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Finding a Place for Juveniles in the Irish Criminal Justice System : Easy Question, Impossible Answer!

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[Printer Friendly Version]

Introduction:

"Before the age of reason we do good and bad without knowing it, and there is no morality in our actions…a child wants to upset everything he can reach. He grabs a bird as he would grab a stone and he strangles it without knowing what he does"[1]

Rousseau refers to the concept of childhood as being one of innocence. Children are deemed free from corruption by virtue of their age and immaturity. They are held out as less responsible for their actions than adults and thus merit different treatment. In recent years we have witnessed to trial of 10-year-old murderers, massacres in American high schools and in an Irish context the gang rape in Cratloe Woods. In the United States , federal lawmakers have described American children as "hardened criminals" and the "largest threat to public safety" rather than as our "future, our greatest resource and our hope for a better tomorrow"[2] . These "criminals" are children themselves, once innocent but now public enemy number one, thus presenting a perplexing difficulty – how should we treat children who commit crime?

This essay examines both international recommendations on the treatment of young offenders and the approach adopted in some western jurisdictions as well as the Irish response to the juvenile justice problem.

Welfare versus Justice:

The varying approaches to juvenile justice are frequently characterised as either "welfare" models or "justice" models. According to Cumeen and White[3] there are a number of discernible features to these polar opposites. Within a welfare system, behaviour is regarded as arising from a range of factors outside the control of the individual. It focuses on the offender as opposed to the offence and rehabilitation is a primary goal. The justice model on the other hand sees young people as responsible for their actions and offending as a result of choice. The model promotes "just desserts" in sentencing with rehabilitation being a secondary goal.

According to Art 3(1) of the United Nations Convention on the Rights of the Child 1989 in all actions concerning children the best interest of the child shall be a primary consideration. Similarly Rule 5 of the Beijing Rules[4] recommends that every juvenile justice system emphasise the well being of the juvenile and ensure that all reactions to such offenders are proportionate to the offence.

Initially most jurisdictions committed themselves to a welfare model promoting rehabilitation and reintegration. In countries like Canada and the Netherlands welfare principles dominated for most of the twentieth century but in recent years they have introduced more repressive measures shifting towards a justice model. In reality very few countries have adhered to a pure model with most policy makers attempting to amalgamate the conflicting ideologies of welfare and justice. Some laws have remained true to their welfare ideals making them increasingly difficult to reconcile with these new "get tough measures". In Canada the system has focused on accountability and proportionate responses to offending while Dutch law simultaneously adopted principles of equality, proportionality and just desserts. Even in the relatively stable Danish system difficulties have been experienced in terms of satisfying the dual goal of rehabilitation and incapacitation once again demonstrating conflict between criminal law and child welfare.[5]

Scotland appears to be a pure welfare model. The emphasis of the Children's Hearing System is on promoting parental responsibility and providing family support in arriving at a decision in the best interests of the child. Scottish juvenile justice is described as one which has "sharpened up" as opposed to "toughened up".

Yet this child centred system is not impervious to calls for tough justice. It has introduced a new method whereby the primary goal that welfare issues play as guiding outcomes is to be sustained but can be reduced if necessary for public protection from serious harm.[6]

Where does Ireland appear in the dispute between welfare and justice? Irelands juvenile justice history appears firmly entrenched in a justice orientated model but the Children's Act 2001 gives some support welfare ideals if only in a limited sense[7] . However the procrastination in the implementation of the said Act means that Ireland is still ruled by many out dated and punitive laws.

So why did these countries depart from the welfare tradition of juvenile justice? It is respectfully submitted that two factors should be discussed in this regard. Firstly the

denial at due process rights and secondly moral panic instigated by the media.

