

# The minimum age of criminal responsibility in continental Europe has a solid rational base

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## Abstract

*The focus this article takes is on the proposition that the age of criminal responsibility is a meaningful term. It will be stated that there is no proof that today's young children have a greater understanding of the world than children had in the past. The article wants to make clear that the principle that children below a certain age are too young to be held responsible for breaking the law can be based on strong scientific evidence. It argues that it is unacceptable in the light of these empirical findings to decide not to have a national minimum age of criminal responsibility (MACR) and to leave the decision to prosecute a child under a certain age to the Lord Advocate. It is stated that there is sufficient scientific ground to conclude that a realistic MACR would be at age 14 or 15.*

## Introduction

Considering the age of criminal responsibility implies an assessment of juvenile justice systems. The significant diversity that is typical of this field worldwide is striking. Countries vary far more widely in juvenile than in adult justice systems.<sup>1</sup> Juvenile justice systems vary in their age boundaries, as they do in their sentences and educational measures. At first sight there seems to be a rather modest variety of upper age jurisdictions. These vary between 15 and 18, with the exception of Japan, where youths can only be brought before the adult criminal court once they are aged 20 or older. In fact, these small margins of upper age limits of juvenile justice systems are profoundly relativised by a wide variety of options to transfer or waive young offenders to adult criminal courts in some countries.<sup>2</sup>

Comparing continents concerning the minimum age limits of criminal responsibility (MACR) worldwide, however, we find far more extreme contrasts. In Europe, the absolute lower age limit below which children cannot be held criminally responsible varies

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1 Michael Tonry and Anthony Doob (eds), *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (University of Chicago Press 2004).

2 See Ido Weijers, An Nuytiens and Jenneke Christiaens, 'Transfer of Minors to the Criminal Court in Europe: Belgium and the Netherlands' in Josine Junger-Tas and Frieder Duenkel (eds), *Reforming Juvenile Justice* (Springer 2009) 105–24.

Country	Youngest age: juvenile court	Country	Youngest age: juvenile court
Scotland	8 (12)	Georgia	14
Greece	8 (13)	Germany	14
Malta	9 (14)	Italy	14
England & Wales	10	Latvia	14
Ireland	10 (12)	Liechtenstein	14
Northern Ireland	10	Lithuania	14
Switzerland	10	Macedonia	14
Andorra	12	Moldova	14 (16)
Hungary	12 (14)	Montenegro	14
Netherlands	12	Romania	14 (16)
Portugal	12	Russian Federation	14 (16)
San Marino	12	Serbia	14
France	13 (10)	Slovakia	14
Monaco	13	Slovenia	14
Albania	14	Spain	14
Armenia	14 (16)	Ukraine	14 (16)
Azerbaijan	14 (16)	Czech Republic	15
Austria	14	Denmark	15
Belarus	14	Finland	15
Bosnia-Herzegovina	14	Iceland	15
Bulgaria	14	Norway	15
Croatia	14	Poland	15 (17)
Cyprus	14	Sweden	15
Estonia	14	Belgium	16

Table 1: MACR for juvenile court jurisdiction in Europe

from 8 (Scotland and Greece), 9 (Malta), 10 (England and Wales) to 15 (Czech Republic, Poland, the Scandinavian countries) and 16 (Belgium).<sup>3</sup>

Notwithstanding the contrasting lower age limits within this continent, there is a dominant European picture represented by the large group of countries on the European continent where 14 or 15 is the age of criminal responsibility. Overall, this results in 13 years being the average and typical age of criminal responsibility in Europe. If we take a worldwide view, it may be concluded that Europe has by far the highest average MACR of all continents.<sup>4</sup>

There are significant difficulties, though, in establishing the MACR. Firstly, Table 1 makes clear that several European countries, like Scotland, Ireland and Poland, have a standard minimal age for 'common' criminal cases involving young offenders (12, 13, 14, 16 or 17) and a deviant, *lower* age limit concerning 'extreme' cases, like murder, manslaughter, rape (8, 9, 10, 12, 14 and 15). Actually, these lower age limits must be interpreted as implying the bottom-line and absolute MACR, and not the other way round, as is sometimes the interpretation. France, on the contrary, has a standard minimal age of 13, which means that young offenders may be subjected to punishment (*peine*) from that age, but at the same time it has a minimal age of 10 concerning minor offenders, who may receive educational treatment (*sanction éducative*). The Netherlands had a comparable sanction (*Stop*) for minor offenders younger than 12 between 2001 and 2010. England

3 In Belgium, children cannot normally be held criminally responsible before their 18th birthdays, but in the case of murder or manslaughter they can be held criminally responsible from their 16th birthdays.

