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Centre for the Prevention of Youth Crime (ed.)

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Arbeitsstelle Kinder- und Jugendkriminalitätsprävention

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Contents

1 The Challenge for the German Juvenile Justice System – and the Objective

Juvenile criminal law is preventively conceived law; its design purpose and its responsibility in practice are not to ensure that offenders are punished, but rather that those convicted should subsequently show themselves capable of living within the law. The aim is that following their first clash with the law they should not go on to commit further offences. The rationale and purpose amount to what is called "special prevention": the future behaviour of the young persons concerned is supposed to be influenced for the better. They are supposed to gain an understanding of the harmful or reprehensible nature of their earlier conduct, thereby acquiring a degree of resistance to recidivism. And they are supposed to be put in a position enabling them to live from then on without re-offending. For most of the ubiquitous or episodic criminality on the part of young people, the clear warning suffices: this particular behaviour will not be tolerated, it is forbidden and will be punished (the technical term here is "norm clarification"). Insight, enablement to live an offence-free life, and norm clarification are – to put it in simple terms – the objectives of all reactions and interventions under juvenile penal law. There is admittedly also a repressive element, as a safeguard; but that is a provision for exceptional circumstances, and in terms of results is likewise aimed at subsequent good conduct: detention in a young offenders institution follows on a serious offence – but here too due attention must be paid to the educational aspect.

Juvenile criminal law may be described as a body of law based on penal law and not only providing for both prevention in general and education in the specific individual case, but also – because judicial processes must respect the constitutional principle of proportionality – enforcing these outcomes in the individual case. This means that the law must refrain from punishing the offender in cases where an educational measure appears appropriate and sufficient for achievement of the object of intervention by the juvenile penal system: namely the future good conduct of the offender. Legally, juvenile criminal law rests on the *Jugendgerichtsgesetz* (Juvenile Courts Act). It takes its starting-point in the corpus of indictable offences recognised in general penal law and imports the constitutional and procedural safeguards required in a constitutional democracy, these appropriately modified for juvenile court use. To this extent, juvenile criminal law is penal law. However, the Juvenile Courts Act proscribes the sanctions available under general penal law and instead offers courts a wide array of reactions and interventions appropriate to young persons, to be applied in response to potentially criminal behaviour on the part of minors aged 14 to 17, and also to provide solutions tailored to individual age and maturity for the age-group 18-20. To this extent, juvenile criminal law is also a body of law designed to educate and help. This is why it makes sense to

describe it not as juvenile penal law but as juvenile criminal law. The latter does not set out to punish in the first place, but instead concerns itself with the study of juvenile criminality and furnishes the prosecuting bodies – the *Jugendstaatsanwaltschaft* (juvenile prosecution services) and *Jugendgerichte* (juvenile courts) – with norm-clarifying measures and a large number of ways to help and support a given young person, with a view to avoiding the commission of further offences.

This philosophy of juvenile criminal law applies to juvenile criminality generally and also to offences of violence against other individuals. Only when respect and acceptance of the right to life and to freedom from bodily injury can be communicated to young people in such a way that violence directed against others ceases to represent an alternative course of action will it become possible to limit the disposition to violence and the burden that violence imposes on society. The juvenile criminal law can and will play a part in bringing this about.

In the overall context of youth and violence, offender numbers are high; yet young offenders are far outnumbered by young victims. Most of these are victims of violence inflicted by young people, for the most part in places where they spend their leisure hours. But they also include victims of violence at the hands of adults, particularly within the family. Society needs accordingly to stop seeing young people exclusively as offenders, and be more prepared than hitherto to focus its attention on young people as victims. While this is not of central importance in juvenile criminal law, it does matter, in the context of reviewing options for sanctions, that those at the receiving end of juvenile violence are themselves in most cases juveniles.

2 The Importance of Violence as an Element within Juvenile Criminality

Violent acts within the context of juvenile criminality cover a broad range from a mild use of physical force in age-typical scuffles and fights all the way to the most heinous acts of violence such as different degrees of homicide. Offences of serious violence, i.e. *Gewaltkriminalität* in the German police terminology, including murder, manslaughter, robbery with violence or the threat of violence, and grievous bodily harm, are, on a quantitative measure, of fairly marginal significance. The role of juveniles in qualitatively serious acts of violence is generally over-estimated: for example, it takes as little as the involvement of several young people in a fight – and this category covers almost two-thirds of all juvenile criminality involving violence – to qualify a bodily injury as a "grievous" bodily injury, regardless of the actual consequences of the injury

inflicted. And yet the less serious offences involving bodily injury, in a similar way to shoplifting, are part of the everyday scene in juvenile criminality, which means they rank among the principal juvenile offences.

At the same time, social and political perceptions of juvenile violence overrate its extent, structure and gravity. It is often dramatised and sensationalised. This is the case both in the historical, traditional sense and in today's context. The *Kriminologisches Forschungsinstitut Niedersachsen* (Lower Saxony Criminological Research Institute) has reported survey findings indicating that those polled believed there had been a sharp rise in dangerous and serious criminality, whereas in fact some of the registered statistics indicate a considerably lower incidence.

It is true that the number of offences of violence recorded by the police, and the number of minors suspected of such offences, have both gone up[1]. However, it may well be the case that this simply reflects increased inclination on the part of an over-sensitised public to report offences, given that over 90% of registered criminality is brought to police awareness by reports from the public. Thus a statistical increase does not necessarily reflect an actual increase on violence, as it may in large part result from a new coverage in police statistics of offences that formerly escaped registration. This trend has been reinforced by increased and successful police investigative activity.

