

Chapter 3- The Age of Criminal Responsibility

Chapter objectives-

- To examine international standards concerning juvenile justice on the issue of age of criminal responsibility
- To explore latest research on adolescent brain development and relevant information of child development found in child psychology to understand its implication on the age of criminal responsibility
- To critically discuss the current statutory provisions on the age of criminal responsibility of a juvenile in India and its compliance to the international standards, relevant Constitutional provisions and science

Chapter 3- The Age of Criminal Responsibility

Children across the world can break the law at any age, but the difficult question which arises is, ‘At what age can they be criminally held responsible for their alleged crimes?’ Defining when the childhood ends and adulthood begins is one of the most complex problems that the society faces today. The recent scientific advancements on brain development indicate that the pre-frontal cortex, the part of the brain which is responsible for decision making and impulse control are not fully mature until the mid 20s.²²⁵ The significance of this exploration cannot be downplayed as these scientific findings could have a major impact on the law. But, there are no scientific findings which say that the juveniles or the adolescents cannot distinguish between right and wrong. Youth may be able to distinguish behaviour as inappropriate or dangerous, but other reasons such as peer pressure or less developed capacity to foresee consequences may cause youth to engage in the behaviour anyway.²²⁶ Does this indicate that the juvenile can be totally excused for their violent and homicidal behaviour? In India a juvenile delinquent/ child in conflict with law is a person who has not attained the age of 18 years on the date of the commission of an offence. A juvenile committing a serious crime at the age of 17 years and 11 months is treated differently from a person committing the same crime at the age of 18 years and 1 day. The inevitable question which follows is, ‘Does the juvenile brain become an adult brain immediately on attaining the age of 18 years?’

For the purpose of this research study, the researcher uses two concepts with respect to the age of criminal responsibility of a juvenile - ***Minimum age of criminal responsibility (hereinafter MACR)*** and ***Age of Criminal Majority***. A child below the MACR does not possess mens rea to commit crimes. Thus, they are absolutely excused for their criminal behaviour and cannot be subjected to the criminal law

²²⁵ K. Sadler, N. Gupta, *Adolescent Global Health*, 121, 124 in *The Mass General Hospital for Children Handbook of Paediatric Global Health*, (N.Gupta, B.D. Nelson, J.Kasper, P.L.Hibberd, 2014)

²²⁶ Mark Soler et al., *Juvenile Justice Lessons for a new era*, 16 *Georgetown Journal on Poverty Law and Policy* 483, 493 (2009) available at <http://www.flintridge.org/newsresources/documents/JuvenileJustice-LessonsforaNewEra-2009.pdf>, last seen on 14/05/2017 ; *Adolescent Decision Making and Youthful Culpability*, MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, available at http://www.adjj.org/content/page.php?cat_id, last seen on 28/03/2017

procedures of a country. On the other hand, this does not imply that the children who have attained the minimum age of criminal responsibility or above can be brought under the purview of adult criminal justice system. Despite the variation in MACR across the globe, the United Nations Convention on the Rights of the Child (UNCRC) obligates all the state parties to establish at the domestic level, a specific justice system for all the delinquent children under the age of 18 years which focus on rehabilitation and reformation rather than punishment and retribution.²²⁷ Therefore, *minimum age of criminal responsibility* simply means the lowest age limit for juvenile court jurisdiction. The MACR varies from country to country across the globe from as low as 6 years upto the age of 18 years. The international median age of MACR is 12.²²⁸ The researcher uses the term, *age of criminal majority* to mean the age at which the offenders do not get any special safeguards neither under the UNCRC nor in the domestic legislations and are dealt under the adult criminal justice system for the offences committed.

In India, the existing law i.e the Juvenile Justice (Care and Protection of Children) Act, 2015 which repealed the Juvenile Justice (Care and Protection of Children) Act, 2000 defines a juvenile as a person who has not completed eighteenth year of age. This new legislation also permits the juveniles between the ages of 16-18 years to be tried as adults for heinous offences.

One of the reasons which triggered the need for the passage of this law was the involvement of juvenile offenders aged 16-18 years in some of the publicized cases of rape of recent times.²²⁹ These serious and brutal crimes committed by the juvenile does question and challenge the justice of them remaining in the juvenile justice system. The infamous Nirbhaya gang rape case sparked public panic and prompted protests in the country with some of the conservative sections of the society urging the reduction of the age of criminal responsibility of a juvenile from 18 to 16 years, while

²²⁷ Art. 40(3), UNCRC

²²⁸ Don Cipriani , *Children's Rights and the Minimum Age of Criminal Responsibility : A Global perspective*, 110 (Ashgate Publishing Company, 2009)

²²⁹ Committee on Human Resource Development, Rajya Sabha, *The Juvenile Justice (Care and Protection of Children) Bill*, 2014 at 12

certain criminologists and child rights activists pleaded the retention of the age limit of 18 years.

In this chapter, the researcher looks into the international standards concerning juvenile justice on the issue of age of criminal responsibility. It also contains latest research on adolescent brain development and relevant information of child development found in child psychology to understand its implication on the age of criminal responsibility. This is followed by a critical discussion of the current statutory provisions on the age of criminal responsibility of a juvenile in India. An attempt is made to understand India's compliance to these international standards and constitutional provisions on the issue of age of criminal responsibility and to analyze Indian position in the light of scientific developments on adolescent brain maturation.

3.1 International instruments concerning juvenile justice on the issue of age of criminal responsibility

The definition of juvenile is guided by many international instruments- mainly the United Nation Convention on the Rights of the Child, 1989 (hereinafter referred to as UNCRC) which is a comprehensive treaty covering children's civil, political, economic, social and cultural rights. It is ratified by almost all the countries across the globe. The UNCRC was ratified by India in the year, 1992. Apart from the UNCRC, there are also other international rules and guidelines in the area of juvenile justice viz; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Guidelines on the Prevention of Juvenile Delinquency (The Riyadh Guidelines) and United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Although, these rules and guidelines are non-binding in nature, they provide a complete framework for the care, prevention, protection, treatment of children in conflict with law when considered collectively with the UNCRC. In this part of the chapter, the researcher chronologically looks into the international instruments concerning juvenile justice on the issue of age of criminal responsibility to understand the extent of India's compliance to these international standards. These include the following:

a. The [United Nations] Standard Minimum Rules for the Administration of Juvenile Justice, 1985- “The Beijing Rules”

The [United Nations] Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (hereafter the Beijing Rules) adopted by the United Nations in 1985 was the first ever international instrument specifically dealing with juvenile justice. It laid down elaborate guidelines for the administration of juvenile justice. The Commentaries attached to these rules is read as the essential part of the document. None of the subsequent international instruments so far has specified the minimum age of criminal responsibility (MACR) despite the list of vague directions for determining MACR is stated in the Beijing Rules long back in 1985. Nevertheless, the Beijing Rules provides some insights for determining the age of criminal responsibility (lower age limit and upper age limit for juvenile court jurisdiction). The following are the relevant extracts of the Beijing Rules-

Rule 2.2 (a) *“A juvenile is a child/ young person who under the respective legal system, may be dealt with for an offence in a manner which is different from an adult.”*

The above rule acknowledges the establishment of a separate justice system for juveniles in conflict with law to be dealt in a manner distinct from adult criminal justice system. However, it also points out that age limit will depend upon and explicitly made dependent on each respective systems, thus fully respecting the economic, social, political, cultural and legal systems of member states.²³⁰ Thus, the researcher understands that the age limit to define a juvenile is left to the discretion of respective legal systems and suitable to its unique context. This inevitably justifies the wide variety of ages coming under the definition of juvenile ranging from 7 years to 18 years across the globe.

Rule 4.1 *“In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of the age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”*

The Rule applies to the MACR- referring specifically to the lower age limit of juvenile court jurisdiction. It directs only those countries who have recognized the

²³⁰ Commentary to Rule 2.2(a), The Beijing Rules

concept of MACR, not to fix the age limit at too low level. Further, the Rule also lay down relevant factors viz. emotional, mental and intellectual maturity to be considered in fixing the MACR. But the question which arises is ‘What constitutes low and what is the appropriate age of criminal responsibility? Moreover, these relevant factors stipulated in the rules to be considered for determining MACR are subjective often leading to indefinite interpretations. Consequently, there are extreme variations as far as MACR is concerned across the countries in the world.

b. The United Nations Convention on the Right of the Child (UNCRC), 1989

As already mentioned, UNCRC is the wide- ranging treaty covering various rights of children ratified by almost all the countries across the globe. Article 37 and 40 of the convention specifically deals with aspects of juvenile justice. First and foremost, the convention obligates the member states to establish separate laws and institutions applicable to children committing crimes which shall be distinct from adult criminal justice system.²³¹ The relevant extracts from the UNCRC with respect to age of a juvenile are as follows-

Article 1- “For the purposes of the present convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

The researcher understands from this provision that although, UNCRC defines a child as a person under the age of eighteen years, it also grants discretion to the State parties to determine by law the age at which childhood may be concluded even before the completion of eighteen years of age.

