



# ALTERNATIVES TO CUSTODY FOR YOUNG OFFENDERS

NATIONAL REPORT ON JUVENILE JUSTICE TRENDS

Germany

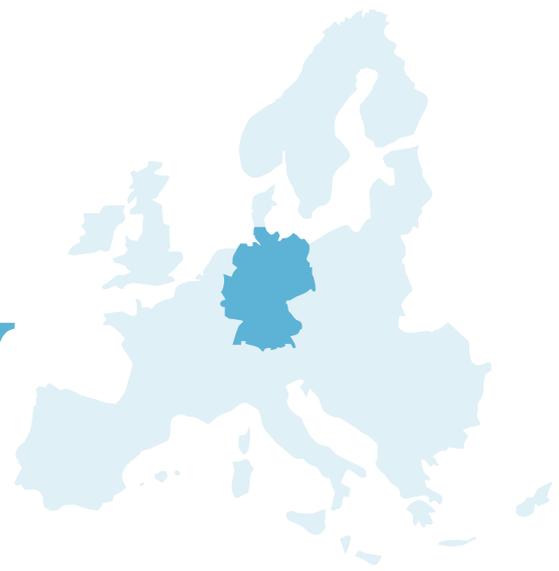


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## A. Juvenile Justice

**A.1. Please describe the legal framework and the main characteristics of the juvenile justice system of your country.**

**A.1.1. Is there a special law or code regarding juvenile justice?**

**A.1.2. Which courts and other special authorities are responsible for the reactions of juvenile offending (criminal courts, specialised juvenile criminal courts, family courts, special prosecutors, police etc.)?**

**A.1.3. What is the scope (only criminal or also antisocial behaviour) of juvenile justice? How is the age of criminal responsibility regulated (please refer to the different age groups and include the legal definitions on “child”, “youth” and “young person”)?**

**A.1.4. Are there specific procedural rules for young persons and how do they differ from those for adults? Are due process guarantees respected?**

Juvenile offending in Germany since 1923 has fallen within the scope of the “Juvenile Justice Act” (JJA), which introduced specialised Juvenile Justice Courts and other specialised parties to the proceedings, special procedural rules and special sanctions and measures.<sup>1</sup> The Juvenile Justice Act has since then – including several amendments – been applicable if a young person commits an offence described by the general penal law (Strafgesetzbuch, StGB). One year earlier (1922) Germany had introduced a special Juvenile Welfare Act for children in need of care, which was modernised in 1990 and is now titled The Children and Youth Welfare Act. Hence, since the 1920s Germany has followed a “dualistic” approach: Children in need of care are subject to the Child Welfare

<sup>1</sup> A very comprehensive report about juvenile justice in Germany is to be found at Dünkel 2011. See furthermore Dünkel 2006.

System which offers help and protection, juvenile offenders are subject to the Juvenile Justice System which also aims to react in the “best interest of the child” and to support rather than to punish, but reacts with procedural rules and settings which have their roots in the criminal justice system and respects due process guarantees which are often linked to the youth welfare system. These regulations were subject to changes within the last hundred years but the main elements remained. According to § 2 JJA the goal of juvenile justice is “above all to counter renewed criminal offences on the part of a youth or young adult. In order to achieve this goal, the legal consequences, and with respect for the parental right of upbringing also the procedure, shall be orientated primarily in line with the educational concept.”

Compatible to this general approach, the juvenile justice act is only applicable in case a young person commits an offence described by the general penal law. The penal law does not include any status offences like drinking in public or truancy. Those actions are defined as administrative offences and subject to a special Administrative Offences Act (“Ordnungswidrigkeitengesetz”) which can result in an administrative fine. A system of “Antisocial Behaviour Orders” like in England and Wales has not been established in Germany. If juveniles show “antisocial” behaviour which does not result in criminal offences, the Child Welfare System does have to proof if the juvenile and/or his parents need and want support. All support measures are in general voluntary. Only if the child is in extreme danger the youth welfare agencies can ask the family court to take the juvenile out of his or her family or to apply special support measures to the parents or responsible persons.

