

Balancing Punitive and Rehabilitative Approaches to Juvenile Justice

An investigation into the common mechanisms used by countries to prosecute young offenders as adults

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Introduction

In 2015, India passed legislation that allowed juveniles in conflict with the law to be treated as adults if their crime was considered suitably heinous. This kind of legal response to crime is not unique to India as many countries around the world adopt similar models. This report will investigate a range of responses to juvenile crime from around the world. This will include allowing juveniles to be charged and tried as adults as nations try to grapple with appropriate solutions to juvenile crime.

Juvenile justice as a ‘global concept,’ has been heavily influenced by international law, particularly in the last two decades. International covenants such as The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘Beijing Rules’), The United Nations Convention on the Rights of Child (CRC) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (‘Riyadh guidelines’), have shaped the global landscape of juvenile justice towards a more rehabilitative, restorative and child-welfare based model. Many countries in Europe, South America and Asia have ratified these international rules, standards and treaties into their own legislation to protect and promote the human rights of children in conflict with the law. At the same time, particular serious crimes have driven public and political demands for tougher responses to juvenile crime which has led to some countries adopting a more retributive and punishment-based approach.

This report will focus on 15 countries; some of which pursue a ‘child welfare’ based model focused on education, rehabilitation and reconciliation and a clear separation between adult and juvenile offenders. Other countries follow a more punitive, punishment-based model with deterrence, retribution and incarceration at its heart. Prosecution of adult and juvenile offenders can often fall under the same procedures through the concept of ‘juvenile waiver.’

The featured countries are:

- i. United States of America
- ii. Canada
- iii. Brazil
- iv. Mexico
- v. Saudi Arabia
- vi. Italy
- vii. France
- viii. Netherlands
- ix. Belgium

- x. Japan
- xi. China
- xii. Australia
- xiii. Malaysia
- xiv. India
- xv. Pakistan

Psychological assessments will also be examined as they are a critical feature of many juvenile justice systems and used in many different ways to guide a juvenile's progress through the system.

The report will also provide contextual background for this analysis by looking at international law, general theories on juvenile crime and why children and juveniles commit crime in the first place.

Definitions

Serious or Heinous crime

Crimes the state prohibits by law involving serious personal injury or death, such as murder, manslaughter, sexual assault, physical assault

Child

An individual under 18 years of age

Juvenile

A minor, not an adult within the criminal justice system

Juvenile Justice System

Specialised part of the criminal justice system focused on juveniles

Presumptive

Inference of fact, derived from legislation or case law, which arises when certain circumstances are held to be true

Static predictors of risk

Aspects of a person's history that are not amenable to change or intervention, such as past criminal history¹

Dynamic predictors of risk

Aspects of a person's character that are amenable to change or intervention²

doli incapax

presumption that an individual is incapable of doing wrong

parens patriae

Inherent power of a court to make decisions in the best interests of an individual

common law

System of law developed through judicial decision and precedent; not enacted through legislation

civil law

Codified system of law³

¹ Carwyn Scoones, Gwenda Willis and Randolph Grace, 'Beyond Static and Dynamic Risk Factors: The Incremental Validity of Release Planning for Predicting Sex Offender Recidivism' (2012) 27 *Journal of Interpersonal Violence* 222, 224.

² Ibid.

³ All other definitions from Australian Law Dictionary (2nd ed, 2013).

Juvenile justice in India

In 2015, the Indian Parliament passed a new Act governing juvenile justice in India. While the *Juvenile Justice (Care and Protection of Children) 2015 Act* (India) advocates for a ‘child-friendly’ approach to juvenile justice through ‘proper care, protection, development, treatment and social re-integration’, it also allows for children aged 16-18 years to be tried as adults for heinous offences.⁴ Against this legislative backdrop, crimes committed by juveniles account for 0.67% of total crime in India.⁵ When the Bill was introduced to the Lok Sabha in August 2014, crimes committed by those aged between 16-18 accounted for the majority of juvenile crime.⁶

It was the brutal rape and murder of Jyoti Singh in 2012 that proved to be the catalyst for the legislative changes. The youngest person found guilty was 17 years of age and only served three years in jail, while his older co-defendants were sentenced to death.⁷ There were several legal attempts made to have the minor tried as an adult, however these were ultimately rejected by the Supreme Court.⁸

The perception of unequal punishment between the offenders and the corresponding outcry from the media and Indian public increased the political will to change the law.⁹ The secretary of the Ministry of Women and Child Development believed that under the old Act, there was not a sufficient deterrent for crimes such as murder and rape and it was not ‘equipped’ to deal with offenders of such crimes.¹⁰ Allowing juveniles to be charged with ‘heinous’ crimes would ‘address the issue of increased lawlessness in the society to some extent and will also protect the rights of victim to justice’.¹¹ Given the controversy, the entire Bill went through several rounds of consultation, with the provision allowing for 16 to 18 year olds to be tried as adults coming in for much criticism.¹² The Parliamentary Review Committee noted that the provision violated not only the United Nations Convention on the Rights of the Child but also the Indian Constitution.¹³ Many also argued that juvenile justice should be focussed on reform and rehabilitation rather than punitive punishment.¹⁴ The

⁴ *Juvenile Justice (Care and Protection of Children) 2015 Act* (India) s 19 (1)(i).

⁵ National Crime Records Bureau, Ministry of Home Affairs (India), *Crime in India 2017*, (October 2019) 403.

⁶ PRS Legislative Research, *Vital Stats: Children in Conflict with Law* (August 2015) 1.

⁷ Neelam Dehal et al, ‘Juvenile Justice in India: Balancing the Age as a Key to Curb Increasing Crimes?’ (2015) 36 *Journal of Forensic and Legal Medicine* 158; Department-Related Parliamentary Standing Committee on Human Resource Development, Parliament of India, *The Juvenile Justice (Care and Protection of Children) Bill, 2014* (264th Report, February 2015) 12.

⁸ Ved Kumari, ‘Juvenile Justice in India’ in Franklin E. Zimring, Maximo Langer and David S. Tanenhaus (eds) *Juvenile Justice in Global Perspective* (NYU Press, 2015) 176.

⁹ *Ibid* 182.

¹⁰ Department-Related Parliamentary Standing Committee on Human Resource Development (n 7) 10.

¹¹ *Ibid*.

¹² *Ibid* 12-16.

¹³ *Ibid* 16.

¹⁴ *Ibid* 16-17, 21-22.

Review Committee ultimately recommended that Clause 19 be reviewed as the whole objective of a juvenile justice act should be to juvenile offenders were treated appropriately for their age rather than a shift outside of its more protective bounds.¹⁵

The key feature of the Act allows 16 to 18-year-olds to be tried as adults for heinous offences, that is any crime that carries a sentence of seven years or more.¹⁶ To determine whether a child can be tried as an adult, the Juvenile Justice Boards conduct a preliminary inquiry, assessing the mental and physical capacity of the child as well as their capacity to understand the offence and consequences of their actions.¹⁷ The Board can also take into consideration the views of social workers and psychologists.¹⁸ This assessment will determine whether a child remains under the jurisdiction of the Children's Court or is transferred to the adult court.¹⁹ Recent examples of the provision in action include the case of *Khan v State of Maharashtra & Shaikh*, where a 17 year old, who allegedly murdered a three-year-old remained within the juvenile justice system whereas a 16-year-old charged with the murder of a seven-year-old was found to have the capacity to be charged as an adult.²⁰

¹⁵ Ibid 62.

¹⁶ *Juvenile Justice (Care and Protection of Children) 2015 Act* s 15.

¹⁷ s 15(1).

¹⁸ Ibid.

¹⁹ Ibid s 19.

²⁰ Asha Bajpai, 'The Juvenile Justice (Care and Protection of Children) Act 2015: An Analysis' (2018) 2 *Indian Law Review* 191, 201; *Khan v The State of Maharashtra & Shaikh* [2018] (Unreported, High Court of Bombay, Criminal Appellate, No 1153).

Drivers of juvenile crime

Understanding why children and young people offend can help policymakers develop more effective models, programs and strategies to deal with juvenile crime.

There is a substantial body of research on the subject, although it skews heavily towards juvenile crime in developed countries, particularly the United States. Research reveals that most crime occurs during adolescence, with 17 being the peak age of offending in the United States (although this peak age is increasing over time).²¹ This is also reflected in Australia, where most crime is committed by those aged 15-19.²² After that point, the number of offenders reduces in successive age groups.²³

This shift from criminal to law-abiding behaviour underpins Terrie Moffitt's developmental theory of crime, where most offenders are 'adolescent-limited' rather than 'life-course persistent'.²⁴ Adolescence-limited offenders are often driven by peer group pressure, drugs and alcohol as well as their stage of brain development.²⁵ This group, which makes up the majority of juvenile offenders, start offending around age 14 and desist once they mature.²⁶ Life-course persistent offenders, however, which make up between 5-10% of male adult offenders, start even earlier and remain criminals for the majority of their lives.²⁷ The literature indicates that it is the interaction of neuro-biological factors combined with negative family and social environments that characterises this cohort.²⁸

The following section gives a brief overview of the research and theories regarding the causes of juvenile anti-social or delinquent behaviour. As scientists come to a greater understanding of the human brain, so does the ability to analyse crime from a neuro-biological perspective as well as more controversially, from a genetic perspective.

²¹ Terrie Moffitt, 'Adolescence-Limited and Life-Course-Persistent Antisocial Behaviour: A Developmental Taxonomy' (1993) 100 *Psychological Review* 674, 675; Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, *Arrest Characteristics of Older Juveniles and Young Adults* (2017) <https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_UCR2017.pdf>

²² Crime Statistics Australia, Australian Institute of Criminology, *Offenders by Sex and Age Group 2008-9 to 2016-17* (January 2019) https://www.crimstats.aic.gov.au/facts_figures/2_offenders/A2/

²³ Moffitt (n 21) 675; Crime Statistics (n 22).

²⁴ Moffitt (n 21) 674.

²⁵ Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, *What Makes Juvenile Offenders Different from Adult Offenders?* (No. 409, February 2011) 3-4; Fleur A. Souverein et al, 'Serious Violent Young Offenders in South Africa: Are they Life-Course Persistent Offenders?' (2016) 31 *Journal of Interpersonal Violence* 1859, 1861.

²⁶ Rolf Loeber et al, 'Conclusions and Policy Implications' in Rolf Loeber et al, *Violence and Serious Theft: Development and Prediction from Childhood to Adulthood* (Routledge, 2008) 309, 318; David P. Farrington, 'Predictors of Violent Young Offenders' in Donna M. Bishop and Barry C. Field (eds) *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (Oxford University Press, 2012) 146, 151.

²⁷ Magda Stouthamer-Loeber et al, 'Desistance from and Persistence in Offending' in Rolf Loeber et al, *Violence and Serious Theft: Development and Prediction from Childhood to Adulthood* (Routledge, 2008) 269, 278; Souverein (above n 5) 1861; David P. Farrington, 'Predictors of Violent Young Offenders' in Donna M. Bishop and Barry C. Field (eds) *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (Oxford University Press, 2012) 146, 151.

²⁸ Loeber (n 26) 310; Souverein (n 25) 1861

a. Neuro-biological causes of offending

Advances in brain imaging through MRI have revealed that 'anti-social' youth often have impaired or reduced activity in the amygdala.²⁹ The amygdala, which processes emotions, allows humans to understand and respond to aggression and fear. A well-functioning amygdala discourages anti-social behaviour and increases empathy for those suffering pain and distress.³⁰ Children who have issues with their amygdala function can also have issues with their orbitofrontal cortex, the part of the brain that helps with planning and decision-making, and the hippocampus which helps regulate emotion and motivation. Consequences of having problems with these parts of the brain can include lack of inhibition and inability to regulate emotions, both of which can increase the likelihood of juvenile offending and an inability to respond to punishment.³¹ Damage to these parts of the brain can be caused by a range of individual factors including genetics, brain injury, illness and environment as well as how these factors interact with each other. It is important to note that these deficits in and of themselves do not mean that a child will become a criminal; it is the complex interaction of a number of factors that lead a child to crime.

The pre-natal environment also has a role to play in brain function. Research shows that children exposed to smoking in the womb are at an increased risk of anti-social behaviour as are children with foetal alcohol syndrome.³² Birth complications further increase the risk, such as premature or forceps delivery and low-birth weight.

Other neurological functioning disorders can also have an impact on the likelihood of criminal behaviour. Lower verbal IQ or the ability to understand and solve problems through language, has been consistently linked to anti-social behaviour, with deficits at age 13 found to correlate to persistent offending at age 18.³³ Lack of executive function, found in disorders such as ADHD, is also strongly linked to juvenile offending.³⁴ This means an individual lacks impulse control, has an inability to plan effectively and measure risk appropriately.³⁵

Other neurological deficits that have been found to have some role in anti-social behaviour are autonomic under-arousal and hypo-responsivity, which means a lack of fear and a need for constant stimulation.³⁶ These traits have been found to be more common in psychopathy-prone teenagers.³⁷ An imbalance of hormones

²⁹ Melissa Peskin et al. 'Personal Characteristics of Delinquents: Neurobiology, Genetic Predispositions, Individual Psychosocial Attributes' in Donna M. Bishop and Barry C. Field (eds) *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (Oxford University Press, 2012) 73, 76.

³⁰ Ibid.

³¹ Ibid 78.

³² Ibid 87.

³³ Ibid 79.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid 82.

³⁷ Ibid.

especially decreased cortisol, and increased testosterone has also been found to have a similar effect and is common to delinquent children.³⁸

These complicated biological interactions have serious implications for juvenile justice and the role of punishment.

b. Family

The family group is extremely influential in the development of children. Parents, in particular, have always been considered a key factor in juvenile delinquency and offending. Much of the available research indicates that some styles of parenting or a childhood marred by violence can lead to poorer outcomes later in life.

Under the General Theory of Crime model, a child learns his or her ability to self-regulate from their parents and this can determine their future level of anti-social behaviour – the greater one's ability to regulate, the less likelihood of anti-social behaviour.³⁹ Moreover, this model argues that a deficit in appropriate parental nurturing and discipline increases the chances of juvenile misbehaviour.⁴⁰ Research in Australia has also highlighted the link between maltreatment in childhood and increased rates of offending later in life.⁴¹ The well-known New Zealand Dunedin study found that having a delinquent sibling, poor supervision in childhood and a 'disrupted' family were the strongest family-based predictors of violent juvenile offending.⁴² Outcomes from other longitudinal studies found that parental anti-social behaviour and having a convicted parent by the age of 10 were both 'significant predictors' of youthful violence and adult convictions.⁴³ A child witnessing violence in the home also increased the chance of violent offending as a juvenile and adult.⁴⁴

An Indian study reached similar conclusions when it reviewed 605 children in detention centres.⁴⁵ It found that a lack of parental supervision and involvement were prevalent amongst most of the children, with the fact that many lived with non-biological parents seen as a contributing factor.⁴⁶

c. Strain theory

³⁸ Ibid 84.

³⁹ Ronald L. Simons, Leslie Gordon Simons and Donna Hancock, 'Linking Family Processes and Adolescent Delinquency: Issues, Theories and Research Findings' in Donna M. Bishop and Barry C. Field (eds) *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (Oxford University Press, 2012) 175, 181.

⁴⁰ Ibid.

⁴¹ Crime Facts Info, Australian Institute of Criminology, *Pathways from Child Maltreatment to Juvenile Offending* (No. 42, February 2003).

⁴² David P. Farrington, 'Predictors of Violent Young Offenders' in Donna M. Bishop and Barry C. Field (eds) *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (Oxford University Press, 2012) 146, 156-7.

⁴³ Ibid 163.

⁴⁴ Ibid 165.

⁴⁵ Saju Parackal and Rita Panicker, *Children and Crime in India: Causes, Narratives and Interventions* (Palgrave MacMillan, 2019) 27.

⁴⁶ Ibid 35-36.

As the name suggests, this theory posits that the strains or stressors within the lives of adolescents, such as bullying, family issues or poverty create such pressure and anger that this results in criminal activity.⁴⁷ While not all strains are going to push someone in the direction of delinquent or criminal behaviour, there are four characteristics that are more likely to result in that outcome. Firstly that the strain is high in magnitude – the extent to which the strain is disliked, or if it is of high-frequency; secondly, that the strain is perceived as unjust or undeserved; thirdly, where the strain is associated with low social control, such as a lack of parental supervision; and lastly that the strain can be resolved through crime, such as a need for money.⁴⁸ Strain theory has also been used to explain why adolescents are more likely to reoffend; they are leaving the shelter of childhood behind and entering an adult world where they may have less support and have trouble understanding their role within it.⁴⁹

Much of the literature on juvenile crime stresses that generally it is not just one factor that drives someone towards crime, it is often multi-factorial. Understanding this could lead to more appropriate and effective programs to deal with children and young people involved in the justice system.

