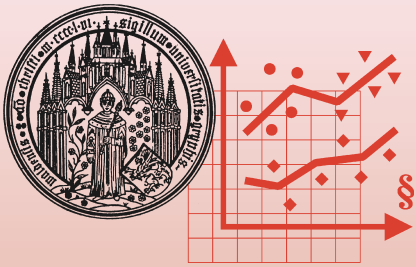
Schriften zum Strafvollzug,
Jugendstrafrecht und zur
Kriminologie

Herausgegeben von Prof. Dr. Frieder Dünkel
Lehrstuhl für Kriminologie an der
Ernst-Moritz-Arndt-Universität Greifswald

Band 36/2



Frieder Dünkel, Joanna Grzywa,
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Juvenile Justice Systems in Europe

Current Situation and Reform Developments

Vol. 2
2nd revised edition

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Volume 1

Germany

Frieder Dünkel

Preliminary Remarks

Germany is situated at the centre of Europe with borders to Denmark, Poland, the Czech Republic, Austria, Switzerland, France, Luxemburg, Belgium and the Netherlands. The country has a geographical area of 357,114.22 square km. With 82,314,906 Million inhabitants (31 December 2006) the population density per square kilometre is 230.

Germany, with its capital city Berlin, is a parliamentary democracy. Article 20 of the Constitution (*Grundgesetz*) defines the political system as "a democratic and social welfare state under the rule of law". Germany is a Federal Republic consisting of 16 Federal States, which dispose of a certain degree of autonomy, particularly concerning questions of education and culture, and – since 2006 – also prison law. Criminal law and juvenile justice, however, remain issues that are regulated at the federal level. Therefore, in these matters the same federal law applies in all Federal States.

In 2007 the gross domestic product was 40,415 US$ per capita and the unemployment rate lay at 8.1% (April 2008) (about 6.6% in West-, 13.9% in East-Germany, i. e. the five States which formed the former German Democratic Republic prior to the re-unification of Germany in 1990).

The age structure (31 December 2006) is as follows: children under 8 y.: 7.0%; children 8-14 y.: 5.8%; juveniles 14-18 y.: 4.4%; young adults 18-21 y.: 3.6%; young adults 21-25 y.: 4.7%; adults 25-30 y.: 6.0%; adults 30-40 y.: 13.6%; adults 40-50 y.: 16.7%; adults 50-60 y.: 13.1%; adults 60 y. and older: 25.0%.

Roughly 8.8% (7.3 Mill.) of the population have a foreign passport, one quarter of whom are of Turkish nationality (25.8%). About one third (32.3%) are from other EU Member States, particularly from Italy (7.9%), Poland

(5.4%), Greece (4.5%), Austria (2.6%), Portugal (1.7%) and Spain (1.6%). Population growth in Germany has been on the decline for years and this despite increases in the number of immigrants, which played a significant role in the 1980s and early 1990s. Immigrants from the former Soviet Empire with German roots have been issued German passports and are not classed as foreigners.

1. Historical development and overview of the current juvenile justice legislation

The history of the system of specific social control for minors in Germany dates back to the beginning of the previous century. As early as 1908, courts in some major German cities began developing special court chambers that specialised in issues of youth delinquency. However, the idea of specific legislation was only successfully pursued after World War I, opting for the "dualistic" approach of welfare *and* justice. Thus, in 1922 the Juvenile Welfare Act (JWA – *Jugendwohlfahrtsgesetz* of 1922) dealing with young persons in need of care was passed. One year later the Juvenile Justice Act (JJA – *Jugendgerichtsgesetz*, literally translated as the Juvenile Courts Act)[1] followed, which dealt with juvenile offenders who had committed a delinquent act prescribed by the general penal law (*Strafgesetzbuch*, StGB). A totally welfare oriented model of juvenile justice did not suit the German "mentality", which remained intent on retaining the option of punishing young offenders. The resulting compromise was a "mixed" system of juvenile justice, combining elements of educational measures with legal guaranties and a procedural approach in general that was characteristic of the justice model. The JJA did not create a new "juvenile penal law". Punishable forms of behaviour are the same as for adults – so-called status offences are not covered by the JJA. The Act contains provisions for a specific system of reactions/sanctions that are applicable to young offenders, as well as some specific procedural rules for the Juvenile Court and its proceedings (e. g. the principle of non-public trials).

Contrary to the general penal law for adults, the legislator of 1923 for the first time "opened the floor" for *educational measures instead of punishment* (and especially instead of imprisonment; the corresponding slogan was "*Erziehung statt Strafe*"). Furthermore, the possibility of abandoning the otherwise strictly applied principle of obligatory prosecution (principle of legality, *Legalitätsprinzip*) was introduced. The JJA was thus a forerunner of the notion of prosecutorial discretion in determining whether and how to prosecute, or

1 The literal translation of "Jugendgerichtsgesetz" reflects the historical roots of the JJA. It goes back to the adjudication of specialised judges of youth chambers at some courts of bigger cities like Berlin, Cologne or Frankfurt. The "Jugendgerichtsbewegung" ("movement for establishing juvenile courts") had a major influence on the first JJA in 1923; see *Schaffstein*/*Beulke* 2002, p. 34 ff.

whether to dismiss a case due to its petty nature or because educational measures had already been initiated by other institutions or persons (see §§ 45, 47 JJA). The third pillar of innovation of the 1923 legislation was to raise the age of criminal responsibility from 12 to 14 years.

In this context, it is worth mentioning that the only time 12 to 14 year olds have been re-criminalized since this change in the age limit was under the Nazi regime between 1933 and 1945. Today, lowering the age of criminal responsibility is only an issue (of a more rhetorical or symbolic nature, particularly in the run-up to elections) for a few conservative politicians of the Christian Democratic Parties (CDU/CSU) – an issue that has no prospects of being accepted either by the majority of their own parties, or by the other political parties in Germany.

The law of 1923 and the amendments that followed provided no definition of the principle of "education". History has demonstrated that under certain ideologies such a lack of precise definitions can result in a totally different interpretation of the meaning and intended use of the educational principle. Thus the Nazis defined "education" as *education through* (rather than *instead of*) *punishment*, i. e. a certain repressive meaning of education prevailed. The introduction of so-called disciplinary measures – particularly the short-term detention centre (up to four weeks of detention as a short sharp shock) – by an administrative decree of 1940 and an amendment to the JJA in 1943 can be seen as a demonstration of the repressive *Zeitgeist* of the Nazi era.

After World War II the legislator decided to retain these measures, as similar approaches had also existed in other European jurisdictions (see e. g. the British detention centre). Yet the reforms of the Nazi system had been ambivalent insofar as they also included educational innovations that had been discussed in the previous era of the Weimar Democracy of the 1920s. On the other hand it can be seen that a totalitarian ideology of education was linked to the general totalitarian ideology of the Nazis.[2]

The Juvenile Welfare Act of 1922 was a classic law providing intervention in the sense of the "*parens patriae*" doctrine, according to which the State "replaces" parents who are not able or willing to fulfil their educational duties. The educational measures provided by the JWA were similar to (or even the same as) the educational measures stipulated in the Juvenile Justice Act, like supervisory directives, care orders, orders to improve the educational abilities of parents, placement in a foster family or in residential care to name but a few. In the years that followed, the interventions of the JWA were not changed and received very little criticism. However, reform debate emerged in the late 1960s following social and political movements and developments. The main criticism was directed at the closed institutions ("homes") as stipulated by the JWA. The most critical points of the JJA lay in the disciplinary measures, particularly the measure of youth detention of up to four weeks (a kind of shock incarceration

2 See *Wolff* 1986; 1989.

for repressive purposes). The reform movement in the early 1970s was strongly in favour of a unified welfare model that excluded classic justice-model sanctions as far as possible. However, this idea was already abandoned again in 1974.[3] Thereafter, reform proposals were made in favour of the dualistic approach of separate welfare and justice legislation. Finally, in 1990, the JWA was replaced by a modern law of social welfare (under the concept of the social welfare state, *Sozialstaat*). The role of the juvenile welfare boards was shifted to one of being institutions of support rather than agents of "intervention". At least in theory, the more repressive educational measures like detention in secure (closed) residential care were abolished. In the late 1980s and early 1990s a few closed welfare institutions were re-opened (about 260 places in total in five Federal States – which is about 0.3% of all places for residential measures in the welfare system). 11 States have no closed welfare institutions, but can instead send children and juveniles to a home in another Federal State.[4]

The German juvenile justice system has experienced major changes since the 1970s. In the first instance, this occurred without any legislative changes being made, in a process that has been termed "reform through practice" ("*Jugendstrafrechtsreform durch die Praxis*"). This process was characterized by the development of new, innovative projects by social workers, Juvenile Court prosecutors and judges. As a consequence, in the 1980s the number of juvenile prison sentences declined considerably following the introduction of "new" community sanctions.[5] Major reforms of juvenile justice and welfare legislation were then passed in 1990, following the reunification of Germany, which entailed the introduction of numerous new educational measures and sanctions into the JJA that had previously been practised only on an experimental basis. In addition, the Juvenile Welfare Act of 1922 was modernised and is now titled Children's and Youth Welfare Act (CYWA, *Kinder- und Jugendhilfegesetz* or *Sozialgesetzbuch VIII*). It provides a coherent system of support and education for children and juveniles who are in need of care and whose parents apply for such support. In cases where parents do not apply for such support (non-cooperation), the Family Court on request of the juvenile welfare authorities can apply the necessary measures, including the transfer to foster families or even closed residential care as a last resort (according to §§ 1631b, 1666, 1666a Civil Code, BGB). A recent draft bill aims at strengthening the powers of the Family Court and at making earlier intervention easier in cases

3 See in detail *Schaffstein/Beulke* 2002, p. 41 ff.

4 Interestingly 87% of juveniles in closed residential care come from the States which dispose of the closed facilities, and only 13% come from other States, see *Arbeitsgruppe „Familiengerichtliche Maßnahmen bei Gefährdung des Kindeswohls"* 2006, p. 37 ff.; *Hoops/Permien* 2006, p. 25; see also *Sonnen* 2002, p. 330.

5 See *Dünkel/Geng/Kirstein* 1998; *Dünkel* 2006; *Heinz* 2008.

where parents neglect their children. The bill was triggered by a series of upsetting cases in the early 2000s in which children had died as a result of parental neglect. It needs to be stressed that this intended reform should not be misunderstood as a move towards more repressive civil law interventions, but rather as a means of earlier and more consistent educational support for families that are in need of it.

1 January 2008 saw the enactment of the second amendment to the Juvenile Justice Act that provides juvenile justice in Germany with an overall aim. § 2 (1) JJA stipulates that the primary aim of the JJA is to prevent individual juveniles and young adults from committing (further) offences. In order to achieve this goal, the imposition and execution of interventions and (as far as possible) the juvenile criminal procedure – with regard to the rights of parents or legal guardians – are to be oriented towards this educational aim. The explanatory paper of the draft clearly states that other aims like general prevention or the protection of the public are not to be considered.[6] Furthermore, the explanatory paper emphasises that the application of juvenile sanctions is to be based on empirical evidence and the principles of "what works", which is in line with the Recommendation of the Council of Europe (2003) 20 on "New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice."[7]

2. Trends in reported delinquency of children, juveniles and young adults

Contrary to the USA and to some countries in Europe, in Germany there are no longitudinal studies of victimisation and delinquency on the basis of representative surveys. Several regional victimisation and self-report delinquency studies have existed since the mid 1990s that give at least an impression of how youth crime has developed in Germany over the last 10 years.[8] The overall impression is that – in contrast to the picture that is drawn by police recorded data – youth crime and violent crime in particular have not increased in the last 10 years. Rather, elevated official figures can be explained largely by increased rates of reporting offences (see below).

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6 See Bundestagsdrucksache 16/6293, p. 10; *Dünkel* 2008, p. 2 f., which is conform with the existing jurisprudence of the Higher Courts and the Supreme Court, Bundesgerichtshof, see *Eisenberg* 2008, note 5 on § 17; *Ostendorf* 2009a, Grdl. Zu §§ 17-18, note 6.

7 No. 5: "Interventions with juvenile offenders should, as far as possible, be based on scientific evidence on what works, with whom and under what circumstances", see *Council of Europe* 2003.

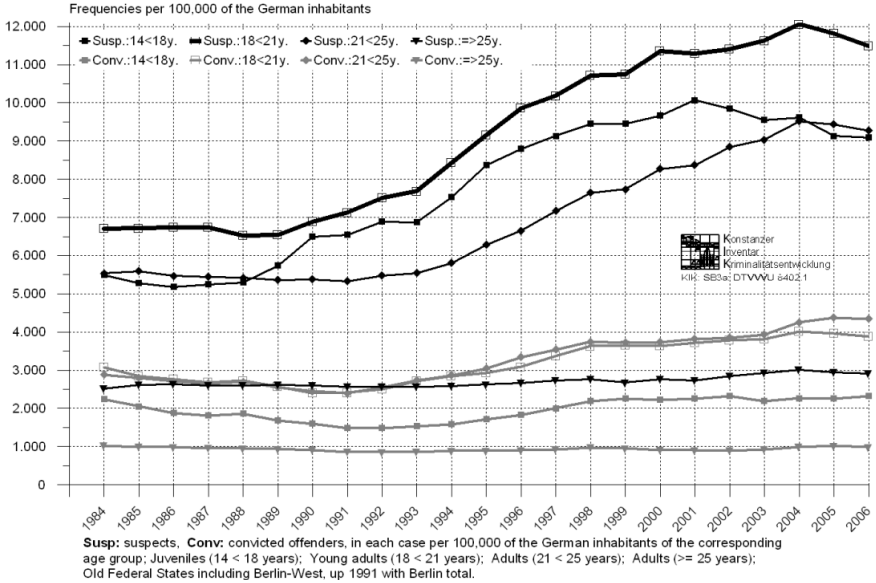
8 See *Wilmers et. al.* 2002; *Baier et. al.* 2007; *Boers/Walburg/Reinecke* 2007; *Dünkel/Gebauer/Geng* 2008.

Besides the well-known shortcomings of police and court based data, the German statistics are also problematic because the counting rules were changed in the 1970s and 1980s. These methodological changes have left us with more or less comparable data only for the years from 1984 onwards. However, with the reunification of Germany in 1990 the comparability of the data sets has been compromised once again. Due to the fact that we do not dispose of court-based data for all "new" Federal States, some of the following figures only refer to the formerly West-German Federal States, for which a longitudinal analysis is possible for data since the 1980ies. Police and court-based data from the former GDR (East-Germany) are not comparable to data from the old Federal States of former West Germany due to the many differences in their legal systems and their data collection rules.

Police-recorded data for West Germany indicate stable or even slightly decreasing levels of juvenile delinquency in the 1980s up until 1989, followed by rising numbers up until the mid-1990s. From then onwards the rate of young offenders – and of violent offenders in particular – was rather stable, as can be taken from *Figures 1* and *2*.[9] Police data, however, indicate a stabilisation only for robbery offenders, whereas after 1993 cases of serious and bodily injury were still increasing for juveniles and young adults. A particular increase can be observed in the five new Federal States of former East Germany (Brandenburg, Mecklenburg-Western Pomerania, Thuringia, Saxony, and Saxony-Anhalt) during the first five years following the country's reunification. In 1995, the rates of juveniles suspected of having committed certain (in particular violent) offences (in some cases clearly) surmounted those of the western Federal States (see *Figure 3*). Yet due to increases in the West German juvenile suspect rates in the following ten years leading up to 2005, parallel to a stabilisation or even reduction in the East German figures, the gap between East and West Germany has become much narrower (see *Figure 3*). These developments need to be put in connection with the overall situation in German society at that time. The changes in the data indicate a kind of process of normalisation following a period of particular problems arising from social transition and anomie or "normlessness" in East Germany.

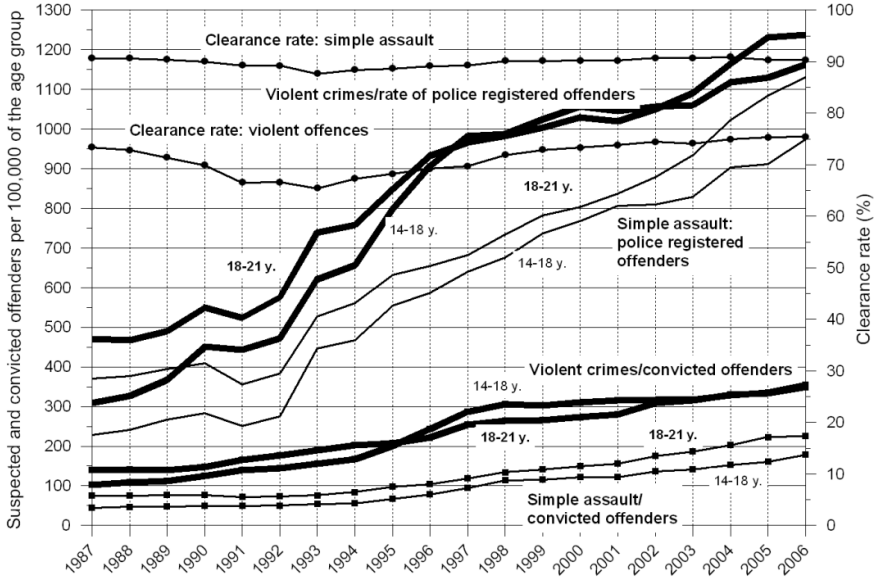
9 For a comprehensive overview of the development of juvenile crime in Germany, see *Bundesministerium des Inneren/Bundesministerium der Justiz* 2006; for a similar development in other European countries, see *Estrada* 1999; 2001.

Figure 1: Male German suspects and convicted offenders by age groups, 1984-2006. All offences (without traffic offences)



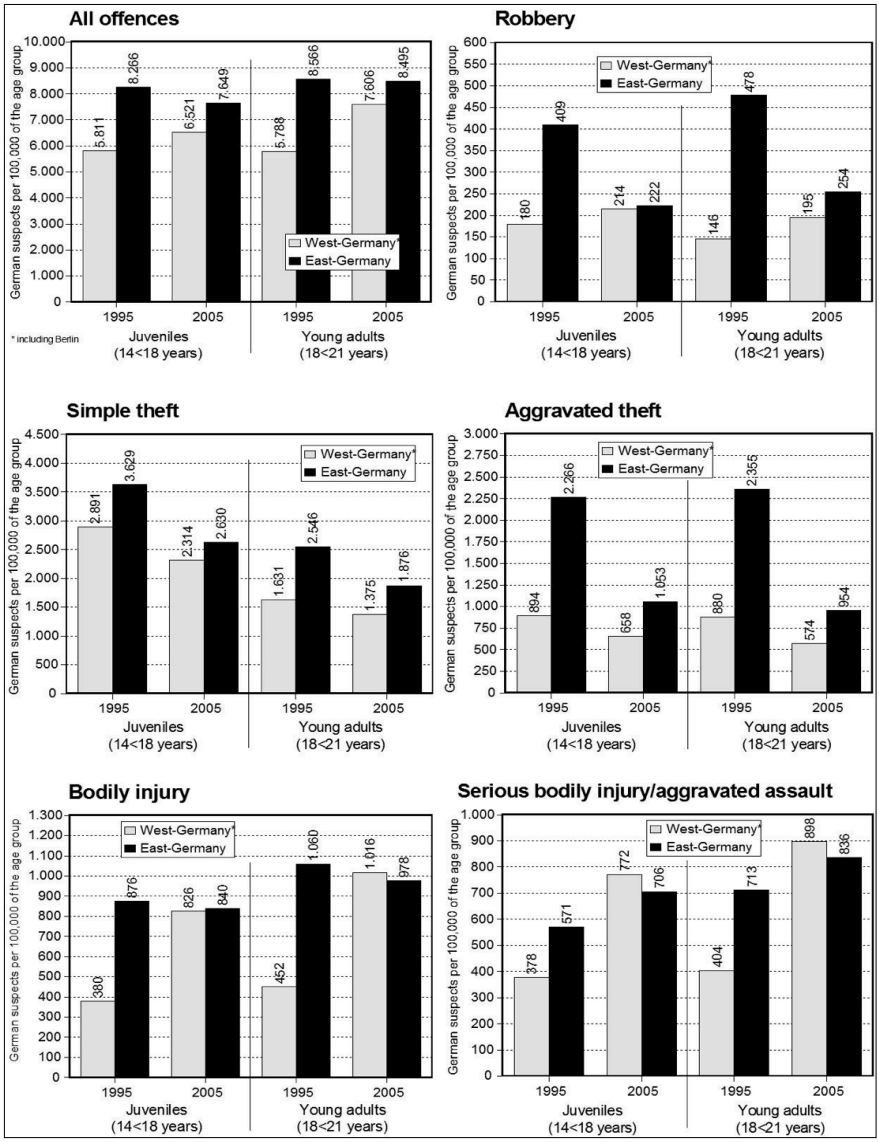
Source: *Heinz* 2008.

Figure 2: Suspected and convicted violent offenders 1987-2006, per 100,000 of the age group



Source: Federal Bureau of Police (Bundeskriminalamt) (Ed.): Polizeiliche Kriminalstatistik 1987-2006; Federal Statistical Office (Statistisches Bundesamt) (Ed.): Strafverfolgungsstatistik 1987-2006; own calculations.

Figure 3: Suspected juveniles and young adults in East and West Germany per 100,000 of the age group, 1995 and 2005



Source: Federal Bureau of Police (Bundeskriminalamt) (Ed.): Polizeiliche Kriminalstatistik 1995; 2005; own calculations.

Young migrants and members of ethnic minorities have become a major problem for the criminal justice system in Germany. They are especially over-represented in connection with violent offences. For the time period of 1984 to 1997, 83% of the increase in the police registered crime rate for persons aged between 14 and 21 can be attributed to foreign citizens.10 Most of these foreigners are born in Germany. The Turkish minority plays a specific role in this regard. Self report studies from the late 1990s revealed that the rate of violent offenders was twice as high in the Turkish group compared to the German juveniles.[11] However, the over-representation of foreigners – according to self-report studies – has decreased since then.[12] *Boers/Walburg/Reinecke*[13] even come to the conclusion that, according to their comprehensive study in a West-German region of North Rhine-Westphalia, young foreigners are no longer overrepresented at all.

Looking at different groups of ethnic minorities or foreigners, up to 1993 asylum seekers had played a predominant role in the increase in the general crime rate, but also in the increase of pre-trial detainees and sentenced prisoners. This problem disappeared after a change of immigration legislation in 1993 that consequently reduced the flux of immigration considerably.[14]

A specific problem has emerged with the so-called "*Aussiedler*", regularly people from the former empire of the Soviet-Union with a German passport. This group exhibits severe integration problems stemming from language deficiencies and other issues. They are often sentenced for serious violent crimes and compose a rather explosive prison subculture.[15]

All the phenomena described here concerning young migrants and ethnic minorities are only valid for the old Federal States of former West Germany. The East German "*Länder*" insofar face very different crime problems that are more in connection with the German native population. Because only very few foreigners live in the former East, their contribution to the crime problem as offenders is very limited. Rather, they deserve particular attention for their over-representation as victims of violent crimes, particularly committed by xenophobic or right wing extremists.[16] However, since 1998 right wing

10 See *Pfeiffer et al.* 1998, p. 48.

11 See *Pfeiffer et al.* 1998, p. 81.

12 See *Wilmers et. al.* 2002; *Baier et al.* 2007.

13 See *Boers/Walburg/Reinecke* 2007.

14 See also *Dünkel* 2005.

15 See *Dünkel* 2005; *Dünkel/Walter* 2005.

16 See *Dünkel/Geng/Kunkat* 2001; *Dünkel/Geng* 2003.

extremist and xenophobic attitudes as well as self reported violent crime have declined in East Germany.[17]

There are many possible explanations for the increase in recorded (in particular violent) crime that occurred after the German reunification, the opening of borders in Eastern Europe in general and the concomitant social changes. One of the most popular explanations is *Heitmeyer*'s theory of social disintegration.[18] The East German development can also be connected with the increase of opportunity structures and a lack of social control at the beginning of the 1990s, when police forces where being re-established. One general argument for explaining elevated rates of violent crime in 1990s is that the population's sensitivity to and reporting rate of violent crimes had changed. One of the very few longitudinal victimisation studies that was conducted by *Schwind et al.* in the city of Bochum in 1975, 1986 and 1998 showed that changed reporting rates accounted for a major share of the increase in violent offending.[19] The survey results indicate that while the officially registered assault rate increased by 128%, the non-reported rate only rose by 9%. The overall increase was only 24% from 1975 to 1998. What had really changed considerably was the reporting rate: whereas in 1975, 7.2 unreported crimes were added to one reported crime, in 1998 the ratio was only 3.4 to 1 (see *Table 1*). This implies that the dark figure had diminished by half and the "real" increase of violent crime was much less impressive than police data suggested. Similar results have been obtained through research on youth violence in several German cities, which amongst other things reveal that the reporting rate of robbery victims increased from 34% to 44% in the period from 1997/8 to 2004/5, and the rate for serious bodily injury rose from 20% to 25%.20 These results have been confirmed in a regional study for the North-East region around Greifswald.[21]

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17 See *Wilmers et al*. 2002, p. 101 ff.; *Sturzbecher 2001*; *Dünkel/Geng* 2003; *Schröder* 2004; *Baier* 2008, p. 41 ff. (reporting a considerable decline of xenophobic attitudes amongst juveniles in West-German cities); *Dünkel/Gebauer/Geng* 2008; all with further references. For the years 2002-2007, *Heitmeyer/Mansel* (2008, p. 18 ff.) report rather stable attitudes of xenophobic and other hostile group-oriented attitudes amongst the general population in Germany.

18 See *Heitmeyer* 1992; *Heitmeyer et al.* 1996.

19 Assault/serious bodily injury; see *Schwind et al.* 2001.

20 See *Baier et al.* 2007; *Baier* 2008; *Bundesministerium des Inneren/Bundesministerium der Justiz* 2006. p. 19 ff.

21 See *Dünkel/Gebauer/Geng* 2008: for example the reporting rate for robbery has increased from 38.5% to 46.2%; for the discrepancies between police registered data and victimisation studies see *Raithel*/*Mansel* 2003.

Table 1: Development of police registered and non-registered violent crimes (assault) in Bochum 1975-1998

	1975	1998	Changes: 1998 compared to 1975
Police registered offences	865	1,976	+ 128%
Non reported offences	6,214	6,772	+ 9%
Police registered *and* non reported offences	7,079	8,748	+ 24%
Ratio of reported to non reported offences	1 : 7.2	1 : 3.4	

Source: *Schwind et al*. 2001, p. 140.

Another important statement is that the development of police registered crime rates is not on a par with court-based crime rates. The increase in the number of sentenced young offenders is much less important than one would presume when looking at the police data, as can be taken from *Figures 1* and *2* above. The gap between police registered and convicted (sentenced) young offenders has increased considerably. One reason is the practice of diversion by Juvenile Court prosecutors and judges (see *Section 5* below) which is partly the result of an increase in petty property offences in particular. There are, however, indications that reported cases of violent offences, too, are often not very serious and therefore eligible for mediation and diversion as well.[22] For instance, in Hanover robberies involving very minor damages (less than 15 Euro) increased during the 1990s.

Although rates of violent offending increased in the early 1990s, particularly robbery and (serious) bodily injury, it is still true that the vast majority of juveniles and young adults are not violent offenders. Non-violent property offences account for about 70% of all crimes reported to have been committed by young offenders.[23] The victims of such crimes are regularly the peers of young offenders. Victims of violent adult offenders are also very often children or young persons (for example regarding (sexual) child abuse or child maltreatment). Also considering domestic violence, the First Periodic Security Report ("*Erster Periodischer Sicherheitsbericht*") of the German Government

22 See *Pfeiffer et al*. 1998.

23 See *Bundesministerium des Inneren/Bundesministerium der Justiz* 2001; 2006; *Walter* 2005; *H.-J. Albrecht* 2002, D 32.

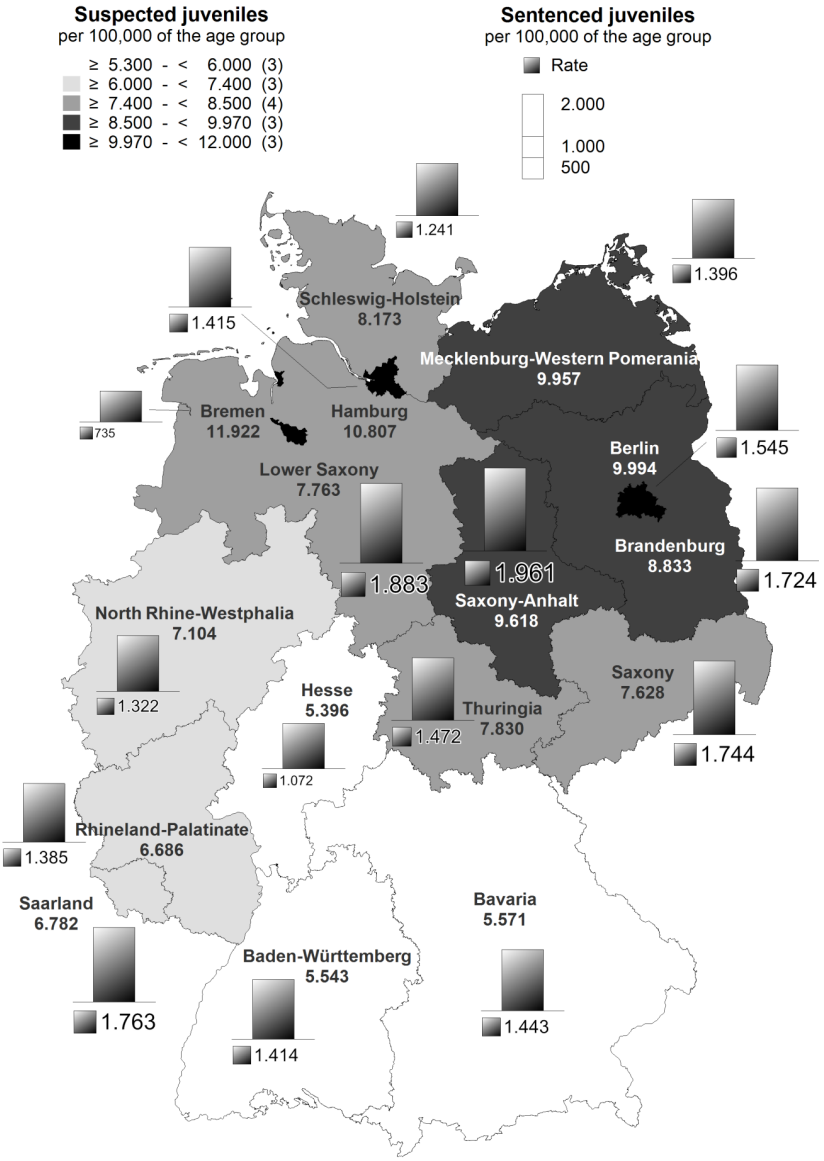
states: "Young persons deserve attention and the protection of society not so much as perpetrators than as victims of violent crimes."[24]

Violent and other crime is not equally distributed over the different regions of the country. It is more widespread in cities than in rural areas, and the official crime rates indicate an elevated prevalence rate in the northern compared to the southern Federal States of Germany.[25] Whether these differences are "real" or merely the product of different reporting and selection strategies is not entirely clear. Looking at the different Federal States, an interesting observation is that the relatively high police-registered general crime rates for juveniles and young adults in the northern and north-eastern states (like Bremen, Berlin, Hamburg, Schleswig-Holstein, Mecklenburg-Western Pomerania or Brandenburg) compared with those of southern states like Bavaria or Baden-Württemberg diminish if we look at the ratio of court-sentenced young persons (always calculated per 100,000 of the age group). The ratio of *sentenced* young offenders in the southern states is even higher than in the above mentioned northern States (see *Figures 4* and *5*). This is not only a result of different reporting rates, but of very distinct and different styles of diversion, as will be elaborated in *Section 5* below.

24 *Bundesministerium des Inneren/Bundesministerium der Justiz* 2001, p. 2.

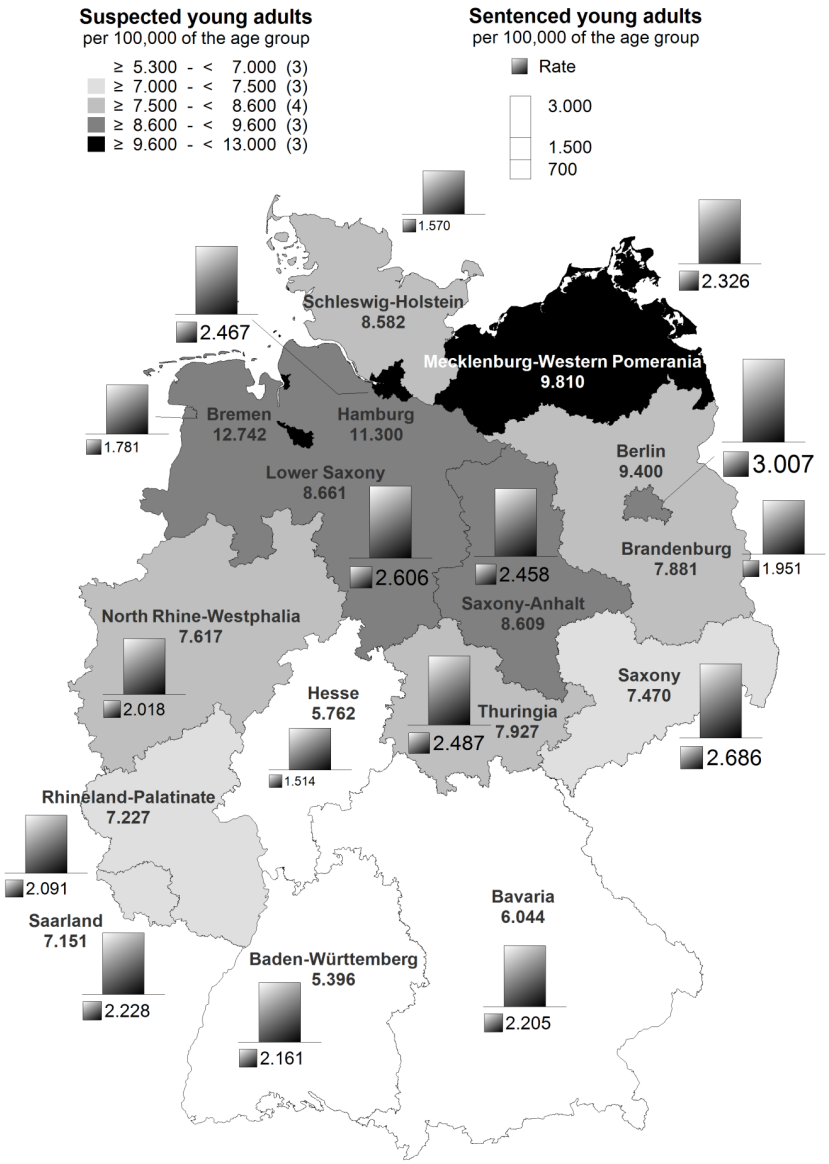
25 On the differences between East and West Germany see *Figure 3* above.

Figure 4: Suspected and sentenced German juveniles 2008



Source: Federal Bureau of Police (Bundeskriminalamt) (Ed.): Polizeiliche Kriminalsttistik 2008; Federal Statistical Office (Statistisches Bundesamt) (Ed.): Strafverfolgungsstatistik 2008; own calculations.

Figure 5: Suspected and sentenced 18-21 year old young adults in 2008



Source: Federal Bureau of Police (Bundeskriminalamt) (Ed.): Polizeiliche Kriminalstatistik 2008; Federal Statistical Office (Statistisches Bundesamt) (Ed.): Strafverfolgungsstatistik 2008; own calculations.

3. The sanctions system: Kinds of informal and formal interventions of the German Juvenile Justice Act (JJA – *Jugendgerichtsgesetz, JGG*)

In cases of crimes, the interventions of the JJA are characterised by the principle of "subsidiarity" or "minimum intervention" (see the diagram at the end of the article).[26] This means that penal action should only be taken if absolutely necessary. Furthermore, sanctions must be limited by the principle of proportionality. The legislative reform of the JJA in 1990, passed in the same year as that of the JWA, underlines the principle of Juvenile Court sanctions as a last resort ("*ultima ratio"*). Therefore, priority is given to diversion, and where the Juvenile Courts do impose sanctions, primacy is given to educational or disciplinary measures instead of youth imprisonment.

The most important response to petty offending is the dismissal of the case without any sanction being issued. In this context one should emphasise that police diversion, like the British form of cautioning or warnings, is not allowed in Germany. The underlying reason for this is of a historical nature, lying more specifically in the possible abuse of police power as it occurred under the Nazi regime. Therefore, all forms of diversion are provided for only at the level of the Juvenile Court prosecutor or the Juvenile Court judge. The police are strictly bound by the principle of legality. All criminal offences have to be referred to the public prosecutor.

The 1990 reform of the Juvenile Justice Act in Germany extended the legal possibilities for diversion considerably. The legislature thus reacted to the reforms that had been developed in practice since the end of the 1970s.[27] The law now emphasises the discharge of juvenile and young adult offenders on grounds of the petty nature of the crime committed, or because of other social and/or educational interventions that have taken place (see § 45 (1) and (2) JJA). Efforts to make reparation to the victim or to participate in victim-offender

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26 The application of the JJA is restricted to crimes defined by the general penal law (StGB). The Juvenile Welfare Act (JWA) is applied when a child or juvenile in his personal development seems to be "in danger" and needs help or measures provided by the JWA. The measures are chosen according to the estimated educational needs. They are not imposed in an "interventionist" style, but offered and taken by parental request. Partially, the measures are the same as the ones provided by the JJA (e.g. social training courses, special care etc.). The residential care order exists in both laws, too. If the authorities of the youth welfare department want to bring a child or juvenile to such a home (against the parents' will), they must ask the Family Court judge for a respective (specific) order (according to § 1631b Civil Code, *Bürgerliches Gesetzbuch*). Such homes are usually open facilities.

27 See *Bundesministerium der Justiz* 1989; *Heinz* in *Dünkel/van Kalmthout/Schüler-Springorum* 1997, p. 53.

reconciliation (mediation) are explicitly put on a par with such educational measures. There is no restriction concerning the nature of offences that are eligible; felony offences ("*Verbrechen*") can also be "diverted" under certain circumstances (e. g. a robbery) if the offender has repaired the damage or made another form of apology (restitution/reparation) to the victim.[28]

We can differentiate four levels of diversion. Diversion without any sanction ("*non-intervention*") is given priority in cases of petty offences. Diversion with measures taken by other agencies (parents, the school) or in combination with mediation is the second level of diversion ("*diversion with education*"). The third level is "*diversion with intervention*". In these cases the prosecutor proposes that the Juvenile Court judge impose a minor sanction, such as a warning, community service (usually between 10 and 40 hours), mediation (*"Täter-Opfer-Ausgleich"*), participation in a training course for traffic offenders (*"Verkehrsunterricht"*) or certain obligations like reparation/ restitution, an apology to the victim, community service or a fine (§ 45 (3) JJA). Once the young offender has fulfilled these obligations, the Juvenile Court prosecutor will dismiss the case in co-operation with the judge. The fourth level is the introduction of levels one to three in the Juvenile Court proceedings after a charge has been filed. In practice, the Juvenile Court judge will fairly often face the situation that the young offender has, in the meantime (after the prosecutor has filed the charge), undergone some form of educational measure like mediation, which would deem a "formal" court sanction unnecessary. Section 47 of the JJA enables the judge to dismiss the case in these instances.

Also *formal sanctions of the Juvenile Court* are structured according to the *principle of minimum intervention* ("*Subsidiaritätsgrundsatz*"; see the diagram at the end of the text). Juvenile imprisonment has been restricted to being a sanction of last resort, if educational or disciplinary measures appear to be inappropriate (see §§ 5 and 17 (2) JJA). The reform of the Juvenile Justice Act of 1990 extended the catalogue of juvenile sanctions by introducing new community sanctions like community service, the special care order (*"Betreuungsweisung"*), the so-called social training course[29] and mediation.[30] The educational measures of the Juvenile Court, furthermore, comprise different forms of directives concerning the everyday life of juvenile offenders in order to educate and to prevent dangerous situations. Thus the judge can forbid contact with certain persons and prohibit going to certain places ("whereabouts", see § 10 JJA). Disciplinary measures include the formal warning, community

28 The situation is different in the general penal law for adults (over 18 or over 21 years old) where diversion according to §§ 153 ff. of the Criminal Procedure Act is restricted to misdemeanours. Felony offences (i. e. crimes with a minimum prison sentence provided by law of one year) are excluded.

29 See *Dünkel*/*Geng*/*Kirstein* 1998.

30 See *Dünkel* 1996; 1999; *Bannenberg* 1993.

service, a fine, and detention for one or two weekends or for up to four weeks in a special juvenile detention centre (*"Jugendarrest"*).

Youth imprisonment is executed in separate juvenile prisons.[31] Youth prison sentences are only a sanction of last resort (*"ultima ratio"*, see §§ 5 (2), 17 (2) JJA), in line with the view espoused by international rules like the so-called Beijing-Rules of the *United Nations* of 1985.[32] The minimum length of youth imprisonment is six months for 14-17 year-old juveniles, and the maximum limit is set at five years. In cases of very serious offences for which adults could be punished with more than ten years of imprisonment, the maximum length of youth imprisonment is ten years. In the case of 18-20 year-old young adults sentenced according to the JJA (see *Section 8* below) the maximum penalty is ten years, too (see §§ 18, 109 JJA). The preconditions for youth imprisonment are either the "dangerous tendencies" of the offender that are likely to exclude community sanctions as inappropriate, or the "gravity of guilt" concerning particular, serious crimes (such as murder, aggravated robbery etc.; see § 17 (2) JJA).[33]

Youth imprisonment sentences of up to two years can be suspended in cases of a favourable prognosis; in all cases the probation service gets involved. The period of probationary supervision is one to two years, and the period of probation lasts for a total of two to three years.

4. Juvenile criminal procedure

Germany has developed an effective system of private and state welfare institutions as well as justice institutions in the field of juvenile crime prevention and of juvenile justice. The agencies organised on the basis of the CYWA are: the community youth welfare departments (*Jugendämter*) and the youth services in youth court proceedings (*Jugendgerichtshilfe, JGH*) which have a double task: They fulfil purely welfare oriented tasks (family aid, protection of children in need of care according to the CYWA). Secondly, they support the juvenile

31 See for the specific legislation of the Länder since 2008: *Dünkel* 2007; *Eisenberg* 2008a.

32 See United Nations 1991; *Dünkel* 1994, p. 43; No. 17.1. of the Beijing Rules restricts youth imprisonment only to cases of serious violent crimes or repeated violent or other crimes if there seems to be no other appropriate solution.

33 The precondition of "dangerous tendencies" for imposing a prison sentence is very often heavily criticised as it provides room for stigmatisation and possibly contributes to an "inflation" of prison sentences where the Juvenile Court judge cannot find appropriate alternatives, see *Dünkel* 1990, p. 466 f.; law reform proposals urge for abolishing the term "dangerous tendencies" and for keeping only the precondition of the "gravity of guilt", see *Albrecht* 2002; *Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen* 2002; *Dünkel* 2002 with further references.

prosecutor and court by delivering personal and family background information for the trial, and they are partly responsible for the execution of educational measures (mediation, social training etc. based on the juvenile prosecutor's or judge's decision). The youth services in youth court proceedings (JGH) are also responsible for avoiding unnecessary pre-trial detention. Therefore, they participate in the proceedings as early as possible and are immediately informed if a juvenile is placed in pre-trial detention (see § 72a JJA). The personnel of the JGH are social workers or social pedagogues with at least three years of university education (*Fachhochschulen für Sozialarbeit*). The personnel of private welfare institutions in most cases have the same professional education. Sometimes they also have teachers, psychologists and social workers with special training (e. g. as mediators) at their disposal. The Federal Probation Service also provides special courses for further professional specialisation, e. g. as a mediator.

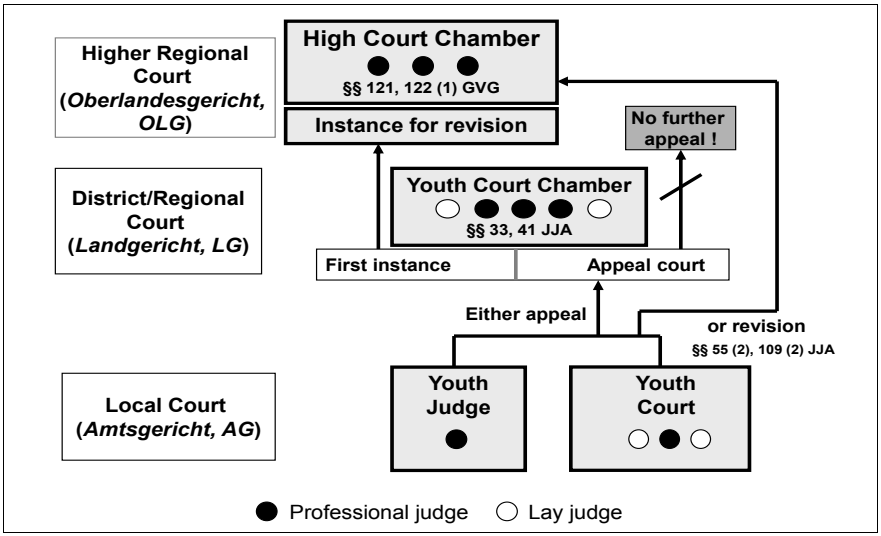
The German juvenile justice system provides for *specialised Juvenile Courts* as well for juvenile prosecutors (see § 37 JJA). Even at the level of the police – at least in big cities like Berlin, Hamburg or Stuttgart – specialised youth police units exist. The juvenile prosecutor and judge are assisted by the social workers of the community youth welfare department. The reality of juvenile prosecutors' and judges' specialisation is sometimes problematic as at least in some Federal States, being a juvenile judge or prosecutor is only seen as the initial stage of a professional career. This results in a rather high degree of personnel fluctuation, and can even be a request of the justice administration. Furthermore, in some rural areas, specialisation is limited by a lack of cases, and therefore "juvenile" judges also work in other judicial branches (general criminal law, civil law etc.). In this respect, from an international comparative perspective it could be deemed advantageous that German Juvenile Courts cover the whole range of 14-21-old juveniles and young adults, which enables more specialisation than in countries where Juvenile Courts are restricted to deal only with minors.

Where prosecutorial diversion appears inappropriate and the likely sentencing outcome is a non-custodial sanction, the prosecutor submits a case file to the youth judge at the Local Court. In cases of more serious offending that could possibly result in a youth prison sentence, the prosecutor bring the accusation to the Youth Court of the Local Court, which is composed of one professional and two lay judges (see *Figure 6*). Only in the most serious cases, regularly of homicide or manslaughter, but since the end of 2006 also of cases with sexual offences against minors or others who should not be exposed to an appeal hearing, the prosecutor submits the file to the Youth Chamber at the District Court (three professional and two lay judges).

The German system of judicial review in juvenile justice provides that the juvenile can only appeal once, either to the District Court ("*Landgericht*") in order to effect a second hearing, or to the Higher Regional Court of a Federal State ("*Oberlandesgericht*") for a review of legal questions (see § 55 (2) JJA).

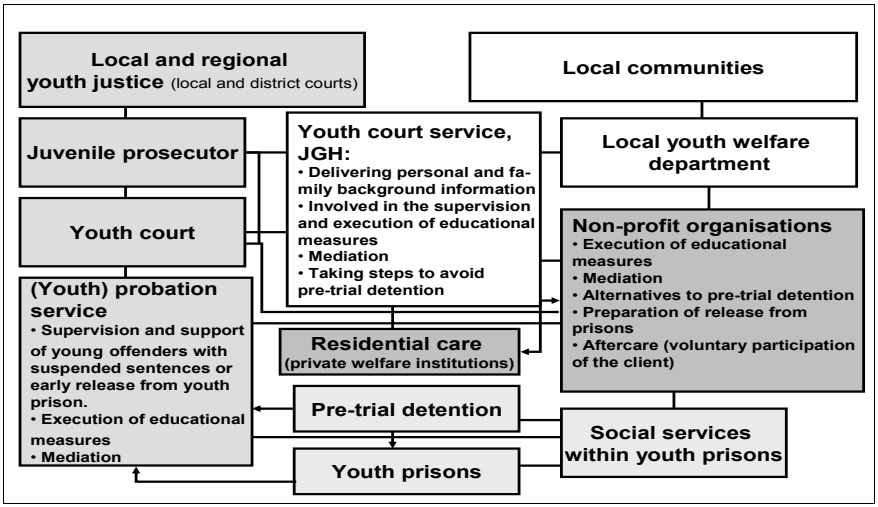
The German system of Juvenile Courts is shown in *Figure 6*.

Figure 6: The German juvenile court system



As has been stated earlier, different agencies are involved in the German juvenile procedure. This approach can be characterised by the idea of a multi-agency approach as proposed by the Council of Europe's Recommendation (2003) 20. The Youth Court Service plays a central role in this context, as can be taken from *Figure 7*.

Figure 7: The multi-agency approach in German juvenile justice



4.1 Problematic issues in German juvenile procedure

Juvenile justice systems, particularly those following the welfare model, are often criticised for failing to guarantee human rights. Compared to the general criminal procedure for adults, the right of access to a legal defence counsel or other basic human rights issues seem to be underdeveloped in some countries, and some critical scholars denounce the juvenile justice system as "second class justice".

The German juvenile justice system shares this criticism only to a minor extent, as in general the legal procedural rules are very similar for juvenile and adult criminal justice. The JJA states that the procedural rules, for example the rules of evidence, are the same as for general criminal procedure. Deviations from this general rule are based on educational aims. For example, the court hearings are not open to the public (see § 48 JJA) in order to protect the juvenile's privacy and to avoid stigmatisation. In juvenile trials the participation of the so-called youth court assistant ("*Jugendgerichtshilfe*"), i. e. a social worker from the community youth welfare department, is required (see § 38 (2) JJA). They have to prepare a social report and are required to participate in the court trial in order to give evidence about the personal background of the juvenile and to assist the judge in finding the appropriate sanction. However, practice is not always in line with the law, as many youth welfare departments are heavily overburdened. Therefore, particularly in less serious cases, a social inquiry report is not submitted and the presence of the youth court assistant at the court hearing is not always guaranteed.

The right to a defence counsel, in principle, is more elaborate in the juvenile justice system. Every juvenile who is placed in pre-trial detention has to have an advocate appointed immediately (see § 68 No. 4 JJA), whereas in criminal cases for adults this right is realised only after having endured three months of pre-trial detention. Furthermore, there are restrictions for imposing pre-trial detention on juveniles, particularly for 14 and 15 year-old offenders (see § 72 (2) JJA). Residential care in a juvenile home should always be given priority over pre-trial detention. Reality, however, sometimes indicates that the legal preconditions are not always adhered to. Therefore, criticism against inappropriate forms of pre-trial detention cannot be refuted.[34]

Another problematic issue is the right to appeal against Juvenile Court decisions. A court decision cannot be appealed solely on the basis of attempting to effect the imposition of a different educational measure (see § 55 (1) JJA). This seems to be problematic in cases where a judge imposes a rather "severe" educational measure like several hundred hours of community service. Unlike in other countries, in Germany community service is not limited to a maximum overall duration (for example 80 hours in Austria; in other countries 120-240 hours). Thus, in individual cases, a violation of the principle of proportionality has been observed.

Another critical issue concerning the system of judicial review in juvenile justice is that – as has been pointed out above – a juvenile can only file one appeal, either to the District Court in order to get a second hearing, or to the Higher Regional Court for a review of legal questions (see § 55 (2) JJA). This shortening of review procedures was introduced in order to speed up trials and to enforce the educational approach of juvenile justice. However, from a legal and human rights perspective, this puts juveniles at a disadvantage compared to their adult counterparts.

On the other hand, juveniles benefit from the regular exclusion of a joint procedure by the victim or their representative counsel ("*Nebenklage*"), and from the total exclusion of the so-called private criminal procedure ("*Privatklage*", i. e. the private charge if the public prosecutor refuses prosecution in the public interest), both of which are not possible in the German juvenile justice system (see § 80 (1), (3) JJA). At the end of 2006, the possibility of a joint procedure by the victim was introduced for the very few cases of serious violent crimes where the victim has suffered serious injuries (see § 80 (3) JJA). Joint civil claims, like the French "action civile" (in Germany "*Adhäsionsverfahren*") where the victim can claim for compensation of civil damages within the penal court trial, have been admitted in the cases of young adults also in juvenile criminal procedures (see § 109 (2) JJA).

A few (practically unimportant) rules disadvantage juveniles for the sake of educational concepts. For example, the served period of pre-trial detention –

34 For empirical results see *Kowalzyck* 2008.

according to the discretion of the judge – might not be taken into account if the remaining period of a juvenile prison sentence is less than six months and therefore estimated as being insufficient for the educational process of reintegration (see § 52a JJA).

In general one can say that the orientation of the German juvenile criminal procedure to preserve fundamental rights is quite well developed and that disadvantages compared to adults are restricted to more exceptional cases. Thus the German juvenile justice system does not share the shortcomings of welfare systems relying more on informal procedures (e. g. round tables, family conferences etc.) than on formal legal rights.

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

In the 1980s, diversion became the principal juvenile justice reaction to juvenile offending in West Germany. In this context it has to be stressed that police registered juvenile crime during the 1980s had been rather stable, with violent crimes having greatly diminished.[35] The extension of diversion even continued in the 1990s when official crime rates (violent offending in particular) increased (see *Section 2* above). A real increase in crime occurred after the opening of the borders in Eastern Europe and the occurrence of phenomena such as anomie and social disintegration in the youth subcultures particularly in the East German Federal States. The rate of young violent offenders registered by the police in East Germany until 1995 tripled; since then it has been stable or has slightly decreased.[36] The practice of using diversion as a measure of controlling the input into the juvenile justice system can be clearly shown in the eastern Federal States as well as in the so-called "city-states" of Berlin, Bremen and Hamburg. The elevated crime rates in these states have been balanced by more extensive diversion practice (see the gap between police registered suspects and convicted juveniles or young adults as indicated in *Figures 4* and *5*).

Before the law reform, the discharge rates (diversion) in West Germany had already increased from 43% in 1980 to 56% in 1989. The steady increase continued to 69% in 2003 and 68% in 2006 (see *Figure 8*).[37] It should be stressed that the increase is particularly attributable to diversion without intervention (according to § 45 (1) JJA), whereas the proportion of diversion

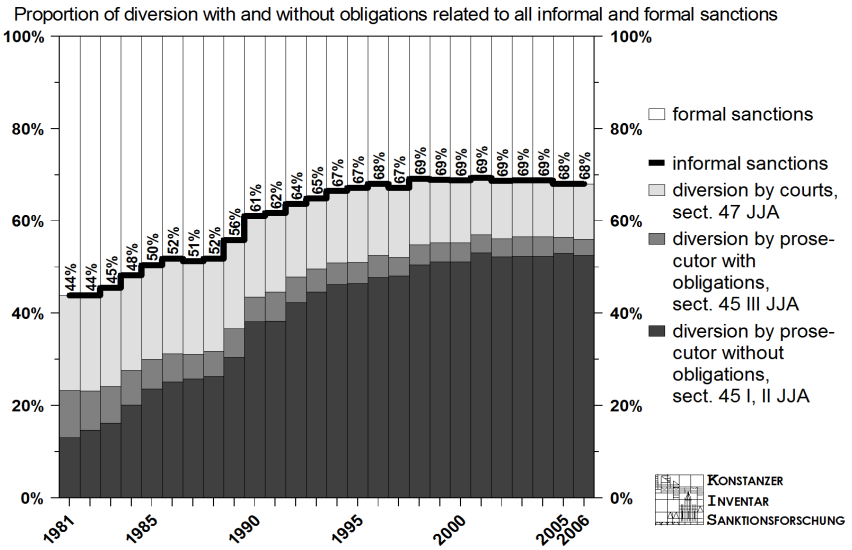
35 See *Heinz* 2005; *Bundesministerium des Innerern/Bundesministerium der Justiz* 2006.

36 From 1995 onward one can observe a (slightly) diminishing juvenile crime rate in East Germany and a increasing crime rate in West Germany (also concerning violent offences), which results in a "convergent" situation in both parts of Germany, see *Dünkel* 2006; *Heinz* 2008, and *Figure 3* above.

37 See *Heinz* 1994; 2008; *Heinz* in *Dünkel*/*van Kalmthout*/*Schüler-Springorum* 1997.

combined with educational measures remained stable or recently even slightly declined (see *Figure 8*).

Figure 8: Diversion rates (dismissals by prosecutors or courts) in the juvenile justice system of Germany, old Federal States, 1981-2006



Source: *Heinz* 2008.

However, the large regional disparities have not been eliminated. The discharge rates varied in 2006 between 57% in Saarland, 62% in Bavaria, 81% in Hamburg and 88% in Bremen. Apparently, it is the case in all Federal States of Germany that the diversion rates are higher in the urban centres than in the rural areas.[38] This contributes to the rather stable conviction rates and caseloads of Juvenile Court judges.

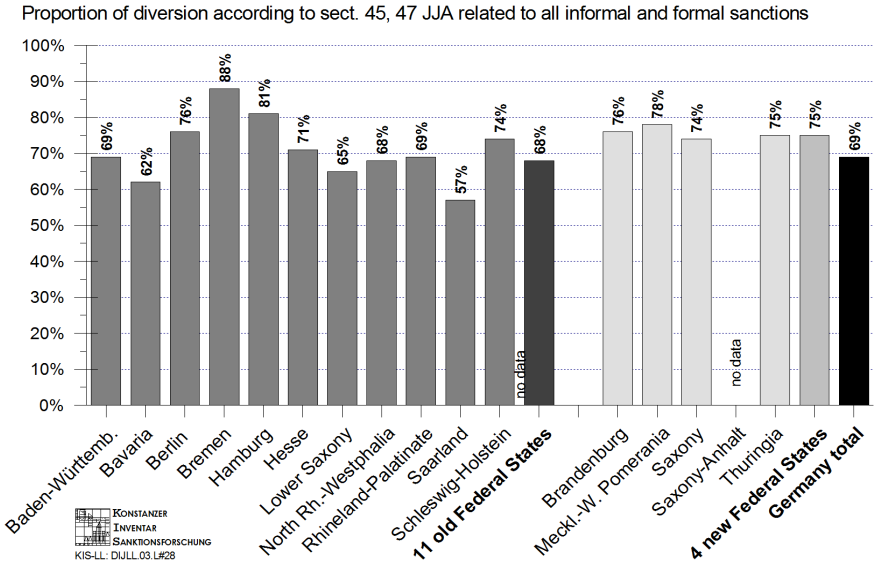
It is interesting to compare the diversion practice with regard to the Federal States of eastern and western Germany. It had been presumed that the penal culture in East Germany would be more severe and repressive. However, calculations of diversion rates gave evidence of even more widely extended diversion practice in the new Federal States, with an overall rate of 75% (see

38 See *Heinz* 1994; 1998/99.

Figures 9 and *10*).[39] Again, the "economic" strategy of controlling the input and workload of the Juvenile Courts is clear and evident. There is, however, also another explanation that seems to be plausible. The expanded diversion rates could also be indicative of different reporting behaviour. In East Germany possibly more petty offences are reported to the police, which are in turn later excluded from further prosecution by the Juvenile Court prosecutors.

The overall diversion rate for Germany in 2006 was 69% (see *Figure 9*).

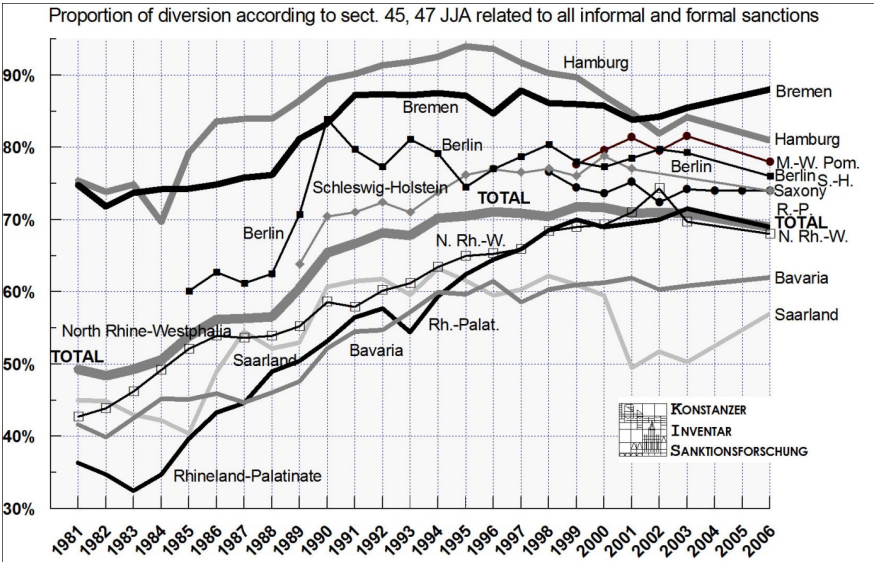
Figure 9: Diversion rates (dismissals by prosecutors or courts) in the juvenile justice system in comparison of the Federal States, 2006



Source: *Heinz* 2008.

39 Mecklenburg-Western Pomerania and Brandenburg even had diversion rates of 78% and 76%; see also *Heinz* 2008; *Dünkel*/*Scheel*/*Schäpler* 2003.

Figure 10: Diversion rates (dismissals by prosecutors or courts) in the juvenile justice system of Germany in comparison of selected federal states, 1981-2006



Source: *Heinz* 2008.

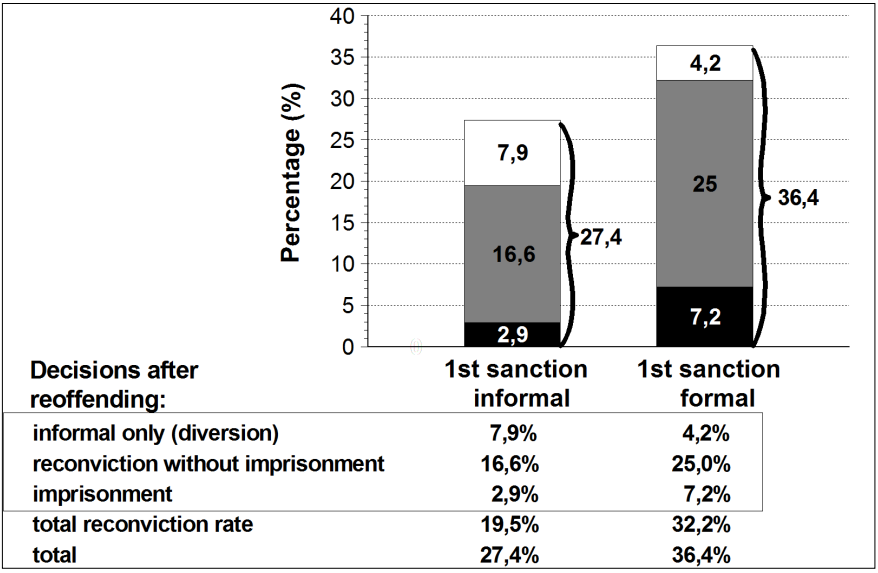
The strategy of expanding informal sanctions has proved to be an effective means not only for limiting the Juvenile Courts' workloads, but also with respect to special prevention. The reconviction rates of those first-time offenders who were "diverted" instead of being formally sanctioned were significantly lower. The re-offending rates after a risk period of three years were 27% vs. 36% (see *Figure 11*).[40] Even for repeat offenders, the re-offending rates after informal sanctions were not higher than after formal sanctions.[41] The overall recidivism rates in states like Hamburg – with diversion rates of more than 80% or 90% – was about the same (at between 28% and 36%) as in states like Baden-Württemberg, Rhineland-Palatinate or Lower Saxony where the proportion of diversion at that time accounted for only about 43-46%, with recidivism rates at around 31-32% (see *Figure 12*). Thus, the extended diversionary practice has at least had no negative consequences concerning the crime rate and general or

40 See *Heinz* 1994; 2005a; 2006; 2008; *Dünkel* 2003, p. 94.

41 See *Storz* 1994, p. 197 ff.; *Heinz* 2005a, p. 306.

special prevention.[42] It also reflects the episodic and petty nature of juvenile delinquency.

Figure 11: Rates of formal and informal sanctions after a first sanction for larceny and a risk period of three years (juveniles, 1961 cohort)

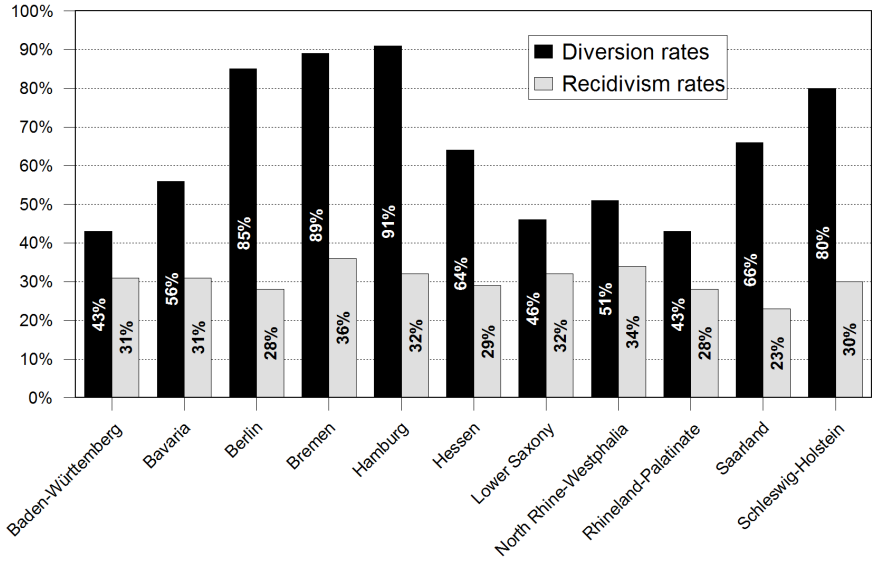


Decisions after reoffending:	1st sanction informal	1st sanction formal
informal only (diversion)	7,9%	4,2%
reconviction without imprisonment	16,6%	25,0%
imprisonment	2,9%	7,2%
total reconviction rate	19,5%	32,2%
total	27,4%	36,4%

Source: *Storz* 1994; *Heinz* 2005a; 2008.

42 See *Heinz* 2005a; 2006.

Figure 12: Diversion rates and recidivism in comparison of the Federal States in former West Germany (simple theft, first time offenders, birth cohort 1961; risk period: 3 years)



Source: *Storz* 1994, p. 153 ff.; *Heinz* 2006, p. 184 ff.

Another important result concerning the "effectiveness" of diversion is the Freiburg birth cohort study. The study covered more than 25,000 juveniles from the birth cohorts 1970, 1973, 1975, 1978 and 1985. The proportion of diversion instead of formal punishment for 14 and 15 years old juveniles increased from 58% to 82%. Recidivism after two years (according to official crime records) was 25% for the diversion group and 37% for the juveniles formally sanctioned by the Juvenile Court.[43] The difference of 12% in favour of diversion corresponds to the above mentioned earlier studies. The Freiburg birth cohort study demonstrates that the increased use of diversion as shown by *Figures 8* and *10* above does not correspond to an increase in delinquency rates amongst juveniles. On the contrary, the recidivism rates of comparable delinquents (for different typical juvenile delinquent acts) were significantly lower compared to those formally sanctioned by the court.[44]

43 See *Bareinske* 2004, p. 188; *Heinz* 2006, p. 186.

44 See *Bareinske* 2004, p. 136 f.

Similar results have been obtained with regards to levels of self reported delinquency of juveniles diverted from the juvenile justice system compared to those who are formally sanctioned. The "diversion group" reported fewer offences in the three years after being diverted than the control group of formally sanctioned juveniles.[45] *Crasmöller* therefore states that more repressive reactions contribute to an increase likelihood of further delinquency.[46]

The most comprehensive and in depth study is the Bremen longitudinal study on juvenile delinquency and integration into the labour market by *Schumann* and his colleagues.[47] 424 juveniles were contacted five times over a period of eleven years. The results revealed that the development of delinquent careers depended primarily on gender, attachment to delinquent peers, and the kinds of sanctions issued by the juvenile justice system. Court sanctions had negative effects also with regards to labour market integration (stable employment).[48] On the other hand it seems that the juvenile justice system itself has less impact (no matter what sentencing decision is made) compared to positive or negative developments in the life course, such as successful school or work integration, good relations to pro-social friends etc, or negative experiences of exclusion in social life, attachment to delinquent peers etc. Nevertheless, the Bremen longitudinal study also demonstrates that (prosecutorial) diversion instead of (court) punishment is an appropriate means for reducing juvenile and young adult delinquent behaviour.[49]

6. The sentencing practice – Part II: The Juvenile Court dispositions and their application since 1980

At the same time, the proportion of "formal" sanctions has diminished to only 31-32% of all cases that could have entered the system at the Juvenile Court level. Interestingly, major changes in the Juvenile Court's sentencing practice can be observed for the 1980s and early 1990s (see *Figure 13*). The proportion of sentences to short-term custody in a detention centre dropped from 11% to only 6% (which amounts to a reduction of about 45%) in the West German Federal States. Unconditional youth imprisonment (six months up to five, in exceptional cases, up to ten years, see *Section 2* above) accounts for only 1.5% of all formal and informal sanctions against 14-21 year old offenders, suspended youth prison sentences for 3.5%. The reduction in the share of youth prison

45 See *Crasmöller* 1996.

46 See *Crasmöller* 1996, p. 124 f., p. 132.

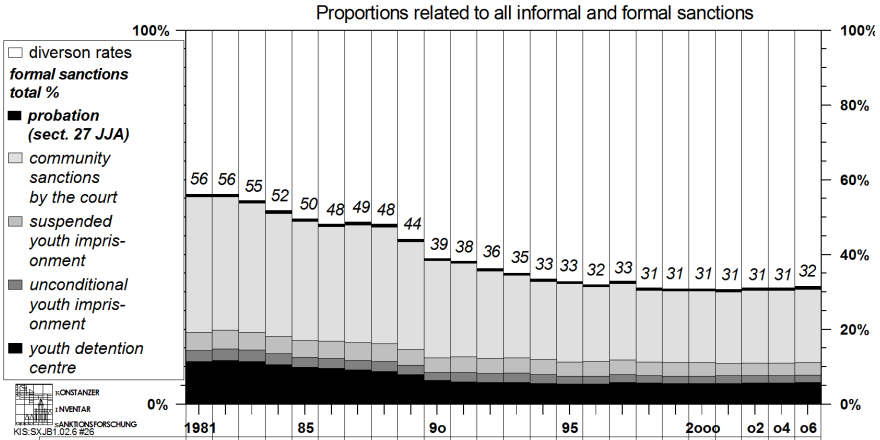
47 See *Schumann* 2003.

48 See *Prein*/*Schumann* 2003: p. 200 ff.; *Schumann* 2003a, p. 213.

49 See *Prein*/*Schumann* 2003, p. 208.

sentences from 8% to 5% implies a 38% reduction since 1981. This is remarkable insofar as in the 1990s the proportion of youth prison sentences remained stable, while the number of violent offenders increased considerably. Also, the reduction in the issuance of community sanctions by the courts from 36% to 20% is attributable to the extended diversion practice.

Figure 13: Sanctioning practice in the juvenile justice system in Germany, old Federal States, 1981-2006



	1981				85				90					95			2000				02	04	06
diversion	44	44	45	48	50	52	51	52	56	61	62	64	65	67	67	68	67	69	69	69	69	69	68
community sanctions by the court	36	36	35	33	32	31	32	31	29	26	25	23	22	21	21	20	20	19	19	19	19	20	20	20
youth detention centre (- 4 weeks)	11	12	11	11	10	10	9	9	8	6	6	6	6	6	5	5	6	6	5	5	5	6	6	6
youth imprisonment (min. 6 months)	8	8	8	8	7	7	7	7	7	6	7	6	7	6	6	6	6	6	6	6	6	5	5	5

Source: *Heinz* 2008.

Since 2007 statistics on the court sentencing practice present data on the whole of Germany (including the so-called new federal states of former East-Germany, see *Table 2*). About 70% of youth prison sentences are suspended (71% in 2008; combined with the supervision of a probation officer).[50] Since the mid-1970s, prison sentences of up to one year have been suspended in about 80% of the cases (2008: 80.5%). Even the longer prison sentences of more than one year up to two years are now suspended in 56% of cases (2008), whereas in the mid-1970s such practice was only exceptional (less than 20%). The extended practice of probation and suspended sentences (even for repeat offenders) has been a great success, as the revocation rates dropped to only about 30%. On the

50 Own calculations; see for data until 2006 *Heinz* 2008.

one hand, this could very well indicate that the Probation Service has apparently improved its efficiency, but on the other hand, the courts have also altered their practice by trying to avoid revoking suspended sentences for as long as possible.[51] Again, it becomes clear that German Juvenile Court judges follow the internationally recognised principle of imposing youth imprisonment as a last resort ("*ultima ratio*") and for periods that are as short as possible (*minimum intervention approach*).

The average length of youth prison sentences has risen slightly. The dynamics behind this increase can be explained by a drop in the proportion of sentences up to one year, with a parallel increase in sentences to more than one year up to two years (see *Table 2*). However, this has been "compensated" by a higher rate of suspended sentences (see also above). The proportion of youth prison sentences of more than five years has remained stable and very low (2008: 0.7%), whereas the sentences from two to five years have increased. This is, however, not the result of more severe sentencing on behalf of the juvenile judges, but rather due to the increasingly frequent conviction of offenders for more serious crimes, such as robbery and serious bodily injury (see *Figures 14* and *15* below).

Interestingly the comparison of the figures for 2006 (related only to West Germany) with 2007 and 2008 (for the whole of Germany) do not show any difference in the length of sentences and the proportion of suspended sentences, which indicates that the sentencing styles in East and West Germany 20 years after the re-unification of Germany are about the same. The increase of total numbers 2007 compared to 2006 is due to the fact that East German federal states are included, which cover about 20% of the German population. The decrease of sentenced juveniles and young adults in 2008 explains the development in the numbers of young offenders in juvenile prisons (see *Section 11* below).

51 See *Dünkel* 2003, p. 96 ff.

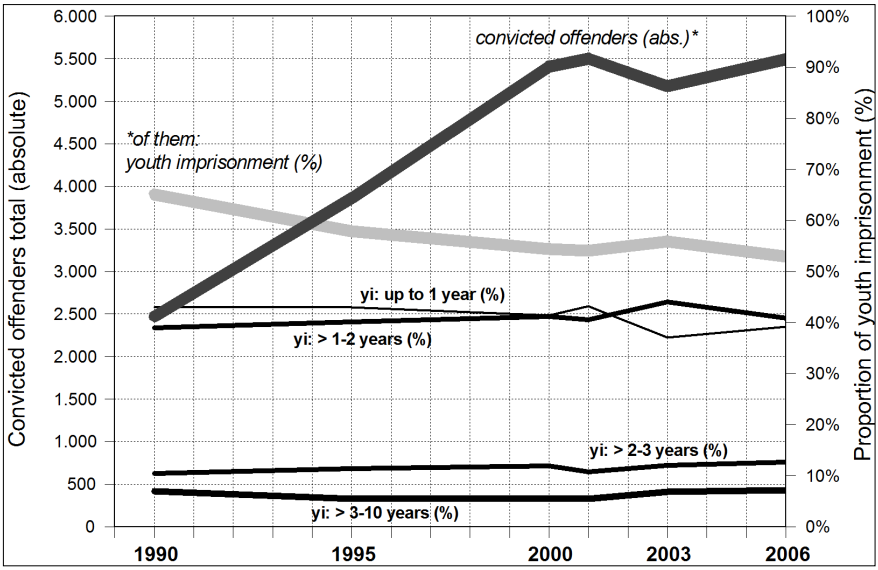
Table 2: Length of youth prison sentences, 1975-2006 (old Federal States) and 2007-2008 (total Germany)

Year	YI total (abs.)	susp. YI (%)	6 m. – 1 J. (%)	6 m. – 1 y., susp. (% rel. to col. 4)	1 – 2 y. (%)	1 – 2 y., susp. (% rel. to col. 6)	2 – 3 y. (%)	3 – 5 y. (%)	5 – 10 y. (%)
1975	15,983	55.9	70.1	74.9	20.4	16.7		5.9	0.6
1980	17,982	62.2	71.0	79.4	20.1	28.6	4.5	2.1	0.7
1985	17,672	61.9	65.0	79.1	24.6	42.4	5.9	2.6	0.8
1990	12,103	64.3	62.2	79.2	28.0	53.7	6.4	2.4	0.6
1995	13,880	63.9	56.8	78.5	32.4	59.7	7.2	3.0	0.6
2000	17,753	62.1	54.8	78.5	33.8	56.4	7.9	2.9	0.5
2005	16,641	60.7	54.0	77.1	34.4	55.5	8.0	3.1	0.5
2006	16,886	60.5	53.7	77.6	34.0	55.3	8.4	3.3	0.5
2007	20,480	60.7	53.7	77.0	34.6	56.0	8.0	3.2	0.6
2008	19,255	62.3	53.1	80.5	34.5	56.8	8.4	3.3	0.7

Note: m. = months; YI = Youth Imprisonment; susp. YI = Suspended Youth Imprisonment (probation); y = year(s).
Source: Federal Statistical Office (Ed.): Strafverfolgungsstatistik 1975-2008; own calculations.

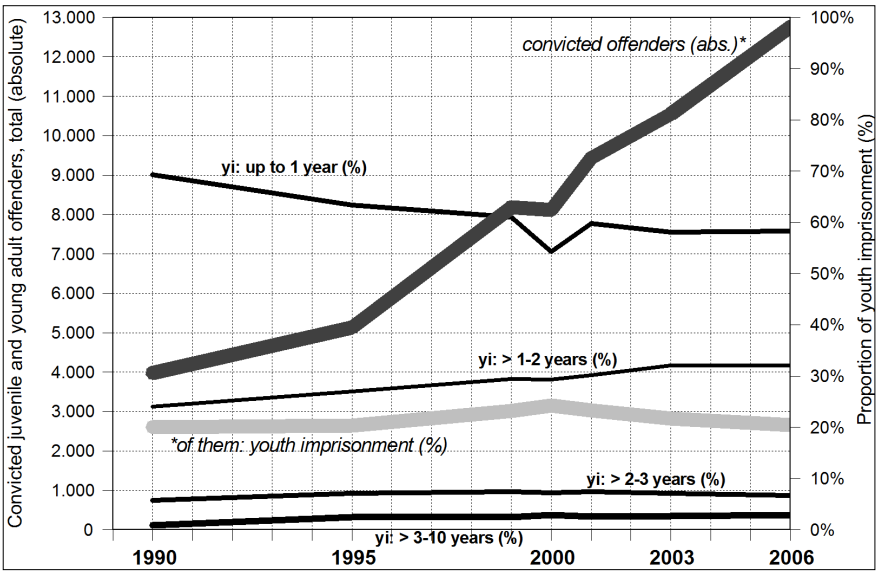
The practice of even repeatedly suspending youth prison sentences to between one and two years had already preceded the reform of 1990 to a great extent, with no less than 54% of such sentences being suspended in 1990 (the ratio in 1995 even went up to 60% and remained stable at about 55% in the following years, see *Table 2*). Making alternatives to youth imprisonment available to young adults, who are more involved in crime than juveniles (particularly in respect of crimes such as robbery), has contributed to the considerable decline by about 40% in the rate of imprisonment of juveniles and young adults between 1983 and 1990. This decline can only be attributed to a limited extent (5%) to demographic change. Since 1990 the youth prisoners' rates, however, have increased considerably. But as can be seen in the case of robbery and assault, this is not a result of longer prison sentences being imposed, but rather is attributable to the increase in the absolute numbers of sentenced persons (see *Figures 14* and *15*).

Figure 14: Length of youth prison sentences under juvenile criminal law for robbery, 1990-2006 (convicted juvenile and young adult offenders, old federal states)



Source: Federal Statistical Office (Ed.): Strafverfolgungsstatistik 1990-2006; own calculations.

Figure 15: Length of youth prison sentences under juvenile criminal law for serious and dangerous bodily injury, 1990-2006 (convicted juvenile and young adult offenders, old federal states)



Source: Federal Statistical Office (Ed.): Strafverfolgungsstatistik 1990-2006; own calculations.

6.1 Reforms since the 1970s in West Germany: innovation from the grassroots of the juvenile justice system – the new community sanctions (mediation, community service, social training courses, care order)

As indicated under *Section 1* above, Germany experienced a reform movement that evolved from the "grassroots" of the juvenile justice system. Practitioners of private or community organisations (youth welfare departments in the cities) and Juvenile Court prosecutors and judges developed so-called 'new community sanctions' from 1974 onwards when it became evident that legislative reforms would not be achieved in the near future.[52] These projects were established close to the Juvenile Courts at the community level, very often by the communal welfare boards, but were then transferred to private organisations. This is a peculiarity of the juvenile

52 For one of the first projects of so-called "Brücke"-initiatives, see *Pfeiffer* 1983.

welfare system that gives priority to privately run projects (principle of subsidiarity of state versus privately run organisations, see § 4 (2) JWA). The idea of the 1970s and 1980s was to establish appropriate and educational alternatives to the traditional, more repressive sanctions like short-term incarceration in a detention centre ("*Jugendarrest*", see *Section 2* above). The first "new" community sanction to be implemented was the community service order. It was followed or accompanied by the special educational care order. This care order means that a social worker is attached to a juvenile offender like a mentor for a period of usually six to twelve months. It is seen as an alternative to the classic probation sanction where a probation officer sometimes has 70 or more cases. The care order amounts to more intensive oversight, as in practice a social worker will have no more than 10 to 15 cases. It is evident that the care order can be much more efficient in providing help and social integrative services than a suspended prison sentence with supervision by a probation officer.

Since the beginning of the 1980s another "new" community sanction has been developed: the social training course. This is a group-centred educational measure that targets both leisure-time problems and problems of day-to-day life. Its aim is to improve social competence and skills that are required in private and professional life. Social training courses are organised as regular meetings once or twice per week, often in combination with intensive week-end arrangements (sometimes sporting activities, "adventure" experiences like sailing, mountaineering etc.), usually for a period of up to six months.[53]

The first mediation projects started in the mid-1980s.[54] At the beginning of the 1990s, 60% of the youth welfare departments reported that a mediation project had been established. In 1995 a national poll revealed a total of 368 mediation projects, which is a 68% increase from 1992.[55] However, the authors reported that the majority of mediation schemes ran on an "ad-hoc basis" to cater for individual cases, and not as a priority measure within the ambit of educational measures provided by the JJA.[56]

With the reform law of 1990 the legislator recognised the development of "new community sanctions" by creating legal provision for their further and wider application. The Draft Bill mentioned mediation in particular as being "the most promising alternative to the more repressive traditional sanctions".[57]

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53 See *Dünkel*/*Geng*/*Kirstein* 1998.

54 See *Dünkel* 1999, p. 108.

55 See *Wandrey*/*Weitekamp* in *Dölling* et al. 1998.

56 See *Wandrey*/*Weitekamp* in *Dölling* et al. 1998, p. 130 ff.

57 The legal justification referred to the favourable experiences with assorted pilot projects launched since 1985, which increase consideration for the victim's special circumstances and "settle the conflict between the offender and the victim that results from the

The current JJA in Germany offers many opportunities for arranging mediation or damage restitution. Juvenile Court prosecutors may waive prosecution if reformatory measures have already been implemented or introduced (§ 45 (2) JJA). The 1990 Act explicitly equates mediation with such a reformatory measure. Significantly, the legislator already accredits sincere efforts by juveniles to resolve conflicts or to provide restitution. This arrangement protects juvenile and young adult offenders if the victim of the crime refuses to co-operate. Successful damage restitution more frequently leads to a dismissal because of "reduced culpability" (pursuant to § 45 (1) JJA; similar to § 153 of the Criminal Procedure Act in adult criminal law). Under the same conditions that apply to Juvenile Court prosecutors, Juvenile Court judges may waive prosecution to enable subsequent consideration of mediation efforts by young offenders. Restitution of material losses as well as mediation as a sanction that is independent from the Juvenile Court are peculiarities associated with German juvenile law (see §§ 15, 10 JJA). The juvenile justice system, furthermore, provides for damage restitution in conjunction with a suspended term of detention in a remand home or imprisonment.[58]

Providing mediation as a court ordered sanction in juvenile justice (see § 10 (1) No. 7 JJA) was rightly criticised for violating the voluntary principle that underlies mediation efforts. In practice mediation as a Juvenile Court directive is almost never used,[59] because suitable cases are dealt with in an informal proceeding (diversion in the sense of § 45 (2) JJA, see above) prior to a court trial and therefore do not enter the level of formal court proceedings.

All taken into account, it demonstrates that elements of restorative justice at different levels have been implemented in the German juvenile justice system.[60]

The juvenile law reform of 1990 served as a "booster" for the further extension of new community sanctions. In a nation-wide poll conducted by the Department of Criminology at Greifswald we investigated the period two years before and two years after the law came into force (1 December 1990). There was a 23% increase in the number of projects before and even a 60% increase after the statutory amendment in the case of mediation, which amounts to a ratio of 1 to 2.6 (see *Table 3*). Considerable further increases can also be observed for the care order and for social training courses, but not for the community service order in absolute terms. This is, however, due to the fact that almost all youth

criminal act more appropriately and more successfully (...) than traditional sanctions have done in the past", see Bundesratsdrucksache, No. 464/89, p. 44.

58 The same applies for release on probation; for a summary, see *Dünkel* 1999.

59 See *Rössner*/*Klaus* in *Dölling et al.* 1998, p. 115.

60 After the juvenile justice legislation of 1990, the legislator also passed reforms of the general penal law and the Criminal Procedure Act (StPO) which included some innovation in its emphasis of mediation, see § 46a Criminal Law (StGB) of 1994 and §§ 155a, 155b Criminal Procedure Act (stop), see *Dünkel* 1999, p. 110.

welfare departments already ran community service schemes before 1990, which rather limited the scope for further expansion.

Table 3: Increase of projects of "new community sanctions" (offered by private or public organisations) in the old Federal States before and after the amendment of the JJA in 1990

Educational measure	Increase *before* the law amendment (1st December 1990)	Increase *after* the law amendment (1st December 1990)	Ratio
Mediation	23%	60%	1 : 2.6
Care order	17%	37%	1 : 2.2
Social training course	16%	30%	1 : 1.9
Community service	2%	5%	1 : 2.5

Source: *Dünkel/Geng/Kirstein* 1998.

6.2 The implementation of new community sanctions in East Germany after the reunification in 1990

The main aim of the nationwide Greifswald study on new community sanctions was to obtain empirical data about the establishment of these sanctions in the Federal States, particularly in East Germany in the general context of implementing the JJA in the former GDR. The process of social transition went very quickly in terms of legal reforms. The JJA came into force simultaneously to the re-unification in October 1990, shortly before the amendment of the law in all of Germany. The poll was conducted in 1994 and 1995, and included a questionnaire sent to all community welfare departments, private organisations running mediation and other community sanction schemes, and to Juvenile Court judges.[61] The question was to what extent the new Federal States had been able to implement the structure of juvenile welfare compared to the established infra-structure in West Germany.

The results were astonishing, as a mere four years after re-unification, the East German "*Länder*" had not only reached equivalent structures and quality of juvenile welfare, but had even overtaken the "old" Federal States (see *Table 4*).

61 See *Dünkel*/*Geng*/*Kirstein* 1998.

Table 4: "New" educational community sanctions (offered by private or state organisations) in the old and new Federal States of Germany in 1994

	Youth welfare depart-ments	Social training course		Mediation		Care order		Community service	
	n	n	%	n	%	n	%	n	%
Old Federal States (FRG)	479	350	**73.1**	336	**70.1**	408	**85.2**	461	**96.2**
New Federal States (former GDR)	127	96	**75.6**	112	**88.2**	119	**93.7**	127	**100**
Total Germany	606	446	**73.6**	448	**73.9**	527	**87.0**	588	**97.0**

Source: *Dünkel/Geng/Kirstein* 1998.

This development continued in the five years that followed, as is demonstrated by several further studies, particularly in the field of mediation.[62] The German Federal Government has sponsored and promoted many projects that focus on specific violent offender groups, such as right-wing extremists. At present the police authorities estimate that there are about 10,000 right-wing, violence-prone skin-heads etc. in the whole of Germany. About half of them are said to live in East Germany, although the East German population accounts for only 20% of the German population.[63] The overrepresentation of right-wing extremists in East Germany is a very striking phenomenon and can no doubt be partly explained by the specific problems caused by the economic situation (the unemployment rate is twice that of West Germany), the lack of professional and personal perspectives, particularly in young people, and also the authoritarian style of rearing in East German families.

In consequence of the problems that are specific of East Germany, the youth welfare authorities face a tough workload. Nevertheless, the infra-structure and the number of social workers today are comparable to the state of affairs in West Germany. In the old Federal States youth welfare authorities and the juvenile justice system in general face different problems, particularly with young migrants and young drug addicts. The latter have not (yet) emerged as a prevailing problem in the eastern part of Germany. The "classic" drug in the

62 See *Steffens* 1999; *Schwerin-Witkowski* 2003.

63 For an overview of right-wing extremism in Germany and particularly in the East-German Federal States see *Dünkel*/*Geng* 1999; 2003; *Dünkel*/*Geng*/*Kunkat* 2001.

Eastern *Länder* is alcohol. The illegal drug market has only recently come to be an issue there, although the 'hard drugs' (heroine, cocaine) scene is not yet prevalent.

Community sanctions have seen much progress in the East, too. However, it is mainly the community service order that has gained major importance in juvenile justice practice. The other community sanctions, which are more educational and "constructive" than community service or other traditional sanctions, have made far less of an impact. Consequently, half of the community youth departments stated that they had no more than eight young offenders participating in mediation per year. In 50% of the youth departments no more than eight young persons in West- and seven young persons in East Germany were under special educational care, and the number of participants in social training courses was 18 and 11, respectively. On the other hand 80 and 78 community service orders were counted in 50% of the youth departments. The total number of young offenders sentenced to community service was six to eight times higher than for the other educational sanctions mentioned.[64]

7. Regional patterns and differences in sentencing young offenders

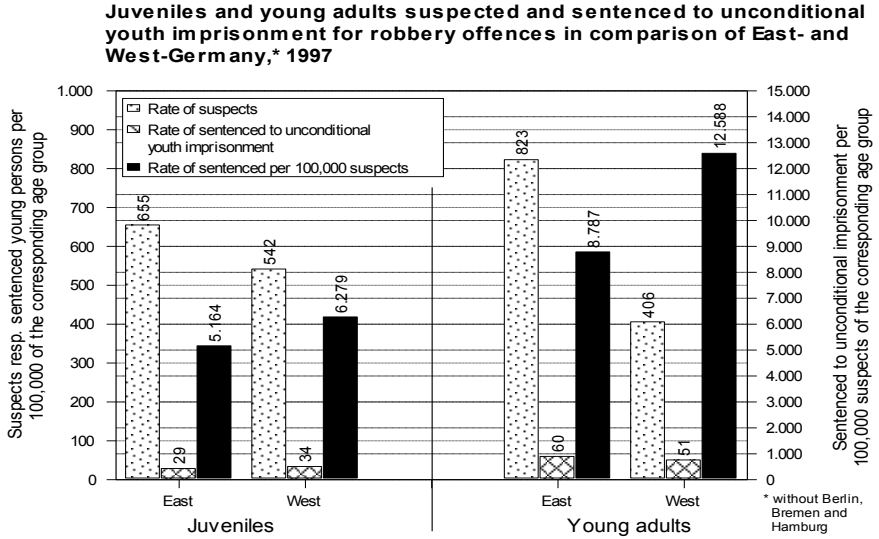
Regional patterns of diversion have already been described under *Section 5*. A comparison of the sentencing patterns of the different Federal States also brings differences to light. In line with a long sentencing tradition, more serious punishment prevails in the southern German States, whereas in the northern States less harsh punishment is predominant. After the reunification of Germany the question was which priorities the East German juvenile judges would set when sentencing young offenders. One hypothesis was that they would be more severe because of the traditional draconic punishments used in the former East German system. However, the juvenile judges – like many other judicial personnel – were imported from the West German States. The Bavarians catered for their neighbouring State Saxony, while the northern States like Schleswig-Holstein or Lower Saxony took care of staffing the Northern East German states like Mecklenburg-Western Pomerania or Saxony-Anhalt. One could therefore presume that the well-known north-south divide would be replicated in the "new Federal States".

Empirically we do not know much about court sentencing practices in East-German Federal States, as statistical data had not been available until recently. A Ph. D. thesis at Greifswald University on Brandenburg, Saxony and Thuringia showed that (contrary to the presumption of some scholars) the sentencing practice was not more repressive in the East. There are some differences in how

64 See in detail *Dünkel* 2006.

certain crimes are responded to, and particularly violent crimes are punished more severely. The youth detention centre option is widely rejected by the judges, whereas suspended youth prison sentences are more widespread than in West Germany.[65] Although the rates of violent offending differed between East and West Germany in the mid-1990s, the number of youth prison sentences was about the same, as is shown in *Figure 16* for robbery offences. The main disparity between East and West Germany was the considerably lower risk for a young suspect in East Germany to be sentenced by the Juvenile Court, which again reflects the extended practice of diversion.[66]

Figure 16: Regional patterns of sentencing in East and West German federal states, 1997



Source: *Kröplin* 2002.

A recent analysis of the statistical data of Mecklenburg-Western Pomerania confirmed the pattern of extended diversionary practices and the few sentences to a detention centre. One peculiarity, however, was the lower rate of suspending youth prison sentences (of up to one or two years). Only 55% of youth prison sentences were suspended, whereas the average in West Germany was about 80%. Particularly in cases of violent offences, Juvenile Court judges seem to rely on "sharp shock" incarceration. On the other hand the study showed

65 See *Kröplin* 2002.

66 See *Dünkel*/*Drenkhahn*/*Geng* 2001; *Kröplin* 2002.

that "new" community sanctions, like social training courses, made up 15% of all formally sanctioned young offenders (10% of young adults, 20% of juveniles).[67] One-third (36%) of all formally and informally sanctioned offenders received a community service order (16% of young adults and almost 80% of juveniles). Mediation, accounting for about 8% (the same ratio for juveniles as for young adults), was far behind. However, like the care order (11%, 8% for young adults, 18% for juveniles) it is apparently not only an alibi for a "repressive" sentencing practice, but an integrated part of a juvenile justice system that greatly relies on the educational ideal.

8. Young adults (18-20 years old) under the jurisdiction of the Juvenile Courts (§ 105 JJA)

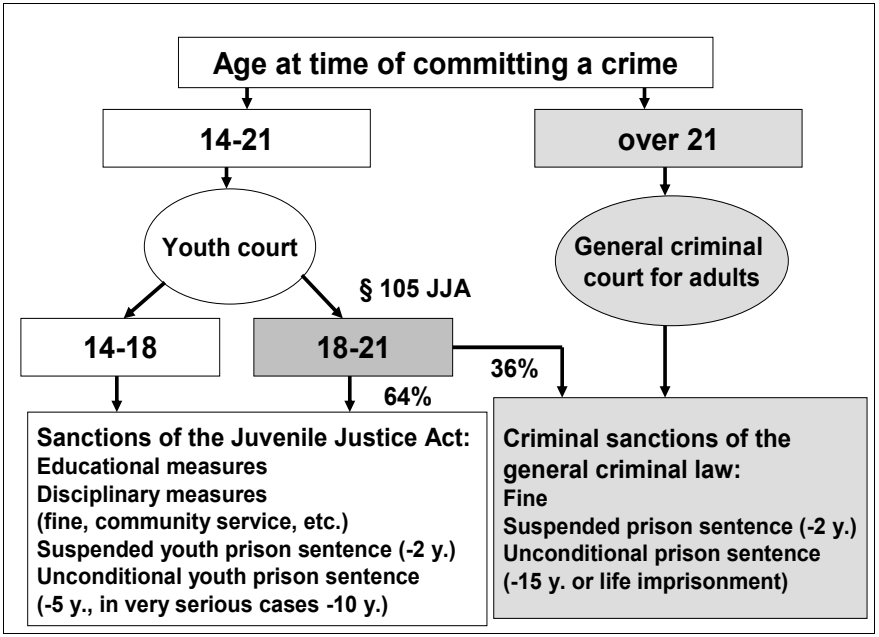
In Germany, since the reform law of 1953, all young adults have been transferred to the jurisdiction of Juvenile Courts. Comparing practices internationally, this decision is remarkable, because it points to extending the scope of Juvenile Courts to include young adults between the ages of 18 and below 21. Although there is a general tendency in Europe to extend the scope of juvenile justice on young adults,[68] the German legislation providing the competence to sentence young adults to juvenile courts still is rather exceptional.[69] In most other countries it is also more or less exceptional that adult courts really impose educational sanctions on young adults. The development in Germany has been in the opposite direction. Undoubtedly a major reason is that the reform of 1953 created the jurisdiction of the Juvenile Court for all young adult offenders independently of whether sanctions of the JJA or of the general Penal Law (StGB) are to be applied (see § 108 (2) JJA). The system of sanctioning 18-20 years old offenders and the age groups below and above young adulthood are shown in *Figure 17*.

67 See *Dünkel*/*Scheel*/*Schäpler* 2003.

68 See *Pruin* 2007; *Dünkel/Pruin* 2011 and in this volume.

69 Many countries provide the application of educational measures or of mitigated sentences of the general criminal law, see *Dünkel/Pruin* in this volume, but according to *Gensing* (in this volume) besides Germany only Austria and Croatia provide that young adults are dealt with under the jurisdiction of the juvenile courts.

Figure 17: The German system of sentencing concerning different age groups



Section 105 (1) No. 1 of that law provides for the application of juvenile law if "a global examination of the offender's personality and of his social environment indicates that at the time of committing the crime the young adult in his moral and psychological development was like a juvenile", he should be punished according to the JJA ("*Reifeentwicklung*").

Furthermore, juvenile law has to be applied if it appears that the motives and the circumstances of the offence are those of a typically juvenile crime ("*Jugendverfehlung"*, see § 105 (1) No.2 JJA). In 1965 only 38% of young adults were sentenced in terms of the Juvenile Justice Act, but by 1990 this proportion had nearly doubled to 64%. In 1995 this share decreased slightly to 60%, but then increased again to 66.2% in 2008.[70] Since 2007 we dispose on statistical data for all Federal States including former East Germany. The overall rate of sentencing according to the JJA was 59.4%, with an average of 51.9% in East and 65.2% in West Germany. This makes it clear that the full integration of young adults into the juvenile justice system in West Germany has been

70 See also *Dünkel* 2002a; 2006; *Pruin* 2007; these data refer to the "old" West German Federal States.

accepted in practice. The regulations mentioned above have also been interpreted very widely by the courts to provide for the application of juvenile law in all cases in which there are doubts about an offender's maturity.[71] The Supreme Federal Court (*"Bundesgerichtshof"*, BGH) held that a young adult has the maturity of a juvenile if "*elements demonstrate that a considerable development of the personality is still ongoing*" ("*Entwicklungskräfte noch in größerem Umfang wirksam sind*", BGHSt 12, p. 116; 36, p. 38). This is the case for the majority of young adult offenders. Thus, the court does not rely on an imaginative (prototype of) juvenile, but on aspects of each individual's personal development. There is no doubt that these arguments also hold for a further extension of the Juvenile Court's jurisdiction, for example to include 21-24 year-old adults (see *Section 13* below). The interpretation of a "typical juvenile crime", which is extensively applied, follows a similar logic.[72]

However, in practice there are considerable regional differences with respect to specific crimes and different regions.

For the most serious crimes such as murder, rape or robbery, nearly all (more than 80% or even 90%) young adult offenders in 2006 were sentenced according to the (in these cases, milder) juvenile law (see *Figure 18*). The reason is that the higher minimum and maximum sentences provided by the "ordinary" criminal law do not apply in juvenile law (see § 18 (1) JGG). Juvenile Court judges, therefore, are not bound by the otherwise mandatory life sentence for murder, or the minimum of five years of imprisonment for armed robbery. German practice appears to be contrary to the so-called waiver decisions in the USA, where serious young offenders are transferred to the "ordinary" criminal justice system.[73]

The only field of offences for which young adult offenders are predominantly sentenced according to adult legal provisions are traffic offences (61% in 2008). This is due to the procedural possibility of imposing fines without an oral hearing („*Strafbefehl*") which is excluded from the juvenile penal law.

There are constitutional reservations about the regional inequalities that have emerged in practice. In North Rhine-Westphalia, for example, according to research from the 1980s, convictions under juvenile law ranged between 27%

71 See BGHSt 12, p. 116; BGH Strafverteidiger 1989, p. 311; *Eisenberg* 2008, notes 7 ff., 36 on § 105; *Ostendorf* 2009a, note 24 on § 105 (emphasising that § 105 JJA should be applied if the sanction according to the JGG is more favourable for the young adult).

72 The examples mentioned in the cases are crimes committed in groups or under the influence of a group, also hooliganism, sometimes very violent crimes that have derived from a specific situation (possibly in combination with alcohol abuse) etc., see *Eisenberg* 2008, notes 34 ff. on § 105; *Ostendorf* 2009a, notes 17 f. on § 105..

73 See *Stump* 2003.

and 91% of all convicted juveniles.[74] When the Federal States are compared, in 2008 the share of young adults being sentenced according to juvenile law ranged from 46% in Mecklenburg-Western Pomerania and 47% in Baden-Württemberg to 86% in Hamburg and 89% in Schleswig-Holstein (see *Figure 19* and *Table 4*). Apparently, Juvenile Court judges have different conceptions of the "typical" personality of juvenile offenders and of the "typical" nature of juvenile delinquency. Overall, there is a north-south divide, with the Federal States in the north increasingly applying juvenile criminal law, whereas in the south Juvenile Court judges rely to a greater extent on the criminal law for adults. The relatively low application of sanctions according to the JJA in Berlin (54%) might be a result of an overrepresentation of foreigners or juveniles with a migrant background, who could more often be deemed mature, particularly if their lifestyle is rather independent from parents or family.

Regarding the new Federal States (of former East Germany) we must notice that the practice varies, but in general it is more reluctant than in the average of West German Federal States (see *Figure 19*). In 2008 the proportion of young adults sentenced according to the JJA was only 46% in Mecklenburg-Western Pomerania, 50% in Saxony, 53% in Brandenburg, 55% in Thuringia and 56% in Saxony-Anhalt.[75] In Mecklenburg-Western Pomerania the proportion in 2001 was 55%, and decreased slightly (see *Table 4*).[76] The low rates in Brandenburg (53%; 2006: only 35%) and Saxony (50%; 2006: only 34%) are not due to the "distrust" of Juvenile Court judges towards the JJA. Rather, they are the result of a specific bureaucratic routine in the application of the "*Strafbefehlsverfahren*", a summary procedure with only a written file in cases of less severe offences, which is only applicable when applying the sanctions of the general criminal law (StGB). Nevertheless in Brandenburg and Saxony the proportions have increased and almost adjusted to the West German level.

Two discourses can be differentiated in this context. On the one hand, there is the "rhetoric" debate in the field of criminal policy and the critique by conservative parties of lenient sentencing through the application of JJA sanctions instead of the provisions of general criminal law.[77] Conservative politicians argue that young adults should be made to assume increased "responsibility", thereby allowing for more severe punishment to be imposed.

74 See *Pfeiffer* 1988, p. 96.

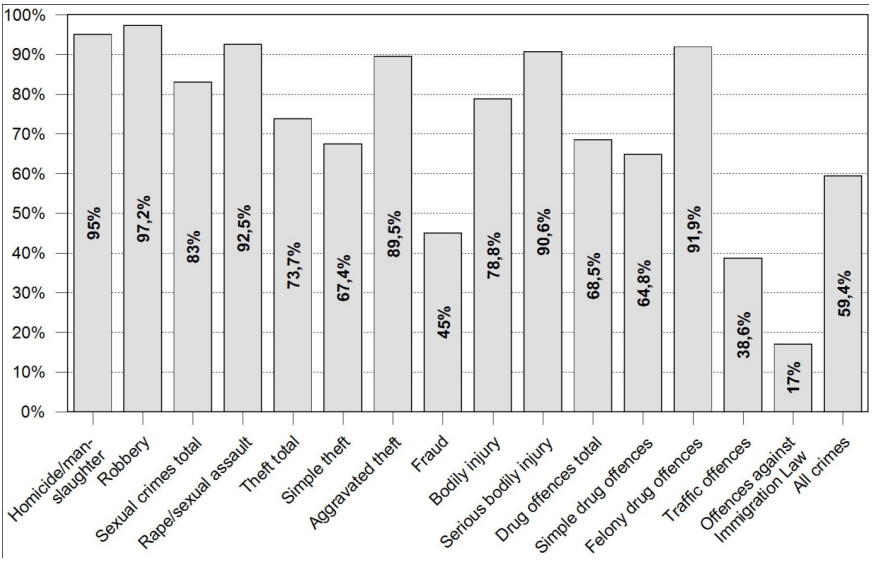
75 See for earlier data *Heinz* 2001, p. 79 ff.

76 See *Dünkel*/*Scheel*/*Schäpler* 2003.

77 These arguments do not consider that in fact sometimes the application of sanctions of the JJA may be a disadvantage rather than a benefit, as can be shown by the fact that in the juvenile justice system the minimum prison sentence is 6 months, in the general criminal law only one month; for some empirical evidence of disadvantages in sentencing, see *Dünkel* 1990; *Pfeiffer* 1991.

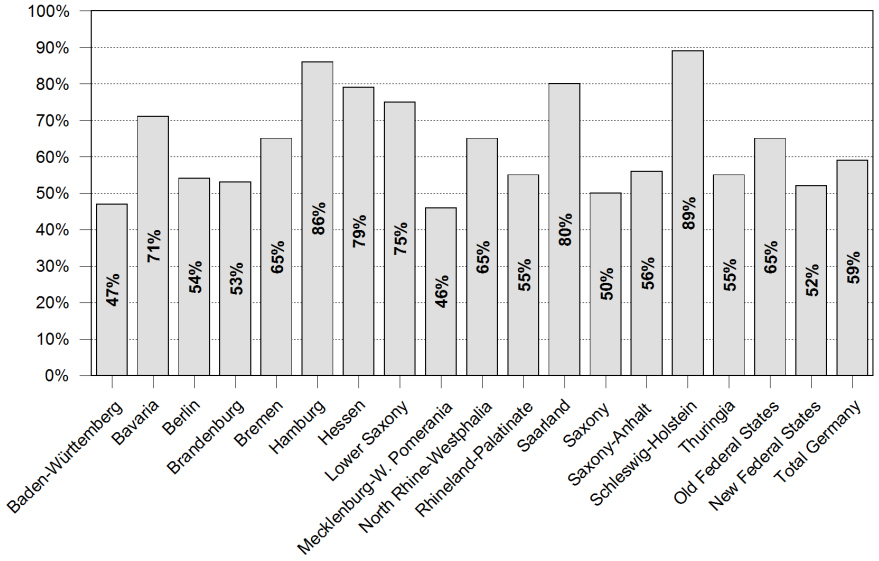
On the other hand, the practitioners "on the ground" have different problems. They want to eschew the application of the general criminal law in order to avoid the imposition of more severe punishment, but would like to be able to impose fines in a summary procedure (without an oral hearing), which up to now is not provided by the JJA ("*Strafbefehl*", see above). This procedure is very economical and time-saving and – as indicated above – is used particularly for traffic offenders (drunken driving etc.).

Figure 18: Proportion of young adult offenders sentenced under juvenile criminal law (§ 105 JJA) according to different crimes in Germany, 2008 (total Germany)



Source: Federal Statistical Office (Ed.): Strafverfolgungsstatistik 2008, own calculations.

Figure 19: Proportion of young adult offenders sentenced under juvenile criminal law (§ 105 JJA) according to different federal states, 2008



Source: Federal Statistical Office (Ed.): Strafverfolgungsstatistik 2008, own calculations.

Table 4: Proportion of (18 to <21 year old) young adults sentenced according to the JJA (§ 105 JJA)

Federal States	Proportion of young adults sentenced according to the JJA (all crimes)				Proportion of young adults sentenced according to the JJA (traffic offences)		
	1998*	2001	2006	2008	1997**	2001	2006
Baden-Württemberg	43%	48%	45%	47%	20%	17%	17%
Bavaria	55%	61%	67%	71%	35%	37%	40%
Berlin	57%	53%	54%	54%	30%	46%	29%
Bremen	62%	71%	69%	65%	61%	72%	71%
Hamburg	92%	83%	87%	86%	95%	81%	77%
Hesse	71%	74%	79%	79%	67%	65%	75%

Federal States	Proportion of young adults sentenced according to the JJA (all crimes)				Proportion of young adults sentenced according to the JJA (traffic offences)		
	1998*	2001	2006	2008	1997**	2001	2006
Lower Saxony	**71%**	**70%**	**71%**	**75%**	**61%**	**57%**	**63%**
North Rhine-Westphalia	**63%**	**66%**	**68%**	**65%**	**45%**	**48%**	**55%**
Rhineland-Palatinate	**47%**	**51%**	**53%**	**55%**	**19%**	**20%**	**24%**
Saarland	**84%**	**87%**	**85%**	**80%**	**77%**	**82%**	**75%**
Schleswig-Holstein	**89%**	**90%**	**88%**	**89%**	**93%**	**88%**	**86%**
Old Federal States total	**59%**	**62%**	**64%**	**65%**	**39%**	**41%**	**44%**
Brandenburg	**30%**	**no inf.**	**41%**	**53%**	**23%**	**no inf.**	**24%**
Mecklenburg-Western Pomerania	**no inf.**	**55%**	**50%**	**46%**	**no inf.**	**41%**	**32%**
Saxony	**34%**	**no inf.**	**47%**	**50%**	**12%**	**no inf.**	**18%**
Saxony-Anhalt	**no inf.**	**no inf.**	**no inf.**	**56%**	**no inf.**	**no inf.**	**no inf.**
Thuringia	**60%**	**no inf.**	**57%**	**55%**	**44%**	**no inf.**	**42%**
New Federal States* **	**38%**	**no inf.**	**48%**	**52%**	**21%**	**no inf.**	**27%**

Sources: *Heinz** 2001; *Kröplin*** 2002; Federal Statistical Office (Ed.): Strafverfolgungsstatistik 2001, 2006; 2008; Strafverfolgungsstatistik Mecklenburg-Western Pomerania 2001, 2006, own calculations.
1998*** resp. 1997 without Saxony-Anhalt and Mecklenburg-Western Pomerania; 2006 without Saxony-Anhalt.

9. Transfer of juveniles to the courts for adults

In Germany, a transfer of juveniles to the criminal court for adults (waiver) is not possible. Even in the case of young adults (18 to <21 years) the system is working in the opposite direction compared to the USA or other waiver systems: the most serious cases are sanctioned under juvenile law, resulting in milder sentences than would be the case for adults (see *Section 8* above). Regardless of which set of legal provisions is applied in sentencing, it is always the Juvenile Court that deals with young adult offenders.

10. Preliminary residential care and pre-trial detention

According to §§ 71, 72 JJA priority should be given to educational alternatives instead of placing a juvenile in pre-trial detention. The alternative will most regularly be an open facility of residential care (welfare home), but could also be a closed welfare institution. In the 1970s such closed institutions were outlawed by most Federal States and practitioners as they were seen as a symbol of "state repression". However, at present a more pragmatic debate has led to the reopening of a few facilities for those juveniles who cannot be handled in an open environment, and for whom the aim was nevertheless to avoid pre-trial detention. So in six out of sixteen Federal States, some 260 places have been created in closed institutions (see *Section 11* below).[78]

Pre-trial detention should be the last resort in order to guarantee a juvenile's attendance at trial. In 1990 the legislator even intensified the necessary preconditions for pre-trial detention because of the possible detrimental effects such detention can have, particularly on juvenile offenders (see § 72 (1) JJA). Pre-trial detention is prohibited for persons less than 14 years of age. For 14- and 15-year old offenders, in cases of danger of not standing trial (escape), pre-trial detention is only permitted if the juvenile has already absconded in the past or has no permanent home address (see § 72 (2) JJA).

Nevertheless the practice of juvenile judges is sometimes problematic as they also use grounds for pre-trial detention that are not provided by law, like crisis intervention, short sharp shock ideologies etc.[79] Empirical research shows, however, that in general juveniles are only sent to pre-trial detention as a last resort.[80] The pre-trial detention rates per 100,000 of the age group are included in *Table 5* below.

The average stay in pre-trial detention rarely exceeds two to three months. A study in Mecklenburg-Western Pomerania showed that of those juveniles and young adults who had been placed in pre-trial detention in 1999, 14% were immediately released, and 29% were later released. In 20% of the cases, they were transferred to a welfare institution according to § 71 JJA. 67% of the very young alleged offenders (14 and 15 years old) and 44% of the 16- and 17-year old juveniles were released on bail and therefore suffered only short periods of pre-trial detention.[81]

Far more juveniles are preliminarily detained in psychiatric hospitals than in closed residential welfare institutions. According to a poll by the heads of psy-

78 See *Arbeitsgruppe* "*Familiengerichtliche Maßnahmen bei Gefährdung des Kindeswohls*" 2006.

79 See *Kowalzyck* 2008.

80 See *Heinz* 2008; *Villmow*/*Robertz* 2004 with further references.

81 See *Dünkel* 2004, p. 484; *Kowalzyck* 2008.

chiatric clinics in Germany, the Family Courts ordered a stay in a psychiatric clinic (according to § 1631b Civil Code) in about 3,500 cases per year, which covers about 13% of the total number of admissions to psychiatric departments for juveniles. Two thirds of this kind of detention last for only two to six weeks, and only one percent of placements are for longer than six months. The conclusion is that far more juveniles are detained in psychiatric than in (closed) welfare institutions, but those in welfare institutions stay there much longer than juveniles in psychiatric institutions.[82]

11. Residential care and youth prisons – Legal aspects and the extent of young persons deprived of their liberty

At the end of 2000 almost 70,000 (69,723) children (below the age of 14) and juveniles were in *juvenile welfare homes*. Of them 10,164 had been placed by a decision of the Family Court, the others upon demand or with the consent of the parents. In October 2006 there were only 260 residential places in closed welfare institutions, a share of only 0.3% of all places.[83] The 260 places are spread across 19 institutions in six Federal States (Baden-Württemberg, Bavaria, Brandenburg, Hamburg, North Rhine-Westphalia and Rhineland-Palatinate). 81 places are used as optional open facilities. The average stay in closed welfare institutions in 2005 was 11 months, which means that about 300 juveniles are placed in closed welfare institutions per year. These numbers demonstrate that placement in closed welfare institutions plays only a marginal role in the German residential care system, with about 20,000 new admissions of juveniles under § 34 JWA per year. While these closed institutions are available to all Federal States, 87% of the juveniles who stay there come from the respective domestic States. Only 13% come from one of the 10 Federal States that do not have their own closed facilities. This can be seen as an indicator that creating new options for juvenile judges consequently increases the demand for them. The daily costs per juvenile were 250 €, which is more expensive compared to youth prisons (100-150 €). The distinction between closed and open welfare institutions is sometimes difficult, as many open institutions provide a few rooms for a temporary "time out", and closed institutions on the other hand temporarily use parts of their facilities as an open environment.

The *legal situation* concerning children's rights in welfare institutions is unsatisfactory insofar as no legal rules exist that govern the execution of such placements. The rules that *are* in place are purely administrative.

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82 See *Arbeitsgruppe* "*Familiengerichtliche Maßnahmen bei Gefährdung des Kindeswohls*" 2006.

83 *Sonnen* 2002, p. 326, reported that in 2001 there were only 150 places in closed welfare institutions.

Youth imprisonment covers the age groups of 14 to 17-year old juveniles, 18 to 20 year-old young adults and adults aged 21 to 24 who were sentenced by Juvenile Courts as juveniles or young adults. As mentioned at the beginning of this paper, the duration of sentences to youth imprisonment ranges from six months to five years. In serious felony cases or in cases involving young adult offenders the maximum limit is 10 years. The average sentence to be served is between one and two years, therefore the average stay in a youth prison is slightly more than one year.

The *legal situation* for young prisoners changed at the beginning of 2008. Before 2008 only a few general legal provisions existed in the JJA and in the Prison Act for adult prisoners. There had not been a differentiated legal framework covering the legal rights and duties of young prisoners. The Federal Constitutional Court (*Bundesverfassungsgericht*) outlawed this missing primary legislation as being unconstitutional, as in Germany any restriction of fundamental human rights has to be based on regulations in law. Administrative rules are deemed an insufficient basis. The Federal Constitutional Court obliged the legislators of the Federal States to pass primary legislation before the end of 2007.[84] In September 2006 a general reform of the legislative competences came into force, transferring the competences for prison legislation to the Federal States ("*Länder*"). The new State Laws in the Federal States vary to some extent and express different political orientations on what is to be seen as the primary goal and the basic principles of youth imprisonment, and what are viewed as being the most promising concepts of rehabilitation.[85] Nevertheless, there is a strong consensus that the organization of youth prisons, even more than in adult prisons, must be oriented towards rehabilitation and education. Furthermore, the prevailing opinion is that youth prisoners shall be accommodated in small living groups and individual cells during the night. All youth prisons should also provide a variety of school and vocational training programmes, special (social) therapeutic units, and a system of progressive preparation for release (including leaves of absence, early release schemes and continuous care and aftercare).[86] Although the competence of youth prison legislation has been transferred to the Federal States, legislation concerning prisoners' complaints rights and procedures are still Federal Law. The reform law of 13 December 2008 (mentioned under *Section 1*) brought major

84 See BVerfG of 31 May 2006, NJW 2006, 2093 ff.; *Dünkel* 2006a; 2006b; *Dünkel*/*van Zyl Smit* 2007; *Goerdeler*/*Pollähne* 2007.

85 See *Dünkel*/*Pörksen* 2007; *Eisenberg* 2008a; *Sonnen* in *Diemer*/*Schoreit*/*Sonnen* 2008, p. 931 ff.; *Ostendorf* 2009.

86 For a comparison of the legislation in the different Federal States see *Dünkel*/*Pörksen* 2007; *Dünkel* 2007; *Eisenberg* 2008a; *Sonnen* 2007; *Sonnen* in *Diemer*/*Schoreit*/*Sonnen* 2008, p. 931 ff.; *Ostendorf* 2009.

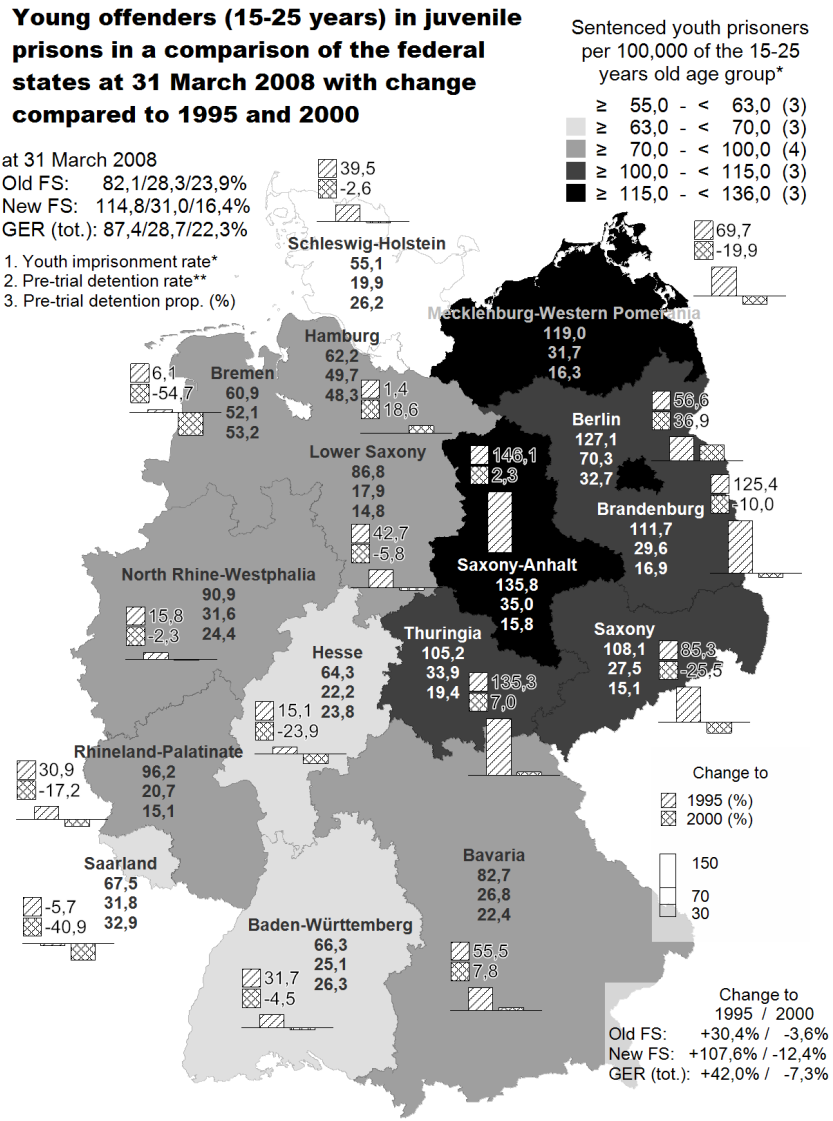
improvements, guaranteeing juvenile and young adult inmates an oral hearing as well as regular legal advice when complaining to the court.[87]

The *actual situation* in *German youth prisons* can be described as follows: In 2008 there were approximately 6,500 young people aged between 14 and 25 in youth custody (31 March 2008: 6,557), 264 (or four percent) of them female. Youth imprisonment rates differ considerably across the Federal States. They are higher in the East, partly because there is more violent crime in the eastern regions. The case of Schleswig-Holstein is interesting in this respect: the imprisonment rate there (2008: 55.1 per 100,000 of the 14-25 age group) has been reduced to a level half that of many other States; in neighbouring Mecklenburg-Western Pomerania, for example, it was 119 per 100,000 (see *Figure 20* below). This reflects an explicit criminal policy of opting for different types of sentences and alternatives to custody.

In the last few years a reduction in the rates of youth imprisonment has been observable, however with some exceptions like Berlin and Hamburg (see *Figure 20* and *Table 5*). With the exception of Berlin an even stronger decrease can be seen for the rates of juveniles and young adults in pre-trial detention.

87 See § 92 JJA in combination with §§ 109 ff. Prison Act, see *Dünkel* 2008, p. 3 f.

Figure 20: Young offenders in German juvenile prisons



* Including those young adult prisoners (over 18 resp. 24 years of age) who have been transferred to adult prisons according to sec. 92 (2) Juvenile Justice Act
** per 100,000 of the 14-21 years old age group

Source: Federal Statistical Office (Ed.): Strafvollzugsstatistik 2006 (see www.destatis.de); own calculations.

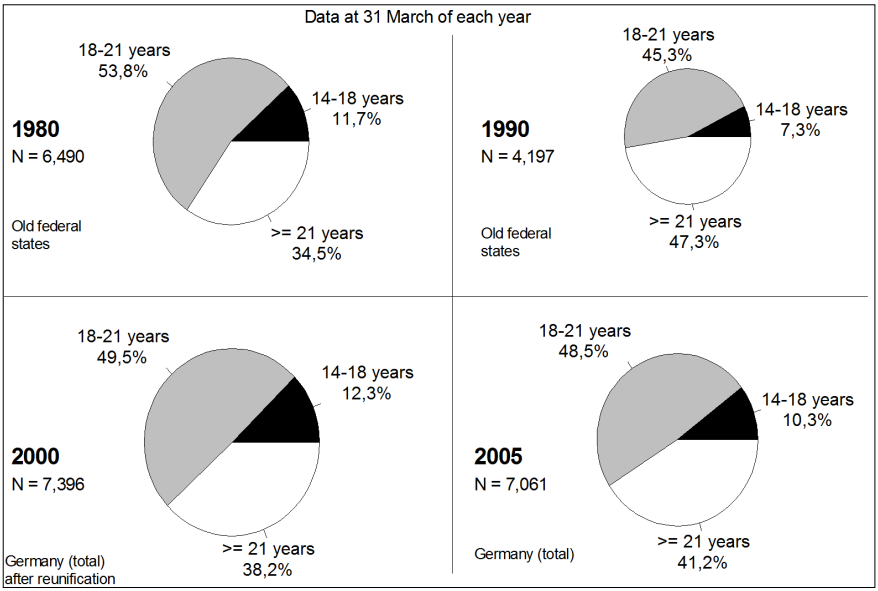
Table 5: Imprisonment rates for juveniles and young adults in youth prisons and in pre-trial detention 2000 and 2008 (at 31 March) in a comparison of the Federal States

	Youth imprisonment rates*		2008 comp. to 2000	Pre-trial detention rates**		2008 comp. to 2000
	2000	2008	in %	2000	2008	in %
Baden-Württemberg	69,4	66,3	-4,5	44,3	25,1	-43,3
Bavaria	76,7	82,7	7,8	50,0	26,7	-46,5
Berlin	92,9	127,1	36,9	59,8	70,3	17,7
Brandenburg	124,1	111,7	-10,0	49,8	29,6	-40,4
Bremen	134,4	60,9	-54,7	59,4	52,1	-12,3
Hamburg	52,4	62,2	18,6	69,5	49,7	-28,5
Hesse	84,4	64,2	-23,9	46,1	22,2	-51,9
Mecklenburg-Western Pomerania	148,4	119,0	-19,9	53,4	31,7	-40,7
Lower Saxony	92,1	86,8	-5,8	34,7	17,9	-48,4
North Rhine-Westphalia	92,9	90,8	-2,3	46,1	31,6	-31,5
Rhineland-Palatinate	116,1	96,2	-17,2	38,5	20,7	-46,3
Saarland	114,2	67,5	-40,8	46,0	31,8	-30,9
Saxony	145,0	108,1	-25,5	61,6	27,5	-55,4
Saxony-Anhalt	132,8	135,8	2,3	58,1	35,0	-39,8
Schleswig-Holstein	56,6	55,1	-2,6	34,9	19,9	-43,1
Thuringia	98,3	105,2	7,0	37,8	33,8	-10,5
"Old" Federal States (West-Germany)	**85,2**	**82,1**	**-3,6**	**45,6**	**28,3**	**-38,0**
"New" Federal States (East-Germany)	**131,0**	**114,8**	**-12,4**	**53,3**	**31,0**	**-41,9**
Germany total	**94,3**	**87,4**	**-7,3**	**47,2**	**28,7**	**-39,3**

* Sentenced per 100,000 of the 15 to 25-year old population.
** Per 100,000 of the 14 to 21-year old population.
Source: Federal Statistical Office (Ed.): Strafvollzugsstatistik 2000; 2008 (see www.destatis.de); own calculations.

Strictly speaking, youth custody in Germany does not necessarily imply prison for *juveniles*: very often it is prison for young adults aged over 18. This reflects the fact that the system of criminal law for juveniles includes young adults aged 18-20 into the jurisdiction of Juvenile Courts. As a result, youth custody facilities house many young adults aged up to 24 who are serving custodial sentences. The distribution of detainees in different age groups is shown in *Figure 21*. 90% of "youth" prisoners in Germany are young adults between 18 and 25 years of age. Only 10% of the total population of 7,061 youth prisoners (31 March 2005) are "real juveniles" aged 14 to 18 (see *Figure 21*).[88]

Figure 21: Age distribution of the youth prison population in Germany, 1980-2005

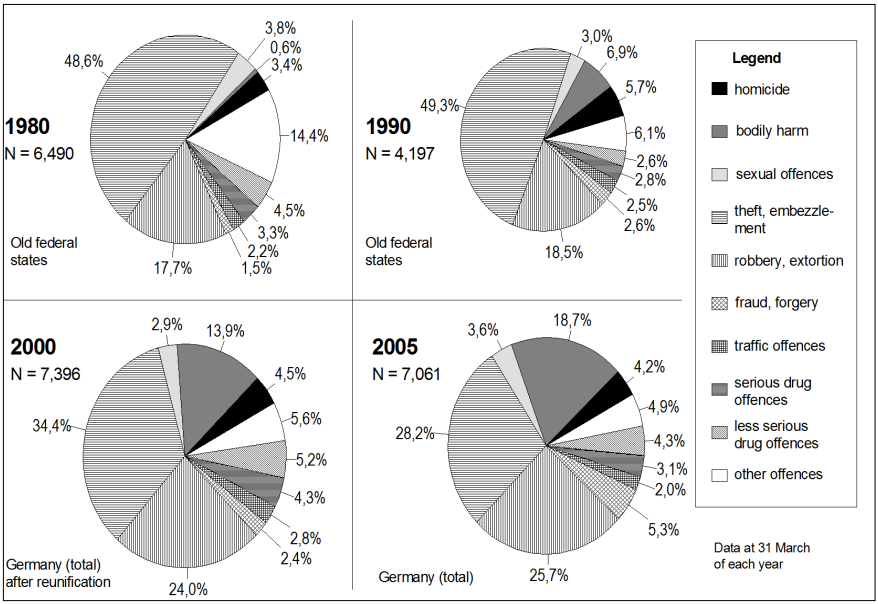


Source: Federal Statistical Office (Ed.): Strafvollzugsstatistik 1980-2005 (see www.destatis.de); own calculations.

Most young detainees are serving sentences for offences involving violence: in 2005 the figures were 19% for bodily harm/assault; 26% for robbery; 6% for homicide; and 3% for sexual offences. Drug-related offences including drug trafficking accounted for 7%. These figures have changed considerably over the last 25 years (less simple property and more violent offenders, see *Figure 22*).

88 See *Dünkel* 2006b, p. 13 f.; *Ostendorf* 2009, p. 59 f.

Figure 22: Youth prison population in Germany, 1980-2005, according to the type of offence



Source: Federal Statistical Office (Ed.): Strafvollzugsstatistik 1980-2005 (see www.-destatis.de); own calculations.

The youth custody system in Germany differs from the prison system for adults in many respects. Firstly, a much wider range of educational and vocational training is offered.[89] Levels of staffing – especially numbers of psychologists, social workers and teachers employed – are much better.[90] In 2001, for example, there was on average one social worker for every 35 detainees in youth custody facilities, and one psychologist for every 76 detainees, compared with double the number of detainees per professional in adult prisons, which were thus clearly disadvantaged.[91] Most youth custody

89 The German speaking reader may find many examples in *Dünkel* 1990, p. 285 ff.; *Trenczek* 1993; *Bereswill/Höynck* 2002; *Goerdeler/Walkenhorst* 2007; for the theoretical aspects of social pedagogic needs and interventions in youth prisons see *Walkenhorst* 2002; *J. Walter* 2007.

90 For a summary, see *Dünkel* 1990; 2006b; *Dünkel*/*Lang* 2002; for an overview of staffing in German prisons see *Dünkel* 1996; *Dünkel*/*Geng* 2007a and below.

