Reimaging Youth Justice In Canada: Envisioning A Responsive Regulatory Model Within A Human Rights Framework – A Potential Lesson For India?

—Dr. John Winterdyk*

Keywords *– youth criminal justice, Canadian justice system, restorative justice, responsive regulatory model, United Nations Convention on the Rights of child, Juvenile delinquents act, Young Offenders Act, Youth Criminal Justice Act.*

Canada has long been recognised as a country with minimal political strife and long championed the rights of its citizens. This article focuses specifically on the evolution and evolving nature of human rights and restorative justice within a Canadian context. The author reviews how the evolution of the Canadian youth justice model has increasingly moved towards embracing restorative justice principles with a human rights framework. Next, the article explores some of the challenges that confront the ability to embrace restorative principles within a human rights framework. It is suggested that while much progress has been made, there is still work to be done and barriers to be removed if Canada is to truly be reflective of a responsive regulatory model of restorative justice that is also grounded within the United Nations Convention on the Rights of the Child. Finally, although the juvenile justice system in India has made considerable progress over the years, there are still major gaps between its'

* John Winterdyk has published over 35 academic books and a score of international peer-reviewed articles. He has conducted various workshops and invited presentations throughout India since 2014. Topics have ranged from crime prevention to juvenile justice to human trafficking, and research methodology. He has also been the recipient of a GIAN award. John's current research and scholarly interests include human trafficking, crime prevention, irregular migration, and comparative criminological and criminal justice related-issues.

intent and practice.[1] *By drawing on the Canadian experience, this article gives suggestions as to how India might be able to close the gap.*

I. The Evolution Of Canadian Youth Justice: From Crime Control To Modified Justice

It is ironic that ever since Socrates first acknowledged the challenge of understanding and responding to young persons, we have been subject to a wide array of perspectives and approaches to dealing with 'wayward youth'.[2] In fact, criminology and criminal justice is replete with specialised journals, text-specific books, and the recipient of numerous research projects that focus on how to control, prevent, intervene, and/or treat delinquent youth. The literature also reveals that juvenile justice is also often seen to be a natural area for applying restorative justice (referred hereafter as RJ) principles.[3]

Since the 1960s, when Canadian Prime Minister Lester B. Pearson won the Nobel Peace Prize, Canada has stereotypically been viewed as a country that values human rights and champions the rights of not only of its own citizens but also the rights of people in war torn regions.[4] Given Canada's long-standing support and recognition of human rights, one might then assume that such rights and preoccupation must also extend to its criminal justice system and more specifically to its juvenile delinquents or 'young offenders' as they are now legally referred to.

In the following section, I will focus on the development of youth justice in Canada with specific attention given to recent trends regarding human rights and restorative justice. Even though it has been over twenty-five years since Canada became the first country to include RJ as a legitimate option within the *Criminal Code*,[5] according to some pundits, Canada has not made the same progress as other parts of the world.[6]

---

1 Maharukh Adenwalla, 'Child Protection and Juvenile Justice System for Juvenile in Conflict with Law', Childline India Foundation (2006) <https://saranalayam.org/cs-content/uploads/aupload/file/be36918a7103c5d1de75ce3eee1c6912.pdf>.

2 Wayward youth is a term used by the former student of Sigmund Freud, August Aichhorn in his 1965 book titled *Wayward Youth.*

3 Lode Walgrave & G Bazemore, 'Restorative Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform', in Lode Walgrave & G Bazemore (eds), Restoring Juvenile Justice: Repairing the Harm of Youth Crime (Criminal Justice Press 1999) 45.

4 For example, since World War II, the Canadian military has been involved in over 70 peace keeping missions ranging from providing UN peace keeping support in South Korea, to Cyprus, Iraq and Iran, to most recently in Haiti in 2010, in the aftermath of the devastating earthquake.

5 John Reilly, Bad Law: Rethinking Justice for a Postcolonial Canada (2019). see Chapter 1.

6 Lee Tustin & Robert Lutes, A Guide to the Youth Criminal Justice Act (2010). p. 124.

II. The Slow Path To Youth Justice Reform

Under the first official legislation created for juvenile delinquents, the *Juvenile Delinquents Act* (JDA), 1908, youth (ages 12-17) were convicted of 'juvenile delinquency' rather than criminal behaviour. Juvenile delinquents were considered to be misguided products of improper upbringing by their families.[7] Since youth were not considered responsible for their actions, the focus of the system was on rehabilitation, re-education and guidance, with the State taking over the parental role (i.e., *parens patriae)* and decision making of the youth.[8] Young persons had minimal rights and were not given any rights to participate in the decision-making process of their punishment or adjudication. The model of youth justice can best be described as a *welfare model*[9] since the juvenile justice system was based on an informal approach in which the key personnel were 'childcare experts' who focused on diagnosing the social, environmental, and personal pathologies of delinquents. Once assessed, the juvenile was then provided the 'necessary' treatment without any official accountability.

Over the next several decades, increased interest in understanding and controlling youth crime evolved and competing disciplinary perspectives on youth crime and youth justice gained prominence.[10] Despite various amendments, criticism grew over whether the principles of *parens patriae* violated basic constitutional rights (i.e., safeguarding of individual autonomy rights). Then, beginning from 1965, the federal government began to actively campaign to reform the JDA.[11]

Finally, in 1984, the JDA was replaced by the *Young Offenders Act* (YOA). This initiative reflected the dominant societal views insofar as young offenders should be held responsible for their offences. Consistent and compliant with being a signatory to the UN Human Rights Convention and a participant and supporter of the UN National Congress on Prevention of Crime and the Treatment of Offenders, the YOA guaranteed all young offenders due process and included provisions to treatments similar to those afforded adults.[12] The YOA also included clear provisions that young offenders were to be represented by counsel in court proceedings like those of adults and court proceedings were now open to the

---

7 Russell Smandych, Gordon Dobbs, & Alvin Esau (1990). In R.smandych, G. Dobbs, & A. Esau Eeds.), Dimension of Childhood: Essays on the History of Children and Youth in Canada. Winnipeg, Manitoba, Canada. Legal Research Institute of the University of Manitoba. see Chapter 1

8 John Winterdyk, Juvenile Justice Systems: International Perspectives, Models and Trends (Routledge 2015) 109.

9 ibid.

10 Ross Gordon Green & Kearney Healy, Tough on Kids: Rethinking Approaches to Youth Justice (Purich Publishing 2003) ch 1.

11 John Winterdyk et al, Youth at Risk and Youth Justice: A Canadian Overview (OUP 2020) 18.

12 Winterdyk (n 8).

public.[13] Additionally, Denov noted that some children's rights advocates argued for "special protections" as they have unique needs resulting from their "vulnerability and [diminished] level of maturity."[14] The YOA represented a shift from a welfare model to a *modified justice model*.[15] The model emphasised due process balanced by informality in trial proceedings. Although seen as an improvement, the model/system was described as a "loosely coupled system" and was quickly met with varying criticisms.[16]

Nevertheless, the YOA complied with some of the key guidelines of the UN Standard Minimum Rules for the Administration of Juvenile Justice - commonly referred to as "the Beijing Rules". Specifically, under the YOA, young offenders were entitled to due process and sentencing was determined with a minimum and maximum range. These principles can be found under Rule 3.1 of the UN Standards.[17] However, due to increased public pressure following a series of high profile violent and senseless killings of young persons by other young persons, beginning in the early 1990s, there was a call for tougher laws and greater accountability.[18]

Overall, it was widely believed that the YOA was not working as well as it should have to address the needs of young offenders.[19] Furthermore, procedural protections for young persons were not being applied in an equitable manner and too many young persons ended-up with adult custodial sentences.[20] Also, various researchers have pointed out that the overarching principles were unclear and conflicting.[21] Inspite of all the efforts, Hackler argued that fundamental issues such as meaningful consequences, appropriate measures to support rehabilitation and reintegration were considered to not have been adequately addressed within the Act.[22]

Despite growing discontent with the YOA, such views were not completely unanimous as certain interest groups were of the opinion that any reforms more

---

13 ibid.

