



Report of the Workshop on Criminal Capacity of Children **Held on Wednesday, 4 May 2011 (University of Pretoria)**

Introduction

The workshop on criminal capacity of children, organized by the Child Justice Alliance, was held on Wednesday, 4 May 2011 at the Centre for Continuing Education at the University of Pretoria. Twenty seven (27) people attended and the participants were drawn from different sectors including government, academics and civil society. The professions represented were law, psychology/psychiatry and social work. See Annexure A for the list of participants.

Session 1: 08:45 – 09:50 Chair: Dr. Ann Skelton

Welcome Remarks and Introduction of Workshop Objectives

Dr. Ann Skelton: Director, Centre for Child Law, University of Pretoria

Dr. Ann Skelton welcomed the participants on behalf of the Child Justice Alliance. She explained that the Child Justice Alliance (the Alliance) was originally formed to support the passage of the Child Justice Bill through Parliament. It is composed of non-governmental organisations (NGOs) and Friends of the Alliance which include government officials and persons from the corporate sector. The Bill was passed into law in 2009 becoming the Child Justice Act (CJA) and the Alliance has since shifted its attention to implementation issues, monitoring and evaluation. The Alliance has a Driver Group which meets three to four times a year and takes care of operational issues and monitors the implementation of the CJA. The CJA provides that within 5 years of implementation, the criminal capacity of children should be reviewed. It is one year since implementation, hence the need to start examining the issue of criminal capacity.

Dr. Skelton gave the legislative history of criminal capacity, stating that when the South African Law Reform Commission (SALRC) drafted the Child Justice Bill various options and aspects of criminal capacity were considered. In 1990 an inter-sectoral workshop was held at the University of Pretoria (UP) where there was strong support to increase the minimum age of criminal capacity from 7 years, and also to retain the rebuttable presumption of the criminal capacity of children below the age of 14, where the State can prove that a child indeed had the necessary criminal capacity.

The SALRC therefore proposed that the minimum age of criminal capacity be raised from 7 to 10, and that the rebuttable presumption be retained between the ages of 10 years or older but under 14 years. This was not particularly controversial, although there were a few 'die-hards' who felt that the minimum age should remain at 7 years. The Child Justice Bill was introduced into Parliament in 2002. Meanwhile, in the international arena, events began to overtake the Child Justice Bill. The 1989 United Nations (UN) Convention on the Rights of the Child (CRC), does not set a minimum age for criminal capacity, and only encourages States Parties to have a

specified minimum age.¹ In 2007, the United Nations Committee on the Rights of the Child, in the UN General Comment No. 10, stated that that a minimum age of criminal capacity younger than 12 is considered by the Committee not to be internationally acceptable.² Furthermore, the approach of a 'presumption' was not favoured, and the General Comment provided that the Committee 'strongly recommends that States Parties set a minimum age that does not allow, by way of exception, the use of a lower age.'³ This means that the Committee prefers a clear 'cut off' age below which a child may not be prosecuted.

The rebuttable presumption of criminal capacity has existed for decades but it does not work very well for children. For example, it was common practice in the past that the prosecution called the parent of the child offender and asked such questions such as 'does the child know the difference between right and wrong?' or 'Have you taught the child the difference between right and wrong?' If the response was in the affirmative, it was regarded as evidence for rebutting the presumption of criminal capacity. Thus the courts have previously relied on the evidence of the parent against the child to ascertain whether or not the child had the necessary criminal capacity at the time of the commission of the offence. The position of the Child Justice Alliance was that if the rebuttable presumption was to be retained, the law must ensure that sufficient evidence is presented and should not rely on the evidence of a parent when making a decision on the criminal capacity of the child.

A Child Justice Alliance conference was held in 2006, where Professor Jaap Doek (Chairperson of the Committee on the Rights of the Child at that time) denounced the Child Justice Bill's approach to criminal capacity and tried to persuade South Africans to opt for a higher cut off age, not younger than 12 years. The Bill came back onto the Parliamentary agenda in 2008 and the Child Justice Alliance decided to support the Bill's proposal for retaining the rebuttable presumption of criminal capacity between the ages of 10 years or older but under 14 years, but encouraged Alliance members to make written and oral presentations setting out their different views. Several submissions by members recommended 12 (or even 14) as a minimum age, some suggested retaining the presumption, others suggested abolishing the presumption and rather opting for a clear 'cut-off' age of 12 or 14..

The Justice and Constitutional Development Portfolio Committee held open and participative discussions on this issue. The Committee was willing to consider the various possibilities and warmed to the idea of flexibility and individuality provided by the presumption, but did consider the simplicity of the 'cut off' approach to also be an attractive option.

In the end, Parliament decided that it did not have enough information about how many and what kind of crimes are committed by 10, 11, 12 and 13 year olds. A compromise was therefore reached, that within 5 years from the implementation of the CJA, Parliament will again consider raising the minimum age of criminal capacity – this time with more information at its disposal.

To this effect, section 8 of the CJA provides that:

"In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in sections 96(4) and (5)."

¹ Article 40(3)(A) UNCRC.

² General Comment No. 10 'Children's Rights In Juvenile Justice' Un Doc. Crc/C/Gc/10 (2007), Para 32

³ Ibid, Para 34.

And sections 96(4) and (5) of the CJA direct the Inter-sectoral Committee for Child Justice to collect the following data on 10, 11, 12 and 13 year olds: The number that have committed crimes and what crimes were committed, the number that went to trial, what sentences were given, the number of cases in which expert evidence was led and what the outcomes were.

