Soundness and justifiability in child welfare proceedings

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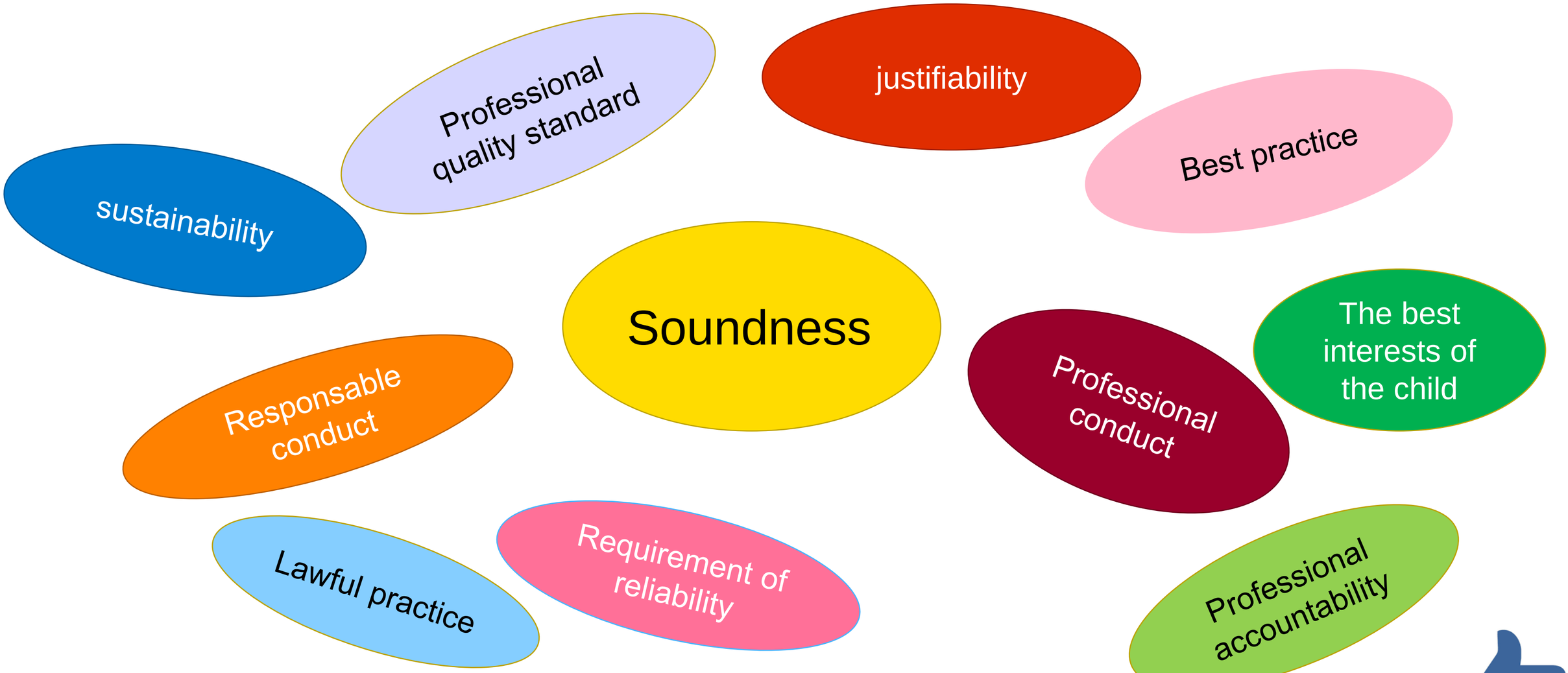
Dear facebook: What is ‘forsvarlighet’ in English?



But what is it?

From customary law to legislation

- The principle of soundness and justifiability – a non-statutory principle developed through Supreme Court case law over several decades
- Implemented in an increasing number of social welfare and health care acts
- Legally binding customary law, but written regulation might have an important educational purpose
- Implemented in the Child Welfare Act 2013
  - ***Section 1-4. Requirement of justifiability***
    - Services and measures under this Act shall be justifiable

Respecting human rights

- The principle of soundness developed before the implementation of human rights conventions
- Today: soundness and justifiability in case management and proceedings must therefor also include respect for fundamental human rights, like:
  - Fair trial, contradiction, private and family life, principle of proportionality (ECHR)
  - For children:
    - best interests principle
    - protection, provision and participation (CRC)

