

# THE IMPLEMENTATION OF ALTERNATIVE SANCTIONS AND MEASURES INTO JUVENILE JUSTICE SYSTEMS

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The article points out one specific aspect of juvenile justice which is highlighted by the different international juvenile justice standards. The concept of diversion as an appropriate strategy of juvenile crime prevention. After a short overview of the history and the basic ideas of the concept of diversion the presenter concentrates on the varieties of diversion within the European juvenile justice system. The frequent use of diversionary strategies can inter alia be explained by the close connection between the juvenile justice system and the youth welfare system which will be indicated further. According to data on the use of diversionary concepts these can be proven as effective strategies, which are not accompanied by higher reconviction rates. Therefore diversion is a meaningful and effective answer (particularly) to juvenile first and second time offenders.

**Keywords:** sanction systems, juvenile justice, diversion, alternative sanctions.

## 1. INTRODUCTION

The research results which are presented in this article are based on the project “Juvenile Justice Systems in Europe”<sup>1</sup>. The project started in 2006. 40 juvenile justice experts from 34 European countries worked together for four years. The result is a wide comparison of juvenile justice within Europe, related to the different scope of juvenile justice, age groups, sanctions and sentencing practices.<sup>2</sup>

The article will focus on the implementation of alternative sanctions and measures in Europe and will present some examples from Germany in particular, in the hope to define some good practice models which can be useful for the ongoing discussion in Romania.

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<sup>1</sup> The project was funded by the European Commission, Justice and Home Affairs (JLS/2006/AGIS/168) and the Ministry of Education, Science and Culture.

<sup>2</sup> See *Dünkel/Grzywa/Horsfield/Pruin* 2011 (4 Volumes, 1908 p.).

## 2. BASIC PRINCIPLES FOR JUVENILE SANCTIONS SYSTEMS IN EUROPE

Many international human rights instruments form some basic principles for juvenile sanctions systems in Europe. One focus of these instruments lies in the promotion of diversion, another one in the avoidance of deprivation of liberty.

International human rights instruments such as

- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice of 1985 (so-called Beijing Rules, see Rules No. 11.1-11.4),
- The Council of Europe’s Recommendation on Social Reactions to Juvenile Delinquency of 1987, Rec. (87) 20 (see Rules No. 2 and 3),
- The Convention on the Rights of the Child of 1989, see Article 40 (3) b),
- The United Nations Guidelines for the Prevention of Juvenile Delinquency of 1990 (so-called Riyadh-Guidelines, see Rules No. 5 and 6),
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly in the Resolution 45/113 of 14 December 1990,<sup>3</sup>
- The United Nations Standard Minimum Rules for Non-custodial Measures (so-called Tokyo-Rules, see Rule No. 5),
- The Council of Europe’s Recommendation on “New ways of dealing with juvenile delinquency and the role of juvenile justice” of 2003, see Rec 2003 (20), see Rules 7, 8 and 10,
- The Council of Europe’s Recommendation on “European Rules for Juvenile Offenders Subject to Sanctions or Measures (ERJOSSM)” of 2008, see Rec (2008) 11, see Rules 5, 10 and 12 (with regards to principles of minimum intervention and proportionality)<sup>4</sup>,

emphasize that diversion should be given priority as an appropriate and effective strategy of juvenile crime policy and determine that alternative sanctions (such as warnings, reprimands, mediation or other educational measures) shall be favoured. Deprivation of liberty has always to be seen as a last resort and justice systems shall introduce procedural safeguards to guarantee the compliance with this rule. Juvenile justice systems have to follow the principle of minimum intervention, which means that always the least invasive decision shall be taken and any intervention shall be as short as possible.

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<sup>3</sup> The United Nations define “deprivation of liberty” as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority” (Art. 11).

<sup>4</sup> See Council of Europe 2009.

### 3. THE IMPLEMENTATION OF ALTERNATIVE SANCTIONS IN EUROPEAN JUVENILE JUSTICE SYSTEMS

All European juvenile justice<sup>5</sup> laws provide a wide variety of sanctions and measures for juvenile offenders.<sup>6</sup> This is in line with the aforementioned international juvenile justice standards which claim for a wide range of sanctions and measures as alternatives to imprisonment. In most countries a non interventional diversion is possible, that means an absolute discharge or withdrawal without further sanctions and measures, usually provided by the prosecutor or, in some countries like England, Ireland or the Netherlands, by the police. All countries provide the possibility to divert a case and combine the conditional dismissal of the case with educational measures or interventions. The systems for this kind of “interventional diversion” vary:

In many countries, minor offences can be dismissed after educational measures have taken place (e.g. mediation, victim-offender-reconciliation, reparation, apology to the victim). The idea is that if the conflict is already solved within the society there is no need to further stigmatize the offender, or to spend much money on cost-intensive criminal procedures. So for example if in Germany at the time of the beginning of the prosecution the offender has already apologised and paid for the damage he produced, the public prosecutor can dismiss the case without any further conditions.

A similar approach is followed in countries where diversion in combination with (minimum) educational interventions is seen as a possible option. One alternative is that the prosecutor or the judge can suspend the case for a certain period of time. The case will be dismissed after the offender has fulfilled special obligations, like community work or reparation of the damage or participation at certain “training courses”. A comparable approach is quite common in Eastern European countries with the so-called “release from criminal liability”, which can be combined with educational measures.

In some countries, diversion can be combined with a referral to the Social Services or a special administrative authorities/bodies, like the “Scottish Hearings System” or the “Juvenile Commissions” in Bulgaria, Estonia or Russia. These bodies can partly issue and partly negotiate the fulfilment of special educational obligation. The transfer of responsibility and sanctioning power to administrative bodies makes it important to guarantee that juvenile justice standards are respected

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<sup>5</sup> The term juvenile justice and juvenile justice system is used in this article in a broad sense and includes systems which follow mainly a welfare approach (e.g. Belgium, Poland) and countries which do not have a specific juvenile justice law but special regulations both in justice and welfare laws for young offenders, which are comparable to juvenile justice regulations in other countries (e.g. the Scandinavian countries).

