

Canada: Repealization and Young Offenders' Rights

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Introduction

In the past century Canada has seen the introduction of three different legislative regimes for administering juvenile justice, the 1908 Juvenile Delinquents Act (JDA), the 1984 Young Offenders Act (YOA), and the 2002 Youth Criminal Justice Act (YCJA) (Smandych, 2001). In the course of this legislative history, Canada has followed a pattern of legislative change that appears similar to many other Western countries, including England and Wales, Australia, and the United States. In each of these jurisdictions recent decades have witnessed earlier predominately child-welfare models of juvenile justice eroded and replaced with more legalistic and punitive 'justice' and 'crime-control' models of juvenile justice procedure. Despite evident similarities in the direction of recent juvenile justice developments across a number of countries, few efforts have been made to systematically compare the experiences of different countries (Bala et al., 2002), and even fewer attempts have been made to offer a cross-national comparative analysis of such developments written from a critical perspective (Muncie, 2005) that goes beyond the typically narrow-legalistic and reformist-technocratic discussions found in most publications (cf. Tonry and Doob, 2004). The aim of this chapter is to contribute to the comparative discourse on youth justice by

offering a critical analysis of recent juvenile justice developments in Canada. This analysis takes into account the themes of repenalization, adulteration, risk management, restoration, and internationalization, and attempts to contribute to a discussion where Canadian juvenile justice practices stand on a continuum in relation to each of these evidently more global juvenile justice developments. In addition, I attempt to provide a more critical account that highlights, among other factors, some of the race and class implications of recent developments in juvenile justice in Canada; which is something largely missing from existing overviews of the Canadian juvenile justice system (cf. Winterdyck, 1997; cf. Bertrand et al., 2002; Doob and Sprott, 2004).

Moral panics and repenalization

'Moral panics' refer to specific periods in history when a particular type or group of individuals 'become defined as a threat to societal values and interests' (Cohen, 2001: 69), while 'repenalization' refers to 'a distinct hardening of attitudes and criminal justice responses to young offending' typically tied to the growth of politically right-wing law and order, or 'get-tough', thinking about crime (Muncie, 2005). The argument that moral panics and repenalization are more often directed at visible ethnic minorities and the poor is supported by evidence from the Canadian experience over the last two decades. While Canadian youth crime rates stabilized and began to drop in the 1990s, the media still found numerous opportunities to make it appear that youth crime was getting worse and that young criminals were getting more dangerous. Although all Canadian youth are collectively portrayed in this way, Schissel (1997) documents numerous media reports of the 1990s that perpetuated racialized, class, and gender-biased images of dangerous and out-of-control young criminals; producing 'decontextualized' stories of youth crime and young criminals, in which criminal behaviour - disproportionately reported to be that of Aboriginal and Asian youth - was blamed on poverty and inadequate parenting, especially in single-parent (typically female-led) families. It is no coincidence that Aboriginal youth are among the poorest of the poor in Canada (Canada, Statistics Canada, 2003a, 2003b), and that they are also vastly over-represented in juvenile justice processing and youth incarceration statistics (Green and Healy, 2003). In their study of the competing discourses of youth justice reform in the 1990s, Hogeveen and Smandych (2001) point to similar racialized and class-based images of youth crime and young offenders that emanate from the media and politicians. More recently, Hogeveen (2005: 74) has taken this analysis further, arguing that construction of an archetypal dangerous and 'punishable young offender was clearly evident in Canada throughout the late 1990s as politicians and the public debated solutions to the problem of youth crime. In the ethos of a "new punitiveness" that eschews any pretence of compassion toward serious offenders, the Federal Government signalled its intention to come down tougher on problematic youth'.

What have been the driving forces behind repenalization in Canada? Are recent trends in the criminal justice processing and imprisonment of juvenile offenders indicative of a continuing movement toward repenalization? To address these questions, it is necessary to retrace the circumstances that led to growing criticisms of the 1984 YOA and the move toward replacing it with new 'get-tough' federal legislation. Legislative and political power in Canada is divided between the Federal government, and the country's ten provinces and three territories. As part of this division of power, the Federal government has the sole responsibility to enact national juvenile justice legislation. However, it is the responsibility of provinces and territories to implement federally-enacted juvenile justice laws. Consequently, one of the realities of the Canadian situation is that each of the provinces and territories has a great deal of autonomy to decide how it will implement, or not implement, federal criminal legislation respecting young offenders.

