



UN STANDARDS AND NORMS ON JUVENILE JUSTICE: FROM SOFT LAW TO HARD LAW

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From soft law to hard law

outline:

- Why do we need standards and norms?
- What are the standards and norms on juvenile justice?
- How do they affect our work as practitioners?
- From "soft law" to "hard law": the impact of the Convention on the Rights of the Child

Why do we need standards and norms?

"each society itself decides what is crime and what to do about it"

- > criminal justice has long been purely territorial
- > each criminal justice system is different
- > particularly true for juvenile justice

Why do we need standards and norms?

- London, 1872: First International Congress on Crime Prevention and the Repression of Crime, including Penal and Reformatory Treatment
 - “children hovering on the verge of criminality”
 - “what is the best organization of reformatory institutions for juveniles”
- Paris, 1882: first of many international congresses on child welfare



Why do we need standards and norms?

➤ League of Nations

- Child Welfare Committee
- juvenile justice became an intergovernmental issue



Why do we need standards and norms?

➤ United Nations

- continued exploration of “what works” in juvenile justice
 - one third of the first UN criminal policy programme dealt with juvenile justice:
 - medical and educational measures for children with antisocial tendencies
 - employment and protection of children leaving school
 - treatment of juvenile offenders with medical and educational methods

Why do we need standards and norms?

➤ United Nations

- staple of UN Congresses
 - focus on offenders, or “at-risk” children?
 - proper scope of treatment and punishment
 - criteria for success or failure of treatment
 - what should be the age limits?
- growing strength of human rights basis:
 - 1948 Universal Declaration of Human Rights
 - 1966 Covenant on Civil and Political Rights

Why do we need standards and norms?

- a “standard and norm”
 - defines acceptable conduct
 - sets the minimum level of the quality of justice
 - guides the direction of reform
- an international standard and norm is intended to apply to
 - different countries
 - at different stages of development
 - with different legal and administrative systems



Why do we need standards and norms?

➤ many forms:

- resolutions,
- recommendations,
- declarations,
- standard minimum rules,
- basic principles,
- proclamations,
- statements,
- guidelines, code of conduct, codes of ethics ...

EXAMPLE OF A NORM

RIGHT: right to liberty

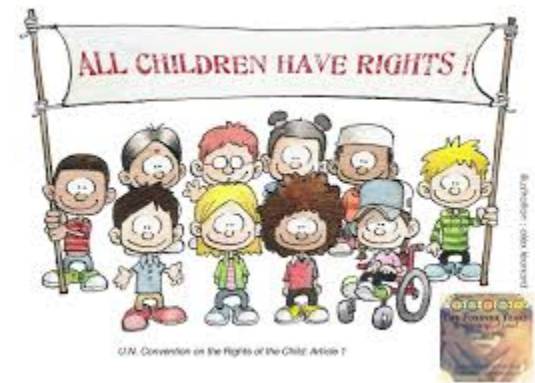
INTERNATIONAL STANDARD: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." (Article 9 paragraph 1 of the International Covenant on Civil and Political Rights)

standards and norms on juvenile justice

- UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules; 1985)
- UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines; 1990)
- UN Rules for the Protection of Juveniles Deprived of Liberty (the Havana Rules; 1990)
- 1997 Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines; 1997)

standards and norms on juvenile justice

- these four are “soft law”: they are not legally binding
- one hard law instrument:
 - the Convention on the Rights of the Child (1989)
 - widely ratified: universal
 - implementation review:
Committee on the
Rights of the Child
 - states report every five years
 - General Comments



How are standards and norms drafted and approved?

- general process of drafting and adoption:
 - initiative from individual experts or organizations
 - preparation of draft
 - discussion of draft at several expert meetings
 - discussion at the UN Commission (or equivalent)
 - adoption by ECOSOC / General Assembly
 - (publication and dissemination by UN Secretariat)

- some changes since the 1992 UN restructuring:
 - bigger role for States
 - use of open-ended intergovernmental meetings

the Beijing Rules

➤ **Beijing Rules** history:

- Sixth United Nations Congress called for “model rules on juvenile justice administration”
- first draft by Professor Horst Schüler-Springorum
- UN *ad hoc* Meeting of Experts on Youth, Crime and Justice (1983; Newark, New Jersey)
- five-week international seminar at UNAFEI
- Sixth Joint Bellagio Colloquium
- Interregional Preparatory Meeting (Beijing)
- Seventh UN Congress (Milan, 1985)
- adoption by the General Assembly

the Beijing Rules

- guiding principle of juvenile justice: well-being of the juvenile and his or her family
- non-discrimination
- age of criminal responsibility should not be too low
- use of discretion and diversion
 - detention only as a last resort
 - deprivation of liberty only for extremely serious crimes

the Beijing Rules

- protection of basic procedural safeguards
- taking the minor's opinion into consideration
- avoidance of unnecessary delay
- no capital or corporal punishment
- the need for professionalism and training
- the objective of measures should be rehabilitation

the Riyadh Guidelines

➤ **Riyadh Guidelines** history:

- no provisions in Beijing Rules on prevention
- in adopting the Beijing Rules, the GA called for standards and norms on prevention
- Professor Allison Morris prepared first draft
- circulated among experts
- discussion at NAUSS (Riyadh) in 1988
- Interregional Preparatory Meeting (Vienna)
- Eighth UN Congress (Havana, 1990)
- adoption by the General Assembly

the Riyadh Guidelines

- well-being of the juvenile and his or her family
- the need for comprehensive prevention plans
- importance of the family and support to the family
- importance of education
- importance of community measures
- role of mass media
- institutionalization of young persons should be a measure of last resort and for the minimum necessary period
- development of the appropriate legislation and juvenile justice administration

the Havana Rules

➤ **Havana Rules** history:

