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The British 1998 *Crime and Disorder Act*: A 'Restorative' Response to Youth Offending?

1. INTRODUCTION

The term 'youth' is very elastic, as it means different things in different spatial and temporal contexts and/or political systems.² However, what these contexts and political systems have had in common is the need to control their delinquent youth. The 'enterprise' for controlling the 'dangerous youth', known as juvenile justice system, does of course not operate in a social policy vacuum, but co-exists alongside other networks influencing, regulating or controlling the lives of the juveniles, such as child care and education.³ The primary aim of this article is to examine the extent to which the British 1998 *Crime and Disorder Act* (CDA) has introduced elements of a restorative approach as part of a mainstream response to youth offending. Moreover, it attempts to examine whether, by introducing restorative justice elements, young offenders are being held more or less accountable for their actions. Occasional reference will be made to the Canadian *Youth Criminal Justice Act* (YCJA), which came into effect in April 2003, since it shares a number of similar characteristics with the CDA, and serves as a comparative counterpoint. But before moving to the presentation of the relevant sections of the British 1998 CDA and the Canadian 2003 YCJA, it should be appropriate to look at the evolution of the two systems, since it is useful in terms of helping us understand the ways in which the current juvenile systems are influenced.

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 2. T. Newburn (1997) 'Youth, Crime and Justice'. In M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology*. 2nd ed. (New York 1997) pp. 613–660.
 3. A. Morris and H. Giller, *Understanding Juvenile Justice* (London 1987) p. 1.

2. A HISTORICAL RETROSPECTION ON JUVENILE JUSTICE IN BRITAIN AND CANADA

Generally, juvenile and adult offenders were treated the same in the criminal justice system until the 1830s, in both Britain and Canada. In 1840, a British parliamentary Bill was introduced to give the magistrates the right to sentence young offenders, under the age of twelve.⁴ Fourteen years later, under the *Youthful Offender Act* 1854, reformatories were introduced to 'educate' the juvenile delinquents, and in 1857 legislation provided a solid basis for the establishment of the 'industrial' schools again for the dangerous youth.⁵ Several years later, in 1879, under the *Summary Jurisdiction Act*, measures were implemented in order that juvenile delinquents could be tried by the magistrates' courts, thus reducing significantly the number of incarcerated youth. The evolution of juvenile justice in Britain is not that dissimilar from the evolution of juvenile justice in Canada. Not only is there a shared social and political history but the two countries' juvenile justice systems tend to parallel each other in a number of significant ways in terms of their ideological objectives – although there are notable differences in terms of their respective general features.⁶ For example, the key personnel in England and Wales are juvenile justice specialists while in Canada they are lawyers and childcare experts. In England and Wales, the general purpose of intervention is to retrain while in Canada, the focus is on sanctioning behaviour and balancing it with appropriate treatment/intervention.

In Britain, these were the main responses to juvenile delinquency in the nineteenth century. However, it was not until 1908 that juvenile justice begun taking shape as a distinctive way of dealing with young offenders. Specifically, as noted by Watson and Austin,

‘The Children’s Act 1908, heralded as the Children’s chapter, was a highly progressive measure; the most important of its provisions was the establishing of the separate juvenile court from which the public were to be excluded’.⁷

This Act also abolished imprisonment for juveniles, set the basis for the creation of borstals and was an amalgamation of welfare and punitive measures.⁸ However, the most important aspect of the Act was not its innovation in terms of provisions but the shaping of the concept of the juveniles as being a separate category with special characteristics. The Act has been characterized as embracing a welfare perspective⁹ not

4. L. Gelsthorpe and A. Morris, ‘Juvenile Justice 1945–1992’. In M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology* (New York 1992) pp. 949–993.

5. A. Morris and H. Giller, *op. cit.* p. 9.

6. J. Winterdyk (ed.) (2002) *Juvenile Justice Systems: International Perspectives*. 2nd ed. (Toronto 2002).

7. Cited by A. Morris and H. Giller, *op. cit.*, p. 10.

8. M. Davies, H. Croall and J. Tyrer, *Criminal Justice: An Introduction to the Criminal Justice System in England and Wales* (New York 1995) p. 136.