The German juvenile justice system provides for specialised Juvenile Courts as well for juvenile prosecutors (see § 37 JJA).<sup>2</sup> Special juvenile judges (“Jugendrichter”) are located at the Local Court. They are responsible if diversion appears inappropriate (see A.2.2.) and the likely sentencing outcome is a non-custodial sanction. In case of more serious offending the prosecutor brings the accusation to the Youth Court of the Local Court, which is composed of one professional and two lay judges. Only the most serious cases (homicide, manslaughter, cases with sexual offences against minors and some other very exceptional cases) are brought to the Youth Chamber at the district Court (three professional and two lay judges). A special Youth Courts Assistance Service (§ 38 JJA) shall be provided by the youth welfare offices working in conjunction with the youth assistance associations. Representatives of the Youth Court Assistance Service shall highlight the supervisory, social and care-related aspects in proceedings before the youth courts. For this purpose, they shall support the participating authorities by researching into the personality of the accused, his development and his environment, and shall express a view on measures to be taken. The Youth Court Assistance Service shall on the one hand provide the juvenile and his parents with the information he or she needs during the prosecution and on the other hand bring personal and individual aspects into the process to help the court to find an individualized and supportive sanction or

<sup>2</sup> The law stipulates that juvenile justice law professionals shall be trained and experienced in pedagogic. However, in practice obviously these requirements are not regarded sufficiently, see Drews 2005.

measure.

The Juvenile Justice Act is applicable for all persons who commit an offence between their 14<sup>th</sup> and their 21<sup>st</sup> birthday. The minimum age of criminal responsibility is 14 years. Young persons below that age are defined by the law as “children” and cannot be prosecuted. Young persons aged 14 and 17 are defined as “juveniles”. They are, according to § 3 JJA, only criminal responsible if there is proof that the juvenile was mature enough to be aware of the wrongfulness of his or her illegal act and was capable of behaving according to such awareness.<sup>4</sup> A transfer of juveniles to the criminal court for adults (waiver) is not possible.

The third age category is “young adults” aged 18 to 20. Since the reform law of 1953 they have been transferred to the jurisdictions of Juvenile Courts. The competent Juvenile Court decides according to § 105 JJA if the sanctions and measures of the Juvenile Justice Act or the sanction and measures of the Criminal Code are applicable in the individual case. § 105 (1) No. 1 JJA provides for the application of juvenile law if “a global examination of the offender’s personality and of his social environment indicates that 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 circumstances of the offence are those of a typically juvenile crime (“Jugendverfehlung”, see § 105 (1) No. 2 JJA). In 2011, 67% of young adults were sentenced in terms of the Juvenile Justice Act.<sup>5</sup> This makes clear that the full integration of young adults into the juvenile justice system in Germany has been accepted in practice. Especially the most serious cases are sanctioned under juvenile law, resulting in milder sentences than would be the case for adults.<sup>6</sup>

The Juvenile Justice Act furthermore provides specific procedural rules for juveniles and young adults. In general the procedural rules for adults are applicable, including due process guarantees like the presumption of innocence etc. But the procedural rules are adapted to the characteristics of young persons at several points (special possibilities to divert the juvenile offender before it comes to a process are described under A.2.2.): According to § 43 JJA the scope of all investigations within the proceedings shall not only be the offence but also the accused’s life and family background, his development, his previous conduct and all other circumstances apt to assist in assessing his psychological, emotional and character make-up. The parent or guardian and the legal representative,

3 Under the Nazi regime between 1933 and 1945 the age limit was lowered to 12. Today, lowering the age of criminal responsibility is only an issue for a few conservative politicians and is sometimes raised after severe cases of juvenile offending have taken place but never leads to serious drafts. See Dünkel 2011, p. 549.

4 Criminological research shows that in practice juvenile courts do not always prove this provisions carefully but rather routinely assume criminal responsibility, see Eisenberg § 3, Brunner/Dölling § 3.

5 Strafverfolgungsstatistik 2012, p. 25.

6 For more information see Dünkel 2011, pp. 587-593, for an European overview see Dünkel/Pruin 2011 with further references.

the school, and the person providing him with training should insofar as possible be heard. This all shall help to find a sanction or measure which is primarily supportive and helpful for the reintegration of the offender. § 48 JJA regulates the exclusion of the public during the deliberations before the decision-taking court, including the announcing of its decisions. There are several regulations for the involvement and participation of the parents which respect their headmost legal guardianship during the process. § 68 JJA regulates compulsory defense counseling for several cases.<sup>7</sup> The right to a defense counsel is more elaborated in the juvenile justice system.<sup>8</sup> § 55 JJA defines how the decisions of the court can be appealed. The goal of this provision is to come to the final judgment faster compared to adult criminal procedure. Therefore young person can only appeal once in cases adults can appeal twice. The idea is that for the development of the young person it is better to come to a faster end of the procedure. However, this regulation is highly criticized because despite of its noble goal it puts the young persons in a worse position compared to adults.<sup>9</sup>

## **A.2. Please describe the sanctioning system regarding juvenile justice in your country.**

**A.2.1. Please give an overview on the sanctions/reactions on youth offending at the different levels of criminal proceedings.**

**A.2.2.1. Which possibilities exist to divert a juvenile from a trial? (Diversion structures/schemes, alternative authorities like special community councils which can impose certain measures)?**

**A.2.3.2. What types of interventions can the competent court impose?**

**A.2.5. Which forms of liberty depriving sanctions are provided? What is the minimum and what is the maximum length for liberty depriving measures?**

**A.2.6. What types of residential and custodial institutions exist for juvenile criminal offenders?**

**A.2.7. What does in practice happen with most juvenile offenders? Are they regularly subject to diversion schemes or to court trials? Do you have any reliable data about the diversionary and sentencing practice?**

If a young person commits an offence, the police start the investigation of the case and refer the offence to the public prosecutor. German law does not allow for police diversion like the British form of cautioning or warnings.<sup>10</sup> The possibilities to divert a case lie in the hands of the public prosecutor or the judge as law professionals.

