Giving effect to young people's right to effectively participate in criminal proceedings

Keywords: *young people, right to a fair trial, effective participation, unfit to plead, stay of proceedings*

Abstract: *Article 6 of the European Convention on Human Rights, guarantees the right to a fair trial, including the right of all defendants to participate effectively in their trial. Although psychiatrists and psychologists frequently report that defendants in the youth court are 'unfit to plead', this concept has no formal application in the youth court. This article will examine how the criminal justice system responds to young people who are not capable of effectively participating in their own criminal proceedings as a result of their youth and immaturity inhibiting their understanding and participation in the trial proceedings.*

Introduction

The very purpose of the criminal law, according to Duff, is to 'identify and declare the public wrongfulness of certain kinds of moral wrongdoing, and to provide for an appropriate public response.'[1] As members of society, we are all answerable to the community in relation to those wrongs that 'violate values on which the civic enterprise depends and display a lack of the respect and concern that citizens owe to each other as fellow citizens.'[2] To put a person on trial is to call them to answer for their wrong-doing,[3] accordingly the criminal trial

[1] RA Duff *Answering for Crime. Responsibility and Liability in the Criminal Law* (Hart, 2007) at p. 47.
[2] RA Duff 'Toward a Theory of Criminal Law' (2010) 84 *Proceedings of the Aristotelian Society* (Supp. Vol.) 1.
[3] RA Duff 'Blame, moral standing and the legitimacy of the criminal trial' (2010) 23(2) *Ratio* 123.

represents 'a two-way moral conversation between the defendant and the court.'[4] The right to a fair trial, as protected by Article 6 of the European Convention on Human Rights, includes the right of all defendants to participate effectively in their trial.[5] The right to effective participation in a criminal trial is 'implicit in the very notion of an adversarial procedure'[6] and is reflected in the specific rights of the accused listed in Article 6(3) of the European Convention – 'to defend himself in person', 'to examine or have examined witnesses', and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.[7]

Duff acknowledged that some citizens may not be competent to understand or participate in a criminal trial, as such these citizens cannot be called to answer for their conduct.[8] In terms of vulnerable defendants, such as young people, in order for the right to effectively participate to be satisfied, consideration must be given to the accused's vulnerability and steps taken to ensure that the vulnerable defendant can understand and participate in the criminal proceedings. This article will examine what options and opportunities are available to young people who are not capable of effectively participating in their own criminal proceedings as a result of their youth and immaturity inhibiting their understanding. The article will consider the extent to which these problematic options and opportunities infringe the young person's fundamental right to a fair trial. This analysis is particularly timely following the recent decision in *R(P) v Derby Youth Court*[9] which restricted the circumstances in which a youth

[4] H Howard, 'Unfitness to plead and the vulnerable defendant: an examination of the Law Commission's proposals for a new capacity test' (2011) 75(3) *Journal of Criminal Law* 194; H Howard, MB Bowen 'Unfitness to plead and the overlap with doli incapax: an examination of the Law Commission's proposals for a new capacity test', (2011) 75(5) *Journal of Criminal Law* 380.
[5] *Stanford v United Kingdom* [1994] ECHR 16757/90 at [22].
[6] Ibid. at [26].
[7] Ibid.
[8] Ibid.
[9] [2015] EWHC 573 (Admin).

with significant participation difficulties can have fitness to plead issues considered by the court.

Fitness to plead

A young person's right to effectively participate in criminal proceedings recognises the young person as an independent holder of rights and reflects a deeper appreciation of the autonomy of the child. MacKenzie defines autonomy in the following terms: '[t]he principle of respect for autonomy … gives rise to an obligation to try to empathically engage with the other's experience, to imagine what the other person's situation is like for her, given her cares, values and concerns.'[10] Autonomy connotes the capacity for 'ethical evaluation and self-control'[11] as well as the competency for self-rule or self-government, which is based on personal rationale, deliberations, choices, and motivations, and, more importantly, freedom from external manipulations, distortions, and coercions.[12] Autonomy, in the context of effective participation in criminal proceedings, is not simply a matter of comprehension, it is also a matter of the child's ability to make evaluative judgments.[13] This ability to make a decision and engage in practical reasoning requires the combination of cognitive ability (to understand the nature and likely consequences of an action) and the evaluative ability to appraise the action and consequences in light of the decision-maker's own preferences, desires, goals, values and standards.[14]

[10] C MacKenzie 'Relational autonomy, normative authority and perfectionism' (2008) 39 *J Soc Phil* 512
[11] A Franklin-Hall 'On Becoming an Adult: Autonomy and the Moral Relevance of Life's Stages' (2013) 63 *Philosophical Quarterly* 223, 251
[12] I Kant 'Grounding for the Metaphysics of Morals,' in *Ethical Philosophy*, trans. James W Ellington (Hackett Publishing Co., 1785/1983)
[13] J Herring and J Wall Autonomy, capacity and vulnerable adults: filling the gaps in the Mental Capacity Act', (2015) 35(4) *Legal Studies* 698, at p. 711
[14] Ibid, at p. 704. Also A Cronin 'Transplants save lives, defending the double veto does not: a reply to Wilkinson' (2007) 33 *Journal of Medical Ethics* 219, p. 200

Bonnie and Grisso identified two important concepts that are critical for conceptualizing the effective participation of young people in a criminal trial. The first is competence to assist counsel, which includes the capacity of the defendant to communicate with counsel on their own behalf, to understand the charges and the purpose of criminal court proceedings, and to appreciate their own role as a defendant in these proceedings. The second fundamental concept is decisional competence, which includes the capacity of a defendant to understand and appreciate the significance of the important decisions that must be made during the adjudication process and to be able to engage rationally in that decision-making process. They conclude that failing to attend to developmental differences relevant to decision-making may result in unfair jeopardy for youths whose developmental incapacities impair their ability to participate in their defence.[15]

Sections 4 and 4A of the Criminal Procedure (Insanity) Act 1964, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004, provide the procedures for determining whether an accused person is unfit to plead. These procedures apply to trial on indictment only, that is Crown Court cases only. There is no statutory provision for the legal test of whether or not an accused person is unfit to plead. Instead the *Pritchard*[16] test has been developed by the common law. The *Pritchard* test requires that the accused must be able to: plead to the indictment, understand the course of the proceedings, instruct a lawyer, challenge a juror and understand the evidence. If the accused is unable to do any one of these five things then they are unfit to plead. If the accused is under such a disability, then section 4A provides for a

[15] R J Bonnie & T Grisso 'Adjudicative competence and youthful offenders', In T Grisso & R G Schwartz (eds.), *Youth on trial: A developmental perspective on juvenile justice* (University of Chicago Press, 2000), at p. 88.

