

Assessing the criminal capacity of children: Are the law and mental health on the same page?

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Introduction

Criminal capacity is a legal term which has no direct, interchangeable, definition in the field of mental health. At best, it is understood as a composite of various threads of cognitive and behavioural functioning, which in themselves defy absolute definition or measurement.

The relationship between the fields of Law and Psychology is one in which the former usually requires precise answers of an “either – or” nature of the latter. Such a question, relevant to our discussion here is: “Does a person possess criminal capacity?” This question implies that an answer should categorically state that the presence of capacity does, or does not exist, and the question does not accommodate an answer that implies degrees of such presence. Such demands are made even more arduous to meet when the legal definitions applied to specific entities are themselves imprecise.

This paper will identify the difficulties involved for psychologists in formulating an understanding of such a legal term; the various threads that compose such a psychological entity; the difficulties in measuring such threads; and the parallel difficulties of situating such elements within a developmental framework.

Whilst the law makers would ideally wish for a precise way of establishing the absolute existence, or absence, of such capacity, and to then situate the presence of such capacity at a uniform chronological age, the mental health fields need to honestly declare that such a requirement is beyond their theoretical and experimental ability.

What is ‘Criminal Capacity’?

For the majority of countries, the concept of criminal capacity is equated with an acceptance that there are certain characteristics which need to be shown to be present before an individual can be held responsible for his/her actions (or negligence) and such responsibility is a pre requisite for a conviction of guilt.

According to Snyman (2002) an individual can only be deemed culpable (i.e. blameworthy or responsible) for an offence if he/she has ‘criminal capacity’, which includes two inherent component abilities. Capacity is usually understood to have a cognitive and a conative component which translates to the need to prove (i) the presence of an understanding of wrongfulness and (ii) an ability to control one’s behaviour in accordance with such an understanding. If one or both are lacking it follows that such accused cannot be held criminally liable. It is accepted that at any given time the cognitive ability to achieve such understanding and also to exercise control of one’s actions are abilities that can be influenced by both pathological and non-pathological factors. Mental illness and mental defect are considered pathological factors, whilst age, temporary stress or the influence of certain ingested substances can be considered some of the non pathological factors interfering with, or limiting, cognitive understanding and/or behavioural control.

The wording of the cognitive component of capacity may differ between countries, and presents more complexity than may initially be evident. Essentially the question asked is: Was the accused able to distinguish between right and wrong at the time of the offence? However, it is suggested that this cognitive capacity implies more than a concrete knowledge of right and wrong, and could include an appreciation of why a particular behaviour is wrong as well as some awareness of possible consequences. Some countries use the term “appreciate” rather than “knowledge”, in an attempt to convey this broader definition (Burchell and Milton 1999). Furthermore, and particularly for children, it would be necessary to show that cognitively an individual is able to ascertain that a behaviour constitutes a breach of a legal requirement and is not simply wrong or naughty – as defined by parental instruction or social convention.

Concepts of right and wrong can also be subjected to specific contexts. Whilst a particular act may be known to be “illegal”, when confronted by urgent human need or moral principle, the same act committed by a specific individual in a specific context may be perceived by the individual as morally right, or at least, excusable. This introduces a “situation specific” component to our, more general, definition (Walker, 2011). Kohlberg’s extensive research using various scenarios and hypothetical dilemmas explored this type of moral reasoning across the developmental spectrum.

Arguments regarding the behaviour (or conative) element of capacity introduce further complexities when the influence of affect or emotion is considered. Transient or chronic stress or provocation can elicit emotion of such force or power that the capacity to manage behavioural control is severely compromised. Again it is acknowledged that those of immature years are unlikely to have developed adequate impulse control and are more prone to emotionally driven behaviour and are also more susceptible to influence from peers, or others, which could undermine their own personal judgment. There is little doubt, therefore, that the cognitive and conative components of capacity are characteristics that are likely to mature, develop and become more refined with the increase of chronological age (Lamb & Sim, 2013).

