

The age of criminal responsibility criminology essay



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One must be aware that the United Nations Convention on the Rights of the Child professes anyone under the age of eighteen is a “ child”. However, in the criminal law, greater distinctions are made: anyone under 18 is a ‘ juvenile’, aged 14-18 are classed as ‘ young persons’ and a person under 14 years old are classed definitively as a “ child”.

What does it mean to be a child in this modern era? Every person has experienced life as a child and could easily accumulate their own perspective, but that is exactly what it would be; a subjective definition that begins with infancy and ends when they reach adolescence. However, ‘ adolescence,’ for legal purposes must portray a mental, intellectual, emotional and more specifically, a moral capacity to differentiate right from wrong.

Before one looks at the legal observations of childhood, it is only sensible to consider the words of those who dedicate their lives to the study of child psychology, and ultimately have wider knowledge.

Psychological theory

Piaget in his work, ‘ The Moral Judgement of the Child’[1]established a theory of not only the cognitive, but also the moral development of a child’s mind, précising that they cannot undertake certain tasks until they are psychologically mature enough to do so. The psychologist Kohlberg expanded on Piaget’s position[2], and their theories make it plain that by ten children are not capable of making moral decisions similar to that of an adult, as they have not fully learned to do so.

The theories suggest that there are 2 stages of moral reasoning (which sometimes overlap) named the heteronomous stage and the autonomous stage. At the heteronomous stage, the child is egocentric and believes the world revolves around them, and they will act depending on the severity of the outcome. This stage continues past the age of ten, so before they reach the next stage it is unlikely that they will be aware of the severity of any outcome. Subsequently, when they are in the autonomous stage, intentions are more important than the consequences of action and should be the basis for judging behaviour, and it is then that a child should be held accountable for his or her actions, not before. The theories suggested here are, of course, non-conclusive and non-exhaustive, but at least give an insight into the questionable nature of the entire concept of an absolute age of criminal responsibility, so it would be worthwhile to keep these theories in mind throughout the discussion.

The age of criminal responsibility

The age of criminal responsibility in England and Wales is ten years.[3] All children under this age are presumed to be *doli incapax* (incapable of committing a crime). After reaching the age of ten however, and as Elizabeth Stokes informs us, there is nothing within the substantive criminal law regarding the attribution of guilt, which distinguishes the responsibility of young people from that of adults.[4]

The Home Office White Paper in 1997, signalled the start of New Labour's tough and punitive, 'No More Excuses' campaign by declaring that;

' Young people who commit offences must face up to the consequences of their actions for ... No young person should be allowed to feel that he or she can offend with impunity ... Punishment is important as a means of expressing society's condemnation of unlawful behaviour and as a deterrent.'[5]

Even though there was much discussion with reference to raising the age in the late 1960s after the Government White paper ' Children in Trouble'[6] (1968) along with Section 4 of the Children and Young Persons Act 1969 which would have raised the age of criminal responsibility to 14 but was never implemented and the provision was repealed in 1991. This introduced an unnaturally bold dividing line between criminal responsibility and irresponsibility for children who offend. This was the case even though arguments have been put forward suggesting that to criminalise and label children is very dangerous, with Deborah Orr proposing that, ' if a child has behaved in a fashion that he or she feels he had little or no control over, and then is told this is " criminal", then the child is being taught that his or her criminality is something over which he has no control.'[7]The following doctrine attempted to decrease the amount of children being labelled until it was abolished.

Doli incapax – Protection or a waste of time?

Before the Crime and Disorder Act 1998 which abolished the doctrine, there had existed for ' hundreds of years'[8]protection for children aged between 10 and 14 years. This protection was the rebuttable presumption that children were ' doli incapax'. Under this legal doctrine, as expounded in the case of C v DPP[9]in addition to committing the actus reus and mens rea of a <https://assignbuster.com/the-age-of-criminal-responsibility-criminology-essay/>

criminal offence the prosecution also had to prove beyond reasonable doubt that they knew what they were doing was seriously wrong.