[16] (1836) 7 C & P 303. The *Pritchard* test was approved by the Court of Appeal in *Friend (No 1)* [1997] 1 WLR 1433.

hearing as to the facts of the case aimed at ascertaining whether or not the accused 'did the act or made the omission' with which they have been charged.

The *Pritchard* test sets quite a high threshold for finding an accused unfit to plead and is usually reserved only for the most severely disturbed of defendants.[17] The question of fitness will depend on the defendant's ability to understand the difference between guilty and not guilty pleas, to follow the evidence in the proceedings, instruct counsel and challenge jurors, although he need not necessarily be able to act in his own best interests. Merely being considered 'highly abnormal' or 'incapable of acting in his own best interests'[18] or suffering a 'high degree of mental abnormality'[19] are not necessarily sufficient grounds to be considered unfit to plead. An understanding on the part of the defendant that what he has done was wrong is not part of the legal test for unfitness to plead, it merely requires that the defendant has a rudimentary understanding of the trial process.[20] There is no statutory requirement that the accused's capacity to effectively participate in the criminal proceedings be tested as part of test for unfitness to stand trial. The *Pritchard* test also fails to cover important aspects of effective participation in a trial, for example the ability to give evidence, and therefore has the practical effect of limiting the number of people who are found to be unfit to plead to extreme cases of cognitive deficiency.[21] The unfitness test offers no consideration of the degree of maturity of cognitive abilities or the development of social-emotional capacities, factors which directly impact upon the young persons' ability to use information to make sound judgments and decisions. The Mental Health Act Commission has raised concerns that

[17] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts 'Fitness to plead and competence to stand trial: a systematic review of the constructs and their application' (2008) 19(4) *Journal of Forensic Psychiatry and Psychology* 576, at 585
[18] *R v Robertson* [1968] 52 Cr App R 690
[19] *R v Berry* [1977] 66 Cr App R 156
[20] WJ Brookbanks and RD Mackay 'Decisional Competence and 'Best Interests': Establishing the Threshold for Fitness to Stand Trial' (2010) 12(2) *Otago Law Review* 265, at 269
[21] RD Mackay, *Mental Condition Defences in the Criminal Law* (Clarendon, 1995) at p. 216

if the *Pritchard* test 'is interpreted literally as a test of cognition it will inevitably require a high level of disability at the extreme end of the spectrum of 'psycho-legal ability'.[22] Therefore it is possible that persons without mental capacity to participate effectively in criminal proceedings could still progress to trial',[23] which could lead to a breach of the Article 6 right to a fair trial.

Despite these limitations the concept of 'fitness to plead' is one of the few ways in which an accused's mental competence to participate effectively in their criminal trial can potentially be assessed. However the procedure in the 1964 Act for unfitness to plead presently only has application to the Crown Court. It has been held that the Crown Court procedure is 'entirely inappropriate' for the determination of issues in the summary jurisdiction.[24] Where an adult defendant who has participation difficulties faces a charge that is triable either way,[25] it is open to the magistrates' court to decline jurisdiction, or the adult defendant to choose Crown Court trial. In this way an adult defendant can be sent for trial to the Crown Court, where fitness to plead issues can be considered. By contrast, the circumstances in which a youth with significant participation difficulties might be sent to the Crown Court for trial are very much more restricted. This is particularly so following the decision in *R(P) v Derby Youth Court*.[26] *R(P) v Derby Youth Court* involved a 13 year old boy who had been charged with two offences of robbery, one attempted robbery, possession of an offensive weapon, and possession of a bladed article. An up-to-date psychiatric report was presented to the youth court which confirmed that the claimant's cognitive function was such that he would not be

[22] P Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts 'Fitness to plead and competence to stand trial: a systematic review of the constructs and their application' (2008) 19(4) *Journal of Forensic Psychiatry and Psychology* 576.
[23] Mental Health Act Commission *In place of fear? Eleventh Biennial Report* (MHA, 2005), at [5.19].
[24] *R (P) v Barking Youth Court* [2002] EWHC 734 (Admin) at [8].
[25] under s 51 of the Crime and Disorder Act 1998, which now covers the sending for trial to the Crown Court of both either-way and indictable-only offences.
[26] [2015] EWHC 573 (Admin).

able to follow the trial proceedings and would not be able to give proper instructions. The report stated that the applicant had a mental age much younger than his actual age and showed indications of autism spectrum disorder and had significant learning, cognition and other issues. The youth court exercised its powers under section 51A(3) of the Crime and Disorder Act 1998 to transfer the case to the Crown Court, having taken the view that a sentence of over two years' detention under the powers available to the Crown Court under the Powers of the Criminal Courts (Sentencing) Act 2000 ought to be considered.

Davis LJ held that it would not be appropriate to send a child or young person who was 'unfit to plead' to the Crown Court for trial under section 51A(3)(b) of the Crime and Disorder Act 1998. The court concluded that because of his unfitness, the defendant would not be 'found guilty' of the qualifying offences with which he was charged. The case was accordingly returned to the youth court for the charges to be dealt with in accordance with the very limited powers of the youth court to consider issues relating to effective participation. The court concluded that the correct procedure to follow in cases before the youth court where the issue of the defendant's fitness to plead or capacity to understand the proceedings was raised, is provided for in section 37(3) of the Mental Health Act 1983 read together with section 11(2) of the Powers of Criminal Courts (Sentencing) Act 2000. If the youth court are of the view that P ought not to face trial by reason of his disability, the court should proceed to decide whether he had done the acts alleged and, if satisfied that he had, should then consider medical evidence and all the circumstances of the case before deciding whether an order under section 37(2) of the Mental Health Act 1983 was appropriate, that is a hospital order or, in the case of a defendant aged 16 or over, a guardianship order or no order.[27]

[27] *R (P) v Barking Youth Court* [2002] EWHC 734 (Admin).

An adult facing an either way charge in the magistrates' court is entitled to elect Crown Court trial, and engage unfitness to plead procedures in the Crown Court. However, following the case of *R(P) v Derby Youth Court* the availability of Crown Court unfitness to plead procedures for youths charged with comparable offences is much more limited, despite the evidence in this case regarding the defendant's inability to participate effectively. Procedures for considering fitness to stand trial, and the consequences which follow from a finding of unfitness, have existed in the Crown Court for decades. There is no logical reason why it should continue to be denied to the youth court. Because of the limited provision for addressing such issues in the summary jurisdiction, it is unclear what will trigger an enquiry into a defendant's capacity for effective participation.