9. L. Gelsthorpe and V. Kemp, ‘Comparative Juvenile Justice: England and Wales’. In J. Winterdyk (ed.), *Juvenile Justice Systems: International Perspectives*. 2nd ed. (Toronto 2002) pp. 127–170.

dissimilar from most other juvenile justice systems (e.g., Hong Kong) that emerged during this time period.¹⁰

The juvenile court was retained until 1933 when the *Young Persons Act* introduced dealing with juvenile delinquents by a selected group of Magistrates, and raised the age of criminal responsibility from seven to eight years. Juvenile justice became a combination of crime control and a welfare perspective.¹¹ After World War II, which had changed people's attitudes and beliefs to a certain degree, the Labour government introduced the *Children Act* of 1945, under which delinquent youth were seen as individuals 'in need of care and protection'; however, detention and attendance centres were also established.¹² The post-war history was marked by calls for a return towards supporting social services that could help the maintenance of the family – reflecting the significance of social and political factors.¹³ Again, as seems to be the case with the evolution of juvenile justice systems around the world, Canada's juvenile justice system also underwent similar reforms after the second World War.¹⁴

In the ensuing years several key reports were commissioned. First, the Ingleby Report in 1960 placed a major role in the *Children and Young Persons Act* in 1963. The new Act saw a return to welfare principles as there was a shift towards the use of diversion, minimising the use of detention centres and borstals, and replacing them with community measures¹⁵ – again, not dissimilar from the recommendations that came from what happened in Canada. During the early 1960s the *Juvenile Delinquents Act* of 1908 was widely criticized across a wide range of points ranging from the discretionary power of the court to a general lack of accountability in the administration of the Act.¹⁶

The *Criminal Justice Act* 1982, which was passed by Mrs. Thatcher's conservative party government, moved away from some elements of welfare and treatment to more punitive elements as it severely attacked the principles of welfare for juvenile delinquents that previous legislation had introduced.¹⁷ In particular the Act gave the magistrates the authority to exercise new powers such as youth custody and parental fines,¹⁸ and limited the discretionary powers the social workers had over young offenders.¹⁹ The dramatic politically motivated shift embodies many of the elements of a crime control model.²⁰

More recently, in the 1990s, the punitive philosophy of the conservative governments was prevalent, fuelled at that time by the extensively media-covered urban disturbances of 1991, and the murder of James Bulger by two 10-year-old boys in

10. J. Winterdyk, *op. cit.*

11. L. Gelsthorpe and V. Kemp, *loc. cit.*

12. A. Morris and H. Giller, *op. cit.*, p. 10.

13. L. Gelsthorpe and V. Kemp, *loc. cit.*

14. See D. Fetherston, 'The Law and Young Offenders'. In J. Winterdyk (ed.), *Issues and Perspectives on Young Offenders in Canada*. 2nd ed. (Toronto 2000) pp. 93–118.

15. L. Gelsthorpe and V. Kemp, *loc. cit.*

16. D. Fetherstone, *loc. cit.*

17. T. Newburn, *loc. cit.*, p. 643.

18. M. Davies, H. Croall and J. Tyrer, *op. cit.*, p. 138.

19. B. Hudson, *Understanding Justice* (Buckingham 1996) p. 42.

20. J. Winterdyk, *op. cit.*

Liverpool in 1993. Home Secretary Michael Howard's 'prison works' speech was the kick-off of some measures to deal with young offenders in which custodial sentences had a central position. For example 'secure training centres' were introduced by the *Criminal Justice and Public Order Act* 1994 for young offenders with previous convictions.²¹ Somewhat ironically, Canada was also affected by several comparatively high profile cases (e.g., Sandy Charles in 1995, Ryan Garrioch in 1996, and Reena Virk in 1997), which were instrumental in fuelling public outrage and a call for reform that have played an instrumental role in forging the new legislation.