<sup>6</sup> See *Dünkel/Pruin* 2009, 2009a, *Dünkel/Grzywa/Pruin* 2011, p. 1650. An overview about the different scopes of juvenile justice systems in Europe can be found at *Pruin* 2011.

on this level as well. Administrative authorities likewise have to avoid each form of deprivation of liberty (e.g. in “schools for students with special needs”) as a reaction to criminal behaviour. Furthermore all measures shall be imposed only for the shortest possible period of time.<sup>7</sup>

If a case is not diverted but reaches the level of the court, European Juvenile justice systems provide a lot of different dispositions as well. This is in line with the European Recommendations mentioned above, which claim for a wide range of sanctions and measures as well as alternatives to imprisonment (see also *Muncie* 2001).

The so called “Community sanctions” define all sanctions and measures which do not lead to deprivation of liberty in any form. Nonetheless we do find differences between the different juvenile justice systems in Europe in this regard.

As a general rule the applicable sanctions and measures follow a certain *hierarchy* that is based on the order in which priority shall be given to the most educational, most appropriate sanction. This regularly opens up the possibility to combine several educational measures or sanctions with each other. A second general principle that is stressed particularly in the Council of Europe’s Rec (2003) 20 is the principle of proportionality that also has to be adhered to when only educational or diversionary measures are applied (see Rule 7 cited above). We can find the following levels of sanctioning, ordered from the least to the most intrusive.

1. Warnings, reprimands, conviction without sentence, educational “directives”;
2. Fines, community service, reparation orders, mediation;
3. Social training courses and other more intensive educational sanctions;
4. Mixed sentences, combination orders (which can be characterised as a more “repressive” way of dealing with juvenile offenders);
5. Suspended sentences without supervision by the Probation Service;
6. Probation;
7. Suspended sentences with supervision by the Probation Service, electronic monitoring;
8. Educational residential care, youth imprisonment and similar forms of deprivation of liberty.

The least invasive sanctions are warnings or reprimands (verbal sanctions),<sup>8</sup> followed by a wide range of alternative sanctions that exert more or less influence on the life of the offender. Many sanctions systems provide educational measures (such as educational “directives” in *Austria* and *Germany*)<sup>9</sup> either as independent

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<sup>7</sup> See *Dünkel/Pruin/Grzywa* 2011, p. 1684. The ERJOSM give good and specific guidelines for the use of alternative measures by such administrative authorities.

<sup>8</sup> Some countries do not provide for warnings/reprimands as a court decision, but still reprimands can be issued if the court or the public prosecutor decides to divert the case, see for example *England/Wales, Germany* or *Lithuania*.

<sup>9</sup> See *Bruckmüller/Pilgram/Stummvoll* 2011, p. 51 ff. and *Dünkel* 2011, p. 562 ff.; see also *Dünkel* 2006.

sanctions or as complementary elements of other sanctions like for instance probation or suspended prison sentences (e. g. *Denmark* or *Kosovo*). The aim of such educational directives is always to improve the educational impact on the one hand and to reduce the impact of risk factors in the juvenile's daily life on the other. The laws should confer a certain degree of discretionary power on the judge to enable him or her to find the most appropriate directive. In between we find the possibility to impose a fine on juvenile offenders which is theoretically possible in many, albeit not all European countries.<sup>10</sup> For example *Belgium, Bulgaria, Croatia, Italy, Poland, Scotland, Serbia* and *Spain* do not refer to fines for juveniles in their reports. Indeed one may question if fines could be seen as educational sanctions, facing the fact that juveniles will often be unable to pay for fines with their own money.<sup>11</sup> On the other hand the *Finnish* report emphasises that fines for juveniles will be low and just touch on the pocket money a juvenile disposes of. In the *Czech Republic* it is possible to suspend a fine. This alternative has been abolished in *Lithuania*.

Most European countries offer victim-offender mediation for juveniles as a court disposition.<sup>12</sup> Yet, in some countries mediation is never or only seldom practiced due to a lack of organisational infrastructure at the local level, as reported by the *Czech Republic, Poland, Romania* and *Kosovo*.<sup>13</sup>

In some countries the personal participation of the victim in a reconciliation procedure (like in victim-offender mediation) is not essential. *England and Wales* know special "reparation orders" that aim at compensating the victim. There is an interesting sanction in *Belgium* called "written project proposed by the youngster". The aim of this project can focus on restoring the damage caused by the offence, apologising, participating in mediation, following intermediate treatment for a maximum of 45 hours, etc.<sup>14</sup>

In many countries, community service can not only be combined with diversion but also be imposed at the court level. Community service combines slight "punishment" with reparative and rehabilitative elements. The offender shall offer "a 'payback' to the community via unpaid work".<sup>15</sup> Community service can be seen as a more disciplinary sanction without intensive educational contents,

<sup>10</sup> Another question is whether the possibility to fine juveniles is used within the country. Most countries rarely or almost never use this sanction for juvenile offenders. One exception is *Finland*, see below.

<sup>11</sup> Most juveniles in Europe finish school late and therefore dispose of their own money relatively late in their life course, see *Dünkel/Pruin* 2011, p. 1590.

<sup>12</sup> As already mentioned above, most countries provide such forms of mediation as a diversionary measure, see also *Doak/O'Mahony* 2011, p. 1720.

<sup>13</sup> Mentioned for example by the reports of *Válková/Hulmáková, Stańdo-Kawecka, Păroşanu* and *Helmken* 2011. If victim-offender mediation is "ordered" by a court, the above discussed question of the voluntariness on behalf of the offender is even more concerning than in cases of diversion.

<sup>14</sup> *Christiaens/Dumortier/Nuytiens* 2011 stress that this innovation "is surrounded more by questions than by answers", p. 109.