This doctrine was working as a filter which recognised 'childhood' to stop 10 being the absolute age of criminal responsibility. Children aged between 10 and 14 years benefited from the presumption as it protected them from the detrimental effects of the enforcement of criminal law.[10]But despite this, it could be suggested that the doctrine did not work as it was professed to as it still did not stop children being prosecuted; as the prosecution only had to prove that children knew the difference between the extreme opposites of right and gravely wrong, and not mere naughtiness and wrong. For example, Bandalli suggests that children have a very flexible approach to ownership, if one were to look at the contents of the Theft Act 1968, s. 1(1) describes the crime as 'dishonesty with intent to permanently deprive' a concept which children might only be aware of as merely 'borrowing.' So in practice it did not work sufficiently, but it cannot be ignored that it had very strong symbolism, which was arguably the most important aspect.

The symbolism of the doctrine

An excellent point made by Pickford questions why the opponents of abolition continue to have faith in a doctrine which has proved to be so inadequate in protecting children anyway.[11]But this is perhaps because at least some acknowledgement was given to the notion of 'childhood' with *doli incapax*, differentiating their treatment from that of adults. It made the police, the CPS and the judiciary stop and think about the degree of responsibility for each individual child,[12]and doing that, however briefly, kept the childhood status in tact.

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The symbolism of the abolition

In spite of these arguments, Jack Straw said on 3 June 1998; “ with great respect, we are abolishing the concept of doli incapax” and thus England and Wales saw the erosion of the policy of protection. However, this was combated with the justification that ‘ removal of protection was removal of ‘ excuse’ culture.’[13]Nevertheless, supporters of the doctrine still implore the judiciary to recognise at least some protection. The recent case of R v T[14]in 2008 it was proposed that only the presumption had been abolished[15]and that the defence remained in tact. But this proposition was quickly flattened and children aged 10-14 would be treated in the same way as other juveniles in deciding whether to prosecute. The abolition of doli incapax was discoursed in conjunction with increasing the age of criminal responsibility, but now there has been an absolute abolition, the government has carried out one without the other, and has left a vacuum where protection should be. Therefore, what doli incapax stood for; its symbolism of protection was quashed and children are treated like adults once again. The possible justifications for this are set out in Part Two.

PART TWO

CRIMINALISATION AND THE RIGHTS OF THE CHILD

“ There is little doubt that punitive imperatives have shaped contemporary policy responses to child ‘ offenders’ in England and Wales.”

- Goldson (2002)

The government is ignoring the widespread discourse and European recommendations about the rights of children. With their apparent

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stubbornness, not to mention the abolition of the centuries old presumption of doli incapax, the question is why are we wedded to the extreme desire to pull children into the criminal justice system and criminalise, rather than taking the civil route which is based on the foundations of protection and welfare? Their policy has brought a large group of children under the auspices of the criminal justice system where previously they may have been successfully diverted.

This current punitive climate can be justified to an extent because people have an innate interest in punishment. Namely, they will view children as adults seeing them as autonomous beings who bear responsibility for what they do, despite their age.

In the NACRO youth crime briefing as recent as December 2008, the Committee expresses concern about the findings of a survey commissioned by Barnado's[16]which show the negative public perception of children:

49% of people believe that children are increasingly a danger to each other and adults,

54% agreed that children are beginning to behave like animals,

35% of people feel like the streets are infested with children.

In addition to this, after the 1994 government submission to the UNCRC, Barnado's and the NSPCC highlighted their outrage of what the government purported to be happening in England and Wales, that it did not reflect what was happening in reality, and thus decided to write their own submissions

such as these, showing that the UK Government has much to answer for.
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The public have a diverse perception of children in contrast with psychologists[17]and they want to prosecute them. To prosecute and put a child through the criminal system costs between £75, 000 (for a youth to be in a young offender's institute) and £150, 000 (for secure accommodation). [18]Although it might be a generally useful deterrent to use the threat of prosecution, recently it can be seen how arbitrarily it is used (which is in breach of Art 37(b) United Nation Convention on the Rights of the Child). For example, an article in ' The Mail Online'[19]states that in Newark, Nottinghamshire, letters of warning have been sent out that " children face prosecution and fines of up to £100 if they annoy neighbours with ball games." .

But if the child was to be prosecuted for kicking a ball around in the street, what would this really achieve? The answer is nothing. Prosecution and custody in this respect would be equivalent to an employer paying a new employee to go through a process which they know does not work,[20]which is obviously a waste of time for everyone involved. The government maintains that it is providing proportionate penalties for child offending and in its report to the CRC states they ' are keen to ensure that children are not prosecuted whenever an alternative can be found' but the NACRO youth crime briefing successfully contests this articulating ' even those who are diverted [away from the courts] by being dealt with reprimand of final warning, are in effect [still] criminalised.'