3. THE CRIME AND DISORDER ACT 1998 AND ITS SECTIONS REGARDING YOUNG OFFENDERS

As it is obvious from the historical retrospection, most of the governmental responses in England to juvenile delinquency have been punitive, with some exceptions. However, the Labour party after the election in 1997, and in particular when the CDA was passed, attempted to decree the prevention of offending by children and young persons as one of the principal aims of the Youth Justice System, by introducing some 'new', restorative justice elements as the main response to youth offending in England and Wales.

Of the various consultation papers, the most telling report, which reflects the direction the New Labour wanted to take, was the 1997 Home Office White Paper: *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales*. As much as the Act was committed to being tough and tough on the causes of crime, it also included provisions for restorative justice initiatives. This new approach reflects a corporatist model. Yet, it remains unclear where the balance lies between crime control and welfare.²² The restorative principles are based on three concepts/elements: those of responsibility, restoration, and reintegration.²³ A fourth element – reconciliation – can also be added to characterising this initiative.

Initially, the offender(s) accept the responsibility for their actions, and recognize the harm they have caused to the victim(s) and the community. As a consequence, they show remorse, they apologize to the victim(s) and the community, and willingly accept to 'restore' the broken bonds with them. This process involves the first two concepts. After reintegration takes place, which is a process of the Community accepting the offender(s) back, the community tries to help the youth avoid certain criminogenic circumstances and include them in future social life. Restorative justice has a multi-dimensional focus, as it does not have the offender(s) as primary actors in the criminal justice process, but it uniquely combines and balances the offenders',

21. B. Hudson, *op. cit.*, pp. 62–63.

22. L. Gelsthorpe and V. Kemp, *loc. cit.*

23. A. Morris and L. Gelsthorpe, 'Something Old, Something Borrowed, Something Blue, but Something New? A Comment on the Prospects for Restorative Justice Under the Crime and Disorder Act 1998', *Criminal Law Review* (2000) pp. 18–30; see also L. Walgrave, 'Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative', 34 *The Howard Journal of Criminal Justice* (1995) pp. 228–249.

victims' and communities' needs.²⁴ It is also worth noting that there is no single theory of how restorative justice should work and there are different models of restorative justice.²⁵ Yet, it is generally agreed that restorative justice offers advantages over traditional justice system models such as treatment, medication, and punishment models, which historically have remained in constant conflict with each other.

In essence, restorative justice highlights the inefficiencies of punishment and retributive philosophy to deal with the offenders and secure the rights of the victims,²⁶ and provides, as mentioned earlier, a significant contrast to punitive measures. The 1998 CDA provides a range of 'new' interventions in an attempt to assist local communities as well as the youth justice agencies to effectively tackle youth crime.²⁷ Some of the interventions are assumed to 'explicitly' introduce restorative justice elements. Specifically, under section 65 and 66, police cautioning has been replaced by 'reprimands' and 'warnings' for juvenile delinquents under the age of 17. This change is mainly a matter of semantics as 'reprimand' is an equivalent of a past practice, cautioning,²⁸ which is an important part of the youth justice process.²⁹ Reprimands like cautioning is a way of diverting the juvenile offenders from the Criminal Justice System, thus avoiding the detrimental effect that formal further action could have for their stigmatization (i.e., labelling) and their potential to become chronic and/or career criminals. According to section 39, when the juvenile offenders receive a 'final warning', they will be referred to the Youth Offending Teams, which are a national network of multi-agency teams operating on a local basis, having the responsibility of carrying out many supervisory duties,³⁰ dealing quickly and simply with less serious offenders and providing a meaningful alternative to entry into the Criminal Justice System. (Canada has similar provisions under section 18 of the YCJA, which are referred to and managed by the Youth Justice Committee, see Box 1.)

24. Office for Juvenile Justice and Delinquency Prevention, *Balanced and Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st century* (1999). Available online at: <<http://ssw.che.umn.edu/rjp/Resources/Documents/Framwork.PDF>>, accessed on 22 January 2001.

