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Juveniles on Trial: A Cross-Country Analysis of Judicial Waivers

By Ida Bahmani, Paris Busby, Namadev Sekar, Neha Sharma and Amit Singh



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Project Overview

Project Supervisors

Bharti Ali - Co Founder and Executive Director, HAQ: Centre for Child Rights
Rebekah Stevens - PACE Project Supervisor, Macquarie University

Rationale

This report was written in fulfilment of the academic requirements necessitated by the Macquarie University Law School's 'LAWS5078: PACE Clinics and Projects' program in partnership with HAQ: Centre for Child Rights- an NGO based in New Delhi, India.

Aim

This report aims to evaluate the processes and implementation mechanisms of judicial waivers across different jurisdictions. This report will highlight the inadequacies and deficiencies of judicial transfers, and will consider the use of psychological assessments as a tool to aid in the determination of judicial waivers.

Format

This report will provide a brief overview of the history, rationale and efficacy of judicial waivers. A range of legal and ethical issues relating to judicial waivers will be discussed, before finally evaluating the approach to judicial justice in a cross country analysis of Australia, England, Germany, New Zealand, Pakistan, South Africa and the United States. These countries were intentionally selected to represent a diverse range of geographical regions.

Limitations of Report

The primary limitation faced in the development of this report is the lack of existing academia and research with regard to the use of psychological assessments in the context of judicial waivers. This included limited access to resources which outlined or evaluated the specific processes adopted by each jurisdiction in the determination of judicial waivers, and relevant statistical data and analyses of the efficiencies of the implementation of judicial waivers. The writers of this report implore that greater research is conducted in this area in order to further inform the implications of judicial waivers on juvenile justice.

Judicial Waivers

Historical Analysis and Rationale

It was previously assumed that the development of the ‘architecture and functioning of the brain were limited to the prenatal period and the first five or six years of life’,¹ however recent scientific evidence propounds that the brain's complex structure continues to mature far beyond the years of early childhood and even puberty.² Medical imaging has demonstrated the transitory nature of the brain, suggesting that ongoing maturation continues well into an individual’s 20s, with the frontal lobes that are responsible for executive functioning like problem-solving, emotions and impulse control, among the last areas of the brain to reach full development.³ Thus, it can be said that the very individuals impacted by the potentially harmful repercussions of juvenile court policies and decisions are also subject to the detriment and vulnerabilities incurred by virtue of the physical, mental and emotional changes that mark this stage of life.⁴ It is therefore crucial, if the juvenile offender is to have an opportunity to become a contributing adult within society, that public policy and legislation demand adequate consideration of the neurodevelopmental changes experienced by the adolescent brain at all stages of the juvenile court process; this must extend to recognition at trial of the correlative relationship between the plasticity of the juvenile brain and an increased likelihood that behaviour and decision-making may be negatively influenced by environmental factors.⁵

As this report will demonstrate, many countries have long wrestled with how best to respond to juvenile offending behaviour. The diverse approaches adopted across jurisdictions alludes to the complex and sensitive nature of juvenile justice policy. It appears from our research that even the objectives that form the very foundation of juvenile justice policy remains disputed,⁶ with many

¹ Kerstin Konrad, Christine Firk and Peter Uhlhaas, ‘Brain Development During Adolescence’ (2013) 110(25) *Deutsches Ärzteblatt International* 425, 426.

² Sara Johnson, Robert Blum and Jay Giedd, ‘Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy’ (2009) 45 *Journal of Adolescent Health* 216.

³ *Ibid.*

⁴ Konrad (n 1) 425.

⁵ *Ibid.*

⁶ Anthony Doob and Michael Tonry, ‘Varieties of Youth Justice’ (2004) 31 *Crime and Justice* 1.

countries, and even states within countries, approaching juvenile justice through widely varied models that fall on a broad spectrum ranging from purely welfare-based to predominantly retributory and punitive.⁷

The early juvenile court distinguished between adults and juveniles, and adopted the *parens patriae* doctrine as its foundation, thereby centring its aims on rehabilitation.⁸ As outlined in this report however, many countries including Australia, England, New Zealand and the United States have since experienced legislative changes and reforms that make it easier for children to be transferred out of the jurisdiction of juvenile courts, and instead tried and sentenced as adults. This process of judicial transfer originally arose out of concern held by the public in response to reportedly high rates of juvenile crime and media coverage of heinous crimes committed by juvenile offenders, that ultimately festered in widespread public doubt regarding the Juvenile Court and its ability to impose proportional sentences and maintain public safety.⁹ Policies for judicial waiver were thereby introduced, and continue to operate today in many jurisdictions despite many of these same countries having signed and ratified the *United Nations Convention on the Rights of the Child* ('*UNCRC*'),¹⁰ which requires under article 40(3)(a) that member States establish a minimum age of criminal responsibility, which is recommended to bear in mind the 'emotional, mental and intellectual maturity' of the juvenile offender.¹¹

This paper will assess the efficacy of judicial waivers, as well as the legal and ethical dilemmas deriving from the process of transferring juveniles to adult courts. This report will suggest that the current process is plagued by inconsistent policies and disputed objectives that have resulted in a heavy reliance on judicial discretion,¹² culminating in fears pertaining to factors such as the arbitrary or discriminatory application of judicial waivers,¹³ including the possibility of a

⁷ Ibid 2.

⁸ Kathryn Monahan, Laurence Steinberg and Alex Piquero, 'Juvenile Justice Policy and Practice: A Developmental Perspective' (2015) 44(1) *Crime and Justice* 577.

⁹ Brandon Bang, Brianne Posey and Craig Hemmens, 'Juvenile Waiver 2014: A Review of State Statutes' (2016) 67(2) *Juvenile and Family Court Journal* 5, 5-6.

¹⁰ *United Nations Convention on the Rights of Child*, opened for signature 20 November 1989, UNTS No 1577, (entered into force 2 September 1990).

¹¹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('*The Beijing Rules*'), A/RES/40/33 (29 November 1985) para 4.

¹² Bang (n 9) 8.

¹³ Alison Burke, 'Trends of the Time: An Examination of Judicial Waiver in One State' (2015) 4(3) *Social Sciences* 820, 822.

disproportionate impact on certain groups of juveniles, such as those from cultural minorities.¹⁴ The dependence on judicial discretion, combined with minimal research to either confirm assumptions that juveniles are more amenable to rehabilitation or to ascertain the long-term detriment of correctional facilities and punitive sanctioning on the adolescent brain development,¹⁵ demonstrates an urgent need for longitudinal studies that can produce credible data to better guide legislative reforms.¹⁶

Efficacy of Judicial Waivers

Juvenile offenders who commit serious offences face two distinct paths within the judicial system. Although the juvenile court handles the majority of cases involving minors, some countries may deem it suitable to transfer a matter from a juvenile to adult court through employing a judicial waiver. While the adoption of this mechanism is dependent on laws and policy pertaining to different international jurisdictions, it remains important to analyse the issue from a holistic standpoint and explore the advantages and disadvantages of judicial waivers.

Advantages

Protection of the Community

A key argument in support for the adoption of judicial waivers considers the provision of the legal mechanism as instrumental in securing the safety of the general public at large. While juvenile offenders do not comprise a large portion of violent offenders,¹⁷ the danger of young, violent offenders returning to their respective communities is cause for considerable concern.¹⁸ Indeed, it is this concern which has largely been attributed to the lowered age of criminal responsibility across various international jurisdictions,¹⁹ permitting the incarceration of juvenile offenders who

¹⁴ Malcolm Young and Jenni Gainsborough, *Prosecuting Juveniles in Adult Court An Assessment of Trends and Consequences* (The Sentencing Project, 2000) 6.

¹⁵ Monahan (n 8) 606.

¹⁶ *Ibid.*

¹⁷ 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.

¹⁸ Mark Fondacaro, 'The Injustice of Retribution: Toward a Multisystemic Risk Management Model of Juvenile Justice' (2011) 20(1) *Journal of Law and Policy* 145, 150.

