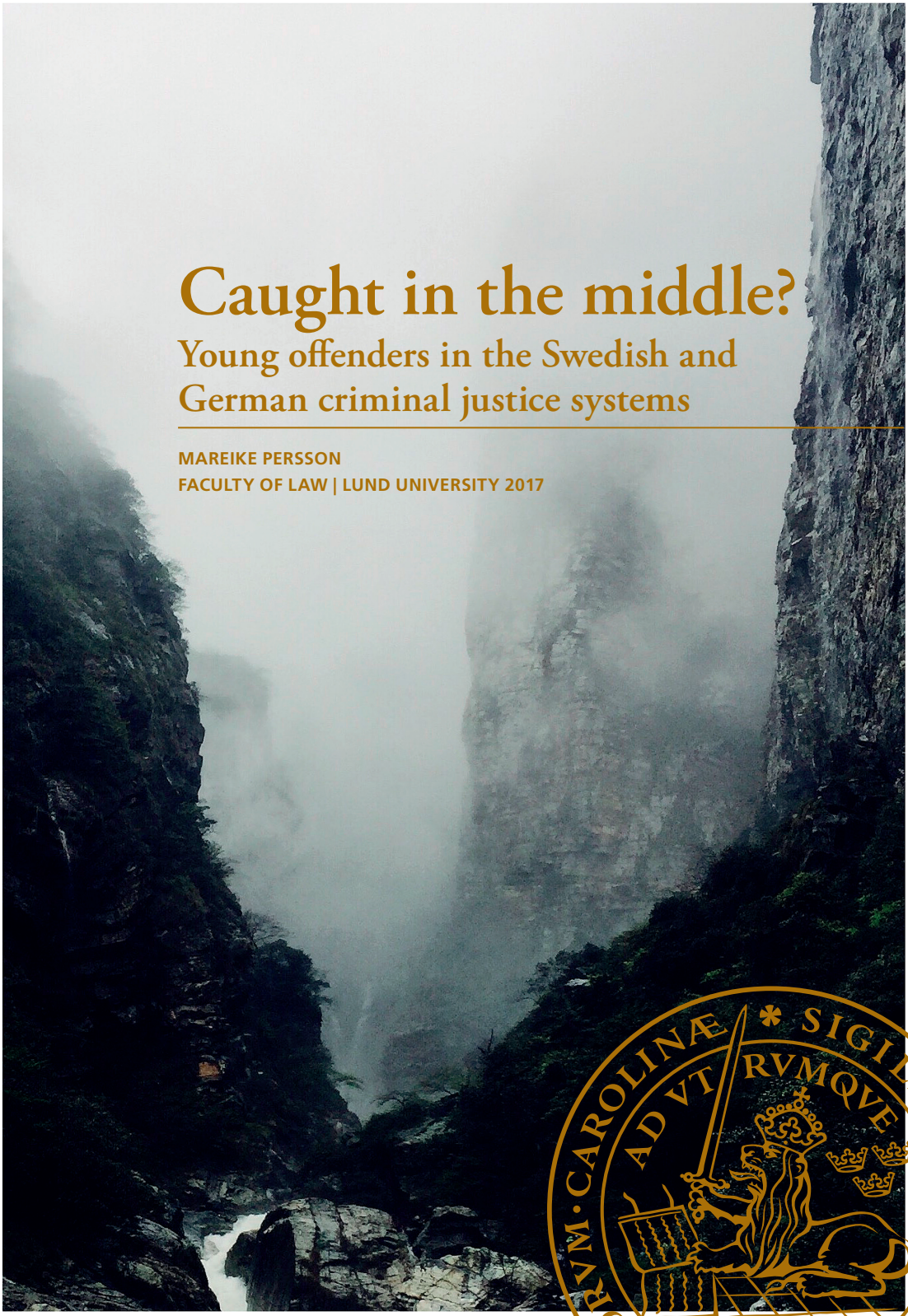
Caught in the Middle?

Young offenders in the Swedish and German criminal justice systems

Persson, Mareike

2017

Document Version:
Publisher's PDF, also known as Version of record



Caught in the middle?

Young offenders in the Swedish and German criminal justice systems

MAREIKE PERSSON
FACULTY OF LAW | LUND UNIVERSITY 2017

Caught in the middle?

Young offenders in the Swedish and German criminal justice systems

Mareike Persson

LUND
UNIVERSITY

DOCTORAL DISSERTATION
by due permission of the Faculty of Law, Lund University, Sweden.
To be defended at Pufendorfsalen, Juridiska institutionen, Lilla Gråbrödersgatan 3C. Date 24 May 2017, at 10:15.

Faculty opponent
Associate Professor Monica Burman

Organization	Document name
LUND UNIVERSITY	Doctoral Dissertation
	Date of issue
Author Mareike Persson	Sponsoring organization

Title and subtitle

Caught in the middle? Young offenders in the Swedish and German juvenile criminal justice systems

Abstract

How should we respond to a criminal offence committed by a young person? It is obvious that this is a very complex question. Multiple factors play important roles: the offence itself, but also the juvenile's background in terms of education, socialization, prior convictions, etc. Every case is unique, but the criminal legal system has to follow the principles of legal certainty and predictability. A legal response to juvenile offending is a consequence of the criminal action, but it also has to consider the lesser maturity and greater vulnerability of young offenders. This dualism makes a trial against a young perpetrator complicated. The ideology of culpability and punishment emphasizes the seriousness of a certain offence. The ideology of welfare accentuates the social situation of the young offender and his or her individual needs. Juvenile criminal justice systems seem to face contradictory demands: from the law in a strict sense and from society at large. They are caught in the middle: between the culpability for the offence and the best interests of the young person.

This thesis investigates the tension(s) between "welfare" and "justice" that the juvenile criminal justice system has to deal with (the "welfare/justice clash") in Sweden and Germany. After exploring the differences between young and adult offenders which underlie the welfare/justice clash, the project presents an in-depth investigation of the Swedish and the German juvenile criminal justice systems. Thus, this study is comparative in its approach. To illustrate the different forms the welfare/justice clash takes in the Swedish and the German juvenile criminal justice systems, I focus on these systems' guiding principles, legal responses and sentencing rules, procedural rules and safeguards, and on the figures in the juvenile courtroom. The investigation is not limited to a doctrinal study. I also present an empirical study, in the form of participant observations in the juvenile courtroom and semi-structured interviews with judges and public prosecutors from both countries, to gain insight into legal practice. The study of the two juvenile criminal justice systems shows that the theoretical welfare/justice clash is visible in books as well as in action, irrespective of the different approaches towards young offenders these countries pursue. However, this does not appear to give rise to any major problems in legal practice, as surprising as this may be. The practitioners in the juvenile courtroom seem to be able to balance and respect both ideologies.

In the analysis, I suggest an explanation for the ability of the juvenile criminal justice systems in Sweden and in Germany to function in spite of the tensions highlighted in the previous chapters. Here, I switch perspectives from an internal view of the juvenile criminal justice system to an external view. I suggest abandoning the purely legal dogmatic (justice) approach and the purely welfare-based or social approach and instead combining elements of them in an approach to juvenile criminal justice that understands it as a system in its own right.

Key words: Young offenders, Juvenile criminal justice systems, Juvenile legal consequences, Sentencing, Law in action, Autopoiesis, Socio-legal studies

Classification system and/or index terms (if any)

Supplementary bibliographical information	Language English
ISSN and key title	ISBN 978-91-7753-283-5 (print) 978-91-7753-284-2 (pdf)

Recipient's notes	Number of pages 408	Price
	Security classification	

Signature Mareike Persson Date 20.4.2017

Caught in the middle?

Young offenders in the Swedish and German juvenile criminal justice systems

Mareike Persson

LUND
UNIVERSITY

Coverphoto by canva.com

Faculty of Law
Department of Law

ISBN (print) 978-91-7753-283-5

ISBN (pdf) 978-91-7753-284-2

Printed in Sweden by Media-Tryck, Lund University
Lund 2017

Content

Acknowledgements

It was a gift to receive the chance to engage full-time with a subject I am passionate about and develop my academic skills. For that, I am thankful to the Faculty of Law at Lund University. This position came with a lot of enriching and exciting experiences.

I first of all want to thank my dedicated supervisors, Ulrika Andersson and Titti Mattsson, for their unfailing support, knowledge, wisdom, and care. It is they who grew and fostered my academic mind. They not only read and commented on the uncountable drafts, but guided me carefully and pushed me to the limits of my intellectual capacities by challenging my reasoning and contributing constantly with constructive critique. Dealing with critique is part of academic life; it was lightened by my friends and colleagues at the Law Faculty in Lund: first of all Martina Axmin but also David Dryselius, Eduardo Gill Pedro, My Pettersson, Anna Nilsson, Britta Sjöstedt, Ellika Sevelin, Josefin Gooch, Tova Bennet, Linnéa Wegerstad, Johan Adestam, Amin Parsa, Andrea Iossa, and Matthew Scott. Special thanks go to Martin Sunnqvist; our conversations were instrumental to understand the Swedish legal system, also from a practitioners angle. I further enjoyed inspiring exchanges with my PhD colleagues in Norway, Ingun Fornes and Morten Holmboe, as well as Laura Tarvainen in Finland and Anne-Lie Vainik here in Sweden, with whom I share research interests and ideas. Being part of the criminal legal team in the Faculty of Law together with Helén Örnemark Hanssen, Sverker Jönsson, and Christoffer Wong was a great experience. Furthermore, Linda Gröning provided valuable insight at my final seminar, for which I am very thankful; the same is true of Rasmus Wandall and Eva Schömer at my mid seminar. Regarding more practical aspects, I want to thank the staff at the Law Faculty in Lund, especially Helena Josefsson, Hans Liepack, and Tony Alexandersson, and the helpful librarians, especially Gunilla Wiklund. Tim Carter improved the language.

Regarding the empirical part of this project, fieldwork cannot be conducted in any institution without the cooperation and the assistance of its members. This study is no exception. I would like to express my gratitude to the staff of the court in Lund and the staff of the juvenile court in Bremen for so willingly accepting the continuous presence of an observer in the courtroom. Furthermore, I am very thankful for the open and positive attitude of the judges and public prosecutors in Sweden and in Germany who volunteered for the interview study.

Furthermore, I want to thank Caro for engaging with the subject and providing important, intelligent, and inspiring insights. You know me better than I know myself.

I am also most grateful to Daniel, not only for his help throughout the whole time of this project, but also for his indestructible belief in me and my capabilities, which made me grow.

For their unfailing love and continuous excitement about my project, I thank my big, noisy, and always supportive family, but especially my parents, Anke and Wolfgang. My daughters Frida and Klara are a constant source of wonder, love, and comfort. It is amazing how your small lives can keep mine in perspective. And last but not least: Erik – my partner, my lover, my best friend. You are my anchor windward. None of this would have been possible without you.

Table of Abbreviations

BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BrB	Brottsbalk (1962:700) (Swedish Criminal Code)
Brå	Brottsförebyggande Rådet (the Swedish Crime Prevention Council)
BtMG	Betäubungsmittelgesetz (German Narcotics Act)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BZRG	Bundeszentralregistergesetz (German Law on the Federal Register of Judicial Information)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
FUK	Förundersökningskungörelsen (1947:948)
GVG	Gerichtsverfassungsgesetz (German Judicature Act)
HD	Högsta Domstolen (Swedish Supreme Court)
JGG	Jugendgerichtsgesetz (German Juvenile Justice Act)
JWG	Jugendwohlfahrtsgesetz (German Juvenile Welfare Act)
LSU	Lag (1998:603) om verkställighet av sluten ungdomsvård (Swedish Act on Closed Institutional Treatment)
LUL	Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare (Swedish Act on Special Provisions for Young Offenders)
LVU	Lag (1990:52) med särskilda bestämmelser om vård av unga (Swedish Act on Special Provisions about Care for Juveniles)
RB	Rättegångsbalk (1942:740) (Swedish Code of Judicial Procedure)
RF	Kungörelse (1974:152) om beslutad ny regeringsform: the Swedish Constitution
RStGB	Reichsstrafgesetzbuch (Penal Code of the German Empire)

RJGG	Reichsjugendgerichtsgesetz (Juvenile Justice Act of the German Empire)
SGB	Sozialgesetzbuch (German Social Security Code)
SkL	Skådestandslag (1972:207) (Swedish Damages Act)
SoL	Socialtjänstelag (2001:453) (Swedish Social Services Act)
SOU	Statens Offentliga Utredningar (The State's Official Investigations)
StPO	Strafprozessordnung (German Code of Criminal Procedure)
StGB	Strafgesetzbuch (German Criminal Code)
UNCRC	United Nations Convention on the Rights of the Child

Chapter 1

Introduction

In this dissertation I investigate how the Swedish and the German criminal justice systems deal with young offenders.[1] To that end, I study and contrast the guiding principles of each system – the principles with respect to which the systems orient themselves. I also examine and compare each system's legal responses and sentencing processes, procedural rules, and personnel aspects. Throughout the thesis I focus on the tensions that arise between the issues of welfare and justice when the offender is a young person.

1.1. The juvenile dilemma

Juveniles occupy a difficult place in society. They are considered both a promise and a threat. This ambiguity is reflected in society's attitudes towards juvenile delinquency: on one hand, young offenders are considered a vulnerable, at-risk group; on the other hand, they are often also seen as immoral, reckless individuals who consciously harm other people's lives or property. This creates a tension between concern and anger, treatment and punishment, supporting measures and control.[2] The importance of both welfare considerations and

[1] Offenders in this sense are, according to Principle 2.2(c) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, the so-called Beijing Rules, all young persons who are alleged to have committed or who have been found to have committed an offence. It covers suspects, arrestees, detainees, those accused of offences, defendants, and convicts.

[2] In criminological discussions, young offenders are labelled as a problematic group but at the same time seen as "uncorrupted bearers of the future"; see Felipe Estrada and Janne Flyghet, *Den svenska ungdomsbrottsligheten* (3rd Edition. Lund: Studentlitteratur, 2013), who emphasize the difficulties this group faces in being the subject of both positive expectations and negative fears (11–13). See also Tapio Lappi-Seppälä, „Nordic Youth Justice," (*Crime and Justice* 2011, Vol.40, No.1: 199-264), who points out that all juvenile justice systems struggle to balance welfare and justice or treatment and punishment (246). Julia Fionda, *Devils and Angels – Youth policy and*

justice considerations[3] in dealing with young offenders is recognized by most authors – both practitioners and scholars – working in Western legal systems.[4] Because in dealing with young perpetrators[5] legal systems have an additional aim, an aim I have chosen to call "education", alongside traditional criminal objectives like punishment, they encounter greater tension than they do in dealing with adult offenders. Apart from the criminal legal response to the criminal action, the practitioners in the juvenile criminal justice system[6] also have to keep in mind the educational and treatment needs of the offender, given that young offenders are less mature than adult offenders. The assumption of this lack of maturity is at the very heart of juvenile criminal justice systems, and it offers the hope that the young perpetrator might yet be influenced in a positive way. In addition to the long-established research into young offending in the fields of social science, criminology, and developmental psychology, recent neuroscientific advances suggest that the time between childhood and adulthood is crucial for the development of the brain. This research thus claims

---

youth crime" (Oxford: Hart Publishing, 2005), speaks of "devils and angels". For Sweden, see prop.2014/15:25, which emphasizes the difficulty of balancing social considerations against the rule of law in the case of young offenders (20, 24).

[3] I engage with these terms in more detail and define them in section 1.2.

[4] In Sweden, prop. 1997/98:96, 138 says that young offenders should first of all be a matter for social services (also prop.2014/15:25, 24.), even if the change in the law in 2007 places the emphasis on proportionality. Furthermore, Christian Diesen, Claes Lernestedt, Torun Lindholm and Tove Pettersson, *Likhet inför lagen* (Falun: Natur och kultur, 2005), outline the difference between young and adult offenders, emphasizing the guiding principle of "the best interests of the child" as set out in the UN Convention on the Rights of the Child (UNCRC) (see Diesen, Lernestedt, Lindholm, and Pettersson (2005), 204). For Germany, see for example Dieter Dölling, „Besonderheiten des Jugendstrafrechts," in *Handbuch der forensischen Psychiatrie*, 435-510 (Darmstadt: Steinkopff Verlag, 2007), Hans-Joachim Plewig, "Konfrontative Pädagogik," in *Handbuch Jugendkriminalität – Kriminologie und Sozialpädagogik im Dialog*, 427-40 (2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften 2011), Friedrich Schaffstein, Werner Beulke, and Sabine Swoboda, Sabine, *Jugendstrafrecht* (Stuttgart: W. Kohlhammer GmbH, 2014) and Ellen Schlüchter, *Plädoyer für den Erziehungsgedanken* (Berlin: Walter de Gruyter, 1994). Apart from that, for an example from outside Sweden and Germany, see Micheal A. Corriero, *Judging Children as Children – A Proposal for a Juvenile Justice System* (Philadephia: Temple University Press, 2006), a judge specializing in juvenile justice in the City of New York who calls specifically for a system designed to educate and socialize children (196).

[5] I employ the terms "young offenders" and "young perpetrators" interchangeably.

[6] For the notion of a juvenile criminal justice system, see section 1.3.

to lend neuroscientific support to the long-held view concerning adolescents' lack of maturity.[7]

How, then, does the law respect these differences between young and adult offenders, and how does it deal with the tensions they create? From a legal dogmatic perspective, the juvenile criminal justice system confronts tensions in relation to the rule of law, the latter demanding proportionality, predictability, transparency, equality, and legal certainty. The ideology of culpability and punishment, which I refer to as the "ideology of justice", emphasizes the seriousness of a certain offence and prior criminal conduct. From another perspective, however, dealing with young offenders demands flexibility, so as to be able to consider and meet their individual needs. This "ideology of welfare" therefore stresses the social situation of the young offender and his or her individual circumstances.[8] Somehow, both ideologies have to interact within the framework of the juvenile criminal justice system.[9] This tension makes the trial of a young offender a complicated matter.

When one looks more closely at the juvenile criminal trial, one sees that this tension – the tension between the ideology of justice and the ideology of welfare – keeps cropping up. It emerges in the context of the procedural rules, with respect to the form and choice of the legal response, and when it comes to the dynamics of the practitioners present in the courtroom. Apart from the wide variety of legal responses available for young offenders, the different focus of the juvenile criminal justice system complicates things further: the aim is to turn the young perpetrator into a law-abiding citizen, making use of the fact that a young offender can still be influenced and formed. The juvenile criminal justice system has to combine and balance justice and welfare considerations. Welfare considerations play a decisive role when dealing with young offenders, but the proceedings still take place in a legal setting. From a legal dogmatic perspective, these considerations are difficult to incorporate within the legal framework, for

[7] For a more detailed discussion, see chapter 2.

[8] These opposing poles have been described by scholars using a multitude of terms. Some of them call the ideology of justice "legalism", "legal rationality", or "due process"; the ideology of welfare is sometimes described as "individualized justice", "responsive justice", or "paternalism".

[9] Burman describes this tension from a perspective of the UNCRC as a "spänning mellan systemskäl och barns mänskliga rättigheter"; see Monica Burman, "Ungdomspåföljder och barns rättigheter," in *Svensk juristtidning 100 år,* eds. Stefan Strömberg et al., 162-75 (Uppsala: Iustus förlag, 2016), 173. Asp speaks of the handling of conflicts of interests; see Petter Asp, "Barn(straff)rätt," in *Barnrätt – En antologi,* eds. Ann-Christin Cederborg and Wiweka Warnling-Nerep, 68-85 (Stockholm: Norstedts Juridik, 2014), 69.

this perspective constantly strives after the clear boundaries demanded by the rule of law. In criminal proceedings, the court is bound by the law, which aims to create order and to impose sanctions if breached. Juvenile criminal justice systems seem to face contradictory demands: from the law in a strict sense and from society at large. They are caught in the middle: between the culpability for the offence and the best interests of the young person. However, in the framework of juvenile criminal justice, the justice and welfare systems are considered to be competing systems which have a duty to cooperate with one another.[10] This tension is expressed not only by several different scholars[11] but also in the commentary to the so-called Beijing Rules:[12]

> The main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as the following:
>
> a. Rehabilitation versus just desert;
>
> b. Assistance versus repression and punishment;
>
> c. Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;
>
> d. General deterrence versus individual incapacitation.

[10] This is expressed in the Swedish legislation in prop. 1989/90:28, 56: "I praktiken måste stöd och kontroll gå hand I hand". A similar tension emerges in relation to police work with young offenders, which was investigated from a criminological angle by Tove Pettersson, *Att balansera mellan kontroll och makt – lokala polisers arbete med ungdomar* (Lund: Studentlitteratur, 2012).

[11] See the scholars mentioned in footnotes 2 and 4. Furthermore, Michael Tärnfalk, *Barn och brott- en studie om socialtjänstens yttranden i straffprocessen för unga lagöverträdare* (Stockholm: US-AB Print Center, 2007), points out that the different aims – a forward-looking perspective on the welfare side and prediction about the future with emphasis on the child's best interests and protection versus a retrospective perspective in criminal law with emphasis on deterrence and punishment on the basis of the crime itself – create tension between different societal strategies (19).

[12] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, which laid the groundwork for the UNCRC of 1989; see John Muncie and Barry Goldson (eds.), *Comparative youth justice critical issues* (London: Sage, 2006), 201-11.

> The conflict between these approaches is more pronounced in juvenile cases than in adult cases. With the variety of causes and reactions characterizing juvenile cases, these alternatives become intricately interwoven.[13]

King and Piper label this "the welfare/justice clash".[14] In the framework of this thesis, I employ this expression to capture the tensions arising out of the fact that the offender is a young person. It seems as if the welfare/justice clash is unavoidable within both the justice system and the social or welfare realms when employing their respective theories and analytical tools. In theory, it does not seem possible to force juvenile criminal justice into one framework or the other.[15] According to my empirical investigations, however, the practitioners active in the juvenile criminal justice system seem to be able to balance these competing demands and to respect both ideologies.[16]

1.2. Welfare considerations and justice considerations

The welfare/justice clash occurs when welfare and justice considerations have to be balanced with one another so as to satisfy both.

In this study, expressions of the ideology of justice – "justice considerations" – are drawn from a dogmatic criminal legal perspective.[17] They refer to the rule of law, and they include, for example, proportionality, predictability, transparency, and equality, as well as the right to a fair trial. In this context, I adopt a perspective of legal certainty.

Whenever I refer to "welfare considerations" in this thesis, I mean principally to refer to the conclusion of disciplines other than law[18] and to emphasize the

---

[13] See the Beijing Rules commentary to point 17.

[14] See Michael King and Christine Piper, *How the Law Thinks About Children* (2nd Edition. Aldershot: Arena, 1995), 4. Lewis Yablonsky, "The Role of Law and Social Science in the Juvenile Court," (*The Journal of Criminal Law, Criminology, and Police Science* 1962, Vol. 53, No.4: 426-36) calls this tension the "legal-social mixture" (427).

[15] See the discussions in chapters 3 to 6.

[16] See chapter 7.

[17] For further elaboration on what dogmatic studies entails, see section 1.5.2.1.

[18] For example, developmental psychology, criminology, and even developmental neuroscience.

specific features of a young offender, as compared to an adult offender, that trigger the need for special treatment. They are expressions of the ideology of welfare. However, under this heading, I also place the "best interests of the child", as they are understood by the UN Convention on the Rights of the Child (UNCRC).[19] This term builds on the specific features of children and is also employed within the legal framework, for instance in social law. Consequently, some of the "welfare considerations" described above do also respect considerations of justice. This means that welfare considerations are not exclusively extra-legal. What appears to be a clash between welfare and justice considerations may in fact be a clash between criminal law and non-criminal law, since aspects like proportionality and predictability are interpreted and balanced differently in, for example, social law and criminal law. This is due to the fact that criminal law is the sharpest sword a state has at its disposal to employ against its own citizens; the criminal law may deprive a person of his or her liberty. This leads to the particular need for safeguards in the form of the rule of law and, further, a narrow interpretation of what the rule of law entails.

The welfare/justice clash arises out of the fundamentally different – even diametrically opposed – aims of the ideology of justice and the ideology of welfare.[20] The perspective of justice is backwards looking: it is concerned with the criminal offence and presupposes the possibility of foreseeable legal consequences that are proportionate to the crime committed.[21] The perspective of welfare, education, or treatment focuses on the present situation and the future. The ideology of welfare is guided by the "best interests of the child" as described by the UNCRC. This means that treatment (or education) takes a front seat, which presupposes an individualized view of the perpetrator and his or her needs[22] and a great degree of flexibility in terms of the legal response. The ideology of justice emphasizes legal certainty for the citizen, which includes,

[19] See Part I Art.3 section 1 of the UNCRC, which states that the "best interests of the child shall be a primary consideration".

[20] In general terms, see Beth Grothe Nielsen, "Mindreårige lovovertraedere mellem to ideologier: den strafferetlige og den socialretlige," (Retfaerd 1983, No.24: 66-88); see also Tapio Lappi-Seppälä and Anette Storgaard, "Unge i det strafferetslige system," (*Tidsskrift for Strafferett* 2014, No.4: 333-59), 334; also Anna Kaldal and Michael Tärnfalk, "Samhällets hantering av barn som begår brott – en verksamhet i flera spar," in *Tvångsvård av barn och unga*, 239-61 (Stockholm, Wolters Kluwer: 2017) and Asp (2014), 74-5.

[21] See Stina Holmberg, "Påföljdssystemet för unga," in *Den svenska ungdomsbrottsligheten*, 313-32 (3rd Edition. Lund: Studentlitteratur AB 2013), 316-17.

[22] See Grothe Nielsen (1983), 75.

amongst other things, predictability, transparency, evidence for guilt, and equality in sentencing.[23] While the ideology of welfare has a strong focus on individualized help, the ideology of justice foregrounds punishment and coercion in the name of societal concerns.[24]

In sum, what separates considerations of welfare and considerations of justice are their different foundations, their different backgrounds, and their different perspectives.

1.3. The notion of a juvenile criminal justice system

The objects of study for this thesis are the juvenile criminal justice systems of Sweden and Germany. As a conceptual starting point, I adopt a legal perspective on the justice system: a justice system consists of legal norms, procedural aspects, institutions, and the particular agents within institutions.[25] Such a justice system is, in my view, a *criminal* system when it seeks to uphold social control, to control and minimize crime, and to impose legal consequences for criminal offences by those who have reached the age of criminal capacity.[26] Note here

[23] See Lappi-Seppälä and Storgaard (2014), 334.

[24] See Grothe Nielsen (1983), 84.

[25] The notion of a legal system is broad, complex, and problematic. Scholars such as H.L.A. Hart, *The Concept of Law* (3rd Edition. Oxford: Clarendon Press, 2012: 193-200); Joseph Raz, *The Concept of a Legal System – An Introduction to the Theory of Legal System* (2nd Edition. Oxford: Clarendon Press, 1980); and Robert S. Summers, *Form and Function in a Legal System – A General Study* (New York: Cambridge University Press, 2006) have engaged with it and these engagements give an impression of the depth of the problem. However, in this thesis I content myself with the more pragmatic approach towards the concept of a legal system that I describe here – at least for chapters 3 to 7. It is inspired by Raz's (1980) notion of the law. Raz points out as the three most general and important features of the law that it is normative, institutionalized, and coercive. It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalized in that its application and modification are to a large extent performed or regulated by institutions. Furthermore, it is coercive in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force. Raz (1980) indicates that every theory of the legal system must be compatible with an explanation of these features and take account of them (3).

[26] When talking about "criminal capacity", I mean the age threshold established by a certain country above which a young offender shall be presumed to have the capacity to violate the criminal law. The term "capacity" is in line with Art.40(3a) of the UN Convention on the Rights

that I employ the term "legal consequence" and not "sanction".[27] A criminal sanction in the general understanding of the term is an evil or discomfort inflicted on the offender because he or she broke the rules.[28] The foundation for such a sanction is the need to countermand the offence and restore the legal position infringed by it, but considerations relating to special and general prevention also play a role.[29] However, in criminal law, the technical term "sanction" is not the only possible legal consequence for a criminal offence, either in Sweden or in Germany.[30] In the German juvenile criminal justice system, the legislation repeatedly emphasizes that the legal consequences of the Jugendgerichtsgesetz (JGG) are not sanctions in the traditional criminal justice sense and do not have a retributive component.[31] This means that it is not the imposition of sanctions that defines a juvenile criminal justice system but rather the possibility of imposing legal responses more generally.

What makes the systems examined here "juvenile" criminal justice systems is the fact that the offenders they deal with are young persons. Because of their immaturity and relative lack of life experience, both Swedish and German criminal law apply specific rules to young offenders. Young persons' lack of

---

of the Child. I engage further with this notion in section 2.1., in section 4.1.1. (for Germany), and in section 4.1.2. (for Sweden).

[27] I have chosen "sanction" (and not "punishment") as my translation of the Swedish "straff" and the German "Strafe". In relation to the question of whether punishment should be a defining factor for criminal law and the difficulties relating to how to integrate treatment, see the interesting thoughts of Fletcher (1998), 25ff., especially 26–7, about young offenders (in relation to constitutional rights granted in the framework of the criminal trial in the United States).

[28] For Sweden, see Petter Asp, Magnus Ulväng and Nils Jareborg, *Kriminalrättens Grunder* (2nd Edition. Uppsala: Iustus Förlag AB, 2013), 15 and for Germany, see Michael Köhler, *Strafrecht Allgemeiner Teil* (Berlin and Heidelberg and New York: Springer, 1997), 37. This is a simplified account of a complex field (for further reading see Nikolaos K. Androulakis, "Über den Primat der Strafe," (*Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 1996, Vol.108, No.2: 300-32), especially his definition on 303.

[29] See Köhler (1997), 37 and Asp, Ulväng, and Jareborg (2013), 30–1. Note that there are a multitude of theories engaging with sanctions and their foundation. However, a presentation of these lies outside the scope of this thesis.

[30] See Asp, Ulväng, and Jareborg (2013), 16 for Sweden and BeckOK StGB/von Heintschel-Heinegg StGB (2016), §38 margin no.1 for Germany.

[31] The only exception is juvenile imprisonment according to §17 JGG, which constitutes a criminal sanction in the literal sense; see section 4.1.1.4. See also Eberhard Schmidhäuser, *Vom Sinn der Strafe* (2nd Edition. Göttingen: Vandenhoeck & Ruprecht 1971), 35.

maturity implies less culpability on the one hand and a higher level of vulnerability and formability on the other hand. Furthermore, it has an impact on issues of deterrence and proportionality.[32]

There are two ways to approach age in the legal context: the "status approach", which is based on biological age, and the "competence approach", which is based on the maturity of the young offender and takes into account facts about the individual.[33] Identifying a boundary between childhood and adulthood becomes important because a person's legal identity as either a child or an adult may confer a series of legal entitlements, duties, responsibilities, and accountability for actions.[34] In relation to criminal law, these approaches seek to establish a point in a child's life after which they may be held accountable for their actions that cause harm to others or society generally.[35] However, the disadvantages of each approach are rather obvious: a status approach might be too static, not paying enough attention to the individual and therefore conflicting with, for example, the UNCRC. On the other hand, a competence approach, with its individualized shape, may conflict with the rule of law, specifically with predictability and transparency.[36]

Article 1 of the UNCRC defines a "child" as a person below the age of eighteen years, unless under the law applicable to the child age of majority is attained earlier. However, this classification of "child" and "adult" would render the distinctions made in the juvenile criminal justice systems confusing. The juvenile criminal justice systems under scrutiny here set thresholds for criminal capacity for children, distinguishing between "child" and "criminally capable child". Additionally, offenders in the 18–20 years age bracket are not treated as "adult" offenders, for this latter category includes only those offenders over the age of 21 years. Consequently, I have chosen to define young offenders between 14 and 17 years of age in Germany and between 15 and 17 years of age in Sweden as "juvenile offenders", and offenders between 18 and 20 years of age in

[32] I engage with this further and in detail in chapter 2.

[33] See Julia Fionda, "Children, young people and the law," in *Children and young people's worlds*, 127-143 (Bristol: The Policy Press, 2009), 127-8.

[34] Ibid., 127.

[35] I return to this aspect in relation to the two systems under investigation in sections 4.1.1. and 4.1.2.

[36] This reasoning is connected to questions regarding the guiding principles of the two juvenile legal systems. Consequently, I do not elaborate further on these aspects here but return to them in chapter 3 and in the country descriptions in chapter 4.

either system as "young adult offenders".[37] Perpetrators under the age of 14 or 15 years of age in Germany and Sweden, respectively, I define as children below the age of criminal capacity. Though this deviates from the definition given in the UNCRC, I consider such sub-divisions necessary for the sake of clarification.

All this means that when I employ the term "juvenile criminal justice system", I refer to the legal provisions regarding young offenders from a criminal justice perspective – as well as the institutional framework, including the practitioners and the dynamics in the juvenile courtroom.[38] This concept of a juvenile criminal justice system is reflected in the structure of this study: it first engages with guiding principles (chapter 3), continues with specific norms regulating legal responses (chapter 4), then turns to procedures (chapter 5), and finally examines institutional aspects (chapter 6). The institutions I consider in detail are the juvenile court and, in particular, the juvenile judge, the public prosecutor, the defence counsel, and the social services.

1.4. Aim

The overarching aim of this thesis is to investigate and analyse the tensions between justice and welfare (the welfare/justice clash) in the juvenile criminal justice systems of Sweden and Germany. I study what influence the fact that an offender is a young person has in the criminal justice systems of these two countries.

This project takes as its point of departure the assumption that young offenders should be treated differently from adult perpetrators. Factors such as the need to respect the "best interests of the child" as understood in the UNCRC, the lesser level of maturity and culpability of children and younger people, and children's greater sensitivity to punishment and so increased vulnerability all imply an increased need to protect young offenders.[39] This leads to specific procedures for the treatment of young offenders. Even if the substantial criminal law is generally the same for juvenile, young adult, and adult offenders, differences in the juvenile criminal justice systems, based on welfare considerations, can be found in relation to the following aspects: the guiding principles, legal responses

[37] See also section 4.1.1. for Germany and section 4.1.2. for Sweden.

[38] This reflects my view of law as living law, which I elaborate below in section 1.5.1.

[39] For further discussion, see chapter 2.

and sentencing, procedural rules, and the personnel who deal with young perpetrators in the juvenile courtroom.

The specific characteristics of juvenile criminal justice systems, which result from taking into account considerations of welfare, cause tensions in relation to the rule of law. This is the "welfare/justice clash" described above. To understand this conflict and the way it is dealt with, I employ the Swedish and the German juvenile criminal justice systems as case studies; these cases provide the reader with an insight into legal rules and practices in this particular field. In other words, I study and present these two juvenile criminal justice systems in depth as law in books (chapters 3 to 6) and as law in action[40] (chapter 7). Consequently, this dissertation attempts to cover all the aspects of the Swedish and the German criminal justice systems that reflect the special status of young offenders. Since most of these arise in the context of the juvenile criminal trial, this is my main focus.[41]

In the analysis in chapter 8, I suggest an explanatory model for the ability of the juvenile criminal justice systems in Sweden and Germany to function in spite of the tensions highlighted in the preceding chapters. I want to invite the reader to switch perspectives and adopt a different approach towards young offenders: I suggest abandoning the purely legal dogmatic (justice) approach and the purely welfare-based or social approach and instead combining elements of them together; here, systems theory, in the form of autopoiesis, is my main source of inspiration. With this tool as a lens, I investigate from a different perspective what happens when justice and welfare meet in the framework of the juvenile criminal justice system. My research shows that even if the welfare/justice clash is evident both in law in books and in law in action, it does not appear to give rise to any major problems within legal practice, as surprising as this may be. As mentioned above, the practitioners in the juvenile courtroom seem to be able to balance the competing demands of both ideologies. I propose a way around the clash that involves seeing the juvenile criminal justice system not in the framework of "welfare" or "justice" but rather as its own entity, as an autopoietic sub-system that follows its own rules and parameters. I claim that because the juvenile criminal justice system has specific programmes[42] that shape its guiding principles, legal responses and sentencing, procedural rules, and personnel, it is

[40] I discuss these terms further in section 1.5.1.

[41] See also section 1.7.

[42] I engage with the different terms defining and shaping an autopoietic system in detail in chapter 8.

appropriate to consider this system as its own specific sub-system in the framework of an autopoietic approach.

Consequently, I phrase my research question as follows:

Research question:

How are the tensions between justice and welfare dealt with in the juvenile criminal justice systems of Sweden and Germany?

Sub-questions:

In which ways do young offenders differ from adult offenders?

What form does the welfare/justice clash take in the juvenile criminal justice system of Sweden and in that of Germany? Which rules and theoretical aspects (law in books) and aspects of legal practice (law in action) of the juvenile trial in each of these criminal justice systems reflect the fact that the offender is a young person?

How can we explain the ways in which these two juvenile criminal justice systems deal with the welfare/justice clash?

1.5. Methodology, methods, and material

According to Banakar, "methodology" captures the interaction between theoretical assumptions and methods (or techniques) of research.[43] Thus, in this section, I first outline my epistemological standpoint, which in turn leads me to a certain set of methods and materials.

1.5.1. Law in books and law in action

To explain the methodology employed in this project, I must say a few words about the understanding of "law" in the context of juvenile criminal law upon which I build this dissertation. In short, my concept of law is not reduced to black-letter law, to rules and norms. I cast the net wider and adopt a more sociological understanding that includes law in action.

[43] See Reza Banaker, *Normativity in Legal Sociology – Methodological Reflections on Law and Regulation in Late Modernity* (Heidelberg and New York: Springer, 2015), 5.

Law in action describes the practical side of law; it examines, mainly through empirical research, how black-letter law comes to life and how it is transformed into practice. The term "law in action" itself is rather well established and is not only applied in relation to criminal law but in all legal disciplines.[44] It originates at the very beginning of the sociology of law in Pound's seminal article "Law in Books and Law in Action", published in 1910 in the United States.[45] Almost contemporaneously with Pound's article, Ehrlich, writing in a European context, introduced the notion of "living law" in his 1913 work on the "Principles of the Sociology of Law".[46] Ehrlich's pair of opposites were "Rechtssatz" (legal proposition) and "Rechtsleben" (legal life). Although it is sometimes claimed that this pair mirrors the concept of law in books and law in action, Nelken has convincingly shown the differences between Pound's and Ehrlich's approaches.[47] He has emphasized that Pound's law in books refers solely to rules and norms whereas Ehrlich's supposedly equivalent term – "norms for decision" – includes not only norms and rules but also the actual patterns of decisions by legislative and judicial bodies.[48]

Pound developed his distinction between law in books and law in action with a view to harmonizing those two by demanding a change of law.[49] My intention

[44] See Roscoe Pound, "Law in Books and Law in Action," (*American Law Review* 1910, Volume 44: 12-36); Mahnoush H. Arsanjani and W. Michael Reisman, "The Law-in-Action of the International Criminal Cour,t" (*The American Journal of International Law* 2005, Vol. 99, No 2: 385-403); David Nelken, "Law in action or living law? Back to the beginning in sociology of law," (*Legal studies* 1984, Vol. 4, No 2: 157-74); Max Travers and John F. Manzo, *Law in Action – Ethnomethodological and Conversation Analytic Approaches to Law* (Aldershot: Dartmouth Publishing Company, 1997).

[45] Pound (1910). For an overview of the development of research into law in action, see Jacob Beuscher, "Law-in-Action research in rural areas of the United States," (*Wisconsin Law Review* 1969: 757-72).

[46] Eugen Ehrlich, *Principles of the Sociology of Law* (Cambridge: Harvard University Press, 1936, first published 1913, second printing 2002).

[47] For further reading see Nelken (1984).

[48] Ehrlich was criticized by Kelsen for confusing normative and descriptive analysis, which is not surprising considering the fact that legal theory in Kelsen's sense was necessarily monistic. However, I agree with Nelken that "both Pound and Ehrlich were less concerned with analytic solutions of the problem of defining law than with the uses to which their definitions could be put" (Nelken (1984), 161). Pound sees law as an instrument that may be used to solve social problems. Ehrlich sees law as an outcome of social processes and social change rather than a tool of intervention.

[49] See Nelken (1984), 166.

in investigating law in action is not to criticize law in books. I take a different approach towards the concept of law. I see law in action as an extension of law in books, an extension that gives life to law in books. Consequently, I do not want to contrast these two concepts but to sketch them as two parts of a broader picture, employing Ehrlich's sociological understanding of law to investigate and explain the juvenile criminal justice system. Since my research examines the legal realm – namely, the juvenile courtroom – I investigate Ehrlich's norms for decision.[50] From the perspective of my research, Ehrlich's concept of norms for decision encompasses most of what Pound treats under both the heading of law in books and that of law in action.[51] Nevertheless, I still employ Pound's expressions, since they capture the distinction I intend in referring to the black-letter law and to the empirical part of my study, and they may make it easier for the reader to follow which aspect I am referring to.

When examining the law, I follow Cotterrell, whose definition of law is, as he points out, as much a matter of practices as of ideas; on his view, it is not just doctrine that is to be considered but *institutionalized* doctrine – ideas created, developed, interpreted, and applied by specific agencies and institutions existing for these purposes.[52] One reason for adopting this broader understanding of law is the fact that it is often falsely assumed that the letter of law reflects what courts actually do, and this assumption then comes to be taken as the truth

[50] To digress briefly, I would like to emphasize to the reader the difference between Ehrlich's term "living law" – which he might best be known for – and "norms for decision". The term "living law" mainly refers to the norms recognized as obligatory by citizens in their capacity as members of associations and therefore goes beyond what is intended by the term "norms for decision". Living law means rather the idea of informal norms within formal organizations (see Ehrlich (1936), 439). "Norms for decision" and "living law" are not necessarily in competition because they apply under different circumstances. Specifically, the need for norms for decision arises only in cases of dispute and conflict (in my case, when the young offender is in conflict with the state because he or she broke the law), whereas living law prevails under normal circumstances (see Nelken (1984), 167).

[51] See Nelken (1984), 165.

[52] Roger Cotterrell, "The Representation of Law's Autonomy in Autopoiesis Theory," in *Living law: studies in legal and social theory*, 121-44 (Surrey: Ashgate, 2008)), further described such an approach as abandoning the "internal/external" distinction in legal studies. According to Cotterrell, the external perspective (of the social scientist with his or her tools) has refused to stay external. "The barbarians have entered the citadel" (123). Håkan Hydén, *Rättssociologi som rättsvetenskap* (Lund: Studentlitteratur, 2002) expresses the same thought, which implies that the norm system is not complete before it is applied in a specific case. He calls this a "legal-realistic standpoint" (my translation of Hydén (2002), 19).

about the everyday handling of criminal cases in court.[53] As Banakar (referring to Norrie) points out, legal rules and doctrine, which according to a strict positivistic understanding are employed to guide the practice of law, ignore the broader social context in which rules and doctrine need to be interpreted before they are transformed into legal practice.[54] Ehrlich captured this thought as follows:

> To attempt to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond. The water put in the pond is no longer a living stream, but a stagnant pond.[55]

Out of this broader social and historical context, both legal practices and also institutions of law have emerged.[56] Courts take on a nature of their own, as has been shown time and time again by studies conducting organizational research of law in action.[57] As the most important set of procedures in the legal system, the trial has its own roles and its own rules.[58] The actual social practices of courts, prosecution offices, and police agencies will always differ from their formal ideals.[59] The practitioners make it possible for law and its context to coexist. But still, they produce legally valid verdicts. Wandall criticizes discussions about sentencing for often taking place on the wrong level: the letter

---

[53] This is criticized by Rasmus Wandall, *Decisions to Imprison – Court Decision-Making Inside and Outside the Law* (Hampshire: Ashgate, 2008), 147. Pauline Westerman, "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law," in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline*?, 87-110 (Oxford: Hart Publishing, 2011) points in the same direction by claiming that there is a growing need for an empirical orientation in legal research. Denis J. Galligan, "Legal Theory and Empirical Research," in *The Oxford Handbook of Empirical Legal Research*, 976-1001 (Oxford: Oxford University Press, 2010) also argues for linking legal theory and empirical research.

[54] See Banakar (2015), 61 and Alan Norrie, *Law and the beautiful Soul* (London: GlassHouse Press, 2013), 20-31.

[55] Ehrlich (1936), 488.

[56] See Banakar (2015), 61 and Norrie (2013), 20–31.

[57] In terms of previous research, see section 1.6.

[58] See Alberto Febbrajo, "Introduction," in *Law and Intersystemic Communication: Understanding 'Structural Coupling'*, 1-14 (Farnham: Ashgate Publishing Ltd., 2013), 4.

[59] See Rasmus Wandall, „Empirical Descriptions of Criminal Sentencing Decision-Making – The use of statistical causal modeling," (*Bergen Journal of Criminal Law and Criminal Justice* 2014, Vol. 2, No. 1: 56-68), 66.

of the law grounds an assumption of what courts actually do, and this comes to be taken as the truth about the everyday handling of criminal cases in court.[60] Feeley stresses the same point when he states: "Formal justice and substantive justice are not the same".[61] He emphasizes that the law is only an approximation of some portion of a polity's values and can only be stated in a general and abstract form, for no set of rules can be detailed enough to anticipate or provide for all particular situations in which the rules are to be applied.[62] He is not the only one who emphasizes the growing need for empirical research in the legal arena.[63] Gröning points out that the criminal legal system is a construction in the framework of reality. She even goes as far as to claim that a purely legal dogmatic approach might be the comfortable solution but that the empirical approach is the right one.[64] Jareborg similarly insists: "We need continuous action-oriented research into and jurisprudential analysis of actual sentencing

[60] See Wandall (2008), 147.

[61] Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russel Sage Foundation, 1992), xviii.

[62] See Feeley (1992), xxx.

[63] Other supporters are Westerman (2011); Michael Walter, "Die Frage nach der Rechtskultur als Brücke zwischen Kriminologie und Strafrecht," (*Zeitschrift für internationale Strafrechtsdogmatik* 2011, Vol. 7: 629-35), Nielsen (2010), and Anne Peters, "Realizing Utopia as a Scholarly Endeavour," (*The European Journal of International Law* 2013, Vol.24, no.2: 533-52). Westerman (2011) advocates cutting one's thinking loose from the boundaries legal doctrine creates and becoming more empirically minded, which implies a greater degree of multidisciplinarity. Peters (2013) claims that the connecting link between theory and less abstract research results is lacking (536, although she is writing about international law). Nielsen (2010) argues that "because the phenomenon of law itself consists of individuals, organizational settings, institutional fields, and the interactions among them, fully understanding law demands research conducted using multiple approaches" (972). Furthermore, Nicola Lacey, „Contingency, Coherence and Conceptualism. Reflections on the Encounter between 'Critique' and 'the Philosophy of the Criminal Law," in *Philosophy and the Criminal Law. Principle and Critique*, 9-59 (Cambridge: Cambridge University Press,1998) states that "in focusing on legal doctrine and schemes of classification, critical legal theorists have sometimes lost sight of important questions about the broader terrain upon which doctrinal conceptions directly or indirectly impinge" (18). Minna Gräns, „Om interaktiv rättsdogmatik," in *Interaktiv rättsvetenskap – en antologi*, 59-76 (Uppsala Universitet, 2006),emphasizes the importance for a legal scholar to seek new perspectives and employ methods other than those of traditional legal theory (62–3). For a discussion of the role of empirical research in the legal arena, see Linda Gröning, "Straffrätten I verkligheten eller som verkligheten? Reflektioner kring straffrättsdogmatikens empiriska förankring," in: *Festskrift till Per Ole Träskman*, 217-28 (Stockholm, Norstedts Juridik, 2011).

[64] See Gröning (2011), 228.

practice, programmes to instruct sentencers".[65] This mirrors the criticisms of Westerman, who claims that there is a need for an empirical orientation in legal research.[66] I heed the calls of these scholars and adopt a more sociological approach towards juvenile criminal law. This leads to my choice of methods.

1.5.2. A multi-method approach

The attempt to capture the different facets of the welfare/justice clash in the juvenile criminal justice systems requires a broad theoretical approach, which I designate as "multi-methodological". After investigating, in chapter 2, the ways in which criminal justice systems understand adolescents to differ from adults, I examine how young offenders are dealt with within both the Swedish and German juvenile criminal justice systems (chapters 3 to 6), adopting a legal dogmatic perspective. The case studies of Sweden and Germany illustrate the forms the welfare/justice clash takes in these countries from a legal theoretical point of view. Then, in chapter 7, I turn to law in action. I adopt an empirical approach in order to gain insight into legal practice in the juvenile courtroom. The empirical studies consist of participant observations conducted in the juvenile courtroom and semi-structured interviews with judges and public prosecutors in both countries, including comparisons between the two. This combination of methods forms my multi-method approach,[67] which uses multiple research techniques or strategies to study how the welfare/justice clash is manifested in the juvenile criminal justice systems I examine.

1.5.2.1. Law in books

The first part of this project consists of an analysis of law in books in relation to guiding principles, the specific legal consequences and sentencing rules for

[65] Nils Jareborg, "Disparities in Sentencing: Causes and Solutions," (Reports presented to the eighth Criminological Colloquium (1987), *Collected Studies in Criminological Research*, Volume XXVI, Strasbourg 1989), 153.

[66] See Westerman (2011), 87–110.

[67] For further reading on multi-method research, see *Nielsen* (2010). She claims: "When a researcher employs multiple approaches to answer questions, the results are likely to be more reliable and contribute more to the theoretical development of our understanding of law and society. […] because the phenomenon of law itself consists of individuals, organizational settings, institutional fields, and the interactions among them, fully understanding law demands research conducted using multiple approaches" (971–2).

young offenders, procedural rules, and personnel in Sweden and in Germany.[68] To investigate law in books, I employ traditional legal methodology, which of course comes with the territory when doing legal research.[69] This kind of doctrinal research is primarily logical semantic analysis, which conveys an overview of the law as it stands by arranging legal concepts, basic principles, and rules of decision making.[70] The primary tool used in law is argumentation.[71] This argumentation takes place in the normative reality of the legal system and is thereby limited and bound to sources of law.[72] Empirical research is rare in traditional legal studies. This is due to the fact that legal studies traditionally focuses on the analysis of legal norms – that is, on what is called doctrine.

According to the Swedish scholar Peczenik, legal doctrine consists of professional legal writings, such as handbooks, monographs, treaties, and other texts, whose task is to systematize and interpret valid law.[73] In other words, doctrinal research is derived from sources internal to the law. Traditional legal methodology may also be referred to as the "analytical study of law" or the "doctrinal study of law".[74] In traditional Swedish legal methodology, preparatory

[68] The descriptions of the legislation give a detailed overview of the juvenile criminal legal systems in Sweden and in Germany. Even if other scholars have provided descriptions of the systems in each country (for Sweden, see Kerstin Nordlöf, *Unga lagöverträdare i social-, straff- och processrätt* (2nd Edition. Lund: Studentlitteratur, 2012); Rita Haverkamp, "Sweden," in *Juvenile Justice Systems in Europe- Current Situation and Reform Developments*, Vol.3, 1329-62 (Godesberg: Forum Verlag, 2010); and Nils Jareborg and Josef Zila, *Straffrättens påföljdslära* (4th Edition. Stockholm: Norstedts Juridik, 2014) and for Germany, see Heribert Ostendorf, *Jugendstrafrecht* (8th Edition. Baden-Baden: Nomos, 2015); Friedrich Schaffstein, Werner Beulke and Sabine Swoboda, *Jugendstrafrecht* (Stuttgart: W. Kohlhammer GmbH, 2014); Franz Streng, *Jugendstrafrecht* (3rd Edition. Heidelberg: C.F.Müller, 2012)), my investigation serves another aim, namely to illustrate the welfare/justice clash in both countries.

[69] See Gröning (2011), who considers legal dogmatics as part of a methodological "authority-paradigm" (220).

[70] See Peters (2013), 545.

[71] See Aleksander Peczenik, "A theory of Legal Doctrine," (*Ratio Juris* 2001, Vol. 14, No.1: 75-105), 76.

[72] See Aleksander Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (Stockholm: Fritzes, 1995), 226.

[73] See Peczenik (2001), 75.

[74] See Aleksander Peczenik, *Scientia Juris Legal Doctrine as Knowledge of Law and as a Source of Law* (Vol.4. Dordrecht and Heidelberg and New York and London: Springer, 2005), 1; see also Hellner, Jan, "Kvalitetskriterier i rättsvetenskapen," *Juridisk Forskning* 2002: 9-18). Note, though, Johan Adestam's, *Den dokumentvillkorade garantin* (Stockholm: Karnov Group Sweden AB, 2014)

works also play a crucial role.[75] Therefore, the material used in relation to the Swedish juvenile criminal justice system in this study also includes preparatory works as a tool for interpreting the statutes. Furthermore, the guiding decisions of the Högsta Domstolen (HD)[76] and judicial doctrine are employed as further sources.[77]

The German approach applies a methodology of statutory interpretation first outlined by Savigny.[78] He introduced a system of four levels of legal interpretation. The first level, the starting point, is interpretation in a literal sense: what lies beyond the literal sense cannot be part of the content of the legal act. The second level is historical interpretation, which concentrates on the aim of the law at the time it was established by the legislature. The third level consists of systematic interpretation. The focus here is the context of the rule. It can be an interpretation of the systematic position (for example, a certain section of a legal rule) or of the underlying conceptual system. The fourth and final level is teleological interpretation. It tries to capture the spirit and purpose of the law under scrutiny. This kind of interpretation concentrates on the law as an element of the fundamental structure of social reality, which the law defines or partly constitutes. It also draws attention to the principles of law immanent in

---

objection to the term "analytical legal science"; he points out that legal science can be analytical without being doctrinal (17).

[75] See Uwe Kischel, *Rechtsvergleichung* (München: C.H.Beck, 2015), 601-4. See also section 4.3.2.2.

[76] Högsta Domstolen (HD) is the Swedish Supreme Court. To avoid confusion, I employ the names in the original languages.

[77] For an overview of the sources available for interpreting law in Sweden, see Annika Staaf (ed.), Birgitta Nyström and Lars Zanderin, *Rätt och rättssystem – en introduktion för professionsutbildningar* (Malmö: Liber AB, 2010) 22-33.

[78] Savigny, Friedrich Carl von. *System des heutigen römischen Rechts*. 8 Volumes. Berlin: Veit, 1840-1849) and more recent eleborations of this methodology by influential scholars such as Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd Edition. Berlin: Springer, 1999). See also important and influential scholars like Robert Alexy, *Theorie der juristischen Argumentation* (3rd Edition. Frankfurt a.M.: Suhrkamp, 1996); Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (2nd Edition. Frankfurt: Athenäum Verlag, 1972); Karl Engisch, *Einführung in das juristische Denken* (11th Edition. Stuttgart: W. Kohlhammer, 2010); Reinhold Zippelius, *Juristische Methodenlehre* (11th Edition. München: CH Beck, 2012).

the legal system. Though it is not spelled out as explicitly, the Swedish approach employs similar interpretive tools.[79]

It is sometimes claimed that Germany features a system of "Begriffsjurisprudenz" (conceptual jurisprudence). This term goes back to von Jhering[80] and describes a mathematical–geographical approach to law. It supposes that law contains no gaps and employs a certain logically organized system of concepts (a "pyramid of concepts") that can be logically deduced from superordinate legal concepts, which themselves are discovered inductively (the "method of inversion"). However, this purportedly mathematical orientation has been criticized as misguided, for it cannot do justice to the differences between individual cases, and it leaves no room for the development of the law. The charges levelled against these positions have to do with its epistemological and logical naivety, obfuscation of values, remoteness from life, lack of consideration of super-positive law, and general overestimation of the potential of the purely dogmatic method.[81] Given its strong focus on concepts – and perhaps also because of the strict division between legislative and judicial power – preparatory works play a minor role in the interpretation of German law. Instead, in the German legal tradition, a greater value is placed on legal commentaries and on scholarly work. The legal commentaries contain the case law of the Bundesgerichtshof (BGH)[82] and scholarly interpretations, both of which play an important role in sentencing decisions.[83]

Starting with the legislation and interpreting it in the light of preparatory works, case law, decisions, legal commentaries, and doctrine-like articles from legal and other scientific journals, monographs, etc., I investigate the contemporary juvenile criminal justice systems of Sweden and Germany.

Why does this study cover sentencing? A sentencing decision is a delicate mix of legislation, considerations relating to the background and personality of the

[79] See Staaf, Nyström, and Zanderin (2010), 34–6.

[80] See Rudolph von Jhering, *Scherz und Ernst in der Jurisprudenz. Eine Weihnachtsgabe* (Leipzig: Breitkopf und Härtel, 1884 (Reprint: ed. Leitner, Max. *Scherz und Ernst in der Jurisprudenz* (Wien: Linde, 2009)).

[81] Haferkamp (2011), "Enzyklopädie der Rechtsphilosophie", margin no. 1, http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/105-jurisprudence-of-concepts (last visited 2017-01-18)

[82] The Bundesgerichtshof (BGH) is the German Federal Supreme Court.

[83] See, further, section 4.3.1.2.

offender, and the interplay of the practitioners present in the courtroom – including the judge, the public prosecutor, the defence attorney, and social services. Furthermore, sentencing is a – if not the – crucial part of the criminal trial. Sentencing rules are of major importance for the shape of a criminal justice system and can reveal much about the system itself. Hogarth expressed the importance of sentencing as follows:

> Sentencing occupies a central position in the administration of criminal justice. Decisions made at this stage have not only important consequences for offenders, but they also affect the entire criminal justice system. Judges and magistrates are given enormous power over the lives of individuals. The proper exercise of that power is a matter of concern to offenders, to the agencies and individuals responsible for law enforcement and the treatment of offenders, and to the public at large.[84]

The sentencing decision may reveal things that are only applicable to young offenders. What factors play a role in the choice of the legal consequences for a young offender? Which programmes, to use a Luhmannian concept, are decisive?

In principle, the task of sentencing is shared between the legislature and the judge. The legislative tool is the criminal code, with the separate elements of the offence and its general penal consequence. The judge manoeuvres within the framework established by the legislature. In other words, legislation is a kind of anticipated sentencing that sets the limits of the judges' discretionary power.[85] When it comes to sentencing, discretion is inevitable. Even under the best of circumstances, those who administer the law must mould abstractions, fill in the gaps, and in the process work their own views of substantive justice into the administration of the law.[86] As will be seen later on, the discretion of the judges in Sweden – and even more so in Germany – is considerably extended in

[84] John Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971), 3. Ralph J. Henham, *Sentencing and the Legitimacy of Trial Justice* (Abingdon Oxon and New York: Routledge, 2012) expresses this attitude when, in the acknowledgements to his book, he describes sentencing as pivotal to the credibility of the criminal process.

[85] See Lothar Schmidt, *Die Strafzumessung in rechtsvergleichender Darstellung* (Berlin: Duncker & Humblot, 1961), 121.

[86] Feeley (1992), xxx.

relation to young offenders, not least because of the wider variety of legal consequences available.[87]

However, "legal method" in general is not an exact science. It has to be developed and applied by human beings, in all their complexity, and this inevitably brings into play a good deal of subjective value.[88] Since the law is, amongst other things, local, historical, interdisciplinary, social, and political, approaches to describing and explaining the law will vary depending on the scholar and his or her specific background.[89] Furthermore, the study of law provides for a variety of research ideas, and probably as many ways to approach them. Additionally, the legal method develops dynamically and depends on the aims and needs of the scholar. The aim of my study and my epistemological standpoint that I have outlined above lead to the need to integrate an empirical part – law in action – into this dissertation.

1.5.2.2. Law in action: Empirical research

In the second part of my study (chapter 7), I employ a sociological methodology. It features an empirical[90] design that aims to capture law in action. Law in action[91] is an emerging sub-discipline of the sociology of law.[92] I

---

[87] For a detailed description, see chapter 4. The demand for broad discretion in relation to young offenders is acknowledged in the Beijing Rules under point 6.

[88] See Nils Jareborg, *Värderingar* (Lund: Studentlitteratur, 1975), 119-243 and Neil MacCormick, *Institutions of law: an essay in legal theory* (Oxford: Oxford University Press, 2007), 291.

[89] In a similar vein, see my discussion of my role as an observer in the observational study in appendix 2.

[90] "Empirical" in this sense is defined as the study of law and legal phenomena by using the systematic collection of information (data) and its analysis according to some generally accepted method (Peter Cane and Herbert M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010), 4).

[91] As I pointed out before, I employ this expression but would like to remind the reader that this thesis does not take its cue from Pound's concept but rather embraces Ehrlich's approach of norms for decisions.

[92] See Thomas Scheffler, Kati Hannken-Illjes and Alexander Kozin, *Criminal Defence and Procedure – Comparative Ethnographies in the United Kingdom, Germany, and the United States* (Electronic book text. Balsingstoke: Palgrave Macmillan, Balsingstoke 2010), 1. They also suggest approaching law in action as an interdisciplinary platform for the study of legal practice in the broadest sense of the word (2). When I refer to law in action, I do not claim, as a realist would, that there is "a social reality" I aim to reveal. I accept the constraint that qualitative research may involve the view of the researcher to such a degree that the findings become somewhat subjective.

take a closer look at the transition from law in books to law in action (this transition is also mirrored in the sub-questions outlined above). I investigate the abstract *and* the concrete[93] to capture the welfare/justice clash and explain the juvenile criminal justice system. In the framework of the concept of law I outlined above, one reason to adopt an empirical approach is in order to be able to investigate courtroom dynamics, which are shaped by communication[94] and reflected in the patterns of behaviour of and encounters between the figures in the juvenile courtroom. These aspects are invisible in law in books. Such an approach involves accepting variable meaning structures in the process of legal decision making. Wandall points out that in the process of sentencing, meanings (like the severity of the offence or personal circumstances) are constructed through the institutions and people who prepare the case, the prosecution, the court, the dynamics of the courtroom, and the ethics of the local community. On this level of meaning structures, there is an operation of sentencing that is invisible to the law yet constitutive of how norms of legal sentencing operate in decision making.[95] I agree with Wandall, who claims:

> This is a perspective that allows us a more complex but also more reliable description of how law matters [in sentencing] – without simplifying law to a static norm and without denying law its normative character.[96]

The tool used to investigate law in action is an observational study in the form of participant observation, combined with semi-structured interviews with judges and public prosecutors.[97] Such a methodological approach affords me an

---

My account is one of a number of possible representations rather than a definitive version of social reality.

[93] See Walter (2011), who emphasizes the importance of empirical research in legal studies (634).

[94] "Communication" is the central feature of social systems, according to Luhmann. I elaborate on this further in chapter 8.

[95] See Wandall (2014), 63.

[96] Ibid., 63.

[97] On 6 November 2013, I received the approval of the regional ethical board (Regionala Etikprövningsnämnden Lund EPN, Diarienummer: 213/638) regarding my empirical research according to lagen 2003:460 om etikprövning av forskning som avser människor. For a more detailed description of this method, see chapter 7 and appendix 2.

intimate view of courtroom dynamics and communication on a general level (the observational study) and on an individual level (the interviews).[98]

My investigation into law in action does not cover all forms of legal practice. I decided against studying case law on this level (i.e. the judgments of the district and the regional courts). The reason for this limitation is the focus of this study. The aspects I am concerned with are not apparent in case law. A written judgment cannot mirror, for example, the courtroom dynamics of the practitioners in the juvenile courtroom.

1.5.2.3. A comparative approach

With regard to the overarching aim of investigating the welfare/justice clash in the juvenile criminal justice system, one might wonder why I have chosen to look at two different juvenile criminal justice systems[99] rather than focusing only on one country. Comparative criminal law[100] has attracted little attention, at least compared to other types of law.[101] Apart from basic research, comparative (criminal) law[102] is application-oriented research which – de lege lata – serves the interpretation of applicable law or the determination of the requirements of its application. In this function, comparative (criminal) law can assist – de lege

[98] See section 7.1.

[99] For the motivation for the choice of countries, see section 1.7.

[100] According to Elisabetta Grande, "Comparative criminal justice," in *The Cambridge Companion to Comparative Law*, 191-209 (Cambridge: Cambridge University Press, 2012), comparative criminal law as a study of foreign laws can be traced back to Paul Johan Anselm von Feuerbach, the acknowledged founder of the discipline (195).

[101] See Mark Dirk Dubber, „Comparative Criminal Law, Chapter 40," in *The Oxford Handbook of Comparative Law*, 1287-1326 (Oxford: Oxford University Press, 2008), 1288; see also Grande (2012), 191–2, who points out that this may currently be changing. As an example, see Mark Dirk Dubber and Tatjana Hörnle, *Criminal Law – A Comparative Approach* (Oxford: Oxford University Press, 2014).

[102] The term "comparative law" itself is often rejected as a misnomer. Other terms, such as "comparative legal systems", "comparative legal traditions", "comparative legal history", "comparative legislation", "comparative jurisprudence", the "comparative study of law" or simply the "comparative method", have been proposed, but all of them have their weaknesses. Since comparatists have not succeeded in coming up with a better term, I continue to use the term "comparative law", but I am well aware of the fact that it can be contested and am not claiming that it is the ultimate solution.

ferenda – in the process of finding new legislative solutions and evaluating them by drawing on foreign or international law.[103]

Chapters 3 to 6 of this thesis provide an in-depth investigation of the juvenile criminal justice systems of Sweden and Germany. This part of my study has scholarly value in itself. When it comes to basic research concerning criminal law, the comparison of different systems is an important method for research. A comparison might inspire a researcher to learn more about and rethink his or her own culture.[104] A crucial advantage when employing a comparative approach is that one is forced to remove oneself from one's own legal system. It is a tool that allows one to break free from the national constraints that bind almost every national lawyer – namely, the authoritativeness of one's own legal system and its sources. This approach creates a certain distance from the familiar system and thereby sharpens one's perception. This is not only a benefit of comparative law but also an important precondition of it. Frankenberg's idea of comparative law as comparable to travelling has much appeal:

> The traveler and the comparatist are invited to break away from daily routines, to meet the unexpected and, perhaps, to get to know the unknown. Traveling promises opportunities for learning both about one's own country and culture and about other countries and cultures.[105]

Like travelling, engaging in comparative legal method opens the mind and is a necessary basis for understanding other (legal) cultures. I explore which elements of the Swedish and the German juvenile criminal justice systems reflect the circumstance that the offender is a young person and what tensions there are in each system that express the welfare/justice clash.[106]

---

[103] See Kischel (2015), 57.

[104] I am aware of my limitations, as a German lawyer, in being able fully to grasp the Swedish legal system; see in this connection Kischel (2015), 32 and Muncie and Goldson (2006), 201.

[105] Günther Frankenberg, "Critical Comparison: Re-thinking Comparative Law," (*Harvard International Law Journal* 1985, Vol. 26: 411-455), 411.

[106] As will be seen in section 1.6., several scholars have engaged with comparative studies in relation to criminal law and young offenders, but from different angles; see Frieder Dünkel, Joanna Grzywa, Philip Horsfield and Ineke Pruin (eds.). *Juvenile Justice Systems in Europe- Current Situation and Reform Developments* (Godesberg: Forum Verlag, 2010); Michael Cavadino and James Dignan, *Penal Systems. A Comparative Approach* (London: Sage, 2006); Hans-Jörg Albrecht and Michael Kilchling (eds.), *Jugendstrafrecht in Europa* (Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 2002); Eric L. Jensen and Jorgen Jepsen

Furthermore, comparative law is very useful for sociologists of law. The comparative study of various legal systems may show how different legal regulations of the same issue function in practice. If law is seen functionally, as a regulator of social facts, the legal problems can be seen as quite similar across most countries. Comparative law often operates with such a functional approach.[107] It concentrates on the real-life problems that often lurk unseen behind the concepts used in national legal systems.[108] In other words, the legal rules and institutions that are to be compared must be functionally comparable to one another; they must be intended to deal with the same problem.[109] In my case, this problem is juvenile delinquency. This common function serves as the comparison's *tertium comparationis*,[110] manifest in different juvenile criminal justice systems and their rules. The legal rules compared in this project are the rules that deal specifically with young offenders, and the institutions are the juvenile courts[111] and the practitioners active in the courtroom. Further, since I compare law in books besides law in action, it might also be said that I employ a contextual comparative method, concentrating the functional approach on its agreeable core.[112]

(eds.), *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems* (Oxford: Hart Publishing, 2006); Frieder Dünkel, Anton van Kalmthout and Horst Schüler-Springorum (eds.), *Entwicklungstendenzen und Reformstrategien im Jugendstrafrecht im europäischen Vergleich* (Godesberg: Forum Verlag, 1997).

[107] For further reading in relation to this functional method, see Ralf Michaels, "The functional method of comparative law, Chapter 10," in *The Oxford Handbook of Comparative Law*," 339-382 (Oxford: Oxford University Press, 2008); also Kischel (2015), 6, 93ff.

[108] See Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd Edition. Oxford: Oxford University Press, 1998), 45.

[109] See Michael Bogdan, *Comparative Law* (Göteborg: Kluwer Norstedts Juridik Tano, 1994), 60 as well as Michael Bogdan, *Concise introduction to comparative law* (Groningen: Europa Law Publishing, 2013), 52.

[110] For more about this term as a "common point of departure," see John C. Reitz, "How to Do Comparative Law," *The American Journal of Comparative Law* 1998, Vol. 46, No.4: 617-636), 622.

[111] I choose to employ the term "juvenile court" and not "youth court", though the terms are used interchangeably in the literature.

[112] For the contextual method, see Kischel (2015), 93, 238–42, who refers specifically to the utilization of empirical studies in contextual comparative studies (see 241).

To be able to approach the Swedish and the German juvenile criminal justice systems and relate them to each other, I employ a comparative method.[113] Investigating both similarities and differences, the comparison takes place along two different axes: horizontally, I compare the Swedish and the German juvenile criminal justice systems with a focus on the welfare/justice clash. Vertically, I investigate how law in books is transposed into law in action, in order to find traces of the welfare/justice clash (in either system) on this axis as well.

It is worth mentioning that comparatists see themselves as being still at the experimental stage when it comes to methodology; this is a potential methodological obstacle. The right method must thus be discovered largely by trial and error, which still nevertheless produces valuable results.[114] Bussani and Mattei speak of "diverse working methods", each of which is a useful tool for the understanding of legal phenomena.[115] Experienced comparatists have learned that a detailed method cannot be laid down in advance; all one can do is take a method as a hypothesis and test its usefulness and practicability against the results of actually working with it. Comparison is treated pragmatically, without any solid theoretical basis.[116]

The reason for choosing Sweden and Germany is that these countries represent two different approaches towards young offenders.[117] Germany has established an independent juvenile court system for young perpetrators and has gathered the procedural rules together in a specific code (the JGG). The German juvenile criminal justice system features a set of independent legal consequences specifically for young offenders and hardly any legal rules in terms of sentencing. It builds on an underlying ideology often described as "educational criminal

[113] For a good extensive overview of the "comparative method" and the problems it faces, see Kischel (2015), 92ff. See also Reitz (1998), who labels his approach a comparative method (636). Regarding the question of whether comparative law is a method or a discipline (or an independent branch of legal studies), see the short overview by Bogdan (2013), 8–10.

[114] See Kischel (2015), 92–3.

[115] See Mauro Bussani and Ugo Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Press, 2012), 3.

[116] See Nils Jansen, "Comparative Law and Comparative Knowledge, Chapter 9," in *The Oxford Handbook of Comparative Law*, 305-338 (Oxford: Oxford University Press, 2008), 307; Reitz (1998), 617–18; see also Zweigert and Kötz (1998), 33.

[117] Kischel (2015) emphasizes the difference between continental European legal thinking (of which Germany is a part) and Scandinavian legal thinking (594ff.).

law".[118] The offender (and not the offence) is the centre of attention, and the goal of deterrence plays (almost) no role; retribution and punishment in the literal sense play only subordinate roles.[119]

Sweden, by contrast, embeds juvenile proceedings in the regular court system. That means that a Swedish judge handles civil and criminal cases relating to juveniles, young adults, and adults.[120] The procedural rules for adults in principle apply analogously.[121] When it comes to sentencing, the Swedish court's starting point is the abstract sentence applicable for an adult, with an emphasis on proportionality, and the court then grants a certain "discount" for young offenders.[122] The court also offers rather detailed legislation in terms of sentencing. To put it simply, the court first establishes the legal consequence for a certain offence irrespective of whether the offender is an adult or not, and then it mitigates it.[123] However, Swedish law does also offer some specific legal consequences only applicable to young offenders. Nevertheless, since its turn to neoclassicism, the Swedish juvenile criminal justice system places a strong emphasis on proportionality – and thereby on the offence rather than on the offender.[124]

In the analysis in chapter 8, I view and explain the Swedish and the German juvenile criminal justice systems from a different perspective. This dissertation argues that the two systems are not as far apart from each other as their theoretical approaches (neoclassicistic in Sweden and welfare-based in Germany)

---

[118] See Christina Stiehl, *Jugendgerichtsgesetz, Jugendkriminalität und Resozialisierung* (Norderstedt: Grin Verlag, 2011), 2; Günther Kaiser and Heinz Schöch, *Kriminologie, Jugendstrafrecht, Strafvollzug* (4th Edition. München: C.H.Beck Verlag, 1994), 181; Plewig (2011), 428; Dölling (2007), 426. For further discussion, see chapter 3.

[119] Except for juvenile imprisonment, §17 JGG.

[120] §25 Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare (LUL) demands that Swedish courts appoint special judges to handle cases involving young offenders. However, the LUL does not establish any requirements with regard to the specific experience or expertise demanded of these judges. For a more detailed discussion, see section 6.2.

[121] See Nordlöf (2012), 391. Lappi-Seppälä (2011) describes this approach as the "Nordic Model of Youth Justice," which is roughly similar across Sweden, Finland, Norway and Denmark but differs from the European and Anglo-Saxon juvenile justice systems.

[122] This approach was also followed in Germany until the introduction of the JGG in 1923 (see Peter-Alexis Albrecht, *Jugendstrafrecht* (3rd Edition. München: Verlag C.H.Beck, 2000), 234).

[123] For a detailed description, see section 4.3.2.

[124] See sections 3.5. and 3.6.

and other differences might seem to indicate.[125] In developing an explanatory model, the second reason for pursuing a comparative approach becomes clear. I hope to convince the reader that the explanatory model not only applies to one but to both systems, and this gives the research greater value.

1.5.3. Explaining the juvenile criminal justice system

My study of the two juvenile criminal justice systems claims that the theoretical welfare/justice clash is evident irrespective of whether a neoclassical approach (Sweden) or a welfare approach (Germany) is adopted. The dilemma concerning the welfare/justice clash is coupled with the problem that analytical theories are only concerned with the positivity of law while sociological approaches have no conceptual tools to do justice to the autonomy of law.[126] However, on the basis of the empirical investigations I have undertaken, I argue that the welfare/justice clash does not appear to give rise to any major problems within legal practice, surprising as it seems. In the analysis in chapter 8, I suggest an explanatory model for the ability of the juvenile criminal justice systems in Sweden and Germany to function in spite of the tensions between welfare and justice considerations. I switch perspectives from an internal view of the juvenile criminal justice system to an external view. This change in perspective enables me to explain the functioning of the juvenile criminal justice system. To do this, I employ the theory of autopoietic systems, which has an ability to understand the difference in communication between legal and social scientific points of view and frame it in a theoretical approach.[127] Using an autopoietic approach as a lens to view the juvenile criminal justice systems in Sweden and Germany, I develop the idea of the juvenile criminal justice system as an autopoietic sub-system.

The functional approach of autopoietic theory[128] is oriented towards the relationship between problems and their solutions. Functional analysis can allow

[125] Reitz (1998) describes such an approach as akin to first comparing apples and oranges and then developing constructs such as "fruit" (625).

[126] In a similar vein, see Martin Partington, "Law's Reality: Case Studies in Empirical Research in Law: Introduction," (*Journal of Law and Society* 2008: 1-7), 1.

[127] See Wandall (2014), 63.

[128] See, further, chapter 8.

us to compare alternative solutions to an underlying problem.[129] This means that the continuation of an autopoietic system (which is one of its basic features) does not depend on the system having a specific structure.[130] I show that the juvenile criminal justice system forms a separate autopoietic sub-system in both Sweden and Germany even though these countries feature different approaches to dealing with young offenders. In this search for common ground between the two juvenile criminal justice systems, I am inspired by Fletcher's subversive attitude.[131] Therefore, I seek to go beyond the apparent diversity or similarity of the rules, looking not only to what legislative provisions, scholars, or judgments say, but also to what happens in legal practice in the life of the law.[132] This is another reason for my decision to investigate law in books as well as law in action. I demonstrate that even if the two investigated systems have evolved from different starting points, both are able to circumvent the welfare/justice clash if they are viewed and explained in terms of an autopoietic approach.

I agree with Wandall that autopoietic theory articulates a constructive response to the need for a conceptual framework that appreciates both law and law's context. With regard to the topic of this study, this interplay becomes crucial. Welfare considerations play a decisive role and thereby create a field of tension that is difficult to resolve within the legal framework, especially as the latter constantly strives for clear boundaries. I propose an autopoiesis-inspired approach as a possible way around the welfare/justice clash. I invite the reader to try to break free from the terminology of "justice" and "welfare" and to define a new sub-system. I propose a view of the juvenile criminal justice system as an autopoietic sub-system that follows its own programmes when dealing with young offenders. Such an explanation may contribute to a stabilization of the juvenile criminal justice system.[133] Because I demonstrate that the juvenile criminal justice system should be seen as its own entity, it follows that there does

[129] See Georg Kneer and Armin Nassehi, *Niklas Luhmanns Theorie sozialer Systeme* (3rd Edition. München: Wilhelm Fink Verlag, 1997), 39.

[130] Ibid., 92.

[131] See Fletcher (1998) for a comparable approach, which pursues an essentially theoretical project unattached to any particular legal system.

[132] See Grande (2012), 197–8.

[133] Gunther Teubner, *Law as an autopoietic system (*Oxford: Blackwell Publishers, 1993), emphasizes that stabilization is the main advantage autopoietic systems have over open systems (15).

not necessarily have to be a separate juvenile justice system[134] established by the legislature. Even if the Swedish and German systems differ considerably in their way of dealing with young offenders, the functioning of both systems can be explained through an autopoietic approach.

1.6. Previous research and relevance

To set my research against the broader background, it is necessary to describe the research that has already been conducted into the juvenile trial and sentencing processes. Since my research features an interdisciplinary approach and thus a rather unorthodox design, this overview of previous research covers a broad variety of types of research conducted in the field of juvenile justice and sentencing. Furthermore, I have included a general overview of research in the fields of "law in action" and socio-legal studies that pursues a comparable interdisciplinary approach.[135]

There are several comparative studies that include general descriptions of different juvenile justice systems.[136] However, these studies are often limited to descriptions of the legal framework and engage with a comparison on a broader level and with a different perspective compared with this thesis.

---

[134] This is not the case in Sweden, as we will see.

[135] Socio-legal studies, placed in the framework of the sociology of law, involves research at the crossroads between legal and social studies. It often consists of the study of the law, legal behaviour, and legal institutions employing sociological tools. It can be considered a sub-discipline of sociology or an interdisciplinary approach within academic law or legal studies. See Reza Banakar and Max Travers (eds.), *Law and Social Theory* (2nd Edition. Oxford: Hart Publishing, 2013), 2.

[136] See Dünkel, Grzywa, Horsfield, and Pruin (2010); Cavadino and Dignan (2006); Albrecht and Kilchling (2002); Jensen and Jepsen (2006); Muncie and Goldson (2006); Dünkel, van Kalmthout, and Schüler-Springorum (1997); see for Finland: Matti Marttunen, "Nuorisorikosoikeus" (*National Research Institute of Legal Policy* 2008, Publication no. 236). There is one study comparing legal consequences for young offenders in Sweden and in Germany (Birgit Geiling, *Påföljder för unga lagöverträdare i Sverige och i Tyskland* (Stockholm: Stockholms universitet, 1981)), but this study is thirty-five years old, and it focuses only on the legal framework.

The legal angle in Sweden is covered mostly by descriptive but also interpretive research into the legal framework or underlying theories and ideologies,[137] and it often concerns the dualism present in the Swedish system between the criminal court and the administrative court.[138] German legal research into the juvenile justice system aims in the same direction. There are plenty of descriptive presentations of the system.[139] One matter often discussed is the ideological bedrock on which German juvenile criminal law is built: the "educational thought" that justifies the welfare approach.[140] However, there is little academic discussion in Germany about the sentencing system in the narrow sense[141] when it comes to young offenders. Most existing research in this area is about the subsequent step – the outcome of the sentencing process – and it is mainly conducted in the field of criminology. Here, plenty of research exists, mostly statistical data on the outcome of court decisions, recidivism, etc.[142] Research

[137] See Nordlöf (2012); Haverkamp (2010); and Jareborg and Zila (2014). See also Nils Åke Gunnar Bramstång, *Förutsättningar för barnavårdsnämnds ingripande mot asocial ungdom* (Lund: Gleerups, 1964), one of the early scholars to pay attention to the legal problems in regard to young offenders.

[138] See Titti Mattsson, *Barnet och rättsprocessen – Rättssäkerhet, integritetsskydd och autonomi i samband med beslut om tvångsvård* (Lund: Juristförlaget i Lund, 2002); Nordlöf (2012); Ulrika Andersson and Titti Mattsson, *Ungdomar i gäng – social- och straffrättsliga reaktioner* (Malmö: Liber AB, 2011); Linda Marklund, *Ett brott – två processer. Medling vid brott och unga lagöverträdare i straffprocessen* (Uppsala: Uppsala universitetstryckeri, 2011).

[139] See Ostendorf (2015); Schaffstein, Beulke, and Swoboda (2014); Streng (2012.

[140] See Franz Streng, "Der Erziehungsgedanke im Jugendstrafrecht," (*Zeitschrift für die gesamte Strafrechtswissenschaft (NStZ)* 1994, No.106: 60-92); Joachim Bohnert, „Strafe und Erziehung im Jugendstrafrecht," (*Juristenzeitung* (*JZ*) 1983: 517-23).

[141] By "narrow sense" I mean the sentencing decision itself conducted by the juvenile court rather than the general system of legal consequences for juveniles.

[142] See Wolfgang Heinz, *Jugendkriminalität in Deutschland – kriminalstatistische und kriminologische Befunde* (Universität Konstanz 2003); Jörg-Martin Jehle, Wolfgang Heinz, Peter Sutterer, Sabine Hohmann, Martin Kirchner and Gerhard Spiess, *Legalbewährung nach strafrechtlichen Sanktionen: eine kommentierte Rückfallstatistik* (Berlin: Bundesministerium der Justiz, 2003); Martin Weber, *Die Anwendung der Jugendstrafe – Rechtliche Grundlagen und gerichtliche Praxis* (Vol.988. Frankfurt a.M. and Bern and New York and Paris: Europäische Hochschulschriften: Reihe 2, Rechtswissenschaft, 1990); Ineke Pruin, *Die Heranwachsendenregelung im deutschen Jugendstrafrecht* (Schriften zum Strafvollzug, Jugendstrafrecht und zur Kriminologie. Vol. 26. Godesberg: Forum Verlag, 2007); Winfired Hassemer, "Die Formalisierung der Strafzumessungsentscheidung," (*Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 1978: 64-100); Dieter Dölling, *Die Zweiteilung der Hauptverhandlung: eine Erprobung vor Einzelrichtern und Schöffengerichten* (Berlin: Schwartz,

looking into underlying mechanisms is usually not conducted by legal scholars but by, for example, sociologists, psychologists, or criminologists, and it emphasizes aspects other than those with which this project is concerned.[143] In terms of the sentencing process in general, the scholarly field is quite small by German standards, and the scholarship verges on being outdated (most of it having been conducted in the 1970s and 1980s).[144] Its subject is often how to get a grip on the broad discretion enjoyed by German judges. Even here, the existing research has a different focus than does this project.

When looking for Swedish research in these areas, I was not able to identify any literature that focuses in the same way this thesis does on how courts conduct proceedings and sentence in relation to young offenders. Besides the general

---

1978); Wolfgang Heinz, *Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882 - 2012 : Stand: Berichtsjahr 2012* (Version: 1/2014); Heinz Schöch, *Strafzumessungspraxis und Verkehrsdelinquenz* (Stuttgart: Enke Verlag, 1973); Gerhard Schäfer, Günther M. Sander and Gerhard van Gemmeren, *Praxis der Strafzumessung* (München: C.H.Beck, 1995); Wolfgang Heinz , "Die neue Rückfallstatistik – Legalbewährung junger Straftäter," (*Zeitschrift für Jugendkriminalrecht und Jugendhilfe* (*ZJJ*) 2004, Vol.15: 35-48). Such research widely relies on official court statistics, records, police statistics, etc., which have their weaknesses, in particular omissions in the sources. Furthermore, traditional sentencing studies are typically formulated as empirical challenges to a formal legal assumption of decision making, as Wandall (2008) quite rightly points out (2).

[143] See Caroline Lemm, *Die strafrechtliche Verantwortlichkeit jugendlicher Rechtsbrecher* (Münster and New York and München and Berlin: Waxmann Verlag, 2000).

[144] See Friedreich Schaffstein, "Spielraum-Theorie, Schuldbegriff und Strafzumessung nach den Strafrechtsreformgesetzen," in *Festschrift für Wilhelm Gallas,* 99 (Berlin 1973); Wolfgang Heckner, *Die Zweiteilung der Hauptverhandlung nach Schuld-und Reaktionsfrage (Schuld-interlokut): Vorschlag einer Gesetzesnovelle zum Strafverfahrensrecht* (Diss. Universität München 1973); Hans Jürgen Bruns, *Alte Grundfragen und neue Entwicklungstendenzen im modernen Strafzumessungsrecht* (Festschrift für Hans Welzel zum 70, 1974: 739-60); Wolfgang Frisch, "Ermessen, unbestimmter Begriff und "Beurteilungsspielraum" im Strafrecht," (*Neue Juristische Wochenschrift* (*NJW*) 1973: 1345ff); Franz Streng, *Strafzumessung und relative Gerechtigkeit- eine Untersuchung zu rechtlichen, psychologischen und soziologischen Aspekten ungleicher Strafzumessung* (Heidelberg: R.v.Deckers´s Verlag, 1984) is one of the few legal scholars who adds a different, interdisciplinary perspective to the picture. In his rather comprehensive (albeit thirty-year-old) professorial dissertation examining sentencing in Germany, he focuses on the legal, psychological, and sociological aspects of inhomogeneous sentencing through a detailed examination of the figure of the judge and confirms the differences in verdicts. See also Franz Streng, "Sentencing in Germany: Basic Questions and New Developments," (*German Law Journal* 2007, Vol. 8, No. 2: 153-72).

literature about sentencing[145] existing studies are mostly of a quantitative nature. They are based on statistics and have a different focus from this research.[146] Furthermore, most of the existing Swedish literature about the sentencing process is not legal research but to be found in the fields of sociology, criminology, psychology, etc. A strong emphasis is placed on the phenomenon of juvenile delinquency itself, and the research attempts to explain deviating behaviour, to identify sources, and to developing tools to reduce offending.[147]

---

[145] See Martin Borgeke, *Att bestämma påföljd för brott* (Stockholm: Norstedts Juridik AB, 2012); Jareborg and Zila (2014); Martin Borgeke, Catherina Månsson and Georg Sterzel, *Studier rörande påföljdspraxis med mera* (5th Edition. Stockholm: Jure Förlag AB, 2013); Hanns von Hofer, "En översyn av påföljdsystemet (Dir.2009:60)," in *Festskrift till Per Ole Träskman*, 238-245 (Stockholm: Norstedts Juridik, 2011); Eva Stenborre, *Påföljdsbestämningen* (Göteborg: Juridiska Akademien i Göteborg, 2005). For a different perspective, see Olof Ställvik, *Domarrollen – rättsregler, yrkeskultur och ideal* (Stockholm: Jure förlag AB, 2009).

[146] See especially the investigations of the Swedish Crime Prevention Council (Brottsförebyggande Rådet Brå). A recent example is Brå Report 2013:3, "Brott bland ungdomar i årskurs nio". Other examples are Bo Vinnerljung, Anders Hjern, Gunilla Ringbäck Weitoft, Eva Franzén and Felipe Estrada, "Children and young people at risk (Chapter 7)," (*International Journal of Social Welfare* 2007, Vol. 16: 163-202); Henrik Belfrage, "Recidivism among rapists in Sweden who have undergone forensic psychiatric examinations," (*The Journal of Forensic Psychiatry* 1994, Vol. 5, No.1: 151-159); Brå Report (2008), "Brottsutvecklingen i Sverige fram till år 2007".

[147] See Hanns von Hofer, "Criminal Violence and Youth in Sweden: a long-term perspective," (*Journal of Scandinavian Studies in Criminology and Crime Prevention* 2000, Vol.1, No. 1: 56-72); Jerzy Sarnecki and Felip Estrada, "Keeping the Balance between Humanism and Penal Punitivism: Recent Trends in Juvenile Delinquency and Juvenile Justice in Sweden," in *Handbook of International Juvenile Justice*, 473-502 (Dordrecht: Springer, 2006); Tore Andreassen, *Institutionsbehandling av ungdomar. Vad säger forskningen?* (Stockholm: Förlagshuset Gothia AB, Centrum för utvärdering av socialt arbete, Statens institutionsstyrelse, 2003); Anders Nilsson, *Fånge i marginalen – uppväxtvillkor, levnadsförhållanden och återfall i brott bland fångar* (Avhandlingsserie No 8. Kriminologiska institutionen. Stockholms universitet 2002); Per Olof H. Wikström and Rolf Loeber, "Do disadvantaged neighbourhoods cause well-adjusted children to become adolescent delinquents?," (*Criminology* 2000, Vol.38: 1109–1142); Jerzy Sarnecki and Felipe Estrada, *Juvenile crime in Sweden - a trend report on criminal policy, the development of juvenile delinquency and the juvenile justice system* (Stockholm: Stockholm University, Department of criminology, 2004); Bengt Börjeson, *Om påföljders verkningar- en undersökning av prognosen för unga lagöverträdare efter olika slag av behandling* (4th Edition. Stockholm: Almqvist & Wiksell Förlag AB, 1966). Furthermore, I want to mention the report "Hanteringen av unga lagöverträdare – en utdragen process" by Riksrevisionen (2009), which focuses on the demand of the expedition of proceedings against young offenders as an example of an extended field of research conducted by Swedish authorities. Other examples are the investigations by the Brå and the different SOUs.

Only a very limited number of studies consider the juvenile perspective on the core sentencing process from a theoretical perspective, and the few that do are not situated in the realm of traditional legal research.[148] Broadening the view to take in the whole of Scandinavia, a handful of studies of sentencing decision making have been published, but these adopt sociological and empirical approaches rather than a traditional legal approach.[149] The number of such studies also remains limited. A different perspective has been contributed by a Brå report focusing on the points of view of young offenders. The 2002 report, entitled "Seven young offenders about their trial",[150] focuses on how young offenders perceived their trials. How did they experience their trial? How well did the trial and the verdict succeed in communicating the principles of penal law and achieving a preventive effect? The report was mainly based on interviews conducted with the young offenders themselves. The interviews show that young people do not always understand what is said and what happens in the trial, and they often feel that they cannot express their views effectively.

King and Garapon[151] emphasize the general obstacles and problems faced in comparative socio-legal research.[152] However, there is still limited work being done in Europe in the field of comparative social-legal criminal research[153] in

[148] See Tärnfalk (2007); Marklund (2011); Arne Dalteg, *Avancerade Unga Lagöverträdare* (Malmö: Diss. Psykiatriska Institutionen, 1990); Anna Hollander and Michael Tärnfalk, "Juvenile Crime and the Justice System in Sweden," in *Youth Justice and Child Protection*, 90-103 (London: Jessica Kingsley Publishers, 2007); Lars-Christer Hydén, "Brott och straff och vård," (*Nordiskt socialt arbete* 1992, Vol.1: 3-13). For a historical perspective, see Hans Swärd, *Mångenstädes svårt vanartad…: om problemen med det uppväxande släktet* (Floda: Zenon, 1993) and also Mats Kumlien, *Uppfostran och Straff. Studier kring 1902 års uppfostringslagar* (Stockholm: Nerenius & Santérus förlag, 1997).

[149] See Camilla Hald, *Web without a Weaver: On the Becoming of Knowledge. A Study of Criminal Investigations in the Danish Police* (Boca Raton: Universal-Publishers, 2011); Wandall (2008); Diesen, Lernestedt, Lindholm, and Pettersson (2005).

[150] Brå Report 2002:18, "Sju ungdomar om sin rättegång".

[151] See Michael King and Antoine Garapon, "Judges and Experts in England and Wales and France: Developing a Comparative Socio-Legal Analysis," (*Journal of Law and Society* 14, 1987, Vol.4: 459-73).

[152] In relation to social-legal studies on a more general level, see Banaker and Travers (2013).

[153] A prominent figure in comparative socio-legal research generally is David Nelken. Regarding comparative criminal socio-legal research, see David Nelken, *Comparative Criminal Justice – making sense of difference* (London: Sage 2010).

relation to young offenders.[154] With regard to empirical research about the courtroom and its actors, the situation is different when looking at the United States. Ethnomethodological research with a focus on law in action has been pursued on different levels, centring, for example, on the court as a social order,[155] the figure of the attorney,[156] and the police as complementary to the study of both the courtroom and the law office.[157] When it comes to young offenders, however, most US studies focus on the problem of prosecuting young perpetrators in adult courts,[158] which is a different focus that is not relevant to my study. Furthermore, sentencing studies constitutes its own field of research in common law countries.[159] Socio-legal studies have proven successfully over

[154] In relation to children in the Nordic framework, see Tove Stang Dahl's, *Barnevern og Samfunnsvern* (Oslo: Pax förlag, 1978), although its focus is child care and therefore welfare/social law rather than criminal law, and Anne-Dorthe Hestbaek, *Tvansanbringelser I Norden – en kompartiv bekrivelse af de nordiske landes lovgivning* (Copenhagen: Socialforskningsinstitutet, 1998). However, this latter study is about the compulsory placement of children outside the home and therefore it touches only superficially on the realm of criminal law. Furthermore, Fionda's (2005) "Devils and Angels" should be mentioned in this context, although this study is mostly about the construction of the young criminal and policy issues, and focuses on the UK.

[155] See Feeley (1992).

[156] See Talcott Parsons, *The structure of social action* (Vol. 2. New York: Free Press, 1949); also Harvey Sacks, "The lawyer's work," in *Law in action: Ethnomethodological and conversation analytic approaches to law*, 43-9 (Aldershot: Darmouth Publishing Company, 1997).

[157] See Albert J. Meehan, "Internal Police Records and the Control of Juveniles Politics and Policing in a Suburban Town," (*British Journal of Criminology* 1993: 504-524). For a good overview, see Scheffler, Hannken-Illjes, and Kozin (2010), 6-8.

[158] For example, see Aaron Kupchik, *Judging Juveniles: Prosecuting Adolescents in Adult and Juvenile Courts* (New York: New York University Press, 2006).

[159] See Andrew Ashworth, *Sentencing and Criminal Justice (*Cambridge: Cambridge University Press, 2010); Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005); Ralph J. Henham, *Sentencing and the Legitimacy of Trial Justice* (Abingdon Oxon and New York: Routledge, 2012); Nigel Walker, *Sentencing Theory – Law and Practice* (London: Butterworths, 1985); Ralph J. Henham, *Sentencing Principles and Magistrates' Sentencing Behaviour* (Aldershot: Avebury Gower Publishing Company Limited, 1990); Susan Easton and Christine Piper, *Sentencing and Punishment – The Quest for Justice* (2nd Edition. Oxford: Oxford University Press, 2012); Eisenstein and Jacob, *Felony Justice. An Organizational Analysis of Criminal Courts* (Little, Brown and Company, Boston and Toronto 1977). Ursula Kilkelly, "Youth Courts and Childrens's Rights: The Irish Experience," (*Youth Justice* 2008, Vol.8: 39-56 conducted a comprehensive observational study of court practice with a focus on children's rights in Ireland). Her findings were confirmed by the Association for Criminal Justice Research and Development (see Jennifer Carroll, Emer Meehan and Sinéad

the years that a non-legal context is of significance to legal decision making.[160] Court observation studies are quite common in the United States, but even there barely conducted by legal scholars.[161]

In my analysis, I employ autopoietic systems theory.[162] I also thus wish to mention briefly the main sources used. Standing out as the "father" of autopoietic theory is the German sociologist Niklas Luhmann.[163] His work on sociological systems theory is wide ranging and complex, and his thought has also been developed by others. Employing his ideas in the framework of the legal system, Gunther Teubner[164] is probably the best example of a legal scholar who has sought to develop Luhmann's theory in the direction of reflexive and more

---

McPhillips, The Children Court: A National Study (Dublin: Association for Criminal Justice Research and Development, 2007)).

[160] See Wandall (2008), 9. Tyrone Kirchengast, *The Criminal Trial in Law and Discourse* (New York: Palgrave Macmillan, 2010), concurs, stating: "The trial as the manifestation of the means by which accusations of guilt are heard and determined, are not exclusive to the interests of select parties, but are inclusive of many voices and perspectives relevant to criminal law and justice. These voices are personal as well as institutional, and include victims, defendants, prosecutors, the Crown, the state, statutory authorities and the public at large" (165).

[161] See the studies of Robert M. Emerson, *Judging Delinquents – Context and Process in Juvenile Court* (New Brunswick and London: Aldine Transaction, 1969 (first paperback printing 2008)); Eisenstein and Jacob (1991); Feeley (1992); Abraham Blumberg, *Criminal Justice Issues and Ironies* (2nd Edition. New York: Watts, 1979); Abraham Blumberg, "The practice of Law as a Confidence Game: Organizational Cooperation of a Profession," (*Law and Society Review* 1967, Vol.1: 15-39); Aaron V. Cicourel, *The Social Organization of Juvenile Justice* (New York: Transaction Publishers, 1967).

[162] See chapter 8.

[163] His best-known works are Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie* (Suhrkamp Verlag, Frankfurt a.M. 1984) and Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp Verlag, Frankfurt a.M. 1997). These works focus rather on society as a whole; however, Luhmann acknowledges the important role law plays; see Dimitris Michailakis, „Review Essay - Law as an Autopoietic System," (*Acta Sociologica* 1995, Vol. 38: 323-37), 324.

[164] Especially Teubner (1993) but also Gunther Teubner, *Autopoietic Law: A New Approach to Law and Society* (Berlin: Walter de Gruyter, 1988). Note again, though, that also Luhmann himself has written about the legal system; see Niklas Luhmann, "Die Codierung des Rechtssystems," (*Rechtstheorie* 1986, Vol.17, No.2: 171-203) and especially Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt a.M.: Suhrkamp Verlag, 1995a). But Luhmann did not restrict himself to just one system. He rather investigated society as such, both the different systems of which it is composed and also on a more comprehensive level; he strove after an overall systems theory.

socially responsive law.[165] Several other scholars have made use of or been stimulated by Luhmann's and Teubner's academic work. I myself have been inspired by King and Piper,[166] Wandall,[167] and Nelken.[168]

By focusing on young offenders and employing a multi-method approach, I seek to contribute a new perspective to the academic discussion that will expand our knowledge and understanding.[169] No research comparable to my own can be found in either Sweden or Germany.

1.7. Limitations

It is obvious that my research is limited by the fact that it deals with only two case studies. The reason for this limitation is the sheer scale of the research that had to be undertaken, including empirical field studies.

Why have I chosen Germany and Sweden as case studies? Apart from the reasons mentioned in section 1.5.2.3., there is the obvious practical advantage that German is my mother tongue, which affords me a keener insight into the legal system – especially since "legal German" is quite an advanced area of the language. It is thus possible for me to obtain current and accurate information on the legal rules and the legal institutions in question. Apart from that, Germany is still one of the leading countries within the continental legal tradition[170] and has always exerted a major influence on Swedish legislation.[171]

---

[165] See Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann – Law, Justice, Society* (Nomikoi Critical Legal Thinkers. Abingdon: Routledge, 2010), 3 (footnote 4 there).

[166] See King and Piper (1995).

[167] See Wandall (2008).

[168] See Nelken (1984) and also Nelken (1996). But, as mentioned, Nelken can also be described as a scholar working within the framework of comparative law; see Nelken (2010). For further sources, see chapter 8.

[169] In terms of this aim as a legitimate aim for empirical legal studies, see Partington (2008), 3.

[170] This applies in the field of criminal law in particular.

[171] See Kischel (2015), 597 and Rolf Nygren, "Vad är egentligen "riktigt svenskt" i den svenska rätten?," (*Svensk Juristtidning (SvJT)* 1998: 103-109), 106-7. In terms of fundamental law, see Martin Sunnqvist, *Konstitutionellt kritiskt dömande* (Stockholm: Jure förlag AB, 2014), 166–7. When it comes to juvenile criminal law, Lappi-Seppälä (2011) emphasizes the strong influence of

This also means there is a sufficient level of comparability between the two systems to be able to make use of analogies. On the other hand, a major difference between the Swedish and the German juvenile criminal justice systems is the fact that Germany has established juvenile courts and gathered all the rules regarding young offenders together in a separate Code, the JGG, which has existed since 1923 and thus provides a sufficiently stable basis for research. Though it has always been influenced by German legislation, Sweden has decided on a different approach, treating young offenders within the same system as adults and – on the face of it – only distinguishing them by granting a discount and offering the possibility of additional legal consequences.