25. J. Winterdyk, 'It's Time, It's Time...Is it Time for Restorative Justice?', *Law Now* (April/May 1998), pp. 20–22.

26. B. Hudson, *op. cit.*, p. 73.

27. Home Office, *Youth Justice: Preventing Offending* (1999). Available online at: <<http://www.homeoffice.gov.uk/yousys/youth.htm>>, accessed on 25 January 2001.

28. J. Dignan, 'The Crime and Disorder Act 1998 and the Prospects for Restorative Justice', *Criminal Law Review* (1999) pp. 48–60.

29. J. Fionda, 'New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998', *Criminal Law Review* (1999) pp. 36–47.

30. J. Fionda, *loc. cit.*, p. 40.

Box 1: Contrasting a Restorative Justice Program in Britain and Canada

An example of restorative cautioning scheme has been taking place in Thames Valley since 1995. When the case of a juvenile offender is considered suitable for a caution, it is passed on to the Restorative Cautioning Unit to schedule a cautioning session, where the offenders and their families, and sometimes the victims and their families, participate in a conversation facilitated by a police officer.³¹ The Restorative Cautioning Scheme involves a kind of mediation between the different parts, and suits very much with the intention of the Labour government to introduce restorative justice elements. Since then, three prisons in Britain (i.e., Bristol, Norwich, and Winchester) have introduced restorative justice initiatives.

The Yukon, a territory in the far northwest of Canada, has a rich history in restorative justice programming based on the practices of its significant population of First Nations people. In 2002 the Yukon initiated a restorative initiative that is referred to as 'community justice'. The focus of the project is 'to contribute to the protection of society and the health of communities and individuals through community based justice initiatives'. The project is a joint initiative of the Yukon First Nations, Yukon communities, and the Territorial government. As their motto states: 'Justice belongs to (the) people and Justice serves (the) people' (see <www.comjustice.yk.net>). Although not reflective of all restorative projects in Canada, it serves to illustrate the diverse approaches that can be used to actualize restorative principles.

Another restorative justice element of the CDA can be found under section 67 of the Act. It states that juvenile offenders aged 10 or more are required to make reparation either to the victims and the community as a whole, or to any other persons affected by the offence. Reparation can take various forms, either specific or symbolic. For example, it can be a financial compensation for the damage the juvenile offenders have done, or a letter of apology to the victims for the distress the offenders have caused.³²

Reparation is a valid principle that we should strongly support, as it can assist offenders to 'reintegrate' into society, something that is a basic concept of restorative justice.³³ In other words, under the CDA, reparation means 'a process involving the establishment of a relationship of atonement between the offenders and their victims' rather than simply paying financial compensation, returning belongings to the victims, or making amends to the community.³⁴ However, what is of significant importance about the reparation order is that under section 68 (subsection 1.b), which proposes the victims 'to be included in the order', the victims, a neglected part of the criminal justice process, become a fundamental element of the reparation order, and

31. A. Morris and L. Gelsthorpe, *loc. cit.*, p. 25.

32. See J. Winterdyk, *op. cit.*

33. M. Cavadino and J. Dignan, *The Penal System*. 2nd ed. (London 1997) p. 43.

can actually determine what form the reparation will take. This provision is similar to section 3 (i)(d)(ii and iii) in the *YCJA* which states victims should be given ‘an opportunity to participate and be heard’ and ‘should be provided with information about the proceedings’. Yet, what both the British and Canadian law neglect to acknowledge, is that restorative initiatives should be supported but left to the ‘communities’ to define and articulate. Such views have been clearly expressed by the Law Commission of Canada, but have only been given token support at the federal level. For example, a study of the Thames Valley project reveals that racially discriminate behaviour complaints against restorative justice approaches have increased from 400-odd in 1995/96 to almost 600 in 1999/00.³⁵