Criminal capacity and related terms

The terms criminal capacity, criminal responsibility and related ones tend to be used interchangeably. While the term *criminal capacity* is used in the South African legislation, especially in the Child Justice Act of 2008, no clear definition is given in the legislation. The official order directed at Clinical Psychologists and Psychiatrists (Form 2) simply states “You are ordered to evaluate the criminal capacity of[child’s name]” There appears to be an implicit expectation that mental health professionals (i) have a complete understanding of this legal term, and (ii) that their interpretation of the concept is the same as that of the court and the legal fraternity in general.

Although sometimes used interchangeably, the term *criminal responsibility* becomes relevant as a consequence to a finding of *criminal capacity*. In other words, an individual can be deemed criminally responsible only if it is proven that he has criminal capacity.

Background: South African situation & legislation & requirements

Historically in South Africa the minimum age of criminal capacity was set at seven years with a rebuttable presumption of *doli incapax* (i.e. not criminally responsible) for accused children between the ages of seven and 14 years. However, the Child Justice Act of 2008 increased the minimum age to 10 years, such that a child under the age of 10 years cannot be prosecuted for a crime, but must be dealt with through the social services system. Unlike many other countries, the new legislation retained a rebuttable presumption of *doli incapax* for child accused between 10 and 14 years, and places the onus for proving criminal capacity in this age band with the party raising the issue. Usually it is the state contesting the incapacity presumption and, therefore, has the task of providing proof of criminal capacity. To this end the law makes provision for expert evidence to be led to enable the courts to make the determination of criminal capacity. According to the legislation, clinical psychologists and psychiatrists are the health professionals deemed “competent to conduct the evaluation of the criminal capacity of a child”.

Since the implementation of the Child Justice Act in early 2010, accused children have been referred to clinical psychologists and psychiatrists for criminal capacity assessments. These practitioners are either in full-time state employ or in private practice. The enlisting of the required specialists has been a challenging endeavor due to, *inter alia*, (a) the general shortage of mental health specialists in the country, (b) the over-extended resources of the state mental health services, and (c) the relatively low interest in forensic mental health work, especially among state employed mental health professionals, (d) the absence of valid and reliable assessment measures.

The legal requirement is that the stipulated practitioner must conduct an examination to evaluate the “cognitive, moral, emotional, psychological and social development of the child”. This task is, perhaps, easier said than done. While on their own, these areas of functioning can be investigated within the context of child development assessments, investigating these functional abilities in the context of criminal capacity is quite another matter.

Writing within the context of the United Kingdom, Elliott (2011) noted that “There is clearly unease among some judges and academics with the current application of the criminal law to young children” (p. 291). There is little reason to believe that this level of concern and uneasiness does not prevail in legal and forensic mental health contexts around the world. The need to carefully examine and consider the issue of criminal capacity and responsibility in children, therefore, warrants serious attention and deliberation, taking into consideration psychological knowledge and current scientific research.

International standards & principles

The matter of juvenile justice has been contemplated by various international bodies over the years. In 1985 the United Nations (UN) developed a set of principles aimed at promoting the well-being of children in conflict with the law, which came to be known as the *Beijing Rules*. These were conceptualized as minimum standards that member states should apply in administering juvenile justice. However, the UN declined to specify a minimum age of criminal capacity, but emphasized instead the danger of setting the age too low. They went on to add that

“The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and

understanding, can be held responsible for essentially antisocial behaviour.”
(United Nation, 1985, s. 4.1).

Of course, the measurement and calibration of the ‘moral’ component is unspecified and is one of the primary sources of difficulty in determining children’s criminal culpability.

The UN *Convention on the Rights of the Child* also does not stipulate a minimum age of criminal responsibility, but urges member states to establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law” (United Nations, 1989, Article 40(3)(a)). Thus far no uniformity has been achieved on minimum age. In this proclamation the UN also stipulated the desirability for dealing with affected children without resorting to judicial measures, wherever appropriate.

In its fundamental principles, the *Riyadh Guidelines*, adopted by the United Nations in 1990, is somewhat more child development focused and progressive, and recommends that member states consider

“that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood” (United Nations, 1990, Fundamental Principles 5(f)).