Protecting young people who cannot effectively participate

Such a sparing use of unfitness to plead is troubling in light of the Prison Reform Trust's findings that young defendants often do not understand legal proceedings or the language used by lawyers, they report feeling intimidated and isolated in court and may not receive a proper explanation of what has happened until after a hearing is over.[28] Children lack the ability to concentrate for long periods, consequently it may be difficult for them to participate effectively in criminal proceedings. As a result the child may not be able to give instructions to his lawyer and may not be in a position to make vital decisions.[29] Cleghorn et al. found that young people often feel anxious and nervous before and during court proceedings, and feel

[28] J Jacobson and J Talbot *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (PRT, 2009). Also H Neal, A Hagell and L Brazier *Young Offenders' Perceptions of their Experiences in the Criminal Justice System* (Polict Research Bureau, 2002); M Botley, B Jinks and C Metson *Young people's views and experiences of the Youth Justice System* (CWDC, 2010).
[29] T Croft *The Criminal Responsibility of Children and Young Persons* (Ashgate,t 2002) at p. 78.

unsupported and confused throughout the proceedings.[30] They also feel frustration that the courts seem rarely to understand the context in which their offences were committed, including the pressures facing them. The UN Committee on the Rights of the Child have also expressed concern that many children feel they are not listened to by judges and other professionals working with children in conflict with the law.[31] Such feelings of bewilderment can lead to young people becoming passive parties in the court process unable to understand the impact the proceedings will have on their lives, thus undermining the rehabilitative function of the youth court.[32] The *Youth Proceedings Advocacy Review* report similarly highlights that the highly formal language and nature of court proceedings pose significant barriers to young defendants' understanding of, and engagement with, the criminal trial process.[33] The young defendants interviewed reported that advocates could be difficult to understand in the context of a court process that, more generally, was often regarded as highly confusing. Many advocates were found to lack knowledge of youth justice law, procedures and provisions and struggle to communicate well with young defendants in an age-appropriate and effective manner. Under section 6 of the Human Rights Act 1998, courts, as a public authority, have a duty to protect the rights of all involved in the case, including a young person's right to effectively participate in their own criminal proceedings, and to consider any evidence regarding the defendant's immaturity and the circumstances of the offence. However the young defendant's in the *Youth Proceedings Advocacy Review* reported inadequate, inconsistent and often ad hoc approaches to assessing their needs and vulnerabilities, with the result that in many instances specific needs were not identified by the

[30] N Cleghorn, R Kinsella, C McNaughton Nicholls *Engaging with the views of young people with experience of the youth justice system* (Paul Hamlyn Foundation, 2011).
[31] United Nations Committee on the Rights of the Child *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (UNCRC, 2016), para 29
[32] C Driver, E.M. Brank 'Juveniles' Knowledge of the Court Process: Results from Instruction from an Electronic Source' (2009) 27 *Behavioural Sciences & the Law* 627
[33] A Wigzel, A Kirby & J Jacobson *The Youth Proceedings Advocacy Review: Final Report* (Bar Standards Board, 2015).

time of the court appearance. This can lead to sentencing decisions that can further entrench young people in the criminal justice system.[34]

Adults in the course of a criminal trial can experience similar confusion and fear, however the developmental characteristics of young people means they are more likely to suffer from deficits relevant to effective participation and may be further disadvantaged by virtue of their immaturity.[35] Grisso *et al* conducted the most comprehensive study of the influence of developmental maturity on the adjudicative competence of young people.[36] They used a large sample of young people in both detention and community settings in multiple geographic regions in the United States. Their findings suggest that young people aged 15 years old and younger were significantly more impaired than 16 and 17-year-olds in abilities related to their competence to participate in a criminal trial. 33% of the 11 to 13 year olds and 20% of the 14 to 15 year olds were as impaired in capacities relevant to effective adjudicative participation as seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians. Adolescents with lower IQs showed significant impairment in competency abilities. Young people aged 15 years and younger were significantly more likely than older youths and adults to make decisions associated with higher risks. Such young people were significantly less likely to consider the long-term consequences of their choices. It has also been found that the stress caused by being a defendant in criminal proceedings has a greater adverse effect upon reasoning abilities for young people than adults[37] which is a significant finding given the heightened stress that many young defendants experience in court

[34] R Deuchar, M Sapouna ‘‘Its harder to go to court yourself because you don’t really know what to expect’: Reducing the negative effects of court exposure on young people – Findings from an Evaluation in Scotland’ (2015) *Youth Justice* 1, at p. 13.
[35] J O’Leary, S O’Toole, BD Watt ‘Exploring juvenile fitness for trial in Queensland’, (2013) 20(6) *Psychiatry, Psychology and Law* 853
[36] T Grisso, L Steinberg, JL Woolard, E Cauffman, ES Scott, S Graham ‘Juveniles competence to stand trial: A comparison of adolescents and adults capacities as trial defendants’ (2003) 27 *Law and Human Behavior* 333.
[37] SB Johnson, VC Jones ‘Adolescent development and risk of injury: using developmental science to improve interventions’ (2011) 17(1) *Injury Prevention* 54; J O’Leary, S O’Toole, BD Watt ‘Exploring juvenile fitness for trial in Queensland’, (2013) 20(6) *Psychiatry, Psychology and Law* 853

proceedings. Baroness Hale acknowledged in *R (on the application of D) v Camberwell Green Youth Court* that young people appearing as defendants in the youth court are:

> "often amongst the most disadvantaged and the least able to give a good account of themselves. They lack the support and guidance of responsible parents. They lack the support of the local social services authority. They lack basic educational and literacy skills. They lack emotional and social maturity. They often have the experience of violence or other abuse within the home."[38]

These problems are exacerbated by the significant proportion of defendants who are unrepresented in the lower courts.[39] As seen above, even where a defendant is represented, identification of participation difficulties can still be an issue. Most summary proceedings are of a simpler nature and, under recent efficiency initiatives in the summary jurisdiction, there is a focus on delivering 'swift' justice.[40] This means that there is less opportunity for a defendant's representatives to gain an understanding of, and raise as an issue, a defendant's lack of capacity for effective participation.