⁴⁷ Robert Agnew, 'Strain and Delinquency' in Donna M. Bishop and Barry C. Field (eds) *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (Oxford University Press, 2012) 289, 289; Kathryn Lynn Modecki, Bep Uink and Bonnie L Barber, Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, *Antisocial Behaviour During the Teenage Years: Understanding the Developmental Risks* (No. 556, July 2018) 2.

⁴⁸ Robert Agnew, 'Building on the Foundation of General Strain Theory: Specifying the Types of Strain Most Likely to Lead to Crime and Delinquency' (2001) 38 *Journal of Research in Crime and Delinquency* 319, 326.

⁴⁹ Agnew (n 47) 300.

Minimum age of criminal responsibility

All juvenile justice systems are built on a similar notion; that children should be treated differently to adults in the criminal justice process, particularly regarding sentencing and sentencing procedures. Under Article 1 of the Convention on the Rights of the Child, a child refers to any human being below the age of eighteen years.⁵⁰ This is the universal standard which binds State Parties.

When it comes to the sentencing of juveniles, issues arise when an offender is considered a child (under 18 years) but is over the States minimum age of criminal responsibility ('*MACR*') when the offence occurs. This *MACR* refers to the age in which countries deem children to have the capacity to commit a crime and thus allows them to be charged, brought before a court, sentenced and imprisoned.⁵¹ This age varies among jurisdictions internationally.

While there is no internationally agreed-upon *MACR* the Committee on the Rights of the Child suggests that states should seek to introduce higher *MACR*'s and has stated that any age below 12 is internationally unacceptable.⁵² This is due to the fact that 'children under the age of 12 have not yet reached the necessary developmental stages in emotional, mental and intellectual maturity' to be held responsible for criminal behaviour.⁵³

While international law advocates for an absolute *MACR* of 12 years, the United Nations prefers that *MACR*'s are set higher to ensure better standards of juvenile justice. Higher *MACR*'s (such as 14 or 16 years) would ensure that young offenders human rights and legal safeguards are fully respected.⁵⁴

In 2019 an independent report was provided to the United Nations General Assembly. It indicated that although efforts have been made to set an internationally agreed-upon *MACR*, no consensus has been reached on the issue. Despite the Committee on the Rights of the Child pursuing an international *MACR* of at least 14 years, 'over 120 states maintain the minimum age at below 14'.⁵⁵ The nature of international law allows countries to do so.

⁵⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 5, (entered into force 2 September 1990) Art 1.

⁵¹ Susan Young, Ben Greer and Richard Church, 'Juvenile delinquency, welfare, justice and therapeutic interventions: a global perspective' (2017) 41(1) 21 *BJPsych Bulletin* 21.

⁵² Committee on the Rights of the Child, General Comment No 10: Children's rights in juvenile justice, 44th sess, CRC/C/GC/10 (25 April 2007) p11.

⁵³ *Ibid*, pgh 33.

⁵⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly resolution 40/33 on 29 Nov 1985.

⁵⁵ UN General Assembly, *Global Study on Children Deprived Of Liberty*, UN GAOR doc A/74/50 (11 July 2019) pgh 43.

The international treaties and conventions reveal the following guidelines for countries in establishing their *MACR*;

- Firstly, states should establish a minimum age below which children are presumed not to have the capacity to infringe criminal law⁵⁶
- Secondly, the *MACR* shall not be fixed at too low an age level, factoring in emotional mental and intellectual maturity⁵⁷
- Thirdly, in order for a fair trial, any child alleged or accused of having infringed the law should be able to participate in the trial effectively and needs to, therefore, comprehend the charges, and the possible consequences and penalties (indicative of the requirement for a *MACR*).⁵⁸
- When sentencing issues arise, states should not use the gravity of an offence as a justification for lowering the *MACR*.⁵⁹

A holistic consideration of all relevant international treaties reveals that while countries are free to establish their own *MACR*'s within their respective systems of law, it is the goal of international law to ensure that children in criminal proceedings have the sufficient moral, intellectual and emotional maturity to bear criminal responsibility.⁶⁰ International law recognises that *MACR*'s will inevitably differ as they should mirror the other social rights and responsibilities stemming from different histories and culture.⁶¹ However, states that do set a *MACR* below 12 years of age would be inherently breaching international human rights.⁶² While the guidelines are somewhat effective the Committee of the Rights of the Child have reported that globally *MACR*'s range from seven to sixteen.⁶³

⁵⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 5, (entered into force 2 September 1990) Art 40.

⁵⁷ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR Doc A/Res/40/33 (29 November 1985) r 4.

⁵⁸ *Ibid* r 14.

⁵⁹ UN General Assembly, *Global Study on Children Deprived Of Liberty*, UN GAOR doc A/74/50 (11 July 2019) 136.

⁶⁰ Lisa Bradley, 'The Age of Criminal Responsibility Revisited' (2003) 8(1) *Deakin Law Review* 71.

⁶¹ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR Doc A/Res/40/33 (29 November 1985) pgh 4.1.

⁶² Committee on the Rights of the Child, General Comment No 10: Children's rights in juvenile justice, 44th sess, CRC/C/GC/10 (25 April 2007) 11.

⁶³ Matti Joutsen, 'UN standards and Norms on juvenile Justice: From soft law to hard law' (Speech, European Institute for Crime Prevention and Control, 27 January 2017) 17.

Theories of juvenile justice

Around the world, there are various legal approaches to dealing with juvenile delinquency. Decades of academic research has revealed that the needs of children (especially children who come into conflict with the law) are complex.⁶⁴ This has resulted in a general understanding that juveniles should be subject to a different system of justice to adults.⁶⁵ The United Nations addresses the importance of this by stating that nation-states should establish; ‘a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed to meet the varying needs of juvenile offenders, while protecting their basic rights’.⁶⁶

Historically there have been two main models of juvenile justice that underpin the various approaches to juvenile delinquency; the welfare and justice approaches. These conceptual models are often presented in philosophical discussions as dichotomies of one another.⁶⁷ Debates over these two models involve a tug of war between those who believe young people require help and guidance and others who believe young people should be treated as accountable and autonomous human beings.

The welfare model was the prevalent ideal behind the separation of juvenile justice systems from adult criminal law. It focuses on the rehabilitation of young offenders through individualised punishments, tailored to the unique needs of the young person.⁶⁸ With its roots in socialism, the theory claims that in order to best understand an individual, it is important to consider the context and environment in which they exist (their family environment, health and other external factors).⁶⁹ Accordingly, young offenders should not bear sole accountability for their wrongdoings, and some obligation must be placed upon the state to assist juveniles rather than punish them.⁷⁰

However, while juvenile justice systems focused on rehabilitation are the byproduct of the welfare model, the last thirty years has revealed a significant shift in approach towards more punitive based (‘get-tough’) sentencing procedures and outcomes for chronic and violent juvenile offenders.⁷¹ This can most significantly be seen through the substantial increase in ‘waiver’ type processes internationally. Juvenile courts are no

⁶⁴ Susan Young, Ben Greer and Richard Church, ‘Juvenile delinquency, welfare, justice and therapeutic interventions: a global perspective’ (2017) 41(1) 21 *BJPsych Bulletin* 21.

⁶⁵ *Ibid.*, 22.

⁶⁶ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR Doc A/Res/40/33 (29 November 1985) para 2.3.

⁶⁷ Brian Lambert and Brett Mason, ‘Justice Welfare of a New Direction?’ (1996) 12 *QUT Law Review* 99, 101.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

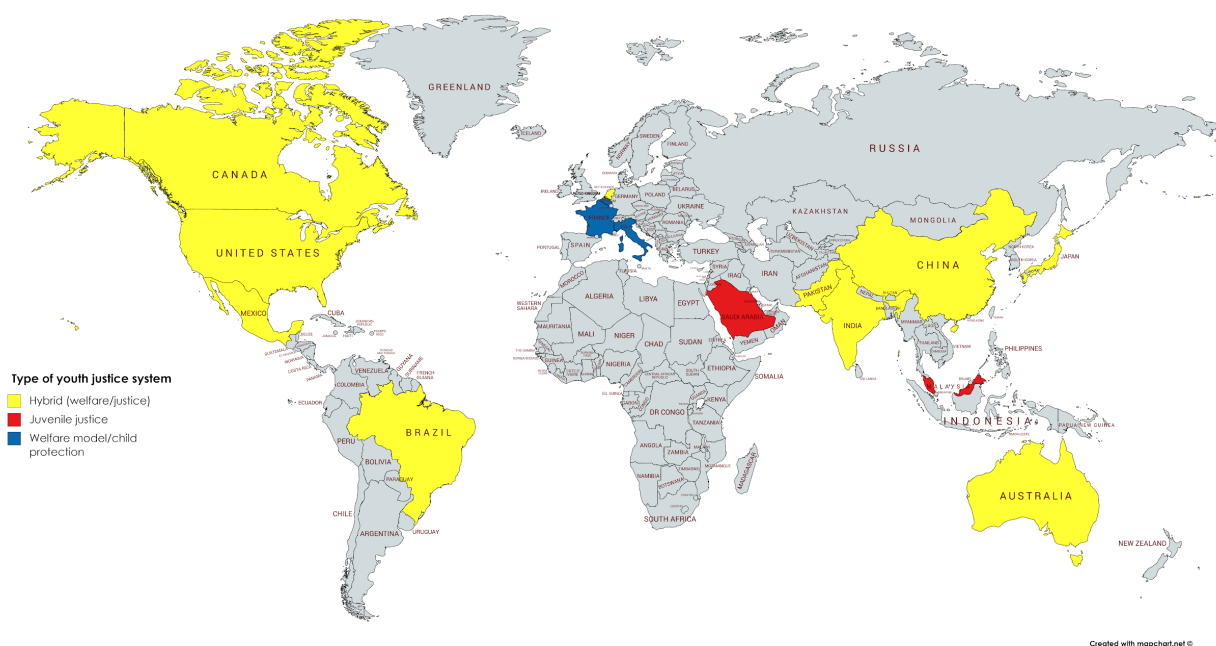
⁷⁰ Ben Mathews, ‘Ethics of Childrens Criminal Responsibility’.

⁷¹ Martin L. Frost, Martha-Elin Blomquist, ‘Cracking Down on Juveniles: The Changing Ideology of Youth Corrections’ (2012) 5(2) *Notre Dame Journal of Law, Ethics and Public Policy* 323.

longer perceived to be effective in punishing serious young offenders and ‘a reality has been constructed and legitimized by many criminologists that rehabilitation is a failed policy that the public will no longer tolerate’.⁷² ‘Community protection, punishment and retribution appear to have gained ascendancy and been openly accepted as legitimate primary objectives’ of juvenile court, particularly in regards to serious offenders.⁷³

However, the notion that juvenile justice systems must fulfil one of two inconsistent goals (that they attempt to rehabilitate the child or provide harsh penalties for serious offenders) is no longer applicable.⁷⁴ Rehabilitation, welfare and retribution do not have to exist exclusively of one another.⁷⁵ Effective juvenile justice systems ‘aimed at protecting society, victims and juveniles themselves can prevent crime and still punish those who commit violent offences.’⁷⁶

While the welfare and justice models provide a solid base from which principles of juvenile justice emerged, youth justice as it currently stands cannot be separated into two paradoxical ideas. The debate between the welfare and justice models for juvenile justice has been superseded in the 21st century. Now, finding a combination of broadening welfare concerns, and the promulgation of the ideology of the justice model is considered paramount and thus new ‘hybrid’ models are emerging.⁷⁷ Young people are seen as being in need of guidance and assistance (the welfare aspect) whilst at the same time offending is seen as the result of calculated decisions by rational actors (the justice aspect).⁷⁸



⁷² Dan Macallair, ‘Reaffirming Rehabilitation in Juvenile Justice’ (1993) (25)1 *Youth and Society* 104, 118.

⁷³ David C. Tate, N. Dickon Reppucci and Edward Mulvey ‘Violent Juvenile Delinquents’ (1995) 50(9) *American Psychologist* 777.

⁷⁴ Michelle L Oropeza, ‘Early Intervention and the Eight Percent Problem: Effectively Merging Theories of Rehabilitation and Retribution in the California Juvenile Justice System’ (2005) 26(4) 1217.

⁷⁵ Ibid 1223.

⁷⁶ Ibid 1237.

⁷⁷ C Simpson and R Hil *Ways of Resistance: Social control and Young People in Australia* (Hale and Iremonger Sydney, 1995) citing D Palmer & R Walters, ‘Crime prevention camps for youth at risk’.

⁷⁸ C Simpson and R Hil *Ways of Resistance: Social control and Young People in Australia* (Hale and Iremonger Sydney, 1995) citing D Palmer & R Walters, ‘Crime prevention camps for youth at risk’.

International standards of juvenile sentencing

a. Introduction

The rights of children in juvenile justice systems have developed significantly over time. Up until the late eighteenth century, children in criminal proceedings were treated the same as adult offenders.⁷⁹ Gradually this has changed. As domestic and international legal systems have evolved, a line has been drawn between offences committed by adults and those committed by juveniles. It is now widely understood that children should be treated separately to adults in the justice system.⁸⁰ This notion is reflected in international standards.

Juvenile justice is now a major area of international law, indicating a twentieth-century shift towards protecting children and their rights. There are now a number of international legal instruments that identify the need for specific regard to juvenile justice. These include

- The Convention on the Rights of the Child (1989)
- UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (1985)
- The United Nations Guidelines on the Prevention of Delinquency (the Riyadh Guidelines)
- UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) (1990)
- Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) (1997)
- The International Covenant on Civil and Political Rights (1976)

b. The Convention on the Rights of the Child

The Convention on the Rights of the Child is the most significant international document from which to identify the principles of juvenile justice. This is due to the fact that it is a binding treaty on signatory states. Such states must now consider the best interests of children when designing and applying law and policy.⁸¹ Further, they are also obligated to ‘take into account an individual child’s evolving capacity, and respect and ensure their inherent dignity is maintained’.⁸²

⁷⁹ John Muncie, ‘International Juvenile (in)justice: Penal Severity and Rights Compliance’ (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 43.

⁸⁰ John Matthew Fabian, ‘Applying Roper v. Simmons in Juvenile Transfer and Waiver Proceedings: A Legal and Neuroscientific Inquiry’ (2011) 55(5) *International Journal of Offender Therapy and Comparative Criminology* 732, 744.

⁸¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 5, (entered into force 2 September 1990) art 3.

⁸² Roger J.R Levesque, ‘Future Visions of Juvenile Justice: Lessons from International and Comparative Law’ (1996) 29(4) *Creighton Law Review* 1563, 1567.

*'[t]he protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/ retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.'*⁸³

The Convention also offers specific protections for young offenders who have been 'alleged, accused or recognised as having infringed the penal law'.⁸⁴ Such protections include;

- The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law (Article 40)
- No child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason or acts or commissions that were not prohibited by national or international law at the time they were committed" (Article 40)
- No child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment (Article 37)
- No child shall be deprived of his or her liberty unlawfully or arbitrarily
- Any arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time (Article 37b)
- Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age (Article 37)

c. The influence of international standards on domestic reform

Despite considerable optimism regarding the effects of international standards on juvenile justice, in application, it seems unlikely that there will ever exist a 'global standard' to sentencing child offenders, particularly those who commit serious crimes. While international law acts as a guide for progressive juvenile justice reform based on 'best interest' principles, 'child-friendly' imperatives and 'last resort' rationales, it may not necessarily result in progressive reform.⁸⁵

Each country has taken a different approach to their juvenile justice systems. While international standards provide standards, the specificity of nations and their juvenile justice systems will inevitably vary. This is due to the specific local conditions and cultural contexts that reflect the goal of 'particular policy-makers and political agendas'.⁸⁶ The sovereignty of nation-states continues to prevail as juvenile justice laws, policies and practices are formed and applied through a 'complex of political, socio-economic, cultural, judicial, organisational and local filters', inevitably resulting in diverse domestic law.⁸⁷

⁸³ General Comment No.10 paragraph 10

⁸⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 5, (entered into force 2 September 1990) art 4.

⁸⁵ John Muncie, 'International Juvenile (in)justice: Penal Severity and Rights Compliance' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 43, 44.

⁸⁶ John Muncie, 'International Juvenile (in)justice: Penal Severity and Rights Compliance' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 43, 52.

⁸⁷ *Ibid.*

This is not to suggest that international law has had no impact on domestic reform. International law clearly recognises the need to protect youth while also providing them with a voice regarding decisions that ultimately affect their life.⁸⁸ This dictates that instead of punishing youth under “adult” due process, courts should focus on child offender accountability by giving them the power to influence dispositional decision making.⁸⁹

This has an effect on a domestic level with many countries progressing in their understandings and application of concepts of juvenile justice. Discussions on young offenders are no longer steeped in the dichotomies of retributive or rehabilitative approaches.⁹⁰ While some countries indeed still focus on traditional forms of punishment there appears to be at least some acknowledgement of the principles of international law and a global appreciation for the desire to reintegrate delinquent youth back into communities. Simply stated, international standards have promoted progressive changes that consider a wide range of approaches to juvenile crime rather than simply ‘getting tough’ on youth.