Since the Act came into operation in April 2010, there are now less than four years remaining to gather the necessary information for the review of the minimum age of criminal capacity.

This workshop on criminal capacity of children, was therefore considered to be a good opportunity to look at different debates on the minimum age of criminal responsibility, to consider some of the stumbling blocks experienced in the assessment of criminal capacity, to debate some of the solutions, and to debate which professionals should be undertaking the assessments of the criminal capacity of children in the cases where the rebuttable presumption is an issue.

The Agenda for the workshop was to discuss criminal capacity of children in relation to the

- Legal perspective
- Probation/social work perspective
- Psychological perspective – including special issues such as children with developmental delays or other mental health problems.

Some of the questions considered were whether or not South Africa has the capacity to undertake the required number of assessments, evaluations and expert reports regarding criminal capacity of children, especially as persons suitable to carry out evaluations include psychologists and psychiatrists only. The workshop also considered that there are some children with specific mental health issues, the borderline cases eg where a child may be chronologically over 14 but developmentally younger – should the energies of psychologists and psychiatrists rather be focussed on these?

Criminal Capacity of Children: The Legal Perspective

Dr. Charmain Badenhorst: Senior Researcher, Council for Security and Industrial Research (CSIR)

Dr. Badenhorst's presentation on the legal perspective of criminal capacity of children focused on case law and how the issue of the rebuttable presumption of criminal capacity has been dealt with in South African courts. This was considered in terms of three themes:- common law presumptions, guidelines and factors from case law, and South Africa's Child Justice Act 75 of 2008.

Common law presumptions

Under the common law, children under the age of 7 years were irrebuttably presumed to lack the necessary criminal capacity and could thus never be prosecuted. Children 7 years or older but under 14 years of age were rebuttably presumed to lack the necessary criminal capacity and in order to prosecute such children the State had to present evidence to rebut this presumption. The prosecution had to prove that the child, at the time of the commission of the offence, had the ability:

- (a) to appreciate the wrongfulness of his or her act ;and
- (b) to conduct himself or herself in accordance with his or her appreciation of the wrongfulness of his or her act at the time of the commission of the offence.

Guidelines and factors from case law

Under case law, several factors and guidelines have been developed as indicators that a child has criminal capacity. A false account as to where the child had obtained stolen goods,⁴ and proof of a 'malicious mind' on the part of the child,⁵ have been used to rebut the presumption of criminal incapacity.

The courts have held that where a child offender has been accused of committing a statutory offence, the evidence to rebut the presumption of criminal capacity should be stronger as it is not about the general ability of the child to differentiate between right and wrong but rather whether he or she knew in the specific instance that he or she acted wrongly.⁶ The State must show that the child knew what the reasonable and probable consequences of his or her act would be. The fact that a child ran away after committing a crime may be understandable on the ground that he or she was too frightened to return home.⁷

In cases where a child offender is charged with an adult offender or a child that is appreciably older than him or her, the court must consider the fact that the child might have acted under the coercion or influence of the adult or older child.⁸ Also, when a child commits a crime with a person whom he or she can be expected to obey, it leads to the presumption that the child acted as a result of compulsion.⁹

If there is evidence that the child planned the offence and hid the fact that he or she committed the offence because he or she was afraid of punishment, the presumption could be successfully rebutted.¹⁰ Where the prosecution does not set out deliberately to prove criminal capacity, the court is nevertheless entitled to look at the evidence in general in order to determine whether the accused has the required criminal capacity.¹¹ In *S v Ngobese and others*,¹² the court suggested four factors that the State should take into account when discharging the onus of proving that the child offender has the required criminal capacity:

- The precise age of the child, as the presumption weakens with the advance of years towards 14 years of age;
- The nature of the crime, as the presumption weakens when the offence is inherently bad;
- The advancement of evidence that the particular accused appreciated the distinction between right and wrong; and
- Proof that he or she knew the act which had been committed by him or her was wrong within the content of the particular case.

Where a child pleads guilty to a charge and hands in a statement in terms of section 112(2) of the Criminal Procedure Act, 1977, the statement must set out the facts which the accused admits; and on which he or she has pleaded guilty and the presiding officer must be satisfied

⁴ *S v Kholh* 1914 CDP 840.

⁵ *Attorney-General, Transvaal v Additional Magistrate Of Johannesburg* 1924 AD 421.

⁶ *R v Mahwahwa And Another* 1956 (1) SA 250 (SR).

⁷ *R v K* 1956 (3) SA 353 (A) and *R v Tsutso* 1962 (2) SA 666 (SR).

⁸ *S v Pietersen and Others* 1983 (4) 904 (ECD).

⁹ *S v Khubeka and Others* 1980 (4) SA 221 (ODP) and *S v M* 1978 (3) SA 557 (TKSC).

¹⁰ *S v S* 1977(3) SA 305 (OPA).

¹¹ *S v M* 1979(4) SA 564 (BSC).

¹² 2002 (1) SACR 562.

that the accused is indeed guilty of the offence. This should include a reference to the child's criminal capacity at the time of the commission of the offence. A deficiency in a section 112(2) statement cannot be cured by the fact that the child had been legally represented.¹³

The Child Justice Act 75 of 2008

The CJA amends the common law principle by raising the minimum age of criminal capacity from 7 years to 10 years. In terms of section 7(2) of the Act a child, who is 10 years or older but under the age of 14 years and who commits a criminal offence is presumed to lack criminal capacity. The State must prove, beyond reasonable doubt, the capacity to appreciate the difference between right and wrong at the time of the commission of an alleged offence, and the capacity to act in accordance with that appreciation.