4 The juvenile codes in most of the USA do not indicate a minimum age of jurisdiction for delinquency cases – see Donna M Bishop and Scott H Decker, 'Punishment and Control: Juvenile Justice Reform in the USA' in Josine Junger-Tas and Scott H Decker (eds), *International Handbook of Juvenile Justice* (Springer 2006) 3–35.

introduced the Child Safety Order for children younger than 10 under the Crime and Disorder Act in 1998, designed for 'nipping crime in the bud'. All three deviations are (or were) incompatible with the UN Convention on the Rights of the Child (UNCRC).

Secondly, what does the minimum age of criminal responsibility exactly tell us about the age at which children can be prosecuted? There is a remarkable differentiation between the age of criminal responsibility and the age of prosecution in several countries. The age of criminal responsibility is understood in general as denoting a complete bar to prosecution; but this does not necessarily mean that youths will be prosecuted from that age. Many countries do not prosecute youths as soon as they reach this minimum age. They operate a typical compromise, combining two different age levels with more or less discretion. They use the age of criminal responsibility as the upper limit of absolute criminal incapacity *and* as the beginning of a period of *conditional* criminal responsibility.<sup>5</sup>

A well-known formula for this solution is the *doli incapax* presumption. According to this presumption, youths will not be prosecuted in principle until they have reached a certain age, some years after the age of criminal responsibility. In jurisdictions where the presumption operates, there are significant differences, both in the period of the presumption and in its actual application.

In some countries, such as the Netherlands, there has never been a period of *conditional* criminal responsibility. The Netherlands introduced a special juvenile justice system in 1901 and there was no minimum age of criminal responsibility until 1965. The MACR was settled at the age of 12. Notwithstanding the implementation of the MACR, 12- and 13-year-olds are rarely prosecuted in criminal courts in the Netherlands. In practice, most are punished via a police referral (*HALT*) and young, repeat or more serious offenders by the prosecutor (*Strafbeschikking*).

The *doli incapax* presumption was abolished in England and Wales by the Crime and Disorder Act 1998.<sup>6</sup> The Home Secretary, Jack Straw, made clear that he wanted to break with the history and philosophy of youth justice in England and Wales, which he branded as an 'excuse culture'.<sup>7</sup> The consequence is that children in England and Wales have become accountable for their offending at age 10.

In contrast, a classical version of the *doli incapax* presumption can be found in Ireland. The age of criminal responsibility is currently 12 years, but the presumption applies to children from the ages of 10 to 14. On raising the minimum age to 12 (previously 8 and then 10) with the introduction of the Children Act 2001, this presumption was implied for children aged over 12 but under 14, despite this aspect never being formally enacted. Ireland retains significant discretion in terms of prosecution and the court, with few exacting rules regarding how the presumption may be rebutted.<sup>8</sup>

The situation in Germany is comparable, albeit that the age of criminal responsibility is higher. The age of absolute criminal incapacity ends at the age of 14. Full criminal responsibility starts in Germany at 18 years of age. What is particularly important here is

5 Thomas Crofts, *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (Ashgate 2002).

6 In 1994 Laws J had published fierce criticism of it ([1994] 3 All ER 190, 197), quoted in Julia Fionda, *Devils and Angels. Youth Policy and Crime* (Hart 2005) 15. New Labour responded in *Tackling Youth Crime: A Consultation Paper* (Home Office 1997) in England and Wales suggesting that this presumption prevented youths being held accountable for their actions. One year later, the Home Office paper, *No More Excuses: A New Approach to Tackling Youth Crime* (Home Office 1997), announced the abolition of the presumption.

