

Criminal liability of minors and severity of penalties: European trends and developments

Preliminary issues in comparative youth justice

Comparative research, especially in the field of youth justice, is fraught with difficulties. The very definition of a child, the classification of crime or penal custody for children and the extent to which aspects of youth justice are recorded, vary enormously throughout Europe (Muncie 2004, p.295).

For instance, the terms 'juvenile' and 'young person' may in some places refer to a person under 18 and in others simply to a person who is treated differently by the criminal justice system from an adult. Most European systems have distinct ways of dealing young people under the age of 21 in conflict with the law. In some European countries, those deprived of their liberty will be detained in 'youth custody' until their mid 20s and distinct procedures will be applied to young people over the age of 18 during the sentencing process.

Further, the age of criminal responsibility appears to have different meanings across Europe. The official age of criminal responsibility may not be the earliest age at which a child can be involved with the justice system due to being in conflict with the law (UNICEF 1998).

For instance, in England and Wales, it is simply not possible to come before the criminal courts or to be arrested under the age of criminal responsibility, which is at the extremely low age of ten. However, while the age of criminal responsibility in Belgium is set at the much higher age of 18 (or 16 for certain serious crimes) much younger children can be dealt with through the criminal system and deprived of their liberty, even though they are not being given a criminal sanction. Similarly in France, where the age of responsibility is 13, children as young as ten can appear before a judge who can impose community or education orders.

Provided these variations are borne in mind, it remains useful to explore the wide ranging differences of approach towards juvenile justice across Europe. Further, it is also possible to identify developing trends that appear to reflect the global approach to youth crime and punishment. Commentators have suggested that youth crime has become an increasingly political issue, especially in Anglophone countries such as UK and US, and that for this reason it has been especially difficult to develop international standards that will be complied with universally. It is indicative of the difficulties of setting standards in this area that the US is the only country alongside Somalia in the world not to have signed the most important international treaty in this area, the United Nations' Convention of the Rights of the Child (UNCRC). Further, many countries have placed reservations on some of the key issues on youth justice. Despite the prevalence of non compliance, juvenile justice is the subject of international guidance that is extremely comprehensive and detailed.

International legal framework

Numerous international treaties and agreements set standards concerning the ways in which children in conflict with the law should be dealt with.

The 1966 International Covenant on Civil and Political Rights (ICCPR) confirms the principle of separation of “young prisoners” from adults in custodial facilities and also prohibits the death penalty for persons found guilty of a crime committed when they were under the age of 18 (Art. 6.5). The ICCPR also contains many safeguards applicable to all persons brought to trial and detained, and specifically states that “[i]n the case of juvenile persons, the [court] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation” (Art. 14.4).

The 1989 UNCRC contains many provisions affecting children in conflict with the law. Key articles of the UNCRC concerning youth justice are Articles 3, 37 and 40. Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration [subsection 1]. Parties undertake to ensure the child receives such protection and care as is necessary for his or her well-being, and, to this end, shall take appropriate legislative and administrative measures [subsection 2].

Article 37 provides for minimum standards in treatment and punishment of juvenile offenders, to ensure that ‘no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.’ It also provides that ‘neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.’

Importantly, Article 37b provides that ‘no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’.

Article 40 provides for recognition of the welfare, dignity and privacy of the child by ensuring that parties treat children ‘in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.’

In addition to the UNCRC, the following rules and guidelines have also been produced:

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (JDLs);
- United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines).

These documents largely reinforce the principles set out in the CRC. A summary of their key content is set out at Appendix 1.

The Committee on the Rights of the Child – the body charged with administering the UNCRC – has stated that the Convention and the Beijing Rules together:-

“call for the adoption of a child-orientated system, that recognises the child as a subject of fundamental rights, and stresses the need for all actions concerning children to be guided by the best interests of the child as a primary considerationⁱ.”

The Council of Europe has also produced detailed recommendations as to the appropriate treatment for children. Recommendation (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice refers to numerous other international documents and agreements in its preamble and notes the fact that ‘juvenile delinquency is perceived as a pressing concern in a number of European countries.’ The recommendations promote a welfare and needs-based approach, suggesting the increased use of alternatives to custody and stringent minimum periods of pre-trial detention. It is understood that new rules are currently being drafted and are due to be published this year.