91 See *Dünkel*/*Lang* 2002.

facilities are smaller than adult prisons.[92] In former West Germany many of the facilities were constructed or substantially renovated within the last 25 years. The buildings in former East Germany, by contrast, were extremely outdated and the appalling conditions that prevailed there in the early 1990s were seen, in some cases, as constituting violations of human rights. The considerable overcrowding in East German youth custody facilities meant, for example, that detainees had to be grouped even outside working hours,[93] and this helped to reinforce subcultures. However, a new facilities have been constructed, including for example Neustrelitz in Mecklenburg-Western Pomerania or Raßnitz in Brandenburg. Single-cell accommodation is provided in these facilities and they meet the standards of a modern custodial establishment geared toward resocialisation, with residential units and a range of training opportunities etc. (for some recent data, see the results of an empirical study by the Department of Criminology in Greifswald below).

With regard to practice in the areas of prison discipline and punishment, the differences between youth custody and adult prison, which were observed when the first statistical comparisons were made in the early 1980s, still apply. The first difference is the much more frequent imposition of disciplinary measures in youth prisons (the average figures for the year 1994 for youth custody and adult prison were 136 and 50 measures imposed per 100 detainees respectively): the sanction of solitary confinement for up to two weeks, for example, was imposed almost four times more frequently in youth custody facilities (32 versus 9 per 100 inmates). One reason for the more frequent use of sanctions on juvenile detainees may be the fact that a higher proportion of them are in custody for the first time – and thus they break the rules because they misjudge the degree of leeway afforded both formally and informally in interaction with others. Another factor is the presence of a high proportion of violent offenders, among whom impulsive and sometimes violent reactions to fellow detainees and staff are more common. The increased incidence of acts of violence against prison staff

92 They are, however, larger on average than, for example, the Austrian facility at Gerasdorf or typical facilities in the Scandinavian countries and the Netherlands.

93 This is one aspect of the oppressive legacy of the GDR prison system which continues to have a very negative effect on custodial facilities in the new Federal States: in 1997 no fewer than 77% of inmates in detention centres there were housed in shared cells, as compared with 41% in the old Federal States. In fact, until 2000 the situation continued to deteriorate in some cases as the prison population increased substantially, see *Dünkel*/*Drenkhahn*/*Geng* 2001; in the meantime after the considerable decrease of the prison population in general (see *Dünkel/Morgenstern* 2010) and in youth prisons in particular (see *Table 5* above), the situation has improved. Most juvenile prisoners are accommodated in single cells as provided by the new legislation of 2007/2008 in the different federal states; see for a comparison of the legislation *Ostendorf* 2009; *Dünkel*/*Pörksen* 2007; *Sonnen* 2007; *Eisenberg* 2008a with further references.

supports this theory.[94] There are, however, also indications that, among prison officers, the concept of a prison with an educative function is perceived to imply a mission, and traditional forms of punishment are seen as tending to deter misbehaviour.[95] There are significant differences in this regard from facility to facility. Certain directors manage to run their establishments virtually without recourse to disciplinary measures and, indeed, solitary confinement has been abolished in some facilities and throughout some Federal States.[96] Both the specific circumstances of youth custody and the fact that the term "education" is not precisely defined leave much room for discretion and for very different conceptions of education in prison, and differing arrangements for it. The individual attitudes of directors have a huge influence here.

A further feature that clearly distinguishes youth custody facilities from adult prisons is the rarity with which detainees are granted home visits, allowed to work outside the prison (i. e. doing a day job for an outside employer without supervision by prison staff) or are transferred to open prisons (on 31 March 2006 only 7.9% of juveniles, compared with 15.9% of adult detainees, were in open institutions).[97] This is explained in part by the risk of juveniles abusing the system (for example because of the high proportion of them serving sentences for violence or drug-related offences), but also to some extent by *different styles of incarceration*. Nationwide comparison of the German Federal States indicates that the prison directors' attitudes toward punishment are crucial and determine how the punishment system is organised within the institutions, and indeed throughout entire States. There is no other explanation for the fact that detainees in Bremen, Hamburg and Schleswig-Holstein are granted home leave 7 to 17 times more frequently than their counterparts in Bavaria, without there being any indication for a parallel increase in the rates of system abuse in these three States.[98] The same is true in relation to daily work leave which is granted 40 times more often in Lower Saxony than in Bavaria.[99] Generally speaking, the northern Federal States have introduced a more liberal approach to prison discipline and punishment, to the extent that a *north-south divide* has been

94 See *Dünkel* 1996a, p. 128, figure 47.

95 See *Dünkel* 1990, p. 216.

96 Bremen, Berlin, Lower Saxony and Rhineland Palatinate, see *Dünkel* 1996, p. 19 ff., p. 102 ff.; see for the "good practice" introduced in the Adelsheim youth prison *J. Walter* 1998.

97 See *Dünkel*/*Geng* 2007; 2007a.

98 See *Dünkel* 1996a; *Dünkel*/*Rössner* in van *Zyl Smit*/*Dünkel* 2001, p. 327; *Dünkel*/*Schüler-Springorum* 2006.

99 See *Dünkel* 1996a, p. 130, figure 49.

identified.[100] There are equally clear regional differences between the figures for juveniles in open institutions at any given time. Certain Federal States have no open youth custody facilities (the Saarland) or only a few single places (e. g. Baden-Württemberg, Bavaria), whereas in 2006 almost every sixth (16.2%) detainee in Lower Saxony was in an institution of this type, as were almost 15.9% of their counterparts in North Rhine-Westphalia (the federal average figure being 7.9%).[101]

Apart from the structural characteristics of the youth custody system, certain interesting types of reform have been introduced in Germany with regard to practice, and these are worth mentioning, both for their potential in promoting reintegration and for their innovative organisational style. On the one hand, efforts have been made to decentralise the traditionally hierarchical model of prison organisation in favour of a team-based approach with much delegation of decision making (as at Rockenberg, Hesse). Outward-bound-type initiatives (with rock climbing, biking or canoeing, for example, as at Adelsheim, Baden-Württemberg) have also been introduced with the aim of giving detainees an intensive experience of group activity, with a sense of responsibility and confidence. There have also been successful experiments with forms of aggressor-victim mediation and with "democratic" prison communities (based on *Kohlberg*'s theory of moral development).[102] Recently, anti-aggression courses for young perpetrators of violent crime have become widespread.[103] Developments in some parts of the "new" (East German) Federal States still lag behind due to the reality of inadequate facilities and staff shortages (especially shortages in well qualified personnel). But in general the situation has remarkably changed and since the mid-2000s youth imprisonment is largely adjusted to West German conditions.

The positive aspects of practice-rooted prison reforms indicate that it is possible to have a good youth custody system even where the legislative framework and the physical facilities are unsatisfactory. The key factors remain commitment on the part of staff and the motivational influence of the institutions' directors and management personnel.

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100 See *Dünkel* 1990, p. 609 ff.

101 The proportion of juveniles in open custodial facilities is half that of adult prisoners in similar establishments, see *Dünkel/Lang* 2002; *Dünkel/Geng* 2007; 2007a. For earlier data see *Dünkel* 1996a, p. 142, figure 61. In some instances it seems likely that problems of definition and organisation of data have occurred.

102 See *Dünkel*/*J. Walter* 2005; see also *J. Walter/Waschek* 2002.

103 See *Dünkel*/*Geng* 2007a; for an evaluation *Ohlemacher* 2001; the German speaking reader will find several project descriptions and evaluations in *Bereswill/Höynck* 2002; *Goerdeler/Walkenhorst* 2007 and in general in the *Zeitschrift für Jugendkriminalrecht und Jugendhilfe*, edited by *Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e. V.* (see www.dvjj.de).

12. Residential care and youth prisons – Development of treatment/vocational training and other educational programmes in practice

There is no systematic research on treatment programmes for young offenders in welfare institutions in Germany. It is, however, clear that residential care implies a variety of schooling and psychological treatment programmes coupled with intensive care. The costs of closed institutions (homes) are about 250 € per day per juvenile, which is noticeably more expensive than youth imprisonment (100-200 € per day).

With respect to youth imprisonment we dispose of a recent study by the Department of Criminology at Greifswald University. In 2006 a written questionnaire was sent out to all 28 youth prisons in order to get basic information about treatment programmes, staffing and measures for the preparation of release and reintegration into society. The results reveal a much better infrastructure of (and for) treatment than in prisons for adults. More in-depth research about juvenile prisons and their impact on young offenders during their stage in prison as well as after release has been conducted by the Criminological Institute of Hanover/Lower Saxony.[104]

First of all, the results of the Greifswald study demonstrated that the general situation (problems of overcrowding, poor living conditions etc.) has improved. Overcrowding in 2006 was restricted to some of the closed youth prisons like in Berlin or Lower Saxony. On average 96% of the places in closed and 73% in open youth prisons were occupied.

Staffing varied considerably from prison to prison, as staffing, and the quality of treatment are the responsibility of each Federal State. Staffing was quite good at least in some States and youth prisons in Berlin, Brandenburg, Hamburg and Lower Saxony, with a staff–prisoners ratio of about 1: 1.5. Looking only at the staff members who are directly involved in treatment and care, like psychologists and social workers, the following differences can be observed. Whereas in Schleswig-Holstein and Hamburg one psychologist had to take care of 33 or 35 young prisoners, the number in the East-German States of Mecklenburg-Western Pomerania, Saxony-Anhalt and Thuringia as well as in the West-German State of Hesse was between 123 and 147 (see *Table 6*).

Regarding social workers (based and working in the institution) the staff-prisoner ratio is much better: In East Germany one social worker had to take care of 50 prisoners, while in West-Germany it was 28 prisoners. The variation was considerable again. In Lower Saxony 18 prisoners were allocated to one social worker. The figures for Bremen and Berlin were comparable, with 21 and

104 Director: *Christian Pfeiffer*, see the contributions e. g. of *Bereswill/Greve* 2001; *Hosser* 2001; *Hosser*/*Bosold* 2004; *Bereswill/Koesling/Neuber* 2007 with further references.

26 respectively. At the other end of the scale, one finds Thuringia with 74 and Saxony-Anhalt with 93 prisoners per social worker (see *Table 6*).

Table 6: Number of prisoners per psychologist and social worker in youth prisons in Germany on 31 January 2006

	Prisoners per psychologist	Prisoners per social worker/social pedagogue
Baden-Württemberg	84	47
Bavaria	88	42
Berlin	42	26
Brandenburg	38	45
Bremen	43	21
Hamburg	35	24
Hesse	130	20
Mecklenburg-Western Pomerania	137	46
Lower Saxony	56	18
North Rhine-Westphalia	84	36
Rhineland-Palatinate	54	29
Saarland	110	28
Saxony	50	34
Saxony-Anhalt	123	93
Schleswig-Holstein	33	26
Thuringia	147	74
"Old" Federal States (West-Germany)	66	28
"New" Federal States (East-Germany)	72	50

Source: *Dünkel/Geng* 2007a.

The offered treatment programmes primarily concerned school and vocational training, which were elements of rehabilitation in all youth prisons. In addition, almost all prisons (96%) offered some kind of (cognitive-behavioural)

anti-aggression programme.[105] However, the numbers of participants remain modest and only a minority of the young prisoners' population can profit from more intensive rehabilitative programmes. This has to be underlined by the fact that, in the closed youth prisons or departments of youth prisons, only 10% were involved in preparatory release measures like day leaves or prison furloughs of several days that may help to adapt to social life outside prison. About 9% of the youth prisoners were accommodated in the two open prisons or one of the (regularly small) open units within 17 closed prisons. In these open facilities between two thirds and three quarters of the juveniles were granted day leaves etc., more than 40% participated in work release, leaving the prison every day for work and coming back only for the night.[106] These results indicate that German youth prisons are still far behind the aspiration of being institutions of effective rehabilitation.

Recent studies of recidivism after release from youth prisons revealed reconviction rates of 70-80%. However, in turn less than 40% returned to prison.[107] Despite high reconviction rates, it has to be noted that there are some indications for effective treatment programmes in cases where a treatment or educational/vocational programme can be continued after release.[108] There are some positive experiences with anti-aggression programmes and cognitive behavioural programmes in the tradition of "Reasoning and Rehabilitation"-schemes. A reduction of reconviction rates by 10-20% can be expected if programmes follow principles of effective offender treatment as outlined by the Anglo-Saxon literature.[109]

105 See *Dünkel*/*Geng* 2007a, p. 148; the statistical data of the Greifswald research project are also presented by *Ostendorf* 2009, p. 56 ff.

106 See *Dünkel*/*Geng* 2007a, p. 150 f.

107 See *Jehle*/*Heinz*/*Sutterer* 2003; *Jehle et al.* 2010, p. 39; compared with the data for those released 1994 the 2004 sample showed a reduced recidivism rate: after a risk period of 3 years from 75% to 66%; the general recidivism rates of those convicted to suspended sentences also decreased (from 54% to 49%), see *Jehle et al.* 2010, p. 29.

108 See *Dünkel* 2006b, p. 52 ff.

109 See e. g. *Andrews et al*. 1990; *Vennard*/*Hedderman* 1998; *Lösel* 1993; 2001; *Dünkel*/*Drenkhahn* 2001; *Sherman et al.* 2006 and *Dünkel*/*Stańdo-Kawecka* in this volume.

13. Current reform debates and challenges for the juvenile justice system

The contemporary tendencies in juvenile criminal policy are ambivalent. Conservative parties in the 1990s demanded a lowering of the age of criminal responsibility from 14 to 12, since the registered crime rate of children had increased (an argument that was not convincing as most of the increase was attributable to petty non-violent offending). After the civil law reform of 2008 which brought improvements for earlier and more intensive socio-pedagogic intervention in the family and welfare system,[110] this demand is not raised anymore. Furthermore, conservative politicians urge that the widely extended practice of sentencing young adults according to the JJA should be removed in order to impose harsher punishment for this age group, and that the application of the JJA should be the exception and not the rule. The simple but enticing argument is that young adults have many responsibilities in civil law and should therefore also be responsible like adults in penal matters. These arguments totally neglect the psychological and pedagogic foundation of the JJA. Today, the development of personality and the phase of integration into adult life take even longer rather than having become shorter.[111] Therefore, German juvenile criminologists and most of the practitioners in juvenile justice urge for the retention of current age limits for young adults. They go even further by calling for an extension of the JJA's remit to cover young adults without any exception,[112] and even to include 21 to 24 years old adults in certain cases where the sanctions of the JJA appear more appropriate.[113] Indeed, in Europe the age limits concerning criminal responsibility vary considerably.[114] On the one hand, in some countries the tendency to lower the age of criminal responsibility to as low as ten years has been put into practice, like in England and Wales (similar tendencies can be observed in the Netherlands). On the other hand most Scandinavian countries have retained their moderate approach with 15 as the age of criminal responsibility. It will be difficult to harmonise the different approaches in Europe, and with regards to the "getting tough" policy in some countries it is not even desirable. However, the majority of countries, particularly in the Baltic, Central and Eastern European countries, have more or

110 See for a summary *Dünkel* 2008a.

111 See *Dünkel/Pruin* 2011 and in this volume with further references.

112 For arguments of comparative law see *Pruin* 2007; *Dünkel*/*Pruin* 2011 and in this volume.

113 See *Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen* 2002.

114 See *Pruin* and *Dünkel/Grzywa/Pruin Šelih* in this volume.

less developed a consensus about age limits of 14, 18 and 21 years.[115] So, in conclusion, it seems to be desirable for Germany to maintain its juvenile crime policy and even expand the application of the JJA to young adults without exception.

A major reform debate took place in September 2002 when the German *Juristentag* (a biannual meeting of German lawyers) discussed the issue "Is the German juvenile justice system still up to date?" The principal expert opinion was presented by *Hans-Jörg Albrecht*, director of the Max-Planck-Institute for Foreign and International Penal Law at Freiburg. His main concluding proposal was to abolish the idea of education, but to nevertheless retain a separate juvenile justice system with proportionate (and with respect to adult offenders milder) sanctions.[116] Concerning the abolition of the "*leitmotiv*" of education, his ideas have been rejected by almost everyone in the German lawyers' assembly, as well as by juvenile criminologists and penal lawyers.[117] Some of *Albrecht*'s concrete proposals, however, corresponded with proposals from the *Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen* (DVJJ), an organisation of Juvenile Court judges, prosecutors, social workers active in juvenile justice and welfare, and criminologists. This organisation has influenced the reform debate of the last 30 years quite considerably. The DVJJ stands for keeping the idea of education in the sense of special prevention and also to extend the scope of constructive solutions, like mediation and other community sanctions. In this context a "reconstruction" of the system of community sanctions is being advocated as well as the further restriction (limitation) of youth prison sentences (abolishing the possibility to impose a prison sentence because of "dangerous tendencies") and of pre-trial detention. They urge for young adults to be generally covered by the JJA.[118]

The former Government of the Social-Democratic Party and the Green Party (1998-2005) was not ready to follow a "populist" and "hysterical" criminal policy, but on the other hand was also unable to pass reform bills that met the demands for less severe and more educational sanctions. After the elections of 2005, a coalition of Social Democrats (SPD) and the Conservative Party (CDU/CSU) was created. The new Government had no plans to introduce more repressive reforms in juvenile justice, although sections of the Conservatives repeatedly brought draft proposals to Parliament, which were oriented towards tougher juvenile justice legislation. One more symbolic, but rather repressive reform was passed on 11 July 2008 with the introduction of *preventive detention*

115 See *Dünkel* 2006c; *Pruin* and *Dünkel/Grzywa/Pruin Šelih* in this volume.

116 See *Albrecht* 2002.

117 See e. g. *Dünkel* 2002; *Streng* 2002; *M. Walter* 2002.

118 See *Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen* 2002 and the recommendations of the Deutsche Juristentag 2002, see www.djt.de.

for dangerous juvenile offenders who have been sentenced to a youth prison sentence of at least seven years for homicide, or other serious violent or sexual offences.[119] Preventive detention according to the new § 7 II-IV JJA is enforced after a person has served the full prison sentence. It is imposed after the original conviction during the time of serving the prison sentence. There must be two psychiatric or psychological expertises predicting a concrete danger that the juvenile will commit further serious crimes that will cause serious harm to possible victims. The law was passed because of one murder case, in which a recidivist young adult killed a child and was seen as being extremely dangerous. The reform law is typically symbolic legislation that aims to calm down moral panics. The reform has been reversed after several decisions of the European Court on Human Rights (ECtHR) which stated that the German measure of preventive detention violates Art. 5 and 7 of the European Convention on Human Rights (ECHR). The first decision in December 2009[120] stated that the preventive measure in its content is equivalent to a proper punishment and therefore the preventive sentence would constitute an unlawful (double) punishment in the sense of Art. 7 ECHR (one of the reasons was the similarity of the execution of the preventive measure in the same prisons and under the same living conditions as ordinary prison sentences). The German Constitutional Court took up the arguments of the ECtHR and concluded that all regulations concerning preventive detention are in violation of the German Constitution[121] and therefore have to be replaced by new legislation (latest until 31 May 2013) that makes preventive detention the absolute exception. Preventive detention shall only be acceptable for very dangerous violent offenders with personality disorders. Thus the preventive detention for juveniles and young adults was also "outlawed" and will probably be abolished entirely.

Feelings of insecurity are exploited by most political parties (except – it should be noted – the Green Party). Right-wing populist parties in some State Parliaments, like in Hamburg, have campaigned successfully during elections with law and order paroles. The role of the mass media is very important in this context. On the other hand, the election campaign in the Federal State of Hesse in January 2008, which was very strongly dominated by getting tough policies in juvenile justice, resulted in a complete disaster for the Christian Democratic Party. Since then a consensus of the major parties seems to be prevailing, namely that the existing juvenile justice system should be left more or less

119 In 2002 and 2004 the German legislator had introduced such preventive detention after a conviction in the general criminal law for adults, see §§ 66a, 66b Penal Code.

120 See *M v. Germany*, decision of 17 December 2009, Application no. 19359/04; more recently 4 other decisions were issued in the same direction, see in particular *Haidn v. Germany*, decision of 13 January 2011, Application no. 6587/04.

121 See *Bundesverfassungsgericht* (Federal Constitutional Court), decision of 4 May 2011, 2 BvR 2365/09, 2 BvR 2333)08, 2 BvR 571/10, 2 BvR 1152/10.

"untouched". Furthermore, the "culture of education" of those working in juvenile justice is strongly engendered in Germany by permanent further-education of practitioners that are organised by the DVJJ and other organisations. The new Government elected in September 2009, a coalition of the Liberal and Christian Democratic parties, has picked up only two reform proposals of the earlier conservative initiatives: to combine a suspended sentence with a "short sharp shock"-detention of up to 4 weeks, and to increase the maximum youth prison sentence from 10 to 15 years in murder cases. Both proposals could possibly violate principles of the Constitution and therefore it is unlikely that the Liberal party will agree. It is remarkable on the other hand that the new Government has – at least up to now – left the far-reaching regulations and practice of applying the Juvenile Justice Act to young adult offenders untouched.

14. Summary and outlook

The German juvenile justice and welfare system shows a remarkable stability and maintenance of the educational ideal. Although more repressive tendencies in parts cannot be denied, the system has not changed and will not change considerably towards a "neo-liberal" approach.[122] Sentencing practice is comparably reasonable, for it retains youth imprisonment as an intervention of absolute "last resort", also for young adult offenders. Only two to three percent of all juveniles and young adults receive an unconditional youth prison sentence. Only a small number of about 250 juveniles are held in closed welfare institutions on any given day, and about 6,500 in youth prisons. In 90% of the cases, the latter group is aged 18 to 25 years.

Therefore, one can honestly state that juvenile welfare and justice have succeeded in providing reasonable and cautious sentencing, although problems of registered serious (violent) crimes and of specific groups of offenders (migrants, foreigners, drug offenders, Neo-Nazi-offenders etc.) have increased.

It was the honourable *Franz von Liszt* who shortly after 1900 stated that good social policy is the best criminal policy. The idea of crime prevention has been developed more and more in the past 20 years in Germany. Successful projects have been established, e. g. to prevent violent or xenophobic crimes, in quite a few cities and communities.[123] This development does not detract from the need for reforms of the juvenile justice system, but it points the way to dealing with the causes of crime. Juvenile justice can play only a marginal role

122 See *Cavadino*/*Dignan* 2006; *Bailleau*/*Cartuyvels* 2007.

123 See e. g. *Dünkel*/*Geng* 2003; *Dünkel* 2005a; *Dünkel*/*Gebauer*/*Geng* 2008; for an overview with international comparons *Krüger* 2010.

in this regard and cannot solve general societal problems (like poverty, unemployment, discrimination etc.).

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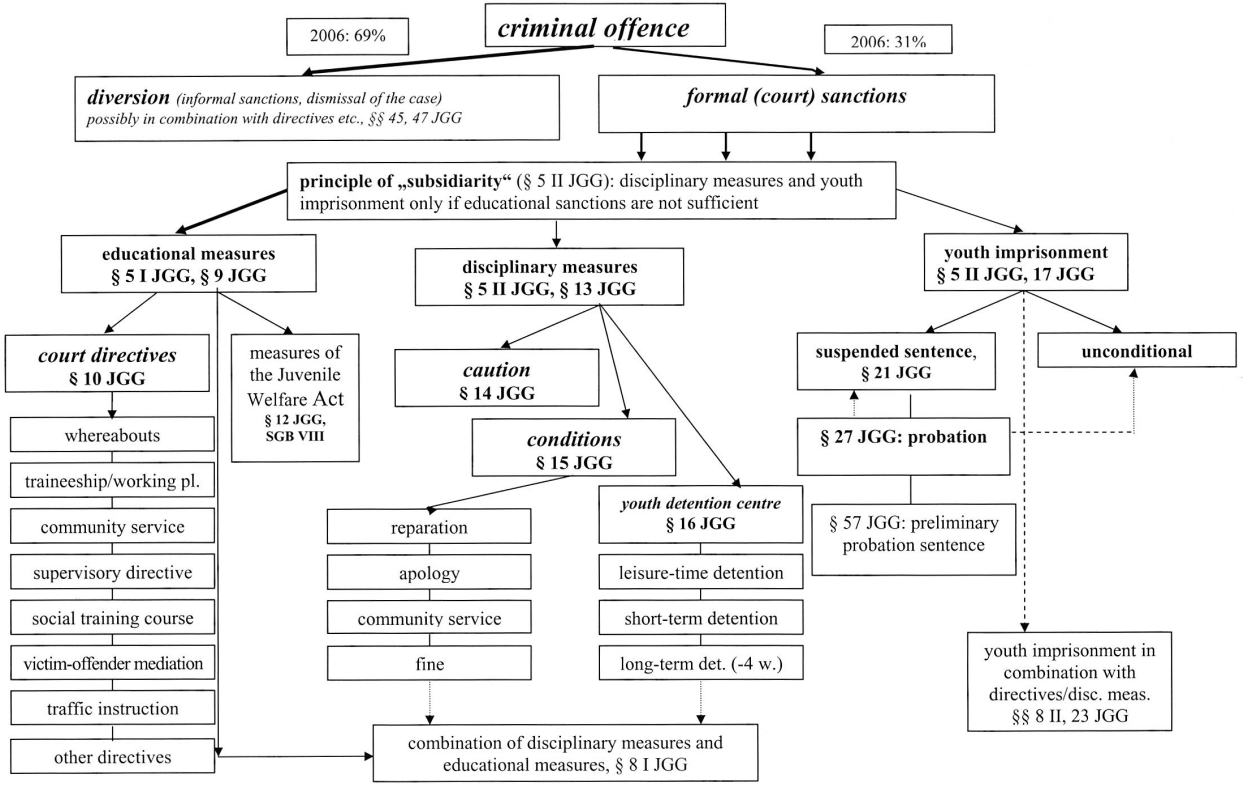
Sanctions of the German juvenile justice system (Jugendgerichtsgesetz, JGG)



Greece

Angelika Pitsela

1. Historical development and overview of the present legislation relating to juvenile justice

The first Greek penal law following the struggle for liberation from Turkish rule (1821) was the *Digest of Criminal Cases* in 1824, which was modelled chiefly on the French *Code Pénale* of 1810. This penal law contained only a special provision relating to persons who were below the age of seven at the time the offence was committed: "If a person below the age of seven commits murder, he or she will be pardoned".

Against this, the first scientifically based Greek Penal Act of 1834 provided for special treatment of young persons, even though it limited itself essentially to a mitigation of the punishment in comparison with adults. The provisions dealing with juvenile crime were contained in the General Part of the Penal Act concerning the "imputability of the crime" (Articles 82-85 Greek Penal Act). Criminal responsibility began at the age of 10, while offenders between the ages of 10 and 14 were held to be criminally responsible in a relative sense. They were to be acquitted if, at the time the act was committed, they did not possess the intellectual ability to discern between right and wrong. If persons between the ages of 10 and 14 possessed the ability to discern at the time of the crime, the offender's age constituted a compelling reason for mitigation of punishment, in particular the death penalty and life imprisonment were excluded. The beginning of the age of criminal responsibility was determined at the age of 14 and over this age the offender's adolescence did not justify any right of the offender for mitigation (Article 85). In this way, the same range of sentences, which were applied to adults, were also applied to persons over the age of 14.

In the drafts of a penal code from 1924 and 1933, childhood as a general ground for the exclusion of criminal responsibility was fixed at the age of 12.

Relative criminal responsibility ended with the person's 16th birthday and between these two ages the courts examined, in individual cases, the juvenile's ability to discern right from wrong. Where such ability was found, the courts would impose a lesser punishment. In the drafts of a penal code from 1935 and 1937 childhood was extended to the age of 14. Relative criminal responsibility ended at age 18. Where it was held that a juvenile possessed the ability to discern, the courts would impose a sentence of detention in a young offenders' institution of unspecified duration. In the most recent revision of the draft (1947-1948) a decision was taken to incorporate the provisions of juvenile criminal law in a specially created chapter at the end of the General Part of the Penal Code.

The juvenile law reform movement, which had reached its height in continental Europe at the beginning of the 20th century, led to the Greek Constitution of 1927[1] providing, for the first time, for special laws for the regulation of the Juvenile Courts system. This constitutional demand led to the enactment of Law no. 5098/1931 "Juvenile Courts", the first independent law on Juvenile Courts in Greece[2]. The objective scope of application of the Greek Law on Juvenile Courts covered both the neglect and delinquency of young persons. This law was held to be a very progressive one, but was never implemented, because the necessary manpower and infrastructure could not be made available. The problem was formally solved by "Emergency Law" no. 2135/1939 *On the Passing of Sentences for Criminal Acts committed by Minors,* which created the Juvenile Court (a juvenile court judge sitting as a single judge) at the venue of each Provincial Court and Higher Provincial Court (functioning as a Court of Appeal). These Juvenile Courts were subsequently set up on a countrywide basis. Finally, Emergency Law no. 2724/1940, *On the Organisation and Functioning of Educational Institutions for Minors*, placed the emphasis on the preventive response of the State and in particular on the compulsory placing of minors in an educational institution when signs of neglect became clear. Essentially this was a welfare measure with a punitive character to it. This Law, the main part of which was subject to many years of unanimous theoretical criticism, was not repealed until 1995.

The Penal Act of 1834 remained in force until 1 January 1951 and was superseded by the existing Penal Code. The substantive law provisions relevant to minors (*anilikoi*) are contained in the eighth and final chapter of the General Part of the Greek Penal Code of 1950 (Law no. 1492/1950, hereinafter called

1 The influence of German constitutional law (Weimar Constitution) is visible here. See *Philippides* 1958, p. 291-313.

2 The models for the Juvenile Courts legislation were the Belgian law on the protection of minors of 1912 and a Polish draft law which, because of difficulties in implementation, could not be enacted.

grPC),[3] whilst the procedural rules are contained in the Greek Code of Penal Procedure of 1950 (Law no. 1493/1950, hereinafter called grPPC). The penal correctional law provisions have been integrated into the Greek Correctional Code of 1999 (Law no. 2776/1999, hereinafter called grCC). The principal objective of the law on juvenile justice was to prevent repeat offending. Social integration through the education of minors was the decisive governing idea behind the realisation of this objective. Thus juvenile criminal law is characterised by the principle of special prevention.

On 21 October 2003 the law on the *Reform of Juvenile Penal Legislation and other Provisions* (Law no. 3189/2003), with its fundamental amendment to substantive and procedural rules, came into force in Greece.[4] Furthermore, on 12.07.2010 the Law No. 3860/2010 on *Improvements of Penal Legislation regarding Juvenile Offenders, Prevention of and Response to Juvenile Victimization and Juvenile Delinquency* has been enacted. However, an independent law on Juvenile Justice was not created by these reforms. The juvenile criminal law provisions constitute a part of the general penal legislation.

Under the present law persons between the ages of 8 and 18 are minors (Article 121 Sec. 1 grPC). Thus, the lower applicability limit of the juvenile criminal law system of sanctions was raised from the age of 7 to the age of 8 and the upper limit from 17 to 18. Relative criminal responsibility begins at age 15 and ends at 18. Hence, normal criminal responsibility begins at age 18. Only persons above the age of 15 may be sentenced to detention in a young offenders' institution. As previously, the system of sanctions under juvenile criminal law is not applicable to young adults.

Persons between the ages of 8 and 15 (hereinafter called children) are "not criminally responsible". However, the fact that children are not criminally responsible does not exclude their ability to act in criminal terms. If such a person commits an act punishable by law, the courts may only impose educational or therapeutic measures (Article 126 Sec. 2 grPC). Hence, the possibility of applying educational or therapeutic measures commences at the age of 8 (the legally standardised lower limit). The Juvenile Court (i. e. a juvenile court judge sitting as a single judge in a Provincial Court) is the sole judicial authority for ordering educational or therapeutic measures against children where they infringe the criminal law (Article 113 Sec. 1 grPPC). Persons who have not yet reached the age of eight are subject to parental custody (*vide* Article 1532 *et seq.* Civil Code) and they are not subject to the Penal Code.

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3 See *Mangakis* 1973, p. 1-33; *D. D. Spinellis* 1993, p. 339-365; *Anagnostopoulos/ Magliveras* 2000.

4 See *Spinellis* 2007, p. 171-199; *Spinellis/Tsitsoura* 2006, p. 309-324; *Pitsela* 2004, p. 64-110.

Persons between the ages of 15 and 18 (hereinafter called juveniles) are either "not criminally responsible" (the title of Article 126 grPC) or "criminally responsible" (the title of Article 127 grPC). Educational or therapeutic measures are imposed preferably against juvenile offenders. Detention in a young offenders' institution as a punishment *sui generis* is only considered when educational measures are not sufficient to prevent the juvenile from committing further criminal acts (subsidiarity of punishment). Whilst the imposition of educational or therapeutic measures does not require a juvenile to be criminally responsible,[5] detention in a young offenders' institution depends on the juvenile offender's criminal responsibility.[6]

In Greece, a mixed form of the welfare model and the justice model predominates.[7] In principle, a juvenile, as an accused, is guaranteed the same basic procedural rights as those to which accused adults are entitled: e. g. the right to be heard (Article 20 Greek Constitution) and the principles of *nulla poena sine lege* (Article 7 Sec. 1 Greek Constitution), *ne bis in idem* (double jeopardy), the right to be present at the hearing, the right to put forward questions, the right to remain silent and the right to be defended.

The dualism of the juvenile criminal law and the youth welfare law continues in present day Greek law. For the latter to intervene, some form of social hardship or a "difficulty in social adjustment" must exist. In these circumstances, minors may be sent to educational institutions if they live in the social environment of persons who commit criminal acts, whether habitually or as a career (cf. Article 17 Sec. 5 Law no. 2298/1995). On the other hand, the juvenile criminal law system of response establishes forms of behaviour which are punishable in accordance with the general provisions.

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5 According to the judicature of the Supreme Court, the court decision which imposes educational or therapeutic measures constitutes a verdict of not guilty and not a punitive sentence, on the grounds that in this way no guiltiness is recognised and no punishment is imposed.

6 The prevailing theory and the constant legal practice require that a culpable act has indeed been committed so as to impose a sentence of detention in a young offenders' institution. As it appears from the official Explanation Report of the Greek Penal Code, the Greek legislator has consciously abandoned the criterion of "discernment". The legislator has adopted the solution which was established by the Swiss Penal Code of 1937 and the French Ordonnance Relative à l' Enfance Délinquante of 1945. According to this, the judge is free to decide whether a penalty ("*poinikos sofronismos*") is necessary after considering the circumstances under which the crime was committed and examining the juvenile offender's entire personality in order to deter the juvenile offender from committing further punishable acts, or whether educational or therapeutic measures are adequate. If the court decides that penalty is essential, it sentences the juvenile to closed placement in a young offenders' institution.

7 See, for example, *Spinellis* 2007, p. 174, p. 189, p. 195 f.

The existing juvenile welfare law is applicable to the age group from 8 to 18. In spite of the existence of the twin-track control system, certain juvenile welfare law measures may also be applied to minor delinquents (*cf.* Article 122 Sec. 1 grPC). Being placed under the care of Youth Protection Associations or the Juvenile Court Aid and being sent to an educational institution (*idryma agogis*) may be also ordered as educational measures by the Juvenile Court after a main hearing against minor offenders. In terms of content, therefore, we find the existence of identical forms of response for different areas of law (youth welfare law and juvenile criminal law).

Since the change in the law in 1995 it is now the juvenile court judge (formerly the Minister of Justice) who decides whether a minor should be sent to an educational institution after he/she has taken account of the minor's character, the social conditions of his/her environment and the report from a Juvenile Court Aid official or probation officer. For this purpose an application by, or the written consent of, the person entitled to exercise parental custody will be necessary.

The Youth Protection Associations (*etairies prostasias anilikon*) are attached to every Provincial Court and are subject to the supervision of the Ministry of Justice. Community care for preventive purposes is administered principally by the Youth Protection Associations and less often by the Juvenile Court Aid, which deals mainly with delinquency. The Youth Protection Associations are able to provide financial and social support, when minors are experiencing serious difficulties in adjusting socially.

In exceptional cases, family law allows a child to be separated from its family by judgment of the courts. Removal from the family home is a measure of last resort which can be taken by a court where the welfare of the child is at risk. Other measures will usually take precedence over the separation of a child from its parents. Within the sphere of family law legislation is concerned with the prevention of danger to the physical, mental or emotional health of the child. Removal of a child from the custody of both parents and placing him/her in a suitable residential institution is ordered by Civil Courts when other measures have failed or are inadequate to prevent danger to the welfare of the child.

2. The development of recorded child, juvenile and young adult crime

In principle the juvenile justice system does not recognise any special criminal offences, but is concerned with general criminal offences (including those of the so called supplementary criminal law). The criminal supplementary laws, however, refer to isolated offences in which only a minor is assumed to be the offender (so called "status offences"). In principle, what is involved here are regulations for the protection of juveniles.

In considering the following analysis of criminal statistics, gathered at both police and court level, it will need to be borne in mind that the statements made refer to Greek juvenile criminal law before the reform effected by Law no. 3189/2003 on the *Reform of Juvenile Penal Legislation*. More recent data after the reform were not available when this report was prepared.

Official police recorded crime by age groups since 1980 can be seen in *Table 1*.[8] With regard to the age structure of the alleged offenders, it is apparent that juveniles are only to a slight extent involved in crime.[9]

Table 1: Alleged offenders according to age groups

Year	Children (7-12 years)		Juveniles (13-17 years)		Young adults (18-20 years)		Adults (over 21 years)		Total*
	N	%	N	%	N	%	N	%	
1980	191	0.1	8,386	2.8	20,189	6.7	274,347	90.5	303,113
1985	206	0.1	11,250	4.0	23,700	8.5	244,166	87.4	279,322
1990	366	0.1	14,932	4.8	24,718	8.0	269,177	87.1	309,193
1995	355	0.1	16,706	6.0	26,858	9.7	233,995	84.2	277,914
2000	541	0.2	22,831	6.9	37,093	11.3	268,409	81.6	328,874
2003	308	0.1	21,295	5.5	42,179	10.9	322,186	83.5	385,968

* All alleged offenders about whom details of age are known.

Source: Administration of Justice Statistics, Table B: 3 on the Statistics Relating to Offences. Statistical Yearbook of the Greek Police, Table 31 and author's own calculations.

During the 1990s, according to police criminal statistics,[10] crimes committed by juveniles under the age of 17 as a percentage of all crime – leaving aside traffic offences (see *Table 2*) – never reached the 2% mark, whereas the proportion of this age group was around 8% of the total population of Greece. Hence, juveniles are below the average where recorded offences are concerned. The

8 As regards to the development of the recorded juvenile delinquency in Greece and the urgent necessity to carry out periodical victimization surveys see *Spinellis/Tsitsoura* 2006, p. 312 ff., 323.

9 See, for example, *Courakis* 1999, p. 110 ff. For a comparative presentation, see *Neubacher/Filou/Pitsela/Walter* 2004, p. 63-72. For an overview of the general expansion of delinquency and sanctioning practice see *Lambropoulou* 2005, p. 217 ff.

10 Regarding the urgent need to improve the criminal statistics see also *Spinellis/Tsitsoura* 2006, p. 323; *Spinellis/Kranidioti* 1995, p. 66-88.

increase in quantitative terms in recorded crimes committed by young persons is attributable mainly to traffic offences, which account for some four-fifths of juvenile delinquency.[11]

Table 2: Alleged offenders (excluding traffic offences) by age groups

Year	Children (7-12 years)		Juveniles (13-17 years)		Young adults (18-20 years)		Adults (over 21 years)		Total*
	N	%	N	%	N	%	N	%	
1990	184	0,1	2,425	1,2	9,005	4,4	192,668	94,3	204,282
1995	306	0,2	2,742	1,6	7,245	4,3	156,633	93,9	166,926
2000	464	0,3	2,766	1,6	9,020	5,0	166,184	93,1	178,434
2003	239	0,1	2,173	1,1	8,487	4,4	182,596	94,4	193,495

* All alleged offenders, about whom details of age are known.
Source: Statistical Yearbook of the Greek Police, Table 31 and author's own calculations.

Table 3: Alleged offenders (excluding traffic offences) per 100,000 of corresponding age group

Year	Children	Juveniles	Young adults	Adults
1990	21	322	1,952	2,516
1995	38	373	1,501	2,008
2000	66	409	1,863	2,002
2003	36	359	1,947	2,126

Source: National Statistical Service of Greece; Statistical Yearbook of the Greek Police, Table 31 and author's own calculations.

Figures relating to alleged offenders (excluding traffic offences) point to an irregular trend in recorded crime. Where children and juveniles are concerned, a slight rise can be seen up to the year 2000, after which a decline is observable; in the case of young adults, the figures show fluctuations (see *Table 3* above).

11 It should be noted that the police criminal statistics count one alleged offender multiple times, even when the offender is accused of repeated commission of the same crime within the year under review.

Leaving traffic offences aside, simple theft is the most frequent offence in adolescence. As a result, and in qualitative terms, juvenile delinquency does not yet give cause for concern or disquiet, although an increase in crimes of violence (particularly robbery) and drugs-related offences can be observed. Recorded violent crime (intentional homicide and bodily injuries, rape and robbery) increased during the 1990s. In quantitative terms, bodily injuries (simple, severe, dangerous and deadly bodily injury) account for the predominant percentage of crimes of violence. Cases of simple bodily injuries in turn make up the predominant percentage of offences involving bodily injuries as a whole. The percentage of juvenile offenders committing crimes of violence in the total number of juvenile offenders (excluding traffic offences) averages less than 5% during the period under review (see *Table 4*). Moreover, the proportion of juvenile delinquents involved in crimes of violence, related to the total number of violent offenders, corresponds to the proportion of alleged juvenile offenders in recorded crimes (see *Tables 2* and *5*).

Table 4: Juveniles committing crimes of violence* as percentage of juvenile alleged offenders (excluding traffic offences)

Year	Juvenile alleged offenders	Juveniles committing crimes of violence	%
1990	2,425	93	3.8
1995	2,742	126	4.6
2000	2,766	130	4.7
2003	2,173	123	5.7

* Includes intentional homicide and bodily injury (simple, severe, dangerous and deadly bodily injury), rape and robbery.
Source: Statistical Yearbook of the Greek Police, Tables 32, 33 and author's own calculations.

Police figures show a steady increase in juvenile alleged offenders in connection with the Narcotics Law (see *Table 6*). Whereas in 1990 only 16 juvenile alleged offenders were investigated by the police for drugs offences, the figure for 2003 was as many as 231 (in 1997 the figure even reached 473). Beginning in the mid 1990's, younger persons were coming more and more frequently into contact with the police authorities in connection with drugs offences. Whilst it is, admittedly, the over 21's who make up the lion's share of police-recorded drug offenders, the increase among the younger age groups (juveniles, but above all young adults) is much more dramatic.

Table 5: Juveniles committing crimes of violence as percentage of all alleged offenders involving crimes of violence

Year	Violent alleged offenders	Juvenile violent alleged offenders	%
1990	8,219	93	1.1
1995	8,765	126	1.4
2000	9,137	130	1.4
2003	9,857	123	1.2

Source: Statistical Yearbook of the Greek Police, Tables 32, 33 and author's own calculations.

Table 6: Persons suspected of drugs offences by age groups (in absolute terms and per 100,000 of corresponding age group)

	Child-ren	Juveniles			Young adults			Adults			Total
Year	**N**	**N**	**%**	**Susp.***	**N**	**%**	**Susp.**	**N**	**%**	**Susp.**	**N**
1990	0	16	0,5	2	179	6,1	39	2,727	93,3	38	2,922
1995	0	45	1,0	6	208	4,8	43	4,096	94,2	53	4,349
2000	4	330	2,9	49	1,930	16,7	399	9,285	80,4	112	11,549
2003	6	231	1,5	38	1,815	12,0	416	13,124	86,5	153	15,176

* Number of established suspects, calculated per 100,000 inhabitants of the corresponding age group of the population.
Source: Statistical Yearbook of the Greek Police, Table 31 and author's own calculations.

Begging was the most frequently committed offence (i. e. misdemeanour) registered by the police during childhood (from age 7 to 12) in 1997-2001.[12]

12 According to Article 407 grPC, habitual beggars due to an aversion to work or greed can be sentenced to up to three months of imprisonment. Article 408 grPC, which used to regulate "vagrancy", was abolished without substitution by Law no. 2207/1994. In the police criminal statistics 241 children were registered in the year 2000 as beggars (45% of the total number of alleged child offenders or 31% of the total number of alleged beggars). The overwhelming majority of children and juveniles who are registered as alleged beggars are of foreign origin (they mainly come from Albania). According to the statistical data provided by the Youth Police Department of the Attiki administrative district (including the wider area of Athens), in 1993 around 86% of the total number of children who were registered for begging were of Albanian origin. The figures for 1996 and 1999 were 95% and 89% respectively.

Whether the cases of the "pseudo-offence" of begging, which, in the great majority of cases goes unrecorded, is actually recorded depends crucially on police monitoring. The fluctuation in the way such cases are recorded (three children in 1991, 250 in 2001) reveals the intensification of police monitoring and hence the significance of the selection processes on statistical reality.[13]

The authorities neither make nor publish any differentiation of alleged offenders according to sex and age. As a result, it is not possible to say anything about the incidence of delinquency among women as minors at the national level.[14] Nor, at the national level, do available police statistics make it possible to say anything about recorded crime among young migrants or members of ethnic minorities.[15] Crimes committed by foreigners (not just migrants) are classified according to general categories of offence or selected offences, but not by sex, age group or foreigners' country of origin.

3. The system of sanctions: The forms of sanction – informal (diversion) and formal (sentencing by the courts)

3.1 Forms of informal sanction (diversion)

In Greece in principle the legality principle applies (Article 43 Sec. 1 grStPPC). Diversion, as applied by the public prosecutor, and which may or may not come with instructions/orders, was first provided for in Law no. 3189/2003 on the "Reform of Juvenile Penal Legislation". Where a minor commits a petty

13 The United Nations' Committee on the Rights of the Child apprehensively criticized in its "concluding observations" (Concluding Observations of the Committee on the Rights of the Child: Greece. CEC/C/15/Add. 170 of 1 February, 2002) regarding the initial comprehensive report (CRC/C/28/Add. 17) that children are prosecuted for begging. Therefore, the Committee recommends that Greece has to decide on the decriminalisation of child-begging, whereas it should at the same time be ensured that adults who could exploit children and lead them into begging will not take advantage of this amendment, see *Pitsela* 2009, pp. 645 ff.

14 According to statistical data given by the Youth Police Department of the Attiki administrative district, in 1993 female minors represented approximately 5% of all minors who were registered as alleged offenders (8% in 1996, and 15% in 1999). Nationwide data are not available, so it is not possible to say whether the increase of girls' delinquency is representative of developments throughout all of Greece.

15 The Youth Police Department of the Attiki administrative district has been collecting information about the minor alleged offenders' alien status since 1991. According to statistical data, in 1993 foreign minors accounted for 57% of the total number of registered alleged minor offenders, excluding delinquency related to traffic and drugs (72% in 1996, and 94% in 1999).

offence[16] or a misdemeanour, the public prosecutor may decide not to begin proceedings if, after having examined the facts of the case and the personality of the suspected culprit in its entirety, he/she believes that prosecution is unnecessary for preventing him/her from committing further offences (simply, non-intervening diversion). In deciding not to prosecute ("*apochi apo poiniki dioxi anilikou*", Article 45A PPC), the public prosecutor may impose on the minor one or more of the non-custodial educational measures or the payment of up to 1,000 Euro in favour of a non-profit institution (intervening diversion, in conjunction with the ordering of educational measures of graduated severity or the payment of a sum of money). The public prosecutor also decides the period of time within which the measures and obligations must be performed.[17] The hearing of the minor by the public prosecutor is obligatory in cases where he has the discretion to refrain from prosecution (Law no. 3860/2010).

Non-custodial educational measures, e. g. offender-victim mediation, reparation, community work, etc. (Article 122 Sec. 1 grPC), which may be ordered by the courts on the basis of the main hearing, may also be imposed in connection with diversion and the decision not to prosecute. Thus, in terms of content, there are identical forms of legal responses at various stages of the proceedings.

3.2 Forms of formal sanction (sentencing by the courts)

Chapter 8 of the General Part of the Greek Penal Code (Articles 121-133), which constitutes a kind of "Codex of Juvenile Criminal Law", deals with the treatment of minors as offenders.[18] The general provisions of the Greek Penal Code apply to minors only where chapter 8 does not contain specific regulations for juveniles (e. g. conditional release, Article 129 grPC) and to the extent that

16 Regarding the prosecution of petty offences, the principle of expediency is prioritized and allows the police to refrain from prosecution after the act has been detected and the offender has been listened to (see Article 14 of Law no. 1481/1984 *About the Organisation of the Ministry of Public Order*).

17 If the minor has not performed and complied with the ordered measures and obligations within the fixed period of time, the public prosecutor shall initiate proceedings and further prosecution. Otherwise, the public prosecutor archives the case and forwards a report to the public prosecutor of the Provincial Court of Appeal. The criminal prosecution proceedings may be resumed if there is non-compliance with the measure or obligation (Article 45A grPPC). Because there is a lack of an explicit provision, the intervention measures imposed in the context of refraining from the criminal prosecution are not added to the criminal record.

18 Whereas there are plenty of publications about Greek Juvenile Criminal Law in German, relevant publications in English are an exception so far, see *Petoussi/Stavrou* 1996, p. 146-159. *Pitsela* 2004, p. 355-378.

they are compatible with the meaning and purpose of the juvenile criminal law provisions.

The special features of substantive juvenile criminal law exist mainly in the legal consequences of the punishable behaviour of children and juveniles. The measures themselves and the sentence of detention in a young offenders' institution do not link to individual statutory offences, but may be imposed in a general sense when a legally statutory offence is committed. The measures are identical for both children and juveniles. Minors are treated in a manner conformable to the young age, which, in individual cases, does not necessarily mean a milder treatment than is the case with adults.

Juvenile criminal law possesses an independent system of sanctions[19] and subdivides the legal consequences of juvenile offences into educational measures, therapeutic measures and detention in a young offenders' institution. Educational measures are, in principle, graduated according to the intensity of intervention. In accordance with Article 122 Sec. 1 grPC, educational measures (*anamorfotika metra*) may include:

a) reprimand;
b) placing the minor under the responsible care of parents or guardians;[20]
c) placing the minor under the responsible care of a foster family;
d) placing the minor under the care of Youth Protection Associations, Youth Centres or Juvenile Court Aid;
e) mediation between the young offender and the victim, so that the offender can apologise to the victim and, in a general sense, so that the consequences of the act can be settled out of court;
f) compensation of the victim or by some other means the removal or alleviation of the consequences of the act (reparation);
g) performance of community work;
h) participation in social and psychological programmes organised by public, municipal, local authority or private institutions;
i) attendance at vocational schools or other training or vocational training facilities;
k) participation in special road safety training programmes;
l) placing the minor under the intensive care and supervision of Youth Protection Associations or Juvenile Court Aid;
m) placing the minor in an appropriate public, municipal, community or private educational institution.

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19 For an overview of the system of sanctions in general, see *Tsitsoura* 2002, p. 271-283. *Spinellis/Spinellis* 1999, p. 35 ff.; *Spinellis/Spinellis* 1995, p. 84-93; *Courakis* 1994, p. 257-264; *Pitsela* 1988, p. 161; *Papalexiou* 1981, p. 151-173.

20 Article 360 grPC (on the 20th Chapter of the Special Part of the Greek Penal Code on "Offences against marriage and family") regulates the breach of childcare duties.

In each of these cases a minor may be subject to additional educational measures in the form of further obligations relating to his/her lifestyle or education. In exceptional cases a minor may be made subject to one or more of those non-custodial educational measures mentioned in the preceding paragraph (Article 122 Sec. 2 grPC). The maximum duration of the educational measure is decided in the judgment of the court (Article 122 Sec. 3 grPC).[21]

The court which orders such educational measures may at any time replace them by others when it considers this to be necessary, and it revokes them when their purpose has been fulfilled (Article 124 grPC). The educational measures ordered by the court end *ipso jure* as soon as the minor becomes 18. The court may order that the measures be continued, but not beyond age 21 where the court considers that the continuation of the measures is necessary for educational reasons (Article 125 grPC).

Under Article 79 Sec. 1 letter a of Law no. 3386/2005 *Entry into, Residence in and Social Integration of Citizens of Third Party States in Greece,* the expulsion of a minor who is a foreign citizen is forbidden when the Juvenile Court has imposed an educational measure on him.

The court will make an order for a therapeutic measure when the minor's condition necessitates special treatment. Article 123 grPC lists, for example, those conditions to which it attaches therapeutic treatment. Where a minor's condition requires a special form of treatment because of mental illness or disorders or other diseases including alcohol and drug dependency, or because he/she exhibits an abnormal retardation in mental or moral development, the court will order that the minor:

a) be placed under the responsible care of the parents, guardians or a foster family;
b) be placed under the care of Youth Protection Associations or Juvenile Court Aid;
c) participate in a therapeutic advisory programme, or
d) be placed in a therapeutic or other appropriate institution.[22]

A court which orders such therapeutic measures may at any time replace them by others when it considers this to be necessary after having called for a report by a group of experts such as doctors, psychologists and social workers.

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21 If the offence committed by a minor constitutes a petty offence, the following educational measures shall be applied: reprimand, placing the minor in the custody of the parents or a guardian bearing the responsibility for his/her upbringing, and participation in special road safety training programmes (Article 128 grPC).

22 In this way it becomes apparent that identical forms of reaction, such as the placing of minors under the responsible care of the parents, guardians or a foster family, or the placing of the minor under the care of Youth Protection Associations or the Juve¬nile Court Aid, function both as educational and therapeutic measures.

Once their purpose has been fulfilled, it will repeal them after having consulted the expertise of the above mentioned professionals. Educational measures may also be replaced by therapeutic ones. No later than one year after they have been ordered, the court will ascertain whether the conditions for replacement or repeal of the educational or therapeutic measures exist (Article 124 grPC).

Therapeutic measures ordered by the court may also be continued beyond age 18, but not, however, beyond age 21 (Article 125 grPC).

Greek juvenile criminal law makes no provision for non-custodial punishments. Detention in a young offenders' institution under Greek law is always punishment through the deprivation of liberty. Where detention in a young offenders' institution is concerned, there is no possibility of a suspended sentence or for detention to be commuted into a fine or community work.[23] Compared with imprisonment under adult law, detention in a young offenders' institution is an independent punishment under juvenile law geared to the special features of juvenile delinquents (Article 127 in conjunction with Article 51 Sec. 1 and Article 54 grPC). Detention (or confinement) in a young offenders' institution presupposes the establishment of the young person's criminal liability and can be imposed when the juvenile has turned 15. Further conditions for detention (*eidiko katastima kratisis neon*) are that particularly serious offences have been committed which would have been defined as felonies in the case of adults and that the crimes committed involve elements of violence or are committed professionally or persistently.[24]

Furthermore, the judgment of the court which imposes detention in a young offenders' institution as punishment should include a special and substantiated justification of the grounds on which the educational or therapeutic measures are deemed insufficient in the specific case, while at the same time the particular circumstances under which the crime was committed as well as the minor's personality should be taken into consideration (Article 127 Sec. 1 grPC). Detention in a young offenders' institution is the sanction which the courts must apply as a last resort (detention as ultima ratio). Such detention cannot be linked to educational measures. The principle of priority and the exclusive nature of "educational measures over punishment" applies.

Indefinite detention in a young offenders' institution was abolished by Law no. 3189/2003 and detention for a fixed period in a young offenders' institution was introduced (Article 127 Sec. 2 grPC). The range of the sentence of detention

23 See *Pitsela/Sagel-Grande* 2004, p. 208-217.

24 The new Article 127 of the Greek Penal Code has been largely influenced by par. 17.1 sec. (c) of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (General Assembly of the United Nations, Resolution 40/33), according to which "*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*".

in a young offenders' institution was reformed in 2010. According to the new modified Article 54 grPC (detention in a young offenders' institution) the duration of detention may not exceed five years (with a minimum of 6 months) if the offence committed is punishable by law with imprisonment of up to ten years. If the sentence for an adult would be life imprisonment or imprisonment for more than ten years, the duration of detention in a young offenders' institution may be from two to ten years. In extraordinary cases of particularly serious offences punishable with life imprisonment or imprisonment of at least ten years, the maximum duration may be fifteen years.[25]

Article 129 grPC provides for the conditional release of juveniles who have been sentenced to detention in a young offenders' institution. The courts will conditionally release a juvenile when half the period of detention has expired. The period of probation is treated as being equivalent to the remaining period of detention which has not been served (Article 129 Sec. 1 grPC). Conditional release is to be granted unless it is decided on the basis of special reasons that the conduct of the juvenile while serving the term of detention makes it absolutely necessary to continue such detention in order to prevent reoffending. Once half the detention in a young offenders' institution has been served, the institution's directorate will apply for conditional release. In all cases the application is accompanied by a report from the institution's social services department (Ar ticle 129 Sec. 2 grPC). The minor's right to appear and be heard by the three-member juvenile court, which decides on conditional release (pursuant to the principle of hearing by a court as set out in Art. 20 par. 1 of the grConstitution) is explicitly acknowledged. Conditional release may also be granted before half the term of detention in a young offenders' institution has expired where important reasons exist and where, in actual fact (i. e. without counting any remission for work while in detention),[26] at least one third of the sentence imposed has been served (Article 129 Sec. 3 grPC).[27]

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25 The United Nations' Committee on the Rights of the Child criticised in its "concluding observations" in the initial Greek report the then existing maximum duration of detention in a young offenders' institution of twenty years. Therefore, the Committee recommended the abolition of the regulations which provide for this length of detention. This recommendation was adopted by the Law no. 3860/2010.

26 Each day worked in detention is normally favourably credited (as two and a half, two, one and three quarters and one and a half days, see also Footnote 54 under Section 12 below) towards the time to be served. School education and participation in educational or advanced training programmes that last at least three months, or participation in vocational education programmes, can be also favourably credited (as two and one and three quarters days) towards the total period of detention to be served.

27 For the granting of conditional release, in general the part of the sentence for which there has been a remission ("good time") because of work is considered as served time. Conditional release is to be granted, when the minor has served one third of the imposed

The only permissible deprivation of liberty which may be imposed on those who were juveniles at the time of the offence is detention in a young offenders' institution, provided that, before he/she was 18, the sentence had already been imposed on the juvenile offender or that he/she had already begun to serve the sentence. Recourse to the system of sanctions provided for in the general criminal law, however, may also be considered on the following conditions:

a) If, at the time of sentencing the juvenile has reached the age of 18, the court may, instead of ordering educational or therapeutic measures (which may be regarded as insufficient), or detention in a young offenders' institution (which may, admittedly, be regarded as necessary, but no longer expedient), nevertheless impose the punishment provided for the offence and, in accordance with the provisions of Article 83 grPC, mitigate it by way of an obligatory requirement (Article 130 grPC). In this case, if educational measures are imposed, they cease once the young person reaches the age of 25.
b) If a person sentenced to detention in a young offenders' institution attained the age of 18 before enforcement of the judgment, the court may replace it with the punishment provided for the offence, however, mitigated as an obligatory requirement pursuant to the provisions of Article 83 grPC. The fact that the offender was a juvenile at the time of the offence constitutes a compelling mitigating factor.

sentence (Article 129 Sec. 4 grPC). During the period of probation it is possible to impose obligations which may be related to the released minor's lifestyle, in particular regarding the place of residence and the participation in a therapeutic drug withdrawal programme. It is also possible to order the expulsion of a foreign released minor to the country of origin unless the family is legally residing in Greece or the expulsion is impossible (Article 129 Sec. 5 grPC). If during the period of probation the released minor is convicted for a new felony or deliberate misdemeanour, the release shall be revoked and Article 132 ("Concurrence of offences") shall apply (Article 129 Sec. 6 grPC). If the period of probation expires without any such revocation, the sentence is considered to have been served (Article 129 Sec. 7 grPC). The court competent for the minor's release or the revocation thereof is the Juvenile Division at the Provincial Court of the region in which the sentence of detention is executed (Article 129 Sec. 8 grPC). If the minor has successfully participated in an approved consulting programme during the stay in detention with regards to Article 20 of the Law no. 3459/2006 "Narcotics Law Code" or due to an offence facilitating the use of drugs, and if a letter from a recognised therapeutic drug withdrawal programme confirms that he/she was accepted in it, such participation is a serious justification for early release (after one third of the imposed sentence of detention has elapsed). People in charge of the therapeutic programme, which takes place outside the young offenders' institution, must inform the court every two months about the consistent participation of the minor or about the successful completion of the programme, as well as about any unjustified interruptions. If the minor interrupts the programme, conditional release is to be revoked (Article 129 Sec. 9 grPC). When the application for conditional release is rejected, a new one can be lodged in two months' time after the rejection unless new facts arise (Article 129 Sec. 10 grPC).

In the application of punishments provided for under the general criminal law the courts have the opportunity to impose long-term imprisonment (confinement to a penitentiary from 5 to 20 years), short-term imprisonment (10 days to 5 years) or a fine.[28] Life imprisonment may never be imposed on juveniles. Confinement to a penitentiary and fines are, in practice, very seldom imposed. Short-term prison sentences predominate, but it is extremely seldom that juveniles serve the full sentence. These sanctions are generally suspended or commuted to fines. Additional consequences of punishments such as the ineligibility to hold or to be elected to public office, loss of voting rights and the security measure of committal to a workhouse, involving as it does a deprivation of liberty (which is unconstitutional and was never implemented in Greece), do not apply when a juvenile is sentenced to a mitigated term of imprisonment (Article 130 Sec. 2, 131 Sec. 3 grPC).

Recourse by the Juvenile Court to the punishments provided by the general criminal law does not therefore inevitably mean a more drastic intervention. Whereas detention in a young offenders' institution is always bound up with the deprivation of liberty, the alternatives to imprisonment (suspended sentences, the commuting of prison sentences into fines or community work) have increasingly assumed greater importance. The extension of alternatives to prison sentencing has a positive influence on the number of young prisoners when Arts. 130 and 131 grPC are applied.

4. The juvenile justice system and juvenile court procedures

A specific juvenile justice system is provided for and recognised in the Greek Constitution as a specialised form of justice.[29] The Juvenile Courts, which are composed exclusively of professional judges, are competent to try all offences committed by minors (8 to 18 years old). The competence of the Juvenile Courts is determined by the age of the offender at the time of the offence. Every Provincial Court has a Juvenile Court consisting of a juvenile court judge sitting as a single judge and a Juvenile Court of Appeal consisting of three judges, one of whom – where possible the presiding judge – must be a juvenile court judge. These two juvenile divisions function as courts of first instance. Every Higher

28 The classification of criminal acts into felonies, misdemeanours and petty offences corresponds to the confinement in a penitentiary (long-term imprisonment), prison (including detention in a young offenders' institution) and arrest facility (including fine defaulters).

29 See Article 96 Sec. 3 of the Greek Constitution, Article 1 grPPC and Article 1 of the Greek Judicature Act (grGJA). Article 96 Sec. 3 reads as follows: "Special laws regulate the administration of juvenile justice; … The juvenile courts' judgments should be promulgated under exclusion of the general public". In the field of juvenile criminal justice there is no participation of lay judges.

Provincial Court has a Juvenile Court consisting of three judges, one of whom – where possible the presiding judge – must be a juvenile court judge. This court functions as an appeal court.[30]

The involvement of the victim in juvenile court procedures follows that characteristic of adult proceedings.[31] It is in all cases permissible for the victim, having declared his/her involvement as plaintiff, to bring a civil action (*politiki agogi*, *action civile*)[32] and hence to file civil-law claims for compensation (damages and/or compensation for pain and suffering) before a Juvenile Court. This is also the case when the Juvenile Court has ordered educational measures. Procedural law allows, along with the *action civile*, the possibility of claiming before the Criminal Court a symbolic sum (usually 44 Euro). Where there is a dispute concerning the value of the claim, it is the Civil Court alone which decides.

There are no special rules on defence in juvenile criminal cases. As in general criminal proceedings an accused at all times and at every stage of the proceedings is entitled to defence counsel. The investigating judge at the pre-trial stage is obliged to appoint a public defence counsel where the accused expressly requests it (Article 100 Sec. 3 grPPC). At trial the presence of a defence counsel is always necessary when the defendant is accused of a felony (Art 340 Sec. 1 grPPC). In this case a defence counsel will be appointed without special application. The appointment of a defence counsel in felony cases was made obligatory by Law No. 3860/2010 (see Article 340 Sec. 1 sentence 3 grStPO). The possibility of having a defence counsel in proceedings before the juvenile court judge sitting as a single judge is relatively rarely used. In proceedings before the Juvenile Court consisting of three judges as a court of first instance as well as an appeal court the accused is more frequently assisted by counsel.[33]

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30 The appointment of the juvenile judge takes place based on a strict formal procedure. A judge of the Provincial Court, respectively of a Higher Provincial Court, is appointed as juvenile judge for three years. This period can be renewed for another three years with the judge's consent (see Article 26 Sec. 6 grGJA). An important amendment regarding the improvement of the juvenile judges' professional position has been introduced by Law no. 3860/2010. The juvenile judge must now have the rank of a presiding judge of the Court of First Instance (s. Art 4 grGJA) and shall have gained expert knowledge by participating in relevant training courses organised by the National School of Judges or by having attained a master's or doctoral degree (s. Article 26 grGJA).

31 See *Kalavros* 1990, p. 299-311; *Brienen/Hoegen* 2000, p. 389-426.

32 *D. D. Spinellis* 1986, p. 405-419.

33 The United Nations' Committee on the Rights of the Child manifested in its "concluding observations" to the initial Greek report (2000) that the right of the children to legal representation or other appropriate assistance was not always systematically guaranteed. Therefore, the Committee recommended the respect of all juvenile justice

Juvenile criminal proceedings are, in principle, governed by the provisions of the general criminal procedural law. Among the special features of proceedings against minors are the following:

- If the accused is a minor, a detailed investigation on the health, moral and mental situation, personality development, of former life, social and family background is carried out (Article 239 Sec. 2 sentence 2 grPPC). The necessary information is obtained by local Youth Protection Associations[34] (Article 239 Sec. 2 sentence 3 grPPC). The social inquiry report is confidential, forms no part of the case file and is available only to the juvenile court judge and those persons entrusted with the minor's welfare (Article 5 Sec. 1 Law no. 378/1976 on the Setting up of the Juvenile Court Aid). Hence, the report is not available to all persons who would have access to the case file, particularly the defence counsel. The Juvenile Court Aid official or probation officer is entitled to refuse to give evidence (Article 5 Sec. 2 Law no. 378/1976, Article 16 Presidential Decree no. 49/1979, supplementing Article 212 grPPC and Article 371 grPC). In practice, the Juvenile Court Aid official is always present when the juvenile court is in session.
- Article 96 Sec. 3 of the Greek Constitution provides that the trial can be held in camera, including the promulgation of judgment.[35]

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standards, including the right to legal representation, free interpretation where needed and other relevant assistance.

34 The Juvenile Court Aid is settled in Greece at the Ministry of Justice (Article 2 of the Presidential Decree no. 36/2000 about the Organisation of the Ministry of Justice) and is subject to the control of the juvenile judge (Article 1 Sec. 2 of Presidential Decree no. 49/1979 about the Establishment, Organisation, Tasks and Responsibilities of the Juvenile Court Aid). The United Nations' Committee on the Rights of the Child manifested in its "concluding observations" of the initial Greek report that there was a lack of Juvenile Court Aid officials, and recommended to increase the number of trained personnel.

35 According to Article 1 Sec. 1 of the Law no. 3315/1955 "On the Supplementation of the Applicable Provisions on Juvenile Courts and the Treatment of Minors" the sessions of the Juvenile Courts are not open to the public, the trial is held in camera. Except for the parties, the witnesses, the defence counsel and the Juvenile Court Aid officials, the presence of the persons entitled to exercise the child's custody and the representative of the competent Youth Protection Association is permitted. The participation of the competent public prosecutor is mandatory during the main trial (Article 4 Sec. 4b grGJA in conjunction with Article 1 grPPC). Furthermore, there is the possibility for the Juvenile Court to temporarily exclude the minor from the trial when it is in the minor's interest or when his/her presence could be an obstacle to the truthful testimony of a witness or a co-defendant. In this case, the defence counsel stays in the courtroom (Article 1 Sec. 2 of the Law no. 3315/1955).

- When one of several defendants is a juvenile, he/she is tried by a Juvenile Court (separation of cases involving juveniles and adults). This is always the case for felony offences. Misdemeanours of juveniles, because of their factual context, can be tried with those of adults jointly before an adult court. At these proceedings a juvenile court judge should be present if possible, where this is deemed to be necessary by the public prosecutor or the so-called deciding court for important reasons which affect the interests of justice. The court may, at its discretion, still make an order for the combined cases to be dealt with separately.
- The fast-track procedure for crimes in "flagrante delicto" (apprehension red-handed/in the very act) is not applicable for minors (see Article 242 § 4 grStPO, introduced by Article 7 of the Law no. 3860/2010).
- Traditionally, appeals against judgments which ordered educational or therapeutic measures had not been permissible. Article 26 of the Law No. 3904/2010 (in force since 23 December 2010) has reversed this by introducing the possibility of appeals also in these cases.
- An appeal is always possible against sentences which impose detention in a young offenders' institution (allowed for the first time by Law no. 3189/2003).[36]
- In addition, an accused could appeal against a judgment imposing deprivation of liberty of more than 60 days (judgment of a single juvenile judge) or four months (judgment of the Juvenile Court consisting of three judges), provided that the juvenile was sentenced to imprisonment under the general criminal law (Article 489 Sec. 1 letter e grPPC). Nowadays the accused person can appeal against the imposed sentence regardless of its length (Law No. 3904/2010).
- A departure from the principle of *res judicata* in relation to the sanctions imposed. The possibility exists of replacing or repealing educational or therapeutic measures. Even detention in a young offenders' institution

36 The accused person can appeal against this sentence independently of the length of the imposed sentence of detention in a young offenders' institution (Article 489 Sec. 1d grPPC). The United Nations' Committee on the Rights of the Child apprehensively manifests in its "concluding observations" in the initial Greek report that the right to appeal is limited to sentences of more than one year of detention. Therefore, the Committee recommended the unrestricted recognition of the right to file an appeal. This recommendation was taken into account by the Greek Legislator (Law no. 3189/2003) and the possibility to appeal any sentence to detention in a young offenders' institution – regardless of its length – was introduced. For reasons of harmonisation with the provisions of the CRC (Article 40 Sec. 2 b(v) CRC) any decision and any measures imposed in consequence of having infringed the penal law can be reviewed by a higher judicial body in Greece today (see Law no. 3189/2003, Law no. 3860/2010, Law no. 3904/2010).

may be replaced by a mitigated punishment of the adult law under the conditions contained in Article 131 grPC.

- Educational measures for minors may be imposed as restrictive measures at the pre-trial stage. The violation of such measures does not necessarily result in custodial remand.
- A limited (more restricted) application of remand in custody (Article 282 Sec. 4 sentence 2 grPPC) in comparison with adults. Remand in custody may not exceed 6 months (exceptionally 9 months).
- A minor may never be ordered to pay the costs of the proceedings in cases before the Juvenile Courts (Article 3 Sec. 5 Law no. 663/1977). Whereas a judgement against a convicted adult will always contain the order to cover court costs (Article 582 Sec. 1 grPPC), a juvenile is never ordered to pay the costs of the proceedings before a Juvenile Court (whether a court of first instance or an appeal court), even if the court orders detention in a young offenders' institution or a mitigated adult law punishment.
- Although educational measures are not genuine penal sanctions, since they may be ordered independently of guilt, they are entered on the criminal record. The same applies for the detention in a young offenders' institution. Therapeutic measures are not subject to entry on the record and therefore have no subsequent legal consequences.[37]

The juvenile court judge does not have the function of an executive enforcement agency. As in general criminal proceedings enforcement of punishment is part of the duties of the public prosecutor. He therefore also supervises the implementation of educational and therapeutic measures and detention in a young offenders' institution (Article 549 Sec. 5 grPPC).

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

There is nothing which can be said about the practice of informal responses (diversion, offender-victim mediation, etc.). Mention should again be made of

37 The registration of educational measures on the criminal record is cleared as soon as a juvenile turns 17 (Article 578 Sec. 1 Letter b grPPC). The registration of convictions to detention in a young offenders' institution for up to one year is cleared five years after sentence has been served; when the minimum duration of the sentence exceeds one year, the registration is cleared after 8 years. This, however, requires that the young person has no new convictions within the five or eight year time periods. In cases of conditional release, the entry on the criminal record is cleared five or eight years after the expiration of the probation period, as long as the suspension of the rest of the sentence was neither revoked nor repealed (Article 578 Sec. 1e grPPC).

the fact that Law no. 3189/2003 on the *Reform of Juvenile Penal Legislation*, which introduced the abatement of Juvenile Court proceedings, has been in force since 21 October 2003. According to the public prosecutor in Thessaloniki, he has never yet decided to refrain from prosecution. On the other hand, the juvenile public prosecutor in Athens has on occasions decided to refrain from prosecution (without imposing instructions).[38] Only in recent times (in 2007) the juvenile public prosecutors in Athens have also been directed to refrain from prosecution by imposing instructions (such as placing the minor under the care of the Juvenile Court Aid).

6. The sentencing practice – Part II: The juvenile court dispositions and their application since 1980

Criminal justice statistics refer to those persons who have been convicted and punished by the courts for felonies or misdemeanours. A survey of the general trend in sentencing and their application in practice in Greece is given in *Table 7*.[39] These statistics also include minors against whom educational or therapeutic measures have been ordered or who have been sentenced to detention in a young offenders' institution.

According to the criminal justice statistics, the number of children against whom educational measures have been imposed in Greece during the years 1980 to 2003 depicts an irregular trend. The trend in the practice of sanctions against children can be seen in *Table 8*.[40] The most frequently imposed educational measure against children is by far the entrusting of the child to the parents or guardian with responsibility for its upbringing.

38 Furthermore, an interview with two juvenile public prosecutors in Athens and in Thessaloniki regarding the implementation of such diversion revealed that this institution had not been implemented until the end of May 2006. According to the juvenile public prosecutors, the non-implementation of Offender-Victim Mediation in the context of refraining from prosecution is due to a lack of appropriate infrastructure and resources.

39 On the whole, longer deprivation of liberty was only of marginal significance to the courts' sentencing practice of the 1970s and 1980s. See *Spinellis* 1983, p. 296; *Lambropoulou* 1993, p. 91-100.

40 Until Law no. 3189/2003 came into force, only a custodial therapeutic measure was provided for by the Law. This therapeutic measure was rarely ordered by the courts in practice, a fact that was most likely contingent on the time-consuming appointment of psychiatric experts as well as on the lack of appropriate therapeutic institutions. If one looks at the sentencing of children of the 1980s up until 2003 in Greece, one would come to the conclusion that only in the 1980s one order to therapeutic treatment was issued for one child.

Table 7: Trends in sentencing and the practice of court-imposed sanctions, (as a percentage of punishments or sanctions imposed)

Type of sanction	1980	1985	1990	1995	2000	2003
Fines	9.6	11.2	9.6	3.6	5.0	8.9
Impris. up to 1 m.	71.6	63.2	62.2	60.6	51.0	44.1
Impris. 1-3 m.	8.9	10.2	11.3	10.9	13.7	15.8
Impris. 3-6 m.	3.5	4.9	6.1	8.3	12.3	13.6
Impris. 6-12 m.	1.8	2.2	3.5	5.0	6.9	7.8
Impris. 1-5 years	0.7	1.6	2.3	4.5	4.4	5.0
Penitentiary	0.1	0.1	0.1	0.5	0.5	0.5
Lifelong penitentiary	0.0	0.0	0.0	0.0	0.0	0.0
Adm. to psychiatry	0.0	0.0	0.0	0.0	0.0	0.0
Detention in a young offenders' institution	0.0	0.1	0.0	0.1	0.1	0.1
Educational or therapeutic measures	3.8	6.5	4.8	6.4	6.0	4.3
Total (%)	100	100	100	100	100	100
Total* (N)	**122,759**	**108,003**	**109,184**	**91,960**	**58,708**	**73,157**

* Measured by the total number of persons sentenced, for whom figures are available on the type and duration of sanction (m. = month/s).

Source: Administration of Justice Statistics, Table B:19; own calculations.

Table 8: Trend in educational measures, (as a percentage of educational measures imposed)

Educational measures	1980	1985	1990	1995	2000	2003
Reprimand	32.2	38.7	22.5	39.9	12.4	9.6
Parental care	36.4	23.8	25.0	11.1	82.6	75.3
Juvenile Court Aid	25.9	36.3	27.5	13.0	4.1	12.6
Educational institution	5.4	1.2	25.0	35.9	0.9	2.5
Total (%)	100	100	100	100	100	100
Total (N)	**239**	**168**	**80**	**323**	**218**	**239**

Source: Administration of Justice Statistics, Tables B:5 und B:19 of the Court Statistics and author's own calculations.

The number of juveniles against whom measures have been imposed or final sentences have been passed by the courts likewise shows, according to the criminal justice statistics, an irregular pattern that is however declining on the whole (see *Table 9*).

Table 9: Trend in sentencing and the practice of court-imposed sanctions against juveniles, (as a percentage of sanctions imposed)

Type of sanction	1980	1985	1990	1995	2000	2003
Fines	0.5	0.3	1.5	0.2	0.2	0.5
Imprisonment up to 1 month	16.3	8.3	17.4	10.6	15.0	16.8
Imprisonment 1-3 months	1.0	1.1	2.4	1.0	2.3	2.9
Imprisonment 3-6 months	0.5	0.3	1.2	1.0	1.7	1.6
Imprisonment 6-12 months	0.2	0.2	0.9	0.5	1.9	0.6
Imprisonment 1-5 years	0.1	0.1	0.8	0.5	0.9	1.0
Temporal penitentiary	0.0	0.0	0.0	0.0	0.0	0.0
Detention in a young offenders' institution	0.2	1.0	0.5	2.1	2.1	1.2
Educational measures	81.1	88.7	75.3	84.0	75.7	75.3
Therapeutic measures	0.2	0.1	0.0	0.0	0.2	0.0
Total (%)	100	100	100	100	100	100
Total (N)*	**5,235**	**7,205**	**6,729**	**6,065**	**3,626**	**3,637**

* Total number of persons sentenced, for whom figures are available on the type and duration of sanction.

Source: Administration of Justice Statistics, Tables B:5 and B:19 of the Court Statistics and author's own calculations.

Where juveniles are concerned, the emphasis in juvenile criminal responses continues to be found in individual preventive educational measures. The trend in educational measures ordered against juveniles in Greece between the years 1980 and 2003 is shown in *Table 10*.[41] The most frequently imposed educa-

41 For a brief overview of the imposed educational measures by the Juvenile Court in Athens in the court year 2003-2004, see *Papadopoulou* 2006, p. 1-3. The recently introduced educational measures represented only 1.7% of the total number of the imposed educational measures by the Juvenile Court in Athens in the year 2003-2004. Out of a total number of 1,258 persons against whom an educational measure was ordered, the

tional measure is the reprimand, followed by placing the juvenile under the responsible care of parents or guardians. The practice of placing juveniles (particularly children) under the care, supervision and support of the Juvenile Court Aid is gradually declining, a fact which is mainly attributable to staff shortages. Finally, placements in educational institutions have witnessed a constant drop, due not least to the shortage of such institutions.

Table 10: Educational measures imposed on juveniles, (as a percentage of educational measures ordered)

Educational measures	1980	1985	1990	1995	2000	2003
Reprimand	52.7	62.2	55.7	62.1	40.7	46.2
Parents	29.5	21.6	26.7	22.7	45.4	40.4
Juvenile Court Aid	15.7	15.2	15.3	12.3	11.1	13.4
Educational institution	2.1	0.9	2.3	2.8	2.8	---
Total (%)	100	100	100	100	100	100
Total (N)	**4,246**	**6,391**	**5,068**	**5,095**	**2,745**	**2,738**

Source: Administration of Justice Statistics, Tables B:5 and B:19 of the Court Statistics and author's own calculations.

With regard to the frequency with which detention in a young offenders' institution is imposed, a practical reluctance predominates (see *Table 9*). From 1978 to 1993 inclusively, detention in a young offenders' institution at no time exceeded the 1% mark. From 1994 onwards a rising trend – albeit with considerable fluctuations – can be observed (1994: 1.6%, 1996: 2.9%, 1998: 0.6%, 1999: 3.5%, 2001: 2.1%, 2002: 2.4% and 2003: 1.2% of the total number of juveniles against whom sanctions were imposed).

In cases involving juveniles the practice of the courts is to resort comparatively often to the forms of response found in adult criminal law. Pecuniary penalties or fines and, particularly, committal to a penitentiary are imposed by the courts on young persons extremely rarely. Rather, the most frequent responses tend to be short-term imprisonment (see *Table 9*). According to judicial statistics, in 2003 around 24.5% (853 persons) of sentenced juveniles

performance of community work was ordered against two persons, victim-offender mediation was ordered against six persons, reparation was ordered against one person and placing the minor under the intensive care and supervision of Youth Protection Associations or Juvenile Court Aid was ordered against twelve persons. Thus, the recently introduced educational measures show a particularly reserved application in the first year after the reform of juvenile penal legislation.

(3,637 persons) were punished under Articles 130 and 131 grPC; a term of under one month was imposed against about 70% of juveniles sentenced to imprisonment (612 out of 833 persons), and around 90% (776 persons) received terms of up to six months. Hence, the picture is dominated by short-term incarceration when mitigated adult sanctions are applied. These sanctions are generally suspended or commuted to fines.

A differentiation between persons against whom sentence has been passed by sex and age groups shows that final sanctions against female minor delinquents are considerably less than those in the male age groups.

A good two thirds of juveniles against whom a sanction was applied have these imposed against them for traffic offences. With regard to the structure of those offences with which the Juvenile Courts are for the most part engaged, and leaving aside traffic offences, theft is the main offence.

A differentiation of foreigners on whom sentence has been passed is shown in the criminal justice statistics on the basis of general categories of offence and country of origin, but not by age groups.

A comparison of the ratio of alleged offenders investigated by the police to those persons against whom sanctions were imposed in the 24 years (1980-2003) shows that the average number of under-age alleged offenders investigated by the police who were subsequently sanctioned was around 44%, whereas for adults this applies "only" to 32% of cases (see *Table 11*).

Table 11: Ratio of alleged offenders investigated by police to persons "sanctioned" by the courts (including traffic offences, as %)

Year	Minors	Adults
1980	63.8	39.8
1985	64.4	37.6
1990	44.4	34.8
1995	37.4	32.7
2000	16.4	20.2
2003	17.9	21.3
Average	44.4	32.0

Source: Administration of Justice Statistics, Tables B:3 Statistics for Offences and B:19 of the Court Statistics; Statistical Yearbook of the Greek Police, Table 31 and author's own calculations.

Finally, those minors investigated by the police (including traffic offenders) constitute, as an average for the 24 years (1980-2003), 4.8% of all alleged

offenders. In contrast, minors against whom sanctions were applied in Greece during the same period account for 6.2% of all persons against whom sanctions were applied (see *Table 12*).

Table 12: Number of minors investigated by police and "sanctioned" (including traffic offences)

Year	Minor alleged offenders		Minors sanctioned	
	N	%*	N	%**
1980	8,577	2.8	5,475	4.5
1985	11,456	4.1	7,374	6.9
1990	15,298	4.9	6,794	6.2
1995	17,061	6.1	6,388	7.0
2000	23,372	7.1	3,844	6.5
2003	21,603	5.6	3,876	5.3

* Percentage of total alleged offenders with indication of age.
** Percentage of total number of persons sanctioned, with indication of sanction and age.
Source: Administration of Justice Statistics, Tables B:3 Statistics for Offences and B:19 Court Statistics; Statistical Yearbook of the Greek Police, Table 31 and author's own calculations. The most recently published Judicial Statistics, which cover the statistics for offences, court statistics and correctional statistics, contain data up to and including 1996. All statistical data referring to the year 1998 and thereafter were communicated to us directly by the National Statistical Service of Greece (see www.statistics.gr).

7. Regional patterns and differences in the sentencing of young offenders

No information can be provided in relation to regional patterns and differences in the sentencing of young lawbreakers. The criminal justice system statistics differentiate the practice of sanctions only by age groups, school education, family status and occupation of the convicted person. No breakdown is given of convicted persons according to the sanctions imposed, age groups and criminal court jurisdiction. Persons convicted are shown merely by general categories of offences and the seat of the Criminal Court.

8. Young adults in the juvenile or adult criminal law – Legal rules and sentencing practice

The final provision of Chapter 8 concerning "Special Provisions for Minors", which, at the same time, is also the concluding provision to the General Part of the grPC, lays down the way in which the criminal law is to deal with "young adults" (*nearoi enilikes*, Article 133 grPC). Young adults (aged between 18 and 21 at the time the offence was committed) are in all cases regarded as being fully criminally responsible. For reasons recognised in the general criminal law, guilt may always be contested (Articles 33, 34 grPC). However, Greek law makes no provision for extending legal consequences, specific as they are to juveniles, to this particular age-group within the meaning of § 105 Juvenile Courts Act of Germany. There is thus no possibility of applying juvenile criminal law sanctions to young adults. The consequences of an offence committed by a young adult must be determined by reference to adult criminal law; it is solely in the discretion of the general court to decide whether to mitigate the punishment (Article 133 grPC in conjunction with Article 83 grPC). The judgment of the adjudicating court is final and, in accordance with established court practice, is unappeasable with regard to the imposition of a mitigated punishment. According to the established practice of *Areios Pagos* (the Supreme Court in civil and criminal cases) no specific reasoning is, in principle, needed if a sentence is not mitigated. Such reasoning is, on the other hand, according to doctrine and recent decisions of the Supreme Court, necessary when an application by a defendant for a mitigated punishment is not met. The judgment, as far as the punishment is concerned, is appealable if the court has not responded to a request by the defendant for the application of Article 133 grPC regarding the mitigating reason of the so called post-adolescence age.

Young adults may even be sentenced to life imprisonment when the court does not impose a mitigated sentence. Where the court hands down a mitigated sentence, life imprisonment is replaced by imprisonment of not less than ten years (Article 83 grPC). Moreover, additional consequences of punishments such as the ineligibility to hold or to be elected to public office, loss of voting rights and the security measure of committal to a workhouse and the security measure of committal to a workhouse (such an institution does not exist, hence this measure has never been applied), involving as it does a deprivation of liberty (which is unconstitutional), do not enter into the considerations when a young adult is sentenced to a mitigated term of imprisonment; there is some theoretical argument about whether this also applies in the case of unmitigated punishment.

The number of convicted young adults in Greece during the years 1980 to 2003 depicts an irregular pattern. *Table 13* provides a summary of the trend in the way punishment is determined and sanctions are applied by the courts in the

case of young adults. Although, under current criminal law, there is no possibility of applying juvenile criminal law sanctions against young adults, it is to be noted from the judicial statistics that, paradoxically, such sanctions are imposed upon a small number of persons in this age group.

Table 13: Trend in sentencing and the practice of court-imposed sanctions against young adults, (as a percentage of sanctions imposed)

Type of sanction	1980	1985	1990	1995	1996	2000	2003
Fines	2.2	2.8	2.6	2.3	4.2	3.2	3.3
Imprisonment up to 1 month	79.5	68.5	70.7	65.7	64.1	56.9	64.2
Imprisonment 1-3 months	8.3	10.9	11.7	7.7	7.4	11.5	14.8
Imprisonment 3-6 months	4.2	5.9	5.9	4.6	6.1	9.1	7.8
Imprisonment 6-12 months	2.3	2.4	3.2	3.0	3.9	3.9	3.7
Imprisonment 1-5 months	1.0	3.3	3.6	6.4	6.6	2.7	3.4
Temporal penitentiary	---	0.2	0.1	0.2	0.3	---	---
Lifelong penitentiary	---	---	0.0	0.0	0.0	---	---
Admission to a psychiatry	---	---	---	---	0.0	---	---
Detention in a young offenders' institution	0.0	0.1	0.0	0.2	0.2	0.2	0.1
Educational or therapeutic measures	2.4	5.9	2.2	9.9	7.1	12.4	2.5
Total (%)	100	100	100	100	100	100	100
Total (N)*	8,711	7,722	6,232	4,961	5,231	4,559	5,610

* Total number of persons sentenced, for whom figures are available on the type and duration of sanction.

Source: Administration of Justice Statistics, Table B:19 of the Court Statistics and author's own calculations.

Young adults sentenced by the general criminal courts to a term imprisonment (short-term or long-term) are, in principle, subject to detention in a young offenders' institution (Article 133 grPC, Article 12 grCC). Hence, from the point of view of the correctional system, the treatment of young adults is largely aligned with the treatment applied to juveniles.[42] According to

42 On the situation of the youth correctional system in a German-Greek comparison, in particular the extent to which international human rights standards of the United Nations and of the Council of Europe are implemented in the reality of the correctional

Article 12 Sec. 1 grCC, young prisoners within the meaning of this Code are prisoners of both sexes who are at least 13 and not yet 21. Young adult prisoners may be moved to and detained in detention centres for adults when there are important reasons (Article 12 Sec. 3 grCC). It is permissible for young prisoners to be kept in young offenders' institutions until they are 25, provided that the Central Committee for Transfers (Article 9 grCC) deems this to be necessary, in response to a recommendation from the Prison Council,[43] to complete the educational or vocational training programmes in which they are taking part, provided the persons concerned show interest and their presence in the institution causes no problems for the common life there or for the proper functioning of the institution (Article12 Sec. 6 grCC).

9. Referral of juveniles to adult courts

There is no statutory provision for referring juveniles (aged 15-18 years) to adult courts.

10. Temporary accommodation in educational institutions and on remand

In accordance with general procedural rules, orders and instructions (the so called restrictive measures) may be given when there are "serious indications of guilt" against a person accused of a felony or misdemeanour punishable by at least three months' imprisonment and such measures are deemed to be absolutely necessary to ensure that he/she appears before the investigating judge or court and, where necessary, to ensure that judgment is enforced (Article 282 Sec. 1 in conjunction with Article 296 grPPC).

These restrictive measures refer in particular to bail (traditionally the most common case being suspending detention on remand), the obligation of the accused to appear at regular intervals before the investigating judge or other authority (duty to appear), compliance with instructions relating to where he/she may reside (residence restrictions) or agreeing not to meet or have any contact with certain persons (Article 282 Sec. 2 grPPC). Educational measures

system, see *Neubacher/Walter/Pitsela* 2003, p. 17-24. The Greek youth correctional system provides on the whole very few positive perspectives, see *Lambropoulou* 2001, p. 33-55; see *Pitsela* 2010, pp. 409 ff.

43 Pursuant to Article 10 grCC a Prison Council works in every detention centre. This three-person Council consists of the director of the detention centre as chairman, the highest-ranking social worker and the highest-ranking in-house expert scientist of the detention centre (jurist, psychologist, agricultural scientist, sociologist or teacher).

(including the placing of the minor in an educational institution) are foreseen for minors and may be imposed as restrictive measures at the pre-trial stage.

Detention on remand may replace orders and instructions when the conditions exist for imposing such restrictive measures and the accused is to be prosecuted for a felony (or repeated cases of homicide by culpable negligence). In addition, special grounds for holding a juvenile on remand have to be met. The accused, in general, has:

a) no known residence in the country;
b) made preparations to facilitate his/her escape from the country;
c) already on some occasion in the past fled the country, either before the trial could take place or sentence could be passed;
d) been sentenced at some time in the past for absconding from prison or breaking his/her residence restrictions; or
e) been justifiably shown that, if released, he/she is very likely to commit other acts, a likelihood that arises based on specifically mentioned events in his/her previous life or on the basis of concrete specific features of the offence committed.

The seriousness of the offence is not of itself sufficient to warrant pre-trial detention (Article 282 Sec. 3 grPPC).

The orders and instructions (restrictive measures) given to an accused may be subsequently replaced by detention on remand: a) when, despite having been legally summonsed, he/she fails to appear before the investigating judge or court without any plausible reasons; b) when he/she flees or makes preparations to flee; c) when he/she infringes the orders and instructions given or fails to report a change in his/her abode; or d) where there are serious suspicions that he/she has committed another felony (Article 282 Sec. 4 in conjunction with Article 298 grPPC).

Detention on remand may be imposed (and enforced) on someone accused of a felony when the purpose of such detention cannot be achieved by means of orders and instructions (principle of subsidiarity of detention on remand). A remand order may be imposed on an accused juvenile (15 to 18 years old) under the same basic conditions (compelling suspicion of having committed a felony and special reasons for detention) as in the case of adults. However, the possibility of imposing remand on juveniles is regulated with a considerably greater degree of strictness. An adult may be remanded when there are compelling reasons to suspect that he has committed a felony; on the other hand, a juvenile may only be remanded when he is seriously suspected of having done so, when the felony is punishable by law with a penalty of at least 10 years of imprisonment, irrespective of the duration of the sanctions to be imposed in the particular case. The infringement of the restrictive measures imposed on a juvenile does not necessarily lead to the imposition of remand in custody on its

own (Article 282 Sec. 2 and 5 grPPC).[44] In accordance with the general provision of Article 87 Sec. 1 grPC, the time spent on remand counts towards the detention in a young offenders' institution or imprisonment (later) decided by the court. The investigating judge may, under the same conditions as those under which an arrest warrant is issued, also issue orders and instructions as an alternative to remand. Neither orders and instructions nor remand may be ordered against persons below the age of 15.

Committing a juvenile to an educational institution as part of the preliminary proceedings is regarded as a measure taken to avoid the need for detention on remand (Article 17 Sec. 4 Law no. 2298/1995); in practice it is hardly ever used. The law makes no other provision for orders and instructions specifically aimed at juveniles. In accordance with Article 2 Law no. 3315/1955, detention on remand is imposed for 12 to 15 year olds in an educational institution; from age 15 onwards the accused is sent to a special section of a young offenders' institution. In practice, remand involving juveniles does not take place in educational institutions, but in institutions or sections for young prisoners in Avlona Attikis, in Kassabeteia (near Volos), in the town of Volos itself (only for young foreigners) and in Thessaloniki (a small young persons' section in an adult prison, until 2008).

An accused may complain against the issue of an arrest warrant or orders and instructions by an investigating judge to the criminal chamber of the Provincial Court, which will (at last resort) give an decision which is not subject to appeal. The complaint, which has no suspending effect, must be filed within five days of the beginning of remand or the serving of the order on the accused. Where an arrest warrant has been issued by decision of the so called deciding court (this is the case where there is disagreement between the public prosecutor and the investigating judge) no complaint is permitted (Article 285 grPPC).

Where, during the course of investigations, the fact arises that the conditions for imposing detention on remand or for issuing restrictive measures no longer exist, the investigating judge may, either automatically or upon recommendation of the public prosecutor, revoke the measures imposed or make an application for setting aside to the criminal chamber of the Provincial Court. If this chamber rejects the application, the accused may complain to the criminal chamber of the Higher Provincial Court (Article 286 Sec. 1 grPPC). In addition, an accused who has been temporarily held on remand or a person against whom orders and instructions have been issued may also apply to the investigating judge to have the measures set aside or to have his/her detention on remand replaced by restrictive measures or to have the issued restrictive measures replaced by others. Where the investigating judge dismisses the application, a complaint may be filed within five days to the criminal chamber of the Provincial Court. The

44 See *Chaidou* 1994, p. 262 ff.; *Pitsela* 1997, p. 76 f.

deadline for the complaint begins with the notification of the dismissed application to the applicant (Article 286 Sec. 2 grPPC). Under this procedure the authority to set aside an arrest warrant or orders and instructions is always vested in the judge (investigating judge, criminal chamber of the Provincial Court or of the Higher Provincial Court in its capacity of so called deciding court, never the public prosecutor).

Following a written submission by the public prosecutor, the investigating judge him/herself may issue an order, which must state the reason: either a) replacing remand by orders and instructions (restrictive measures) and *vice versa* (in this latter case he/she will issue an arrest warrant); b) replace the orders and instructions by other more or less drastic ones. Both the public prosecutor and the accused may complain to the criminal chamber of the Provincial Court against the order of the investigating judge within ten days.[45]

No precise information can be given on the number of juveniles being held on remand.[46] The available statistical data refer to persons being held on remand in young offenders' institutions during the course of a year, in which, however, not only juveniles, but also young adults are being held.

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45 For the public prosecutor, this deadline begins with the enactment of the substitution order. For the accused person, it begins with the notification of the order. The complaint and the deadline for the complaint do not suspend the execution of the order (Article 286 Sec. 3 grPPC).

46 The United Nations' Committee on the Rights of the Child apprehensively manifests in its "concluding observations" in the initial Greek report that a large number of juveniles are held on remand due to misdemeanours, although according to Greek law detention pending trial is allowed to be imposed only when the committed act is punishable by law with deprivation of liberty for at least 10 years independently of the duration of the *in concreto* imposed sanctions (Article 282 Sec. 5 grPPC). Furthermore, the Committee expressed its concern on the fact that delays in judicial proceedings lead to long periods of pre-trial detention. That is why the Committee recommended the Greek government to ensure that detention, including detention awaiting trial, is imposed as a measure of last resort and after careful examination of the gravity of the offence and that stronger efforts should be made so that alternatives to detention can be available. This recommendation was also taken into account by the Greek Legislator (Law no. 3860/2010). Following regulations are introduced: Restrictive measures and pre-trial detention are imposed on juveniles aged over 15. Educational measures as alternatives to pre-trial detention are specific restrictive measures for juveniles. Pre-trial detention cannot be automatically ordered in case the accused juvenile has violated the restrictive measures imposed on him/her. The duration of the detention on remand may not exceed 6 months and, exceptionally, 9 months. Thus, pre-trial detention of juveniles aged over 15, is foreseen as a measure of last resort for the shortest appropriate period of time, restricted to the most serious crimes, in conformity with the provision of Article 37(b) of the Convention on the Rights of the Child.

Table 14: Prisoners in young offenders' institutions (annual intake)

Prisoners/Year	1980	1985	1990	1995	2000	2001	2005
Persons held on remand N/%	281 38.8	183 45.8	156 48.3	173 33.7	197 23.8	194 22.2	265 24.4
Prisoners N/%	443 61.2	217 54.2	167 51.7	341 66.3	629 76.2	679 77.8	820 75.6
Total N/%	**724** **100**	**400** **100**	**323** **100**	**514** **100**	**826** **100**	**873** **100**	**1,085** **100**

Source: Administration of Justice Statistics, Tables C:2 and C:11 (from 1998 C:10 and C:5) of the Correctional Statistics and author's own calculations.

An explicit determination of the maximum duration of remand in custody was introduced for the first time by Law no. 3860/2010. The duration of detention on remand may not exceed 6 months and, exceptionally, 9 months (Article 282 Sec. 5 grPPC). The number of persons awaiting trial in relation to the number of convicted prisoners, which has shown an enormous rise since 1990, remains relatively low (see *Table 14*). With regard to the duration of remand, figures are only available since 1998 and only in relation to the total number of persons being held on remand, differentiated by sex, but not by age groups. *Table 15* shows that periods of remand are becoming increasingly longer.

Table 15: Persons on remand (total) according to duration of remand (annual intake)

	1998	1999	2000	2001	2005
Duration of remand	**N** **%**	**N** **%**	**N** **%**	**N** **%**	**N** **%**
Up to 1 month	300 7.9	288 8.2	176 7.4	309 8.2	389 8.1
1-3 months	743 19.6	614 17.5	462 19.4	783 20.8	915 19.1
3-6 months	989 26.2	803 22.9	537 22.6	850 22.6	1,144 23.9
6-12 months	1,389 36.7	1,297 37.1	787 33.1	1,150 30.6	1,861 38.9
12-18 months	361 9.5	497 14.2	414 17.4	667 17.7	478 10.0
Total	**3,782** **100**	**3,499** **100**	**2,376** **100**	**3,759** **100**	**4,787** **100**

Source: Administration of Justice Statistics, Table C:10 of the Correctional Statistics and author's own calculations.

11. The educational institutions system and youth correctional system – Legal aspects and the number of young offenders subject to prison sanctions

11.1 Educational institutions

It is the responsibility of educational institutions to guarantee the upbringing, social support, schooling and vocational training of those minors who have committed breaches of the law or who are faced with difficulties of social adjustment in the sense that they live in the social environment of persons who commit criminal acts, whether habitually or as a career (see Article 17 Sec. 1 and 5 of the Law no. 2298/1995). Educational institutions are the responsibility of the Ministry of Justice (Article 2 of the Presidential Decree no. 36/2000 about the Organisation of the Ministry of Justice). Since educational institutions for male and female juveniles in the greater Athens area were abolished by presidential decree no. 180/1997, there is currently only one such institution for juvenile males in Greece, in the town of Volos (central Greece). The average age of the inmates in the institution is around 15-16 years. It is very rare that children (8-15 years) are committed to this institution. Nor, in practice, are minors who live in the social environment of persons who commit criminal acts,

whether habitually or as a career (Youth Welfare Law), sent to the educational institution. In practice, juveniles in general spend no more than one year in the educational institution.

11.2 Youth Correctional system

The legal basis for the execution of the sentence of detention in a young offenders' institution is to be found in the Correctional Code (Law no. 2776/1999, in force since 24 December, 1999), which regulates prison sentences and other custodial measures in general. The Greek legal system contains neither an independent Correctional Code regarding the execution of the sentence of detention in a young offenders' institution nor an independent Code regarding the execution of detention on remand. The juvenile correctional provisions are not included in a special chapter of the Correctional Code, but are to be found in separate chapters of the relevant provisions of the Greek Correctional Code. Special provisions are in place for young prisoners, e. g. regarding their accommodation, training, relaxation of custody such as visits, and disciplinary measures. Where no special regulation exists in relation to young prisoners, the general provisions of the Correctional Code apply to the extent that they are compatible with the meaning and purpose of the juvenile law provisions. Accommodation in an educational institution is not part of the correctional system.

According to the legal definition of the Correctional Code, "young prisoners" are persons between the ages of 13 and 21 (currently, however, the minimum age is 15). In young offenders' institutions educational and vocational training programmes shall be provided (Article 12 Sec. 2 grCC). Young adult prisoners may be moved to detention centres for adults when there are important reasons for doing so (Article 12 Sec. 3 grCC). Young offenders' institutions may hold young persons up to the age of 25, where this is deemed to be necessary to complete the education and training programmes in which they are taking part, where they show interest and their presence in the institution causes no problems for the common life there or for the proper functioning of the institution (Article 12 sec. 6 grCC).

Young prisoners live separately from adults exclusively in specially constructed institutions or sections of adult prisons (Article 12 Sec. 6 in conjunction with Article 19 Sec. 3 grCC). There are two independent institutions providing closed custody for young male prisoners in Greece, in Avlona Attikis and in the town of Volos (for foreigners). The third institution is a so called agrarian young offenders' institution in Kassaveteia, at which agricultural work is performed in the mornings. Finally, there was a small section (approx. 15 places) at the correctional institution in Thessaloniki (untill 2008). Since there are only a small number of young women who are convicted to detention in a young offenders' institution, there are no separate institutions available for female

young prisoners. Young female prisoners generally served their time in a separate section of the sole independent women's institution for closed detention in Korydallos near Athens (now in Elaiona of Thiva) and, less often, in a female section of the correctional institution for male prisoners in Thessaloniki. There are neither open nor half-open custody detention centres nor detention units for young prisoners, whether decentralised or nearer home.[47]

The basic education of young prisoners is obligatory (Article 35 Sec. 5 grCC). Young prisoners who have completed their basic education have the opportunity to continue this by means of leave for further training (Article 35 Sec. 6 grCC).

No obligation to work is prescribed either for adults or juveniles. Anyone who does perform work, however, can reduce his/her time spent in detention, for one working day counts towards two and a half days of the duration of detention. Similarly, participants in vocational or other training programmes can reduce their time spent in detention.

Correctional law makes provision for relatively generous leave arrangements (regular leave, leave for schooling and vocational training and continued training, special leave). Regular leave lasts from one to five or eight days. The total duration of regular leave may not exceed 45 days per year. Where detention in a young offenders' institution is imposed a young prisoner shall not be granted regular leave until he/she has actually served one third of his/her time in detention in a young offenders' institution, hence without any working or education days counting towards a reduction in his/her time (Article 55 Sec. 1 grCC), i. e. when he/she has been in detention in a young offenders' institution for at least two months. In addition to this, the general conditions must also have been met. No criminal proceedings may be pending against the prisoner. Moreover, there must be a favourable prognosis that there is no risk of any further offences while being on leave. Finally, there must be reasons to justify the expectation that there is no risk that the prisoner will abscond or that he/she will abuse his/her leave (Article 55 grCC). Regular leave may be granted under the condition that the juvenile is accompanied by the parents or guardians when leaving and returning to the institution (Article 56 Sec. 3 grCC).

The transfer of a young prisoner to so called "half-open" detention in a young offenders' institution is allowed when half the minimum period has been served (Article 60 Sec. 2 grCC), i. e. no earlier than after three months in the

47 A separate section in the adults' prison was organised for the first time in 1891 in Athens for minors under the age of 14 who could attend school education and programmes for the learning of a trade. The first prison for juveniles was created in 1896 in Athens and it consisted of two three-floor buildings with a total capacity of 300 cells. The first prison with agricultural working programmes for convicted persons aged 16 to 21 was organised in 1925 in Kassabeteia at Volos; it is still in operation today. Nowadays, a small number of juvenile prisoners perform agricultural work.

institution. As already mentioned above, the concept of half-open detention in a young offenders' institution has not yet been implemented in practice.

Current correctional law makes no provision for special disciplinary measures for young prisoners. The severest disciplinary measure, *viz.* solitary confinement for up to ten days, may only be imposed on juveniles where special circumstances arise (Article 69 Sec. 5 grCC).

When juveniles are transferred, the use of handcuffs should, as far as possible, be avoided (Article 77 Sec. 1 grCC).[48]

12. The educational institution system and youth correctional system – Development of treatment and training programmes and educational measures in practice

12.1 Educational institutions

Schooling is given in the sole educational institution for juveniles males. The educational institution offers programmes aimed at incorporating them into the "world of work", as well as leisure time activities. Finally, advisory programmes, computer science courses and cultural activities projects are offered.

12.2 Youth correctional system

Chapter 5 of the Greek Correctional Code is devoted to training programmes and prisoners' leisure time. In accordance with Article 34 Sec. 1 grCC all prisoners have the right to training, sports, cultural activities and creative occupation within the institution. The involvement of prisoners in the above activities, their participation and co-operation in appropriate programmes, in particular those concerned with vocational and further education, is viewed favourably with regard to the granting of relaxations of custody.

Article 35 grCC regulates schooling and vocational training. The training of prisoners aims to allow them to acquire or complete their schooling at all stages (school attendance at a training institution at the primary, secondary and tertiary level) and their vocational training. For this purpose, and where possible, the institution will include an elementary school. The prison council organises programmes for vocational training, apprenticeships or qualifications. Moreover, special measures are employed for the training of foreign prisoners, at least to the extent that this is feasible in the institution in question. Where a prisoner is being transferred or when a disciplinary punishment is imposed, training is, as far as possible, not deferred. If disciplinary detention is imposed while the

48 See *Pitsela* 2003.

prisoner in question is undergoing training, detention may be served during holidays, including public holidays.

Every prisoner has the right to keep himself informed of current affairs through newspapers, magazines and radio and television broadcasts (Article 37 Sec. 1 grCC). Active participation by prisoners in entertainment programmes (e. g. artistic individual or group performances, the organising of ensembles, choirs, exhibitions of fine arts or performing arts) and, in a general manner, creative leisure time activities, is given a favourable assessment when it comes to the granting of relaxations of custody or privileges (Article 38 grCC).

Chapter 6 of the Greek Correctional Code is devoted to prisoners' work and employment. Under Article 40 grCC those prisoners who so wish are included in regular programmes of vocational or further education (Sec. 4). Finally, prisoners are employed in unskilled work or services for the detention centres, young offenders' institutions or other public buildings or places; especially work involving the cleaning of buildings, kitchens, laundry, cleaning or transport of food, garden work, etc. Inclusion in such work is for a maximum duration of three months, with the possibility for extension (Sec. 6). Article 41 Sec. 4 grCC stipulates that prisoners wishing to perform unskilled work are to be entered on a list and then called upon to perform such work in chronological order after the date of their applications. The ignoring by the authorities of a chronologically earlier application must be supported by special reasons.

In Greece there are good-time regulations for prisoners who work or take part in training measures. The practice of crediting working days is a tool in the individualisation of the sanction and is intended to serve the offender's rehabilitation[49]. Article 46 grCC regulates the conditions and method of crediting working or training days towards the time to be served (including detention in a young offenders' institution). Prisoners who perform any kind of work or who participate in vocational training programmes or programmes aimed at allowing them to obtain occupational qualifications, may - on a recommendation of the prisoners' working committee and by means of a decision by the competent judicial authority (the public prosecutor) - have the time worked or studied credited to their total period of detention. For persons being held on remand, days credited are taken into account if they are convicted and in this case with effect from the date of enactment of the court decision of first instance (Sec. 1). Important innovations in relation to the good-time regulations are both an extension of the credit system to persons being held on remand and also to those persons engaged in vocational training programmes or programmes intended to allow them to obtain occupational qualifications. Each

49 The institution of the Greek correctional system regarding the favourable crediting of working and training days towards the time to be served is characterised as an institution "of high interest", see *Frangoulis* 1994, p. 30 f.; *Panoussis* 1989, p. 107 ff.

day spent on a vocational training programme or programme aimed at vocational qualifications, with a minimum duration of three months, can be equated to one working day if the prisoner has successfully completed this programme (Article 35 Sec. 8 in conjunction with Article 46 grCC).

The competent judicial authority may refuse (stating the reasons), either wholly or in part, to allow days worked during the last three months to count towards the time to be served, if:

- during the corresponding period the prisoner has been punished with disciplinary measures pursuant to Article 69, Sec. 1 and 2 grCC.
- earlier decisions to allow working days to count towards the time to be served made during the last six months have been revoked because the prisoner has been punished with disciplinary measures.

This decision is appealable within ten days of having been served, the appeal being made to the court responsible for the execution of sentences (Article 46 Sec. 3 grCC). Thus, the crediting of working or training days and, as a result, the shortening of the punishment, may be granted without the court's decision. The prisoner is, however, entitled to a direct appeal against the decision of the judicial authority.

In summary, it may be said that both work and training in correctional institutions are rewarded, with a resulting mitigation of the punishments imposed. The regulations stipulate that, for each working day, two and a half, two, one and three quarters and one and a half days' imprisonment are credited. Furthermore, each day of schooling, training or further education is credited as two or one and three quarter days.[50] Working days or training days, for which credit has been granted, count as having been served. The remission of punishment achieved in this way is taken into account when regular leave is

50 A Presidential Decree, which was enacted after a proposal made by the Minister of Justice, sets out the details regarding the favourable crediting of working or training days towards the time to be served. This favourable crediting must not exceed the maximum limit of two days to be served for each working or training day according to Article 35 Sec. 8 grCC. On special or exceptional occasions, the exceeding of the aforementioned maximum limit can be allowed (Article 46 Sec. 2 grCC). Presidential Decree 107 of 27.4/16.5.2001 regulates in detail the favourable crediting of labour or training or studies towards the period to be served in detention. Presidential Decree 342 of 7.12.2000 increased the maximum limit of favourable crediting of working days in an agricultural or ranch unit to one and a half days of detention in citation of "the necessity to reinforce the function of agricultural prisons". The same regulation is applied for all forms of work of a technical nature that are performed in a workshop or place of work in an agricultural prison or in an agricultural young offenders' institution. Thus, each working day in the above units is credited as two and a half days. Other working days, such as working in the kitchen or construction work, count as two days of served time. Furthermore, other similar auxiliary activities are counted as 1.75 days or 1.5 days of served detention time.

granted and, in particular, when a decision is made regarding the approval of conditional release. Time credited, however, is cancelled for misconduct (for instance disciplinary offences). One of the major problems for the Greek correctional system is, however, the absence of an adequate number of training and work places.[51]

13. Current debates about reform and challenges to the juvenile justice system

The draft law on "Units for the Care of Youngsters"[52], which dates back to the year 1984, and which provides for diagnostic and therapy centres, open and half-open meeting centres and half-open units of social rehabilitation as educational measures, is still at the revision stage. It refers to persons at risk, drug addicts, offenders and persons with psychological and mental problems. Because of the vagueness in the application of the facts necessitating intervention (e. g. "delinquency", "difficulties in social adjustment", "deviant behaviour" or "a serious and immediate risk of delinquency") the draft law has encountered some theoretical criticism. In light of the necessary personnel and material resources which need to be provided for translating such legal rules into practice, it is unlikely that the draft law will ever be accepted. Recently, the subject of more clearly (or entirely) determining the role of the public prosecutor's office in the case of unaccompanied children has been added. In addition, the provisions of the draft law relating to the responsibilities of the Juvenile Court Aid are under revision.

Finally, both the Penal Code and the Code of Penal Procedure are currently awaiting thoroughgoing reform. In November 2005 the Ministry of Justice set up two working parties for the reform of the penal and penal procedural law. Work on the draft laws is well under way.

14. Summary and outlook

The most important amendments brought about by the Law on the "Reform of Juvenile Penal Legislation" (Law no. 3189/2003) and the Law on "Improvements of Penal Legislation regarding Juvenile Offenders, Prevention of

51 On the difficulties of the implementation of training courses in prisons, see *Paraskevopoulos* 1995, p. E23-25. On the institutions that offer vocational training programmes for juvenile prisoners in Greece, see *European Offender Employment Group* 1995. About the education in Greek prisons, see *Papadopoulou/Moisiadis/ Pitsela* 2010, p. 683-722.

52 See in more detail *Spinellis/Tsitsoura* 2006, p. 321 ff.

and Response to Juvenile Victimization and Juvenile Delinquency" (Law no. 3860/2010) can be summarized as follows:

- The lower applicability limit of the juvenile criminal law system of sanctions was raised from the age of 7 to the age of 8, and the upper limit from 17 to 18 years of age.
- Persons aged between 8 and 15 years are absolutely not criminally liable. This is an improvement of the legal situation of this age group in that these children can no longer be subject to detention in a young offenders' institution or to remand/pre-trial detention. The age of relative criminal responsibility as well as the legal age for which punishment can be imposed starts at the age of 15. Normal criminal responsibility begins at the age of 18. This development is a clear improvement of the situation of this age group, which can now be subject to the special provisions of the juvenile criminal law. The increase of the age limits of criminal majority from 17 to 18 allows for the harmonisation with the legal age of majority according to civil law (s. Article 127 grCivil Law) as well as with the provisions of the Convention on the Rights of the Child and other international standards of the juvenile criminal justice system (e. g. the so-called Beijing Rules of 1985 and the Havana Rules of 1990).[53]
- The catalogue of the educational measures has been enhanced. The Juvenile Court now has a graduated catalogue of educational measures at its disposal. The significance of educational measures has been promoted through the reform and the role of these measures has been upgraded. In particular, victim-offender mediation, the compensation of the victim (reparation), the personal apology of the offender to the victim, the participation in road safety training programmes, the performance of community work as well as the participation in school and vocational and in social and psychological training programmes have been included in the catalogue of educational measures.
- There is the possibility for the Juvenile Court to exceptionally impose two or more non-custodial educational measures cumulatively.
- Non-custodial therapeutic treatment has been introduced.

53 It should be particularly emphasized that in the Introduction Report of the draft law "Reform of Juvenile Penal Legislation" (2003) not only the binding instruments of the United Nations (UN-Convention on the Rights of the Child, ratification by Law no. 2101/1992) and of the Council of Europe (European Convention on the exercise of children rights, ratification by Law no. 2501/1997) were taken into account, but also the so-called "soft law" was taken into consideration (for example, the Beijing Rules, the Riyadh Guidelines, the Havanna Rules, the Recommendations of the Council of Europe about "Social Responses to Juvenile Delinquency", "The Role of Early Psychosocial Intervention in the Prevention of Criminality").

- The indefinite duration of educational measures has been significantly limited. On the one hand, the maximum duration of educational measures is now defined by the court's judgement. On the other hand, the necessity or expediency of the imposed educational or therapeutic measures is re-examined by the court no later than one year after its initial imposition.
- Educational or therapeutic measures end ipso jure as soon as the minor turns 18 (previously this had occurred at the age of 21). Exceptionally, educational or therapeutic measures may be continued, but not beyond the age of 21.
- The replacement or revoke of educational measures by therapeutic measures can be ordered by the court after having requested and consulted a report drafted by a group of experts.
- Indefinite detention in a young offenders' institution has been abolished and detention for a definite term has been introduced.
- Detention in a young offenders' institution may be imposed only on minors over the age of 15 and when particularly serious offences have been committed which would have been defined as felonies in the case of adults and if the crimes committed involve elements of violence or are committed professionally or persistently. Furthermore, the judgment of the court imposing detention in a young offenders' institution should include a special and substantiated justification of the grounds on which the educational or therapeutic measures are deemed insufficient in the specific case.
- There is a recently introduced possibility for a higher judicial authority to examine determinate detention in a young offenders' institution regardless of its duration: the sentence can now always be appealed. According to the previous legal provisions, a sentence of up to one year had never been appealable.
- The suspension of the rest of a sentence to detention in a young offenders' institution is normally granted after having served half of the sentence. Such suspension may be also granted prior to this point where important reasons exist and where, in actual fact (i. e. without any favourable allowance for days worked in detention) at least one third of the sentence has been served.
- The abatement of Juvenile Court proceedings has been legally established (procedural subsidiarity principle as a limitation of the principle of legality). The abatement of juvenile court proceedings according to the expediency principle lies within the discretionary power of the public prosecutor (refraining from prosecution).
- The juvenile judge must now have the rank of the Presiding Judge of the Court of First Instance.

In summary, one can conclude that through the reform of the Law on Juvenile Justice the following achievements have been made: the need for educational treatment has been stressed; the protection of the victim has been reinforced (offender-victim mediation, reparation); non-custodial therapeutic treatment has been introduced; deprivation of liberty constitutes a measure of last resort; the public prosecutor's role has been reinforced through the introduction of diversion (refraining from prosecution); the juveniles' legal position has been powerfully reinforced; the juvenile judges' professional position has been improved and the set of tasks given to the Juvenile Court Aid has been enhanced. The Convention on the Rights of the Child actually functioned as an impetus for necessary reforms in the field of juvenile criminal law. This became apparent through the introduction of complete criminal responsibility at the age of 18, the extension of the catalogue of educational measures, the abolition of indefinite detention in a young offenders' institution, the introduction of the possibility to appeal against the sentence of detention in a young offenders' institution independently of its extent and the introduction of diversion as a possibility to settle a criminal law conflict. The mass media have made positive comments on the reform law. The same goes for social scientists as well as juvenile judges, juvenile public prosecutors and representatives of the Juvenile Court Aid, who have pointed out the difficulties in the implementation of the law (lack of appropriate, well-educated personnel, unavailable infrastructure) right after its enactment.

The fact that the Juvenile Courts and the juvenile public prosecutor rarely make use of these recently introduced possibilities is concerning. The public prosecutor does not refrain from prosecuting minors to an extent that merits any mention, and the court too rarely applies the recently introduced welfare-based measures. Furthermore, the Juvenile Court Aid remains quite understaffed at a time when new groups of offenders are coming into consideration (young migrants, descendants of Greek origin from the countries of the former Soviet Union). In particular, there is a lack of establishing further and advanced training courses for Juvenile Court Aid officials with regard to the implementation of new educational measures.[54]

In the beginning of this new century, the child's general legal position has been reinforced in the Greek legal order: the National Observatory of Children's Rights has been established, whose main mission is to monitor the compliance with, and promotion of the implementation of the UN Convention on the Rights of the Child (s. Article 4 of the Law no. 2909/2001). In addition, Greece has ratified by Law no. 3080/2002, the "Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict", and the

54 As regards the conclusions and recommendations on the Greek system of juvenile criminal law, see *Spinellis/Tsitsoura* 2006, p. 312 f.

"Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography" (see Law no. 3625/2007). Moreover, the protection of victimized children has been enhanced through Law no. 3064/2002 "on combating human trafficking, crimes against sexual freedom, child pornography and in general financial exploitation of sexual life, and providing assistance to the victims of such acts". Law no. 3094/2003 has established the independent administrative authority of the "Children's Ombudsman", a department of the Greek Ombudsman whose regulatory mission is to protect and promote the rights of minors (Article 3 Sec. 1).[55] Law no. 3500/2006 "on combating domestic violence" provides for the legal protection of children against acts of domestic violence committed in their presence. Lastly, Greece has ratified, by means of Law no. 3727/2008 the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

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55 For further information see the website: www.synigoros.gr.

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Hungary

Erika Váradi-Csema

Preliminary remarks

Hungary is a small country situated in the centre of Europe with about 10,064,000 citizens[1] and with a history that has changed rapidly. In the last decades important political, economic and social changes have taken place in Hungary. These affected, inter alia, the entire legal system and its institutions.

The Hungarian Constitution of 1949[2] defined Hungary as a democratic country. However as of 1949, especially up until the end of the 1960s, Hungary had to sustain several arduous periods. These periods (e. g. the dark years of the "*Rákosi-regime*", the retaliation after the revolution in 1956) were characterized by unlawfulness. The changes in 1989 determined another new direction in politics. These changes were not without any precedents: The slow degradation of the current political system had already begun earlier. After the political changes in Hungary, the previous Constitution with amendments from 1989[3] entered into force as a new Constitution. The constitutional definition of the institution of the "constitutional state" involves the principle of the separation of powers. As one of the first steps towards achieving this, the Constitutional Court was established.

By the establishment and the maintenance of the "constitutional state" the Constitutional Court had and still has an important role to play, because it describes the content and determines the frameworks of the "constitutional

1 Men: 4,778,000; Women: 5,286,000; Foreigners: 54,430; 7.47% unemployed; GDP: 23,752,721 Million Forint.

2 Act XX of 1949 (1949. évi XX. tv.).

3 E. g.: Act XXXI of 1989 (1989. évi XXXI. tv.).

state" through its judgments.[4] The principle of the "constitutional state" implies due process of law from the formal point of view, and justice (fairness) from the material point of view.

1. Historical development and overview of the current juvenile justice legislation

Independent Hungarian jurisdiction[5] began in 1878, with the first Hungarian Criminal Code, the so called *Csemegi Code*.[6] However, the *Csemegi Code* paid little attention to juvenile offenders, for a number of reasons. First: at that time registered juvenile crime accounted for only 1.6% of the total crime rate. Therefore juvenile delinquency was not regarded as an essential problem. Second: the *Csemegi Code* bore the characteristics of the classical criminal legal school that focused on the criminal act itself. Young delinquents aged between 12 and 16 were regarded as "juveniles". To sentence juveniles, two conditions had to be fulfilled: the first is legal responsibility, and the second is "capacity", implying the ability to understand the wrongfulness of the committed act and also the ability of acting according to this discernment. The *Csemegi Code* adopted almost the same sanctions for juveniles as for adults, only slightly mitigated.

The view of criminal legal schools changed at the turn of the 19th to the 20th century, attributing juvenile perpetrators increased attention. The new philosophy was followed by new legislation: Act XXXVI of 1908 was the first amendment to the *Csemegi Code*. The scope of the Act changed: Young delinquents aged 12 to 18 years could be sentenced if their intellectual and moral maturity was proven. The new Act showed elements of the welfare-model. The objective of criminal intervention was to support and help the juvenile. Every sanction had to be focused on the individual situation of the young offender. The interest of the juvenile and his/her personal circumstances had priority over the severity of the crime. In 1913, Act VII on an independent court system for juveniles entered into force. These two Acts together established an independent and autonomous juvenile justice system in Hungary.

After World War II a new idea appeared in Hungary. The regulations from 1951 and 1954 changed the Hungarian juvenile justice system.[7] Contrary to the previous system, the juvenile court was integrated into the general criminal court system, and the support and help of the juvenile was no longer the primary objective of the law. The age limit remained the same (between 12 and 18), but

4 E. g.: 9/1992. (30.I.) AB.h., 10/1992. (25.II.) AB.h., 11/1992. (5.III.) AB.h.

5 For the history see *Csemáné Váradi/Lévay* 2004, p. 302-327.

6 Act V of 1878 (1878. évi V. tv.).

7 Law-Decree 34 of 1951 ("Ftvr"-1951. évi 34. tvr.).

the intellectual and moral maturity of the juvenile was no longer a condition for punishment. The new juvenile justice system aimed at educating the young offender, but in reality the measures had the character of punishment. In the case of offenders between 15 and 18, the court had to decide primarily about the punishment. "Correctional" (educational) measures could be inflicted as supplementary measures.

In 1961 a second Hungarian Criminal Code[8] was adopted. It was the first socialist Criminal Code in Hungary. This Code put an end to the relative independence of the juvenile justice system: the Act of 1961 reduced its importance, "degrading" it to the level of a Chapter of the Act. Furthermore, the Act dismissed the existence of independent juvenile courts. Juvenile criminal behaviour was henceforward dealt with by the general criminal courts. Nevertheless, some special rules defined the scope and sanctions of juvenile justice. It covered the ages 14 to 18, but intellectual and moral maturity of the juvenile was still not a condition for culpability. Criminal justice interventions were to be seen as "real" justice, where the intervention is an objective reaction to the criminal act and where the criminal act and the severity and degree of guilt are the basis for subsequent sanctions. Sanctions for juveniles should imply "corrective" elements with regard to their later lives.

The Criminal Code (CC) of 1978 did not change the former Act V of 1961 to a great extent. There was only one important difference: measures that were applicable to juveniles were to be given priority over punishment. ("108. § (2): A punishment shall be inflicted when the application of a measure is not expedient").

Since 1978 the CC has been changed by a lot of amendments. The most important amendment to the Criminal Code occured in 1995 (Act XLI of 1995). The changes were based on the Beijing Rules and the 1989 UN Convention on the Rights of the Child.

At the beginning of the 21st century some other acts (e. g. Act of Mediation, Act of Support for the Victim) entered into force, which have had some effects on the juvenile justice system. They were inter alia caused by the accession to the Council of Europe and the European Union and the consequential obligation to change the legal system with regards to international human rights standards. Among others Hungary had to implement the decision (2001/220/IB) of 15 March 2001 about the role of victims in criminal proceedings. Therefore, the CC has become more differentiated in this respect and followed a more humane approach.

The current juvenile justice system is part of the Hungarian criminal justice system (Chapter VII of the CC and 21st Chapter of the Criminal Procedure Act, CPA). The general laws contain special rules and form special institutions that differ from the general provisions for adults.

8 Act V of 1961 (1961. évi V. tv.).

The concept of juvenile age today is as follows: "A juvenile is a person who has passed the age of fourteen years, but not the age of eighteen years, when committing the crime" (Section 107 § (1) CC). Criminal responsibility starts at the beginning of the day following the 14th birthday.

Legal responsibility is the only condition for sentencing juveniles. The capacity or the intellectual and moral maturity of the juvenile is not relevant. The age under 14 forms an obstacle to justice and punishment. The case will be dealt with by child welfare institutions (Child Protection Act)[9]. The category of "young adults" does not exist in the CC (particularities for this age group are described below, see *Section 8*).

The aim of the sanctions or measures[10] that are applicable to juveniles is primarily to influence their development and to ensure that they become useful members of society.[11] The first step is special prevention, whereas the general rules for adults declare general prevention. To achieve this "special treatment", the Code provides special measures for juvenile delinquents. The punishment has to be proportionate to the seriousness of the committed crime, while taking into consideration the act and the offender's personal circumstances.

In this context, a relatively new organisation in Hungary should be stressed: the Office of Justice. Probation officers and mediators belong to this office. This institution is independent and subordinated to the Ministry of Justice. It acts only if the judge or prosecutor requests legal assistance, but in all juvenile justice cases the participation of the Office of Justice is compulsory (e. g. preparing "environmental scanning", i. e. the exploration of the social conditions of the juvenile).

2. Trends in reported delinquency of children, juveniles and young adults

The latest available statistical data about criminality are from 2007.[12] Therefore we are able to comment on the crime situation up until 2007.[13]

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9 "Act XXXI (1997) on the Protection of Children and Guardianship Administration."

10 Section 108 § (1) CC.

11 The general aim of punishment is the prevention – in the interest of the protection of society – of either the perpetrator or any other person from committing an act of crime (Section 37 CC).

12 Due to major law reforms concerning juvenile offenders, legislation is considered in this article until august 2009.

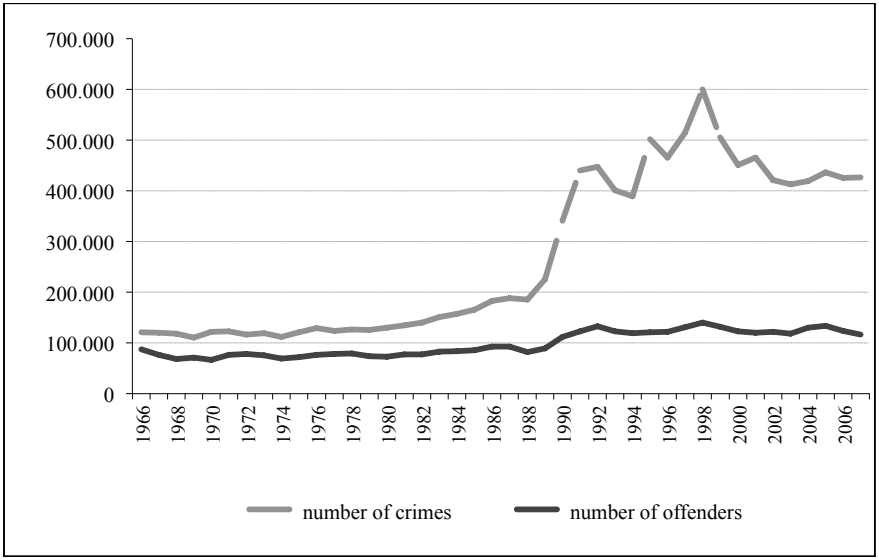
13 The data source is ERÜBS (Egységes Rendőrségi Ügyészségi Bűnügyi Statisztikai Rendszer = the Hungarian Uniform Criminal Statistical System of Police and Prosecutors). The data are published in different studies, books, home-pages, etc. E.g.: Tájékoztató a bűnözésről. (Kiadja az IRM Rendészeti Felügyeleti és Ellenőrzési Főosztály Statisztikai

2.1 General trends in reported delinquency

The criminal situation of a country has a great influence on its jurisdiction. The new rules and amendments – besides the special regulations for juveniles – provide guidelines for dealing with young offenders. In order to understand the main direction, it is necessary to have a comprehensive look at the general situation of registered crime in Hungary.

To represent the overall situation in Hungary, *Figure 1* contains data since 1965, the year that marked the beginning of the Hungarian criminal statistical data service (the Hungarian Uniform Criminal Statistical System of Police and Prosecutors). The figure shows that the rate of registered crime was increasing since 1980, with a significant rise more or less from 1989-1998.

Figure 1: Registered crimes and offenders (absolute numbers)



Source: ERÜBS (Hungarian Uniform Criminal Statistical System of Police and Prosecutors).

Since 1998 we can observe a continuous decrease, but from 2003 the number of crimes began to increase again slightly. The number of offenders was likewise

Osztály, valamint a Legfőbb Ügyészség Számítástechnika-alkalmazási és Információs Osztály); annual publications.

increasing in this period. The number of unsolved crimes is generally very high. For instance in 1998 the perpetrators of 268,258 crimes (45%) could not be found.