7 Anthony Bottoms and James Dignan, 'Youth Justice in Great Britain' in Tonry and Doob (n 1) 21–183.

8 Mairead Seymour, 'Transition and Reform: Juvenile Justice in the Republic of Ireland' in Junger-Tas and Decker (n 4) 117–143.

that variations of the German model can be found all over continental Europe, in the West and in the East. In the Czech Republic, for instance, the age of criminal responsibility is 15, but responsibility from age 15 is conditional, depending on individual maturity.<sup>9</sup>

Slovenia, to take another example, similarly applies two age limits. Yugoslavia's first Criminal Code and Criminal Procedure Code (1929) contained provisions pertaining to young offenders. They were divided into two groups: younger (14–17) and older juveniles (17–21). The younger ones were considered relatively irresponsible, which implied that the court could impose a sentence or educational measures only if their maturity was proven. This division remained intact after the Second World War and it was further expanded into four categories in 1995 under the new Criminal Code: children under 14, who could never be held criminally responsible; young minors (14–16) against whom only educational measures may be applied; older minors (16–18) and young adults (18–21).<sup>10</sup>

In short, this means that the average age at which children can actually be held criminally responsible and be prosecuted in Europe is 14.

### Consensus and debate

The curious thing is that there exists broad consensus that children below a certain age are too young to be held responsible for breaking the law, but there is an extreme variety of MACRs worldwide and there is continuing debate as to the advisable age of criminal responsibility. There exists a set of rules, guidelines and court decisions that presuppose or clarify the implications of an MACR. For example, the Beijing Rules provide a framework and model for national juvenile justice systems.<sup>11</sup> These rules state that the MACR 'shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity' (rule 4.1).<sup>12</sup> The UNCRC similarly articulates that children below a certain age cannot be held criminally responsible. The UNCRC calls for nations to establish a minimum age 'below which children shall be presumed not to have the capacity to infringe the penal law' (Article 40, II.7a). It was not until 2007, however, that the UN Commission on the Rights of the Child settled on an MACR, which, in its opinion, has to be at least 12 years.<sup>13</sup>

In 2007 the European Ministers of Justice decided that European guidelines on child-friendly justice should be prepared. Three years later *Guidelines on Child-Friendly Justice* were published by the Committee of Ministers of the Council of Europe, providing practical guidance to member states of the Council of Europe regarding the adaptation of juvenile justice systems to accommodate the specific rights and needs of children. The guidelines require 'due consideration to the child's level of maturity and understanding . . . justice that is accessible, age appropriate' and that 'the rights of the child including the rights to due process, to participate in and to understand the proceedings' are respected (para IIc).

9 Helena Valkova, 'Restorative Approaches and Alternative Methods: Juvenile Justice Reform in the Czech Republic' in Junger-Tas and Decker (n 4) 277–318.

10 Katja Filipic, 'Welfare Versus Neo-Liberalism: Juvenile Justice in Slovenia' in Junger-Tas and Decker (n 4) 397–413.

11 Geraldine van Bueren, 'Child-Oriented Justice: An International Challenge for Europe' (1992) 6 International Journal of Law and the Family 381–99.

12 At the time of drafting the Beijing Rules a broad consensus on a minimum age of criminal responsibility among the UN states parties was hoped for, but that appeared to be impossible: Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate 2009).

13 UN Commission on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice* (CRC/C/GC/10 2007) para 30.

Several important European Court of Human Rights (ECtHR) rulings have also elucidated particularly crucial procedural implications of an MACR, most notably the notorious *Bulger* case arising in England and Wales.<sup>14</sup> Two 10-year-old boys kidnapped and beat to death 2-year-old James Bulger. The two minors (who at the time of trial had turned 11 years old) were prosecuted on indictment in the Crown Court, in public, before a judge and 12 jurors. The trial caused national and international outrage, with hostile crowds gathered outside the court building and a packed public gallery in the courtroom. After three weeks, both defendants were found guilty by the trial jury. The ECtHR maintained the view:

... that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (para 84).

It concluded that the defendants had been 'unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing' (para 89).

This statement was further considered in *SC v UK*.<sup>15</sup> Despite special arrangements,<sup>16</sup> the ECtHR concluded that 11-year-old SC 'was unable fully to comprehend or participate in the trial process' (para 26). The court explained that Article 6 European Convention on Human Rights does not imply that a juvenile defendant should understand every legal detail during the criminal trial. However, he or she should have:

... a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she ... should be able to understand the general thrust of what is said in court.<sup>17</sup>

An alternative point of view has been expressed by the Scottish Law Commission. In Scotland the lower age limit of criminal responsibility remains at 8 years, strikingly low in comparison to other European countries. However, instead of recommending a higher minimum age, the Commission proposed abolition of the rule that a child has no criminal capacity below a certain age. Surprisingly, this recommendation was clearly not inspired by a call to be more tough on youth crime: the Commission confirmed the characteristic rule in Scottish criminal law that no child under the age of 16 should be prosecuted for any offence except on the instructions of the Lord Advocate (Criminal Procedure Act 1995, c 46, s 42).

