

Do children have the capacity to commit a crime? The question of minimum age of criminal responsibility

Czy dzieci są zdolne
do ponoszenia odpowiedzialności karnej?
Kwestia minimalnego wieku odpowiedzialności karnej

Abstract

The article investigates the question of minimum age of criminal responsibility (MACR). A child under the age of criminal responsibility lacks the capacity to commit a crime. This means they are immune from criminal prosecution – they cannot be formally charged by authorities with an offence nor be subjected to any criminal law procedures or measures. Numerous international treaties and agreements set standards concerning the ways in which children in conflict with the law should be dealt with. A wide range of minimum ages of criminal responsibility worldwide, ranging from a very low level of age 7 or 8 to the commendable high level of age 14 or 16.

On 1st July 2013 a new criminal code, the Act of 2012 entered into force in Hungary, which lowered the MACR from the age of 14 to 12. According to the Official Comments the main reason for lowering is the fact that nowadays the biological development of children speeded up, they reach maturity earlier than ever. Another argument is that children are exposed to more social influences because of the information technology revolution. The Comments states that among children between 12 and 14 years of age violence is used as a tool to enforce their interests. The article takes a critical look at these arguments by examining criminal statistics and insights of psychological research.

Keywords:

MACR; minimum age of criminal responsibility; criminal code; moral development; juvenile offenders; child offenders.

Abstrakt

Opracowanie podejmuje kwestię dolnej granicy wieku odpowiedzialności za dopuszczenie się czynu zabronionego przez nieletnich (MACR). Młodsze dziecko nie odpowiada karnie, co oznacza, że dzieci są nietykalne w materii postępowania karnego – nie mogą być formalnie oskarżone przez władze za wykroczenie ani też nie mogą podlegać żadnym postępowaniom, ani środkom karnym. Liczne międzynarodowe traktaty i porozumienia ustalają standardy dotyczące sposobów postępowania z dziećmi będącymi w konflikcie z prawem. Na całym świecie różnie kształtuje się dolna granica wieku nieletnich, gdy chodzi o dopuszczalność ich odpowiedzialności karnej: poczynając od bardzo niskiego wieku 7 lub 8 lat po wysoki 14 czy 16 lat.

Na Węgrzech 1 lipca 2013 r. wszedł w życie nowy kodeks karny, zgodnie z którym został obniżony wiek odpowiedzialności karnej MACR z 14 do 12 lat. Według uzasadnienia ustawy głównym powodem obniżenia wieku stał się fakt, że rozwój biologiczny dzieci jest obecnie przyspieszony: osiągają one dojrzałość wcześniej niż kiedyś. Po drugie, dzieci są narażone na większe wpływy społeczne, związane z rozwojem technologii informacyjnej. Uzasadnienie stwierdza, że wśród dzieci w wieku pomiędzy 12 i 14 lat przemoc staje się narzędziem egzekwowania interesów. Artykuł krytycznie analizuje oba argumenty w perspektywie statystyki przestępstw oraz wiedzy psychologicznej.

Słowa kluczowe:

MACR; minimalny wiek odpowiedzialności karnej; kodeks karny; rozwój moralny; młodociani przestępcy; nieletni przestępcy.

Introduction

In the past couple of years the issue of crimes committed by children has been more and more discussed. From time to time the question arises: why do children enjoy impunity when they commit a cruel crime?

Childhood is undoubtedly the most important physical and spiritual phase of the development of the individual. At this period the personality has not been established yet, which is considered by the criminal law. The criminal law provides impunity for children under the age of criminal responsibility (MACR – minimum age of criminal responsibility).

What does really the MACR mean? A child under the age of criminal responsibility lacks the capacity to commit a crime. This means they are immune from criminal prosecution – they cannot be formally charged by authorities with an offence nor be subjected to any criminal law procedures or measures. (Penal Reform International 2013) In brief, the MACR is the lowest age at which children may be held liable for crimes (Cipriani 2009, xiii).

Due to common confusion, we have to make a clear distinction between MACR and the minimum age of penal majority. The minimum age of penal majority is the lowest age at which children may be held responsible specifically in adult criminal courts. International standards hold that national minimum ages of penal majority must be 18 years of age or higher. Contrary to such standards: many countries' adult criminal courts still have jurisdiction over some children, and at time the minimum age of penal majority even coincides with the MACR.

I. International legal framework

First of all, it is necessary to examine what the international standards say about the MACR. Numerous international treaties and agreements set standards concerning the ways in which children in conflict with the law should be dealt with.