In qualitative terms, too, the statistics falsify the picture appreciably. In compliance with the penal code's definition, they register bodily injury inflicted by persons acting together as "grievous bodily injury", irrespective of the injury's consequences. In thus highlighting one aggravating feature, they correspondingly fail to acknowledge the special nature of juvenile violence, which is preponderantly and – as an age-related phenomenon – typically committed not by individuals acting alone but by several acting together, and in many cases amounts to mere rough-house behaviour without serious consequences. Minors also inflict serious bodily injuries, of course, but the incidence of such offences is relatively low. These emphatically do not represent typical juvenile violence, and on their own provide no warrant for making the juvenile criminal law more draconian generally, advocated time and again in knee-jerk response after reports of heinous one-off offences are published, generally in the red-top press.

1 On this point, cf. PKS (Police Criminal Statistics) 2005, according to which criminality attributable to juveniles was down 4.3% overall against the previous year, in line with the long-term trend since 1997, whereas registered offences involving bodily injury had increased by 2.3% (BMI 2006:16).

3 The Role of the Media

Contributing to a symposium held at Cologne in 1999 on the theme of "Criminality and the Media", the Bielefeld criminologist Frehsee commented: "One of the most popular topics of recent years has been juvenile criminality, always generalised by characterisation of the young as disposed to violence, actually violent, dangerous, criminal. 'They nick things. They mug people. They kill.' – that kind of headline. The latest thing is child criminality. At this age, even more emphatically than for the 13-20 age-group, grave crimes of violence are the rarest of extreme cases. That fact does not get in the way of headline-writing like 'Little Monsters', 'Children at War', 'Kids who Know no Mercy – Germany Swamped in Tide of Mindless Violence' – effectively characterising the entire generation of our youngest people."

The media exert decisive influence on social and political perceptions of youth criminality. They contribute in large measure to exaggerated perceptions of the incidence of violent crime. They regularly report on spectacular and heinous acts of violence and create the impression that youth criminality is made up of serious acts of violence. In the public perception this reporting leaves behind the erroneous impression of a widespread and serious crime problem for which an increasingly criminal youth generation is responsible.

This impression is reinforced by the regular annual coverage of the police criminal statistics.The rise in figures for youth crime, which may derive in part from increased police vigilance, and most particularly from increased readiness on the part of the public to register complaints – and thus does not reflect a true rise – is often used as a pretext for reports of a "deeply disturbing upward trend in youth criminality". Even where registered offences fall, as has been the case in some categories of offence since 1997 and for offences involving violence since 2001, this false impression is kept going by the prominence given to extreme brutality in specific individual cases.

Current reporting of violence occurring at *Hauptschulen* (secondary schools [without university stream]) is likewise heavily dramatised. Many of those students are socially disadvantaged and without prospects. They do not pose unreasonable demands, but they do aspire to a school-leaving certificate, vocational training, and a job, and to starting a family. They have been unsettled and left fearful by the antics of the media, and the great majority of them want to get on with their studies in peace. However, they are not in a position to construct a normal life for themselves, and it is evident that there have been massive failures of educational and youth policy.

The media nevertheless continue to generate a perception of menacing juvenile criminality. They keep public fears alive, particularly amongst older people. The reporting also affects the course of justice. The judiciary and the prosecuting

authorities, like the general public, draw their knowledge of contemporary events from the mass media. The reporting influences their perceptions and leaves its stamp on their mindset. An appreciable number feel under public and political pressure to take a stand, seeking to halt the allegedly sinister trend. This mechanism is familiar to criminology as a self-amplifying publicity-politics circle. It acts as a burden on the state and on society, leading to unwarranted demands for greater rigour in legislation and severer punishment. Such changes are expensive, and the supposed preventive effect will not materialise. In the most recent period, judicial practice seems to be leaning more frequently towards custodial sentences and also longer sentences, for juveniles as well as for adults, in the (fond) hope of countering this development. Many of the crime policy proposals put forward recently and very recently have reflected this mechanism and its populist appeal. In marked contrast, the findings of scientific research and fieldwork on the causes of juvenile criminality and on meaningful responses to the problem are accorded scant attention and seldom acted upon.

4 The Legal Framework – The German Juvenile Courts Act

4.1 Education as a Preventive Principle

The special features of juvenile penal law are promulgated on the common platform of the *Jugendgerichtsgesetz* (Juvenile Courts Act). First made law in the year 1923, the Act has been amended and reformed at a number of points in its history. The most recent reform of the Act, a substantial change and simultaneously a deepening of the preventive element, aimed at reinforcing the educative intention, reached its conclusion in 1990, following more than eight years of debate on crime policy, in the form of the *Erstes Gesetz zur Änderung des Jugendgerichtsgesetzes* (First Amendment to the Juvenile Courts Act).

The Act's core principle is its educative intent. This educative principle is not defined *expressis verbis* in the text, but is frequently and variously alluded to, as well as being implicit in the actual provisions. Its primary purpose is to reduce the likelihood of further offending by *Jugendliche* and *Heranwachsende* (13-17 and 18-20 age-groups respectively). To achieve this end, the legal consequences and – as far as possible – proceedings should primarily serve the educative intent. In current thinking on the issue, this does not *mean* education in the comprehensive sense implying the moulding of personality and development. That is something that penal law and the judicial system cannot do. The educative goal of juvenile penal law is limited to the achievement of future good conduct. The

means to be used to that end should above all be educative, should help and empower, and should contribute to development in a positive sense. Measures of a repressive character should be accorded lower priority with a view to avoiding their negative side-effects.

This philosophy of juvenile criminal law dates from the time of the codification of the penal aspects of juvenile law in 1923, and was derived from the following sources

- insights gained from the criminological research of the time,
- insights acquired in the course of judicial practice into the social situation of young people as a fundamental cause of offending, and
- experience of the ineffectiveness of penal sanctions as a remedial measure against socially conditioned offending.