Article 40, para 3(a) – “The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”

The researcher understands this provision as an obligation for the State parties to set the MACR. At the same time, there is no agreed criterion specified for fixing the MACR. It is evident to note here that the UNCRC which was drafted four years after the adoption of Beijing rules has preferred to omit the consideration of relevant

²³¹ Article 40(3), UNCRC

factors viz emotional, mental and intellectual maturity in determining the MACR which was laid down in the Beijing Rules. Interestingly the UNCRC, which has sourced many of its provisions from the Beijing Rules including the MACR, has refused to acknowledge the subjective criteria laid down in the Beijing Rules for fixing the MACR.²³² This unclear provision without any substantive guidance justifies the wide interpretation across countries resulting in practice of varied age limits of MACR.

c. UNCRC -General Comment No. 10: Children’s Rights in Juvenile Justice²³³

There is a primary duty on the part of the State parties to the UNCRC to send periodic reports to the Committee on the Rights of the Child (hereinafter referred to as UNCTRC) which is established by the UNCRC.²³⁴ The periodic report is to be submitted every 5 years informing the measures the State parties have adopted to give effect to the UNCRC at the domestic level and the progress made on the enjoyment of those rights.²³⁵ The UNCTRC has provided elaborative guidelines and recommendations for the establishment of juvenile justice system in compliance with the UNCRC (implementation of Articles 37 and 40 of UNCRC) after reviewing the member states performance through their periodic reports.²³⁶ These elaborative guidelines and recommendations were provided through the UNCRC General Comment²³⁷ No. 10 (2007): Children’s Rights in Juvenile Justice. Although, these General comments are not legally binding and non-acceptance does not amount to breach of obligations by the State parties, they do provide authoritative interpretations of these human right instruments. The General Comment No.10 has provided guidance to the State parties in determining the MACR and upper age limit for juvenile court jurisdiction which are discussed as follows-

²³² Preamble to UNCRC

²³³ *Vide* United Nations General Assembly, CRC/C/GC/10, dated 25.04.2007

²³⁴ Article 43, UNCRC

²³⁵ Article 44 ,UNCRC

²³⁶ UNCRC General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, para 3

²³⁷ General comment means a treaty body's interpretation of the content of human rights provisions, on thematic issues or its methods of work. General comments often seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementing treaty provisions. <http://www2.ohchr.org/english/bodies/treaty/glossary.htm>

a. Minimum Age of Criminal Responsibility

The Committee (UNCtRC) calls attention to the huge variations of MACR among state parties ranging from 7 to 16 years with few countries using *doli-incapex* presumption to determine it. The *doli incapex* presumption allows the use of two minimum ages of criminal responsibility. This presumption can be best exemplified by Sec 83 of the Indian Penal Code, where a child aged between 7 to 12 years is said to possess *mens rea* if it is proved that the child at the time of committing of the crime knew the consequences of his wrongful act. The Committee opines that that use of *doli incapex* presumption in assessing the criminal responsibility is entirely left to the discretion of the judge and allows the use of lower minimum age often leading to discriminatory practices.²³⁸

The committee further clarifies the obligation set out by the UNCRC for the States parties to set a minimum age of criminal responsibility (MACR). In this regard it provides that children who at or above the MACR but, below the age of 18 years commit an offence can be formally charged and subject to penal law procedures but, distinct from adult criminal justice system.²³⁹ It further states that children who commit an offence at an age below that minimum cannot be formally charged and held responsible in a penal law procedure but, rather dealt through protective measures in their best interests.²⁴⁰ Although, the Committee does not particularize these protective measures, it urges the State parties to establish a legal mechanism to deal with the child offenders below the MACR guaranteeing fair and just treatment similar to that which is accorded to the children at or above the MACR.²⁴¹

Rule 4 of the Beijing Rules recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. Although, the UNCRC has preferred to omit the relevant factors

²³⁸ UNCRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, para 32

²³⁹ *Ibid* at para 31

²⁴⁰ *Ibid*

²⁴¹ UNCRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, para 33

for the fixing of MACR laid down in the aforementioned rule, the Committee has reiterated it by recommending the States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. General comment No.10 concluded that the minimum age of criminal responsibility below 12 years is considered by the committee not to be internationally acceptable.²⁴² However there appears to have been no rationale for fixing 12 years as the MACR. The CtRC also recommended that the State parties shall not permit the practice of lowering the MACR in exceptional cases where the child is accused of committing serious offence or is matured enough to be criminally held liable.²⁴³

b. Upper age limit for juvenile justice jurisdiction

The UNCtRC prescribes that the upper age limit for the application of special rules of juvenile justice shall be upto the age of 18 years.²⁴⁴ It urges the State parties which restrict the applicability of their juvenile justice rules to children below the age of 16 (or lower) years and transfer such children to adult criminal justice system, to change their laws to achieve a non- discriminatory application of their juvenile justice rules to all persons under the age of 18 years.²⁴⁵ The Committee applauded some State parties for their good practice of permitting the application of juvenile justice rules to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception.²⁴⁶

A careful reading of the relevant extracts of the international standards on the issue of age of criminal responsibility of a juvenile would reveal that indecisive obligations and guidelines are laid down for the State parties to be implemented in their domestic legal system. These inaccurate obligations and guidelines make convenient misinterpretations by the State parties inescapable. The international guiding

²⁴² UNCRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, para 32

²⁴³ Ibid, at para 34

²⁴⁴ UNCRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, para 36

²⁴⁵ Ibid, at para 38

²⁴⁶ Ibid

principles for the determination of the age of criminal responsibility of a juvenile delinquent or child in conflict with law can be summed up as follows-

- The UNCRC mandates the State parties to establish a separate justice system applicable to children alleged or accused of the violation of penal law. Under the UNCRC, the term child includes every person below the age of 18 years unless under the law applicable to the child, majority is attained earlier. This implies that the upper age limit for a juvenile court jurisdiction is 18 years. On the other hand, UNCRC also grants discretion to the State parties to determine by law the age at which childhood may be concluded even before the completion of 18 years. Although, the CtRC through UNCRC General Comment and its concluding observations has emphasized the application of the special rules of juvenile justice categorically to all the children upto the age of 18 years, the non-binding nature of these recommendations is likely to make it inconsequential.
- MACR shall not be fixed at very low level. The relevant factors to be taken into account for fixing the MACR are emotional, mental and intellectual maturity which is undoubtedly highly subjective and indecisive. To avoid any uncertainty in this regard, the UNCtRC in its General Comment (2007) has concluded 12 years to be the MACR & anything below that is unacceptable. However there appears to have been no rationale in recognizing this age limit of 12 years. The practice of doli-incapex presumption is contended not to be in the best interest of child and highly susceptible to discrimination.
- Children committing the crimes below the MACR are recommended to be dealt under a separate mechanism guaranteeing fair and just treatment similar to that which is granted to the children at or above the MACR.

3.2 The Impact of Science on the Age of Criminal Responsibility

Defining when childhood ends and adulthood begins is one of the most complicated challenges that any legal system faces today. Assessment of mental capacity/ maturity of juvenile delinquents were not a major concern until it became the basis for the transfer of such juveniles to adult criminal justice system in some jurisdictions. The latest scientific breakthroughs indicate that children mature at a higher age than what has been previously accepted. The importance of these discoveries cannot be understated as the recent scientific findings are likely to have an impact on law. It is broadly accepted that the adolescent²⁴⁷ brain is less developed than an adult brain and thus, the level of criminal culpability of juvenile/adolescent offenders is lesser than their adult counterparts. Does this indicate that the juveniles can be absolutely excused for their violent and homicidal behaviour? In India, a juvenile committing a serious crime at the age of 17 years and 11 months is treated differently from an individual committing the same crime at the age of 18 years and 1 day. Does the juvenile brain become an adult brain immediately on attaining the age of 18 years? In contrast with the recent scientific findings on brain developments, some jurisdictions have reduced the age of criminal responsibility and allow juveniles aged 16 or 17 years to be tried and punished like an adult. But, there are no scientific findings which say that the adolescents cannot differentiate between the right and wrong. The researcher seeks to find the answers to these perplexing questions by exploring the relevant literature in science and its impact on the age of criminal responsibility. This chapter presents some of the highly influential works of neuroscience and child psychology which has provided the basis for the contemporary research. In particular, Piaget's theory of cognitive development and Lawrence Kohlberg's stages of moral development which is considered to be the most prominent research in the area of developmental psychology is also discussed. There are many varieties of criticism to these theories. However, the researcher intends to present the essential outline of these theories to understand its main idea without delving deeper into its criticisms.

²⁴⁷ For the purposes of the present work, the researcher uses the term "adolescence" to refer to the teenage years during which a young person develops from a child into an adult

Maturity of judgement in Adolescence

There is a large body of scientific research on the adolescent neurological development which indicates that the brain does not fully mature until the mid 20's. The decade-long magnetic resonance imaging (MRI) study of normal brain development, from ages 4 to 21, by researchers at NIH's National Institute of Mental Health (NIMH)²⁴⁸ and University of California Los Angeles (UCLA) shows that such "higher-order" brain centers, such as the prefrontal cortex, don't fully develop until young adulthood.²⁴⁹ Dr. Jay Giedd of NIMH, a brain imaging scientist who is extensively cited as an expert on adolescent brain development expounds that the prefrontal cortex, the part of the brain which is responsible for impulse control and decision making is not fully mature until the third decade of life and is one of the last region of the brain to fully develop.²⁵⁰

Table 1- Behaviour and Cognitive functions of Pre-frontal Cortex²⁵¹

<i>Controlling Impulses</i>
<i>Inhibiting inappropriate behaviour</i>
<i>Initiating appropriate behaviour</i>
<i>Shifting/adjusting behaviour when situations change</i>
<i>Organizing things</i>
<i>Forming strategies and planning behaviour</i>
<i>Making decision</i>

²⁴⁸ The National Institute of Mental Health (NIMH) in USA is the lead federal agency for research on mental disorders. NIMH is one of the 27 Institutes and Centers that make up the National Institutes of Health (NIH), the nation's medical research agency. NIH is part of the U.S. Department of Health and Human Services (HHS).

²⁴⁹ National Institute of Mental Health, Press Release, *Imaging Study shows Brain Maturing*, (17/05/2004) available at <http://www.nimh.nih.gov/news/science-news/2004/imaging-study-shows-brain-maturing.shtm>, last seen on 1/08/2016

²⁵⁰ Daniel R Weinberger, Brita Elvegag, Jay N Giedd, *The Adolescent Brain- A work in progress*, The National Campaign to teen pregnancy (June 2005), at 3, available at https://www.michigan.gov/documents/mdch/The_Adolescent_Brain_-_A_Work_in_Progress_292729_7.pdf , last seen on 12/08/2017

²⁵¹ Ibid, at 11

<i>Sensitivity to feedback (Reward and punishment)</i>
<i>Empathy</i>
<i>Insight</i>

Using the Magnetic Resonance imaging (MRI) scans of the brain structure and function, the researchers have also discovered that the adolescents mostly stimulate their amygdala, the region of the brain that experiences fear, threat, danger and which is associated with emotional and gut responses, whereas the adults more often use their prefrontal cortex, the area of the brain related more to reasoning and judgement.²⁵² These differences will definitely impact the way the adolescents process thoughts and react to situations. Therefore, the adolescents are inclined to act impulsively without analyzing the situation and consequences of their actions.