14 Myriam Denov, 'Children's Rights, Juvenile Justice, and the UN Convention on the Rights of the Child: Implications for Canada' in Katheryn Campbell, Understanding Youth Justice in Canada (Pearson 2005) 65.

15 Corrado et al, Juvenile justice in Canada: A Theoretical and Analytical Assessment (Butterworths 1992) 75–136.

16 John Hagan et al, 'Ceremonial Justice: Crime and Punishment in a Loosely Coupled System' (1979) 58(2) Social Forces 156.

17 Winterdyk (n 8).

18 Ibid.

19 Lee Tustin & Robert Lutes, A Guide to the Youth Criminal Justice Act (LexisNexis 2010) ch 1.

20 Winterdyk (n 11).

21 James Hackler, The Prevention of Youthful Crime: The Great Stumble Forward (Methuen 1978).

22 ibid.

punitive in nature would not reduce the youth crime problem.[23] Nevertheless, the inaccurate and incomplete media reports of individual cases rapidly eroded public confidence in the YOA. The result was that in 2003 the *Youth Criminal Justice Act* (YCJA) replaced the YOA.[24]

III. A Community Change Model – The Youth Criminal Justice Act

In response to a demand for reform, the Declaration of Principles attempted to delineate the purpose, provide a clear structure, and eliminate the inconsistencies found in the YOA more clearly. As noted on the Department of Justice homepage, "the objectives of the youth criminal justice system are to prevent crime, ensure meaningful consequences for offending behaviour, and rehabilitate and reintegrate the young person. In these ways, the youth justice system can contribute to the protection of society".[25]

As described in Winterdyk, the YCJA while sharing elements of the modified justice model, "attempts to embrace characteristics of the welfare model.[26] It attempts to reduce youth crime by modifying the major environmental factors thought to cause delinquency."[27]

Next, I will summarise and highlight some of the key elements of the YCJA. This will allow the reader to understand the socio-political environment that has evolved from this legislation as well as to contextualise on how well the restorative justice movement has been integrated and applied under the Act.

As there are several key elements of the YCJA that acknowledge the restorative justice movement, I will next provide a brief overview of these elements.

The preamble and declaration of principles set out the objectives of the youth justice system. The preamble, for example includes statements that can be used to interpret the intent and meaning of the Act. The preamble of the YCJA includes such statements as:

---

[23] L-G Cournoyer, 'Quebec's Experience Keeping Youth Out of Jail' in John Winterdyk et al, Youth at Risk and Youth Justice: A Canadian Overview (3rd edn, OUP 2020) 335.

[24] Lee Tustin & Robert Lutes, A Guide to the Youth Criminal Justice Act (LexisNexis 2010) 23.

[25] Why Did the Government Introduce New Youth Justice Legislation?, Department of Justice 2009 <https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html>.

[26] Winterdyk (n 8) 132.

[27] SA Reid & M Reitsma-Street, 'Assumptions and Implications of a New Canadian Legislation for Young Offenders' (1984) 7 Canadian Criminology Forum 15.

- Communities and families should work in partnership to prevent youth crime by addressing its underlying causes, responding to the needs of young persons, and providing guidance and support.
- Society has a responsibility to address the developmental challenges and needs of young persons.
- The youth justice system should reserve its most serious interventions for the most serious crimes and reduce the over-reliance on incarceration.

In relation to the Declaration of Principles the key section is section 3, which states:

Clause 3(1)(a):

The youth criminal justice system is intended to:

- Prevent crime by addressing the circumstances underlying a young person's offending behaviour,
- Rehabilitate young persons who commit offences and reintegrate them into society, and
- Ensure that a young person is subject to meaning consequences for his or her offence in order to promote the long-term protection of the public.

Meanwhile, clause 3(1)(b) serves to differentiate the adult system from the youth system as it places an emphasis on *rehabilitation* and *reintegration.*

Section 4 of the YCJA includes the Extrajudicial Measures and Extrajudicial Sanctions. This section encourages the police to explore the use of an informal response to less serious types of offences. Police officers also have the right to speak to the parents of the youth and exercise the option of referring the youth to a social agency for support and to help with the young persons' needs. Such recommendations are suggestions and not legally binding. Therefore, participation is voluntary. However, should the attending officer feel that they have grounds to lay charges and that a warning is not a sufficient deterrent they may do so, but the youth may then be diverted to a programme of "extrajudicial sanctions". Meanwhile, section 18 specifically speaks to the option of Youth Justice Committees and section 19 of the Act refers to the use of Conferences.

There are several measures that can be used under the extrajudicial sanctions. Formally referred to as 'alternative measures', they include options such as: restitution or compensation, service to the victim or community, attendance and

participating in counselling and treatment programmes, etc.in order to ensure due process, extrajudicial sanctions can only be under proscribed conditions.[28]

The use of extrajudicial measures is also a form of *diversion* that attempts to provide opportunities for young persons to avoid the formal process of the justice system. As Hutchinson and Smandych concludes: "the primary aim of both seems to be to reduce the extent of involvement the young offender has with the criminal justice system" and thereby avoid the stigmatising shame and pejorative label that sometimes accompanies youth who are processed through the formal system.[29]

Another aspect of the Act that is deemed necessary to provide context in order to understand and appreciate how the restorative justice process works is not reflected in the YCJA. Hence, a brief overview of sentencing provisions in the Act is considered essential.

The purpose of sentencing under the YCJA is described in section 38(1). Consistent with the general notion that young offenders have special needs and require guidance and support, the overarching purpose of sentencing evolves around the principal of the sentence having a *rehabilitative* focus. To this end the Act denotes that a sentence for the same/similar offence should: (a) not be greater than an adult, (b) should be similar to others in region (consistent), (c) be proportionate to seriousness of offence and degree of responsibility, (d) ensure that all available sanctions other than custody that are reasonable, and (e)(i) choose the least restrictive sentence, (ii) select sentences that are most likely to rehabilitate and reintegrate, and (iii) promote a sense of responsibility.[30] The overarching theme of sentencing under the Act is that sentences reflect fairness and proportionality as well as *meaningful* consequences whose purpose it is to try and create opportunity for rehabilitation but to also ensure the protection of society.

Again, in terms of fulfilling its agreement to the UN protocol (i.e., Beijing Rules) and reflected in principle the doctrines of RJ, section 39(2) of the Act states that alternatives to custody should be considered where they are available and where there is clear precedence that such alternatives can be used in similar situations.

Another section that reflects the RJ model is section 41 of the YCJA. This section pertains to conferencing. There were no provisions under the previous YOA for conferencing, but it was made explicit in section 41 when the YCJA was

---

[28] James Popham & Daniel Antonowicz, 'Understanding the Youth Criminal Justice Act' in John Winterdyk, Youth at Risk and Youth Justice: A Canadian Overview (3rd edn, OUP 2020).

