

ORIGINAL ARTICLE

Can lowering the minimum age of criminal responsibility be justified? A critical review of China's recent amendment

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Abstract

In 2021, China amended its law on the minimum age of criminal responsibility (MACR), lowering the MACR of two specified offences to twelve years. As a result, China now has three different levels of MACR for different offences. Based on the position in China, this article argues that while lowering the MACR against the international trend can be justified as a necessary measure to tackle serious crimes committed by children, creating different levels of MACR based on the types of crime is wrong in principle. This article further considers the classic dilemma in setting an absolute MACR, which results in either freeing the guilty or convicting the innocent. It is argued that setting a relatively low MACR accompanied by robust safeguards of *doli incapax*, child immaturity defence, diversion and wider sentencing options would allow a better assessment of children's culpability and better serve the interests of justice. It is also suggested that lowering the MACR will not unjustifiably undermine children's rights if the juvenile justice system could ensure only those truly culpable could be convicted and that the option of prosecution is reserved as a last resort.

KEYWORDS

child immaturity defence, children, China, *doli incapax*, minimum age of criminal responsibility, youth justice

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1 | INTRODUCTION

The minimum age of criminal responsibility (MACR) refers to the minimum age at which a person might be held criminally liable (Cipriani, 2009). The recent amendment to China’s Criminal Law came into effect in 2021, lowering the age of criminal responsibility to twelve years for two specified offences. The first part of this article outlines the legal framework regarding the MACR and its recent reform in China. The second part discusses the rationale underpinning the need for a MACR. The third part argues that lowering the MACR could be a justifiable response to a series of serious juvenile crimes in China, yet the current piecemeal reform is based on popular justice rather than sound principles. The fourth part considers the classic dilemma in fixing an arbitrary MACR. After discussing scientific evidence on child development, it is suggested that a relatively low MACR supplemented by an individualised approach better serves justice. Fifth, it is suggested that the MACR in China could be unified at twelve years, while at the same time, various safeguards such as: (i) *doli incapax*; (ii) child immaturity defence; and (iii) diversion, should be introduced to achieve the principle of protecting the innocent and punishing the guilty. Finally, wider sentencing options are recommended to better facilitate the rehabilitation and reintegration of child offenders. While basing its discussion on China, this article aims to offer universally applicable arguments as to why lowering the MACR might be acceptable or even preferable to achieve justice, provided that robust safeguards are in place.

2 | CHINA’S RECENT REFORM TO LOWER THE MACR

A major reform to amend the MACR has been passed by China’s Standing Committee of the National People’s Congress (NPCSC) and came into effect in March 2021 (The National People’s Congress of the People’s Republic of China, 2020). The MACR has decreased to twelve years in the case of (i) intentional homicide or (ii) intentional infliction of bodily harm (a) resulting in death or (b) using especially cruel means leading to serious disability (Criminal Law of the People’s Republic of China, 2020, Article 17). The new Article 17 of the Criminal Law provides that in prosecuting children who reach the age of twelve years but below 14 years, affirmation of prosecution from the Supreme People’s Procuratorate is required. On the other hand, the age of criminal responsibility for the eight specified offences remains at 14 years and the age of full criminal responsibility remains at 16 years. A summary of the current MACR in China is listed in Table 1.

TABLE 1 Age of criminal responsibility in China from March 2021

Age (years)	Scope of criminal responsibility
12–13	(i) Intentional homicide or (ii) intentional infliction of bodily harm (a) resulting in death or (b) causing serious disability using especially cruel means.
14–15	Eight specified offences: intentional homicide, intentional infliction of bodily harm causing serious injury or death, rape, robbery, drug trafficking, arson, explosion and poisoning.
16 or above	Full criminal responsibility.

The rationale provided for lowering the MACR to twelve years is to impose proportionate punishment in major crimes, respond to various murders committed by children aged twelve and 13 years, and also to strike a balance between protecting youth and achieving social justice (Guo, 2020).

3 | THE NEED FOR A MACR

China's Supreme People's Court explained that setting a MACR reflects China's juvenile justice policy of 'education first, punishment second' (Shen, 2016, p.358). China prioritised principles of education, reformation and rescuing in response to juvenile delinquency (Criminal Procedure Law of the People's Republic of China, 2018, Article 277; Gong & Yu, 2021; Law of the People's Republic of China on the Protection of Minors, 2020, Article 113). It is believed that both the special characteristics of children and the feelings of victims and society must be considered in dealing with juvenile crimes (Gong & Yu, 2021). The rationale behind setting the MACR in China is that the law deems only at a certain age children would know what is right and wrong and thus it is necessary to educate those below that age and punish those older than that age (Shen, 2016).

The claim that children who are not adequately developed should be protected rather than punished is supported by scientific evidence on brain development. Children's brain structure and usage differ from adults as their brains are still under construction in the developmental process (Barbee, 2011; Midson, 2012). Their developing cognitive capacity and emotional maturity may inhibit their ability to reason and act responsibly (Arthur, 2016). As their prefrontal cortex is not maturely developed, children are less able to perceive or avoid risks, understand consequences, control impulses and manage emotions (Arthur, 2016). Furthermore, children have yet to go through the developmental process of myelination and pruning which would improve their ability to exercise self-restraint and evaluate risks (Midson, 2012). Adolescents also display behavioural changes including an increase in novelty-seeking, risk-taking and peer-based interaction (Midson, 2012). Therefore, children at a very young age may not be able to control their actions and understand the harm and consequences caused by their acts, and should not be viewed as criminally culpable in the same way as adults.