However, it is well known that international rules and guidance are often unenforceable. While it is a useful campaign tool for those with an interest in juvenile justice to be able to refer to a bench mark against which a government is failing, there is little that can be done to make states adhere to these principles – especially when the political will is driving the other way.

A brief overview criminal responsibility and criminal penalties across Europe

A thorough review of the juvenile justice systems in the many countries within Europe is simply not possible in this paper. It remains surprisingly difficult to gather information as to trends, developments and practices in this field across Europe. This section attempts to provide a brief overview of the range of practices and penalties across Europe. This is followed by a focus on the worst offenders (notably the Anglophone countries) and those generally recognised as the most liberal – sometimes even referred to as ‘indulgent’ nations such as

Finland and Italy. Brief references are also made to those countries in which there has been a significant shift in recent years.

The age of criminal responsibility, while meaning different things in different jurisdictions, does provide some indication of a country's approach to juvenile justice.

Country	Minimum age of criminal responsibility
Austria	14
Belgium	18 (16 for serious offences)
Bulgaria	14
Czech Republic	15
Denmark	15
England and Wales	10
Estonia	14
Finland	15
France	13 (but educational measures can be imposed from the age of 10)
Germany	14
Greece	13 (but educational measures can be imposed from the age of 8)
Hungary	14
Iceland	15
Italy	14
Latvia	14
Lithuania	14
Luxemburg	18
Netherlands	12
Northern Ireland	12

Norway	15
Poland	13
Portugal	16
Romania	14
Russian Federation	14
Scotland	8
Slovakia	14/15
Spain	16 (14 in Catalonia)
Sweden	15
Turkey	12