The *Reichsjugendgerichtsgesetz* (Imperial Juvenile Courts Act) of 1923 accordingly enshrined the educative principle at the heart of the new law, taking priority over sanctions of a penal nature. The educative principle subsequently stood the test of practice, and was endorsed by research, particularly during the last quarter of the 20th century.

It cannot be said, however, that the principle of education-not-punishment finds ready general acceptance. In the face of crime committed by young persons, particularly where it has involved the use of physical violence, both the public and its political representatives are apt to lean towards repression and revenge. Yet criminological research and many years of enlightened judicial practice have identified this as more likely on balance to actually entrench criminality. The point applies both to the low-grade criminality widespread among young people and more significantly also to offences involving violence.

Education, such principles as prioritisation of diversion over formal proceedings and of non-custodial over custodial measures, and numerous individual provisions of the Juvenile Courts Act all accord with international agreements and recommendations. The United Nations Standard Minimum Rules of 1985 governing the formation of a judicial system geared to juvenile offenders and the provisions of Articles 37 and 40 of the 1989 UN Convention on the Rights of the Child have their counterparts and find tangible expression in German national law, as do the relevant recommendations and requirements of the Council of Europe, in particular Recommendation R (87) 20 (published 1987) on society's reactions to juvenile criminality.

4.2 Formal Legal Options for Reaction

As noted above, juvenile criminality is ubiquitous and episodic in nature. Extremely widespread during the years of minority, it disappears of its own accord as the phase of juvenile development is left behind. For the most part, juvenile criminality is also of a trivial nature. This is essentially true also of juvenile delinquency involving violence. Reactions provided for in the Act accordingly have in their forefront the strategy of quick reaction with norm-clarifying measures which enable the state prosecution service to desist from further proceedings, or a magistrate to stop proceedings. Available non-custodial measures likewise play a part in enabling the harmful side-effects of custodial interventions to be avoided.

This strategy of avoidance of typical judicially imposed sanctions and of deployment of relatively undamaging, supportive and stabilising reactions in dealing with the juvenile delinquent requires a specific infrastructure which cannot be provided by the judicial system. That is the task of the child and youth services. At the very outset of a case, it must seek to avoid repressive judicial solutions (for instance, detention) by offering appropriate services of its own (see German Social Code Book VIII § 52 Subsect. 2). Once the case is under way, the child and youth services similarly has the obligation to make non-custodial reaction options available, in this way helping to reinforce the modern trend away from punishment in favour of social enquiry. All this requires effective cooperation between the judicial authorities and the child and youth services. Such cooperation is achievable given better training and professional development and appropriate communication between the authorities and individuals involved. This modern approach to dealing with young offenders requires a robust infrastructure of institutions offering and delivering non-custodial management measures. That can only be achieved on a basis of adequate funding put at the disposal of both the judicial authorities and the child and youth services. For as long as non-custodial projects are beset by anxieties about their funding, with an ever-present possibility that work might have to stop for lack of money, the legislative goals of the *Jugendgerichtsgesetz* (Juvenile Courts Act) and Social Code Book VIII will remain unattainable.

Also relevant here are intensified efforts – with a structural focus – to improve communications between the various parties concerned. The way forward has been shown by the *Bezirksjugendgericht* (District Juvenile Court) of Hamburg, which has now been abolished despite protests from the profession. A no less admirable example of cooperation is being set by the teams using the *Haus des Jugendrechts* (House of Youth Justice) at Bad Cannstatt (Stuttgart). Besides the benefits of spatial concentration, it is important in particular that the interfaces between the various competences should work smoothly. If a given minor's case is handled throughout by the same individuals – police officer, youth ser-

vices case-worker, magistrate – within their respective organisations, the usual wastage through interface frictions can be largely eliminated.

4.3 Procedural (Informal) Disposals

In less serious cases, an *Ermittlungsverfahren* (case investigation procedure) will go through informally and without further judicial measures, particularly if parents, the immediate social circle or the offender concerned have already taken appropriate action in relation to the offence. Such action may take the form of educative measures within the family context, an apology to the victim(s) or restitution by the offender of damage caused.

This type of practice, designated internationally as "diversion", is widespread in Germany. On average, almost 70% of all case investigation procedures against minors are disposed of by diversion, without negative impact on the incidence of juvenile criminality. Recidivism rates following diversion procedures are consistently no worse than those following formal sanctions imposed by a *Hauptverfahren* (full judicial process); in fact they tend to be lower.

This is the appropriate context in which to refute the assumption that diversion measures are inappropriate as a reaction to violence on the part of minors – on the grounds that "nothing happens". This assumption is erroneous. While judicial measures are indeed not used, the offence will trigger multiple reactions in the minor's immediate social environment, and these will in most cases suffice for norm clarification. What matters is that the offender should be made aware of the wrongness of the conduct concerned and of the legal penalties that are liable to be the sequel. In most cases, repetition of the offending conduct can be successfully avoided by these means. This not infrequently happens in anticipation of or in the early stages of the investigative procedures, in the form of voluntary participation in violence-prevention projects, or of restitution, which may take the form of a Social Training Course or of a *Hauptverfahren*.

At the same time, diversion is also a practical exemplification of the strategy of fast reaction in juvenile penal practice. This strategy – foreseen in the Juvenile Courts Act and accorded special prominence in § 72 Subsect. 5 – is integral to the educative principle. Given the dynamic nature of individual minors' development, the crucial link between offence and reaction tends to be more readily appreciated when the reaction is swift. Judicial reactions, by contrast, particularly in the form of custodial sentences, still often come months after the offence, which is far too late, and are then perceived as a wrong inflicted without reason or purpose. From this perspective too, diversion is a preferable way of coping with criminality.