<sup>15</sup> *Goldson* 2008. p. 78 (Community Punishment Order).

even though from an idealistic point of view the unpaid work could “provide for the offender to learn new skills” (Goldson 2008, p. 78). This is supposedly an explanation for special age limits for the imposition of community service. For example in *England and Wales*, *Ireland* and *Northern Ireland* community service can only be imposed on juveniles aged 16 or older. Huge differences can be observed with respect to the maximum number of hours: Whereas the limit in *Belgium* is 30 hours, and the *Austrian* maximum is 60 hours, a juvenile offender can receive up to 120 hours in *France* or 200 hours in the *Netherlands*. Quite unfortunately, no statutory limits are provided in *Germany*. However, in practice the large majority of community service orders do not exceed 50 hours. In exceptional cases where disproportionate numbers of working hours are imposed, an appeal would be possible with the argument of a violation of the constitutional principle of proportionality.

The differences in legislation are partly due to different approaches and settings for community service orders: For example, in *Finland* a high number of hours (regularly only for young adults aged 18-20) will replace a sentence of up to 8 months of unconditional imprisonment.<sup>16</sup>

Many countries have successfully implemented creative and constructive measures such as, for instance, social training courses (*Germany*) or so-called labour and learning sanctions or projects (the *Netherlands*), where the juveniles can learn to deal with their aggressive potential or where they can be trained according to their personal skills.

In some countries there are special “centres” to which juvenile offenders can be sent for a few hours a day. In *England and Wales*, the attendance centre order requires a young person to be present at a (usually) police-run institution on Saturday afternoons, where juveniles engage in physical education and other activities designed to inculcate a sense of discipline or social skills, for sessions up to a maximum of 36 hours.<sup>17</sup> In *Kosovo*, the court can commit a minor to a disciplinary centre for a maximum of one month (for up to four hours per day) or for a maximum of four days of a school or public holiday (for up to eight hours per day).<sup>18</sup> In *France*, the law of 5 March 2007 created a new educational measure, *activities during the day* (*mesure d’activités de jour*), in which the juvenile is involved in vocational or school insertion activities at a public or qualified private institution or agency. In *Italy*, the magistrate can order the minor to carry out study or work activities in special working groups.

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<sup>16</sup> In *Finland* prison sentences of up to 8 months may be commuted to community service (from 20 to 200 hours). In order to ensure that community service will really replace an unconditional prison sentence the judge in a first step has to impose the prison sentence, which then in a second step can be commuted to community service. As prison sentences for juveniles are only very rarely used, community service also does not play an important role: In 2005 only 14 community sentences were imposed on 15 to 17 year-old juveniles (0.3% of all 4,252 court disposals, see *Lappi-Seppälä* 2011, p. 460).

<sup>17</sup> See *Dignan* 2011, p. 368. This sanction is comparable to the *German* “weekend arrest”, see *Dünkel* 2011, p. 564, 594 ff.

<sup>18</sup> Up to now, disciplinary centers in *Kosovo* do not exist in practice.

Some European countries (*Estonia, Germany, Lithuania, Russia, Spain* and *Ukraine*) provide for the possibility of short-time detention in special disciplinary centres. The educational effect of detaining young people in a closed institution for a short period of time can be deemed questionable (see below).

*Germany* introduced short-term detention in a special detention centre (up to four weeks of detention as a short sharp shock) into the juvenile justice system by an amendment to the Juvenile Justice Act in 1943. This “demonstration of the repressive *Zeitgeist* of the Nazi era” (see *Dünkel* 2011) is currently still in force, as attempts have been made to adjust it to the educational ideal by transforming it into a kind of stationary social training course. The reality still looks questionable and therefore academic scholars almost unanimously call for the abolition of short-term detention (see *Dünkel* 2011), whereas practitioners emphasise the usefulness of such detention as a stationary social training course in order to prevent (longer) sentences of juvenile imprisonment and for those juveniles who fail to comply with community sanctions.

*Lithuania* provides for a sanction called “arrest” in special “arrest-houses” for a period between 5 and 45 days. The law foresees the possibility this for sanction to be suspended. The situation is similar in *Estonia* (up to 30 days), and in *Russia* arrest in special arrest houses can be applied for 1 to 4 months. In practice this sanction is not used because there are no arrest-houses in the country (see *Shchedrin* 2011). There are in fact legal proposals that aim at this sanction being abolished entirely.

*Ukraine* foresees short-term detention for a period of between 15 and 45 days. The offender must have reached the age of 16 before the court can apply this sanction. However, nothing is known about its practicability.

In *Spain* the juvenile can be ordered to spend weekends in an open centre or at home, with attendance at a centre during the day being considered more lenient (“attending a day institution”). This measure, which is a combined measure, was already included in the law of 1992 under the title “brief detention period of one to three weekends”.

In *England and Wales* the idea of “shock incarceration” in detention centres was abolished in favour of the “detention and training order” with a maximum period of twenty four months. In 1995 the *Netherlands* likewise abandoned the sanction of short-term detention for up to 14 days. Looking at these countries and the rare or non-existent use of similar measures in practice in several Central and Eastern European countries (see e.g. *Russia*) we can observe an increasing tendency against the use of short detention sanctions in Europe (see *Bochmann* 2009, p. 179).

This is not surprising if we look at the criticism that such sanctions have received: *German* research results have shown extremely high recidivism rates among persons who experience short-term detention (70% within four years of

sentence, compared to less than 40% for educational community sanctions).<sup>19</sup> Although the research is not based on a comparison of real control groups, it is evident that juveniles who take part in community sanctions today (such as social training courses or community service orders) are rather comparable to those who had been sentenced to short-term detention before the 1990s. The *German* sentencing practice can therefore be seen as a “natural experiment” in which short-term detention is replaced with (more educational) community sanctions. The recidivism rates for short term detention were always the highest, whereas recidivism after community sanctions remained low in spite of more medium or higher risk offenders having been involved. Therefore, recently (2009) renewed demands from the conservative parties for a new form of arrest (short-term detention in combination with a probation period from a suspended prison sentence) will hopefully remain unsuccessful.

In *Austria, Denmark, Estonia, Finland, Germany, Sweden* and *Switzerland* an offender can be convicted without receiving a concrete sentence. In *Germany* it is a special alternative to youth imprisonment and combined with a period of supervision by the Probation Service.<sup>20</sup> In *Sweden*, the conditional sentence (*villkorlig dom*) brings with it a two year period of unsupervised probation and shall regularly be supplemented with a fine or with community service (for 18 to 20 years-old).