Soundness linked to the rule of law

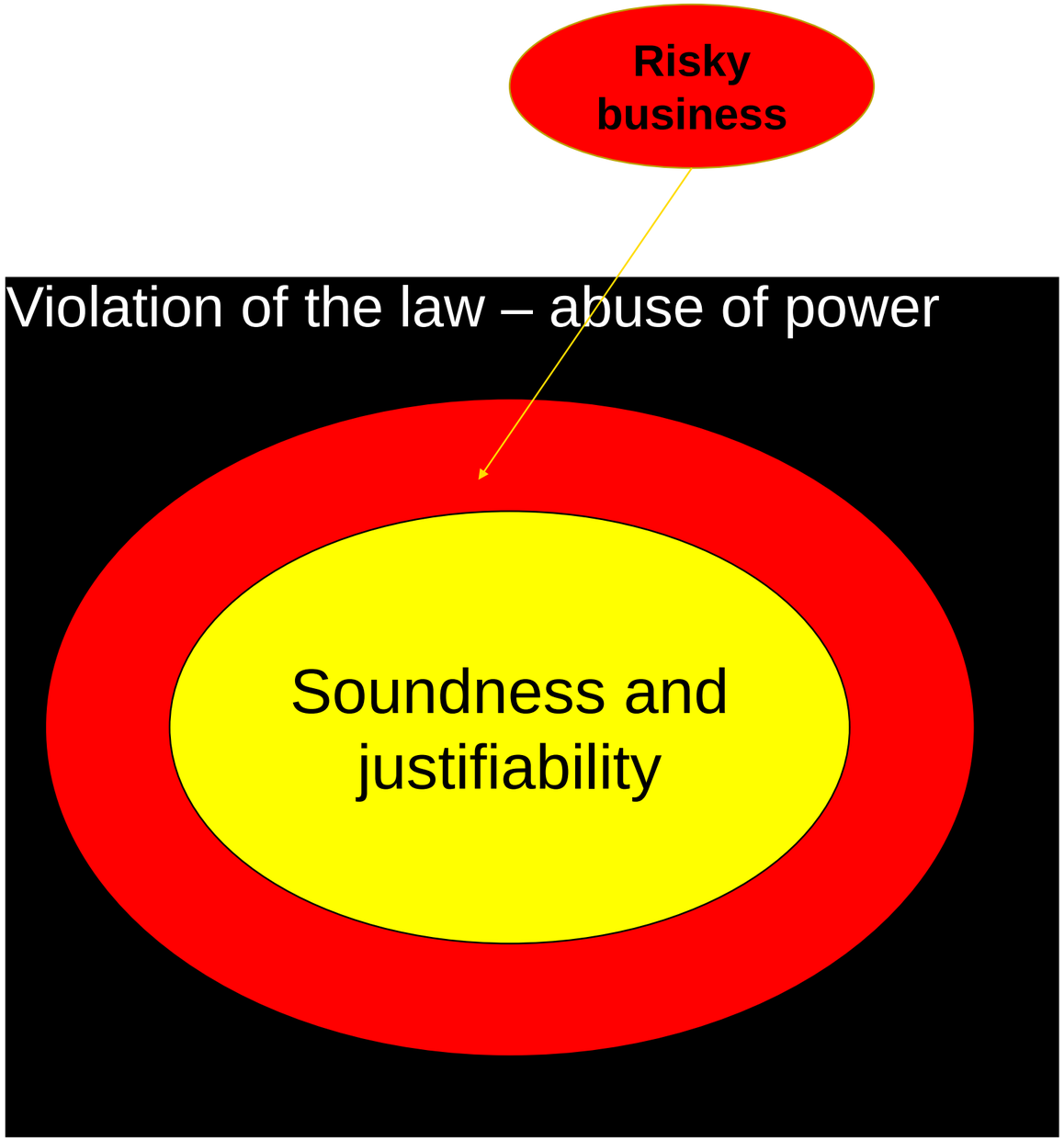
- Correct and thorough investigation, assessment and decision
- Legal-based decisions
- Proper documentation
- Decisions made by competent authorities and competent professionals
- Party rights respected
- Secure child participation
- Best interests of the child assessed and documented

A dymamic principle

- The soundness principle and its different elements are not finally clarified
- The notion of soundness and justifiability has no exact definition
- Changing over time, influenced by..
  - The notion of the child's best interests (also a changing concept!)
  - Practice, case-law and publications from international human rights bodies (CRC, ECHR)
  - New developments in the child welfare field (research, practice, experiences, political changes)

A minimum standard?

- «From our point of view one should avoid labeling requirement of justifiability a minimum standard. That might encourage a practice with a calculated risk of violating the rules» (The Norwegian Board og Health Supervision's hearing statement, Prop 106 L)
- «In our opinion, the principle of the best interests of the child sets a quality standard itself» (The County Governor in Oslo og Akershus, hearing)



Core element 1: Internal control

- Implement systematic review of case management, proceedings and case outcome to detect failures in routines as well as human mistakes, and identify vulnerability in the system
  - i.e. specific position as ‘controller’ in CPS to review all child welfare investigations and check out timelimits etc
  - Report failures, weaknesses, critical ressurce situation to leaders
- The issue of whistle-blowing

Core element 2: Competance and staffing

- A political responsability to safeguard necessary competance and ressources in local CWS to meet the requirement of soundness
- The Child Welfare Act: no requirements of formalized competance or authorization to work in the CWS
- No specific requirement of a minimum norm for the number of empolyees in one single CWS
- No formalilzed norm for the number of cases – children!)- per caseworker

Drammen.no

Core element 3: Thorough CPS investigations

- Regulations in the law, but no national research-based standard or protocol
- Studies show large differences between local CPS' in how they conduct investigations
- local/regional variations in how the thresholds of interventions and legal criteria are interpreted and applied

Risks..

