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SENTENCING YOUTH IN CANADA: A SUITABLE BALANCED APPROACH FOR VIETNAM OR FALLING FROM CHARYBDIS TO SCYLLA?

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Abstract

This paper examines the sentencing regime that applies to the youth in Canada. The origins, history, evolution and challenges that faced this sentencing regime are reviewed. Its comparison with its Vietnamese counterpart allows the author to identify specific elements that could perhaps be improved in Vietnam not forgetting the many relevant differences that exist between the Canadian and Vietnamese criminal law systems. The author submits that the Canadian experience regarding youth sentencing should be considered as a good example for Vietnam.

Keywords: *youth, Canada, Vietnam*

1. Introduction

The interest of studying the youth sentencing regime in Canada, and also to a certain extent that of Vietnam, lies in the fact that "the most controversial stage of proceedings for most young offenders charged with offences is sentencing."[1] For example, the *Youth Criminal Justice Act*[2] ('YCJA') has engendered several controversies regarding its sentencing principles.[3] What also makes the YCJA's sentencing regime worth to be studied is that its

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1 Corrado, R. R., Gronsdahl, K., MacAlister, D., & Cohen, I. (2006), 'Should Deterrence Be Sentencing Principle under the Youth Criminal Justice Act?', *Canadian Bar Review*, 85(3), p. 540 (hereinafter 'Corrado et al., 2006'); Corrado, R. R., Gronsdahl, K., & MacAlister, D. (2007), 'The Youth Criminal Justice Act: Can the Supreme Court of Canada Balance the Competing and Conflicting Models of Youth Justice', *Criminal Law Quarterly*, 53(1), p. 59 (hereinafter 'Corrado et al., 2007').

2 S.C. 2002, c. 1 (hereinafter 'YCJA').

3 Corrado et al. 2006, *supra* note 1, p. 546.

"sentencing provisions ... are more detailed and directive than juvenile justice reforms ... adopted in other common law jurisdictions."[4] As well put by Stubbs, "A key issue for consideration in any discussion of the juvenile justice system is the question of what principles should govern the sentencing of young offenders?".[5] This will be an underlying issue considered throughout this paper.

2. Youth Sentencing Regime in Vietnam

Broadly, "there are two types of procedures used to handle cases involving juveniles in conflict with criminal law: measures without resorting to judicial proceedings (diversion) and judicial proceedings."[6] Diversion does not, however, exist in Vietnamese criminal law,[7] but "[p]ractice shows that a large number of various diversion programmes were introduced and are being implemented around the world."[8] Thus, Vietnam seems to be somewhat isolated on that front on the international scene.

It is worth mentioning that one Vietnamese author lacks clarity and also seems to send a conflicting message when writing about Vietnam's compliance with international standards regarding youth sentencing. On one hand, she wrote that "the penalties and alternative measures in Vietnamese law are *quite close to the international standards*"[9] when, on the other hand, she wrote that "the Vietnamese juvenile justice system *does not meet international standards* with respect to diversions and alternative measures. Vietnamese laws have no legal terms corresponding to 'diversion' or 'alternative measure'."[10] These two statements from this author seem quite hard to reconcile.

Nevertheless, it remains true, according to different authors, that "Vietnam's legal regimes relating to the basic conditions of juvenile fall

4 Roberts, J. V., & Bala, N. (2003), 'Understanding Sentencing Under the Youth Criminal Justice Act', *Alberta Law Review*, 41(2), p. 397.

5 Stubbs, J. (1991), 'The Sentencing of Young Offenders in Canada: Question of Principle', *Current Issues in Criminal Justice*, 3(2), p. 226.

6 Tan Duy, L. H. (2018), 'Evaluation of Vietnamese Criminal Procedure Law Applicable to Juvenile Offenders (Case Study of the United Nations Model of Juvenile Criminal Justice)', *Kutafin Law Review*, 5(2), p. 361 (hereinafter 'Duy 2018').

7 Tan Duy, L. H. (2013), *Protecting the Rights of Juvenile Offenders in Vietnamese and Victorian Criminal Procedure Laws in Compliance with United Nations Benchmark Model of Juvenile Justice*, PhD Thesis, La Trobe University, p. 103 (hereinafter 'Duy 2013'); see, for example, Article 40(3) of the UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577 (hereinafter 'Convention'), that provides that States parties should promote measures for dealing with children in conflict with criminal law without resorting to judicial proceedings when appropriate and desirable, providing that procedural safeguards are fully secured.