[29] T Hutchinson & R Smandych, 'Juvenile Justice in Queensland and Canada: New Legislation Reflecting New Directions' (2005) 23(1) Australasian Canadian Studies 123.

[30] AN Doob & JB Sprott, 'Youth Justice in Canada' (2004) 31 Crime and Justice 185.

introduced. Conferences refer to the general process in which affected parties are brought together to provide advice to decision-makers in specific youth justice cases. Hence, a conference may contain restorative elements if the objective of the conference is to provide advice to the decision-maker on ways of how to repair the harm done to the victim(s).

Like conferencing practised in other countries (e.g., New Zealand and Australia), in Canada conferencing is done in an informal manner. Some of the different forms of conferencing include family group conferences, community accountability panels, sentencing circles and inter-agency case conferences. The purpose of conferences is to provide an opportunity for a wider range of perspectives on a case, more creative solutions, better coordination of services, and increased involvement of the victim and other community members in the youth criminal justice system.[31]

Viewed in this context, YJCs and conferencing is tacit "as a disruption of peace of the community, and not an offence against the state."[32] Hence, the general acknowledgement, that the YCJA represents a 'community change model' as opposed to a 'modified justice model' and is reflective of the RJ practice of trying to involve both victim and the offender in restoring social and community harmony.[33]

IV. A 'Loosely Coupled' Youth Justice Model

As Hagan et al. (1979), among others, have argued, since the 1970s we have seen an international shift from classical to a more positivist philosophy of (youth) justice.[34] In Canada, this has also been reflected in the transitions from the JDA to the YOA and now YCJA. However, as the esteemed Canadian criminologist/sociologist James Hackler has repeatedly argued (1978, 2000, 2001, and 2005), the Canadian youth justice system is "less developed" than systems in many other parts of the world and that the system has moved away from the welfare model to a poorly defined and prescribed legalistic model which although, attempting to strike a balance between accountability and rehabilitation and restoration (see previous section), may not have fared as well as we would like to think.[35] For example, even though juvenile crime decreased from 1998 to 2014,

[31] M Reeve, Conferencing and the Youth Criminal Justice Act (Centre for Justice & Reconciliation, August 21, 2003) <http://restorativejustice.org/rj-library/conferencing-and-the-youth-criminal-justice-act/3596/#sthash.oCPpzbxr.dpbs> accessed 27 September 2020.

[32] SA Reid & MA Zuker, 'Conceptual Frameworks for Understanding Youth Justice in Canada: From the Juvenile Delinquents to the Youth Criminal Justice Act' in Katheryn Campbell (ed), Understanding Youth Justice in Canada (Prentice Hall 2005) 95.

[33] Reid (n 27).

[34] Hagan (n 16).

[35] Hackler (n 21).

then it began to increase slightly again. In 2017/18 the youth incarceration rate was 41 per 10,000 population (down 7% from 2016/17).[36] However, when compared to India, the rate of juvenile offending increased 47 percent from 2005 to 2015 (Juvenile delinquency in India, 2017). Therefore, there may be value for Indian legislature to look at what has transpired in Canada.

As the YCJA was being debated, one of the reports brought to bear on the direction of the new Act was a 1998 report authored by a Canadian House of Commons Justice Committee (the Daubney Committee). The Report stated that the: "… Committee found the evidence it heard across the country about the principles of restorative justice [RJ] compelling", and recommended that governments at all levels support the expansion and evaluation of RJ programmes at all stages of the criminal justice process.[37] In particular, *Recommendation 19* of the report recommended that all levels of government across the country should support the expansion and evaluation of victim-offender reconciliation programmes at all stages of the criminal justice process which: (a) provide substantial support to victims through effective victim services; and (b) encourage a high degree of community participation.[38]

As described by Morrison, Asadulllah, and Pawlychka (2020),[39] the YCJA includes clear provision for the use of RJ. For example, according to Morrison, several of the restorative justice values that can be entrenched into the legislation include:

- Societal responsibility to address developmental challenges and needs of young persons in order to guide them into adulthood;
- Communities and families should work in partnership through multi-disciplinary approaches, to address crime prevention by addressing its underlying causes, providing guidance and support to young persons, particularly those at risk;
- Young persons have rights and freedoms, including those set out in the United Nations Convention on the Rights of the Child, in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights;

---

[36] Greg Moreau, 'Police-Reported Crime Statistics in Canada 2018' (Statistics Canada, July 22, 2019) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00013-eng.htm> accessed 27 September 2020..

[37] Dan Ven Ness, 'David Daubney of Canada presented the 2011 International Prize for Restorative Justice' (Centre for Justice & Reconciliation, July 4, 2011) <http://www.restorativejustice.org/RJOB/david-daubney-of-canada-presented-the-2011-international-prize-for-restorative-justice/> accessed 27 September 2020.

[38] ibid.

[39] Brenda Morrison et al, 'Juvenile Justice and Restorative Justice: Reflecting on Developments in British Columbia' in John Winterdyk et al (eds), Youth at Risk and Youth Justice: A Canadian Overview (3rd edn, OUP 2020) 439.

- The youth justice system should foster responsibility and ensure accountability through meaningful consequences and effective rehabilitation and reintegration; and

- The youth justice system should reserve its most serious interventions for the most serious crimes and reduce over-reliance on incarceration.

It is somewhat ironic that as a champion of human rights and one of the first countries to formally introduce RJ into its' youth justice system, Canada has not fully capitalised on this opportunity for shifting from the traditional social control mechanisms to one of social engagement as a way and means of addressing and dealing with youth crime. As the well-known Canadian judge Barry Stuart pointed out at a conference in 2007, "Canada's role in the development of restorative justice is as an exporter. We invent it, and others develop it in a fuller capacity".[40]

Although the YCJA has been in effect for nearly twenty-years, and it is the first youth justice legislation in Canada to acknowledge the importance and value of restorative justice; in practice it remains a delicate and controversial issue as to whether the application of the YCJA should or does focus on social control or to facilitate change in how we respond to young offenders. Next, I will take a closer look at the RJ model within the framework of the YCJA as well as explore the model within the context of the UN Convention on the Rights of Children.

V. The YCJA And 'Responsive Regulation'

As described above, the YCJA provides for, and in some cases explicitly demands that consideration be given to extrajudicial measures and sanctions. It is important to note that the potential for legislation alone to have a real impact on the youth that encounter the criminal justice system is limited in its scope.[41] Furthermore, as noted above, this legislation can provide a framework for the creation and implementation of a variety of restorative processes designed to effectively address youth criminality.

Nonetheless, for these aims to be realised their success is "dependent on the attitudes and policies of police and prosecutors, and or the availability of community-based alternatives."[42] The factors of altering previously held punitively oriented justice viewpoints and finding the resources necessary to implement and evaluate community-based alternatives present an obstacle for realising the

[40] 6th International Conference on Restorative Justice (2003), Conference paper, The Centre for Restorative Justice, Simon Fraser University, Burnaby, British Columbia.

[41] Hutchinson (n 28).