¹⁹ Lisa Bradley, 'The Age of Criminal Responsibility Revisited' (2003) 8(1) *Deakin Law Review* 71.

have committed heinous crimes. Subsequently, the ability to imprison a juvenile offender may be expected to protect the community from further acts of violence that the offender may commit had the child remained at liberty within society.

The Need for Retribution

When discussing juvenile justice advocacy, concerns regarding the need for retribution may be disregarded following the general acknowledgement of the importance of rehabilitating juvenile offenders.²⁰ Indeed, whilst rehabilitation remains essential within the juvenile justice system, some scholars have argued the failure to recognise the important role of retribution may lead to increased offending due to a perceived lack of serious consequences and the failure to address the public interest in ensuring certainty and accountability within the justice system through the incarceration of young perpetrators of heinous crimes.²¹ Subsequently, the provision of judicial waivers for juvenile offenders may be viewed as necessary in adequately recognising and addressing the need for retribution.

Disadvantages

Negative long-term impacts upon the child

Experts in developmental psychology have echoed concerns over the employment of judicial waivers and subsequent incarceration of children as adolescence is a key period in development.²² The incarceration of children during these crucial years of development may result in a plethora of negative impacts, including increased mental health disorders, poor education outcomes and long-term fractures in familial and social relationships.²³ Many children who commit heinous crimes are likely to have suffered from childhood trauma, abuse or neglect.²⁴ Despite the recognition of this, the provision of judicial waivers perpetuates and compounds the psychological

²⁰ David C. Tate, N. Dickon Reppucci and Edward Mulvey 'Violent Juvenile Delinquents' (1995) 50(9) *American Psychologist* 777.

²¹ *Ibid* 779.

²² Carly Dierkhising et al, 'Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning' (2014) 20(2) *Psychology, Public Policy and Law* 181, 184.

²³ *Ibid*.

²⁴ *Ibid* 182.

distress likely experienced by the offender,²⁵ leading to potentially severe, long term and irreversible psychological damage.

Recidivism rates

Recent statistics provided by the United Nations revealed overwhelming evidence supporting the notion that the incarceration of juvenile offenders may in fact lead to greater entrenchment of the juvenile within the criminal justice system as opposed to achieving rehabilitation and reformation objectives.²⁶ The prospect of judicial waivers promoting higher recidivism rates is a concern echoed throughout individuals involved within the criminal justice system throughout various international jurisdictions.²⁷ Subsequently, available statistics illuminate the pressing need for the diversion of juvenile offenders from incarceration as a consequence of the employment of judicial waivers to rehabilitative measures mandated by officers of the juvenile court system.²⁸ In adopting this approach, it is predicted that juvenile offenders will be less likely to reoffend in future instances.

Concluding remarks

Upon consideration of the above analysis, it remains evident that perceptions of judicial waivers are coloured by one's opinion of whether the justice system should protect the community or champion the rights and rehabilitation of the juvenile offender. Due to the controversial nature of administering judicial waivers, the administration of such waivers for juvenile offenders differs greatly across various international jurisdictions.

²⁵ Naomi Sugie and Kristin Turney, 'Beyond Incarceration: Criminal Justice Contact and Mental Health' (2017) 82(4) *American Sociological Review* 719, 731.

²⁶ UN General Assembly, Global Study on Children Deprived Of Liberty, UN GAOR doc A/74/50 (11 July 2019).

²⁷ Chad Trulson et al, 'A problem of Fit: Extreme Delinquents, Blended Sentencing and the Determinants of Continued Adult Sanctions' (2011) 22(3) *Criminal Justice Policy Review* 263, 264.

²⁸ 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, 7.

Legal and Ethical Issues

Who Is the Real Stakeholder?

Let it be stated forthrightly, this is a report. Not an essay, submission, nor critical analysis, but an overview of information; such intended to be of some use to a decision-maker in a position of influence. Let it be used to justify some change, no change, or a debate on what constitutes change. I present the following writing as the output of broad research into multiple disciplines, philosophies and ethics, in the hope that some benefit is affected by this section. This section ultimately aims to provide an overview of the stakeholder oft absent in consideration, despite their prime position- the juvenile.

The Ariadne's thread of judicial waiver is the benevolent disposition of juvenile courts. In cases of great ethical turbidity, where the court must reconcile diametrically opposed positions of public fears and the best interests of the child, benevolence sustains its True North quality and guides the decision-maker. However, concomitant with socially divisive politico-legal decisions, adopting reforms favourable to either side produces a highly politicised issue that few governments, let alone judiciaries, wish to clarify. What the issue devolves into then is a zero-sum game with the consistent losers, the juvenile. This brings us to the crux of the debate, best summarised via dialogue:

Person 1: *When a juvenile is before a court charged with an indictable offence the judge makes an arbitrary decision informed by little more than their personal moral compass...*

Person 2: *This 'arbitrary decision' is a product of discretion, whereby the legislature has empowered the judicial system to deliberate whether the juvenile in concern has any realistic prospect of rehabilitation...*

Person 1: *...if not moral compass, then on reliance of the morality that previous decisions of a similar nature alluded to but could not quite translate into an authoritative source of law.*

Person 2: *...with issues of judicial waiver, the judge is tasked with considering the individual circumstances of the juvenile and deciding the prospects of rehabilitation*

based on, conventionally, two factors; one, the seriousness of the crime, and two, the individual's personal circumstances. As a result, setting precedence would be counterintuitive to the aim of providing a hyper-personalised insight into the circumstances that led to the juvenile crime.

Albeit a simplified snapshot of the debate, it highlights the salient issues preventing either side from compromise; first, the perceived unhinged discretionary power, and second, the use of this power to decide the fate of adolescents. Overall, the intersection between adolescents and the law has, evidently, been dealt with as novel cases despite their nature not being penumbral. Whether this is considered favourable or not, the answer is a product of where one sits on the plane of public fear and best interests of the child.

In an attempt to reconcile the opposing views, the scholar William Hannan posited that, so long as procedural elements are maintained which permit the adolescent to make their case, be heard in an unbiased forum, and have the right to appeal decisions, judicial discretion in this aspect is the most appropriate legal mechanism to decide when the original jurisdiction of juvenile courts is to be waived.²⁹ Commenting on necessary reforms, Hannan propounded that most value will be reaped through further training of judicial officers presiding over the juvenile court, so as to emphasise the need to understand the juvenile's personal situation rather than the crime in isolation.³⁰ Additionally, greater funding is to be directed to juvenile courts, purposed to resource the individualised treatment each juvenile is entitled by virtue of their youth.³¹

As a background to the discussion, we examine the genesis of judicial waiver by understanding the 'child'. Here, the question is not *who* the child is, not the race, ethnicity, or economic status, despite their influence nonetheless, but rather, *what* exactly *is* a child for the purposes of judicial waiver. The instinctual response by many formulations, whether based in sociology or philosophy, is whether the child has developed moral culpability and capacity. In essence, whether they understand good from bad and the ramifications of their actions. It is these two features that are indicative of a transcendence from child to adult, in the strict sense. An alternative view relies on

²⁹ William Hannan, 'Judicial Waiver as the Only Equitable Method to Transfer Juvenile Offenders to Court' (2014) 22(1) *Notre Dame Journal of Law, Ethics and Public Policy* 193, 197.

³⁰ *Ibid* 220.

³¹ *Ibid* 223.

biology which, despite providing an empirical answer based on medical sciences, is limited in the legal setting insofar that developmental difficulty in children would render them forever children in the law's eyes, thereby revoking a fundamental privilege of adulthood – agency.³²

As to age, the 'child', with respect to a judicial waiver, is above the age of criminal responsibility and below the age of legal adulthood; in Australia, that would be above 10 and below 18.³³ Similarly in South Africa, it is also 10 and 18.³⁴ Within this window, the juvenile is to be considered an adolescent as opposed to a child.³⁵ The transition, or continuous path per se, has no definitive point where a child instantaneously becomes an adult, instead, there are incremental changes that occur on biological and metaphysical levels which begin to reflect an adult more so than a child; this adolescence therefore manifests as the transitory period from the two extremities of childhood and adulthood, varying purely on a matter of degree.³⁶ This is precisely why the legal system must be ultra-observant as to the level of progress an adolescent has made on the spectrum from child to adult, to accordingly apply the most appropriate jurisdiction. To briefly restate, the 'child' for the purposes of judicial waiver is an adolescent, an important semantic distinction recognising the intermediary stage of development and ascribing accountability in correlation to their development.