8 Duy 2018, *supra* note 6, p. 361.

9 Pham, T. T. N. (2015), *The Rights of the Child in the Judicial Sector in Vietnam: Compliance with International Legal Standards*, Doctor of Philosophy thesis, Faculty of Law, Humanities and the Arts, University of Wollongong, p. 179 (italics added).

10 *ibid*, p. 196 (italics added).

shorts in many ways of meeting international standards".[11] For example, the *Convention on the Rights of the Child*[12] recognizes the possibility of detention or "imprisonment of a child, but it specifies that [it] must be a measure of last resort, in effect for the shortest appropriate period of time."[13] Thus, even though the Criminal Code of Vietnam provides for different types of sentences that apply specifically to the youth, such as reprimand,[14] warning, fine, non-custodial reform and imprisonment,[15] the latter remains in Vietnam the most frequent sanction applied to juvenile offenders, even if, in general, "[t]he evidence is overwhelming regarding the ineffectiveness of prison in terms of deterring young persons from committing further crimes."[16] Even if it has decreased in recent years,[17] imprisonment is certainly not 'a measure of last resort' in Vietnam for the youth.

Contrary to Vietnam, "[p]robation is the most common form of sentence for young persons" in Canada.[18] For quite minor offences, a reprimand[19] or an absolute discharge,[20] the least serious sentences, may also be imposed. As for fines, Bala reported that "[j]udges dealing with young offenders have usually been reluctant to impose a fine on a youth, since this is a purely punitive sanction."[21]

Vietnamese courts "can apply one of two judicial measures of educative and preventive characters, education at a commune or sending the offender to reformatory."[22] With respect to reform schools in Vietnam, Parèus wrote:[23]

On paper, reform schools in Vietnam offer a regime of education, counselling and vocational training to juveniles. The emphasis on these activities may distinguish a reform school from a regular prison setting or

11 Tan Duy, L. H. & Dandurand, Y. (2021), 'Alignment of Vietnamese Law on the Treatment of Juvenile Prisoners with International Standards and Norms', *Youth Justice*, p. 14 (hereinafter 'Duy & Dandurand').

12 Convention, *supra* note 7.

13 *Quebec (Minister of Justice) v. Canada (Minister of Justice)*, 2003 CanLII 52182 (QC CA), para. 149; Convention, *supra* note 3, article 37(c).

14 Law No. 100/2015/QH13, 27 November 2015, article 93 (hereinafter 'Law No. 100').

15 *ibid*, article 98.

16 Davis-Barron, S. (2015), *Youth and the Criminal Law in Canada*, 2nd edition, LexisNexis Canada, p. 337.

17 Duy & Dandurand, *supra* note 11, p. 2.

18 Davis-Barron, *supra* note 16, p. 424; Bala, N. & Anand, S. (2009), *Youth Criminal Justice Law*, 2th ed., Concord Irwin Law, p. 531.

19 Davis-Barron, *ibid*, p. 417: "In practice, reprimands are rarely used in youth justice court".

20 *ibid*, p. 420: "An absolute discharge is similar to a reprimand because neither sanction, once imposed, requires anything further of the young person. Similar to a reprimand, an absolute discharge is imposed after a finding of guilt."

21 Bala & Anand, *supra* note 18, p. 524.

22 Pham, *supra*, note 9, p. 195; Law No. 100, *supra*, note 14, article 98.

23 Parèus, F. (2014), *Policing Youth in Vietnam: Using Juvenile aReform as a Means of Social Control*, Master Thesis, University of Oslo, p. 56.

confinement in Vietnam. However, it is necessary to point out... the reality of the situation. First, it is important to highlight that in terms of the nature and manner of implementation in general, the administration, management and organization of the reform schools is notably under the control of the Ministry of Public Security, who are also responsible for the administration of the police force and prison system. In addition, it is the police who are the educators in the reformatories.

Parèus added that "there is a state interest in keeping a high number of youths in reform schools [in Vietnam] due to the component of forced labour and thus, a clear indication that detention is used beyond simply a means of last resort."[24] While the author may not necessarily agree with this bold statement, it would raise indirectly the question as to what would be the right approach between, on one hand, the rehabilitation and reintegration of the young offender and, on the other hand, the punitive aspect of law enforcement.