Children's understanding of crime and the law may also be very different from that of adults. First, parents and teachers heavily shape children's understanding of norms. If children are not taught what the law prohibits them from doing, they will be oblivious to certain acts that would attract penal sanctions. For example, a child being taught to routinely steal food for family living may not know it is unlawful, let alone to perceive any wrongfulness in his/her act (McDiarmid, 2013). Second, if the norms that were being taught conflict with the law (such as being taught that it is fine to respond to bullying by fighting back despite the law's prohibition on violence), children would be unable to recognise the higher legitimacy of the law. They may struggle to understand why they should follow the remote concept called 'law' instead of what their parents told them (Sherry, 2018). Third, even if a child understands that certain acts are prohibited by the law, they may fail to internalise their wrongfulness. For example, a child might be told that taking others' property would make others sad. Yet the child might not appreciate the importance of respecting others' property as he/she may mistakenly believe that theft is acceptable if it does not make the other person sad (Sherry, 2018).

Furthermore, the purpose of criminal law is to set clear standards to direct people's behaviour (Herring, 2016). Thus, a person could only be properly criminalised if he/she has the cognitive capacity to understand the requirements of the law and the nature and consequences of his/her acts (Crofts, 2016), so that a fair warning has been communicated to him/her before criminalisation (Horder, 2019). Also, criminal liability could only be properly imposed if a person has the capacity and fair opportunity to conform his/her behaviour to comply with the law (Horder, 2019), or in other words control themselves 'to act otherwise than they did' (Lacey, 2001, p.353). When there is a defect in understanding or controlling themselves, there is no free will in the choice of

action (Crofts, 2016). Given young children's unique developmental stage and diminished capacity, their acts of hitting someone or stealing something, despite out of their own volition, should not always be regarded as entirely 'morally autonomous choices fit for legal condemnation and state punishment' (Horder, 2019, p.68).

Research also indicates that young children might not be able to understand the complexity of criminal proceedings (Grisso et al., 2003). Moreover, early criminalisation is likely to lead to a higher likelihood of reoffending (Bateman, 2012) and life-course interaction with the criminal justice system (Cunneen, Goldson & Russell, 2016). Criminalisation may also lead to stigma and labelling effects, causing child offenders to internalise and adopt the label of being an offender (United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990, para. 5(f)). They are more likely to drop out of school, stay unemployed and perform subsequent deviant acts (Bernburg & Krohn, 2003). An appropriate MACR is therefore beneficial to prevent the negative consequences associated with early criminalisation.

International children's rights instruments also regard the setting of the MACR as an important safeguard. Article 40(3)(a) of the United Nations Convention on the Rights of the Child (UNCRC), which was ratified by China in 1992 (Office of the United Nations High Commissioner for Human Rights, n.d.), states that a MACR should be established. Article 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) further states that the MACR 'shall not be fixed at too low an age level, bearing in mind the fact of emotional, mental and intellectual maturity'. Therefore, setting a MACR honours international commitment and is consistent with international norms.

4 | THE CALL FOR A LOWER MACR IN CHINA

As the spokesperson of China's Legislative Affairs Commission pointed out, lowering the MACR is a targeted response to the new trend in juvenile offending (Gong & Yu, 2021). The reform aims to curb the trend of increasingly violent crimes committed by increasingly young children (Jiao, Wang & Han, 2021). In recent years, there have been numerous reports in China that children under the MACR have committed serious crimes, yet escaped criminal charges under the previous law due to their young age. Examples found in various newspaper reports include:

- three children aged 11–13 years killed their teacher in school after she caught them stealing snacks;
- a twelve-year-old boy stabbed his mother to death as an act of revenge towards corporal punishment;
- a twelve-year-old boy killed his seven-year-old relative with a wood plank for fear of being punished after an accident;
- a twelve-year-old girl poisoned her classmate and her classmate's sister to death;
- a twelve-year-old boy stabbed his classmate to death after an argument;
- a 13-year-old girl killed her classmate and dismembered the body being jealous of her beauty;
- a 13-year-old boy killed his parents with a hammer after an argument;
- a 13-year-old boy killed his mother with a hammer after she killed his dog;
- a 13-year-old boy killed his mother with premeditation after she prohibited him from using a mobile phone;
- a 13-year-old boy stabbed a ten-year-old girl to death after failing to rape her;
- a 13-year-old boy choked another boy to death;

- a 13-year-old boy killed a 73-year-old woman while robbing her;
- a 13-year-old boy killed his ten-year-old relative and threw her body into the woods;
- a 13-year-old boy forced his classmate to remove her clothes and stabbed her when she refused; and
- a 13-year-old boy poured gasoline and set fire to a woman in order to rob her phone, causing her to suffer severe damage.

There is a lack of official crime figures recording crimes committed by children aged 12–13 years in China because prosecution cannot be initiated against them under the previous law. However, official statistics have shown that between 2017 and 2021, the number of child offenders who were (above the prevailing MACR and) arrested and vetted by the procuratorate under suspicion of committing the eight specified serious crimes (as listed in Table 1, including murder and rape) reached 92,885, accounting for approximately 30% of the total number of persons who committed the eight specified serious crimes (The Supreme People's Procuratorate, 2022). While figures following the lowering of the MACR are yet to be released, it is possible that a substantial number of children have committed very serious crimes at the age of 12–13 years. As it is obvious that not all crimes will be known or reported by the media, the above examples could just be the tip of the iceberg.