Every child who is alleged to have committed an offence must be assessed by a probation officer. One of the purposes of the assessment, in the case of a child who is 10 years or older but under the age of 14 years, is to express a view on whether expert evidence on the criminal capacity of such child would be required. The probation officer makes recommendations on various issues, including the possible criminal capacity of the child, if the child is 10 years or older but under the age of 14 years, as well as measures to be taken in order to prove criminal capacity.

When deciding to prosecute a child between the ages of 10 years or older but under the age of 14 years, the prosecutor must consider factors such, as the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child, the nature and seriousness of the alleged offence, the impact of the alleged offence on any victim, the interests of the community, the probation officer's assessment report, the prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry, the appropriateness of diversion, and any other relevant factor.

If matter has not been withdrawn or diverted by the prosecutor before the preliminary inquiry, the matter must be referred to a preliminary inquiry. The preliminary inquiry is in essence the first appearance of the child in a criminal court. Diversion is one of the objectives of the preliminary inquiry, but the inquiry magistrate may only consider diversion the matter if he or she is satisfied that the child had the necessary criminal capacity at the time of the commission of the offence. The inquiry magistrate must consider the assessment report of the probation officer when making a decision regarding the criminal capacity of the child. The inquiry magistrate or child justice court may, of its own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child by a suitably qualified person. The evaluation must include assessment of cognitive, emotional, moral, psychological and social development. Section 11(5) provides that, where the inquiry magistrate has found that the child's criminal capacity has not been proved beyond a reasonable doubt he or she may, if it is in the best interest of the child, cause the child to be taken to a probation officer for any further action. The preliminary inquiry is an informal pre-trial procedure that is inquisitorial in nature and there is no requirement for a legal representative acting on behalf of the child, although nothing in the CJA precludes a child from being legally represented.

¹³ *Obakeng v S* Case Number CA11/2009 North West High Court; *Mshengu v S* 2009(2) SACR 316 (SCA) and *S v Skade and Another* Case Number 49/10 Unreported Eastern Cape Division.

Session 2

09:50 – 11:30 Chair: Mr. Lorenzo Wakefield

Mr. Wakefield introduced the speakers, Dr. Leon Holtzhausen and Mr. Mthetho Mqonci. He then opened the session by offering a look at inter-sectoral government collaboration and asked the question 'Which profession is key to child justice?'. In his view, it is the probation officers because they are the first to assess a child in conflict with the law and they stay involved in the process until the matter has been diverted and the child successfully complied with the diversion order, or until the trial has been concluded and compliance of the sentencing order has been achieved, where applicable. In this regard probation officers have to provide various reports, including assessment reports, pre-sentencing reports and sentence monitoring reports. They further make a recommendation about the possible criminal capacity of a child and whether further evidence will be needed to prove the criminal capacity of a child.

Criminal Justice Social Work and the Assessment of Criminal Capacity

Dr Leon Holtzhausen: Assistant Professor, Department of Social Development, University of Cape Town

Dr. Holtzhausen presented a criminal justice social work perspective on criminal capacity issues. He explained that forensic social workers, probation officers, and private social workers all deliver services to the same system and client, therefore there is need for a unified way of approaching the criminal justice system in South Africa.

Dr. Holtzhausen defined criminal justice social work as a specialized practice which aims to identify and address offending behaviour, reduce the risk of re-offending, and restore those that have been injured by crime.

Within the criminal justice practice framework, irrespective of the unit of intervention chosen to change criminal behaviour and reduce risk of re-offending, the criminal justice social worker (CJSW) must be able to provide a coherent rationale for action taken and decisions made during intervention – a correctional specific practice approach serves as a point of departure for addressing offending behaviour. Furthermore, irrespective of the 'method of intervention' chosen to work with offenders and others, a CJSW specific practice approach provides a systematic, orderly, predictable and measureable way of working within the criminal justice sector.

The nature of the child was historically seen as evil or innocent. The way we define children incorporates assumptions about how we ought to treat them (the child is a criminal and the criminal is a child). Historically, children were believed to be naturally evil, born in original sin and susceptible to influence and vulnerable to corruption therefore one had to beat the devil out of them. The juvenile justice system was developed because of a recognition of the need for protection of children. Later, the belief was that children are moral. A child was believed to be sacred, morally pure, to be nurtured, protected. The juvenile justice system was therefore for control, discipline and restraint or public accountability.

Is the child a victim or a threat? Children are perceived as both.¹⁴ In criminal law, "whether a child is a child or not a child depends on what he or she has done." In social work, a child and what he or she is, goes way beyond what they are doing.

¹⁴ Titus J.J. 'Juvenile Transfers As Ritual Sacrifice: Legally Constructing The Child Scapegoat' *Youth Violence And Juvenile Justice* Vol. 3 (2005) 116. Available At, [Http://Yvj.Sagepub.Com/Cgi/Content/Abstract/3/2/116](http://Yvj.Sagepub.Com/Cgi/Content/Abstract/3/2/116)

At the heart of the debate over the age of criminal capacity is its relationship to moral judgment, competence and accountability. The criminal capacity debate is an attempt to establish something very important based on a biological indicator, namely, age. Thus, proportionality in sentencing regards the child as having reduced culpability. The dilemmas of this include; the judging level of culpability of adolescents for criminal offences, and allowing youth second chances while punishing offenders for crimes.

Violent behavior (e.g. fighting & aggression) is relatively common in childhood or early adulthood because of the developmental stages that children go through. It is natural for them to take risks.

