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The Legal Age of Discretion

Francis Bennion revisits a discarded common law doctrine

Introductory

The common law concept of the age of discretion humanely recognises that, in nature, children advance gradually to maturity and do not all possess the same degree of awareness. Unhappily the concept has fallen into disuse in England and Wales; and the law has thereby been impoverished. This is part of a general neglect of legal theory.

In a recent important editorial Adrian Turner, Consultant Editor of this journal, said that time and again we have seen criminal justice reforms that have lacked philosophical focus.[1] Commenting on this[2] I said that a notorious example of what Mr Turner referred to is the Sexual Offences Act 2003, about which I have often complained. It has no discernible philosophical focus, yet it regulates widely a topic to which moral and legal philosophy has frequently adverted and which cries out for its guidance. I suggested that there needs to be some wise official body whose advice would be sought by legislators when needed.

R. A. Butler set up such a body in 1959, called the Criminal Law Revision Committee of England and Wales (CLRC). It was a standing group of legal experts that could be called upon by the Home Secretary to advise on legal issues and propose recommendations for reform. It produced many useful reports, including one on sexual offences (Cmnd 9213). But as we shall see, not all its recommendations were sound.

Following the setting up of the Law Commissions in 1965, the CLRC gradually fell into desuetude, and has not been convened since 1985. This is now shown to have been a mistake. The CLRC should have been retained as an active force, though its membership might well have been widened to include moral philosophers and criminologists.

In this article I discuss once again an area of criminal law which has gone seriously wrong through neglect of the age of discretion doctrine, where conceivably the assistance of a learned body like an enlarged CLRC might have proved helpful. A recent scandal centred on the Old Bailey trial of two pre-pubescent boys for allegedly raping a little girl of eight. They were 10 years old at the time. Outraged comments were on the lines of 'Has the world gone mad?' The boys were not of course named, so I shall refer to it as the 2010 Child Rape Case. Before discussing the case I need to explain in more detail the common law concept of the age of discretion.

Years of Discretion

The *Oxford English Dictionery* (2nd edition, 1998) defines discretion in one of its senses (the relevant one here) as the ability to discern or distinguish what is right, befitting, or advisable, especially as regards one's own conduct or action. It describes the age of discretion as 'the time of life at which a person is presumed to be capable of exercising discretion or prudence; in English law the age of 14'. Lord Lowry said:

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[1] See p. 18, *ante*.
[2] Letter, p. 45, *ante*.

> 'In the 17th century the 'age of discretion' was fixed by Coke at 14. It was accepted as such by Hale.'[3]

This apparently applies only to males however. At common law the age of discretion for females is said by William Blackstone to be 12.[4]

This concept of the age of discretion showed the wisdom of the common law, though the concept can be traced as far back as classical Roman times. So far as criminal liability is concerned, it does not correspond with nature to treat in exactly the same way all young people who have passed beyond infancy but not yet attained the mature age of majority or adulthood. There is in nature an intermediate point, characterised as the age of discretion. Blackstone said:

> 'What the age of discretion is, in various nations is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth until seven years of age; *pueritia*, from seven to 14; and *pubertas* from 14 upwards . . . During the first stage of infancy and the next half stage of childhood, *infantiae proxima*, they were not punishable for any crime. During the other half stage of childhood, approaching to puberty from 10½ to 14, they were indeed punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations and not with the utmost rigour of the law. During the last stage (or the age of puberty, and afterwards) minors were liable to be punished, as well capitally, as otherwise.'[5]

The previous position was thus expressed in Stephen's *Digest*: 'No act done by any person over seven and under 14 years of age is a crime, unless it was shown affirmatively that such person had sufficient capacity to know that the act was wrong'.[6] The age of criminal responsibility in England and Wales was raised to ten by the Children and Young Persons Act 1963 s. 16. The need for a child aged between ten and 14 to be found to be *doli capaces*, or capable of mischief, continued until it was

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unwisely abolished in England and Wales by the Crime and Disorder Act 1998 s. 34.[7]

I have explained elsewhere how this abolition was misconceived as overlooking the effect of immaturity on the ability to satisfy the need for *mens rea*.[8] In the same article I showed that the age of discretion doctrine is also relied on by the common law in the rule that ignorance of law is no defence (the ignorance of law doctrine). This is expressed in various maxims of which the best known is *ignorantia juris neminem excusat* (ignorance of the law excuses no one). Because of the ignorance of law doctrine, mens rea can be possessed even though the defendant was in fact unaware that the actus reus formed an element of an offence. *But the ignorance of law doctrine applies only where the defendant has attained the age of discretion.* To impute knowledge of the law generally to children under that age would be preposterous.