The problem under the previous law was that all of those child offenders in the above examples could not bear criminal responsibility as they were under 14 years of age. Therefore, they could only either be released immediately or sent to a shelter for re-education. In one case, a boy who killed his mother unashamedly alleged that 'it was only my mother' instead of anyone else. He was nonetheless released within days and sent back to school (Zhou, 2020). In another case in which a 13-year-old boy stabbed a ten-year-old girl seven times and killed her following an unsuccessful attempt to rape her, the boy subsequently said in a private online chat to his friend that he had not reached the age of 14 years (SOHU.com, 2019). To provide a further example, after a 13-year-old boy who raped a 14-year-old girl was released by the police, the boy further killed the victim's mother in retaliation to the civil suit brought by the victim's family (SOHU.com, 2006). These cases indicated that some children are possibly aware of the prevailing MACR and fearlessly committed crimes knowing that they will not be governed by the criminal law.

While it is appreciated that children may have a reduced capacity to control their impulses, and some children may not appreciate the wrongfulness of their conduct, such facts do not justify leaving a legal lacuna completely unaddressed. What is wrong with the previous law in China lies not in the presumption that children below 14 years of age cannot distinguish between right and wrong, but that even when it can be shown that the child offender is well aware of the nature, consequences and wrongfulness of the act, the law *must* still find him/her not criminally liable. As such, the law had not only failed to convey appropriate censure to those culpable, but also failed to compel them to receive appropriate rehabilitation programmes offered by the criminal justice system. It creates a lose-lose situation for the offenders, victims and society. The series of serious youth crimes committed by children aged 12–13 years have thus demonstrated a clear need for reform in China.

The proposal to lower the MACR also does not significantly deviate from international norms. Although encouraging states not to lower the MACR (United Nations Committee on the Rights of the Child, 2019, General Comment No.24, para. 22), the UN Committee on the Rights of the Child in 2007 has commented that setting an age level below twelve years is not internationally acceptable (United Nations Committee on the Rights of the Child, 2007, General Comment No.10, para. 32). In other words, while the recent General Comment No.24 encourages setting a higher age at

14 years, the age of twelve years would not be so low as to render it unacceptable. Many countries, including Belgium, Ireland, Netherlands (Brown & Charles, 2021) and Scotland (Age of Criminal Responsibility (Scotland) Act 2019) have their MACR set at twelve years. Furthermore, Article 17.1 of the Beijing Rules recognised that in dealing with juvenile offenders, apart from the needs of the juvenile, the authorities could also take into account the gravity of the offence and the needs of society. UN Committee on the Rights of the Child, General Comment No.24 similarly stated in 2019 (at para.76) that while the overall approach in dealing with child offenders should not be strictly punitive: '[w]here serious offences are committed by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, *including considerations of the need for public safety and sanctions*' (italics added). In this regard, the proposed reform does not deviate from international standards and can be justified in light of the need to protect society and the public from serious crimes.

5 | PROBLEMATIC PIECEMEAL REFORM: INCONSISTENCY IN CREATING THREE LAYERS OF THE MACR

While in principle, lowering the age of criminal responsibility in the cases of (i) intentional killing and (ii) intentional infliction of bodily harm causing death or serious disability appears to be a justifiable response to serious crimes, it is contended that the scope of reform is too limited, and creates inconsistency and incoherence in the Chinese criminal justice system.

The principle of punishing the guilty (or retribution) means that punishment should properly reflect the moral culpability of the offender (*R v. M* [1996]). The recent amendment created three different ages of criminal responsibility depending on the type of offence. The puzzling question is: why children aged twelve and 13 years who commit rape, robbery and indecent assault are conclusively presumed to have no criminal capacity or culpability, while children at the same ages who commit intentional killing are deemed to have known its wrongfulness and are therefore worthy of punishment? Similarly, why are children aged 14 and 15 years who commit theft and indecent assault not punishable, while they will be criminally liable if they commit robbery? The law is contradictory in treating a child aged 12–13 years as a moral agent capable of committing murder but not robbery. It should be emphasised that the seriousness of the type of offence itself does not guarantee that the child perpetrator has knowledge of its wrongfulness or consequences, or can exercise control over themselves, and vice versa. The different layers of ages in both the previous legislation and the current reform, which criminalise young offenders based on the objective seriousness of the offences but not their subjective appreciation of the wrongfulness of the crimes and the capacity to control their acts, fail to reflect the principle of 'protecting the innocent and punishing the guilty' which underpins the setting of the MACR.

The current high age of criminal responsibility delivers mere lenience for no good cause and fails to achieve retribution, deterrence or rehabilitation, as young offenders committing serious crimes can always escape criminal liability. By letting young offenders go free from proportionate punishment (and intervention in their best interests) merely because of their young age, the offenders and other potential young offenders would not be deterred from (re)offending. More importantly, by failing to subject those young offenders in need of intervention to appropriate rehabilitative programmes and education as mandated by the criminal justice system, it would be difficult for them to reform and rehabilitate to become law-abiding citizens. Adopting three different layers of age in which attachment of criminal liability depends upon the types of offence committed is thus uncondusive towards fulfilling the core aims of the juvenile justice system. If

it can be proven that the young offenders are aware of the wrongfulness of their actions and were capable of controlling themselves, it is unsound to suggest that they should always not be held criminally liable only because the offences they committed were not of the gravest kind.