It is encouraging to note the body’s recognition of maturational factors, as opposed to simply static criteria such as chronological age, in contemplating criminal culpability. The idea of development and maturation are, key to understanding children’s behaviour, and especially criminal behaviour and culpability. Recent research brings to the fore the relevance of developmental trajectories, and especially neurodevelopmental milestones that need to be considered in the debate over the minimum age of criminal responsibility, and youth culpability (Lamb, & Sim, 2013; Ryberg, 2014).

In 1994, following their conviction of the murder of toddler James Bulger in the United Kingdom, 10-year olds Jon Venables and Robert Thompson lodged appeals with the European Court of Human Rights. The court held that even though there was no universally accepted or binding minimum age of criminal responsibility, it believed that (i) holding a child of 10 years responsible for criminal behaviour was not inhumane, but that (ii) the minimum age of 10 years (in English Law at the time) was “on the low side” (Wolff & McCall Smith, 2000). No recommendation was given as to a preferred minimum age.

The Scottish Law Commission (2002) viewed the age of criminal responsibility as having two relevancies: firstly it is regarded as the age below which a child is deemed not to have the requisite capacity to commit a crime, and secondly, it is the age above which the accused’s age is irrelevant to the way in which the case is managed within the criminal justice system in terms of the trial, sentencing, and other procedures.

Risks associated with legislating a fixed age of criminal responsibility

Risks associated with setting the age too low

The potential dangers associated with assuming the criminal capacity of children who do not have the requisite cognitive and conative capacity have been identified by those campaigning internationally for the raising of the chronological age at which such capacity is assumed, and include:

- (1) Subjecting children to a criminal justice system labels children with an identity at a critical stage of their identity formation, and could have a marked effect on the trajectory of their social and psychological development.
- (2) Consequences of a guilty conviction may often include a period of incarceration. Such places are ill equipped to provide therapeutic environments and are more inclined to arrest development than facilitate healthy growth and address deficiencies in early development.
- (3) A period of exclusion from normal educational facilities are likely to inhibit career advancement and condemn the future young adult to under employment or unemployment. The lack of a legitimate means of financial independence in adulthood may act as an incentive for future criminal activity.
- (4) Should such procedures and consequences be interpreted as unfair it is likely that this will contribute to an anti-social, or anti establishment attitude to further compound a personal sense of alienation.

Whilst the above points are presented separately it is perhaps the corporate effect of these interacting factors which will compound the accumulated personal consequences (cf. Goldstone, 2013; Bateman, 2013).

It is of little surprise therefore that there is a growing wave of support to increase the age of capacity in most countries. The United Nations, the Beijing Rules and other international standards (described above) have opted for this approach.

Risks associated with setting the age too high

It is however necessary to question the basis for such changes and “enlightened developments”. Possible dangers of setting the age of capacity too high include the following:

- (1) It would be necessary to find justification for, on the one hand, increasing the age at which children are assumed to have criminal capacity whilst, on the other, decreasing the age at which children are afforded civil liberties and responsibilities (Delmage, 2013). Psychological theory and research should provide evidence that would result in a more consistent and congruent alignment of rights and responsibilities. During a recent campaign in England to increase the age of capacity (from 10 years of age) (Church, Goldson&Hindley, 2013) it was argued that the law expected a child to be of at least 16 years of age before being granted the responsibility to own a pet whilst holding children aged 10 criminally liable (Goldstone, 2013). It is difficult to correlate such divergent views of the cognitive abilities of the same child. Is there psychological justification for both rules? Or does it rather sound as if different categories of laws for children emanate from very different sources with varying views of the developmental stages and abilities of children? A country portraying equally diverse views of children’s civil liberties and criminal responsibility (in the opposite direction to England) is South Africa. Here there is a campaign to have an irrebutable presumption of incapacity at age 14 years yet a right to request medical procedures and abortions, without parental consent, at age 12 is already enshrined in the Children’s Act.
- (2) It may even be insulting to children to recognise, on the one hand, that they have access to information and education which equips them with an ever increasing amount of knowledge, yet simultaneously for adult society to assume an ever decreasing cognitive capacity to appreciate right from wrong. Is this contributing to a generalized “dumbing down” of children, in spite of the availability of an increasing amount of information?