The law treated 14 as the age of discretion for other purposes too. In the mid-nineteenth century a well-known law dictionary said 'A male at 14 is at years of discretion, so far at least that he may enter into a binding marriage.'[9] Under the Education Act 1918 attendance at

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[3] *Re C (a minor) v Director of Public Prosecutions* [1996] 1 AC 1 at [19].
[4] *Commentaries on the Laws of England* (Oxford, 1st edn 1769) iv 212.
[5] *Loc. cit.*, iv 22.
[6] Sir James Fitzjames Stephen, *Digest of the Criminal Law* (1889), chap. III, headed 'General Exceptions', art. 26.
[7] See F A R Bennion, 'Offences by Children: the Mental Element', 172 JPN (14 June 2008) 380-384, www.francisbennion.com/2008/017.htm.
[8] See F. A. R. Bennion, 'Mens rea and defendants below the age of discretion' [2009] Crim. L. R. 757-770, www.francisbennion.com/2009/031.htm.
[9] Wharton, *Law Dictionary* (1848), 21/1.

school or other educational provision became obligatory for all children up to the age of 14, which remained the position until the Education Act 1944 raised the age to fifteen.

The 2010 Child Rape Case

The two boys charged at the Old Bailey in the 2010 Child Rape Case were said to be the youngest males ever to be prosecuted for rape in England and Wales. They were well short of the age of discretion, so could not be deemed under the legal fiction applicable to those who have attained that age (the ignorance of law doctrine) to know the law of rape. That is one of several errors of law apparently perpetrated in that case. It was exacerbated by the fact that, as with any sexual crime, a child who has not attained puberty is incapable of understanding rape's true nature.

Under the headline 'Child rape case sparks anger' the *Times* reported that on 24 May 2010 the two boys were each found guilty of attempted rape but acquitted of rape itself.[10] Demands followed for sweeping reform of the way young children are dealt with in the criminal courts. The Judge who tried the case, Mr Justice Saunders, said that there were lessons to be learnt and observed that the way children give evidence in adult courts is not ideal. He ordered a report into the impact of the Old Bailey trial on the little girl who gave evidence against the boys.

The *Times* said that the Judge's concerns, which are likely to be referred to senior judges and Mr Kenneth Clarke, the new Lord Chancellor, are reinforced by a line-up of leading lawyers including the former Director of Public Prosecutions, Sir Ken Macdonald. The latter warned that 'we are making demons of our children' and that the case was a spectacle 'that has no place in an intelligent society'. He added:

> 'Very young children do not belong in adult criminal courts. They rarely belong in criminal courts at all.'

So why did Sir Ken's successor as DPP, Mr Keir Starmer QC, institute a prosecution for rape against these two boys?

Sir Paul Stephenson, the Metropolitan Police Commissioner, said the whole country would be troubled by the case, which saw the two primary school pupils stand trial for taking part in what a defence barrister called 'that age-old game, doctors and nurses'.[11] Maggie Atkinson, the Children's Commissioner for England, said the age of criminal responsibility should be raised.[12]

There is another relevant common law doctrine, also now abandoned. It is that a boy who is under the age of discretion is incapable of sexual intercourse. I shall call it the sexual incapacity doctrine.

The Sexual Incapacity Doctrine

At common law a male under the age of discretion was presumed incapable of sexual intercourse as well as being *doli incapax*. The latter presumption (abolished in 1998 as stated above) was rebuttable by evidence, but the former was irrebuttable. A boy who, at the time of the alleged offence, was under 14 could not, in point of law, be guilty of an assault with intent to commit a rape; and if he were under that age, no evidence was admissible to show that, in point of fact, he could commit the offence of rape.[13]

Blackstone stated the sexual incapacity doctrine as follows.

> 'A male infant, under the age of 14 years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it. For though in other felonies

[10] *The Times*, 25 May 2010.
[11] *The Daily Telegraph*, 7 June 2010.
[12] *Ibid.*
[13] *R. v Phillips* (1839) 8 C. & P. 736; *R v. Wade* [1892] 2 QB 600.

> *malititia supplet aetatem* (malice supplements age) . . . yet, as to this species of felony, the law supposes an imbecility of body as well as mind.'[14]

This reference to imbecility of mind needs to be noted. In the parliamentary debates on abolition of the doctrine it was mistakenly assumed that the doctrine related only to incompetency of body. The original basis of the doctrine was that it would be unseemly for the law to require and consider evidence as to the degree of ability of a male infant to achieve sexual penetration. Such nice considerations do not trouble our courts of today.