When the YOA was implemented in 1984 it signaled a shift in the spirit of both adjudicating and governing erring youth, as envisaged by Federal politicians. No longer would 'the causes of delinquency' be the focus of legislation and experts, as was the case under the earlier child-welfare model, but now 'young offenders' themselves would be adjudicated and managed. Thus, with the enactment of the YOA, the 'young offender' became viewed as a deviant adolescent who was 'responsible for their actions and should be held accountable' (Canada, Young Offenders Act, Section 3). At the same time, however, it is equally important, although perhaps less well-known outside of Canada, that this legislated move toward a 'justice' model of juvenile court procedure was also undertaken in order to make Canadian juvenile justice legislation consistent with the new Charter of Rights and Freedoms enacted in 1982, which for the first time guaranteed 'all Canadians' constitutionally-defined fundamental legal rights (Bala, 1997). One inconsistency recognized by law reformers was that under the 1908 JDA the provinces had the power to decide on the upper age limit of children who would fall under the jurisdiction of juvenile courts (with this age varying from 15 to 17 depending on the province). The problem of inter-provincial variation in the assigned age of criminal responsibility was addressed in the YOA, and remains the same under the new YCJA, with courts given jurisdiction over youth from 12 to 17 years old. However, even with the move from a 'child-welfare' to a more legalistic 'justice' model that came with the enactment of the YOA, a dramatic amount of inter-provincial variation continued to persist, for example, in the rates of bringing cases into youth court, the use of custody, and the transfer of cases to adult court (Doob and Sprott, 2004). In addition, from the outset, youth court judges had the difficult task of attempting to balance the legislated need to hold young offenders more 'accountable' and 'responsible', with their judicial responsibility of ensuring that accused youth were afforded the 'enhanced legal rights' granted in the Charter and spelled out in the YOA. Not surprisingly, youth court judges and their decisions soon became a lightning rod for the attacks of law-and-order critics who

complained that the YOA was 'soft on crime' and too concerned with protecting the rights of 'young criminals'. What ensued was largely a political battle for votes played out in the media, with most politicians involved in the campaign arguing the same line; that the YOA needed to be scrapped and replaced with 'tougher' more adult-like youth 'justice' legislation (Hogeveen and Smandych, 2001).

The processes of repenalization, defined as the hardening of attitudes and criminal justice responses to young offending, and adulteration, as the erosion of special measures designed to protect young people from the full weight of the law (Muncie, 2005), were in full-swing in Canada by the mid-1990s. This is reflected, first, in the young offender punishment trends and incarceration rates. As Hogeveen (2005: 81) notes, 'in 1997 Canada had an incarceration rate of roughly 1046 while the United States possessed an incarceration rate of roughly 775 per 100,000 youths aged 12 to 17. In addition, from 1991 to 1997 while the American rates for incarceration were remaining relatively stable, Canadian rates were steadily increasing'. It was also routine in the 1990s that many of the custodial sentences handed down in youth court were for relatively minor offences and that judges tended to hand out relatively short sentences; most of them being for property offences and minor assaults, and the majority of sentences (77%) being less than 3 months (Doob and Sprott, 2004: 216-17). At the same time that the use of custodial sentences was increasing, the use of 'alternative measures', or formalized programs by which young offenders were dealt with through non-judicial community-based alternatives, was shown to have been decreasing (Canada, Statistics Canada, 2000, 2004).