It is also exceptionally questionable whether children should be tried in the Crown Courts, as the NACRO briefing[21]suggests that the Crown Court is primarily an arena for dealing with adult offenders through jury trial, and <https://assignbuster.com/the-age-of-criminal-responsibility-criminology-essay/>

children who commit grave crimes are, in large degree, processed as if they were adults.[22]

And so, in the shadow of sympathetic European progressiveness, New Labour, with its ' No More Excuses' draconian approach has conceded to the whims of the public and are practically stealing away what it is to be a child, including what they deserve and have a right to - protection, which a higher age of criminal responsibility would ensure.

In Europe: UN Convention on the Rights of the Child (UNCRC)

According to United Nations Committee on the Rights of the Child regarding the age of criminal responsibility, countries should " consider whether a child can live up to the moral and psychological components of criminal responsibility" and notes that if the age of criminal responsibility is set too low " the notion of responsibility would become meaningless". The Committee has recommended State Parties not to set a minimum age of criminal responsibility at a too low level and to increase an existing minimum age to an internationally acceptable level concluding that the minimum age below the age of 12 is considered unacceptable.

According to UK Children's Commissioners' Report to the UNCRC, although the UK has ratified the UNCRC, the Convention is not part of domestic law and remains unenforceable. Recent legislative and policy developments are in clear breach of the UNCRC, for example, the ' naming and shaming' of children subject to anti-social behaviour orders[23]. Even if these did not breach the Convention rights, it would be unsuccessful anyway, as some

children, especially the higher end of the spectrum would actually be proud of having an ASBO, or as Deborah Orr suggests[24], they would be ‘badges of pride and perverse achievements.’

Thompson and Venables – case study

“How it came about that two mentally normal boys aged 10 of average intelligence committed this terrible crime is very hard to comprehend . . .”

– Morland, J

The cases of R v. Secretary of State for the Home Department, Ex parte V. and R. v. Secretary of State for the Home Department, Ex parte T, concerned Robert Thompson and Jon Venables, both 10½ year old boys, being convicted of the murder of a two year old boy. They were only just over the age of criminal responsibility. They were sentenced to detention during Her Majesty’s Pleasure and the trial Judge; Morland J set the minimum term to be served at eight years to reflect their “extreme youth.”

The NACRO youth crime briefing[25] ‘ Grave crimes’, mode of trial, and long term detention,’ reports that the European Court of Human Rights (ECHR hereafter) determined that the defendants were denied a fair trial since they were unable to participate effectively in the proceedings given the nature of the court room and the intense public scrutiny saying ‘ the formality and ritual of the Crown Court must have seemed incomprehensible and intimidating for a child of eleven’. This breaches Art 3 of the Convention, to have the best interests of the child as the primary consideration.

The Youth Crime Briefing[26]reports that even after the Lord Chief Justice issued a Practice Direction (in February 2000), which gave guidance for the conduct of such proceedings and ‘ calls upon Crown Courts to have regard to the welfare of the child and to avoid exposing him or her, so far as possible, to intimidation, humiliation or distress (my emphasis added),’ further cases go on to breach Convention rights. This was detailed in the case of SC v UK[27]where an eleven year old boy who did not have the intellectual, moral or cognitive capacity for his age group, had his right to a fair trial breached ‘ even though the procedure adopted would have complied with the Practice Direction’.

The ECHR stated that:

‘[He] has little comprehension of the role of the jury Even more strikingly, he does not seem to have grasped the fact that he risked a custodial sentence, and even once sentence had been passed ... he appeared confused and expected to be able to go home with his foster father.’

The Court then went on to make recommendations as to how a child with the ‘handicap’ of childhood should be processed that they should be tried in a specialist tribunal noting afterwards that there are at present no proposals to develop one.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice – The Beijing Rules.

The Beijing Rules adopted by the General Assembly in 1985, specifies in section 4.1 that the lower age of criminal responsibility “shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”.