- despite ICPC, SMRs and Beijing Rules, extensive incarceration of children continued
- Havana Rules promote alternatives, and the protection of the rights of children in custody
- Defence for Children International working group
- circulated among experts
- Max Planck Institute
- discussion at NAUSS (Riyadh) in 1988
- Interregional Preparatory Meeting (Vienna)
- Eighth UN Congress (Havana, 1990)
- adoption by the General Assembly

the Havana Rules

- Havana Rules apply to all persons under 18 years
- deprivation of liberty = any detention, imprisonment or placement in a public or private custodial setting
- closely follow the contents of the SMRs; on e.g.
 - pre-trial detention
 - admission to juvenile facilities and classification
 - the physical environment and accommodation
 - education, vocational training, work, recreation
 - religion, medical care
 - physical restraint and the use of force
 - disciplinary procedures, inspections and complaints
 - personnel

the Havana Rules

- well-being of the juvenile (rehabilitation)
- deprivation of liberty should be last resort and for the minimum period
- non-discrimination
- protection of basic procedural safeguards
- protection of confidentiality
- separation of juveniles from adults

the Havana Rules

- promotion of small open facilities
- juveniles deprived of their liberty should be prepared for release
- contacts with the family and the wider community must be maintained
- no corporal punishment or solitary confinement
- need for professionalism and training

the Vienna Guidelines

➤ **Vienna Guidelines** history:

- entry into force of the Convention on the Rights of the Child provided new basis for cooperation among many stakeholders
- ECOSOC called for guidelines on this cooperation
- expert group meeting in Vienna (1997)
- adopted by ECOSOC

the Vienna Guidelines

- measures of general application
- specific targets
- measures to be taken at the international level
- mechanisms for the implementation of TA projects
- implementation of country projects
- child victims and witnesses

are international standard and norm binding?

- general view: standards and norms are soft law, and thus not binding
 - they are simply a request to apply the contents
 - if a state (or practitioner) does not comply, there are no sanctions
- **but:** soft law is a stage in development of hard law
- soft law may contribute to customary international law
- soft law may be used as arguments for amending national law and in national and international discourse

from soft law to hard law

- ... and then came the Convention on the Rights of the Child



from soft law to hard law

➤ Convention on the Rights of the Child

- provisions setting out **basic rights and principles** (non-discrimination, the best interests of the child, the right to life, survival and development, the right to be heard)
- provisions that apply to **juveniles in conflict with the law** (e.g. on deprivation of liberty, and the treatment of a child in conflict with the law)
- provisions that apply to all children, but are **particularly relevant if a child has been placed in an institution** (e.g. contact with family, the right to express their views and to be heard, the right to be protected from physical or mental violence)

from soft law to hard law

- review of implementation of the CRC
 - reports from states every five years; the Committee issues conclusions and recommendations
 - General Comments
 - General Comment no. 7 on rights in early childhood
 - General Comment no. 12 on the right to be heard
 - **General Comment No. 10 (2007) on the rights of children in respect of juvenile justice**

from soft law to hard law

- example 1: the minimum age of criminal responsibility
 - considerable disparity:
 - some have minimum age at 14-16
 - some use a higher and lower age
 - some allow even young children to be tried (as young as 6-7 years)
- Beijing Rule 4: “not fixed at too low an age level”
- CRC 40(3) requires “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”

from soft law to hard law

➤ General Comment 10:

- "... the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level.
- From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable.
- States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level."

from soft law to hard law

- example 2: the right to be heard
 - different types of decision-makers
 - different types of procedures
 - different types of structures

- Beijing rule 14.2 guarantees the right to be heard:
“The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.”

from soft law to hard law

➤ CRC art. 12:

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

from soft law to hard law

- the Committee has time and again returned to the child's right to be heard, and recommended that
 - laws be changed,
 - policy be developed,
 - more resources be given, and
 - in general closer attention be given to this right in practice, and not just in law

- in General Comment 10, the Committee has clarified the child's right to be heard

from soft law to hard law

- “The child should be given the opportunity to express his/her views concerning the (alternative) measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight.
- Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions
- ... to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour ...
- Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.”

from soft law to hard law

- many other examples of the inclusion of "soft law" into the CRC and the work of the Committee, such as:
 - competent, independent and impartial authority
 - right to legal assistance
 - presence of parents during legal proceedings
 - protection against self-incrimination
 - right to privacy
 - shortest possible period of detention
 - use of diversion and non-custodial sanctions
 - right to appeal
 - no cruel, inhuman or degrading treatment

from soft law to hard law

- general tendencies in the work of the Committee:
 - guarantee of procedural and substantive rights
 - limitation of the scope of definition of delinquency
 - increased use of diversion
 - less imprisonment
 - less severe and punitive sanctions for juveniles

from soft law to hard law

- the Convention on the Rights of the Child marks a shift from soft law to hard law
- the Committee is continuing this process: the standards and norms are one step in the spread of international best practice, of "what works"
- we have come from the paternalism of 100 years ago to recognition of the rights of juveniles – including their right to be treated equally and as active participants in juvenile justice



domo arigato!

—

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