

# A case for raising minimum age of criminal responsibility

May 2007

# The concept of age of criminal responsibility

- The ‘Age of criminal responsibility’ refers to “the age at which a person is considered capable of discernment (the capacity to distinguish right from wrong) and therefore bearing the responsibility for his criminal acts. It is the age from which the child is judged capable of contravening the criminal law”
- Note: The issue of age and criminal responsibility relates to two distinct set of issues
  - the age at which children are deemed to have the mental capacity to commit a crime
  - the second relates to the age at which it is appropriate to render them liable to prosecution and formal sanctions

# Significance of a minimum age of criminal responsibility

- The concept of an age of criminal capacity reflects the globally-accepted idea that children are:
  - slow to develop mental capacity and
  - that the criminal justice system is an inappropriate place to deal with their misbehaviour

# Significance of a minimum age

- The concept is reflected in nearly all jurisdictions of the world throughout history
- Hence, the CRC's provisions on this issue thus simply follow on this historical recognition, as do other CRC provisions which evince recognition of children's rights arising from their status as minors.

# International law and minimum age

- Article 40 (3) (a) of the CRC requires state parties to establish ‘a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’.
- This obligation is reiterated in the African Children’s Charter which is worded in similar terms (Article 17(4))
- These provisions fall short of prescribing such an age, a clear illustration of the lack of an international standard on the age at which criminal capacity should be imputed.

# International law

- This further explains the absence of an international standard in an area where notions concerning the age at which children are able to understand the consequences of their actions differ widely across cultures, and even within a given society.

# Guidance in the Beijing Rules

- Despite the discretion accorded to states, some guidance is provided in the Beijing Rules to the effect that that the minimum age should not be fixed at too low an age level, bearing in mind the facts of a child's emotional, mental and intellectual maturity (Rule 4(1))

# Guidance in the Beijing Rules

- Hence while the choice of a minimum age would always be considered an arbitrary decision (in the absence of actual research on child development) the choice of such an age must not be arbitrary.

# UN Committee's jurisprudence

- Since the adoption of the CRC there have been significant developments in relation to how the UN Committee on the Rights of the Child (CROC) has interpreted the obligation of States on the issue of minimum age.
- The CROC's views can be said to be three-pronged:-

# UN Committee's jurisprudence

- Firstly, the Committee has been unequivocal that failure to establish a minimum age of criminal capacity is a violation of the CRC. This has been the CROC's message to States which have submitted their implementation reports and appeared before the Committee without ever having set such an age. Criticisms in the Concluding Observations to the initial State Reports of Guatemala, Micronesia, Panama and Senegal are illustrative of this stance

# UN Committee

- The second prong of the CROC's interpretation has considered certain minimum ages set by States as astonishingly low and hence a violation of the CRC.
- The Committee has asserted that “an inappropriately low age for criminal responsibility shows that the State does not have a clear idea of what the criminal law can achieve with young children, and does not appreciate the harm it can cause

# UN Committee

- According to the CROC, as acknowledged by its criticism of low ages of criminal responsibility, a re-examination of the minimum age of penal responsibility upon ratification of the CRC is vital.

# UN Committee

- The third prong of CROC's views relates to the *doli incapax* rule (the rule in most English/Roman Dutch common law countries- where children between certain ages (usually 7-14) are considered to lack capacity unless it is proven otherwise).

# UN Committee

- Before clearly pronouncing itself in its most recent **General Comment No. 10 on Child Rights in Juvenile Justice**, the Committee appeared to be in favour of considering the upper age of the *doli incapax* rule as the effective age of criminal responsibility and hence the doctrine as a mantle in the protection of child rights.

# UN Committee

- Hence in reaction to the abolition of this doctrine in the Isle of Man, the CROC stated:

“The Committee notes with concern that the Children and Young Persons Bill proposes to abolish the presumption that children between the ages of 10 and 14 years are doli incapax [incapable of committing a criminal offence], which means that legally the minimum age of full criminal responsibility is lowered from 14 to 10 years..... [It] strongly recommends that the Isle of Man reconsider its decision to abolish the principle of doli incapax for very young children. The Committee also recommends that the Isle of Man review its legislation with a view to increasing the age of criminal responsibility and to ensuring full conformity with the principles and provisions of the Convention ....”

# UN Committee

- The CROC reacted similarly to UK's abolition of the doctrine. It criticized the low minimum age of criminal responsibility set at 10 years for the rest of the UK (and 8 years for Scotland) and expressed 'particular concern' on the abolition of the doctrine. However, while recommending that the UK considers raising the age of criminal responsibility from 10 years, the Committee stopped short of specifically recommending the reinstatement of the *doli incapax* rule.