Under section 69 of the CDA, which applies ‘where a child or young person is convicted of an offence other than one for which the sentence is fixed by the law’, a penalty, which is supposed to carry a lot of restorative justice elements, is imposed, the Action Plan Order.³⁶ This Order is supposed to keep young offenders away from re-offending by providing a short-term but intensive programme of work (Muncie, 1999), which would involve the local Youth Offending Teams as well as the parents of the offenders. This programme of work will be in the form of a three months’ intervention where the juvenile delinquents will be placed under the supervision of a responsible officer, who would provide them with the directions in order for the Plan to be implemented (CDA: section 69, subsection 2). Again, the Action Plan Order can be seen not only as a way of keeping young offenders out of custody, but also provides them with ‘benchmarks’, which, if they are used correctly, will prevent further re-offending. Section 3(i)(c)(vi) of the *YCJA* would appear to be somewhat more specific in its wording as its states that whenever appropriate and feasible, the law should ‘encourage the repair of harm’ – a clear example of the restorative justice philosophy. Yet, while the law can offer provisions, it cannot enforce such measures. In recent years several Canadian judges, while commending the new provisions in the *YCJA*, have also taken the opportunity during their rulings to point out that the provinces have provided minimal support to ensuring the execution of the extrajudicial measures.³⁷

These are the only provisions of the CDA which can be said to have introduced some restorative justice elements, although they have some shortcomings which do not allow us to accept them uncritically as a part of a restorative mainstream criminal justice system’s response to youth offending in England and Wales.³⁸ Specifically, in respect of the ‘reprimands’ and ‘warnings’ mentioned before, the Act implies that the warning will be the formal response to young offenders where these offenders had previously be warned (received a reprimand), or the offence committed was serious enough to receive a reprimand (CDA: section 65, subsection 3). However, although it is not indicated that the ‘warning’ is ‘final’, it is in essence a penalty planned to

34. M. Wasik, ‘Reparation: Sentencing and the Victim’, *Criminal Law Review* (1999) pp. 470–479.

35. J. Dobry, *Restorative Justice and Police Complaints: A Report by the Independent Police Complaints Authority* (Ottawa 2001).

36. J. Dignan, *loc. cit.*

37. N. Bala, *Youth Criminal Justice Law* (Toronto 2003).

38. J. Dignan, *loc. cit.*, p. 50.

be imposed only once, something that appears to give no second chance to the young offenders;³⁹ and if a juvenile who has received a final warning commits a petty offence, after that s/he will be tried by a court.

With respect to restorative conferencing, it can be argued that there can be some potential problems related to the actual operation of these conferences. For example, although the Restorative Cautioning Unit in Thames Valley has been shown to be successful, and has been heavily supported by the standing government members, it could be criticised because 'the role of the police officer is more dominant, and the shaming of the offending behaviour is more obvious, cut and uncontested. Offenders say comparatively little ... the police officers' questioning and comments accounts for between 58 and 70 per cent of the words spoken'.⁴⁰ Obviously, under these circumstances restorative conferencing can only be 'restorative' in theory and not in practice. The only ones who seem to benefit from this process are the police, who at the end of the day pose as the 'reconciliators' with all the implications this may have in terms of their public image. Again, under the existing format the offenders and the victims appear to only receive marginal, or token, support. For example, victims in a restorative conference not only may not be able to be given their assets, dignity or sense of security back, which is an important part of the restorative approach, they may also have an 'inelegant' role to play. Specifically, if the restorative conferences are not neutral and unbiased, there is a high risk for the victims to be conscribed to act as the 'agents for the administration of shame and punishment for offenders'.⁴¹ Hence, while the CDA makes provision for restorative justice, the Act is less clear on how to. Not dissimilarly, while restorative justice initiatives might be perceived to be a bit clearer, any effort to implement such programmes is usually dependent on good will and volunteerism. While there may not be anything wrong with such an approach, in times of limited resources and limited time, it might be unreasonable to assume that quality programmes can be sustained.