1. The first document was the International Covenant on Civil and Political Rights (ICCPR, 1966), which confirms the principle of separation of “young prisoners” from adults in custodial facilities (Art. 10.3) and also prohibits the death penalty for persons found guilty of a crime committed when they were under the age of 18 (Art. 6.5). It states that “In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation” (Art. 14.4).

2. Specific guidance is given to States under the UN Standard Minimum Rules for the Administration of Juvenile Justice [The Beijing Rules]. The Rules, which are recommendatory and non-binding, were adopted by General Assembly resolution of 29 November 1985. They require member states to seek, in conformity with the irrespective general interests, to further the well being of the juvenile and her or his family [rule 1.1].

Because of the very different legal systems, the Rules don't give an exact definition to the MACR nor to the minimum age of penal majority. According to the rule 2.2:

- (a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult;
- (b) An offence is any behavior (act or omission) that is punishable by law under the respective legal systems;
- (c) A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence.

The content of the different manner can be concluded from other rules. For example, rule 2.3 determines the aims of the juvenile justice system:

- to meet the varying needs of juvenile offenders, while protecting their basic rights;
- to meet the needs of society;
- to implement the following rules thoroughly and fairly.

It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety of ages coming under the definition of "juvenile", ranging from 7 to 18 years of age or above.

According to Rule 4 (Age of criminal responsibility) in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

The official Commentary says that the minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behavior and other social rights and responsibilities (such as marital status, civil majority, etc.).

3. On 20 November 1989, the General Assembly of the UN adopted the UN Convention on the Rights of the Child (CRC). The Convention is ratified by 194 countries in the world as well as the Holy See, The State of Palestine (except Somalia, South Sudan and the US). Under the CRC an international body of experts,

the Committee on the Rights of the Child was established which periodically reviews national-level progress and made General Comments for the rules of the Convention.

According to the Article 40 (3a) of CRC, States Parties shall seek to promote “the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.

The Committee understands this provision as an obligation for States parties to set a minimum age of criminal responsibility (Committee on the Rights of the Child 2007). This minimum age means the following:

- children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests;
- children at or above the MACR at the time of the commission of an offence but younger than 18 can be formally charged and subject to penal law procedures. But these procedures, including the final outcome, must be in full compliance with the principles and provisions of CRC.

So we have to ask the question: according to the CRC which age can be the minimum age of criminal responsibility? There is no answer in the Convention nor in the General Comments.

In line with the Rule 4 of Beijing Rules the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 as the absolute minimum age and to continue to increase it to a higher age level.

At the same time, the Committee urges States parties not to lower their MACR to the age of 12. A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child’s human rights and legal safeguards are fully respected.

4. The Council of Europe has also produced detailed recommendations as to the appropriate treatment of children. Recommendation (2003) 20 of the Committee of Ministers to member states ‘concerning new ways of dealing with juvenile delinquency and the role of juvenile justice’ makes the following definition on juveniles:

“juveniles” means persons who have reached the age of criminal responsibility but not the age of majority; however, this recommendation may also extend to those immediately below and above these ages.

II. International experiences, changes

According to the reports submitted by States parties, CRC shows the existence of a wide range of minimum ages of criminal responsibility. They range from a very low level of age 7 or 8 to the commendable high level of age 14 or 16.

Quite a few States parties use two minimum ages of criminal responsibility (Committee on the Rights of the Child 2007). Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes. The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices.

The MACRs in different European countries are the following (Janes 2008, 4–5):

10 years	12 years	13 years	14 years	15 years	16 years
England, Wales	Northern Ireland	France	Austria	Czech Republic	Portugal
	The Netherlands		Bulgaria	Denmark	Spain
	Turkey		Estonia	Finland	
			Germany	Iceland	
			Hungary	Norway	
			Italy	Sweden	
			Latvia		
			Lithuania		

In Germany children between 14 and 18 years are sentenced by the juvenile court, and an adult between 18 and 21 years may still be sentenced by the juvenile court if mental matureness does not exist.

In Russia 16 by default, but 14 years of age specifically for some grave crimes like murder, rape, robbery, extortion, kidnapping, terror attack, vandalism.

In Poland under the Article 10. § 2 of the Criminal Code, a juvenile, who after attaining the age of 15 shall commit an especially heinous crime (e.g. murder, harness, terror attack) may be liable, if the circumstances of the case and the mental state of development of the perpetrator, his characteristics and personal situation warrant it, and especially when previously applied educational or corrective measures have proved ineffective.