The rates for the crimes and offenders per 100,000 inhabitants likewise increased. In 2007 there were 4,241 crimes per 100,000 inhabitants and 1,154 offenders per 100,000 inhabitants. Among all crimes, the crimes against property play the most important role (2007: 64.7%), followed by crimes against public security (2007: 17.9%).

The most "common" offence is theft (e. g.: 173,869 cases in 2007). The damage caused by the increase in crimes against property is a serious problem. In 2007, damages totalling 117.1 billion Hungarian Forint were caused by property offences. Yet, only a very small share of this figure was compensated (7.2 billion Hungarian forint = 6.1%).

Among the crimes against public security, drug-abuse was not alarmingly high on average (4,663 cases in 2007), but its rate has seen increases over the last five years.

The rate of violent crimes was 6.9% in 2007. There has not been much difference or change in the number of these crimes over the last few years. For instance, the total number of robberies has slightly decreased since 2001, the year with the highest number of robbery cases (2001: 3,319; 2007: 3,119 cases).

The number of foreign offenders (without Hungarian citizenship) was 3,565 in 2007; it decreased by 23.6% in comparison to 2005.

There is a difference between the individual counties of Hungary in terms of offenders and of the rate of the number of crimes. The rate of crimes per 100,000 inhabitants was the highest in Csongrád (4,477), Nógrád (4,470) and Baranya (4,346). The rate of offenders per 100,000 was the highest in Szabolcs-Szatmár-Bereg (1,605), Borsod-Abaúj-Zemplén (1,476) and Jász-Nagykun-Szolnok (1,353) in 2007. These data reflect that the number of offenders is highest in the North-Eastern part of Hungary.

2.2 Child- and juvenile criminality[14]

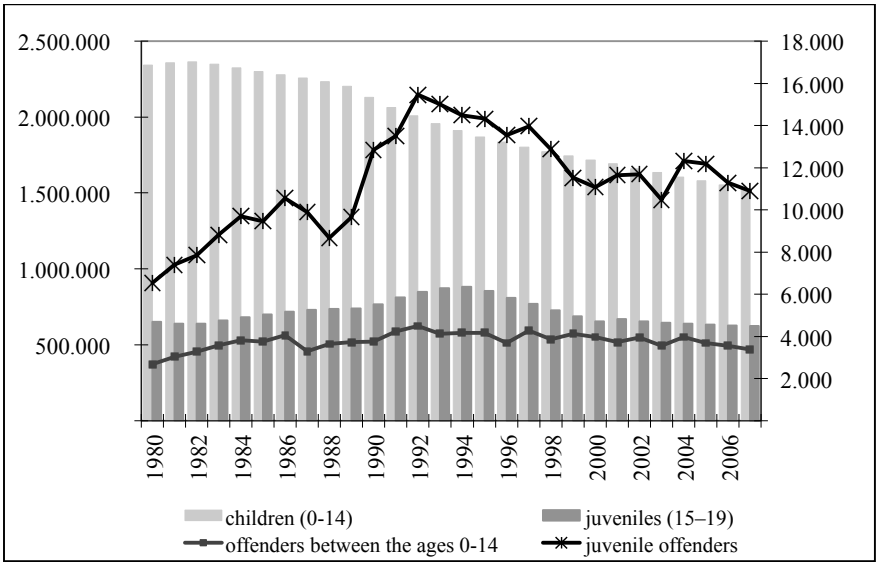
Concerning juvenile delinquency, it is very important to take into account that the number of people in the overall population belonging to the age-group in question has been continuously decreasing. Accordingly, the absolute number of child and juvenile offenders has decreased as well, whereas the rate of child and

14 All data about of child- and juvenile criminality are published with the help of ERÜBS (The Hungarian Uniform Criminal Statistical system of Police and Prosecutors). E. g. Tájékoztató a gyermekkorúak és fiatalkorúak bűnözésével összefüggő egyes kérdésekről. Legfőbb Ügyészség Számítástechnika-alkalmazási és Információs Főosztály, Budapest (yearly publications); Népességszám, korstruktúra, bűnözés, IM Kodifikációs, Elemző és Statisztikai Főosztály, Budapest, 2000; A bűnözés és jogkövetkezményei 1-2, IM Kodifikációs, Elemző és Statisztikai Főosztály, Bp. 2000; *Csemáné Váradi* 2006, p. 525-542.

juvenile offenders per 100,000 inhabitants has increased since 1989 (see *Table 3* under *Section 6* below).

In 2007, 0.2% of all children (under the age of 14) were registered as offenders.[15] The number of juvenile offenders on the basis of the juvenile population did not change much in the last period. 2.2% of the juvenile population were registered for crimes in 2007.

Figure 2: The absolute numbers of children and juveniles in the population and of all registered young offenders



Source: ERÜBS (Hungarian Uniform Criminal Statistical System of Police and Prosecutors) and KSH (Hungarian Central Statistical Office).

The largest share of minor offenders comes from the eastern part of Hungary: from Borsod-Abaúj-Zemplén 13%, Jász-Nagykun-Szolnok 9.9%, and from Hajdú-Bihar 8.6% in the year 2007.

The structure of criminality of children and juveniles is very similar. For example:

- the largest share of crimes are crimes against property; the rate of this form of offending compared to the total number of crimes committed by children has been decreasing; the most popular offences are theft and

15 Based on the child population, Data source: KSH (Hungarian Central Statistical Office).

burglary, but among juveniles car theft and the arbitrary seizure of a vehicle also have a role to play;
- the rate of violent crimes compared to the total number of registered crimes committed by children is increasing; the percentages of robberies, batteries and cases of "rowdiness" are significant as well.

The principal characteristics of the child-offenders (between 0 and 14) are the following:[16]
- approximately 85-90% of the offenders are boys;
- a significant part of these boys is endangered by their own detrimental social situation;
- almost 75% of the offenders live in full families; the parents work as ancillary staff, unskilled workers or skilled workers, but most of these parents are unemployed.

We can describe the typical Hungarian juvenile offender as follows:
- the majority of the offenders are boys;
- crime commission usually occurs after the age of 17;
- most of the juveniles have completed 5-8 classes of elementary school. Students start the 8-class elementary school at the age of six in Hungary, but 18-25% of juvenile offenders between 14 and 18 were still learning at elementary schools in the period from 1980 to 2007. The rate of unemployed or (financially) dependent juvenile offenders decreased during this time (from 30% to 14%). In 2007, 45.5% of the young offenders had studied at trade schools, 15% at secondary schools;
- a significant share of the young offenders are endangered by their own detrimental social situation;
- the majority of these offenders live in whole families; their parents work as ancillary staff, unskilled workers or skilled workers, but a relevant ratio of these parents is unemployed or pensioners;
- among the subjective causes for offending, the intention of attaining money is first and foremost. Aggression comes second, wrong estimations about the elements of the offence are in third and risk and adventure seeking is in fourth place. Among the objective causes, the bad influence of peer-groups ranks in first place, followed by temporary financial problems, low income and family-problems.

16 *Csemáné Váradi* 2006 with further references.

2.3 The causes of criminality[17]

Crime is a complex phenomenon which is influenced by numerous factors and conditions. On a macro-structural level, the current social and economic situation of Hungarian society influences criminality to a large extent. At the end of the 1980s and at the beginning of the 1990s there were enormous social, political and economic changes in Hungarian society. The new period brought sometimes tragic changes for many people. The social structure in Hungary shows the form of a pyramid: Only one to two percent of the population is at the top of the pyramid, which means that they are very wealthy. Below them, there is a section of 38% who could make use of the new opportunities and live in relatively good circumstances. The rest of society however faces major difficulties and their situation is insecure.[18] The rate of delinquents who are underprivileged is higher than the rate in the higher social stratums of society.[19] Most of the minor and juvenile delinquents have hard lives or bad family backgrounds. Parallel to these tendencies, the traditional norms like work, knowledge and loyalty came into crisis, and money and success have become the standard of value. The role of education is very significant in the process of socialization. Considering that students come from different social classes and have different possibilities and financial conditions, this is the basis of many problems, which cannot be solved by the Hungarian school system alone.[20] The youths' situation can drive them into criminality. According to the opinion of experts[21] young people have special characteristics which increase the risk of becoming criminals (e. g. superficial personal relationships, the lack of critical abilities and often strong dependence from older friends or gang-members).

The political and economic changes in 1989 gave rise to difficulties for the majority of the population. Great differences arose between the social classes. According to the commentary of the Recommendation (2003) 20 concerning "New ways of dealing with juvenile delinquency and the role of juvenile justice", these negative processes can be observed all over Central and Eastern Europe.[22]

Data on the lives and well-being of children and adolescents in the economically advanced nations were published by the UNICEF Innocenti

17 *Csemáné Váradi* 2006, p. 525-542; *Csemáné Váradi* 2001, p. 55-91.

18 *Ferge* 2000, p. 3-17.

19 *Huszár* 1984, p. 11-27.

20 *Münnich/Vágh* 1989, p. 389.

21 *Kósa-Szilárd* 1989, p. 46.

22 See *CoE* 2003 and *EESC* 2006.

Research Centre in 2007. It shows Hungary's poor position in the ranking of the rich countries (number 19 out of 21 countries).[23]

2.4 Unrecorded criminality

A statistical database for unrecorded criminality, like the National Crime Victimization Survey (NCVS) of the USA, does not exist in Hungary. Some research has been conducted on a smaller scale in order to "illuminate" the dark figure of crime.[24]

In 2005, 2,200 students between the ages of 13 and 15 were surveyed about their lifestyle. The aim of this international research project[25] was to summarize information about youth criminality and the causes of offending.

As our earlier experience had already indicated, criminal acts committed by juveniles are predominantly directed against property and are typically less severe or dangerous for society. Juveniles most often commit situational thefts which cause only minor damages. As far as crimes against property are concerned, the number of female perpetrators has been continuously increasing. The juveniles "work" in groups that offer them a feeling of community and security.

Among violent criminal acts, there is great number of fights committed by groups. The significance test shows that doing harm and other violent crimes are closely related: 50% of those who have caused harm had already taken part in group fights and 38% of them had already had weapons.

Although a lot of adolescents had shown "anti-social behaviour" in their childhood (e. g. truancy, small thefts, fighting, etc.), most of them grew out of this behaviour. Yet, there are some exceptions for the above mentioned cases: e. g. those minors who started taking drugs in their childhood. Generally their (anti-social) behaviour is carried over into adulthood.

The research reveals that there is more than one risk factor among the minors surveyed. The lack of a protecting family or a stable circle of pro-social friends often results in deviance. Another reason could be the opportunity structure which facilitates offending. In the majority of cases, the interviewed offenders showed only one risk-factor (61%). 17.5% of the interviewed juveniles had two risk-factors, while only 1.5% exhibited three risk-factors. Juveniles in general tend to spend less time with their families. Even if they are at home, they often spend their time isolated watching TV or in front of the computer (three or more hours per day). Other juveniles spend three or more hours per day with their peers. Those spending their time in front of a monitor are less exposed and prone to becoming involved in violent offending. Those

23 UNICEF 2007, p. 21.

24 *Virágh* 2005.

25 *Kerezsi/Parti* 2008.

who "go out" gradually break away from the control of their parents and are more and more subjected to the influence of deviant peers. It is rather worrying that the acceptance of violence is especially high among the surveyed juveniles.

For the most part offences remain undetected, and even if they are uncovered, it is usually not the police, but rather a "civil" adult (a teacher, a relative, a father of a friend, etc.) who becomes aware the offence. The danger of being detected by private persons is therefore greater than being detected by the police or the State. The low chances of getting caught and being subsequently punished are due both to the low degree of damage that the offences generally cause and to the leniency of society in reporting such offences. Surprisingly, teachers only rarely become aware of criminal acts (only 7%) although they meet their pupils every day. The lack of punishment could be seen to result in an encouragement for the juveniles to continuously re-offend.

Although the area of Hungary is only 93,000 square kilometres, the social circumstances of juveniles living in the eastern and western part differ significantly. This could explain the differences in their crime rates indicated by the official criminal statistical data (see above).[26]

3. The sanctions system: Types of informal and formal interventions

3.1 Informal interventions

For juvenile offenders, two institutions of informal intervention play an important role: the postponement of indictment and mediation.

There are three possibilities for a postponement of the indictment (diversion) in the CPA.

The prosecutor must postpone the indictment for one year if the proceeding was suspended in the case of drug addiction, and the drug abuser provides medical proof of his/her participation in special treatment or training (§ 283 CC, § 222 (2) CPA). If this training is successful, the case will be dismissed. In case the offender had omitted to pay alimony the prosecutor can delay indictment for a term of one year if doing so would result in the alimony being paid.

In both cases, the prosecutor can impose certain rules of conduct, some of them containing restorative elements (e. g. the juvenile has to compensate the the victim etc., § 225 (2), (3) CPA).

The prosecutor furthermore can dismiss a case if the following criteria are fulfilled:

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26 It is important to mention that the *ISRD 2* research project was carried out among students who actually attend school. So juvenile offenders who do not attend school regularly are excluded from the research results.

- Existence of a criminal act that is punishable by imprisonment for no more than five years;
- "remarkable" mitigating circumstances;
- presumable positive changes in the behaviour of the suspected juvenile after the criminal procedure;
- dismissal is in the interest of the juvenile's development.

In case of a decision the prosecutor relies on e. g. the social background and the lifestyle of the juvenile. According to these facts, the prosecutor can postpone the indictment if there is hope for a successful probation period with the help of a probation officer. This institution gives the possibility to diversion if the crime is minor or medium serious.

Since 1st January 2007 a possibility for mediation was integrated into the Hungarian justice system. The law was reformed in 2009. The new rules concern active repentance: Section 36 (1): "The person shall not be punishable who damaged the afflicted person by the following crimes: crimes against the person (Chapter XII, Title I, III); crimes against transportation safety (Chapter XIII); crimes against property (Chapter XVIII), which are misdemeanours or felonies and not punishable with imprisonment more than three years, and the offender has confessed the criminal act before the indictment has been filed and she/he has repaired the damages in the frame of the mediator's procedure in a way which is accepted by the victim.

(2) Sanctions may be mitigated without limitation in case of the crimes mentioned in paragraph (1), if the offender damaged the afflicted person by a crime which shall not be punishable with imprisonment more than five years and the offender has confessed the criminal act before the indictment has been filed and has repaired the damages in the frame of the mediator's procedure in a way which is accepted by the victim."

The subsection may not be applied if the offender is a habitual recidivist, committed the crime as a member of a criminal organisation, or if the crime caused the death of the victim.

There is almost no difference (not even in the range of those crimes which can be referred to mediation) between the application of mediation for adults and juveniles, except for one point: for juveniles mediation is possible in case of crimes punishable with imprisonment up to five years (see § 107/A CC).

The mediation procedure is regulated by the CPA. Article 221/A determines the range of mediation, the role of the actors in mediation etc. The aim of the mediation procedure is the compensation of the damage and the promotion of the future law-abiding behaviour of the suspected person.

The case can be remitted to the mediation institution during the criminal procedure only once. In this case the prosecutor suspends the proceeding for a maximum of six months.

3.2 Formal interventions

The aim of sanctions or measures is primarily to support the adequate development of the juvenile in order to ensure that he/she can become a useful member of the society (Section 108 § (1) CC). Therefore, the emphasis is on special prevention, whereas the general rules for adults also stipulate general prevention as an aim of punishment (Section 37 CC).

The Hungarian sanctions system is dualistic and relatively determined. The sanctions applicable for juveniles are divided into two parts: sanctions and measures. The sanctions are divided into two main groups: main sanctions and ancillary sanctions. We have only one special sanction for juveniles: education in a reformatory school (Section 118 CC). This sanction shall be ordered by the court if the successful education of a juvenile requires his/her placement in an institution.

Table 1: Formal sanctions and measures in the criminal justice system

			General	For juveniles
Sanctions	Main	Imprisonment	From 2 months to 15 years or life sentence; as cumulative sentence: 20 years.[27]	Minimum: 1 month general maximum: 5 years (or in most serious felonies 10 or 15 years); as cumulative sentence and total sum of punishments: 7 years and 6 months (or in most serious felonies 15 or 20 years) (Sect. 110 of the CC).

27 Special minimum and maximum length of sentences are determined in the Special Part of the Criminal Code (Section 40 of CC). Imprisonment for juveniles: shortest term of imprisonment to be imposed against juvenile offenders shall be one month for all types of criminal acts. The longest duration of imprisonment that may be ordered against a juvenile who is aged 16 or older at the time of the offence shall be a) fifteen years, in cases of crimes that are also punishable with life imprisonment; b) ten years, for crimes punishable with imprisonment exceeding ten years. The longest duration of imprisonment that may be ordered against juveniles aged under 16 at the time of committing a crime that is punishable with life imprisonment shall be ten years. Apart from these cases, the longest duration of imprisonment that may be imposed on a juvenile shall be five years if the crime is punishable with imprisonment exceeding five years. If the convict has turned 21 when imprisonment is commenced, or reaches that age during the execution thereof, the court shall define the degree of the execution of imprisonment.

			General	For juveniles
		Community service	No restriction (Sect. 49 CC).	It may only be imposed against juveniles at the age of 16 and over at the time of sentencing (Sect. 113 CC).
		Fine	No restriction (Sect. 51 CC). In case of non-payment, the fine can be changed into imprisonment.	If he/she has independent earnings or appropriate property; the fine can be changed into imprisonment in case of non-payment (Sect. 114 CC).
	Ancillary	**Prohibition from public affairs**	In case of immediate imprisonment.[28]	In case of imposing imprisonment of one year or longer (S 115 CC).
		Prohibition from exercise of profession	Sections 56, 57 CC.	
		Prohibition from driving vehicles	Sections 58, 59 CC.	
		Banishment	If his/her stay at the given places endangers public interest.[29]	A juvenile living in an appropriate family milieu may not be banished from the locality in which his/her family is living (Sect. 116 CC).
		Expulsion	Sections 58, 59 CC.	
		Fine as ancillary sanction	Sections 64, 65 CC.	64, 65 CC; It can be commuted into imprisonment in case the fine cannot be enforced (Sect. 114).

28 The person who is sentenced to immediate imprisonment for the commission of an intentional crime, who is deemed "unworthy" of the right to participate in public affairs, shall be prohibited from the exercise thereof (Section 53 CC).

29 In cases defined in the Special Part of the Criminal Code, a person sentenced to imprisonment may be banished from one or more localities or from a specified part of the country, if his/her stay at these places would be a threat to the public interest (Section 60 of CC).

		General	For juveniles
Measures	**Reprimand**	Section 74 CC.	
	Probation	Under certain conditions.[30]	May take place in case of any crime (Section 117 CC).[31]
	Forced medical treatment	Section 71 CC.	
	Forced cure of alcoholics	During the time of imprisonment[32]	During the time of imprisonment and education in a reformatory institution (Section 118/A CC).
	Confiscation	Sections 77, 77/A CC.	
	Confiscation of property	Sections 77/B CC.	
	Supervision by a probation officer	Under certain conditions[33]	**In many cases – Section 119 CC**[34]
	Education in a reformatory institution	---	**This measure shall be ordered by the court if the successful education of a juvenile requires his/her placement in an institution. (Sect. 118 CC).**

30 Section 72 of CC: "… if it is for an infraction or felony punishable by imprisonment of up to three years if there is substantial reason to believe that it will serve the purpose of rehabilitation."

31 The probation period may last from one year to two years. The juvenile shall be under the supervision of a probation officer.

32 Section 75 of CC.

33 Supervision by a probation officer may take place if such monitoring is necessary in order for the parole period to be served successfully (Section 82 of CC).

34 Section 119 of CC: A juvenile sentenced to suspended imprisonment, put on probation, released on parole, temporarily released from a reformatory institution has been postponed, or in the case of the postponement of indictment, shall be under supervision by a probation officer.

4. Juvenile criminal procedure

In 1998, a new Criminal Procedure Act was created, but it came into force only on 1 July 2003. The Act contains the most important rules of this procedure, for example the guarantees of human rights.

One of the basic rules of the Criminal Procedure Act is that proceedings against a juvenile offender shall be conducted taking into account the characteristics of his/her age and in a way that promotes the respect of the juvenile offender for the laws.

In Hungary the police are the usual investigative authority, but the Hungarian Customs and Finance Guard or the captain of a Hungarian ship of commerce or that of a civil airplane has the right to investigate in certain cases as well. The public prosecutor's offices are also entitled to carry out investigations, but in cases of juveniles, the "prosecutor for juvenile offenders", who is designated by a superior prosecutor can fulfil the role of a prosecutor. She/he shall examine the observance of special rules and, when necessary, initiate protective and precautionary measures.

As far as the committal for trial is concerned, the public prosecutor's offices play the most important role. The competence is shared between the local and the county public prosecutor's offices, just like in the case of courts (depending on the given type of crime).

Criminal proceedings against juveniles may only be based on public accusation: in these cases private prosecution and additional private accusation are excluded. Participation of a defence counsel is compulsory and the legal representative (usually one of the parents) acts in the interest of the juvenile offender.

In the recent past not only the institutional system of justice, but also the system of appeal has changed. Now there is a two-phase appeal-system, a situation that has affected the role of the different institutions. There are four kinds of criminal courts: Local Court, County Court, High Court of Appeal and the Supreme Court.

In case of adult offenders, Local Courts usually work with single judges or member boards (one professional judge and two lay assessors). In special cases County Courts proceed. This kind of court always works in board, usually with one professional judge and two lay assessors. Depending on the type of the case, two professional judges and three lay assessors can also proceed. If the Local Court acts as the court of first instance, the appellate court is the County Court in a three member board of professional judges. The Criminal Procedure Act exhaustively enumerates those crimes in case of which only the County Court has the competence to proceed as the court of first instance. In these cases the appellate court is the High Court of Appeal (always in board). The role of the Supreme Court is mainly restricted to extraordinary remedies.

Not only the prosecutor, but also the court has to be specialized if the alleged offence was committed by a juvenile. The presiding judge (single judge)

at the court of first instance and a member of the panel at the second and third instance is appointed by the National Judiciary Council. One of the lay judges at the court of first instance shall be a teacher.

Most cases are settled at the local level although not every Local Court is authorised to try juvenile cases. Solely Local Courts at the seat of the County Courts and in Budapest the Pest District Court shall conduct the procedure.

The other person who plays an important role in the procedure against juvenile offenders is the probation officer. He/she prepares a report on the living conditions, social environment and family background, and before a sanction or measure is imposed or before the indictment is postponed, the court and prosecutor may obtain his/her opinion.

The 21st Chapter of the CPA contains special procedural rules regarding juveniles. These rules have priority over the general regulations. Most of the special rules concern the means of evidence, pre-trial detention and special proceedings in juvenile cases.

The most important special rules are the following:

- the waiver of the right to trial[35] is impossible;
- the special aim of the proceeding is the promotion of the juvenile's development;
- only the prosecutor for juveniles appointed by a superior prosecutor can proceed,
- the Juvenile Court with exclusive jurisdiction is the Local Court at the seat of the County Court (in Budapest this is the Pest Central District Court);
- the composition of the Juvenile Court is special in a criminal trial: one of the lay assessors is a teacher, the professional judge is appointed by the National Judiciary Council;
- compulsory defence;
- the legal guardian of the accused juvenile has some special rights (e. g. right to review documents); the legal guardian can be questioned as a witness as well;
- the social inquiry reports prepared by probation officers and the opinion of the juvenile's school or workplace must also be taken into

35 The CPA gives the possibility for the adult offender to refuse the right of having trial under certain conditions (e. g.: if the accused makes a confession). CPA 534, § (1): "At the motion of the prosecutor, in a procedure instituted due to a criminal offence punishable by a maximum of eight years of imprisonment, the court may establish the guilt of the accused in a judgement delivered at a public session and may impose a sentence if the accused waives his right to a trial and pleads guilty. Neither the private accuser, nor the substitute private accuser may motion for a procedure based on a waiver of the right to a trial".

consideration; the goal is the exploration of the offender's personality, mental capacity and living conditions;
- pre-trial detention is executed in a reformatory institution or in a detention centre for juvenile delinquents;
- the indictment can be postponed if the crime is punishable with a maximum of five years of imprisonment (three years is the general rule for adults);
- the case can be transferred to a mediation institution if the given crime is punishable with a maximum of five years of imprisonment (three years is the general rule for adults);
- the public can be excluded more easily (in case of juveniles the CPA provides more possibilities for having closed sessions than in adult cases);
- there are special rules for the hearing (e. g. in the interest of juvenile the hearing can be held in his or her absence);
- the maximum duration of pre-trial detention is two years (three years for adults);
- private prosecution is not allowed;
- supplementary private prosecution is not allowed.

There is no age group between juveniles and adult offenders, but if the offender is of the age between 18 and 21 she/he is a young adult and this fact is one of the mitigating circumstances (see *Section 8* below).

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

The investigation can be closed through:
- termination (either some facts block the criminal procedure, e. g. the death of the offender, or the offender is only reprimanded),
- indictment (the case is transferred to the court),
- other kinds of closing (e. g. the prosecutor postpones the indictment for probation, see Section 3.1 above).

Table 2: The partition of the different forms of closing investigations

Year	Closing investigation														
	Total	A) Termination	Percent of total (%)	thereof: Reprimand	Percent of total (%)	B) Indictment	Percent of total (%)	thereof: Proposal of the prosecutor to probation order without trial	Percent of total (%)	C) Other kinds of closing	Percent of total (%)	thereof: Postponement of indictment	Percent of total (%)	thereof: Mediation*	Percent of total (%)
1980	6,458	1,060	16.4	943	14.6	5,384	83.4	---	---	14	0.2	---	---	---	---
1981	7,333	1,166	15.9	1,007	13.7	6,139	83.7	---	---	28	0.4	---	---	---	---
1982	7,775	1,346	17.3	1,215	15.6	6,403	82.4	---	---	26	0.3	---	---	---	---
1983	8,732	1,708	19.6	1,536	17.6	7,008	80.3	---	---	16	0.2	---	---	---	---
1984	9,614	1,922	20.0	1,747	18.2	7,677	79.9	---	---	15	0.2	---	---	---	---
1985	9,364	1,801	19.2	1,593	17.0	7,541	80.5	---	---	22	0.2	---	---	---	---
1986	10,554	1,913	18.1	1,738	16.5	8,618	81.7	---	---	23	0.2	---	---	---	---
1987	9,852	2,008	20.4	1,844	18.7	7,818	79.4	---	---	26	0.3	---	---	---	---
1988	9,369	2,408	25.7	1,555	16.6	6,935	74.0	---	---	26	0.3	---	---	---	---
1989	9,901	2,433	24.6	1,956	19.8	7,432	75.1	---	---	36	0.4	---	---	---	---
1990	12,984	5,217	40.2	1,842	14.2	7,692	59.2	---	---	75	0.6	---	---	---	---

Year	Closing investigation													
	Total	A) Termination	Percent of total (%)	thereof: Reprimand	Percent of total (%)	B) Indictment	Percent of total (%)	thereof: Proposal of the prosecutor to probation order without trial	Percent of total (%)	C) Other kinds of closing	Percent of total (%)	thereof: Postponement of indictment	Percent of total (%)	thereof: Mediation*	Percent of total (%)
1991	14,016	2,864	20.4	2,113	15.1	11,096	79.2	---	---	56	0.4	---	---	---	---
1992	18,928	5,910	31.2	2,591	13.7	12,914	68.2	---	---	104	0.5	---	---	---	---
1993	18,304	6,309	34.5	2,858	15.6	11,922	65.1	---	---	73	0.4	---	---	---	---
1994	17,297	5,902	34.1	2,947	17.0	11,324	65.5	---	---	71	0.4	---	---	---	---
1995	17,001	5,749	33.8	2,949	17.4	11,085	65.2	370	2.2	167	1.0	101	0.6	---	---
1996	16,020	5,264	32.9	2,595	16.2	9,971	62.2	979	6.1	785	4.9	734	4.6	---	---
1997	16,581	5,555	33.5	2,774	16.7	10,199	61.5	1,175	7.1	827	5.0	771	4.7	---	---
1998	15,504	5,396	34.8	2,439	15.7	9,235	59.6	1,165	7.5	873	5.6	817	5.3	---	---
1999	13,921	4,906	35.2	2,256	16.2	8,016	57.6	904	6.5	999	7.2	958	6.9	---	---
2000	13,836	5,044	36.5	1,985	14.4	7,868	56.9	912	6.6	924	6.7	896	6.5	---	---
2001	14,342	4,698	32.8	1,856	12.9	8,361	58.3	913	6.4	1,283	9.0	1,239	8.6	---	---
2002	14,331	4,799	33.5	2,018	14.1	8,314	58.0	907	6.3	1,218	8.5	1,188	8.3	---	---
2003	12,794	4,509	35.2	2,022	15.8	7,553	59.0	652	5.1	732	5.7	698	5.5	---	---

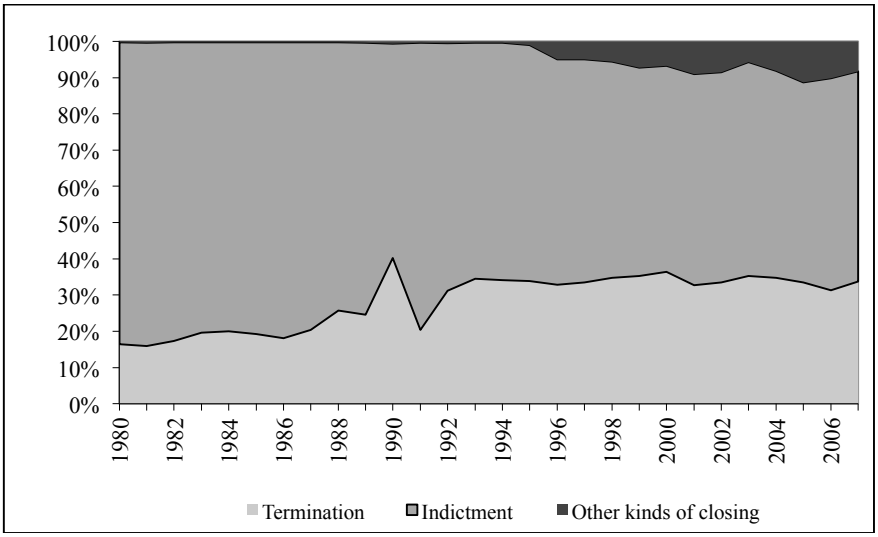
Year	Closing investigation														
	Total	A) Termination	Percent of total (%)	thereof: Reprimand	Percent of total (%)	B) Indictment	Percent of total (%)	thereof: Proposal of the prosecutor to probation order without trial	Percent of total (%)	C) Other kinds of closing	Percent of total (%)	thereof: Postponement of indictment	Percent of total (%)	thereof: Mediation*	Percent of total (%)
2004	14,821	5,150	34.8	2,412	16.3	8,462	57.1	618	4.2	1,209	8.2	1,197	8.1	---	---
2005	14,654	4,908	33.5	2,310	15.8	8,092	55.2	676	4.6	1,654	11.3	1,643	11.2	---	---
2006	13,587	4,256	31.3	1,869	13.8	7,943	58.5	752	5.5	1,388	10.2	1,351	9.9	---	---
2007	13,524	4,554	33.7	1,807	13.4	7,846	58.0	693	5.1	1,124	8.3	867	6.4	138	1

* In the past the Hungarian Criminal Code did not know some institutions like e.g. mediation or postponement of indictment.
Source: ERÜBS (Hungarian Uniform Criminal Statistical System of Police and Prosecutors).

The two forms of informal interventions, the postponement of indictment and mediation, are relatively young legal institutions in the Hungarian juvenile justice system, so there are no considerable data of these forms in the research period (1980-2007). However, the existing data show that a widespread application of these instruments has not been realized so far. The Hungarian Judicial Statistics inform about the following two facts:

- on the one hand, the positive processes of the sentencing practice of the last few years (see Section 6 below) and
- on the other hand, the small rate of postponement of indictments compared to the total number of indictments (e. g. maximum 11.2% in 2005)

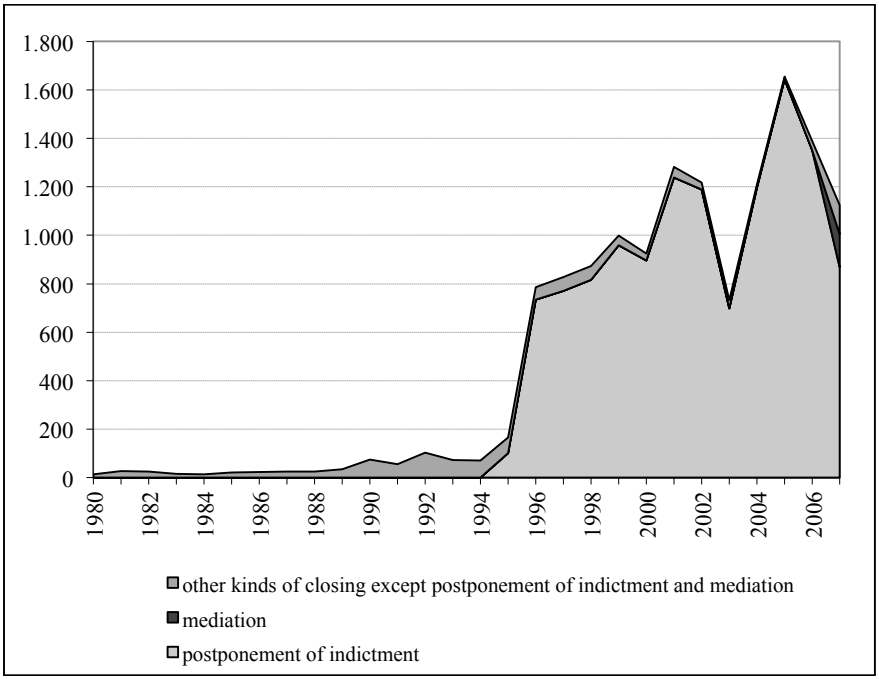
Figure 3: The forms of closing investigations against juvenile perpetrators



Source: ERÜBS (Hungarian Uniform Criminal Statistical System of Police and Prosecutors).

The background and the causes of these processes are different. According to the opinion of experts, the approach of the legal authorities is changing very slowly. The increase in the rate of postponement of indictment is a result of the compulsory form of diversion in connection with drug-addiction (see *Section 3.1* above): The increasing number of drug-crimes resulted in a subsequent increase in the use of the compulsory forms of postponement of indictment.

Figure 4: Other forms of closing the investigation (group "C" of Table 2)

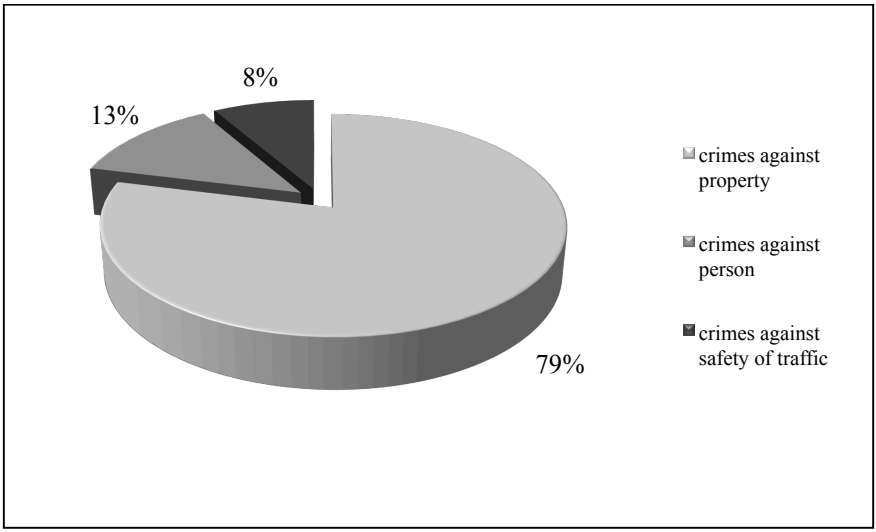


Source: ERÜBS (Hungarian Uniform Criminal Statistical System of Police and Prosecutors).

Since 1st January 2007 the prosecutor or the judge can use mediation as well. Due to the fact that the official statistics from 2008 had not yet been published at the time of submission, there is not enough information about the practice. In 2007 a total of 299 procedures of mediation in connection with juveniles as offenders or victims were registered.[36] Mediation is applied especially in cases of crimes against property. It is to be assumed that the issuance of reprimands plays an important role for all other closed cases of juvenile offences. Significant data are not available in the Hungarian statistics.

36 In 138 cases, mediation with juvenile offenders was successful and resulted in the investigation being closed, see *Table 2*.

Figure 5: The partition of crimes committed by juveniles in all cases of mediation (2007)



Source: Studies by Foundation Partners Hungary and the Office of Justice.

Unfortunately, there are great differences in the use of mediation in the different counties in Hungary in practice, as has been confirmed through research by Foundation Partners Hungary[37] or the Office of Justice.[38] Overall, mediation procedures are successful; in the majority of cases compensation is achieved. The forms of the agreements were: financial compensation (67%), apology (22%), non-financial compensation (8%), financial and non-financial compensation combined (3%).[39]

6. The sentencing practice – Part II: The juvenile court dispositions and their application since 1980

The absolute number of juvenile offenders who are sentenced by a judge rose from 4,613 in 1980 to 8,802 in 1999. Since then the numbers have decreased

37 *Wagner* 2008.

38 *Igazságügyi* 2007.

39 See *Wagner* 2008; *Igazságügyi* 2007.

continuously – in 2007 6,213 juvenile perpetrators were convicted (see *Table 3*).[40]

The reasons for this decrease are complex. The absolute number of juvenile perpetrators has been decreasing in the last 20 years as a result of a decrease in the absolute number of juveniles in the overall population. The rate of juvenile offenders per 100,000 of the age group is, however, increasing (see *Section 1* above). On the other hand, a (very slow) change in the sentencing practice can be observed, based on the influence of the European regulations and the effect of the new possibilities for diversion (see above *Section 3*).

One of the traditional arguments against the Hungarian sentencing practice is the issue of overcrowding in prisons. Among juvenile perpetrators, the rate of offenders who are sentenced to imprisonment has decreased in the last few years. In 2007, 27.2% of convicted juveniles were sentenced to imprisonment. In most cases (77%) the prison-sentence was suspended.

The rate of fines is generally low. One reason is that juvenile perpetrators usually entail bad social conditions, the majority of them live in detrimental personal situations. The Hungarian CC defines the conditions for a fine very strictly: According to § 114 (1) CC, the perpetrator has to have an independent income or appropriate property, requirements that the majority of juvenile offenders do not fulfil.

As mentioned earlier, ancillary punishment and independently applicable measures can be used in cases involving juveniles. There are many measures and ancillary sanctions that can be applied without a main sanction, while others cannot.

A frequently used measure for juveniles is the probation order. The number of juveniles released on parole[41] has been relatively high among convicted juveniles. 55.7% of all imprisoned juveniles were released on parole in 2007.

Community service is rarely used. In the opinion of the judges this sanction would not work in the Hungarian practice. This kind of sanction cannot be applied as it is very difficult to find institutions that provide the possibility for these jobs.

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40 Data Source: ERÜBS. Tájékoztató a gyermek- és fiatalkorúak bűnözésével összefüggő egyes kérdésekről. Kiadja a Legfőbb Ügyészség Számítástechnika-alkalmazási és Információs Főosztálya.

41 A juvenile may be released on parole from imprisonment, if a) he has served at least three quarters of his sentence to be executed in a prison for juveniles, b) he has served at least two-thirds of his sentence to be executed in a detention centre for juveniles. The juvenile shall be under the supervision of a probation officer.

Table 3: The total number of convicted juveniles and the application of certain sanctions and measures

Year	Number of convicted juveniles	The number of juveniles being finally sentenced to:											
		Imprisonment				Fine		Ancillary punishment or independently applicable measures					
		All		Suspended (from all)				All		Probation order*		Education in a reformatory school*	
		Sum	%	Sum	%	Sum	%	Sum	%	Sum	%	Sum	%
1980	4,613	1,553	33.7	725	46.7	386	8.4	2,407	52.2	1,873	77.8	267	20.5
1981	5,098	1,712	33.6	715	41.8	322	6.3	2,810	55.1	2,229	79.3	254	18.9
1982	5,527	1,871	33.8	791	42.3	302	5.5	3,062	55.4	2,495	81.5	292	16.0
1983	5,865	2,136	36.4	906	42.4	326	5.5	3,142	53.6	2,648	84.3	261	12.5
1984	6,290	2,454	39.0	1,061	43.2	356	5.7	3,169	50.4	2,688	84.8	311	11.3
1985	6,067	2,473	40.8	1,110	44.9	297	4.9	3,042	50.1	2,541	83.5	255	12.4
1986	6,513	2,696	41.4	1,299	48.2	357	5.5	3,200	49.1	2,777	86.8	260	9.5
1987	6,655	2,580	38.8	1,268	49.1	414	6.2	3,430	51.5	2,957	86.2	231	9.3
1988	6,220	2,086	33.5	1,059	50.8	418	6.7	3,479	55.9	3,051	87.7	237	7.7
1989	6,362	1,884	29.6	1,011	53.7	369	5.8	3,961	62.3	3,598	90.8	148	6.0
1990	5,155	1,771	34.4	951	53.7	219	4.2	3,099	60.1	2,767	89.3	217	7.0
1991	6,200	2,000	32.3	1,103	55.1	165	2.7	4,021	64.9	3,612	89.8	256	6.4
1992	6,898	2,334	33.8	1,443	61.8	173	2.5	4,379	63.5	3,970	90.7	253	5.8
1993	6,606	2,130	32.2	1,309	61.5	212	3.2	4,252	64.4	3,862	90.8	166	3.9
1994	7,537	2,279	30.2	1,493	65.5	366	4.9	4,857	64.4	4,445	91.5	198	4.1

Year	Number of convicted juveniles	The number of juveniles being finally sentenced to:											
		Imprisonment				Fine		Ancillary punishment or independently applicable measures					
		All		Suspended (from all)				All		Probation order*		Education in a reformatory school*	
		Sum	%	Sum	%	Sum	%	Sum	%	Sum	%	Sum	%
1995	8,717	2,091	24.0	1,489	71.2	440	5.0	6,172	70.8	5,736	92.9	159	2.7
1996	7,769	1,956	25.2	1,477	75.5	407	5.2	5,395	69.4	5,113	94.8	112	2.0
1997	7,247	1,971	27.2	1,423	72.2	477	6.6	4,774	65.9	4,198	87.9	162	3.4
1998	7,844	2,217	28.3	1,606	72.4	529	6.7	5,041	64.3	4,410	87.5	232	4.6
1999	8,802	2,601	29.6	1,909	73.4	750	8.5	5,294	60.1	4,701	88.8	191	3.6
2000	7,822	2,275	29.1	1,721	75.6	659	8.4	4,745	60.7	4,215	88.8	218	4.3
2001	8,295	2,392	28.8	1,751	73.2	551	6.6	5,143	62.0	4,496	87.4	304	5.8
2002	7,974	2,100	26.3	1,547	73.7	576	7.2	5,051	63.3	4,450	88.1	291	5.6
2003	7,334	2,038	27.8	1,513	74.2	421	5.7	4,676	63.8	3,980	86.3	238	5.2
2004	6,935	1,762	25.4	1,379	78.3	434	6.3	4,531	65.3	3,947	88.1	201	4.5
2005	6,880	1,820	26.5	1,425	78.3	434	6.3	4,385	63.7	3,773	86.8	189	4.3
2006	7,174	1,891	26.4	1,524	80.6	368	5.1	4,673	65.1	4,078	88.3	199	4.3
2007	6,213	1,691	27.2	1,302	77.0	339	5.5	3,944	63.5	3,459	88.6	191	4.9

* From all ancillary punishments.
Source: ERÜBS (Hungarian Uniform Criminal Statistical System of Police and Prosecutors).

Among the alternative sanctions and measures, probation orders, education orders and reprimands are (more or less) frequently used.

The rate of education orders has been continuously decreasing. In 2007, only 4.9% of juvenile offenders who received alternative sanctions were ordered to corrective education in a reformatory school.

Other supplementary sanctions can be ordered only in connection with a main sanction. The most "popular" sanctions are prohibition from public affairs, the suspension of the driving license and the fine as a supplementary sanction. The application of these sanctions in practice has remained stable in recent years.

The Hungarian CC contains mitigated rules for juvenile offenders regarding the prohibition from public affairs (see *Section 3.2, Table 1* above). Owing to the above mentioned rules, the rate of prohibition from public affairs is lower than the rate of immediate imprisonment among juveniles.

In 2007, reprimands were ordered in 237 cases (in 2003: 385), which is 3.8% of all finally sentenced juveniles.

7. Regional patterns and differences in sentencing young offenders

In Hungary there is no continuous research on differences in the sentencing by the different counties. Obviously, there is the possibility to revise the annual statistics of the judiciary practice of judgment.

Due to the resolute sanctions-system of the Hungarian Criminal Code, the adjudicating judge has a wide range of possibilities to consider. The Supreme Court puts in great efforts in order to harmonize the practice of the judges.[42]

It is generally accepted that in a justice model, it is very important to guarantee that similar offences committed under similar conditions be judged with similar decisions, irrespectively of the adjudicating court. Secondly, theoretically nobody should suffer any form of advantage or disadvantage "by geography" (this principle is not considered to be in contrast with the constitutionally guaranteed independence of judges).

A research project[43] was initiated covering the practice of judges in similar cases in 2006, in order to analyze whether or not there are any differences between them. Unfortunately, this research does not include cases of juvenile delinquency. The background of this research was that in the eastern region of the country the same crimes are judged more severely than in other parts of Hungary. Furthermore, there seemed to be a difference between the practice of judges in the capital and in the counties.

42 E. g.: 56. BKv.

43 *Badó/Bencze* 2007, p. 22-24.; 2008.

In the course of the study, 1,000 concluded cases were chosen from 19 counties and the Capital Courts, where the offenders had nearly the same conditions. The two chosen crimes were theft and grievous bodily harm.

The findings of the study were shocking: there was great variation between the practice of the strictest and of the most soft-hearted, lenient courts. In Fejér County the rate of immediate imprisonment was five times higher than in Pest County for comparable offences. The rate is almost the same in the case of grievous bodily harm as well. This is shocking not only from the point of view that Hungary is a relatively small country when compared to other European states, and there is no explanation for these great differences.

The research also revealed that the strictest counties (concerning thefts and grievous bodily harm) were Borsod-Abaúj-Zemplén, Szabolcs-Szatmár-Bereg and Jász-Nagykun-Szolnok és Veszprém Counties. The most "lenient" judgement was made in Pest County, Vas, Zala, and Tolna Counties in the case of both crimes. There was no real evidence for proving that the practice in Budapest is very lenient. In the case of both crime types under investigation, Budapest was in the mid-field.

Another interesting result of the study was how different the judging of theft and grievous bodily harm was. The two crimes are evaluated as having the same level of severity by the Hungarian Criminal Code, for both crimes are punishable with a maximum of three years of imprisonment. Despite this fact, the courts judged theft more severely than grievous bodily harms. So, of the 19 counties, 13 responded to thefts with immediate imprisonment in 50% of the cases. At the same time, sentences to immediate imprisonment for grievous bodily harm were only issued in three court rulings. This is interesting not only from the point of view of the danger that these crimes pose to society, but also that the judges took into account the fact that the injured party is forgiving in most of these cases.

The background of these differences can be that the Supreme Court published fewer decisions on the extent of sentences from 1993 onwards, which could have a negative effect on nationwide sentence-uniformity. Secondly, the institution of safekeeping ceased to exist, an institution which allowed the judgement to be objected to, and to be appealed to the Supreme Court. It is very important to note that the sentencing practice greatly depends on the value system of the judge and the region in which they live (the level of social welfare in the region, how often crimes occur, the social situation of the offenders). At the same time, the offender's features can even directly affect the sentencing decision. Sometimes the court does not impose fines on offenders whose social situation is bad – even if this would be an appropriate penalty – because the inability to pay would charge the court with more administration. Therefore the court instead imposes a prison sentence.

8. Young adults (18-21 years old) and the juvenile (or adult) criminal justice system – Legal aspects and sentencing practices

The Hungarian Criminal Code does not know the category of young adults. The relevant fact is the time of the offence, the time of the criminal procedure is not relevant. This means that if the offender is 18 years old (or older) at the time of the offence, the general rules and sanctions of the Hungarian CC are definitely applicable.

There is only one paragraph in the Hungarian CC which deals with offenders who are older than 18 years: Life imprisonment can be ordered only if the offender has reached the age of 20 at the time of the commission of the crime.

The Criminal Division of the Hungarian Supreme Court issued guidelines for sentencing, which state that being between 18 and 21 years of age (thus close to the age of a juvenile) at the time the offence was committed is an important mitigating factor. The mitigation depends on the deliberation of the judge.[44]

9. Transfer of juveniles to the adult court

The regulations of the Hungarian Criminal Code do not know the possibility of a waiver between juvenile criminal justice and general criminal jurisdictions.

The question of whether the juvenile or adult jurisdiction is competent is answered by the age of the offender at the time of the offence. If the offender was between the ages of 14 to 18 at the time, the Juvenile Court is competent, regardless of the age of the offender at the time of the proceedings, and without any possibility to transfer the case to the adult jurisdiction.

10. Preliminary residential care and pre-trial detention

The place for the execution of pre-trial detention is always set by the court. In the case of juveniles the measure can be executed in a reformatory institution or in a prison. The decision depends on the personality of the juvenile and the crime he/she is accused of. The court also has the opportunity to change the place of pre-trial detention later (during the execution) if the prosecutor, the defence counsel or the defendant make a request in this regard. In this way a juvenile who is located in a reformatory institution could be taken to prison or a police cell (for a maximum of five days).

44 See *Section 13* below about draft laws for the introduction of the age group of "young adults".

10.1 (Police) custody

According to the general rules, juveniles can be taken into custody under the same provisions as for adults. According to Section 126 (1) of the Criminal Procedure Code, taking the defendant into custody implies a temporary deprivation of a suspected person of his/her liberty. The custody of the defendant may be ordered upon a reasonable suspicion that the defendant has committed a criminal offence subject to imprisonment – thus, in particular, if the defendant is caught when committing the act – provided that a probable cause exists to believe that the pre-trial detention of the defendant is to follow. The defendant cannot be held in custody for longer than seventy-two hours. After the lapse of this period, he/she shall be released, unless the court has ordered pre-trial detention. Custody may be ordered and terminated by the court, the prosecutor or the investigating authority.

The numbers and percentages of juveniles in custody have declined considerably over the last twenty years. Whereas in 1985 19.4% of all accused juveniles were taken into custody, in 2007 this was the case for only 4.6% of all accused juveniles.

10.2 Pre-trial detention: Execution in prison

According to the relevant regulations the same rules are applicable to juveniles as to adults, with only a few exceptions. The rules of placement render a possible different treatment of juveniles during the pre-trial detention.

In a reformatory school the interests of juveniles can be maintained at a higher level. The main task of the reformatory institution is to promote the juvenile's development in order to help him/her for social integration. At the time of the juvenile's reception and release the institution has to inform the legal representatives, the competent guardianship court, the public guardianship authority and the competent child care services in case the juvenile is in temporary or permanent education.

Table 4: The number of juvenile offenders in pre-trial detention and its duration (only in prison; 31 December 2007)

Duration of pre-trial detention	Number of alleged juvenile offenders	
	N	%
< 3 months	68	41.5
3-6 months	39	23.8
6-9 months	21	12.8
9 months-1 year	19	11.6
1-1.5 years	12	7.3
1.5-2 years	4	2.4
> 2 years	1	0.6
Total	164	100

Source: Yearbook 2007 of Hungarian Prison Service.

10.3 Pre-trial detention: Execution in a reformatory institution

If pre-trial detention is executed in a reformatory institution, it follows the same basic rules as if the measure "education in a reformatory institution" had been executed. There are, almost predictably, certain differences: at the time of the juvenile's reception the institution has to inform the legal representative, the competent guardianship court, the public guardianship authority and also the competent child care services in case the juvenile is in temporary or permanent education.

In the institution the juveniles are permitted to wear their own clothes, but it is obligatory to give them uniforms if they do not have their own clothes. It is not necessary to equip them with identification cards. Juveniles do not get pocket money but they receive fundamental hygiene goods. If juveniles do not have deposit money, the institution has to ensure the money to write two letters per month. The supervision of juveniles during pre-trial detention is also performed by technical instruments beyond the usual ones. It is not permitted that the juvenile takes part in education, work and other programs outside the institution. Nor is it permissible to reward them with short-time leaves or to allow them holidays or sick-leave. The institution has to provide for the juveniles to get in contact with their relatives and other permitted persons under supervision. They are also entitled to get unsupervised contact with their legal

defence, the supervision officer, the representative of the church, the ombudsman of human and civil rights, the ombudsman of minority, and the diplomatic and consular representative of their country.

At the time of the juvenile's release the institution has to inform the same organizations and persons as at the time of reception. In addition, the public prosecutor or the court which ordered the termination of pre-trial detention must be informed.

The judicial statistics of recent years show a continuous decrease in the absolute number of orders to pre-trial detention (see *Table 5*). The number of offenders held in pre-trial detention in reformatory institutions has been decreasing as well.

Table 5: The absolute number of prosecuted juveniles (1985-2007) and the extent of juveniles in pre-trial detention (in prisons and in reformatory institutions)

Year	Number of accused juveniles[45]	Juveniles in pre-trial detention	
		N	%
1985	9,364	1,386	14.8
1986	10,554	1,457	13.8
1987	9,852	1,219	12.4
1988	9,369	795	8.5
1989	9,901	760	7.7
1990	12,984	800	6.2
1991	14,016	940	6.7
1992	18,928	939	5.0
1993	18,304	873	4.8
1994	17,297	822	4.8
1995	17,001	638	3.8
1996	16,020	575	3.6
1997	16,581	614	3.7
1998	15,504	473	3.1
1999	13,921	477	3.4

45 Comment from the editors: These numbers of accused juveniles diverge in parts from the data presented in *Figure 2* (all registered juvenile offenders). All data originate from the official statistics. We were not able to determine the reasons for possible discrepancies.

Year	Number of accused juveniles[45]	Juveniles in pre-trial detention	
		N	%
2000	13,836	418	3.0
2001	14,342	444	3.1
2002	14,331	449	3.1
2003	12,794	411	3.2
2004	14,821	333	2.2
2005	14,654	286	1.9
2006	13,587	341	2.5
2007	13,524	328	2.4

Source: ERÜBS (Hungarian Uniform Criminal Statistical System of Police and Prosecutors)

11. Residential care and youth prisons – Legal aspects and the extent of young persons deprived of their liberty[46]

According to the Hungarian Criminal Code one finds differences between main and supplementary sanctions and measures. Among these legal consequences there are some that deprive the convict – an adult or a juvenile – of his/her liberty. A juvenile can be sentenced to imprisonment as a sanction or to education in a reformatory institution as a measure (see *Section 3* above).

The imprisonment of a juvenile shall be executed in penal institutions built especially for juveniles – juvenile detention centres or juvenile prisons.[47]

Education in a reformatory institution is the only measure which can be applied solely against juveniles. It shall be ordered by the court if the successful education of a juvenile requires his/her placement in such an institution. The duration of education in a reformatory institution may last from one to three

46 The author thanks *Krisztina Fodor-Lukács* for her assistance to drafting this *Section*.

47 There are two degrees of penal institutions for juveniles: the stricter form is the prison, the less strict regime is the detention centre. Imprisonment shall be executed in a prison for juveniles, if a) the juvenile is sentenced to imprisonment of two years or more for a felony, or if b) a juvenile who is sentenced to at least one year of imprisonment is a recidivist, or prior to the perpetration of an intentional crime he had been sentenced to education in a reformatory institution for an intentional crime. In all other cases, prison sentences shall be executed in a detention centre for juveniles. For adults, there are three degrees of penal institutions: high security prison, regular prison or detention centre. During the execution of imprisonment, those citizens' rights and obligations of the convict that are contrary to the aim of the punishment, particularly those which are also covered by the prohibition from public affairs, shall be suspended. Life imprisonment shall be executed in a high security prison.

years. Persons are released from the institution no later than after having turned 19 years of age. The court may conditionally release juveniles from reformatory institutions after they have served half of their sentence, but no earlier than after one year, and only when it can be supposed on well-founded grounds that the aim of the measure may also be achieved without further education in a reformatory institution. The duration of the probation period shall be equal to the remainder of the measure from which the juvenile has been conditionally released, but shall last at least for one year.[48]

The Code of Criminal Law Enforcement regulates the execution of the juvenile's imprisonment in its special orders which complete the general orders (see the Code of Criminal Law Enforcement, law-decree 11 of 1979). Neither the aim nor the task of the juveniles' correction differs from the general objectives. However, during the execution of imprisonment special care has to be devoted to the education of the juvenile, the development of his/her personality and also to his/her psychological improvement.

The special features of the execution of imprisonment are the following:

- At the time of the juvenile's reception the institution has to inform the competent guardianship court, the public guardianship authority and also the competent child care service in case the juvenile is in temporary or permanent education.
- The order of education that is suitable for the characteristics of juveniles can contribute to the success of the educational process and to positive influencing. The general rules apply to the juveniles' imprisonment but differences originate from the specific characteristics of the juvenile age-group.
- Special needs of the age-group should be taken into consideration and it should be the aim to avoid harmful and detrimental effects. The adequate grouping of the juveniles is an important condition. The so-called "regime-system" and the progressive-system – well-tried in international practice – were introduced in Hungary in the 1990s. According to its main points, the juvenile who fulfils the institutional requirements could be transferred to a half-open section where leaving the institution temporarily is also possible. With regard to different facts (e. g.: the features and circumstances of the crime, the duration of punishment, the juvenile's behaviour in the institution), half-open, closed or open-sections can be created in the institution. An important element of the system is the permeability between the different sections

48 The court terminates the conditional release if the juvenile is sentenced to imprisonment for a crime committed during the probation period, or if education in a reformatory institution is ordered. The court may terminate temporary release if it applies another punishment or measure against the juvenile, or if the juvenile violates the rules of supervision by a probation officer.

on the basis of the juvenile's behaviour and achievements. The juveniles' education does not undertake all the functions of family or school education, but resocialisation has a better chance than in the case of adults. Another important task is to complete missing primary school education. In 1993, taking part in primary school education became voluntary for those who have turned 16, so it is one task of correction to arouse the juveniles' interest in finishing school.

- The juvenile detention centres also have to help inmates learn a trade. First of all, the juveniles' institution has to provide circumstances to train skilled workers. In practice, not only the significant financial expenditure but also the lack of conditions for training skilled workers, such as primary school qualification and the time for completing the course, add to the difficulties.
- Another important field is the adequate employment of the juvenile. The jobs have to be suitable for juveniles, their interests, and should also meet the requirements of the labour market.

The most important rules on education in a reformatory institution are regulated in the Code of Criminal Law Enforcement:

- In reformatory institutions, education was regulated at a legal level for the first time in 1979 during the correctional codification. The main task of reformatory school education is to promote the juveniles' improvement so that he/she becomes "a useful member of society".
- Reformatory institutions are schools for special pedagogical tasks which operate under the supervision of the Ministry of Social Affairs and Labour. Due to the fact that the reformatory institutions execute measures ruled by the courts, detailed regulations are settled by the Minister of Social Welfare and the Minister of Justice.
- Educators have to aim to fill in the juveniles' social gaps and to correct the problems that lie hidden in the background.
- The aim is that juveniles receive therapies if needed for the correction of their personality, that heal possible personality disorders, contribute to solving problems of adaptation and which address their addictions.
- In the sanctions system of Hungarian criminal law, "education in a reformatory institution" is the only measure that is used only in cases of juveniles. It can be considered as the strictest measure because due its liberty-depriving nature. The particular feature of the measure is that it can be applied in any case of any crime if the juvenile's successful education can be ensured in this way.
- Education in a reformatory institution can last only up until the offender has turned 19 (without considering the rest of the time of the measure).
- The juveniles are placed in small groups of no more than 12 residents.

- The aim of the education and training is to cater for the juveniles' educational gaps, to continue their studies and to enable them to obtain skills that increase their chances in the labour market. The regulation describes the education and training both as "school and non-school education".
- The law regulates two types of juvenile work: paid and unpaid. Unpaid jobs are e. g.: cleaning the rooms, bathrooms, sitting rooms or the corridors. All other jobs should be remunerated. The restrictions of the Labour Laws resulting from the characteristics of the age-group have to be taken into consideration.
- According to his/her behaviour and diligence, the juvenile is entitled to pocket money, which is 8-12% of the minimum monthly wage, and which can be spent to buy goods of basic necessity.

Table 6: Convicted juvenile prisoners by prison regime (31. 12. 2007)

	Total	Male	Female
Juvenile medium regime	148	140	8
Juvenile light regime	132	128	4
Total	280	268	12

The relatively low number of imprisoned juveniles compared to *Table 3* above (juveniles sentenced to imprisonment) can be attributed to the long time periods for the prosecution. Therefore, often a juvenile will have reached the age of adulthood at the time of the judgement and is thus not registered as a "juvenile" anymore but rather as an "adult" (even if she/he can stay in a juvenile prison until his/her 21st birthday).

12. Residential care and youth prisons – Development of treatment/vocational training and other educational programmes in practice

In the history of Hungarian correctional law, developing a special system for juveniles became possible for the first time in the 1960s. It was based upon the socialist attitude and it was quite different from the system for adults. The socialist idea of re-education became dominant. In addition, individual and communal therapy activities emerged.

The realization of these high-sounding ideas was difficult in practice. As a result, introducing methodical innovations in connection with special treatment

for juveniles could not be put into practice; the institutions of the juveniles only became formally independent from the penitentiary system. In the meantime, the interests of manufacturing and security gradually took over the role and place of educational aspects.

From the mid-1970s, when codification began, extensive reforms were not taken. Only the necessary measures for maintaining the operation of the system were taken. The Code of Criminal Law Enforcement – law-decree 11 of 1979, which is still the highest level rule of correctional (penal) law – was born at the end of this period. During the preparation of this law the lack of theoretical generalization of experience and of scientific cultivation in this special field was quite perceivable. Instead of the idea of re-education, a more realistic definition of correctional aims was emphasized as a positive aspect of the obligation of correction. These objectives could only be achieved during the 1980s.

From the beginning of the 1990s the representatives of criminal sciences urged the reform of the sanctioning system more and more impatiently. The increase in juvenile delinquency, the new results of criminal sciences or the agreements and offers of international organizations can be mentioned as causes of the above mentioned actions.

Despite rising levels of juvenile delinquency and the aggravation of Hungarian Penal Law, the data on sentencing indicate that the courts consequently kept the *ultima ratio* principle/role of imprisonment in mind. In the 1990s 15.9% (820 convictions) of juvenile convictions, in 1995 6.9% (602 convictions) and in 2000 only 6.2% (463 convictions) were sentenced to imprisonment.

Furthermore, the efforts to modernize the process of the juveniles' correction continued. There were hopeful attempts to introduce the so called progressive system, which had been proven to be appropriate in international practice. Its main point is that if a juvenile adheres to the institutional requirements, he/she can be transferred to the half-open section of the institution in which temporary leaves are also possible.

At the end of the 1990s the general aggravation of correction induced the initiation of the progressive system. The main focus of this still-existing system was the adequate group-education of juveniles, based on the psychological and pedagogical observation of their personalities. According to the recommendation of psychologists or pedagogues, juveniles who are more pitiful, defenceless, and in need of more protection and care are placed in a so called "correctional group"; those who are viewed as posing a threat to other inmates or themselves because of their aggressiveness are placed in other separated groups. Those who are obliged to undergo compulsory treatment (alcohol and drug addicts) and juveniles who are suffering from personality disorders are placed in the "healing-educating group".

Since a juvenile's personality is still developing, different pedagogical methods can be applied during their incarceration in order to assist in this development. One of the important fields is the allocation of groups of 15-20

juveniles to one tutor. As a result of this grouping, it is possible to operate self-motivated organizations in prisons that lend a helping hand by preparing and arranging cultural and spare time activities. In juveniles detention centres we have to devote special attention to cultural and spare time activities that are in line with their age. Another aim is satisfying the juveniles' needs for physical education and sporting activities that contribute to easing tension. In addition, one has to organize programmes and study circles that are suitable for self-education and which are close to the juveniles' interest.

In Hungary – partly due to legal requirements and international obligations – there were several changes in the recent period that determined the direction of further steps. We could well be witnesses to professional staff training that involves external experts (e. g.: psychologists); the development and renovation of – and the making of technical changes to – the institutions; and training, aggression treatment programmes and labour-market training organized to cater especially to juvenile convicts.

In Budapest a special programme to be handled by supervision officers was commenced. There was a video training in the juvenile prison of Tököl, and other projects which were applied with the help of international organisations and associations. Regarding the positive results of these projects it must be mentioned that the Regional Juvenile Prison in Szirmabesenyő has continued special anti-aggression training programmes at its own expense after the financial help of the international organisations ceased to be. The aim of the training is to identify the antisocial juveniles' lack of skills, problems in their way of thinking and – based on the identified problems – to correct them, to make it possible to keep a tight hold on their aggressiveness and to reach a higher moral level of decision making. We can also mention the work of the students studying at the Faculty of Law and Social Work of Lóránt Eötvös University, the results of the Juvenile Helper Organization of the Complex Consensus Foundation ("Patronus Juvenilis") or the reintegration programmes for young adults in different parts of the country.

13. Current reform debates and challenges for the juvenile justice system

The reform process concerning juvenile justice can not at all be described as consistent. Although the need for a special treatment of juvenile offenders is emphasised again and again, the laws were not changed accordingly and no specific juvenile justice code was set up so far. During the time of the AGIS-project, some considerable turns were taken in criminal policy. During the year 2007, a draft for a specific Criminal Code for Juveniles was discussed under the

involvement of experts. In late 2007, the programme "New Order and Freedom"[49] was established which emphasised the issue of "public security" and relegated the reform ideas for a specific juvenile justice system to the fringe. The majority of juvenile justice experts still supports and promotes the establishment of specific regulations for juvenile offenders and has not given up the hope for the future realisation of these ideas. Therefore, the historical background and the particularities of the "Concept of the new Code of Juvenile Criminal Justice" shall be presented with the following remarks:

Since the end of the 1990s there has been great demand for a new Criminal Code that takes the features of modern European crime policy and contemporary social characteristics into account. As a result of this need different drafts and legal codifications have been initiated. Extra attention has been paid to the rules governing juvenile offenders. A major concern is that many proposals are basically a simple adaptation of the general rules and do not appropriately take the features and characteristics of young people into consideration. So, for example a juvenile's intellectual and moral maturity and capacity are not a presumption for criminal responsibility. There is a great need for specially educated experts, and for a harmonization of the aims of child and youth welfare and criminal law.

The Codification Committee asked *Professor Dr. Miklós Lévay* and associate professor *Dr. Erika Váradi-Csema* to prepare a study about the reform of the juvenile criminal law in 2002. The Committee agreed on the main points of the study.[50] In December 2006, the "Concept of the new Code of Juvenile Criminal Justice" was born. This concept – made by *Dr. Katalin Ligeti* – takes into account the study and the standpoint of the Codification Committee.[51] The basic structure and the plot of the concept are defined by the goals of the reform, which are the following:

- to establish a complex approach to treating and dealing with juvenile crime;
- to create an independent Hungarian juvenile criminal justice system;
- to form new age-groups, taking into consideration the age-group of young adult offenders;
- to define the age limits of criminal responsibility;
- to introduce a new category of liability alongside legal responsibility, which appreciates the special phase of psychological development of youth;

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49 1074/2007. (X. 1.) Kormányhatározat az "Új rend és szabadság" programért felelős kormánybiztos kinevezéséről és feladatairól.

50 *Csemáné Váradi/Lévay* 2004, p. 302-327.

51 *Ligeti* 2006, p. 21-38.

- to create a new juvenile criminal justice system which would be able to prevent recidivism and to increase the possibilities of (re)integrating juvenile offenders;
- to create a new, more differentiated sanctions system which is able to take into consideration the compensation of victims or of the injured community as a whole;
- to bring into agreement the rules of criminal law, procedural law, penal law and child and youth welfare.

In order to achieve these goals, the existing models need to be adapted in order to be able:

- to take into account meeting the targets of socially integrating juvenile offenders and the safety of society;
- to more effectively include and apply elements of restorative justice;
- to enforce the concept which states that criminal procedural law and penal law are institutions which are layered on top of each other, and which can only achieve these goals together.

In order to precipitate that the model changes, the aim of the Concept is the creation of an independent and complex juvenile criminal justice system like in Germany and Austria.

The Concept mentions two possibilities regarding age limits. One of the proposals would give the Criminal Court the possibility to call child offenders (aged 12 to 14) into account when they have committed premeditated crimes against persons. In such cases, the courts could only order corrective education as a punishment, but it could order measures without further limitations.

The second proposal is in favour of the present age limit of legal responsibility (the age of 14). The Concept fixes that in this case the system of child and youth welfare must be strengthened.

The Concept also aims at the introduction of the new category of "young adults" aged 18 to 21. According to this, the Criminal Court could order sanctions and measures stemming from juvenile criminal law – except corrective education and supervision by probation officers – insofar as the following conditions are met:

- the committed crime is punishable by imprisonment for up to five years;
- the perpetrator is not a repeat offender; and
- the crime in question was not committed as a member of a criminal organization.

It is deemed necessary to introduce the criteria of "capacity" alongside legal responsibility (the ability to understand the wrongfulness of the committed act and the ability of acting according to this; see *Section 1* above). The examination of capacity is a complex procedure which requires the examination of mental and moral maturity, and of self-control.

The examination of mental maturity focuses on the intellectual features and characteristics of the juvenile. In the course of this investigation, the degree to which the juvenile accepts the basic norms of society is analyzed. The self-control examination analyses the ability of the juvenile to refrain from and object to illegal actions and desires. The concept depicts in detail the practice of the German judges as a good example.

In connection with introducing the new criteria of responsibility, we need to declare that the legal responsibility of juveniles is conditional. The court is officially obliged to keep checks on the capacity. In cases where the juvenile's mental and moral maturity does not allow for him/her to regret the consequences of the committed crime, the court can only order the measure of supervision by a probation officer.

The concept further suggests the introduction of a different sanctions system, which would be structured as follows:

- educational measures without incarceration: supervision by a probation officer;
- other measures without incarceration: confiscation, confiscation of property;
- measures for incarceration: involuntary treatment in a mental institution, involuntary detoxification;
- sanctions without incarceration: suspension of imprisonment, community service, fine, release on parole with supervision by a probation officer, deprivation of basic rights, suspension of a license, suspension of a driving license, bans, expulsions;
- sanctions of incarceration: imprisonment, conditional release from prison, corrective education.

The concept also addresses the criminal procedural rules for juvenile offenders. In recent years the Hungarian Criminal Procedure Act has been changed many times, resulting among other things in the introduction of mediation and of the postponement of indictment with directives. Accordingly, the presently valid regulations are modern and can be incorporated into a new Juvenile Criminal Code without any changes.

Due to social, political and economic factors, the issue of an independent Juvenile Criminal Code has most recently received only little support. At the end of the 2000s, more and more reports about crimes committed by children and juveniles have appeared in the media. The brutality of the offences or the very young age of the offenders shocked the public. The number of bullying-cases and of violent attacks against teachers in schools or kindergartens has increased. This news coverage has influenced the general public opinion. The remarkable change of criminal policy mainly happened in connection with other crimes which were committed by adults and were taken as arguments for political changes.

An independent Juvenile Criminal Code does not fit into this criminal policy, and has consequently been pushed slowly into the background. Parallel to this process, different drafts for the General Part of the Hungarian Criminal Code have been developed.

After several versions the draft of the new General Part of the Hungarian Criminal Code (CC) from the beginning of 2009 deals with juveniles only in a few regulations. This draft follows the idea of so-called "two-tier criminal policy". The following regulations of this draft are in line with the above mentioned Concept for a juvenile justice system:

- the scope of misdemeanours is wide;
- it extends the applicability of mediation (the offence-types are not restricted; mediation can be applied in the case of every not serious offence);
- it changes the sanctioning system (so the combination of possible measures and sanctions is multiplied);
- it eliminates compulsory alcohol-treatment;
- it creates a new system of supervision by probation officers; "intensive supervision" involves the performance of community work by young offenders.

During the legislative process, which is still underway (December 2009), various drafts have contained a lot of different concepts for the treatment of offenders. Compared to the earlier drafts, the latest draft contains partly more punitive approaches and stricter regulations for offenders, for example for recidivists. The newest draft, furthermore, contains the extension of lawful self-defence and the introduction of the concept of "preventive lawful self-defence" with the aim of meeting the demands of society.

Regarding juvenile perpetrators, the draft foresees more possibilities for mediation as a result of the general modifications.

The category of young adults should be introduced according to the drafts from 2006 and 2008. The category refers to offenders between 18 and 21 years of age. According to these drafts, special regulations for this age-group are as follows:

- young adults cannot be sentenced to life imprisonment;
- education in a reformatory institution is also possible;
- they can be put on probation if the committed crime is punishable by not more than five years in prison; the special rules of postponing indictment can also be applied to young adults.

As mentioned above, the concept is not discussed in Parliament at the moment, but neither has it been formally rejected yet. However, the latest amendments to the general criminal law did in general not touch regulations concerning juvenile offenders. The last amendment to the Criminal Code in spring 2009 only touches slightly on the special criminal rules for young offenders (in connection

with mediation the criteria of different crime-types was abolished, and community service may be imposed on juveniles above the age of sixteen at the time of sentencing). Proposals for special regulations for young adults were removed from the draft for a new juvenile justice code. The only rule for this age-group (according to the latest amendment) is that a person can be placed in a reformatory institution until his/her 21st birthday.

14. Summary and Outlook

In Hungary juvenile legislation and juvenile justice are part of the general criminal legislation and criminal law. The legal basis of criminal intervention is the commission of a crime. The criminal procedure is characterized by important principles such as the principle of "fair trial" and the rule of law. Emphasis is given to preserve legal guarantees.

In the last 10 to 12 years, the neo-classical theory has emerged in Hungary. However, this theory is not fully reflected in the juvenile justice system. The idea was of greater importance in the sanctioning practice for adults.

The changes in the more recent period can be attributed to the fact that Hungary became a Member State of the European Union. We have to harmonize our legal system with the recommendations and rules of the EU and the Council of Europe, which envisage mediation, diversion, improved victims' rights etc.

In the field of the regulations of juvenile justice, there are no indications of any neo-liberal tendencies. Our justice system has the characteristics of the modified justice model.[52]

In the last few years there have been some discussions about the legal regulations on the basis of international tendencies and Hungary's historical development. As a result of the codification-activity in the field of juvenile justice, we are in the process of creating a new Hungarian Juvenile Criminal Code.

The Hungarian criminal rules for child and juvenile offenders have come a long way, evolving from the treatment ideology of 1908 to the modified justice model. On this path, they faced difficult and dangerous historical periods like for instance the 1950s, the years of hard communism (for example: in the period of the "proletarian dictatorship",[53] criminology did not exist in Hungary due to political causes).[54] In the meantime, Hungarian society has changed very drastically.

We are currently standing at the gates of change, and we can ask ourselves the question: which way is the best way? Several facts have an influence on this decision.

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52 *Wynterdyk* 1997.

53 *Lévay* 2006, p. 155-200.

54 The period of the "proletarian dictatorship" existed from 1948 on. Criminology was resuscitated from the beginning of 1960s.

In Hungary – like in other countries – criminal policy plays the most important role for (and has the greatest effect on) criminal regulation. Its development is determined by the opinion and professional approach of politicians. Though different political sides support different criminal policies (neo-liberal, law and order, etc.), it seems that the changing currents of policy have not had such a direct influence on the juvenile justice system. The rules of the Hungarian Criminal Code or the Criminal Procedure Act for juvenile offenders were changed in the new phases of Hungarian history after 1989. The changes are partly based on our international obligations (i. e. the ratification of the UN-Convention on the Rights of the Child etc.).

From a legal point of view German-speaking countries have had a great influence on our country, which can on the one hand be attributed to historical roots. On the other hand the institutions, experts, professors, judges etc. within the field of criminal sciences have had good and direct connections working together. For example, when the new Hungarian mediation-rules were in the phase of legal codification, the experience, regulations, institutions-system and practice in Germany and Austria were important examples for us.

Previously, the Hungarian historical root, especially in connection with juveniles, did not play a particularly prominent role. Nowadays, in the course of codification we often hear mentioned the Acts from 1908 and 1913. The Act XXXVI of 1908 is a good example because of its independence from the general Criminal Codes and Criminal Procedure Codes. With the Act VII from 1913 the independent court-system for juveniles was established.

In itself, the opinion of experts or of the citizens of Hungary as a whole does not have direct influence on the juvenile justice system. Professionals have in fact compiled the problematic points, mistakes and shortcomings of the Hungarian criminal justice system and also written about them. Yet, without governmental and political will, these efforts were not enough to trigger the codification of amendments or reforms. However, due to a handful of facts and issues – for example the new political approach and the great societal and economic changes that Hungary has witnessed – the government has recognized the necessity of a new Criminal Code. In 2001 codification began, also affecting the rules for juvenile offenders as part of the general Criminal Code.

The media – like in other countries – can influence the general perception of child and juvenile crime. Up until recently, the resulting pressure from society on policy-makers had not been enough to lead to the creation of new rules related to juvenile offending. Sometimes we would hear about violent cases committed by children or youth, but this issue was not in the limelight of the media. However, since the end of 2007 the newspapers, TV networks etc. have focussed more on child and juvenile criminality as well as on possible solutions to this situation. This now continuous interest has its foundations in two specific cases. In Budapest a 10 year old boy (called *Krisztián*) from Romania stabbed a student seriously because he refused to hand over his mp3-player. The event

occurred in the afternoon at a bus-station in the centre of Budapest. As it turned out, this young child had dominated Blaha Lujza square and the underpass for several months, terrorizing passers-by and committing robberies and thefts. Some days later a young boy from one of the trade schools of Budapest beat his classmate so severely that he in fact died some hours later. The crime was committed in the street outside the school in front of the students and passers-by.

The discussion about youth crime, violent crimes, the offenders' high level of aggression, possible solutions to offending, the minimum age of criminal responsibility, the role of child and youth welfare, the causes etc. has become very intensive. These cases raised another issue as well, namely the question of crimes committed by minorities.

In this case the view of the government and the demands of the citizens coincide – the situation of child and youth criminality has to change for the better. Although the opinions differ regarding the means by which to effect such a change, there is one important result. A discussion has developed and is ongoing in society, among professionals, the government, the institutions and the actors concerned.

Parallel to the positive discussions and new drafts in connection with juvenile justice we can observe other processes in Hungarian criminal policy. In the second part of 2007 the government declared a zero tolerance approach with the programme "New Order and Freedom".[55] New legal institutions were introduced such as "objective responsibility" in traffic.

In the last two years, the Hungarian Criminal Code was modified several times.[56] Moreover several laws were drafted. The implemented or planned modifications partly aim to combat demonstrations and riots through limiting the right of public meeting. The recent occurrence of riots was based on political motivations in the majority of cases and can be described as protest activities against the current Hungarian political system. Furthermore another – basically social – problem appeared in connection with sport events. To combat shouting inside stadiums or fighting outside stadiums the aggravation of legal regulations of the Hungarian Criminal Code and the Hungarian infringement law is seen as a helpful hand. As another answer, one proposal of the opposition contains the adoption of the "three strikes" strategy as most prominently exercised in the USA, or the Act of "Trikrát a dost" that was passed in Slovakia in 2003. The Minister of

55 1074/2007. (X. 1.) Kormányhatározat az „Új rend és szabadság" programért felelős kormánybiztos kinevezéséről és feladatairól.

56 During the last years and in the coming two years the Hungarian Criminal Code was modified or will be modified several times (30 June and 9 August 2009, 1st January, 1st May and 1st July 2010.) Among these amendments are important modifications of the Hungarian sanctions system. Moreover new forms of behaviour have been made punishable.

Justice[57] declared that the Hungarian Government plans to follow a more rational approach, especially regarding persistent violent offenders, and that three strikes will not be an issue – "there is rather a need for ten or fifteen strikes."

According to this idea, the new amendment to the Hungarian Criminal Code created the notion of the "violent recidivist". Beside this, according to the Comment to the amendment, "raising the upper limit of punishment is not enough as a solution; the lower limit of punishment should also be raised".[58]

In this political climate, the notion of an independent Criminal Code for juvenile offenders has been pushed into the background. The modifications suggested in earlier amendment-proposals that emphasized the principle of special treatment currently find little to no consideration.

We have had a great opportunity to build up a new system of responding to juvenile crime. However, at the moment it appears as though an independent criminal justice system for juvenile offenders in Hungary will not be treated as a realistic or serious issue in the near future.

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57 Available at: www.irm.gov.hu/?katid=1&id=104&cikkid=4960 (last access: 5.4.2009).

58 The aim of the most part of the new regulations (Act XLVII of 2009 and Act LXXX of 2009) was to tighten the criminal law. E. g.: Probation orders are excluded for recidivists, special regulations for violent recidivists are introduced, the maximum limit for prison sentences was raised from 15 to 20 years etc. The new regulations follow the ideal of "law and order". Criminal law is misused as a solution for social problems.

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Ireland

Dermot P. J. Walsh

1. Historical development and overview

The first tentative steps towards the development of a juvenile justice system in Ireland were taken in the second half of the nineteenth century at a time when there was no established difference between the treatment of adult and child offenders.[1] Local courts of summary jurisdiction[2] were given powers to deal with children for a wide range of offences, including serious indictable offences,[3] which would otherwise have been dealt with in the adult courts before a judge and jury. Detention facilities, in the form of reformatory and industrial schools, were developed as an alternative to adult prisons for child offenders under 16 years of age. The former catered only for young offenders over 12 years of age. The latter catered primarily for children who had been neglected, orphaned or abandoned, but they also accommodated offenders between 7 and 12 years of

1 For an account of the Irish juvenile justice system, see *Kilkelly* 2006; *Walsh* 2005.

2 A court of summary jurisdiction is one in which the accused is tried by a judge sitting without a jury. The primary example is the District Court. It is a court of local and limited jurisdiction and constitutes the bottom tier in the pyramidal court hierarchy in Ireland.

3 Criminal offences in Ireland are broadly classified into indictable offences and summary offences. The former refer to offences which must normally be tried on indictment in a jury trial. They tend to be the more serious offences. The summary offences are those which must be tried by a judge sitting without a jury in the District Court. They tend to be the less serious offences. There are a large number of indictable offences which can be tried summarily if both the defendant and the prosecutor agree.

age, and in certain circumstances up to 15 years of age.[4] Nevertheless, there was no real difference between them in terms of their objective which was to educate, rehabilitate and provide industrial training to the children in their care. A striking feature was that they were mostly privately owned and run by religious orders that provided the service on contract to the state.

The first comprehensive legislative code on juvenile justice was the Children Act 1908. This Act was an exceptionally liberal and innovative measure for its time. It reflected a desire to rehabilitate child and young offenders. Treating them as if they were adults was recognised as being harsh, unfair and destined to lock them into a lifestyle of crime. Instead of using the criminal justice system as an instrument of punishment the Act aimed to deploy it as a means of early intervention designed to steer the young offender away from a criminal career. In particular this would mean avoiding their incarceration in adult prisons where they would otherwise come into close contact with, and be educated by, more hardened and experienced criminals. Equally, it was important that they should not be burdened with the public label "criminal" at too early an age if that could be avoided. It was also considered inappropriate to expose them to the full panoply of a public trial on indictment even for relatively serious offences.

Accordingly the 1908 Act made provision for: limits on the nature and length of custodial punishments applicable to child offenders; more emphasis on non-custodial punishments for child offenders; greater parental responsibility for the offending of their children; summary trial for most offences where the accused was a child;[5] and measures to protect the child from the formality and publicity of the adult criminal process. In addition it made provision for taking children at risk into care. The Act also introduced new provisions on the establishment and regulation of industrial and reformatory schools, replacing the pre-existing legislation in this area.

The liberal, rehabilitative emphasis of the 1908 Act was "balanced" by the Prevention of Crime Act 1908 which was enacted on the same day as, and as part of a package with, the Children Act 1908. Its primary significance throughout most of the twentieth century was the establishment of borstal institutions[6]

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4 Offenders between the age of 12 and 15 years of age could be accommodated in an industrial school if they had not been convicted previously and if the manager of the school in question was willing to take them.

5 Summary trial is trial in a court of summary jurisdiction which, in this context, means the District Court (see fn.2) or the District Court sitting as a Children Court (this is dealt with later).

6 These were detention centres for young offenders. They were characterised by the fact that they were secure facilities in which the offender was 'reformed' through a strict regime of education, physical exercise and social and industrial training. A sentence of detention in a borstal institution would normally be for a minimum period which was

and the provision of judicial powers to pass sentences of detention in such institutions.

Throughout the twentieth century the Children Act 1908 was the dominant statutory force in the juvenile justice system. It was amended and supplemented from time to time in a piecemeal manner by a number of statutory enactments. The most important of these were the Children Act, 1941, the Children (Amendment) Act, 1957 and the Prisons Act, 1960. The first two made further provision concerning, *inter alia*, the management of reformatory and industrial schools, the grounds for admission of children to the schools, the maximum and minimum periods of detention orders, conditions for release on licence, post-release supervision, the funding of the schools, and an increase in the age of children who could be dealt with through the juvenile (as distinct from adult) justice system. The more punitive options available under the Prevention of Crime Act 1908 were extended by the Criminal Justice Administration Act 1914 and the Prisons Act 1960.

While the Children Act 1908 Act reflected a rehabilitative ethos it did not include formal provision for the diversion of young offenders away from the criminal process altogether. This did not appear in Ireland until the 1960s when the police force (the Garda Siochana) began to develop a juvenile diversion programme on a non-statutory basis.

By the 1970s it was widely acknowledged that the Irish juvenile justice system was seriously outdated and in need of major reform. The problems stemmed primarily from: the age of criminal responsibility being set at too low a level (7 years of age), underdeveloped diversion and detention facilities, structural inadequacies in the management of the system and weaknesses in the powers and procedures available to the police and courts. It took until 1996 before reforming legislative proposals were brought before parliament, and another 5 years before they were enacted into law in the form of the Children Act 2001.

By any standards, the Children Act, 2001 is a major piece of legislation. As originally enacted, it ran to 145 pages of the statute book, comprising 271 sections grouped together in 13 parts. Overall, it would appear that the Act struck a balance between the "welfare" and "justice" approaches to child offending. While the criminal justice system was retained as the primary vehicle for dealing with child offenders, sufficient modifications were included to ensure that the rehabilitation of the child remained a major feature. The innovations included: raising the age of criminal liability from the standard 7 years up to 12 years, diverting children away from the criminal justice system through an enhanced juvenile diversion programme, introducing restorative justice to the trial procedure, expanding the range of non-custodial sanctions, prohibiting the use

long enough to deliver the 'benefits' of the regime. See *Osborough* 1974 for a comprehensive treatment of the borstal regime in Ireland.

of imprisonment for children under the age of 18 years, re-structuring the detention facilities and placing rehabilitation at the heart of sentencing policy.

The provisions of the 2001 Act were not self-executing. They would only come into force when the necessary order or orders were issued by the appropriate Minister. Unfortunately, implementation proceeded at a very slow pace. Major parts of the Act, including the raising of the age of criminal responsibility, the full range of non-custodial sanctions and the new provisions on detention had still not been implemented five years later when significant amendments to the 2001 Act were effected by the Criminal Justice Act 2006. The changes reflect a more punitive than rehabilitative policy. They include: a reduction in the age of criminal responsibility to 10 years for murder, manslaughter, rape and aggravated sexual assault;[7] the extension of the juvenile diversion programme to deal with non-criminal behaviour (anti-social behaviour) and the further extension of the programme to children as young as 10 years of age; the introduction of anti-social behaviour orders for children from 12 years of age; a revision of the detention facilities for child offenders; and the replacement of the Minister for Education and Science by the Minister for Justice, Equality and Law Reform as the person responsible for the management of detention schools.

The Children Act, 2001 as substantially amended, was fully brought into force in March 2007. Even now, however, its implementation is being hampered through a lack of resources and advance planning in the provision of detention facilities. It would not be unfair to say, therefore, that a significant feature of the Irish criminal justice system at least since 2001 has been confusion in policy content and policy implementation.

The following analysis of the juvenile justice system is focused only on state interventions in response to the criminal offending of a child under the age of 18 years. Also included is the procedure for issuing anti-social behaviour orders to children (and adults) who engage in certain types of behaviour. Technically this is a civil procedure which applies to both criminal and non-criminal forms of behaviour. Nevertheless, it must be included because it involves the application of significant restraints on the freedom of the child in response to the offensive behaviour of that child. In other words it bears many of the key hallmarks of a criminal intervention, even though it does not automatically result in the child acquiring a criminal record.

2. Trends in juvenile delinquency

Any attempt to describe trends in juvenile delinquency in Ireland is seriously hampered by the manner in which the data is compiled and presented. There is

7 Ironically this could be interpreted as an increase in the age of criminal responsibility from 7 years to 10 years for these offences as the increase to 12 years provided for in the 2001 Act had not been implemented by the time that the 2006 Act was enacted.

no single database in which all known juvenile crimes are recorded on an annual basis. Different records are maintained depending on factors such as the level of seriousness of the crime and whether it was dealt with through the courts or a diversionary programme. Even single data sources have not been consistent in the manner in which they have recorded the data over several years and the data sources themselves are not compatible. Data on some features, such as arrest and bail, are not published at all.[8]

The primary source of data on offences committed by young people was the annual reports of the Garda Commissioner. Since 2006 that function has been taken over by the Central Statistics Office (CSO). Generally, the data is presented separately for serious offences (indictable or headline), less serious offences (summary or non-headline) and offences dealt with under the Garda Diversionary Programme.[9] The data in each cannot be combined to provide an overall picture of juvenile delinquency. The trends much be extracted separately for each. The current section addresses the trends for the indictable and summary offences while later sections address the trends emerging from the Garda Diversion Programme.

The data on indictable and summary offences was generally broken down and presented under the type of offence and the age and gender of the offender. Unfortunately, over the past sixty years there have been frequent changes in the methodology used to compile and present the data. A major change in the classification of offences in 1999-2000 (see fn. 10) has been particularly problematic. The net effect is that it is not possible to compare trends before and after this year with any degree of confidence. It is also likely that erratic swings presented by the annual data from 2000-2002 are an artificial consequence of this change. Further problems have arisen from the fact that the age classification of a child offender and the selection of age categories for offenders have not remained constant. The latest such change occurred in 2004 when the established 14-16 year old category and the 17-20 year old category changed to 14-17 years and 18-20 years respectively. Coming so fast on the heels of the 1999-2000 change

8 Because of too many changes in the methodologies used in compiling and presenting data, and too many gaps and overlaps in the data that is provided, tables would be horrendously complicated. Accordingly, tables are not provided in this chapter.

9 As explained in fn.3 offences in Ireland are traditionally classified into indictable (generally the more serious offences) and summary (generally the less serious). This classification was used in the presentation of the crime statistics up to 1999-2000. From then until 2005, the indictable/summary classification was replaced (only for the purpose of recording and publishing the crime data) by a classification of headline and non-headline offences. Broadly speaking these reflect the indictable/serious and summary/less serious classification, but the correlation is not exact. Since 2005 this classification has been dropped in favour of grouping offences into subject areas irrespective of seriousness. So far, this subject classification has been applied to the data for 2006 and 2007 and, retrospectively, to 2002.

this renders it virtually impossible to chart recent trends with any degree of confidence. Indeed the 2004 change coincided with a recorded massive increase in offences for 2004 followed by a massive decrease in offences for 2005. The scale of these swings is such that they can only be the artificial result of the change in the recording methods.

A detailed breakdown of the less serious (summary/non-headline) offences has only been provided since 2002. They, too, suffer from the 2004 change in the age categories used to record offences. To make matters worse the data does not deal separately with offences which were dealt with in the jury courts and those dealt with in the Children Court which deal with most of the juvenile offending.

Data under the headline/non-headline classification was published up to and including 2005. Since then, this classification has been replaced by 16 subject groupings which do not distinguish offence categories on the basis of seriousness. Unfortunately, the new system does not retain the detailed breakdown of age groups for offenders under 18 years of age.

Separate data on cases dealt with in the Children Court have been published by the Courts Service from 2004. Unfortunately the 2004 data deals only with the Children Court in the Dublin Metropolitan Area while the 2005 and 2006 data deals with the Court in the country as a whole. The data is confined to the disposal of cases in the Children Court.[10] It is broken down for each year of a child's age from 12 to 18, but does not offer a breakdown by offence. In both 2005 and 2006 more than one fifth of the cases are represented as having no record of age. Such cases are entirely missing from 2004. In 2007 and 2008 the data is limited to the number of defendants, offences and outcomes. There is no breakdown in terms of age groups.

It follows from these weaknesses that it is difficult to draw any reliable trends from the official Children Court data.[11] It will be seen later that some tentative conclusions might be drawn about the modes of disposal of cases in the Children Court. For the present, however, the only thing that can be said with any certainty is that the very large majority (over 90%) of children being dealt with in the Children Court are from 15 to 18 years of age.

Other limited sources of data include the annual reports of the Prisons Service and the Department of Education and Science (industrial and reformatory schools). Generally, there is a lack of empirical research focused specifically on juvenile offending. One recent study that is worth mentioning is the survey of 400 offenders dealt with by the Children Court in a number of centres

10 Strangely the 2005 report presents the data as "Outcome Of Cases Disposed Of In Juvenile Courts" (emphasis added) even though the official title is Children Court.

11 See *Walsh* 2005 for an attempt to extract trends.

throughout the country in 2004. This was carried out by the Association for Criminal Justice Research and Development Ltd. (ACJRD).[12]

Subject to these and other shortcomings in the data, an attempt will now be made to outline the trends in child offending from 1980 for serious (indictable/headline) offences and from 2002 to 2005 for less serious (summary/non-headline) offences as reflected in the data in the Garda Commissioner's annual reports. Unfortunately, it is not possible to offer anything beyond broad trends on age, gender and offence classifications as they are the only factors recorded. It will be seen later that it is possible to offer some more detail with respect to trends in the Garda Diversion Programme. The data itself is only available up to 2005. Unfortunately, the CSO publications from 2006 do not generally break the data down into age groups below 18 years of age.[13] The limitations of the data for 2006 and 2007 are such that there is very little scope to make observations that correlate with the data and trends from previous years.

While there have been fluctuations in convictions of young people for serious offences from 1980 to 2005, including evidence of an upswing in the last few years, the overall trend has been distinctly downwards. This would seem to reflect the impact of the Garda Diversion Programme. The 17 to 20 year old group is by far the dominant group over this period. Overall it accounts for more than half of all offenders under 21 years of age. However, that share has been increasing rapidly in recent years and in 2003 stood at over 80%. After the change in age categories in 2004, the 18-20 year olds account for just over three quarters of the offenders in 2005. The under 14 age group, by contrast, is the smallest. Overall it accounts for about 18% of the total, although its share has dropped to negligible levels in recent years. It had virtually disappeared by 2005. The third group, the 14 to 16 year olds, accounts for about 28% of the total and was running at less than 20% in 2003. As the 14-17 year old group since 2004 it has been running at close to 30%. As a generalisation it can be said that there has been a dramatic decrease in the numbers under 17 years of age convicted of serious offences since 1980.

Overall the gender breakdown is 88% male and 12% female. This huge gap appeared to be contracting. From 2003 it was averaging at 83% male and 17% female. The gap was narrowest for the 17/18-20 year olds, averaging at 78% male and 22% female since 2003. The data for 2007, however, suggests that it has widened again to 91% and 9%. It is not possible to tell whether this is a

12 *Carroll/Meehan* 2007.

13 There are no published data on immigrants in the criminal justice system broken down on the basis of age. It would appear that immigrants now account for a disproportionate share of the prison population. Anecdotally, it would appear that they consist mostly of adults. If there is an issue with child immigrants we have no data on which to identify or quantify it.

once-off aberration or a result of the changes to the recording classification or an accurate reflection of what is happening on the ground.

Up until the year 2000, larceny and other property offences accounted for the vast majority of cases (over 90%) in which under 21s were convicted of serious offences. Offences against the person accounted for a very small number, less than 5%, while "other offences" barely featured. A change has occurred in the course of the current decade with the reclassification into headline and non-headline offences. While larceny increased its share to become established as the undisputed, dominant, serious offence for the under 21s, the other property offences declined sharply to around 20%. This drop was so sharp and sudden that it is difficult to believe that it was not exaggerated artificially by changes in recording the data. Perhaps for the same reason offences against the person showed signs of a dramatic increase, reaching a level of 20% before dropping back to an average of 17% compared with levels of 2 and 3% in the 1990s. In the past few years it is averaging around 13%. The "other offence" category also increased dramatically in absolute terms, although its relative share was still small.[14] It is suspected that these dramatic shifts were the result of the change from the indictable/summary classification to the headline/non-headline classification. While each of the two classifications broadly reflects a serious/non-serious divide, the correlation between them is not exact.

Virtually all offences against the person and "other offences" were committed by males in the 14-20 year old bracket, with the very large majority being committed by males in the 17/18-20 year old bracket. Much the same applies to the other property offences. While 17/18-20 year old males account for a large majority of the larceny offences, females also feature strongly. Indeed, females, particularly in the 17/18-20 year age category, are contributing substantially to the upward trend in larcenies.

Since comparable data on the less serious offences is only available for analysis from 2002 to 2005 it is difficult to identify any credible trends, especially since the age categories were changed in 2004. It would appear that the overall downward trend evident in the more serious offences is also present in the less serious offences. Interestingly, the less serious offences show a distinct drop[15] in 2004 when the more serious offences recorded an extreme (and presumably artificial) increase. The under 14 age group is virtually non-existent in the less serious offences. Even the 14-16/17 age group appears to be under-represented (at about 10%) compared with their share of the serious offences.

14 There is data on numbers of child drug offenders – in the same manner that there is data on numbers dealt with for other offences. There is no data beyond bare numbers – and there is nothing about those numbers which deserves any more comment than there already is in the text.

15 The most likely explanation is an artificial consequence of the change in recording methodology. There does not appear to be any other reasonable explanation.

The vast majority of the offenders (90% plus) are in the 17/18-20 year old category. Surprisingly, the gender gap is even wider for the less serious offences than it is for the serious offences. It is averaging at 92% male and 8% female.

The major offences by far in the less serious category are driving offences and public order offences, the former accounting for over 40% while the latter account for over 30%. The driving offences actually increase to 50% of all offences for 2005. Between them the driving offences and the public order offences account for three quarters of all less serious offences committed by persons under 21 years of age. No other offence category comes close to them. Interestingly, the frequency of these two offence categories is driven by the 17/18-20 year olds. While these offences are also the most popular for the 14-16/17 year olds, the gap between them and some other offences, most notably taking a vehicle without the consent of the owner and criminal damage, is not as large as it is for the 17/18-20 year olds. Given the relatively low numbers of offences committed by females and under 14 year olds, it is unwise to draw any conclusions about them. Nevertheless, it is worth noting that for females the most frequent offence (apart from driving offences and public order offences) is assault. Surprisingly the females account for 15% of the assaults which is far above their percentage share of any other offence.

The 2007 data for the under 18s reveals further dramatic change. Larceny is still dominant at about 28%. Public order has rocketed up the charts to 25%, while the other property offences register at 5%. Offences against the person have dropped back to 10%, but this is still several times their level in the 1990s before the data was distorted by classification changes. It must be remembered, of course, that these figures for 2007 are not directly comparable with the data outlined above because of the classification change in 2005. Moreover, all of the data is based on offences dealt with by all the courts, not just the Children Court. Moreover, they do not include the offences which were dealt with through the Garda Diversion Programme. These are considered later.

It is worth noting that the trends drawn from the official data are reflected in the results of the empirical study carried out by the ACJRD Ltd. in 2004.[16] That study found that about 90% of the offenders appearing before the Children Court were males living primarily in single parent households in disadvantaged localities. The vast majority did not appear to have any engagement with mainstream education. The most common offences were road traffic offences, theft offences and public order offences. The public order offences were generally linked to alcohol consumption. Theft offences were more prevalent in the courts outside Dublin while the road traffic offences were more prevalent in the Dublin Court. Surprisingly, each offender was charged on average with 6 charges.

16 *Carroll/Meehan* 2007 at chapters 3 and 4.

3. The sanctions system

Ireland uses a combination of diversionary, non-custodial and custodial sanctions to deal with juvenile offenders. The Children Act 2001 provides the current statutory basis for the full range of options, although it should be noted that several of them were already familiar in Irish law and practice.

3.1 Diversion

Technically the diversionary options are not sanctions at all. Typically, they apply either by diverting the offender away from the criminal trial process altogether or by re-routing him away from formal criminal sanctions after the trial procedure has commenced. The major example of the former is the Diversion Programme which is managed by the Irish police (the Garda Siochana). It was first introduced on a non-statutory basis in 1963, enhanced and extended in the early 1990s and finally given a statutory foundation in 2001.[17] Essentially the programme deals with a young offender by means of a caution instead of a formal charge and prosecution. The net result is that the offender – technically[18] – will not acquire a criminal record and will be spared the experience of being processed through the full criminal justice system. In 2006 the programme was extended to persons who had behaved anti-socially (not a criminal offence) and to persons as young as 10 years of age, even though the general age of criminal responsibility is now set at 12 years of age. The programme is managed by a Director who is a senior member of the Garda Siochana appointed by and answerable to the Garda Commissioner.

Technically the programme applies to any criminal or anti-social behaviour committed by a child who is at least 10 years of age,[19] although the Minister for Justice, Equality and Law Reform may issue regulations excluding certain types of criminal behaviour from its scope on account of their seriousness.[20] To be admitted a child must accept responsibility for his or her criminal or anti-social behaviour and must consent to be cautioned and, where appropriate, supervised by a juvenile liaison officer.[21] The admission of a child in any individual case is

17 Children Act, 2001, Part 4. See *Walsh* 2005, at ch. 4, and *Kilkelly* 2006, at ch. 3.

18 There is now provision for the prosecution to inform the court of a child defendant's previous involvement in the Diversion Programme when the court is considering what sentence to impose for another offence of which the child has been convicted by the court.

19 Children Act, 2001, s. 23.

20 Children Act, 2001, s. 47.

21 A "juvenile liaison officer" is a regular member of the Garda Siochana who has been designated for the time being to work with child offenders and children who are at risk

also subject to the Director being satisfied that the admission would be appropriate in the best interests of the child and that it would not be inconsistent with the interests of society and any victim. Views expressed by the victim are given consideration but the victim's consent is not a pre-condition of admission.

Once admitted, the child is administered either an informal or a formal caution in respect of the offending behaviour. The latter must be administered in the presence of the child's parents or guardian and should normally happen in a Garda station. The Director may also invite the victim to be present at the administration of a formal caution (in which case it is known as a restorative caution). In this event there shall be a discussion about the child's behaviour and the member administering the caution may invite the child to apologise to the victim and to make financial or other reparation to him or her. There is no bar on the same child being the subject of repeat cautions, although it would appear that the same child cannot be the subject of an informal caution after he or she has already received a formal caution.

Where a child has received a formal caution he or she will be placed by the Director under the supervision of a juvenile liaison officer for a period of up to 12 months. This can happen consequent on an informal caution, but it is not obligatory in that case. On the recommendation of the liaison officer a conference can be held in respect of any child who has been admitted to the programme. A conference is a meeting of persons concerned with the welfare of the child. It is chaired by the juvenile liaison officer or other member of the Garda Siochana and normally includes the child, the child's parents or guardian and family members and any other person or persons (for example, representatives from the child's school, local health board and probation service) whom the chairperson considers would make a positive contribution. The victim can be invited to attend. The immediate object of the conference is to consider the level of supervision that would be appropriate for the child given his or her personal circumstances. It can also draw up an action plan for the child which can include: making an apology and reparation to the victim, attendance at school or a training programme, participation in sport or recreational activity, being at home at certain times and staying away from certain places. There is provision for periodic review of compliance with an action plan.

A child participating in the programme benefits from the same privacy protections as are applicable to a child in the Children Court. So, for example, thereis a general prohibition on the publication of any report in relation to his or her admission to the programme and on the proceedings of any conference or action plan. Also, the child cannot be prosecuted for the criminal behaviour (or be issued with an anti-social behaviour order) in respect of which he or she is admitted to the programme. While the child's admission of responsibility for

of engaging in criminal behaviour. They retain their full powers, duties and status as members of the Garda Siochana even while engaged in work as juvenile liaison officers.

that behaviour cannot be used against him or her in any civil or criminal proceedings, there is provision for the prosecution to inform the court of a child defendant's previous involvement in the Diversion Programme when the court is considering what sentence to impose for another offence of which the child has been convicted by the court.[22]

Pre-offending diversion

Although the Garda Diversion Programme is aimed essentially at children who have offended or engaged in anti-social behaviour and accepted responsibility for their offending or behaviour, juvenile liaison officers also work informally with children "at risk" of offending. The programme is supported by a range of Garda special projects which are aimed at diverting young people away from crime. These were devised as a response to worrying levels of public disorder, vandalism and alienation among young people and the Garda Siochana in neglected suburban housing areas, initially in Dublin and subsequently in other cities around the country. They represent a partnership between the police, the Probation Service,[23] youth service organisations and local communities to engage the interest and energies of young people with a view to diverting them away from crime and anti-social activities. Proposals for individual projects are developed by youth service organisations in conjunction with the local community and the assistance of the Garda Siochana and the Probation and Welfare Service. The projects include youth club activities, sport programmes, entertainment, excursions, school visits and talks.

3.2 Non-custodial and community sanctions

The Children Act 2001 makes provision for a range of non-custodial and community sanctions which can be applied by any criminal court in respect of a child offender. Some of these were already firmly established prior to 2001.[24]

Where a court is satisfied of the guilt of a child it can reprimand the child without proceeding to the imposition of a formal penalty.[25] This option has been

22 Children Act 2001, s. 48 (2).

23 The Probation Service is a state agency composed of social workers who work full time in the rehabilitation of offenders and in trying to divert those at risk of offending from becoming involved in crime. They also assist the courts in devising sanctions which take into account the needs and circumstances of the offender. They are independent of the police and prison services.

24 See *Kilkelly* 2006 at chapter 6 for the argument that the sentencing options in the 2001 Act are little more than a repackaging of the options that were already available to the court since 1908.

available since 1st May 2002, although it may not differ in substance from the probation order that the court has been able to impose on an offender (not just a child offender) since at least the late nineteenth century.[26] The probation order operates as a warning to the offender that if he or she does not keep the peace and abide by any conditions imposed by the court for a specified period he or she is liable to be brought back before the court for punishment. In the case of a child offender it would be common for the court to appoint a probation officer to supervise compliance with the order and report to the court on the child's progress.

The power to impose a financial penalty on offenders has been available to courts since the thirteenth century.[27] Today, the power of the Children Court to impose a fine on a child is based in the Children Act 2001. It stipulates that the Court may impose a fine of up to a maximum of half the maximum applicable to an adult convicted summarily of the same offence.[28] For a child this means that the maximum for some offences is about € 1,000. When determining the appropriate amount in any individual case the court must have regard to the child's present and future means and his or her financial commitments. The court also has the power to award costs against the child and, since 1993, has had the power to make an order of compensation against the child in favour of the victim.[29] In appropriate cases the court may direct that any such compensation order should be paid by the child's parents or guardian. Where a child is convicted on indictment (trial by jury) it would appear that he or she is subject to the same maximum fine levels that apply to an adult, for the offence in question. Unlike an adult a child cannot be detained or imprisoned for default in payment of a fine.

The Children Act 2001 makes provision for a range of community sanctions which any criminal court can impose on a child offender, although most of them were only brought into effect from March 2007.[30] These include: a day centre order which involves attendance on certain days at a centre to participate in and avail of the activities and instruction provided at that centre; a probation

25 Children Act, 2001, s. 98.

26 *O'Malley* 2006, ch.23.

27 *O'Malley* 2006, ch.26.

28 Children Act, 2001, s. 108.

29 In Ireland traditionally criminal courts were only concerned with the punishment of the offender, as distinct from a remedy for the victim. Compensation for injury and loss suffered as a result of the wrongs committed by others was normally available only in the civil courts. In recent years, however, the criminal courts have acquired powers to order the offender to pay compensation to the victim in certain circumstances. See *O'Malley* 2006, chapter 27.

30 Children Act, 2001, ss. 115-141.

(training or activities programme) order which is a probation order coupled with an obligation to complete a programme of training or specified activities recommended by a probation officer; a probation (intensive supervision) order which is a probation order coupled with an obligation to submit to intensive supervision by a probation officer in matters such as the completion of an education or training programme or course of treatment; a probation (residential supervision) order which is a probation order coupled with an obligation to reside in a certified hostel residence under the supervision of a probation officer; a suitable person (care and supervision) order which involves assigning the child to the care of a designated person who will fulfil the role of the child's parent or guardian (this option is available only with the consent of the child's parents or guardian); a mentor (family support) order which involves assigning the child to a person for the purpose of help, advice and support aimed at preventing the child from committing further offences (this option is available only with the consent of the child's parents or guardian and assent of the mentor); and a restriction of movement order which requires the child to be indoors between certain hours each day and/or to stay away from certain places or premises at specified times.

Another community based option is the community service order.[31] This involves the offender performing unpaid work for the benefit of the community for a specified number of hours over a specified period. It has been available since December 1984 in respect of offenders who are at least 16 years of age and who have been convicted of an offence which does not carry a mandatory sentence. The court can consider a community service order as an alternative to imprisonment or detention where the offender consents to an order and the court is satisfied that he or she is a suitable person for that option and that suitable arrangement can be made for him or her.[32]

3.3 Custodial options

There are a number of custodial options depending on the age of the child offender.[33] Up until 1st March 2007 a child – depending on his or her age and circumstances – could be sentenced to a period of detention in an industrial school, a reformatory school, a place of detention, St. Patrick's Institution or to a term of imprisonment.[34] As their names suggest the industrial and reformatory

31 Children Act, 2001, s. 115.

32 See *Walsh/Sexton* 1999.

33 For a detailed discussion of these and the regimes in them, see *Kilkelly* 2006 at chapter 7.

34 See *Walsh* 2005, op. cit. at chapter 7.

schools were aimed at the education and rehabilitation of the child.[35] Their regimes were based primarily on the normal school day and programme. Some of the reformatory schools had secure accommodation. The reformatories catered only for offenders, while the industrial schools had a mix of offenders and children who were at risk or who were in need of care and protection. The reformatories generally catered for offenders from 12 to 17 years of age, while the industrial schools generally accepted offenders who were under 12 years of age and, in some cases offenders between the ages of 12 and 16 years. As mentioned above, several of the industrial schools were owned by religious orders which provided the service on behalf of the state. As such, the admissions policies could differ from school to school. Where an offender was sent to an industrial school it could be for such period as the court deemed proper, although the offender could not normally be detained there beyond his or her 16th birthday. Offenders could be sent to a reformatory school for a period of at least 2 years and not more than 4 years. Some reformatories were also designated as places of detention to which offenders could be sent for periods of longer than 4 years.

St. Patrick's Institution was developed as a borstal institution (see fn. 6). It combines the disciplinary regime of a prison with the education and rehabilitation roles of a reformatory. It caters only for male offenders, usually in the age range from 17 to 21 years. However, a court can sentence sixteen year olds to St. Patrick's in certain limited circumstances, and 15 year olds have been accommodated there due to exceptional circumstances. As will be seen later, St. Patrick's suitability for the detention of child offenders has been heavily censured by the European Committee on the Prevention of Torture and by the Irish Inspector of Prisons and Places of Detention. There is no female equivalent to St. Patrick's.

The places of detention combine secure accommodation with rehabilitation appropriate to the age and circumstances of the child. The practice has always been to designate certain reformatory schools and St. Patrick's as places of detention for these purposes.

Before March 2007 both male and female offenders who were at least 15 years of age could have been sentenced to a term of imprisonment in certain circumstances. In practice, female offenders who were at least 17 years of age had to be sentenced to imprisonment as there was no custodial equivalent to St. Patrick's Institution for them. Indeed, girls as young as 15 years sometimes had to be accommodated in a special unit of the adult female prison in Dublin when, as was frequently the case, there were no suitable reformatory places available for them. Prison is still the only custodial option for all female offenders who are at least 18 years of age.

35 *Walsh* 2005 at chapter 9.

Since March 2007 a child offender (under 18 years of age) cannot be sentenced to imprisonment.[36] The only custodial option is detention in a children detention school (formerly the reformatory schools) or St. Patrick's Institution.[37] There is no prescribed minimum or maximum period for a detention order. However, it cannot be imposed for a period longer than the term of imprisonment that the Court could impose on an adult for the same offence.[38] The Children Act 2001 reflects a bias in favour of non-custodial sanctions for children. It states that a court cannot impose a children detention order unless it is satisfied that detention is the only suitable way of dealing with the child and a place in a detention school is available.[39] However, there is provision for the court to defer making an order until a place becomes available.[40]

3.4 General sentencing principles

The 2001 Act sets out a number of principles to guide courts in dealing with children who are either charged with or found guilty of criminal offences.[41] The principles reflect a strong combination of "due process" and "child welfare" values with neither being given priority.[42] Generally the courts are required to respect the due process rights of the child by having regard to the principle that children have rights and freedoms before the law equal to those enjoyed by adults. This includes, in particular, a right to be heard and to participate in any proceedings that affect them. Criminal proceedings must not be used solely to provide any assistance or service needed to care for or protect the child. On the specific issue of punishment it is stated that a penalty imposed for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, and should take the form most likely to maintain and promote his or her development. It should also take the least restrictive form that is appropriate in the circumstances. Detention should be imposed only as a last resort. Emphasis is placed on the importance of facilitating the continuance of the child's education, employment or training and the promotion of family bonds and stability. These 'welfare' oriented principles are balanced by a

36 Children Act, 2001, s. 156.

37 There is a transitional provision which permits St. Patrick's to continue being used for boys between the ages of 16 and 18 years.

38 Children Act, 2001, ss. 149 and 155(7).

39 Children Act, 2001, s. 143.

40 Children Act, 2001, s. 145.

41 Children Act, 2001, s. 96.

42 See *Kilkelly* 2006 at ch.6 for criticism of how these principles are not always applied in practice.

reminder that a penalty imposed on a child should be no greater than that imposed on an adult for the same offence, that the child's age and maturity should be taken into account as mitigating factors and that the measures taken to deal with the child's offending should also have due regard to the rights of the victim and the protection of society. The court should normally seek a probation officer's report on the child before imposing a penalty for his or her offending.[43] This is especially important if the court is considering a detention order. The court may also seek a victim impact report before imposing a penalty.

3.5 Anti-social behaviour orders

Amendments effected to the Children Act 2001 by the Criminal Justice Act 2006 have introduced a procedure to combat anti-social behaviour in respect of children from 12 to 18 years of age.[44] It empowers a member of the Garda Siochana (a police officer) to issue a warning to a child who has behaved in an anti-social manner. The warning must specify what the behaviour is and where and when it occurred. It will demand that the child cease the behaviour. Where a Garda superintendent in charge of a district receives a report from a member of the Garda concerning the anti-social behaviour of a child he or she shall convene a meeting to discuss the behaviour if he or she is satisfied that it may recur. Those requested to attend shall include: the child, the child's parents or guardian, the member who issued a warning to the child and, where relevant, a juvenile liaison officer. The purpose of the meeting is to agree a "good behaviour contract" for at least six months. If the superintendent feels that a meeting would not have the desired effect (or if it is held and does not succeed in its objectives) the child shall be admitted to the Garda Diversion Programme. If the Programme is not considered a viable option, the superintendent shall apply to the Children Court for a behaviour order in respect of the child.

The Children Court may grant a behaviour order on the application of a superintendent where it is satisfied that the child is continuing or is likely to continue to behave in an anti-social manner. This order will prohibit the child from doing anything specified in the order and it may compel the child to comply with specified requirements relating to, for example, school attendance. The order cannot last any longer than two years. The child may appeal against an order to the Circuit Court. Failure to comply with a behaviour order without reasonable excuse is a criminal offence.

Technically this anti-social behaviour order procedure is not part of the criminal process. It is administered through the civil jurisdiction of the Children

43 Children Act, 2001, s. 99.

44 Children Act, 2001, Part 12A. The Criminal Justice Act, 2006 also introduced a separate procedure for persons over 18 years of age.

Court. Nevertheless the close association with the criminal process is obvious. Frequently, the anti-social behaviour of the child will consist of minor criminal offending which could be dealt with through the Garda Diversion Programme and the criminal jurisdiction of the Children Court. It is administered initially by the Garda Siochana who have the power to convene a meeting aimed at securing changes in the behaviour of the child. Where an order is issued by the Children Court it will require the child to engage in certain behaviour and desist from other behaviour. In many cases this will be indistinguishable from sanctions imposed by the Court in the exercise of its criminal jurisdiction, because the order involves the application of significant restraints on the freedom of the child in response to the offensive behaviour of that child. It does not result in the child acquiring a criminal record. However, a failure to comply with the order will constitute a criminal offence.

4. Juvenile criminal procedure

Ireland has had a separate Juvenile or Children Court since the early part of the twentieth century.[45] Although usually described as a distinct court the Children Court is actually the established District Court[46] with an expanded jurisdiction. In most parts of the State it is presided over by the resident judge of the District Court and sits in the same premises as the District Court, although on different dates or times or in a different part of the building from the latter. It is only in the Dublin Metropolitan Area that the Children Court has its own separate premises.[47]

The Children Court differs significantly from the District Court in its jurisdiction.[48] The former is competent to deal with all offences – apart from a small number of very serious crimes such as murder and manslaughter – charged against defendants who are under 18 years of age at the commencement of the proceedings. The jurisdiction of the District Court, by contrast, is confined to summary offences and certain indictable offences which were committed in circumstances which are not so serious as to require trial on indictment.[49] It does not follow, however, that all indictable offences (apart from the most extreme such as murder) will be dealt with in the Children Court when the defendant is under 18 years of age. In any individual case the judge may consider that the offence is too serious to be dealt with summarily. Equally,

45 See *Walsh* 2005, op. cit. at chapter 6.

46 The District Court is a court of local and limited jurisdiction and constitutes the bottom tier in the pyramidal court hierarchy in Ireland.

47 For recent empirical studies of the Children Court in action, see: *Kilkelly* 2005; *Carroll/Meehan* 2007.

48 Children Act, 2001, Part 7.

49 See *Walsh* 2002, at chapter 13.

when charged with an indictable offence, the child may refuse to be dealt with summarily in the Children Court. In either event, the offence will be dealt with on indictment (by judge and jury) in the Circuit Court or Central Criminal Court, whichever is generally applicable to the offence in question (see section *9.* below).

Subject to important modifications outlined below, proceedings in the Children Court follow the same general course as proceedings in the District Court.[50] The child will appear before the Court to answer charges either as a result of having been arrested and brought in custody before the Court or as a result of being summonsed to appear before the Court at a specified date, time and location. Either way he or she is entitled to be legally represented in the proceedings and should be accompanied by a parent or guardian. The legal representation will be paid for by the State where the defendant cannot afford it. Where the child is represented, it will normally be by a solicitor (as distinct from a barrister).[51] The case against the child is usually presented by a police officer. The charge is put to the child in court and he or she is asked to plead guilty or not guilty. In the event of a guilty plea the case will often be adjourned to allow for the preparation of probation reports etc. on the child to assist the judge in determining an appropriate sentence. In the event of a not guilty plea the trial proceeds in the normal way with the prosecution case being presented through the examination of witnesses who can then be cross-examined by the child or his representative.[52] Likewise the child can present a defence by making oral submissions and/or by calling witnesses who will be examined or cross-examined. At the close of the submissions the judge decides whether the child is guilty or not guilty. Where the former determination is made the case will normally be adjourned for sentencing in the same manner as a guilty plea. The issue of remanding the child on bail or in custody can arise at any time from the moment the child first appears before the court to the time when sentence is imposed. The legal principles governing bail do not generally distinguish between adults and children (this is dealt with later). In practice the Irish judges will remand a child in custody only as a last resort.

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50 See *Kilkelly* 2006, at chapter 5.

51 The legal profession in Ireland is divided into solicitors and barristers. The former are general practitioners who deal directly with clients from their offices in towns and cities. While they are competent to engage in advocacy in the courts up to and including the High Court they tend to confine their litigation functions to preparatory and support work for barristers whom they engage as specialists in advocacy. Nevertheless, it is quite common for solicitors to represent clients in less serious matters in the District Court (including the Children Court). See *Byrne and McCutcheon 5th ed.* (2009) at ch.3.

52 In practice it often happens that the case will be adjourned to a future trial date; see *Kilkelly* 2005.

Modifications have been made to the standard procedure of the District Court when it is sitting as a Children Court. These changes are aimed partly at protecting due process rights and partly at promoting the welfare of the child. Lately, more emphasis has been placed on the latter. Proceedings in the Children Court have always reflected a more informal atmosphere than those in the District Court so as to enhance the capacity of the child's awareness and participation. The judge and lawyers present do not wear their traditional wigs and gowns and the participants try to avoid the use of technical language. The numbers present in the courtroom are kept to a minimum by excluding all persons except participants and *bona fide* representatives of the press.[53] The privacy of the child is further protected by a prohibition on the publication of reports of the proceedings, apart from the court's decision.[54] By protecting the privacy of child offenders the law aims to enhance their rehabilitation.

The Children Act 2001 has introduced two major innovations in the juvenile justice procedure which will have the effect of blurring the distinction between formal criminal proceedings and extra judicial interventions aimed at rehabilitating the child. The first of these changes, which was only brought into force in July 2007, enables the Court to divert the child out of the criminal process and into the care and supervision jurisdiction of the health boards.[55] The Court can trigger this jurisdiction by directing the health board concerned to convene a family welfare conference to consider the circumstances of the child with a view to recommending the making of a care and supervision order. The conference brings together the child, his or her parents or guardian, relatives of the child, an officer of the relevant health board and any other person whom the conference coordinator feels would make a positive contribution. The crime victim, if any, does not have an absolute right to attend. On being informed of the board's action in the matter, the Court may dismiss the charge against the child on its merits if it is satisfied that it is appropriate to do so.

The second possibility now available to the Court is to adjourn the proceedings and set up a family conference to devise an action plan to address the child's offending.[56] The Court can do this only where the child accepts responsibility for his or her behaviour and the Court is satisfied that the child and his or her parents or guardian could make a positive contribution to the conference. The composition of the conference is similar to that of the family welfare conference, except that it is convened by a probation officer who must

53 With the exception of the Dublin Metropolitan Area Children Court the physical layout of the court buildings makes this restriction difficult to enforce in practice; see *Kilkelly* 2005*,* at ch. 3.

54 Children Act, 2001, s. 93.

55 Children Act, 2001, s. 77.

56 Children Act, 2001, ss. 78-87.

also invite the victim (if any) to attend. The role of the conference is to identify why the child became involved in criminal behaviour, determine how he or she can be diverted from such behaviour, mediate between the child and the victim and address the concerns of the victim. The overall aim is to formulate an action plan which the child will be expected to follow over a defined period. This may include matters such as attendance at school or work, participation in a training programme, staying at home at specified times, staying away from specified places or persons and an apology and/or compensation to the victim. The plan is submitted to the Court for approval. Where this is forthcoming the Court will dispose of the case on the basis of the plan. Otherwise it will proceed with the criminal proceedings and impose a sentence in the normal way.

Where a child is jointly charged with an adult for a summary offence the case against both the child and the adult should normally be tried in the Children Court.[57] However, if the Court considers that they should be heard in the District Court (the adult court of local and summary jurisdiction) then it shall be heard there. The legislation does not offer any guidance on the factors which should influence the Court in its decision. Where a child is charged jointly with an adult for an indictable offence which (in the case of the child) could be tried in the Children Court, the Court shall deal with the child as if he or she was charged alone.

It must be apparent from this outline of procedure in the Children Court that it would be unusual for a child offender to have his or her case dealt with to finality on the first appearance. Even before the restorative justice modifications were introduced it was normal for a child offender to appear several times over a period of at least 6 months before his or her case was completed. In its study of 400 cases dealt with by the Court in 2004 the ACJRD Ltd. found that each child had an average of 8 Court appearances before his or her case was finalised (4 children had over 50 appearances each).[58] This was compounded by the fact that each child waited on average for 6 months for his or her first Court appearance. It would appear, therefore, that delay is a significant factor in the operation of the Court.

Where a child is tried on indictment before a judge and jury in the Circuit Court or the Central Criminal Court, the normal rules of criminal procedure generally apply, including those on publicity.[59]

Where a child is convicted and sentenced in the Children Court he or she has a right of appeal to the Circuit Court.[60] The appeal takes the form of a complete re-hearing, generally in the same manner as ordinary appeals from the District

57 Children Act, 2001, s.74.

58 *Carroll*/*Meehan* 2007, at chapter 5.

59 *Kilkelly* 2006, chapter 5.

60 Children Act, 2001, s. 265.

Court. No special provision or modification is made to accommodate the fact that the appellant is a child, apart from the restrictions on publication of the child's identity.[61] Appeals from the Circuit Court or the Central Criminal Court are by way of leave to the Court of Criminal Appeal. Once again, it is the ordinary procedure that applies to the appeal.

The procedure outlined above applies generally to children over the age of 12 years and below the age of 18 years.[62] As noted earlier, the lower age threshold drops to 10 years of age for certain very serious offences. There is a further twist in respect of a child under 14 years of age. Where such a child is charged with a criminal offence the court may dismiss the case on its merits where the court determines that the child did not have a full understanding of what was involved in the commission of the offence as a result of his or her age and level of maturity.[63]

The professionals engaged in the juvenile criminal procedure are mostly general practitioners. There is no body of specialist juvenile prosecutors. The prosecution case in the Children Court will normally be led by a police officer.[64] It is worth noting, however, that where the child defendant is under 14 years of age the case cannot proceed without the consent of the State Director of Public Prosecutions (DPP).[65] In the Circuit Court or the Central Criminal Court, the case against a child will be presented by a barrister in private practice supported by a solicitor in private practice both of whom will be acting for the DPP (see fn. 60). Neither will have any specialist qualifications in juvenile prosecutions. The defence lawyer in the Children Court will normally be drawn from the general ranks of private solicitors. While a few solicitors in Dublin will have developed a particular expertise through regular practice in the Children Court there, most will be general practitioners with relatively little experience of

61 In practice, there are very few such appeals, and it can be expected that the court will be cognisant of the fact that the appellant is a child and it will make whatever concessions it can. It remains the case, however, that the letter of the law does not make special provision for the child appellant.

62 Children Act, 2001, s. 52.

63 Children Act, 2001, s. 76 C.

64 See *Kilkelly* 2005. There is a long tradition in Ireland of police officers performing the role of prosecutor in summary cases – in respect of both adult and child defendants. If the case is too serious or complex for a police prosecutor, it will be taken by a barrister in private practice appointed on a case by case basis by the State prosecution service (DPP). It is important to note that in Ireland the State prosecutor takes the decision to prosecute and then acts in support of the prosecutor in court – he does not actually present the case in court. See *Walsh* 2002, chapter 12.

65 Children Act, 2001, s. 52 (4).

such cases.[66] The defence in the Circuit Court or Central Criminal Court will normally be led by a barrister in general private practice. The judge in the Children Court will usually be the resident judge for the District Court in the area. In the Dublin Metropolitan area the identity of the judge will change frequently. None of them are trained specially as juvenile justice judges. However, the government has recently announced plans to establish a panel of trained judges for the Children Court.[67]

The only practitioners in juvenile criminal procedure who are likely to work full-time on juvenile justice matters are juvenile liaison officers and probation officers. The latter assist the Court by drawing up probation reports which are used by the judge as part of the sentencing process. They also have a responsibility to set up family conferences and to supervise the implementation of an action plan resulting from such conferences and certain other non-custodial penalties imposed by the Court.

5. Sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

Informal methods of dealing with child offenders are available as an alternative to the trial process and as an option for dealing with offenders who have been charged and brought before the courts. The former, which has been available since 1963, consists primarily of the Garda Diversion Programme and is outlined earlier under "the sanctions system". The latter was introduced by the Children Act 2001 and has been operational only since July 2005. It involves the convening of a family conference to address the child's offending. This is explained earlier under "juvenile criminal procedure".

Data on the operation of the diversionary procedure suffers from most of the limitations applicable to the data on offences dealt with by the courts as described earlier. Although the family conference provisions were put into effect in July 2004 there are no published statistics on their application for 2005 or 2006. The only data on their operation is tucked away in the 2004 Annual Report of the Department of Justice, Equality and Law Reform which states that 11 referrals for family conferences were received by the Probation Service by the end of 2004. Research carried out by Mary Burke in 2006 suggests that the uptake on the family conference option is very low; only 62 family conferences were convened in 2006 out of a total of 2,386 cases dealt with by the Children Court in that year.[68]

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66 See *Kilkelly* 2005, at chapter 5.

67 *O'Brien* 2007.

68 National Commission on Restorative Justice 2006, chapter 5.

By comparison with the family conference the data on the operation of the Garda Diversion Programme is positively voluminous. Nevertheless, it too suffers from serious limitations. Although the programme has been operational since 1963 it is not possible to extract meaningful trends from that date to the present. Initially the programme was confined to certain parts of the country and was not fully operational throughout the whole country until the early 1990s. It is only since 1994, however, that the data has been recorded in a manner which gives a breakdown on the basis of age and type of offence. Regional breakdowns have been available only since 1996 (see below under 'regional patterns and sentencing'). Published data is available up to, and including, 2007.

The numbers referred to the programme have been on an upward curve since 1991. It is not possible to extract trends in the percentage breakdown between males and females. The most that can be said is that the average breakdown since 1991 is around 82% male against 18% female, with some evidence of an increase in the female share in recent times.

The age categories used in the data range from 10 to 17 years. As a generalisation the share of admissions correlates with age in ascending order up to 16 years of age. The 16 and 17 year olds (especially the latter) lagged behind younger age groups up until the late 1990s when they began to overtake the others. Over 80% of admissions come from the 14 to 17 year olds (inclusive). Since the mid-1990s there has been a distinct migration upwards in the age profile of admissions. In other words the share of older children being admitted is increasing, while the share of younger children is decreasing. In 2007, for example, 14-17 year olds accounted for 89% of the total, while the under 12s accounted for one-third of one percent.

For many years, larceny was the most common offence in the programme. In 2006 and 2007, however, it was pushed into third place by alcohol-related offences which now constitute more than one-fifth of the total, and road traffic offences which constitute 16% of the total. Criminal damage and public order offences are the next most common. Other offences which feature are: assault, burglary, taking a vehicle and drugs.

More than half of all referrals to the Diversion Programme are dealt with by way of a caution, whether formal or informal. However, there are significant differences in the trends for the two types of caution. The informal caution is by far the most popular method of disposal, accounting for over 40% of all referrals since the 1990s, and there is evidence of its share increasing. In 2007 it accounted for 57% of referrals. The formal caution, on the other hand, is vying with prosecution as the next most popular method of disposal. Although initially much more popular its share is dropping significantly, being squeezed between prosecutions and informal cautions. The prosecution option, currently at 15%, has increased its share in recent years. There are several possible explanations for this. The most likely is that the authorities are admitting more borderline cases to the programme. Increasingly these are being dealt with by way of a

prosecution rather than by a formal caution. The least common method of disposal is 'no action' at an average of 4%. However, its pattern has been erratic and there is evidence that it is on the increase.