3. Canada, A World Leader in Youth Sentencing, But for What?

Canada had "one of the highest rates in the world of per capita use of courts and custody for adolescent offenders"[25] at the time when the *Young Offenders Act*[26], now repealed, was in force. For example, "the custodial rate for juveniles [was] as high, if not higher, in Canada than in the United States"[27] as well as Australia and New Zealand;[28] twice that of the United States, ten to fifteen times that of many European countries, Australia and New Zealand.[29] Thus, Canada could have been described in that time as a leader, but as "a world leader in imprisoning youth".[30]

Against that background, Bala and Roberts observed that a "major rationale for enacting the [YCJA] was to reduce Canada's high rate of custody for adolescent offenders, based on the belief that community-based responses are more effective for dealing with most young offenders."[31] This rationale is reflected in the preamble of the YCJA.[32] In short, rehabilitation

24 *ibid*.
25 Roberts & Bala, *supra* note 4, p. 396; see also Endres, K. (2004), 'The Youth Criminal Justice Act: The New Face of Canada's Youth Criminal Justice System', *Family Court Review*, 42(3), p. 527.
26 R.S.C. 1985, c. Y-1.
27 Roberts, J. V. (2003), 'Sentencing Juvenile Offenderas in Canada: An Analysis of Recent Reform Legislation', *Journal of Contemporary Criminal Justice*, 19(4), p. 418.
28 Doob, A. N., & Sprott, J. B. (1999), 'Changes in Youth Sentencing in Canada', *Federal Sentencing Reporter*, 11(5), p. 262; Davis-Barron, *supra* note 16, p. 341.
29 Anand, S. (2003), 'Crafting Youth Sentences: The Roles of Rehabilitation, Proportionality, Restraint, Restorative Justice, and Race Under the *Youth Criminal Justice Act*', 40 *Alta. L. Rev.* 943, p. 944.
30 *ibid*.
31 Bala, N. & Roberts, J. V. (2008), 'Canada's Juvenile System: Promoting Community-Based Responses to Youth Crime' in J. Junger-Tas & S. H. Decker, *International Handbook of Juvenile Justice*, Springer, p. 37.
32 Roberts & Bala, *supra* note 4, pp. 398-399; Endres, *supra* note 25, p. 529.

and reintegration of young persons who have been into trouble are the main goals of the YCJA.[33] For example, the prosecutor and police have the discretion to refer cases to '*extrajudicial* measures'[34] (previously called '*alternative* measures'[35] in the *Young Offenders Act*,[36] but these measures do not carry the same meaning), i.e. outside the court system.[37] This may take the form of a warning[38] or a caution[39].[40] These measures "do not require any finding or formal admission of guilt by the youth."[41] The existence of these measures is meant to contribute to lower the rate of youth incarceration.[42]

However, when the youth is incarcerated, the lengths of sentences imposed under the YCJA are usually significantly shorter than would be the case for adults. Practically speaking, "[f]or most offences, the maximum sentence that may be imposed in a youth justice court is two years, rising to three years for offences for which an adult is liable to a term of life imprisonment, and to ten years for murder."[43] Before the YCJA was enacted, a youth would typically serve the whole sentence in a custodial setting,[44] but with the YCJA all custodial sentences will involve a period in a custodial facility followed by a period of community supervision.[45]

4. Justifying the Comparison of Canada with Vietnam

According to Kropotkin, a Russian revolutionary and geographer as well as the foremost theorist of the anarchist movement, "Prisons do *not* moralize their inmates; they do *not* deter them from crime."[46] Without condoning what Kropotkin wrote about prisons, Canada, because of the evolution of its youth sentencing regime that ended up aiming to reduce the use of imprisonment in the context described above, may undoubtedly

33 Sections 3(1)(a)(ii) and 3(1)(b)(i) YCJA.

34 These measures "must be considered first, and the court process is resorted to only if the extrajudicial measures are not appropriate or adequate": Endres, *supra* note 25, p. 532; the broader concept of 'extrajudicial measures' is defined in section 2 of the YCJA as "measures other than judicial proceedings ... used to deal with a young person alleged to have committed an offence."

35 "the primary response to youth crimes was the court process, and alternative measures were only an alternative": Endres, *ibid*.

36 R.S.C. 1985, c. Y-1 (hereinafter 'YOA').

37 *R. v. T. (V.)*, [1992] 1 S.C.R. 749; see also sections 4(c), 4(d) YCJA.