Being in the fortunate position of being able to undertake my research in Sweden has meant that I have had the necessary contacts for seeking information and materials concerning the Swedish system. In terms of material, it is a major benefit to have mastered the Swedish language as well. This has enabled me to consult primary sources of law. Nelken dubbed this kind of comparative research "living there". "Living there" involves wider participation in the general life of the country and may even include an active consulting or critical role in relation to the criminal justice system itself.[172] He points out that long-term involvement in a culture makes it possible to discover more about the intellectual and political affiliations of informants and to gain direct experience of the relationship between criminal justice and broader aspects of the society. He even goes so far as to claim that "[a]ctually living in a place for a long period is the best – perhaps the only reliable – way to get a sense of what is salient".[173]

In the framework of the empirical part of this study, I concentrate on the classic legal arena of the juvenile criminal trial: the courtroom. One of the aims of the empirical part of this thesis is to investigate the interplay and the dynamics of the practitioners in the juvenile criminal trial, and since the courtroom is the forum where these practitioners meet, communicate, and interact, this is my focus. I should emphasize here that the centre of my attention is not the young offender or the offence itself. Moreover, I do not engage closely with statistics

---

the German criminal law reformer Franzt von Listz on the development of what he calls the "Nordic Model of Youth Justice" (202).

[172] See Nelken (2010), 95.

[173] Ibid., 96. As an example, he emphasizes the importance of seeing how social control is exercised in Italian family life as indispensable for understanding what is and is not asked of its juvenile justice system.

and the criminological background or research regarding legal consequences for young offenders; this is not the focus of my project.

My investigation does not deal with welfare, social, or civil legislation regarding children in either country; the focus is criminal legislation. However, because of the close connections between these kinds of legislation and the juvenile criminal legal systems in both countries – due to the welfare/justice clash – it is not possible to avoid them completely. But I will only touch briefly on these issues where it is necessary for understanding the criminal legislation.

Furthermore, I only engage with proceedings against young offenders who have reached the age of criminal legal responsibility. In other words, I do not include offenders under the age of 14 (for Germany) or 15 (for Sweden) in this study.

Finally, I have chosen English as the working language for this thesis. When doing research in and on two countries, the aim should be to make the results accessible to audiences in both countries. English is the best-known foreign language in both Sweden and Germany. Apart from that, English provides for an international accessibility, especially with regard to the academic community. All this notwithstanding, we must keep in mind the difficulty in describing these national systems in English: the English language often lacks words for exact translations of particular technical terms, as certain legal concepts familiar in most of the continental European countries do not exist in the English legal system.

1.8. Outline

I have structured my thesis as eight chapters, including this introduction. In the second chapter, I approach the question of *why* there is a welfare/justice clash in relation to young offenders, which connects to the first sub-question of my research questions. I investigate the roots of the clash by looking closely at the distinctive stage between childhood and adulthood. I show that the reasons that most Western legal systems treat young offenders differently from adult perpetrators have to do with the nature of this specific time in life.[174] This

[174] However, Jörg-Martin Jehle, Christopher Lewis and Piotr Sobota, „Dealing with Juvenile Offenders in the Criminal Justice System," (*European Journal on Criminal Policy and Research* 2008: 237-47), point out that there are differences between countries in terms of the procedures used (237).

chapter covers biological and psycho-social aspects and considerations as well as legal ones.

In chapters 3 to 6, I seek to understand the forms the welfare/justice clash takes in the juvenile criminal justice systems of Sweden and Germany, which relates to the second sub-question of my research questions. These chapters contain in-depth studies of the Swedish and the German juvenile criminal justice systems from a legal dogmatic perspective. Within each chapter, a descriptive part is followed by an analysis from both a welfare and a justice perspective for each section. The chapters are divided up as follows: in chapter 3, I start out with a rough overview of the history of the juvenile criminal justice systems in Sweden and Germany and engage further with the guiding principles of each. Chapter 4 consists of detailed studies of each system's specific legal consequences for young offenders, including possibilities for dismissing and diverting cases, as well as sentencing aspects. In chapter 5, I focus on the procedural specifics and protective safeguards regarding young offenders. Chapter 6 contains an investigation of the figures in the juvenile court. Each chapter starts out by investigating the German system. Though it might be seen as a courtesy to Sweden – the country that made this research possible – to start out by examining the Swedish system, I have nevertheless chosen Germany as my starting point. The reason is simple: as a lawyer trained in Germany, I am more familiar with the German system. This also means that to some extent I measure the Swedish system against the German system.

Chapter 7 contains the empirical part of my study: law in action. In this chapter, I present the findings from the observational study and the interviews. Here, again, I start out in each section with a descriptive part, followed by analyses from both the welfare and justice perspectives in order to investigate the welfare/justice clash.

Chapter 8 contains the overarching analysis that builds on the earlier findings. This chapter connects to the third sub-question, and it suggests an explanation for the ability of the juvenile criminal justice systems in Sweden and in Germany to function in roughly similar ways, notwithstanding their differences in dealing with young offenders and the aforementioned tensions. It contains an introduction to autopoietic systems theory, which serves as my analytical tool and should enable the reader to follow my reasoning as I develop my account of the juvenile criminal justice system. I present my idea of the juvenile criminal justice system as an autopoietic sub-system, and I apply this concept to the juvenile criminal justice systems of Sweden and Germany.

Chapter 2

Between childhood and adulthood

The phase during which a young person transforms from a child below the age of criminal capacity to a juvenile, a young adult, and finally an adult[175] is a very special period, and its effects are visible in, for instance, the physical changes of the body in size and shape. In this chapter, this transitional phase is labelled "adolescence". Despite the possibility that this might invite confusion, I choose to employ this term since it is the term found in the non-legal scientific literature this chapter engages with.

When young people reach a certain age, they are assigned legal and criminal capacity, even though they are not yet adults. The ability to be governed by norms that prescribe certain kinds of behaviour is not innate but develops with age and is learned in the education and socialization process, which can happen faster or slower depending on the conditions encountered by the individual.[176]

This chapter investigates the phase between childhood and adulthood and how it might bear on the (juvenile) criminal justice system. It aims to answer the first sub-question of my research questions, namely: *in which ways do young offenders differ from adult offenders?* This means that this chapter engages with the very basis of the welfare/justice clash. Why do welfare considerations have such weight when it comes to young offenders? In other words, this chapter seeks to answer the question: how can we explain the welfare/justice clash?

The following factors provide a useful framework for understanding what is distinctive about adolescence. On the one hand, there are cognitive factors: young persons' capacity to assess and appreciate the harmful consequences of their criminal actions is less developed (I describe these as "biological factors" and take these to include hormonal changes). On the other hand, there are

[175] See the definitions in section 1.3.

[176] See Alexander Böhm and Wolfgang Feuerhelm, *Einführung in das Jugendstrafrecht* (München: C.H.Beck, 2004), 26.

factors relating to volitional control: for example, young persons have had less time to develop impulse control and to learn to resist peer pressures to offend (I label these "psychosocial factors").[177]

2.1. Biological factors

From a biological perspective, a young person's level of maturation is reflected in various ways. Apart from the less than fully developed bodies and brains of young persons, there are also hormonal changes that must be taken into account.

2.1.1. Brain maturation

Neuroscientific work on the limited maturation of young persons has only been undertaken fairly recently.[178] It provides evidence that brain maturation in adolescence is incomplete.

For centuries, the discussion of young offenders has recognized a distinctive stage of life between childhood and adulthood,[179] but there has been little scientific evidence to draw on in this regard. Most expertise was based on

[177] See von Hirsch and Ashworth (2005), 36. The professional literature about adolescent risk taking is huge. I make no claim to be exhaustive – especially since this literature in medicine, psychology, etc. is outside of my area of professional competence – but I want to draw the reader's attention to some of these interesting findings. For a good overview see Valerie F. Reyna and Frank Farley, "Risk and Rationality in Adolescent Decision Making," (*Psychological Science in the Public Interest* 2006, Vol.7, No.1: 1–44).

[178] Laurence Steinberg, "A behavioral scientist looks at the science of adolescent brain development," (*Brain and Cognition* 72, 2010: 160–4), describes the field of developmental neuroscience as "having matured from a field in its infancy to one that is now approaching its own adolescence" (160). This also indicates the weakness of this field, which is still developing.

[179] Aristotle claimed some 2,500 years ago that "they [the young] are impulsive and quick-tempered and inclined to follow up by anger. And they are unable to resist their impulses" (See George A. Kennedy, *Aristotle on rhetoric: A theory of civic discourse. Newly translated with introduction, notes, and appendixes by George A. Kennedy* (Oxford: Oxford University Press, 1991), 165).

speculation and not on empirical enquiry.[180] In the early 1970s, the systematic scientific study of psychological development during adolescence began.[181] Fairly recently, developmental neuroscientists have claimed that the brains of young persons are not as developed as the brains of adults. These neuroscientists thereby seem to have confirmed the longstanding popular belief that adolescence is characterized by a unique set of features that warrant its consideration as a distinct period of development.[182] It appears that the brain changes characteristic of adolescence are among the most dramatic and important to occur during the human lifespan.[183] Recent developmental neuroscientific research has shown that there is continued brain maturation through to the end of the adolescent period.

> Findings from both cross-sectional and longitudinal imaging studies of late childhood and adolescence showed that brain regions associated with more basic functions such as motor and sensory processes mature first, followed by association areas involved in top-down control of thoughts and action. This pattern of development is paralleled by a shift from diffuse to more focal recruitment of cortical regions with learning and cognitive development. […] The reported shift in cortical architecture and function is presumably an experience-driven maturational process that reflects fine-tuning of neural systems with experience and development.[184]

Steinberg describes how heightened risk taking in adolescence is the product of the interaction between two brain networks: firstly, the cognitive-control network that subserves executive functions such as planning, thinking ahead, and self-regulation and that matures gradually over the course of adolescence

---

[180] See Elizabeth S. Scott, N. Dickon Reppucci, and Jennifer L. Woolard, "Evaluating Adolescent Decision making in Legal Contexts," (*Law and Human Behavior* 1995, Vol.19, No.3: 221–44), 224ff.

[181] Elizabeth S. Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Cambridge: Harvard University Press, 2010), 28.

[182] See Sarah-Jayne Blakemore, "The social brain in adolescence," (*Nature Reviews Neuroscience* 2008, Vol.9: 267–77), 267, who focuses on the development of the "social brain" that has to do with the understanding of others' emotions, intentions, and beliefs. She reviews evidence that certain areas of the social brain undergo substantial functional and structural development during adolescence.

[183] See Steinberg (2010), 160.

[184] B.J. Casey et al., "Imaging the developing brain: what have we learned about cognitive development?," (*Trends in Cognitive Sciences* 2005, Vol.9, No.3: 104–10), 108.

and young adulthood largely independently of puberty and, secondly, the socioemotional network that is especially sensitive to social and emotional stimuli and that is remodelled in early adolescence by the hormonal changes of puberty.[185] The development of logical reasoning abilities and improvements in abstract and hypothetical thinking take place between the ages of 11 and 16. The logical reasoning abilities of 16-year-olds are comparable to those of adults.[186] The ability to consider the consequences of choices continues to improve in the following years.[187] Unlike logical reasoning abilities, psychosocial capacities that improve decision making and moderate risk taking – such as impulse control, emotion regulation, the capacity to delay gratification, and resistance to peer influence – continue to develop well into young adulthood.[188] These latter developments are not considered complete until approximately the age of 25.[189] Psychosocial immaturity during adolescence may undermine what might otherwise be competent decision making.[190]

In other words, an adolescent's brain matures first intellectually and then socially and emotionally. Such findings seem to be supported by statistical

[185] See Laurence Steinberg, "Risk-Taking in Adolescence – New Perspectives from Brain and Behavioral Science," (*Current Directions in Psychological Science* 2007, Vol.16: 55–9), 56 and Tomas Paus, "Mapping brain maturation and cognitive development during adolescence," (*Trends in cognitive sciences* 2005, Vol.9, No.2: 60–8), 60. Both explain this as arising in part from an increase of white matter in the prefrontal cortex as a result of myelination, the process through which nerve fibres become sheathed in myelin, a white, fatty substance that improves the efficiency of brain circuits. More efficient neural connections within the prefrontal cortex are important for higher-order cognitive functions like planning ahead, weighing risks and rewards, and making complicated decisions.

[186] See Raymond Corrado and Jeffrey Mathesius, "Developmental Psycho-Neurological Research Trends and Their Importance for Reassessing Key Decision-Making assumptions for Children, Adolescents, and Young Adults in Juvenile/Youth and Adult Criminal Justice Systems," (*Bergen Journal of Criminal Law and Criminal Justice* 2014, Vol.2, No.2: 141–63), 144ff.

[187] See Scott and Steinberg (2010), 34.

[188] See Armin Raznahan et al., "Patterns of coordinated anatomical change in human cortical development: a longitudinal neuroimaging study of maturational coupling," (*Neuron* 72, 2011, No.5: 873–84), who have conducted a longitudinal neuroimaging study of brain maturation looking into late childhood, adolescence, and early adulthood.

[189] See Corrado and Mathesius (2014), 154. They even draw the conclusion that one might consider raising the maximum age for juvenile justice systems to 24 years (159).

[190] Steinberg (2007), 56.

evidence showing that adolescents are overrepresented in incidents of every category of reckless behaviour.[191]

2.1.2. Hormonal changes

Another important biological aspect of the time between childhood and adulthood is puberty. Puberty involves elevated levels of gonadal steroid hormones which sculpt neural circuits; this leads to significant neuronal rewiring.[192] Important changes in activity involving the neurotransmitter dopamine occur during early adolescence, especially around puberty.[193] It has been claimed that there are substantial changes in the density and distribution of dopamine receptors in pathways that connect the limbic system, which is where emotions are processed and rewards and punishments experienced, and the prefrontal cortex, which is the "brain's chief executive officer".[194] Dopamine plays a decisive role in how humans experience pleasure. Consequently, a change in the dopamine level leads to an elevated level of sensation seeking. Sisk and Zehr point out:

> The recognition that the actions of pubertal hormones during adolescence have long-lasting consequences on brain structure and function raises fundamental questions that demand experimental study for a better understanding of the variables and interactions that influence behavioral maturation. […] Adolescence is clearly pivotal for behavioral development.[195]

Furthermore, increased levels of testosterone are associated with impatience, irritation and, consequently, aggressive and destructive behaviour.[196] Steinberg

---

[191] See Jeffrey Arnett, "Reckless behavior in adolescence: A developmental perspective," (*Developmental review* 12.4, 1992: 339–73), 339.

[192] See Cheryl L. Sisk and Julia L. Zehr, "Pubertal hormones organize the adolescent brain and behavior," (*Frontiers in Neuroendocrinology* 26, 2005: 163–74), 163, 170–1.

[193] See Corrado and Mathesius (2014), 151.

[194] Laurence Steinberg, "Should the Science of Adolescent Brain Development Inform Public Policy?," (*Issues in Science and Technology* 2012: 67–78), 68.

[195] Sisk and Zehr (2005), 171.

[196] See Dank Olweus, Ake Mattsson, Daisy Schalling, and Hans Loew, "Circulating testosterone levels and aggression in adolescent males: a causal analysis," (*Psychosomatic medicine* 1988, Vol.50, No.3: 261–72), 270.

suggests that it makes evolutionary sense that adolescents are more motivated by appetitive inclinations, more oriented towards sensation seeking, and more willing to take risks, for adolescence is the period during which individuals must leave the natal environment and seek out mates.[197]

2.2. Psychosocial factors[198]

Biological explanations of antisocial behaviour seem appealing because they are easy to grasp and therefore seem to render such behaviour easier to deal with, but the phase between childhood and adulthood is more complex than such explanations suggest. Developmental psychology has been investigating and trying to explain this period of an individual's life for much longer than developmental neuroscience. Changes during adolescence happen not only on a biological level, but also on a social level, and this makes it necessary to consider social science, criminology, developmental psychology – the list is long. The variety of disciplines involved here reflects once more the complexity of the problems this phase of life gives rise to. Shepard defines adolescence as "the psycho-social response to the profound biological changes of puberty within a societal context".[199] Consequently, one should not make the mistake of addressing only the biological aspects – especially developmental neuroscience – when discussing, for instance, the potential culpability of young offenders.

2.2.1. Time of experimentation

Adolescence is a time of a lot of major changes in a young person's life – not only biologically but also emotionally. It is claimed to be a time of

[197] See Steinberg (2010), 160.

[198] I define psychosocial factors as the combination of social factors (like social background, peer influence, situational context, etc.) and psychological factors (like self-control).

[199] Robert E. Jr. Shepard, "Developmental Psychology and the Juvenile Justice Process," (*Criminal Justice* 1999, Vol.4, No.1, American Bar association: 42–4), 43. In a similar vein, Reinhard Kreissl, "Neurowissenschaftliche Befunde, ihre Wirkung und Bedeutung für ein Verständnis in der Jugendkriminalität," in *Handbuch Jugendkriminalität*, 113–23 (2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011), defines the brain as the most social organ of the human being (118).

experimentation and testing limits,[200] and it is a time during which capacities of self-regulation are still underdeveloped. It is also a time during which the future adult is shaped. Von Hirsch and Ashworth point out that adolescence is a time

> for weaning oneself away from adult authority, for learning to live autonomously, for testing limits. As a result, it is a time for making misjudgments, including those that harm others.[201]

Zimring considers the granting of a freedom to experiment to juveniles a particularly important element of a free society.[202] Our society aims to raise responsible citizens who live offending-free lives, are able to think for themselves, and make responsible decisions. Autonomy is a goal that juveniles aim to reach. Society also considers autonomy a valuable attribute of a citizen in a free society: it is not raising sheep who simply follow rules and leaders. The aim of creating autonomous citizens implies the risk that mistakes will be made by some of the developing young citizens. While these mistakes (for example criminal offending) may have serious consequences, they will lead to learning, and so the young person will be less likely to reoffend in the future.[203] As von Hirsch and Ashworth point out: "Learning to make choices carries with it the risk of making *bad* choices".[204]

Accepting such an understanding involves the recognition that even a "good" youngster, who is at an appropriate intellectual and emotional level of development for his or her age, can fail in his or her moral evaluation of a specific situation. Such a mistake can be seen as a slip that does not necessarily reflect the young offender's general state of mind towards criminal conduct. Even Aristotle claimed that the actions of young offenders are no proof of a "bad" character, as can be assumed in the case of a grown adult.[205] Young people always exhibit the highest rates of offending. With regard to reported

---

[200] See Phillip Hwang and Björn Nilsson, *Utvecklingspsykologi* (3rd Edition. Stockholm: Natur & Kultur, 2011), 327.

[201] Von Hirsch and Ashworth (2005), 44.

[202] See Zimring (2005), 18.

[203] Obviously, this argument is only valid to a certain extent. We do not want young offenders to "experience" a murder to learn that killing a person is wrong.

[204] Von Hirsch and Ashworth (2005), 46.

[205] Aristotle claimed that "the wrongs they commit come from insolence, not maliciousness"; see Kennedy (1991), 166.

delinquency, it reaches its peak in the 18–25 years age group.[206] Boys tend to be more criminally active than girls[207] and also are more often the victims of crime.[208] After these years the rates decrease.[209] Juvenile delinquency is therefore not necessarily the gateway to a criminal career but, on the contrary, a "normal"[210] phenomenon during this developmental phase.[211] Many young offenders cease offending when they move into adulthood.[212]

---

[206] See Inspektionsrapport 2009:2; Gerhard Spiess, *Jugendkriminalität in Deutschland – zwischen Fakten und Dramatisierung. Kriminalstatistische und kriminologische Befunde* (Konstanzer Inventar Kriminalitätsentwicklung 2/2012, Bibliothek der Universität Konstanz 2012); Bundesamt für Statistik (2008), "Jugendkriminalität 2008".

[207] See Heinz, Wolfgang, *Kriminelle Jugendliche – gefährlich oder gefährdet?* (Vol. 220 UVK. Universitätsverlag Konstanz 2006), 2; see further, also relating to gender, Mechthild Bereswill and Anke Neuber, "Jugendkriminalität und Männlichkeit," in *Handbuch Jugendkriminalität*, 307–17 (2nd Edition, Wiesbaden: VS Verlag für Sozialwissenschaften, 2011); Mirja Silkenbeumer, "Jugendkriminalität bei Mädchen," in *Handbuch Jugendkriminalität*, 319–31 (2nd Edition, Wiesbaden: VS Verlag für Sozialwissenschaften, 2011); Kerstin Nordlöf, „Genus i kontexten unga lagöverträdare," in *Festskrift till Catharina Calleman – I Rättens Utkanter*, 261-74 (Uppsala: Iustus förlag, 2014); Meda Chesney-Lind, "What about the girls? Delinquency programming as if gender mattered," (*Corrections Today* 2001, Vol. 63, No.1: 38–45); Meda Chesney-Lind and Randall G. Shelden, *Girls, Delinquency, and Juvenile Justice* (2nd Edition. Belmont: Wadsworth Publishing Co, 1998). Dowd confirms this pattern as valid in the United States (Dowd, seminar "Asking the Man Question: Men, Masculinities, and Equality," Lund University, 2013-03-13).

[208] See Statistiska centralbyrån (2012), 84, 87–8.

[209] See Wolfgang Heinz, "Bei der Gewaltkriminalität junger Menschen helfen nur härtere Strafen! Fakten und Mythen in der gegenwärtigen Jugendkriminalpolitik," (*Neue Kriminalpolitik* 2008b, Vol.2: 50–9), 50ff.; Wolfgang Heinz, *Jugendkriminalität in Deutschland – kriminalstatistische und kriminologische Befunde* (Universität Konstanz 2003).

[210] The expression "normal" is put in scare quotes to avoid the impression that I consider deviating behaviour as something normal. Generally, criminal behaviour is deviant and can therefore be considered not normal. Otherwise, the juvenile not committing any criminal offences would logically be considered "abnormal", which cannot be right. But according to the statistics, criminal conduct is so common during adolescence that it can be seen as a part of typical youth behaviour.

[211] See Hanns von Hofer, "Åtgärder mot ungdomsbrottslighet," in *Den svenska ungdomsbrottsligheten*, 333–49 (3rd Edition. Lund: Studentlitteratur, 2013), 333.

[212] See L. Alan Sroufe et al., *The Development of the Person – The Minnesota Study of Risk and Adaption from Birth to Adulthood* (New York and London: The Guilford Press, 2005), 193; Zimring (2005), 95. For Sweden see BRÅ Report 2000:7, 5.

2.2.2. Sensation seeking

It has also been argued that emotional arousal and affective lability increase during adolescence, which leads to sensation-seeking behaviour and therefore increased risk taking. Steinberg writes:

> The temporal gap between puberty, which impels adolescents towards thrill seeking, and the slow maturation of the cognitive-control system, which regulates these impulses, makes adolescence a time of heightened vulnerability for risky behavior. Risk taking is the product of a competition between the socio-emotional and cognitive-control networks, and adolescence is a period in which the former abruptly becomes more assertive while the latter gains strength only gradually, over a longer period of time.[213]

What happens during puberty, it is claimed, is a shift in reward sensitivity that drives adolescents to seek higher levels of novelty and stimulation than they did as children. At mid adolescence, reward seeking peaks because the brain system is at its height of arousability but – as mentioned before – systems important for self-regulation are still immature.

However, increased risk taking may not be due to the fact that adolescents underestimate risks. Reyna and Farley point out that although the aim of many interventions is to enhance the accuracy of risk perceptions, adolescents also sometimes overestimate important risks.[214] The belief that adolescents feel invincible is a myth.[215]

2.2.3. Lower levels of self-control

In addition to the fact that adolescence is a time of experimentation and sensation seeking, adolescents are considered to have – on average – lower levels of self-control than adults.[216] It has been claimed that changes in mood, which

---

[213] Steinberg (2007), 55–6. This risk taking is indicated by statistics on automobile accidents, binge drinking, contraceptive use, and crime.

[214] Such as HIV and lung cancer – see Reyna and Farley (2006), 34.

[215] Ibid.

[216] See Sarah-Jayne Blakemore and Trevor W. Robbins, "Decision-making in the adolescent brain," (*Nature neuroscience* 2012, Vol.15, no.9: 1184–91), 1184–5.

are also based on hormonal changes, are influenced by an interaction between rapidly evolving gender-based self-identities and stressful social relationships. The latter include, first of all, relationships with authority figures like parents, but also those with peers. Adolescence is considered a time of introspection and withdrawal from the family. The young person starts to observe him- or herself from the viewpoint of others and develops a self-perception (an ideal self as opposed to the real self). Neubauer claims that at this time the mental division between subject and object occurs in relation to the self.[217] Differences or gaps between desirable self-identities and negative, externally imposed labels can often be a major source of adolescent stress, frustration, and anger.[218] Hay and Ashman describe an interactive relationship between gender, parents, peers, and the school in the formation of an adolescent's general self-concept (confidence and self-worth) and emotional stability (calmness, freedom from anxiety, and depression).[219]

According to Zimring, new domains (including, for example, secondary education, sex, and driving) require not only the cognitive appreciation of the need for self-control in new situations but also its practice.[220] Increasing maturity leads to new capabilities in the form of criticism and questioning and also manifests in the form of new values, attitudes, and behaviour which lead young persons to contrast themselves with their parents. Peers largely assume the position of parents in the socialization process.

Another aspect of the lower levels of self-control is connected to something discussed earlier, namely, the apparent diminished capacity for thinking ahead which leads to more spontaneous decisions. Criminal conduct often arises out of an impulsive decision. This is clear from the fact that, for example, instances of juvenile delinquency often occur during leisure time and in uncontrolled, free spaces.[221] A person with a well-developed self control system would consider the possible outcomes before acting. This ability seems not to be completely developed in adolescents, in part due to the fact that young people simply lack

---

[217] See Walter F. Neubauer, *Selbstkonzept und Identität im Kindes-und Jugendalter* (München: Ernst Reinhardt Verlag, 1976).

[218] See Corrado and Mathesius (2014), 152.

[219] See Ian Hay and Adrian F. Ashman, "The development of adolescents' emotional stability and general self-concept: The interplay of parents, peers, and gender," (*International Journal of Disability, Development and Education* 2003, Vol.50, No.1: 77–91), 87.

[220] See Zimring (2005), 60.

[221] See Schaffstein, Beulke, and Swoboda (2014), 25.

the life experience and therefore the accumulated knowledge that comes from having lived for longer.

2.2.4. Peer pressure

Another crucial aspect to be considered is, as I mentioned briefly above, the apparent sensitivity of adolescents to peer pressure because of the increasing importance of peers and the decreasing importance of parents during this phase of life.[222] Peer pressure – or rather the inability to resist it[223] – is a well-known problem for young people, who often operate in groups which convey to them feelings of identity, community, and orientation.[224] Even if a person is at the average level of intellectual and emotional development for their age, they may be in a situation in which they appreciate what the morally right thing to do is but bend to peer pressure, making the wrong choice.[225] Studies in social science indicate that when individuals are alone, there are no differences in risk taking across the different age groups, but when people are in groups, risk taking increases among adolescents and college students but not among adults.[226] Both same-sex and opposite-sex peer friendships seem to be more influential in the formation of females' and males' emotional stability than relations with parents.[227] Adolescents are, it is claimed, highly responsive to the social rewards afforded by positive peer evaluation.[228]

It has been argued that peer influence exhibits a curvilinear relationship with age: it increases through early adolescence, peaks in middle adolescence (around

---

[222] SOU 1993:35 points out that juvenile delinquency is according to criminological research a group phenomenon (36).

[223] See Zimring (2005), 61.

[224] See Bernd-Dieter Meier et al., *Jugendgerichtsgesetz. Handkommentar* (Baden-Baden: Nomos, 2011), §105, 856. See also Schaffstein, Beulke, and Swoboda (2014), 24.

[225] For further reading, see Andersson and Mattson (2011) on juveniles in gangs.

[226] See Laurence Steinberg, "Risk-Taking in Adolescence – New Perspectives from Brain and Behavioral Science," (*Current Directions in Psychological Science* 2007, Vol. 16: 55–9), 56.

[227] See Hay and Ashman (2003), 84.

[228] See Lia O'Brien et al., "Adolescents Prefer More Immediate Rewards when in the Presence of their Peers," (*Journal of Research on Adolescence* 2011, Vol.21, No.4: 747–53), 747; Amanda E. Guyer et al., "Probing the neural correlates of anticipated peer evaluation in adolescence," (*Child Development* 2009: 1000–15), 1014.

15 years of age) and slowly declines into adulthood.[229] The peer effect is said to be due specifically to the impact that peers have on adolescents' reward sensitivity.[230] This sensitivity to peer pressure is a typical stage of development in a young person's life; adolescents turn away from their parents and look for new role models while younger children still look to their parents to make decisions for them. From the biological (developmental neuroscientific) point of view, Steinberg explains this phenomenon as follows:

> In the presence of peers or under conditions of emotional arousal, however, the socio-emotional network becomes sufficiently activated to diminish the regulatory effectiveness of the cognitive-control network. Over the course of adolescence, the cognitive-control network matures, so that by adulthood, even under conditions of heightened arousal in the socio-emotional network, inclinations toward risk taking can be modulated.[231]

Offending or bad behaviour by young people is often connected with "hanging out with the wrong crowd", associating with troubled individuals.[232] Corriero writes: "The power of peer pressure on a child's decision to engage in criminal behavior is directly related to an adolescent's need to belong and be accepted by his peers".[233]

Another aspect of this phenomenon is pointed out by Riera, who claims that the fear of the loneliness that would result from not joining in with a criminal action persuades young people to take the easy option: to go along with the crowd.[234] Findings from developmental psychology indicate that friends have a tendency to become more and more alike in their opinions, statuses, and interests over time.[235] The fear of being rejected leads to conformity. These tendencies peak at around 15 to 16 years of age.[236] In other words, the element of peer pressure can

[229] See Corrado and Mathesius (2014), 149.

[230] See Steinberg (2012), 74.

[231] Steinberg (2007), 56.

[232] Sroufe et al. (2005), 195.

[233] Corriero (2006), 30.

[234] See Michael Riera, *Uncommon Sense for Parents with Teenagers* (LLC: Random House, 2012), 22.

[235] See Stephen von Tetzchner, *Utvecklingspsykologi – Barn- och Ungdomsåren* (Lund: Studentlitteratur, 2005), 611–13.

[236] Ibid.

have a direct and an indirect effect. The direct effect is that the young person will orient his or her decision with respect to the peer group. Indirectly, adolescents' desire for peer approval, or their fear of rejection, will affect their choices. Behavioural science supports these assumptions through studies of susceptibility to antisocial peer influence that show that vulnerability to peer pressure increases between preadolescence and mid adolescence, peaks in mid adolescence and gradually declines thereafter.[237] Consequently, one might suppose that if a young person has time to evaluate a situation, he or she may be just as capable as an adult of making a reasonable decision, but if the young person is emotionally aroused or surrounded by peers – which is quite common in cases of juvenile delinquency – he or she may be much less capable of making the "right" decision, or simply not mature enough to do so.

2.3. Legal implications

From a legal perspective, the biological and psychosocial factors tied to adolescence can be interpreted as having an impact on criminal law. Young offenders are less culpable for their actions and they are more sensitive to criminal sanctions.[238] These factors can have an impact on deterrence and on proportionality. These biological and psychosocial factors were earlier defined as belonging to the realm of welfare considerations.[239] The need to respect welfare considerations in juvenile criminal justice is what lays the foundation for the welfare/justice clash.

2.3.1. Less culpability/blameworthiness

As mentioned briefly earlier, owing to the fact that adolescents have less life experience than adults, the law applies specific rules to young offenders[240] to

[237] See Steinberg (2004), 55.

[238] See von Hirsch and Ashworth (2005), 36.

[239] See section 1.2.

[240] This is visible in most Western criminal justice systems. See Frieder Dünkel et al., (eds.), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* (Godesberg: Forum Verlag, 2010), which comes in four volumes covering 34 systems in total. See Ineke Pruin, "The scope of juvenile justice systems in Europé," in *Juvenile Justice Systems in Europe: Current Situation*

reflect their lack of maturity.[241] This lack of maturity means they are less culpable on the one hand and more vulnerable and formable on the other hand.[242]

Legal capacity rests on the idea that the offender can be blamed for his or her action.[243] An inability to understand a criminal action may lead to acquittal in both the Swedish and the German criminal justice systems. Both systems deal with the lack of an understanding of the crime[244] not in relation to criminal responsibility as such – which would mean that an offender could be found innocent on the grounds of a lack of intention[245] – but rather in the framework

---

and Reform Developments, Vol.4, 1513–56 (Godesberg: Forum Verlag, 2010), 1513 and also Jehle, Lewis, and Sobota (2008), 237.

[241] Sociologists define maturity as the end product of "socialization". Ellen Greenberger and Aage B. Sorensen, "Towards a concept of psychosocial maturity," (*Journal of Youth and Adolescence* 1974, Vol.3: 329–58), representing the psychologists' approach to the definition of maturity, propose factors such as the capacity to function adequately on one's own, to contribute to social cohesion, and to interact adequately with others (329). The lack of maturity of young offenders is also recognized on a European level (see Christopher Salvatore et al., "A Systematic Observational Study of a Juvenile Drug Court Judge," (*Juvenile & Family Court Journal* 2011, Vol. 62, No.4:19–36), 20) and reflected in the European Recommendations Rec (2003)20 and Rec (87)20.

[242] See Schaffstein, Beulke, and Swoboda (2014), 8. For the Swedish recognition of this lack of maturity, see prop.2014/15:25, 20. Examples of this recognition can also be found in a variety of other legislation, for example the prohibition on voting under the age of 18, as well as age limits when entering into a binding contract, driving a car or marrying without parental consent.

[243] For Germany see Bundesverfassungsgerichtsentscheidung BVerfGE 20, 323 (331), BVerfGE 57, 250 (275) and BVerfGE 82, 106 (114). The Bundesverfassungsgericht (BVerfG, which is the German Federal Constitutional Court) emphasizes in several decisions the constitutional rank of the so-called "Schuldprinzip" (principle of guilt) – see BVerfGE 6, 389 (439) and BVerfGE 96, 231 (249). The principle "nulla poena sine culpa" is based on Art.1 I and Art.2 II GG, protecting human dignity and the right of a person to personal responsibility. In Sweden, this concept is called "skuldprincipen" (the principle of guilt) and results from the so-called "konformitetsprincipen" (principle of conformity). The latter entails that an offender who was not capable of conforming to the law should not be punished. The skuldprincipen even comprises an aspect of proportionality in relation to sentencing, namely that a punishment may not exceed the level of guilt; see Asp, Ulväng and Jareborg (2013), 269–71. For Germany the same applies; see BVerfGE 22, 323 (331).

[244] A lack of understanding corresponds to a lack of culpability.

[245] Intention is part of the subjective preconditions of being found guilty of an offence (see Asp, Ulväng and Jareborg (2013), 64 for Sweden and Köhler (1997), 149ff. for Germany).

of the sentencing decision in Sweden[246] and under the specific aspect of guilt in Germany.[247] Note here that the term "guilt" is used differently in the two legal systems. In Sweden, it describes the demand for intent or negligence.[248] A lack of culpability due to a lack of understanding, on the other hand, is in Sweden defined in Chapter 30 §6 Brottsbalk (1962:700),[249] which concerns sentencing.[250] In Germany, the term "guilt" is used to assess whether there are any reasons to excuse the offender's actions, and lack of culpability is treated under this heading. In the German criminal justice system, such rules fall under the rubric of "lack of capacity to be adjudged guilty due to emotional disorders" in §20 StGB[251] and in terms of a diminished capacity to be adjudged guilty in §21 StGB. Both the Swedish and the German regulations rest on the understanding that only an offender who could and should have acted

[246] See Asp, Ulväng and Jareborg (2013), 65. In other words, the Swedish criminal legal system has no specific rules regarding children's criminal responsibility. Generally, all perpetrators are considered responsible, irrespective of their age. However, they can only be held accountable for their criminal action and be punished once they have passed the threshold of 15 years of age.

[247] In the German criminal justice system, the question of guilt is placed systematically after the question of whether a crime has been committed (thereby still making it possible to participate in the crime due to the principle of limited accessoriness), fulfilling the objective (as stated in the specific statute) and subjective (intent) requirements as well as the absence of justifying reasons like self-defense. This means that if the offender is excused in that sense because lacking guilt (for example because of insanity), no criminal punishment can be imposed and the offender should receive some sort of care, for example in the form of a placement in a psychiatric hospital according to §63 StGB. See Köhler (1997), 124 and 348ff.; see also Tatjana Hörnle, "Guilt and Choice in Criminal Law Theory – A Critical Assessment," (*Bergen Journal of Criminal Law and Criminal Justice* 2016, Vol. 4, No. 1: 1-24), 17, who questions this construction and offers interesting thoughts regarding "guilt".

[248] See Lars Holmqvist et al., *Brottsbalken: en kommentar* (5th Edition. Stockholm: Norstedts Juridik AB, 2007), Chapter 1 §2 BrB and Asp, Ulväng and Jareborg (2013), 269.

[249] Brottsbalk is the Swedish Criminal Code (henceforth: BrB).

250 In this framework there is a wide field of legal research highlighting the different aspects and problems in relation to the accountability of offenders who display some kind of mental limitation. However, I do not go into this further because it is beyond the scope of this thesis. For further reading, see Linda Gröning, "Tilregnelighet och utilrenelighet: begreper og regler," (*Nordisk Tidsskrift for Kriminalvidenskab* 2015: 112–48).

[251] §20 StGB reads as follows: "Any person who, at the time the offence is committed, is incapable of appreciating that their actions were unlawful or of acting in accordance with any such appreciation on account of a pathological mental disorder, a profound consciousness disorder, mental deficiency or any other serious mental abnormality, shall be deemed to have acted without guilt" (my translation).

differently can be blamed for his or her actions.[252] This understanding is also expressed by the Latin "nulla poene sine culpa".[253]

Even if the German rules, which define guilt negatively, do not mention juveniles or children below the age of criminal capacity,[254] the lesser culpability of young offenders is generally accepted. In the German system, §3 JGG provides an additional reason to exclude guilt for juveniles; it states:

> A juvenile shall bear criminal capacity if, at the time of the offence, he has reached a level of moral and intellectual maturity sufficient to enable him to understand the wrongfulness of the act and to behave in accordance with such understanding.[255]

In Sweden, there is a lively debate taking place about whether the demand for objective accountability should be reintroduced into the Swedish criminal justice system.[256] However, the discussion mostly concerns the question of how to deal with a defence on grounds of insanity. In a fairly recent judgment, HD has acknowledged the lesser culpability of young offenders by pointing out that the capability of a young perpetrator to take responsibility for his or her actions is

[252] See Gröning (2015), 116.

[253] See Wolfgang Joecks, *Strafgesetzbuch – Studienkommentar* (6th Edition. München: C.H.Beck, 2005), §20 margin No.1.

[254] §19 StGB, which mentions young offenders, states: "Whoever at the time of the offence is under fourteen years of age lacks capacity to be adjudged guilty". However, this rule does not say anything about a diminished level of guilt for young offenders between 14 and 20 years of age; it rather states the age of criminal capacity. See also Heribert Ostendorf (ed.), *Jugendgerichtsgesetzkommentar* (10th Edition. Baden-Baden: Nomos, 2016), Background to §3 margin No.3, which emphasizes the principle of guilt as the foundation for criminal capacity even for young offenders.

[255] I elaborate further on the preconditions to be met when young offenders are tried in Germany in section 4.1.1.; but note here that §3 JGG and §§20, 21 StGB are not incompatible with each other. A young offender deemed legally responsible according to §3 JGG can still act without guilt according to §§20, 21 StGB. For further discussion see Ostendorf (2016), §3 margin No.2ff.

[256] See SOU 2012:17 "Psykiatrin och lagen – tvångsvård, straffansvar och samhällsskydd". It proposes introducing objective accountability and placing it systematically after the objective requirements of an offence but before the question of intent (556ff., 706). I do not elaborate further on this extensive and complicated field since it lies outside the scope of this thesis.

not yet fully developed. This is why they have to be treated with greater tolerance.[257]

Zimring and Jensen and Jepsen agree that adolescents are less culpable.[258] This is also recognized on a European level. Recommendation (2003)20 says:

> Culpability should better reflect the age and maturity of the offender, and be more in step with the offender's stage of development, with criminal measures being progressively applied as individual responsibility increases.[259]

The biological and psychosocial factors described above can, when seen together, contribute to an explanation of the lesser culpability of young offenders.

2.3.2. The greater sensitivity to punishment

Another argument that bears on the juvenile criminal justice system relates to the fact that adolescents are considered to be more sensitive to punishment.[260] A penalty is considered to have a greater punitive bit if imposed on a young offender. They have different perceptions of incarceration. One factor contributing to this is that they experience time differently, which makes a term of imprisonment seem longer to them.[261] Further factors are isolation, decreased autonomy, and high control density, which all lead to physical and psychological stress.[262]

---

[257] See NJA 2014, 658; see also B 5566-11, delivered 2012-01-31.

[258] See Franklin E. Zimring, *American Youth Violence* (Oxford and New York: Oxford University Press, 1998), 75 and Franklin E. Zimring, *American Juvenile Justice* (Oxford and New York: Oxford University Press, 2005), 57–8 and Jensen and Jepsen (2006), 444.

[259] See https://wcd.coe.int/ViewDoc.jsp?id=70063 (last visited 2017-01-18).

[260] HD in Sweden has agreed with this point, as confirmed in judgment B 1296-14, 3 (Nr.5) and in judgment B 5566-11, 4 (Nr.8). See also Henry John Mæland, *Norsk alminnelig strafferett* (Bergen: Justian AS, 2012), 205.

[261] See Reyna and Farley (2006), who emphasize that, for the young person, short-term aims are considered more important than long-term aims (12). See also Michael Tärnfalk, *Professionella yttranden – En introduktion till socialt arbete med unga lagöverträdare* (Stockholm: Natur och Kultur, 2014), 31 and Jareborg and Zila (2014), 151.

[262] See Schaffstein, Beulke, and Swoboda (2014), 317.

Another aspect is the make-up of the population of a juvenile detention facility, which often holds the "negative selection" of offenders for whom all other measures have failed.[263] Papendorf mentions that the negative socialization process with other inmates leads to the learning of antisocial survival techniques that counteract the possible positive effects of incarceration.[264] This results in the young offender having even less of an ability to manage in the outside world. Von Hirsch and Ashworth write:

> Critical opportunities and experiences need to be provided between the ages of 14 and 18. A juvenile requires adequate schooling and learning opportunities; needs to be in a reasonably nurturing atmosphere such as that of a family; requires exposure to adequate role models; and needs to be able to begin to develop ties to friends and associates who can be trusted. […] It is characteristic of adolescents that their self-esteem, their sense of self as worthwhile persons having the potential for a better future, tends to be more fragile than that of adults.[265]

The deprivation of liberty interferes with personal development by limiting mobility, curtailing life experience, restricting opportunities, and stigmatizing the young person through their being labelled as a criminal when released.[266] Scott and Steinberg indicate that young people whose educational paths are impeded or disrupted during adolescence often do not fully recover.[267] They emphasize that what happens during adolescence undoubtedly shapes an

---

[263] See Jörg-Martin Jehle et al., *Legalbewährung nach strafrechtlichen Sanktionen: Eine bundesweite Rückfalluntersuchung 2010 bis 2013 und 2004 bis 2013* (Berlin: Bundesministerium der Justiz und für Verbraucherschutz, 2016), 9.

[264] See Knut Papendorf, "Gegen die Logik der Inhaftierung – die Forderungen des AJK aus heutiger Sicht," in *Handbuch Jugendkriminalität*, 573–83 (2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011), 576. Ostendorf (2016) points out that, even if the empirical data in relation to the recidivism rates of imprisoned young offenders is not reliable, there seems to be a consensus that after four to five years of incarceration the de-socializing effects outweigh the socializing effects (§18 margin no.11).

[265] Von Hirsch and Ashworth (2005), 42.

[266] See Lucia Zedner, "Sentencing Young Offenders," in *Fundamentals of Sentencing Theory – Essays in Honour of Andrew von Hirsch*, 165–86 (Oxford: Clarendon Press, 1998), 173; see also Albrecht (2000), 56.

[267] See Scott and Steinberg (2010), 32.

individual's views of the world, their mental health, and their likelihood of success as adults.

The fact of young people's greater sensitivity to punishment supports the conclusion that punishment affects a young offender more severely than an adult. This fact can be linked to what Gröning calls the "argument from mercifulness or humanity".[268] Such an argument builds on the assumption that it is unacceptable to hold certain offenders responsible because of the punishment constituted by the criminal process and the verdict themselves. The suffering that results from the trial and the punishment is deemed problematic on humanitarian grounds.[269] Punishment affects the young person's ordinary process of development. It interrupts ordinary routines and interferes with certain development processes. However, this is not necessarily a bad thing. In the case of some young offenders, this interference may be just what is needed to help them become law-abiding citizens. But the effects of such punishment must be determined much more carefully than in the case of adults.

2.3.3. Deterrence

The phenomena described above may also have an impact on possible deterrent effects. It could be argued that offenders should not be punished if the punishment cannot have any norm- and/or action-shaping effect because of these offenders' potentially diminished mental capabilities.[270] However, as stated above, the cognitive abilities of a young offender are not impaired compared to those of an adult offender. On the other hand, deterrence is closely connected to the capability to think ahead and calculate risks in advance – an ability which is rather to be treated under the rubric of psychosocial aspects, which are underdeveloped in juveniles and young adults. They often commit offences spontaneously and not on the basis of a plan. If young offenders mostly act without thinking, the threat of punishment cannot deter them from committing an offence.

The susceptibility of young people to sensation seeking and peer pressure also bears on the efficacy of deterrence. Steinberg concludes that heightened risk

[268] See Gröning (2015), 115.

[269] Ibid.

[270] See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation (Chapters I–V)* (Hoboken: Blackwell Publishing Ltd, 1972), 96; also Gröning (2015), 114.

taking during adolescence is likely to be normative, biologically driven, and inevitable.[271] Combined with less self-control and the need to obey peer pressure, this might outweigh any possible deterrent effect (both general and individual).

Furthermore, the aim of transforming the young offender into a law-abiding citizen necessarily involves expectations about what effects a legal consequence might have on the young perpetrator.[272] It may not come as much of a surprise that it is difficult to forecast the future development of a young offender.[273] Criminological research has tried to develop some tools to help the judge to evaluate the individual possibilities scientifically.[274] One fairly well-established truth from a criminological point of view, however, is that imprisonment or detention of any kind does not have much of a positive effect on young offenders – neither from a general nor from an individual deterrent point of view.[275] In fact, rather the opposite is the case: the recidivism rate for young offenders who have served a prison sentence is higher than the recidivism rate for those who have suffered any other sanction.[276] Even the existing empirical

[271] See Steinberg (2004), 57.

[272] As we will see later, these expectations play a central role especially in the German juvenile criminal justice system due to the fact that this system focuses on the offender rather than on the offence and ties the possible legal consequence closely to the individual person. However, they are also of importance in the Swedish juvenile criminal justice system.

[273] The Swedish government acknowledged this problem explicitly in prop.2005/06:165, 56. Jareborg (1989) has emphasized that there is a growing appreciation of the fact that predictions tend to be based more on guesswork than on knowledge (13). Hogarth (1971) emphasizes the same point, saying that "it is difficult to know with any degree of certainty whether an offender before the court is likely to pose the risk of further crime, and even more difficult to know whether that risk can be in any way altered by choosing one form of sentence over another. Still more problematic is estimating whether the imposition of a deterrent penalty is likely to prevent potential offenders from committing crime" (4).

[274] See Schaffstein, Beulke, and Swoboda (2014), 112.

[275] See Joachim Walter, "Bedingungen bestmöglicher Förderung im Jugendstrafvollzug," (*Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2006: 236–43), 249; Maeland (2012), 204; Albrecht (2000), 5; and Linda Gröning, "Kriminell Lavalder – noen utgangspunkter," (*Tidsskrift for Strafferett* 2014, No.4: 314–32), 318.

[276] For Germany, which still has juvenile prisons, see Jörg-Martin Jehle et al., *Legalbewährung nach strafrechtlichen Sanktionen: Eine bundesweite Rückfalluntersuchung 2007 bis 2010 und 2004 bis 2010* (Godeberg: Forum Verlag, 2013), 55, 78; also Jehle, Albrecht, Hohmann-Fricke, and Tetal (2016), 11, 13; Heinz (2004), 35; and Meier et al., (2011), §17 margin no.4. For Sweden, see Tove Pettersson, *Återfall i brott bland ungdomar dömda till fängelse respektive sluten ungdomsvård*

studies for adults suggest that the deterrent effect of imprisonment itself or the length of imprisonment is limited for those who have experienced it.[277] Apart from that, it cannot be overlooked that arguments in relation to general deterrence are not built on a stable empirical foundation.[278]

2.3.4. Proportionality

Another aspect to be considered is the impact of the diminished culpability of a young offender on proportionality: the legal consequence has to be proportional to the blameworthiness of the young perpetrator. The principle of proportionality is one of the cornerstones of the rule of law in relation to criminal law. It indicates that the legal consequence has to be proportionate to the seriousness of the offence committed, even considering the offender's guilt or blameworthiness.[279] This means that the younger the age at which a criminal justice system imposes criminal capacity on its young people, the more sensitive the system must be to reducing punishment because of their diminished responsibility.[280] Zimring aptly states:

> Even when sufficient cognitive skill and emotional control is present to pass the threshold of criminal capacity, a significant deficit in the ability to appreciate or control behavior would mean the forbidden conduct is not *as much* the offender's

(Statens institutionsstyrelse. Report 2/10. Stockholm: Edita, 2009), 39ff. However, as mentioned before, it cannot be overlooked that this group of young offenders represents probably the most problematic group of perpetrators because of the character of juvenile imprisonment/closed institutional treatment as ultima ratio.

[277] See Daniel S. Nagin, Francis T. Cullen, and Cheryl Lero Jonson, "Imprisonment and reoffending," (*Crime and Justice* 2009, Vol. 38, No.1: 115–200).

[278] See Gröning (2015), 115–16 as well as Raymond Paternoster, "How much do we really know about criminal deterrence?," (*The Journal of Criminal Law & Criminology* 2010, Vol.100, No.3: 765–824), 766–823.

[279] The principle of proportionality (in German "Verhältnismässigkeitsgrundsatz") is derived from the principle of the rule of law. In the framework of criminal law, it holds that all coercive measures enforced by a state have to be proportionate. For Sweden, see prop.1997/98:96, 148; Borgeke (2012), 30–1; and Jareborg and Zila (2014), 65ff. See also SOU 1995:91 Part II, 54ff. For Germany, see BVerfGE 19, 348; BVerfGE 20, 49; and BVerfGE 23, 133. In relation to pre-trial detention, see also Jörg-Martin Jehle, *Untersuchungshaft zwischen Unschuldsvermutung und Wiedereingliederung* (München: Minerva Publikation, 1985), 14.

[280] See Zimring (2005), 58; also von Hirsch and Ashworth (2005), 36.

> fault as it would otherwise be, and the quantum of appropriate punishment is less.[281]

But why should such a reduced culpability not be applied to an adult offender displaying similar deficits in brain maturation to an adolescent? This can be related to a time factor. The evaluation of what is right and wrong – morally, emotionally, and legally – develops as the young person grows older, experiences different social and emotional situations, communicates with others, and is educated by other individuals. An adolescent's understanding of harm is not yet fully adequate. This understanding grows through the influence of external factors as the young person gets older. Von Hirsch and Ashworth call this a developmental process.[282] Adolescents have not had the same opportunity to internalize the values of society in the same way as adults have – simply because they have had less time in which to do so. In other words, society has different normative expectations of adolescents from those it has of adults. Law has to reflect what can reasonably be demanded of an adolescent by recognizing their lack of cognitive and volitional maturity.

2.4. The impact of developmental neuroscience on law and its limitations

How much of an impact can developmental neuroscience really have on law? One may be tempted to think that it fundamentally changes the thinking around young offending.[283] The findings of developmental neuroscience show that deterrence-based arguments for punishment are ineffectual in the case of young offenders. If they are intellectually capable of knowing right from wrong but biologically incapable of acting accordingly, the prospect of punishment cannot have any deterrent effect. In a similar way, these developmental neuroscientific findings may imply that well-established approaches to juvenile delinquency (like discussion groups, etc.) are ineffective. As long as the process

[281] See Zimring (2005), 58.

[282] See von Hirsch and Ashworth (2005), 38.

[283] Blakemore (2008) points out that the study of neural development during adolescence is likely to have important implications for society in relation to education and the legal treatment of teenagers (275).

of brain maturation cannot be accelerated, such approaches cannot influence a young offender in a positive way. The remaining options would be either incarceration or no response at all; the young offender's brain will mature and he or she will learn from experience and develop in the right direction come what may.

But one should not make the mistake of taking developmental neuroscience to be more important than the behavioural sciences. Maroney cautions against the false notion that teens' propensity to offend is "hard-wired", a view that not only makes societal reform seem pointless but, by implying the impossibility of deterrence, could support the unnecessary incapacitation of many adolescents until their brains "grow up".[284] Regarding a possible deterrent effect, developmental neuroscience seems not to offer groundbreaking new insights but rather supports older findings from the behavioural sciences. Concerning well-established approaches to juvenile delinquency, Paternoster points to the greater confidence that non-legal factors are more effective in securing compliance than legal threats.[285] This is also confirmed by Hill, Lockyer, and Stone, who emphasize that a fair degree of consensus has emerged in the field of juvenile justice about effective intervention. Among the key conclusions are that structured, focused work with individuals and families, often having a cognitive-behavioural component, tends to be most effective.[286]

Apart from that, developmental neuroscience also has its weaknesses. One is that it is not able to provide individual assessments.[287] Neuroscience analyses group trends, which does not reflect the importance that an individual assessment has when it comes to young offenders. Maroney puts this problem as follows:

[284] See Terry A. Maroney, "The False Promise Of Adolescent Brain Science In Juvenile Justice," (*Notre Dame Law Review* 2009, Vol.85, No.1: 89–176), 174.

[285] See Paternoster (2010), 765

[286] See Malcolm Hill, Andrew Lockyer, and Fred Stone, *Youth Justice and Child Protection* (London: Jessica Kingsley Publishers, 2007), 15. In the same line of thought, see also David P. Farrington, "Longitudinal and Experimental Research in Criminology," (*Crime and Justice* 2013, Vol.42, No.1: 453–527), 502.

[287] See Maroney (2009), 146.

> Normal brains follow a unique developmental path bounded roughly by the general trajectory; that is, while all humans will pass through the same basic stages of structural maturation at more or less the same stages of life, the precise timing and manner in which they do so will vary. […] Researchers therefore consistently agree that developmental neuroscience cannot at present generate reliable predictions or findings about an individual's behavioral maturity.[288]

Another problem is linked to this one. Developmental neuroscience has not been able to establish the detailed connection between brain immaturity and adolescents' behaviour or the extent to which the latter mirrors the former. This connection is crucial, and it cannot be established by neuroscience alone. Developmental psychology and sociology play an irreplaceable role. This also means that there is no one-sided linear causality from the biological level to the level of social behaviour, for there are numerous feedback functions between environment and biological processes.[289] Developmental neuroscience cannot, by itself, explain why some young people become offenders and some do not. What developmental neuroscience has brought to light are the relative deficiencies which are *partly* attributable to biological constraints that have an effect on the degree to which a young offender is blameworthy.[290] In terms of the hormonal changes mentioned above, we can say that the increase of sexual and other hormones may make a certain behaviour more likely, but it does not cause the behaviour by itself. There are still environmental factors at work.[291]

There are also considerations concerning legal equality which prohibit relying too heavily on developmental neuroscience. It is well established that girls mature considerably faster than boys, which would imply that there should be different legal consequences depending on gender. But this is prohibited by the constitutional principle of equal treatment. Legal values cannot be outweighed by biological findings. This illustrates the interplay of developmental neuroscience with other disciplines like law, social sciences, etc. Though some behaviour is biologically driven, other brain changes are the consequence of experience. This means there is a way to influence the brain of an adolescent. It has been argued that the brain is malleable, and there is a good deal of evidence

[288] Ibid.

[289] See Kreissl (2011), 115.

[290] See Maroney (2009), 150.

[291] See Meier et al., (2011), §105 margin no.11.

that adolescence is a period of especially heightened neuroplasticity.[292] Experience may be crucial here, since the brain seems to mature through social learning. Steinberg points out that there is growing evidence that the actual structure of prefrontal regions active in self-control can be influenced by training and practice.[293] Note, though, that some laboratory research indicates that individuals are more attentive to risks when they are described verbally rather than experienced as outcomes in a learning task. In other words, risky options are avoided when they are described verbally but are preferred when outcomes are experienced.[294]

Consequently, developmental neuroscience cannot by itself explain the lesser culpability or the increased sensitivity to sanctions of young offenders. It cannot offer guidance about how to respond to a young person's offending. Nevertheless, it can contribute tremendously to our understanding of young offenders. In Steinberg's words:

> The brain science, in and of itself, does not carry the day, but when the results of behavioral science are added to the mix, I think it tips the balance toward viewing adolescent impulsivity, short-sightedness, and susceptibility to peer pressure as developmentally normative phenomena that teenagers cannot fully control.[295]

However, the practical influence of developmental neuroscience in the courtroom may be further limited by the fact that the individual judge has a choice about whether or not to consider it. There is always a way out for the judge because of the scope of discretion; that is, the judge may claim that in a particular case the young offender was mature enough to know what he or she was doing and emotionally developed enough to act accordingly. This means that the knowledge of developmental neuroscience may be valuable on a policy basis, but in the courtroom it might only serve to support the judge's pre-existing attitude.[296]

---

[292] Steinberg (2012), 72; this is also the reason why adolescence is a period of vulnerability to many forms of mental illness. See also Corrado and Mathesius (2014), 152.

[293] See Steinberg (2012), 73.

[294] See Reyna and Farley (2006), 33.

[295] Steinberg (2012), 76.

[296] Maroney (2009) reached this conclusion after looking into judgments in the US, where developmental neuroscience is far more developed and recognized than in Europe. He says:

2.5. Conclusion

All the considerations discussed in this chapter tend towards the conclusion that young offenders should be treated differently from adult perpetrators. Peer orientation, foolhardy attitudes towards risk, and the powerful combination of social immaturity and physical mobility make adolescence into something of a minefield.[297] Various biological and psychosocial factors underlie young offenders' lesser culpability and greater sensitivity to punishment. These factors have an impact on deterrence and proportionality. Developmental neuroscience can play a role in explaining some of the differences between young and adult offenders, but it should be treated as a background to discussions about how to create the conditions necessary for young persons, including young offenders, to become healthy, productive adults, rather than as the main focus.[298]

The specific characteristics of the transitional phase from childhood to adulthood can be interpreted as a reason for the existence of the welfare/justice clash. The need to respect the special nature of this period is what gives rise to the welfare considerations that have to be taken account of in juvenile justice. In other words, the welfare/justice clash I will investigate further in the following chapters can be understood as being rooted in the very specific nature of this phase of life.

"Courts tend to view the findings of developmental neuroscience as either irrelevant to the specific determination before them or as insufficiently persuasive as to invalidate schemes for imposition of non-death sentences" (128).

[297] See Zimring (2005), 20.

[298] See Maroney (2009), 174.

Chapter 3

Guiding principles of the German and the Swedish juvenile criminal justice systems

In chapter 2, I explained *why* young offenders should be treated differently from adult offenders and in doing so uncovered the roots of the welfare/justice clash. This chapter and the following three chapters ask *how* young offenders are handled in the Swedish and the German juvenile criminal justice systems. I provide in-depth descriptions and analyses of both juvenile criminal justice systems, focusing on their legal responses, sentencing processes, procedural rules, and the personnel present in their juvenile trials.

The aim of these chapters (chapters 3 to 6) is to analyse the forms the welfare/justice clash can take and what effects it can have. These chapters therefore amount to an answer to the second sub-question of my research questions: *what form* does the welfare/justice clash take in the juvenile criminal justice system of Sweden and in that of Germany? How is the juvenile criminal justice system constructed in Sweden and in Germany? Which rules and theoretical (law in books) aspects of the juvenile trial reflect the fact that the offender is a young person? This chapter contains a brief historical overview of the development of the juvenile criminal justice systems of Germany and Sweden and an account of the principles that guide how they function today from both welfare and justice perspectives.

3.1. Historical development in Germany

The treatment of young offenders has been a topic in German law for centuries. The Reichsstrafgesetzbuch (RStGB), enacted in 1871, was the first nationwide criminal code in Germany. According to the RStGB, juveniles between the ages of 12 and 18 were to be held responsible for criminal actions if they had sufficient intellectual insight into the wrongness of the deed (mens rea). They were tried by the regular criminal courts, applying the same procedural rules as applied to adults, although there was the possibility of mitigating the sentence.

During the second regional congress of the International Penal Law Association in Halle, Germany, in 1891, the idea of an independent "juvenile law" was mooted. The suggestion of the formation of a separate criminal law for juveniles was initially prompted by two factors: first, the modern school of criminal law associated with Franz von Liszt sought the transformation of traditional retributive criminal law into preventive criminal law. This was based on the understanding that the purpose of criminal law is not to punish guilt but to prevent future criminal offences. Secondly, new biological, psychological, and sociological insights supported the idea that children below a certain age lacked criminal capacity and that the interests of juveniles should be prioritized. A juvenile court movement developed that aimed at the rehabilitation of juveniles.[299] It stressed the need for a completely different system of justice for juvenile offenders, which it envisaged as a system of education.[300]

Since parliamentary legislation had not kept up with these developments, the reformers acted on their own initiative. The juvenile court movement emerged as an informal task force of practitioners, politicians, and scholars. In 1908, some German courts in Frankfurt am Main, Cologne, and Berlin developed special court chambers to experiment with new ways of dealing with young offenders. They were departments of the local criminal courts given special jurisdiction for all defendants between the ages of 12 and 18. In 1911, the first fully specialized juvenile prison was opened in Wittich/Mosella. In 1917, the reformers founded a reform organization which still exists today (Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen).

---

[299] See Jill Mehlbye and Lode Walgrave, *Confronting Youth in Europe* (Copenhagen: AKF Forlaget, 1998), 255.

[300] See Hans-Jörg Albrecht, "Juvenile Crime and Juvenile Law in the Federal Republic of Germany," in *Juvenile Justice Systems – International Perspectives,* 171–207 (2nd Edition. Toronto: Canadian Scholars' Press, 2002), 172.

One of the central questions for this movement was whether there should be a unitary system combining justice and welfare or whether it would be preferable to have different legal rules and different jurisdictions for welfare and criminal justice purposes.[301] The outcome of this debate was a dualistic system of welfare and justice, partly consisting of the Jugendgerichtsgesetz,[302] which survives to this day. The JGG was developed by Gustav Radbruch, elaborating on the ideas of Franz von Liszt,[303] and was enacted on 16 February 1923.[304] It was the first regulation to deal exclusively with all juvenile criminal justice matters in Germany, and it replaced §§55–7 of the StGB.

---

[301] See Berthold Simonsohn, *Jugendkriminalität, Strafjustiz und Sozialpädagogik* (Vol.325. Berlin: Suhrkamp, 1969), 7ff. and Bundesministerium für Jugend-, Familie und Gesundheit (1973), "Diskussionsentwurf eines Jugendhilfegesetzes".

[302] The literal translation of "Jugendgerichtsgesetz" – Juvenile Courts Act – reflects the historical roots of the JGG, which was greatly influenced by the specialized judges of juvenile chambers at courts in select bigger cities of Germany (like Berlin, Frankfurt am Main, and Cologne). The other part was the Jugendwohlfahrtsgesetz (JWG), which was enacted in 1922, before the JGG. The JWG dealt with young persons in need of care and was applied when a child was below the age of criminal capacity or a juvenile's personal development was assessed as being "in danger". It was a law that provided intervention in the classic sense of the parens patriae doctrine; the state replaces parents who are not able or willing to fulfil their educational duties. The educational measures imposed by the JWG were similar or even the same as the educational measures stipulated in the JGG today. Finally, in 1990, the JWG was replaced by a modern law of social welfare. The juvenile welfare boards offer help; they are not agents of intervention.

[303] One of the reasons that juvenile criminal law sought to distance itself from adult criminal law was the "Marburg programme" set up by Franz von Liszt (1905). In this programme, von Liszt stressed the damaging effects of adult criminal penalties – then almost exclusively prison sentences – when applied to juvenile offenders. He claimed that imprisonment should be reserved for a small group of offenders assessed to be in need of extensive rehabilitation, to be administered during long prison sentences and aimed at reducing the risks of recidivism. This represented a call for alternatives to imprisonment for all other offenders. But it should not be overlooked that von Liszt's approach lacked a convincing theory that could explain the evident failure of traditional criminal law and criminal sanctions and why the alternative he proposed would be more effective. The rise of the social work professions and their insertion in to the criminal justice system during the twentieth century and the development of "labelling theory" (which stipulated that being labelled as a "deviant" causes a person to engage in deviant behaviour) have helped to close this gap. See Franz Von Liszt, "Kriminalpolitische Aufgaben (1889-1892)," in *Strafrechtliche Aufsätze und Vorträge* (Vol. 1. Berlin 1905), 290, 426ff.

[304] See Ulrich Eisenberg, *JGG – Jugendgerichtsgesetz mit Erläuterungen* (18th Edition. München: C.H. Beck, 2016), Introduction, margin no. 1.

The JGG involved several fundamental changes to the criminal code. It introduced educational measures (Erziehungsmassregeln) as a legal consequence for young offenders in addition to the sanctions applicable for adults. Its justification was the need to protect the young from the supposedly corrupting effects of the adult world (including its criminal justice system).[305] The age of criminal responsibility was raised from 12 to 14. The mens rea condition was expanded: the defendant now needed not only to be intellectually but also morally mature in order to be responsible for his or her criminal actions. Furthermore, the young perpetrator had to be deemed capable of directing his or her behaviour in a way that befitted the intellectual and moral status reached. Punishment as prescribed by the StGB should only be inflicted if it was deemed unavoidable (and even then only in a mitigated form); whenever educational measures seemed promising and therefore sufficient, the JGG was applicable.[306] Court proceedings were adapted to educational needs: for example, the basic principle of closed doors in a juvenile trial[307] was introduced in order to protect the young person's privacy and to avoid stigmatization. Further, it was ensured that there was a social court assistant working for social services present.[308] The social court assistant would provide an assessment of the personality of the young offender, support and mentor the young offender, and assist the juvenile court in finding the appropriate sanction.

After 1933 the Nazi regime immediately set about reshaping the JGG in order to replace rehabilitation with retribution. As a result, on 6 November 1943, the Reichsjugendgerichtsgesetz (RJGG) was enacted. The old non-criminal sanctions were complemented by the new category of "corrective measures" (Zuchtmittel), including warnings, penalties, and juvenile detention of up to four weeks.[309] The idea of "educational measures instead of punishment" was replaced with "education by punishment".[310] Juvenile imprisonment terms of a minimum of three months and a maximum of ten years were introduced. The

[305] See Hans-Jörg Albrecht, "Youth justice in Germany," (*Crime and Justice* 2004, Vol.31: 443–93), 443–4 or Eisenberg (2016), Introduction, margin no. 13–14.

[306] See Eisenberg (2016), Introduction, margin no. 2.

[307] §48 JGG.

[308] §38 II JGG.

[309] See Eisenberg (2016), Introduction margin no. 4.

[310] See Frieder Dünkel, "Juvenile Justice in Germany: Between Welfare and Justice," in *International Handbook of Juvenile Justice*, 225–62 (Dordrecht: Springer, 2006), 226–7, who reflects that the repressive meaning of education prevailed.

suspended sentence (or probation) was abolished.[311] The limits of criminal capacity were changed by introducing the possibility of punishing children between the ages of 12 and 14 if they committed a severe offence that required a legal consequence to defend the legal order .[312] Juveniles between 14 and 17 could be treated and sanctioned as adults, and they could face sanctions like the death penalty and castration if they committed a "severe crime with heinous intent" or were regarded as "by their character abnormally serious criminals".[313]

After World War II, most of the Nazi elements were removed[314] from the JGG, but it was not until 4 August 1953 that a revised, democratic JGG was enacted.[315] This JGG retained the three sub-divisions of legal consequences for young offenders, which exist to this day, but changed their ranking. Educational measures were prioritized, followed by corrective measures, and then juvenile imprisonment as a last resort – the ranking that is still in force today.[316] Education thus became the overriding principle.[317]

In the 1970s, the choice between a welfare model and a criminal justice model was again the topic of discussion, but attempts to place juvenile delinquents completely under the regime of welfare laws and welfare administration, and thereby abolish juvenile criminal law, did not succeed.[318] In the 1980s, new

---

[311] It had been introduced in 1923 as an option for young offenders only; see Albrecht (2004), 447.

[312] This according to §3 II S.2 RJGG; see Ostendorf (2016), Basics §§1 and 2, margin no. 2. Only in the period of the Nazi Regime between 1933 and 1945 were 12- and 13-year-olds "recriminalized" for certain offences and behaviours. Today, the lowering of the age of criminal responsibility is only an issue for a few conservative politicians of the Christian Democratic Parties (CDU/CSU), but the policy has no chance of being accepted by the majority of politicians; see Dünkel (2006), 3.

[313] §20 I and II RJGG. These provisions were strengthened in the course of the war, when special wartime criminal regulations for crimes (Kriegssonderstrafrechts-Verordnung) were introduced.

[314] However, the legislature decided to keep short-term detention (up to four weeks) as a short, sharp shock treatment, as this also existed in other European jurisdictions (for example British detention centres).

[315] BGBl. I, 751.

[316] The possible duration of juvenile imprisonment was changed to a minimum of six months and a maximum of five years.

[317] BT-Drucks. 1/3264, 39. See also the discussion of the guiding principle in section 3.2.

[318] These attempts were mostly instigated by practitioners and critical university scholars, who raised grave doubts about the existing system. It was during this time that Germany came closest

work on legal reform began. The Federal Ministry of Justice did not succeed in presenting a fully revised JGG bill, but, in 1990, the parliament passed the 1. JGG-Änderungsgesetz.[319] The next changes to the JGG occurred through the Justizmodernisierungsgesetz (JuMoG),[320] from 22 December 2006, which mostly adjusted procedural rules. The 2. JGG-Änderungsgesetz[321] entered into force on 13 December 2007 and for the first time stipulated explicitly (in §2 I s.2 JGG) the educational aim which forms the guiding principle of the juvenile criminal justice system.

The JGG does not constitute a "new juvenile criminal law". In all proceedings involving young offenders, the regulations of the general criminal law, both substantive and procedural, are applicable unless modified by the JGG. This means that the application of the JGG is restricted to crimes defined by the general criminal law[322] and that the JGG is – according to §2 II JGG – lex specialis.[323] Most of the JGG's regulations concern procedural rules, and they contain a specific system of legal responses[324] applicable to young offenders. The legal responses provided for by the JGG are characterized by the principle of subsidiarity or minimum intervention. This means that a criminal response should only be selected when absolutely necessary. Furthermore, legal responses are limited by the principle of proportionality, and a legal consequence of incarceration is considered a measure of last resort (ultima ratio). Consequently, the primary sanctions of the juvenile court are educational or corrective

---

to abolishing juvenile criminal law and replacing it with a youth welfare law. One reason for the failure of this initiative was the strong resistance by criminal justice professionals, which rendered a compromise impossible.

[319] "First Act for the Alteration of the Juvenile Justice Act" – my translation. See BGBl I, 1853. This bill dealt with the most urgent problems. The plan was to present a thoroughly restructured JGG in 1992, but this never happened because of the overload of the governmental system caused by the German reunification in 1990. The changes had been developed by active and forward-thinking practitioners and scholars from the late 1970s; see Mehlbye and Walgrave (1998), 259. Furthermore, new educational measures were introduced (for example community service and social training courses).

[320] "Act to Modernize the Juvenile Justice Act" – my translation. BGBl. I, 3416.

[321] BGBl. I, 2894.

[322] See Eisenberg (2016), Introduction, margin no. 16 and §1 margin no. 23; see also §4 JGG.

[323] See Eisenberg (2016), §2 margin no. 17-8.

[324] I employ the term "legal responses" to cover all legal consequences provided for by the JGG as well as the dismissal/diversion of a case.

measures. This structure is based upon the guiding principle of the German juvenile criminal justice system, to which I now turn.

3.2. The guiding principle in Germany

The guiding principle of the German juvenile criminal justice system is the principle of education, as set out in §2 I s.2 JGG. Its objective is to forestall further criminal conduct by the young offender; in other words, its aim is to transform the young perpetrator into a law-abiding citizen.[325] German juvenile criminal law focuses on the offender and his or her rehabilitative needs while the adult criminal system concentrates mainly on the offence itself. Therefore, the German juvenile criminal justice system is sometimes called "offender criminal law" (Täterstrafrecht) or "educative criminal law" (Erziehungsstrafrecht).[326] The focus on the individual and education still involves gaining insight into the wrongdoing itself, but it should also avoid stigmatizing young people as criminals. This rests on an understanding that young offenders differ from adult perpetrators psychologically, physiologically, and in their social status during the transitional developmental period from childhood to adulthood.[327] As a consequence, the principle of education prevails over general prevention and arguments of just desert.[328]

The introduction of the principle of education into a general framework of criminal justice has led to an ongoing debate about the relationship between punishment and education. While the modern school of criminal law favoured a rehabilitation-oriented system,[329] opponents feared that the educational rationale

[325] See §2 I s.1 JGG and Eisenberg (2016), §5 margin no.3 or Streng (1994), 84.

[326] See Ostendorf (2016), Basics §§1 and 2 margin no. 4; Schaffstein, Beulke, and Swoboda (2014), 1; and Arthur Kreuzer, "Ist das deutsche Jugendstrafrecht noch zeitgemäss?," (*Neue Juristische Wochenschrift* (*NJW*) 2002: 2345–51), 2346ff. This expression contrasts with "offence criminal law", which focuses on the offence rather than on the offender. As mentioned, "offence criminal law" is the focus in adult criminal law.

[327] I looked into that aspect in more depth in chapter 2. For Germany, see also Albrecht (2004), 445.

[328] See BGHSt 15, 224 (226).

[329] The most prominent representative of the modern school of criminal law was – as mentioned before – Franz von Liszt (see especially footnote 427).

would serve as a "Trojan Horse", legitimating harsher interventions in relation to young offenders[330] and undermining criminal law in general.[331]

Even if the law recognizes education as the guiding principle of the juvenile criminal legal system, the wording of §2 I s.2 JGG still leaves space for interpretation as it emphasizes that legal consequences and proceedings should be guided mainly (although not exclusively) by the educational principle.[332] Even if juvenile criminal law in Germany is lex specialis, it is still criminal law: it presupposes guilt[333] and eventually leads to a legal response.[334] Consequently, juvenile criminal law in Germany is constantly having to balance the competing aims of education and punishment,[335] as described in chapter 1 in relation to the welfare/justice clash.

Another reason there has been so much debate in Germany is the lack of consistency in the wording of the JGG. Terms like "educational measures" are used in conjunction with the term "juvenile imprisonment". This allows for several interpretations, depending on the attitude of the interpreter.[336] But even the meaning of the word "education" itself is not unproblematic, and it is not defined in the JGG. What should it entail? It goes further than (positive) special prevention, which is an aim for adult offenders too.[337] From a pedagogical point

---

[330] See Jutta Gerken and Karl Schumann, *Ein trojanisches Pferd im Rechtsstaat: der Erziehungsgedanke in der Jugendgerichtspraxis* (Pfaffenweiler: Centaurus-Verlag-Gesellschaft, 1988).

[331] See Wolfgang Heinz, "Abschied von der Erziehungsideologie im Jugendstrafrecht; Aktuelle kriminalpolitische Bestrebungen im Spiegel empirischer Untersuchungen," (*Zeitschrift für Rechtspolitik* 1992, Vol.23: 7-11). For a more detailed description of the "classical" school's critique of the "modern" school, see Karl von Birkmeyer, *Was lässt von Liszt vom Strafrecht übrig?: eine Warnung vor der mordernen Richtung im Strafrecht* (München: C.H. Beck, 1907).

[332] Regarding the ambiguity of the term "education", see Albrecht (2000), 68–72; see also Schaffstein, Beulke, and Swoboda (2014), 58.

[333] See Albrecht (2000), 66ff. and Schaffstein, Beulke, and Swoboda (2014), 1.

[334] This is clear from the use of the term "retribution" in §13 JGG or in the phrase "gravity of guilt" in §17 JGG in connection with the choice of the legal consequence. For further discussion of the different legal consequences for young offenders and their preconditions, see section 4.1.1.2. (correctional measures) and section 4.1.1.4. (gravity of guilt as a condition of the sentence of juvenile imprisonment).

[335] See Schaffstein, Beulke, and Swoboda (2014), 2 and also BGHSt 18, 207 (208).

[336] See Dünkel (2006), 227 and Albrecht (2000), 68, 138.

[337] See Ralph Grunewald, "Die besondere Bedeutung des Erziehungsgedankens im Jugendstrafverfahren," (*Neue Juristische Wochenschrift (NJW)* 2003: 1995–7), 1996. See also Albrecht

of view, there are countless educational approaches, from very strict to lenient. However, Streng suggests that the meaning of education in the context of juvenile criminal law should not go beyond the prevention of individual reoffending and that it should achieve this through a flexible, individualized choice of legal consequences rather than specific pedagogical content.[338] This view can find support in the wording of §2 JGG. Streng thinks that any meaning of education extending to the manipulation of attitudes, general behaviour patterns, or motivations for complying with norms is moreover likely to violate constitutional rights (of the juvenile offender and his or her parents[339]) and, in practical terms, overestimates the capabilities of any justice system.[340] However, without going into this discussion in detail, we can say that the central role of education as the guiding principle of the juvenile criminal justice system is generally accepted in Germany. This is reflected not least in the fact that the German juvenile criminal justice system is – as mentioned earlier – always labelled "educational criminal law".

The German approach can be interpreted as an expression of what Fionda calls the "developmental model".[341] The key features of such a model are that crime is viewed as part of the traumatic adolescent Sturm und Drang of a teenager's life. Therefore, most (though not all) young offenders are likely, in normal circumstances, to grow out of their offending behaviour as they get older. The response to juvenile offending therefore needs to be as non-stigmatizing and flexible as possible; it needs to assist in the maturing process and not hinder the child's growth.[342]

(2000), 66–78, for a discussion of the term "education" in the juvenile criminal justice system; also Eisenberg (2016), §2 margin no. 5–16.

[338] See Streng (1994), 83–4, 89. In the same line of thought, see Schaffstein, Beulke, and Swoboda (2014), 59.

[339] In relation to the latter, see BVerfG 2 BvR 716/01 and BVerfG NJW 2003, 2004.

[340] See Streng (1994), 84.

[341] See Fionda (2005), 39.

[342] Ibid.

3.3. The tensions created by an educational approach

The German approach of the juvenile criminal justice system leads to several problems in relation to the rule of law, which demands proportionality, predictability and legal certainty, transparency, and equality. These legal principles are vague and general and seldom give clear and explicit answers to questions of law. Instead, they offer a framework for balancing opposing interests.[343] The educational guiding principle introduces an additional legal principle into the framework of the juvenile criminal justice system. It implies a strong focus on the individual instead of the offence. This in turn gives the juvenile court broad discretion, and this can lead to conflict with the aforementioned legal principles. The welfare/justice clash is evident in the need to respect the principle of education as a welfare consideration and to balance it against the rule of law as a justice consideration. The following sections examine the problems that, from a legal perspective, arise when an educational approach to juvenile criminal law is pursued. They concern legal (un)certainty, (in)effectiveness, disparity in verdicts, and (in)equality.

3.3.1. Legal (un)certainty

The far-reaching effects of adopting an educative guiding principle are clear in the proposal, put forward by some academics, to interpret all criminal law "juvenile appropriately",[344] meaning that legal rules which are not compatible with the principles of the JGG or which would lead to inappropriate results should be teleologically reduced so that they are not applied.[345] This would mean that not only the rules but even the underlying principles of the JGG would override the rules and principles of the general criminal law.[346] However, this radical interpretation of the JGG has not been put into practice due to the

[343] See Annika Souminen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters* (Cambridge and Antwerp and Portland: Intersentia, 2011), 25.

[344] See Schaffstein, Beulke, and Swoboda (2014), 24, 69, 70.

[345] Examples could be gang delinquency (§244 and §244a StGB), obtaining benefits by devious means (§265a StGB), or threat (§§240, 241 StGB).

[346] See Eisenberg (2016) §2 margin no.27; Ostendorf (2016) §1 margin no.10; Klaus Laubenthal, "Ist das deutsche Jugendstrafrecht noch zeitgemäss?," (*Juristenzeitung (JZ)* 57, No.17, 2002: 807–18), 813.

legal uncertainty[347] it would create in substantive criminal law.[348] To that extent, the rule of law, as a justice consideration, sets boundaries to the educative guiding principle. Respecting the principle of education in the procedural framework and in the choice and design of the legal consequence is generally seen as sufficient.

3.3.2. (In)effectiveness

Critics of the German model might cite the fact that empirical studies have not been able to prove that a welfare approach focusing on the offender rather than on the offence has any positive preventive effects. Such a lack of empirical evidence has also been one of the main arguments for Sweden to change their system of legal consequences.[349] However, in relation to the effectiveness of the legal consequences available for young offenders (possibly except in the case of incarceration), it has to be acknowledged that the value of empirical studies is a complicated matter. It has not yet been possible to establish comprehensively which path to choose: welfare or justice.[350] The effectiveness of a neoclassical approach is therefore as debatable as that of an educational approach. Yet, as mentioned in chapter 2,[351] a rather well-established and empirically well-founded claim in criminology is that imprisonment or detention of any kind does not have much of a positive effect on young offenders, either from a general or from an individual preventive point of view (in fact quite the opposite).[352]

---

[347] The principle of legal certainty is anchored in the German constitution – Art.103 II Grundgesetz (GG).

[348] See BGH StV 2000, 670.

[349] See SOU 1995:91, Part II, 46–7.

[350] See Thomas J. Bernard and Megan C. Kurlychek, *The Cycle of Juvenile Justice* (2nd Edition. New York: Oxford University Press, 2010). However, this kind of empirical research falls within the realm of criminology and is not the focus of this thesis. Consequently, I do not proceed further into this wide and complicated field but just want to point out the problem.

[351] See section 2.1.3.

[352] See Walter (2006), 249; Maeland (2012), 204; Gröning (2014), 318; Pettersson (2009), 39ff. in relation to recidivism.

3.3.3. Discretion and the problem of "relative justice"

An implication of the kind of individualistic approach we find in the German juvenile criminal justice system is the broad discretion granted to the juvenile court.[353] This may be in conflict with the principle of legal certainty and with the rule of law, the latter of which is a constitutional principle set out in Art.20, 28 I GG. The BVerfG has decided that the broad discretion of the juvenile court does not conflict with the principle of legal certainty or the rule of law since the juvenile court still operates within the framework of the criminal law in terms of offences, which makes it sufficiently certain (nulla crimen sine lege Art. 103 II GG).[354] Furthermore, there are clearly defined demands in relation to the legal consequences.

However, apart from diminished transparency and predictability and the obvious minimization of the monitoring role of the state through a reduction in its ability to control,[355] a problem resulting from the broad discretion of the juvenile courts is the disparity of verdicts. Considering the broad discretion of German juvenile courts, it is not surprising but rather to be expected that verdicts in comparable cases differ considerably across Germany. The heterogeneous character of criminal verdicts has been documented several times over the years.[356] The differences are striking, not only because of their frequency but also in terms of their magnitude. For example, the so-called "Nord-Süd-Gefälle"[357] refers to the fact that verdicts for young offenders in the north of Germany tend to be more lenient than in the south. There is a similar divide with regard to dismissals of cases and the application of the JGG to young adults.[358] This leads to the rather absurd circumstance that an offence that receives a sentence of, for example, community service for juveniles in Hamburg

[353] See section 6.2.

[354] See BVerfGE 74, 102.

[355] See Fionda (2005), 270, who argues that such a model can be justified on the basis of its character of "measured minimalism", rooted in its benevolent intentions.

[356] See Streng (1984), 13.

[357] "North–South divide" – my translation. See Klaus Laubenthal, Helmut Baier, and Nina Nestler, *Jugendstrafrecht* (Dordrecht and Heidelberg and London and New York: Springer, 2015), 53; and also, for a little more detail, Ostendorf (2016), Basics §§105 and 106 Margin no.7, which also mentions an "East–West divide".

[358] See Mathias Kröplin, *Die Sanktionspraxis im Jugendstrafrecht in Deutschland im Jahr 1997 – ein Bundesländervergleich* (Godesberg: Forum Verlag, 2002), 6.

may lead to juvenile imprisonment for young offenders in Munich.[359] The disparity in verdicts cannot be explained by differences in the characteristics of the offences or the offenders.[360] Criticisms of such disparities in legal doctrine and from practitioners themselves have long been made.[361] Expressions like "fishing in the dark",[362] "anarchical",[363] and "chaos"[364] reflect this critique. Still, we should not ignore the fact that it is hard to compare criminal sentences because of the uniqueness of individual cases. As Hogarth points out:

> Without adequate statistical control over the types of cases appearing before the courts, it would be wrong to assume that there is a genuine lack of uniformity in sentencing. Apparently unequal sentences for similar offences may also result from differences in the social contexts in which the courts operate, such as differences in the crime rate, or in public opinion, or in the resources to deal with offenders available locally.[365]

The next question that arises, then, is whether the disparity in verdicts amounts to an infringement of the principle of equal treatment.

---

[359] See Schaffstein, Beulke, and Swoboda (2014), 264, who find that a young offender in Bavaria who has previously committed two minor property offences runs a risk of being sentenced in a formal trial that is 18 times higher than the risk they would face in Hamburg (in relation to the year 1994).

[360] See Albrecht (2002), 200–1; see also Wolfgang Heinz, "Mehrfach Auffällige – Mehrfach Betroffene. Erlebnisweisen und Reaktionsformen," (*Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen (DVJJ)*, Bonn 1990: 30–73), 62.

[361] Wach indicates as early as 1890 that "it is true, the judicial sentencing is in major parts arbitrariness, mood, chance. This is an open secret, a painful fact of experience to everybody who has been working as a penal law practitioner" (see Adolf Wach, *Die Reform der Freiheitsstrafe. Ein Beitrag zur Kritik der bedingten und der unbestimmten Verteilung* (Leipzig 1890), 41). Similar references to arbitrariness, mood and chance can be found in Wilhelm Kahl, "Reform der Strafzumessung," (*Deutsche Juristen-Zeitung* 1906, Vol.11: 895–901), 895. Hellmuth von Weber, "Die richterliche Strafzumessung," (*Schriftenreihe der juristischen Studiengesellschaft Karlsruhe* 1956, Vol. 24), describes as "a vital question" the matter of which judge an offender is brought before (19).

[362] See von Liszt (1905), 393.

[363] See Heinrich Drost, *Das Ermessen des Strafrichters. Zugleich ein Beitrag zu dem allgemeinen Problem Gesetz und Richteramt* (Berlin: Carl Heymanns Verlag, 1930), 117.

[364] See von Weber (1956), 19.

[365] Hogarth (1971), 7.

3.3.4. (In)equality

The demand for equality before the law is part of the rule of law and the demands of legality in a constitutional state. Within this framework, equality is used to substantiate predictability.[366] Predictability, then, is a central issue when measuring legal certainty.[367] Legal equality fundamentally means that like cases have to be treated alike and unlike cases differently, unless there is reason for differential treatment.[368] In Germany, the principle of equality is adopted as a principle of constitutional status in Art. 3 GG. Consequently, the disparity in verdicts for young offenders conflicts with one of the cornerstones of the German constitutional state.[369] This inconsistency and lack of predictability may lead to diminished trust in the system.[370]

The principle of equality may be infringed in two ways: through the disparity in verdicts amongst different young offenders[371] and through the disparity in verdicts between young offenders and adult offenders. The educative guiding principle may lead to legal consequences for a young offender which could either be considered "harsh" or "lenient" in comparison to the legal consequence an adult offender would face in a similar case. However, in the framework of Art.3 GG, and also in relation to the principle of proportionality, it can only be concluded that this constitutes a disparity if young offenders are comparable to

[366] See Helén Örnemark Hansen, "Liket inför lagen-lika inför straffet?- För- och nackdelar med individanpassad rättssäkerhet," (*Nordisk Tidsskrift for Kriminalvidenskab* 2011, Vol.98, No.3: 267–83), 268. However, Claes Lernestedt, *Likhet inför lagen – rättsfilosofiska perspektiv* (Stockholm: Norstedts Juridik, 2015), points out several problems that arise in seeking to define equality (15–21).

[367] See Örnemark Hansen (2011), 268.

[368] This definition of equality was given by the BVerfG in BVerfGE 55, 88.

[369] See Albrecht (2002), 201 and Schaffstein, Beulke, and Swoboda (2014), 3.

[370] See Schaffstein, Beulke, and Swoboda (2014), 3. Another aspect of this thought is the possible infringement of the principle of proportionality and the personality rights of the young offender; see Ralph Grunewald, "Der Individualisierungsauftrag des Jugendstrafrechts – Über die Reformbedürftigkeit des JGG," (*Neue Zeitschrift für Strafrecht (NStZ)* 2002: 452–8), who argues in relation to the latter that personal autonomy is also respected when the state enables the young offender to develop the capacity to understand and respect the fundamental values of a society (455–6).

[371] Note here that Albrecht (2002) emphasizes an additional aspect of inequality that arises from the reliance on the principle of education in the juvenile justice system: disadvantaged juveniles are more likely to face intensive types of sanctions (200).

adult offenders. The BVerfG has established that groups subject to a norm may be treated differently if there are differences between the groups of such form and weight that differential treatment can be justified.[372] Such differences between young and adult offenders were described in chapter 2. The establishment of a specific juvenile criminal law is an indication of the fact that German law acknowledges such differences.[373] Juveniles and even young adults are different from adult offenders to such an extent that we cannot say that in instances of differential treatment their treatment is "harsh" or "lenient"; they are simply treated differently.[374] This means that they *should* be treated differently from adults, both as perpetrators and as victims.[375] Such a requirement also features in the UNCRC, which demands that "the best interests of the child" (Art.3) are considered, building on an understanding that children are vulnerable and need support and protection.[376]

However, this still leaves us with the problem of the disparity of verdicts between young offenders themselves.

3.3.5. Independence of the juvenile court

As I mentioned above, it is obvious that the problem of disparity and possible inequality in verdicts has its roots (partly) in the broad discretionary power enjoyed by the German juvenile court. This discretionary power is closely connected to the independence of the judiciary. The more discretion is limited (for example through sentencing guidelines), the less independent judges become.

Ashworth asks whether the large degree of discretion given to judges in sentencing is not contrary to the spirit of the principle of legality. The argument is that broad and relatively unstructured discretion results in defendants being judged and deprived of their liberty for reasons which have not been formally authorized, which may not be fully declared, and which may include the

[372] See BVerfGE 55, 88.

[373] See Rudolf Brunner and Dieter Dölling, *Jugendgerichtsgesetz: Kommentar* (12th Edition. Berlin: Walter de Gruyter, 2011), Introduction II Margin no.26a; Schlüchter (1994), 81; and Schaffstein, Beulke, and Swoboda (2014), 216–17.

[374] See Schaffstein, Beulke, and Swoboda (2014), 3; see also Grunewald (2002), 456.

[375] See Diesen, Lernestedt, Lindholm and Pettersson (2005), 195, 204

[376] See RättsPM 2013:7 section 11. See also sections 3.5. and 3.6.2., below.

subjective preferences of the individual judge.[377] The alternative to such broad discretion would be to have detailed rules that guide the judge's decision. It comes down to the question: whom do we trust more, the judge or the legislature?

On the other hand, even the independence of the judiciary rests, at bottom, on the legislature. The independence of the judiciary – just like the principle of equality – is constitutionally protected, and it is set out in Art.91 GG. According to the BVerfG, sentencing constitutes no violation of Article 3 GG (which is also followed by the BGH today) because the independence of the judiciary is recognized as a systematic limitation of the principle of equality. The criminal court is only required to judge without respect to the identity of the person and also, when determining the sentence, to avoid making any arbitrary distinctions.[378]

Nevertheless, sentencing is just like any other application of the law and so is subordinate to "the mandatory precepts of equality".[379] Equality before the law must therefore be interpreted as *relevant* equality in the eyes of the law.[380] The aim should be to achieve what Hood describes as "equality of consideration",[381] which means that in similar situations courts ought to consider similar factors and have similar reasons for selecting particular forms of sentencing.[382]

However, the geographical disparities are too great to be explained by "equality of consideration" or "relevant equality". It remains the case that the educative

---

[377] See Andrew Ashworth, "Techniques for reducing subjective disparity in sentencing," in *Disparities in Sentencing: Causes and Solutions* (Collected Studies in Criminological Research, Vol. XXVI, 101–33. Strasbourg, 1989), 120.

[378] See BVerfGE 1, 345.

[379] See BVerfGE 19, 47.

[380] See Lernestedt (2015), 67.

[381] See Roger G. Hood and Hermann Mannheim, *Sentencing in magistrates' courts: a study in variations of policy* (London: Stevens, 1962), 129.

[382] Following this thought, it is consistent with legal principles that verdicts may turn out differently in at first glance similar cases. Dworkin (1978) also defends this outcome with his example of the judge "Hercules" as the ideal judge. What he demands of his "Hercules" is the well-balanced consideration of all aspects of a case. In pursuing this goal, different judges might reach different verdicts which are all still in line with the rule of law. This leads to the phenomenon of "subjective objectivity" (see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978)).

guiding principle leads to an inequality in verdicts between different young offenders.

3.4. Historical development in Sweden

The Swedish juvenile criminal justice system is defined by a fundamental piece of legislation that was passed in 1902.[383] The legislation entered into force on 1 January 1905 and has retained its basic structure while undergoing minor changes to adjust to changing times.

For offenders under the age of 15, this legislation meant that the criminal code would not be applicable; instead, they were placed under the control of child welfare committees.[384] These committees were intended to ensure that children and juveniles received an adequate education when the educational means available at home or at school were insufficient. The measures available included cautioning the legal guardian, warning or caning the child, supervising the home and the child, and ultimately separating the child from the home.[385] For young perpetrators between 15 and 17, criminal punishments were mitigated.

The Acts of 1902 expressed early notions of social welfare. They reflected enlightenment ideas about children's rights to a decent life and an adequate education, even when such rights conflicted with the rights of parents.[386] By viewing offences as "vanart", the new legislation turned away from criminal

[383] 1902 års vanartslag = lagen angående uppfostran åt vanartade och i sedligt avseende försummade barn från år 1902. See Nordlöf (2012), 22.

[384] My translation of "barnavårdsnämnden". This child welfare committee had to include a member of the poor-law board, a clergyman, a schoolteacher, and a physician in the public medical organization. Furthermore, at least one member had to be a woman. Since 1960, one member has had to be a legal expert; see Carl-Gunnar Janson, "Youth Justice in Sweden," (*Chicago Journals* 2004: 391–441), 397. The committees were to deal with so-called "vanart", meaning advanced delinquency or moral neglect. The threshold of 15 years of age still applies, according to chapter 1 §6 BrB. This means that children under the age of 15 can be considered responsible for a criminal action, but they may not be sentenced to a criminal legal consequence. This also means that they may not be prosecuted. However, as mentioned in section 1.6., children under the age of 15 are not part of the target group of this thesis.

[385] At the same time this legislation was passed, the national reformatory for boys outside Motala (Bona) and, a year later, the private school for girls near Nässjö (Viebäck) opened.

[386] See Janson (2004), 396; see also Nordlöf (2012), 22.

punishment as a response to youthful misbehaviour. It introduced a basic division of responsibilities between the social services and the judiciary: up until the age of 15, social services had responsibility, while the judiciary was responsible for young offenders between 15 and 20, with gradually increasing judicial involvement as the young offender's age increased. However, the Acts of 1902 rejected a juvenile court and relied instead on the common sense and experience of the trusted men of the parish, guided by the vicar.[387]

When the master's right to flog his subordinates was abolished in 1920, the legislature was taking more interest in the possible damages to a child that an intervention might cause and focused more on preventive measures. In line with this shift of focus, a report by the Child Welfare Commission[388] led to the Barnavårdslag (SFS 1924:361)[389] in 1924. This Act required all municipalities to establish a barnavårdsnämnd. The authority of these bodies was gradually extended: at first, they covered children up to the age of 15, then children up to the age of 18, and finally even young adults up to the age of 21 who were deemed to be pursuing a reckless, lazy, or immoral way of life and whose rehabilitation required special social measures.

However, it was not until the 1940s that the general authoritarian approach was softened and oriented more towards treatment, guided by evidence from the behavioural social sciences. In the 1950s, more emphasis was placed on avoiding incarceration. In 1982, the municipalities and their social services[390] took over responsibility for the institutional treatment of children and young people in residential institutions (reformatory schools), as part of an attempt to deal with the increases in delinquency among young people in these institutions.[391]

In 1962, the Swedish parliament passed the BrB, which entered into force in 1965. It replaced the Criminal Act of 1864, and it was strongly influenced by twentieth century ideals of treatment: it was characterized by an individualized

[387] See Janson (2004), 396.

[388] Barnavårdskommitténs betänkande SOU 1956:61 "Ny barnavårdslag".

[389] "Child Welfare Act" – my translation.

[390] My translation of "socialtjänsten".

[391] See Janson (2004), who shows that because reformatory care was used as a last resort when all other attempts had failed, the remaining clients became progressively more antisocial and difficult to manage (399).

focus when it came to legal consequences, for young and adult offenders alike.[392] As an expression of this ideal, treatment measures for young offenders were mainly carried out by the juvenile care system. However, there was no separate law for young offenders. Since a recurring theme in juvenile legal thinking is the detrimental impact that appearing in court might have on a young person, prosecutors were, as early as 1944, authorized to refrain from prosecuting juveniles between the ages of 15 and 17 who had confessed to the offence and instead hand them over to social services.

In the first post-war decades, optimism about the possibilities for changing young offenders into law-abiding citizens endured. In criminal law, a welfare approach prevailed.[393] The aim was to minimize the damage caused by punishment and to provide the offender with care that would help him or her to turn into a law-abiding citizen.[394] Focus was placed on the individual offender. Interventions by the authorities were seen as being intrinsically harmful, creating problems rather than solving them. The labelling theory, which had become influential in the social sciences, pursued this line of thought and fitted well with the radical critical ideology of the times.[395] Its assumptions led to the view that the labelling of young offenders occurred mainly within formal institutions, such as the judicial system, social services, and the education system. If this was right, the policy implications appeared almost inevitable: to protect individuals from being labelled, a conscientious social worker had to keep them away from the police, courts, and social services.[396]

In 1964, for the first time a specific law dealing with young offenders, the Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare,[397] entered into force, following complaints that juvenile perpetrators were not facing serious enough legal consequences for their actions. This law outlined to the police and

[392] See Martin Borgeke and Catharina Månsson, "Den nya lagstiftningen om påföljder för unga lagöverträdare," (*Svensk Juristtidning (SvJT)* 2007: 181–203), 181. For adults, the individual–preventive focus has been gradually abandoned, but for young offenders it has remained.

[393] This approach also prevailed in social welfare reform.

[394] See Janson (2004), 408.

[395] See ibid. and, for example, the outcome of the study undertaken by Börjeson (1966), 214–15.

[396] See Janson (2004), 408. However, in the 1980s, this version of labelling theory began to become less influential.

[397] "Act on Special Provisions for Young Offenders" – my translation; henceforth: LUL.

public prosecutors how to deal with young offenders, and it remains in force today.