Various theories seek to understand violent behavior, namely:-

- Differential Association Theory
- Social Learning Theory
- Social Control Theory
- General Strain Theory

These theories only partially account for key etiological processes. A number of theories propose multiple pathways to antisocial behavior.¹⁵ The challenge is between typing and process. The focus is primarily on typing individuals according to patterns of involvement in problem behavior. If you just say he has criminal capacity, that is typing, but social workers are interested in the process by which individuals enter those pathways and the individual changes within that happen over time. Moral development is not a once off but a lifelong process. Children learn patterns of behaviour from the socializing institutions of the community. Therefore, it is not enough to assess the child only but also the community.

A developmental perspective of violence

The Social Development Model (SDM) is a synthesis of control theory, social learning theory & differential association theory. It acknowledges multiple biological, psychological and social factors at multiple levels in different social domains that lead to the development of problems e.g. drug use, delinquency and violence.

There are four constructs of socialization which make up the identity of self:-

1. Opportunities for involvement with others
2. Degree of involvement and interaction
3. Skills to participate in interactions
4. Reinforcement from performance in activities & interaction

Children learn patterns of behavior (pro-social or antisocial) from the socializing agents of family, school, religious & other community institutions and peers.

Risk and need assessment in an individual's behaviour may happen at four levels, namely;

- 1st Generation - clinical judgement / interview
- 2nd Generation – static risk factors

¹⁵ Huang et al, 'Modeling Mediation in the Etiology of Violent Behavior in Adolescence: A Test of the Social Development Mode' *Criminology* 39:1 (2001) 80.

- 3rd Generation – criminogenic need (dynamic) factors
- 4th Generation – combine clinical judgement with actuarial risk assessment (RNR)

These are based upon the social developmental perspective of criminal conduct and also on three core principles of risk, need and responsivity or readiness to change.

The important dimensions measured are moral concern and moral development. Moral concern is a subset of our concerns orientated toward justice, rights and welfare (well-being of others), namely, concern, activities, awareness of standards, rules and goals (SRGs). Moral development concerns with well-being of others and the ability to act on those concerns i.e. empathy. Empathy can either be cognitive or affective and it means ‘feelings that are more congruent with another’s situation than with own situation’¹⁶ It has to do with performance rather than competence (not experience only but also capability). Empathic experience need not involve the same feeling as that of the target person. There is empathic concern where the aggressor takes the perspective of victim sympathy and emphatic mimicry, where the aggressor observes sadness, fear and distress and copies the victim thereby increasing aggression.

Emotional empathy involves experiencing an appropriate and concordant change in mood in response to another’s circumstances – specifically, sharing the emotional experience of another person (for example feeling distressed by another’s unhappiness).¹⁷ Cognitive empathy involves understanding another person’s feelings on a cognitive level – grasping intellectually or conceptually how another person is feeling.¹⁸

Measuring moral development

Moral development can be measured by way of clinical interview (Bio-psychosocial Perspective & DAC); assessment tools, such as defining the issues test ([DIT 2](#)), victim empathy response assessment ([VERA](#)) and socio-moral reflection measurement- short form (SRM-SF); and assessment principles such as standardized interview schedules, frameworks, tools and indigenization of actuarial tools.

There are three levels for dealing with a client in social work namely, description, assessment and contract levels. Description involves such factors as client identification; person, family, household and community systems; person system; family and household system; community system; presenting the problem and issues of concern; assets, resources and processes; social history (developmental, personal, familial, cultural, critical events, moral development, SUD, medical, physical, biological, legal, educational, recreational, religious or spiritual, prior services).

Secondly, a tentative assessment of the person in the environment is undertaken. Here, the problem or issues are looked at in terms of the nature, duration, frequency, severity, and urgency, and also risk and protective factors. Then, assess the person and situation by looking at personal factors, situational or systemic factors. Also look at the motivation or readiness to change and the stages of change, as well as the risk and needs assessment. This then leads to the formulation of the case.

¹⁶ Hoffman M.L., *Empathy and Moral Development: Implications for Caring and Justice* New York: Cambridge University Press (2000) 30.

¹⁷ Marshall W.L., Hudson S.M., Jones R., & Fernandez, Y.M., ‘Empathy in sex offenders,’ *Clinical Psychology Review*, Vol. 15, (1995) 99-113.

¹⁸ Ibid.

Thirdly, a service contract is created where the problem or issues are; client-identified, worker-identified and also agreed upon problems or issues. Also consider service goals and plans (who will do what, by when and how?).

Probational Perspectives to Criminal Capacity of Children

Mr. Mthetho Mqonci: Deputy Director, Social Crime Prevention, Department of Social Development

Mr. Mqonci explained that probation officers are qualified social workers, trained in theories and can identify where there is need for intervention.

Sections 34-40 of the CJA provide that probation officers must conduct an assessment of a child alleged to have committed an offence. In terms of section 35(g) for 10 to under 14 year olds, probation officers may express a view on whether further evidence should be adduced regarding criminal capacity. Section 40, provides for all recommendations that probation officers can put in the assessment report. In terms of section 40(1)(f), a probation officer's report may contain a recommendation on criminal capacity of the child and measures that may be taken to prove such criminal capacity.

Session 3 11:20 – 12:30 Chair: Joe Ngelanga

Joe Ngelanga introduced the speakers and made a brief comment on section 11(3) of the Child Justice Act, that the determination of criminal capacity can take place either at the preliminary inquiry or at the Child Justice Court.

General Approach and Challenges in the Forensic Mental Health Assessment of Criminal Capacity in Children

Professor Anthony Pillay: Principal Clinical Psychologist, Department of Behavioural Medicine, Nelson R Mandela School of Medicine, UKZN & Fort Napier Hospital

Professor Pillay, looked at several provisions in the CJA. Section 7 (2) of the Act provides that a child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11.