The adolescent is tasked with learning about the world and the obligations of the social contract they are so bound to. By virtue of existing in a civil society, there are rules to be followed and consequences when breached. The adolescent must, as they develop, continue to absorb the functioning of society and inform themselves about the rules and regulations fundamental to its operation. Such is the expectation of the adolescent. In this exploratory phase, the adolescent has limited autonomy with how they lead their life, exchanging agency for dependency on adults.³⁷ Their role as they continue to learn and grow is to develop a sense of 'self' through trying on different 'selves' and the worlds associated with them. Sometimes this may result in an ambitious

³² Moreover, it would supplant incoherence in the law as the presumption is children undergo natural processes which progress them into an adult and, if an adult were to have this process hindered to the extent that they fail to resemble an adult, that would mean they were children: Tamar Schapiro, 'What Is a Child?' (1999) 109(4) *Ethics* 715, 733.

³³ Children (Criminal Proceedings) Act 1987 (NSW) s 5.

³⁴ Anthony Pillay, 'Deliberating the minimum age of criminal responsibility' (2015) 45(2) *South African Journal of Psychology* 143, 143; *Children's Act 2005* (South Africa) s 17.

³⁵ Notably, 'child' is a semantic preference of humanitarian organisations stressing the moral fallibility of convicting the young.

³⁶ Schapiro (n 32) 724.

³⁷ Schapiro (n 32) 715.

adolescent, other times, it may be that the ‘self’ the adolescent has adopted is one criminally inclined.³⁸ It should be noted that the behaviour itself does not define the adolescent, but the ‘self’ they have imprinted. To this effect, should correction of the child occur that educates them on the inappropriateness and consequences of the ‘self’ related to criminality, rehabilitation is a real prospect; that is, rehabilitation into a law-abiding citizen. It is by adopting different personas throughout the developmental phases of adolescence do youth arrive at a sense of self that foundations their personality and disposition. It is this play of ‘dress up’ that forms the body of work adolescents are assigned to complete with the deadline being 18, and the job to become themselves.³⁹

To this effect, some judicial systems reflect the understanding that adolescents are in a transitory stage through the default jurisdiction being a juvenile court. This communicates a recognition that while adolescents try on different selves, there may be some that are misaligned to the expectations of society, and it is the responsibility of adults then, to recognise that adolescents have this additional burden of working out how to exist in civil society.⁴⁰ How their choice of *incorrect* behaviour is corrected, is through the pain of discipline handed by the juvenile court, acting as a surrogate conscience rather than a stark reminder of their subjection to external authority typically associated with adult courts.⁴¹ In essence, the role of the juvenile court that acknowledges the developmental nature of juveniles is to determine the circumstances that brought the adolescent before a judge and what could be done to prevent reappearances.⁴² This is accomplished through a thorough and individualised assessment of the adolescent, including factors such as family and personal problems that plagued them. The task is to correct the conditions that made crime the most viable option, eliminate or mitigate them, and educate the adolescent to understand the gravity of their decisions during their developmental stages. It is through this *parens patriae* means

³⁸ Hannan (n 29) 214.

³⁹ Schapiro (n 32) 732.

⁴⁰ A greater question for sociology is to determine whether adults have an obligation to raise the young, and in response to this, law is to answer whether liability rests solely with the adolescent if society (a collection of adults) has failed in their obligation. See Elizabeth Scott and Laurence Steinberg, ‘Rethinking Juvenile Justice’ (2008) 9(194) *Harvard University Press* 1, 69-70.

⁴¹ Schapiro (n 32) 736.

⁴² Jeffrey Fagan and Elizabeth Deschenes, ‘Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders’ (1990) 81(2) *The Journal of Criminal Law and Criminology* 314, 318.

that the court is able to assist the adolescent come to terms with their actions and the repercussions of them personally, to their family, and to society at large.⁴³

While there are more general issues with the juvenile system, it is not the purview of this section to discuss them at length, but rather, to focus on the juvenile. Nor is it within the scope to canvass greater sociological questions that strike at the validity of *parens patriae* against individual agency arguments, or whether the waiver of certain ethnic or socioeconomic communities may create a cycle of crime within that region.⁴⁴ When observed in the periphery with judicial waiver as the central subject, the operations of the juvenile court are guided by principles of rehabilitation, through education and reintegration into the community. For the purpose of this report, this is a non-issue. However, the point where a judge decides that the rehabilitative process of juvenile court is no longer fit for a specific adolescent, greater transparency would assist in alleviating some concerns of child rights advocates.

Ultimately, in theory, judicial waiver is to be used in the most extreme of cases with a natural inclination to retain juvenile jurisdiction, and rehabilitation preferred. In practice, research has indicated that a bureaucratic pressure to produce efficiency statistics, a need to quell external political pressure, and the burdens of limited financial resourcing have proven to be hindrances to an otherwise well-meaning system.⁴⁵ In this respect, greater research is required for more insight into the extent that juveniles are adrift in the judicial system. For, despite their centrality to the issue, and rather incomprehensibly, they occupy the central focus of legislation without any material consultation; in effect, they are *the* main stakeholder insofar that their freedoms are curtailed, or their agency blunted, yet their views on the matter are neither given serious attention nor a platform to express. Sometimes a child, other times an adult, dependent on the whims of a court, the juvenile rides the tide that volatile politics create.

⁴³ In an ideal context, the extent of *parens patriae* would decline in intrusiveness with the increasing maturity of the adolescent.

⁴⁴ Hannan (n 29) 216.

⁴⁵ Hannan (n 29) 223.

Judicial Waivers: The Presumption of Guilt

The discretionary nature of judicial waivers pose a significant threat to the natural justice and procedural rights of any given child faced with the prospect of judicial transfer.⁴⁶ As outlined in earlier sections of this report, the crux of the court's assessment in their determination of the waiver lies in the following: the severity of the crime; and the individual circumstances of the child. The latter considers the criminal background, age, likelihood of rehabilitation, psychological assessments, and the child's social and familial background. This pretrial determination hinders the child's right to natural justice and procedural fairness, as the mere successful transfer immediately condemns the juvenile as being perceived as more dangerous and incorrigible than their juvenile counterparts; a characterisation likely to impede upon their trial in the adult court and result in prejudicial outcomes.⁴⁷

Jurisdictions which adopt a discretionary approach to the determination of judicial waivers such as the United States, this results in a convoluted and inconsistent system, with often unequal and disparate rulings.⁴⁸ Empirical evidence suggests that alongside consideration of legal issues, juvenile court judges also incorporate their own preconceived notions and beliefs as to the efficacy of juvenile transfers into their decisions, further exacerbating issues of subjectivity.⁴⁹ The inherent biases which exist in the determination of judicial transfers are well documented,⁵⁰ with some studies identifying that family structure, socio-economic status, and whether the juvenile was a victim to abuse, are reflective of the child's treatability and capacity for rehabilitation, and in turn whether they will be more responsive to the juvenile or adult criminal court.⁵¹ The presence of bias in the determination of judicial waivers, is exacerbated by the absence of a sophisticated system or effective objective guidelines as the conclusion derived as to the efficacy of the transfer is clouded by subjective notions or perceptions of corrigibility. This results in disparate, unbalanced

⁴⁶Tiffani N Darden, 'Constitutionally Different: A Child's Right to Substantive Due Process' (2018) 50(1) *Loyola University Chicago School of Law* 211.

⁴⁷ Kareem L Jordan, 'Juvenile Status and Criminal Sentencing: Does it Matter in the Adult System?' (2014) 12(4) *Youth Violence and Juvenile Justice* 315, 317.