In 1977, the approach to juvenile justice shifted away from treatment and the offender towards "neoclassicism".[398] Criticism of the existing system had to do with its neglect of the harm caused by the offence, the unpredictable duration of measures, and the lack of proportionality between the offence and its consequences.[399] A criminal policy task force from the Brå recommended that principles of justice and proportionality between crime and punishment should be applied irrespective of the perpetrator's personal needs for treatment.[400] These suggestions led to one of the most striking signs of the turn away from treatment-based criminal law: the sentence of "juvenile prison" was abolished in 1980; from then on, young offenders had to be incarcerated in normal prisons.[401] Neoclassical thinking also underlay the 1979 Commission of Imprisonment's[402] recommendations, which stated that sanctions should reflect the severity and reprehensibility of the criminal act.[403] Furthermore, a reform of

[398] Other expressions employed in this context are, for example, "just desert" or "restorative justice", the latter of which contrasts with "reparative justice". I have chosen to use the term "neoclassicism" in the framework of this thesis to describe the shift away from the focus on treatment towards a stricter focus on the offence and more traditional justice considerations and principles, since it is the term most often employed in the Swedish literature. The term is related to the "classicist" criminal law school of the eighteenth century (which included, for example, Anselm von Feuerbach and C. J. A. Mittermaier), based on the ideas of Cesare Beccaria, who claimed that the individual who subordinates him- or herself to a sovereign has a philosophical right to just punishment – an early expression of the principle of legality that even emphasizes the principle of proportionality. I will not got go deeper into these roots; for further reading, see Cesare Beccaria, *Dei delitti e delle penne - Om brott och straff.* Translated by Paul Enoksson (Stockholm and Rome 1977) and, for an overview, Christian Häthén, *Straffrättsvetenskap och Kriminalpolitik. De Europeiska Straffteorierna och deras betydelse för Svensk Strafflagstiftning 1906-1931: Tre Studier* (Lund: Studentlitteratur, 1990), 42, 61–2.

[399] See Haverkamp (2010), 1329; also Jareborg and Zila (2014), 99.

[400] See Brå Report 1977:7; see also Nordlöf (2012), 195-6.

[401] Note here that at the same time the application of the "juvenile discount" (see section 4.3.2.1.) was extended from 18 to 21 years of age to avoid young adult offenders between 18 and 20 suffering exceedingly harsh punishments, for they would previously have been eligible for the legal consequence of "juvenile prison"; see prop.1978/79:212, 65. In 1988 it was generally emphasized that criminal conduct committed by an offender under the age of 21 should lead to a reduced prison sentence; see prop.1987/88:120, 98.

[402] My translation of "Fängelsestrafkommittén".

[403] See SOU 1986: 13–15, 30.

legal consequences[404] revised the whole system of the selection of legal consequences. The new law, which now can be found in chapter 29 and 30 BrB, entered into force on 1 January 1989 and can be considered another expression of the move away from the emphasis on treatment towards the priority of the principle of proportionality and equivalence.[405]

The Commission on Juvenile Delinquency,[406] which was appointed in 1990, observed the shift from individual prevention towards a focus on the offence itself and acted in light of this general development. The commission proposed adapting the system of legal consequences for young offenders to the principles applicable for adult perpetrators (even if lack of maturity should still be taken into account on humanitarian grounds).[407] But this led to the austere conclusion that the practice of referring a young offender to the social services for care should be abandoned because it was inconsistent with the notion of a connection between sanction and offence. Responsibility for supervision should be handed back to the courts.[408] This can be seen as an attempt by the judiciary to take back some of the authority it had lost to social services.[409] However, with the reforms of 1999, the new Social Democratic government left social services in charge of the care and protection of juveniles.[410] It passed a new law, based on investigation SOU 1993:35, "Lag (1998:603) om verkställighet av sluten ungdomsvård" (LSU),[411] which took effect on 1 January 1999. The newly

[404] Påföljdsbestämningsreform of 1988, based on SOU 1986:13–15, followed by prop.1987/88:120.

[405] See Per-OleTräskman, "Påföljd, proportionalitet och prioritering av samhällsstraff," (*Svensk Juristtidning (SvJT*) 2003a: 173–94), 174. Another expression was the change in the LUL in 1988 that introduced the demand for "skötsamhet" ("orderliness" – my translation. §22 LUL as well as prop.1987/88:135, 18–20) as a precondition for dismissing a case against a young offender. A second reform undertaken in 1995 strengthened the preconditions for a dismissal further by stipulating that a dismissal should generally not be granted to repeat offenders (see prop.1994/95:12, 76–7 and Brå Report 2000:7, 9).

[406] My translation of "Ungdomsbrottskommittén".

[407] See Brå Report 2000:7, 7.

[408] See SOU 1993:35, 209.

[409] See Janson (2004), 409.

[410] See prop.1997/98:96, 138.

[411] "Act on Closed Institutional Treatment" – my translation.

created closed institutional treatment was to be carried out by the SiS[412] in cooperation with social services. It was to be a substitute for prison for 15- to 17-year-old offenders for most cases, but not all.[413] Nevertheless, it was emphasized in the preparatory works that fundamental principles like justice, proportionality, and predictability should henceforth shape the choice of the legal consequence.[414] Yet, in a 2002 report assessing the 1999 reforms, Brå pointed out that, in the case of young offenders, there are difficulties in combining the principles of care and need with the principles inherent to criminal law.[415] This is a straightforward expression of the welfare/justice clash.

Since 1 January 2007, the rules regarding specific juvenile legal consequences have been gathered together in chapter 32 BrB. This legislation is based on the report of the Investigation into Juvenile Delinquency[416] and is designed to focus on and protect juveniles. The aim of the 2007 juvenile justice reforms was to create a system of state responses to juvenile offending that would be more clearly geared towards the reduction of recidivism while also reducing the use of fines and prison sentences.[417] Further, up until 2007, the main sanction in Sweden for young offenders aged 15–17 was transfer to social services. This was criticized for a lack of transparency and predictability, since social services had more or less free rein to decide on treatment needs.[418] To overcome these difficulties, juvenile care and community service for juveniles were introduced.

---

[412] In 1993, the Statens institutionsstyrelse (SiS, the National Board of Institutional Care – my translation) was established, and it began operating on 1 April 1994. It is a public authority administering and running compulsory care for juveniles and adult addicts. It took over responsibility for the so-called "section 12 homes". §12 Lag (1990:52) med särskilda bestämmelser om vård för unga (LVU - "Act on Special Provisions about Care for Juveniles" (my translation)) states that there shall be special institutions/homes for young persons who need treatment under especially close supervision.

[413] As intended, a prison sentence for young offenders has become the exception but can still be unavoidable in some cases, for example if the seriousness of the offence requires a longer incarceration than the four years closed institutional treatment can provide. See further section 4.1.2.5.

[414] See prop.1997/98:96, 140–51 and Borgeke and Månsson (2007), 183.

[415] See Brå Report 2002:19, 41.

[416] Ungdomsbrottsutredningens betänkande "Ingripanden mot unga lagöverträdare" – SOU 2004:122.

[417] See prop. 2005/06:165, 1.

[418] See Lappi-Seppälä (2011), 221.

While community service for juveniles was originally only an additional legal consequence, since 2007 it has been an independent legal consequence.[419]

All these developments illustrate that the Swedish juvenile criminal justice system has one foot in the adult criminal justice system and one in child welfare – two systems based on fundamentally different principles.[420] As mentioned in section 1.2., the ideology of justice (as the guiding ideology of the adult criminal justice system) and the ideology of welfare (as the guiding ideology of child welfare) aim in fundamentally different, even diametrically opposed, directions.[421] The shifts and combinations I have described in this section demonstrate the welfare/justice clash.

3.5. The guiding principle in Sweden

The historical development of the Swedish juvenile criminal justice system, the shift from treatment to neoclassicism, means that it is not labelled as easily as the German juvenile criminal justice system. Since the turn to neoclassicism, the Swedish approach to young offenders has been based in large part on the principle of proportionality[422] as an expression of the principle of the rule of law.[423] Swedish legislature has tended to attach most weight to proportionality,

[419] See Stina Holmberg, "Påföljder för unga – ett system med två svårförenliga principer," (*Nordisk Tidsskrift for Kriminalvidenskab* 2007: 444–6), 445.

[420] See Lappi-Seppälä (2011), 199 and Lappi-Seppälä and Storgaard (2014), 334. See also Nordlöf (2012), 162–75 for an overview of the development of the system of legal consequences for young offenders.

[421] In general terms, see Beth Grothe Nielsen, "Mindreårige lovovertraedere mellem to ideologier: den strafferetlige og den socialretlige," (*Retfaerd* 1983, No.24: 66–88).

[422] Proportionality in this sense means that the legal consequence, as society's response, has to be proportionate to the seriousness of the offence committed, whatever the offender's guilt or blameworthiness. See prop.1997/98:96, 148; Borgeke (2012), 30–1; and Jareborg and Zila (2014), 65ff. See also SOU 1995:91 Part II, 54ff.

[423] Note here that this does not contravene the UNCRC, since the UNCRC does not demand that the best interests of the child always have to be prioritized but rather that they have to be considered and that there must be a justification if other interests are deemed more important (see RättsPM 2013:7, section 11).

equivalence, predictability, and equal treatment,[424] even emphasizing a more consistent shape for legal consequences.[425] Swedish law thereby follows a concept of juvenile criminal law which is oriented towards adult criminal law but with a reduction of the young offender's "guilt" because of their age.[426] This reduction finds expression in chapter 29 §7 BrB.[427] This solution can be traced back to the interest in creating a consistent and just jurisprudence.[428] The importance of the balance between the severity of the offence[429] on one hand and the response of society on the other hand is emphasized several times in the preparatory works.[430] This balance is embodied in the principle of proportionality as the central principle of the Swedish criminal legal system.[431] Proportionality should ensure legal certainty and consistency in sentencing, which is harder to achieve with an individualistic approach, as the example of the German juvenile criminal justice system has shown.[432]

---

[424] See prop. 1997/98:96, 141–7; for more in general regarding the principles guiding the choice of legal consequences, see prop. 1987/88:120, 36.

[425] See prop. 1997/98:96, 147–51 and prop.2005/06:165, 42.

[426] The contrast here is with the German model of an "educative criminal law".

[427] First Jareborg and Zila and then Borgeke tried to give more substance to this rule and introduced the following guidelines, widely applied by the courts – even HD (see for example NJA 2015, 1024) – in Sweden: four-fifths of the adult penalty for a 20-year-old perpetrator, two-thirds for a 19-year-old, half for 18 year old perpetrators, one-third for a 17-year-old, a quarter for a 16-year-old, and a fifth for a 15-year-old. These are to be understood as guidelines and not as binding rules. The older the young offender is, the harsher he or she can be punished. For more on this, see section 4.3.2.

[428] See Tärnfalk (2007), 113.

[429] I choose the term "severity of the offence" as a translation of "straffvärde" because I believe it captures its meaning as far as possible. The "straffvärde" appears in chapter 29 §1 BrB, reflecting its central position in Swedish Criminal Law. Although it is not defined, chapter 29 §1 second break BrB, as well as chapter 29 §2 and §3 BrB, stipulates some, but not all, of the factors that are relevant in assessing the severity of a crime. This shows that there are a variety of aspects to "severity", and it goes beyond the purely judicial–technical meaning of the term. It should not be equated with the levels of severity an offence may have according to a specific law prescribing different levels of sanction (like, for example, the different levels of theft).

[430] See prop. 2005/06:165, 58.

[431] See Träskman (2003a), 174.

[432] Such an approach does not necessarily entail a "harsher" legal consequence for young offenders; on the contrary, the welfare approach is often criticized since it can be misused to inflict a more

However, the changes that took effect on 1 January 2007 are, according to the preparatory works, designed to focus on and protect juveniles. As mentioned above, the aim of the 2007 juvenile justice reforms was to create a system of state responses to juvenile offending that is more clearly geared towards the reduction of recidivism as well as the reduction of the use of fines and prison sentences.

Nevertheless, even if the juvenile justice system as a whole aims at rehabilitation and at turning young offenders into law-abiding citizens,[433] and even if it emphasizes, even after the reforms, that young offenders should first and foremost be subject to measures within social services,[434] it has been argued that the major reforms of both 1999 and 2007 were designed to place a greater emphasis on punishment.[435] The reforms give precedence to the principles of predictability, proportionality, and consequence[436] while also holding that perpetrators' pedagogical needs must be taken into account.[437] The difficult balance to be struck is concisely expressed in prop.2005/06:165:

> The current system entails that it is the seriousness of the offence which shall form the basis for the determination of the legal consequence. Criminal principles including predictability, proportionality and consistency are granted decisive importance. However, to combat recidivism, it is not considered to be sufficient to focus on the criminal offences as such. The entirety of the offender's situation must be considered. This idea should be especially prominent when it comes to the treatment of young offenders. A starting point is that the right care and treatment is more likely to prevent young offenders from continuing to

---

invasive legal consequence than the offence itself would require in the name of, for example, education.

[433] This is not least due to Art.40 UNCRC.

[434] See prop.2005/06:165, 42f. This is also evident in the fact that the judicial authorities choose the specific juvenile legal consequence (for example, community service for juveniles, juvenile care or closed institutional treatment – see the discussions in sections 4.1.2.2.–4.1.2.4 and 4.3.2.), which is then carried out by social services. See SOU 2012:35, 671; prop.2005/06:165, 42; Nordlöf (2012), 308; and Borgeke and Månsson (2007), 187.

[435] See Holmberg (2013), 313.

[436] See prop.2015/16:151, 31, which emphasizes that the influence of proportionality has increased noticeably in relation to specific legal consequences for juveniles.

[437] See Borgeke (2012), 387; see also Örnemark Hansen (2011), 271.

> commit crimes than social responses that are solely based on the seriousness of the offence.[438]

This last sentence is an indication of the importance of respecting welfare considerations (focusing on "treatment" and "care") even within the framework of a neoclassical approach. This is, as such, an expression of the welfare/justice clash. Nevertheless, the guiding principle of the Swedish juvenile criminal legal system is heavily shaped by traditional "rule of law" concerns like proportionality, predictability, and equality. Neoclassicism is the prevailing tradition in the (juvenile) criminal justice system in Sweden.[439] Hollander and Tärnfalk write:

> In Sweden as in other countries in Europe, throughout the last decade, children have been focused on as "offenders" first and "children", or children in need, second. It seems as if both the ideology, policy and practice is less interested in supporting children than accusing them, although this view is fundamentally against the principle on children in welfare and child protection legislation, and in the UN Convention on the Rights of the Child.[440]

This trend seems to be continuing; it is reflected in, for example, investigation SOU 2012:34, which recommends a stricter approach towards young repeat offenders[441] and proposes a new legal consequence for young law offenders with

---

[438] Prop.2005/06:165, 43, my translation.

[439] See Johan Munck, "Var star nyclassizismen idag?," (*Svensk Juristtidning* (*SvJT*) 2015: 424–7), 427; also Petter Asp, "Straffrätten – i går, i dag och i morgon," in *Svensk juristtidning 100 år*, eds. Stefan Strömberg et al., 138-61 (Uppsala: Iustus förlag, 2016), who calls this stream "förtjänstparadigmet" and claims that young law offenders probably fit worst into this system (142).

[440] Hollander and Tärnfalk (2007), 90.

[441] SOU 2012:34 states: "Reaktionerna vid återfall i brott och vid misskötsamhet under verkställighet av de påföljder som väljs som alternativ till fängelse i anstalt kommer att stramas upp. Det leder till att fler kommer att tas in i anstalt på grund av nya brott eller att tilläggssanktionen inte fullgörs" (26). Even more recently, prop.2015/16:151 proposes as a general rule in cases of new criminal conduct committed before the legal consequences of juvenile care or community service for juveniles are fully enforced, that an additional legal consequence (not including the earlier legal consequences) should be imposed; see prop.2015/16:151, 66ff. One of the reasons for this regulation being the general rule is that it should indicate clearly to the young convict that the legal consequence is a consequence of and a response to the committed offence. See prop.2015/16:151, 69.

a more restrictive character.[442] I will now investigate the tensions created by this neoclassical guiding principle.

3.6. Tensions caused by the neoclassical approach

As I mentioned above, the approach of the German juvenile criminal justice system faces its own kinds of criticism. However, the merits of a neoclassical approach are also debatable. Such an approach is open to the critique that it does not pay enough attention to the young offender's rights and human dignity, as well as to the UNCRC's "best interests of the child" principle. Moreover, it is less flexible than an education-based system.

3.6.1. "Offence criminal law"

A neoclassical approach focuses on the rule of law and therefore on the offence rather than the offender. In doing so, Zedner claims that "the offender is constructed as an anonymous actor whose individual characteristics, qualities, and failings are beyond the legitimate purview of the sentence".[443] The individual steps back and the offence takes centre stage. The end is to satisfy societal needs for punishment and to uphold the rule of law rather than to tailor a sentence specifically to the young offender. But, as I have explained, the criminal conduct of young offenders is often driven by different factors – biological and psychosocial – from those that motivate adult offenders.[444] Not doing justice to these factors may lead to a conflict with the human dignity and personality rights of a young perpetrator.

Apart from that, placing emphasis on the offence rather than the offender may be considered to amount to a failure on the part of the state to protect its own citizens, especially vulnerable young persons. As we will see later, the Swedish juvenile criminal justice system is very closely tied to the adult criminal justice

[442] See SOU 2012:34, Vol.3, 653ff regarding "ungdomsövervakning". This proposal was not considered yet in prop.2014/15:25 but the Committee of Justice (justitieutskott) proposed a different name " helgavskiljning med fotboja" in its consideration of prop.2014/15:25; see 2014/15:JuU9. This change of name indicates a stronger focus on a measure restricting freedom.

[443] Zedner (1998), 165.

[444] See chapter 2.

system, especially when it comes to sentencing rules.[445] The court determines the seriousness of the young person's offence in the same way as it does in the case of an adult offender. It then establishes the hypothetical sentence for an adult perpetrator, before mitigating the sentence in light of the fact that the offender is a young person. Simply offering young offenders mitigated versions of the sentences appropriate for adult offenders could be seen as a harmful reductionism. However, as I will detail, the approach to sentencing young offenders is more complex than this.[446]

3.6.2. UNCRC

Another criticism of the Swedish juvenile criminal justice system might be that, in giving precedence to the offence rather than the individual, it does not respect the rights of the child. Because of Sweden's duty to uphold the UNCRC, the best interests of the child should be a primary concern, including when dealing with juvenile offenders.[447] This protection of the interests of juveniles rests upon article 3 of the UNCRC, which stipulates:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[448]

However, the "best interests of the child" principle is not (yet) explicitly expressed in the juvenile criminal justice system.[449] The UNCRC, which was

[445] I elaborate on this aspect in section 4.3.2.3.

[446] For a detailed account of sentencing in Sweden, see section 4.3.2.

[447] See prop.2005/06:165, 42; Borgeke and Månsson (2007), 186; Nordlöf (2012), 232; or RättsPM 2013:7, section 3. This also becomes clear in explicit guidelines issued to public prosecutors about how to respect the UNCRC (see Guidelines by the Development Centre (my translation of "Utvecklingscentrum") Stockholm in relation to the treatment of young offenders). See also most recently Burman (2016).

[448] International rules and conventions have gained more and more importance in Swedish legislation over the last few decades; see for example Dag Victor, "Svenska domstolars hantering av Europakonventionen," (*Svensk Juristtidning (SvJT)* 2013: 343–96). One example is the UNCRC.

[449] See Nordlöf (2012), 271.

ratified by Sweden 1990,[450] has not directly been incorporated into Swedish law and therefore does not in itself constitute binding law in Sweden; [451] but, according to the ratification duty, it has been transformed into the Swedish constitution without any conditions – including in relation to the demand to consider and respect the "rights of the child".[452] This also means that Swedish criminal law should be consistent with article 40.1 of the UNCRC, which stipulates:

> States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

That said, the UNCRC has still not been incorporated into Swedish law.[453]

3.6.3. Equality

As will be seen in the following chapters, the Swedish juvenile criminal justice system also features specific rules for young offenders that deviate from those that prevail in the adult criminal justice system. Consequently, even a neoclassical approach may raise concerns regarding equality. The principle of equality[454] before the law is anchored in the Swedish constitution. Treating young offenders differently from adult offenders (for example by mitigating the sentence) may conflict with the principle of equality. However, as in Germany,

---

[450] See SÖ (Sveriges överenskommelser med främmande makter (Swedish Agreements with Foreign Powers – my translation)) 1990:20.

[451] Sweden features a so called dualistic system; see SOU 2016:19, 350-1.

[452] See chapter 1 §2 section 5 Regeringsformen (RF) and SOU 2009:68, 129–30.

[453] In winter 2015, the Swedish government extended an ongoing investigation with the aim of incorporating the UNCRC into Swedish legislation; see Dir.2015:17. It was followed by SOU 2016:19 recommending to incorporate the UNCRC into Swedish law, which then could be directly applied by the courts.

[454] "Principen om allas likhet inför lagen" (my translation) is in Sweden stipulated in chapter 1 §9 RF. See Lernestedt (2015), 15–21, for definitions and discussions of the relevant terms and concepts. He also points out the problem of formal and material equality (18–19).

differential treatment is permitted on humanitarian grounds. Such a ground is the age of the offender.[455]

With respect to equality between young offenders, Sweden has faced the same problem of heterogeneous verdicts as has arisen in Germany.[456] The application of the law was considered to be far too dependent on judges' individual perceptions of cases,[457] which led to the unequal treatment of different young offenders. Swedish legislators decided to act. The result was the adoption of fairly precise sentencing rules.[458] Chapter 29 §1 BrB, which is also applicable to young offenders, calls more or less explicitly on the courts to focus on the unity of the application of the law. If equality in verdicts is the aim, it demands fairly precise rules concerning sentencing. This means the court's task becomes more mechanical: the court has to subordinate itself and its decisions to a system in which the uniform application of the law is a central aim.[459] However, the judge's task can never become so constrained as to not leave the court any leeway in decision making. Since the courts deal with human beings and since no case will be entirely like another, the outcome of a trial can never look like a mathematical equation. Equality cannot be achieved by simply creating rules to be followed – cases are too unique for that – but will always demand a certain balancing of the different interests in a just way. Even if the judge's discretion is smaller in Sweden than in Germany, the court still has a fairly wide field to operate in and to reach different outcomes in similar-looking cases.

Even though Sweden took rather radical steps to reach equality, criminological research shows that the demand for equal punishment for equal offences is not fully realized.[460] Even if legal practitioners (judges) were to respond to this criticism by claiming that no cases are completely alike, it cannot be ignored that on a higher level there are clear patterns in how courts adjudicate.[461]

---

[455] See Nordlöf (2012), 160; see also Diesen, Lernestedt, Lindholm, and Pettersson (2005), 204ff.

[456] See Per-Ole Träskman, "Har vi någon 'tjeck' på straffmätning och påföljdsbestämning," in *Josefs resa - vänbok till Josef Zila*, 221–36. (Uppsala: Iustus Förlag, 2007), 227.

[457] See prop. 1987/88:120, 43–8. Zedner (1998) says that "at each historical moment the young offender is in part a construct of the sentencer's vivid imagination" (186).

[458] See section 4.3.2.

[459] See Träskman (2007), 225–6.

[460] See Per-Ole Träskmann, *Samma straff för lika brott- strävande att uppnå en enhetlig rättstillämpning inom Europa* (Rikosoikeudellisia kirjoituksia VII. Pekka Koskiselle 1.1.2003 omistettu. Helsinki 2003b), 304. See also Bra-Report 2000:13.

[461] See Träskman (2007), 229.

Träskman concludes that the present system for young offenders in Sweden is too complicated in practice to achieve the goal of equal verdicts. There are too many different legal consequences and too many possibilities of combinations of consequences for the system to be clear. This leads to a lack of predictability, equivalence, and equality.[462]

3.6.3. Inflexibility

Another concern about the neoclassical approach was mentioned in prop.1997/98:96, in which the Swedish government warned against taking neoclassical thinking too far. SOU 1995:91 I-III had originally proposed abolishing the legal consequences "conditional sentence" and "supervision"[463] because of the degree of foresight needed in order to determine when these punishments are appropriate. However, these proposed changes were never implemented because of the loss of flexibility that they threatened.[464] It was thereby indirectly acknowledged that the neoclassical turn in Swedish (juvenile) criminal justice implies a certain loss of flexibility.

3.6.4. Interfering with the judiciary: Separation of powers and non-legislative influences

As was pointed out before, the Swedish juvenile criminal justice system is closely tied to the adult criminal justice system, especially when it comes to sentencing rules. The quest for more equality in verdicts has led to fairly precise rules on sentencing in Sweden.[465] This may be seen as problematic in relation to the independence of the judiciary and the separation of powers. The legislature steers the judiciary. This could mean that sentencing becomes subject to political influence.

---

[462] See Hanns von Hofer, "En översyn av påföljdsystemet (Dir.2009:60)," in *Festskrift till Per Ole Träskman*, 238–45 (Stockholm: Norstedts Juridik, 2011), 239; also Träskman (2003a), 191, who – like others – also points out another problem: that there is no clear ranking of legal consequences.

[463] See section 4.1.2.4.

[464] See prop.1997/98:96, 76-8.

[465] See sections 4.3.2.1. and 4.3.2.2.

Furthermore, the court sets out from the sentence which would be applicable for an adult offender and then mitigates it if the offender is a young person, often making use of a list of suggested reductions. Borgeke, Månsson, and Sterzel[466] gathered decisions of the HD and developed a kind of "handbook" for how to sentence in different situations. According to my Swedish interview partners,[467] this handbook occupies an important – if not indispensable – place in the practice of Swedish courts. Träskman confirms that the Studier rörande påföljdspraxis book is probably the most frequently cited source among judges and has achieved a respected status.[468] Additionally, because Swedish sentencing law for young offenders is based on sentencing for adults,[469] scales for reducing the sentence depending on the age of the perpetrator have been developed.[470] Note that these guidelines are created by practitioners and legal scholars. Even if they can be seen as consisting merely of the decisions of the HD, put into a more general framework, they are the result of private initiative and do not have the character of official policy.[471] The HD does not support such a system of guidelines;[472] however, the HD has itself applied these guidelines, for example in NJA 2002, 489.

A possible danger which accompanies the allocation of guidelines is the risk that the court adheres too strongly to the scale, thereby sacrificing its independence.[473] Although not binding, such guidelines might be interpreted as an infringement of the independence of the judiciary. The use of "lists" limits the judge's discretion in the interests of predictability and equality. A necessary consequence of this is a lesser degree of flexibility when selecting a legal consequence. An outsider could get the impression that determining the correct

[466] Martin Borgeke, Catherina Månsson, and Georg Sterzel, *Studier rörande påföljdspraxis med mera* (5th Edition. Stockholm: Jure Förlag AB, 2013).

[467] For the empirical research, see chapter 7.

[468] See Träskman (2007), 228.

[469] See section 4.3.2.

[470] See Martin Borgeke, *Att bestämma påföljd för brott* (Stockholm: Norstedts Juridik AB, 2012).

[471] See Träskman (2007), 228.

[472] See NJA 2000, 421.

[473] This view is shared by Jaakko Forsman, *Anteckningar enligt professor Jaakko Forsmans föreläsningar öfver straffrättens allmänna läror med särskild hänsyn till strafflagen af den 19 december 1889* (Med tillstånd af föreläsaren utgifna af Lars Wasastjerna. 3rd Edition. Helsingfors 1930), 526–7.

legal consequence is more like a mathematical equation and is somehow a static matter. It is something of a human weakness to search for guidelines to hold on to when the field one is operating in becomes ambiguous. But every individual case demands that the court consider its unique circumstances by finding the right legal consequence. Especially when the law provides for a wide range of consequences for a court to choose from – as is the case with young offenders – the hazards of explicit guidelines become greater. Will the verdict show enough respect to the circumstances of the individual case?

Träskman has disputed the need for rules and guidelines and asked whether it is not sufficient to act with a modest and humane attitude towards one's fellow humans and one's society – whether common sense combined with rational thinking might not allow a judge to act right.[474] As persuasive and worthwhile as this ideal is, one has to consider that it most probably is achievable only in a perfect society. Judges are human. They are influenced by personal values, fears, practical considerations like efficiency, etc. It is this human aspect that gives rise to the tendency towards sentencing guidelines and the prioritization of objectives like public confidence, transparency, and consistency.

3.7. Conclusion

The Swedish and the German juvenile criminal justice systems approach young offenders from different directions. While the German juvenile criminal justice system builds on the idea of education, the contemporary Swedish juvenile criminal justice system focuses on proportionality, predictability, and equality, in accordance with the neoclassical tradition. The German system thus allows considerations of welfare to prevail while the Swedish system places priority on considerations of justice. In other words, as far as their guiding principles are concerned, the two systems emphasize opposing sides of the welfare/justice clash.

However, the German juvenile criminal justice system does not completely disregard justice considerations, and welfare considerations still play a role in the Swedish system. From a welfare/justice clash perspective, the guiding principles of the systems reflect the considerations that, on balance, tend to prevail in the two systems under investigation. Both approaches have their advantages and

[474] See Träskman (2007), 222.

both trigger different system-immanent problems. A guiding principle of education leads to conflicts with legal certainty, effectiveness, equality, and disparity in verdicts. The disparity in verdicts in Germany between young offenders seems to be an unavoidable effect of the underlying ideology of juvenile criminal law: the principle of education. Since the focus is on the offender rather than on the offence, this individualization presupposes the broad discretion granted to the juvenile court, which leads to disparities in verdicts. It further prohibits the introduction of sentencing guidelines, which would lead to more consistent verdicts. Sentencing guidelines would restrict the juvenile court's ability to make an individualized evaluation and put more focus on proportionality.[475] Such an emphasis on proportionality is a feature of the Swedish (juvenile) criminal justice system. However, as was shown above, this approach does not solve the problem either, and it can conflict with the young offender's rights, undermine their human dignity, and be at odds with the "best interests of the child" as understood by the UNCRC. Apart from that, it is a less flexible approach.

Consequently, neither of the two juvenile criminal justice systems prevails over the other. Both have to find a way to respect the fact that an offender is a young person while respecting the rule of law. The welfare/justice clash endures irrespective of the guiding principle adopted due to the fact that the lesser maturity of a young offender cannot be ignored in this realm of justice.

In the next chapters, I will look more deeply into the two juvenile criminal justice systems to investigate in more detail the shape the welfare/justice clash takes in each.

[475] For more thoughts on the issue of sentencing guidelines, see section 4.3.2.3.

Chapter 4

Legal responses to a young offender's offence

In this and the following two chapters, I focus on the substantive and procedural frameworks established in the Swedish and the German criminal justice systems regarding young offenders, looking for traces of the welfare/justice clash from a legal dogmatic perspective.[476] This chapter contains a legal dogmatic analysis of the legal consequences, provisions for dismissing cases, and sentencing rules for young offenders. It illustrates the impact of welfare considerations on the shape and the application of the legal rules in this realm of justice. The sections are divided into a descriptive part, followed by an analysis from a welfare/justice perspective for each section. In the analysis, I consider the extent to which the legal rules can be interpreted as expressions of justice and/or welfare considerations and discuss the tensions that arise that exemplify the welfare/justice clash.

4.1. Legal consequences[477]

4.1.1. Germany

In Germany, the legal consequences applicable to young offenders are independent of those applicable to adult perpetrators.[478] The penalty stated in

[476] The legal dogmatic method and the national differences were described in section 1.5.2.1.

[477] I do not to employ the term "sanction" because German law emphasizes repeatedly that the legal consequences of the JGG are not sanctions. The only exception is juvenile imprisonment according to §17 JGG, which constitutes a criminal sanction in the literal sense.

[478] See Eisenberg (2016), §5 margin no.10; Herbert Diemer, Holger Schatz, Holger and Bernd-Rüdiger Sonnen, *Jugendgerichtsgesetz mit Jugendstrafvollzugsgesetzen* (7th Edition. Heidelberg:

the law for a certain offence is no more than an indicator of the severity of a particular kind of criminal conduct (for example, that murder is more serious than shoplifting), but the penalty levels play no role whatsoever in determining the sentence for a young perpetrator;[479] only the description of the offence is applied to young offenders.[480] The reason for this is simple: as explained in section 3.2., the focus of German juvenile criminal law is the offender rather than the offence. Therefore, it makes no sense to apply the different penalty levels to young offenders, for they relate to the severity of the offence rather than to the offender.[481]

The key to the definition of "juvenile" crime is the age of the offender at the time of the offence.[482] To be held accountable for a criminal action in Germany, the young offender must be at least 14 years old.[483] Children under the age threshold are never subject to criminal proceedings.[484] Young offenders under the age of 14 years are dealt with by social services and – if necessary – the family court.[485] Yet being 14 or older is not by itself sufficient to establish

---

C.F.Müller, 2015), 1, 70, 99. The formal sanctions applicable to adults – which are not permitted as sanctions for young offenders – are fines or imprisonment. Imprisonment of up to two years can be imposed on probation. Probation and fines can be combined with community service. Note that even §74 JGG states that the young offender can be relieved of the costs and disbursements of the trial to avoid the imposition of a fine through the back door; see Eisenberg (2016), §74 margin no.8.

[479] See Eisenberg (2016), §18 margin no.3; Schaffstein, Beulke, and Swoboda (2014), 109.

[480] This is expressed in §18 I s.3 JGG.

[481] See Schaffstein, Beulke, and Swoboda (2014), 176.

[482] According to §1 II JGG, in conjunction with §8 StGB. See Ostendorf (2015), 48.

[483] See §19 StGB. The age of 14 was not chosen because of scientific insight, but is rather derived from social custom (see Gerd Schütze, "Der § 3 JGG und das Dilemma, die strafrechtliche Verantwortlichkeit nicht sicher genug einschätzen zu können," (*DVJJ-Journal* 1997, Vol.8: 366–9), 366). Historically, it is certainly connected to the fact that at this age (primary) school duty (Volksschulpflicht) was completed and professional training began. Consequently, a possible incarceration should not interfere with school; see Pruin (2010), 1548. In the church, confirmation also happened (and still happens) at this time (see Christine Dörner, "100 Jahre Diskussion des Strafmündigkeitsalters oder: Die Hartnäckigkeit der Maxime 'Strafe muß sein'," (*DVJJ-Journal* 1992, Vol. 3, No.193: 175–84), 177).

[484] Age constitutes therefore an absolute hinder from a procedural systematic point of view; see BeckOK StPO/Allgayer JGG §1 margin no.1.

[485] As a civil court, the family court can subject young offenders under the age of 14 to measures of the youth welfare service according to §1666 BGB and §1666a BGB.

criminal capacity. According to §3 JGG, the juvenile must be mature enough to be aware of the wrongfulness of his or her criminal action and to be capable of behaving in accordance with such an awareness.[486] This rule provides a specific "presumption of innocence"[487] for juvenile offenders between 14 and 17 years of age.[488] Consequently, insufficient maturity and the incapability of insight into wrongdoing are additional reasons to exclude a young offender's guilt compared to adult offenders.[489] These factors must be examined by the juvenile court in relation to every young offender between 14 and 17 and maturity and capability of insight positively affirmed.[490] This rule exemplifies an aberration of a status approach and leaves an opening for considerations which are quite similar to those of a competence approach. Such an approach is in line with the guiding principle of the German juvenile criminal justice system I described earlier,[491] giving priority to education and individual solutions rather than predictability and legal certainty. Nevertheless, it is still the biological age that is the key to criminal capacity. Full criminal capacity commences at age 18, which is in line with the UNCRC.

Young adults between 18 and 20 years of age are – according to the law – treated as adults and therefore presumed to be fully accountable, even if they always fall under the jurisdiction of the juvenile court. However, according to §105 I No.1 JGG, a young adult will be treated as a juvenile if his or her level of mental and emotional development at the time when he or she committed the unlawful act was "juvenile", where the evidence for this will involve the

[486] See Brunner and Dölling (2011), §3 margin no.4-4c.

[487] The general criminal law concept of the "presumption of innocence" (anchored in Art.6 section 2 ECHR) is thus broadened for young offenders in relation to their level of maturity.

[488] See Pruin (2010), 1540, who suggests a concept of "doli incapax", stemming from Roman law, which should differentiate between young offenders who are able to understand their wrongdoing and those who are not. This means that the presumption of innocence for children could be overridden if the capacity to understand and to act accordingly was proven.

[489] For an adult, the reasons for excluding guilt are regulated by §20 StGB. See section 2.3.1.

[490] See RGSt 58, 128 and also, for example, Laubenthal, Baier, and Nestler (2010), 34. Note, though, that in practice this kind of lack of maturity is seldom assumed; the maturity of the young offender and therefore the legal capacity according to §3 JGG are rather assumed through the application of empty terms. See Ostendorf (2016), Basics §3 margin no.4 and Brunner and Dölling (2011), §3 margin no.3.

[491] See section 3.2.

circumstances, manner, or motive of its commission.[492] This requires an evaluation of the whole personality of the young adult.[493] This reflects an acknowledgement that adolescence requires flexibility because of variations in maturation, social and moral development, and levels of integration into the adult world among young people.[494] According to the BGH, the decisive factor is whether "developmental forces are still active on a larger scale".[495] Furthermore, according to §105 I No.2 JGG, a young adult should be tried as a juvenile if the offence is of typically juvenile character. This term ("typische Jugendverfehlung") is not precise enough to understand its content without a teleological interpretation.[496] According to the BGH, such offences are lapses which flow from the driving forces of development.[497] In its relation to §105 I No.1 JGG, No.2 of this statute can be understood as making the process of seeking evidence easier for the juvenile court.[498] If the offence itself appears to have such a juvenile character, the juvenile court does not have to investigate the whole personality of the young adult in relation to the individual level of maturity. If the juvenile court determines that the young adult is not to be treated as a juvenile, it retains jurisdiction over him or her, but must apply the provisions of the general criminal law.[499] In practice, however, most young adults are tried as juveniles.[500]

---

[492] See §105 JGG. Evidence of intellectual and emotional maturity may involve looking at the young person's residence situation, level of education, personal commitments in terms of relationships, etc. Offences involving typical juvenile behaviour, circumstances, or motives could include shoplifting, damage of property, fighting, etc.

[493] See BGH StV 1983, 378.

[494] See chapter 2. See also Schaffstein, Beulke, and Swoboda (2014), 83.

[495] See BGHSt 36, 37 (40); BGH StV 1994, 607.

[496] See Laubenthal, Baier, and Nestler (2010), 50 and Schaffstein, Beulke, and Swoboda (2014), 87.

[497] See BGHSt 8, 92 (92).

[498] See Schaffstein, Beulke, and Swoboda (2014), 87.

[499] In the same line of thought, note that according to §103 II JGG the juvenile court is the competent court in trials in which a juvenile and an adult are indicted together. However, the guideline to §103 indicates that such a combined trial is generally not appropriate.

[500] This does not necessarily mean that the young adult convicted as a juvenile will be punished less harshly since juvenile criminal law leaves the juvenile court a broader choice of legal responses adaptable to the specific situation. But it cannot be denied that one of the reasons that the juvenile court applies the rules for juveniles to a young adult especially in cases of more serious criminality

The JGG offers a wide range of dispositional measures ranging from warnings to institutional confinement for a maximum of 10 years (for young adults even up to 15 years). They are divided into three general categories: educational measures, corrective measures, and juvenile imprisonment.[501] These sanctions are structured according to the principle of minimum intervention. According to §§5 and 17 II JGG, juvenile imprisonment is restricted to a sanction of last resort if educational or disciplinary measures seem to be inappropriate.

As mentioned before, the legal consequences of the JGG are independent of the legal consequences applicable for adults. For adults, the possible "sanctions" are fines and imprisonment.[502] "Other measures" are the measures found in §§61 to 72 StGB and §73 StGB, like, for example, some form of special care.[503] The juvenile court does not take into consideration the possible sentence for an adult in a comparable case.

4.1.1.1. Educational measures

Educational measures[504] are orders and prohibitions that are intended to govern the lifestyle of the young offender and thereby promote and secure his or her education. They should have a positive impact on the behaviour of the young perpetrator in securing and enhancing conditions of socialization. They aim at education – and not retribution, even if this is how they might be perceived by the young offender – and are occasioned by (but not carried out because of[505]) the offence.[506] Educational treatment is individual treatment that begins with the investigation of the family background, formal education, general

(like robbery or murder) is the reluctance of courts to impose the high minimum penalties applicable to adults.

[501] My translation of the German terms "Erziehungsmassregeln" (§§9–12 JGG), "Zuchtmittel" (§§13–16 JGG), and "Jugendstrafe" (§§17–19 JGG). This legislative classification is not reflected in scholarship, which rather divides measures into ambulant or stationary measures according to the severity of the intervention (see in this connection Torsten Lenz, *Die Rechtsfolgensystematik im Jugendgerichtsgesetz (JGG): Eine dogmatische Strukturierung der jugendstrafrechtlichen Reaktionsmöglichkeiten am Masstab des Verhältnismässigkeitsgrundsatzes* (Berlin: Duncker & Humblot, 2007), especially 205ff.).

[502] See §§39 and 40 StGB.

[503] See BeckOK StGB/von Heintschel-Heinegg StGB (2016), §38 margin no.1.

[504] §10 JGG "Erziehungsmassregeln" (my translation).

[505] In German "aus Anlass" and not "wegen".

[506] See Schaffstein, Beulke, and Swoboda (2014), 122–3.

environment, interests, and habits of the young offender. The juvenile court seeks to correct aspects of the young offender's personality which obstruct his or her becoming a law-abiding citizen by imposing orders or enforced juvenile care according to §12 No.1 and No.2 JGG. "Orders" imposed by the juvenile court may include community service for juveniles, participation in social training courses, participation in victim–offender mediation, participation in traffic education, and attendance at vocational training.[507] The maximum number of hours for community service for juveniles is not prescribed but limited by the principle of proportionality. The German constitutional court has clarified that community service for juveniles is not in conflict with the prohibition on compulsory labour since it is only a short, selective commitment and does not degrade the person as compulsory labour under a totalitarian regime would.[508] The two forms of enforced juvenile care (which are the order of "Erziehungsbeistandsschaft" according to §12 No.1 JGG and residential care ("Heimerziehung") or another form of supervised living according to §12 No.2 JGG) originate from youth welfare law and are supervised by a social worker.[509] The idea of retribution is alien to educational treatment; educational measures are not to have any punitive character.[510] Nevertheless, neither the consent of the young offender nor that of his or her parents is required.

The juvenile judge has no direct coercive tools to draw on if the young offender does not go along with the imposed educational measures. However, according to §11 III JGG, the juvenile judge can respond to culpable disobedience with short-term detention of up to four weeks, but only as a measure of last resort.[511] This sort of short-term detention is not a substitute for educational measures but an instrument to enforce them.[512] It seems that the imposition of short-term detention on top of an educative measure almost inevitably leads to the actual

[507] The enumeration of measures is not exhaustive; they rather serve as examples for the juvenile courts. As mentioned before, this does not conflict with Art.103 II GG (nulla poene sine lege) as long as the rule of law is obeyed, the orders serve their specific function, and the orders do not conflict with constitutional rights.

[508] See BVerfGE 74, 102; BVerfG NJW 1991, 1043.

[509] See Schaffstein, Beulke, and Swoboda (2014), 122.

[510] See Eisenberg (2016), §10 margin no.6.

[511] See Diemer, Schatz, and Sonnen (2015), §11 margin no. 20 and Schaffstein, Beulke, and Swoboda (2014), 132.

[512] See Eisenberg (2016), §11 margin no.24.

legal consequence exceeding the level of what is proportionate;[513] however, this is authorized by the law.

4.1.1.2. Corrective measures

Corrective measures[514] are to be imposed when the juvenile court considers that the young offender possesses a sufficient degree of responsibility to answer in some manner for his or her unlawful conduct and if educational measures seem insufficient. Their aim is retribution in order to bring forcefully to the young offender's conscience that he or she has to be held responsible for the committed wrong.[515] In other words: corrective measures should teach the young offender a lesson.[516] However, this form of retribution is pedagogical rather than punitive in nature and aims at the individual offender.[517]

A precondition of corrective measures is that the young perpetrator must not show major deficits from an educational point of view. Although the JGG makes it clear that corrective measures are not criminal sanctions, the offence acquires a more independent role in the formulation of the juvenile court's judgment than in the case of educational measures. Corrective measures may consist of a warning, the demand for an apology, the imposition of fines or compensation for the victim, and short-term detention. Community service for juveniles or social training courses can also be imposed as corrective measures. Short-term detention – considered as a "sharp shock treatment" – is imprisonment for up to four weeks.[518] It means placement in a special unit

[513] I elaborate on the general problems related to short-term detention, which also apply in the case of short-term detention on grounds of disobedience, in the next section.

[514] §13 JGG "Zuchtmittel" (my translation).

[515] See BGH NStZ 1996, 232–3 and BGHSt 15, 224 (225). See also Jörg-Martin Jehle, *Criminal Justice in Germany – Facts and Figures* (5th Edition. Berlin: Federal Ministry of Justice, 2009), 35, who labels these measures "disciplinary measures".

[516] See Schaffstein, Beulke, and Swoboda (2014), 152. This also means that corrective measures have rather a short-lived effect; in contrast, educational measures aim at a more long-lasting educative outcome.

[517] See Diemer, Schatz, and Sonnen (2015), §5 margin no. 11 and Schaffstein, Beulke, and Swoboda (2014), 151–2.

[518] Short-term detention may also be imposed for one to two weekends ("Freizeitarrest"), for up to four weeks maximum, and even in a new form of warning-shot detention (see section 4.1.1.4.). For more detail, see Frieder Dünkel, "Freiheitsentzug für junge Rechtsbrecher – aktuelle Tendenzen im internationalen Vergleich," (*Recht und Politik* 1989, Vol.25: 27-35) or Karin Schwengler, *Dauerarrest als Erziehungsmittel für junge Straftäter: eine empirische Untersuchung über*

separated from the juvenile prison and is subject to ongoing review.[519] According to §90 JGG, short-term detention should feature an educational design and should, in addition to getting the young person to reflect and having a deterrent effect, help the young offender to address the personal problems which contributed to the criminal conduct.[520] However, the recidivism rate for four years after short-term detention is considerably higher (70 per cent) than the recidivism rate for juvenile imprisonment with probation (59.6 per cent).[521]

Corrective measures – including a simple warning – imposed by the juvenile court are formally registered, but in a specific educational register rather than in the general central registry,[522] since corrective measures are not criminal sanctions and therefore do not have the legal effects of such sanctions.[523]

Additionally, as in the case of educative measures, the juvenile judge may respond to disobedience with the imposition of short-term detention as a means of enforcement.[524]

From a statistical point of view, the most common legal consequences for young offenders in Germany are corrective measures in the form of warnings, community service for juveniles, or fines, followed by educational measures, which may themselves take the form of community service for juveniles or participation in a social training course.[525]

---

den Dauerarrest in der Jugendarrestanstalt Nürnberg vom 10. Februar 1997 bis 28. Mai 1997 (Fink, 1999).

[519] I will present this discussion in section 4.1.3.

[520] See Schaffstein, Beulke, and Swoboda (2014), 162 and Ostendorf (2016), §90 margin no. 4.

[521] See Karin Schwengler, "Erziehung durch Unrechtseinsicht?," (*Kriminologisches Journal* 2001, Vol. 33: 116–31), 116ff.; Wolfgang Heinz, "Verschärfung des Jugendstrafrechts; Kriminalpolitische Forderungen im Spannungsfeld zu wissenschaftlichen Erkenntnissen," (*Neue Kriminalpolitik* 2008a, Vol.2: 1–23), 17–18.

[522] See also section 5.7. The same applies to educational measures.

[523] See §13 III JGG.

[524] See §§11 III, 15 III s.2 JGG.

[525] See Ostendorf (2016), Basics §§5–8 margin no. 4 as well as Basics §§13–16a margin no. 5; also Schaffstein, Beulke, and Swoboda (2014), 100–1 and Jehle (2009), 37.

4.1.1.3. Conditional sentence/probation

A rather special legal construction is the so-called "Schuldspruch" according to §27 JGG – literally: "guilty verdict". In this case, the juvenile court finds the accused guilty in the narrower, procedural sense[526] but is uncertain whether the young offender demonstrates the dangerous tendencies that would justify juvenile imprisonment.[527] Therefore, the young perpetrator is placed on probation for one to two years under the supervision of a probation officer. The juvenile court may even combine this verdict with other measures, such as community service for juveniles. If the young delinquent reoffends, the juvenile public prosecutor can apply to the juvenile court to reopen proceedings for the crime which led to the "Schuldspruch" and plead for juvenile imprisonment on the basis that the young perpetrator has now demonstrated dangerous tendencies.[528] This also means that the young offender who is sentenced according to §27 JGG faces a high degree of uncertainty about what legal consequence he or she might face if he or she breaks the terms of probation.

Since it is also possible to sentence a young offender to suspended juvenile imprisonment (as will be discussed later in 4.1.1.4.), the legal consequence of §27 JGG offers an additional way of keeping the young offender out of prison but under surveillance.

4.1.1.4. Juvenile imprisonment

Strictly speaking, juvenile imprisonment according to §17 JGG is the only real criminal sanction in German juvenile criminal law,[529] and it is therefore the ultima ratio. It is the sole legal consequence that contains the legal aim of retribution through punishment, but it does not abandon the guiding principle of education.[530] It is carried out in separate juvenile prisons to avoid detrimental effects upon re-socialization. According to the so-called Beijing Rules, mentioned in chapter 1, juvenile imprisonment should be restricted to cases of

[526] See Schaffstein, Beulke, and Swoboda (2014), 198.

[527] See section 4.1.1.4. on "dangerous tendencies" as a precondition for juvenile imprisonment.

[528] A similar construction can be found in §§61–61b JGG in relation to suspended juvenile imprisonment (in relation to the latter, see section 4.1.1.4.), which allows the juvenile court to delay the decision on whether or not a juvenile imprisonment sentence can be suspended. Here, the uncertainty lies not in the dangerous tendencies, but rather in the positive prognosis.

[529] See Jehle (2009), 35.

[530] See Böhm und Feuerhelm (2004), 217 and Schaffstein, Beulke, and Swoboda (2014), 1, 165–6.

serious violent crimes or repeated violent or other crimes where there seems to be no other appropriate solution.[531] Rule 19 of the Beijing Rules limits institutionalization in two respects: "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period". Hence, imprisonment is restricted in terms of its duration and in terms of the number of cases to which it can apply. On an international level, the protection of juveniles deprived of their liberty is further defined in the so-called Havana Rules.[532] The minimum length of juvenile imprisonment in Germany is six months, the maximum in general is five years for young offenders between 14 and 17. The reason that the minimum length for juvenile convicts is longer than for adults (in the regular adult criminal court the minimum is one month) is the belief that the treatment and education of a young offender are efficient only if a minimum term of secure placement is available to counterbalance the disadvantages of being labelled as having a criminal record and being introduced to the often dangerous environment of prison.[533] The maximum length of five years reflects criminological research indicating that after five years the de-socializing effects of incarceration become greater than the socializing effects.[534] In cases of very serious crimes, crimes for which an adult could be punished with more than ten years imprisonment, a juvenile can be sentenced to a maximum imprisonment of ten years, a young adult even up to 15 years.[535] Note, though, that the BGH considers such long-term juvenile imprisonment not to be educationally justifiable.[536] The recidivism rate after juvenile imprisonment is very high: 68.4 per cent.[537]

The preconditions for juvenile imprisonment are either that the young offender demonstrates "dangerous tendencies"[538] that are likely to render community

[531] This might be due to criminological insights into the harmful effects of imprisonment, especially in the case of young offenders; see section 2.3.2.

[532] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990. However, I do not engage further with these international regulations since they lie outside of the scope of this thesis.

[533] See Schaffstein, Beulke, and Swoboda (2014), 177.

[534] See Ostendorf (2016), §18 margin no.11 and BGH NStZ 1996, 233.

[535] §18 JGG and §105 III s.2 JGG.

[536] See BGH StV 1996, 269 and BGH NStZ 1997, 29; BGH NStZ 1996, 233 or BGH StV 1998, 344.

[537] See Jehle, Albrecht, Hohmann-Fricke, and Tetal (2013), 55, 78 and section 2.3.3.

[538] My translation of "schädliche Neigungen", §17 II JGG, 1st alternative.

sanctions inappropriate or that there is a particularly "gravity of guilt".[539] Dangerous tendencies are defined as considerable deficiencies rooted in the personality or caused by inadequate education or environmental influences which pose the risk of further offending and which will be of a significant character without extensive education.[540] This means that dangerous tendencies are likely to lead to reoffending.[541] As a result, the imposition of juvenile imprisonment presupposes that dangerous tendencies not only caused the offence but are still present at the time of the trial and the conviction.[542]

The idea of the gravity of guilt is one of the few examples in German juvenile criminal law in which the legislature has chosen to let positive special prevention be outweighed by the societal need for expiation and has thereby created a "real" criminal sanction.[543] However, guilt in this sense is not defined by the objectively grave result of the offence but rather by "inner guilt".[544] This again places the focus on the offender and his or her personality, motive, and character. It is further to emphasize that the enforcement of juvenile imprisonment has to be carried out in such a way that it can have the necessary educational effect.[545]

Juvenile imprisonment sentences of up to two years have to be suspended in cases in which reoffending is deemed unlikely.[546] When there is a positive prognosis, the suspension of the sentence is obligatory.[547] The young offender is then always provided with a parole officer, who will not only supervise the young perpetrator but also assist him or her in establishing a law-abiding lifestyle. Furthermore, a young offender serving a sentence of juvenile

[539] My translation of "Schwere der Schuld", §17 II JGG, 2nd alternative.

[540] See BGH NStZ 2002, 89. For more detail about what "dangerous tendencies" means and how they can be taken into account, see Eisenberg (2016), §17 margin no.18–27.

[541] See Eisenberg (2016), §17 margin no.18b.

[542] See BGH StV 1998, 331.

[543] See Schaffstein, Beulke, and Swoboda (2014), 168.

[544] See MüKoStGB/Miebach/Maier StGB (2016), §46 margin no.35. However, the grave result of the offence may give an indication of the personality of the young offender. See BGHSt 15, 224 (226). See also Meier, Rössner, Trüg, and Wulf (2011), §17 margin no.25ff.

[545] See §18 II JGG. See also BGH NStZ 1996, 233.

[546] §21 I and II JGG. Here, only special preventive reasons are decisive. The gravity of guilt does not matter whatsoever.

[547] See BGH StV 1991, 424.

imprisonment may be paroled after having served a third of the sentence (the minimum term for an adult is half).[548] In all cases, the probation service gets involved and according to §24 I JGG a probation officer must be appointed because of young convicts' greater need for help and support.[549] The period of probationary supervision is one to two years;[550] the period of probation is two to three years.[551] From an educational point of view, §23 I s.1 JGG stipulates that the juvenile court shall in general combine a suspended sentence with the kinds of orders mentioned above in relation to educational and correctional measures. Additionally, in §§57, 61-61b JGG, the legislature has established the possibility of postponing the decision on whether a juvenile imprisonment sentence can be suspended and has added a separate decision.[552] This option can be used by the juvenile court when a prognosis is not yet possible at the time of sentencing.

It is worth mentioning that in 2012, the German parliament introduced so-called "warning-shot detention".[553] This implied a toughening up of the juvenile justice system since detention (of up to four weeks) could now be imposed in addition to a suspended juvenile imprisonment sentence or to a conditional sentence/probation.[554] The aim is to use short, intensive educative supervision to make it less likely that the young person will reoffend during their suspended juvenile imprisonment sentence; it should show young offenders what they can expect if they reoffend by subjecting them to a short period of detention.[555] Furthermore, this option should avoid the young convict misinterpreting a

[548] §88 JGG. Parole is also regarded as a conditional suspension of the execution of part of a prison sentence.

[549] See Schaffstein, Beulke, and Swoboda (2014), 209.

[550] §24I JGG.

[551] With the possibility of prolonging the period of probation to four years or reducing it to one year. See §22I JGG

[552] See BGHSt 14, 74.

[553] See BGBl. I 1854.

[554] Previously, different measures that deprived the offender of freedom could not be combined.

[555] See Schaffstein, Beulke, and Swoboda (2014), 159, 161, who also sum up the problems and discussions around the introduction of "warning-shot detention" (201–8). Also, BT-Drs. 17/9389, 12 and Jörg Kinzig and Rebecca Schnierle, "Der neue Warnschussarrest im Jugendstrafrecht auf dem Prüfstand," (*Juristische Schulung (JuS)* 2014: 210–15). A more detailed description of this complicated problem is beyond the bounds of this thesis.

suspended imprisonment sentence or a conditional sentence/probation as a "neutral" response.

4.1.2. Sweden

The Swedish juvenile system[556] consists of two interacting parts: social services for children and young people and the criminal courts. In other words, the state may intervene in any case of deviant behaviour on the part of a young offender, regardless of their age. Young perpetrators are not to be treated in the same way as adults. They are attributed a lesser level of guilt and a higher degree of vulnerability, and so they deserve more chances.[557] The age of criminal legal capacity in Sweden is 15.[558] This capacity, however, is systematically placed on the level of sentencing rules.[559] The crucial time to determine age is at the time of the offence.[560] If the young perpetrator is under the age of 15, they are always referred to social services. In these cases, the applicable law is the Socialtjänstlag (2001:453)[561] or the Lag (1990:52) med särskilda bestämmelser om vård för unga.[562] Since these offenders have not reached the age of criminal capacity, no legal sanction may be imposed on them.[563] In other words, if the offence was committed by a perpetrator under the age of 15, it is still a criminal offence, but

[556] To clarify, when I employ the term "juvenile system", I mean all legal norms, procedures, institutions, and agents within the institutions dealing with young offenders of all ages, including those offenders who have not yet reached the age of criminal capacity (the latter in contrast to my notion of a juvenile criminal justice system described in section 1.3.).

[557] See SOU 1993:35 del A, 98.

[558] This threshold goes back to the civil age of majority, which was raised to 21 in 1721; see Nordlöf (2012), 175, 179, who indicates that 15 years is the threshold for procedural competence in cases of social law. See also Kerstin Nordlöf, *Straffrättens processer för unga lagöverträdare* (Stockholm: Norstedts Juridik, 1991), 11–15.

[559] This was explained in section 2.3.1.

[560] See Nordlöf (2012), 178.

[561] Social Services Act – my translation (henceforth: SoL).

[562] Act on Special Provisions about Care for Juveniles – my translation (henceforth: LVU).

[563] However, offenders under the age of 15 can also be the subject of an investigation that may lead to an indictment asserting guilt according to §38 LUL. The general rules governing how to proceed with offenders under the age of 15 are found in §32ff. LUL. I do not go further into this specific procedure since it lies outside the scope of this thesis.

the young offender cannot be punished in the framework of the criminal justice system.[564]

This limitation no longer holds if the perpetrator is 15 or older. In contrast to the German system, the threshold is absolute and leaves no discretion in regard to the maturity of the young offender. This reflects a straightforward status approach, as described previously,[565] and is very much in line with the guiding principle of the Swedish juvenile criminal justice system, which places a great weight on, for example, predictability and transparency.[566] Consequently, if a young person in the 15–20 years age bracket[567] commits a criminal offence, responsibility for dealing with the offender lies primarily with the criminal courts. If the behaviour is deviant but not criminal, social services intervene, if necessary with the help of the administrative court according to SoL or LVU (but not the criminal court).

In general, the first chapter of the BrB is divided up into "sanctions" and "other consequences for an offence". The only "sanctions" are imprisonment and fines.[568] "Other consequences" are suspended sentences (conditional sentences and supervision) and transfer to special care. When it comes to young offenders, the system of legal consequences also includes community service for juveniles, juvenile care, and closed institutional treatment.[569] The last three options are carried out by social services.[570] However, adult legal consequences, like fines, conditional sentences, and supervision, are also possible legal consequences for young offenders, but as options of last resort if none of the legal consequences specifically tailored to young offenders are deemed suitable.[571]

---

[564] See NJA 1960, 521 and NJA 1998, 693.

[565] See section 1.3.

[566] On the guiding principle of the Swedish juvenile criminal justice system, see section 3.5.

[567] The upper limit of 21 years corresponds to the German regulations and was chosen because it had been the age of legal majority (today, the threshold for legal majority is 18 years); see Dir.2009:60, 16.

[568] See Träskman (2003a), 173.

[569] My translation of "ungdomstjänst" (chapter 32 §2 BrB), "ungdomsvård" (chapter 32 §1 BrB) and "sluten ungdomsvård" (chapter 32 §5 BrB).

[570] See Nordlöf (2012), 308.

[571] See SOU 2012:34, Volume 3 Part 2, 371.

The central pieces of legislation for young offenders can be found in chapter 29 §7, chapter 30 §5, and chapter 32 BrB (1962:700) and the aforementioned Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare (LUL). If the latter does not contain any specific procedural rules for young offenders, the general rules of the Rättegångsbalk (1942:740) (RB) apply. Chapter 29 §7 BrB stipulates that if someone under 21 commits a crime, the offender's youth should be taken into consideration in the sentencing (the so-called "juvenile discount"[572]). This is done by mitigating the sentence received by young offenders below the age of 21.[573] Chapter 30 §5 BrB establishes a higher threshold for sentencing young offenders to prison. Chapter 32 BrB contains rules concerning the specific juvenile legal consequences "juvenile care" and "community service for juveniles".

Even young adults are still to a certain extent protected by their youth. The Swedish juvenile criminal justice system respects the fact that becoming an adult does not happen overnight but is a process.[574] The LUL provides a set of specific rules for young offenders under the age of 21 years. However, it should be noted that almost every rule in the LUL starts with the formulation: "against the offender who is not yet 18 years", drawing a clear line between juvenile and young adult offenders. The likelihood of being arrested and placed in detention is greater for young adults than for juveniles. The preconditions for a dismissal are more stringent, the "juvenile discount" granted in the framework of chapter 29 §7 BrB is smaller, and the threshold that must be met for juvenile care or community service for juveniles to be considered is higher.[575]

4.1.2.1. Fines

If a young perpetrator is sentenced to pay a fine, the lowest level of punishment in the Swedish criminal system is the so-called "penningsböter", which means that a certain fixed amount must be paid. The minimum amount is 200 and the maximum amount 4,000 Swedish krona (SEK); in cases of more than one

[572] For a more detailed discussion of the "juvenile discount", see section 4.3.

[573] Even if applicable to all offenders, chapter 29 §3 point 3 BrB should be mentioned here, since it stipulates the possibility of mitigating the sentence because of a lack of development, experience, or capability of judgement.

[574] See chapter 2.

[575] For a more detailed account, see Mareike Persson, "Heranwachsende im schwedischen Strafrechtssystem," (*Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2015, No.4: 378–84.). See also Brå Report "Särbehandling av lagöverträdare 18–20 år", 2012.

offence the fine can be up to 10,000 SEK. The next level of fine is linked to income – day fines. According to chapter 24 §1 BrB, the minimum day fine is 30 and the maximum 150. In cases of more than one offence, this can even mount up to a maximum of 200 days. It is the view of the legislature that fines are not the most appropriate legal consequence for a young offender.[576] The reason is that the obligation to pay fines may lead to indebtedness, which could complicate the young person's later adult life or mean that a person other than the convict – for example, their legal guardian – pays the fine, thereby undermining the aim of the sentence.[577] Furthermore, fines may lead to further criminal conduct to finance them.[578] Besides, it has been found that fines have no rehabilitative impact; they do not reduce the likelihood that a young offender will offend again.[579] A recent HD judgment,[580] however, not only backs the use of fines as a legal consequence for young offenders, but goes a step further by stating that no "juvenile discount" should be applicable to the minimum fines that can be imposed on young offenders.

The third possible form of fine, "normerade böter",[581] is only mentioned here for the sake of completeness. Since it applies in cases in which it is of particular interest that the offender should suffer some economic loss,[582] it usually does not apply as a legal consequence for young offenders.

4.1.2.2. Community service for juveniles

Community service for juveniles consists of unpaid labour or other organized activity in different types of programmes or education.[583] Lappi-Seppälä calls it a

[576] This view is also reflected in the Attorney General's guidelines RÅ 2003:1. Note, however, that this view did not prevail until 2007. Before that, fines were considered a suitable legal consequence for a young offender if there was no need for care, and fines were widely imposed; see Nordlöf (2012), 180.

[577] See Borgeke and Månsson (2007), 189.

[578] See Schaffstein, Beulke, and Swoboda (2014), 135.

[579] See Nordlöf (2012), 181.

[580] See NJA 2014, 658 and also HD B5566-11 from 2012-01-31.

[581] Chapter 25 §4 BrB.

[582] See Nordlöf (2012), 184.

[583] The performance of community service is set out in a work plan for every individual case (chapter 5 §1b SoL).

"junior version" of community service.[584] Besides unpaid labour in municipalities or charitable organizations as part of the public sector, community service for juveniles may also consist of unpaid labour in the private sector, and even attendance at certain programmes or education.[585] It should be meaningful and be seen as not just a punishment. However, it should clearly be a consequence of the criminal conduct, and it should demonstrate explicitly that it is not acceptable for juveniles and young adults to commit crimes.[586] Community service for juveniles applies to juveniles up to the age of 18 but is also an option for young adults if there are "special" reasons; the preparatory works mention as such special reasons the crime being committed before the young offender turned 18 and is trialed shortly afterwards.[587]

In January 2007, community service for juveniles became an independent legal consequence[588] that is now tied to the severity of the offence.[589] The court may impose community service for juveniles of anywhere from 20 hours to a maximum of 150 hours.[590] Until recently, community service for juveniles demanded the consent of the juvenile to the measure. This was based on the idea that there is little meaning in sentencing a juvenile offender to community service if he or she does not intend to fulfil the hours set. However, a proposition, followed by an amendment of the LUL, which entered into force on 1 July 2015, abolished the requirement for the consent of the young offender

[584] See Lappi-Seppälä (2011), 221.

[585] See prop.2005/06:165, 67 and Brå Report 2011:10, 61.

[586] See prop.2014/15:25, 36.

[587] See prop. 2005/06:165, 77 and 132.

[588] Community service (chapter 27 §2a BrB) is not an independent legal consequence for adult offenders but can only be imposed in addition to another legal consequence, for example to avoid imprisonment. See Borgeke (2012), 84.

[589] See Jareborg and Zila (2014), 40 and 151. "Severity of the offence" is my translation of the term "straffvärde". I will come back to this key term in the Swedish criminal justice system when elaborating further on sentencing in section 4.3.2.

[590] See prop. 2005/06:165 77. One hundred and fifty hours equates to an offence for which an adult offender would face a sentence of 6 months imprisonment; see NJA 2007, 636, which emphasizes that community service for juveniles is not considered an appropriate legal consequence if the severity of the offence exceeds 6 months imprisonment. Twenty hours community service is equivalent to a 60 day fine for an adult offender. This lower threshold of a 60 day fine was established in prop.2005/06:165, 132 and applied by the HD in NJA 2008, 626, where the young offender was sentenced to 25 hours of community service for juveniles as an equivalent to a fine of a little over 50 days for an adult offender.

when being sentenced to community service for juveniles.[591] The main reason for this change was that this requirement could lead to a young offender more or less deciding on his or her own sentence; in cases of refused consent, the options for alternative legal consequences are very limited.[592]

The Swedish ILO Committee[593] and the Swedish government take the view that community service for juveniles is not in conflict with any convention concerning compulsory labour.[594] Their reasoning refers to SOU 2012:34, which states that community service in the framework of a sentence does not conflict with the ECHR.[595] It has been argued that it is unlikely that community service without consent constitutes compulsory labour because the refusal to carry out community service does not lead to a longer prison sentence, and the convict cannot legally be forced to carry out the imposed community service.[596] Furthermore, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) demand consent for community service for juveniles if it is used at the preliminary proceedings stage. However, there is no such demand if community service for juveniles is imposed in form of a sentence, which suggests that a sentence of community service for juveniles without the consent of the young offender is not in conflict with the Beijing Rules. As a result, since 1 July 2015, consent has not been required.

In practice, community service for juveniles has become the most common legal consequence for young offenders between 15 and 17 years of age (besides juvenile care).[597] It can also be imposed in combination with other legal consequences, for example juvenile care.[598] The wide applicability of this legal

[591] See prop.2014/15:25, 39–40.

[592] Ibid., 37–40. The same considerations apply to juvenile care; see section 4.1.2.3.

[593] The International Labour Organization, ILO, is the UN specialized agency which seeks the promotion of social justice and internationally recognized human and labour rights; see http://svenskailo-kommitten.se/om-ilo/ (last visited 2016-04-26).

[594] See prop.2014/15:25, 40.

[595] See SOU 2012:34, Volume 3 Part 2, 439ff. with reference to Volume 2, 400ff.

[596] See the reasoning in prop.1997/98:96, 93ff. regarding community service for adults, to which which SOU 2012:34 refers.

[597] See Brå Report 2017:5, 283, 301–2. For young adults in the age bracket 18–20, fines, conditional sentences, and supervision are the most common legal consequences; see Brå Report 2017:5, 302–3.

[598] See NJA 2009, 121.

consequence for young offenders is also reflected in the statement in the preparatory works that the character of the offence ("brottets art"[599]) is no obstacle to the imposition of community service for juveniles.[600] The HD has followed this lead, ruling that community service for juveniles is a suitable legal consequence for perjury and even stating that the number of hours should not be influenced by the character of the offence.[601]

4.1.2.3. Juvenile care

As mentioned earlier,[602] on 1 January 2007, juvenile care according to chapter 32 §1 BrB replaced transfer into the care of social services, and it is now demanded that there be a "specific" need for care as a precondition.[603] However, "specific" is not further defined and is sometimes even replaced by the word "egentligt"[604] in the preparatory work.[605]

Juvenile care occupies something of a special place in the legal consequences available for young offenders. While the other sanctions can be fitted into a system of increasing intervention in the young person's life, juvenile care can be designed in various ways that differ tremendously in terms of severity. It covers a wide range of alternatives, not least because it can be combined with other measures like fines or community service for juveniles, depending on the severity and the character of the offence and the previous criminal conduct of the young offender.[606] According to chapter 32 §1 BrB, the SoL and the LVU constitute the alternatives for intervention[607] (for example, dialogue with social services, contact with a contact person, participation in different sorts of programmes,

[599] For further explanation of this term, see section 4.3.2.1.

[600] See prop.2005/06:165, 132.

[601] See NJA 2007, 624.

[602] See section 3.4.

[603] The rate of imposition of this legal consequence has decreased since the introduction of this precondition; see Brå Report 2011:10, 6.

[604] In English "actual" – my translation.

[605] See prop. 2005/06:165, 55. Problems of application have been predicted by Borgeke and Månsson (2007), 199.

[606] How these should be combined is explicitly left open. See prop.1997/98:96, 151.

[607] See chapter 5 §1 SoL (in cases where the young person cooperates) and §3 LVU (in cases where coercive measures against the will of the young person or his or her legal guardians are unavoidable). See also SOU 2012:34, 308.

placement according to the SoL or the LVU, drug tests, or family-related interventions[608]), which are intended to ensure that juveniles or children below the age of criminal capacity grow up in safe and appropriate circumstances. This illustrates that the Swedish juvenile criminal justice system is to a considerable extent based on the system applicable for the intervention and detention of juveniles in the framework of social services. The extent to which measures are needed should be considered with regard to the comprehensive definition in the SoL.[609] Since the character of juvenile care can be very different from case to case, juvenile care may be used in cases of serious delinquency as well as in cases of crimes with a low "severity of the offence".[610] The younger the offender, the more options the consequence "juvenile care" offers, even in cases of serious criminality.[611] However, as set out in chapter 32 2nd break BrB, the judge is bound by the principle of proportionality when determining whether juvenile care should be imposed. There is no rule that juvenile care cannot be used several times for the same person, as long as the measure is changed each time. If there is no need for care, or if the need is limited, community service for juveniles should be the legal consequence of choice for juvenile offenders.[612]

During social services' assessment of whether a young offender needs juvenile care, they must take into account the young offender's whole life situation. A criminal record is, of course, a strong indication of an unfavorable development.[613] If a young offender is sentenced to juvenile care, the verdict has to emphasize the risk of continued delinquency and contain a juvenile contract[614] (if the measures are based on SoL) or a care plan[615] (if the measures

[608] See Brå Report 2011:10, 42.

[609] See prop. 2005/06:165, 55.

[610] See prop.2014/15:25, 21.

[611] See Nils-Olof Berggren, Agneta Bäcklund, Johan Munck, Dag Victor, and Fredrik Wersäll, *Kommentar till Brottsbalken (25 – 38 kap): om påföljderna* (Supplement 8 January 2016. Stockholm: Norstedts Blå Bibliotek, 2016) BrB 32:1 (2012), 5.

[612] See prop.2005/06:165, 64 and SOU 2012:34, Volume 3 Part 2, 310.

[613] See Borgeke and Månsson (2007), 190; Berggren, Bäcklund, Munck, Victor, and Wersäll (2016); BrB 32:1 (2012), 3. It is in general social services that establish the crucial "specific need for care" as a precondition for juvenile care as a legal consequence; see Brå Report 2012:13, 296. However, the interpretation of the specific need for care is far from consistent in the way it is applied by social services; see Brå Report 2010:11, 8.

[614] My translation of "ungdomskontrakt".

[615] My translation of "vårdplan".

are based on LVU) describing the planned measures. Swedish legislature does not ignore the fact, however, that it is difficult to carry out a concrete assessment of the risk of a specific young perpetrator relapsing into a criminal lifestyle.[616] Nevertheless, prior to the reforms of 1999 and 2007, the courts generally had no control over what the social services did once a young person had been referred to them.[617] The change in legislation of 2007 reflects the shift of responsibility towards the courts.

One of the basic principles of the SoL is that all assistance should be voluntary as long as possible and should be arranged in collaboration with the legal guardians. According to LVU, coercive measures should only be taken if they are unavoidable. A major problem with juvenile care (and, before 1 July 2015, even with community service for juveniles) is linked to the precondition that the young offender has to consent to these measures – at least in the case of a juvenile contract based on the SoL. If the young perpetrator declines to give his or her consent, the court is left with few options, given that juveniles are to be kept out of prison. This leads to the undesired result that the young offender can influence the legal consequences to a significant extent. If young offenders do not consent, they can only be given fines or conditional sentences. However, the court always has the option of sentencing young offenders without their consent to the same measures under the LVU (instead of a using juvenile contract in line with the SoL) in the framework of a care plan.

One procedural peculiarity regarding juvenile care under the LVU that should be pointed out is that the criminal court that asserts the guilt of the young offender and sentences him or her to juvenile care according to LVU still requires there to be, additionally, a decision by the administrative court asserting the need for care.[618] The administrative court generally approves social services' application according to the care plan attached to the criminal verdict if the circumstances are identical.[619] If they do not approve, the criminal court can –

[616] In relation to such a prognosis, see section 2.3.3. Furthermore, prop. 2005/06:165, 56 points out that a young person in need of care must not be excluded from juvenile supervision just because there is no recidivism risk.

[617] For an overview of the historical development of juvenile care, see Nordlöf (2012), 221–32.

[618] Ibid., 235.

[619] See Berggren, Bäcklund, Munck, Victor, and Wersäll (2016), BrB 32:1 (2012), 3–4.

following an application by the public prosecutor – sentence the young offender with a different legal consequence.[620]

4.1.2.4. Suspended sentences: Conditional sentence and supervision

For the sake of completeness, I should briefly mention conditional sentences and supervision as possible legal consequences. These "normal" sanctions for adults may be applied when specific juvenile consequences are not an option. This may be the case if the young offender refuses to consent to juvenile care according to SoL or if the crime committed is too serious to be punished only with the aforementioned specifically juvenile consequences. A conditional sentence[621] can be described as a conditional relief of penal sanction or simply a warning not to commit further crimes.[622] This is why it should normally be combined with a fine.[623] The time of surveillance is two years[624] of unsupervised probation. In practice, conditional sentences are frequently applied in cases of one-time offenders and offenders who pose only a small risk of reoffending.[625]

If a convict is sentenced to supervision,[626] the court assigns a probation officer to help and monitor the convict for one year. The whole probation time amounts to three years.[627] Supervision can be combined with a fine, a short time in prison, or community service for juveniles. Furthermore, the court can impose additional obligations or requirements concerning employment, education and training, the offender's place of residence, medical treatment, and compensation for damages.

---

[620] This is according to chapter 38 §2 BrB; see also Nordlöf (2012), 236.

[621] My translation of "Villkorlig Dom"; chapter 27 BrB.

[622] See Josef Zila, *Det straffrättsliga påföljdsystemet* (2nd Edition. Stockholm: Norstedts Juridik AB, 1998), 25. This legal consequence is equivalent to the German "Schuldspruch" described above (see 4.1.1.3.).

[623] See Nils Jareborg, *Straffrättsideologiska Fragment* (Uppsala: Iustus Förlag, 1992a), 167.

[624] Chapter 27 §3 BrB.

[625] See Haverkamp (2010), 1339.

[626] My translation of "Skyddstillsyn"; chapter 28 BrB.

[627] Chapter 28 §§4-5 BrB.

4.1.2.5. Closed institutional treatment or juvenile imprisonment

It is one of the underlying principles of the Swedish juvenile criminal justice system that young offenders should be kept out of prison.[628] It is because of this principle that closed institutional treatment was introduced in 1999. The aim was to create a credible alternative to imprisonment and to introduce a new legal consequence for young offenders that involved the deprivation of liberty and expressed a powerful societal response to the offence. This was a time during which the demands of justice, proportionality, consequence, and predictability were gaining a stronger influence on the choice of legal consequences for young perpetrators.[629] Nevertheless, the initial motivation for the development of closed institutional treatment was that the deprivation of liberty should take place under circumstances that minimized the risk of harmful effects and counteracted the causes of individual delinquency as effectively as possible. While being deprived of liberty, the young offender was to receive adequate treatment.[630]

Closed institutional treatment is meant to be the main option when depriving young offenders of their liberty is unavoidable.[631] A precondition of being sentenced to closed institutional treatment is that the young offender was under 18 years old when the criminal act was committed and under 21 at the time of the verdict. Closed institutional treatment is carried out in special facilities under the control of the SiS. The rules governing how it is enforced are stipulated in lagen (1998:603) om sluten ungdomsvård (LSU).[632] Treatment can last from 14 days up to 4 years. Provisions concerning provisional release are not applicable to juvenile offenders, and the court has to take this into account when determining the severity of the offence.[633] The underlying thought is that a juvenile whose behaviour is so unacceptable as to warrant closed institutional

---

[628] See NJA II 1993, 434, which emphasizes that juvenile offenders should only be sentenced to imprisonment because of the character of the offence (so-called "art" crime – see further section 4.3.2.1). See also NJA 1996, 509, which indicates that the greatest possible restraint has to be observed when imposing a prison sentence on an offender under the age of 18 years.

[629] See prop.1997/98:96, 152ff.

[630] Ibid, 156ff. Note, though, that these considerations concern the enforcement rather than the choice of the legal consequence.

[631] See prop.1997/98:96, 152ff. and Jareborg and Zila (2014), 157.

[632] For an overview of what the enforcement of closed institutional treatment entails, see Nordlöf (2012), 187–90.

[633] See Borgeke (2012), 453 and Jareborg and Zila (2014), 157.

treatment requires long-term education to be transformed into a law-abiding citizen. To be able to provide this education, the young perpetrator has to be present in the education unit.

In line with the principle that juveniles must be kept out of prison, chapter 30 §5 BrB stipulates that a prison – or closed institutional treatment – sentence for persons below the age of 18 requires "extraordinary" reasons; for a person between 18 and 20 it requires "special" reasons. These terms are not further defined in the preparatory works; however, it is emphasized that, first and foremost, considerations concerning the severity of the offence could be the sorts of considerations that satisfy the demand of "extraordinary" grounds.[634] Furthermore, under specific circumstances demanding special reasons, it is still possible to sentence a young offender to prison instead of institutional treatment.[635] An example of this is when the severity of the offence requires a longer incarceration than the four years closed institutional treatment can provide.[636] Note that the HD has emphasized, in case NJA 2001, 913, that closed institutional treatment focuses on treatment while imprisonment does not. This was also the reason for sentencing the young offender in this case to imprisonment instead of closed institutional treatment: the HD did not see a need for care for the defendant.

If a young person below the age of 20 is sent to prison, he or she serves the sentence in special correctional facilities separate from those that house adult

[634] On the imprisonment of young offenders in general, see prop. 1987/88:120, 103 and prop. 1989/90:7, 20. On the introduction of closed institutional treatment, see prop.1997/98:96, 160.

[635] An example is when the offence is perjury. See NJA 1996, 757. In relation to young adults, see RH 1995:217 and RH 1995:170 concerning the offence of drink-driving, which leads to a prison verdict. See also the recent decision B 3830-16 of Svea Hovrätt, 4, 5.

[636] The HD mentions this situation as one example of a situation in which a juvenile offender should be placed in prison instead of closed institutional treatment; see NJA 2001, 913 or the so-called "Hallandsåsmålet" of the Hovrätt (County Court) över Skåne och Blekinge B 1381-04 (even if the offender in this case was 18 years old and therefore a young adult; the accomplice, who was 10 months younger, was sentenced to 4 years closed institutional treatment). Another example is the situation in the aforementioned case (so-called "artbrott") or if the time that has passed between the offence and the verdict is so long that the offender is no longer suitable for closed institutional treatment because of his or her age; for the latter, see SOU 2012:34, Volume 3 Part 2, 313.

prisoners.[637] The minimum term of imprisonment is 14 days and the maximum term normally 10 years. Life imprisonment cannot be imposed on juveniles or young adults, but if the law provides life imprisonment for adults, the maximum term for juveniles can be up to 14 years[638] if the offence is very serious.

A special form of imprisonment for both juveniles and adults is intensive supervision with electronic monitoring. This means that the convicted person can serve a prison sentence of up to six months at home while carrying out work or educational obligations. The offender is not allowed to leave the home if this is not explicitly scheduled as part of an individualized plan.

Particular attention should be drawn to the fact that, like the German "warning-shot detention", it is possible in the Swedish system to combine supervision with short-term imprisonment (as set out in chapter 28 §3 BrB). However, chapter 30 §11 BrB indicates that this combination should remain the exception and should only be imposed if it is unavoidable because of the severity of the offence or the previous criminal conduct of the offender. It is applicable in all cases in which considerations of general deterrence do not demand a stricter legal consequence.[639] The preparatory works mention explicitly the possibility of avoiding long-term imprisonment for young offenders.[640]

4.1.3. Analysis from a welfare/justice perspective

4.1.3.1. Germany

In the German juvenile criminal justice system, the welfare/justice clash is evident in relation to the age of criminal capacity. The need to investigate the maturity of a young offender at the time of the offence reflects elements of a competence approach and can be interpreted as an indication of a sensitivity to welfare considerations. However, the rule of law demands legal certainty and therefore a predictable threshold for criminal capacity. This is why the threshold

[637] As I have mentioned, Sweden has not had any juvenile prisons since 1980. However, the prisons in Luleå, Täby, Kistianstad, Hällby, and Borås have special juvenile units where young convicts can be placed.

[638] The threshold has been raised from 10 to 14 years rather recently, mostly in the interests of proportionality; see prop.2008/09:118, 31ff.

[639] See prop.1978/79:212, 74.

[640] Ibid., 55. See also NJA 2015, 1024 and NJA 2000, 314, the latter of which emphasizes the broadened scope of supervision for young offenders.

is placed at the age of 14 years, reflecting a status approach. Combining both in §3 JGG expresses the welfare/justice clash.[641]

The age is at the time of the offence (and not the time of the sentencing) is decisive for the application of the JGG. Yet, according to the German educational approach to juvenile criminal justice, it would seem to make sense to refer to the current situation of the offender; however, it is still the offence and the time it was committed that are the "gatekeepers" in this regard. This reflects justice considerations, which look backwards towards the offence, notwithstanding the guiding principle of education stated in §2 JGG. However, when it comes to the choice of the legal consequence, it is not the time of the offence but rather the time of sentencing that is decisive for the educational intervention. Here, welfare considerations prevail.

The structure of legal consequences in the German juvenile criminal justice system follows a system of increasing intensity of intervention.[642] It thereby provides the tools to allow the system to obey the principle of proportionality as a justice consideration. Yet a system with the aim of educating rather than punishing (as expressed in §2 JGG[643]) presupposes that the legal consequence has an individualized shape. It should render an increasing intensity of intervention unnecessary since the aim of education rather than that of proportionality justifies the legal consequence. Then again, the shape of the legal consequences for young offenders in Germany are clearly geared towards the educative guiding principle as a welfare consideration. This is reflected in the fact that the structure of juvenile legal consequences diverges from that of adult legal consequences. Nevertheless, proportionality as a genuine justice consideration still plays a decisive role by establishing the limit that must not be exceeded. This interaction exemplifies the welfare/justice clash, balancing proportionality with the wide variety of individualized legal consequences available for young offenders.

Educational measures in the German juvenile criminal justice system aim exclusively at education and are therefore an expression of the fact that the system attends to welfare considerations. However, they also reflect the

[641] Regarding young adults, §105 JGG shows evidence of the impact of the maturity of the offender as a welfare consideration. However, as mentioned earlier, I do not engage further with the complex area of young adults, which contains a multitude of legal, criminological, and political questions (for further reading, see Eisenberg (2016), §105 margin no.6–6d).

[642] See Eisenberg (2016), §5 margin no.20.

[643] See section 3.2.

welfare/justice clash: even if educational measures can be considered as genuinely belonging in the realm of welfare, they are handed down by criminal courts and do not require the consent of the young offender or his or her parents – even if they interfere with their parental rights. This can be interpreted as an expression of justice considerations. In relation to the indirect coercive tools at a judge's disposal, these considerations are even taken a step further. The juvenile judge's ability to impose short-term detention in cases of disobedience may be seen as an expression of justice considerations prevailing, for detention has much more the shape of a "punishment" than educational measures, which explicitly serve welfare aims. What should be achieved with short-term detention is, however, the enforcement of the educational measure. Therefore, the possibility of imposing short-term detention is an expression of the welfare/justice clash that seeks to balance welfare and justice considerations.

In relation to corrective measures, the welfare/justice clash becomes visible in the fact that corrective measures aim in part at retribution. However, as mentioned above, this form of retribution is pedagogical rather than punitive in nature and aims at the individual offender. Here, we find another indication of the welfare/justice clash in this combination of retribution and pedagogical aims. The shape corrective measures can take reflects this clash even more sharply than does the framework of educational measures. Still serving the educative guiding principle, correctional measures can at their severest consist of short-term detention. Yet there seems to be no further educational aim with short-term detention beyond detention itself. Since the timeframe of short-term detention is too short for authorities really to work with the young offender, the thought behind this corrective measure seems to be to show young perpetrators where their road leads if they do not make a turn. However, it has been claimed that short-term detention accomplishes the opposite.[644] It might actually take away the fear of imprisonment by giving a young person an experience of the unknown,[645] and it may even lead to harmful defiance and defence responses.[646] It has also been claimed that short-term detention facilitates the young offender's adaption to the prison environment rather than cultivating fear of

[644] See Knut Papendorf, "Gegen die Logik der Inhaftierung – die Forderungen des AJK aus heutiger Sicht," in *Handbuch Jugendkriminalität. Kriminologie und Sozialpädagogik im Dialog,* 573–83 (2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011) and also Karl Schumann, *Jugendarrest und/oder Betreuungsweisung* (Bremen: Universität Schriftenreihe, 1985).

[645] See Schumann (1985), 171.

[646] See Schaffstein, Beulke, and Swoboda (2014), 158.

it.[647] This claim can be supported by the high recidivism rate among this group.[648]

The law in Germany leaves no doubt that correctional measures are not criminal sanctions (though they are legal consequences within the juvenile criminal justice system). It is emphasized that the only real criminal sanction is juvenile imprisonment according to §17 JGG, but even here the guiding principle of education and welfare considerations shine through. "Gravity of guilt" as one prerequisite for juvenile imprisonment is one of the few examples in German juvenile criminal law in which the legislature has chosen to let the need for positive special prevention be outweighed by the societal need for expiation, thereby creating a "real" criminal sanction. The insertion of "gravity of guilt" in the legal framework reflects justice considerations. However, the special definition of "guilt" (which is not defined by the objectively grave result of the offence but rather according to "inner guilt", which again turns the focus on the offender and his or her personality, motive, and character) reveals the tension between welfare and justice considerations that the legislature sought to balance. This is therefore a vivid expression of the welfare/justice clash. It also means that the clash might in practice not be as acute as it seems in theory, because the gravity of guilt is often a symptom of dangerous tendencies in the young offender's personality.[649] The BGH goes as far as demanding educative reasons as a precondition for imposing juvenile imprisonment even in cases where there is gravity of guilt.[650] This has been criticized as a step too far because it would blur the distinction between "gravity of guilt" and "dangerous tendencies".[651] However, the judiciary's view can be supported by a teleological interpretation in the light of the guiding principle of education.[652]

§18 II JGG stipulates that juvenile imprisonment has to be imposed in such a way that it can have the necessary educational effects on the young offender.

---

[647] See Albrecht (2000), 57.

[648] See Jehle, Albrecht, Hohmann-Fricke and Tetal (2016), 11.

[649] See Diemer, Schatz, and Sonnen (2015), §17 margin no. 20 and Schaffstein, Beulke, and Swoboda (2014), 168.

[650] See BGHSt 15, 224 (226) and BGHSt 16, 261 (263).

[651] For a recapitulation of the discussion, see Brunner and Dölling (2011), §17 margin no.14d; Schaffstein, Beulke, and Swoboda (2014), 171–2; or Diemer, Schatz, and Sonnen (2010), §17 margin no. 22.

[652] See Eisenberg (2016), §17 margin no.34a.

Here we find an expression of the welfare/justice clash through the strong influence of welfare considerations on this otherwise solely criminal sanction in the German juvenile criminal justice system.[653]

When a sentence for juvenile imprisonment is suspended, the criminal–political function is not unproblematic: is it a punishment or rather a special preventive measure of re-socialization?[654] The compromise position claims that a suspended sentence is neither punishment (as a justice consideration) nor a purely educational measure (as a welfare consideration) but combines both,[655] thereby clearly illuminating the welfare/justice clash. §23 I JGG is an argument for this position: s.1 contains the educational aspect that the suspended sentence is to be combined with orders,[656] but s.2 allows for the possibility of imposing orders in retribution for the committed wrong.[657] This also means that §23 I JGG tries to balance both welfare and justice considerations and is therefore illustrative of the welfare/justice clash.

The additional option of keeping a young offender out of prison stipulated in §27 JGG (conditional sentence/probation) may be considered an expression of welfare considerations: the aim is to try in every possible way to avoid the incarceration of young offenders, even if the principle of proportionality as a justice consideration would militate in favour of incarceration. The very existence and legislative construction of §27 JGG can be seen as an expression of the welfare/justice clash: the young offender is found guilty in the justice sense but does not receive a prison sentence since no negative relapse prognosis demanding long-term educational intervention can be made. As a result, the young perpetrator is given another chance, but under control and surveillance – again balancing justice and welfare considerations.

The assumption that a young offender will misinterpret a suspended juvenile imprisonment sentence or a conditional sentence/probation as a "neutral"

---

[653] In the same line of thought, see Diemer, Schatz, and Sonnen (2010), §5 margin no. 8.

[654] See Reinhart Maurach, Karl Heinz Gössel, and Heinz Zipf, *Strafrecht Allgemeiner Teil, Teilband 2, Erscheinungsformen des Verbrechens und Rechtsfolgen der Tat* (7th Edition. Heidelberg: C.F.Müller, 1989), §65 margin no.11, 637, for a good overview of the different positions.

[655] See Schaffstein, Beulke, and Swoboda (2014), 189.

[656] Orders in the sense of §10 JGG as educational measures. Note here that adult criminal law in §56c StGB only offers the possibility ("can") of implementing orders for an adult offender if he or she is in need of such help to avoid relapsing into crime.

[657] This means orders in the sense of §15 JGG as corrective measures.

response – which has been used as a justification for introducing warning-shot detention – is not based on empirically verifiable findings.[658] The fact that warning-shot detention was introduced anyway can be interpreted as an expression of the prioritization of justice considerations and a desire to seek retribution for a committed wrong. However, one year after its introduction, records showed that the juvenile courts were making very cautious use of this option,[659] which might reflect a recognition of the harmful environment of incarceration for a young offender – and so the influence of welfare considerations. The sparing use of this form of detention can be considered a positive outcome since, generally, the corrective measure of short-term detention aims at a group of offenders other than that targeted by juvenile imprisonment,[660] the latter intended for offenders with a negative prognosis and the former for offenders with a positive prognosis. Nevertheless, warning-shot detention exemplifies another difficult balancing act between welfare and justice considerations.

4.1.3.2. Sweden

In the Swedish juvenile criminal justice system, the welfare/justice clash becomes visible in the overall structure of legal consequences. The additional set of legal consequences available for young offenders, especially those containing some idea of "care" in the widest sense (particularly juvenile care, which comes in many different forms) can be interpreted as an indication that legal consequences should be adapted to the individual needs of the young offender. On the other hand, the possibility of imposing "adult" legal consequences in the form of suspended sentences (conditional sentences and supervision) on young offenders might be understood as an expression of justice considerations, for they make sure that every offender receives a legal consequence if the specific juvenile consequences are inappropriate.[661] Additionally, Swedish courts are able

[658] See Eisenberg (2010), 1509. Note that such a construction is also disapproved of on a European level by Rec (2003) 20, No.17.

[659] See http://www.spiegel.de/panorama/justiz/wamargin no.schussarrest-fuer-junge-straftaeter-nur-selten-vollstreckt-a-957386.html (last visited 2017-01-24).

[660] See Ulrich Eisenberg, "'Feindlichen Übernahme' im Jugendstrafrecht? Zur Situation eines politisch aufgeladenen Rechtsgebiets," (*Neue Juristische Wochenschrift (NJW)* 2010: 1507–9), 1509.

[661] Brå Report 2000:7 emphasizes that the reforms of the LUL pursued the aim of bringing the system of legal consequences for young offenders and that for adults closer to one another; see Brå Report 2000:7, 7.

to place young offenders not only in closed institutional treatment, but also in prison (under special circumstances). Then again, juvenile care and community service for juveniles are legal consequences that, through their broad scope, cover an extended target group. This fact, combined with the recent abolition of the precondition of consent for community service for juveniles, suggests that courts may be able to avoid the imposition of adult legal consequences, at least in the case of juvenile offenders. Even if the Swedish legislature emphasizes a neoclassical approach that stresses justice considerations,[662] and even if the Swedish juvenile criminal justice system features a strict status approach regarding the age for criminal capacity that also reflects the priority given to justice considerations, a closer investigation of legal consequences reveals the considerable influence of welfare considerations.

The fact that fines are not considered the most adequate legal consequence for a young offender is a case in which welfare considerations prevail over those of justice. Indebtedness, which could complicate the young person's later adult life, should be prevented. Another such case is the acknowledgement of the lack of a rehabilitative impact from fines that would stop a young offender from offending again. However, through the aforementioned judgment from 2014,[663] the HD eliminated at a stroke any welfare considerations in relation to minimum fines, demonstrating an unmistakable preference for justice principles, specifically the principle of proportionality. Nevertheless, it has also been acknowledged that in the framework of fines there is scope for taking account of the offender's age, even if it is a smaller scope than exists in relation to a possible prison sentence.[664] This attempt to strike a balance in relation to the young offender's age is an expression of the welfare/justice clash.

Community service for juveniles was originally introduced in 1999 with the aim of strengthening the principle of proportionality in cases in which a young offender is sentenced to juvenile care.[665] At that time, it was therefore an expression of a justice consideration. Even if that aim is still valid,[666] the thought behind the change of legislation in 2007, when community service for juveniles became an independent legal consequence, was to reduce the number of

[662] See section 3.5.

[663] See NJA 2014, 658 and also HD B5566-11 from 2012-01-31.

[664] See HD B 5566-11 from 2012-01-31 and also NJA 2012, 16.

[665] See Nordlöf (2012), 238 and also Burman (2016), 168.

[666] See Nordlöf (2012), 240.

juveniles receiving prison sentences by sentencing young offenders not in need of the special care of social services to community service. This respects the greater vulnerability of young perpetrators and so expresses a sensitivity to welfare considerations. Regarding community service for juveniles, we now find an expression of the welfare/justice clash in the way this legal consequence seeks to balance these aspects: it should be meaningful and should be seen not only as a punishment. However, it should clearly be a consequence of the criminal conduct and should make it explicit that it is not acceptable for juveniles and young adults to commit crimes.[667] The preparatory works emphasize that the need for flexibility (meaning that the legal consequence has to be adapted to the young offender) must be balanced with the principles of equality and consistency, which should guide the system of legal consequences;[668] the preparatory works thus put the welfare/justice clash into words. Additionally, the preparatory works acknowledge that community service for juveniles has a pedagogical value in that it gives the young offender the chance to compensate for the harm he or she caused the victim,[669] which recognizes an aspect of welfare rather than justice. As another expression of welfare considerations, community service often includes a concluding discussion between social services and the young offender that should give the young person the chance to reflect on his or her life situation and discuss the offence.[670] This makes clear that the target of community service for juveniles is young persons in need of education and guidance but without a specific need for care. With the recent abolition of the demand for consent – and perhaps even more in the discussions around it – the welfare/justice clash, the weighing and balancing of welfare and justice considerations, has again become visible. The aforementioned HD ruling[671] that the character of the offence ("brottets art") is not an obstacle to the imposition of community service for juveniles as a legal consequence (instead of a prison sentence, as would be the case for adult offenders) can be interpreted as welfare considerations winning out over those of justice: the young offender's lack of maturity and vulnerability is taken to be the most important factor. Therefore, a prison verdict can be avoided.

[667] See prop.2014/15:25, 36.

[668] Ibid.

[669] See prop. 2005/06:165, 64.

[670] Ibid., 67.

[671] See NJA 2007, 624.

The fact that SoL and LVU constitute the alternatives for intervention in the framework of the legal consequence "juvenile care" demonstrates the close relationship between justice and welfare in the Swedish juvenile criminal justice system. These social norms become part of the juvenile criminal justice system. The basic concern of the rules of the SoL and the LVU is the individual need of the young offender; but juvenile care as a legal consequence has to satisfy the demands of the rule of law as well (especially the principle of proportionality as a justice consideration). This exemplifies the welfare/justice clash. As previously mentioned, prior to the reforms of 1999 and 2007, the courts generally had no control over what social services did once a young person had been referred to them. The change in legislation of 2007 reflects the shift of responsibility towards the courts in the form of control. Here, the Swedish legislature has decided to tip the balance between welfare and justice considerations in favour of justice. However, as I have described, when the criminal courts hand down a sentence of juvenile care under the LVU, an additional decision by the administrative court confirming the need for care is still required. It is questionable what purpose these two processes, which deal with the same subject, serve (not to mention the question of ne bis in idem). While not engaging further with that question, this special Swedish solution of juvenile care according to the LVU, with the additional safeguard of the administrative court, reflects again the strong impact of welfare considerations. It is therefore also quite a vivid expression of an instance of the welfare/justice clash in which the Swedish legislature has not been able to decide who should be entrusted with the duty of evaluating the need for care.

Juvenile care covers a wide range of alternatives, not least because it can be combined with other measures like fines or community service for juveniles depending on the severity and the character of the offence and the previous criminal conduct of the young offender. It thereby respects the principle of proportionality, and to this end it may involve intensive intervention.[672] Here we find again an indication of the balance which has to be struck between the needs of the young offender (welfare considerations) and the principle of proportionality (justice considerations). The preparatory works emphasize that besides social services' assessment of whether the young offender is in need of

[672] See chapter 32 §1 second break BrB. See also Brå Report 2002:19, 18, which confirms that additional legal consequences are imposed to satisfy the principle of proportionality (though this report does not explicitly refer to juvenile care, which had not at this point been established as a legal consequence). For an overview of the possible combination of juvenile measures, see Borgeke and Månsson (2007), 183.

care (welfare considerations), traditional justice considerations like the principle of equality and consistency have also to shape the legal consequence of juvenile care.[673] Swedish law hands the court all the tools needed to impose juvenile care even on non-consenting young offenders (through LVU), which thereby allows for a coercive aspect if there is a need for care and gives juvenile care the widest possible range of applicability. We thus find a similar structure to that of the German juvenile justice system of legal consequences; both allow for a coercive aspect if it is deemed necessary in the name of welfare (that is, the young offender's need for care). Such a coercive element as a form of punishment could be interpreted as an expression of the priority given to justice considerations, but it has to be acknowledged that the coercion is due to the fact that the young offender demonstrates a need for care. This means that even here the impact of welfare considerations shines through, reflecting the welfare/justice clash.

A problem linked to juvenile care is the lack of guidelines in relation to the question of when juvenile care is sufficient as a legal consequence from a proportionality perspective.[674] The legislature does not address this problem and leaves it up to the courts. The influence of welfare considerations is especially strong in relation to this legal consequence, in which the "need" of the young offender is of decisive importance. The fact that the "specific" need for care as a precondition for juvenile care is not further defined leads to a confusion about how to interpret the expression "specific" and might further jeopardize predictability, which is an expression of the rule of law. This also means that the lack of an interpretive framework for what constitutes a "specific" need for care creates a major obstacle to achieving a consistent application of the law and avoiding disparities in verdicts – declared aims of the neoclassical turn in the Swedish system.[675] The danger of confusion is heightened by the fact that juvenile care can take such differing forms. However, it seems the Swedish legislature chose here not to define the specific need more precisely but rather let this term be interpreted by social services and according to the discretion of the judges. It can be argued that this limitation of the rule of law in favour of broader discretion is based on welfare considerations, namely the aim of leaving more leeway to the courts in order to allow them to respect the individual needs of the young offender. This discretion granted to the court regarding juvenile care upholds the welfare/justice clash.

