Victims to Partners: Child Victims and Restorative Justice

Tali Gal

A thesis submitted for the degree of Doctor of Philosophy at The Australian National University

25 May 2006
Declaration

This thesis is an account of research undertaken between March 2003 and May 2006 at The Research School of Social Sciences, Regulatory Institutions Network, The Australian National University, Canberra, Australia.

Except where acknowledged in the customary manner, the material presented in this thesis is, to the best of my knowledge, original and has not been submitted in whole or part for a degree in any university.

Tali Gal
25 May 2006
Preface

I had been a children’s rights lawyer in Israel, working regularly with child victims of crime, when I decided to learn about restorative justice and explore its appropriateness as an alternative to the criminal process for child victims. I was led by frustration with the formal court process and its inability to address the needs and views of those young victims who sought the help of the non-governmental organization I was working for. These victims, and often their families, felt they were being unheard, disrespected and lost in the system — despite the fact that Israel has some far-reaching laws protecting child victims and witnesses from the hassles of the court process. It was not revenge that they wanted, but opportunities to tell their stories and to let their offenders know what they had caused them. They also wanted professionals to take them seriously and consider their views. Lacking any real solutions, I often could only comfort them and refer them to treatment.

Beyond my frustration with the criminal process, my work as a children’s advocate also taught me how much children of all ages want, and are able, to take part in decision-making in matters regarding their lives. Parents and professionals are so focused on protecting children from harm (a novel goal in itself) that they sometimes forget to treat them as individuals. At the same time I often encountered the limitations of a strictly rights approach, which might suit lawyers, but does not necessarily promote the interests of children.

During the course of this research I became a mother, and that only strengthened my conviction that with adequate help and genuine respect, even young children can be active participants in our daily lives.

I hope that this work will find its way to make a difference in some child’s life, as even one child is a whole world.
Acknowledgements

I would like to express my thanks to all of the people whose help, advice and support made significant contributions to this thesis. First and foremost, many thanks go to my primary supervisor Professor John Braithwaite, who has been a constant source of encouragement and brilliant guidance throughout the process. John’s willingness to be my PhD supervisor was the reason for moving to Australia, and it turned out to be a wonderful decision, much of it thanks to his inspiring supervision. I am also very grateful to my second supervisor Dr. Heather Strang, for many thoughtful comments and constant warmth and support. Next, thanks to the third member of my supervisory panel, Dr. John Seymour, who provided excellent advice about specific chapters as well as general contributions to the central argument of the thesis. Thanks also to all of the staff, students and associates of the Regulatory Institutions Network. It has been a joy to be part of such a stimulating and supportive academic environment. In particular I would like to thank those brilliant academics who read earlier drafts and provided helpful comments: Dr. Eliza Ahmed, Dr. Val Braithwaite, Prof. Hilary Charlesworth, Dr. Nathan Harris, Dr. Lyn Hinds and Dr. Brenda Morrison. Similarly, the marvellous opportunity of studying at the Australian National University must be acknowledged, and would not have been made possible without the ANU funding. On a more personal level, warm thanks go to my family and friends who often provided balance and assistance when most needed. I have been very fortunate to be surrounded with people whose fields of expertise were relevant to this work. I would especially like to thank Dr. Sharon Bessell, Tony Foley, Prof. Shahar Mendelson, Dr. Tamar Morag, Peter Reddy, Mary Schwartz, Prof. Herman Schwartz, Dr. Sascha Walkley, and my father Dr. Reuven Gal, who contributed their time and thoughts through reading drafts and commenting on them, in addition to their continuing care and support. Thanks also to Eldad Ohayon and Anna Cirjak for acting as family in times of need. I would also like to thank my mother, brother and sister in law and my parents in law for always staying very close, despite the geographical distance, and for their ongoing kindness, love and encouragement. Finally, my greatest thanks go to my husband Omri Guttman and my son Guy Guttman, who make life wonderful, even in the hardest days.
Abstract

Children belong to one of the most vulnerable population groups to crime. Child victims of crime have to overcome the difficulties emerging from their victimization as well as those resulting from their participation in the adversarial criminal justice process. Child victims are typically treated by legal systems as either mere witnesses — prosecutorial instruments — or as objects of protection. Children’s human rights and their needs beyond immediate protection are typically ignored.

This thesis combines an examination of children’s human rights (articulated largely in the UN Convention on the Rights of the Child) with a review of psychosocial literature on children’s needs. It integrates the two disciplines thus creating a ‘needs–rights’ model regarding child victims. This model is then used to evaluate the criminal justice process and its successes (and failures) in meeting the needs and rights of child victims. Such an integrated needs–rights evaluation identifies not only the difficulties associated with testifying in court and being interviewed multiple times. It goes beyond these topical issues, and uncovers other shortcomings of the current legal system such as the lack of true participation of child victims in the decision–making process, the neglect of rehabilitative and developmental interests of victimized children, and the inherent inability of the adversarial process to seek proactively the best interests of child victims.

