

## **Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology**

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### **Abstract**

The concepts of 'liability age' and 'capacity responsibility' have been widely dissected by researchers in various fields. However, their application to both criminal and tort liability of children remains inconsistent. Furthermore, rarely has an interdisciplinary approach adequately dealt with these concepts and their impact on legal norms. This text investigates the notion of criminal and tort liability age in connection with the notion of capacity responsibility, in relation to children, and further questions the adequacy of the relevant legal norms. This endeavour to improve the applicable legal norms is supported by an analysis of the pertinent findings in the field of psychology, particularly in respect of the moral development of children. Informed by an excursion through the ideas of Piaget, Kohlberg, and Gilligan, among others, regarding the moral development of children, the text also serves to assess the impact of concepts of moral responsibility and maturity, in relation to the development of the legal norms, which determine the age of liability of children. The text concludes with a proposal for a criminal and tort liability age framework, based upon indicative/presumptive age milestones, and an integrated approach to all relevant circumstances in casu.

### **Keywords**

Criminal liability; Tort liability; Liability age; Legal responsibility; Moral responsibility; Moral development; Piaget; Kohlberg; Gilligan; Maturity

### **1. Introduction**

Article 3 (1) of the United Nations Convention on the Rights of the Child (UNCRC) names the best interests of the child as (at least) one of the main criteria to be employed whenever adopting measures regarding a child. The fact that this criterion should be employed by several entities within the countries that ratified the UNCRC, including the courts of law, is of great importance: courts of law should not be blind to the special conditions of the person sitting behind the bench, namely, their age. A child is a kind of defendant whose age, in relation to his/her physical and psychological development and emotional and educational needs, demands particular consideration. Furthermore, Article 40 of the Convention states that when a child is accused of having infringed penal law, the following priorities need to be observed, taking into account the child's age (which, I argue, are equally valid, with the necessary adaptations, for the infringement of private law):

1. Promoting the child's sense of dignity and worth;
2. Reinforcing the child's respect for human rights and the fundamental freedoms of others;
3. Promoting the child's reintegration and his/her adoption of a constructive role in society.

These standards of protection are further supported by other international human rights documents, including the Universal Declaration of Human Rights (Article 25 (2): the entitlement of childhood to 'special care and assistance'), the UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), and the UN Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'). Accordingly, the Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, recently called on authorities to adopt family-based and social alternatives to imprisonment, such as mediation (Hammarberg, 2007).

Despite these internationally recognised rules, the legal systems of many countries have failed either to formally or substantially embrace them. An alleged recent example of this is the approval of the new Colombian Child and Adolescent Code, which lowered the age of criminal responsibility to twelve years of age (for a critique of this Code, see the debate launched by several NGOs at <http://www.comunidadessegura.org/?q=en/node/31337>). It is also pertinent to point out that other jurisdictions, such as the English one, stipulate either very low ages for criminal responsibility or no age limit for the duty to pay damages, which undoubtedly raises concerns as to whether the requirements set in the above rules are met, leading to proposals that the age of criminal responsibility be raised (Allen, 2006). The considerations set forth in this article are not bound to any jurisdiction in particular; they are aimed at being potentially applicable to any jurisdiction. What matters is that the commission of a criminally punishable or a tortious act by a child can, in many countries, lead to a child being sentenced to several years of imprisonment, alongside adults, or to the payment of high amounts in damages, leading to a life-long lack of professional training and education, psychological and social ineptitude, as well as economic plight and premature financial indebtedness.

Repressive tendencies and security-obsessed policies very often overshadow sensible and adequate social, educational and legal policies. Youth justice has followed different models since it was created. To a large extent, provisions relating to youth justice have moved from a retributive model, which aimed at penalising the child for what he/she had done, to a re-educational model, which tried to re-socialise the child. More recently, some youth justice systems have adopted yet another model, the reparation-reconciliation (or mediation) model: the focus is now placed on giving the child the possibility to make reparations and resolve the conflict and the damage caused (Abruzzese, 1996: 73-74). Which option best promotes voluntary and spontaneous respect for the norms by children is, of course, debatable, as is the issue of which key factors should lead us to adopt one model rather than any other. This wide-ranging debate falls outside the scope of this article. This article will concentrate instead on only one aspect of any youth justice system: What considerations can assist the legislator in determining the age of criminal or civil liability? What constitutes a good argument for increasing or lowering such age limits? Curiously enough, children's rights activists may even wish to argue for lowering the age of a child's criminal liability. Such was the case in Thailand, where a governmental Bill aimed at increasing the criminal age from 8 to 13 was contested on the grounds that it could encourage children to commit crimes (knowing that they would not be punished) and adults to exploit children in criminal activities (Charoenpo, 2004).

If the law is supposed to regulate people's lives in society, in order to render them as peaceful and fulfilling as possible, then lawyers should be able to leave their own technically complex and intricate small world and investigate the object of their work: people's lives themselves. I believe that only in

so doing is one able actually to make valid and meaningful proposals for improving the law (for a seemingly contrary opinion, see King, 1997). Therefore, I have attempted to find some answers to the above-mentioned questions in children's lives, more precisely, in their psychological and moral development. I will, therefore, concentrate in this article on how the psychological and moral development of children relates to the possibility of holding them liable for their behaviour and for any damage they may cause. Several authors have studied children's moral development and sense of justice. Other authors have disputed the accuracy of those studies and have suggested some changes thereto or offered completely new ones. This area of knowledge is immensely precious, as it may allow us to understand how a child's cognitive and moral development may influence his/her ability to be held responsible in the eyes of the law.

In this search for precious contributions to this legal field from the field of psychology, one cannot lose sight of the fact that jurists should be critical in accepting the results of scientific research as being universally valid. In fact, there has been a certain level of abuse of scientific research, namely in the USA, in order to support results with which the legal policy-makers identify themselves ideologically, even if other plausible interpretations could have been deductible from those same data (Fineman/Opie, 1987: 124-125 and 156-157). As much research is not entirely neutral, nor is its use by commentators. However, although social sciences cannot offer all of the answers, they can help by discussing the limits and contents of legal regulation or the good sense of a policy option. I will then take psychological research as an additional material to be carefully used in conjunction with other data, so as to model or question legal policy in this field.

## **2. Contributions from Psychology**

In order to determine how the psychological development of children relates to the possibility of holding them responsible for their behaviour and for any damage that they may cause, one needs to assess how their capacity to commit a wrongful act consciously and willingly changes throughout their development. It is important to assess at what stage children acquire the capacity to understand and want (or at least conform to) a certain act, and when they start being aware of the consequences of their behaviour and acquire the ability to adjust it. I, therefore, seek to take into account those aspects of what psychologists have studied, researched, discovered and concluded in the field of child development and moral reasoning that might be relevant to the theme of this article. This may prove to be essential to us, insofar as it may provide us with many interesting and crucial answers. The exact extent to which considerations of moral responsibility and a child's development can be relevant to the assessment of legal responsibility will be dealt with in point 4.1, below.