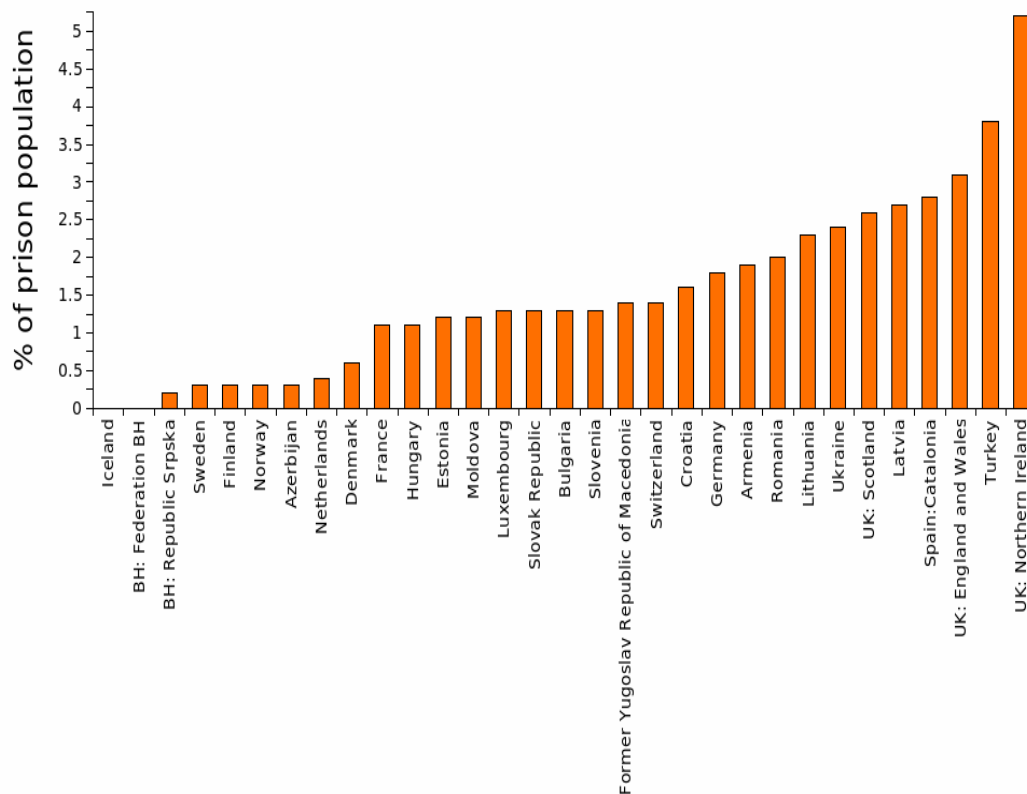
The Anglophone offenders

As can be seen from the comparative ages of criminal responsibility across Europe, the countries that make up the UK have the lowest ages of responsibility. The changes to the age of criminal responsibility in England over the last 50 years are symptomatic of the volatile nature of penal policy in the field of juvenile justice. The age was increased from 7 to 10 in 1969 alongside a raft of measures designed to create a welfare based criminal justice system. While these measures were famously implemented in Scotland (where, ironically, the age of criminal responsibility remains at the age of 8) with the creation of children’s hearings system able to dispense a range of educational and welfare based measures instead of penal penalties, the reforms never really took off in England and Wales. Even those ‘welfare’ based initiatives that have been successfully introduced have traditionally in England only served to expand the range of criminal disposals available to the Courts (Muncie and Goldson 2006, p35).

Further, in 1998, the ‘New Labour’ government, developing the trend set by the Conservative Prime Minister Margaret Thatcher, abolished the presumption of ‘doli incapax’ for 10 to 14 year olds. This ensured that there was a presumption that children between these ages were not capable of committing an action that they knew to be ‘seriously wrong’ unless the prosecution could prove otherwise. The abolition of this presumption in England has been considered as symptomatic of a rigid and inflexible attitude to penal policy for children in recent years. Therefore, in the cases of England and Scotland it can be said that the age of criminal responsibility is not an accurate indication of the severity of the regime.

However, a brief survey of the ages of criminal responsibility and the percentage of children that make up the prison population in European countries does appear to suggest that the lower the age of criminal responsibility the larger the juvenile prison population. Thus, those countries with the lowest ages of criminal responsibility between 8 and 12 (England and Wales, Scotland, Turkey, Northern Ireland and the Netherlands), fall within the top six highest juvenile prison populations – with the notable exception of the Netherlands which has only recently developed harsher penal policies.

Percentage of prisoners under 18 by country



Source: Council of Europe (May 2006) Penological Information Bulletin

The range of sentences available for children in England and Wales have also been criticised: life sentences remain available for children and remain mandatory for children convicted of murder. Since the Criminal Justice Act 2003,

a range of new sentences designed to ensure 'public protection' have been available for children: these include indefinite sentences for public protection which will only allow for a child to be released on the completion of a successful parole application, following which the child will remain on licence for a period of at least ten years, or until the parole board cancels the licence. These sentences have been deeply criticised as failing to take into account the development of the child.

All children tried for serious offences are tried in adult courts. Children aged 17 and above are not provided with the same procedural safeguards at the police station as children under 17. Civil orders, known as "Anti-social behaviour orders" (ASBOs), which if breached can lead to sentences of imprisonment, can be imposed where a child appears to be a social nuisance. Children can also be made subject to sex offender notification requirements for life if they receive a sentence of imprisonment for certain sexual offences of over 30 months or more.

Despite the very low age of criminal responsibility, in 1998 a range of penalties, specifically aimed at children under the age of criminal responsibility were introduced. Child safety orders can be made in the family courts if a child is considered to be at risk and can lead to a child being supervised in the community by a criminal justice professional.

Italy and Finland – tolerance and indulgence?

Italy has been described by leading English experts as 'model of tolerance and non-punitiveness from which England and Wales has much to learn' (Nelken 2006, p161). Italian judges have a wide discretion to pardon children, deem the offence to be irrelevant on the basis that it is trivial or provide them with alternative options to custody including pre-trial probationary periods. These pre-trial probationary periods are available for all types of offences, including serious offences such as murder. Life sentences are not available to children and the Courts have ruled the imposition of a life sentence on a child to constitute 'cruel and unusual' treatment.

The prison rate in Italy therefore is exceptionally low: there was a constant decrease in the numbers of children in prison between the late 1970s to 1990s, with a large majority of those in prison awaiting trial (Nelken 2006, p166). At any given time only around 500 people under the age of 18 are in prison in Italy compared to around 3000 at any one time in England and Wales. Of the 500 young people in custody at any one time, it is notable that only a very small proportion are Italian born. It is suggested that this may be due to the difficulties in administering pre-trial probationary measures to such children. This issue has been the subject of much criticism and mirrors concerns about the proportion of children from minority or foreign backgrounds in prison across Europe.

The low levels have persisted despite recent concerns about rising youth crime. Political attempts in 2003 to toughen the juvenile justice system for serious crimes, especially in relation to the use of pre-trial probation for murder, following

the case of two young lovers that committed murder in 2000, failed at the first parliamentary hurdle.

