THE *YOUNG OFFENDERS ACT*: ONE JUDICIAL PERSPECTIVE

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The Canadian response to youth crime has not been significantly different from the approach taken in other common law jurisdictions. The nature, purpose and effectiveness of the youth justice system formed the subject matter of over two decades of debate in our country. The reciprocal impact of legislative provisions and judicial functions are key components of that debate.

The *Young Offenders Act* became law on 2 April 1984.[1] It replaced the *Juvenile Delinquents Act*[2] which had formed the underpinning of the youth justice system and remained basically unchanged since its enactment in 1908. The old legislation became the target of criticism because it was perceived as incapable of fulfilling its promise to protect, treat, and guide young persons. Where treatment or help was given, there was fear that it was done at the expense of the youth's legal rights to a fair hearing. In Canada and other jurisdictions, there was concern that young persons were, in some cases, receiving the worst of both worlds, an informal hearing devoid of due process and no effective treatment.

The *Young Offenders Act* has not escaped close public scrutiny. The Act has been the subject of criticism for its failure to ameliorate the nature of our response to youth crime. The new "justice model" has not attracted reactions that are significantly more positive than those to its immediate predecessor, the "medical model." Many of the criticisms levelled at the *Young Offenders Act*, and by extension at the present youth court, should be focused on the manner in which the legislation has been implemented and the extent to which essential adjunctive resources have been provided. It has been suggested that any legislation has both an "expressive character" and an "instrumental character." The former represents the values that society aims to protect, and the latter represents the manner in which society prosecutes or implements the protection of those values.[3]

Both the *Young Offenders Act* and the *Juvenile Delinquents Act* were expressly promulgated under Parliament's authority to legislate in respect of criminal law and procedure. The new legislation has abandoned the omnibus offence of

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[1]R.S.C. 1985, c. Y-1 [hereinafter the *Young Offenders Act*].

[2]R.S.C. 1970, c. J-3 [hereinafter the *Juvenile Delinquents Act*].

[3]R. DeCuyper, "Review of the Basic Approach of Economic Crime" (1982) 53:1-2 Revue Internationale de Droit Pénal 50.

delinquency which included acts that were not criminal for adults (for example, sexual immorality). The young person is now charged directly under the *Criminal Code* or other federal statutes.[4]

The instrumental character of the *Juvenile Delinquents Act* was such that judges were expected to act as wise and caring parents. The formalities of evidence law and criminal procedure were insignificant compared to the need to "straighten out" a child. To that end the juvenile was to be treated "as an offender, one in a condition of delinquency, therefore requiring help and guidance and proper supervision."[5] The new legislation has in effect divorced the youth court from the child welfare court. However, the dispositional powers of the Act are not intended to be a substitute for child protection laws.

As a judge, I am increasingly aware that the effects of laws upon citizens, particularly young persons, are often determined by *other people*. The conduct of these *other persons* is determined more by custom, values and attitudes, which, to the extent that they can be defined, reflect and help establish the law. However, while laws may set out certain rules and guidelines, values are difficult, if not impossible, to compartmentalize legally or scientifically. While the law may succeed in expressing certain values that require protection, the will to provide the means to achieve the expressed goal is often wanting. The failure to inject vital resources into the value protection process should not reflect negatively on the merits of the latter. Much of the criticism directed at the *Young Offenders Act* has focused on the expressive character of the legislation, with little or no recognition of the need to clearly examine society's collective view of its instrumental character.

The problem of youth crime existed prior to the *Juvenile Delinquents Act*, and while different in nature, still exists despite the *Young Offenders Act*. If youth crime may be characterized as a phenomenon, then I venture to say the *Young Offenders Act* can be viewed as an epiphenomenon. In turn, the *Juvenile Delinquents Act* was the epiphenomenon to the phenomenon of youth crime prior to 1984. Society's legislative response to crime in both cases represents a secondary and companion situation. Neither the *Juvenile Delinquents Act* nor the *Young Offenders Act* should be perceived as realistic and effective solutions to the problem of crime. Nor should the *court* be seen as the solution. The legislation and the court process must be combined with other societal components if they are to be effective at all. The *Young Offenders Act* was not designed, and should not be perceived as having been designed, to effectively transform the youth court

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[4]R.S.C. 1985, c. C-46 [hereinafter the *Criminal Code*].

[5]*Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, s. 3(2).

into the emergency or treatment ward, or worse still, the catholicon for all social ills.

