

Alternatives to detention of children in conflict with the law

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Outline

1. Alternatives to detention: a human rights issue
2. Forms of detention & context
 1. Three levels of implementation
 2. Challenges

Project Violence in institutions for juvenile offenders (PC-CP, Council of Europe)



1. Human Rights Issue

- Art. 37 CRC – Core provision that recognizes:
 - Impact of detention on children
 - Last resort & shortest appropriate period of time (art. 37 (b) CRC)
 - Need for child specific, human rights approach
 - Rights holder, child specific approach, legal safeguards (art. 37 (c) and (d) CRC)
- Broad definition of *deprivation of liberty*:
 - ‘any form of placement in an institution by decision of a judicial or administrative authority, from which the juvenile is not permitted to leave at will’

(rule 21.5 European Rules for juvenile offenders etc.)

2. Forms of detention & context

- Arrest & police custody
 - Large discretion
 - Critical phase
- Pre-trial detention
 - Judicial oversight, but still large discretion
 - Balancing various interests (truth finding, personal liberty, fair trial, early intervention)
- Incarceration as a disposition
 - Imprisonment, custodial treatment orders etc.
 - Repressive & constructive objectives (art. 40 (1) CRC)
- Welfare/child protection institutions
 - Alternative measure?
 - Intervention for children under MACR? Rights based?

3. Three levels of implementation (I)

- Level 1: Legislation

- Grounds and reasons for use of detention

- No detention, unless provided for by law (i.e. strict and clear provisions)
- Instruction that alternatives must be considered
- Time limitations (see General Comment No. 10)
- Alternative dispositions provided by law
- Minimum age for deprivation of liberty (rule 11(a) Havana Rules)
- Room for tailored decisions

- Legal safeguards

- Legal and other appropriate assistance (art. 37 (d) CRC)
- Information to juvenile and parents / clarification of decisions

- Review mechanisms

- Judicial scrutiny (art. 37 (d) CRC)
- Crucial for ‘shortest appropriate period of time’ – dynamic element of legality
- (Cf. art. 25 CRC in case of treatment or child protection)



3. Three levels of implementation (II)

- Level 2: Existence of alternative measures
 - Arrest & police custody
 - Parental custody, report to social services, one stop child justice centers, diversion mechanisms
 - Pre-trial detention
 - Night detention, house arrest, electronic monitoring, conditional suspension
 - Dispositions
 - Art. 40 (4) CRC: e.g. care, guidance, supervision orders, counselling, probation, foster care, education and vocational training programmes (i.e. alternatives for institutional care)
 - Suspended sentences; early conditional release; electronic mon.
 - Close, semi-open and open institutions – ‘pathway’
 - Child protection / youth care as an alternative (?)

3. Three levels of implementation (III)

- Level 3: Decision making

- Education and training (incl. tools) / awareness-raising & capacity building

- What are the options and how can they be of use?
- How to cope with discretion?
- Relevance of considering alternatives
- What are *adequate* alternatives in the context of juvenile justice?

- Perceptions & assumptions

- Juvenile delinquency
- Seriousness of offences / status offences
- Trust in alternatives / experience of discretion
- Willingness to use alternatives

- Transparency of the decision making & safeguards

- Clarification as part of responsibility of decision maker
- Information for juvenile
- The higher the level of discretion, the bigger the need



4. Challenges

- Drafting of legislation
- Availability and use of alternatives
 - Risk of net-widening
 - Evidence based / what works?
 - Cost-effectiveness
 - Exchange of in depth knowledge about alternatives and implementation strategies
- Perceptions (legislator, policy maker, decision maker)
 - Lack of insight in perceptions and effect on decision making
 - Hard to address
- (Alternative measures & rights of the child / child friendly justice)

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T. Liefwaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards*, Antwerp/Oxford: Intersentia 2008.