Supervision or surveillance orders can likewise be found in most European countries. In most countries, the Social Service or the Probation Service is responsible for the execution of this measure. In *Kosovo*, the juvenile offender is usually supervised by the legal representative, normally the parents. In *Italy* likewise the offender can be “placed” at home: During such “house arrest” the minor usually stays at home under the supervision of his/her parents or another caregiver. The aim is to avoid isolating the minor from his/her familiar and social surroundings in order to prevent disturbances to his/her personal development.

In *Finland* the Juvenile Punishment Order consists of work programmes, supervision and activity programmes that aim to promote social adjustment, the person’s sense of responsibility and his/her social relations. There is a strict requirement that this sentence only be issued in high-risk cases. This requirement may prevent net-widening effects as the Juvenile Punishment Order is definitively only applied in cases of repeat offenders who have already been sentenced to conditional imprisonment.

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<sup>19</sup> The recidivism rate of about 70% is also higher than for those sentenced to conditional juvenile imprisonment (probation) and about the same as for unconditional juvenile imprisonment (see *Jehle/Heinz/Sutterer* 2003). The concern is that short-term detention is provided for the lower-risk offenders and therefore the high recidivism rates indicate a failure of such short-term detention; the results insofar are in line with the meta-analyses showing no effect sizes for shock-incarceration and similar scare straight programmes, see e.g. *MacKenzie* 2006; 2006a; *Andrews* 2009 with further references.

<sup>20</sup> See § 27 *German JJA* and *Dünkel* 2011, p. 578.

Contrarily, in *England* and *Wales* the introduction of the so-called referral order could well be having a net-widening effect,<sup>21</sup> since it is more invasive and rigorous than the conditional discharge that it has essentially replaced in practice. “Action plans” or “referral orders” in contrast to the *Finnish* “Juvenile Punishment Order” follow a more punitive approach.

In *Estonia*, *Hungary*, the *Netherlands*, *Poland*, *Portugal*, *Slovenia*, *Spain* and *Sweden* it is possible to confiscate a person’s driver’s license or to issue a prohibition from driving a vehicle as independent sanction or measure. In these cases the courts have to consider a certain susceptibility to unequal treatment, because there are special groups of juveniles or young adults who are more dependent on driving a car than others (due to work obligations, poor local infrastructure etc.). We have serious reservations against the temporary withdrawal of a driver’s licence as a standalone sanction, especially if it is used for other than only traffic related offences. The future integration of juveniles is often more difficult when their mobility is hampered. Therefore, educational efforts should be made to allow juveniles to participate in traffic in a responsible manner. Social traffic training courses seem to be the appropriate answer, rather than excluding juveniles from mobility – particularly when they live in rural areas.

Many (but not all) European countries provide suspended juvenile prison sentences that frequently go hand in hand with supervision by the Probation Service or a similar service with a social work approach. In *Germany* and *Estonia* for example, such supervision is obligatory. The “Continental European Model” of suspended sentences implies the imposition of a youth prison sentence, the execution of which is not immediate. Should an offender fail to meet the conditions of probation, suspension is revoked and the juvenile serves the term of imprisonment set at the first trial (for example in *Austria*, *Bulgaria*, *Germany* or *Spain*).

Especially the states of the United Kingdom (*England* and *Wales*, *Northern Ireland* and *Scotland*) as well as *Ireland*, *Cyprus* and *Kosovo* provide for probation as a special sanction. This sanction is – as its name indicates – always connected with support from and control by the Probation Service. Contrary to the “Continental European Model”, in these countries no term of detention is fixed. Therefore, where an offender fails to comply with his or her probationary requirements, the term of imprisonment is determined in a second sentencing trial. Here one finds another explicit example for how the same terms can mean different things in a European “exchange”: Many countries use the term “probation” to describe the “Continental European” approach of “suspended sentences with supervision”.<sup>22</sup>

No European country has managed to totally avoid imprisonment or detention for juveniles. Many different forms of deprivation of liberty with corresponding institutions can be found in Europe, like youth prisons, detention centres, closed educational care or schools “for juveniles with special needs”.

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<sup>21</sup> See *Dignan* 2011, p. 391 ff. and *Dünkel/Pruin* 2009, p. 195.

<sup>22</sup> The *Swedish* doctrine explicitly expresses that supervision has to be viewed as a comparatively severe punishment, while conditional sentences are less severe interventions. At the same time, both are deemed more severe than fines, while being less intrusive than deprivation of liberty.

Especially researchers and practitioners from eastern or middle European countries claim that oftentimes the laws in their countries do provide a lot of alternative sanctions, but the judges or prosecutors do not apply them. The reason oftentimes lies in the lack of any infrastructure. The law might allow for victim-offender mediation – but if no organisation or no service is able to offer mediation, this good new approach will gain no traction. Another problem related to the implementation of alternative sanctions is oftentimes that the question of funding is not responded.

#### 4. THE SANCTIONING PRACTICE IN SOME EUROPEAN COUNTRIES

Those aspects might – apart from different sentencing cultures in general – inter alia be responsible for the huge differences related to sentencing practices.

In *Austria*, for example, diversion plays an important role (50% of all reactions to juvenile offenders). Partly diversion is combined with the application of special educational measures are applied, for example special obligations or victim-offender-mediation. If it comes to a court decision, community sanctions are widely used. Imprisonment is really taken as a last resort (9% of court disposals), and only 1 % of all receives an unconditional prison sentence.

Sanctioning in *Bulgaria* is quite different: Many cases are not sent to court but decided by a “juvenile commission”, which is responsible for all kinds of antisocial behaviour of children, including criminal offending. As there is no data, we are not able to analyse exactly how big the influence of this other sanctions is. We think that 50% of all cases of juvenile criminal offending end up in front of juvenile commissions. If it comes to court, traditionally imprisonment (80-90%) played important role, now reduced to “only” ca. 50%. Recently, mediation (ca. 40% of court disposals) plays an important role.

*Denmark* might be seen as a positive example with regards to the implementation of international juvenile justice standards in practice: Although diversion counts only for 20% of all decisions, community sanctions are very widespread and deprivation of liberty is the absolute exception.