[673] See prop.2014/15, 36.

[674] See Borgeke (2012), 296ff. or Borgeke and Månsson (2007), 198ff.

[675] See section 3.5.

The preparatory works regarding closed institutional treatment or imprisonment emphasize that this legal consequence has first and foremost to be proportionate in relation to the severity of the offence and that institutional treatment expresses a powerful societal response.[676] The preparatory works point out that the need for treatment plays no role whatsoever in relation to the choice of this legal consequence. It should be imposed only if it is justified as a response to the offence[677] – in other words, if it suffices from a viewpoint of proportionality as a justice consideration. This evaluation is carried out by the court, which is confronted with a care plan prepared by social services containing the proposal of closed institutional treatment as a legal consequence. This plan reflects welfare rather than justice considerations and is considered a vital precondition of the imposition of this legal consequence, for how can a court decide that closed institutional treatment is the proportionate legal consequence without reflecting on the young offender's care needs? When it comes to the enforcement of the measure, welfare considerations seem to prevail. This is clear from the description of the design of closed institutional treatment, which emphasizes that "treatment" is the aim of the measure[678] and that harmful effects are to be minimized. The HD has emphasized that closed institutional treatment has a treatment focus while imprisonment does not.[679] It seems here that the Swedish turn towards neoclassicism and thereby justice considerations is not as harsh as it might appear at first sight. On the sentencing level, the courts cannot deny that the substance of closed institutional treatment is exactly that: treatment. Considering what closed institutional treatment entails when it is enforced, it becomes rather obvious that this legal consequence is not intended as punishment. This is also clear from the fact that when the young offender begins to serve a sentence in closed institutional treatment, he or she meets first of all with a psychologist, a teacher, and a social worker to establish the specific need for care and treatment and to develop an individual plan.[680] Nevertheless, closed institutional treatment involves the deprivation of liberty and so is a penal response to a crime that must be enforced safely and adequately.[681] Here, again,

[676] See prop.1997/98:96, 152ff.

[677] Ibid., 156.

[678] Ibid., 156ff. See also http://www.stat-inst.se/var-verksamhet/sluten-ungdomsvard-lsu/ (last visited 2017-01-24).

[679] See NJA 2001, 913.

[680] See http://www.stat-inst.se/var-verksamhet/sluten-ungdomsvard-lsu/ (last visited 2017-01-24).

[681] See Borgeke (2012), 421.

we find an expression of the difficult trade-off between welfare and justice considerations. The decision to sentence a young offender in Sweden to closed institutional treatment thus illustrates the welfare/justice clash in several ways.

4.2. Dismissal and diversion

The general rules in the German criminal justice system for a dismissal, an exception from the principle of legality,[682] are stipulated in §§153–154e StPO, and their scope is significantly broadened in relation to young offenders through the possibility of diversion, stipulated in §§45 I–III JGG. The dismissal of a case covers all cases where the public prosecutor does not find it necessary to prosecute the case before a court of law. Dismissal refers to cases in which there is insufficient evidence or the offender cannot be identified, etc., but also to cases in which the offender is deemed guilty but the offence requires no formal trial. For young offenders, this last alternative goes under the heading of "diversion". It is a subcategory of dismissal and constitutes the major difference between the rules for a dismissal applicable to young offenders and those applicable to adult offenders. The word "diversion" itself stems from the Latin "divertere", which means "to steer sideways".[683] This category is based on the principle of opportunity.[684] It is a form of official response that is an alternative to a formal criminal trial and which can avoid the disadvantages of a criminal trial – like, for example, stigmatization – but still have a cautionary effect in relation to the socialization of a young person.[685]

In the German juvenile criminal justice system, the most frequent response to minor offences is the dismissal of the case in the form of diversion by the juvenile public prosecutor and the juvenile court.[686] This response is justified by

[682] §§152 II, 163 StPO in conjunction with §2 JGG. On the principle of legality, see section 6.3.

[683] See for example Ostendorf (2015), 92.

[684] Regarding the principle of opportunity as opposed to the principle of legality, see also section 6.3.

[685] See Schaffstein, Beulke, and Swoboda (2014), 261.

[686] For a statistical overview, see (for the year 2012) https://www.destatis.de/DE/-Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260127004.pdf?__blob=publicationFile, 11, 26; Schaffstein, Beulke, and Swoboda (2014), 263; or Albrecht (2002), 197. This is also in line with 1990's UN guidelines for the Prevention of Juvenile

the normality, ubiquity,[687] and the episodic character of juvenile delinquency.[688] Because of the abuse of police power that occurred under the Nazi regime, the police have no discretionary power whatsoever to dismiss criminal cases but are strictly bound to the principle of legality, which means that they must refer every suspect to the public prosecutor's office. Nevertheless, the police may initiate the conditions required to divert a case.

The JGG stipulates four levels of diversion, which may take an unconditional or a conditional form. A confession from the young offender is not necessarily a precondition for a dismissal. The failure to satisfy the conditions imposed as part of a divertive measure may lead to a trial, which means that a conditional diversion may be compared to a suspended sentence. The four levels of diversion the JGG offers, in order of increasing intensity of interference, are:

- §45 I JGG: Dismissal without any consequence in the case of minor offences with minor guilt and no public interest in prosecution. It is applied when the juvenile public prosecutor does not see any further educative need apart from the discovery of the offence and the investigative procedure.[689] The consent of the juvenile judge is not a necessary precondition.
- §45 II JGG: Dismissal with educative measures taken by other actors (for example, the parents, the school,[690] or measures initiated by the public prosecutor[691]) or in combination with mediation if the juvenile public prosecutor does not deem it necessary to involve the juvenile judge.
- §45 III JGG: Dismissal with the intervention of the juvenile judge. This means that the public prosecutor proposes that the juvenile judge imposes a minor legal consequence (such as a warning, community service for juveniles, mediation, participation in a training course for

---

Delinquency (the Riyadh guidelines), which state that youth justice policy should avoid criminalizing children for minor misdemeanours.

[687] See Laubenthal, Baier, and Nestler (2010), 2ff.

[688] See Albrecht (2000), 21.

[689] See guideline No.2 for §45 JGG.

[690] See guideline No.3 s.2 for §45 JGG.

[691] However, how far this competence goes is a disputed matter; see Eisenberg (2016), §45 margin no.21 and Schaffstein, Beulke, and Swoboda (2014), 268–9.

traffic offenders, an apology to the victim, a fine), but here the confession of the young offender is a precondition and the legal guardian has to consent.[692] In this case, the formal criminal trial is replaced by an informal magisterial educative process, which often takes place in the chambers of the juvenile judge. Once the young offender has fulfilled the imposed obligations, the prosecutor will dismiss the case in cooperation with the judge. Note here that the imposed legal consequences are the same as those in educational or correctional measures. The difference lies in the fact that one is imposed through a formal sentence and the other is imposed in the form of a divertive decision.

- §47 JGG: If the charge has been filed but the young offender has undergone some educational measures before the proceedings and therefore a formal trial seems unnecessary, or if it becomes evident during the trial that no formal verdict is necessary, this section introduces the same options of dismissal for the juvenile court as §45 I–III JGG with the consent of the public prosecutor.

These broad options for diversion are what is responsible for the fact that the vast majority of cases against young offenders are closed without a verdict: between 68 and 70 per cent.[693]

In Sweden, the police are not as strictly bound to the principle of legality as in Germany (see, for example, chapter 48 §1 RB, which empowers the police to impose a so-called "ordningsbot", a fine). Although §9 polislagen (1985:387) confirms in the first section the principle of legality, section two stipulates the possibility of a "rapporteftergift".[694] The latter states that the police may use their discretion to decline to file a report if the offence can be considered trivial and if it is obvious that a possible legal consequence would not exceed a fine. Further, §13 LUL allows the police to direct juveniles aged 15 to 17 to repair the damage caused by their offences as soon as possible if the young offender confesses or if the perpetration is obvious. If a minor offence is observed, the police may react on the spot since they are usually the first contact the young

[692] See Schaffstein, Beulke, and Swoboda (2014), 128.

[693] See Heinz (2012), 126. According to the prevailing opinions, the specific forms for dismissing a case according to §§45, 47 JGG do not exclude the possibility of dismissing a case according to §§153, 153a, 154 StPO and §31a BtMG; see Eisenberg (2016), §45 margin no.9ff.

[694] "Relief to report" – my translation.

offender has at the place of the offence.[695] They can thereby create the preconditions to allow for a dismissal by the public prosecutor, although a dismissal is not automatic.[696]

The Swedish juvenile public prosecutor may also dismiss a case on certain grounds that are only applicable to young offenders. In the case of adult offenders, the only options for dismissing a case can be found in chapter 20 §7 RB, which can also be applied to young offenders. The additional rules applicable to young offenders are stipulated in §§16–22 LUL.[697] There are basically two additional grounds for young offenders: first, minor offences can be dismissed if they were committed because of "juvenile thoughtlessness" or precipitately.[698] This basically means that the young perpetrator is a first-time offender who has confessed.[699] Second, the case may be dismissed if appropriate measures are taken by social services or others to help and support the young offender.[700] Appropriate measures in this sense include parental action, supervision, victim–offender mediation,[701] or social care. An additional precondition is that no essential public or individual interest would be thereby disregarded. This condition implies, for example, considering the severity and character of the offence, taking into account the aim of maintaining law-abiding behaviour in general, and sustaining society's trust in the objectivity of the judiciary.[702]

---

[695] See prop.1987/88:135, 26.

[696] See prop.1987/88:135, 28.

[697] After first being subsidiary to chapter 20 §7 RB, §17 LUL is now lex specialis; see prop.1987/88:135, 11, 17–18.

[698] See §17 LUL – my translation of "okynne eller förhastande".

[699] The liberal non-prosecution policy, which was adopted in the 1970s and 1980s, was in 1994 restricted to first-time offenders; see Lappi-Seppälä (2011), 226.

[700] §17 No.1–3 LUL.

[701] For an in-depth study of mediation in relation to young offenders in Sweden, see Linda Marklund, *Ett brott – två processer. Medling vid brott och unga lagöverträdare i straffprocessen* (Uppsala: Uppsala universitetstryckeri, 2011).

[702] See prop.2014/15:25, 50ff. See also the prosecutor's guidelines, RåR 2006:3, 4ff and especially 9–11, which catalogue the offences for which a dismissal based on juvenile thoughtlessness or precipitateness might be appropriate.

When the public prosecutor decides to dismiss a case, the young offender is summoned to his or her office and the decision is delivered like a verdict.[703] Here, the preparatory works emphasize that the meeting should amount to a "serious warning from society".[704] According to §22 LUL, the decision is linked to the requirement that the young offender behave in an orderly and law-abiding way in the future; otherwise, the decision can be revoked. In other words, if the young offender does not comply with the juvenile contract or the care plan, the juvenile public prosecutor will repeal the dismissal and prosecute.

This dismissal decision is delivered personally and formally to the young offender in the office of the public prosecutor, according to §18 LUL. §19 LUL states that at a meeting in accordance with §18 LUL, the public prosecutor shall specifically explain the meaning of the decision to dismiss the case and the requirement which this decision entails – namely, to behave – and to clarify what the consequences of further violations of the law might be.[705]

It should be noted that an amendment to the LUL, which came into force on 1 July 2015, has changed the wording from "åtalsunderlåtelse" to "straffvarning".[706] The underlying reason is the normative function of criminalization and the importance of sending a clear signal to the young offender that this is a penal response.[707]

In Sweden, the procedural framework does not provide for the possibility of diverting a case in court. In court, the only alternative to a verdict being reached is that the public prosecutor decides to drop the case.

Analysis from a welfare/justice perspective

When it comes to the dismissal of a case, there are some differences between the Swedish and the German juvenile criminal justice systems. In Germany, the police have to transfer every case to the public prosecutor. The vast majority of

[703] §18 LUL.

[704] See prop.1994/95:12, 80.

[705] If the young perpetrator reoffends within six months, such a dismissal can be revoked; see prop 2014/15:25, 51.

[706] See prop.2014/15:25, 49, 50. My translation of "åtalsunderlåtelse" is diversion, and my translation of "straffvarning" is penalty warning.

[707] See prop.2014/15:25, 50.

cases in Germany are dismissed or diverted by the juvenile public prosecutor and therefore never reach the courtroom. This may also be due to the fact that there are several ways in which the public prosecutor in Germany can dismiss/divert a case. In relation to the aim of diversion – avoiding stigmatization but still having a cautionary effect – we find a clear indication of the welfare/justice clash. The scope for dismissal is widened for young offenders because of welfare considerations (the aim of avoiding stigmatization, which stems from developmental psychology and criminological findings and thus the realm of the social sciences), but dismissal still serves as a warning – an expression of the importance of considerations of justice. Regarding dismissal according to §45 III JGG, the procedural form makes all the difference while the content often stays the same irrespective of whether the young offender receives a verdict or a dismissal. This form of dismissal reflects how close diversion and a formal verdict are to one another. Furthermore, the clear emphasis on an educative process is evidence of the strong influence of welfare considerations in this realm of justice – another indication of the welfare/justice clash.

A major advantage of these divertive measures is not only that they are less stigmatizing than other measures but also that they enable a faster response to the offence.[708] However, it should not be overlooked that the control and safeguards are considerably smaller in comparison to the strictly formalized criminal trial, which may raise issues from the perspective of the rule of law. Another problem may be that minor offences are "sanctioned" with legal consequences like community service for juveniles in the name of education, which might lead to an extension of the state's social control.[709] As a justice consideration, the principle of proportionality is relevant to whether a young offender's case can be diverted or should be brought to trial. Consequently, the whole German system of diversion again comes down to a delicate balance of welfare and justice considerations, and so it is a clear representation of the welfare/justice clash. The various ways of dismissing a case against a young offender – the broad "diversion staircase", as it is known – reflects the guiding principle of the German juvenile criminal justice system,[710] placing emphasis on welfare rather than on justice considerations, though not abandoning the latter

[708] In relation to "how time matters", see section 5.3.

[709] Wolfgang Heinz, "Zahlt sich Milde aus? Diversion und ihre Bedeutung für die Sanktionspraxis," (*Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2005, Vol.2: 166–78) calls this problem the "widening of the net effect" (173).

[710] See section 3.2.

completely. Given the system's educative guiding principle, and given the acknowledgement of the potentially harmful environment of a trial for a young person, it is not surprising that the legislature ensured that the young offender can be subject to several forms of dismissal before he or she enters a courtroom for the first time (and courts have made good use of this possibility). On the other hand, it cannot be denied that both the public prosecutor and the juvenile court are in a position to exercise a certain degree of coercion, since the case can still be brought to trial if, for example, the young offender does not comply with the imposed measures. Here, justice considerations become important. However, the wide variety of options for dismissing a case explain the statistics relating to the German juvenile justice system.

In both Sweden and Germany, the assessment of whether a case can be dismissed involves taking into account the severity and character of the offence and the aims of maintaining law-abiding behaviour in general and society's trust in the objectivity of the judiciary, all of which are expressions of justice considerations. On the other hand, the very fact that there are broadened possibilities for dismissing a case because of the young offender's immaturity and vulnerability or because of some form of educational intervention reflects the importance given to welfare considerations. Both systems acknowledge the harm that may be caused by a formal trial against a young offender.[711] Note also the ability of the Swedish police to react on the spot and thereby create the circumstances which allow for a dismissal. The preparatory works emphasize the pedagogical value of a fast response.[712] This means that a certain restriction of the presumption of innocence as a justice consideration is accepted on the basis of considerations of welfare. The balance to be struck becomes visible in the precondition that the offender has to be caught in the act or to confess,[713] which again reflects the welfare/justice clash. The broadened rules for a dismissal in relation to young offenders can also be seen as an expression of this balancing act. However, although the Swedish public prosecutor makes considerable use of this tool, it is not employed as frequently as it is by the German public prosecutor.[714]

---

[711] See for Sweden SOU 1993:35, 71 and Brå Report 2000:7, 29; for Germany Schaffstein, Beulke, and Swoboda (2014), 261 and Eisenberg (2016), §45 margin no.17a.

[712] See prop.1987/88:135, 26.

[713] Ibid., 26–7.

[714] Before the LUL was tightened up in 1988, a dismissal was the most common response to juvenile offences. After 1988, the number of cases being dismissed halved. After the 2007 reforms,

The fact that the meeting with the Swedish public prosecutor delivering a dismissal should constitute a serious warning from society can be seen as an expression of justice considerations. In fact, this kind of dismissal is much like a verdict, since it can also contain legal consequences – for example, juvenile care.

The fact that a decision can be revoked if the young offender does not comply with it also reflects a balance between justice and welfare considerations and an expression of the welfare/justice clash similar to that found in the German juvenile criminal justice system. The diversion can be seen as giving the young perpetrator a chance to prove that he or she can become a law-abiding citizen without the intervention of the state, and so avoid the stigmatization and the harm that comes from facing a trial. However, if the young offender does not comply, justice considerations – for example, the need for a response based on the principle of proportionality – come to the fore. Furthermore, regarding the second form of dismissal, it should be noted that only measures comparable to juvenile care suffice as a justification for a dismissal and none of the other legal consequences – for example, community service for juveniles – do. This again illustrates the importance of juvenile care as the overarching legal consequence for juveniles, as I mentioned earlier.[715]

The recent change of wording from "diversion" (åtalsunderlåtelse) to "penalty warning" (straffvarning) in July 2015 emphasizes again a neoclassical approach in Sweden and the move away from "welfare" towards "justice" when it comes to young offenders. It further serves as another expression of the welfare/justice clash, for it stipulates the possibility of dismissing a case based on welfare considerations, for example avoiding stigmatization of young offenders and acknowledging the differing conditions of juvenile offending, but on the other hand it demonstrates the importance of justice considerations – not least in the change of label itself.

---

around 40 per cent of all cases were brought to trial, which has meant another step away from diversion. See Holmberg (2013), 319–20. This reflects the turn towards a proportionality approach in Sweden. According to the "Kriminalsstatistik" from Brå 2012, 37 per cent of all cases in 2011 were dismissed by the public prosecutor.

[715] See section 4.1.2.3.

4.3. Sentencing

This section attempts to capture the rules – including soft law[716] – that govern how to choose a legal consequence for a young offender in the Swedish and the German juvenile criminal justice systems, with a focus on the question of how welfare and justice considerations are balanced in this area.

4.3.1. Germany

4.3.1.1. §46 StPO and §267 StPO

In the German criminal justice system, courts do not receive much guidance from the law regarding matters of sentencing. The German StPO does not contain any explicit sentencing rules. Apart from prescribed statutory sentencing ranges in the StGB,[717] the law is limited to §46 I s.1 StPO, which stipulates that "the guilt of the offender is the foundation for the sentencing",[718] and §267 III s.3 StPO, which states that "the reasons which were decisive for the determination of the legal consequence" have to be stated in the sentence. The term "guilt" is not further defined. Furthermore, the StPO does not contain any general rules in relation to mitigating or aggravating circumstances.[719] Streng

[716] The term "soft law" refers to sources other than the legal rules having an impact on sentencing. See further sections 4.3.1.2.– 4.3.1.4. and sections 4.3.2.2.– 4.3.2.5.

[717] It should be noted that, additionally, particular offences carry with them quantitative conditions as part of the determination of the severity of a crime – for example, the amount of narcotics in question, blood alcohol concentration, or the value of damage caused.

[718] §46 StPO can be considered an expression of the culpability principle under which the punishment must be proportionate to the individual guilt of the offender. This can be drawn from the notion of the rule of law ("Rechtsstaat") in Art.20 III of the German Constitution (Grundgesetz); see Streng (2007), 153.

[719] A few exceptions can be found in the so-called "Regelbeispiele", which are enumerations of aggravating circumstances as an indication of what can be considered as particularly serious. An example is burglary of a home in relation to theft. Most legal scholars have regarded the introduction of "Regelbeispiele" as a major improvement because it structures judicial discretion but leaves room for the accommodation of exceptional cases; see Thomas Weigend, "Sentencing in West Germany," (*Maryland Law Review* 1983, Vol.42:37–89), 52. Nevertheless, the amount of discretion is still large, since the court may disregard these suggestions or may label the offence as particularly serious in the absence of a specific "Regelbeispiel" since they regularly contain an opening clause.

calls this method of sentencing a "black-box model" of judicial decision making.[720] The court is called upon to fit the individual case into the statutory framework, taking into account the idiosyncrasies of the case, namely the degree of criminal intent, the amount of damage, and the likelihood of reoffending.[721] This causes problems with predictability as an expression of the rule of law. Different people (judges) can have different perceptions of the "reprehensibility" of an offence and which aspects should matter – and to what extent – when "placing" the legal consequence on the scale the law provides.[722] The classification according to the statutory framework is mainly done intuitively without acting arbitrarily.[723] Such a latitude system, as featured in both Germany and Sweden, leads to a burdensome situation for the court: because the court cannot be sure that it is delivering the "right/just" verdict on the scale available, it will seek a minimum level of punishment to avoid the risk of sentencing too strictly – a known phenomenon in German and Swedish courts. In Germany, this conduct has been confirmed and encouraged by the BVerfG. Following the principle of "sensible and moderate sentencing" established by the BVerfG,[724] the punishment must be oriented to the minimum within the framework if there are no specific grounds justifying a harsher sentence. In the Swedish courts, there has until recently only been one exception to this rule: serious drug offences.[725] However, in practice, German courts consider the same circumstances the Swedish law establishes in chapter 29 §2 and §3 BrB, which are, according to §267 I and III StPO, considered in detail in the written motivation for a verdict.

The situation gets even more blurry when young offenders are involved since, as mentioned earlier, the statutory sentencing ranges stipulated in the StGB are not applicable to young offenders. In other words, there exists no minimum sanction for young perpetrators for any offence. This is also due to the fact that very different legal consequences are applicable to young offenders, as I have

---

[720] See Streng (2007), 156.

[721] Ibid.

[722] It should be noted, however, that the German StGB contains maximum penalties and a number of provisions providing minimum penalties. The minimum fixed term for imprisonment is one month. A term of imprisonment of less than six months can only be imposed in extraordinary circumstances.

[723] See Streng (2007), 156.

[724] See BVerfGE 28, 386 (391); BVerfGE 45, 187 (253); BVerfGE 73, 206 (253).

[725] See Träskman (2007), 233.

described above. In relation to juvenile imprisonment, §18 II JGG (which I mentioned in section 4.1.1.4.) stipulates that "juvenile imprisonment is to be allocated in such a way that the necessary educative effect can be achieved".[726] However, this emphasis on the educative guiding principle does not offer any further help with how to determine a legal consequence for a young offender. Considering this, one might get an idea of the immense spectrum of legal consequences a German juvenile court can impose without any further guidelines set down in law. The German juvenile court does not even have the statutory framework as a guideline but is only restricted by the principle of proportionality as the ultimate threshold.[727]Furthermore, another difference between sentencing adult offenders and sentencing young offenders lies in the fact that a young offender does not receive a sentence for each offence he or she has committed, which are then combined into an overarching sentence; rather, all offences are dealt with at once, gathered together in one legal consequence as if the young perpetrator had committed only one offence.[728]

Having made that clear, it is not surprising that verdicts can differ considerably throughout Germany in comparable situations because of the immense discretion possessed by the juvenile court.[729] The question arising then is: are there unwritten guidelines a juvenile court in Germany applies, and, if so, what are these guidelines? The general aims of sentencing certainly play a role in the sentencing decision. The law itself seldom defines such goals, which can be summarized as follows: rehabilitation, the deterrent effect of the criminal sanction, detention of dangerous and anti-social offenders, and finally an alleged moral right and duty invested in the courts to impose punishment as an expression of society's disapproval.[730] If the law mentions an aim, it is usually

[726] The older the young offender gets – maybe even passing into adulthood, since it is the age at the time of the offence and not at the time of the proceedings that determines if juvenile criminal law should apply – the less weight is assigned to the educative aims of juvenile imprisonment. The balance gradually shifts towards retribution as a justice consideration; see Diemer, Schatz, and Sonnen (2010), §5 margin no.10. However, there is no absolute age limit on when the right of the state to educate ceases; see BGH NStZ 2002, 204 (207).

[727] See BGH NStZ 1990, 389.

[728] This is the "principle of the unity of the legal consequence" (in German: "Einheitsprinzip") stipulated in §31 JGG, which says that even if the sentence states the different offences, it does not break down the unified legal consequence accordingly; see Schaffstein, Beulke, and Swoboda (2014), 109, 115.

[729] See section 3.3.3.

[730] See Hogarth (1971), 3–4.

not to be seen as exclusively but in the context of the other social goals set out in the penal codes.[731] §46 II s.2 of the German StPO clarifies that the likely effect of the punishment on the offender's future life has to be considered. This is relevant to the rehabilitation of the offender and reflects a focus on the individual. It also means that part of the task imposed on a court involves the estimation of the likely impact of the sentence on the offender. This is a most complex task, not least because the knowledge of the deterrent or rehabilitative effect of different penal measures is limited.[732] Jareborg emphasizes that there is growing evidence that predictions tend to be based more on guesswork than on knowledge.[733] Nevertheless, apart from the culpability principle and rehabilitation, other aims of sentencing, such as individual or general deterrence, the preservation of the legal order, or the confirmation of the norm, can also play a role, as long as the sanction can be considered as fair given the guilt of the offender (in other words: as long as the sanction is proportionate).[734] By choosing a rather ambiguous formula in §46 StPO, the German legislature has clearly indicated that the gravity of the criminal act is not the only or even the dominant parameter.[735] Sentencing courts must accept the unresolved antinomy between statutory punishment goals.[736] This is somewhat easier in the German juvenile criminal justice system. As I have shown, the undisputed guiding principle here is, according to §2 JGG, the principle of education. The

[731] See Schmidt (1961), 121.

[732] See section 2.3.3.

[733] See Jareborg (1992a), 13. Hogarth (1971) emphasizes the same point, writing that "it is difficult to know with any degree of certainty whether an offender before the court is likely to pose the risk of further crime, and even more difficult to know whether that risk can be in any way altered by choosing one form of sentence over another. Still more problematic is estimating whether the imposition of a deterrent penalty is likely to prevent potential offenders from committing crime" (4).

[734] See Streng (2007), who discusses the so-called "leeway theory" (my translation of Spielraumtheorie), which is currently the dominant theory when it comes to sentencing in German jurisprudence and criminal law theory. The contrasting theory is called the "pinpoint theory" (my translation of Punktstrafentheorie), which promotes the idea that the court is capable of precisely pinpointing the just sanction.

[735] See Streng (2007), 160; see also Bernd-Dieter Meier, "Licht ins Dunkel: Die richterliche Strafzumessung," (*Juristische Schulung (JuS)* 2005: 769–73 and continued in *JuS* 2005: 879–81), 770.

[736] See Weigend (1983), 78. This leads to the situation that German law presupposes that the existing framework is filled out with recourse to utilitarian objectives; see Streng (2007), 161.

underlying thought is that a young offender is to be treated differently because of his or her lack of maturity and the expectation that a young person is still formable.[737]

From a practical perspective, little is known about the internal deliberations of the court. In Germany, some have argued that this process should consist of at least two stages: first, setting a sentence that reflects the offender's culpability; second, correcting it for his or her rehabilitative needs and possibly further adjusting it to satisfy the demands of general deterrence.[738] Note here, though, what has been stated earlier, namely that general deterrence must not play a role in relation to young offenders. However, Weigend thinks that it is not likely that many panels actually undertake this complicated process.[739]

4.3.1.2. Legal commentaries

The case law of the BGH plays a decisive role for the sentencing decision. This becomes especially clear in the extensive use of legal commentaries containing the important decisions of the supreme courts in Germany side by side with scholarly interpretations. However, the BGH, while acknowledging that we can draw some conclusions about the average sentences for particular types of case, has declined to offer any more extensive schematization.[740] The problem with case law is that it will always refer to an individual case. Circumstances will never be identical. Consequently, case law can only provide a suggestion for the decision and can never serve as a "guideline" in the narrower sense – especially given the strong focus on individualization in the German juvenile criminal justice system. Note again that, especially in comparison with the Swedish system, preparatory works seldom play a role in the interpretation of legal statutes.[741] I will elaborate further on this point in section 4.3.2.2.

---

[737] See chapter 2 and, in terms of the guiding principle of the German juvenile criminal justice system, section 3.2.

[738] See Karl Lackner, *Über neue Entwicklungen in der Strafzumessungslehre und ihre Bedeutung für die richterliche Praxis* (Heidelberg: Müller Juristischer Verlag, 1978), 12–13.

[739] See Weigend (1983), 64–5.

[740] Münchner Kommentar StGB, §46 margin no.77; BGHSt 28, 318 (319); BGHSt 34, 345 (350).

[741] This was mentioned in section 1.5.2.1.

4.3.1.3. The advisory directives of the Attorney General

Even if there is no clear legislative framework for the details of a sentencing decision in Germany, it has to be acknowledged that there exist some – though very few – guidelines on the level of the prosecution authorities. These advisory directives are set up by the Attorney General of each German Land (federal state) – which means that they can differ between the different Länder – and play a supporting role.[742] It should be emphasized, however, that these guidelines set out by the Attorney General can at best be guidance for an individual assessment. Such instructions do not replace the individual examination. The advisory directives can contain rules on juvenile proceedings or how to handle undercover agents and informants.[743] In terms of their legal status, such advisory directives are internal administrative rules. This also explains why they are only found on the level of the prosecution authorities and not in courts. Judges are independent and not part of an executive administration, as the public prosecutors are.[744] Consequently, judges can never be bound by administrative rules. In terms of applicability to sentencing, the underlying reason for having such guidelines is that the public prosecutor in Germany has to have some kind of idea about how the verdict might turn out if all of the stated facts in the indictment are proved right. This evaluation will

[742] The competence to set up advisory directives is regulated in the "Landesgesetze". See for example, for Frankfurt am Main, http://www.gsta-frankfurt.justiz.hessen.de/irj/GSTA_Intemargin no.et?rid=HMdJ_15/GSTA_Intemargin no.et/nav/d02/d02701f2-fa8f-c711-d88e-f197ccf4e69f ,,,,11111111-2222-3333-4444-100000005002%26_ic_seluCon=0717061e-49d5-3811-d88e-f197ccf4e69f%26shownav=false.htm&uid=d02701f2-fa8f-c711-d88e-f197ccf4e69f&shownav=false (last visited: 2017-01-24).

[743] As an example in relation to juvenile proceedings, see "Richtlinien für die Bearbeitung von Jugendstrafsachen bei den Staatsanwaltschaften - Rundverfügung des Generalstaatsanwalts des Landes Brandenburg" http://www.gsta.brandenburg.de/sixcms/detail.php?gsid=bb2.c.535883.de&template=seite_gsbb_1 (last visited: 2017-01-24). These guidelines contain the explicit advice to make use of "diversion" as much as possible. For a discussion of guidelines concerning diversion and regional differences, see Alexander Linke, "Diversionsrichtlinien im Jugendstrafverfahren – Bundeseinheitliche Einstellungspraxis durch Verwaltungsvorschriften der Länder?," (*Neue Zeitung für Strafrecht* (NStZ) 2010: 609–14).

[744] The hybrid role of the public prosecutor is not unproblematic to define: on one hand, they can be bound by directives and subject to instructions according to §146 GVG, which might indicate an executive role; see BVerfGE 103, 142, 156. On the other hand, they are independent of the courts (§150 GVG), have a duty of objectivity (§160 II StPO), and broad discretion in relation to dismissals, which can be considered as strong arguments for a judicial role; see BGHSt 24, 170 (171).

determine where the public prosecutor files the indictment – the juvenile court, the juvenile juror court (both at the district court) or the juvenile chamber (at the regional court).[745] Furthermore, as stated before, the advisory directives can contain rules on when to deliver a diversion decision, which can be considered as a form of sentencing at the prosecution level.

Furthermore, when it comes to more general, practical procedural guidelines for public prosecutors, and to a certain extent also for courts, the "RiStBV"[746] should be mentioned as the common guidelines in all Länder and for the federal government. However, the RiStBV contains no advice on how to sentence as regards content but for example sets out which points the final plea of the public prosecutor should contain.[747]

Note again, though, that all these guidelines are established at the level of the public prosecutor's office and can never bind the independent judge. However, they can serve as an example for courts.

4.3.1.4. Common understandings (regarding minor offences)

It should be mentioned that there exist certain common understandings regarding minor offences when it comes to sentencing. Such understandings are mainly found in the field of traffic or minor drug offences and only exist on a local level (for example in a certain court district).[748] Consequently, they can vary significantly from district to district. These understandings are usually not

[745] As will be seen later, proceedings in Germany do not always start out at the level of the district court as they do in Sweden. Depending on the expected outcome, the indictment can for example also be filed at the regional court; see also section 6.1.

[746] "Richtlinien für das Strafverfahren und das Bussgeldverfahren" issued by the Federal Ministry of Justice together with the Länder. They are supplementary administrative regulations.

[747] Regarding the final summation, the rules stipulate that "Hält der Staatsanwalt die Schuld des Angeklagten für erwiesen, so erörtert er auch die Strafzumessungsgründe (§ 46 StGB; see also No. 15) sowie alle Umstände, die für die Strafbemessung, die Strafaussetzung zur Bewährung, die Verwarnung mit Strafvorbehalt, das Absehen von Strafe, die Nebenstrafe und Nebenfolgen oder die Anordnung von Maßregeln der Besserung und Sicherung, des Verfalls, des erweiterten Verfalls oder sonstiger Maßnahmen (§ 11 I No. 8 StGB) von Bedeutung sein können" (see No.138 II).

[748] Here I can cite my own experience as a juvenile public prosecutor in the German cities of Bremen and Bremerhaven. In 2005, juveniles riding a moped without a driver's licence had become a major problem. The juvenile judges and juvenile public prosecutors agreed to confiscate the moped if the young offender was caught by the police a second time and passed this guideline on to the police. It did not take long until word spread among the juveniles, which led to a significant decrease in cases.

in writing. They are non-binding and not official; they have been shaped over time and by sentencing customs.[749] Another thing that influences the sentencing customs of courts and plays a substantive role in terms of certain local sentencing traditions is the specific training for German judges. A German lawyer who has passed the second state exam with outstanding results can be employed as a judge immediately. With very little practical experience, he or she will be – in most cases – assigned to a three-judge panel, which deliberates and determines sentences together. This means that the young judge gradually learns the local sentencing tariffs from the other judges, who themselves learned them from older judges years earlier. Local sentencing traditions are thus passed on from one judicial generation to the next.[750]

4.3.2. Sweden

Historically, the Swedish sentencing system has developed from punishment that was absolute, with no discretion for the court, to a latitude system with a good deal of freedom for the court, and finally to a system that clearly regulates the "measurement of the punishment" (straffmätning) and determines the legal consequence through principles and rules.[751] Today, Sweden has a highly structured system of sentencing principles[752] and features fairly precise sentencing rules, which have been made possible by the changes that aimed at

[749] The existence of such common understandings in Germany is confirmed by Martin Killias, "Sentencing reform—from rhetorics to reducing sentencing disparity" (*European Journal on Criminal Policy and Research* 1994, Vol.2, No.1: 19–28), who goes so far as to call them "guidelines" (24). He refers to the empirical research that Hassemer conducted in 1983. His research confirmed that more than 90 per cent of the sentencing decisions investigated corresponded to the standard sentence recommended for that particular type of offence (see Raimung Hassemer, "Einige empirische Ergebnisse zum Unterschied zwischen der Herstellung und der Darstellung richterlicher Sanktionenentscheidungen," (*Monatsschrift für Kriminologie und Strafechtsreform* Vol.66, No. 1, 1983: 26–39). See also Meier (2005), 880.

[750] See Weigend (1983), 82.

[751] This is based on SOU 1986:13–15 (which was triggered by Brå Report 1977:7, "Nytt straffsystem"), which very much laid the foundation for prop. 1987/88:120 and the connected legislation in 1989 and in the following years – SOU 1995:91 I–III and prop.1997/98:96 – which maintain the same foundation in regard to legal principles but emphasize consistency even more strongly. See also Zila (1998), 15–18, Träskman (2007), 223 and Nordlöf (2012), 245ff.

[752] See Lappi-Seppäla and Tonry (2011), 21.

prioritizing justice principles I mentioned earlier.[753] Chapters 29 and 30 BrB contain detailed provisions on general principles and set out criteria relating to both the type and the degree of punishment to be taken into account in making sentencing decisions. Chapter 29 BrB deals with the measurement of punishment, while chapter 30 BrB focuses on finding the appropriate legal consequences. However, as we will see, there is an interdependency between the two chapters since factors which influence the measurement of the punishment might also influence the choice of the appropriate legal consequence.[754] This makes their application far from simple.

The Swedish sentencing system obviously focuses on the fact that a precondition for a somewhat consistent application of the law is that the process of the evaluation of the severity of the offence as the baseline of criminal sentencing is not too complicated, but open and comprehensible. This is also the reason that the grounds for a verdict and for the choice of a legal consequence have to be stated explicitly, reflecting the aim of enhancing predictability and consistency in the application of criminal law.[755] The evaluation of the severity of the offence is based upon a tradition of legal practice, which over the years has established a framework showing where to place a legal consequence on the legislative scale. Additionally, particular offences carry quantitative conditions as an aspect of the severity of a crime, for example the amount of narcotics in question, blood alcohol concentration, or the value of damage caused.

4.3.2.1. Chapters 29 and 30 BrB

The system of chapters 29 and 30 BrB is complex and involves an interplay of legal norms. The existing rules that influence the determination of penal consequences were introduced into the BrB in 1988, codifying earlier practice by the courts into written law. These rather detailed rules, which state mitigating and aggravating circumstances,[756] are motivated by the principle of legality,

[753] See section 3.5. This new structure thereby met the demand made by Brå Report 1977:7, 403–7 to place greater weight on the severity of the offence in question and on proportionality between the offence and the punishment. Individual prevention was rejected on the grounds that the court should not engage in prognosis. The exceptions were the legal consequences "conditional sentence" and "supervision", although this has more to do with fairness than individual prevention; see SOU 1986:14, 71, 75 and prop.1987/88.120, 37, 47.

[754] See Nils Jareborg, "Påföljdsbestämningens struktur," (*Svensk Juristtidning (SvJT)* 1992b: 257–75), 258.

[755] See prop.1987/88:120, 1.

[756] The stated circumstances are not an exhaustive list; see prop. 1987/88:120, 42, 47.

which is one of the basic principles on which the Swedish state is based.[757] As mentioned earlier, the idea of these reforms was to increase predictability and consistency.[758] Both were thought to have been strengthened further by case law, based on the fact that the courts have the duty to state the circumstances which have been decisive for the penal consequence handed down.[759] How to find the "right" and proportionate legal consequence is not described in minute detail in chapters 29 and 30 BrB. The underlying structures a court applies differ considerably from the legislative structure.[760] However, this is comprehensible given that it is not the duty of the legislature to provide the courts with a field manual. Nevertheless, a Swedish judgment – especially when delivered by the HD – often contains a detailed explanation of the sentencing decision, some of which offers detailed, step-by-step explanations of why the decision was reached.[761]

Chapter 30 §4 BrB contains the general rule for choosing between imprisonment and a fine. Section 1 emphasizes that specific weight has to be placed on circumstances which could avoid a prison sentence. Section 2 then mentions the three specific reasons for imprisonment, the first of which is the severity of the offence. The key Swedish term "straffvärde", mentioned above, emerges from chapter 29 §1 BrB.[762] Consequently, when finding the legal consequence for a young offender or an adult offender, the first step for a Swedish court is to determine the severity of the offence. The offence has to be put in relation to similar offences.[763] This illustrates that the expression "severity of the offence" is a relative term and the expression of an evaluation.[764] The

[757] The principle of legality can be found in the so-called "Regeringsformen" (1974:152), chapter 1 §1 3rd break and stipulates that the all public power is bound by the law.

[758] See prop. 1987/88:120, 39, 43.

[759] Ibid., 40.

[760] See Jareborg (1992b), 258 and also Jareborg and Zila (2014), 100.

[761] See as examples NJA 2015, 1024 or NJA 2000, 314.

[762] The term "straffvärde" entered the criminal–political debate through Brå Report 1977:7 and was introduced based on SOU 1986:14, 21, 406 and prop.1987/88:120, 37, and was considered as well adapted to the newly established preference for proportionality and consistency. Apart from the severity of the offence, the other two examples which might trigger imprisonment are the "art" character of the offence or recidivism risk. These will be explained later.

[763] See SOU 1986:14, 131; see Jareborg (1992), 154; see also Träskman (2003a), 174.

[764] See prop. 1987/88:120, 36. The severity of the offence can be divided into an abstract and a concrete part. For the terms "abstract" and "concrete" severity of the offence, see SOU 1986:14,

severity of the offence builds on the principle of proportionality and the principle of equality.[765] In a nutshell, the principle of equality says that offences of equal severity should lead to equal punishment. By giving precedence to this principle, the Swedish system has tried to free itself from reliance on the individual evaluation of a certain offence by an individual judge. The individual's estimation of the severity of the offence should be insignificant. Another aspect of the aim of achieving equality has been to place a stronger emphasis on earlier legal practice. The courts should try to adapt their findings more to established legal practice. This should not lead to a static system with no room for variation, but changes of legal practice should only be initiated by the HD.[766] This means that the court has to have access to earlier legal practice.[767]

The severity of the offence is determined on two levels. First, the court focuses on the crime itself. It thereby determines the law applicable to the offence, stating a certain sanction and the circumstances of the crime – for example, the harm suffered by the victim or the danger constituted by the offence.[768] As stated before, this evaluation leads to the abstract severity of the offence. Then, turning to the personal level, the court has to weigh up the individual and personal circumstances affecting the offence itself that could warrant either a

131. The abstract severity of the offence can be found in the law applicable for a certain offence. The concrete severity of the offence has to be assessed by taking the circumstances of the individual case into account. The latter is carried out by the legal authorities. From here on, when referring to "severity of the offence", I mean the concrete severity of the offence.

765 See Jareborg and Zila (2014), 67 and Träskman (2007), 226.

766 See Stenborre (2005), 15.

767 Probably the most frequently applied source of such information for a judge is the book by Borgeke, Månsson and Sterzel, (2013), which has become a widely accepted source (see Träskman (2007), 228). See further section 4.3.2.2.

768 Chapter 29 §1 second break BrB gives some examples of circumstances which the court has to weigh up. This list is not exhaustive and is further defined in chapter 29 §2 and §3 BrB in regard to the aggravating and mitigating circumstances tied to the offence. Note in regard to young offenders especially chapter 29 §3 BrB, which also allows for a mitigation because of lack of development, experience, or capacity for reasonable judgement. However, this is not to be applied generally to young offenders (this contrasts with chapter 29 §7 BrB, which I engage with further later) but rather in cases in which the young perpetrator demonstrates such deficiencies in comparison to a comparable person of the same age; see prop.2009/10:147, 45 and HD B 5566-11 from 2012-01-31. See also the discussion in Borgeke, Månsson, and Sterzel (2013), 138–9. Other relevant factors can be found in chapter 23 §5 BrB.

more lenient or a more severe punishment – the specific severity of the offence.[769] During this assessment, which has to respect the principles of proportionality and equivalence,[770] the court also applies the so-called "juvenile reduction" according to chapter 29 §7 BrB.[771] Borgeke describes this evaluation of the severity of the offence as a platform from which the court can then approach the question of the concrete legal consequence itself.[772] In other words, the severity of the offence is the assessment of the danger and harmfulness of an offence and the guilt of the offender expressed in the offence itself.[773] Swedish law does not stipulate a clear threshold of severity of the offence above which the legal consequence shifts from fines to a prison sentence, but the preparatory works indicate a prison sentence of 12 months as a guideline for when the legal consequence cannot remain at the level of fines and the presumption against a prison sentence is nullified.[774] Legal practitioners have absorbed this guideline and have turned it into a hard-and-fast rule.[775] This leads to the somehow critical effect that only if the severity of a crime is less than 12 months can the

[769] See SOU 1986:14, 131 or Jack Ågren, *Billighetsskälen i BrB 29:5 – Berättigande och betydelse vid påföljdsbestämning* (Stockholm: Jure Förlag AB, 2013), 307ff. For further and more detailed discussion, see Dag Victor, "'Straffmätningsvärde' och påföljdsval," (*Svensk Juristtidning (SvJT)* 2015: 173–98), which also shows that it is far from clear how to determine a sentence within this system. However, Petter Asp, "Enighet om tumregeln," (*Svensk Juristtidning (SvJT)* 2015: 292–6) illustrates in his counterplea that the different opinions are not as controversial as it might seem (292ff.).

[770] See SOU 1986:14, 15.

[771] The decisive age is the age at the time the offence was committed. Furthermore, the court will consider possible reasons mitigating or aggravating the severity of the offence according to the reasons stated in chapter 29 §5 BrB. Note further that chapter 29 §7 BrB is not only applicable to the traditional criminal punishments, which are imprisonment and fines, but also to all the other specific juvenile legal consequences; see Borgeke, Månsson, and Sterzel (2013), 130. Regarding fines, the guidelines of the Attorney General only allow a juvenile reduction for offenders up to the age of 18. However, this view was rejected by the HD; see NJA 2005, 878 and NJA 2000, 421.

[772] See Borgeke, (2012), 39ff. Note, though, that this statement is not uncontroversial; see Victor (2015).

[773] See Jareborg and Zila, (2014), 110.

[774] See prop. 1987/88:120, 100 and NJA 1994, 153. This might also be seen as a presumption in favour of imprisonment if the severity of the offence exceeds 12 months; in this line of thought, see Jareborg (1992b), 257 and Victor (2015), 195.

[775] See Jareborg and Zila (2014), 142. For an example of the application of these guidelines, even in the HD, see NJA 2015, 1024.

court give a conditional sentence. It has to be acknowledged, however, that the HD has emphasized that the presumption for prison for sentences longer than 12 months is not automatically applicable in cases of young offenders; here, the court has first to apply chapter 29 §7 BrB, which might nullify the presumption.[776]

If the severity of the offence is below 12 months and so does not demand imprisonment, then in the next step the court examines whether the character of the offence (so-called "art" crimes) or the recidivism risk demands a prison sentence. The term "art" crime is unique to Sweden and somewhat problematic since it is not further defined by the legislature. It means that certain types of crime should always lead to a prison sentence. Considerations of general deterrence underlie the decision to make the type of crime a criterion for the sentence, which contravenes the principle of proportionality.[777] Though the preparatory works give some guidelines and examples,[778] it is up to the courts to determine the term, which means them stepping into the legislature's shoes.[779] This leads to problems with legal certainty and the predictability of law. Courts may respond to the fact that certain crimes are the current focus of society and declare them to be "art" crimes, thereby enabling them to hand down more serious sentences than the law provided for in the first place.[780] This makes the law emotional rather than rational[781] and has also been criticized by, for

[776] See NJA 2000, 314 (which deviates from earlier decisions in NJA 1991, 444 and NJA 1994, 153), which emphasizes the underlying value, also expressed in chapter 30 §5 BrB, of keeping young offenders out of prison; see also B 3843-08 from 2009-03-25 and NJA 2008, 359, where chapter 29 §7 BrB has not nullified the presumption but the consideration of reasons based on chapter 29 §5 BrB has.

[777] See Andrew von Hirsch and Petter Asp, "Straffvärde," (*Svensk Juristtidning (SvJT)* 1999: 151–76), 155.

[778] Examples of "art" crimes are perjury, drink-driving, particular offences against the hunting law, illegal residence in Sweden, fiscal offences and unprovoked battery. See SOU 1986:14, 74 and prop. 1987/88:120, 101. According to NJA 1992,190, even the fact that a crime is hard to prevent or detect can mean that it has an "art" character.

[779] See prop.1987/88:120, 36–7.

[780] See NJA 1989, 870. According to the preparatory work, this is the aim of the legislature; see prop. 1987/88:120, 100.

[781] See Jareborg and Zila (2014), 141.

example, von Hirsch and Asp.[782] If the court considers it necessary to sentence someone to prison according to chapter 30 §4 BrB, it will turn to chapter 29 BrB to decide upon the specific length of the sentence or to find alternative legal consequences, for example supervision combined with community service, to avoid a minor imprisonment. At this point, it will again consider possible aggravating or mitigating circumstances according to chapter 29 §5 BrB, but on a more personal level that is not as tied to the offence as it is to the offender.[783] All these steps illustrate the interaction of these two chapters of the BrB.

This means that, in contrast to German law, when finding the proportionate legal consequence, Swedish law always begins from the same starting point for all offenders – juveniles, young adults, and adults. The age of the offender plays no decisive role at first. Put simply, the court establishes the legal consequence for a certain offence irrespective of whether or not the offender is an adult. The procedural rules for adults are in principle applicable analogously.[784] The major difference is that, if the offender is younger than 21, the court will grant a certain, more or less fixed,[785] discount according to chapter 29 §7 BrB[786] and then "translate" the adult legal consequence into a specific juvenile legal consequence, since Swedish law offers legal consequences only applicable to young offenders, as mentioned above. However, SOU 2012:34 reflects Sweden's turn towards the neoclassical proportionality/punishment approach[787] in that it stipulates that all legal consequences for young offenders should be measured on the basis of the general severity of the offence.[788] Nevertheless, SOU 2012:34 seems to recognize the problems of such an approach and states that the legal consequence has to be appropriate for the individual as well.

---

[782] See von Hirsch and Asp (1999), 155–6. However, I do not engage further with the large academic discussion concerning the construction of "art" crimes in Swedish criminal law, which would lead me too far from the aims of this dissertation.

[783] See Ågren (2013), 326ff.

[784] See Nordlöf (2012), 391.

[785] See further section 4.3.2.3.

[786] Note again what was said earlier in footnote 768 in relation to chapter 29 §3 BrB. In other words, the so-called "juvenile discount" under chapter 29 §7 BrB is applied independently of the individual maturity of the young offender; see Borgeke, Månsson, and Sterzel (2013), 130.

[787] See Holmberg (2013), 330.

[788] See SOU 2012:34, 370: "Det är sålunda det bötesstraff eller det fängelsestraff som hade dömts ut om den påföljden hade valts (det s.k. straffmätningsvärdet) som bör ligga till grund för valet av ungdomspåföljd".

Apart from sentencing, it should be mentioned that the approach to the severity of an offence in relation to a dismissal by the public prosecutor – which can be, as I said earlier, compared to a sentencing decision – is different. The prosecutor's guidelines emphasize, in contrast to the approach just described, that the maturity of young offenders between the ages of 15 and 17 can vary considerably.[789] These guidelines therefore recommend not making a sharp distinction solely based on age, which is in direct opposition to the approach applied in court.

4.3.2.2. The importance of preparatory works

One of the main sources for the interpretation of the law in Sweden is the preparatory works provided by the legislature.[790] They explain a particular new provision in a rather detailed way, both in terms of the aims legislators had in mind and in terms of the definitions of terms used. Preparatory works describe the whole development of new legislation or legislative changes, including the discussions around it, from different angles. The extensive use of preparatory works constitutes a major difference from the German system, which is sometimes – as mentioned in section 1.5.2.1. – accused of featuring a system of "Begriffsjurisprudenz" and which has a strict division between legislative and judicial powers. As mentioned before, for the interpretation of the law, the German legal practitioner mostly makes use of legal commentaries, which consist of references to case law by the supreme courts or sometimes scholarly work; a reference only seldom contains an indication of the preparatory works, despite the fact that they are considered a legitimate tool for interpretation, even in Germany. However, an extensive use of preparatory works in Germany might be considered an intrusion into the judiciary's powers, which are meant to be kept apart due to the separation of powers. This may again have historical roots, which have meant less trust being placed in the state and so a stronger need for control, which has been implemented in different ways.[791] In Swedish history, there has never been the kind of grave misuse of power as can be found in German history. The decisive importance of preparatory works may also be an expression of the democratic tenor of Swedish lawyers and thereby a possible expression of politics taking precedence over the law[792] since it guarantees the

[789] See RåR 2006:3, 5.

[790] See Kischel (2015), 601–4.

[791] The BVerfG in Karlsruhe might be considered the ultimate controlling instance.

[792] See Nygren (1998), 108.

influence of democratically elected legislators not only on the legal text but also on its application.[793]

4.3.2.3. Flirting with sentencing guidelines[794]

The Swedish sentencing approach described above lays the foundation for a system of guidelines that are provided by legal practitioners through "practice meetings"[795] and through academic work. Based on court practice, Jareborg and Zila have introduced a system of guidelines for reducing sentences for young offenders, which stipulate that someone of 15 years of age should have their sentenced reduced by 75 to 85 per cent compared to the adult sentence, while an 18 year old should receive a sentence reduced by 45 to 55 per cent.[796] The prominent books "Studier rörande påföljdspraxis med mera", by Sterzel, Månsson, and Borgeke, and Borgeke's "Att bestämma påföljd för brott" go a step further, introducing tables that set out how to reduce the legal consequence according to the age of the young offender and offering a stable basis for sentencing a young offender based on earlier court practice. Note here, though, that the HD does not support such a system of guidelines;[797] however, even the HD applied these guidelines in NJA 2002, 489.

As reflected in the court practice on which these guidelines are based, the Swedish age-based system of gradations in terms of young offenders assumes that the opportunities for development are in all respects related to age.[798] Consequently, the Swedish system assigns a greater legal responsibility to a 17-year-old than to a 15-year-old.[799] The scale, now to be found in a very handy toolkit (namely the books mentioned above), became widely used in Swedish courts in the sentencing of young offenders.[800] These can therefore, I think, be

---

[793] See Kischel (2015), 602.

[794] See also section 3.6.4.

[795] See further discussion in section 4.3.2.5.

[796] See Jareborg and Zila (2014), 155.

[797] See NJA 2000, 421.

[798] See chapter 2.

[799] Critical voices point out that such a scale reflects moral expectations, not actual patterns of development among individuals; see von Hirsch and Ashworth (2005), 39.

[800] See NJA 2000, 421; NJA 2002, 489; NJA 2011, 466; NJA 2015, 1024; and in relation to fines NJA 2012, 16. In the preface to the third edition 2009, Borgeke gives the example of a young judge who feels uncertain about what the right legal consequence is. Such a judge will now no

compared to sentencing guidelines as they exist in certain common law countries. Träskman confirms that the "Studier rörande påföljdspraxis" book is probably the most frequently applied source of information for a judge and has achieved a respected status.[801] He acknowledges the advantages of this but points out the weaknesses as well: the book is based on a private initiative; it does not have the character of official policy and can therefore not claim to be an official handbook. Furthermore, it is (for understandable reasons) not updated on a yearly basis and can therefore not provide a picture of the latest developments in legal practice.

One might compare these guidelines to the preparatory works, which explain a particular law and sometimes even define certain terms. However, there is a major difference between preparatory works and these guidelines in terms of sentencing: preparatory works are explicitly provided by the legislature, and so have democratic legitimacy, and they are not as concrete as the "sentencing guidelines" (if one might call them that) provided by practice meetings and by the books by Borgeke and by Sterzel, Månsson, and Borgeke.

4.3.2.4. Attorney General guidelines

Furthermore, we should mention the guidelines issued by the Swedish Attorney General, which serve as a kind of instruction manual for sentencing. The clearly stated aim of these guidelines is to achieve a homogeneous application of the law.[802] There are a great variety of these guidelines, which consist of instructions for how to deal with certain situations.[803] They are directed at the public prosecutors and therefore do not contain explicit references to sentencing as such. However, the importance and influence of them is reflected in the fact that they are not only cited in the judgments of the HD, but even applied by the courts – for example, when it comes to administrative fines.[804] Consequently,

---

longer have to ask an older colleague but can look the question up in Borgeke, Månsson, and Sterzel's book (7).

[801] See Träskman (2007), 228.

[802] The prosecutor guidelines (my translation of "Riksåklagarens riktlinjer RåR") are set out by the Swedish Attorney General as the national chief prosecutor. The purpose of the guidelines is to achieve a uniform application of the law and to contribute to the development of legal practice – in other words, to how laws are applied in practice.

[803] Note further that, in combination with an analysis of court practice in relation to penalty orders, in April 2013 a "rättspromemoria" was issued, gathering the "usual" outcome in fines in average cases concerning certain offences; see Sterzel, Månsson, and Borgeke (2013), 1235ff.

[804] See NJA 2014, 658.

their significance goes further than the administrative directives of the Attorneys General in Germany. In terms of young offenders, there are the "Prosecutors' guidelines for dealing with young offenders".[805] The explicit, overarching aim is, again, to achieve a homogeneous application of the law in terms of LUL.[806] These guidelines contain, for example, rules explaining how and when to grant a dismissal according to §17 LUL which can be compared to a sentencing decision by a court. The rules in relation to a dismissal based on juvenile thoughtlessness[807] offer an indication of how the severity of a certain offence should affect sentencing.

4.3.2.5. Practical ways to unity in Sweden: Practice meetings

Swedish judges do not hesitate to share their thoughts in seeking to find a common path to a homogeneous application of the law. This becomes evident in the fact that Sweden has so-called "practice meetings",[808] official exchanges between judges to discuss legal issues that also involve discussions about how to find the "right" legal consequence. The book by Sterzel, Månsson, and Borgeke[809] mentioned above is to a large extent based on the findings of these meetings. They are conducted by the HD but can also take place on a smaller scale in regional courts. These discussions are intended to help individual judges in their professional roles by establishing guidelines. The guidelines should not be understood as binding rules; the judge remains independent under all circumstances. This approach is in line with the proposals of the eighth Criminological Colloquium in 1987 on disparities in sentencing, which concluded that the co-operation of judges is essential. This in turn presupposes intensive training for judges, including giving them information about the disparities in sentencing in a given jurisdiction and findings about the causes of these disparities.[810]

---

[805] My translation of "Riksåklagarens riktlinjer för handläggning av ungdomsärenden". See RåR 2006:3.

[806] RåR 2006:3, 1.

[807] See RåR 2006:3, 9–11.

[808] My translation of "Praxismöte".

[809] See section 4.3.2.2.

[810] See "Conclusions and recommendations of the Colloquium," in *Collected Studies in Criminological Research* (1989), 153.

4.3.3. Analysis from a welfare/justice perspective

A considerable difference between the two systems under investigation lies in their approaches to sentencing. This starts with the fact that Swedish legislation provides a fairly detailed set of sentencing rules. Even if a German court may come to the same conclusions, these are not regulated in the German StPO but rather left to the court's discretion. This gap is only filled with very rudimentary guidelines in the form of soft law. Besides the legal commentaries, there are also common understandings regarding minor offences between the juvenile judges, the juvenile public prosecutors, and the advisory directives of the Attorneys General. Sweden, on the other hand, has established a highly structured system of sentencing principles and features fairly precise sentencing rules in chapter 29 and chapter 30 BrB. These rules serve the aims of equality, proportionality, and transparency – expressions of justice considerations. Apart from that and the guidelines provided by the legislature through preparatory works, soft law sources include the books by Borgeke and by Sterzel, Månsson, and Borgeke, the judges' practice meetings, and the guidelines from the Attorney General.

Furthermore, a major difference between the Swedish and the German juvenile criminal justice systems is the fact that the Swedish sentencing system for young offenders always proceeds from the legal consequence which would be applicable for an adult offender and then mitigates the sentence according to the offender's age. SOU 2012:34 reflects Sweden's neoclassical turn[811] insofar as it stipulates that all legal consequences for young offenders should be measured on the basis of the general severity of the offence[812] (a justice consideration). It is claimed in the preparatory works that the influence of proportionality has increased noticeably in relation to specific juvenile legal consequences and that more focus has been placed on the seriousness of the offence.[813] Nevertheless, SOU 2012:34 seems to recognize the problems of such an approach in regard to young offenders and states that the legal consequence has to be appropriate for the individual as well (a welfare consideration). This latter concern expresses the balance to be struck between welfare and justice considerations and thus reflects the welfare/justice clash. The "juvenile discount" granted in relation to the

[811] See Holmberg (2013), 330.

[812] See SOU 2012:34, 370: "Det är sålunda det bötesstraff eller det fängelsestraff som hade dömts ut om den påföljden hade valts (det s.k. straffmätningsvärdet) som bör ligga till grund för valet av ungdomspåföljd".

[813] See prop.2015/16:151, 31, 67.

severity of the offence and the translation of the adult legal consequence into a specific juvenile legal consequence are based on the acknowledgement of the greater vulnerability of young offenders and thereby express the importance of welfare considerations. During the transitional phase of becoming an adult in the criminal legal sense between 18 and 20, welfare considerations retreat more and more into the background to let justice considerations prevail. Here we again find a balancing act by the legislature between welfare and justice considerations in relation to the age of the offender – another expression of the welfare/justice clash.

In the German juvenile criminal justice system, on the other hand, the hypothetical sentence for an adult offender plays no role whatsoever in relation to young offenders. Not even the statutory framework of the StGB, as providing upper and lower limits, applies to young perpetrators. The juvenile legal consequences are completely independent of adult legal consequences. This is true even for young adults if they are sentenced as juveniles. The German juvenile criminal justice system is in general attentive to traditional justice considerations regarding the question of guilt;[814] however, once "guilt" is established, the whole system deviates considerably from the rule of law in favour of the principle of education as an expression of welfare considerations. Abandoning principles like transparency, predictability, and (to a certain extent) even proportionality in the name of education, the German sentencing system for young offenders takes on a life of its own. This is reflected, for example, in the immense amount of discretion granted to the juvenile court and the almost complete absence of guidance of any form. That the German juvenile court enjoys this broad leeway but is still restricted by the principle of proportionality expresses the welfare/justice clash on the level of sentencing. The fact that young offenders are not sentenced for different offences separately but receive a so-called "Einheitsstrafe" reflects once more the educative guiding principle and so the priority of welfare considerations and the focus on the offender rather than on the offence described in section 3.2.

It seems fair to say that the Swedish juvenile criminal justice system emphasizes justice considerations in relation to the question of guilt and when stressing the importance of the rule of law, especially proportionality and the homogeneous application of the law expressing equality, regarding the choice of the legal consequence. This is clear from the rather well-structured system of sentencing

[814] However, as will be seen later, the procedural framework allows for some deviations and is even "bent" by the practitioners; see chapter 5 and section 7.3.

rules and the different forms of guidance that are available to the court. However, the clear structure determining how to make a sentencing decision becomes more blurry when it comes to the specific juvenile legal consequences. This is particularly the case in relation to juvenile care, which can be imposed for basically any kind of criminal conduct, the severity of the offence indicating the proportionality-threshold rather than a clear landmark. With these kinds of legal consequences, the court has to engage in balancing welfare and justice considerations while being heavily influenced by reports from social services. Here, we find a clear expression of the welfare/justice clash. Furthermore, the enforcement of the verdict – especially with regard to specific juvenile legal consequences like community service for juveniles, juvenile care, and closed institutional treatment – is guided by welfare considerations, which in itself has an impact on the choice of the legal consequence. This complex interaction and balancing exemplifies the welfare/justice clash.

4.4. Summarizing conclusion

Overall, the Swedish and the German juvenile criminal justice systems seem to pursue similar approaches regarding legal consequences for young offenders. Educational and corrective measures in Germany more or less amount to fines, community service for juveniles, and juvenile care in Sweden. The German conditional sentence and the Swedish conditional sentence and supervision also mirror each other. When looking closer into the Swedish juvenile justice system, what we find is that the guiding principles of proportionality, predictability, and equality (justice considerations), instead of education and treatment (welfare considerations), are not as clearly reflected in the system of legal consequences for young offenders as the preparatory works might suggest. The neoclassical turn in the Swedish juvenile criminal legal system is supposed to be a turn away from individualized solutions in favour of equality and predictability. However, the study of the structure of the legal consequences available for young offenders reveals that there is still a lot of room for individualized solutions. The legal consequence of "juvenile care", in particular, is broad and can take many different forms, which brings it closer to the tailored solutions used in the German juvenile criminal justice system for all sorts of different perpetrators and offences. Here we see evidence of the earlier Swedish welfare approach, which still remains and did not disappear with the turn towards neoclassicism. The influence of welfare considerations becomes especially obvious in the choice of

the legal consequence. It is the young offender's need for care that is the decisive factor in whether the young perpetrator is to be sentenced to juvenile care or (if there is no need for care) sentenced to community service for juveniles instead. This trace of an enduring welfare approach is also felt in the enforcement of the legal consequence, which is conducted by social services if it consists of juvenile care, closed institutional treatment, or community service for juveniles. As mentioned in section 3.5, the structure of the Swedish juvenile criminal justice system has one foot in the adult criminal justice system and one in child welfare, two systems based on fundamentally different principles.[815] This demonstrates the welfare/justice clash.

A difference between the two systems lies in the fact that Germany still features juvenile prisons. Sweden, in contrast, abolished juvenile prisons and replaced them with closed institutional treatment under the supervision of social services. However, research shows that the difference between the closed institutional treatment and juvenile prison in Sweden is insignificant.[816] Young offenders often do not understand the difference. What matters to them is that they are being held in a closed institution. Educational treatment is also provided in German juvenile prisons. Consequently, the difference is not as substantial as it might seem. All these options respect the greater vulnerability of young offenders deprived of their freedom (a welfare consideration) and provide "treatment" rather than "punishment". Here, the welfare/justice clash is visible in the balancing of an actual punishment in the form of incarceration and the aim of designing this incarceration appropriately from a treatment perspective.

Legal consequences for young offenders in Germany are held completely separate from legal consequences for adult offenders. This fact can be interpreted as an outcome of welfare considerations in this realm of justice. In Sweden, by contrast, legal consequences especially created for juveniles are an additional alternative, complementing the adult legal consequences which might also be applied to young offenders (even if juvenile legal consequences should be the first choice). The existence of specific legal consequences can be understood as an outcome of welfare considerations but their placement in the structure of adult criminal legal consequences reflects their character as a criminal punishment (a justice consideration). Therefore, the assigned place of the legal consequences for young offenders in either country can also be interpreted as an

[815] See Lappi-Seppälä (2011), 199 and Lappi-Seppälä and Storgaard (2014), 334.

[816] See Tove Pettersson, *Återfall i brott bland ungdomar dömda till fängelse respektive sluten ungdomsvård* (Statens institutionsstyrelse. Report 2/10. Stockholm: Edita, 2009).

outcome of the balancing of welfare and justice considerations and therefore as an expression of the welfare/justice clash.

In Sweden, the options for dismissing a case are more restricted and fewer cases are dismissed by the juvenile public prosecutor as compared with Germany. However, the numbers might not be as significant as we might suppose at first. The reason is that in Sweden even the police are allowed to "dismiss" cases (rapporteftergift). Consequently, many minor cases, which in Germany end up on the juvenile public prosecutor's desk, will have already left the system by this stage. This means that, in general, both countries feature a system of selecting and dismissing/diverting minor offences before entering the juvenile trial. But it has to be noted that Swedish law does not provide for the possibility of the juvenile court diverting a case once it has entered the courtroom. Still, the overall framework means that the rules specifically introduced for dismissing/diverting a case when the offender is a young person reflect the welfare/justice clash in both investigated systems by broadening the possibilities for a dismissal because of the acknowledgement of the stigmatizing effect of a trial (welfare considerations), though still within a framework governed by justice considerations. Even if there are certain differences in the way the rules are constructed and applied, the mere fact that the rules for a dismissal are considerably broadened in both countries shows the strong influence of welfare considerations in this realm of justice. The need to balance the possible harm a trial might cause a vulnerable young offender with the principle of proportionality and the control and safeguards a trial can offer[817] reflects the welfare/justice clash.

A main difference between the Swedish and the German juvenile criminal justice systems is found in their approaches to the sentencing of young offenders. Sweden has established a highly structured system of sentencing principles and features fairly precise sentencing rules, which always proceed from the severity of the offence, irrespective of whether the offender is a juvenile, young adult, or adult offender, before granting a "discount" and sometimes translating the adult legal consequence into a juvenile legal consequence. In doing this, the Swedish courts have access to a rather broad range of tools in the form of soft law. This structure and the tools available serve the aims of equality, proportionality, and transparency, and so express justice considerations. Germany, on the other hand, has almost no rules to guide the sentencing decision, which grants the court a broad discretion that is even greater in

[817] See for further elaborations chapter 5.

relation to young offenders. The access to soft law material seems negligible. Justice considerations like equality and transparency have to take a back seat in favour of welfare considerations in order to enable the juvenile court to tailor the legal consequence to the young offender. Of course, it can be argued that preserving the independence of the judiciary by granting them such discretion is a justice consideration in the wider sense: it protects the criminal justice system from political influence. Yet this discretion is not specific to the juvenile criminal justice system but applies to the approach to sentencing generally in Germany. What makes the German juvenile sentencing system stand out is the even broader discretion enjoyed by the juvenile court, with no guidelines from the legislature apart from the principle of proportionality. This broader discretion is owed to the priority given to welfare considerations, namely the aim of accommodating the individual needs of the young offender.

In sum, a closer look at the legal consequences for young offenders, rules for dismissal/divertive measures, and sentencing reveals that – irrespective their diverging guiding principles – both juvenile criminal justice systems are heavily influenced by welfare considerations and reflect the welfare/justice clash. The turn towards neoclassicism in Sweden has not changed that. On the other hand, the German juvenile criminal justice system is not a pure welfare system either but is also influenced and shaped by justice considerations. Both systems perform a balancing act in seeking to satisfy both ends: welfare and justice.

Chapter 5

Procedural specifics and protective safeguards

The special features characterizing adolescence described in chapter 2, which underlie the welfare/justice clash, lead to an alternative system of legal responses for young offenders. But this is not all. Because of their limited maturity, it has been claimed that young perpetrators are more likely to make statements, more likely to confess, and that they have less knowledge about their rights.[818] Therefore, it is easier to convict them and to impose legal responses on them. This leads to the necessity to strengthen procedural safeguards regarding young offenders.

In this chapter, I analyse the specific procedural rules and protective safeguards enshrined in the Swedish and the German juvenile criminal justice systems. As in the previous chapter, I divide the sections into an initial descriptive part, which is then followed by an analysis from a welfare/justice perspective.

5.1. Procedural rules in general

Juvenile criminal law is "real" criminal law. Consequently, in both countries the juvenile trial is carried out within the strict framework of the criminal procedural rules. General procedural rules and principles apply, as long as there are no specific rules for young offenders as lex specialis. However, as will be seen below, several of these specific procedural rules deviate significantly from the general rules. In Germany, this has to do with the educative guiding principle, and also in Sweden it is due to certain welfare considerations influencing the legal realm.

[818] See Albrecht (2000), 286.

The procedural rules applicable to young offenders in Germany are gathered together in the JGG. As mentioned in section 3.1., the JGG created no "new juvenile criminal law". In all proceedings against young offenders, the regulations of the general criminal law, both substantive and procedural, are applicable unless modified by the JGG. This means that the application of the JGG is restricted to crimes defined by the general criminal law[819] and that the JGG is – according to §2 II JGG – lex specialis.[820]

In Sweden, the most comprehensive bill relating to young offenders is the LUL. It provides rules for police officers, public prosecutors, and courts for how to deal with young perpetrators under the age of 21. The LUL is lex specialis.[821] If it does not provide for a rule, the general laws of the Rättegångsbalk (1942:740) (RB)[822] are applicable.

German criminal courts operate according to the principle of official investigation – which is described as an inquisitorial principle[823] and is to be found in §244 II StPO[824] – which stipulates inter alia that the German courts have a basic duty to investigate the facts of a case by themselves to ensure that the judgment is substantively correct.[825] This means that the parties propose different kinds of evidence, but it is up to the court to decide what evidence is relevant and therefore to be considered in court.[826] However, the parties can file a formal request to consider specific evidence. The court can only decline the

[819] See Eisenberg (2016), Introduction, margin no. 16 and §1 margin no. 23; see also §4 JGG.

[820] See Eisenberg (2016), §2 margin no. 17–18.

[821] See prop.1987/88:135, 17–18 regarding §17 LUL.

[822] The Swedish Code of Procedure – my translation.

[823] See Werner Beulke, *Strafprozessrecht* (13th Edition. Heidelberg: C.F. Müller Verlag, 2016), §2 margin no.21. Note that when I speak of an inquisitorial approach, system, etc., I mean this principle of official investigation in its various expressions, even if an "inquisitorial approach" in the narrow sense means that the investigative organs and the judge are unified in one person, which is not the case in the Swedish system or the German system. See also section 6.3.1. and Per-Olof Ekelöf et al., *Rättegång första häftet* (9th Edition. Stockholm: Norstedts Juridik AB, 2016), 71.

[824] And also in §155 II and §60 II StPO.

[825] This duty implies the investigation of the sufficient maturity and capability of insight of young offenders according to §3 JGG, as described in section 4.1.1. See MüKoStPO/Trüg/Habetha, 1st Edition 2016, StPO §244 margin no.90.

[826] For example, the judge only calls the witnesses he or she considers crucial for determining the facts.

request on the basis of reasons stipulated in §244 III–V StPO. If the parties have missed something, the court has the duty to step in and can demand further investigation by the public prosecutor or even order investigative measures. Consequently, Germany features an inquisitorial system, which aims at the clarification of the facts and places the responsibility on the court. This also becomes evident in the structure of the proceedings. The court conducts the main questioning, and only afterwards do the public prosecutor and the defence counsel contribute additional questions if something remains unclear. In the German justice system, the principle of official investigation is the major difference between criminal and civil proceedings. Civil proceedings apply an adversarial system:[827] the court considers only the evidence presented by the parties and decides accordingly, thereby arriving at "formal" rather than "material" truth.[828] The principle of official investigation is closely connected to the fact that in criminal proceedings the state imposes a punishment. This principle helps to justify the potentially serious interferences with individual freedom that may result from criminal trials.

The Swedish system is not governed by the principle of official investigation to the same extent, though it still affects some of the Swedish procedural rules, especially those that regulate criminal trials.[829] Instead of an inquisitorial system, the Swedish model places criminal and civil proceedings closer together, with criminal proceedings also featuring an adversarial system.[830] In short, this means that, according to the "principle of disposition",[831] it is up to the parties to choose and present the evidence, which thereby creates the framework for the

[827] See Beulke (2016), §2 margin no.21.

[828] Ibid., §2 margin no.21.

[829] See SOU 2013:17, 214 and Ekelöf et al. (2016), *Rättegång I*, 71–2.

[830] See Josef Zila, "The Prosecution Service Function within the Swedish Criminal Justice System," in *Coping with Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe*, 285–311 (Berlin: Springer, 2006), 287. The wording (in Swedish "kontradiktorisk" and "inkvisitorisk") goes back to Latin roots: contra dicere = contradicting and inquirere = investigate. For the differences between the two approaches, see further for example Ekelöf et al. (2016) and *Rättegång I*, 70–1, 75, who point out that the criminal process in Sweden is also described as "ackusatorisk", from the Latin "accusator", which means public prosecutor. I decided to translate the word for the Swedish approach as "adversarial".

[831] To be found in chapter 17 §3 and chapter 30 §3 RB. For a more detailed discussion of the principle of disposition, see Larsson, "Dispositionsprincipen och dispositiva regler," (*Svensk Juristtidning (SvJT)* 1980, 577–605), 577–88 and Ekelöf et al. (2016), *Rättegång I,* 61ff.

proceedings.[832] The court has no duty to ensure the completeness of the evidence.[833] The court merely evaluates the facts of the case on the basis of the presented evidence. Thus, the parties, instead of the court, dominate the trial.[834] This is also clear from the structure of the hearing: in contrast to the German approach, the public prosecutor is mainly responsible for questioning. Note here that the Swedish system features a single procedural code for both criminal and civil proceedings,[835] which is only possible because an adversarial approach is pursued in both types of proceedings. Yet the principle of disposition is a little more restricted in the criminal trial. For example, the court is not bound by a defendant's confession,[836] and the legal consequence is determined ex officio.[837] Furthermore, humanitarian concerns regarding wrongful convictions have been met by placing the burden of proof concerning all directly relevant circumstances on the public prosecutor,[838] who is also obliged to observe the principle of objectivity.[839] Furthermore, chapter 35 §6 RB stipulates that the court may collect its own evidence; but the expression "may" does not imply any duty to collect evidence.[840] A recent proposal – SOU 2013:17 – concerning procedural aspects of the criminal trial suggests even more far-reaching limits concerning the court's substantive process management; this proposal entails

[832] See SOU 2013:17, 213.

[833] Sweden has moved away from the inquisitorial model that its legal system previously featured; see NJA II 1943, 450. See also Ekelöf et al. (2016), *Rättegång I*, 76–7, which stipulates that the court has no general duty to indicate if the defendant or the public prosecutor has missed an important legal rule or precedent. However, it might be considered suitable for the court to inform the parties if it plans to support the judgment with such a rule/precedent.

[834] See Peter Westberg, *Domstols officialprövning* (Lund: Juristförlaget i Lund, 1988), 29, although this is rather in relation to civil proceedings; also Larsson (1980), 579.

[835] The aforementioned "Rättegångsbalk (1942:740)" (RB).

[836] See "Thomas Quick case" Ö 3147-09 and Ekelöf et al. (2016), *Rättegång I*, 70. Note also that Ekelöf et al. (2016), *Rättegång I*, 71–2, point out that criminal proceedings are steered ex officio to a greater degree in relation to the defendant's procedural position.

[837] See Ekelöf et al. (2016), *Rättegång I,* 70.

[838] See Ekelöf et al. (2016), *Rättegång I*, 78, Per Olof Ekelöf, Henrik Edelstam, and Lars Heumann, *Rättegång fjärde häftet* (7th Edition. Stockholm: Norstedts Juridik AB, 2009), 113.

[839] See Ekelöf et al. (2016), *Rättegång I*, 73.

[840] In practice, the judges seldom use this option (see SOU 2013:17, 213, 219).

that weaknesses in the evidence should be at the expense of the prosecution and lead to a dismissal.[841]

Analysis from a welfare/justice perspective

The procedural approaches employed by the Swedish and the German (juvenile) criminal justice systems differ. Sweden follows an adversarial approach featuring the principle of disposition, which gives a prominent role to the parties (the defendant with his or her defence counsel on one side, the public prosecutor on the other), while Germany represents an inquisitorial system, which grants a more active role to the court due to the principle of official investigation. These two concepts represent a striking difference between the German and the Swedish juvenile criminal justice systems in regard to the procedural framework in the (juvenile) criminal trial.

Regarding the welfare/justice clash on this general procedural level, the underlying procedural concepts in both countries are steered by justice rather than by welfare considerations. The principle of official investigation, which is of central importance in the German juvenile criminal justice system, can be interpreted as an expression of a justice consideration: it is guided by the rule of law and its associated safeguards, which protect the defendant from wrongful conviction and so the unjustified interference from the state's sharpest tools. The Swedish procedural rules pursue an adversarial approach and do not reveal, on a general level, any evidence of welfare considerations either.

Instead, the impact of welfare considerations becomes evident in both countries' specific juvenile procedural rules, which are lex specialis for young offenders. The next sections investigate these procedural specifics, which deviate from the general rules.

[841] See SOU 2013:17, 220 and 223, which proposes for instance that the judge should not be allowed to act independently in regard to the collection of evidence in matters concerning guilt. Only the parties should be allowed to determine the question of guilt. Furthermore, SOU 2013:17 proposes that the suggestion of the legal consequence made by the public prosecutor should bind the court insofar as it should not be allowed to impose a more serious legal consequence (234–5, 243). Prop.2013/14:170, based on this SOU, did not adopt these changes (yet), however, and only dealt with complex criminal proceedings (stora brottmål) and proceedings cancelled due to the fact that the defendant did not show up.

5.2. Pre-trial detention

In general, in the Swedish and the German juvenile criminal justice systems the use of pre-trial detention should be limited.[842] The exhaustive list of reasons for issuing an arrest warrant in Germany in §112 III StPO – namely, the suspect is likely to flee, the suspect intends to destroy evidence or intimidate witnesses, the suspect is likely to continue with criminal conduct, or the suspect is strongly suspected of a serious crime – apply to a young offender only in a restricted form. According to §72 II JGG, authorities may only use the risk of fleeing as a justification for pre-trial detention if an offender younger than 16 years of age has made an attempt to escape or has no permanent place of residence. The practical procedure corresponds to the procedure applicable to adults. This means that young offenders may be interrogated only after they have been advised of their right to remain silent and to consult with an attorney of their choice.[843] All phases of interrogation are strictly regulated by statute[844] and techniques such as exhausting the suspect, hypnosis, and deception are forbidden. The police may warn and release young offenders or detain them; but if young offenders are detained, they must be brought before a judge without delay and no later than one day after being taken into custody.[845] The judge determines whether continued detention is warranted or if it can be avoided by other measures, such as bail or close outside supervision.[846] Additionally, if the offender is a juvenile, the legal guardian and social services have to be informed immediately and have a right to be present during the interrogation.[847] Another measure only applicable to young offenders, regulated in §72 JGG, is that pre-trial detention should be avoided by placing a young perpetrator in a closed home under the supervision of social services. Practically, this statute causes problems. A place in a closed home requires not only the capacity but also

[842] According to Art. 37 UNCRC, coercive measures against a young offender, such as detention, have to be a measure of last resort. This is further emphasized in the Beijing Rules and in the Havana Rules, the latter of which specifically concerns juveniles deprived of their liberty.

[843] See §136 I StPO.

[844] See §136a StPO.

[845] See §128 StPO.

[846] See §116 StPO and §72 JGG.

[847] See §67 JGG.

administrative organizational measures, which are sometimes difficult to put in place as quickly as needed.

The use of bail to avoid pre-trial detention is rare in the case of young offenders in Germany. The young perpetrator is usually not in an economically independent position, which means that his or her parents would post bail, thereby undermining the aim of bail. If detained, young offenders are to be placed in a special detention home for juveniles or in the juvenile wing of the detention prison.[848] Pre-trial detention must be organized in such a way as to favour education, with the consequence that a young offender placed in pre-trial detention is obliged to work. The length of pre-trial detention is strictly regulated.[849] According to §72 V JGG, proceedings against a young perpetrator who has been detained prior to trial must be carried out with "extraordinary speed". But theoretically it is possible for a juvenile to spend up to six months (or even more) in confinement awaiting trial. The final sentence is normally reduced by the time served before trial.[850]

In Sweden, the police must proceed with caution when considering taking a young offender into custody. Even if the law does not draw a specific line (as is the case with pre-trial detention, which always demands extraordinary grounds), in practice the demand for extraordinary grounds – a precondition I will come back to shortly – applies even when taking a young offender into custody.[851]

---

[848] The division of young offenders and adults in prison is also required by the UNCRC, article 37c: "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances". It is also reflected on a European level in Rec(2008)11, Part III; see https://wcd.coe.int/ViewDoc.jsp?id=1367113 (last visited 2017-01-20).

[849] According to §121 I StPO, pre-trial detention may exceed six months only if there are extraordinary grounds. Continued pre-trial detention is to be reviewed by the Higher Regional Court (Oberlandesgericht) according to §122 StPO.

[850] See §52a JGG.

[851] See RättsPM 2013:7, section 24. Note, though, as indicated in section 4.1.2.5., that the term "extraordinary" is not further defined in the preparatory works. For an example in which the HD denied that there were extraordinary reasons, see NJA 1978, 471; also NJA 2008, 81, in which the sufficient surveillance afforded by juvenile care according to LVU made pre-trial detention redundant.

The police may hold a person for questioning for up to six hours[852] and has to inform the public prosecutor as soon as possible.[853] After that, the officer in charge may hold the suspect for another six hours, but must reveal that the person in custody is being treated as a suspect and has the right to legal counsel. According to the guidelines for public prosecutors issued by the Development Centre[854] Stockholm concerning the application of the UNCRC in relation to young offenders, the public prosecutor should apply at the court for legal counsel, paid by public funds, for the young offender as early as possible.[855] The legal counsel should attend the first interrogation of the suspect.[856] If the suspect is a juvenile, the parents or the legal guardian have to be informed immediately unless this would harm the investigation.[857] If the offence could lead to a prison sentence, social services also have to be informed immediately.[858] If the offence is so serious that the expected sanction would result in imprisonment for more than a year and the certainty that the suspect will be found guilty by a court of law has reached a certain level,[859] the public prosecutor may obtain a court order for the suspect's detention within four days from the time the suspect was arrested.[860] The court order should be issued in a pre-detention trial. If it is issued, the court also decides on a timeframe within which the public prosecutor has to file the indictment.[861] If this time exceeds two weeks, the court must hold

[852] See chapter 23 §9 RB.

[853] See Justitieombudsman (JO) decision of 9 April 2010 and JO's decision of 5 April 2016. An "ombudsman" is an institution, which describes a public representative who has the right to investigate and review other public institutions, especially the administration, perhaps because of a complaint from a citizen; see Kischel (2015), 610–11. This institution – at least in relation to the justice ombudsman – is mentioned in chapter 13 §6 of the Swedish constitution RF.

[854] My translation of "Utvecklingscentrum".

[855] See also section 6.5., describing the recent development in the Swedish juvenile criminal justice system to strengthen the rights to legal counsel for young offenders.

[856] See RättsPM 2013:7, section 4.

[857] See §5 LUL.

[858] See §6 LUL.

[859] For adult (and even young adult) offenders this threshold is placed at the level of special reasons (my translation of "särskilda skäl"), while there have to be extraordinary reasons (my translation of "synnerliga skäl") for a juvenile offender, which means that there have to be specifically strong indications that the person held in custody is guilty of having committed a serious crime.

[860] See chapter 24 §13 RB.

[861] See chapter 24 §18 RB.

a new pre-detention trial every second week.[862] The Swedish legal system does not have the concept of bail; economic means are not to make any difference to the law.[863]

The general preconditions for pre-trial detention in Sweden are basically the same as in Germany: the suspect is likely to flee; the suspect intends to destroy evidence, intimidate witnesses, or impede the investigation in another way; or the suspect is likely to continue with criminal conduct.[864] The additional reason for pre-trial detention in the German system – that the suspect is strongly suspected of a serious crime – is not precisely mirrored in Swedish law. However, if the offence committed could lead to a prison sentence of two years or more, the suspect should be placed in pre-trial detention unless it is clear that there is no reason for detention.[865] That said, this rule applies primarily to adult suspects. For a young offender, the public prosecutor has relatively broad discretion for avoiding pre-trial detention even if the offence committed would satisfy the aforementioned conditions.[866] According to chapter 24 §1 3rd break RB, pre-trial detention may only be imposed if it is proportionate. For young offenders, this rule is tightened further in chapter 24 §4 1st break RB, which stipulates that if there is a danger that pre-trial detention could cause serious harm, for example because of the offender's age, it may only be imposed if it is obvious that safe supervision cannot be put in place in another way. Persons under the age of 18 are considered as being in danger of serious harm when placed in pre-trial detention.[867] This legislation builds on the assumption that the ends served by pre-trial detention can also be achieved by social services,[868] although it acknowledges that avoiding pre-trial detention in favour of supervision may be a less viable option in cases in which there is a risk that

[862] See chapter 24 §18 3rd break RB.

[863] See Janson (2004), 417.

[864] See chapter 24 §1 RB.

[865] See chapter 24 §1 2nd break RB.

[866] See RåR 2006:3, 41.

[867] See prop.1964:10, 163. See also Brå Promemoria 2015, 7, 12–13.

[868] See Justitieombudsman (JO) 1994/95, 255; JO 2009/10, 252 (for the specific institution of the "ombudsman", see what was said in footnote 853); and also Nordlöf (2012), 339. For a critical assessment of such an alternative placement, see Tove Pettersson, "När hjälpen gör ont värre – om (oönskade?) konsekvenser av att undvika häkte för unga lagöverträdare," in *Tvångsvård av barn och unga*, 279–95 (Stockholm: Wolters Kluwer, 2017).

witnesses might be intimidated or evidence destroyed.[869] Furthermore, §23 LUL demands "extraordinary" reasons to place a juvenile in pre-trial detention, making pre-trial detention for juveniles the exception rather than the rule. In relation to the question of whether such "extraordinary" reasons exist, the court has to place specific weight on the age of the offender and the seriousness of the offence. The weight of the different reasons for detention matters.[870]

Sweden was heavily criticized for its rules – or rather its lack of rules – regarding pre-trial detention for young offenders and its application of this measure.[871] One reason for these criticisms was that young perpetrators in pre-trial detention often end up in some form of isolation because of the extensive use of restrictions.[872] This is linked to the fact that pre-trial detention is often imposed on young offenders in cases in which there is a risk that witnesses might be intimidated or evidence destroyed, which then leads to the imposition of restrictions.[873] Furthermore, we should mention in this context the problem of overly long pre-trial detention[874] – which relates to the principle of acceleration I engage with shortly[875] – and the lack of routine for juvenile offenders.[876]

---

[869] See prosecutors' guidelines RåR 2006:3, 21ff.

[870] See NJA 2015, 649.

[871] See RättsPM (2013), "Unga lagöverträdare och barnkonventionen". Sweden was also criticized for its rules regarding pre-trial detention for adult offenders and its application of this measure.

[872] See the report of the Barnombudsman (2013), "Från insidian" (for the specific institution of the "ombudsman", see what was said in footnote 853). See also the report of the Public Prosecutor's Office "Häktningstider och restriktioner" (2014), 82–6 and the findings of Brå Promemoria 2015, 4. Recently, Brå has confirmed again that, in spite of these criticisms, the use of restrictions has not declined; see http://www.bra.se/bra/nytt-fran-bra/arkiv/press/2017-01-25-manga-haktade-i-sverige-halls-isolerade.html (last visited 2017-02-07). See also Brå Report 2017:6, which emphasizes the particularly harmful effect on young offenders due to their level of development as compared with adult offenders (55, 66–7).

[873] See http://www.bra.se/bra/nytt-fran-bra/arkiv/press/2017-01-25-manga-haktade-i-sverige-halls-isolerade.html (last visited 2017-01-31), which points out that in 2015, 81 per cent of the 140 young detainees in Sweden were held under isolating restrictions. See also Brå Report 2017:6, 35.

[874] See Brå Promemoria 2015, 7. Such overly long pre-trial detention is to be taken into account as a mitigating circumstance according to chapter 29 §5 BrB; see NJA 2015, 769.

[875] See section 5.3.

[876] See the UN's criticisms (UN Subcommittee on Prevention of Torture and other Cruel, Inhuman reports of Sweden"), CAT/C/SWE/6-7, 2014, 4 no.9.

Analysis from a welfare/justice perspective

In both countries, the use of pre-trial detention for young offenders is subject to restrictions. The underlying reason for the higher threshold for using pre-trial detention in the case of young perpetrators is the fact that they are considered more vulnerable to the negative effects of detention.[877] This is the sharpest tool the criminal law has for responding immediately to an offence, and in both countries the rules governing its use are heavily influenced by safeguards in line with the rule of law (for example the principle of proportionality), which reflects justice considerations. The rules in these countries are more or less the same, except for the fact that the German system features a semi-absolute maximum threshold of 6 months, which can only be extended in exceptional circumstances, and that Sweden makes more extensive use of restrictions in connection with pre-trial detention. However, since both countries acknowledge the harmful environment of pre-trial detention for young offenders because of their greater vulnerability, juveniles under the age of 18 may only be placed in pre-trial detention under very specific circumstances. This is an expression of the balancing of welfare considerations with the interests of the society and justice in guaranteeing a criminal trial. It thus exemplifies the welfare/justice clash.

An example of this balance in the German juvenile criminal justice system is §72 JGG, which stipulates that pre-trial detention should be avoided by placing young perpetrators in closed homes under the supervision of social services. The law clearly indicates that this option has to be chosen over pre-trial detention, which can be interpreted as prioritizing the welfare consideration of avoiding the harmful environment of imprisonment. This welfare consideration is further enhanced by §72 V JGG, which specifically emphasizes that proceedings against a young perpetrator who has been detained prior to trial must be carried out with "extraordinary speed". As described above, this rule rests upon an acknowledgement of young offenders' greater vulnerability to the negative effects of incarceration. This welfare consideration has to be balanced with the society's need to guarantee a trial and to be protected as justice considerations.

In the Swedish juvenile criminal justice system, an underlying aim of the rule that social services must be informed as early as possible is to enable them to find alternative solutions to pre-trial detention – since juveniles are to be kept out of prison if possible. Chapter 24 §4 1st break RB and §24 LUL stipulate a

[877] See section 2.3.2. See also United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havanna Rules) I No.3.

higher threshold for placing young offenders in pre-trial detention, which can be interpreted as an expression of the acknowledgement of the harmful environment of detention and young persons' greater vulnerability to the effects of this environment, and so as a manifestation of welfare considerations. The importance placed on these considerations here restricts the principle of proportionality (a justice consideration). However, the very existence of the possibility of placing young offenders in pre-trial detention reflects justice considerations, namely the interests of society and justice in guaranteeing a criminal trial.

As I mentioned above, Sweden was criticized by the UN for their rules and their application concerning pre-trial detention, especially in relation to isolation. Consequently, Sweden is currently looking again at the rules for pre-trial detention. There is a movement towards considering alternatives to pre-trial detention for juveniles;[878] this can also be interpreted as an attempt to strike a better balance between welfare and justice considerations, and so as an acknowledgement of the welfare/justice clash.

5.3. How time matters

An underlying feature of all investigations and proceedings against young offenders in both Germany and Sweden is the principle of the acceleration of proceedings.[879] It is based on the understanding that a rapid response is necessary in order to influence the young offender.[880] This is partly due to the

[878] See the report of the Public Prosecutor's Office "Häktningstider och restriktioner" (2014), 85–6.

[879] This principle is also recognized in Article 40 point 2 b (ii) and (iii) of the UNCRC.

[880] See BGHSt 30, 98 (101); BGHSt 51, 34 (41); and BVerfG NStZ-RR 2007, 385 (386). See also prop.2014/15:25, 2. See, however, A. Mertens, *Schnell oder gut? Die Bedeutung des Beschleunigungsgrundsatzes im Jugendstrafverfahren* (Frankfurt a.M.: Lang, 2003), who points out that from a psychological, pedagogical, and criminological perspective, there is more to say in this context (35–89). Also Andrea Schmidt, "Das beschleunigte vereinfachte Jugendverfahren in Bamberg – Das Bamberger Modell im Spannungsfeld zwischen Beschleunigungsziel und Erziehungsgedanke," (*Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2014, No.1: 31–7) and Frank Guido Rose, "Wenn die (Jugend-)Strafe der Tat nicht auf dem Fusse folgt: Die Auswirkungen von Verfahrensverzögerungen im Jugendstrafverfahren," (*Neue Zeitschrift für Strafrecht (NStZ)* 2013: 315–27).

different way in which young people perceive time[881] and – especially in Germany – because the principle of education demands a fast response to achieve maximum effect and to avoid a possible relapse into criminal behaviour.[882] Since young persons' development is not yet complete, the principle of acceleration is considered particularly effective when it comes to young offenders.[883] Apart from the psychological stress proceedings cause for young offenders,[884] it is also important that they can still appreciate the connection between the offence and the legal consequence.[885]

The principle of acceleration emerges from Art. 5 and 6 ECHR and in Germany also from Art.25 GG as well as Art.20 III GG and Art.2 II GG, the latter of which stipulate the principle of the rule of law, the social state principle, and the right to a fair trial.[886] The principle of acceleration is embodied in §§120–122a, 229 StPO[887] and furthermore explicitly for young offenders in the before

[881] See Reyna and Farley (2006), 12, who emphasize that even if the young person has stable basic requisites, they consider short-term aims more important than long-term aims. Bernard and Kurlychek (2010) agree, stating that "their temporal focus is more immediate than long term" (216). See also Tärnfalk (2014), 31; Jareborg and Zila (2014), 151; Asp (2014), 73.

[882] See Meier et al. (2011), §72 margin no.3; see also Schaffstein, Beulke, and Swoboda (2014), 232; Albrecht (2000), 385; and Mertens (2003), 30–2. See also the official guidelines for §55 No.1 RL JGG in Brunner and Dölling (2011), §55. Note further that even in relation to adults it has been argued that the delayed imposition of punishment is not helpful when it comes to seeking to influence the behaviour of criminal offenders (see Paternoster (2010), 765, in relation to deterrence).

[883] See Schmidt (2014), 31.

[884] See Brå Report 2012:5, 15.

[885] See Diemer, Schatz, and Sonnen (2015), §55 margin no.3. This is also emphasized in Brå Report 2002:19, 41.

[886] See Mertens (2003), 14–15. Note, though, that a violation of the principle of acceleration does not hinder the procedure (which would lead to a dismissal of the trial according to §260 III StPO); see Beulke (2016), §2 margin no. 26. Legal practice considers overly long proceedings as a mitigating circumstance in the framework of sentencing; see BGHSt 35, 137 (141) and BGH NJW 2000, 748. However, a dismissal might be an option if there are very serious violations; see BGHSt 46, 159 (169) or BGH NStZ 1996, 506. In relation to young offenders, the BGH stated that mitigation because of an infringement of the principle of acceleration must not lead to a term of juvenile imprisonment being too short from an education point of view, which would jeopardize its educational aims; see BGH NStZ 2003, 364–5.

[887] It is also further reflected in the restricted possibilities for interrupting the trial according to §§228 I s.1 Alt.2, 229 I StPO as an expression of the principle of concentration of proceedings; see Beulke (2016), §2 margin no.26a.

mentioned §72 V JGG, which concerns pre-trial detention.[888] Regarding the latter, the principle of acceleration is more demanding than the general principle of acceleration applicable to adults in pre-trial detention.[889] The fact that the principle of acceleration is only explicitly mentioned in §72 V JGG does not allow for the argumentum e contrario that it is not applicable in other circumstances in the framework of the JGG, for it is clearly of fundamental importance in relation to the educative guiding principle.

The JGG contains almost no explicit guidance concerning timeframes,[890] but the principle of acceleration is also reflected in the rules about the "simplified juvenile trial" according to §§76ff. JGG. Such proceedings are placed somewhere in between diversion[891] and a formal trial.[892] They allow for the possibility of accelerating proceedings by waiving some of the preconditions of a formal trial (e.g. a request rather than formal indictment is sufficient, and there are no interlocutory proceedings) in cases of minor criminal conduct somewhere between a misdemeanour and a more serious offence.[893]

Following the principle of acceleration, in Germany the verdict should generally be delivered directly after the criminal trial according to §268 III StPO. Regarding young offenders, this is not least due to its important pedagogical function for the young person.[894] It might clarify the committed wrong once more for the young offender and make him or her see the necessity of the legal consequence.[895] §54 I JGG provides for an extension of the necessary

[888] See Meier et al. (2011), §72 margin no.3.

[889] See Eisenberg (2016), §72 margin no.17.

[890] Exceptions are §87 III s.2 JGG and the relatively new §16a JGG, which stipulates in relation to "warning-shot detention" (described in section 4.1.1.4.) that this kind of detention may only be enforced within the three months after the verdict became res judicata.

[891] See section 4.2.

[892] See Albrecht (2000), 381 and Eisenberg (2016), §78 margin no. 4–6.

[893] I do not engage further with this specific form of juvenile trial; for further reading, see Schaffstein, Beulke, and Swoboda (2014), 300–2. Note, though, that this form of proceedings is often a substitute for the general accelerated proceedings for adults (§§417ff. StPO), which is prohibited for juvenile offenders (§79 II JGG) because of the limitations it places on the possibility of investigating the offender's personality; see Albrecht (2000), 381 and Eisenberg (2016), §78 margin no. 6. For the same reason, penalty orders (§§407ff. StPO) are also prohibited for juvenile offenders according to §79 I JGG.

[894] See the official guidelines for §54 RL JGG No.2; see Brunner and Dölling (2011), §54.

[895] See Schaffstein, Beulke, and Swoboda (2014), 277.

motivation for the sentence, which is to include the reasons which were decisive for the choice of the specific legal consequence and must respect the emotional, mental, and physical nature of the young offender.[896] This also means that the sentence has to contain a detailed description of the personality of the young offender.[897] However, §54 II JGG also provides for the possibility that the reasons for the sentence not be revealed if such reasons could cause problems for the education of the young offender.

Despite the importance of the principle of acceleration, it has to be acknowledged that in general, the German juvenile criminal justice system works only sluggishly. In relation to short-term detention, for example, statistics show that the average time that passes between the verdict and the start of the detention is three months, between the offence and the start of detention six months.[898]

In Sweden, a comparable regulation has recently (summer 2015) entered into force governing the timeframe in relation to the enforcement of community service for juveniles. This rule stipulates that no more than two months shall pass after sentencing before this legal consequence commences.[899] In general, in Sweden offences committed by a young person (aged 15–20) should be processed with special expedition.[900] In terms of the proceedings, this principle is anchored in §29 LUL. Regarding the investigation, it can be found in §4 LUL, which stipulates a timeframe of six weeks between the notification of the suspicion and the decision to indict;[901] the preparatory works specifically emphasize the underlying pedagogical reasons but also the need to react clearly

[896] This is emphasized in the official guidelines for §54 RL JGG No.1; see Brunner and Dölling (2011), §54.

[897] See Ostendorf (2016), §54 margin no. 17 and Brunner and Dölling (2011), §54 margin no.11.

