Discussion on Minimum Age of Criminal Responsibility: Analytical Essay

A child is, as defined by the UN Convention on the Rights of the Child, “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” The UN Convention on the Rights of the Child mandates for “the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.” The minimum age of criminal responsibility (MACR) is consequently the age at which a child is deemed to have sufficient understanding to be responsible for their behaviour and thus can be prosecuted for a crime. The MACR of England and Wales is defined in the Children and Young Persons Act 1933 (as amended) which sets out that “It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence”.

Children who are over the MACR can be arrested and detained in custody although custody is expected to be used sparingly. Half of all children who are arrested go to court because at this junction there are attempts made to minimise the number of children going into the criminal justice system (CJS). There are a number of concessions made for children in court including; the option to sit with parents, carers or their legal team, automatic reporting restrictions, different sentences and instead of being sent to adult prisons they are sent to special secure youth centres. However, a child is tried in the crown court if they are being charged with more grievous offences such as some sexual or firearms offences, manslaughter and murder. A child is tried in an adult court if they are being prosecuted alongside an adult. Children under the MACR in England and Wales cannot be arrested or charged with a crime but there are other measures available such as the Child Safety Order or Local Child Curfews.

Throughout history there has been a strong presumption against criminalising children. The Pre-Norman Laws of Ine, existing from the 8th century, legislated that 10 year olds could be held responsible for their actions. Bracton’s 13th century writing considered children under 10 to lack mens rea (intent to commit a criminal action) but did not determine a specific MACR. The principle of doli incapax was first introduced in the 14th century during the reign of Edward III. It requires the prosecution to prove a clear demonstration of wrongful intent by the child, effectively raising the MACR. By the 15th century the MACR was lowered to 7 and it was not changed until the Children and Young Persons Act 1933 which raised the age to 8 and then subsequently the Children and Young Persons Act 1963 which raised the MACR to 10. The view of children and the age of responsibility was suddenly thrown into public scrutiny after the murder of the toddler James Bulger, by two 10 year old boys, in 1993. This pushed the new labour government towards a harsher approach in an effort to be “tough on crime, tough on the causes of crime,” resulting in the Crime and Disorder Act 1998 which abolished the principle of doli incapax. Since 1998 there have been no discussions around the MACR apart from two attempts by Lord Dholakia (Liberal Democrat) to pass a private member’s bill which would have raised the MACR of England and Wales from 10 to 12.

Around the world MACR’s range from 6-18 years. One quarter of countries have a MACR of 14 years which is also the global mode. The global mean is 12.5 years and the median would be 14 years . Most European countries set their MACR’s between 14 and 16 years but at 10 years England and Wales’ MACR is the lowest in Europe alongside Switzerland.

In 1985 the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules") stated that "Efforts should…be made to agree on a reasonable lowest age limit that is applicable internationally." In 2007 this was formalised in the General Comment No.10 (2007) Children's rights in juvenile justice which "concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable." Subsequently the UN Committee on the Rights of the Child (UNCRC) has asked the UK on three separate occasions to raise its MACR. Additionally, the European Social Rights Committee in 2005 declared the UK in breach of Article 17 of the European Social Charter because of its low MACR.

A number of reasons have been cited by successive governments for not raising the MACR of England and Wales. The earliest of these reasons was used to legitimise the MACR of 7 (that stood from the 17th century to 1933, when the Children and Young Persons Act was passed.) The argument to justify a MACR of 7 was that if children under seven could not understand the concept of intent then they could not intentionally commit criminal acts. This was concluded in 1932 in research by Jean Piaget that children under seven judged naughtiness in terms of the consequences of the act, not by intentions. However even this justification of the low age of 7 does not stand up to further research in this field. In 1977, Keasey and Sales asked children from 5 to 7 to judge stories about arson, assault, theft and homicide. This experiment "found that the judgments of naughtiness were based on intent rather than consequences for 67% of the five-year-olds, 83% of the six-year-olds, and 89% of the seven-year-olds." This piece of research rendered the previous justification of even a MACR of 7 obsolete.