⁴⁸ Barry C Feld, 'Race, Youth Violence, and the Changing Jurisprudence of Waiver' (2001) 19(1) *Behavioral Sciences and The Law* 3, 8.

⁴⁹ Jill M D'Angelo, 'The Complex Nature of Juvenile Court Judges' Transfer Decisions: A Study Of Judicial Attitudes' (2007) 44(1) *The Social Science Journal* 147, 150.

⁵⁰ *Ibid* 149.

⁵¹ *Ibid* 152.

and ineffectual rulings as there lacks a coherent objective system which mitigates the potential for bias to skew the determination of the judicial waiver.

The determination of the judicial waiver occurring before the trial poses an additional impediment to natural justice. Although the waiver does not in itself impose a sentence on the juvenile, the courts in their determination of the waiver, stigmatise and impose undesirable characteristics upon the juvenile, such as incorrigibility, dangerousness, and culpability, a perception likely to be carried over to the adult criminal court.⁵² The process of judicial waivers inherently imposes a guilty charge prior to the child being convicted or heard before a court, as the biases which present themselves at the time of the judicial transfer follow through to the criminal court, with studies showing that juveniles which have been transferred to the criminal court presented a higher likelihood of receiving prison sentence than their adult counterparts, and received harsher sentences than their young adult counterparts.⁵³ Although it could be inferred that this is as a result of the system effectively separating those who are more likely to be guilty, the influence that a judicial waiver inherently commands over the perception of the juvenile in the eyes of the court should not be dismissed. Additionally, the decision to transfer a juvenile to the adult criminal court is likely to have a direct consequence on the sentencing of the child, with research suggesting that sentencing is often as a result of a cumulative and interrelated decision making process.⁵⁴ Therefore, the judicial waiver decision acts as an indicator of the child's culpability, incorrigibility and the danger they pose to society, and suggests that they are unsuitable for sufferance, rehabilitation or any form of leniency in the determination of their sentencing.

The judicial transfer process significantly impedes upon the natural rights of the juvenile as the lack of objective guidelines or systems results in a process riddled by bias and subjectivity. In justifying their determination for a judicial transfer, the court relies on subjective notions and perceptions of corrigibility and capacity for rehabilitation. This results in a convoluted and inconsistent system, with often disparate rulings as different justifications and considerations are utilised in determining the transfer. The consequences of this process continue on to the trial and

⁵² Suzanne O Kasaa et al, 'The Impact of Waiver to Adult Court on Youths' Perceptions of Procedural Justice' (2018) 24(4) *Psychology, Public Policy, and Law* 418, 420.

⁵³ Ibid.

⁵⁴ Brian D Johnson and Megan C Kurlychek, 'Transferred Juveniles in the Era of Sentencing Guidelines: Examining Judicial Departures for Juvenile Offenders in Adult Criminal Court' (2012) 50(2) *Criminology* 525, 532.

subsequent sentencing, as the successful transfer suggests the child is dangerous, incorrigible and culpable of the act, effectively rendering the child guilty before the hearing has even commenced.

The Inherent Lack of Standardisation in Psychological Assessments

Due to the inherent lack of standardisation, the use of psychological assessments in a judicial setting is contrary to the reliance courts have placed on empirical evidence. Psychological assessments have been utilised in varying jurisdictions to assess factors such as: competence of an individual, necessity of a judicial waiver and sentencing considerations. As with all scientific procedures, psychological testing requires standardisation to ensure that results are appropriate. Through proper standardisation, comparability between test results can be considered accurate. However, if standardisation is not undertaken correctly, the interpretation of test results are skewed. This lack of standardisation can result in an interpretation of results based on an individual's judgement rather than scientific method. Although it is not the primary determinant on the effectiveness of a psychological assessment, standardisation is essential in ensuring that the reliability of psychological assessments is upheld.

As highlighted, the utilisation of psychological testing requires an experimental control to ensure comparability is accurate. The current form of psychological tests were created to assist psychologists and have an overarching therapeutic purpose. Although variance and difficulty in establishing an experimental group may be overcome in a psychological setting, it is irreconcilable when considering the significant evidential burden in a judicial setting. The determination of a 'normal' group is exceedingly difficult when considering the varying socio-economic factors which are present. As exhibited by the Flynn Effect, throughout time, there is a tendency of results to change due to the instability of what is considered a 'societal norm'.⁵⁵ As psychological tests, such as MMPI-2, track an individual's results against a 'norm', it is inappropriate without consideration of the relevant societal factors.⁵⁶ The inability to gain an accurate control group and the lack of standardisation results in an inherent flaw when considering the utilisation of an individual being compared. A psychological test may have its normative group as individuals who are from a different economic state. Due to this, any changes to the scale or results are left to the discretion of the individual administering or interpreting the test. The difficulty in forming a 'norm' group is also exacerbated when considering the large range of psychological tests resulting

⁵⁵ Ronald Fischer and Taciano L. Milfont, 'Standardization in psychological research' (2010) 3(1) *International Journal of Psychological Research* 88, 89.

⁵⁶ *Ibid* 90.

in minimal data.⁵⁷ Even the utilisation of standard deviations is not able to overcome the inherent lack of standardisation which is existent in the multitude of psychological tests.⁵⁸

Although the discretion which exists in the interpretation of test results may be sufficient for a therapeutic setting, when considering the necessity of empirical evidence in a legal system, it is not appropriate. Due to the lack of standardisation the interpretation of an individual's result and subsequent character can be left to the administrator of the test. The administrator may have varying 'attitudes, personality or societal'⁵⁹ views. These varying views of the interpreter have the ability to subconsciously skew the analysis of an individual's results.⁶⁰ Both adversarial and inquisitorial systems utilise a fact-finder to interpret evidence and consider judgements. As the majority of psychological assessments, even when considering judicial waivers, operate on a comparison to a 'norm' group, the subjective interpretation of results is contrary to the purpose of a judicial setting. The judicial setting's reliance on statistical evidence is breached when considering the discretion which is afforded when psychological tests are interpreted.

It must be recognised that the aforementioned issues with standardisation in psychological settings are not easily reconcilable. The inability to standardise test results is an inherent risk which is existent with psychological assessments. Without having data covering a range of socio-economic groups, it is inappropriate to form an 'experimental group' which is considered a norm. Even if the seemingly impossible task of data formation is complete, as highlighted by the Flynn Effect, comparison of an individual's results to these would err due to changing societal values. Although the lack of standardisation may be overcome by discretion in a therapeutic setting, in a judicial process which has significant consequences, it is inappropriate.

⁵⁷ Stephen D.Hart, Christine Michie and David J. Cooke, 'Precision of actuarial risk assessment instruments. Evaluating the 'margins of error of group v. individual predictions of violence' (2007) 190 (s 49) *British Journal of Psychology* 60, 62.

⁵⁸ *Ibid.*

⁵⁹ Fischer (n 59) 89.

⁶⁰ *Ibid.*

Cross Country Analysis

I Australia

Australia utilises a common law system which inherited legislation and framework from the United Kingdom. The legal system operates on an adversarial system. The sentencing of juveniles in Australia focuses on the rehabilitation and education of juveniles.⁶¹ The legislation surrounding judicial waivers varies on a state basis. Although psychological assessments are not utilised in the granting of judicial waivers, they are applied when considering the sentencing of juveniles.

Age of Criminal Responsibility

All the states and territories in Australia have adopted 10 years as the age of criminal responsibility.⁶² However, from the ages of 10 -14 years old, the presumption of *doli incapax* holds.⁶³ This presumption, that a child is unable to commit crime as they are not aware of right and wrong, is rebuttable.

Process of Judicial Waiver:

The process of granting a judicial waiver is held in the legislation of each state. The courts do not utilise psychological assessments when undertaking a judicial waiver, rather, examine whether the juvenile's crimes fit the legislative exemption to transfer to the district court. In New South Wales, a child who undertakes a 'serious indictable offence'⁶⁴ will be tried as an adult at 'general law'.⁶⁵ These offences can include homicide, offences punishable for 25 years and any offences committed under the firearm act.⁶⁶ The court does not consider psychological assessments in the process of a judicial waiver. Despite the judicial waiver occurring, when considering sentencing, the initial objectives of rehabilitation and education in the juvenile sentencing legislation must be considered.

