved in the circumstance.[114] A male child under the age of 12 is presumed to be incapable of sexual intercourse, though this is a rebuttable presumption and a younger boy can be prosecuted for sexual offences related to sexual intercourse where it can be demonstrated that he was capable of performing the act on

[112] Children's Act, S 88.

[113] Penal Code, S 14.

[114] Criminal Code, Sections 6 and 7.

the balance of probabilities.[115] This is very similar to the intendment of the provisions of section 1(2) (a) of the Nigerian Violence against Persons (Prohibition) Act 2015 except that the VAPP Act did not qualify its provisional statement.

6. Conclusion

Criminal justice administration in juvenile matters is always geared towards the best interest of the child. There is also no doubt that the Violence Against Persons (Prohibition) Act 2015, came into force with good intention to address both sexual, domestic and other kinds of violence against persons. These acts have become so rampant in recent times. It is also strongly believed that the VAPPA came to support, promote and strengthen existing good laws such as section 30 of the Criminal Code, section 50 of Penal Codes, the Administration of Criminal Justice Act 2015, and the Childs' Right Act 2003. Therefore, providing that *(a) where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years imprisonment is* contrary to the Child's Right Act 2015. It is an abuse of the minimum age immunity principle, an affront to juvenile justice and will do no child offender any good. It should therefore be reviewed and possibly expunged. Understandably, while the age immunity principle subsists, high rate of criminal acts involving minors either as innocent agents or co-perpetrators compel advocacy for reducing the age of criminal responsibility. It is also possible that a low age of criminal responsibility perpetuates the marginalization

[115] Criminal Code, Sections 63.

of underprivileged youths and exacerbates disadvantage within the society. Children involved in criminal proceedings are less likely to complete their education and secure meaningful employment in future. The VAPPA can among other measures in the best interest of the child authorise sending child offenders under 14 to reformatories and be only subject to protection, assistance or re-education measures where they lack discernment. The law does not regard children as offenders but as people in conflict with the law. The aim is rather restorative criminal justice system for functional re-integration into the society and not otherwise.