Individual states will continue to hold their sovereign right to develop their own systems of juvenile justice. But countries have learned considerable amounts from one another's successes and failures. This has influenced the international guidelines that assist states in achieving the most effective responses.

iv. Serious young offenders and international standards of sentencing

Many states are increasingly subjecting serious delinquent youth to adult criminal process and punishment. This is due to the rationale that juvenile justice systems are ill-equipped to deal with serious crime.⁹¹

Serious young offenders create unique challenges for both juvenile and adult justice systems.⁹² On the one hand, they are children and should be treated as such.⁹³ Yet they also fail to neatly fit within either traditional understandings of the juvenile justice system and its processes or adult court sentencing processes.⁹⁴ Whilst some serious young offenders may indeed be inadequately dealt with by rehabilitation focused sentencing processes numerous studies have also highlighted issues with applying adult sentences. These concerns include the absence of rehabilitative and individualised treatment in adult sentencing, the potential for increased recidivism upon adult system release and leniency and punishment gap issues.⁹⁵

⁸⁸ Barry C Feld, ‘Juvenile and Criminal Justice Systems’ responses to Youth Violence’ (1998) 24 *Crime and Justice* 205.

⁸⁹ *Ibid.*

⁹⁰ Brian Lambert and Brett Mason, ‘Justice Welfare of a New Direction?’ (1996) 12 *QUT Law Review* 99, 101.

⁹¹ Donna M. Bishop, ‘Juvenile Offenders in the Adult Criminal Justice System’ (2000) 27 *Crime and Justice* 81.

⁹² Chad r. Trulson, Jonathan W. Caudill, Scott H. Belshaw and Matt DeLisi, ‘A problem of Fit: Extreme Delinquents, Blended Sentencing and the Determinants of Continued Adult Sanctions’ (2011) 22(3) 263, 264

⁹³ Martin L. Frost, Martha-Elin Blomquist, ‘Cracking Down on Juveniles: The Changing Ideology of Youth Corrections’ (2012) 5(2) *Notre Dame Journal of Law, Ethics and Public Policy* 323, 332-6.

⁹⁴ Chad r. Trulson, Jonathan W. Caudill, Scott H. Belshaw and Matt DeLisi, ‘A problem of Fit: Extreme Delinquents, Blended Sentencing and the Determinants of Continued Adult Sanctions’ (2011) 22(3) 263, 264.

⁹⁵ Chad r. Trulson, Jonathan W. Caudill, Scott H. Belshaw and Matt DeLisi, ‘A problem of Fit: Extreme Delinquents, Blended Sentencing and the Determinants of Continued Adult Sanctions’ (2011) 22(3) 263, 264

This focus on providing juveniles “adult” due process rights is disappointing on an international level. By giving youth additional rights, domestic courts are forced to place a superseding emphasis on community safety and protection in regards to serious crimes.⁹⁶ The result of this is for society to ‘get tougher’ on youth rather than enact law and policy that promotes their best interests.⁹⁷ The ‘best interests’ of a child thus become secondary to the superseding claim of community safety and public protection. Nation-States of CROC that allow such procedures to occur are departing from their obligations under international standards.⁹⁸

The United Nations reject the process by which the nature of a young offender’s crime warrants them being treated like an adult in sentencing.⁹⁹ International law defines the age limits in which systems of juvenile justice should be applied. This is between a (minimum) lower age limit of 12 years and an upper age limit of 18 years.¹⁰⁰ Allowing children, no matter the seriousness of the offence, to be treated outside of these guidelines is an unacceptable process.¹⁰¹

The theory behind the application of juvenile justice involves an understanding that young offenders are incapable of bearing the mental capacity necessary to bear criminal responsibility. To create exceptions to this is a breach of international law. Either a child has the capacity to commit a crime, or they do not, their treatment should not be determined regarding the nature of their crime.

This claim is accepted by the UN Human Rights Committee and all UN bodies monitoring the application of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰² According to international law, states must never try children as adults and any State that permits such a practise should reform their laws immediately.¹⁰³

⁹⁶ Brian D. Johnson, Megan C. Kurlychek, ‘Transferred Juveniles in the Era of Sentencing Guidelines; Examining Judicial Departures for Juvenile Offenders in Adult Criminal Court’ (2012) 50(2) *American Society of Criminology* 525, 532.

⁹⁷ Roger J.R Levesque, ‘Future Visions of Juvenile Justice: Lessons from International and Comparative Law’ (1996) 29(4) *Creighton Law Review* 1563, 1584.

⁹⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 5, (entered into force 2 September 1990) art 3.

⁹⁹ Committee on the Rights of the Child, General Comment No 10: Children’s rights in juvenile justice, 44th sess, CRC/C/GC/10 (25 April 2007) p 9.

¹⁰⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 5, (entered into force 2 September 1990) art 1 and Committee on the Rights of the Child, General Comment No 10: Children’s rights in juvenile justice, 44th sess, CRC/C/GC/10 (25 April 2007) p11.

¹⁰¹ Committee on the Rights of the Child, General Comment No 10: Children’s rights in juvenile justice, 44th sess, CRC/C/GC/10 (25 April 2007) para 37.

¹⁰² Human Rights Council, ‘Report of the High Commissioner for Human Rights on the Protection of human rights of juveniles deprived of their liberty’ 21st sess, A/HRC/21/26 (13 August 2012).

¹⁰³ Committee on the Rights of the Child, General Comment No 10: Children’s rights in juvenile justice, 44th sess, CRC/C/GC/10 (25 April 2007) para 40.

Juvenile and adult court punishments

International law and thus much of the domestic juvenile justice law it influences is traditionally founded on the principles of child welfare; focusing on rehabilitative and protective models of justice. However, as society has developed and a 'greater number of juveniles have committed "adult like" violent crimes' there has been a social and legal push for adult type punishments for serious young offenders. This has resulted in an increasingly common legislative process by which serious juvenile offenders are tried within adult systems of criminal law.

This process suggests a perception that juvenile courts are ineffective in their outcomes regarding serious offenders. By focusing on punitive and retributive outcomes, social fears of ('the seriousness of juvenile crime, the ineffectiveness of rehabilitation in diminishing recidivism, the failure of juvenile courts to protect the public and the expansion of due process rights for violent juvenile offenders) diminish.

However, studies have shown that juveniles who enter the adult system are subjected to outcomes that are much harsher than would be found in the juvenile system. Transfer to the adult court is often described as the "capital punishment of juvenile justice", existing as the harshest policy in youth court systems. Thus, it is reserved for the most serious of young offenders.

By trying a juvenile as an adult one implies that the child has the mental capacity to bear "adult" criminal responsibility. Instead of being considered a juvenile who requires rehabilitation they are deemed culpable of their offence and thus deserving of punishment. This actively rejects the evidence which traditional juvenile justice systems rely on; that children should not ever bear the same moral and legal culpability as an adult as they should be treated as children in every context.

a. Juvenile waiver

One of the most common forms of trying a juvenile in an adult court is by juvenile waiver, most usually by judicial waiver or legislative waiver.

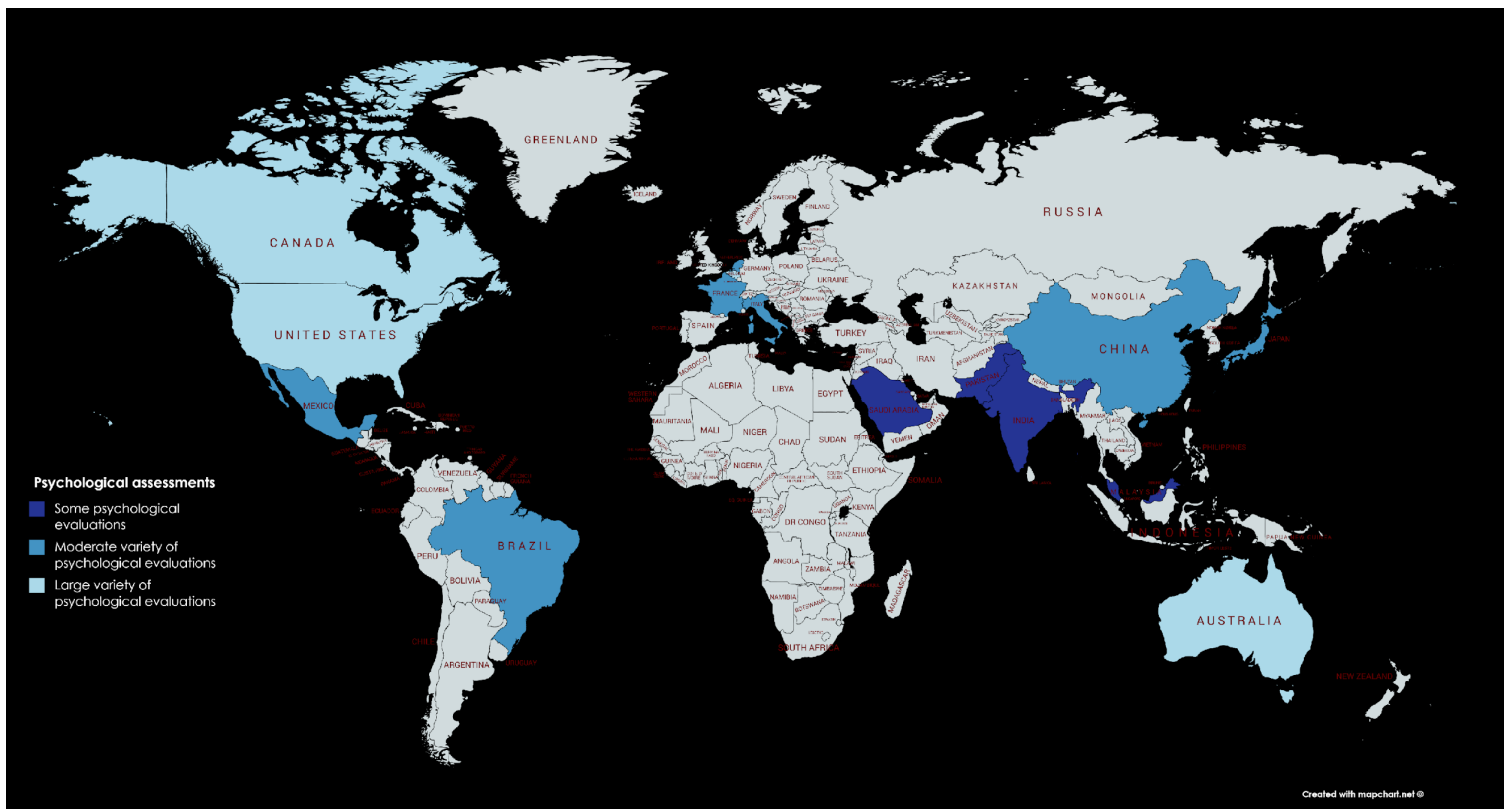
Judicial waiver is discretionary and involves consideration of a multitude of factors to determine an offenders' capacity. Legislative waiver however automatically excludes young people from the jurisdiction of the juvenile court for certain types of offences.

Judicial waivers require decision makers to base decisions of transfer (from juvenile court to adult court) on guidelines provided by the state. These vary among jurisdictions that apply juvenile waivers. Whether or not these legislative guidelines are followed, or whether extra-legal factors (e.g. race) have influence on deci-

sions of transfer is unclear and would require more investigation. Nevertheless, such factors may include; the potential risk to the community, the nature and severity of the alleged offence, the maturity and character of the juvenile, the juveniles legal history, whether the offence was aggressive, violent, premeditated or wilful and whether the alleged offence was against persons or against property. Given the psychological nature of many of these factors it is common that psychologists assume significant roles in evaluating transfer decisions.

b. The role of psychological assessments

While not all countries use psychological assessments, for those that do, they can play a number of roles within the juvenile justice system. Broadly, psychological assessments are firstly used for the triaging of juveniles when they first enter the system, secondly to determine capability to be tried as an adult (where applicable) and finally to help guide appropriate sentencing or punishments for a convicted juvenile. Assessing juveniles can be challenging due to their maturing brain, however it can provide treatment pathways for individuals, particularly in systems that are focussed on reducing recidivism.



c. Types of psychological assessments

The triaging of juveniles occurs when they first come into contact with the juvenile justice system and is generally focussed on an assessment of two aspects; the risk of reoffending and any acute mental health conditions. This process can be categorised as either screening or assessments; with the former, a much quicker process to ensure any immediate concerns are dealt with, and the latter a more individualised process looking at longer term interventions.

Assessment name	Description	Jurisdictions
Mental Health assessments		
<i>Massachusetts Youth Screening Instrument</i>	A 52-question self-report screening instrument that measures symptoms on seven scales regarding emotional, behavioural, or psychological disturbances, including suicide ideation	US
<i>Child and Adolescent Functional Assessment Scale (CAFAS)</i>	Functional assessment that rates juveniles on the basis of the adequacy and deficits in functioning within life domains such as home and school and with regard to potential problem areas such as substance use or self-harmful behaviour.	US
<i>Child and Adolescent Needs and Strengths—Comprehensive (CANS)</i>	A needs assessment tool that documents functioning in several domains, including substance abuse, mental health, other risk behaviours, and caregiver needs.	US, Canada
<i>Achenbach System of Empirically Based Assessment (ASEBA)</i>	18-item self-report form focusing on eight behavioural and problem dimensions that can be grouped into two broader types of pathology: “externalizing”(outward expression) and “internalizing” (inward feelings and thoughts). It is completed by the youth, parents, or teachers.	US
Risk Assessments		
<i>Youth Assessment and Screening Instrument (YASI)</i>	Measures both risk and strengths in juvenile populations as well as other high-risk youth. Also measures protective factors to help case workers build on the strengths of youth to buffer the negative impact of risk. Provides pre-screening functionality, critical for settings where triage based on risk principles is required.	US
<i>Youth Level of Service/Case Management Inventory (YLS/CMI)</i>	Most widely used assessment in the US. It is a well-validated, comprehensive, standardized inventory for assessing risk among juveniles 12–17. It includes measures of static and dynamic risks that can assist with post-matter case planning	US, Canada
<i>Structured Assessment of Violence Risk in Youth (SAVRY)</i>	A comprehensive risk assessment for adolescents. It contains measures of structured static and dynamic risk factors and protective factors to be combined with professional judgment in deriving the level of risk. Although the SAVRY originally was intended to assess violence risk, research indicates that it also has high accuracy for predicting general delinquent reoffending.	US, Canada
<i>Washington State Juvenile Court Assessment (WSJCA)</i>	Involves a rescreen, full assessment, and reassessment. They are administered by trained probation officers and other staff. Youth rating moderate or high risk on the pre-screen complete the full assessment, whereas those rating low risk do not get a full assessment.	US
<i>Actuarial risk assessment instruments (ARAI)</i>	Based on statistical models of weighted factors supported by research as being predictive of the likelihood of future offending. A risk score is calculated by assigning numeric values to risk factors such as criminal history, mental illness, and substance abuse problems, among many others. Some actuarial risk assessment tools include only static/historical risk factors, such as age of the offender and criminal history. However, some ARAIs also measure dynamic, changeable factors, such as pro-criminal attitudes.	The Netherlands
<i>Juvenile Risk Assessment Scale (JRA)</i>	The JRAS differentiates between low risk, moderate risk, and high risk that is tapped by nine static items and five dynamic items	US
<i>Estimate of Risk of Adolescent Sexual Offence Recidivism (ERASOR)</i>	A tool to assess risk of sexual violence among juveniles aged 12 to 18 years. The final risk estimate derived from using the ERASOR is short term (i.e., maximum 1 year) and should not be used to address questions related to long-term risk	US
<i>Juvenile Sex Offender Assessment Protocol-II (J-SOAP-II)</i>	Empirically informed guide for the systematic review and assessment of a uniform set of risk factors that has been associated with sexual and violent offending. It is designed to be used for boys in the age range of 12 to 18 years who have been adjudicated for sexual offences as well as non-adjudicated youths with a history of sexually coercive behavior.	US
General psychological assessments		
<i>Wechsler scales (WISC-IV)</i>	Intelligence test	US, Australia
<i>Hare Psychopathy Checklist: Youth Version (PCL:YV)</i>	An assessment designed to measure psychopathy traits among juveniles aged 12 to 18 years. Psychopathy traits are seen as a risk factor for future violent offending	US, The Netherlands, Australia
<i>Connors Comprehensive Behaviour Rating Scale</i>	Designed to give a complete overview of child and adolescent disorders and concerns.	US, Australia

Country Analysis

1. The hybrid models

2. The welfare models

3. The justice models

Country analysis will be split into 3 broad theoretical approaches to juvenile crime:

The hybrid model features a combination of features from both the welfare and justice models. This model is the most popular globally. Many states seek to balance their obligations to protect juveniles under international law with the demands of society for more punitive responses to serious juvenile offending. Systems that feature this approach often have an established juvenile justice system with strict protective measures in place to protect child rights, however feature juvenile waivers allowing for more punitive responses on a case-by-case basis. Some utilise psychological testing throughout the trial process, however more commonly psychological testing is utilised after sentencing with the aim of reducing recidivism. Increasingly, in countries taking on a hybrid or welfare approach, more testing has been introduced throughout the trial, such as screening, capacity and risk assessment tests in order to determine whether the child should be held criminally responsible.