The New Labour government of 1997-2010 brought in a dramatic change to age responsibility legislation, even if it did not directly address the MACR itself. The 1998 Crime and Disorder Act legislated for the abolition of the principle doli incapax. A principle which had made it difficult to prosecute children from 10-14 years without the prosecution proving a clear demonstration of wrongful intent. Therefore the arguments in favour of the abolition of doli incapax can be taken as arguments against raising the MACR of 10. The central argument in favour of the abolition of doli incapax was that it "flies in the face of common sense," as 10 year olds know the difference between right and wrong. This argument has also been used by the Cameron Conservative government to defend the MACR, as children aged 10 and over are "able to differentiate between bad behaviour and serious wrongdoing." If we took the notion, of judging the MACR narrowly through the linear construct of right and wrong, as being correct, the New labour justification seems reasonable and rational. At 10 you would expect, using common sense, that the vast majority of children would have the ability to determine between right and wrong. Whilst the New Labour government is right in that respect, the conflation between knowing the difference between right and wrong with the moral understanding key to criminal responsibility, has dangerous consequences. Especially when considering the MACR. Unlike the linear construct of knowing the difference between right and wrong, moral understanding develops incrementally through childhood and adolescence and is difficult to gauge or define in a single interaction.

Another key argument of the New Labour years, repeated by the Cameron government, was that young people should take responsibility for their actions. This argument has two key take-aways. Firstly, a point of principle. If 10 year olds are able to differentiate between right and wrong then they should be held accountable for their actions. Demonstrated in the 1997 White Paper for tackling youth crime in England and Wales which states that "the government wants to give a clear signal that children can be held responsible for their actions from the age of ten."

Secondly, a point of practice in bringing together two parts of the youth justice system often judged to be irreconcilable. The punishment and prevention of criminal offences versus looking after the young person's welfare. If a young offender is forced to take ownership and face the consequences of their actions it can help rehabilitate them and develop their moral understanding. In essence New Labour argued that tackling the criminal behaviour no longer just protects the public, it also improves the individual's welfare. If this is the case then a lower MACR results in young offenders taking responsibility for the consequences of their actions which could help stop future offences.

Recently there has been little debate over the MACR but when asked in the Cameron years about why the government opposed a raise, Lord Ahmad of Wimbledon pointed additionally to the importance of making sure that serious offences can be prosecuted in order to keep the public safe and that a lower MACR enabled multi-agency youth offending teams to "intervene early and prevent robustly further offending."

One of the main areas focused on by campaigners calling to raise the MACR is child development and how this impacts upon behaviour and decision making capabilities. This has even been reflected, as early as 1985, in international standards with The Beijing Rules dictating that the MACR's of countries "shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." The MACR is the age at which an individual can take criminal responsibility for their actions. Criminal responsibility is usually simplified to knowing the difference between right and wrong, this fails to take into account interconnected moral capacities whose development is pivotal to an individual's understanding of law and morality. Children's capacities and autonomy to deal with morality develop incrementally as they take more responsibilities over time and gain different experiences. Children have almost no legal responsibility until their teens and individual development varies as it is affected by a range of factors from developmental and mental disorders to environmental differences. Whilst there is no consensus around what age these capacities are sufficiently developed, it is usually not until mid-teens that conventional morality and "law and order" morality are achieved. Taking into account these capacities, it is questionable whether as a society we can justify the criminalisation of children who haven't yet developed the ability to understand law and morality, two central concepts that underpin our entire justice system.

The neuroscientific understanding of how a child develops and how this affects their decision making has improved considerably in the past 50 years since the last change to the MACR in legislation. With new technology neuroscientists can now use complex scanning techniques to create detailed images of the developing brain which allows connections to be made between brain structure and developmental theory. This neuroimaging is allowing neuroscientists to start developing nuanced understanding of different brain areas that could tentatively help with the conceptualisation of criminal responsibility. One of the most important recent discoveries is that changes continue in important neural circuits that underpin behaviour until at least the age of 20. All this research concludes that the brain is constantly developing through childhood and adolescence.