The most noticeable feature of the gender breakdown in the disposals data is the tendency for the female share to increase as the severity of disposal method decreases. So, for example, males account for a disproportionately large share of the prosecutions, while the females account for a disproportionately large share of the informal cautions and no further actions. This may reflect a tendency to treat females more leniently. A more likely explanation is that the males tend to present with more serious offences and offences involving violence. It is worth remembering in this context that males account for the vast majority of offences against the person and are the dominant force in property offences. Female offending, on the other hand, is characterised by larceny.

6. Sentencing practice – Part II: The juvenile court disposals and their application

Discussion of sentencing in the Children Court is seriously hampered by the poor state of the published data. Official statistics on non-custodial dispositions for the country as a whole are available only for 2005-2008 in the annual reports of the Courts Service. They deal only with cases before the Children Court and offer nothing beyond absolute numbers for each disposition and, for 2005 and 2006 only, broken down by year of age of the children from 12 to 18. Some further insights can be gained from the 2004 study conducted by the ACJRD Ltd.[69]

On average over the four years from 2005 to 2008 inclusive, about 40% of the cases dealt with by the Children Court resulted in no formal penalty, mostly because they were dismissed, struck out, withdrawn or no order is made. Detention was the next most frequent disposition at around 18%. With the exception of probation in 2005 and 2006 (around 12 or 13%), the remaining dispositions (fine, peace bond, return to a higher court, community service order and donation to the 'poor box') all had single figure shares. Unfortunately, these figures are not wholly compatible with those from the evaluative studies carried out by *Kilkelly* (2003-04) and ACJRD (2005) both of which found a significantly higher use of detention.[70]

The statistics on custodial dispositions are also published in a most unsatisfactory manner. They must be extracted from a combination of the annual

69 *Carroll/Meehan* 2007, at chapter 6. See also *Kilkelly* 2006 at chapter 6 for references to two separate research studies on sentencing in the Dublin Children Court in the 1980s and 1990s, and an unpublished study from 2001/02.

70 *Kilkelly* 2005; *Carroll/Meehan* 2007, at chapter 6.

reports of the Department of Education and Science and the annual reports of the Department of Justice, Equality and Law Reform. The former cover the certified reformatory and industrial schools (designated the Children Detention Schools since March 2007).[71] They provide a breakdown of numbers in the schools on the basis of each year of age from 11 years to 17 years, but give no information on the offences or length of sentence. Even more problematic is the fact that they only provide the numbers in the schools on 30th of June each year. In other words they do not give figures for the number of committals in any given year. The annual reports published by the Department of Justice, Equality and Law Reform do give the numbers of committals each year to the prisons and St. Patrick's Institution. They also break the number down by age classifications. Between 1994 and 2000 the Department followed a practice of publishing composite reports spanning several years instead of annual reports. The data in these composite reports is not wholly compatible with those in the annual reports. Nor are the data compiled and presented in a manner whereby meaningful conclusions about committals in any single year or years can be drawn. Since 2001 the Irish Prison Service has published annual statistics but these do not always follow a consistent methodology and they are not wholly consistent with the methodology for earlier years. It is difficult, therefore to extract meaningful trends.

The numbers detained in the reformatory and industrial schools on the 30th June each year show an overall downward trend from 159 in 1978 to 41 in 2005 (the latest year for which data is available).[72] The downward trend is especially sharp since 1993. The vast majority of these are boys, with the females accounting for about 3% of the total (in 2005 there were no girls at all on 30th June 2005). Among the boys the 15 year olds account for the largest share, at 27% of the total (in 2005 it was 50%). They are closely followed by the 14 year olds at 23% and the 16 year olds at 20% (in 2005 the percentages had reversed with the 14 year olds accounting for 15% and the 16 year olds for 35%). Between them these three age groups account for 70% of the total, while the 11 year olds account for 3% and the 17 year olds account for 6% (in 2005 the 14 to 16 year olds accounted for 95%). It is important to note that the order of merit (in terms of size) changes frequently between the age groups on a year to year

71 The Annual Reports of the Court Service from 2001 to 2005 also provide data on the number of committals to industrial and reformatory schools on an annual basis. The data is recorded on a calendar year basis while the corresponding data from the Annual Reports of the Department of Education and Science relates to the number of persons in the schools on June 30 each year. While the former data should be more pertinent for current purposes, it offers nothing beyond a bald statement of numbers committed each year. Accordingly, the data from the Reports of the Department of Education and Science is preferred here.

72 These figures refer to committals as distinct from remands.

basis. There is also evidence of external factors at play in committals at certain times. In 1994, for example, the 11 to 14 year old age group experienced a major and sudden surge in numbers at exactly the same time as the older age groups experienced an equally sudden and major drop. In 1995 the exact reverse happened. The 17 year olds also experienced a once-off sudden massive surge in 2000.

The intake for girls seems to increase with age more so than boys. For girls the peak age between 1980 and 2002 is 16, while for boys it is 15. The 16 year olds account for 29% of the total females. They are closely followed by 15 year olds at 23% and the 17 year olds at 22%. Between them these three age groups account for about three quarters of the females. By contrast the same age groups for boys account for just over half of the male total. At the lower end of the age scale the female numbers increase in line with age: 11 year olds account for 1%, the 12 year olds for 2%, the 13 year olds for 6% and the 14 year olds for 17%. The tendency for female intake to be weighted more heavily than the males towards the older age groups is reflected in the proportions of females to males. Overall it is in the ratio of 1:22. At the 11 year olds, however, it is 1:85. As the age increases the ratio shortens consistently until the 17+s when it is 1:7.

The data on the reformatory and industrial schools does not include information on the length of sentences being served.

The data for St. Patrick's Institution shows a clear upward trend in committals from 530 in 1976 to 1,108 in 1994. The numbers throughout the 2000s average around the 1,000 mark, with a high of 1,300 in 2004 and a low of 756 in 2007. Up to 1994 it was apparent that the committals were dominated by the upper age groups. Almost two thirds were in the age range 17 to 20 years.

The most striking feature of the statistics for under 21 males committed to prison – up to 1994 – is the tendency for their share of annual prison committals to increase as the severity of sentence increased. Their share of males sentenced to imprison-ment for less than 3 months was 10%. While their share contracted for sentences beyond 3 years, it never fell below the 10% share applicable to sentences of three months or less. A similar but less marked pattern is evident for females.

The ACJRD study found that of those children sentenced to detention in their sample only 19% were committed to a detention school while the remaining 81% were committed to St. Patrick's Institution.[73] The vast majority of those committed to a detention school were sentenced for a period of two years. Almost two fifths of those committed to St. Patrick's were sentenced for periods of 6 months or less. Thirty percent were sentenced to 12 months or more. About two fifths of those who were sentenced to St. Patrick's Institution had served a period of detention in a detention school in the past.

73 *Carroll/Meehan* 2007, at chapter 6.

7. Regional patterns in sentencing

Demographically Ireland is divided between Dublin city and suburban environs with a population of about one and a quarter million and the rest of the country with a population of 3 million. While there are significant urban centres in the rest of the country (Cork, Galway, Limerick, Waterford and Kilkenny) none of them has a population in excess of 300,000. It follows that regional comparisons are generally drawn between Dublin and the rest of the country, although for criminal justice purposes data is sometime compiled on the basis of the major policing regions of: the Dublin Metropolitan, Eastern, Northern, South-Eastern, Southern and Western Regions. Of these the Northern and the Western Regions would be considered the most rural, with the Southern and Eastern Regions being the next most urbanised after Dublin.

Unfortunately data on sentencing in Ireland is not, and never has been, compiled and published on a regional basis. The stark exception concerns dispositions through the Garda Diversion Programme. Technically, of course, these are not sentences at all. Since, however, they are the only dispositions which are broken down by region they will have to be used to give some limited insight to regional comparisons. Even then, the picture is further clouded by the fact that the data on programme dispositions is only broken down by region since 1991.

The most striking feature to emerge is that Dublin is a significantly heavier user of prosecution than the rest of the country. In 2007, for example, it accounted for 41% of prosecutions even though it only dealt with less then one third of total children referred to the programme. It also used prosecution in 19% of its own cases, compared with 13% for the rest of the country. By contrast, Dublin was a lighter user of the formal caution, accounting for only 26% of the total in the country as a whole.

8. Young adults and juvenile sanctions

There are no special procedures for young adults.

Further there is no provision in Irish law for any of the sanctions aimed specifically at child offenders to be applied to young adult offenders (18-21 years of age). The sanctions provided for in the Children Act 2001 are specifically reserved for children (under 18 years of age). In practice, of course several of the non-custodial options available in respect of child offenders are modified versions of adult sanctions which are frequently applied to young adult offenders. The primary examples are probation orders, community service orders and fines.[74] In the case of custodial sanctions, there is scope for a more direct

74 See *Walsh* 2002, at chapter 21.

overlap between child offenders and young adult offenders. Although it is expected that all offenders under the age of 18 years who are sentenced to detention will be accommodated in a detention school, it is still the case that males of at least 16 years of age can be sentenced to detention in St. Patrick's which caters for male offenders up to the age of 21 years. Although there is no legislative provision for it, some female offenders over 16 years of age are still being accommodated in a designated section of Mountjoy adult Prison in Dublin because the necessary places in a detention school are not yet available.[75]

A young offender between the ages of 17 and 21 years can be sentenced to detention in St. Patrick's Institution for a period not exceeding the term of imprisonment to which he would otherwise have been sentenced. This can also apply to a 16 year old offender if the court considers that no other method for dealing with the case is suitable. If convicted on indictment, a young offender between the ages of 16 and 21 years can be sentenced to a period of detention of between 2 and 3 years, instead of being sentenced to a term of imprisonment. This option is only available if it appears to the court that by reason of his criminal habits or tendencies or association with persons of bad character it is expedient that the offender should be subject to such detention and under such instruction and direction as appears most conducive to his reformation and the repression of crime. There is also provision for a young offender between the ages of 17 and 21 years to be committed to St. Patrick's Institution when convicted summarily of an offence which is punishable by a term of imprisonment for one month or more. This can also arise where the offender has been convicted previously of an offence, or has broken a condition of his recognisance after having been discharged on probation.

As indicated above data on committals to St. Patrick's Institution are only available in a consistent manner from 1976 to 1994. This shows that 18 to 21 year olds accounted for 60% of all committals in this period. As might be expected the 18, 19 and 20 year olds are among the largest single year age groups over this period, although the number of committals in each year tends to vary erratically. The largest single age group is the 18 year olds, with the 19 year olds close behind. In third place are the 17 year olds. Towards the end of the period for which data are available the 19 year olds were establishing themselves as the dominant age category with the 18 and 17 year olds not far behind.

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75 It should be noted that since March 2007 all child offenders up to 18 years of age, whether male or female, who are sentenced to detention should be sentenced to a detention centre. At the time of writing, however, St. Patrick's Institution was being used as a detention centre for young males of at least 16 years of age (and in some cases 15 years of age), while females of at least 16 years of age were being accommodated in a special unit in the adult female prison in Dublin.

9. Transfer of children to the adult courts

Since 1884 children below the age of 16 years could be tried summarily for a wide range of indictable offences which would otherwise be tried before a judge and jury.[76] In 1908 the age limit was increased to 17 years of age and provision was made for the charges to be heard in the District Court (court of local and summary jurisdiction) sitting separately as a Juvenile Court. Today, pursuant to the Children Act 2001, children below the age of 18 years can be tried in the District Court sitting as a Children Court for all offences, apart from a few of the most serious offences.[77] The latter consist of: treason and associated offences; usurpation of the functions of government or obstruction of the government or President; murder, attempt to murder and conspiracy to murder; piracy; certain offences under the Geneva Conventions Act 1962; offences under the Genocide Act 1973; offences under the Criminal Justice (United Nations Convention against Torture) Act 2000; certain offences under the Competition Act 2002; and manslaughter. When charged with any of these offences, the child must be tried in the Central Criminal Court before a judge and jury.

Even for those indictable offences which are triable in the Children Court it is possible for a child defendant to be tried in the Circuit Court before a judge and jury. This can happen where the child exercises his or her right to be tried before a judge and jury. For the purpose of making his or her decision in this matter the child must be informed by the Court of the right to choose, and the court must specifically inquire of the child whether he or she consents to be tried summarily. The child may seek the assistance of a parent or guardian (or spouse, if married) in making the decision.

Where a child wishes to plead guilty to an offence which must be tried before a judge and jury the Children Court may take the plea of guilty and send the child forward to the appropriate adult court for sentencing.[78]

A child must be tried before an adult court for an indictable offence where the Children Court is of the opinion that the offence does not constitute a minor offence fit to be tried summarily or to be dealt with summarily on a plea of guilty. The Court's assessment in this matter is not confined to the type of offence or the circumstances of its commission. The Court must also take into account the age and level of maturity of the child and any other facts it considers relevant.

A final possibility that needs to be mentioned is trial in a Special Criminal Court which normally sits with three judges and no jury. There is provision in Irish law for the establishment of such courts by government proclamation

76 *Walsh* 2005, at chapter 6.

77 Children Act, 2001, s. 75.

78 Children Act, 2001, s. 75.

where the government considers that the ordinary courts are inadequate to secure the effective administration of justice.[79] When a Special Criminal Court has been established certain offences must be tried in it and there is provision for any offence to be referred to it by the prosecutor in certain circumstances. It can happen, therefore, that a child defendant would be returned directly for trial to a Special Criminal Court or be transferred to it from a Children Court (or another adult court). A Special Criminal Court was established in 1972 in response to the violent situation in Northern Ireland. That Court is still sitting although some of its case load has actually concerned organised crime.

Where a child is tried in an adult court, the normal rules of criminal procedure in that court apply. No formal concession is made for the fact that the defendant is a child as distinct from an adult. The sentencing jurisdiction of the court in such cases is also more wide ranging than that available in the Children Court.

In its study of a sample of 400 offenders before the Children Court in 2004 the ACJRD found that less than 5% were sent forward for trial on indictment (i. e. to be tried by judge and jury in an adult court).[80] It would seem to follow that the vast majority of child offenders who are tried in a court are dealt with in the Children Court.

10. Preliminary residential care and pre-trial detention

When a child is charged with a criminal offence he or she is brought in the first instance before the Children Court. Unless the child is dealt with on the first appearance the Court will have to decide whether to release him or her on bail or remand him or her in custody. Subject to one exception, the Court's decision in this matter will be based on the same principles that apply to an adult. The one exception is that the Court cannot impose a requirement on a child to lodge money by way of a surety before being released on bail.[81]

In practice most child defendants are released on bail to await trial in the Children Court or are sent forward on bail for trial or sentence in an adult court, although a significant minority (about 20%) are remanded in custody initially. When granting bail the Court may impose one or more conditions, some of which would not normally arise in respect of an adult defendant. These include a requirement on the child to: reside with his or her parents or guardian or other specified adult; receive education or undergo training; report to a specified police station at a specified time or times; not associate with a specified individual or individuals; and stay away from a specified building or place.[82]

79 *Walsh* 2002, at chapter 20.

80 *Carroll/Meehan* 2007, at chapter 6.

81 Children Act, 2001, s. 89.

82 Children Act, 2001, s. 90.

Where a child is released on bail and does not comply with any of the conditions imposed on him or her and is subsequently found guilty of the offence charged, the court may, when dealing with the child for the offence, take into account the child's failure to comply with the conditions. This may result in a stiffer sentence than would otherwise have been imposed.

The Children Act 2001 introduced new provisions on the jurisdiction to remand a child in custody. These apply where the child is: charged with or found guilty of an offence; is sent forward for trial; or where the Court has postponed a decision in respect of the child.[83] Where the court remands a child in custody in any of these situations he or she shall be remanded to a place designated by order of the Minister for Justice, Equality and Law Reform as a junior remand centre.[84] The Minister may designate as a junior remand centre any place which in his opinion is suitable for the custody of children remanded under this provision. This can include part of any children detention school. Where it is part of a children detention school, a child remanded to it shall, as far as is practicable and where it is in the interests of the child, be kept separate from and not be allowed to associate with children in respect of whom a period of detention has been imposed. Moreover, a place can only be designated as a junior remand centre with the consent of its owners or, as the case may be, its managers. Male children over the age 16 years of age may also be remanded to St. Patrick's Institution.[85]

When remanding a child in custody under these provisions, the Court must explain its reasons for doing so in open court in language that is appropriate to the age and level of understanding of the child.[86] Moreover, the legislation specifically prevents the Court from remanding a child in custody under these provisions if the only reason for doing so is that the child is in need of care or protection.[87]

These provisions have only been in force since March 2007. Prior to that, children and young persons charged with a criminal offence could be committed to custody in a place of detention or a remand institution to await trial or sentence.[88] The actual location was dependant on the age and circumstances of the individual in question. In practice it was likely to be St. Patrick's Institution for males over 16 years of age and prison for females over 17 years of age. In exceptional circumstances a child of 15 years of age or older could have been

83 Children Act, 2001, s. 88(1).

84 Children Act, 2001, s. 88(2).

85 Children Act, 2001, s. 88(12).

86 Children Act, 2001, s. 88(3).

87 Children Act, 2001, s. 88(10).

88 *Walsh* 2005, at chapter 6.

committed to prison. Currently, it is still the practice to remand males over the age of 16 years of age to St. Patrick's and females over 17 years of age to prison as the remand centres for children over 16 years have not yet been provided.

It is also worth noting that the police have the power to release on bail a child who has been arrested for an offence.[89] The officer in charge of the police station to which the child has been brought can release the child on bail if he or she considers that it is prudent to do so and no warrant directing the detention of the child is in force. Where the child is released on bail it will be on the condition that he or she appears before the next sitting of the Children Court in that area to answer the charge. A surety may be taken for that purpose. Where the officer decides not to release the child on bail he or she must take the child before a sitting of the Children Court as soon as practicable. This can mean a short period of detention in police custody.

There is very little empirical data on pre-trial detention of child defendants. In its study of 400 cases in the Children Court in 2004 the ACJRD found that 20% of the children were remanded in custody.[90] On the face of it this is a high percentage. It must be appreciated that all of those remanded in custody would not necessarily be remanded for the whole pre-trial period which could last for anything up to one year or more. Also many of them are remanded in custody for the purposes of an assessment aimed at identifying their needs and how those needs might best be met. It is also worth noting that the proportion remanded in custody is significantly higher in Dublin and the other cities than it is in the rural areas.

11. Residential care and youth prisons – Legal aspects and the extent of young persons deprived of their liberty

Since March 2007 the custodial facilities for young offenders are children detention schools (formerly reformatory schools), St. Patrick's Institution and "prison". The legislation stipulates that children under the age of 18 years cannot be sentenced to a term of imprisonment.[91] Where a court imposes a detention order, the child under the age of 18 years should normally serve the sentence in a detention school. Currently, however, the detention schools available cater only for children under the age of 16 years. Accordingly, males over the age of 16 years will normally serve their detention in St. Patrick's Institution while females will normally serve it in a designated area of the adult female prison in Mountjoy.

89 Children Act, 2001, s. 68.

90 *Carroll/Meehan* 2007, at chapter 5.

91 Children Act, 2001, s. 156.

11.1 Children detention schools

Currently there are four detention schools, all located in the greater Dublin area: Finglas Child and Adolescent Centre, Oberstown House (Boys), Oberstown House (Girls) and Trinity House.[92] All of these, with the exception of Finglas, are on the same campus. There are plans to develop an additional facility on this campus to cater for the 16 to 18 year olds who are currently accommodated in St. Patrick's or a designated area of the adult female prison.

Each detention school is administered by its own board of management appointed by the Minister. The board makes the rules on the management of its school and must carry out such policy in relation to the children in its school as the Minister specifies.[93] It must appoint a director and staff who are responsible for the day to day running of the school.

The director of a school must accept any child lawfully ordered by a court to be detained in the school.[94] While detained there, the child must comply with the rules and regime of the school, including its disciplinary code. The contents of this code are a matter for the school's management, but it cannot include corporal punishment, deprivation of food or drink or treatment that is cruel, inhuman or degrading or that could reasonably be expected to be detrimental to physical, psychological or emotional well-being.[95]

The director of a school may permit a child to be absent from the school temporarily for certain purposes, including employment, training, sport and entertainment in the community.[96] He or she can also authorise the temporary release of a child into the custody of his or her parents, guardian or a responsible person to facilitate the child's successful re-integration.[97] There is also provision for the release of a child back into the community under supervision. It may happen that the court has imposed a detention and supervision order. In this event half of the detention period is spent in a detention school (or detention centre, as the case may be) and half under supervision in the community. During the period of the child's detention, whether in the school or on temporary release etc., he or she is deemed to be in the lawful custody of the director of the school.

There is provision for transfers between detention schools. The Minister may direct the transfer of a child detained in a children detention school to another such school to serve the whole or any part of the remainder of his or her

92 For a detailed account of each, see *Kilkelly* 2006 at chapter 7.

93 Children Act, 2001, s. 176.

94 Children Act, 2001, s. 193.

95 Children Act, 2001, s. 201.

96 Children Act, 2001, ss. 202 and 203.

97 Children Act, 2001, ss. 205-207.

period of detention.[98] This can happen where the school to which the child is to be transferred caters for that class of child and provides the conditions and facilities necessary for it to achieve its principal object in the case of the child in question. The class of child in this context could refer to matters such as the child's religious beliefs or need for specialised treatment.

A child's detention in a detention school comes to an end when he or she has completed the period of detention as specified by the court. Where the child reaches the age of 18 years without completing his or her period of detention the remainder will normally be served in St. Patrick's Institution or an adult prison.[99]

There is no provision for a child to earn remission in a children detention school, although there is the possibility of temporary release with supervision in the community. The Minister may also grant unconditional release on compassionate grounds.[100]

It was originally envisaged that the detention schools would remain under the supervision of the Minister for Education and Science. In 2006, as part of the general move towards a more 'justice' oriented approach to the treatment of juvenile offenders, legislation was enacted transferring responsibility to the Minister for Justice, Equality and Law Reform.[101] Since March 2007 the Minister is the supervisory body for these schools. Each board of management has the power to makes rules for its school with the consent of the Minister. In the absence of such rules, the rules governing St. Patrick's and adult prisons shall apply.[102]

11.2 St. Patrick's Institution

St. Patrick's Institution can be described as a youth prison.[103] It is a successor to the old borstal regime that was introduced in Britain in 1908. It deals exclusively for boys in the age group of 16 to 21 years, although it has been accepting boys of 15 years of age as a temporary emergency measure. It is a secure institution in the mould of an adult prison. Offenders committed to St. Patrick's by the courts must be accepted by the management. While there, they are subject to the general rules governing prisoners, including discipline, temporary release and early release. When a young offender has reached the age of 21 years without having completed his period of detention in St. Patrick's he should normally be transferred to a prison.

98 Children Act, 2001, s. 198(1).

99 Children Act, 2001, s. 155.

100 Children Act, 2001, s. 209.

101 Criminal Justice Act, 2006, s. 146.

102 Children Act, 2001, s. 156B.

103 *Walsh* 2005, at chapter 9.

The suitability of St. Patrick's as a detention facility for young offenders has been severely criticised by the Irish Inspector of Prisons and Places of Detention and, to a lesser extent, the European Committee on the Prevention of Torture (CPT). The latter, in its 2006 Report on Ireland expressed concern at a culture of inter-prisoner intimidation and violence, which was partly fuelled by a drugs problem.[104] There was insufficient participation in educational and industrial training classes and frequently classes had to be cancelled due to staff shortages.[105] There was also a need for more medical and psychological support services. In his 2005 Annual Report the Inspector of Prisons and Places of Detention considered that it was unsuitable for purpose and that it should be closed down immediately. This echoed a call first made 20 years earlier by the Report of the Committee of Inquiry into the Penal System (the Whitaker Report).

11.3 Persons held in detention

The total number of children detained in detention schools at any one time is in the region of about 50 to 60, with a low of about 10 in one school to a high of about 18 or 20 in another. They have a total capacity of 71. There can be about 180 to 200 boys detained in St. Patrick's at any one time. It has a capacity of 220.

Data on the lengths of sentence served or periods of detention served by offenders in these schools, places of detention, St. Patrick's Institution and prison is very limited. It was dealt with earlier under the heading of 'Sentencing practices – part II' and 'Young adults and juvenile sanctions'.

12. Residential care and youth prisons – Treatment, training and educational programmes

Each children detention school has its own distinct care regime.[106] It is difficult, therefore, to generalise too much about them. Nevertheless, they all share the common aim of providing the child with the routine and supports traditionally associated with the home environment, in so far as that is possible in the circumstances. Statutorily, they are required to provide appropriate educational and training programmes for the children referred to them.[107] In particular they must aim to promote the reintegration of the children into society and prepare them to take their place in the community as persons who observe the law and

104 CPT/Inf (2007) 40, at paras. 38-39.

105 CPT/Inf (2007) 40, at paras. 45 and 59.

106 *Kilkelly* 2006 at ch.7.

107 Children Act, 2001, s. 158.

are capable of making a positive and productive contribution. The schools shall pursue these aims and objectives in respect of the children by:

a) having regard to their health, safety, welfare and interests, including their physical, psychological and emotional well-being; providing proper care, guidance and supervision for them;
b) preserving and developing satisfactory relationships between them and their families;
c) exercising proper moral and disciplinary influences on them; and
d) recognising the personal, cultural and linguistic identity of each of them.[108]

The director of a school is under a legal obligation to make arrangements for medical treatment for any child in the school that is in need of such treatment.[109] This may require removal to hospital or even transfer to another school. The Minister decides which detention schools will provide any particular courses of specialised treatment which in his or her opinion should be available for children in need of such treatment.[110] The director must ensure that each child in the school shall, as far as practicable, be given the opportunity to practise his or her religion and to receive religious assistance and instruction.[111] As noted above, each school must have its own rules of discipline and these are enforced by the director.

Generally, the schools follow the routine and programme of the traditional school day, modified to accommodate the particular needs and circumstances of the children in their care.[112] Most of the schools also place an emphasis on vocational training aimed at providing the children with skills which will enhance their employability and capacity to develop into balanced and productive members of society. Where appropriate, individual children will be permitted to pursue employment and training outside the school on a daily basis. Mobility trips involving a temporary absence from the school are also used to promote a child's personal and social development, awareness, and appreciation in matters of culture, education and recreation. Each mobility trip must be authorised by the director of the school concerned and shall be granted for a specified period.[113] Before giving authorisation the director must be satisfied, on the basis of an assessment of the child's suitability for such trips, that the

108 Children Act, 2001, s. 158.

109 Children Act, 2001, s. 200.

110 Children Act, 2001, s. 197.

111 Children Act, 2001, s. 199.

112 *Walsh* 2005, at chapter 9.

113 Children Act, 2001, s. 204 (2).

purpose of the trip is appropriate for the child.[114] During the trip the child must be accompanied at all times by at least one member of school staff.[115] Any breach by a child of the rules governing the grant of mobility trips will render that child ineligible for such trips for such period as the director may determine.[116] Absconding while on a mobility trip shall be treated as a breach of school discipline.[117]

The Minister may suspend mobility trips for a particular child or for any school where he or she is satisfied that they would not be in the best interests of the child or school or of society generally during the specified period.[118] Any such suspension will be for a specified period. This period may be renewed on as many occasions as the Minister considers necessary until the circumstances that gave rise to the suspension no longer apply.[119]

Generally the schools aim to maintain and develop the child's links with the community and family. To this end day trips to the seaside and countryside and for entertainment and shopping are a normal feature of the year, as is engagement with the community in sporting and other social activities. Visits from family are encouraged and, in suitable cases, children are granted overnight and weekend visits to their families.

While some detention schools are secure units, or contain secure units, in the sense that children are locked in their rooms at night, most follow a relatively open regime.

The schools are subject to an inspection at least once every 12 months by an inspector appointed by the Minister.[120] The inspection reports, and the reports of any special investigations carried out by the inspector, are submitted to the Minister. There is also a visiting panel for the schools appointed by the Minister.[121] It is expected to visit each school at frequent intervals to hear any complaints that may be made to it by any child in the school, to report on any abuses or irregularities observed or repairs or structural alterations that may be needed and on any other matter. The panel reports to the Minister. Any judge may visit any children detention school at any time.[122]

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114 Children Act, 2001, s. 204(4).

115 Children Act, 2001, s. 204(3).

116 Children Act, 2001, s. 204(7).

117 Children Act, 2001, s. 204(8).

118 Children Act, 2001, s. 204(5).

119 Children Act, 2001, s. 204(6).

120 Children Act, 2001, ss. 185, 186 and 186A.

121 Children Act, 2001, ss. 190-191.

122 Children Act, 2001, s. 192.

St. Patrick's Institution is a secure institution for boys.[123] There is an emphasis on rehabilitation in its regulations. Regulation 4, for example, states that: "An inmate shall, in so far as his length of sentence permits, be given such training and instruction and be subjected to such disciplinary and moral influences as will conduce to his reformation and the prevention of crime".[124]

He shall also be allowed regular physical recreation and exercise and be given regular physical training as may be necessary to promote his health and well-being, unless he is medically unfit. If the Governor considers that the writing and receipt of letters will promote the inmate's rehabilitation he may permit the inmate to write and receive as many as he thinks proper. In practice, however, St. Patrick's looks, feels and operates like a prison.[125] Access to the outside is strictly controlled and the boys are locked in their cells at night and for certain periods during the day. The regime is also more like that in a prison as distinct from that in a detention school.

There are educational, training and recreational facilities. While normal schooling is not a standard feature of the regime in the manner of a detention school, it is available full-time for those who wish to avail of it. While training opportunities are limited, it would appear that some form of training is available to anyone who wishes to take part in it. There is no provision for part-time employment outside of the Institution. Home contact is also limited with no provision for weekend release, and visits confined to one or two per week for convicted persons and one each day for 6 days per week for boys on remand. Despite these limitations the Institution is committed to the provision of a safe, secure and humane environment in which the boys are encouraged to get the maximum benefit from the period that they spend there.[126] There is a programme in which the staff comes together on a multi-disciplinary basis to plan out the sentence for each boy. There is also a monitored drug-free unit in which boys are encouraged and supported in their endeavour to remain drug free. Boys who abide by the rules of the unit can earn extra privileges.

Convicted offenders are kept separate from those on remand. The latter also follow a different regime in that they do not benefit from education and work opportunities to the same extent as the convicted offenders. The under-age boys

123 See *Kilkelly* 2006 ch.7 for a detailed account of the regime there.

124 Saint Patrick's Institution Regulations, 1960, reg. 4.

125 Significantly, on the Dail Committee stage of the Criminal Justice Bill, 1960, the Minister said that "primarily St. Patrick's must remain a prison". Dail Debates Vol.183, Col.898. For criticism of the failure of the Criminal Justice Act, 1960 to enshrine a more strident distinction between St. Patrick's and prison, see J O'Connor "The Juvenile Offender" *Studies* (1963) 69 at 91-92. The 2005 Report of the Inspector of Prisons and Places of Detention suggests that this analysis is as true today.

126 See the decision of the European Court of Human Rights in *DG v Ireland* (2002) 35 EHHR 33 for a very informative account of the regime in St. Patrick's.

who are sent to St. Patrick's occasionally are kept separate from the other boys. Segregation also applies to the 15 year olds who have been accepted as a temporary emergency measure. They are accommodated on separate landings which have been specifically refurbished to suit their needs. In addition, this new unit operates on the basis of standards laid down by the Department of Education and Science. In effect it is a wholly separate detention centre, modelled on the detention schools, which just happens to be located within St. Patrick's.

The courts on occasions have commented on the distinct role of St. Patrick's Institution. They perceive it as a custodial unit whose primary mission is the reform of offenders sent to it.[127] It is considered to be an alternative to, as opposed to the equivalent of, imprisonment.[128] The expectation is that each offender will benefit from a programme of training which caters for his particular circumstances and is aimed at steering him away from future criminal activity. It follows that a judge must exercise discretion in sentencing an offender to a term of detention in St. Patrick's. Just because the offender falls within the eligible age category it does not follow that such a sentence would be appropriate. The judge should satisfy himself or herself that the particular offender would be likely to benefit from the curriculum in St. Patrick's and would not prevent other inmates from benefiting from it.[129]

St. Patrick's comes under the remit of the Inspector of Prisons and Places of Detention who reports to the Minister. It has also its own Visiting Committee.

13. Current reform debates and challenges

Since the late 1970s there had been a general recognition that the Irish juvenile justice system was failing society generally and children at risk in particular. It suffered from: an emphasis on formal legal process, criminalisation at a very early age, the use of a narrow range of sanctions developed to deal with adult offending, detention facilities designed (and sometimes built) in the nineteenth century, a lack of specialist expertise and training for the key players in the legal process and serious under-resourcing. These deficiencies were most visible in some of the sittings of the busier Children Courts throughout the country.

127 *State (White) v Martin* (1977) 111 ILTR 21.

128 In *State (White) v Martin* (1977) 111 ILTR 21 it was held that detention was radically different from imprisonment. But note *State (Sheerin) v Kennedy* [1966] IR 379 where it was held that there was no practical difference between detention and imprisonment. Gannon J in *State (Craven) v Frawley* [1980] IR 1 attempts to reconcile the two by pointing out that the Supreme Court in *White* was emphasising that detention should be chosen only in special circumstances. Equally, it may be that the Supreme Court in *Sheerin* was merely stating the obvious, namely that both options involved deprivation of liberty within a disciplined regime.

129 See *Henchy* in *State (White) v Martin* (1977) 111 ILTR 21 at 24.

Typically a single harassed District Court judge who was trained (and more accustomed) to deal with adult offenders would sit for hours trying to work through a list of child defendants, many of whom would have been waiting around the court for hours for their case to be heard. Regularly the judge would find that the options and facilities needed to respond to the circumstances and offending of the child simply were not available in law or practice. Even where the judge considered that it was necessary in the interests of the child and society that the child should be detained in a secure facility with appropriate supports, he or she would often find that no places were available. This was especially the case with young female offenders.

These glaring, but standard, deficiencies in the juvenile justice system were complemented by even greater shortcomings in the provision for non-offending children at risk. In the late 1990s the lack of resources to cater for such children were so grave that some courts had no other option but to commit some of them to detention in St. Patrick's Institution which, as explained earlier, is the equivalent of a prison for young people.[130] To make matters worse the country was rocked in the 1990s with a whole series of shocking revelations on the physical and sexual abuse of children in residential industrial schools, particularly those run by religious orders on contract to the State, at least up until the 1970s.

Despite the urgent need for reform, the debate on how to reform dragged on very slowly over the last two decades of the twentieth century. Advocates for reform on behalf of children relied increasingly on international human rights standards and best practice elsewhere. They were often frustrated, however, by bureaucratic and vested interests. Ultimately, it seemed that the battle for reform was won with the enactment of the Children Act 2001.

The 2001 Act was generally welcomed as a balanced and innovative response to the serious deficiencies of the outmoded juvenile justice system which was still based on legislation enacted in 1908. The 2001 Act's emphasis on diversion, restorative justice and sanctions tailored to address the causes of a child's offending managed to deliver key elements of a 'welfare' approach, while at the same time protecting many of the due process rights of the child. All that was needed was the allocation of the resources and the provision of the infrastructure necessary to give effect to the philosophy behind the Act. Unfortunately the resources and infrastructure were not provided. The inevitable result was that major parts of the Act were not put into effect immediately. These included the provisions on: raising the age of criminality, the restorative justice procedure, the expansion of non-custodial sanctions, the reform of the custodial facilities and the prohibition on the use of imprisonment as a sanction. Those parts of the Act that were put into effect made little material difference to the operation of the system. In particular the Children Court continued to sit in most parts of the country as an extension of the District Court. The cases were

130 See, for example, *D.G. v Ireland* (2002) 35 EHRR 1153.

heard by the District Court judges who were given neither the resources nor the training to deal with the difficult personal and family circumstances of the children who were appearing before them.[131] Similarly, the prosecution and the defence lawyers generally lacked any specialist training or resource support. The only specialist expertise available to the court was provided by the officers of the Probation Service who could report on the background and circumstances of an individual child defendant and supervise compliance with any non-custodial sanction that may be imposed. They too, however, were grossly under-resourced and understaffed.

The net effect was that the juvenile justice system carried on after the enactment of the 2001 Act much as it had done before.[132] The advocates for reform focused their efforts on the release of the necessary resources and the full implementation of the Act. Very quickly, however, it became apparent that a groundswell against some of the key 'welfare' based provisions in the Act was growing in government. Fuelled by a media driven 'moral panic' over the threat posed by juvenile crime and anti-social behaviour the government adopted a more punitive approach to the juvenile justice system in 2006. This was reflected not just in the introduction of measures to combat anti-social behaviour but also by a retreat from key provisions in the 2001 Act before they were ever brought into force. In particular, the age of criminality was lowered again for certain offences, the reform of the detention facilities was revised and the facilities themselves were transferred from the management and control of the Minister for Education and Science to the Minister for Justice, Equality and Law Reform. This reflects a distinct move away from a 'welfare' to a 'justice' oriented regime in these facilities.

The extent to which these 'justice' oriented reforms and the remaining 'welfare' oriented reforms are applied in practice will have a huge bearing on the future shape of debate on and challenges for the juvenile justice system in Ireland. As always the resource issue will be critical and the early signs are not positive from a 'welfare' and rehabilitative perspective. At the time of writing, appropriate detention and support facilities have not been built, with the result that many child offenders are still being committed to St. Patrick's Institution and even to the adult female prison at Mountjoy. While the restorative justice option in the Children Court is making a difference in some cases, the numbers are small and the experience of child defendants, judges and practitioners in the other cases is no different from what it was ten years ago. Finally, the plight of children at risk remains as it was due to a lack of resources in the provision of:

131 See *Kilkelly* 2006, at chapter 5.

132 For a reasoned argument that the Irish system continued to fall short of international human rights standards, see *Kilkelly* 2006, at chapter 5.

appropriate family supports; residential, educational and training facilities; crime prevention programmes; and probation supports.

14. Summary and outlook

For most of the twentieth century, juvenile justice was the forgotten section of the Irish justice system. The reforms that were introduced in Britain from the 1960s onwards passed Ireland by as it retained the Victorian system right into the third millennium. The Irish juvenile justice system continued to labour under the burdens of: an exceptionally low age of criminal responsibility, under-investment in diversion programmes, a lack of specialist expertise among legal professionals dealing with juveniles, too few disposal options for judges dealing with child offenders and a shocking lack of resourced detention facilities for children whose circumstances required such facilities. These problems were compounded by the fact that the management of and responsibility for the juvenile justice system were hopelessly fragmented. Too much control was ceded to the religious orders, especially in the provision of child detention facilities, with too little accountability for their performance. Unclear lines of demarcation between the Departments of Justice, Equality and Law Reform, Education and Science and Health and Children hampered the development of coherent and progressive policy-making and contributed to arbitrary overlaps and gaps in provision. Policy-making and accountability were further undermined by a woeful failure to compile and maintain coherent data on even the most basic aspects of juvenile crime and justice.

After several decades of prevarication concrete moves were finally made to address some of these problems with the enactment of the Children Act 2001 and its provision for diversion, restorative justice, a wider range of non-custodial options and a reform of child detention facilities. In hindsight, however, it appears that this important landmark has been racked by policy confusion and a lack of political will to provide the necessary resources to ensure the full implementation of the Act. Accordingly, the system carried on into the twenty first century much as it had done throughout the twentieth. The failure to embrace reform was also reflected in the failure to develop a meaningful system for the recording of data on juvenile crime and justice.

Lately, there are signs that the government is finally adopting a more focused approach to the subject; albeit one that is characterised by a ‘get tough’ policy on juvenile crime and young offenders. Driven largely by a media generated concern about the level and extent of anti-social behaviour, the government has secured significant amendments to the 2001 Act to reflect a more punitive approach to juvenile offending. This has included: a lowering in the age of criminal responsibility for certain offences, the use of the civil process to combat anti-social behaviour and the transfer of child detention facilities from the management of the Department of Education and Science to that of the

Department of Justice. On the other hand these developments have been accompanied by a more concrete commitment to provide the resources that are sorely needed to deliver a justice system that caters for the basic rights of children who come into contact with it. Of particular note in this context is the positive work of the Irish Youth Justice Service which was established in 2005. Only time will tell whether these initiatives will bear fruit. Unfortunately, there are no concrete signs that the reforms will be complemented by the compilation and publication of comprehensive data on juvenile crime and justice in a coherent manner.

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Italy

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1. Historical development and overview of the current juvenile justice legislation

In the mid-1800's, Italy saw the beginnings of a movement which was based on new sociological and psychological findings and the discovery of "youth" as a special stage of personal development. This movement argued that juvenile offenders should be subject to less severe sentencing.

The *Rocco* Penal Code of 1930, which raised the age of criminal responsibility from 9 to 14 years and lowered the age of full responsibility from 21 to 18, made explicit reference to the concept of the capacity of will and thought as a new parameter replacing the previous parameter of "discernment".[1] As a result, an offender who had attained the age of 18 at the time of the offence was considered to be an adult, presumed capable of understanding and acting intentionally and therefore criminally liable. This presumption may not be considered valid, however, if it is proved that the offender was unable to understand and act intentionally at the moment of the offence, due to insanity (Article 88 of the Criminal Code) or other causes. If insanity is proved, the offender cannot be considered liable for the offence and therefore no penalty can be imposed on him/her, with the exception of those security measures that may be applied if the offender is recognised to be socially dangerous.

The minimum age of criminal responsibility is currently set at 14 years (Article 97 of the Criminal Code). Any minor who has not attained that age can not be indicted for any type of illegal behaviour, since it is presumed that he/she

1 In the Rocco Penal Code criminal offences are divided into two main categories: crimes and misdemeanours. The discretionary criteria used in the Criminal Code to discern between these two types of criminal acts are of an exclusively formal character and depend on the different types of penalties.

is incapable of understanding and intent. In certain circumstances, persons aged under 14 can be recognised as being socially dangerous and can therefore be subjected to security measures. In order to establish whether a minor aged between 14 and 17 years should be subjected to a penalty, the Court must, for each case and on the basis of the concrete evidence delivered by the prosecuting authorities, ascertain whether the perpetrator of the crime had reached an adequate level of maturity and psychological development at the moment of the offence to understand the seriousness of the act (Article 98 of the Criminal Code).[2]

The Rocco Penal Code from 1930 (named after the fascist Minister of Justice) is currently still in force. Like all the Codes of European Countries approved since then, it was inspired by the Napoleonic Code of 1810 on the one hand, and by the 1870 Code of William, on the other hand. Although it was modelled on the liberally inspired Codes of the nineteenth century which were informed to a greater extent by Liberalism, the fact that it was approved when Fascism was at its height (1942-1943) meant that, in compliance with the ideological dictates of an authoritarian State, the Code was originally very severe and gave a highly repressive role to the State powers.[3]

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2 Art. 97 of the Italian Penal Code states that a person who has not reached the age of 14 at the moment when he or she commits a crime must not be punished. Art. 98 states that a person who has reached the age of 14, but not 18 at the time of committing a crime and "who is capable of understanding and willing" must be punished, but the punishment may be reduced. At the age of majority, 18 years old, the person becomes fully responsible for his/her crimes. Between the ages of 14 and 17 the ability to understand and act according to it must be ascertained in each case. The system recognizes that the cognitive ability of a juvenile to understand is not necessarily the same as that of an adult. In this respect the Courts have established the concept of immaturity: a condition of inadequate physical, psychological or even social development. Since minors under the age of 14 are not responsible, they are automatically acquitted. Minors between the ages of 14 and 17 may be given a custodial sentence, which is usually reduced to two-thirds of the sentence that would have been imposed on an adult offender for the same crime.

3 Alongside the incriminating provisions contained in the Criminal Code, Italy has had special laws, too. The complementary legislation has always been an important source of criminalisation. The importance of this legislation has increased over the years in a way that it induced some legal scholars to affirm that the *Rocco Code* is no longer the main source of the Italian Criminal Justice System, but a secondary and supplementary one. Among the numerous special criminal laws, it is necessary to mention at least those related to secret associations (Law 17 of 1982), the credit market (Legislative Decree 58 of 1998), the banking market (Legislative Decree 385 of 1993), building, urbanisation and the environment (Law 1150 of 1942, Law 1086 of 1971, Law 62 of 1974, Law 10 of 1977, Law 457 of 1978, Law 47 of 1985, Law 431 of 1985, Legislative Decree 22 of 1997), bankruptcy (Royal Decree 267 of 1942), paedophilia (Law 75 of 1958), prostitution (Law 75 of 1958), migration (Legislative Decree 286 of 1998), drugs (Presidential Decree No. 309 of 1990), and taxation (Law 516 of 1982).

Unlike in other European nations, a distinct Juvenile jurisdiction did not exist in Italy, until the inception of the Juvenile Court in 1934. Originally, the Juvenile Court was composed of two magistrates and one honourable citizen competent in social service and educated in biology, psychiatry, criminology or pedagogy. This composition was modified by law no. 1441 of 1956 that raised the number of the lay judges to two. Currently the Juvenile Court is composed of four persons: a professional Appeal Judge who presides over the Court proceedings; a Court Magistrate, and; two citizens, one of each gender, who act as assistants and consultants to the case. The citizens are selected from among "experts" in the fields of biology, psychiatry, criminal anthropology, education and psychology.

At the time of its inception in 1934, three competences were attributed to the Court:

1 the *Penal Competence* which guarantees that juvenile offenders be judged by a specialised judge;
2 the *Administrative Competence* addressing juveniles under 18 years of age, who, for repeated behaviour, demonstrate proof of deviance and the need for moral correction;
3 the *Civil Competence* which regards the area of provisions limiting parental authority.

The Constitutional Law (December 22, 1947) marked an important evolution in juvenile rights and formed the basis for a wider and more complete consideration and protection of the minor. In 1956, after the Constitution had come into force, law no. 888/1956 changed the approach to juvenile offenders, focusing greater attention on their needs and deficiencies. Rehabilitative intervention was, in this way, aimed as individualized treatment to cope with deficiencies and personal motivation, whereas in the years before the protection of society was considered the main priority.

Currently, juvenile offenders are seen as individuals in need of protection and re-socialisation. The Juvenile trial is guided by the principle of minimal intervention which tries to avoid the harmful consequences of a trial for a juvenile personality still in development.

The modification of the Juvenile Justice System in 1956 was oriented towards a rehabilitative approach and in 1962 a range of Welfare Services were established (*Gatti/Verde* 1988). These included a specialised Social Service for minors which would work in close cooperation with the Juvenile Court and whose task was to carry out a range of interventions to help and support juveniles in the civil, penal and administrative fields. Before 1956 magistrates imposed mainly penal measures on juvenile offenders, though these were tempered with rehabilitative elements. After 1956 the juvenile justice system became more and more rehabilitative by means of a strong and structural relationship between Courts and Social Services. The overall aim was to create a welfare system inspired by the need for social control, whether or not the minor

had committed any crime. At the same time, criticisms arose regarding the old fashioned nature of the structures and institutions for the rehabilitation and social care of minors. Many institutions (which were originally old convents or schools) were seen as uncomfortable and insufficient, with poor sanitary arrangements. In 1977 a specific Law (Presidential Decree D.P.R. no. 616) on administrative centralization caused a deep transformation in the practical work in the Juvenile Justice System. The legislation transferred executive authority over decisions taken in the civil and administrative fields from the Ministerial Social Services to the Local Social Services. Local Social Services fostered the development of alternative social policies, putting juvenile offenders into the general social welfare system for minors and their families. This represented a strong shift towards community intervention and went hand in hand with the development of smaller residential structures, aimed at facilitating compliance with the laws and avoiding the stigmatization and social exclusion associated with closed Institutions. According to the new law, the measures for juvenile offenders had to be imposed by the Juvenile Court, but the penal, civil or administrative provisions had to be implemented by Local Authorities. This separation led to a hidden struggle between Juvenile Court Magistrates and Local Social Services (*Gatti/Verde* 2002). In fact the implementation of Court-based penal measures depended on the structures that the Local Authorities had provided.

From the middle of the 1970s, partly due to experiments of diversion in other European Countries, and partly due to national and international research activities on the potential negative effects of criminal justice interventions, the principle of "minimum prejudice of the trial", has progressively gained ground. This principle provides for the imposition of minimum judicial interventions, in particular those of a coercive or restrictive nature. Hence, in each case, the judge needs to take into account the "prejudice" the trial may cause to the minor and consider whether it is appropriate to continue with the proceedings.

In Italy, this principle is embodied in D.P.R. [Decree of the President of the Republic] no. 448 of Sept. 1988 "Approval of the provisions concerning criminal proceedings involving juvenile defendants", which develops the results of national and international observations and experiences, thereby anticipating important principles, such as those enshrined in the UN Convention on the Rights of the Child, signed in New York in 1989.

The approval of D.P.R. no. 488 introduced a new juvenile penal procedure for young offenders within the broader context of a more general procedural law reform[4]: D.P.R no. 488 provided a shift from an inquisitorial to an accusatory

4 The most significant legislation that has affected the criminal justice system was the 1988 promulgation of a new Code of Criminal Procedure. The new Code represented a substantial shift from the old inquisitorial system to a modern adversarial system. The most important innovation of this new legislation concerns the admission of evidence that, as a rule, can be obtained only during the course of an oral and public trial, in front

model. In the following year, the Legislative Decree no. 272 of July 1989 introduced "Regulations for the implementation of D.P.R. no. 448" concerning the establishment of specific procedural safeguards for juvenile offenders.

The new process is divided into different phases. The first, the so-called preliminary investigation, is conducted by the Public Prosecutor through the criminal investigation Department of the Police (under the supervision of the Judge of the Preliminary Investigations – GIP, *Giudice delle Indagini Preliminari*). This is followed by a preliminary hearing, during which the judge assesses the investigations carried out and decides whether to dismiss the case or order a trial. The preliminary hearing is carried out by one professional magistrate and two honorary judges. The Court can decide to commit the minor for trial, find "no grounds for prosecution", place the youth on probation, or may apply an alternative sanction to detention. In order to avoid any trauma the young offender is not cross examined. Furthermore, it is not possible to institute a civil action to claim compensation for damage during Juvenile Trials. In order to protect the minors involved, the parents or those who have legal authority over them are allowed to attend the trial. Given the young age of the defendants, and in order to assist in their social rehabilitation, as well as for purposes of prevention, the law provides for two decisions that might be issued: a decision dismissing the case because the fact is of minor importance and a decision suspending the trial and putting the defendant on probation. The decisions are of great significance. In the first case, the judge can decide not to proceed when, given the light and occasional nature of the offence committed; he/she decides that a continuation of the trial would harm the development of the minor. In the second case, the judge can suspend the penal proceedings entrusting the minor to the Social Service Office for Minors (USSM), which draws up an Individualized/Tailored Educative Project (PEI), for a period that can not exceed a maximum of three years for the most serious cases. At the end of the period of suspension, if a positive evaluation of the minor's behaviour during the probation period is given, the charge is dropped; so the judge declares the crime as extinguished. In case of a negative outcome the prosecution will be continued.

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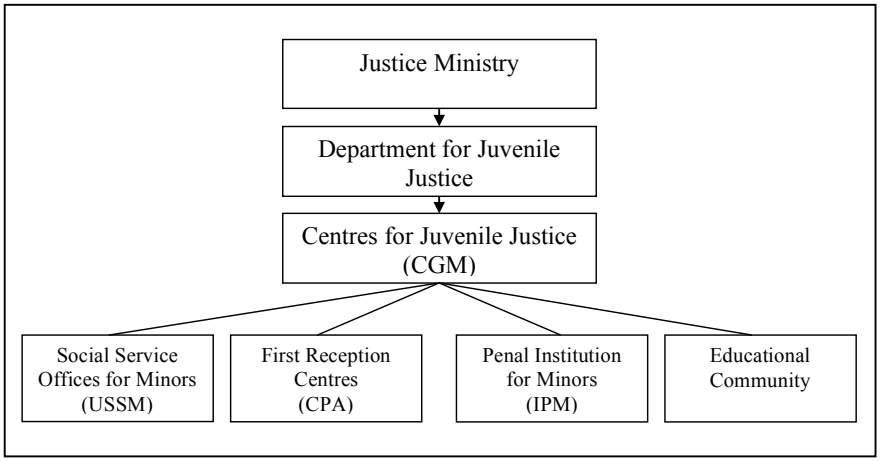
of the judge (acting as a third party) on the basis of witnesses' cross- examination and other kinds of proof legally presented in the Court. The trial is conducted by the prosecution and defence on a parity basis. Although the new Italian Code of Penal Procedure is similar to the adversarial English and American Systems, its system of written laws still retains important differences when compared with the Anglo-American system, such as mandatory penal action (obbligatorietà dell'azione penale). The obligation to institute a penal action is determined by the Constitution (Art.112). According to this provision, the Public Prosecutor is legally bound to start the investigation, if he notices the commission of a crime (notizia criminis), and if there is enough evidence, to take penal action against the alleged offender. The Italian prosecutor therefore has no discretionary power to discharge a case because of the principle of expediency.

Figure 1: The organisation of Juvenile Justice



A brief description of Juvenile Justice Services is useful in order to understand the different competencies. The Department for Juvenile Justice is responsible for the policy, the coordination and the control of all activities that concern the relationship between minors and justice. It organizes the local Juvenile Services and the prevention as well as the prosecution of juvenile delinquency.

Services of the Department, at the regional level, are first of all the Centres for Juvenile Justice (CGM). They are competent to organize the integration of the different Juvenile Services on the local level (Social Service Offices for Minors – USSM, First Reception Centres – CPA, Penal Institutions for Minors – IPM and Educational Communities) and to coordinate their work.

The Social Service Offices for Minors (USSM), of which there are 29 in Italy, assist minors in each state, and oversee the protection of their rights. They collect information on the cognitive, psychological, familial and social conditions of the minor. Moreover they support and control measures in the precautionary phase of the process, in cooperation with the other Juvenile Services and the local bodies. In particular, the USSM starts acting within 96 hours from the child's arrest by the police; it implements educational programmes for young offenders serving non-custodial measures; supervises youths under probation during the criminal proceedings, and; generally enforces any alternative measures or community sanctions.

The First Reception Centres (of which there are 26 in Italy, CPA, Centro di Prima Accoglienza) accommodate children directly after the arrest by the police and before any hearing before a judge, for a maximum of 96 hours. This "filter" service helps to avoid sudden contact with prison and provides young offenders with information, assistance and support by social workers. Where a judge

decides that the child has to remain under criminal justice, the CPA drafts an educational project for the offender. The team of the Service arranges a first investigation of the psychological and social situation of the minor with the objective of providing the competent Judicial Authority with all relevant information.

Custodial measures (both pre-trial detention or prison sentences) against minors are carried out in the Penal Institutions for Minors (IPMs). The IPMs accommodate those who committed an offence whilst under the age of 18, until they are 21 years old. They have open and closed areas for common activities (i. e. school, sport, refectory, etc.) and wings with cells with sanitation where juveniles sleep at night and spend their leisure time. There are currently 17 IPMs in Italy, and four of them (i. e.: Turin, Milan, Rome and Naples) are equipped with female wings.

Educational communities support all penal treatments except detention; they can also be run by the Department for Juvenile Justice, but they usually work upon protocol agreements or co-management with the third sector.

Educational communities are responsible for the execution of precautionary measures. On a trial basis they are used for the execution of alternatives to detention in cases where there is no parental figure or where the family environment is considered unfit for the young person to return to.

2. Trends in reported delinquency of children, juveniles and young adults

2.1 Italian and migrant juvenile offenders

Juvenile delinquency has aroused strong social alarm, especially in recent years, and this is often due to specific criminal events. In fact, as we can see in *Table 1*, the juvenile crime rate increased during the years 1992 to 2004, although the number of juvenile offenders has decreased.

Table 1: Juvenile offenders and population (14-17 years)

Year	Juvenile offenders	Juvenile population	R*
1992	44,788	3,177,809	1,409
1993	43,375	3,012,735	1,440
1994	44,326	2,848,464	1,556
1995	46,051	2,709,903	1,699
1996	43,975	2,604,475	1,688
1997	43,345	2,522,533	1,718
1998	42,107	2,464,151	1,709
1999	43,897	2,413,008	1,819
2000	38,963	2,366,984	1,646
2001	39,785	2,312,908	1,720
2002	40,588	2,273,081	1,786
2003	41,212	2,268,588	1,817
2004	41,529	2,272,295	1,828

R* Rate of Juvenile offenders per 100,000 of overall juvenile population.
Source: ISTAT data, own calculations.

In *Table 2* numbers of Italian juvenile offenders are compared to migrant juvenile offenders. As one can see, the Italian juvenile criminal population decreased from 1992 to 2004 by 19% from 82% to 71%., whereas the migrant juvenile offenders' rate shows an increase of 50.6% (Rate 1), although this may be due to a general increase of young migrants in the overall youth population.

Table 2: Italian and migrant juvenile offenders

Year	Italian juvenile offenders	Foreign juvenile offenders	R 1*	R 2**
1992	36,786	8,002	82%	18%
1993	34,268	9,107	79%	21%
1994	33,311	11,015	75%	25%
1995	33,350	12,701	72%	28%
1996	32,521	11,454	74%	26%
1997	32,149	11,196	74%	26%
1998	31,181	10,926	74%	26%
1999	32,010	11,887	73%	27%
2000	29,839	9,124	77%	23%
2001	31,065	8,720	78%	22%
2002	30,579	10,009	75%	25%
2003	29,747	11,465	72%	28%
2004	29,476	12,053	71%	29%

* Percentage of Italian juvenile offenders among all juvenile offenders.
** Percentage of foreign juvenile offenders among all juvenile offenders.
Source: ISTAT data, own calculations.

2.2 Italian and migrant minors: Kind of offences

For both Italians and migrant juvenile offenders the most common offences are property offences, followed by crimes against the person (which includes assault with intent, attempted homicide, sexual violence), and drug crimes. The total number of offences committed by migrant juvenile offenders increased markedly in recent years, although this must be set in the context of a rising juvenile migrant population.

Table 3: Italian and migrant juvenile criminality

	Year	Property offences	Crimes against the person	Drug crimes	Other Crimes	Total
Italian juvenile offenders	2000	14,778	8,494	3,489	654	29,839
	2001	15,572	8,947	3,331	694	31,065
	2002	15,146	8,754	3,397	735	30,579
	2003	14,503	8,289	3,690	743	29,747
	2004	14,267	8,195	3,177	793	29,476
Migrant juvenile offenders	2000	6,571	729	799	184	9,124
	2001	5,896	784	789	177	8,720
	2002	6,950	981	675	168	10,009
	2003	8,094	1,093	728	405	11,465
	2004	8,753	1,280	684	161	12,053

Source: ISTAT data.

Table 4 contains data on CPAs.[5] For Italians entries into CPAs peaked in 1992, and decreased significantly from 1998 onwards; whereas the numbers of migrant juvenile offenders entering CPAs increased significantly over the same period. It is interesting that, in the year 2004, only 30% of all juvenile offenders were migrants (see *Table 2*, Rate 2), but almost 70% of those who entered the CPA were migrants. From *Table 3* we can assume that this is not due to more serious offences committed by foreign juveniles.

All in all, the proportion of juveniles in CPAs increased until the end of the 1990s, and has decreased since then (Rate 2 in *Table 4*).

5 Minors may be detained if suspected of having committed an offence. In such cases the young offender is housed in a small correctional institution, a CPA for a maximum of 96 hours, see under *Section 1* above and *Section 10* below.

Table 4: Juvenile offenders in CPA according to nationality

Year	Entrance in CPA			Juvenile offenders	Rate 1* (%)	Juvenile population	Rate 2**
	Italians	Migrants	Total				
1992	2,591	1,916	4,552	44,788	10.2	3,177,809	143
1993	2,376	1,746	4,122	43,375	9.5	3,012,735	136
1994	2,161	1,924	4,085	44,326	9.2	2,848,464	143
1995	1,936	2,239	4,175	46,051	9.1	2,709,903	154
1996	1,952	1,838	3,790	43,975	8.6	2,604,475	145
1997	2,007	2,189	4,196	43,345	9.7	2,522,533	166
1998	1,917	2,305	4,222	42,107	10.0	2,464,151	171
1999	1,973	2,275	4,248	43,897	9.7	2,413,008	176
2000	1,744	2,250	3,994	38,963	10.3	2,366,984	168
2001	1,711	1,974	3,685	39,785	9.3	2,312,908	159
2002	1,561	1,952	3,513	40,588	8.7	2,273,081	154
2003	1,532	1,990	3,522	41,212	8.5	2,268,588	155
2004	1,587	2,279	3,866	41,529	9.3	2,272,295	121
2005	1,540	2,115	3,655	---	---	2,305,982	158
2006	1,480	2,025	3,505	---	---	2,304,010	152

* CPA entrance rate of juvenile offenders x 100.
** CPA entrance rate of juvenile population x 100.000.
Source: Juvenile Justice Department and ISTAT.

In terms of the gender of those entering CPAs, there is a large gap between males and females. Italian female juveniles commit about 5% of all offences, whereas for migrant female juveniles the percentage is about 38%. Mostly these are "nomads" (i.e. without a fixed address) charged with property offences. The lack of a fixed domicile is a likely reason for the high rate of entrances into CPAs for migrants (see *Table 4*).

As regards the nationality of migrant juvenile offenders, most come from Eastern Europe, in particular, Serbia-Montenegro, Bosnia-Herzegovina and Croatia, and from North Africa, primarily Morocco and Algeria.

Table 5 shows data regarding juvenile offenders in Penal Institutions for Minors (IPM, Istituti Penali per Minorenni, see below, *Section 11*). *Table 5* shows a marked increase in the total numbers of juvenile migrants in correction facilities. The percentage of foreign juvenile offenders deprived of their liberty is much higher than the percentage for Italian offenders.

Table 5: Juvenile offenders in IPM according to nationality

Year	Italian juvenile offenders (IJO)			Foreign juvenile offenders (FJO)		
	entries into IPM	IJO	Rate 1 (%)	entries into IPM	FJO	Rate 2 (%)
1999	871	32,010	2.7	1,005	11,887	8.4
2000	779	29,839	2.6	1,107	9,124	12.1
2001	698	31,065	2.2	946	8,720	10.8
2002	630	30,579	2.0	846	10,009	8.4
2003	686	29,747	2.3	895	11,465	7.8
2004	629	29,476	2.1	965	12,053	8.0

Rate 1: Percentage of Italian juvenile offenders sentenced to IPM.
Rate 2: Percentage of foreign juvenile offenders sentenced to IPM.
Source: Juvenile Justice Department.

With reference to countries of origin, migrant minors arrive from Eastern Europe, particularly Romania, ex-Yugoslavia and from Albania.

Community measures and sanctions (either as a consequence of a probation/ diversion sentence, or as an alternative to custody) are mainly imposed on Italians (about 57% in 2006), although in recent years, they have been imposed on a growing number of migrants (36%) and gypsies (9%).

One of the reasons for the relatively higher rates for young migrants is that migrant juvenile offenders come into contact with the Juvenile Justice System more easily compared to Italians. Also migrant minors have a higher probability of being sentenced to prison than Italians. One reason for this is that the Italian Juvenile Penal System provides alternative sanctions for juvenile offenders unless this is not possible because of the absence of family, stable residence or full-time employment.

3. The sanctions system: Kinds of informal and formal interventions

The D.P.R. no. 448 combined with general procedural provisions is one of the fundamental Laws regulating formal and informal interventions for young offenders. Generally D.P.R. no. 448 aims to limit as far as possible the use of pre-trial detention for minors (which may be imposed mainly in cases of robbery, rape and homicide).

Concerning the decisions that Courts can impose, the Penal Code states that the orders and sentences applicable to adults may also be applied to minors.

The Italian Criminal Code makes a fundamental differentiation between criminal sanctions, on the one hand, and between penalties and security measures (*Misura di sicurezza*), on the other. The former, which have a set maximum duration, are applied to people recognised as being guilty of an offence. The latter, which do not have a fixed duration, are applied to socially dangerous people, i.e. people who, on the basis of a prognosis, are considered likely to commit other crimes in the future. In this case, the security measure applied can only be removed when they are no longer considered socially dangerous.[6]

In 1981, Law no. 689 introduced community sanctions to replace short custodial sentences. These were aimed at preventing a person sentenced to a short term of imprisonment from spending time in a Penal Institution for Minors, thus protecting him/her from its "criminogenic" influence. The community sanctions can be applied under certain conditions: if the custodial sentence to be served does not exceed one year (i. e. reference is made to the actual sentence imposed by the judge and not to the maximum penalty prescribed by the law for a given offence). There is an alternative sanction of community work which is rarely applied; probably because the conditional suspension of the sentence is preferred which, as opposed to other alternative sanctions, has an almost non-existent sanctioning element, at least as far as first time offenders are concerned. On the contrary, the other alternative measures to imprisonment (probation, house arrest, semi-custody (*semilibertà*; comparable to work release or other programmes of regular leave of absence) and "early release") are widely used.

Probation can be applied to an offender who has received a prison sentence of less than three years or who still has three years to serve in prison. The period of probation must correspond to the sentence to be served, or remaining to be served. On the basis of the personality tests (following the amendments introduced by Law 165 of 1998, it is no longer necessary for the tests to be conducted in a prison – thus avoiding the need to stay in prison), and when there

6 The Italian Criminal Code provides certain minimum and maximum sentences. This means that a judge is not free to decide on the length of the sentence but is bound by law. Article 133 establishes parameters and classifies them into two categories according to the seriousness of the offence (taking into consideration the type of offence committed, the seriousness of the damage caused or of the threat posed and the level of guilt) and the capacity of the offender to commit an offence - including the offender's reasons for committing the offence, his/her precedents and life conditions and his/her behaviour before committing the offence). This was the result of an attempt to reach a compromise between the classical and the positivist school in 1930. In fact, the criteria used for deciding on the length of the sentence, (i.e. the type of offence committed, its seriousness and the level of guilt) fully comply with the classical school's concept of criminal law. At the same time, the criteria relating to the offender's capacity to commit an offence and above all, his/her social dangerousness, clearly respond to those advocated by the positivist school.

is reason to believe that the measure will contribute towards rehabilitating the offender, the latter has to carry out activities under the control of the Social Services. The Social Services control the behaviour of the person and assist in his/her reintegration into society. If this alternative measure proves positive, the rest of the penalty is cancelled. If it fails, the measure is revoked and the offender must serve the rest of his/her sentence in prison.

Special mention should be made of the specific alternative measure of probation, which is used for drug addicts and alcoholics. This measure differs from the basic form of probation in various respects. First of all, it can substitute a prison sentence or the remainder of a prison sentence of four instead of three years, as is normally the case. Second, this measure can only be applied to drug addicts or alcoholics who are taking part or have requested to take part in therapeutic treatment. In this way, the offender is allowed to choose between serving the prison sentence and undergoing treatment.

House arrest can be applied to persons who have to serve a prison sentence not exceeding three years (which is increased to four years for some categories such as pregnant women, people aged over sixty, minors aged under twenty), This measure is applied whenever it is not possible to assign the person to the Social Services.

Semi-custody gives the offender the opportunity to spend a part of the day outside prison in order to participate in educational, vocational or other activities that are useful for his/her social rehabilitation. Only those offenders who have already served at least half of their sentence are granted this alternative measure.

Early release is granted to those offenders who have participated in a re-educational course, and consists of a reduction of 45 days for every six months of detention. This reduction can also be applied to prisoners serving life sentences although, taking into account the twenty-year time limit needed in order to be able to be granted conditional release, they can only be released after 21 years of imprisonment.

A measure of last resort is the detention of juveniles (see *Section 11* below).

As more informal responses to juvenile delinquency, Article 27 D.P.R. no. 448/88 introduced the possibility of "dismissal on the basis of insufficient seriousness of the offence" as a diversionary sentence (see *Sections 5* and *6*) as well as various possibilities of victim-offender-mediation (see section *5.*). Additionally there is the possibility of a "judicial pardon" (see *Section 6*) and a special form of "Pre-trial probation", introduced through Article 28 D.P.R no. 448/88 (*Sospensione del processo e messa alla prova*, see *Section 5*) in a preliminary phase of the process. If the offender fulfils the conditions and obligations for the probation period, the case will be dismissed.

4. Juvenile criminal procedure

Once notification of a crime is received, the Public Prosecutor has the duty to immediately book it in the appropriate register. Whether or not the minor is arrested is at police discretion, according to the seriousness of the event, the age and personality of the minor. The offender's parents are immediately notified about the crime. Always taking into consideration the seriousness of the act and the age and personality of the minor, the minor is taken to police headquarters where he or she can be detained for not more than 12 hours. After this period the person who has parental authority (or the guardian or other delegated person) will take the minor into custody. Police will inform the Public Prosecutor (PM, *Pubblico Ministero*) and the Juvenile Social Services. Parents or the eventual custodian are advised of their duty to ensure the minor's disposal to the Prosecutor and to monitor his behaviour. If this is not possible, police inform the Prosecutor who will provide for the minor to be accompanied to a CPA.

All these measures must be confirmed by the Judge of the Preliminary Investigation (GIP). The hearing takes place within 48 hours from the filing of the request by the PM. The Counsel and the person with parental authority must be advised immediately. Thereafter, the GIP interrogates the minor. At the end of this hearing the minor may be released, otherwise a preventive measure or remand can be applied. The GIP has the task of adopting measures restricting personal freedom if this proves necessary during the investigation. He/she also decides whether it is necessary to extend these measures, following a request by the PM. In addition, at the request of the parties the GIP decides whether to admit taking evidence during the pre-trial phase and presides over the proceedings.

From the act of filing the crime the PM has six months to carry out investigative activities for assessing the facts and verifying the evidence against the suspect. Once investigations have been completed the PM will be able to ask for:

1. an extension of the time for closing investigations,
2. the dismissal of the proceeding when the fact turns out to be unfounded (i. e. the act is not foreseen by the law as crime, the suspect did not commit the act or sufficient evidence does not surface),
3. indictment (*rinvio a giudizio*),
4. summary trial (*giudizio immediato*).

The Preliminary Hearing is the most important hearing in the Juvenile Trial, in which the judge has a broad power of definition. It is defined as "special" because it is characterized by: a) the choice of the most suitable penal response; b) the involvement of the Social Services; c) the support of parents. This is the first contact a juvenile offender has with the criminal process. If the Preliminary Hearing ends with the decision of indictment, then the minor must appear in a specific hearing. The judgement hearing can not take place earlier than 20 days

from the date of the decree of the indictment. Social Services and the Local Agencies may be involved. The Court pronouncing a sentence of acquittal can adopt, in the case of urgent necessity, temporary civil provisions to protect the minor with a separate decree. Also, as a preventive measure the Court may order home confinement or a placement in a community.

With the provision that arranges home confinement the judge requires the juvenile to remain at his or her parental home or, if not appropriate, in another private residence. The judge can impose a prohibition on communicating with people other than those with whom the minor resides, or that provide assistance to him or her.

Placement in a community can be made in a public or private facility. This measure is determined by provisions of the judge, who can impose on the minor obligations in relation to study, vocation or other useful activities relating to education, authorizing him/her to leave the community. Authorization is also necessary in order to have contacts with the family or making use of brief allowances. The measure must be applied not only in the case of valid requirements connected to investigations but also when it is useful for helping minors to face their problems in a satisfactory way.

The Preliminary Hearing is followed by an accusatorial trial where different forms of sentencing can be ordered (probation, detention, acquittal). Detention can be applied when it proceeds for crimes not including manslaughter for which the law establishes a life sentence or detention not less than the maximum of 9 years. The judge arranges detention if serious requirements relating to the investigation are present, related to concrete danger of the acquisition of evidences; if the minor escaped or a concrete danger of escape exists; if there is the concrete danger that juvenile offender will commit serious crimes using arms or other instruments for personal violence. Detention should guarantee the following points:

1. organization and subdivision of young offenders into small groups (10/12 individuals) satisfying the requirement to guarantee a good relational climate and the need of a powerful treatment/educational intervention,
2. separation of juveniles from adults,
3. integration between Italian and migrant youth,
4. permission to work and to live (partially) outside the institution,
5. integration with the external community,
6. relationships with relatives and other meaningful people.

The Re-entry Court also guarantees that the sentence is executed in compliance with the law. This is no longer under the exclusive jurisdiction of the Administration and therefore better guarantees the rights of the detainees. In fact, the provisions adopted by the Re-entry Court are issued by a Jurisdictional Body once the parties have been heard. The Re-entry Court was introduced in 1975 by Law 354. Its jurisdiction has been widened considerably to reflect the

new effort to strengthen the educational role of penal sanctions (Article 27 of the Constitution).

The appeal trial is up to the defendant, but can also be proposed by the person with parental authority. During the proceeding it is important to foster collaboration among State, Regional and Local Agencies. The objective is to achieve, throughout the whole territory, a network of contacts within the gamut of Private Social Services, able to support the intervention of the Juvenile Justice Services. In this respect the Administration of Justice has taken steps in recent years, to drive the integration of the various organizational structures' Services, with the common objective of creating a network for early intervention planning.

In the executive phase of the trial, the Department for Juvenile Justice, in cooperation with the Administration of the Penitentiary Department, tried to expand the continuity in the treatment and limit the negative influences of pre trial detention through the introduction of detention in special facilities for young people up to the age of 21.

Some criminal justice procedures which are applicable to adults can also be imposed on juveniles. In addition to the normal procedures, the Code also provides for five other types of "alternative procedures":

1. Abbreviated trial *(Giudizio abbreviato)*. A defendant may ask, with the consent of the Public Prosecutor, for a decision to be pronounced on the basis of the evidence collected during the preliminary phase. If the judge considers it possible to adjudicate on the basis of the said evidence, he/she pronounces the judgement. Where a sentence is pronounced, the penalty is reduced by one-third.

2. Bargaining the sentence *(Patteggiamento, Applicazione di pena su richiesta)*. When the envisaged sentence does not exceed two years, the defendant or the PM may ask for a given sentence to be applied. If the two parties agree and the judge considers the proposed sentence appropriate, he/she applies the negotiated sentence. The advantages for defendants are that they are granted a reduction of up to one-third of the sentence, they do not have to pay Court costs and they are not subjected to any security measures. The PM cannot close a case autonomously by means of a simplified trial or by reaching a simple agreement with the person being investigated or indicted, without the involvement of the Court. It is true that the Italian legal system also envisages simplified means of "negotiated" sentences between the prosecution and the defence. It is always necessary for the judge to oversee the guarantee of the principle of the obligation to take criminal action, which is a pillar of the Italian system of criminal procedure. Thus, for example, according to the Italian system, whilst the two parties can "propose" a negotiated sentence, it is up to the judge to decide on the adequacy of the proposed sentence. The sentence can only be executed if the judge considers it appropriate.

3. Proceeding by Decree *(Decreto penale di condanna*, also known as an order of summary punishment/penalty order*)*. If the Public Prosecutor believes that only a pecuniary penalty should be applied, he/she asks the GIP to decide

the case by decree. If this request is accepted by the GIP, a decree containing the sentence is issued. If the defendant appeals against the sentence, an ordinary criminal law procedure is instituted.

4. Immediate trial *(Giudizio immediato)*. When there is conclusive evidence, the Public Prosecutor and the defendant can ask to pass immediately from the preliminary investigative phase to the Court hearing, without holding a prelimnary hearing.

5. Summary trial *(Giudizio direttissimo)*. This type of trial can be applied when an offender is caught red-handed (*in flagrante delicto*), or when the commission of an offence is confessed. The defendant appears directly before the Court, although he/she has the right to apply for an abbreviated trial or the bargaining of the sentence.

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

The new juvenile penal trial is a shift from a purely rehabilitative and punitive perspective to a new conception of the penal procedure: restorative justice. The attention to the victim is a recent development in Italy. The idea of restorative justice, and the use of mediation, is based on a growing interest in, and consideration of, the victims of crimes. In Italy, as in many other countries, Victim Offender Mediation (VOM) has become an object of reflection only in the last decade. In practice, VOM is restricted mainly to juvenile offenders. VOM initiatives have been carried out in Turin, Bari, Catanzaro, Milan, Palermo, Rome, Trento and Venice. Within the Italian juvenile criminal law, VOM can be activeted at every point of the penal procedure:[7]

1. During the preliminary investigations – Article 9 of the D.P.R. no. 448/88 "Investigations/assessment of the personality of the minor" (Accertamenti sulla personalità del minorenne). Article 9 provides that the PM and the judge acquire facts and information about the minor's personal, familiar, social conditions and resources, to assess criminal responsibility and to estimate the social importance of the act. In this phase, VOM has a character of an immediate "response" to the crime. Before the victim and offender become labelled by their roles in the process they meet with a third non-institutional body, the mediator. VOM requires: the admission of responsibility; the consent of the minor; the consent of the victim.

2. During the preliminary hearing – According to the D.P.R there are two possibilities for introducing VOM:

a) Article 27 D.P.R. no. 448/88 "dismissal on the basis of insufficient seriousness of the offence" (diversionary sentence), provides an opportunity for VOM. The insufficient seriousness and the occasional nature of the criminal

7 For VOM in the phase of a court proceeding, see *Section 6*.

behaviour represent two elements which make mediation the most appropriate instrument for resolving the conflict between the offender and victim;

b) Article 28 D.P.R no. 448/88 "pre-trial probation" (*Sospensione del processo e messa alla prova*). In this case, the law recognizes an opportunity for a specific positive effect of a possible reconciliation during the probation procedure. Therefore, VOM becomes an instrument through which young offenders and victims, adequately supported, take part in the management of the conflict caused by the crime.

The possibility of the dismissal on the basis of insufficient seriousness of the offence according to Article 27 has become more and more important since its introduction (*Picotti/Merzagora* 1997, p. 219). The same is true for "pre-trial probation" according to Article 28 D.P.R no. 448/88. The percentages for the application of this form of probation rose from 2.9% in 1992 to 11.1% in 2005 (*Table 6*).

Table 6: Juvenile offenders and probation according to Article 28

Years	Juvenile offenders	Preliminary hearings (b)	Probation (c)	Ratio (c/b)
1992	44,788	26,928	788	2.9%
1993	43,375	24,451	845	3.5%
1994	44,326	25,807	826	3.2%
1995	46,051	25,683	740	2.9%
1996	43,975	26,568	938	3.5%
1997	43,345	22,936	1,114	4.9%
1998	42,107	24,138	1,249	5.2%
1999	43,897	25,294	1,420	5.6%
2000	38,963	17,535	1,471	8.4%
2001	39,785	18,965	1,711	9.0%
2002	40,588	18,935	1,813	9.6%
2003	41,212	19,323	1,863	9.6%
2004	41,529	20,591	2,177	10.6%
2005	40,364	19,289	2,145	11.1%
2006	39,626	---	1,996	---
2007	---	---	2,339	---

Source: Juvenile Justice Department.

Article 28 offers a response to juvenile delinquency which is adapted to the personality of the minor, through the proposal and the construction of an Individualized/Tailored Educative Project (PEI) drawn up by the Social Service Office for Minors (USSM). This is an example putting into practice the principles of *ultima ratio* and of "minimal intervention" (or de-stigmatization principle) which tries to avoid the harmful consequences of a trial for a personality still in development. The project must provide for flexibility during probation. Therefore, the elements of the plan must be open for modification, and the probation period can be shortened or substantially lengthened in relation to the conditions of the probation. This flexibility therefore allows the modification of the project in progress should unexpected events occur; should the specific needs of the minor change, or; should resources become scarce. USSMs firstly try to provide information and in particular to encourage the family to cooperate through meetings that should help them to accept and understand the measure. They attempt to promote the opportunity that probation presents, in particular the opportunity for positive growth of the minor, compared to the stigmatising effect of a sentence.

Each PEI must consider certain areas of intervention, that are: family, as the unit where the minor has significant relationships; school; work; leisure time, as an educative-experimental space where the minor's capacity for autonomy and self-realization are played out; peer group, considered, from a pedagogical and educational point of view, as a resource and a risk for the development of the minor; associations and voluntary services, analysed as an alternative proposal to the needs of self-realization, responsibility, identification and socialization of the minor. The points to which the minor is subject, therefore, have to be stringently respected, so that the minor's conduct is carefully observed, and they are able to comprehend the importance of probation. Judges can also order special obligations and prescriptions concerning study activities, jobs, stage, vocational training or other activities useful for the minor's development. The judge can also impose particular obligations of a positive nature such as voluntary social service, environmental protection or sports activities, always considering the special developmental stage of minors in order to prevent them from being reduced to simple instruments of social and penal control. Negative obligations can also be prescribed: such as timetables, prohibition to attend places and/or contacts to specific people. In the case of serious and repeated violations of the prescription the judge can impose the measure of home confinement.

Table 7: Outcomes of probation (in %)

Outcome	1999	2000	2001	2002	2003	2004	2005	2006	2007	Total
Success	83.9	80.5	80.5	79.1	80.5	81.4	80.5	82.0	80.9	80.9
Extension	1.8	1.7	1.3	1.1	1.5	1.5	1.2	1.6	4.0	1.6
Court referral	3.5	5.0	4.2	4.1	3.5	3.8	4.2	2.7	2.6	3.8
Conviction	6.7	8.2	8.6	10.4	7.6	7.4	7.6	8.6	7.3	8.1
Other	4.1	4.6	5.4	5.3	6.9	5.9	6.5	5.1	5.2	5.6
Total	100	100	100	100	100	100	100	100	100	100

Source: Juvenile Justice Department data, own calculations.

Table 7 shows that probation can be seen as largely successful in that criminal prosecution is terminated (80.9% in 2007). In a small proportion of other cases the probation period is prolonged and extended for an additional period of observation. The outcome of "Court referral" is a relatively unusual measure. On average, 8.1% were convicted, which means that diversion through pre-trial probation was not successfully used by the juvenile, and the case is continued in a court proceeding.

6. The sentencing practice – Part II: The juvenile court dispositions and their application since 1980

From 1980 to 1988 the penal process for minors was strictly inquisitorial, but after the approval of D.P.R. no. 488/88, which introduced a new juvenile penal procedure, the system became accusatory. The new forms of sentencing are inspired broadly by diversion, probation and de-institutionalization. The main specific penal provisions for minors are:

Judicial Pardon (*Perdono giudiziale*): this is a form of decriminalization that is applicable only once. In this case a pardon is applied when, having considered the gravity of the offence and the individual's criminal responsibility, the magistrates presume that minor will not commit any further offences. This measure remains on the minor's criminal record until he/she reaches the age of 21 years.

The Insanity Defence is a form of dismissal on the grounds of incapacity to understand and to form intent (*Incapacità di intendere e di volere*). This measure depends on the ascertainment of a condition of immaturity.

Article 27 D.P.R. no. 448/88, the dismissal on the basis of insufficient seriousness of the offence (*Sentenza di non luogo a procedere per irrilevanza*

del fatto), states that if the offence is petty and when to proceed with the case would have negative effects on the minor's education, the Public Prosecutor may ask the magistrate to dismiss the case on the grounds of insufficient seriousness of the offence (see *Section 5* above).

Article 28 D.P.R. no. 448/88, pre-trial probation *(Sospensione del processo e messa alla prova)* can be obtained either at the Preliminary Hearing (see *Section 5* above) but also during the course of the trial with the same characteristics as described before. The probationary period may be as long as three years for a serious crime.

During probation and the dismissal on the basis of insufficient seriousness of the offence, the magistrate may impose prescriptions (*Prescrizioni*), which are aimed at making amends for the consequences of the offence and promoting reconciliation with the victim. This underlines the shift from a punitive rehabilitation stance towards a restorative approach and reflects a new concept of the criminal sanction which emphasizes the personal responsibility of the offender and clearly contains a series of proposals and opportunities which the person can seize for his/her own change, and a better consideration of the interests of the victim, whether it is a single person or society as a whole. In this regard, through VOM both the victim and the offender can actually take part in the resolution of the conflict caused by the offence, instead of contenting themselves with accepting a judgment issued by another party. In Italy prosecution is mandatory and consequently, the development of VOM will not be able to meet the need for the reduction and streamlining of proceedings. However, the system of juvenile criminal justice is able to redefine the boundaries of the criminal intervention, creating a sort of "middle land" where it is possible to exercise justice without instituting legal proceedings. In this regard, some examples are the various phases preceding the trial and the judgment, as mentioned in Article 9, Article 27 and Article 28. In addition to these phases preceding the judicial settlement of the trial, VOM is also possible during the phase of execution of alternative sanctions (which may be imposed also during the phase of the preliminary hearing) and in the order of placing the offender under the supervision of a Social Worker (*Affidamento in prova al Servizio Sociale*), an alternative measure to detention, in relation to the fact that: "the offender placed under the supervision of a social worker shall do his best in favour of the victim of his offence ..." (Article 47 of Law no. 354/75). Also during the phase of the enforcement of the sentence, and in particular in relation to a pecuniary penalty, VOM is possible when the said penalty has to be changed by the judge due to the insolvency of the sentenced person (Article 101 of Law no. 689/1981).

In sum, there are numerous instruments in juvenile penal law that allow the judge to adapt a sentence to the juvenile offender's personality. The underlying philosophy is inspired by diversion and flexible sentencing.

Unlike that for adult offenders, Italian penal and procedural law for juveniles is inspired by a general criterion of *ultima ratio*. These principles must especially be observed when imposing any form of detention for juvenile offenders. Particular emphasis is given to special forms of sentencing (i. e. probation) where Social Services (at local and governmental level) and families play an essential role.[8] The specificity of juveniles in conflict with the law was expressed in a decision of the Constitutional Court no. 168 of 1994, which excluded, without conditions, the constitutional legitimacy of life sentences for juveniles. The Court has in fact confirmed that Article 31 of the Constitution (which provides special protection for children and juveniles and favours the institutions necessary for this aim) deems life prison sentences for juveniles illegal, because life prison sentences for all offenders would treat all offenders punitively, without taking into account the particular conditions and circumstances of juveniles. It is precisely Article 31 of the Constitution, together with international petitions, that enforces a rehabilitative and educative approach for juvenile offenders.

Governmental Social Services are requested to support the actions of the Judicial Authority to accentuate the most important principle in the juvenile penal law, which demand that process and sentencing measures must be adapted to the personality and the educative requirements of minors. Local Social Services are more oriented towards prevention and treatment activities.

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8 Criminal procedure can be described as adversarial in nature. No informal justice system exists. The Italian Legal System is based on written laws. Penal law defines what specific behaviour is criminal and what specific minimum and maximum penalties are provided. The basic principles of no penalty without a law (*nulla poena sine lege*) and no crime without a law (*nullum crimen sine lege*) are stated in the Penal Code (Art. 1) and in the Italian Constitution (Art. 25). Other basic constitutional principles follow as well: a) legal responsibility rests solely on the acting individual; b) rules of penal law are not retroactive; c) no one can be sentenced without a fair trial (*nulla poena sine judicio*); d) no one can be considered guilty until a final sentence has been pronounced; e) penalties cannot consist of treatment contrary to the sense of humanity and must tend to the rehabilitation of the offender; f) personal freedom is inviolable and no one shall be deprived of it except under specific provisions of the law. These principles include clarity of the law, no punishment without trial, proportionality between crime and punishment, definitions of crime and punishment based on a system of written laws and fixed penalties, and the elimination of secret accusations. The dissemination of these principles is commonly ascribed to the influence of *Cesare Beccaria*'s treatise "On Crimes and Punishments" (*Dei delitti e delle pene*). For example, the accused does not have the right to plead guilty to a lesser offence (plea bargain). The inadmissibility of a plea bargain in the system is based on the principle of the "obligation to institute a penal action" (*Obbligatorietà dell'azione penale*), which does not allow discretion in prosecution. The Judicial Authority is legally bound to take action against crimes and cannot modify his charges in exchange for a plea of guilt. In other words, discretionary or selective enforcement does not exist (plea bargaining is not provided).

The Juvenile Judge has to give particular attention to understanding the personal, familiar and social situation of juvenile offenders in order to identify the most appropriate sentence. A high degree of discretion allows the chance to individualize educational and vocational measures to meet the juvenile offender's needs. Furthermore, in order to prevent suffering caused by the trial and to enable a positive development of personality, it is established that the judge must illustrate to the minor the legal and social meaning of the trial as well as the content and the reasons for the decisions adopted.

Regarding the sanctioning practice, detention is inflicted on an extremely limited number of young offenders. In 2004, just 2.1% of Italian juvenile offenders where sent to a youth detention centre (IPM, see *Table 5* above). The percentage of migrant juvenile offenders sent to a IPM is much higher (2004: 8.0%, see *Table 5* above). They often receive this custodial measure because of the lack of other alternatives;[9] detention is used as an emergency response to social situations which are difficult to handle. This bifurcation is typical of many modern juvenile justice systems: the modernisation of the system, implemented through such measures as diversion and probation, seems to be available to the more fortunate sector of the target population, while the old methods – not completely abandoned – end up as a receptacle for those minors who are less fortunate, like foreign juveniles (*Gatti/Verde* 2002). In fact, foreign juveniles are incarcerated for committing less serious crimes than Italians.[10] During

9 Before 1922, the Italian Prison System was under the direction of the Ministry of the Interior. Since then, it has been under the direction of the Ministry of Justice, which determines the general outlines of Italy's basic Criminal Justice Policies. The Department for Prison Administration is located in the Ministry of Justice. The head of the department is usually a Cassation Judge nominated by the Government upon proposal of the Minister. The Department for Prison Administration is divided into regional superintendencies that control the activities of individual penal institutions located in each regional territory. The Directors of the Prison Administration are placed at the head of the individual regional superintendence and the penal institutions. The personnel of the Prison Administration comprises, in addition to the employees and officials, the Correctional Police Corps which has the task of guaranteeing order within the correctional institutions, as well as the Social Service Staff who provide useful information for applying, modifying or revoking the security measures and instruments used to assist the offenders' social rehabilitation. The USSMs, Social Service Offices for Minors, supervise and support offenders subjected to alternative measures.

10 For adult offenders, the principal penalties used are prison, including life imprisonment, and fines. Secondary penalties (*pene accessorie*), which are always inflicted in connection with the principal penalties, are basically forms of legal interdiction or disqualification (prohibition from holding public and private office, forfeiture of parental authority). As a rule, all property crimes are punished by imprisonment or a fine. (Penal Code, Art. 18-20). When pronouncing a sentence for minor crimes, the judge may substitute imprisonment with substitute sanctions for short-term imprisonment. These sanctions are: a) Semi-custody (*Semi-detenzione*): only the night is spent in prison; b)

imprisonment juvenile offenders are under the jurisdiction of a Re-entry Court (*Magistratura di Sorveglianza*).

7. Regional patterns and differences in sentencing young offenders

As mentioned before, any decision of the Court is adopted by a "board" chaired by a magistrate (President), flanked by another judge and two honorary judges (one man and one woman). A fundamental key is the "normative discretion" of the judges; this doesn't mean that he/she has a free will but has the "right to freedom of action and decision within the limits set by law". The primary point is that all provisions must be applied in a manner appropriate to the personality and educational needs of the young person (Article 1 – DPR no. 448/88). The Court in its decision must consider a variety of factors concerning the offender (personality, level of education/schooling), the offence (seriousness of the offence and behaviour after having committed the crime), the family and the communitarian context as well as the opportunities locally offered by the territory.

Sentencing is therefore a discretionary activity and it depends not just on the magistrate's discretional power but on different social resources, some of which are geographically based. For instance, no particular use of probation or type of imprisonment is locally determined, but instead there is a diversity of Social Services and facilities in the community in different parts of Italy that sometimes determines a different use of sentencing.

8. Young adults (18-20 years old) and the juvenile (or adult) criminal justice system – legal aspects and sentencing practices

For young adults the fundamental criminal and procedural laws are the same as for adults. The only special law provision for young adults regards the conditional suspension of the sentences: if a minor commits a crime, he/she can continue to receive the special benefit of minor legislation until the age of 20

Release under control (*Libertà controllata*): a number of restrictions are imposed, such as not leaving town or daily check-ins at the local police station; and c) pecuniary sanctions/fines (*Pena pecuniaria*). In addition to these penalties, which are inflicted as penal sanctions if a person is found guilty of a crime, penal law provides for the imposition of Safety Measures (*Misure di sicurezza*) against socially dangerous individuals. According to the Penal Code, a person is socially dangerous if he/she has committed a crime and there is a strong likelihood that he/she will commit another crime in the future, given the characteristics of the offence and the offender. The concept of social dangerousness is based on the prediction of recidivism (Constitution, Art. 25; Penal Code, Art. 203).

(this is of particular importance if it comes to a prison sentence). For crimes committed by young people aged 18 up to below 21, conditional suspension of the sentence is applicable for longer sentences than in the case of adults (prison sentences of 2 ½ years instead of 2 years for adults). The Prison Laws provide for special treatment for young people up to 20 years of age (as a consequence they remain in the IPM until their 21st birthday). It is important to remember that for young people a greater duration of bonus leaves from prison is recognized (twenty days at a time rather than fifteen for adults, up to sixty days a year, rather than 45 for adults) and that for juveniles up to 20 years of age, house arrest is allowed, connected with particular health, study, work, and family obligations in the case of a detention sentence that does not exceed four years.

9. Transfer of juveniles to the adult court

It is not possible to transfer a minor to an adult court. He/she can give legal testimony or as a victim, but as a defendant he/she can for no reason be transferred to an adult jurisdiction. As we said before the young person could stay inside the IPM until the age of 20; after the 21st birthday there must be a soft transition from juvenile to adult institutions. To assure continuity of the activity also a gradual transfer of competences from the Juvenile Justice Department to the Penitentiary Administration Department is legally provided. The Juvenile Social Services have to prepare the transition to the adult institution determined on the basis of individual needs.

As far as the access to alternative or substitute measures is concerned, coordination between Social Services Offices for Minors (USSM) and Adult Probation Offices (*Ufficio Esecuzione Penale Esterna* – UEPE) is crucial. (Circular No. 5 26/07/2006 "Continuity in treatment of young adults with criminal procedures – *Circolare n. 5 26/07/2006 Continuità trattamentale dei giovani adulti sottoposti a provvedimenti penali dell'Autorità Giudiziaria*").

10. Preliminary residential care and pre-trial detention

Pre-trial detention can not only be arranged by the investigative police but also by the Public Prosecutor. The reason for this is not to prevent a criminal act but to prevent a person, suspected of certain serious crimes, from escaping justice. Arrest or detention leads the judicial police to immediately inform the Social Service Office for Minors (USSM). A minor can be arrested *in flagrante* if caught during the commission of a crime eligible for pre-trial detention. In any case a minor may be detained if suspected of having committed a non-culpable offence. In such cases the young offender is housed in a small correctional institution, a CPA (see *Section 1*), for a maximum of 96 hours. Law limits as far as possible the use of pre-trial detention for juveniles. Pre-trial detention may

only be invoked in cases of aggravated theft, robbery, rape and extortion, if there is a severe risk of subversion of evidence, attempt to escape or if the crime is considered a serious risk to society. The magistrate can impose pre-trial measures only in the case of an offence punishable by life-imprisonment or for a period of not less than five years. The judge arranges pre-trial detention if there is a concrete danger of the acquisition or the authenticity of evidence; if the minor absconded or a concrete danger of escape exists or if, for specific circumstances of the act and the personality of the minor, there is a concrete danger that he/she will commit serious crimes using arms or other instruments for personal violence or violence directed against the constitutional order (i. e. organized crime or the same types of crimes for which they have already been tried). In the case of detention juveniles are sent to an IPM (see *Section 2* above).

Should a juvenile offender fail to comply with a measure, he/she can "pass through" to a more severe intervention, the harshest being pre-trial detention (for a maximum of one month) which is only imposed as a last resort under certain preconditions. Other measures consist of special prescriptions and obligations *(Prescrizioni)* that involve ordering the minor to carry out studies or work activeties, house arrest or a placement in a community for juveniles. The Penal Code states that orders and sentences applicable to adults may also be applied to minors.[11]

From this moment on the Social Services provide young offenders with psychological assistance even in the absence of parents or any other person close to them. All of the information collected on the personality and social conditions is particularly relevant for the PM in adopting penal measures.

Juveniles entering prisons, in this pre-trial phase of the proceedings, are mainly foreigners coming from East European countries such as Romania, or from the countries of North Africa, especially Morocco and Algeria, since they are often homeless; many of them are in fact unaccompanied foreign minors. For the extent of juveniles in CPAs, see *Table 4* above.

11 The period of time spent in pre-trial custody is taken into consideration when deciding on the length of the sentence in the case of a conviction and is deducted from the sentence still to be served. In addition to preventive custody, the Italian Criminal Procedure Code provides for other forms of restrictions of personal liberty that are applied before the final sentence is pronounced. These are arrest and being held for questioning (*Fermo*). These two measures are only used during the preliminary investigative phases, and not during the trial, because they are temporary measures. Since they are only applied during the pre-trial phase, they are not contained in the book of the Code dealing with precautionary measures, but in the book on preliminary investigations.

11. Residential care and youth prisons – Legal aspects and the extent of young persons deprived of their liberty

With regard to legal aspects and the limits for the deprivation of liberty of minors, four kinds of individual measures have been provided: 1) prescriptions/ obligations involving entrustment to Social Services, 2) house arrest, 3) placement in a community for minors and 4) detention. This final prescription is considered as a last resort, that is, a measure applicable only in case of the most serious crimes.

In applying these measures, the judge must consider the developmental stage of youthfulness and choose the measure that does not interrupt any positive development.

With the placement in a community for minors, the judge orders that the juvenile offender be entrusted to a public or private authorized community, imposing a detailed prescription concerning study or job activities, that is, educational activities. The organisation and the management of this type of communities must answer to the following criteria: a) living conditions like in families, which also provides for the presence of minors not subject to penal procedure, with not more than ten participants, in order to guarantee a climate of educative significance, also through individual plans; b) engagement of professionals from various disciplines; c) cooperation of all the interested institutions and use of the territory resources.

Detention can be applied to juveniles for crimes not including manslaughter for which the law establishes a life sentence or detention not less than the maximum of 9 years.

As presented in *Table 5*, the rate of Italians in IPM stands roughly at 2% whereas the rate of foreigners instead varies between 8% and 12%. Accordingly, the detention rate for foreigners is four times higher than for Italians, despite the fact that they are responsible for only one third of the most serious crimes against the person. With reference to the country of origin, most foreign minors in IPMs come from countries of Eastern Europe, particularly Romania, ex-Yugoslavia and Albania. Many are children who come from Africa, in particular from Morocco and Algeria. Their medium age is around 16/17 years, while those aged 14 or 15 years are less often represented. The present age of detainees includes those who are called “young adults” (aged 18-20). They committed crimes when they were still minors and remain under the responsibility of the Juvenile Services until they have turned 21 (see *Section 8* above).

12. Residential care and youth prisons – Development of treatment/vocational training and other educational programmes in practice

Intervention for minors who commit crimes is not intended to be exclusively punitive, but, above all, rehabilitative with an individualized plan that allows successive reintegration into society once the sentence has been completed. It is necessary that the ministerial apparatus and the various professionals involved in the execution of sanctions and measures collaborate in the achievement of the unique aim of supplying a qualitatively meaningful response to minors who, for different reasons, find themselves within the penal system.

Minors are offered the opportunity to achieve a secondary school degree in the various Penal Institutions for Minors. This type of intervention is intended to guarantee the minor's right to schooling ensured by the Italian Constitution. In IPMs vocational training is offered as well as therapeutic treatment programmes and other programmes which develop and advance opportunities for the young person and encourage minors to assume responsibility for their lives. This model, providing the active participation of minors in finding their own developmental course, gives them an active role in the redefinition of their own life. Active endorsement is also discussed, in which the minor employs the time in intervention-activities where they can experience new opportunities for their own personal growth.

For minors inside the IPMs, the most important institution that can orient them towards a perspective of change is the school. The activities provided involve primary schooling and vocational training for workers. These activities are designed not simply to promote the learning of basic concepts, but also to awake an interest in learning and culture in those who might never have experienced this before. They try, therefore, to stimulate initiative, to improve the process of self-appraisal, to favour maturation of the youth, and not the simple attainment of a diploma. The educational course must be proportional to the length of the minor's stay in the institution and connected to concrete experiences; they must give particular attention to the ethnic and cultural characteristics of the minors; they must use experimental methods and instruments that integrate the youth into the activities of vocational training/job and free time. Teachers must define intervention methods which stimulate the minors to participate in scholastic activities so that they do not just have a formal presence, but take on meaning beyond the obligation to participate. The courses inside the IPMs fall into the 150 hour formula, but in various parts of Italy experimental projects have been introduced: 1) the External Penal Area, 2) didactic programmes using new technologies, 3) multi-disciplinary programmes, 4) programs of integration with the elementary school and 5) programmes of integration with vocational training for workers.

The common denominator is the search for ways to involve minors in school activities which rouse their interest and are applicable in daily life. Teachers involved in these programmes are asked to carry out coherent individual courses directed at the individual minor. In order to reach this objective, an individual-vocational training contract serves as a useful instrument of interaction between minors, teachers and the other persons surrounding the minor. The contract is based on the minor's "starting point" (i. e. what are the areas of greatest deficiency, what are the minor's interests, what kind of engagement will be requested, what objectives do they intend to achieve, which diploma they want to reach). In this educational context, the concept of "formative credit" was introduced. This instrument allows the minor to benefit from the educational training inside the institution, even if the duration of the penal measure does not allow the minor to receive a degree or to finish a course. The minor is assisted by the modes deemed most suitable, in consideration of his/her specific educational plan. The educational plan therefore regards not only the school area, but also the psychological area so that minors have the possibility to acquire a new positive perception of themselves, through which they can comprehend that they too can learn something, that school is not only that traditional institution they already knew and abandoned, but, that around them are teachers interested in them as people, beyond the school curriculum, who can help them to achieve concrete plans for the near future. Trainings concerning communication, expression and interaction are part of the school courses inside the IPMs. Teachers must be focused, above all, on the relationship with the individual minor. They have to cooperate with colleagues, as frequent meetings are necessary in order to create a real working team able to face the more problematic situations. Individualized/Tailored Educative Projects shall encompass different disciplines and, in order to achieve this, a real cooperation between teachers is necessary. Moreover, the collaboration between the penitentiary system (whose limitations influence the school system) and the school system is difficult. Organizing the programmes and ensuring that the timetables are respected, identifying minors who should participate in an activity, coordinating the various activities and, finally, guaranteeing order and safety are factors that challenge the management of the IPM. Therefore, it is essential that the school and penitentiary systems have complete familiarity with each other.

The common objective must be the rehabilitation of the minor, who must learn to become an honest citizen. Adolescence is an age in which choices are still subject to changes and reflections. Adults have the opportunity to offer adolescents an awareness of life experience. For this reason, to resume, or to positively re-evaluate some forms of instruction, such as the education of legality, is very important. As far as drug and alcohol abuse is concerned, treatment is offered to individuals subject to restrictions and/or fulfilling preventive detention. An urgent therapeutic intervention is provided at the admission to the Institution, and a therapeutic programme is also provided which

continues after the end of detention, ensuring connections to the therapeutic programmes already in course when the detainee is freed.

13. Current reform debates and challenges for the juvenile justice system

The new Juvenile Justice System is the result of a compromise among various ideologies: safeguarding the rights of the offender (due process), increasing the responsibility of the minor, rehabilitating the young offender through personalised social programmes of rehabilitation, reducing the use of (preventive) detention (*De Leo* 1985). There are many points of contrast between the treatment oriented welfare model and the stance of pure crime control. On one hand the reform introduced a system which promotes the decriminalization of any type of offence on the ground of insignificance (Article 27 D.P.R. no. 448/88 "dismissal on the basis of insufficient seriousness of the offence"). On the other hand the system allows a range of preventive therapeutic measures, a range of psychosocial interventions aimed at providing a response within the penal system. Because over the years the norms have been applied very differently in various areas, the new tendency is now a re-centralization of penal intervention.

It should be remembered that officially based statistical analyses of delinquency often reflect the action of the social control agencies rather than the real numbers and features of delinquent behaviour. In general, property crimes are the most commonly recorded type of offence while violent crimes are rather unusual. The increase in the numbers for juvenile violence could be a product of the spreading condition of alienation resulting from the problems of mass immigration, the growing number of idle juveniles and finally the dissolution of local communities in urban neighbourhoods, once characterized by working-class culture.

The large number of reported foreign juveniles can be seen as a consequence of two different causes: firstly, immigrant minors live in a very difficult social situation (clandestine immigration, irregular families, school problems, poverty), which entails a growing risk of their involvement in delinquent and criminal pathways; secondly, their socio-economic and cultural circumstances result in a greater vulnerability to penal reaction. They have a greater chance of being reported, prosecuted and incarcerated than their Italian counterparts (*Gatti/Verde* 2002). While foreign juvenile offenders are mainly concentrated in Northern and Central Italy, the involvement of juveniles in organised crime violence is typical of Southern Italy where deteriorating neighbourhoods of southern towns give juveniles the chance to be hired by criminal organizations, where minors are

exposed to criminal values and lifestyles in the hopes of aspiring to roles in the criminal organization.[12]

Another point is related to the difference between a strong non-punitive, rehabilitative approach (with a full range of psycho-social interventions) for many young offenders (especially young middle class Italian males) and the "others", the foreign (or nomad) young offenders.

An interesting new approach introduced in recent years on an experimental basis is that of Victim Offender Mediation (VOM) schemes between offender and victim together with community service orders. Many VOM Offices have been constituted, relatively independent from the Court, composed of educators, psychologists and criminologists. In Italy, Victim Offender Mediation Centres were established for the first time in the early 90s within the Juvenile Criminal Justice System. The system is functionally connected with, and somewhat dependent on, a complex network of subjects and institutions, such as the national and local Social Services, the Judicial Police for Juveniles, voluntary work associations, and rehabilitation communities, where the juvenile offenders may be placed for the execution of a sentence (probation, rehabilitation, etc.).

As to the actual application of interventions, the main guidelines developed are the following:

1. defining and proposing a new set of rules for the enforcement of penal sanctions in relation to minors, limiting the interventions of a strongly restraining nature, such as detention, to more serious situations, considering the type of offence committed, the age and the problematic nature of the person;

2. implementing and using a multifunctional system of services, as a new model of intervention for juvenile deviance, taking also into account the experiences of other European Countries (VOM in penal cases, Community Service, etc.) welcoming the international Recommendations in this field and the EU Guidelines;

3. given the great number of minors reported for having committed an offence, but who are not under restrictive measures, strengthening and organizing in a different way the interventions of Juvenile Penal Services, defining new models providing for cooperation and interconnection of all the resources (state, local, private and public) available in the territory;

4. establishing a functional link between the intervention policy of the Department for Juvenile Justice and the policy of all the other institutions, both public and private, including Universities and study and research bodies involved in the problem of juvenile *malaise*.

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12 Organized crime conducts illegal activities over portions of the territory in at least three Regions in the South of Italy: Sicilia (were we find Mafia), Calabria (with N'drangheta) and Campania (with Camorra). Although each organization has a different history, structure and modus operandi, their main illegal activities (which often involve violent crime) are similar, ranging from extortion and drug trafficking to corruption.

Despite the proposals of the Department for Juvenile Justice, in Italy nowadays it is a compromise between different ideologies, between a just deserts model caused by the moral panic among the public about certain forms of juvenile crime, and due process which insists on the formal and special guarantee of young offenders' rights in the Juvenile Justice System. Even though the centre right Government is moving towards revising the Juvenile Law to reform what are considered lenient measures, the welfare/participatory model with an emphasis on rehabilitation seems to be maintained in principle.

For many international scholars Italian Juvenile Justice is characterized by leniency, by a strong level of tolerance of the Juvenile Justice System against the backdrop of increasingly punitive Juvenile Justice Policies that have evolved in many Anglo-American Societies (*Nelken* 2006). Much of the penal policy governing juveniles in Italy were established by the Juvenile Justice Procedural Reform Act of 1988, which addresses the delinquency of youths between the ages of 14 and 18 years. The procedures require that prison should be avoided and that the legal process should not interrupt the normal process of education and growing up. For the most part, juvenile offenders are treated informally and never enter the procedural phase of trial process; the rate of juvenile detention is exceedingly low compared to Anglo-American societies. Additionally, the cultural significance of the family is much more prominent than in Anglo-American or partly other Central-European cultures, illustrated by the low rate of "broken families" in the country, and family is largely regarded as the natural and proper place for discipline and socialization. The importance of the Catholic Church in guiding Italian Penal and Juvenile Policies is also noted as a contributing factor to the tolerance displayed toward juvenile offenders in this country. The lack of scientific evaluation and criminology within Italian society as well as a lack of recidivism data on young offenders is another problem. Against *David Nelken*'s criticism, it is argued (*Ciappi* 2008) that even in Italy, having in mind the high percentage of foreign minors in Penal Institutions for Minors, there is a sort of double punitiveness that characterizes the penal and procedural system. Social development initiatives in the field of juvenile justice mainly address and are geared towards young Italians.

14. Summary and outlook

In the mid-nineteenth century a new way of perceiving minors who are involved in the criminal jurisdiction developed in Italy: the criminal jurisdiction of minors was separated from that of adults. In 1934 the Italian Juvenile Court was created, controlling three different areas: penal, civil and administrative competencies. Then, in 1956, a new Law (no. 888/1956) changed the way minors were perceived. In fact, this Law was more aware of the needs and privations of this particular group of minors demonstrating abnormal behaviour, and new educational support was created to organize individualized treatment to better

understand delinquency among minors. In the 1970's the main goal was the prevention of delinquency by minors, thus recovering the fractured educational relationship. In 1988 (D.P.R. no. 448) minors involved in criminal jurisdiction were considered to have the primary right to be educated. There are three main principles of the criminal trial: The principle of deprivation of liberty as a last resort, the principle of minimum intervention and the principle of proportionality between the sanction and the offence.

The main goal of the prosecution is to make the minors liable for their actions and of the consequences in order to understand why they have been involved in the Criminal Justice System. This is an important part of the process since it is possible to restore the damaged social system. The various steps of the juvenile penal trial (*Processo penale minorile*) consider the gravity of the crime, the age of the minor, his/her personality, and the economic and social situation of the family to understand what responsibility it has for the minor. One of the main innovations is Article 28 of the D.P.R. no. 448/88 with the suspension of the trial and the measure of the entrusting of the minor to the Social Service Offices for Minors (Probation).

Juvenile delinquency has aroused social alarm due to specific cases, although the rate of juvenile crime has decreased. Since the 1990's there has been an increase in the number of foreign minors (especially from ex-Yugoslavia, Romania, Albania, Morocco and Algeria) hosted in the CPAs (see *Section 1*) compared to Italians. Generally speaking, for all juvenile offenders, property crimes are most common, followed by crimes against the person (voluntary injuries, attempted homicide and sexual violence) and drug crimes. The majority of juveniles inside penal institutions for minors are migrant and unaccompanied minors.

The general idea is to create social conditions for the inclusion of minor offenders through rehabilitation. The main goal of the juvenile criminal jurisdiction is general prevention and special prevention of juvenile delinquency as well as the full inclusion and reintegration of young offenders. The D.P.R. no. 448 combined with general procedural provisions is one of the fundamental laws regulating formal and informal interventions for young offenders. Generally D.P.R. no. 448 seeks to limit as far as possible the use of detention for minors with measures as: probation, house arrest, semi-custody and early release.

Once notification of the crime is received, the Public Prosecutor has the duty to book it into the appropriate register. The arrest, always optional, is under police discretion, according to the seriousness of the event, the age and the personality of the minor. The young offender is then taken to police headquarters where he or she can be kept for no more than 12 hours. After this period the person who has parental authority (or the guardian/tutor or other delegated person) will take the minor into custody. If this is not possible, the police inform the Public Prosecutor (PM) who will place the minor in a CPA. All these measures must be confirmed by the Judge of the Preliminary Investigation

(GIP). The hearing takes place within 48 hours and after the GIP has chosen the appropriate measure. From the act the PM has six months for the investigation and takes a decision. If the trial goes on, other different forms of sentencing can be ordered by the judge.

The juvenile criminal trial incorporates a new way of perceiving the sentence. The general idea is to create circumstances so that the sentence can serve to repair the damage rather than the simple fulfilment of the sentence and rehabilitation.

The attention to the victim is fundamental; Victim Offender Mediation (VOM) in particular find especial use, with its high recognition of the rights of the victim. The VOM procedure can be activated at different stages of the proceedings.

The new forms of sentencing are inspired broadly by diversion, probation and de-institutionalization. The main specific penal provisions for minors are: Judicial Pardon, Insanity Defence, Article 27 and Article 28. From 1980 to 1988 the penal legislation for minors in fact was strictly inquisitorial. The new Law of the year 1988 (and in particular with Article 28) explains the importance of adapting sentencing to the personality of the minor, maintaining the idea of penalization while developing an educational programme arranged between involved services, the minor and judge. Probation is an important legal instrument to encourage development of the minor's personality through the internalization of civil laws.

Regional differences in the sentencing practice can not be clearly explained or presented because judges have wide discretional power. Nevertheless "normative discretion" is limited by the law. All provisions must be applied in a manner appropriate to the personality and educational needs of the young person.

For young adults criminal and procedural law are the same as for adults; the only special legal provision regards alternatives to prison. The suspension of a sentence is easier for young people under 21. Furthermore, persons in Italy continue to receive some special benefits of minor legislation up until the age of 21 (this is of particular importance in the case of detention).

It is not possible to transfer a minor to an adult court. Regarding the execution of the sentence, a young person remains in the IPM until the age of 21; then there is a soft transition from the juvenile institution to an adult prison.

It is necessary to have considerable proof of guilt when restrictive measures are to be adopted. The law limits the use of pre-trial detention for juveniles as far as possible. Pre-trial detention may be invoked in cases of aggravated theft, robbery, rape or extortion. Detention may be ordered if there is also the severe risk of subversion of evidence, absconding or if the crime is considered a serious risk to society. The magistrate can impose preventive measures but only in the case of an offence punishable by imprisonment for life or for a period of no less than five years

Personal precautionary measures are: limitation under the supervision of Social Services, house arrest, placement in a protected community, and detention. This

final prescription is considered as a last resort, that is, a measure applicable only in case of the most serious crimes. In applying the measures, the judge must consider the developmental process of the minor and choose the measure that does not interrupt any positive development.

The common denominator is the search for ways of involving minors in school activities that rouse their interest and are applicable in daily life. Teachers involved in these programmes are asked to carry out coherent individual courses directed at the individual minor. In order to reach this objective the individual-vocational training contract serves as a useful instrument of interaction between minors, teachers and the other figures surrounding the minor in order to identify the minor's starting point. In this educational context, the concept of Formative Credit is introduced. Also, the vocational training inside the IPMs is fundamental for preventing deviant behaviour through therapeutic treatment programmes and adequate sanctions and opportunities, adopting the model of responsibility. This model, providing the active participation of the minors in finding their own developmental course, gives them an active role in the redefinition of their own lives.

Nowadays, Juvenile Justice in Italy is a compromise between different ideologies. On the one hand, there is a model that has its footing in a moral panic among the public about certain juvenile crimes. On the other, we find a due process approach which insists on the formal and special guarantee of young offenders' rights in the Juvenile Justice System. At the same time, the Italian centre-right Government is moving towards revising the Juvenile Law in the direction of a reform of the welfare/participatory model with an emphasis upon rehabilitation.

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Kosovo

Dierk Helmken

1. Historical development and overview of the current juvenile justice legislation

1.1 Historical development

As a consequence of the Kosovo war in June 1999 the South-Serbian Autonomous Province of Kosovo, which has an estimated two million inhabitants, of which 90% are of Albanian ethnicity and Islamic religion, became the first protectorate of the United Nations Organisation. At first the whole civil administration lay in the hands of the UN Interim Administration in Kosovo (UNMIK). The applicable law still consisted of the old hierarchy of Yugoslavian federal law, Serbian state law and Kosovar provincial law. As far as needed this traditional set up was annulled or modified by the Regulations of the Special Representative of the Secretary General of the UN, called SRSG, the highest administrator of UNMIK. In May 2001 the provisional constitution of Kosovo (Constitutional Framework) came into force, which provided a certain amount of self-government to the Kosovars. But this excluded the legislative und executive power in the field of law and security. Within the frame of this competence the SRSG gave order to scrutinize and reform the most important codes governing the penal law. In the course of reforming the Criminal Code and the Criminal Procedure Code a completely new Juvenile Justice Code of Kosovo (JJCK) was created which came into force on 20. April 2004.

Before June 1999 the law on Juvenile Justice in Kosovo was determined by scattered provisions in the Criminal Law of the Socialist Autonomous Province of Kosovo of 1977 (Chapter IV, Art. 11-28), the Criminal Code of SFRY of 1976 (Chapter VI, Art. 71-83) and the Law on Criminal Proceedings of SFRY of 1986 (Chapter XVII, Art. 452-492).

1.2 Overview of the current legislation

The present JJCK is the result of a legislative process of an administration, which was dominated by UN officials. The deliberation phase, however, included the input of Kosovar juvenile judges and UN judges from European countries with a civil law background. As to nobodies' surprise the leading role of the UN officials in the shaping of the new law resulted in the preponderance of the principles and provisions laid down in the diverse conventions and covenants of the UN in the field of Juvenile Justice. The most important being:

1) the Convention on the Rights of a Child (CRC), in force since 2.9.1990, which has been signed by all members of the UN except the USA and Somalia;
2) the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), adopted by the General Assembly on 29.11.1985;
3) the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly on 14.12.1990.

In spite of the influence of these international norms the creators of the new law were wise enough to basically maintain the traditional institutions and norms from former times in the jurisdiction. Thus one can call the JJCK a blend of national and international law.

The JJCK contains 157 articles. It thereby doubled the number of articles as compared to the old law. Five of these deal with general principles, 31 with the system of sanctions, 42 with procedural norms, 62 with the execution of sentences, 9 with procedural norms in cases with juvenile victims and 8 with transitional problems.

The seven leading principles of the JJCK (Art. 1)[1] seem to be disorganized with regard to their selection and order. Justly quoted at first is the general orientation of the JJCK according to the needs and well-being of the child. This reflects the welfare approach of rules 1 and 5 of the Beijing Rules. Art. 1 also repeats the second part of rule 5 of the Beijing Rules, which, somewhat surprisingly and unsystematically, stresses the principle of proportionality, which is a mainstay of the basic procedural structure of a rule of law regime. Then the provision lists the following principles:

a) the applicability of diversion measures,
b) deprivation of liberty as a last resort and limited to the shortest possible period of time,
c) the obligation to promote rehabilitation,
d) the right to be heard,

1 Legal provisions quoted by numbers only are those of the Juvenile Justice Code of Kosovo.

e) in enforcement: right to be treated humanely, to be separated from adults, to stay in contact with relatives, to contact a defence counsel, rights to remedies against deprivation of liberty, the right to swift proceedings,
f) the right to privacy.

The entities addressed by these unsystematically organised provisions are, also in piecemeal order, juvenile judges, prosecutors and execution officials. Art. 2 is devoted to defining legal terms of the JJCK. Here the different definitions of the different age groups are important.

Following the UN terminology a person below the age of 18 is designated as a child (Art. 1 CRC). A child between the age of 14 and 18 is additionally labelled as a minor. A person above the age of 18 is an adult. A person between the age of 18 and 21 is a young adult. And since the JJCK can refer to all persons between 14 and 21, this mixed group of children and adults is called juveniles. A person aged 14 to 18 can therefore be called a child, a minor and a juvenile at the same time. The confusion of this nomenclature is owed to the respective confusion of the UN nomenclature, which additionally uses the term "young persons".

The old Yugoslavian law did not use the term "minor", but stuck to the term "juvenile". This term was however divided into the "junior juvenile" (14-16) and the "senior juvenile" (16-18), a distinction which is still well justified according to the importance of this age limit with regard to the applicability of punishments.

The definition of "juvenile judge" is also remarkable, since it really defines the prerequisites which have to be fulfilled to become a juvenile judge. Unlike correspondent provisions of other Juvenile Justice systems, like e. g. the German, it is content with requiring only expertise in dealing with matters concerning children and young adults. This is, at least at present, more realistic than the idealistic, but hollow requirements of extensive knowledge in the fields of education and psychology. The lack of a definition of a juvenile prosecutor is also worth mentioning, which connotes with the lack of such an institution in Kosovo, and is one of the main flaws of the JJCK.

According to Art. 3 the JJCK is always applicable to minors, but to young adults only where the Code mentions this especially. For the differentiation the age at the time of the perpetration of the offence is decisive.

The relationship between the government agency which is responsible for the protection and well-being of children in Kosovo, called the Guardianship Authority (GA) (a branch of the Social Welfare Centre), and the Juvenile Court is regulated only in Art. 5. It gives the juvenile judge the power to impose any measure which is apt to preserve the rights and well-being of the child. It includes the commitment of the child to an educational institution under the supervision of the GA. The juvenile judge can also order the commitment of the

child to another family, if it is necessary to sever the child from its home environment.

2. Trends in reported delinquency of children, juveniles and young adults

The Kosovo Police Service (KPS) has been collecting statistical data about criminal offences since 1999, which is collected and processed in the Crime Analysis Department, in the Crime Statistics Sector. The data is collected according to three age groups: children (below *14*), minors (14-18) and adults. One can infer from the commentaries attached to the published statistics that there is as yet no recognition about the limitations of the registration of criminality. Therefore, the registered numbers of juvenile delinquents are not to be taken at face value. The year 1999, in which the war took place and in which the NATO forces invaded the country, shows only 90 registered criminal offences committed by minors (14-18).This small number is surely owed to the absence of a reliable official social control system. In the subsequent five years until 2004 juvenile delinquency has remained at about 3,000 cases per year. Yet these figures, too, should be observed with caution, since the legal system lacked much, and one can surmise that the propensity of the population to report crimes to the police was still low. Only in the subsequent years 2005 (3,800) and 2006 (4,200) the number of reported crimes committed by minors has increased, but without anybody knowing whether this marks only an enlargement of the field of registered criminality or whether this stands for a real increase of criminality. Since Kosovo does not have any infrastructure for empirical criminological research, for now this question has to remain unanswered.

In 2006 juvenile delinquency (14-18 year olds) accounted for roughly 19% of overall registered crime (22,980), while child delinquency (below 14) in 2006 amounted to 400 cases, which is roughly 10% of the amount of juvenile criminality.

Looking at the type of offences committed, theft is the predominant offence. While theft accounted for more than 70% of child offending it still remained at 'only' 50% with juveniles. Second rank is held by aggressive offences (assault/harassment) in both categories. But these offences accounted only for 10% of child criminality and 17% of juvenile crime. What is remarkable is, however, the surge of public disorder offences committed by minors, which forms 12% of all juvenile criminality. Some 57% of the registered juvenile offences were committed in cooperation with other perpetrators.

Like in the old Yugoslavian law young adults are only treated according to the JJCK in exceptional cases. The police statistics therefore do not count young adults separately.

The court statistics of 2006, which are collected in the statistics department of the Kosovo Judicial Council (KJC), report that at the municipal courts – which are competent to try offences with a punishment of up to five years imprisonment – there were 994 indictments against minors (80%), while the district courts received 262 (20%) indictments. In that year 4,230 offences were registered by the police, so roughly 30% of the offences reached the court stage. Unfortunately, further information is lacking to explain the reasons responsible for the dismissal of the remaining 70%.

The third source of judicial data presently available in Kosovo are the statistics of the Probation Service (PS). Its main task is the assistance of the prosecutors and juvenile judges in juvenile delinquency cases.

For the years 2004 and 2005 the PS has evaluated its case files and has come up with the following results:

1) The 1,580 registered offences that were dealt with by the PS were committed by first-time-offenders in 80% of the cases. 10% were attributable to second-time-offenders.
2) Only 2.5 % related to female offenders.
3) 1/3 of the offences pertained to 14-16 year old minors, 2/3 to 16-18.
4) 1/3 of the crimes were situated in a rural environment, 2/3 in urban areas.
5) 60 % of the minors had already quit school.
6) 6% were illiterate, 18 % had attended school until 7th grade, 51% up until 10th grade.
7) 85% lived in a 'complete' family.
8) 2/3 had 5 to 8 siblings, 15% had 9 to 10 siblings and 6% has 13 to 17 siblings.
9) 2/3 lived in bad to very bad economic conditions.
10) It is remarkable, that numbers of registered thieves stemming from poor families are two to three times higher than those from well-off families, while the numbers of bodily aggressors show a 3 to 6 times higher rate for minors from well-off families.

Statistics of the PS, regarding their activities in the field of implemented measures, are available for the year 2006 and for the first half of 2007, which will be quoted throughout the text.

3. The sanctions system

3.1 General provisions

The JJCK differentiates between measures and punishments (Chapter IV). The duration of sanctions must be determined (6,4). Against minors below the age of 16, only measures can be applied (6,3). Measures and punishments that impose

deprivation of liberty up to two years, can be suspended (6,5). The measures are divided into diversion measures and educational measures (6,1).

Art. 7, 1 contains special criteria which are to be observed when meting out sanctions against minors. They are on the one hand offence related, on the other offender related.

The latter fall into the realm of the PS, which according to paragraph 2 is obliged to provide a social inquiry report. Art. 7, 3 stipulates that the court shall not pass any sanctioning decision before obtaining the social inquiry report and the recommendation of the PS except in cases of minor offences.

3.2 Informal intervention/Diversion measures[2]

Art. 13 lists the three aims of diversion:

1) Avoidance of the main trial
2) Rehabilitation and reintegration and thereby
3) Avoidance of recidivism

Art. 14 designates the prerequisites for the application of diversion measures:

1) Acceptance of responsibility by the minor for the criminal offence;
2) Expressed readiness by the minor to make peace with the injured party; and
3) Consent by the minor, or by the parent, adoptive parent or guardian on behalf of the minor, to perform the diversion measure imposed.

If the minor does not comply with the order, the prosecutor may recommence the prosecution (14,3).

The JJCK names only a closed list of diversion measures:

1) Mediation between the minor and the injured party, including an apology by the minor to the injured party;
2) Mediation between the minor and his or her family;
3) Compensation for damage to the injured party, through mutual agreement between the victim, the minor and his or her legal representative, in accordance with the minor's financial situation;
4) Regular school attendance;

2 Diversion measures are only seldom applied by the prosecutors and not at all by the juvenile judges. The court statistics for 2006 do not even have a special category to show such court orders. The statistics of the PS shows for 2006 only 62 diversion measures were implemented, which is 1.5% of all reported offences. In three of the five districts of Kosovo only 9 diversion measures were applied all together. In the fist half of the year 2007 diversion measures only formed 8% of the cases to be processed by the PS. Only the district of Prizren reported the use of diversion measures (27), while the other four districts together reported only 7 measures. The main reason for this unwillingness to use the new law seems to be the mentality of the prosecutorial service, which was not used to deciding such matters in pre-UNMIK times, when even the investigative work was done by the investigative judge.

5) Acceptance of employment or training for a profession appropriate to his or her abilities and skills;
6) Performance of unpaid community service work (CSW), in accordance with the ability of the minor offender to perform such work;[3]
7) Education in traffic regulations; and
8) Psychological counselling.

Art. 79 obliges the PS to supervise the performance of the diversion measures and to report to the ordering authority.

3.3 Formal interventions

3.3.1 Educational measures

The main objective of educational measures are not the mere avoidance of recidivism, but to contribute to the rehabilitation and proper development of a minor offender, by offering protection, assistance and supervision, by providing education and vocational training, and by developing his or her personal responsibility, and thereby to prevent recidivist behaviour. The JJCK divides the educational measures into three groups of different degrees of intervention (Art. 17):

a) disciplinary measures,
b) measures of intensive supervision,
c) institutional measures.

The term of an educational measure may not exceed the maximum term of imprisonment prescribed for the criminal offence. The court which imposed the educational measure is obliged to supervise its execution and issue orders in relation to this enforcement (80, 1). The court is assisted by the PS (80, 2). According to Art. 81 the execution of an educational measure shall meet a number of ambitious goals which require well educated personnel. The expenses of the educational measure are borne by the government. But the court shall decide which share of the costs shall be recovered from the legal representative of the minor (8).

Art. 83 stipulates that the enforcement of a measure shall commence as swiftly as possible. To achieve this aim the law sets very short time limits (three days for the issuance of the enforcement order; three days for the institution to

3 CSW as a diversion measure has completely confused the Kosovar juvenile justice system. After conducting 6 round table discussions in 2007 with all the stakeholders of juvenile justice in Kosovo, it became evident that the majority of functionaries felt bound by the provisions of CSW as a punishment (Art. 28). It also appeared that this measure was hardly used by the prosecutors and judges. Furthermore, there were even some who uttered the opinion that CSW would contravene the international rules against forced labour.

start the measure). Furthermore, the court has to maintain records about any educational measure imposed.[4]

Art. 84 provides for the necessary flexibility of the court to impose, stop or change any measure needed to protect the well-being of the minor. It has to inform the GA about it.

If, after a ruling on imposing an educational measure has been rendered, additional circumstances, new evidence or evidence which existed but which was not known at the time the decision was rendered comes to light which would clearly have affected the selection of the measure, the court shall review the ruling and may terminate the execution of the measure or may substitute it with another. The court may not impose a more severe measure on the basis of newly-considered evidence (125, 1).

If the execution of an educational measure has not commenced within one year of the date on which the decision imposing the measure becomes final, the court shall review the decision and decide whether to execute or to terminate the measure or to substitute it with another. The court may not impose a more severe measure (125, 2).

3.3.1.1 Disciplinary measures

Disciplinary measures are:

a) admonition (18),[5]
b) commitment to a disciplinary centre (19).[6]

These measures are imposed on a minor offender whose best interest is served by a short-term measure, particularly if the criminal offence was committed out of thoughtlessness or carelessness. At the disciplinary centre the minor shall be engaged in useful activities that shall be appropriate to his or her age, skills and interests with the aim of developing his or her sense of responsibility (19, 4). The court can commit the minor to a disciplinary centre (21):

1) For a maximum of one month, for up to four hours per day; or

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4 One may doubt the practicality of these ambitious time limits. Their idealistic approach can only stand the test of reality if equally stern measures of control are installed. This is not the case so far.

5 According to the KJC statistic 19% of the sentences passed in 2006 against minors ended with an admonition. This sanction is the second most used reaction of the courts.

6 There are no disciplinary centres in Kosovo yet, even though this is an institution of the old Yugoslavian law. The lack of this institution leads to an unnecessary rigidity of the Kosovar sanctioning system, since a juvenile judge who wants to impose an institutional measure has no choice but to sentence the minor to at least 1 year in an educational-correctional institution, or for at least 6 months in juvenile prison. Such a system would only produce beneficial results if the juvenile judges really followed the last-resort principle strictly.

2) For a maximum of four days of a school or public holiday, for up to eight hours per day.

The court can order the PS to supervise the measure and also to assist the youngster's family. The legal representative is responsible for the regular attendance of the minor (86, 1). The institution is obliged to immediately inform the court about slacking attendance and must maintain execution records. If, through no fault of the minor, the execution of the measure of committal to a disciplinary centre has not commenced within six months from the date on which the decision imposing the measure becomes final, the measure shall not be enforced (125, 3).