<sup>7</sup> Critics say that the compulsory defence counseling does not go far enough- see for an overview Gensing 2011, p. 1638.

<sup>8</sup> Dünkel 2011, p. 568.

<sup>9</sup> See Dünkel 2011, p. 568.

<sup>10</sup> The underlying reason for that is from historical nature: the Nazi regime showed the possible abuse of police power. See Dünkel 2011, p. 562.

In a juvenile justice case (including young adults if according to § 105 JJA juvenile law is to be applied), the public prosecutor has broader possibilities to divert a case before the start of the court process according to § 45 JJA.<sup>11</sup> Juvenile and young adult offenders can be discharged on grounds of the petty nature of the crime committed (see § 45 (1)). This discharge is not combined with any sanctions or measures and is given priority in cases of petty offending according to the principle of minimum intervention (“non intervention”). The public prosecutor can furthermore discharge the offender because of other social and/or educational interventions that have taken place (see § 45 (2) JJA). Efforts to make reparation to the victim or to participate in victim-offender reconciliation (mediation) are explicitly put on a par with such educational measure (“diversion with education”). The last alternative for a discharge through the public prosecutor is described in § 45 (3) JJA. The public prosecutor proposes that the Juvenile Court judge imposes (before the start of the first process hearing) a minor sanction, such as a warning, community service (usually between 10 and 40 hours), mediation, participation in a training course for traffic offenders or certain obligations like reparation/restitution, an apology to the victim or a fine. Once the young offender has fulfilled these obligations, the Juvenile Court prosecutor will dismiss the case in co-operation with the judge.

After the charge has been filed, the Juvenile Court can also discharge juvenile and young adult offenders on the grounds of a) the petty nature of the crime, b) because of other social and/or educational interventions that have taken place or c) after the fulfillment of special obligations, indicated by the Juvenile Court (see § 47 JJA). This special form of diversion by the judge is grounded in the fact that often, the offender, between the file of the charge and the start of the process, has undergone some form of educational measure which would deem a “formal” court sanction unnecessary.

If the offender is found guilty and the case is not discharged for any reason, the court imposes a formal sanction. Whereas adult criminal law provides in general prison sentences (including suspended prison sentences) and fines, the Juvenile Justice Act holds a lot of alternatives to these “classical” criminal sanctions. All formal sanctions of the Juvenile Court are structured according to the principle of minimum intervention (see §§ 5 and 17 (2) JJA). On the first level the JJA provides “educational measures”. Educational measures can be special directives imposed by the Juvenile Court concerning the everyday life of the offenders in order to educate and to prevent dangerous situations. The judge can for example forbid contact with certain persons and prohibit going to certain places (see § 10 JJA), but can also impose community service, mediation or a so called training course where the offender will be trained one day or evening over several weeks together with other offenders to behave better according to the social conventions (including special anti aggression training units). The Juvenile Judge or Juvenile Court is free to invent special directives which suit the personality and/or the social living conditions of the offender. The court can furthermore require the offender to avail himself of supervisory assistance in the form of supervisory assistance by a social

<sup>11</sup> See Dünkel 2011, pp. 562 et seq.

worker coming from the local Youth Welfare Agency or to go avail himself in a day and night-time institution or in another form of supervised accommodation, if otherwise his wellbeing would be endangered (this directive is only approvable if all other ambulant alternatives cannot save the wellbeing of the offender in a comparable way).

In case the offence and the social development of the offender convinced the court that the offender “must be made acutely aware that he must assume responsibility for the wrong he has done” (§ 13 JJA), the Juvenile Court can impose “disciplinary measures”. Disciplinary measures can mean reprimands. The judge can furthermore require the youth to repair the damage, to apologise personally to the victim, to perform certain tasks or to pay a sum of money to a charitable organisation. If other disciplinary measures are not proportional, the Juvenile Court can send the juvenile to a special juvenile detention centre (“Jugendarrest”) for one or two weekends or for up to four weeks.