The MACRs outside Europe:

6–12 years	7 years	10 years	12 years	14 years	18 years
United States	India	Australia	Canada	China	Brazil
Mexico	Nigeria	New Zealand	Israel	Ukraine	Argentina
	Pakistan		Japan		Peru
					ICC

In the United States the MACRs are determined by state, however only 15 states have set minimum ages, the lowest minimum is 6 years (Northern Carolina).

In Australia the MACR is now 10 years of age. Between the ages of 10 and 14, a further rebuttable presumption (*doli incapax*) operates to deem a child between the ages of 10 and 14 incapable of committing a criminal act. Only the prosecution can rebut this presumption, by showing that the accused child was able at the relevant time adequately to distinguish between right and wrong. From 14 to either 17 or 18 years of age (depending on jurisdiction), young offenders may be held fully responsible for their criminal acts but are subject to a different range of criminal sanctions than adults committing the same offenses (Urbas 2000, 1).

In the Islamic Republic of Iran the MACR is 9 for women and 15 for men.

There are some countries that have lowered the minimum age of criminal responsibility in the past years. For example, in Denmark the minimum age of criminal responsibility was reduced from 15 to 14 years of age in June 2010. In Georgia the MACR has been lowered from 14 to 12 years of age in 2008. Some countries considered or are considering lowering the age of criminal responsibility (Argentina, Brazil).

What are the arguments in these countries for lowering the MACR? First of all, the raising of the number of the crimes committed by children and the fact that these crimes become more and more violent. Another argument is that committing the first criminal act takes place earlier. According to those who are for the lowering, due largely to the rapid development of economy and information technology new generations are growing up rapidly. The jurisdiction cannot

be lenient because of the lack of punishment crimes are more likely to be committed in the future.

According to those who are against the lowering, the number of very serious crimes are low, however, it cannot be a reason for retribution. They say it is in contrast with international standards and with children's welfare and children's rights.

IV. The MACR in Hungary

1. Short historical review

In the traditional Hungarian criminal law the minimum age of criminal responsibility was guided by the legal age: men at the age of 14, women at the age of 12 had the capacity for guilt.

Around 1505, ages for the two sexes were unified, from this time the age of 12 meant the attainment of legal age. At or above 12 years of age, the judge could decide to take into consideration the youthfulness of the offender. Later, in the eighteenth century children under the age of 14 have not been punished because they had no capacity for guilt.

According to the first Hungarian Criminal code (Act 5 of 1878 or after its creator Csemegi-Code) childhood was a reason for exclusion of culpability. Under the § 83 of the Csemegi-Code persons under the age of 12 could not be responsible for committing a crime. The commonly accepted concept of the regulation was that a child under the age of 12 is not highly developed intellectually and has no independent will.

In 1908 there were significant changes in the rules for the criminal offender, children and juveniles. Children under the age of 12 were not accountable, but some measures could be taken against them. If the court concluded that the child's family environment was morally sound, handed him over the school authority. Punishment employed by the school authority could be reprimand or confinement. If the court did not consider the family environment sound, it informed the child welfare authority. The modification of the Criminal Code introduced also the definition of the juvenile, which marked people between 12 and 18 years of age. For juveniles different criminal rules could be applied – for the very first time in Hungarian criminal law.

The next change took place during the creation of the New Criminal Code in 1961. The Act raised the minimum age of criminal responsibility to 14 years. According to the Minister's reasons for the act it was necessary because the first

stage of the education system ends at the age of 14, when children leave primary school. By this time, they acquire the basic knowledge which is necessary for social life. A further argument in favor of raising the age limit was the fact that the laws of neighboring countries also placed the MACR higher. From 1961 to 2013 the MACR in Hungary was 14 years of age.

2. The MACR in Hungary according to the New Criminal Code

On 1st July 2013 a new criminal code, the Act of 2012 entered into force in Hungary. The creation of this act began in 2000, and during this period numerous variations were published.

Our New Criminal Code lowered the MACR from the age of 14 to 12.

According to the Official Comments the main reason for lowering is the fact that nowadays the biological development of children has speeded up, they reach maturity earlier than ever. Another argument is that children are exposed to more social influences because of the information technology revolution. The Comments states that among children between 12 and 14 years of age violence is used as a tool to enforce their interests.

The argument is confuted by the statistics. The number of the child offenders hasn't changed a great deal in the past years, and the ratio of the violent crimes is not the highest (Source of statistics: Office of the Prosecutor General 2013).

