

香港刑事責任年齡的研究

A Study on the Age of Criminal Responsibility in Hong Kong

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SUMMARY REPORT

1. Introduction

According to Section 3 of the Juvenile Offenders' Ordinance, the current legal position in Hong Kong regarding the age of criminal responsibility is stated thus: *"It shall be conclusively presumed that no child under the age of 7 years can be guilty of an offence."* Those above the age of seven, however, may be charged and face prosecution and other possible consequences of having committed a crime. The advent of the concept of Children's Rights has prompted some members of society to question the maturity, cognitive development, judgment and self-control of children under the age of 14. It is believed that children will suffer a grave injustice if they are faced with the criminal justice system when they lack the maturity to understand the consequences of their behaviour. Other groups in society, however, take the position that children over the age of seven are mature enough to realise criminal intent, and should therefore be held responsible for their behaviour. They also believe that the current system of juvenile justice has no shortcomings with respect to the protection and processing of juveniles. The question which we face is how to balance the differing viewpoints regarding the age of criminal responsibility for children? By surveying the opinions of those in the legal profession, community leaders, academics, agency administrators, educators and youth workers, as well as, soliciting the opinions of the general public, we hope to improve our understanding of the differing points of view, so as to facilitate the creation of a suitable policy and improved services.

2. Methodology

Both a qualitative survey and a quantitative survey were employed for this study. For the qualitative survey it was conducted among opinion leaders. Copies of a self-administered questionnaire, together with a background information paper on the issue and the current situation of Hong Kong, were sent out to a wide spectrum of potential respondents including legal and judicial professionals, community leaders, academics, advisory committee members, agency administrators, educators and youth workers. The questions of the survey were directed to solicit respondents' opinions towards the age of criminal responsibility, the rationale on which they based their support or disapproval to any change in the age of criminal responsibility, as well as possible implications for any change.

The qualitative survey was conducted from 3 July to 10 September 1998. A total of 72 copies of a questionnaire were sent out and 45 were successfully completed and returned. For the quantitative survey it was conducted by telephone from 10 to 12 August 1998. A total of 539 people, aged 18 or above, were successfully

interviewed. The success rate was 44.0 per cent, whereas the standard error was within 2.1%. The analysis contains a synthesis of both the qualitative and quantitative data from the respondents and from an extensive review of the literature.

3. Discussion

3.1 The opinions towards a change on the age of criminal responsibility are diversified.

As revealed from the result of the qualitative survey among opinions leaders, a larger portion of the respondents favoured an increase to the age of criminal responsibility above the age of 7 to, for example, the ages of 10 or 14. On the other hand, about one-third of opinion leaders preferred the age of criminal responsibility to remain unchanged at the age of 7.

For those experts and academics that are in favour of raising the age of criminal responsibility, their reasons can be divided into two categories, namely, “that children or juveniles should be protected” and “that children or juveniles are not mature”.

More specific explanations of why some opinion leaders believe the protection of children should be strengthened, was provided in the following arguments. As one respondent indicated, the rights of children may still be largely jeopardized and infringed if they are being brought into the juvenile justice system, in spite of law-enforcement agents taking into consideration the age and background of the prosecuted. Furthermore, the situation would be worsened by the inconsistency in practice of law-enforcement agents. Two children, who have committed similar offences, for example, may be treated differently on the discretion of law-enforcement officials. This inconsistency in practice could lead to injustice and unpredictability in the juvenile justice system. In addition, the criminal record of the existing system has a life-long labelling effect on juvenile offenders, which effectively destroys their future. All of the above explanations reflect the inadequacy of our existing system on the protection of children and juveniles.