- (3) Another area of potential significance is the evaluation of the child’s ability to appreciate wrongfulness, with the child’s ability to appreciate the difference between lies and truth. Much campaigning has taken place in recent years to encourage courts to adopt a more informed approach to the testimony of children – both as victims and as witnesses. Whilst there is some merit in a cautionary attitude to such testimony there is sufficient knowledge, supported by research, to advance the view that a child’s capacity to be accurate in their testimony is perhaps greater than was previously assumed. When viewed in parallel with the increasing age of assumed criminal capacity (the ability to discern right from wrong), we are witness to a decreasing age of assumed reliability of a child’s testimony and their ability to discern truth from falsehood. Can Developmental Psychology support these two trends which appear to be moving in opposite directions on the age scale?
- (4) A further concern regarding a mistaken assumption of capacity which sets a chronological age above that at which such discernment and behavioural control can occur, is raised in the analysis of risk factors for adult offenders. One of the most consistent features of those characteristics which are found to be strong indicators of adult criminal behaviour, and in particular the more repeated, aggressive and sexual offences, is the tendency to have displayed such behaviour and disregard for others at a young age. In reviewing available Violence Risk Assessment tools, the most consistent variable appearing on the “Static” list of contributing factors, is the presence of violent behaviour before the age of 15 years. (Otto and Douglas 2010). Such findings are not surprising when considering the diagnostic features of an antisocial personality disorder which include the presence of a conduct disorder before the age of 15 years (American Psychiatric Association, 2013). The seriousness of this issue needs to be acknowledged. Even if not used to motivate for a decreased age of criminal capacity, it should be applied when considering the consequences for children who commit serious antisocial acts but are exempt from the legal justice system.

Developmental psychology theory – how is it informing the issue?

The developmental psychology theories relevant to criminal capacity are largely those in the areas of cognitive and moral development, with Jean Piaget and Lawrence Kohlberg as the chief proponents.

Piaget’s work suggested that children pass through four sequential stages (see below) in their cognitive development (Inhelder& Piaget, 1958). While it is understood that all typically developing children pass through these stages, the age thresholds and transitional times are by no means absolute criteria, and cannot necessarily be used to denote psychopathology, if an individual child does not meet those precisely.

<i>Stage</i>	<i>Approximate ages</i>
Sensorimotor	birth - 2 years
Preoperational	2 – 7 years
Operational	7 – 12 years
Formal operations	12 years – adulthood

Of relevance to criminal capacity are the last two stages described by Piaget, although it is only in the final stage, i.e. from about the age of 12 years, that children develop *hypothetico-deductive* reasoning. This refers to the child’s ability to reason using ‘if-then’ assumptions and

formulate consequential scenarios to possible actions. In other words a more abstract type of thinking is possible. Applied to criminal capacity it would mean that until the individual has reached the formal operations stage he/she is not able to contemplate the possible outcomes of his/her actions. This would suggest that a child cannot be deemed blameworthy or to have criminal capacity before the age of about 12 years because of the inability to conceptualise the consequences of their actions.

Moral development, on the other hand, refers to the gradual acquisition of values and knowledge regarding just and ethical ways of thinking and behaving in society. This encompasses, in simple terms, the ideas about what is ‘right’ and ‘wrong’, and ‘good’ and ‘bad’. Piaget provided the theoretical foundations for this area of study as well, but it was Kohlberg who furthered the ideas and research into this field.

Piaget had proposed a three-stage theory of moral development that progressed from (i) the premoral stage when there is no sense of obligation to rules; (ii) the stage of moral realism when right and wrong is based on consequences (e.g. punishment) to (iii) the stage of autonomous morality when right and wrong are decided through mutual and societal understanding. In expanding these ideas, Kohlberg considered moral development through three levels, each with two stages.

<i>Stage</i>	<i>Level & Orientation</i>
(I) Premoral / Preconventional	(1) Obedience & avoidance of punishment
	(2) Individualism, Instrumentalism, & Exchange
(II) Conventional / Role Conformity	(3) Interpersonal conformity (Good-boy/good-girl)
	(4) Societal conformity (Law & order)
(III) Postconventional / Principled Morality	(5) Social contracts / rights
	(6) Universal ethical principles

Of course, it is argued that few individuals achieve the final level of morality. Moreover, while Kohlberg’s work is widely recognised, it has been severely criticised for its gender and culture bias (Gilligan, 1982; Snarey, 1985).