The research works of Lawrence Steinberg, a distinguished University Professor of Psychology at Temple University, USA and an internationally renowned expert on psychological development²⁵³, indicates that during adolescence, in addition to difference in the physical structure between adolescent and adult brains, the period of adolescence is also marked by the distinctness in the functioning of the brain. According to him, the ability to control oneself i.e. self-control is likely to be easier for adults as they employ multiple networks of brain regions and allocate the work across the different areas of the brain in comparison to adolescents who place heavy reliance on the usage of smaller number of regions of the brain.²⁵⁴ The adolescent brain is highly hypersensitive to risky acts when the potential of reward is high.²⁵⁵ On the basis of aforementioned neurological and psychological evidence, the point the researcher seeks to derive is that the adolescent and adult brains differ in structure and function. Further, the adolescents are likely to act on impulse without any consideration of risks involved.

²⁵² Ibid, at 2

²⁵³ http://www.laurencesteinberg.com/component/content/index.php?option=com_content&view=article&id=1&Itemid=116

²⁵⁴ Steinberg Lawrence, *Should the Science of Adolescent brain development inform public policy?* 50 Court Review 70, 71 (2012), available at <http://aja.ncsc.dni.us/publications/courtrv/cr50-2/CR50-2Steinberg.pdf>, last seen on 14/05/2017; Originally published as Lawrence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 28(3) ISSUES IN SCIENCE AND TECHNOLOGY 67 (Spring 2012).

²⁵⁵ Ibid

Various studies pointing to neurobiological immaturities of adolescents also suggest that they are more amenable to rehabilitation.²⁵⁶ Given that some juveniles commit horrific adult crimes like murder, rape, etc., the obvious question that arises here is, “Should the juveniles be absolutely excused for their violent and homicidal behaviour on account of their incomplete brain maturation compared to their adult counterparts”? Paul Thompson, Professor of neurology at the University of California, Los Angeles, states that these researches on adolescent brain developments cannot be used to excuse their violent or homicidal behaviour, but it can be used as evidence that teenagers are not yet adults and the legal system should not treat them as such.²⁵⁷ Steinberg also affirms “adolescents should be perceived as inherently less responsible than adults and shall be punished less harshly than adults even when the crimes committed are identical.”²⁵⁸ He further clarifies that the brain systems responsible for cognitive process mature faster than the regions related to self-regulation and accordingly adolescents mature intellectually before they attain social and emotional maturation.²⁵⁹ According to Dr. Preeti Jacob of Department of the Child and Adolescent Psychiatry at NIMHANS, Bengaluru, preparation or planning of serious crimes does not indicate mental maturity of a juvenile but, rather choosing an inappropriate behaviour is an indication of an immature brain.²⁶⁰ On the basis of these findings, the researcher is compelled to infer that some juveniles are smart enough to plan or carryout adult-like crimes, but not matured enough emotionally to magnify the consequences of their actions . It does not mean that the adolescents cannot control impulsive action, but it may be more difficult task than for a mature brain of an adult.²⁶¹ These scholars have recognized adolescents diminished criminal

²⁵⁶ Beatriz Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*, 63 *Hastings Law Journal* 1469, 1485 (2012), available at <http://www.hastingslawjournal.org/wp-content/uploads/2014/03/Luna-63.6.pdf>, last seen on 12/3/2015; John F. Stinneford, *Youth Matters: Miller v. Alabama and the Future of Juvenile Sentencing*, 11 *Ohio State Journal of Criminal Law* 1, 2 (2013), available at <http://moritzlaw.osu.edu/students/groups/osjcl/files/2013/12/1.-Stinneford.pdf>, last seen on 13/03/2015

²⁵⁷ Thompson, Paul, *Startling Finds on Teenage Brains*, 2 in *Sacramento Bee* (25 May 2001) B7, available at http://www.scholastic.com/teachers/sites/default/files/asset/file/juvenile_startling_finds_on_teenage_brains-thompson.pdf, last seen on 25/12/2015

²⁵⁸ Steinberg Lawrence, *Should the Science of Adolescent brain development inform public policy?* 50 *Court Review* 70, 74 (2012), available at <http://aja.ncsc.dni.us/publications/courtrv/cr50-2/CR50-2Steinberg.pdf>, last seen on 14/05/2017

²⁵⁹ *Ibid*, at 71

²⁶⁰ Interview with Dr. Preeti Jacob, Nimhans , Bangalore (16/01/2017)

²⁶¹ Daniel R Weinberger, Brita Elvegag, Jay N Giedd, *The Adolescent Brain- A work in progress*, The National Campaign to teen pregnancy (June 2005), at 15, available at

responsibility and have altogether ruled out the possibility of complete absolution of criminal responsibility of such adolescent offenders.

Lawrence Steinberg also draws attention to the fact that these structural and functional changes in the brain do not take place in an invariable manner and consequently different individuals mature at different ages and at different rates.²⁶² Thus, it is beyond the bounds of possibility to accurately state the age as to when the adolescent brain becomes an adult brain.²⁶³ This implies that there will be different ages at which an individual can mature and inevitably there may be individuals over the age of 18 years lacking the mental maturity to be criminally held responsible for their actions. On the other hand there may be individuals in the age range of 13 to 18 possessing all the attributes of criminal responsibility. Thus, in the light of this psychological evidence it is impossible and unjustifiable to assess the mental maturity of an individual by setting a chronological boundary with fixed age limits.

Piaget, a Swiss clinical psychologist in his influential work known as Piaget's theory of cognitive development²⁶⁴, identified four stages of child's intellectual growth. The discussion of this theory becomes important as it has provided the foundation for contemporary study on the cognitive development. Piaget named the first stage as "**Sensory-Motor**" stage which was said to last for children from birth upto 2 years. During this period a child learns about his or her environment by sensory motor activities such as seeing, touching etc. without the use of abstract reasoning.²⁶⁵ The second stage, i.e. the "**pre-operational stage**" which lasts around 2 to 7 years is marked by development of language skills, memory and imagination but, distinguished by ego centric thinking i.e. they will only see the outside world from their own perspective.²⁶⁶ Piaget's third stage i.e. "**Concrete operations (Elementary and early adolescence stage)**" was said to last for children around 7-12 years which is

https://www.michigan.gov/documents/mdch/The_Adolescent_Brain_-_A_Work_in_Progress_292729_7.pdf, last seen on 10/04/2018

²⁶² Steinberg Lawrence, *Should the Science of Adolescent brain development inform public policy?* 50 Court Review 70, 74 (2012), available at <http://aja.ncsc.dni.us/publications/courtrv/cr50-2/CR50-2Steinberg.pdf>, last seen on 14/05/2017; See also, David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for effective decision making*, 14(1) Stanford Law and Policy Review 13, 15 (2003)

²⁶³ Steinberg Lawrence, *Should the Science of Adolescent brain development inform public policy?* 50 Court Review 70, 74 (2012), available at <http://aja.ncsc.dni.us/publications/courtrv/cr50-2/CR50-2Steinberg.pdf>, last seen on 14/05/2017;

²⁶⁴ See Trevor Buck, et al., *International Child Law* (Routledge, 2nd ed., 2011)

²⁶⁵ Ibid at 7

²⁶⁶ Ibid

recognizable by decrease in ego-centric thinking. In this period the child is capable of accepting another person's point of view and can appreciate more than one perspective at the same time, but they do not develop abstract reasoning at this stage.²⁶⁷ The fourth stage of Piaget's theory, "***Formal operation (Adolescence and Adulthood)***" is acquired by children around the age of 11/12 years to adulthood.²⁶⁸ According to him, "the children at this stage are capable of logical thinking and abstract reasoning." Piaget also states that some people may never reach this stage.²⁶⁹ The theory fails to explain why some individuals proceed faster than others from one stage to another and thus fails to explain individual differences in cognitive development.²⁷⁰ This theory points to the fact that although cognitive/intellectual development progresses at different rates in different individuals, it takes place within the similar age ranges. It also indicates that some individuals may never attain the later stage. Piaget's theory thereby reaffirms the stance of present-time scholars that it is impossible to measure mental maturity (cognitive maturity) by fixing a definite age.

Maturity of moral reasoning

Informed by the neurological and psychological findings, the researcher deduces that judgement and emotional development of an individual completely takes place in early adulthood and occurs in an inconsistent manner. Then, the frequent question which arises is whether a child who has attained the capacity to engage in moral thinking and moral reasoning could be considered mature enough to be held liable for his/her criminal actions. The American Psychologist, Lawrence Kohlberg's theory of stages of moral development²⁷¹ has gained a prominent place in the analysis of moral development. The theory is grouped into three levels of two stages each. Levels and stages of moral development are as follows-

²⁶⁷ Ibid

²⁶⁸ Ibid, at 8

²⁶⁹ Ibid

²⁷⁰ Ibid

²⁷¹ W.C. Crain , *Kohlberg's Stages of Moral development*, Theories of Development(Prentice-Hall 1985) available at <http://www.polsci.tu.ac.th/lawrence.pdf> ,last seen on 20/04/2017

1. Pre-conventional level

Stage 1 – “At this stage children conform to the instructions of the authorities only from fear of the consequences. They follow rules to avoid the possible punishment for its violation. Right and wrong at this stage is decided in terms of punishment.”²⁷²

Stage 2 – At this stage moral thinking is motivated by rewards and self interest. Right and wrong is determined by what is rewarded.²⁷³

2. Conventional Level

Stage 3 – Children adopt moral thinking of right and wrong at this stage with the desire to please others and make others see them as more likeable among all. They believe that people should live up to the expectations of the family and community and behave in "good" ways i.e having good motives and interpersonal feelings such as love, empathy, trust, and concern for others.²⁷⁴

Stage 4 –According to Kohlberg, “moral judgments at this stage is marked by obligation to follow law and order.”