[42] N Bala & JV Roberts, 'Canada's Juvenile Justice System: Promoting Community-Based Responses to Youth Crime' in Josine Junger Tas & Scott Decker (eds), International Handbook of Juvenile Justice (Springer International Publishing 2006) 37, 47.

potential that RJ can have on the Canadian youth justice landscape. A major tenet of this paradigmatic shift requires that justice professionals and the communities they serve to, see crime as an act that causes harm or injury, requiring that something be done to repair that harm.[43] According to the Norwegian sociologist and criminologist Nils Christie (1977), the return of the "conflicts" to those most affected by the criminal event and their active participation in resolving the conflict becomes the preferred mechanism.[44] A shift in thinking towards complete acceptance of alternative approaches to incarceration is necessary because although consensus can be reached regarding many goals of youth justice in Canada opinions vary on the best method for achieving them.[45] According to Braithwaite, "with individual criminal offending, there are still many who defend a consistent punishment policy" even despite evidence to the contrary.[46] Furthermore, according to Morrison et al., "the findings suggest that holistic reform within the Canadian juvenile justice system is yet to come; in that, the justice system has yet to embrace the theoretical and practical research and development that has emerged internationally regarding potentially effective restorative justice programmes."[47]

Within RJ proponent circles much debate has occurred which Sharpe (2004) has referred to as a "fault-line;" the proposed relationship between RJ and the criminal justice system.[48] Given the focus of this article, it is apparent that within the Canadian context there is an intertwining of the two approaches within the legal framework of the YCJA. Additionally, this approach is consistent with the perspective put forward by the Canadian Resource Centre for Victims of Crime (CRCVC) who note that "there will always be a need for the traditional justice system, as some cases are simply not appropriate for RJ programmes" (CRCVC, 2011).[49]

Braithwaite's discussion of RJ and *responsive regulation* provides a theoretical framework that may be useful in understanding the YCJA and the place that RJ has within the Canadian youth justice system.[50] He accepted the premise that RJ

---

[43] Daniel Ness & Karen Strong, Restoring Justice: An Introduction to Restorative Justice (3rd edn, Routledge 2010) ch 3.

[44] Nils Christie, 'Conflicts as Property' (1977) 17(1) British J of Criminology 2–3.

[45] Canada: Standing committee on Justice and Solicitor General, Taking responsibility: Report of the standing committee justice and Solicitor General on its views of sentencing, conditional release and related aspects of corrections (House of Commons 1988) 4.

[46] John Braithwaite, Restorative Justice and Responsive Regulation (OUP 2002) 30.

[47] Morrison (n 39) 439.

[48] Susan Sharpe, 'How Large Should the Restorative Justice "Tent" Be?' in Howard Zehr & Barb Toews (eds), Critical Issues in Restorative Justice (Lynne Rienner Publishers 2004) 22.

[49] Canadian Resource Centre for Victims of Crime, 'Restorative Justice in Canada: What Victims Should Know', (2011) <https://www.crcvc.ca/docs/restjust.pdf> accessed 27 September 2020.

[50] Braithwaite (n 46).

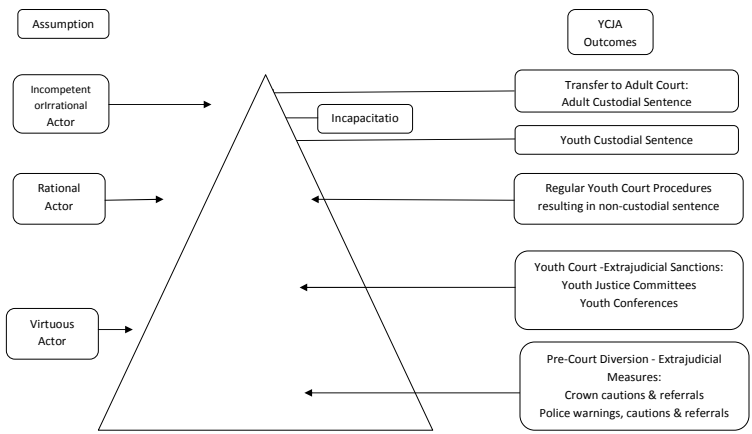
can function within a framework that does not require "building separatist institutions".[51] Furthermore, Braithwaite argued that the restorative processes adopted within this framework should be consistent with the international discourse of human rights and "constrained by all the rights that are foundational to liberal legalism".[52] Additionally, Braithwaite's argument that RJ must adhere to and protect the fundamental human rights is also explored within the context of the YCJA and the provisions it makes for RJ approaches and programmes.[53]

Braithwaite stated that: "the basic idea of responsive regulation is that governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist approach is needed."[54] Challenging a system founded on regulatory formalism, Braithwaite argued that a consensual solution to the problems arising from a crime be attempted through a dialogue-based and community-oriented processes.

Before examining the responsive regulatory within the current Canadian context, we will next provide an overview of the foundation and principles of the *regulatory pyramid* which was developed by Braithwaite as it provides the foundation upon which the implementation of a responsive regulatory approach to youth crime occurs (see Figure 1).[55]

Figure 1 – The Regulatory Pyramid and the YCJA

(Adapted from Braithwaite (2002a: 32 – Figure 2.2)



51 ibid 240.
52 ibid 12.
53 John Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 British J of Criminology 563.
54 Braithwaite (n 46) 29.
55 ibid.

Considering three *types of actors* (i.e., virtuous, rational, and incompetent or irrational) the regulatory pyramid integrates restorative, deterrent, and incapacitative approaches to seeking justice. Braithwaite argued that each of these models are limited in their ability to achieve justice and that the pyramid: "cover[s] the weaknesses of one theory with the strengths of another."[56] The pyramid seeks to achieve compliance with the law by "attempt[ing] to solve the puzzle of when to persuade and when to punish."[57]

A key component of the responsive regulatory model is its dynamic nature. In the context of youth offending, this model argues that the societal response to these behaviours should begin at the base of the pyramid with a restorative approach. An interventionist approach is required dependent on the response of the individual offender to the initial restorative-based intervention. Where reform is not forthcoming, the societal response to continuing unacceptable behaviour is met with increasingly "demanding and punitive interventions."[58] If compliance is achieved there is no reason to move further up the pyramid. It is important to note that an initial "failure" does not necessarily mean that an escalation up the pyramid to a deterrent approach is warranted. Successive restorative-based approaches may be undertaken before resorting to a more punitive deterrent approach and finally, as a last resort, an incapacitative intervention. As stated by Braithwaite: "reform must be rewarded just as recalcitrant refusal to reform following wrongdoing will ultimately result in punishment."[59] In response to this Braithwaite provided a justification for implementing this integrated model.[60] The functional operation of the pyramid emphasises, particularly in the first instance, an approach that "preserve[s] freedom as non-domination" as it is less coercive and considered to be more respectful to individuals.[61] Additionally, it achieves legitimacy for the more coercive punishment-oriented interventions as they are engaged only when there has been a failure at the lower level of the pyramid.[62]

VI. Responsive Regulation And The YCJA

The YCJA provides for the incorporation of RJ approaches into the overall response to youth offending. One question that remains however is; does the YCJA legislation adopt a responsive regulatory approach?

The preamble to the YCJA is suggestive of a responsive regulatory approach in addressing youth crime. The YCJA Preamble states:

---

56 ibid 32.
57 ibid 30.
58 ibid 30.
59 ibid 31.
60 ibid.
61 ibid 32.
62 ibid.