⁶¹ Australian Human Rights Commission, 'Juvenile Justice', *Australian Human Rights Commission* (Web Page) < <https://humanrights.gov.au/extended-area-work/juvenile-justice> > .

⁶² *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

⁶³ *Ibid.*

⁶⁴ *Ibid* s 17.

⁶⁵ *Ibid.*

⁶⁶ *Ibid* s 3.

Use of Psychological Assessments:

Psychological assessments are not utilised in the process of a judicial waiver. Although no legislation specifically states the requirement, when considering juvenile sentencing judges may consider pre-sentencing reports. These reports can include psychological assessments undertaken to determine the characteristics of the juvenile. Despite these reports, there is no ‘professionally endorsed standard’⁶⁷ of psychological tests. The utilisation of psychological assessments varies and has no clear standards. These tests are further questionable due to the high degree of discretion provided in whether they are utilised.

⁶⁷ Debra Bycroft, Greg E. Dear and Deidre Drake, ‘Psychological reports for sentencing juveniles in Australian Courts’ (2019) 26(3) *Psychiatry, Psychology and Law Journal* 355.

II England

England utilises a common law and adversarial justice system. England has often been criticised for its punitive focus on juvenile justice, especially in comparison to its rehabilitative European neighbours.⁶⁸ This punitive shift was as a result of the seminal case of the murder of James Bulger in the late 1990s, and although there are some juvenile restorative programs sprinkled throughout the country, there is less focus on rehabilitation at a greater national level.⁶⁹

Age of Responsibility

England has one of the youngest ages of penal responsibility in Europe at just 10 years old. Although prior to 1998 children between the ages of 10-13 were presumed to be *doli incapax* and incapable of committing a criminal offence, this was abolished by the *Crime and Disorder Act 1998* (UK). As a result, children between the ages of 10 and 17 are equally capable of committing offences, and there is no limitation of liability due to an incapacity to understand right from wrong. Anyone over the age of 18 is subject to the adult criminal justice system.

Process of Judicial Waiver

The use of judicial waivers in England first occurred in the seminal case of James Bulger, regarding the murder of a two year old by two boys aged 10.⁷⁰ This was one of the first instances of a child being heard before an adult court due to the exceptional circumstances of the case. Judicial waivers are determined at the discretion of the court, who may consider the transfer for more serious offences, such as offences with a minimal sentence of 14 years, where they determine that the juvenile system is insufficient. However, there also exist legislative waivers for manslaughter and murder which result in an automatic transfer to the adult criminal court.

Use of Psychological Assessments

⁶⁸ Claire Hamilton, Wendy Fitzgibbon and Nicola Carr, 'Punishment, Youth Justice and Cultural Contingency: Towards a Balanced Approach' (2016) 16(3) *Youth Justice: An International Journal* 1, 2.

⁶⁹ *Ibid.*

⁷⁰ *R v Secretary of State for the Home Department, ex parte Venables* All ER 97 [1997]; *R v Secretary of State for the Home Department, ex parte Thompson* All ER 97 [1997].

There is no requirement for the use of psychological assessments in the determination of judicial transfers as they are solely discretionary. Although psychological assessments may be used by the court to aid in their determination, this is not an essential or required element. In the *James Bulger Case*, psychological assessments were supplementary rather than determinative.⁷¹ There currently does not exist a standardised or recommended psychological assessment in England for the purposes of determining the efficacy of judicial transfers.

⁷¹ *R v Secretary of State for the Home Department, ex parte Venables* All ER 97 [1997]; *R v Secretary of State for the Home Department, ex parte Thompson* All ER 97 [1997].

III Germany

Since the early 1920s policies pertaining to youth justice in Germany have consistently focussed upon ‘sanctions that foster prosocial development’ of children, youth and young adults who are in conflict with the law.⁷² *Jugendgerichtsgesetz* (‘the Juvenile Court Act’)⁷³ was the first step towards a rehabilitative and educational model, however ongoing policy development continues to reflect those concepts suggested by the modern school of criminal law, which rejects punitive sanctions and instead favours ‘behaviour-modifying rehabilitative measures’ targeting recidivism.⁷⁴ The approach taken by the German juvenile justice system ultimately rests on the notion that legal interventions must center around care and education in order to address the causes that underpin juvenile criminal behaviour.⁷⁵

Age of Criminal Responsibility

Under the Juvenile Court Act a youth is deemed to be someone who, at the time of the act, has reached the age of 14 but not yet 18, whilst a young adult is someone who, at the time of the act, has reached the age of 18 but not yet 21.⁷⁶ The legislation further states that the objectives of criminal law in relation to this age group is to ‘counter renewed criminal offences’ and is hence, orientated primarily towards education.⁷⁷

Judicial Waiver

There is a stark difference between the approach taken by Germany, and many other juvenile justice systems such as those adopted in North America. Most importantly, Germany does not provide within its legislative framework, an opportunity to waive juvenile rights or transfer juvenile offenders to adult courts.⁷⁸ Rather, to the contrary, the juvenile justice system accommodates young people up to 20 years of age and provides a range of protections that ought to be afforded to both youth and young adults. These protections include, but are not limited to, the expectation that judges and public prosecutors responsible for juvenile court proceedings

⁷² Hans-Jorg Albrecht, ‘Youth Justice in Germany’ 31 (2004) *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* 443.

⁷³ *Jugendgerichtsgesetz* [Juvenile Court Act] (Germany) 4 August 1953, JGG, 1953.

⁷⁴ Hans-Jorg (n 72) 444.

⁷⁵ *Ibid* 445.

⁷⁶ *Jugendgerichtsgesetz* [Juvenile Court Act] (Germany) 4 August 1953, JGG, 1953, s 1(2).

⁷⁷ *Jugendgerichtsgesetz* [Juvenile Court Act] (Germany) 4 August 1953, JGG, 1953, s 2(1).

⁷⁸ Hans-Jorg (n 72) 452.

possess knowledge, experience and training relating to the education and upbringing of youth,⁷⁹ and the appointment of a representative from the youth courts assistance service throughout all stages of proceedings.⁸⁰ The representative that is appointed to the juvenile is a social worker responsible for researching and informing the court about details relating to the offender's education, upbringing and welfare, which could be relevant to proceedings and assist the judge in making the most appropriate sanctions.⁸¹ The sanctions available for juveniles in Germany pertain to supervisory measures, as well as placement in a psychiatric hospital or institution; however, where this is unsuccessful or deemed insufficient, disciplinary measures or a youth penalty may be imposed to punish an offence committed by the juvenile offender.⁸² Where alternatives are not deemed appropriate or are rendered unsuccessful and the seriousness of the crime warrants a youth penalty, being time spent in a facility,⁸³ the minimum that can be imposed is 6 months and at the very most up to 10 years.⁸⁴

Germany's approach to juvenile justice has been described as an 'enlightened policy' which, aside from a number of years during the Nazi Regime, has been applied consistently.⁸⁵ Germany's approach to juvenile justice has accommodated a substantially low juvenile incarceration rate, and as such, resulted in widespread concern amongst the public regarding the leniency that is afforded to juvenile offenders.⁸⁶ The success of this approach however is questionable, with rates of violent crime amongst juvenile and young adult males between 1993-2018 representing a 'wavelike development' with a steady incline up until 2007, that has since mostly followed a progressive and gradual decline.⁸⁷ Longitudinal studies to ascertain the long-term effects of Germany's approach to juvenile justice on rates of recidivism and rehabilitation could greatly assist in easing public

⁷⁹ *Jugendgerichtsgesetz* [Juvenile Court Act] (Germany) 4 August 1953, JGG, 1953, s 37.

⁸⁰ *Jugendgerichtsgesetz* [Juvenile Court Act] (Germany) 4 August 1953, JGG, 1953, s 38(3).