Fitness to plead is a historical legal concept which has evolved very little since its appearance in case law.[41] This concept could be reformed and reframed as a test of a person's spectrum of ability to effectively participate in a criminal trial which embraces both the foundational competence to assist counsel and the contextualised concept of decisional ability which explicitly acknowledges the defendant's decisional competence and best interests.[42] Only by

[38] [2005] UKHL 4, para 56
[39] K Souza and V Kemp, *Study of defendants in Magistrates' Courts* (Legal Services Commission, 2009) at p 8.
[40] Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System*, (Cm 8388, 2012) (MoJ, 2012), at [81]; Ministry of Justice, *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System* (MoJ, 2013) at p. 16; J McEwan, 'Vulnerable Defendants and the Fairness of Trials' [2013] 2 *CLR* 100, at p. 101; Law Commission *Unfitness to Plead Volume 1: Report* Law Com 364 (Law Commission, 2016) at para 7.31.
[41] T Exworthy 'UK Perspective on Competency to Stand Trial' (2006) 34(4) *Journal of the American Academy of Psychiatry and the Law* 466
[42] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts 'Reformulating fitness to plead: a qualitative study' (2009) 20(6) *Journal of Forensic Psychiatry and Psychology* 815.

retaining some recognition of the differences in capacity and capabilities of children and adults, can the court ensure that the criminal trial, including youth court proceedings, is consistent with fundamental principles of fairness and due process. The above analysis of the evidence demonstrates that children are not naturally equipped with an ability to understand the wrongfulness of criminal acts and participate in criminal proceedings but develop this gradually, at different and inconsistent rates. It is therefore essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that further steps are taken to promote his ability to understand and participate in the proceedings. The Law Commission has emphasised that effective participation requires more than just the passive presence of the accused, but also active involvement on their part in their trial which would 'in practice require the accused to be able to make certain decisions in this regard.' [43] In its recent report *Unfitness to Plead Volume 1: Report,*`[44] the Law Commission recommended that a statutory framework should be developed in the youth court for determining whether a defendant lacks the capacity to participate effectively in a trial.

As it currently stands the criminal justice system in England currently assumes that there are no psychological differences between child and adult offenders that are important to effective participation in criminal proceedings. Such an assumption overlooks the state's obligations to develop social, political and legal institutions that foster the autonomy and the capacity for self-determination of its youngest citizens. The right of a child to be able to effectively participate in their criminal proceedings, as protected by Article 6 of the European Convention on Human Rights is also reflected in the United Nations Convention on the Rights of the Child. This UN Convention was signed by the UN General Assembly in 1989

[43] Law Commission *Unfitness to Plead Consultation Paper Part 2 The Existing Law* (Law Commission, 2010) at [2.89].
[44] Law Commission *Unfitness to Plead Volume 1: Report* Law Com 364 (Law Commission, 2016).

and ratified by the UK government in 1991. The UN Convention promotes the view that all children, including those involved in offending behaviour, are invested with important rights, including the right to have their best interests as a primary consideration in all court actions involving them (Article 3) and the right of young people accused of engaging in criminal behaviour to be treated in a manner consistent with the promotion of the 'child's sense of dignity and worth … and which takes into account the child's age' (Article 40). Compliance with Article 40 of the Convention requires that criminal proceedings should consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for their behaviour. Where judicial proceedings are necessary, procedures should be within the context of a specific system for children and should be appropriate to the child's age and developmental capacity. The child should be able to participate effectively in such proceedings, as is required by Article 40(2)(b)(iv) of the UN Convention on the Rights of the Child. The right to participate in decision-making is a core right under Article 12 of the Convention which requires States Parties to:

> assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

This right has been identified by the Committee on the Rights of the Child as a general principle with which all Convention provisions must be read.[45] Article 14 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 stresses the need for youth criminal proceedings to be conducted in an atmosphere of understanding to allow the child to participate and to express herself freely, taking into account her age and maturity. Therefore according to the UN Convention on the

[45] United Nations Committee on the Rights of the Child *General Guidelines regarding the form and contents of Periodic Reports to be submitted by States Parties under Article 44, paragraph 1(b) of the Convention* (UNCRC, 1996).

Rights of the Child and the Beijing Rules, a fair trial requires that the child accused of having infringed the penal law be able to effectively participate in the trial, and consequently needs to comprehend the charges, and possible consequences and penalties, in order to direct their legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measures to be imposed.

In General Comment No.10 on *Children's Rights in Juvenile Justice* (2007) the UN Committee on the Rights of the Child encouraged the development of juvenile justice policies that ensure respect for children's rights, and emphasise the principle that states must safeguard the child's dignity and the child's right to express themselves at 'every point of the justice process'.[46] Furthermore General Comment No.12 on *The Right of the Child to be Heard* (2009)[47] recommends that the context in which a child exercises his right to be heard has to be enabling and encouraging, so that he can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what he has decided to communicate.[48] A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his age. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy and appropriately trained staff.[49] In General Comment No 7 *Implementing child rights in early childhood* (2005) the UN Committee on the rights of the child stressed that the Convention 'requires that children, including the very youngest children, be respected as persons in their own right' and that listening to young people's views represents recognition of, and respect

[46] United Nations Committee on the Rights of the Child *General Comment No. 10: Children's Rights in Juvenile Justice* CRC/C/GC/10 (UNCRC, 2007).
[47] United Nations Committee on the Rights of the Child *General Comment No. 12: The right of the child to be heard* CRC/C/GC/12 (UNCRC, 2009)
[48] Ibid, at para 42
[49] Ibid., at para 34

for, the child's separate identity.[50] These General Comments outline the importance of the concept of legal capacity for the exercise of civil, political, economic, social and cultural rights and how ignoring the issue of legal capacity encourages the denial of such rights to young people. The United Nations Convention can be seen as a watershed in conceptualising and responding to young people who are struggling to effectively participate in their own criminal proceedings as it reinforces and reaffirms the importance of enforceable rights and entitlements.