The problem of crime, which has plagued societies for years, can be approached from different points of view. We can look at the philosophies of how to deal with problem people[6] or we can look at the situation empirically, that is the problem itself or the offence.[7] Each of the approaches is legitimate, and most people are unlikely to be easily persuaded of the relative superiority of either approach. Suffice to say that the *Young Offenders Act* has provided an opportunity to re-examine these and other similar issues. This review is an opportunity to balance the competing theories and approaches. In re-examining these issues, it is particularly important to consider the different characteristics of the various stages of a youth's involvement in the court system, especially during adjudication and disposition.

As a judge, I remind myself that the youths that I see as alleged or actual offenders are but the tip of the "youthful conduct iceberg." Most young persons do antisocial acts. Not all of them get caught and most do not realize the impact of their actions upon victims. Should all young persons who do antisocial acts be the subject of criminal charges? The more serious cases may very well be exceptions and not the rule. Perhaps the problem should be viewed generally rather than focusing on the exceptional or sensational cases. If murder and manslaughter charges represent less than 1% of the charges against young persons, what significance does this have for society's attribution of such offences to a faulty or deficient piece of legislation?[8]

The *Young Offenders Act* abandoned the concept of the all-embracing offence of delinquency. Parliament's primary concern, expressed in the legislation, is now with the criminal conduct of young persons and not that of protection or child welfare. Protection of the child's welfare is duly enshrined in provincial and territorial civil legislation. The distinction between these two objectives, coupled with a clear recognition of due process of young persons, is consistent with, and in some areas stronger than, the rights provided under the *Charter*.[9] While some may lament the passing of the informal proceedings under the *Juvenile Delinquents Act*, the fundamental concept of fairness dictates that *any* person charged with a criminal offence should have recourse to a system that respects individual rights. No person should be pressured into an admission of guilt by well-meaning

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[6]*Le malade*, the condition of the person.

[7]*La maladie.*

[8]"Violent Offences by Young Offenders" (1986/87-1988/89) 10:5 Jurisdat 5. The figure is 0.4%.

[9]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

individuals who believe the alleged offender could benefit from supervision, guidance and treatment.

A finding of guilt in a youth court should not necessarily be the only condition for entry into a treatment centre or specialized programme of care and education. There are still too many situations where minor charges are laid for the purpose of *connecting* a protection-type youth to the process and resources of the *Young Offenders Act*. Mental health and child welfare proceedings *should* be the appropriate response. There are situations where I wish the court had the jurisdiction to suspend Young Offender proceedings, and, with minimum delay, transform or transfer the matter directly into a protection hearing.

Some have argued that the *Young Offenders Act* and due process have in fact stifled the possibility of informal resolution of conflicts. Section 4 of this Act has, on the contrary, clearly recognized that issues relating to alleged offences need not be formally dealt with in the court process. This legislative alternative to the judicial process has either not been implemented, or implemented in a minimal or restrictive manner. Surely this non-implementation is not a frailty of the Act? While the exercise of prosecutorial discretion varies considerably from region to region, this variation is no more a reflection of the weakness of the Act than is the unavailability of community resources to ensure early identification and intervention. Greater accessibility to alternative measures would enable the court to concentrate on the more serious or contested charges in a timely fashion. The professional training and development of persons participating in the investigation, prosecution, defence and disposition of young offender cases is essential for the proper administration of youth justice. Any deficiencies in that area, regardless of their root causes, cannot be attributed to the nature and character of the legislation.

The *Young Offenders Act*, like its predecessor, provides for the possibility of a transfer to an adult court in exceptional cases. The exceptional case is usually that of murder or attempted murder. Young persons found guilty in youth court of first or second degree murder are now subject to a maximum of five years less a day. The period of custody remains a maximum of three years, but an additional period of conditional supervision is provided. Amendments to the *Criminal Code* provide that when a young person is convicted of murder after a transfer to adult court, he or she will be eligible for parole after serving five to ten years of the sentence, rather than the ten to twenty-five years that applied before.

The new standard in transfer applications requires the court to consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person. If the two objectives cannot be reconciled, the court is required to order the transfer because protection of the public is paramount. While difficulties in the interpretation of these competing

objectives may not disappear under the new provisions, it is safe to assert that confusion and ambivalence should be greatly reduced in the future.

Transfer applications signal situations where the youth justice system is perceived as being inadequate or inappropriate given the circumstances of a case. Should this be necessary? Should not a separate youth justice system be such that it is capable of responding to *all* cases involving youthful offenders? The time, energy and resources spent on transfer hearings themselves may outweigh the costs of administrative, practical and adjunctive service reforms necessary to develop such a complete and comprehensive youth court system.

Aside from the practical difficulties, I see a philosophical or conceptual problem with the idea of transfers. The exercise is essentially a sentencing proceeding, but it is done prior to a finding of guilt. The evidence before the court is essentially hearsay. The nature of the offence, the circumstances surrounding its commission, medical and psychological reports and pre-disposition concerning the accused, are all presented in the context of an artificial proceeding.