3. Post-Conventional

Stage 5 – At this stage a person believes that moral and ethical choices are above law, but, they also understand law as social contracts which they agree to comply with until it could be altered by democratic means.²⁷⁵

Stage 6 – At this stage a person define the principles by which agreement will be most just.²⁷⁶

Kohlberg’s original research was a cross-sectional study. Later he carried longitudinal studies with his original sample and it was during this work, Kohlberg decided to

²⁷² Ibid, at 3

²⁷³ Ibid

²⁷⁴ W.C. Crain , *Kohlberg’s Stages of Moral development, Theories of Development*,(Prentice-Hall 1985) at 4, available at <http://www.polsci.tu.ac.th/lawrence.pdf> ,last seen on 20/04/2017

²⁷⁵ Ibid, at 5

²⁷⁶ W.C. Crain , *Kohlberg’s Stages of Moral development, Theories of Development*,(Prentice-Hall 1985) at 7, available at <http://www.polsci.tu.ac.th/lawrence.pdf> ,last seen on 20/04/2017

discard stage 6.²⁷⁷ In his new longitudinal findings, he observed that Stage 4 does not become dominant until the boys are in their 20s and 30s in contrast with his previous cross-sectional study wherein he observed that Stage 4 had become dominant by age 16.²⁷⁸ He further observed that Stage 5 too appears in the mid 20s and never becomes very prevalent.²⁷⁹

Drawing on the expertise of the psychologist, Kohlberg, moral thinking begins from the childhood and continues to progress throughout life. A child is prompted to follow the rules by fear of punishment or self interest in contrast with an older child who prefers to follow law by choice and agrees to comply with until it could be altered by democratic means. An older child makes moral decisions in the larger interest of the society. However, Kohlberg's research broadly points to the conclusion that it is impossible to establish that an individual has reached stage of moral development by a particular age.

Findings of developmental psychology of children are to a greater extent in corroboration with the findings of neurological sciences as far as mental maturity of children is concerned. The researcher in this study observed that the mental maturity in the context of neuroscience and developmental psychology includes intellectual, social and emotional development, moral development etc. This might be of relevance to the criminal justice system in determining criminal culpability of a juvenile. The vital points that emerge from the preceding discussion of scientific researches with respect to mental maturity of a juvenile/ adolescent are as follows-

- There is convincing evidence in neuroscience that the region of the human brain responsible for decision making and impulse control is not completely matured until the 20's.
- Developmental psychology evidence supports that the adolescents are more likely to act on impulse without any consideration of risks involved.

²⁷⁷ Ibid at 10

²⁷⁸ Ibid

²⁷⁹ W.C. Crain , *Kohlberg's Stages of Moral development, Theories of Development*,(Prentice-Hall 1985) at 10, available at <http://www.polsci.tu.ac.th/lawrence.pdf> ,last seen on 20/04/2017

- The neuroscience and behavioural study suggests that the adolescents lack the maturity and judgement to foresee and understand the outcomes of their actions.
- The renowned experts have recognized adolescent's diminished criminal responsibility and have altogether ruled out the possibility of complete absolution of criminal responsibility of such adolescent offenders.
- The complete brain maturation i.e. intellectual, social and emotional development do not take place in an invariable manner and consequently different individuals mature at different ages but, do so within the similar age ranges. Thus it is impossible to assess mental maturity by fixing a definite age.

At this stage of the research, considering the scientific evidence that all individuals progress through different stages and at different rates but, approximately within the similar age ranges, it seemed reasonable for the researcher to decide the cases of serious & violent juvenile delinquents on an individual basis after assessing the mental maturity of such juveniles rather than setting a distinct chronological age. It can be best exemplified with some countries in the recent past transferring juveniles to adult criminal justice system after assessing the mental maturity of such children. Further research in this direction indicated that the tools to assess/measure mental maturity on an individual basis are neither well developed nor it is possible to distinguish between mature and immature adolescents on the basis of brain images and is likely to produce many errors.²⁸⁰ Dr. Preeti Jacob of Department of the Child and Adolescent Psychiatry at NIMHANS, Bengaluru, in the interaction with the researcher stated there are no tools to assess / measure mental maturity.²⁸¹ In the light of probability of errors that may arise due to the absence of tools to make individual mental maturity assessments, the researcher posits that it is desirable to set a specific cut off age to define a juvenile and determine criminal culpability.

²⁸⁰ *Less guilty by reason of adolescence*, McArthur foundation Research Network on Adolescent development and Juvenile Justice at 4 , available at <https://ccoso.org/sites/default/files/import/Less-guilty-by-reason-of-adolescence.pdf>, last seen on 12/03/2017; Joint Submission to the Ministry of Women & Child Development on Juvenile Justice (Care & Protection of Children) Bill, 2014 by CCL, NLSIU & Nimhans

²⁸¹ Interview of Dr. Preeti Jacob, Nimhans, Bangalore (16/01/2017)

Although, the building of pre-frontal cortex is a biological process, there is growing evidence that the actual structure of the pre-frontal region can be influenced by genetic and environmental factors.²⁸² Steinberg also opines that training, experience etc. promote the development of this region.²⁸³ However the scientific jury is not clear as to how much of this process is automatic versus how much is susceptible to manipulation and intervention.²⁸⁴ Nevertheless, the critical point to be derived from this finding is that, despite the neurological and psychological advancements that the teenagers are not the same as adults in terms of brain development, it seems prudent to conclude that proper interventions and training can help the child to learn appropriate behaviour. Drawing the points together, the core submission made by the researcher is that contemporary understanding on the age of a juvenile and treatment of juvenile in the juvenile justice system must be informed by science in addition to political, social and cultural values.

3.3 Age of criminal responsibility in India (Lower age limit and upper age limit for juvenile court jurisdiction)

The Indian Juvenile Justice system predominantly focused on the rehabilitation and reintegration of juveniles and mental capacity/ maturity of such juveniles were not an important concern until the recent passage of JJA 2015. Although, the new legislation maintains a separate justice system for all the juveniles/children in conflict with law upto the age of 18 years, it also allows juveniles aged 16 - 18 years committing heinous offences to be tried like an adult after evaluating the physical and mental capacity of such children. These assessment procedures play a very crucial role as they constitute the fundamental factors in depriving a juvenile delinquent the benefits of juvenile justice system and thus necessitate careful, defensible evaluation system. The inevitable question which now arises is, “How to assess the mental capacity/

²⁸² Daniel R Weinberger, Brita Elvevag, Jay N Giedd, *The Adolescent Brain- A work in progress*, The National Campaign to teen pregnancy (June 2005), at 2, available at https://www.michigan.gov/documents/mdch/The_Adolescent_Brain_-_A_Work_in_Progress_292729_7.pdf

²⁸³ Steinberg Lawrence, *Should the Science of Adolescent brain development inform public policy?* 50 Court Review 70, 72 (2012), available at <http://aja.ncsc.dni.us/publications/courtrv/cr50-2/CR50-2Steinberg.pdf>, last seen on 14/05/2017

²⁸⁴ Supra 282, at 2

maturity of a child and what are the tools and procedures available to accurately assess it?”

The Juvenile Justice (Care and Protection of Children), Act 2000 had placed all juveniles up to the age of 18 years in one category irrespective of the mental maturity and gravity of offence committed by them which was mooted to be ultra vires Article 14 of the Constitution of India pointing to the fact that the unequal's had been clubbed together, not separately identified and analyzed and given the same benefit. The new legislation, JJA 2015 allows juvenile aged 16-18 years to be tried as an adult in case of heinous offences. The Statements of Objects and reasons of the Juvenile Justice (Care & Protection of Children) Bill, 2014 stated that the JJA 2000 was ill equipped to tackle the juvenile offenders in the age group of 16- 18 years by relying on the data collected by the National Crime Records Bureau (NCRB) which established increased cases of heinous crimes committed by the children in the age group of 16-18 years.²⁸⁵ But, the NCRB data is merely based on the number of juveniles apprehended and not on the number of convictions which was also observed by the Parliamentary standing committee report. It clearly indicates that the number of heinous crimes committed by the juveniles in the age group of 16-18 years is definitely smaller than the data published by NCRB. Therefore, it is contended that the JJA 2015 has provided for superficial differentiation of juvenile aged 16 – 18 years without any rationale and justification thus violating Article 14 of the Constitution. This part of the chapter critically looks into the Indian law governing the age of criminal responsibility of a juvenile. In particular, the researcher intends to study the India's compliance to international standards on the issue of age of criminal responsibility, relevant constitutional provisions and to analyze its position in the light of recent scientific advancements on brain maturation. An attempt is made to critically look into the significance of treating juveniles aged 16-18 years committing heinous offences differently and bring to the fore undecided issues.

²⁸⁵ Committee on Human Resource Development, Rajya Sabha, *The Juvenile Justice (Care & Protection of Children) Bill*, 2014 at 8

The criminal jurisprudence in India uses two ages to determine the MACR i.e. doli in capex presumption. Referring to Section 82 of the Indian Penal Code, a child under the age of 7 years does not possess of mens rea & thus, they are excused from all criminal responsibility.²⁸⁶ Further, Section 83 of the Indian Penal Code provides that a child aged between 7 and 12 years are also deemed doli incapex but, here the presumption is rebuttable. The child is doli capex i.e. he is said to possess mens rea if it is proved that the child at the time of committing of the crime knew the consequences of his wrongful act.²⁸⁷ In very simple words, the MACR in India ranges from 7-12 years contingent on maturity and understanding of such child. Clearly, this authorizes the use of minimum ages as low as 7 years. On the other hand, setting of the minimum age as low as 7 years does not appear to meet any justification.

3.3.1 The Age of Criminal Responsibility and Juvenile Justice System in India

Juvenile Justice (Care and Protection of Children) Act, 2015, the current legislation regarding juvenile justice system in India, provides distinct rules and procedures to deal with the children in conflict with law. In the Indian context, a child in conflict with law or a juvenile delinquent means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such an offence.²⁸⁸

The JJA 2015 categorizes the offences into three groups-

1. **Petty offences**- are those offences under the Indian Penal Code or any other law for the time being in force which is punishable with imprisonment up to three years.²⁸⁹

The Juvenile Justice Board shall dispose the cases of petty offences through summary proceedings.²⁹⁰

²⁸⁶ According to the Section 82 of the IPC “Nothing is an offence which is done by a child under seven years of age.”

²⁸⁷ According to the Section 83 of the IPC “Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion.”