The period of adolescence has been well characterised and satirised throughout history as one of risk-taking, heightened emotional responses and engagement in impulsive and ill-judged behaviour. Until recently the cause of this behaviour in this specific period of development had evaded scientists. Now it has been discovered that it is due to a maturational imbalance between the Amygdala, the reward system and responsible for emotional processing, and the

Prefrontal Cortex, a self-regulatory region important for decision-making, impulse control and consequential thinking. The Amygdala develops during early adolescence whereas the prefrontal cortex is a lot slower to mature with the latest neuroimaging suggesting it isn't fully developed until 25 let alone at the age of 10. This demonstrates why children and young people have less developed impulse control compared to adults. The result of this research could suggest that criminal acts by children could be understood as behavioural and developmental issues from immature impulse control development. This maturational imbalance means that young adolescents have a greater affinity for risk-taking as the cognitive control system is not yet mature enough to restrain their impulses that are heightened by the more developed emotional and reward processing system. It also means young adolescents have poorer consequential thinking and will prioritise immediate rewards over long term consequences. This makes the period of adolescence a time of amplified inclination to reckless and ill-judged behaviour which will have an impact upon their decision-making in both a criminal and civil setting.

This relationship can be presented by the Dual-Systems model. A study in 2016 showed that self-regulation develops linearly over the course of adolescence and reaches a plateau during mid 20's. Conversely, reward and sensation seeking follows an inverted U-shaped pattern. It increases between preadolescence and late adolescence, peaking at roughly 19 before declining as individuals move into their 20s.

This period of development is made more complex by the changing social interactions. Children and adolescents are increasingly influenced by their peers as they age with decreasing parental controls. Research has demonstrated that in real life adolescents' behaviour can be strongly determined by external factors such as social settings and peers whereas, in controlled laboratory settings, adolescents can make decisions in a similar way to adults. There is a shift between the ages of 10-14 where young people place more emphasis in behaving in a way to elicit approval from their peers, instead of trying to elicit approval from their family. When surrounded by peers adolescents make more reckless judgements and are poorer at planning so it is unsurprising that they are more likely to commit crimes in groups. Adolescents are also more likely to highly value social inclusion and so place greater prominence on relationships with their peers. It is for this reason that many individuals who demonstrate criminal behaviour in their adolescence do not demonstrate the same behaviour in adulthood.

Neuroscience demonstrates that pre-adolescents and adolescents, compared to adults, have a restricted ability to control their impulses and consider long-term consequences when making decisions, which is then amplified among their peers. However the law still judges them as if they are fully formed adults with fully formed cognitive abilities and fully transitioned to new social cues, away from parental controls. If young people have a predisposition that tends towards ill-judged behaviour and short term rewards, as a society we are simply penalising them for their developmental and social challenges instead of offering welfare and support. Adolescence is already a tumultuous and rapidly changing period in an individual's life from developmental changes to social changes and it will be those caught in the criminal justice net that inevitably need that welfare and support the most.

When considering the intersection between neuroscience and the law, it is important to consider the extent to which scientific absolutes can translate into legal absolutes. It is difficult to transfer scientific terms into legal terms such as responsibility without falling into the trap of "oversimplification and over-reach". The Royal Society has additionally highlighted that there is

significant individual variations in the timing and development of certain capacities and brain areas which causes a variability in the extent to which cognitive development impacts on the individual, their decision making abilities and their understanding of morality and law. In a world where scientific absolutes and legal absolutes perfectly aligned, decisions about responsibility would be made on a case-by-case basis at this stage of the developmental process. Thus defining an exact and universally applicable MACR, from solely a neuroscientific perspective, is difficult. Ultimately the law cannot only rely on science for deciding the issue of the MACR as there can never be a law that perfectly translates into the scientific reality. Nonetheless there is a key take away from developmental theory; the UK's MACR is illogically low and not aligned with current understanding of development. To quote the Royal Society "it is clear that at the age of ten the brain is developmentally immature, and continues to undergo important changes linked to regulating one's own behaviour."