The thesis further explores an alternative to the criminal justice process — that of restorative justice — and examines its applicability to child victims. Unlike the criminal justice paradigm, restorative justice fosters the equal participation of the stakeholders (in particular victims, offenders and their communities), and focuses on their emotional and social rehabilitation while respecting their human rights. To explore the suitability of restorative justice for child victims, five restorative justice schemes from New Zealand, Australia and Canada and their evaluation studies are reviewed. Each of these schemes has included child victims, and most of them have dealt with either sexual assaults of children or family violence and abuse. Yet each of the evaluated schemes illuminates different concerns and proposes varying strategies for meeting the needs–rights of child victims.

While these schemes demonstrate the significant potential of restorative justice to better address the full scope of the needs and rights of child victims, they uncover emerging concerns as well. Therefore, in the last part of the thesis, the needs–rights model is used once again to derive subsidiary principles for action, to maximize the benefits of restorative justice for child victims and minimize the related risks. A complex set of needs and rights is managed by a method of grouping them into needs–rights clusters and deriving from them simple heuristics for practitioners to follow. This clustering method of needs–rights-heuristics is a methodological contribution of the research to the psychology of law.
# Contents

Declaration ii  
Preface iii  
Acknowledgements iv  
Abstract v  

1 Introduction 2  
1.1 Thesis aim 3  
1.2 Thesis overview 3  
1.3 Thesis scope 4  
1.4 Restorative justice: definition and central principles 7  

2 Children’s Rights 11  
2.1 Introduction 11  
2.2 The rights discourse: critics and proponents 12  
2.2.1 Rights versus needs discourses: strengths and weaknesses 14  
2.2.2 An international human rights discourse 15  
2.3 Why talk about children’s rights? 16  
2.3.1 Minow’s Relational Model of Rights 18  
2.3.2 Federle’s Empowerment Rights Model 20  
2.4 Theories of rights in relation to children: the needs–rights debate 21  
2.5 Conclusions so far 25  
2.6 International children’s rights documents 26  
2.7 The UN Convention on the Rights of the Child 27  
2.8 The general principles of the Convention 29  
2.8.1 First guiding principle: Equality 30  
2.8.2 Second guiding principle: the Best Interests of the Child 31  
2.8.3 Third guiding principle: Life, Survival and Development 35  
2.8.4 Fourth guiding principle: Participation 37  
2.9 Child–victims’ rights under the Convention 43  
2.9.1 Protection against victimization 45  
2.9.2 The right to rehabilitation 45  
2.10 Conclusions 46  

3 Child Victim’s Needs: Findings from the Psycho–Social Literature 51  
3.1 Introduction 51  
3.2 Crime and its aftermath 51
## Contents

3.2.1 The effects of crime on children ........................................ 53
3.3 Victims’ needs in the healing process: theories and findings ........ 58
  3.3.1 Empowerment and control ........................................... 59
  3.3.2 Procedural justice ..................................................... 66
  3.3.3 Direct interaction with the perpetrator ............................. 68
  3.3.4 Material reparation .................................................... 72
  3.3.5 Group discussion ...................................................... 72
  3.3.6 Support network ....................................................... 73
  3.3.7 Social acknowledgment and validation .............................. 75
3.4 Bridging between needs and rights: an integrated discourse ........ 76
3.5 Conclusion ................................................................. 81

4 Child Victims in the Criminal Justice System .......................... 84
  4.1 Introduction .............................................................. 84
  4.2 Victims in the criminal justice process: distressing elements .... 85
  4.3 Child victims in the criminal justice process: particular vulnerabilities .............................................................. 87
    4.3.1 Testifying in court ................................................... 88
    4.3.2 Waiting for the testimony ........................................... 89
    4.3.3 In the courthouse .................................................... 89
    4.3.4 Specific issues in family abuse cases ............................ 89
    4.3.5 Summary ............................................................... 89
  4.4 Recent reforms and their limitations .................................. 90
  4.5 Potential benefits of the criminal justice process for child victims .............................................................. 94
  4.6 A needs–rights evaluation ................................................ 96
    4.6.1 The Best Interests cluster .......................................... 97
    4.6.2 The Control cluster ................................................. 100
    4.6.3 The Procedural Justice cluster ..................................... 103
    4.6.4 The Protection cluster .............................................. 105
  4.7 Conclusions ............................................................... 109