In *Finland* almost no diversion takes place. Fines are the most applied sanction, and imprisonment is the absolute last resort (less than 1%).

In *Germany*, diversion plays an immense role: 69% of all juvenile justice cases are diverted. Community sanctions are oftentimes applied to juvenile offenders, and imprisonment is applied only in 6% of all court disposals.

*Spain* is currently following a “getting tough”-approach, followed by increasing detention rates. But diversion and mediation still serve as major orientation in the sentencing practice.

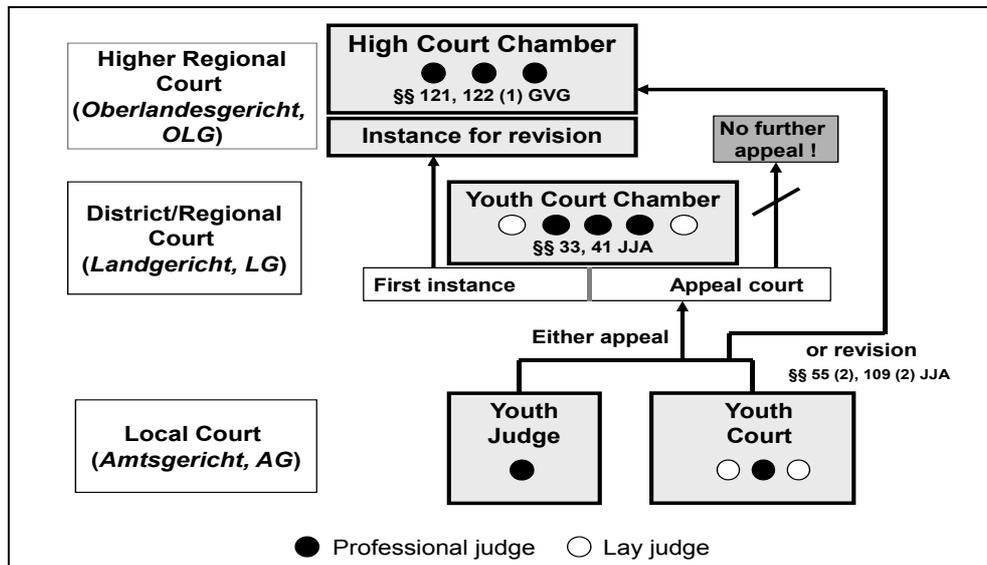
In *Switzerland*, educational measures by the juvenile court play an important role. If it comes to detention this is oftentimes served in open residential homes. The imprisonment rate is below 1%.

In *Ukraine* the orientation lies at suspended prison sentences. Community sanctions are almost never used in practice and the imprisonment rates are extremely high.

#### 6. THE GERMAN MULTI-AGENCY APPROACH AS GOOD PRACTICE AS A CATALYSER FOR THE IMPLEMENTATION OF ALTERNATIVE SANCTIONS

As mentioned above, diversion and community sanctions are widely applied in *Germany*. This is only possible because the juvenile justice system and the social system do work in close cooperation in favour of the juvenile. Such a structure has been implemented by a two track system of welfare and justice laws, the Child and Youth Welfare Act (CYWA, *Kinder- und Jugendhilfegesetz*) and the Juvenile Justice Act (JJA, *Jugendgerichtsgesetz*). These laws demand the implementation of a network of private, state welfare and justice agencies.

In the *German* special juvenile court system (see Figure 1) usually a single special and specialised youth judge decides, or in more severe cases a youth court or in case of very serious crimes a youth court chamber decide on reactions to juvenile offending. Even on the level of the *German* high court we do find a special chamber dealing with juvenile cases.



Source: See *Dünkel* 2011.

**Figure 1:** The German juvenile court system.

According to its basic philosophy the Juvenile Justice Act gives priority to diversion and the minimum intervention principle. Educational community

sanctions do consequently play a very important role. Youth imprisonment on the other side shall only be applied as short as possible and as a last resort (*ultima ratio*). It is not possible to transfer juveniles to adult courts, even in most serious cases. In contrary, the jurisdiction of the juvenile court includes 14-17 years old juveniles as well as 18-20 years old young adults. In practice, *German* judges sentence about 65% of all young adult offenders according to juvenile criminal law and they are regularly sent to juvenile prisons and not to adult prisons.

Cooperation-partner of this special juvenile justice system is an independent youth welfare system which is responsible for all children in need. Youth services are established at the local community level. They often use the help of private non-profit organisations, for example for organising victim-offender-mediation, and all these youth services are financed by the federal states and their ministries of social affairs.

On a community level youth welfare departments can be found in every city. They are responsible for all children in need of care, and each youth welfare department commands a special youth service in youth court proceedings, containing from social workers who are specialized in juvenile justice issues. They do have a double task:

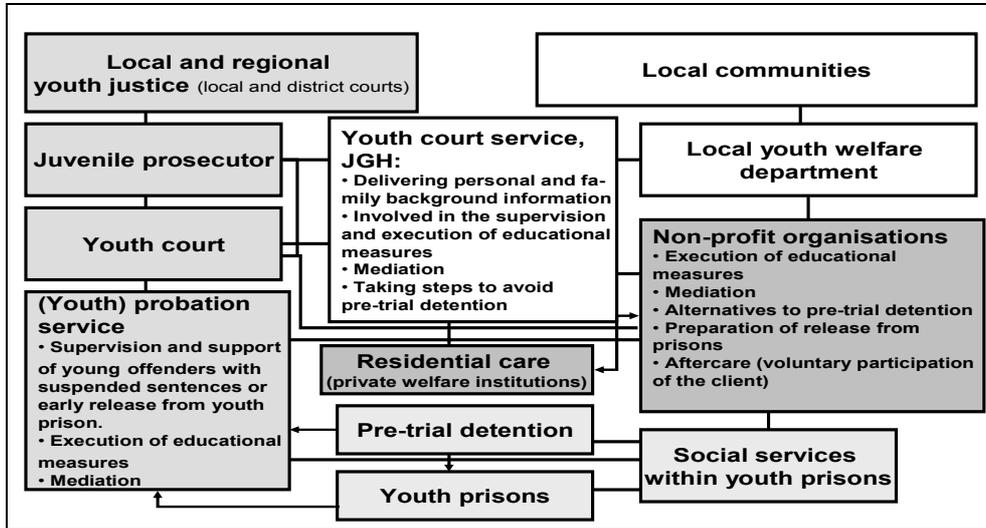
They fulfil purely welfare oriented tasks (family aid, protection of children in need of care according to the CYWA).