The shift toward treating young offenders more similar to adult offenders is also reflected, although not in a simple straightforward way, in amendments made to the YOA from 1986 to 1995 on sentencing and transfers to adult court. In 1986 a new offence was introduced in the YOA called a 'failure to comply with a disposition', which was aimed at making the Act 'look tough' on youth who failed to comply with the conditions attached to their non-custodial sentences. As Doob and Sprott (2004: 201) have recently pointed out, '[f]ourteen years later, this single offense would be responsible for 23% of the custodial sentences handed down in the country'. This 'get-tough' amendment was followed by others in 1992 and 1995, which increased the maximum sentences available in youth court for murder from three years in custody to a combined sentence of six years in custody and four years of 'conditional supervision in the community' (Doob and Sprott, 2004: 208). Amendments were also introduced in this period to make it progressively easier to transfer cases to adult court. This was done mainly by changing the 'test' followed by the courts in transfer hearings from one based on the 'interest of society ... having regard to the needs of the young person' (YOA, 1984, s. 16(1)), to one based on the 'paramount' importance of the 'protection of the public' (YOA, 1995, s. 16(1.1)) (cited in Bala, 1997: 276). Another related change introduced in 1995 was the creation of 'presumptive' offences for 16 and 17 years olds, which meant that if a youth of this age was charged with any of four serious violent offences (murder, manslaughter, attempted murder,

and aggravated sexual assault) they 'would be "presumptively" transferred to adult court unless they successfully argued that the transfer should not take place' (Doob and Sprott, 2004: 213). Not without controversy, as we will see shortly, in the YCJA enacted in 2002 the notion of 'presumptive' offences was taken a punitive step further, by lowering the age to 14 years from 16 years and by adding a new category of other 'serious violent' offences, that if a youth was convicted of twice before, it would be presumed on the third conviction that an adult sentence be imposed. There is also evidence that during the years the YOA was in force young offenders received more severe sentences than adults for some similar offences (Sanders, 2000; Roberts, 2003). Why, then, despite the bifurcated nature of the legislation that was finally enacted, were media and political discourses surrounding Canadian youth justice reform in the 1990s predominantly 'punitive' in tone (Hogeveen, 2005)? The obvious reason for this is political expedience, as Doob and Sprott (2004: 214) aptly note in their discussion of the series of 'get tough' amendments made to the YOA in 1995: 'The political imperative is simple to describe ... it is easier to be "tough on crime" than to be smart about crime.'

The YCJA was finally proclaimed in force 1 April 2003, with many new ostensibly 'tough on youth crime' measures clearly aimed at placating the law-and-order lobby. However, something that was not predictable from the vast bulk of the preceding media and political discourse, but that was also contained in the YCJA when it was finally enacted, was a very explicitly-stated concern and detailed mandate for making greater use of alternative community-based 'extra-judicial' measures for dealing with less serious young offenders in order to meet Canada's commitment to respecting the United Nations Convention on the Rights of the Child (Barnhorst, 2004; Denov, 2004). Later we will look more specifically at how this second legislative agenda is reflected in the content of the YCJA. We will also see that the perennial Canadian problem of the potentially inconsistent and inequitable local implementation of federal juvenile justice legislation has not disappeared with the YCJA. Rather specific enabling provisions of the legislation relating to the bifurcated use of adult sentences and restorative-justice conferencing, along with other provisions, may even further intensify this problem.

Since both repenalization and adulteration were in full-swing in Canada by the mid-1990s, the introduction of a new supposedly 'tougher' legislative regime heralded in the YCJA actually represents more of a continuation of an already established trend than a radical departure from the past. In the next section, we look in more detail at specific provisions of the YCJA that reflect the further dismantling of traditional 'child-welfare' oriented juvenile court procedures that were originally designed 'to protect young people from the stigma and formality of adult justice' (Muncie, 2005: 39). In doing so, information is introduced to help the reader decide whether, with the implementation of the federal YCJA, Canada is getting any tougher, or any smarter, in the way it is approaching the problem of youth crime. However, before we turn to this, one other key development that occurred on the eve of the implementation of the YCJA must be mentioned.

In the lead up to the enactment of the YCJA, both right (conservative) and more left (social democratic) provincial governments opposed the legislation as either being still not 'tough enough' or a complicated 'rat's nest' (Rabson, 2003), while Québec, standing alone, opposed the legislation because it threatened to destroy what defenders claimed was the province's already well-functioning juvenile justice system (Hogeveen and Smandych, 2001; Trépanier, 2004). To further legitimate its claim of the disastrous consequences of implementing the YCJA, the Québec government launched a court challenge to the legislation in the form of a reference to the Québec Court of Appeal on the constitutionality of the impending Act; in response to which the Court of Appeal ruled that specific provisions of the Act concerning the imposition of adult sentences on young offenders and exceptions to protecting the privacy of accused and convicted youth violated the Canadian Charter of Rights and Freedoms (Anand and Bala, 2003; Québec, Court of Appeal, 2003). To date, the Federal government's response to the Québec Court of Appeal has been to state that at some point the Act will be amended to make it legally-consistent with its ruling, while a number of provinces have reacted with 'outrage' that Ottawa is going to water-down the key 'get-tough' provisions of the YCJA to comply with the Québec Reference decision (Benzie, 2003; Gillis et al., 2003a, 2003b). Consequently, from the outset, the YCJA has operated under a cloud of controversy and uncertainty about its future.