Those who argue that children or juveniles are not mature, tend to approach the issue from a perspective of psychological development. They believe that not only is a child above the age of 7 psychologically immature, but that in general, a child above the age of 7 cannot differentiate right from wrong. The children’s understanding, knowledge and ability to reason are limited. They may not understand the consequences of their action or behavior, particularly if influenced by others. One respondent, who agrees to increasing the age of criminal responsibility to 14, states: *“It is too early for a child under the age of 14 to bear the burden of criminal responsibility in modern society. This grossly neglects the principle of protection for children. In fact, a majority of psychological or sociological theories supports the argument that deviant behavior of juveniles are irrational and illogical. It should properly be regarded as a consequence of social influences rather than personal determination with criminal intent. As a result, children or juveniles should not bear criminal responsibility at such a young age.”*

Of course, not all respondents have the same opinion. One respondent, who opposes the age increase of criminal responsibility to 14, explains that if the age of criminal responsibility is moved up to 14, it would be detrimental to young offenders on one hand, and a risky move to society as a whole on the other. He further elaborates: *“If the age of criminal responsibility is increased to 14, young offenders between the age of 11 and 14 will not necessarily enter into the Police Superintendents’ Discretion Scheme (PSDS). They would not be referred to join the Community Support Scheme in which counselling and rehabilitative services are provided by professional social workers. In this sense, it would be a loss to the young offenders. Furthermore, for those young offenders who are tried in the juvenile court, they will receive a basically just and fair trial. Magistrates, as judicial professionals, will consider both personal character, family background, social factors, as well as sentencing principles before they reach a final verdict. The options of sentences also range from release and fines to compensation, which in general has little labelling effect. In the process of trial, judicial officials, parents, social workers (mainly probation officers) will work together to help the juvenile offenders learn about the responsibility and consequences of their own criminal act. This process to emphasise the right of ‘learning and responsibility’ over the right of ‘getting rid of criminal responsibility’ is even more valuable to young offenders. Unless we deny the professional quality of our judges, unless we deny the existence of protective measures in our juvenile justice system, and unless we deny the effectiveness of our provisions on decriminalizing offences, to increase the age of criminal responsibility to 14 will be a very risky move to our society. If the law and order situation worsens some day, our criminal justice system will be found to be ineffective, if not paralyzed.”*

In fact, law and order worries are also shared by some other respondents in spite of their being in favour of increasing the age of criminal responsibility to 10 or 14. These respondents point out that a public education campaign should be launched to reassure the general public that raising the age of criminal responsibility does not mean greater leniency to young offenders or less concern for law and order in society.

On the other hand, the results of the quantitative survey conducted by telephone, revealed that 59.7% of the respondents from the general public preferred the age of criminal responsibility to remain unchanged at 7. Reasons for this position include: that children of 7 in general can differentiate right from wrong, and, are therefore capable of committing a crime with criminal intent (46.0%), and that the existing juvenile justice system operates very well (40.1%).

Results of the telephone survey also revealed that over one-third (33.8%) of the respondents are in favour of increasing the age of criminal responsibility. Among this group of proponents, over two-thirds (68.7%) suggested the age of criminal responsibility be raised to between 10 and 13. The survey also shows that a great majority (92.3%) of the respondents believes that juvenile offenders are psychologically immature when they commit a crime and should be forgiven, rather than bear criminal responsibility. However, support drops drastically when serious offences are concerned. Over nine-tenths (90.4%) of the respondents do not agree that offenders should be let off for serious crimes, but that they must be brought to

court for trial.

In conclusion, results of the qualitative survey of opinion leaders show that more respondents were in favour of increasing the age of criminal responsibility above the age of 7. In contrast, results of the quantitative survey on the general public by telephone showed that more people preferred the age of criminal responsibility to remain unchanged at 7. This reflects that the opinions towards changing the age of criminal responsibility are diverse.

3.2 There are divided views on the age of maturity a child has to bear criminal responsibility. A larger number of the respondents tends to agree that the age should be above 7.

As noted above, it seems to be difficult to have a clear-cut age of maturity for a child. Maturity involves intellectual and mental development and emotional stability. It also implies that a child should be able to have the knowledge, understanding and judgement to differentiate right from wrong. He or she should be able to understand to a certain extent the consequences of his or her own act or behavior. However, due to differences in personal traits, cultural background, race, education, sex, physiological development and moral development, it seems to be difficult, if not impossible, to determine an absolute age by which to indicate maturity.