According to the UNCRC Article 40(2)(b) every child has the right to the presumption of innocence, to informed promptly at the charges against him/her, to have the matter determined without delay by a competent and independent body, the right to silence, a right to an appeal, to understand the language used in proceedings and to have their privacy respected at each stage of the trial. In Australia the Youth Justice Coalition[8] criticised the Australian system in terms which would have been valid for most welfare-oriented systems at that time. It stated that the system provided few rights, wide discretion and few criteria. Hence welfare youth justice systems appear to reflect implicit assumptions that by becoming involved in offending behaviour children forfeited their rights to a protected legal status. This issue culminated in Re Gault[9] where the US Supreme Court strongly upheld due process rights for juveniles. The reaction to this was that if juveniles were to be granted due process rights then they could be subjected to formal justice. This increased levels of juveniles transferred to adult courts especially in the Netherlands and the difference between juvenile and adult procedures became negligible in many jurisdictions[10] .

The second definable cause for the turn from welfare occurred as a result of the media turning the tide of public opinion and creating moral panic. In the media the youth of today are presented as a threat to social order. This causes the public to lobby politicians to “Get tough on crime”. The politicians then look to reform and inevitably come up with one solution – more interventions and harsher sentences. Thus those involved in the legal profession lost faith in the welfare model after Re Gault while simultaneously the public’s perception of the system was one of children “getting away with crime”. These combined to lead to the promotion of justice as opposed to welfare ideals.

In the last century many countries have demonstrated an inability to settle on one type of system and have instead attempted to satisfy the dual goals of welfare and justice. It is clear that no consensus exists as to which approach – Welfare versus Justice – is to be commended as both have inherent flaws and certain benefits. Therefore one must look beyond the type of system adopted in order to determine if any consensus exists as to the treatment of juvenile offenders, in this regard I now turn my attention to the age of Criminal Responsibility.

Age of Criminal Responsibility

In every juvenile justice system across the world the age of criminal responsibility is arguably its most distinctive and important feature. It is obviously inhumane and of little practical value to hold very young children responsible for breaking the law so we try to protect them from the full rigours of the criminal justice system until they are old enough to take full responsibility for their actions.

According to Beijing Rule 4 the age of criminal responsibility shall not be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity. The United Nations Convention on the Rights of the Child (hereinafter the UNCRC) Art 40 (3)(a) says that State Parties shall adopt an age below which children shall be presumed not to have the capacity to infringe the penal law. Hence even international standards fail to provide specific guidance as to the age to be adopted in this regard.

Ireland is still governed by the common law age of 7 as the Children Act 2001[11] has not been fully implemented to date. England retains 10 as its age, in Scotland its 8, the Scandinavian countries adopt 15, the Netherlands and Canada enforce the age of 12 and Germany and New Zealand operate a juvenile justice system where 14 is the minimum age for criminal prosecution. Do all these varying ages mean that children across the globe depending on the country they grow up in all mature at different rates?

In England the Thompson and Venables case in the European Court of Human Rights[12] (herinafter the ECHR) led to in depth examination of England 's juvenile justice system. The ECHR refused to rule that the age at 10 was too low in all cases however England came under heavy criticism from the academic community in relation to the age of criminal responsibility. Despite this England still refuses to increase it. At the time of the James Bulger murder England also operated what's known as the presumption of doli incapax, applied to children between 10 and 14. The presumption was that such children were presumed incapable at committing a crime but this could be rebutted by proof beyond reasonable doubt that the child understood his actions were seriously wrong as opposed to merely naughty.

In 17 days of the Thompson and Venables trial only 20 minutes of evidence was tendered to rebut the presumption and this was accepted by the Court as sufficient[13] . This was a heavily criticised element of the trial and after the case the English government decided to abolish the presumption[14] . Thus while in theory the age in England had been 10 in reality it had been 14 and by removing the presumption England effectively widened the net to allow for the prosecution of a whole new group of children – those formerly protected by the presumption those in what Conor Hanly calls the "twilight zone"[15] .

In contrast, Ireland has chosen to put doli incapax on a statutory footing in the Children Act 2001[16] . The Act also proposes raising the age of criminal responsibility in Ireland to 12. One problem is that it has been reformulated so that a child must know that what he has done is "wrong" as opposed to "seriously wrong" as was its original formulation. Hence while in theory Ireland 's age of criminal responsibility was 7 in practice many children were protected up to the age of 14. If

the Act is implemented the age of criminal responsibility will be raised to twelve in theory, in practice the presumption of doli incapax will be easier to rebut so those who would formally have been protected up to 14 may now be open to prosecution.