Punishing 'criminal kids' under the YCJA: from child-welfare to adulteration and risk management

From 'youth court' to 'youth justice court'

One sign of increased adulteration in the YCJA resides in the renaming of youth courts and the revamping of procedures to be followed in prosecuting cases. The YCJA provides for the creation of a new court called the youth justice court. Although many of the functions to be performed by this new court are the same as those carried out in youth courts under the YOA, the new youth justice court has also added newly defined responsibilities. In addition to allowing for the continuation of specialized courts to hear criminal cases involving youth, the YCJA stipulates that any superior court of criminal jurisdiction can be deemed a youth justice court for the purpose of the operation of the Act. A key reason for this added option is that under the YCJA a young person accused of committing a serious criminal offence has *the right to elect to be tried by a judge and jury* sitting in a superior court of criminal jurisdiction. This legal right to a jury in youth court trials did not exist under the YOA, except, after 1995, in the case of a youth charged with murder who could face a sentence of more than five years in prison if convicted (Bala, 1997). Granting young persons accused of committing more serious offences a right to a jury trial is only one example of how the YCJA treats criminally-accused youth more like adult accused criminals.

The adulteration of principles

The YCJA contains specific sections spelling out the general principles underlying the legislation (Section 3), as well as declarations of principles regarding the use of extra-judicial measures (Sections 4, 5) and sentencing and committal to custody (Sections 38, 39). What is most significant about the declaration of the purpose of the YCJA (Section 3) is that it recognizes that 'the principal goal of the youth justice system is to protect the public'. As recent commentators, including Bala (2003) and Doob and Sprott (2004) emphasize, Section 3 of the YCJA should not be read simply as a sign that greater emphasis is being placed on deterrence or incapacitation, since the section also focuses on the need for the 'long term' protection of society through the 'prevention of crime' and 'rehabilitation and reintegration'. Moreover, these authors point out that in comparison to the YOA 'the various provisions of the YCJA that articulate principles and philosophy provide a *clearer message* for those charged with the operation of the youth justice system and the making of decisions about individual young offenders' (Bala, 2003: 74, emphasis in original; Doob and Sprott, 2004). According to this argument, these more clearly enunciated principles set a high standard of care to be adopted by youth justice officials empowered to enforce the YCJA, and thus consequently they 'have the potential to increase consistency in the youth justice system across Canada' (Bala, 2003: 74). However, given the nature of the actual enabling sections in the YCJA under-girding these somewhat lofty principles, this hope seems overly optimistic.

Adult sentences

Provisions of the YCJA regarding the use of adult sentences are probably the most complicated, and definitely the most controversial sections of the legislation. They also perhaps most clearly demonstrate the over-optimism of the prediction that the YCJA may result in a more uniform youth justice system across Canada. When the YCJA was originally introduced for debate in the House of Commons, it contained a clause (in Section 61) on the sentencing of a youth convicted of a 'presumptive offence' which stated that an adult sentence could 'be imposed on a young person who is found guilty of an offence for which an adult could be sentenced to imprisonment for more than two years' if it was 'committed after the young person attained the age of 14 years'. However, in the amended Act passed in February 2002, this clause was replaced with one that allows much more room for discretion on the part of provincial governments to set the lower age, stating: 'The lieutenant governor in council of a province may by order fix an age greater than fourteen years but not more than sixteen years for the purpose of the application of the provisions of this Act relating to presumptive offences' (Canada, 2002, YCJA, assented to 19 February). The impetus for the amendment came from the vehement opposition to punishing 14 year olds like adults that was voiced by opposition members of the Bloc

Québécois (Canada, 2000). This concession to Québec poses serious implications for the possible unequal application of the YCJA in different provinces and territories. Specifically, since each province and territory now has the option of 'opting' out of the application of Section 61, it is inevitable that for potentially exactly the same offence, some 14 year olds will be sentenced as adults while others will not.