> *"AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation, and that reserves its most serious interventions for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons."*

The primary mechanisms providing for a responsive regulatory approach include the use of extrajudicial measures and sanctions (defined in sec. 2 and outlined in sections 4 & 5 of the YCJA) and include the practices of police warnings and cautioning (sections 6 & 7), Youth Justice Committees (sec. 18) and youth conferences (sections 19 & 41). According to Bala and Roberts the *Act* articulates the significance of these approaches to juvenile justice in Canada.[63] Section 4 of the *Act* states that these measures are considered often to be "the most appropriate and effective way to address youth crime." Furthermore, section 6 requires: "a police officer s*hall* (emphasis added)" give consideration, based on the principles outlined in section 4, to proceed with extrajudicial measures as a "sufficient" means for addressing the youth's behaviour. This requirement is consistent with Braithwaite's notion of responsive regulation. The assumption underlying the YCJA is that alternative methods to formal court processing are to be given due consideration. Therefore, there are no explicit *a priori* assumptions regarding a prescribed method that must be employed. Additionally, as noted by Morrison et al. extrajudicial measures provide "an essential first response to youth crime" consistent with Braithwaite's regulatory pyramid.[64]

There is no doubt that the YCJA encourages those engaged in the youth justice system to consider the least restrictive means for addressing youth crime while also holding youth accountable for their behaviour.[65] Nevertheless, it has been suggested by some that extrajudicial measures and sanctions tend to be directed toward first-time, non-violent youth offenders.[66]

Although the *Preamble* and sec. 4(c) suggests that extrajudicial measures are typically reserved for non-violent offenders (see sec. 4(d)), the *Act* does not preclude a decision to utilise these measures in cases involving violence or in subsequent dealings with a youth. As noted by Bala, even youth with prior contact with police, and prior criminal records may be considered for extrajudicial measures taking into account other relevant information such as, "the seriousness of the offence, the prior record and attitude of the youth, and the views of

---

63 Bala (n 42).
64 Morrison (n 39) 440.
65 Doob (n 30).
66 Popham (n 28); Bala (n 42).

the victims, as well as the policies of the specific police force."[67] By incorporating extrajudicial measures and sanctions, opportunities for including restorative approaches exist at all stages of the process. As stated by Bala and Roberts: "this provision is intended to encourage police and prosecutors to avoid automatically escalating the degree of criminal justice intervention in response to any subsequent offending."[68] Avoiding an automatic increase towards formal adjudication in favour of at least considering less formal restorative approaches is compatible with Braithwaite's responsive regulatory model. If these restorative approaches do not result in the requisite behavioural change required to address the goals of the YCJA (i.e., preventing youth crime, rehabilitating and reintegrating youth into society, ensuring that youth are subject to meaningful consequences, etc.) then the young offender will be processed through the conventional youth justice system.[69] Hence, the YCJA is consistent with the regulatory pyramid as in that it provides for increasing the intervention strategy to achieve these goals when necessary.

VII. Restorative Justice, Human Rights, And The YCJA

I will now shift the focus to RJ and human rights with an examination of the YCJA. Specifically, attention will be given to the UN *Convention on the Rights of the Child* (hereafter CRC) and the rights it affords to children who have met the Canadian legal system.

Since 1945, the world has borne witness to a fundamental shift in international law wherein the consideration of individual human rights that challenged previously held notions of sovereignty has taken root, expanded and been enshrined in numerous international, regional, and national instruments. Prior to World War II, international law focused almost exclusively on the rights and duties of states with minimal consideration provided to individual rights.[70] At that time, affording and protecting individual human rights was considered "a matter of national, not international concern."[71] States were, for the most part, free to exercise absolute authority over individuals within their territory. How they chose to exercise their authority was not considered the business of any other state and

---

[67] N Bala, 'Community-Based Responses to Youth Crime: Cautioning, Conferencing, and Extrajudicial Measures' in Katheryn Campbell (ed), Understanding Youth Justice in Canada (Pearson 2005) 176.

[68] Bala (n 42) 47.

[69] Popham (n 28).

[70] Martin Dixon, Textbook on International Law (6th edn, OUP 2007) ch 1.1.

[71] DW Van Ness, 'Restorative Justice and International Human Rights' in Joe Hudson & Burt Galaway (eds), Restorative Justice: International Perspectives (Lynne Rienner Publishers 1996) 18.

interference by another state was deemed a violation of sovereignty and considered inappropriate.[72]

In the aftermath of the atrocities of World War II, the development of the various international human rights conventions were envisioned as providing a basis upon which the international community strives to "ensure that individuals are protected from the excesses of states and governments."[73] The veritable explosion of international human rights treaties since its early inception in the mid-1940s suggests that individual human rights have established a strong foothold in the global consciousness.

Being influenced by the social justice movement,[74] it is not surprising that human rights are of great interest and concern for scholars and practitioners of RJ.[75] Indeed, the same basic underpinnings noted above as driving international recognition of human rights, is posited by Braithwaite as an argument that resonated with reformist politics, in that, "many can identify with a commitment to combating oppressive state structures of inhumane reliance on prisons."[76] While the conceptualisation of human rights within the context of RJ has been debated (see below), the protection of human rights must be of paramount concern regardless of country, race, creed and gender. Within the global context of youth justice, the CRC provides an international framework upon which restorative practices focused on addressing youth crime can be evaluated.

VIII. Un Convention On The Rights Of The Child (CRC)

The CRC represents the continuing evolution in the realm of human rights. Although a recognition of the need for rights that specifically address the unique position occupied by children "have existed for centuries, the direct implementation of children's rights into both public policy and law is quite new".[77] The CRC potentially provides global standards for youth justice reform.[78] Moore and Mitchell argued that any reforms in a nation's youth justice system must consider

---

[72] Richard Bilder, 'An Overview of International Human Rights Law' in Hurst Hannum (ed), Guide to International Human Rights Practice (4th edn, University of Pennsylvania Press 2004) 3.

[73] Martin Dixon, Textbook on International Law (6th edn OUP 2007) 343.

[74] Jennifer Llewellyn & Robert Howse, 'Restorative Justice: A Conceptual Framework' (Law Commission of Canada, October 22, 2004) <http://www.lcc.gc.ca/en/themes/sr/rj/howse/howse_main.asp> accessed 27 September, 2020.

[75] Braithwaite (n 52).

[76] ibid 564.

[77] Denov (n 14) 68.

[78] John Muncie, 'The Globalization of Crime Control – The Case of Youth and Juvenile Justice: Neo-liberalism, Policy Convergence and International Conventions' (2005) 9 Theoretical Criminology 35.

these international standards and norms.[79] However, as observed as part of what Muncie refers to as 'globalisation of youth justice', reforms will be "mediated by distinctive national and sub-national cultures and socio-cultural norms when they are activated on the ground".[80] This has been the case in Canada.[81]

The preamble of the CRC provides the human rights context in which the convention was developed. It refers to several international instruments as providing a foundation upon which it was created. Although the entire convention has applicability to the spectre of juvenile justice, a few specific articles on the convention (i.e., articles 3, 12, 37 & 40)[82] are of interest to the current discussion.