While Nelken suggests that there may be a range of social and cultural issues to explain the low rates of imprisonment in Italy, including the strength of the family and the absence of a heavy drinking culture among the youth, he places a heavy emphasis on the lack of media hype or obsession with youth justice issues in Italy as part of the 'moral panic' cited as the cause for tougher policies in Europe generally.

Similarly, juvenile justice in Finland has become significantly more lenient in recent years, in line with its Scandinavian neighbours. At the beginning of the 1950s, Finland had about 200 prisoners (including adults) per 100,000 inhabitants while the figures in Sweden and Norway were at around 50 (Lappi-Seppala, 2006, p179). The 1950 Finnish figure tops the record rates of the number of prisoners in England and Wales today! However, in the last 30 years the Finnish system has undergone total transformation so that the prison population was reduced to almost a third of the 1950 figure by the early 1990s and has been stable at around 70 per 100,000 since then. Further, this enormous reduction in the general prison population which has been mirrored by the juvenile population has not had any noticeable effect on crime rates. This reduction was achieved by reform of the Penal code which allowed for lesser sentences of imprisonment and a much greater use of community punishments.

Children cannot be given life sentences and the maximum sentence for a child under 18 is 12 years. The majority of cases, including juvenile cases, are disposed of by way of a fine or conditional imprisonment. However, for children convicted of serious crimes carrying a sentence of over 4 years, Finland has been criticised for the lack of separate juvenile custodial establishments.

Juvenile justice in Finland has a strong emphasis on welfare. While at the end of 2003, there were only 62 children in juvenile prison, it is notable that in any given year some 8000 children are in public care, 20% of whom are placed there against their will. On average some 350 children between the ages of 14 and 17 are placed in mental care institutions each year. It is interesting that figures as to the number of children in care or in hospital do not tend to appear on most accounts of states' juvenile justice system. In order to provide some form of comparison, around 65,000 children in the care of local authorities in England and Wales as of the end of March 2007.

Even though Finland has been held out as an example not only of tolerance but of a country that has managed to totally reform its penal system without any impact on public safety, concerns about youth violence have re-opened the debate about lowering the age of criminal responsibility. In 2001 a majority of Finnish parliament members signed a proposal to reduce the age. Although the proposal was rejected the issue remains on the agenda.

Significant shifts throughout Europe: trends and developments

While no other country in Europe appears to come anywhere near to implementing as harsh a penal policy as that provided for in England and Wales, the issue of youth justice appears to be a hot political topic in many countries. Many countries have seriously considered raising the age of criminal responsibility in recent years. Increases in secure places for children under 18 have been widespread throughout Europe. This is despite research in many countries revealing that instances of youth crime have either stabilised or decreased. However, instances of violent crime appear to have increased (Barbaree 2001, p213).

For instance, the number of places in youth detention in the Netherlands has trebled from 700 in 1990 to 2,400 in 2003 - although half the children will be detained for psychiatric or psychological treatment. Treatment can take up to six years. Recent changes to police detention rules, due to lack of spaces in youth detention, now allow 16 and 17 year olds to be detained for up to 16 days and 15 hours in police custody. This age group may also be placed in adult prisons in breach of the requirement for separation under the UNCRC (see uit Beijerse and van Swaaningen 2006, pp74-75). While the system in the Netherlands retains its core principles of rehabilitation, serious crime has become a deeply political issue, which has been intertwined with concern about violent offences among young people from ethnic minorities: over half the population in youth detention centres are not born in the Netherlands.

Similar concerns in Belgium about increasing public unsafety attributed to youths from ethnic minorities, especially of Moroccan and Eastern European origin, has resulted in pressure to introduce a juvenile justice system in which children are held more accountable for their actions. Despite the age of criminal responsibility being set at 18, children even younger than 12 years of age can be placed in secure centres in exceptional circumstances. Further, a new law passed in the wake of the murder of a teenager by two other teenagers in 2006, allowed for the creation of a large new prison for 16 and 17 year olds.