Scotland has similarly experienced difficulty with the age at criminal responsibility and the Scottish Law Commission has gone so far as to recommend its abolition[17] . They consider young offenders have sufficient protection from 3 elements of the existing system, first, the Crown needs to prove mens rea. Second, consequent to the Thompson and Venables case the court need to ensure that the child fully understands and can participate in proceedings and third guidelines as to prosecution include taking age into account.

I respectfully submit that this recommendation should not be followed. Although the line draw in terms at age is an arbitrary one, it does represent some modicum of protection. Scotland is proposing abolition without initiating alternative measures. Instead I would adopt the position proposed by McDiarmid[18] . If the age of criminal responsibility is to be abolished then there needs to be provision for a preliminary hearing of expert evidence to determine whether a child has both criminal capacity and the ability to understand and participate in proceedings against him. Justice would thus be individualised to take account of the child's development and personal maturity. One may argue that this would be an unmanageable system, however in 1811 in the Netherlands[19] criminal capacity was decided on a case by case basis as it was in Denmark[20] in the 1850's and prosecution could only take place if the child understood his actions and had a sufficient level of maturity to be tried. Should this occur it is important that it doesn't become routine like the German Youth Court process[21] .

Youth Court Law demands proof that a juvenile offender was mature enough to be aware of the wrongfulness of an illegal act and was capable of behaving according to such awareness. Despite this law German Youth Court practices don't comply with this rule and routinely assume criminal responsibility for young offenders.

I would respectfully submit that while there doesn't appear to be any consensus as to an agreed age there does appear to be agreement that the ages adopted in Ireland, England and Scotland are too young as children at this age don't have the cognitive reasoning necessary to take responsibility for their actions. When debate began about raising the age of responsibility in Ireland the Task Force on Child Care Services opined that the public would view children as "getting away with crime" if the age was raised.[22] This argument can easily be rebutted if there is a proper non-criminal system in place to deal with those under the age of criminal responsibility.

Therefore while many factors influence the way juveniles are treated age is the most distinctive and arguably the most important while at the same time being the most arbitrary. Subsequent to determining whether a child can be held accountable for a crime one must consider how he should be dealt with. Two options generally arise at this stage – diversion or prosecution.

Diversion –Informal Justice

A young person who is apprehended does not necessarily appear before the children's court as there are a number of options available to the police to divert a young person from the court system. These informal programmes allow young people to remain in a particular community and avoid labelling of a young person as a delinquent which the Riyadh Guidelines[23] recognise as detrimental to rehabilitation.

Art. 40 (3)(b) at the UNCRC places a duty on the State Parties to seek to promote, whenever appropriate and desirable, diversionary measures without reverting to formal trial.

Diversion can come in various forms including counselling, temporary supervision and guidance, attendance at a vocational training programme or conflict mediation and reconciliation. While every jurisdiction has adopted various approaches to diversion the consensus appears to be to utilise it wherever possible.

Most jurisdictions recognise that the police are the first point of contact for juvenile offenders and so allocate substantial discretion to them in terms of who qualifies for diversion. The police are thus the "gatekeepers" to diversion. In Ireland we operate the Garda Diversion Programme which was given statutory recognition in the Children Act 2001[24] . This programme provides a system of cautioning juvenile offenders and its primary purpose is to prevent re-offending and to educate juveniles on their responsibility to society. The programme provides for informal cautions[25] , formal cautions[26] or the use of family conferences[27] . The juvenile must be under 18 and have entered a guilty plea for the crime in question[28] . It is the Director of the Programme who determines eligibility and as such no other data is available as to why particular offenders are accepted or rejected[29] . The conference incorporates elements of restorative justice pioneered in the New Zealand system[30] . In New Zealand the conferences operate on 2 levels: Firstly, as an alternative to courts for young people who have not been arrested and secondly as a mechanism for making recommendations for judges before sentencing. As a result of these family group conferences very few youths ever experience the court process.