The welfare model generally sees youth as victims of society that are in need of protection and nurture. Instead of punishing the child the welfare model seeks to understand the underlying causes of criminal behaviour and reintegrate young offenders back into society through rehabilitation and re-education.

The justice model is known for its emphasis on punitive punishment and emphasis. It is based on adherence to the due processes of law and the assumption that young people should be responsible for their actions. Punishment and retribution are achieved through penalties set by domestic legislation designed in accordance with the severity of the offence. This model encourages the application of juvenile waiver as it allows juveniles to be held criminally responsible and promotes deterrence by allowing juvenile punishment to equal adult punishment in severity. Countries with a justice model do not have a strong focus on the needs of the child, therefore do not have systems in place for psychological testing.

United States of America

a. Overview

The United States of America ('US') has one of the most complex juvenile justice systems in the world. Within the US there are 50 different juvenile justice systems, and inevitably some states lean towards a more welfare-based approach and others lean more punitively.

Despite the disparate approaches overall, the US prioritises a 'get tough' approach to policy making in regard to juvenile justice. This is largely due to the media's specific focus on incidences of extreme violence carried out by young persons, contributing to a distorted public perception of youth crime and a punitive attitude towards punishment.¹⁰⁴ The cases of *Kent*¹⁰⁵ and *Gault*¹⁰⁶ in the mid 60's, prompted the shift from a rehabilitative juvenile justice system to a more punitively focused system. The US has set a global precedent in establishing multiple transfer mechanisms. All US States have transfer laws that allow or require criminal prosecution of some young offenders.¹⁰⁷ However each States laws differ greatly in terms of flexibility and breadth of coverage. There are three basic categories of transfer mechanisms; judicial waiver laws; prosecutorial discretion or concurrent jurisdictional laws and statutory exclusion laws. It is estimated that 2.2 million youth younger than 18 are subject to routine criminal processing within the US.¹⁰⁸ More than 100,00 juveniles are being adjudicated in US criminal courts every year.¹⁰⁹

This is all against a backdrop of declining crime. According to the Office of Juvenile Justice and Delinquency Prevention, between 2000 and 2017 the estimated number of juvenile arrests decreased by around 62%.¹¹⁰ In 2018, the number of juveniles arrested fell 11% from the previous year.¹¹¹ In comparison, there was only a 2.1% decrease in adult arrests in the same period.¹¹² Despite this decrease in youth crime, punitive legal measures such as juvenile transfer, introduced as a response to increasing juvenile crime in the 80's and 90's remain. It has become increasingly easier, cheaper and quicker to have a child waived into adult criminal court.¹¹³

¹⁰⁴ Stephanie Penney and Marlene Moretti, 'The Transfer of Juveniles to Adult Court in Canada and the United States: Confused Agendas and Compromised Assessment Procedures' (2005) 4(1) *International Journal of Forensic Mental Health* 19, 19-37.

¹⁰⁵ *Kent v United States*, 383 US 541 (1996).

¹⁰⁶ *In re Gault*, 387 US 1, (1967).

¹⁰⁷ Patrick Griffin et al, 'Trying Juveniles as Adults: An analysis of state transfer laws and reporting' (2011) *Juvenile Offenders and Victims National Report Series Bulletin*, 2.

¹⁰⁸ *Ibid*.

¹⁰⁹ Steven N. Zane, Brandon C. Welsh and Daniel P. Mears, 'Juvenile transfer and the specific deterrence hypothesis: Systematic review and meta-analysis' (2016) 15(3) *Criminology and Public Policy* 901, 901-925.

¹¹⁰ Office of Juvenile Justice and Delinquency Prevention, 'Statistical Briefing Book', *Estimated number of juvenile arrests, 2017* (Webpage, 22 October 2018) <<https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2017>>.

¹¹¹ Federal Bureau of Investigation Criminal Justice Information Services Division, 'Current Year over Previous Year Arrest Trends Totals, 2017-2018', *2018 Crime in the United States* (Table, 2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-36>>.

¹¹² *Ibid*.

¹¹³ Carrie Freid Mulford et al, 'Legal issues affecting mentally disordered and developmentally delayed youth in the justice system' (2004) 3(1) *International Journal of Forensic Mental Health*, 3, 3-22.

b. Age of criminal responsibility

The *MACR* for federal crimes is set at 11 years old. However, at State level, 33 states have no *MACR*, theoretically allowing a child to be sentenced to criminal penalties at any age.¹¹⁴

c. Process

Most US states allow for juvenile court judges to waive jurisdiction over certain cases and transfer them to criminal court.¹¹⁵ The states of Alaska, Rhode Island, Delaware and Wyoming have no age restriction in relation to the transfer to children to criminal court for any criminal offence. After these States, the lowest specified age for juvenile waiver within the US is 10 years of age. Only around 13 states publicly report all transfers.¹¹⁶ 14 States do not report on their transfers at all, significantly impeding the data collected on waived cases within the US.

d. Types of waiver

Judicial waiver laws allow juvenile courts transfer cases to adult court on a case-by-case basis. These cases are filed originally with the juvenile court and are then transferred to the adult court via judicial approval following a formal hearing.¹¹⁷ Most States prescribe conditions or articulated standards for a waiver, however it is most often at the discretion of the judge. Some States make the waiver automatic in certain circumstances such as classes of cases, and some even specify mandatory circumstances in which a waiver must be applied.

There are three forms of judicial waiver; discretionary, presumptive and mandatory. 45 States feature discretionary judicial waiver laws.¹¹⁸ 15 States feature presumptive judicial waivers and another 15 States utilise mandatory judicial waivers.¹¹⁹ The landmark case of *Kent v United States*¹²⁰ established the discretionary waiver and the transfer criteria in determining which individual and legal factors are taken into consideration when determining transfer to criminal court. The criteria, known as the *Kent Criteria* evaluate the youth's maturity level, the seriousness of the offence, public safety, amenability, prior legal history, and response to the juvenile justice system.¹²¹

¹¹⁴ Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate, 2009) 221-222.

¹¹⁵ Griffin et al, (n 4) 4.

¹¹⁶ Ibid 15.

¹¹⁷ *Kent v United States*, 383 US 541 (1996).

¹¹⁸ Griffin et al, (n 4) 3.

¹¹⁹ Ibid.

¹²⁰ *Kent v United States*, 383 US 541 (1996).

¹²¹ Soo Jung Lee and Louis J. Kraus, 'Transfer of Juvenile Cases to Criminal Court' (2016) 25(1) *Child and Adolescent Psychiatric Clinics of North America* 41, 41-47.

Prosecutorial discretion or concurrent jurisdiction laws cover cases that can occur in either juvenile or criminal court. There are currently 15 States with these laws.¹²² The prosecutor is responsible for determining which court the case should be tried in. Statutory exclusion laws are provisions that grant criminal courts exclusive jurisdiction over certain cases involving juvenile offenders.¹²³

Further, within the US system there are some unique provisions that allow for children to be tried as adults. ‘Once an adult always an adult’ laws require children to be prosecuted as adults if they have been previously criminally charged, in most cases without regard to the seriousness of the current offence. There are 34 States that feature this automatic transfer to criminal court once a juvenile has been prosecuted as an adult.¹²⁴ Maryland, Michigan, Minnesota, and Texas have laws that only allow the automatic transfer of felony convicted children. Children as young as 11 are vulnerable in these states. Iowa, California and Oregon set an age restriction for this provision at age 16.¹²⁵ There are also provisions that allow children who are being tried in criminal court, to be transferred back to juvenile court. These provisions are known as reverse waiver laws. Some states also offer blended sentencing, which allows juvenile court to impose criminal sentencing options or vice versa.

e. Sentencing and Incarceration

After a child is waived to adult court, it is important to consider whether they are able to be incarcerated, and what types of sentencing they are subject to. The ability to incarcerate children varies greatly between states. What is concerning is that in most US states, juveniles are subject to incarceration while awaiting trial in a criminal court. 48 of 50 States allow jailing of juveniles awaiting criminal trial. Law in only 18 of these states specifies that juveniles must be incarcerated separately from adults when awaiting trial.¹²⁶ In 2009, a survey found there was more than 7000 youths under 18 being held in US jails.¹²⁷

Juveniles are no longer subject to the death penalty due to the US Supreme Court ruling it unconstitutional in 2005.¹²⁸ However the death penalty could be imposed on children in the USA between 1974 and 2005.¹²⁹ In 1989, the Supreme Court concluded that the execution of 16 to 17 year olds was not constitutionally barred.¹³⁰ Thus, when youth transfers were introduced over three decades ago, up until 2005 the death penalty could be imposed on waived juveniles. This resulted in seven states, Missouri, Texas, Virginia, Georgia, Oklahoma,

¹²² Griffin et al, (n 4) 3

¹²³ Ibid 2.

¹²⁴ Ibid 3.

¹²⁵ Ibid 7.

¹²⁶ Ibid 23.

¹²⁷ Ibid.

¹²⁸ *Roper v Simmons*, 543 US 551, 567 (2005)

¹²⁹ Amy Linn, ‘History of Death Penalty for Juvenile Offenders’, *Juvenile Justice Information Exchange* (Article, 13 February 2016) < <https://jjie.org/2016/02/13/history-of-death-penalty-for-juvenile-offenders/>>.

¹³⁰ *Stanford v Kentucky*, 492 US 361, (1989).

¹³¹ Linn (n 27).

South Carolina and Louisiana, executing juvenile offenders between 1989 and 2005.¹³¹ During this period, 226 juveniles were sentenced to death and 22 were executed before the practice was abolished.¹³²

f. Psychological assessments

Most waiver decisions in the USA are made by the youth court judge's assessment of the dangerousness, amenability to treatment and the level of maturity exhibited by a youth.¹³³ Apart from transfers that are automatically applied based on the age of the offender and the type of offence (for example statutory or legislative waivers and prosecutorial waivers), information is gathered from developmental physicians and forensic psychologists.¹³⁴

Evidence regarding a youth's culpability and propensity to future violence is also required from forensic evaluators.¹³⁵ The three factors of dangerousness (of future violence but also to others and the public), amenability to treatment and maturity remain determinative factors in deciding most transfer hearings despite a lack of uniform guidelines for defining these legal constructs and their assessment.¹³⁶ However some states also include factors such as treatment needs, emotional and behavioural aspects of the offence and intellectual disability or mental illness.¹³⁷ Overall each state seems to have similar Kent-like criteria along with other factors such as balancing the rights of the child and the community.

In cases of discretionary juvenile waiver the procedure requires an initial transfer hearing which the court first acknowledges that a threshold standard has been met regarding the facts, the youth's age and current and prior offences.¹³⁸ Then the juvenile court will consider the standards set out in Kent.¹³⁹ These criteria include but are not confined to: community protection; seriousness of the offence; whether the offence was violent, aggressive; premeditated or wilful; the nature of the offence (whether it was against person or property); sophistication and maturity of the youth assessed by ascertaining personal and situations, and prior contact with legal and mental institutions.¹⁴⁰ These criteria will vary from State to State. Frequently during these transfer hearings psychologists will be called to offer opinions on the above criteria. It is not clear whether the involvement of a psychologist is mandatory to offer qualified assessments.

¹³² Ibid.

¹³³ Thomas Grisso, 'Forensic clinical evaluations related to waiver of jurisdiction' in Jeffery Fagan and Franklin Zimring (eds), *The changing borders of juvenile justice: Transfer of adolescents to the criminal court* (Chicago: University of Chicago Press, 2000) 320, 320-351.

¹³⁴ Thomas Grisso, 'Forensic evaluation in delinquency cases' in AM Goldstein (ed), *Handbook of psychology: Forensic psychology* (New York: Wiley, 2003) 315, 315-334.

¹³⁵ Ibid.

¹³⁶ Randal Salekin, 'Clinical evaluation of youth considered for transfer to adult criminal court: Refining practice and directions for science' (2002) 2(1) *Journal of Forensic Psychology Practice* 55, 55-72.

¹³⁷ Kirk Heilbrun et al, 'A national survey of U.S. statutes on juvenile transfer: Implications for policy and practice' (1997) 15(2) *Behavioral Sciences and the Law* 125, 125-149.

¹³⁸ Thomas Grisso, *Forensic evaluation of juveniles* (Sarasota, FL: Professional Resource Press, 1998).

¹³⁹ *Kent v. United States*, 383 U.S. 541 (1966).

¹⁴⁰ Ibid.

Specifically, physicians are brought in to address three psychological constructs relevant to the transfer of juveniles including risk, sophistication-maturity and treatment amenability.¹⁴¹ There is significant commentary endorsing evaluations regarding sophistication-maturity and treatment amenability¹⁴², however assessing dangerousness and risk is more challenging.

Assessments used to determine these factors are often dated and unreliable. Anticipating future behaviour is difficult in any case; predicting future youth behaviour is even harder. Regarding the determination of future dangerousness and maturity, it is vital to recognise that adolescence is a period of continuous developmental change, characterised by a period of rapid social, behavioural and emotional transition. Thus, any information collected from evaluators will become quickly outdated as the juvenile continues to develop and mature.¹⁴³

In order to test for sophistication-maturity, forensic mental health professionals use a variety of tools.¹⁴⁴ Cognitive testing is utilised to help determine competency in juveniles facing transfer. Clinical psychologists utilise the Wechsler intelligence scales (WISC-IV, WAISIII) to assess perception, cognitive processing, attention and judgment in juveniles.¹⁴⁵ Sternberg's triad¹⁴⁶ is used to identify prosocial, asocial and antisocial behaviours and assess 'street smart' youth that may have scored lower in cognitive testing. Academic testing is also used to determine whether youth have learning disabilities or neurological dysfunction.

The Structured Assessment of Violence Risk in Youth (SAVRY) is a professional judgement risk assessment developed for offenders.¹⁴⁷ This interview is empirically based and uses professional judgment to assess youth offenders.¹⁴⁸ This is an individualised evaluation of the offender which examines both risk and protective factors allowing for professional discretion.¹⁴⁹

Psychopathy Checklist: Youth Version (PCL:YV) is a modified checklist for juveniles, originally use to assess risk in adults. It is used to determine adolescent risk and amenability to treatment.¹⁵⁰ It has been found that there is a strong correlation between high PCL:YV scores and criminal versatility, violent and aggressive behaviour, increased recidivism rates and treatment non-compliance.¹⁵¹ In regards to risk factors, and predicting dangerousness, this form of testing has been successful in producing some correlations between high

¹⁴¹ Anne-Marie Leistico and Randall Salekin, 'Testing the Reliability and Validity of the Risk, Sophistication-Maturity, and Treatment Amenability Instrument (RST-i): An Assessment Tool for Juvenile Offenders' (2003) 2(2) *International Journal of Forensic Mental Health* 103.

¹⁴² Christopher King, 'The psycholegal factors for juvenile transfer and reverse transfer evaluations' (2018) 36 *Behavioural Science Law* 46, 48.

¹⁴³ Grisso (2000) (n 31).

¹⁴⁴ King (n 40) 48.

¹⁴⁵ Penny and Moretti (n 1) 30.

¹⁴⁶ Robert Sternberg, 'Implicit theories of intelligence as exemplar stories of success: Why intelligence test validity is in the eye of the beholder' (2000) 6(1) *Psychology, Public Policy, and Law* 159, 159-167.

¹⁴⁷ Gina Vincent, 'Psychopathy and Violence Risk Assessment in Youth' (2006) 15(2) *Child and Adolescent Psychiatric Clinics of North America* 407, 422.

¹⁴⁸ Randy Borum, Patrick Bartel and Adelle Forth, 'Structured Assessment of Violence Risk in Youth' in Thomas Grisso, Gina Vincent and Daniel Seagrave (eds) *Mental Health Screening and Assessment in Juvenile Justice* (US: The Guilford Press, 2005) 311, 313.

¹⁴⁹ Ibid 313-314.

¹⁵⁰ Raymond Carrado et al, 'Predictive Validity of the Psychopathy Checklist: Youth Version for General and Violent Recidivism' (2004) 22(1) *Behavioural Science and Law* 5, 6-7.