²⁸⁸ Section 2(13) and Sec 2(35), Juvenile Justice (Care and Protection of Children) Act, 2015

²⁸⁹ Sec 2(45), Juvenile Justice (Care and Protection of Children) Act, 2015

²⁹⁰ Section 14(5)(d), Juvenile Justice (Care and Protection of Children) Act, 2015

2. Serious offences- are those offences under the Indian Penal Code or any other law for the time being in force which is punishable with imprisonment between three to seven years.²⁹¹ In such cases the juvenile shall be dealt by the JJB in accordance with the procedure prescribed by the Crpc for the trial of summons cases.²⁹²

3. Heinous offences- are those offences for which the minimum punishment under Indian penal Code or any other law for time being in force is seven years.²⁹³ In cases of heinous offences committed by a juvenile aged 16 and above, a preliminary assessment shall be made by the JJB with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence.²⁹⁴ If the Board is satisfied on preliminary assessment that the matter should be dealt by the Board itself, then the Board shall dispose it in accordance with the procedure prescribed by the Crpc for the trial of summons cases.²⁹⁵ The JJB on preliminary assessment may also pass an order transferring the trial of the case to the Children's Court that there is a need for trial of the said child as an adult.²⁹⁶ The Children's Court may further decide as to whether child should be tried as an adult or not. If the concerned court decides that there is no need for the trial of the child as an adult, then it shall dispose of the matter by passing appropriate orders that could be passed by the Juvenile Justice Board in respect of the child found to be in conflict with law.²⁹⁷ If the Court decides that there is need for trial of the child as an adult & such child is adjudicated guilty, then the Court shall pass appropriate orders and ensure that such child found in conflict with law is sent to the place of safety till he attains the age of twenty one years and thereafter shall be transferred to jail to serve the remainder of his term.²⁹⁸ It is pertinent to note that such child on attaining the age of twenty one years is not automatically transferred to jail to complete the remainder of the sentence. The JJA 2015 mandates the Children's Court/ Sessions Court to conduct the evaluation of such child on attaining the age of 21 years

²⁹¹ Sec 2(54), Juvenile Justice (Care and Protection of Children) Act, 2015

²⁹² Section 14(5)(e), Juvenile Justice (Care and Protection of Children) Act, 2015

²⁹³ Sec 2 (33), Juvenile Justice (Care and Protection of Children) Act, 2015

²⁹⁴ Sec 15(1), Juvenile Justice (Care and Protection of Children) Act, 2015

²⁹⁵ Sec 15(2), Juvenile Justice (Care and Protection of Children) Act, 2015

²⁹⁶ Sec 18(3), Juvenile Justice (Care and Protection of Children) Act, 2015

²⁹⁷ Sec 18(1) ,Juvenile Justice (Care and Protection of Children) Act, 2015

²⁹⁸ Sec 19 & 20, Juvenile Justice (Care and Protection of Children) Act, 2015

based on the yearly follow up progress reports made by the Probation Officer/ District Child Protection Unit or the social worker and opinion of relevant experts to make an assessment as to whether such child underwent reformatory changes to become contributing member of the society or not.²⁹⁹ Based on this evaluation result the Children's Court/Sessions Court may either decide the child to be released under the supervision of monitoring authority³⁰⁰ or to complete the remainder of the sentence in jail.³⁰¹

The broad principles that govern the age of criminal responsibility of a juvenile in India are summed up as follows-

- Children under the age of 7 years lack the capacity to form mens rea and thus cannot be criminally held responsible for their criminal wrongdoings.
- The MACR of a juvenile in India ranges from 7-12 years contingent on maturity and understanding of such juvenile.
- Children alleged to be in conflict with law aged 7 to 18 years come within the purview of juvenile justice system governed by distinct rules and procedures laid down in the Juvenile Justice (Care and Protection of Children) Act, 2015.
- The JJA 2015 permits juveniles aged 16-18 years committing heinous offence to be tried like an adult in Children's Court/ Sessions Court after assessing the physical and mental capacity of such juveniles.

3.3.2 Categorization of juveniles aged 16-18 on the basis of heinous offence in Juvenile Justice (Care & Protection of Children) Act, 2015

The rationale for the genesis of the practice of trying a juvenile as an adult and subjecting them to longer sentence in India was that the identifiable fraction of

²⁹⁹ Sec 20, Juvenile Justice (Care and Protection of Children) Act, 2015

³⁰⁰ The State Government shall maintain a list of monitoring authorities and prescribe mandatory procedures. (Proviso to Section 20(2) of JJA 2015)

³⁰¹ Sec 20, Juvenile Justice (Care and Protection of Children) Act, 2015

juvenile delinquents aged 16 – 18 years committing heinous offence were not suitable to be dealt by the Juvenile Justice (Care & Protection of Children) Act, 2000 .³⁰² This was based on the data collected by the National Crime Records Bureau (NCRB) which established increased cases of heinous crimes committed by the children in the age group of 16-18 years. As already mentioned, the NCRB data is merely based on the number of juveniles apprehended and not on the number of convictions which was also observed by the Standing committee report. It clearly indicates that the number of heinous crimes committed by the juveniles in the age group of 16-18 years is definitely smaller than the data published by NCRB. Therefore, it is contended that the JJA 2015 has provided for superficial differentiation of juvenile aged 16 – 18 years without any rationale and justification thus violating Article 14 of the Constitution. Nevertheless, the study of the NCRB data for the last 15 years (2001-2015) by the researcher indicates that older juveniles specifically in the age group of 16-18 years have the highest arrest rates and account for almost 70% of the total arrests for serious and heinous offences every year.³⁰³ However, it is pertinent to note that the NCRB does not collect any data regarding convictions of juveniles classified by age and crime.³⁰⁴ The researcher understands that reliance on conviction rates rather than arrest rates is likely to provide better estimates and accurate data for the purpose of the sub-classification of juveniles on the basis of age and crimes. Therefore, the researcher sought the following details from the High Court of Karnataka by relying on the General circular No.3/2014 issued by this court on 21.012.2014 mandating the JJB of every district to submit the quarterly reports of disposed & pending cases to the High Court³⁰⁵ -

1. Total number of cases instituted against juveniles across Karnataka, year-wise (2014-2017) classified by age & offences
2. No. of cases disposed of by the JJB including conviction & acquittal details, year-wise (2014-2017) classified by age & offences.

³⁰² Statements of Objects and Reasons of the Juvenile Justice (Care & Protection of Children) Bill, 2014

³⁰³ The researcher has presented, compared & analyzed the NCRB data pertaining to crimes committed by juveniles in Chapter 2. See p.66-69

³⁰⁴ Information sought by the researcher from NCRB through RTI, Annexure 1

³⁰⁵ See Annexure 2

The researcher also sought the aforementioned information for the year 2000-2014, but said information is not available with the High Court of Karnataka.

Table 2- Conviction and Acquittal details (Juveniles aged 7-12 years)

Juveniles aged 7-12 years								
Heinous Offences					Non Heinous Offences			
Year	Total cases Opening Balance + cases instituted	Convictions	Acquittal	Pendency	Total cases Opening Balance + cases instituted	Convictions	Acquittal	Pendency
2014	05	0	0	05	13	0	02	11
2015	13	01	04	08	28	02	20	06
2016	16	0	09	07	31	03	19	09
2017	26	02	17	07	28	02	10	16

Table 3- Conviction and Acquittal details (Juveniles aged 12-16 years)

Juveniles aged 12-16 years								
Heinous Offences					Non Heinous Offences			
Year	Total cases Opening Balance + cases instituted	Convictions	Acquittal	Pendency	Total cases Opening Balance + cases instituted	Convictions	Acquittal	Pendency
2014	145	05	32	108	268	26	87	155
2015	200	06	33	161	294	21	45	198
2016	252	09	59	184	423	67	96	260
2017	321	16	59	246	425	34	131	260

Table 4- Conviction & Acquittal details (Juveniles aged 16-18 years)

Juveniles aged 16-18 years								
Heinous Offences					Non Heinous Offences			
Year	Total cases Opening Balance + cases instituted	Convictions	Acquittal	Pendency	Total cases Opening Balance + cases instituted	Convictions	Acquittal	Pendency
2014	1012	36	255	721	1195	72	540	583
2015	1127	24	215	888	1229	75	350	804
2016	1237	34	183	1020	1438	119	561	758
2017	1576	52	449	1075	1549	88	527	934

Table 2, 3 & 4 indicates that juveniles aged 16-18 years account for the majority of the cases instituted before the JJB every year for both heinous & non-heinous offences across the State of Karnataka. It is clear that the number of acquittals is higher than the number of convictions every year irrespective of the age-groups of juveniles. The data also indicates increasing number of pending cases every year. For instance, Table 4 representing the cases instituted against juveniles in the age-group of 16-18 years for heinous offences indicates that 71% of the total cases in 2014, 78% in 2015, 82% in 2016 & 68% in 2017 are pending cases. It is pertinent to note here that convictions/acquittals are counted at the year of adjudication and not at the year of the institution of the case i.e for instance, a case instituted in the year 2014 might result in conviction/acquittal in 2016 & they form part of the 2016 acquittal/conviction records. Therefore comparison of cases instituted & number of conviction/acquittals on an annual basis does not provide correct estimates. Taking this into account, the researcher opines & submits that it is not judicious to rely on conviction data. In the absence of any other official data, the 'closest' reliable authentic data available regarding crimes committed by juveniles is that of the NCRB on arrest rates. They are definitely an important source of crime information which cannot be disregarded in the larger interests of the public.

Even before the passage of JJA 2015, the interference of the Honourable Supreme Court was sought in *Salil Bali v. Union of India*³⁰⁶ through writ petitions to lower the age of juvenile from 18 (as fixed under JJA 2000) to 16 years in the light of violent crimes committed by them. It would be seen by this judgement, that although the Apex Court dismissed the petition, it ruled that the definition of a juvenile could be considered differently if sufficient data exists to necessitate the change. The relevant extracts from the judgement are reproduced below-

“There are, of course, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be re-integrated into mainstream society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and re-integrate children with criminal propensities into

³⁰⁶ (2013) 4 SCC 705

mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the future.

*.... and the data available with regard to the commission of heinous offences by children, within the meaning of Sections 2(k) and 2(l) of the Juvenile Justice (Care and Protection of Children) Act, 2000, we do not think that any interference is necessary with the provisions of the Statute till such time as sufficient data is available to warrant any change in the provisions of the aforesaid Act and the Rules. On the other hand, the implementation of the various enactments relating to children would possibly yield better results.*³⁰⁷ (Emphasis added)

The statistical data of the NCRB over the last 15 years signaling highest arrest rates of juveniles in age group of 16-18 for heinous offences when read together with the above Supreme Court ruling appears logical and also justify JJA 2015 in further categorizing juveniles aged 16-18 years on the basis of heinous offence to subject them to differential treatment.