Internationally, the adjustment of the MACR might occasionally be regarded as being influenced by moral panics arising from particularly serious incidents, such as children killing children (Adorjan & Chui, 2014). Similarly, it is observed that China adopts the model of 'authoritarian populist justice' (Liebman, 2011; Shen, 2016), in which policies and decisions are often made in response to public concerns and petitions. Frequent media reports of serious crimes committed by young children would lead to the public's fear of insecurity and strengthen their support for harsher penal policy (Li, 2015). It was opined that China's recent reform of the MACR was a response to the public outcry of holding young children accountable amid the surge of murders committed by young offenders (Yue, 2020). Similarly, a member of the Chinese People's Political Consultative Conference stated that the reform responded to the people's demands and complied with the people's expectations (Yang, 2021). It appears that the piecemeal amendment, which only criminalised youth between twelve and 13 years for the two specified crimes, serves as a response to public concern towards the high-profile murder cases rather than be based on sound principles.

The international community also discouraged the creation of different layers of the MACR. In the UN Committee on the Rights of the Child, 2019, General Comment No.24, para. 25, the Committee expressed its concern about permitting the application of a lower MACR when children are accused of a serious offence. The Committee commented that '[s]uch practices are usually created to respond to public pressure and are not based on a rational understanding of children's development'. The Committee strongly recommended that a unified age should be set instead.

The above discussion has outlined the problematic situation following China's recent reform. While there is a genuine need to lower the MACR in China, it also appears unsatisfactory to lower the MACR only for two specified crimes, which has created three layers of the MACR. Therefore, the next question is, should the MACR be unified at a lower level?

6 | THE CLASSIC DILEMMA IN FIXING THE MACR: EITHER CONVICTING THE 'INNOCENT' OR FREEING THE 'GUILTY'

The classic dilemma in setting the MACR is that if it is set too low, immature children might be unfairly convicted even when they are not morally reprehensible for their acts. Yet if the MACR is set too high, the criminal justice system will let go of mature children who have sufficient criminal capacity and voluntarily performed criminally reprehensible acts. Hence, fixing a MACR must involve some degree of arbitrariness, particularly when both the UNCRC and the Beijing Rules offer no precise guidance as to the exact age to be fixed. As the Office of the United Nations High Commissioner for Human Rights (OHCHR) commentary on the Beijing Rules (1985) states, the MACR in different countries 'differs widely owing to history and culture' (see <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/beijingrules.pdf> para. 4.1 (accessed 3 September 2023)).

There is also a conflict between the general reluctance to lower the MACR to protect the innocent and the alarming social circumstances which call for holding the guilty liable. The UN Committee on the Rights of the Child has recently encouraged states to increase the MACR to 14 years, as '[d]ocumented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12–13 years due to the fact that their frontal cortex is still developing ... they are unlikely to understand

the impact of their actions or to comprehend criminal proceedings' (United Nations Committee on the Rights of the Child, 2019, General Comment No.24, para. 22). Nonetheless, the serious crimes committed by children aged 12–13 years in China, as discussed above, signified the need to lower the MACR, especially when sufficient maturity and moral culpability of the said children can be demonstrated. This struggle highlights the need to consider both scientific evidence and the appropriate response to serious crimes happening in society.

Interestingly, research has shown that in the process of puberty, between late childhood and early adulthood, children's prefrontal and limbic connections undergo a process of rewiring. During that period, their active dopamine levels increase and their limbic system becomes hyperactive (Treiber, 2017). As a result, the increase in their tendency of risk-taking is more abrupt than the increase in their capacity to exercise self-regulation. This leads to a 'time gap' which leaves middle adolescents most prone to commit crimes (Walsh, 2011). This finding is confirmed by a recent study conducted in China, which shows that the self-control ability of children continuously decreases from the ages of eleven to 15 years, and then U-turns to a rising trend (Shang et al., 2022). Therefore, even adopting the UN Committee on the Rights of the Child, 2019, General Comment No.24's recommendation to set the MACR at 14 years, arguably it still fails to protect the most vulnerable group of middle adolescents, at around 15 years of age, which has the weakest ability to exercise self-control.

Such dilemmas cannot be easily resolved as neither neuroscience nor developmental psychology could conclusively suggest an age at which children will possess sufficient capacity for criminal liability to be imposed (Delmage, 2013). As suggested by Wishart (2018), dualism is involved in children's developmental change, in which they will possess some degree of mental capacity yet have not reached complete cognitive maturity. Research demonstrates that:

- children could recognise the wrongfulness of criminal conduct and could distinguish between criminal conduct and mischievous conduct at eight years (Wagland & Bussey, 2015);
- children are able to conform to norms and rules to avoid disapproval of others at the ages of 10–13 years (The Law Reform Commission of Hong Kong, 2000, para. 3.32);
- children can demonstrate capability of handling logic-based mental tasks by determining whether a hypothesis is correct or not at eleven years (Wishart, 2018);
- the brain's white matter volume, which indicates the general maturity of mental function, only steadily increases between 14 and 21 years (Wishart, 2018);
- amygdala, which regulates emotions and self-control, has a peak maturation age of 15 years in males and 19.7 years in females respectively (Wishart, 2018); and
- Fully matured rational abilities will not completely develop until 20–30 years of age (Walsh, 2011).