[898] See Schaffstein, Beulke, and Swoboda (2014), 162.

[899] See prop.2014/15:25, 40–3 and SFS 2015:80.

[900] See prop.2013/14:170, 28.

[901] See prop.2005/06:165, 110ff., which proposed the change in legislation that made it that the principle of acceleration is applicable to all types of offences committed by juveniles. The earlier restriction was mainly due to the great work burden placed on public prosecutors; see prop.1994/95:12, 63. The principle of acceleration for cases against young offenders can also be found in Förundersökningskungörelsen (1947:948) (FUK), which stipulates that the public prosecutor and the police should confer regularly to avoid any delay in investigations against offenders in the 15–17 years age bracket (§2).

and consistently.[902] But an investigation from Brå came to the conclusion that, as in Germany, the principle of special expedition of juvenile proceedings was not being followed.[903] Furthermore, §4 LUL is restricted to young offenders between 15 and 17 years of age. The same restriction applies to the further specifications in §29 LUL, which contains the definition of the general demand of acceleration of proceedings for juvenile perpetrators (between 15 and 17). If the law prescribes more than six months imprisonment for the committed offence, the timeframe between the indictment and the trial may not exceed two weeks.[904] These time limits might be extended under certain circumstances. However, this timeframe is seldom met.[905]

There is also a special regulation in Sweden regarding young offenders in relation to the delivery of the verdict.[906] According to §30 LUL, the judgment should be pronounced orally at the main hearing in cases where the offender is under the age of 21 unless there are extraordinary obstacles to this. The preparatory works emphasize here the greater impression that will be made on young offenders while the trial is still fresh in their minds and the fact that this offers a chance to explain the verdict.[907]

Analysis from a welfare/justice perspective

The principle of the acceleration of the juvenile trial is of crucial importance in both the Swedish and the German juvenile criminal justice systems. The general

[902] See prop.2005/06:165, 111.

[903] Brå Report 2012:5 came to the conclusion, by contrast, that timeframes for investigations and proceedings concerning young offenders even exceeded the comparable timeframes for adult offenders when the offence was rape, robbery or extortion (7). In more than half of the cases reviewed, the timeframe was exceeded (9).

[904] §29 LUL refers to chapter 45 §14 second section RB. Note here that these timeframes were under review but this did not lead to any major changes; see Ds 2013:30 "Skyndsamhetskrav och tidsfrister i ärenden med unga misstänkta och unga målsägande" and prop.2013/14:170, 25, 28, 29 and SFS 2014:321.

[905] See Riksrevisionen RiR 2009:12, 23ff..

[906] In contrast to the German system, the delivery of the verdict in Sweden is in general not part of the proceedings itself, though it should be delivered publically according to chapter 5 §5 second break RB. See Ekelöf et al. (2016), *Rättegång I*, 154.

[907] See prop.1994/95:12, 90; see also Nordlöf (2012), 356–7.

choices of both legislatures reflect the welfare/justice clash. Accelerated proceedings contain the risk of a less thorough investigation, thereby increasing the chances that mistakes will be made and potentially threatening trust in the system. This thus raises issues from the perspective of justice and legal certainty. However, these risks are accepted because of the acknowledged need for a fast response to juvenile offending to ensure the best possible outcome for the young offender, reflecting welfare considerations. Welfare considerations here override justice considerations. On the other hand, provisions for accelerated proceedings are built into the justice system, which is subject to the rule of law. This tension illustrates the welfare/justice clash.

The priority of the acceleration of proceedings is reflected in several of the detailed rules I have discussed as expressions of the welfare/justice clash. In the German juvenile criminal justice system, according to §87 III s.2 JGG, which allows the juvenile court to abstain from the enforcement of short-term detention if six months has elapsed since the verdict, reflects the view that delayed enforcement of short-term detention undermines the educative ideal. In such situations, the unenforced sentence leads to the result that the young offender receives no legal consequence at all. The possible harm caused by a delayed enforcement from an educative perspective (a welfare consideration) overrides the society's interest in punishment (a justice consideration).

The "simplified juvenile trial" (§§76ff. JGG), which was created to accelerate proceedings, means that the juvenile court is not bound as strictly by the formal rules of the criminal trial.[908] This reflects the welfare/justice clash: it eases the strict procedural rules not only because this makes legal proceedings more efficient, but also because it satisfies welfare aims having to do with the aforementioned insights into young persons' different perception of time, which stem from developmental psychology; then again, the simplified juvenile trial is still a criminal trial, conducted in the criminal courtroom, satisfying the aims of justice.

In the framework of §268 III StPO (the verdict should be delivered immediately after the trial), §54 II JGG stipulates a major deviation from the rules applicable to adult offenders. It allows for the possibility of not revealing the reasons for the verdict on the basis of educational considerations; this is in conflict with the principle of a fair trial,[909] the latter being a consideration of justice. Here, the

[908] See BGHSt 12, 180 (182).

[909] The principle of a fair trial can be understood as a consequence of the rule of law (see BGHSt 32, 245 (350) and BGHSt 37, 10 (13)) or it can be justified through a combination of Art.1 I, 2

principle of education – and so welfare considerations – overrides an established principle of the rule of law. Consequently, §54 II JGG can be seen as an expression of the welfare/justice clash. §54 I s.2 JGG explicitly emphasizes the need to respect the emotional, mental, and physical nature of the young offender – an expression of welfare considerations.

In Sweden, the preparatory works concerning §4 LUL emphasize underlying pedagogical reasons for the principle of acceleration, but also highlight the need to react clearly and consistently to the offence. These two considerations might be interpreted, on the one hand, as welfare considerations (having to do with the pedagogical needs of the young person), but, on the other hand, they may also be interpreted as justice considerations (since the rule of law demands consistency and transparency[910]), which makes §4 LUL an expression of the welfare/justice clash. §29 LUL reflects the same influence of welfare considerations on specific regulations for accelerating proceedings. Moreover, the underlying reasons for §30 LUL (that the judgment shall be pronounced orally at the main hearing) are pedagogical, welfare considerations. The same considerations apply to the German juvenile trial: the importance of an immediate delivery of the verdict is emphasized in the official guidelines to §54 JGG.

5.4. Avoiding stigmatization

A distinctive feature of the German juvenile criminal trial is that it is always held behind closed doors to avoid any stigmatization of the young offender;[911] this is in contrast to the principle of public access to the trial applicable to adult criminal trials according to §169 s.1 StPO, Art.6 I 1,2 ECHR, which in general

---

II s.2, 20 III, 101 I s.2, 103 I GG, Art.6 I ECHR (see BVerfG NJW 2001, 2245). However, the concrete content of the principle of a fair trial is rarely defined; see Beulke (2016), §2 margin no.28. An application should therefore only be made cautiously; see BGHSt 40, 211 (217ff). I do not elaborate further on this wide, problematic field as it is not related to the focus of my research. However, I touch upon it in section 6.4.

[910] This is also supported by the Brå Report 2002:19 into the 1999 reforms. The reforms emphasizes the importance of time for the principles of proportionality, predictability, and (especially) consistency. See also prop.2005/06:165, 111.

[911] See §48 JGG.

covers the trial and the pronouncement of a judgment.[912] "Public" in this sense means that everybody, regardless of who they are or what affiliations they might have with certain groups in society, can attend a trial.[913] However, as a deviation from the general rule, §48 JGG is only applicable to juveniles and not to young adults. If a juvenile and a young adult are indicted together, the court has to decide whether the public should be excluded on the grounds of the educational interests of the juvenile offender.[914]

Another distinct feature of the German juvenile criminal trial is the possibility of removing the young offender from the trial temporarily if facts are being discussed which might harm the young perpetrator's education (§51 JGG); this is in contrast to §230 I StPO, which stipulates that a trial may not be held against an absent adult offender, and §231 StPO, which states the duty of the adult defendant to be present. If the young offender is excluded according to §51 I s.2 JGG, the juvenile court has to inform the young offender afterwards about these facts if they are necessary for the defence.

In Sweden, by contrast, all trials, criminal and civil – even those against young offenders – start from the assumption that they are to be public.[915] This is due to the principle of transparency, which says that government and other agencies' activities must be, as far as possible, open to the public.[916] Members of the public have a right to see any public records, in order to have a good insight into authorities' actions and be able to exercise civil control over them.[917] But there are exceptions. One is found in §27 LUL, which stipulates that cases against an

[912] This used to be because of the need to control the trial and to avoid the arbitrary use of power by the state. Today, it is rather the general public's interest in information which is seen to be important; see Beulke (2016), §19 margin no. 376 and BGHSt 9, 280 (281).

[913] See BGHSt 28, 341 (343ff.). However, the access may be subject to certain legislative restrictions. See for example §175 I GVG. However, I do not engage further with these rules since they are of no further interest in relation to this thesis.

[914] See §48 III JGG.

[915] This is according to chapter 2 §11 second break of the Swedish constitution (Kungörelse (1974:152) om beslutad ny regeringsform (henceforth: RF)) and chapter 5 §1 first break RB.

[916] The principle of transparency (my translation of "Offentlighetsprincipen") is anchored in the Swedish constitution in chapter 2 §1 Act on the Freedom of the Press (my translation of "Tryckfrihetsförordningen"). In relation to the trial, see Ekelöf et al. (2016), *Rättegång I*, 152ff.

[917] See Ekelöf et al. (2016), *Rättegång I*, 159ff., which also questions whether this aspect of control is still important nowadays. For more about this very important and rather uniquely Swedish principle, see Kischel (2015), 614–17.

offender under the age of 21 who is indicted for a crime which might lead to a prison verdict should be handled in such a manner that the case does not attract attention. The court may hold the trial behind closed doors if this is necessary to protect the young offender from inconveniences that may be caused by the attention of the public (§27 II LUL). Note further that the possibility of deciding a criminal trial without a hearing, which is possible for adult offenders if the expected punishment does not exceed a fine, is excluded according to §27 IV LUL.

Analysis from a welfare/justice perspective

One major difference between the two countries lies in the fact that the trial of a young offender in Sweden is – as a starting point – always open, while the juvenile trial in Germany takes place behind closed doors. However, this difference is a logical consequence in light of the importance of the principle of transparency, which is held in particularly high regard in Sweden in contrast to the guiding principle of education in Germany. Nevertheless, a safeguard to avoid the stigmatization of young offenders in Sweden is built into §27 LUL, which states that the judge can decide to exclude the public if necessary. §27 LUL is based on young offenders' need for protection because of the possible problems for them that can arise from public proceedings.[918] It thereby acknowledges the greater vulnerability of young perpetrators and the need to avoid stigmatization, which express welfare considerations. The Swedish juvenile criminal justice system tries to balance these considerations against the aims of justice, such as the principle of transparency and the principle of public information. This is therefore an expression of the welfare/justice clash. Furthermore, §27 IV LUL demands that young offenders face a hearing in any case. According to the preparatory works, this is due to the "important pedagogical value" of a trial.[919] It thereby reflects another welfare consideration, which in this case overrides procedural economy and efficiency.

In the German juvenile criminal justice system, §48 JGG, which excludes public access to a juvenile trial as an exception to the general rule, protects the young offender's right to privacy and accommodates developmental-psychological and pedagogical considerations (welfare considerations).[920] The young offender

[918] See prop.2004/05:131, 117.

[919] See SOU 2001:103, 159–64, prop. 2004/05:131, 141, 143 as well as Nordlöf (2012), 343.

[920] See Meier et al. (2011), §48 margin no. 1.

should not be made to feel like the centre of attention, which might incline him or her to show off or "entertain" a possible audience; neither should the young perpetrator be made to feel even more vulnerable than they already are.[921] Furthermore, this rule is meant to avoid possible disadvantages in relation to future professional or social development, which could impede their reintegration into society. Here, the individual concerns of the young offender are prioritized over the societal interest in attending the trial, reflecting the focus on the offender. Consequently, in the framework of the JGG in Germany, the principle of education (welfare considerations) overrides the principle of public access to the trial and the principle of transparency[922] (justice considerations). Furthermore, §51 JGG, which allows for the temporary exclusion of the young offender from the trial, is yet another expression of the welfare/justice clash and the influence of the educational guiding principle overriding, in this case, the defendant's right to be heard enshrined in Art. 103 I of the German constitution and Art.6 ECHR (justice considerations). Furthermore, the temporarily removed young offender only has to be informed of the facts that do not pose a threat to the achievement of educative aims. Here, again, the principle of education as a welfare consideration overrides the right to a fair trial as a justice consideration. Thus, these specific rules to exclude the public from a juvenile criminal trial express the ways both legislatures have grappled with the welfare/justice clash.

5.5. Appeal

German law allows for two ways of reviewing a judgment: "Berufung" (§§312–23 StPO) and "Revision" (§§333–58 StPO). Both the defendant and the prosecution have the right to appeal.[923] The appeal from first instance (Berufung) is appeal by trial de novo in a higher court.[924] New evidence may be presented by the parties, and a new decision on both facts and law is made. Consequently, the Berufung usually disputes both the verdict and the sentence,

[921] See Eisenberg (2016), §48 margin no. 8.

[922] See BGHSt 44, 43 (44) and also Meier et al. (2011), §48 margin no. 6. This possibility is explicitly mentioned even in Art.6 No.1 s.2 ECHR.

[923] §296 I StPO.

[924] See BeckOK StPO/Eschelbach StPO §312 Introduction.

but the defendant can restrict the appeal to the sentence if he or she concedes guilt but considers the sentence disproportionate (§318 StPO). According to §314 I StPO, this form of appeal has to be filed within one week of the original judgment. If only the defendant appeals, the sentence can only be changed in the defendant's favour (no reformation in peius[925]). The appeal to a higher regional court (Revision) is review by a higher court on questions of law.[926] At this level, the appellant must allege specific procedural or substantive mistakes by the initial court as evidenced in the record and, in particular, the written judgment.[927]

An adult offender can use both means of appealing a judgment, first Berufung and then, if the first fails, Revision.[928] The situation is quite different for young offenders. According to §55 JGG, the right to appeal is limited for the convicted young offender[929] factually (§55 I JGG) and with regard to the different instances of the courts (§55 II JGG). To appeal judgments of the Single Magistrate and the Juvenile Juror Courts,[930] the appellant must choose between Berufung or Revision (§55 II JGG). Judgments which impose educational or corrective measures may be appealed upon the question of guilt only, not on the question of the severity of the sentence (§55 I JGG).[931] This means, in other words, that some verdicts are not revisable in relation to the legal consequence.[932]

---

[925] See BGHSt 29, 269 (270). In order to evaluate the intensity of the interference of the differing – and sometimes combined – legal consequences, a holistic view of all the imposed legal consequences is required; see BGHSt 24, 11 (14) and also Eisenberg (2016), §55 margin no. 75–94 for an overview of the relationships between the legal consequences for young offenders regarding their interference intensity.

[926] See BeckOK StPO/Wiedner StPO §333 margin no.4–6.

[927] Ibid., margin no.12–14.

[928] The convict can also choose to appeal directly on the basis of the Revision – in which case it is called a "Sprungrevision" – according to §335 I StPO; see BeckOK StPO/Wiedner StPO §33 margin no.4.

[929] This limitation also restricts the public prosecutor's right to appeal the verdict; see Schaffstein, Beulke, and Swoboda (2014), 216.

[930] For the German court structure, see section 6.1.

[931] Educational assistance according to §12 No.2 JGG is excluded (§55 I JGG last sentence).

[932] See Albrecht (2000), 384.

In Sweden, the sentenced young offender has the right to appeal the verdict to a higher instance. However, there are no specific rules for young perpetrators; the general rules apply. The levels of jurisdiction are the district court (Tingsrätt), the regional court (Hovrätt), and the HD. Since all trials in Sweden start out at the level of the district court,[933] the first instance of appeal is the regional court according to chapter 49 §1 RB. If the young offender was sentenced to no more than a fine or was found guilty of a crime which cannot lead to more than six months imprisonment, the regional court will only accept an appeal under certain circumstances (so-called "prövningstillstånd"). Both the defendant and the public prosecutor have a right to appeal. If only the defendant appeals or if the public prosecutor appeals in favour of the defendant, the court of next instance cannot hand down a harsher sentence than the original court did (no reformatio in peius). An appeal has to be filed within three weeks of the original judgment. A further appeal to the HD is possible according to chapter 54 §1 RB. However, even here a "prövningstillstånd" is set as a threshold.[934]

Analysis from a welfare/justice perspective

Both the Swedish and the German juvenile criminal justice systems offer the possibility of appealing a verdict; this is part of the right to a fair trial, the latter an expression of the rule of law as a justice consideration. A court decision must be controllable, which is normally satisfied through the guarantee of judicial review. In Germany, however, appeal is restricted for a young offender. The young perpetrator has to choose between the two options of Berufung or Revision. Additionally, a young offender cannot appeal the choice of an educational or corrective measure but only the question of guilt. The limitations on the right of appeal are based on the theory that the measures of the JGG will be most effective when carried out immediately so that the young perpetrator may experience a close connection between his or her acts and the legal consequence.[935] The aim of reaching a legally binding judgment faster by means of a limitation of the right to appeal builds on the principle of education as a

[933] See section 6.1.

[934] See chapter 54 §9 RB. The most important precondition is that the case has value as a precedent (chapter 54 §10 No.1 RB).

[935] See BGHSt 30, 98 (101); BVerfG NStZ-RR 2007, 385 (386); and Meier et al. (2011), §55 margin no. 2. See also the guidelines RiJGG §55 No.1 s.1. and BeckOK StGB/von Heintschel-Heinegg StGB §46 margin no.63.

welfare consideration and the connected principle of the acceleration of juvenile proceedings.[936] Here we again find an example of welfare considerations clashing with justice considerations and, in this instance, of the principle of education prevailing over the right to a fair trial. Major restrictions on the young offender's rights to appeal a decision are accepted in the name of the educational guiding principle as a welfare consideration.

This means that, regarding the appeal of a verdict, only the German juvenile criminal justice system reflects the welfare/justice clash in specific rules applicable to young offenders. The Swedish juvenile criminal justice system applies the same rules as for adult offenders. Thus, the right to appeal a verdict in Sweden is not influenced by the welfare/justice clash.

5.6. Enforcement of the sentence

In Germany, according to §82 JGG, the juvenile judge who issues the sentence is also responsible for its enforcement. This is a major difference from the rules applicable to adults.[937] This rule constructs a much tighter net around the young offender and ensures that the same juvenile judge deals with the offender not fulfilling his or her duties under the sentence as dealt with the trial itself. Furthermore, from a practical point of view, it provides for a faster procedural process since possible misconduct is always reported directly to the juvenile judge without having to go via the public prosecutor's office. As mentioned earlier, the practical enforcement of the sentence is often in the hands of social services. Social services organize the enforcement of educational or corrective measures. If the young offender fails to fulfil the educational or corrective measure imposed on him or her, short-term detention may be imposed by the juvenile judge to enforce the measure. At the request of the public prosecutor, the juvenile judge first warns the convict to fulfil his or her duty. If the offender does not comply with the verdict at that point, short-term detention of up to four weeks can be imposed.[938] It should be emphasized again that this sort of

[936] See section 5.3.

[937] In cases involving adults, the prosecutor's office takes over responsibility for enforcement (see §451 I StPO) and in some cases the enforcement chamber does (§462a StPO).

[938] §§11 III, 15 III JGG.

short-term detention does not replace the original sentence.[939] The obligation to fulfil the educational or corrective measures originally imposed still stands after the short-term detention has been imposed. With regard to a suspended sentence or a conditional sentence/probation, a strong emphasis is placed on the intensive educative influence during the probation period.[940] Even here, the JGG gives the responsibility to the juvenile judge, who "outsources" this duty to a probation officer for practical reasons. As mentioned before,[941] in contrast to adult criminal law, the appointment of a probation officer for a young convict is obligatory.

Another specific enforcement aspect to be mentioned in relation to young offenders in Germany is stipulated in §56 JGG: the partial enforcement of a verdict. This norm enables the juvenile court to declare a part of a verdict enforceable for educational reasons[942] even if the young offender has appealed another part.

In Sweden, all specific juvenile legal consequences (community service for juveniles, juvenile care, and closed institutional treatment) are enforced by social services.[943] This reflects one of the basic principles on which the Swedish system for young offenders is based, namely that young offenders should first and foremost be dealt with within social services.[944] The court is at this point no longer involved in the process: when the sentence has been delivered, the court's duty is done. If a convict does not comply with the verdict, the Swedish court can, on the request of the public prosecutor, annul the earlier sentence and sentence the young offender in a different way.[945] Nevertheless, the Swedish judge does not have coercive measures at his or her disposal to "force" the convict to comply with the sentence as the German juvenile judge does. This leads to the problem that young offenders can influence their legal consequence. Theoretically, offenders can refuse to obey the sentence repeatedly until they are sentenced to the outcome they desire. Furthermore, there is no rule that the enforcement of a verdict for juvenile care demands res judicata. Such a rule was

[939] See also sections 4.1.1.1. and 4.1.1.2.

[940] See Schaffstein, Beulke, and Swoboda (2014), 209.

[941] See section 4.1.1.4.

[942] See Brunner and Dölling (2011), §56 margin no. 1, 4.

[943] See Nordlöf (2012), 308.

[944] See prop.2014/15:25, 24. Also NJA 2001, 225 and Berggren et al. (2016), BrB 32:1 (2012), 5.

[945] Chapter 32 §4 BrB.

considered unnecessary since the social services can in any case impose measures independently of the judgment.[946]

Analysis from a welfare/justice perspective

In both countries, the rules for the enforcement of a young offender's sentence show evidence of the impact of welfare considerations and the welfare/justice clash. Most specific juvenile legal consequences are – in Sweden and in Germany – in practice enforced by social services. Social services organize most of the juvenile legal consequences, like community service for juveniles, social training courses, juvenile care, or victim–offender mediation. The enforcement of juvenile care in Sweden does not demand res judicata. This can only be explained in terms of an attentiveness to welfare considerations – namely, to the need to accelerate enforcement to achieve the best impact from an educational perspective and the aim of dealing with offenders within social services rather than within the legal realm – which in this case override justice considerations (in particular the principle of legal certainty). This is interesting in relation to the guiding principle of the Swedish juvenile criminal justice system, as I have presented it.[947] Even if neoclassicism emphasizes the principle of proportionality, the approach to the enforcement of the sentence implies instead the importance of welfare considerations; social services are placed at the centre. However, justice considerations are also reflected in the fact that it is a criminal judgment that is being enforced.

In the German juvenile criminal justice system, even if social services handles the practical enforcement of most measures, the juvenile judge remains in charge after the trial. The juvenile judge thereby assumes an educational mandate which transcends purely judicial functions and becomes administrative.[948] He or she maintains close supervision of the young convict and even has the legal tools to enforce compliance with the sentence – at least indirectly. Short-term detention may be imposed if the young convict does not comply with the sentence. The possibility of imposing short-term detention exemplifies the welfare/justice clash: it reflects an aspect of force – perhaps even of punishment,

[946] See Berggren et al. (2016), chapter 32:1 (2012), 4.

[947] See section 3.5.

[948] This also implies that in this function the juvenile judge can become subject to directives and instructions; see Albrecht (2000), 400 and also Schaffstein, Beulke, and Swoboda (2014), 162.

since it is imposed in addition to the original legal consequence – and so a justice consideration as part of securing the otherwise educational aim of the original legal consequence. The Swedish judge does not have such tools available; but if the young convict does not comply, the verdict itself can be changed in a new trial,[949] which may ultimately have the same effect.

Furthermore, §56 JGG in the German juvenile criminal justice system contains the possibility of enforcing a part of the sentence even if another part has been appealed. Reminding the reader of the principle of unity ("Einheitsprinzip") that guides the sentencing decision in cases of more than one offence,[950] here too the juvenile system differs from the adult criminal justice system in that it conflicts with the rules for res judicata (§449 StPO) in the name of the educational guiding principle. Res judicata is an expression of justice considerations in the form of legal certainty and predictability. This makes §56 JGG a legal norm that seeks to balance welfare and justice considerations: the enforcement of a part of the sentence should serve the educational aim (welfare consideration) even if the sentence – consisting of one unified set of legal consequences for all offences committed – is appealed. A sentence given to an adult offender cannot be enforced until it has reached res judicata.

5.7. Criminal registers

Germany keeps a central registry containing criminal records: the Bundeszentralregister.[951] All aspects of access to these records – for example, who may have access, how long a criminal record is kept, and when a record has to be removed from the registry – are regulated by the Bundeszentralregistergesetz (BZRG).[952] The register is not open to the public and is only accessible by the limited audience stated in the law. According to §46 BZRG, records are to be erased after a certain time (between 5 and 20 years, depending on the crime). The Bundeszentralregister even contains information

[949] §30a LUL, which refers to chapter 32 §4 BrB.

[950] This principle entails that the young offender only receives one cumulative legal consequence. However, this consequence may be a combination of different measures which are then partly enforced. See section 4.3.1.1.

[951] Federal Register of Judicial Information – my translation.

[952] Law on the Federal Register of Judicial Information – my translation.

about juvenile legal consequences, but only if these are juvenile imprisonment or a conditional sentence. All other juvenile legal consequences – and even diverting measures, when the case is dismissed according to §§45 I–III or §47 JGG – are registered in a specific educational register, the Erziehungsregister, which is also regulated by the BZRG.[953] The Erziehungsregister is only accessible by the bodies stated in §61 BZRG, namely the juvenile courts, the juvenile public prosecutor, and social services (not the police). Records in the Erziehungsregister are to be erased when the offender turns 24, as long as there are no records in the Bundeszentralregister as well.[954] According to §32 I BZRG, such records are not registered in the certificate of good conduct (Führungszeugnis) to avoid a negative impact on, for example, future employment prospects. In that sense, a young offender whose sentence was only registered in the educational register may rightfully say that they have no criminal record.[955]

The Swedish equivalent of the German Bundeszentralregister is the liability register – the belastningsregister. It is regulated in a specific code,[956] administrated by the police committee,[957] and it contains all sentences handed down by Swedish courts and also dismissals by the public prosecutor and the police. It even includes convictions by courts outside of Sweden under certain circumstances.[958] Sweden does not keep a separate register for young offenders. Even decisions of the public prosecutor according to §17 LUL (a dismissal in the form of diversion) are recorded in the belastningsregister. The register is not open to the public and is only accessible by the bodies stated in the law.[959] The length of time that a record is kept depends on the sentence that was issued.[960] However, some specific rules for young convicts – but only those under the age of 18 – can be found in §17 number 4b, 5, 6, 8, 10b and 11b lagen (1998:620) om belastningsregister, which stipulate a shorter timeframe for the deletion of

[953] See §59 BZRG.

[954] See §63 II BZRG.

[955] See §53 I BZRG and Albrecht (2000), 417; Laubenthal, Baier, and Nestler (2010), 425; and Schaffstein, Beulke, and Swoboda (2014), 153.

[956] The "lagen (1998:620) om belastningsregister".

[957] Rikspolisstyrelsen – my translation.

[958] See §4 i Lagen (1998:620) om Belastningsregister.

[959] See §6 Lagen (1998:620) om Belastningsregister.

[960] See §17 Lagen (1998:620) om Belastningsregister.

records from the belastningsregister. If the convict does not commit a new offence during that time, the record is deleted from the register. A change in the law in 2011 stipulated that a decision to dismiss a case according to §17 LUL should be deleted from the belastningsregister after three years if the young convict was between 15 and 17 years old at the time of the offence and has not reoffended.

Analysis from a welfare/justice perspective

A register of a young offender's criminal records poses a dilemma for juvenile criminal law. On the one hand, a register stigmatizes, and it constitutes the feared long-term effect of an offence and sanction that could jeopardize the re-socialization of the young perpetrator.[961] Such a fear can be identified as expressing a concern for the welfare of young offenders. On the other hand, especially in relation to the fact that German juvenile criminal law is "offender criminal law", a register is necessary to gain knowledge about earlier criminal conduct and to be able to assess the personality of young perpetrators in order to find suitable legal consequences.[962] This aspect contains both welfare and justice considerations. The existence of a register in itself serves a justice consideration, namely the aim of gaining knowledge of earlier criminal conduct and considering it from a perspective of proportionality and assessing possible new offences in light of it. Previous criminal conduct usually leads to a harsher sentence. Assessing the personality and finding a suitable legal consequence, in contrast, can be interpreted as welfare considerations.

Registers for convicts are kept in both countries. Sweden has only one register for adult, young adult, and young offenders; however, it features shorter timeframes for the deletion of records for young convicts under the age of 18. This reflects the goal of avoiding jeopardizing the young offender's future development, which reflects a welfare consideration. Germany, by contrast, keeps a separate register for young offenders. It is more restricted in terms of who has access to it, and it features different timeframes for the deletion of records. The Erziehungsregister exclusively serves the aim of facilitating the investigation of the personality of a young offender in cases of new criminal conduct,[963] which reflects the system's focus on the offender. These special

[961] See Albrecht (2000), 413.

[962] See Brunner and Dölling (2011), Before §97 margin no. 3.

[963] See Schaffstein, Beulke, and Swoboda (2014), 153.

provisions benefiting the young offender are another expression of the welfare/justice clash, giving preference to the protection of the young offender in order to avoid long-term stigmatization at the expense of the societal interest in being protected from persons who commit crimes. The fact that the BZRG only contains juvenile legal consequences if they are juvenile imprisonment or conditional sentences reflects their more punitive character from the perspective of justice. However, the limitation of the registration to only these two most serious legal consequences can also be interpreted as an expression of the aim of avoiding stigmatization as far as possible, and so of the importance placed on young offenders' welfare. All other legal consequences for young offenders in Germany are registered in the Erziehungsregister. This is the compromise struck by the German legislature to balance the interests of welfare and justice: on the one hand, a register is necessary to be able to assess the personality of the young perpetrator and find a suitable legal consequence in cases of repeat offending; on the other hand, a register stigmatizes and constitutes a long-term effect of an offence and sanction that could jeopardize the re-socialization of the young person. This thought is also reflected in the fact that records are erased earlier – a fact which is also true in the Swedish juvenile criminal justice system because of the very same welfare considerations. However, the fact that even the decisions of the public prosecutor under §17 LUL are recorded in the Swedish belastningsregister basically thwarts the aim of the dismissal: to avoid the stigmatization of young offenders. As a result, a change in the law in 2011 stipulates that a decision to dismiss a case according to §17 LUL will be deleted from the belastningsregister after three years if the young perpetrator was between 15 and 17 years old and has not since committed a new offence. The preparatory works acknowledge the specific disadvantages faced by young offenders due to the influence of the belastningsregister on the possibility of studying abroad, getting a driver's licence, and being employed in certain professions.[964] This reflects welfare considerations, focusing on the future development of a young offender rather than past criminal conduct.

[964] See prop.2009/10:191, 10ff.

5.8. Conclusion

As I have shown, both juvenile criminal justice systems feature specific rules that offer a wider scope of protection to young offenders based on the assumption that they are more vulnerable. In Germany, this is supported by the educative guiding principle set out in §2 JGG; but even in Sweden pedagogical value is emphasized as one of the cornerstones of many of the specific rules of the LUL.[965] However, as I have also illustrated, some of the procedural specifics the legislature has established for young perpetrators conflict with other principles – for example, the right to a fair trial, transparency, or the principle of proportionality. The different procedural rules for young offenders in both countries are therefore an expression of the welfare/justice clash. Due to the specific needs of young offenders, procedural rules in this realm of justice are relaxed and adapted in the interests of welfare. Nevertheless, justice considerations are still of crucial importance in the delicate balance the juvenile criminal justice systems must strike.

[965] See prop.2004/05:131, 143.

Chapter 6

Figures in the courtroom

Welfare considerations also have an impact on the roles assumed by the figures in the juvenile courtroom. This chapter therefore attends to the people taking part in the juvenile trial. It analyses the roles that the judge, the public prosecutor, the defence counsel, social services, the parents and legal guardians, and the victim play from a legal dogmatic perspective and considers the impact of welfare considerations on their legal roles.[966] As we will see, focusing on these roles and the structure of the court brings out the different guiding principles governing the two systems and allows us to see the different ways the welfare/justice clash appears in each country. Again, each section is divided into a descriptive part and an analysis from a welfare/justice perspective.

6.1. Court structure

As described earlier, in the German juvenile criminal justice system, criminal law is not enforceable against young offenders under the age of 14, which means that no criminal proceedings may be brought against this group of perpetrators.[967] Such offenders are referred to social services, which has a

[966] Some of the topics under scrutiny in this chapter might also fit under the heading of "safeguards", as investigated in chapter 5 (for example the defence counsel or the role of the victim). However, because the procedural specifics are tied to the roles of particular figures in the courtroom, I have decided to place the discussion of these issues in this chapter. Note again that I do not engage further with the role of the defendant. Nevertheless, most of the procedural issues regarding the defendant that could be investigated arise in relation to the other courtroom figures, since they all bear on the defendant in one way or another.

[967] See Ostendorf (2016), §1 margin no.1; Bernd-Rüdiger Sonnen, "Kinder- und Jugenddelinquenz in der strafrechtlichen Ermittlung," (*Zeitschrift Familie, Partner, Recht (FÜR)* 2013: 409–12), 409; Torsten Verrel, "Kinderdelinquenz- ein strafprozessuales Tabu?," (*Neue Zeitschrift für Strafrecht (NStZ)* 2001: 284–90), 285.

protective mandate in cases of child endangerment.[968] If coercive measures are required, the German family court is the competent authority.[969] Youth welfare services have the right to act on the spot (immediate responsibility) in urgent cases – that is, if the child or a third party are in physical danger.[970]

Whenever a person aged between 14 and 20 commits a criminal act, they may be held responsible by a juvenile criminal court. In Germany, the juvenile courts are departments of the district court or the regional court.[971] There are three different types of juvenile court. Their respective jurisdictions depend on the expected legal consequence. The first type is the single magistrate court. It has the competence to impose educational and corrective measures and juvenile imprisonment of up to one year, and it consists of one legally trained professional judge. The second type is the juvenile juror court.[972] It possesses residual jurisdiction over all other cases concerning young offenders. In other words, the cases brought before the single magistrate court are the legislative exception. The hearings in the juvenile juror court are conducted by a magistrate presiding over two lay jurors. Each juror has an equal vote with the magistrate in deciding both the guilt of the defendant and the legal consequence. The third type is the juvenile chamber of the district court, which has jurisdiction over special cases referred to it by the juvenile juror court and cases that are within the jurisdiction of the "Schwurgericht".[973] The juvenile chamber is also an appellate court for decisions of the other two types of juvenile court. This chamber is staffed by three magistrates and two lay jurors. All this means that jurisdiction in Germany is not only divided up horizontally (for example, between family or criminal courts) but also vertically within the criminal court.

Germany is not the only country that "outsources" certain areas of law to specialist courts. Since 1989, "problem-solving courts" have emerged throughout the United States and the common law world.[974] Such courts seek to

---

[968] §8a SGB VIII, which can be applied to children below the age of criminal capacity and to juveniles up to the age of 18. The SGB VIII regulates the Child and Youth Welfare Service.

[969] §§1666, 1666a, 1631b BGB.

[970] §42 SGB VIII.

[971] See Jehle, Lewis, and Sobota (2008), 240.

[972] My translation of "Jugendschöffengericht".

[973] According to §§74 II, 74e GVG, the "Schwurgericht" is the instance in which very serious cases are tried, for example murder cases.

[974] See Kirchengast (2010), 143.

manage specific offences, offenders, and victims using specialized knowledge, treatment, and practice to best meet the particular needs of those before the court,[975] which means a departure from the principles of adversarial justice and instead the adoption of alternative intervention based on planning and welfare support.[976] Problem-solving courts, or problem-solving justice more broadly, seek to utilize the position of the court in the community. Rather than understanding the court's power to sentence the accused as a sovereign exercise of control which corrects the conduct of the accused through threat or force, problem-solving courts seek to place themselves amongst other services and service providers as part of an integrated approach to the management of all aspects of justice in the disciplinary area of the criminal justice system. Rather than simply turn the offender over to corrections, these courts seek to supervise them. The courts become a vital part of the rehabilitation of the offender and the reintegration of the offender into the community.[977] This description of problem-solving courts suggests that they share some similarities with the German juvenile criminal justice system. In both cases, the idea of education is central, and judges remain in charge of the supervision of the enforcement of the sentence.[978]

As I explained in section 5.4., in Germany hearings involving a juvenile offender are not open to the public (unlike trials involving young adults), but parents and legal guardians are allowed to attend. Apart from the defendant, the participants at the hearing are the specialized juvenile public prosecutor, who is the plaintiff

---

[975] Ibid., 183.

[976] An example of this is the drug court in Florida, which emerged in 1989. See http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/drug-courts/ (last visited 2016-08-09). Other examples of problem-solving courts are mental health courts, domestic violence courts, sex offences courts, community courts, and – last but not least – juvenile courts.

[977] Kirchengast (2010), 144–5. Kirchengast (2010) describes the principles of problem-solving courts as follows: "Enhanced information, community engagement, collaboration, individualized justice, accountability and an outcomes focus are important policy markers for problem-solving courts. Problem-solving courts will seek to reverse the tendency to dehumanize the justice experience by making connections with service providers and the community to reconnect offenders and victims with professionals from relevant disciplines" (145). He sees the key as the realization that the offender is an individual who needs to be engaged in networks of care and assistance that reconnect and restore them to their community.

[978] See §82 I JGG and further discussions in sections 5.2. and 7.5.1. See also Albrecht (2002), 176.

representing the juvenile division of the public prosecutor's office, sometimes a defence counsel, sometimes a probation officer, a court reporter, and a social court assistant, who provides the court with reports on the offender's background, circumstances, and character.[979]

The Swedish system for dealing with young offenders consists of two interacting parts: the social services system for children and young people and the criminal justice system.[980] If someone under the age of 15 commits a crime, they are always referred to social services. Since these offenders have not reached the age of criminal responsibility, no legal sanctions may be imposed on them.[981] If a young person from 15 to 20 years of age commits a criminal offence, responsibility for dealing with the offence lies primarily with the criminal justice system. The dual system is reflected in the jurisdictions of the criminal and the administrative courts. According to the LVU, care should be provided to juveniles up to the age of 18 (and even to young adults up to the age of 20[982]) in danger of health and developmental risks resulting from substance abuse, criminal conduct, or other socially destructive behaviour.[983] Upon the social welfare committee's request, the administrative court may decide to place a young person in institutional care if the young person's health or development is in jeopardy. A criminal record is not a precondition for a juvenile to be placed in a special home, but it often combines with other personal and social factors to lead authorities to impose this measure.

When persons between the ages of 15 and 20 commit a criminal act, they may be held responsible by a criminal court. The Swedish system does not feature juvenile courts. Nor does it divide the jurisdiction of the courts vertically, which means that every case – from shoplifting to murder – is held before the district court.[984] According to chapter 1 §3b I RB, the district court for criminal cases

[979] For the role of the social court assistant, see 6.5.

[980] See section 3.5.

[981] See section 4.1.2.

[982] §1 3rd section LVU.

[983] §3 LVU states: "Vård skall också beslutas om den unge utsätter sin hälsa eller utveckling för en påtaglig risk att skadas genom missbruk av beroendeframkallande medel, brottslig verksamhet eller något annat socialt nedbrytande beteende".

[984] See chapter 1 §1 RB.

consists of a magistrate presiding over three lay judges.[985] Each lay judge has an equal vote with the magistrate in deciding both the guilt of the offender and the legal consequence.

As I mentioned in section 5.4., Swedish juvenile criminal trials are (almost) all open to the public. Apart from the court and the defendant, the other participants in the trial are a specialized juvenile public prosecutor, almost always a defence counsel, a court reporter, sometimes a representative of social services, and sometimes a probation officer.

It should be stressed, again, that in both countries the procedural position of the young offender in the criminal trial is in general the same as the position of an adult offender. This means in particular that the young offender's procedural rights are not restricted because they are underage.[986]

Analysis from a welfare/justice perspective

The major difference between the German and the Swedish juvenile criminal justice systems is the fact that Germany features juvenile courts while in Sweden trials against young offenders take place in the general criminal courts.[987] The establishment of specialized juvenile courts in Germany can be interpreted as an expression of the welfare/justice clash. On the one hand, it reflects the impact of welfare considerations – the acknowledgement of the need for specialized knowledge relating to the welfare of the young person. On the other hand, such courts are departments of the district or the regional court and are therefore still tied to the general criminal court, which can be understood as expressing the importance of justice considerations. The general criminal court structure is strictly bound by the rule of law since criminal law involves the most serious measures a state can impose on its citizens. The administrative location of the German juvenile courts can therefore be interpreted as an expression of the welfare/justice clash. Sweden, in contrast, remains true to its neoclassical guiding principle, as described in section 3.5., in that it makes no distinction between

[985] According to chapter 1 §3b II RB, if the legal consequence does not exceed a fine or imprisonment up to six months, the court may also consist only of one magistrate. See also Nordlöf (2012), 343.

[986] See Schaffstein, Beulke, and Swoboda (2014), 233 for Germany and Nordlöf (2012), 342 for Sweden.

[987] I return to the issue of specialization in the role of the judge in 6.2.

adult and young offenders regarding the jurisdiction of the criminal court. Here, justice considerations seem to prevail. However, as will be seen presently, the Swedish juvenile justice system satisfies the specific needs of young offenders in other ways.[988]

Another difference between the two countries can be found in the fact that Germany divides the jurisdiction of the courts not only horizontally but also vertically. In Sweden, on the other hand, all trials begin at the level of the district court. This difference, however, does not bear on the welfare/justice clash.

6.2. The role of the judge[989]

In Germany, the juvenile judge is the central figure in the juvenile trial.[990] According to §37 JGG, juvenile judges should be "educationally qualified and experienced in the education of youth".[991] They should be specialists in youth

[988] See also prop.1994/95:12, 34.

[989] I have decided not to include lay judges in this investigation. However, according to §35 JGG, even here the specific aspects that are decisive in the choice of lay judges reflect again the guiding principle of the German juvenile criminal justice system in placing an emphasis on educative abilities. For further reading, see Schaffstein, Beulke, and Swoboda (2014), 221–2. For Sweden, §25 LUL stipulates that even lay judges should be specifically appointed. See Nordlöf (2012), 344–5.

[990] The key role of the juvenile judge – as a person and not simply within the juvenile court – is described and emphasized by Kirsten Simon, *Der Jugendrichter im Zentrum der Jugendgerichtsbarkeit. Möglichkeiten und Grenzen des jugendricherlichen Erziehungsauftrages im Hinblick auf §37 JGG* (Mönchengladbach 2003).

[991] Training for juvenile judges – and juvenile public prosecutors – is provided by the "German judges' academy" (Deutsche Richterakademie), which offers several special courses that aim at deepening specialist knowledge. Each course takes about a week (see Jahresprogramm der Deutschen Richterakademie – Tagungen 2015: "Einführung in das Jugendstrafrecht", "Interdisziplinäres Jugendstraf- und Familienrecht", "Fachübergreifende Qualifizierung im Jugendstrafrecht", "Die Anhörung/Vernehmung von Kindern und Jugendlichen, auch unter Berücksichtigung der Videovernehmung" and "Gewalt in der Familie – Familien- und Strafrechtliche Aspekte, Stalking und Kindesmissbrauch") http://www.deutsche-richterakademie.de/icc/drade/nav/1ff/1ff60609-4df5-3641-fc47-91426350fd4c&press=true&page=1&pagesize=1.htm (last visited 2015-03-18). However, it has to be acknowledged that these special training courses for juvenile judges are neither obligatory, nor do juvenile judges always attend them in practice; see Schaffstein, Beulke, and Swoboda

offending.[992] This is reflected in the fact that a juvenile judge deals more or less exclusively with juvenile criminal cases.[993] The only time a (juvenile) criminal judge has to decide a civil law matter is when a claim for damages is filed alongside an indictment. However, according to §81 JGG, such a damages claim is prohibited in juvenile proceedings (although not in proceedings against young adults).

A German juvenile judge has more duties than a judge in criminal cases for adults. This is evident from the fact that, according to §34 I JGG, the juvenile judge has certain duties in the stages before the trial takes place that are not normally imposed on the judge presiding over the trial itself (for example, duties in the preliminary proceedings regarding search warrants, issuing an arrest warrant, etc.). Alike the criminal judge for adults, the juvenile judge decides during the "Zwischenverfahren"[994] to admit the indictment and opens proceedings according to §203 StPO. According to §199 StPO, the (juvenile) criminal judge thus exercises control over the indictment of the public prosecutor and examines the files independently to see whether the evidence justifies treating the offender as a suspect.[995] This means that prior to the trial the juvenile judge studies the files of the police and the public prosecutor; the report from the social court assistant; records from prior juvenile and family court hearings, from schools, or from institutions where the young offender may have been confined; and any letters from interested parties such as clergy or employers. Due to the principle of official investigation, the juvenile judge

---

(2014), 219 and also Hans-Joachim Plewig, "Jugendstrafrecht," in *Wörterbuch Soziale Arbeit. Aufgaben, Praxisfelder, Begriffe und Methoden der Sozialarbeit und Sozialpädagogik*, 491–6 (6th Edition. München: Juventa, 2008), 493 or Nele Drews, "Anspruch und Wirklichkeit von § 37 JGG," (*Zeitschrift für Jugendkriminalität und Jugendhilfe* 2005, No.4: 409–14), 409. For further empirical research concerning the extent to which the demands of §37 JGG are met in practice, see Simon (2003).

[992] See BGHSt 8, 349 (354). Note, though, that §37 JGG is classified as a mere guideline and does not imply any duty to specialize; see BGH MDR 1958, 3256. The specialization is often achieved through practical experience and on the basis of a particular interest in young people; see Albrecht (2000), 299 and his summary of existing empirical investigations on 300–2. The importance of specifically trained staff is also emphasized on an EU level in the "European Rules for Juveniles Subject to Sanctions and Measures" (Rec (2008) 11, rule 18).

[993] See further details in the empirical part of this thesis in section 7.5.1.

[994] Interlocutory proceedings – my translation.

[995] See BeckOK StPO/Ritscher StPO §199 margin no.4.

conducts the main questioning during the trial while the public prosecutor and the defence counsel contribute additional questions afterwards, if necessary.

Additionally, in a departure from the adult criminal system, the juvenile judge who delivers the verdict is also responsible for the enforcement of the measure according to §82 JGG.[996] The juvenile judge remains in charge even after delivering the sentence and supervises the carrying out of the verdict. From a practical point of view, this provides for a more rapid procedural process since possible misconduct is always reported directly to the juvenile judge without any detour through the public prosecutor's office.

In Sweden, §25 LUL stipulates that a trial against a young offender should be handled by a judge who has been specifically appointed to deal with such cases, unless this would raise any particular problems.[997] The decision of the head judge of a district court about whom to appoint should be guided by the interests of the potential appointee and by whether they are suitable for the role; the judge in question should have the authority and the capability to communicate with young offenders.[998] Note here that the law itself does not demand any kind of special training or specific skills for the judge in question (that is, it does not anymore; until 2001 it was stipulated that the judge should be specifically suitable for the role[999]). Nevertheless, the preparatory works emphasize that appointing certain judges specifically to deal with juvenile offenders would lead to several advantages: the development of knowledge and experience in this area and personal continuity for possible recidivist perpetrators.[1000] However, the demand to appoint judges specifically to deal with these cases is currently under review after the Swedish justice ombudsman established that over the last 20 years this rule had not accomplished the desired

[996] See also section 5.6.

[997] The General Comment No.10 (2007) regarding children's rights in juvenile justice by the Committee on the Rights of the Child explicitly points out that the establishment of specialized units is required for a comprehensive juvenile justice system. The form recommended is the establishment of juvenile courts either as separate units or as part of existing regional/district courts. The Swedish solution – namely the appointment of specialized judges – is only stated as a temporary solution (see points 92 and 93).

[998] See Nordlöf (2012), 345.

[999] See change of law with SFS 2001:152.

[1000] See prop.1994/95:12, 53 and 82ff. According to an evaluation in SOU 1999:108, the introduction of §25 LUL has mostly had positive effects, even if the investigation has also revealed several shortcomings (10).

effect and had often not been obeyed at all or had been obeyed only partially.[1001] In terms of specific training for handling juvenile trials, the Swedish judicial academy offers a single course divided into two parts: "ungdomsmål steg 1 och steg 2". The course takes all of four days to complete.[1002]

As I mentioned before, Sweden features an adversarial system in criminal trials. This places much greater weight on the parties, namely the public prosecutor and the defence counsel. The judge acts more like a referee, evaluating the evidence and then presenting a verdict. It is up to the public prosecutor to present the facts and lead the interrogation, with the defence attorney providing further questions. The judge does not interfere in the presentation of the evidence. If the judge thinks there is a need for further investigation, he or she does not usually point this out during proceedings, but will rather simply acquit the defendant.[1003] This gives the judge the role of a process leader, controlling and guarding the procedural rules but not exerting any influence with regard to the question of guilt. The latter duty belongs to the public prosecutor.[1004] The judge steers the procedure of the criminal trial and ensures that it is performed quickly, effectively, and to a high standard.[1005] Consequently, in Sweden, the role of the judge in the criminal trial is rather passive.[1006]

Regarding enforcement, all specifically juvenile legal consequences – like community service for juveniles, juvenile care, and closed institutional treatment – are enforced by social services.[1007] The judge is no longer actively involved in the process once the verdict is delivered; the supervision is rather turned over to the public prosecutor's office. Once the verdict has been delivered, the judge's duty is done.

[1001] See JO 2016/17, 71; also http://www.jo.se/sv/JO-beslut/Soka-JO-beslut/?query=282-2016 (last visited 2017-02-06).

[1002] Domstolsakademien – http://np.netpublicator.com/netpublication/n00047565 (last visited: 2016-09-29).

[1003] Note, though, the right of the judge to collect evidence described in section 5.1.

[1004] See SOU 2013:17, 214.

[1005] Ibid., 221.

[1006] This was also confirmed by Zila (2006), 287.

[1007] See section 5.6.

Analysis from a welfare/justice perspective

The juvenile judge is not only the central figure in German juvenile proceedings but also the very embodiment of the welfare/justice clash. As the figure chiefly responsible for achieving the educative aims of the German juvenile trial, the role of the judge has some strongly ideological elements.[1008] Juvenile judges in Germany are judges and educators at the same time.[1009] The principle of official investigation entails that the juvenile judge has a duty to ensure that the criminal trial proceeds in accordance with the rule of law, which assigns the juvenile judge the role of a protector of the principle of a fair trial (a justice consideration). However, their protective role encompasses the defendant as a person and emphasizes the parens patriae role of the judge.[1010] This is based upon the idea that the failure of parents in raising their children and in providing adequate education implies a need for public education, organized either by youth departments or (in case of criminal behaviour) by the juvenile criminal court,[1011] which reflects a focus on of the welfare of the young person. Positive role models are considered particularly important, as in many instances staff have to play the roles normally performed by members of the young offender's family.[1012] The fact that the German juvenile judge has so many duties – in the stages before the trial as well as in the enforcement stage – reflects the legislature's intention to concentrate responsibility for all the important

[1008] See Albrecht (2000), 297.

[1009] See Schaffstein, Beulke, and Swoboda (2014), 214.

[1010] The original idea behind parens patriae, which stems from common law, was that the king in his role as "father of the country" should possess the authority to protect his subordinates, especially the vulnerable ones – like, for example, children below the age of criminal capacity and juveniles; see Schaffstein, Beulke, and Swoboda (2014), 214. During the nineteenth century, the role changed, and the state was granted the authority to step in as a legal guardian for orphans or children whose parents lost their legal guardianship. This principle establishes the legal ground for the state to intervene between parents and children through court decisions; see Brigitte Stump, *Adult time for adult crime – Jugendliche zwischen Jugend- und Erwachsenenstrafrecht* (Schriften zum Strafvollzug, Jugendstrafrecht, und zur Kriminologie, Vol.18 Godesberg: Forum Verlag, 2003), 51. Schaffstein, Beulke, and Swoboda (2014) also point out that a young person often encounters the law for the first time in the person of the juvenile judge (214).

[1011] See Albrecht (2002), 172–3.

[1012] See Frieder Dünkel, "Young People's Rights: The Role of the Council of Europe," in *Reforming Juvenile Justice*, 33–44 (New York: Springer, 2009), 44. On a European level, this thought is also expressed in Rec(2008)11, Part I, A, 18 (see https://wcd.coe.int/ViewDoc.jsp?id=1367113 (last visited 2016-11-08)).

decisions regarding a young offender in one person.[1013] This constructs a much tighter net around the young perpetrator and ensures that the same juvenile judge deals with a convict not abiding by the terms of the sentence as convicted the young person in the first place. This should indicate to young offenders that someone from the authorities cares about them and is watching closely over them. For the same reason, a probation officer must be appointed for every young offender sentenced to a suspended or a conditional sentence/probation. The role of the probation officer in the German system contains another expression of the welfare/justice clash: it comprises not only an educational mandate (a welfare consideration) but also aspects of supervision and a duty to report misconduct (a justice consideration – the need for control). Since the probation officer acts as an extension of the juvenile judge, this expression of the welfare/justice clash can be directly transferred on to the role of the juvenile judge. Schaffstein, Beulke, and Swoboda emphasize that a juvenile judge, apart from having to possess the normal qualities of a judge, needs in addition a sensitivity to psychological considerations and a knowledge of how to relate to young people; first and foremost, the judge has to possess a love for young people and an understanding of the problems they face.[1014] But besides all these aspects, which reflect the educative guiding principle, the juvenile judge is still a judge. As mentioned above, the principle of official investigation means that the juvenile judge has a duty to ensure that the criminal trial proceeds in accordance with the rule of law. The double role the judge plays, combining control and support in the delivery and enforcement of sentences, is the most vivid example of the welfare/justice clash at the level of personnel. The juvenile judge is one person who has to fulfil two related but essentially separate judicial functions.[1015]

The role of the judge is different in the Swedish juvenile criminal justice system. The adversarial approach to criminal trials means the responsibilities of the judge and the public prosecutor in the trial are switched in the Swedish system as compared with the German system (though without ascribing the public prosecutor the role of an educator). Due to the adversarial approach, the judge assumes a controlling function during the proceedings to ensure that the rule of law is obeyed and that the principles of a fair trial are upheld (justice

[1013] See Schaffstein, Beulke, and Swoboda (2014), 220.

[1014] See Schaffstein, Beulke, and Swoboda (2014), 214.

[1015] In fact, until 1998, §34 II s.1 JGG recommended that the juvenile judge should, if possible, also be the guardianship judge at the family court; see Schaffstein, Beulke, and Swoboda (2014), 215, 220.

considerations). However, Swedish law still places a specific mandate on the Swedish judge who handles young offenders that is more demanding than the comparable role for adult criminal proceedings. This is clear from the fact that a Swedish judge who deals with juvenile criminal cases has to be specifically appointed according to §25 LUL. As mentioned above, the district court's head judge has to decide who to appoint based on the potential appointee's interest in and suitability for such cases, and appointees are expected to have authority with young persons and the ability to communicate effectively with them. This condition can be interpreted as a requirement to display some kind of pedagogical suitability, and so as an expression of a welfare consideration. Furthermore, as I said in chapter 4, it cannot be denied that the choice of the legal consequence, especially in relation to specific juvenile legal consequences, is itself very strongly influenced by welfare considerations.[1016] Here, the welfare/justice clash is evident in the role of the Swedish judge too, for the judge has to balance welfare and justice considerations in the sentencing process.

It should be noted that, even if both systems require a certain amount of specialization from juvenile judges, there are no specific educational requirements. The possibilities for further training also appear limited. This may undermine the aim, in both legal systems, of placing specialized judges in the juvenile criminal courtroom.

6.3. The role of the public prosecutor

In both Sweden and Germany, the prosecution of juveniles, young adults, and adults is based on the principle of prosecution and the principle of legality. The principle of prosecution means that an independent authority has the duty of indicting offenders.[1017] In both countries, this duty is given to independent public prosecution departments.[1018] The role of the public prosecutor is also based on the principle of objectivity, which implies a duty to work towards a substantively correct judgment.[1019] However, in neither country are public

[1016] See section 4.3.2.

[1017] See Beulke (2016), §2 margin no.18.

[1018] For Germany, see §152 StPO; for Sweden, see chapter 7 §4 RB.

[1019] See SOU 2013:17, 220 and SOU 2011:45, 105 and 137 for Sweden and §160 II StPO for Germany.

prosecutors as completely independent as judges.[1020] As described earlier,[1021] they are part of the executive rather than the judiciary and can therefore be subject to internal guidelines.

The principle of legality means that the public prosecutor is generally obliged to file charges in every case in which there is reasonable evidence that the offender has committed a crime.[1022] Exceptions to this principle are the possibilities to dismiss a case, sometimes expressed as the principle of opportunity as opposed to the principle of legality.[1023] In both countries, the scope for a dismissal is significantly broadened in relation to young offenders.[1024]

Without a formal indictment by the public prosecutor's office, no juvenile case may be brought before the juvenile criminal court in either country. Since the function of the indictment is to inform the perpetrator of the deed (informational function) and to close the actual offence off from other facts and circumstances (limiting function), the bill of indictment must contain the name of the accused, the charge, the time and place of the alleged offence, the legal elements of the offence, and the applicable penalty provisions. Furthermore, the indictment must indicate the evidence, a possible defence counsel, and the court which is competent for the trial.[1025]

After criminal proceedings have been initiated, information on personal and social circumstances relevant for evaluating the personality of the juvenile offender and the choice of sanction must be gathered. Apart from the duty to investigate the offence, the German juvenile public prosecutor is, according to

---

[1020] They are independent in the sense that they cannot be subject to instructions from the government. However, the public prosecution service is organized in a more or less strictly hierarchical structure. Public prosecutors are part of the executive rather than the judiciary and can therefore be subject to internal guidelines. See Zila (2006), 285, 288–9 for Sweden; for Germany, see §§146–7 GVG and Beatrix Elsner and Julia Peters, "The Prosecution Service Function within the German Criminal Justice System," in *Coping with Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe*, 207–36 (Berlin: Springer, 2006), 207.

[1021] See sections 4.3.1.3. and 4.3.2.4.

[1022] For Sweden, see chapter 20 §6 RB; see also Per-Olof Ekelöf, Henrik Edelstam, and Robert Boman, *Rättegång femte häftet* (7th Edition. Stockholm: Norstedts Juridik AB, 2007), 142–3. For Germany, see §§152 II, 170 I, 160, 163 StPO; see also BeckOK StPO/Beukelmann StPO §142 margin no.2.

[1023] See Beulke (2016), §2 margin no.17.

[1024] See section 4.2.

[1025] For Germany, see §200 StPO and Nr.110 RiStBV; for Sweden, see chapter 45 §4 RB.

§43 JGG, further obliged to investigate the personality of the young offender. The investigation of the personality is conducted with the help of the social court assistant[1026] and the police.[1027] In Sweden, before the public prosecutor decides on an indictment of a juvenile, he or she should collect a report from the social welfare office.[1028] A precondition of contacting the social welfare office, however, is that the juvenile has confessed to the offence or that there is sufficient evidence for it to be likely that the juvenile will be convicted of the crime in question. Furthermore, the offence must not be of a minor character.

According to §37 JGG, juvenile judges and juvenile public prosecutors in Germany should be "educationally qualified and experienced in the education of youth". In terms of the public prosecutor, the law goes even further, stipulating that a public prosecutor should not be appointed as a specialized juvenile public prosecutor during the first year of service.[1029] Even public prosecutors have the opportunity to take part in further training in the framework of the "judges' academy" mentioned above.[1030] Here, they can attend courses twice a year, each course lasting for about one week. Within the prosecutorial administration, juvenile public prosecutors are usually centralized in a separate unit.

The Swedish public prosecution services are also responsible for specialized juvenile prosecutors. These specialized public prosecutors deal exclusively with cases involving young offenders; this is in line with §2 LUL, which states that the public prosecutor in charge of the investigation of an offence committed by a young perpetrator should be specifically suited to dealing with such cases. Furthermore, the same paragraph specifies that, if the young offender has been subject to prior criminal investigations, the same public prosecutor should deal with the new case as dealt with the previous one(s), if possible.

Because of the various way in which cases may be diverted (as illustrated in section 4.2.), juvenile public prosecutors in Germany have considerable responsibility. The same is true of Swedish public prosecutors. On the other hand, with regard to the enforcement of a verdict, the duties of the German juvenile public prosecutor are restricted. Responsibility for the enforcement of a

[1026] With regard to the role of the social court assistant, see section 6.5.

[1027] See Schaffstein, Beulke, and Swoboda (2014), 255.

[1028] See section 6.5.

[1029] §36 I s.2 JGG.

[1030] In relation to the juvenile judge, see section 6.2., especially footnote 991.

verdict in adult cases rests with the public prosecutor's office; in the framework of juvenile criminal law, it is transferred to the juvenile judge.

Analysis from a welfare/justice perspective

Regarding the question of a dismissal/diversion in the pre-trial stage, in both countries the role of the public prosecutor is considerably broadened in the interests of the welfare of the young offender.[1031] From a procedural point of view, a trial and a sentence may be forgone if divertive measures in the form of a dismissal/diversion are sufficient.[1032] This also means that the principle of legality in relation to young offenders is restricted by the principle of subsidiarity, which in Germany rests on the idea of the priority of the educational ideal.[1033] These latter welfare considerations – including the acknowledgement of the harmful environment of the trial, which is to be avoided if possible – are ranked as more important than the strict application of the principle of legality as a justice consideration. But in Sweden the underlying idea of broadening the possibilities for dismissing a case against a young offender might also be interpreted as an expression of welfare considerations. For instance, the "förmåningstal",[1034] as described in §19 LUL, suggests an educative role for the public prosecutor when dismissing a case according to §17 LUL. It means that the public prosecutor has to communicate to the young offender what the decision to divert the case means, the duty to behave well, and the consequences of further criminal conduct. Such concerns reflect a pedagogical approach that aims to secure the welfare of the young person.

The broadened mandate regarding dismissals makes it fair to claim that, in this way, public prosecutors in both countries assume the role of a judge.[1035] This could lead to a conflict with the doctrine of the separation of powers. After all,

---

[1031] See section 4.2.

[1032] See Schaffstein, Beulke, and Swoboda (2014), 257.

[1033] See Eisenberg (2016), §45 margin no.9.

[1034] "Reprimand speech" – my translation.

[1035] This is particularly the case given that almost two-thirds of all German juvenile cases result in a dismissal/diversion by the public prosecutor. See Heinz, "Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882–2012," Konstanzer Inventar Sanktionierungsforschung, (http://www.uni-konstanz.de/rtf/kis/Sanktionierungspraxis-in-Deutschland-Stand-2012.pdf; last visited: 2017-01-20), 126.

the public prosecutor is part of the executive and is not formally equipped with the judicial power and independence of a judge. Then again, the broadened scope for dismissing/diverting a case is to be understood as giving procedural expression to welfare considerations (namely, the aim of avoiding stigmatization and the harmful environment of a trial) that have to be respected when dealing with young offenders. However, these welfare considerations still have to be balanced against justice considerations, especially the principle of proportionality. What this means is that in both countries public prosecutors embody the welfare/justice clash: when deciding on the dismissal of a case and trying to communicate this decision, they must balance welfare and justice considerations.

The impact of welfare considerations is further reflected in the general mandate of the public prosecutors to investigate the personality and background of the young offender (in Sweden, this is implemented through the collection of a report from social services; in Germany, it is stipulated explicitly in §43 JGG). This investigative duty focuses on the offender rather than on the offence: on the individual's situation and needs. This expresses the importance of welfare considerations. However, in Sweden, the precondition of collecting social services' report – a confession or sufficient evidence to secure a conviction – is an expression of a justice consideration, ensuring that the rule of law regarding the presumption of innocence is upheld.

6.4. The role of the defence counsel

As I outlined in chapter 2, my point of departure is the assumption that young offenders differ from adult offenders. This difference consists in part in young persons' deficient decision-making capacities, lack of a sense of responsibility, and lack of knowledge of their rights and therefore an inability to defend themselves properly. This places young offenders in a disadvantageous position in courtroom, with its particular forms of communication,[1036] and this means an increased need for a defence counsel.

[1036] See Albrecht (2000), 346 and Brunner and Dölling (2011), §68 margin no.9. Regarding language and the courtroom encounter in the juvenile courtroom, see also sections 7.5.2. and 7.5.3.

In Germany, according to §137 I StPO, a young offender always has a right to a defence counsel, just like any adult offender.[1037] In cases involving young offenders, the parents (§67 III JGG) and the legal guardian (§137 II StPO) also have a right to mandate a defence counsel. The police must inform the young perpetrator of the right to consult with an attorney of his or her choice prior to questioning. This right to choose and consult with a defence counsel extends through all stages of proceedings. A defence counsel has to be appointed (a "compulsory" defence counsel) in all cases in which an adult would be entitled to one according to §140 StPO (mostly in cases of felony offences and cases in which the offender has been placed in pre-trial detention).[1038] In addition, according to §68 I No.2–5 JGG, there are more possibilities for assigning compulsory legal representation in cases involving young offenders due to their greater need for protection.[1039] For example, there are cases in which the privileges of the parents or the legal guardian may have been revoked (No.2), in which the parents or legal guardians are excluded from the trial according to §51 II JGG (No.3), or in which the young offender is has been placed in pre-trial detention (No.5). In relation to the defence counsel, the German legislation does not contain the demand that they be "educationally qualified" as is stipulated for the juvenile judge and the juvenile public prosecutor.

In Sweden, according to §24 LUL, a defence counsel is appointed if the suspect is under the age of 18 unless it is obvious that he or she has no need for a defence counsel.[1040] It is only assumed that there is no need for a defence counsel in minor cases – for example, minor traffic offences – and the rule is that in general a public defence counsel should be assigned.[1041] The preparatory works reject the introduction of a demand of specific suitability for the young offender's defence counsel.[1042] A young offender has a right to a public defence counsel from the moment he or she is informed about being a suspect. When a

[1037] The right to a trusted defence counsel enjoys constitutional status; see BVerfG 38, 111.

[1038] See §68 I No.1 JGG.

[1039] See Eisenberg (2016), §68 margin no.9a and Albrecht (2000), 286 and 290. Note also that access to records is granted only to a defence counsel (§147 StPO), which means that if access to records is required – for example, because of an extensive report by the social court assistant or by an expert – the court has to appoint a defence counsel for the young offender.

[1040] The preparatory works emphasize the importance of a public defence counsel for young offenders in light of the UNCRC (especially in relation to Art.40); see prop.1994/95:12, 91–2.

[1041] See prop.1994/95:12, 93–4 and prop.2011/12:156, 43 as well as JO 2008/09, 92.

[1042] See prop.2005/06:165, 112.

defence counsel is to be appointed, the leader of the investigation should notify the court.

Analysis from a welfare/justice perspective

In both countries, there is more scope for appointing a public defence counsel in relation to young offenders. This is based on the acknowledgement of a young perpetrator's greater vulnerability and thus greater need for protection, and so is an expression of welfare considerations.

In the German juvenile criminal justice system, §68 JGG[1043] broadens the general provisions relating to the defence counsel. The demand that the defence counsel should possess a particular educational qualification, however, is considered to restrict the right of the defendant to an effective defence as laid down in Art.6 section 3c ECHR.[1044] But it has been acknowledged that the defence counsel can be a valuable resource when it comes to the pedagogical mandate of the juvenile court if he or she is attentive to these educational aims;[1045] on the other hand, it is claimed that the defence counsel may seriously jeopardize the achievement of the educative goals of the juvenile court.[1046] Nevertheless, the prevailing academic opinion in relation to the mandate of the defence counsel is that he or she has to try to achieve the best outcome for the client – even if that would be at odds with the educational ideal of the juvenile court. The defence counsel thus has the same position in both juvenile and adult criminal proceedings.[1047] Besides the right of the young offender to a fair trial,[1048] as a justice consideration, the main reason for this is that juvenile criminal law contains aspects of retribution and punishment besides education, and it is the duty of the defence counsel to avoid punishment for the client (as a

[1043] And also §67 III JGG and §137 II StPO.

[1044] See Eisenberg (2016), §68 margin no.10.

[1045] See Ellen Schlüchter, „Der Erziehungsgedanke als Leitbild der Verteidigung im Jugendstrafverfahren," (*Bonn: Bundesministerium der Justiz*, 1987: 29ff.), 35, who insists that the defence counsel has a duty to pursue an "optimal educative effect".

[1046] See Schaffstein, Beulke, and Swoboda (2014), 237.

[1047] See Eisenberg (2016), §68 margin no.10–13 or Ostendorf (2016), §68 margin no.3.

[1048] According to Art.6 Section 1 and 3 ECHR; see also Albrecht (2000), 288–9.

justice consideration).[1049] Still, within that framework there remains enough space for the defence counsel to respect psychological and pedagogical considerations.[1050] Others advocate the view that there should be a different mandate depending on the character of the legal consequence,[1051] or that the educational guiding principle should be considered in relation to the choice of the legal consequence but not with regard to the question of guilt.[1052] All of these conflicting arguments illustrate the impact of the educational guiding principle and thus the importance of welfare considerations. In the academic debate about the role of the defence counsel, we can witness an attempt to balance welfare and justice considerations and so an expression of the welfare/justice clash. However, the opinion that juvenile criminal law contains certain aspects of retribution and punishment that do not aim simply to educate juveniles and that it is the duty of the defence counsel to avoid punishment for their clients and guarantee a fair trial makes the defence counsel an embodiment of justice rather than welfare considerations. It has been acknowledged that the legal counsel can be a counterbalance to state power and that this makes it more likely that the truth will be uncovered.[1053]

It should also be noted that the general right of young offenders to a defence counsel is sometimes disputed in Germany. One argument against the presence of a defence counsel is that attorneys may obstruct the court by treating it as an

[1049] See Eisenberg (2016), §68 margin no.10 and also Jesko Baumhöfener, *Jugendstrafverteidiger – Eine Untersuchung in Hinblick auf §74 JGG* (DVJJ Schriftenreihe der Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V. Mönchengladbach: Forum Verlag Godesberg, 2007), 17. This also means that the defence counsel, who knows whether or not the client is guilty, has no duty to reveal this knowledge on educational grounds; see BGH 2, 375 (377).

[1050] See Eisenberg (2016), §68 margin no.11a or Arnold Köpcke-Duttler, "Besitzt die Verteidigung im Jugendstrafverfahren eine Erziehungsaufgabe?," (*DVJJ- Journal* 2001, No. 2:133–6), 133.

[1051] See Brunner and Dölling (2011), §68 margin no.12 in relation to what was described in sections 4.1.1.1.–4.1.1.4.

[1052] This position is advocated by Schaffstein, Beulke, and Swoboda (2014), 238. For further reading and an overview of these issues, see Baumhöfener (2007), 4–31 or Matthias Zieger, *Verteidigung in Jugenstrafsachen* (5th Edition. Heidelberg: C.F.Müller Verlag, 2008), especially part 5.

[1053] See Peter-Alexis Albrecht and Steffen Stern, "Verteidigung in Jugendstrafsachen," (*Strafverteidiger* 1988: 410 ff.), 412.

adversarial system, thereby undermining the educational guiding principle.[1054] However, it would not be right to exclude all attorneys merely because some are obstructionists – particularly in light of their mandate as I presented it above. Besides, even if the probation officer, the social court assistant, and the juvenile judge act as the young offender's defence counsel in their parens patriae roles, it cannot be denied that the defence counsel can often render valuable assistance, since some of the other parties – especially the social court assistant or the probation officer – are sometimes unaware of the law or may have personal standards which would hamper an unprejudiced defence. Apart from that, juvenile judges are often too busy to search for and discover mistakes made by these officers.[1055] Another argument against young offenders' right to a defence counsel is that the role of the defence counsel is difficult to define and that many juvenile perpetrators may be too young to direct their attorneys. What should the attorney do: argue the case he or she believes is in the young offender's best interests, or act as a neutral investigator, gathering and presenting to the court as much information about the case and the perpetrator as possible?[1056] Additionally, it can be argued that a defence counsel for young offenders is inappropriate because a juvenile court finding is often not a "real" criminal conviction.[1057] On the other hand, the idea that the finding is not a genuine criminal conviction should serve to protect the young perpetrator (from stigmatization or the harmful environment and effects of the trial) and should not be used as a basis for denying young offenders a guarantee granted by law to their adult counterparts. All these conflicting positions reflect yet another aspect of the welfare/justice clash as it appears in the definition of the role of the defence counsel.

[1054] See Albrecht and Stern (1988), 411 or Wolf-Günther von Cohnitz, *Der Verteidiger in Jugendsachen* (Neuwied am Rhein: Luchterhand, 1957), 67.

[1055] For more on the role of the defence counsel in general as an organ of the judiciary in virtue of its role in ensuring a fair trial, see Beulke (2016), §9 margin no.150.

[1056] Here, we find similar questions as arose before in the discussion of the mandate of the defence counsel. For further discussion, see Martin Guggenheim, "The right to be represented but not heard: reflections on legal representation for children," (*New York University Law Review* 1984: 76–156) and Richard Kay and Daniel Segal, "The role of the attorney in juvenile court proceedings: a non-polar approach," (*Georgetown Law Journal* 1961, 1972–1973: 1401–24).

[1057] For example, the dismissal of a case according to §47 JGG, a legal consequence that nonetheless might be perceived as a "punishment" by the defendant. In this light, its non-criminality seems more like a legal fiction.

In the Swedish juvenile criminal justice system, there is not a debate about the role of the defence counsel in the same way, which is probably because of the system's adversarial approach and the neoclassical loadstar. The assignment of a defence counsel to a young offender is the rule in Sweden.[1058] Because of the adversarial system, the need for a defence counsel is much greater than in the German system because young offenders are in greater need of protection. The more frequent assignment of a public defence counsel in Sweden is therefore in the interests of welfare (the weaker position of the young offender because of their lack of maturity and greater vulnerability) as well as justice (the right to a fair trial and the need to balance state power), and therefore expresses the welfare/justice clash. However, as mentioned above, the preparatory works rejected the introduction of a demand that the defence counsel be specifically suited for dealing with cases involving young offenders.

A recent change in the Swedish prosecutor guidelines[1059] highlights the need of young perpetrators for a defence counsel and establishes a strengthened right to a defence counsel for this group. The reason for the changes is the UNCRC and the associated aim of acting in the best interests of the child. A major concern of the "Justitieombudsman" (JO)[1060] was that public prosecutors were questioning young offenders without a defence counsel present.[1061] Here, young offenders' greater need for a defence counsel and for protection represents welfare considerations to be balanced against justice considerations (the right to a fair trial and the need to balance state power) and exemplifies another facet of the welfare/justice clash in the Swedish juvenile criminal justice system.

However, despite the impact of welfare considerations, the role of the defence counsel in both countries incorporates, more than any other role in the juvenile courtroom, justice considerations: the defence counsel is entrusted with the duty to ensure a fair trial and balance the state's power.

[1058] Ekelöf et al. (2016) argue in a similar way that a public defence counsel is even more vital than the aforementioned principle of objectivity and the elements of the principle of official investigation in the Swedish criminal trial (see *Rättegång I*, 74).

[1059] The changes of the original prosecutor guidelines RåR (2006:3) entered into force on 4 April 2016. They are the results of cooperation between the Swedish Attorney General (Riksåklagare) and the Lawyer's Society (my translation of "Advokatssamfundet"); see RåR (2016:1).

[1060] For a description of the role of the ombudsman, see section 5.2. footnote 853.

[1061] See JO 2008/09, 98ff.

6.5. The role of social services

The youth welfare service, incorporated into the German juvenile criminal trial through a social court assistant,[1062] is assigned the task of assisting the juvenile court.[1063] The social court assistant is the pedagogical authority in the juvenile criminal trial.[1064] This relates to the character of German juvenile criminal law as "offender criminal law",[1065] which implies that the juvenile court must not only assess the young offender's level of maturity (in relation to §3 JGG and §105 JGG) but also adapt the legal consequence to the educational needs of the young perpetrator, making use of a prognosis about the future behaviour of the young offender.[1066] This presupposes an objective investigation into the personality of the young offender to enable the juvenile court to decide on a suitable legal consequence. From a procedural point of view, the social court assistant is an institution sui generis. The role has its own rights and duties;[1067] it is not a part of law enforcement or a counsel for the defendant, nor is it evidence in the case.[1068] According to §52 of the SGB VIII, the youth welfare service has to contribute to juvenile criminal proceedings in accordance with §§38 and 50 III s.2 JGG. In order to fulfil this duty, after being informed by the police or the public prosecutor,[1069] a social court assistant investigates the personal and social circumstances of the defendant in order to advise the juvenile court on the appropriate sanction and deliver a report.[1070] However, the social court assistant

[1062] §38 JGG; my translation of "Jugendgerichtshilfe".

[1063] See §52 SGB VIII, which refers to §38 JGG and §50 Abs.2 s.2 JGG.

[1064] See Albrecht (2000), 310.

[1065] See section 3.2.

[1066] See Simon (2003), 114.

[1067] See BGH 27, 250ff. For a concise summary of these rights and duties, see Schaffstein, Beulke, and Swoboda (2014), 245–7.

[1068] See Schaffstein, Beulke, and Swoboda (2014), 245.

[1069] Whenever the question of whether a young offender should be placed in pre-trial detention arises, the social court assistant is to be informed immediately and to be present at the pre-trial custody hearing. One of the reasons for this has already been mentioned (in section 4.1.1.4.), namely that incarceration is a measure of last resort. One way to avoid pre-trial detention for a young offender is if social services can offer an alternative placement.

[1070] §38 II s.2 JGG relates to this investigation of the personal background of the young offender. This reflects the aim of closer cooperation between the different agencies involved (a multi-agency approach), which is emphasized in Rec (2008) 11, rule 15. Furthermore, it gives the social court

has no duty to appear in the juvenile court,[1071] although the juvenile court is obliged to inform the social court assistant of the date and time of the trial. If they appear, they have the right to assume an active part in the juvenile criminal trial, if they so wish, by being admitted to the floor and delivering their report (§50 III s.2 JGG). The report does not necessarily have to be a written report. The importance of this investigation of the socio-biographical development of the young offender for the verdict is reflected in §43 JGG, which emphasizes the necessity of evaluating the mental, spiritual, and overall character of the young perpetrator and defines the scope of the social court assistant's investigation.[1072]

The role of the social court assistant in relation to the young offender is not unproblematic. On the one hand, the assistant is a person of trust for the young perpetrator, and the assistant will have spoken with the young person at length about their overall life situation, family issues, education, leisure time activities, etc., as well as about the offence. On the other hand, the social court assistant has to report to the juvenile court and must point out troubling aspects of an offender's personality or lifestyle (note that the social court assistant has no right to refuse to give evidence).[1073] This latter point is also reflected in the procedural role of the social court assistant as a sui generis institution that is required to be objective.[1074] The social court assistant is a representative of society and state.[1075] Ostendorf describes the role of the social court assistant as that of a "double agent".[1076]

From the preparatory works, it appears that the role of social services[1077] in the Swedish juvenile criminal trial is similar. These works state that the point of

---

assistant an assignment comparable to police work: firstly, to investigate the personality of the offender and, secondly, to investigate the offence itself; see Albrecht (2000), 311.

[1071] See Eisenberg (2016), §38 margin no.23.

[1072] See Verrel (2001), 288.

[1073] See BVerfGE 33, 367ff. This in contrast to the defence counsel, which is yet another reason that the social court assistant cannot assume the role of a "social counsel" substituting for the defence counsel; see in this connection Albrecht (2000), 344. Note, however, that the social court assistant generally does not serve as a body of evidence, even if he or she can be heard as a witness; see Eisenberg (2016), §50 margin no. 39.

[1074] See Eisenberg (2016), §38 margin no. 23 and Albrecht (2000), 312.

[1075] See BVerfGE 33, 382.

[1076] See Ostendorf (2015), 80.

[1077] In this thesis, the expression "social services" refers to "socialtjänsten", which answers to the "socialnämnden" (the latter being the public authority responsible for the practical and political

departure should be that young persons who commit offences should first and foremost be dealt with by social services.[1078] This is reflected in the fact that the responsibility for enforcing the two central legal consequences of "juvenile care" and "community service for juveniles" rests with social services. The importance of social services in the Swedish juvenile criminal justice system is based on the acknowledgement of their specific competence and expert knowledge in working with young persons with social problems.[1079] The preparatory works emphasize that social services have the professional skills needed to evaluate the social situations of young offenders and to suggest specific interventions.[1080] If an offender under the age of 18 is the suspect of a crime which can lead to a prison verdict, social services have to be informed immediately;[1081] at the latest, they must be informed when the young offender is informed that they are a suspect.[1082] An underlying thought is that social services should be able to initiate any sort of investigation into the personal circumstances of the young perpetrator and suggest a potential supportive intervention as early as possible.[1083] According to §7 LUL, social services should, if possible, be present when the suspect is questioned by police. They should assume, first and foremost, a supportive role.[1084] Furthermore, an early engagement in the process should enable social services to establish a relationship not only with the young offender but also with the parents.[1085] According to §11 LUL, the public prosecutor should request a report from social services before prosecuting a young offender under the age of 18 if such a report has not already been requested. Commissioning a report from social services is unnecessary only in cases of minor offences, for example if it is obvious that the offence will lead to a dismissal. Apart from the description of the young offender's personal development and living conditions in general, the report should contain

---

work regulated by the SoL in each Swedish municipality). In this study, I refer to social services mostly in connection to the function they perform in the criminal trial.

[1078] See prop.2014/15:25, 24.

[1079] Ibid.

[1080] See SOU 2012:34, Volume 3 Part 2, 391.

[1081] §6 LUL.

[1082] §11 LUL.

[1083] See prop.1994/95:12, 66.

[1084] Ibid., 67.

[1085] Ibid.

information about any social service measures the young perpetrator has previously been subjected to and an assessment of whether the offender has a special need for measures aimed at countering an unfavorable development. This mandate contains a general duty to inform.[1086] Furthermore, the report should contain an account of all the measures social services plan to carry out. These may consist of a care plan, which rests upon provisions in the LVU, or a care contract, resting on the provisions of the SoL.[1087] If there is no such report, the court cannot sentence the young offender to juvenile care.[1088]

The Swedish social services should be informed when the public prosecutor decides to dismiss the case according to the provisions of the LUL and should be able to attend the meeting at which the public prosecutor informs the young offender of the dismissal.[1089] However, the LUL does not contain any provisions dictating or even recommending the presence of social services in the juvenile trial.

As in the German juvenile criminal justice system, Swedish social services have a difficult role to play in relation to the young offender. Because of the nature of their mandate, social services are somewhat caught in the middle; they function as figures of trust and support for young offenders, but at the same time they have to carry out a controlling function.[1090]

Analysis from a welfare/justice perspective

The role of the Swedish social services in the juvenile criminal justice system is not established in the same way as the role of the social court assistant in Germany, the latter of which is a genuine institution created for the juvenile court according to §38 JGG. However, their mandate is similar. In both countries, their roles combine elements of control and support and so embody the welfare/justice clash. They genuinely aim at the welfare and social education of the young person (welfare considerations), but they also find themselves with

[1086] See SOU 2012:34, Volume 3 Part 2, 307.

[1087] See section 4.1.2.

[1088] §28 LUL.

[1089] §18 and §21 LUL.

[1090] Tärnfalk (2014) – with reference to Dominelli – compares this dilemma to the two faces of Janus in Roman mythology, who has to help and control people at the same time (33).

duties of justice and obligations to report to the court (justice considerations in the form of transparency and control).

In Sweden, the complicated role of social services is crystallized in the dual function of their report: in the interests of predictability and proportionality, the statement must enable the court to foresee the type of intervention planned and the relation it bears to the offence; in the interests of welfare, the report must properly assess the young offender's needs. It is the young person's current situation and potential for development that must be taken into account, not the offence itself.[1091] Here, we find an instance of the balancing of welfare and justice considerations. Social services have to handle what Tärnfalk calls an "inbuilt dilemma",[1092] meaning that they face tensions to balance "social and legal needs"[1093] or, in my terms, welfare and justice considerations. The rules underpinning their report must adhere to certain standards, namely the best interests of the child and the child's needs as an expression of welfare considerations. On the other hand, the report lays the foundation for the legal consequences the offender is to face, and these have to be proportionate to the crime as a justice consideration. The implication is that the social workers' interventions should be in proportion to the severity of the crime. This suggests the lawyerly view that the social welfare system should correspond to the criminal justice system in the way it judges the severity of the crime and sets out the sentence, which highlights the difficulties social workers face in this task.[1094] However, Tärnfalk considers it possible to combine these interests successfully.[1095] This assumption is supported by Brå's Report 2002:19, which states that the judges thought that the statements submitted by social workers to prosecutors respected the principles of proportionality and culpability in the way they planned interventions for young people prosecuted for criminal offences, and courts in most cases agreed to social services' proposals for legal consequences.[1096] The findings of this report contradict an argument put forward by some German critics, who suggest that the necessity for strong cooperation between the court and the social court assistant could lead to rivalry

[1091] See Hollander and Tärnfalk (2007), 99.

[1092] See Tärnfalk (2014), 32.

[1093] Ibid.

[1094] See Hollander and Tärnfalk (2007), 101.

[1095] See Tärnfalk (2014), 33.

[1096] See Brå Report 2002:19, 33.

between the two parties and attempts by both parties to delegitimize the other and enhance the impression of their own professionality at the expense of the other, which would lead to a lowering of standards.[1097] This clearly represents the conflict between welfare and justice considerations and exemplifies the welfare/justice clash.

In the German juvenile criminal justice system, the social court assistant's mandate includes a role as an investigation assistant for the juvenile court in relation to the personality of the young offender, a role similar to that of the police;[1098] on the other hand, the social court assistant is also a supervising tutor who is meant to help and protect the young person in the early stages of an investigation and throughout the juvenile trial. This duty implies a responsibility to provide help if the offence and the trial lead to new problems, for example conflicts with parents, at school, or at work, and to seek to avoid panic responses like new criminal conduct, fleeing, or suicide.[1099] The role of the social court assistant incorporates social education and criminal justice. It is one of the most important institutions aiming to protect young persons' welfare in the realm of criminal law.[1100]

The picture that has emerged is that social services in the Swedish juvenile criminal justice system and the social court assistant in the German juvenile criminal justice system are institutions in which justice and welfare considerations intertwine with one another. They are both embodiments of the welfare/justice clash.

[1097] See Bernd Dollinger and Henning Schmidt-Semisch (eds.), *Handbuch Jugendkriminalität. Kriminologie und Sozialpädagogik im Dialog* (2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011), 15. The findings of the Brå Report cannot simply be transferred to the German juvenile justice system. However, as we will see in section 7.5.3., my empirical study supports such a conclusion.

[1098] It should be noted that the social court assistant in the German juvenile criminal justice system has a role as part of the state's crime-fighting apparatus.

[1099] See Schaffstein, Beulke, and Swoboda (2014), 251–2.

[1100] See Albrecht (2000), 310.

6.6. The role of parents and legal guardians

In both Sweden and Germany, the role of the parents and the legal guardians – which are in most cases the same people – pertains only to cases involving young offenders up to the age of 18. This is due to the fact that here, any intervention by the state interferes with the educational right of the parents. Article 5 and Article 18 of the UNCRC stipulate that the responsibilities, rights, and duties of parents and legal guardians shall be respected, including their right to educate the child and their responsibility to ensure the best interests of the child are protected. The state has a responsibility to assist the parents and legal guardians in these tasks. In both Sweden and Germany, the law gives the parents and the legal guardians of a young offender rights to be informed and to be present at hearings and interrogations.

In the German juvenile criminal legal system, §67 JGG sets out the position of the parents and legal guardians, providing them with rights and duties that make them into independent parties in the trial.[1101] However, in contrast to civil law, they are not automatically the representatives of the young offender.[1102] The reason for their extended rights is that the intervention of the state might conflict with the parents' right to educate their child, which is anchored in the German constitution in Art.6 II GG. This means that the state only has a protective role and must not interfere too much with the educational rights of the parents.[1103] As an expression of the parents' and the legal guardian's rights, §67 JGG contains the rule that they are to be apprised of all information and measures taken, and that they have the right to the "last word" alongside the young offender. Furthermore, §67 JGG expands the rights of the defendant towards the parents and legal guardians: to attend the juvenile trial (which is held behind closed doors), to ask questions and propose motions, to attend investigative meetings, to choose the defence counsel, and to lodge an appeal. §50 II JGG stipulates the duty of the juvenile court to summon the parents and the legal guardian. However, §51 II JGG enables the juvenile court to exclude parents and legal guardians from the hearing, but only in exceptional cases when

[1101] See Schaffstein, Beulke, and Swoboda (2014), 276.

[1102] See A. Richmann, *Die Beteiligung des Erziehungsberechtigten und des gesetzlichen Vertreters am Jugendgerichtsverfahren* (Frankfurt a.M.: Lang, 2002), 19. According to §1626 BGB, the parents and the legal guardian are automatically the representatives of a juvenile when it comes to, for example, contractual obligations. See also Brunner and Dölling (2011), §67 margin no.1a.

[1103] For more detail, see BVerfG 2 BvR 716/01, BVerfG NJW 2003, 2004.

their presence could harm the defendant or the investigation. This phrasing makes clear that in juvenile proceedings the presence of parents and legal guardians is the rule rather than the exception. Furthermore, according to §43 I s.3 JGG, parents and legal guardians should be consulted whenever possible.[1104] This rule refers to the investigation of the personal and social circumstances of the young offender, which should be undertaken as soon as possible. However, when parents and legal guardians are questioned as part of this investigation, their precise role is the matter of some dispute. A convincing position in this debate is that they are not to be considered formal witnesses,[1105] which also enables the judge to contact the parents when preparing for the trial.[1106]

In Sweden, §5 LUL stipulates that the legal guardian of a juvenile has to be informed immediately if a young offender under the age of 18 is suspected of an offence. According to the preparatory works, this rule is based on the fact that young perpetrators are in need of support from parents and adults in general – including those representing the public authorities.[1107] This is also the reason that the legal guardian has to be summoned to the police questioning if it does not impede the investigation. The same applies if the public prosecutor decides to dismiss the case according to LUL and summons the juvenile to inform them of the dismissal.[1108] However, the presence of parents and legal guardians is not a right per se[1109] since they can be excluded.[1110] Furthermore, according to §26 LUL, the court informs parents and legal guardians about the date of the trial in cases in which the public prosecutor brings a charge against an offender under the age of 18. Chapter 21 §1 RB also stipulates that the legal guardian of a child or a juvenile should be heard in court when it is deemed necessary because of the character of the offence. If the indictment concerns an offence which could lead to a prison sentence, the parents and legal guardians must be heard in the trial. The preparatory works again emphasize the importance of support for the young

[1104] For an overview of all these rights and duties, see Richmann (2002).

[1105] Even though they have a right to refuse to give evidence according to §52 I No.3 StPO.

[1106] See Brunner and Dölling (2011), §67 margin no.2 and Schaffstein, Beulke, and Swoboda (2014), 236.

[1107] See prop.1994/95:12, 64–5, which emphasizes the active role a legal guardian should assume by participating in the process and providing help and support; see also DS 2013:30, 103.

[1108] §18 LUL.

[1109] See Brå Report 2014:11, 29.

[1110] For example according to chapter 23 §10 RB. See also the reasons stated in prop.1994/95:12, 65.

offender, but they also state that, beyond the importance of parents' and legal guardians' statements for determining which legal consequences the young person will face, the trial should make clear to the parents/legal guardians that they have a responsibility for the young offender.[1111] In these cases, they have the right to be compensated like witnesses. However, the inclusion of the word "like" in the statute makes it clear that parents and legal guardians are not witnesses per se.

As of 1 September 2011, parents and legal guardians can be made vicariously liable for offences committed by minors that cause personal injury and property damage and violation, with no requirement that they participated in or promoted the crime.[1112] In cases in which such a damage claim is brought, the legal guardians become a genuine party of the criminal trial, with all the rights and obligations that go along with that status.

Analysis from a welfare/justice perspective

The role of parents and legal guardians is more prominent in German than in Swedish proceedings, which reflects the stronger position of the young offender in the German system. In both countries, parents and legal guardians have the same rights to be informed and participate in the juvenile trial as the juvenile does (if the young offender is under the age of 18 years), but in Germany, the legal guardian is also granted the same rights as the defendant in the proceedings.

The involvement of parents and legal guardians in juvenile criminal proceedings is an acknowledgement not only of parents' rights, but also of the lower level of maturity and greater vulnerability of young offenders, and so these measures express welfare considerations. Respecting parents' rights to educate their children and acknowledging their influence in the form of support and care can also be interpreted as advancing the welfare of the young person. On the other hand, respecting parental rights that are anchored in the constitution can also be seen as a way of upholding principles of justice. The emphasis on the support and security of the young offender, combined with the aim that parents and legal guardians should cooperate in order to avoid reoffending, may also be

[1111] See prop.1994/95:12, 88–9.

[1112] Chapter 22 §§1–2 RB; chapter 3 §§5 and 11 Skadeståndslag (1072:207) (SkL); prop. 2009/10:142, 41–2.

interpreted as giving expression to justice considerations: the goal of special deterrence and the aim of guaranteeing a fair trial through control and by placing young offenders on as equal a footing with adult offenders as possible.[1113] According to the Swedish preparatory works, the objective of involving parents and legal guardians is also to promote their cooperation in the prevention of reoffending.[1114] Equally, it might also be seen as an indication that the law is attempting to encourage and support educative measures. All these factors make it difficult to determine how the role of parents and legal guardians should be seen and illustrate the welfare/justice clash.

The Swedish juvenile criminal justice system features the specific provision of parental liability. The underlying reason for this is that juvenile delinquency is considered to be connected to the parents' responses to their child's deviant behaviour.[1115] Parental liability for the consequences of such behaviour should make it clear that parents/legal guardians are primarily responsible for communicating values and norms to their children that should reduce the likelihood of offending.[1116] The educative grounds for this measure reflect welfare considerations. On the other hand, holding parents and legal guardians accountable for a young person's offence can also be interpreted as serving the interests of justice by ensuring that the victim receives damages. Here, we find another expression of the welfare/justice clash.

6.7. The role of the victim

According to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, there are four basic rights that all victims should enjoy: access to their own trial and fair treatment, the right to compensation from the offender, the opportunity to receive compensation from the state, and the right to material, medical, psychological and social support from public or

[1113] See also what was stated in Brå Report 2014:11, 49–50 in relation to legal certainty.

[1114] See prop. 1994/95:12, 65 and DS 2013:30, 104. See also prop. 1987/88:135, 32f.

[1115] See DS 2009:42, 44.

[1116] See Brå Report 2014:11, 31.

voluntary organizations.[1117] However, it should be borne in mind that this declaration is not a binding document but rather a statement of aims.

In Germany, the victim is not a party in the criminal trial. Even if the court grants the right to attend proceedings as a joint plaintiff,[1118] the victim remains a witness, but has further rights, such as attending the hearing at all stages and proposing motions.[1119] However, in trials against young offenders, such an accessory prosecution is only admissible in the cases described in §80 JGG, which basically restricts this right to cases of serious felonies. In these cases, the victim has a legal right to be present throughout the proceedings, even if the juvenile trial is held behind closed doors.[1120] Apart from this possibility, the victim of a crime is a witness, with the same rights and obligations as any other witness. However, there has been a movement in Germany towards strengthening the position of the victim of the crime such that they not only serve the function of a witness. This is reflected in the "Opferschutzgesetz"[1121] and the two amendments to it, the Opferrechtsreformgesetz[1122] of 30 June 2004 and 29 July 2009, and also in the "Gesetz zur Stärkung der Rechte von Opfern sexuellen Missbrauchs" (StORMG).[1123] Moves towards increased victim protection were triggered at the European level by the directive of the European Parliament and of the Council of 25 October 2012 on minimum standards on the rights (2012/29/EU), support and protection of victims of criminal proceedings, replacing Council Framework Decision 2001/220/JHA from 15 March 2001. The Victim Protection Directive was transposed into national law through the third Opferrechtsreformgesetz, which entered into force on 31

[1117] See Magnus Lindgren, Karl-Åke Pettersson, and Bo Hägglund, *Brottsoffer: från teori till praktik* (Stockholm: Jure CLN AB, 2001), 43–5.

[1118] According to §80 JGG and §396 StPO.

[1119] §397 ff. StPO.

[1120] See §48 II JGG. This is an exception to the general procedural structure. Generally, the role of the victim as a witness means that the victim cannot be present during the interrogation of the defendant if the victim is to be heard as a witness, since in the German criminal trial the witness is always questioned after the defendant.

[1121] Victims Protection Act – my translation.

[1122] Victim's Rights Reform Act – my translation.

[1123] Act on the Strengthening of the Rights of Victims of Sexual Abuse – my translation.

December 2015. Because of this European directive in particular, work on strengthening victim protection in Germany continues.[1124]

According to §81 JGG, the possibility of making a civil claim for compensation in the German criminal trial, which is possible in cases against adults[1125] and against young adults, is prohibited in trials against juvenile offenders.[1126]

In the Swedish criminal justice system, the role of the victim is not simply that of a witness, even though the victim is not a party in the trial.[1127] Sweden features rules stipulating when a victim of a crime is entitled to a lawyer.[1128] According to §1 of this law, the court appoints a lawyer for the victim in cases of sexual offences, offences against life, body, and health, and crimes for which the offender could receive a prison sentence, if the victim needs the support of a lawyer. The lawyer of a victim should represent the interests of the victim and offer support and help;[1129] the state bears the expenses.[1130] The Swedish victim does not have to join the public prosecutor in the motion to be entitled to a lawyer.

Analysis from a welfare/justice perspective

The role of the victim in the German (juvenile) criminal trial as a witness is not a strong one. This is clear from the procedural structure linked to this role.[1131]

[1124] See, for instance, new proposals to emphasize psychosocial assistance for the victims of crime and to widen their right to information: http://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Staerkung_Opferrechte_Strafverfahren.html?nn=6765704 (last visited 2017-01-20) and http://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Gesetz_zur_Staerkung_der_Opferrechte_im_Strafverfahren.pdf?__blob=publicationFile&v=5 (last visited 2017-01-20).

[1125] See §§403–6c StPO.

[1126] See Eisenberg (2016), §81 margin no.4; see also BGH NStZ 1991, 235.

[1127] See chapter 36 §1 RB and chapter 37 §1 RB. Consequently, the victim is not obliged to take an oath before delivering the statement. According to chapter 36 §11 RB, a witness always has to swear an oath in the Swedish trial.

[1128] Lagen (1989:609) om målsägandebiträde.

[1129] §3 Lagen (1989:609) om målsägandebiträde.

[1130] §§5–6 Lagen (1989:609) om målsägandebiträde.

[1131] For example, the defendant is always questioned first in German (juvenile) criminal proceedings. The victim is usually questioned as the first witness.

This role is further weakened by the impact of the welfare considerations influencing the procedural rules governing the German juvenile trial. The limited possibilities for an accessory prosecution (§80 JGG) and the prohibition on civil claims for damages in the juvenile criminal trial (§81 JGG) reflect a focus on the offender rather than the victim, which takes into account the greater vulnerability of young perpetrators. Because of the educational guiding principle and the strong focus on the offender rather than on the offence, the importance of the protection of the offender outranks that of the protection of the victim. In this framework, justice considerations like retribution and compensation have to take a back seat in favour of welfare considerations.

In Sweden, the victim has a sui generis procedural role. The right to a lawyer follows from the fact that in this system the victim is not merely seen as a witness. Furthermore, the victim's far-reaching entitlement to a lawyer may also be based on the fact that the civil claim is included within the criminal proceedings. This much stronger position for the victim (compared to their position in the German system) is probably due to the adversarial structure of the Swedish criminal trial. Nevertheless, it has to be acknowledged that, according to a recent report by the Crime Prevention Council, the situation for victims in Swedish criminal trials is not ideal either.[1132] The report identifies deficiencies regarding the support of victims during and after the trial, including in relation to information.[1133] When it comes to the role of the victim in cases involving young offenders in Sweden, I find no specific indications of the impact of welfare considerations.

6.8. Conclusion

This chapter has illustrated that there are some significant differences between the Swedish and the German juvenile criminal justice systems with regard to the roles of the figures in the courtroom. As I have mentioned, Sweden features an adversarial and Germany an inquisitorial procedural approach.[1134] These two

[1132] This is despite the fact that Swedish courts provide witness services, whose importance is acknowledged in prop.2000/01:79, and the existence of an authority for victims of crime – Brottsoffermyndigheten (http://www.brottsoffermyndigheten.se/ (last visited 2017-01-25)).

[1133] See Brå Report 2016:8.