While the concept of restorative conferencing is gaining support within the criminal justice system, in practice it still remains something of an abstract concept and has yet to become an integral part of the legal and criminal justice process.⁴² Cooley's discussion paper prepared for the Canadian Law Commission expresses a similar sentiment as he addresses some probing issues around the illusive construct of 'justice as a lived experience' is not readily answerable.⁴³

It could be argued that offenders' rights, which are equal to those of victims in the restorative approach, are violated in terms of the offenders being coerced sometimes to participate in a conference, where they may not be willing to or even adequately prepared for, or it may not even be a pleasant experience. A groups of researchers, for example, after evaluating restorative justice schemes in England and Wales, found

39. J. Fionda, *loc. cit.*, p. 41.

40. Young and Goold, cited by A. Morris and L. Gelsthorpe, *loc. cit.*, p. 23.

41. J. Dignan, *loc. cit.*, p. 56.

42. A. Morris and L. Gelsthorpe, *loc. cit.*, p. 23.

43. D. Cooley, *From Restorative Justice to Transformative Justice: Discussion paper* (Ottawa 1999).

that in some cases the offender felt worse for taking part as they found the meeting with their victim embarrassing and upsetting.⁴⁴

In addition, there are some punitive elements in the reparation order. Initially what can be identified is a kind of 'conflict' of interests between the offenders and the victims. As mentioned earlier, the victims can contribute to the reparation order by actually recommending the form reparation should or could take (CDA, section 68 subsection 1.b). However, if the offenders are not willing to comply, the reparation order automatically becomes punishment.⁴⁵ In other words, 'the offender may be coerced into reparation'.⁴⁶ Secondly, a reparation order, no matter what it attempts to achieve in terms of penological aims, is still under section 67(7) (which specifies that the reparation order should be commensurate with the seriousness of an offence), subject to requirements of proportionality.⁴⁷ However, proportionality is a core principle for the distribution of punishment.⁴⁸ Yet, the notion of just desserts is a poorly veiled rationale for the use of incapacitation-punishment. And as a Canadian author observed, just desserts has simply served as a vehicle by which to address overcrowding with selective incapacitation and other community-based programs.⁴⁹ Meanwhile, 'the concept of just desserts is little more than an illusion that offers the offender and the victim little, if any, opportunity for reparation of the harm done'.⁵⁰ These sentiments are even reflected in the critique of what the draft guidance for reparation says, 'every effort should be made to ensure that reparation relates as closely as possible to the offence itself'.⁵¹ However, when the offence itself is examined and variables such as detrimental family environment or psychosocial issues are neglected, then regardless of any restorative efforts a young person may still be at considerable risk of offending. Neglecting to address such predisposing factors and the criminogenic settings of a young person is likely to produce strain and/or interpersonal conflict which risks eroding the reintegrative element of the restorative approach. What appears evident is an ideological clash between the classical doctrines and positivist principles. Neither the CDA nor the YCJA would appear to have found a formula by which to balance accountability with restorative principles. This would appear to represent an area worthy of closer scrutiny as restorative justice initiatives continue to evolve and emerge.

Under section 34 of the CDA the presumption of *doli incapax* (i.e., the presumption that under a certain age young people are incapable of doing bad, thus cannot be held fully responsible for their actions) is abolished. After the section was repealed in 1998, children aged 10 or older can now be treated like adults. This lower age limit is now one of the lowest in the world.⁵² By raising the age of prosecution the

44. D. Miers, M. Maguire, S. Goldie, K. Sharpe, C. Hale, A. Netten, S. Uglow, K. Doolin, A. Hallam, J. Enterkin and T. Newburn, *An Exploratory Evaluation of Restorative Justice Schemes*. Crime Reduction Research Series Paper 9 (London 2001).

45. J. Dignan, *loc. cit.*, p. 55.

46. A. Morris and L. Gelsthorpe, *loc. cit.*, p. 29.

47. M. Wasik, *loc. cit.*, p. 472.

48. Andrew von Hirsch (1986) cited by M. Cavadino and J. Dignan, *op. cit.*, p. 50.

49. D. Cayley, *The Expanding Prison* (Toronto 1998).

50. K. Menninger, *The Crime of Punishment* (New York 1968).

51. M. Wasik, *loc. cit.*, p. 476.

52. See J. Winterdyk, *op. cit.*

Act removed a very important principle which acted to protect children from the ‘full rigour’ of the criminal law.⁵³ The abolition of the presumption of *doli incapax* can lead to the imprisonment even of 10-year-old persistent offenders – very much a contravention of the UN Convention of Rights, which is the benchmark for the respect of human dignity, could not possibly be ‘parallel’ to the introduction of restorative justice elements.^{54, 55}