IX. Potential Human Rights Issues With Restorative Justice And The YCJA

As rich as the arguments are for incorporating RJ into any youth justice system, incorporating such principles is not without its critics.[83] Despite the potential observed and the acknowledgment that human rights must be provided for in restorative practices, there is a noted concern that there has been an over-emphasis on strict compliance with due process legal protections.[84] Restorative practices have been criticised with respect to a number of due process rights afforded to offenders in a criminal trial: 1) the presumption of innocence, 2) the right to legal representation, 3) the case being heard before an independent, impartial and competent tribunal, 5) double jeopardy, 6) proportionality in sentencing, 7) the right to appeal, 8) consistency in the application of the law, and 9) the role that the state is to play in ensuring these rights.[85]

One critique of restorative justice put forward by Daly is that proponents of RJ, albeit with what she refers to as "well-meaning intentions", have portrayed it

---

[79] Shannon Moore & Richard Mitchell, 'Rights-Based Restorative Justice in Canada: From Silence to Citizenship' in Michael Freeman, *Law and Childhood Studies: Current Legal Issues* (OUP 2012) 210–211.

[80] Muncie (n 78), 57.

[81] Denov (n 14).

[82] United Nations Child Rights Convention, art 3 – all organizations concerned with children with children should word towards what is best for each child; art 12 – rights to express views freely and be listened to; art 37 – no one is allowed to punish children in a cruel and harmful way; & art 40 – a child offender should treated in a manner be commensurate with age. See <https://www.unicef.org/child-rights-convention>.

[83] John Winterdyk, 'Canada: Rethinking Restorative Justice and its Implementation in a Postcolonial Era' in Theo Gavrielides (ed), Comparative Restorative Justice (forthcoming, Springer 2021) 18.

[84] Ann Skelton & M Sekhonyane, 'Human Rights and Restorative Justice, in Handbook of Restorative Justice' in Gerry Johnstone & Daniel Ness (eds), Crime and Human Rights (Sociology of Crime, Law and Deviance (Emerald Group Publishing Limited 2007) 580.

[85] ibid.

as diametrically opposed to RJ.[86]According to Ward and Landlands, this is considered to be problematic as it does not fully address such human rights questions as these "crude value categories," the "good" (restorative justice) when compared to the "bad" (retributive justice) can result in "practitioners [becoming] overconfident and [believing] that their system cannot violate offenders' human rights.[87] Daly (2002) argued that this simplistic categorisation has resulted from confusion and lack of agreement over the precise meaning of the term punishment and where, or if, it fits within the RJ paradigm.[88] Furthermore, she stated that, "we could say, for example, that any criminal justice sanction is by definition 'punitive', but that sanctions can vary across a continuum of great to less punitiveness".[89] From this perspective, it is plausible that any type of sanction is punitive to some degree. Congruent with this line of reasoning, Ashworth expressed concern with restorative justice as undermining the rule of law.[90] Procedural safeguards and constraining limits are required to avoid the potential risks associated with restorative approaches to crime. Within the Canadian context, it is argued that given Canada's early promotion of the CRC and its relative positioning in the global economy that "apart from tired ideological assumptions about the primacy of 'traditional values' or the nature of a normative childhood, there are not rational explanations for stakeholders across the nation to lag behind most other industrialised, and many non-industrialised states" in making the necessary provisions for this to be achieved.[91]

One of the crucial rights afforded to youth is the right to remain silent. Flowing from this right is the *a priori* assumption of the presumption of innocence. Restorative justice, in general, and in juvenile justice this fundamental guarantee has garnered criticism.[92] The criticism is the result of many RJ processes requiring the youth to accept responsibility for their behaviour before being accepted into the process.[93] The rationale behind this is the result of the focus RJ places on the victim and the attempts to protect them from further victimisation. Nevertheless, it raises issues with respect to how, and if, this admission of responsibility may be translated into an admission of guilt that might undermine the right to remain silent and therefore, the presumption of innocence.

Given the parallel operation of restorative approaches and court-based approaches within the single framework of the YCJA, this demonstrates the

---

86 Kathleen Daly, 'Restorative Justice: The Real Story' (2008) 4 Punishment & Society 59.

87 Tony Ward & Robyn Langlands, 'Restorative justice and the human rights of offenders: Convergences and divergences' (2008) 13(5) Aggression and Violent Behavior 362.

88 Daly (n 86).

89 ibid 61.

90 Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42(3) British J. of Criminology 578.

91 Moore (n 79) 86.

92 Skelton (n 84); Langlands (n 87).

93 Winterdyk (n 83).

potential to address this concern. Although extrajudicial sanctions available under the YCJA do require the youth to "accept responsibility for the act," the concern noted above with respect to the presumption of innocence and the right to remain silent is at least somewhat ameliorated. Section 10(2)(c) of the YCJA specifically requires that: "the young person, having been informed of the extrajudicial sanction, full and freely consents to be subject to it." Furthermore, provisions in the YCJA explicitly prohibit the use of a youth's acceptance of responsibility in extrajudicial measures in any civil or criminal proceedings (s. 10(4)). Despite these efforts, other related issues arise in conjunction to this, namely the right to legal representation and the notion of voluntariness and coercion.

The YCJA and the CRC explicitly provide for the right to legal representation. Although the presence of defence attorneys is designed to protect the "best interests" of their client, it is argued that defence attorneys approach a "case" from a position that is inherently contrary to that of RJ as they do not follow a mediation process. In RJ circles the inclusion of defence attorneys in restorative processes is often deemed undesirable although some programmes exist which allow, but do not require their participation.[94] In the context of extrajudicial measures and sanction the role of the counsel is designed to provide the young person with adequate information regarding their options such that they can make an informed decision as to how they desire to proceed with their case when presented with the option of an extrajudicial measure or sanction (s. 10(2)). Despite the objections by some proponents of RJ to attorneys participating in the actual RJ process itself, recognition has been forthcoming such that access to counsel regarding participation in restorative processes as an alternative to court is acceptable.[95] Providing youth with the requisite information needed to make a fully informed decision as to how they wish to proceed in addressing their circumstance is also congruent with the CRC in that it provides youth with the opportunity to participate in judicial proceedings that directly impact them. However, this brings to the foreground another issue that is contentious in RJ, voluntary participation, and the notion of coercion.

According to Wards and Langland, if RJ is to comply with human right standards and provide for the freedom and autonomy of the individual, they argue "it is (then) imperative that offender participation in such proceedings is voluntary".[96] Voluntary participation and coercion are of even greater concern when addressing the circumstances of young people.[97] Daly suggests that when youth are engaged with adults representing the criminal justice system, the

[94] Skelton (n 84).
[95] Skelton (n 84).
[96] Langlands (n 87) 361.
[97] Braithwaite (n 46).

perceived power differential can result in acute forms of coercion.[98] Coercion and voluntariness are intertwined in that they both are cognizant of power differentials that exist in society. Despite the observation that youth may *consent* to participate in restorative processes, there is a risk in assuming that coercion has disappeared as a result.[99]

The concern may be associated with a pressing issue facing the Canadian youth justice system. Through an examination of Canada's comportment with CRC standards Moore and Mitchell cite the Canadian Senate reports of 2005 and 2007 as continued evidence that Canadian youth remain "silenced" in no small part due to the lack of education and awareness of the rights they are guaranteed as a result of Canada's signatory status to the convention.[100] This lack of basic awareness potentially opens the door for increased coercion as youth are unaware of their rights and must, therefore, rely on the guidance of others who occupy positions of power over them.