What implications do these findings bring to the setting of the MACR? It is important to note that the whole point of setting a MACR is to set *an absolute minimum* age at which some children can fairly be held liable, but not at an age at which *most* children are mature enough to impose criminal liability on them. Obviously, the neuroscience evidence of when the brain is fully matured cannot be of help in setting the MACR, as criminal capacity (encompassing the ability to understand the law and consequences of the act, as well as the ability of self-control) could have been developed before the brain has fully matured. It would also be absurd to suggest that criminal liability should absolutely not attach even in the stage of early 20s, a period when young adults are studying at university or have even started work.

On the other hand, it seems to be plausible to suggest at the age of twelve years, which scientific evidence demonstrates that at least some children at that age can distinguish right from wrong and can exercise self-control, and thus could make 'morally autonomous choices fit for legal condemnation and state punishment' (Horder, 2019, p.68), there should be at least a mechanism to hold those children criminally liable as a last resort. When children have developed sufficient criminal capacity and committed crime according to their free will, their immaturity or impulsivity arising from incomplete development which contributes to their criminal act should be regarded as a mitigating factor rather than a complete defence.

The struggle of whether to lower the MACR arises because there is a presupposed binary opposition that we should either criminalise all or let go of all children who committed wrongful acts at a fixed age. This is a false premise because 'the process of developing the capacities necessary for criminal responsibility does not take place at a consistent pace and there can be vast differences at the same biological age' (Crofts, 2015, p.127). As a result, the culpability of children who perform the same act at the same biological age may also differ. It is unfair both to convict the innocent and to free the guilty. Apart from freeing the guilty, the recent amendment which lowers the MACR to twelve years for the two specified offences without individualised assessment could equally risk convicting children at 12–13 years who have not developed sufficient criminal capacity. The recent amendment thus also 'fails to allow for individualised justice, ignores differences in rates of maturity and risks over-criminalizing very young children' (Fitz-Gibbon, 2016, p.407).

Three important points can be summarised from the above discussion. First, some children have developed sufficient criminal capacity to be properly convicted at the age of twelve years (and some have not). Second, there should not be different MACR for different types of crimes and the MACR should be unified. Third, as the MACR merely sets an absolute minimum age, it is important to individually assess children's criminal capacity and culpability instead of presuming that all children above the MACR have criminal capacity and that all of them should be prosecuted. The conclusion is that if there are sufficient safeguards to allow individualised assessment of children's criminal capacity and culpability, lowering the MACR to twelve years can be justified.

To achieve both aims of punishing the guilty and acquitting the innocent, it is proposed that *only* young children at the age of 12–15 years (the current age range for partial criminal responsibility in China) who: (i) have developed sufficient maturity to appreciate the wrongfulness of their acts; (ii) have the capacity to control themselves, and could appreciate the nature and consequences of the conduct; and (iii) are exceptionally in need of appropriate intervention from the criminal justice system, should be prosecuted. Applying the above criteria, the corresponding safeguards for children that should be introduced or maintained will be discussed below.

6.1 | Introducing the defence of *doli incapax*

It is recommended that the defence of *doli incapax* should be introduced in China. *Doli incapax* refers to the principle that children below a certain age are presumed to have no capacity to commit crime (Crofts, 2015). The rationale behind the principle is to provide a benevolent safeguard so that insufficiently mature children do not have to go through the criminal justice system (*C (A Minor) v. DPP [1996]*). Although abolished in England and Wales, *doli incapax* remains applicable in common law jurisdictions such as Australia, New Zealand and Hong Kong.

Under the principle of *doli incapax*, a young offender will not be held criminally liable unless the prosecution can prove 'beyond reasonable doubt not only that he caused an *actus reus* with

mens rea but also he knew that the particular act was not merely naughty or mischievous, but “seriously wrong” (*HKSAR v. Lui Tsun Sum* [2020]). There is no presumption of normality and the court cannot assume that the defendant knew that his/her conduct was seriously wrong simply because any child of the defendant’s age would know so. The court could consider the personal development of the defendant and may call the defendant’s family members or teachers as witnesses to testify on the defendant’s understanding towards the subject matter of the proceedings (*R v. B, R v. A* [1979]).

As discussed, one of the fundamental principles of criminal law is that penalties of law should not be imposed unless a person has the capacity and fair opportunity to adjust his behaviour to the law. In this regard, the abolition of *doli incapax* in England and Wales was criticised as being bizarre to hold ‘that a person is completely irresponsible on the day before his tenth birthday, and fully responsible as soon as the jelly and ice-cream have been cleared away the following day’ (Smith, 1994, p.427). It is important to highlight that *doli incapax* acknowledges young people’s developing capacities and allows for a gradual transition to full criminal responsibility (Crofts, 2015). It also recognises individual differences at the same biological age (Cauffman & Steinberg, 2000) by holding those who have developed sufficient mental capacity to be criminally responsible while protecting those not developed enough. For instance, in *C (A Minor) v. DPP* [1996], the twelve-year-old defendant was found holding the handlebars of a motorcycle while another boy attempted to break the padlock, and was initially convicted of attempted theft. His conviction was later quashed by the House of Lords under the doctrine of *doli incapax* because there was no evidence to show that he knew that his act was seriously wrong.