In terms of section 11(1), the State must prove beyond reasonable doubt the capacity of a child who is 10 years or older but under the age of 14 years to appreciate the difference between right and wrong at the time of an alleged offence and to act in accordance with that appreciation. Section 11(3) states that a child justice court may order an evaluation of the criminal capacity of the child by a suitably qualified person, which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child. In terms of section 97(3) of the CJA the Minister of Justice and Constitutional Development must determine the category or class of persons who are competent to conduct the evaluation of criminal capacity..¹⁹

¹⁹ Government Gazette, 31 March 2010.

Section 8 provides for a review of the minimum age of criminal capacity, to be done by Parliament within 5 years after implementation of this section in the CJA, to determine whether minimum age should be raised.

With reference to the minimum age of criminal capacity, the CRC in Article 40 requires 'the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.' The CRC does not stipulate a minimum age. The United Nations' Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") state that the minimum age of criminal responsibility differs widely owing to history and culture, by setting the minimum age too low or if there is no age limit at all, the notion of responsibility would become meaningless.

Practical challenges in executing section 11(3)

There are a number of practical challenges in executing section 11(3) of the Act. The first is that of facilities, as proper facilities need to be established in all provinces to conduct such evaluations. The facility must be considered as a specialized area of service and the question is whether it will be an in- or out-patient service, whether the children need admission to hospital, what kind of documentation they will have and whether or not they will be required to pay. The second challenge is insufficient capacity (the availability of psychologists and psychiatrists) nationally, as this is a specialized area of practice that requires scarce professionals. Thirdly, there is need for understanding what the examination entails. Lastly, there is need for training.

Time

Section 11(4) states that '...the person identified to conduct an evaluation of the child must furnish the inquiry magistrate or child justice court with a written report of the evaluation within 30 days of the date of the order', but there is a long waiting list. As such, as much as there is need for the time period there is also a need for capacity to do that.

Clinical Practice Challenges

The challenges related to clinical practice according to the current state of research are that there is not much available on forensic mental health examination and the issue of children's culpability.

The type of examination required for children between 10 and under 14 year olds to determine criminal responsibility is also problematic and one needs to ask and answer questions such as:- Does the child have an understanding of right and wrong? Does the child have an understanding of right and wrong in relation to the crime? Does the child have the capacity to act in accordance with that appreciation?

But what is the law really asking of child development specialists? By requiring proof that the child accused between 10 and under 14 years knows right from wrong and can act accordingly, is the court asking for proof that the child is 'normal'? If so, then it means that the law presumes that children are fundamentally 'not normal', unless proven otherwise. If not, is the law asking for proof that the child is functioning 'above normal'?

In 1995, the House of Lords in the United Kingdom expressed sympathy for a lower Court's argument that the presumption of *doli incapax* was outdated, illogical and produced inconsistent results. The rule is said to be illogical because the presumption can be rebutted by proof that

the child was of normal mental capacity for his age, and, as noted by Urbas, this means every child is initially presumed not to be of normal mental capacity for his age, which is absurd.²⁰ The House of Lords deferred to Parliament to determine whether the common law presumption should remain part of English law and after much parliamentary debate it was abolished by statute some three years later in section 34 of the Crime and Disorder Act 1998 (England and Wales), but this has led to some confusion in judicial circles.

In *R v JTB*²¹ the critical question before the court was whether section 34 of the Crime and Disorder Act 1998 abolished the defense of *doli incapax* altogether, in the case of a child aged between 10 and under 14 years, or merely abolished the presumption that the child has that defense.²²

Table 1 – Minimum age of criminal responsibility in selected countries

Country	Age
Singapore, India, Nigeria, Thailand, USA (some States)	7
Kenya	8
Ethiopia, Bangladesh	9
Australia, Switzerland, South Africa, Malawi, UK (England, Wales and northern Ireland),	10
UK (Scotland), Canada, Ireland, Japan, South Korea, Netherlands, Uganda	12
France, Algeria	13
China, Italy, Germany, New Zealand, Russia, Ukraine, Slovenia, Estonia, Denmark	14
Finland, Norway, Sweden, Egypt	15
Portugal	16
Poland	17
Brazil, Argentina, Colombia, DRC, Belgium	18

In Australia, the Criminal Code Act, 1995 provides in section 7.2(1) that a child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. Evidence must show the accused to have appreciated that the act in question was “seriously wrong, as opposed to something merely naughty or mischievous” Age is not always synchronized with development; hence, chronological age does not necessarily indicate criminal capacity. In ‘normal’ functioning children, higher age correlated with greater responsibility.

Current approaches in criminal responsibility examinations suggest that there is no standard ‘checklist’ approach and it is an under-studied field as not much research work has been done in this area, both internationally and nationally. It is therefore virgin territory that requires research and clinical development. The approaches include intelligence, social competence, cognitive development and moral development.

Mostly, the tests were borrowed from the West. Therefore, there is a lot of criticism against simply applying them in our context. The definition of intelligence depends on what intelligence

²⁰ Urbas, G. (2000). The Age Of Criminal Responsibility. *Trends And Issues In Crime And Criminal Justice* (Australian Institute Of Criminology), 181, 1-6.

²¹ [2009] UKHL 20. Available at <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090429/jtb-1.htm> .

²² New Law Journal, 2009, 159.

tests measure, the questions asked that portray what intelligence is, for example if you know what a thermometer is. However, can this assess the intelligence of rural children who have a very little likelihood of encountering a thermometer?