¹⁵¹ Ibid.

scores and adult violent recidivism¹⁵², however difficulties remain in successfully determining youth risk as their personalities are non-static enough to evidence a strong psychopathic diagnosis.¹⁵³

Risk, Sophistication-Maturity, and Treatment Amenability instrument (RST-i) is a standardised test to determine the risk of dangerousness and sophistication maturity for children ages 9-18. It serves to fill the gap in available instruments to test juvenile offenders maturity levels and amenability to treatment. Dr Randall Salekin, the creator of the RST-I has promoted the adoption of a standardised national transfer system made up of the *Kent* criteria and a method for balancing them. Though the development on the RST-I testing is improving the validity of psychological assessments of children within a legal setting, it is still not a national requirement for courts to carry out professional mental health assessments as a part of the transfer hearing.¹⁵⁴

Further, out of the three main mechanisms that allow for juveniles to be transferred to adult criminal court (prosecutorial discretion, juvenile waiver and statutory exclusions) only juvenile waiver calls for mental health testimony.¹⁵⁵ Occasionally it has been seen that reverse waivers and blended sentencing decisions have also featured forensic mental health assessment. This is problematic as it suggests mental and psychological assessments are only carried out in one of the three ways in which a child can be routinely transferred.

Despite these valid methods of assessment, it has proven difficult for psychologists to apply these results in a legal context due to underdeveloped, standardised assessment criteria.¹⁵⁶ There are questions as to whether the current assessments are able to address the malleability of children and the specific developmental factors vital to the predictive validity of long-term risk assessments.¹⁵⁷ After the Supreme Court first addressed the issue of risk assessments in juvenile transfer in *Barefoot v Estelle*¹⁵⁸, extensive research into these assessments took place, resulting in increased predictive validity.¹⁵⁹ As the introduction of transfer laws and the Kent criteria are recent developments, detailed research into the outcome of these risk assessments, such as tracking recidivism into adulthood, has yet to be established. Further it is not clear whether the use of psychological assessments is fully accepted by legal officials.¹⁶⁰

It is uncertain whether the punitive system that developed in the USA over the last 30 years has contributed to reduced crime rates or improved control of juvenile delinquency.¹⁶¹ Studies have taken place

¹⁵² John Monahan et al, *Rethinking Risk Assessment* (Oxford University Press, 2001) 96-97.

¹⁵³ Zina Lee et al, 'The Validity of the Antisocial Process Screening Device as a Self-Report Measure of Psychopathy in Adolescent Offenders' (2003) 21(6) *Behavioural Science and Law* 771, 771.

¹⁵⁴ Grisso (2000) (n 31) 331-32.

¹⁵⁵ King (n 40).

¹⁵⁶ Leistico and Salekin (n 39).

¹⁵⁷ Vincent (n 45) 423-24.

¹⁵⁸ *Barefoot v Estelle* 463 US 880, (1983).

¹⁵⁹ Randy Otto, 'Prediction of Dangerous Behavior: A Review and Analysis of "Second-Generation" Research' (1992) 5(1) *Forensic Reports* 103, 103.

¹⁶⁰ Dia Brannen et al, 'Transfer to Adult Court: A National Study of How Juvenile Court Judges Weigh Pertinent Kent Criteria' (2006) 12(3) *Psychology, Public Policy, and Law* 332, 345.

¹⁶¹ Julianne Sheffer, 'Serious and habitual juvenile offender statutes: Reconciling punishment and rehabilitation within the juvenile justice system' (1995) 48(2) *Vanderbilt Law Review*, 479 -492.

in which the effects of juvenile transfer are examined.¹⁶² The outcome of this empirical research concluded youth waived to adult criminal court re-offended at faster rates than those who remained in the juvenile system. Several other studies have also found faster recidivism rates in children transferred to adult criminal court.¹⁶³ A handful of studies have shown that judicial transfer mechanisms do not promote general deterrence or prevent juvenile crime.¹⁶⁴ Thus, it can be concluded that juvenile transfers are ineffective in reducing juvenile crime.¹⁶⁵ There is a lack of research into the long-term effects of juvenile transfers have on youth.

¹⁶² Donna Biship et al, 'The transfer of juveniles to criminal court: Does it make a difference?' (1996) 42(2) *Crime and Delinquency* 171-191.

¹⁶³ Jeffery Fagan, 'The comparative advantage of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders' (1996) 18(1-2) *Law and Policy* 77-114.

¹⁶⁴ Richard Redding, 'Juvenile Transfer Laws: An Effective Deterrent to Delinquency?' *Office of Juvenile Justice Delinquency Prevention* (Juvenile Justice Bulletin, June 2010) <<https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>>

¹⁶⁵ Penny and Moretti (n 1) 25.

a. Overview

The juvenile justice model in Canada is based on both punitive and welfare approaches. Provisions are aimed at rehabilitation and reintegration, but prioritise community protection as paramount. In Canada, the rate of serious youth violence has been stable and consistent for the past three decades.¹⁶⁶ The Canadian criminal justice system is bound by a national criminal code, which creates consistency across provinces.¹⁶⁷ The legislation allows children between the ages of 12-17 to be tried as adults depending on the circumstances of the case. However, there are no provisions that allow children to be automatically waived into the adult system.¹⁶⁸ All juveniles, over the age of 14 may be sentenced in a criminal court if they have committed any presumptive offence, or any offence that an adult would receive a sentence of two years or longer as per the *Youth Criminal Justice Act 2003* ('YCJA').¹⁶⁹ Each province has the discretion to set the age for when this provision applies, but it must be between the ages of 14 and 16.¹⁷⁰ The onus is then on the accused to demonstrate why a juvenile sentence would be appropriate.

b. Age of responsibility

The age of criminal responsibility is 12.¹⁷¹

c. Process

The YCJA aims to 'hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public'.¹⁷² This seeks to weave together two competing demands, however establishes that society will take precedence over the individual.¹⁷³ The YCJA is relatively more punitive in regards to transfer decisions than the previous *Juvenile*

¹⁶⁶ RJ Bromwich, 'Compassion, human rights, and adult sentencing under the YCJA: Guidance for interpretation of the adult sentencing provisions of Canada's new youth justice law' (2002) 14 *Windsor Review of Legal and Social Issues* 71, 71-113.

¹⁶⁷ Rick Ruddell, Larry G. Mays, Dennis M. Giever, 'Transferring juveniles to adult courts: Recent trends and issues in Canada and the United States' (1998) 49 *Juvenile and Family Court Journal* 1, 1-15.

¹⁶⁸ Penny and Moretti (n 1).

¹⁶⁹ *Youth Criminal Justice Act*, SCR 2003, s 62 ('YCJA Act').

¹⁷⁰ *Ibid* s 61.

¹⁷¹ *Criminal Code*, RSC 1985, c. C-46, s 13.

¹⁷² YCJA Act (n 67) s 38[1].

¹⁷³ Penny and Moretti (n 1) 24.

¹⁷⁴ *Juvenile Delinquents Act*, SCR 1908, c. C-40.

¹⁷⁵ YCJA Act (n 67).

*Delinquents Act 1908*¹⁷⁴ and *Youth Offenders Act 1985*¹⁷⁵ setting out to determine whether juvenile sanctions properly hold youths accountable for their offence.¹⁷⁶

Waiver proceedings are only initiated after a finding of guilt within the youth court. Only then can a judge decide if an adult sentence may be more appropriate. An application for adult sentencing must be made and formally decided upon during a hearing.¹⁷⁷ Transfer from the youth court to the criminal court is only available for children ranging between 14 and 16 years old. If the offence is a presumptive offence (murder, attempted murder, manslaughter or sexual aggravated assault), then an adult sentence will be imposed unless the youth persuades the court that a juvenile sentence will adequately hold them accountable.

Despite allowing these more punitive transfer mechanisms, Canada aims to offset harsher punishments by allowing ‘intensive rehabilitative custody’ orders to ensure that a juvenile charged with a violent offence who suffers from a mental illness, psychological disorders or an emotional disturbance is treated accordingly.¹⁷⁸ Further, there is the ability under the YCJA for children to serve the first part of their sentence while they are still considered a child, in juvenile facilities, then be transferred to adult facilities after the age of 20.¹⁷⁹

d. Psychological assessment

Canada utilises psychological assessments within the youth justice system. Their system features screening tools used in the initial stages of the trial, various assessment mechanisms used throughout the trial and post-sentencing mechanisms to ensure individualised treatment needs are met. It has both developed and implemented internationally recognised tools used across all the provincial youth systems.¹⁸⁰

SAVRY assessments, like those used in the US, are used in Canada in addition to other similar assessments such as the Criminal Sentiments Scale (CCS). The CCS is used to measure levels of criminal sentiment by identifying antisocial attitudes, values, and beliefs that may influence antisocial behaviour.

The Youth Level of Service/Case Management Inventory (YLS/CMI) is a standardised instrument used by professionals to assess the risk of recidivism and the need for correctional programs in order to reduce recidivism. It is specifically designed for use with young offenders¹⁸¹ and comprises of a 42-item survey to determine the level of risk and needs factors used to formulate a case plan.¹⁸²

¹⁷⁶ Bromwich (n 64).

¹⁷⁷ YCJA Act (n 67) s 64[1], 71.

¹⁷⁸ Ibid s 42[7][b].

¹⁷⁹ Ibid s 76 [2][a].

¹⁸⁰ Government of Canada, ‘Youth Risk/Need Assessment: An Overview of Issues and Practices’, *Appendix One: Description Of Assessment Tools* (Web Page, 7th January 2015) < https://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/rr03_yj4-rr03_jj4/a1.html>.

¹⁸¹ R. D. Hodge and D. A. Andrews, ‘The Youth Level of Service/Case Management Inventory manual and scoring key’ (2002) *Multi-Health Systems Canada*.

¹⁸² Government of Canada (n 79).

The Youth Offender Level of Service Inventory (YO-LSI) is an assessment tool developed in Canada and now used internationally.¹⁸³ It is another instrument used to identify risk level but is also used to target criminogenic areas of needs.¹⁸⁴ It uses both static and dynamic predictors of criminal risk and needs that are grouped under seven factors: substance abuse, educational/employment problems, criminal history, accommodation problems, psychological factors and family problems.

Canada also employs specific instruments such as Static-99 to address individual needs. Static-99 is an actuarial instrument that is used to predict the probability of sexual and violent recidivism among adult males who have been convicted of at least one sexual offence against a child or non-consenting adult.¹⁸⁵ This test, along with multiple others, highlights the breadth of testing available specific to the individual needs of the child. These tools are ultimately used as aids to determine a child's mental capacity and criminal culpability, vital in determining whether a child should be transferred. Once a transfer takes place, these assessments are continued in order to address the child's individual needs when considering sentencing options.

Despite this impressive list of assessment tools, their application is still determined on a discretionary basis. In most Canadian provinces, there remains no one formal tool that is consistently used. There has also been a lack of validation studies conducted for many of these assessments.¹⁸⁶

¹⁸³ Mark Olver, Keira Stockdale and Stephen Wormith, 'Risk assessment with young offenders: A meta-analysis of three assessment measures' (2009) 36(4) *Criminal Justice and Behavior* 329, 329-353.

¹⁸⁴ Government of Canada (n 79).

¹⁸⁵ Ibid.

¹⁸⁶ Government of Canada, 'Youth Risk/Need Assessment: An Overview of Issues and Practices', *Appendix Three: Provincial Profiles* (Web Page, 7th January 2015) <https://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/tr03_yj4-tr03_jj4/a3.html>.

a. Overview

Mexico has been proactive in its efforts to keep up with international standards regarding the rights of children. In 2005, constitutional reform took place, which changed the existing system into a rights-based juvenile criminal justice system to honour the Convention on the Rights of the Child.¹⁸⁷ The new system '*Sistema Integral de Justicia para Adolescentes*' (Comprehensive Justice System for Adolescents) has provided significant steps forward in recognising and fulfilling the rights of adolescents.¹⁸⁸

b. Age of criminal responsibility

The age of criminal responsibility, as stated in the Constitution of Mexico, is 12 years old.¹⁸⁹ Children between the ages of 12 and 18 are subject to the Mexican integrated systems of justice where their conduct qualifies as a crime under the penal law. Crimes committed by children under 12 can only be subject to rehabilitation and social assistance under the provisions of the Constitution.¹⁹⁰

c. Process

According to the National Statistics on Adolescents in Conflict with the Law, between 2005 and 2006 the number of adolescents incarcerated dropped by over 50% as a direct response to the changes brought about by this reform.¹⁹¹ It standardised the minimum and maximum ages for the application of the juvenile justice system and confirmed incarceration as a last resort for juveniles between the ages of 14 and 18. These reforms also eliminated the possibility of incarceration as a punishment for children aged 12-13. Furthermore, incarceration was now only to apply to criminal offences and was statutorily limited to be only applicable to adolescents ages 14 and over in the most serious of cases.¹⁹²

In 2008 Constitutional reforms took place that regulated the use of pre-trial detention.¹⁹³ The operation of this system within each province varies; however, all are bound by the constitutional requirements. Now a prosecutor must request pre-trial detention only when other alternatives are not sufficient to guarantee the

¹⁸⁷Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 5, (entered into force 2 September 1990).

¹⁸⁸ Susana Sottoli, *The Rights of Children and Adolescents in Mexico: A present day agenda* (United Nations Children's Fund Report, January 2011) 86.

¹⁸⁹ Constitution of Mexico 1917 art 18.

¹⁹⁰ Ibid.

¹⁹¹ Sottoli (n 87) 86.

¹⁹² Ibid.

¹⁹³ Constitution of Mexico 1917 art 19.

defendant's appearance at hearings, their protection, or when the defendant has committed a previous violent crime.¹⁹⁴

d. Psychological assessment

Juveniles under 14 who have not committed a felony offence are released without any rehabilitation or treatment options and without assessment as to what would be the best outcome.¹⁹⁵ Little information is available on the use of psychological assessments in Mexico. It seems that in the current climate, there is a lack of funding available within the justice system to implement uniform youth assessment measures.

Mexico aims to focus on the rights of the child and child welfare when implementing provisions. However, it seems a lack of funding and resources has proven problematic in establishing mechanisms to fulfil a fully welfare-based approach. The lack of focus on psychological assessments and remaining punitive mechanisms available for children still reflect elements of a justice-based system. Overall, Mexico falls into the category of a hybrid system.

¹⁹⁴ Douglas Keillor, 'Children in Prison: Excessive juvenile pre-trial detention in Mexico City' (2013) *International Justice Consulting, inc* 21, 21.

¹⁹⁵ Martha Frías Armenta and Livier Gómez Martínez, 'Juvenile Justice in Mexico' (2014) 3 *LAWS* 580, 583.

a. Overview

Brazil is a leader in setting the global trend towards establishing broader legal protections to children. It was the first Latin American country to incorporate the Convention of the Rights of the Child into its national legislation via the *Statute of the Child and Adolescent*.¹⁹⁶ The Penal Code also establishes further special consideration by which if the perpetrator of a crime is less than 21 years of age then the punishment for the crime is reduced.¹⁹⁷

In 2017, a proposed constitutional amendment was introduced to allow children age 16 and above to be tried and punished as adults. This proposed amendment, PEC 33/2012 sought to modify Article 228 of the Constitution, which currently prevents minors under 18 from being held criminally responsible. The amendment sought to allow prosecutors to petition judges to allow children over 16 to be tried in criminal court on a case-by-case basis, only however in ‘specific and extraordinary’ cases. This would create the possibility of a wide range of procedures and punishments being applied to juveniles that were originally only intended for adults. Specifically, this amendment focused on crimes such as homicide, rape, kidnapping, very serious bodily injury, and repeat offences of armed robbery.

b. Age of criminal responsibility

According to the Constitution, minors under 18 years are not criminally responsible subject to the rules of special legislation.¹⁹⁸ This is further confirmed in the *Brazilian Penal Code* which provides that minors under 18 years are not criminally liable and are subject only to the rules established in special legislation, the *Estatuto da Criança e do Adolescente Art 104 (Child and Adolescent Statute)*¹⁹⁹ The *Child and Adolescent Statute* also confirms that minors under 18 are not criminally liable.²⁰⁰

c. Process

The *Child and Adolescent Statute* considers a crime or misdemeanour carried out by a minor to be an infraction.²⁰¹ No child will be deprived of their liberty except in cases involving infraction, or written order issued

¹⁹⁶ Statute of the Child and Adolescent 1990.

¹⁹⁷ The Brazilian Penal Code 1940 art 208.

¹⁹⁸ The Brazilian Constitution art 228.

¹⁹⁹ The Brazilian Penal Code 1940 art 27.

²⁰⁰ Child and Adolescent Statute 1990 art 104.