The sexual incapacity doctrine was abolished by the Sexual Offences Act 1993, which was directed to no other purpose. It originated from a Government-supported private member's Bill. An earlier attempt to abolish the doctrine in this way failed because the topic was linked to anti-kerb

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crawling provisions which encountered objection.[15] Speaking on the earlier Bill, Jeffrey Randall MP (now Lord Randall of St Budeaux) cited the report of the CLRC's 'Working Paper on Sexual Offences—October 1980', paragraph 27:

> 'Under the present law. . . a boy under 14 cannot be convicted of … rape … whatever his actual physical capacity. Boys under this age … do in fact commit acts which would be rape if they were over 14 … Cases of this kind occur in what have become known as 'gang bangs', that is a series of sexual assaults by a group of youths on a girl. Such cases are very serious indeed as the girl often suffers severe emotional injury as well as physical harm … The older boys will be convicted of rape and punished severely, while a boy under 14, who may have had a leading part in the rape, can only be treated as having aided and abetted. Such a scandalous situation should not exist in modern law.'

This is typical of the ignorant way such matters are often discussed – even by eminent lawyers. It is simple-minded to say that penetration effected by a precocious 12-year old would have been rape if he were over the age of discretion. The point is precisely that he is *not* over the age of discretion. His emotional and intellectual state is that of a child, and he should therefore be treated by the court as a child.

In the debate on the earlier Bill Mr Toby Jessel MP cited a police officer's report which said:

> 'The age of 14 was set in the 19th century, partly by statute law and partly by case law. It is a known medical fact that the age of puberty for girls and boys has gradually reduced. Boys and girls mature earlier than they did a century ago. I do not know the reason for that; it may have something to do with improved and balanced diet.'

Again this missed the point. A reduction in the age of physical puberty does not mean that the mental factors have changed.

For the earlier Bill, the Minister in charge was Mr John Patten MP (now Lord Patten). He said the Bill was recommended in the 15th report of the CLRC, where the committee was unanimous. 'It is just what is wanted by the committee and most sensible public opinion today.' At least the Minister recognised that some 'sensible public opinion' did not agree with the abolition of the ancient doctrine – perhaps because they understood its true import.

The Minister went on to say that in the four latest years for which figures were available, nearly 300 boys aged between 10 and 13 years were proceeded against for indecent assault on a female. The lesser charge of indecent assault had to be substituted in those cases because the sexual incapacity doctrine did not allow for the offender to be capable of doing what he did. He continued:

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[14] *Loc. cit.*, iv 212. Here 'imbecility' means incompetency.
[15] See Sexual Offences Bill 1990, HC Deb 16 February 1990, vol. 167, cc. 590-613.

> 'It is important for the House to realise the nature of the offences. In one, the victim, aged four, handicapped and epileptic, was raped by the boy next door, aged thirteen. In another the victim was aged five. A victim aged ten was gang-raped while visiting friends by thirteen-year-old boys who dragged her upstairs. The last of the litany of distressing examples that I could give the House was a sickening multiple attack on a married woman in her late twenties, a mother of three, by schoolboy rapists under the age of 14 . . . The law says that what manifestly happened and can be proved did not happen. That is grossly unsatisfactory for the statute book.'

The last two sentences are a gross exaggeration. The law did not say that what manifestly happened did not happen. On the contrary it accepted that it did happen and deserved punishment. Only, because of the age of the perpetrators, the punishment must be for indecent assault not rape. Either way the punishment actually imposed on defendants of such tender ages would in practice be about of the same nature.

In the main debate on the Bill for the 1993 Act similar comments were made.[16] One, by Mr Bowen Wells MP, expresses the essence of the argument. He said that sexuality 'starts from birth' and is 'a gradually-learnt matter'. He could have added that a great increase in natural learning about it comes at puberty, before which its nature cannot truly be known or even glimpsed. What he did sensibly add was this:

> '. . . the form that sex education in schools takes needs to be examined carefully. Sex education should be treated very sensitively and ought to include teaching about the emotional content that should go with the whole experience of sexuality. The absence of any emotional content from such learning is a serious mistake.'

Later Mr Wells became more controversial.

> '[Sex by children] is something which I am not certain we should criminalise. Would we put someone who has committed that act in prison or in a place of restraint? Is that the kind of law that we want imposed on the children of this country?'

Summary of the Above

The above explains that the age of discretion doctrine, an important doctrine of the common law, has suffered undeserved neglect, particularly in the criminal field. The doctrine draws a distinction between the legal treatment of children who have not yet attained the age of discretion (14 for males and 12 for females) and its treatment of persons who, while still under the age of majority (at present eighteen in England and Wales), have attained the age of discretion. It picks out recent examples of neglect of this doctrine, which it is submitted have had unfortunate consequences for the law. The examples are as follows.