The last resort in sentencing juvenile offenders is youth imprisonment. Youth imprisonment can only be imposed by the Juvenile Court if educational or disciplinary measures appear to be inappropriate. Youth imprisonment is executed in separate juvenile prisons. They differ from the prison system for adults in many aspects,<sup>12</sup> e.g. a much wider range of educational and vocational training or much better levels of staffing on the one side, but more frequent imposition of disciplinary measures, rarer grant of home visits or transfer to open prisons on the other side.<sup>13</sup> The minimum length of juvenile imprisonment is six months. The maximum limit is set for five years for 14-17 year-old juveniles, and 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, the maximum length is ten years, and in case of murder which is assessed by the court as especially serious (e.g. very cruel, more than one dead person etc.) the maximum length is 15 years.<sup>14</sup>

The practice of juvenile justice reflects the legislative goals of the JJA: diversion according to §§ 45, 47 JJA plays a very important role for the sentencing practice. Diversion is the most likely reaction to juvenile or young adult offending<sup>15</sup> and the ratio of diverted juvenile justice cases lied over the past years between 68% and 70%.<sup>16</sup> Most of the diverted cases are diverted according to § 45 (1) JJA (diversion by the prosecutor without intervention). Despite the considerable differences in the use of diversion between the German Laender<sup>17</sup> the high use of diversion shows that Juvenile Justice practitioners are

12 See Dünkel 2011, pp. 601 with many further references.

13 See Dünkel 2011, p. 602-603.

14 Since March 7, 2013.

15 See Dünkel 2011, pp. 569 et seq.

16 Heinz 2012, p. 114.

17 Heinz 2012, p. 120, Dünkel 2011, p. 571.

convinced of this alternative to a formal court procedure.<sup>18</sup>

If it comes to a formal sanction after a court procedure, the most likely sanction was in 2010 a disciplinary measure (70,5% of all juvenile justice court sanctions). Among those sanctions, ambulant disciplinary measures play a major role, short time detention was during the last years among all disciplinary measures only imposed in less than 20%, followed by educational measures (19,2%) and youth imprisonment with a ratio of 10,3%.<sup>19</sup> About 70% of youth prison sentences are suspended and combined with the supervision of a probation officer.<sup>20</sup> Thus youth imprisonment is in practice used as a last resort. Another question is whether it is imposed for the shortest possible period. Analysis showed that the average length of youth prison sentences has risen slightly.<sup>21</sup> Still the proportion of long prison sentences of more than five years has remained very low (less than 1% of all youth prison sentences), the vast majority of youth prison sentences lies under 2 years.

18 Background, history and value of diversion in juvenile justice is pictured in Dünkel/Pruin/Grzywa 2011.

19 Heinz 2012, p. 121.

20 Dünkel 2011, p. 576.

21 Dünkel 2011, p. 577.

## B. Restorative approach within juvenile justice

**B.1. Where do you see a restorative approach within the juvenile justice system (this questionnaire follows a process based definition of restorative justice)?<sup>22</sup>**

**B.2. What are the types of restorative justice measures provided for juveniles (e.g. victim-offender mediation, family conferencing, circles)? Please also refer to their legal basis.**

**B.3. Do these restorative measures play a role in juvenile justice (sentencing) practice?**

**B.4. What are the main actors involved in delivering restorative justice measures (public institutions, NGOs...). Who bears for the costs of restorative justice measures?**

In Germany, the main form of restorative justice applied on young persons is victim-offender mediation.<sup>23</sup> Since the 1980s, victim-offender mediation (Täter-Opfer-Ausgleich) gained importance in the country. The establishment of mediation projects was influenced by the international restorative justice movement as well as by criminal policy discussions in Germany aiming at promoting victims' rights and alternative measures for offenders. The first pilot projects on victim-offender mediation for juveniles and young adults were implemented in four German cities in the middle of the 1980s and each project has been evaluated systematically.<sup>24</sup> Until the middle of the 1990s, the number of mediation projects increased significantly across the country. A study conducted in 1993/1994 revealed that victim-offender mediation for juveniles and young adults was available in most parts of Germany.<sup>25</sup> The number of mediation projects increased from 226 in 1992 to 368 in 1995. The majority of cases were registered with young offenders.<sup>26</sup>

Regarding the legal framework, victim-offender mediation, it is provided by the Juvenile Justice Act since 1990 both as a diversionary and educational/disciplinary measure (see above 2.).<sup>27</sup> Hereby, the legislator offers a wide approach and underlines that a serious

<sup>22</sup> According to Article 2 of ECOSOC Resolution 2002/12, a restorative process means “*any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.*” Such ‘encounter’-based processes include mediation, conciliation, conferencing and forms of community reparation boards.

<sup>23</sup> See Parosanu XXXXX

<sup>24</sup> See for further information for instance Dölling/Henninger 1998, p. 203 ff.

<sup>25</sup> See Dünkel/Geng/Kirstein 1998, p. 167 ff.