38 Section 6 YCJA.

39 Section 7 YCJA.

40 Bala, N. (2003), 'Diversion, Conferencing, and Extrajudicial Measures for Adolescent Offenders', *Alberta Law Review*, 40(4), p. 1008: "there is no legal difference between a 'warning' and 'caution', but the 'caution' is seen as a more formal response".

41 *ibid*, p. 1010.

42 Endres, *supra* note 25, p. 535.

43 Roberts & Bala, *supra* note 4, p. 401.

44 Doob & Sprott, *supra* note 27, p. 266.

45 Bala, N. & Roberts, J. V. (2008), 'Canada's Juvenile System: Promoting Community-Based Responses to Youth Crime', in J. Junger-Tas & S. H. Decker, *International Handbook of Juvenile Justice*, Springer, p. 56.

46 Piotr Kropotkin, *In Russian and French Prisons*, London: Ward and Downey, 1887 (italics in the original).

serve as a relevant example, if not as *the* good example, for Vietnam's required changes to comply with international law standards that should be implemented in its approach to sentencing youth, in spite of the many differences between Canada's and Vietnam's criminal law regimes. One of the major differences that fundamentally distinguish Canada's law that applies to youth from Vietnam's is that the latter has a particular chapter "containing special provisions designed for juvenile offenders"[47] in its criminal code, and its "juvenile justice system is made up of a range of legal codes, decrees and ordinances",[48] whereas Canada has a separate law specifically designed to only apply to the youth.[49] While important, these structural differences are inconsequential for the weight of the comparisons made, for the discussion held and for the conclusions drawn in this paper.

5. Explaining (Not Justifying) Over-Incarceration of Youth

The over-incarceration of youth in Vietnam may find a partial explanation in the "justice officials' lack of trust in the effectiveness of community-based sanctions".[50] According to Tan Duy, the weight that the media have on "the public having biased views regarding the guilt of children and young offenders [could t]heoretically... affect judges in the decision-making process."[51] In our views, the nature of this comment could be similar to the contention that supposes that "judicial decision-making can be explained largely by frivolous factors, perhaps for example the relationship between what judges eat and what they decide."[52] However, while this is not a guarantee against any potential bias from the judicial, it should still not be forgotten that the Constitution of Vietnam "includes provisions ... to limit bias of judges",[53] then this scenario remains just that, theoretical – not saying that it could not perhaps exist.

From a Canadian perspective, the very same issue of possible judges' biases would be addressed by the concept of judge's "independence and impartiality [that] are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice."[54] A breach of independence and impartiality would be taken very seriously by

47 Duy (2018), *supra* note 6, p. 359.
48 Cox, P. (2010), 'Juvenile Justice Reform and Policy Convergence in the New Vietnam', *Youth Justice*, 10(3), p. 230.
49 Duy (2018), *supra* note 6, p. 359.
50 Duy & Dandurand, *supra* note 11, p. 2.
51 Duy (2013), *supra* note 7, p. 173.
52 Kozinski, A. (1993), 'What I Ate for Breakfast and Other Mysteries of Judicial Decision Making', 26 *Loy. L.A. L. Rev.* 993, p. 993.
53 Nicholson P. & Quang N. H. (2017), 'Independence, Impartiality and Integrity of the Judiciary in Vietnam' in H. P. Lee and Marilyn Pittard, *Asia-Pacific Judiciaries – Independence, Impartiality and Integrity*, Cambridge University Press, p. 391; for example, see Vietnam Constitution 2013, article 103(2) that reads: "The trials of the judges and assessors are independent and shall only obey the law", implying they should not follow their own personal opinions or biases, for example.
54 *R. v. Valente*, (1985) 2 S.C.R. 673, para. 22.

any (level of) courts in the first place. The importance of impartiality was also raised by the Honourable Murray Gleeson, former Chief Justice of Australia in the following words, "[j]udges ... are supposed to be dedicated to the proposition that the administration of justice requires both the reality and the appearance of impartiality."[55] The same perspective is shared by most, if not all, Commonwealth (and Special Administrative Region of Hong Kong, former Commonwealth) jurisdictions, including Canada.