One of the most cherished principles of our criminal common law is that an accused person is presumed innocent until proven guilty. However, in a transfer hearing the troublesome and rather schizophrenic "presumed innocent, but assumed guilty" approach is often used. There is an assumption that the Crown will be able to prove the alleged offence at trial. However, history has clearly shown that evidence subsequently called, admitted or proven at trial will not always substantiate the alleged offence. The result may be a finding of guilt on a lesser offence or an acquittal.

Assuming a successful prosecution, a traditional sentencing hearing involves the consideration of such elements as the following: the facts found by the court, the accused's character, background and feelings towards the victim, expressions of remorse or lack thereof, willingness to change and participate in restitution programmes, and so forth. The person preparing reports for a transfer hearing must respect the youth's fundamental right to silence and his or her right against self-incrimination. It is difficult to reconcile the process of transfer with the traditional principles of due process and judicial responsibility. This difference is over and above the practical dilemma of attempting to determine the appropriate sentencing forum on the basis of incomplete and potentially inaccurate factual situations.

If we must maintain a form of "safety valve" for exceptional cases, perhaps we might consider dealing with the issue of transfer to an adult court *after* a finding of guilt. I recognize the need to examine practical, legislative and perhaps constitutional factors, but surely that is no longer foreign to us.

The range of dispositional powers conferred upon the court by the *Young Offenders Act* is quite broad. The discretion of the court and others responsible for the execution of particular dispositions has been narrowed. Custodial dispositions are time-limited, and this too is perceived by some as being inimical to the traditional treatment-oriented philosophy of the youth court. On the other hand, some perceive the general increase in custodial dispositions as a reflection of society's and the court's increased punitive attitude. That a young person should have the right to refuse treatment, which is perceived to be in his or her interest, is a source of concern. For many, the maximum disposition for serious crimes is still problematic and proof that the Act is the primary cause of youth crime in our country.

The number and nature of dispositions under the *Young Offenders Act*, compared to those under the *Juvenile Delinquents Act*, must be examined in the context of their respective societal and systemic climates. The nature and frequency of the offences, the characteristics of the offender, and the alternatives available are all significant. However, realistic and reliable comparisons are very difficult. While custodial dispositions may have increased under the *Young Offenders Act*, they are generally of a shorter nature. The frequency of serious offences has risen, as has the involvement of female youth in these grave and violent offences. Just as importantly, custodial dispositions under the *Young Offenders Act* include many open facilities that were unavailable to the court before the Act (except as Children's Aid foster homes). I recall that after having succeeded in the enactment of an open-detention category prior to trial, some authorities pleaded with judges to re-examine the increased tendency to detain. The simple fact was that judges were more likely to order detention because they knew that often meant a community group home and not a secure institution.

I suggest that it might have been more realistic, and certainly less confusing, to ensure better alternatives to detention in the form of release on bail with specific conditions. The public, and particularly the youth and family, could better understand what was happening. You are either in or out, but the degree to which your liberty is affected while out on bail could vary. However, it was deemed more appropriate to categorize the degree of detention and make it such that some allegedly "detained" youth are basically no more detained than the average resident of a Children's Aid Society group home.

Frequently judges are asked by administrative authorities to *recommend* secure pre-trial detention in some cases. I normally refuse, politely reminding them that this was precisely the type of discretion that they wished to keep from the judge. It is interesting to note that the judicial discretion to determine the level of custody at the dispositional stage has been questioned. Perhaps the court will again be invited to *recommend* the level of custody in particular cases to provide

insurance against an administrative decision that might subsequently prove embarrassing.

Dispositions under the *Young Offenders Act* tend to reflect the emphasis on the offence and its characteristics more than those under the *Juvenile Delinquents Act*. Under the latter the characteristics of the delinquent youth dominated. Simple comparisons of the overall use rates of particular dispositions, without regard to such factors as the changed characteristics of the cases themselves, the screening of cases before court and the mix of offences on which youths are found guilty, are not particularly meaningful. While there may be a demonstrated change in philosophy or approach at the dispositional stage, I am not persuaded that it reflects an increased severity. It is certainly not the public's perception.

The discrepancies that occur in dispositions reflect the nature of the principles enunciated in the Act. They are also consistent with the perennial problem of sentencing. One reason that sentencing is often perceived as the most difficult judicial task is that, over and above the variability and complexity of the cases, society itself has difficulty defining exactly what it expects from the court. The traditional principles of sentencing in adult cases may be applied differently by different judges in similar fact situations. Such variation is potentially greater under the *Young Offenders Act* because, over and above the traditional principle of sentencing, there are other sometimes contradictory goals placed before the judge. For example, the youth's requirements of supervision, discipline, control, assistance, and guidance are sometimes in conflict with protecting society from illegal behaviour. There is also the goal that young persons should bear responsibility for their crimes, but not be held accountable in the same manner or suffer the same consequences as adults. It remains to be seen whether the dual objectives incorporated into the "interest of society" standard recently articulated for transfer hearings will be reflected in dispositions.