The Commission advanced three arguments in support of this proposal. First, it argued that today children of eight years of age have a greater understanding of the world than children of this age had in the past. This might suggest, in its opinion, that there could be a case for further lowering the age.<sup>18</sup> Second, if an age of criminal responsibility was a matter of applying developmental psychology, then why was there such disparity in

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14 *T and V v UK* App nos 24724/94, 24888/94 (ECtHR, 16 December 1999).

15 *SC v UK* App no 60958/00 (ECtHR, 15 June 2004).

16 The hearing in the Crown Court was adjusted to the child's age insofar as the defendant was accompanied by a social worker: he was not required to sit in the defendant's dock, judges did not wear wigs and gowns and frequent breaks were taken.

17 'The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence ...' (para 29). More recently (2009) the court has repeated in its judgment in the case of a 15-year-old Turkish boy, who complained that he had been deprived of a fair trial because he was not able to participate effectively: *Güneç v Turkey* App no 70337/01 (ECtHR, 20 January 2009).

18 Gerry Maher, 'Age and Criminal Responsibility' (2005) 2 *Ohio State Journal of Criminal Law* 493-512.

the ages adopted in different countries? Finally, it noted, relying on the findings of the well-known Kilbrandon Committee, that the principle that children below a certain age are too young to be held responsible for breaking the law was not based on any empirical data concerning their understanding:

The legal presumption by which no child under the age of 8 can be subjected to criminal proceedings is not therefore a reflection of any observable fact . . .

It is clear, therefore, that the 'age of criminal responsibility' is largely a meaningless term.<sup>19</sup>

This article adopts the opposite view. Its main focus is on the proposition that the age of criminal responsibility is far from being a meaningless term and that there is convincing evidence available which makes clear that the age of criminal responsibility is indeed meaningful. This argument is advanced in four parts. First, there is no evidence that today's young children have a greater understanding of the world than children had in the past; secondly, the principle that children below a certain age are too young to be held responsible for breaking the law, as stated in the UNCRC and other international standards, is based on strong scientific evidence; thirdly, it is unacceptable in the light of these empirical findings to reject a national MACR, leaving the decision to prosecute a child under a certain age to a Lord Advocate, or a comparable person or institution; finally, there is sufficient scientific grounds to conclude that a realistic MACR would be at age 14 or 15.

### The level of understanding held by young children

The peremptory tone with which it is alleged that young children have more understanding of the world than children in the past is staggering. The Anneveldt Commission in 1982 argued that we should take account of the 'empirical fact' that 'young people adopt more mature and independent attitudes at a younger age than they did twenty years earlier'.<sup>20</sup> However, there is simply no empirical basis to this assertion. Worse still, all scientific evidence suggests otherwise.

The idea of more mature children who have a greater understanding of the world may have emerged, at least partly, from popular psychology, which has paid much attention to early manifestations of puberty. Puberty may start as early as 8 in girls and 9 in boys in Western countries (while generally the range for the first signs is still taken as 14 for girls and 16 for boys). Early puberty, however, seems to be a typical cultural phenomenon, dependent on factors like diet and lifestyle, endocrine disrupters and obesity, which seem to have had an epidemic character in the recent decades in jurisdictions such as the USA.<sup>21</sup> Puberty is simply one element in the many physical changes children experience. More importantly, there exists no systematic relationship between the timing of puberty and the intellectual and emotional development of adolescents.<sup>22</sup> As every paediatrician, pedagogue and experienced teacher knows, there is little correlation between physical development and mental and emotional development in adolescents.

19 Committee on Children and Young Persons Scotland, *Report of the Committee on Children and Young Persons* (HMSO 1964) 73.

20 Anneveldt Commission, *Sanctierecht voor jeugdigen* (Staatsuitgeverij 1982).

21 Marcia E Herman-Giddens, Paul B Kaplowitz and Richard Wasserman, 'Navigating the Recent Articles on Girls' Puberty in Pediatrics: What Do We Know and Where Do We Go from Here?' (2004) 113(4) *Pediatrics* 911–17.

22 Laurence Steinberg and Robert G Schwartz, 'Developmental Psychology Goes to Court' in Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: Developmental Perspectives on Juvenile Justice* (University of Chicago Press 2000) 9–31.