⁸¹ Julia Brehrens, *Study on children's involvement in judicial proceedings: Contextual overview for the criminal justice phase – Germany* (National Report, Directorate-General for Justice European Commission, 11 April 2014) 22.

⁸² *Jugendgerichtsgesetz* [Juvenile Court Act] (Germany) 4 August 1953, JGG, 1953, s 5.

⁸³ *Jugendgerichtsgesetz* [Juvenile Court Act] (Germany) 4 August 1953, JGG, 1953, s 17.

⁸⁴ *Jugendgerichtsgesetz* [Juvenile Court Act] (Germany) 4 August 1953, JGG, 1953, s 18.

⁸⁵ Hans-Jorg (n 72).

⁸⁶ Edith Palmer, *Germany Children's Rights: International and National Laws and Practice* (Report, Law Library of Congress, August 2007) 93.

⁸⁷ Jörg-Martin Jehle, *Criminal Justice in Germany Facts and Figures* (Federal Ministry of Justice and Consumer Protection, 7th ed, 2009) 16.

concern regarding leniency, and encourage other jurisdictions to adopt models that are similarly founded on education and rehabilitation.

IV New Zealand

The New Zealand judicial system bases itself on the Westminster system established in the United Kingdom. It operates as an adversarial court system. When considering juvenile sentencing, the New Zealand judicial system has the primary focus on the rehabilitation and reintegration of juveniles.⁸⁸ Judicial waivers and transfers to the criminal court can be undertaken at the discretion of the court with consideration of multiple factors. Despite this ability being granted to courts, the process is rarely undertaken.

Age of Criminal Responsibility:

Despite the United Nations stating that an appropriate age of criminal responsibility is 14,⁸⁹ New Zealand has 10 years old as the age of criminal responsibility.⁹⁰ From the ages of 10-13, the presumption of *doli incapax* holds.⁹¹ This presumption states that a child cannot undertake a crime during this age as they have no bearing of right or wrong. However, this presumption is rebuttable under statute.⁹²

Process of Judicial Waiver:

Under the *Children, Young Persons and their Families Act 1989 (NZ)* ('CYPA'),⁹³ a court is able to transfer a juvenile to the district court to be tried as an adult. A judicial waiver is able to occur when the juvenile is between 14 – 15 years old.⁹⁴ An individual between this age is only able to be transferred if the crime they committed was a 'category 4' or 'category 3' offence.⁹⁵ These are offences which are punishable through imprisonment for more than 2 years.⁹⁶ Individuals who commit these crimes within the age group are not automatically transferred to the district court,

⁸⁸ New Zealand Justice, 'How the Justice System Works', *New Zealand Ministry of Justice* (Web Page) < <https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/#:~:text=New%20Zealand's%20justice%20system%20is,concept%20called%20separation%20of%20powers> >.

⁸⁹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 44th sess, CRC/C/GC/ (25 April 2007) p11.

⁹⁰ *Crimes Act 1961 (NZ)* ('NZ Crimes Act ') s 21.

⁹¹ *Ibid.*

⁹² *Ibid* s 22.

⁹³ *Children, Young Persons and their Families Act 1989 (NZ)* ('CYPA').

⁹⁴ *Ibid* s 283.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

rather, the presiding judge is able to use discretion and consider whether a transfer is necessary. When assessing the appropriateness of a judicial waiver, the judge considers social circumstances of the juvenile, likelihood of recidivism, seriousness of the crime and the attitude of the juvenile.⁹⁷ No psychological assessments are utilised in the process of a judicial waiver. The utilisation of a judicial waiver is extremely rare to ensure that the primary needs of the juvenile, rehabilitation and reintegration, are met.

Use of Psychological Assessments:

Psychological assessments are not utilised when granting judicial waivers. The trial judge utilises their own discretion through consideration of factors which are listed in legislation. As examined throughout the consideration of competence, the New Zealand judicial system holds the use of psychological assessments on juveniles as ‘inappropriate’.⁹⁸ Rather, the court provides discretion to the judge to consider circumstances and to undertake an appropriate decision.

⁹⁷ Ibid

⁹⁸ Kirk Heilbrun, ‘The Role of Psychological Testing in Forensic Assessment’ (1992) 16(3) *Law and Human Behaviour* 257, 260.

V Pakistan

The principles of juvenile justice in Pakistan were significantly reflective of British Law.⁹⁹ However, following the independence of the country in 1947 and the establishment of the country as an Islamic Republic shortly afterwards, Pakistani laws heavily reflect both English and Islamic legal principles.¹⁰⁰

Initially, the Pakistani approach to juvenile justice reflected a more punitive and punishment-based model towards addressing children in conflict with the law. Scholars had largely attributed this shift to the age of criminal responsibility to seven years old,¹⁰¹ significantly departing from the United Nations Committee recommendation of fourteen years despite Pakistan ratifying the CRC in 1990.¹⁰² Pakistani legislation further stipulated that children aged seven to twelve years old may be held criminally accountable for their actions if it is established the child ‘attained significant maturity of understanding to judge the nature and consequences of (their) conduct on that occasion’.¹⁰³

However, following key legislative reform in 2018, the Pakistani juvenile legal system began to reflect a more therapeutic model of justice.¹⁰⁴ The *Juvenile Justice System Act 2018* established protocols aimed at protecting and rehabilitating children in conflict with the law and emphasised the role of incarceration as a final resort to addressing juvenile crime.¹⁰⁵

When approaching the issue of judicial waivers, Pakistan has maintained a strong separation between juveniles and adult criminal courts through the establishment of the Juvenile Court, which holds exclusive jurisdiction in addressing juvenile crime.¹⁰⁶ While circumstances exist that involve

⁹⁹ Shemeen Abbas, ‘The Power of English in Pakistan’ (1993) 12(2) *World Englishes* 147.

¹⁰⁰ *Constitution of Pakistan 1973* (Pakistan) art 265.

¹⁰¹ Nimrah Ishfaq, ‘Empirical Evidence of Multi-Facets of Delinquency in Pakistan: Revised Self-Reported Delinquency Scale’ (2019) 34(1) *Pakistan Journal of Psychological Research* 115, 123.

¹⁰² *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.

¹⁰³ *Penal Code 1860* (Pakistan) s 83.

¹⁰⁴ Ashraf Ali, Muhammed Saleem and Shadid Habib, ‘Juvenile Justice System Ordinance 2000: Judgements of Apex Courts in Pakistan’ (Research 230 Report, University Marden Pakistan, 2013) 197.

¹⁰⁵ *Juvenile Justice System Act 2018* (Pakistan).

¹⁰⁶ *Ibid* s 4.

the transfer of children to adult courts, the role of psychological testing remains supplementary and informative, as opposed to determinative.

Psychological testing is primarily involved in early intervention protocols, and ensures juvenile offenders receive appropriate supervision and evaluation during the prosecution stage.¹⁰⁷ While the statistics examining the use of judicial waivers within a Pakistani context is unclear, it remains established knowledge that the determination of a juvenile's capacity remains largely to the discretion of the legal presiding officer, without mandated consideration of their psychological states informed through forensic testing.¹⁰⁸

¹⁰⁷ Amila Amber Malik, Saima Masoom Ali and Tooba Farooq, 'An analytical review: predictors, prevention and interventions for juvenile delinquency' (2018) 51(1) *Journal of Social Sciences and Humanities* 183, 193.

¹⁰⁸ *Ibid* 187.