Social competence

Social Competence refers to the child's ability to solve problems posed by the social context. It is the ability to deal with day-to-day challenges and it is about contextually relevant social maturity. Social competence is not necessarily correlated with IQ, but relevant to criminal capacity. For example, ask if a child can carry water on her head or know what firewood to select? This is important because that is very much related to context. The child's ability to solve certain problems and deal with issues in their social cultural milieu is important.

Thinking processes

Cognitive Development refers to children's development in thinking patterns and understanding of the world. Piaget's stages of cognitive development are: - Sensorimotor period (birth – 2 yrs), pre-operational period (\pm 2 – 7 yrs), and the concrete operational period (\pm 7 – 12 yrs), formal operations period (\pm 12 yrs – adulthood). The formal operations stage is characterized by reasoning that is hypothetic-deductive. The reasoning process develops into the ability to contemplate consequences. This is of relevance in the determination of children's criminal capacity

Moral development refers to ways of thinking and behaving in differentiating what is right and wrong. In children's early years the distinction is made on the basis of consequences. Development progresses to the stage where actions are deemed right or wrong based on (i) social conventions and (ii) the impact on others. The major theorists are Kohlberg and Piaget.

Kohlberg's stages of moral development

The pre-conventional stage (up to \pm age 9 years) and moral judgments based on consequences (don't do wrong, because you don't want to be punished).

The conventional stage - (\pm 9 – 15 years), where right/wrong based on social convention. The post-conventional stage, where own (internal) moral standards develop.

However, Kohlberg says the best stage of development, most of us as adults do not reach, therefore it is important to take that into account when examining children.

Helwig, Zelazo, & Wilson state that 'young children are capable of taking into account other people's perspectives when making moral judgments of psychological harm.'²³ According to Scott & Steinberg, 'developmental research clarifies that adolescents, because of their immaturity, should not be deemed as culpable as adults ... but they also are not innocent children whose crimes should be excused.'²⁴ The distinction between excuse and mitigation seems straightforward, but it is often misunderstood. As such, take that into consideration other

²³ Helwig, C.C., Zelazo, P.D. & Wilson, M. (2001). Children's Judgements Of Psychological Harm In Normal And Noncanonical Situations. *Child Development*. 2001 Jan-Feb;72(1):66-81.

²⁴ Scott, E. S. & Steinberg, L. (2008). Adolescent Development And The Regulation Of Youth Crime. *The Future Of Children*, 18, 15-33.

than just having one cut off age like in the U.K. There is a degree of responsibility that all individuals will have but to what extent that responsibility is in place should be related to mitigating factors.

Intervening time is the time between alleged offence and examination. The child is learning from experiences in the intervening period. For example, a 12 year old boy, had committed an offence a year earlier and by the time he was seen for assessment, he had had sessions of psychological therapy for one year (on account of his parents), so that obviously affected the way he responded during the examination.

Behaviour surrounding the alleged offence

Flight on its own may not be sufficient. Flight in combination with other factors may be used to rebut *doli incapax*.²⁵ Other factors include attempts to hide evidence and past criminality. Evidence of previous criminality is, of course, rarely admissible to prove an issue in a criminal trial. However, in relation to *doli incapax* such evidence is regularly admitted.

After Professor Pillay's presentation, Mr. Clive Willows came in as a discussant and he spoke about the issues relating to assessment of criminal capacity under the Child Justice Act.

The Child Justice Act 75 of 2008: Issues in Assessment

Mr. Clive Willows: Clinical Psychologist, Pietermaritzburg

Mr. Willows started his presentation by explaining that in the beginning religious and philosophical beliefs created an understanding of the 'Natural state of Humankind and we cannot deny that, to some extent, personal beliefs continue to inform the principles applied in law and in psychology. He went on to say that science is the modern 'religion' in which there is a reliance on research and 'proof'. Psychology is the science of human behaviour whose purpose is to explain, predict and change human behaviour.

The interface between psychology and law is that law determines the rules of discourse, the concepts and the language while psychology tries to adjust and adapt science into principles and precedents. The two operate differently and it will never be a comfortable marriage. Law determines the discourse. For example, lawyers come up with terms like 'capacity'.

Psychologists are aware of the variables of human nature and the underlying presumptions, for example, 'the reasonable man' is a measure against which other tests must be measured yet, there is no psychological test for a reasonable man. Law and psychology are two disciplines from fundamentally different origins.

Now looking at the laws relating to children, can psychology explain, predict and change the thoughts, feelings and behaviour of children to assist in the implementation of these laws?

Criminal capacity is the ability to know the difference between right and wrong and to act in accordance with that knowledge. Research shows that the capacity to deceive develops at about the age of 3 years. There is therefore a difference between cognitive development of children as per Piaget, and moral development as per Kohlberg. Kohlberg's research was conducted on 10-16 year old boys to see what reasoning process is used and how it is used at

²⁵ NSW Young Lawyers Criminal Law Committee (2004). A Practitioner's Guide to Criminal Law (3rd Edition).

that age. It is linked to Piaget's cognitive theory. For example, a poor man's wife is seriously ill, the medication is expensive, he breaks in and steals it. The question is, is he right, and not, is it illegal? The question is different to that of capacity. There are three stages of Kohlberg's moral development.

Level 1: The pre-conventional stage, where there are hedonistic consequences of reward and punishment, or expedient co-operation.

Level 2: The conventional stage where one seeks approval through social acceptance and judgment, and co-operates with established norms.

Level 3: The post-conventional stage where there is acceptance of universal principles, beyond group conformity, toward autonomy.