The view that effective participation goes beyond the cognitive abilities of the accused is also reflected in the judgments of the European Court of Human Rights in *SC v United Kingdom*[51] and *V v the United Kingdom* and *T v the United Kingdom*.[52] In these cases the European Court of Human Rights acknowledged that when a child faces prosecution there is a risk that he will be unable to participate effectively because of his young age and limited intellectual capacity. In *SC v UK* the applicant was 11 years old when he was convicted for attempted robbery. There was evidence that he had limited intellectual ability, a poor attention span and would be unlikely to follow the proceedings. The psychiatrist who examined him had concluded that, while he was fit to enter a plea, the court would have to ensure that the procedure was explained to him in terms that he could understand. The European Court of Human Rights held that effective participation required that the child is dealt with in a manner which takes full account of his or her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his or her ability to understand and participate, including taking appropriate steps to enable a youth with learning difficulties or

[50] United Nations Committee on the Rights of the Child, *General Comment No 7: Implementing child rights in early childhood* CRC/C/GC/7/Rev.1 (UNCRC, 2005) at para 5.
[51] [2004] 40 EHRR 121.
[52] [2000] 30 EHRR 121.

mental impairment to participate in their trial.[53] The European Court of Human Rights, however, found that *SC* was not able to participate effectively in the proceedings and therefore was denied a fair trial. The European Court accepted that a child defendant, as with an adult, did not need to be able to understand every point of law or evidential detail. Neither youth nor limited intellectual capacity alone necessarily leads to breach of the Article 6 right to effectively participate in a trial. However, the court stressed that the child should have a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. The defendant should be able to follow what is said by the prosecution witnesses and to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.[54]

Article 6 of the European Convention on Human Rights and the principle of effective participation were also considered by the European Court of Human Rights in the joint cases of *V v the United Kingdom* and *T v the United Kingdom*.[55] These cases involved Jon Venables and Robert Thompson, two boys convicted of murdering toddler James Bulger in 1993. The European Court of Human Rights determined that the trial of a child aged as young as 11 does not in itself give rise to a breach of the European Convention, as long as effective participation is ensured. The European Court of Human Rights in *V v UK* and *T v UK* held that Article 6 had been breached because of the manner in which the Crown Court trial was conducted, despite court procedures having been modified, to a certain extent, given the defendants' youth. In relation to Thompson, there was psychiatric evidence that he was suffering from post-traumatic stress disorder and that this, combined with the lack of

[53] *R on the application of TP v West London Youth Court* [2005] EWHC 2583 Admin.
[54] *SC v United Kingdom* (2005) 40 EHRR 10 at [29].
[55] [2000] 30 EHRR 121.

therapeutic work after the offence, meant that he had limited ability to instruct his lawyers and to testify in his own defence. In Venables' case, there was evidence that he had the emotional maturity of a younger child, that he was too traumatised and intimidated to give his account of events to his lawyers or the court and that he was not able to follow or understand the proceedings. The European Court of Human Rights were particularly struck by the paradox that children who were deemed to have sufficient mental capacity to engage their criminal responsibility and participate effectively in a Crown Court trial had a play-area made available to them during adjournments. Because of the intense media attention, the public scrutiny and the defendants' 'immaturity and disturbed emotional state', the European Court considered that Thompson and Venables were unable to participate effectively in their trial in contravention of Article 6.[56]

As a result of these European Court rulings the trial of young people in the Crown Court is governed by the *Consolidated Criminal Practice Direction 2007*. The overriding principle of the Practice Direction is that the trial process should not expose young people to avoidable intimidation, humiliation or distress and that regard should be had to the welfare principle as stated in section 44 of the Children and Young Persons Act 1933. The welfare principle's main virtue is that it requires a decision made with respect to a child to be justified from the point of view of a judgment about the child's interests, objective immaturity, vulnerability and comparative lack of control over their immediate surroundings.[57] Significantly the Practice Direction requires the court to take account of the defendant's age and maturity and of their ability to understand what is going on when making arrangements for trial. The language used should be comprehensible by the young person, robes and wigs should not be worn and there should be no recognizable police presence in the courtroom.

[56] *T & V v United Kingdom* (2000) 30 EHRR 121 at [85].
[57] R Arthur 'Protecting the best interests of the child: A comparative analysis of the youth justice systems in Ireland, England and Scotland' (2010) 18(2) *International Journal of Children's Rights* 217.

Despite these accommodations, the youth justice system in England and Wales assumes that in the context of criminal proceedings, young people from the age of 10 are capable of participating meaningfully in any court case involving them, have a rational understanding of court proceedings, are able to follow what is said by prosecution witnesses, can explain their version of events, point out any statements with which they disagree, make the court aware of any facts which should be put forward in their defence and have a broad understanding of the nature of the trial process and of what is at stake, including the significance of any penalty that may be imposed.[58] For many young people in conflict with this law, this standard will simply not be achievable. Most other countries in Europe have accommodated this reality by setting their age of criminal responsibility much higher than it is in England and Wales and thereby shielding the youngest children from the possibility of being convicted in criminal proceedings but without the ability to effectively participate in those proceedings. The United Nations Committee on the Rights of Child, in its most recent report on the UK's compliance with the Convention on the Rights of the Child, once again recommended that the minimum age of criminal responsibility be raised in accordance with acceptable international standards.[59] In light of the low age of criminal responsibility in England and Wales, the absence of a statutory procedure to consider a young defendant's capacity for effective participation represents a fundamental deficiency of the youth justice system. When psychiatrists and psychologists report that a defendant in the youth court is 'unfit to plead' this concept has no formal application in the youth court. The problematic absence of an unfitness to plead framework in the youth court is more marked than in the adult magistrates' court because of the seriousness of offences which are tried in the youth court. This is

[58] As required by *SC v United Kingdom* (2005) 40 EHRR 10 at [29], Article 6 of the European Convention on Human Rights and the various United Nations provisions discussed previously.
[59] United Nations Committee on the Rights of the Child *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (UNCRC, 2016), para 80

particularly so because of the limited scope for children and young people charged with more serious offences to engage the unfitness to plead framework available in the Crown Court and the limited mechanisms available to the youth court to consider the young person's competence to effectively participate in their own criminal proceedings. The next sections will unpack these mechanisms and consider their utility in criminal trials involving young people who are struggling to effectively participate as a result of their youth and immaturity.

The Mental Health Act 1983

Where effective participation issues arise, in the absence of any other provision, section 37(3) of the Mental Health Act 1983 and section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000 potentially represent mechanisms to protect a young defendant from conviction. Section 37(3) of the Mental Health Act 1983 empowers the magistrates' court, including the youth court, to make a hospital order (or a guardianship order in respect of a defendant aged 16 or over), without convicting the defendant if satisfied that the defendant 'did the act or made the omission charged'. Such orders can only be made if the requirements of section 37(2) of the 1983 Act are satisfied by the evidence of two registered medical practitioners, namely that the defendant suffers from a 'mental disorder' which makes treatment in hospital, or supervision under a guardianship order, appropriate, and that such an order would be the most suitable method of disposing of the case. Section 11 of the 2000 Act empowers the youth court to adjourn proceedings, provided they are satisfied the child committed the criminal offences they have been charged with, and order a medical report on a defendant's physical or mental condition.