Restorative justice processes encourage full participation. They do provide a venue wherein a young person is afforded a greater opportunity to participate in the decision-making process that leads to an outcome than in the conventional justice process. Depending on the specific process, they also provide opportunities for victims and the wider community to have a voice in determining the best way to address the harms caused by the crime. According to Ward and Langlands, "the danger is that offender wishes will be trumped by those of the community and victim(s), and that the option to accept an outcome or return to court is really a form of subtle coercion."[101] Given power differentials between adults and youth it is conceivable that the outcome, although argued as achieved through full participation including the youth's perspective, may give greater weight to and reflect the desires and opinions of the adults present.

A primary argument questioning the true voluntary nature of participation in RJ is that of the general perceptions of informal approaches being less punitive than formal approaches. As Ikpa argued, participation in RJ based on the premise that offenders are likely to believe that formal court processes result in greater and more punitive sanctions. This undermines the notion of true voluntary participation.[102] This argument has also been noted by Ward and Langlands as one that

---

[98] Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris & Gabrielle Maxwell (eds), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (Hart Publishing 2001) 59.

[99] Ann Skelton & Cheryl Frank, 'How Does Restorative Justice Address Human Rights and Due Process Issues?' in Howard Zehr & Barb Toews (eds), Critical Issues in Restorative Justice (Lynne Rienne Publisher 2004) 203.

[100] Moore (n 79).

[101] Langlands (n 87) 361.

[102] Tina S Ipka, 'Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System' (2007) 24 Washington University J of Law & Policy 301.

questions the implementation of Braithwaite's regulatory pyramid within responsive regulation.[103] Ward and Langlands argued that the model implicitly utilises the formal criminal justice system as a coercive tool in attaining participation within RJ processes.[104] They also noted that offenders may *choose* to participate in RJ processes out of fear that their refusal to do so may detrimentally impact them in legal proceedings should they decide to pursue that venue for their case.

For Skelton and Sekhonyane, the degree of coercion experienced by an accused can be reduced by "the manner in which options are provided to the suspect … and proper training of officials who are responsible for putting the option to the accused."[105] The right to a lawyer may provide for this safeguard within the Canadian youth justice system. However, as with the implementation of restorative practices, this would require a degree of acceptance of restorative approaches on the part of the defence attorney. Their views with respect to RJ may impact the advice that they provide their clients.

Given the suggested support for RJ within the context of the YCJA as well as the intention, although unrealised, to include youth in the decision-making processes, it is somewhat ironic that the legislation does not provide a legal right for young people to request extrajudicial measures and sanction.[106] Bala stated that despite encouraging the use of alternative approaches in sections 4 and 5 of the YCJA youth do not have "a legal right to be dealt with outside the court system."[107] The decision to proceed with these alternatives' rests solely with the criminal justice professionals undermining the CRC right guaranteeing youth engagement and the availability of community-based alternatives across provincial jurisdictions.[108]

The CRC and the YCJA clearly articulate the right to a fair trial overseen by a competent and impartial tribunal. The question of impartiality is raised in the context of RJ as Ashworth noted that victims and community members cannot necessarily be expected to be impartial nor competent with respect to consistent application of the law.[109] In fact, Ashworth claims that: "the empowerment of communities, howsoever defined, might involve a sacrifice of 'rule of law' values such as consistency, which, it is argued, ought to be standards for criminal law."[110] From a restorative approach, when addressing the harm created by the crime, what is required to repair that harm will be different based on the different expectations and needs of the victims. The YCJA recognises both the need

[103] Langlands (n 87).
[104] ibid.
[105] Skelton (n 84).
[106] Bala (n 66).
[107] ibid 83.
[108] Bala (n 42).
[109] Ashworth (n 90).
[110] ibid 582.

for the "limits of fair and proportionate accountability" as well as the involvement of "parents, the extended family, the community or other societal agencies" in assuring meaningful consequences that also address the need for "rehabilitation and reintegration" (s. 3(c)). The key is to find a balance between the competing interests of addressing individual circumstances while also providing for a consistent application of the law. Furthermore, as noted above, providing equal access to extrajudicial measures is an issue that remains to be addressed nationwide.

In concluding his argument Ashworth clearly articulated his position with respect to the role that the state must play in the process of administering justice within a human rights framework.[111]

> *"…it should remain the responsibility of the state towards its citizens to ensure that justice is administered by independent and impartial tribunals, and that there are proportionality limits which should not only constrain the measures agreed at restorative conferences…. but also ensure some similarity in the treatment of equally situated offenders."*

Braithwaite, although disagreeing with Ashworth's stance regarding the role of the State, does recognise that "state-sanctioned human rights are vital for regulating the tyrannies of informal justice."[112] However, Braithwaite argued that there must be a broadening of the discourse of human rights away from the narrow focus that currently exists to one that presents an opportunity for a bottom-up approach to developing standards for restorative practice. Based on an examination of human rights instruments, Braithwaite proposes a framework that has at its roots a foundation that "might be grounded in the values and rights in UN or European human rights instruments."[113] In his proposal, he outlines three standards regarding human rights upon which should be considered in "setting standards" for restorative justice practice that are duly respectful of human rights: 1) "constraining standards", 2) "maximising standards", and 3) "emergent standards."[114] According to Braithwaite,

> *"The constraining list are standards that must be honoured and enforced as constraints; the maximising list are standards restorative justice advocates should actively encourage in restorative processes; the emergent list are values we should not urge participants to manifest – they are emergent properties of a successful restorative justice process."*[115]

---

[111] ibid 591.
[112] Braithwaite (n 52) 564.
[113] ibid 574.
[114] Braithwaite (n 52) 570; These include: (1) remorse over injustice, (2) apology, (3) censure of the act, (4) forgiveness of the person, and (5) mercy (Braithwaite, 2002b, p 570).
[115] Braithwaite (n 46) 571.

Braithwaite provides a six-step process by which these standards can be incorporated into the development of restorative justice practice and by which we can measure and assess the degree to which the Canadian youth justice system adheres.[116] The final step is to "aggregate these local regulatory conversations into a national regulatory conversation … for example by legislating for them or threatening programme funding when they are flouted".[117] It is within the framework of these "standards" that we will now turn our attention to the YCJA to determine how well the Canadian youth justice system complies as provided for in the legislation. Given that the focus of this article is on youth justice, I will incorporate the United Nations Convention on the Rights of the Child in the discussion which is specifically listed in Braithwaite's proposed framework but is to be considered in light of his "maximising principle" that requires "respect for the fundamental human rights" provided for in international instruments and conventions.

X. The YCJA And Its Compliance With The CRC And Braithwaite's Framework

In 1991, Canada became a signatory to the CRC. In doing so, the country became obliged under the requirements originating from this status, to recognise the commitments outlined in the Convention when entertaining reforms to the youth justice system. However, due to the dualist nature of Canada's perspective on international law, the CRC is not afforded the same status as domestic law governing human rights (i.e., the *Charter of Rights and Freedoms*). As such, "where Canadian laws are found not to be in accord with the standards of the Convention, Canada has agreed to amend its laws over time and harmonise them with the Convention". With respect to the CRC and Braithwaite's framework, the YCJA represents some positive initial results but still has room for improvement.

The Preamble to the YCJA the legislation specifically identifies and recognises the commitment resulting from Canada's signatory status to the CRC. It states:

> *"WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognises 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. (YCJA)."*

Despite this recognition, a fundamental principle of the CRC is that the "best interests of the child shall be a primary concern" (CRC, Article 3(1)). The

[116] ibid.
[117] ibid 575.