4.4 Formal Sanctions after an Offender has been Charged

For dealing with the more serious criminal offences committed by minors and violence by minors resulting in serious injury, the entire gamut of formal sanctions envisaged by the Juvenile Courts Act is available. These are imposed by magistrates after the minor has been duly charged. Under the Act they are classified as *Erziehungsmaßregeln* (educative measures), *Zuchtmittel* (disciplining measures) and *Jugendstrafe* (detention in a young offenders institution). Depending on the impact interventions are intended to have, they will generally be designated as either custodial or non-custodial measures. In applying them, the law uses the strategy of *Priorität der früheren Stufe* (leniency before severity). This reflects the principle of proportionality and means in practice that any given measure may be imposed only if the next less severe measure does not suffice in terms of educative effect (see JGG[2] §§ 5, 17). Thus, for example, *Jugendstrafe* as the "ultimate sanction" may only be imposed once other measures cease to offer prospects of educative effect.

The categories of "educative measures" (which comprise *Weisungen* [court orders] and educational assistance under the *Kinder- und Jugendhilfegesetz* [Child and Minors Support Act] – see Social Code Book VIII) and "disciplining measures" – i.e. *Verwarnung* (admonishment) and *Auflage* (conditional discharge with case-specific stipulations) – are non-custodial measures; *Arrest* (detention without criminal record) and *Jugendstrafe* mean custody. *Jugendstrafe* is detention in a *Jugendstrafanstalt* (young offenders institution) and is the only penal sanction leading to a criminal record (listing in the *Bundeszentralregister* [national central register]). All other measures are recorded in the *Erziehungsregister* (educative measures register).

4.4.1 Non-Custodial Sanctions

Weisungen (court orders) regulate the young offender's behaviour by imposing or proscribing certain forms of conduct with a view to supporting and underpinning the educative process. The best known and most frequently used court orders are listed at *Jugendgerichtsgesetz* (Juvenile Courts Act; JGG) JGG § 10; compulsory work with educational value, supervision by a mentor, participation in a Social Training Course, and Victim-Offender Mediation/Dialogue as a form of restitution are especially widely used. But the list of possibilities is open-ended. Magistrates may select a measure not listed in the catalogue if it is deemed more appropriate to the educational needs of the young offender concerned.

2 *Jugendgerichtsgesetz* (Juvenile Courts Act)

Among the *Weisungen* or orders that may be imposed, one that can be singled out as a meaningful and effective measure against violent offending by minors is victim-offender mediation/dialogue. Its aim is a progressive defusing of the conflict situation to the point of reconciliation between the offender and the vctim, which means that it can be described as a victim-focused strategy. This aim can be achieved by *Schadenswiedergutmachung* (restitution for losses/damage caused), *Schmerzensgeld* (compensation for injuries and/or suffering caused), apology to the victim, assistance or support for the victim, and similar actions. It is important that the confrontation between offender and victim should take the form of a face-to-face meeting or conversation, usually with a conflict mediator participating. A surprisingly large number of victims agree to attend. It gives them an opportunity to overcome fear and humiliation better than would be possible were the offender to remain an anonymous criminal. If the victim declines to participate, on reasonable grounds such as feeling psychologically unable to cope with meeting the offender face to face, the sentencing magistrate will consider a different sanction, such as work for a victim aid project. However, where the victim's refusal to attend is unwarranted and the offender's endeavours sincerely meant, the court may find the latter sufficient and choose to impose no further sanction.

For offenders, these encounters seem to represent major hurdles, some individuals perceiving them as more onerous than a traditional sanction.

The normative place assigned to victim-offender mediation among *Weisungen* in general as a formal sanction is controversial, because success in a victim-offender mediation procedure is usually contingent on the voluntary factor. In practice, consequently, conflict resolution is most often achieved on a diversion basis. Nonetheless, the addition of victim-offender mediation to the Juvenile Courts Act list of *Weisungen* in 1990 represented a new departure in crime policy and must be regarded as a further trailblazing step in the direction of more prevention and more restitution in penal law.

Contrary to the expectations of those responsible for crime policy planning at the time of full adoption of victim-offender mediation – who had essentially envisaged it as appropriate to cases of theft, damage to property, and verbal abuse – over half of the cases assigned by State prosecution services or courts have in fact been offences of actual bodily harm, or at the low end of robbery with violence.

Here too, as in other reactions anticipated in the *Juvenile Courts Act,* the considerable discretion allowed to prosecuting authorities and courts results in wide variation in actual practice across the different German states and regions. The possible applications for victim-offender mediation have by no means yet been fully explored.

The Social Training Course too is capable of instilling due respect for the bodily integrity of other human beings. Such courses afford abundant opportunities to gain young people's confidence, and in turn to instil knowledge and thoughtfulness. They may be experience-centred – taking the form, for instance, of an extended climbing expedition in the mountains, mentored by social education professionals, or offering participants the group experience of crewing a large sailing vessel. Again, the approach to the course participants can be learning-centred, i.e. presented as a kind of seminar involving violence-related topics. Social Training Courses in various forms are widely used, and years of experience have proved their potential for teaching minors empathy and an appreciation of the importance of socially responsible behaviour[3].

Of the disciplining measures, *Auflagen* (stipulations attached to a conditional discharge) are the most important. They include obligatory work spells (community service), payment of a sum of money to benefit a common-good institution, apology to the victim, and restitution, to the best of the offender's ability. Fines apart, the community service orders are the most widely used sanctions in juvenile penal practice. They differ from the work service orders issued under the educative provisions (*Weisungen*) in that they are not designed to relate to the particular offending behaviour concerned, and require no mentoring by social education professionals. Even on policy grounds alone, community service orders are thus easier for a court to impose in the form of *Auflagen*, because these are not subject to additional constraints in the same way as *Weisungen*. In spite of these simplified aspects, the community service Auflage still remains better suited than fining or imprisonment to induce empathy and constructive review of the offending behaviour.