<sup>26</sup> Wandrey/Weitekamp 1998, p. 130 ff.

<sup>27</sup> Moreover, in 2012 the Law on Mediation (Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung) came into force, which is a general law on mediation in all fields of conflict. The law stipulates the general procedure, role and responsibilities of mediators, but does not

attempt by the offender to reconcile with the injured person is considered sufficiently. Within the diversion scheme, mediation can be applied by juvenile public prosecutors or judges (§§ 45 (2), 47 (1) no. 2 JJA, see 2. above. Beside the possibility of applying mediation during diversion, mediation can be ordered by the court as part of an educational measure (§ 10 (1) no. 7 JJA). The law provides that “the judge may instruct the juvenile to attempt to achieve a settlement with the injured person (victim-offender mediation)”. Furthermore, mediation might be taken into account when applying the disciplinary measure of restitution (§ 15 (1) no. 1 JJA). During the probationary period or early release the measures might also come into play in order to exercise a supervisory influence on the conduct of the young person (§ 23 (1), 88 (6) JJA). Both the educational and disciplinary measures are considered critical as the court order to achieve a mediation agreement is not in full accordance with the principle of voluntariness as one of the main bases of a mediation procedure. In principle, there is no restriction on eligible offences. Usually, minor or medium severity offences are considered applicable and petty offences are excluded. In several Federal States in Germany, juvenile diversion guidelines underline categories of offences that are eligible for victim-offender mediation.

Generally, victim-offender mediation is applicable at all levels of the criminal procedure. Even at the correctional level, victim-offender mediation and other restorative approaches have been experienced during last years. From 2009 to 2012, a model project on restorative justice was carried out within the EU MEREPS-project “Mediation and Restorative Justice in Prison Settings” in the city of Bremen.<sup>28</sup> It is planned to continue the project, which involves both juveniles and adult inmates, in 2014.

Although the legal framework for victim offender mediation and its organisational infrastructure is favorable, the implementation in practice remains unsatisfying.<sup>29</sup> In practice, statistical data on the use of mediation from very few sources are available and may serve as an orientation, as there are no complete statistics on victim-offender mediation in Germany. The statistics on the Administration of Justice (Rechtspflegestatistik) provide information about court decisions including victim-offender mediation. They however do not inform about mediation as part of diversion, what accounts for the largest share. Regarding all court decisions which include victim-offender-mediation the majority was applied on young persons. In 2011, there have been 2.469 decisions including mediation under the juvenile law out of a total of 3.377 decisions including mediation. The majority of decisions regarding young persons were made up by disciplinary or educational measures.<sup>30</sup> However, the proportion of the court decisions which include mediation is less than 1% of all convictions.

Furthermore, the Federal Statistics of Victim-Offender Mediation (Bundesweite Täter-

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provide for specific regulations on victim-offender mediation.

<sup>28</sup> See Hartmann et al. 2012, p. 241 ff.

<sup>29</sup> Heinz 2012, p. 182.

<sup>30</sup> Statistisches Bundesamt, Rechtspflege, Ausgewählte Zahlen für die Rechtspflege, 2012, p. 89.

Opfer-Ausgleichsstatistik) inform about the implementation of mediation in practice. They include data of facilities that voluntarily participate in the statistics and therefore are not complete, but provide for in-depth information. In the 2010 survey, 33 mediation facilities participated and provided data. According to these statistics, in 2010, 41.8% of the accused were juveniles and young adults.<sup>31</sup> Regarding the categories of offences committed by young persons, 50.3% include assault, followed by damage to property (15.2%) and other property related offences (10.0%).<sup>32</sup> The overwhelming majority of all cases including young persons and adults were initiated during preliminary proceedings (82.1%) and most cases resulted in successful mediation agreements (91.0%).<sup>33</sup> Most often mediation is initiated by public prosecutors in order to divert the case. The previous statistics from 2006-2009<sup>34</sup>, providing more detailed data on young persons, show that in the year 2009, 60.8% of the referred cases were initiated by public prosecutors, 14.4% by youth courts assistance services, 7% by courts, 7% by police and 6.7% by offenders.<sup>35</sup> The statistics furthermore reveal that the overwhelming proportion of mediation meetings resulted in successful agreements (96.5%).<sup>36</sup> Mediation agreements included most often apologies, followed by damage compensation, services for the victim, compensation for immaterial damages, gifts, etc.<sup>37</sup> Regarding the willingness to participate, 68.9% of the victims agreed to participate in a mediation with young offenders. The proportion of young offenders willing to participate in mediation was significantly higher (92.1%).<sup>38</sup>

Mediation is carried out either by public or private organisations and there are no costs for the parties involved in mediation. Public facilities include youth welfare agencies or youth court assistance services, as well as social services (probation services) and court assistance services for adults. As can be taken from the Federal Statistics of Victim-Offender Mediation, most of the agencies were private agencies, which were responsible for 88.3% of the mediation cases.<sup>39</sup> Private organisations are in general specialized on victim-offender mediation, whereas public agencies are partly specialized as there are different work fields. Funding for public agencies is provided by the communities, counties or Federal States. Private organizations receive limited public financing or have to ensure funding independently. Shortage in funding in recent years has become a major concern in communities.