Conclusions

While penal policies and measures that can be imposed upon children under the age of 18 vary widely across Europe, it can be said that there is an increased concern about the threat of youth crime. While most research suggests that rates of youth crime are stable or have decreased, high profile cases or increases in violent offending appear to act as triggers throughout Europe to increase the severity of penalties. The prevalence of young people from ethnic minorities in custody appears to be a cause for concern in many countries. While media and public opinion on this topic does not appear to play as important a role in most European countries as it does in the UK and the US, where a tough stance on law and order appears to be of key political importance, there appears to be an increasing interest throughout Europe in this area by politicians. This

arguably hinders the development of penal law and practice in compliance with international standards and obligations.

As the official commentary to the Beijing Rules explains, 'the main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature.' Penal policy can be underpinned by conflicting notions of rehabilitation, assistance and protection and repression and punishment, as well as general deterrence set against individual incapacitation.

The commentary notes that 'the conflict between these approaches is more pronounced in juvenile cases than in adult cases.' In contrast to consideration of adult criminality, it is often impossible to exclude developmental understanding or simply the process of growing up as a major contributor to crimes committed by children. An analysis of the philosophical notions underpinning juvenile justice in the current climate is likely to reveal in many European jurisdictions the application unhappy mixture of these notions. There appears to be a lack of consistency or even logic in the contemporary approach. Many jurisdictions appear at one and the same time to have their juvenile justice systems rooted in preventative and rehabilitative ethos while attempting at the same time to satisfy perceived public anxieties for harsher custodial sentences for serious crimes or even persistent minor offending. The overall result is an increase in the number of children passing through criminal justice systems despite the fact that most jurisdictions report that youth crime figures have decreased or are stable.

Bibliography and Further Reading

Bala, N et al (Eds.) (2002) *Juvenile Justice Systems: an international comparison of problems and solutions* Thompson

Barbarett, R. (2001) Youth Crime in Western Europe: will the old world imitate the new? in White, S (2001) *Handbook of Youth and Justice* Springer

Laura Janes
The Howard League for Penal Reform (England and Wales), 2008

Gendrot, S. (2006) *France: the politicisation of youth justice* in Muncie, J and Goldson, B. (Eds) (2006) *Comparative Youth Justice* SAGE publications

Jensen, E. and Jepsen, J. (2006) *Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice Systems* Hart

Lappi-Seppala, T (2006) *Finland: a model of tolerance?* In Muncie, J and Goldson, B. (Eds) (2006) *Comparative Youth Justice* SAGE publications

Muncie, J. (2004) *Youth Crime (2nd Edition)* SAGE publications

Muncie, J and Goldson, B. (Eds) (2006) *Comparative Youth Justice* SAGE publications

Put, J. and Walgrave, L. (2006) *Belgium: from protection towards accountability?* Muncie, J and Goldson, B. (Eds) (2006) *Comparative Youth Justice* SAGE publications

uit Beijerse and van Swaaningen (2006) *The Netherlands: Penal welfarism and risk management* in Muncie, J and Goldson, B. (Eds) (2006) *Comparative Youth Justice* SAGE publications

Tonry, M. and Doob, A.(Eds.) (2004) *Youth crime and youth justice: comparative and cross national perspectives* in Crime and Justice Vol 31, Chicago University Press

UNICEF 1998 Innocenti Digest, Juvenile Justice available at <http://www.unicef-irc.org/publications/pdf/digest3e.pdf>

White, S (2001) *Handbook of Youth and Justice*. Springer

Appendix
EXTRACTS FROM INTERNATIONAL STANDARDS GOVERNING THE
RIGHTS OF JUVENILES

[A] United Nations Convention on the Rights of the Child

The UN Convention on the Rights of the Child is a global treaty which is binding on all States Parties. It applies to children that is persons who are under the age of 18 years unless under the law applicable to the child, majority is attained earlier. It enjoins state parties to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, other opinion, national, ethnic or social origin, property, disability, birth or other status [Art 2[1]].

Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration [§ 1]. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties at his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take appropriate legislative and administrative measures [§ 2].

Article 37 provides for minimum standards in treatment and punishment of juvenile offenders:

“States Parties shall ensure that:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;”

The requirement in Article 37b that any detention be for the shortest appropriate period of time appears to signal a totally different approach to detention than that applicable to adults. Article 37b was repeatedly referred to by the English courts and by the European Court in the Venables litigation. However, it is questionable how much practical effect the principle has been given.

Article 40 provides for recognition of the welfare, dignity and privacy of the child:

“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

...

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) ...

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

...