[1134] See section 5.1.

differing concepts are reflected in the different ways in which these systems configure the various roles in the courtroom. This is most obvious in the roles of the judge and the public prosecutor in the (juvenile) criminal trial. In Sweden, the judge takes the role of a referee, sitting more or less quietly and listening during the proceedings, while the public prosecutor conducts the interrogation. In Germany, the juvenile judge occupies the most active role of all the practitioners in the (juvenile) criminal trial, leading proceedings and asking questions, while the public prosecutor and the defence counsel ask additional questions only afterwards if something remains unclear.[1135] This active role for the German juvenile judge continues even after the trial, at which point the judge is responsible for the enforcement of the verdict. The central role of the juvenile judge in the German juvenile criminal justice system is based on the inquisitorial approach and the principle of official investigation combined with the educative principle that guides juvenile justice, while the more passive role of the Swedish judge can be traced back to the adversarial approach to criminal trials. The latter makes the presence of a defence counsel in Sweden more important than in the German system. However, in both countries, the scope for appointing a public defence counsel is broader in relation to young offenders, which respects their greater vulnerability as an expression of welfare considerations.

The roles of all the figures in the Swedish and German juvenile courtrooms – perhaps with the exception of the victim in the Swedish juvenile criminal justice system – are influenced and shaped by the welfare/justice clash to varying degrees. Their particular mandates reflect the ways welfare considerations shape their respective roles in this realm of justice. Each is required to balance welfare and justice considerations. Especially heavily affected in this regard are social services/social court assistants and the juvenile judge. These roles appear to embody the welfare/justice clash.

[1135] Note here, though, the broadened responsibility public prosecutors have in both countries regarding dismissals of cases (as described in sections 4.2. and 6.3.).

Chapter 7

Reality bites

This chapter aims to capture law in action through two empirical studies of how legal rules are applied in the juvenile criminal courtroom and how the practitioners handle the welfare/justice clash in this context.[1136] What problems (if any) do they struggle with when trying to strike a balance between welfare and justice considerations? To refer back to my research questions, this chapter tries to answer the following question: *which aspects of legal practice (law in action) in the juvenile trial reflect the fact that the offender is a young person?*

To answer this question, I undertook two empirical investigations. These were a participating observational study and a semi-structured interview study with judges and public prosecutors. The aims of the observational study were to observe how the legal rules described in the previous chapters play out in legal practice and to observe specific features of the juvenile trial that are not explicitly expressed in the law. These are found in courtroom dynamics, which are shaped by the roles the practitioners assume, expressed in their communications,[1137] and reflected in the patterns of behaviour of, and the encounters between, the practitioners in the juvenile courtroom. By observing these factors, I tried to identify additional aspects of the welfare/justice clash. How are welfare and justice considerations expressed in language and juvenile courtroom dynamics? The aim of the interviews was to gain insight into the extent to which the impact of welfare considerations in this realm of justice is present in the attitudes of the individual legal professionals, as well as in the actual sentencing decisions. These aspects cannot be illustrated simply by looking at cases but have to be approached through first-hand, empirical investigation.

[1136] This extension of the doctrinal study is based on my understanding of the law as described in section 1.5.1.

[1137] Note here that "communication" is the central feature of social systems as the operation used according to Luhmann. For further discussion, see chapter 8.

7.1. Methodological considerations[1138]

Participant observation is a method in which a researcher takes part in the daily activities, rituals, interactions, and events of a group of people as a means of learning the explicit and tacit aspects of their lived routines and their culture.[1139] In social science, this kind of research is regarded as qualitative research.[1140] The research into the sentencing of young offenders has been dominated by quantitative research,[1141] but quantitative methods lack the flexibility needed for a study of ongoing courtroom dynamics. Observation is a methodology which seems more suitable for studying the dynamic environment of a trial.[1142] Therefore, I sat as an observer in juvenile criminal trials in Sweden and in Germany, in order to approach law in action. Participant observation does not necessarily imply that I actively took part in the juvenile trial. That said, this qualitative empirical method does involve participating through social interaction: talking to the participants of the setting under investigation or

[1138] The methodological considerations I outline here merely give a rough overview. The reader looking for a more detailed account of my methodological considerations is advised to consult appendix 2.

[1139] Kathleen M. DeWalt and Billie R. DeWalt, *Participant Observation – A Guide for Fieldworkers* (2nd Edition. Plymouth, Altamira Press, 2011), 1.

[1140] See Alan Bryman, *Social Research Methods* (4th Edition. Oxford: Oxford University Press, 2012), 380ff., 430ff. This formal definition is based on the empirical approach in disciplines like anthropology and the social sciences.

[1141] See section 1.6.

[1142] According to Lisa Webley, "Qualitative Approaches to Empirical Legal Research," in *The Oxford Handbook of Empirical Legal Research*, 926–50 (Oxford: Oxford University Press, 2010), qualitative research is particularly good for examining whether or not a particular social phenomenon exists and, if so, for determining the nature of the phenomenon (948). In terms of the method of direct observation, see for example Jürgen Bortz and Nicola Döring, *Forschungsmethoden und Evaluation für Human- und Sozialwissenschaftler: mit 70 Tabellen* (3rd Edition. Heidelberg and New York: Springer, 2002), 267. Participant observation is a methodology which seems suitable for studying the dynamic environment of a trial since – as Harvey A. Moore and Jennifer Friedman point out ("Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision Making," (*Clinical Sociology Review* 1993, Vol. 11: 123–41)) – "participant observation is one of the few approaches which can assimilate holistic knowledge and diverse data for application to emerging situations in an applied (or clinical) role" (123). In a similar vein, see Salvatore, Hiller, Samuelson, Henderson, and White, (2011), 19; Sally Satel, "Observational Study of Courtroom Dynamics in Selected Drug Courts," (*National Drug Court Institute Review* 1998, Vol. 1, No. 1: 43–72), 43ff.

adapting to the situation in certain ways to avoid being a disturbing influence.[1143]

In the observations I carried out, I attended a total of 32 juvenile trials as a participant observer in Sweden and Germany. My focus was mainly on the practitioners in the juvenile trial.[1144] I spent around eight weeks in total at the district court in Lund (Sweden) and four weeks at the juvenile court in Bremen (Germany). I began my empirical investigations in Sweden. My reason for this was that I am already familiar with the German juvenile court system, and I thus wanted to get to know the Swedish system before conducting my observations in Germany. The observations in Sweden were divided into two stages. I started out with a three-week period observing juvenile trials. After this first observational period, I analysed the findings and evaluated whether what I had focused on had provided me with the information I needed. In the course of this analysis, I made some minor changes to my approach. Subsequently, I carried out the second period of observation, now in Germany, which was now also combined with the interviews. I visited the German district court of Bremen for four weeks. This timeframe was motivated by the fact that the juvenile court in Bremen has more juvenile trials per day than the district court in Lund. Consequently, I was able to conduct my observation in Germany over a shorter period. Since I was by this point familiar with the Swedish system, I was able to approach the German system with "fresh eyes" and from a new angle that afforded me new insights into the system. After that, I conducted a third period of observation. This was undertaken in Sweden and was combined with interviews. This allowed me to apply the knowledge gained from the previous observational periods in Sweden and Germany.

When carrying out the courtroom observations, I employed a practice-theoretical approach,[1145] which means that I concentrated on the observation of

[1143] See Katrine Fangen and Ann-Mari Sellerberg, *Många möjliga metoder* (Lund: Studentliteratur, 2011), 35.

[1144] The ethnomethodological emphasis on relational structures means that the situated order of a social institution cannot be understood without taking into account all the relevant activities on the part of all the participants (and not just the attorneys, as did Parsons (1949)). See Scheffler, Hannken-Illjes, and Kozin (2010), 3.

[1145] For more in general about practice theory, see Theodore R. Schatzki, "Practice Theory," in *The Practice Turn In Contemporary Theory*, 1–14 (London: Routledge, 2001a).

practices.[1146] This approach builds on the idea that people's social practice – in my case, the juvenile proceedings and the sentencing process for young offenders – is socially shaped. Applying this idea to the juvenile criminal justice system means that practices are not only defined by the procedural rules, but also grow out of the social interaction between people in the framework in a way that is also potentially shaped by the ideological background. According to this approach, practices may be a routinized way in which bodies are moved, objects are handled, subjects are treated, things are described, and the world is understood.[1147] These practices can be physical, linguistic, or mental activities, as well as material things, organized together against a shared background understanding.[1148] In this study, "practice" should be understood as the courtroom dynamics in the juvenile trial – "the field" – reflected in the application of legal rules, communications, and practitioners' patterns of behaviour (verbal expressions, body languages, etc.); in other words, it should be understood as law in action. The more that judges are afforded discretion in certain fields of law, the more important it is to actually view courtroom practice. As I explained earlier, the trial of a young offender is one of the contexts in which – in both Sweden and Germany – the law grants broad discretion to judges in order that they can respond more flexibly and adapt particular legal consequences to the personal needs of the offender. This gives the practitioners more room to manoeuvre, and it makes a practice-theoretical approach more fruitful.

In this practice framework, I observed the following factors. I attended closely to the practitioners regarding the way that they were dressed and the spaces they occupied. I observed their professional behaviour, placing an emphasis on language (spoken language, body language, and glances) and communication. This also entailed an observation of the character of the courtroom encounter (mild, bureaucratic, harsh, formal or informal). An obvious reason for emphasizing communication is the fact that language is one of the most

[1146] I considered this limitation to the observation of practices necessary since the amount of data would otherwise be overwhelming. In the analysis in chapter 8, I "translate" the practices into programmes that shape the communications in the Luhmannian sense.

[1147] See Anat Reckwitz, "Toward a theory of social practices: A development in culturalist theory," (*European Journal of Social Theory* 2002, Vol. 5, No. 2: 243–63), 250.

[1148] See Theodore R. Schatzki, "Practice mind-ed orders," in *The Practice Turn In Contemporary Theory*, 42–55 (London: Routledge, 2001b), 55.

important tools for a lawyer.[1149] It is no secret that legal discourse[1150] deploys a specific sort of language.[1151] This holds not only of expressed/verbal language but also of body language.[1152] Furthermore, I measured the time dedicated to fact finding and legal evaluations (evidence/impersonal facts) and to more individual factors. I also measured the time dedicated to explaining the verdict to the young offender. Additionally, I observed the influence of social services on the overall proceedings and in relation to the verdict. Last but not least, I registered the outcome of the trial.

The second part of my empirical research consisted of interviews with (juvenile) judges and (juvenile) public prosecutors. The aim was to gain insight into the extent to which welfare considerations are present in the attitudes of the individual courtroom practitioners, whose attitudes in turn influence actual sentencing decisions. An interview can be a way of providing a view of a person's

[1149] To this extent, I share Schömer's view; see Eva Schömer, *Konstruktion av Genus i Rätten och Samhället* (Göteborg: Iustus Förlag, 1999), 198. She compares the development from individual to lawyer to the development from child to adult. Learning legal language is a necessary part of becoming a legal professional. The same is true of the clothes, gestures, and social intercourse. Foucault pointed out that different fields, like law, medicine, or management, have a tendency to establish expert discourses; see Michel Foucault, *Diskursens ordning* (Stehad: Brutus Östlings, 1993), 57.

[1150] According to Foucault, the term "discourse" represents an anonymous, impersonal, intention-free chain of linguistic events. In discourse theory, the basic element of a social system is not the human being but communication. Communication is to be understood as the unity of utterance, information, and understanding. Modern criminal justice policy operates in accordance with a number of competing discourses (see Kirchengast (2010), 65). Today, it is beyond doubt that the legal arena can claim to have its own discourse. The same is true of social discourse. Discourse theory is a massive field of research. However, I do not engage further with discourse theory here since it lies beyond the scope of this study.

[1151] See Anette Svingstedt, *Servicemötets praktik på en tingsrätt, ett äldreboende och ett hotel* (Lund: Lunds universitet, 2012), who thinks that legal language gives a formal and antiquated impression (115–16). See also Katarina Jacobsson, "'Vi kan inte göra hipp som happ.' Åklagares formuleringar av en objektiv ordning," (*Sociologiskt forskning* Vol.2, 2006: 30–61), who points out that legal discourse attributes objectivity to its actors (31) and stresses the professional discourse of the courtroom (36).

[1152] Sharyn Anleu Roach and Kathy Mack, "Magistrates' everyday work and emotional labour," (*Journal of Law and Society* 2005, Vol. 32, No. 4: 590–614), describe the body language of lawyers as distanced and disciplined. Svingstedt (2012) confirms these findings and describes the body language of court encounters as reserved and formally correct (125). She interprets this as an expression of formality, neutrality, distance, domination through hierarchical status, and anonymity in the courtroom. This is also reflected in the neutral and formal dress code.

subjective world.[1153] A major part of legal proceedings – especially in relation to sentencing – takes place within the minds of the judge and the public prosecutor. An interview can be a method of accessing this hidden level of assessment. The interviews were semi-structured[1154] and steered by an interview guide.[1155] According to Charmaz, although researchers often choose intensive interviewing as a single method, they may complement other methods, such as observations, surveys, and research participants' written accounts.[1156] I interviewed six judges (one male and two female in Sweden,[1157] and one male and two female in Germany[1158]) and five public prosecutors (one male and one female in Sweden,[1159] and two male and one female in Germany),[1160] mostly in their own offices. The interviews are reported using illustrative quotations.

When analysing the empirical research, I used thematic analysis as an analytical tool. In this, I was inspired by Braun and Clarke, who employ this method in the field of psychology.[1161] Thematic analysis is a method for identifying, analysing, and reporting patterns (themes) in data.[1162] Braun and Clarke describe thematic analysis as a foundational method for qualitative analysis and emphasize its flexibility, which can allow one to produce a rich, detailed, and complex account of data. This method can work both to reflect reality and to unpick or unravel the surface of "reality".[1163] However, there is no straightforward agreement about what thematic analysis is or how you go about

[1153] See Steinar Kvale and Svend Brinkmann, *Den kvalitativa forskningsintervjun* (Lund: Studentlitteratur, 2014), 15, 17.

[1154] Semi-structured means that the researcher and participant(s) set some broad parameters for the discussion (see Mike Crang and Ian Cook, *Doing Ethnographies* (London: Sage, 2007), 60).

[1155] The interview guide and the information material can be found in appendix 1.

[1156] See Kathy Charmaz, *Constructing Grounded Theory* (London: Sage, 2006), 28.

[1157] These interviewees are identified as C1, C2, and C3.

[1158] These interviewees are identified as A1, A2, and A3.

[1159] These interviewees are identified as D1 and D2. The reason I interviewed only two public prosecutors in Sweden is that, by this point, the interview studies had reached a point at which I was making no new discoveries through them; I had reached a point of saturation.

[1160] These interviewees are identified as B1, B2, and B3.

[1161] See Virginia Braun and Victoria Clarke, "Using thematic analysis in psychology," (*Qualitative Research in Psychology* 2006, Vol.3, No.2: 77–101).

[1162] Ibid., 79.

[1163] Ibid., 81.

doing it. I applied a deductive approach (or "theoretical" thematic analysis), meaning that my analysis tends to be driven by my theoretical or analytic interest in the area. In other words, when searching for themes in the data, I had both my research questions and the autopoietic approach in mind.

A theme captures something important about the data in relation to the research question and represents some level of *patterned* response or meaning within the data set.[1164] My overarching theme is "youth", and this is divided into two sub-themes under the broad headings of "welfare" and "justice". The justice theme – what I have referred to before as justice considerations – consists of expressions of the rule of law and the principle of a fair trial, for example considerations of proportionality, equality, predictability, punishment, etc. The welfare theme aligns with what I have referred to as welfare considerations. In other words, I examined how the circumstance that the offender is a young person played out in the data in ways that reflect the welfare/justice clash. I searched, for instance, for communications containing words like "immature", "young", "education", "future", "developing", "the best interests of the child", and so on, which reflect the welfare theme, and for communications containing words like "proportionality" or "punishment", reflecting the justice theme. However, I did not restrict this study to the semantic level, but approached my material from a latent or interpretative level. In terms of the justice theme, for example, I focused on an individualized contra proportionality approach and looked for traces of the impact of the rule of law. Here, the framework was more than purely linguistic: I also tried to extract the courtroom dynamics, reflected in the language, the communication, and the encounters in the juvenile trial. What I wanted to find were repeated patterns that expressed the balancing act between the welfare and justice themes. Which of these themes were expressed in the behaviour and actions of the courtroom practitioners?

This chapter does not revisit all the points discussed in chapters 3 to 6. Instead, I have looked for additional or particularly striking expressions of the welfare/justice clash that were not visible at the level of law in books. Furthermore, I do not divide up the findings of the observational studies and the interviews but present them together so as to let them support or oppose each other.

In terms of the structure of this chapter, each section starts out with an account of examples extracted from the two empirical investigations. The second part of

[1164] Ibid., 82.

each section analyses the results in relation to the welfare/justice clash in order to draw out the themes.

7.2. The aims of the juvenile criminal justice system

The guiding principles I described in chapter 3 are closely intertwined with the aims of a juvenile criminal justice system. With this in mind, I asked interviewees what they would like to achieve with a verdict or a dismissal of a case. One emerging pattern was that all the interviewees in Germany emphasized that the aim of the juvenile court is to support the young offender in their transformation into a law-abiding citizen. For example, interviewee A1 stated that "they never come back again. They will then be so impressed or guided by both the trial and the measures that they refrain from committing any further crimes".

None of my German interviewees mentioned a need to punish as an aim but declared their dedication towards the guiding principle of education. In the observational study, the juvenile judge asked the offender in several cases: "how should this [i.e. the life of the young offender] continue?" (for example trials 2, 7, and 25). However, in some trials, the juvenile judge or the public prosecutor found it important to add some hours of community service for juveniles to the legal consequence "to express that a law has been broken" (trials 8, 10, 11, 13, 16). One juvenile judge explicitly said that he considered the imposition of community service for juveniles important in two ways: on the one hand as a reminder that the act was illegal, but on the other hand as a test of whether the offender could fulfil the required hours of community service (for example in trial 19), which would be important from the perspective of their future working life.

When asked about the aims they want to achieve, the Swedish interviewees demonstrated a similar attitude to their German counterparts. The comments of interviewees C2 and D2 are illustrative:

> The idea is that you should communicate the seriousness of what one has done and sit face to face with the court and the other party then. [...] We hope we do not see you back here, you must go on and it depends on you and such things. [...] but with regard to what the juvenile needs [...] it is more care than punishment indeed. [...] Spontaneously, I say, that there are two things I want to achieve. One is of course, yes, the judgment itself is supposed to be right, if

> possible; I guess, this is number one – it should be fair. I will convict or acquit on the basis of the evidence. [...] Then there is of course also when it comes to juveniles […] to be reasonably pedagogical towards the individual. (C2)

> For me it is, I suppose – at least this permeates my thinking – the purpose is, of course, that they should get a response for what they have done; that is really the basic idea, and that is why I am sitting in my place. Then, the entire system is pervaded – it is hoped that they will learn something from this, that they will not come back to us, do not commit new crimes, that they should learn from this. (D2)

In regard to diversion,[1165] D2 went on to say the following:

> You react to the whole life situation. We try to make an overall assessment there: what kind of person is that [...] where the crime itself is really just a minor part [...] then, it is often the case that you attach a very big weight to how he lives his life and the interaction with the parents.

Interviewees C1 and C3 in Sweden mentioned the aim of punishment and stated:

> It is not as much punishment when it comes to juvenile legal consequences, but it is still the point of reaching the offender [...] But there is more of the other, to get back on track, I think. (C1)

> Punishment comes in – when it comes to fines, it is easy to see but […] if a juvenile has a need for juvenile care, then you can say that the punishment thought becomes in some way stronger the lesser the need for juvenile care is. (C3)

Note, however, that there was no evidence of the pedagogical attitude in the results of the observational study.[1166]

[1165] This is a specific form of dismissal available to public prosecutors for juvenile offenders only. I discussed this in section 4.2.

[1166] See also section 7.5.

Analysis from a welfare/justice perspective

Both the empirical investigations indicate that Germany and Sweden are more similar in their approaches to young offenders than the doctrinal study might have suggested. The law in books investigation described in chapter 3 depicted almost diametrically opposed approaches (the welfare approach in Germany versus the neoclassical approach in Sweden). However, the interview study reveals that the aim pursued in sentencing or dismissing cases is similar in both countries: to transform the young offender into a law-abiding citizen (welfare theme), but without abandoning the aims of justice (for example proportionality).

None of my German interviewees mentioned a need to punish as an aim. The focus seems to be rehabilitative and individualized, which reflects the theme of welfare. This presupposes broad discretion, which is in conflict with the principles of predictability, equality, and transparency, these being expressions of the theme of justice.[1167] The focus is (almost exclusively) on the future development of the offender and not on the offence. This was clear not only in the interviews, but also in the observational study. However, the juvenile judges did not totally forsake proportionality (justice theme). This became obvious in the course of the observational study, for example from the emphasis on making it clear to the young offender that "the law has been broken". Then again, one of the juvenile judges emphasized explicitly that the imposition of additional community service served both aims: to satisfy the principle of proportionality (justice theme) and also to evaluate the young offender's ability to fulfil the set hours of community service and so hold down a job in the future. This again demonstrates the future-oriented perspective (welfare theme) instead of a past-oriented perspective on the offence itself (justice theme).

The Swedish interviews reveal a similar picture, looking towards the future of young offenders and seeking to help them and turn them into law-abiding citizens. Help and care and the future-oriented perspective reflect the welfare theme. One interviewee stated explicitly that "it is more care than punishment" that is the aim. Another comment emphasized the focus on the needs of the young offender, articulating an individualized approach based on the welfare theme (D1). This is also reflected in the importance placed on the report from social services. Even if interviewee C2 explained that "we look [at] how serious the offence is", thus evincing the justice theme of assessing the severity of the

[1167] This was described in section 3.3.

offence with a view to determining a proportional response, the interviewee went on to say that the court usually agrees to the proposals of social services with regard to whether there is a need for care. It has to be acknowledged that the aim of punishment was also mentioned. Two interviewees expressly used the word "punishment" in relation to legal responses for young offenders and implied that this aim is one of the considerations that they bear in mind, which reflects the justice theme. This was not only in relation to the offence itself but also in relation to the choice of the legal consequence. Two interviewees connected this aim to their role ("this is why I am sitting in my place" (Swedish interviewee D2); "I will convict or acquit on the basis of the evidence" (Swedish interviewee C2)). Then again, both these interviewees also highlighted pedagogical and individualized legal consequences, which are expressions of the welfare theme.

7.3. Procedural rules

Procedural rules, especially the strict rules applicable in the criminal trial, can be considered as an expression of the justice theme, satisfying the principle of the rule of law, especially with regard to predictability and transparency. However, as I explained in chapter 5, these rules are modified in relation to young offenders on the basis of welfare considerations. Consequently, these rules have to balance the themes of justice and welfare. There was evidence of this balancing in the observational studies and the interviews conducted in both of the countries under investigation.

In the observational study in Germany, none of the observed cases led to an acquittal. This is not purely coincidental. In trial 4, for example, the young offender was obviously lying and denying participation in the crime. The judge had not called any witnesses, however, and wanted to close the case. The judge and the public prosecutor therefore engaged quite energetically in an interrogation of the young offender, until he (partly) confessed. At that point, the judge and the public prosecutor agreed, with a nod, that this would be enough to avoid a further trial. The judge gave the legal note that the young perpetrator could also be found guilty of aiding and delivered a verdict accordingly. Note, further, that the young offender was not represented by a defence counsel. This case was not unique in my observations. In many cases, the young offender confessed to the crime. However, if the young perpetrator did not directly deny that he or she had committed the crime and was ready to

confess to at least part of the crime or, for example, to a lower level of participation, the juvenile judge and the public prosecutor exchanged glances or even words that expressed their aim of reaching a diverting decision instead of pursuing a thorough investigation into the level of the young offender's participation in the crime (for example in trials 7 and 17). This was discussed in the interviews. One German juvenile judge explained to me:

> If you know the offender committed the crime but you cannot prove it the way you should, the educational effect of an acquittal would be most unfortunate. The offender would not take the court seriously. So, if there is any way of "pushing" the young perpetrator into a minor confession – for example confession to aiding and abetting – the legal consequence would have a better educational effect. In practice, it does not matter too much to which form of perpetration of an offence the young offender confesses. The legal consequence is not so much measured on the offence, but rather on the educational need of the offender.

A similar approach was evident from the comments of a public prosecutor who, in the final summation in trial 4, stated: "it does not matter if the offender is an offender, co-offender or only aided the offence. In the end, he or she will face the same legal consequence anyway".

One of the German public prosecutors, however, considered such an approach to be against the law and unfair to the young offender. She meant that it places the group of young perpetrators at a disadvantage compared to adult offenders. On the other hand, the same public prosecutor said in her final statement: "You confessed to aiding the robbery. Maybe you even did a little more than aiding, but that does not really matter in terms of the legal consequence" (interviewee B2 in trial 11).

In the German juvenile criminal justice system, the need for some kind of legal consequence involving a possible educational effect seems to be considered more important than the pursuit of "legally spotless" proceedings. This was clear in trials 1 and 12, in which the public prosecutor did not conduct his summation "by the book", but began by saying that he was not going to repeat the different offences again (the offender had confessed) because "the interesting part is what to do with the young offender". I observed this sort of comment in many different trials (for example, in trials 1, 4, 6, 8, and 13). Interviewees confirmed this impression. Even if they all emphasized that the same procedural rules apply to the juvenile trial as apply to an adult trial (apart from a few specific points, like closed doors, as described in chapter 5), they also pointed to the fact that

procedural rules are not applied "as accurately. […] Everything is a bit less formal" (German interviewee A1). Interviewee A2 commented:

> In principle, one would say, of course, that it is the same with the procedural rules [in juvenile and adult trials], otherwise I would disown my position as a lawyer, if I'd say that's a big difference. But of course, the procedural framework takes a different shape in practice in the juvenile trial, especially when you focus on criminal matters with a simpler content. There's a lot of educational conversation, the educational influence beyond the requirements of the StPO, which would put boundaries, takes place and is also realized.

However, he also stated:

> But if you think of a trial, where there is very much at stake, if for example even the defence counsel is adopting a more offensive approach and fighting to avoid certain legal responses, where the evidence is pending, then you cannot help but apply the StPO, and I mean literally. If you do not do it, you will immediately be attacked for it.

Note here especially the expression "then you cannot help it", indicating that the strict application of criminal procedural rules is the last resort, pursued only if unavoidable.

This less strict application or "bending" of the procedural rules, which was also described by interviewee B2 and which I observed in the German juvenile criminal trials, is pushed even further in relation to the pre-trial detention of young offenders in Germany. A rather pragmatic approach to the use of pre-trial detention was quite bluntly stated by one of my interviewees:

> For example, if someone has robbed a gas station with a gun or pushes an old lady over on the street and maybe even hurts her and takes something from her, then, in such a case, I would generally always say that you have to have a close look at the reasons for pre-trial detention and that I might have to come to such a decision [of imposing pre-trial detention] to give the impression, to make the significance of the whole situation clear. Because if the juvenile is home again in the evening, then the signal is devastating for all others, who then perceive the signal – those are often peer-groups at risk – the signal for the young offender himself is of course just as devastating. Nothing too severe happened. We do use these possibilities, absolutely. When it comes to probation, where securing arrest warrants are issued, we are also prepared, for example, to set aside such securing arrest warrants after a few weeks. They do not necessarily have to be the final

> consequence of leading to a withdrawal [of probation], but the influence of such temporary operating coercive measures – I mean, that can have influence. We also see that even the defence attorneys wait a bit with an application for the review of a remand in custody and thereby allow for the same means. The idea is: better a direct response than facing, after half a year, the question of whether he still can get probation or not. This is actually inconsistent with the StPO, which is not different than for adults. (A2)

There was no evidence of a similar misuse of the system of pre-trial detention in the Swedish case. According to one of the interviewees, practice seems to be in line with legislation:

> But it is much more difficult to sentence a person under 18 years to prison [referring to pre-trial detention as well as to a prison sentence] than someone who is over 18. Between 18 and 21 years, it requires specific reasons for imprisonment, and under [this age] it requires extraordinary reasons, and extraordinary is of course a much heavier word. Thus, you will seldom come to the conclusion that a 16-year-old must go to prison. (C3)

In the observational study in Sweden, I got the impression of a rather formal approach in the trial. This was clear from the strict application of procedural rules as well as from the language and the communication (for instance, there was very little direct interaction between the court and the young offender).[1168] Swedish interviewee C3 confirmed my subjective impression of the trial's rather formal character, stating:

> The criminal trial is of course rather controlled. It is quite a formal process, anyway, where you as a judge do not adopt such an active role, unlike the oral preparation that we have in civil or family cases when you sit and talk to parties all the time, and so on, and try to find solutions and talk. It is not like that at all [in the criminal trial], but you listen to the material that is presented, so there is not a lot of space for that. And there are often quite large distances also, of course, sitting in larger courtrooms, sitting at a table; you have your defence counsel, and so on.

However, interviewee C2 pointed to the following differences between a juvenile and an adult criminal trial:

[1168] Regarding language and communication as elements of the dynamics of the juvenile courtroom, see sections 7.5.2. and 7.5.3.

> It is also true that cases are prosecuted even if they are not so serious, where in other contexts [in adult cases] one might issue a penalty order or the public prosecutors give a suspended sentence. These cases are prosecuted anyway because one wants the juvenile to meet with a judge – they should come. The idea is that you should communicate the seriousness of what you have done and sit face to face with the court and the other party. (C2)

Even if this approach does not go as far as bending the rules as happens in Germany, procedural rules might be applied a little less strictly in relation to young offenders in Sweden. Interviewee C1 in Sweden commented that "juveniles are usually pretty keen to call witnesses – kind of a friend who has seen something. Here, I think, one is a bit more accommodating in those cases, witnesses who quite obviously would have been rejected in an adult trial".

Analysis from a welfare/justice perspective

Regarding procedural rules, the empirical investigations in both countries reveal the strong impact of the theme of welfare. There are several examples of the welfare/justice clash, of the welfare theme conflicting with the rule of law. The latter is especially important in the realm of criminal law, for this realm contains the most serious legal consequences that a state can impose on its citizens. A deviation from the rule of law in the name of an educational rationale means reduced levels of predictability and legal certainty and endangers the principles of a fair trial and of the presumption of innocence. On the other hand, these conflicts with the rule of law seem to be accepted in the name of welfare.

In the German juvenile criminal justice system, there are several striking things to note concerning procedural rules generally. The observational study and the interviews convey a rather informal picture of the juvenile trial and reveal a considerable "bending" of the procedural rules in the name of the best interests of the child, reflecting the welfare theme. For example, young offenders are "pushed" into confessions, seemingly without any worry that the juvenile judge might thereby appear to be biased.[1169] In a strictly procedural sense, such a course of action would be impossible: it would be objected that the judge was interfering too actively in the trial, deviating from the judge's objective role, being biased, and infringing the principle of the presumption of innocence (all

[1169] Also, the legal form of the offender's participation in the crime (offender, co-offender, or aid) does not seem to play a major role.

expressions of the justice theme). Due to their obligation to be objective,[1170] this criticism also applies to the public prosecutor when dealing with the young offender. When asked about this, all of my German interviewees declared that they respected the procedural rules and would not violate them; they thereby acknowledged the justice theme as entering into the balance that has to be struck. However, most of them stated that there is a certain amount of "bending" the rules in the name of the educational guiding principle. This reflects the strong impact of the welfare theme on the procedural rules in the juvenile criminal trial: the young offender is primarily tried in light of his or her underlying social maladjustment rather than in light of the offence itself. Note, again, the expression used in one of the interviews regarding the strict application of the criminal procedural rules as a last resort (when "you cannot help it"). In other words, it seems as if the justice theme only prevails when the juvenile judge is forced to obey it, for example because of an aggressive defence counsel; otherwise, the German interviews suggest, the welfare theme calls for a more informal framework. However, the way my interview partners struggled to justify this bending of the rules vividly expresses the welfare/justice clash. Note that none of them reported experiencing any problems in combining the themes of justice and welfare.

In Sweden, on the other hand, both empirical investigations reveal a more formal approach: a strict observation of the criminal procedural rules and a strong emphasis on the theme of justice. The comment of interviewee C2 regarding the prosecution of a young offender when an adult offender in a similar case might have received a penalty order reflects – in contrast to the German approach – the fact that keeping the young offender out of the courtroom is not the highest priority. Avoiding the stigmatizing effect of a trial seems to be less important than securing a face-to-face meeting in the courtroom. Interviewee C2 did not explain further the reasons for this. It might be interpreted as evidence of a pedagogical approach that prizes being able to communicate with the young offender directly, and so of the welfare theme, even if it ignores criminological research indicating the harmful effects of the environment of the courtroom. Here, the different assessment of the situation because the offender is a young person reflects the welfare/justice clash in another form. The welfare theme leads to an alternative procedural treatment for the young offender. This impression was confirmed by interviewee C1, who described a somewhat "softer" procedural approach in relation to young offenders when it comes to witnesses. This accommodation of young offenders

[1170] See section 6.3.

and flexibility in relation to the procedural rules indicates that even in the Swedish juvenile criminal justice system the theme of welfare has an influence. However, this impression was undermined by the comments of C3, who basically denied that the welfare theme had any impact on the procedural rules and suggested that juvenile trials stick to a pure justice approach.

The balancing of the welfare and justice themes is even more apparent in relation to pre-trial detention in the German juvenile criminal justice system. As I have mentioned, the law aims to keep young offenders out of prison because of their greater vulnerability and the harmful effects of incarceration. This is in line with the Beijing rules. Consequently, the rules governing pre-trial detention for young perpetrators are stricter than the rules for adults.[1171] The interview study reveals, however, that German juvenile judges consider a short period of pre-trial detention to serve as a kind of wake-up call and to give the young person a taste of prison[1172] which might have positive effects,[1173] and they employ so-called "apokryphic" reasons for pre-trial detention.[1174] Such apokryphic reasons entail that pre-trial detention is imposed despite the fact that none of the formal reasons for pre-trial detention apply or that the infliction is disproportionate. In other words, such a use of pre-trial detention is not only the opposite of the German legislature's intention (which is that, in the interests of education, the threshold for placing a young offender in detention should be higher, not lower) but also against the law. The comment of German interviewee A2 regarding pre-trial detention is also the most vivid example of the significance of the educational guiding principle's influence over the juvenile criminal legal system; this principle pushes the system to the limits of legality (and even past them) by bending procedural rules in the name of welfare. As an expression of the

[1171] See section 5.2.

[1172] According to German interviewee A2.

[1173] However, criminological research indicates otherwise. The same thought applies here as was stated in section 4.1.1.2 in relation to corrective measures. See Thilo Eisenhardt, *Der Jugendarrest: eine Chance der Kriminalprävention* (Vol. 2. Frankfurt a.M.: Lang, 2010); Knut Papendorf, "Gegen die Logik der Inhaftierung – die Forderungen des AJK aus heutiger Sicht," in *Handbuch Jugendkriminalität. Kriminologie und Sozialpädagogik im Dialog,* 573–83 (2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011); also Karl Schumann, *Jugendarrest und/oder Betreuungsweisung* (Bremen: Universität Schriftenreihe, 1985).

[1174] See Schaffstein, Beulke, and Swoboda (2014), 291; see also Albrecht (2000), 58 and Eisenberg (2016), §72 margin no.5a and 9, the latter emphasizing the complementary function of pre-trial detention, which is not only against the law but hardly in line with the guiding principle of education.

welfare/justice clash, the juvenile judges, in collaboration with the public prosecutors, impose pre-trial detention as an immediate response to the offence in the form of a "short, sharp shock" in the name of the educational guiding principle, an expression of the welfare theme. In this case, the welfare/justice clash is even starker in practice than it is in theory.[1175]

In the Swedish juvenile criminal justice system, on the other hand, the rules for pre-trial detention seem to be applied as the legislature intended, regardless of the fact that, as I mentioned earlier in section 5.2., Sweden was heavily criticized for its system of pre-trial detention. Nevertheless, one of my Swedish interviewees (C3) indirectly acknowledged a differing threshold even within the "juvenile" age group (15–17 years of age) in regard to pre-trial detention. She acknowledged that lower levels of maturity mean less culpability, which may raise the age at which it is appropriate to impose pre-trial detention. In this realm of justice, knowledge of the potentially negative effects of incarceration on juveniles (welfare theme), which has been established by the social sciences, is weighed against the interests of justice.

7.4. Legal responses

7.4.1. The choice of legal consequences

In the observational study in Sweden, 7 out of 12 young offenders were sentenced to a specific "juvenile" legal consequence and 5 were sentenced with an "adult" legal consequence. However, in the interview study in Sweden, my interview partners emphasized the existence of a different set of legal consequences available for young offenders and stressed that individualized considerations play a major role when deciding on a legal consequence for a young offender. Interviewee C2 described it as the application of "completely different considerations". Interviewee C1 said:

> There are a few more individualized and practical considerations just in juvenile cases; this is a matter of finding what is right – not the legal consequence that is right in a strictly formal manner but a consequence that enables this juvenile to embed it into his or her life and make something useful out of it.

[1175] See section 5.2.

Interviewee C3 described a more detailed approach:

> You have to have […] some sort of idea of the normal punishment for an adult first to be able to translate it to a young offender. I always start from an adult. [...] If you are 18, you get about half. […] And then, based on that, you have to look into the question of if there is a need for care or not and is this enough here in relation to the seriousness of the offence […] and if he refuses, if he is unsuitable for community service for juveniles, if he refuses juvenile care, so maybe often all that remains is just a fine.

Interviewee C2 described the process in a similar way, saying that "admittedly you have to assess the severity of the offence, but then we do have these discounts for juveniles". My Swedish interviewees indicated that the impact of more individualized considerations can even lead to juveniles being handed seemingly "harsher" sentences in comparison to what an adult offender would have received. The comment of interviewee C2 exemplifies this point:

> Even if it [the proposal for a legal consequence by social services] ranges in the upper limit, maybe you should go along with it, for the young boy or girl may need just that, and then we can sentence him or her, so to say, to a little more than what the crime actually requires. You can do that if it is not completely out of proportion. [...] It is more care than punishment, indeed.

Swedish interviewee C3 confirmed such an approach (as did Swedish interviewee D1), even going so far as to advocate, in some cases, overriding what would be proportionate, stating that "it happens sometimes that a care plan is more severe than the crime itself would justify" (C3).

These statements were made especially in relation to the legal consequence of "juvenile care", described in section 4.1.2.3. All my Swedish interviewees emphasized the unique shape and importance of this particular legal consequence. They expressed the view that juvenile care is the default legal consequence for young offenders if social services state that there is a need for care and if the offence is not so serious that it requires closed institutional treatment and not of so minor a character that a fine would suffice. Interviewees D2 and C3 put this point as follows:

> Legal consequences for juveniles are designed in such a way that it is first of all a question about juvenile care. And that covers, in fact, all kinds of offences, if there is a special need for care […] This legal consequence is placed like a lid over everything else. (D2)

> What counts for juveniles really: is there a need for care – this should somehow be question number one […] If there is a need for care, then it must be accommodated, one might say, if it is not about extremely simple small deeds, where someone has stolen candy for 10 Swedish krona or something, simple shoplifting where it should just be a fine if it is first time, to murder or something where it might be prison anyway. The need for care is the key. (C3)

In all of the cases I observed in the German juvenile court, the young offender – even if he or she was a young adult – was punished (or diverted) according to juvenile criminal law (and not adult criminal law). The legal consequence was without exception a specialized juvenile consequence. In almost all cases, the legal consequence was in line with the proposals of the social court assistant, but sometimes the proposed sentence was complemented with an additional consequence. Almost all decisions (sentences and divertive decisions) involved a combination of several legal consequences that were adapted to the needs of the individual. For example, in trial 10, a young adult offender was sentenced to a conditional sentence, combined with several other legal consequences: a six-month social training course, 100 hours of community service for juveniles, compensation for damages, and the obligation to try to find an apprenticeship. This long list of additional measures can be explained by the fact that the court were doing everything they could do to avoid a sentence of juvenile imprisonment. The defendant had committed a felony (armed robbery) while on probation following an earlier two-year juvenile imprisonment sentence. However, the court reasoned that this did not show that the young offender had dangerous tendencies[1176] at the time of the trial, as it seemed as though the young offender had started to get his life in order. The court sought not to undermine this positive development.

All the interviewees in Germany emphasized the distinction between the question of guilt and the legal consequence. They said that although the question of whether an offence had been committed and the matter of the young offender's guilt had to be considered first, this process did not need to be as legally "spotless" as it would be in a case involving an adult offender.[1177] Some even went a step further by saying that the question of guilt plays only a minor role. German interviewee A2 put it as follows:

[1176] Regarding the preconditions for juvenile imprisonment, see section 4.1.1.4.

[1177] See what was said earlier regarding the general procedural rules.

> The elements of an offence and the investigation of the offence usually play a smaller role and the exploration of personal things mostly play a very important role; thus, much emphasis is placed on the information about the personal background, the contribution of the social court assistant or others who are involved in the process.

The other German interviewees confirmed the lesser importance of a legally "spotless" assessment and the increased importance of addressing the individual needs of the young offender. For example, A3 stated that "legally, it is not so relevant if the offender is classified as an accomplice or if he or she only aided the offence; rather: what do we do with this person?"

Interviewee A1, however, suggested a slightly different picture: "it does matter whether the defendant was an accomplice or only aided. In terms of aid, only the supporting act is punished; for example, complicity would lead to 10 days of community service, aiding only to five days". This comment might indicate a stronger orientation towards a justice theme in the form of proportionality. However, she then qualified her statement: "yet, if the social court assistant states that it is also for the aiding offender important to attend a social training course, then I would do that too".

Thus, according to the German interviewees, more weight is attached to finding the "right" educative measure, in the sense of the most "educationally meaningful" measure (A3), and this may be a measure viewed as "harsher" than the typical legal consequence for an adult in a comparable case. Interviewee A3 described the far-reaching implications of this individualized focus by stating: "this can lead to the offender actually getting a heavier punishment than what is actually proportional, because it is educationally meaningful".

Note here that according to this interviewee, A3, the legal consequence may exceed the threshold of proportionality. Her view was confirmed by the other German interviewees, B2 and B3, who also emphasized that young offenders may be handed sentences that are apparently "harsher" than an adult in a comparable case would receive. Their view is not shared by the BGH, which considers the legal consequences provided by the JGG to be "milder" options.[1178]

[1178] See BGHSt 12, 116 (119) and BGHSt 36, 37 (40). In contrast, academic voices have highlighted that a juvenile sanction can be "harsher"; see Christian Pfeiffer, *Unser Jugendstrafrecht-eine Strafe für cie Jugend?: die Schlechterstellung junger Straftäter durch das JGG-Ausmaß, Entstehungsgeschichte und Kriminalpolitische Folgerungen* (Kriminologisches Forschungsinstitut

In the observational study in Germany, even though I was not allowed to participate in the deliberation that led to the sentence,[1179] I observed many (probably most, if not all) of the factors that influenced the juvenile court's decision. These situations often occurred when a case was dismissed by the court according to §47 JGG and when "open sentencing" was being pursued;[1180] but even when the proceedings ended with a sentence, many of the decisive aspects in regard to sentencing were openly discussed in the trial. In trial 8, for example, the juvenile judge and the public prosecutor discussed possible mediation in combination with compensation for the victim as a legal consequence in the form of a sentence. The social court assistant was also involved in the discussion. In the end, the juvenile judge and the public prosecutor openly agreed on a legal consequence, so the sentence was delivered very quickly and was not a surprise to anyone. What the juvenile judge, the public prosecutor, and the social court assistant did in such cases was to discuss the sentencing decision together openly. This was reflected in the short duration of the deliberation, which expressed such a common understanding (in case 8, the deliberation took two minutes, which basically consisted of the juvenile judge writing down the verdict). A similar situation could be observed in trial 16, in which a comprehensive discussion about the legal consequence between the juvenile judge, the public prosecutor, and the social court assistant had already taken place during the gathering of the evidence. This led to the public prosecutor not recounting all the considerations taken into account in sentencing in her summation but rather simply stating that all such factors had been extensively discussed in the trial; she said she would not say any more about that matter, and then simply stated the legal consequence. These observations were confirmed by interviewee A3:

> My experience is rather that you discuss everything that may be the outcome already in the trial. […] I ask the defendant what he thinks, what he needs, and ask the social court assistant what they suggest what could be done here. And

---

Niedersachsen 1991) and also Jörg Martin Jehle and Nina Palmowski, "Noch einmal: Werden Heranwachsende nach Jugendstrafrecht härter sanktioniert?," in *Kriminologie ist Gesellschaftswissenschaft – Festschrift für Christian Pfeiffer zum 70. Geburtstag*, 323–37 (Baden-Baden: Nomos, 2014).

[1179] Most cases I observed were presided over by a single magistrate. This juvenile judge remained in the courtroom during the deliberation – which took place entirely within his or her own mind. Only in cases in the juvenile juror court did deliberation take place in the judge's chamber.

[1180] I elaborate on open sentencing in section 7.4.2. which means that individual factors, the deliberation, and the explanation of a diverting decision according to §47 JGG were intertwined in an open conversation between the practitioners in the juvenile courtroom.

> then you debate and discuss with the public prosecutor. By doing that, the thoughts are in principle not only thought, but they have also been discussed, and they are then reflected in the judgment.

This approach was not mirrored in the Swedish juvenile trial.

7.4.2. Dismissal and diversion

I have already explained that the scope for a dismissal in the form of diversion is considerably extended in both of the juvenile criminal justice systems I am investigating.[1181] Such decisions can be considered a subcategory of sentencing. Swedish interviewee D2 explained dismissals involving young offenders as follows:

> When we dismiss a case [at the public prosecutor level], then they will not face any legal consequence whatsoever. […] And if I see that the juvenile would obviously be sentenced to juvenile care in court, then I can under certain conditions dismiss the case […] and then say: you do not have to go to trial, you will not be sentenced to juvenile care, but the dismissal means that you have to follow this juvenile contract or care plan, if they are in juvenile care according to LVU, so that in principle it [the dismissal] has the same effect as a judgment, so that there is actually a punishment, though there is no judgment on it.

He also stressed that this system deviates considerably from the adult criminal justice system. As I have mentioned, a diverting decision is delivered personally and formally to the young offender in the office of the public prosecutor according to §18 LUL. §19 LUL states that at a meeting in accordance with §18 LUL, the public prosecutor must specifically explain the meaning of the decision to dismiss the case and the requirements that go along with this decision – namely, to behave – and clarify what the consequences of further offending might be. Describing this meeting as a "warning", Swedish interviewee D1 said that it involves a rather intense personal plea to the young offender to refrain from further criminal conduct. Interviewee D2 explained this as follows:

> When we make decisions about a dismissal, then they come here to this office and get served with the dismissal here. [...] Rebukes, that depends a little on the personal style. I rarely reach a scolding level, but I talk seriously with them

[1181] See section 4.2.

> sometimes. You confront the whole life situation. We try to make an overall assessment a bit: what kind of person is that, does he have some good friends or does he hang out in the wrong circles, is he attending school or doesn't he give a shit, is he out there each weekend and using drugs, or is it just a coincidence that he was at a party where there happened to be cannabis and all the others smoked and he did it himself because of peer pressure or what is it otherwise – many such things, where the crime itself is really only the minor part.

One striking result of the observational studies was that in more than 50 per cent of the German trials the case was diverted in court according to §47 JGG (10 out of 19 cases).[1182] In many trials, this tendency to divert cases became visible quite early on. In all these cases, the young offender had confessed, and so the juvenile judge dedicated little time to evidence gathering and fact finding (an average of 2 minutes). Regarding the individual factors, the juvenile judge involved the public prosecutor and the social court assistant early on, and the whole trial took on the character of a conversation, a discussion of how to deal with the young offender. In these cases, the individual factors, the deliberation, and the explanation of the diverting decision were intertwined (for example in trials 5, 6, 7, and 9). This is what I described earlier as "open sentencing". In several cases, the juvenile judge, the public prosecutor, and the social court assistant discussed the possible legal consequences openly (for example in trials 6 and 13). In trial 8, the juvenile judge asked the public prosecutor and the social court assistant whether the case could be diverted if mediation were possible as an "order".[1183] The public prosecutor agreed, but only on the condition that it was combined with some hours of community service for juveniles. The juvenile judge agreed to this and the case was diverted. I got the impression that these deals were a kind of bargaining. I observed a similar process even in cases that ended with a formal verdict. For example, in trial 16, the juvenile judge asked the public prosecutor, in front of everybody in the courtroom, if the case could be diverted in combination with an order of five days of community service for juveniles and three meetings with a drug abuse counsellor. However, the public prosecutor did not agree to this, and the trial ended with a formal verdict that imposed the aforementioned orders on the young offender.

[1182] To remind the reader, the procedural framework in the Swedish juvenile criminal justice system does not provide for the possibility of diverting a case in court (see section 4.2.). In court, the only alternative to a verdict would be that the public prosecutor decides to lay down the case. Consequently, all cases I observed in Sweden ended with a verdict. In one case, the offender was acquitted.

[1183] For "orders" as educational measures, see section 4.1.1.1.

Analysis from a welfare/justice perspective

The empirical investigation of the choice of legal consequence and dismissal/diversion reveals that the theme of welfare is the primary concern in both the Swedish and the German juvenile criminal justice systems. This is more surprising in the case of Sweden than it is in the case of Germany. Even if Swedish legislature indicates otherwise,[1184] the choice of the legal consequence for a young offender seems to be guided by the best interests of the child and by individual needs (both expressions of the welfare theme) rather than by the theme of justice (in the form of equality, predictability, and proportionality).

The Swedish judges' descriptions of the sentencing process in the interviews convey a picture of a very detailed process that reflects both the legislation and the strong influence of the tools I described in section 4.3.2.3. By taking as its point of departure an assessment of the general severity of the offence, the Swedish court respects the principles of predictability, equality, and transparency – the theme of justice. The general rules for reducing the sentence for young offenders serve the same aims. However, one interviewee said that the severity of the offence was "admittedly" considered only so that the discount applicable for young offenders could be applied. This suggests that the theme of justice has somewhat less importance. And in relation to the choice of the legal consequence itself, the Swedish interviewees stressed that individually tailored solutions play a major role.[1185] The interviews indicate that in this context the welfare theme is the decisive factor in the Swedish juvenile criminal justice system.

This becomes most apparent in relation to juvenile care, which is described by the Swedish interviewees as *the* legal consequence for young offenders with care needs.[1186] The strong emphasis on the decisive "need for care" reflects the theme of welfare in its purest sense. As the Brå Report 2002:19 confirms, the importance of this factor is respected by the court if social services assert that the young person concerned has care needs. Here, the fact that the welfare theme takes precedence was explicitly stated.[1187] Regarding the choice of the legal consequence, the focus seems to shift away from the offence towards the

[1184] See sections 3.5. and 4.3.2.1.

[1185] A similar conclusion was reached in the Brå Report 2002:19, 43.

[1186] Kaldal and Tärnfalk (2017) come to a similar conclusion (254).

[1187] See Brå Report 2002:19, 43.

individual. As I have explained, an individualized focus accommodated to the young offender's needs is an expression of the welfare theme, and it can lead to a loss of equality, predictability, legal certainty, and transparency. Further, it conflicts with the sentencing rules and the preparatory works I described in section 4.3.2., which insist that the seriousness of the offence and the theme of justice are the decisive factors. Even if the individualization of the legal consequence is also acknowledged, it should – according to the legislature – not be the decisive factor. However, the interview study indicates exactly that.

And what is more, the Swedish interviews indicate that the chosen legal consequence might be at the very limit of what the principle of proportionality allows (or may even exceed it).[1188] The interviews show that Swedish judges are ready to stretch the principle of proportionality (justice theme) as far as possible to satisfy the individual needs of the young offender (welfare theme), reflecting the welfare/justice clash. When it comes to the choice of the legal consequence, the principles of proportionality, transparency, and equality – so important since Sweden's turn to neoclassicism – seem not to be the decisive factors. Here, Swedish judges seem to let the welfare theme take precedence over the justice theme.

Note, however, that in the Swedish case the observational study suggests a more moderate picture. Seven out of 12 young offenders were sentenced with a specific "juvenile" legal consequence and 5 young offenders were sentenced with an "adult" legal consequence. In other words, the Swedish courts chose in almost half of the observed cases to impose an "adult" legal consequence instead of a specifically juvenile legal consequence. Such a choice can only be motivated by the aim of upholding the principle of proportionality and reflecting the severity of the offence (justice theme) rather than the aim of accommodating the young offender's lower level of maturity (welfare theme). In other words, in this case, the practice described in the interviews deviates from the practice observed in the courtroom. However, given the small scope of my study, this may be sheer coincidence.

The evidence from Germany confirms the strong focus on educational effectiveness (welfare theme). Practice seems to mirror the legislation and the guiding principle: the legal consequence in Germany is shaped to fit the offender

[1188] The proportionality threshold becomes perhaps the most blurry in relation to the legal consequence of "juvenile care", since this legal consequence comes in so may different forms (see section 4.1.2.3.).

rather than the offence.[1189] This is apparent from the fact that all sentences delivered in the observational study in Germany – including divertive decisions delivered in court – were specifically juvenile legal consequences. These sentencing decisions reflect the tailoring of the legal consequence to the young offender, which expresses the welfare rather than the justice theme. In choosing the legal consequence, the decisive factor was the young offender's individual needs rather than the severity of the offence. This is also clear from the German interviewees' suggestion that the question of guilt plays only a minor role compared to the choice of the legal consequence. The evidence displayed an orientation towards issues of education and pedagogy (welfare theme) rather than proportionality and predictability (justice theme). The interviewees claimed, further, that the precise way in which the offender participated in the offence (justice theme, related to the principles of predictability and legal certainty) could be neglected in favour of the question of how to deal with the young offender (reflecting the welfare theme in the form of treatment and education). The German interviews indicated that the legal consequence could even exceed the threshold of proportionality in the name of welfare. This means that there are cases in which the educative guiding principle (welfare theme) takes precedence over the principle of proportionality and the rule of law (justice theme). Here, the welfare/justice clash becomes evident once more. This indicates, again, that the juvenile court responds to the maladjustment of the young offender rather than to the offence as such.

However, I also observed that the justice theme was not completely abandoned in Germany. Trial 10, mentioned above, serves as a good example of the balancing act that juvenile courts have to perform in this regard. On one hand, it reflects the strong influence of the welfare theme inasmuch as the court imposed a large number of additional measures in order to avoid a juvenile imprisonment sentence because the court acknowledged the negative impact of incarceration on young offenders.[1190] On the other hand, the necessity of the additional legal consequences can only be explained on the basis of considerations of proportionality (especially the compensation and the community service for juveniles), given the serious nature of the offence. This mirrors the justice theme. Then again, by focusing on the individual offender, these additional consequences should also partly serve welfare aims, for example the social training course and the obligation to find an apprenticeship. The

[1189] See section 3.2.

[1190] See sections 2.3.2. and 2.3.3.

BGH explicitly states that the possibility of combining several legal consequences allows the court to satisfy both retributive and educative ends.[1191] In other words, the justice theme still plays a role in the sentencing decision. This also means that the sentencing decision reflects the balancing act of the welfare and justice themes and is an expression of the welfare/justice clash in action.

In the German juvenile trials I observed, considerations relating to sentencing were often discussed openly by the juvenile judge, the juvenile public prosecutor, the defence counsel (if present), and the social court assistant (if present). This "sentencing" process could even end up as a bargain between the juvenile judge and the juvenile public prosecutor (especially when the case was diverted according §47 JGG, which requires the consent of the public prosecutor). The decisions I observed in the framework of "open sentencing" were made on vague grounds and were not shaped by any concrete rules, which is a result of the broad discretion granted to the juvenile court,[1192] and there was very little use made of any form of guideline. Here, again, the procedural rules are bent in the name of the educational guiding principle, an expression of the welfare theme. This was often apparent in the juvenile judge's straightforward approach to finding a practical solution that met the young offender's needs,[1193] the lack of a formal division between the hearing of the evidence and the summations, and the open discussions of the sentencing. None of my German interviewees voiced any concerns about the potential for bias. The pragmatic prioritization of finding a sensible solution given the needs of the young offender is evidence that in this context the welfare theme prevails over the justice theme (the latter in the form of the presumption of innocence and compliance with criminal procedural rules). However, since a formal verdict was still delivered, the procedural rules were, to that extent, observed. This again reflects the sort of balancing act which takes place in the framework of the welfare/justice clash.

The situation was different in the Swedish observational study, which may perhaps be due to the different role the judge has in the Swedish juvenile criminal trial.[1194] Here, I could detect no hint whatsoever of what the verdict

[1191] See also BGHSt 18, 207 (208).

[1192] See section 4.3.1.

[1193] See also section 7.5.

[1194] See section 6.2.

might be before it was pronounced, which suggests a strict adherence to the procedural rules (justice theme).

Regarding the dismissal/diversion of a case, the interview study indicates that the two countries feature rather similar approaches, even if the scope for dismissal/diversion is considerably broader in the German juvenile criminal justice system.[1195] Here, the impact of the welfare theme is again more apparent in law in action than in theory. The Swedish interviewees emphasized the underlying welfare theme guiding the decision to divert a case, even if the justice theme still plays a role. The fact that the case can be dismissed in combination with measures that equal juvenile care means the harmful environment of a trial can be avoided for a young person, which is evidence of the importance of the welfare theme. On the other hand, one Swedish interviewee explicitly used the expression "punishment", comparing such a dismissal to a sentence, thereby emphasizing the justice theme. However, in the comments relating to the delivery of the decision in a personal meeting, the impact of the welfare theme becomes even more obvious. Interviewee D2's description of the meeting with young offenders clearly shows the influence of the welfare theme. The fact that the public prosecutor "confronts the whole life situation […] where the crime itself is really only the minor part" illustrates the interplay of the justice and welfare theme and exemplifies the welfare/justice clash.

In the case of Germany, the welfare/justice clash in relation to a dismissal or a diversion is reflected in the interviews and also in the observational study in the courtroom, since the German rules allow for a dismissal in court according to §47 JGG. Trial 8 exemplifies the welfare/justice clash in juvenile proceedings in Germany: the juvenile judge advocated a dismissal combined with mediation as way of avoiding a formal sentence and the stigmatization that goes along with it (welfare theme); the public prosecutor agreed, but only on the condition that the young offender receive some hours of community service for juveniles that would teach the perpetrator a lesson and satisfy the aim of proportionality (justice theme). The large number of dismissals in the German juvenile court, the open sentencing, and the bargaining about legal consequences all amount to a departure from traditional criminal procedural rules on the basis of educational grounds (welfare theme). These proceedings did not follow the strict criminal procedural rules originally laid down for a criminal trial (the latter an expression of the justice theme). Cases that did not fulfil the formal requirements for a dismissal (for example, because the formal evidence did not suffice to secure a

[1195] See section 4.2.

conviction) were still dismissed according to §47 JGG, infringing the presumption of innocence.[1196] However, as I mentioned before in relation to the general procedural rules, this departure from the normal rules seems not to be a headache for the legal professionals in the courtroom; it was neither mentioned as a problem in the interviews nor pointed out in the observed proceedings (even though in some cases there was a defence counsel, who might well seek to object to a biased judge).

7.5. Courtroom dynamics

The empirical investigation of courtroom dynamics in the juvenile trial shows that in both Sweden and Germany they assume a specific shape when the defendant is a young offender. This is apparent from the role of the judge, the language employed in the trial, and the patterns of behaviour of, and the encounters between, the practitioners in the juvenile courtroom.

7.5.1. The role of the judge

In the district court in Bremen, there are six juvenile judges. Five of them deal exclusively with juvenile criminal cases. Only one of the judges has a divided responsibility: half juvenile and half adult cases; even here, however, the adult cases are all criminal cases. As I have already pointed out, the only time these judges might deal with civil law is when there is a damage claim in a case involving a young adult.[1197] In my observations, no case involved a damage claim. The juvenile judges in Bremen are assigned cases alphabetically according to the surname of the defendant. But once a juvenile judge has been dealing with a certain young offender, the judge retains a competency for dealing with any future cases involving the same young perpetrator.

The proceedings I observed in Germany reflected the fact that the juvenile judge is the central and most active figure in the juvenile criminal trial. As I explained in the previous chapter, juvenile judges study the file thoroughly before the

[1196] Recall here the description above of young offenders being "pressed" into confessions to enable the court to dismiss the case; see section 7.3.

[1197] See section 6.2.

trial[1198] and conduct the questioning. After questioning the young offender, the juvenile judge admits the public prosecutor and the defence counsel (if present) to the floor to ask questions or make statements. The public prosecutor and the defence counsel make contributions if they think the juvenile judge has missed something. The questioning always follows this sequence, irrespective of who proposed the evidence. Regarding their role, the German interviewees pointed out that the juvenile judge assumes a role similar to that of a parent. Exemplifying this response, interviewee A1 stated: "most of the young offenders never had a role model in their life. The judge should take this role, kind of like a parent".

Such an approach was evident in most of the trials I observed in the German juvenile court. Especially when the juvenile judge was highly experienced, I got the impression of a parent lecturing their child. The pedagogical character of the way the juvenile judges communicated with the young offenders demonstrated this. Such "personal pleas" to the young offender took place in the proceedings as well as in the explanation of the reasons for the verdict. In the proceedings, all juvenile judges I observed pressed the young offenders, not letting them get off the hook with excuses. It was clear how uncomfortable this made many of the young perpetrators. One juvenile judge, in trial 14, referred explicitly to her role, saying: "being a juvenile judge, I am used to explaining the dangers of alcohol". She then launched into a long lecture about the misuse of alcohol. In trial 12, a similar plea was made about the dangers of drugs. In trial 17, the juvenile judge not only made eye contact with the young offender when explaining the verdict (as did all other juvenile judges I observed), but also removed his glasses, making his gaze even more intense. In trial 6, which concerned a defendant accused of drink-driving and driving without a licence, the juvenile judge dedicated a considerable amount of time to explaining the dangers of drink-driving. In his personal plea he asked whether the young offender was seeking to get a driver's licence, and told the young person that that would demand responsible behaviour. When the case ended with a diverting decision, the pedagogical plea began earlier and was intertwined in the investigation of the individual factors (for example in trials 5, 6, 7, 9, 13, 14, and 17). In cases of a verdict, the personal plea may already have begun during the trial, but was presented in a concentrated form in the explanation of the verdict to the young offender.

In Lund's district court, there are three judges who are specifically appointed to handle cases involving young offenders. However, their responsibility stretches

[1198] See the discussion in section 6.2.

further, including criminal cases against adult offenders and civil cases. One of the Swedish interviewees (C1) said simply: "everybody does everything". Furthermore, other judges may deal with cases against young offenders if the three appointed judges cannot take the case (for example, because they have too much other work).

The more passive role of the Swedish judge, described in the previous chapter,[1199] was clear from my empirical investigations. In all observed trials, the judge obviously adopted the role of a referee, taking a back seat in the proceedings while the public prosecutor and the defence lawyer mainly did the talking, reflecting the adversarial shape of the trial described in section 5.1. For example, in most cases the judge introduced the involved parties, but not always, and asked some questions to confirm the identity of the defendant. [1200] Then the judge handed the interrogation over to the public prosecutor. After the public prosecutor, the defence attorney got the opportunity to ask questions. However, this order could be changed when it came to the presentation of the evidence. In accordance with the adversarial approach, the "parties" – the defendant versus the public prosecutor, who is sometimes side by side with the victim – presented the evidence. The party who produced the evidence had the right to introduce the evidence and – if the evidence was brought forward by a witness – ask questions first.[1201] The judge intervened only with procedural questions and if formal decisions were required. This contributed to the trial's formal character.

The formal character of the Swedish juvenile criminal trial was further reflected in the way the judge explained the reasons for the verdict. The Swedish judges I observed stated the verdict emotionlessly, and they did not direct themselves towards anyone. There were no personal pleas like the ones I observed in the German juvenile proceedings. The only exception was trial 8, in which the Swedish judge directly addressed the young offender and told him that she really hoped the offender had understood, that she hoped everything would go well, and that she hoped they would not have to meet again in court. However, this small personal plea was expressed before the summations and not carried forward into the explanation of the reasons for the verdict. The latter was again delivered formally and emotionlessly; the judge spoke to the paper rather than to the offender. The absence of personal pleading in the Swedish juvenile trial also affected the average amount of time dedicated to the explanation of the verdicts.

[1199] See section 6.2.

[1200] For a similar observation in her study, see Svingstedt (2012), 124.

[1201] See chapter 36 §17 RB.

When the verdict was delivered immediately after the trial – which happened in 7 out of 12 cases – the explanation of the reasons for the verdict took on average 3 minutes. The longest explanation of the reasons for a verdict I observed took 5 minutes, in the framework of a trial that lasted 134 minutes. In the German proceedings, the explanation of the reasons for a verdict took longer – an average of 9 minutes when the trial ended with a formal verdict, which included a large amount of personal pleading.

The interview study only confirmed the formal, detached impression I got from the observations in part. The Swedish judges had a different self-perception. For instance, one of the Swedish interviewees (C1) highlighted the sense in which the judge in juvenile proceedings is often trying to make up for a lack of parenting on the parent's part:

> It might be someone who comes from a situation in which there is no adult who listens at home and in school they feel discouraged. It becomes an opportunity to talk a little. There is one thing that has not been working properly; there is a lack from the parent's side.

All the judges I interviewed in Sweden emphasized that when the judgment is delivered directly after the trial they try to explain to the young offender why he or she has been convicted and what the legal consequence means. Nevertheless, they pointed out that they did not offer some kind of personal rebuke in the trial.

> I do not think I rebuke them because it is quite difficult to do that in a good way because some are quite hardened, and they would almost only laugh. And in this case, the court would pretty much lose prestige. Somehow, it is simply that they have been sentenced after all. We have listened to all their evasion and excuses, but we did not believe them; that is what the judgment says. (C3)

However, two Swedish interviewees described a slightly more nuanced picture:

> It may well happen that you do some kind of moral preaching anyway, and talk about this, now you know what you have done, now you are convicted for this, we hope we do not see you back here, you have to move on and it depends on yourself and things like that. Usually, I try to do that. (C2)

> You really would want to communicate so that you can talk through the judgment in a different way, like "we were thinking like this", and so on, and the small reprimand speech which you are expected to give as well. (C1)

Then again, in my observational study, I did not observe any moral preaching or reprimand speeches in the form these interviewees described. In relation to the dismissal of a case, interviewee D2 painted a different picture from the observation, which I described earlier regarding the dismissal of a case and has an impact on the role of the public prosecutor. Here, interviewee D2 described that he raises his voice sometimes.

Analysis from a welfare/justice perspective

The observational study in Germany confirms the role of the juvenile judge outlined in the previous chapter[1202] as the most active figure in the juvenile trial. The judge occupied the central role and interacted and engaged with the young offender. This was most apparent in the personal pleading, which gave the impression that the juvenile judge had assumed the role of a parent. This was also confirmed in the interviews. The German juvenile judges engaged in a personal manner with the young offender and often did not keep a professional distance, as one might expect from the formal, objective role of a judge in the procedural sense (the justice theme in the form of the principle of objectivity). One juvenile judge, in trial 14, referred explicitly to her role when she said that, "being a juvenile judge, I am used to explaining the dangers of alcohol", thereby highlighting the specific educative duty a juvenile judge has in German courts, which goes beyond the traditional role of a criminal judge. The traditional criminal judge engages more or less exclusively with the criminal conduct, reflecting the justice theme. I observed similar approaches in, for example, trial 6 (drink-driving and driving without a licence) and trial 12 (a drug-related charge). This strong emphasis on the educational approach reflects the impact of the welfare theme in this realm of justice. Regarding the personal pleading, the observed juvenile judges all assumed the role of an educator, explaining what could have happened and what will happen if the young perpetrator reoffends. In all the cases I observed in Germany, the juvenile judge blended a positive, encouraging attitude with a stern, imposing approach, and there was often a personal touch. This again put one in the mind of a parental approach, more in line with the welfare than with the justice theme. It was pointed out in the interviews that the German juvenile judge is supposed to be a role model for the young offender. This was also reflected in the assignation of cases: the underlying reason that a reoffender should appear before the same juvenile judge

[1202] See section 6.2.

is based on the idea of education and the specific role a juvenile judge should play in that framework, which has to do with the parens patriae role described in section 6.2., an expression of the welfare theme. Serving as a role model is not part of the traditional role of a judge, and this is therefore an expression of the welfare theme. Yet the German juvenile judge still has to sentence the young person, and is thus restricted by the principle of proportionality. The role of the judge in this sense typifies the welfare/justice clash. But, as I explained above in sections 7.3. and 7.4., this threshold of proportionality is in practice stretched to its limits, and sometimes even transcended. In this case, justice appears to be outweighed by welfare.

The Swedish observational study, by contrast, shows that the judge acts more as a referee, assuming a passive, distant role. The judge does not assume the role of an educator (welfare theme), as in Germany, but rather that of a judge in the purely legal sense, presiding over the decision of right and wrong (justice theme). This was evident in the almost total lack of personal pleading in the observed proceedings. The Swedish judges engage less with the young offender as a person and more with the offence itself, thereby placing greater emphasis on the justice theme. All my Swedish interviewees stressed that they do not offer some kind of personal rebuke in the trial. A personal rebuke may be interpreted as an expression of a personal engagement and a pedagogical approach, reflecting the welfare theme. One Swedish interviewee highlighted in this connection the potential for the court to lose some of its prestige. Such a concern reflects the importance attached to the justice theme rather than the welfare theme: it stresses the importance of the role of courts in society instead of the individual needs of the offender.

Instead of personal pleading, the Swedish interviewees emphasized the word "explanation" and stated the importance that the young offenders understand what is going on. The Swedish courts seem to aim at transparency (justice theme), although this emphasis on "explaining" was not corroborated by the observational study. The explanation of the reasons for the verdict was stated very briefly and formally, and the statement was not directed towards the defendant, which created the impression of a formal criminal trial adhering strictly to the procedural rules. Additionally, in several cases the verdict was not delivered immediately after the trial. Here, the possibility of explanation disappeared completely. Then again, two Swedish interviewees mentioned "moral preaching" (C1) and "reprimand speech" (C2), which can be interpreted as an attempt to introduce something of a pedagogical approach (welfare

theme). However, the Swedish interviewees did not stress the importance of any form of direct "education" for the young offender.

7.5.2. Language

I have mentioned that I focus on the aspect of communication in the framework of the observational study. The basic medium of communication is language.[1203] The language of the legal arena is expressed not only through a very specific technical language but also through a certain kind of body language.

The language employed in the German juvenile trials I observed was adapted to the offender. It was rather informal and not highly technical, which is in line with the Beijing rules, point 14.2. of which states:

> The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

That this adapted language was being employed became evident when observing the juvenile judges, given that, in the structure of the German juvenile trial, the juvenile judge occupies the central role and does most of the talking.[1204] The German juvenile judges always addressed the young offender directly and actively sought to maintain eye contact. Many juvenile judges employed "Du" for younger offenders or "Sie" as the polite formal address for young adults. The juvenile judge sometimes even employed juvenile slang to aid the young person's comprehension (e.g. "this means the slammer",[1205] in trial 11, or "umchecken", describing a body check while ice skating, in trial 8). All the juvenile judges I observed tried to get through to the young perpetrator. This became especially clear in the explanation of the reasons for verdicts, which involved – as I described in relation to the role of the judge, above – a great deal of personal pleading and employed language adapted to the young person. This is, again, borne out by the amount of time dedicated to personal pleading in the explanation of the reasons for the verdict to the young offender (an average of 9 minutes). The personal pleading was in all cases I observed almost totally void of technical legal terminology. When the juvenile judge had to use a purely legal

[1203] See Luhmann (1997), 205.

[1204] In regard to the role of the juvenile judge, see sections 6.2. and 7.5.1.

[1205] My translation of the slang word "Knast", meaning prison.

expression, extra effort was put into explaining it to the young offender (for example, in trial 10 the juvenile judge explained in simple terms the expression "schädliche Neigungen" as a necessary requirement for juvenile imprisonment, and in trial 19 the juvenile judge explained the legal consequence §27 JGG (conditional sentence) by stating: "this is your last stop. Next stop is prison"). The juvenile judges made a concerted effort to be understood by the young offenders.

There were two occasions on which the language the German juvenile judge employed became formal in the course of the juvenile trial. The first was when the verdict itself was delivered. Everybody had to rise and the juvenile judge began with the words "im Namen des Volkes" ("in the name of the people"). However, this formal part often consisted of only one sentence. Once the juvenile judge had read this short phrase, everyone sat down again and the reasons for the verdict were explained. In all the trials I observed, during this explanation and the personal pleading the German juvenile judge employed a language explicitly adapted to the young offender.

The other occasion the German juvenile judge employed "legal" language was when something was stated for the records, for example the introduction of a certain document. Before the juvenile judge read a document, the judge told the court assistant which page was going to be read or quoted for the record. But this was more of an aside, and it was obviously not directed towards the young offender. This was made plain by the way the juvenile judge acted: he or she turned towards the court assistant and used formal language. The juvenile judge would then change addressee and language again to make certain that the young offender understood what had just happened. This sometimes occurred in relation to the explanation of a certain document – the medical record of a blood alcohol test, for instance.

In the trials I observed in Germany, the public prosecutor occupied a less active role, observing the trial and filling in with further questions if necessary.[1206] This was partly due to the fact that the juvenile judge had explored the facts of the case. However, the use of a language tailored to the young offender became apparent in the case of the public prosecutors in the summation. In trial 10, for instance, the public prosecutor began her summation with the words: "I am going to address you directly". What this public prosecutor made explicit, the other public prosecutors I observed said implicitly by making eye contact with the young offender and engaging in a large amount of personal pleading and

[1206] In terms of the role of the public prosecutor, see sections 6.3. and 7.5.3.

lecturing. The only exception was trial 24: the juvenile public prosecutor was ill, and a general public prosecutor was filling in. The general public prosecutor did not address the offender personally, but performed the summation in a rather formal and distanced manner. This gave me a vivid impression of the different forms of summation. In all the other trials, the public prosecutor dedicated only a minor part of the statement to the legal aspects of the case and focused for the most part on the questions of how to respond and how to find a legal consequence that fitted the offender.

In my observation of the Swedish court, by contrast, I initially noted that the judge hardly communicated with the young offender at all. The language was in most cases not adapted to the young offender.[1207] The legal professionals often communicated in legal terms "over the offender's head" – a point which was also made by the Brå investigation in 2002.[1208] However, in the interviews, the Swedish interviewees emphasized the need to adapt proceedings and, in particular, the language to the young offender. The fact that this was not reflected in the observational study - also visible in the almost complete lack of personal pleading - may be due to the different role the judge has in the Swedish court.[1209] However, the lack of personal pleadings might also be due to the purely practical reason that many of the judgments observed in Sweden (42 per cent) were not delivered directly after the trial but only in written form a week later. When delivering the verdict immediately after the trial, the Swedish judges I observed were brief and employed formal language. Even though the Swedish procedural system does not feature a model in which everybody rises when the verdict is delivered, the Swedish judges I observed still managed to project a formal, serious attitude which shaped the courtroom dynamics as a whole. The explanation of the reasons for the verdict took on average three minutes. Only in trials 2, 11, and 12 were the explanations of the reasons for the verdict directed at the young offender, but even in these cases the explanations were only brief.[1210] There was no personal pleading like that I had observed in German proceedings. In all the other cases, the judge stated the verdict dispassionately, and did not direct the verdict towards anyone in particular. When the verdict

[1207] See also section 7.5.3.

[1208] Brå, "Sju ungdomar om sin rättegång," Report 2002:18.

[1209] See section 6.2. and section 5.1. in regard to the adversarial approach to the juvenile criminal trial.

[1210] Trials 11 and 12 were presided over by the same juvenile judge. The presiding judge in trial 3 was not a specialized "juvenile" judge.

was not delivered directly after the trial, the judge simply stated that the verdict would be accessible one week from the time of trial. In these cases, there were no oral pronouncements of the judgment. Interviewee C2 explained that "you can summon everybody to deliver the verdict, but here we do not have such a tradition". Consequently, in these cases, the young offender never received an oral explanation of the reasons behind the verdict, but only a standard written judgment that uses technical legal language. One of the Swedish interviewees (C2) pointed out that "in this case, the pedagogical effect disappears, of course", although he considered this unavoidable in certain cases. It seems to be left to the defence counsel to explain the verdict to the young convict in more detail.

Analysis from a welfare/justice perspective

In Sweden, the language employed in the juvenile courtroom was formal. The professionals used legal expressions, but tried – at least sometimes – to make the trial as understandable to the young defendant as possible. Note here that the observational study in this way suggests a different picture than is suggested by the interviews. In the interview, the Swedish judges emphasized the need to "explain" to the young offender. However, in the framework of my observational study, they seldom interacted with the young offender directly: the Swedish judge recited the verdict to the public (or to the paper in front of them) rather than specifically to the young offender, and there was seldom any personal pleading. Emphasis was placed on the need to observe the formal procedural rules, which reflects the importance of the justice theme, rather than the need to deviate from them in the interests of the young offender's welfare.

In Germany, on the other hand, the juvenile judge employed a language almost directly opposed to that employed in the Swedish trials: adapted to the young offender, avoiding legal terms, and seeking to communicate as directly as possible. It thereby conveys an informal impression and reflects the guiding principle of the German juvenile criminal legal system: education,[1211] an expression of the welfare theme. The professionals even used slang expressions. Here, the focus seems to be on reaching and "helping" the young offender in the best possible way (welfare theme), rather than on "explanation" as an expression of transparency or punishment (justice theme). This became palpable in the often highly engaging personal pleading from the juvenile judges and the public prosecutors. In this, the German public prosecutors exemplified the

[1211] See section 3.2.

welfare/justice clash: the summations were shaped by formal, procedural rules, and the public prosecutor would often stand; however, this formal approach was tempered by the use of informal language and the clear attempt to reach out to the young offender, which can be interpreted as incorporating something of the educative approach. In all German juvenile trials, the public prosecutors dedicated only a minor part of the summation to the legal aspects of the case and focused instead on the questions of how to respond to the offender and how to find a legal consequence which fitted them. This sort of summation is doubtless also due to the fact that most young perpetrators confessed – a fact which was stated earlier and pointed out by all the German interviewees. Nevertheless, it is another instance of the welfare/justice clash: the summation, though shaped by the formal, procedural rules, emphasizes the welfare of the young offender (namely, the question of which individualized legal consequence is appropriate in order to address the personal needs of the young offender, even if these might also be combined with some additional consequences to satisfy the demands of justice, in the form of retribution or compensation) rather than the offence itself (which would reflect the justice theme). All these observations confirm the strong influence the theme of welfare has in this realm of criminal justice.

The two situations in the German trials in which the language did become formal and legal (the delivery of the verdict and statements for the records) were shaped to satisfy procedural rules and thereby reflect the importance of the justice theme in the form of legal certainty and revisability. Apart from these two exceptions, the whole German juvenile criminal trial, with its informal tenor, appears geared towards the young offender and his or her various needs – not only in relation to the legal consequence, but also regarding the comprehensibility of the trial. All this expresses the theme of welfare, while the alternation between informal language and the formal language demanded by the two situations mentioned above exemplifies the welfare/justice clash.

7.5.3. Courtroom encounters and teaming up

In the single magistrate court in Germany, the courtroom dynamics, shaped by the language employed and the patterns of behaviour of the practitioners, created an informal and relaxed atmosphere.[1212] All the juvenile judges I

[1212] Note here, though, that the courtroom dynamics were more formal in the observed trials in the juvenile juror court (see section 6.1. regarding the court structure in Germany). This may be

observed in Germany obviously put effort into "deformalizing" the trial, even if the layout of the courtroom necessitated a certain formal seating arrangement (especially in relation to the juvenile judge, who often presided from behind a large, elevated table at one end of the room) and even if the court demanded a formal dress code.[1213] For example, the juvenile judge always introduced everybody in the courtroom, addressing the young offender personally, often explaining the different functions of all those present. This was also reflected in the language I described in section 7.5.2. The way the German juvenile judges addressed the young offender ("Du" or "Sie") reflects a level of linguistic informality and an attempt to add a personal touch to the trial. As I have stressed, the legal professionals in the juvenile court made an effort to adapt their language to the perspective of the young offender and to reach out to him or her. German interviewee B3 confirmed this impression, stating:

> In terms of the atmosphere, it is certainly such that the proceedings [involving young offenders] are – at least regularly – handled considerably more informally. The language used by the legal professionals of the court – the chairman – is mostly adapted to the juvenile to make it understandable; also, the proceedings as a whole are clearly more informal than is actually the case in adult criminal matters.

Such an approach cannot be found in the Swedish juvenile courtroom. Here, the courtroom dynamics in the observational study were more formal. There was a formal way of seating, placing the judge and the lay judges at the head of the room. In Swedish courts, there is no formal dress code in the form of a robes of office, but there seemed to be a dress code: most of the judges, public prosecutors, and defence counsels wore suits or the equivalent. The courtroom dynamics and the strict observance of the criminal procedural rules created a formal atmosphere. In most of the cases (9 out of 12), the judge introduced the professionals present. However, I did not get the impression that the aim was to relax the atmosphere; rather, it seemed to have been done out of courtesy. Only in two of the cases did the judge explain the roles of the practitioners present and the procedure that was to follow. In one case, the judge did not provide any introduction before the first witness was called. He explained to the witness

---

because cases before the juvenile juror court generally concerned more serious crimes and the offenders were often engaged in a more serious criminal lifestyle.

[1213] All legal professionals are required to wear a so-called "Robe", which is a black robe of office, which contributes to the formal appearance.

what was going to happen and who was who, but he did not direct this towards the defendant. The language employed in the Swedish juvenile criminal trials was of a "legal" character, which contributed to the formal feel of the trial and also shaped the general courtroom dynamics. The proceedings sometimes seemed to take place "over the defendant's head": the young offender often seemed to have trouble understanding what was going on and had to ask the defence counsel for an explanation. This observation is supported by the outcome of the Brå report 2002:18. Here, again, it seems as if the Swedish approach aims at satisfying the principle of the rule of law (justice theme) through strict obedience to the procedural rules, which is not the case in Germany.

An interesting feature of the German juvenile trial was a certain element of teamwork among the practitioners in the courtroom, which was connected to the relaxed, informal interactions between the legal professionals, including the social court assistant. Take, for example, the aforementioned practice of "open sentencing". Here, all the legal professionals and the social court assistant discussed which measures could meaningfully address the needs of the young offender (for example in trials 6, 8, 10, 12, and 13). Even outside of the procedural boundaries of the trial, the juvenile judge and the public prosecutor, in particular, spoke informally and openly about the potential outcome of the case given how it looked from the files (for example in trial 7).

In Germany, this aspect of teamwork was also visible in relation to the defence counsel (when present). A defence counsel was only present in a minority of cases (trials 10, 11, 12, 16, and 17). Three of these five cases dealt with felonies and therefore required the presence of a defence counsel.[1214] In these cases, the defence counsel seemed familiar with the attitude of the juvenile judge and the public prosecutor, and adapted to the informal dynamic. This was evident in the communication that look place outside the formal boundaries of the trial: making friendly conversation with the other legal professionals during a break and also actively discussing possible outcomes for the case with the judge and the public prosecutor. When this happened, the defence lawyer sometimes even assumed a critical attitude towards the defendant, wondering aloud what legal consequence might be necessary to avoid reoffending. Trial 12, a case involving a young adult seriously addicted to heroin, can serve as an example in this regard. Here, the judge, the public prosecutor, and the defence counsel combined forces to plead with the young offender to agree to an arrangement

[1214] "Compulsory legal representation" in the sense of §68 JGG; see section 6.4.

that included a direct transfer from pre-trial custody into drug therapy. The defence counsel went so far as to give the young offender a nudge at his shoulder, as if to say, "go on, agree to the terms". Furthermore, in this case the defence counsel discussed the possible legal consequence with the juvenile judge and the public prosecutor in the trial in a way that strongly conveyed the impression that all three of them were teaming up with one another. Another example is trial 19, in which the defence counsel was whispering to his client, trying to elicit a confession, as the juvenile judge pressed the defendant. All the German interviewees confirmed this impression, with one emphasizing a "team spirit" (A2) and another the different performances in the juvenile court as compared with the adult court (A1). Interviewee B3's comment is illustrative:

> A defence counsel who often defends young perpetrators, engaging fully with the educational approach and who designs his or her defence in line with the educational thought – of course he is not knowingly going to allow a guilty verdict for an innocent client – but who does not pursue in principle permissible and possible defence strategies that would be pursued in adult proceedings, because he assumes in the best interests of the client that such strategies would not help, because it is not the crucial question whether, for example, the offender was an accomplice or aided, but the key question is how to influence the defendant educationally. […] A defence counsel who goes rather for a conflict defence is certainly not wrong formally, but he might possibly thwart the intended educational success, which already lies indeed in the performance of the trial itself. (B3)

This attitude is not in line with the prevailing academic opinion about the mandate of the defence counsel, as described in section 6.4., which is that the defence counsel should try to achieve the best outcome for the client – even if that would be at odds with the educational ideal of the juvenile court – and should thus adopt the same role as he or she would in adult criminal proceedings.[1215]

The observational investigation in Germany indicated that this teaming up extends beyond the legal professionals to include the social court assistant.[1216] The moment the evidence-gathering process turned to focus on the individual factors, the social court assistant was involved as a fully fledged member of the

[1215] See Eisenberg (2016), §68 margin no.10–13 and also Ostendorf (2016), §68 margin no.3.

[1216] It can be assumed that the teaming up would also include a probation officer, if they were present. However, there were no probation officers present in any of the observed cases.

team in the juvenile courtroom. I got the impression that the social court assistant was taken very seriously because of the different kind of expertise he or she brought to the trial. This was reflected in the observational study: in all cases in which the social court assistant was present at the trial (in trials 1–3, 6–10, 12, 13, 16, 19, and 25), the court ruled in line with the social court assistant's proposals. Here, again, all my interviewees confirmed this observation. Interviewee A3's comment is typical of this view:

> I almost always decide in accordance with the social court assistant, except when it comes to short-term detention or juvenile imprisonment since the social court assistants in Bremen do not propose incarcerating measures. […] They [social court assistants] are the ones who have studied social pedagogy and know how to offer educationally useful measures. These are things I can think of or imagine, but I cannot justify it in a professional way, and that is up to the social court assistant. (A3)

In other words, the social court assistant's assessment of which legal consequences might be appropriate was generally accepted by the court. In my observations, if the juvenile judge deviated from the precise proposals, this was only to add an additional legal consequence, usually demanded by the public prosecutor (for example, in trials 1, 3, 6, and 8), to the legal consequence proposed by the social court assistant. The only trial I observed in which the court substantially deviated from the proposal of the social court assistant was trial 11, but this concerned the procedural form rather than the content: since the offence was a rather serious felony, the case was not diverted according to §47 JGG and instead there was a formal verdict but with the content proposed by the social court assistant. Interviewee B3 described the role of the social services as follows:

> [It might happen] that the social court assistant does not see themselves as part of the state apparatus, which tries jointly to find out all the circumstances – whether harmful to or in favour of the juvenile – and then to find the educationally best solution, but [if the social court assistants] see themselves as a party, namely as a quasi-extension of the defence and only there to achieve the lowest possible sanction, then they firstly fail to fulfil their mandate, secondly behave illegally and also thirdly discredit themselves in the eyes of the other practitioners in the proceedings. (B3)

In the Swedish juvenile trials, there was no evidence of comparable teamwork between the judge, the public prosecutor, and the defence counsel. The judge

was not involved in any kind of interaction with the defendant, the public prosecutor, or the defence counsel outside of the procedural framework. The judge did not interfere in the interrogation of the defendant or the witnesses. None of the Swedish judges gave any hint whatsoever during the proceedings about the direction in which the verdict might head. This marked a major difference from the German juvenile trial. In Germany, some juvenile judges were quite open with what they thought about the value of a certain statement from the young offender. In German trial 5, for example, the judge showed clearly that he thought that the young perpetrator was lying by responding with a rather sarcastic "sure" to the offender's claim that he had paid a fine. When the offender in a Swedish trial was a juvenile, the judge read the social services' report out loud in the trial. Even if a representative from social services was attending the trial, it was still the judge who presented the report, although the representative would then contribute additional information or answer further questions. The report from social services always stated whether the young offender had care needs and if the young offender had agreed to juvenile care or community service for juveniles. Regarding the latter consequences, the report contains a proposal, for example a care plan or care contract. Swedish interview D2 explained that social services do not specify their proposal in detail; for example, they do not propose a certain amount of hours of community service for juveniles, but they rather express whether they believe the young offender is suitable for community service for juveniles and whether the perpetrator has agreed to this measure. In other words, the concrete amount of hours of community service for juveniles is assessed by the court according to the sentencing rules I described in section 4.3.2. In all cases I observed bar one, the court agreed to social services' proposals. This observation is in line with that of Svensson, who asked: who actually sentences the young offender?[1217] However, in my observations, the Swedish social services never gave a statement that referred to any other legal consequence (for example a fine). They stuck strictly to the specifically juvenile consequences.

Analysis from a welfare/justice perspective

Much of what was said about language in section 7.5.2. holds also of the encounters observed in the Swedish and the German courtrooms, given that

[1217] See Kerstin Svensson, "Socionomers roll i påföljdsvalet – Vem dömer?," (*Brottsförebyggande Rådets Tidskrift Apropå* 2000, Vol.1: 18–20), 20.

such encounters involve language. The Swedish juvenile trials were formal, strictly adhering to the procedural rules. This reflects the theme of justice: the rule of law, and in particular the principle of legal certainty. The formal approach might be due to the fact that the Swedish juvenile criminal proceedings are public, while the closed doors of German juvenile criminal trials might help to facilitate their informal atmosphere. In Germany, proceedings were informal to the extent that the procedural rules were – as mentioned in section 7.3. – "bent", almost to the point of illegality, in the name of education and the best interests of the child, reflecting the theme of welfare. The informal approach was for example apparent in trial 5: the sarcastic comment of the juvenile judge ("sure") indicating that he thought that the young offender was lying, which – from a legal perspective – could be taken as a sign that the juvenile judge was biased. However, none of the other professionals present reacted in any way that would have suggested that they thought it inappropriate for the juvenile judge to openly demonstrate such a view on the statement of the young perpetrator. I observed several similar situations in the German juvenile trial: situations in which the juvenile judge expressed quite openly his or her view in the proceedings, in a departure from the objective role demanded of the judge by the justice theme. The other professionals – public prosecutors, defence counsels, and social court assistants – did not criticize this behaviour, and they often pursued a similar approach. This all reflects an informal and relaxed attitude to proceedings, with the juvenile judge playing more the role of a "strict father figure" than that of an independent judge. Greater value is attached to the potentially educative effects of expressing direct disapproval when, for instance, the defendant is obviously lying than to strict obedience to the procedural rules, strict objectivity, or the appearance of an absence of bias.

Furthermore, in Germany I observed that the practitioners tended to "team up" with each other in the courtroom. In most observed cases, the educational approach was pursued to such an extent that not only did the public prosecutor work hand in glove with the juvenile judge, but also the defence counsel became part of the "team", getting involved in and contributing to shared discussions about how to deal with the young offender from an educational point of view. Even if such a course of action was from a legal perspective not advantageous for his or her client, the defence counsel nonetheless teamed up with the others. As I explained in section 6.4., the defence counsel is in theory an expression of the justice theme. However, in the case of the German juvenile criminal justice system, my observational investigations and interviews indicate otherwise. In the observational study, the defence counsel often departed from the formal duty of a defence counsel to ensure a fair trial (justice theme) in favour of an

individualized approach guided by educational aims, an expression of the welfare theme (for example in trials 10, 11, 12, and 16). This strong emphasis on an educational approach (welfare theme) even on the part of the defence counsel – who is essentially placed in the trial to uphold the principle of a fair trial and so the rule of law – again illustrates the welfare/justice clash.

The "teaming up" even encompassed social services. One German interviewee suggested a reason for their strong influence: the social court assistant is able to justify the appropriate legal consequence "in a professional way". In the adult criminal trial, the professional expertise necessary for estimating a legal consequence is possessed by the judge, who weighs the different demands of the rule of law. In the juvenile trial, as this interviewee acknowledged, the expertise of the social court assistant (reflecting the welfare theme) is even more important than the assessment the court is able to provide (reflecting the justice theme). This interplay reflects, once more, the welfare/justice clash. According to my interpretation, the fact that the social court assistant does not make any proposals that involve incarceration is not due to the fact that they do not consider the proportionality requirement; rather, their purely welfare-based approach does not view incarcerating measures as justified even on the basis of considerations of proportionality, because of their questionable educational effect. Such a measure is only justified on the basis of the justice theme. This expresses, once more, the balance between welfare and justice that the court has to strike.

The "teaming up" observed in Germany did not occur in the Swedish context. Here, the public prosecutor and the defence counsel assumed the procedural role the law intends for them, pursuing an adversarial approach to proceedings. Nevertheless, Hollander and Tärnfalk emphasize that even in the Swedish juvenile criminal justice system there is collaboration:

> The sentence of transfer to special care forces the social services on the one hand, and the prosecutors and courts on the other, to collaborate in ways that meet the young person's welfare needs while also addressing the offence with an element of punishment and reparation.[1218]

This comment is an explicit expression of the welfare/justice clash: the demand for teamwork between the different entities, including social services – even in the Swedish juvenile criminal justice system. Interviewees acknowledged the important influence of the report from social services, but in my observations

[1218] See Hollander and Tärnfalk (2007), 97; see also SOU 2014:122.

social services attending the trial was the exception rather than the rule. As an institution guided by the theme of welfare, social services only proposed specifically juvenile legal consequences, although they did take proportionality (justice theme) into consideration when proposing a legal consequence. Here, the observational investigation confirmed the theoretical dilemma of social services I described in section 6.5.: their role embodies the welfare/justice clash. However, social services did not propose a specific number of hours of community service for juveniles. This assessment was left to the court, in accordance with the sentencing rules I referred to in section 4.3.2. As I explained there, these principles are more oriented towards the justice theme: proportionality, predictability, and equality. Here, we find again a balancing between welfare and justice: a juvenile legal consequence is imposed on the basis of the needs of the young offender and should be meaningful, but it is concretely measured against the principles of proportionality, predictability, and equality.

The role of the defence counsel in Sweden was also shaped by the adversarial approach to the juvenile criminal trial. However, this should not be taken to imply that the defence counsel in Sweden adopted an aggressive attitude; rather, the difference was that there was no common discussion, collaboration, etc., as was the case in Germany. In other words, the defence counsels in Sweden to a much greater extent sought to ensure a fair trial, thereby serving the aims of justice.

7.6. Conclusion

My empirical investigations have shown that the two systems have more similarities in practice than their guiding principles and the preceding doctrinal study might have led us to expect. Furthermore, they demonstrate that the practitioners in the juvenile courtroom face no major problems in combining welfare and justice considerations (that is, what I have referred to in this chapter as the welfare and the justice themes), either in Sweden or in Germany.

As expected, the empirical study of these two systems reveals that the impact of the welfare theme is considerably greater in the German than in the Swedish juvenile criminal justice system. However, even the Swedish juvenile criminal justice system shows evidence of the strong influence of the welfare theme – and this influence is even more apparent in practice than it is in theory.

Regarding the guiding principles of the juvenile criminal justice system, empirical investigation reveals that the overarching aim in both countries seems to be to use the available tools to transform the young offender into a law-abiding citizen. Both systems focus on the future development of the young person (welfare theme) rather than looking backwards towards the offence (justice theme). This is in line with the German welfare-based approach[1219] but not with the Swedish neoclassical approach.[1220]

Then again, the Swedish and the German juvenile criminal trials show very interesting, differing features on the practical level. A striking example is the formal shape of juvenile proceedings in Sweden as against the informal approach of German juvenile proceedings, the latter of which is reflected in the bending of procedural rules and in the relaxed courtroom dynamics. These dynamics include in particular the "teaming up" of the courtroom practitioners in the German juvenile proceedings, an approach confirmed by the German interview study. This approach is motivated by the educative guiding principle and the best interests of the child, as expressions of the welfare theme. The welfare theme also has an important impact on the role of the judge that is not mirrored in the Swedish juvenile criminal justice system. The differences in the role of the judge may also be due to the different underlying procedural approaches: the adversarial approach in Sweden, which includes the principle of disposition and gives an important role to the parties (the defendant, the defence counsel, and the public prosecutor), versus the inquisitorial system in Germany, which places the juvenile judge in an active role in the courtroom in accordance with the principle of official investigation.

However, even if my observations suggest that the Swedish juvenile criminal trial is characterized by a formal approach, a strict adherence to the procedural rules, and formal courtroom dynamics (expressions of the justice theme), the interviews revealed that procedural rules can be "softened" in cases involving young offenders and that the language employed is supposed to be less formal and more suited to the young perpetrator. But this was not borne out by the courtroom observation. The impact of the welfare theme in the Swedish juvenile criminal justice system becomes most palpable in relation to the choice of the legal consequence, especially regarding juvenile care, which was described by interviewees as the default legal consequence for young offenders in need of care. Here, the Swedish judges seem to let the justice theme be overridden by the

[1219] Described in section 3.2.

[1220] Described in section 3.5.

welfare theme: the principle of proportionality is pushed to (and perhaps beyond) its very limits, which in this case makes the Swedish approach very similar to the German approach.

Neither the observational studies nor the interviews suggest that any of the legal professionals confront any major problems in balancing the interests of welfare and justice. None of the practitioners active in the juvenile courtrooms in either country voiced any concerns in relation to this balancing act or regarding the conflicts that arise between the rule of law and particularly proportionality (justice theme) and the best interests of the child (welfare theme). In both countries, they seem to have no problem respecting both. There are many examples from the German cases that would, in adult criminal proceedings, have triggered objections of judge bias. None of the German practitioners – not even the defence counsel – seemed to have a problem with the role the juvenile judge assumed in the proceedings. In Sweden, the judges stuck more closely to the justice theme, observing the guiding principle of neoclassicism; however, even Swedish judges described the strong influence of the welfare theme – here mostly obviously in relation to the choice of the legal consequence.

To sum up, regardless of the similarities and the differences these empirical investigations reveal, both juvenile criminal justice systems are influenced by the welfare theme and the justice theme. However, my investigations suggest that this does not appear to give rise to any major problems within legal practice – surprising as this may seem. The players active in the juvenile courtroom seem to adapt to their slightly different roles and apply the legal rules in slightly different ways. In the next chapter, I consider what the explanation for this might be.

Chapter 8

Changing perspectives - Explaining the juvenile criminal justice system

> It is in the balancing of the interests of various, at times competing, parties, that we are able to break away from normative approaches to embrace nuance and innovation.[1221]

As the previous chapters highlighted, both the Swedish and the German juvenile criminal justice systems are heavily influenced by welfare *and* justice considerations (or what were described in the last chapter as the welfare and the justice theme). A neoclassicistic approach is also influenced by the fact that the youth of the offender has to be respected. A welfare approach is also influenced by the rule of law and is mindful of the fact that criminal law is the state's sharpest sword. From a theoretical perspective, the welfare/justice clash seems to be unavoidable when it comes to young offenders, regardless of which approach – neoclassical or educative – is chosen. Therefore, the choice of the approach seems not to have been taken on the basis of theoretical considerations but rather political ones.[1222]

[1221] Kirchengast (2010), 212.

[1222] For an example of how politics influences the response to youth crime in Great Britain, see Fionda (2005), 40–4. See also Barry Goldson, "'Children in need' or 'young offenders'? Hardening ideology, organizational change and new challenges for social work with children in trouble," (*Child and Family Social Work* 2000, Vol.5: 25–265), who points out that "the movement of the policy pendulum which swings between the polarized points of welfare and punishment is inevitably subject to political influence and the vagaries of public opinion" (256). See also Bernard and Kurlychek (2010), who suggest that empirical data cannot support the choice of one option as superior to another. They describe how ideas about juvenile delinquency and juvenile justice have remained the same for 200 years irrespective of whether existing or proposed juvenile justice policies were harsh or lenient and irrespective of the levels of juvenile delinquency itself (206–7). See also section 3.3.2.

However, even if the welfare/justice clash is evident both in law in books and in law in action, it does not appear to give rise to any major problems within legal practice,[1223] irrespective of the approach chosen. According to the statistics, juvenile delinquency has remained stable or even decreased during the last 20 years in both countries.[1224] None of my interviewees said that they faced any difficulties in combining justice and welfare considerations.[1225] The observational study did not indicate any problems either. For the young offenders concerned, however, the legal responses – irrespective of whether they are categorized as education or punishment – are experienced in much the same way and can hardly be distinguished.[1226]

[1223] For Sweden, in addition to my empirical findings, see SOU 2012:34, Vol.3, 363–5 and, in relation to dismissals, prop.1994/95:12, 80, supporting this assumption. For Germany, see Dieter Rössner, "Erziehung und Strafe – die verkannte Zweispurigkeit des Jugenstrafrechts," in *Erziehung und Strafe – Jugendstrafrecht in der Bundesrepublik Deutschland und Polen – Grundfragen und Zustandsbeschreibung*, 18–27 (Bonn and Godesberg: Forum Verlag 1990), 18 and Anne Lütkes and Frank Rose, "Das geltende Jugendstrafrecht ist besser als sein Ruf," (*Zeitschrift für Rechtspolitik (ZRP)* 2003: 472–3). Wandall (2008) calls for an open view in his study of sentencing, accepting that "the courtroom participants are quite capable of constructing decisions [to imprison] as legally valid, even when the decisions are responsive to more contextual concerns and factors" (147–8).