3.3.1.2 Measures of intensive supervision[7]

These are intensive supervision by:

a) the legal representative, normally the parents (PA),
b) another family,
c) the GA.

These measures are imposed on a minor whose best interest does not require isolation from his or her previous environment and is served by a long-term measure which provides the minor with an opportunity for education, rehabilitation or treatment. The term of this measure may not be less than three months or more than two years.

As a special feature of all measures of intensive supervision the court may impose the following special obligations:

1) To apologize personally to the injured party;
2) To compensate for the damage to the injured party, in accordance with the minor's financial situation;
3) To attend school regularly;
4) To accept employment or to receive training for a profession appropriate to his or her abilities or skills;
5) To refrain from any form of contact with certain individuals likely to have a negative influence;
6) To accept psychological counselling;
7) To refrain from frequenting certain places or locations likely to have a negative influence; and
8) To abstain from the use of drugs and alcohol.

The court may, at any time, terminate or modify the special obligations imposed on a minor. If the minor does not comply with the special obligations, the court may substitute the measure of intensive supervision. Intensive

7 According to the KJC statistics in 2006 52% of the sentences ordered intensive supervision. A glance at the PS statistics shows that this must have been almost exclusively intensive supervision by the parents of the accused.

supervision by the PA requires that the court has confidence that the PA will be able to fulfil the necessary educational requirements (even though they have been negligent in the past). To ensure compliance the court can impose certain obligations on the PA (20, 2) which they have to obey (88, 1). The court can also order the PS to supervise the measure and to assist the PA. PA and PS have to report regularly (89).

Intensive supervision by a foster family[8] is used when (and as long as) the PA is not capable of educating the minor. The court determines the foster family upon the recommendation of the PS, which has extensive obligations to check the appropriateness of the foster family (90, 2).The propensity of the minor has to be respected (90, 3). The PS and the foster family have to enter into a written contract. The minor shall maintain regular contact to his or her original family.

Intensive supervision by the GA[9] is implemented so the minor stays at his original family, while the representative of the GA looks after him regularly. When imposing this measure, the court will also define the duties of the Guardianship Authority, including (22):

1) Overseeing the minor's education;
2) Facilitating access to vocational training and employment;
3) Ensuring that the minor is removed from any adverse influences;
4) Facilitating access to necessary medical care;
5) Providing possible solutions to any problems that might arise in the minor's life; and
6) Such other duties as the court determines would be in the best interest of the minor.

The GA must immediately nominate the responsible official and inform the court.

3.3.1.3 Institutional measures

These are committals to

a) an educational institution;[10]

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8 In the year 2006 the PS statistics do not show a single case of this nature. This contrasts to the information given by the head of the centre for social welfare of Pristina, who claimed to have a sufficient number of families on a list. Foster families could be easily found, since they are entitled to a maintenance reimbursement of €50 p.m. for a foster child which is a relative, and €100 for an unrelated child. The discrepancy between these different pieces of information might be explained by the fact that maybe foster families are not ready to accept juvenile criminals.

9 While there was no such court sentence in 2006, the PS statistics report that in the first six months of 2007 7% of the cases processed by the PS related to intensive supervision by the GA and the police. The latter is, unfortunately, not stipulated in the law.

10 There are no such educational institutions in Kosovo.

b) an educational-correctional institution;[11]
c) a special care institution.[12]

These measures are imposed on a minor whose best interest is served by isolation from his or her previous environment and by a long-term measure which provides an opportunity for education, rehabilitation or treatment.

It is especially noteworthy that the director of an institution is obliged to send a half-yearly report to the competent court[13] and the PS and can file a motion for amending or terminating the measure (123,1). The provision of the JJCK that states that the competent court shall make a half-yearly visit to the institution to check on the minor is also remarkable.[14] He shall meet the minor and the competent warden and educators to satisfy himself about the correctness of the sentence and its progress (123, 2). The court has the power to give orders to the PS and the director to remedy deficiencies and can direct the PS to report about its implementation (123, 3).

The competent court shall review the execution of an educational measure every six months (124, 1). The minor, the PA, the director of the institution or the PS may request a review of the execution of an educational measure (124, 2). The juvenile panel of the competent court shall issue a decision within eight days of the receipt of the request. An appeal against the decision may be filed with the court of second instance within three days of the original decision. During the review the competent court shall consider the reports of the PS and of the director of the institution and shall hear the minor, the PA, the defence counsel, the public prosecutor and the PS.

On the basis of the review the court may decide to continue or terminate the enforcement of the educational measure, or substitute it for a less severe educational measure.

As an exception to paragraph 5 of the present article, the court may substitute an educational measure with a more severe measure where the minor has failed to comply with a special obligation.

During the time that the educational measure is being executed, the PS shall maintain regular contact with the minor, his or her family and the institution. No later than three months before the release of the minor, the institution shall inform the PA and the PS and shall propose measures to them for the reception

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11 According to the court statistics of 2006, two percent of all sentences committed the accused to this institution. This amounts to about 16 inhabitants throughout the year.

12 There is no such institution in Kosovo. Serious cases have to be referred to the mental health centre in Stimlje.

13 The director of the Lipjan correctional institution claims that he observes the time limits for such reports meticulously. The report is prepared by the competent social worker.

14 The director of Lipjan claims that this obligation is hardly fulfilled by the juvenile judges.

of the minor (137).[15] The PS shall offer assistance to the minor after release for as long as he or she needs it. It shall cooperate with the GA or the PA if necessary (138).

Once released, the GA shall take special care of a minor who has no parents, or whose family circumstances are not settled. This care shall include, in particular, accommodation, food, the acquisition of clothes, medical treatment, the regulation of family circumstances, completion of vocational training and employment of the minor (139).

The minor, the PA and the PS can file remedies against institutional measures. They can file for a stay (99) or suspension (102) of execution. An appeal against the court decision can be filed to the appellate court within three days (99, 3). The first appeal stays the enforcement of the sentence.

The court shall commit a minor to an educational institution when he/she requires full-time supervision by appropriate educators (24). The term of this measure may not be less than three months or longer than two years. In order to preserve the privacy of the minor only the director of the institution and the competent educator shall be informed of the measure (106, 2). The PS chooses the institution and is in charge of delivering the minor to it (107). If the minor tries to evade the measure, the PS can call for the police to help, a circumstance of which the court has to be informed (108). Committals to an educational-correctional institution[16] can be imposed by the court when a minor who has committed a criminal offence punishable by imprisonment of more than three years requires specialised education (25). When deciding on the imposition of this measure, the court shall consider the gravity and nature of the criminal offence and whether the minor has previously been sentenced to an educational measure or juvenile imprisonment. The term of this measure may not be less than one year, or more than five years in duration.

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15 The director of Lipjan claimed that the PS is fulfilling this obligation as required.

16 Kosovo has not built a new educational-correctional institution, but uses a certain part of the former Yugoslavian Lipjan correctional institution for this purpose. The remainder of the institution is now used as a prison for juvenile males and females as well as for adult females and adult males sentenced to short term imprisonment. The minors are lodged in 6-bed-cells with three lofts. Each prisoner has only one small wooden cupboard at his disposal to store personal belongings. The slightest degree of privacy is lacking. Once a week the minors are allowed to use the phone and to shop for groceries. For schooling up to 13th grade the institution employs three full time teachers, while the director wants seven. Formerly the institution, which was built in 1978, was used as a semi-confined correctional facility only with a high degree of specialised personnel. It has been renovated lately, so its general condition can be deemed satisfactory. It has a capacity of 120 inmates and 80 personnel. 30% of the personnel are Serbian, which is highly unusual for Kosovo. On 29 April 2007, 39 minors were serving a juvenile imprisonment sentence, while nine were inhabitants of the educational-correctional institution.

Provisions regarding the execution of the measure (109-118) include the regulation that such an institution shall be of a semi-closed nature, which means that it shall not have a perimeter wall, that other security measures are more liberal (no weapons, no video-cameras, more visits, more leave). Male and female prisoners as well as minors and adult prisoners have to be separated (109).

If the minor does not report to the institution voluntarily, police transport can be ordered. If the minor hides, a wanted notice is issued. The JJCK stresses that coercive transports have to observe the respect for human dignity (111, 2; 108, 2).

When the minor is admitted to an educational-correctional institution (112), his or her identity and the grounds and authority for the educational measure shall first be established, upon which he or she then undergoes a medical examination within 24 hours of arrival. The name of the minor, the grounds and authority for the educational measure and the date and time of his or her arrival at the correctional facility shall be recorded in a register. The minor shall then be sent to the section for personal examination for no more than sixty days for the purpose of establishing an individualized programme. The programme for dealing with minors shall be established by an expert team at the educational-correctional institution.

Minors are assigned to educational groups in accordance with their age, mental development, and other personal characteristics, and in accordance with the specific features of their individualized programme. An educational group has at the most twenty minors and a special educator (113, 2). Minors have the right to exercise sufficiently in order to remain healthy, and to spend at least three hours a day outside closed premises during their free time. The minor shall have a secured environment for playing sports, exercising and other physical activities. If the institution cannot provide adequate schooling, he or she may be granted the right to attend an outside school (115).[17] The minor is entitled to receive at least one one-hour-visit per week by a relative. Other persons who do not exert a negative influence on the minor can visit twice a month.[18] The director has the right to exclude persons from visiting. The minor has the right for daily and weekly leisure time and for 30 days of leave. The director can grant an additional 15 days of leave.[19] With regard to disciplinary measures (118) the minor may not be subject to solitary confinement. The minor may be accommodated in a special unit of the educational-correctional institution as a disciplinary punishment under the following conditions:

17 According to the director of the Lipjan correctional institution outside schooling is not necessary, since all types of teaching are provided in the institution.

18 The director in Lipjan claimed to apply the liberal rule to all types of visitors, whether related or not.

19 In practice the prisoners all receive thirty days of leave, but no extra leave.

1) The period of accommodation in a special unit may not exceed fifteen days;
2) the minor shall not be accommodated alone in the special unit;
3) the minor shall be entitled to exercise his or her right to spend at least three hours daily outside closed premises during free time and to receive visits;
4) the minor shall have access to textbooks and other books; and
5) the minor shall be visited by a medical officer and educator once a day and by the director twice every seven days.

The court may commit a minor to a special care facility (26) instead of to an educational institution or an educational-correctional institution upon the recommendation of a medical expert when a minor requires special care due to a mental disorder or physical handicap, and it is in the best interest of the minor. The court that has imposed the measure shall review the need for a further stay in the special care facility every six months and when the minor reaches the age of eighteen years.

3.3.2 Punishments

3.3.2.1 Fine

The JJCK uses only one form of pecuniary sanction, the fine (27). It is not a youth-specific sanction, but its size is reduced when imposed against a minor. When determining the amount of a fine, the court shall consider the material situation of the minor and, in particular, the amount of his or her personal income, other income, assets and obligations. The court shall not set the level of a fine above the means of the minor.

The imposition of a fine may not be less than 25 Euros (50 against adults) or more than 5,000 EUR (500,000 against adults). The judgment shall determine the deadline for the payment of a fine, which may not be less than fifteen days or more than three months, but in justifiable circumstances the court may allow the fine to be paid in instalments over a period not exceeding two years. Payment in instalments is also possible if the minor is unwilling or unable to pay the fine. Thereafter, if the minor is unwilling or unable to pay the fine, the court may, with the consent of the convicted person, replace the fine with an order for community service work which will not interfere with his or her regular employment or school activities. A fine imposed on a minor that is unpaid may not be replaced by a term of imprisonment (127, 2).

3.3.2.2 Community service work [20]

The court may order community service work with the consent of the minor to replace an institutional educational measure of up to three years, juvenile imprisonment of up to two years or a fine. When imposing an order for community service work, the court shall order the minor to perform unpaid work for a specified term of thirty (30) to one hundred and twenty (120) hours. The form and type of work is determined by the PS, which also designates the specific organization for which the convicted person will perform this work, decide on the days of the week when the community service work will be performed and supervise the performance thereof. Community service work shall be performed within a period specified by the court which shall not exceed one year. If, upon the expiry of the specified period, the minor has not performed the full number hours or has only partially completed the sentence, the court shall order that a proportionate duration of the original term of the institutional educational measure or juvenile imprisonment be executed, however taking the share of community service work that has been performed into consideration. In the case of a fine, the court shall order the payment of a fine proportionate to the duration of the community service work that has not been performed.

Special attention is paid to ensuring that the completion of community service work does not prevent regular school attendance or other important activities (128, 2).

The PS shall submit a written report to the court on the performance of the community work and any obstacles in the execution of this measure (129, 1). If the minor cannot complete the CSW order because of a subsequent change in circumstances for which he or she is not responsible, the PS shall ask the court to review the order. The court may, in view of the results achieved, amend the order or terminate the enforcement of the measure.

20 In 2006, eight percent of all sentences replaced the imposed fine or juvenile custody by a community service work order (KJC statistics). According to the PS statistics 41% of the cases processed by the PS related to CSW orders.

3.3.2.3 Juvenile imprisonment[21]

The purpose of juvenile imprisonment is to contribute to the rehabilitation and development of the minor offender with an emphasis on the minor's education, specialized education, vocational skills, and proper personal development. In addition, juvenile imprisonment should positively influence the minor through protection, assistance and supervision to prevent recidivism (29).

The punishment of juvenile imprisonment can be imposed

a) on a minor offender who has reached the age of sixteen years and;
b) has committed a criminal offence punishable by imprisonment of more than five years ;
c) when the imposition of an educational measure would not be appropriate because of the seriousness of the criminal offence, the resulting consequences and the degree of responsibility (30).

The time frame of juvenile imprisonment ranges from six months to five years. In aggravated cases the upper limit can be extended to up to ten years (31, 2). The upper limit of punishments stated in the Criminal Code is also binding for minors[22], while the lower limit may be transgressed (31, 1). Conditional release can be granted after one third of the sentence has expired (32, 1). When granting conditional release, the court may impose a measure of intensive supervision by the PA, in another family or by the GA to last until the end of the original sentence (32, 2). Conditional release can be revoked if during the period of conditional release the minor commits a criminal offence for which a term of imprisonment or juvenile imprisonment of at least six months is prescribed (32, 3). Statutory limitation on the execution of juvenile imprisonment up to three years is only one year (33, 3). For concurrent criminal offences, the court shall impose only one educational measure or only a punishment of juvenile imprisonment when the legal conditions are fulfilled for the imposition of such punishment and the court finds that it should be imposed. This also applies when the minor has committed another criminal offence before or after the imposition of the educational measure or juvenile imprisonment (34).

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21 In 2006 unconditional juvenile imprisonment was imposed in only four percent of all sentences (about 32 cases, KJC statistics). A suspended sentence was passed in three percent of the cases. This means that only 0.7% of all registered juvenile criminals were put behind prison bars. If one adds the two percent who were committed to an educational-correctional institution, then slightly over one percent of the criminal minors were sentenced to custodial sanctions.

22 The JJCK repeats this principle of non-discrimination of minors with regard to adults on several occasions.

3.3.2.4 Mandatory treatment

The provisions for adults apply.

3.3.2.5 Accessory punishments

The provisions for adults apply.

4. Juvenile criminal procedure

4.1 Juvenile Courts

The first-instance-competence is determined by the adult law. This means that offences punishable with fines or imprisonment not exceeding five years are dealt with by the municipal courts, the others by the district courts (Art. 21 ff PCPCK) A juvenile panel in the court of first instance and the juvenile panel in the court of second instance, except for panels in the Supreme Court of Kosovo, shall be composed of one juvenile judge and two lay judges. The juvenile judge shall be the presiding judge of the panel (49, 1). A juvenile panel in the Supreme Court of Kosovo shall be composed of three judges, including at least one juvenile judge. When a juvenile panel adjudicates at a main trial, it shall be composed of two juvenile judges and three lay judges (49, 2). The lay judges in a juvenile panel shall be selected from among professors, teachers, educators, social workers, psychologists and other persons who have experience in the upbringing of minors (49, 3).

Lay judges participating in a juvenile panel shall be of different genders (49, 4). The court of second instance shall have jurisdiction:

1) To decide on an appeal against a decision of the juvenile panel rendered at first instance;
2) To decide on an appeal against a decision of the public prosecutor;
3) To decide on an appeal against a decision of the juvenile judge; and
4) In other cases, as provided for by law (51).

The territorial jurisdiction is determined by the permanent residence of the minor. If there is none, then the present residence is valid. For practical reasons the scene of the crime can also determine the responsible jurisdiction (52).

4.2 Juvenile criminal procedure

The JJCK stresses the need for an expeditious proceeding against minors in general and even more so against minors detained on remand (37). A minor shall not be adjudicated in absentia (39, 1). When undertaking an action at which a minor is present, and especially at his or her examination, the authorities partici-

pating in the proceedings are obliged to act carefully, taking into account the psychological development, sensitivity and the personal characteristics of the minor, so that the conduct of the proceedings does not have an adverse effect on his or her development (39, 2).

Mandatory defence is stipulated in the following cases (40, 1):

1) for the first examination of the minor;[23]
2) from the ruling on the commencement of the preparatory proceedings, if the preparatory proceedings are conducted for a criminal offence punishable by imprisonment of more than three years; and
3) from the ruling on the commencement of the preparatory proceedings for other criminal offences for which a less severe punishment is provided, if the juvenile judge considers that the minor needs a defence counsel.

In a case of mandatory defence, if the minor or PA does not appoint a defence counsel the juvenile judge or the competent authority conducting the proceedings shall appoint ex officio a defence counsel at public expense (40, 2). If there is no mandatory defence, a defence counsel shall be appointed at public expense at the request of the minor or PA if he or she is unable to pay for the cost of his or her defence.

The minor must be informed of the right to defence counsel at public expense under the previous paragraph before the first examination (40, 5). Only a defence counsel registered at the Bar Association can represent a minor (40, 6).[24]

The PA has the right to accompany the minor in all proceedings and may be required to participate if it is in her/his best interest. The juvenile judge can exclude the PA from participation in proceedings if such exclusion is in the best interest of the minor (41, 1).

When the PA does not exercise the parental duties, the court may nominate a temporary guardian for the minor which he takes from a list prepared by the GA.

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23 Empirical scrutiny of the compliance of this very ambitious provision, which implements Art. 15 of the Beijing Rules but finds no match in the old Yugoslavian law, is necessary.

24 All participants of a juvenile trial interpret these provisions that in trial there should always be a defence counsel present, even though the law only prescribes mandatory defence in cases which fall within the jurisdiction of the district courts (offences punishable with more than 5 years imprisonment). Allegedly it happens quite often, that the minor and his parents are not accompanied by a lawyer. Then the juvenile judge appoints one of the available advocates waiting in the corridors of the court. Such a court appointed counsel is remunerated with a fixed fee of presently €38 for the trial. Since this is not well paid, the advocates are said to lack commitment and are mainly interested in keeping the trial short. It needs to be examined whether the judicial system nurtures the wrong perception that a defence counsel is mandatory in all juvenile trials, and thereby upholds a custom for the support of the 450 Kosovo advocates.

Art. 43 stipulates that everybody is obliged to give testimony about the psychological development, living conditions and personality of the minor.

As a rule there should be no joint indictment against a minor and an adult. In exceptional cases an order for joint trial is possible, but appealable within three days (44, 1).[25]

Art. 45 provides the GA with strong rights of participation in the proceedings. The prosecutor has to inform the GA about the initiation of proceedings against the minor (45). Summonses are to be addressed to the minor and his PA. Summons by publication is not allowed against minors (46).

The whole proceeding is confidential. Documents of the proceedings can only be published with the consent of the court, but must always maintain the anonymity of the minor (47)

Art. 50 contains the legal basis for the application of diversion measures by the prosecutor (50, 1) and the juvenile judge (50, 2). Before the decision the minor, the PA and the defence counsel must be heard.[26]

4.2.1 Preparatory Proceedings

Art. 54 contains the main legal basis for diversion by dismissal of juvenile proceedings. For criminal offences punishable by imprisonment of less than three years or a fine, the public prosecutor can decide not to initiate preparatory proceedings, even though there is a reasonable suspicion that the minor committed the criminal offence, if the prosecutor considers that it would not be appropriate to conduct the proceedings against the minor in view of the nature of the criminal offence, the circumstances under which it was committed, the absence of serious damage or consequences for the victim, as well as the minor's past history and personal characteristics.[27] The prosecutor can also dismiss the case in view of an already pending enforcement stemming from a previous conviction (54, 2). The prosecutor has to inform the GA about such dismissals.

The prosecutor can call on the PS, the minor and the PA to prepare such a dismissal. Preparatory proceedings shall be initiated by a ruling of the public prosecutor. The ruling shall specify the minor against whom the preparatory

25 In interviews with prosecutors it appeared that this basic international principle is not rated highly in Kosovo, since the objective to finish a case in one trial prevails. This again shows the need for a specialised juvenile prosecutor who puts the well-being of the minor before the economy of labour.

26 This surely is another reason for the prosecutors to refrain from using diversion measures.

27 The obligation of the prosecutor to dismiss the case only after having considered among others the minor's past history and personal characteristics again poses another unnecessary obstacle for using this method of disposing of the case, since this calls for the previous preparation and delivery of a social inquiry report by the PS.

proceedings will be conducted, the time of initiation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, evidence and information already collected and a report on any measure or punishment previously imposed on the minor. A stamped copy of the ruling on the preparatory proceedings shall be sent to the juvenile judge without delay (55, 1).

If the mental health of the minor is doubtful, the juvenile judge shall order the minor to be examined by a psychological expert.

During the preparatory proceedings the defence counsel and the PA have the right to file motions and ask questions. Also, the GA can participate with the consent of the juvenile judge. The interrogation of the minor shall, when necessary, be conducted in the presence of a child guidance counsellor.

If the prosecutor has not finished the proceeding within six months, he needs the consent of the juvenile judge to continue it (59).

Two weeks before the prosecutor intends to file the indictment, he has to inform the defence counsel. He then has the right to file motions for new evidence to be considered (60).

After the termination of the preparatory proceeding the prosecutor files a motion to the juvenile panel for the imposition of a measure or a punishment.

4.2.2 Main Trial

The JJ shall schedule the main trial within eight days of the receipt of the motion (67, 2). The JJ can dismiss the case or impose diversion measures at any time of the proceedings (14).[28] Only the accused, the defence counsel and the prosecutor are bound to attend the main trial. The PA, GA and PS should also be summoned. Their non-appearance is no obstacle for the main trial to be held (68, 2).[29]

The public is excluded from the main trial against minors (69, 1), no matter how old the offender is at the time of the trial. The PA can only be excluded in exceptional cases to protect the well-being of the minor (69, 3).

The concentration principle is realized by the obligation of the JJ not to adjourn or recess. Exceptions must be reasoned and reported to the president of the court (70).

If the court imposes an educational measure, a ruling is passed which states only the measure to be imposed and which does not pronounce the minor as being guilty. The explanation of the ruling shall contain a description of the criminal

28 It seems that this provision is not or hardly used by the JJ.

29 It seems that the non-appearance of either of these participants is often used to postpone the trial.

offence and the circumstances which justify the imposition of the educational measure (71, 3). Punishments, however, are imposed by a judgement (71, 4). Art. 72 stipulates that the decision must be drawn up within three days after the promulgation. The minor must pay the costs of the proceeding only if he or she is sentenced to a punishment, provided he/she has the means to do so (73).

The court can also order the minor to pay damages to the injured party if his or her financial situation allows for it, regardless of whether a measure or a punishment is imposed.

4.2.3 Legal Remedies

Art. 75 confers onto all participants the right to appeal all terminating decisions of the court.[30] The appeal must be filed within eight days from the receipt of the decision. What is remarkable is that the right to file an appeal also applies to the minor's relatives, even if this is against his or her will (75, 2). The minor cannot waive his right to appeal. An appeal against a ruling imposing a measure normally stays the execution. The court can decide otherwise for the well-being of the minor. If the appellate court wants to impose an institutional sanction, if the decision of first instance did not impose one, it is mandatory to conduct a hearing (76). The right to protection of legality and re-opening lies against all decisions (77, 78).

4.2.4 Probation Service

The legal basis of the PS is Art. 7, 2. The Probation Service was created as a novelty in the Balkans in 2002 by UNMIK. In the course of 2003 it covered all five districts of Kosovo. Its task is threefold: to take care of all persons who have received a suspended sentence, who have been conditionally released from a closed institution, and all minors against whom criminal proceedings have been initiated. To fulfil this task the Probation Service presently has 67 employees. So far the PS personnel have no specialised education. They are largely learning on the job, though they do all have an academic education, as psychologists, teachers, jurists or sociologists.

The headmistress of the Probation Service considers it as her legal obligation that a representative of the Probation Service is present at any trial against minors. It could not be verified whether the Probation Service is also already present when the detention of a minor is at stake and whether there is an emergency service for such cases. The Probation Service also serves as a clearing point for previous crimes committed by a minor. It collects these data from the GA as well. The infrastructure of the Probation Service requires

30 This corrects the wide power of the court in Art. 109, where the decisions are not dependent on the consent of the other participants of the trial.

amelioration, since they have only a few cars at their disposal. This is an obstacle for the fulfilment of their foremost task of visiting the minors at their residence to gather the necessary information for the social inquiry report. It is desirable that the tasks related to the work for the JJ should be separated from the other tasks and to form a special juvenile Probation Service.

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

Since the beginning of 2007 the prosecutorial service has been separated from the judicial service. It has started to collect its own data and prepare its own statistics about juvenile proceedings. The data available so far show that the Municipal Court Prosecutors, who are predestined to use this institution, have hardly applied diversion measures.[31] The reasons for this are manifold, among them the inflexible mentality of the older prosecutors, the impracticability of the legal provisions and the lack of infrastructure. It is absolutely necessary to create and specialise the juvenile prosecutor by law who can concentrate on juvenile proceedings and the building and deployment of the juvenile infrastructure.

According to Art. 67, 3 the courts may also use diversion measures, but also here the new institution has not caught on. No knowledge, not to mention a will, is perceivable that juvenile judges might correct the lacking commitment of the prosecutors.

Victim-offender mediation ranks in third place in the list of diversion measures, but none has been implemented so far. There are no specialists who can conduct such proceedings.

31 Refer to footnote no. 2. The statistics of the Municipal Court Prosecutors of Pristina district for the time from 1. June 2006 to 30 June 2007 show that not a single diversion measure has been issued.

6. The sentencing practice – Part II: The juvenile court dispositions and their application since 1980

The percentage distribution of the different sanctions for the year 2006 is presented in *Table 1*.

Table 1: Sanctions imposed in the year 2006

Educational measures:		**73%**
	Disciplinary measures (admonition)	19%
	Intensive supervision (90% by parents)	52%
	Educational-correctional institution	2%
Punishments		**15%**
	Community service work	8%
	Suspended sentence	3%
	Juvenile imprisonment	4%
Others und unknown		**12%**

Stationary sanctions (Educational-correctional institution and Juvenile Imprisonment) amount to only 6% of all sanctions.

7. Regional Differences in the Practice of Sentencing

The available data are scarce. The only statement that can be made at this time is that with regard to the application of diversion measures one can say that only the Prizren region, which has a fairly mixed population (Albanian, Turkish, Serbian and others), is using this satisfactorily. This is most probably due to some contingent personal set up of the prosecutorial service or the PS in Prizren.

8. Young adults (18-21 years old) and the juvenile (or adult) criminal justice system – legal aspects and sentencing practices

The provisions of the JJCK can only be applied to young adults when especially stipulated by the law (3, 2). The door for young adults to the amenities of the JJCK is Art. 10, 1, which stipulates that the court may impose a measure or punishment in accordance with Article 6 if it determines that the objective that would be achieved by imposing a term of imprisonment would also be achieved

by imposing the measure or punishment (considering the circumstances in which the criminal offence was committed, the expert opinion in relation to the psychological development of the young adult and his or her best interest).

The enforcement of such a measure or punishment shall not last longer than until the young adult reaches the age of 23 (10, 2)

It seems that the hurdles which the court has to overcome in order to treat a young adult as a minor are far too high to be of any practical use. There seem to be no such cases. Besides this, it seems to be a mistake of the legislator to leave the application of this provision practically in the hands of the prosecutors and judges who could stall the proceeding until the accused has turned 21.

The JJCK also offers a few interesting regulations regarding cases in which juvenile proceedings are initiated against a person who has become an adult in the meantime. Art. 8, 1 stipulates that a proceeding against an adult who is older than 21 shall not be admissible if he or she committed the offence when younger than 16 years of age.

If the perpetrator is still a young adult in this case, criminal proceedings are only admissible if the charge is for a serious crime (imprisonment over 5 years). But also in this case only educational measures can be imposed (which could last up to three years, however).[32]

An adult who has committed an offence when aged older than 16 falls under the jurisdiction of the JJCK. If he or she is already over 21, the sanction of juvenile imprisonment may be converted into adult imprisonment (9, 1 & 2).

The principle of confidentiality is also observed against an adult who was a minor at the time the offence was perpetrated. In executing a sentence a prisoner who reaches the age of 18 should be separated from the younger prisoners.

9. Transfer of juveniles to the adult court

There are no such regulations in the JJCK.

10. Preliminary residential care and pre-trial detention

10.1 Provisional Detention in an Educational Institution

In Kosovo there is no such provision or institution.

32 Art. 8 rests on the idea that lapse of time in juvenile delinquency can act as a factor, which can make sanctions superfluous. However, one could challenge this regulation as fairly inflexible and lacking considerations of public safety.

10.2 Pre-trial detention/detention by the police or on remand[33]

This is regulated in arts. 62-66. Detention of a minor must be ultima ratio and for as short a time as possible (62). Police detention shall not last longer than 24 hours. The juvenile judge can order a prolongation by ordering pre-trial detention (63). The juvenile judge must use all alternatives to pre-trial detention including those of the normal procedure (Art. 281 CPC). The ruling on remanding a minor to custody shall provide a reasoned explanation for the insufficiency of alternatives to pre-trial detention.

Pre-trial detention shall not last longer than one month (64). The juvenile panel can extend this period by a further two months, while the need for prolongation must be checked after one month.

Minor detainees must be separated from adults. They can be detained in an educational-correctional institution. While in detention on remand, the minor shall receive social, educational, vocational, psychological, medical and physical assistance, as required in view of his or her age, gender and personality (65). At the commencement of detention the minor must undergo a general medical check-up (42).

11. Residential care and youth prisons – Legal aspects and the extent of young persons deprived of their liberty

11.1 Residential care

There is no educational institution in Kosovo as of yet.

11.2 Youth prisons

11.2.1 The Legal Situation

The provisions regarding the execution of punishments against adults[34] as well as the provisions regarding the execution of a committal to an educational-correctional institution are applicable. The minor is entitled to receive adequate

33 All minor detainees are placed in Lipjan. The founding of the PS seems to have had a beneficial effect on the number of detention orders, since these numbers have remained stable at 70 to 80 per year since 2005 in spite of rising numbers of offences. On 25 April 2007 only four juvenile detainees were held in Lipjan. The provisions of the JJCK have been adopted in the respective police order of 10 November 2005, dealing with the detention of minors.

34 Law on the Execution of Penal Sanctions.

vocational education or training. The labour of prisoners should be of educational value and be remunerated adequately (131, 1). The professional staff of the service treating the minor shall have an adequate knowledge in the fields of pedagogy and psychology (131, 2).

The correctional facility shall be of semi-confined nature (132, 1). Males must be separated from females (132, 2). Young offenders shall not stay longer in the facility than until their 23rd birthday. When they turn 18 they must be separated from the minors (132, 3). For the sake of finishing school or vocational training they may stay until their 27th birthday. Once a year the prison director must send a report outlining the behaviour of the minor and the enforcement of the punishment (132, 5).

As a rule, minors shall serve their sentences together (133, 1). On request of the minor the director can grant the separation of the minor from other prisoners if the director considers it reasonable (133, 2). Without request the director can only order separation if this would avert peril for the life or health of the minor or others or would be beneficial to the security of the facility (133, 3).

The director can grant leave twice a year for a maximum total of 30 days. This shall not interfere with school needs (134). Legal remedies against measures of the director lie in the hands of the juvenile judge of the region (136).

11.2.2 Execution of Juvenile Imprisonment – The Reality

On 25 April 2007 according to the information of the director of the correctional facility there were 23 male and one female juvenile prisoners in Lipjan. In the adult prison of Dubrava eight young adults were detained at that time. In the Lipjan facility there were also nine minors in the educational-correctional department, four juveniles in detention, and 28 adult female prisoners and 30 adult males serving short term sentences. The male juvenile prisoners were living in six-bed-cells with three lofts as a rule. The male juvenile prisoners, who had lost their privileges due to contraventions against the order of the facility, were living in a separate block in two-bed-cells. The director claimed that the composition of the cells would be carefully controlled in order to avoid discrimination or abuse of weaker prisoners by the others. The director tries to treat the privileged prisoners like those who are only serving an educational-correctional term (though remarks about the reality of execution in an educational-correctional institution should be noted, see footnote below).[35]

35 See footnotes 16-19.

12. Residential care and youth prisons – Development of treatment/vocational training and other educational programmes in practice

According to Art. 112, 2 a team of experts shall develop an individual training programme for each prisoner within 60 days. The director of Lipjan claimed that this provision is strictly adhered to. The expert team consists of the deputy director, the senior supervisor, the block supervisor, a medical doctor, a social worker, a psychologist and the labour coordinator. According to Art. 131, 1 the facility shall offer vocational training. For the male prisoners the following courses are available: electrician, mason, farmer, plumber. For the women they offer: tailor, house keeping and farming. The courses last three months and can be repeated. Each vocational training course is supervised by a professional trainer.

13. Current reform debates and challenges to the juvenile justice system

At present Kosovo lacks all prerequisites for the development of a forum which could form the basis for a reform debate. There is no professional public because there are no professional associations and journals. The rapporteur has conducted six round table discussions with all relevant stake holders in juvenile justice and has recommended the founding of a juvenile justice association in Kosovo. Time will tell whether or not this will materialize.

Similar to many countries in Europe, juvenile justice does not rank highly in the priority lists of politicians in Kosovo. The European Agency for Reconstruction (EAR), which controls the funds that the EU spends for the development of the countries in the Balkans, has granted the amount of 1.2 million Euros to the UNICEF office in Kosovo under the title "Support to the Kosovo Juvenile Justice System". The project began in March 2007, and is devoted to the task of developing alternative measures, to create a criminological register and to come up with programmes for the prevention of child criminality.

The US Agency for International Development (USAID), which maintains a strong outpost in Kosovo, has also recently granted 19 million Dollars to help the development of the Kosovar legal system. It seems possible that the US NGO "National Centre for State Courts" (NCSC), which will conduct the programme, will spend at least part of this sum in the field of juvenile justice.

The legal system in Kosovo is developing very slowly. In spite of the presence of UNMIK since 1999, it still is deficient in many ways when compared with the Western European countries. In many respects it is a huge construction site that needs support at all corners. The problems of juvenile justice seem to be a luxury problem under this aspect. To gain attention of the

public and of the politicians it is therefore important to confine oneself to the following few, but strong demands for reform:

1) Specialisation:

This is the main prerequisite for the development of any effective juvenile justice system. Only the exclusive or cardinal engagement in the field of juvenile justice engenders within the functionaries the right educative mentality and approach to the cases of offences committed by minors. The structural set-up of the juvenile justice system automatically and gradually moulds attitudes and behaviour of all participants in the field. It is not necessary to train the functionaries extensively. All they need is to stay on the post and learn by doing. Expertise can develop with experience.

In order to attract high standard functionaries it will be necessary to raise the levels of social and professional prestige. This is done through the remuneration of this work, which must not be less than is paid in the other fields of law. Furthermore, campaigns to emphasise the importance of the juvenile justice sector for wider society should be carried out.

The functionary who is in most need of specialisation is the prosecutor. The JJCK needs to be reformed in this respect. The legislators have obviously not recognised that the prosecutor is the key player in the entire system. In a system that follows the principle of legality all registered offences pass through the hands of the prosecutor. In Western European countries only a fraction of these are indicted[36], while the vast majority are terminated, either without further action or after applying diversion measures. These decisions are made by the prosecutor who thereby slips into the function of a judge. A prosecutor who deals mainly with adult cases and who is only rarely confronted with juvenile offenders cannot do justice to the latter because his punitive attitude, to which he is used to, does not help him/her or even hinders him/her in finding the adequate measures to treat juvenile offenders.

The second functionary of the system who needs specialisation is the police force. These specialists will not only concentrate on the collection of evidence against the suspect, but will also observe the social and pedagogic aspects of the case and will report some basic facts about the environment of the minor. It will be necessary to develop a special training programme for the Police School in Vushtri and to pass the necessary rules of implementation.

Finally, the probation service also requires specialisation because at present it is overburdened with services for sentenced adults. Here, the same reasoning applies with regard to moulding the adequate mentality of the social workers who deal with the minors. Besides that the JJCK stipulates a strong role of the PS with many obligations to report, control and to assist.

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36 According to the statistics of 2006 the municipal prosecutors of Pristina processed 359 cases, of which only 73 were terminated (20%).

2) Building Institutions

The JJCK has established a tiered system of sanctions against juveniles. The problem is that a few of the foreseen tiers are missing in practice. This results in a certain inflexibility of the system which forces the juvenile judges to mete out sentences that are either more, or less severe, than they would have liked them to have been.

The institutions that are most obviously missing are the disciplinary centres in the five districts. This is a missing link, between liberty reducing alternative measures and institutional measures.

Furthermore, it is necessary to provide at least one educational institution where young minors (14 -16) can be placed under the supervision of educational specialists. Such an institution is also needed to provide an alternative for juveniles who are detained on remand.

It is also necessary to invest in the development of a system of alternative measures, which can be used for diversion purposes. Victim-offender mediation, social training courses, anti-aggression courses, and a fund from which injured persons receive compensation for damages are missing in this respect.

Finally, a chair for criminology and for juvenile justice needs to be installed at the University of Pristina to provide the system with the needed empirical research and evaluation.

14. Summary and outlook

In contrast to most other countries in Europe the problem with juvenile justice in Kosovo does not seem to be that the Kosovars punish their youth too severely. The empirical figures collected for the year 2006 clearly show that the Kosovars are not applying diversion measures as yet. But if one looks closer one finds that in the end the Kosovar juvenile judges only send four percent of their clientele behind bars, which is even less than e.g. the long time average of Germany, which has remained stable for years at five to six percent. The real difference between the Kosovo juvenile justice system and those of the Western European countries is that its output of formal decisions is much higher. Kosovar prosecutors file motions for main trial in 80% of their cases, while e. g. German juvenile prosecutors dismiss 70% of their cases. But if we look at the sentences, we find that the Kosovo judiciary only ‘roars’ but ‘does not bite’. In 2006, 71% of the sentences passed by the juvenile judges actually did not impose any sanction. 19% ended with a mere verbal admonition and 52% were ordered intensive supervision by the parents – which actually implies a second chance for the offender and his family. So we can state that the lack of disciplinary centres and a system of alternative measures has benefited the Kosovar youth because the judiciary, in lack of alternatives, has decided to refrain from actual sanctioning.

One must, however, keep in mind that the Kosovar society still rests on the joint family and clan system where the disciplinary possibilities within the family of the juvenile perpetrator may still function. In order to know whether the extensive use of the measure of intensive supervision by the parents is really a reflection of the working system of informal sanctioning or whether this is just a result of the helplessness of the juvenile judges, it is necessary to conduct sociological and criminological research.

Secondly, it needs to be mentioned that the legislators have tried to implement the international agreements on juvenile justice. This has sometimes led to very ambitious provisions, which puts time pressure on the functionaries of the system on the one hand while overburdening them with obligations of controlling and reporting on the other hand, which in turn would lead to passive strikes in any legal system, not to mention Kosovo. Such idealistic, but unrealistic provisions really undermine a system of law because those provisions remain 'dead law'. Furthermore, they corrupt the mentality of the functionaries who neglect or ignore those provisions with a bad conscience.

Much empirical research and evaluation are still needed before one could really pass a judgement on the quality of juvenile justice in Kosovo. It could very well be that the mentality of the functionaries of the Kosovo legal system has not really changed much from the old Yugoslavian times and that much more financial and personal assistance are needed to attain a degree of the rule of law that is prevalent in the other European countries.

Latvia

Andrejs Judins

Latvia is one of the Baltic countries. The first independence of the State was proclaimed on 18 November 1918. From 1940 onwards Latvia was occupied by the Soviet Union and incorporated into the USSR. In 1990 Latvia declared the restoration of its *de iure* independence, and the de facto independence of the State was regained the following year. Since 1st May 2004 Latvia has been a Member State of the European Union.

Latvia covers a geographical area of 64,589 km^2 and shares land borders with Estonia, the Russian Federation, Belarus and Lithuania. In January 2011, Latvia had a population of 2,23 million, of which 17 per cent was aged under 18.

1. Historical development and overview of the current juvenile justice legislation

Juvenile justice provisions are not defined as a separate field of the Latvian legal system. However, Latvian criminal law and criminal procedure law as well as other laws provide for specific characteristics related to young offenders. Therefore, juvenile justice in Latvia is a set of norms from different areas of law that define characteristics of liability and special measures that can be applied to juvenile offenders, establish the procedure of applying punishment to minors, and how this punishment is to be enforced.

In Latvia, a justice approach combined with welfare elements is applied for dealing with juvenile offenders. Breaches of the law by minors draw reactions both from the justice system (police, Public Prosecution Service) as well as from institutions dealing with the protection of children's rights and welfare. In cases where penal measures and sanctions of criminal justice are deemed necessary, the institutions of the child protection, welfare and education system are not

pushed aside, but rather continue delivering assistance to the minor and protectting its rights.

Latvian law acknowledges that a minor offender is first and foremost a young developing person. The fact that he/she is an offender is secondary. Also, the fact that a child or young person has committed a criminal offence does not in any way diminish the duty of the state to protect him/her and to care for his/her interests. Concurrently, being a minor does not exempt a person from being liable for having committed an offence.

According to the Latvian legal approach, a minor is a person who has not yet reached the age of 18. In the field of criminal law, a juvenile is a person aged 14 to 17. A minor who has not reached 14 years of age is not criminally liable. However, according to the *Law on the Application of Compulsory Correctional Measures to Children*, compulsory measures can be imposed on children who are 11 to 18 years old.

The special criminal law provisions for minors apply to persons who have not reached 18 years of age when an offence is committed. Having turned 18 by the time the punishment is adjudged does not waive this provision. Special procedural characteristics have to be adhered to if a person is not 18 at the time when procedural activities are initiated.

The organization of Latvia's prison system and of the enforcement of criminal punishments are defined in the Code on the Enforcement of Sentences, the Ordinance from the Cabinet of Ministers and other special administrative instructions. The Code on the Enforcement of Sentences was adopted in 1970 and was originally titled the Corrective Labour Code. This piece of legislation came into force on 1st April 1971 and provides special provisions for imprisoned 14 to 18-year-olds. A person who is serving a custodial sentence may in fact retain the status of a juvenile up to the age of 21.

During the time a child is under arrest or in detention for a criminal offence, the guarantees of the rights of the child during the safeguarded period are determined by laws regulating criminal procedures or serving of sentence. Every child has the right to apply with a submission to institutions for the protection of the rights of the child. Such communications cannot be censored.

With the purpose of guaranteeing childrens' rights, the *Law on the Protection of the Rights of the Child* was adopted in Latvia in 1998. The goal of the Law is the protection of the interests of all children, including those who have committed a criminal offence.

The protection of the rights of children is a complex issue in which numerous agencies are involved. State institutions, agencies and local self-government have special obligations in the sphere of the protection of children's rights:

The Cabinet (Government): Formulates relevant draft laws and issues the necessary regulations on the protection of childrens' rights; approves long-term State policy projects in the field of protecting the rights of children; establishes a commission for the protection of the rights of the child; approves State

programmes for the preparation of social educators and social workers; approves a programme for the prevention of child crime and the protection of the child from crime that is drafted by the Ministry of the Interior (see below).

Ministry of Welfare: Formulates State policy projects in the field of child and family social security, including the fields of social insurance and social care.

Ministry of Health: Formulates State policy projects in the field of child health care.

Ministry of Education and Science: Formulates State policy projects in the field of child education and sports; organises the implementation of approved projects; ensures the accessibility and quality of education.

Ministry of the Interior: Ensures that a draft programme is developed for a three-year period for the prevention of child crime and for the protection of the child from crime, and co-ordinates the implementation of this programme; ensures special training for police officers for working with young offenders and their families.

Ministry of Justice: Organises the training of judges and ensures that court work is organised so that primary consideration is given to the protection of the rights and the best interests of the child.

Ministry of Culture: Formulates the State programme in the field of culture and cultural education and is responsible for its implementation.

Juvenile affairs inspectors: Juvenile affairs inspectors are police officers who work in the State Police's Public Order Branch. Inspectors with responsibility for children take the welfare aspect of their role seriously and are an important local resource and asset in assisting children before and after they have been caught up in the judicial system.

Orphan's Courts: An Orphan's Court is a guardianship and trusteeship institution established by a county, city or parish Local Government.[1] An Orphan's Court shall ensure by priority the protection of the rights and legal interests of a child, inform a Local Government Social Services Office or other responsible institutions of families in which the development and upbringing of a child is not being sufficiently ensured and where assistance is necessary and act on behalf of a child in criminal procedures in the cases specified in the Code of Criminal Procedure.

Prison Administrations: The prison administration ensures pre-trial detention as a security measure and imprisonment as a criminal punishment.

State Probation Service: The State Probation Service is an administrative institution under the supervision of the Ministry of Justice, which is responsible for the supervision of probationers and the correction of their social behaviour. The service's duties also cover other functions as specified in the law, for instance: providing an evaluation report on a probationer; drafting a social behaviour correction programme and ensuring the accomplishment of preventive

1 The Law on Orphan's Courts was adopted by the Saeima on 22 June 2006.

measures; co-ordinating the implementation of sentences to performing community service; supervising the implementation of decisions connected with the public work of minors; supervising persons who are serving a term of probation following the termination of a criminal matter, thus releasing them conditionally from criminal liability; co-operating with prisons, preparing prisoners for their release from serving a sentence to deprivation of liberty; supervising persons upon whom a conditional sentence has been imposed and who have been conditionally released from prison; providing post-custodial support to persons released from prison.

Public Prosecutor's Office: The Public Prosecutor's Office is an institution of judicial power that independently supervises the observance of law within the scope of the competence determined by law. The task of the Prosecutor's Office lies in reacting to violations of the law and ensuring that decisions relating to such violations are in accordance with the legally prescribed procedures. The Prosecutor's Office organises, manages and conducts pre-trial investigations; initiates and conducts criminal prosecution; maintains charges of the State; supervises the execution of sentences; protects the rights and lawful interests of persons and the State in accordance with the procedures prescribed by law. The Office of the Prosecutor General also organises training for prosecutors with respect to issues regarding the rights of the child and ensures that these rights are observed during pre-trial investigations.

The State Inspectorate for the Protection of Children's Rights: The Inspectorate is an institution of direct administration supervised by the Minister for Children and Family Affairs. It provides supervision and control of the observance of regulatory enactments in the field of protecting children's rights.

Ombudsman's Office: The Ombudsman's Office informs the public regarding the rights of children; examines complaints regarding violations of children's rights, paying particular attention to violations committed by State or Local Government institutions and the employees thereof; submits proposals which promote the observance of the rights of the child.

Local Governments: Local Governments are responsible to analyze if the rights of children are observed and upheld, and are responsible for formulating and putting local children's rights protection programmes into practice in their administrative catchment areas; they develop and implement programmes for working with street-children, carry out other measures for ensuring and protecting the rights of the child.

2. Trends in reported delinquency of children, juveniles and young adults

During the last years the number of criminal offences registered for juveniles has been declining. This can, however, not only be explained by more effective

prevention, but also by a deteriorating demographic situation in the country and a marked decrease in the number of children.[2]

In 2003 every sixth registered criminal offence was committed by a juvenile; in 2006 juveniles committed every eighth criminal offence (12,1 %). In 2010 6,2 per cent of all criminal offenders were juveniles.

Property crimes are the most common offences within the structure of juvenile offending, accounting for 69% of all sanctioned offences committed by minors in 2010. Apart from thefts, which are the most frequent criminal offences, minors are also often punished for robbery and fraud. In the 1990s crimes against property constituted between 70 and 80% of all crimes committed by minors. Hooliganism and violations of road traffic regulations are also frequently committed by minors. In contrast, the number of minors punished for sexual crimes (1%) and drug related offences (1%) is relatively low.

Violent crimes are frequent among minors. However, they are not the predominant category of juvenile offending. Recently about 15% of minors were punished for bodily injuries, robbery, sexual violence, murder, extortion and violent hooliganism. The share of minors who were punished for violent offending was much lower in the 1980s (about 8%).

The number of criminal offences committed by juveniles who are neither employed nor in formal education was about 20-25% in 2010. In 2005 this applied to the perpetrator of every third criminal offence. However, three years earlier the figure had been much higher at around 50%.

18% of criminal offences committed by juveniles in 2010 were committed while the offender was inebriated. The number of persons tried for the illegal production, possession and trading of drugs witnessed a sharp increase from 1996 to 2005. According to data from the State Drugs Agency, 1,024 minors (aged 10 to 17) were registered with the Drugs Service in 2005 as having problems stemming from the abuse of alcohol, drugs and other psycho-active substances (371.9 per 100,000 10 to 17-year-olds). According to the information of the State Police, in 2010 every sixth criminal offence committed by juveniles involved alcoholic intoxication.

Criminal offences are often committed in groups: 69% of the minors who were sentenced in 2010 had offended in a group. There has, however, been a decrease in group-offending since the early and mid 1990s, where the figure had been at around 80%.

In 2006, the majority of sentences against juveniles involved 16 and 17-year-olds. 72% of all relevant convictions were issued against this age group, and this share has not changed significantly since 1996, where 73% of all sentences against juveniles had concerned 16 and 17-year-olds.

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2 For example, at the beginning of 2009 the number of children at the age of 10 to 14 amounted to 99,147, i. e. 43 % less than the number of children of the same age in 1990 (174,590).

Briefly turning to the gender structure in juvenile crime, almost predictably, the vast majority of young offenders are boys. In 2006, only 5.6% of all sentenced minors were girls. Interestingly, the female share has in fact decreased by one percent since 1996, which is contrary to recent developments in other European countries, where (in some cases) significant increases in female delinquency have been observed.

Table 1: Juvenile offenders convicted in Latvia, 1994-2010

Year	Convicted persons, total	Convicted minors	%
1993	15,262	1,211	10.8
1994	13,350	1,143	10.5
1995	9,797	1,063	10.9
1997	12,772	1,676	13.1
1999	12,862	1,795	14.0
2000	12,689	1,797	14.2
2002	12,615	1,794	14.2
2003	13,586	1,838	13.5
2004	13,222	1,786	13.5
2005	11,245	1,388	12.3
2006	10,019	1,352	13.5
2007	10,090	1,193	11.8
2008	10,737	1,119	10,4
2009	10,855	930	8,6
2010	9,617	751	7,8

Source: Ministry of Justice, Court Information System (CIS).

Table 2: Persons suspected of criminal offences

Year	Suspects, total	Suspected minors	%
1990	12,879	2,410	18.7
1991	12,719	2,340	18.4
1992	15,231	2,298	15.1
1993	15,262	2,094	13.7
1994	13,350	1,679	12.6
1995	17,261	2,626	15.2
1996	17,180	2,713	15.8
1997	17,494	2,800	16.0
1998	17,476	3,030	17.3
1999	17,014	2,712	15.9
2000	17,807	3,134	17.6
2001	19,838	3,231	16.2
2002	18,377	2,869	15.6
2003	21,383	3,395	15.9
2004	23,320	3,693	15.8
2005	17,025	2,758	16.2
2006	17,533	2,123	12.1
2007	18,937	2,191	11.6
2008	19,216	1,812	9.4
2009	18,649	1,383	7.4
2010	15,848	988	6.2

Source: Ministry of the Interior.

Table 3: Convicted persons by type of crime and age, 1990-2005

		Total	Intentional homicide	Aggravated assault	Rape	Property theft	Hooliganism	Illicit preparation, storage a. selling of narcotics
1990	Total	7,159	115	192	102	2,512	536	37
	Minors*	15.3	7.8	---	39.2	---	16.0	0.0
1992	Total	9,097	131	199	142	4,989	420	38
	Minors	12.6	6.9	---	28.9	---	7.9	0.0
1994	Total	11,295	154	334	63	6,459	485	106
	Minors	10.5	5.1	2.6	19.7	14.5	13.3	0.0
1995	Total	9,797	191	333	70	4,488	470	104
	Minors	10.8	4.7	2.7	14.3	17.3	15.5	2.9
1996	Total	10,428	106	226	64	4,980	515	140
	Minors	11.9	0.9	4.9	20.3	18.7	18.4	0.7
1998	Total	12,952	111	274	101	6,012	717	169
	Minors	13.0	7.2	4.4	15.8	21.4	19.9	3.0
2000	Total	12,689	104	270	56	4,568	709	166
	Minors	14.2	6.7	5.6	12.5	24.1	20.3	3.6
2002	Total	12,615	138	313	61	4,068	643	555
	Minors	14.2	6.5	8.0	11.5	24.0	20.8	7.7

		Total	Intentional homicide	Aggravated assault	Rape	Property theft	Hooliganism	Illicit preparation, storage a. selling of narcotics
2003	Total	13,586	137	308	66	4,400	801	738
	Minors	13.5	10.2	5.5	25.8	23.3	22.8	6.1
2004	Total	13,222	155	303	58	3,990	807	718
	Minors	13.5	5.8	5.6	15.5	23.6	21.9	7.1
2005	Total	11,218	100	229	44	3,277	686	598
	Minors	12.5	10.0	3.5	4.5	19.3	22.7	5.4
2006	Total	9,960	101	205	52	3,151	562	500
	Minors	13.5	5.9	8.3	7.7	22.6	20.6	3.0
2007	Total	10,126	122	208	50	2,844	472	555
	Minors	11.9	9.0	5.3	8.0	21.4	21.8	2.5
2008	Total	10,737	98	188	44	3,107	538	733
	Minors	10.4	8.2	4.3	18.2	18.1	19.3	4.4
2009	Total	10,855	79	180	39	3,991	438	1,007
	Minors	8.6	3.8	1.7	15.4	13.0	14.8	2.3
2010	Total	9,607	77	155	19	3,802	258	898
	Minors	7.8	5.2	1.3	5.3	11.6	13.2	2.2

* Percent of total.
Source: Central Statistical Bureau.

Table 4: Criminal offences commited by juveniles (14 to 17-years-old)

Year	1995		1999		2003		2004	
Total, including:	Total	%	Total	%	Total	%	Total	%
	2,591	100	3,757	100	4,255	100	4,189	100
Intentional homicide, Murder	14	0.5	10	0.3	11	0.3	10	0.2
Heavily bodily injury	19	0.7	16	0.4	20	0.5	18	0.4
Rape	25	1.0	11	0.3	10	0.2	7	0.2
Robbery	69	2.7	232	6.2	256	6.0	212	5.0
Theft of property	1,922	74.2	2,713	72.2	2,490	58.6	2,413	57.6
Hooliganism	137	5.3	202	5.4	257	6.0	296	7.0

Source: Ministry of Children and Family Affairs.

3. The sanctions system – Kinds of informal and formal interventions

There are no options for either punishing or applying compulsory corrective measures to children under the age of 11. However, this does not rule out the possibility of claiming compensation for incurred damages through civil proceedings. Compulsory corrective measures can only be applied to children aged 11 and older.

There are two options for reacting to offending by young persons aged 14 to under 18 years. The first option is to declare the young person criminally liable and to impose a criminal law sanction accordingly. There is, however, also a system of so-called compulsory corrective measures (CCM), that are issued when this liability is lacking. The law also provides for the combination of a conditional sentence with compulsory corrective measures.

The *Law on the Application of Compulsory Correctional Measures to Children* provides the following interventions:

- The issuance of a warning;
- The imposition of a duty to apologise to the victims if the latter agree(s) to such a confrontation;
- Placing a young person under the surveillance and supervision of parents, guardians, as well as other persons, authorities or organisations,

for 6 to 12 months, however without exceeding the youngster's 18th birthday. This measure may be applied if an approved person, authority or organisation agrees to raise and supervise the youngster. Furthermore, the young person in question has to agree to the measure, has to promise to respect the opinion of the person or organisation to which he/she is placed, and to follow the prescribed routine.

- Young persons aged 15 and older can be ordered to perform work in order to alleviate the consequences of the harm caused by their offending behaviour. This measure can be applied if the work in question does not threaten the youngster's security, health, morals and development, and if the work in question is allowed to be performed by persons of this age in general.
- Persons aged 15 and older who have an income can be obliged to reimburse the harm that their offending has caused.
- The imposition of conduct orders.
- The imposition of a duty to perform community service for a total of 10 to 40 hours.[3]
- Placing a young person in an educational establishment for social correction for 12 to 36 months, but for no longer than until he/she has turned 18.

In addition to these compulsory corrective measures (CCMs), a duty to undergo treatment for alcohol addiction, narcotic, psychotropic or toxic substances or other addictions may be imposed on a minor. The consent of the minor or his/her parents is necessary to enforce treatment of the described dependencies.

Although the CCMs should be treated as a progressive method, and their use in practice should be increasing accordingly, recent data suggest a different state of affairs. In 1999, 572 cases were transferred to courts for the application of CCMs. One year later, the number had dropped to only 311 cases. Since then, the number has risen again to 627, just over the 1999 level.[4] According to the most recent data of the Court Information System in 2010 Latvian courts applied CCMs in only 240 cases. In the opinion of State Police specialists, this trend can possibly be attributed to the fact that the relevant procedure for preparing cases is excessively complicated. The issues here include the requirement that the young person in question undergo an outpatient examination before his/her case can be forwarded, thus notably complicating the situation. This especially applies to rural regions of Latvia, where such examinations are often only available at the regional centre. Such circumstances often result in a young

3 The State Probation Service became responsible for implementing unpaid work as a compulsory corrective measures for minors in 2005; before that this function had been in the hands of the Local Governments.

4 Source: Ministry of Children and Family Affairs.

person receiving a criminal law sentence instead, because the CCM cannot be applied. To alleviate this situation, it is important to assess whether or not the procedure for applying CCMs needs to be simplified.

Juvenile offenders receive the same kinds of criminal law sentences as adults. However, regulating Acts envisage limitations in relation to the type of sentence and the implementation thereof. Therefore, in accordance with the legislation of Latvia, a young person cannot be sentenced to life imprisonment. The death sentence was abolished in Latvia in 1996, and the relevant legislation provides that the death penalty can only be imposed on adults for certain crimes committed in times of war.

Minors can be sentenced to the following forms of basic punishment:

1) deprivation of liberty;
2) community service;
3) fine;
4) the additional punishments provided for in the Criminal Code.

Deprivation of liberty is the most repressive punishment in the Latvian system of criminal sanctions. The Latvian jurisprudence respects the principle that deprivation of liberty for juveniles must be used as a last resort. However, in the past youth prison sentences in some cases were also imposed on first time offenders and for less serious crimes. After an amendment to the Criminal Law which became effective on 1 July 2009 this is now explicitly prohibited.

Criminal juveniles are eligible for prison terms lasting between 3 months and 10 years. For misdemeanours and for less serious crimes youth imprisonment shall not be applied to juveniles. For serious crimes which are associated with violence or threat of violence the maximum period of deprivation of liberty may not exceed five years. For other serious crimes the maximum possible period of imprisonment is 2 years and for expecially serious crimes ten years (for adults, the maximum period is life imprisonment).

Juveniles who have committed a criminal offence before reaching the age of 18 can be released on parole (conditionally released). According to the law, any person can be released on parole as long as he/she has committed no disciplinary violations, has not reoffended, and has already served a specified minimum proportion of the total sentence. For adults, this minimum share of the sentence depends on the offence for which the sentence is being served. Perpetrators of criminal violations and less serious offences are eligible for conditional early release after having served half of their sentence. For serious crimes, two thirds of the prison term have to be served before release on parole becomes an option. Where the committed offence is deemed especially serious, early release only becomes an issue after 3/4 of the total sentence. For minors, on the other hand, eligibility for early release does not depend on the seriousness of the offences, but rather is fixed at half of the total envisaged term.

The possibility of an early release of minors is used very frequently, in fact almost in every case in which the law allows it. Unfortunately, the statistical

data on conditionally released juveniles and their levels of recidivism are not collected in Latvia.

For the remaining share of the total sentence, the court can impose certain special obligations on the parolee, such as not to change his/her place of residence without the prior consent of the State Probation Service, to register periodically with the State Probation Service and to participate in probation programmes or to be present at his/her place of residence at specified times. A few years ago, special obligations were only very infrequently attached to conditional early releases. The situation has changed somewhat in the last three years, and nowadays special obligations are frequently imposed.

A fine is applicable only to those minors who have their own income. The amount of the fine may range from one to fifty minimum monthly wages applicable in the Republic of Latvia.[5] The fine as a criminal punishment is very seldom applied for minors.

Community service (literally – compulsory work) as a criminal punishment is available since 1999. As of yet, the law provides for no special regulations on the performance of unpaid work by juveniles. According to the law, community service involves a person's compulsory participation in an indispensable public service as a form of punishment. It involves performing work in the geographical area in which the offender resides, during the free time, outside regular employment or study hours, and without remuneration. The number of hours of work are specified in each individual case within the boundaries of 40 and 280 hours. Community service is a sentence with widespread application in sentencing juveniles. The number of juveniles sentenced to community service has been increasing from year to year (from 6% in 2002 to 14% in 2006, see *Table 5* below).

Police supervision, limitation of rights, confiscation and deportation from the Republic of Latvia are additional punishments that can also be imposed in cases of criminal juveniles.

Police supervision aims at supervising the behaviour of a person released from a place of deprivation of liberty, and so that this person may be subjected to the limitations prescribed by the police institution. Police supervision shall be imposed only when adjudging a sentence of deprivation of liberty in cases set out in the Special Part of the Criminal Law, for a term of not less than one year and not exceeding three years. For many criminal offences, police supervision has been defined as an obligatory punishment. For that reason, a lot of convicted juveniles are sentenced to police supervision. Overall, this type of punishment

5 Since 1st January 2011 the minimum monthly wage prescribed in the Republic of Latvia is 200 Lats (~285 €), therefore the amount of a fine issued against a minor shall not exceed 10,000 Lats (~14,250 €). A fine for an adult person shall not exceed two hundred times the minimum monthly wage prescribed in the Republic of Latvia at the time of the judgement.

has to be evaluated favourably, since it allows the behaviour of persons to be controlled after release from prison.

According to the law, the limitation of rights is the deprivation of rights as to specific or all forms of entrepreneurial activity, to specific employment, to the holding of specific positions or the acquisition of permits or rights provided for in a special law. This punishment can only be applied to juveniles in cases where a person has committed a criminal offence pertaining to road traffic. In these cases, courts or the prosecutor can prohibit the offender from receiving a driver's licence.

Confiscation of property is the compulsory transfer of the property owned by a convicted person or parts of such to State ownership without compensation. In some cases confiscation is obligatory – the court even formally applies it even though the convicted minor has no property which could be confiscated.

A citizen of another State, or a person who has a permanent residence permit of another State, may be deported from the Republic of Latvia if a court finds that, considering the circumstances of the matter and the personality of the offender, it is not permissible for him/her to remain in the Republic of Latvia. In practice the deportation from Latvia has not yet been applied to a juvenile.

Latvian Criminal Law also provides for juveniles to be conditionally sentenced. If a court, in determining a sentence in the form of youth imprisonment and taking into account the nature of the committed offence and the harm caused, the personality of the offender and other circumstances of the matter, is convinced that the offender, in not serving the sentence, will not commit further crimes, it may sentence him/her to a conditional sentence. In such cases the punishment is not executed if within the term of probation the convicted person does not commit a new criminal offence, does not violate public order, and fulfils the obligations imposed by the court. In imposing a conditional sentence the court prescribes a term of probation of not less than 6 months and not exceeding three years.

The supervision of conditionally sentenced persons is carried out by the State Probation Service. Social rehabilitation of juvenile offenders is of particular importance to ensure that the conditionally sentenced juveniles are not convicted repeatedly for committing yet more serious offences.

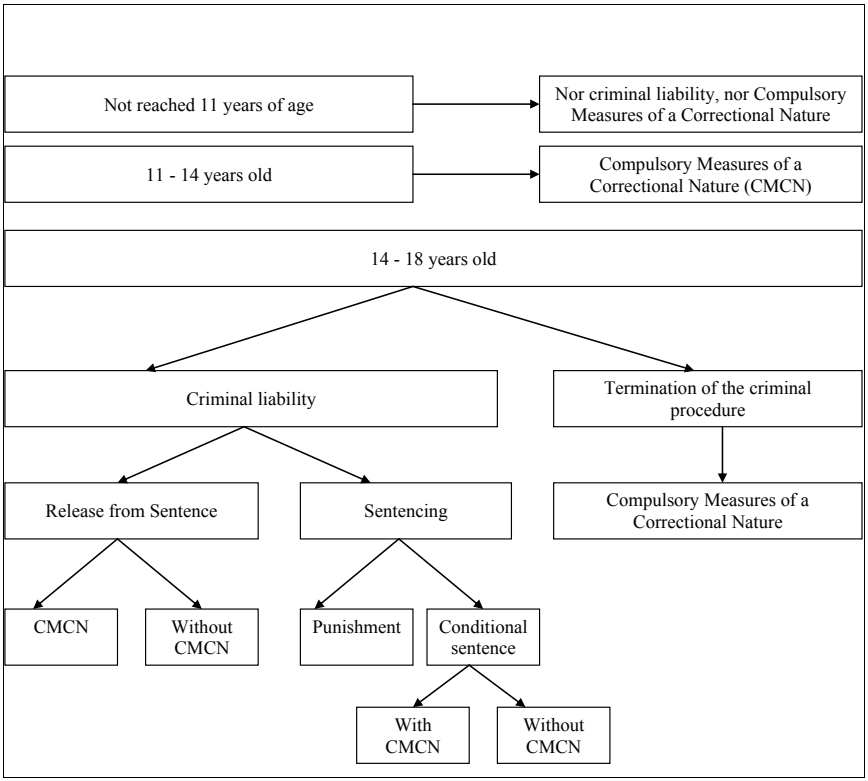
If the person upon whom the conditional sentence has been imposed does not fulfil his or her obligations, the court can order that the conditionally suspended sentence be served after all, or extend the term of probation by one year.

Since 2002 Conditional Release from Criminal Liability has also been provided by law. According to the law, a person who has committed a not serious crime may be conditionally released from criminal liability by the prosecutor if, taking into account the nature of the offence, the harm caused, information characterising the suspect and other circumstances of the matter, he/she is convinced that the accused person will not commit further criminal

offences. In conditionally releasing a juvenile from criminal liability, the prosecutor shall determine a probationary period of between three and 18 months. Additionally, the prosecutor – with the consent of the suspect – can impose special obligations. If a person who has been conditionally released from criminal liability re-offends during the period of probation or fails to perform the imposed duties, his/her criminal prosecution shall be continued.

A person who has committed a criminal offence before reaching the age of 18 may be released from sentence (e. g. serving a prison sentence), by imposing "compulsory measures of a corrective nature". Release from sentence can be revoked if a minor has not fulfilled the obligations imposed by the court for the period of release.

Figure 1: The criminal sanctions for juveniles in Latvia



4. Juvenile criminal procedure

In Latvia, there is no special law governing juvenile criminal procedure. The Latvian Code of Criminal Procedure applies both to adults and to minors, but some special legal provisions for juveniles are defined in it. The Code states compulsory exemptions in relation to minors and provides additional guarantees to minors during the proceedings, such as mandatory participation of a defence counsel from the beginning of the investigations, the presence of legal representatives of the juvenile during the proceedings, the presence of teachers and psychologists during the interrogation of minors, the application of special means of security measures, such as placing under supervision of parents, the placement in a social correctional educational institution, and special regulations for pre-trial detention of minors.

According to Latvian Criminal Procedural Law the length of an interrogation of a minor shall not exceed 6 hours. At the discretion of the investigating authorities, minors shall be examined in the presence of a pedagogue or a specialist who has been trained to perform the tasks of a psychologist for children in criminal proceedings. The minor's legal guardians, a close relative or a trustee has the right to participate in an interrogation, if this person is not the person against whom the criminal proceedings have been initiated, a detained person, a suspect, or an accused, and if the minor does not object to his/her participation. This person may ask the minor being interrogated questions with the permission of the conductor of the investigative operation.

The Orphan's Court acts on behalf of a child in the cases specified in the Code of Criminal Procedure. However, Latvian legal provisions on criminal procedure contain no special provisions for the Orphan's Court to play an active role in the criminal process.

The cases shall be tried in an open court session. However, a court may require with a reasoned decision that a court session be held in camera in a criminal case regarding a criminal offence committed by a person who has not reached 16 years of age. A court adjudication shall be announced publicly, but if a criminal case has been tried in a closed court session, only the introductory and operative parts of the court adjudication shall be announced publicly.

A court of first instance is generally represented by a single judge. Collegial adjudication (judge and two lay judges) in a court of first instance is necessary for cases of (particularly) serious crimes, or if a public prosecutor, an accused minor, or his/her defence counsel requests collegial adjudication. A judge of a court of first instance may also order a case to be adjudicated collegially if the criminal matter at hand is particularly complicated. Therefore, the court composition does not depend on the age of the suspected offender, but on the seriousness of the criminal offence. In Appellate or Cassation Courts, criminal matters are always adjudicated by a panel of three judges. There are, however, no judges, prosecutors or police officers who are directly specialised in working with juvenile offenders.

Although judicial power in Latvia is vested in the courts, the prosecutor also has rather wide powers for applying criminal sanctions against juvenile offenders. The prosecutor not only organises, manages and conducts pre-trial investigations, and initiates and conducts criminal prosecution, but also has certain rights to apply criminal sanctions and measures.

An accused person, for example, may be conditionally released from criminal liability by the prosecutor. Conditional release from criminal liability is basically the same as the conditional sentence, with the central difference being that the person is not officially sentenced, but "merely" freed of liability. Also, the maximum probation term is only 18 rather than 36 months.

A prosecutor may also complete pre-trial criminal proceedings by applying a penalty order. Such a penalty order can entail a fine or community service.

In determining that a settlement is possible and that the involvement of an intermediary is useful, a prosecutor or police officer may inform the State Probation Service regarding such a possibility and its usefulness. In the case of victim-offender mediation, an intermediary trained by the State Probation Service may facilitate the conciliation of a victim and the offender. The mediator's participation in this settlement process is not obligatory – regardless of the way the settlement was made it has equivalent effects. According to criminal law, a minor who has committed a criminal violation or less serious crime may be released from criminal liability if a settlement is achieved with the victim or with his/her legal guardian.

If the prosecutor determines that the offence has been committed by a minor under the age of 14, proceedings shall not be initiated and all case materials shall be forwarded for departmental examination. Subsequently a decision shall be made regarding the possibility of applying a compulsory correctional measure.

Where the court recognises that an accused juvenile has committed a criminal offence, it can refrain from imposing a criminal penalty and instead apply a compulsory correctional measure as provided by law, taking into consideration the special circumstances in which the offence was committed and all further information that has been gathered on the offender that mitigates his/her liability.

In choosing and applying compulsory correctional measures a court shall take into account the nature and severity of the criminal offence, the personal characterising data of the accused person and the circumstances that aggravate and mitigate his/her liability.

Criminal proceedings against minor suspects are to be held speedily and within a reasonable period of time, a priority that is not mirrored in procedural provisions governing adult offenders. The participation of a defence counsel is mandatory in criminal proceedings if an accused person has not reached 18 years of age. The minor can refuse the defence counsel that he has been provided with, and request a replacement from the authority to which the ensuring of legal assistance has been entrusted. However, minors can even refuse a defence counsel entirely.

In order to fully guarantee the rights and interests of a minor who has the right to legal assistance, the minor's representative may participate in the criminal proceedings.

The following persons may be a representative:

- one of the legal guardians – mother, father, guardian, trustee;
- one of the grandparents or a brother or sister of legal age, if the minor has lived together with one of such persons and the relevant relative is responsible for taking care of the minor;
- a representative of an authority protecting the rights of children;

- a representative of a non-governmental organisation that performs the function of protecting the rights of children.

A representative shall be permitted to participate in criminal proceedings, or he or she shall be replaced, with a decision by the person directing the proceedings. The representative shall be permitted to participate in criminal proceedings from the moment when a minor has acquired the right to assistance of counsel and a decision has been made regarding the participation of his/her representative. The representative's participation to the proceedings ends when the person to be represented reaches majority.

The Code of Criminal Procedure contains special provisions on the interrogation of minor suspects. According to the law the length of an interrogation shall not exceed 6 hours, including an interruption, within a 24 hour time period without the consent of the minor. A minor who has not reached 14 years of age (or, on the basis of the discretion of the performer of an investigative operation, any minor), shall be interrogated in the presence of a pedagogue or a specialist who has been trained to perform the tasks of a psychologist for children in criminal proceedings. (As to the participation of parents etc. see above).

A minor who has not reached 14 years of age cannot be punished for refusing to testify and for the conscious provision of false testimony.

There are legal provisions in place that protect minors from repeated direct questioning and examination in certain circumstances where such practice could be psychologically harmful for the minor.[6] In such cases, direct interrogations shall only be performed with the permission of the investigating judge, but in court, and based on an official court decision.

A person who has committed a criminal violation[7] before reaching the age of 18 shall be treated as a non-convicted person once the sanction resulting from that sentence has been successfully served. Basically, this implies that a person aged 18 and older who commits a further offence will be treated as a first time offender.

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

The sentencing practice in Latvia is not familiar with informal options for responding to juvenile crime. Whether or not a person has come of age is not of

6 Where a psychologist indicates that such practice could be harmful to: 1. a minor who has not yet reached the age of 14, 2. minor victims of violence committed by a person upon whom he/she is materially or otherwise dependent, 3. minor victims of sexual abuse.

7 A criminal violation is an offence for which criminal law provides deprivation of liberty for a term not exceeding two years, or a lesser punishment.

relevance in cases where a person has committed a criminal offence – the criminal process is initiated and investigation is carried out in all cases.

Certainly, if the accused person is a minor, the prosecutor may claim exemption from punishment or apply compulsory corrective measures. The police, the Prosecutor's Office and the court often seek opportunities to mitigate criminal sanctions, for example, by applying compulsory corrective measures instead of custody, by ordering conditional sentences or exempting from liability.

Since 1999 the Criminal Law has envisaged the option of exempting a person from liability if he/she has made a settlement with the victim. The law does not envisage that a mediator has to take part in the settlement process. However, both the State Probation Service and several NGOs have started active implementation of victim-offender mediation in the criminal procedure. The law also bestows the State Probation Service with a duty to facilitate the mediation procedure and to train mediators. Victim-offender mediation in Latvia cannot be viewed as a completely informal procedure. The Code of Criminal Procedure does not define the victim-offender mediation procedure in detail. However, it envisages its application and its legal consequences. If victim-offender mediation has been successful and the persons have reached a settlement, the initiator of the procedure has the right to close the case and exempt the person from criminal liability, if a person has committed a deliberate criminal offence for which he can receive up to five years in custody or has committed a crime negligently. In certain cases the person directing the criminal proceedings is in fact obliged to close the criminal process and to exempt the person from liability if settlement with the victim has been reached.

The prosecutor has rather broad powers to apply criminal sanctions against juvenile offenders.

If a prosecutor has determined that criminal proceedings can be ended by issuing a penalty, he/she shall draw up a corresponding order, which shall include the decision regarding the termination of criminal proceedings and specify the penalty and the time period for its execution.

Such penalties by the public prosecutor can involve a fine or community service, the extent of which may not exceed half of the maximum fine or duration of community service provided for in the Criminal Law. The prosecutor may also apply an additional penalty (restriction of rights), which is limited to half of the maximum duration prescribed for additional penalties in the Criminal Law, too.

The public prosecutor can also terminate criminal proceedings and conditionally release a person from criminal liability if:

1) a person is prosecuted regarding the perpetration of a criminal violation or a less serious crime;
2) a person has not previously been sentenced for an intentional criminal offence;

3) the person in question has not been previously conditionally released from criminal liability within the last five years;
4) a higher-ranking public prosecutor agrees to such a termination of proceedings and notes the termination in the criminal proceedings register.

The termination of criminal proceedings shall be allowed only with the voluntary and clearly expressed consent of the accused. When conditionally releasing a person from criminal liability, a public prosecutor shall determine a time period of supervision of three to 18 months. Furthermore, certain duties specified in the Criminal Code can be attached to the period of supervision.

The prosecutor may also terminate criminal proceedings if 1) an act has been committed that has the features of a criminal offence, but which has not caused an injury or harm that would warrant the application of a criminal penalty, 2) the person who has committed a criminal violation or a less-serious offence has come to a settlement with the victim or his/her representative, or 3) a criminal offence has been committed by a minor and special circumstances surrounding the commission of the offence have been determined, and information has been acquired regarding the minor that mitigate his/her liability.

6. The sentencing practice – Part II: Juvenile court dispositions and their application since 1980

The courts have the power either to sentence a minor for a criminal offence or to exempt him/her from punishment.

The fact that an offender has not reached 18 years of age is recognised by many judges as a mitigating circumstance. This practice is subject to criticism, since the age of a person is a factor that has to be considered but does not present the basis for automatic mitigation of liability.

The court can apply a criminal sanction to a juvenile offender, can impose a conditional sentence, can convict the offender without subsequently imposing a punishment, or can exempt him/her from punishment but apply compulsory corrective measures.

Both judges and prosecutors tend to apply less severe sanctions in cases of juvenile offenders. As can be taken from *Table 5*, roughly 50-70% of juvenile offenders received conditional court sentences from 2002 to 2010, while actual sentences to custody were only ordered against 19-26% of sentenced juveniles. Fines are applied very rarely (in less than 1% of the cases), and the number of persons who are required to perform community service as their main sentence has been growing from year to year.

Table 5: Criminal sentences against juveniles, 2002 to 2006 (in percent)

Year	Imprisonment	Community service	Fine	Conditional sentence
2002	26.0	6.0	0.7	67.0
2003	24.0	5.0	0.6	71.0
2004	20.0	7.0	0.7	72.0
2005	19.0	12.0	0.5	68.0
2006	26.0	14.0	0.4	59.0

Source: Court Administration data, Court Information System (CIS).

Deprivation of liberty is usually applied to those juveniles who have committed particularly serious crimes – murder, rape, grievous bodily harm resulting in death, or qualified robbery. By comparison, the court only rarely hands out real custodial sentences to juveniles who are sentenced for the first time.

An absolute majority of juvenile prisoners are serving custodial sentences for property crimes rather than offences associated with violence. Very often the reason for the deprivation of liberty is not the harm caused by the crime or the person's dangerousness, but rather that it is prescribed by law. Where a conditional sentence has been imposed upon a juvenile and he/she has committed a new criminal offence during the term of probation, even if it is not a serious crime and has not caused harm to the community, the court is obliged to sentence the juvenile to imprisonment.

Although between every fourth and fifth sentenced minor receives an actual prison sentence, the specified term to be served is usually comparatively short and the option of early release is widely applied in cases of juveniles. Therefore, the composition of juveniles serving prison sentences changes rather quickly. For example, on 1st January 2006, there were 142 convicted minors in Latvia. Within a year the Cesis EIM and Ilguciems prison took in 203 sentenced persons, and 218 minors were released from prisons. On 1st January 2011, there were only 48 convicted minors in Latvia.

Table 6: Terms of deprivation of liberty in Cesis EIM

	2001		2002		2003		2004	
Number of convicts	144		147		152		155	
Terms of custodial sentences	N	%	N	%	N	%	N	%
From 3 to 6 months	---	---	4	2.7	1	0.7	---	---
From 6 months to 1 year	7	4.9	10	6.8	15	9.9	9	5.8
From 1 to 3 years	93	64.6	88	59.9	90	59.2	80	51.6
From 3 to 5 years	35	24.3	33	22.5	27	17.8	36	23.2
From 5 to 10 years	8	5.6	11	7.5	18	11.8	29	18.7
More than 10 years	1	0.7	1	0.7	1	0.7	1	0.6

Source: Cesis EIM.

Table 7: Level of penitentiary recidivism among prisoners who serve a custodial sentence in Cesis EIM

Number of prisoners	2001		2002		2003		2004	
	144		147		152		155	
	N	%	N	%	N	%	N	%
First time	136	94.4	140	95.2	137	90.1	41	26.4
Second time	8	5.6	7	4.8	13	8.6	66	42.5
Third time	---	---	---	---	2	1.3	36	23.2
Fourth and more	---	---	---	---	---	---	12	0.6

Source: Cesis EIM.

7. Regional patterns and differences in sentencing young offenders

Latvia is a comparatively small unitary state with a small population. Therefore, there are no regional differences in the sentencing of minors, the applied measures and their practical implementation.

8. Young adults (18-20 years old) and the juvenile (or adult) criminal justice system – Legal aspects and sentencing practices

The Latvian Criminal Code and Code of Criminal Procedure have no special provisions concerning young adult offenders. Therefore, the general regulations and provisions regulate the activities in relation to the respective category of offenders. Young adults are not separated from other adults during the term of the sentence. However, the special criminal law provisions for minors also apply to young adults if a person has not reached eighteen years of age at the time of committing the criminal offence.

Accordingly, certain restrictions are in place for some criminal sentences. For example, the maximum prison sentence for young adults may not exceed 15 years, and the amount of fines is limited to 50 minimum monthly salaries. Also, where a young adult has committed a criminal offence before having turned 18, he/she may be conditionally released from punishment if he/she has served not less than half of the imposed punishment.

As soon as juvenile convicts reach the age of 18, they become eligible for a transfer to a prison for adults, if their behaviour excludes the possibilities of keeping them in the institution for juveniles or of granting early release. Which prison and which regime transferred juveniles are to be placed in is determined by the institution's administrative commission.

In order to strengthen the results of re-socialization, as well as to provide the possibility of acquiring completed comprehensive education or professional training, in accordance with the decision of a prison's administrative commission, juveniles who have reached the age of 18 may be kept in the institution for juveniles until the end of their service or until the day they reach the age of 21.

9. Transfer of juveniles to an adult court

There are no special Juvenile Courts in Latvia. All criminal, cases regardless of the age of the accused, are heard by Regional, City or District Courts.

10. Preliminary residential care and pre-trial detention

A system of residential care that involves staying at a residential home which provides care and support 24 hours per day does not exist in Latvia.

According to legal provisions on criminal procedure the security measure of placement in a social correctional educational institution (SCEI) may be applied upon the decision of an investigating judge. In practice this security measure is used very seldom.

Since 2003 the Centre for Public Policy PROVIDUS has set up two pilot projects – the first experimental pre-trial supervision services in Latvia, with the aim of providing an alternative security measure for juveniles. The pilot project demonstrated to Latvian policy makers how pre-trial supervision could function within the Latvian Criminal Justice System. The pilots operate on the basis of particular cooperation agreements, outside of the current legal framework. Pre-trial supervision services have been established in several cities in Latvia.

The experience with such projects has shown that pre-trial supervision can prevent future criminal offences and change juvenile behaviour. The State Probation Service has acknowledged the success of the pilot projects and is poised to embark on nation-wide implementation of pre-trial supervision. The Ministry of Justice Action Plan for 2007-2013 plans for pre-trial supervision to be established as an alternative security measure in 2010. Due to the economic crisis as well as a lack of political will this goal has not be achieved so far.

According to Latvian criminal procedure law pre-trial detention may be applied by a decision of an investigating judge. Grounds for pre-trial detention are the concrete risk of absconding or of collusion, or the non-fulfilment or improper fulfilment of procedural obligations. Security measures as such shall be applied if there are grounds for believing that the relevant person will continue criminal activities or avoid investigation and court appearances.

Pre-trial detention is the deprivation of a person's liberty that can be applied based on the decision of an investigating judge through court adjudication in the cases provided for by law, before the entering into effect of a final adjudication in concrete criminal proceedings, if there are grounds for detention. The application of pre-trial detention shall be the basis for a restriction of the rights of a person, and shall allow for the following:

- the holding of the person in a remand prison or in specially equipped police premises;
- the moving of the person from one place of detention to another if the course of proceedings require it;
- a restriction on the meetings and contacts of the detained person, except for meetings with a defence counsel;
- supervision and checks of the correspondence and conversations of the detained person;
- the determination of the internal procedures and regime in the place of detention;
- a restriction of the scope of property located in individual usage.

An investigating judge shall determine the amount of restrictions individually for each detained person, within the boundaries specified by law, assessing the proposals of an investigator or public prosecutor, hearing the views of the detained person, as well as taking into account the nature of the criminal offence and the reason for detention.

Juvenile offenders are not detained together with adult offenders. Even if juveniles and adults are kept in the same facility (pre-trial detention), they are kept separately in order to rule out any contact between these two categories of offenders. In the Central Prison (before the reorganisation this prison was called Matisa prison), persons who have reached the age of 18 are kept separately from juveniles and adult prisoners.

There are five institutions for minor detainees in Latvia – two remand prisons (Daugavpils, Liepaja) and three pre-trial detention sections in Cesis prison, Ilguciems prison and in the Cesis educational institution for minors, where a new prison department for juvenile detainees was opened in 2011.

Pre-trial detention may be applied only if concrete fact-based information, acquired in criminal proceedings, gives rise to justified suspicions that a person has committed a criminal offence for which the law provides a penalty of deprivation of liberty, and the application of alternatives to pre-trial detention will not be sufficient to ensure the legal purposes of remand.

If a minor is held suspect for or accused of having committed a crime through negligence or a misdemeanour, until 2005 pre-trial detention could not be applied. If a minor is held suspect or accused of having committed an intentional less-serious crime, pre-trial detention shall be applied only if the relevant person has violated the provision of another security measure or is suspected or accused of having committed another crime that is serious or particularly serious.

Long delays in remand prisons before cases could come to court had been acknowledged as a problem in the 1990s. The President of Latvia has evaluated the situation as a very grave human rights violation. Since 2002 the Code of Criminal Procedure has defined that the period for which a juvenile may be detained pending investigation is set at no more than 6 months, while the period allowed for judges to examine cases is also limited to 6 months.

According to new Code of Criminal Procedure (in force since 2005), minors who are accused or suspected of having committed a misdemeanour can be detained in pre-trial detention for a maximum of 1.5 months. This upper limit is extended to 4.5 months where the offence in question is a less-serious criminal offence (which are more severe than misdemeanours), and to 6 months in cases of serious crimes. Where the offence in question is particularly serious, the maximum term of pre-trial detention is 12 months. A detained person shall be released immediately if the duration of his/her detention exceeds the maximum prison sentence specified in the law regarding the criminal offence of which the person has been accused.

The “placement of a minor in a social correctional-educational institution” can be ordered by an investigating judge or through a court decision before the entering into effect of a final adjudication in concrete criminal proceedings, if the holding in detention of a juvenile suspect is not necessary, yet there is insufficient evidence that the minor will fulfil his/her procedural duties and will

not commit new criminal offences while free. Placement in a social correctional-educational institution takes place in accordance with the same procedures (including the procedures for appeal and control), conditions and for the same time periods as in the case of pre-trial detention. Time spent in the social correctional-educational institution is treated as time spent in prison, with one day in the institution corresponding to one day spent in prison.

International bodies such as the European Committee for the Prevention of Torture and the UN Human Rights Committee and local human rights NGOs have criticized long terms of pre-trial detention and inhuman living conditions in the pre-trial detention prisons in Latvia.[8] For example, juveniles spend up to 23 hours per day in overcrowded, unrenovated prison cells, with no educational opportunities or social correction programmes. The provisions of *Internal Rules of Procedure in Investigation Prisons* which prescribe a minimum space of three square meters per juvenile detainee have not been implemented in all institutions.

According to law, time spent in pre-trial detention is to be deducted one to one from a resulting sentence to imprisonment. However, it is necessary to take into consideration that a person's position before trial is less advantageous than that of a convicted person, not least if one takes the conditions of pre-trial detention in Latvia into account.

As a result of detention as a security measure, juveniles are considerably restricted in terms of their freedom of movement and their possibility to communicate, to receive information and to lead a healthy, active lifestyle. According to the dominating philosophy of pre-trial detention, primacy is given to a person's isolation, whereas the re-socialization of juvenile detainees is either of secondary importance or is ignored completely. It should be acknowledged that the organizational concept of detention of juveniles does not comply with the objectives of their re-socialization. Despite the fact that prison officers take efforts to help the children, structure their time and involve them in activities, the way their detention is organized does not provide an efficient solution to this problem. Taking into consideration that the persons are kept in detention for months, it must be admitted that this has a degrading and detrimental impact on the detainees.

The problem of structuring the free time of imprisoned juveniles is of current importance, particularly regarding juvenile pre-trial detainees, who

8 Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 12 May 2004 http://www.cpt.coe.int/documents/lva/2008-15-inf-eng.htm; Monitoring Report on Closed Institutions in Latvia by the Latvian Centre for Human Rights www.humanrights.org.lv/upload_file/Final_monitoring_reportEN.-pdf.; *A. Judins*: Nepilngadīgo ieslodzīto statuss. Ieteikumi starptautisko standartu sasniegšanai. (Status of Juvenile Prisoners and Development of Recommendations for the Improvement Thereof to Reach Compliance with the International Standards – Latvian language). Riga, p. 132. www.politika.lv/ index.php?f=271.

spend more than 20 hours per day in their cells and who are virtually not engaged in any activities. Such long-term inactivity and lack of occupation have a destructtive psychological effect and contribute to their (further) isolation from society.

The restriction of juvenile detainees to their cells is regarded as negative. Possibly, restricting them to cells may be applied for a short period of time – during the first days after the initiation of proceedings. However, there is no justification for keeping juveniles in cells over several months. This is unnecessary for both the achievement of the goals of the criminal procedure and for the person's re-socialization. While the conditions of pre-trial detention for girls are good, the opposite is the case for boys, particularly in Cesis EIM.

In Latvia, juvenile pre-trial detainees[9] are subject to greatly different treatment than convicted juvenile prisoners. Although international human rights standards require the separation from sentenced prisoners in order to privilege pre-trial detainees (because of the presumption of innocence), the conditions for detainees in Latvia's prisons are much worse than those for convicted persons. This is due to the fact that the material and technical conditions of Latvia's prisons do not allow for an effective solution to be found that can provide both for the achievement of the goals of the criminal procedure and for the observance of the rights and freedoms of the detained persons at the same time. With this in mind, priority appears to be given to the interests of the criminal procedure, whereas the prisoners' interests are sacrificed.

The living space provided per juvenile detainee is insufficient. Taking into consideration that detainees spend up to 24 hours a day in their cells for several months, the space specification of three square meters per prisoner as guaranteed by state regulations cannot be regarded as sufficient.

Pre-trial detainees have the opportunity to attend school. However, the problem is that in prisons separate classes are organised for each dormitory. The number of classes is comparatively small. Moreover, considering the differences in the levels of education among the detainees, the instructor has to teach material meant for schoolchildren of different grades at the same time. In Cesis EIM the pre-trial detainees attend secondary school together with the convicted prisoners and have a normally functioning system of classes. In this context though, many detainees are often deprived of the opportunity to regularly attend classes due to the impossibility to ensure their proper isolation from joint perpetrators where offences were committed in complicity.

Detainees often have a lot of unstructured free time. Detainees are deprived of the opportunity to engage in physical activities, or such opportunities are very rare.

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9 This refers to Matisa Prison, Liepaja Prison, Daugavpils Prison, Cesis IEM, but does not refer to Ilguciems prison.

11. Residential care and youth prisons – Legal aspects and the extent of young persons deprived of their liberty

11.1 Institutions for social correction

Educational institutions for social correction are under the jurisdiction of the Ministry of Education and Science and act in accordance with the Education Act, the General Education Act and a by-law approved by the Minister for Education and Science. Special child-care establishments are designed for accommodating juveniles who have committed a criminal offence, and who are sentenced by the court to mandatory educative measures – referral to "education and reformatory facilities" (ERF). There is only one special child-care institution in Latvia (ERF Naukseni). In 2009 the ERF Strautini and in 2003 the ERF Pilcene were closed in order to reduce costs and save state funds.

ERF Naukseni was opened in 1998 and accommodates girls aged 11-18 and boys aged 11-14 who have received court verdicts for lesser offences. There were 31 inmates in ERF Strautini on 24th February 2011.

11.2 Youth prisons

On 1st January 2005 the share of juvenile convicts in Latvia made up 2.9% of the total number of convicts, an unwelcome situation, as the index in Latvia is among the highest in the EU.

The situation regarding imprisoned persons on the whole can be regarded as positive: the convicts' housing conditions and regime of serving the sentence are much more favourable compared with the conditions and regime to which pre-trial detainees are subjected.

The Latvian Code of Sentence Enforcement stipulates that males shall be kept separately from females and juveniles shall be kept separately from adults. Persons who are detained before trial shall be kept separately from convicts. The law determines that male juveniles shall serve their custodial sentences in the residential institutions for juveniles, while female juveniles are placed in the specially opened department for juveniles in the female prison. There are two institutions in Latvia where minors serve criminal sentences to deprivation of liberty. Convicted boys serve custodial sentences in the Cesis educational institution for minors, and convicted girls in Ilguciems Prison for women.

Evaluating the situation of prisoners' segregation into categories, one can state that generally it complies with international standards. The rules prescribed in the normative acts concerning prisoners' segregation into categories are generally adhered to. Imprisoned juvenile males as well as females are kept separately from adults.

At the same time it must be noted that juvenile detainees are not fully isolated from contact with adult prisoners – in Ilguciems prison juveniles come into contact with adults when attending school, but in Central Prison (formerly: Matisa prison) and the prisons of Liepaja and Daugavpils juveniles have the opportunity to communicate illicitly with adult prisoners. In the prison of Liepaja juvenile and adult detainees are kept in neighbouring cells, in Central Prison juvenile detainees communicate with adult prisoners during yard time.

In Ilguciems prison the section for juveniles can house up to 20 girls. Unlike other penitentiaries, in Ilguciems prison convicted and detained juveniles are kept together. Although formally it does not comply with recommenddations about keeping convicted and detained persons separately in this situation, such an approach is justifiable. Taking into consideration the small number of females, the prison administration does not find it appropriate to separate the convicted girls from the detained ones; for example, in July 2011 only one resident had the status of a detainee. Evidently, her isolation from other juveniles would have had more negative than positive effects. The juveniles' education section is placed in a separate building and girl-prisoners can utilize premises on both floors of the building. On the second floor there are the girls' bedrooms (two girls to one room), but on the first floor there are public rooms the prisoners can gather in – big furnished rooms with a couch, table, TV-set, VCR, a kitchen, WC, shower and gym.

In previous years in Cesis prison the yearly number of inmates varied between 130 and 170. The dwelling block was subdivided into eight sections, each with its own dormitory. In 2011 the renovation of the prison was completed. The juveniles are now accommodated in cells for 2 to 4 inmates.

Over recent years more attention has been paid to the re-socialisation of minors in prison. Institutions have formed social rehabilitation departments whose staff deal with the re-socialisation and rehabilitation of convicts and with training various basic social skills programmes for juvenile offenders.

Social rehabilitation work is characterized by the staff as the complex of measures which is directed towards preparing socially isolated people for life in a normal environment, towards restoration and development of social skills, towards regaining social status and integration into society. This work includes the implementation of various educational programmes: organizing sports and cultural events, forming creative and arts hobby-groups, religious work, work with the convicts' self-government organization, individual work with youths and work with the parents of juvenile offenders.

According to the law, juvenile convicts are entitled to the following:

- 12 longer visits (from 36-48 hours) per year with closer relatives;
- 12 shorter visits a year (1.5-2 hours);
- to go shopping in the prison store without any restrictions regarding the amount of money spent;
- to make 6 phone calls per month;

- to leave the premises of a reformatory with the permission of the head of institution for a time period of up to 10 days a year, and up to 5 days in the case of death or serious illness of a close relative, if such illness endangers the relative's life.

According to the order of the day, juvenile prisoners are involved in different activities all day long. Prisoners have the possibility to communicate with other persons and get information by writing and receiving letters and by phone calls. There are no limitations regarding the amount of written correspondence a prisoner may send or receive. Juveniles can have books and magazines for reading and access literature in the prison's library. Radios, CD players and other personal devices are also accepted. Convicts have the possibility to watch television as well.

Guaranteed medical services are available in the institution.

The Code of Sentence Enforcement determines that school programmes shall be provided in prisons so that convicted juveniles can acquire general education. Comprehensive studies of the convicted persons shall be promoted and taken into account in determining the level of improvement and development.

Secondary schools are structural units of the juvenile prisons/prison sections. According to the regulations of the establishment, participation at school is mandatory, except in cases where the youths are working during study hours.

Table 8: Education of convicted persons serving their sentence in Cesis EIM (by 1 September 2004)

Form/Grade of school	5.	6.	7.	8.	9.	10.	11.	12.	Individual tuition	Total
Learning in Latvian (*form a*)	0	8	8	15	18	11	6	0	13	79
Learning in Russian (*form b*)	6	2	14	10	19	11	5	0	9	76

Source: Cesis EIM.

Every year a parental conference takes place at Cesis EIM and Ilguciems prison. The parents of convicts have the opportunity to visit units where prisoners live, to talk to teachers and staff of the social rehabilitation department, to get to know about daily life in the juvenile prison, about the youths and their behaviour, about what prisoners eat and what medical care is provided. Only parents or persons officially substituting them may come to the conference.

The fact that Cesis EIM is visited annually by approximately 800 people from outside (delegations, pupils and teachers from other schools, social workers, etc.) is worth noting positively. The same situation applies to Ilguciems prison.

12. Residential care and youth prisons – Development of treatment/vocational training and other educational programmes in practice

In the year 2000, a programme for improving convicted juveniles' physical and mental health was introduced by the organization "Education for Freedom" (*Izglitiba brivibai*), which was founded in 1998 and whose members are mainly the institution's pedagogues and medical personnel. 15 teenagers are covered by the physical health programme annually, the main task of which is to help them to overcome addictions.

Some programmes were implemented in Cesis EIM, dedicated to the convicts of the "group at risk" – the HIV infected, AIDS patients, the Hepatitis-C infected, tuberculosis patients and patients suffering from other infectious diseases. "Initiative of health information at Cesis Juvenile Prison" is one such programmes which was implemented by the non-governmental organisation "DIA+LOGS" in the framework of the project "Nord-Balt Prison".

The programme, dedicated to the groups at risk, was also carried out by the youth branch of "The Red Cross of Latvia's Youth", as well as by the non-governmental youth organization "Pret Straumi".

The Code of Sentence Enforcement states that the acquisition of basic vocational education shall be organised in prisons so that prisoners can work while they are in the prison as well as after their release. Vocational studies are organised for convicts in Ilguciems Prison and Cesis EIM. The vocational training department of Cesis EIM is not a branch of a vocational school but practically an independent vocational school functioning in the institution. The vocational training department provides programmes according to the juveniles' interests. Juveniles can acquire working skills in three professions in this department: fitter's, craftsman's and woodcraft skills.

The summer camp that is organised in the Cesis EIM is a positive development. In accordance with the law which allows juvenile convicts to leave the institution for up to 10 days, in the summer 10 juveniles from Cesis EIM went on a 10-day summer camp. The main task of the camp was to promote the exchange of life experiences with so-called street children who had worked with a Canadian psychologist whose main task was to arouse motivation in individuals to reject drug addiction, alcoholism, crime, to help to cope with tasks of life, to develop communication skills and to give an individual a possibility to regain physical, spiritual, professional, social and economic wholesomeness, i. e., to integrate oneself into society after the experience.

The vocational training department of Cesis EIM is very popular among inmates, and for the time being it is not able to cater for the great demand among prisoners to train to become woodworkers and craftsmen.

Cesis EIM education department provides the possibility to all willing juveniles to participate in exhibitions of technical creative activity, which is organised twice a year by the vocational training department. In these exhibitions, which are very important for the juveniles, boys demonstrate their creative imagination, the application of their skills and abilities in practice. A commission is then formed in order to evaluate the juveniles' creations and presentations, and those juveniles who rank among the first three places in each group receive bonuses in the form of various inducements.

When finishing training at Cesis EIM's vocational training department, juveniles who have attained adequate working skills prepare a final practical assignment ("journeyman's piece"), which is developed by juveniles independently. When the final assignment has been completed, it is evaluated by experts and the juvenile receives a certification, specifying the amount of hours that he/she spent learning and working at Cesis EIM vocational training department, as well as how many hours a juvenile has worked with every machine and piece of equipment in the woodworking workshop.

The fact that a juvenile has received his vocational or school qualification in the school/training centre of a prison is not indicated or visible in the certificate.

Feedback from juveniles who were released from Cesis EIM has shown that several juveniles have found woodworking jobs upon release.

Some convict employment projects have been carried out in the previous years: from 1994 to 1996 oyster mushrooms were cultivated at Cesis EIM; from 1996 to 1998, in cooperation with Swedish businessmen, parts for palisades were produced; from 2000 to 2001 wood preparations for shelves were produced in the carpenter's shop and sent to Sweden; from 2001 to 2002 birdcages were produced in cooperation with the Cesis company "CED" to be sent to Great Britain.

According to conclusions by the representatives of administration, the convicts willingly work outside the territory of the institution because they think that time goes by more quickly that way. Besides the low wage is of importance, too. Juveniles mainly work outside the institution's territory from April to September when they take part in cleaning up the city of Cesis, and help the city's schools and organisations to carry out renovations and restorations. According to the law, convicts are involved without compensation in activities such as improving the surrounding territory, as well as improving the material living conditions of the facility. Convicted youths are periodically involved in improvement and cleaning activities in the institution. In the communal rooms of prison units a schedule is put up on the notice board for cleaning up territories of the institution, as well as a schedule for making beds, cleaning up the shoe-

cases, windowsills, wardrobes and dusting. Convicts carry out these respective and other necessary tasks in turns, yet not exceeding two hours per day.

Girls from Ilguciems prison are also involved in professional training organised by teachers from a vocational secondary school of Riga. They have the opportunity to learn the professions of hairdresser, tailor or cookery.

There are also plans for developing vocational education in the correctional institutions in Strautini and Naukseni.

13. Current reform debates and challenges for the juvenile justice system

It is clear and generally accepted that no single institution on its own – be it the police, the prison system, the probation system or other – can introduce a radical change to effectively tackle juvenile crime. The work of State institutions in this area lacks co-ordination and funding for the implementation of major projects. State institutions also lack the capacity for effectively working with juvenile offenders. Child protection organisations, NGOs and law protection institutions have become involved in a debate about possible reforms of the system.

Recently the debate about applying compulsory corrective measures and particularly about placement in social behaviour correction institutions has become more active. These institutions do not perform their functions appropriately at present and rather even feature as places that are often the sites of crime. New institutions must be established and the existing institutions must undergo reform. However, the Education and Science Ministry that supervises the respective institutions is not yet ready to take such radical steps.

There is still a debate underway on what constitutes a criminal sentence in relation to a minor. Although there is awareness that juvenile offenders need assistance, rehabilitation and resocialisation, there are also State officials who defend the repressive character of sentences, considering that the most important element of the sentence is the isolation of juvenile offenders from society.

There is also a lively debate underway regarding the policy of sentences in relation to juvenile offenders, applying alternative sentences and exemption from criminal liability.

Within the framework of criminal procedure, it is important to limit the application of imprisonment for juveniles and to develop security measures that are alternatives to detention, i. e. pre-trial supervision. For this, both financing should be allocated and regulating Acts should be amended to legalise this security measure. The State Probation Service has acknowledged the success of the pilot projects and is poised to embark on nation-wide implementation of bail supervision. The Ministry of Justice Action Plan for 2007-2013 provides for pre-trial supervision to be established as an alternative security measure in 2010.

Abuse of alcohol and narcotic drugs, psychotropic substances and alcohol dependence are all among factors linked to juvenile crime. The regulating Acts envisage the option to oblige a person to undergo treatment, however, only with his/her consent or the consent of his/her legal representatives. The State Childrens' Rights Protection Inspectorate has urged to allow the treatment of minors who have committed crimes under the influence of inebriating substances without the child's consent.

The social rehabilitation of juvenile offenders is of particular importance for ensuring that conditionally sentenced juveniles are not convicted repeatedly for committing yet more serious offences. The work with conditionally sentenced persons in Latvia should be made more efficient. These offenders should be subjected to strict control and supervision, and the reasons that led them to committing a crime should be addressed and eliminated; namely, a complex solution of the problem should be offered. The juveniles who have served terms of imprisonment should have access to the necessary assistance in order to facilitate their social re-integration and to prevent them from re-offending.

The application of compulsory correctional measures to children should be encouraged and simplified.

More attention should be devoted to the isolation of juvenile convicts from adult convicts. Although juvenile convicts are accommodated separately from adults, in many facilities juveniles have the opportunity to communicate with adult convicts. However, it should be admitted that in individual cases relevant contacts are almost impossible to avoid due to the infrastructure and location of prisons.

14. Summary and outlook

There is an awareness about juvenile crime as a social problem, but there is no common opinion on the best way to tackle it. On the one hand, there are calls for harsher sentencing of juvenile offenders, while others deem it desirable to abstain from criminal sentences, or to apply sentences and measures that are as lenient as possible.

The attitude of State institutions towards juvenile crime is frequently not proactive but reactive. Crime prevention measures that specifically target minors are insufficient. The system functions with an aim to disclose a criminal offence, to try the offender and to apply a sentence. Measures that would help prevent criminal offences from being committed are lacking.

According to the dominant philosophy of detention, the objective of a person's isolation is primary, whereas the re-socialization of juvenile detainees either has a secondary meaning or is ignored completely. In Latvia, when making decisions to place juveniles in places of imprisonment, interests of criminal procedure and those of the execution of punishment are attributed primary consideration and often they are interpreted too formally.

The organisational concept of the pre-trial detention of juveniles does not comply with the objectives of their re-socialization. Despite the fact that prison officers take efforts to help the children, structure the time of the prisoners and involve them in activities, the way in which such detention is organised does not provide an efficient solution to this problem. Taking into consideration that the persons are kept in such detention for months, it must be admitted that this has a degrading impact on the children's psyche and in fact contributes to their isolation from society.

The procedure and conditions in prisons for sentenced juvenile offenders should be amended. During the day, detainees should be provided with the opportunity to move freely around the premises of the relevant complex. Provision should be made for walking space to which juvenile detainees have free access outside school and working hours, and where they can do sports, physical exercises, play basketball, volleyball, football and other games. Prisoners should be provided with an opportunity to cook their own meals (in addition to the meals they receive in the facility), and should also be provided with the opportunity to pursue their hobbies, or to spend their time reading books and magazines, drawing, playing musical instruments or board games, watching television, etc. One such detainment complex could house 15-20 juveniles. Special re-socialization programmes for detainees should be implemented. Detainees should be provided with the opportunity to have a paid job while at the same time being involved in vocational studies.

The philosophy of imprisonment and pre-trial detention has to be radically revised. It is not permissible that a person who has not yet been convicted is held in such degrading conditions. Imprisonment should not substantially limit a person's right to education, information, physical development etc.

The main elements of sentence enforcement in cases of juvenile offenders shall be re-socialization, correction of their behaviour, education and psychological assistance. Child protection institutions and the Probation Services have to undertake a more active role in the work with juvenile offenders. It is important to ensure effective after-release assistance for each minor in order to develop social skills and the ability to lead a law-abiding life.

In seeking an individual approach to every convict, a sentence enforcement institution cooperates with institutions of social services and charity organizations. Special attention is turned towards the family, issues of education and employment, as well as conditions that ensure means of subsistence immediately after the release.

Recognizing the prisoners' education as a matter of priority, it is essential to prepare teachers for working specifically with juvenile inmates.

When organizing work with juvenile convicts, particularly recidivist offenders, a need for certain segregation of different groups of offenders should be assessed. There is also a need for special programmes that may contribute to the re-socialization of such groups.

In many prisons, the only difference between the cell and the walking space is that the latter is in the open air. In reality, the walking space is a small cage, where one can breathe and stroll back and forth. Walking spaces should be re-constructed by expanding their area and equipping them with sports gear for physical activities, such as basic training equipment, a basketball hoop, etc.

Moreover, there often exists a necessity to remove a minor from his/her customary environment due to the negative impact that it can have, often culminating in the commission of further offences. Apart from the deprivation of freedom as a punishment for committing a crime, the court can use different means for reaching this goal, such as sending a person to a special social correctional facility. However, there is currently only one such facility in the country. The age of the minors who are placed in this facility ranges from 11 to 18 years, which is another factor that can be seen being counterproductive in terms of correcting their behaviour. The minimum period for which a person can be sent to Strautini is one year, which many judges consider to be too long.

Thus, there is a need for new special social correctional facilities, to which juvenile offenders can be sent for a period of several months to one year and where it would be possible to implement re-socialization programmes, as well as provide minors with the necessary support, such as psychological assistance, and treatment for substance dependencies.

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The Sentence Execution Code of Latvia, adopted on 23 December 1970.

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Lithuania

Gintautas Sakalauskas

Summary

The registered juvenile delinquency in Lithuania could best be described by the following data:

- during the period from 1990 to 2002 the absolute number of registered offences that juveniles have been charged with has increased from 2.506 to 5.152 (approximately by 100%). The number of charged persons has increased from 2.042 to 3.522 (approximately by 40%). However relative numbers (counted per 100.000 population) have not changed significantly, during the last 5 years only slight variations of registered juvenile delinquency can be noticed;
- juveniles constitute approximately 14-16% among all persons charged with criminal offences;
- during the period from 1990 to 2003 the percentage of offences that juveniles had been charged with amounted to 15-19% of all crimes, during the last 5 years the percentage of these offences has decreased to 12%;
- 30% of all charged juveniles had been 14-15 years of age, 70% of all charged juveniles had been 16-17 years of age;
- approximately 5-7% of all charged juveniles were females;
- approximately 60% of all charged juveniles were school-children; approximately 25% of all charged juveniles had no formal occupation (did not attend school and were not employed);
- approximately 80% of offences committed by juveniles are property offences;
- approximately 2/3 of all charged juveniles had committed offences in groups.

The Penal Code of Lithuania that has come into force on May 1, 2003 provides for two age limits – 14 and 16 years of age. Although Art.13, para.1 of the Code embeds a general rule persons are liable under the Code only after they have reached 16 years of age, actually the Code establishes penal liability of 14 year old juveniles for all the most serious crimes as well as for all the property offences that juveniles are traditionally most often charged with. The latter offences are enumerated in Art.13, para.2 and are the following: murder (Article 129); severe impairment to health (Article 135); rape (Article 149); sexual harassment (Article 150); theft (Article 178); robbery (Article 180); extortion of property (Article 181); destruction of or damage to property (paragraph 2 of Article 187); seizure of a firearm, ammunition, explosives or explosive materials (Article 254); theft, racketeering or other illicit seizure of narcotic or psychotropic substances (Article 263); damage to vehicles or roads and facilities thereof (Article 280).

There is a separate chapter (Chapter XI) of the Penal Code devoted to the peculiarities of penal liability of minors. Article 80 establishes that these peculiarities are being established in order to 1) ensure correspondence of liability to the age and social maturity of these persons; 2) restrict the possibilities of imposition of a custodial sentence and broaden the possibilities of imposition of reformative sanctions against these persons; 3) help a minor to alter his manner of living and conduct by coordinating a penalty for the committed criminal act with the development and education of his personality and elimination of reasons for the unlawful conduct; 4) prevent a minor from committing new criminal acts.

Art.18, para.2 of the Code provides for the possibility to apply the aforementioned peculiarities of the penal liability against a person who was of the age of 18 years at the time of commission of a criminal act, however was below the age of 21 years where a court, having taken into consideration the nature of and reasons for the committed criminal act as well as other circumstances of the case, and, where necessary, clarifications or conclusion of a specialist, decides that such a person is equal to a minor according to his social maturity and application of peculiarities of criminal liability against him would correspond to the purpose provided for in Article 80 of this Code.

The Penal Code sets some peculiarities in respect of application of criminal penalties to juveniles. In imposing a penalty upon a minor, a court shall take into consideration the following circumstances: the living and upbringing conditions of the minor; the state of health and social maturity of the minor; previously imposed sanctions and effectiveness thereof; the minor's conduct following the commission of a criminal act (Article 91).

Out of all the criminal penalties foreseen in the Penal Code only the following can be imposed upon juveniles:

- community service for a period from one month up to one year (from 10 up to 240 hours of unpaid work, not more than 40 hours per month) (Article 46, 90);

- a fine from 1 up to 50 minimum standards of living (MSL) (one minimum standard of living is currently approximately 38 Euros) – only against a minor already employed or possessing his own property (Article 47, 90);
- restriction of liberty for a period from three months up to two years, serving certain obligations and injunctions imposed by the court (Article 48, 90);
- arrest for a period from 5 up to 45 days (Article 49, 90);
- fixed-term imprisonment from 3 months up to 10 years (Article 50, 90). A court may impose a fixed-term imprisonment upon a minor where there is a basis for believing that another type of penalties is not sufficient to alter the minor's criminal dispositions, or where the minor has committed a serious or grave crime. In the event of imposition of a custodial sentence against a minor, the minimum penalty shall be equal to one half of the minimum penalty provided for by the sanction of an article of the Code according to which the minor is prosecuted. (Article 91).

Where a minor is sentenced to imprisonment for one or several crimes committed through negligence or to imprisonment for a term not exceeding four years for the commission of one or several premeditated crimes, a court may suspend the imposed sentence for a period ranging from one to three years. The sentence may be suspended where the court rules that there is a sufficient basis for believing that the purpose of the penalty will be achieved without the sentence actually being served (Article 92).

During the period from 2004 to 2008 two penalties compounded the major part of the whole structure of penalties imposed upon the minors. These penalties were fixed-term imprisonment (actual imprisonment amounted to 31% of all the penalties imposed, while the percentage reaches up to 57% in case suspended sentences are included) and restriction of liberty (31 %). Therefore the aforementioned penalties amounted to 90% of all the penalties imposed upon minors. It should also be noted that actually imprisonment and arrest amount to 37% of all the penalties imposed. Therefore it should be stated that penalties that are related to deprivation of liberty constitute the major part in the whole structure of penalties imposed upon juveniles and such a practice contradicts international standards and recommendations that emphasize exclusiveness of application of deprivation of liberty upon juveniles. The number of sentences of community service imposed upon minors (as well as the corresponding number related to adults) is constantly decreasing. There were 96 sentences (amounting to 6% of all penalties) of community service imposed upon minors in 2004, while this number has decreased to 12 (1%) in 2008.

Art. 82, paragraph 1 of the Penal Code establishes that a minor who has committed a misdemeanor or crime and has been released from criminal liability or a penalty may be subject to the following educational sanctions:

- warning (a court shall state to him in writing the possible legal consequences ensuing from the commission of new criminal acts, Article 83);
- reparation of property damage (shall be ordered only when a minor has resources which he can independently dispose of or when he is capable of eliminating the damage by his own work, Article 84);
- unpaid educational work (shall be imposed for a period of 20 up to 100 hours to be performed at health care, custody and guardianship or other state or non-state bodies and organizations, work at which may be of a reformative character, Article 85);
- orders concerning the whereabouts (to promote the education) and supervision orders (parents or other natural or legal persons caring for children, shall be ordered for a period from six months up to three years, but not after a minor reaches the age of 18 years) if: 1) the parents or other persons agree to bring up and supervise the minor, have no negative influence on the minor themselves, have a possibility to provide favorable conditions for the development of his personality and agree to provide the necessary information to the institutions supervising the execution of the above sanction, 2) the minor agrees that the indicated persons bring him up and supervise him and promises to obey them and behave properly, Article 86);
- orders of conduct (may be imposed for a term from thirty days up to twelve months; a court may impose mandatory obligations upon a minor, Article 87);
- placement in a special reformative facility (may be fixed for a period of six months up to three years, but not for longer than until a minor reaches the age of 18 years, Article 88).

A court may impose against a minor not more than three mutually compatible educational sanctions.

The Penal Code sets rather strict criteria to be met for a possibility of release from penal liability (such a release is a necessary precondition for educational sanctions to be imposed) to arise. A minor who commits a misdemeanor, a negligent crime or a minor or less serious premeditated crime for the first time may be released by a court from criminal liability where he: 1) has offered his apology to the victim and has compensated for or eliminated, fully or in part, the property damage incurred by his work or in monetary terms; or 2) is found to be of diminished capacity; or 3) pleads guilty and regrets having committed a criminal act or there are other grounds to believe that in the future the minor will abide by the law and will not commit new criminal acts.

Analysis of the practice of imposition of educational measures reveals that orders of conduct constitute the major part of actually applied educational measures (approximately 2/3 of all educational measures applied). Warnings

also make up for a significant part of the practice (almost 20% of reformative measures applied in 2008). Other reformative measures are much rarer.

It should be noticed that statistical data gathered in Lithuania do not provide for clear on numbers of certain penalties imposed on all juveniles that have committed offences in a certain year. The problem is caused by the fact that courts (while filling statistical reports on their activities) indicate only those persons that had been sentenced before reaching formal maturity. In case the juvenile has reached the age limit of maturity before the sentence was promulgated, he/she is indicated as an adult even those cases when the court applies (or had to apply) peculiarities of penal liability of minors. For example, 3.627 juveniles were charged with criminal offences in 2008. 1.263 juveniles had been sentenced (31% of them had been sentenced to deprivation of liberty) and 476 juveniles were imposed educational measures during the same year. A small number of juveniles had been acquitted, a part of case has been discontinued, and part of juveniles had been released from penal liability due to reconciliation (all the aforementioned cases could encompass several hundreds of juveniles at most). Therefore it can be presumed that approximately 1.500 juveniles had been sentenced after they have reached the age of maturity and statistical data compiled by Lithuanian courts do not reveal what penalties and educational sanctions had been imposed upon them. It can only be guessed that the ratio of penalties and reformative sanctions should (or could) be similar to the one described above.

Male juveniles serve the penalty of deprivation of liberty in the only specialized institution in Lithuania – Kaunas Juvenile Reformatory. Several girls serve this penalty in Panevėžys Female Reformatory. There were 192 juveniles imprisoned in Lithuania in the end of 2008. During the period from 1996 to 1999 and the period from 2001 to 2002 the numbers of juveniles serving deprivation of liberty had been twice higher than the corresponding numbers during the years following the entry into force of the Penal Code in 2003 (that provided for a new penalty of arrest). These numbers were lower in 2000 only – according to a wide amnesty that has covered also juveniles. The fact that the number of imprisoned juveniles has decreased almost twice after the enforcement of the new Penal Code constitutes an unquestionably positive trend. It should be noticed that the number of 200 imprisoned juveniles is extremely high, taking into account that the whole population of Lithuania is 3.4 million people. For example in Germany (population of which is 25 times higher) the number of imprisoned juveniles (14-17 years of age) is 663 only.

The rules on execution of penalties in Lithuania are provided in the Code on Execution of Penalties, the rules on penal procedure are set in the Code on Penal Procedure. However norms that provide for special regulation in respect of juveniles are quite rare in these codes.

1. Historische Entwicklung und Überblick über die gegenwärtige Gesetzgebung zum Jugendstrafrecht

Litauen kann bisher lediglich auf eine kurze und bislang noch wenig entwickelte eigenständige Tradition im Jugendstrafrecht verweisen. Erst seit 1918, als Litauen die Unabhängigkeit vom Russischen Imperium erklärte und die Litauische Republik gegründet wurde, bestand wieder[1] die Möglichkeit, eigene Gesetze zu verabschieden. In der Zeit der ersten litauischen Republik (bis 1940) galt allerdings in Litauen das Strafgesetzbuch des Russischen Imperiums von 1903 mit späteren Änderungen fort. Dieses StGB wurde über lange Zeit hinweg von den berühmtesten russischen Strafrechtswissenschaftlern entwickelt und galt damals als progressiv, äußerst systematisch und theoretisch gut begründet. Das war wahrscheinlich der Grund dafür, dass die litauischen Politiker und auch die Strafrechtswissenschaftler über lange Zeit hinweg keinen Bedarf für ein neues litauisches StGB sahen. Das StGB wurde in der Zwischenzeit allerdings im Hinblick auf die als notwendig erachteten „politischen" Korrekturen und das Sanktionensystem teilweise abgeändert.

Das StGB sah einige spezielle Regelungen für strafbare Jugendliche vor: Zunächst erfolgte eine Dreiteilung der Strafmündigkeit. Als nicht strafmündig galten Kinder bis zur Vollendung des 10. Lebensjahres, Jugendliche im Alter von 10 bis unter 17 Jahren galten als teilweise strafmündig. Ihre strafrechtliche Verantwortlichkeit musste in jedem Einzelfall obligatorisch geprüft werden. Strafen konnten für Jugendliche dieser Altersgruppe durch Erziehungsmaßnahmen ersetzt werden (die Überweisung zur Betreuung – eine ambulante Maßnahme – oder in ein geschlossenes Erziehungsheim). 17- bis 21-jährige junge Menschen waren zwar voll strafmündig, es existierten allerdings besondere Milderungsmöglichkeiten.

Die wissenschaftlichen Arbeiten aus dieser Zeit wiesen darauf hin, dass man der Jugendkriminalität mit Strafen und Repressionen allein nicht begegnen könne, da eine Strafe die Persönlichkeit eines Jugendlichen kaum positiv beeinflussen könne, sondern vielmehr schädliche Auswirkungen habe. Schon damals wurde dementsprechend nach alternativen Möglichkeiten zur Sanktionierung (insbesondere in der Form ambulanter Maßnahmen) gesucht.[2] Zu dieser Zeit gab es in Litauen keine speziellen Jugendgerichte, obwohl in Kaunas (der damaligen

1 Vor der Zugehörigkeit zum Russischen Imperium galten in Litauen die Statuten von 1529, 1566 und 1588, die für diese Zeiten auch recht progressiv waren. Litauen verlor seine Selbstständigkeit endgültig nach der letzten Teilung des polnisch-litauischen Staates im Jahr 1795 und wurde Teil des Russischen Imperiums. Die litauischen Statuten wurden jedoch erst 1840 endgültig abgeschafft (ausführlicher s. Litauisches Statut, http://de.wikipedia.org/wiki/Litauisches_Statut).

2 *Drakšienė* 1997, S. 96.

Hauptstadt) nur bestimmte Richter Jugendstrafsachen verhandelten.[3] Im Klaipėda (Memel)-Gebiet galt das Strafgesetzbuch für das Deutsche Reich aus dem Jahre 1871.[4]

Nach der Okkupation Litauens durch die Sowjetunion im Jahr 1940 wurde in Litauen das sowjetische Strafgesetzbuch eingeführt. Von 1957 an war es allen Sowjetischen Sozialistischen Republiken erlaubt, ihre eigenen Strafgesetzbücher zu verabschieden. Am 25.12.1958 erließ der Oberste Rat der UdSSR die *Grundsätze der strafrechtlichen Gesetzgebung der UdSSR und der Unionsrepubliken*[5], nach deren Vorgaben auch die Sowjetrepubliken ihre Strafgesetzbücher entwerfen und verabschieden sollten. Das StGB der Litauischen SSR wurde am 26.06.1961 verabschiedet und trat am 01.09.1961 in Kraft. Dieses StGB blieb mit vielen Änderungen bis zum 1.5.2003 gültig, obwohl Litauen seine Unabhängigkeit schon am 11.3.1990 wiedererlangt hatte und bereits seit 1996 ein Entwurf für ein neues Strafgesetzbuch existierte. Dieser Entwurf wurde allerdings erst nach vielen Diskussionen und auch erheblichen Änderungen am 26. September 2000 vom Parlament verabschiedet und trat am 1.5.2003 in Kraft.[6]

Das sowjetische StGB von 1961 unterteilte die gegenüber Jugendlichen zu verhängenden Sanktionen in Erziehungsmaßnahmen und Strafen. Die Erziehungsmaßnahmen wurden relativ häufig verhängt. Eine Besonderheit des gesamten Systems stellten die 1962 gegründeten so genannten „Kommissionen für Jugendwesen" dar, die aus verschiedenen für die Arbeit mit Jugendlichen zuständigen Beamten und Laien aus der Gesellschaft zusammengestellt wurden und unter anderem für die Anordnung von Erziehungsmaßnahmen im Fall der Entlassung der Jugendlichen aus der strafrechtlichen Verantwortlichkeit zuständig waren. Sie konnten bei jeder Form „abweichenden" Verhaltens Jugendlicher tätig werden, unabhängig vom Alter des Jugendlichen. Sie durften auch die schwerste Erziehungsmaßnahme – eine Einweisung in ein Erziehungsheim (Kolonie), das damals dem richtigen Gefängnis ähnelte – verhängen. Eine solche Einweisung war schon ab dem 12. (!) Lebensjahr des Jugendlichen möglich.[7] Da diese Vorgehensweise eindeutig dem Rechtstaatsprinzip widersprach, wurden die Kommissionen nach der Wende abgeschafft. Somit entstand allerdings eine

3 *Kairys* 1937, S. 247 ff.

4 *Drakšienė* 1997, S. 96.

5 Vgl. *Lammich* 1994, *Lammich/Piesliakas* 1994, *Piesliakas/Senkievicius* 1997, *Lammich/Piesliakas* 2003. Vgl. auch *Čepas/Pavilonis* 1973, S. 207 ff.

6 Lietuvos Respublikos baudžiamasis kodeksas (Das Strafgesetzbuch der Republik Litauen). 26.09.2000, Nr. VIII-1968 (Žin., 2000, Nr. 89-2741), mit späteren Änderungen.

7 Nepilnamečių reikalų komisijų nuostatai. Visuomeninių nepilnamečių auklėtojų nuostatai (Grundordnung der Kommissionen für Jugendwesen. Grundordnung der gesellschaftlichen Erzieher der Jugendlichen). Vilnius, 1981. Vgl. auch *Čepas/Pavilonis* 1973, S. 207 ff.

Lücke im Jugendstrafrecht, und die Erziehungsmaßnahmen wurden in der Folge nur noch sehr selten verhängt (vgl. hierzu unten *Kapitel 5*). Nach der Wende sah das bis zum 1. Mai 2003 gültige und mehrmals geänderte StGB für straffällige Jugendliche grundsätzlich dieselben Strafen und Strafrahmen wie bei Erwachsenen vor.[8]

Das neue StGB enthält einen speziellen Abschnitt (XI.), in dem die Regelungen für straffällige Jugendliche (14- bis unter 18-Jährige, ausnahmsweise bis unter 21-Jährige) zusammengefasst sind. Vorschläge während der Reform des Strafrechts für ein eigenständiges Jugendstrafgesetzbuch konnten sich nicht durchsetzen.[9] Allerdings kann auch die Existenz eines separaten Abschnittes im neuen StGB als Errungenschaft angesehen werden, weil im alten StGB alle Normen, die straffällige Jugendliche betrafen, im gesamten allgemeinen Teil zerstreut waren und ein einheitliches Konzept fehlte.

Am 28. Juni 2007 wurde das neue Gesetz der Republik Litauen über „minimale und mittlere Beaufsichtigung der Kinder" verabschiedet, das zum 1. Januar 2008 in Kraft trat.[10] Das Gesetz sieht einige Maßnahmen (der „minimalen und mittleren Beaufsichtigung") vor, die gegenüber Kindern und Jugendlichen mit „abweichendem" Verhalten angeordnet werden können, unter anderem die Einweisung in ein Erziehungshaus (s. g. „Sozialisationszentrum"). Die in diesem Gesetz festgelegten Maßnahmen können gegenüber Jugendlichen bis zum Alter von einschließlich 17 Jahren angeordnet werden. Die Einweisung in ein Erziehungsheim (Sozialisationszentrum) kann ausnahmsweise auch gegenüber Kindern im Alter von unter 14 Jahren erfolgen, d. h. eine Mindestaltersgrenze ist faktisch nicht festgesetzt (ausführlicher s. unten *Kapitel 3*).

Abschließend sollte erwähnt werden, dass in Litauen immer noch das alte Ordnungswidrigkeitengesetzbuch (OWiGB) in Kraft ist, in dem einige Tatbestände den Straftatbeständen ähneln. Sie werden allerdings nach dem Verfahren der Ordnungswidrigkeiten behandelt sowie mit Sanktionen des Ordnungswidrigkeitenrechts geahndet[11] (ausführlicher s. unten *Kapitel 3*).

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8 *Pečkaitis/Justickis* 1997, S. 412.

9 Vgl. *Dünkel/Sakalauskas* 2001, S. 77.

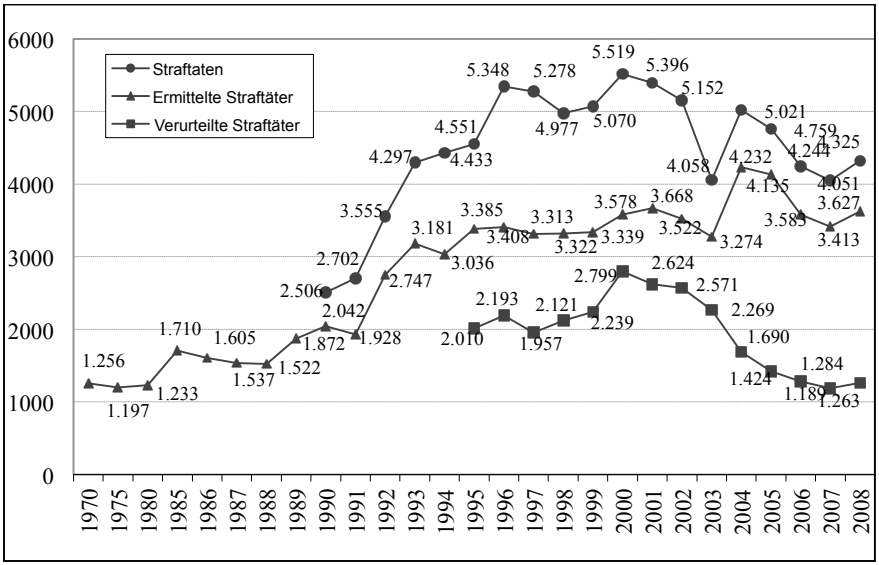
10 Lietuvos Respublikos vaiko minimalios ir vidutinės priežiūros įstatymas (Das Gesetz der Republik Litauen über minimale und mittlere Beaufsichtigung der Kinder). 28.06.2007, Nr. VIII-1238 (Žin., 2007, Nr. 80-3214).

11 Lietuvos Respublikos administracinių teisės pažeidimų kodeksas (Ordnungswidrigkeitengesetzbuch der Republik Litauen) 13.12.1984 (Žin., 1985, Nr. 1 1), mit späteren Änderungen. Dieses Gesetz findet auch gegenüber Jugendlichen Anwendung.