Besides victim-offender mediation, family conferencing (Gemeinschaftskonferenzen)<sup>40</sup>

<sup>31</sup> Kerner/Eikens/Hartmann 2012, p. 10.

<sup>32</sup> Ibid., p. 24.

<sup>33</sup> Ibid., p. 12, 36.

<sup>34</sup> In the year 2009, 23 facilities delivering victim-offender mediation participated in the data collection.

<sup>35</sup> Kerner/Eikens/Hartmann 2011, p. 121.

<sup>36</sup> Ibid., p. 173.

<sup>37</sup> Ibid., p. 183.

<sup>38</sup> Ibid., p. 162.

<sup>39</sup> Kerner/Eikens/Hartmann 2012, p. 6.

<sup>40</sup> The conferences are based on the Family Group Conferencing approach in New Zealand and the

has been carried out at a pilot level in Northern Germany since 2006. The family conferences were initiated by members of the local crime prevention council and established in cooperation with police, public prosecutors, juvenile judges, youth court assistance and community stakeholders. This restorative justice scheme is targeting juveniles and young adult offenders aged 14 to 20 years. It involves a wider circle of participants, including supporters for the young offender and the injured party. Conferences are applicable in medium severity cases like assault, robbery, burglary. After charges are laid, the public prosecutor and juvenile judge refer the case to the mediator. In case the young person agrees to the conferencing process and a successful agreement was reached, the case will either be dismissed or the sentence mitigated by the court.<sup>41</sup>

Recently, a pilot project aiming at introducing peacemaking circles in Europe has been initiated. From 2011 to 2013, the potential of the circles in Germany, Hungary and Belgium has been assessed.<sup>42</sup> This restorative approach provides an alternative to the formal court proceeding and involves community members in the decision making process of conflict resolution.

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Belgian Hergo, see Hagemann 2008, p. 8-9.

41 See Hagemann 2008, p. 10 ff. and Blaser et al. 2008, p. 26 ff.

42 For further information see: <http://foresee.hu/en/segedoldalak/news/592/> and <http://www.jura.uni-tuebingen.de/einrichtungen/ifk/forschung/implementing-peacemaking-circles-in-europe/EU-Project-Summary.pdf> (accessed on 27.11.2013).

## C. Foster care within the juvenile justice system

**C. 1. Does foster care play any role in your juvenile justice system?**

**C. 2. Under which conditions can foster care be imposed within the juvenile justice system (at pre- or post-sentencing level or in case of diversion)? Can foster care be imposed as an alternative to custody or pre-trial/ police detention? If so please describe the regulations for foster care (length, rights of the children/the foster carers etc.) If there are possibilities in law, how are they used in practice?**

**C. 3. Does your system know any other alternatives to custody like alternative care in case of pre-trial detention (e.g. in closed juvenile welfare institutions instead of prisons) or in case of juveniles sentenced to youth prison or comparable forms of custody? If there are possibilities in law, how are they used in practice?**

In Germany, foster care is provided in the youth welfare system by the Children and Youth Welfare Act (SGB VIII) if a young person's wellbeing is at risk. Given this precondition and if assistance is in need in order to ensure the development of the child or juvenile<sup>43</sup>, parents or legally responsible persons are entitled to supervisory assistance (§ 27 (1) SGB VIII). Supervisory assistance includes placement in a foster family (§ 33 SGB VIII). Hereby, the age and developmental stage as well as the emotional attachment of the young person and possibilities to improve the conditions in the family of origin have to be taken into account. Principally, foster carers can be family members or non-related carers or professionals. In general, foster care (as all other measures of supervisory assistance provided by the youth welfare system) is applicable only in case the parents agree. The civil (family) court only applies placement in foster care while depriving the parents of their care in case of a serious danger of the wellbeing of the child, in accordance with the principle of proportionality (§§ 1666, 1666a Civil Code), as a last resort. In case the child or juvenile asks for protection or in case there is serious and immediate danger for the wellbeing of the child, the local youth welfare agency has to take the child out of his home to live temporarily in a family employed by the social services (§ 42 SGB VIII).