[1224] For Sweden, see Brå Report 2017:5, 283ff.; Brå Report 2012:13, 273; Brå Report 2000:7, 11; for Germany, see https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/StrafverfolgungsstatistikDeutschlandPDF_5243104.pdf?__blob=publicationFile, 6 (last visited 2017-03-02) or Polizeiliche Kriminalstatistik 2008, 31 and Polizeiliche Kriminalstatistik 2013, 36; also Frieder Dünkel, "Germany," in *Juvenile Justice Systems in Europe – Current Situation and Reform Developments*, 547–622 (Vol.2. Godeberg: Forum Verlag, 2010), 552. According to Bernard and Kurlycheck (2010), the picture in the US is similar; they describe the juvenile justice system as "highly successful" (220–2). However, the picture conveyed by statistics is complex and influenced by a lot of different factors (for example, the way in which public and media awareness influences reporting practices and the differences between police statistics and statistics that refer to penal action – prosecution or criminal conviction). Furthermore, statistics naturally do not reflect all those crimes that are not reported to the police (the dark field). Therefore, they can only give us a restricted image of reality. Despite these restrictions, the idea that there has been a general trend of decreasing juvenile delinquency seems rather uncontroversial. However, I am aware of the fact that this trend need not necessarily be due to the functioning of the juvenile criminal justice system.

[1225] See section 7.5. Note here again that Tärnfalk (2014) considers it possible to combine these interests successfully (33). See also Brå Report 2002:19, 33, which confirms this notion, since courts usually agree to social services' proposals.

[1226] See Albrecht (2000), 68.

The question this chapter seeks to answer is therefore: how can the specific forms the juvenile criminal justice system takes in each country – deviating from the adult criminal justice system, creating tensions between welfare and justice, but still functioning – be explained?

The assumption is that the Swedish and the German juvenile criminal justice systems resemble each other more closely than their guiding principles suggest. In order to see this resemblance, one must take a step back from the details investigated in the foregoing chapters. I invite the reader to follow me by adopting the perspective of systems theory, an autopoietic approach, as the lens that enables us to look beneath the surface of the juvenile criminal justice systems of Sweden and Germany. Inspired by King and Garapon, I analyse the two systems by using concepts generated in social science rather than in law.[1227]

To accomplish this, I translate the findings from chapters 3 to 7 into functional and structural "programmes"[1228] following an autopoietic approach. Such an approach suggests a response to the aim laid out in chapter 1, namely to analyse and explain the ability of the juvenile criminal justice systems of Sweden and Germany to function in spite of the differences and tensions caused by conflicting welfare and justice considerations. With the help of the investigations carried out in the previous chapters, I argue that we should view juvenile criminal law as a separate autopoietic sub-system and that this view is valid in both Germany and Sweden, despite the many differences between their two juvenile criminal justice systems documented in the course of this thesis.

[1227] See Michael King and Antoine Garapon, "Judges and Experts in England and Wales and France: Developing a Comparative Socio-Legal Analysis," (*Journal of Law and Society* 14, 1987, Vol.4: 459–73). Gräns (2006) emphasizes the importance for a legal scholar to seek new perspectives and employ methods other than the traditional legal method (62).

[1228] Programmes in this sense are defined by Luhmann (1995a) as complexes of conditions for the correctness of behaviour (317). I explain this further in section 8.3.1. and elaborate on my "translation" of my findings into programmes in sections 8.4.1.–8.4.2.3.

8.1. What is autopoiesis?

Autopoiesis is a theoretical approach within systems theory stemming from sociology and, ultimately, from biology.[1229] The idea of transferring an autopoietic approach into the legal arena as a way of seeking a new way of looking at law goes back to Niklas Luhmann, a German sociologist and a prominent systems theorist in sociology. Luhmann's ideas offered a groundbreaking and innovative view of law. It moved away from mainstream systems theory, which conceived systems as "open systems" feeding upon exchanges with their environment that mainly came down to "inputs" and "outputs". What was considered problematic about such an approach was that it presumed the possibility of objectivity when observing external reality.[1230] Furthermore, a problem that this input/output systems approach faced was how to explain a world which is obviously able to build up order but avoid generating a confusion between the system and its environment. Luhmann's proposal of autopoiesis was developed as a way to understand systems that can select inputs and outputs according to internal needs and can withstand irritating information about their environments.[1231]

The theory of autopoiesis is a development of systems theory and assumes that we live in a world which is functionally differentiated into different social sub-

[1229] In the field of biology, the theory of autopoiesis is the work of two Chilean biologists trained in cybernetics: Humberto Maturana and Francisco Varela; see Jean-Pierre Dupuy, "On the Supposed Closure of Normative Systems," in *Autopoietic Law: A New Approach to Law and Society*, 51–69 (Berlin: Walter de Gruyter, 1988), 51 and also Kneer and Nassehi (1997), 33ff.

[1230] In consequence, for example, the brain (which was Maturana's main object of study) would have to have a capacity to see and understand its world from a perspective outside of itself, which obviously is impossible; see Michailakis (1995), 324–5.

[1231] See Niklas Luhmann, "Operational closure and structural coupling. The differentiation of the legal system," (*Cardoza Law Review* (1991–1992), Vol. 13: 1419–41). I do not claim to completely cover Luhmann's account of autopoietic theory, which is not only rich and dense, but also highly theoretical. I rather present a rough overview of how I understand autopoietic theory, which is a major source of inspiration for my approach. However, since Luhmann's theory is highly theoretical and might be considered somewhat static (a view supported by Michael King, "What's the Use of Luhmann's Theory," in *Luhmann on Law and Politics: Critical Appraisals and Applications*, 37–52 (Oxford: Hart Publishing, 2006), 51), I want to highlight at the outset that I have chosen to apply a more eclectic approach which is also influenced by other authors, such as King and Piper (in particular their notion of child-responsive law; see King and Piper (1995), 143–67), Teubner (and his notion of reflexive law; see Teubner (1993)), and Wandall (2008).

systems, law being one of them.[1232] A system is organized complexity which operates through the selection of a certain order.[1233] Systems consist of operations, which are the forms of activity which constitute a system. In the case of the legal as a social system, these operations are communications.[1234] Communications are necessarily organized into systems: otherwise, there would be no way of attributing any communication to any particular semantic context and no way of excluding irrelevant and inappropriate meanings, which would render it impossible to know what is being referred to.[1235] Communication follows the principles of system/environment difference and autopoiesis. Translated into the legal system, communication within the legal system follows the division between legal and illegal[1236] as the binary coding, and this communication is self-referential.

[1232] See Luhmann (1989), 137–8; see also Zenon Bankowski, "How does it Feel to be on Your Own? The Person in the Sight of Autopoiesis," in *Law as Communication*, 63–80 (Aldershot: Dartmouth Publishing Company, 1996), 65. Philippopoulos-Mihalopoulos emphasizes the importance of differentiation (or distinction, as he calls it) as the most relevant concept and the concept with which Luhmann most often begins; see Philippopoulos-Mihalopoulos (2010), 36ff.

[1233] Note that the use of the term "system" here deviates from the definition provided in section 1.3. For further reading regarding the term "system" in an autopoietic sense, see Luhmann (1984), 46ff. See also the discussion in section 8.3.

[1234] Luhmann's notion of communication is different from the traditional sense of the term. He sees communication as a synthesis of three selections: information, message, and understanding (see Luhmann (1997), 190). The most important part is the third selection: the understanding of the difference between information and message by the "ego" (as the recipient) in contrast to the "alter" (as the sender) that selects the information and the message out of the information. Consequently, Luhmann identifies difference, rather than consensus, as crucial for communication (see Luhmann (1997), 229), which distinguishes his view from that of Habermas and others. The content of the message itself is of no importance for the existence of the basic unit of communication. However, it gains importance through a fourth selection, which happens during the subsequent communication, when the recipient becomes the sender, which starts a new basic unit of communication.

[1235] See Michael King, "The Radical Sociology of Niklas Luhmann," in *Law and Social Theory*, 59–73 (2nd Edition. Oxford: Hart Publishing, 2013), 64.

[1236] In German, the binary coding is "Recht/Unrecht" (see Luhmann (1995a), 168ff.), which is translated in various ways into English. Some authors use "lawful/unlawful", others "legal/illegal" or "legal/extra-legal". I have decided to adopt the translation "legal/illegal", which was used in Teubner's translation (1993), *Law as an autopoietic system*, and also in Ziegert's (2004) translation of Luhmann's *Law As A Social System*.

What was groundbreaking about Luhmann's theory at the time he proposed it is that it shifts the focus from the inside of the system towards its borders – the difference between system and its environment (applied to the legal system: legal/illegal). System and environment are two sides of the same coin. According to Luhmann's theory, the environment does not exist first. The shape of the system defines the environment and vice versa. This also means that different systems have different environments, as everything that falls outside a specific system is defined as its environment.[1237] As mentioned before, in the past law was treated in abstraction from real social behaviour. The legal order was considered open and responsive, shaping and adapting to the social environment but independent of it. Luhmann's theoretical approach suggests a different notion of the boundaries of the legal system. These boundaries are defined not at an institutional but at an operative level. They are defined by the legal system itself, which serves as the decisive parameter for whether communication is legal or illegal (the binary coding).

> The law is not politics and not the economy, not religion and not education; it produces no works of art, cures no illnesses, and disseminates no news, although it could not exist if all of this did not go on too. Thus, like every autopoietic system, it is and remains to a high degree dependent on its environment […]. And yet, as a closed system, the law is completely autonomous at the level of its own operations. Only the law can say what is legal and what is illegal, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations. […] It achieves its structural stability through this recursivity and not, as one might suppose, through favorable input or worthy output.[1238]

The term "illegal" is employed in the sense of "outside the legal system" without any moral judgement and not with the meaning of "against the law".[1239] In other words, the law only considers factors which are defined as legally relevant.[1240] The code is simply a rule of attribution and connection. If the question of whether something is legal or illegal arises, the communication

[1237] See Luhmann (1984), 249.

[1238] Niklas Luhmann, "Law as a Social System," (*Northwestern University Law Review* 1989, Vol.83: 136–50), 139.

[1239] See Luhmann (1986), 173.

[1240] See Tärnfalk (2007), 82.

belongs to the legal system.[1241] That is why the difference becomes crucial as a border. The system itself uses this difference internally through observation to enable the division into self-referentiality and external-referentiality.[1242] But since these observations happen within the system, they are both "inside" and "outside" at the same time, observing while being in the system. This creates a blind spot.[1243]

Autopoiesis,[1244] the second main aspect of Luhmann's theory, means that the law presupposes and reproduces itself, that it is a result of a self-referential process, analogous to the functioning of the brain.[1245] As mentioned above, these kinds of system are no new invention. In biology, they are referred to as cells and organisms.[1246] The biological models are transferred to social and legal spheres by replacing living organisms with communication as the reference. An autopoietic system produces and reproduces its own elements through the interaction of its elements. In biology, these systems are based on life. In law, they are based on meaning, with communications as its constituents.[1247] Luhmann introduced circularity into the legal world as a defining aspect of social systems. Teubner puts this as follows:

> [T]he reality of law consists of a multitude of circular processes. The whole legal system is seen as a dynamic cyclical reproduction of legal elements embedded in hypercyclical relations of legal structures and processes.[1248]

[1241] See Luhmann (1991–1992), 1427.

[1242] See Luhmann (1997), 45 and 77.

[1243] Ibid., 1131ff. This thought can be connected to my considerations relating to my role in the observational and the interview study (see appendix 2, section 5.) even if strict Luhmannian thinking would not pay much attention to these considerations (me as a person) (see section 8.4.2). I am a second-order observer (in relation to first- and second-order observers, see Niklas Luhmann and Jin-hui Zhang, *Die Kunst der Gesellschaft* (Frankfurt a.M.: Suhrkamp Verlag, 1995b), 92ff.) in relation to the juvenile criminal justice system, since at the first order, the system observes itself. To overcome my blind spot as an observer, another observer would be necessary, and so on.

[1244] The term autopoiesis stems from "auto" = self and "poien" = create, organize, produce.

[1245] See Michailakis (1995), 325.

[1246] See footnote 1229.

[1247] See Michailakis (1995), 325.

[1248] Teubner (1988), 1.

The circular reference of rules to decisions and decisions to rules creates the autonomy of the legal system with respect to other social systems. Decisions are legally valid only when they are taken on the basis of rules. But the validity of rules presupposes that they are created through decisions which are considered valid.[1249] This circularity suggests closure. The law is a system of meaning which creates its own objects and criteria of truth.[1250] Expressed differently, the law becomes legal through the interplay of mechanisms internal to the legal system itself; it is not merely determined by the environment.[1251] All input coming from other systems, such as the economy, politics, and even individual actors, is filtered and transformed into legal knowledge.[1252] This means that autopoietic systems theory creates a functional-structural vision of society.[1253] In the earlier versions of his theory, Luhmann sees law's social function as the organization of people's expectations. Law should stabilize congruent expectations and, in doing so, provide certainty.[1254] The role law plays in society forces it to be autonomous because of its inbuilt authority. On the other hand, it cannot be ignored that other discourses influence legal reality and shape it.[1255] It all comes down to a

[1249] See Michailakis (1995), 330.

[1250] See Bankowski (1996), 65.

[1251] See Patrick Nerhot, "The Fact of Law," in *Autopoietic Law: A New Approach to Law and Society,* 312–34 (Berlin: Walter de Gruyter, 1988), 313.

[1252] See Bankowski (1996), 65.

[1253] See Wandall (2008), 13. This means that Luhmann combines the biological model with aspects of sociological structural-functional theory. According to David Nelken, "Changing Paradigms in the Sociology of Law," in *Autopoietic Law: A New Approach to Law and Society*, 191–216 (Berlin: Walter de Gruyter, 1988), the power of Luhmann's approach stems from this synthesis of law as an autopoietic system and the sociological theory of functional differentiation (200).

[1254] See King (1991), 305.

[1255] Teubner (1993) recognizes an interplay of different discourses by claiming that "law is forced to produce an autonomous legal reality and cannot at the same time immunize itself against realities produced by other discourses in society" (745), thereby acknowledging that the theory of autopoietic systems and discourse theory have some common elements (see Gunther Teubner, "The two faces of Janus: Rethinking Legal Pluralism," (*Cardozo Law Review* 1992, Vol. 13: 1443–62), 1446). See also Linnéa Wegerstad, *Skyddsvärda intressen & straffvärda kränkningar* (Lund: Media-Tryck Lunds universitet, 2015), 49. I am well aware of the rich and lively research concerning discourse (theory), which I have chosen not to engage with further. However, I employ the term "discourse" to describe different sorts of communication (legal or social), as do the authors I relate to and cite.

fragile balance between the law respecting the influence of other discourses and its being autonomous enough to maintain society's trust in the system.

Through the operational closure of the law, communication is coded as either legal or illegal. But that the system is closed should not be taken to mean that it does not consider its environment. Quite the opposite is the case: the system displays a "contextual openness". The system functions by differentiating and combining normative and cognitive expectations.[1256] Legal reasoning has to know in which respects it is supposed to learn (did somebody kill another person? = cognitive expectations) and in which respects it is not (should the person have been killed? = normative expectations).[1257] The normative expectations underline the autonomous nature of the system, its need for a reference to a legal norm: normative closure. The cognitive expectations underline the legal system's dependency on and embrace of its environment: its contextual openness. The unity of the operations underlines the reciprocal dependence of closure and openness.[1258] Normative closure is all about the self-maintenance of the system in opposition to the environment, while cognitive openness serves to coordinate this process with the system's environment.[1259] Consequently, a system can never be completely closed or completely open.[1260] The form of the exchanges between system and environment is not defined by the environment, but by the closed organization of the autopoietic system.[1261]

[1256] Luhmann (1988) defines expectations as normative if they do not need to be changed when disappointed (19). The opposite applies in the case of cognitive expectations (19). This means that the decisive factor for whether expectations are normative or cognitive is that of learning or not learning (19–20).

[1257] See Luhmann (1991–1992), 1427.

[1258] See Wandall (2008), 16 and Luhmann (1988), 20–1.

[1259] See Niklas Luhmann, "The Unity of the Legal System," in *Autopoietic Law: A New Approach to Law and Society*, 12–35 (Berlin: Walter de Gruyter, 1988), 20.

[1260] Philippopoulos-Mihalopoulos expresses this idea by pointing out that closure and openness together constitute a form. Only through the one can the other be observed and become more or less operable. See Philippopoulos-Mihalopoulos (2010), 41–2.

[1261] See Kneer and Nassehi (1997), 51, who compare this interdependence with the expressions "autonomy" and "autarchy". Autopoietic systems are autonomous but not autarkic or self-sufficient.

Legal closure does not preclude openness to the social context of decision making: it requires it.[1262]

In my understanding, normative closure takes place through law in books while contextual openness becomes visible through law in action. When looking at law in action, the environment gains a whole new significance as compared with law in books. It shapes law in action to a large extent. If one ties these two aspects closely together in one system, then what results is my concept of the law.[1263] Cotterrell sees autopoietic theory as reinterpreting the internal/external dichotomy in law as a matter of social practice, and he thinks that it theorizes this in a manner more sophisticated than anything to be found in contemporary legal philosophy.[1264] Ewald takes the positive appreciation of Luhmann's theory a step further by calling it

> a kind of Columbus' egg in the order of the theory of law. It [autopoiesis] would simultaneously allow one to transcend and to conserve the split between the pure theory and sociology; it would complement one by the other and ultimately reunite them. It would be the theory that was needed.[1265]

However, Cotterrell also points to certain weaknesses within the theory of autopoiesis, mainly that the theory stands and falls with the assumption of law as a system.[1266] Yet he acknowledges that it provides analytical models of key features of law, even if it does take the models as a kind of reality in themselves and does not offer substantial sociological explanations.[1267] But this last point – the sociological explanation – is not what I am after in this project. What I am looking for is exactly what Cotterrell suggests the autopoiesis theory provides: an analytical model of the key features for explaining the juvenile criminal justice system.

[1262] See Niklas Luhmann, *Law as a social system* (trans. by Ziegert, Klaus A. Oxford: Oxford University Press, 2004), 105.

[1263] See section 1.5.1.

[1264] See Roger Cotterrell, "The Representation of Law's Autonomy in Autopoiesis Theory," in *Living law: studies in legal and social theory*, 121–44 (Surrey: Ashgate, 2008), 127.

[1265] Francois Ewald, "The Law of Law," in *Autopoietic Law: A New Approach to Law and Society*, 36–50 (Berlin: Walter de Gruyter, 1988), 42.

[1266] See Cotterrell (2008), 128.

[1267] Ibid., 131.

8.2. Bringing autopoiesis into the juvenile courtroom

Luhmann's theory of autopoiesis covers the legal system as a whole. In this study, I am focusing on one part of this system in particular, namely the courtroom in proceedings against young offenders.[1268] Both Tuori and Wandall have confirmed that the microcosm of the courtroom follows the same rules of autopoietic circularity. Tuori claims: "The legal order is, as it were, created anew in every court decision".[1269] Wandall explains autopoiesis in the courtroom by stating:

> It [the legal system] reproduces itself by constantly referring legal communications to already existing legal communications, just as the interaction system inside the courtroom reproduces itself by referring communications to communications that are already established as relevant in the interaction system.[1270]

I agree with Wandall, who argues that Luhmann's theory of law's operational closure signals a constructive response to the need for a conceptual framework that appreciates both law and its context in the design of legal decision making.[1271] King sees the same opportunity in autopoietic theory and claims that "autopoietic theory represents a radical departure from the 'competing ideologies' approach of the late seventies and early eighties".[1272]

Kirchengast claims that autopoiesis provides a framework that can account for the interpretive flexibility of criminal law and justice.[1273] As mentioned before, in my understanding of autopoietic theory the link of normative closure and contextual openness is evident in the decision making of the judge, who considers the actual facts[1274] of a case (contextual openness) and applies them to

---

[1268] I agree with Wegerstad (2015), who emphasizes the central role of courts in the center of the system (62–4).

[1269] See Kaarlo Tuori, *Critical Legal Positivism* (Aldershot: Ashgate, 2002), 29.

[1270] See Wandall (2008), 14.

[1271] See ibid., 18.

[1272] King (1991), 303–4.

[1273] See Kirchengast (2010), 208.

[1274] I have chosen not to engage in the debate about "facts of law" (see Nerhot (1988), 312–33), but I am aware of the difficulties inherent in the word "facts". Nerhot points out that the fact is a

the legal rules (normative closure). Wandall points out that cognitive control is inserted on another level as well: judges have personalities, and they make use of them when acting in court.[1275] Furthermore, court organization itself provides space for local policies and structures to enter into decision making.[1276] Wandall describes the whole structure very well:

> Thus, normatively a court decision must constantly refer back to the legal system – the law – to ensure legal validity. This is how the court decisions are legally closed. Cognitively, a legal norm has to be asserted; it has to be asserted that conditions for legality are met and it has to take place in a social organization of courts. This is how legal decisions are necessarily contextually open. The simultaneous operations of openness and closure are united in operational closure.[1277]

To this reasoning, I add the perspective of young offenders. In law understood as an autopoietic system, the discretion granted to its elements influences the redefinition of the system. Since, as I have explained, this discretion is broader in the framework of the juvenile criminal justice systems under investigation than it is in adult criminal justice systems, the former systems have more scope to define and redefine themselves. Here, the contextual openness connects to a further aspect: the strong impact of welfare considerations. When focusing on young offenders, the legislatures of Sweden and Germany have articulated the need to respect welfare considerations in legal decision making, thereby making certain "illegal" aspects "legal". Welfare considerations, which are originally outside of the scope of criminal law and its strict framework under the rule of law, are incorporated into the legal system. This is also apparent in courtroom organization. By giving social services a place in the juvenile trial and relying on their reports, "welfare" is directly present in the courtroom, influencing the decision in the interests of welfare. Because of the different way in which young offenders are treated – namely, with a view to transforming them into a law-abiding citizens, focusing on the individual and his or her future – welfare

---

pure creation. The choice of givens in a particular situation made by the judge is determined by the norm in terms of which they are judged. But this division is not of interest for my discussion since facts – no matter how the word is interpreted – will always represent contextual openness.

[1275] Wandall (2008), 17.

[1276] See for example section 4.3.1.4. and footnote 748.

[1277] Wandall (2008), 18.

considerations such as personal background become more important in this legal setting.

8.3. Defining a specific autopoietic (sub-)system

Which, then, are the aspects defining a specific system in the framework of an autopoietic approach? According to social systems theory, the main aspects of a system are its function and its structure.[1278] When Luhmann defines a system,[1279] he uses functionality as a differentiating aspect. An autopoietic system has to be oriented towards a specific problem in society.[1280] Teubner extracts the conditions for the structure of an autopoietic system: it establishes norms for its own operations, structures, processes, boundaries, and environments – in other words, for its own identity.[1281] The structure of a system limits the selection of possible elements, making some of them more probable than others.[1282]

Luhmann recognizes the existence of sub-systems and he regards the legal system as a sub-system of society. The legal system is a differentiated functional system *within* society.[1283] Teubner speaks of second-order autopoietic systems, which can only develop if and when a system produces its own components. There must be new and different self-referential circles that form the basis for a higher-order autopoietic system.[1284] In Teubner's words:

[1278] See Luhmann (1995a), 165.

[1279] "System" in the way Luhmann uses it might be considered a misnomer. Philippopoulos-Mihalopoulos points out that the term gives the impression of systematicity, of normative promise and unfailing consistency, of a method, itself systematic, which produces systematized units of perfectly formed totalizing boundaries. But Luhmann's system is nothing of the sort. For Luhmann, law (as an example of a system) is a system of tirades without inherent content, a setting up without origin, a transitive act that ends up in void: law is what is set up as law in a sum that lacks togetherness; see Philippopoulos-Mihalopoulos (2010), 43–5. In other words, Luhmann's system is not something stable but consists of a flow of connections and operations.

[1280] See Luhmann (1995a), 60.

[1281] See Teubner (1993), 33.

[1282] See Kneer and Nassehi (1997), 93.

[1283] See Luhmann (1989), 137–8.

[1284] See Teubner (1988), 221; also Teubner (1993), 69.

> Social sub-systems acquire increasing autonomy if their components (element, structure, process, identity, boundary, environment, performance, function) are self-referentially defined via reflexive communications (self-observation). […] Some have become so thoroughly independent that they have to be regarded as second-order autopoietic social systems. They have constituted autonomous units of communication which, in turn, are self-reproductive. They produce their own elements, structures, processes, and boundaries. They construct their own environment, and define their own identity. The components are self-referentially constituted, and are in turn linked with one another by means of a hypercycle.[1285]

Consequently, I consider it possible to recognize a sub-system *within* the legal system – maybe not in the strict Luhmannian sense, but in Teubner's sense. In his framework of reflexive law, Teubner recognizes the possibility of structuring and restructuring semi-autonomous social systems, thus acknowledging the existence of the latter.[1286] In its most advanced form, Teubner's reflexive law allows programmes to be reread, reconstructed, and recontextualized by other sub-systems.[1287] King and Piper also acknowledge the possibility of the emergence of new sub-systems, which go on to become increasingly autonomous specialist discourses implied by fragmentation.[1288]

8.3.1. Shaping an autopoietic legal sub-system

Binary coding is essential for an autopoietic system. The coding takes place through the use of programmes, the latter giving life to the binary code and distinguishing what counts as, in our case, legal or illegal within the legal autopoietic system. A system programme is defined as a complex of conditions for the correctness of behaviour.[1289] Programmes define what is "correctly" legal and "correctly" illegal.[1290] The programmes provide the criteria to define and

[1285] Teubner (1993), 32, 69.

[1286] See Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," (*Law and Society Review* 1983: 239-85), 255.

[1287] See John Paterson, "Reflecting on Reflexive Law," in *Luhmann on Law and Politics: Critical Appraisals and Applications*, 13–36 (Oxford: Hart Publishing, 2006), 29.

[1288] See King and Piper (1995), 28.

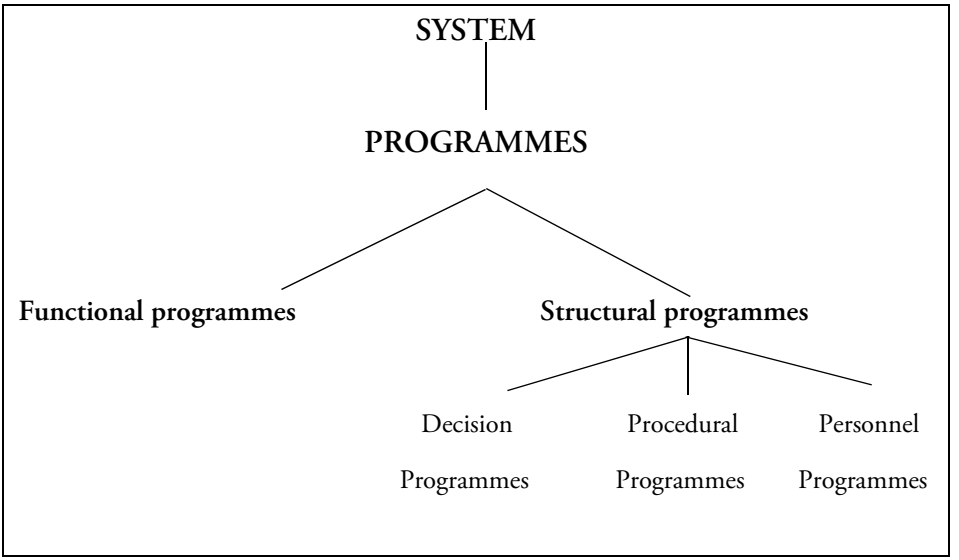
[1289] See Luhmann (1995a), 317.

[1290] See Luhmann (1987), 171–2.

shape the binary code which would otherwise be an empty term.[1291] Whereas the system's code is invariant (and thus to change the code is to change the system), its programmes can change.[1292] Programmes make themselves felt through the factors I investigated in chapters 3 to 7, namely the applicable rules, the different roles of figures in the courtroom, and the courtroom communications and dynamics.

An autopoietic system within the legal framework would qualify as a sub-system if it employed different programmes than are employed in the adult criminal justice system to give life to the legal/illegal binary code. Since a system is defined by structure and function, the programmes shaping the binary code can be found on these two levels. Apart from the functional programme relating to the guiding principles of the Swedish and the German juvenile criminal justice systems, in regard to structure I investigate decision programmes, procedural programmes, and personnel programmes. These define the binary coding legal/illegal in the framework of the juvenile criminal justice system.

The following diagram illustrates this structure:



[1291] Examples of legal programmes within the legal autopoietic system include legislative acts and court precedents in the shape of relevant sentencing criteria and principles.

[1292] See Paterson (2006), 18.

The previous chapters illustrated the strong influence of "illegal" considerations in both of the juvenile criminal justice systems under scrutiny. In this context, "illegal" refers to what I labelled earlier "welfare considerations" (in the doctrinal part of the thesis) and "the welfare theme" (in the empirical part).[1293] I consider them to have such a strong impact that they change the criminal justice system in such a way that we are justified in defining the juvenile criminal justice system as an autopoietic sub-system that takes on a life of its own.

8.3.2. A legal sub-system or a welfare system?

One might ask whether the juvenile criminal justice system should be considered an autopoietic sub-system in the framework of the legal autopoietic system or if it should rather be regarded as even more independent: as its own welfare[1294] autopoietic system. This would mean that it would be completely independent of the legal autopoietic system.

A distinguishing feature of an autopoietic system is its particular kind of communication, which is expressed in programmes. Communications (and programmes) can be considered legal when they employ the binary code applicable to the legal system, which is the binary code legal/illegal. If the binary coding is other than this – for example, "good for the child/not good for the child" – then we are dealing with a different system (for example, a welfare instead of a legal autopoietic system).

A main argument for viewing the juvenile criminal justice system as a welfare autopoietic system would be that the legal framework only constitutes the shell of this system. It serves as a gatekeeper: once this threshold is passed, the communications become markedly influenced by welfare considerations (especially in sentencing, as is the case in both the Swedish and the German systems[1295]). The welfare autopoietic system in relation to children works with the binary coding "good for the child/not good for the child", relating to the "best interests of the child" as defined by the UNCRC. Adopting such a

[1293] See also the definition in section 1.2.

[1294] "Welfare" in this sense should not be understood to mean "welfare state" but rather something much narrower. The focus of attention becomes not social policy, but the individual, and relationships between individuals, although only in a reactive manner. It is rather to be understood as a synonym for a social system in the autopoietic sense.

[1295] See section 4.3.

perspective would mean that the legal autopoietic system left it to the welfare autopoietic system to answer the questions, but lent legal authority to their decisions or agreements.[1296] An argument for this approach could be that in the case of a young offender, the perspective looks forwards, not backwards: the main aim is to turn young offenders into law-abiding citizens, not to punish them for their committed legal wrongdoing. The tools employed for dealing with young offenders (for example, the specific legal responses) have little in common with the tools available to the adult criminal justice system, that is – in terms of legal consequences – fines and imprisonment.

However, even if these objectives are important, it is still criminal offending that is the entrance to the system and that influences the definitions.[1297] Legal objectives still play a strong role in the juvenile criminal justice system. This becomes clear when considering the importance of the principle of proportionality and the fact that other legal guarantees and the rule of law still apply. Furthermore, juvenile criminal law still punishes – at least to a certain extent – criminal offending. It is the sharpest sword a state can use to react to an offence committed by a young person. And it cannot be ignored that the personnel present in the juvenile courtroom reflects the weight attached to the interests of justice: at least three lawyers (the judge, the public prosecutor, and the defence counsel) but only one representative from social services.

Thus, it makes more sense to regard the juvenile criminal justice system as an autopoietic sub-system within the legal autopoietic system (and not as a welfare autopoietic system). They share a similar procedural framework, and the juvenile criminal justice system is still greatly influenced by justice considerations/the justice theme. The shell of the system is the same for both adult and young offenders. The processes of the juvenile criminal justice system are rooted in the legal autopoietic system. Placing the juvenile criminal justice system within the legal framework puts it firmly under the rule of law, with its guarantees concerning legal certainty and predictability.

Yet, after placing the juvenile criminal justice system within the criminal legal framework, I propose breaking it loose from its ties to the adult system and suggest that the content of some of the legal guarantees are reshaped in such a

[1296] King and Piper (1995) describe such a construction as avoiding the Luhmannian sin of de-differentiation, although the result may be criticized for other reasons, such as a lack of procedural protection (xv).

[1297] For example, "education" in the German JGG is a criminal legal construct and operates on the premise of a criminal allegation; see Albrecht (2000), 71.

way as to make the juvenile criminal justice system more flexible. In other words, the criminal legal autopoietic system functions only as an outer shell, while the inner content of the juvenile criminal justice system is defined neither by the legal nor by the welfare system but rather by its own parameters. To express this idea in system-theoretical terms, the main reason for considering the juvenile criminal justice system as an autopoietic sub-system of law instead of a welfare autopoietic system is that the binary code for the legal autopoietic system – legal/illegal – applies. The juvenile legal sub-system is distinguished in terms of what gives life to the binary code, the programmes, and these are neither the same as those of the adult legal autopoietic system nor the same as those employed by the welfare autopoietic system.[1298] The juvenile criminal justice system has its own way of making sense of its external environment through its specific programmes.[1299]

8.3.3. A possible critique

King claims that there cannot be a genuine partnership between law and welfare and that this would only lead to the enslavement of the knowledge of child welfare by the legal system. His example is the idea of a family court, to which he objects: "It would increase the scope of interference, that is, the colonization by law of social science concepts and the consequential distortion of their original meaning".[1300] The problem, it is claimed, is that the underlying definitions used in the legal and social systems differ. Easton and Piper agree, pointing out that failures in inter-agency cooperation result not only from a lack of workable and effective means of communication but also because of different ways of thinking and of establishing the "truth".[1301] Basic social concepts, such as "child" or "parent", are redefined by the law and thus given a legal meaning.[1302] King and Piper claim:

[1298] For Germany, such a view of the juvenile criminal justice system is supported by BGHSt 8, 354 and by Brunner and Dölling (2011), who describe the juvenile criminal justice system as an autonomous system in its aim, structure, and procedure (see Introduction II, margin no.26).

[1299] I show in section 8.4. that these programmes are different within the juvenile criminal justice system.

[1300] King (1991), 319.

[1301] See Easton and Piper (2008), 209.

[1302] As Teubner (1993) points out, "legal discourse increasingly modifies the meaning of everyday world constructions and in case of conflict replaces them by legal constructions" (743).

> Legal communications and child welfare communications co-exist within the legal process, and this combining of discourses has been achieved through the law's enslavement of the knowledge of the agents of child welfare science which, when existing outside the legal discourse, constructs children's deviant behavior in ways which are quite different from the constructions of the law.[1303]

To illustrate this, one can think of the term "young criminal", which forms the basis for the legal consequence "juvenile care". According to social organizational principles, the young criminal is constructed as follows:

1. Criminal conduct is seen as the result of one or several identifiable causes. These causes are not unique to those who offend, but may be found in a variety of human behaviors.
2. These causes are identifiable through the observation and analysis of young people, either alone or within different social and physical environments.
3. Changes in young people's behavior are attributable to internal changes taking place within the individuals concerned, or to changes in the external environment, or to an interaction of these two sets of factors.[1304]

In contrast, the criminal in the legal sense is defined using terms like "guilt", "seriousness of the offence", and "criminal history". However, this is not enough when defining the *young* criminal. When it comes to young offenders, welfare considerations play a crucial role *within* the justice system – this is reflected, for example, in the importance attached to the report from social services. Additionally, not every young person who has committed a crime is automatically considered a criminal. This is apparent in the many ways in which a case may be diverted.[1305] Consequently, in the juvenile courtroom, the legal and the welfare definitions of the young criminal are intertwined and cannot be kept apart. I agree with White, who contends that the idea that the juridical "field" imposes a simple, one-way linguistic imperialism upon other "fields"

[1303] King and Piper (1995), 111.

[1304] King and Piper (1995), 105.

[1305] For a more detailed description of these possibilities, see section 4.5.2.1.

betrays the naïve realism of formalism and instrumentalism, which dissolves in the more complex analyses of, for example, Bourdieu and Teubner.[1306]

8.3.4. A way out?

King's solution is to develop own mechanisms for child psychiatrists, child psychologists, and social workers for resolving disputes and managing conflicts outside of the confines of the justice system.[1307] I am reluctant to accept this solution. When it comes to criminal conduct, I find it problematic to circumvent the legal arena. As I have stressed throughout, a legal response to criminal conduct is the sharpest sword a state can employ against its own citizens: it may deprive a person of liberty. Therefore, it requires particular procedural safeguards in the form of a narrow interpretation of the rule of law. And Wandall shows that it is not necessary to adopt King's solution. His conclusion is that decisions [to imprison] involving other and more legally problematic sentencing ideologies, programmes, and meanings do not lack legal legitimacy, as some think. He calls for an open view, accepting that "the courtroom participants are quite capable of constructing decisions (to imprison) as legally valid, even when the decisions are responsive to more contextual concerns and factors".[1308] He takes these considerations a step further, not only acknowledging illegal factors in sentencing, but also stressing their importance: "The decision-making process functions as an important setting through which law acquires political and cultural energy; inputs of political change and modification".[1309] In other words, he claims that law does not enslave other discourses; it is, rather, influenced by them. Torpman points in the same direction by emphasizing that cognitive openness is necessary for creating a sphere of legal development which is capable of adapting to developments in society.[1310]

[1306] See Susan White, "Interdiscursivity and child welfare: the ascent and durability of psycho-legalism," (*The Sociological Review* 1998, Vol.46, No.2: 264–92), 272.

[1307] See King and Piper (1995), 164.

[1308] Wandall (2008), 148.

[1309] Ibid., 149.

[1310] See Jan Torpman, *Rättssystemets lärande* (Akademisk Avhandling, Stockholms universitet 2002), 17.

I agree with Wandall that Luhmann's theory of autopoiesis offers a conceptual path leading in that direction. Employing an autopoietic approach as an analytical tool makes it possible to bring welfare and justice considerations together without one enslaving the other. As we will see in section 8.4., in the framework of the juvenile criminal justice system both justice and welfare shape the programmes defining the legal/illegal binary code. Teubner claims that it is the experience of life, the experience that discursive practices "know" how to overcome the blockage of paradoxes and antinomies, that moves autopoiesis beyond deconstructive analysis into reconstructive practice.[1311] As the earlier chapters have demonstrated, the two juvenile criminal justice systems respect both justice and welfare considerations.

How can we understand the interaction of justice and welfare from an autopoietic perspective? Luhmann expresses the possibility of the "interlocking of independent units"[1312] in the form of structural coupling. Teubner explains the idea of structural coupling to understand how two discourses can communicate.[1313] Different systems communicate through structural couplings, which are the outcome of continued interchange, of continued selection of information among the information produced by the environment, which allows the system to operate without disintegrating.[1314] If the couplings between two systems are not only isolated events[1315] but occur on a regular basis in a structured way (and not only occasionally[1316]), they are considered structural couplings. Structural couplings are forms of simultaneous (and therefore not causal) relations.[1317] Language, for instance, is a bridge between psychic and

[1311] See Teubner (1992), 1444.

[1312] See Luhmann (1995a), 223.

[1313] Structural coupling is often used in the framework of legal pluralism. Since I am working with rather "traditional" sources of law, I do not dwell on the ideas of legal pluralism. Yet I am borrowing some of its ideas, which may be used on a smaller scale when trying to explain the juvenile criminal justice system. For more about legal pluralism, see John Griffiths, "What is Legal Pluralism?," (*The Journal of Legal Pluralism and unofficial Law* 1986, Vol. 18, No. 24: 1–55); Sally Engle Merry, "Legal pluralism," (*Law and society review* 1988: 869–96); and Teubner (1992).

[1314] See Michailakis (1995), 328.

[1315] See Luhmann (1995), 441, who speaks of "irritations" rather than couplings.

[1316] This would be an "operational coupling". It occurs when a certain aspect from one autopoietic system becomes relevant for another autopoietic system. An example Torpman (2002) uses is a payment, which leads to the fulfilment of a contractual obligation. The payment therefore belongs not only to the economic but also to the legal system, and couples them (42–3).

[1317] Luhmann (1991–1992), 1432.

social systems in the form of structural coupling;[1318] it enables them to communicate.

In Teubner's modified view of structural coupling, the communication between the different autopoietic systems – in the case of the juvenile criminal justice system: the justice and the welfare system – happens on a regular basis through constructive misreading, linkage institutions, and responsiveness.[1319]

Constructive misreading means an alternative interpretation. Law constructively misreads other social discourses.[1320] I suggested this above in describing the construction of the young criminal. The term "young criminal" gains a different content in the juvenile criminal justice system from the content it has in the social system.

Linkage institutions within the juvenile criminal justice system are juvenile courts or specialized judges, specialized public prosecutors, social services, and different juvenile detention facilities.[1321] What makes them linkage institutions is the fact that they deal with young offenders, applying the programmes defining the binary code. The linkage institutions are the point of transition between justice and welfare. The programmes are shaped through both justice and welfare, as I will illustrate in more detail shortly. The linkage institutions shape the duration, quality, and intensity of the structural coupling.[1322] They permanently link parallel processes of self-reproduction to each other, which has the effect that the number of possible viable eigenvalues will decrease since they have to endure increased perturbation.[1323] This is also a reason to take a closer look at the courtroom dynamics and the personnel programmes. I investigate whether the quality and intensity of the structural coupling justifies us in considering the juvenile criminal justice system as its own autopoietic sub-system.

Teubner sees responsiveness as the third requirement for structural coupling. Social responsiveness comes about when linkage institutions connect the legal

---

[1318] See Luhmann (1997), 108.

[1319] See Teubner (1992), 1447.

[1320] This is precisely the criticism King (1991) expresses, described above.

[1321] The police also have specialized units for juvenile delinquency. They can also be considered as linkage institutions in that sense.

[1322] See Teubner (1992), 1447.

[1323] Ibid., 1460.

system more tightly to other autonomous social systems. It becomes stable if linkage institutions squeeze structural couplings into a direction that prompts systems to act on each other in a cyclical fashion.[1324] This is exactly what happens in the framework of juvenile criminal justice systems. The preceding chapters illustrate the close and frequent interaction between justice and welfare considerations in the Swedish and German juvenile criminal justice systems. Consequently, the couplings of the justice and the welfare autopoietic systems here are systematic and structural.

Yet, in my view, the relationship between justice and welfare in the juvenile criminal justice system goes beyond mere structural coupling. From a theoretical perspective, my proposal of an autopoietic sub-system with its own programmes for dealing with young offenders suggests that this system has transcended the level of structural coupling and become a sub-system in its own right. This can be interpreted as a further development of an earlier structural coupling. The idea behind this is, again, to stabilize the juvenile criminal justice system.[1325] I will replace Teubner's terminology of "constructive misreading" in the context of structural couplings with "reshaping" in the framework of a sub-system. I think that there is a genuine cooperation between justice and welfare; the two inputs are balanced on an equal level. Therefore, the juvenile criminal justice system should be seen not in terms of the well-worn ideas of justice and welfare, but as its own system. The programmes defining the binary coding legal/illegal in the juvenile criminal justice system come to life by embracing both and forging them together. Since neither the system of justice nor the system of welfare prevails over the other, the juvenile criminal justice system acts as its own autopoietic sub-system. What happens is an internal reconstruction and reshaping process. Justice and welfare do not causally influence each other; rather, the juvenile criminal justice system uses both of them as perturbations to build up its own internal structures. It invents a new and rich "source" of law.[1326] The linkage institutions named above intertwine justice and welfare considerations, reshape them, and use them in a cyclical fashion.

[1324] Ibid., 1448, 1460.

[1325] Teubner (1993) emphasizes that stabilization is the main advantage autopoietic systems have over open systems (15).

[1326] For this possibility, see Teubner (1992), 1453–4. In a similar line of thought, White (1998) argues that the form of knowledge in contemporary child welfare is best understood as a complex amalgam of legal and scientific knowledge, with neither framework being preferred a priori (288).

8.3.5. Understanding the juvenile criminal justice system as a sub-system

Much can be gained by understanding the juvenile criminal justice system as a sub-system that is independent, for the most part, of the adult criminal legal system and constitutes its own sphere, a sphere that is neither purely legal nor purely welfare-based. Such a view can explain why the juvenile criminal justice systems of Sweden and Germany are not so different from each other after all, even though the doctrinal study indicated otherwise – especially with regard to their guiding principles. Viewing the juvenile criminal justice system this way can also help to explain why it is tolerated that legal rules are applied slightly differently in the practice of juvenile criminal law.

Such an approach allows us to circumvent the theoretical problem of the welfare/justice clash and suggests an explanation for the ability of the juvenile criminal justice systems in Sweden and Germany to function and to perform their roles despite the tensions highlighted in the previous chapters. Neither discourse dominates the other; they rather both contribute to a sub-discourse that emerges from their interplay. A legal autopoietic sub-system, still tied to the rule of law, albeit in a reshaped form, disarms the criticism often raised against a pure welfare approach – that it leaves too much room for manoeuvre for social services and thereby leads to problems with transparency. It does the same for the critique from the opposite angle – that a neoclassical approach does not do enough to respect the "best interests of the child".

To view the juvenile criminal justice system as more or less independent of the adult criminal justice system also allows for a different way of justifying legal decisions. The sub-system should not be measured and compared in relation to the adult criminal justice system but must follow its own path.[1327] It implies that young offenders should (and do) not face legal responses which are "harsh" or "lenient" compared to adult legal responses, but responses that are simply different. As I illustrated in chapter 2, young perpetrators are not small adults, and they should be treated accordingly. Such a view also offers a response to the political and societal tendency, which is especially clear in the media, to measure sentences for young offenders against the bar set for adults.

[1327] Tärnfalk (2014) argues in a similar way when he proposes a new agency, gathering lawyers and sociologists (socionomer) with specific competence in relation to young offenders under one roof. He emphasizes that such a solution would clarify the role allocation within the system and the problem of mixing treatment and punishment (in other words: the welfare/justice clash) would be obviated (220).

Then again, it could be claimed that no longer seeing the juvenile criminal justice system as closely connected to the adult criminal justice system might make the legal system less coherent and less clear. Different rules would apply to criminals depending on their age. But adopting the perspective of the juvenile criminal justice system as a sub-system would not mean a fundamental change to the already existing framework in either Sweden or Germany. Young offenders are already treated differently within these systems. My proposal would not require another structure but would rather offer an explanation for the existing framework and encourage a different view of it. The sub-system is already there. To acknowledge its existence would rather make things more clear. What this requires is a different way of thinking and approaching young offenders. This would not introduce something completely new into the legal systems. For example, family law and its court system is often independent of the civil law system. I propose a similar approach – at least in theory – in the criminal justice system when it comes to young offenders. There should be a clear systematic line between juvenile criminal justice and adult criminal justice.

Another objection that might be raised against a separate sub-system concerns equality: it would imply that adult offenders should be treated differently from young offenders. This argument, however, could be neutralized by providing an objective reason justifying differential treatment.[1328] This objective reason is the difference between young offenders and adult perpetrators, which I outlined in chapter 2. A main reason for viewing the juvenile criminal justice system as a separate unit is precisely that it allow us to stop comparing young perpetrators with adult offenders.

Breaking the juvenile criminal justice system free from both the adult criminal justice system and the welfare system could help to avoid de-differentiation and confusion. My proposal to view the juvenile criminal justice system as a sub-system that follows its own programmes could lead to stabilization. As I pointed out before, Teubner has emphasized that stabilization is the main advantage of autopoietic systems in comparison to open systems.[1329]

[1328] See sections 3.2.1.4. and 3.4.1.3. regarding the objection of equality.

[1329] See Teubner (1993), 15.

8.4. Applying the autopoietic approach

In this section, I apply an autopoietic approach to the juvenile criminal justice systems of Sweden and Germany. I translate the findings from chapters 3 to 7 into functional and structural programmes to illustrate the specific juvenile content of the programmes which shape the binary code legal/illegal. I argue that their specific shape justifies regarding the juvenile criminal justice systems under scrutiny as autonomous autopoietic sub-systems.

A juvenile criminal justice system can be viewed as an autopoietic system in general. This is a logical consequence of the assumption that the legal system is an autopoietic system, which has been convincingly argued by several scholars.[1330] As I said in section 8.3.2., I start from the assumption that the juvenile criminal justice system applies the binary coding legal/illegal. The use of the same binary code as the legal system justifies the classification of the juvenile criminal justice system as being part of the legal system, which means the juvenile criminal justice system qualifies as an autopoietic system. The question is whether it can be considered a sub-system. This would be the case were the programmes shaping the binary code different from those shaping the adult criminal justice system.

As I explained earlier, the binary coding is stable while the programmes which define its content can change. I retrieved the programmes applied in the investigated juvenile criminal justice systems through a doctrinal study in chapters 3 to 6. In the framework of my empirical research, in chapter 7, the programmes also became visible in practice.[1331] Another reason that empirical investigation is necessary becomes clear here. Paterson and Teubner point out that empirical research in the autopoietic framework looks excellent for qualitative research techniques, case-studies of formal organizations, and ethnomethodological research techniques.[1332] They emphasize the need for careful empirical observation in order to find out which operations recursively link up to other operations in the field such that, in linking up with one

[1330] I have already named many of them: Luhmann, Teubner, von Foerster, Kirchengast, Ewald, and Wandall.

[1331] See section 7.1. and appendix 2 for more on the practice-theoretical approach.

[1332] See John Paterson, and Gunther Teubner, "Changing Maps: Empirical Legal Autopoiesis," (*Social & Legal Studies* 1998, Vol.7, No.4: 451–86), 455.

another, they gain the autonomy of an autopoietic system.[1333] They point out, further, that autopoietic theory does not impose a set of pre-existing systems but rather compels us to observe concrete interactions in order to discover the systemicity of the research project.[1334]

From a practice-theoretical perspective – the approach I applied in the empirical investigation – the practice of organizations creates and is created by the situation or the context in which the practice takes place.[1335] This suggests similarities to an autopoietic approach which also describes a closed system defined by its own, internal programmes, producing and reproducing itself. Svingstedt describes this connection (although without mentioning autopoiesis) by stating that "with the close relation and connection between practice and its context, organizations are produced and reproduced through the employees' everyday practice".[1336]

It should be noted, though, that in contrast to an autopoietic system, practices do not possess a sui generis nature.[1337]

8.4.1. The functional programme

The functional programme in a juvenile criminal justice system is the orientation towards the response to juvenile delinquency.

The UNCRC – the most rapidly and widely ratified international human rights treaty in history[1338] – stipulates the following in Part I Art.3, 1:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[1333] Ibid., 460.

[1334] Ibid., 459.

[1335] See Paula Jarzabkowski, *Strategy as practice- An activity-based approach* (London: Sage, 2005), 20.

[1336] Svingstedt (2012), 17, 249.

[1337] See Schatzki (2001a), 5.

[1338] See http://www.unicef.org/crc/ (last visited 2017-01-25).

This focus on the "best interests of the child" has several implications for juvenile criminal justice systems. International documents emphasize that in the framework of juvenile justice, the traditional objectives of criminal justice, such as punishment and retribution, must give way to the objectives of rehabilitation and restorative justice.[1339] This entails an individualized focus on the offender (and not only on the offence). Since young offenders are considered still to be immature and therefore impressionable and formable, the aim is to turn them into law-abiding citizens, and not (only) to punish them.[1340] Burman claims that the UNCRC entails a right to rehabilitation for young offenders and that from this perspective legal consequences which aim at retribution cannot be accepted.[1341] The idea that a young person is still formable suggests the possibility of achieving educative aims by interfering with their criminal behaviour. This implies a perspective which is directed forwards in time instead of backwards. It presupposes a prognosis, embedded in the broader discretion granted, for instance, to juvenile judges in Germany and Sweden. Such a prognosis cannot be based solely on prior criminal conduct, but has to factor in social circumstances like social background, family, school, peers, etc. (welfare considerations).[1342] This leads to tensions with the rule of law (predictability, equality, transparency, and proportionality), as justice considerations, and a potential for conflict[1343] in the form of the welfare/justice clash. Furthermore, as I explained in chapter 2, it is acknowledged that young offenders deserve more protection than adult offenders because of their greater vulnerability.

The German juvenile criminal justice system's educative guiding principle, set out in chapter 3, is expressed in the law in §2 JGG. It contains all the aforementioned elements: a future-oriented perspective, a strong focus on the individual, broad discretionary power for juvenile judges and juvenile public

[1339] See General Comment No.10 (2007), "Children's rights in juvenile justice" para. 10.

[1340] Some might claim that punishment can also be in "the best interests of the child", as it helps to turn the young offender away from further criminal conduct. Whatever I might think about that, punishment can never be the primary aim within the framework of the UNCRC. It must only be used as a tool for achieving the end of transforming the young offender into a law-abiding citizen.

[1341] See Burman (2016), 165.

[1342] See section 2.3.3. in relation to the problem of a prognosis.

[1343] See King and Garapon (1987), 469.

prosecutors, and the aim of transforming the young offender into a law-abiding citizen – an aim to which the aim of retribution is alien.[1344]

Although the Swedish juvenile criminal justice system appears quite different from the German system if one considers the former's neoclassical guiding principle,[1345] a similar approach becomes apparent when one looks more closely at the overall structure of the Swedish system. The diverse set of legal responses available for young offenders, especially those containing some idea of "care" in the widest sense (particularly juvenile care, which comes in many different forms[1346]), the stronger procedural protection, the broader discretion granted to the judges, and the involvement of social services are all indicators that the legal consequence should be adapted to the individual needs of the young offender.[1347] Even if Swedish legislature emphasizes a neoclassical approach that foregrounds justice considerations, careful investigation of both the legal and procedural framework and the results from the empirical component of this thesis reveal that once it is established that an offence has been committed by a young perpetrator, welfare considerations come to prevail over justice considerations – or at least the former strongly influence the latter. This can be explained in terms of a future-oriented perspective that aims to turn the young offender into a law-abiding citizen[1348] supplanting a perspective that looks backwards on the committed wrong and aims to secure retribution. This future-oriented perspective presupposes that it is possible to find an individualized legal consequence for the young offender.[1349] These aims were confirmed by my Swedish interviewees.[1350]

This means that both juvenile criminal justice systems pursue the objective of turning the young offender into a law-abiding citizen by adopting a perspective that focuses on the future development of the young person rather than on seeking retribution for the offence or punishment for the offender, as the adult criminal justice system does. These considerations differ from the regular programmes applicable in the adult criminal justice system, which are guilt, the

[1344] See section 3.2.

[1345] See section 3.5.

[1346] See section 4.1.2.3.

[1347] See chapters 4 to 6 regarding the Swedish juvenile criminal justice system.

[1348] See also prop.2005/06:165, 1.

[1349] See Lernestedt (2015), 129.

[1350] See section 7.2.

seriousness of the offence, and a previous criminal record. In the language of an autopoietic approach, these latter programmes define the binary coding legal/illegal in the function of the adult criminal justice system. In this system, the perspective looks backwards and is influenced to a greater degree by "just deserts" thinking.

Note here, though, that "function" in this sense regards only the aim under which the juvenile criminal justice system is *supposed* to work. Whether it is able to fulfil this goal is an empirical question which belongs to the realm of criminology and falls outside the scope of this thesis.

8.4.2. The structural programmes

Regarding the structure of the juvenile criminal justice systems of Sweden and Germany, I translate the findings from chapters 4 to 7 into structural programmes, in accordance with an autopoietic approach. I divide these programmes into subcategories:

- Decision programmes
- Procedural programmes
- Personnel programmes

I am aware of the fact that studying personnel programmes more closely might be considered as implying a step away from a Luhmannian approach, since Luhmann adopts an avowedly anti-humanistic definition of society.[1351] Within systems, he does not recognize people as programmes but only communications. Yet Luhmann acknowledges the existence of the individual human being, not as a unit of analysis but rather as itself a conglomeration of autopoietic systems:[1352] the body as a biological system and the conscience as a psychic system. He sees the human being as the precondition but not as the definition of society and acknowledges that "communication refers constantly […] to people".[1353]

Somehow, there is communication. Even if – according to autopoietic theory – people do not communicate, but only deliver messages, it is possible through

[1351] See Luhmann (1997), 37.

[1352] See Niklas Luhmann, *Die Erziehung der Gesellschaft* (Frankfurt a.M.: Suhrkamp Verlag, 2002), 82.

[1353] Luhmann (1997), 378.

observation to decompose communication into the acts of persons.[1354] A person is identifiable as a participant of a communication and thereby a structure of an autopoietic system,[1355] even if they themselves do not communicate since only the system can communicate.[1356] Åkerstrom Andersen writes:

> Although psychic systems are unable to communicate with each other, communication is also unable to communicate unless at least two psychic systems partake in the communication.[1357]

Communications are to a certain extent shaped by their environment, both through contextual openness and also through the role that persons play within this environment.[1358] Even if Luhmann consequently argues against the intermixture of psychic and social systems,[1359] neither one of them can exist without the other. This close tie – in fact, interdependence – between communications and psychic systems Luhmann calls "interpenetration".[1360] All communication is structurally coupled with consciousness. Without consciousness, communication is impossible.[1361] What we find here is the paradox of total dependence in combination with total operational independence.[1362] Luhmann acknowledges the importance of psychic systems and accords them a privileged position in communication because psychic systems are involved in communication in a particular way. Only psychic systems are able to disturb and irritate communications.[1363] In other words, persons are structures of the autopoiesis of social systems.[1364] This is how I

[1354] See Luhmann (1984), 229 and Luhmann (1997), 378.

[1355] See Kneer und Nassehi (1997), 156, who also define persons as points of identification within a communication (87).

[1356] See Luhmann (1997), 106.

[1357] Niels Åkerström Andersen, *Discursive Analytical Strategies – Understanding Foucault, Koselleck, Laclau, Luhmann* (Bristol: The Policy Press, 2003), 76.

[1358] Kneer and Nassehi (1997) point to the fact that Luhmann's term "person" is related to the sociological term "role" (156, footnote 58).

[1359] See Luhmann (2002), 247ff.

[1360] Ibid., 264. Here we find again a sort of structural coupling, as described in 8.4.

[1361] See Luhmann (1997), 103.

[1362] See Luhmann (2002), 273ff.

[1363] See Kneer and Nassehi (1997), 69.

[1364] Ibid., 156.

employ the personnel programme in the framework of my study. My observations and interviews do not focus on specific individuals, but look for general patterns in the roles the practitioners assume within the juvenile courtroom, patterns that are expressed in communications. My empirical investigation tried to capture the programmes through which the psychic systems shape the communications – verbal as well as non-verbal – in the juvenile courtroom and thereby shape the binary code legal/illegal. The personnel programmes become important because communication can only process what has already been psychically processed.[1365] The communication in the juvenile courtroom is not shaped by just one of the aforementioned factors but rather by a conglomeration of all of them, and this constructs an independent level of order.[1366] I now decompose the communication in the juvenile courtroom into the aforementioned programmes.

8.4.2.1. Decision programmes

In this section, I analyse the factors influencing the choice of legal response for young offenders in the Swedish and the German juvenile criminal justice systems from an autopoietic perspective. Viewing these choices through this lens, I define the available legal consequences, the rules for a dismissal/diversion, and the sentencing rules as "decision programmes".

The specific sets of legal consequences applicable to young offenders in Sweden and Germany, the rules for the dismissal/diversion of cases, and the sentencing rules were described in chapter 4 and, from an empirical standpoint, in chapter 7. As I documented, they deviate considerably from the rules applicable in the adult criminal justice systems, and they are influenced by welfare considerations.

The legal consequences for young offenders in Germany feature a design which is entirely independent of that of the adult legal consequences. Although the sentencing decision is influenced by the individual's guilt, the severity of the offence, and prior criminal conduct, these aspects play only a minor role in the choice of the legal consequence for young perpetrators and are mostly relevant in relation to the principle of proportionality. According to the investigation of law in books and law in action in the German juvenile criminal justice system, the primary focus is on the individual. The aim is to find a tailored solution in the form of a legal consequence that meets the young offender's needs. This is also reflected in the broad discretion granted to the juvenile judges. This means that

[1365] See Luhmann (1984), 238.

[1366] See Kneer and Nassehi (1997), 68.

the rule of law, in the form of predictability, transparency, and equality, is reshaped in the name of the guiding principle of education. Part of this structure is also that the outer boundaries set by the law in terms of minimum and maximum penalties do not apply in the case of a young offender, which, again, has a large impact on predictability. This, combined with the broad discretion afforded to the judges, again reshapes the principle of transparency, and, again, this is due to the principle of education that guides the German system.

As the empirical studies regarding the choice of the legal consequence in Germany reveal, the individualized focus in the German juvenile criminal justice system is so strong that the principle of proportionality is stretched to its limits, and sometimes even abandoned, if the individual needs of a young offender demand a more intense level of intervention. The primary concern is to adapt the legal consequence to young offenders and their personal needs in order that they be transformed into law-abiding citizens. This is apparent not only from the broad range of possible legal consequences (which are not exhaustively listed in the law) but also from the broad discretion enjoyed by the juvenile judges and the strong emphasis on the fact that retribution is an aim alien to German juvenile criminal law.[1367] This means that the rule of law has to stand back in the name of the guiding principle of education, and this allows for a reshaping of the principle of proportionality.

A similar reshaping of the rule of law is evident in the rules for and application of dismissals in the form of diversion, not only to avoid prosecution but also in the German juvenile trial itself. Even cases of more serious criminality can be diverted if it is deemed appropriate, and this can take place both before and during the juvenile trial. The German legislature has established a wide variety of possible legal consequences that may be imposed by the public prosecutor or the juvenile judge without delivering a verdict, thus avoiding the potential stigmatization that accompanies a formal verdict. The empirical investigation in chapter 7 shows that juvenile judges in particular make good use of this approach. Another example of reshaping can be found in in the process of "open sentencing"[1368] and the practice of "pushing" young offenders into confessions when the evidence is not sufficient for a verdict.[1369] Here, again, the principle of proportionality is stretched to its limits (and reshaped) and has to stand back in favour of welfare considerations. Furthermore, the principles of transparency,

[1367] As I have already mentioned, the only exception is juvenile imprisonment.

[1368] See sections 7.4.1. and 7.4.2.

[1369] See section 7.3.

legal certainty, predictability, and the presumption of innocence are all also reshaped.

Consequently, regarding the decision programmes, German juvenile criminal law seems to leave the realm of adult criminal law behind and establish its own boundaries. In other words, the programmes defining the binary code legal/illegal differ. The impact of welfare considerations – considered "illegal" in the adult criminal justice system – give the decision programmes a different content.

In the Swedish juvenile criminal justice system, the decision programmes for young offenders also diverge considerably from those for adult offenders. There are different legal consequences available specifically for young offenders. The legal consequence "juvenile care", in particular, can be interpreted as evidence of a programme deviating from that which gives content to sentencing decisions in the adult criminal justice system. Although Swedish legislature emphasizes repeatedly that the legal consequences for young offenders take as their point of departure the severity of the offence (as in the case of adult offenders), this programme is not followed all the way through. This is clear if we consider the framework of juvenile care, which is established as a legal consequence for all kinds of offences, minor and more serious. This was also emphasized by the interviewees.[1370] The wide variety of circumstances in which juvenile care can be applied directly contradicts an approach in which the legal consequence is tied strictly to the severity of the offence (which is an expression of the principle of proportionality). The decisive factor is rather the need of the young offender, as assessed by social services. Proportionality serves only as a threshold (as in the German juvenile criminal justice system). The Swedish interviews indicate that, if necessary, the principle of proportionality may be stretched to its limits. Consequently, in the case of juvenile care, welfare considerations, rather than justice considerations, become the decisive aspect. The same reasoning applies in relation to community service for juveniles. The Swedish interviewees explicitly emphasized a "pedagogical" approach and so suggested that an educational ideal, and thus welfare considerations, guides their conduct. This, along with the stronger focus on the individual, means that the principles of proportionality, predictability, and equality are reshaped in the Swedish juvenile criminal justice system.

In relation to the dismissal/diversion of a case, there is also a deviation from the rules of the adult criminal justice system. One of the Swedish interviewees put

[1370] See section 7.4.1.

the difference concisely: "it is called the same thing and has the same consequence, namely that you do not have to go to trial, but the basis for deciding upon a dismissal is very different between juveniles and adults". In both Sweden and Germany, the public prosecutor assumes the duties of the judge when diverting a case, but without the transparency guaranteed by a formal trial. In other words, the relaxed rules for a dismissal reshape the principle of transparency in both countries.

This means that the decision programmes in the Swedish and German juvenile criminal justice systems feature their own specific design, serving the functional programme described above: to transform the young offender into a law-abiding citizen. This entails a much stronger focus on the individual needs of young offenders and the significance of welfare considerations, and this leads to a reshaping of the rule of law. The strong impact of welfare considerations gives the code "legal" (meaning: relevant for the legal system) a specific shape, which, in my view, justifies the view that there is a specifically juvenile content to the programmes defining the binary code legal/illegal that is distinct from the content in the adult criminal justice system. Factors which would be only minor considerations, or no considerations at all, in the adult criminal justice system become of the utmost importance, even decisive, in the juvenile criminal justice systems of both countries (for example, the social background, the life circumstances, and the personality of the young offender – those things the court tries to influence). Traditional "justice" concerns like predictability, equality, proportionality, and transparency are reshaped and even, partly, sacrificed as programmes.

8.4.2.2. Procedural programmes

This section analyses the specific procedural rules applicable to young offenders, which I call here "procedural programmes". These rules were investigated from a doctrinal perspective in chapter 5 and empirically, in part, in section 7.3.

The Swedish and German juvenile criminal justice systems feature a distinct set of specific procedural rules applicable only to young offenders. They are geared towards the protection of the young perpetrator and serve the "best interests of the child", for example by attempting to avoid stigmatization as far as possible and to accelerate proceedings. The specific procedural programmes seek to strengthen the protectionary web woven around a young person in society; they imply that young offenders deserve more chances and more protection than adult offenders.

The fact that proceedings against young offenders in Germany are always held behind closed doors reshapes the principle of transparency, limiting the public control of criminal proceedings to avoid stigmatization, which is in the interests of the young person's welfare. Additionally, the specific "Erziehungsregister" reshapes the principle of transparency, limiting access to young persons' criminal records to avoid stigmatization and to avoid jeopardizing the resocialization of the young person. Furthermore, accelerated proceedings may lead to a loss of legal certainty because of a less thorough investigation, as was described in section 5.3. This loss of legal certainty is accepted, however, in the name of the guiding principle of education. A rapid response after the offence is considered educationally meaningful and more important than a thorough investigation. Therefore, the boundaries of legal certainty are here reshaped.

Major restrictions of the young offender's rights to appeal a decision in Germany are accepted in the name of the educational rationale. This amounts to the interests of welfare overriding justice considerations: namely, that a court decision must be controllable, which is normally satisfied through the guarantee of judicial review and reflects an aspect of the principle of a fair trial and so the rule of law. Here, procedural guarantees of the German criminal justice system are reshaped.

As the German juvenile judges and public prosecutors confirmed during the interviews, the functional programme described earlier leads not only to the strong impact of welfare considerations on the decision, but also to a bending of the procedural rules – sometimes to the extent that decisions are taken that are against the law, as in the case of pre-trial detention.[1371] Facts are not investigated to the same extent and "confessions" are basically engineered by the courtroom practitioners, all of which is justified on the basis of the guiding principle of education. Here, the binary code legal/illegal is defined in such a way that non-criminal conduct (non-criminal because there would not have been enough proof for a guilty verdict, which should mean an acquittal) is declared as being against the law and leads to a legal consequence, mostly in the form of a diverting decision. Such a practice contravenes the principle of objectivity and the presumption of innocence. It also means that in the procedural programmes of the German juvenile criminal justice system, traditional "legal" concerns like proportionality, predictability, equality, transparency, and the right to a fair trial are redefined as programmes, and even partly sacrificed, in the name of the

[1371] See section 7.3.

educational rationale; in other words, their content is reshaped. The programmes defining the binary code gain a specifically juvenile content.

In the Swedish juvenile criminal justice system, as opposed to the German, this reshaping is less evident in law in books, but even here we find possibilities for restricting transparency (for example, rules that allow the exclusion of the public from trials, to avoid stigmatization) and rules for the acceleration of proceedings. Regarding the latter, the Swedish regulations even establish specific timeframes, which is not the case in the German juvenile criminal justice system. The preparatory works in Sweden emphasize the underlying pedagogical reasons for this, but also highlight the need to respond consistently and clearly.[1372] Accelerated proceedings contain the risk of a less thorough investigation, which threatens the rule of law in the form of legal certainty. This means that in the Swedish juvenile criminal justice system, the principles of transparency and legal certainty are reshaped. Furthermore, the interview study in Sweden indicates that there is some scope for bending the procedural rules in order to secure the best interests of the child.[1373]

Another interesting feature of the the procedure in Sweden is that a decision to sentence a young offender to juvenile care according to LVU requires two processes: one in the criminal court and one in the administrative court, which assesses the need for care. Apart from the confusion generated by the involvement of two different courts, the Swedish legislature has decided to reshape the principle of predictability in this context: the decision of the administrative court can lead to the need to change the legal consequences imposed by the criminal court. The interplay of the criminal and the administrative court is also problematic on another level: a criminal court can impose a conditional sentence/probation on a young offender, but this does not stop the administrative court from deciding to impose compulsory care according to LVU on the young person – for the very same reasons that led to the conditional sentence/probation in the criminal court.[1374] Here, the question of ne bis in idem or res judicata arises.[1375] This is also reflected in the fact that

[1372] See section 5.3.

[1373] See section 7.3.

[1374] This mechanism works the other way around too: the administrative court is allowed to take a stand regarding the question of criminal guilt if no criminal trial is taking place; see Nordlöf (2012), 375.

[1375] In the same line of thought, see Nordlöf (2012), 254.

the enforcement of juvenile care does not demand res judicata.[1376] Yet the Swedish legislature seems to accept an intervention into these cornerstones of the legal system in the name of the best interests of the child, thereby again reshaping them by giving them a more restricted content. A similar reshaping of res judicata is visible in the German rule §56 JGG: the partial enforcement of a verdict. This norm enables the juvenile court to declare a part of a verdict enforceable for educational reasons.

The rules for pre-trial detention are very restrictive in both countries, which reshapes the principle of proportionality in the opposite direction with a view to avoiding the harmful environment of imprisonment for vulnerable young offenders – an expression of welfare considerations. Here, the principle of proportionality is interpreted more narrow than in the adult criminal justice system in both countries and contains a different content due to welfare considerations. In other words, the principle of proportionality is reshaped again. Note here, though, what was described earlier, namely that the German juvenile judges sometimes counteract the restrictive use of pre-trial detention on educational grounds. Consequently, in the German juvenile criminal justice system, when it comes to pre-trial detention, the reshaping happens in two opposite directions.

As the empirical studies reveal, the language employed in the Swedish juvenile trial is formal. In Germany, in contrast, the language of all practitioners is very much adapted to the young offender, avoiding legal terms and trying to communicate as directly as possible. This is especially apparent in the language employed and the attitudes assumed by the German juvenile judges. As an extension of language, the encounters in the Swedish juvenile trials are also formal, strictly following the procedural rules. German juvenile trials are informal to the extent that the procedural rules are bent – almost to the point of illegality – all in the name of the guiding principle of education and the best interests of the child. Here, there is a welfare-based reshaping of procedure (e.g. the principle of objectivity) in the German system, but not so much in the Swedish system.

All these considerations justify the conclusion that the procedural programmes defining the binary code possess their own distinctive character in the juvenile criminal justice systems I have investigated.

[1376] See section 5.6.

8.4.2.3. Personnel programmes

This section engages with structural aspects relating to the courtroom figures and courtroom dynamics, which I described in chapter 6 and empirically investigated in chapter 7. I define these aspects as "personnel programmes".

Both systems feature specific judges appointed to deal with young offenders and specialized juvenile public prosecutors. The reshaping part of an autopoietic system in the legal framework is closely connected to the discretion granted to the practitioners in the system. In the framework of the juvenile criminal justice systems of both Sweden and Germany, this discretion is broad, and it is traditionally accorded to the person of the judge, but also to the public prosecutor in virtue of the possibility of dismissals and divertive measures. The system thus has a wider scope for defining and redefining (or reshaping) itself.

During the interviews, the judges in both Sweden and Germany defined their role as expanded in comparison to that of the regular criminal judge. In Sweden, all my interviewees emphasized the need to "explain" and cooperate with social services when it comes to the matter of which legal consequence fits the young offender. Two interviewees indicated the possibility of a "reprimand speech" or "moral preaching", which can be interpreted as indicating an educational approach. This means that there is at least a small amount of reshaping of the role of the judge, who steps outside of the role of a referee[1377] and into the role of an educator. This has an impact on the principle of objectivity,[1378] reshaping its content.

The reshaping is more apparent in relation to the Swedish specialized juvenile public prosecutor, who bears some similarities to the German juvenile public prosecutor. The mandate of the Swedish public prosecutor is considerably broadened in relation to young offenders, for instance with regard to the enhanced possibilities for dismissing/diverting a case. This point is confirmed by the interview comments. The Swedish interviews suggest an educational approach resembling that pursued in the German juvenile proceedings and by the German juvenile public prosecutors. Here, we find another reshaping of the principle of objectivity. Furthermore, in both countries, the public prosecutor steps into the role of a judge. This might be interpreted as in conflict with the idea of the separation of powers. An organ of the executive assumes a judicial

[1377] Described in section 6.2. and, empirically, in section 7.5.

[1378] Jacobsson (2006) points out that public prosecutors demonstrate their objectivity through, among other things, a non-moralizing attitude (44–5).

role. The role of an executive organ is, in this way, reshaped to serve the functional aims of the juvenile criminal justice system described above. The strong educative tenor of the mandate of Swedish and German juvenile public prosecutors justifies the assumption that this personnel programme reshapes the binary code.

In Germany, the role of the juvenile judge is more obviously distinct from the role of the judge in the adult criminal trial, as described in section 6.2 and, empirically, in section 7.5. The German juvenile judges interact intensively with the young offender in the juvenile trial, particularly in the highly personal pleas. The juvenile judge thus bends the procedural rules, even to the point of breaking them, deviating from the principle of objectivity and the presumption of innocence. However, this is tolerated (and even supported) not only by the public prosecutor but also by most defence counsels (if they are present). There do not appear to be any worries about possible bias; rather, the opposite is the case. The practitioners in the German juvenile courtroom "team up"[1379] with one another: the juvenile judge is supported in his or her approach by the others present. Therefore, it can be claimed that the role of the juvenile judge reshapes aspects of the rule of law (like the right to a fair trial). Welfare considerations dramatically reshape the programmes expressed in the role assumed by the juvenile judge. A similar claim can be made regarding the role of the juvenile public prosecutor in the German system.

Further, the role of the German juvenile judge stretches to the enforcement of the sentence.[1380] Here, again, there is a conflict with the doctrine of the separation of powers, one of Germany's constitutional principles. An organ of the judiciary assumes an executive, administrative role.[1381] In other words, the role of the judiciary is, to this extent, reshaped in the German juvenile criminal justice system to serve the guiding principle of education.

The roles of social services and the social court assistant also suggest a marked reshaping of the personnel programmes defining the binary coding legal/illegal. Both systems make room for social services, which is clear from what was said above about decision programmes: the choice of legal consequence is heavily influenced by the evaluation of social services. As described in section 6.5., social

[1379] See section 7.5.3.

[1380] See section 5.7.

[1381] This also implies that in this function the juvenile judge can become subject to directives and instructions; see Albrecht (2000), 400 and also Schaffstein, Beulke, and Swoboda (2014), 162.

services in the Swedish juvenile criminal justice system and the social court assistant in the German juvenile criminal justice system can be seen as embodiments of the welfare/justice clash. In Germany, the social court assistant sometimes almost assumes the role of a fully fledged player in the juvenile courtroom. This was witnessed in the "teaming up" in the courtroom and was confirmed by the interviews.[1382] Teubner calls this phenomenon "the overlapping membership of persons" or "role interference". In other words, the structural personnel programmes in the form of social services reshape the decision programmes applicable in the adult criminal justice system in the direction of prognosis, future, and welfare, and not only guilt, the severity of the offence, and prior criminal conduct, thereby giving the binary coding legal/illegal a different content from that which applies in the adult criminal justice system. Furthermore, the fact that the report from social services or the social court assistant has such a dramatic impact on the choice of the legal consequence reshapes the content of the principle of proportionality regarding young offenders, also described earlier in regard to decision programmes.

Another example of such a reshaping can be found in the defence counsel in the German juvenile criminal system. As documented in section 6.4. and section 7.5.3., the defence counsel in many cases forms a part of the "legal team" in the juvenile courtroom. This was confirmed and further supported in the interviews: the defence counsel was described as bound by the aim of education rather than the short-term interest of the client. This means that the right to a fair trial gains a different content or, in other words, is reshaped by a differing aim. The procedural programme also generally broadens the right of a young offender to a defence counsel.[1383]

The Swedish juvenile criminal justice system does not mirror the German system in this respect, although the right to a defence counsel is broadened in Sweden because of the greater vulnerability of young offenders.

Most of the practitioners in the juvenile courtroom in both Sweden and Germany represent a merger of justice and welfare. The legal professionals assume a "welfare" character in their justice role while social services and the social court assistant adopt a "justice" approach in their welfare role, adapting

[1382] See section 7.5.3. This inclusion of social services and the elevation of them to the same level as the legal professionals is a peculiarity of the German juvenile criminal trial. In the adult trial, the legal professionals "own" the expert discourse and exclude the other participants; see Svingstedt (2012), 122–3.

[1383] See section 6.4.

proposed measures to proportionality.[1384] This is also reflected in the courtroom dynamics, especially the informal character of the German juvenile trial, with its teaming up and personal statements. I claim that all these aspects justify the conclusion that in the framework of the juvenile trial, the personnel programmes reshape the programmes defining the binary code legal/illegal.

8.5. Conclusion

What the doctrinal and the empirical investigations of the previous chapters reveal is the fact that, regardless of the similarities and the differences between the two investigated juvenile criminal justice systems, both are heavily influenced by welfare *and* justice considerations (or themes). Furthermore, it has been established that the supposed guiding principles of the two systems are not followed consistently all the way through – either in Germany or in Sweden.

Muncie and Goldson state:

> Modern juvenile justice appears as ever more hybrid: attempting to deliver neither welfare or justice but a complex and contradictory amalgam of the punitive, the responsibilising, the inclusionary, the exclusionary and the protective.[1385]

This means that the theoretical welfare/justice clash persists in both countries, regardless of which approach – neoclassical or educative – the two countries claim to pursue.

Then again, according to the insights established by the empirical investigations in chapter 7, the tensions between welfare and justice considerations do not appear to give rise to any major problems within legal practice, as surprising as this may be. The figures active in the juvenile courtroom seem to adapt to slightly different roles and apply the legal rules in slightly different ways as compared the ways they would be applied in the adult criminal justice system.

Consequently, whether one describes these systems as guided by "justice" (neoclassical) or "welfare" (education) seems to be a political choice, or an academic or theoretical matter, rather than a practical necessity. I question the

[1384] See Tärnfalk (2014), 33.

[1385] See Muncie and Goldson (2006), 214.

need to label the ongoing events in the juvenile courtroom as either one or the other and propose the idea of an autopoietic sub-system as a third way.

This chapter demonstrates that the juvenile criminal justice systems in Germany and Sweden feature distinct juvenile programmes, consisting of the functional programme and the structural programmes. It illustrates that the decision programmes, the procedural programmes, and the personnel programmes in regard to young offenders follow their own paths, deviating from the adult criminal justice system. They are geared towards the common aim of transforming the young offender into a law-abiding citizen (the functional programme), and they develop into specific shapes in the two juvenile criminal justice systems investigated in this study. Consequently, these programmes define the binary code legal/illegal in a way that is different from the way it is defined in the regular (adult) criminal legal system. In the framework of the juvenile criminal justice system, there is a reshaping not only of legal guarantees (the right to a fair trial, the principle of objectivity, the presumption of innocence, and the separation of powers) but also of the rule of law, in the form of predictability, transparency, equality, and proportionality. These take on new forms. The differences regarding function and structure are so dramatic that they justify viewing the juvenile criminal justice systems of Germany and Sweden as their own autopoietic sub-systems.

The investigation of these two systems has established that there does not necessarily have to be an institutionally separate juvenile justice system in order for my proposal – that the juvenile criminal justice system should be regarded as its own autopoietic sub-system – to be valid. Even if the two investigated systems of Sweden and Germany pursue different approaches to dealing with young offenders, both systems can be understood through an autopoieticic approach. The key consideration for justifying the claim that a juvenile criminal justice system is its own separate sub-system is the fact that, within it, specific juvenile programmes are the decisive factors. They supply the binary code legal/illegal with a different content from that which applies to the programmes in the adult criminal justice system. According to my view, this basic set of specific programmes generates the "deep structure" of the juvenile criminal justice system – in Sweden and in Germany. This deep structure becomes visible once we adopt the autopoietic approach.

Utilizing such an approach, I argue for breaking the juvenile criminal justice system free from the adult criminal justice system and from the welfare system. This should allow us to more clearly display the juvenile criminal justice system (at least in the investigated countries) as what it already is: a sub-system of its

own, pursuing its own particular programmes. Not only are young offenders different from adult offenders, but the juvenile criminal justice system is different from the adult criminal justice system. This autopoietic explanation is an attempt to establish a theoretical foundation for a more or less independent juvenile criminal justice system. I have invited the reader to step back from the well-worn tracks of "justice" and "welfare" and view the juvenile criminal justice system through a different lens. The autopoietic approach affords us a view of the juvenile criminal justice system that allows us to circumvent the theoretical problem of the welfare/justice clash.

A juvenile criminal justice system should not be committed either to "justice" in the form of neoclassicism or "welfare" in the form of an educational approach, but it should be measured according to different standards that provide it with the room for manoeuvre it deserves. My explanation of the juvenile criminal justice system as an autopoietic sub-system is an invitation to redefine these standards.

Appendix 1

Information

1a. Sweden

Information om projektet:

”Att döma unga lagöverträdare – en jämförande studie”

Detta är ett straffrättsligt projekt som bedrivs vid juridiska fakulteten vid Lunds universitet. Docent Ulrika Andersson (tel.: 046-222 11 14/ email: ulrika.andersson@jur.lu.se) är huvudansvarig för projektet som genomförs av doktorand Mareike Persson (tel.: 046-222 11 75/ email: mareike.persson@jur.lu.se).

Genom alla tider har unga lagöverträdare uppvisat den högsta brottsliga belastningen. Den rapporterade brottsligheten når sin topp i åldersspannet mellan 18 och 25 år. Pojkar är mer kriminellt aktiva än flickor och blir oftare brottsoffer. Efter tjugofemårsåldern minskar brottsnivån. Ungdomsbrottslighet är därför inte nödvändigtvisst en ingång till en kriminell karriär, utan kan i motsats anses vara ett "normalt" fenomen under denna utvecklingsfas.

I sin doktorsavhandling ska Mareike Persson undersöka den dömande processen för unga lagöverträdare från en teoretisk och praktisk synvinkel. Forskningsfrågan hon söker besvara är, hur stor vikt ungdomsaspekten verkligen har i den dömande processen i Sverige och i Tyskland.

I den praktiska delen kommer Mareike Persson att genomföra deltagande observationer på två domstolar (en i Sverige och en i Tyskland), i kombination med intervjuer med såväl domare som åklagare. Detta för att få insyn i den dömande processen angående unga lagöverträdare. Rent praktiskt kommer Mareike Persson att sitta som åskådare i rättegångssalen och observera domare och åklagare. Undersökningens syfte är att få fram ungdomsfaktorn i rättssalens dynamik. Med andra ord ska Mareike Persson få fram vilken faktisk inverkan ungdomsaspekten har i den dömande processen. Detta innebär att de enskilda ärendena inte kommer att studeras i sig.

Syftet med intervjuerna är att undersöka samma frågeställning på individnivå. Intervjuerna kommer att vara semi-strukturerade, vilket innebär att Mareike Persson kommer ha vissa frågor enligt en intervjuguide som ska stödja en mer allmän diskussion. Intervjuerna kommer beröra ett mer allmänt plan. Därför ombeds intervjupersonerna att undvika att kommentera enskilda ärenden.

Alla observationer och svar inom intervjustudien kommer att behandlas så att inte obehöriga kan ta del av dem. Deltagarna i studien förbli anonyma.

Studiens resultat kommer att publiceras i en doktorsavhandling.

Mareike Persson vill tydliggöra att deltagande i forskningsprojekt är frivilligt och att man när som helst, utan särskild förklaring, har rätt att avbryta.

Ansvariga

Forskningshuvudman är Lunds universitet, juridiska fakulteten. Behörig företrädare för forsningshuvudmannen är prefekten Vilhelm Persson. Forskare som är huvudansvarig för genomförandet av projektet är docent Ulrika Andersson (tel.: 046-222 11 14/ email: ulrika.andersson@jur.lu.se) men studien kommer att genomföras av doktoranden Mareike Persson (tel.: 046-222 11 75/ email: mareike.persson@jur.lu.se). Alla nås via adressen: Lilla Gråbrödersgatan 4, 221 00 Lund.

1b. Germany

Information zu dem Promotionsprojekt:

" Communicating Youth – Young offenders in legal systems on the example of Germany and Sweden" (preliminary titel)

Bei dem Projekt handelt es sich um ein Promotionsvorhaben an der Juristischen Fakultet der Universität Lund (Schweden). Betreuende Hochschullehrerin ist Frau Docent Ulrika Andersson (Tel.: 0046 –(0)46-222 11 14; E-mail: ulrika.andersson@jur.lu.se); die Durchführung obliegt der Doktorandin Mareike Persson (Tel.: 0046-(0)46-222 11 75; E-mail: mareike.persson@jur.lu.se).

Die Statistiken zeigen, dass junge Straftäter die höchste kriminelle Belastung in der Gesellschaft aufweisen. Die Kriminalitätsbelastung erreicht ihren Höhepunkt in der Altersgruppe zwischen 18 und 25 Jahren. Jungen sind sowohl kriminell aktiver als Mädchen als auch häufiger Opfer von Straftaten. Nach Erreichen eines Alters von 25 Jahren, sinkt die kriminelle Belastung.

Jugendkriminaltät ist folglich nicht zwingend der Beginn einer kriminellen Karriere, sondern kann vielmehr als ein "normales" Phänomen innerhalb dieser Entwicklungsphase betrachtet werden.

Im Rahmen ihres Promotionsprojektes untersucht Frau Persson den jugendstrafrechtlichen Prozess in Bezug auf theoretische und praktische Aspekte ("law in books" und "law in action"). Die Forschungsfrage, die sie beantworten möchte, ist, wie stark sich der Jugendaspekt in Deutschland und in Schweden niederschlägt.

Bezüglich des praktischen Teils ihres Projektes führt Frau Persson teilnehmende Beobachtungsstudien in Kombination mit Experteninterviews (sowohl mit Jugendrichtern als auch mit Jugendstaatsanwälten) durch. Hierzu nimmt Frau Persson als Zuschauerin im Gerichtssaal an der Hauptverhandlung teil und beobachtet das Gesamtgeschehen mit Fokus auf die professionellen Teilnehmer. Die Untersuchung zielt darauf ab, den Jugendfaktor im Rahmen der prozessrechtlichen Dyamik herauszuarbeiten. Anders ausgedrückt: Frau Persson möchte untersuchen, welche Bedeutung dem Umstand zukommt, dass der Delinquent ein Jugendlicher/Heranwachsender ist. Dies bedeutet, dass weder die einzelnen Taten noch die Person des Angeklagten von Interesse für diese Untersuchung sind. Entsprechende individualisierbare (d.h. über die Art des verletzten Strafgesetzes und statistische Angaben wie Alter und Geschlecht hinausgehende) Daten werden im Rahmen der Untersuchung nicht erhoben

Die anschliessende Interviewstudie zielt auf dieselbe Fragestellung, nun aber auf individuellem Niveau. Die Interviews sind semi-strukturiert, was bedeutet, dass Frau Persson einige Fragen gemäss eines Leitfadens stellen wird, um eine allgemeine Diskussion zu initiieren. Auch die Interviews zielen nicht auf individuelle Aspekt von Taten oder Tätern, sondern werden allgemein gehalten. Deshalb werden die Interviewpartner gebeten, zu vermeiden, einzelne Fälle zu kommentieren. Auch hier werden keine individualisierbaren Daten erhoben.

Die Teilnehmer der Observations- und Interviewstudien verbleiben anonym. Sämtliche Beobachtungen und Antworten innerhalb der Interviewstudie werden nicht für Unberechtigte zugänglich sein.

Das Ergebnis der Untersuchung wird als Doktorarbeit publiziert werden.

Es ist herauszustellen, dass die Teilnahme an dem Forschungsprojekt freiwillig ist und dementsprechend jede/r Teilnehmer/in – ohne besondere Erklärung – jederzeit die Teilnahme zu beenden.

Verantwortung:

Hauptverantwortlich für dieses Forschungsprojekt ist die Juristische Fakultät der Universität Lund (Schweden). Der bevollmächtigte Vertreter für die Universität Lund ist der Präfekt herr Vilhelm Persson. Die für die Durchführung des Forschungsvorhabens hauptverantwortliche Forscherin ist die Hochschullehrerin Frau Docent Ulrika Andersson (Tel.: 0046-(0)46-222 11 14; E-mail: **ulrika.andersson@jur.lu.se**), die Studie wird jedoch von der Doktorandin Frau Mareike Persson durchgeführt (Tel.: 0046-(0)46-222 11 75; E-mail: mareike.persson@jur.lu.se). Sämtlich genannte Personen sind unter folgender Anschrift erreichbar: Juridiska Fakulteten, Lunds Universitet, Lilla Gråbrödersgatan 4, 221 00 Lund.

Questionaire

2a. Sweden

A.Domare

1. Beskriv kort din yrkesbakgrund. Ev. specialutbildning som ungdomsdomare?

2. På vilket sätt tror du att en rättegång mot en ung lagöverträdare är annorlunda än en rättegång mot en vuxen lagöverträdare?

3. Beskriv (tanke-) stegen du tar på vägen till en dom.

4a. Vilka är de mest relevanta faktorerna för en dom som beträffar unga lagöverträdare? (förmildrande och försvårande)
4b. Rangordna dessa faktorer.
I. förmildrande
II. försvårande

5. Använder du andra parametrar när du dömer ungdomar än när du dömer vuxna? Finns det en annan vikt-balans i faktorerna?

6. Använder du några praktiska verktyg som hjälpmedel att komma fram till en dom mot en ung lagöverträdare? Om så är fallet, vilka?

7. Vad är skillnaden när den unga personen är mellan 18-20 år gammal?

8. Vilken roll spelar det för dig om föräldrarna är med i förhandlingen?

9. Vilken roll spelar socialtjänsten? Hur mycket vikt har deras utlåtelse?

10. Vilken roll spelar advokaten?

11. Vilka effekter skulle du vilja uppnå med domen?

12. Vad förväntar du dig att uppnå med domen?

B. Åklagare

1. Beskriv kort din yrkesbakgrund. Ev. specialutbildning som ungdomsåklagare?

2. På vilket sätt tror du att en rättegång mot en ung lagöverträdare är

annorlunda än en rättegång mot en vuxen lagöverträdare?

3. Beskriv (tanke-) stegen du tar när du ska lägga ner ett fall då du bedömer en ung lagöverträdare som skyldig men anser det inte som nödvändig att åtala honom/henne.

4a. Vilka är de mest relevanta faktorerna för ett sådant beslut? (förmildrande och försvårande)
4b. Rangordna dessa faktorer.
I. förmildrande
II. försvårande

5. Använder du andra parametrar när du beslutar att lägga ner ett fall som beträffar en ung lagöverträdare än när du lägger ner ett fall mot en vuxen? Finns det en annan vikt-balans i faktorerna?

6. Använder du några praktiska verktyg som hjälpmedel att komma fram till ett beslut att lägga ner fall mot en ung lagöverträdare? Om så är fallet, vilka?

7. Vad är skillnaden när den unga personen är mellan 18-20 år gammal?

8. Vilken roll spelar det för dig om föräldrarna är med i förhandlingen?

9. Vilken roll spelar socialtjänsten? Hur mycket vikt har deras utlåtelse?

10. Vilken roll spelar advokaten?

11. Vilka effekter skulle du vilja uppnå med nedläggningen?

12. Vad förväntar du dig att uppnå med nedläggningen?

2b. Germany

A.Richter

1. Bitte beschreiben Sie kurz Ihren beruflichen Hintergrund.
(Spezialausbildung/-erfahrung als Jugendrichter?)

2. Wie unterscheidet sich aus Ihrer Sicht eine Verhandlung gegen Jugendliche/Heranwachsende von einer Verhandlung gegen Erwachsene?

3. Bitte beschreiben Sie die (gedanklichen) Schritte, die Sie zur Urteilsfindung unternehmen.

4a. Welche sind die entscheidenden Faktoren im Rahmen der Urteilsfindung gegen einen Jugendlichen/Heranwachsenden? (mildernde und erschwerende Umstände)

4b. Bitte gewichten Sie diese Faktoren nach ihrer Bedeutung.
I. mildernde Umstände
II. erschwerende Umstände

5. Ziehen Sie andere Aspekte in Betracht, wenn Sie gegen Jugendliche/Heranwachsende verhandeln und diese verurteilen als wenn Sie gegen Erwachsene verhandeln? Gewinnen ähnliche Faktoren unterschiedliches Gewicht?

6. Nutzen Sie praktische Werkzeuge als Hilfsmittel zur Urteilsfindung? Wenn ja, welche?

7. Worin liegt der Unterschied, wenn der Angeklagte ein Heranwachsender ist?

8. Was möchten Sie mit einem Urteil gegen einen Jugendlichen/Heranwachsenden erreichen?

9. Was erwarten Sie, mit einem Urteil gegen einen Jugendlichen/Heranwachsenen zu erreichen?

B. Staatsanwalt

1. Bitte beschreiben Sie kurz Ihren beruflichen Hintergrund. (Spezialausbildung/-erfahrung als Jugendstaatsanwalt?)

2. Wie unterscheidet sich aus Ihrer Sicht eine Verhandlung gegen Jugendliche/Heranwachsende von einer Verhandlung gegen Erwachsene?

3. Bitte beschreiben Sie die (gedanklichen) Schritte, die Sie im Rahmen einer Diversions-Einstellung unternehmen.

4a. Welche sind die entscheidenden Faktoren im Rahmen einer Diversionsentscheidung? (mildernde und erschwerdende Umstände)

4b. Bitte gewichten Sie diese Faktoren nach ihrer Bedeutung.
I. mildernde Umstände
II. erschwerende Umstände

5. Ziehen Sie andere Aspekte in Betracht, wenn Sie ein Verfahren gegen Jugendliche/Heranwachsende einstellen als wenn es sich bei dem Beschuldigten um einen Erwachsenen handelt? Gewinnen ähnliche Faktoren unterschiedliches Gewicht?

6. Nutzen Sie praktische Werkzeuge als Hilfsmittel im Rahmen einer Diversionsentscheidung? Wenn ja, welche?

7. Worin liegt der Unterschied, wenn der Beschuldigte ein Heranwachsender ist?

8. Was möchten Sie mit einer Diversionsentscheidung gegen einen Jugendlichen/Heranwachsenden erreichen?

9. Was erwarten Sie, mit einer Diversionsentscheidung gegen einen Jugendlichen/Heranwachsenen zu erreichen?

Observational study guide

Trial Nr.

Offence:

Time passed between offence and trial:

Age of the offender:

Gender of the offender (m/f):

Professionals present:

Placed/Dressed:

Open doors (+/-):

Standing up when judge enters/ when pleading/ when delivering the verdict (+/-):

Presentation and explanation "who is who" to the offender (+/-):

Duration of the trial (1 (less than 10 min) – 6 (more than 60 min):

a. evidence-gathering in terms of facts:

b. individual factors:

c. deliberation:

Time dedicated to explain the verdict to the offender (in min):

Specific vocabulary

	Extreme technical jargon	50/50	Understandable/adapted to the juvenile
Judge			
Public Prosecutor			
Defense Lawyer			

Punished/not punished (+/-):

Specific juvenile consequence (+/-):

In line with the proposal of the social services (+/-):

General demeanor/atmosphere (formal vs informal) on a scale of 1-3

	Judge			Public prosecutor			Defense lawyer		
	Verbal	Body	Looks	Verbal	Body	Looks	Verbal	Body	looks
Tense to relaxed									
Stern to friendly									
Closed to open									
Dismissive to attentive									
Intimidating to encouraging									

Communication outside the formal boundaries: (e.g. looks, communications outside the procedural framework etc.):

Overall impression:

Declaration of consent

4a. Sweden

Samtycke till deltagande i doktorandprojekt:

”Att döma unga lagöverträdare – en jämförande studie”

Jag har informerats, fått tillfälle att ställa frågor och fått dem besvarade.

Jag samtycker härmed till deltagande i studien inom ramen för en intervjustudie/observationsstudie. Jag kan när som helst avsluta mitt deltagande i studien utan att ange skäl härtill.

_____

(Namnteckning)

_____

(Namnförtydligande)

Kontaktinformation:

Docent Ulrika Andersson

Lilla Gråbrödersgatan 4

221 00 Lund

Tel: 046-222 11 14

Email: ulrika.andersson@jur.lu.se

Doktorand Mareike Persson

Lilla Gråbrödersgatan 4

221 00 Lund

Tel: 046-222 11 75

Email: mareike.persson@jur.lu.se

4b. Germany

Einverständniserklärung für die Teilnahme an dem Promotionsprojekt:

"Communicating Youth – Young offenders in legal systems on the example of Germany and Sweden" (preliminary titel)

Ich bin informiert worden, hatte Gelegenheit, Fragen zu stellen und bekam diese beantwortet.

Hiermit erkläre ich mich mit der Teilnahme an obengenanntem Projekt im Rahmen einer teilnehmende Beobachtungsstudie/Interviewstudie einverstanden.

Ich kann jederzeit ohne Angabe von Gründen meine Teilnahme an dem Projekt abbrechen.

_____

(Unterschrift)

Kontaktinformation:

Docent Ulrika Andersson

Lilla Gråbrödersgatan 4

221 00 Lund

Tel: 046-222 11 14

Email: ulrika.andersson@jur.lu.se

Doktorand Mareike Persson

Lilla Gråbrödersgatan 4

221 00 Lund

Tel: 046-222 11 75

Email: mareike.persson@jur.lu.se

Appendix 2: Empirical methodological considerations

Chapter 7 contains only a limited version of the methodological considerations underlying the empirical investigations presented in that chapter. This appendix contains a more detailed description for the interested reader.

As mentioned earlier, the empirical research of this thesis consists of an observational study combined with semi-structured interviews with judges and public prosecutors from Sweden and Germany. Such an empirical approach reflects sociological methodologies rather than traditional legal research. However, lawyers can benefit from sociological methodologies since sociologists can provide lawyers with an understanding of human behaviour which can aid in the development of strategic themes to be applied during trials.[1386] Mileski has indicated the importance of observational studies in the courtroom, stating:

> Although some stages may be set and some denouements may be neatly written in prosecutors' offices, the ways in which these sketchy plots are acted out in the courtroom remain largely unexplained.[1387]

Though she made this observation some time ago, the problem remains, as Wandall has confirmed as recently as 2008. He highlights that "the formal legal framework represents one, but only one point of view of sentencing decision-making in court".[1388]

The aim of the empirical investigation – the observational study and the interviews – was to establish how the legal rules described in chapters 3 to 6 play out in legal practice in the juvenile proceedings and the sentencing process in

[1386] See Moore and Friedmann (1993), 2.

[1387] Maureen Mileski, "Courtoom Encounters: An Observation Study of a Lower Criminal Court," (*Law & Society Review* 1971, Vol.5, No.4: 473–538), 474.

[1388] See Wandall (2008), 2.

relation to the fact that the offender is a young person. The aim was also to gain some insight into specific features of the juvenile trial: the courtroom dynamics, which are reflected in the communications and the patterns of behaviour of the practitioners in the juvenile courtroom. These latter aspects are invisible in law in books and in case law, but can be approached with the help of empirical investigation. My research should help courtroom professionals to reach a better understanding of their social milieu. Lincoln and Guba refer to such an aim as that of achieving "ontological authenticity".[1389] Contributing to knowledge and understanding can be considered a legitimate aim for empirical legal studies.[1390]

Through the empirical component of this study, I tried to identify additional aspects of the welfare/justice clash. How are welfare and justice considerations expressed in the communications and patterns of behaviour of the courtroom practitioners? How are they expressed in courtroom dynamics and shaped by the application of legal rules? The possible impact of welfare considerations in this realm of justice may reflect the welfare/justice clash. Participant observation is – according to DeWalt and DeWalt – an appropriate strategy for achieving such an aim.[1391]

1. Participant observation

We can formally define participant observation, an empirical approach adopted in disciplines like anthropology and the social sciences, as a method in which a researcher takes part in the daily activities, rituals, interactions, and events of a group of people as a means of learning the explicit and tacit aspects of their daily routines and their culture.[1392] Social science regards this kind of research as a type of qualitative research.[1393] Quantitative research has dominated the research into the sentencing of young offenders, but it seems to lack the flexibility needed to link the research to ongoing courtroom events. Observation is a methodology which seems more suitable for the study of the dynamic environment of a

[1389] See Bryman (2012), 393.