Therefore, to comply with the rule of law, a theoretical or any kind of bias, as mentioned above, should not only be absent from judge's written or verbal court decisions, but also from the judge's decision-making process, which requires him or her to keep a fresh untainted mind, even when he or she was exposed to media coverage of a matter, or else of the kind. Nevertheless, judges should not be expected to live in a vacuum,[56] and then, they should be expected, in order to remain neutral, to resist any temptation to accept a version of events regarding a case, whatever the nature of the case is, based on facts reported outside of the courtroom. This equally applies to Vietnam and Canada, and in most judicial systems.

The over-incarceration of youth in Vietnam may also find a partial explanation in the "*narrow* judicial interpretation of the principle of proportionality focused almost *exclusively* on the seriousness of the offense".[57] This approach does not seem much different, at least at first glance, than what was found by the Quebec Court of Appeal in 2003 in the decision *Quebec (Minister of Justice) v. Canada (Minister of Justice)* that discussed the then-recently adopted YCJA, and where the court stated: "Sentencing is governed by a number of principles, one of which, the proportionality rule, gauges the accountability of the young person, particularly in terms of the seriousness of the offence."[58]

However, the similarity of the Vietnamese and Canadian approaches to youth sentencing ends there since, for instance, "paragraph 38(1)(e) and subsections 39(2), (3) and (5) [of the YCJA] ... provide that custody or imprisonment be subject to the obligation to impose *the least restrictive* sentence possible that offers *the best chance of rehabilitation and reintegration* into the community, since custody cannot be substituted 'for other [more appropriate] social measures'".[59]

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55 Gleeson, M., Chief Justice of Australia (August 16, 1998), *The Role of the Judge and Becoming a Judge*, National Judicial Orientation Programme, Sydney.

56 See, e.g., *Starr v. State, 297 Ark. 26, 759 S.W.2d 535* (1988).

57 Duy & Dandurand, *supra* note 11, p. 2 (italics added).

58 *Quebec (Minister of Justice) v. Canada (Minister of Justice)*, *supra* note 13, para. 36; section 38(2)(c) YCJA.

59 *ibid*, para. 41 (italics added); see also section 3(1) YCJA that sets out the governing principles under this Act and emphasizes rehabilitation and reintegration.

6. Historical Background

The examination of the evolution of Canada's youth sentencing regime would assist in understanding how Canada went from the status of 'world leader' in imprisoning youth to a juvenile justice system that focuses on the rehabilitation and reintegration of juvenile offenders, then it could perhaps serve as an example for countries that currently over-incarcerate youth and that could be willing to follow a similar path as Canada's, and that would then evolve accordingly.

6.1. Juvenile Delinquents Act

The *Juvenile Delinquents Act* (JDA)[60] was in force from 1908 to 1984. It was Canada's first national juvenile justice law. It recognized that young offenders should not be treated as criminal offenders, but rather as misdirected and misguided children.[61] Rather than imposing custody, informal responses to young offenders were very common,[62] including diversion even though the JDA did not include provisions directly dealing with it.[63] The JDA can be described as following the 'welfare model'[64] that is "primarily concerned with informal proceedings and broad discretion and, accordingly, highly individualized sentencing".[65] However, when the youth was given a custody sentence, Bala and Roberts noted:[66]

"The JDA provided for indefinite committals to youth custody facilities, based on the rationale that some juveniles needed the benefit of a significant period of time in a structured environment, away from a corrupting situation at home, and that the length of time needed to effect rehabilitation could not be determined by a court, but only by correctional officials after the youth spent time in custody."

The role given to correctional officers in that context clearly resembles that of Vietnam's reform schools that was previously described.

6.2. Young Offenders Act

The *Young Offenders Act* (YOA) was in force from 1984 to 2003 and replaced the JDA. The adoption of this new Act may be somewhat connected to the enactment of the *Canadian Charter of Rights and Freedoms*[67] in 1982, since

60 S.C. 1908, c. 40.
61 Bala & Roberts, *supra* note 31, p. 38.
62 Bala, *supra* note 40, p. 993.
63 *ibid*, p. 994.
64 However, "[i]n practice, most youth justice systems overlap in their approach, procedures and outcomes resulting in a mixture of characteristics from all the models": Corrado et al., 2007, *supra* note 1, p. 25.
65 *ibid*, pp. 19-20.
66 *ibid*, p. 39 (italics added); Bala (2009), *supra* note 34, p. 561.
67 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982 c.1.