2. Entwicklung der registrierten Kinder- und Jugend- und Heranwachsendenkriminalität

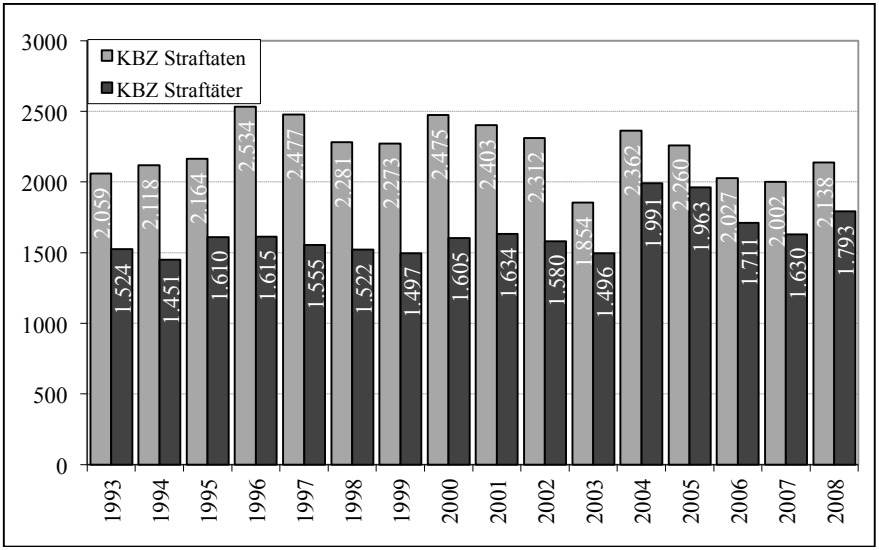
Im Zeitraum zwischen der Unabhängigkeitserklärung (1990) und dem Jahr 2002 ist die Anzahl der registrierten Straftaten mit Jugendlichen als Tatverdächtigen um das Zweifache (von 2.506 bis 5.152), die Anzahl der ermittelten straftatverdächtigen Jugendlichen um 40 % (von 2.042 bis 3.522) gestiegen (s. *Abb. 1*).[12] Nach dem Inkrafttreten des neuen StGB sieht man deutliche Veränderungen in der Sanktionspraxis: Obwohl seit 2003 mehr straftatverdächtige Jugendliche ermittelt worden sind, werden immer weniger straffällige Jugendliche verurteilt. (s. auch unten *Kapitel 5*).

Abbildung 1: Entwicklung der Jugendkriminalität in Litauen (absolute Zahlen)



12 Alle statistischen Angaben zur Situation in Litauen sind, sofern keine speziellen Angaben gemacht werden, der Internetseite des Litauischen Kriminalitätspräventionszentrums entnommen: Criminological statistics: www.nplc.lt/stat/stat.htm.

Abbildung 2: Kriminalitätsbelastungsziffern bei Jugendlichen



In der *Abb. 2* sind Kriminalitätsbelastungsziffern bei Jugendlichen im Zeitreihenvergleich dargestellt. Man kann allgemein feststellen, dass in den letzten 15 Jahren keine drastischen Veränderungen zu erkennen sind. Der deutliche Rückgang der registrierten Jugendstraftaten im Jahr 2003 war wahrscheinlich eine Nebenwirkung der umfangreichen gesetzlichen Reformen, die auch viele organisatorische Veränderungen mit sich brachten (unter anderem auch veränderte statistische Erfassungen, neue Straftatbestände etc.).

Weitere wichtige statistische Daten zur Jugendkriminalität:

- der Anteil der tatverdächtigen Jugendlichen beträgt jährlich durchschnittlich ca. 14-16% aller Tatverdächtigen,
- der Anteil der von Jugendlichen begangenen Straftaten betrug 1990-2003 ca. 15-19%, in den letzten 4 Jahren ist dieser Anteil auf ca. 12% gesunken,
- ca. 30% aller tatverdächtigen Jugendlichen sind 14-15 Jahre alt,
- ca. 5-7% aller tatverdächtigen Jugendlichen sind Mädchen,
- ca. 60% aller tatverdächtigen Jugendlichen sind Schüler; ca. 25% haben keine Beschäftigung (keine Schule und keine Arbeitsstelle),
- fast 80% aller Jugendstraftaten sind Vermögensdelikte,
- zwei Drittel aller tatverdächtigen Jugendlichen haben in Gruppen gehandelt.

Tabelle 1: Tatverdächtige Jugendliche bzgl. Mord/Totschlag, Vergewaltigung, schwerer Körperverletzung sowie Drogendelikten (absolute Zahlen)

	Mord/Totschlag	Vergewaltigung	Schwere Körperverletzung	Drogendelikte
1990	2	40	9	---
1992	11	22	3	---
1994	22	28	12	---
1995	30	33	12	4
1996	28	29	15	6
1998	23	21	16	18
2000	23	27	17	29
2002	27	30	28	14
2003	23	16	22	66
2004	22	42	41	47
2005	22	29	32	39
2006	28	50	28	76
2007	21	35	30	49
2008	23	52	31	91

In der *Tabelle 1* ist die Entwicklung der schwersten Gewaltstraftaten sowie der Drogendelikte der straftatverdächtigen Jugendlichen in Litauen dargestellt. Es ist anzumerken, dass der Anstieg der Mord- und Totschlagsdelikte, an deren Begehung Jugendliche verdächtigt waren, in Litauen zwischen 1990-1995 am größten in ganz Mittel- und Osteuropa war.[13] In Litauen lebten im Jahr 2006 insgesamt ca. 210.600 Jugendliche. In 2006 entfielen damit auf 100.000 Jugendlichen ungefähr 13 Morde/Totschläge.

3. Das Sanktionensystem. Formen informeller (Diversion) und formeller (gerichtliche Verurteilung) Sanktionen

3.1 Allgemeines

Der erste Paragraph des XI. Abschnittes (§§ 80-94) StGB benennt die Ziele der besonderen Bestimmungen des Jugendstrafrechts:

13 *UNICEF* 2000, S. 103.

- Es muss sichergestellt werden, dass die strafrechtliche Verantwortlichkeit dem Alter und der sozialen Reife der in diesem Abschnitt behandelten Personen entspricht.
- Die Anwendung der Freiheitsstrafe ist zu begrenzen und die Möglichkeiten der Anwendung erzieherischer Maßnahmen sind auszuweiten.
- Dem Jugendlichen ist zu helfen, seine Lebensweise und sein Verhalten zu ändern. Das Bestrafen für die begangene Straftat muss mit der Entwicklung seiner Persönlichkeit, mit seiner Erziehung und mit der Beseitigung der Ursachen des gesetzwidrigen Verhaltens verbunden werden.
- Der Jugendliche ist von zukünftigen Straftaten abzuhalten.

§ 13 Abs. 1 StGB sieht vor, dass generell die strafrechtliche Verantwortung mit der Vollendung des 16. Lebensjahrs beginnt. Für einige schwerere bzw. jugendtypische Delikte[14] sieht § 13 Abs. 2 StGB als Ausnahme von Abs. 1 eine strafrechtliche Verantwortung ab 14 Jah*ren* vor.

Diese „Ausnahmeregelung" relativiert die allgemeine Altersgrenze des Abs. 1, weil die meisten jugendtypischen Straftaten (vor allem Diebstahl und Raub) in den Bereich des Abs. 2 fallen. Die eigentliche Strafmündigkeitsgrenze von 16 Jahren bleibt damit in Litauen z. B. für die leichte Körperverletzung (§ 138) oder die Verletzung der öffentlichen Ordnung (§ 284 StGB) bestehen. Die zweistufige Altersgrenze wurde fast wörtlich aus dem alten StGB übernommen.

Das neue StGB hat ebenfalls die Einteilung der Sanktionen, die gegenüber straffälligen Jugendliche verhängt werden können, in „Erziehungsmaßnahmen" und „Strafen" (s. *Übersicht 1*) beibehalten.

Im StGB und im Strafprozessgesetzbuch (StPGB) sind einige Möglichkeiten für eine Einstellung des Verfahrens vorgesehen. Diese gelten in der Regel für alle Straftäter, also nicht nur für Jugendliche, unter dem Oberbegriff der „Entlassung aus der strafrechtlichen Verantwortlichkeit" (s. unten *Kapitel 3.2.*). Eine spezielle Regelung für die Entlassung Jugendlicher aus der strafrechtlichen Verantwortlichkeit ist im besonderen XI. Abschnitt des StGB vorgesehen (s. unten *Kapitel 3.3*).[15]

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14 Es handelt sich um folgende Delikte: Mord/Totschlag (§ 129 StGB); schwere Körperverletzung (§ 135 StGB); Vergewaltigung (§ 149 StGB); sexuelle Misshandlung (§ 150 StGB); Diebstahl (§ 178 StGB); Raub (§ 180 StGB); räuberische Erpressung (§ 181 StGB); qualifizierte Formen der Sachbeschädigung (§ 187 Abs. 2 StGB); Diebstahl von Schusswaffen, Munition oder Explosionsstoffe (§ 254 StGB); Diebstahl, räuberische Erpressung oder andere rechtswidrige Wegnahme von Drogen oder anderen bewusstseinsverändernden Mitteln (§ 263 StGB); qualifizierte Formen der Beschädigung von Verkehrsmitteln, Verkehrswegen (Schienen) oder sich an und auf Verkehrswegen befindenden Geräten (§ 280 Abs. 2 StGB).

15 Das Gesamtsystem formeller und informeller Sanktionen wird angesichts der zusätzlich zu beachtenden Maßnahmen des Ordnungswidrigkeitengesetzbuches (s. unten *Kapitel 3.5*) und

3.2 Diversion

§ 38 StGB sieht (für alle Straftäter, nicht nur für Jugendliche) eine bedeutsame Möglichkeit für die Entlassung aus der strafrechtlichen Verantwortlichkeit vor, eine Versöhnung zwischen dem Täter und dem Opfer. Ein Täter, der ein Vergehen,[16] ein fahrlässiges Verbrechen oder ein minderschweres oder mittelschweres vorsätzliches Verbrechen[17] begangen hat, kann aus der strafrechtlichen Verantwortlichkeit entlassen werden, wenn er:

1) sich geständig gezeigt hat,
2) freiwillig den Schaden für eine natürliche oder juristische Person ersetzt oder beseitigt oder dieses bereits vereinbart hat,
3) sich mit dem Verletzten[18] oder mit dem Vertreter der juristischen Person[19] ausgesöhnt hat, und
4) ein Grund zu der Annahme besteht, dass er in der Zukunft keine weiteren Straftaten begehen wird.

Aus diesem Grund kann ein „Rückfalltäter" oder ein „gefährlicher Rückfalltäter" nicht aus der strafrechtlichen Verantwortlichkeit entlassen werden, ferner auch nicht ein Täter, bei dem bereits früher von der Strafverfolgung aufgrund einer Aussöhnung mit dem Opfer abgesehen wurde, wenn seit dem Tag der Aussöhnung bis zur Begehung der neuen Straftat weniger als vier Jahre vergangen sind. Wenn eine aus der strafrechtlichen Verantwortlichkeit aus diesem Grund entlassene Person im Laufe eines Jahres ein Vergehen oder ein fahrlässiges Verbrechen begeht oder sich ohne rechtfertigende Gründe nicht an die

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des Gesetzes über minimale und mittlere Beaufsichtigung der Kinder (s. unten *Kapitel 3.6*) unübersichtlich und kompliziert.

16 Ein Vergehen liegt dann vor, wenn im Besonderen Teil des StGB für diese Straftat keine Freiheitsstrafe vorgesehen ist. Für mehrere Vergehen konnte das Gericht zunächst (seit 1.5.2003) nur eine Erziehungsmaßnahme anordnen. Seit dem 13.7.2004 konnte es auch eine Strafe verhängen (§ 82 Abs. 3 StGB), musste aber diese besonders begründen. Mit Wirkung zum 21.7.2007 ist dieser Absatz abgeschafft worden, weil nunmehr eine andere Regelung die obligatorische Verhängung einer Strafe für Mehrfachtäter vorsieht (s. unten *Kapitel 3.3. Erziehungsmaßnahmen*).

17 Ein minderschweres Verbrechen liegt vor, wenn im Besonderen Teil des StGB für diese Straftat eine maximale Freiheitsstrafe von 3 Jahren vorgesehen ist. Ein mittelschweres Verbrechen liegt dann vor, wenn im Besonderen Teil des StGB für diese Straftat eine maximale Freiheitsstrafe von 6 Jahren vorgesehen ist (§ 11 StGB).

18 Bis zum 21.7.2007 sah das Gesetz einen breiteren strafprozessrechtlichen Begriff des „Geschädigten" an dieser Stelle vor. Die Versöhnung war in bestimmten Fällen auch mit Geschädigten möglich (wie z. B. mit Verwandten), die nur indirekt geschädigt wurden (z. B. durch den fahrlässig verursachten Tod ihres Verwandten). In der aktuellen Fassung zielt diese Bestimmung nur auf eine Versöhnung mit der unmittelbar verletzten Person ab.

19 Bis zum 21.7.2007 gab es eine Möglichkeit, sich auch mit dem Staat zu versöhnen (durch einen Vertreter, wie z. B. das Steueramt). Diese Möglichkeit wurde jedoch abgeschafft.

Voraussetzungen und den Inhalt des durch das Gericht bestätigten Vertrages wegen Schadensersatzes hält, kann das Gericht seinen Beschluss über das Absehen von Strafverfolgung aufheben und erneut die Frage der strafrechtlichen Verantwortlichkeit dieser Person für alle begangenen Straftaten verhandeln. Wenn die Person in dieser Periode ein neues vorsätzliches Verbrechen begeht, *wird* der frühere Beschluss über die Entlassung aus der strafrechtlichen Verantwortlichkeit ungültig und die Frage der strafrechtlichen Verfolgung dieser Person für alle begangene Straftaten neu verhandelt.

Ein Täter-Opfer-Ausgleich im eigentlichen, internationalen Sinne dieses Wortes liegt nicht vor, da kein Vermittler oder Mediator an diesem Verfahren beteiligt ist. Die Versöhnung hängt vom Willen der Untersuchungsbeamten, der Staatsanwaltschaft und des Richters (des Gerichtes) sowie von den Entscheidungen des Täters und vor allem des Opfers ab. In der Praxis bemühen sich die Täter heftig um die Versöhnung mit dem Opfer, wenn ihnen diese Möglichkeit eröffnet wird. Teilweise kommt es seitens der Täter auch zu Drohungen und Druck. Anderseits sehen einige Opfer hier eine Möglichkeit, soviel Geld wie möglich zu verdienen, und/oder haben zu große Erwartungen an den Täter. Zu einer richtigen Versöhnung, einer Verarbeitung der Straftat und einer angemessenen Entschädigung kommt es in diesem Verfahren höchst selten.

Der Gesetzgeber hat allerdings im neuen StGB die Möglichkeiten für die Versöhnung stark ausgeweitet und mehr Raum für informelle Reaktionen auf die Straftat geschaffen. Es wird leider keine Statistik darüber geführt, wie viele Jugendstrafsachen auf diese Art und Weise eingestellt werden. Nach einer Untersuchung werden ca. 15 % aller Strafverfahren aus diesem Grund eingestellt.[20]

Für die eigentliche Einstellung des Verfahrens aus dem Grund der Versöhnung zwischen dem Täter und dem Opfer ist eine Entscheidung des Richters erforderlich. Mit dieser Entscheidung bestätigt der Richter den Beschluss des Staatsanwaltes über die Einstellung des Strafverfahrens (§ 214 Abs. 2 StPGB).

Im StGB sind noch zwei weitere allgemeine Möglichkeiten für die Entlassung aus der strafrechtlichen Verantwortlichkeit vorgesehen. Eine Person, die ein Vergehen oder ein fahrlässiges Verbrechen begangen hat, kann durch einen begründeten Beschluss des Gerichtes aus der strafrechtlichen Verantwortlichkeit entlassen werden, wenn es sich um einen Ersttäter handelt und nicht weniger als zwei Milderungsgründe (§ 59 Abs. 1 StGB) und keine Verschärfungsgründe (§ 60 Abs. 1 StGB) vorliegen. Diese Entlassungsmöglichkeit wird im StGB als „Entlassung beim Vorliegen von Milderungsgründen" bezeichnet (§ 39 StGB).

Die zweite Möglichkeit ist die Leistung einer Bürgschaft durch eine vertraute Person (§ 40 StGB). Eine Person, die ein Vergehen, ein fahrlässiges Verbrechen oder ein nach der Definition des StGB „minderschweres" oder „mittelschweres" vorsätzliches Verbrechen begangen hat, kann aus der strafrechtlichen Verantwortlichkeit entlassen werden, wenn ein Antrag einer ver-

20 Vgl. *Baranskaitė* 2005.

trauten Person auf die Leistung der Bürgschaft gestellt wurde und wenn der Straftäter:

5) ein Ersttäter ist,
6) sich geständig gezeigt hat und seine Tat bereut,
7) freiwillig den Schaden ersetzt oder beseitigt oder dieses bereits vereinbart hat, und
8) Grund zu der Annahme besteht, dass er den Schaden ersetzen oder beseitigen sowie in der Zukunft keine weiteren Straftaten begehen wird.

Die Leistung der Bürgschaft kann mit oder ohne Kaution angeordnet werden. Als vertraute Personen kommen die Eltern, die Verwandten oder andere zuverlässige Personen in Betracht. Die Dauer für die Leistung der Bürgschaft beträgt zwischen einem und drei Jahren.

Es wird leider keine Statistik darüber geführt, wie häufig Straftäter (auch Jugendliche) aus diesen zwei genannten Gründen aus der strafrechtlichen Verantwortlichkeit entlassen werden.

Eine dritte Möglichkeit ist die speziell für Jugendliche vorgesehene „Entlassung der Jugendlichen aus der strafrechtlichen Verantwortlichkeit" (§ 93 StGB). Erst in diesem Fall kommt die Anwendung der Erziehungsmaßnahmen in Frage. Diese Regelung wird deswegen zusammen mit den Erziehungsmaßnahmen im folgenden Abschnitt beschrieben.

3.3 Erziehungsmaßnahmen

Das StGB stellt relativ strenge Voraussetzungen für die Anordnung der Erziehungsmaßnahmen (anstatt Strafe) auf. Sie können für ein Vergehen[21] oder für ein Verbrechen in den Fällen der Entlassung der Jugendlichen aus der strafrechtlichen Verantwortlichkeit (Absehen von der Strafverfolgung) oder der Entlassung von der Strafe verhängt werden (§ 82 Abs. 1 StGB). Ein Jugendlicher kann aus der strafrechtlichen Verantwortlichkeit entlassen werden, wenn er als Ersttäter ein Vergehen oder ein fahrlässiges, minderschweres oder mittelschweres vorsätzliches Verbrechen begangen hat und:

21 Bis zum 21.7.2007 galt die systematisch unbefriedigende Regelung, dass das Gericht für ein Vergehen immer eine Erziehungsmaßnahme anordnen musste (der Jugendliche konnte in solchen Fällen nicht aus der strafrechtlichen Verantwortlichkeit entlassen werden) und für ein Verbrechen eine Erziehungsmaßnahme anordnen konnte, wenn der Jugendliche aus der strafrechtlichen Verantwortlichkeit entlassen wurde. Dieses Missverhältnis wurde beseitigt, was aber zu einer Verschärfung der strafrechtlichen Verantwortlichkeit bei den Vergehen geführt hat. Jetzt kann auch bei einem Vergehen (wie auch bei einem Verbrechen) nur der Ersttäter aus der strafrechtlichen Verantwortlichkeit entlassen und damit auch Erziehungsmaßnahmen angeordnet werden. Früher konnte das Gericht auch für mehrere Vergehen eine Erziehungsmaßnahme anordnen.

9) sich beim Verletzten entschuldigt hat und mindestens teilweise den entstandenen Schaden durch Arbeit oder durch verfügbare Geldmittel bereits wiedergutgemacht hat, oder
10) als vermindert schuldfähig anzusehen ist, oder
11) ein Geständnis ablegt, bzgl. der begangenen Straftat Reue zeigt, oder wenn andere Gründe zu der Annahme bestehen, dass er sich in Zukunft gesetztreu verhalten und keine neue Straftaten begehen wird (§ 93 Abs. 1 StGB).

Das für die Entlassung eines Jugendlichen aus der strafrechtlichen Verantwortlichkeit zuständige Gericht ordnet in diesem Fall die in § 82 StGB vorgesehenen Erziehungsmaßnahmen an.[22] In dieser Vorschrift sind folgende Erziehungsmaßnahmen vorgesehen:

1) Verwarnung als mildeste erzieherische Maßnahme kann als selbständige Maßnahme oder zusammen mit anderen erzieherischen Maßnahmen angeordnet werden. Durch die Verwarnung erklärt das Gericht dem Jugendlichen schriftlich die möglichen rechtlichen Folgen im Falle der Begehung weiteren Straftaten (§ 83 StGB).
2) Wiedergutmachung des materiellen Schadens oder dessen Beseitigung kann gegenüber Jugendlichen nur dann angeordnet werden, wenn sie über eigenes Geld verfügen oder der Schaden durch Arbeitsleistungen beseitigt werden kann. Die Wiedergutmachung des materiellen Schadens oder dessen Beseitigung durch Arbeit muss in der vom Gericht bestimmten Zeit erledigt werden (§ 84 StGB).
3) Gemeinnützige erzieherische Arbeit wird für 20 bis 100 Arbeitsstunden in den Institutionen und Organisationen des Gesundheitswesens, der sozialen Fürsorge oder in anderen staatlichen oder nicht staatlichen Institutionen und Organisationen, in denen die Arbeit erzieherisch gestaltet werden kann, angeordnet. Gemeinnützige erzieherische Arbeit wird nur mit der Genehmigung des Jugendlichen auferlegt und darf nicht zusammen mit der Einweisung in ein spezielles Erziehungsheim angeordnet werden (§ 85 StGB).
4) Übergabe zur Erziehung und Beaufsichtigung. Straffällige Jugendliche können zur Erziehung und Beaufsichtigung ihren Eltern oder anderen natürlichen oder juristischen Personen, die sich um die Kinder kümmern, per Anordnung übergeben werden. Bei dieser Erziehungsmaßnahme ist eine Laufzeit von sechs Monaten bis zu drei Jahren vorgesehen, sie endet spätestens mit Vollendung des 18. Lebensjahres. Diese Erziehungsmaßnahme kann auch in Kombination mit weiteren

22 Das Verfahren wird, wie auch im Fall der Einstellung des Verfahrens aus dem Grund der Versöhnung zwischen dem Täter und dem Opfer durch die Entscheidung des Richters eingestellt. Mit dieser Entscheidung betätigt der Richter den Beschluss des Staatsanwalts über die Einstellung des Strafverfahrens (§ 214 Abs. 2 StPGB).

Erziehungsmaßnahmen verhängt werden, allerdings nicht zusammen mit der Einweisung des Jugendlichen in ein spezielles Erziehungsheim. Für die Anordnung dieser Maßnahme müssen sowohl besondere Voraussetzungen auf der Seite der betreuenden Person als auch auf der Seite des zu Betreuenden erfüllt werden. Die mit der Erziehung und Beaufsichtigung betraute Person muss sich zunächst mit der Maßnahme einverstanden erklären. Zusätzlich muss positiv festgestellt werden, dass sie keinen negativen Einfluss auf den zu Betreuenden ausübt, weiterhin, dass günstigste Voraussetzungen für die Entwicklung der Persönlichkeit des Jugendlichen vorliegen und schließlich muss die Betreuungsperson sich zur regelmäßigen Berichterstattung gegenüber der die Maßnahme überwachenden Institution verpflichten. Das Gesetz verlangt ausdrücklich das Einverständnis des Jugendlichen mit der Unterstellung zur Beaufsichtigung und Erziehung. Zusätzlich muss sich der Jugendliche verpflichten, die betreuende Person „anzuhören" und sich angemessen zu verhalten (§ 86 StGB).

5) Verhaltensbeschränkungen. Die Laufzeit dieser Maßnahme kann zwischen 30 Tagen und 12 Monaten betragen. Das Gericht kann im Rahmen dieser Erziehungsmaßnahme dem Jugendlichen folgende Weisungen auferlegen:

- zu einer bestimmten Zeit zu Hause sein,
- eine Ausbildung aufzunehmen bzw. fortzusetzen, oder zu arbeiten,
- bestimmte Kenntnisse zu erwerben oder Verbote zu erlernen (Verkehrsregeln, Verhaltenregeln in der Schule u. ä.),
- sich einer Heilbehandlung zu unterziehen bzgl. Alkohol-, Drogen- oder Medikamentenabhängigkeit oder Geschlechtskrankheiten,
- an einem von staatlichen oder nicht staatlichen Organisationen veranstalteten sozialen Trainings- oder Rehabilitationskurs teilzunehmen.

Das Gericht kann auch folgende Verbote aussprechen:

- sich an Glückspielen zu beteiligen,
- bestimmte Tätigkeiten auszuüben,
- ein Kraftfahrzeug zu fahren,
- Örtlichkeiten, die einen schlechten Einfluss auf das Verhalten des Jugendlichen haben, zu besuchen oder mit Personen, die einen schlechten Einfluss auf den Jugendlichen haben, in Verkehr zu kommen,
- ohne Erlaubnis der die Vollstreckung der strafrechtlichen Maßnahmen kontrollierenden Institutionen den Wohnsitz zu wechseln.

Diese Erziehungsmaßnahme kann als alleinige Maßnahme, aber auch in Verbindung mit weiteren Erziehungsmaßnahmen angeordnet werden. Ausgeschlossen ist lediglich die Anordnung in Verbindung mit der Einweisung in ein spezielles Erziehungsheim (§ 87 StGB).

6) Einweisung in ein spezielles Erziehungsheim. Hierbei handelt es sich um die härteste erzieherische Maßnahme. Die Laufzeit der Maßnahme kann zwischen 6 Monate und 3 Jahre betragen, allerdings höchstens bis zur Vollendung des 18. Lebensjahres. Die konkrete Laufzeit der Maßnahme setzt das Gericht fest und berücksichtigt dabei die Persönlichkeit des Jugendlichen, die Wiederholung der Straftaten, früher verhängte Maßnahmen und die Tatumstände. Diese Erziehungsmaßnahme kann selbständig oder in Verbindung mit der Verwarnung oder der Wiedergutmachung des materiellen Schadens oder dessen Beseitigung angeordnet werden (§ 88 StGB).

3.4 Strafen

Das StGB sieht für straffällig gewordene Jugendliche folgende Strafen vor:

1) gemeinnützige Arbeit,
2) Geldstrafe,
3) Freiheitsbeschränkung,
4) Arrest,
5) zeitige Freiheitsstrafe.

Gegenüber straffälligen Jugendlichen können somit mit einigen Ausnahmen die gleichen Strafen wie gegenüber Erwachsenen verhängt werden. Die folgenden drei im Erwachsenenstrafrecht vorgesehenen Strafen können gegen Jugendliche nicht verhängt werden: Entziehung der öffentlichen Rechte (§ 44 StGB), Entziehung des Rechts, eine bestimmte Arbeit oder bestimmte Tätigkeit auszuüben (§ 45 StGB) und lebenslange Freiheitsstrafe (§ 51 StGB).

Gemeinnützige Arbeit als Strafe für Jugendliche unterscheidet sich lediglich durch die Dauer von der gemeinnützigen Arbeit für Erwachsene: Bei Jugendlichen darf sie 240 Stunden nicht überschreiten (§ 90 Abs. 2 StGB). Im Erwachsenenstrafrecht ist die maximale Dauer auf 480 Stunden für ein Verbrechen und 240 für ein Vergehen festgesetzt (§ 46 StGB). Im allgemeinen Erwachsenenstrafrecht (diese Regelungen gelten in diesem Fall auch für Jugendliche) ist vorgesehen, dass gemeinnützige Arbeit nur mit der Zustimmung des Verurteilten verhängt werden kann. Sie wird für die Dauer von einem Monat bis zu einem Jahr verhängt, mit jeweils 10-40 Arbeitsstunden pro Monat.

Die theoretische und praktische Unterscheidung zwischen der gemeinnützigen Arbeit als Strafe und der gemeinnützigen erzieherischen Arbeit als Erziehungsmaßnahme ist nicht eindeutig.

Geldstrafe kann gegenüber Jugendlichen nur dann verhängt werden, wenn sie arbeiten oder über eigenes Vermögen verfügen (§ 90 Abs. 3 StGB). Die Höhe der Strafe beträgt 1-50 Beträge im Sinne des gesetzlich festgelegten monatlichen Existenzminimums (zurzeit sind es ca. 38 Euro, d. h. die Höhe der Geldstrafe kann maximal ca. 1.880 Euro betragen). Für Erwachsene beträgt die

Höhe der Geldstrafe maximal 300 Beträge im Sinne des gesetzlich festgelegten monatlichen Existenzminimums (§ 47 StGB).

Für die Anwendung der Freiheitsbeschränkung (eine Art Hausarrest) sind keine Ausnahmen für Jugendliche vorgesehen (§ 48 StGB). Diese Strafe kann gegen Jugendliche erst seit dem 13. Juli 2004 (nach einer Änderung des StGB) verhängt werden. Die Laufzeit der Strafe kann 3 Monate bis 2 Jahre betragen. Den Inhalt der Strafe bilden verschiedene Weisungen und Verbote (z. B. das Verbot, den Wohnsitz zu wechseln, bestimmte Örtlichkeiten zu besuchen, die Weisung, zu einer bestimmten Zeit zu Hause zu sein, den durch die Straftat entstandenen Schaden wiedergutzumachen, eine bestimmte Anzahl an Stunden gemeinnütziger Arbeit zu leisten u. ä.).

Beim Arrest handelt es sich um einen Freiheitsentzug besonderer Art, der in speziellen Arrestanstalten vollzogen wird. Bei Jugendlichen kann der Arrest für eine Dauer von 5 bis 45 Tagen verhängt werden (§ 90 Abs. 4 StGB), bei Erwachsenen beträgt die mögliche Dauer 15 bis 90 Tage für ein Verbrechen und 10 bis 45 Tage für ein Vergehen. Der Arrest kann nach der Entscheidung des Gerichts auch an arbeitsfreien Tagen verbüßt werden (§ 49 Abs. 5 StGB).

Das Höchstmaß der Freiheitsstrafe für Jugendliche beträgt 10 Jahre. Das StGB sieht für die Verhängung eine besondere Regelung vor: „Eine Freiheitsstrafe kann gegenüber Jugendlichen nur dann verhängt werden, wenn für das Gericht ein Grund zur Annahme besteht, dass andere Strafen nicht ausreichen oder der Jugendliche ein schweres oder sehr schweres Verbrechen[23] begangen hat. Bei der Bemessung der Freiheitsstrafe wird der Strafrahmen im Mindestmaß auf die Hälfte des Mindestmaßes der im konkreten Paragraphen des StGB vorgesehenen Sanktion reduziert“ (§ 91 Abs. 3 StGB).

Als das neue StGB in Kraft trat, gab es eine Möglichkeit, die Geldstrafe, den Arrest und die Freiheitsstrafe bei Jugendlichen wie bei Erwachsenen zur Bewährung auszusetzen. Für die Geldstrafe und den Arrest wurde diese Möglichkeit am 13.07.2004 abgeschafft mit der Begründung, dass bei diesen Strafen die Aussetzung nicht den Strafzweck erfüllen könne und eine Aussetzung einfach zu milde sei (so die amtliche Begründung des Gesetzesentwurfs). Zurzeit besteht damit nur bei einer Freiheitsstrafe die Möglichkeit der Aussetzung zur Bewährung. Für Jugendliche sind dabei spezielle, gegenüber den für Erwachsene geltenden Regelungen mildere Voraussetzungen vorgesehen: Das Gericht kann die verhängte Freiheitsstrafe nur dann zur Bewährung für die Dauer von einem Jahr bis zu drei Jahren aussetzen, wenn ein oder mehrere fahrlässige Verbrechen begangen worden sind oder die Dauer der für ein oder mehrere vorsätzliche Verbrechen zu verhängenden Freiheitsstrafe vier Jahre nicht übersteigt. Darüber

23 Ein schweres Verbrechen liegt dann vor, wenn im Besonderen Teil des StGB für diese Straftat eine maximale Freiheitsstrafe 10 Jahre vorgesehen ist. Ein sehr schweres Verbrechen liegt dann vor, wenn im Besonderen Teil des StGB für diese Straftat eine maximale Freiheitsstrafe von mehr als 10 Jahren vorgesehen ist (§ 11 StGB).

hinaus kann die Freiheitsstrafe nur dann zur Bewährung ausgesetzt werden, wenn das Gericht Grund zur Annahme hat, dass die Ziele der Strafe auch ohne Vollstreckung erreicht werden können (§ 92 StGB). Dabei verhängt das Gericht eine oder mehrere der in § 82 StGB vorgesehenen erzieherischen Maßnahmen, nicht jedoch die Unterbringung in einem Erziehungsheim.

Im Allgemeinen muss das Gericht bei der Strafzumessung in allen Jugendstrafsachen stets folgende Umstände berücksichtigen:

1) die Lebens- und Erziehungsbedingungen des Jugendlichen,
2) den Zustand seiner Gesundheit und seine soziale Reife,
3) das Verhalten nach der Tat (§ 91 Abs. 2 StGB).

Die Staatsanwaltschaft ist verpflichtet, diese Bedingungen zu erforschen und der Anklageakte beizulegen (§ 220 Abs. 2 StPGB).

Gegenüber einem Jugendlichen kann auch Verfall und Einziehung angeordnet werden (§§ 67, 72 StGB).

3.5 Ordnungswidrigkeitenrecht

Dem Recht der Ordnungswidrigkeiten kommt in Litauen – der Tradition des alten sowjetischen Systems folgend – immer noch ein hoher Stellenwert zu (insgesamt über 500 Paragraphen mit einzelnen Ordnungswidrigkeiten). Es beinhaltet nicht nur „reine“ rechtswidrige Handlungen im staatlichen Verwaltungsbereich, sondern auch mehrere als „rechtswidrig“ deklarierte Taten, die bestimmten Straftaten ähneln, beispielsweise:

- geringfügige Entwendung von Eigentum (§ 50 OWiGB) bis zur Höhe des monatlichen Existenzminimums (ca. 38 Euro) durch einen Diebstahl, einen Betrug oder eine Unterschlagung, wenn keine die Tat qualifizierenden Umstände vorliegen,
- vorsätzliche Sachbeschädigung (§ 50(3) OWiGB), die keinen bedeutenden Schaden zur Folge hat,
- geringfügige Verletzung der öffentlichen Ordnung (§§ 174, 175 OWiGB) u. a.

Für genannte und andere Ordnungswidrigkeiten können die 16- und 17-jährigen Jugendlichen (§ 13 OWiGB) mit folgenden Sanktionen (in der Regel durch ein Gericht) belegt werden (gem. §§ 21, 22 OWiGB):

- Verwarnung,
- Geldstrafe (zwischen 10 und 500 Litas = 3 bis 145 Euro),
- Entziehung und Verfall,
- Entzug bestimmter Rechte (z. B. Fahrerlaubnis, Jagderlaubnis etc.).

Für Erwachsene ist darüber hinaus die Verhängung eines Arrests von bis zu 30 Tagen (§ 29 OWiGB) und die Amtsenthebung (§ 29(1) OWiGB) gesetzlich vorgesehen.

Es werden leider keine Statistiken darüber geführt, wie häufig Jugendliche Ordnungswidrigkeiten begehen und welche Sanktionen anschließend gegen sie verhängt werden.

3.6 Das Gesetz über minimale und mittlere Beaufsichtigung der Kinder

Das schon erwähnte neue Gesetz über minimale und mittlere Beaufsichtigung der Kinder sieht folgende Maßnahmen der minimalen Beaufsichtigung vor, die gegenüber Kindern mit auffälligem Verhalten angeordnet werden können (gem. § 6):

a) Arbeit eines Spezialisten mit dem Kind (Beratungen).
b) Weisung, ein Tageszentrum zu besuchen,
c) Weisung, an einem sozialen Bildungs-, Rehabilitations-, Integrations-, Präventionsprogramm oder an anderen ähnlichen Programmen teilzunehmen,
d) Weisung, bis zur Vollendung des 15. Lebensjahres am Schulunterricht teilzunehmen.

Die Maßnahmen von a) bis c) können für die Dauer von einem Monat bis zu einem Jahr angeordnet werden, aber nicht länger als bis zur Vollendung des 18. Lebensjahres.

Die einzige Maßnahme der mittleren Beaufsichtigung ist die Einweisung in ein (stationäres) Sozialisationszentrum für eine Dauer von bis zu 3 Jahren (§ 7). In dieses Sozialisationszentrum können auch Jugendliche nach dem StGB eingewiesen werden (Einweisung in ein spezielles Erziehungsheim, s. oben *Kapitel 3.3* bzgl. Erziehungsmaßnahmen).

Die Maßnahmen der minimalen Beaufsichtigung können gegenüber einem Kind angeordnet werden:

1) das eine Straftat begangen und das Alter der strafrechtlichen Verantwortlichkeit nach dem StGB noch nicht erreicht hat,
2) das ständig Ordnungswidrigkeiten begeht und das Alter der ordnungswidrigkeitsrechtlichen Verantwortlichkeit nach OWiGB noch nicht erreicht hat,
3) das eine Ordnungswidrigkeit begangen hat, mit einer ordnungswidrigkeitsrechtlichen Sanktion aber nicht geahndet wurde,
4) dessen Verhalten anderen Personen schadet und das andere Personen in Gefahr bringt, und wenn die Bemühungen der Erziehungsberechtigten und der örtlichen Gemeinde für die positive Änderung seines Verhaltens nicht ausreichen,
5) das ständig nicht lernt oder die Schule schwänzt (§ 8 Abs. 1).

Die genannten Maßnahmen dürfen erst dann angeordnet werden, wenn die Schule alle Möglichkeiten zu Hilfen nach dem Bildungsgesetz ausgeschöpft hat (§ 8 Abs. 2).

Eine Einweisung in ein Sozialisationszentrum kann in den Fällen 1) bis 3) angeordnet werden sowie dann, wenn auf vorangegangene Maßnahmen der minimalen Beaufsichtigung keine positiven Verhaltensänderungen folgten (§ 8 Abs. 3). Diese Maßnahme wird normalerweise gegenüber Jugendlichen von 14 bis 18 Jahren angeordnet, kann aber ausnahmsweise auch gegenüber jüngeren Kindern angeordnet werden, wenn durch das Verhalten des Kindes eine reale Gefahr für das Leben, die Gesundheit oder das Eigentum anderer Personen entsteht (§ 7).

Alle Maßnahmen werden nicht durch ein Gericht, sondern durch die Direktoren der zuständigen Stadtverwaltungen angeordnet, eine Einweisung in ein Sozialisationszentrum setzt allerdings die Erlaubnis des Gerichtes voraus (§ 9). Aus der Sicht des Rechtsstaatsprinzips ist diese Anordnungsbefugnis sehr fragwürdig, und es ist noch nicht klar, wie die Regelungen in der Praxis umgesetzt werden.

4. Jugendgerichtsbarkeit und Jugendverfahren

Das neue Strafprozessgesetzbuch (StPGB) trat zusammen mit dem StGB am 01.05.2003 in Kraft. In der Strafprozessordnung sind jedoch nur sehr wenige Regelungen für straffällige Jugendliche vorgesehen.

In Litauen gibt es keine eigenständigen Jugendgerichte und auch kaum Spezialisierungen in Jugendstrafsachen bei der Polizei, der Staatsanwaltschaft und den Gerichten. In größeren Gerichten und in einigen Staatsanwaltschaften sind besonders bestimmte Beauftragte für Jugendstrafsachen zuständig, diese bearbeiten allerdings nebenbei auch noch andere Strafsachen. Bei der uniformierten Polizei gibt es eine Abteilung für Jugendkriminalitätsprävention (Inspektoren für Jugendwesen); bei der Kriminalpolizei gibt es keinerlei Spezialisierung für Jugendsachen.

Das StPGB sieht einige spezielle Regelungen für Jugendliche vor, die aber nicht wie im StGB in einem Abschnitt zusammengefasst, sondern über das gesamte Gesetz verteilt sind.

Die Öffentlichkeit einer Gerichtsverhandlung kann ausgeschlossen werden, wenn der Beschuldigte ein Jugendlicher ist (§ 10 StPGB).

In Jugendstrafsachen ist die Anwesenheit eines Rechtsanwalts obligatorisch (§ 51 Abs. 1 P. 1 StPGB). Ein genereller Verzicht des Jugendlichen auf einen Rechtsanwalt kann durch den Untersuchungsbeamten, den Staatsanwalt oder den Richter (bzw. das Gericht) abgelehnt werden (§ 52 Abs. 2 StPGB). Die gesetzlichen Vertreter des Jugendlichen (Eltern, Fürsorger, Betreuer) können sich am Strafprozess beteiligen, wenn diese Beteiligung den Interessen des Jugendlichen nicht widerspricht (§ 53 StPGB). Gesetzliche Vertreter haben im Strafprozess bestimmte, gesetzlich festgelegte Rechte und Pflichten (§ 54 StPGB).

Neben den allgemeinen Maßnahmen zur Sicherstellung der Strafverfolgung und Strafvollstreckung existiert eine speziell für Jugendliche vorgesehene Maß-

nahme: die Übergabe zur Beaufsichtigung an die Eltern, Betreuer oder andere natürliche oder juristische Personen, die sich um Kinder kümmern (§§ 120, 138 StPGB). Untersuchungshaft darf gegenüber Jugendlichen maximal bis zu einer Dauer von 12 Monaten angeordnet werden (im Vergleich zu 18 Monaten bei Erwachsenen; § 127 StPGB). Die Erstanordnung der Untersuchungshaft ist bei Erwachsenen und bei Jugendlichen nur für eine Dauer von bis zu 3 Monaten möglich. Im Gesetz sind keine Sonderregelungen für die Untersuchungshaft bei Jugendlichen vorgesehen.

Das Gesetz verbietet der Strafjustiz, Daten straftatverdächtiger Jugendlicher oder jugendlicher Opfer zu veröffentlichen (§ 177 StPGB). Bei den Erwachsenen ist eine Veröffentlichung in Ausnahmefällen mit Zustimmung des Staatsanwaltes möglich.

Für die Vernehmung der jugendlichen Straftatverdächtigten, Beschuldigten, Opfer und Zeugen sieht das Gesetz einige zusätzliche Einschränkungen vor.

Zur Vernehmung eines beschuldigten Jugendlichen kann der Vertreter des Amtes für Kindesrechtsschutz oder ein Psychologe geladen werden. Sie sollen helfen, den Jugendlichen unter Berücksichtigung seiner sozialen und geistigen Reife zu vernehmen (§ 188 Abs. 5 StPGB; § 272 Abs. 4 StPGB).

Jugendliche Opfer und Zeugen werden vom Untersuchungsrichter befragt, wenn der gesetzliche Vertreter, der Rechtsanwalt oder der Staatsanwalt dieses im Interesse des Kindes beantragt (§ 186 Abs. 1 StPGB). Sie werden im Untersuchungsverfahren normalerweise nur einmal vernommen. Dabei kann eine Audio- oder Videoaufnahme gemacht werden. Der Untersuchungsrichter soll unerlaubte Einwirkungen auf jugendliche Opfer und Zeugen durch den Angeklagten oder seinen Anwalt verhindern. Jugendliche Zeugen und Opfer werden zur Gerichtsverhandlung nur in Ausnahmefällen geladen (§ 186 Abs. 2 StPGB). Wenn die Gefahr besteht, dass der Angeklagte einen negativen Einfluss auf jugendliche Opfer oder Zeugen ausüben könnte, kann der Untersuchungsrichter ihm die Teilnahme an der Vernehmung der Jugendlichen untersagen (§ 186 Abs. 3 StPGB). Wenn allen Prozessbeteiligten (mit der Ausnahme des Vertreters des Amtes für Kindesrechtsschutz und des Psychologen) der Aufenthalt im Vernehmungsraum nicht gestattet wird, dann muss eine Audio- oder Videoaufnahme hergestellt und die Möglichkeit, die Vernehmung von einem anderen Raum zu verfolgen sowie Fragen zu stellen, geschaffen werden (§ 186 Abs. 4 StPGB).[24] Zu der Vernehmung muss[25] auf Initiative des Staatsanwalts oder des Untersuchungsrichters auch der Vertreter des Amtes für Kindesrechtsschutz oder ein Psychologe geladen werden. Sie sollen helfen, den Jugendlichen unter Berücksichtigung seiner sozialen und geistigen Reife zu vernehmen (§ 186 Abs. 5 StPGB). Falls ein jugendlicher Zeuge zur Gerichtsverhandlung

24 Diese Regelung ist neu und gilt seit dem 21.7.2007.

25 Bis zum 21.7.2007 war diese Vorschrift als „Kann-Bestimmung“ ausgestaltet.

geladen wird, muss an der Vernehmung ein Vertreter des Amtes für Kindesrechtsschutz oder ein Psychologe beteiligt werden (§ 280 StPGB).

5. Strafzumessungspraxis – Teil I: Informelle Reaktionen

2008 wurden von 3.627 ermittelten jugendlichen Straftätern (noch als Jugendliche) 1.263 (34,8 %) zu einer Strafe verurteilt (s. oben *Abb. 1*), 2 (bis Mitte 2008) Jugendliche wurden freigesprochen, gegen 476 (13,1 %) Jugendliche wurde eine Erziehungsmaßnahme verhängt (s. unten *Tabelle 1*). Es ist nach der litauischen Statistik leider nicht feststellbar, wie der Strafprozess für die restlichen 1.886 Jugendlichen (52 %) ausgegangen ist. In Betracht kommen alle Diversionsmöglichkeiten (s. oben *3.2.* zur Diversion), das Verfahren kann aber auch aus anderen Gründen eingestellt worden sein. Problematisch ist auch, dass die Gerichte in ihrer Statistik nur diejenigen Personen als „Jugendliche" zählen, die zum Zeitpunkt der Verurteilung noch Jugendliche sind.

6. Strafzumessungspraxis – Teil II: Jugendgerichtliche Sanktionen und Anwendungspraxis seit 1980

Nach den umfangreichen Reformen des alten StGB in den Jahren 1992 bis 1995 verblieben im litauischen Sanktionensystem nur noch zwei Alternativen: die Freiheitsstrafe oder deren Aussetzung zur Bewährung. Zwei weitere theoretische Alternativen – die „Besserungsarbeit" und die Geldstrafe – verloren in der Praxis bald ihre Bedeutung.[26]

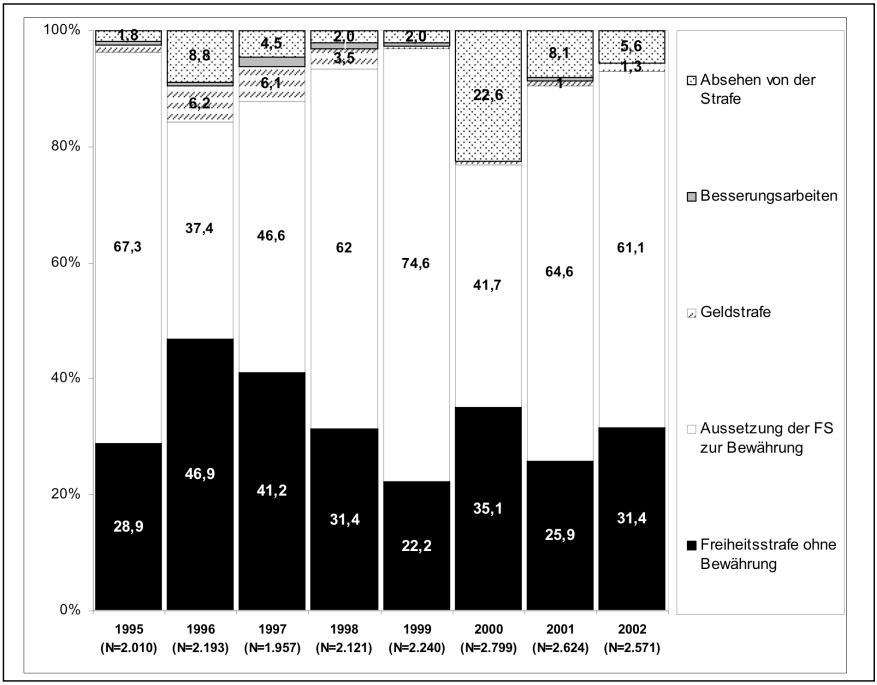
Im Rahmen der „Besserungsarbeit" – einer typisch sowjetischen Strafe – wurde der Bestrafte weiterhin bei seiner Arbeitsstelle beschäftigt, von seinem Lohn wurden jedoch für die Dauer von zwei Monaten bis zu zwei Jahren 5-20% einbehalten. Schnell wurde deutlich, dass die Voraussetzungen für diese Strafart in der freien Marktwirtschaft nicht erfüllbar sind. Zum einen sind die meisten Betriebe privatisiert worden und wollen einen Straftäter in der Regel nicht mehr weiterbeschäftigen. Zum anderen kann eine Arbeitstelle nicht garantiert werden; eine derartige Garantie wurde allerdings für die Vollstreckung der Besserungsarbeit vorausgesetzt. Das neue StGB schaffte entsprechend diese Strafe ab und führte die gemeinnützige Arbeit ein. Zu Sowjetzeiten und unmittelbar nach der Wende hatte der Anteil der Besserungsarbeiten ca. 25% an allen Sanktionen betragen.

Die Geldstrafe spielte in der Sanktionierungspraxis nach dem alten StGB kaum eine Rolle. Ein Grund dafür war das für die litauischen Verhältnisse sehr hohe gesetzliche Minimum der Geldstrafe, das schon immer wegen des Bestre-

26 Zur Strafrechtsentwicklung in Litauen vgl. *Lammich* 1994; *Lammich/Piesliakas* 1994; *Piesliakas/Senkievicus* 1994.

bens nach scharfen strafrechtlichen Sanktionen sehr hoch war und vom 24.09.1996 bis zum 09.10.2001 das Hundertfache des monatlichen Existenzminimums betrug (aktuell wären das umgerechnet ca. 3.620 Euro). Niedrige Einkommen und Verarmung stellten allgemein die Anwendung der Geldstrafe in Frage.

Abbildung 3: Gegenüber Jugendlichen verhängte Strafen 1995-2002 (in %)



Die Sanktionierungspraxis für Jungendliche ähnelte derjenigen für Erwachsene bis zum 1.5.2003 stark. Andere Alternativen zur Freiheitsstrafe als die Aussetzung zur Bewährung existierten praktisch kaum. Der Anteil der gegenüber Jugendlichen verhängten unbedingten Freiheitsstrafen lag 1995-2002 zwischen 22,2% (1999) und 46,9% (1996) (s. *Abb. 3*).[27] Das Gesetz sah im Vergleich zu den Erwachsenen bei Jugendlichen günstigere Voraussetzungen für die Aussetzung der Freiheitsstrafe zur Bewährung vor, diese Möglichkeit wurde bei den Jugendlichen entsprechend häufiger genutzt. Der Anteil derer, bei denen von

27 Vgl. *Dünkel/Sakalauskas* 2001; *Sakalauskas* 2001a; *Sakalauskas* 2001b; *Sakalauskas* 2003; Juvenile Justice Programme in Lithuania.

einer Strafe abgesehen wurde, war im Jahr 2000 wegen einer Amnestie, die statistisch als „Absehen von Strafe“ erfasst wurde, erhöht. Die Erziehungsmaßnahmen spielten keine Rolle in der Sanktionierungspraxis, weil für ihre Anwendung das Gesetz strenge Voraussetzungen vorsah und unter anderem ihre Vollstreckung gesetzlich nicht geregelt war.

Das Inkrafttreten des neuen StGB veränderte die Sanktionierungspraxis. In der *Tabelle 2* sind die gegenüber Jugendlichen verhängten formellen Sanktionen (für Verbrechen oder Vergehen) dargestellt. In der *Abbildung 1* (s. *oben*) sieht man, dass die Anzahl der verurteilten Jugendlichen 2003-2008 insgesamt von 2.571 auf 1.263 gesunken ist, da häufiger „informelle“ Sanktionen (Erziehungsmaßnahmen sowie andere Formen der Entlassung aus der strafrechtlichen Verantwortlichkeit) verhängt wurden,[28] die allerdings statistisch nicht erfasst werden (s. *oben Kapitel 5*).

28 In Litauen wird der Begriff „informelle“ versus „formelle“ Sanktionen nicht verwendet, jedoch entspricht die Verhängung von Erziehungsmaßnahmen in Verbindung mit der „Entlassung aus der strafrechtlichen Verantwortlichkeit“ der richterlichen Diversion in westeuropäischen Ländern.

Tabelle 2: Gegenüber verurteilten Jugendlichen verhängte Strafen in Litauen

	2004	2005	2006	2007	2008
Insgesamt verurteilte Jugendliche	**1.690**	**1.424**	**1.284**	**1.189**	**1.263**
Insgesamt verhängte Strafen	**1.690**	**1.421**	**1.285**	**1.195**	**1.263**
davon:					
Freiheitsstrafe ohne Bewährung	**327** 19,0%	**408** 29,0%	**353** 27,0%	**330** 27,6%	**390** 30,9%
Aussetzung der Freiheitsstrafe zur Bewährung	**682** 40,0%	**379** 27,0%	**403** 32,0%	**394** 33,0%	**328** 26,0%
Entlassung von der Strafe	**32** 2,0%	**15** 1,0%	**4** 0%	**7** 0,6%	**2** 0,2%
Arrest	**110** 7,0%	**145** 10,0%	**50** 4,0%	**51** 4,3%	**75** 5,9%
Aussetzung des Arrestes	**335** 20,0%	---	---	---	---
Geldstrafe	**108** 6,0%	**114** 8,0%	**66** 5,0%	**45** 3,8%	**64** 5,1%
Gemeinnützige Arbeit	**96** 6,0%	**28** 2,0%	**21** 2,0%	**8** 0,7%	**12** 1,0%
Freiheitsbeschränkung	---	**329** 23,0%	**333** 26,0%	**360** 30,1%	**392** 31,0%
Andere	0	**6** 0,4%	**54** 4,0%	0	0

Es wird deutlich, dass die Aussetzung der Freiheitsstrafe zur Bewährung die meist genutzte Sanktionierungsart geblieben ist. Sie wird jährlich in ca. 26% bis 40% aller Fälle genutzt. An zweiter Stelle liegt die unbedingte Freiheitsstrafe (20-30%). In 2004 spielte auch die Aussetzung des Arrestes noch eine deutliche Rolle in der Sanktionierungspraxis. Die Möglichkeit, eine Geldstrafe und einen Arrest zur Bewährung auszusetzen, wurde durch eine Gesetzesänderung zum 13.07.2004 für Erwachsene und Jugendliche abgeschafft. Gleichzeitig wurde für die Jugendlichen die Strafe der „Freiheitsbeschränkung“ (Hausarrest) eingeführt, die vermutlich in der Praxis die Aussetzung des Arrestes ersetzt. Die gemeinnützige Arbeit wird, ebenso wie die Geldstrafe und der Arrest, selten verhängt.

Die Verhängung der Erziehungsmaßnahmen in der Praxis ist in *Tabelle 3* dargestellt.

Tabelle 3: Gegenüber Jugendlichen verhängte Erziehungsmaßnahmen

Erziehungsmaßnahmen	2004	2005	2006	2007	2008
Verwarnung	163	99	155	145	110
Wiedergutmachung des materiellen Schadens oder dessen Beseitigung	52	19	21	20	23
Gemeinnützige erzieherische Arbeit	96	51	128	64	42
Übergabe zur Erziehung und Beaufsichtigung	142	42	57	35	19
Verhaltensbeschränkung	526	470	622	525	407
Einweisung in ein spezielles Erziehungsheim	5	12	3	6	0
Insgesamt Erziehungsmaßnahmen:	**984**	**693**	**986**	**795**	**601**
Insgesamt Personen:	**---**	**599**	**723**	**624**	**476**

Über 50% aller angeordneten Erziehungsmaßnahmen sind Verhaltensbeschränkungen. Es folgen Verwarnungen und die gemeinnützige erzieherische Arbeit.

Die Einweisung in ein spezielles Erziehungsheim erfolgt in der Praxis sehr selten. Zurzeit existieren in Litauen vier derartige Erziehungsheime (drei für männliche und eins für weibliche Jugendliche), in denen jeweils nur wenige wegen Straftaten verurteilte Jugendliche untergebracht sind. Die zahlenmäßig weit überwiegende Population kommt (erstaunlicherweise ohne Gerichtsentscheidung) aus dem Bereich der Jugendhilfe (jeweils ca. 30-40).[29]

Es ist nur begrenzt möglich, den Stellenwert der Erziehungsmaßnahmen in der Sanktionierungspraxis des Jugendstrafrechts zu beurteilen. Es existiert keine allgemeine Statistik, die alle insgesamt abgeurteilten straffälligen Jugendlichen und alle nach dem Jugendstrafrecht abgeurteilten Personen enthält. Im Jahr 2008 wurden z. B. bei 13,1 % (476 von 3.627, s. *Abb. 1* und *Tabelle 1*) aller ermittelten Straftäter eine oder mehrere Erziehungsmaßnahmen verhängt. Da allerdings nicht exakt bekannt ist, welcher Anteil der ermittelten Straftäter letztlich überhaupt abgeurteilt wird, und weil, wie *oben unter 5.* erwähnt, in die Statistik über Jugendliche nur die Jugendlichen aufgenommen werden, die zum Zeitpunkt der Aburteilung noch Jugendliche waren, kann der Anteil der Erziehungsmaßnahmen an allen jugendstrafrechtlichen Sanktionen nicht genau ermittelt werden.

29 Über Jugendhilfe in Litauen vgl. *Oberloskamp* 2005.

Allgemein kann man feststellen, dass nach dem Inkrafttreten des neuen StGB in der jugendstrafrechtlichen Sanktionspraxis einige Veränderungen eingetreten sind. Die Freiheitsstrafe wird seltener verhängt. Das sieht man besonders deutlich, wenn man die absoluten Zahlen vergleicht. So wurde z. B. 2002 eine unbedingte Freiheitsstrafe gegenüber 824 Jugendlichen verhängt und damit mehr als doppelt so häufig wie im Jahr 2007 (330). Weiterhin werden Strafen häufiger verhängt als Erziehungsmaßnahmen.

7. Regionale Besonderheiten und Unterschiede in der Praxis

Es sind in Litauen keine regionale Besonderheiten und Unterschiede zu bemerken, weil das Land relativ klein ist (3,35 Mio. Einwohner, 65.000 qm Fläche).

8. Heranwachsende (18- bis 21-Jährige) im Jugend- oder Erwachsenenstrafrecht – Rechtliche Regelungen und Strafzumessungspraxis

§ 81 Abs. 2 StGB sieht eine mögliche Anwendung des Jugendstrafrechtes auf 18- bis 20-jährige Heranwachsende vor, wenn das Gericht unter Berücksichtigung der Tatumstände, ggf. unter Zugrundelegung eines Gutachtens hinzugezogener kompetenter Fachleute, die Entscheidung trifft, dass der Heranwachsende nach seiner sozialen Reife einem Jugendlichen gleich steht und durch die Anwendung der besonderen Bestimmungen des Jugendstrafrechts die in § 80 StGB genannten Ziele besser erreicht werden können.

Gegenüber Heranwachsenden können in diesem Fall alle Erziehungsmaßnahmen und Strafen sowie andere Regelungen des Jugendstrafrechtes angewandt werden, mit der Ausnahme der zwei Erziehungsmaßnahmen, deren Anwendung (und Vollstreckung) nach dem Eintritt der Volljährigkeit nicht mehr möglich ist: die Übergabe zur Erziehung und Beaufsichtigung (§ 82 Abs. 1 Nr. 4 StGB) und die Einweisung in ein spezielles Erziehungsheim (§ 82 Abs. 1 Nr. 6 StGB).

Es gibt leider keine statistischen Daten (bzw. Forschungsergebnisse) dazu, wie häufig die Möglichkeit der Anwendung von Jugendstrafrecht auf Heranwachsende in der Praxis genutzt wird. Nach persönlichen Mitteilungen von Richtern ist dieser Paragraph in der Praxis weitgehend irrelevant, weil für die Richter (sowie für die in diesem Paragraphen genannten „Fachleute“) Kriterien der sozialen (Un)Reife der Jugendlichen fehlen und sie auch nicht entwickelt, wissenschaftlich erarbeitet oder durch die Rechtsprechung definiert werden.

9. Überweisung von Jugendlichen an Erwachsenengerichte

Wie schon erwähnt gibt es in Litauen keine speziellen Jugendgerichte, sondern lediglich Vorgaben für Spezialisierungen auf der Ebene der Richter und Staats-

anwälte, die jedoch auch nicht in allen Bezirken umgesetzt werden. Auch diese spezialisierten Richter und Staatsanwälte sind dann jeweils noch für weitere Straftaten zuständig und nicht nur für Jugendstrafsachen. Deswegen kann man in Litauen nicht zwischen Jugend- und (oder) Erwachsenenengerichten differenzieren.

10. Vorläufige Unterbringungen im Erziehungsheim und in der Untersuchungshaft

Die Untersuchungshaft ist in Litauen durch ein spezielles Untersuchungshaftgesetz (UGH) geregelt.[30] Zurzeit gibt es in Litauen vier Untersuchungshaftanstalten: jeweils eine in Šiauliai und in Kaunas (erst 2004 eingerichtet), eine Abteilung in Vilnius (im Gefängnis) und eine Abteilung in Kaunas Jugendstrafanstalt. In allen Untersuchungshaftanstalten werden auch Jugendliche untergebracht, die meisten befinden sich jedoch in der Abteilung für Jugenduntersuchungshaft in der Jugendstrafanstalt Kaunas.

§ 10 UHG legt eine separate Unterbringung der jugendlichen Untersuchungsgefangenen fest. Nach der alten Fassung des Gesetzes (§ 12) war es noch möglich, mit der Genehmigung des Staatsanwaltes die Jugendlichen gemeinsam mit den Erwachsenen unterzubringen, die neue Fassung sieht eine strikte Trennung vor. Den Jugendlichen stehen täglich mindestens 2 Stunden Hofgang (§ 29 UHG), 4 Mahlzeiten und einmal pro Woche eine Einkaufsmöglichkeit zu. Jedem Untersuchungsgefangenen müssen in der Zelle mindestens 5 qm zur Verfügung gestellt werden.[31] Diese Regelung gilt für alle Untersuchungshaftgefangenen, für Jugendliche gibt es diesbezüglich keine speziell auf Jugendliche zugeschnittenen Sonderbestimmungen. Die Hausordnungen der Untersuchungshaftanstalten regeln darüber hinaus ausführlich alle Aspekte der Untersuchungshaft: das Aufnahmeverfahren, die Einrichtung der Zellen, die Kommunikation mit der Außenwelt, den Tagesablauf, das Entlassungsverfahren etc.

Es gibt in Litauen noch keine Diskussion über mögliche Alternativen zur „normalen" geschlossenen Untersuchungshaft („Untersuchungsheime" u. ä.). In der StPGB sind nur wenige ambulante Alternativen (s. oben unter *4.*) vorgesehen, die bis auf die „Übergabe zur Beaufsichtigung" (siehe oben unter *4.*) in

30 Lietuvos Respublikos suėmimo vykdymo įstatymas (Untersuchungshaftgesetz der Republik Litauen, im Folgenden zitiert als UHG). 18.01.1996, Nr. I-1175 (Žin., 1996, Nr. 12-313), in der Fassung vom 1.7.2008, Nr. X-1660 (Žin., 2008, Nr. 81-3172), in Kraft getreten am 1.4.2009. Die Einzelheiten der Unterbringung in einer Untersuchungshaftanstalt regelt die Hausordnung der Untersuchungshaftanstalten vom 7.9.2001.

31 Lietuvos Respublikos teisingumo ministro įsakymas dėl kardomojo kalinimo vietų vidaus tvarkos taisyklių patvirtinimo (Die Verordnung des Justizministers der Republik Litauen über die Bestätigung der Hausordnung der Untersuchungshaftanstalten). 7.9.2001, Nr. 178 (Žin., 2001, Nr. 78-2741).

erster Linie auf erwachsene Straftäter zugeschnitten sind. Es wird statistisch nicht erfasst, wie häufig und welche Maßnahmen zur Sicherstellung der Strafverfolgung und Strafvollstreckung gegenüber Jugendlichen verhängt werden.

11. Heimerziehung und Jugendstrafvollzug – Rechtliche Aspekte und der Umfang junger Täter in freiheitsentziehenden Sanktionen

Während zum Ende des Jahres 2002 noch 306 Jugendliche (222 Verurteilte und 84 Untersuchungsgefangene, s. *Tabelle 4*) inhaftiert waren, reduzierte sich die Zahl bis Ende 2008 auf 200 Jugendliche (143 Verurteilte und 57 Untersuchungsgefangene, Berechnet auf 100.000 Einwohner[32] dieser Altersgruppe gab es damit Anfang 2009 in Litauen ca. 99 (2002 war es noch 137) jugendliche Strafgefangene.

Ungefähr die Hälfte der verurteilen (männlichen) Jugendlichen hat eine Freiheitsstrafe von 1 bis 3 Jahren zu verbüßen, etwa ein Drittel wurde zu 3 bis zu 10 Jahren verurteilt. Die durchschnittliche Dauer der von den Gerichten verhängten Freiheitsstrafen gegenüber Jugendlichen betrug im Jahr 2008 3 Jahre. Die durchschnittliche Dauer der real verbüßten Freiheitsstrafen war im Jahr 2008 allerdings kürzer: sie betrug durchschnittlich 1 Jahr und 2 Monate.[33] Gründe dafür waren vorzeitige Entlassungen aus dem Strafvollzug zur Bewährung und Amnestien. Gem. § 157 Abs. 3 StVollstrGB, können jugendliche Verurteilte aus dem Strafvollzug zur Bewährung entlassen werden, wenn sie mindestens ein Drittel der verhängten Freiheitsstrafe verbüßt haben.

Die in Litauen geltenden Rechtsvorschriften sehen nur wenige Besonderheiten für den Jugendstrafvollzug vor. Kapitel XI. Abschnitt 3 des neuen litauischen Strafvollstreckungsgesetzbuches (StVollstrGB)[34] legt unter der Überschrift „Jugendbesserungshäuser“ eine generelle Trennung von Erwachsenen und Jugendlichen in den Strafanstalten fest (§ 70 Abs. 2 StVollstrGB). Jugendliche Strafgefangene haben mehr Rechte im Bereich der Kommunikation mit der Außenwelt und werden nur in einfachen und leichten (Regime-)Gruppen untergebracht (§ 78 StVollstrGB). Weitere Besonderheiten (wie z. B. ein spezielles Vollzugsziel, besondere Anforderungen für das Personal u. ä.) existieren nicht. Nur im Bereich der Disziplinarmaßnahmen sieht das StVollstrGB für Jugendliche Milderungen vor: Die Höchstdauer für einen Arrest in einer Disziplinarzelle ist auf

32 Litauen hatte Anfang des Jahres 2009 ca. 3,35 Mio. Einwohner, darunter 202.336 Jugendliche.

33 Juvenile Interrogation Facility – Correction Facility: www.nti-pn.lt/statistics.html.

34 Lietuvos Respublikos bausmių vykdymo kodeksas (Das Strafvollstreckungsgesetz der Republik Litauen). 27.6.2002, Nr. IX-994 (Žin., 2002, Nr. 73-3084), mit späteren Änderungen.

10 Tage beschränkt (gegenüber 15 Tagen bei Erwachsenen, § 142 Abs. 1 P. 4 StVollstrGB) und die Anwendung des unmittelbaren Zwangs ist gegenüber Jugendlichen eingeschränkt (er kann regelmäßig nur dann angewendet werden, wenn der Jugendliche selbst angreift oder mit einer Waffe Widerstand leistet, vgl. § 121-124 StVollstrGB).

Tabelle 4: Gefangene Jugendliche in Litauen 1996-2008 (jeweils am Ende des Jahres)

	Strafgefangene (verurteilte) Jugendliche	Jugendliche in der U-Haft	Anteil der inhaftierten Jugendlichen im Strafvollzug %
1996	279	244	3,9
1996	234	205	3,6
1997	348	203	4
1998	265	178	3,1
1999	199	185	2,7
2000	69	132	2,1
2001	183	116	2,6
2002	222	84	2,8
2003	119	75	2,4
2004	124	60	2,3
2005	123	56	2,2
2006	114	57	2,1
2007	131	61	2,5
2008	143	57	2,5

Die litauischen Verordnungen über die Ernährung der Gefangenen sehen bei Jugendlichen vier Mahlzeiten am Tag vor.

Für die jugendlichen Strafgefangenen männlichen Geschlechts gibt es in Litauen eine getrennte Einrichtung, Mädchen verbüßen ihre Freiheitsstrafe in einer getrennten Abteilung des Frauenstrafvollzuges.[35]

35 Die Anzahl der inhaftierten Mädchen ist sehr gering (am 1.1.2009 waren 3 Mädchen inhaftiert).

Das neue StVollstrGB sieht ebenso wie das alte Gesetz vor, dass Jugendliche mit dem 18. Geburtstag in die Strafanstalten für Erwachsene verlegt werden. Nur im Wege der Belohnung dürfen sie in der Jugendstrafanstalt bleiben, jedoch in jedem Fall nur bis zur Vollendung des 21. Lebensjahres. Aber auch in diesem Fall gelten für sie die Vorschriften des Erwachsenenstrafvollzugs (§ 81 StVollstrGB). Diese Regelung kann zwar als besonders sinnlos betrachtet werden, wurde aber dennoch in das neue Gesetz übernommen. Sie widerspricht grundsätzlich dem Ziel der Erziehung.

Verurteilte im Alter von 18 bis einschließlich 20 Jahren, die mehrfach wiederholt gegen die Regeln des Strafvollzugs verstoßen haben, können zur Verbüßung der Strafe aus der Jugendstrafanstalt in eine Erwachsenenstrafanstalt (in eine einfache (Regime-)Gruppe) verlegt werden (§ 82 StVollstrGB). Hat der Strafgefangene das 21. Lebensjahr vollendet, so wird er unmittelbar in die Strafanstalt (Besserungshaus) für Erwachsene verlegt.

12. Heimerziehung und Jugendstrafvollzug – Entwicklung von Behandlungs- und Ausbildungsprogrammen sowie erzieherische Maßnahmen in der Praxis

Wie bereits erwähnt, sehen das litauische StVollstrGB und das UHG nur wenige Besonderheiten für den Jugendstrafvollzug und die Jugenduntersuchungshaft vor.

Gem. § 147 Abs. 1 StVollstrGB ist für Jugendliche bis zum vollendeten 16. Lebensjahr[36] obligatorisch eine Schulausbildung vorgesehen. In der Jugendstrafanstalt („Jugendbesserungshaus“) wird eine komplette Schule eingerichtet, wenn hier mindestens 80 Gefangene bis zum vollendeten 16. Lebensjahr untergebracht sind, die keinen Hauptschulausschluss vorweisen können. Liegt die Anzahl solcher Gefangenen zwischen 5 und 80, werden im Jugendbesserungshaus nur einzelne Schulklassen als Teil der in diesem Gebiet vorhandenen Schule gebildet. Die Kosten für die Schulgebäude und das Inventar trägt die Anstalt, die Pädagogen und die Bücher werden vom Bezirk bezahlt.

Die Jugendstrafanstalt in Kaunas hat auf eigene Initiative einige Programme zur sozialen Rehabilitation ausgearbeitet:[37] Programme zur individuellen Arbeit mit strafgefangenen Jugendlichen („Adaptionsprogramm“, Programm zur Entlassungsvorbereitung, Programm zur Verhaltensänderung in Zusammenarbeit mit den Eltern, Programm zur sozialen Unterstützung) und Programme für die Gruppenarbeit (Programm zur sozialen Integration in die Gesellschaft, Programm für Zivilcourage, Programm zur rechtlichen Bildung, Programm für die

36 Gem. Art. 41 Abs. 1 der Verfassung der Republik Litauen besteht bis zum 16. Lebensjahr Schulpflicht.

37 Vgl. Juvenile Integration Facility-Correction Facility. Juvenile Education and Rehabilitation. www.nti-pn.lt/education.html.

Ausbildung sozialer Werte, das Programm „Denke selbst“, Erste-Hilfe-Kurse, Kunsttherapie, Musiktherapie, Gewaltpräventionsprogramm, Selbstverletzungs- und Suizidpräventionsprogramm, Suchtpräventionsprogramm, Sportprogramm, Selbstbildungsprogramm, Computerkurse, Programm für die Stärkung der Werteeinstellungen und der Sozialbeziehungen). Es gibt leider keine Informationen darüber, wie diese Programme in der Praxis umgesetzt werden, wie sie von Jugendlichen anerkannt und empfunden werden und wie effektiv sie sind. Es ist auch anzumerken, dass diese „Programme“ eher nicht als standardisierte und formalisierte Rehabilitations- oder Resozialisierungsprogramme bezeichnet werden können – richtigerweise sollte man sie als Freizeit- oder Beschäftigungsmaßnahmen einordnen.

13. Aktuelle Reformdebatten und Herausforderungen an das Jugendstrafrechtssystem

In vielen Bereichen in Litauen (besonders innerhalb der staatlichen Strukturen) ist zu bemerken, dass nach dem EU-Beitritt viele Reformen „ihren Sinn verloren zu haben“ scheinen. Das gemeinsame und akzeptierte Ziel, der EU beizutreten, wirkte auf die Reformvorhaben wie ein Katalysator. Jetzt, da der Druck von außen nicht mehr vorhanden ist, wird häufig auch kein Grund mehr für (eigentlich dringende) Reformen gesehen. Mit dieser Entwicklung hat auch das Jugendstrafjustizsystem zu kämpfen. Ein neuer Katalysator könnte das Geld aus den Strukturfonds der EU sein, weil eigentlich noch großer Bedarf an weiteren Veränderungen besteht.

In diesem Zusammenhang ist zunächst anzumerken, dass das System der ambulanten Erziehungsmaßnahmen noch nicht ausreichend funktionsfähig ist. Es fehlt an Trägern und Projekten (vor allem für die erzieherische gemeinnützige Arbeit sowie für eine vernünftige Gestaltung der Freiheitsbeschränkung z. B. mit sozialen Trainings- oder Rehabilitationskursen), die diese Maßnahmen vollstrecken könnten.[38] Freie Träger sind bisher in das neue System noch überhaupt nicht integriert.

Die Einweisung in ein spezielles Erziehungsheim wirft Probleme auf, die in Litauen schon seit 15 Jahren nicht gelöst werden können. Die gesamte Infrastruktur und Organisation solcher Heime ist nach der alten Ideologie aufgebaut: große Gebäude, strenge Disziplin als Haupterziehungsmittel, fehlende rechtliche Grundlagen, fehlende wirksame Konzepte, keine Möglichkeit zur individuellen Arbeit, biologische Ansätze für die Erklärung des abweichenden Verhaltens etc. Ein Gesetzentwurf, der vor zwei Jahren entwickelt wurde und unter anderem auch den rechtlichen Status solcher Heime und ihre Organisation regeln sollte, konnte (bisher) wegen der fehlenden Konzeptionalisierung des ganzen Systems

38 Vgl. auch *Kietytė* 2005, S. 227 f.

nicht ausführlich diskutiert werden. Auch das neue Gesetz über die minimale und mittlere Beaufsichtigung der Kinder wird diese problematische Situation wohl kaum lösen.

Drittes wichtiges Problem ist die Anwendung des Jugendstrafrechts auf Heranwachsende. Das Gesetz sieht zwar diese Möglichkeit vor, sie wird jedoch in der Praxis kaum genutzt, weil Kriterien für die Feststellung der sozialen (Un-) Reife einer Person fehlen.

Weiterhin wird ein Bedarf für fachgemäße Mediation in Jugendstrafsachen gesehen. Die aktuell vorgesehene Möglichkeit zur Versöhnung zwischen Täter und Opfer schafft viel Raum für Manipulationen und schöpft die positiven Möglichkeiten dieser Maßnahme nicht aus. Für die jugendlichen Täter und auch für ihre Opfer wäre es sehr wichtig, eine Gelegenheit für ein tieferes Bearbeiten der Straftat (des Konflikts) zu schaffen, was nur mit der Beteiligung eines Mediators erreichbar scheint.

Der Jugendstrafvollzug sollte in Litauen erzieherisch aufgebaut werden. Die aktuellen rechtlichen Grundlagen sowie die Organisation des Jugendstrafvollzuges entsprechen den Erfordernissen der Resozialisierung und Rehabilitierung der Jugendlichen nicht. Der Jugendstrafvollzug unterscheidet sich rechtlich und organisatorisch nicht vom Erwachsenenstrafvollzug.

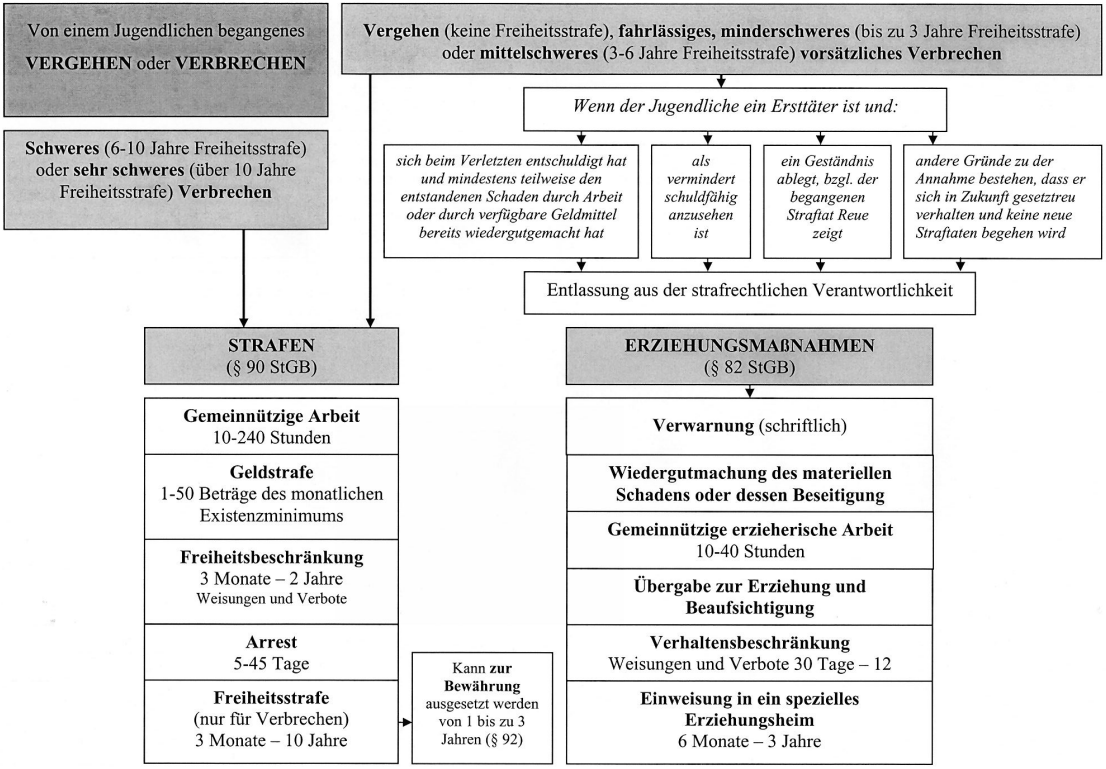
14. Zusammenfassung und Ausblick

In Litauen ist die registrierte Jugendkriminalität (bezogen auf die absoluten Zahlen der Straftaten und der ermittelten Straftatverdächtigen) in den letzten 15 Jahren gestiegen. Die Betrachtung der Kriminalitätsbelastungsziffern demonstriert hingegen, dass seit 1993 keine wesentlichen Veränderungen zu verzeichnen sind.

Das neue StGB, das am 01.05.2003 zusammen mit dem Strafprozessgesetzbuch und dem Strafvollstreckungsgesetzbuch in Kraft trat, hat im Wesentlichen das alte Jugendstrafrecht übernommen. Es enthält jedoch auch einige bedeutsame Änderungen: Das Jugendstrafrecht wurde systematisch in einem Abschnitt zusammengefasst, die Möglichkeiten der Anwendung von Erziehungsmaßnahmen wurde ausgeweitet, neue Strafen eingeführt und die Anwendung der Freiheitsstrafe eingeschränkt.

In der Praxis werden immer weniger Jugendliche formell verurteilt, und die Freiheitsstrafe spielt eine immer geringere Rolle. Die am häufigsten verhängte Sanktion bleibt jedoch nach wie vor die Aussetzung der Freiheitsstrafe zur Bewährung.

Übersicht 1: Strafen und Erziehungsmaßnahmen gegenüber Jugendlichen im litauischen StGB (in der Fassung vom 27.06.2008)



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The Netherlands

Anton M. van Kalmthout, Zarif Bahtiyar

1. Historical development and overview of the current juvenile justice legislation

The introduction of the Child Acts in 1905 made it possible for the state to intervene in cases in which parents neglect their educational duties. They also provided means for combating juvenile delinquency. These Acts are the foundation of the current system of child protection and juvenile criminal law in the Netherlands.

In the criminological literature, juvenile delinquency covers criminal offences committed by young persons under the age of 24. In comparison to the criminal notion of juvenile delinquency, this is a broader age range, as Dutch juvenile criminal law only covers criminal offences committed by under aged young persons who can be held liable under criminal law. This criminal liability of minors starts at the age of 12 years, and ends when a person turns 18. Therefore, no penalties can be imposed on young persons who are younger than 12 at the time of the offence. The fact that young persons cannot be prosecuted due to their young age is considered to be an irrefutable legal presumption. Young age thus lifts responsibility for one's own actions. As is the case with any boundary, this one, too, is arbitrary and often a matter of discussion, especially in light of the fact that more and more young children are becoming involved in serious offending.

Obviously, this state of affairs does not imply that these children are free to offend as they please. Offending by children under the age of 12 is reacted to through civil law rather than criminal law. Within this context, children are often taken into custody under civil law, which – when necessary – can go hand in hand with a care order. Also, these civil law measures are pronounced by the juvenile court judge. On the other hand, young persons over 12 years of age can

exhibit mental immaturity which in turn results in an inability on their behalf to comprehend the unlawfulness of their conduct.[1]

Contrary to many other countries, the Dutch legislator has chosen not to create a separate statutory regulation for juvenile criminal (procedural) law. The basic principle of the Dutch system is that the criminal (procedural) law for adults is also applicable to juveniles, as far as no deviated provisions are formulated. Regarding substantive criminal law, these deviated provisions are compiled in Title VIIIa of Book I of the Penal Code (hereinafter PC). The deviated procedural provisions can be found in Title II of Book IV of the Code of Criminal Procedure (hereinafter CCP). An important difference between the criminal proceedings of adults and juveniles is that the latter category has a separate type of judge – the juvenile court judge – who acts both as an examining and as a trial judge. Furthermore, in the criminal proceedings for juveniles the parents/ guardian and the Child Care and Protection Board are assigned an important role, and the powers of the lawyer are arranged differently concerning a few aspects. Another difference is that, in principle, juvenile criminal proceedings take place behind closed doors.

In addition to the stated sections of the PC and the CCP, there are other sources which are of relevance for juvenile criminal law, the most important being: the Youth Care Act[2] (with its Implementing Order and other orders and regulations), Youth Custodial Institutions Act, the Youth Custodial Institutions Regulations, the Convention on the Rights of the Child[3] and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules; 1985).

Besides the juvenile criminal procedural law, in principle the substantive juvenile criminal law is also similar to that for adults, except when separate provisions are included into the PC or other penal statutes. As far as deviated provisions for juveniles are applicable, these are based on the principle that – where possible – the interest of the juvenile has to be the first matter of importance. Therefore, the emphasis in juvenile criminal law is less on punishment and reprisal, and more on the protection and (re-)education of the young person.

This distinction in approach is especially expressed in the wider possibilities that Title VIIIa PC offers for settling a criminal offence out-of-court, and in the kind and severity of sanctions that can be imposed on a young person. Yet the

1 As far as this is not a matter of a poor development or a sick disturbance of one's mental faculties, on the basis of which special criminal measures can be imposed, it is under circumstances nevertheless a justification on the ground of excusable error in the law (error iuris) or in the facts (error facti).

2 Act of 22 April 2004. Date of commencement: 1st January 2005.

3 Approved by statute law of 24 November 1994, Stb. 1994, 862 and entered into force in the Netherlands on 8 March 1995.

difference to adult law has diminished considerably since the revision of the juvenile criminal law in 1995.[4] One major thought behind this revision was that today's youth is substantially more mature and can thus be better made more aware of their conduct and responsibilities. This does not alter the fact that the current sanctions system remains strongly imbued with educational principles: education- and work projects as an alternative to custodial punishments or fines; a custodial sentence (youth detention) with a maximum duration of one year for under 16-year-olds (regardless of offence-severity), and two years for 16 and 17-year-olds. These maximum periods also apply in cases of concurrence and recidivism, which is due to the fact that – contrary to the situation with adults – concurrence and recidivism are not seen as grounds for an increase in penalty in the juvenile criminal law. As a result of the relatively low maximum sentences that young offenders can receive – even for the most serious offences – these maxima are not reduced where an offense was "merely" attempted, prepared, unsuccessfully incited or committed in complicity, which would apply for adults under adult criminal law.

Another marked difference to adult criminal law is that, with the imposition of a custodial sentence or measure, the judge has an important (advising) voice in the decision on where and in which way the sentence or measure shall be enforced.

A further distinction from adult criminal law is that the judge can exercise his or her influence on the enforcement of a custodial sentence that he or she has imposed by releasing the young person on parole. The threat of having to serve the remainder of the sentence functions as the main incentive for properly fulfilling the conditions of conduct that the judge imposes. In the criminal law for adults, release on parole was abolished in 1989, and replaced by automatic early release after two-thirds of a sentence has been served. Since 1st July 2008 automatic release was abolished again and replaced by a system of conditional release based on individual prognoses including the possibility to impose directives and supervision by the probation service.[5]

There are two important exceptions to the rule that the special provisions of the PC are applicable to young persons aged 12 to 17 at the time of the offence. The first of these exceptions is that the judge can decide not to apply juvenile criminal law to young persons of 16 or 17 years of age, and to try them according to the provisions of adult criminal law instead. The other exception is that a young adult between the ages of 18 and 21 years can be tried as a minor if his or her personality and the circumstances in which the offence was committed deem this appropriate. These exceptions shall be discussed later on in this report in *Sections 8* and *9* respectively.

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4 For more regarding the revision in 1995, see inter alia: *Mintjes* 1995, p. 781-787; *Bartels* 1995, p. 69-75; *van der Laan* 1995, p. 242-247.

5 See for the reform in detail Parliamentary Documents I 2006-2007, 30 513, nr. D.

2. Trends in reported delinquency of children, juveniles and young adults

The period of 1960 to 1982 saw an increase of more than 100% in the absolute number of minor suspects who were heard by the police (from 22,900 to 48,900). Between 1983 and 1993 the number of police registered minors dropped from 45,500 in 1983 to just over 37,000 in 1993, which was again followed by a sharp rise, peaking at nearly 51,000 in 1996. During the period of 1997 to 2001 the number of minor suspects remained relatively stable, fluctuating around the 47,000 mark. Since 2002 there has again been a sharp increase in the number of minor suspects, reaching 65,000 in 2005. *Table 1* shows the number of suspects during the period 1980 to 2005. A distinction is made between boys and girls.

Table 1: Number of heard minor suspects during the period (×1.000)

Year	Total	Boys	Girls
1980	42.3	38.2	4.1
1981	44.9	40.4	4.5
1982	48.9	44.0	4.9
1983	45.5	40.8	4.7
1984	46.9	41.5	5.4
1985	46.6	40.6	6.0
1986	45.7	40.4	5.3
1987	42.7	37.5	5.2
1988	40.4	35.8	4.6
1989	39.4	35.3	4.1
1990	38.3	33.9	4.4
1991	39.7	35.0	4.7
1992	41.4	36.3	5.1
1993	37.1	32.6	4.5
1994	38.7	34.0	4.7
1995	41.4	35.8	5.6
1996	51.0	44.2	6.8

Year	Total	Boys	Girls
1997	47.3	40.8	6.5
1998	46.3	40.4	5.9
1999	48.2	41.6	6.7
2000	47.5	41.2	6.3
2001	47.2	39.8	7.4
2002	51.0	43.2	7.8
2003	55.2	46.7	8.6
2004	61.3	52.3	9.1
2005	64.5	53.6	10.8

Source: Central Bureau of Statistics (CBS).

The trend for boys meticulously mirrors the overall trend. This is attributable to the by far larger share of boys among all suspects (around 85% compared to 15% for girls). After a peak of around 44,000 in 1996, the number of heard criminal minor boys dropped again, stabilising at around 40,000 until 2001. Yet since 2002 there has been a sharp increase in the number of boys, reaching over 52,000 in 2004.

The number of heard minor female suspects in the 1995 to 2000 period was relatively stable at around 6,500 per year. However, since 2001 a relatively strong increase can be observed in the data, with the police hearing 10,000 suspect girls in 2005. The relative increase in the number of heard female minor suspects during the 1995 to 2005 period was stronger than was the case for boys (an increase of 93% compared to 50%).

It is obvious that we cannot draw any conclusions on the scale of juvenile offending solely on the basis of these police data, not least due to the possible distortion that could be caused by changes in reporting rates. Furthermore, it is not unthinkable that the police, due to increasing public concern about violence, have given extra priority to prevention. On the other hand, self report data and the almost stable willingness to report among the population are an indication that there has been an increase in offending by minors, albeit not to such a degree as the police statistics suggest.

The strong increase in the number of heard minors since 2002 can be attributed to the three main categories of offences:

- vandalism, or crimes against public order or the public authorities;
- violent crimes;
- property crimes.

The degree of the increase in registered crime is not uniform across all offence categories. Property crimes are the most common offences, followed by vandalism and public order offences. Between 1995 and 2004, the number of minors who were suspected of property offences fluctuated between 24,000 and 28,000 per year. With the exception of a peak in 1996, up to 2001 the number of minors suspected of property crimes slightly decreased, a trend that was not to persist. Since 2002 there has been an increase in the number of 12 to 17 year-old suspects who were heard for property offences, reaching nearly 28,300 in 2004. In that year, 43.5% of the total number of heard minors was suspected of a property crime.

With the exception of 1996, during the period 1997 to 2001 the number of 10 to 17-year-olds who were suspected of vandalism or public order offences was at around 11,000 each year. Yet, as was also the case with property crime, the figures have shown a strong increase since 2002. In 2004 over 19,100 minors were heard because they were suspected of an offence from this category (29.4% of the total number of heard 12 to 17-years-olds). Compared to 1995, where over 9,100 minors were heard as a result of vandalizing or an offence against public order and pubic authority, the number has more than doubled.

The increase within this category of offences during the 2001 to 2004 period can mostly be attributed to the sub-categories of public order and public authority offences, most especially the former. The number of offences against public order was in fact on the decrease from 1996 to 1998, from about 4,400 to just over 1,400. This period of decrease was followed by a slight increase up to 2,100 minor suspects in 2001. Yet in recent years, the rate of increase has gained momentum, with the number of minors suspected of an offence against public order more than tripling up to the year 2004 (7,100 registered suspects).

The number of minors who were heard for vandalism nearly doubled from 1995 to 2004, from almost 5,000 to 9,900. Until 1997, there was a strong and noticeable increase in the number of known cases of vandalism, which was followed by a period of relative statistical stability, with the figures for the years 1997 to 2001 fluctuating around 7,500 to 7,800 suspects. Since 2002 there has been a vast increase in the number of minors who were heard as a result of vandalism.

There has been a constant increase in the number of young suspects who are heard for violent offences. In 1995 roughly 6,400 minors were suspected of violent crimes. By 2004, the figure had increased by over 100% to 13,600. Accordingly, 21% of the 12 to 17 year olds who were heard by the police in 2004 were suspected of having committed a violent offence.

Within the category of violent crime, the two most frequent offences are assault and robbery. In 2004, over 7,000 minors were heard by the police for cases of assault (over 10% of all heard minor suspects), and over 2,600 minors were suspected of robbery (four percent of the total). The increase in violent offending since 1995 can mainly be attributed to the number of suspects of assault and of crimes against life and limb. Since 2001 the number of minors

heard for assault has remained reasonably stable (6,000-6,100). The police statistics sadly do not allow a distinction to be made between a between simple and grievous bodily harm.

Another large subgroup among violent offences that needs further explanation is the group of crimes against life. In 2004 over 2,700 minors were suspected of an offence from this category (over four percent of the total). This group of offences includes (not exhaustively) threat, attempted homicide/-murder, involuntary manslaughter and physical injuries.

Since the year 2000 it has been possible to register threats separately from other offences. In the period from 2000 to 2004, the share of threats within the group of crimes against life and persons fluctuated between 88% and 94%. The number of minors who were heard for a crime against life and persons amounted to over 1,000 in 1995, nearly 1,400 in 2000, and in 2004 the number was more than 2,700. Statistics show that the vast majority of offences in this category are threats. Since 2000 the number of registered threats has doubled from roughly 1,200 to more than 2,500 in 2004.[6]

42% of all 12 to 17 year old suspects are immigrants, of whom 18% are of western origin and 82% are of non-western origin. The share of immigrants among first time offenders is smaller than their share among repeat offenders. As *Table 2* below shows for the period of 2002 to 2004, about 39% of first time offenders were immigrants, while the figures for repeat offenders in the same period were at around 52%.

Table 2: Suspects (excluding HALT disposals) total and by type of suspects and by ethnic origin

	2002		2003		2004	
	Number	**%**	**Number**	**%**	**Number**	**%**
First time offenders, of whom	**15,259**	**100**	**16,461**	**100**	**18,363**	**100**
Autochthon	8,510	**60**	9,395	**60.6**	10,637	**60.9**
Immigrants, of whom:	5,672	**40**	6,108	**39.4**	6,829	**39.1**
Morocco	1,121	**7.9**	1,290	**8.3**	1,501	**8.6**
The Netherlands Antilles or Aruba	578	**4.1**	521	**3.4**	557	**3.2**
Surinam	915	**6.5**	895	**5.8**	1,064	**6.1**

6 *Eggen*/*van der Heide* 2006 (Paragraph 4.6 on Deliquency and investigation).

	2002		2003		2004	
	Number	**%**	**Number**	**%**	**Number**	**%**
Turkey	708	**5.0**	855	**5.5**	1,017	**5.8**
Other non-western	1,197	**2.2**	1,304	**2.3**	1,349	**2.3**
Western	1,153	**1,4**	1,243	**1.5**	1,341	**1.7**
Origin unknown	1,077	**7.6**	958	**6.2**	897	**5.1**
Repeat offenders, of whom:	**8,526**	**100**	**9,694**	**100**	**10,928**	**100**
Autochthon	3,940	**47.5**	4,657	**49.1**	5,202	**48.4**
Immigrants of whom:	4,350	**52.5**	4,835	**50.9**	5,557	**51.6**
Morocco	1,303	**15.7**	1,494	**15.7**	1,641	**15.3**
The Netherlands Antilles or Aruba	445	**5.4**	499	**5.3**	569	**5.3**
Surinam	727	**8.8**	769	**8.1**	801	**7.4**
Turkey	463	**5.6**	536	**5.6**	739	**6.9**
Other non-western	719	**1.3**	762	**1.3**	911	**1.6**
Western	693	**0.9**	775	**1.0**	896	**1.1**
Origin unknown	236	**2.8**	202	**2.1**	169	**1.6**

Source: See: *Blom*/*van der Laan* 2006.

3. The sanctions system (kinds of informal and formal interventions) and the sentencing practice[7]

When a sanction is defined as being a legally authorized negative reaction by the competent authorities to a committed offence, the Dutch sanctions system for juveniles comprises more than merely punishments and court ordered measures. Juvenile criminal law, to a larger extent than adult criminal law, also provides for informal sanctions that involve no formal judicial interference.

These extrajudicial sanctions have been developed especially to spare youngsters the defamatory and stigmatizing experience of formal proceedings and court appearances for as long as possible. Instead, the police and the Public Prosecution Department have been granted authority to give youngsters the opportunity to conclude their cases in a more informal manner under certain

7 Parts of the text under *Section* 3 are taken from *van Kalmthout* 2002.

conditions, by requiring them to render specific performances or to pay a certain sum of money, for which both law and practice offer numerous possibilities. Within this respect it is important to know that the Dutch Penal Code divide criminal offences in two categories: misdemeanours (*overtredingen*) and crimes (*misdrijven*). The principle penalties for misdemeanours which are committed by juveniles are the task penalty (community service and/or learning programmes) and a fine. Crimes can also be punished with juvenile detention.

3.1 Sanctions by the police

3.1.1 The conditional police dismissal

The police do not take further action against minor suspects in all cases. In many cases a warning, an unconditional dismissal or a conditional dismissal are deemed sufficient. Such (conditional) dismissals reflect the need to conclude cases involving youngsters with a minimum of damage and interference whenever possible. The most common conditions are that the youngster compensates the damage caused, or apologizes to the victim. Generally, such informal interventions have no legal basis; however there is one example of an exception.

Article 77e PC provides the basis for a special form of conditional dismissal. The Article states that the police, with permission from the public prosecutor, can suggest that a young suspect participate in a special project, which can consist of a range of different requirements, for instance repairing the caused damage, attending special courses, or performing community service. Many cities have founded special offices to organize and coordinate the so-called "HALT disposal", which is an out-of-court settlement offered by the Public Prosecutions Service to juvenile offenders involving community service or educational tasks. Participating in such a project means that no official report will be sent to the public prosecutor. The minor is not obliged to accept the offer from the police. However, if he does not, the case will be officially referred to the public prosecutor.

Not all offences are eligible for a HALT disposal. Rather, the offence must be one which is stated in a separate ministerial regulation.[8] This regulation focuses on light offending that falls under the category of "nuisance" behaviour, such as light forms of property offences, violence, arson, vandalism and street offences, illegally letting off fireworks and wanton behaviour. In many cases the seriousness of the offence will be determined by the damage that has been caused. Where the damage is higher than the amount stated in the regulation, participation in a HALT disposal will not be possible.

8 Ministerial regulation HALT offences, 25 January 1995, Stb.1995, 62, last changed on 15 September 2003.

In 1999 a special form of the HALT disposal – the so-called STOP disposal – was introduced for children under the age of 12 who have behaved in a way that would have been criminal had they been 12 or older. This disposal is not a penal measure and is not obligatory, but rather functions on a voluntary basis. The parents decide whether they (with their child) wish to participate in the measure. If they cooperate, they have to give written authority. The implementation is the responsibility of local HALT departments. After an experimental period, the STOP disposal was introduced nationally on 1st August 2001.

3.1.2 Out-of-court settlement with the police

In 1984, the legislator gave the police and the Public Prosecutions Department the authority to, under certain conditions, make a deal with the suspect so that prosecution could be avoided. The authority of the police concerning young offenders only relates to misdemeanours. The youngster can buy off a prosecution by paying an amount not exceeding 350 €. Adult suspects can also be offered a buy off for criminal offences at the same amount for crimes, which is not possible for youngsters. For criminal offences committed by youngsters, the legislator has provided for other alternatives such as the HALT disposal.

3.2 Settlement by the Public Prosecutions Department

When criminal proceedings involving a youngster cannot be dealt with by the police, the official report is sent to the Public Prosecutions Department. At this stage, there are also several possibilities that can help to spare the youngster an appearance before a judge.

The public prosecutor has a choice between a conditional dismissal and a transaction. The conditional dismissal and the transaction are both forms of a conditional, extrajudicial settlement by the Public Prosecutions Department. The difference is that a conditional dismissal is not provided by law and therefore offers more room for flexibility and creative solutions than the transaction. The latter is provided for by law and is thus subject to legal limitations.[9]

9 The Public Prosecution Department Disposal Act (Wet OM-afdoening) was enacted on 4 July 2006 by the Upper House and has taken effect at the end of 2007. This Act adapts the judicial basis of out-of-court settlement of criminal cases and gives the Public Prosecutions Department other extrajudicial possibilities to settle certain criminal cases. With this Act, the out-of-court settlement is no longer designed to prevent prosecution, but rather has become an action of prosecution.

3.2.1 The (un-)conditional dismissal

Like the police, the public prosecutor can also decide not to (further) pursue criminal proceedings. He or she can do this unconditionally, give the suspect a good telling-off, or attach certain conditions to the decision. If the suspect does not fulfil the conditions, the public prosecutor regains the right to prosecute. In principle, the public prosecutor can make this decision for all crimes, but in practice it usually concerns less serious offences. The nature of the offence, the personality of the suspect and the possibilities for influencing the behaviour of the minor in a positive way all play an important role in making this decision. Since the conditional dismissal has no statutory footing, the public prosecutor is not bound to legal regulations in terms of the conditions that can be enforced or required. In practice, it is generally accepted that the public prosecutor can suggest the same conditions as the judge can when issuing a suspended sentence. The conditions that are most frequently applied in cases of young offenders are compensation, repairing the damage caused, notification requirements (for football hooliganism), street ban, ambulant or clinical treatment (especially in cases of drug addiction) and mandatory contact with an institution of youth welfare work.

3.2.2 Transaction

The possibilities for the public prosecutor to make a deal with the suspect are broader than those of the police, but more limited than those of a conditional dismissal. A transaction is available for all minor offences and in all cases in which the committed crime carries a maximum penalty of 6 years of imprisonment for adults. In the Netherlands this encompasses over 90% of all criminal offences. If a pecuniary offence has been committed and the suspect is willing to pay the maximum fine, the public prosecutor is obliged to arrange a compromise. Regarding juvenile suspects, the maximum fine cannot exceed 3,350 €. Apart from a fine, other conditions can be issued, such as providing compensation to the victim, performing unpaid labour or attending a training programme.[10]

The last mentioned condition is identical to the alternative sanctions that can be set by a judge as an alternative to juvenile detention and/or fines. In the literature these sanctions are generally referred to as task penalties. They consist of community service orders and/or learning/training programmes. The use of the community service order has increased enormously over the last decade, both for minors and for adults. While adults are predominantly issued community

10 For youngsters, the law also knows another condition which is not known to the adult criminal law: that the suspect will conform to the instructions of a family supervision institution for the duration set by the public prosecutor for a maximum period of 6 months.

service, juveniles are mostly involved in learning and training projects. Community service includes a great number of socials skills courses, victim-offender programmes, and combined work- and training projects that are often concentrated on a specific offence or a specific type of offender. We will return to this issue in more detail below when discussing judicial sanctioning modalities.

3.3 Settlement by the Public Prosecutions Department in practice

Transactions or (un-)conditional dismissals are not the only ways by which the Public Prosecutions Department can avoid bringing a case to court. Rather, where there is only a slim chance for a conviction, due to insufficient evidence or technical-judicial hindrances, a case can be "technically dismissed".

Although not settled by law, it is indeed practice that, when suspected of a great number of offences, an offender is only charged with a few, while the remaining offences are added to the dossier (the so-called "consolidation of related actions"). The suspect has to be in full agreement with this, because the judge can bear these offences in mind while setting the height and form of punishment. Also, the suspect has the advantage that he/she cannot be confronted with these offences for a second time.

As shown in *Table 3* below, only a few juvenile criminal proceedings reach the trial stage. In 2005, 35,875 juvenile suspects were registered by the police. Of those, 12,292 were settled by a judge and 23,289 by the Public Prosecutions Department. These figures illustrate that prosecution and subpoena must be seen as a last resort in the large range of possibilities to confront youngsters with their offences.

Table 3: Registered and settled court cases with minor suspects

Year	Registered cases Public Prosecutor's Department	Settlements by the Public Prosecutor's Department	Settlements by the judge*
1995	23,923	15,887	7,017
1996	26,213	16,769	7,580
1997	27,456	18,420	7,442
1998	27,535	17,768	7,895
1999	27,071	16,533	8,311
2000	26,993	17,627	9,004

Year	Registered cases Public Prosecutor's Department	Settlements by the Public Prosecutor's Department	Settlements by the judge*
2001	27,544	18,873	8,903
2002	28,465	19,521	10,014
2003	31,060	20,238	10,782
2004	33,819	21,193	11,897
2005	35,875	23,289	12,292

* Consolidations at trial are not included.
Source: CBS.

3.4 The imposition of a sanction by the examining judge

Juveniles are judged by specialised juvenile court judges rather than regular judges. Most of these criminal cases are conducted by a judge sitting alone (*unus judex*). Serious or complicated criminal cases, or cases where minors stand trial together with adults, are tried by a board of several judges of whom one is a juvenile court judge.

The juvenile court judge also acts as an examining judge when the suspect is a minor. One duty of the examining magistrate is to decide on the issue of pre-trial detention. Within that framework he has several possibilities to avoid sending a suspect to pre-trial detention in a penitentiary institution.

3.5 Punishment, alternative sanctions and measures

Only a small proportion of criminal cases against juveniles are actually prosecuted. Yet this does not imply that a sanction must follow every time an offence is proven and a suspect is found guilty. Article 9a PC provides the possibility of the "judicial pardon", which is only a guilty verdict without the imposition of a punishment or measure. So, a judge can determine in his or her judgement that no punishment or measure should be imposed. However, where a judge does decide to impose a sanction, he or she can choose between three kinds of sanctions: punishment, measures or alternative sanctions.

3.5.1 Juvenile punishment

Like in adult criminal law, the punishments are divided into principal sentences and additional sentences.

The principal sentences for juveniles are:

1) in the case of a criminal offence:
   a) juvenile detention;
   b) fine.
2) in the case of a summary offence:
   a) fine.

The additional sentences for juveniles are:

1) confiscation
2) disqualification from driving.

3.5.1.1 Juvenile detention

In the event of a criminal offence, juvenile detention is one of the main sentences mentioned in the law. This punishment, introduced in 1995, is the only custodial sentence known in juvenile criminal law. The duration of juvenile detention will not exceed one year (twelve months) for minors aged 12 to 15 and will not exceed two years for 16 and 17-year-olds. Juvenile detention is discussed more extensively in *Section 11* below.

3.5.1.2 Fines

Fines range from a minimum of three Euros to a maximum of 3,350 €. This maximum is the standard for all criminal offences and summary offences. When imposing a fine, the judge has to bear in mind the (financial) circumstances of the suspect. In finding a verdict, the judge can state that the juvenile can pay the fine in instalments. If the fine is not paid or only partially paid, and if the remaining sum can not be recovered through the juvenile's belongings, the outstanding amount can be replaced by subsidiary juvenile detention. The duration of such detention is limited to a minimum of one day and a maximum of three months. For each 15 Euros of the outstanding amount, only one day of detention can be imposed. At the request of the juvenile, subsidiary juvenile detention can be converted into an alternative punishment such as community service or attending a learning/training programme.

3.5.1.3 Additional punishment

Juvenile criminal law knows two additional punishments: confiscation and disqualification from driving a vehicle. Confiscation and disqualification can be imposed separately, together with principle sentences or in combination with each other.

Confiscation in juvenile cases is identical to its regulation in adult criminal law, and concerns objects that played a role in or were vested through offending. Disqualification from driving a vehicle was introduced by the revision of the juvenile criminal law in 1995. Such a disqualification applies mainly to mopeds.

However, additional punishments can also be imposed if the juvenile criminal law is applied to young adults between 18 and 21 years of age, in which case the driving ban also applies to cars and motorbikes.

3.5.2 Criminal measures

Like in the general criminal law for adults, the Dutch system for sanctioning juveniles is a so-called twin-track system, which means that besides punishments, other sanctions can be imposed which are not based on the settlement of "debt". With these criminal measures, the safety of society, restoration of the old situation or treatment of the offender must be the central issue.

The criminal measures which can be imposed are:

1) placement in a juvenile institution,
2) confiscation,
3) confiscation of illegally obtained profits or advantages,
4) compensation.

3.5.2.1 Placement in a juvenile institution

The measure of placement in a judicial institution (PIJ-measure) for juvenile offenders is the only custodial measure known in juvenile criminal law at present. It can be compared with the in-patient or hospital order for adults. It is a drastic sanction for which the legislator has set strict conditions. This measure will be discussed in more detail under S*ection 11* below.

3.5.2.2 Confiscation

The confiscation measure is identical for minors and adults. It is meant to withdraw objects from circulation that were obtained by criminal means, used by or fabricated for the preparation of the crime or used to hinder investigations. This is only possible if these objects are of the sort that uncontrolled possession is contrary to the law and public interest. Since social interest is the first matter of importance, the measure is also feasible when a (juvenile) suspect is acquitted or discharged.

3.5.2.3 Confiscation of illegally obtained profits or advantages

The application of this measure to juvenile offenders does not differ from how it would be used in cases involving adults. This form of confiscation was introduced to the PC a few years ago, and its purpose is to deprive the sentenced person of the profits obtained through criminal acts. The measure can not only be imposed for illegally obtained profits through a criminal act with a conviction, but also for other acts known to have been committed by the person sentenced.

The amount of the sum will be determined through a separate procedure. If the person sentenced does not pay the appointed sum, it will be converted into subsidiary detention, the duration of which is determined by a judge, however not exceeding a maximum of 6 years. This also applies to juveniles.

3.5.2.4 Compensation

As in adult criminal law, the judge can order a juvenile to compensate any damage caused by the offence. If necessary, this measure can be combined with other punishments or measures. It is based on the liability of the offender against the injured party under civil law. This means that it can not be imposed on criminal juveniles who – according to civil law – cannot be held responsible for their behaviour. This is of importance because Article 164 Book 6 of the Civil Code stipulates that the behaviour of a child who has not yet reached the age of 14 can not be attributed to that child as a wrongful act. If, in such a case, the judge wants to impose compensation as a sanction, he will have to resort to the conditional sanction modality which enables him to impose compensation as a special condition.

3.5.3 Alternative sanctions

With the revision of the juvenile criminal law in 1995, a new category of sanctions was introduced that aims at avoiding the imposition of custodial sentences against juveniles as far as possible – hence the name "alternative sanctions". These sanctions are thus meant to replace punishments, and can also be substitutes for subsidiary juvenile detention. In practice, the term "alternative sanctions" has been increasingly replaced by the "community service order", which – from a rhetorical perspective – is a shift away from the alternative character of the sanction towards an emphasis of its actual content.

This sanction obliges a juvenile to perform certain achievements that are expected to have a special preventive influence on the juvenile. These achievements can be:

a) performing unpaid labour for the benefit of the general public;
b) performing labour to atone for the damage caused by the offence;
c) attending an educational project.

These sanctions correspond to the special conditions that the public prosecutor can attach to a transaction. However, a significant difference is that these sanctions, as a condition of a transaction, can include a maximum of 40 hours and must be fulfilled within a maximum of three months. If the alternative sanction is imposed through a judicial verdict, the size of each of these sanctions will be a maximum of 200 hours or in combination a maximum of 240 hours. The period in which the alternative sanction must be completed amounts to 6

months for a project, or 100 hours of community service. Alternative sanctions of a larger scale must be completed within one year.

An important difference between traditional punishments and measures is the fact that an alternative sanction can only be imposed with the consent of the juvenile suspect. Another condition set by law regarding the imposition of an alternative sanction is that the judge receives advice in advance from the Child Care and Protection Board about the nature, the contents and the possibilities for such a sanction. In practice, this advice is released by the coordinator of the Bureau of Alternative Sanctions, which is responsible for their implementation.

The Child Care and Protection Board bears the actual responsibility for the preparation, the implementation and the supervision/guidance of alternative sanctions. The formal responsibility on the other hand lies with the authority which is legally responsible for the implementation of the sentences: the Public Prosecution Service.

When the Public Prosecution Service is under the impression that the alternative sanction has not been implemented properly, it can submit a claim to the judge to, instead of the given alternative sanction, implement the original punishment or another alternative sanction. The judge is obliged to take the part of the alternative sanction which has been completed properly into consideration. However, the law does not state which criteria must be observed in this matter.

If a juvenile suspect has been placed in police custody prior to the implementation of the alternative sanction, has been through pre-trial detention or has been placed in an institution for observation, this period of detention counts towards the alternative sanction.

With the HALT disposals, which are to be considered as a light form of community service in the early stages of the case, the community service orders, imposed by the Public Prosecution Department and the judge, have expanded enormously.

3.6 Accumulation of penalties, alternative sanctions and measures

The legislator has given the judge a considerable amount of freedom to determine the nature and extent of the sanction, as well as the possibility to combine different sanctions. All thinkable combinations are possible and juvenile detention, fines and placement in an institution for juveniles can be implemented wholly or partially.

Different than with adults, minors can be issued an alternative sanction in combination with a wholly or partially custodial sentence. With a (proposed) combined penalty of juvenile detention and a fine, the judge can replace the fine by one or more alternative sanctions, a possibility that is not (yet) known in current adult criminal law. The combination of unconditional placement in an

institution for juveniles with a fine or alternative sanction is not possible. However, this measure can be combined with juvenile detention, one or more additional penalties, or one or more other measures.

3.6.1 Conditional modalities

A form of sanction that is used quite frequently in juvenile criminal cases is the conditional sentence. The conditional element lies in the possibility for the judge to order the imposed sanction to be implemented in full or partially, with the condition that the juvenile suspect will not commit a new criminal offence within a specific trial period and will live up to the special conditions imposed by the judge. This conditional modality can be applied to the penalty of juvenile detention, fines and to the measure of placement in an institution for juveniles.

Another conditional modality is conditional release. The situation in juvenile criminal law is comparable to adult criminal law after the former automatic unconditional release in 2008 has been replaced by conditional release after having served two thirds of the sentence in the general PC. In juvenile criminal law early release always was bound to certain conditions that are stated by the judge. What the suspended sentence and conditional release have in common is that probation and certain conditions are linked to the judicial decision. Non-compliance results in its revocation. This probationary period can last for a maximum of two years.

The special conditions which can be imposed must relate specifically to the behaviour of the juvenile. Customary conditions are, for instance, a ban from entering certain areas where youth are known to assemble and where disorderliness is common, a ban from visiting certain places, the obligation to report to the police at certain times or an obligation to undergo ambulant or clinical treatment. The judge has a considerable amount of discretion and freedom in finding sensible conditions for behaviour.

The Public Prosecution Department is responsible for monitoring young persons' compliance with the conditions. Supervision should not be confused with the provision of help and support in observing the conditions, which is a task that a judge can assign to a family supervision institution or (in special cases) to a private individual person. When the juvenile is under supervision according to civil law, the task can be appointed to a family guardian.

3.7 Measures according to civil law

As is also the case in juvenile criminal law, in civil law judicial interference is considered to be an *ultimum remedium* and the priority lies with the many forms of voluntary assistance for families and/or minors with behavioural problems. Not until the possibilities for voluntary assistance have been exhausted or appear to be insufficient shall measures be imposed that imply a higher degree of stress.

In all cases, protection of the minor is the central issue. Many of these means of coercion address the parents but the effects are far-reaching for the minor as well. This is especially the case when placement under supervision is concerned.[11] With this measure, the authority of the parents or guardian is restricted because the minor is supervised by a family guardian who provides the parents with advice in care and education. The parents are obliged to observe the indications of this family guardian, and neglecting them to a serious degree is grounds for dismissing parental authority (Article 258 Book 1 of the Civil Code).

Placement under supervision is possible if the juvenile court judge is under the impression that a minor is growing up in such a manner, that his/her moral and mental interests or health are under serious threat and other means to avert this threat have failed. Though the law states that the juvenile court judge can also place a child under supervision upon the request of a parent, foster parent, partner of the parent who exercises authority over the child, or the Public Prosecutor's Department, in practice it is the Child Welfare Council that files such requests.[12] Placement under supervision lasts for one year but can be repeatedly extended by a further year.

If it is in the best interest of the education and care of the minor or if it is for the benefit of the investigation into the moral and mental condition of that minor, the juvenile court judge can authorize the family supervision institution to issue a care order. Being placed under such supervision can even involve him or her being committed to a closed institution. However, this can only be issued if a minor exhibits serious behavioural problems.

In principle, placement under supervision is intended as a temporary measure. The same applies for the care order which eventually is directed at returning the child to its home environment. However, some circumstances may require harsher measures to guard the child from moral or mental decline. In those cases parent(s) can be stripped of their parental authority. Authority over the child is then usually entrusted to a legal person from the field of youth assistance, and the child is placed in a foster home or juvenile institution.

The Dutch PC provides no possibility for taking actions under criminal law against parents who fail to fulfil their duty to provide for their children. If the parents are to be held responsible for the (criminal) behaviour of their child, it is only possible through the above mentioned civil law measures.[13]

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11 Introduced by the Act of 5 July 1921, Stb. 1921, 834, amended by the Act of 19 May 1922, Stb. 1922, 325.

12 *Wortmann* 2006, p. 213.

13 Currently an initiative-bill is being handled in the Lower House which aims to expand the liability of the parents/guardian for the behaviour of minors aged 14 to 18 years, Parliamentary Documents II 2005-2006, 30 519.

It is striking that this measure is hardly ever actually applied when minors offend. However, especially with violent offences (assault, homicide, assault, and rape) the offence does justify intensive contact between the Child Care and Protection Board and the parent(s). In many cases the parent(s) will be involved in the further guidance of their child.

4. Juvenile criminal procedure

Different from many other countries, the Dutch legislator has not chosen to create a separate statutory regulation for juvenile criminal (procedural) law. The basic principle of the Dutch system is that the criminal (procedural) law for adults is also applicable to juveniles, as far as no deviated provisions are formulated. The deviated procedural provisions can be found in Title II of Book IV of the CCP. Regarding certain means of coercion, this implies for example that the examination of a person's body and clothes, as laid out in Article 56 of the CCP, is fully applicable to this category of young suspects. Also, the special powers to investigate, as stated in Title IVA of Book I of the CCP, apply to young suspects as well.[14]

An important difference between the criminal proceedings for adults and juveniles are that the latter are judged by a special juvenile court judge, who acts both as an examining and as a trial judge. Furthermore, in criminal proceedings involving juveniles, the parents or guardian and the Child Care and Protection Board are assigned more important roles. Also, the powers of the lawyer are arranged differently in some aspects. Another difference is that in principle the criminal proceedings for juveniles take place behind closed doors.

The public prosecutor is fully responsible for the prosecution policy, but frequent consultation between the partners involved in the prosecution, such as the Public Prosecution Department, the police, the Child Care and Protection Board and the Juvenile Probation Service, is important for the effective completion of juvenile criminal cases. Each district has its own Judicial Case Consultation. Regular participants to this consultation are the Public Prosecution Department, the police and the Child Care and Protection Board. Following an evaluation of the consultation's conclusions, a decision is made whether or not the section for youth welfare work should be involved (Juvenile Probation Service and voluntarily youth welfare work). By way of a transfer form, the case is presented to the Consultation. This happens within seven days after the first interrogation by the police.[15] The goal is for most of the cases that are discussed in the Judicial Case Consultation to lead to a settlement by the Public Prosecution Department.

14 *de Jonge/van der Linden* 2004, p. 131.

15 *Doek*/*Vlaardingerbroek* 2006, p. 455.

When there is a suspicion of criminal offences for which pre-trial detention is allowed, the public prosecutor or the assistant prosecutor can order custody when it is in the interest of the investigation. The period of custody is three days and it can be prolonged by the public prosecutor for another three days in urgent cases (Article 58, Paragraph 2 of the CCP). In the case of a prolongation, the young suspect has to be brought before the examining judge within three days and 15 hours, starting from the time of arrest by the police. During the interrogation by the examining judge, the young suspect is authorized to be assisted by an attorney. When the juvenile court judge/examining judge decides that a person has been unlawfully placed in custody, he/she will order that the suspect be immediately released. The public prosecutor can lodge an appeal against this judgement within 14 days. The police have to immediately inform the Child Care and Protection Board whenever a custody order is issued (Article 491, Paragraph 1 of the CCP).

When the public prosecutor finds it necessary to put the young suspect in pre-trial detention, he/she will file a claim to the examining judge. Pre-trial detention will be discussed in more detail under *Section 10.* below.

Article 2 of the CCP determines which judge has territorial jurisdiction over a case. The Article offers a few options, *inter alia*, the court in whose jurisdiction an offence is committed, in which the suspect has his place of residence or where he is actually located at that time. In general, when it is possible to choose, the court where the offence was committed is usually preferred (Article 2, Paragraph 2 CCP). For young persons, preference is to be given to trying them in the jurisdiction of their place of residence, i. e. where their parents or guardians have their place of residence (1:12 of the Civil Code).

Article 495 Paragraph 1 of the CCP states that a juvenile court judge will deal with the case at the court session. The rule in practice is that cases are reported to a single juvenile court judge. Sometimes it can be a full court, which the juvenile court judge has to be a part of.

It is stated in Article 459b of the CCP that criminal cases involving young people shall not be tried in public. The chair of the court can allow special permission and a public trial can be ordered when the interests of the public nature of the court sessions weigh greater than protecting the suspect's (his fellow suspects', parents' or guardians') privacy.

The young suspect is obliged to appear at the court session, including court sessions on appeal. When a suspect fails to appear in court the investigation at the court session has to be postponed to a specified date. A set rule is that a representative of the Child Care and Protection Board has to attend the sessions of the juvenile court judge, who for that purpose has received special permission based on Article 495b Paragraph 1 of the CCP. The parents or guardians who are called up for the session are not obliged to appear in court. If they do so, they are allowed to speak after having heard their child, possible fellow

suspects, witnesses and experts. They are allowed to respond to everything they have heard from these persons.[16]

After judgement, which is expressed in public, the juvenile court judge has to inform the suspect of his/her right to appeal and of the period of 14 days within which this has to occur. The suspect as well as the public prosecutor can sign away the power to take recourse to that legal remedy. When this happens, the judgement is directly enforceable. Besides the appeal to a higher court, the young person can also appeal to the Court of Cassation. The way the legal remedies have to be applied is the same as for adults. When the convicted young person is younger than 16, both he/she and his/her attorney can lodge legal remedies. As soon as the convicted young person is 16 years old, he/she has to apply the chosen legal remedy personally or explicitly authorize his/her attorney to do so.

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

Article 77e PC stipulates that the police, with the approval of the public prosecutor, can make an offer to juvenile suspects to participate in a special project. Where this offer is accepted, no report is sent to the public prosecutor.

Through the HALT disposal, the juvenile is made aware of his/her behaviour and is – where applicable – given the chance to repair the damages resulting from it.[17] In order to be eligible for a HALT disposal, a juvenile must confess to having committed the offence. Another precondition is that the juvenile has received no more than one HALT disposal in the past, and none within the last year.

The HALT disposal has already been available for 25 years and has shown much development over the years. The disposal is now applicable to a larger range of offences, which are listed in a separate ministerial regulation. When the total damage is greater than 900 Euros per person and 4,500 Euros per case, the HALT disposal is not applicable.

As *Table 4* below shows, in the years 2003-2005 the HALT disposal was used 20,951, 21,496 and 22,215 times respectively, which is over 40% of all juvenile suspects known by the police.

16 *Bac* 2004, p. 61-72.

17 *Ferwerda*/*Smulders* 2006, p. 13.

Table 4: HALT- and STOP-referrals*

Year	HALT	STOP	Total
1987	1,184	---	1,184
1988	2,154	---	2,154
1989	4,738	---	4,738
1990	6,456	---	6,456
1991	8,948	---	8,948
1992	11,084	---	11,084
1993	11,167	---	11,167
1994	14,316	---	14,316
1995	17,235	---	17,235
1996	21,413	---	21,413
1997	20,867	---	20,867
1998	21,748	---	21,748
1999**	---	---	22,756
2000	18,948	1,784	20,732
2001	18,056	1,639	19,695
2002	19,665	1,962	21,627
2003	20,951	2,304	23,255
2004	21,496	2,167	23,663
2005	22,215	1,948	24,163

* Includes the referrals between the HALT offices.
** In 1999 the STOP disposal is introduced. For this year it is not possible to split up the total of referrals into the HALT and STOP-referrals.
Source: HALT, the Netherlands.

Table 4 also shows the figures of the STOP disposal, which applies to children under the age of 12 who have committed an offence. The STOP disposal can involve teaching commitments and there is also attention for the aggrieved party. Fundamentally, parents and their child can take part in this project only once. A second STOP can only be issued where the parents request it and the public prosecutor has no objections. The forms of behaviour which fall under this disposal are similar to the ones of the HALT disposal.[18]

18 See www.halt.nl for more on HALT and STOP.

In the pilot year 2000, over 1,700 children were presented for a STOP disposal at 53 Halt bureaus. A first evaluation report established that 72% of the candidates under the age of 12 attended and completed the STOP disposal, and their cases were concluded successfully after having met their obligations. In 17% of the entries, the parents pulled out.[19] In 2005, 961 STOP disposals were concluded. During the period 2002-2005 the absolute number of STOP disposals has decreased by 15%.

The following table gives a breakdown of the HALT and STOP disposals of the years 2004 and 2005 into the type of offence that triggered the disposal to be issued.

Table 5: HALT- and STOP-disposals according to the type of offence

	2004		2005	
	HALT	**STOP**	**HALT**	**STOP**
Property offences	6,696	616	8,021	532
Firework offences	4,313	434	5,193	520
Vandalism	3,681	366	4,147	451
Rowdiness	2,271	237	2,424	217
Security reasons	450	100	456	99
Public order	52	0	36	1
Other offences	1,731	117	1,845	121
Total	19,194	1,870	22,122	1,941

Source: HALT, the Netherlands.

6. The sentencing practice – Part II: Juvenile court dispositions and their application since 1980

Of all criminal cases against minors which are registered with the public prosecutor, around one third are summoned to appear in court. Over the past years, more and more cases have been dealt with formally by a judge rather than by more informal means. The number of court cases settled by judges grew steadily from 7,017 in 1995 to 11,897 in 2004, an increase of almost 70%. It is

19 *de Jonge*/*van der Linden* 2004, p. 66.

clear that this is a result of the rise in the number of minor suspects who are heard by the police.

When we divide court cases into categories of committed offences, the period 1995-2004 shows an increase in all categories. Of all the cases that were settled by a judge, 36% concern property crimes, 29% involve violent crimes and 25% are crimes of vandalism or offences against public order.

The number of cases concerning property offences increased from 3,545 in 1995 to 4,307 in 2004. The number of court cases concerning violent offences has grown ceaselessly since 1995, reaching almost double the 1995 figure in 2004 (from 1,822 to 3,479). This rise mainly comes down to an increase in the number of assault cases, with a slight increase in the number of robberies and an increase in the number of threats. However, the strongest increase in this group was in the number of offences against public order.

The number of cases concerning vandalism or public order offences that are settled by a judge has more than doubled since 1995 (from 1,259 to 2,992 in 2004). This can be mainly attributed to the rise in the number of offences against public order.[20]

The range of possibilities of sanctions which can be imposed by a judge on minors is discussed under *Section 3* One of these sanctions is the task penalty, which was added to the law through the revision of the juvenile criminal law in 1995. A task penalty implies participation in a working project (unpaid work or recovering the damage caused), an educational project or a combination project which contains elements of both.

As shown in *Table 6* below, between 1997 and 2004 the community service order was the punishment that was most frequently imposed on minors. Its application increased from 4,026 to 7,671 sentences respectively (a rise of 90.5%). The community service order is followed by juvenile detention. In 2004, one third of the total number of sanctions imposed by a judge on minors was youth detention.

20 *Eggen*/*van der Heide* 2006 (Paragraph 5 on Persecution and Trial).

Table 6: Penalties and measures imposed on juveniles 1997-2005

	1997	1998	1999	2000	2001	2002	2003	2004	2005	%
Main sentences*										
Imprisonment	284	254	265	279	241	233	217	215	197	1.1
Fine	952	855	771	763	739	663	651	708	636	3.6
Youth detention	2,988	3,405	3,778	3,970	4,194	4,742	5,242	5,902	5,516	31.4
Community service order	4,026	4,411	4,864	5,359	5,343	6,151	6,880	7,671	8,033	45.7
Additional penalties										
Disqualification from driving	21	39	33	32	37	30	43	50	45	0.3
Confiscation of goods	134	120	156	131	152	172	163	178	163	0.9
Measures										
Payment to state	517	770	1,010	1,125	1,325	1,762	2,012	2,272	2,434	13.8
Confiscation	130	135	148	141	154	169	170	156	174	1.0
PIJ-measure	192	240	224	213	188	202	202	250	286	1.6
Other penalties and measures	24	2	3	3	5	2	3	8	6	0.0
Unknown	85	168	111	118	44	57	69	92	93	0.5
Total	9,353	10,399	11,363	12,134	12,421	14,183	15,652	17,502	17,583	100

* Conditional as well as unconditional penalties are included.
Source: CBS.

7. Regional patterns and differences in sentencing young offenders

There are unfortunately no data available on regional differences in the sentencing of young offenders in the Netherlands.

8. Young adults (18-20 years old) and the juvenile (or adult) criminal justice system – legal aspects and sentencing practices

There are a few exceptions to the rule that young persons aged 18 and over are to be dealt with according to the provisions of criminal law that apply to adults. One of these exceptions is contained in Article 77c PC, which states that a young adult, who at the time of committing the offence was over the age of 18 but not yet 21, can be tried according to the juvenile criminal law, depending on the offender's personality and the circumstances in which the offence was committed. Since the applicability of juvenile law to young adults is dependent on the age at the time of the offence, juvenile sanctions can also be imposed on an adult who has in the meantime surpassed the age of 21.

This exception basically influences which sanctions are available to judges. In the judgment, the judge has to consider administrating a juvenile sanction even if the person in question is already a young adult or even an adult. When the judge in fact applies a juvenile sanction, he/she has to justify this. Yet also where the suspect has requested it and the judge refuses to do so, he/she has to express the reason for this refusal in his/her justification of the chosen punishment. In this motivation, the judge can take into account the impression the suspect has made, as well as information received though reports.[21]

Until the introduction of the Prison Act there was a fixed maximum age for the placement of young adults. This criterion was made redundant by the introduction of this law. Until the introduction of the "guide for the special care of psychologically immature men in the prison system" in 2001, there was no specific policy for the category of young adults.[22] The result of the new policy is that a separate regime for young adults, the so-called "*JOVO-regime*" (*JOVO* is an abbreviation of the word "jong volwassene", which means "young adult") has been created in the prison system, which is a form of special care. This separate regime started in 2002 and aims at offering extra protection and perspectives for young adult detainees between the ages of 18 and 24 years. The most important goal is to "reduce the harm and criminal infection which is

21 HR (Supreme Court of the Netherlands) 12 June 1990, NJ 1990, 835.

22 Parliamentary Documents II 2001-2002, 28 292, nr. 2.

caused by detention, by providing for, *inter alia*, a protected environment and intensive guidance". For that purpose, the young adult detainees are allocated to separate sections in the prisons. The "JOVO-regime" falls under the category of "specific recognizable regimes" and is indicated as "special care" in the Prison Act (Article 14 Prison Act).[23]

The creation of a "JOVO-regime" as a form of special care has also taken shape in the Youth Custodial Institutions Act of 2002. With the introduction of this law, the sentence that stated that an adult who is sentenced to youth detention has to serve his sentence in an adult prison was abrogated. The legislator has not set a maximum age for the place in which a custodial sentence has to be enforced. Article 9, Paragraph 2 of the Youth Custodial Institutions Act stipulates remand homes as the places where sentences to youth detention are to be served. Article 15 of the Youth Custodial Institutions Act is especially important, as it prescribes that institutions or sections of remand homes can be reserved for the accommodation of young persons who need special care, which is connected to their age, mental or physical development. When the term "young person" is not related to a certain maximum age in the law, it should be regarded that adults on whom the punishment of youth detention is imposed (based on Article 77c PC) also have to serve their sentences in a remand home, or in a special section thereof.[24]

Police Statistics show that 24% of all suspects are aged 18 to 24. Young adults between 18 and 24 – as can minors – can be ordered to Intensive Guidance. This form of intensive, ambulant after-care service for "hard core young persons" exclusively takes place within a judicial framework. It can be imposed as a special condition in cases of suspended sentences or where pre-trial detention is suspended.[25]

9. Transfer of juveniles to the adult court

Another exception to the juvenile criminal law in the Netherlands is the possibility of applying the criminal law for adults to minors. On the basis of Article 77b PC the juvenile court judge can determine that instead of the juvenile criminal law, a sanction from the adult criminal law will be imposed on young suspects aged 16 and 17 at the time of the offence. However, this is only possible when there are grounds for it in:

a) the seriousness of the criminal offence, or
b) the personality of the young offender, or
c) the circumstances in which the offence is committed.