### **2.1. Moral Responsibility and Child Development**

Although it may seem to be a given, the fact that children and adults cannot be held morally responsible in the same way would seem to be forgotten on many occasions. Moral responsibility, according to the dominant moral philosophy, implies freedom, and children and adults are not equally free. Freedom and duties mutually determine each other. Furthermore, since there are different degrees of freedom, it follows that there are different degrees of responsibility. The degrees of freedom enjoyed by children and adults are closely linked to the notions of ability, control, knowledge

and autonomy (Helkama, 1981: 24). As the intensity of these elements increases in the personality and behaviour of a person, the degree of freedom that one enjoys also increases. Moral freedom, in particular, can be defined as 'the power or ability to form a judgement of the relative goodness and badness of the alternatives possible and of acting in accordance with that judgement' (Ginsberg, quoted in Helkama, 1981: 30). Moral development has, therefore, to do with normative issues concerning what 'should be', and not with factual issues concerning what 'is' (Lourenço, 2002: 37). However, authors disagree on how what is fair or not should be defined, which criteria should be used to assess moral development, what are the psychological processes involved in the moral functioning of people and what are the best ways to promote it.

Children have been compared to intuitive moral philosophers (Schweder/Turiel/Much, 1981). In fact, they develop moral concepts within a process of active searching and construction, not simply by disclosing previously existing static meanings from ordinary moral language. Accordingly, 'ordinary moral language' simply does not exist (Helkama, 1981: 10). Several psychologists have attempted to put forward theories which explore the concept of moral responsibility and the development of conceptions of justice, both in children and in adults. Piaget worked on the progressive capacity of producing subjective responsibility judgements, whereas Kohlberg worked on a theory of moral development and Gilligan studied the distinction between the ethic of care and the ethic of justice and its consequences for Kohlberg's theory.

## **2.2. Piaget and the Cognitive Development of Children**

Piaget, one of the most renowned psychologists of the twentieth century, constructed what is arguably the most influential theory of child development and learning. Despite a few aspects of this theory being considered to a large extent superseded (such as the sensorimotor period: Meltzoff, 2004) or at least questionable (such as the subjective character of the nascent object concepts: Johnson, 2004), it is nevertheless worth examining some of the features which remain relevant. In fact, it can be said that although Piaget's cognitive development theory can be criticised, it has not been negated, since subsequent approaches merely 'identify additional important aspects of development and/ or provide a more specific account of Piagetian-like changes' (Flavell/Miller/ Miller, 1993: 8). Piaget's theory revolves around the idea that, during the child's development, he/she builds cognitive structures. These structures consist of networks of concepts, which allow the child to understand and respond to external stimuli provided by the surrounding environment. These structures become increasingly sophisticated throughout the child's development, going from a mere cry to highly complex operations. Piaget identified four main stages of cognitive development:

1. Sensorimotor stage (birth – 2 years of age): The child begins to process the information he/she receives and builds a set of concepts regarding reality and how it works. He/she does this through physical interaction with his/her environment. During this stage, the child plays with physical objects, but does not know that they remain in existence even when out of sight. Towards the end of this stage, the child gains the capacity of maintaining the mental image of an object or person, even if they are not actually present (object permanency).

2. Preoperational stage (ages 2-7): The child does not yet conceptualise abstractly and needs concrete physical situations. He/she develops language rapidly and uses words and images to interact with the environment. The child believes that everyone sees the world the same way that he/she does (egocentrism). Furthermore, he/she is still unable to understand that quantity does not change if the

shape changes (reversibility) and focuses on only one aspect of a stimulus (centration). Towards the end of this stage, the child understands reversibility and already understands that quantity does not change if the shape changes (conservation).

3. Concrete operations (ages 7-11): Thanks to the physical experience that the child collects, he/she starts to conceptualise. He/she creates logical structures that explain his/her physical experiences. The child also gains the capacity to solve abstract problems, such as solving arithmetic equations with numbers instead of objects, but his/her thinking is still mainly connected to objects, rather than abstract ideas. The child has gradually less centristic thought and increasingly focuses on more than one aspect of a stimulus. 4. Formal operations (beginning at ages 11-15): The cognitive structures of the child become similar to those of an adult, including conceptual reasoning, such as the idea of cause and effect. The child develops a more abstract view of the world and can apply reversibility and conservation to both real and imagined situations.

Throughout the child's development, he/she uses the mental structures that he/ she possesses in order to cope with the experiences offered to him/her by the environment. When the experience is not new, the child fits it into the already existing cognitive structures and maintains a balance. However, if the experience is new, this balance is threatened and the child has to alter the existing cognitive structures in order to fit the new experience. This process enables the child to construct increasingly satisfactory cognitive structures. Although Piaget believed that all children, from different cultures, go through these stages in the same order, he also admitted that the age range from each stage can vary from child to child.

Taking this framework as a starting point, Piaget elaborated a theory on the development of moral judgement in his book 'The Moral Judgement of the Child', in 1932. The judgement in question here has morality as its object, morality being understood as the social, prescriptive and normative rules and principles which everyone is asked to respect. Based on stories which concerned clumsiness, stealing and lying, Piaget assessed the degree of development of moral judgement in children of different ages. He concluded, among other things, that (see Helkama, 1981: 38-39; Mussen/Conger/Kagan/Huston, 1990: 446-447):

1) Young children adhere to a notion of objective responsibility, which means that they evaluate acts according to their exact material conformity to rules and material consequences, and not to the motives or intentions behind them. This notion of responsibility is characteristic of moral realism, that is, seeing duty as self-subsistent and imposing category, to which individuals have to abide no matter what the circumstances. These notions fit into the heteronomous morality of young children: the moral notions of young children are a product of their submission to adult authority. This is a morality based on fear of punishment and strict obedience to authority. According to these children, punishment should be immediate, retaliatory, and exculpatory. Some authors have argued that young children do have some understanding of intentions after all (Karniol, Costanzo, Coie, Grumet, and Farnill; for a review, see Mussen/Conger/Kagan/ Huston, 1990: 446). Other authors have also questioned the degree to which there is, in fact, such submission from children to authority (Laupa, 1991; Smetana, 1995). They based their criticism on the observation that children do refuse to obey adults when ordered to commit immoral acts. However, according to other authors, Piaget had mostly in mind submission to adults in everyday relationships between adults and children, not particular instances of the commission of unfair or immoral acts (Lourenço, 2002: 81).