On the other hand, the principle of *doli incapax* also enables the criminal justice system to hold young offenders who deserve punishment liable. In the case of *HKSAR v. YHN* [2017], the defendant was aged under 14 years at the time of the offences, and was charged with eight counts of attempted rape and indecent assault to his sisters. The Court of Appeal held that his sophisticated actions, including: (i) choosing the timing when no one was at home and locking the door when committing the offences; (ii) telling the victims not to shout; and (iii) forcing the victims to watch a pornographic film before sexually assaulting them, demonstrated that he must have known what he was doing to be seriously wrong. This is a good illustration that the rebuttable presumption of *doli incapax* could be rebutted to punish those youths who have developed a sufficient moral understanding that his/her act was seriously wrong.

Despite recognising that *doli incapax* allows for individualised assessment of criminal responsibility, the UN Committee on the Rights of the Child has discouraged the use of such presumption with the fear that it will ‘leave much to the discretion of the court and results in discriminatory practices’ (United Nations Committee on the Rights of the Child, 2019, General Comment No.24, para. 26). As illustrated above, the principle of *doli incapax* is relatively clear: it requires the court to determine whether the child knew that his/her action was seriously wrong. Successful implementation has also been observed in common law jurisdictions such as Hong Kong and Australia. As with all other legal decision-making processes such as the determination of intention or recklessness, inevitably there would be subjective judgments for the court to determine. This itself is not disturbing or discriminatory. After all, whether the court in a particular jurisdiction unduly fetters its discretion depends on its rule of law condition, which determines whether the court would strictly and properly apply the legal rules. If not, discriminatory practices on children could still exist with or without *doli incapax*. Properly understood, the principle of *doli incapax* operates as a defence to crimes and there is no unfairness or significant incompatibility with the existing Chinese Law.

6.2 | Introducing the child immaturity defence

Newton & Bussey's (2012) study found that even for children who can generally distinguish right from wrong, 'developmental differences on psychosocial factors such as self-efficacy beliefs can influence children to make poor judgements in relation to delinquent behaviour, and undermine their knowledge of right and wrong' (p.85). Furthermore, dysfunctional family life, abuse and strain would further undermine children's ability to make rational decisions, especially in a 'hot' situation that requires immediate thinking (Timmer, Antonaccio & French, 2021; Walsh, 2011). Consider a child who recognised what he/she did was seriously wrong, but he/she cannot control the impulses to perform that action out of anger or jealousy. Should the child be found criminally liable? Alternatively, should a child bear criminal responsibility if he/she cannot understand what consequences will follow from the action? The answer to both questions should be *no* because the child cannot control him/herself to act otherwise. Thus, his/her choices are not truly 'morally autonomous choices fit for legal condemnation and state punishment' (Horder, 2019, p.68).

Article 18 of China's Criminal Law (2020) stipulates that a mentally ill person who cannot recognise or control his/her conduct should not bear criminal responsibility. However, immature children generally do not fall under the definition of mentally ill persons and therefore cannot rely on such a legal defence. In a case published by the Supreme People's Court, the child offender suffered from moderate mental retardation and showed mild symptoms of obsessive-compulsive disorder, and thus was found to have a lower capacity in decision making and self-control. No legal defence was available to the child offender, and he was convicted. However, the court imposed a lenient suspended sentence (The Supreme People's Court of the People's Republic of China, 2015). With no existing defence available specifically to children who are developmentally immature, it could be said that these children bear the risk of being unfairly convicted.

Therefore, a new child immaturity defence could be proposed. If, due to the child's developmental immaturity at the time of the offence: (i) his/her ability to appreciate the nature or consequences of the conduct was substantially impaired; or (ii) his/her ability to exercise control over the conduct was substantially impaired, the child should have a valid defence (for other formulae proposed, see Fitz-Gibbon (2016); McDiarmid (2016)).

This proposal provides a defence for children whose mental capacity were substantially impaired by developmental immaturity and that they cannot appreciate the nature or consequences of their conduct, or cannot exercise control over their conduct. This echoes UN Committee on the Rights of the Child, 2019, General Comment No.24, para. 28, which states that children with developmental delays or neurodevelopmental disorders should be excluded from the criminal justice system. Offering an extra cognition and volition-based defence in addition to the moral-based defence under *doli incapax* ensures that children who are in need of education and protection rather than punishment will stay away from the criminal justice system.

6.3 | Prosecutorial discretion and diversion

Apart from providing children with defences under the substantive law, procedural safeguards should also be in place to ensure that child offenders' contact with the court process and prison is kept as a last resort. Article 40(3)(b) of the United Nations Convention on the Rights of the Child (1989) provides that states should promote 'measures for dealing with such children without resorting to judicial proceedings'. Such measures, which refer children to programmes or

activities outside the criminal justice system, are referred to as diversion measures (United Nations Committee on the Rights of the Child, 2019, General Comment No.24, para. 15). UN Committee on the Rights of the Child, 2019, General Comment No.24 describes diversion as an integral part of the juvenile justice system which should be adopted as the way to deal with the majority of child offenders. The General Comment states that: ‘in addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost-effective’. Indeed, as most delinquencies are adolescence-limited and most children would naturally desist from crime when they reach adulthood (Moffitt, 1993), the criminal justice system’s intervention is generally unnecessary and should only be used as a last resort.