Practicalities of assessment of criminal capacity

There is a dearth of appropriate measuring instruments that meet the scientific criteria of validity and reliability. Thus, an assessment of personal and social competency is probably more helpful than the IQ test. Vineland's Social Maturity Scale asks the question, how does the community assess the child, normal or not?

As a matter of opinion, misdemeanors of children should be decriminalized, but children have a right to learn via consequences in order to benefit from socialization. It would be rare to find a child over 10 lacking in capacity to tell right from wrong. The two pillars of the capacity argument are problematic in psychology. It is difficult to find a time when a person knew what they were doing is wrong but nonetheless acted against it. In law, if on the day before you turn 10 you kill you will not be charged, and if you kill 3 days after you turn 10, in law there has been a fundamental developmental difference which could have devastating consequences. There is nothing like that in psychology where development is regarded as a process which differs from individual to individual.

Session 4 12:30 – 13:30 Chair: Prof Pieter Carstens

Professor Carstens introduced the speakers for this session, namely, Professor Denis Viljoen and Dr. Lynda Albertyn.

Foetal Alcohol Syndrome (FAS) and Criminal Capacity

Professor Denis Viljoen: Chairperson and Chief Executive Officer, Foundation for Alcohol Related Research (FARR), Rondebosch, Cape Town

Professor Viljoen explained that foetal alcohol syndrome (FAS) is the most common form of mental retardation in the world. It is preventable but there is no biological test that can determine or detect it during pregnancy. FAS is a condition where the child suffers mental and physical deficiencies as a result of the mother drinking heavily during pregnancy.

The clinical characteristics of FAS are as follows:

- growth retardation
- characteristic face
- nervous system problems such as small head, behavioural problems like hyperactivity, poor concentration, inappropriate social behavior, average IQ of 65

- behavioural and interpersonal problems such as mental health problems, disrupted school experience, trouble with the law, confinement, inappropriate sexual behavior and alcohol and other substance abuse problems
- organ system involvement

The discriminating features of FAS are; the middle part of the face does not develop well in the child, such that it is flat, short palpebral fissures (the separation between the upper and lower eyelids), short nose, indistinct philtrum (an underdeveloped groove between the nose and the upper lip), thin upper lip and the head circumference is very small and that is related to the functioning of the brain. Associated features are low nasal bridge, minor ear anomalies and undersized jaw (micrognathia).

Prof Viljoen stated the care should be exercised when measuring mental retardation as sometimes it depends on other factors other than FAS. Therefore, he suggested that professionals look at other factors affecting the behaviour of individuals such as nutrition.

Abnormal behaviour in society is very much a part of FAS. In South Africa, the figures of FAS represent 10 times that of all other developmental problems combined. Most excessive drinking takes place in shebeens and there are about 250,000 shebeens in RSA. In pregnancy, 1.2 beers per day or 5-6 beers per occasion, per week is enough to cause FAS. The genetic element to FAS is that in cases of identical twins, they all get affected with full blown FAS but non-identical twins may not both be affected.

Conduct Disorder and the Criminal Justice System

Dr Lynda Albertyn: Principal Specialist Psychiatrist, Area 248 Charlotte Maxeke Johannesburg Academic Hospital

Dr. Albertyn defined conduct disorder as a psychiatric condition defined largely by “rule breaking and destructive and aggressive behaviour”. In slight tautology, this would mean that if you break rules and enter the criminal justice system this defines you as having a conduct disorder.

Characteristics of rule breaking:

- Bullies, threatens
- Fights
- Uses weapon
- Cruel to people and animals
- Steals
- Forced sexual activity
- Destroyed property
- Fire setting
- Theft
- Lies
- Stays out at night
- Runs away from home
- Truant from school

Older diagnoses may be more helpful and these include psychopathy and bad prognostic indications. Psychopath may be diagnosed by such factors as, lack of empathy, being cold emotionally and calculating, manipulative, callous with little or no guilt or remorse, inform on others and try to blame others for their own misdeeds, superficially charming and often are

assessed as more intelligent than they actually are. Bad prognostic indications include early onset (before 10 years), severity, psychopathic characteristics, low IQ, co-morbid ADHD, low anxiety.

The prevalence of conduct disorder is 4-7% and rising, and it is suffered more by males than females. Conduct disorders are made largely by social and psychological factors, including:-

- Antisocial parents
- Mentally ill mother especially antisocial, but also depressed
- Punitive, physically aggressive punishment
- Parents cold emotionally
- Chaotic homes
- Multiple early caretakers and lack of attachment in early years
- Poverty and crowding
- Single mothers
- Teenage pregnancies
- Smoking in pregnancy
- Deviant peers
- School dropout

The children with conduct disorder are troublesome, dangerous, costly to manage, do not get better, are unsuitable for most forms of therapy, and medication is unhelpful in most instances. Parents are not capable of containing them.

Children with conduct disorder lack empathy. There is a distinction between sympathy and empathy. Sympathy is manipulative as it allows no real remorse although one may regret. There is no evidence that there is genetic predisposition to conduct disorder. Depression and antisocial parents contribute to the development of conduct disorder. The single most important thing that happens to a child is attachment to the mother, in the first years and that is what creates empathy. The brain formation in the first two years is set and it is not always possible to change later. Where there is detachment or poor boundaries, there is no empathy.