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- The abolition by the Crime and Disorder Act 1998 s. 34 of the need for a child aged between ten and 14 to be found *doli capaces*, or capable of mischief.
- Failure to appreciate that the Crime and Disorder Act 1998 s. 34 did not remove the burden on the prosecution to prove *mens rea*.
- A linked failure to appreciate that the Crime and Disorder Act 1998 s. 34 did not alter the fact that the ignorance of law doctrine does not apply to children who have not attained the age of discretion.
- Failure to appreciate that a child who has not attained puberty cannot have a true understanding of the nature of sexual intercourse.
- Failure to realise that the probably mistaken abolition of the sexual incapacity doctrine by the Sexual Offences Act 1993 has a bearing on some modern cases.

[16] For the debate see HC Deb. 30 April 1993, vol. 223, cc. 1257 *et seq*.

The absence of mention of these matters in recent judgments and comment suggest that they may not be known to some modern criminal lawyers. It seems there may be a lack of scholarship among some present-day practitioners.

Stop Press: an Interview with Mr Paul Mendelle QC

I had reached this far in the writing of this article when I learnt that Mr Paul Mendelle QC, chairman of the Criminal Bar Association, had given an important interview on the 2010 Child Rape Case.[17] For completeness I need to give his views in full.

Mr Mendelle said the current limit of 10 is 'awfully young' and runs the risk of a child being prosecuted for crimes they are too immature to understand. He said the issue of children in adult courts also needs to be re-examined. He added that the issue of how old someone must be before they know they are committing a crime resurfaced after the Old Bailey conviction of the two 10-year-olds for attempted rape on the evidence of an eight-year-old girl.[18] Mr Mendelle went on to say:

> 'Should we look at the system? Yes of course we should look at the system. We have almost the lowest age of criminal responsibility in Europe and I suspect one of the lowest in the world. Ten is awfully young. A child of 10 can know it's doing something wrong and not always appreciate it is criminally wrong. Imagine a case where a couple of eleven year olds are accused of committing a sexual crime with each other. The eleven year olds may know that what they are doing is wrong, naughty, seriously naughty. But do they know that it's a crime? For which people can go to prison, lose their liberty?'

Mr Mendelle obviously intends his question to be answered in the negative. It is a pity his enlightened view did not prevail when the misguided so-called reform of this area of the law was being pushed through in 1998.

Mr Mendelle then called for a return to the *doli incapax* system abolished by the Crime and Disorder Act 1998 s. 34, under which he said 'there was a presumption that children aged 10 to 14 were not criminally responsible unless the prosecution could demonstrate they knew their actions were criminally wrong'. He added:

> 'It wasn't a bad system because it was a sliding scale. I think most people probably accept that somewhere around 14 or 15 people are sufficiently grown up to be criminally responsible. It does mean that essentially you fix the age of criminal responsibility at 14 and do a bit better with the truly young. But there ought to be a degree of flexibility below that because we have all had experience of kids 15, 14, 13 who are incredibly streetwise.'

The way Mr Mendelle puts his argument here suggests he is unaware of the doctrine of the age of discretion. The facts about it described in this article strengthen his case for a return to the old law.

The report of Mr Mandelle's interview adds that an anonymous spokeswoman for the Ministry of Justice said:

> 'The Government believes that children are old enough to differentiate between bad behaviour and serious wrongdoing at age 10. Setting the age of criminal responsibility at age 10 allows front line services to intervene early and robustly, preventing further offending and helping young people develop a sense of personal responsibility for their behaviour. In practice, the majority of young people are not prosecuted in court and there are rehabilitative processes in place, which include interventions to tackle offending behaviour and underlying problems.'

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[17] Reported in *The Daily Telegraph*, 7 June 2010.
[18] In fact one had reached the age of 11 before he was convicted.

This gives the Government department's game away. No sensible person could truly believe that the average 10-year old has a firm grasp of the difference between mere bad behaviour and serious wrongdoing. What the spokeswoman for the Ministry of Justice is really saying is something on these lines:

> 'It really doesn't matter exactly what the criminal law says, we will treat children like this in much the same way whatever they are convicted of. We want our front line services to intervene early and robustly, whatever the law may say. Law doesn't really come into it – this is basically a social welfare problem.'

The truth that this is the official attitude is confirmed by that statement that the majority of misbehaving youngsters are not prosecuted in court. Note the Orwellian phrase 'there are rehabilitative processes in place'. They include suitable 'interventions'. It does not matter that a naughty child's life is permanently blighted by possession of a criminal record that suggests commission of some very grave anti-social act. This 'spokeswoman' represents a body calling itself the Ministry of Justice (a new title in our long constitutional history). Justice requires that the criminal laws of the state are correctly applied, not skated over by heedless bureaucrats.