The commentary states that a specific approach should be taken, which is ‘whether a child can live up to the moral and psychological components of criminal responsibility’ and making explicit reference to the ‘individual discernment and understanding.’ This relates profusely to the theories that Piaget and Kohlberg propose where they have said that moral development is a continual process that occurs throughout the lifespan, and I would suggest that to fix the age at ten is to put a limit on an uncertain event, that is to say, they are severely generalising the mental capacity of children, leading to injustices in the ‘due process’ that children are entitled to have. Even if it can be argued that increasing the age would lead to net-widening of children (who may have developed moral capacity earlier) being excused for crimes, that does not displace the argument that the majority of crimes committed by children are minor, and could be prevented with concern for the individual offender and not the offence. .

In fact, the Beijing Rules state in part 11. 1, ' consideration shall be given...to dealing with juvenile offenders without resorting to formal trial' emphasizing that, ' this practice [will] serve to hinder the negative effects of subsequent proceedings,' such as ' the stigma of conviction and sentence'.

The Rules also make clear the relationship that the age of criminal responsibility must have with its other limitation counterparts; the legal age of consent, the legal age of drinking, marital status, civil majority for example. There is also the notion of the need of a higher mental intelligence, emotional and moral capacity to be responsible in respect to all of these, and this just does not sit well with having the age of criminal responsibility at ten. [28]

Risk and Predictive Factors

In addition to disregarding the Beijing Rules, the government have actually contributed to the reason that children are committing crimes, evidenced by certain predictive factors that have led to increased youth crime in certain contexts. The Youth Offending Board[29]maintains that anti-social behaviour and crime is not immediately down to the child's choice, but rather the context in which they are placed. From their web page headed, ' Targeted Prevention of Youth Crime and Anti-Social Behaviour' they raise the policy issue of funding for a start, and reinforce that, " one of the best and most cost-effective ways to reduce youth crime is to prevent young people from getting into trouble in the first place, by dealing with the problems that make it more likely they will commit crime or anti-social behaviour." They then proceed to list possible predictive factors such as lack of or poor education,

poor family relationships (bad parenting), and the child living in public housing located in high risk, inner city areas.

To start with, the report from the UK Children's Commissioners to the UN Committee on the Rights of the Child evidenced that child poverty is high with around 3.1 million people living in poverty (29% of children) in England and more than 1 million children living in poor housing, which is a possible reason why children commit crime. Here it is not individual choice, but the government's own policy that is creating the increased likelihood of child offenders. The Joseph Rowntree Foundation suggests that current measures mean child poverty will rise from 18% to 33% over the next 20 years. They say the poverty gap is created by state benefits which are linked to inflation, rather than earnings, and that is of government concern. And so, if the Government is likely to miss its target to halve the number of children living in poverty by 2010, then they are in theory adding to the offending rates instead of reducing them, defeating their whole objective of being tough on crime.

Other factors arise from poor parenting and bad education. In a speech to the Association of Teachers and Lecturers in 2002, the former education secretary Estelle Morris argued that bad parenting has created a "cycle of disrespect" among children, and again does not show it to be the individual's own choice. Poor education leads to truancy, alcohol misuse and other antisocial activities that adults would not be punished for. The Joseph Rowntree Foundation found that almost half the young people aged 11 to 17 reported committing at least one criminal act in a survey of 14,000 school students.[30]It is fair to argue that this shows crimes are being committed by <https://assignbuster.com/the-age-of-criminal-responsibility-criminology-essay/>

children to whom *doli incapax* formerly applied, but this paper is not insisting that children between 10 and 14 do not commit crimes, it is reiterating that the punitive measures for this age group are a step backwards in an otherwise progressive world, and alternative measures are needed. The government have excused themselves of any blame, when it is obvious from the above factors that they have an inherent part to play.

Children are no longer treated as special cases when it comes to the types of penalties available to the courts when they ought to be. The status of 'childhood' still remains and needs to be protected. But condemning children to the penalties that adults have, they are subverting the whole concept of 'childhood' and are returning to the stage in history where children were no less than 'little adults'[31] a definition which philanthropists such as Mary Carpenter in the very early stages of the youth justice system were trying to eradicate.

PART THREE

ALTERNATIVES

Justice/Welfare

" Burgeoning youth incarceration and high reconviction rates in England and Wales have

prompted a search for alternative responses."