My main objective as a judge should be an appropriate and fair disposition which will hopefully:

(1) help to rehabilitate the offender and ensure that he or she becomes more productive, stable and law-abiding,[10]
(2) reflect the least restrictive alternative, and
(3) ensure society's interest in justice, peace and safety, having regard to the appropriate balancing the principles of the Act.

To accomplish this the court requires access to a wide variety of resources. The disparities and inadequate dispositions are often a function of the lack of

[10]I recognize that to speak of *re*habilitation, to some extent at least, presupposes a prior state of *ha*bilitation.

appropriate resources. Even if we were to arrive at near perfection in legislation, the expressed goals would be meaningless without the instrumental means with which to accomplish the desired tasks.

Many youths found guilty of offences may, nonetheless, function in the community while responding to the court's disposition of their case. Others, despite a wide array of community alternatives, may need confinement with or without treatment. As a judge, I am mindful that I can virtually guarantee punishment, but I cannot guarantee treatment. Over and above the uncertain state of the art, including its ultimate efficacy, treatment can mean different things to different people. Even if a youth consents to treatment, what assurance can the court and youth have that the promised treatment will be provided? "A young offender would be a fool to consent to help when he knows he can't get it."[11]

Ideally, a disposition should be seen as fair by the offender, the victim and the community. *The Young Offenders Act,* which espouses the justice model, is superior to its predecessor. This due-process model facilitates a more realistic examination of such factors as the nature and seriousness of the offence, the views of the victim, the circumstances surrounding the commission of the offence, the views of the offender, and his or her history and background. Due process:

> permits the opportunity to introduce one small piece of clarity and concreteness and thus may lead toward reduction of confusion, ambivalence and inconsistency by dealing with the events rather than the dynamics.[12]

The *Young Offenders Act* is regrettably perceived by some as having ineffective and simplistic solutions to, and therefore the undisputed cause of, the complex and multifaceted problem of crime. The focus must re-adjusted onto society's response to the need for community based preventive and treatment resources. These are necessary adjuncts to the legislation.

Our social and economic situation is such that we can hardly expect a reduction in youth crime. Social institutions, particularly schools, need the resources to identify persons at risk and intervene at an earlier stage. Inter-agency collaboration is desperately needed to ensure that intervention is coupled with, and not separate from, treatment resources. Where prevention and alternatives to the formal process are unsuccessful, collaboration in the system must replace the "turfitus" which saps the initiative of many dedicated persons and accounts for the duplication of some resources and the unavailability of others. There must be on-going evaluation of existing programmes, and timely sharing of research data. None of these factors have much to do with the legislation. Crozier, a

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[11]R. Meen, "Due Process: the Search Progress" (Address to the Conference on the *Young Offenders Act,* Toronto, 5 May 1987) [unpublished] at 3.

[12]*Ibid.* at 1.

distinguished French sociologist, explored the crisis of modern, industrial society and suggested some strategies for social change. In *The Stalled Society* he states:

> A society's capacity for action, its ability to reveal its own problems, to discover solutions to them and to put those solutions into effect, and its aptitude for innovation, all depend essentially on its established resources. Formal or informal institutions are the instruments of human co-operation. There can be no more exalted talk than to be concerned in their development. Imagination is not enough here. We must summon up other virtues whose intellectual qualities have long been forgotten, of which the most important are patience and courage.[13]

The *Juvenile Delinquents Act* had its flaws and the *Young Offenders Act* is not perfect, but we are making progress. The tradition of the juvenile court has left its mark in many positive respects. The blending of theory and experience with those of the other social sciences is imperative. As a judge I must be more than a legal technician. Law alone is incompetent to dictate an appropriate and adequate disposition. There is a need for informed and open collaboration in the prevention, prosecution and resolution of antisocial and criminal conduct. Funding hassles, professional jealousies, duplication of services and resources, and lack of co-operation must be challenged, reduced and eventually eradicated. The sound principles and goals expressed in the legislation will otherwise be at risk of becoming shallow shibboleths.

My effectiveness as a youth court judge may be affected by the legislation. But it is much more likely to be affected by the availability of human and material resources, which are the *sine qua non* of fulfilling the promise of the legislation.

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[13]M. Crozier, *The Stalled Society* (New York: Viking Press, 1973) at 177.