2) At around the age of ten or eleven, children increasingly acquire the capacity of making moral judgements based on intentions and motives. They then enter the stage of subjective responsibility, developing an autonomous morality. Subsequent research has indicated that children of seven and

eight years of age can sometimes even consider extenuating circumstances in their judgements of attribution of responsibility (Shaw/Sulzer, 1964; Shaw/Briscoe/Garcia-Esteves, 1968; Shaw/Reitan, 1969; Shaw/Iwasaki, 1972). Cognitive moral development does not, however, stop this early. The child slowly develops towards a morality based on equality, reciprocity and agreement. Punishment should have a didactic aim, be reciprocal and contribute to the improvement of the person.

Although children may become aware of their own intentions as early as the age of three, it seems that the constraints imposed on the lives of young children by adults prevent them from using intentions as a moral criterion before they reach seven years of age (Minton/Kagan/Levine, 1971). The shift from the phase of objective to subjective responsibility is slow and gradual, and depends on general intellectual development (cognitive growth and transition from egocentrism to decentrism) (Lickona, 1976; Shantz, 1975) and social relations (transition from submission to adult constraint to co-operative social relations with peers). Nevertheless, although intelligence remains a highly pertinent variable, it is not strong enough to prevail over the importance of age. The content area in which children seem to be able to produce subjective responsibility judgements at an earlier age is in lying, most likely because this is also the content area where the notion of intention is acquired earlier. It has also been suggested that children attain the ability to make judgements of subjective responsibility earlier when situations involve human beings (as opposed to objects) and, in particular, when acts are committed towards peers/familiar people (as opposed to adults/strangers) (McKechnie, 1971; Imamoğlu, 1975; Ruffy, 1981).

Methodological improvements incorporated by later studies have indicated that children can make judgements of subjective responsibility before they reach the age of seven (Helkama, 1981: 86-87). Still, there is 'ample evidence [of] the fact that the more refined psychological distinctions of motivation develop rather slowly', mostly concerning a satisfactory understanding of the concept of 'good intentions'. See, for example, the study conducted by Wright and Niemelä in 1966, attesting to how exceptionally slowly and gradually children understand motives as a moral criterion in situations that offer other criteria besides motives and material consequences (Wright/Niemelä, 1966). Furthermore, it has been found that young children have severe difficulties in understanding complex sequences of actions involving hierarchical means-ends relations and older children frequently consider intentional injury accidental (Collins/Berndt/Hess, 1974; Berndt/Berndt, 1975). Moreover, it has been advanced that adolescents up to the age of thirteen could 'lack a clear conception of a moral agent as an independent centre of distinct personal causality, capable of resisting provocation or temptation and making decisions regardless of the social environment. This lack might partly reflect their lack of moral independence from adults and peers.' (Helkama, 1981: 96) Most importantly, it has been shown that, up to the age of at least seventeen, there is a systematic development in the ability to produce subjective responsibility judgements and to understand intentionality (Kugelmass/Breznitz, 1967; Kugelmass/Breznitz, 1968; Breznitz/Kugelmass, 1967).

Despite the focus on the developmental trends of the acquisition of moral judgements of children, Piaget's theory also pays consideration to those sociopsychological factors that may be relevant thereto. Furthermore, the research that has been carried out subsequently tends to confirm the developmental sequence proposed by Piaget. Even though some of the criticism raised is valid, many authors (Dean/Youniss, Kurtines/Pimm, Lickona, Shantz, Vandenplas-Holper) consider that most of the elements that contradict Piaget's theory can be explained without discarding the whole theory (for a review, see: Helkama, 1981: 66; Lourenço, 2002: 42-43).

### **2.3. The Social Learning Critique**

Piaget's understanding of the stages in moral judgement has been the object of modifications and has also been harshly criticised by social learning theorists since the 1960s (Bandura/McDonald, 1963). While Piaget sees the evolution of moral judgement in children as a pre-defined path to be followed and makes it depend on the (cognitive) development of children, social learning theorists do not support the idea that moral development should be conceptualised in stages. They accept the existence of developmental trends, but believe that stages overlap and objective and subjective judgements exist simultaneously at all ages (Helkama, 1981: 42-43). Children acquire moral judgements mainly through modelling, but modelling can have no or limited effect on moral reasoning if the cognitive skills or the performance preferences of children do not allow for a stronger evolution. Thus, children's cognitive skills and performance preferences have, according to these authors, a more vital role in the acquisition of moral judgements than any fixed sequence of development stages. Specific socialising and environmental effects have more weight than the active construction of the child.

Another common criticism of Piaget is that his research on moral judgement is middle-class and culturally biased. However, there is no conclusive proof of this. On the one hand, it is true that some research including different social classes indicates that the ability to employ language regardless of the immediate context, as required in verbal moral judgements, is not favoured by the common forms of socialisation used in disfavoured social environments. Consequently, children from these environments limit themselves to a local and personal perspective and are hardly capable of analysing situations from the perspective of others, i.e., have difficulties decentrating. However, on the other hand, the existence of the objective and subjective responsibility stages in Piaget's theory has withstood the cross-cultural consistency test (Helkama, 1981: 115). In conclusion, Piaget's theory, even when integrated with contextual factors such as socioemotional and cultural considerations, is still considered valid to a considerable extent today hence the vigour of neo-Piagetian research (Suizzo, 2000).

### **2.4. Kohlberg and the Moral Development Stages**

In 1963, Kohlberg advanced his theory on moral development, which was greatly inspired by Rawls's 'A Theory of Justice' and Plato's 'Republic' (Hekman, 1995: 27). For Kohlberg, morality has its essence in the sense of justice. The sense of justice is more important than respect for social or moral norms. Therefore, consideration for equality, equity, social contracts and reciprocity in human relationships is more important to Kohlberg than obeying or disrespecting certain social or moral norms. Justice should not only be the rule for the action, but also the reason for the action itself. Central to this understanding is the idea of hierarchy between moral rules and moral principles. Several psychologists and sociologists, such as Mancuso/Sarbin, Durkheim, Berkowitz and Eysenck, have expressed serious doubts with regard to this understanding, laying instead greater importance on the social context or conditioned reflexes than on reason (see, on this debate, Lourenço, 2002: 29-30). Nevertheless, according to Kohlberg, moral development goes through six main stages, divided into three levels, each stage corresponding to a specific socio-moral perspective and concept of justice, i.e., a different moral orientation or philosophy and a particular way of coordinating and prioritising conflicting

perspectives and values (Kohlberg, 1987: 259-324; Mussen/Conger/Kagan/Huston, 1990: 447-455; Lourenço, 2002: 96-121):