Risk management

There are also numerous parts of the Act, from new front-end 'extra-judicial' and 'deferred custody and supervision' measures ('conditional sentences' in the adult system), to new back-end 'intensive rehabilitative custody' and post-release 'supervision in the community' (mandated offender treatment programs and parole in the adult system), that make the treatment of youth under the YCJA more similar to the treatment of adult offenders in regard to the increasing concern shown for predicting risk and managing potentially-recidivist offenders in the 'community' (Hannah-Moffat, 2005; Muncie, 2005). Again, however, since the exact manner in which any criminal law provisions affecting youth are followed is determined at the provincial level through discretion invoked by police, prosecutors, defense counsel, judges, and government justice and corrections officials, as well as an array of possible non-governmental 'community' participants, the YCJA will inevitably create many opportunities for 'substantive differences' in the treatment of 'at-risk' and criminally-convicted youth in different parts of the country (cf. Doob and Sprott, 2004: 236). Regardless, it appears that under the YCJA concern for the general welfare or 'best interests' of children has been made subordinate to concerns with holding young criminals more accountable (like adults) and managing them in custody and in the community through measures based on risk profiling and risk management. However, it needs to be pointed out that there is no clear rationale or principle included in the YCJA justifying the increased risk profiling and risk management of young offenders; but instead, it is more likely that the extent to which these features become part of the implementation of the YCJA will largely depend on how provincial and territorial authorities decide to interpret and apply the Act. At the same time, as we will see shortly, risk management techniques may often also co-exist at the local level in a complex fusion with forms of pretentiously less-punitive (Daly, 2002) community-based 'restorative' justice approaches.

Identifying 'criminal youth'

A final telling sign of both adulteration and increased concern for risk management in the YCJA resides in changes affecting the publication of information that reveals the identity of young persons. Although initially under the YOA access to information on youth court cases was tightly restricted, later amendments

'decreased the privacy protections afforded youths' (Bala, 1997: 213). These protections have been eroded further by provisions contained in Part 6 of the YCJA. Most importantly, Section 110(2) allows information about the identity of a young person to be made public, in cases (a) 'where the information relates to a young person who has received an adult sentence'; and (b) 'where the information relates to a young person who has received a youth sentence for an offence ... [defined as a] "presumptive offence"', while Section 110(4) allows a youth justice court judge, on an application made by the police, to permit 'any person to publish information that identifies a young person as having committed or allegedly committed an indictable offence, if the judge is satisfied that (a) there is reason to believe that the young person is a danger to others; and (b) publication of the information is necessary to assist in apprehending the young person'. In addition, the YCJA allows for a considerable amount of judicial discretion in this area, since Section 75(3), which relates to youth given adult sentences, states that a youth justice court judge 'may', alternatively, 'order a ban on publication of information that would identify the young person ... if the court considers it appropriate in the circumstances, taking into account the importance of rehabilitating the young person and the public interest'. Canada's leading legal expert on youth justice, Nicholas Bala (2003: 386-87), points out that 'by allowing for the publication of identifying information about young offenders who have committed very serious offences but who are not subject to adult sanction', the YCJA represents a 'significant change to the publication regime of the YOA'. In its Reference Re Bill C-7, the Québec Court of Appeal (2003) obviously agreed with Bala (2003) on this point, and went further by ruling that it was clear that Sections 110(b), 75(3) and related provisions could be considered unconstitutional, and in violation of the Canadian Charter of Rights and Freedoms protection of privacy guarantees. Like its ruling against provisions dealing with 'presumptive' adult sentences of the YCJA in the same Reference, the controversy raised by the Québec Court of Appeal's ruling on sections of Part 6 of the YCJA is far from over (Anand and Bala, 2003).

From blaming to shaming? The restorative pretensions of the YCJA

While in the enactment of the YCJA the Federal government signaled that it is willing to promote more strict penalties for serious offenders, the YCJA also facilitates the expanded use of 'extra-judicial' measures (diversion, police warnings, family group conferencing, and mediation) for first time and non-serious offenders. Consequently, in order to assess whether Canadians are punishing tougher or punishing smarter, we also need to look, at least briefly, at these extra-judicial measures provisions.