They support the juvenile-prosecutor and court by delivering personal and family background information for the trial and they are responsible for the execution of educational measures (mediation, social training, etc.)

And they are, beside the probation services, responsible for the supervision of the community or diversionary sanctions.

Remarkable is the independent status this service has, especially if we compare it to social juvenile justice services in other countries, which most of the European countries have in any form. The Youth services in youth court proceedings are not under the supervision of the judge or the ministry of justice, but under the supervision of the ministry of social affairs. It has to be differentiated from the specific probation service and consists from a whole team of social-pedagogues with at least three years of university education (*Fachhochschulen für Sozialarbeit*). They are connected to a network of many agencies and organizations that offer trainings and organize measures for juvenile offenders (see Figure 2). The youth services in youth court proceedings (*JGH*) are furthermore responsible for avoiding unnecessary pre-trial detention.

The youth service can involve and does involve private institutions and NGOs in the execution of community sentences. So for example there are NGOs which offer Victim offender mediation and others who developed special training courses for juveniles. These NGOs are paid for the work with offenders through the budget of the youth welfare system (ministry of social affairs).



Source: Dünkel 2011.

Figure 2: The multi-agency approach in German juvenile justice.

The German juvenile justice system provides a wide range of alternative reaction to juvenile offending (see Figure 3).

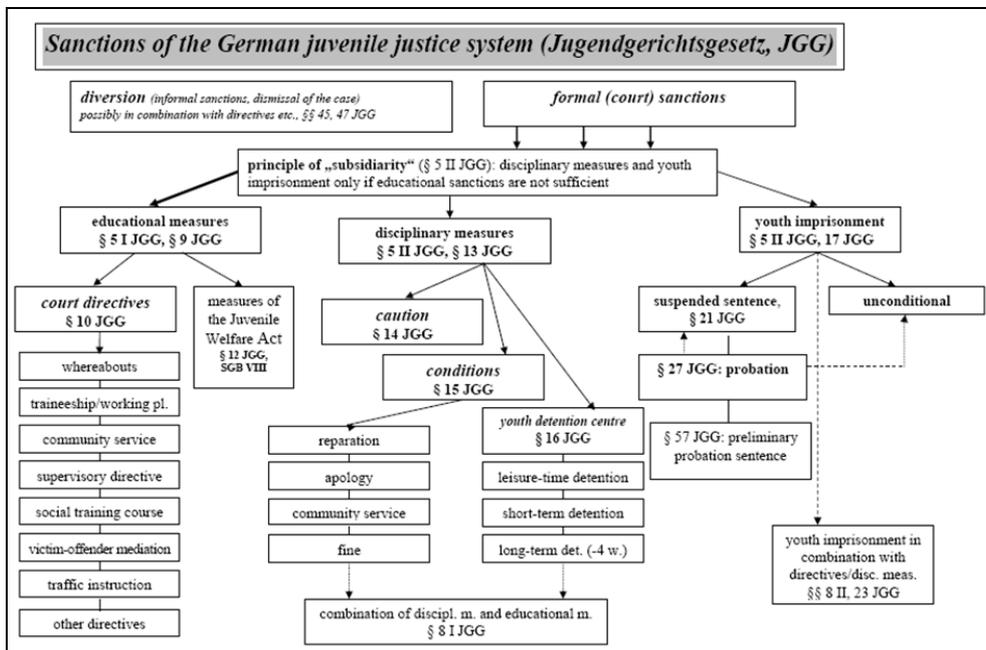
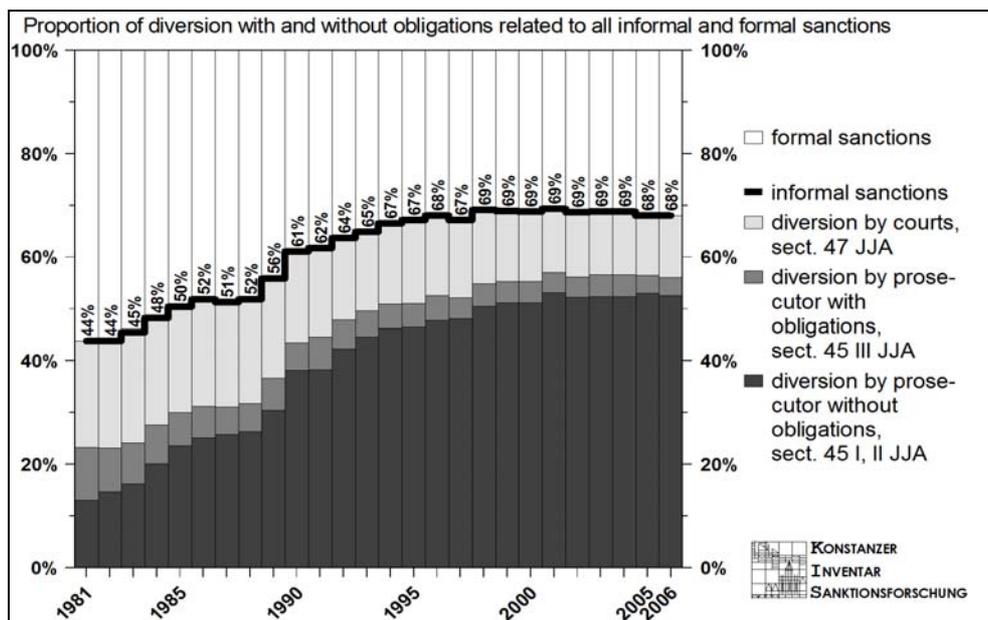


Figure 3: Sanctions of the German juvenile justice system.