Youth Welfare statistics demonstrate that during the year 2010 73.692 young persons

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<sup>43</sup> According to the scope of the youth welfare law, children and juveniles are persons between 0 and 18 years. Young adults can receive support and care until their 21. birthday. In case support measures have been taken before their 21. Birthday, they may be prolonged for the necessary period of time (see § 41 SGB VIII).

under 21 years have been in family care (45.9 per 100.000 of all persons under 21 years<sup>44</sup>). Analyses indicate major regional disparities for the placement of young persons in family care.<sup>45</sup> Statistics furthermore show that the duration of family care is in about one third of all placements shorter than one year, in app. 30% 1-3 years, in app. 18% 3-7 years and in 20% longer than 7 years. This shows that family care is mainly of provisional character.<sup>46</sup> In general, the German analysis demonstrates that family care is not provided as much as in other countries and there is currently no debate about the strengthening of its influence. Ambulant supervisory support measures which allow keeping the juvenile in his family of origin have been expanded lately and a major part of those juveniles who ended in family or residential care can be supported now with those measures. Major discussions in the 1960s and 1970 led to reforms and qualifications in residential care and to a differentiation of the support measures. Due to this development, public opinion does not favor family care over residential care in every case but looks at the individual case. In general, family care is favored over residential care as a last resort for children under the age of 6.<sup>47</sup>

In the juvenile justice system foster care does not play a role as well. Young offenders can be ordered to receive some forms of supervisory assistance by the Juvenile Criminal Court. In theory an influence of foster care is possible at different levels of the criminal procedure but in practice foster care does not play a role in juvenile justice.

#### **a. Pre-Trial or during Trial**

On the pre-trial level family care could theoretically be a possibility to avoid pre-trial detention: § 72 JJA says that pre-trial detention is to avoid whenever possible (last resort). According to § 72 (1) JJA, pre-trial detention may be imposed and enforced only if its purpose cannot be achieved by a preliminary supervision order or by other measures. According to § 71 JJA, such a preliminary supervision order could end in (temporary) family care. It can not only be imposed to avoid pre-trial detention, but also to support the juvenile (this possibility is not given to young adults, see § 109 JJA) if his development would otherwise be at risk and immediate action seems necessary. The juvenile and his parents have to agree to the measure.<sup>48</sup> Placement in a residential home is only possible if other preliminary measures are not adequate. In practice foster care and other preliminary supervision orders do not play any role (Brunner/Dölling 2012, § 71 Para 2).

44 Fendrich/Wilk (2011).

45 Fendrich, S. et. al. (2012).

46 see Blandow, J. (2004).

47 Wiesner (2011) § 33 para 37 et seq.

48 Eisenberg 2013 § 71 Para 4a and 5.

## **b. As an educational measure**

In case a criminal procedure ends with a verdict of the Court, juvenile offenders can be ordered some forms of supervisory assistance by the Juvenile Criminal Court (§ 12 JJA). However, family care according to § 33 SGB VIII cannot be imposed by the court as an alternative way of dealing with young offenders.

According to § 10 JJA, the Court can impose an “educational measure”, and according to § 10 (1) no. 2 JJA, the judge may instruct the juvenile to live with a family or in residential care. Most juvenile justice scholars state that the parents of the juvenile offender in general have to agree with such an instruction.<sup>49</sup> It should be discussed with the local welfare agency if they agree and pay for the costs. In practice this alternative does not play any role. Statistics do not show in how many cases § 10 (1) no. 2 JJA was applied but special analyses have shown that the Juvenile Courts do not use this alternative. The deletion of this provision has been claimed (see Eisenberg 2013 § 10 para 17).

In case of a suspended youth prison sentence or after early release from youth prison, the competent juvenile judge can impose educational measures according to § 10 JJA as well (§ 23 JJA) and could theoretically instruct the juvenile to live with a family. But again, in practice this alternative is not used.

## **c. Transfer to the family court**

The last way that a criminal offence of a juvenile could theoretically “end” in foster care would be that the Juvenile Court transfers the case to the Family Court according to § 53 JJA. The law provides this possibility in case that the offence demonstrates that the juvenile’s problems are mainly caused by his or her family surroundings and that it would be more promising if the family would be supported by the Family Court. In case that during the Family Court procedure it comes to light that the wellbeing of the juvenile is endangered if he stays in his family, the Family Court is able to take the juvenile out of his family and place him in foster care. However, this possibility is not used in practice.

Therefore foster care remains purely an institution of the Youth Welfare Law and plays no role in Juvenile Justice.

Furthermore § 12 JJA provides that two forms of supervisory assistance are possible – either assistance by a social worker or placement in a day and night-time institution or another form of supervised accommodation. Supervisory assistance by a social worker according to § 30 SGB VIII means to support the juvenile in addressing developmental problems while involving the social environment and preserving the relationship to the family. Placement in a day and night-time institution or another form of supervised accommodation (§ 34 SGB VIII) aims at connecting everyday life with educational and therapeutic services and thereby foster the juvenile’s development. Juveniles shall be assisted in matters of vocational training and employment.