the JDA may have been found to be "inconsistent with the legal protections recognized in the *Charter*".[68] Nine years after its adoption, the Supreme Court of Canada ('Court') in *R. v. (M.) J.J.*,[69] the "only significant judgment regarding young offender sentencing principles under the YOA",[70] had to resolve a debate regarding the role to be played by deterrence as a factor, and decided that general deterrence should be considered in sentencing, albeit to a lesser extent than for adults.[71] In spite of the statement of the Court in the latter decision, i.e. reformation and rehabilitation of a young offender "must be the ultimate aim of all dispositions", Cesaroni and Bala argued that "the Court's approach ... contributed to the high rate of use of custodial sentences under the YOA."[72] One of the reasons may be because the dominant objective of the YOA was to hold a youth accountable for their actions,[73] rather than to focus on their rehabilitation.[74] Along the same lines, the YOA "gave wide discretion to the judiciary and to professionals dealing with young people who were deemed to be delinquent",[75] and "offered little real guidance as to which youths should be imprisoned."[76]

The YOA is also more *offence*-oriented than *offender*-oriented as the JDA was.[77] In addition, according to Bala:[78]

"in the context of dealing with young offenders, many of whom have 'troubled' family backgrounds, [*R. v. M. (J.J.)*] often means support for longer periods in a 'controlled' environment, away from the presumed harmful influences of the family. This implicitly indicates support for longer custodial sentences for many young offenders. This is in direct contrast to the use of rehabilitation as a factor in adult sentencing, where it is invariably used to justify a shorter custodial sentence."

This situation led the Parliament to amend the YOA in 1995 and add section 24(1.1) that provides that "the youth court shall take into account ... that an order of *custody shall not be used as a substitute for appropriate child protection*, health and other social measures." As a side note, let us mention

68 Bala & Roberts, *supra* note 31, p. 39.
69 [1993] 2 S.C.R. 421, p. 434 (hereinafter 'M. (J. J.)').
70 Anand, *supra* note 29, p. 947.
71 Cesaroni, C., & Bala, N. (2008), 'Deterrence as Principle of Youth Sentencing: No Effect on Youth, but Significant on Judges', *Queen's Law Journal*, 34(1), p. 453; Davis-Barron, *supra* note 16, p. 367; M. (J. J.), *supra* note 65, p. 496.
72 Cesaroni and Bala, *ibid*, p. 454.
73 Section 3(1)(a.i) YOA.
74 Bala & Roberts, *supra* note 31, pp. 39-40.
75 Stubbs, *supra* note 5, p. 229.
76 Bala & Roberts, *supra* note 31, p. 53.
77 Anand, *supra* note 29, p. 947.
78 Bala, N. (1993), '*R. v. M. (J. J.)*: The Rehabilitative Ideal for Young Offenders – Back to the Past?', 20 C.R. (4th) 308, p. 309.

that this principle was also carried over in the YCJA that provides under section 39(5) that custody cannot be substituted for other more appropriate social measures.

Nevertheless, in 1998, the Canadian Minister of Justice still "believed that the system relie[d] too heavily on custody as a response to the vast majority of non-violent youth when alternative, community-based approached can do a better job of instilling social values".[79]

Justice Charron of the Court wrote in the decision *R. v. B.W.P.; R. v. B.V.N.*, "Parliament did not simply amend its predecessor, the YOA, it repealed it",[80] and then it adopted a new Act, the YCJA, which started from a clean slate. Justice Charron also discarded the use of "a detailed comparison of the two statutes"[81] as well as court precedents decided under the YOA, including the decision of the Court in *R. v. M. (J.J.)* should they be used to interpret the YCJA.

6.3. Youth Criminal Justice Act

Scholars argued that the "inherent ambiguities and inconsistencies" of the YOA would "ultimately lead to major reforms".[82] As we now know, this rather led to the adoption of the YCJA in 2003, which was "a complete overhaul of the juvenile justice system."[83] As observed by Roberts and Bala, "the YCJA articulates new principles for the sentencing of young offenders and creates new sentencing options."[84] This is not to say that the YCJA is flawless since it would still require some improvements, i.e. legislative amendments for instance, to the extent where, for example, "some principles are mentioned several times, in slightly different ways, and the relationship between certain important and sometimes inconsistent principles is not clearly explained."[85]

The Court stated in the decision *R. v. C.D.*; *R. v. C.D.K.* rendered in 2005, two years after the enactment of the YCJA:[86]

79 Doob, A. N. & Sprott, J. B. (2006), 'Punishing Youth Crime in Canada: The Blind Men and the Elephant', *Punishment and Society*, 8(2), p. 229.