References could be made to psychological theorists on moral development of which Lawrence Kohlberg is one of the most widely quoted exponents. Basically, Kohlberg outlines three main stages of moral reasoning, with two substages at each level. In Kohlberg's framework, Level 1 (the Pre-conventional Level), moral judgment is based on the desire to avoid punishment and gain rewards. This is most dominant at about age 10. At Level 2 (the Conventional Level), the child is motivated by the desire to conform. It emerges in middle adolescence and is most common at about the age of 16. At Level 3 (the Post-conventional Level), moral judgment is rational and internalized and behavior is controlled by internal ethical standards. Post-conventional reasoning is relatively rare. According to Kohlberg, therefore, the age of moral development for a law-abiding citizen happens about the age of 10 to 13. However, Kohlberg's conceptualization and typology is still relative. The age reference for each level and substage are still subject to various influences such as sex, culture, or education. Moral development, on the other hand, is also individualized. It is therefore possible that someone may remain at a certain stage for his or her whole life. In short, the explanatory capability on maturity by Kohlberg, though widely quoted, remains unavoidably limited. References should be drawn to the social conditions, the nature and trends of juvenile crimes, the attitudes of the general public, in addition to psychological theories, as far as the age of criminal responsibility is concerned.

The results of opinion leaders are divided. Despite the fact that many of them start off from similar psychological premises, their conclusions differ widely. Proponents of raising the age of criminal responsibility to 14 believe, that not only is a child under 14 less morally culpable for his or her actions than an adult, but that in general, a child under 14 cannot differentiate right from wrong. A child's behavior is

largely a resultant of various social influences. On the other hand, proponents of raising the age of criminal responsibility to 10, have different views. They believe that when a child reaches the age of 10, he or she should have the knowledge, understanding and ability to judge right from wrong. With compulsory education from the age of six and in this information era, it seems to deviate from common sense that a child of 10 lacks the ability to understand or the capability to comprehend right from wrong.

For those who propose to retain the age of criminal responsibility at 7, they believe that a child in general matures earlier than previous generations in this era of mass media information. To assume a child over the age of 7 is immature and incapable of committing a crime because he or she lacks necessary criminal intent, may not be accurate.

Findings of recent research do indicate that children of Hong Kong are biologically more mature at an earlier age. The “Youth and Sex Survey”, conducted once in five years by The Hong Kong Family Planning Association, reflects this trend. In the latest edition of this longitudinal survey, held in 1996, the age of respondents was lowered to include children of 11 and 12. This is due to the fact that children of Hong Kong are more sexually mature than a generation ago.

Public opinion is also divided, as is revealed from the results of the telephone survey. 44.8% of the respondents said that a person is regarded “mature” when he or she reaches the age of 18 to 20. Only a minute portion (0.7%) of the respondents said maturity is reached at 14. No one indicated that a child is mature by the age of 7. 28.1% of the respondents believe that only when a child reaches the age of 14 to 17 can he or she have the necessary criminal intent. Another 23.6% respondents said the age should be around 18 to 20. Some 35.0% respondents said only when a person reaches 18 to 20 can he or she understand the consequences of his or her criminal act. Overall, the results from the telephone survey revealed that a large portion of the general public regarded the age of maturity to be between 18 to 20.

In summary, given the fact that there are differing views regarding the age of maturity for bearing criminal responsibility between opinion leaders and the general public, it is advisable to make further inquiries as to the reasons behind this difference.

3.3 Counselling, educational and rehabilitative services for juvenile offenders should be further strengthened, no matter whether there is a change or not to the age of criminal responsibility.

In spite of the fact that the views from opinion leaders on the age of criminal responsibility are diverse, there is a common concern that counselling, educational and rehabilitative services for juvenile offenders should be further strengthened, no matter whether there is a change or not to the age of criminal responsibility.