1. First Level (Pre-conventional): Justice and morality are a group of external norms which are respected in order to avoid punishment or to satisfy concrete and individualistic desires or interests. This level includes the stages of Heteronomous Morality (obedience and punishment are most valued) and of Individualism, Instrumental Purpose and Exchange (individualist, concrete perspective).
2. Second Level (Conventional): Social norms and expectations have been internalised, people fulfil their duties and claim their rights as established by the social order. This level includes the stages of Mutual Interpersonal Expectations, Relationships, and Interpersonal Conformity (interpersonal, relational morality) and of Social System and Conscience (respect for the law is the highest value).
3. Third Level (Post-conventional): Individuals value universal ethical principles and determine their action with respect to these principles, the law is worth less than moral imperatives. This level includes the stages of Social Contract or Utility and Individual Rights (social and common good, rules yield to principles) and of Universal Ethical Principles (ethical principles and the principle of justice command action). This stage was later on withdrawn by Kohlberg from his theory as an empirical stage, but has been kept as a mere ideal of moral development (Lourenço, 2002: 96 and 114).

These stages were defined in response to the kind of arguments advanced by subjects of different ages when presented with moral dilemmas. Immediately relevant to our discussion is the following: at stage 1, 'what is right' already includes 'avoiding physical damage to persons and property'; by stage 4, 'what is right' implies upholding laws, 'except in extreme cases where they conflict with other fixed social duties'; at stage 6, self-chosen ethical principles take priority and one disregards laws if these do not respect those principles (Kohlberg, 1987: 259-324).

Each stage forms a complete autonomous unit and integrates the previous stage(s). In addition, stages form a universal and fixed sequence. In order to attain a certain stage of moral development, one has, among other things: to possess a certain level of logical thought; to possess a certain level of role-taking or social perspective; to a certain extent, closely relate his/her behaviour to that moral stage; to have developed certain features of his/her ego (Helkama, 1981: 6-7; Mussen/Conger/Kagan/Huston, 1990: 453-454).

Kohlberg attempted to indicate which ages usually reach each stage. Although such ages are merely approximate, it is extremely relevant to the aims of the theme of this article to make reference to them (Lourenço, 2002: 96-101). The pre-conventional level (stages 1 and 2) includes children until about nine years of age, as well as some adolescents and adults. The conventional level (stages 3 and 4) includes adolescents between 10 and 20 years of age, as well as some adults. The post-conventional level (stages 5 and 6) includes some adults, usually older than 20-25 years of age. Nevertheless, according to research carried out by Turiel and his colleagues, children of 3 or 4 years of age are already able to distinguish between morality and social conventions, morality being obligatory, general and inalterable, and social conventions being dependent from social organisation, existing practices, rules and authority. These authors seem to attribute to children a high level of moral autonomy and an overtly generous moral competence. This has been criticised, namely due to the methodological and conceptual inaccuracies pointed out by Lourenço, Fowler, Glassman and Zan (Lourenço, 2002: 75).

Development can cease at any stages. Although the majority of adults most likely reasons from stages four structures, some stop at stages two or three and others evolve to stage five or six (Duska/Whelan, 1977: 102-105). Kohlberg's view of moral judgements as both cognitive and developmental has



subsequently been further developed and updated, as well as consistently reaffirmed, by the Minnesota approach to research in moral development (Thoma, 2002: 225-245; Walker, 2002: 353-367).

## **2.5. The Feminist Critique**

The 1970s witnessed a serious questioning of this allegedly male-centred psychological theory. Prominent authors, such as Gilligan, were at the forefront of the feminist movement which led to a 'serious reconsideration of research methods and the practices of psychological assessment and psychotherapy' (Gilligan, 1982: xi). Kohlberg's theory was accused of being oblivious to the differences between men's and women's 'voices', and, consequently, did not take into due account the existing power relationships (Gilligan, 1982: xviii). The 'ethic of care', privileged by women's moral judgements, as opposed to the 'ethic of justice', gained increasing relevance and the focus moved from individuals to relations. The impact of this evolution on developmental psychology was inevitable: the elements that had hitherto been considered to determine the level of moral development of a child or adolescent were called into question, and consideration of further complexities was demanded. As Gilligan asserted two decades after the initial steps of this movement, 'theories of human development (...) turn out to be theories about men', insofar as 'the relational crisis which men typically experience in early childhood occurs for women in adolescence, (...) this relational crisis in boys and girls involves a disconnection from women which is essential to the perpetuation of patriarchal societies, and (...) women's psychological development is potentially revolutionary not only because of women's situation but also because of girl's resistance.' (Gilligan, 1982: xxiii)

Those which were thus far often considered to be problems in women's development were, after all, problems with the developmental theories that attempted to represent and conceptualise that development (Gilligan, 1982). Kohlberg's and Erikson's theories, as well as Levinson's and Vaillant's work, could no longer be considered sexually neutral, and, drawing from the works of other authors such as Chodorow, Stoller, Lever, Bettelheim, McClelland, Broverman, Vogel, Clarkson, Rosenkrantz, Miller, Haan, and Holstein, different consideration was called for in relation to the development of women and men (Gilligan, 1982). Care and empathy should be given due consideration as elements against which women's development can be measured, so that womanhood and adulthood are not so discrepant. Gilligan goes on to argue that, as girls seem to have a vision of the 'world that coheres through human connection rather than through systems of rules', any theory on moral development should take into account different modes of moral understanding (Gilligan, 1982: 29).

This movement of feminist critique was strengthened in the 1980s by an increasing number of psychologists, in true pursuit of societal and cultural change. The focus remained on considering both the justice and the care approach to morality as equally valid, while questioning the equation of maturity with separation, selfsufficiency and independence (Gilligan et al., 1988). Based on expanding research carried out by several psychologists in the field of development, to name Johnston as but one example, it has been proved that all people are capable of seeing a moral conflict both from the perspective of justice and care. Nevertheless, people tend to maximise one of those perspectives and minimise the other: women focus on the issue of care and men on the issue of justice (Gilligan et al., 1988). Since the theories put forth by Freud, Piaget and Kohlberg are predominantly focused on justice, women's moral development is not duly considered by them. This also has logical

consequences for the way in which moral development tests are designed and conducted, since the angle they adopt is also limited.