YCJA does repeatedly refer to this principle in numerous sections. However, two issues with respect to this principle are noteworthy. First, it has been recognised by scholars that this principle is wholly absent in the YCJA's declaration of principle.[118] Secondly, the YCJA's declaration of principles seems to provide a conflicting founding principle. In section 3(1)(a), the declared purpose of the YCJA is to address youth crime in youth criminal justice system in order to "promote the long-term protection of the public." Reference to the "best interests of the young person" in some substantive sections that follow the declaration of principles is clearly articulated. For example, section 25(8) affords primacy to the young person's interests take primacy over the parent's when they are in conflict.

If it appears to a youth justice court judge that the interests of a young person and the interests of a parent are in conflict, or that it would be in the best interests of the young person to be represented by their own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of the parent (s. 25(8)).

However, in many additional sections this statement of principle is frequently followed by the phrase "or in the public interest." One might argue that the placement of the "best interests of the young person" comes first in order of appearance suggesting that this is of greater importance. Nevertheless, the qualifying statement "or in the public interest" is suggestive that there are competing principles that must be considered; and it might be argued given the appearance of the noted concern for "public safety" in the YCJA declaration of principles, that the public interest is the primary principle to be applied within the legislation. This observation potentially undermines the YCJA's potential for complete compliance with the CRC and Braithwaite's proposed framework.

XI. Summary: The Future Of RJ And HR For Young Offenders In Canada (And India)

This article began with a brief overview about the social, political, economic, demographic, and cultural background of Canada. For those not familiar with Canada, its history is reflective of significant influence during the country's formative years but has since evolved into a nation-state that champions civil and human rights. The country's strong linkage to its Indigenous peoples prepared Canada well for embracing restorative justice principles and practices[119]– or more specifically, the general way in which many of Canada's indigenous people looked at crime.[120]

---

[118] Moore (n 79).

[119] Winterdyk (n 83).

[120] Jane Dickson-Gilmore & Carol La Prairie, Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change

However, as reflected throughout this article, the evolution of youth justice in Canada has been a slow process marked and influenced by certain global trends while also spiriting its own path. The evolution of juvenile justice legislation in Canada evolved from a focus on crime control to a modified model of justice, and most recently a community change model while always trying to acknowledge and respect the diversity of its population and the principles of due process and fairness for juvenile delinquents. The transition from the *JDA* to the *YOA* and now the *YCJA*, while largely driven by political and public dissatisfaction with the existing legislation at the time, has increasingly attempted to be compliant with the UN Convention of the Rights of Children and the Convention on Human Rights.

As reflected in the discussion, over the past 30 plus years, youth justice legislation has moved ever closer to a responsive regulatory model. However, based on the commentary presented in this article, there remains a disconnect between the legislation's intention and its actualisation. Yet, the research on RJ initiatives in Canada (and internationally) have shown that when surveyed, (young) offenders generally express satisfaction with their involvement with RJ programs and also affirmed that the programs and process were fair.[121] But, while the YCJA is federal legislation, it is the responsibility of the provinces to administer and respond to the Act and this gives many of the provinces and territories, because of their unique social, political, and economic attributes, their own unique characteristics. Therefore, while it can generally be said the RJ and human rights are widely respected and upheld within Canada, there remains considerable variation between the respective jurisdictions.

Notwithstanding these pragmatic issues, Canada's youth justice system, over the past several decades, appears to be making progress to establishing a balance between crime control and RJ while also upholding the fundamental human rights principles. The system has moved from experimentation with RJ principles and programmes to entrenching RJ based programmes into sentencing, and disposition options.[122] In fact, it was suggested throughout this article, that RJ and human rights has been and is maturing in the country. However, depending which federal party is in power, the balance would appear to be a precarious one as current Liberal government is focused more on crime control than RJ. It was observed throughout this article that in-spite of RJ maturing in Canada, there remain a number of fundamental pragmatic challenges (e.g., resource capacity, administrative logistics, and political will) that limit any suggestion that RJ and human rights represent a fundamental priority or focus for the YCJA. Arguably,

(University of Toronto Press 2007); John Reilly, Bad Law: Rethinking Justice for a Postcolonial Canada (Rocky Mountain Books 2019).

[121] James Bonta et al, 'An Outcome Evaluation of a Restorative Justice Alternative to Incarceration' (2002) 5 Contemporary Justice Review 338.

[122] Winterdyk (n 83) 456.

one of the saving graces for RJ and the upholding of human rights principles for young offenders might well be the fact that the Canadian public has become more knowledgeable and that the relative success of the extrajudicial measures section of the YCJA has enabled such alternative measures to become firmly planted within the justice system.[123] It is safe to say that while Canada may not be at the same stage in its expression of RJ and human rights for youth justice, it may be fair to suggest that RJ for youth (and adults), as also expressed by Tomporowski, Buck, Bargen, and Binder(2010) that it "will continue to evolve and expand in Canada."[124]

Finally, a word on how this article might be of relevance to the Indian juvenile justice system.

The Indian Juvenile Justice Act has undergone several iterations since it first came into force in December 1st, 1986, with the most recent iteration being the Act of 2015.[125] Although, in principle, the Act has been described as a 'rights model',[126] inspite of the provisions to provide care, protection, and rehabilitation of neglected children and juvenile offenders, in practice there appears to be a lack of awareness of the Act by those responsible for implementing the Act.[127] Therefore, while the Indian juvenile justice system is in need of internal support, any amendments to the implementation of the Act might want to consider how elements of the RJ approach, as discussed in this article, might be adapted to the Indian system so that the Act is more in alignment with the CRC and other international standards and guidelines. After all, since juvenile offending knows no borders, by engaging in comparative analysis countries can learn from one another and move their respective juvenile justice system forward based on evidence as opposed to historical, social, and political conventions which are often not informed by evidence, but subjective rhetoric.

---

[123] Adrienne MF Peters & Raymond Corrado, 'The Youth Justice System in Action, in Youth at Risk and Youth Justice: A Canadian Overview' in John WInterdyk et al (eds), Youth at Risk and Youth Justice: A Canadian Overview (3rd edn, OUP 2020) 335.

[124] Barbara Tomporowski et al, 'Reflections on the Past, Present, and Future of Restorative Justice in Canada' (2010) 48(4) Alberta L. Review 815.

[125] Maharukh Adenwalla, 'Child Protection and Juvenile Justice System for Juvenile in Conflict with Law' (Childline India Foundation 2006)<https://saranalayam.org/cs-content/uploads/aupload/file/be36918a7103c5d1de75ce3eee1c6912.pdf> accessed 27 September 2020; Tapan Chakraborty, 'Juvenile Justice in India' in John Winterdyk, Juvenile Justice Systems: International Perspectives (2nd edn, Canadian Scholars 2002); Sruti DK, 'A Critical Analysis of Juvenile Justice Act and System in India' (2017) 5(4) J of Political Science & Public Affairs 2.

[126] John Winterdyk & Nicholas Jones, 'The Shifting Visage of Youth Justice in Canada: Moving Towards a More Responsive Regularity Model with a Human Rights Framework' in Theo Gavrielides (ed), Rights & Restoration within Youth Justice (De Sitter Publications, 2012), ch 9; Ved Kumar, The Juvenile Justice System in India: From Welfare to Rights (OUP 2004).

[127] Winterdyk (n 83); Sruti DK, 'A Critical Analysis of Juvenile Justice Act and System in India' (2017) 5(4) J of Political Science & Public Affairs 1.