One problem with non-custodial measures in as far as they affect young people with ethnic background is that inadequate linguistic competence in German rules out the many programmes involving a large element of verbal communication. First remedial steps have been introduced – in the form of anti-aggression training conducted in Turkish – but these are still too few.

4.4.2 Custodial Sanctions

The custodial sanctions of *Jugendarrest* and *Jugendstrafe* (detention in a young offenders institutions – see also above and below for definition) have very high recidivism of up to 78%. This in itself means it would be unjustifiable for penal policymakers to expect subsequent good conduct. The Juvenile Courts Act (JGG) strategy is accordingly to avoid custody as far as possible. Apart from the principle of custody being used only as a last resort – i.e. when educative

3 Holthusen, Bernd/Schäfer, Heiner (2007): Violence Prevention Strategies in the Child and Youth Services in Germany with reference to young people aged 13 and up.
Download: www.dji.de/youthcrime.

measures and *Auflagen* no longer suffice (see JGG §§ 5 Subsect. 2 and 17 Subsect. 2) – the law also requires implementation of a sentence to be avoided when there are educational grounds for suspension. The court, in its capacity as implementing instance, can wholly or partially rescind the implementation order should circumstances arise subsequent to sentencing that justify such non-implementation of the sentence on educational grounds (see JGG, § 87 Sect. 3). The *Jugendstrafe* sentence imposed may be suspended for a probationary period if there is felt to be a reasonable prospect of the minor concerned responding to the sentence pronounced by good conduct, even if the sentence remains suspended (see JGG § 21). Even the actual pronouncing of a *Jugendstrafe* sentence (see JGG § 27) and – where part of a sentence has been served – the remaining part of that sentence may, for educational reasons, be suspended on condition of good conduct. A further point is that custodial measures, as opposed to non-custodial, are much more expensive, costing many times more per sentenced detainee than non-custodial measures per probationer.

Jugendarrest is detention for a period not exceeding four weeks. Sentence options available are *Freizeitarrest* (leisure hours detention) on two or four days, *Kurzarrest* (short-term detention) for up to four days, or *Dauerarrest* (full-period detention) for from one to four weeks. The *Ungehorsamsarrest* sentence (non-compliance detention) is a sanction used in cases of failure to comply with *Weisungen* or *Auflagen*, and is not relevant to the present context.

The severest penalty is *Jugendstrafe* for a period of up to ten years. The minimum *Jugendstrafe* sentence is one of six months. *Jugendstrafe* of under two years may be suspended on probation if the prognosis for the minor's future development is favourable. This happens in about 70% of the cases in which a *Jugendstrafe* sentence is imposed.

5 German Juvenile Court Practice

Actual use made of diversion, the informal means of disposal of an *Ermittlungsverfahren* (case investigation procedure) once initiated, varies extremely widely from one federal German state to another, within individual states, regions, *Gerichtsbezirke* (legal jurisdictions), and even within the decisions of a single court or prosecuting authority. The differences do not arise from regional variations in crime levels, variations in the criminal inclinations of individual offenders, or differing degrees of culpability in individual cases. They seem to be caused by differing use made of the discretion allowed. That in turn points to ignorance or deliberate disregard of relevant academic research findings. In view of the constitutional obligation to afford equal treatment to all, these differences verge on the unacceptable.

The differences of practice in the use made of diversion are substantial. The figures range from 50% in one state to 85% in others. Since 1988 they have averaged just under 70% across Germany as a whole. Re-offending figures following diversion are relatively encouraging, and certainly no worse than the corresponding figures for formal sanctions. The implication for judicial practice is that any decision to impose a formal sanction needs to be supported by demonstration of why it is the better option in the case in point. Otherwise the principle of proportionality dictates use of the less drastic intervention.

The satisfactory outcomes associated with diversion practice argue for increased usage of the available options. In addition to improved outcomes in terms of offenders' future good conduct, a higher proportion of diversions would bring the benefits of reductions in legal and enforcement costs and in the workload of courts and prosecution services. The practice followed by prosecution services could be influenced to this end by way of the guidelines on use of diversion procedures. While these guidelines are not binding upon the courts, they nevertheless influence court practice. Almost all the German federal states have such guidelines. Those in force for the nation as a whole have model character, but are not binding on the prosecution services operating in the individual states.

The relative frequency of use of the various formal reaction options is likewise far from fixed. First place, at almost 60%, is taken by non-custodial disciplining measures, esp. *Auflagen* specifying community service or a fine. These too are primarily of a norm-clarifying character, though they do have elements of punishment. The current heavy use made of these sanctions, particularly the imposition of fines, should prompt careful scrutiny of their effectiveness. While they bring a case to a speedy and uncomplicated conclusion, their effectiveness in regard to subsequent adherence to the law is open to doubt.

Weisungen aiming to regulate the conduct of young offenders constitute about 7% of sentences imposed. By working to minimise negative factors and enhance positives, they are more successful than custodial sentences in assuring subsequent good conduct. Increased use of the *Weisung* option in practice appears desirable.

For this to be possible, however, there would need to be nationwide coverage by institutions, projects, groups and associations working under the aegis of the child and youth services to provide non-custodial young offender services on a professional basis. In an area which has no victim-offender mediation or Social Training Course projects of its own, the court cannot have recourse to these non-custodial options even where they would have obvious merits in individual cases. The relevant infrastructure is not widely enough available. This applies particularly to rural areas. It would be appropriate for the funding burden to be borne by the judicial system, given that use of non-custodial

measures saves it considerable expenditure. The fact that for years past this step has not been taken, even in the face of the lower re-offending statistics that further strengthen the case for preferring non-custodial options, seems to be attributable to a conviction on the part of professional jurists working in legal administration and the judiciary, but not trained in the issues of concern here, that measures of a social-education nature are not generally appropriate for penal interventions. This mindset is blind not only to the prospects offered by non-custodial strategies but also to the fundamental intentions of the Juvenile Courts Act.