There is also the issue of moral judgement versus moral behaviour, in that knowledge does not necessarily predict accordant behaviour. In this respect Rest’s (1984) Four Component model considers that morality involves moral sensitivity, moral judgement, moral motivation, and moral action. The ability to conduct oneself in a manner that is concordant with one’s understanding of socially acceptable and lawful behaviour is required to complete the mastery of tasks inherent in moral development.

As with all measurable characteristics of psychological development it is inevitable that a variance of achieved goals between different ages will be noted. For our purposes it is equally valid to recognise that variance between individuals of the same age will be noted. There are many, perhaps limitless, variables that can impact on the rate of development, and these, whilst relevant from a preventative and curative perspective, cannot be explored in this paper. The conclusion however is that any attempt to establish a universal, definitive chronological age that will accurately reflect the presence of criminal capacity is doomed to fail. This leads to the inevitable conclusion that in order to precisely determine the presence or absence of such capacity, or even a measure of the extent to which such capacity has developed, an assessment

of each individual's functioning would need to be undertaken. The question is - do we have, or are we likely to develop, reliable and valid measures to provide conclusive answers?

Neurobiology literature – adolescents' brains and criminal capacity

For most of history in psychology, mental health and criminal law there has been a reliance on cognitive and moral development theories and research such as those cited above. However, the past 15-20 years has brought to the fore a range of neuro-anatomical and neuro-developmental research findings that has shifted our thinking about some of the child and adolescent development issues as they were previously conceptualised and understood. These developments need to be carefully examined and their relevance seriously considered in (i) the criminal capacity assessments of juveniles, as well as (ii) the formulation of criminal law as it affects youth offenders.

Research as early as 1999 revealed that the adolescent brain is a developing structure, and that it has not achieved complete maturation until early adulthood (Sowell, Thompson, Holmes, Jernigan & Toga, 1999). Reference is made here especially to the frontal lobes which are critical to executive functions such as decision making, problem-solving, planning and response inhibition. These are clearly functional areas that have a direct bearing on criminal capacity and criminal responsibility. Empirical findings such as this build on the developmental theories and assumptions set in motion years ago by seminal theorists in the area of human development, such as Piaget and Kohlberg.

Complete development of the prefrontal cortex is not achieved until the early twenties or later, and this area is responsible for goal-directed behaviour which includes planning and response inhibition, allowing "an individual to pause long enough to take stock of a situation, assess his or her options, plan a course of action, and execute it" (Johnson, Blum & Giedd, 2009, p. 218). It has also been noted that the "ventromedial prefrontal cortex is a critical neural substrate for the acquisition and maturation of moral competency that goes beyond self-interest to consider the welfare of others." (Taber-Thomas, et al., 2014, p. 1254).

These scientific findings must be considered of relevance to the courts in determining criminal capacity, because an individual who does not possess the capacity to assess a situation and formulate an appropriate response cannot be held criminally liable. Importantly, it has been demonstrated that even though adolescents may develop capacities similar to adults in some areas, their reasoning ability is not as well developed (Sowell, Thompson, Tessner & Toga, 2001). The neuroscience data must also be viewed against the juvenile justice legislations in South Africa and many other countries, which carry the implicit (and in some cases explicit) condition that for an accused person to be held criminal responsible he/she must be shown to have the competencies of the typical adult. In other words, he/she should be able to distinguish right from wrong and act accordingly like the typical adult. However, the neurodevelopmental research indicates that adolescents do not develop into typical adults until their early twenties.