<sup>49</sup> Eisenberg 2013 § 10 Para 17.

Beside these supervisory measures, youth courts may apply specific instructions on young persons (see 2. above). According to § 10 (1) no. 5 JJA, “the judge may instruct the youth to submit himself to the care and supervision of a specific person (care assistant)”. This instruction is also applicable during the probationary period (§ 23 (1) JJA) or early release (§ 88 (4), 23 (1) JAA). But it does not mean that the juvenile leaves his original social surroundings. The care assistant supports the juvenile in his everyday life. Therefore it is not possible to suspend a youth prison sentence and send the juvenile instead to a foster family or to place him in a day and night-time institution.

The Youth Prison Laws of the Laender partly provide regulations which allow the introduction of an alternative to the youth prison sentence via the implementation of special institutions. Those institutions shall allow for the execution of the prison sentence in a quite open environment - comparable to a closed day and night-time institution. The oldest project in this context stems from Baden Wurttemberg and has been copied in other Laender. The “Project Chance” aims to avoid imprisonment for a group of juvenile offenders who have been sentenced to youth imprisonment without probation by placing them in two young offender institutions. These institutions are each located in smaller villages, each with space for 15 boys, but with slightly different conceptions. The participation in the projects is voluntary. The youth prison is allowed to offer the possibility to offenders who are not drug addicted, who are not sentenced because of sexual offences and who have not shown rough violence in their offence. The director of the youth prison adds two informal reasons to that list. He offers the project to weak offenders who may be normally mistreated in the youth prison, that of which he has found through his experience.

The aim in both projects is to rehabilitate young offenders through offering new perspectives for their future life. In both institutions the youngsters have the possibility to receive a school degree or to finish a vocational training.

Unlike in most “normal” German youth prisons, the projects draw closer attention to the peer group and in general to the contact with other people. Whereas in one of the projects, the boys live together in one house with single rooms, one kitchen and one living room for the whole community, in the other project the boys stay in two living communities that are organised like families: each community has two “house parents” or a “house family”.

In both projects the boys start with very strict daily routines. In one institution they wake up every morning at 5.50 a.m. and start a sports programme. At seven a.m. they have breakfast, and from 8 a.m. to 5 p.m. they go to school or to work. Then they are required to do their household duties and only in the late evening they have some time for themselves. After and in between the work they have meetings with the peer group. As mentioned above, these peer-group meetings are very important for the concept of the institution. The youngsters are confronted here with their behaviour. If they behaved in accordance to the rules, they will be praised by the others and will get good credits, so they have the possibility to ascend to the next rank in the hierarchy. Indeed the hierarchy is very strong in the projects. If the offender has reached a higher rank he has more

liberties in his daily life or he can become a so called “tutor” for the newer inmates.

If the youngster misbehaves he has to face up to his behaviour in the group. He can lose his higher rank, and as a last resort he could lose his place in the institution and be sent back to the youth prison.

It is important to mention the building of a network set up for an amount of time after the offender’s release from the institution. At least in one institution they try to find a place to live, a workplace, free time activities and last but not least a person to whom the youngster is closely attached for the time after the release.

The two projects have been evaluated. The results show that the projects are not beneficial in respect of the recidivism rates.

Furthermore about half of the offenders do not finish the project. Some of them were sent back to the youth prison because of their misbehaviour, and some of them wanted to go back to the youth prison by their own regard because they could not come along with the daily routines. An interesting result of the evaluation is that even the boys who were sent back to Adelsheim showed positive changes in certain areas of life, for example their health. Those who regularly finished their time in the institutions showed positive changes with respect to their formal qualifications and their occupational outlook as well as to special occupational soft skills. They also showed a growing social competence regarding their ability to solve conflicts or to stand criticism. Their self-perception likewise often changed positively and in most cases the relationship to their original family was improved.

The youngsters themselves criticised the stressful daily routine and the immense amount of rules. They also mentioned that the system rewards grasses and so called “slimies”. This last point entails one of the main criticisms of the evaluators. It could be argued that the offenders just superficially play their “new behaviour” to reap the benefits of the system. So they then could be educated to the role of slime, to betray and assimilate instead of stay strong and show some backbone. Another point of this critique is the Christian approach in one of the institutes. The institution itself describes the Christian activities as optional offers, but from the evaluation one gets the impression that the participation in Christian activities is not totally voluntary.

All in all the evaluation report stressed the positive aspects of the institutions – especially compared to the development in prison.

On the level of pre-trial detention we do also find certain projects or programmes who aim to serve as alternatives to incarceration and are oftentimes comparable to residential care projects.<sup>50</sup>

50 Brunner/Dölling 2011, § 72.

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