As indicated above, one important reason for the shortfall has to do with the difficult funding situation affecting many non-custodial projects. State judicial authorities taking the view that the financial underpinning of such projects cannot be a responsibility of theirs – although the nature of the task suggests otherwise – and youth offices in many cases likewise expressing unwillingness, or feeling unable on cost grounds to provide support, it follows that projects of this kind, mounted by independent providers, tend to be dependent on subventions – particularly from local authorities – and on charitable giving. Providers who find themselves forced year after year to re-think and re-organise the mainstream funding for their project cannot reasonably be expected to give continuous, wholly focused attention to the real task in hand. Many projects of great promise are living from hand to mouth financially – or have already succumbed. The problem could be made less acute through costs participation by the judiciary, which stands to make considerable savings from the reductions in custodial responsibilities achievable through non-custodial alternatives, or at least through a desirable increased uptake of non-custodial alternatives.

The situation could be further eased by stepping up the flow of communication between the judicial authorities and the child and youth services. It should be a matter of course for prosecuting authorities in the young offender field to be exchanging ideas and experience with juvenile courts on a regular basis. This would enable information gaps to be avoided, prejudices to be diminished and improvements in sentencing and implementation to be achieved. And still further benefits would accrue if the magistracy and prosecuting authorities in this field were to familiarise themselves with the requirements laid down in the Juvenile Courts Act.

Of formal sanctions imposed, some 18% are *Jugendarrest*. A *Jugendarrest* sentence cannot be suspended on condition of good behaviour, but the court can choose to refrain from implementing the sentence, wholly or in part. The *Jugendstrafe* sentence likewise accounts for about 18% of sentences, while 12% impose a period of probation. That means that the minors concerned are spared custody, subject to specific probationary conditions. If they violate the conditions imposed, the suspension of sentence can be revoked. A *Jugendstrafe* sentence which has not been suspended must be served in full, except in cases

where the convicted offender is released early on the grounds that a favourable prognosis makes such action appear justifiable.

Comparison of sentencing practice in 2004, as described here, with that of earlier times shows that sentencing of young offenders is making more and more use of non-custodial reactions and has been cutting progressively back on sanctions involving deprivation of liberty. This trend reflects the current state of knowledge reached by international and national criminological research in the quest for a rational design for a judicial system appropriate to young offenders, and is accordingly to be welcomed.

Recently, however, particularly in connection with offences involving violence, and in the unjustified hope of thus reducing violent criminality, a trend towards more frequent and heavier custodial sanctions has become apparent. If one accepts the premiss that acts of violence – discounting the mild physicalities that typically accompany disputes among minors – are predominantly a consequence of exclusion, absence of hope for the future, failure at school, violence suffered at the hands of others, and similar social and individual negatives – as observed, for instance, in the case of young non-integrated or inadequately integrated ethnic German or other immigrants – it will be evident that severe punishment does not serve to ease the complex of problems and in fact is more likely to make matters worse.

The application of *Jugendstrafrecht* (Juvenile Penal law) to *Heranwachsende* (the 18-to-20 age-group), long a disputed issue in the debate on crime policy, finds varying degrees of acceptance in penal practice. The strategy of seeking the cooperative involvement of young people who have not yet completed their personal development is an internationally recognised one and is recommended for adoption (cf. the UN Standard Minimum Rules, the "Beijing Rules" and the Council of Europe's recommendation R (87) 20). As with diversion, uptake rates vary from region to region within Germany. At the time the relevant § 105 was incorporated in the Juvenile Courts Act in 1953, the average uptake was about 21%; over the years it was to increase to over 60%. It is striking that for serious cases, in which expert witnesses are generally called in – e.g. robbery with violence or manslaughter offences – the uptake rate exceeds 90%. In dealing with offending 18-20-year-olds, then, accused of non-trivial offences, professionals work almost regularly on the basis that the individuals concerned have not reached full maturity. In terms of crime policy, this suggests a presumption of a general degree of immaturity affecting young offenders of the 18-to-20 age-group: while they have attained the legal age of majority, they have as a rule not yet reached social maturity. For these individuals too, the fine tuning made possible by the range of reaction options provided for in the *Jugendgerichtsgesetz* (Juvenile Courts Act) gives much better prospects of a successful period of probation than would the rigid punishment regime of imprisonment or fining that could be expected under adult law.

Many contributors to the ongoing debate on crime policy have spoken out in favour of changes to this legal position. Their arguments tend to adhere to the populist level. The contention is that persons old enough to vote in elections and sign legal agreements must also accept the full legal consequences of any criminal offences that they commit. The counter-argument advanced by experienced practitioners in the field is that account must be taken of the degree of maturity attained by the specific offender at the time of the offence. This approach is underpinned by scientific evidence from research in developmental psychology, education and sociology that the maturing process continues up to the beginning of the third decade of life.

6 Youth Justice Administration in Germany: Personnel and Training

The judicial system relating to minors is administered by dedicated benches of magistrates and dedicated prosecutors. Under § 37 of the Juvenile Courts Act these men and women are expected to have competence as educators and be experienced in youth education. Criminal legal training alone cannot satisfy the requirements profile prescribed in § 37 of the Juvenile Courts Act for work in the youth justice system. Neither the legal studies nor the trainee period provide sufficient engagement with the specific circumstances and requirements of youth justice. A legal qualification lacking a foundation in (for instance) juvenile criminology, education theory and psychology cannot fulfil the requirements specified by § 37 of the Juvenile Courts Act.