The focus of section 37(3) of the Mental Health Act is not on effective participation in trial, but on whether the defendant has a 'mental disorder' and on his or her suitability for a

hospital or guardianship order. Having a mental disorder within the meaning of section 1 of the Mental Health Act, particularly one which is susceptible to treatment, is not always an effective identifier of those who are unable to participate effectively in trial. For example, section 37(3) has no application to a young defendant with a learning disability, unless that disability is associated with 'abnormally aggressive or seriously irresponsible conduct'.[60] Section 37(3) also has no application to, nor offers any protection from conviction for, young defendants whose difficulties may arise as a result of communication impairment or some other difficulty falling outside the statutory definition of 'mental disorder'. This is particularly concerning given the disproportionately high rate of communication impairment and learning disability amongst young people who engage in offending behaviour. Research suggests that that 60% of children in the criminal justice system have significant speech, language or communication difficulties and 30% have a learning disability.[61] The association between speech and language disorders and behaviour difficulties is well established.[62] Communication problems tend to be labelled as behaviour problems and difficulties in understanding make young people very vulnerable in relation to education.[63] In comparison to the general and adult population, young offenders exhibit much higher rates of: learning disability;[64] post-traumatic stress disorder;[65] attention deficit hyperactivity disorder (ADHD);[66] and other psychiatric disorders, notably conduct disorder.[67]

[60] Mental Health Act 1983, s1(2A).

[61] K Bryan, J Freer, and C Furlong 'Language and communication difficulties in juvenile offenders', (2007) 42(5) *International Journal of Language and Communication Disorders* 505; Department of Health *Healthy children, safer communities* (Department of Health, 2009); N Hughes, H Williams, P Chitsabesan, R Davies and L Mounce *Nobody made the connection: the prevalence of Neurodisabillity in young people who offend* (Office of the Children's Commissioner, 2012); E Vizard *How do we know if young defendants are developmentally fit to plead to criminal charges: the evidence base* (Michael Sieff Foundation, 2009).

[62] E Humber and PC Snow 'The language processing and production skills of juvenile offenders: a pilot investigation' (2001) 8(1) *Psychiatry, Psychology and Law* 1; BJ Tomblin, X Zhang, P Buckwater and H Catts 'The association of reading disability, behavioural disorders and language impairment among second-grade children' (2000) 41(4) *Journal of child psychology and psychiatry* 473.

[63] SJ Hooper, JE Roberts, SA Zeisel and M Poe 'Core language predictors of behavioural functioning in early elementary school children: Concurrent and longitudinal findings' (2003) 29(1) *Behavioral Disorders* 10.

[64] N Loucks, *No one knows: Offenders with learning difficulties and learning disabilities: The prevalence and associated needs of offenders with learning difficulties and learning disabilites* (Prison Reform Trust, 2007); M Rutter and H Giller *Juvenile Delinquency: trends and perspectives* (Penguin, 1983); M Rutter, H Giller and A

The narrow focus of section 37(3) of the Mental Health Act 1983 on defendants who have a 'mental disorder', as defined by section 1 of the 1983 Act, significantly limits the availability of the provision and provides no test for identifying when a defendant in the magistrates' court, including the youth court, should be shielded from conviction by virtue of his or her participatory difficulties. Little account is taken of the fact that a child might be unable to effectively participate without any such impairment but simply on account of immaturity or the unusual nature of their upbringing. In *DPP v P*[68] Lady Justice Smith acknowledged the apparent deficiency in the procedures provided for by the 1983 Act and the 2000 Act in so far as the youth court is concerned,

> It seems to me that, although the provisions of section 11(1) [of the 2000 Act] and section 37(3) [of the 1983 Act] may provide a complete statutory framework for the determination of 'all the issues that arise in cases of defendants who are or may be mentally ill or suffering from severe mental impairment', they do not provide the solution to all the problems which may confront a youth court before which a young person of doubtful capacity appears.[69]

Moreover section 37(3) of the 1983 Act and section 11 of the 2000 Act only apply to imprisonable summary offences. There is no statutory procedure at all for dealing with a defendant who is unable to participate effectively in the proceedings, but who is charged with a non-imprisonable offence.

Hagell *Antisocial behaviour by young people* (Cambridge University Press, 1998); DJ West and DP Farrington *The Delinquent Way of Life. Third Report of the Cambridge Study in Delinquent Development* (Heinemann, 1977).

[65] H Steiner, IG Garcia and Z Mathews 'Post traumatic stress disorder in incarcerated juvenile delinquents' (1997) 36(3) *Journal of the American Academy of Child Psychology and Psychiatry* 357.

[66] AE Kazdin 'Adolescent development, mental disorders and decision making of delinquent youths' in T Grisso and RG Shwartz (eds.) *Youth on Trial: A Developmental Perspective on Juvenile Justice* (Chicago University Press, 2000), at p. 33.

[67] Royal College of Psychiatrists, *Child Defendants* (Occasional paper OP56) (Royal College of Psychiatrists, 2006), at p. 50.

[68] *DPP v P* [2007] EWHC 946 (Admin), at [53].

[69] *Crown Prosecution Service v P* [2007] EWHC 946 (Admin), at [16].

Some scholars have suggested that the Mental Capacity Act 2005, implemented in England and Wales in 2007, provides a clearer framework and guidance for determining capacity and could be reformed and adapted to incorporate young defendants.[70] The Mental Capacity Act 2005 places on a statutory footing the law relating to capacity in respect of healthcare and welfare decisions and introduces a framework for determining capacity to make decisions in respect of property and financial affairs. The 2005 Act applies to a number of different areas of decision-making such as the management of financial affairs and social care, but currently does not apply to young people under the age of 16 years.[71] It defines a lack of capacity as occurring where a person '… is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'. This impairment can be either permanent or temporary. Section 3 of the 2005 Act provides that a person is unable to make a decision for himself if he is unable to '(a) understand the information relevant to the decision, (b) retain that information, (c) use or weigh that information as part of the process of making the decision, or (d) communicate his decision (whether by talking, using sign language or any other means)'. A central part of the assessment of capacity under the 2005 Act is the focus on the interaction between a person's abilities and the demands of the particular situation. Thus the cognitive and psychological capacities required to demonstrate capacity are likely to vary according to the complexities of the legal case.[72] The 2005 Act adopts a more functional approach, focusing on the particular

[70] For example, G Vassall-Adams and L Scott-Moncrieff 'Capacity and fitness to plead: The yawning gap' (2006) *Counsel* 14; WJ Brookbanks and RD Mackay 'Decisional Competence and 'Best Interests': Establishing the Threshold for Fitness to Stand Trial' (2010) 12(2) *Otago Law Review* 265, at p.269; TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts 'Fitness to plead and competence to stand trial: a systematic review of the constructs and their application' (2008) 19(4) *Journal of Forensic Psychiatry and Psychology* 576.
[71] Mental Capacity Act 2005, s. 1(5).
[72] TP Rogers, NJ Blackwood, F Farnham, GJ Pickup and MJ Watts 'Fitness to plead and competence to stand trial: a systematic review of the constructs and their application' (2008) 19(4) *Journal of Forensic Psychiatry and Psychology* 576, at p. 584.