In the 2005 case *Roper vs. Simmons*, where an individual convicted of murder, who was 17 years at the time, received the death sentence, the American Psychological Association, American Medical Association and other professional groups submitted *amicus* briefs to the effect that at the age of 17 years the adolescent brain is still developing. It was argued that both adolescent brain structure and behaviour were not as mature as those of adults and that in areas critical to decision making the human brain continues to develop into young adulthood (American Psychological Association, 2014). It was further argued by the American Medical Association and other bodies (2005) that in adolescence there is a greater reliance on the

amygdala (i.e. the part of the brain associated with primitive impulses like aggression, anger, and fear) whereas in adults similar information is processed through the frontal cortex (i.e. the part of the brain associated with impulse control and good judgment). In addition, it was put forward that areas of the brain associated with the assessment of risk, impulse control and moral reasoning develop last, that is, after late adolescence. Haider (2006) noted that, on the basis of the scientific evidence supporting these briefs, the Supreme Court overturned the death penalty. Emphasizing the significance of the scientific evidence, she stated “Thus, in our science brief, we argued that juveniles’ brains are anatomically different *and deficient* as compared to those of adults” (p. 371). While the issue of the death penalty is not under discussion in this paper, the abovementioned principle applies in the broadest sense to the issue of adolescents’ capacity and responsibility for criminal actions even in countries that do not impose the death penalty.

These modern technological advances in measurement of maturation are perhaps providing us with a rationale for the observations noted by earlier researchers such as Piaget and Kohlberg.

A case for diminished responsibility?

The Juvenile Justice Center (2004) of the American Bar Association, in its review of the neuroscience research, argues that scientific evidence points to adolescents being less culpable for criminal behaviours than healthy adults. They believe that while adolescents should not be excused for their crimes, their lesser culpability needs to be taken into consideration in the determination of punishments. Morrison, (2011) noted that after the Bulger trial in the UK, the jury foreman, Vincent Moss had expressed regret at the unanimous guilty verdict, adding that a more appropriate outcome would have been guilty but with diminished responsibility.

Given the neurobiological and neurocognitive evidence, it follows that to hold adolescents criminally liable for unlawful actions may be unfair and unjust. However, it is also evident within the contexts of social justice, human development and psychological learning theories that offending behaviours from children and adolescents should not go unpunished. The question of diminished capacity, therefore, comes into play, and may warrant further interrogation in the context of youth justice.

Of course, the concept of ‘diminished responsibility’ implies an earlier level of responsibility, which has been reduced due to mental health problems. However, in the case of children and adolescents this term may be problematic due to their position in the developmental trajectory, and we suggest that a consideration of "emerging responsibility" may be a more appropriate notion.

Summary and way forward

The situation as it is South Africa, and other countries that legislate a rebuttable presumption of *doliincapax*, is as follows:

- The Law requires the presence of criminal capacity before proceeding to conviction.
- The Law has not established a universally accepted and understood definition of such capacity.
- The Law requires a specific chronological age at which the court can assume that such capacity exists.

- Psychological sciences cannot adequately deconstruct this concept in a manner that allows for a psychological assessment process that reliably identifies the presence, or the measure of the components of this concept. Neither can psychology and the human development sciences precisely identify the chronological age at which such capacity exists in its entirety.
- There are dangers for the individual and society, if such an age is set too low. There are dangers for the individual, and society, if the age is set too high.
- The assessment process, even in its incomplete and inadequate state, is too time consuming and costly to be applied to each child.

In developing a way forward it is important to recognize that

- (1) It is not possible to determine an exact age above which criminal capacity exists irrefutably.
- (2) Mental health examinations to inform criminal capacity have low reliability. The moral development literature, while helpful, is unable to provide absolute criteria to determine criminal capacity unequivocally. The rebuttable presumption of incapacity (currently existent in South Africa and some other countries) is, therefore, a flawed approach to child justice, if absolute and reliable measurement criteria are not available.
- (3) Neurodevelopmental research is providing convincing evidence that even by the late teens, brain development is not complete, especially in the prefrontal cortex, meaning that executive functions such as planning, reasoning and decision making are not as evolved as in adults.
- (4) The idea of diminished responsibility (or ‘emerging responsibility’) may need to be considered in dealing with youth in conflict with the law.

The issue of criminal capacity and minimal age certainly requires much more consideration and deliberation in light of the scientific evidence and the need to ensure justice to all parties involved. Re-examining and re-framing the questions posed by courts in keeping with the purpose and intention of youth justice legislation could ensure outcomes.

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