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23 *Verwers/Bogaerts* 2005, p. 10.

24 *Cleiren/Nijboer* 2007, notes to Article 77c PC.

25 *Verwers/Bogaerts* 2005, p. 9.

Until the revision of the law in 1995, the grounds a) and b) had to apply cumulatively. The possibilities for the application of this Article have become more flexible since 1995. The main aim was to have a more fluent transition between the different age categories. With this in mind, the criteria a) and b) are now formulated alternatively, and the third criterion c) has been added. The addition of the third criterion made it possible to equally punish offenders who are part of a group and aged just under or above 18.[26]

The application of Article 77b PC can have major consequences for a young offender, as it makes much more severe punishments applicable. On the basis of the adult criminal law, the judge can choose from the punishments which are enumerated in Article 9 PC. An example is the enforcement of a long-term prison sentence plus detention under a hospital order which can be prolonged indefinitely. The community service order can be imposed for a longer duration than according to juvenile criminal law, and the fine is bound to broader limits.[27] Theoretically, life sentences were possible. In order to get certainty on this subject and to meet the recommendations of the Committee on the Rights of the Child, in a reform law coming into force in 2008 Article 77b PC was extended with a second paragraph which states: "No life imprisonment can be imposed with the application of Paragraph 1."[28]

There is no clarity of what each of the three mentioned criteria in Article 77b PC actually imply. These criteria have to be filled in more specifically by the judge, who thus has quite extensive freedom in applying the various legal rules. Legal practice has shown that "the seriousness of the criminal offence" is most often used for the application of Article 77b PC against minors. Public interest often plays an important role with this criterion. In recent cases in which Article 77b PC has been applied, many involved offences against life or attempts of such offences.[29] Regarding the personality of the offender, the judge has to take not only the offender's personality at the time of the offence into consideration, but also the way in which he presents himself during the investigations in court.[30]

The judge is obliged to justify applications of Article 77b PC in cases involving young offenders, but up to now the requirements that the Supreme Court of the Netherlands has set for such a justification have not been very demanding. The application of Article 77b PC has to be motivated in the

26 Parliamentary Documents II, 21 327 nr. 3, (MvT), p. 32.

27 *Janssens* 2005, p. 290.

28 See for the draft bill Parliamentary Documents II 2005-2006, 30.332.

29 Such as, *inter alia*: Rechtbank (Court) Groningen 24 april 2007, LJN: BA4035, Rechtbank's-Hertogenbosch 13 februari 2001, LJN: AA9954.

30 HR 8 maart 1994, NJ 1994, 413.

judgement, but just quoting the grounds appears to be sufficient in principle.[31] The current state of affairs is that the Supreme Court wants judges who decide on factual issues to be more detailed in their motivation, when an explicit and well-founded defence is forwarded or when the imposed sanction causes amazement without giving a further explanation.[32] It is argued in the literature that more is expected of the judge than merely a standard motivation for his decisions.

The revision of Article 77b PC in 1995 which made its application more flexible resulted in a fear among many that adult criminal law could be applied to juveniles more easily. This impression was strengthened by some cases of young offenders in recent years in which judges decided not to try on the basis of juvenile criminal law, but to rule according to adult criminal law.[33] Various studies have nevertheless shown that before 1995, Article 77b PC (at that time 77c PC) was applied relatively often: 15.5% of all young people were tried according to adult criminal law. Even though the amendment of the law in 1995 made the Article more flexible, the percentage has gone down considerably. This has especially to do with the raising of maximum punishments. For a few years now the number of convictions under adult criminal law has been reasonably stable. Article 77b PC is applied to around three percent of all young offenders who are aged 16 and 17, which is about 200 to 250 times per year.[34]

10. Preliminary residential care and pre-trial detention

Pre-trial detention itself can be divided into three phases: remand in custody (Article 63, CCP), remand detention (Article 65, CCP) and detention pending trial (Article 65, CCP). Pre-trial detention is only possible when there are serious indications that the suspect has committed the crime. Cases in which pre-trial detention can be ordered are stated in Articles 67-67a CCP. The grounds are equal to the criminal law for adults. Pre-trial detention should be ended when its duration will exceed the total final punishment of deprivation of liberty in the case of a conviction.[35] The number of detainees in pre-trial detention in the Netherlands has increased, both overall as well as among youngsters more specifically. From 1990 to 2005 the number of all pre-trial detainees increased by 130%.[36]

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31 HR 9 april 1974, NJ 1974, 244.

32 *Stoet* 2007, p. 13.

33 *Weijers* 2007, p. 175.

34 *Bakker* 2006, p. 190-191.

35 *Bos/Mehciz* 2001, p. 6.

36 *Boone*/*Moerings* 2007, p. 55-57.

When the public prosecutor wants to keep the young suspect in pre-trial detention, he/she has to file a claim for remand in custody to the examining judge (Article 63 CCP) who then has to assess the claim. Filing the claim opens the prosecution and when it is disallowed, a refusal follows. If the claim is approved, remand in custody can be ordered for an unextendable period of up to 14 days. The suspect can lodge an appeal with the court against the order to pre-trial detention.

If the public prosecutor is of the opinion that the pre-trial detention has to be prolonged after the 14 days, he will file a claim on remand detention at the court. Before the beginning of the investigation at court it is possible to prolong the remand detention twice; however a period of 90 days in total can not be exceeded. For juveniles there is a special rule which implies that when the court has not heard the suspect on the claim, the order to remand detention may not exceed the term of 30 days.

It is up to the judge (examining judge) to decide where pre-trial detention is to be served. According to the law "any place that is suitable for that purpose" is sufficient. In practice, youth custodial institutions which are appointed as remand homes are being used especially. It can and does occur that a young person can not be transferred to a remand home due to capacity problems. It is laid down in Article 16a of the Youth Custodial Institutions Act that a young person aged 16 or 17 can be held in a police station for a maximum period of 10 days. The selection officer who is in charge of the placement can decide on this after he has determined that there is no place available in the remand home. For young persons under the age of 16 the maximum period is three days. The young person can not lodge an objection to the selection officer's decision. However, he can ask the judge to suspend the custody, as the enforcement of the decision is contrary to Article 37 of the Convention on the Right of the Child. Paragraph c of this Article states, *inter alia*, that a young person under the age of 18 "shall be separated from adults unless it is considered in the child's best interest not to do so". So, confinement in a house of detention or police station is not in accordance with the Convention on the Right of the Child, unless there is a clear separation of adults and minors. This can for example be in a separate section of the house of detention.

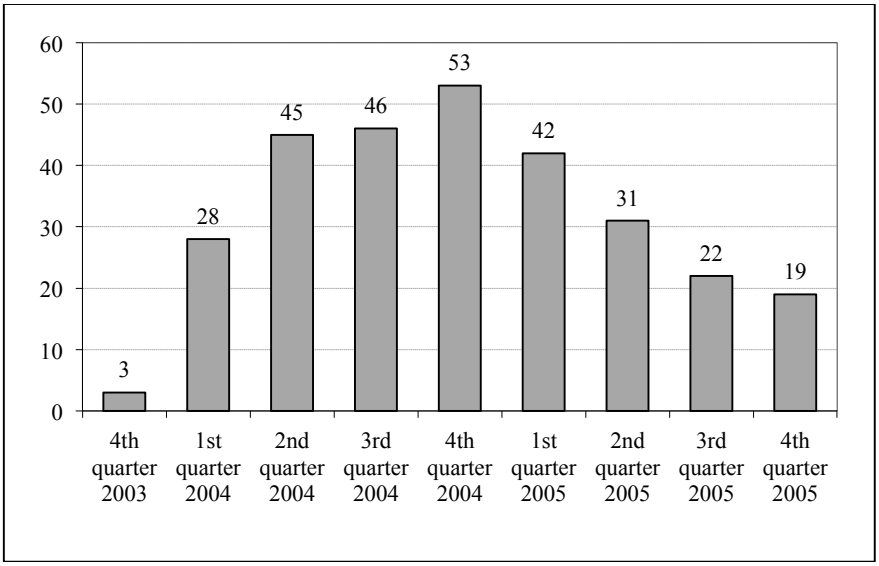
The capacity problems with regard to remand homes resulted in the development of alternatives to custodial pre-trial measures to thus lower the required number of places in institutions. Since 2000, Rotterdam has experimented with electronic house arrest for young persons who were sent to pre-trial detention. Young persons went to school or work during the day and in the evening and night they stayed at home under electronic supervision. The guidance by the after-care organization provided a detailed week program which the young person had to follow. Non-compliance resulted in placement in a youth custodial institution for the rest of the pre-trial detention period. In the

meantime, the electronic house arrest pilots have ended and have been replaced by another alternative for pre-trial detention called "night detention".[37]

With night detention, the young person goes to school or work during the day, and in the evenings, at night and at the weekends he stays in a remand home. To be eligible for this program, the juvenile must have a "positively structured spending of the day" (school or work) close to the remand home (concerning daily travel). To guarantee that the pre-trial measure runs smoothly, the juvenile also has to sign a contract in which he/she agrees with the conditions. Juveniles whose remaining punishment is expected to be quite long and juveniles without a legal residence permit in the Netherlands are barred from night detention.[38]

Night detention was introduced across the country in September 2003. Since its introduction, there have been 622 places available for night detention spread over 11 judicial institutions. *Figure 1* shows the influx of young persons for night detention for the period from the end of 2003 to the end of 2005.

Figure 1: Intake night detention



Source: National Service of Correctional Institutions (DJI) 2006.

37 *Doek*/*Vlaardingerbroek* 2006, p. 467-475.

38 Factsheet Nachtdetentie jeugdigen bij voorlopige hechtenis; Ministry of Justice 2006-June/F&A 6794.

Pre-trial detention can also be alternatively enforced on an extramural basis in the form of an "educational- and training program" (for which the Dutch abbreviation is STP). More on this program will follow under *Section 12* below.

11. Residential care and youth prisons – Legal aspects and the extent of young persons deprived of their liberty

There are youth custodial institutions for the enforcement of custodial sentences as well as for criminal and civil measures. In these institutions special rules apply for their residents and staff. The rules are laid out in the Youth Custodial Institutions Act and the Youth Custodial Institutions Regulation which belongs to the Act, some ministerial rulings, and circulars including the so-called house rules which can differ for each institution. Furthermore, parts of some other acts and decrees are relevant for the law on juvenile detention, especially the (1994) Enforcement Juvenile Criminal Law Decree.[39]

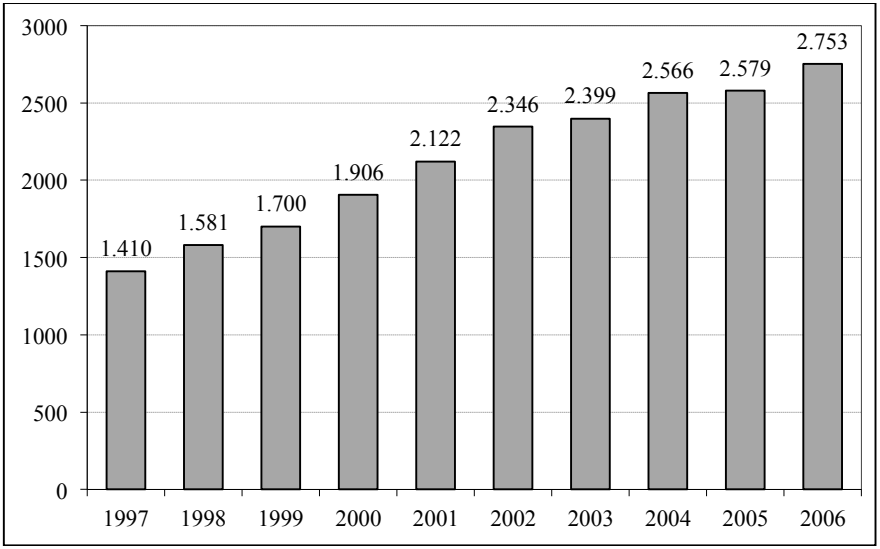
In the early 1980s, there were around 650 places in youth custodial institutions. The number of places has increased since then, to around 2,700 in 2006, as shown in *Figure 2* below. This is four times the capacity of two decades earlier.

By far the majority of the juveniles in youth custodial institutions are under eighteen (80 to 85%). Around 5% are under thirteen and there are dozens of children even younger than twelve. There has been an increase in the number of girls recently and since 2001 girls have accounted for about a quarter of the total population. The proportion of boys has therefore fallen slightly from a steady 80% in the nineties to 75% in early years of the 21st century. The average stay in treatment centres over the past fifteen years has been around 375 days, with a few exceptional years when the averages were much higher.[40]

39 *de Jonge*/*van der Linden* 2004, p. 181.

40 *Boone*/*Moerings* 2007, p. 153-154.

Figure 2: Development of the capacity of Youth Custody Institutions in the Netherlands



Source: Justice Institutions Service (www.dji.nl/grafiek.asp?id=26).

The Netherlands counts a total of 14 youth custodial institutions, which are subdivided into remand homes and treatment centres, and state- and subsidized private institutions.

The remand homes accommodate*, inter alia*, minors on whom juvenile detention has been imposed, but also minor pre-trial detainees.[41] The focus in remand homes is on (re-)education.

The treatment centres accommodate youngsters who are ordered to stay in a judicial institution for juvenile offenders. This measure is imposed on a juvenile when the causation of a crime can also be attributed to a developmental disorder, for which the centre aims to offer treatment. The treatment centres also accommodate juveniles whose stays are the result of a child protection measure, for instance a care order or placement under supervision, under which a juvenile can not stay at home and has to go to a boarding school or foster home.[42] The custodial sentence of juvenile detention, placements in a judicial institution for juvenile offenders and care orders will be dealt with in the following pages.

41 See Article 9 of the Youth Custodial Institutions Act for an overview of titles for residence in a remand home.

42 See www.dji.nl/main.asp?pid=52.

11.1 Juvenile detention

In the event of a criminal offence, the custodial punishment of juvenile detention is one of the main sentences mentioned in the law. This punishment, introduced in 1995, is the only custodial sentence known in juvenile criminal law. The period of juvenile detention will not exceed one year (twelve months) for minors aged 12 to 15 years and will not exceed two years for those at the age of 16 and 17 years. The minimum period to which a juvenile can be sentenced is one day. According to Article 77i, Paragraph 2 PC, the duration of juvenile detention should be indicated in the decision of the court in days, weeks or months.

Commencement of juvenile detention is regulated in Article 26 PC, and the time spent in custody, pre-trial detention or detention abroad in pursuance of a Dutch request for extradition, is counted as served time (Articles 77i par. 3 and 27 PC).

As mentioned above, juvenile detention is enforced in remand homes. In principle boys and girls are accommodated separately, but exceptions are possible (Article 12 of the Youth Custodial Institutions Act). In his decision, the judge can make a recommendation as to where and how detention shall be executed. After he will be informed by the Public Prosecution Department about the decision, the Minister of Justice is the person who decides. When the juvenile does not agree with the decision of where he is to be placed he can lodge a complaint against it.[43]

The judge who imposes the punishment can, when demanded by the Public Prosecution Department or at the request of the person convicted, replace the punishment of juvenile detention wholly or partially by one of the punishments mentioned in Article 9, Paragraph 1 PC.[44] This is possible if the convicted person turns 18 during the enforcement of the sentence and, in the opinion of the judge, would no longer be eligible for juvenile detention (Article 77k PC).

A conversion is only possible when the sentence in question has become irrevocable. It is not permitted to immediately decide on conversion to a custodial sentence for adults when sentencing to juvenile detention. The same applies for the conversion of the enforcement of conditional juvenile detention to imprisonment with a fixed duration.[45] No legal remedy is available for challenging a conversion.

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43 *Bac* 2004, p. 105.

44 These punishments are imprisonment, custody, community service order and a fine.

45 *Doek*/*Vlaardingerbroek* 2006, p. 504.

11.2 Placement in a judicial institution for juvenile offenders

This measure – introduced in 1995 – can only be enforced:

a) when the criminal offence in question is serious and eligible for conditional detention;
b) when the safety of others or the general safety of persons or goods demands it, and
c) if the measure is most favourable for the further development of the juvenile suspect.

This is a list of cumulatively formulated conditions. If all three conditions are met, the measure can be imposed either with a conviction or in connection with an acquittal. If the measure is enforced on conviction, it can be combined with juvenile detention and/or an additional punishment. It can only be combined with a fine if the enforcement of the measure is to be wholly or partially conditional.

Placement in a judicial institution for juvenile offenders can be compared with the in-patient or hospital order for adults. It is a drastic sanction for which the legislator has set strict conditions. One of the conditions is that the judge must have a reasoned recommendation from at least two behavioural scientists coming from different disciplines. Usually, one of these behavioural scientists is a psychologist. If the minor in question exhibits a mental disorder, or that the development of his/her mental faculties is only limited, one of the behavioural scientists must be a psychiatrist.

In the treatment centres men and women can be accommodated separately as well as together.[46] When placement in a judicial institution for juvenile offenders is imposed on an adult on the basis of Article 77c PC, enforcement will take place according to what is stated in Article 37c PC on detention under a hospital order for adults. Concretely, the measure means that one can also be subjected to a forensic hospital in other cases (for instance in the situation that a minor has come of age or if placement in a forensic hospital is to be preferred to placement in a juvenile institution).

In principle, placements in a judicial institution for juvenile offenders are in force for the duration of two years. However, it can be terminated conditionally or unconditionally at all times by the Minister of Justice, after having obtained advice from the Child Care and Protection Board. The measure can also last longer than two years. The judge who imposed the measure can, on demand of the Public Prosecution Department, repeatedly extend the term by up to two years, as long as the total duration of the measure does not exceed four years. If it concerns a minor whose mental faculties show limited development or who

46 The law also offers the possibility that the placement of a juvenile is geared to the special needs of the juvenile, for example in a psychiatric hospital (Article 77s, Section 5 PC).

suffers from a mental disorder, the total duration of the measure may not exceed six years. However, renewal is only possible when the enforced measure is wholly or partially conditional. Apart from that, the measure must be enforced in relation to a crime directed against or causing danger to the physical integrity of one or more persons, especially regarding crimes of violence and sexual offences.

11.3 Care order

Minors serving a care order are placed under supervision, but can also end up being admitted to a youth custodial institution. So, alongside the criminal measure of "placement in a judicial institution", there exists the possibility to end up in a treatment centre under civil law. For this, an explicit authorization from the juvenile court judge is needed, which will only be given if such a placement is required due to severe behavioural problems of the minor (Article 1:261 of the Civil Code).

There has been criticism on the joint accommodation of juveniles who are placed according to criminal- and civil law that dates back years already. Since 1st January 2010, joint accommodation of these two categories of juveniles is no longer be permitted. The Minister of Youth and Family is now responsible for the reception and treatment of juveniles who are placed in institutions according to civil law, and the Minister of Justice is responsible for criminal law cases.

In order to achieve this goal, the Ministry of Youth and Family has developed new youth facilities, and existing youth custodial institutions have been partly transferred to the youth care system.[47]

A recent report by four Inspectorate Offices – conducted on the request of the Minister of Justice – investigating safety in youth custodial institutions concludes that the juvenile institutions fulfil their task insufficiently. The institutions run the risks of an unsafe treatment- and work climate. The research shows that the greatest shortcomings lie in the areas of education, treatment and the expertise of personnel. Also, the policy and practice are more focused on finding ways for dealing with problems rather than preventing them.[48]

In her reaction to the report the State Secretary of Justice has announced immediate action "by taking extra measures in addition to those that are already in place". Besides this, the State Secretary is setting on a substantial enlargement of structural capacity, which is needed in order to be able to cater for the

47 *Verduyn* 2007, p. 22.

48 Veiligheid in justitiële jeugdinrichtingen: opdracht met risico's. Inspectie jeugdzorg (Inspectorate for Youth Care)/Inspectie van het Onderwijs (Inspectorate of Education)/Inspectie voor de Gezondheidszorg (Inspectorate for Health) and Inspectie voor de Sanctietoepassing (Inspectorate for the Application of Sanctions), September 2007.

increasing number of juvenile offenders, and to ensure that the institutional staff can work with smaller groups.

12. Residential care and youth prisons – Development of treatment/vocational training and other educational programmes in practice

The rehabilitation and the re-integration of juveniles into society are important principles when youngsters are placed in custodial institutions on the basis of a punishment or measure. The Youth Custodial Institutions Act regulates what the institutions have to provide for its inhabitants in terms of education, care, recreation and sports.

Article 20 of the Youth Custodial Institutions Act states that the remand home governor can draft residence plans for juveniles. For juveniles who have a remaining sentence of three months or more, he is obliged to do this. In a treatment centre the governor has to draw up a treatment plan for everyone who is placed in the centre. Several parties are involved in the implementation of the plan, such as the group leaders, teachers, guardianship institutions and the probation service. Wherever possible, parents, guardians, step-parents or foster parents are also involved, unless they give notice of not wanting to play a role in the plan, or when weighty interests of the juvenile object to it (Article 25 Youth Custodial Institutions Act).

The youngster is obliged to be in school or attend other activities within the framework of his pedagogical development. Which school and activities he attends is noted in the juvenile's individual plan. The Expertise Centres Act (1st August 1998) applies for the education provided in private institutions and in state institutions. This education consists of theoretical teaching and vocational- and practical training. Youngsters aged over 12 have to receive 1,000 hours of schooling per year.

Other activities to which youngsters are entitled are regulated in Article 53 of the Youth Custodial Institutions Act, including the right to use the library facilities on a weekly basis and to follow the news via TV or newspapers. Furthermore, juveniles are entitled to physical training (twice a week for 45 minutes each), two hours of daily recreation and a daily hour of airing. These minimum requirements can be extended according to each institution.[49]

The following is an example for a daily programme routine of two groups in a youth custodial institution.

49 *Doek/Vlaardingerbroek* 2006, p. 741.

Time	Group 1	Group 2
07.30 - 08.15	Wake up/breakfast	Wake up/breakfast
08.15 - 09.45	Class/activity unit	Class/activity unit
09.45 - 10.15	Break	Break
10.15 - 11.45	Class/activity unit	Class/activity unit
11.45 - 13.30	Lunch/airing/free time in the room	Lunch/airing/free time in the room
13.30 - 15.00	Class/activity unit	Class/activity unit
15.00 - 15.30	Break	Break
15.30 - 17.00	Class/activity unit	Class/activity unit
17.00 - 17.30	Dinner	Airing
18.30 - 19.00	Airing	Dinner
19.00 - 21.15	Recreation	Recreation

A regulation on educational and training programmes (hereinafter STP) has been added to the Youth Custodial Institutions Act. Article 3 defines an STP as "a combination of activities in which minors can participate for the purpose of execution of the enforced custodial sentence or custodial measure with reference to their stay in an institution". This means that, following their stay in an institution, minors can be given the opportunity to take part in an STP from outside the institution.

Juveniles in youth detention are eligible for an STP after having served half of the imposed sentence and when the remaining punishment amounts to at least one and no more than three months. The STP must start no later than one month before a juvenile's release date. Juveniles who are sentenced to youth detention for two months or less are not eligible for an STP. The same applies where the remaining punishment after custody/pre-trial detention has been deducted from the total sentence is one month or less.

The selection officer decides whether a minor can participate in an STP. On the bases of Article 19, par. 1 under b of the Youth Custodial Institutions Act a minor can also submit a request to participate on his own initiative.

The meaning of an STP is noted in the acknowledgement regulations STP and the Youth Custodial Institutions Regulation. Several providers can submit a request to the Sector Directorate of the Youth Custodial Institutions to have their programmes or modules acknowledged.

The programme covers a minimum of 26 hours per week and the activities on offer are directed towards:

- teaching special social skills;

- offering education;
- improving chances in the labour market after successfully completing a custodial sentence or measure;
- offering special care to the youngster in the fields of addiction, mental welfare or mental disablement;'
- filling in free time, or
- other forms of educational treatment of the minor, which on the one hand maintain the character of the custodial sentence or the custodial measure, and on the other hand prepare him/her for his/her the return to society.[50]

In its 2005 research on the enforcement of STPs in youth custodial institutions, the Youth Care Inspectorate judged that good results are being achieved with the STP at the individual level. When STPs are implemented, juveniles achieve concrete results regarding living, working or school. The Inspectorate also believes that still not enough juveniles actually participate in STPs. This is partly due to the fact that youth custodial institutions and their partners are still adapting to the STP, and partly to practical bottlenecks.[51]

13. Current reform debates and challenges for the juvenile justice system

"Jeugd Terecht" was a policy programme that the previous government introduced, which focused on preventing offending and reoffending by young persons aged 18 and younger. The programme consisted of 58 different actions, which were subdivided according to the following four themes: tailor-made, chain of collaboration, effectiveness and aftercare. The programme started in 2003 and finished with a final conference in February 2007. At least 300 experts from within the field of youth delinquency assembled at this conference. The experts made these and other recommendations to the new government which reached a coalition agreement in February 2007:

"To carry the plans any further, Jeugd Terecht has to be continued. With that, the focus has to be more on prevention and aftercare. Also children aged less than 12 years have to receive more attention. It is important that the municipalities take the lead in tackling youth delinquency; the application of administrative enforcement should be possible".

How the new government intends to continue the policy of recent years remains to be seen, and will be discussed under *Section 14*. A "Minister of

50 Article 2 of the Youth Custodial Institutions Regulation.

51 Een betere terugkeer in de maatschappij. De uitvoering van STP en proefverlof in de praktijk, Inspectie Jeugdzorg (Inspectorate for Youth Care) 2006 January, p. 3.

Youth and Family" has been introduced, and the following has been *inter alia* laid out regarding "Youth and Family" in the coalition agreement:

"It should be possible for children from problem families to be placed under supervision more swiftly. Legislation will be presented to the Lower Chamber which allows the juvenile court judge to impose a less severe measure, such as parenting assistance, before a serious threat for the child's development exists. Parents are becoming legally responsible for the damage which their minor children cause."

Within the framework of the enforcement of the action program "Jeugd Terecht", a bill on the influence of behaviour was introduced before Parliament on 20 October 2005.[52] This bill extends the possibilities for influencing the behaviour of young persons who have committed one or more criminal offences. The explanatory memorandum of the bill says the following:

Including an increase in the number of violent crimes committed by young persons, there has also been a polarization of youth delinquency. Furthermore, to an increasing extent, young persons who come into contact with criminal law exhibit (serious) behavioural problems that are often connected to underlying family problems and a lack of clarity and correction from their direct surroundings. Criminal law approaches to deal with these young persons will be effective sooner if they are geared more towards re-education. The central points of this approach need to lie in influencing the youngsters' behaviour and in offering them a clear, improved structure to life, with the ultimate goal of encouraging their reintegration and helping them to assume a constructive role in society. Currently the existing sanctions for young persons offer insufficient possibilities for such a pedagogic approach, which lasts for a long period of time and includes a possible need for youth welfare work.

Enlargements of the possibilities of the bill consist of, *inter alia:*

1) the introduction of a measure for influencing behaviour;
2) extending the possibilities to combine sanctions from juvenile criminal law;
3) the actual legal regulation of the possibility to attach special conditions to a suspension of pre-trial detention;
4) the introduction of the conversion of some juvenile sanctions (subsidiary youth detention and conditional youth detention into subsidiary or conditional adult detention in case the juvenile has reached the age of 18).
5) abolition of the (theoretical) possibility of life imprisonment for juveniles on whom adult criminal law is being applied.

With regard to the measure stated under point 1), it should be mentioned that it can only be imposed if the nature of the committed crime, the multitude of the

52 Parliamentary Documents I 2007-2008, 30.332, nr. B. The bill has been converted into an Act, which entered into force on 1st February 2008.

committed crimes, previous criminal convictions and the behavioural problems of the suspect give reason to induce this measure, and if its application is important for the suspect's further development. The measure lasts for a minimum of 6 months and a maximum of one year, and can be extended once for no longer than the same amount of time for which it was initially imposed.

The bill also excluded the possibility of imposing the penalty of life imprisonment for juveniles, and provides for a legal conversion from a substitute juvenile detention to a substitute detention in case the minor has become an adult at the time of the enforcement. Furthermore, a legal conversion was introduced from the conditional juvenile detention to imprisonment in case the minor has become an adult at the time of the enforcement.[53]

Other important challenges to and initiatives within the juvenile justice system include:

- The nationwide introduction of so called "victim-offender conversations" and "restorative justice courses" into juvenile criminal law. This is a form of mediation in which offenders and victims are brought together again, the aim being that this confrontation helps the offender to grasp the effects and consequences of his behaviour for the victim. At the same time, the latter is provided with an opportunity to better understand the underlying motives behind his/her victimisation and to thus better come to terms with it. On the basis of Article 10 of the Framework Decision of the Council of the European Union in 2001 (2001/220/JBZ), the Netherlands is obligated to develop possibilities for mediation in criminal cases. The former Minister of Justice specified the policy lines to the Lower House and declared that the nationwide introduction of "victim-offender-conversations" has been decided. The basic principles are that the conversations take place on a voluntarily basis; they are only a supplement to the criminal procedure; a report of the finished "victim-offender conversations" can be sent to the public prosecutor when the criminal proceedings have not yet been concluded. The conversations shall be prepared and implemented by the institution *Slachtoffer in Beeld*.[54]
- Bill 30 644, which in the meantime has been enacted, proposed, on the basis of a judicial authorization regulated by the Youth Care Act, to provide and implement closed juvenile care outside of the judicial juvenile institutions, in facilities which are appointed on the basis of the Youth Care Act. The purpose of this move is the separation of the

53 Programma Aanpak Jeugdcriminaliteit-Jeugd Terecht, Handreiking jeugdstrafrecht, Ministry of Justice 2004.

54 For more see: *Blad* 2007-3, p. 50; Herstel een plaats geven in maatswerkaanpak van jongeren 2005.

criminal juveniles and civil juveniles who had being placed together in judicial juvenile institutions.[55]

- Since 1st January 2010, joint accommodation of these two categories of juveniles is no longer permitted. The Minister of Youth and Family is responsible for the reception and treatment of juveniles who are placed according to civil law. In order to achieve this goal, new youth facileties are currently being developed and some youth custodial institutions have been transferred to the youth care system;
- Bill 30 519 – submitted on 10 April 2006 – was an initiative-bill aiming to widen parental liability for the behaviour of their 14 to 18 year old children;[56]
- A report by four Inspectorate Offices investigating safety in youth custodial institutions concluded that the juvenile institutions fulfil their task insufficiently. In reaction to the report the State Secretary of Justice has announced immediate action (see already *11.3* above).

14. Summary and outlook

One of the goals the legislator had in mind with the revision of the juvenile criminal law in 1995 was to bring the legal position of the juvenile more into line with that of an adult. The thought behind this goal was that today's youth are substantially more mature and can thus be better made aware. The new rules take more consideration for the legal capacity of juveniles (they can for example file complaints against writs, lodge appeals or submit a request to the Child Care and Protection Board themselves). Though the revised juvenile criminal law makes it possible to take more severe action against juveniles, it does not alter the fact that the current sanctions system is strongly imbued with educational principles such as learning and work projects as an alternative for a custodial punishment or fine, a custodial sentence (youth detention) which can not last longer than a year for persons under the age of 16, even for the most serious crimes.

"*Jeugd Terecht*", the juvenile policy program of the previous government focused on preventing youth offending and reoffending. The program ended in 2007 and recently the new government presented its project "Veiligheid begint bij voorkomen" to the Lower House which outlines the policy for the coming years.[57] The program aims at decreasing delinquency levels in the Netherlands

55 Parliamentary Documents I 2007-2008, 30.644, nr. C.

56 Parliamentary Documents II 2005-2006, 30.519, nr. 3.

57 Letter of 6 November 2007, 5513871/07/VbbV, Directorate-General Administration of Justice and Law Enforcement (Directoraat-Generaal Rechtspleging en Rechtshandhaving).

by 25% by the year 2010 in comparison to 2002 figures. With regard to juvenile delinquency the government chooses an individual approach to prevent recidivism, in which the emphasis will be more on prevention than in the past.

The individual approach focuses on, *inter alia*: repeat offenders, introducetion of new sections regarding conditional sanctions (conditional release, optimazation of conditional sanctions, judicial care and treatment of drug addicts), and the introduction of a programme reducing recidivism in prisons. This individual approach aims to achieve a 10% reduction in recidivism rates.

List of used abbreviations:

CBS	Central Bureau of Statistics
CCP	Code of Criminal Procedure
DJI	National Agency of Correctional Institutions
HR	Supreme Court
JOVO-regime	Regime for young adults
NJ	Dutch Case Law
PC	Penal Code
PIJ-measure	Placement in a juvenile institution
Stb.	Bulletin of Acts and Decrees
STP	Educational- and trainings program
WODC	Research and Documentation Centre

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Northern Ireland

David O'Mahony

Preliminary Remarks

Northern Ireland's system of youth justice has very recently undergone a significant transformation. A restorative justice approach to deal with young offenders[1] and victims has been integrated in the criminal justice system through a youth conferencing process. Before exploring the new restorative youth conferencing process, this paper looks at the historical development of youth justice. It considers overall crime levels and how the criminal justice system in Northern Ireland deals with young people who have offended. It examines what is known about youth offending in general and looks specifically at a number of innovative approaches to criminal justice practice. The sanctioning system and juvenile criminal procedure is considered, looking at the police led diversionary schemes, the newly introduced restorative youth conferencing process and the court based sanctions. Sentencing practice is looked at detailing diversionary and court dispositions, before examining the use of youth custody, which has also seen significant change. The paper closes with a discussion on current debates and recent findings on the operation of restorative youth conferencing and concludes with an overview of key innovations that are important internationally.

1 The terms "Young people" and "Juveniles" are used interchangeably in this chapter and refer to individuals who are criminally responsible, but dealt with in the specialised juvenile or youth courts. Currently this includes individuals 10 to 17 years of age (inclusive), but prior to 2005 it was 10 to 16-year-olds.

1. Historical development and overview of the current juvenile justice legislation

In Ireland[2] like many jurisdictions, prior to the mid-Nineteenth Century, there was little or no differentiation made between the adult and the juvenile offender, either procedurally, or in terms of their allotted punishment. Adults and juveniles were treated in much the same ways and exposed to the full range and force of criminal sanctions, from physical punishments like flogging and hanging to imprisonment and transportation (*Radzinowicz* 1986). Throughout the latter half of the nineteenth century, however, there arose a growing concern for the welfare of children; numerous Poor Law Amendments were passed as well as legislation specifically addressing the needs of deserted and destitute children (see *Caul* 1983). This concern for the welfare of the child was accompanied by an emerging acceptance of the need for a special jurisdiction over juvenile offenders.

The first evidence of a change in attitude toward the treatment of young offenders came in relation to the nature of juvenile dispositions. In Ireland, following the 1854 Act, the Reformatory Schools (Ireland) Act 1858 was passed, and subsequently replaced by the Irish Reformatory Schools Act 1868, the same year that the Industrial Schools (Ireland) Act 1868 was passed. The reformatories were designed to receive children up to the age of 16 who had been found guilty of a criminal offence; the industrial schools were to provide for children up to the age of 14 in need, or "whose circumstances are such that if left in their own surroundings, they are likely to join the delinquent population" (*Caul* 1983; see also *Gelsthorpe/Morris* 1994).

The twin preoccupation with the protection of children and their social control provided the binary core for the Children Act 1908, which, following the precedent set in Illinois, with the passing of the Juvenile Court Act 1899 (*Platt* 1969), established the first juvenile court system in Great Britain and Ireland. The court's jurisdiction extended over civil and criminal proceedings: it consolidated and amended earlier legislation allowing state intervention in the lives of those children in need of care and protection, as well as identifying what was to be done when "children" (under the age of 14) and "young persons" (between the ages of 14 and 16) came into conflict with the criminal law. For the first time, then, a separate court existed with powers to deal with both children in need of care and protection as well as those in conflict with the law.

In relation to the issue of juvenile offending, while the American court system allowed for a primarily welfare-oriented approach treating children not as offenders, but as delinquents in need of care and treatment, the 1908 Act by

2 Ireland was divided following the Irish War of Independence (1921) into the Republic of Ireland (the 26 counties to the south of Ireland) and Northern Ireland (the 6 counties in the north east of Ireland). Northern Ireland is part of the British United Kingdom.

contrast did not seek to lessen a child's liability under the law, but rather provided for an ameliorated application of the criminal law for young offenders. The influence of earlier reforms ensured that in relation to the criminal process and methods of disposition, welfare considerations gained a more central place in dealings with children. In general, all young offenders were to be heard in a setting that removed them from contact with adult offenders; the Act confirmed the age of criminal responsibility at seven, below which age a child could not commit a criminal offence; it removed the death penalty for all young offenders, as well as prohibiting the imprisonment of "children" (under 14), and restricting the ability of the courts to send "young persons" to prison.

The 1908 Act provided the blueprint for youth justice in Northern Ireland over the next forty years. Before 1950, the only notable change in the Northern Irish juvenile justice system came with the passing of the Children (Juvenile Courts) (Northern Ireland) Act 1942 which enabled two lay "children's guardians" to sit with a magistrate in juvenile cases. Their role however was limited to questioning those persons giving evidence.

In 1950, following the White Paper, *Protection and Welfare of the Young and the Treatment of the Young Offender* (1948), the Children and Young Persons Act (NI) was passed. The 1950 Act replicated many of the changes of the 1933 Act marking a shift away from a policy of punishment, to one with an increased emphasis on "treatment" of the offender and a merging of criminal and welfare concerns that placed the welfare of the child as paramount. The Act reinforced the principle that the juvenile court should sit separately from the adult criminal court; abolished the industrial and reformatory schools in favour of a unified training school system, dealing with children in need of care and protection and juvenile delinquents together; replaced the "children's guardians" with lay representatives having special experience of children and giving them equal voting rights with the presiding magistrate; raised the age of criminal responsibility from seven to eight; redefined the maximum age of a "young person" raising it from fifteen to sixteen; included provision to prohibit publication of the identity of any child before the juvenile court; and, established a Child Welfare Council. Again, most significantly, the new legislation followed the 1933 Act in stating that, "[e]very court in dealing with a child or young person who is brought before it, either as being in need of care or protection or as an offender or otherwise, shall have regard to the welfare of the child or young person" (s.46(1)).

However, the very considerably expanded emphasis on the welfare of young offenders that characterised so much of the thought and policy concerning youth justice in Great Britain during the 1960s remained largely absent from Northern Ireland, especially in relation to proposals that emphasised that offending should be dealt with in a civil rather than criminal forum. The Children and Young Persons (Northern Ireland) Act 1968 failed to address or respond seriously to any of the issues raised by the Kilbrandon Report (1964), or the two White Papers, *The Child, the Family and the Young Offender* (1965), and *Children in Trouble* (1968).

Rather the Act simply consolidated the principles underlying the previous legislation, re-enacting the 1950 Act. There remained a clear distinction between those children who were in need of care, and those who had come into conflict with the law in a judicial and legislative sense, though both were exposed to a range of disposals such as training school orders to meet their needs and, indeed, children placed in these institutions were dealt with together on loose welfare principles, whether they had been sentenced on welfare or offending grounds.

It was some ten years later before any significant thought was given to the plight of juveniles under the Children and Young Persons (Northern Ireland) Act 1968. This was to come in the form of the highly insightful "Report of the Children's and Young Persons Review Group" 1979, chaired by Sir Harold Black. This report was a fundamental review of the juvenile justice system in Northern Ireland and stressed the overarching importance of prevention and co-ordination, seeking to support children and their families, schools and communities through a wide range of voluntary and statutory agencies responsible for helping children. Importantly the report argued – unlike the British legislation of the time – that child care proceeding and criminal matters should be dealt with in a judicial rather than a civil forum and that care proceedings should be dealt with separately in a court specialising in such matters or a family court. Further, children in need of care requiring placement away from their homes should not be held in the same institutions as children who had offended; that juvenile offenders should be dealt with in a juvenile court solely dealing with criminal matters. As such, the case was made for a clear separation of child welfare cases and criminal matters at both an administrative and judicial level, while emphasising the need for due process in a judicial forum.

Following the Black Report (1979), things were slow to evolve and there was much resistance and political controversy not least from the training school system. As a result, the changes that did occur were mostly cosmetic, including the "Prior Compromise" which led to an administrative separation of care and justice facilities in the training schools in 1982; an Education and Libraries Order in 1989 which brought school truants before the juvenile courts for training; and the 1989 Treatment of Offenders Order which reduced the semi-determinate training school order from three to two years duration.

Nevertheless the Children and Young Persons (Northern Ireland) Act 1968 was to remain the state of the law in Northern Ireland for more than twenty-five years and it was not until the Children (Northern Ireland) Order 1995 was enacted, which, following the lead of the Children's Act 1989 in England and Wales, for the first time since 1908, effectively separated care and education cases from juvenile offenders in the criminal process. The Order was followed by the Criminal Justice (Northern Ireland) Order 1996 and the Criminal Justice (Children) (Northern Ireland) Order 1996 (*O'Mahony/Deazley* 2000).

The most recent changes to youth justice in Northern Ireland have been the most significant to date, with the introduction and mainstreaming of restorative

youth conferencing. Currently the only part of the United Kingdom to adopt mainstreamed statutory based restorative conferencing for young offenders has been Northern Ireland. The new youth conferencing system was introduced on a pilot basis in late 2003. The youth conferencing arrangements have statutory footing in the Justice (Northern Ireland) Act 2002 (*O'Mahony/Campbell* 2006). The new measures provide for two types of disposal, diversionary and court-ordered conferences. Both types of conference take place with a view to a youth conference co-ordinator providing a plan to the prosecutor or court on how the young person should be dealt with for their offence. Diversionary conferences are referred by the Public Prosecution Service and are not intended for minor first time offenders – who are normally dealt with by the police by way of a warning or police caution. For the prosecutor to make use of the diversionary restorative conference the young person must admit to the offence and consent to the process (*O'Mahony/Campbell* 2006).

Court ordered conferences, on the other hand, are referred for conferencing by the court and like diversionary conferences the young person must agree to the process and must either admit guilt, or have been found guilty in court. An important feature of the legislation is that the courts must refer all young persons for youth conferences, except for offences carrying a mandatory life sentence. The court may refer cases that are triable by indictment only or scheduled offences under the Terrorism Act (2000). In effect, the legislation makes conferencing mandatory except for a small number of very serious offences.

The format of the youth conference normally involves a meeting, chaired by an independent and trained youth conference facilitator, with the offender (and his or her guardian), the victim (who is encouraged to attend) and a police officer. Following a dialogue a "youth conference plan" or "action plan" will be devised which should take into consideration the offence, the needs of the victim and the needs of the young person. The young person must consent to the plan, which can run for a period of not more than one year and which usually involves some form of reparation or apology to the victim. Ideally the plan will include elements that address the needs of the victim, the offender and the wider community, so as to achieve a restorative outcome (*O'Mahony/Campbell* 2006).

Overall, the juvenile justice system in Northern Ireland currently caters for children and young persons who are between ten and seventeen years of age (prior August 2005 the age range was 10-16). As in England and Wales, there is a rule of law that a boy or girl under the age of ten years cannot commit a criminal offence. In other words, they are said to be *doli incapax* (incapable of wickedness). Children under the age of ten who do come to the attention of the police for committing offences, however, can be referred to social services and if there are difficulties or problems in the home, or in their social circumstances, these may be dealt with using child welfare legislation (Children Order 1995).

2. Trends in reported delinquency of children, juveniles and young adults

Northern Ireland has relatively low levels of crime, despite the high profile and serious terrorist related offences that have been in the media in the past. Police recorded crime statistics show that recorded crime levels have generally been about half of that recorded in England and Wales. Recently recorded crime levels have increased from 62,222 offences in 1997 to 123,194 in 2005/06 (*Lyness et al.* 2006). This has meant that the crime rate has increased from around 37 crimes per 1,000 of the population in 1997 to 72 per 1,000 population in 2005/06. These changes appear to have largely been caused by new counting rules that came into effect in 1998 which record crimes that were not previously part of the official figures and together with the introduction of a new data collection system have had a significant impact on recorded crime levels. Despite these changes, however, Northern Ireland still has relatively low levels of police recorded crime.

Making direct comparisons between the levels of crime in different jurisdictions is difficult because of differing counting rules, definitions of crime and the contrasting ways criminal justice systems operate and measure crime. However, the most reliable evidence appears to support the view that Northern Ireland has relatively low levels of police recorded crime. For example, if we consider offences defined as "crime index offences" that are used in America, and which are normally included in data from Northern Ireland, it is evident from the seven categories included that Northern Ireland has lower levels of crime per 100,000 population than England and Wales, although similar levels of homicide and rape (*Table 1* below).

Much of crime recorded by the police is property related, in fact 67% of offences in 2005/06 involved property such as theft, burglary or criminal damage, and of these vehicle crime (including theft from and theft of vehicles) accounted for about half of all property crime (*Lyness et al.* 2006). Though property related crime makes up the majority of crime recorded, Northern Ireland generally has had a higher proportion of violent and sexual related offences, with 28% of offences in 2005/06 being recorded as violent, by comparison to 21% in England and Wales (2004/05).

Table 1: Crime Index Offence Categories 2004/05: Rate per 100,000 population

Index Offence	Northern Ireland	England and Wales
Homicide*	2	2
Rape**	22	27
Robbery***	81	168
Burglary	786	1,288
Theft	1,565	3,382
Theft of a Vehicle	516	458
All Crime	6,938	10,537

* Includes Murder, Manslaughter and Infanticide – excludes attempts.
** Includes Attempted Rape.
*** Excludes Hijacking.
Source: *Lyness et al.* 2005, p. 14.

Victimisation surveys confirm the lower levels of police recorded crime in Northern Ireland. The International Crime Victimisation Survey which surveyed victims of crime in a number of different countries in Europe and North America showed that Northern Ireland had the lowest victimisation rate of any of the participating countries. Only 15% of those questioned in Northern Ireland (for the 2000 survey) had been a victim compared with an international average of 21% (*Hague* 2001). Earlier surveys confirm these findings and the 1995 International Crime Victimisation Survey showed Northern Ireland to have the lowest incidence rate of criminal victimisation (at 27 crimes per 100 population) of the eleven industrialised countries surveyed. Indeed, the rate of victimisation in Northern Ireland was considerably lower than America, Canada or England and Wales (*Mayhew et al.* 1997).

A comparison of the Northern Ireland Crime Survey 2005 (*French/Freel* 2007) with the 2005/06 British Crime Survey also shows that the risk of becoming a victim of crime is lower in Northern Ireland (17.3%) than in England and Wales (23.5%). While England and Wales had higher rates than Northern Ireland for household crime (18.1% v 13.2%) and personal crime (6.4% v 4.3%), the two jurisdictions had similar rates for violent crime (3.4% v 3.1%).

Considering the nature and extent of juvenile crime in Northern Ireland, there are a number of sources of information available that are worthwhile examining. One such source is the self-report method. For example, *McQuoid* (1994 and 1996) conducted a self-reported delinquency study in Belfast in late 1992 to early 1993 and found, like many other similar studies, that a high proportion of young people admitted committing delinquent acts. Indeed, about

75% of 14-21 year olds surveyed admitted committing at least one delinquent act at some time in their lives. A further 47% said they had done so in the past year. These figures did not include very minor offences like "status offences" or alcohol consumption (see *Table 2*).

Table 2: Self-Reported Delinquency – Prevalence of Delinquent Behaviour *Ever* and *Last Year* (study from 1992/93)

Type	Ever N	In %	Last Year N	In %
Property Offences	457	51.8	225	25.5
Violent Offences*	560	63.4	210	23.8
Drug Offences	219	24.8	176	19.9
Overall Delinquency**	667	75.5	418	47.3

* Violent Offences includes violence against the person and violence towards property such as vandalism.
** Overall Delinquency excludes alcohol and problem behaviour.
Source: Adapted from *McQuoid* 1996, p. 95-96.

McQuoid's (1994) research confirms how widespread delinquent behaviour is, particularly during adolescence and young adulthood. But, the majority of delinquent acts disclosed were relatively trivial in nature, including such things as bus-fare evasion, spraying graffiti or less serious acts of vandalism. Relatively few young people admitted committing much more serious acts, such as violence against the person or drug-related offences. The research reveals that 88% of the most recent offences had gone undetected by the police and frequent offenders tended not to be specialists, but involved themselves in a range of offences involving property, violence and drugs. The survey also found that the peak age for offending was concentrated in the 18-19 age bracket and proportionately more boys admitted to both offending and more serious offending than girls.[3]

Conviction data in Northern Ireland confirms that young people are much more likely to be convicted of an offence, but as they get older they become

3 These general findings have been confirmed by other international studies. For example, a Home Office self report study, conducted in England and Wales (*Graham*/*Bowling* 1995), focusing on 14 to 25 year olds, found that about half of the boys and one third of the girls admitted offending. This research found that boys were proportionately more involved in offences such as property crimes, and just under half of the boys admitted property offences while only a quarter of the girls admitted such offences. Violent crimes were also admitted to by one third of the boys and one tenth of the girls. Overall boys were found to be about three times more likely than girls to commit a criminal offence, although they were five times more likely to commit more serious offences.

significantly less likely to engage in crime (*Lyness et al.* 2006). These data support the hypothesis that much youth criminality occurs with their transition into adulthood, in a period when boundaries between right and wrong are often tested, but as young people mature find employment and stability in their lives, they largely grow out of crime (*Rutherford* 1992). These general findings are important especially in terms of how youth crime is best dealt with. It is neither necessary nor productive to involve the criminal justice system with every minor act of delinquency, especially given the vast majority of young people desist from offending as they mature into adulthood.[4]

3./4. The sanctioning system (kinds of informal and formal interventions) and juvenile criminal procedure

The sanctioning of criminal behaviour by young people in Northern Ireland takes place at three levels within the criminal justice system. Firstly at the police level, including diversionary[5] sanctions such as warnings or cautions. Secondly, through the recently introduced restorative youth conferencing process, which can occur at the state prosecution level or at the court level, and is now one of the primary responses to offending. And thirdly, at the court level, when the youth conferencing process has not been used for a specific reason.

Police

The police are generally the first point of contact and the main gate keepers into the criminal justice system. They have considerable powers of discretion in terms of how they deal with young offenders and use specialist juvenile officers. A dedicated Juvenile Liaison Scheme operated since 1975 and dealt with all young offenders (previously 10 to 16 years of age, currently 10-17 years of age) who came to the attention of the police. This was replaced in 2003 by a Youth Diversion Scheme and specialist officers review all such cases and make referrals as to how juveniles should be dealt with (prosecutors now make the final decision, usually based on police recommendations).

When dealing with cases that come to the attention of the police there are four broad options available, including taking "no further action", in which case

4 Unfortunately there are no statistics available in Northern Ireland that look at the offending of young migrants. Northern Ireland did not experience significant migration, especially over the period of the conflict. In the past two to three years there has, however, been a noticeable influx of migrants, especially from Eastern European countries.

5 Diversion in this context means diversion away from formal prosecution. It does not involve young persons being diverted into alternative programmes.

the young person is not processed any further than being referred to the Youth Diversion Scheme. This is most commonly used when there is insufficient evidence to establish that a crime was committed, or the offence and circumstances were so trivial it is not considered worth pursuing. Secondly, the police may give an "informed warning" which is an informal action and occurs where there is evidence that a crime has been committed, but a warning is considered sufficient to deal with the matter. Such warnings are usually given to the young person and their parent(s) but they do not result in any formal criminal record for the young person – although a note of these warnings is kept for one year. Alternatively, the police may decide to give a "restorative caution" to the young person. This can only take place if the young person admits to the offence, there is sufficient evidence to prosecute and the young person and their parent(s) gives informed consent to the caution. Police restorative cautions are recorded as part of a criminal record and kept for two and a half years and should the young person re-offend, may be cited in court. The last option is for the police to refer the case to the Public Prosecution Service for prosecution through the courts. This is usually reserved for more serious offences, or where the young person has had previous warnings or prosecutions.

The development of "restorative cautioning" has been led by police forces including the Thames Valley police in England and the police in Northern Ireland. In essence this approach seeks to deal with crime and its aftermath by attempting to make offenders "ashamed" of their behaviour, but in a way which promotes their reintegration into the community, and is delivered by trained officers (*Hoyle et al.* 2002). Research in Northern Ireland, on the restorative cautioning scheme found it to be a significant improvement on previous cautioning practice (*O'Mahony/Chapman/Doak* 2004). While the research found evidence of minor offenders being drawn into the process, it was successful in securing some of the traditional aims of restorative practice, in that reintegration was achieved through avoidance of prosecution and through a process which emphasised that the young person was not bad while highlighting the impact of the young person's offending on the victim (*O'Mahony/Doak* 2004).

One of the major achievements of the Youth Diversion Scheme is that it only resorts to prosecuting a relatively small proportion of young people referred to it. Typically, only about 5-10% of cases dealt with through the youth diversion scheme are referred for prosecution and only about 10-15% are given restorative cautions. The majority (about 75-80%) are dealt with informally, through "informed warnings" or no further police action is taken. In 2002/03 for example, only 5% of cases dealt with by the Youth Diversion Scheme were prosecuted through the courts, 14% were given formal cautions and therefore 81%, were dealt with informally. There has been a general increase in the use of informal measures when dealing with young people who come to the attention of the police and the proportion of cases given "informed warnings" or no further police action has increased over the past ten to fifteen years.

Diversion in Northern Ireland usually refers to diverting individuals out of the criminal justice system, rather than diverting them into some other programme or activity, which is often used in other jurisdictions. Indeed, diverting young people away from the courts is generally a more positive response than formally prosecuting them, and the police have been operating a progressive policy in terms of diverting young people away from formal criminal processing. The police point to encouraging reconviction data to support their policy, which shows that only about 20% of juveniles cautioned in Northern Ireland went on to re-offend within a one to three year follow-up period (*Mathewson/ Willis/Boyle* 1998) whereas about 75% of those convicted in the juvenile courts were reconvicted over a similar period (*Wilson/Kerr/Boyle* 1998).

Restorative youth conferencing

The introduction and incorporation of restorative interventions into the youth justice system in Northern Ireland signals a radical departure from previous responses to youth offending. It builds upon the use of increasingly diversionary practices by which the young person is side-tracked away from the formal court system. Such diversion is employed as an early intervention designed to prevent further offending by the young person, whilst avoiding the potentially stigmatising label of a criminal record (*Becker* 1963).

The new youth conferencing model has similarities with the New Zealand family group conferencing system, which has been in operation since 1989 (see *Maxwell/Morris* 1993); however the Northern Ireland model places considerably greater emphasis on the victim in the process.

The Youth Conference process

The youth conferencing system has statutory footing in part four of the Justice (Northern Ireland) Act 2002. Additionally, The Youth Conference Rules (Northern Ireland) 2003 establish the procedures to be followed when convening and facilitating a conference. The Youth Conference Service was introduced in December 2003 in the form of a pilot scheme and initially was available for all 10-16 year olds living in the Greater Belfast area. In mid-2004, the scheme was expanded to cover young people living in more rural areas, including the Fermanagh and Tyrone regions. Section 63 of the Justice (Northern Ireland) Act 2002 provides for the extension of the youth justice system to cover 17 year olds in the jurisdiction of the youth courts,[6] which took effect from August 2005.

6 The youth court is a specialised form of magistrates' court and is made up of a Magistrate and two lay magistrates. A hearing in the youth court is similar to one in the magistrates' court though the procedure is adapted to take account of age of the defendant.

Before it was launched throughout the rest of Northern Ireland, a thorough and independent evaluation of the youth conference system took place.

The youth conferencing system marks an important new role for the Public Prosecution Service[7] and Youth Courts, as it is has become one of the primary responses to nearly all young offenders brought for prosecution. Youth conferencing also significantly alters how victims and offenders experience the criminal justice system. In theory, it offers both parties increased involvement in the process and the opportunity to 'reclaim' their case from a professionalized, often alienating system (*Christie* 1979; *Shapland/Wilmore/Duff* 1985).

Typically, a youth conference involves a meeting in which a young person is provided with the opportunity to reflect upon their actions, and offer some form of reparation to the victim.[8] The victim, who is given the choice whether or not to attend, can explain to the offender how the offence has affected him or her as an individual. In theory, this means that a conference gives the offender the chance to understand their crime in terms of its impact, particularly on the victim, and for the victim to separate the offender from the offence. Following group dialogue on the harm caused by the young person's actions, a "conference plan" is devised. This plan takes the form of a negotiated "contract", with implications if the young person does not follow through what is required of him or her. Agreement is a key factor in devising the "contract", and the young person must consent to its terms. Ideally, the "contract" will ultimately have some form of restorative outcome, addressing the needs of the victim, the offender and wider community.

Two types of youth conferences are provided for in the legislation: diversionary youth conferences and court-ordered youth conferences. Both forms of conference take place with a view to a youth conference co-ordinator[9] providing a recommendation to the Prosecutor or court on how the young person should be dealt with for their offence.

A diversionary conference is convened following a referral by the Public Prosecution Service. The Prosecutor will only make a youth conference referral

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7 The Public Prosecution Service is a new independent service that considers all cases referred for prosecution by the police. It was established in 2005, replacing a system whereby the police brought most prosecutions to the courts. The service now makes the decision whether to prosecute or not and handles prosecutions in the courts. Prosecutors usually deal with both adult and juvenile cases referred by the police.

8 Typically a youth conference meeting will last between forty minutes to an hour and a half. Conferences take a considerable amount of time to prepare properly, so all participants – including the victim – can fully participate. Normally, it takes the conference co-ordinator the equivalent of about two days of work to set up and run a youth conference.

9 Youth conference co-ordinators are employed directly by the Youth Conferencing Service. They have specialist training in the facilitation of conferences and most staff have employment experience and training in social work, probation or community services.

where he would otherwise have instituted court proceedings. Diversionary youth conferences are not intended for minor first time offenders, who, depending on the seriousness of the offence, will usually be dealt with by the police and given an informed warning with a "restorative theme" or a restorative caution. Instead, diversionary conferences are often initiated as a "follow-up" intervention to curb offending, particularly where there has been previous contact with the criminal justice system. Two preconditions must be in place for a diversionary conference to occur: firstly, the young person must consent to the process and secondly they must admit that they have committed the offence. Where these conditions are not met the case will be referred to the Public Prosecution Service for a decision on whether to continue and, if so, the case may be dealt with through the ordinary court process.

Secondly, a young person may be referred to a youth conference by a court, known as a court-ordered youth conference. Again, the admission or establishment of guilt and consent of the young person are prerequisites for a court-ordered conference to take place. A distinctive feature of the Northern Ireland system is that a court must refer a young person to a youth conference. This is subject to certain restrictions: when a magistrate refers a case they must take into account the type of the offence committed. Only offences with a penalty of life imprisonment, offences which are triable, in the case of an adult, on indictment only and scheduled offences which fall under the Terrorism Act (2000) are not automatically eligible for youth conferencing. In effect, the vast majority of young offenders should be dealt with through the conferencing process. The mandatory nature of court-ordered referrals highlights the intended centrality of youth conferencing to the youth justice system. In jurisdictions where referrals are discretionary, the uptake has often been low which has led to the marginalisation of restorative schemes to the periphery of the justice system (*Shapland et al.* 2004; *Miers et al.* 2001; *Crawford/Newburn* 2003).

Court sanctioning

Young people in Northern Ireland are dealt with in special youth courts,[10] unless they are charged with adults, in which case they may be tried in the adult court and then referred for sentencing to the youth court if found guilty. In the youth court, which is a variation of the Magistrates Court, a panel of three magistrates, one of which is a resident magistrate[11] and the other two lay

10 Representatives from the Social Services Department work in the Youth Court and are able to provide reports to the court and conferencing service on the social circumstances and background of the young person.

11 Resident magistrates are legally trained and preside over the youth court. A resident magistrate sits in the youth court with two lay magistrates and they make sentencing decisions together. The magistrates receive some specialist training to sit in the youth court.

magistrates (at least one of the panel should also be a woman), preside over cases. The principal legislation governing the treatment of young people in the courts (especially up to late 1996) has been the Children and Young Persons Act (Northern Ireland) 1968.

As noted above, most cases that are heard in court have to be referred for youth conferencing. However, the court may exercise its powers of sentencing if the young person does not consent to conferencing, if they have been refused conferencing (by the conference co-ordinator), or if the court rejects the conference plan. Furthermore, if a young person does not admit guilt to a charge the case will be heard in the youth court and guilt or innocence will be established.

Young people who appear in the youth court often have legal representation. Free legal representation (Legal Aid) is provided for young people if their parents on a low income. Legal representatives are often practicing solicitors who specialise in criminal and youth court work.

Young people, like adults, also have rights of appeal to the higher courts if there are specific grounds – such as if the correct procedures were not followed. Similarly, the prosecution may appeal a sentence, if it is considered grossly lenient.

The sentencing options available to the court include: a) discharges, which may be absolute or conditional[12], such as requiring no re-offending within a fixed time frame; b) monetary penalties, which depending on the age of the young person have to be paid by the parents or young person and include fines, recognizance, and orders for compensation, as well as forfeiture and restitution; c) community penalties including community service[13] (age restricted), probation[14], the attendance centre order[15] and combination order.[16] More recent

12 An absolute discharge may be imposed where punishment is considered inappropriate. The offender is found guilty but no further action is considered necessary. A conditional discharge may be imposed when the young person is found guilty and they are discharged, on the condition that they stay out of trouble for a set period of time (between 6 months and two years). If another offence is committed during this time, the court can look at the old offence as well as the new one.

13 Community service is unpaid work that must be completed in the community. It is restricted to those 16 years of age or older and the number of hours of such work is restricted by legislation.

14 Probation is a court order which places the individual under the supervision of a probation officer for a specific period of time. The individual may be required to meet regularly with their probation officer and to participate in programmes that address their offending behaviour.

15 An attendance centre order is a court order which requires the individual to attend a particular centre at specific times and to engage in productive activities at the centre (including sports etc.). It is mostly used at weekends.

16 A combination order is a probation order combined with an element of community service.

community penalties include the reparation order, which requires the offender to make reparation either to the victim of the offence or some other person affected by it, or to the community at large. The community responsibility order is a form of community service which may be imposed and combines a specified number of hours to be spent on practical activities and instruction on citizenship; d) custodial sentences, including the juvenile justice centre order[17], which was introduced in 1999 to replace the training school order. It is for a determinate period between 6 months and two years, with half of the sentence spent in custody and the other half spent under supervision in the community and is available for those 10 to 16 years of age. Detention in the young offenders centre[18] is usually used for those 17 to below 21 years of age and the maximum term is four years.

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

The use of diversionary practices by the police (see above), to move young people away from prosecution through the courts, is an important part of how the Northern Ireland criminal justice system operates. Most young people who offend, especially for the first time, are not referred for prosecution but are dealt with, formally or informally by the police.

The Northern Ireland Youth Diversion Scheme is a specialist unit within the police service which deals with young offenders. The scheme has been highly effective in managing to keep the number of young people prosecuted through the courts to a minimum.

The police in Northern Ireland operate a Youth Diversion Scheme in which specialist officers review all cases involving young offenders (10 to 17 years of age). The youth diversion officers are one of the main gate keepers into the criminal justice system. They have considerable discretion in terms of the recommendations they make to the public prosecutor and on how young offenders are dealt with.

The majority of formal cautions given in Northern Ireland are to male offenders. Annually, around 80% or more of all juveniles cautioned are male. The lower number of cautions given to girls corresponds generally to their lower

17 A juvenile justice centre order is a custodial sentence for individuals 10 to 16 years of age. Such individuals are held in secure custody in a specialist unit, the juvenile justice centre.

18 The young offenders centre is a special prison catering for young adult prisoners between the ages of 17 to 20 years of age. Individuals of 21 years of age and over sentenced to custody are placed in the normal adult prisons.

levels of offending. However, of those girls who do offend, they appear more likely to receive a caution than boys.

6. The sentencing practice – Part II: The juvenile court dispositions and their application since 1980

As noted above, the practice of dealing with young offenders has changed significantly since 2003/04. Many offenders are now referred to youth conferencing when they appear in court. The statistics currently available best reflect the operation of the courts prior to this change and are not yet fully representative of current practice. The statistics are also limited in that they do not give any indication of regional differences. However, to give an oversight of how the courts operated prior to 2004, the following reviews the available statistics.

The majority of juveniles processed through the courts are at the older end of the age spectrum, with 16 year olds generally accounting for about half of all juvenile prosecutions. Few juveniles under thirteen years of age are prosecuted, and over the last decade no more than a few ten year olds have been prosecuted in the courts. There a number of differing patterns in terms of sentence types for which juveniles are convicted. If 2003 is taken as an example (see *Table 3* below), the most common disposal for juvenile offenders was supervision in the community (43%), followed by conditional discharges (33%), then fines (10%) and immediate custody (7%). Those indictable[19] offences most likely to result in a custodial sentence for a juvenile were robbery (50%) and burglary (18%). For less serious types of offences, including summary and motoring offences, the most common disposals were conditional discharges, fines and supervision in the community.[20]

19 Indictable offences are those more serious crimes which, if the individual is an adult, are tried on indictment in the Crown Court by a judge and jury. Triable-either-way offences include some generally less serious offences which, under certain circumstances, are triable either summarily in a magistrates' court or on indictment in the Crown Court. Summary offences are less serious and are tried in a Magistrates' Court before magistrates with no jury.

20 Supervision in the community includes the probation order, community service order, combination order, and attendance centre order.

Table 3: All court juvenile disposals (percentages) 2003

Crime Category	Immediate Custody	Suspended Custody	Supervision in the Community	Fine	Conditional Discharge
Percentage of Juveniles	7	2	43	10	33

Source: *Lyness et al.* 2005, p. 59.

Whilst the sentencing pattern for juvenile offenders for indictable and summary offences has fluctuated considerably between 1987 and 2004, especially if absolute numbers are considered, differences in numbers by individual disposals year on year mostly mirror the differences in the overall rate of convictions. Considering the proportion of juveniles given specific disposals, a clearer picture emerges in terms of the trends in sentencing. Overall, there has been relative stability in the proportions of juveniles given differing disposals over this time period. For example, between about a quarter to a fifth were given custodial sentences and around a third were given community sentences over the years 1987-2003. The more noticeable changes which occurred include a drop in the use of fines, from 18% of all disposals in 1987, to 10% in 2003 and an increase in the use of some community sentences such as the community service order (see *Table 4* below). However there have been very significant changes in the use of custody after 2003, which is detailed below (see *Sections 11* and *12*).

Table 4: Sentencing of juveniles by all courts: Indictable and Summary Offences

Sentence/Year	1987	1989	1991	1993	1995	1997	1999	2001	2003	2004	2005*
Prison	2 0%	3 0%	0 0%	0 0%	0 0%	0 0%	5 1%	3 0%	1 0%	1 0%	1 0%
Young Offenders' Centre	37 3%	44 5%	31 4%	22 3%	54 6%	32 4%	48 6%	7 1%	7 1%	14 2%	81 4%
Training School	220 18%	170 18%	170 21%	116 16%	165 18%	141 16%	12 1%	---	---	---	---
Juvenile Justice Centre	---	---	---	---	---	---	18 2%	66 8%	46 6%	48 7%	49 3%
Total Immediate Custody	259 21%	217 23%	201 25%	138 19%	219 23%	173 19%	83 10%	76 9%	57 7%	65 9%	144 10%
Prison Suspended	6 0%	4 0%	1 0%	1 0%	2 0%	0 0%	3 0%	1 0%	0 0%	0 0%	0 0%
YOC Suspended	36 3%	38 4%	19 2%	14 2%	25 3%	24 3%	18 2%	4 1%	14 2%	20 3%	72 5%
Attendance Centre	101 8%	99 11%	80 10%	83 11%	92 10%	61 7%	10 1%	36 4%	89 11%	104 14%	126 9%
Combination Order	---	---	---	---	---	---	0 0%	1 0%	6 1%	6 1%	23 2%
Probation/ Supervision	215 17%	209 22%	172 21%	163 22%	219 23%	293 33%	274 33%	290 33%	216 26%	171 24%	185 13%

Sentence/Year	1987	1989	1991	1993	1995	1997	1999	2001	2003	2004	2005*
Community Service	0 0%	7 1%	26 3%	19 3%	27 3%	22 2%	37 4%	24 3%	49 6%	47 7%	77 5%
Fine	219 18%	134 14%	67 8%	33 5%	55 6%	57 6%	128 15%	98 11%	80 10%	59 8%	348 24%
Recognisance	21 2%	10 1%	12 1%	26 4%	29 3%	42 5%	27 3%	45 5%	31 4%	16 2%	57 4%
Conditional Discharge	354 28%	206 22%	211 26%	244 34%	262 28%	222 25%	241 29%	290 33%	273 33%	205 28%	299 21%
Absolute Discharge	19 2%	10 1%	8 1%	4 1%	5 1%	4 0%	9 1%	15 2	12 1%	4 1%	13 1%
Youth Conference**	---	---	---	---	---	---	---	---	---	20 3%	72 5%
Community Responsibility	---	---	---	---	---	---	---	---	---	0 0%	32 2%
Other	15 1%	4 0%	7 1%	0 0%	0 0%	0 0%	7 1%	0 0%	7 1%	5 1%	7 0%
All Sentences	1,254	938	804	725	935	898	837	880	834	722	1,455

* From 2005 statistics include 10-17's before this date they included only 10-16's.
** Refers to the number of youth conference orders completed.
Source: Adapted from *Lyness et al.* 2005 and 2006.

7. Regional patterns and differences in sentencing young offenders

The available statistics in Northern Ireland do not give any breakdown of sentencing by regions.

8. Young Adults (18-21) and the juvenile (or adult) criminal justice system – legal aspects and sentencing practices

In Northern Ireland individuals 18 years and over are treated as adults in the criminal justice system. For individuals between the ages of 17 and 21 the major difference in terms of their treatment in the courts occurs in relation to custodial sentencing, whereby young offenders (17-20) are usually sentenced to the young offenders centre, rather than adult prison.[21] Otherwise, individuals 18 and over are treated in the same manner as adults.

9. Transfer of juveniles to the adult courts

The transfer of juveniles to the adult court in Northern Ireland is wholly exceptional and confined to juveniles who have been charged with homicide, or those that have been co-accused with an adult. If a juvenile is co-accused with an adult he or she may be tried in the adult court, but would referred back to the youth court for sentencing following a finding of guilt.

10. Preliminary residential care and pre-trial detention

The detention of juveniles before trial is primarily regulated by the Criminal Justice (Northern Ireland) Order 1996 and the Criminal Justice (Children) Order 1998 which together restrict the powers of the courts to detain juveniles in custody. These two pieces of legislation are intended to ensure that the custody of juveniles, either on remand or under sentence is strictly limited to the most serious, violent or persistent offenders. Detention prior to trial is therefore now limited to serious offences, where there is a significant risk of the young person failing to appear, or if there is a risk of further offending or interfering with witnesses. Otherwise, there is a presumption that juveniles will not be remanded in custody.

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21 The sentence of detention in a Young Offenders Centre is used instead of imprisonment for offenders convicted of imprisonable offences, who are between 16 to 20 years of age. The maximum term is four years. Individuals may be transferred to an adult prison when they reach 21 years of age. Exceptionally, individuals under the age of 21 may be given longer sentences (more than 4 years) of imprisonment.

For those juveniles remanded in custody, the average time spent on remand is usually short, between 20 to 30 days (*Hague/Campbell* 2002). Juveniles held on remand include: those charged with an offence whom the courts have ruled should be detained in custody pending a trial; those whom the courts have permitted to be released on bail pending trial but have not as yet met the conditions of the bail; those who had been released on bail but have subsequently been readmitted because they breached a condition of the bail; and those who have been found guilty by the court but have been ordered to be detained in custody pending sentence.

The Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) also provides that where a child has been charged with an offence and either bail cannot be granted, or where no place of safety can be established for their release, he or she may be detained overnight in custody pending a court appearance.

11./12. Residential care and youth prison – Legal aspects and the extent of young persons deprived of liberty and development of treatment/vocational training and other educational programmes in practice

Youth custody

The use of custody for juveniles in Northern Ireland merits specific attention, because the arrangements have been so different than other jurisdictions. The most common form of custodial sentence for juveniles in Northern Ireland was the Training School Order (no longer in use).[22] In 1997, for example, 141 of the 173 juvenile custodial sentences were made to training schools. Only 32 were to prison establishments like the Young Offenders Centre.

Prior to the end of 1996, juveniles (10-16 years inclusive, at that time) could be sent to training schools if they were found to be in need of care, protection and control (care reasons), for persistent school truancy (education reasons), or if they were convicted of an offence that could attract a custodial sentence (justice reasons). The Children (Northern Ireland) Order 1995 removed the care and education cases from the training school system which meant they only catered for juvenile offenders after this date.

The four training schools in Northern Ireland catered for different populations, such as boys and girls, Catholics and Protestants, as well as mixed populations. Juvenile offenders could also be remanded to a training school while awaiting trial and the training schools were independently operated and

22 Note changes under the Criminal Justice (Children)(NI) Order 1998, and Criminal Justice (NI) Order 1996, juvenile justice orders, and custodial sentencing; see *Section 6* below for further details.

managed. The majority of training school places were in "open establishments" and were operated with a welfare ethos. There were also secure placements available to deal with more "difficult" children and those who absconded from the open establishments.

The Training School Order was a semi-determinate sentence, providing authority for detention for a period of up to two years, but a child could be released on license after a period of 6 months at the discretion of the training school managers.[23] Alternatively, a child could be released at any time if release was approved by the Northern Ireland Office. In the mid-1990s, the average period of custody in the training schools for juveniles was around 12 months, however, this varied for individual children and between training schools and some children spent considerably longer periods in custody.

Considering trends in the use of custodial sentences in Northern Ireland, as noted earlier, about a quarter to a fifth of juveniles sentenced between 1987 and 1997 were placed in custody. Over this period the proportion of juveniles sentenced to custody, specifically immediate custody, was not only greater than adults (in 1997 15% of adults were sentenced to immediate custody for indictable and summary offences at all courts as opposed to 19% of juveniles), but also greater than that in England and Wales (where about 12% of juveniles were sent to custody in 1996). Further, juvenile offenders in Northern Ireland spent considerably longer in custody than their counterparts in England and Wales and indeed longer than young adult offenders in Northern Ireland.[24] Although over the decade 1987-97 the number of juveniles given custodial sentences fell from a high in 1987 of 259 to a low in 1993 of 138 juveniles, numbers increased nearly every year to 186 in 1996 which was the equivalent to a rate of 99 per 100,000 population.

There were many problems with the operation of the training school system in Northern Ireland. For example, considering the remand of juveniles in custody while awaiting trial, the duration of these varied considerably and, quite often, children were remanded in secure accommodation for lengthy periods. Furthermore, the period spent on remand was not taken into account as remission or time spent against the subsequent training school order.[25] The training school system housed children for care, justice, and educational reasons, until recently (as noted earlier), and many children from the care side of the system ended up on the justice side, after committing comparatively minor offences. As noted by the Northern Ireland Office in a policy document (*The*

23 Note however developments under the Criminal Justice (Children) (NI) Order 1998; see *Section 6*.

24 See also CRC A37(b), BR 17(1)(b)(c), 19(1), RDL 1, 2.

25 Note however developments under the Criminal Justice (Children) (NI) Order 1998; see *Section 6* below.

Way Forward 1996): "It is an indictment of the present system that around 50 percent of the current justice population were initially referred to the training schools for care or protection reasons".

Reports from the Northern Ireland Office noted that some training school orders were made for minor offences that most probably would not have resulted in custody for adults, and many young people spent longer periods in custody than adults, when convicted of similar offences. Furthermore, some children found themselves "locked" into the system because of a lack of community facilities or because they were thought to come from poor home backgrounds (Northern Ireland Office, 1999). Certainly this was a failure in the system. It is wrong in principle to allow the length of time a child spends in custody to be dependent on their behaviour in custody or their home circumstances, rather than their actual criminal record or the nature of their offence(s). In effect, some juveniles were deprived of their liberty for what was considered by some to be practicable, or even for their own "best interests". More generally, there was a lack of safeguards for the rights of children held in custody, despite the good intentions of most staff in the training school system.

However, very significant changes have occurred in the use of custody for juveniles in recent years. The introduction of the Children (Northern Ireland) Order 1995 removed welfare and educational cases from those who could be sent to custody. The Criminal Justice Act (Northern Ireland) 1996 also curtailed the powers of the courts to impose custodial sentences, limiting them to more serious, violent and sexual offences and the Criminal Justice (Children) Order 1998 extended the right to bail for children except in the most serious cases and introduced a determinate "Juvenile Justice Order". The Juvenile Justice Order ranges from 6 months to two years – half of which is spent in custody and the other half under supervision in the community. The combined result of these legislative changes saw the number of juveniles given custodial sentences drop very significantly, from 23% in 1995 to 10% or less from 2002 to 2005 (see *Table 4* above).

These changes in the legislation combined with the close management of the custodial arrangements for juveniles also saw the juvenile custody population fall dramatically. In the mid 1980s around 200 or more juveniles were held in custody in the four training schools across Northern Ireland. As noted above, they were generally held for less serious offences than adults held in custody. Reconviction data showed that the majority of juveniles released from custody re-offend within three years. *Curran* (1995), for example, showed that 86% of juveniles released from secure custody were reconvicted within three years and Northern Ireland Office figures show 97% of boys released from training schools were reconvicted within three years (*Wilson et al.* 1998). The evidence clearly shows that custody for juveniles was and is ineffective in terms of preventing or reducing re-offending.

The juvenile population (10-16 years) in custody decreased steadily from the 1990's to an average of only about 25-35 persons (held in the Juvenile Justice Centre) over the 2003/04 period (which equates to about 20 per 100,000 of the relevant population) – about half of which were held on remand and the other half were sentenced (*Lyness et al.* 2006).[26] This has been a considerable achievement in turning around what had been a failing system, which allowed young people to be placed and held in custody for reasons other than the seriousness of their offence, to a system which now uses custody for juveniles sparingly and as a last resort.

Table 5: All court juvenile sentencing (percentage of all sentences)

Sentence	1994	1996	1998	2000	2002	2003	2004	2005
Juvenile Justice Centre	---	---	---	8	7	6	7	3
Young Offenders Centre	4	5	4	2	1	1	2	6
Training School	21	15	13	---	---	---	---	---
Custody Probation Order	---	---	---	---	---	0	0	1
Total Immediate Custody	25%	20%	17%	11%	8%	7%	9%	10%

Notes: Data from 2005 includes 17 year olds.
Source: Adapted from *Lyness* 2004, p. 69 and data provided by the Northern Ireland Office to the author.

The new juvenile justice centre was completed in 2007 and was built in response to recommendations made by the comprehensive review of the juvenile justice estate and the Criminal Justice Review in 2000. It is the main custodial facility for juveniles in Northern Ireland and has the capacity to provide accommodation for up to 48 young people. While numbers vary the average population is normally between 25 and 30 – mostly boys between 15 and 16 years of age. The new centre accommodates boys and girls who have been remanded into or sentenced to custody by the court, therefore, accommodation

26 The average population of young people (10-16 years) held in custody in 2005 is similar. Some 26 individuals were held in the Juvenile Justice Centre (aged 10-16). A further 9 individuals (aged 10-16) were held in the Young Offenders Centre (which is designed for 17-20 year old offenders) giving a total average of 35 in custody for 2005.

more specifically designed to meet the needs of girls has been incorporated within the new centre.

The regime of the centre is based around the educational needs of children and provides for their education and support. All of those held in the centre are housed in units of around 6 to 10 children who have their own single rooms. Children typically spend week days in the on-site school and have association time and visits in the evening and weekends. The regime of the facility is based around a points system which reflects the behaviour of the child. Children who follow the regime and behave well are given incentives such as being able to have a television and personal belongings in their room.

13. Current reform debates and challenges for the juvenile justice system

The most recent and major reform to youth justice in Northern Ireland has been the incorporation of restorative youth conferencing as the main criminal justice disposal. This has changed the face of the youth justice system and although it has only been in operation for a few years, early indications appear to be positive. The youth conferencing scheme has been subject to a major evaluation in which the proceedings of 185 conferences were observed and personal interviews were completed with 171 young people and 125 victims who participated in conferences (*Campbell et al.* 2006). This research allows us to reflect on the extent to which the scheme has been successful in achieving its aims and the extent to which it renders the justice system more accountable and responsive to the community as a whole.

The research findings were generally very positive concerning the impact of the scheme on victims and offenders and found it to operate with relative success. Importantly, the research showed that youth conferencing considerably increased levels of participation for both offenders and victims in the process of seeking a just response to offending. The scheme engaged a high proportion of victims in the process: over two-thirds of conferences (69%) had a victim in attendance, which is high compared with other restorative based programmes (cf. *Maxwell/Morris* 2002; *Newburn et al.* 2003; *O'Mahony/Doak* 2004). Of these 40% were personal victims and 60% were victim representatives (such as in cases where there was damage to public property or there was no directly identifiable victim). Indeed, nearly half of personal victims attended as a result of assault, whilst the majority (69%) of victim representatives attended for thefts (typically shoplifting) or criminal damage.

Victims were willing to participate in youth conferencing and 79% said they were actually "keen" to participate. Most (91%) said the decision to take part was their own and not a result of pressure to attend. Interestingly, over three quarters (79%) of victims said they attended "to help the young person" and

many victims said they wanted to hear what the young person had to say and their side of the story: "I wanted to help the young person get straightened out". Only 55% of victims said they attended the conference to hear the offender apologise. Therefore, while it was clear that many victims (86%) wanted the offender to know how the crime affected them, what victims wanted from the process was clearly not driven by motivations of retribution, or a desire to seek vengeance. Rather it was apparent that their reasons for participating were based around seeking an understanding of why the offence had happened; they wanted to hear and understand the offender and to explain the impact of the offence to the offender.

Victims appeared to react well to the conference process and were able to engage with the process and discussions. It was obvious that their ability to participate in the process was strongly related to the intensive preparation they had been given prior to the conference. A lot of work was put into preparing victims for conferencing and they were generally well prepared. Only 20% of victims were observed to be visibly nervous at the beginning of the conference, by comparison to 71% of the offenders. They were also able to engage and play an active part in the conferencing process and 83% of victims were rated as "very engaged" during the conference and 92% said they had said everything they wanted to during the conference.

Overall 98% of victims were observed as talkative in conferences and it was clear that the conference forum was largely successful in providing victims with the opportunity to express their feelings. Though most victims (71%) displayed some degree of frustration toward the young offender at some point in the conference, the vast majority listened to and seemed to accept the young person's version of the offence either "a lot" (69%) or "a bit" (25%) and 74% of victims expressed a degree of empathy towards the offender. It is important to realise, though, that while a minority of victims were nervous at the beginning of the conference, this usually faded as the conference wore on and nearly all reported that they were more relaxed once the conference was underway. Also, the overwhelming majority (93%) of victims displayed no signs of hostility towards the offender at the conference. Nearly all victims (91%) received at least an apology and 85% said they were happy with the apology. On the whole they appeared to be satisfied that the young person was genuine and were happy that they got the opportunity to meet them and understand more about the young person and why they had been victimised. On the whole, it was apparent, for the victims interviewed, that they had not come to the conference to vent anger on the offender. Rather, many victims were more interested in "moving on" or putting the incident behind them and "seeing something positive come out of it".

For offenders it was evident that the conferencing process held them to account for their actions, for example, by having them explain to the conference group and victim why they offended. The majority wanted to attend and they gave reasons such as, wanting to "make good" for what they had done, or

wanting to apologise to the victim. The most common reasons for attending were to make up for what they had done, to seek the victim's forgiveness, and to have other people hear their side of the story. Only 28% of offenders said they were initially "not keen" to attend. Indeed many offenders appreciated the opportunity to interact with the victim and wanted to "restore" or repair the harm they had caused. Though many offenders who participated in conferences said they did so to avoid going through court, most felt it provided them with the opportunity to take responsibility for their actions, seek forgiveness and put the offence behind them. Youth conferencing was by no means the easy option and most offenders found it very challenging. Generally offenders found the prospect of coming face to face with their victim difficult. For instance, 71% of offenders displayed nervousness at the beginning of the conference and only 28% appeared to be "not at all" nervous. Despite their nervousness, observations of the conferences revealed that offenders were usually able to engage well in the conferencing process, with nearly all (98%) being able to talk about the offence and the overwhelming majority (97%) accepting responsibility for what they had done.

The direct involvement of offenders in conferencing and their ability to engage in dialogue contrasts with the conventional court process, where offenders are afforded a passive role – generally they do not speak other than to confirm their name, plea and understanding of the charges – and are normally represented and spoken for by legal counsel throughout their proceedings. Similarly, victims were able to actively participate in the conferencing process and many found the experience valuable in terms of understanding why the offence had been committed and in gaining some sort of apology and/or restitution. This too contrasts with the typical experience of victims in the conventional court process where they often find themselves excluded and alienated, or simply used as witnesses for evidential purposes if the case is contested (*Zehr* 1990).

Nearly all of the plans (91%) were agreed by the participants and victims were on the whole happy with the content of the plans. Interestingly, most of the plans agreed to centre on elements that were designed to help the young person and victim, such as reparation to the victim, or attendance at programmes to help the young person. Few plans (27%) had elements that were primarily punitive, such as restrictions on their whereabouts, and in many respects the outcomes were largely restorative in nature rather than punitive. The fact that 73% of conference plans had no specific punishment element was a clear manifestation of their restorative nature. But more importantly, this was also indicative of what victims sought to achieve through the process. Clearly, notions of punishment and retribution were not high on the agenda for most victims when it came to devising how the offence and offender should be dealt with through the conference plan.

Overall indications of the relative success of the process were evident from general questions asked of victims and offenders. When participants were asked what they felt were the best and worst aspects of their experience a number of common themes emerged. For victims, the best features appeared to be related to three issues: helping the offender in some way; helping prevent the offender from committing an offence again; and holding them to account for their actions. The most positive aspects of the conferencing were clearly non-punitive in nature for victims: most seem to appreciate that the conferences represented a means of moving forward for both parties, rather gaining any sense of satisfaction that the offender would have to endure some form of harsh punishment in direct retribution for the original offence. Victims and offenders expressed a strong preference for the conference process as opposed to going to court and only 11% of victims said they would have preferred if the case had been dealt with by a court. On the whole they considered that the conference offered a more meaningful environment for them. While a small number of victims would have preferred court, identifying conferencing as "an easy option", this view was not held by the offenders. The offenders identified the most meaningful aspect of the conference as the opportunity to apologise to the victim, a feature virtually absent from the court process. Yet, they also identified the apology as one of the most difficult parts of the process.

A clear endorsement of victims' willingness to become involved in a process which directly deals with the individuals that have victimised them was evident in that 88% of victims said they would recommend conferencing to a person in a similar situation to themselves. Only one personal victim said they would not recommend conferencing to others. For the vast majority who would, they felt the process had given them the opportunity to express their views, to meet the young person face to face, to ask questions that mattered to them, to understand why the incident happened to them, and ultimately, it appeared to help them achieve closure.

Research is planned to assess the impact of the scheme on recidivism rates. It is not expected that the success of youth conferencing will hinge on achieving marked reductions in re-offending. Previous research has shown such schemes can have impacts, but these are normally only slightly better than traditional court based sanctions. Rather, it appears the success of the process lies in its ability to deliver a process of justice that actively holds offenders to account for their actions, whilst giving victims a voice and which gives participants considerably higher levels of satisfaction with both the process and outcomes in terms of delivering a just response to crime.

14. Summary and outlook

Northern Ireland offers a number of insights in youth justice practice that are important internationally. One of the major strengths of the system is its ability

to deal effectively with most juvenile offending at an early stage, using the least formal and intrusive methods. The police Youth Diversion Scheme has been effective in managing to divert the majority of young people referred to it away from formal prosecution. Typically only 5-10% of young people referred to the scheme are prosecuted through the courts, most are dealt with by informal processes including "no further action" or "informed warnings". Research supports the use of less formal measures and re-offending rates for these measures are considerably better than for those drawn into the criminal justice system.

Recent changes including restrictions placed on the use of youth custody and how it is managed have also had a major impact on the number of children held in custody. Northern Ireland had a system that locked up too many young people, often unnecessarily. It now has a very low rate of custody for young people, and unlike many other jurisdictions, seems to be effectively restricting custody to only the most serious and repeat offenders.

The introduction and mainstreaming of restorative youth conferencing has seen the face of criminal justice change dramatically for young people and victims in Northern Ireland. It has been designated as the main response for young offenders and appears to offer significant advantages over the primarily retributive based approach to sentencing. It offers victims a role in seeking to put right the damage caused by offending and addresses their needs, while holding young offenders to account for their actions. In many respect the recent achievements of the new restorative youth conferencing system have been due to the adoption of the model as the main response to offending and the proper funding and facilitation of the scheme. The success of restorative justice as a model is very much tied up in the quality of its provision. Whilst it is by no means a panacea, it offers another way of dealing with youth crime that appears to be more satisfactory, especially for those directly affected by crime. Restorative schemes elsewhere that have been marginalised or poorly funded have often struggled to be effective in terms of providing restorative justice. In New Zealand, research shows that a successful conference also contributed to reducing the chance of re-offending (*Maxwell/Morris* 2002). Therefore, if youth conferencing is to prove effective in achieving long-term positive outcomes – including possibly reducing re-offending – proper funding, high standards of best practice, and due process and procedural equity must be aspired to and attained.

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Poland

Barbara Stańdo-Kawecka

1. Historical development and overview of the current juvenile justice legislation

1.1 The 1921 draft of a separate juvenile justice law

At the very beginning of the 20th century, when the movement towards separate juvenile justice systems emerged in the United States, Canada, Belgium, Germany and other European countries, Poland did not exist as an independent country. However, it was in 1919 – one year after having regained independence – that a legislative commission was set up in Poland to prepare drafts of both the criminal and civil law.

Issues concerning the juvenile justice system were hotly disputed in a subdivision of the legislative commission for criminal law reform. As a rule, members of that commission shared the opinion that children and youths who had violated the criminal law should not be treated as "little adults", and they should not receive the same penalties as adult offenders. Some members of that commission supported a welfare approach, suggesting that juvenile offenders up to 18 years of age should not be punished, regardless of whether or not they had acted with discernment (*rozeznanie;* in German *Einsicht*). Penalties containing elements of retribution and repression should be totally excluded from the catalogue of reactions towards juvenile offending, and only educational and correctional measures should be applied to them. Others, however, were not willing to completely abolish the criminal responsibility of juveniles. They preferred the division of juvenile offenders into those acting without the ability to discern between right and wrong (discernment), and those who commit offences while being able to distinguish between right and wrong and who were able to direct their behaviour accordingly. Only educational and correctional

measures should be applied to the former category of juveniles, while the latter category should be punishable, but with the possibility for mitigated penalties or for substituting penalties with educational or correctional measures under certain circumstances.

In 1920 different assumptions concerning the juvenile justice system that emerged from the legislative commission were consulted with French scientists. At the same time, during his stay in Vienna, one of the leading actors in the legislative commission – Professor *J. Makarewicz* – asked Professor *Stoos* from Switzerland and Professor *Gleispach* from Austria for their opinion on the proposed juvenile law. After these international consultations the draft of the Act on Juvenile Courts was prepared by the legislative commission in 1921.[1]

The 1921 draft was a kind of compromise between supporters of a radical orientation – who insisted on imposing only educational and correctional measures on juveniles – and more moderate scholars who wanted to retain some elements of juvenile criminal responsibility. According to provisions of the 1921 draft, juveniles under 13 years of age could not be held criminally responsible, and were only eligible for educational measures. Juveniles who committed an offence between 13 and 17 years of age should be treated in the same way, providing that they were not mature enough to understand the nature of the act, and to behave according to that discernment.

Juveniles who committed an offence between their 13th and 17th birthdays while being able to understand the nature of their actions and to behave accordingly were to be sentenced to placement in a correctional house. These correctional houses constituted a kind of indeterminate youth custody (*Rahmenstrafe*). The court was obliged to determine the shortest and the longest period of stay in such an institution, however within the boundaries of 6 months and 10 years. The juvenile could be conditionally released by the court even before the shortest period determined in the court sentence had passed. After the shortest and before the maximum term of stay in the institution had expired, juveniles could be released by the house board. Under certain circumstances (for example when the criminal proceedings were launched after the juvenile had turned 18) the court could impose an adult penalty instead of the *quasi*-penalty of placement in a correctional house. This optional substitution of sentence was however mandatory under certain circumstances (for example where a juvenile who had committed an offence before turning 17 and was at least 21 at the time of the court ruling in the first instance). According to the 1921 draft, juvenile cases fell within the jurisdiction of juvenile judges who were appointed in Regional Courts.

1 Justification to the 1921 draft of the Act on Juvenile Courts, p. 12.

1.2 The Criminal Code of 1932

The 1921 draft of the Juvenile Courts Act was never enacted. However, most of its provisions were included in the 1928 Code of Criminal Procedure as well as in the Criminal Code of 1932. The Code of Criminal Procedure of 1928 introduced separate Juvenile Courts as well as separate proceedings in juvenile cases, although in practice before World War II Juvenile Courts were set up only in some of the largest cities.[2] The 1932 Criminal Code contained a separate chapter with substantive provisions concerning juveniles. Pursuant to Art. 69 of this Code, in the context of criminal law, a juvenile was a person who had committed an offence before having reached 17 years of age. The 1932 Act retained the categorization of juveniles into those acting with and without discernment that had been suggested in the 1921 draft. Young offenders under the age of 13 could only be issued educational measures, as could those juveniles between 13 and 17 who had acted without the ability of discerning the wrongfulness of their behaviour. Educational measures were reprimands, placement under the supervision of parents, a trustworthy person or a trustworthy institution, or placement in a state or privately run educational institution.

Under Art. 70 of the 1932 Criminal Code, juveniles aged 13 to 16, who had committed an offence while having been able to understand the nature of the act and to direct their behaviour accordingly, were to be sentenced to placement in a correctional house. It was, however, possible to impose educational measures on such juveniles instead, if the court found that placing them in a correctional house was inappropriate due to the circumstances of the offence, the juvenile's character or the circumstances of his/her life and environment. The implementtation of placements in a correctional house could also be conditionally suspended by the court. According to the 1932 Code, the court did not determine a minimum or maximum duration of stay in these correctional institutions. Rather, juveniles could be institutionalized in such a house until the age of 21. However, there was also the possibility of being granted conditional early release.

The legal nature of being placed in a correctional house under the Criminal Code of 1932 was controversial. According to some lawyers, this residential intervention constituted a special educational-preventive measure, different from other educational measures provided by the Code. In the opinion of others, however, it was a specific penalty, *quasi*-penalty or educational penalty (in German *Erziehungsstrafe*) that combined some retributive elements and a predominantly rehabilitative goal.[3] In cases stated by the Code, placement in a correctional home could be replaced by an 'ordinary' penalty, particularly in

2 *Korcyl-Wolska* 2004, p. 30.

3 *Stańdo-Kawecka* 1993, p. 10-15.

cases concerning juvenile offenders who had turned older than 17 years of age in the course of the court proceedings.[4]

1.3 The 1982 Juvenile Act

The juvenile-specific provisions of the Criminal Code of 1932 and the Code of Criminal Procedure of 1928 were – with some limited amendments – valid up to May 1983, when they were replaced through the commencement of the Juvenile Act of 1982 (*ustawa o postępowaniu w sprawach nieletnich*, hereinafter abbreviated as JA), which is still in place and valid today. The JA of 1982 covers substantive legal questions and procedural matters as well as matters related to the execution of measures imposed on juveniles. These provisions not only apply to juveniles who have committed an offence, but also to those who show signs of so-called 'demoralization'. In comparison to the 1932 Criminal Code, the 1982 JA strengthened the paternalistic welfare approach:

a) the notion of a 'juvenile' under the 1932 Criminal Code covered perpetrators who committed offences while under 17 years of age; in 1982 it was broadened by the JA; 'juveniles' in the meaning of the 1982 JA are not only perpetrators of offences, finance offences (for example not paying taxes, customer duties etc.) and selected petty crimes (*wykroczenia*, in German *Übertretungen*), referred to as 'punishable acts' that are committed by over 13 and under 17 year olds; 'juveniles' in the context of juvenile justice are also persons under 18 who show signs of problem behaviour, referred to by the legislator as signs of 'demoralization';
b) the catalogue of reactions applied under the 1982 JA to both juvenile perpetrators of 'punishable acts' as well as juveniles showing signs of 'demoralization' are much the same and cover educational, medical and corrective measures;
c) all measures provided for both categories of juveniles according to Art. 3 of the JA shall be imposed in order to safeguard the best interest of children as well as to achieve positive changes in their personality and behaviour;
d) at least theoretically, juvenile offenders – with a few exceptions – are seen as not being responsible for their punishable acts; generally, they are treated by the 1982 JA as persons who are not mature enough to recognize the dangerousness of their behaviour for society, or to control their actions;
e) the 1982 JA stresses diagnosis and treatment, and disregards guilt and punishment; the term of 'responsibility' is only used in the context of

4 *Stańdo-Kawecka* 2007, p. 280-282.

parents; according to the Preamble to the JA, its main objectives are to counteract the 'demoralization' and delinquency of juveniles, to create conditions for those who have come into conflict with the law or with the rules of acceptable social behaviour, to help to return youngsters to normal life and to strengthen the care and educational functions of the family and its sense of responsibility for the development of children;

f) the competent authority in juvenile cases is the Family Court, which has broad discretion. It shall act in the best interest of the child, with an emphasis on bringing about favourable changes in his/her personality and behaviour. When necessary, this emphasis was also to lie in ensuring the proper discharge of parental obligations, and to take the public interest into account.

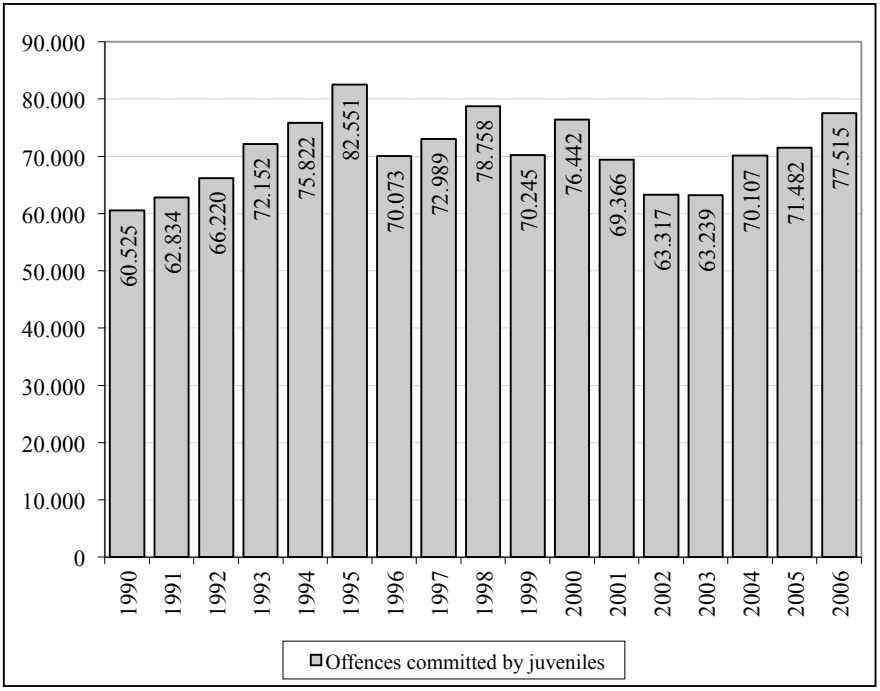
As a result of the changes introduced to the juvenile justice system by the 1982 JA, the term 'juvenile criminal law' does not constitute an official term in the Polish legal language. Instead, the term 'juvenile law' has been used in the legal terminology.[5]

2. Trends in reported delinquency of children, juveniles and young adults

In police statistics, juvenile offenders are classed as persons who have committed offences (*występki i zbrodnie*, in German: *Vergehen* and *Verbrechen*) after having reached the age of 13, but before turning 17. Comprehensive data on juvenile offences have been available in Poland since 1990. The number of offences committed by juveniles in the period 1990-2006 according to police statistics is shown in *Figure 1*. The overall number of juvenile offences recorded by the police had been rising in the years 1990-1995, but after 1995 no clear trends could be observed. Up to 2002 and 2003 the number of juvenile offences dropped off almost to the level of 1990, a trend that again saw a reversal in subsequent years. Yet the overall impression is a rather stable level of reported juvenile delinquency in Poland.

5 *Krajewski* 2006, p. 158.

Figure 1: Number of recorded offences committed by juveniles

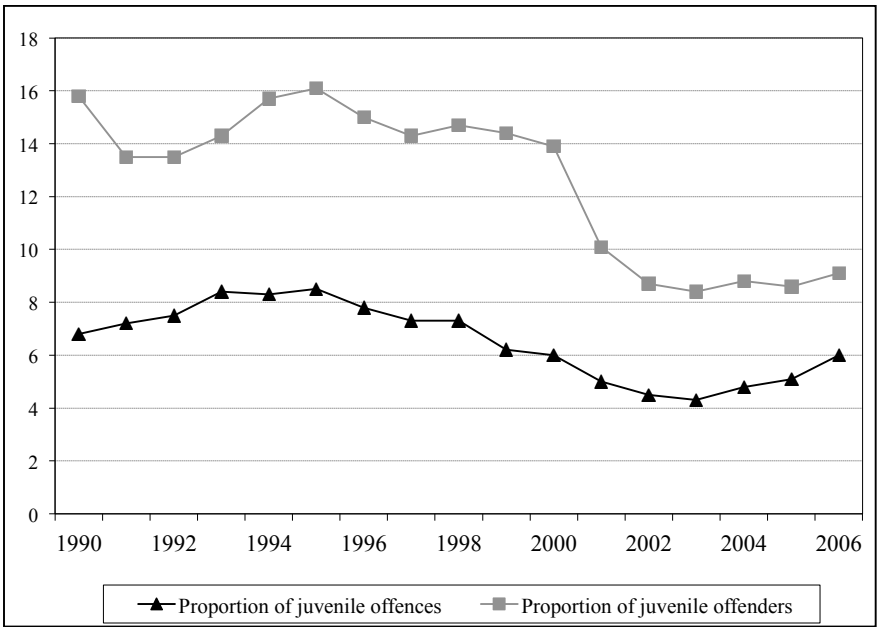


Source: Police Statistics, available online: www.kgp.gov.pl.

Figure 2 below shows the proportion of juvenile offences among all offences recorded by the police. A significant increase can be noticed between 1990 and 1993. While in 1990 juvenile offences constituted 6.9% of all offences recorded by the police, in 1993-1995 the share levelled off at 8.3-8.5%. In the subsequent years, however, the proportion of juvenile offences fell continuously up until 2003, where it amounted to 4.3%, a much lower share than at the beginning of the 1990s. As was also the case with the absolute number of offences committed by juveniles shown in *Figure 1* above, here, too, the figures have been rising since 2003. The percentage of juvenile *suspects* among all suspects recorded by the police has shown more or less similar tendencies to the share of juvenile offences. At its peak in 1995 the share amounted to 16.1%. After 1995, however, it started to drop and since 2002 it has remained relatively stable. The sharp decrease in the percentage of juvenile suspects observed between 2000 and 2002 seems to be connected with the sudden growth in the number of adults suspected of drunk driving, which at that point started to be penalised as an offence under the Criminal Code. Generally, trends in juvenile

offending compared to trends in overall crime levels seem to point out that the former did not contribute significantly to the overall growth of recorded offences in Poland after 1989.[6]

Figure 2: Proportions of juvenile offences and juvenile offenders among overall number of offences and suspects



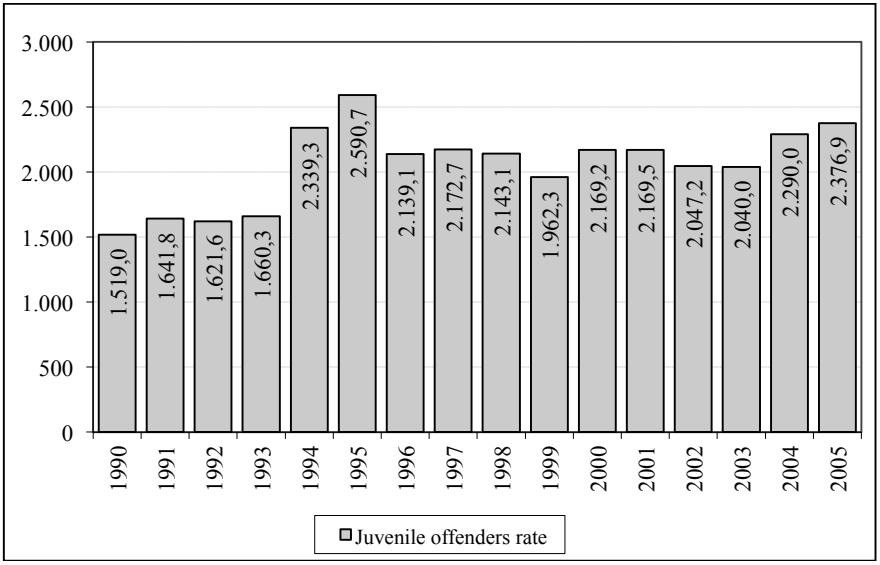
Source: Police statistics available online: www.kgp.gov.pl.

Since 1990 the age structure of the Polish population has changed somewhat. However, these demographic developments do not seem to have influenced the picture of juvenile crime significantly. Juvenile offenders' rates per 100,000 of the 13 to 16 year old population are depicted in *Figure 3*. After a period of relative stability in the early 1990s, the figures rose by a full 41% from 1993 to 1994, peaking a year later at 2,590 per 100,000. The rates dropped again in the following year, and then achieved a certain degree of stability up to 2005. It should be noted, however, that in 2000-2002 the juvenile offenders' rates per 100,000 youths did not decrease as sharply as the proportion of juvenile suspects among all suspects. Undoubtedly, this justifies the conclusion that the sudden drop in the percentage of juvenile offenders among all persons suspected of

6 *Krajewski* 2003a, p. 21.

committing offences in those years was mainly due to changes in the number of adult suspects.

Figure 3: Juvenile offender's rate per 100,000 of the 13 to 16 year old population



Source: Data for the years 1990-2001 come from: *Siemaszko/Gruszczynska/Marczewski* 2003. Atlas przestepczosci w Polsce 3. Warsaw: Oficyna Naukowa, p. 58. Data for the years 2002-2005 are computed on the basis of police statistics (juvenile offenders number) and Statistical Yearbook of the Republic of Poland (population aged 13-16).

A matter of a great concern in Poland during the 1990s was the changing structure of juvenile crime. According to police statistics, the number of homicides committed by juveniles (including attempted homicide) has not shown clear patterns (see *Table 1*). Generally, this number was growing in the years from 1990 to 1997 with the exception of 1995, and has been decreasing since 1998.

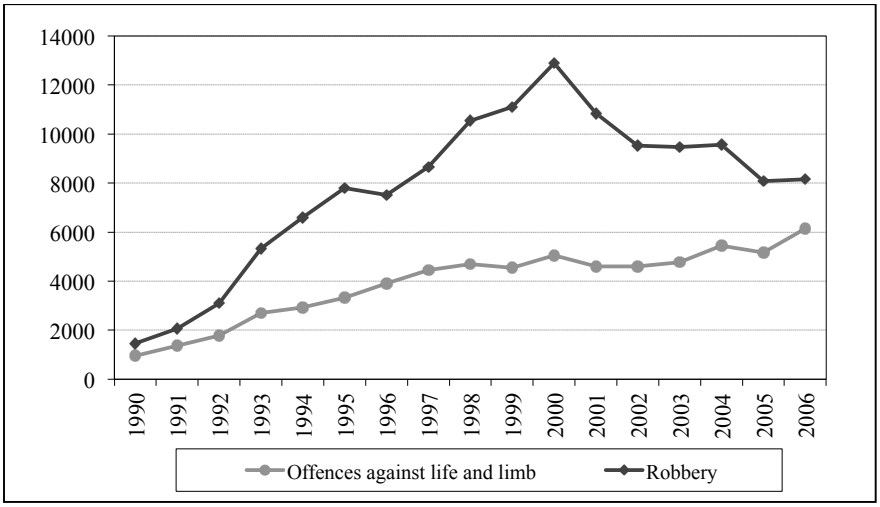
Table 1: Number of homicides (including attempted homicide) by suspected juveniles

Year	Number of homicides	Year	Number of homicides	Year	Number of homicides
1990	17	**1996**	36	**2002**	21
1991	19	**1997**	36	**2003**	7
1992	21	**1998**	29	**2004**	11
1993	22	**1999**	28	**2005**	11
1994	33	**2000**	16	**2006**	19
1995	26	**2001**	20		

Source: Police Statistics, available online: www.kgp.gov.pl.

Since the beginning of the 1990s, the overall number of violent offences committed by juveniles (homicide, bodily injury, brawling and battery) has been growing almost continuously. In the case of robbery, the situation is slightly different. A sharp increase in the number of robberies in the years from 1990 to 2000 was followed by a nearly continuous drop up until 2006 (see *Figure 4*).

Figure 4: Offences against life and limb, and robbery committed by juveniles in the years 1990-2006 (absolute numbers)

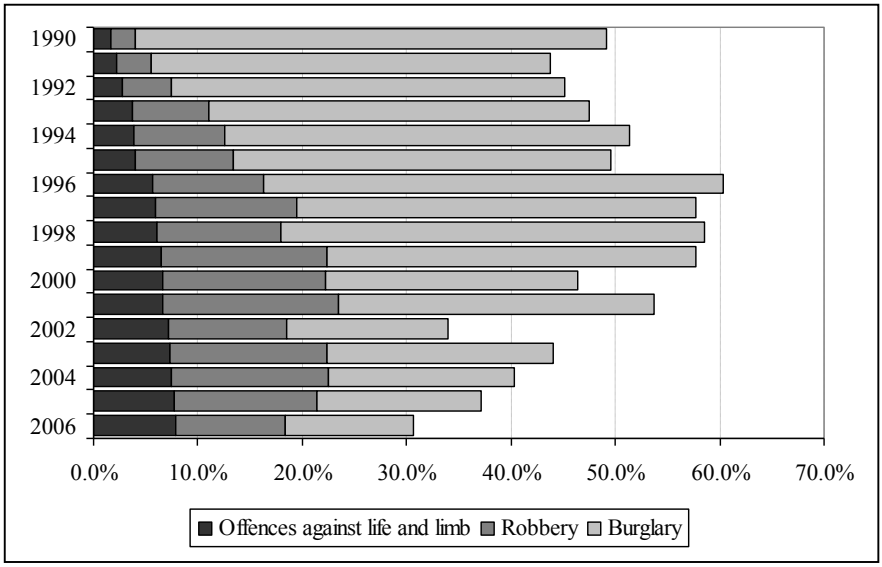


Source: Police Statistics, available online: www.kgp.gov.pl.

The shares both of offences against life and limb and of robberies among all offences committed by juveniles were also increasing in the 1990s. Offences against life and limb constituted 1.6% of all offences committed by juveniles in 1990, while the rates in the late-1990s were almost four times of that (6.5%). As for the share of robbery, growth was similarly substantial, reaching 16.9% in 2001 compared to 2.4% in 1990. In the more recent years, however, the share of robberies has been decreasing while the percentage of offences against life and limb has stabilised at a relatively high level of around 7 to 8%. Over the whole period of 1990 to 2006, the proportion of police reported burglaries committed by juveniles has been in steady decline (see *Figure 5*). The number of thefts committed by juveniles is not recorded separately in police statistics. This offence is included in the category of 'other' offences.

Data on the proportion of juveniles among all persons suspected of robbery and of selected violent offences, such as homicide, bodily injury, brawling and battery, are also supportive of the notion of a negative or concerning development in the structure of juvenile crime.[7]

Figure 5: Offences against life and limb, robbery and burglary among all juvenile offences (in percentages)



Source: Police Statistics, available online: www.kgp.gov.pl.

7 See *Stańdo-Kawecka* 2006, p. 365.

Data on the number of juvenile drug offences cannot be interpreted without taking into account changes to both the drug policy as well as law enforcement patterns by the police in Poland in recent years.[8] Drug abuse has been recognized as a social problem in Poland at least since the mid-1970s. However, in the 1970s and 1980s the most popular drug was so-called 'Polish heroin', or '*kompot*', which was easy to produce at home without special laboratory equipment. 'Polish heroin' was produced almost exclusively by addicts themselves for their own use. At that time commercial production and dealing with drugs were practically unknown. Drug policy was dominated by a public health approach towards consumers. The drug law of 1985 did not criminalize the possession of drugs. Drug users were subject to social and health policy measures unless they committed criminal offences, such as dealing, property crimes or violent offences.

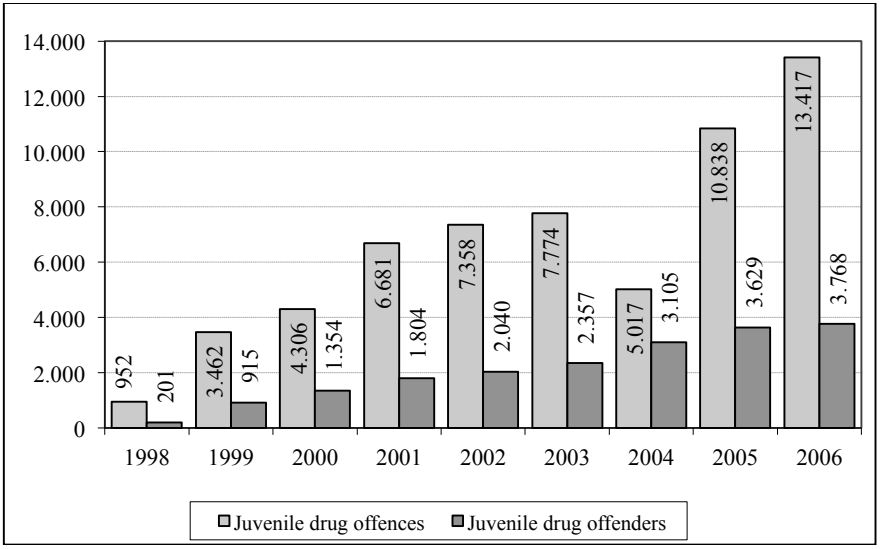
Since 1989, however, the situation related to the production and consumption of drugs has changed significantly. Poland has become an important drug producing country as well as an important transit route for organized smuggling. As a result, there have also been changes to the domestic drug markets.[9] In 1997 the drug law of 1985 was replaced with the Drug Counteraction Act, which generally retained the public health approach towards drug users and the depenalization of drug possession for personal consumption. Under this Act, possession of any amount of drugs was treated as a criminal offence, however, possession of a small quantity of drugs constituted 'circumstances mandating exemption from punishment'.

In 2000, provisions of the 1997 Drug Counteraction Act were amended in order to remove the exemption from punishment in cases of possession of small quantities of drugs. In 2005 a new Drug Counteraction Act was passed by parliament according to which the possession of any quantity of illegal drugs is a criminal offence. Changes to the drug policy have increased the number of drug related offences, including juvenile offences. However, a sharp increase in the number of drug offences had already occurred between 1997 and 1998, before the penalization of the possession of any amount of drugs was introduced. Also, there were strong indications that this increase resulted not only from an actual shift in drug-related practices, but also from more proactive policing with respect to dealing. Basic trends concerning juvenile drug offences since 1998 can be taken from *Figure 6*. The majority of juveniles suspected of drug offences in 2005-2006 were suspected of possession.

8 *Krajewski* 2003b, p. 288.

9 *Krajewski* 2003b, p. 276-282.

Figure 6: Number of juvenile drug offences and juvenile drug offenders



Source: Police Statistics, available online: www.kgp.gov.pl.

Police statistics do not record data according to gender. However, Family Court statistics related to the number of juveniles in court proceedings due to 'punishable acts' (these are offences and some selected petty crimes) indicate that the number of girls suspected of committing such acts has recently been growing faster than the number of boys, although generally the proportion of girls among all juvenile offenders has remained relatively low, amounting to 10-15% (*Table 2*).

Table 2: Number of juveniles in court proceedings due to 'punishable acts' by gender

Year	1999	2000	2001	2002	2003	2004
Girls total	2,310	2,675	2,906	2,992	3,218	3,690
Indicator (1999=100)	100	115.8	125.8	129.5	139.3	159.7
Boys total	22,599	22,992	23,070	22,119	22,303	24,652
Indicator (1999=100)	100	101.7	102.1	97.9	98.7	109.1

Source: Ministry of Justice, Department of Statistics 2006. Statistical analysis of information on registry and judgements in juvenile cases for the years 1999-2004.

Separate police statistics have recently been published on the offences committed by children younger than 13 (*Table 3*). These children are not treated as 'juvenile offenders', and their acts are included neither in statistics on juvenile offences nor in general statistics on crime. Generally, this age group shows similar trends to the 13 to 16-year-olds. The overall number of offences committed by children in the years 1999-2006 has been decreasing. The number of both property offences as well as robberies has been dropping significantly, while the number of offences against health and life taken together has been more or less stable, with the exception of brawling and battery (which have in fact increased).

Table 3: Offences committed by children below the age of 13

Year	1999	2000	2001	2002	2003	2004	2005	2006
Homicide	0	1	0	0	0	1	0	2
Bodily injury	157	173	184	155	189	219	172	163
Brawling and battery	100	105	112	118	133	144	169	163
Robbery	319	347	274	212	182	219	175	177
Property off.*	1,681	1,433	1,239	1,108	1,026	867	855	986
Drug offences	12	39	9	14	17	25	30	37
Other	464	392	361	324	451	499	684	589
Total	2,733	2,490	2,179	1,931	1,998	1,974	2,085	2,117

* Property offences include theft, burglary as well as property damage.
Source: Police Statistics, available online: www.kgp.gov.pl.

3. The sanctions system – Kinds of informal and formal interventions

According to the 1997 Criminal Code, as a rule the lowest age of criminal majority in Poland is 17 years at the time of the offence. Persons who commit offences before they have turned 17 can only exceptionally be held criminally responsible for their actions. Pursuant to Art. 10 § 2 of the 1997 Criminal Code, such a person may be criminally responsible provided that he or she committed one of the most serious crimes enumerated in this Article while aged 15 or 16, and the circumstances of the offence and the offender, the level of his/her maturity as well as the previous ineffectiveness of educational or corrective measures justify directing the case to the criminal court for adults. Provisions of the 1982 JA, however, are not fully consistent with Art. 10 of the Criminal Code, because Art. 13 and 94 of the JA also provide the possibility to impose a penalty (including imprisonment) upon a juvenile who has committed a 'punishable act' while being at least 13 years of age. In practice, this specific 'exchange' of placement in a correctional house for a penalty on the basis of Art. 13 and 94 JA is ordered in several cases each year.

Juveniles in the meaning of the 1982 JA are not only perpetrators of 'punishable acts' committed while being 13 to 16 years of age, but also persons under 18 who show signs of 'demoralization'. In the JA, the legislator does not use the term 'offence' (*przestępstwo,* in German *Straftat*) as in cases of adult offenders, but instead chose to refer to a 'punishable act' (*czyn karalny*) in order to stress that as a rule children and youths below 17 years of age are not mature enough to be held criminally responsible for their actions. However, the JA does not define the notion of 'demoralization'. Article 4 of the JA merely gives some examples of behaviour or circumstances that are treated as signs of 'demoralization': violations of the principles of community life, commission of a prohibited act, truancy, use of alcohol or drugs, running away from home, prostitution, as well as association with criminal groups. It should be noted that there is no minimum age limit for juveniles showing signs of 'demoralization'. The commission of an offence by a minor younger than 13 is considered a sign of 'demoralization', and does not constitute a 'punishable act' under the JA. Provisions concerning 'demoralized' juveniles are intended to provide Family Courts with broad discretion in initiating state intervention according to basic assumptions of the paternalistic 'child savers' ideology.[10]

With a few exceptions mentioned above, no penalties provided for adults can be imposed on juvenile lawbreakers. The catalogue of sanctions applied to juveniles contains a wide range of educational, medical and corrective measures. All educational and medical measures may be applied both to juveniles who

10 *Krajewski* 2006, p. 159.

commit 'punishable acts' whilst between 13 and 16 years of age, and to juveniles under 18 who exhibit serious problem behaviour (signs of 'demoralization'). As for corrective measures, they may be imposed only on 13 to under 17 year old juveniles who have committed 'punishable acts' prohibited by the criminal law as offences or finance offences.

While choosing between educational, medical and corrective measures the Family Court should take into account the best interest of the juvenile in question, the need to achieve positive changes in his or her personality and behaviour, as well as the need to encourage and support parents or guardians to properly fulfil their duties (Art. 3 § 1 of the JA). As regards corrective measures, some additional factors should be taken into consideration, such as a high degree of 'demoralization', the circumstances and nature of the committed act as well as the possible ineffectiveness of (also previously administered) educational measures.

3.1 Educational measures

In the terms of Art. 6 of the JA, the educational measures include:

a) a reprimand;
b) supervision by parents, a guardian, a youth or other social organization, a workplace, a trustworthy person or a probation officer;
c) applying special conditions, such as redressing damage, apologizing to the victim, performing unpaid work for the benefit of the victim or local community, taking up school education or a job, taking part in educational or therapeutic training, avoiding specific locations, refraining from the use of alcohol and other intoxicants;
d) a ban on driving,
e) forfeiture of objects gained through the commission of a punishable act;
f) placing a juvenile in a youth probation centre;
g) placing a juvenile in a foster family;
h) placing a juvenile in a suitable institution or organization providing education, therapy or vocational training;
i) placing a juvenile in a residential youth socio-therapeutic centre, youth educational centre or youth school-educational centre for disabled children.

Most educational measures do not require a change in the juvenile's place of living. For residential placements, for more than twenty years after the commencement of the 1982 JA, it was possible to place juvenile offenders and juveniles showing signs of 'demoralization' in the same open welfare institutions as children and youth in need of care (for example in children's homes or family group-homes). It was commonly accepted that the needs of juveniles in the meaning of the JA as well as children in need of care were much the same. However, this situation changed in 2004. Since then residential welfare institutions,

such as children's homes or family group-homes, have been under the authority of the Ministry of Welfare, and they have – at least in theory – provided care and education only for children deprived of parental care that have neither committed offences nor shown signs of 'demoralization'. According to the amended provisions of the JA, residential juvenile educational institutions are so called youth socio-therapeutic centres as well as youth educational centres, which are designed only for juveniles who are placed in them on the basis of the JA. These centres can be either publicly run (by the local government) or privately run (by churches, charities or foundations) and they are subject to regulation by the Ministry of Education. In practice, however, due to a of lack of places in both youth socio-therapeutic centres and youth educational centres, family judges institute care proceedings instead of JA proceedings, which still enables them to place a child with problem behaviour in a welfare institution.

3.2 Medical measures

Medical measures may also be applied to juveniles who have committed 'punishable acts' or for 'demoralized' juveniles, providing that they are suffering from a mental deficiency, mental disease, some kind of mental disorder or from alcohol or drug addiction. These measures imply placing juveniles in a psychiatric hospital or other suitable health care institution. According to Art. 12 of the JA, if there is a need to ensure only care and protection, the juvenile may be placed in a social welfare institution or in a suitable youth educational centre. In practice, however, placing a juvenile in a health care or social welfare institution is used only in very exceptional cases.

Both the educational and medical measures are applied to juveniles for an indeterminate period of time. As a rule these measures terminate when a juvenile reaches the age of 18. The duration can be extended to his/her 21st birthday in exceptional cases. The Family Court that executes the measures may change, revise or repeal them at any time if it is advisable for educational reasons.

3.3 Corrective measures

Juveniles who have committed 'punishable acts' whilst aged 13 to 16 can be issued corrective measures instead of educational and medical measures. The correctional measures provided by the JA 1982 are suspended and unsuspended placements in a correctional house for an indeterminate period. Pursuant to Art. 73 § 1 of the JA, a juvenile who is placed in a correctional house can stay there no longer than up to the age of 21, although he/she may be granted conditional release earlier. Article 11 of the JA states that placements in a correctional house may be conditionally suspended if the personal and environmental circum-

stances of the offender and the nature of the committed act give grounds for supporting this. Conditional suspended placements bear a one to three year probationary period which is connected to educational measures.

The Juvenile Court, when choosing between educational, medical and corrective measures, should take the interest of the juvenile as well as the need to achieve positive changes in his/her personality. However, in deciding whether or not to impose a corrective measure, the Juvenile Court should also take several other factors into consideration, such as the type and circumstances of the act, the degree of the juvenile's 'demoralization', and the (in)effectiveness of (also previously imposed) educational measures. However, the JA does not provide for the principle of proportionality, nor does it require an evaluation of the juvenile's culpability (discernment).

Correctional houses are administered by the Ministry of Justice. However, placing a juvenile in such institutions is not the same as a sentence to imprisonment. Houses of correction are not part of the prison system, which in Poland only encompasses prisons for adult offenders (sentenced or detained on remand). The execution of the placement in a correctional house is not covered by the Code on the Execution of Penalties. On the contrary, respective provisions are included in the 1982 JA as well as in the Minister of Justice Ordinance of 2001 on correctional houses and shelters for juveniles.

3.4 Penalties

According to Art. 5 of the JA, penalties may be imposed on juveniles only in cases determined by law, providing that 'other measures' are not able to ensure a juvenile's rehabilitation. Under the provisions of Art. 10 of the 1997 Criminal Code, a juvenile may be criminally responsible provided that he/she committed one of the most serious crimes while aged 15 or 16, and that the circumstances of the offence and the offender, the level of his or her maturity as well as the ineffectiveness of educational or corrective measures justify directing the case to an adult Criminal Court. Transfers to adult courts are decided by the family judge or Family Court. The penalty imposed on the juvenile by the Criminal Court may not exceed two thirds of the maximum penalty provided for adult perpetrators of the same offence. Offenders who at the time of the offence were under the age of 18 cannot be sentenced to life imprisonment (Art. 54 § 2 of the Criminal Code).

Penalties can also be issued to perpetrators of 'punishable acts' who were 13 to 16 years old at the time of exhibiting the behaviour in question. According to Art. 13 and 94 of the JA 1982, the Family Court can decide to substitute a placement in a correctional house with an adult penalty, including imprisonment, under the following circumstances:

a) the perpetrator is at least 18 years old at the time of the court sentence, or he/she had reached this age before the enforcement of the corrective measure began;
b) the imposition or enforcement of the corrective measure would be useless.

For many years, the possibility for substituting a corrective measure with a penalty has raised a lot of reservations with the judiciary and in doctrine. The main point of discussion appears to be the fact that the corrective measure should aim at the best interest of the juvenile concerned, and is to be imposed regardless of his/her ability to be criminally responsible (the issue of guilt or discernment is irrelevant in proceedings carried out in juvenile cases). As a result the imposition of a penalty instead of a corrective measure under circumstances provided by Art. 13 and 94 of the 1982 JA is possibly in violation of the principle of *nulla poena sine culpa.*[11]

3.5 Mediation

Victim-offender reconciliation programmes have been carried out in Poland on an experimental basis since 1995. Mediation in juvenile cases was legally regulated in the year 2000 through amendments to the JA of 1982. According to Art. 3a of the JA (that was added in 2000), the Family Court, while acting on the initiative or with the consent of both the juvenile and the victim, may at any stage of the proceedings transfer the case to mediation by an institution or a trustworthy person. Results of the mediation shall be reported to the court by the institution or trustworthy person, and they are taken into consideration when deciding the case. Family judges enjoy a broad discretionary power in juvenile cases and they may drop the proceedings at an early stage as a result of successful mediation. Another possibility to divert the case from formal court proceedings is provided by Art. 42 § 4 of the JA. Pursuant to this Article, following the so-called 'explanatory proceedings' (equivalent to preparatory proceedings in adult cases) the Juvenile Judge is authorized to transfer the case to the school or social organization to which the juvenile attends or belongs, provided that the judge deems the measures of educational influence that are at the school's or organisation's disposal to be sufficient.

4. Juvenile criminal procedure

Provisions governing the proceedings in juvenile cases are highly sophisticated, constituting a specific 'mixture' of both civil and criminal procedure modified

11 *Stańdo-Kawecka* 2007, p. 322-325.

by the JA 1982. The following basic characteristics of the proceedings should be mentioned:

a) Juvenile cases concerning signs of 'demoralization' and 'punishable acts' are dealt with by Family Courts.
b) Family judges and Family Courts are competent at all stages of the proceedings in juvenile cases.
c) As a rule, the proceedings in juvenile cases are subordinated to the civil procedure, with some exceptions when the criminal procedure has to be applied.

Since the early-1980s Family Courts in Poland have been organized as special divisions within District Courts. The basic idea underlying the concept of the Family Court is that family judges should have advanced knowledge of the problems that concern different members of any given family. They should also be specially trained in order to have additional knowledge of education, psychology and social work. As a result, the scope of authority of Family Courts ranges from cases heard according to family and guardianship law, cases regarding the enforcement of compulsory treatment of alcoholics and drug addicts, juvenile cases related to prevention, reacting to problem behaviour of persons under the age of 18 as well as 'punishable acts' committed by those aged 13 to 16. During the 1990s, however, the jurisdiction of Family Courts was limited somewhat, as divorce cases were transferred to Regional Courts, and competence for family related offences committed by adults was shifted to Criminal Courts.

4.1 Preliminary inquiry (the explanatory proceedings)

In juvenile cases, it is the family judge who, after having been informed that a juvenile has serious behavioural problems (shows signs of 'demoralization') or has committed a punishable act, institutes the preliminary inquiry that the 1982 JA calls 'explanatory proceedings'. The involvement of the police and public prosecutors in juvenile cases is very limited. In the terms of Art. 37 and 39 of the JA, the police are competent to collect and preserve evidence of 'punishable acts', including the interrogation of a juvenile suspect, in urgent cases. The interrogation of a juvenile by the police should be carried out in the presence of parents, a guardian or a lawyer.

According to the JA, the police have no discretionary powers. On the contrary, they are obliged to immediately report every juvenile case to a family judge after having collected and stored the necessary evidence in urgent cases. However, there are reasons for assuming that the police do not report all juvenile cases to the family judge, but deal with some cases informally – though no research related to this issue has yet been carried out. Some research on police activities in juvenile cases reveals that, in practice, the police do not report juvenile offences to a family judge immediately after having collected the

evidence in urgent cases. Yet they do often report the cases after having conducted further investigations.[12]

Under Art. 33 of the JA the main objective of the explanatory proceeding is to determine whether or not there is evidence of 'demoralization' or whether a 'punishable act' has been committed, as well as to determine whether there is a need to apply the juvenile measures provided by the Act. During the explanatory proceeding the family judge should also gather information concerning the juvenile and his/her educational, medical and welfare situation. In the terms of Art. 37 of the JA, the family judge may order specific measures by a probation officer or the police. If necessary the Family Court can refer a juvenile to a family diagnostic-consultative centre for diagnosis or place him/her under psychiatric observation in a public health institution for a period not exceeding six weeks (Art. 25 and 25a of the JA).