# UN Committee

- In the G.C (Paragraph 16), the CROC has now come out and stated that it is not in favor of the *doli incapax* rule. Hence the CROC prefers to set an absolute minimum age at the level where State Parties would like it to be set in principle-this would be the upper age of the *doli incapax* principle.
- The Committee's main reason for this position is that the doctrine is, more often disregarded in practice with judges deferring to prosecutorial discretion rather than allowing for a proper burden of proof. Hence the danger that the doctrine does not serve as a protective mantle.

# UN Committee's views

- From the CROC's recommendations to many States, especially in more recent review of State Reports, it can be concluded that in all instances where the minimum age of criminal responsibility was below the age of 12 years, the CROC recommended an increase without expressly stating what the age should be.

# UN Committee's views

- The CROC has also focused attention on the point that State Parties need to ensure fair trial rights and the due process safeguards in treating children below the age of criminal responsibility.
- Article 40(3) (b) of the CRC calls for measures for dealing with children below the minimum age 'without resorting to judicial procedures' while fully respecting 'human rights and legal safeguards fully'.

# State Practice-Africa

- In Ghana, Kenya, Lesotho and Uganda, the *doli incapax* rule was part of the English common law inherited in these countries. Early statutory/penal laws in these countries codified this rule providing that children below the age of 7 (8, in Kenya) were treated as not having criminal capacity. Children between the age of 7 and 14 (12 in Kenya) were however treated as lacking in capacity unless this was otherwise proven by the prosecution. This rule forms part of the common law in South Africa and Namibia.

# Africa

- On the other hand, the age was set much higher ages in other African countries. Senegal and Burkina Faso adopted 13 as the minimum age, and some other African countries opted for higher minimum ages - Sudan at 15 and Libya at 14. It has been asserted that 13 is "the most common African minimum age". Rather than attribute these higher ages to either an influence of emerging influence of international law or as reflecting local perceptions on child offending, for many of these African countries this may be explained through the reception of colonial laws (as with the African commonwealth countries under study). The higher minimum ages of criminal responsibility may thus reflect the legacy of the former colonizing country, for example France. The common minimum age of 13 in Senegal and Burkina Faso, just two examples of former French colonies is illustrative in this regard.

# Europe

- In Europe, while nearly all countries have adopted an upper age of 18, remarkable differences still obtain on the minimum ages of criminal responsibility. Thus 15 years is the minimum age in the Scandinavian countries of Denmark, Sweden and Finland. In Western Europe, Netherlands set this age at 12 years, in France it has been set at 13 for quite a while. In Germany and Italy the age is set at 14 years. At the lower end of the continuum are countries such as Cyprus with 7 as the minimum age and the UK with 10. Criticizing these differences as arbitrary and illogical, Jaap Doek has argued for the minimum age of criminal responsibility to be increased to at least 12 years of age in countries with a low minimum in Europe. He further argues that “raising the minimum age in just a few countries would help set an international standard for the more than forty countries in Eastern and Western Europe” .

# Developments on the doli incapax rule-Ghana and Uganda

- The rule has been abolished in Uganda. The 1996 Ugandan Children's Statute set the minimum age at 12. In Ghana a 1998 legislative amendment to criminal law set the age at 14.
- The reasons for the increase in the minimum age in Ghana and Uganda were mainly predicated on references to the guideline in the Beijing Rules (Rule 4.1). Tested against the jurisprudence of the CROC, this choice meets the standards required of States under the CRC

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# Ghana and Uganda

- Abolition of the doctrine seemed, however, to have been motivated by a practical consideration that available statistics showed that “children under 14 years were generally involved in petty (rather than any serious offences)
- The same reason seemed to have motivated the choice to abolish the doctrine in Uganda

# Uganda

- The Ugandan Committee was swayed by its research that showed that very few children under the age of 14 had been arrested and charged with serious offences during a two year period

# Kenya, South Africa and Namibia

- The rule is still part of law in many African countries, despite the UN Committee's view. It remains part of Kenyan, Namibian and South African law.
- In Kenya, the child law reform committee in charge of the new children's law considered as adequate the *doli incapax* rule as it is (with a minimum age of 8 and children between the age of 8 and 12 being considered *doli incapax*). The UN Committee in its 2001 C/Observations criticized the age of 8 as too low and recommended that it be raised.

# Namibia

- In Namibia, the reform body behind the proposed Child Justice Bill in Namibia had proposed a minimum age of 10 and retention of the presumption of incapacity for children aged between 10 and 14 years. This was until a follow up meeting of Government Ministers of 8 May 2003 recommended the retention of the common law rule pertaining to capacity-hence Namibia may (even with the passage of new legislation) retain a low minimum age of 7 and the *doli* doctrine's application for children between this age and 14 years.

# South Africa

- In South Africa, the Child Justice Bill proposes an increase in the minimum age of criminal capacity from 7 to 10 years and a retention of the rebuttable presumption for children aged between 10 and 14.
- The South African Law Commission proposed the retention of the doctrine calling it “a protective mantle”.