Due to this close cooperation of juvenile justice and juvenile welfare in Germany diversion and community sanctions play an important role in the sanctioning practice for juveniles (see Figure 3).

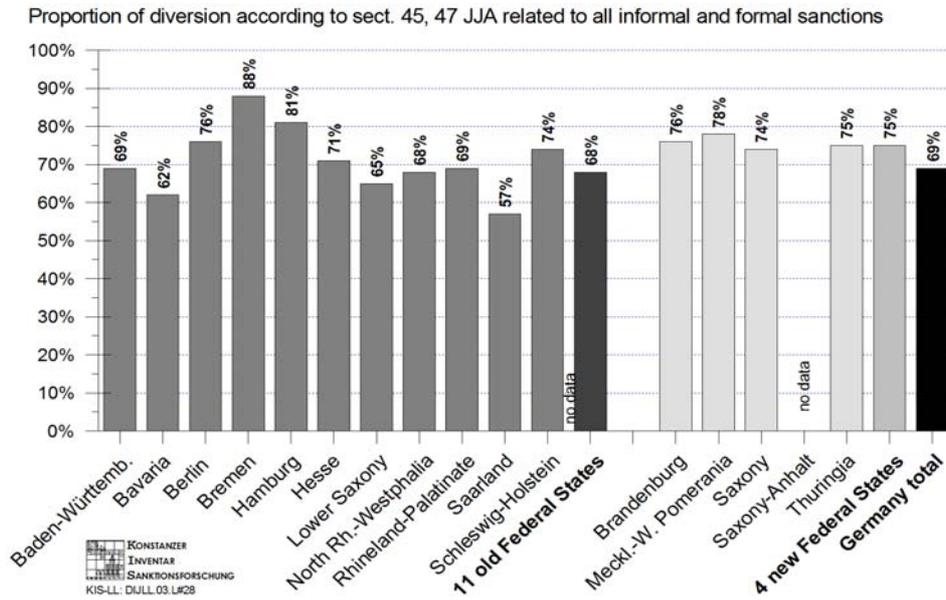
Since the 1980s we find a steady rise in the use of diversion. Whereas short after the introduction of these alternatives in 1980 only 10 % of all cases were diverted, nowadays 70% of all cases are diverted. The German system does not know any police diversion like in *England* or *Wales*, but the prosecution service has some discretionary power to divert the cases. The prosecutor can unconditionally divert a case without any conditions or educational measures, and this is widely used as you can see here. More than 50 % are diverted without any educational measures or sanctions following, and further 20% are diverted either by the prosecutor or by the judge, combined with educational measures like the participation at a victim-offender-mediation process or the participation at special training courses.



Source: Heinz 2008.

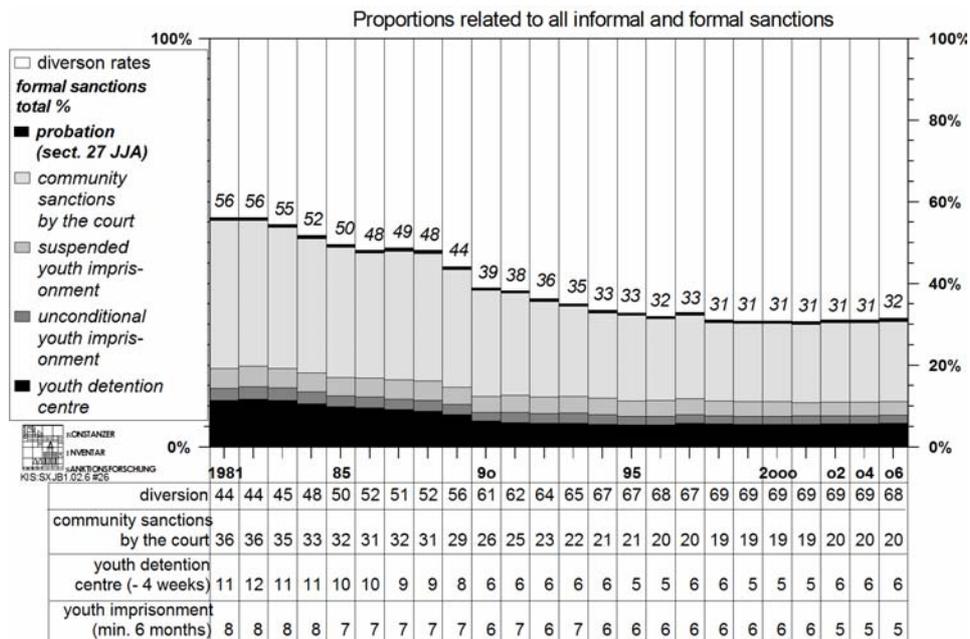
**Figure 4:** Diversion rates (dismissals by prosecutors or courts) in the juvenile justice system of Germany, old Federal States, 1981-2006.

Compared to other European countries, *Germany* is a small country. But still the 16 different federal states follow an own strategy of criminal policy. In some federal states is used in almost 90% of all cases, in others a little more than 50%.



Source: Heinz 2008.

Figure 5: Diversion rates (dismissals by prosecutors or courts) in the juvenile justice system in comparison of the Federal States, 2006.



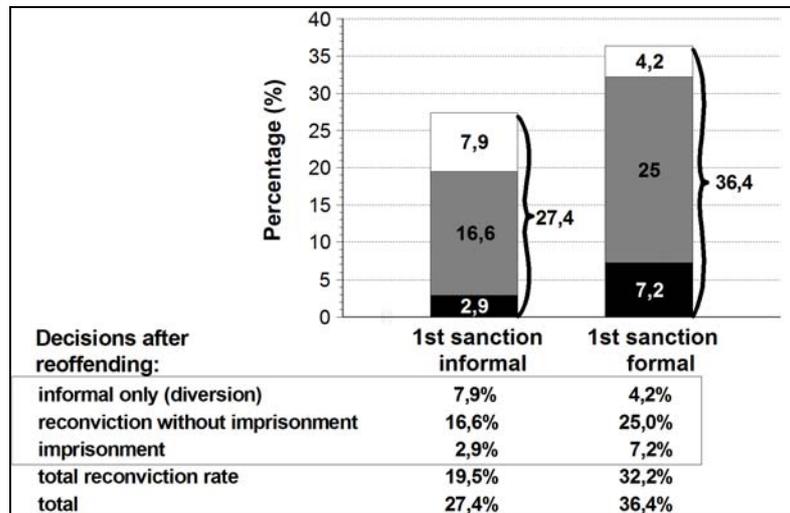
Source: Heinz 2008.