decision to be made and assessing capacity in relation to this,[73] which promotes the enhancement of decisional autonomy.[74]

However the Mental Capacity Act 2005 is not entirely a satisfactory approach. The 2005 Act expressly states that a person is assumed to have capacity and is not to be treated as unable to make a decision merely because he or she makes an unwise decision.[75] This reflects a broader problem with the binary nature of autonomy and capacity which is seen in medical law more generally. The assumption is that once a person is deemed to have capacity, they are capable of acting autonomously and their decisions should not be interfered with.[76] Consequently Herring and Wall have expressed concern that the 2005 Act has led to people being classified as having capacity even though they are not able to exercise autonomy.[77] Thus the Mental Capacity Act 2005, similar to the Mental Health Act 1983, is ill-equipped to deal with the nuances of young people who may be unable to effectively participate in their own criminal proceedings due to their immaturity and incapacity, despite the prevalence of effective participation issues amongst very young defendants. Where the 1983 Act and the 2000 Act cannot adequately address participation concerns, the only other available remedy for a young defendant who is unable to participate effectively is to apply to stay proceedings as an abuse of process. Such an application invites the court to stay the proceedings on the basis that it will be impossible, as a result of the defendant's participatory difficulties, for them to have a fair trial.[78]

---

[73] M Donnelly, 'Capacity assessment under the Mental Capacity Act 2005: delivering on the functional approach?' (2009) 29(3) *Legal Studies* 464.
[74] E Cave 'Goodbye *Gillick*? Identifying and resolving problems with the concept of child competence', (2014) 34(1 *Legal Studies* 103, 121.
[75] Mental Capacity Act 2005, s. 1(4).
[76] MI Hall, 'Mental capacity in the (civil) law: capacity, autonomy and vulnerability' (2012) 58(1) *McGill Law Journal* 1.
[77] J Herring and J Wall 'Autonomy, capacity and vulnerable adults: filling the gaps in the Mental Capacity Act', (2015) 35(4) *Legal Studies* 698, 700.
[78] *Connelly v DPP* [1964] AC 1254, [1964] 2 WLR 1145 and *DPP v Humphrys* [1977] AC 1, [1976] 2 WLR 857.

Stay of proceedings in the Youth Court

In *DPP v P*[79] Lady Justice Smith considered how the court should proceed where the defence wish to apply for a stay of proceedings on the basis that the defendant is unable to participate effectively. The case concerned a 13-year-old boy with Attention Deficit Hyperactivity Disorder, the mental age of a seven year old and a full scale IQ of 65 placing him in the lowest centile of the population. His verbal intellectual skills, his general memory functioning and his ability to pay attention and concentrate were all within the severely disabled range. P was charged with a number of criminal offences in the youth court. Lady Justice Smith considered that where effective participation is raised as the issue on an abuse of process application, it would be appropriate for the court to embark on the trial process. The court would then hear medical evidence as part of the evidence in the case.[80] Keeping a careful eye on the defendant's understanding and ability to engage in the proceedings, the court should halt the proceedings at any stage if it concludes that the defendant is not participating effectively in the trial. The court would then have discretion to proceed with a fact-finding hearing (under section 37(3) of the Mental Health Act) or to stay the proceedings as an abuse of process, but only if 'no useful purpose at all could be served by finding the facts.'[81]

Lord Justice Scott Baker in *R (TP) v West London Youth Court*[82] considered the issue of effective participation and staying proceedings and concluded that 'neither youth nor limited intellectual capacity necessarily leads to a breach of Article 6.'[83] His reasoning was based on the consideration that a youth court is a 'specialist tribunal' designed to accommodate the participation difficulties of young defendants, as contemplated by the European Court in *SC v*

[79] *DPP v P* [2007] EWHC 946.
[80] Ibid. at [53].
[81] Ibid. at [56].
[82] [2005] EWHC 2583 (Admin).
[83] Ibid. at [27].

UK. *TP* concerned a 15 year old who had the intellectual capacity of an eight year old and was charged with robbery and attempted robbery. *TP* sought judicial review of the decision of the youth court not to stay the proceedings as an abuse of process. The Divisional Court in dismissing the application stated that the question for the court was whether the accused would be able effectively to participate in his trial in order to ensure that the trial did not breach Article 6 of the European Convention on Human Rights. It upheld the minimum requirements of a fair trial as including the following:

> (a) the accused had to understand what he or she is said to have done wrong;
>
> (b) the court had to be satisfied that the accused when he or she had done wrong by act or omission had the means of knowing that was wrong;
>
> (c) the accused had to understand what, if any, defences were available to him or her;
>
> (d) the accused had to have a reasonable opportunity to make relevant representations if he or she wished; and
>
> (e) the accused had to have the opportunity to consider what representations he or she wished to make once he or she had understood the issues involved.

In *DPP v P*[84] the Administrative Court confirmed that it is only in exceptional cases that the youth court should exercise its power to stay proceedings before hearing any evidence on the substantive issue. The Administrative Court concluded that it is for the court, not the doctors, to decide whether a trial should take place, because it is the court's opinion of the youth's level of understanding which must determine whether a trial takes place. The court must be willing, in appropriate cases to disagree with and reject the medical opinion, and to consider the possibility that the medical evidence might appear in a different light if and when the trial progresses.

[84] [2007] EWHC 946 (Admin).

Despite the prevalence of effective participation issues as a result of natural developmental immaturity, and the prevalence of psychiatric conditions and learning disability amongst defendants in the youth courts, staying proceedings as an abuse of process remains a discretionary remedy which is very rarely exercised[85] in only 'exceptional circumstances'.[86] Furthermore this is particularly so in the youth court, where it would only be in exceptional cases that a stay would be granted before evidence is heard.[87] Even in those rare cases where the child is severely impaired and a stay is granted, inevitably, no disposal can attach to a stay of proceedings. As a result, where a stay is imposed, the court has no power to impose a disposal to address the concerning behaviour which brought the defendant to the attention of the courts. The imposition of a stay means that there is no intervention to tackle problematic behaviour and that any mental health difficulties or learning disabilities go unaddressed, which risks further deterioration in the young person's condition and further offending behaviour. Given the challenges and inadequacies associated with a stay of proceedings, other options and opportunities must be considered to promote fairness in criminal trials involving young defendants.