In Germany the police also hold some influence as to whether a young person will be diverted or not and in the Netherlands most juveniles are kept outside the system as police deal with them informally with petty offenders being referred to the child protection system[31] . England 's police operate a cautionary procedure with a police reprimand being given for a first office and subsequent offences warranting a final warning or criminal charges, prosecution and conviction. If you are given a warning under the English system this is combined with a rehabilitative programme organised by a Youth Offending Team who are locally based multi-agency groups aimed at "nipping crime in the bud"[32] .

Many countries also operate community-based projects to prevent juvenile delinquency recognising prevention as being better than cure. In Ireland we have "Copping On" a joint national crime awareness initiative between an Garda Siochana and Youthreach. In England they have "On Track" targeted at primary school children and their families. In the Netherlands they have STOP targeted at intervention with parental consent[33] .

Hence even in countries like England where the legislative has adopted a decidedly punitive approach diversion is frequently used and the consensus among most states is that it presents the best option for most juvenile offenders and reduces recidivism. However, there is also consensus among academics as to the perceived failings of these diversion programmes. Firstly question has been raised as to the amount of discretion afforded to the police in this area many of whom have been accused of "cherry picking" offenders with the best chances and letting the serious offenders try their luck in the criminal courts. Another area of criticism is the "net widening" of social control which these programmes afford offenders who would have been "let off" in the past are now entering the system through a different door.

Criticism has also been levied against diversion in relation to the shift of focus towards victim's rights conferences as opposed to focusing on the offender as well as the perceived lack due process rights in these diversion programmes. Most diversion services require an offender to have pled guilty thus relinquishing his right to a fair trial, presumption of innocence and to have the prosecution prove the case beyond reasonable doubt.

In terms of diversion there is consensus that it is a worthwhile initiative and a better mechanism than courts for dealing with less serious offenders. However, there does not appear to be such agreement in terms of serious offenders with many countries opting to try them in an adult court and dismiss suggestions of diversion for such youths when arguably they are the ones most in need of diversion. It is now necessary to consider how youths who are not given the chance at diversion are treated.

Prosecution in Court

Court proceedings for adults are formal, adversarial, dominated by legal jargon and the offender is the subject of the proceedings as opposed to a participant in them. In relation to juvenile proceedings international standards affirm that the best interests of the child should always be to the fore and due process rights should be observed[34] . Thus there is general consensus that children should not face the same proceedings as adults but there is limited agreement as to what factors should govern the trial of young offenders. Three factors do appear throughout the readings in this area. These are the right to privacy, the right of young people to participate in their trial and sentencing practices of the courts.

In terms of right to privacy Beijing Rule 8 states that a juvenile's right to privacy shall be respected to avoid harm from undue publicity and by the process of labelling. This is reinforced by Art 40(2)(b)(viii) of the UNCRC and would imply that details leading to identification of such offenders should not be published. The Irish Children's Court sits in camera with limited access for bona fide press members or legal researchers and there can be no publication of the names or addresses of such offenders. The youth court in England sits in private as do the youth courts in the Netherlands and Germany . Even in countries like Denmark where no separate juvenile justice system exists the right to privacy can be enforced as the judge has the authority to decide in the circumstances whether it should sit in camera[35] .

Difficulty arises when countries transfer juveniles to adult's courts for serious offences. This was perhaps most evident in the trial of Thompson and Venables[36] . In contravention of international best practice restrictions on publication were lifted towards the end of the trial. Apparently demands for public justice outweighed the right to privacy and its underlying importance in the rehabilitation of young offenders. It is contended that even if there is no other area of consensus within juvenile justice, every country should adopt a process which ensures that the right to privacy is upheld as a fundamental right in proceedings and a trial by mass media as occurred in this case is not repeated.