5 Restorative Justice Experiences Involving Child Victims .............. 115
  5.1 Introduction .............................................................. 115
  5.2 Three major forms of restorative justice processes .................. 117
  5.3 Potential benefits of restorative justice for victims ................ 119
    5.3.1 Particular potential benefits in family violence and other serious crimes .............................................................. 120
  5.4 Relevant restorative justice experiences ................................ 121
    5.4.1 New Zealand .......................................................... 122
    5.4.2 South Australia ....................................................... 124
    5.4.3 The Australian Capital Territory .................................. 127
    5.4.4 Hollow Water ......................................................... 134
    5.4.5 Newfoundland and Labrador ....................................... 135
  5.5 Discussion: central concerns and challenges .......................... 142
  5.6 Conclusions ............................................................... 151
## 6 Victims to Partners: A Child–Inclusive Approach in Restorative Justice

6.1 Introduction ............................................ 153
6.2 The Best Interests cluster of principles for action ................. 155
6.3 The Control cluster of principles for action ....................... 158
   6.3.1 Participation–enhancing techniques .......................... 163
   6.3.2 The Sierra Leone Truth and Reconciliation Committee: a test case .................................................. 164
   6.3.3 Child representation ............................................. 166
6.4 The Procedural Justice cluster of principles for action .......... 168
6.5 The Protection cluster of principles for action .................... 170
6.6 Child–inclusive restorative justice: heuristic principles ........ 173
6.7 A final (idealistic) comment ........................................ 180

## 7 Conclusions

7.1 A human rights discourse in the case of child victims ............ 181
7.2 An integrated needs–rights model ................................ 184
7.3 An inchoate model ............................................. 184
7.4 A needs–rights evaluation: the criminal justice process ........ 187
7.5 Restorative justice and child victims: the potential ............ 190
7.6 Fulfilling the potential: using a needs–rights model as a guide .. 190
7.7 Working heuristically: from theory to a simple blueprint .......... 191
7.8 A methodological contribution .................................... 194
7.9 Moving beyond child victims ....................................... 195
7.10 Beyond restorative justice ......................................... 196

Bibliography .......................... 198
## List of Figures

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1</td>
<td>Roger Hart’s Ladder of Participation (1992)</td>
<td>42</td>
</tr>
<tr>
<td>2.2</td>
<td>Child victims’ rights: a visual account</td>
<td>49</td>
</tr>
<tr>
<td>3.1</td>
<td>Integrating psycho–social and legal discourses: a needs–rights model for child victims</td>
<td>78</td>
</tr>
<tr>
<td>4.1</td>
<td>The Best Interests cluster: shortcomings of the criminal justice process</td>
<td>98</td>
</tr>
<tr>
<td>4.2</td>
<td>The Control cluster: shortcomings of the criminal justice process</td>
<td>101</td>
</tr>
<tr>
<td>4.3</td>
<td>The Procedural Justice cluster: shortcomings of the criminal justice process</td>
<td>104</td>
</tr>
<tr>
<td>4.4</td>
<td>The Protection cluster: shortcomings of the criminal justice process</td>
<td>107</td>
</tr>
<tr>
<td>4.5</td>
<td>A needs–rights evaluation: shortcomings of the criminal justice process</td>
<td>111</td>
</tr>
<tr>
<td>6.1</td>
<td>The Best Interests cluster: principles for action in restorative justice settings</td>
<td>156</td>
</tr>
<tr>
<td>6.2</td>
<td>The Control cluster: principles for action in restorative justice settings</td>
<td>159</td>
</tr>
<tr>
<td>6.3</td>
<td>The Procedural Justice cluster: principles for action in restorative justice settings</td>
<td>169</td>
</tr>
<tr>
<td>6.4</td>
<td>The Protection cluster: principles for action in restorative justice settings</td>
<td>171</td>
</tr>
<tr>
<td>6.5</td>
<td>A needs–rights framework for a child–inclusive restorative justice: principles for action</td>
<td>174</td>
</tr>
<tr>
<td>7.1</td>
<td>Child victims’ rights: a visual account</td>
<td>183</td>
</tr>
<tr>
<td>7.2</td>
<td>Integrating psycho–social and legal discourses: a needs–rights model for child victims</td>
<td>185</td>
</tr>
<tr>
<td>7.3</td>
<td>A needs–rights evaluation: shortcomings of the criminal justice process</td>
<td>188</td>
</tr>
<tr>
<td>7.4</td>
<td>A Needs–Rights framework for a child–inclusive restorative justice: principles for action</td>
<td>192</td>
</tr>
</tbody>
</table>
List of Tables

3.1 Theories on control and their analysis of past and present control . . 63