Year	Total number of recorded offenders	Juvenile offenders (14 - 18)		Child offenders (0-14)	
		number	ratio	number	ratio
2010	122.259	11.248	9,18	2.607	0,02
2011	112.859	11.034	9,77	2.714	0,02
2012	100.239	10.056	10,03	2.604	0,025

Recorded child offenders with regard to the crimes committed in 2012 (Total: 2604)

crimes	number	ratio
Crimes against person of which:	356	13,67
<i>homicide</i>	3	0,12
<i>battery</i>	244	9,37
Crimes against sexual morals of which	46	1,77

<i>sexual violence</i>	5	0,19
Crimes against public order of which	557	21,39
<i>hooliganism</i>	437	16,78
Crimes against property of which	1552	59,60
<i>theft</i>	932	35,79
<i>robbery</i>	95	3,35

Recorded child offenders in regard to sex and age in 2012 (total: 2604)

		number	ratio
SEX			
	male	2160	82,95
	female	444	17,05
AGE			
	0-10	525	20,16
	11	372	14,29
	12	651	25,00
	13	1056	40,55

3. Regulation

According to the Section 4 (1) of the New Criminal Code ‘criminal offense’ means any conduct that is committed intentionally or – if negligence also carries a punishment – with negligence, and that is considered potentially harmful to society and that is punishable under this Act.

The conditions of the criminal liability are the following:

- human act
- culpability, which means the conduct is committed intentionally or with negligence
- factuality, which means the conduct is punishable under the Criminal Code
- harmful to society, which means the act prejudices or presents a risk to the person or right of others, and the fundamental constitutional, economic or social structure of Hungary.

There are also regulated grounds for the exemption from criminal responsibility in the Criminal Code. One of them is the Minimum Age of Criminal Responsibility.

Under the Section 16:

Persons under the age of fourteen at the time the criminal offense was committed shall be exempt from criminal responsibility, with the exception of homicide [Subsections (1)–(2) of Section 160], voluntary manslaughter (Section 161), battery [Subsection (8) of Section 164], robbery [Subsections (1)–(4) of Section 365] and plundering [Subsections (2)–(3) of Section 366], if over the age of twelve at the time the criminal offense was committed, and if having the capacity to understand the nature and consequences of his acts.

So in Hungary, by default the MACR is 14 years of age. But it is possible to punish children between 12 and 14 in certain cases, with the following conditions:

- a) Perpetrator has to be over the age of 12 at the time the criminal offense was committed
- b) that is possible only in the case of:
 - homicide
 - voluntary manslaughter
 - battery, if it is life threatening or results in death
 - robbery
 - plundering, if it is committed in respect of a substantial value (more than 5 million HUF, app. 16.500 €), in a gang or in criminal association with accomplices.
- c) The perpetrator has to have the capacity to understand the nature and consequences of his or her acts.

Under the age of 12, it is not possible to charge someone with committing a crime. Children under 12 have no capacity to understand the nature and the consequences of the act. This is an irrefutable presumption.

Between 12 and 14 years of age, the presumption is rebuttable in case of the five certain crimes. In the beginning of the criminal procedure the prosecutor has to order an inquiry with experts. In practice, medical experts are appointed to carry on the examination, without the obligation to work with pedagogues or psychologists. When the expert lays down the fact that the offender did not have the capacity to understand the nature and the consequences of his or her act, the prosecutor has to stop the procedure.

When the child had the capacity to understand the nature and the consequences of its act, it is responsible for the crime. What can be the punishment?

Under the Section 106 of the Criminal Code, only measures may be imposed upon a person who has not reached the age of fourteen at the time the criminal offense was committed.

The measures are the following:

- a) warning;
- b) conditional sentence;
- c) placement in a Reformatory Institution.

Conditional sentence means that the court may defer the imposition of a sentence conditionally, if it is for an infraction or felony punishable by imprisonment of up to three years if there are reasonable grounds to believe that probation will serve the purpose of rehabilitation.

The court shall order placement in a reformatory institution if proper education of the juvenile can only be provided in an institution. Placement in a reformatory institution may not be ordered against a person over the age of twenty at the time of sentencing. The duration of placement in a reformatory institution may be from one year to four years.

V. Psychological characteristics of childhood

Considering the legal framework, the question arises whether these regulations correspond to the psychological development of children. At what age are children aware of their actions and their consequences? When do they develop the sense to identify social expectations, and the basic norms of coexistence? When do they have the capacity to commit a crime?