Admirers of Gilligan's work have gone so far as to consider this line of criticism and research as 'a move away from the universalism and absolutism of modernist epistemology toward conceptions that emphasize particularity and concreteness', a true take 'on the entire Western tradition', a 'new moral language altogether', 'an other, incompatible theoretical space', 'situated, connected, and discursively constituted' knowledge (Hekman, 1995: 2, 17, 25, 32). In fact, the replacement of the 'autonomous self' with the 'relational self' can be seen as having such repercussions. The supposedly alternative moral philosophies advanced by Nussbaum, Weil, Murdoch, Blum or Hume, as well as by Nagel or Walzer, are not, in fact, truly alternative: they can still be placed within the absolutism/ relativism continuum of modernist moral theories (Hekman, 1995: 34-50). Communitarian critics of liberalism (Sandel, MacIntyre) or feminist ethicists (Lloyd, Moller, Okin, Pateman, Eisenstein) are, to a certain extent, unable to offer better alternatives (Hekman, 1995: 50-64). According to this perspective, Gilligan paved the way for many other voices to join the moral realm – not just gender, but a plurality of voices, such as race, class and culture, allowing each one of those voices to be unique – and for the overcoming of the traditional ethical theory, in the line of the work of Noddings, Ruddick, Addelson, Hoagland, Chodorow, Keller and Young (Hekman, 1995: 65). Hekman argues that Gilligan is, in fact, calling for the deconstruction of traditional moral theory and its restructuring, mainly in relation to three elements: epistemology, power and subjectivity – and this belongs to a wider discourse of the politics of difference (Hekman, 1995: 34-163). Hence, the feminist critique requires a whole new approach to the study of history, culture, law and literature (West, 1997).

Gilligan's work can, however, also be looked at from Kohlberg's scheme, as a relativisation within the context of Kohlberg's theory. In this line of reasoning, the 1990s witnessed the work of prominent psychologists such as Burman, Taylor, Sullivan, and of course, Gilligan, who approach developmental psychology – namely its models, research methods and institutional practices – in a critical, challenging, and intervenient way, while not attempting to wholly replace it (Burman et al., 1996; Burman et al., 1998; Taylor/Gilligan/Sullivan, 1995). Through situating the child in the historical and socio-political conditions in which he/she exists, idealised models that tend either to normalise or pathologise are questioned (Burman, 1994). Greater emphasis is placed on social development, historical and cultural influences, relationships, and the role of communication (Burman, 1994). The need to include class, gender and 'racial' considerations in developmental psychology is, in any case, absolute, a fact which has methodological and structural implications. Seeing moral development as encapsulating the problems and limitations of traditional developmental psychology models, Burman considers both the theory and tool created by Kohlberg to be not only gender-biased, but also Western / urban cultural-biased. Burman also accuses Kohlberg of being ethnocentric, culturally chauvinistic, and based on a bourgeois liberal model (Burman, 1994: 177-186).

In any case, the feminist critique led by Gilligan has also, inevitably, itself been the object of intense debate: it has been considered by many authors as 'methodologically unsound, theoretically confused, and even antifeminist' (Hekman, 1995: 1). On the one hand, Kohlberg, as well as other authors (Eisenberg/Lennon, Walker), has produced research which looked deeper into these concerns and concluded that there were no significant gender differences, as claimed by the feminist critique. Kohlberg also argued that the six stages of his theory integrated both care and justice considerations, but this claim also fell prey to criticism (Gilligan et al., 1988: 111-138; Hekman, 1995: 29). Feminists such as Tronto, on the other hand, have claimed that underlining traditional differences between genders only further perpetuates women's inferiority (Hekman 1995: 10, 23). Other authors, such as Fulani, drawing from Wittgenstein's and Gergen's writings, go even further, criticising Gilligan on the

basis that a moral system, like testing, is detrimental to development and is, consequently, unnecessary (Burman et al., 1998: 140-158). Furthermore, the data provided by Gilligan's research has been considered statistically non-significant, insufficient to support her conclusions (Hekman, 1995: 18). Finally, the clear gender distinction in moral development has not been supported by later research carried out in the 1990s (Krettenauer/Edelstein, 1999, Pratt/Skoe/Arnold, 2004). If lacking objectivity and not adequately supported by evidence, the conclusions defended by Gilligan and her followers are not social science but merely an ideology. Even Gilligan herself, although still rejecting the language of 'moral development stages' and admitting that justice and care are elements common to all humans, has subsequently admitted that the assessment of the link between gender and moral voice is highly complex, since there are other questions that need to be considered (Hekman, 1995: 10).

## **2.6. Some Intermediate Remarks**

It is not within the scope of this article to make an autonomous critique of the models of moral development developed so far. I will, therefore, refrain from deciding which model or critique is most defensible, since that task is definitely not one that a lawyer should undertake. Instead, what is relevant for the purpose of this article is to form a picture of the state of the art in this field and to see how that picture can be used for legal purposes. I will, therefore, merely attempt to reach some conclusions from the above debate, and shall avoid an autonomous (and possibly sterile) choice of one or the other contrary position.

The theories of both Kohlberg and Piaget have the developmental dimension in common. Although this implies a considerable degree of cultural universality, these authors have integrated the relevance of cultural factors into their theories, without disclaiming the need for 'more sophisticated understandings of culture and overcoming the cultural insularity of core psychological constructs and methods' (Miller, 2005). It has also been shown that Kohlberg's levels of morality are confirmed in people from very different cultures, in accordance with research carried out by Colby, in the USA, Nisan and Kohlberg, in Turkey, Snarey, Reimer and Kohlberg, in Israel, and Biaggio, in Brazil (Lourenço, 2002: 96-97, Dawson, 2002: 154). It has been confirmed by several researchers (Crowley, Glassco, Milgram/Youniss, Jensen/Hafen, and Jensen/Larm) that it is possible to induce durable developmental changes through teaching programmes (Helkama, 1981: 120-121; Duska/Whelan, 1977: 103). In fact, education is now recognised as a determining factor in the moral stage one achieves (Dawson, 2002). Furthermore, the developmental dimension seems to be highly influenced by the forms of inter-individual interaction (general socialisation) (Helkama, 1981: 113; Ruff y 1981). Also, in line with the feminist critique, care reasoning is a key element of socialisation (Pratt/Skoe/Arnold, 2004). Nevertheless, experimental research has failed to prove social learning theorists or feminist critics right and accurately to question the cognitive-developmental theory. Finally, methodological flaws and theoretical and empirical shortcomings in Kohlberg's theory have been recognised and addressed: refinements have been introduced without calling into question the conclusion that it is a generally sound theory (Krettenauer/Edelstein, 1999). Indeed, there is wide research to support the fixed order of the stages proposed by Kohlberg, the achieving of higher moral stages at older ages, and the development towards increasingly higher moral stages (Burman, 1994: 179; Dawson, 2002).