The second element concerning youth courts internationally, which merits discussion, is the right of the child to participate in the trial. According to Rule 14 Beijing Rules it is conducive to the best interests of the juvenile that the trial be conducted in an atmosphere of understanding which allows him to participate and express himself freely. This is further supported by Art 12(1) of the UNCRC which compels State Parties to assure that if a child is capable of forming his own views he has the right to express those views freely. Once again it was the case of Thompson and Venables that highlighted the deficiencies in terms of treating juveniles as participants in, rather

than just as subjects of the proceedings. Their inability to participate effectively in their trial was the main reason the ECHR ruled that T and V had not obtained a fair trial under Art 6 ECHR. Subsequent to this England issued a practice statement[37] in relation to the trial of young offenders emphasising that all possible steps should be taken to assist young defendants to understand and participate in proceedings. Unfortunately, such statements do not always follow through in practice - children are still compelled to sit in the dock away from family, social workers or legal representatives. The Dutch court has taken a much more favourable approach to participation of young offenders in the trial process.[38] The judge in the Dutch court engages in direct conversation with the offender ensuring the youth understands exactly what's happening. The Northern Ireland Youth Justice Agency[39] states that one of its aims is to ensure children are given reasons for decisions concerning them and are consulted in such proceedings. Hence in theory, at least, there is consensus that juveniles should be active participants in the proceedings. To further uniformity in this area I would respectfully submit that youth courts should allow the use of a type of youth advocate like those in New Zealand[40] who would be specifically selected for their personality, cultural background, training and experience to explain proceedings in a language the child can understand. Simultaneously, the judge should be an active participant in proceedings engaging in dialogue with the youth to ensure he fully comprehends the proceedings.

The final element at the trial process, which I will discuss, is sentencing. According to Rule 17 of the Beijing Rules the reaction of the court in sentencing should always be proportionate to the gravity of the offence, the circumstances and needs of the juvenile and of society. In sentencing there is obvious conflict between rehabilitation and just desserts – two diverse approaches which many jurisdictions have attempted to amalgamate into one system. England and Wales advocate a punitive approach to sentencing with the custodial sentence leading the sanctions handed down in English courts. In further support of this is the fact that 49% of judges said that when sentencing juveniles the seriousness of the offence was the guiding factor and only 22% said it was the welfare of the child[41] . They frequently contravene international best practice as detention is supposed to always be a measure of last resort yet appears to be the first port of call for many youth magistrates in England .

However not all jurisdictions adopt such a hard line in sentencing. The German Youth Court has for the last century endorsed the idea that punishment is not the best approach to youth offending. Sentencing instead targets education and rehabilitation of young offenders. They reject general deterrence, prevention and the seriousness of the offence as the most influential factors in sentencing[42] . In Ireland the Children Act 2001 states that any imposition should not interfere dramatically with the child's education or employment or relationships within the family[43] . When sentencing the judge is to be sensitive to the offender's age, background and the nature of the offence committed. These would appear to be sensible guidelines but unfortunately are still insufficient. There is a need for quality before the law but also a sentence which is appropriate for the particular offender. In order to harmonise these two goals – equality and individual justice I would contend that a body analogous to that used in

the Australian system would be a welcome innovation[44] . In Australia judicial commissions monitor sentencing and provide education and training for magistrates. I would submit should be adapted to monitor sentencing practices, issue guidelines to judges and publish statistical information in the area to ensure there is public awareness of sentencing practices. At the very least this could lead to an understanding of sentencing practices in difficult jurisdictions if not a consensus as to the best approach to be adopted.

Conclusion

Although much of the international law on juvenile justice is progressive and child oriented offering hope for consensus among contracting states as to how young offenders should be treated the reality is that the majority of these provisions are enshrined only in recommendations. Jurisdictions hence do not hold themselves strictly bound to these provisions and are increasingly adopting varied responses to juvenile crime. Being realistic there is not likely to be a single best approach in response to youth offending and it is clear that a country cannot adhere to a pure justice or pure welfare model. Attempts at amalgamating these two ideals have presented numerous difficulties, as has the age of criminal responsibility, the use of diversion and trial of young offenders. Essentially there are only two issues in relation to juvenile justice on which jurisdictions agree. First, children should be treated differently to adults and second, nothing is simple in the field of youth justice.