It is true that the intellectual abilities of children develop markedly during adolescence. Young children are not able to think in abstract ways, while adolescents are often able to think in more advanced, abstract, efficient and effective ways.<sup>23</sup> Logical reasoning skills gradually increase between the ages of 11 and 16. From approximately their 12th birthday, young people acquire the ability to reflect on more abstract issues. Matters such as poverty, justice, fairness and love attract significantly more attention from young adolescents around the age of 12.<sup>24</sup> They start to become interested in knowledge of the world, in social relations, rights, news, politics. Step-by-step young adolescents start to reflect on relationships and on themselves as persons with a past, present and future.<sup>25</sup>

Nevertheless, there are no indicators that suggest major changes in children's cognitive development in contemporary times, as compared to years ago. Children still act without considering the consequences of their behaviour in any (real) detail. Some may be able to repeat political slogans, others may show outstanding practical abilities in using laptops or smartphones, some can recite an impressive list of television stars, heroes in sport or pharaohs, but since they still lack the ability to think in abstract and reflexive ways, they do not act more maturely nor do they understand more of the world.<sup>26</sup>

### Young children ought not to be held responsible for breaking the law

There is strong scientific evidence that children below a certain age are too young to be held responsible for breaking the law. Children, studied from an objective, mature perspective, do not fully know what they are doing. This is a conceptual, political–philosophical consideration, implying that they may know what they are doing in that they are correctly apprised of the relevant facts, but they simply are unable to grasp the moral and legal importance of these facts.<sup>27</sup>

Young children cannot fully perceive themselves as citizens, or as subject to the law. If they do something wrong, they perceive this as a wrong against their parents, the wider family or their teacher, their neighbour or their friend. Their reasoning is not yet adequate; their notions of the law, an offence, criminal court, state and citizenship are typically childish and need further maturation; and they lack experience with things like the law, the state, etc.<sup>28</sup>

23 Laurence Steinberg, *Adolescence* 5th edn (McGraw Hill 1999); Steinberg and Schwartz (n 22).

24 They also start to think experimentally and are fascinated by hypothetical thoughts, (endlessly) considering all sorts of possibilities and solutions to a problem. Abstract thinking develops gradually over the course of adolescence until around the age of 17 or 18, when this ability no longer notably improves. See Laurence Steinberg and Elizabeth Cauffman, 'Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making' (1996) 20 *Law and Human Behavior* 249–72; Laurence Steinberg, *The Science of Adolescent Risk-Taking* (National Academies Press 2011).

25 Generally, only by mid-adolescence do the formal cognitive capacities resemble those of adults. See Elizabeth Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008).

26 A good example is provided by the difference between what is called 'digital literacy' and 'digital skills'. Whereas digital skills refers to practical abilities in using digital devices, digital literacy refers to a range of digital skills, knowledge of the basic principles of computing devices and skills in using computer networks, as well as to an ability to engage in online communities and social networks while adhering to behavioural protocols, to an ability to find, capture and evaluate information and, what's more, to an understanding of the societal and ethical issues raised by digital technologies and to an ability to think critically about these technologies.

27 David Archard, 'Philosophical Perspectives on Childhood' in Julia Fionda (ed), *Legal Concepts of Childhood* (Hart 2001) 43–56.

28 Joseph Adelson, 'The Political Imagination of the Young Adolescent' (1971) 100 *Daedalus* 1013–50; Anna Emilia Berti and Alessandra Andriolo, 'Third Graders' Understanding of Core Political Concepts (Law, Nation-State, Government) before and after Teaching' (2001) 127 *Genetic Social and General Psychology Monographs* 346–77; Martin D Ruck, Rona Abramovitch, and Daniel P Keating, 'Children's and Adolescent's Understanding of Rights: Balancing Nurturance and Self Determination' (1998) 69 *Child Development* 404–17.