It is still judicious, it would seem, to believe in the existence of a universal developmental trend in children, which includes the evolution from objective to subjective responsibility in moral judgement,

even if the emergence of the latter can vary considerably depending on several factors. Among these, social interaction has undoubtedly gained standing, since it has subsequently been concluded by authors such as Stern, Kagan, Hoffman and Mordecai, that even very young children are after all capable of initiating and maintaining personal connections, creating relationships and socially interacting (Gilligan, 1988: viii-ix). Development is, therefore, not solely influenced by age. However, age remains the most important indicator of the moral development of a human being, mostly during adolescence. Even authors who deny that development is governed by age do recognise that certain ranges of age are 'good predictors' of stages of moral development, mostly between the ages of twelve and twenty (Duska/Whelan, 1977: 103). As Erikson puts it:

It often takes considerable time – well into the early twenties – before an adolescent can make a workable whole out of all that became distinctive of him in the years of childhood. For what once was play and pretense, in adolescence becomes rehearsal with different ways of living until the main life performance, namely the individual's lasting identity in the adult world, is established. (Erikson/Erikson, 1987: 622)

While the social learning and psychoanalytic perspectives should be given due consideration, the cognitive-developmental approach subsists as the most convincing and solid theory in this field. It refuses to classify an action as moral or immoral without first knowing the reasons that structure that action and it accepts that someone's moral development is the construction of a person in interaction with the environment surrounding him/her, not just the mere result of the influences exercised on him/her (Lourenço, 2002: 23). According to Lourenço, an analysis of post-Kohlberg critiques and proposals allows us to consider the contextual and post-modern perspectives (e.g., Brown, Debold, Tappan, Gilligan and Packer) as epistemologically contradictory, nihilistic, and opportunistic. Furthermore, this author also believes that the behaviourists, in particular Skinner, do not pay enough attention to cognitive elements, nor assume any basic moral principle (justice, for example) (Lourenço, 2002). All things considered, the cognitive-developmental theory undoubtedly seems to offer the most exhaustive answers, effectively combining philosophic arguments, psychological research and educational purposes, proposing the most rational criteria in regards to morality and moral development, better assuming the idea of one's development and being the most committed to the construction of a fairer society. Thus, this seems to be the best picture that one can form of the state of the art in this field.

### **3. The Concept of Maturity**

Children seem increasingly self-confident and in control of their lives. They seem to grow in a very independent way, are given much freedom and access to a number of activities and opportunities that their parents at that age were not. This may be, at least partially, the result of the strongly urbanised western societies in which so many children grow up nowadays. However, experts have alerted us to the fact that present day youths are, in fact, more protected, less autonomous, emotionally less mature and more subordinate and susceptible to being manipulated than before (Reto, 2005). Furthermore, youths enter the labour market later than before and become responsible later too (Reto, 2005). In sum, they seem less mature.

The concept of maturity has also become increasingly more relevant in the legal field. Several studies have pointed out the importance of maturity as a key concept in determining the capacity of discernment of children. By 'capacity of discernment' I am referring to what in southern European

legal systems which use romance languages refer to as 'imputabilità' (Italian), 'imputabilidade' (Portuguese), and 'imputabilidad' (Spanish). In French, although the word 'imputabilité' exists, this concept is more often translated by the word 'discernement' in legal writings. Maturity should indeed be used as a corrective tool of the concept of discernment, defining this in reference to the "“evolutionary dynamics” experienced and expressed during adolescence' (Ceretti, 2002: 277). An individual can be considered mature when he/she is autonomous both in the affective-emotional-instinctive sphere and in regards to his/her social integration. The necessary requisites to become a mature person acquire a predominant role in determining responsibility. Apart from this, responsibility is ontologically understood, that is, in considering whether an individual is responsible or not one has to individualise and measure all elements that may be relevant to that concrete situation (level of education, dynamics of interpersonal relationships, reasoning capacity, susceptibility, infantile characteristics, deficit in structuring the personality, etc) (Ceretti, 2002: 279-280). Since the 1970s, external factors, such as the socio-cultural context surrounding the child, have been incorporated into the analysis of discernment of the child: individual psychological factors are nowadays inseparable from the social-environmental factors in the determination of the development of a child's personality. Furthermore, in the 1980s several studies concluded that youths who can be considered mature but have grown up in an underprivileged environment may not be able to interiorise adequate models of behaviour and of social valuation (Ceretti, 2002: 283).

The considerations produced by scholars regarding discernment in the criminal field are *mutatis mutandis* applicable to the private legal field. In fact, the physical and mental maturity of the child should also be relevant in cases of tortious acts, even if considering the different mechanisms and functions of criminal and private law. Accordingly, a child should only be responsible when he/she is in possession of a range of capacities and competences, which vary from individual to individual and depend on several factors (age, psychological conditions determined by endogenous and exogenous conditions, etc). Moreover, the discernment of a child is to be assessed in connection to the specific (wrongful) act, since to understand the consequences of certain forms of behaviour the child needs a greater measure of maturity than for other kinds of behaviour. So, for example, anyone understands the value of life and the immorality of attempting against it. Although this approach certainly makes sense, it also raises an important question: should adopting a behaviour that violates the most basic values and rules (which even a person with low discernment would grasp) not indicate that that person possesses a strongly imbalanced or disturbed personality? The same data may, then, give origin to opposite judgements and, therefore, create conflicts between psychological and legal approaches. In any case, maturity and discernment cannot be objectively analysed in an isolated situation. This normative analysis requires a comparison with other similar situations. This means that one has to take into consideration what another child of normal development of the same age would do in the same situation. Despite all efforts to ground this assessment in science, legal certainty inevitably allows for some flexibility in the courts, since the judge has to deal with a complex multiplicity of factors (Ceretti, 2002: 277-279).

Lastly, it is important to point out that a rigorous examination of the child's maturity in court would undoubtedly lead to fewer instances of children being held liable (Pepino, 1996: 48). Too often, judges and other judicial operators take legal ages of liability as the definitive element in the determination of the discernment of the child. If the assessment of the maturity and discernment of the child would be carefully done in every individual case, as it should happen, courts' decisions would most likely be less severe for children above the legal age of liability. It may be argued that considering a child immature and without enough discernment to be held liable for his/her actions is tantamount to harming his/her self-esteem and confirming his/her role of wrongdoer. This argument overlooks the fact that a sentence holding a child liable only makes sense for him/her if it is proportionate. In fact,

it has been rightly argued that the principle of proportionality should ensure that penal dispositions should not be disproportionately lenient nor disproportionately severe, in particular in the field of juvenile justice (Fagan/ Zimring, 2000: xii; CRC, 2007: 16). Furthermore, not holding a child liable in a specific case does not mean that the child is irresponsible in general; it just means that the child should not be held responsible under those particular circumstances (Pepino, 1996: 50-51). It follows that emotional, mental and intellectual maturity should have an impact on the measure of a sentence and on legal responsibility in general. In this sense, age can be a mitigating circumstance or even an absolute bar to holding the defendant liable, depending on the specific circumstances.