Generally, the explanatory proceeding in juvenile cases is based on the provisions of the Code of Civil Procedure. As regards the collection and storage of evidence by the police as well as the appointment and functions of a lawyer, however, the provisions of the Code of Criminal Procedure are to be followed. The family judge who conducts the explanatory proceeding may at any time drop the case on the principle of expediency. Further, at this stage of the proceedings the family judge may refer the case to a mediation programme. This is on a voluntary basis and depends on the motivation and consent of both the victim and the offender. A juvenile is entitled to a defence counsellor and in some cases participation of a defence counsellor is mandatory. This is the case if there is a conflict of interests between the juvenile and his/her parents, and/or if the juvenile has been remanded in a youth detention facility (*schronisko dla nieletnich*). At the next stage of the proceedings, the participation of a defence counsellor is also mandatory if the case is dealt with by the court in the so called 'correctional proceeding' governed, as a rule, by provisions of criminal procedure.

Upon completion of the explanatory proceedings the family judge may drop the case unconditionally if there is no evidence to prove that the juvenile committed a 'punishable act' or showed signs of 'demoralization'. Additionally, the family judge may drop the case on the principle of expediency if the imposition of educational or corrective measures would serve no purpose, in particular when such measures had already been imposed on the juvenile in a previous case. According to statistical data from the Ministry of Justice, in the years 1999-2004 decisions to drop the proceedings because of the principle of expediency were made in about 9-10% of all juvenile cases.[13]

12 *Korcyl-Wolska* 2001, p. 425-426, see also *5.* below.

13 Ministry of Justice, Department of Statistics 2006, available online: www.ms.gov.pl.

Apart from discontinuing the proceedings, the family judge may also decide to do one of the following:

a) To refer the case to the school attended by the juvenile or a social organization to which he/she belongs, if the judge is of the opinion that the educational measures available to the school or organization are adequate. In practice, however, such referrals are made very rarely: for example, among 120,802 cases dealt with in explanatory proceedings in 2004, only 172 cases concerning 'punishable acts' and 83 involving 'demoralization' were transferred to schools and social organizations.[14]

b) In order to refer a case to care and educational proceedings, the judge must be convinced, on the basis of the gathered evidence, that educational or medical measures should be applied. In practice such decisions have been made by family judges in half of the juvenile cases dealt with in explanatory proceedings. In the years 1999-2004, between 41% and 47% of all juvenile cases dealt with in explanatory proceedings were referred to care and educational proceedings. As for cases only involving 'punishable acts', the percentages amounted to 40-45% respectively.[15]

c) If there are grounds for placing the juvenile in a correctional house, the case will be referred to correctional proceedings. The correctional proceeding is not available in juvenile cases of 'demoralization', and only about 2% of cases involving 'punishable acts' have recently been referred to such proceedings.[16]

d) If, in the course of the explanatory proceedings, circumstances come to light which make the case eligible for transfer to the adult Criminal Court, and thus for an adult penalty, the case shall be referred to the public prosecutor who files the accusation before the Criminal Court. This happens only in exceptional cases. In the years from 1999 to 2004, between 242 and 309 cases were transferred to public prosecutors, which in terms of percentages were 0.2-0.3% of all cases dealt with in explanatory proceedings.[17] However, the reason for these transfers lies not only in the possibility to impose adult penalties on juveniles. Rather, where a perpetrator was under 17 at the time of the offence, but has turned 18 by the time the proceedings are instituted, referrals to adult courts allow for the preliminary investigations to be conducted according to the Code of Criminal Procedure. According to

14 Statistical Yearbook of the Republic Poland 2005. Warsaw: Main Statistical Office, published annually.

15 Ministry of Justice, Department of Statistics 2006, available online: www.ms.gov.pl.

16 Ministry of Justice, Department of Statistics 2006, available online: www.ms.gov.pl.

17 Ministry of Justice, Department of Statistics 2006, available online: www.ms.gov.pl.

research carried out by *Rzeplinska* in the year 2000 in 18 Regional Courts (out of 47 Regional Courts in Poland), 43 juvenile offenders were held criminally responsible for an offence committed while being 15 or 16 years of age. Most of them (39) were 16 at the time of the offence, and only four were criminally responsible for offences committed while aged 15.[18]

4.2 Court proceedings

Once the explanatory proceedings have been completed, the family judge decides how to further proceed with a given case, by choosing which form of proceedings should be initiated:

a) Care and educational proceedings or
b) Correctional proceedings.

Correctional proceedings are only initiated where juveniles have allegedly committed a 'punishable act' after having reached 13 years of age, and only if there are grounds for placing them in a correctional house. As regards care and educational proceedings, they are used in cases of juveniles showing signs of 'demoralization' as well as in cases of 'punishable acts' for which the application of corrective measures is not deemed an option.

The main difference between these two proceedings relates to the provisions governing procedural issues. Care and educational proceedings are governed by the provisions of the Code of Civil Procedure, albeit taking some legislative modifications through the JA into consideration. In these proceedings a family judge deals with the case alone and in a rather informal way. In correctional proceedings the case is dealt with by a presiding family judge and two laymen. A juvenile offender has to have a defence counsellor in correctional proceedings. In cases of serious offending the public prosecutor has to attend the hearing. However, he/she does not have the task of bringing an accusation. Rather, in juvenile cases the role of the public prosecutor lies in safeguarding public interest. In both proceedings, the (presiding) judge is usually the same person who had previously been responsible for conducting the explanatory proceedings of the same case. A juvenile as well as his/her parents have the right to appeal Family Court decisions before the Regional Court. According to Art. 45 and 53 of the JA, in juvenile cases hearings are not public, unless public hearings are justified on educational grounds.

Pursuant to Art. 3 §1 of the JA, in cases involving juveniles, including perpetrators of offences, the primary consideration should be their welfare, with an emphasis on bringing about favourable changes to their personality and behaviour and, when necessary, ensuring the proper fulfilment of parental

18 *Rzeplińska* 2007, p. 507-508.

obligations. However, additional consideration should also be given to the public interest. Under Art. 3 § 2 of the JA basic criteria that should be consulted in choosing appropriate measures are the personality of a juvenile, with particular reference to his/her age, health, mental and physical development, character and behaviour, as well as the causes and degree of 'demoralization', his/her environment and the conditions of his/her upbringing. As far as the placement of a juvenile in a correctional house is concerned, however, account is also to be taken of the circumstances and nature of the offence. No principle of proportionality between the seriousness of the committed 'punishable act' and the measure imposed is provided by the JA.

Generally, Family Court judges in Poland have a broad discretionary power in juvenile cases. They have a great deal of discretion in deciding whether to drop a case or to continue proceedings, to apply provisional measures as well as to impose educational, medical or corrective measures. Additionally, Family Courts are responsible for the enforcement of the imposed measures and have the power to revoke or repeal them if it is justified by the educational needs of the juvenile in question.

5. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency

Under the 1982 JA the police have no discretionary powers. As described earlier, according to Article 37 of the Act the police are obliged to report every juvenile case to a family judge immediately after having collected and stored the necessary evidence in urgent cases.[19]

The provisions of the JA also bestow discretionary powers upon the family judge for dealing with juvenile cases informally. Under Art. 21 § 2 of the JA, the family judge may drop or refuse to initiate proceedings if the imposition of educational or corrective measures would serve no purpose, in particular when such measures had already been imposed on the juvenile in a previous case. In recent years about 9-10% of juvenile cases were dealt with informally by dropping the proceedings due to the principle of expediency (*Table 4*).

19 *Korcyl-Wolska* 2001, p. 425-426.

Table 4: Juvenile cases dropped on the principle of expediency

Year	Total number of juvenile cases in explanatory proceedings	Cases dropped on the principle of expediency		Number of cases for 'punishable acts' in explanatory proceedings	Cases due to 'punishable acts' dropped on the principle of expediency	
		Numbers	%		Numbers	%
1999	103,200	10,444	10.1	85,373	9,095	10.7
2000	110,826	10,207	9.2	89,685	8,827	9.8
2001	115,356	10,578	9.2	91,766	8,889	9.7
2002	108,485	9,947	9.2	84,675	8,264	9.8
2003	108,864	9,319	8.6	81,469	7,490	9.2
2004	120,802	10,816	9.0	86,753	8,334	9.6

Source: Ministry of Justice, Department of Statistics 2006. Statistical analysis of information on registry and judgements in juvenile cases for the years 1999-2004. Available online: www.ms.gov.pl.

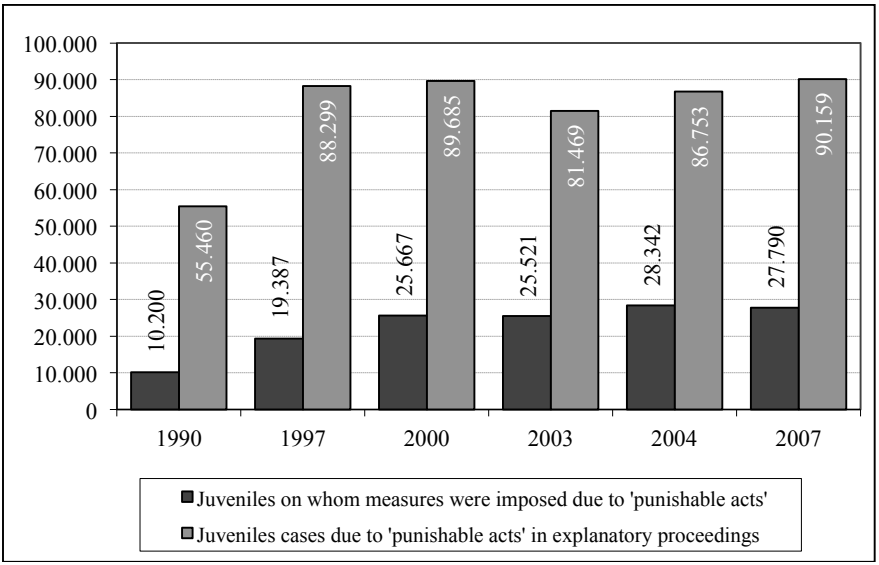
Dropping the proceedings in juvenile cases at an early stage can result in the initiation of mediation, which has been regulated by law since the year 2000 through amended provisions of the JA. At any stage of the proceedings, the family judge, acting on the initiative or with the approval of both the juvenile and the victim, may transfer the case to be mediated by an institution or a trustworthy person. So far, the number of juvenile cases that have in fact been transferred for mediation has been rather limited. Another possibility to divert cases from formal court proceedings is to transfer them to the school or social organization to which the juvenile attends or belongs, providing that the judge finds the measures of educational influence that are at the disposal of the school or organization to be sufficient. As has already been mentioned above, in practice this form of dealing with juvenile cases has been used very rarely (about 250-300 cases each year).

6. The sentencing practice – Part II: The juvenile court dispositions and their application since 1980

The 1982 JA distinguishes between educational, medical and corrective measures. Educational and medical measures may be imposed on juveniles showing signs of 'demoralization' as well as on perpetrators of 'punishable

acts'. Both educational and medical measures are applied for an indeterminate period of time. As a rule they terminate on the 18th birthday of a juvenile, while some can be made to last until he or she turns 21. The Family Court that executes the measures may revise or repeal them at any time if that is advisable on educational grounds. As for corrective measures, which imply the suspended or unsuspended placement of a juvenile in a correctional house, they are also imposed for an indeterminate period. In contrast to educational and medical measures, corrective interventions may be applied only to juveniles who have committed a 'punishable act' prohibited by law as an offence or finance offence while being 13-16 years of age. *Figure 7* shows the number of juvenile cases involving the commission of 'punishable acts' that reached the explanatory proceedings before the Family Courts in selected years between 1990 and 2004, as well as the number of juveniles who received educational or corrective measures as a result of these proceedings.

Figure 7: Juvenile cases due to 'punishable acts' and juveniles upon whom educational or corrective measures were imposed (absolute numbers)



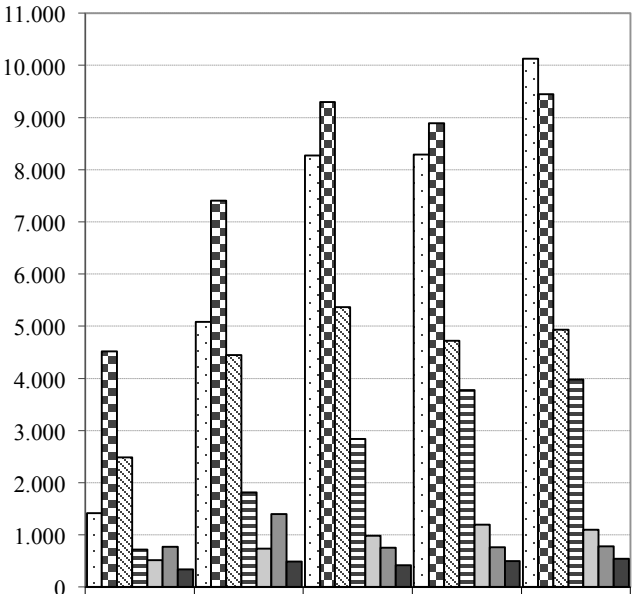
Source: Data computed from Statistical Yearbook of the Republic of Poland 2000 and 2005. Warsaw: Main Statistical Office (a yearly publication).

Figure 7 shows that, in the period between 1990 and 2004, the number of juveniles who received educational or corrective measures for committing

'punishable acts' increased more quickly than the total number of cases that reached explanatory proceedings. In practice, educational measures form the vast majority of court dispositions for juvenile offenders (see *Figure* 8). In recent years correctional measures have been applied relatively seldom and less often than in 1990. In 2004 (on 31 December) there were 1,396 inmates in 26 correctional houses. This number has not changed significantly since 1990, where it amounted to 1,457.[20] The most frequently applied educational measure in 2004 was the reprimand, which was imposed on 10,125 juveniles. It should be noted that the number of reprimands rose from 1,421 in 1990 to 10,125 in 2004, which suggests that the number of non-serious cases being formally dealt with by Family Courts has increased. Placing a juvenile in an educational centre, a socio-therapeutic centre or school-educational centre for disabled children was limited to 1,100 juveniles in 2004. Residential measures are thus much more rarely applied than their non-residential counterparts.

20 Statistical Yearbook of the Republic of Poland 2000 and 2005.

Figure 8: Educational and corrective measures imposed on juveniles for 'punishable acts'



	1990	1997	2000	2003	2004
Reprimand	1.421	5.087	8.270	8.288	10.125
Supervision by a probation officer	4.522	7.403	9.296	8.889	9.445
Supervision by parents	2.489	4.446	5.368	4.725	4.930
Specific conduct orders	722	1.811	2.837	3.777	3.980
Placement in an educational institution/centre	520	738	983	1.196	1.100
Correctional house (suspended)	771	1.403	751	759	781
Correctional house (unsuspended)	336	488	422	500	541

Source: Data computed from: Statistical Yearbook of the Republic of Poland 2000 and 2005. Warsaw: Main Statistical Office (a yearly publication).

7. Regional patterns and differences in sentencing young offenders

Unfortunately, there are no data available concerning these issues.

8. Young adults (18-21 year olds) and the juvenile or adult criminal justice system – Legal aspects and sentencing practices

Persons who commit an offence after having turned 17 are equally criminally responsible as adults according to the provisions of the 1997 Criminal Code. As a rule, Polish criminal law grants no special status to young adult offenders (*młodociani*). There are however, a select few provisions in the Criminal Code that mitigate the punishments that persons can receive who were aged 17 to 20 at the time of the offence, insofar as they are under 24 years old when sentence is passed (in first instance). First of all, life imprisonment may not be imposed on an offender who was not yet 18 at the time of the offence (Art. 54 § 2 of the 1997 Criminal Code). Pursuant to Art. 54 § 1 of the Criminal Code, while imposing a penalty on young adults, courts should take into account the need to rehabilitate the offender. Article 60 of this Code provides for the possibility to extraordinarily mitigate penalties imposed on young adults, providing that it is justified by the need to rehabilitate them.

The age border (17 years of age) between juveniles and adults has been made more flexible to some extent by the provisions contained in Art. 10 § 4 of the Criminal Code, which refers to perpetrators of non-serious crimes (*występki*; in German: *Vergehen*) who are 17 but not yet 18 years of age. The court may impose educational, medical or corrective measures on the offender instead of a penalty, if the circumstances of the case, the degree of the offender's development as well as his/her personal circumstances justify this. In practice, however, the courts have hardly ever made any use of this possibility.

Special provisions for young adults who have been sentenced to lengthy prison sentences are discussed under *11* below.

9. Transfer of juveniles to adult courts

Generally, cases of 'demoralized' juveniles and juveniles who have committed 'punishable acts' are matters only for family judges and Family Courts. Pursuant to Art. 16 and 18 of the JA, adult Criminal Courts have jurisdiction over juvenile cases only in exceptional cases.

a) The first case in which a transfer is possible is when a juvenile has committed an offence in complicity with an adult, where the offence of the juvenile is strictly connected to the offence of the adult, and the

welfare of the minor does not preclude the investigation from proceeding. Upon completing the investigation, the prosecutor refers the case to a Family Court or – provided that a joint trial of the case is essential – submits the indictment to a Criminal Court which should follow the provisions of the JA in adjudicating the juvenile suspect.

b) The second transferable case is where the proceedings involve an offence that was committed after the offender had turned 13 and was not yet 17, but where the proceedings are initiated after the offender's 18th birthday. As in the previous case, the Criminal Court should follow the provisions of the JA in adjudicating the juvenile suspect, which in turn implies that penalties may be imposed only in exceptional cases.

c) The third scenario that justifies a juvenile case to be transferred to an adult Criminal Court is when a juvenile – aged 15 or 16 at the time of the offence – has committed one of the most serious crimes listed in Art. 10 § 2 of the Criminal Code, which include: assassination of the President of the Republic, homicide, causing serious bodily injury with deadly consequences, causing a catastrophe of a serious character, road accidents with fatal consequences, hijacking, aggravated rape, hostages-taking, and robbery. The young person may be punished by an adult Criminal Court under rules that apply to adult offenders. The family judge or the Family Court (at the preliminary stage) decides whether to hand the case over to the public prosecutor, who is however not obliged to bring an indictment to the adult court. If new circumstances are revealed that make the imposition of a penalty appear unnecessary, the prosecutor can refer the case back to the family judge or Family Court.

Waiving juvenile jurisdiction and transferring cases to the Criminal Court is not an automatic procedure. Except when one of the offences listed in Art. 10 § 2 CC has been committed by a 15 or 16 year old, other circumstances need to be taken into consideration, such as the circumstances of the committed offence, the personal circumstances of the perpetrator, the degree of his/her development, and the possible ineffectiveness of (previously applied) educational or corrective measures. The maximum penalty imposed on a juvenile by a Criminal Court on the basis of Art. 10 § 2 of the Criminal Code shall not exceed two-thirds of the statutory maximum that applies to adults for the same offence. Where the statutory maximum is life-imprisonment, the maximum penalty that can be imposed on a juvenile is 25 years. The court may also apply provisions for an extraordinary mitigation of the sentence. It should be added that Art. 54 § 2 of the Criminal Code provides that no person who at the time of the offence was

under the age of 18 can receive a life sentence. Yet as already stated above, such waiver and transfer decisions are very rare in practice.[21]

10. Preliminary residential care and pre-trial detention

According to Art. 40 JA, a juvenile suspected of having committed a 'punishable act' at or above 13 years of age may be detained in a special police institution for juveniles for a period not exceeding 72 hours. Both the Family Court and the parents or guardians are to be notified immediately when a juvenile is detained in such an institution. Should the family judge make no decision concerning provisional measures prior to the expiry of this 72 hour period, the juvenile should be released immediately and handed over into the custody of his/her parents or legal guardian. According to research, juvenile suspects in fact tend to remain in such police institutions for periods that exceed 72 hours, due to a lack of places in the youth educational institutions and youth detention facilities – institutions to which family judges can send juvenile suspects as provisional measures.[22]

Provisional measures imposed by a family judge or a Family Court range from supervision by a probation officer, another trustworthy person, a workplace or a youth organization, to being placed in a public health institution, a youth educational or socio-therapeutic centre, a school-educational centre for disabled children, or a special detention facility for juveniles. Generally, provisional measures that are applied by family judges are similar to the educational and medical measures imposed on juveniles by Family Courts after cases have been adjudicated. In some cases the placement of a juvenile in a youth detention centre (the JA uses the term *schronisko dla nieletnich*, which translates to shelter for juveniles) may be ordered as a provisional measure, if placement in a correctional house is to be the expected outcome of the trial, and where in addition there are grounds for fearing that he/she may abscond, destroy evidence, or if it is impossible to establish his/her identity. Exceptionally, a juvenile may also be placed in a youth detention centre if placement in a correctional house is the expected outcome of the trial, and he/she is suspected of having committed one of the above stated serious crimes as enumerated in Art. 10 § 2 of the Criminal Code.

In contrast to youth educational (or socio-therapeutic) centres that are under the authority of the Ministry of Education, youth detention centres are under the authority of the Ministry of Justice. The maximum period for which a juvenile can be detained before being directed to the court hearing *(rozprawa*, or in German *Hauptverhandlung*) is three months. However, this period may be

21 *Rzeplińska* 2007, p. 507-508.

22 *Korcyl-Wolska* 2001, p. 199-200.

prolonged by an additional three months if particular circumstances of the case deem this necessary. According to Art. 27 § 6 of the JA, the total duration of stay in a youth detention centre until the court of first instance states its judgement cannot exceed one year. This period of one year may only be prolonged by the Regional Court in exceptional cases.

As a rule, juveniles cannot be detained in remand prisons for adult criminal suspects. Art. 18 § 2 of the JA, however, states that in exceptional cases a juvenile, who at the time of the offence was at least 15 years old, may be temporarily detained in a remand prison for adults, provided that there are grounds to believe that he/she is likely to be sentenced to a penalty provided for adults under Art.10 § 2 of the Criminal Code, and that placement in a youth pre-trial detention facility would not be sufficient. According to prison statistics, in 2006 (on 31 December) there were twelve persons aged 15 or 16 who were detained on remand in detention facilities for adults.[23]

11. Residential care and youth prisons – Legal aspects and the extent of young persons deprived of their liberty

There are no youth prisons in Poland. As a general rule, juveniles under the age of 17 who commit an offence cannot be detained on remand in remand prisons for adults, nor can they be punished with imprisonment. Provisions that make it possible to detain a juvenile, who at the time of offending was at least 15 years old, in a remand prison, or to sentence him/her to an adult penalty, are very restrictive, and in practice they are used extremely rarely. According to prison statistics, in December 2006 the total number of prisoners amounted to 88,647, of whom 14 persons were aged 15 or 16. Twelve of these juveniles were detained on remand, while the remaining two were serving prison sentences. However, at the same time there were 1,014 prisoners in the 17-18 age group, of whom 742 were remand prisoners and 272 were sentenced prisoners.[24] Undoubtedly, most of them were suspected of or sentenced for an offence committed after having turned 17, but some of them were deprived of their liberty due to an offence they had committed while younger than 17.

The 1997 Code on the Execution of Penalties provides that prisoners under 21 years of age are 'young adults' who are to be detained in special prisons, separately from 'full adults'. Prisons for sentenced young adults are either open, semi-open or closed, with the majority of young adult prisoners residing in closed institutions. As is the case with other prisons in Poland, those catering for

23 See: Central Administration of the Prison Service 2006, data available online: www.czsw.gov.pl.

24 See: Central Administration of the Prison Service 2006, data available online: www.czsw.gov.pl.

young adults are overcrowded and offer limited opportunities for participation in work, education, vocational training and other useful activities. The situation is quite different in correctional houses.

12. Residential care and youth prisons – Development of treatment/vocational training and other educational programmes in practice

Correctional houses, as already stated, are institutions for juveniles who have been sentenced to correctional measures by Family Courts. A juvenile remains in the institution until he/she turns 21, unless early conditional release is granted. Correctional houses are subordinated to the Ministry of Justice, but they are governed separately from the Prison Service. Minister of Justice Ordinance of 2001 provides for separate correctional houses for juveniles with mental disorders and personality disorders, for alcohol and drug addicted juveniles, and for those who are HIV-positive. Juveniles without such problems are directed to common houses of correction, which are divided into open, semi-open and closed establishments. Juveniles who have previously escaped from open or semi-open institutions should be placed in closed establishments. The Ordinance provides for a further type of correctional house that is designed for juveniles with a high degree of 'demoralization' that demands restrictive educational supervision.

Compared to prisons, correctional houses do not only offer better material conditions, but also provide far better possibilities for taking part in education, vocational training, sports or recreational activities, and better psychological and therapeutic care. These superior provisions account for the fact that the average monthly cost per juvenile in a correctional house is about four times higher than the average monthly cost of imprisonment.

In December 2005 there were 26 houses of correction housing 1,475 inmates. In the school year 2005/2006 there were 20 primary schools (classes 1-6) in correctional houses with 171 pupils, and 26 lower secondary schools (*gimnazja*, classes 7-9) with 859 pupils. Also, twenty-three upper secondary schools offered vocational education to 343 pupils. The situation was much the same in youth detention centres. In 18 institutions there were 542 detained juveniles who could attend eight primary schools, nine lower secondary schools and six upper secondary vocational schools.[25]

In Poland, there are also residential institutions for juveniles showing signs of 'demoralization' or who have committed 'punishable acts' and received educational rather than correctional measures, such as youth educational centres and youth socio-therapeutic centres. The number of juveniles institutionalized in

25 Statistical Yearbook of the Republic of Poland 2006.

such centres amounted to 4,518 in December 2005, of whom 3,195 were placed in 51 youth educational centres. The remaining 1,323 juveniles were accommodated in 14 youth socio-therapeutic centres.[26]

Youth educational centres as well as youth socio-therapeutic centres are subordinated to the Ministry of Education. They are either public institutions run by the local government, or privately run by churches, charities or foundations. As a rule, juveniles stay in such centres until their 18th birthday unless the Family Court revokes the educational measure earlier. In some cases, however, it is possible for juveniles to voluntarily prolong their stay until the end of the school year. Apart from primary, lower secondary and upper secondary vocational education, youth educational centres as well as youth socio-therapeutic centres offer a wide range of different educational and therapeutic programmes.

13. Current reform debates and challenges for the juvenile justice system

The JA of 1982 is based on the idea of the paternalistic Family Court whose main task is to "save" and protect children who are deprived of proper parental care, as well as those children who break social rules and who come into conflict with the law. Generally, the juvenile justice system in Poland is characterized by the central role of family judges in preventing the social maladjustment of juveniles, and also by the broad discretion that they are accorded in order to do so. Initially, the welfare-oriented approach embodied in the 1982 Act had been predominantly positively evaluated by the judiciary and doctrine. However, some reservations concerning the sophisticated rules governing the proceedings in juveniles' cases as well as the unclear legal character of placements in a correctional home had been formulated as early as in the 1980s.[27] During the 1990s the criticism of the Act intensified and came to be formulated from various points of view.

According to some researchers, the welfare-oriented paternalistic approach to juvenile offenders has raised a great deal of doubts concerning the legal status of juveniles during the proceedings, particularly with respect to the principles of proportionality and the presumption of innocence, as well as the right of a juvenile to be adjudicated by an impartial tribunal.[28] The possibility of substituting placements in correctional houses – which the 1982 Act views as a special measure focussing on the welfare and rehabilitation of the juvenile offender regardless of his/her guilt – with a penalty (including imprisonment)

26 Statistical Yearbook of the Republic of Poland 2006.

27 *Strzembosz* 1985, p. 311-313.

28 *Korcyl-Wolska 2004, p. 203-212; Stańdo-Kawecka* 1998, p. 40.

has become a matter of a great controversy due to the possible violation of the principle of *nulla poena sine culpa*. Another point of criticism is the sharp border that Polish criminal law draws between offenders under 17 years of age and those who are older than 17. While the former are perceived – with a few exceptions – as children who lack the maturity to assume responsibility for their actions, the latter are treated as fully responsible under the Criminal Code with only very limited possibilities for modified or mitigated penalties. Such extremely different regimes do not take into account the gradual developmental process from childhood to adulthood and cause serious problems in cases where persons just under 17 and persons just over 17 years of age offend in complicity.

In recent years further grounds for criticism have emerged, raised by politicians and journalists who voiced that juvenile crime rates have been rising dramatically and that juvenile offenders had become more and more violent and dangerous. Consequently, demands for more stringent punishment have often been voiced in the media. The current system for responding to juvenile delinquency has received wide criticism for being 'too soft' on young offenders and not adequately protecting the public against juvenile crimes. As a matter of fact, it was as early as in 1995 and 2000 that the JA was amended in order to introduce a more restrictive approach to juveniles who commit serious crimes subsequent to being given a suspended order to a correctional house, after being granted parole from such a house, or during their stay in it, provided that there were no grounds for referring the case to an adult Criminal Court in order to impose a penalty provided for adults on the perpetrator.[29]

At the end of 2003 the Ministry of Justice decided to summon a committee of experts in order to draft a Juvenile Code, which was published by the Ministry of Justice in April 2007.[30] Generally, the draft:

a) broadens the notion of 'demoralization' as well as the possibility to institutionalize children showing signs of 'demoralization',
b) makes juveniles who commit petty crimes (*Übertretungen*) while aged 15 or 16 criminally responsible for their acts as adults,
c) provides Family Courts with broader possibilities to punish juvenile offenders who are at least 13 years of age at the time of the offence,
d) provides Family Courts with many possibilities to impose a monetary penalty upon parents or guardians.

However, efforts aiming at providing punishment within the paternalistic welfare oriented approach resulted in many inconsistencies and unclear provisions that are clearly visible in this draft. The draft has not yet been brought before parliament, and after the political change in October 2007 it will probably not be the orientation of juvenile justice reform in upcoming years.

29 *Stańdo-Kawecka* 2006, p. 356-357.

30 Projekt ustawy – Kodeks nieletnich, available online: www.ms.gov.pl.

14. Summary and outlook

Since 1982 the juvenile justice system in Poland is based on the welfare approach. Family Courts play the central role in the system of preventing and combating juvenile crime and social maladjustment. Such a system makes it possible for juvenile offenders to avoid imprisonment and other penalties that are originally aimed at adults. However, it provides a basis for the institutionalization of children and juveniles in educational centres or correctional houses in cases in which adults may not be deprived of their liberty. The past government had proposed to change the juvenile law in order to broaden the possibilities for punishing juveniles for petty crimes and offences as well as to institutionalize juveniles showing other signs of 'demoralization'. The idea to impose monetary penalties on parents or guardians in order to increase their control over children was also supported by the Government. Issues concerning early-intervention programmes and preventive social work with families are not matters of top priority, which remains in line with the general tendency of being 'tough on crime' that could be observed in Poland until very recently. There is, however, hope that the newly elected government (October 2007) will return to more rational criminal policy in general, and juvenile policy in particular.

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Portugal

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1. Historical development and overview of the current juvenile justice legislation

1.1 The historical development prior to the Educational Guardianship Law

Portugal did not have specific legislation for minors in trouble with the law until it became a Republic in the early 20th century. The first law of this nature dates back to 1911, a year after the Monarchy fell and the Republic was established. The Decree of 27 May 1911, commonly known as the Childhood Protection Act (*Lei de Protecção à Infância,* LPI), was the result of the slow ripening of key ideas during the last quarter of the 19th century: the need to remove offending minors from adult prisons and the convenience of instituting early preventive intervention under a jurisdiction specialised in matters pertaining to children in danger, at risk, or who were a threat to public safety. A juvenile justice system was only actually set up later on in the first quarter of the 20th century. In the Penal Codes of 1837, 1852 and 1886 there were only several special rules for delinquent juveniles relating to sanctions.[1] The law of 15 June 1871 created the

1 In the Penal Codes of 1837 and 1852, minors were considered not to be liable for a criminal offence up until the age of 7. From this age on and up to the age of 14 they could be convicted if the court (the common adult court) considered that they had acted with discernment in committing the offence. In the Penal Code of 1886, the age for criminal liability was raised so that children under 10 could not be held liable for a criminal offence. It was also established that those persons between the ages of 10 and 14 who were considered not responsible due to a lack of discernment, and who were not handed over to parents or guardians, would be interned in correctional institutions or prison camps, with no limit to the internment set out in the sentence.

Correctional and Detention Home of Lisbon (*Casa de Correcção e Detenção de Lisboa*) as a civil prison for boys under the age of 18. This prison was a first step in trying to spare incarcerated minors from being mixed with adults in common prisons.

The major advantage of the Child Protection Act (LPI) of 1911 was that it removed young people under the age of 16 who have committed offences and minor offences from the scope of criminal law. It subjected them to a specialized jurisdiction, Childhood Guardianship (*Tutoria de Infância*), and obliged them to comply with decisions which were different from normal punishments. However, the LPI was an instrument of criminal policy specifically intended for minors (treating the minor for his own sake but also for the sake of public order) which was socially discriminatory and influenced by the main criminological ideology that had been prevalent at the time.[2] News of and studies on the juvenile courts of the United States, England and Germany, as well as the first French experiments in 1910, sparked much interest and influenced the legislative process that led to the LPI. The most decisive influence of all was brought to bear by the bill presented to the senate, by the Belgian Minister of Justice, *Jules Le Jeune*, in 1889. The key ideas of that bill deeply impressed Antonio de Oliveira, the most important person behind the Child Protection Act.[3]

With the Decree of 15 May 1925, the youth courts, known as Guardianship District Courts (*Tutorias Comarcãs*), began to spread throughout the country, and minors under the age of 16 were finally no longer sentenced. Minors "in danger", merely as a result of social need, are distinguished from minors in moral danger and the former can no longer be interned in offenders' institutions. This category covered delinquents and pre-delinquents, offences that were seen as an indication of a personality that was highly dangerous to society. Young offenders under the age of 9 began to be considered 'minors in danger' in 1927 and accordingly could not be interned in offenders' institutions. The Law of 1925 established measures of social defence with a preventive, rehabilitative and corrective aim.[4]

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2 It sought to establish a balance between the positivist Italian school with its anthropological roots, and the theories of the socialist criminological school, which was represented in Portugal by the then Minister of Justice, Alfonso Costa, who was a Professor of Law at the University of Coimbra and who firmly believed in the rehabilitative qualities of the agricultural field colonies in relation to delinquent minors.

3 As is well known, Belgium would only have its own Child Protection Law in 1912, under the impetus of the Carton de Wiart couple.

4 These measures had a therapeutic purpose designed to combat crime, an approach that was hoped to be best suited to the criminal aetiology. The progressive regime was implemented in the practices of detention: permanent internment in reformatories was established as a measure of reform, and internment in correctional facilities as a

The important 1962 reform of the guardianship services for minors – still during Salazar's dictatorship – was not a complete break with the previous system. It aimed at adjusting the welfare model that established the jurisdiction over minors to the changes and developments subsequent to WWII that could be observed in Western Europe, as to how to explain, understand and react to child and youth crime and to the new ways in which this criminality was manifesting itself. It also sought to make the model more cohesive so as to put an end, once and for all, to the lengthy, confusing and contradictory nature of the legislation in force up to that time. The model envisaged by the reforms wished to distinguish itself from the structural aspects of the previous intervention model, which was more affected by those transformations and developments. The work undertaken in Belgium, with a view to a reform of the Law of 1912 (and that culminated in the Belgian Law of 8 April 1965) had been followed attentively by the Portuguese legislator, and became a point of reference for the development sought within the scope of the welfare model.

With the new reform, the aim was not to repress the minor's behaviour, as deviant or undisciplined as it might be, but to effect criminal prevention by protecting the minor through the courts, by recourse to measures of protection, assistance and education.[5]

The Law of 1962, known as the Organisational Guardianship of Minors (*Organização Tutelar de Menors* – OTM), provided the youth courts with a set of measures of diverse content, nature and severity, that could be imposed either separately or cumulatively, and which covered everything from a simple admonition to the deprivation of freedom.[6] These measures were supplemented by the

measure of correction for minors in an advanced state of depravity, albeit, still considered to be capable of rehabilitation.

5 The committed offence was simply seen as an indication that the minor was in need of protection and education. The legitimacy of the State's intervention, via the courts, was founded on carrying out the protection of the minor. Of the measures established with that purpose in mind, internment, especially in offenders' institutions, began to be considered as ultima ratio, with recourse to it only being permissible in situations in which there are no favourable conditions for rehabilitating the minor. The subsidiary nature of internment was the corollary of the repudiation of the idea that the social rehabilitation of minors should be carried out by separating the minor from his social and family environment and that closed institutions with their severe and uniform discipline, immense amount of work and the permanent threat of severe punishments would be the most appropriate means for eliminating the corrupting influences of those environments.

6 Between these extremes, measures were introduced that were of a compulsory nature (placement of the minor with his parents, guardian or person in charge of the minor, or placing the minor as an apprentice or worker in a private company or public or private institution), economic nature (binding over to be of good behaviour, deducting a sum of money from the income, salary or wages) or limited the minor's freedom and were to be

establishment of measures of internment in offenders' institutions, all applicable to minors under the age of 16.[7] No limit to the legal intervention in relation to the minimum age of minors was foreseen, except as regarded the application of measures of internment in an offender's institution, which could not be imposed on minors under the age of 9.

The principle of personalized intervention was followed by the criteria needed for its implementation: the adjustment of the measure to the minor's personality, for his protection, defence and education. For this purpose the measures had to obey the principles of indeterminacy and flexibility. Their implementation did not have to obey the principle of proportionality in relation to the offence committed, nor did it have to take into account its general intimidatory value. The suspension of the measure and the suspension of the procedure were a novelty. The measures (save for the measure of internment in a school-prison or equivalent facilities) would cease to apply no later than at the age of 21, however they could also be lifted before this age if the minor demonstrated that he had socially readjusted.

The application of measures of internment had to be preceded by observation in an observation centre or in a medical and psychiatric institution.[8]

The social and political changes that followed the Revolution of 25 April 1974 and the return of democracy to the country made it even more evident to those with more responsibility within the minors' guardianship system that there was a huge difference between the lofty objectives of the law and actual implementation. Despite the wide-ranging assortment of measures that were available to the courts, the logic of institutionalization had been maintained. This resulted in frequent and indeterminate use of measures of internment, especially of internment in observation centres. The large offenders' institutions continued to be overcrowded. The expectations regarding the semi-internment and semi-liberty regimes were not fulfilled, since not enough was invested in the

executed in the community (assisted freedom, placement with an adoptive family) or in an institution (internment in public or private education and assistance institutions).

7 Theses measures are: being held at an observation centre; placement in a boarding home; internment in a medical and psychiatric institution, internment in a re-education institution and internment in a prison school or equivalent facilities. All these measures were applicable to minors under the age of 16 for: committing a crime or a minor crime, begging, vagrancy, prostitution or libertinism, serious difficulty in adjusting to normal social life, due to their behaviour or tendencies, or for being victims (of ill treatment, abandonment, and neglect and jeopardized health, safety, or moral development).

8 The aim was to guarantee that the re-education measures were determined in harmony with the real psychological, family and social conditions of each case, and to guarantee the success of new experiences by introducing new measures as was the case of placement in a semi-internment home. The minor's psychiatric assessment was considered the most important part of his observation and was required of all minors, not just those considered mentally anomalous.

creation of a sufficiently large number of units that would permit this measure to be imposed and thus to permit a reduction in the population of the large institutions. It was also considered unrealistic to set aside the large institutions and to leave them empty and lifeless, though it was believed that the ideal answer would be to have all the facilities run as small open communities, in a family-like manner. Educational intervention was still rooted in a highly repressive regime. The reality was far different from the exemplariness pretended by the law. It was still common for minors to be subjected to corporal punishment and aggression, as was the imposition of sanctions which were complied with in inhuman and degrading conditions, as a way of breaking the minor's personality.

In carrying out the Ministry of Justice's Action Plan (*Plano de Acção do Ministério da Justiça*) – approved by the Council of Ministers on 20 September 1974 – a multidisciplinary committee was set up. In their preparatory work, which culminated in the 1978 Revision of the OTM, the purpose of keeping the intervention regarding maladjusted minors subordinated to the objective of protection was already evident. Nevertheless, to fulfil this purpose, the Belgian Law of 8 April 1965 was much more closely followed, since it was considered desirable to incorporate the principle of consensual socio-administrative intervention, in relation to the majority of child maladjustment cases, as well as the principle of subsidiarity of the judicial intervention, with merely protective and educational objectives. On the other hand, it was also considered important to maintain courts with specialized jurisdiction in juvenile matters. The jurisdiction of these courts of mixed composition encompassed minors all the way up to the age of 18. They could, however, decide not to try a minor aged 16 or over due to the circumstances involved, and refer the matter to the regular courts instead. Judicial intervention should therefore fall to the public prosecution (whose representative would be the curator for minors (*curador de menores*)) with its socio-economic intervention in the hands of committees for the protection of minors.

It may be considered odd that the juvenile justice system remained deeply rooted in the "welfare model" when it was reformed in 1978 (and for a quarter of a century afterwards), even after profound political and social transformations had taken place as a result of the Revolution of 25 April 1974. The reason for this has to do with fact that the concerns of the new Democratic State based on the rule of law were of a political, economic and social nature. The country had still not found political and governmental stability. The priority was on consolidating democracy and the rights of citizens. In the euphoric aftermath of the end of a long lasting and repressive regime, the concept of authority was in crisis.[9]

The rapid ratification of the Convention on the Rights of the Child by Portugal and the ensuing need for its implementation allowed for a broader

9 Authority was confused with authoritarianism and this even affected the paradigm of education, at all levels, from home tutelage to state education.

critical reflection on the results of the welfare model in which the system was firmly rooted. It was concluded that it was inadequate and inappropriate and, because of this, abusive and inoperable in relation to the problems it was supposed to address. At the source of this result were reasons of a conjunctural and structural nature, essentially linked to deficiencies and faults in the conception and implementation of the model, and which were interconnected with the organizational deficiencies and lack of resources needed to accomplish it and the overheating of the resulting system. The generalizations, ambiguities and the imprecision of the law were at the forefront, as well as the disrespect for the most basic guarantees for minors and their parents in the guardianship procedure, allowing for a vast amount of arbitrariness. The fact that guardianship measures are those that most limit rights, made the way in which the law defines situations that require guardianship intervention even more vague and imprecise, and conformed the courts' interventions to an extremely informal procedure without ensuring the right of access to the law and the right to defence that is enshrined by the constitution.

The contrast between the different and frequently contradictory pictures and expectations that the parties to the proceeding had, and the possibilities and realities of all, were the reason for a generalized dissatisfaction with a system under the purely protective paradigm.[10]

10 The inability to claim guarantees in the guardianship procedure, mainly concerning evidence that the minor has committed the offence, permitted the uncontrolled and perverse use of internment in an offenders' institution. This was used as a means to provide the minor with the conditions in which to live and develop, becoming a double punishment for minors who are also victims, especially when enforced in re-education facilities, because they were perceived to be an incomprehensible and unjust punishment, given the ambivalence as regards the image of these institutions, about which the opinion persisted – among the public and even magistrates – that the need for prisons for minors was dictated by the concern for public protection (*Duarte-Fonseca* 2005). By obscuring the arbitrariness of the intervention permitted by law, the opacity of the guardian procedure was a high price to pay for the protection afforded by that confidentiality. The lack of time limits associated with the measures of internment was a source of anxiety and destabilization for the minors, having little to do with the proclaimed defence of their interests and the personalized planning of its execution. The system functioned as a powerful mechanism which selected minors from socially vulnerable families, and for whom internment acted as a precipitator, penalizing and criminalizing poverty (*Gersão* 1988). Though the courts knew they were overcrowding guardianship institutions with minors that only needed social support and not internment in these institutions, the courts would file and dispose of a case, or apply non-institutional measures to minors who had committed infractions, on the grounds that there was a lack of places available in the offenders' institutions. The lack of proportion between the measure imposed and the offence committed meant that the measure of internment was proportionately imposed more on minors who had committed minor offences (such as simple theft) than on minors who had committed serious offences (crimes against persons). Protected by a discursively incoherent law, which is

1.2 The legitimacy and assumptions underlying educational guardianship intervention

The Law no. 166/99 of 14 September (*Lei Tutelar Educativa - LTE*: Educational Guardianship Law) entered into force in January 2001. This Law, together with the Law no. 147/ 99 of 1 September (*Lei das Crianças e Jovens em Perigo - LP*: Law on the Protection of Children and Young People in Danger), is the fundamental text on the last reform of the legal framework for minors. The key objective of this new framework is to distinguish between situations involving minors that commit criminal offences (educational intervention) and minors in danger (protective intervention) and to differentiate the respective responses. It should be pointed out that these differentiated responses can apply to the same minor since, as is well known, both needs are often related. In these cases, protective and educational interventions which are governed by their respective procedural rules, with their own specificities, provide for the necessary rules of interconnection between them as regards jurisdiction. Frequently, it is the same court that has jurisdiction over both cases.

For the purposes of the Educational Guardianship Law a minor is defined as any person aged between 12 and 16 years.[11]

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manifestly ambiguous and little demanding as regards the differentiation of interventions in institutions, based on the specific needs of certain groups of minors, the entities in charge of the execution of decisions and measures subjected all interned minors to aberrant socializing (*Moura* 2000) and a practically uniform intervention, without taking into account the heterogeneous nature of the problems concerned. Those in the system felt that there was a lack of responses to address serious cases of maladjustment and delinquency. This problem was pointed out and a definition of strategies to manage the violence within the institutions was requested. Taking advantage of the fragile nature of the system, certain minors were on terrible terms with the authorities and resisted complying with the rules, which generalized aggressive behaviour in the institutions. The gravity of the offences committed by minors who had run away from the institutions also caused the communities that neighboured the institutions to look on them with suspicion and fear and caused alarm among the public in general. The staff members of these institutions, always understaffed insufficiently prepared, were extremely insecure, especially due to the lack of clear guidelines in relation the interventions they were supposed to carry out. At the heart of their concerns and doubts was disciplinary action. Only in the 1990s were general guidelines and regulations set forth as regards interventions in offenders' institutions. In the absence of a legal instrument covering this area, the General Regulation of 1997 sought to minimize the legal insecurity that arose as a result. On the other hand there were no auditing or inspection activities with preventive purposes.

11 Given the objectives of educational intervention, the minimum age for this intervention has been set at 12 years. It was considered that, below this age of 12 years, the minor's psycho-biological conditions require an intervention that is not compatible with the educational system. However, it should be noted that the commission of a crime by a minor aged below 12 years, to the extent that it is related to situations of social need,

The legitimacy and effectiveness of the state's system of intervention for minors requires differentiation between distinct types of interventions. From the outset, the State's protective intervention is justified whenever the minor's possibility of benefiting from, or exercising civic, social, economic and cultural rights are undermined by factors that are beyond his or her control (neglect, social exclusion, abandonment or ill-treatment). The Portuguese Constitution has charged society and the State with "the duty to protect children, in order to safeguard their full development (...)" in light of the minor's fragility in the face of adverse conditions. The rationale for educational intervention is of a distinct nature. This type of intervention is only acceptable when there is evidence of a situation of rupture with the core set of essential community values, as embodied by penal norms. These norms are the reference framework and represent the minimum level of obedience that is required from any citizen. The State has the right – and duty – to correctly intervene whenever the minor, by breaching penal norms, reveals a personality that is hostile to legal duties. In this case, it is necessary to educate the minor by the law, in order to ensure that the minor will internalise legal rules and values.

In effect, the model of educational intervention has substituted the so-called protective model, in which a minor who fails to adopt normal rules of conduct was considered to be a person at risk, and for this simple reason, the State could legitimately educate him or her. It is a well-known fact that it was in the name of the recognition of rights that the US Supreme Court engendered a transformation process in the 1970s that had a decisive impact on juvenile justice, not only in America but also in Europe. It is also well-known that the criticism raised in this regard was aimed at the extension of social control, in the wake of the development of so-called criminology of "social reaction": increased interventionism "on behalf" of children and young people was incisively and directly questioned, legitimising and paving the way towards a policy of non-intervention.

Nonetheless, a tributary model of an extreme "purely bifurcated" legal system has not been adopted. Instead, the aim has been to find a "middle course" that achieves a balance between safeguarding the minor's rights – and thus conferring legitimacy to the intervention – and the satisfaction of community norms of safety and social harmony – thus making the solution effective (*Rodrigues* 1997).

The prevailing "policy for minors" in Portugal attempts to preserve this balance. Its legitimacy is founded on the young citizen's responsibility. It is this responsibility which conditions and determines the key guidelines of educational intervention in relation to minors.

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may indicate that the state should intervene. The intervention in this case should be solely of a protective nature, to be carried out within the framework of the Law on the Protection of Children and Young People in Danger.

As a result, the first key assumption underlying this type of intervention is verification of an offence as an act classified as a violation of penal law norms. The minor, as a person who is responsible for his/her acts, is also responsible for the social damage resulting from them. Yet the legitimacy of educational intervention only exists – and this is the key consideration – if committing the offence expresses the existence of a need to correct the minor's personality as manifested through committing the offence. The singularity of the Portuguese system resides herein: it seeks (achieves) a balance between recognition that the young citizen should assume a certain degree of responsibility for his/her acts while respecting his learning/training process. It is on this basis that the educational process is legitimised rather than penal measures (*Larizza* 2005).

In this context, the minor is no longer seen solely as a product of circumstances beyond his/her control. Without denying the existence of such circumstances he/she is seen as a social actor who bears responsibility for his/her acts without implying that this responsibility is equivalent to that assumed by an adult.

There is awareness that the stage of development and maturity of a child or young person warrants a special type of intervention: if priority is placed on proof of an offence in order to legitimate the assumption of educational intervention, the truth is that it does not occupy the same central place that it occupies in general penal law. The respective need for education must be evaluated in each specific situation and updated when the educative measure is applied.

In this manner the proof of the facts of a crime is a necessary, but insufficient basis for the application of an educational measure. Such an order may only be applied if both of the above assumptions are verified. Lastly – and this is the third assumption – given that educational guardianship intervention is not of a retrospective, but of a forward-looking nature, in terms of education, it is understood that the need to correct the personality should persist at the moment in which the order is applied or the decision is made that affects the minor. An intervention of this nature would not make sense for a minor whose personality has adjusted since the time of committing the offence.

The objective of applying educational measures (*medidas tutelares educativas*) is the minor's socialisation. What is called "education in the law" in normative terms, expresses the need for education to encourage respect for essential community values that have been violated by the offence. The meaning of socialisation is thereby clarified. This does not represent moral correction, but is rather – in respect for the freedom of conscience that pertains to all citizens – to educate the minor to pursue a social life that complies with essential legal norms.

In the meantime, it is necessary to bear in mind that this goal is no longer unquestionable in a society of risk where there is increasing emphasis on security. The main questions concern the suitability of justice for minors in order to effectively "manage" juvenile delinquency – above all when such delinquency involves violence and a new discourse arises in the penal context – that law should also provide risk management, in particular the prevention of recidivism. The

objective of the intervention may be to impose the "just deserts" on offenders. In terms of juvenile justice, this implies prioritizing the security of the community and as a result, the principles of retribution and selective incapacitation.

By contrast, the model of educational intervention affirms the socialising and educational nature of intervention in conformity with the need to defend society. It is true that the State cannot ignore its duty to uphold social peace and protect the community's essential legal goods solely on the grounds that an offence was committed by a minor. But two topics must nonetheless be emphasised. To begin with, the primary objective of applying educational measures is socialisation, and not satisfying the community's expectations of security. As already mentioned, an educational measure may not be applied unless there is a clear indication for the need to correct the minor's personality as manifested by his/her offending. As a result, community expectations regarding the defence of legal goods may be frustrated. However, in these circumstances, it is understood that the resulting social damage should be borne by the community itself, as a cost of co-existence with young persons. Having upheld defence of society, in these terms, an educational measure is compatible – and this is the second topic – with the minor's interest, precisely as a result of the purpose that the educational intervention intends to attain. The key issue in this case is actually to make the minor feel responsible for the social damage caused and educating him or her for (future respect of) the law. The State has the duty to maximise the minors' possibility of exercising their rights: and in doing so, the State both fulfils this duty and also serves its own interest by defending society against any form of attack or aggression. In this manner, the community's expectations should be considered to be satisfied strictly to the extent that the application of a measure is required in terms of the minor's interest, within an intervention that will educate him in the law (*Rodrigues* 1997).

2. Trends in reported delinquency of children, juveniles and young adults

For several years juvenile delinquency (of those minors age less than 16) accounted for only a small share of overall criminality in Portugal. In the last years: from two percent in 2001 to one percent in 2002, and 1.2 percent in 2005 and 2006.

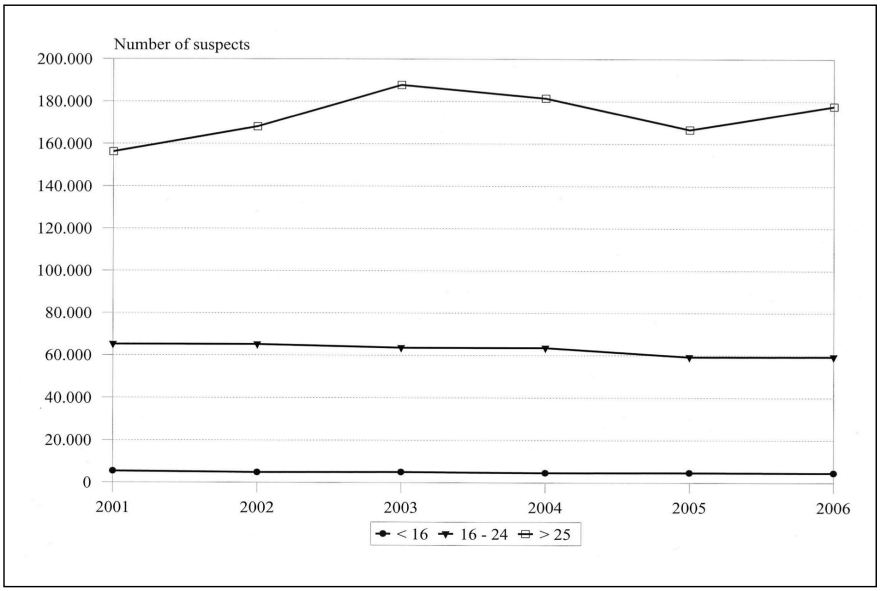
Table 1: Portugal - Juvenile delinquency (age <16): recorded crimes

Year	2001	2002	2003	2004	2005	2006
No. of crimes	3,542	3,021	4,965	4,664	4,649	4,606

Source: MAI.

The number of recorded crimes has slightly decreased since 2003. In general, the numbers of juveniles and young adults in the years since 2001 has been stable or even declining (see Figure 1).

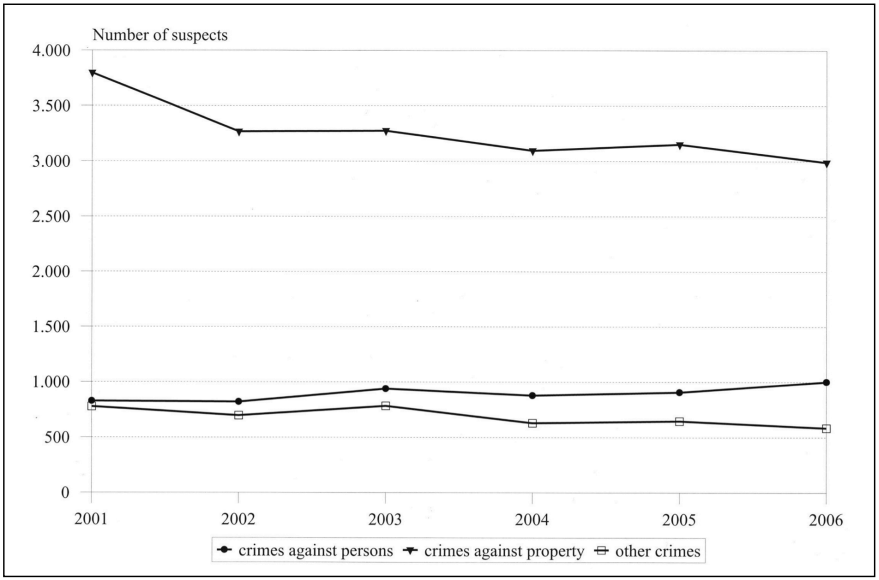
Figure 1: Suspects of police recorded crimes according to age groups



Source: DGPJ/MJ.

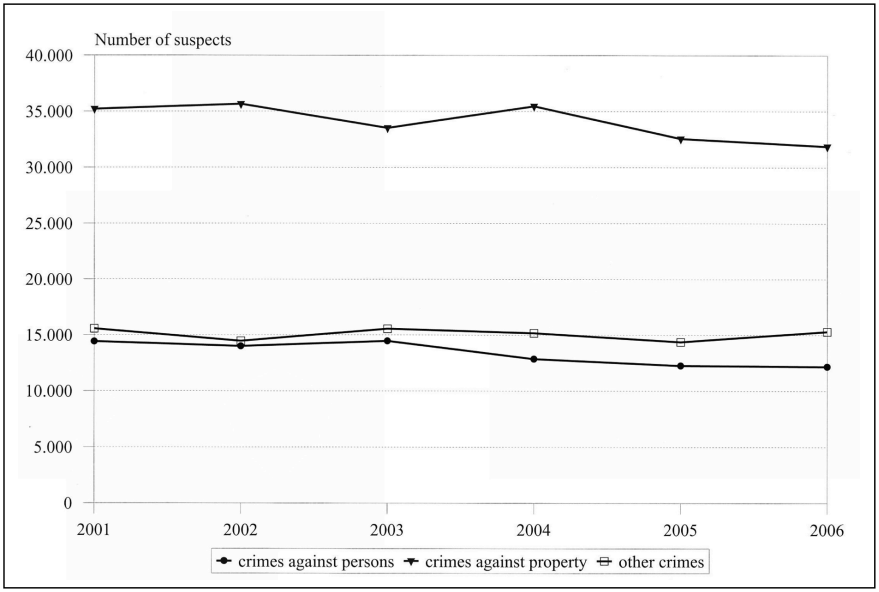
The majority of recorded delinquency involves male perpetrators of property crime, and the same picture applies especially to young adults (Figure 3).

Figure 2: Police registered suspects aged under 16 according to crimes



Source: DGPJ/MJ.

Figure 3: Police registered suspects aged 16-24 according to crimes



Source: DGPJ/MJ.

3. The sanctions system – Kinds of informal and formal interventions

3.1 General considerations

Orders shall be of an educational nature in accordance with their respective objectives. When choosing which measure to apply, the court follows the general criterion of preferring the measure that will foster the objectives of the minor's socialisation in an adequate and sufficient manner. This general criterion incorporates two sub-criteria that further perpetuate its meaning. In this context, the legislator has also indicated that the most convenient measure for achieving this goal is not only that "which represents a lower level of intervention in the minor's autonomy of decision and conduct of life" as well as that "which is able to obtain greater adhesion of the minor and adhesion of his parents, legal representative or *de facto* guardian". The principle of preference for non-institutional measures over institutional measures is thereby consecrated, given that an internment order is that which undoubtedly represents the greatest intervention in the minor's autonomy of decision and conduct of life. As a result

of this principle, on the one hand, internment in an educational centre is the last resort of criminal policy for minors and, on the other hand, when its application is unavoidable, its decisive goal should be that of the minor's socialisation.

The principle of specific duration of educational measures has been consecrated, both in legal terms and in terms of determining its concrete extent.

The determination of the duration of educational measures is subject to the regulatory principle of proportionality. This principle limits the State's educational power in that it prohibits the application of educational measures whose duration is revealed to be disproportionate. Criteria for determining the specific duration of the order and, at the same time, reference points for gauging proportionality, are the "gravity of the offence" committed and the "need to educate the minor in the law manifested by having offended and subsisting at the moment that the decision is made". Like some other systems the Portuguese juvenile justice system relies on both principles: offence gravity and the educational needs.

Educational measures are limited by the principle of proportionality. When determining the gravity of the offence, the judge must bear in mind the material and moral damage caused by the behaviour, the type and manner of execution of the offence, or the degree of understanding or degree of intent manifested by the practice of the offence. In this context, the specific duration of the order depends on the need to educate the minor.

The principle of jurisdictional control over the execution of the order has an impact on the effective protection of minors' rights. However, such a principle has only been unsatisfactorily established in legal texts, as there is no mechanism of guarantee to uphold the institutionalisation of jurisdictional control over the execution of the orders. The objective of jurisdictional control over the execution is not only to guarantee effective supervision of minors' rights during the execution of measures, but also to promote compliance with the applied measures. Regarding this second aspect, a judicial executive act is required: the decision transmitted *in rem judicatam*, in written form, that determines the applied order. In this context the court is also responsible for the revision and for the declaration of the extinction of any measures, as well as for the termination of the internment order.

In relation to the revision of the measures, attention should be drawn to the extreme flexibility involved therein, which enables prompt and opportune tailoring of the foreseen measure to the specific educational needs of minors. In this manner, the legislator in Portugal has emphasised the principle of contemporary relevance, whereby in the event of the substitution of a measure, the measure next in line – in terms of severity– does not necessarily have to be applied, with another one being eligible instead. It is desirable to take greatest possible advantage of this flexibility, countering the tendency that has been observed to date whereby, in the wake of a revision, the majority of measures are either maintained or extinguished.

It should also be emphasised that, in its decision, the court determines the entity responsible for supervising the execution of the applied order. The court normally has a wide range of legal possibilities in order to determine who shall be responsible for this supervision – it can be an individual person or a corporate body, of public or private status.

There are nonetheless exceptions to this rule: see below chapters 11./12.6.

3.2 A closed catalogue of educational measures

In accordance with the principle of legality, in terms of the vagueness doctrine, the legislator provides a closed catalogue of educational measures. Other types, modalities or regimes of measures distinct from those specified in the law shall not be applied. In all circumstances the affirmation of this principle does not impede the judge from establishing greater flexibility in the terms of setting the specific content of the measures within the specified modalities.

The range of educational measures is classified in order of increasing gravity, i. e., by the degree of limitations or restrictions on the minor's conduct of life.

The principle of preference for non-institutional measures is explicitly enshrined in the law. The legislator specifies an extremely rich and diversified range of measures as an alternative to internment in an educational centre.

Non-institutional (community) measures are:

- Admonition (*admoestação*);
- Restriction of the right to ride motorbikes or to obtain permission to ride motorbikes, for a period ranging between one month and one year;
- Reparation to the victim (*reparação ao ofendido*);
- Economic compensation or work for the benefit of the community;
- Imposition of rules of conduct;
- Imposition of obligations;
- Attendance of formative (training) programmes;
- Educational supervision

Redressing the damage caused may be through the presentation of apologies, economic compensation or the performance of activities that are connected with the damage caused to the victim. As regards economic compensation, the amount may be divided into instalments so that this measure is not more burdensome than the minor can financially bear. However, care must be taken so that the instalments are not so low as to make them insignificant and unimportant to the minor, thereby perverting the purpose of the measure. As for activities in benefit of the victim, the rights of the minor cannot be jeopardised by the offended party or by the kind of activities to be performed. His/her education and involvement in other formative (training) activities that are

relevant for a normal and healthy development should not be affected as a result. The amount of time spent daily and weekly on reparative activities must allow the minor a sufficient number of hours for study and for other recreational activities necessary to his development. Therefore, limits of two days a week and three hours a day have been established for such reparative activities. The minor's right to one day of rest per week must also be fully respected. During the school year the activity must not be performed on a Sunday. If the activity goes on for too long it runs the risk of becoming disproportionately heavy and of perverting the purpose of the educational measure. So as to avoid this problem other maximum time limits have been established: a total of twelve hours spread out over four weeks.

These also apply to the measure of economic compensation or the performance of work for the benefit of the community (*realização de prestações económicas ou de tarefas a favor da comunidade*). In accordance with these measures the minor must make a payment of a specified amount or perform an activity that benefits a public or private non-profit organisation. The activity lasts a maximum of 60 hours and must not exceed a total period of three months. It can also be carried out on weekends or on bank holidays. Financial compensation can also be paid in instalments, as long as this does not distort the meaning of the intended measure. When the judge fixes the amount of the payment or instalment he must take into consideration the minor's ability to pay.

The measure of imposing rules of conduct (*imposição de regras de conduta*), like the measure of imposing obligations, are among those that the legislator is less concerned about specifying with exactitude, in compliance with the principle of equality, given the difficulty in foreseeing or inventorying all the rules of conduct that could suit the varied needs involved in educating the minor in the law. Thus, the enumeration of rules of conduct in the law acts solely as an example and guide for the numerous rules for personal social life that the judge, in basing his/her decision on the need for education, will have to consider. These are of a preventive nature and are meant to adjust the minor's behaviour to the rules and values essential to life as a member of society. The imposed rules of conduct cannot put abusive or unreasonable limitations on the minor's freedom to make decisions or lead his/her life. The idea is to avoid not only disproportionate restrictions, but also those that are unsuitable for the normal social and personal life of adolescents and youths, and which by perverting the meaning of the measure would compromise the success of its execution. It should be noted, moreover, that the maximum duration for this measure is two years. This is a very long period of time from a young person's point of view, which makes this measure additionally serious since it places limitations on a person's freedom and on the way in which a minor leads his/her life.

The imposition of obligations (*imposição de obrigações*) also has a maximum duration of two years. This measure seeks to address minors whose educational needs are satisfied by attending programmes and activities of an

educational, formative or therapeutic nature and that are accessible and organised for the population in general. By attending these programmes and activities the minor can acquire or consolidate the psycho-biological conditions that are necessary for the normal and healthy development of his/her personality and improve his/her results at school or in professional training. The imposition of obligations may mean that the minor is obliged to:

- attend a professional training centre, a professional training or a school where the minor's attendance and marks are controlled;
- attend counselling sessions in a psycho-pedagogical institution for children and to follow the guidelines that have been established;
- attend activities in clubs or youth associations;
- undergo medical, psychiatric, psychological treatment or the equivalent at a public or private institution, as a hospitalised patient or an out-patient, to treat alcoholism, drug addiction, contagious or sexually transmitted diseases or mental illness. The judge should always seek the minor's agreement for the treatment programme. If the minor is over the age of 14 his consent is compulsory.

Attendance of formative programmes (*frequência de programas formatives*) is an innovative measure, but still not fully implemented since it depends on the publication of the regulations of the Educational Guardianship Law concerning the non-institutional measures and also on the creation of specific programmes for delinquent minors. The legislator seems to have been considering special formative programmes, which would require the minor's intense participation and would therefore restrict the minor's liberty. The measure can, as a rule, last six months, though certain formative programmes geared to specific areas and problems have also been foreseen. These may last longer, though not more than the maximum limit of a year. In exceptional cases the measure may include an obligation to reside with a competent person or in an institution (in all cases open facilities that are not run by the Ministry of Justice) that provides accommodation.

The measure of educational supervision (*acompanhamento educativo*) consists of the adjudication to an individualised educational project (*projecto educativo pessoal* or *PEP*) that covers the areas of intervention fixed by the court. It can impose rules of conduct or obligations on the minor as well as attending formative programmes. Whenever this is the case, the measure can consist of a combination of other educational measures, which is an exception to the rule provided for by the law not to accumulate educative measures regarding the same minor for the same offence in the same proceedings. The content of the measure can be very wide ranging. It all depends on the minor's individual educational needs and its scope can be broadened, as a result, to the areas of intervention that the judge is free to set. The educational project is executed by the social services of the Ministry of Justice for reinsertion (*Direcção-Geral de Reinserção Social* or *DGRS*). It is up to these social services for reinsertion to supervise, guide, follow and support the minor throughout the course of the

personal educational project. The measure lasts for a minimum of three months and for a maximum of two years.

The last (and the most severe) of the measures that can be imposed by the youth court is internment in an educational centre (*centro educativo*) of the Ministry of Justice (see bellow chapters 11./12.).

4. Juvenile criminal procedure

The educational guardianship procedure provided for by the Educational Guardianship Law is governed by its own rules, though it is similar in many ways to the penal procedure, especially as regards legal guarantees. Educational intervention can lead to a restriction of rights, freedoms and guarantees. Therefore, approximating this procedure to penal procedure is the most effective way of ensuring respect for the minor's dignity.

Educational intervention is the responsibility of the family and youth courts (*Tribunais de Família e Menores*). These are courts with specialized competence that can now be found throughout the country. Nevertheless, in areas outside its jurisdiction, district courts (*tribunais de comarca*), which are courts with general competence, can also sit as family and youth courts.

As a rule, only one judge (a specialised youth judge) sits in family and youth courts or district courts that function as family and youth courts. However, if the case involves an educational measure of internment in an educational centre the judge sits with two lay judges.

From a procedural viewpoint, the educational guardianship model implies "acceptance of responsibility" in accordance with the requirements of article 40, no. 2, paragraph b) of the Convention on the Rights of the Child.

From this perspective, the process is organised in two stages: the investigation, led by the Public Prosecution Service (*Ministério Público – PPS*), and the jurisdictional stage, led by the judge. This two-stage process is intended to guarantee a dialectic structure within the process, whereby the minor emerges as the procedural "subject", bestowed with individual rights and guarantees. Above all, this serves the interest of the minor in achieving an impartial, objective and independent decision, taken by an entity, such as the judge, that is in a completely tertiary position in regards to the case.

The activity of the PPS is developed in accordance with the legal principle of speedy procedure.

Thus, given that the offence is a necessary pre-condition for launching an educational intervention, no measure will be applied and the process will be dismissed if the offence is not proven or if there is insufficient evidence of the offence. However, in addition to the evidence of the offence, a further indispensable pre-condition for the application of an order is the need to educate the minor in the law. Therefore, no order will be applied and the process will be dismissed if the PPS concludes that the respective need for education was not manifested in

the perpetration of the offence. In these cases the PPS may only file the case, however, if the offence is qualified as a crime punishable with a prison sentence of up to three years.

On this basis, it may be concluded that the jurisdictional stage (*fase jurisdictional*) will follow when, in light of the evidence of the offence, the PPS considers it to be necessary to apply an educational measure or, when the offence is qualified as a crime punishable with a prison sentence of more than three years, even if the public prosecution does not consider it to be necessary to apply such an order. It is thereby clear that different criteria govern the articulation of powers between the PPS and the judge. Firstly, it would seem reasonable that it should be the PPS, as a guardian of public interest, to assess the existence of the offence that serves in this regard as a mere pre-condition for verifying educational need. Secondly, if the offence is defined as being less serious (qualified as a crime punishable with a prison sentence of less than three years), it is accepted that the judgment may be solely made by the PPS in regards to the need for an educational measure, and the PPS may determine that the process be dismissed in order to prevent unnecessary prolongation of contact with the justice system. Above all, if it is concluded that there is a need for an educational measure, the jurisdictional stage will follow, requiring the PPS to open the respective jurisdictional stage, and to proceed in the same manner in cases in which the offence is qualified as a crime punishable with a prison sentence of more than three years, even when it considers that there is no need for an order. In this situation, the gravity of the offence makes it advisable that the court intervenes. Finally, after a request has been made to open the jurisdictional stage, the judge may dismiss the process if he agrees with the PPS's proposal that it is unnecessary to apply an educational measure.

Regarding the content of the investigation, two conclusions may be drawn from the pre-conditions for educational interventions. Firstly, it is understood that the investigation is directed at checking the evidence of the offence, and also checking the need for educational measures. Secondly, at any stage of the process, and not only in order to determine which educational measure to apply – and thus within the investigation – information is required concerning the minor's personality.

The social inquiry report on the minor can be used as a means of obtaining evidence. It is meant to aid the judicial authorities in understanding the minor's personality, his conduct and his integration into his socio-economic, educational and family context. The judicial authorities may request information from the social services of the Ministry of Justice for reinsertion (DGRS) or other public bodies as well as from private entities. The judicial authority solicits the social report from the DGRS. When a measure of internment in an educational centre with an open or semi-open regime is to be imposed, the social inquiry report must include a psychological evaluation. When the measure is to be imposed in

a closed regime the judicial authority orders an expert's report on the personality of the minor which must be carried out by the DGRS.

The jurisdictional stage is an oral and contradictory stage that focuses upon oral statements, immediacy and the search for material proof. At the same time, requirements of formality and legality are combined with solutions of protection and consensus.

Two notes should be made here. The first concerns the preliminary audience (*audiência preliminary,* preliminary hearing). It is clear from its legal configuration that this may take any one of three forms. Firstly, an extremely informal and short session intended for obtaining the minor's agreement concerning the order proposed by the PPS with which the judge also agrees – in which the judge asks the minor if he accepts the proposal. Secondly, an equally informal and short session, in which the search for consensus is extended to the PPS – in regards to an order proposed by the judge. Finally, a formal and more complex session of preliminary audience in which – guaranteeing the contradictory procedure of proof – the judge decides which order is to be issued. As a result, the simplified process of holding a preliminary hearing is the common means of procedure, and thus delivers various possibilities of configuration. This form of creating greater flexibility for the specific configuration of the preliminary hearing enables the judge to tailor it to the actual requirements of the specific case and configure the hearing in such a manner as to uphold the rights of the minor's defence, thus guaranteeing the adversary system in its most complex and formal form.

The second reflection concerns the cases in which there is an "audience". The first example of this situation is the case in which the judge fails to agree with the PPS's proposal that it is not necessary to apply an education measure, when the offence is qualified as a crime punishable with a prison sentence of more than three years. Given that the "preliminary audience" is above all – but not only – a space of consensus, this legal solution is justified. There are also grounds for an "audience" in cases in which, although the PPS has requested the application of a non-institutional order, the judge understands that the "the nature and gravity of the facts, the urgency of the case or the order proposed" do not justify abbreviated treatment. Finally, there are always grounds for an "audience" whenever the PPS requests that an institutional educational measure be imposed. Given that the application of a measure that involves depriving the minor of his/her liberty is at stake, it is a common understanding that an eminently consensual solution such as the "preliminary audience" is not suitable since it may conceal the restriction of guarantees.

Protection and consensus are the hallmarks of the educational process. The idea of protection, mediated by the principle of opportunity, forms the grounds for solutions of preliminary dismissal and suspension of the process. The principle of opportunity, in this context, is assumed as an element of differentiated strategy of criminal policy that breaks with the rigidity of a principle of unrestricted

legality, based on criteria of the minor's socialisation. Thus, the PPS should take into account the stigmatising and negative effects that formal court proceedings may have on a minor's socialisation.

The application of the principle of opportunity, meanwhile, is bound by predetermined and cumulative legal precepts. Firstly of an objective nature: the reduced or mediated gravity of the eventual offence, calculated in function of the punishment foreseen for the corresponding crime. Secondly, of a subjective nature: the need to educate the minor that may be either null (cases of preliminary dismissal) or scarce (cases of suspension of the process).

The idea of consensus underlying the process is manifested in the specific configuration of the jurisdictional stage, but also mediated by the principle of opportunity in the suspension of the process (*suspensão do processo*). In this instance the consensual solution involves the minor and his parents, legal representatives or de facto guardians.

The case may be suspended by the prosecutor (if the offence is qualified as a crime punishable with a prison sentence of less than five years) if a plan of conduct (*plano de conduta*) is proposed by the minor (and accepted by the prosecutor), demonstrating that he/she will be able to maintain correct conduct in future, without committing further offences. If the plan is successfully executed during the suspension's delay the prosecutor dismisses further investigation.

The committed participation of these protagonists (the minor and his/her parents, legal representatives or de facto guardians) may be highly relevant in order to successfully suspend the case. For this reason it is common understanding that, although their agreement is not obligatory, their opinion should be heard in regards to the plan of conduct, the solution that aims to balance the two relevant areas of interest: that of commitment of the persons responsible for the "education" of the minor and the avoidance of subjecting the minor to the process. Yet these terms clearly imply that absence of the agreement of the said persons does not obstruct suspension of the process, although such agreement is desirable. Ideas of mediation and redress were also taken into consideration. They fall within the objective of "education of the minor in the law".

Mediation is provided in the contexts of diversion – for the purposes of preparation and implementation of the plan of conduct in order to suspend the procedure – and of preliminary hearings. In this case, mediation takes place within the framework of the procedure as a means of obtaining consensus regarding the measure to be applied, which may be any of the specified non-institutional measures. Mediation arises in the context of co-activity implied by the process. This immediately suggests that the participation of the parties involved in this process may not be voluntary. The parties involved are not only the offender and the victim (who may not even be present), but also include the judge, the Public Prosecution Service and the minor's defence counsel. In the context of mediation for preparing the "plan of conduct", this arises as an

extra-procedural means of conflict resolution, assuming the voluntary participation of the persons involved in the mediation procedure (the minor and his/her parents, legal representatives or de facto guardians, and possibly the victim as well, in accordance with what is more suitable for the mediation procedure). In this case, mediation also arises associated to redress, given the possibility that the plan of conduct can present it as a condition for suspending the process.

Educational Guardianship Law: Preliminary proceedings

Responsible authority for investigation	Diversion by the Police	Diversion by the Prosecutor	Diversion by the Judge	Particularities
Public Prosecutor	No	Yes*	Yes	Preliminary hearing

* Only if the offence is qualified as a crime punishable with a prison sentence of less than 5 years.

The genuine revolution introduced by the Educational Guardianship Law with regards to the minor's status – that acquires the position of procedural subject – leads to the consecration of the minor's right to be supported by the defence counsel in all procedural acts in which he/she participates.

It is worthwhile considering the aspect that confers to the minor the right to constitute or request the nomination of a defence counsel. This right is to be exercised by the minor or by the parents, legal representatives or de facto guardians.[12] If the juvenile wants to have a defence lawyer but cannot afford it, the judge decides to appoint a lawyer.

In order to maintain coherence with the nature and objectives of the educational guardianship process it was chosen not to adopt the request of a civil indemnity payment, and thus not admit to the process the concept of injured party. The victim as a party intervening in the conflict is already heard within the process and in a certain manner stands as representative of the community values that have been damaged.

The principle of public exposure has been consecrated within the process. Given that it is known that this principle fosters the transparency and democratic

12 The minor is not prevented from exercising this right in all cases in which he wishes to exercise it: for example when there is a conflict between the minor and his parents, legal representatives or de facto guardians in regards to the confidence placed in the defence counsel, or when there are no parents, legal representatives or de facto guardians or when such persons do not exercise such a right. It is important to remember that the issue at stake is the safeguard of the minor's defence and not that of his parents, legal representatives or de facto guardians.

nature of the process, certain deviations from the general regime of public exposure were proposed, with greater amplitude and depth than that which occurs within the penal process, in order to protect the minority age of the participants, specifically in terms of their state of psychological and intellectual development or their sensitivity to the presence of the general public. In this regard, the limits of public exposure that should be observed in a general manner are identified as: "respect for the minor's personality and for his private life, whereby, as far as possible, his identity should be preserved".

Having concretised the general definition of the limits of public exposure, specific rules are foreseen for attendance of the general public in the preliminary audience and audience itself.

Thus, regarding the general public, the judge may restrict public attendance – to the extent that part of any audience may take place without public attendance – or the judge may rule that any audience shall take place without public attendance.

Exceptions to the rules of public exposure include the safeguard of the "dignity of persons and/or public morals" or the guarantee of the "normal functioning of the court". Criteria to be taken into consideration in this regard are the circumstances in which the presence of the public "may psychically or psychologically affect the minor or the genuine character of the evidence".

In regards to the aspect of public exposure in terms of the media, the possibility is foreseen that the judge may rule the prohibition of narration or reproduction of certain acts or procedural items or divulgation of the minor's identity, on penalty of simple disobeyance.

At the same time, "the reading of the decision is always public", which signifies that the case is equally public even if the trial proceeds with restrictions or exclusions in terms of public exposure. Having balanced the interest of the transparency and democratic character of the trial and the risks of stigmatisation caused by public exposure, the legislator aimed, in adopting this solution, to not underestimate the idea of social rebuttal, to the extent that this may contribute to the minor's adhesion to the educational process and thereby induce a sense of responsibility as an active member of the community (social and educational dimension of the public exposure of reading the decision).

Participating parties at the proceedings and the youth court trial and their specialization					
Youth judges	Lay judges*	Juvenile prosecutors	Specialized police officers	Specialized defence counsel	Welfare agencies
Yes	Yes	Yes	No	Yes	Yes

* Only for the application of an internment measure

There is a specific registration regime for educational measures, having introduced a definitive separation from adults' criminal records. Given that this is a matter that directly involves minors' fundamental rights and whose objective is the constitution, access and operation of a central personal data file, a set of norms are adopted within the Educational Guardianship Law that duly oversee such rights and efficiently regulate the respective procedures, taking into consideration the personal data regime established within prevailing legislation. The registration of educational measures is, from the outset, an indispensable instrument for the suitable functioning of the justice system for minors, not only in procedural terms – where knowledge of the minor's prior record may have a wide range of effects, for example, for the application of a prevention order -, but also in substantive terms – for example, in terms of the decision on the application, choice and determination of the duration of measures. On the other hand, such registration is highly important, both for the execution of educational measures and internment orders in educational centres, and also in the realm of scientific and statistical research.

5./6. The sentencing practice – Part I: Informal ways of dealing with juvenile delinquency and Part II: The juvenile court dispositions and their application since 1980

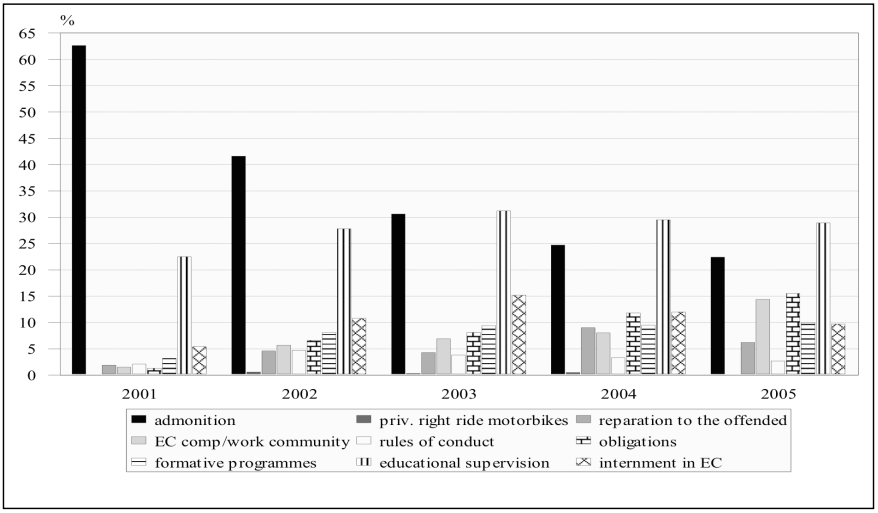
Trends in the application of educational measures

As regards the effective application of educational measures, a less serious educational measure was used quite extensively: admonition. However, more recently this measure has been applied less often. From 2004 on, it has been replaced by educational supervision as the measure which is proportionately most used. Educational supervision had previously been the second most frequently applied measure.

In relation to the restorative measures provided for – in particular the measure to repair the damage caused to the offended person (through the presentation of apologies, economic compensation or exercise of activities) and the measure of economic compensation or work for the benefit of the community – these are not yet applied to the extent that would be advisable given their essentially educational nature and propensity to inculcate a sense of responsibility. Nonetheless, it should be noted that the latter measure was more often applied than the measure of internment in 2005.

The fact that the regulations of the Educational Guardianship Law concerning non-institutional measures have still not been published is often pointed out as one of the strongest reasons why these measures are not utilised more often.

Figure 4: Educational measures imposed by the youth court



Source: MJ/DGPJ.

The measure of internment, in any of its modalities, must be only used as a last resort, thus fulfilling the principle enunciated in the LTE, in accordance with key international documents.

If the percentage of measures of internment applied under the Educational Guardianship Law with regards to the number of minors tried by youth courts is compared to the percentage of measures of internment applied under the OTM of 1978, to minors having committed an offence, the percentage of measures of internment under the Educational Guardianship Law seems to be higher than the percentage in the nineties of the 20th century under the OTM of 1978. However, it should be remembered that at that time, the measure of internment was proportionately more often applied to minors at risk and pre-delinquents than to minors who had committed an offence.

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Table 2: Number of juveniles tried by the youth court & number of juveniles with internment measures

Law:	OTM 1978										
Number of juveniles/Year	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
tried by the youth court	1,433	1,361	1,374	1,264	1,452	1,536	1,338	1,340	1,346	1,643	n.a.
1. internment measures	78	76	38	74	65	74	66	38	32	38	n.a.
Law:	**LTE 1999**										
Number of juveniles/Year	**2001**		**2002**		**2003**		**2004**		**2005**		**2006**
tried by the youth court	1,018		867		868		968		812		n.a.
1. internment measures	55		94		132		116		79		n.a.
1.1 in closed facilities	12		29		35		25		16		n.a.
1.1 in half open facilities	24		42		73		51		46		n.a.

Source: MJ/GEP/DGPJ.

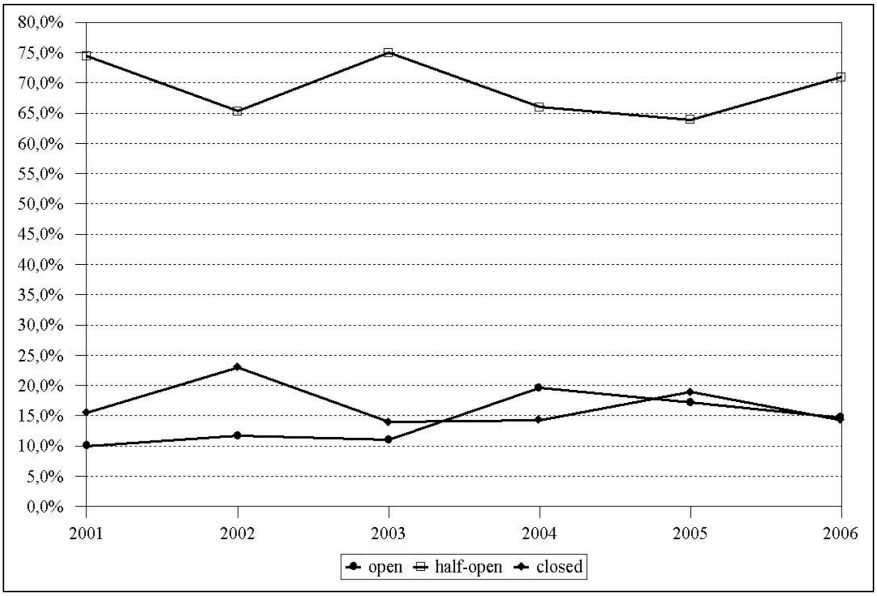
In 2005, the measure of internment was surpassed (proportionately) by the imposition of obligations and, as mentioned above, by the measure of economic compensation or community service work. In the same year, the measure of attendance of formative programmes also reached the same percentage as the measure of internment in an educational centre.

In taking into account the regimes in which the measure of internment can be imposed, it is evident that the measure of internment in closed facilities has been used less and less since 2003. The limited number of minors interned in a closed regime confirms that only a very limited number of cases in Portugal seem to justify recourse to such a serious measure.

The half-open regime is still the regime that is most used.

The open regime was applied proportionately more than the closed regime (in 2001 until 2003), but recently was applied to about the same degree as the internment in closed institutions, which can be seen in the population of the educational centres. It has been dropping since 2003.

Figure 5: Educational centre's population in open, half open and closed facilities (in %, December 31)



Source: MJ/IRS.

7. Regional patterns and differences in sentencing young offenders

In this respect there are no data available.

8. Young adults (18-21 years old) and the juvenile (or adult) criminal justice system – Legal aspects and sentencing practices

The age limit for criminal responsibility is maintained at 16 years (article 19 of the Penal Code). The refusal to lower this limit is justified from a criminal-political viewpoint due to the need to defend the minor aged below 16 years from the most serious form of state intervention (penal action) and thus ensure that the minor is not subjected to a system that bears a high level of social symbolism and stigma.[13]

It would, nonetheless, be highly convenient to raise this age limit to 18 years and in this ensuring that the age of penal responsibility coincides with the age of civil majority. This is an aspect of the Portuguese system to which the Convention of the Rights of the Child has not yet been applied and which has aroused criticism within Portugal, above all by defenders of legal doctrine. When the reform was made, however, it was considered to be premature to make such an alteration before testing how the new model operates in practice, given that it represented a complete alteration in relation to the protection model in force up until that date. Furthermore, certain scholars claimed that the new educational model represented an unjustified hardening of the approach. Essentially, criticism was made of the supposed attempt to establish "a penal law for young offenders" in Portugal. Today, in a very different context, where it is widely accepted that the LTE did not constitute a simple hardening of reactions to juvenile delinquency, but rather a more rational and effective form of intervention, it would be desirable to raise the age of penal responsibility to

13 This position is upheld in terms of legal dogma through the minor's incapacity to bear legal liability, in a certain sense of the term. In effect, whereas it is true that although being aged under 16 does not prevent the minor of being capable of "assessing the illicit nature of his conduct" or "make decisions in accordance with this assessment", the possession of this capacity does not legally result in the presumption of the capacity to bear legal liability. Legal and criminal liability is founded on an ethical-social judgement in regards to the personality of the person responsible for the illicit act. But there are plausible grounds to consider that an individual's personality, in terms of legal-penal assumptions, is not fully formed at the age of 16. There are legitimate grounds for hoping that committing an illicit act does not stand for persistent offending but instead that the individual's personality is still in a stage of development. In this case all evidence suggests that interventions of the penal system should be rejected.

18 years, thus eliminating any idea of ambiguity in relation to the treatment of delinquent minors in Portugal.

The need for this alteration is particularly important given that enactment of the LTE was not accompanied by implementation of a new "special penal regime for young adults" (the current legislation in this regard was enacted in 1982: Decree-Law nº 401, September 23, 1982). It is a well-known fact that one of the cornerstones of any special penal regime of this nature is the avoidance, as far as possible – i. e. beyond that which is possible in the case of adults – of application of prison sentences to young adults. In Portugal, this results in a serious non-sense for the system, fostered by two aspects: the age of penal responsibility is set at 16 years, but no specific provision had been established for the legislation enacted in 1982. As a result, no possibility is foreseen for application of "special" measures, as an alternative to a prison sentence, for young people who commit crimes when they are offenders aged between 16 and 18 years. However in relation to young people aged between 18 and 21 years the application of "special" measures, the so called corrective measures (*medidas de correcção*) as an alternative to a prison sentence, is foreseen: i. e. admonition, the imposition of obligations, the fine and internment in a detention centre. These measures, however, are not applied in practice and at the present time no institutions serve as a detention centre. Only the special mitigation of the prison sentence permitted by this law continues to be applied.

It should be noted that the LTE specifies a series of rules for the resolution of problems resulting from the joint application of educational and penal orders for the same minor. This possibility is always available, given that the LTE foresees the possibility that a juvenile court may intervene and enforce an educational measure for a minor until he reaches the age of 18 for an offence committed by the offender before he attained at least the age of 16. In effect, two types of situation may arise: a penalty appropriate for a crime committed by an offender aged over 16 may be applied to a minor, who is now aged over 16 years, as long as he is currently serving an educational measure for an offence that was committed before he reached the age of 16; alternatively an educational measure may be applied to a young person aged under 18 years who is serving a prison sentence for a crime that was committed before he reached the age of 16. A general regime has been established in which orders and punishments are to be served on a cumulative basis, except where this is mutually incompatible.

Age of criminal responsibility		
Non criminal responsibility for penal offences (Educational Guardianship Law)*	Criminal responsibility (adult criminal law can/must be applied); Young adults law can be applied	Legal majority
12-15/(16-17**)	16–21	18

* Only educational guardianship measures.
** Only for offences committed by juveniles younger than 16.

9. Transfer of juveniles to the adult court

In this range (12 until 16 year old minors) a transfer to adult courts is inadmissible. The youth court can impose educational measures if the minor, suspected for having committed facts considered crimes between 12 and 16, has not yet reached the age of 18. If the suspect (for having committed acts considered crimes between 12 and 16) is an adult, the transfer to adult courts is inadmissible as well.

10. Pre-trial deprivation of liberty

Pre-trial deprivation of liberty can be imposed by the youth court judge as a precautionary measure on young people over 12 and under 16 years of age, as long as they have not yet reached the age of 18 and are suspected of having committed acts considered crimes under Portuguese criminal law. This precautionary measure (*medida cautelar de guarda*) consists of detention in an educational centre in secure or semi-secure facilities.

This is the most serious of all the protective measures applicable to young offenders and a youth court judge may only resort to it if other precautionary measures provided for by the Educational Guardianship Law are insufficient or inadequate.

This order may only be imposed if the following pre-conditions are cumulatively fulfilled:

- There must be strong evidence of the offence or offences.
- The probability of the application of a guardianship measure, corresponding to the observance of a need to educate the minor.
- The probability that the young person will abscond or commit further offences.

These pre-conditions are common to all precautionary measures. If they are no longer applicable the measures have to be terminated.

Precautionary measures aim to safeguard verification within the process of the facts concerning the offence and the minor's educational needs. Such orders are subject to the principle of the "vagueness doctrine", and only those specified by law may be applied. The specific application of such orders is conditioned by a series of principles: vagueness doctrine, need, suitability, proportionality, subsidiarity and uncertainty principles.

The other precautionary measures which may be applied are:

- Placement of the minor (with the parents, legal representatives or the de facto guardians, or another competent person) with the imposition of obligations;
- Custody of the child in a public or private institution.

In addition to the conditions already mentioned, the Educational Guardianship Law only allows that a pre-trial internment order in an educational centre be applied where the offence committed is an offence that carries a maximum custodial sentence of more than five years, or when two or more offences have been committed, which are classified as crimes against persons that are punishable by a maximum custodial sentence in excess of three years.

If the minor is under 14, the order will be complied with in a semi-secure institution. If the minor is over 14, he or she will be placed in secure facilities.

The internment as a precautionary measure can be imposed for a period of three months and can be extended for another three months in especially complex cases and where the reasons on which it is based are duly stated.

Proceedings involving a precautionary internment in an educational centre, which are underway during judicial vacation, are given priority status.

During the investigation (*inquérito*: inquiry), only the Public Prosecution Service, which is in charge of this procedural stage, can request precautionary measures. During the jurisdictional stage these measures can be imposed by the judge or requested by the PPS. If the PPS is not the party requesting a precautionary measure it has the right to a hearing.

In observance of the adversarial nature of proceedings, the minor has the right of defence. A prior hearing with the defence lawyer and parents, legal representatives, or guardians should occur whenever possible.

Table 3: Number of juveniles in pre-trial internment & internment order in EC*

	2001	2002	2003	2004	2005	2006
Pre-trial internment	26	44	41	30	31	30
Internment order	163	173	249	240	211	213
Other court's decisions	30	9	4	2	9	24

* On 31st December.
Source: MJ, GPLP, IRS.

On the last day of 2006, 30 young people were complying with a pre-trial detention order in an educational centre, which corresponds to 11% of the centres' total population. These numbers do not demonstrate variations as regards the last two years. Of these 30 youths, eight were females; seven were in secure facilities, one of whom was female.

The rights and duties of minors complying with a precautionary measure in an educational centre are the same as for minors in the same centres that are serving an internment measure imposed by the court. In accordance with the United Nations Standard Minimum Rules for Juveniles Deprived of their Liberty (1990), the Educational Guardianship Law establishes that the activities programme should be different for each group. However, to date this has not been the case. Due to the principle of the presumption of innocence, the law sets forth that minors complying with precautionary measures need only attend a varied activity programme daily. The main objectives of this programme are to help minors acquire social skills and to satisfy the physical and psychological developmental needs.

The law also provides for separate accommodation in educational centres for minors complying with precautionary measures of internment and for minors complying with internment measures imposed by the court. However, this too has not been the case in practice.

Because the age of criminal majority is 16, pre-trial penal detention (*prisão preventiva*) is a measure of constraint (*medida de coacção*) that is also applicable to young people between the ages of 16 and 18. In 2006, 110 young people of this age were remanded to the Portuguese prison system for pre-trial detention. This corresponds to 97% of all individuals between the ages of 16 and 18, coming into the prison system that year. Of the 113 young people under 18 who entered the prison system in 2006 only three were females, and only three were convicted and; 35 were foreigners. On the last day of 2006 there were 47 individuals between 16 and 18 years of age in custodial accommodation. Of the

47 detainees: ten were foreigners – all in pre-trial detention – and only one was female.

For the past few years, young adults from 16 to 18 years of age have unfortunately not been separated from adults in prisons.

Recent amendments to the Penal Procedure Code, introduced by law no. 48/2007, of 21 August took into account the pre-conditions for imposing pre-trial detention. If the judge finds that other measures of constraint are inadequate or insufficient he may impose pre-trial detention:

- When there are strong indications that a crime punishable by a sentence exceeding a maximum of three years of imprisonment has been wilfully committed;
- If the case involves a person that has entered or remained in national territory on an irregular basis, or if extradition or deportation proceedings have been instituted against him;
- When there are strong indications that a crime of terrorism has been wilfully committed or that violent or highly organized crimes have been committed and are punishable by a maximum prison sentence in excess of three years (new pre-condition).

If the suspected person (*arguido*) to be subjected to pre-trial detention suffers from mental illness, the judge may order confinement in a psychiatric hospital or an other similar institution rather than in a prison, but only after having heard the defence counsel and, whenever possible, a family member.

Other measures of constraint (enforcement measures) are:

- Declaration of identity and residence;
- Mandatory bail;
- Obligation of the person to present himself periodically before a judicial authority or criminal police body (in addition to any other);
- Suspension from practicing a profession, the performance of public or private duties or activities; suspension of parental authority, of guardianship, of a curator's powers, and of the management of assets or the issuance of securities;
- The prohibition and imposition of forms of conduct;
- House arrest (with or without electronic monitoring).

No measure of constraint other than the declaration of identity and residence may be imposed, unless, at the moment the measure is to be imposed:

a) The person has absconded or there is a risk of absconding;
b) There is a real likelihood that the course of the inquiry or the pre-trial investigation will be disturbed and particularly, likelihood that the gathering, handling or authenticity of the evidence will be corrupted;
c) There is a risk, associated with the nature and circumstances of the crime or the personality of the accused, that this person will continue his criminal activity or seriously disturb public order and peace.

As a rule, pre-trial detention can last 18 months but in certain cases involving more serious crimes, it can go to two years or even three years and four months (when the procedure is for one of the above mentioned crimes and is of exceptional complexity due to the number of accused or victimized persons or to the highly organized nature of the crime). No mitigating factors regarding the age of the defendant are provided for – not even for young adults from 16 to 18 years of age.

11. Residential care and youth prison – Legal aspects and the extent of young persons deprived of their liberty

11.1 Internment in an educational centre

Regarding the order of internment in an educational centre (*internamento em centro educativo*) and its implementation regimes (open, semi-open and closed), it should also be understood that they are ordered in the law by their increasing level of gravity, given the legal characterisation of each of these regimes that determines the classification of the educational centres, and in turn, the respectively operating regimes and degree of openness to the outside world.

The requirements and assumptions underlying the application of internment in a half-open (or semi-secure) regime are restricted. Such a measure may only be applied to a minor who is at least 12 years old when the measure is actually applied, a prior social report and a psychological assessment about the minor's personality must be carried out; and, in addition to this fact, only if the minor has committed an offence against a person which corresponds to a crime that may be punished by a prison sentence in excess of three years or two or more offences which correspond to a crime that may be punished by a prison sentence in excess of three years. This internment (also the internment in open centres) has a minimum duration of three months and a maximum of two years.

The requirements and assumptions underlying the application of internment in a closed regime are extremely restricted, which is perfectly understandable, given the intensity of the restriction on personal liberty implied by this measure. As a result, such a measure may only be imposed on a minor who is at least 14 years old when the measure is actually applied, and a prior expert examination of the minor's personality must be carried out; and, in addition to this fact, only if the minor has committed an offence which corresponds to a crime that may be punished by a prison sentence in excess of five years or two or more offences against persons which corresponds to a crime that may be punished by a prison sentence in excess of three years. This internment has a minimum duration of six months and a maximum of two years or exceptionally three years, in the event of an offence committed that corresponds to a crime that may be punished with a maximum prison sentence in excess of eight years or when two or more offences

have been committed that correspond to crimes against persons that may be punished with a maximum prison sentence in excess of five years.

Youth & Juvenile Justice: Juveniles deprived of their liberty		
Age of non-criminal responsibility for penal offences (Educational Guardianship Law)	Age of criminal responsibility under adult criminal law/age until which mitigated sentences can be applied	Age range for youth deprivation under Educational Guardianship Law (internment in educational centres)
12–15	16/21	12-21*/14-21**

* Open & half-open centres.
** Closed centres.

The internment measure seeks to enable the minor to internalize values pursuant to the law and acquire resources that permit him to lead his life in a socially and legally responsible manner in the future. These objectives should be attained by removing the minor from his usual surroundings and also by using personalised pedagogical and therapeutic methods. The educational centre's programme teams are comprised of clinical and therapeutic sub-teams that are responsible for the development of these programmes.

The interned minor has the right to receive a detailed educational plan, the so-called "personal educational project" (PEP). The execution of the measure of internment in an educational centre is carried out through the accomplishment of this project.

The PEP is an instrument, in the form of a written document that organises and records the educational intervention to be carried out for the period of time corresponding to the duration of the measure. It is drawn up after having taken into account the minor's motivations, aptitudes, his real educational and social reinsertion needs, the regime of execution and the duration of the measure. For this reason, it must be in harmony with the educational intervention project of the educational centre or the residential unit of the educational centre in which the minor has been interned. It must list the objectives to be attained within the time frame of the measure and the steps to be achieved, the respective time limit and the resources to be utilized.

The PEP must be ratified by the court subsequent to the public prosecution's prior opinion. The drawing up, following and assessing of the PEP through interdisciplinary professionals with training in various areas (medicine, psychology, social services, pedagogy etc.) must not be done without the minor's participation. He has the right to participate in drawing up the PEP as well as to be periodically informed as to its progress and assessment, save for limitations

which have been expressly imposed by the court for the protection and defence of the minor's own interests.

Each interned minor should be under the care of a technical expert of the technical and residential team. This person is responsible for following, guiding and supervising the minor's educational process, for being the liaison with the minor's family and his social milieu and for the preparation of the PEP, as well as for the information and reports necessary to comply with the judicial decision.

The centres are administrated by the social services for reinsertion of the Ministry of Justice and are classified as open, semi-open and closed (*abertos, semi-abertos & fechados*) as regards their operation and degree of openness to the outside, but in the same educational centre there may be more than one type of residential unit for different regimes. The LTE also provides for educational centres that can be classified according to the educational intervention projects that they apply, in order to respond to the special educational needs of specific groups of delinquent minors. The educational centres involved in this type of educational intervention project, as well as those that apply programmes and therapeutic methods would be classified as special educational centres, but none have been created until now.

No educational centre has been created so far in the regions of Algarve and the Autonomic Regions of Madeira and Azores. This fact results in the transfer of juveniles into another region for complying with the pre-trial internment measure or the internment order. These juveniles in consequence are accommodated very far from their families and friends and lack the personal contact and their help and support.

The classification of the centres determines the maximum number of places in residential units, and the trend has been to set up groups that are as small as possible in accordance with the restrictions determined by the internment regime or the specificity of the intervention.

Therefore, the maximum number of places in the residential units in the closed regime and in the special units (which is not dependent on the regime of internment) has been 10, whereas in residential units in the half-open and open regime there are 12 and 14 places. Educational centres are facilities that have always had a small number of places, but recently a few have closed and the announced closure of others means that the population in the centres that remain may increase.

The actual duration of the internment measure can be reviewed. The execution of the measure and the time elapsed, its interaction with the minor's personality as well as family, social, environmental and other factors can determine that alterations should be made with regards to the minor's need for education. A review is the mechanism of assessment, calibration and reorientation of the educational measures in view of the minor's current educational necessities. It can be motivated by:

- The lapsing of a period of time of execution as determined by the law, after which it is compulsory. This period of time is a year, save for measures of internment in an educational centre in half-open and closed regimes where the time limit is six months. A review is also compulsory if the educational measure interacts with a measure of constraint of pre-trial detention or a punishment with which it is incompatible, thereby obliging the commencement or the continuation of compliance with the measure to be postponed.
- The inappropriateness of the measure as regards the circumstances or educational needs of the minor, namely because it has become excessive or insufficient in relation to these needs. The measure may also be impossible to execute for reasons that have nothing to do with the minor or that are caused by him, cases in which a review may be requested by the public prosecutor, the minor himself, his defence counsel, and his parents, legal representatives or de facto guardians. However, in contrast to non-institutional measures that can be reviewed at any time, a review of a measure of internment in an educational centre can only take place after a minimum period of three months since the commencement of the execution or the date of the last review. The reasons for this differentiated treatment not only have to do with the necessity to ensure stability in executing the minor's personal educational project, but are also linked to the need to preserve the public's security and peace. The public entity responsible for following and ensuring the execution of the internment measure are the social services for reinsertion. They are obliged to inform the court when one of the grounds for a review occurs and the proposal for a review of the measure may contain the periodic reports of the educational centre on the execution of the measure and the minor's educational progress.

The effects foreseen by the review of the internment measure in an educational centre confer great flexibility to the execution of this measure. In accordance with the results of an assessment of the minor's situation regarding the (non-)execution of the measure, the law provides the judge with various possibilities to (re)adjust the educational intervention. If this is unwarranted, the measure imposed shall remain the same. If the judge considers it unnecessary to continue to execute the measure, due to the educational progress already achieved by the minor, he can reduce its duration or suspend it for the time still remaining, on the condition that the minor does not commit another offence. He can also extinguish the measure in compliance with the principle establishing the minimum length of time, which should prevail in all decisions that determine minors' internment.

The judge can fix an execution regime that is less restrictive, if the regime initially applied is excessive in view of the minor's progress, or he can replace a

measure for another non-institutional measure, for an equal or shorter period of time in relation to the time still left to serve, or he can suspend its execution.

On the other hand, if the minor does not comply with the measure and violates the duties inherent to it in a gross and persistent way, the judge – in addition to a serious cautioning of the minor as to possible consequences if his behaviour continues – may increase the length of the measure by 1/6 of the length initially established, without altering the regime, or he may replace it by a more restrictive regime for the time that is left to serve, as long as the preconditions concerning the minor's age and the gravity of the offence that the law requires in order to fix this regime are satisfied.

The interned minor, along with his parents, legal representatives or de facto guardians and his defence council may appeal all decisions made during the execution of the measure that impose greater restrictions than those resulting from the judicial decision. The minor interned in an education centre has the right to lodge appeals and to be personally informed about how to exercise this right as soon as he is admitted to the centre. An appeal lodged by his parents, legal representatives or de facto guardians or by his defence counsel may be addressed to the centre's director in writing. It is the responsibility of the centre's director to refer the matter to the court and the Public Prosecution's duty to comment on the lodged appeal. The minor, his parents, legal representatives or de facto guardians may also address their requests or complaints to any other services for social reinsertion regarding matters pertaining to the internment, by any means they wish. It is the duty of the educational centre's director to maintain direct contact with minors during their internment.

As with the other educational measures, the internment measure in an educational centre ceases and is extinguished as soon as it has been executed for the length of time fixed in the decision which imposed it, as a result of a review, or in any case on the date on which the young person reaches the age of 21.

Under the LTE, educational centre populations decreased by about more than 75% comparatively to the population of the centres and other kinds of internment institutions of the Ministry of Justice under the precedent juvenile law.

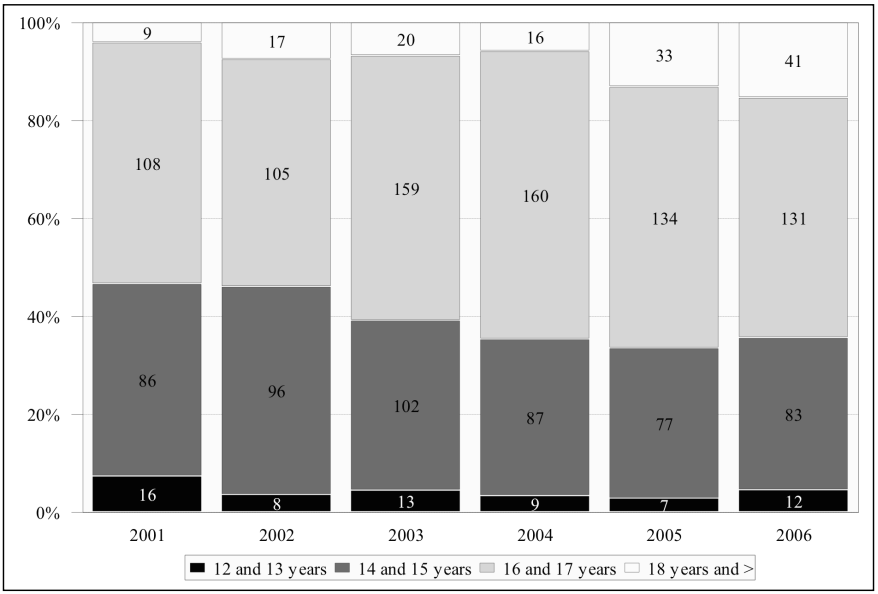
Table 4: Educational centre's population by gender (under LTE)*

	2001	2002	2003	2004	2005	2006
Total	*219*	*226*	*294*	*272*	*251*	*267*
Male	210	208	276	255	237	248
Female	9	18	18	17	14	19

* On 31st December.
Source: MJ/DGRS.

Due to the low number of female juveniles, the one remaining educational centres for females will be soon deactivated. In the near future one (mixed) centre will be opened for male and female juveniles.

Figure 6: Educational centre's population by age range



Source: MJ/DGRS.

The average age of the population in educational centres is increasing. The age range of 18-21 is growing and the one of 14-15 decreasing. This fact is meaningful for the planning of activities in the more affected centres. The age group of 12 and 13 years old juveniles is very small (31st Dec. 2006 only 12, i. e. less than 5% of the total population).

11.2 The status of the minor deprived of liberty due to internment in an educational centre

11.2.1 Rights of the minor

The LTE favours the principle of maintaining all the rights and guarantees that are legally afforded to the minor and that are compatible with the execution and the purpose of the internment, thereby guaranteeing the minor's civil, political,

social, economic and cultural rights in all that is not incompatible. Internment in an educational centre therefore should be carried out with respect for the minor's personality, his ideological and religious freedom, and for the rights conferred upon him by the Constitution of the Portuguese Republic, as well as for his legitimate interests in all that will not necessarily be affected by the correct compliance with the decision.

The rights and guarantees legally conferred upon the minor can only be suspended or limited during his internment by express decision of the judge, if this proves to be necessary for the protection and defence of the minor's own interests, and only for the time strictly necessary to safeguard his interests.

These important matters and other important aspects for the execution of the internment in an educational centre are developed and completed by the Centers' General Regulations (*Decreto-Lei n.º 323-D/2000, of December 20*). An evident sign of the importance given to this secondary legislation is the fact that it entered into force on the same date as the Education Guardianship Law (1st January 2001).

Right to be informed in a personal and adequate manner: The minor's right to be informed in a personal and adequate manner is the right that almost all of the other rights build on. Upon his admission to the centre, the minor must be informed of his rights and duties, of the regulations in force, the disciplinary regime, and of how to make requests, complaints or lodge appeals. It is the centre's duty to make this information available to the minor in the shortest period of time possible subsequent to his admission to the centre. This information should be complete and instruct the minor as to his rights and duties, including the manners in which he can exercise his rights and the consequences of not complying with his duties, which the technical expert responsible for his admission is charged with ensuring. The information given must be completed with the delivery of a summary to the minor explaining his rights and duties and the regulations in force. This right of the minor to be informed also includes the right that he has to be periodically informed of his legal situation.

Right that the centre will act in the best interest of the minor's life, physical integrity and health*:* Recognising this right has wide-ranging implications that cover a multiplicity of aspects concerning institutional conception, planning, installation, organisation, dynamics and articulation. This right leads to the fixing of a minimum period of rest at night, the fixing of compulsory recreational periods, the explicit prohibition of any measure – be it of a disciplinary or other nature, that involves corporal punishment, the privation of food or any other cruel or inhuman treatment that could compromise the minor's mental or psychological health – and the provision of various preventive measures of discipline and security in the educational centre. Of these preventive measures, the most important are inspections of individual or collective spaces and searches of the minor's person, clothing and personal belongings. As regards

prevention and health care, the minor shall be examined by the health services within a maximum period of 48 hours subsequent to his admission to the educative centre. During that period he shall be subject to special attention and surveillance so as to prevent attitudes that could put his life, or physical or psychological safety at risk. If contagious diseases do not require hospitalization, for prophylactic reasons the minor may be placed in separate facilities in the centre for the amount of time prescribed by the doctor. The minor is prohibited from exchanging or lending personal hygiene articles that could pose a risk to other persons' health. The minor is guaranteed all types of assistance including the assistance and hospitalisation required by his state of health and shall not be limited to the educational centre's available resources. Minors in educational centres may only take medication prescribed by a doctor and they must be informed as to the reasons for the medication.

Right to attend school: The right to attend school for the compulsory nine years is a right stemming from the right to equal opportunities for access to schooling which is enshrined by the Constitution of the Portuguese Republic and which corresponds to a duty of the minor, up until he has reached the age of 15.

Right to preserve one's dignity: The law affirms the principle of the organization of life in the educational centre with collective social life as a reference. Accomplishing this principle, especially as regards the facilities in terms of habitability, decor, and comfort, and the programming, preparation, presentation and consumption of meals, as well as the programming, layout and organization of the areas set aside for recreational activities, can help the minor's adjustment to his internment and promote his participation in the educational centre's activities. This can aid the minor in overcoming the sense of loss at having had to leave his usual environment. In recognising this right to the preservation of dignity, other rights that reinforce the principle of the personalization of the intervention follow, namely the minor's right to be addressed by his name, the right to use personal articles of hygiene, the right to possess documents, money and personal objects, the right to keep secure money and objects that are not prohibited and that the minor does not want or cannot keep with him, and their restitution on the date the internment is terminated, as well as the right to clothing belonging to the minor or supplied by the centre. It is established that the minor be accommodated in his own room or, if this is not possible, in his personal space in a dormitory with room for not more than 3 minors. The application or execution of any measure – be it of a disciplinary nature or other type of nature – that implies inhuman or degrading treatment and that violates the respect for the minor's dignity is also explicitly forbidden. Searches of the minor's person must always be carried out without the presence of a person of the opposite sex or other minors, and must be conducted in a manner that will not offend the minor's dignity.

Right to preserve one's privacy*:* From the foreseen right to preserve one's privacy follows the minor's right to protect his privacy and not make public the

execution of his educational measure of internment or any other judicial decision that has determined the minor's internment in an educational centre. It is the minor's right to refuse to be photographed or filmed and accordingly his right to control his image. The dissemination, by any means, of images or audio recordings that allow the minor and his situation of internment to be identified is prohibited, regardless of the minor's consent. A minor interned in an educational centre also has the right to refuse to make statements to, and to be interviewed by the news media. In order for the minor to freely decide on this issue in an informed manner, he has the right to be informed by someone in charge of the centre as to the meaning and intention of any requests for an interview. The minor cannot be interviewed as to why an educational intervention was imposed, notwithstanding the minor's consent. Staff members or competent persons accompanying a minor during authorized visits must do so with caution in the presence of third parties due to the situation of internment. It has also been established that no mention must be made on school and professional certificates obtained while in an educational centre that would reveal involvement in an educational measure.

Right to privately contact the judge, the public prosecutor and the defence counsel: The minor also has the right to contact the educational centre's director in private, in accordance with the respective internal regulations.

Right to maintain authorised contact with the outside world, namely by letter, phone, by receiving or making visits, and by receiving and sending parcels.

Right to be heard prior to the imposition of any disciplinary measure: If the minor has not had the opportunity to defend himself, the disciplinary measure imposed shall be considered null. The minor's right to defend himself requires that he be informed that he has committed a disciplinary infraction in a way that will allow him to wholly understand the accusation and that he be heard so that he can defend himself against it.

Freedom of religion: Respect for the minor's rights means that in the centre's activities timetables, periods in which the minor can practice his religious faith are taken into consideration. It is the centre's responsibility to respect the diets essential to the minor's religion. The minor has the right to choose, to attend or not to attend religious services and to contact representatives of his faith. He may possess the books and objects necessary to observe and instruct himself on his religion and can refuse religious counselling and indoctrination.

11.2.2 Duties of the minor

Along with the rights conferred upon minors in an educational centre there are also duties, particularly duties related to the respect for people and goods, of permanency, correction, attendance and punctuality. It is the respect for the rights of minors that makes any demands as regards duties more credible.

Violating the duty of permanency means a minor's unauthorised absence that can take two forms: escaping and not returning to the centre on the date and/or hour stipulated by the authorisation for the leave. The risk to escape is one of the situations that can result in the minor being transferred to another educational centre that is operated the same way. As a last resort, measures of restraint can be considered. If the court finds it necessary to use the services of a police force to locate and return the minor to the centre it may issue a warrant to bring the minor back (*mandado de condução*). The minor's unauthorised absence may result in him being sent to another educational centre, especially if it has been a prolonged absence, if the centre from which he has been absent does not have places or if there are internment decisions to execute. The time the minor was absent is deducted from the length of time that the minor has complied with and can constitute grounds for a review, namely if the prolonged absence makes compliance with the measure unviable or if the minor has violated the duty of permanency in a gross manner, in which it is evident that the minor intends to get out of executing the measure, above all to continue to commit offences or because of the repeated nature of the absences. The law considers very grave disciplinary infractions to be: escaping, successfully instigating another minor to run away. Grave disciplinary infractions are: not returning to the centre on the date and at the time that was authorised, the attempt to escape, as well as the instigation of another minor to run away.

Intervention in an educational centre obeys the principle that a minor should be motivated to participate actively in the execution of his PEP and to obtain positive results as regards his educational progress, as well as to behave in a correct and responsible way. One way in which to achieve this principle is to give rewards.

To prevent the minor from not fulfilling some of his duties, namely the duty to respect people and property, the duty of permanency and the duty of obedience, the law allows for a restraint measure as a last resort. When the minor violates duties that are his obligation and that are not normal disciplinary infractions, the law provides for recourse to educational methods to be applied in order to correct the minor's conduct. If the minor does not fulfil a duty that corresponds to the commission of a typical disciplinary infraction, the law determines the primacy of this recourse when confronted with the minor's conduct, the educational response that he accepts, and only subsidiary recourse to the imposition of a disciplinary measure. Even if disciplinary proceedings have been concluded, the director of the educational centre can ask the minor to repair the damage caused, to reconcile with the offended party or to carry out work for the centre's benefit. If the minor complies with the request, the disciplinary proceedings are extinguished.

The restraint measures are enumerated with exactitude due to the gravity and susceptibility involved in recourse to these types of measures. Physical restraint and precautionary isolation are both provided for. In the LTE, physical

restraint is circumscribed to the use of physical force to immobilize the minor. The Centres' General Regulations add that physical force may only be used to remove the minor.

Precautionary isolation consists of temporarily separating the minor from other people and (or) temporarily banning him from entering the centre's other facilities. It may take place in an annex of the centre that is especially adapted so as to avoid acts and situations that justify measures of restraint. The use of this type of measure can only be accepted as a last and exceptional resort to prevent a grave violation or continued violation of the minor's duty to respect people and property, the duty of permanency, and the duty of obedience that the minor is obliged to comply with. The law enumerates with exactitude the situation in which its application is permitted, namely to prevent injurious acts or acts that put the minor or other minors in danger, to prevent flight, to avoid serious damage to the educational centre's annexes or equipment, to overcome a minor's violent resistance to orders and guidance from the centre's staff.

11.3 Disciplinary regime

The LTE has reserved the general term disciplinary infractions for misbehaviour with serious consequences, by minors interned in educational centres who have violated the duties that they are obliged to comply with and that are disturbing or damaging the peace and sociability, the discipline and order, and, for this reason, they may jeopardise the security of the people and goods in the institution. These infractions have been classified into three types: light infractions, grave infractions and very grave infractions corresponding to common language and sense, and are grouped and enumerated with exactitude in accordance with their level of gravity for social life in the educational centre. Sets of disciplinary measures have been fixed precisely according to their type and duration, with a view to putting the principle of proportionality of the disciplinary intervention and the determination of the duration of disciplinary measures into operation. The characterisation of disciplinary infractions is on par with the characterisation of disciplinary measures, one of the most important guarantees that the minor has against the discretion and abuses of interventions in institutions.

The accumulation of disciplinary measures with regard to the same minor and for the same disciplinary infraction is prohibited, as is the imposition of collective disciplinary measures or those that apply to an undetermined number of interned minors. Disciplinary intervention also complies with the principles of suitability and of opportunity. In harmony with the principle of opportunity, the form of the disciplinary proceedings depends on the gravity of the disciplinary infraction. Common disciplinary proceedings are for grave or very grave disciplinary infractions and summary disciplinary proceedings are for light disciplinary infractions. The list of disciplinary measures covers: reprimands, suspension of the use of pocket money conceded by the education centre, the

non-attribution of pocket money by the centre, suspension of the use of the minor's savings, suspension of the minor's participation in some or all of the programmed recreational activities, the loss of privileges as regards visits, suspension of minors to socialise with others. Only the educational centre's director can impose any of the disciplinary measures established, with the exception of his legal substitute in his absence. The person responsible for reprimanding a minor is the staff member who had direct contact with him at the moment the infraction was committed or when he took knowledge of it and who is also professionally involved in educational interventions that concern the minor.

11.4 Position of the parents or legal representative during the internment

Unlike what has been established with regard to the execution of non-institutional educational measures, the execution of the measure of internment in an educational centre cannot be accompanied by the minor's parents or legal representatives, firstly due to the demands related to the running of these institutions, especially those with a half-open or closed regime. Secondly, it would be difficult to coordinate the participation of various parents in the educational centre's intervention projects. Nevertheless, within the limits imposed by internment, an effort is made to try to affect the parental relationship as little as possible. Respecting parental rights means not allowing the parents or legal representatives to distance themselves from the legal duties that have in fact not been affected by the judicial decision. On the other hand, the parents or legal representative should be involved and be made responsible for aspects relevant to the execution of the measure, the minor's educational progress and his reinsertion in society. This perspective establishes that minor's parents or the legal representative must maintain their rights and duties regarding the minor as long as they are not incompatible with the execution of the measure and have not been limited or prohibited by the judge in the minor's educational interest.

It is the parents' or legal representatives' right to be informed, save for restrictions and prohibitions imposed by the court on the facts and circumstances relevant to the minor's life during or because of internment.

The parents, the legal representatives and the de facto guardians should be heard in relation to the preparation, alteration and execution of the PEP, more specifically regarding formative activities that the minor must attend and authorisation for weekend and holiday home leaves.

As regards the parents' and the legal representatives' general duty to collaborate with the educational centre, the Centres' General Regulations makes them liable for any damage caused by the minor when in their care during authorised leaves.

11.5 Monitoring of the centre's activities

The centre's activities are monitored through visits by family and youth court judges, public prosecutors, and members of independent supervisory committees. These independent committees consist of state representatives (of the Assembly of the Republic, the Government and the Superior Councils for the Judiciary and the Public Prosecution) and non-governmental children's organisations, and can request information on the running of the centres in various areas and visit these, anytime they consider necessary, in accordance with the law that grants them free access.

Visits to the educational centres and contact with the interned minors are among the powers of the family and youth court judge and the public prosecutors. These visits allow the judges and public prosecutors to follow the operation and activities of the centres and to monitor their compliance with the law so as to protect the legality and the rights and interests of the minors interned. Direct and personal contact with the structures and running of the educational centres allows, on the other hand, a correct and realistic appraisal of the possibilities of internment measures, thereby helping to avoid unrealistic expectations. This also benefits future decisions regarding the imposition of a measure of this nature. These visits also allow the judge and the public prosecutor direct contact with the minor, even in private, which affords them first hand knowledge of the minor's situation, his educational progress and consequently an appropriate review of the measure.

11.6 Execution of sanctions: Specialities

In harmony with the principle of jurisdictional control of the execution of measures, the authorities charged with supervising and guaranteeing execution must, under the terms specified by law or by the court, provide the court with information on the execution of measures and the evolution of the minor's educational process, as well as when circumstances arise that may warrant revision of such measures.

The court should connect the execution of the educational measure to the parents or other people of importance to the minor, be they family members or not, whenever possible and suited to the educational purposes envisaged. The court should delimit the collaboration of these people with regard to the services and entities charged with following and ensuring the execution of measures so as to guarantee a conjugated effort.

As emphasised above, the court establishes the entity responsible for supervising the execution of the applied order and normally has a wide range of legal possibilities in order to determine who shall be responsible for this supervision. There are nonetheless exceptions to this rule.

Due to the inherent gravity and nature of certain measures, whose execution requires a highly specialised degree of quality and qualification of material (premises and equipment) and human resources (technical staff), it is advisable that such execution is guaranteed by specific services that are suitably prepared for this purpose. A specific example is an internment order in an educational centre, whose regime and content requires specific structures, with various degrees of specialisation, involving premises (accommodation, health care provision, education and training, maintenance and support), equipment (machinery, furniture, health care, culture and training materials), programmes (educational, formative, maintenance and support) and staff (technical experts in various areas, teachers and trainers). In such a case it is perfectly understandable that it is the law itself which determines the entity to be charged with supervising and guaranteeing the execution of the measure applied.

12. Residential care and youth prisons: Development of treatment/vocational training and other educational programmes in practice

There is no in depth research on the practice of educational programmes beyond what has been mentioned in *Section 11*.

13. Current reform challenges for the juvenile justice system

As regards minors covered by the Educational Guardianship Law, changes announced by the government in educational centres are currently under way. These alterations have to do with a decrease in the number of centres (and the human resources associated with them), their redistribution throughout the country and the restructuring of the centres that are to remain open, so as to concentrate more minors in each centre, thereby lowering the costs per capita.

As far as young adult delinquents are concerned, the government has recently revealed a project concerning a law (which is under preparation) which will define the specific regime that is applicable, including the nature of and type of sentences to be imposed. It is therefore probable that the previous model of a double regime, in which minors could be treated in the same way as youths between the ages of 16 and 18, will not be maintained. Nor will the special regime be kept for youths between the ages of 16 and 18 when certain preconditions were met.

Recent amendments to the Penal Code, introduced by Law no. 59/2007, of 4 September 2007, allow young people under the age of 21 who have been convicted, to serve a sentence that has been imposed upon them (should it not be over two years) at their place of residence while being electronically monitored.

They may also serve the remaining period of a prison sentence in this regime (up to two years also) if the period exceeds the amount of time for which they were deprived of their liberty under the regime of detention, remand in custody or house arrest.

14. Summary and outlook over the development of the Portuguese juvenile justice system

Since January 2001 the Portuguese Juvenile Justice System can be described as the combined result of three different kinds of state interventions, taking into account three age ranges.

Under the Educational Guardianship Law (*Lei Tutelar Educativa*) juveniles aged between 12 and 16 years are responsible for committing an act classified as being illegal by penal law if the offence indicates educational needs to correct their personality. This responsibility is non criminal, is established by a specialised court for family and juveniles (*Tribunal de Família e Menores*) through particular procedural rules and proceedings (*Processo Tutelar Educativo*) and is concretized by the execution of an educational guardianship measure (*medida tutelar educativa*) imposed by the youth courts. The principle of specific duration of educational measures has been consecrated, both in legal terms and in terms of determination of its concrete extent.

For the first time two kinds of restorative measures are particularly foreseen: reparation to the victim (*reparação ao ofendido*) and economic compensation or work for the benefit of the community.

The internment in an educational centre (*centro educativo*) – a public institution administered by the Ministry of Justice's social services for reinsertion (*Direcção-Geral de Reinserção Social*) – is the most severe educational guardianship measure taking into account the degree of limitation or restriction that it – particularly in a half-open (or semi-secure) or in a closed regime – is considered to potentially represent for the minor in regards to his autonomy of decision and conduct of life. The requirements and assumptions underlying the application of internment in a half-open or in a closed regime are restricted. The internment in an educational centre can also be imposed as a pre-trial precautionary measure (*medida cautelar de guarda em centro educativo*) in secure or semi-secure facilities.

The most important aspects for the execution of placement in an educational centre are developed and completed by the Centres' General Regulations (*Decreto-Lei n.º 323-D/2000, of December 2000*). An evident sign of the importance given to this secondary legislation is the fact that the enforcement of the Education Guardianship Law (1999) only came into force in conjunction with the Centres' General Regulations (1st January 2001).

Below the age of 12 there is no responsibility for any criminal behaviour. The intervention in this case should be solely of a protective nature, to be carried out within the framework of the Law on the Protection of Children and Young People in Danger (*Lei das Crianças e Jovens em Perigo*).

It should be pointed out that these differentiated kinds of responses can be applied to the same minor after the age of 12 if both needs are related. Protective and educational interventions which are governed by their respective procedural rules, with their own specificities, provide for the necessary rules of interconnection between them as regards the jurisdiction.

Since 1911 the age limit for criminal responsibility has been maintained at 16 years in Portugal. It would be highly convenient to raise this age limit to 18 years, and in this ensuring that the age of penal responsibility coincides with the age of civil majority. The need for this alteration is particularly important, given that the enactment of the Educational Guardianship Law was not accompanied by the implementation of a new "special penal regime for young adults" (the current legislation in this regard was enacted in 1982: Decree-Law nº 401, 23 September 1982). As a result, no possibility is foreseen yet for the application of "special" measures, as an alternative to a prison sentence, for young people who commit crimes when they are offenders aged between 16 and 18 years. Furthermore, for the past few years, unfortunately young adults aged from 16 to 18 have not been separated from adults in prisons.

However, even if a new special penal regime for young adults is expected, changes raising the age limit for criminal responsibility to 18 years are not expectable in the near future due to the fact that the Penal Code has just been modified in September 2007.

Rare events of great violence in which juveniles are involved are highly emphasised by the media. As in other countries, this gives the public a wrong perception of the dimension and extent of juvenile criminality, which is generally perceived as being larger than it really is if we look at the statistics. As a consequence of those events some isolated voices make the public call for lowering the age of criminal responsibility to 14 or even 12.

The juvenile justice legislation is generally well perceived and accepted, particularly by magistrates and other professionals who are involved in the justice system. No changes in important issues seem to be required. The model of responsibility based on the needs for education in societies' values and the principle of contemporary relevance in relation to revision of the measures seems particularly adequate regarding criminal youth. Nevertheless, it is probably also due to the low importance of juvenile criminality amongst general criminality recorded in Portugal: 1,2%, in 2005 and 2006 (*Relatório Anual de Segurança Interna* 2006; see also *Agra/Castro* 2007). Considering the cases concluded by the Public Prosecution Service in the years 2002 to 2005, it should be pointed out that in only 15% of cases the jurisdictional stage was followed and that in the same period 66% of the cases were dismissed (*Procuradoria-*

Geral da República – Relatórios 2002-2005) because the offence was not proven, there was insufficient evidence of the offence or it was concluded that the need for education was not manifested in committing the offence.

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