VI South Africa

South Africa is a signatory of the *Convention on the Rights of the Child*,¹⁰⁹ having signed it in 1993 and ratified on 16th June 1995.¹¹⁰ The approach to children in conflict with the law is guided by the promotion of *ubuntu* (compassion and humanity), enshrined in the objectives of their main juvenile legislation, the *Child Justice Act 2008* (South Africa) (*'CJ Act'*).¹¹¹ These laws are intended to apply a holistic methodology in dealing with juvenile crime, purposed to break the cycle of crime and provide services that encourage children to become law-abiding citizens.¹¹² In furtherance of this objective, a notable point is the non-derogable characteristic of its guiding principles, such that commit the decision-maker to consider in their deliberation a range of factors which address some issues prevalent in the judicial waiver debate; for instance, the necessity to consider the juvenile's participation, agency, and the necessity to maintain the informality of procedure whilst retaining the protections afforded to adult criminal courts.¹¹³

Age of Criminal Responsibility

The CJ Act provides that the minimum age of criminal capacity is 14. Under the age of 10, *doli incapax* is accepted and therefore prosecution is nulled. Over the age of 10 yet under 14, a presumption of incapacity applies unless the State provides otherwise.¹¹⁴

Underpinning Theory

Rehabilitation is the operative theory underpinning the CJ Act. The sentiment when canvassing the Act and in conjunction with its provisions, are attestations to this rehabilitative purpose that guides how the law is to interact with juveniles. While there are numerous examples within the legislation, consider the following as indicative: '[This Act therefore aims to recognise the present realities of crime in the country and the need to be proactive in crime prevention by placing

¹⁰⁹ Convention on the Rights of a Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹¹⁰ South Africa Parliament, *Promoting Children's Rights in South Africa: Fast Facts – United Nations Convention On The Rights Of The Child (UNCRC)* (Report, 19 November 2019) 2.

¹¹¹ Child Justice Act 2008 (South Africa) s 2.

¹¹² Ibid.

¹¹³ Ibid s 3.

¹¹⁴ Ibid s 7.

increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending'.¹¹⁵

Societal Attitudes

While data related to social attitudes typically conveys information from the perspective of adults, consider instead the insight offered by Tyson and Stones, who conducted a questionnaire targeted at high school students in South Africa to determine explanations for juvenile delinquency.¹¹⁶ Among a range of interesting conclusions, an oft overlooked factor is the necessity element. Considering the low socioeconomic status in parts of South Africa, a limited access to resources, and the racial inequities (both perceived and real), such formed rationale for crime due to deprivation. In addition to this, also consider the insight from Tadesse, finding a range of issues that hindered the child from seeking help from the government and public institutions. In his work, the following were some conclusions: lack of education, distrust of government lawyers, an insistence of innocence, the perception that lawyers delay and prolong cases, the allegation that lawyers coerce juveniles to enter guilty pleas, and the preference of juveniles to self-represent.¹¹⁷ Combining the wisdom from these sources, the conclusion is that environmental factors external to the juvenile are likely to be the prime determinants of juvenile crime in low socioeconomic geographies.

Psychological Testing and Judicial Waiver

There is limited data directly noting the use of psychological testing in South African judicial waiver cases. Therefore, the follow-on questions of their effectiveness or considerations of natural justice / procedural fairness, cannot be accurately answered nor reflected upon due to this lack of relevant and specific data. While commentary from bygone scholarly works that captured the South African legal system during the late 90s and early 2000s are available, these are of no substantive use due to legislative reform over the recent years; they are, however, indicative of how courts interacted with psychological testing. Such works illuminate that reliance on psychologists was limited to the production of reports regarding criminal responsibility and child

¹¹⁵ Ibid 2.

¹¹⁶ Graham Tyson and Christopher Stones, 'South African adolescents' explanations for juvenile delinquency' (2002) 32(3) *South African Journal of Psychology* 1, 1.

¹¹⁷ Tadesse, Admassu, 'Reforming Juvenile Justice Legislation and Administration in South Africa' (Seminar Paper, UNICEF International Child Development Centre, 12-22 October 1997).

custody issues, but not in matters related to sentencing.¹¹⁸ Their relevance was limited to ancillary matters and away from assisting the court determine appropriate severity of punishment with respect to juveniles, a counterintuitive approach because an indication of competence would make correlative punishment more equitable. To this effect, the use of psychological testing was approached in the same vein as Expert Witnesses, capable and vulnerable to adversarial testing which affected their accuracy.¹¹⁹

This snapshot has been concise and somewhat of an overview nature. Greater research is certainly necessary and best achieved with access to South African jurisprudence, in addition to caselaw. Based on this information, cross-referenced with the objectives of juvenile legislation, a more concrete understanding of how psychological testing within the domain of judicial waiver will be illuminated, showcasing how its use may or may not be reflective of the overall push towards a more rehabilitative system that focuses on the needs of the child and not the deeds.¹²⁰ Due to time constraints, this paper could not fill that void.

¹¹⁸ Mary-Anne Martin, 'Psychological assessment for the courts: A Survey of psychologists' (M. Psych., Edith Cowan University, 1999) 1, 25.

¹¹⁹ Ibid 5.

¹²⁰ Ann Skelton, 'From Cook Country to Pretoria: A Long Walk to Justice for Children' (2011) 6(2) *Northwestern Journal of Law and Social Policy* 413, 414.

VII United States

Historical Background

The United States (US) approach to juvenile justice has seen many reforms throughout history. Its early approach was influenced by the English Common Law notion that children under a certain age are criminally incapable by virtue of their age and respective inability to distinguish right from wrong, nor understand the consequences of their actions.¹²¹ This however changed in the 1800s when juvenile misbehaviour attracted widespread public concern that ultimately resulted in children being placed in prisons with adult offenders.¹²² Concerns developed regarding the likely implications of such an approach, leading reformers to suggest an alternative model in the form of a juvenile facility that would house children that were in conflict with the law, yet deemed 'salvageable'.¹²³ Such efforts to reform the placement of juveniles in adult correctional facilities eventually led to the creation of the first Juvenile Court in Illinois in 1899.¹²⁴ However, by the late 1980s there was again, widespread public concern deriving from fear surrounding a wave of juvenile 'super-predators'¹²⁵ resulting in legislators once again introducing further reforms,¹²⁶ which made it significantly easier for children to be tried as adults within the broader criminal justice system, and therefore outside the scope of those protections typically afforded to children by the juvenile court.

¹²¹ Frances Reddington, 'Age and Criminal Responsibility' (2002) 1 *Journal of the Institute of Justice and International Studies* 105, 106.

¹²² *Ibid.*

¹²³ Stanford Fox, 'Juvenile Justice Reform: An historical perspective' (1970) 22 *Stanford Law Review* 1187, 1189.

¹²⁴ Reddington (n 121) 106.

¹²⁵ John DiLulio, 'The coming of the super-predators' *Weekly Standard* (Publication, November 27 1995).

¹²⁶ National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (Washington DC, The National Academies Press, 2013) 32.

Age of Criminal Responsibility

Whilst a minimum age of criminal responsibility below 12 years old has been deemed internationally unacceptable,¹²⁷ the US remains the only country to have not ratified the Convention on the Rights of the Child¹²⁸ and is hence, not bound by article 40(3)(a).¹²⁹

As a nation made up of 50 states, the US' state-based approach to juvenile justice, possesses some of the most varied laws regarding the criminal culpability of children; for example, currently North Carolina has the youngest minimum age of criminal responsibility at 6 years old,¹³⁰ whilst the highest minimum age is in Massachusetts, where in 2018 the age was raised from 7 to 12 years old.¹³¹

The Use of Judicial Waivers

The US has many avenues for transferring juvenile offenders to the adult criminal justice system. Each state contains provisions in statute, which describe those situations whereby a juvenile offender may, or must, be tried as an adult. Each state's approach is varied, however many states utilise a combination of the following options for determining judicial transfer. These include:¹³²

1. Juvenile court petition

a. Discretionary waiver

Whereby the juvenile court judge is responsible for making a discretionary decision whether or not to transfer the matter to adult court

b. Presumptive waiver

¹²⁷ Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) 11.

¹²⁸ *United Nations Convention on the Rights of Child*, opened for signature 20 November 1989, UNTS No 1577, (entered into force 2 September 1990).

¹²⁹ *Ibid* art 40(3)(a).

¹³⁰ Juvenile Justice Geography, Policy, Practice and Standards, 'Jurisdictional Boundaries', *Jurisdictional Boundaries- North Carolina* <<http://www.jjgps.org/jurisdictional-boundaries/north-carolina#delinquency-age-boundaries>>.