A question therefore arises that should persons with conduct disorder be held criminally responsible? Here, one has to ask if they know the difference between right and wrong, whether or not they are capable of making decisions and whether or not the diagnosis mitigates against the crime committed. If one has conduct disorder, they do know the difference between right and wrong but their capacity to feel for others and make decisions has been impaired. As such, to say that it is a mental problem, hospitals will be flooded and conduct disorder children will be held responsible for the actions they take. Conduct disorder costs society a lot through accidents and crime. Parents often create the problem but are not able to contain it. Also, you have to be able to attach to some extent if you are to be able to get therapy e.g. attach to the therapist. To simply say the children need therapy will not make much difference if they are unable to attach.

Research findings about rehabilitation and treatment suggest that there is need for a long term management programs that are consistent, kind, established, teaching social behaviour (for example boys/girls' towns, industrial schools or children's homes). There is also need for containment and structure in terms of consequences, fairness yet firmness and rule following. Also, family therapy with committed parents can show some benefit. Furthermore, DBT has also shown some benefit. However, even with best systems in place, there are poor results.

Overall, prevention for example preventing mothers from drinking, encouraging mothers to be with children in the first two years of the child's life, and investing in specialised programmes for these children is the only key to preventing and managing conduct disorder.

Discussions

Following the presentations, a number of questions and comments were raised. The discussions centered around the following main issues, namely: the question of victim empathy, the training of probation officers, health professionals and other role players in the assessment of criminal capacity, challenges faced when dealing with children diagnosed with conduct disorder and the minimum age of criminal capacity.

The importance of empathy was highlighted since it links with moral development, which is one of the aspects that needs to be assessed during the evaluation of the criminal capacity of children. The distinction between cognitive and emotional empathy is important when dealing with child offenders.

Regarding the training of probation officers, health professionals and other role players in the assessment of criminal capacity, the need to keep on building capacity in the field was highlighted as well as the need to keep everyone updated on developments in the field.

Diagnosing children with conduct disorder presents various challenges. The fact that a child suffers from conduct disorder does not necessarily mean that he or she does not have the required criminal capacity to be held liable for the commissioning of an offence. However, capacity of such children is diminished as they often cannot act in accordance with the knowledge that they have. There is a lack of specialized institutions that offer treatment and rehabilitation to children suffering from conduct disorder since long term management programmes that are structured, consistent and that focuses on teaching social behavior are needed.

On the minimum age of criminal capacity, the arbitrariness of the differences in minimum age of criminal responsibility in different countries was discussed. It was suggested that South Africa should possibly consider raising the minimum age of criminal capacity to 12 years because that is the internationally acceptable minimum. The CJA does provide for a review and this opportunity should be utilized.

Challenges

The following challenges have been identified in the assessment of criminal capacity of children:

- Certainty about a child's criminal capacity prior to diversion is very important. If the child does not take responsibility for the criminal offence, the matter may not be diverted and the child who did not have criminal capacity at the time of the commission of the offence may not want to take such responsibility. In these cases the prosecutor must proceed with a trial in the child justice court if the matter is not withdrawn. Even if the child takes responsibility for the offence and the matter is diverted, the child still needs to successfully comply with the diversion order before the matter can be finalized. If the child does not comply, the prosecutor may decide to proceed with the trial and the child's acknowledgement of responsibility will be noted on the record as an admission. It will then be too late to consider the criminal capacity of the child at the time of the commission of the offence, at this stage of the proceedings.

- There is a lack of psychiatric facilities and professionals to conduct the assessment of criminal capacity of children. Routine assessments of these children place an increased burden on already stressed resources.
- The status of assessment reports is a concern. There are concerns about the quality and accuracy of assessment reports because probation officers are still using old and outdated theories and not modern theories of criminal behavior. Therefore, the way that information is gathered and the tools used needs to be updated in line with international best practice. Assessment reports do not meet the needs and requirements of the court, the child offender and the community.

Recommendations

The following recommendations were made;

1. There is need to be able to access the information and make recommendations for research regarding how many children have been held to have criminal capacity, for what crimes and what ages specifically, and how the system deals with them.
2. Submissions should be made to Parliament during the course of the review of the minimum age of criminal capacity. Consideration should be given to changing the law to remove the rebuttable presumption of criminal capacity, and to opt instead for a cut-off age below which a child cannot be prosecuted. Therefore, research to support the review and possible raising of the age to 12 years and the rationale behind it ought to be done. The fact that the international acceptable minimum age of criminal capacity has been set at 12 years should be a consideration in this regard.
3. There is a need to revisit the way that assessments are conducted and the tools and tests currently used. It appears that those conducting the assessments are currently poorly equipped and there is no national standardized approach. Psychologists and psychiatrists are expected to use their own methods as there is no guidance.
4. In matters where preliminary inquiries are conducted these inquiries should be more inquisitorial in nature to allow for all the relevant information to be placed before the inquiry magistrate. This would give a clearer picture of the child's circumstances, the circumstances surrounding the commission of the offence and may also give an indication on the possible criminal capacity (or lack thereof) of the child.
5. There is a need to focus on bridging the gap in cases where a child has been referred for an assessment in terms of section 77 or 78 of the Criminal Procedure Act (his or her ability to understand the proceeding and to stand trial or referral for an evaluation of his or her criminal capacity or lack thereof due to a mental illness or mental defect) and assessment of the criminal capacity of children 10 years or older but under the age of 14 years. Health professionals should also consider the child's criminal capacity (where it is not due to a mental illness or mental defect and the child is 10 years or older but under the age of 14 years) even if the child has been referred in terms of section 77 or 78 of the Criminal Procedure Act and should include a finding in this regard in their report.

ANNEXURE A

List of Participants

Child Justice Alliance

Workshop on Criminal Capacity of Children 4 May 2011, University of Pretoria

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