(vii) To have his or her privacy fully respected at all stages of the proceedings. ”

The Committee on the Rights of the Child – the body charged with administering the Convention – has stated that the Convention and the Beijing Rules (see Part B, below) together:-

“call for the adoption of a child-orientated system, that recognises the child as a subject of fundamental rights, and stresses the need for all actions concerning children to be guided best interests of the child as a primary consideration.” (1995 CRC/C/42 Annex VIII p64)

[B] The UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)

Specific guidance is given to States under the United Nations Standard Minimum Rules for the Administration of Juvenile Justice [“The Beijing Rules”]. The Rules, which are recommendatory and non-binding, were adopted by General Assembly resolution 40/33 of 29 November 1985. They require member states to seek, in conformity with their respective general interests, to further the well being of the juvenile or his family [rule 1 §1].

While the Rules permit the incarceration of juveniles Rule 17 requires that the period of incarceration should be the minimum necessary and that regard must be had at all times to the welfare of the young offender:

“17. Guiding principles in adjudication and disposition

17.1 The disposition of the competent authority shall be guided by the following principles:

- (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
 - (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
 - (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
 - (d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.
- 17.2 Capital punishment shall not be imposed for any crime committed by juveniles.
- 17.3 Juveniles shall not be subject to corporal punishment.
- 17.4 The competent authority shall have the power to discontinue the proceedings at any time.”

The official commentary to the Rules explains:

- “The main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as the following:
- (a) Rehabilitation versus just desert;
 - (b) Assistance versus repression and punishment;
 - (c) Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;
 - (d) General deterrence versus individual incapacitation.

The conflict between these approaches is more pronounced in juvenile cases than in adult cases. With the variety of causes and reactions characterizing juvenile cases, these alternatives become intricately interwoven.

It is not the function of the Standard Minimum Rules for the Administration of Juvenile Justice to prescribe which approach is to be followed but rather to identify one that is most closely in consonance with internationally accepted principles. Therefore the essential elements as laid down in rule 17.1 , in particular in subparagraphs (a) and (c), are mainly to be understood as practical guidelines that should ensure a common starting point; if heeded by the concerned authorities (see also rule 5), they could contribute considerably to ensuring that the fundamental rights of juvenile offenders are protected, especially the fundamental rights of personal development and education.

Rule 17.1 (b) implies that strictly punitive approaches are not appropriate. Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some

merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person.

In line with resolution 8 of the Sixth United Nations Congress, rule 17.1 (b) encourages the use of alternatives to institutionalization to the maximum extent possible, bearing in mind the need to respond to the specific requirements of the young. Thus, full use should be made of the range of existing alternative sanctions and new alternative sanctions should be developed, bearing the public safety in mind. Probation should be granted to the greatest possible extent via suspended sentences, conditional sentences, board orders and other dispositions.

Rule 17.1 (c) corresponds to one of the guiding principles in resolution 4 of the Sixth Congress which aims at avoiding incarceration in the case of juveniles unless there is no other appropriate response that will protect the public safety.

The provision prohibiting capital punishment in rule 17.2 is in accordance with article 6, paragraph 5, of the International Covenant on Civil and Political Rights.

The provision against corporal punishment is in line with article 7 of the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the draft convention on the rights of the child.

The power to discontinue the proceedings at any time (rule 17.4) is a characteristic inherent in the handling of juvenile offenders as opposed to adults. At any time, circumstances may become known to the competent authority which would make a complete cessation of the intervention appear to be the best disposition of the case.”

Rule 5 requires that the juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence:

“5. 1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”

The official commentary explains:

Rule 5 refers to two of the most important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. (See also rule 14.)

The second objective is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts in relation to the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

By the same token, reactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as has been observed in some juvenile justice systems. Here, too, the proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded. In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles.

Rule 8 expands on the provision relating to privacy in Article 40 of the Convention (above):

"8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published. "

The official commentary to the Rules explains:

"Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".

Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle (The general contents of rule 8 are further specified in rule 2 1.)."

[C] United Nations Rules for the Protection of Juveniles Deprived of their Liberty

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty were adopted by General Assembly resolution 45/113 on 14 December 1990. Like the Beijing Rules, they provide guidance and are recommendatory. Rule 2 provides that juveniles should only be deprived of their liberty in accordance with the Beijing Rules. Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum period necessary period and should be limited to exceptional cases. It further provides that the length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

i 1995 CRC/C/42 Annex VIII p64