²⁰¹ Ibid art 103.

by the competent judicial authority.²⁰² The act stipulates a maximum confinement period of 45 days before a final decision on the acts of infraction must be issued.²⁰³

Once a juvenile is arrested, the police will lay a charge and direct the child to the court, which will then decide whether custody is appropriate until the end of the investigation. The police have the power to direct a juvenile to the adult system if the severity of the crime allows, and also to divert the juvenile away from the court system entirely.²⁰⁴ Police discretion to send juveniles to adult criminal court has contributed to the reported overcrowding of juvenile detention centres.²⁰⁵ Once the juvenile is sentenced, the case is sent to a correctional department, which administers the sentence. There are six alternative measures available in Brazil; warning, repairing the damage, community services, probation, open custody and secure custody.²⁰⁶ These alternative measures can be applied after the trial or after a period of evaluation in secure custody.

d. Psychological assessments

It is not clear whether any testing is done during the trial or before sentencing. The only evidence of any testing is after the trial has concluded and the juvenile has been sentenced. Once the offender is moved to the appropriate correctional department, an advisor is assigned. This can be a social worker or psychologist. Once at the facility a primary evaluation takes place, followed by clinical interviews and reporting.

Despite these welfare-oriented reforms, some provisions still remain which produce justice-focused outcomes. Police discretion to send juveniles to adult court, without any psychological assessment required is a very punitive mechanism. Thus, Brazil exhibits a hybrid approach.

²⁰² Ibid art 106.

²⁰³ Ibid art 108.

²⁰⁴ Alex Eduardo Gallo, 'Brazilian Young Offenders: Profile and Risk Factors for Criminal Behavior'(2013) 2 *International Journal of Criminology and Sociology* 163, 163-168.

²⁰⁵ Jo Griffin, 'Is brutal treatment of Young offenders fuelling crime rates in Brazil?' *The Guardian* (online, 3 March 2017 <<https://www.theguardian.com/global-development/2017/mar/03/brazil-crime-rates-brutal-treatment-young-offenders>>).

²⁰⁶ Alex Eduardo Gallo, *Brazilian Young Offenders: Profile and Risk Factors for Criminal Behavior*, *International Journal of Criminology and Sociology*, 2013, 2, 163-168. 164.

Australia

a. Overview

Australia features a hybrid system of juvenile justice. Despite its well-developed juvenile system, featuring comprehensive juvenile justice laws with a strong focus on child welfare, loopholes remain to allow children to be punished as adults. There is different governing legislation across the various states. Australia is a federal law system, with all states and territories governed by their own legislation e.g. in New South Wales, the *Children (Criminal Proceedings) Act 1987* (CCPA) and the *Young Offenders Act 1997* (YOA) govern how children are dealt with when they commit a criminal offence.

b. Age of criminal responsibility

The age of criminal responsibility in Australia is 10 years old. Between the ages of 10 and 14 children, *doli incapax* applies in all Australian jurisdictions. *Doli incapax* presumes a child under 14 does not know their conduct was wrong however this presumption is rebuttable. Once 14, children are held responsible for their crimes.

c. Process

A child is defined by the CCPA as ‘a person who is under the age of 18 years. This act also defines serious children’s indictable offences, such as homicide and offences punishable by imprisonment of 25 years to life. These offences are heard in adult court. A child charged with a serious children’s offence will be dealt with by the ‘general law’, meaning the criminal law.²⁰⁷ However, all courts exercising criminal jurisdiction over children must abide by the principles set out in the CCPA.²⁰⁸ The following sentencing orders are available for juveniles: a dismissal, good behaviour bond; a fine; referral to youth justice conferencing; conditional or unconditional probation; a community service order; or confinement to detention.²⁰⁹ There is an automatic transfer of children who have committed serious indictable offences into adult jail once they turn 18²¹⁰. In South Australia and Tasmania, the Supreme Court deals with all charges of homicide regardless of the age of the offender.

d. Psychological assessments

There is evidence of psychological testing taking place once a juvenile has been ordered into custody, mostly carried out in order to gain insight into youth recidivism rates.²¹¹ Currently, Western Australia is implement-

²⁰⁷ *Children (Criminal Proceedings) Act 1987* (NSW) s 17 (‘CCPA’). ²⁰⁸ *Ibid* s 6.

²⁰⁹ *Ibid* s 33.

²¹⁰ *Ibid* s 19.

²¹¹ Don Weatherburn, Rachel Cush and Paula Saunders, ‘Screening juvenile offenders for further assessment and intervention’ (2007) 109 *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research 1.

ing Multi-Systemic Therapy (MST), a widely utilised form of intervention to reduce recidivism in young offenders. It is not expressly clear whether these assessments are utilised with the intention of determining whether a child should be tried as an adult. However, the results are provided to the judge who has discretion over the matter. It should be noted that these programs are expensive. It has been estimated that to put every child who appears in the NSW Children's court through an MST program would cost AU\$43 million a year.²¹²

YLS/CMI screening is used in Australia and has been adapted to include factors that are specifically Australian.²¹³ This test is usually implemented early in the trial process; however, it is not administered to every juvenile making a first appearance in court. Usually, it is up to the discretion of the judge once specific risk factors have been identified, to implement screening.²¹⁴ This screening has proven valuable in preventing recidivism but due to its discretionary nature, many children who need early intervention are missed.²¹⁵

Australia does utilise valuable psychological assessments to offset the punitiveness of allowing juvenile waivers. However, they are not standardised or compulsory. Despite legislation featuring strong welfarist ideals, punitive outcomes still remain. Thus, Australia is considered a hybrid system.

²¹² Ibid.

²¹³ Anthony Thompson and Andrew McGrath, 'Subgroup differences and implications for contemporary risk-need assessment with juvenile offenders' (2012) 36(4) *Law and Human Behaviour* 345, 345-355.

²¹⁴ Weatherburn, Cush and Saunders (n 110) 2.

²¹⁵ Ibid 1.

China

a. Background/overview

China has successfully maintained a welfare-based model mixed with punitive measures.²¹⁶ To date, China has upheld its international obligations by outlining a set of principles and objectives intended to meet the needs of the juveniles in its domestic laws.²¹⁷ It still maintains a mixture of cultural and historical influences in its domestic laws, such as Maoism and Confucianism, and blends these with western values such as the doctrine of *parens patriae*.²¹⁸ The result, its juvenile justice system promotes reconciliation, rehabilitation, collective responsibility and restorative justice.²¹⁹ China views children as being more susceptible to negative peer influences and having ample capacity for rehabilitation, whilst focusing on the family and upholding the “best interests of the child” .²²⁰

b. Age of criminal responsibility

The age of criminal responsibility is a two-tiered system as juveniles over the age of 16 are held to be *fully* criminally responsible, whilst juveniles under the age of 14, but below 16, are held to be *relatively* criminally responsible.²²¹ This is only in relation to *grave offences*, as a person aged 14 or 15 may *relatively* be criminally responsible for serious crimes such as murder, GBH, assault causing death, rape, robbery, drug trafficking and poisoning.²²²

c. Process

China does not have a separate juvenile justice system similar to Western models, as the organisation and procedure of the juvenile justice system do not differ greatly from the adult system. ²²³ However, because of their age and vulnerability, juvenile offenders receive increased protection over their adult counterparts, such

²¹⁶ Hongwei Zhang and Ni He, ‘Status, Issues and Challenges of Chinese Juvenile Justice’ (2018) 34(2) *Journal of Contemporary Criminal Justice* 219, 221.

²¹⁷ *Ibid.*

²¹⁸ H. Zhang, ‘Strengthening juvenile rights or doing the opposite: The legal mysteries of Chinese Juvenile justice system behind the “Li gang-rape case”’ (2015) 10(2) *Journal of Law and Social Deviance* 1, 7-10.

²¹⁹ *Ibid.*

²²⁰ Zhang and He, above n 63, 222.

²²¹ *Chinese Criminal Law 1997* (China) s 17.

²²² *Ibid.*

²²³ Zhang, above n 65, 7-10.

as the hearing of matters in a 'juvenile tribunal' or 'juvenile collegiate panel,' and increased supervision, social inquiries, legal aid services and collaborative efforts during police investigation.²²⁴ Whilst having no formal system of juvenile waiver, juveniles aged between 16-18 years of age can technically be tried in adult courts under processes which mirror adult prosecution.²²⁵

China has always tried to reconcile the development of the child and their rehabilitation with the competing concerns of public safety and recidivism.²²⁶ Gradually, its system has matured in giving priority to education rather than punishment, despite countering voices and practices calling for harsher treatment of juvenile offenders.²²⁷

d. Psychological Assessments

Judges in juvenile tribunals may decide to order the need for psychological evaluation and counselling at any stage of the adjudication process which is prescribed under statutory law.²²⁸

²²⁴ Zhang and He, above n 63, 223-224.

²²⁵ J Feinerman, 'The disposition of cases involving juvenile delinquents in the People's Republic of China' (1985) 4 *Pacific Basin Law Journal* 1, 5-6.

²²⁶ Zhang and He, above n 63, 226.

²²⁷ *Ibid* 227.

²²⁸ *Law on Prevention of Juvenile Delinquency 1991* (China) art 39.

Pakistan

a. Overview

Pakistani juvenile law consists of substantive measures inherited from British Indian Law. The nation gained independence in 1947 and established an Islamic Republic in 1973, its laws now reflect a mixture of English Common Law and law founded by the Islamic Republic.²²⁹

Pakistan's previous legislation reflected a model aimed towards protecting and rehabilitating children into society.²³⁰ It was based on the therapeutic justice model in which the primary purpose was to protect and reform young offenders - only using incarceration as a last resort.²³¹ It also protected children from maltreatment during different stages of investigation, such as prohibiting institutions to order labour or corporal punishment whilst a child was in custody.²³²

However, Pakistan introduced key reforms in 2018, with the *Juvenile System Act (JJSA) 2018* which replaced the previous legislation under the *Juvenile Justice System Ordinance 2000*.²³³ Under the new legislation, new protocols have been introduced that are aimed at diversion and rehabilitation by establishing rehabilitation centres, observation homes and juvenile justice committees.²³⁴

In addition to this, the legislation introduced key definitions relating to the meaning of "child," age of criminal responsibility, "juvenile," "major offence" and "heinous offence."²³⁵ These new legislative definitions are central to identifying children and separating them from adult offending. For example, under the Act, "child" is now recognised as a person under the age of 18.²³⁶ In addition, "juvenile" means a child who may be dealt with for an offence in a manner which is different from an adult.²³⁷

b. Age of criminal responsibility

The minimum age of criminal responsibility in Pakistan is 7 years of age.²³⁸ This differs substantially from the global average of 10-14 years old.²³⁹ In addition, children between 7 to 12 may be punished under the old

²²⁹ *Indian Independence Act 1947* (India) s 18(3); *Constitution of Pakistan 1973* (Pakistan) art 265; Martin, above n 113, 21.

²³⁰ Ashraf Ali, Muhammed Saleem and Shadid Habib, 'Juvenile Justice System Ordinance 2000: Judgements of Apex Courts in Pakistan' (Research Report, University Marden Pakistan, 2013) 197.

²³¹ Ibid.

²³² *Juvenile Justice System Ordinance 2000* (Pakistan) s 12(a).

²³³ *Juvenile Justice System Act (JJSA) 2018* (Pakistan); *Juvenile Justice System Ordinance 2000* (Pakistan).

²³⁴ Waseem Ahmad Shah, 'View from the Courtroom: Key provisions of juvenile law yet to be implemented,' *Dawn* (online, 8 April 2019) <<https://www.dawn.com/news/1474623>>.

²³⁵ *Juvenile Justice System Act (JJSA) 2018* (Pakistan) s 2 ('definitions').

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ *Penal Code 1860* (Pakistan) ss 82.

²³⁹ Ido Weijers and Thomas Grisso, above n 181, 49.

penal code, so long as it can be proven that they have “attained significant maturity of understanding to judge the nature and consequences of [his or her] conduct on that occasion.”²⁴⁰

c. Process

Pakistan has maintained a strong policy towards separating adult and juvenile offending with the establishment of the Juvenile Court.²⁴¹ Accordingly, the Juvenile Court has exclusive jurisdiction to try cases in which a juvenile is accused of an offence.²⁴²

In addition, children are heard in the juvenile court for all offences and that provisions of the law will have an ‘overriding effect,’ notwithstanding anything contained in any other law from time being in force.²⁴³ This is to ensure that children aren’t heard in special courts such as the Anti-Terrorism Court (ATC) and the Narcotics Court for terrorism and drug offences under separate legislation.²⁴⁴

Measures are also in place to prevent the court overriding the legislation and making its own judgement based on the circumstances of the offending. The legislation also prevents a trial being held with a juvenile and adult by ensuring separateness through the Juvenile Court, and if it is in the interests of justice to hold a joint trial of a juvenile and an adult, the juvenile court may dispense with the physical presence of the juvenile and they may be allowed to join the Court proceedings through audio-visual technological link.²⁴⁵

The legislation provides better access to legal representation, which is a right offered to every child or juvenile who is a victim of an offence.²⁴⁶ In addition, early intervention protocols ensure that non-institutionalized juvenile delinquents receive supervision and evaluation during the early stages of prosecution, such as individual, one-to-one counselling with citizen volunteers during probationary supervision.²⁴⁷

²⁴⁰ *Penal Code 1860* (Pakistan) s 83.

²⁴¹ *Juvenile Justice System Act (JJSA) 2018* (Pakistan) s 4.

²⁴² *Ibid.*

²⁴³ *Juvenile Justice System Act (JJSA) 2018* (Pakistan) s 23.

²⁴⁴ Usama Malik, ‘Pakistan’s Juvenile Justice,’ *The Nation* (online, 31 October 2018) < <https://nation.com.pk/31-Oct-2018/pakistan-s-juvenile-justice>>.

²⁴⁵ *Juvenile Justice System Act (JJSA) 2018* (Pakistan) s 12.

²⁴⁶ *Ibid* s 3.

²⁴⁷ Amila Amber Malik, Saima Masoom Ali and Tooba Farooq, ‘An analytical review: predictors, prevention and interventions for juvenile delinquency’ (2018) 51 *Journal of Social Sciences and Humanities* 183, 193.

a. Overview

Prior to World War Two, Japan's juvenile justice system was aimed towards a child-welfare, based model since maintained by the 1948 juvenile justice reforms.²⁴⁸ The focus of these reforms was to guarantee juvenile rights during adjudication and establish the Family Court.²⁴⁹ The age range of juveniles increased from under 18 years to less than 20 years and greater attention was given to educative measures that will enable juvenile delinquents to develop their individual abilities.²⁵⁰ In addition to this, the welfare based model was also a participatory model, in which citizens were encouraged to participate as volunteers in activities to realise the purpose of the Juvenile Law.²⁵¹

However, the focus on rehabilitation, education and the right to due process under the law, shifted towards a more punitive, punishment-based model during the 21st century. Several factors during the 1990s prompted the government to amend the laws such as restoring powers they possessed under the old law, providing greater protections to the rights of the victim and limiting the jurisdiction of the Family Court.²⁵²

Parliament amended the Juvenile law in 2000 by introducing new provisions revising the approach of the Family Court, providing greater victim rights and imposing larger responsibility on juvenile offenders.²⁵³ Although still protecting some of the welfare-based principles of the old law, the new law placed greater accountability on the parents and legal counsellors needed during the prosecution of serious offences.

b. Age of criminal responsibility

²⁴⁸ Yokoyama Minoru, 'Juvenile Justice and Juvenile Crime: An Overview of Japan' in John Winterdyk (ed), *Juvenile Justice* (CRC Press, 2014) 179, 180-181.

²⁴⁹ Ibid 182.

²⁵⁰ Ibid.

²⁵¹ Ibid 183.

²⁵² Jae Joon Chung, 'The Policies of Criminal and Juvenile Justice Policies in Japan' (2016) 66 *Crime Law Soc Change* 359, 260-361.

²⁵³ Yokoyama Minoru, 'Revision of the Juvenile Law toward Partial Criminalisation in Japan' in A Manganas (ed) *Essays in Honour of Alice Yotopoulos-Marangopolous: Human Rights, Crime-Criminal Policy: Volume B* (Bruylant, 2003) 1545 – 1562.

²⁵⁴ *Child Welfare Act* (Japan) art 4.