4. A CONTRADICTIONARY MODEL

The CDA also introduced some criminal and non-criminal orders, which provide a ‘context’, either temporal or spatial, for the criminalisation of children under the age of 10.⁵⁶ Specifically, with respect to criminal orders, the Action Plan Order, and the reparation order mentioned earlier, the Act introduced the Detention and Training Order. Section 73 entails a significant proportion of punitive measures, which cannot be perceived as attempts towards restorative justice. This section brought together the sentence of detention in a young offender institution for offenders 15 and over and the secure training order for 12–14 year olds, and extended the custodial provision for some 10-year-olds. Regardless of the provisos, any potential for the incapacitation of young children poses considerable risk to their moral development as well as their socialisation and development behaviour. Furthermore, to reinforce the use of imprisonment or detention for very young offenders is a negative aspect of the Act and yet another contravention of the 1998 *UN Convention on the Rights of the Child* (CRC). Again, comparisons with the new Canadian youth justice legislation reveals that their new legislation can also be characterised as reflecting contradictory objectives. For example, the YCJA emphasises the need to provide meaningful consequences (i.e., proportionate punishment) that hold young people accountable for their actions but also calls for rehabilitation and reintegration (see s. 90(1)), s. 91 back into the community (i.e., individualised intervention/treatment. For examples, s. 4(d) pertains to ‘extrajudicial measures’ which allows for the use of alternative measures to traditional court proceedings). Not only do such measures refute any of the government’s attempts to import rehabilitation but also compromises importing any restorative elements into the criminal justice system.

With respect to the non-criminal orders, under section 11 of the Act, child safety orders are introduced, which ‘place the child, for a period specified in the order, under the supervision of a responsible officer’, and ‘require the child to comply with requirements’ specified by the court. Gelsthorpe and Kemp provide an example for

53. J. Muncie, *Youth Crime: A Critical Introduction* (London 1999) p. 256.

54. J. Dignan, *loc. cit.*, p. 54.

55. According to Powers of Criminal Courts (Sentencing) Act 2000 (s. 100–107) 10–17 year olds cannot be imprisoned as such but can be dealt with by the way of Detention and Training Order. Only persistent offenders 10–17 year old are eligible for imprisonment. Additionally, for those aged 10 or 11 years the court must be satisfied that only a custodial sentence would be adequate to protect the public from further re-offending.

56. L. Gelsthorpe and V. Kemp, *loc. cit.*

such requirements.⁵⁷ They can take the form of preventing a child from being in certain places and associating with certain individuals, and argue that the value of allowing children to refrain from criminal activities with minimal intervention is abandoned. Moreover, under section 14 (Local Child Curfew Schemes), children are banned from being in a public place between 9 p.m. and 6 a.m. unless they are accompanied by a responsible adult.⁵⁸ What these sections provide is nothing more but an extension of the concept 'delinquency' to this of 'criminal offending'.⁵⁹ It is questionable whether these orders are attempts to introduce a restorative approach, as they focus on possible future offending; there is no actual 'damage' caused by young people to be restored. However, this issue might well speak to the broader notion of the intended and/or unintended scope of restorative justice.

Finally, under section 8 parenting orders are introduced. Specifically, what is required by the parents (or guardians of the child), is to comply, for a period of not more than twelve months, with requirements specified by the court, such as to attend counselling or guidance sessions. However, parenting orders are associated with bad parenting by the parents, who may receive a fine or a custodial sentence if they do not comply with them.⁶⁰ Again, no matter what the intentions of the government have been, this order is perceived distrustfully (especially by the parents), and it can lead to more punitive measures. Canada's YCJA also has similar provisions under section 26(2) and section 27 which 'allows a youth justice court to order that a parent attend any proceedings if such attendance is considered "necessary or in the best interest of the young person"'.⁶¹ However, while most parents will attend proceedings voluntarily, it is not clear what the impact is for the youth or the system.