#### **4. Legal Implications of the Contributions from Psychology**

As pointed out above, the 'vision of reality that is given to us by the empirical science is a partial vision', therefore empirical research 'cannot discharge us from deciding based on judgements of value' (Machado, 2004: 47-49). Still, we absolutely cannot disregard the importance of the findings in the field of psychology and of the concept of maturity mentioned until now. I will thus attempt to draw some relevant implications to the legal fields of criminal and tort liability of children.

##### **4.1. The Relationship between Moral and Legal Responsibility**

The most popular trend in moral philosophy claims that, while moral responsibility already answers the question of what it should be, with regard to legal responsibility one can distinguish what it is from what it should be. Therefore, according to many moral philosophers, priority should be given to the concept of moral responsibility in determining what legal responsibility should be (Helkama, 1981: 2). The exact way that this should happen, if it should happen at all, is of course debatable.

Moral philosophy most often starts from human free agency and considers agents only responsible insofar as they are free. Legal provisions do reflect this, insofar as agents are generally only liable when acting intentionally, recklessly or negligently (or in any other way corresponding to a category of mental element or consciousness that might exist in a given jurisdiction; see, for example, in the USA: Miller, 2001). This obviously does not apply to those situations where strict, corporate, or vicarious liability is at stake. These fields of liability are, in fact, continuously growing and some authors, such as Epstein, have even advocated a general system of strict liability to replace the traditional law of negligence (for a critique of this proposal, see Simmonds, 1992). The principle most commonly accepted and valid is still the one that responsibility requires some mental element. Even though the role of the mental element or mens rea is considerably smaller in tort law than in criminal law, this is understandable and justifiable, insofar as criminal law focuses on agents and tort law has to strike a balance between the interests of the victim, tortfeasor and society (Cane, 2000). In addition, even strict, corporate and vicarious liability can be considered compatible with the moral concept of responsibility, if we take into account that both moral and legal responsibility not only produce a judgement on individual conducts, but also consider the necessary societal distribution of risks and resources (Cane, 2002: 109, 163-164, and 175-177). Morality and law might not be so distant from each other after all.

Cane produced a very compelling analysis of the relationship between morality and law, which I wish to follow here and whose conclusions I share. Morality and law are, at first, quite different, namely in regards to the institutions that support them and the enforcement mechanisms that they have access to (Cane, 2002: 11 and 43). Still, 'morality and law are both parts of a rich tapestry of responsibility (and other normative) practices' (Cane, 2002: 13). Morality and law are symbiotic, especially as regards issues of responsibility, in the sense that morality may indicate what legal solution should be adopted as well as law can suggest the best moral reasoning. Suggesting the truthfulness of this point, it has been observed that normative concepts inevitably influence the design and interpretation of the results of the empirical research on children's development of concepts of justice. Research in this field has taken as a given the normative consideration regarding what is a valid conception of justice or not and which one is better or worse (Kristjánsson, 2003). Furthermore, the reasoning used to develop rules and principles in the field of legal responsibility is essentially the same as the one used in the field of moral responsibility (Cane, 2002: 16). It is also worthwhile noticing that distinctions existent in law, such as between tort and criminal law, also exist in moral thought (Cane, 2002: 51). Finally, both law and morality have social values and normative structures in common, as well as common functions (Cane, 2002: 54, 58).

The previous considerations do not mean that legal and moral responsibilities should be the same, since other elements and considerations might require them, under certain circumstances, to adopt different stances. Still, the degree of interactivity between law and morality is rarely correctly grasped and accepted. It is, therefore, not only justifiable but also recommendable to feed into law what morality says about responsibility and to draw the due consequences from the way moral judgement and responsibility evolve throughout the child development.

## **4.2. A Proposal**

Some kind of liability age framework can prove to be extremely useful, in order to provide a minimum degree of legal certainty to children, as well as to all actors of the legal system. Besides this, the existence of a framework of presumptive ages of responsibility is also legally and economically effective, since it precludes the necessity for the extremely costly individual assessment of capacity of discernment. In fact, the minimum age of criminal responsibility and the upper age limits for juvenile justice have been considered the core elements of a comprehensive juvenile justice policy by the Committee of the Rights of the Child (CRC, 2007: 4). Thus, setting impersonal standards is justifiable and to be recommended (Cane, 2002: 73).

As we have seen, children only start acquiring the capacity to make moral judgements based on intentions and motives after the age of seven. In addition, they reason at a pre-conventional level of moral development up to the age of at least nine. Setting a first limit at the age of nine allows us to include in it all children under Piaget's stage of subjective responsibility and Kohlberg's stages 1 and 2. Therefore, until this age children should undoubtedly be exempted from any kind of criminal or tort liability. From the age of ten years onwards, children gradually develop a moral reasoning more centred on others and on society as a whole (Kohlberg's stages 3 and 4). Furthermore, up to the age of thirteen children very often lack moral independence from adults and peers and up to the age of seventeen children's discernment is still developing (Kugelmass/Breznitz, 1967; Kugelmass/Breznitz, 1968; Breznitz/Kugelmass, 1967; Helkama, 1981). Consequently, during an intermediary age span between ten and seventeen (or at least sixteen) years of age some form of tort liability should be

allowed, but only if especially attenuated. Criminal liability should still be excluded, taking into account the extensively researched risk of the labelling effect that could take place in relation to such children. In addition, as Cane rightly observes, the special stigma carried by criminal law allows for special consideration for personal characteristics. At any rate, cases of children under these circumstances would be better handled through a different judicial system, separate from the one that administers criminal justice to adults. This is also in line with what has been proposed by the European Committee on Social Rights, the European Committee for the Prevention of Torture, and the Committee of the Rights of the Child (Hammaberg, 2007; CRC, 2007: 6-10), which have argued for a higher age of criminal responsibility and a separate juvenile justice system. In fact, the Committee of the Rights of the Child has urged all States Parties to the UNCRC to raise the minimum age of criminal responsibility in their legislation to sixteen years of age, or fourteen at the very least (CRC, 2007, 8-10). Furthermore, although the limitations of any juvenile justice system may request a selective use of its mechanisms, it can hardly be completely called into question (Fagan/ Zimring, 2000). Thirdly, and finally, a last stage between the age of seventeen and twenty-one is justified in light of the findings that cognitive and moral development continues into the early twenties. Therefore, young adults should enjoy some kind of privileged form of liability.