Those over the age of 16 can have their matter remitted back to the public prosecutor from the Family Court if they have committed homicide or a malicious offence resulting in death.²⁵⁵

Reforms were again introduced in 2007 and 2008, amidst two juvenile offenders, a 12-year-old boy and an 11-year-old girl, committing horrific murders against two other minors during 2003 and 2004. Because the children were below the age of criminal responsibility, the police could not conduct research into the crimes, rather a Child Consultation Centre undertook this task.²⁵⁶ However, this was formalized during the 2007 reforms, as police now have the power to investigate serious cases of law-breaking by children and prepare a report for the chief of the Child Consultation Centre, which can then be referred to the Family Court.²⁵⁷ Additionally, children under the age of 12 who commit serious crimes, such as murder, may now be placed in a Juvenile Training School, a provision which was not previously in place until these two murders took place.²⁵⁸ ²⁵⁹ As discussed above, all cases of juvenile delinquency must be referred to the Family Court on first instance. However, Family Court Judges have the discretion to refer a case back to the public prosecutor for heinous crimes, which is analogous to transferring a youth to the Juvenile Court in Western countries.²⁶⁰ A legal counsellor must appear at the court as an attended for the juvenile offender.²⁶¹ The juvenile is subject to criminal indictment, including imprisonment of up to 15 years (maximum life imprisonment term for a “child”).²⁶²

Japan’s ‘tough on crime’ stance regarding juvenile offending has paid off, with the country having one of the lowest juvenile crimes rates and being heralded as one of the ‘safest countries in the world.’²⁶³ Particularly, Japan’s criminal index, including its rate of incarceration and executions, have remained stable and recorded low numbers.²⁶⁴ Notwithstanding these figures, it is undeniable that sensationalist reporting and ‘moral panic’ within the community has had a monumental impact on law reform in Japan, as policy changes in juvenile justice only occurred in response to widescale coverage of several violent murders during the 2000s.²⁶⁵

²⁵⁵ Ibid.

²⁵⁶ Ibid 186.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ministry of Foreign Affairs Japan, ‘Definition of the child,’ (Web Page, 2014) <<https://www.mofa.go.jp/policy/human/child/report2/definition.html>>.

²⁶⁰ Minoru, above n 96, 183.

²⁶¹ Ibid 185.

²⁶² Ibid 187.

²⁶³ Chung, above n 101, 360.

²⁶⁴ Ibid.

²⁶⁵ Ibid 361.

Netherlands

a. Overview

Historically, the Dutch government considered juvenile offending a “normal” stage of adolescence.²⁶⁶ Although it needed attention, it was generally thought to be of lesser concern than adult crime and as such juvenile justice provisions reflected a rehabilitative and educational purpose.²⁶⁷ However, since reforms in 1995, with the introduction of the New Criminal Code for Juveniles, juvenile justice in the Netherlands has started to resemble the adult criminal law, with severe juvenile sanctions and juvenile transfer.²⁶⁸ Changes in the social, political and economic landscape of the Netherlands, such as recession, unemployment and immigration influenced policy makers and government to take a ‘tough on stance’ against crime. These provisions quashed the role of personality assessments in the judge’s decision to refer a juvenile to the adult system for prosecution, and instead made the ‘seriousness’ and ‘circumstances’ of the offence the main considerations.²⁶⁹ They also introduced heavier sentences for juvenile offenders and increased the maximum penalty for 16 to 18-year-old offenders in the adult courts.²⁷⁰ Judges and Public Prosecutors are still encouraged to impose sanctions on juveniles which reflect a ‘constructive character,’ such as sanctions of a pedagogic character for first time and second time offenders.²⁷¹ However, the new legislation has eroded the strict accountability provisions of the previous protective model, as now constructive sanctions include more severe punishments for recidivists and greater emphasis on disciplining juvenile offenders.²⁷²

b. Age of criminal responsibility

Children below 12 years old cannot be prosecuted for a criminal offence in the Netherlands.²⁷³ Youth aged between 12 and 18 fall into “the punitive minor years,” and are subject to the juvenile justice system.²⁷⁴ Those above 18 years of age are considered “adults” and fall under the general law.²⁷⁵

c. Process

²⁶⁶ Henk Ferwerda, ‘Juvenile Justice and Juvenile Crime in the Netherlands’ in John Winterdyk (ed), *Juvenile Justice* (CRC Press, 2014) 239, 240.

²⁶⁷ Ibid 241.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ J Bartel, *Jeugdstrafrecht* (Kluwer Juridisch, 2007).

²⁷² Ibid.

²⁷³ *Code of Criminal Procedure* (Netherlands) art 486.

²⁷⁴ Ibid.

²⁷⁵ Ferwada, above n 63, 241.

Juveniles aged between 16 and 18 may have their matter heard under the adult criminal system.²⁷⁶ This depends on the suspect and the nature of the crime, and measures are generally restricted to juveniles who commit crimes such as rape, homicide or murder.²⁷⁷ Although they may be sentenced under the adult penal law, they must have their matter heard in the Youth Court, which enables certain protections such as the right to a closed court, no personal circumstances disclosed to the public, and the right to free legal representation.²⁷⁸

If a penal measure is imposed on a juvenile subject to the adult criminal law, the Youth Court must impose a sentence in accordance with the objectives of the juvenile justice system, which focuses primarily on education and special prevention.²⁷⁹ If the judge imposes an order of custodial treatment, such as serving time at a youth custodial institution, the Youth Court must consult reports of two independent behavioural experts, one of which has to be a psychiatrist of the juvenile, if they suffer from mental illness or problematic development.²⁸⁰

Two distinctions can be drawn out regarding the use and effectiveness of judicial waiver in the juvenile system in the Netherlands. Firstly, the use of juvenile waiver in the Netherlands is very low, as in 1995 the rate of all cases dealt by the juvenile courts was 16% which dramatically reduced to 1.2% in 2004.²⁸¹ In fact, the rate of juveniles sentenced to detention centres reduced by 23% between 2008 and 2012.²⁸² Scholars argue the decreased reliance on the Youth Court and Youth Detention Centres to prosecute and incapacitate offenders, and increased reliance of diversionary measure such as restorative justice, foster care and minimal intervention programs have contributed to the falling rates of juvenile delinquency.²⁸³

²⁷⁶ *Criminal Code* (Netherlands) art 77b.

²⁷⁷ *Ibid.*

²⁷⁸ *Code of Criminal Procedure* (Netherlands) art 488ff; *Dutch Constitution* (Netherlands) art 121; *Code of Criminal Procedure* (Netherlands) art 495(b)(1); *Criminal Code* (Netherlands) art 489.

²⁷⁹ Ton Liefaar and Maryse Hazelzet, 'Alternatives to Custody for Young Offenders: National Report on Juvenile Justice Trends' (Comparative Report, International Juvenile Justice Observatory, 2012) 8.

²⁸⁰ *Ibid* 9.

²⁸¹ Wiejers, Nuyiens and Christiaens, above n 77, 110.

²⁸² Liefaar and Hazelet, above n 88, 8.

²⁸³ *Ibid* 11-20.

Belgium

a. Overview

Since the beginning of the 20th century, the Belgium juvenile justice system has been underpinned by the idea that children have to be protected and re-educated rather than punished.²⁸⁴ Early statutes, such as the *Children's Act 1912*, reflected a welfare-based model aimed towards reintegration and rehabilitation.²⁸⁵ Young offenders are not considered to be responsible for their actions; offences are considered the symptoms of their underlying problems.²⁸⁶ Thus, the Children's Court interventions were not grounded in offences or the principle of proportionality, but on the young offender's personality and social context.²⁸⁷ Instead of punishment, protective youth measures were implemented 'in the best interests of the child.'²⁸⁸ The focus on protective and rehabilitative measures were strengthened with the *Youth Protection Act (YPA) 1965*,²⁸⁹ which repealed the previous Children's Court with the Youth Court and replaced all forms of punishment with youth measures.²⁹⁰

b. Age of criminal responsibility

The minimum age of criminal responsibility in Belgium is 16 years old which is comparatively higher than other European countries.²⁹¹ In principle, the upper age limit of the Belgian juvenile justice system is 18 years of age, but because juveniles may be transferred at 16 years of age, criminal responsibility starts at this age.²⁹² Although children under this age may not be held criminally responsible, the *Youth Protection Act* imposes a range of measures for juvenile delinquents of different ages.²⁹³ For children under the age of 12 only a reprimand, a supervision order or intensive educational guidance is possible.²⁹⁴ Detention in a close

²⁸⁴ Jenneke Christiaens and An Nuytiens, 'Transfer of Juvenile Offenders to Adult Court in Belgium: Critical Reflections on the Reform of a Moderate Practice' (2009) 9(2) *Youth Justice* 131, 132.

²⁸⁵ *Children's Act 1912* (Belgium); Christiaens and Nuytiens, above n 63, 132.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ *Youth Protection Act 1965 (YPA)* (Belgium).

²⁹⁰ Johan Put and Lode Walgrave, 'Belgium: From Protection towards Accountability?' in John Muncie and Barry Goldson (eds), *Comparative Youth Justice: Critical Issues* (SAGE Publishing, 2006) 111, 126.

²⁹¹ Ido Weijers and Thomas Grisso, 'Criminal Responsibility of Adolescents: Youth as Junior Citizenship' Child' in Josine Junger-Tas and Frieder Dunkel (eds), *Reforming Juvenile Justice* (Springer, 2009) 45, 51.

²⁹² Sabien Hespel and Johan Put, 'Alternatives to Custody for Young Offenders: National Report on Juvenile Justice Trends' (Comparative Report, International Juvenile Justice Observatory, 2014) 3.

²⁹³ Ibid.

²⁹⁴ Ibid.

facility is only possible for minors above 14 years of age.²⁹⁵

c. Process

Although promoting a system based on child welfare, reforms in 1965 introduced transfer to the Adult Court, commonly known as ‘judicial waiver,’ which made it possible for juveniles aged between 16 and 18 to have their matters transferred to the Adult Court.²⁹⁶ The 2006 reforms did not alter the age of criminal responsibility and introduced two new cumulative criteria that make juveniles responsible for their criminal acts.²⁹⁷ Arguably, the implementation of juvenile waiver is directed towards a juvenile justice system, as opposed to a child-welfare based model, however educational and rehabilitative reforms still remain paramount in sentencing decisions in Belgium, as juvenile waiver is seldom used.²⁹⁸

Juveniles charged with serious offences, including murder, rape and other violent offences, may have their matter transferred to the adult court.²⁹⁹ Alternatively, if the offence is not a serious one, juvenile transfer may only occur if at least one youth protection measure has been imposed on the juvenile.³⁰⁰ Since the 2006 reforms, transferred juveniles must be sent to the Extended Youth Court to have their matter assessed. This is a special chamber in the Youth Court where the previous role of the Magistrates court has been expunged, and three judges, one from the Magistrates Court, and two with specific training juvenile justice matters, sit to evaluate the transfer of the juvenile.³⁰¹ Only in the most severe matters will the juvenile be heard directly in the Crown Court.³⁰² In addition, juvenile detention has been reformed, as previously juveniles remanded in custody who had their decisions transferred would end up in adult prisons.³⁰³ Under the new law, remand custody and prison sentences are executed in specialised juvenile detention centres, which complies with separation requirement of juvenile and adult offenders under the ICCR.³⁰⁴

The rationale for judicial waiver in Belgium is two-fold. Firstly, if the juvenile continues to commit crime which increases in severity, then an educational measure is no longer considered to be most appropriate response.³⁰⁵ Rehabilitation is no longer an option, as for the legislature the juvenile offender has ‘steeped in anti-social behaviour.’³⁰⁶ Secondly, if the juvenile commits serious crimes, such as rape, manslaughter or murder, then the principle of community protection is given greater weight and justifies the need for adult

²⁹⁵ Ibid.

²⁹⁶ *Youth Protection Act 1965 (YPA)* (Belgium) art 38.

²⁹⁷ Yana Jaspers et al, ‘Pathways of Transferred Youth Offenders into Adulthood’ (2017) 17(2) *Youth Justice* 153, 155-157.

²⁹⁸ Put and Walgrave, above n 70, 126-127.

²⁹⁹ Jaspers et al, above n 72, 156.

³⁰⁰ Ibid.

³⁰¹ *Judicial Code* (Belgium) art 76, 78, 92 and 101.

³⁰² Jaspers et al, above n 72, 156.

³⁰³ Ibid.

³⁰⁴ *United Nations Convention on the Rights of Child*, opened for signature 20 November 1989, UNTS No 1577, (entered into force 2 September 1990).

³⁰⁵ Jaspers et al, above n 182, 156.

³⁰⁶ Christiaens and Nuytiens, above n 173, 132.

transfer.³⁰⁷ In this sense, it can be argued that transfer is reserved for the so called ‘hard core’ of young offenders, or serious offenders.³⁰⁸

The transfer mechanism in Belgium is intended to be exceptional, and thus extensive motivation of the Youth Court’s transfer decision is required.³⁰⁹ Two processes need to occur before the Youth Court decides on whether to transfer a juvenile to an adult court. Firstly, the Youth Court is obliged to explain a transfer decision in detail.³¹⁰ The legal criteria for making the decision includes ‘incompatibility’ of the personality of the youngest, and as 2006, the maturity of the juvenile and his or her social context.³¹¹

d. Psychological assessments

The court must conduct two compulsory inquiries; (1) a psychological assessment; and (2) a social inquiry. A medical-psychological examination, carried out by a psychiatrist, a psychologist or a multidisciplinary team of experts, must be conducted to obtain relevant information on the personality of the young offender.³¹² In addition, social workers must obtain any information relating to the social context of the juvenile which will be produced to the Youth Court for assessment.³¹³ It should be noted that the seriousness of the offence, nor previous offending are requisites for transfer.³¹⁴ The Youth Court may take these elements into account, however, only if they provide information on the personality of the young offender.³¹⁵

e. Conclusion

Since 2010, the public prosecutors statistics show a steady decline of juvenile offenders reported to the prosecutor’s office.³¹⁶ Between 2006 and 2010, cases of delinquency represented more than 50% of all reported cases. This figure dropped by 20% in 2014, with only 37,494 reported for delinquency.³¹⁷ In addition, transfer decisions only represented 3% of the Youth Courts judgements in 2001, 36 years after its introduction in 1965.³¹⁸

³⁰⁷ Jaspers et al, above n 182, 156.

³⁰⁸ Christiaens and Nuytiens, above n 173, 132.

³⁰⁹ Catherine Van Dijk, An Nuytiens and Christian Eliaerts, ‘The Referral of Juvenile Offenders to the Adult Court in Belgium: Theory and Practice’ (2005) 44(2) *The Harvard Journal* 151, 152.

³¹⁰ Jaspers et al, above n 72, 156.

³¹¹ Ibid.

³¹² Christiaens and Nuytiens, above n 173, 132.

³¹³ Ibid.

³¹⁴ D Goiset, ‘Divestment: An Exceptional Measure?’ (2000) 199 *Youth Law Journal* 14, 15-16.

³¹⁵ Ibid.

³¹⁶ Els Dumortier, Jenneke Christiaens and An Nuytiens, ‘Belgium’ in Scott Decker and Nerea Marteache (eds), *International Handbook of Juvenile Justice* (Springer 2006) 239, 245.

³¹⁷ Ibid.

³¹⁸ Wiejers, Nuytiens, and Christiaens, above n 308, 118.

France

a. Overview

The French system is a welfare-based approach which prioritises educational measures over penal outcomes and only places children in specialised care as a last resort option.³¹⁹ The judge in criminal proceedings plays an important role in the investigation and sentence as they must make themselves fully aware of the child's background e.g. the permeability of living conditions, and determine the measures available to prevent further offending.³²⁰

b. Age of criminal responsibility

There is no absolute minimum age of criminal responsibility for children in France, as children who are 'able to understand what they're doing' are criminally responsible for their crimes.³²¹ Scholars note the poor wording and lack of clarity with this provision which does not establish a set age of criminal responsibility.³²² As a result, children between 8 and 10 may be considered to have the requisite understanding necessary to establish capacity.³²³ Nonetheless, no child can be held criminally responsible in the adult courts until 18 years of age, and thus juvenile offenders under no circumstances may appear before an adult court.³²⁴

c. Process

All juvenile courts must hear cases behind closed doors in an 'informal process' which is geared towards protecting the best interests of the child.³²⁵ The judge must receive an educational report composed by various institutions, such as police officers, psychologists and social workers, which informs his or her opinion when sentencing the offender.³²⁶ Although the vast majority of cases are minor, for very serious offences such as murder, rape or robbery, a juvenile offender may be sentenced under adult laws.³²⁷ If found guilty, they may only receive half of the maximum adult sentence for the offence, which for example in the case of murder, would be 10 years (as under the general law the maximum sentence for an adult who is convicted of

³¹⁹ Ibid.

³²⁰ G Chantraine and N Sallee, 'Educate and Punish: Educational work and discipline in penitentiary for minors' (2013) 54 *French Review of Sociology* 437, 440.

³²¹ *Penal Code* (France) art 122.8.

³²² The Law Library of Congress, 'Children's Rights: France,' (Web Page) <https://www.loc.gov/law/help/child-rights/france.php#_ftnref87>.

³²³ Ibid.

³²⁴ *Penal Code* (France) arts 3, 8.

³²⁵ Junger-Tas and Dunkel, above n 13, 50, 51.

³²⁶ Vuattoux, above n 49, 11-14.

³²⁷ Junger-Tas and Dunkel, above n 13, 115, 227.

murder is 20 years imprisonment).³²⁸

d. Psychological assessments

It is a requirement that the juvenile judge collect information on the young offender by way of social inquiry including information on the family, the character and criminal record of the young offender, educational environment, behaviour at school, conditions of being brought up and other social circumstances.³²⁹ They may also order a medical examination and, if necessary psychological examinations.³³⁰ These assessments can take place at many different stages of the criminal process such as during provisional custody or after the juvenile is placed into a special school for delinquents or children's home.³³¹

³²⁸ *Penal Code* (France) arts 14, 20.