China has increased its use of prosecutorial discretion and diversion measures over the past decade. The rate of decision in not arresting children who committed crimes has increased from 26.7% in 2014 to 50.4% in 2021 (The Supreme People’s Procuratorate, 2020, 2022). Even when children were formally arrested, Article 177 of the Criminal Procedure Law (2018) states that when the crime is trivial, and no punishment is needed or punishment should be exempted according to the Criminal Law, no prosecution should be initiated. Apart from unconditional non-prosecution, non-prosecution might also come with conditions attached. Under Article 282 of the Criminal Procedure Law (2018), the procuratorate may, after considering the views of the public security authority and the victim, offer conditional non-prosecution if: (i) conditions for initiating prosecution have been met; (ii) the child offender expresses remorse; and (iii) the actual sentence that is likely to be served by the child offender upon prosecution is under one year. In deciding whether or not to offer conditional non-prosecution, the procuratorate may also receive information from social worker, education expert and psychologist to assist in the determination. In borderline cases, conditional non-prosecution rather than prosecution would be the preferred approach. The use of non-prosecution (including both unconditional and conditional) towards child offenders has been consistently increasing from 10.3% in 2014 to 39.1% in 2021 (The Supreme People’s Procuratorate, 2020, 2022).

The condition for non-prosecution will be for the child offender to abide by the law, report his/her activities to the relevant authority, and receive correction and education as directed for a period between six months and one year as determined by the procuratorate (Criminal Procedure Law of the People’s Republic of China, 2018, Article 283). The correction and education measures (diversion measures) that the procuratorate may impose are (Rules of Criminal Procedure for People’s Procuratorates, 2019, Article 476):

- (i) to attend addiction treatment or counselling;
- (ii) to perform voluntary services;
- (iii) a prohibition from entering certain premises or meeting specified persons;
- (iv) to compensate and make an apology towards the victim;
- (v) to receive education; and
- (vi) other conditions that protect the victims and prevent reoffending.

If there is a serious violation of any condition imposed, the prosecution may be re-initiated (Criminal Procedure Law of the People’s Republic of China, 2018, Article 284).

The Supreme People’s Procuratorate has recently issued five guiding cases in relation to conditional non-prosecution. In Guiding Case No. 103, the child committed assault during an unsuccessful robbery shortly after his father passed away and when having an argument with his mother. As he was in need of education and discipline, conditional non-prosecution for the period

of one year was deemed more conducive towards his reintegration into the society. An education group was specifically formed with the participation of school, parents and community to tailor-make education plans for him, so as to minimise interruption towards his academic and family life. After he successfully entered university and abided by the conditions satisfactorily, the period of supervision was shortened from twelve to eight months (The Supreme People's Procuratorate, 2021a). In contrast, the child offender in Guiding Case No.107 refused to attend the education sessions and frequently failed to attend work, and instead often gathered with other delinquents. As he was in serious breach of the conditions for non-prosecution, he was eventually prosecuted and received eight months' imprisonment (The Supreme People's Procuratorate, 2021a).

With the continuously increasing trend in China's use of diversion measures, it is believed that even if the MACR was lowered to twelve years, most child offenders would be diverted instead of prosecuted. Subjecting them to diversion measures is better than the status quo, in which child offenders below the MACR would either be released without follow-up measures or be sent to specialised reformatory schools. An immediate release would be too lenient and serves no useful purpose in rehabilitating the child offender; yet, sending child offenders to reformatory schools away from their family and parents arguably amounts to imposing a custodial sentence, which might be too harsh in many cases and may lead to stigmatisation. It could be seen that the diversion system in China provides an individually designed rehabilitation plan which encompasses a variety of education and correctional measures in the community. This could prevent stigmatisation of child offenders and facilitate their rehabilitation and reintegration into the society. Prosecution will only be initiated when it is strictly necessary and is reserved for serious offences or serious violations of non-prosecution conditions, providing further protection to children.

However, some improvements could be made to the current diversion system. First, conditional non-prosecution should be made available for consideration under all types of offences. Currently, conditional non-prosecution is not applicable to child offenders who commit certain types of offences such as public safety offences and national security offences, or to children likely to serve an imprisonment of more than one year if prosecution is initiated (The Supreme People's Procuratorate, 2021b). While it is agreed that diversion may not be applicable in very serious cases, there should not be an automatic exclusion and the applicability of diversion measures should be considered on a case-by-case basis to safeguard children's best interests (United Nations Convention on the Rights of the Child, 1989, Article 3). Second, the resources allocated towards diversion programmes should be increased. As recognised by the Supreme People's Procuratorate (2020), some cases were not offered conditional non-prosecution only because there was a lack of sufficient support from the community organisation, or that the local procuratorate believed it would be too troublesome to supervise the child offender. Ensuring sufficient resources and support at the local level is thus essential for successfully promoting diversion.

China already has a diversion system that focuses on 'education, reformation and rescuing' and is largely in line with international standards. With these suggestions, it is hoped that diversion programmes in China could further protect children's best interests and ensure that their rehabilitative needs are placed at the centre of the system.