Training provided on a continued professional development basis for prosecutors and magistrates dealing with young offenders cannot easily replace the relevant lacunae in university and traineeship background. In many cases legal practice allows no time for professional development courses. The impression is sometimes given that the specialisms of youth justice are just so many more routine ports of call for junior magistrates and prosecutors to add to their CV, with the result that a professional development course in these areas often seems not worthwhile. The practice of work allocation at the direction of the court President cannot always remedy these regrettable situations. Presidents frequently seem to have been obliged to apply other criteria to case allocation than those in § 37 of the Juvenile Courts Act. Similar circumstances can be seen to affect the allocation of work to the prosecution services.

Case allocation as it operates in practice not infrequently bundles competences in individual professional specialisms without distinguishing between young and adult accused. Thus for instance, all road traffic-related or narcotics-related offences occurring in the court's case-list may be grouped together, so that the

magistrate(s) and prosecutor(s) for the field in question will be expected to deal with juvenile offenders as well as adults. On occasion this leads to juvenile offences being judged on criteria that are not appropriate for young offenders.

Court practice of this nature, which undermines the aims of the Juvenile Courts Act, could be constructively challenged by the formation of *Schwerpunktgerichte* (special-focus courts), which would be area juvenile courts in the sense of the Juvenile Courts Act § 33. Regrettably, Hamburg has recently taken a step in the opposite direction by doing away with its area juvenile court, even though its value had been proven over the years. The undesirable consequences feared at the time seem now to be manifesting themselves.

In the context of the ongoing debate on crime policy, it has long been urged that a Youth College should be established with a view to improving the training and continued professional development of personnel concerned with juvenile court proceedings. In 2002 a resolution to that effect was adopted by the Association of German Jurists. It has the support of the *Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen* (German Union for Juvenile Courts and Juvenile Court Help inc.), a learned society dedicated to research on the causes and effects of juvenile criminality. Yet the proposal is still waiting even today to be put into practice. In the interim, however, following an initiative from the *Deutscher Richterbund* (Association of German Judges and Public Prosecutors), the German Union for Juvenile Courts and the universities of Magdeburg and Hamburg jointly set up the *Netzwerk Jugendakademie* (Academy for Youth Court Proceedings), and within this network they began work in 2006 on the project of the long-demanded Acedemy itself.

In terms of numbers of appearances, there is less involvement of defence counsel in juvenile than in adult criminal proceedings. This circumstance gives all the more reason for concern because minors are less adept in self-defence and less capable of cogent argument than adults, as well as being notably disposed to confess to offences – even offences that they have not in fact committed. This would warrant a higher rate of defence involvement than for adults. Yet in the *Amtsgerichte* (approx. = county courts) it is actually considerably lower. The *Jugendgerichtshilfe* (youth services in youth court proceedings) and *Jugendhilfe* (child and youth services) working in this area of the law have no power to remedy the problem. This state of affairs means that insufficient account is being taken of § 140 Sect. 2 of the *Strafprozessordnung* (German Code of Criminal Procedure; StPO), which requires a defence counsel to be engaged if the accused is manifestly unable to defend him- or herself.

A further important factor in the inadequacy of defence provision in the *Amtsgerichte* is that while these courts, in their capacity as *Jugendschöffengericht* (juvenile court with lay judges) enjoy comprehensive jurisdiction and the same sentencing powers as the *Landgericht* (approx. = regional or crown court), yet

are not subject to the same statutory obligation as the *Landgericht* to provide for a defence. A possible remedy would be to extend the list of instances with compulsory defence provision (see StPO § 140 Subsect. 1 No. 1) to include the *Jugendschöffengericht*.

In juvenile penal procedure, alongside the three constituent elements found also in adult procedure – prosecutor, court/bench, defence – there is also a fourth active participant, the *Jugendgerichtshilfe* (youth services in youth court proceedings), which collectively has its own participatory obligations and rights. This service has the duty to bring the social and educational aspects of the minor's current situation and developmental stage to the awareness of the court and to advocate appropriate measures. It must receive advance notification of the trial date, and its representative(s) will be called upon to address the court. The youth services work in youth court proceedings on behalf of the court. It has the duty to advise the court and assist it in reaching its decision. At the same time, however, it has a pastoral obligation vis-à-vis the minor concerned. It explains the proceedings to him or her and provides guidance on conduct during the hearing. This requires the placing of confidence by the minor in the youth services' personnel – who nonetheless are obliged to disclose their knowledge to the court. Thus the service is forced to play an ambivalent role; and this can and does have harmful consequences.

The youth services in youth court proceedings are the responsibility of local authority *Jugendämter* (child and youth offices). These offices may be differently organised according to the authority they belong to: some as a special service, some as a branch within general youth services. Youth services personnel need to be adequately informed about the specific requirements of the Juvenile Courts Act and to understand the criminological specifics of juvenile criminality. They should be in regular communication with the prosecuting service for offences by minors, and with the juvenile court. This point takes on particular importance during the *Ermittlungsverfahren* (case investigation procedure) when there is a need to secure bail for the accused. Even at the beginning of the preliminary hearing and without a prospect of the accused being remanded in custody, this level of communication remains important, as the youth office or the representative of the *Jugendhilfe* (child and youth services) attending the hearing is obliged under Social Code Book VIII § 52 to ascertain in good time whether the juvenile offenders concerned are eligible for those services provided by the child and youth services that justify a diversion measure – and to notify either the youth prosecution service or the juvenile court without delay. At the full hearing, the youth services is expected to comment on the sanctions to be imposed. Integration of the youth services in youth court proceedings into general youth services might well have an adverse effect on the level of competence at which these special responsibilities are discharged.

In some cases the reports on the educational and social aspects of the minors' situations and the recommendations of the youth services are not adequately taken into account by the court. This sometimes leads to an illegal situation in that the youth services neither takes part in the proceedings nor contributes a report on the educational and social aspects of the minors' situations. This can constitute grounds for an *Aufklärungsrüge* (plea that the court failed to give clarifying directions). A clarification of this point at Social Code Book VIII § 52 could dispel the misunderstanding concerned.