[1] J.J Rousseau, Emile (1974) London, Dent.

[2] Juan Alberto Arteaga, “Juvenile (in)Justice: Congressional attempts to abrogate the procedural rights of juvenile defendants” 102(4) Columbia Law Review (May 2002) 1051-1088.

[3] Chapter 9 “The institutions of juvenile justice” Cumeen and White, Juvenile Justice: An Australian Perspective, OUP, 1995.

[4] UN Standard minimum rules for the Administration of Juvenile Justice (Beijing Rules) 1995, www.unhchr.ch

[5] Anthony N. Doob and Michael Tonry, “Varieties in Youth Justice” 2004 31 Crime and Justice 1

[6] Buist and Asquith, “Juvenile Crime and Justice in Scotland” Chapter 5 in Bala et al, Juvenile Justice systems: An international comparison of problems and solutions, Thompson 2002.

[7] Part 4 Children Act 2001.

[8] Op. Cit. Fn 3

[9] Manfredi, The Supreme Court and Juvenile Justice, University Press of Kansas, 1998, Chapter 5 "Gault in the Supreme Court" pp 101-129

[10] Josine Junger Tas "Youth Justice in the Netherlands" 2004 31 Crime and Justice 293.

[11] Sec 52(1) Children Act 2001 will change the Irish age of criminal responsibility to 12 once implemented.

[12] Eur Court HR T v. UK and V v. UK 16 TH Dec 1999, www.echr.coe.int

[13] Fiona Buckley BCL, "The Treatment of Children who kill in the criminal justice system: Just or Unjust?" colr.ucc.ie

[14] Crime and Disorder Act 1998.

[15] Conor Hanly "Child Offenders: The Changing Response of Irish law"1997 Vol. 19 Dublin University Law Journal 113

[16] Sec52(2) Children Act 2001.

[17] McDiarmid "Age of Criminal Responsibilty: raise it or remove it?" 5 Juridical Review (2001) 243-258.

[18] Supra.

[19] Op cit. fn 10

[20] Britta Kysgaard, "Youth Justice in Denmark" 2004 31 Crime and Justice 349

[21] Hans-Jorg Albrecht, "Youth Justice in Germany" 2004 31 Crime and Justice 443

[22] D. Griffin "The Juvenile Conundrum – Ireland's response to Youth Offending" [2003] COLR 12, colr.ucc.ie

[23] Riyadh Guidelines for the Prevention of Delinquency 1990, www.unhchr.ch

[24] Part 4 Children Act 2001.

[25] Sec 25.3 Children Act 2001

[26] Sec 25.2 Children Act 2001

[27] Sec 29 Children Act 2001

[28] Sec 23(1) Children Act 2001

[29] Sec 20(1) Children Act 2001

[30] Allison Morris, "Youth Justice in New Zealand" 2004 31 Crime and Justice 243.

[31] Op. cit fn 10.

[32] Fortin, Childrens Rights and the Developing Law, Butterworths, 2 nd Edition 2003, Chapter 18 "The rights of Young Offenders".

[33] Op. cit fn5

[34] Art 3(1) UNCRC 1989, Art 40(2) UNCRC 1989, Rule 7 Beijing Rules.

[35] Op. cit fn 20.

[36] Op cit. fn 12.

[37] Practice Statement (Crown Court: Trial of Children and young persons) 2000

[38] Weijers, "Requirements for Communication in the Courtroom: A comparative perspective on the Youth Court in England / Wales and the Netherlands" 4(1) Youth Justice (2004) 22-31

[39] Youth Justice Agency Northern Ireland: Framework Document, www.nio.uk

[40] Op cit. fn 30.

[41] Op. cit fn 22.

[42] Op. cit fn 21

[43] Part 9 especially Sec 96 Children Act 2001

[44] Op cit. fn 3