- Pitts and Kuula[32]

The overall aims of the criminal justice system are to avoid future re-offending and to exact retribution on behalf of the victim and society[33]as <https://assignbuster.com/the-age-of-criminal-responsibility-criminology-essay/>

defined in s. 37 of the Crime and Disorder Act 1998. The UK government for England and Wales have two main options they could take towards a child who has committed a crime; a diversionary approach operating at a cautionary level or to prosecute amounting to either a judicial process of punishment on the basis of harm done or a punishment approach regarding the welfare of the child. The inability to comply with the UNCRC recommendations is exposed where they take the punitive route almost every time.

The response to juveniles oscillates between the justice or welfare approach, that is to say whether you look to the offence of the offender. The welfare approach is founded on determinist reasons outside of the child's control, so he or she bears no responsibility. However the justice approach appears to predominate in England and Wales, which will inevitably mean that the age of criminal responsibility will remain too low, as it does not allow a child to be anything but responsible.

Civil Law approach

The civil family law is an example of the welfare approach. There is an odd dichotomy because, in contrast with the criminal law which employs a fixed cut-off point, family law takes an individualised and functional approach, joined with a completely different perception of childhood, which is in line with the UNCRC. The perception seems nearer to that outlined by Piaget and Kohlberg which understands the vulnerable and dependent nature of a child, and again works on the basis that the child's welfare is paramount. Helen Keating also suggests that the child may also be seen as incompetent in legal terms, and that developmental discourse has found expression in law <https://assignbuster.com/the-age-of-criminal-responsibility-criminology-essay/>

and has made its way into the system through the test formulated from Gillick v West Norfolk and Wisbech Area Health Authority and Another[34]. .

The level of competence required is ' sufficient understanding and intelligence to enable him to understand fully what is proposed' and ' sufficient discretion to enable him to make a wise choice in his or her own interests'.[35]Despite the problems that the test can amount to, such as delay in ascertaining the competence, its influence has become enshrined in statute. The Children Act 1989 even begins with a checklist for the welfare principle stating that the court should have regard to the ' the ascertainable wishes and feelings of the child considered in the light of his or her age and understanding.'[36].

There is no such parallel in criminal law, which begs the question of why two systems running side by side are contradictory. It cannot be that the children in family law cases are more vulnerable than those in criminal law, so it must be due to the approach. The UK Government should take a step back and try to ignore the distorted perceptions of children that the public emanate, and look more closely at the individual child - perhaps even looking at them as if they were their own young.

Comparative Systems

With the New Labour policy so behind most other countries it is unsurprising that one can find models of welfare based systems which, despite their own shortcomings (such as paternalistic decision-making) still puts us to shame.

Lesley McAra introduces a substantive summary of the developments in

Scottish Youth Justice[37]noting it exhibited a high degree of stability in its <https://assignbuster.com/the-age-of-criminal-responsibility-criminology-essay/>

welfare based institutional framework and policy ethos, up until it started acting like England. By filtering in punitive measures such as anti-social behaviour legislation when the Children (Scotland) Act was passed in 1995, Scotland has conceded to the public's moral panics about persistent offenders and is transforming. The fact that their age of criminal responsibility is going to raise to 12 (from 8) when the Scottish Government's Criminal Justice and Licensing Bill passes in 2009, may just have saved them from themselves.

This was the philosophy of the Kilbrandon Committee's[38]' children's hearing system.' Here a child, passing several grounds for referral (which are astonishingly similar to the grounds that the civil (family) law invokes for a Care Order[39]'.. is or is likely to suffer serious harm' and/or with admission of guilt) are referred to a tribunal consisting of ' lay-people', who operated from a ' needs not deeds' viewpoint was in direct contrast with England's Ingleby Committee.

It will bring Scotland into line with most of Europe, but the Scottish Government said the rise would not mean " letting off" younger offenders, as Justice Secretary Kenny MacAskill said amongst recent discourse,

" Evidence shows that prosecution at an early age increases the chance of reoffending - so this change is about preventing crime. Rather they will be held to account in a way that is appropriate for their stage of development and ensures that we balance their needs with the need to protect our communities."

Similarly in Finland a different approach is taken. The age of criminal responsibility is 15, and their answer is to look at the child on the whole; their environment whilst dividing children into their age groups based on cognitive functions, needs, and understanding. Moving from a punitive to welfare syste