# South Africa

- The Commission found that majority of the respondents (to its Issue Paper) supported the retention of the rebuttable presumption but did not proffer the options of the age thresholds under which the presumption would operate (especially whether and why the upper threshold of 14, a common law relic, should be retained). Retention of the age of criminal capacity and the fixing of the thresholds at 10 (minimum age) and 14 (the age up to which the presumption applies) was motivated by scientific as well as practical considerations.

# South Africa

- Research presented before the Commission showed that very few children between the ages of 7 and 14 (the ages for the common law presumption) are actually charged and convicted of crimes, just as with the Ugandan example.
- The Commission was also swayed by scientific and developmental arguments (based on studies on selected South African children tend to show that children develop cognitive and connative capacity more or less at the age of 10

# South Africa

- In proposing a minimum age of 10, the South African Law Commission envisions that in light of research detailing the paltry number of child offenders in general and in the age category of 10-14 in particular, very few of child offender cases – mainly singular and unusual cases of serious offending - may actually proceed to trial in light of the centrality of diversion as a procedure in the proposed child justice system

# South Africa

- In addition, the Commission referred to the views of the CROC and developments elsewhere (the UK, Hong Kong, Australia and Uganda).

# Minimum age/doli incapax in the UK, Hong Kong and Australia

- In the UK, the Crime and Disorder Act, 1998 led to the abolition of the doli incapax rule and the setting of a minimum age of 10 which has been criticized by the UN Committee.
- The Labor government's arguments for the doctrine's abolition seem to have coalesced on the historical existence of the rule which was, according to the government, now outdated and out of touch with modern English societal conditions.

# UK

- A number of commentators however agree on the point that the primary rationale for the doctrine's abolition (in tandem with the erosion of other legal safeguards hitherto available to children) was rooted in a philosophy of 'responsibilization' through a new youth justice policy – 'a get tough on crime view'.

# Australia

- The developments regarding the doli incapax doctrine in England led to similar debates on its continued application in Australia.
- In an examination of the issue in 1997, the Australian Law Reform Commission reached a contrary position to that in the UK. The Commission was particularly wary of 'punitive developments' in juvenile justice elsewhere.

# Australia

- Hence it recommended the retention of the doctrine ( with a minimum age of 7 and children between 8 and 14 deemed to lack capacity unless proved otherwise). The Commission suggested that the doctrine be legislated for through Statute

# Hong Kong

- This reasoning resonates with that of the Hong Kong Law Commission whose proposals for an increase of the minimum age of criminal responsibility from 7 to 10 years and the retention of the *doli incapax* presumption for children between this age and the age of 14, were given statutory recognition through the recent Juvenile Offenders Ordinance of 2003.

# Some conclusions regarding developments on doli incapax

- The doctrine recognizes the fundamental nature of childhood in the sense of children not having the ability to understand the wrongfulness of criminal acts and that that they develop this understanding gradually, at different and inconsistent rates.

# Some conclusions

- However it appears that the UN Committee has been swayed by research showing that the doctrine is more often ignored in practice (e.g in English, Australian, Kenya and South Africa courts) rather than the rationale of the doctrine.
- In an attempt to deal with this problem, the South African Child Justice Bill and the proposed new children's law of Lesotho seeks to strengthen the procedure of rebutting the doctrine.

# Some conclusions

- The relevant provision in the two bills enact the common law position that vests the burden of rebutting the presumption on the prosecution beyond reasonable doubt. A significant new introduction to the rebuttal procedure is the provision which requires that the Preliminary Inquiry to be held in all child offender cases and before proceedings the issue of a child's capacity will be dealt with in depth (section 5 South African Bill). At the instance of the child or his legal representative, an evaluation by child development experts/any suitably qualified person such as medics and psychologists) of the child's cognitive, Such experts may be called to give their evidence of the evaluation in court. (South African Bill, section 56, Lesotho Bill, section 83).

# Some conclusions

- The Committee is yet to consider a case of a State party which increases the minimum age in the doli incapax rule from the common law age (7 years) to a higher one (say 10 as the S.A one) while rebuttably presuming children between such an age and 14 years as lacking capacity.

# Some conclusions

- The South African Child Justice Bill envisages that very few children in the *doli incapax* bracket (proposed for the ages 10-14) will undergo the process of a criminal trial because of S.A statistics showing that very few children in this age bracket commit serious crimes. The majority, committing petty property offences are expected to be dealt with by the centrality of the diversion procedure in the Bill.

# Some conclusions

- It is however highly likely that the setting of a minimum age below 12 would be considered as 'too low' by the UN Committee, in spite of arguments on the importance of the doctrine and improvement in the rebuttal procedure. This is the message in Paragraph 16 of the General Comment on Juvenile Justice.
- Further, the UN Committee may be swayed to believe that any protection offered by an enhanced rebuttal may just be speculative –or not likely to be observed in practice. Hence the need for an absolute minimum age which is set at higher than 12.