Plethora of empirical research indicates that serious & violent juvenile delinquents differ from non-violent juvenile delinquents in many ways. A research study comprising a study group of 22 distinguished researchers sponsored by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), which is a part of US Department of Justice found that serious violent juvenile offenders are a distinct group of offenders who tend to start early and continue late in their offending and likely to develop behaviour problems in several areas including aggression, dishonesty, property offenses and conflict with authority figures in their early childhood and adolescence.³⁰⁸ A longitudinal study of 4500 adolescents in the age group of 17-18 years indicated that violent adolescents were substantially more likely than their non violent peers to suffer from emotional & behavioral problems, substance abuse, low academic orientation, dropping out of school & poor mental health.³⁰⁹ The findings from various studies indicate that youth who engage in serious

³⁰⁷ Ibid

³⁰⁸ Rolf Loeber & David P Farington, *Never too early, never too late: Risk factors and successful intervention for serious violent juvenile offenders*, *Studies on crime and crime prevention* 7, 28 (1998); Serious violent offenses with reference to aforementioned study includes homicide, rape, robbery, aggravated assault, and kidnapping. Also available at <https://www.ojjdp.gov/jjbulletin/9805/offenders.html>, last seen on 20/04/2013

³⁰⁹ Ellickson P et al, “*Profiles of violent youth: substance use and other concurrent problems*”, 87 (6) *American Journal of Public Health* 985, 987 (June 1, 1997), available at

and chronic crime often exhibit signs of impaired learning ability, poor self control expressed in impulsivity, a propensity for risk taking, and high levels of aggressive emotions and lack of empathy.³¹⁰ A number of structured intervention programmes (empirically successful) that work best for these individual deficits have been developed across the globe such as anger control therapy, aggression replacement training, brain power program, anger coping program, gang resistance education and training program, social competence promotion program etc and these programs require careful selection and training of individuals administering them.³¹¹ The intensity of intervention to reduce re-offending of violent youth offenders should be higher relative to that needed for non-violent youth offenders.³¹² Serious violent youth offences may indicate greater and individualized treatment needs and interventions different from non-violent offences³¹³ and thus necessitate secure confinement designed to treat serious, violent criminal behaviours. Simply put, the varying needs of serious & violent juvenile offenders require separate treatment. Further, the researcher opines that putting together the older serious violent juvenile delinquents with the younger non serious delinquents in the same correctional institutions are likely to result in criminal contamination which is against the best interests of the child.

The researcher posits that the categorization of juveniles aged 16-18 on the basis of heinous offence is not violative of Art.14 of the Constitution & the differential treatment is meted out to them on the basis of reasonable classification. The test of reasonable classification permitted under Article 14 must fulfill two conditions, namely-

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1380935/pdf/amjph00505-0099.pdf>, last seen on 27/03/2018

³¹⁰ Robert D Hoge, *Serious and violent juvenile offenders: Assessment and Treatment*, Paper presented at the 139th International training course (2009), Visiting experts' Papers (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders UNAFEI) Resource Material Series no.78, at 52, available at http://www.unafei.or.jp/english/pdf/RS_No78/No78_10VE_Hoge2.pdf . With reference to this study, violent actions such as homicide, aggravated assault, rape, and robbery are almost always treated as serious violent crimes.

³¹¹ Ibid, at 54

³¹² Lai Violet et al, "*Violent and Nonviolent Youth Offenders: Preliminary Evidence on Group Subtypes*", 14(3) Youth Violence and Juvenile Justice 313, 323-324 (2016) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4874061/>

³¹³ Ibid, at 313

- i. *“The classification must be founded on an intelligible differentia which distinguishes the persons or things that are grouped together from those excluded and*
- ii. *The differentia must have rational nexus with the object sought to be achieved by the statute in question”*.³¹⁴

Taking into consideration, the NCRB statistical data of last 15 years signaling highest arrests of juveniles aged 16-18 years for heinous offences and the above cited relevant empirical studies indicating serious, violent juvenile delinquents as a category of offenders distinct from non-violent delinquents warranting rigorous, individualized interventions and secure confinements, the researcher submits that juveniles aged 16-18 years committing heinous offences constitute a distinct group & believes that this satisfies the first limb of the reasonable classification test. The essence of the JJA 2015 is undoubtedly rehabilitation and reintegration of a child in conflict with law. It is relevant to note here that when a juvenile aged 16 -18 years alleged to have committed a heinous offence is tried as an adult and adjudicated guilty, such child found in conflict with law is sent to the place of safety for rehabilitation (secure confinement) till he attains the age of twenty one years and thereafter shall be transferred to jail to serve the remainder of his term. But, such child on attaining the age of twenty one years is not automatically transferred to jail to complete the remainder of the sentence. The JJA 2015 mandates the Children’s Court/Sessions Court to conduct the evaluation of such child based on the yearly follow up progress reports and based on this evaluation result the concerned Court may either decide the child to be released under the supervision of monitoring authority or to complete the remainder of the sentence in jail.³¹⁵ In other words, a juvenile aged 16-18 years held guilty of heinous offence is placed in an adult jail only if rehabilitation of such juvenile has been unsuccessful. Although, the viability and the legality of the mechanism of transferring the juvenile to Childrens Court/Court of Session is discussed critically in subsequent pages, the researcher submits that there is no fallacy in further categorizing the juvenile into an age-group of 16-18 years on the basis of heinous offence and the classification is intended to achieve the main object of the JJA 2015 i.e. rehabilitation and reintegration. The researcher posits that this satisfies the second limb of the reasonable classification test.

³¹⁴ K.Thimmappa vs. Chairman Central Board of Directors SBI, AIR 2001 SC 467

³¹⁵ Sec 19 & 20, JJA 2015

It is pertinent to note here that as far as the trial of the child aged 16 and above as an adult is concerned, Sec 19(1) of the JJA 2015 does not mandate the Children's Court to impose the mandatory minimum sentence prescribed for the offence (heinous offence as defined under the JJA 2015) in the IPC or any other law for the time being in force. The relevant section uses the language, "the Children's Court may decide that there is a need for trial of the child as an adult and pass *appropriate orders* subject to the provisions of Sec 21³¹⁶, *considering the special needs of the child*, the tenets of fair trial and maintaining child friendly atmosphere."³¹⁷ Furthermore, the JJA 2015 mandates that the Children's Court shall ensure that such child found in conflict with law is sent to a place of safety for rehabilitation till he attains the age of 21 years and thereafter, the person shall be transferred to a jail, if he is yet to complete the term of stay.³¹⁸ On careful reading of these provisions, the researcher understands that the judges of the Children's Court are given discretion to decide the duration of stay of such children found in conflict with law. At this juncture, the researcher strongly suggests that indeterminate sentencing may be appropriate for children in conflict with law for two reasons. *Firstly*, rehabilitation is clinical which is based upon observation and treatment rather than theory and discretion. Therefore, the duration of rehabilitation should be indeterminate because it is impossible to foresee the course or extent of rehabilitation as it entirely depends upon how a person responds to it. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment.³¹⁹ *Secondly* the category and nature of offences covered under the definition of 'heinous offences'³²⁰ as per the JJA 2015 supports the use of indeterminate sentencing. It is relevant to note here that the heinous offence under JJA 2015 includes wide range of offences punishable with minimum 7 years of imprisonment or more not only under the IPC but also other law such as the Narcotic drugs Act (1985), Arms Act (1959) etc.³²¹ To

³¹⁶ Sec 21 JJA 2015, "No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence either under the provisions of this Act or under the provisions of Indian Penal Code or any other law for the time being in force".

³¹⁷ Sec 19(1)(i), JJA 2015

³¹⁸ Sec 19(1)(3), Sec 20(1) and Sec 20(2), JJA 2015

³¹⁹ Barry C. Feld, Case and materials on Juvenile Justice Administration, American Book series, 890(2nd ed., 2004)

³²⁰ Sec 2(33), JJA 2015-"heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more

³²¹ For list of heinous offences under JJA 2015 prepared by NLSIU- see Annexure 3. Also available at <https://www.nls.ac.in/ccl/jjdocuments/childrenoffences2016.pdf>

illustrate, although the juvenile committing murder under the IPC and juvenile illegally importing narcotic drugs to India punishable under the Narcotic Drugs Act are heinous offences as per the JJA 2015, the latter not being as severe as the former do not require the same duration of stay. Also, age cut off of 21 years as provided under Sec 20 the JJA 2015³²² is necessary because problems becomes apparent when comparison is made of juvenile delinquent retained in juvenile justice system beyond the age of 21 years on the pretext of rehabilitation with the rest of offenders in the age group of 18 years and above coming under the adult criminal justice system. This kind of indeterminate sentencing considers the need of rehabilitation of young offenders with a motivation to return to the society earlier and also provides a safeguard to the community. Although, the discretionary nature of indeterminate sentence may likely lead to widely varying and inequitable treatment of similarly situated offenders³²³, sentence disparity is justifiable in the context of rehabilitation as it allows the juvenile to follow his own pace of rehabilitation taking into account his specific needs.³²⁴ Sentence disparity would be inequitable in the context of punishment, since punishments attempts to penalize an individual for the crime committed, and thus requires all individuals committing the same crime obtain the same punishments.³²⁵ Considering the subjectivity of release decisions in case of rehabilitation dependent sentences, the researcher proposes the constitution of a multidisciplinary team. The determination that the juvenile has been rehabilitated must be assigned to a multidisciplinary team comprising of adjudicating authority (JJB), mental health experts, experienced psychologists/counselors and staff of place of safety(Superintendent of the house, Probation Officer and /Counselor). The progress of the

³²² **Sec 20 of the JJA 2015 reads-**

1. When the child in conflict with the law attains the *age of twenty-one years* and is yet to complete the term of stay, the Children’s Court shall provide for a follow up by the probation officer or the District Child Protection Unit or a social worker or by itself, as required, to evaluate if such child has undergone reformative changes and if the child can be a contributing member of the society and for this purpose the progress records of the child under sub-section (4) of section 19, along with evaluation of relevant experts are to be taken into consideration.