³²⁹ Catherine Blatier, 'Juvenile Justice in France: The Evolution of Sentencing for Children and Minor Delinquents,' (1999) 39(2) *British Journal of Criminology* 240, 242.

³³⁰ *Penal Code* (France) art 8.

³³¹ Blatier, above n 60, 243, 247.

a. Overview

The Italian juvenile justice system is one based on tolerance, welfare, education and rehabilitation. Wide-scale reforms during the 1970s and 1980s, such as the *1988 Code of Criminal Procedure*, introduced new juvenile justice procedures and created clear distinctions between the prosecution of adult and juvenile offenders.³³² Reforms were aimed at safeguarding the rights of the minor, increasing their responsibility in terms of punishment, obtaining rehabilitation through personalised approaches and early release from imprisonment by reducing the terms of preventive detention.³³³

b. Age of criminal responsibility

The minimum age of criminal responsibility in Italy is 14 which is similar to other European countries who promote a welfare-based model such as Germany, Austria, Spain and Hungary.³³⁴ Those under the age of 14 charged with a crime are acquitted.³³⁵ In addition to this, children over the age of 14 cannot be tried as adults or prosecuted in adult courts.

c. Process

The Italian juvenile justice system is administered by an ad hoc body, the 'juvenile court'.³³⁶ Although children may still be sentenced under the same provisions as adults, they receive separate treatment, support and protection, safeguarded under judicial discretion, juvenile justice legislation and judicial pardon.³³⁷ The Italian Juvenile Justice System recognises that the cognitive ability of a juvenile to understand and form intent is not necessarily the same as an adult.³³⁸

d. Psychological assessment

³³² David Nelken, 'Foil comparisons or foiled comparisons? Learning from Italian juvenile justice' (2015) 12(5) 519, 520-522.

³³³ Uberto Gatti and Alfredo Verdi, 'Comparative juvenile justice: An overview on Italy' in Jon Winterdyk (ed, *Juvenile Justice Systems: International Perspectives* (Canadian Scholars Press, 2002) 297, 310.

³³⁴ Patrizia Meringolo, 'Juvenile Justice System in Italy: Researches and Interventions,' (2012) 11(4) *Universitas Psychologica* 1081, 1082-1083.

³³⁵ Ibid.

³³⁶ Anna Costanza Baldry and Andreas Kapardis, *Risk Assessment for Juvenile Violent Offending* (Routledge, 2012) 28-30.

³³⁷ Zachariah Reveruzzi, 'Italy's Unique Diversionary Approach to Juvenile Justice – Probation and Judicial Pardons' (March 2016) *Australian Crime Prevention Council* 5-6.

³³⁸ Gatti and Verdi, above n 37, 298.

During the criminal process, the aims of social and psychological rehabilitation are prioritized; it is an obligation for courts to ensure that the child not be negatively affected, either psychologically or socially through their prosecution for criminal offences.³³⁹

Children must undergo personality assessments during different stages of processing to assess their psychological and educational development.³⁴⁰ The information attained from these assessments can better inform judges and prosecutors in terms of possible punishments.³⁴¹ In addition, children must be accompanied by specialised professionals during arrest and first reception, such as psychologists, educators, legal assistance and youth workers, to ensure the juvenile is supported also the parents if necessary.³⁴²

e. Conclusion

Despite wide criticism that the Italian Juvenile Justice System is too benevolent in its approach and hands out ‘slap on the wrist’ punishments for a wide variety of violent and sexual offences, scholars note the wide-scale success of the approach in reducing recidivism. Since 1992, recidivism reduced from 22.83% to 3.28% in central cities like Milan, Rome and Parma and reoffending rates remain incredibly low when compared to England or Wales.³⁴³ Psychologists and legal commentators attribute the success to the clinical intervention and passionate commitment shown to helping children affected by crime.³⁴⁴

³³⁹ *Juvenile Justice Code 1988* (Italy).

³⁴⁰ *Penal Code* (Italy) art 13, 14, 15.

³⁴¹ Neklen, above n 144, 519.

³⁴² *Ibid* 520.

³⁴³ *Ibid*.

³⁴⁴ *Ibid* 527.

Malaysia

a. Overview

Malaysian juvenile justice is based on the English common law.³⁴⁵ It attempts to uphold a system based on diversion, reconciliation and rehabilitation.³⁴⁶ Malaysian law has been criticised for allowing inappropriate and harsh punishments to be imposed on children including; whipping; life imprisonment and the death penalty.³⁴⁷ In addition, Malaysia controversially grants excessive discretionary powers to judicial officers (otherwise known as ‘Yang Di-Pertuan Agong,’) who may sentence juveniles to imprisonment for indefinite periods of time.³⁴⁸

b. Age of criminal responsibility

A child is defined in Malaysia as a person below the age of 18 years.³⁴⁹ The minimum age of criminal responsibility is 10 years of age due to the common law presumption of *doli incapax*.³⁵⁰ Similar to other English law countries, this presumption states that children below the age of 10 years are conclusively regarded as incapable of committing crime.³⁵¹³⁵² *Doli incapax* then becomes an rebuttable presumption for children 10-12 years of age.³⁵³ If the prosecution can show that the child has ‘attained sufficient maturity of understanding to judge of the nature and consequence of his conduct,’ the child may be found criminally liable for their wrongdoing.³⁵⁴ Only the defence can raise the presumption in their favour, and therefore the burden of proof lies with them in showing on the balance of probabilities that the child was incapable of committing any crime.³⁵⁵ Nonetheless, children who are alleged to have committed any criminal offence between the ages of 10-12 may be charged by the prosecution without any restriction.³⁵⁶ The defence may raise a preliminary objection at the early stages of the trial to challenge the criminal culpability of the offender.³⁵⁷ They may also rely on a large body of evidence to substantiate their claim, such as the conduct of the accused, their-

³⁴⁵ Aminuddin Mustafa, ‘Diversion Under Malaysian Juvenile Justice System: a Case of Too Little Too Late?’ (2016) 11(2) 135, 140-143.

³⁴⁶ *Criminal Procedure Code* (Malaysia).

³⁴⁷ Awal Mohd, ‘Child Rights in Malaysia: Which way?’ (2009) 2 *Malaysian Law Journal* 88, 89.

³⁴⁸ Mustafa, above n 80, 142.

³⁴⁹ *Criminal Procedure Code* (Malaysia) art 1.

³⁵⁰ *Penal Code* (Malaysia) s 82.

³⁵¹ Akmal Mohamad, Aminuddin Mustafa and Mohd Badrol Awang, ‘Criminal Responsibility of Children under Malaysian Law: Time for a Re-Evaluation’ (2017) 35(9) *World Applied Sciences Journal* 1783, 1784.

³⁵² *Ibid* 1785.

³⁵³ *Penal Code* (Malaysia) s 83.

³⁵⁴ *Ibid*.

³⁵⁵ *Evidence Act 1950* (Malaysia) s 105.

³⁵⁶ Mohamad, Mustafa and Awang, above n 86, 1785.

³⁵⁷ *Ibid*.

family background, notes from the police investigation, education background, expert evidence and other.³⁵⁸

c. Process

Malaysia has established a special court for the children known as the “Courts for Children,” which is given jurisdiction to try and hear various applications regarding children in conflict with the law.³⁵⁹ However, the Children’s Court does not have jurisdiction to try all offences, as offences punishable with death, offences triable under certain legislation, and offences in which children are tried jointly as adults, will be transferred to either the Session Court or High Court.³⁶⁰

There are safeguards in the law which ensure that children who are convicted of serious crimes subject to the death penalty must not be sentenced to death.³⁶¹ However, there are many flaws to the application of these protections, as children may be sentenced to an indefinite period of detention, upon the pardon of the magistrate.³⁶² For example, the case of *Prosecutor v Kok Wah Kuan*,³⁶³ where a decision to indefinitely detain a child convicted of murder was held to be a constitutionally valid

In fact, certain legislation can supersede the protections ensured by the *Childs Act 2001* and other legislation.³⁶⁴ The *Essential Security Cases (Amendment) Regulations (ESCAR) 1975*, expressly permits that children, regardless of their age, who are convicted of security offences to be sentenced to the death penalty.³⁶⁵ This was the case in *Lim Hang Seo v P.P.*,³⁶⁶ as a 14 year old boy found guilty of possession of a firearm and ammunition was sentenced to death under national security legislation.³⁶⁷ After appealing to the Federal Court, the Magistrate reduced the sentence to detention in a boys school, but the Court nonetheless held the punishment was constitutionally valid and appropriate.³⁶⁸ This is despite clear provisions in the CRC,³⁶⁹ the ‘Beijing Rules’³⁷⁰ and the International Covenant on Civil and Political Rights,³⁷¹ which unambiguously prohibit the use of corporal punishment and the death penalty.

³⁵⁸ Abdul Rahim, ‘Child Crime and the Development of the Adolescent Brain: Implications Malaysian Law’ (2012) *Journal Languages and Libraries* 175, 175-177.

³⁵⁹ *Child Act 2001* (Malaysia) s 11.

³⁶⁰ *Essential (Security Cases) Regulations 1975 (ESCAR)* (Malaysia); Mustaffa, above n 80, 140-141.

³⁶¹ *Child Act 2001* (Malaysia) s 97(1).

³⁶² Mustaffa, above n 80, 142.

³⁶³ [2008] 1 MLJ 1.

³⁶⁴ *Child Act 2001* (Malaysia) s 97(1).

³⁶⁵ *Essential (Security Cases) Regulations 1975 (ESCAR)* (Malaysia) reg 2(1).

³⁶⁶ [1978] 1 MLJ 68.

³⁶⁷ *Internal Security Act 1960* (Malaysia) s 57.

³⁶⁸ *Lim Hang Seoh v P.P* [1978] 1 MLJ 68.

³⁶⁹ *United Nations Convention on the Rights of Child*, opened for signature 20 November 1989, UNTS No 1577, (entered into force 2 September 1990) art 37.

³⁷⁰ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, A/RES/40/33, (entered into force 29 November 1985) art 17.3.

³⁷¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS No 999, (entered into force 23 March 1976) art 7.

d. Psychological assessments

Children who are found guilty must undergo a probation report before the Court for Children can impose an order which includes a social inquiry report and psychological evaluation.³⁷² The report must be conducted by a social welfare office.³⁷³ In addition, the use of counsellors and counselling services are also available for children sentenced to a non-residential diversionary program.³⁷⁴

³⁷² Datin Paduka Hajjah Intan Bte et al, 'A Measure of Last Resort? The Current Status of Juvenile Justice in ASEAN Member States' (Research Paper, Raoul Wallenberg Institute, 2015) 77-78.

³⁷³ *Child Act 2001* (Malaysia) s 90(13)(b).

³⁷⁴ Datin Paduka Hajjah Intan Bte et al, above n 110, 85-86.

Saudi Arabia

a. Overview

The Kingdom of Saudi Arabia is an absolute monarchy and follows a religious theocracy which incorporates Islamic principles into its legal system.³⁷⁵ Saudi Arabia has no juvenile justice legislation, as the main source of juvenile justice comes from the *Sharia* which is sourced from the Quran and the Sunnah of the Prophet Muhammed.³⁷⁶ In particular, court discretion and guiding principles when sentencing juvenile are drawn from the *Hanbali* school – the fourth orthodox school of thought within *Sunni* Islam.³⁷⁷ As a consequence, Saudi Arabia fails to explicitly outline the rights of juvenile offenders or how their cases are handled, leaving criminal justice system officials with broad discretion in determining the arrest of juveniles, how long to detain them, and what punishments to impose.³⁷⁸

b. Age of criminal responsibility

The minimum age of criminal responsibility for a child in Saudi Arabia is 12.³⁷⁹ This age still complies with the Convention on the Rights of Child (CRC).³⁸⁰ However, as noted by scholars, because criminal liability is based on comprehension and volition, as prescribed under Sharia Law, the criminal liability of young people differs according to their age.³⁸¹ Therefore, technically the minimum age of criminal responsibility is 7, as only this age is recognised as a phase of ‘complete lack of comprehension.’³⁸²

c. Process

Due to the lack of legislative guidance and strong adherence to religious tradition, there is no formal difference between child and adult offending.³⁸³ Children are recognised as ‘adults’ when they reach either a set

³⁷⁵ Eric Connolly, ‘Identifying Latent Classes of Antisocial Behaviour Among Youth From Saudi Arabia: An Assessment of the Co-Occurrence Between Aggression, Psychopathy, Low Self-Control, and Delinquent Behaviour’ (2017) 15(3) *Youth Violence and Juvenile Justice* 219, 223.

³⁷⁶ Saad Alateeq, ‘The assessment of juvenile offenders: learning lessons from Saudi Arabia from a contextual comparison with Scotland’ (Dissertation, University of Strathclyde, 2017) 57.

³⁷⁷ Ibid 58.

³⁷⁸ Ibid 59.

³⁷⁹ Human Rights Watch, ‘Adults Before Their Time: Children in Saudi Arabia’s Criminal Justice System’ (Web Page, 2019) <<https://www.hrw.org/report/2008/03/24/adults-their-time/children-saudi-arabias-criminal-justice-system>>.

³⁸⁰ *United Nations Convention on the Rights of Child*, opened for signature 20 November 1989, UNTS No 1577, (entered into force 2 September 1990) para 30.

³⁸¹ Alateeq, above n 129, 62.

³⁸² Ibid.

³⁸³ M Zureikat, ‘The causes of juvenile delinquency in Riyadh city’ (Theses, Naif Arab University for Security Sciences, 2005).

age or natural signs (i.e. puberty).³⁸⁴ Therefore, the age range for male juveniles might be extended to 20 years according to a judge, whilst in the case of serious crimes such as murder, a juvenile will be treated as an adult at the age of 16.³⁸⁵ They can be sentenced to corporal punishment for serious crimes (also known as *Hadd crimes*) including whipping and amputation, as well as subject to the death penalty if found convicted of murder.³⁸⁶

Saudi Arabia still ensures some protections for children such as using separate courts and detention facilities.³⁸⁷

d. Psychological Assessments

During most stages of the criminal justice process, psychological assessments are implemented to evaluate the psychological stability of child. These assessments, unlike other general provisions, are codified under the 1969 decree made by the Ministry of Justice in the Kingdom of Saudi Arabia.³⁸⁸ Under principle 3, the court should take into account the minors psychological stability and avoid exposing them to any kind of fear of threat.³⁸⁹ This is also supported by the Saudi PHR Document 2000, which provides that juveniles are only to be tried by a juvenile judge on the basis of the bill of indictment and the juveniles social report submitted by the institutions social supervisor, specifying the juveniles social and psychological circumstances.³⁹⁰

³⁸⁴ Rudolph Peters, *Crime and punishment in Islamic law: theory and practice from sixteenth to the tent-first century* (Cambridge University Press, 2005).

³⁸⁵ Zuriekat, above n 136.

³⁸⁶ Alateeq, above n 129, 32.

³⁸⁷ Ibid 17.

³⁸⁸ Hajed Alotaibi, 'Minors crimes in Saudi Arabia: analytical thematic study on Saudi juveniles' system' (Dissertation, Bangor University, 2017) 22.

³⁸⁹ Ibid 23.

³⁹⁰ Mashood Baderin, 'A comparative analysis of the right to a fair trial and due process under international human rights law and Saudi Arabian domestic law' (2006) 10(3) *The international journal of human rights* 241, 270.

Conclusion

In summary, this paper has launched a theoretical and practical examination into the common mechanisms used to prosecute young offenders as adults. On a theoretical note, it has examined the current legislative and judicial scheme in India and highlighted key areas for reform. It has analysed the drivers of crime such as neurobiological causes of offending, the role of the family and strain theory. The minimum age of criminal responsibility has been analysed as a social, cultural and political construct and its role during judicial proceedings magnified. The role of international standards in sentencing juvenile offenders on a global scale has been conveyed. Furthermore, juvenile waivers and the role of psychological assessments have been given special attention. The purpose and mechanisms of juvenile waiver have been analysed to provide greater insight into the reasons for implementing juvenile transfer. Moreover, the types of psychological assessments and their importance during all stages of processing has been explored. On a practical note, this paper has synthesized the above mentioned theoretical analysis onto a global scale by examining 15 different countries and their approaches to juvenile justice. It has examined the varying ages of criminal responsibility, the historical development and challenges with reform, the different approaches to juvenile justice, including rehabilitation and punitiveness, the processes of juvenile waiver and the wide variety of psychological assessments relied upon. In its analysis, this paper hopes to present a 'world view' of juvenile justice by highlighting the key areas that work for some countries, whilst discussing the challenges and obstacles they face.