While voluntary attendance is generally considered to be positive, the idea of compelling an unwilling or unable parent to attend is not likely to bode well for the young offender. Furthermore, compelling a parent to attend court is not consistent with a restorative approach.

5. CONCLUSION

The CDA (and perhaps not coincidentally the YCJA) generally appears to be one of the most 'liberal' pieces of legislation ever passed. Specifically, some of its provisions such as reprimands and warnings, restorative conferencing, or reparation orders, are thought to add a restorative element to the youth justice system, although this is applicable to some special cases, and under certain circumstances. Thus, it could be said that the Act introduces restorative elements but to a very small extent to be perceived as the mainstream response to youth offending. Ironically, although not

57. L. Gelsthorpe and V. Kemp, *loc. cit.*

58. Until the end of summer 1999 and almost a year after their introduction by the CDA there was no use of the local child curfew orders (BBC News, 'Child Curfew Laws Unused', BBC News (1999). Available online at: <http://news.bbc.co.uk/1/hi/uk_politics/422528.stm>, accessed on 2 February 2003).

59. J. Fionda, *loc. cit.*, p. 45.

60. See L. Gelsthorpe and V. Kemp, *loc. cit.*

61. N. Bala, *op. cit.*, p. 246.

discussed at length, similar provisions have been incorporated into the YCJA in Canada, but given its relative infancy it is not possible to offer any concrete observations as to its relative effectiveness. Many provisions of the Act, such as detention and training order, are rather punitive (e.g., see s. 42(9), s. 85, and/or s. 24.5). In many respects too it did nothing but change the names of the old, punitive, criminal 'care order' to 'supervision order', and the old 'intermediate condition' to 'action plan order'. In addition none of the non-criminal orders seems to contribute to the attempt of introducing restorative justice. The provisions of the Act co-exist in tension and competition⁶² due to a political culture, which does not allow any parties to be 'weak on crime'.⁶³ Although the Act can be viewed as quite progressive, it is in essence a continuation of the policies adapted by the previous acts during the 1990s and in Canada not dissimilar from their *Young Offenders Act* 1984. In terms of whether young people escape punishment, it can be argued that it is not the case. First, because of the reasons mentioned previously, and secondly because, even if we accept that restorative justice is explicitly introduced by the Act, it (i.e., restorative justice) does not necessarily exclude a punitive response, but rather 'widens the net of responses to youth crime'.⁶⁴

Trying to incorporate the notion of justice within the CDA and/or YCJA would appear to be an unattainable virtue. The American Supreme Court Justice Oliver Wendell Holmes was said to always be outraged when a lawyer used the word in court. Justice through legislation is relative as one party never fully reaches satisfaction. It is not fairness to all partners even under the guise of restorative justice. The point of any legislation should not be one of attempting to be legally just (since this is a factual improbability) but one that transcends political and/or naïve public ideas and truly places the best interest of the individual above subjective ideals. So while restorative justice fits well under the UN Convention on the Rights of the Child, it is important to improve the application of restorative justice, not only nationally but on an international level as well. Again, while restorative justice initiatives offer a promising alternative to convention juvenile justice, it is time to work towards a strong policy programme that objectively considers the best approaches and practices of introducing restorative initiatives. Neither the CDA nor the YCJA would appear to have effectively considered the magnitude of institutional reconstruction and redesign. Should we fail to do so, the political and social pendulum may prematurely swing away, or back to the draconian efforts of the past. For 'reforms based solely on arguments of expediency, reduced fiscal expenditures, vacuous behavioural science theories ... are likely to portend more contradictions and failures within our social structure'.⁶⁵

62. L. Gelsthorpe and V. Kemp, *loc. cit.*

63. J. Dignan, *loc. cit.*, p. 54.

64. S. Cohen, *Visions of Social Control* (Cambridge 1985).

65. B. Krisberg and J. Austin, *The Children of Ishmael* (Palo Alta, CA, 1978) p. 577.