2. After the completion of the procedure specified under sub-section (1), the Children’s Court may—
 i. decide to release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed term of stay;
 ii. decide that the child shall complete the remainder of his term in a jail:

Provided that each State Government shall maintain a list of monitoring authorities and monitoring procedures as may be prescribed.

³²³ Jeffrey E Butler , *A study on the issue of indeterminate versus determinate sentencing*, 30 *Juv. & Fam. Ct. J.* 39, 44 (1979)

³²⁴ Gauri Pillai & Shrikrishna Upadhyay, *Juvenile Maturity and Heinous crimes: A Relook at juvenile justice policy in India*, 10 *NUJS Law Review* 49, 72 (2017)

³²⁵ *Ibid*

child must be quarterly reviewed by the same team. On successful rehabilitation, the child shall be released irrespective of the length or duration of the stay subject to Sec 21 of the JJA 2015. The multidisciplinary team is likely to make objective release decisions in the best interest of the juvenile delinquents as well as the society.

3.3.3 Preliminary assessment into heinous offences by the Juvenile Justice Board under the JJA 2015

In case of heinous offence alleged to have been committed by a juvenile aged sixteen and above, a preliminary assessment is to be made by the Juvenile Justice Board (JJB) with respect to the mental and physical capacity of such juvenile to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence with the assistance of experienced psychologists/psychosocial workers or other experts.³²⁶ If the Board, after preliminary assessment is satisfied that such child requires to be tried as an adult, it may pass an order transferring the trial of the case to the Children's Court/ the Court of Sessions (where the Children's Court has not been designated).³²⁷ In terms of JJA 2015, the Children's Court is a Court established under the Commission for Protection of Child Rights Act, 2005 or a Special Court under the Protection of Children from Sexual Offences Act, 2012(POCSO)/ Sessions Court having jurisdiction to try such offences where aforesaid courts have not been designated.³²⁸ As of 27.11.2016, Special Courts have been designated under POCSO Act, 2012 as well as Commission for Protection of Child rights Act, 2005 in all the 30 districts of Karnataka.³²⁹ Further, the access to panel of experts shall be provided to the JJB by the District Child Protection Unit.³³⁰ On being satisfied that the child in question needs to be tried as an adult, the JJB after assigning the reasons shall transfer the case to the Childrens Court.³³¹ On receipt of the transfer decision by the JJB, the Children' Court shall reassess the matter to decide whether to try the child as adult or not.³³²

³²⁶ Sec 15, JJA 2015

³²⁷ Sec 18(3), JJA 2015

³²⁸ Sec 2(20), JJA 2015

³²⁹ Information sought through RTI. See Annexure 4

³³⁰ Rule 10(A), Juvenile Justice (Care and Protection of Children) Model Rules, 2016

³³¹ Rule 10(A)(4), Juvenile Justice (Care and Protection of Children) Model Rules, 2016

³³² Sec 19(1), JJA 2015 and Rule 13, Juvenile Justice (Care and Protection of Children) Rules, 2016

The researcher intends to bring to the fore the flawed and incomplete procedures of preliminary assessment which is likely to threaten the best interest of the child as well as the society.

Firstly, the JJA 2015 and the Juvenile Justice (Care & Protection of Children) Model Rules, 2016 is silent on the procedure to be followed by the JJB in preliminary assessments and the Children's Court in reassessing the matter. The draft Central Model Rules, 2016 under the Juvenile Justice (Care and Protection of Children) Act, 2015 had clearly laid down the mandatory requirements to be adhered to by the JJB for making preliminary assessment and transfer decisions in case of heinous offences. The JJB was authorized to make any transfer order only after interacting with the child and after taking into consideration the social investigation report, statement of witnesses recorded by the Child welfare police officer, medico- legal report, forensic reports, documents prepared during the course of investigation by Child Welfare Police Officer, medical reports, mental health reports including an assessment of the cognitive maturity of the child in addition to submissions made by the child through his legal representative.³³³ The researcher understands that the aforementioned preliminary assessment requirements are necessary to consider whether there are sufficient grounds to proceed against the alleged juvenile. Strangely, these procedural requirements are conspicuous by its absence in the final JJ Model Rules 2016.

The draft model rules had also specified a number of factors for the consideration of Juvenile Justice Board while arriving at a transfer decision enumerated as follows³³⁴-

- Whether the child in question can be identified as child in need of care and protection under the JJA 2015;
- Whether such child has been a victim of crime / abuse and exploitation in the past;
- If the offence is committed for the survival;

³³³ Rule 14(4) and 14(5), Draft Model Rules, 2016 under the Juvenile Justice (Care and Protection of Children) Act, 2015

³³⁴ Rule 14(9), Draft Model Rules, 2016 under the Juvenile Justice (Care and Protection of Children) Act, 2015

- If situational factors such as mental trauma and cruelty is the driving force behind the commission of a crime;
- If crime committed under coercion or fear of mental or physical harm to oneself or others;
- If offence committed by the child alongside adults, the Board shall consider the aspect whether independent of the influence of the adults, the child may not have committed the offence;
- Mental illness of the child, addiction to drugs, alcohol etc ;
- Children under peer group influence particularly criminals;
- If previously involved in violent incidents /any offence;
- If deliberate self-harm/ suicidal tendencies exist;
- Exposure to media violence including pornography;
- Personality traits and habits of the child;
- Whether the child aware of the nature and consequences of his act and his perception of such act and;
- Recruitment in non-State armed groups”.

However, the aforementioned mandatory requirements and factors to be adhered to by the JJB in making preliminary assessments specified in the draft model rules is also conspicuous by its absence in the final JJ Model Rules 2016(notified on 21st September, 2016) under the Juvenile Justice (Care and Protection of Children) Act, 2015. The JJ Model Rules, 2016 entirely places the responsibility to make transfer decisions on the JJB members who *may* take the assistance of experienced psychologists or psychosocial workers.³³⁵ Further, the JJ Model Rules 2016 has not provided any additional guidelines regarding the procedure of preliminary assessments and as a matter of course leaving room for discretion. On the other hand, the researcher opines that the factors that were enumerated in the draft model rules to be considered by the JJB in transfer decisions might be taken into account in designing personalized care and rehabilitation plan for the juvenile delinquents rather than as considerations that inform transfer decisions. Further, the researcher opines that the draft model rules did not specify clearly the importance attached to these factors under different circumstances. Consequently, the judges are likely to exercise

³³⁵ Sec 15(1), JJA 2015 & Rule 10 A, JJ Model Rules 2016

their personal bias or surrender to public pressure in considering these broad factors. In practice, some judges may emphasize on situational factors leading to crime while some may focus on mental maturity of the child. In summation, the researcher opines and submits that the JJA 2015 and the JJ Model Rules 2016 sets forth no specific guidelines for the exercise of this important discretionary act but, leaves the formulation of criteria for preliminary assessment to the JJB. The lack of guidelines and clarity in the procedure may result in differential treatment of similarly situated offenders. There have already been instances of ambiguity in the preliminary assessment process in many parts across India.³³⁶

Secondly, taking into account the latest scientific research affirming adolescent's diminished criminal culpability on the basis of developmental immaturity and the lack of diagnostic tools to measure mental maturity/ assess mental capacity, the researcher opines and submits that the criteria of mental capacity in preliminary assessments to transfer juveniles to Children's Court is unintelligible. Therefore, the researcher posits that the preliminary assessment is a faulty mechanism premised on a flawed criterion. Post JJA 2015, there is instances of juveniles being subjected to Intelligence Quotient (IQ) tests to assess their mental capacity to commit the alleged heinous offences.³³⁷ Also, in the empirical study of the three selected districts of Karnataka – Bangalore (U), Udupi & Dharwad, the researcher found that as of 28/03/2018, the JJB, Bangalore has not transferred any cases of juveniles alleged to have committed heinous offences to Childrens Court. The members of the JJB, Bangalore stated that such juveniles shall be dealt by the JJB until the establishment of Childrens Court to try heinous offences. The further discussion indicated that though L, LIII & LIV Addl. City Civil & Sessions Judge is designated as Special Courts under POCSO Act, 2012 in Bengaluru City, direction has been issued to shift this court to the premises of the Observation Home, Bangalore. As of 14/03/2018, the JJB members, Udupi have not transferred any case to the Childrens court as any juvenile aged between 16-18 years alleged to have committed heinous offence has not been produced before them. The JJB members, Dharwad stated that as of 9.03.2018, two cases of juvenile aged 16-18 years alleged to have committed heinous offence has been transferred to adult

³³⁶ Bhavya Dore, *A year since the new Juvenile Justice Act came into being, chaos rules its implementation*, Scroll.in(15/01/2017), available at <https://scroll.in/article/826668/a-year-since-the-new-juvenile-justice-act-came-into-being-chaos-rules-its-implementation>, last seen on 17/08/2017

³³⁷ Ibid

courts. They stated that the transfer was made by relying on the assessment report submitted by Dharwad Institute of Mental Health and Neurosciences (DIMHANS). The further interaction with the JJB members & Public Prosecutor, Dharwad revealed that transfer was made on the finding in the assessment report that such juvenile was not suffering from any mental disease. The inevitable question which arises here is whether an IQ test/ mental health would mean the child's capacity to commit the offence & understand its consequences.

Thirdly, the JJA 2015 permits the JJB on preliminary assessment to transfer the case of heinous offences to the Children' Court / the Sessions Court (where the Children Court is not designated) for trial. It is pertinent to note here that the Children's Court is the Sessions Court equipped to try offences committed against children by adults per se and not the offences committed by children. The Judges in the Children's Court and Sessions Court are not trained to deal with children in conflict with law in contrast with the specially designed & trained JJB panel comprising of principal magistrate and two social workers. Trial of juveniles in adult courts is violation of the UNCRC as it mandates the State parties to establish distinct justice system applicable to all children in conflict with law.³³⁸

In the light of the above discussion, the researcher proposes that the juveniles aged 16 and above committing heinous offences must be given distinct treatment within the juvenile justice system by empowering the JJB to decide such cases rather than transferring the trial to the Childrens Court/the Sessions Court. On adjudicated guilty, such offenders must be sentenced in the place of safety for intensive and rigorous rehabilitation.