80 [2006] 1 S.C.R. 941, para. 19.

81 *ibid*, para. 21.

82 Reported in Corrado et al. (2007), *supra* note 1, p. 15.

83 Roberts, *supra* note 27, p. 413.

84 Roberts & Bala, *supra* note 4, p. 396.

85 *ibid*, p. 397. For example, "The issue of parity in sentencing is further complicated by Charron J.'s holding in *R. v. B.W.P.; R. v. B.V.N.* that the approach to sentencing under the YCJA is highly individualized and offender-centric. On the hand, the youth sentence must be similar to youth sentences imposed similar young persons in the region found guilty of the same offence committed in similar circumstances. On the other hand, the sentence must be carefully crafted to fit the circumstances and rehabilitative needs of the particular young person before the court. These two principles do not always appear reconcilable.": Davis-Barron, *supra* note 16, pp. 351-352.

86 [2005] 3 S.C.R. 668, para. 59 (italics added).

"... *the YCJA*, which departs from the YOA's discretionary approach to custodial dispositions and instead provides for *clear conditions* that must be satisfied before a custodial disposition can even be considered as an option, *was designed, in part, to send a clearer message to those involved in the youth criminal justice system about restricting the use of custody for young offenders* ..."

The alleged clarity of the legislative intention of the YCJA did not prevent some authors to argue that "one of the most contentious issues in the interpretation of the YCJA was whether deterrence should be a factor in the sentencing of young offenders."[87] Key sentencing principles were not included in the YCJA, such as general or specific deterrence.[88] Justice Charron recalled the definitions and also distinguished these principles as follows in the decision *R. v. B.W.P.; R. v. B.V.N.*:[89]

Deterrence, as a principle of sentencing, refers to the imposition of a sanction for the purpose of discouraging the offender and others from engaging in criminal conduct. When deterrence is aimed at the offender before the court, it is called 'specific deterrence', when directed at others, 'general deterrence'.... General deterrence is intended to work in this way: potential criminals will not engage in criminal activity because of the example provided by the punishment imposed on the offender. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity.

Denunciation was not included either in the YCJA as a sentencing principle.

In 2003, the year of the adoption of the YCJA, two authors suggested that "[a]lthough the term 'deterrence' has disappeared from the statute, the concept of deterring young offenders may well continue to underlie the sentences that some judges impose."[90] Sections 3 and 38 of the YCJA both speak of 'meaningful consequences', but the YCJA does not define its meaning. Section 38 states that the goal of young offender sentencing is to be achieved by holding "a young person accountable for an offence through the imposition of just sanctions that have *meaningful consequences* for the young person and that promote his or her rehabilitation and reintegration into society." Roberts noted that the words 'meaningful consequences' are ambiguous and that "[s]ome judges may interpret the phrase to connote

87 Cesaroni & Bala, *supra* note 71, p. 451.
88 Davis-Barron, *supra* note 16, p. 365; Corrado et al. (2006), *supra* note 1, p. 542 and p. 544.
89 *Supra* note 80, para. 2; Davis-Barron, *ibid*, p. 366.
90 Roberts & Bala, *supra* note 4, p. 400.

severe sanctions; for these, it may be deterrence in disguise."[91]

With respect to the interpretation of the words 'meaningful consequences', Robert and Bala commented:[92]

"A society that permits criminal behaviour without imposing consequences on offenders invites lawlessness. The presence of meaningful consequences could therefore be interpreted as the existence of responses sufficiently rigorous to deter the offender and, possibly, other potential offenders. If not to serve as a *deterrent*, why should wrongful conduct be accompanied by "meaningful consequences"? In everyday discourse, when someone is informed that certain actions on their part will have "meaningful consequences," this information is imparted in an attempt to inhibit the conduct in question – *deterrence*, in other words."