1. Childhood starts with birth, however, its end point is still disputed in psychology. In proper sense this terminus is a process itself, as the child turns into an adolescent. This process is signified by somatic changes. Around the age of 12–13, the outlook of the child changes: its cast of features becomes more characteristic, the body scales alter as its limbs undergo serious growth, secondary sex characteristics appear. Simultaneously, changes in children's lifestyle are observable. The most obvious change is the break with playing, the most characteristic activity so far. The child does not participate in playing its own person, but uses a puppet instead, acting like another person or an object. This is relieved by daydreaming, which is strongly self-centered. The daydreamer becomes the central person in these pictures, such as a famous sportsman or a singer. Children of this age are more sensible and are willing to make serious efforts to acquire knowledge or skills; that is, when their first attempts to gain self-sufficiency appear. The child wants its own life, which means that it wants to decide on its own re-

sponsibility. However, this claim for self-sufficiency is still unreal at this point, since the formulated desires do not correspond to its abilities and possibilities. However, we need to stress that these ambitions are not equal with the claim for self-sufficiency of adolescents: they rather want to be adults, equal with their parents, including the right for criticism (Mérei, Binét 2001, 282). Until the child gets to this point, it has to go through an elemental development.

2. Children undergo development from their birth on, and the regularities of this process are objects of study. Psychology differentiates between somatic development (height and weight, motor functions), perceptual development (audiovisual perception), cognitive development (cognition, linguistic skills, memory), and the development of personality and social relationships ("self"-concept, gender identity and interpersonal relationships). Concerning our topic, it is cognitive development which plays a pivotal role, and within that, the process of the development of ethical thinking.

The different stages of cognitive development were first described by Piaget. His often cited, and also criticized view of development distinguishes between four different stages. He named the first *sensorimotor stage*, which is typical for the first two years. At this age the interference between physical actions and sensory experiences have special importance. The child distinguishes itself from objects, and conceives itself as a performer of actions, who can act intentionally in order to cause certain changes. The second is the *preoperational stage*, meaning the period at the age between 2 and 7. The name comes from the fact that children of this age are not yet able to perform certain mental operations and understand concrete logic. They start learning the language, to denote objects with pictures or words. Still, their thinking is still egocentric, without the ability to take other people's point of view. The next is the *concrete operational stage* (age between 7 and 11), when children are able to think about objects and events in logical terms. They understand time, space and quantity. They are able to order objects based on different qualities and to grade them along a dimension, such as size. Around the age of 11–12 children arrive at adult thinking, i.e. they become able to think in logically abstract terms, and critically analyze their hypotheses. This is the first time that we may observe children dealing with the possible, the future and ideological problems. This last stage of cognitive development is called *formal operations* (Atkinson 2001, 71).

The development of moral thinking is also a process, similar to that of the cognitive development. It has different stages according to the types of answers given to moral problems. Kohlberg differentiates between six stages of moral development, grouping them into three levels. The first is the so called *pre-conventional level*, comprising the first two stages. The first is *obedience and punish-*

ment orientation, when children follow rules in order to avoid punishment. At the second stage they act according to the rules to receive a reward and favor. It is called *self-interest orientation*. According to Kohlberg every child is to be found on the first level until the age of ten, when a clear shift can be observed: they start to show interest for other people's opinion, and evaluate their behavior in terms of these. This is typical for the second level, called *conventional*, which involves the third and the fourth stages of moral development. The third is called *good-boy/girl orientation*, since children at this age tend to stick to the rules in order to avoid disapproval by others. The fourth is the stage of *authority and social-order orientation*, when laws and social norms are held in order to avoid the disapproval by authorities and the sense of guilt ("not meeting obligations") resulting from it. Most children are to be found on this level until the age of 13, however, those, who have reached formal operations, are already able to perform abstract thinking, a precondition for the *post-conventional* morality of level three. Stage five is characterized by *social contract orientation*. The person follows the generally accepted rules, which are important for the common good, and acts according to these rules, to sustain dignity and self-esteem. Stage six is the peak of moral development, which is *universal ethical principles driven*. Action is led by ethical principles, such as justice, dignity, equality, and the person opts for them in order to avoid self-condemnation (Atkinson 2001, 82).

In short, according to a majority consensus in psychology, a child can be fully aware of its actions at the age of 12–13, and be able to realize consequences, identify social expectations, and the basic norms of social coexistence. It can judge earliest at this age, whether its behavior is in accordance with these norms. If it doesn't act according to the norms, it might be able to provide reasons why it turned against them.

VI. Summary

However, this earliest stage is by far not common. Criminal acts committed by children show the influence of adults, or peers. It is possible that their intellectual and psychological development is preceded by the biological. In their cases instruments of penal law have less an educational, rather than the opposite effect: due to stigmatization it is more probable that a convicted child becomes a criminal at adult age.

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