The YCJA defines extra-judicial measures as any 'measures other than judicial proceedings under this Act used to deal with a young person alleged to have

committed an offence'. Under this ambit, the YCJA contains explicit enabling clauses that allow for police and crown prosecutors to use warnings, cautions, *and referrals* (Sections 6, 7, 8, 9) as an alternative to judicial proceedings. In addition, it allows for the use of extra-judicial sanctions (Sections 10, 11, 12) with young persons whose offences are considered too serious to be dealt with only with a warning or caution, but not serious enough to warrant formal court proceedings. Related sections outline the role of youth justice committees (Section 18) in administering extra-judicial measures and provide for the creation of conferences (Section 19(2)) that have the mandate, 'among other things, to give advice on appropriate extra-judicial measures, conditions for judicial interim release, sentences, including the review of sentences, and reintegration plans'. The mandate given to community conferences is potentially extremely broad, since the YCJA (Section 19(1)) states that at any point in the processing of a young offender: a 'youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act'. Also, the overall tone of the YCJA is one that discourages the use of custody for less serious offenders and, in turn, creates many new possible opportunities for the use of more restorative community-based diversion and sentencing options. For example, Section 39(1), on 'Committal to custody' for an offender receiving a 'youth sentence', states that 'a youth justice court shall not commit a young person to custody' except under specifically allowed circumstances, including that 'the young person has committed a violent offence' and that the young person has [previously] failed to comply with non-custodial sentences', while Section 39(2), on 'Alternatives to custody', orders that 'a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles [of sentencing] set out in section 38'. Advocates of the YCJA may well contend that sections such as these pose a major challenge to 'get tough' notions about sentencing, and that the legislation can have a long-term significant impact on the reduction of custody sentences and the increased use of more restorative community-based options.

Although it is far too early to tell what the effect of these new pretentiously more-restorative provisions will be over the long-term, there is already anecdotal and some statistical evidence that they are having at least a short-term effect in reducing court use and custody sentences for first time and less-serious young offenders. According to the latest figures from Statistics Canada, the country's youth incarceration rate in 2002-3 hit its lowest point in eight years. Manitoba, which is usually only next to Saskatchewan for having the highest youth incarceration rate in the country, recorded a 30% decrease in youth custodial sentences, along with a substantial reported increase in the use of police discretion

in cautioning youths without charging them (Canada, Statistics Canada, 2004; Owen, 2004). It has also been reported that crown cautions are now routinely being used in Manitoba to deal with less serious property offences such as shoplifting, with a claimed 90% 'success' rate (Rabson, 2005). Similar reports of substantial short-term reductions in the use of incarceration of young offenders as a result of the YCJA have been published in various provinces, and youth justice court judges have noted anecdotally and in recent reported case law decisions, the effect of the YCJA in this regard (Bala and Anand, 2004; Elliot, 2005; Harris et al., 2004).

However, there are a number of factors that may potentially undermine the restorative pretensions of the YCJA, and perhaps, in turn, contribute to bringing about a return to higher youth incarceration rates in the future. One of these is the real possibility that volunteer youth justice committees and other community groups that are recruited to carry out 'conferences' and impose 'extra-judicial' sanctions will become overwhelmed by large caseloads, and hindered by inadequate funding and training (Hillian et al., 2004). Another problem derives from the YCJA delegating the power to create guidelines for 'non-judicial conferences' to provincial and territorial governments (Sections 19(3) and (4); Harris et al., 2004: 381). This makes it inevitable that there will be significant inter-provincial and even local community-by-community variation in the manner in which conferences are carried out, which is similar to what happened with the implementation of 'alternative measures' provisions in the YOA (Hillian et al., 2004). Another related possibility is that, despite the best intentions of youth justice court judges to employ more restorative non-custodial sentencing options and make use of referrals to child welfare and other community agencies (through applying Section 35), the resources may simply not be in place at the local level to support these alternatives, which will lead to more young offenders coming back to court; possibly for the failure to comply with previous non-custodial sentences, or to face more serious charges. Ultimately, if these scenarios play themselves out in the typical Canadian fashion, what we will most likely see is that under-resourced and over-burdened 'communities', such as many of Canada's remote Aboriginal communities, will eventually be seen to have failed at developing adequate community-based 'restorative' measures for dealing with 'their' youth. This in turn may well perpetuate the tragic-damaging cycle of individual and institutional racism and recurrent law- and-order 'moral panics' that have been directed historically at Aboriginal youth, as well as at other most often urban, and more frequently poor, visible minority youth in Canada. Despite these and other features of the YCJA, which show that opportunities for perpetuating race and class discrimination are clearly enabled through the legislation, these issues are largely overlooked in the dominant academic and governmental (state) discourse around 'restorative' justice and youth conferencing in Canada (cf. Calhoun and Borch, 2002; Chatterjee and Elliott, 2003; Elliott, 2005; Green and Healy, 2003).