Young children lack the capacity to form criminal intent or to fully understand the moral and legal implications of their actions. They may understand (or not) that what they are doing or have done may be naughty or mischievous, but they are unable to fully understand their actions as a criminal offence, that is, as actions contrary to the law. They do understand themselves as children who have to obey their parents and teachers, but not the law or the state. Criminal responsibility requires a perception of the law, of acting and wrong-doing. It requires a capacity to grasp the legal impact of actions, 'to know what we are responsible for and what our prospective responsibilities are'.<sup>29</sup>

There are several psychosocial factors that can explain the unsophisticated judgements made by children and young adolescents. Peer pressure is a significant environmental factor affecting value judgements. From around the age of 8, children begin to focus on associating with peers. During this period, making friends is of crucial importance to children and there seems to be less motivation to associate with adults.<sup>30</sup> This is especially relevant with regard to antisocial behaviour, since peer pressure blocks young adolescent's recently acquired ability (and interest) in hypothetical reflection. Warr suggests that a crucial factor influencing children's behaviour is 'fear of ridicule'. Young adolescents tend to conform to their peers' behaviour, even peers who encourage antisocial behaviour, in order to avoid ridicule and rejection.<sup>31</sup>

Another important factor pertains to emotional development. Volatility of mood (i.e. mood swings or moodiness) is considered to be a characteristic for young adolescents.<sup>32</sup> When negative emotionality is part of the temperament of a child, it is associated with higher levels of aggression and externalising problems. These children tend to deal less constructively with perceived feelings of anger which, in combination with lower levels of impulse control, can lead to delinquent behaviour.<sup>33</sup>

Children also have difficulty in perspective-taking. Skills associated with a developed sense of identity include the ability to form interpersonal relationships, to reflect on one's own behaviour and to be able to morally reason on a higher level. Perspective-taking ability gradually increases until the age of 16. This ability enables the young person to understand how decisions or actions are viewed by other persons, even if that is not the persons' own view. Perspective-taking is closely related to being able to have feelings of empathy towards others.<sup>34</sup> Empathy is the result of emotional as well as cognitive processes. The emotional state of another person has to be understood by the adolescent and the adolescent must be able to share in the emotional state of that other person, thereby adequately regulating his or her own emotions. Empathy decreases the probability

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29 Peter Cane, *Responsibility in Law and Morality* (Hart 2002) 54.

30 Susceptibility to peer pressure peaks around the age of 14 and then declines. This implies that sometime between the ages of 12 and 16 peer pressure is highest and declines gradually thereafter: Scott and Steinberg (n 25).

31 Mark Warr, 'Making Delinquent Friends: Adult Supervision and Children's Affiliations' (2005) 43(1) *Criminology* 77–106.

32 Scott and Steinberg (n 25). Research suggests that a positive mood can increase risk-taking behaviour to a certain extent. When risks are low, they are taken more easily when in a positive mood. But when risks are perceived to be high, individuals do not want to have their good mood destroyed by taking risks and tend to be more conservative in decision-making. See Steinberg and Cauffman (n 24).

33 Nancy Eisenberg, 'Emotion, Regulation and Moral Development' (2000) 51 *Annual Review of Psychology* 665–97.

34 Eisenberg has defined empathy as 'an affective response that stems from the apprehension or comprehension of another's emotional state or condition and is similar to what the other person is feeling or would be expected to feel': *ibid* 671.



of certain types of criminal behaviour, while a lack of empathy is assumed to have a facilitating influence on offending.<sup>35</sup>

The conclusion that children below a certain age are too young to be held responsible for breaking the law does not imply that the child should simply be viewed in law as completely irresponsible. On the contrary, children must be viewed as beings with 'evolving capacities' (UNCRC Article 5), with a growing responsibility and a growing awareness of their position as legal subjects. Our modern view of childhood is a developmental one. The normal youth acquires moral and legal autonomy step by step, developing from extreme dependence and vulnerability in infancy to near independence, partial self-sufficiency and growing maturity in adolescence.

### Rejecting an MACR would result in the gravity of the crime being decisive

It is unacceptable not to have a national MACR and to leave the decision to prosecute a child under a certain age to the Lord Advocate, or a comparable person or institution. The standard implication of the absence of a minimum age of criminal responsibility means the gravity of the crime will be decisive for bringing (very) young defendants into the juvenile justice system and for punishing (very) young offenders according to this system, while this system also presupposes that the participants can be held responsible (albeit, that responsibility is deemed to be reduced) for their actions.

It is essential to adopt a bright-line rule that very young offenders should not (normally) be handled in a juvenile justice system. We should not accept the idea that these same very young offenders should go to the youth court if they are suspected of something very serious, like manslaughter, murder or rape. A very young person has an insufficient degree of capacity to form criminal intent, no matter what crime he or she commits.