The results of the telephone survey also indicate that over half (58.1%) of the

respondents from the general public agree that “*to educate and to provide an opportunity to rehabilitate*” juvenile offenders are important. Another one-quarter (27.1%) of the respondents believed that “*preventing juvenile offenders from committing crimes in future*” is important. Only about 7.8% of the respondents expressed that “*punishing juvenile offenders*” is important. At the same time, 60.5% of the respondents were in support of more leniency towards juvenile offenders, while another 56.2% indicated that more counselling services would be beneficial for their rehabilitation.

Putting together all this data, it is reasonable to conclude that the majority opinion of society indicates that counselling, educational and rehabilitative services for juvenile offenders should be further strengthened, no matter whether there is a change or not to the age of criminal responsibility.

3.4 In recognition of the trend on “child protection” in international community, references could be made to experiences of other places with regard to issues concerning the change of age for criminal responsibility.

The contemporary direction in juvenile justice emphasizes the use of rehabilitative approaches for juvenile offenders who have committed minor offences. Juvenile offenders, when compared with their adult counterparts, are often treated differently because of the assumption that they are psychologically immature and cannot differentiate right from wrong. As a result, these factors should be taken into consideration in every juvenile justice system.

The adoption of the United Nations Convention on the Rights of the Child (“the Convention”) by the international community, signifies a major step towards the recognition of children’s rights. The Committee on the Rights of the Child (“the Committee”) considered the *United Kingdom’s Initial Report in respect to Hong Kong* under Article 44 of the Convention on 2 and 3 October 1996. The Committee then recommended that the age of criminal responsibility be raised. In June 1997, in response to the Committee’s recommendation, the Hong Kong Government stated its position that the age of criminal responsibility should remain unchanged at 7.

The reunification of Hong Kong and China begins a new era of “one country, two systems”. The People’s Republic of China will include Hong Kong in its own report to the relevant Committee. It is reasonable to expect that the People’s Republic of China will adopt the same practice with regard to the Convention on the Rights of the Child to which it is a party. With the progress of the general level of education in Hong Kong, the public is more receptive to better child protection and rehabilitative measures for juvenile offenders. This is demonstrated by some measures in the juvenile justice system. Examples are the extension of the Police Superintendent’s Discretion Scheme, the expansion of the Duty Lawyers Scheme, the adoption of protective measures for juvenile offenders in criminal proceedings, and the use of closed-circuit monitors for young victims to give evidence. All these measures are applauded by the general public. With respect to the age of criminal responsibility, it seems to be timely for the government to re-consider and conduct

further research into the related issues. In recognition of the trend on “children protection” in the international community, references could be made to experiences in other places regarding these issues concerning the change of the age of criminal responsibility.

3.5 The general public has great concern on the situation of law and order in society, given the recent trend of an increasing number of young people committing crimes.

A crucial question on the age of criminal responsibility: will the change of the age of criminal responsibility make the law and order situation deteriorates faster? The findings of the telephone survey shed some light in this respect. In spite of over half (58.1%) of the respondents being in favour of rehabilitative measures for juvenile offenders, and that another half (56.2%) of the respondents support more counselling services for those who go astray, only a small number (7.8%) of the respondents agree that these measures be applicable to young offenders of serious crimes. This shift of attitude clearly indicates the worries and concerns of the general public regarding the law and order situation of society. The importance of law and order, apparently, is a higher priority than is the rehabilitation of young offenders.

The statistics on juvenile crime for the last few years give us a clearer picture. The trend of an increasing number of young people in committing crimes as well as the increase in petty crimes, is obvious. The average age of juvenile offenders has been getting lower. Crimes such as sexually assault, grossly bodily harm, offense against persons, criminal intimidation, burglary, robbery, arson or theft, are mostly committed by juveniles of 7 to 16. Other petty crimes, such as shoplifting or gang fighting, are also increasing among juveniles. One significant trend should be noted that crimes, no matter serious or petty, committed by children under 10 are relatively few. Whereas starting from age 10, particularly for the ages 11 to 13, the statistic of crimes across the board climbs abruptly. This clearly reflects that ages 11 to 13 are crucial for child development. It also matches the fact that most of the children at this age are undergoing a transition period from Primary Five or Six to Secondary Form One. The new challenge from the change of school and parental expectations, coupled by emotional instability, seems to be manifested by deviant behavior in the committing of petty crimes for juveniles at this age. In short, the statistics show that crimes committed by children under 10 are relatively few in numbers.