6.4 | The need to introduce wider sentencing options

Even for children who have been properly found guilty notwithstanding the above safeguards, their culpability is arguably lower. In *Roper v. Simmons* (2005), the US Supreme Court held that the imposition of the death penalty on children is wrong because their lack of maturity and

underdeveloped sense of responsibility makes them prone to taking ill-considered actions. Their personalities are transitory and less fixed, and they are also more susceptible to peer pressure in risk-taking (Spear, 2013). Research similarly indicates that they are less enabled to consider others' perspectives (Van der Graaff et al., 2014) or long-term consequences when facing immediate short-term gain (Haines et al., 2021). The UK Sentencing Council has also recognised that children may not fully appreciate the effect of their actions, and 'changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour' (Sentencing Council for England and Wales, 2017, para. 1.5). As a result, children who commit crimes are less culpable as compared with adults and hence 'the case for retribution is not as strong with a minor as with an adult' (*Roper v. Simmons* (2005)).

In line with Articles 40(1) and 40(4) of the United Nations Convention on the Rights of the Child (1989), wider sentencing options must be provided to cater for the rehabilitative needs of child offenders and facilitate their reintegration. Research suggests that as children's brains are still developing and creating new connections, a rehabilitative approach will be particularly effective for children as compared with adults (Midson, 2012). The UK Sentencing Council similarly stated that children 'are likely to benefit from being given an opportunity to address their behaviour and may be receptive to changing their conduct' (Sentencing Council for England and Wales, 2017, para. 1.6).

While Article 17 of the Criminal Law (2020), which stipulates that youth offenders should be given lighter punishment, should be retained, appropriate laws should be enacted to ensure that custodial sentences are imposed only as a last resort and the best interests of child offenders are treated as a primary consideration in sentencing. Sentencing factors such as deterrence or protection of the public should normally give way to rehabilitation (United Nations Committee on the Rights of the Child, 2019, General Comment No.24, para. 76). Under the current Chinese law, the only sentencing option for all convicted criminals, including child offenders, is imprisonment or a suspended sentence (Shen, 2016). This significantly limits the suitable options available to child offenders.

Community sentences, which are found conducive to youth rehabilitation, might be introduced in China. Custodial sentences with training and rehabilitation elements, such as the detention and training order in the UK (Sentencing Council for England and Wales, n.d.) and the rehabilitation centre order in Hong Kong (Rehabilitation Centres Ordinance, 2019) might be considered. Having youth detention institutions specifically designed to facilitate children's rehabilitation is preferable.

After discussing the above safeguards, the classic dilemma in setting an appropriate MACR could be reconsidered. Consider that a 13-year-old child: (i) killed another; or (ii) repeatedly committed rape or robbery. Assume also that the child is found to be capable of: (i) understanding the law; (ii) controlling him/herself; and (iii) understanding the nature and consequences of his/her act. Advocates of maintaining or raising the MACR may suggest that early contact with the criminal justice system is bad for the child, and that in general children have lower culpability because they are more prone to commit crimes due to immaturity (see, e.g., Crofts, 2023; Singh, 2023). While these points are agreeable, this is hardly a satisfactory response that explains why the child should not be prosecuted at all. Even if the above arguments have some force in answering why the child should not be subjected to life or very lengthy imprisonment, they still cannot satisfactorily explain why the child should not receive his deserved censure by means of conviction and why the child should not be sent to youth custodial institutions for an appropriate period in an attempt to rehabilitate him/her, and thus ensure that he/she will not pose further harm to the public. With the discussed safeguards, the arguments for maintaining or raising the MACR are simply not

strong enough to justify giving all children absolute immunity to prosecution, especially when some could be properly regarded as gravely culpable and greatly in need of rehabilitation. The approach of setting a relatively low MACR to be supplemented by robust safeguards is therefore a preferable approach than maintaining or increasing the MACR in ignorance of the serious crimes committed by children in China. Additionally, the approach is also consistent with the UN Committee on the Rights of the Child, 2019, General Comment No.24 which allows considerations of 'the gravity of the offence' and 'the need for public safety and sanctions' to be taken into account provided that children's best interest remains the primary consideration.

7 | CONCLUSION

The prevalence of serious youth crimes in China sparked the discussion on whether the MACR in China was too high, and has led to the recent legislative change that creates three layers of MACR. However, the recent reform is unprincipled as it selectively criminalises children based on the objective seriousness of crimes without considering children's subjective capacity and culpability. While agreeing on the necessity to set a MACR to protect innocent children, the precise line is often difficult to draw. A balance must be struck between protecting innocent immature children and protecting the public interest by convicting children worthy of punishment (McDiarmid, 2016). At certain ages, for example between twelve and 15 years, inevitably there will be some children who have developed sufficient maturity to appreciate the wrongfulness of their actions and the ability to exercise self-control, while others at the same age do not. In other words, even at the same age, due to developmental differences, some children should be regarded as criminally culpable while others should not. Rather than insisting on maintaining or raising the MACR, it is proposed that setting a unified MACR at twelve years can be justified on the grounds of protecting the public if (and only if) the principle of 'protecting the innocent and punishing the guilty' could be ensured. To achieve this, (i) the common law principle of *doli incapax*; (ii) the child immaturity defence; and (iii) prosecutorial discretion and diversions should be adopted as safeguards to protect children. These safeguards could protect children who do not recognise the wrongfulness of their actions and who cannot control themselves at the time of the act free from criminal sanctions. It is also expected that most children would be referred to diversion measures and prosecution will be reserved for most serious cases. As for children who are held liable, a rehabilitative and reintegrative approach should be promoted, and the sentencing imposed should be in the children's best interests. To achieve this, various sentencing options should be introduced in China. With these proposals, it is hoped that individual developmental differences between children are recognised and the principles of 'education, reformation and rescuing' could be further promoted.

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