### A realistic age of criminal responsibility is 14 or 15

Holding children responsible for breaking the law requires an assessment of their adjudicative capacities.<sup>36</sup> Juvenile defendants have to be competent to be brought before a court for adjudication. The legal concept of competence to stand trial (or the capacity to defend) in the USA – which is defined as 'sufficient ability to consult with his attorney with a reasonable degree of rational understanding as well as factual understanding of the proceedings against him'<sup>37</sup> – requires that the defendant has sufficient ability to understand and to recognise the importance of criminal proceedings and to assist his or her lawyer in the defence.<sup>38</sup>

The UN Committee on the Rights of the Child states that, when an accused juvenile is brought before court, he or she should be capable of participating in criminal proceedings. When the young person is not capable of participating in and understanding the proceedings, he or she should not be criminally charged and prosecuted.<sup>39</sup> As noted above, according to the ECtHR (*T and V v UK* (1999); *SC v UK* (2004); *Güveç v Turkey* (2009)) and the European *Guidelines on Child-Friendly Justice*, it is essential that a child charged with an offence is dealt with in a manner which takes full account of his or her

35 Darrick Jolliffe and David P Farrington, 'Empathy and Offending: A Systematic Review and Meta-Analysis' (2004) 9 *Aggression and Violent Behavior* 441–76.

36 Richard J Bonnie and Thomas Grisso, 'Adjudicative Competence and Youthful Offenders' in Grisso and Schwartz (n 22) 73–103.

37 *Dusky v United States* 362 US 402 (US Supreme Court, 18 April 1960).

38 Thomas Grisso, 'What We Know about Youths' Capacities as Trial Defendants' in Grisso and Schwartz (n 22) 139–72.

39 CRC/C/GC/10, 25 April 2007, para 46.

age, level of maturity and intellectual and emotional capacities and that steps are taken to promote his or her ability to understand and participate in the proceedings. The minor should be able 'to understand the general thrust of what is said in court'.

In the last 20 years, several studies have been conducted on children's understanding of the nature of criminal proceedings.<sup>40</sup> From these studies, it can be concluded that juveniles below the age of 14 or 15 are unlikely to be familiar with trial-related information.<sup>41</sup> Grisso concludes that, generally, young people around 14 years of age are able to form an adequate conception of what it means to appear before a judge in court.<sup>42</sup> Many young people between the ages of 14 and 16 who have to appear in court, though, are not yet capable of forming accurate ideas about what they can expect or what is expected of them, partly because of individual differences in maturity and partly because of the range of problems they may experience.<sup>43</sup> The stress of having to appear before a judge and being sentenced in court can impact upon their understanding of the youth court hearing even more.

From these studies it can be concluded that juveniles aged 14 and younger are more likely than older adolescents and young adults to be impaired in their ability to understand criminal proceedings.<sup>44</sup> Children are only beginning to be capable of understanding enough of what it means to appear before a judge when they are around 14 or 15 years of age.

### Conclusions

The age of criminal responsibility is far from being a meaningless term. Formal cognitive abilities mature by middle adolescence, many psychosocial abilities mature somewhat later and brain development may continue (far) into early adulthood. There is no evidence that children in contemporary society have a greater understanding and more advanced cognitive abilities than children had in the past, whereas there is enough evidence to recommend 12 as the age below which we should presume absolute lack of criminal responsibility in general. There is also strong evidence for adolescent immaturity in a range of factors related to decision-making for adolescents aged 15 and under as a group. This would suggest that, for the relevant group of delinquent youths, with its high prevalence of mental disorders and developmental disorders and low intelligence, the appropriate age of criminal responsibility would be 15 or at least 14.

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40 Emma Crawford and Ray Bull, 'Teenagers' Difficulties with Key Words Regarding the Criminal Court Process' (2006) 16(6) *Psychology, Crime and Law* 653–67; Christine Driver and Eve M Brank, 'Juveniles' Knowledge of the Court Process: Results from Instruction from an Electronic Source' (2009) 27 *Behavioral Sciences and the Law* 627–42; Carolyn Greene, Jane B Sprott, Natasha S Madon and Maria Jung, 'Punishing Process in Youth Court: Procedural Justice, Court Atmosphere and Youths' Views of the Legitimacy of the Justice System' (2010) 52 *Canadian Journal of Criminology and Criminal Justice* 527–44.

41 Grisso (n 38).

42 Ibid.

43 Scott and Steinberg (n 25); Ido Weijers and Thomas Grisso, 'Criminal Responsibility of Adolescents: Youth as Junior Citizenship' in Junger-Tas and Dünkel (n 2) 45–67.

44 Ibid.