It would be erroneous to say that the Indian juvenile justice system is largely unaffected by the recent scientific advancements on the adolescent brain development. The neuroscience and behavioural psychology on adolescent brain development is cited in the most recent judgments of the Indian Supreme Court namely Salil Bali v.

³³⁸ Art. 40(3), UNCRC

Union of India³³⁹ (2013), Subramanian Swamy and Ors v. Raju³⁴⁰ (2014). Reference to mental maturity of a juvenile in the light of scientific advancements were made in the aforementioned judgments on the issue of age of criminal responsibility of a juvenile and the Supreme Court has affirmed the principle that “juveniles under the age of 18 years should be treated in a manner different from their adult counterparts.” As already discussed, the findings of neuroscience & developmental psychology indicate that the complete brain maturation i.e. intellectual, social and emotional development takes place in an uneven manner and consequently different individuals mature at different ages but, do so within the similar age ranges. Considering this fact, it is very much possible that there may be juvenile delinquents aged 17 years lacking the traits of criminal responsibility and on the other hand, there may be juvenile delinquents aged 15 years attaining all the attributes. At this juncture, treating all juveniles upto the age of 18 years as one class may appear unreasonable as it is likely to bring a juvenile delinquent having all the traits of an adult criminal under the purview of juvenile justice system. But the Hon’ble Supreme Court has emphasized time and again in a plethora of cases that the classification made by the legislature need not be scientifically complete and mathematically equal. In other words, perfect equality is not required. The same principle has been highlighted by the Supreme Court regarding the classification of juveniles’ upto the age of 18 years as a distinct category in Dr. Subramanian Swamy case (supra). The relevant extracts from the judgement are reproduced below-

“Classification or categorization need not be the outcome of a mathematical or arithmetical precision in the similarities of the persons included in a class and there may be differences amongst the members included within a particular class. So long as the broad features of the categorization are identifiable and distinguishable and the categorization made is reasonably connected with the object targeted, Article 14 will not forbid such a course of action. If the inclusion of all under 18 into a class called ‘juveniles’ is understood in the above manner, differences inter se and within the under 18 category may exist. Article 14 will, however, tolerate the said position.

³³⁹ (2013) 4 SCC 705

³⁴⁰ (2014) 8 SCC 390

Precision and arithmetical accuracy will not exist in any categorization. But such precision and accuracy is not what Article 14 contemplates."³⁴¹

But, there has always been an obvious alternative in the abovementioned scenarios - decisions on case- by-case basis, taking into account not only the age but, also the nature of the offence and mental maturity of the delinquent. It is pertinent to note here that in the absence of any tools to assess mental maturity on an individual basis, the JJB is likely to make bad assessment decisions. Drawing from these points, the researcher submits that decision on a case-by case basis is not judicious.

Hypothesis 1- There is relationship between the age and nature of crimes committed by juveniles in India.

The researcher in Chapter 2 has presented, compared and analyzed National Crime Records Bureau (NCRB) data pertaining to crimes by juveniles for the last 15 years i.e 2001-2015. The age data is given in class intervals i.e 7-12 years, 12-16 years and 16-18 years. Based on the study of the NCRB figures, the following concluding observations are made by the researcher-³⁴²

- The juveniles apprehended in the age-group of 16-18 years account for 50-70% of the total arrests every year. The juveniles in the age-group of 12-16 years account for 25-40% of the total arrests every year.
- The data shows that the highest number of arrests for murder and rape was made in the age-group of 16-18 years which accounted for 50-70% of the total arrests every year.
- The majority of arrests for dacoity and robbery were made of juveniles in the age group of 16-18 years.

Further the Table 2, 3 and 4 of Chapter 3³⁴³ indicate that juveniles aged 16-18 years account for the majority of cases (both heinous and non-heinous) instituted before the JJB, Karnataka for the years (2014-2017).

³⁴¹ Ibid

³⁴² See Chapter 2 at 66-69

³⁴³ See Chapter 3 at 102 and 103

Therefore the researcher understands that there is direct relationship between the age and nature of crimes committed by juveniles in India.

Therefore the hypothesis stands substantiated.

3.4 Conclusion

Having carefully considered international standards, brain and behavioural research and Indian position, the researcher submits the following-

- Although the UNCRC defines “child as a person under the age of 18 years”, it also grants discretion to State parties to determine by law the age at which childhood may be concluded even before the completion of 18 years. However, there are rules and guidelines (General comment no.10) that emphasize the application of special rules of juvenile justice system categorically to all children upto the age of 18 years but, not legally binding per se. Considering all these points together, the researcher concludes that, in compliance to international standards, India has set a specific justice system applicable to juveniles upto the age of 18 years.
- The Committee on the Rights of the Child (CtRC) in its General Comment has concluded that 12 years shall be the MACR & anything lesser than that is unacceptable. But, there appears to have been no rationale in recognizing the age limit of 12 years. Nevertheless MACR in India i.e. 7 years appears to be too low compared to international community.
- There is no mechanism in India to deal with the children below the minimum age of criminal responsibility committing crimes. Delinquency research shows that the foundations for both prosocial and disruptive behaviour are laid down in the first five years of life.³⁴⁴
- The neuroscience and behavioural study suggests that the adolescents lack the maturity, judgement to foresee & understand the consequences of their

³⁴⁴ Don Cipriani , *Children’s Rights and the Minimum Age of Criminal Responsibility : A Global perspective*, 141 (Ashgate Publishing Company, 2009)

actions. The studies also finds that children mature at different rates but within similar age ranges and thus it is entirely possible that a person over the age of 18 years may lack the mental maturity to be criminally held responsible. On the other hand, there may be individuals in the age range of 13-18 possessing all the traits of criminal responsibility. But, in the absence of any tools to assess mental maturity on an individual basis, it appears more judicious to fix a distinct age to determine the age of criminal majority. India has chosen 18 years as the age of criminal majority which is consonance with UNCRC & majority of the countries across the globe. Accordingly, juveniles upto the age of 18 years as one class come under the purview of juvenile justice system. On the other hand, the Apex Court of India has ruled that differences inter-se exists in any classification as permitted under Article 14 of the Constitution and mathematical nicety or perfect equality are not required.

- The statistical data of the NCRB over the last 15 years signaling highest arrest rates of juveniles in age group of 16-18³⁴⁵ for heinous offences justify the JJA 2015 in further categorizing juveniles by age-group of 16-18 years on the basis of heinous offence to be subjected to differential treatment. The findings of the relevant empirical literature indicate that juveniles committing serious and violent offences constitute a distinct category of offenders requiring distinct and longer treatment, rigorous interventions compared to non-serious juvenile delinquents. The researcher posits that this categorization is a reasonable classification as permitted under Article 14 of the Constitution. Further, it is pertinent to note here that a juvenile aged 16-18 years held guilty of heinous offence is placed in the juvenile justice system upto the age of 21 years and then transferred to adult jails only if the rehabilitation of such juvenile has been unsuccessful. Thus, the researcher submits that there is no fallacy in categorizing juvenile aged 16-18 years on the basis of heinous offence and the classification is intended to achieve the main object of the JJA 2015 i.e. rehabilitation and reintegration. The varying needs of this category of delinquents warrant distinct treatment.

³⁴⁵ See chapter 2 at 66-69

- The researcher challenges the viability and legality of preliminary assessment into the heinous offences by the JJB and submits that preliminary assessment mechanism is faulty procedure premised on a flawed criterion likely leading to arbitrary decisions threatening the best interest of child.

The reckoning date for the determination of the age of the juvenile is the date of the commission of the offence & not the date when he is produced before the authority or the court.³⁴⁶ Proof of age is one of the most serious problems in assessing the age as the births are not registered in India³⁴⁷ and consequently majority of the children do not possess any proper documentation. In cases of any confusion with respect to the age of a juvenile arising due to the lack of any acceptable documentation, the benefit of doubt is always in favour of juveniles. There would be miscarriage of justice if the JJB grants benefit of doubt to the accused aged above 18 years due to lack of documents and bring them under the purview of juvenile justice system. The inevitable alternative in the absence of authentic age proof documents are the forensic medical examinations. In India, if birth certificate obtained from school or municipal authority is not available, the age shall be determined by bone ossification test (radiographic examination of the bones) or any other latest medical age determination tests.³⁴⁸ The date of birth determined by this ossification test is inaccurate as the margin of error is 2 years on either side.³⁴⁹ Among the proponents, the most widely recommended method is to collate the independent results of psychological assessment, a general physical examination, a dental examination looking in particular at the mineralization of third molar and X-ray of wrist.³⁵⁰ However these age estimation methods are discouraged due its wide margin of error, exposure of children to unnecessary radiations and they also involve huge costs and expertise in the process.³⁵¹

³⁴⁶ Pratap Singh v. State of Jharkhand, AIR 2005 SC 2731 at 2741

³⁴⁷ Devanik Saha, *Unregistered Births Put Many Indian Teen – Crime suspects at Risk*, India Spend (11/02/2016), available at <http://www.indiaspend.com/cover-story/unregistered-births-put-many-indian-teen-crime-suspects-at-risk-84879>, last seen on 20/08/2016.

³⁴⁸ Sec 94, JJA 2015

³⁴⁹ R. P. Kathuria, *Law of Crimes and Criminology*, Volume 3, 2845 (Vinod publications 2000)

³⁵⁰ Don Cipriani , *Children's Rights and the Minimum Age of Criminal Responsibility : A Global perspective*, 133 (Ashgate Publishing Company, 2009)

³⁵¹ Ibid, at 134

The researcher submits that the JJA 2015 is a novel and unprecedented legislation that tries to strike a right balance among the conflicting interests in the juvenile justice system- rehabilitation of juvenile delinquent, public safety and justice to victims (perpetrator of crime is a juvenile). The researcher acknowledges the intention of the legislature to consider the need to rehabilitate juveniles committing heinous offences until they attain the age of 21 years and thereafter transfer such juveniles to adult justice system only if such rehabilitation fails. There is an element of threat of transfer to adult justice system when rehabilitation fails and it is likely to deter juveniles from committing crimes. But, strangely the legislature failed to envision the faulty preliminary assessment procedure premised on a flawed criterion likely leading to arbitrary decisions threatening the best interest of child.