While the age groups proposed above are close to those adopted in the legislation of some jurisdictions, they are also quite far from those adopted in the legislation of many others. It is, of course, up to the legislature of each country to make its own judgement as regards the best solution to adopt. In any case, the age groups indicated could be used as mere presumptions of development, meaning that judges could rebut such presumptions and place the child in question at a higher or lower level of cognitive and moral development in comparison to the average child of the same age, consequently increasing or diminishing his/her degree of liability. Judges can obtain this information through the expert opinions of psychologists trained in the field of assessment of moral development. The methods of assessment of moral development are quite varied: psychoanalytic methods focus on emotion related elements (fear, shame, guilt, sadness, empathy, selfishness), social learning methods measure the occurrence and frequency of moral and immoral behaviours of the individual (through direct observation, interviews to third persons or submitting the individual to tests), cognitive developmental theorists use cognitive tests to assess the moral reasoning of individuals. The latter have been developed in time by several psychologists, such as Piaget, Damon, Kurtines/Pimm, Colby/Kohlberg, Rest, Gibbs, Basinger, and Fuller/ Widaman. Of these, those most commonly used and considered most reliable are the Kohlberg methodology, the Rest methodology (also known as Minnesota test or DIT – Defining Issues Test), as well as the Social Reflection Questionnaire created by Gibbs. The Kohlberg method is defended as the one which allows the deepest analysis of the moral reasoning, although it is also considered the most complex to carry out. In any case, the methods for assessment of moral development are instruments to assess the moral reasoning of individuals, not their moral value. Although this implies that people should not be treated differently depending on the stage of moral reasoning they fit into, this should not prevent us from drawing elements from the moral development theories to ground a proposal of legal framework which better protects the interests of children in the field of tort and criminal liability. In fact, as long as this use is done in the promotion of the well being of individuals and of justice, it is justified (Lourenço, 2002: 123-155).

Whatever the liability age framework may be, the correct reading of all relevant elements concerning the maturity and discernment of a child has to be integrated (Ceretti, 2002: 286-288). This means that the judge cannot exacerbate the value of individual elements; he/she has to afford due value to each of the relevant aspects: psychological and physical development of the child, his/her family life, social integration, and education, nature of the wrong-doing, procedural behaviour, cultural and ethnic origins and characteristics, etc. Secondly, the role and importance that each one of these elements



concretely has on the child's development have to be assessed. Thirdly, special attention has to be given to problematic conditions in the child's life (regarding personal, family or other social or environmental elements), and to the resources he/she has or can access (any means available to the child which can provide him/her with support in any sense). Fourthly, when determining the degree of fault or guilt of the child, one also has to take into account the cognitive and social competence of the child and the capacity of the child to determine his/her own behaviour in the face of an act that can be perceived as wrongful. This does not mean that these factors are not relevant in cases involving adults; it simply means that in cases involving children such factors deserve greater consideration, bearing in mind all that has been said above on child development. Finally, judges, experts and all other professionals who come into contact with children within the justice system context should receive specific training and work together in using all of the opportunities available to them to:

- Make the child aware of the meaning of his/her acts (help him/her interiorise and gain conscience of the negative value of his/her actions through on-going communication with reality);
- Promote responsibility as a connection between the norms and values of the child's culture and his/her expression through behaviour.

Indeed, these functions sit well with the importance of the development of empathy, something that is greatly valued by authors such as Higgins, Yeates/Selman, and Rawls. Developing empathy and other affection-related factors helps children, as well as any other human being, to expand their perspectives, allowing them to put themselves in others' positions, and, consequently, to better develop their moral judgements (Duska/Whelan, 1977: 106-107; Lourenço, 2002: 82). Furthermore, if judges and experts, working in a multi-disciplinary team in the interests of the child, perform their duties with this in mind, the fight against repressive tendencies can be more successful (Abruzzese, 1996: 69-75; Pepino, 1996: 53). This does not mean transforming the judge into a social worker; it simply means giving back to justice its primordial social function.

## 5. Conclusion

The criminal and private law aspects of justice affecting children are ever more intertwined, and should complement and strengthen each other. The aims of the proposal presented in part 4.2., above, remain the prevention of any further wrongdoings, the protection of the child, and helping him/her become a responsible member of society. The age limits for a child's criminal and tort liability, as crucial as they are to the life of any child, should be given very close attention. Juvenile justice systems have long since accorded great importance to the age and (lack of) maturity of young defendants, 'in recognition of their limited life experiences, undeveloped cognitive skills, and often limited capacities for self discipline and control.' (Fagan/Zimring, 2000: xii) General prevention and special positive prevention theories have already convincingly demonstrated that the wisest reaction to wrongdoings places emphasis on the relational-consensual, responsabilisation, educational and re-socialisation dimensions of public policies (Ceretti, 2002: 299). Nevertheless, only a trans-disciplinary perspective can hope to understand and contribute properly to improving the legal framework applicable to children, including all the rights and duties that it includes. This article represents an attempt to build a bridge between, on the one hand, the results produced by psychologists' research, and, on the other hand, legal concepts such as 'discernment' and 'capacity'. This can lead us to a better

understanding of where the age limits for criminal and tort liability should be set at and how we can better advocate their change.

Although age remains an indicator, as opposed to evidence, of cognitive and moral development, legal certainty and legal and economic efficiency favour the definition of an liability age framework. This framework is, of course, a simplification, since it could be further fine-tuned through an endless number of considerations, such as the convenient balance between the corrective, distributive and retributive functions of responsibility. Moreover, this framework needs to be used in a flexible and reasonable manner, taking into account all possibly relevant elements and the circumstances of each case in particular. It should be clear by now that, under certain circumstances, not considering a child liable for a wrongdoing that he/she has caused is not the result of any benevolent, voluntary or altruistic gesture on the part of the legislative or judicial power. It is merely the result of the due recognition of a natural fact: the ability to consider legal and social norms as criteria for moral behaviour and judgement progresses slowly and gradually throughout childhood and adolescence. Moreover, the recognition of such fact has been echoed in legal systems from the Roman XII Tables, throughout the middle ages, to modern times (Pepino, 1996: 49). Children only gain conscience of legal and social rules as determinants of responsibility at a more advanced stage of development (Helkama, 1981: 165). There are undeniable age-development trends in the acquisition of moral behaviour and judgement skills and competences. The exact evolution depends on the cognitive and role-taking stages attained by each individual. The psychopathologic paradigm does not provide a sufficient and accurate image of the child's discernment for legal purposes. On the contrary, a broader view is required to grasp the complexity of the elements which form part of the child's development and personality. A better solution has to be reached not only in name of 'the best interests of these children but also the short and long term interest of the whole society.' (CRC, 2007)

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