..with a national standard

- Too standardised or ‘instrumental’ practice – leaving little room for individual assessments?
- Sufficient resources and competance to train and follow up how the standard is implemented?

..with not having it..

- The use of available tools or protocols which are ‘on the marked’, but not evidence-based nor developed in a research environment

Core element 4: Discretionary powers in accordance with law

- First: Clarify obligations, criteria, limitations and power according to the law
- Identify the ‘room of action’ for individual assessments and discretion
- Considerations of all relevant aspects of the case, including the views of the child
- Balancing interests and rights of private parties involved
- Best interests of the child assessment: Decisive weight – CWA sec 4-1

Core element 5: The best interests of the child

- Best interests of the child
  - Not a fully open assessment
  - Include a ‘buffet’ of specific elements developed through case-law, practice and research, and the Committee on the Rights of the Child has further developed the best interests assessment in General Comment no 14
  - 3 functions:
    - Principle of international customary law
    - An individual right
    - A rule of procedure

Core element 6: Supervision and developing practice

- The Norwegian Board of Health Supervision (Statens Helsetilsyn) responsible for national supervising and controlling of local child welfare services and institutions
- The County Governor is investigating individual cases
  - Initiated by complains in invididual cases
  - Initiated by the Governor himself
- Reports from the Board and the Governor contribute to develop the notion of soundness
  - clarifying the content of, and elements in, the soundness principle in assessments, law references and decisions

‘Concern put aside’

- ‘Bekymring i skuffen’ – last report of the Norwegian Board of Health Supervision 2017
- Failures in i.e.:
  - Reception and management of notifications of concern
  - Illegal dissmissal of notifications involving children at risk (violence, abuse, serious neglect..)
  - All unlawfully dissmissed cases must be reopened and thoroughly investigated

Core element 7: consequences of violations

- When violation of the soundness principle: often no real consequences
- requirements of improvements and corrections expected to be followed up
- Practical consequence: increased ressources to the CPS…
- In extremely rare cases: penal consequences (‘foretaksstraff’) – fine (bot)
- Individual criminal case for professional misconduct:
  - never happened (almost never individual charges)

Corporate penalties – case of 2014

- CWS reported to the police for professional misconduct
- Involving more than 100 children in need for CWS measures had their cases dropped
- Unlawful dismissals of cases involving children risking serious exposed to sexual abuse and violende
- Failure to document case proceedings and assessments
- Failure to consider the best interests of the child
- Failure to interview the children

Why penalty in child welfare cases?

- «The preventive effect of penalty.. does not appear in this case. But the values to be protected, and the fact that the penal threat would have a real preventive effect towards other municipalities, is present.»
- «There can be no doubt that children’s growing up conditions constitute an important value in which there is a common interest defending, and that a penal threat might contribute to the municipalities allocating necessary ressources for the child welfare services and strenghtening the internal control to avoid violations of the law in the future.» (Attorney General Tor Aksel Buch)

'Falioure and Betrayal’

- Commission of experts appointed by the Government to review some of the most serious cases of child abuse, violence, child deaths in Norway to analyze what went wrong, and how to prevent such cases in the future
- Relevant to the comprehension of the meaning of soundness

Findings

- Revealing of violence was not a result of the efforts of public authorities (more coincidential, or private initiatives)
- Conversations with children was missing, or was of poor quality
- Lack of understanding of the cause of symptoms, behaviour expressions and signs of consern
- Parent’s vulnerability was not discovered or was underestimated

Findings (continue)

- The duty to report to police and CPS was not followed
- Poor investigations and too weak basis for assessments and decisions of public welfare-/health authorities
- Weaknesses in communications and in colaboration between the different services
- Poor follow-up on persons convicted for sex abuse
- Relations to the adult were given priority over protecting the child

In the name of justice!

- The issue of soundness ‘forced’ me to highlight failure and misconduct..
- Child welfare workers all over the country are doing a fantastic job every day to support children and families, prevent abuse and neglect and protect children from it!

Stick to the law and stay sound!

Six Phd’s in Norwegian child welfare law 1999-2015

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Useful references

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- NOU 2016:16 Ny barnevernlov. Sikring av barns rett til omsorg og beskyttelse
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