¹³¹ Juvenile Justice Geography, Policy, Practice and Standards, 'Jurisdictional Boundaries', *Jurisdictional Boundaries- Massachusetts* <<http://www.jjgps.org/jurisdictional-boundaries/massachusetts#delinquency-age-boundaries>>.

¹³² Juvenile Justice Geography, Policy, Practice and Standards, 'Jurisdictional Boundaries', *Jurisdictional Boundaries* <<http://www.jjgps.org/about/jurisdictional-boundaries#provisiondetails>>.

Whereby certain offenses and age combinations, as set out in Statute, carry a presumption that the matter should be heard in adult court

c. Mandatory waiver

Whereby statutes establish certain conditions, which if met, warrant the juvenile court to waive its jurisdiction in favour of a mandatory transfer to adult court

2. Criminal court petition

a. Prosecutorial discretion

Whereby under Statute, a prosecutor is granted the authority to decide whether to bring charges in the juvenile court or the adult court

b. Legislative exclusion

Whereby certain age and alleged offence combinations are excluded from the jurisdiction of the juvenile justice system

c. Once an adult, always an adult

Whereby legislative provisions require that a juvenile who was previously sanctioned by the criminal court, have future allegations heard in the same jurisdiction

3. Mitigating provisions

a. Reverse waiver

Whereby Statute states that the adult criminal court judge may or must waive its jurisdiction and transfer the matter back to the juvenile court system

b. Juvenile blended sentence

Whereby the jurisdiction of the juvenile court is maintained, however a combination of juvenile and adult criminal sanctions may be imposed

c. Criminal blended sentence

Whereby the criminal justice system retains jurisdiction over the matter, however in sentencing the offender the Court is permitted to impose juvenile-only sanctions, or a combination of juvenile and adult sanctions

The Influence of Psychological Testing in Judicial Waivers

The provision of judicial waivers in American Courts permit the transfer of juvenile offenders to an adult court. Whilst most states mandate psychological considerations when determining this transfer, the ultimate discretion in the matter is granted to the presiding Judge or Magistrate.¹³³

The three forms of judicial waivers employed in American courts include mandatory, presumptive and discretionary waivers, with the majority of States favouring the employment of discretionary waivers. The landmark case of *Kent v United States* gave rise to several mandatory considerations including, but not confined to: the seriousness of the offence; the nature of the crime; the juvenile's maturity and prior record; community protection and prior contact with mental or legal institutions.¹³⁴

Most considerations surrounding judicial waivers in America are tempered by considerations of the juvenile's maturity, dangerousness to the general public and amenability of treatment.¹³⁵ Some States require consideration of further factors including intellectual disability, mental illness and treatment needs.¹³⁶ Upon a holistic examination of the States, it remains evident that Courts consider the criteria established in *Kent* in conjunction with further factors including the rights of the child and protection of the community at large. While psychologists are often relied upon to provide evidence pertaining to the above criteria, this is not mandated practice across all states.

Instead, forensic psychologists are involved in Court proceedings to address the following tripartite considerations of risk, sophistication-maturity and treatment amenability.¹³⁷ In order to assess these factors, evaluators use a range of psychological tests.

¹³³ Stephanie Penney and Marlene Moretti, 'The Transfer of Juveniles to Adult Court in Canada and the United States: Confused Agendas and Com-promised Assessment Procedures' (2005) 4(1) *International Journal of Forensic Mental Health* 19, 37.

¹³⁴ *Kent v United States* 383 US 541 (1996).

¹³⁵ 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, 47.

¹³⁶ 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, 149.

¹³⁷ Dia Brannen, '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, 339.

Assessing considerations of future risk perpetuated by a juvenile remains an exceedingly challenging task. As adolescence is a key period of development defined through continuous change,¹³⁸ there remains a perpetual risk that any information regarding future risk factors will ultimately remain inaccurate as the juvenile continues to grow and develop.

When testing for sophistication maturity, the Wechsler intelligence scales are often employed by forensic psychologists in order to assess the juvenile's intellectual capacity, cognitive processing and judgement.¹³⁹ Neurological testing may further be employed in order to determine whether juveniles may have a developmental or psychological illness.

The Psychopathy Checklist: Youth Version is an adapted test used to foresee juvenile risk amenability to treatment.¹⁴⁰ Scholars have noted the strong correlation between high scores documented on the test and increased recidivism rates and non-compliance with treatment recommendations.¹⁴¹

Despite the presence of various methods of assessments, it remains challenging for psychologists to apply these tests and achieve their relevant legal outcomes. Growing concerns have arisen regarding whether current psychological testing is able to effectively evaluate juvenile offenders during a period of development characterised by ongoing psychological changes.¹⁴² Due to the plethora of potential negative impacts stemming from the incarceration of a juvenile as an adult offender,¹⁴³ It remains evident that extensive research and refinement is required in the administration of psychological testing in informing judicial waivers.

¹³⁸ 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, 78.

¹³⁹ Stephanie Penney and Marlene Moretti, 'The Transfer of Juveniles to Adult Court in Canada and the United States: Confused Agendas and Com- promised Assessment Procedures' (2005) 4(1) *International Journal of Forensic Mental Health* 19, 38.

¹⁴⁰ 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.

¹⁴¹ *Ibid* 7.

¹⁴² Thomas Grisso, 'Forensic evaluation in delinquency cases' in AM Goldstein (ed), *Handbook of psychology: Forensic psychology* (New York: Wiley, 2003) 315, 334.

¹⁴³ Ian Lambie and Isabel Randell, 'The Impact of Incarceration on Juvenile Offenders' (2013) 33(3) *Clinical Psychology Review* 448, 453.

Conclusion

This report has evaluated the approaches taken to juvenile justice across a number of jurisdictions, and specifically the process for transferring a juvenile to adult court. As outlined, the age at which individuals who encounter the juvenile justice system is a period characterised by extraordinary changes in one's physical, psychological and emotional development. Additionally, research suggests that the adolescents brain has not yet fully developed and importantly confirmed, that those parts of the brain necessary for executive functioning do not reach full maturation until well into what is presently considered to be adulthood - their mid 20s.

In considering the efficacy of judicial waivers in the context of sentencing juvenile offenders, it is apparent that there needs to exist a balance of interests between public safety and punishment, and the rights and protections that must be afforded to children by virtue of their age under international legal expectations. Given the significance of this, and the competing interests inherent in this mechanism, it should be noted that the utilisation of such waivers will likely remain controversial and vary vastly in accordance with these competing priorities and influences.

Judicial waivers undeniably impede upon a juvenile's right to natural justice and procedural fairness as the discretionary approach adopted across multiple jurisdictions results in inconsistent application and determinations. In jurisdictions which utilise psychological assessments in order to justify and support judicial waiver decisions, this, in some instances, further exacerbates the possibility of inconsistent decisions. Although the use of psychological assessments may be considered appropriate in a therapeutic setting, the discretionary interpretation of results is contrary to a judicial system's reliance on empirical evidence.

Psychological assessments have an inherent difficulty in ensuring standardisation, which drastically impacts the reliability of the data provided. As the data is not accurately comparable, its use in consideration of judicial waivers is inconsistent with the stringent evidential burden existent in judicial systems. Further, the mere determination of a juvenile as being eligible for judicial transfer implicitly stigmatises the child as dangerous, incorrigible, and culpable for the crime. This characterisation effectively renders the child guilty before being tried for the crime in question. The inherent discretionary nature of judicial waiver decisions severely hinders a

juveniles right to procedural fairness and natural justice, as there are not privy to a consistent and standardised system free of bias.

Whether our views as bystanders to juvenile delinquency are derivatives of socio-political environments, culture, an allusion to various ethical dispositions, or, however we may dress it, the manner in which judicial discretion is utilised to waive jurisdiction is reflective of our society. How we choose to mould this reflection is within our agency as decision-makers, ultimately deciding: are we a merciful society or one punitive?

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