Hope for the future? The YCJA and the UN Convention on the Rights of the Child

A final issue that needs to be addressed is the extent to which Canadian youth justice legislation complies with the UN Convention on the Rights of the Child, and whether this raises any hope for better treatment of young offenders in Canada in the years to come. As noted earlier in the chapter, a second legislative agenda reflected in the content of the YCJA was a very explicitly-stated concern for meeting Canada's commitment to respecting the UN Convention on the Rights of the Child. Thus, it is important to highlight parts of the YCJA that were enacted in order to make Canadian youth justice legislation more compliant with the UN Convention, and at least briefly review arguments that have been advanced regarding the likely effects of this greater compliance on the treatment of young offenders.

The preamble to the YCJA boldly states that 'Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, and have special guarantees of their rights and freedoms'. These rights are expanded upon at different points in the YCJA, and most relevantly with regard to the UN Convention, under sentencing principles which state that the sentence imposed on a young offender 'must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances' (Section 38(2)(a)) and that 'all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons' (Section 38(2)(d)). Also, Section 39(5) even more explicitly states that 'a youth justice court shall not use custody as a substitute for appropriate child protection, mental health or other social measures', while Section 35 (which deals with 'Referral to Child Welfare Agency') adds that 'a youth justice court may, at any stage of proceedings against a young person, refer the young person to a child welfare agency for assessment to determine whether the young person is in need of child welfare services'.

What do we make of these provisions? First, it is clear that the YCJA does attempt to comply with many aspects of the UN Convention including the principle of non-discrimination, the guarantee of specific legal rights, and the principle of the 'minimum use of custody' (Bala, 2003; Denov, 2004; Muncie, 2005: 45). However, some academic commentators, like Doob and Sprott (2004), and even Federal government Department of Justice officials (Canada, Department of Justice, 2003), suggest that the YCJA actually goes beyond the UN Convention in the degree to which it places strict limits on the use of custody sentences, because of its strict adherence to a 'proportionality framework' which requires that the sentence 'must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence' (Canada, Department of Justice, 2003; YCJA, section 38(2)(c)). In other words, implicitly

throughout the Act, and quite explicitly in Section 39(5), the YCJA purposefully discourages youth justice court judges from taking into account 'child welfare' concerns affecting the young offender that would presumably be dealt with better through a 'child-welfare' agency; which, collectively (perhaps not coincidentally), happen to be funded mainly from the coffers of provincial and territorial governments. As the Department of Justice authoritatively proclaims on its website, 'others believe it is necessary to incarcerate youth for longer periods than warranted by the seriousness of the offence in order to treat a youth's problems. Even though the child-welfare rooted Juvenile Delinquents Act of 1908 was replaced in 1984 with the more rights-oriented Young Offenders Act, some sectors still see the criminal law as a tool to paternalistic ends. Using coercive authorities, like the criminal law power, under the guise of "doing what is best to help the youth" can result in unquestioned breaches of protections that would normally shield an accused' (Canada, Department of Justice, 2003). While it seems likely that the narrowly-defined 'legal rights' of young persons will fare reasonably well under the YCJA, unfortunately there is already ample evidence that if the 'proportionality framework' becomes the one that is followed most closely in Canadian youth justice court proceedings in the years to come, the 'social welfare rights' of young persons granted by the UN Convention will not enjoy much protection. If this happens, there is room to question whether the YCJA is really any improvement over earlier legislative regimes for administering juvenile justice in Canada.

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