Putting together all this data, it seems quite clear that the public in general is in support of rehabilitative measures for juvenile offenders, despite their equal worry and concern on the law and order situation of society. When considering raising the age of criminal responsibility, how to balance the issues of “child protection” and “public safety” must be one of the central themes.

3.6 The social condition and attitudes of the public must be taken into consideration when dealing with the issue of the age of criminal responsibility.

It is quite clear that the issue of the age of criminal responsibility is beyond only legal premises. Consideration should be taken in respect of psychological maturity, moral development, social conditions, public attitudes, the nature and trend of the crime, rehabilitative measures, practice on decriminalizing offenses, counselling and education, children's rights and protection and so forth. Despite its difficulty, it is advisable to strike a balance between all the relevant factors before the government should reach any final decision on the change of the age of criminal responsibility.

4. Recommendations

In view of the above discussion, the Federation will recommend:

- 4.1 Since the issue on the age of criminal responsibility concerns many aspects of society, and the opinions towards change are diverse, the government must undertake a wide consultation of opinion and recognize different points of view before any change can be initiated.
- 4.2 Results of the findings reveal that most opinion leaders are in favour of raising the age of responsibility above the age of 7, based on the belief that the "protection of children" should be strengthened. This is in contrast to the opinion of the general public that preferred the age of criminal responsibility to remain unchanged at 7. This opinion was greatly concerned with the issue of "maintaining law and order in society". The government needs to strike a balance between these two different viewpoints. Among those who are in support of increasing the age of responsibility, there is no consensus on exactly what age is to be recommended. Opinions towards a change of age to above 10 years old are also very divided.

In recognition of the trend in the international community towards the protection of children, and after considering the social conditions and attitudes of the public, the Federation recommends that the government consider raising the age of criminal responsibility to a level widely accepted by the society.

- 4.3 Due to the fact that decriminalizing offences and supporting rehabilitation of juvenile offenders are widely accepted by society, it is advisable that an overhaul of all related legislation should be reviewed. Examples would include: the Juvenile Offenders

Ordinance (CAP.226), Evidence Ordinance (CAP.8), Criminal Procedure Ordinance (CAP.221), Protection of Children and Juveniles Ordinance (CAP.213), Magistrates Ordinance (CAP.227), Rehabilitation of Offenders Ordinance (CAP.297), Probation of Offenders Ordinance (CAP.298), Training Centre Ordinance (CAP.280), Prisons Ordinance (CAP.234) and Community Services Order Ordinances (CAP.378). The Federation recommends that the principle of decriminalizing offenses and rehabilitation must be respected.

- 4.4 In considering the issue of the age of responsibility, it must be clear that this is an issue that extends beyond legal considerations. It is an issue that also concerns public policies on the rehabilitation of juvenile offenders, its related counseling and education resources allocation, worries about safety and order, public attitudes towards juvenile offenders, etc. Any change to the age of criminal responsibility implies the change of many other related policies. For example, if the age of criminal responsibility is raised to a specific age, it does not mean that children under that specific age, when deviant (then "criminal"), can be totally left out of our legal or social service systems. Instead, new measures, probably under the guidelines of "child protection" may be implemented. As a result, children may no longer have to be criminally responsible, but have legal, social, counselling, or rehabilitative services provided as well. In view of these facts, the Federation recommends that the government should review the situation from a more macroscopic view. In considering any change on the age of criminal responsibility, a review on the child protection services as well as the policies on the rehabilitation of juvenile offenders should be mandatory.