The Juvenile Courts Act prescribes the involvement of lay magistrates. In proceedings against minors, the lay magistrates present at the full hearing must include one man and one woman. They are expected to have competence as educators and be experienced in youth education. The system of having the lay magistrates panel selected by local councils could be improved by selection of applicants conforming more closely to the qualifications required by the Act.

7 Current Proposals for Reforms to the German Juvenile Criminal Law

Since the 1990 amendment of the Juvenile Courts Act, a large number of changes to the law have been proposed. Most of the proposals for change have come in the wake of an individual spectacular case or a rise in crime figures as recorded in official police statistics. The principal demand is that the law should be made more stringent and general penal law applied more regularly to the 18-20 age-group. Specific examples include an option to impose a so-called *Warnschussarrest* (warning-shot detention) in conjunction with a suspended juvenile sentence; an increase in the maximum *Jugendstrafe* term of imprisonment to 15 years; and diminished application of juvenile criminal law in hearings involving 18-20-year-olds. Met time and again with united resistance from qualified professionals, these demands have to date not been implemented. The professional view is that such changes are unwarranted. Research by criminologists on the effect of sanctions gives reason to fear that introducing them in the context of juvenile criminality would if anything have a retrograde effect on prospects for subsequent good conduct. Be that as it may, a bill favouring such reforms originated in the *Bundesrat* (upper house of the German parliament) during the last legislative period (*Gesetzentwurf zur Verbesserung der Bekämpfung der Jugenddelinquenz* [Bill for Improved Measures against Juvenile Delinquency], Parliamentary Paper BT-15/1472 dated 06.08.2003), and in 2006 was again tabled in the Bundestag (parliament lower house) (BT- 16/1027 dated 23.03.2006).

The opposing point of view is contained in the detailed proposals drawn up in 2002 by the Association of German Jurists and the Deutsche *Vereinigung für Jugendgerichte und Jugendgerichtshilfen* (German Union for Juvenile Courts and Juvenile Court Help inc.); based on scientific knowledge and practical experience, these proposals seek further extension of the reform that began in 1990 with the First Amendment to the Youth Courts Act. A draft bill originating in the Federal Ministry of Justice in 2004 shares these aims. However, it is a much less comprehensive document than the two sets of proposals put forward by the professional bodies. It owes its inception to a German Constitutional Court ruling of 16 January 2003 on an issue of parental rights in juvenile criminal cases; apart from recommending an appropriate change to the rules, it merely re-examines the old problem of how to define the educational principle incorporated in the Juvenile Courts Act.

The proposals put forward by the *Bundesrat* (upper house of the German parliament) and the Federal Ministry of Justice contain no remedies for the deficiencies in the youth justice system that we have described. The Federal Ministry of Justice bill does make a commendable attempt to disentangle the educational principle from the incubus of a pedagogical concept of education and to give it an iconic status marking the primary focus of the Juvenile Courts Act on the mere avoidance of recidivist behaviour as the declared objective.

The resolutions put forward by the two professional associations include extensive proposed changes and additions relating to such issues as the value of conflict resolution outside the courtroom, initial and continued professional training of personnel working within the judicial system, the place and contribution of youth social workers in juvenile court proceedings, the conduct of defence in juvenile criminal cases, the preferring of informal case disposals, and the legal consequences system. These changes and additions would largely eliminate the deficiencies mentioned above, and would ensure implementation of the further development of the reform – as called for in 1990 by the Federal government and the *Bundestag* – on the lines of the First Amendment (1990) to the Juvenile Courts Act.

The decisions that must be taken in the near future, in favour of the proposals put forward by the *Bundesrat*, or in favour of those put forward by the Federal government and the professional associations, should not be taken on the basis of populist political considerations, but rather on the basis of solid research findings and many years of practical experience. The knowledge is there to be used.

8 Concluding Remarks

From the point of view of a crime policy that aims to contribute usefully towards prevention of juvenile disposition to violence and commission of violent acts, it is desirable that the existing comprehensive and diverse range of good options available under the existing legislation should be competently applied, that the deficiencies in the infrastructure of non-custodial projects and court practice should be eliminated, and that priority should be given to the further development of an educatively oriented reform of the Juvenile Courts Act. The Juvenile Courts Act is in no way a product of "better times", for when it was first codified in 1923 and when updated in 1953 and 1990 it offered a helpful response to young people who were socially and educationally in dire straits. That response has proved itself nationally, and internationally is regarded as exemplary. Against such a background, there is no requirement in Germany for hasty, ill-considered changes to the law, changes that are essentially knee-jerk reactions to isolated spectacular cases and incidents.

There remains the problem of how to achieve lasting acceptance of these insights in the political and public domain. Under the influence of sensationalist crime reporting in the media, the public and their politicians tend to have rigid and repressive views on the issue of juvenile criminality, in marked contrast to the professionals working in this field. To close the knowledge gap responsible for this mindset will be a major challenge. Among other things, it will be essential for research results to be lucidly organised and presented.

However, there is no alternative to the ceaseless endeavour to propagate scientific knowledge, most of all during times of active efforts via the crime debate to bring about reform moves, as at present. For that long endeavour, those best able to contribute are scientists, professional associations, and the relevant civil service departments and Ministries. At the same time, politicians have the responsibility, in the context of the issues discussed, to pay due heed to the needs and special characteristics of the youth generation. That constitutes an important task for the future. That demands a new culture in relations with young people. For adults, it is not enough to see only the problems that young people bring with them – the problems they have brought since time immemorial. They must also have an eye for the difficulties that their own current arrangements governing community life are creating for young people and the world they will live in. In terms specifically of juvenile criminality, this means taking cognisance of the knowledge built up by the professional workers in the field, and making that knowledge the basis for determining appropriate reactions to juvenile delinquents.

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