However, the Court decided otherwise stating that the wording of the YCJA "can only support the conclusion that Parliament deliberately excluded general deterrence as a factor of youth sentencing."[93]

It could be said in all fairness that Justice Charron made a prophetic statement in 2006 in *R. v. B.W.P.; R. v. B.V.N.* when she wrote: "Had Parliament intended to make deterrence part of the youth sentencing regime, one would reasonably expect that it would be expressly included in the detailed purpose and principles set out in the statute."[94] Indeed, in 2012, the Parliament made legislative amendments to the YCJA to include specific deterrence and denunciation as sentencing principles. But, perhaps, the result of having the Parliament bring the said amendments could be a basic example of the vague application of the dialogue between the courts and the legislatures,[95] where the latter fixed what was identified as flawed by the highest court of the land. According to Davis-Barron,[96]

... this "constitute[d] a 'quantum shift' in the approach to sentencing young persons. It is a notable departure in light of the original intent of the YCJA. One of the major purposes of the YCJA, as originally introduced, was to reduce the incarceration of young persons ... *specific deterrence and denunciation are now codified sentencing objectives* that a youth justice court can consider when determining the appropriate youth sentence.... These principles more directly support jail sentences... they were excluded from the YCJA of 2003.

91 Roberts, *supra* note 27, p. 420.
92 Roberts & Bala, *supra* note 4, pp. 399-400 (italics added).
93 *Supra* note 80, para. 34.
94 *ibid*, para. 24.
95 See, e.g., Rosenberg M. & Perrault S. (2002), 'Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada', 16 *Supreme Court Law Review* 375.
96 Davis-Barron, *supra* note 16, pp. 335-336 (italics added).

Conclusion

Pham suggested that "[p]enalties applicable to juvenile offenders [in Vietnam] should be *expanded*, provided the court more options when imposing a particular measure or punishment on juvenile offenders."[97] In the same vein, Tan Duy wrote that "the legal framework [applicable to youth in Vietnam] should adopt a wide range of sentencing options in order to assist the court to choose the most suitable measure to apply in each case."[98]

In Canada, youth court judges have a broad range of penalties and sanctions which can be imposed. The range of punishments and penalties is broader than what might be considered for adults who have committed crimes. The court has the choice of imposing on the young person, among other measures, a reprimand,[99] an absolute discharge,[100] a fine,[101] restitution of the stolen property,[102] the performance of a community service,[103] the obligation to enter an intensive support and supervision program[104] or a custody order, the length of which may vary depending on the offence committed.[105] Eighteen different sanctions are available, at the fingertips of the youth court judge, which gave them with the YCJA, at least in 2003,[106] "a wider range of sanctions than most other common law jurisdictions. The increase in the range of available sanctions will, in all likelihood, have two effects: it will help to reduce the number of committals to custody as judges have more options from which to choose, and, at the same time, it may increase the variability of outcome at the sentencing stage."[107]

However, in light of the (chaotic or unstable, at best) evolution of the youth sentencing regime that first came to life in Canada with the JDA, then changed with the adoption of the YOA, and then changed again with the adoption of the YJCA, which was also, in turn, amended on an important point regarding sentencing, the author of this paper submits that the sole availability of a wide range of penalties and sanctions should unfortunately not be considered as sufficient to really reduce the number of committals to custody. For example, specific deterrence and denunciation were brought by way of amendments in the YCJA in 2012 where the Court considered *initially*,

97 Pham, *supra* note 9, p. 295 (italics added).
98 Duy (2013), *supra* note 7, p. 42.
99 Section 42(2)(a) YJCA.
100 Sections 42(2)(b) and (c) YJCA.
101 Section 42(2)(d) YJCA.
102 Section 42(2)(f) YCJA.
103 Section 42(2)(i) YCJA.
104 Sections 42(2)(l) and (m).
105 Sections 42(2)(n) to (r).
106 Roberts & Bala, *supra* note 4, pp. 416-417.
107 *ibid*.

before these amendments, that the absence of inclusion of 'deterrence' in the YCJA made this principle *not* applicable to youth sentences rendered under the YCJA regime. This evolution is an example of how much a sentencing regime may vary and evolve, potentially in various different directions, in terms of relevant and applicable principles. More is required for the sentencing regime to perhaps become stable rather than falling (potentially) from Charybdis to Scylla.

Anand had wisely stated in 2003 that "[o]ne of the largest obstacles to overcome in reducing the use of youth incarceration is judicial inertia concerning youth sentencing practices." Keeping that in mind, having a broad range of options is only one part of the solution, but is not the only one. On one hand, the will of the judiciary to use and rely on these different options, which sometimes may need to call for a change of judicial culture, and, on the other hand, ensuring that the legislature a country will adopt and/or keep a substantially clear legislation, are also part of the solution. This bonified suggested solution should not be understood as being exhaustive. This reasoning undoubtedly applies entirely to both Canada and Vietnam. ●

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