Reformers in this area have recommended that the youth court be radically reformed and developed into a problem-solving youth court, involving the co-location of relevant children's and youth services in court buildings and provision for review of sentences by the sentencing judge.[88] Such a shift would permit the reinvigoration of the welfare principle (as enshrined in section 44(1) of the Children and Young Persons Act 1933) and a renewed focus

[85] *Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42, [1993] 3 WLR 90.
[86] *R (Ebrahim) v Feltham Magistrates' Court* [2001] EWHC Admin 130 at [17]; *Attorney General's Reference (No 1 of 1990)* [1992] QB 630, at 643.
[87] *R(TP)* v *West London Youth Court* [2005] EWHC 2583 (Admin). Also *Crown Prosecution Service v P* [2007] EWHC 946 (Admin).
[88] A Wigzell, A Kirby and J Jacobson *The Youth Proceedings Advocacy Review: Final Report* (Bar Standards Board, 2015); Lord Carlile of Berriew *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes.* (The Howard League for Penal Reform, 2006).

on ensuring children's underlying needs are met. The most recent observations of the United Nations Committee on the Rights of the Child reiterate that the principle that the child's best interests are taken as a primary consideration is still not reflected in criminal justice law, policy and judicial decision-making.[89] Protecting the welfare of the child inevitably requires recognition that children may lack the capacity to participate in criminal proceedings. Similarly the judiciary have recommended that in some cases, civil proceedings under the Children Act 1989 would be more appropriate than criminal proceedings.[90] Hughes LJ commented in the High Court case of *DPP v R*[91] that:

> … where … children are concerned there may often be better ways of dealing with inappropriate behaviour than the full panoply of a criminal trial. Even where the complaint is of sexual behaviour it ought not to be thought that it is invariably in the public interest for it to be investigated by means of a criminal trial, rather than by inter-disciplinary action and co-operation between those who are experienced in dealing with children of this age …

The principal aim of the youth justice system, as defined in section 37 of the Crime and Disorder Act 1998, is to prevent offending by children and young persons. All persons and bodies carrying out functions in relation to the youth justice system have a duty to have regard to that aim. Smith LJ in *DPP v P*[92] stated in relation to this provision that:

> it seems to me that this statutory framework, based as it is on the aim of preventing crime by children and young persons, ought to provide a means by which the relevant agencies can consult and co-operate over the handling of a child who, whether as the result of intellectual disabilities or misconduct or both is getting into trouble, so as *to*

[89] United Nations Committee on the Rights of the Child *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (UNCRC, 2016), para 25
[90] *R v W* [2007] EWCA Crim 1251
[91].[2007] EWHC 1842 (Admin) at para 37
[92] [2007] EWHC 946 (Admin)

tackle those problems, if possible, without resorting to criminal proceedings (emphasis added).

These judgments offer encouragement and an opportunity for the relevant authorities to consult about the best way forward in respect of a child who is about to be prosecuted for an offence, rather than to embark on a prosecution. Such an approach would be consistent with Article 37 of the UN Convention which requires that criminal proceedings should only be used as a last resort.

Using a problem-solving youth court or proceedings under the Children Act 1989 are not without criticism as they may lead to unclear and unpredictable outcomes and disproportionate and indeterminate treatments, in circumstances where if an adult had committed similar offences they would have been treated more leniently. Certainty has traditionally been seen as an important and defining characteristic of the rule of law.[93] The rule of law has never been comprehensively defined, however Fuller in *The Morality of Law*[94] identified several elements of law as necessary for a society aspiring to institute the rule of law, including: laws should be written with reasonable clarity to avoid unfair enforcement; laws must avoid contradictions, laws must not command the impossible. Furthermore Lord Bingham of Cornhill set out a number of the salient features of the rule of law including: the law must afford adequate protection of fundamental human rights; and the existing principle of the rule of law requires compliance by the state with its obligations in international law.[95] Clearly the rule of law enforces minimum standards of fairness, justice and fundamental (substantive and procedural) rights. Accordingly, if a decision is made to prosecute a child for a criminal offence, the prosecutor and the court need to be alive to the

[93] F von Hayek *The road to serfdom* (Routledge, 1944); F. von Hayek *The constitution of liberty* (Routledge, 1960).
[94] L Fuller *The Morality of Law* (Yale University Press, 1964).
[95] Lord Bingham 'The Rule of Law' (2007) 66(1) *CLJ* 67.

possibility that the child might not be able to understand and participate in the criminal proceedings.

Conclusion

In England and Wales children who are alleged to have broken the law are held accountable for their actions through an adversarial system that prioritises the finding of guilt or innocence and sentencing for a particular offence. This approach deflects blame for the social conditions which underpin youth offending to individual young people who are ill-equipped to participate in formal criminal proceedings, even in the specialist youth court. There is a greater need to develop structures to address inequality and disadvantage and to support young people to exercise legal capacity, including supported decision-making and a recognition that background social and political contexts are central to facilitating autonomy. In other spheres of law (for example, the right of young people to make decisions regarding their own medical treatment) we have seen judicial recognition of autonomy interests and their evolution into autonomy rights.[96] The issues raised in this paper suggest the need for a fundamental rethink about how young people who engage in offending behaviour are dealt with and whether a trial process, based very much upon the adversarial adult criminal trial (albeit adapted for young people) is really the most effective or appropriate response.

Lord Steyn in the House of Lords case of *R v G*[97] held that 'Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society'. As Lord Diplock stated, in the differing context of the partial defence of provocation to murder, 'to require old heads on young shoulders is inconsistent with the law's compassion of human

[96] *Airedale NHS Trust* v. *Bland* [1993] 1 All ER 821 at 866; *Chester* v. *Afshar* [2004] UKHL 41, [92] per Lord Walker 'the importance of personal autonomy has been more and more widely recognised'. Also, E Cave 'Determining capacity to make medical treatment decisions: Problems implementing the Mental Capacity Act 2005'(2015) 36(1) *Statute Law Review* 86

[97] [2003] UKHL 50.

infirmity'.[98] Lord Diplock is expressly acknowledging that the law must make allowances for youthful immaturity rather than insisting on the impossible, that the young person must at all times demonstrate the same understanding and competence as an adult. Only by retaining some recognition of the differences in capacity and capabilities of children and adults, can courts ensure that the criminal trial is consistent with fundamental principles of fairness, due process and the rule of law.

[98] *Camplin* [1978] AC 705, 717.