Figure 6: Sanctioning practice in the juvenile justice system in Germany, old Federal States, 1981-2006.

The absolute majority of all cases which are not diverted do end with community/educational sanctions. Only 5% of all cases do end with a sanction of youth imprisonment, but in most of the cases this prison sentence is suspended and the juvenile will not go one single day to prison but be supervised by the probation service.

### 7. IS DIVERSION AN EFFECTIVE YOUTH JUSTICE STRATEGY?

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 5*).<sup>23</sup> Even for repeat offenders, the re-offending rates after informal sanctions were not higher than after formal sanctions.<sup>24</sup> 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 6*). Thus, the extended diversionary practice has at least had no negative consequences concerning the crime rate and general or special prevention.<sup>25</sup> It also reflects the episodic and petty nature of juvenile delinquency.



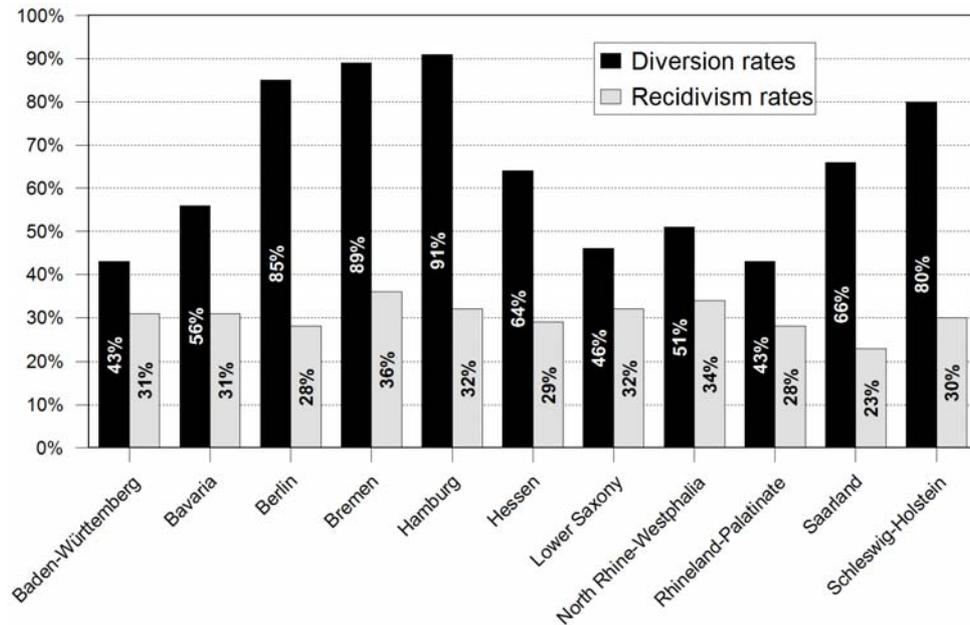
Source: *Storz* 1994; *Heinz* 2005; 2008.

**Figure 7:** Rates of formal and informal sanctions after a first sanction for larceny and a risk period of three years (juveniles, 1961 cohort).

<sup>23</sup> See *Heinz* 1994; 2005a; 2006; 2008; *Dünkel* 2003, p. 94.

<sup>24</sup> See *Storz* 1994, p. 197 ff.; *Heinz* 2005a, p. 306.

<sup>25</sup> See *Heinz* 2005; 2006.



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

**Figure 8:** 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).

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.<sup>26</sup> 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 4 and 5 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.<sup>27</sup>

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

<sup>26</sup> See *Bareinske* 2004, p. 188; *Heinz* 2006, p. 186.

<sup>27</sup> See *Bareinske* 2004, p. 136 f.

in the three years after being diverted than the control group of formally sanctioned juveniles.<sup>28</sup> *Crasmöller* therefore states that more repressive reactions contribute to an increase likelihood of further delinquency.<sup>29</sup>

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.<sup>30</sup> 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).<sup>31</sup> 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.<sup>32</sup>

## 8. SUMMARY AND CONCLUSION

Juvenile justice systems have developed sanctions systems that differ from the general criminal law by a large variety of educational and community based interventions. The principle that deprivation of liberty must remain a measure of last resort is recognized worldwide, but not all jurisdictions practice this principle in the same way. However, also in the Middle and Eastern European countries youth imprisonment and other custodial sanctions loose importance.

This development is accompanied by the implementation of new community sanctions, which have emerged in Western Europe since the late 1970s, in Eastern Europe since the early 1990s.

Diversion has in many countries gained major importance and has been proofed to be a successful alternative way of dealing with “everyday” petty offences. Mediation and other restorative justice measures such as family group conferencing have successfully been implemented in some countries (*Belgium, Germany, Northern Ireland* etc.) and are supported by recent reforms in many countries. Other “constructive” educational sanctions or measures (educational or vocational training, anti-aggression programmes) have also been successfully implemented and expanded in the last decades.

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<sup>28</sup> See *Crasmöller* 1996.

<sup>29</sup> See *Crasmöller* 1996, p. 124 f., p. 132.

<sup>30</sup> See *Schumann* 2003.

<sup>31</sup> See *Prein/Schumann* 2003: p. 200 ff.; *Schumann* 2003a, p. 213.

<sup>32</sup> See *Prein/Schumann* 2003, p. 208.

Some European countries face a lack of infrastructure for the use of alternative sanctions in practice. The *German* cooperation between youth justice and youth welfare could be an example of good practice in this respect.

The international human rights instruments such as the ERJOSSM of 2008 give a clear orientation to a humane and in terms of the rehabilitation of offenders promising further development of juvenile justice. This orientation deserves full support and national legislators and practitioners should take further advantage of exchanging good practices and experiences.

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