[1390] See Partington (2008), 3.

[1391] See DeWalt and DeWalt (2011), 126.

[1392] DeWalt and DeWalt (2011), 1.

[1393] See Bryman (2012), 380ff, 430ff.

trial.[1394] I used this method to investigate law in action, which in my case meant sitting as an observer in trials involving young offenders in Sweden and in Germany. Participant observation does not necessarily imply that I actively took part in the trial, although this qualitative empirical method does imply participation in the form of social interaction – for example, talking to the participants or adapting to the situation in certain ways to avoid being a disturbing influence.[1395] I will return to this point under the heading "defining my role", below.

When carrying out the observations in the courtroom, I employed a practice-theoretical approach,[1396] which means that I concentrated on the observation of practices.[1397] This approach builds on the idea that people's social practices – in my case, the juvenile proceedings and the sentencing process for young offenders – is not given by nature (or by the legislature) but is socially shaped. Applying this idea to the juvenile criminal justice system, it means that practices are shaped not only by procedural rules, but also by the social interactions between people out of which they grow, which are also influenced by the ideological background. The number of studies using a practice-theoretical approach has risen in recent years but there has not yet been such a study within the legal field in Scandinavia or Germany. The existing studies are rather in the field of sociology.[1398] According to this theoretical approach, practices may be a routinized way in which bodies are moved, objects are handled, subjects are treated, things are described, and the world is understood.[1399] They can be physical activities, linguistic activities, mental activities, and material things that

[1394] Qualitative research is particularly good for examining whether or not a particular social phenomenon exists and, if so, for understanding the nature of the phenomenon (Webley (2010), 948). In terms of the method of direct observation, see Bortz and Döring (2006), 267. Participant observation is a methodology which seems suitable for studying the dynamic environment of a trial since – as Moore and Friedmann point out – "participant observation is one of the few approaches which can assimilate holistic knowledge and diverse data for application to emerging situations in an applied (or clinical) role" (Moore and Friedmann (1993), 123). See, in a similar vein, Salvatore et al. (2011), 19; Satel (1998), 43ff.

[1395] See Fangen and Sellerberg (2011), 35.

[1396] For more about practice theory in general, see Schatzki (2001a).

[1397] In the analysis in chapter 8, I "translate" the practices into programmes that shape communications in a Luhmannian sense.

[1398] For an overview of the existing studies, see Svingstedt (2012), 17.

[1399] See Reckwitz (2002), 250.

are organized together against a shared background understanding.[1400] I consider this limitation to practices necessary because the amount of data would otherwise be overwhelming. Practice theory[1401] stresses the significance of the context or the situation of social interactions. Cotterrell points out that law is as much a matter of practices as of ideas, so it is not just doctrine that is to be considered but *institutionalized* doctrine – ideas created, developed, interpreted, and applied by specific agencies and institutions existing for this purpose.[1402] Consequently, my definition of practice as applied to my research should be understood as the courtroom dynamics in the juvenile trial – "the field" – covering legal/procedural rules, the patterns of behaviour of the participants in all their different forms (verbal expressions, body language, etc.), and the shared background understanding; in other words: law in action, investigating how the legal framework is actually transferred into legal practice. By studying practices instead of individuals, social groups, or societies, power relations and the structures of organizations are revealed.[1403] From a practice-theoretical perspective, the practice of organizations creates and is created by the situation or the context in which the practice takes place.[1404] This thought suggests the idea of autopoiesis,[1405] which also describes a closed system defined by its own internal programmes, producing and reproducing itself. Svingstedt describes this connection (although without referring to autopoiesis) by stating: "with the close relation and connection between practice and its context, organizations are produced and reproduced through the employees' everyday practice".[1406]

The practices at the centre of my attention in the empirical investigation were the courtroom dynamics, reflected in communication and patterns of behaviour and shaped by the application of legal rules, my aim being to assess the interplay

[1400] See Schatzki (2001b), 55.

[1401] Note that I use the term "practice theory" for the sake of simplicity. I am aware of the fact that practice theory is not a theory in itself but a collection of theories and theoretical perspectives that derive inspiration from several theoretical fields. This is why I have chosen to talk instead of the use of a practice-theoretical approach as a sociologically oriented field which is helpful for discussing and understanding everyday practice.

[1402] See Cottorrell (2010), xvii. This thinking mirrors my concept of law, which I have already outlined, and explains why I am investigating law in action as well as law in books.

[1403] See Svingstedt (2012), 16.

[1404] See Jarzabkowski (2005), 20.

[1405] I elaborate on autopoiesis in detail in chapter 8.

[1406] Svingstedt (2012), 17, 249.

of justice and welfare considerations in relation to young offenders. The difference between legal and other social environments is that the practice is to a great extent formed by legal rules. The structure of the procedures, the use of physical objects, and the language are more or less directly governed by formal regulations. Courtroom professionals are given little room for manoeuvre for behaving spontaneously, creatively, or independently in the encounters in the courtroom.[1407] In other words, procedure has to be taken into consideration when analysing practice, which it shapes to a certain extent.[1408] However, it should be noted that viewing practice is more important the more discretion is left to the judge in certain fields of law. As I explained in chapter 4, dealing with young offenders is one of the fields in which – both in Sweden and in Germany – the law grants broad discretion to judges so that they are able to respond more flexibly and adapt legal consequences to the individual needs of the offender. This gives the participants more leeway and makes a practice-theoretical approach fruitful.

In this framework of practice, I observed the following parameters. I attended to the way the practitioners were dressed and the way they occupied space. I observed their professional behaviour, placing an emphasis on language (verbal, body language, and glances) and communication. This also entailed observing the nature of the courtroom encounter (mild, bureaucratic, harsh, formal or informal). An obvious reason for emphasizing communication is that language is one of the most important tools for a lawyer.[1409] It is no secret that legal discourse[1410] uses a specific sort of language.[1411] This is true of body language as

[1407] See Svingstedt (2012), 251, who stresses that the service logic of the district court implies legally imposed limitations that are realized in the district court lawyers' regulated actions and are governed by practice.

[1408] Following Luhmann's understanding of procedure, by way of the participants' actual contributions, each procedural system generates meaning, as well as an individual structure of options and restrictions; see Scheffler, Hannken-Illjes, and Kozin (2010), 5. Procedure in this sense does more than just hosting legal rules or formalities; it sets them into motion and makes them work on various components synchronically: facts, norms, and parties.

[1409] To this extent, I share Schömer's view; see Schömer (1999), 198. She compares the development from individual to lawyer to the development from child to adult. Legal language forms a necessary part of becoming a legal professional. The same is true of clothes, gestures, and social intercourse. Foucault pointed out that different fields, like law, medicine, or management, have a tendency to establish expert discourses; see Foucault (1993), 57.

[1410] According to Foucault, the term "discourse" represents an anonymous, impersonal, intention-free chain of linguistic events. In discourse theory, the basic element of a social system is not the human being but communication. Communication is to be understood as the unity of utterance,

well as of explicit or verbal language.[1412] There are several reasons for the different sort of language employed in courtrooms. One is the underlying "written language culture".[1413] The language utilized is controlled by the underlying legal rules found in legal codes. The communication/language creates clear borders of inclusion and exclusion. An additional factor which complicates communication in the courtroom is that the primary discursive forms of the courtroom – the monologue and the interrogation – are not normal parts of interaction; in normal circumstances these would create unease and resentment.[1414] A focus on the different sort of language employed in the courtroom is nothing new to social science,[1415] but I direct the reader's attention to the specific communication in the form of practices that take place in trials against young offenders in Sweden and Germany.

Furthermore, I measured the time dedicated to fact finding and to legal evaluations (evidence/impersonal facts) and more individual factors. I also measured the time dedicated to explaining the verdict to the young offender.

---

information, and understanding. Modern criminal justice policy operates in accordance with a number of competing discourses (see Kirchengast (2010), 65). It is beyond doubt that the contemporary legal arena can claim to have its own discourse. The same is true of social discourse. Discourse theory is a massive field of research. However, I do not engage further with discourse theory in this thesis since it lies beyond the scope of this study.

[1411] See Svingstedt (2012), who thinks that legal language gives a formal and antiquated impression (115-6). See also Jacobsson (2006), who points out that legal discourse attributes objectivity to its actors (31) and stresses the professional discourse in the courtroom (36).

[1412] Anleu Roach and Mack (2005) describe the body language of lawyers as distanced and disciplined. Svingstedt (2012) confirms these findings and describes the body language of court encounters as reserved and formally correct (125). She interprets this as an expression of formality, neutrality, distance, domination through hierarchical status, and anonymity in the courtroom. This is also reflected by the neutral and formal dress code.

[1413] See Svingstedt (2012), 122.

[1414] See Nigel G. Fielding, "Lay people in court: the experience of defendants, eyewitnesses and victims," (*British Journal of Sociology* 2013, Vol.64, No. 2: 287–307), 301, who has studied lay persons' experiences of witnessing and giving testimony in adversarial hearings. He has concluded that the cross-examination as a hearing style creates anxiety, frustration, and confusion among lay persons, who are unfamiliar with the adversarial situation.

[1415] See for example Maxwell Atkinson and Paul Drew, *Order in Court – The Organization of Verbal Interaction in Judicial Settings* (London: Humanities Press (Macmillan Press), 1979); Karin Aronsson, Linda Jönsson, and Per Linell, "The courtroom hearing as a middle ground: Speech accommodation by lawyers and defendants," (*Journal of Language and Social Psychology* 1987, Vol.6, No.2: 99–115); and Anleu Roach and Mack (2005).

Additionally, I observed the influence of social services on the overall proceedings and in relation to the verdict. Last but not least, I registered the outcome.

2. Interviews

I complemented the picture drawn from the observational study with evidence from interviews of (juvenile) judges and (juvenile) public prosecutors. The aim of the interviews was to get a better insight into how strongly the fact that the offender is a young person affects the attitude of the individual legal professional, as well as the actual sentencing decision. In other words, I wanted to capture the way in which the welfare/justice clash is reflected on an individual level, a level not visible in the proceedings themselves. An interview can provide a view of a person's subjective world.[1416] A major part of legal proceedings – especially in relation to sentencing – happens within the mind of the judge or the public prosecutor. An interview can be a method of accessing this hidden level of assessment. The interviews were semi-structured[1417] and steered by an interview guide.[1418] According to Charmaz, although researchers often choose intensive interviewing as a single method, it complements other methods, such as observations, surveys, and research participants' written accounts, very well.[1419]

[1416] See Kvale and Brinkmann (2014), 15, 17.

[1417] Semi-structured means that the researcher and participant(s) set some broad parameters for the discussion; see Crang and Cook (2007), 60.

[1418] The interview guide and the information material can be found in appendix 1.

[1419] See Charmaz (2006), 28.

3. Sampling[1420]

I attended a total of 32 juvenile trials as a participant observer in Sweden and Germany. My focus was mainly on the legal practitioners in the juvenile trial.[1421] I spent around eight weeks in total at the district court in Lund to conduct my observations in Sweden and four weeks at the juvenile court in Bremen, Germany. The observations in Sweden were divided into two stages. I started out with a three-week period observing juvenile trials in Sweden – a kind of pilot study. The reason I began my empirical studies in Sweden is that I am already familiar with the German juvenile court system. Consequently, I wanted to get to know the Swedish system before conducting my observations in Germany. After this first observational period, I analysed the findings and evaluated whether the focus I had chosen provided me with the information I needed. In the course of this analysis, I made some minor changes to my approach. Subsequently, I carried out the second period of observation, now in Germany, combined with the interviews. I visited the German district court in Bremen for four weeks. This shorter timeframe was motivated by the fact that the juvenile court in Bremen gets through more juvenile trials per day than the district court in Lund. Consequently, I was able to conduct my observation in Germany over a shorter period. Since I was by this point familiar with the Swedish system, I was able come to the German system with "fresh eyes", and this afforded me new insights and perspectives. After that, I returned to Sweden and conducted a third period of observation, combined with interviews. This allowed me to apply the knowledge gained from the previous observational periods in Sweden and Germany.

The reason I chose Bremen is mostly of a practical nature. In Germany, the juvenile trial is not open to the public. This means that I had to find a way to get access to the trials. According to §48 II s.3 JGG, the presiding judge can allow the presence of an auditor for special reasons. Since I have worked in

[1420] The term "sampling" should not be understood as suggesting a representative selection. I would like to remind the reader that my empirical research is of a qualitative character. The aim is to sample a case because it exemplifies a dimension of interest. My approach represents case sampling as a form of purposive sampling; see Bryman (2012), 419.

[1421] The ethnomethodological emphasis on relational structures clearly implies that the situated order of a social institution cannot be understood without taking into account all the relevant activities on the part of all the participants (and not just the attorney, as did Parsons (1949)). See Scheffler, Hannken-Illjes, and Kozin (2010), 3.

Bremen before,[1422] I am familiar with the setting and with many of the people. The juvenile judges active in Bremen agreed to allow me in their trials as an observer. I am aware of the fact that Lund and Bremen are not completely comparable (Lund is a classic university city with a population of approximately 112,000; Bremen (without Bremerhaven) has a population of around 550,000), but since I was chiefly concerned with the practitioners active in the courtroom, the population and the character of the cities are not particularly important factors. The practitioners are unlikely to be influenced by the size or social background of the cities themselves, and they possess similar levels of education. Furthermore, I have excluded the natures of the crimes and other extraneous factors from this study.

I conducted my observational study in the district courts (and not the county court) since I wanted to observe proceedings of first instance (and not proceedings of the appeal court). In Sweden, all proceedings start out on the level of the district court. In Germany, the jurisdiction of the juvenile court is two-tiered.[1423] However, because of the special structure of the juvenile court's jurisdiction, almost all cases start at the level of the district court, either in the single magistrate court or in the juvenile juror court. Consequently, my observation covered the vast majority of cases. However, I kept in mind that different levels of courts have distinct pathologies, which means that the seriousness of the offence affects the way court officials approach the trial.[1424]

I observed only one specific court in each country. I want to reiterate here that my study is of a qualitative and not a quantitative nature. Consequently, I do not claim that the particular ways in which the district court in Lund and the juvenile court in Bremen deal with young offenders are characteristic for all other cities in Sweden and in Germany. On the other hand, this study is neither an analysis of a unique institution nor an analysis of an institution in a unique setting. The focus is not on features that might be unique or even particularly distinctive in comparison to other district courts dealing with juveniles. I do hope, however, to convince the reader that specific factors influence court procedure and sentencing when the defendant is a young person and that this reflects the welfare/justice clash and justifies a view of the juvenile criminal justice system as an autopoietic sub-system.

[1422] I am a German lawyer and have worked as a specialized juvenile public prosecutor for several years in the cities of Bremen and Hamburg.

[1423] For more detail in terms of the court structure, see section 6.1.

[1424] Feeley (1992), xxvii.

In the interview study, I interviewed six judges (one male and two female in Sweden and one male and two female in Germany) and five public prosecutors (one male and one female in Sweden and two male and one female in Germany[1425]), mostly in their own offices. It was an immense advantage that I was already familiar with this social milieu, not only in terms of the language but also because the interviewees – first of all in Germany – considered me an "insider" and spoke more freely.[1426]

I focused on the judge and the public prosecutor as the representatives of the state and the legal system and as those responsible for sentencing. This reflects a formal view of the traditional institutions that are responsible for concluding proceedings in the legal sense.[1427] Including the public prosecutor broadens the picture as it is the public prosecutor who suggests the legal consequence in the final summation. The idea was to make the findings more reliable by adding another view to the overall picture. However, I decided not to include diversion decisions taken by the public prosecutor in the observational study. The reason for this is practical. The trial is what the public can see and take part in; diversion happens in the prosecutor's office with no public audience. Furthermore, many (if not most) decisions to divert a case only take place "on paper", without a personal meeting between the public prosecutor and the young offender. Nevertheless, the interviews did reflect some elements of what goes on in sentencing decisions performed by public prosecutors in the form of a diversion, since the considerations taken up in the summation in court are often the same as the considerations relevant in decisions about whether a case should be prosecuted or diverted.

Furthermore, I did not include social services or the police in the investigation and the interview study, even though most of the criminal sentences for young offenders are carried out by social services. The enforcement is more of a practical question, and it falls outside of the framework I have chosen to focus on in this study. Apart from that, others have already provided accounts of the

[1425] The reason I interviewed only two public prosecutors in Sweden is that the interview study had reached a point at which I was no longer making any new discoveries through the interviews; I had reached a point of saturation.

[1426] The reason I might be considered an "insider" is that I am a German lawyer and have worked as a specialized juvenile public prosecutor for several years.

[1427] This is the reason I chose to leave out the defence attorneys, who represent a client and thereby take a side.

role of social services in the Swedish juvenile criminal trial and the way they have to manoeuvre between welfare and justice.[1428]

4. Tools

One of the key features of my approach was the use of field notes.[1429] I tried to record everything that happened during a day in a diary and structured the notes in the evening or at least every other day. The more time I spent at court, the more structured my notes became.

Furthermore, when conducting the interviews with the judges and public prosecutors, I followed a field guide. The interviews were – as previously mentioned – semi-structured. Prior to each interview, I explained the project and the anonymity of the interview. The interviews were taped. Later on, I transcribed the interviews and translated them into English.

5. Defining my role

The significant role of the observer in participant observation must be acknowledged. The observer is the research tool.[1430] Because of the limits to objectivity[1431] that flow from this fact, it is crucial to have a clear picture of the

[1428] See Tärnfalk (2007) and, from a more practical angle, Tärnfalk (2014). Lupita Svensson, *Häktad eller omedelbart omhändertagen?: en studie om akuta frihetsberövanden av unga lagöverträdare* (Stockholms universitet 2006) presented similar findings in her dissertation.

[1429] The necessity of this tool is emphasized by DeWalt and DeWalt (2011): "While the participant observer is learning to become a participant, s/he is trying to identify the specific actions and products of action that are indictors of key concepts and components of a conceptual framework. For this reason, careful observations and the recording of observations in field notes are critical elements of the operationalization of the conceptual framework" (81).

[1430] Ibid., 111.

[1431] It should be observed that the term "objectivity" is already very difficult to define. The objectivity of the judge, for example, is only a construction, as Streng indicated in 1984. On the subject of objectivity, see Moa Bladini, *I Objektivitetens Sken – en kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande brottsmål* (Malmö: Makadam förlag, 2013). I use the term as a description of how I tried to detach myself as

observer's role in the research design. The general problem of being part of the environment one is trying to observe is inherent to participant observation. Paul emphasized this as early as 1953:

> Participation implies emotional involvement; observation requires detachment. It is a strain to try to sympathize with others and at the same time strive for scientific objectivity.[1432]

Exploring the dynamic tension between participation and observation is critically important. One has to stay aware of "the others" and "the self".[1433] Nevertheless, DeWalt and DeWalt say that in their own experience, despite differences in theoretical perspectives, gender, ethnicity, and other personal factors, the broad-brush descriptive observations of individual researchers concerning human behaviour are relatively consistent.[1434]

According to Spradley's typology of a continuum of "degree of participation" of researchers,[1435] I would place myself somewhere between passive participation and moderate participation. I began in the role of a "fly on the wall", passive participation, but this role changed when I got more engaged with the

---

much as possible from personal views, but I acknowledge the fact that I will never be free of all the limitations stemming from my personal experience, social background, education, nationality, and so on. What I present in my empirical study is therefore some kind of "subjective objectivity" (the term is borrowed from Dworkin; see footnote 382). Consequently, I see myself as an interpretivist researcher (see Webley (2010), 931). In my view, Sarah Hamilton, *The Two-Headed Household: Gender and Rural Development in the Ecuadorean Andes* (Pittsburgh: University of Pittsburgh Press, 1998), captures these thoughts quite well: "The ethnographic information I collected is a social construct; as an actor, as well as an observer, I participated in the creation of that information. I have placed myself in this book's narrative action and have described relationships with informants and institutional affiliations that limit the field of action I was able to encompass" (33).

[1432] Benjamin David Paul, *Interview techniques and field relationships* (Chicago: University of Chicago Press, 1953), 69.

[1433] See Barbara Tedlock, "From participant observation to the observation of participation: The emergence of narrative ethnography," (*Journal of Anthropological Research* 1991, Vol.47, No.1: 69–94), 69. To put this differently, it can be stated that "pure observation seeks to remove the researcher from the scene of actions and behaviors, while pure participation immerses the researcher in the scene of actions and behaviors" (see DeWalt and DeWalt (2011), 39).

[1434] See DeWalt and DeWalt (2011), 37.

[1435] See James P. Spradley, *Participant Observation* (New York: Holt, Rinehart and Winston, 1980), 58–62.

courtroom personnel.[1436] A setting of pure observation – the isolation of the observer and the observed object[1437] – with absolute non-participation might have its advantages but such a setup was impossible in my case. There is no way to observe a courtroom and not be visible. In practice, this did not pose a problem. The court encounters were very much part of a closed environment: practitioners navigate in their spaces and use their language, etc., and are not disturbed by the presence of observers. This comes with the territory, since a courtroom is generally open to the public. The legal professionals and the representatives from social services present in the juvenile courtroom were used to a public audience and this did not disturb them. This means it is appropriate to consider the juvenile proceedings and the sentencing processes I was observing as not being influenced by my attendance and observing activity. This also means it is unlikely that members of the court team or other participants acted in a manner they thought desirable to the researcher, which is a potential issue in observational studies. Consequently, it is unlikely that the influence of any form of observer effect had a substantial impact on the results. However, I cannot ignore the fact that, because of my personal background, I might be somehow more involved than an absolutely unbiased observer. Nevertheless, I tried to distance myself from my prior personal observations and experience, and stayed aware of my possible limitations. And it should be noted that everybody, even an unattached observer, becomes part of the scene as time goes by.[1438]

On the other hand, it can be considered a significant – if not indispensable – advantage to be familiar with some courtroom practices: the legal language and terms used, and the knowledge of the "silent conversation" taking place in the court encounters. Wandall points out quite rightly that "communication in the courtroom is heavily legally structured. Yet courtroom persons hardly ever mention a statute and hardly ever a legal principle".[1439] Cottorrell emphasizes that it is hard to imagine anyone functioning consistently and permanently as a Hartian "external observer" of legal rules without any (probably considerable)

[1436] James P. Spradley, *You Owe Yourself a Drunk: An Ethnography of Urban Nomads* (Boston: Little, Brown 1970), had this experience when he acted as an observer of the Seattle Criminal Court System.

[1437] See Robert F. Bales, *Interaction Process Analysis – A Method for the Study of Small Groups* (Chicago: The University of Chicago Press, 1950), 5, who created a study setup with a one-way mirror between the observer and the observed subjects to reduce disturbance.

[1438] See Wandall (2008), 175–7.

[1439] Ibid., 179.

normative understanding.[1440] He actually acknowledges the importance of overcoming the old analytical distinctions between participation and observation, which are often unhelpful if the diversity of legal experience is to be recognized.[1441] Following this line of thought, the fact that I am also a lawyer with practical experience might put me on an equal level in the eyes of the courtroom participants. This can also be considered as an advantage, especially in the interview situations.

Furthermore, I tried to avoid what Nelken calls ethnocentrism.[1442] He describes this pitfall as "confusing the familiar with the necessary". I am well aware of the problem that I observed the Swedish system "with German eyes",[1443] but this was also an advantage because I saw patterns invisible to Swedes who might have been too caught up in their own system. The same was true for the German system: my previous observations in the Swedish court enabled me to see aspects of the German juvenile criminal justice system I had never noticed before. Consequently, as I pointed out before, the best I could do was to stay aware of my limitations and reflect on them.[1444] Again, I am well aware of the fact that my aim cannot be to present an objective picture – but this is not the aim of qualitative research.

[1440] See Cottorrell (2008), 125.

[1441] Ibid., 127.

[1442] See Nelken (2010), 18ff.

[1443] Muncie and Goldson (2006) emphasize that a widely acknowledged problem in comparative analysis is that of interpreting the experience of other countries through the experiential lens of those countries with which the researcher is most familiar (201).

[1444] Crang and Cook (2007) claim that "the task for all researchers is to recognize and come to terms with their/our partial and situated 'subjectivity' rather than aspire to an impossibly distanced 'objectivity'" (13). Nelken (2010) expresses the same thought in more general terms, not only with reference to participant observation, by pointing out that "whatever choice is made, the methods we choose and the way we use them are not only a means to obtaining information but are also intimately linked to the substance of what we find or think we find" (100).

6. Analysing

When analysing the empirical research, I used thematic analysis as an analytical tool. In this, I was inspired by Braun and Clarke, who employ this method in the field of psychology.[1445] Thematic analysis is a method for identifying, analysing, and reporting patterns (themes) within data.[1446] Braun and Clarke describe thematic analysis as a foundational method for qualitative analysis and emphasize its flexibility and its ability to provide a rich, detailed, and complex account of data. It can be a method that works both to reflect reality and to unpick or unravel the surface of reality.[1447] However, there is no straightforward agreement about what thematic analysis is or how you go about doing it. I applied a deductive approach (or "theoretical" thematic analysis), meaning that my analysis tends to be driven by my theoretical or analytic interest in the area. In other words, when searching for themes in the data, I had both my research questions and the autopoietic approach in mind. A theme captures something important about the data in relation to the research question, and represents some level of *patterned* response or meaning within the data set.[1448] My overarching theme was "youth", divided up into two sub-themes under the broad headings of "welfare" and "justice". The justice theme – what I have referred to before as justice considerations – consists of expressions of the rule of law and the principle of a fair trial, for example considerations of proportionality, equality, predictability, punishment, etc. The welfare theme aligns with what I have referred to as welfare considerations. In other words, I examined how the circumstance that the offender is a young person played out in the data in ways that reflect the welfare/justice clash.

I searched, for instance, for communications containing words like "immature", "young", "education", "future", "developing", "the best interests of the child", and so on, which reflect the welfare theme, and for communications containing words like "proportionality" or "punishment", reflecting the justice theme. However, I did not restrict this study to the semantic level, but approached my material from a latent or interpretative level. In terms of the justice theme, for example, I focused on an individualized contra proportionality approach and

[1445] See Braun and Clarke (2006).

[1446] Ibid., 79.

[1447] Ibid., 81.

[1448] Ibid., 82.

looked for traces of the impact of the rule of law. Here, the framework was more than purely linguistic: I also tried to extract the courtroom dynamics, reflected in the language, the communication, and the encounters in the juvenile trial. What I wanted to find were repeated patterns that expressed the balancing act between the welfare and justice themes. Which of these themes were expressed in the behaviour and actions of the courtroom practitioners?

7. Reliability and validity – or not?

One major critique of the method of participant observation – apart from its being too subjective – is that it is not replicable. In other words, the reliability of the research is questioned. But I dispute the use of these terms in relation to qualitative studies. Reliability and validity are terms closely connected with quantitative research. They derive from positivist rather than interpretivist conceptions of data and data analysis.[1449] But the aim of qualitative studies is different. Qualitative research aims to generalize to theory rather than to populations. What I was looking for was insight into the arena of the juvenile trial and responses from legal professionals (through the interviews) to theorize around this insight. This is interpretative research, which means that the sample size is not relevant to the outcome. Webley says that "qualitative studies may not (usually) provide systematic generalizable findings; but often problems within the legal system, best practice insights and the effect of policy shifts can only be examined using in-depth, qualitative methods".[1450] It is the quality of the theoretical inferences that are made from qualitative data that is crucial to the assessment of a generalization.[1451] This is how I respond to the critique that the results of participant observation are often drawn from a rather small sample and therefore cannot be generalized. I think the terms "reliability and validity" must be kept apart from qualitative studies.[1452] My research presents a unique group of people at a specific moment in time. The idea is to show that a certain

[1449] See Webley (2010), 931.

[1450] Ibid., 948.

[1451] See Bryman (2012), 406.

[1452] Nevertheless, I attended a number of trials. When repeatedly participating in similar events over the course of fieldwork, DeWalt and DeWalt (2011) claim that it is possible to test reliability (113). Thus, I cross-checked my findings by employing different methods, the observations in the courtroom and the interviews, which present different perspectives on the same phenomenon.

practice takes place at a specific time and place, but this does not mean that it must *always* take place in this way. In this light, my approach of drawing conclusions from my working notes is logically consistent.

Bibliography

Books, Book Chapters and Articles

Adestam, Johan. *Den dokumentvillkorade garantin*. Stockholm: Karnov Group Sweden AB, 2014.

Albrecht, Peter-Alexis and Stern, Steffen. "Verteidigung in Jugendstrafsachen – Buchbesprechung der Dokumentation des Bundesministers der Justiz, Bonn 1987". *Strafverteidiger* 1988: 410.

Albrecht, Hans-Jörg. "Juvenile Crime and Juvenile Law in the Federal Republic of Germany." In *Juvenile Justice Systems – International Perspectives,* ed. Winterdyk, John, 171-207. 2nd Edition. Toronto: Canadian Scholars' Press, 2002.

Albrecht, Hans-Jörg and Kilchling, Michael (eds.). *Jugendstrafrecht in Europa*. Freiburg im Breisgau: Max-Planck-Institut für ausländisches und internationales Strafrecht, 2002.

Albrecht, Hans-Jörg. "Youth justice in Germany." *Crime and Justice* 2004, Vol.31: 443-93.

Albrecht, Peter-Alexis. *Jugendstrafrecht*. 3rd Edition. München: Verlag C.H.Beck, 2000.

Alexy, Robert. *Theorie der juristischen Argumentation*. 3rd Edition. Frankfurt a.M.: Suhrkamp, 1996.

Andreassen, Tore. *Institutionsbehandling av ungdomar. Vad säger forskningen?* Stockholm: Förlagshuset Gothia AB, Centrum för utvärdering av socialt arbete, Statens institutionsstyrelse, 2003.

Andersson, Ulrika and Mattsson, Titti. *Ungdomar i gäng – social- och straffrättsliga reaktioner*. Malmö: Liber AB, 2011.

Androulakis, Nikolaos K. "Über den Primat der Strafe." *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 1996, Vol.108, No.2: 300-32.

Anleu Roach, Sharyn and Mack, Kathy. "Magistrates' everyday work and emotional labour." *Journal of Law and Society* 2005, Vol. 32, No. 4: 590-614.

Arnett, Jeffrey. "Reckless behavior in adolescence: A developmental perspective." *Developmental Review* 1992, Vol.12, No.4: 339-73.

Aronsson, Karin, Jönsson, Linda, and Linell, Per. ”The courtroom hearing as a middle ground: Speech accommodation by lawyers and defendants.” *Journal of Language and Social Psychology* 1987, Vol.6, No.2: 99-115.

Arsanjani, Mahnoush H. and Reisman, W. Michael. “The Law-in-Action of the International Criminal Court.” *The American Journal of International Law* 2005, Vol. 99, No 2: 385-403.

Ashworth, Andrew. “Techniques for reducing subjective disparity in sentencing.” In *Disparities in Sentencing: Causes and Solutions,* Collected Studies in Criminological Research, Vol. XXVI, 101-33. Strasbourg, 1989.

Ashworth, Andrew. *Sentencing and Criminal Justice.* Cambridge: Cambridge University Press, 2010.

Asp, Petter, Ulväng, Magnus, and Jareborg, Nils. *Kriminalrättens Grunder*. 2nd Edition. Uppsala: Iustus Förlag AB, 2013.

Asp, Petter. “Barn(straff)rätt”. In *Barnrätt – En antologi,* eds. Ann-Christin Cederborg and Wiweka Warnling-Nerep, 68-85. Stockholm: Norstedts Juridik, 2014.

Asp, Petter. ”Enighet om tumregeln.” *Svensk Juristtidning (SvJT)* 2015: 292-96.

Asp, Petter. “Straffrätten – i går, i dag och i morgon”. In *Svensk juristtidning 100 år,* eds. Stefan Strömberg, Charlotte Kugelberg, Petter Asp, Anders Eka, Boel Flodgren, Mikael Mellqvist, 138-61. Uppsala: Iustus förlag, 2016.

Atkinson, Maxwell and Drew, Paul. *Order in Court – The Organization of Verbal Interaction in Judicial Settings*. London: Humanities Press (Macmillan Press), 1979.

Bales, Robert F. *Interaction Process Analysis – A Method for the Study of Small Groups*. Chicago: The University of Chicago Press, 1950.

Banakar, Reza and Travers, Max (eds.). *Law and Social Theory*. 2nd Edition. Oxford: Hart Publishing, 2013.

Banakar, Reza. *Normativity in Legal Sociology – Methodological Reflections on Law and Regulation in Late Modernity*. Heidelberg and New York: Springer, 2015.

Bankowski, Zenon. “How does it Feel to be on Your Own? The Person in the Sight of Autopoiesis." In *Law as Communication*, ed. Nelken, David, 63-80. Aldershot: Dartmouth Publishing Company, 1996.

Baumhöfener, Jesko. *Jugendstrafverteidiger – Eine Untersuchung in Hinblick auf §74 JGG.* DVJJ Schriftenreihe der Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V. Mönchengladbach: Forum Verlag Godesberg, 2007.

Beccaria, Cesare. *Dei delitti e delle penne - Om brott och straff.* Translated by Paul Enoksson. Stockholm and Rom 1977.

Belfrage, Henrik. "Recidivism among rapists in Sweden who have undergone forensic psychiatric examinations." *The Journal of Forensic Psychiatry* 1994, Vol. 5, No.1: 151-59.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation (Chapters I–V)*. Hoboken: Blackwell Publishing Ltd, 1972.

Berggren, Nils-Olof, Bäcklund, Agneta, Munck, Johan, Victor, Dag, and Wersäll, Fredrik. *Kommentar till Brottsbalken (25 – 38 kap): om påföljderna*. Supplement 8 January 2016. Stockholm: Norstedts Blå Bibliotek, 2016.

Bernard, Thomas J. and Kurlychek, Megan C. *The Cycle of Juvenile Justice*. 2nd Edition. New York: Oxford University Press, 2010.

Beulke, Werner. *Strafprozessrecht*. 13th Edition. Heidelberg: C.F. Müller Verlag, 2016.

Beuscher, Jacob. "Law-in-Action research in rural areas of the United States." *Wisconsin Law Review* 1969: 757-72.

Bereswill, Mechthild and Neuber, Anke. "Jugendkriminalität und Männlichkeit." In *Handbuch Jugendkriminalität – Kriminologie und Sozialpädagogik im Dialog,* eds. Dollinger, Bernd and Schmidt-Semisch, Henning, 307-17. 2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011.

Birkmeyer, Karl von. *Was lässt von Liszt vom Strafrecht übrig?: eine Warnung vor der mordernen Richtung im Strafrecht*. München: C.H. Beck, 1907.

Bladini, Moa. *I Objektivitetens Sken – en kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande brottsmål*. Malmö: Makadam förlag, 2013.

Blakemore, Sarah-Jayne. "The social brain in adolescence." *Nature Reviews Neuroscience* 2008, Vol.9: 267-77.

Blakemore, Sarah-Jayne and Robbins, Trevor W. "Decision-making in the adolescent brain." *Nature neuroscience* 2012, Vol.15, no.9: 1184-91.

Blumberg, Abraham. "The practice of Law as a Confidence Game: Organizational Cooperation of a Profession." *Law and Society Review* 1967, Vol.1: 15-39.

Blumberg, Abraham. *Criminal Justice Issues and Ironies*. 2nd Edition. New York: Watts, 1979.

Bogdan, Michael. *Comparative Law.* Göteborg: Kluwer Norstedts Juridik Tano, 1994.

Bogdan, Michael. *Concise introduction to comparative law*. Groningen: Europa Law Publishing, 2013.

Bohnert, Joachim. "Strafe und Erziehung im Jugendstrafrecht." *Juristenzeitung (JZ)* 1983: 517-23.

Borgeke, Martin and Månsson, Catharina. ”Den nya lagstiftningen om påföljder för unga lagöverträdare.” *Svensk Juristtidning (SvJT)* 2007: 181-203.

Borgeke, Martin. *Att bestämma påföljd för brott*. Stockholm: Norstedts Juridik AB, 2012.

Borgeke, Martin, Månsson, Catherina, and Sterzel, Georg. *Studier rörande påföljdspraxis med mera*. 5th Edition. Stockholm: Jure Förlag AB, 2013.

Bortz, Jürgen and Döring, Nicola. *Forschungsmethoden und Evaluation für Human- und Sozialwissenschaftler: mit 70 Tabellen*. 3rd Edition. Heidelberg and New York: Springer, 2002.

Bramstång, Nils Åke Gunnar. *Förutsättningar för barnavårdsnämnds ingripande mot asocial ungdom*. Lund: Gleerups, 1964.

Braun, Virginia and Clarke, Victoria. “Using thematic analysis in psychology.” *Qualitative Research in Psychology* 2006, Vol.3, No.2: 77-101.

Brunner, Rudolf, and Dieter Dölling. *Jugendgerichtsgesetz: Kommentar*. 12th Edition. Berlin: Walter de Gruyter, 2011.

Bruns, Hans Jürgen. *Alte Grundfragen und neue Entwicklungstendenzen im modernen Strafzumessungsrecht.* Festschrift für Hans Welzel zum 70, 1974: 739-60.

Bryman, Alan. *Social Research Methods*. 4th Edition. Oxford: Oxford University Press, 2012.

Burman, Monica. “Ungdomspåföljder och barns rättigheter”. In *Svensk juristtidning 100 år,* eds. Stefan Strömberg, Charlotte Kugelberg, Petter Asp, Anders Eka, Boel Flodgren, Mikael Mellqvist, 162-75. Uppsala: Iustus förlag, 2016.

Bussani, Mauro and Mattei, Ugo (eds.). *The Cambridge Companion to Comparative Law*. Cambridge: Cambridge University Press, 2012.

Böhm, Alexander and Feuerhelm, Wolfgang. *Einführung in das Jugendstrafrecht*. 4th Edition. München: Verlag C.H. Beck, 2004.

Börjeson, Bengt. *Om påföljders verkningar- en undersökning av prognosen för unga lagöverträdare efter olika slag av behandling*. 4th Edition. Stockholm: Almqvist & Wiksell Förlag AB, 1966.

Cane, Peter and Kritzer, Herbert M. (eds.). *The Oxford Handbook of Empirical Legal Research*. Oxford: Oxford University Press, 2010.

Carroll, Jennifer, Meehan, Emer, and McPhillips, Sinéad. *The Children Court: A National Study*. Dublin: Association for Criminal Justice Research and Development, 2007.

Cavadino, Michael and Dignan, James. *Penal Systems. A Comparative Approach*. London: Sage, 2006.

Casey, B.J., Tottenham, Nim, Liston, Conor, and Durston, Sarah. "Imaging the developing brain: what have we learned about cognitive development?." *Trends in Cognitive Sciences* 2005, Vol.9, No.3: 104-10.

Charmaz, Kathy. *Constructing Grounded Theory.* London: Sage, 2006.

Chesney-Lind, Meda and Shelden, Randall G. *Girls, Delinquency, and Juvenile Justice*. 2nd Edition. Belmont: Wadsworth Publishing Co, 1998.

Chesney-Lind, Meda. "What about the girls? Delinquency programming as if gender mattered." *Corrections Today* 2001, Vol. 63, No.1: 38-45.

Cicourel, Aaron V. *The Social Organization of Juvenile Justice*. New York: Transaction Publishers, 1967.

Cohnitz, Wolf- Günther von. *Der Verteidiger in Jugendsachen*. Neuwied am Rhein: Luchterhand, 1957.

Corrado, Raymond and Mathesius, Jeffrey. "Developmental Psycho-Neurological Research Trends and Their Importance for Reassessing Key Decision-Making Assumptions for Children, Adolescents, and Young Adults in Juvenile/Youth and Adult Criminal Justice Systems." *Bergen Journal of Criminal Law and Criminal Justice* 2014, Vol. 2, No. 2: 141-63.

Corriero, Michael A. *Judging Children as Children – A Proposal for a Juvenile Justice System.* Philadephia: Temple University Press, 2006.

Cotterrell, Roger. "The Representation of Law's Autonomy in Autopoiesis Theory." In *Living law: studies in legal and social theory*, ed. Cotterrell, Roger, 121-44. Surrey: Ashgate, 2008.

Crang, Mike and Cook, Ian. *Doing Ethnographies*. London: Sage, 2007.

Dahl, Tove Stang. *Barnevern og Samfunnsvern*. Oslo: Pax förlag, 1978.

Dalteg, Arne. *Avancerade Unga Lagöverträdare*. Malmö: Diss. Psykiatriska Institutionen, 1990.

DeWalt, Kathleen M. and DeWalt, Billie R. *Participant Observation – A Guide for Fieldworkers*. 2nd Edition. Plymouth, Altamira Press, 2011.

Diemer, Herbert, Schatz, Holger and Sonnen, Bernd-Rüdiger. *Jugendgerichtsgesetz mit Jugendstrafvollzugsgesetzen*. 7th Edition. Heidelberg: C.F. Müller, 2015.

Diesen, Christian, Lernestedt, Claes, Lindholm, Torun, and Pettersson, Tove. *Likhet inför lagen*. Falun: Natur och kultur, 2005.

Dollinger, Bernd and Schmidt-Semisch, Henning (eds.). *Handbuch Jugendkriminalität - Kriminologie und Sozialpädagogik im Dialog*. 2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011.

Drews, Nele. "Anspruch und Wirklichkeit von § 37 JGG." *Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2005, No.4: 409-14.

Drost, Heinrich. *Das Ermessen des Strafrichters. Zugleich ein Beitrag zu dem allgemeinen Problem Gesetz und Richteramt.* Berlin: Carl Heymanns Verlag, 1930.

Dubber, Markus Dirk. "Comparative Criminal Law, Chapter 40." In *The Oxford Handbook of Comparative Law*, eds. Reimann, Mathias and Zimmermann, Reinhard, 1287-326. Oxford: Oxford University Press, 2008.

Dubber, Markus Dirk, and Hörnle, Tatjana. *Criminal Law – A Comparative Approach*. Oxford: Oxford University Press, 2014.

Dupuy, Jean-Pierre. "On the Supposed Closure of Normative Systems." In *Autopoietic Law: A New Approach to Law and Society,* ed. Teubner, Gunther, 51-69. Berlin: Walter de Gruyter, 1988.

Dworkin, Ronald. *Taking Rights Seriously.* Cambridge: Harvard University Press, 1978.

Dölling, Dieter. *Die Zweiteilung der Hauptverhandlung: eine Erprobung vor Einzelrichtern und Schöffengerichten.* Berlin: Schwartz, 1978.

Dölling, Dieter. "Besonderheiten des Jugendstrafrechts." In *Handbuch der forensischen Psychiatrie*, ed. Dölling, Dieter, Leygraf, Norbert and Sass, Henning, 435-510, Darmstadt: Steinkopff Verlag, 2007.

Dörner, Christine. "100 Jahre Diskussion des Strafmündigkeitsalters oder: Die Hartnäckigkeit der Maxime ‚Strafe muß sein'." *DVJJ-Journal* 1992, Vol. 3, No.193: 175-84.

Dünkel, Frieder, van Kalmthout, Anton, and Schüler-Springorum, Horst (eds.). *Entwicklungstendenzen und Reformstrategien im Jugendstrafrecht im europäischen Vergleich.* Godesberg: Forum Verlag, 1997.

Dünkel, Frieder. "Freiheitsentzug für junge Rechtsbrecher – aktuelle Tendenzen im internationalen Vergleich." *Recht und Politik* 1989, Vol.25: 27-35.

Dünkel, Frieder. "Juvenile Justice in Germany: Between Welfare and Justice." In *International Handbook of Juvenile Justice*, ed. Junger-Tas, Josine, 225-62, Dordrecht: Springer, 2006.

Dünkel, Frieder. "Young People's Rights: The Role of the Council of Europe." in *Reforming Juvenile Justice*, eds. Junger-Tas, Josine and Dünkel, Frieder, 33-44, New York: Springer, 2009.

Dünkel, Frieder. "Germany." In *Juvenile Justice Systems in Europe – Current Situation and Reform Developments*, eds. Dünkel, Frieder, Grzywa, Joanna, Horsfield, Philip, and Pruin, Ineke, 547-622, Vol.2. Godeberg: Forum Verlag, 2010.

Dünkel, Frieder, Grzywa, Joanna, Horsfield, Philip and Pruin, Ineke (eds.). *Juvenile Justice Systems in Europe- Current Situation and Reform Developments*. Godesberg: Forum Verlag, 2010.

Easton, Susan and Piper, Christine. *Sentencing and Punishment – The Quest for Justice*. 2nd Edition. Oxford: Oxford University Press, 2012.

Ehrlich, Eugen. *Principles of the Sociology of Law*. Cambridge: Harvard University Press, 1936, first published 1913, second printing 2002.

Eisenberg, Ulrich. "'Feindlichen Übernahme' im Jugendstrafrecht? Zur Situation eines politisch aufgeladenen Rechtsgebiets." *Neue Juristische Wochenschrift (NJW)* 2010: 1507-09.

Eisenberg, Ulrich. *JGG – Jugendgerichtsgesetz mit Erläuterungen*. 18th Edition. München: C.H. Beck, 2016.

Eisenhardt, Thilo. *Der Jugendarrest: eine Chance der Kriminalprävention*. Vol. 2. Frankfurt a.M.: Lang, 2010.

Eisenstein, James and Jacob, Herbert. *Felony Justice: An Organizational Analysis of Criminal Courts*. Boston and Toronto: Little, Brown and Company, 1977.

Ekelöf, Per Olof, Edelstam, Henrik, Heuman, Lars, and Pauli, Mikael. *Rättegång första häftet*. 9th Edition. Stockholm: Norstedts Juridik AB, 2016.

Ekelöf, Per Olof, Edelstam, Henrik, and Heumann, Lars. *Rättegång fjärde häftet*. 7th Edition. Stockholm: Norstedts Juridik AB, 2009.

Ekelöf, Per Olof, Edelstam, Henrik and Boman, Robert. *Rättegång femte häftet*. 7th Edition. Stockholm: Norstedts Juridik AB, 2007.

Elsner, Beatrix and Peters, Julia. "The Prosecution Service Function within the German Criminal Justice System." In *Coping with Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe*, eds. Jehle, Jörg-Martin and Wade, Marianne, 207-36. Berlin: Springer, 2006.

Emerson, Robert M. *Judging Delinquents – Context and Process in Juvenile Court*. New Brunswick and London: Aldine Transaction, 1969 (first paperback printing 2008).

Engisch, Karl. *Einführung in das juristische Denken*. 11th Edition. Stuttgart: W. Kohlhammer, 2010.

Esser, Josef. *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis*. 2nd Edition. Frankfurt: Athenäum Verlag, 1972.

Estrada, Felipe, and Flyghet, Janne. *Den svenska ungdomsbrottsligheten*. 3rd Edition. Lund: Studentlitteratur, 2013.

Ewald, Francois. "The Law of Law." In *Autopoietic Law: A New Approach to Law and Society*, ed. Gunther Teubner, 36-50. Berlin: Walter de Gruyter, 1988.

Fangen, Katrine and Sellerberg, Ann-Mari. *Många möjliga metoder.* Lund: Studentliteratur, 2011.

Farrington, David P. ”Longitudinal and Experimental Research in Criminology.” *Crime and Justice* 2013, Vol.42, No.1: 453-527.

Fazel, Seena, Doll, Helen, and Långström, Niklas. “Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys.“ *Journal of the American Academy of Child & Adolescent Psychiatry* 2008, Vol.47, No.9: 1010-9.

Febbrajo, Alberto. “Introduction.” In *Law and Intersystemic Communication: Understanding ‘Structural Coupling’*, ed. Febbrajo, Alberto, 1-14. Farnham: Ashgate Publishing Ltd., 2013.

Feeley, Malcolm M. *The Process Is the Punishment: Handling Cases in a Lower Criminal Court*. New York: Russel Sage Foundation, 1992.

Fielding, Nigel G. “Lay people in court: the experience of defendants, eyewitnesses and victims.” *British Journal of Sociology* 2013, Vol.64, No. 2: 287-307.

Fionda, Julia. *Devils and Angels – Youth policy and youth crime*”. Oxford: Hart Publishing, 2005.

Fionda, Julia. “Children, young people and the law.” In *Children and young people’s worlds*, eds. Montgomery, Heather and Kellett, Mary, 127-43, Bristol: The Policy Press, 2009.

Fletcher, George P. *Basic Concepts of Criminal Law*. New York: Oxford University Press, 1998.

Forsman, Jaakko. *Anteckningar enligt professor Jaakko Forsmans föreläsningar öfver straffrättens allmänna läror med särskild hänsyn till strafflagen af den 19 december 1889.* Med tillstånd af föreläsaren utgifna af Lars Wasastjerna. 3rd Edition. Helsingfors 1930.

Foucault, Michel. *Diskursens ordning*. Stehad: Brutus Östlings, 1993.

Frankenberg, Günter. “Critical Comparison: Re-thinking Comparative Law.” *Harvard International Law Journal* 1985, Vol. 26: 411-55.

Frisch, Wolfgang. “Ermessen, unbestimmter Begriff und ”Beurteilungsspielraum” im Strafrecht.” *Neue Juristische Wochenschrift (NJW)* 1973: 1345ff.

Galligan, Denis J. ”Legal Theory and Empirical Research.” In *The Oxford Handbook of Empirical Legal Research*, ed. Cane, Peter and Kritzer, Herbert M., 976-1001. Oxford: Oxford University Press, 2010.

Geiling, Birgit. *Påföljder för unga lagöverträdare i Sverige och i Tyskland*. Stockholm: Stockholms universitet, 1981.

Gerken, Jutta and Schumann, Karl. *Ein trojanisches Pferd im Rechtsstaat: der Erziehungsgedanke in der Jugendgerichtspraxis*. Pfaffenweiler: Centaurus-Verlag-Gesellschaft, 1988.

Goldson, Barry. "'Children in need' or 'young offenders'? Hardening ideology, organizational change and new challenges for social work with children in trouble." *Child and Family Social Work* 2000, Vol.5: 255-65.

Grande, Elisabetta. "Comparative criminal justice." In *The Cambridge Companion to Comparative Law*, eds. Bussani, Mauro and Mattei, Ugo, 191-209. Cambridge: Cambridge University Press, 2012.

Greenberger, Ellen and Sorensen, Aage B. "Towards a concept of psychosocial maturity." *Journal of Youth and Adolescence* 1974, Vol.3: 329-58.

Griffiths, John. "What is Legal Pluralism?." *The Journal of Legal Pluralism and unofficial Law* 1986, Vol. 18, No. 24: 1-55.

Grunewald, Ralph. "Der Individualisierungsauftrag des Jugendstrafrechts – Über die Reformbedürftigkeit des JGG." *Neue Zeitschrift für Strafrecht (NStZ)* 2002: 452-58.

Grunewald, Ralph. "Die besondere Bedeutung des Erziehungsgedankens im Jugendstrafverfahren." *Neue Juristische Wochenschrift (NJW)* 2003: 1995-97.

Gräns, Minna. "Om interaktiv rättsdogmatik." In *Interaktiv rättsvetenskap – en antologi*, eds. Gräns, Minna and Westerlund Staffan, 59-76. Uppsala Universitet, 2006.

Gröning, Linda. "Straffrätten I verkligheten eller som verkligheten? Reflektioner kring straffrättsdogmatikens empiriska förankring." In *Festskrift till Per Ole Träskman*, eds. Andersson, Ulrika, Wong, Christoffer, and Örnemark Hansen, Helén, 217-28. Stockholm, Norstedts Juridik, 2011.

Gröning, Linda. "Kriminell Lavalder – noen utgangspunkter." *Tidsskrift for Strafferett* 2014, No.4: 314-32.

Gröning, Linda. "Tilregnelighet och utilrenelighet: begreper og regler." *Nordisk Tidsskrift for Kriminalvidenskab* 2015: 112-48.

Grothe Nielsen, Beth. "Mindreårige lovovertraedere mellem to ideologier: den strafferetlige og den socialretlige." *Retfaerd* 1983, No.24: 66-88.

Guggenheim, Martin. "The right to be represented but not heard: reflections on legal representation for children." *New York University Law Review* 1984: 76-156.

Guyer, Amanda E. and McClure-Tone, Erin B. and Shiffrin, Nina D. and Pine, Daniel S. and Nelson, Eric E. "Probing the neural correlates of anticipated peer evaluation in adolescence." *Child Development* 2009: 1000–15.

Haferkamp, Hans-Peter. "Enzyklopädie der Rechtsphilosophie." 2011. http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/105-jurisprudence-of-concepts (last visited 2017-01-20).

Hald, Camilla. *Web without a Weaver: On the Becoming of Knowledge. A Study of Criminal Investigations in the Danish Police.* Boca Raton: Universal-Publishers, 2011.

Hamilton, Sarah. *The Two-Headed Household: Gender and Rural Development in the Ecuadorean Andes*. Pittsburgh: University of Pittsburgh Press, 1998.

Hart, H.L.A. *The Concept of Law.* 3rd Edition. Oxford: Clarendon Press, 2012: 193-200.

Hassemer, Winfried. "Die Formalisierung der Strafzumessungsentscheidung." *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 1978: 64-100.

Hassemer, Raimund. "Einige empirische Ergebnisse zum Unterschied zwischen der Herstellung und der Darstellung richterlicher Sanktionenentscheidungen." *Monatsschrift für Kriminologie und Strafechtsreform* 1983*,* Vol.66, No. 1: 26-39.

Haverkamp, Rita. "Sweden." In *Juvenile Justice Systems in Europe – Current Situation and Reform Developments*, Vol. 3, eds. Dünkel, Frieder, Grzywa, Joanna, Horsfield, Philip, and Pruin, Ineke, 1329-62. Godesberg: Forum Verlag, 2010.

Hay, Ian, and Ashman, Adrian F. "The development of adolescents' emotional stability and general self-concept: The interplay of parents, peers, and gender." *International Journal of Disability, Development and Education* 2003, Vol.50, No.1: 77-91.

Heckner, Wolfgang. *Die Zweiteilung der Hauptverhandlung nach Schuld-und Reaktionsfrage (Schuld-interlokut): Vorschlag einer Gesetzesnovelle zum Strafverfahrensrecht.* Diss. Universität München 1973.

Heinz, Wolfgang. "Mehrfach Auffällige – Mehrfach Betroffene. Erlebnisweisen und Reaktionsformen." *Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen (DVJJ)*, Bonn 1990: 30-73.

Heinz, Wolfgang. "Abschied von der Erziehungsideologie im Jugendstrafrecht; Aktuelle kriminalpolitische Bestrebungen im Spiegel empirischer Untersuchungen." *Zeitschrift für Rechtspolitik* 1992, Vol.23: 7-11.

Heinz, Wolfgang. *Jugendkriminalität in Deutschland – kriminalstatistische und kriminologische Befunde*. Universität Konstanz 2003.

Heinz, Wolfgang. "Die neue Rückfallstatistik – Legalbewährung junger Straftäter." *Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2004, Vol.15: 35-48.

Heinz, Wolfgang. "Zahlt sich Milde aus? Diversion und ihre Bedeutung für die Sanktionspraxis." *Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2005, Vol.2: 166-78.

Heinz, Wolfgang. *Kriminelle Jugendliche – gefährlich oder gefährdet?*. Vol. 220 UVK. Universitätsverlag Konstanz 2006.

Heinz, Wolfgang. “Verschärfung des Jugendstrafrechts; Kriminalpolitische Forderungen im Spannungsfeld zu wissenschaftlichen Erkenntnissen.” *Neue Kriminalpolitik* 2008a, Vol.2: 1-23.

Heinz, Wolfgang. ”Bei der Gewaltkriminalität junger Menschen helfen nur härtere Strafen! Fakten und Mythen in der gegenwärtigen Jugendkriminalpolitik.” *Neue Kriminalpolitik* 2008b, Vol.2: 50-9.

Heinz, Wolfgang. *Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882 - 2012 : Stand: Berichtsjahr 2012*. Version: 1/2014.

Hellner, Jan. "Kvalitetskriterier i rättsvetenskapen." *Juridisk Forskning* 2002: 9-18.

Henham, Ralph J. *Sentencing Principles and Magistrates' Sentencing Behaviour*. Aldershot: Avebury Gower Publishing Company Limited, 1990.

Henham, Ralph J. *Sentencing and the Legitimacy of Trial Justice*. Abingdon Oxon and New York: Routledge, 2012.

Hestbaek, Anne-Dorthe. *Tvansanbringelser I Norden – en kompartiv bekrivelse af de nordiske landes lovgivning*. Copenhagen: Socialforskningsinstitutet, 1998.

Hill, Malcolm, Lockyer, Andrew and Stone, Fred. *Youth Justice and Child Protection*. London: Jessica Kingsley Publishers, 2007.

Hirsch, Andrew von and Asp, Petter. “Straffvärde.” *Svensk Juristtidning (SvJT)* 1999: 151-76.

Hirsch, Andrew von and Ashworth, Andrew. *Proportionate Sentencing: Exploring the Principles*. Oxford: Oxford University Press, 2005.

Hofer, Hanns von. ”Criminal Violence and Youth in Sweden: a long-term perspective.” *Journal of Scandinavian Studies in Criminology and Crime Prevention* 2000, Vol.1, No. 1: 56-72.

Hofer, Hanns von. “En översyn av påföljdsystemet (Dir.2009:60).” In *Festskrift till Per Ole Träskman*, eds. Andersson, Ulrika, Wong, Christoffer, and Örnemark Hansen, Helén, 238-45. Stockholm: Norstedts Juridik, 2011.

Hofer, Hanns von. “Åtgärder mot ungdomsbrottslighet.” In *Den svenska ungdomsbrottsligheten,* eds. Estrada, Felipe and Flyghet, Janne, 333-49. 3rd Edition. Lund: Studentlitteratur, 2013.

Hogarth, John. *Sentencing as a Human Process.* Toronto: University of Toronto Press, 1971.

Holmqvist, Lars, Leijonhufvud, Madelleine, Träskman, Per-Ole, and Wennberg, Suzanne. *Brottsbalken: en kommentar*. 5th Edition. Stockholm: Norstedts Juridik AB, 2007.

Hollander, Anna and Tärnfalk, Michael. "Juvenile Crime and the Justice System in Sweden." In *Youth Justice and Child Protection,* eds. Hill, Malcolm, Lockyer, Andrew and Stone, Fred, 90-103. London: Jessica Kingsley Publishers, 2007.

Holmberg, Stina. "Påföljder för unga – ett system med två svårförenliga principer." *Nordisk Tidsskrift for Kriminalvidenskab* 2007: 444-6.

Holmberg, Stina. "Påföljdssystemet för unga." In *Den svenska ungdomsbrottsligheten*, eds. Estrada, Felipe and Flyghet, Janne, 313-32. 3rd Edition. Lund: Studentlitteratur AB 2013.

Hood, Roger G. and Mannheim, Hermann. *Sentencing in magistrates' courts: a study in variations of policy.* London: Stevens, 1962.

Hwang, Philip and Nilsson, Björn. *Utvecklingspsykologi*. 3rd Edition. Stockholm: Natur & Kultur, 2011.

Hydén, Lars-Christer. "Brott och straff och vård." *Nordiskt socialt arbete* 1992, Vol.1: 3-13.

Hydén, Håkan. *Rättssociologi som rättsvetenskap*. Lund: Studentlitteratur, 2002.

Häthén, Christian. *Straffrättsvetenskap och Kriminalpolitik. De Europeiska Straffteorierna och deras betydelse för Svensk Strafflagstiftning 1906-1931: Tre Studier.* Lund: Studentlitteratur, 1990.

Hörnle, Tatjana. "Guilt and Choice in Criminal Law Theory – A Critical Assessment." *Bergen Journal of Criminal Law and Criminal Justice* 2016, Vol. 4, No. 1: 1-24.

Jacobsson, Katarina. "'Vi kan inte göra hipp som happ.' Åklagares formuleringar av en objektiv ordning." *Sociologiskt forskning* Vol.2, 2006: 30-61.

Jansen, Nils. "Comparative Law and Comparative Knowledge, Chapter 9." In *The Oxford Handbook of Comparative Law*, eds. Reimann, Mathias and Zimmermann, Reinhard, 305-08. Oxford: Oxford University Press, 2008.

Janson, Carl-Gunnar. "Youth Justice in Sweden." *Chicago Journals* 2004: 391-441.

Jareborg, Nils. *Värderingar*. Lund: Studentlitteratur, 1975.

Jareborg, Nils. "Disparities in Sentencing: Causes and Solutions." Reports presented to the eighth Criminological Colloquium (1987), *Collected Studies in Criminological Research*, Volume XXVI, Strasbourg 1989.

Jareborg, Nils. *Straffrättsideologiska Fragment*. Uppsala: Iustus Förlag, 1992a.

Jareborg, Nils. "Påföljdsbestämningens struktur." *Svensk Juristtidning (SvJT)* 1992b: 257-75.

Jareborg, Nils and Zila, Josef. *Straffrättens påföljdslära*. 4th Edition. Stockholm: Norstedts Juridik, 2014.

Jarzabkowski, Paula. *Strategy as practice- An activity-based approach.* London: Sage, 2005.

Jehle, Jörg-Martin. *Untersuchungshaft zwischen Unschuldsvermutung und Wiedereingliederung*. München: Minerva Publikation, 1985.

Jehle, Jörg-Martin, Heinz, Wolfgang, Sutterer, Peter, Hohmann, Sabine, Kirchner, Martin, and Spiess, Gerhard. *Legalbewährung nach strafrechtlichen Sanktionen: eine kommentierte Rückfallstatistik.* Berlin: Bundesministerium der Justiz, 2003.

Jehle, Jörg-Martin, Lewis, Christopher, and Sobota, Piotr. "Dealing with Juvenile Offenders in the Criminal Justice System." *European Journal on Criminal Policy and Research* 2008: 237-47.

Jehle, Jörg-Martin. *Criminal Justice in Germany – Facts and Figures*. 5th Edition. Berlin: Federal Ministry of Justice, 2009.

Jehle, Jörg-Martin, Hans-Jörg Albrecht, Sabine Hohmann-Fricke, and Tetal, Carina. *Legalbewährung nach strafrechtlichen Sanktionen: Eine bundesweite Rückfalluntersuchung 2007 bis 2010 und 2004 bis 2010.* Godeberg: Forum Verlag, 2013.

Jehle, Jörg-Martin, and Palmowski, Nina. "Noch einmal: Werden Heranwachsende nach Jugendstrafrecht härter sanktioniert?." In *Kriminologie ist Gesellschaftswissenschaft - Festschrift für Christian Pfeiffer zum 70. Geburtstag*, eds. Baier, Dirk and Mößle, Thomas, 323-37. Baden-Baden: Nomos, 2014.

Jehle, Jörg-Martin, Albrecht, Hans-Jörg, Hohmann-Fricke, Sabine, and Tetal, Carina. *Legalbewährung nach strafrechtlichen Sanktionen: Eine bundesweite Rückfalluntersuchung 2010 bis 2013 und 2004 bis 2013.* Berlin: Bundesministerium der Justiz und für Verbraucherschutz, 2016.

Jhering, Rudolph von. Scherz und Ernst in der Jurisprudenz. Eine Weihnachtsgabe. Leipzig: Breitkopf und Härtel, 1884 (Reprint: ed. Leitner, Max. Scherz und Ernst in der Jurisprudenz. Wien: Linde, 2009).

Jensen, Eric L. and Jepsen, Jorgen (eds.). *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems*. Oxford: Hart Publishing, 2006.

Joecks, Wolfgang. *Strafgesetzbuch – Studienkommentar*. 6th Edition. München: C.H.Beck, 2005.

Junger-Tas, Josine and Dünkel, Frieder (eds.). *Reforming Juvenile Justice*. Dordrecht and New York: Springer, 2009.

Kahl, Wilhelm. "Reform der Strafzumessung." *Deutsche Juristen-Zeitung* 1906, Vol.11: 895-901.

Kaldal, Anna and Tärnfalk, Michael. "Samhällets hantering av barn som begår brott – en verksamhet i flera spar." In *Tvångsvård av barn och unga,* eds. Leviner, Pernilla and Lundström, Tommy, 239-61. Stockholm, Wolters Kluwer: 2017.

Kaiser, Günter and Schöch, Heinz. *Kriminologie, Jugendstrafrecht, Strafvollzug*. 4th Edition. München: C.H.Beck Verlag, 1994.

Kay, Richard and Segal, Daniel. "The role of the attorney in juvenile court proceedings: a non-polar approach." *Georgetown Law Journal* 1961, 1972-1973: 1401-24.

Kennedy, George A. *Aristotle on rhetoric: A theory of civic discourse. Newly translated with introduction, notes, and appendixes by George A. Kennedy.* Oxford: Oxford University Press, 1991.

Kilkelly, Ursula. "Youth Courts and Childrens's Rights: The Irish Experience." *Youth Justice* 2008, Vol.8: 39-56.

Killias, Martin. "Sentencing reform—from rhetorics to reducing sentencing disparity." *European Journal on Criminal Policy and Research* 1994, Vol.2, No.1: 19-28.

King, Michael and Garapon, Antoine. "Judges and Experts in England and Wales and France: Developing a Comparative Socio-Legal Analysis." *Journal of Law and Society* 14, 1987, Vol.4: 459-73.

King, Michael and Piper, Christine. *How the Law Thinks About Children*. 2nd Edition. Aldershot: Arena, 1995.

King, Michael. "What's the Use of Luhmann's Theory." In *Luhmann on Law and Politics: Critical Appraisals and Applications*, eds. King, Michael and Thornhill, Chris, 37-52. Oxford: Hart Publishing, 2006.

King, Michael. "The Radical Sociology of Niklas Luhmann." In *Law and Social Theory*, eds. Banakar, Reza and Travers, Max, 59-73. 2nd Edition. Oxford: Hart Publishing, 2013.

Kinzig, Jörg and Schnierle, Rebecca. "Der neue Warnschussarrest auf dem Prüfstand." *Juristische Schulund (JuS)* 2014, 210-5.

Kirchengast, Tyrone. *The Criminal Trial in Law and Discourse*. New York: Palgrave Macmillan, 2010.

Kischel, Uwe. *Rechtsvergleichung*. München: C.H.Beck, 2015.

Kneer, Georg and Nassehi, Armin. *Niklas Luhmanns Theorie sozialer Systeme*. 3rd Edition. München: Wilhelm Fink Verlag, 1997.

Köhler, Michael. *Strafrecht Allgemeiner Teil*. Berlin and Heidelberg and New York: Springer, 1997.

Köpcke-Duttler, Arnold. "Besitzt die Verteidigung im Jugendstrafverfahren eine Erziehungsaufgabe?." *DVJJ- Journal* 2001, No. 2:133-6.

Kreissl, Reinhard. "Neurowissenschaftliche Befunde, ihre Wirkung und Bedutung für ein Verständnis in der Jugendkriminalität." In *Handbuch Jugendkriminalität – Kriminologie und Sozialpädagogik im Dialog*, eds. Dollinger, Bernd and Schmidt-

Semisch, Henning, 113-23. 2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011.

Kreuzer, Arthur. "Ist das deutsche Jugendstrafrecht noch zeitgemäss?." *Neue Juristische Wochenschrift (NJW)* 2002: 2345-51.

Kröplin, Mathias. *Die Sanktionspraxis im Jugendstrafrecht in Deutschland im Jahr 1997 – ein Bundesländervergleich.* Godesberg: Forum Verlag, 2002.

Kumlien, Mats. *Uppfostran och Straff. Studier kring 1902 års uppfostringslagar*. Stockholm: Nerenius & Santérus förlag, 1997.

Kupchik, Aaron. *Judging Juveniles: Prosecuting Adolescents in Adult and Juvenile Courts*. New York: New York University Press, 2006.

Kvale, Steinar and Brinkmann, Svend. *Den kvalitativa forskningsintervjun*. Lund: Studentlitteratur, 2014.

Lacey, Nicola. "Contingency, Coherence and Conceptualism. Reflections on the Encounter between 'Critique' and 'the Philosophy of the Criminal Law." In *Philosophy and the Criminal Law. Principle and Critique*, ed. Duff, Antony, 9-59. Cambridge: Cambridge University Press, 1998.

Lackner, Karl. *Über neue Entwicklungen in der Strafzumessungslehre und ihre Bedeutung für die richterliche Praxis.* Heidelberg: Müller Juristischer Verlag, 1978.

Lappi-Seppälä, Tapio and Tonry, Michael. "Crime, Criminal Justice, and Criminology in the Nordic Countries." *Crime and Justice* 2011, Vol.40, No.1: 1-32.

Lappi-Seppälä, Tapio. "Nordic Youth Justice." *Crime and Justice* 2011, Vol.40, No.1: 199-264.

Lappi-Seppälä, Tapio and Storgaard, Anette. "Unge i det strafferetslige system." *Tidsskrift for Strafferett* 2014, No.4: 333-59.

Larenz, Karl and Canaris, Claus-Wilhelm. *Methodenlehre der Rechtswissenschaft*. 3rd Edition. Berlin: Springer, 1999.

Larsson, Sven. "Dispositionsprincipen och dispositiva regler." *Svensk Juristtidning (SvJT)* 1980: 577-605.

Laubenthal, Klaus. "Ist das deutsche Jugendstrafrecht noch zeitgemäss?." *Juristenzeitung (JZ)* 57, No.17, 2002: 807-18.

Laubenthal, Klaus, Baier, Helmut, and Nestler, Nina. *Jugendstrafrecht*. Dordrecht and Heidelberg and London and New York: Springer, 2015.

Lemm, Caroline. *Die strafrechtliche Verantwortlichkeit jugendlicher Rechtsbrecher.* Münster and New York and München and Berlin: Waxmann Verlag, 2000.

Lenz, Torsten. *Die Rechtsfolgensystematik im Jugendgerichtsgesetz (JGG): Eine dogmatische Strukturierung der jugendstrafrechtlichen Reaktionsmöglichkeiten am Masstab des Verhältnismässigkeitsgrundsatzes.* Berlin: Duncker & Humblot, 2007.

Lernestedt, Claes. *Likhet inför lagen – rättsfilosofiska perspektiv*. Stockholm: Norstedts Juridik, 2015.

Lindgren, Magnus, Pettersson, Karl-Åke, and Hägglund, Bo. *Brottsoffer: från teori till praktik.* Stockholm: Jure CLN AB, 2001.

Linke, Alexander. "Diversionsrichtlinien im Jugendstrafverfahren – Bundeseinheitliche Einstellungspraxis durch Verwaltungsvorschriften der Länder?." *Neue Zeitung für Strafrecht (NStZ)* 2010: 609-14.

Liszt, Franz von. "Kriminalpolitische Aufgaben (1889-1892)." In *Strafrechtliche Aufsätze und Vorträge*, von Liszt, Franz. Vol. 1. Berlin 1905.

Liszt, Franz von. "Das Verbrechen als sozial-pathologische Erscheinung." In *Strafrechtliche Aufsätze und Vorträge*, von Liszt, Franz. Vol. 2. Berlin 1905.

Luhmann, Niklas. *Soziale Systeme. Grundriss einer allgemeinen Theorie*. Frankfurt a.M.: Suhrkamp Verlag, 1984.

Luhmann, Niklas. "Die Codierung des Rechtssystems." *Rechtstheorie* 1986, Vol.17, No.2: 171-203.

Luhmann, Niklas. "The Unity of the Legal System." In *Autopoietic Law: A New Approach to Law and Society,* ed. Teubner, Gunther, 12-35. Berlin: Walter de Gruyter, 1988.

Luhmann, Niklas. "Law as a Social System." *Northwestern University Law Review* 1989, Vol.83: 136-50.

Luhmann, Niklas. "Operational closure and structural coupling. The differentiation of the legal system." *Cardoza Law Review* (1991-1992), Vol. 13: 1419-41.

Luhmann, Niklas. *Das Recht der Gesellschaft*. Frankfurt a.M.: Suhrkamp Verlag, 1995a.

Luhmann, Niklas and Zhang, Jin-hui. *Die Kunst der Gesellschaft*. Frankfurt a.M.: Suhrkamp Verlag, 1995b.

Luhmann, Niklas. *Die Gesellschaft der Gesellschaft*. First and second sub-band. Frankfurt a.M.: Suhrkamp Verlag, 1997.

Luhmann, Niklas. *Die Erziehung der Gesellschaft*. Frankfurt a.M.: Suhrkamp Verlag, 2002.

Luhmann, Niklas. *Law as a social system*. Trans. by Ziegert, Klaus A., eds. Kastner, Fatima, Nobles, Richard, Schiff, David, and Ziegert, Rosamund, Oxfort: Oxford University Press, 2004.

Lütkes, Anne and Rose, Frank. "Das geltende Jugendstrafrecht ist besser als sein Ruf." *Zeitschrift für Rechtspolitik (ZRP)* 2003: 472-3

Mæland, Henry John. *Norsk alminnelig strafferett*. Bergen: Justian AS, 2012.

MacCormick, Neil. *Institutions of law: an essay in legal theory*. Oxford: Oxford University Press, 2007.

Marklund, Linda. *Ett brott – två processer. Medling vid brott och unga lagöverträdare i straffprocessen.* Uppsala: Uppsala universitetstryckeri, 2011.

Maroney, Terry A. "The False Promise Of Adolescent Brain Science In Juvenile Justice." *Notre Dame Law Review* 2009, Vol.85, No.1: 89-176.

Marttunen, Matti. "Nuorisorikosoikeus." *National Research Institute of Legal Policy* 2008, Publication no. 236.

Mattsson, Titti. *Barnet och rättsprocessen – Rättssäkerhet, integritetsskydd och autonomi i samband med beslut om tvångsvård*. Lund: Juristförlaget i Lund, 2002.

Maurach, Reinhart, Gössel, Karl Heinz, and Zipf, Heinz. *Strafrecht Allgemeiner Teil, Teilband 2, Erscheinungsformen des Verbrechens und Rechtsfolgen der Tat.* 7th Edition. Heidelberg: C.F.Müller, 1989.

Meehan, Albert J. "Internal Police Records and the Control of Juveniles Politics and Policing in a Suburban Town." *British Journal of Criminology* 1993: 504-24.

Mehlbye, Jill and Walgrave, Lode. *Confronting Youth in Europe*. Copenhagen: AKF Forlaget, 1998.

Meier, Bernd-Dieter. "Licht ins Dunkel: Die richterliche Strafzumessung." *Juristische Schulung (JuS)* 2005: 769- 773 and continued in *JuS* 2005: 879-81.

Meier, Bernd-Dieter, Rössner, Dieter, Trüg, Gerson, and Wulf, Rüdiger. *Jugendgerichtsgesetz. Handkommentar*. Baden-Baden: Nomos, 2011.

Merry, Sally Engle. "Legal pluralism." *Law and society review* 1988: 869-96.

Mertens, A. *Schnell oder gut? Die Bedeutung des Beschleunigungsgrundsatzes im Jugendstrafverfahren.* Frankfurt a.M.: Lang, 2003.

Michaels, Ralf. "The functional method of comparative law, Chapter 10." In *The Oxford Handbook of Comparative Law*," eds. Reimann, Mathias and Zimmermann, Reinhard, 339-82. Oxford: Oxford University Press, 2008.

Michailakis, Dimitris. "Review Essay - Law as an Autopoietic System." *Acta Sociologica* 1995, Vol. 38: 323-37.

Mileski, Maureen. "Courtoom Encounters: An Observation Study of a Lower Criminal Court." *Law & Society Review* 1971, Vol.5, No.4: 473-538.

Moore, Harvey A. and Friedman, Jennifer. "Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision Making." *Clinical Sociology Review* 1993, Vol. 11: 123-41.

Muncie, John and Goldson, Barry (eds.). *Comparative youth justice critical issues*. London: Sage, 2006.

Munck, Johan. “Var star nyclassizismen idag?.” *Svensk Juristtidning (SvJT)* 2015: 424-7.

Nagin, Daniel S., Cullen, Francis T., and Jonson, Cheryl Lero. "Imprisonment and reoffending." *Crime and Justice* 2009, Vol. 38, No.1: 115-200.

Nelken, David. “Law in action or living law? Back to the beginning in sociology of law.” *Legal studies* 1984, Vol. 4, No 2: 157-74.

Nelken, David. “Changing Paradigms in the Sociology of Law.” In *Autopoietic Law: A New Approach to Law and Society*, ed. Teubner, Gunther, 191-216. Berlin: Walter de Gruyter, 1988.

Nelken, David (ed.). *Law as Communication.* Aldershot: Dartmouth Publishing Company, 1996.

Nelken, David. *Comparative Criminal Justice – making sense of difference*. London: Sage 2010.

Nerhot, Patrick. “The Fact of Law.“ in *Autopoietic Law: A New Approach to Law and Society,* ed. Teubner, Gunther, 312-34. Berlin: Walter de Gruyter, 1988.

Neubauer, Walter F. *Selbstkonzept und Identität im Kindes-und Jugendalter*. München: Ernst Reinhardt Verlag, 1976.

Nielsen, Laura Beth. ”The need for multi-method approaches in empirical legal research.” In *The Oxford Handbook of Empirical Legal Research*, eds. Cane, Peter and Kritzer, Herbert M., 951-75. Oxford: Oxford University Press, 2010.

Nilsson, Anders. *Fånge i marginalen – uppväxtvillkor, levnadsförhållanden och återfall i brott bland fångar*. Avhandlingsserie No 8. Kriminologiska institutionen. Stockholms universitet 2002.

Nordlöf, Kerstin. *Straffrättens processer för unga lagöverträdare*. Stockholm: Norstedts Juridik, 1991.

Nordlöf, Kerstin. *Unga lagöverträdare i social-, straff- och processrätt*. 2nd Edition. Lund: Studentlitteratur, 2012.

Nordlöf, Kerstin. “Genus i kontexten unga lagöverträdare.” In *Festskrift till Catharina Calleman – I Rättens Utkanter,* eds. Persson, Annina H. and Ryberg-Welander, Lotti, 261-74. Uppsala: Iustus Förlag, 2014.

Norrie, Alan. *Law and the beautiful Soul*. London: GlassHouse Press, 2013.

Nygren, Rolf. “Vad är egentligen “riktigt svenskt” i den svenska rätten?.” *Svensk Juristtidning (SvJT)* 1998: 103-9.

O’Brien, Lia, Albert, Dustin, Chein, Jason, and Steinberg, Laurence. “Adolescents Prefer More Immediate Rewards when in the Presence of their Peers.” *Journal of Research on Adolescence* 2011, Vol.21, No.4: 747-53.

Olweus, Dand, Mattsson, Ake, Schalling, Daisy, and Loew, Hans. "Circulating testosterone levels and aggression in adolescent males: a causal analysis." *Psychosomatic medicine* 1988, Vol. 50, No. 3: 261-72.

Ostendorf, Heribert. *Jugendstrafrecht*. 8th Edition. Baden-Baden: Nomos, 2015.

Ostendorf, Heribert (ed.). *Jugendgerichtsgesetzkommentar.* 10th Edition. Baden-Baden: Nomos, 2016.

Papendorf, Knut. "Gegen die Logik der Inhaftierung – die Forderungen des AJK aus heutiger Sicht." In *Handbuch Jugendkriminalität - Kriminologie und Sozialpädagogik im Dialog,* eds. Dollinger, Bernd and Schmidt-Semisch, Henning, 573-83. 2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011.

Parsons, Talcott. *The structure of social action*. Vol. 2. New York: Free Press, 1949.

Partington, Martin. "Law's Reality: Case Studies in Empirical Research in Law: Introduction." *Journal of Law and Society* 2008: 1-7.

Paternoster, Raymond. "How much do we really know about criminal deterrence?." *The Journal of Criminal Law & Criminology* 2010, Vol.100, No.3: 765-824.

Paterson, John and Teubner, Gunther. "Changing Maps: Empirical Legal Autopoiesis." *Social & Legal Studies* 1998, Vol.7, No.4: 451-86.

Paterson, John. "Reflecting on Reflexive Law." In *Luhmann on Law and Politics: Critical Appraisals and Applications*, eds. King, Michael and Thornhill, Chris, 13-36. Oxford: Hart Publishing, 2006.

Paul, Benjamin David. *Interview techniques and field relationships*. Chicago: University of Chicago Press, 1953.

Paus, Tomáš. "Mapping brain maturation and cognitive development during adolescence." *Trends in cognitive sciences* 2005, Vol. 9, No.2: 60-8.

Peczenik, Aleksander. *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*. Stockholm: Fritzes, 1995.

Peczenik, Aleksander. "A theory of Legal Doctrine." *Ratio Juris* 2001, Vol. 14, No.1: 75-105.

Peczenik, Aleksander. *Scientia Juris Legal Doctrine as Knowledge of Law and as a Source of Law.* Vol.4. Dordrecht and Heidelberg and New York and London: Springer, 2005.

Persson, Mareike. "Heranwachsende im schwedischen Strafrechtssystem." *Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2015, No.4: 378-84.

Peters, Anne. "Realizing Utopia as a Scholarly Endeavour." *The European Journal of International Law* 2013, Vol.24, no.2: 533-52.

Pettersson, Tove. *Återfall i brott bland ungdomar dömda till fängelse respektive sluten ungdomsvård.* Statens institutionsstyrelse. Report 2/10. Stockholm: Edita, 2009.

Pettersson, Tove. *Att balansera mellan kontroll och makt – lokala polisers arbete med ungdomar.* Lund: Studentlitteratur, 2012.

Pettersson, Tove. "När hjälpen gör ont värre – om (oönskade?) konsekvenser av att undvika häkte för unga lagöverträdare." In *Tvångsvård av barn och unga*, eds. Leviner, Pernilla, and Lundström, Tommy, 279-95. Stockholm: Wolter Kluwer, 2017.

Pfeiffer, Christian. *Unser Jugendstrafrecht- eine Strafe für die Jugend?: die Schlechterstellung junger Straftäter durch das JGG-Ausmaß, Entstehungsgeschichte und Kriminalpolitische Folgerungen.* Kriminologisches Forschungsinstitut Niedersachsen 1991.

Philippopoulos-Mihalopoulos, Andreas. *Niklas Luhmann – Law, Justice, Society*. Nomikoi Critical Legal Thinkers. Abingdon: Routledge, 2010.

Plewig, Hans-Joachim. "Jugendstrafrecht." In *Wörterbuch Soziale Arbeit. Aufgaben, Praxisfelder, Begriffe und Methoden der Sozialarbeit und Sozialpädagogik*, eds. Kreft, Dieter and Mielenz, Ingrid, 491-6. 6th Edition. München: Juventa, 2008.

Plewig, Hans-Joachim. "Konfrontative Pädagogik." In *Handbuch Jugendkriminalität – Kriminologie und Sozialpädagogik im Dialog*, eds. Dollinger, Bernd and Schmidt-Semisch, Henning, 427-40. 2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften 2011.

Pound, Roscoe. "Law in Books and Law in Action." *American Law Review* 1910, Volume 44: 12-36.

Pruin, Ineke. *Die Heranwachsendenregelung im deutschen Jugendstrafrecht*. Schriften zum Strafvollzug, Jugendstrafrecht und zur Kriminologie. Vol. 26. Godesberg: Forum Verlag, 2007.

Pruin, Ineke. "The scope of juvenile justice systems in Europe." In *Juvenile Justice Systems in Europe- Current Situation and Reform Developments*, eds. Dünkel, Frieder, Grzywa, Joanna, Horsfield, Philip and Pruin, Ineke, Vol.4, 1513-56. Godesberg: Forum Verlag, 2010.

Raz, Joseph. *The Concept of a Legal System – An Introduction to the Theory of Legal System*. 2nd Edition. Oxford: Clarendon Press, 1980.

Raznahan, Armin, Lerch, Jason P., Lee, Nancy, Greenstein, Dede, Wallace, Gregory L., Stockman, Michael, Clasen, Liv, Shaw, Phillip W. and Giedd, Jay N. "Patterns of coordinated anatomical change in human cortical development: a longitudinal neuroimaging study of maturational coupling." *Neuron* 2011, Vol. 72, No. 5: 873-84.

Reckwitz, Anat. "Toward a theory of social practices: A development in culturalist theory." *European Journal of Social Theory* 2002, Vol. 5, No. 2: 243-63.

Reimann, Mathias and Zimmermann, Reinhard (eds.). *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2008.

Reitz, John C. "How to Do Comparative Law." *The American Journal of Comparative Law* 1998, Vol. 46, No.4: 617-36.

Reyna, Valerie F. and Farley, Frank. "Risk and Rationality in Adolescent Decision Making." *Psychological Science in the Public Interest* 2006, Vol. 7, No.1: 1-44.

Richmann, A. *Die Beteiligung des Erziehungsberechtigten und des gesetzlichen Vertreters am Jugendgerichtsverfahren*. Frankfurt a.M.: Lang, 2002.

Riera, Michael. *Uncommon Sense for Parents with Teenagers.* LLC: Random House, 2012.

Rose, Frank Guido. "Wenn die (Jugend-)Strafe der Tat nicht auf dem Fusse folgt: Die Auswirkungen von Verfahrensverzögerungen im Jugendstrafverfahren." *Neue Zeitschrift für Strafrecht (NStZ)* 2013: 315-27.

Rössner, Dieter. "Erziehung und Strafe – die verkannte Zweispurigkeit des Jugenstrafrechts." In *Erziehung und Strafe – Jugendstrafrecht in der Bundesrepublik Deutschland und Polen – Grundfragen und Zustandsbeschreibung*, eds. Wolff, Jörg and Marek, Andrzej, 18-27. Bonn and Godesberg: Forum Verlag 1990.

Sacks, Harvey. "The lawyer's work." In *Law in action: Ethnomethodological and conversation analytic approaches to law*, eds. Travers, Max and Manzo, John F., 43-9. Aldershot: Darmouth Publishing Company, 1997.

Salvatore, Christopher, Hiller, Matthew L., Samuelson, Benta, Henderson, Jaime S., and White, Elise. "A Systematic Observational Study of a Juvenile Drug Court Judge." *Juvenile & Family Court Journal* 2011, Vol. 62, No.4: 19-36.

Sarnecki, Jerzy and Estrada, Felipe. *Juvenile crime in Sweden - a trend report on criminal policy, the development of juvenile delinquency and the juvenile justice system*. Stockholm: Stockholm University, Department of criminology, 2004.

Sarnecki, Jerzy and Estrada, Felipe. "Keeping the Balance between Humanism and Penal Punitivism: Recent Trends in Juvenile Delinquency and Juvenile Justice in Sweden." In *Handbook of International Juvenile Justice*, eds. Junger-Tas Josine and Decker, Scott H., 473-502. Dordrecht: Springer, 2006.

Satel, Sally. "Observational Study of Courtroom Dynamics in Selected Drug Courts." *National Drug Court Institute Review* 1998, Vol. 1, No. 1: 43-72.

Savigny, Friedrich Carl von. *System des heutigen römischen Rechts*. 8 Volumes. Berlin: Veit, 1840-1849.

Schäfer, Gerhard, Sander,Günther M., and van Gemmeren, Gerhard. *Praxis der Strafzumessung.* München: C.H.Beck, 1995.

Schaffstein, Friedrich. "Spielraum-Theorie, Schuldbegriff und Strafzumessung nach den Strafrechtsreformgesetzen." In *Festschrift für Wilhelm Gallas*, 99. Berlin 1973.

Schaffstein, Friedrich, Beulke, Werner, and Swoboda, Sabine. *Jugendstrafrecht*. Stuttgart: W. Kohlhammer GmbH, 2014.

Schatzki, Theodore R. "Practice Theory." In *The Practice Turn In Contemporary Theory*, eds. Schatzki, Theodore R., Knorr Cetina, Karin and von Savigny, Eike, 1-14. London: Routledge, 2001a.

Schatzki, Theodore R. "Practice mind-ed orders." In *The Practice Turn In Contemporary Theory*, eds. Schatzki, Theodore R., Knorr Cetina, Karin and von Savigny, Eike, 42-55. London: Routledge, 2001b.

Scheffler, Thomas, Hannken-Illjes, Kati, and Kozin, Alexander. *Criminal Defence and Procedure – Comparative Ethnographies in the United Kingdom, Germany, and the United States*. Electronic book text. Balsingstoke: Palgrave Macmillan, Balsingstoke 2010.

Schlüchter, Ellen. "Der Erziehungsgedanke als Leitbild der Verteidigung im Jugendstrafverfahren." Bonn: Bundesministerium der Justiz, 1987: 29ff.

Schlüchter, Ellen. *Plädoyer für den Erziehungsgedanken*. Berlin: Walter de Gruyter, 1994.

Schmidhäuser, Eberhard. *Vom Sinn der Strafe*. 2nd Edition. Göttingen: Vandenhoeck & Ruprecht 1971.

Schmidt, Andrea. "Das beschleunigte vereinfachte Jugendverfahren in Bamberg - Das Bamberger Modell im Spannungsfeld zwischen Beschleunigungsziel und Erziehungsgedanke." *Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2014, No.1: 31-7.

Schmidt, Lothar. *Die Strafzumessung in rechtsvergleichender Darstellung*. Berlin: Duncker & Humblot, 1961.

Schöch, Heinz. *Strafzumessungspraxis und Verkehrsdelinquenz*. Stuttgart: Enke Verlag, 1973.

Schömer, Eva. *Konstruktion av Genus i Rätten och Samhället*. Göteborg: Iustus Förlag, 1999.

Schütze, Gerd. "Der § 3 JGG und das Dilemma, die strafrechtliche Verantwortlichkeit nicht sicher genug einschätzen zu können." *DVJJ-Journal* 1997, Vol.8: 366-9.

Schumann, Karl. *Jugendarrest und/oder Betreuungsweisung*. Bremen: Universität Schriftenreihe, 1985.

Schwengler, Karin. *Dauerarrest als Erziehungsmittel für junge Straftäter: eine empirische Untersuchung über den Dauerarrest in der Jugendarrestanstalt Nürnberg vom 10. Februar 1997 bis 28. Mai 1997.* Paderborn: Fink, 1999.

Schwengler, Karin. "Erziehung durch Unrechtseinsicht?." *Kriminologisches Journal* 2001, Vol. 33: 116-31.

Scott, Elizabeth S., Reppucci, N. Dickon, and Woolard, Jennifer L. "Evaluating Adolescent Decision Making in Legal Contexts." *Law and Human Behavior* 1995, Vol.19, No.3: 221-44.

Scott, Elizabeth S. and Steinberg, Laurence. *Rethinking Juvenile Justice*. Cambridge: Harvard University Press, 2010.

Shepard, Robert E. Jr. "Developmental Psychology and the Juvenile Justice Process." *Criminal Justice* 1999, Vol. 14, No. 1, American Bar association: 42-44.

Silkenbeumer, Mirja. "Jugendkriminalität bei Mädchen." in *Handbuch Jugendkriminalität – Kriminologie und Sozialpädagogik im Dialog,* eds. Dollinger and Schmidt-Semisch, 319-31. 2nd Edition. Wiesbaden: VS Verlag für Sozialwissenschaften, 2011.

Simon, Kirsten. *Der Jugendrichter im Zentrum der Jugendgerichtsbarkeit. Möglichkeiten und Grenzen des jugendricherlichen Erziehungsauftrages im Hinblick auf §37 JGG*. Godesberg: Forum Verlag, 2003.

Simonsohn, Berthold. *Jugendkriminalität, Strafjustiz und Sozialpädagogik.* Vol.325. Berlin: Suhrkamp, 1969.

Sisk, Cheryl L. and Zehr, Julia L. "Pubertal hormones organize the adolescent brain and behaviour." *Frontiers in Neuroendocrinology* 2005, Vol. 26: 163-74.

Sonnen, Bernd-Rüdeger. "Kinder- und Jugenddelinquenz in der strafrechtlichen Ermittlung." *Zeitschrift Familie, Partner, Recht (FÜR)* 2013: 409-12.

Souminen, Annika. *The Principle of Mutual Recognition in Cooperation in Criminal Matters.* Cambridge and Antwerp and Portland: Intersentia, 2011.

Spradley, James P. *You Owe Yourself a Drunk: An Ethnography of Urban Nomads*. Boston: Little, Brown 1970.

Spradley, James P. *Participant Observation.* New York: Holt, Rinehart and Winston, 1980.

Spiess, Gerhard. *Jugendkriminalität in Deutschland – zwischen Fakten und Dramatisierung. Kriminalstatistische und kriminologische Befunde*. Konstanzer Inventar Kriminalitätsentwicklung 2/2012, Bibliothek der Universität Konstanz 2012.

Sroufe, L. Alan, Egeland, Byron, Carlson, Elizabeth A., and Collins, W. Andrew. *The Development of the Person – The Minnesota Study of Risk and Adaption from Birth to Adulthood*. New York and London: The Guilford Press, 2005.

Staaf, Annika (ed.), Nyström, Birgitta, and Zanderin, Lars. *Rätt och rättssystem – en introduktion för professionsutbildningar*. Malmö: Liber AB, 2010.

Steinberg, Laurence. "Risk-Taking in Adolescence – What Changes, and Why?." *Annals of the New York Academy of Sciences* 2004, Vol. 1021 No. 1: 51-8.

Steinberg, Laurence. "Risk-Taking in Adolescence – New Perspectives from Brain and Behavioral Science." *Current Directions in Psychological Science* 2007, Vol. 16: 55-9.

Steinberg, Laurence. "A behavioral scientist looks at the science of adolescent brain development." *Brain and Cognition* 2010, Vol. 72: 160-4.

Steinberg, Laurence. "Should the Science of Adolescent Brain Development Inform Public Policy?." *Issues in Science and Technology* 2012: 67-78.

Stenborre, Eva. *Påföljdsbestämningen.* Göteborg: Juridiska Akademien i Göteborg, 2005.

Stiehl, Christina. *Jugendgerichtsgesetz, Jugendkriminalität und Resozialisierung*. Norderstedt: Grin Verlag, 2011.

Streng, Franz. *Strafzumessung und relative Gerechtigkeit- eine Untersuchung zu rechtlichen, psychologischen und soziologischen Aspekten ungleicher Strafzumessung.* Heidelberg: R.v. Deckers´s Verlag, 1984.

Streng, Franz. "Der Erziehungsgedanke im Jugendstrafrecht." *Zeitschrift für die gesamte Strafrechtswissenschaft (NStZ)* 1994, No.106: 60-92.

Streng, Franz. "Sentencing in Germany: Basic Questions and New Developments." *German Law Journal* 2007, Vol. 8, No. 2: 153-72.

Streng, Franz. *Jugendstrafrecht*. 3rd Edition. Heidelberg: C.F. Müller, 2012.

Stump, Brigitte. *Adult time for adult crime – Jugendliche zwischen Jugend- und Erwachsenenstrafrecht*. Schriften zum Strafvollzug, Jugendstrafrecht, und zur Kriminologie, Vol.18. Godesberg: Forum Verlag, 2003.

Ställvik, Olof. *Domarrollen – rättsregler, yrkeskultur och ideal*. Stockholm: Jure förlag AB, 2009.

Summers, Robert S. *Form and Function in a Legal System – A General Study*. New York: Cambridge University Press, 2006.

Sunnqvist, Martin. *Konstitutionellt kritiskt dömande.* Stockholm: Jure förlag AB, 2014.

Svensson, Kerstin. "Socionomers roll i påföljdsvalet – Vem dömer?." *Brottsförebyggande Rådets Tidskrift Apropå* 2000, Vol.1: 18-20.

Svensson, Lupita. *Häktad eller omedelbart omhändertagen?: en studie om akuta frihetsberövanden av unga lagöverträdare.* Stockholm: Stockholms universitet, 2006.

Svingstedt, Anette. *Servicemötets praktik på en tingsrätt, ett äldreboende och ett hotel.* Lund: Lunds universitet, 2012.

Swärd, Hans. *Mångenstädes svårt vanartad…: om problemen med det uppväxande släktet*. Floda: Zenon, 1993.

Tedlock, Barbara. "From participant observation to the observation of participation: The emergence of narrative ethnography." *Journal of Anthropological Research* 1991, Vol.47, No.1: 69-94.

Tetzchner, Stephen von. *Utvecklingspsykologi – Barn- och Ungdomsåren.* Lund: Studentlitteratur, 2005.

Teubner, Gunther. "Substantive and Reflexive Elements in Modern Law." *Law and Society Review* 1983: 239-85.

Teubner, Gunther. *Autopoietic Law: A New Approach to Law and Society*. Berlin: Walter de Gruyter, 1988.

Teubner, Gunther. "The two faces of Janus: Rethinking Legal Pluralism." *Cardozo Law Review* 1992, Vol. 13: 1443-62.

Teubner, Gunther. *Law as an autopoietic system.* Oxford: Blackwell Publishers, 1993.

Torpman, Jan. *Rättssystemets lärande.* Akademisk Avhandling, Stockholms universitet 2002.

Travers, Max and Manzo, John F. *Law in Action – Ethnomethodological and Conversation Analytic Approaches to Law*. Aldershot: Dartmouth Publishing Company, 1997.

Träskman, Per-Ole. "Påföljd, proportionalitet och prioritering av samhällsstraff." *Svensk Juristtidning (SvJT)* 2003a: 173-94.

Träskmann, Per-Ole. *Samma straff för lika brott- strävande att uppnå en enhetlig rättstillämpning inom Europa*. Rikosoikeudellisia kirjoituksia VII. Pekka Koskiselle 1.1.2003 omistettu. Helsinki 2003b.

Träskman, Per-Ole. "Har vi någon "tjeck" på straffmätning och påföljdsbestämning." In *Josefs resa - vänbok till Josef Zila*, eds. Asp, Petter and Lernestedt, Claes, 221-36. Uppsala: Iustus Förlag, 2007.

Tuori, Kaarlo. *Critical Legal Positivism.* Aldershot: Ashgate, 2002.

Tärnfalk, Michael. *Barn och brott- en studie om socialtjänstens yttranden i straffprocessen för unga lagöverträdare.* Stockholm: US-AB Print Center, 2007.

Tärnfalk, Michael. *Professionella yttranden – En introduktion till socialt arbete med unga lagöverträdare.* Stockholm: Natur och Kultur, 2014.

Verrel, Torsten. "Kinderdelinquenz- ein strafprozessuales Tabu?." *Neue Zeitschrift für Strafrecht (NStZ)* 2001: 284-90.

Victor, Dag. "Svenska domstolars hantering av Europakonventionen." *Svensk Juristtidning (SvJT)* 2013: 343-96.

Victor, Dag. "'Straffmätningsvärde' och påföljdsval." *Svensk Juristtidning (SvJT)* 2015: 173-98.

Vinnerljung, Bo, Hjern, Anders, Ringbäck Weitoft, Gunilla, Franzén, Eva, and Estrada, Felipe. "Children and young people at risk (Chapter 7)." *International Journal of Social Welfare* 2007, Vol. 16: 163-202.

Vogel, Hans Heinrich. "Sources of Swedish Law." In *Swedish Legal System*, ed. Bogdan, Michael, 20-38. Stockholm: Norstedts Juridik, 2010.

Wach, Adolf. *Die Reform der Freiheitsstrafe. Ein Beitrag zur Kritik der bedingten und der unbestimmten Verteilung.* Leipzig 1890.

Walker, Nigel. *Sentencing Theory – Law and Practice.* London: Butterworths, 1985.

Walter, Joachim. "Bedingungen bestmöglicher Förderung im Jugendstrafvollzug." *Zeitschrift für Jugendkriminalrecht und Jugendhilfe (ZJJ)* 2006: 236-43.

Walter, Michael. "Die Frage nach der Rechtskultur als Brücke zwischen Kriminologie und Strafrecht." *Zeitschrift für internationale Strafrechtsdogmatik* 2011, Vol. 7: 629-35.

Wandall, Rasmus. *Decisions to Imprison – Court Decision-Making Inside and Outside the Law*. Hampshire: Ashgate, 2008.

Wandall, Rasmus. "Empirical Descriptions of Criminal Sentencing Decision-Making – The use of statistical causal modelling." *Bergen Journal of Criminal Law and Criminal Justice* 2014, Vol. 2, No. 1: 56-68.

Weber, Hellmuth von. "Die richterliche Strafzumessung." *Schriftenreihe der juristischen Studiengesellschaft Karlsruhe* 1956, Vol. 24.

Weber, Martin. *Die Anwendung der Jugendstrafe – Rechtliche Grundlagen und gerichtliche Praxis*. Vol.988. Frankfurt a.M. and Bern and New York and Paris: Europäische Hochschulschriften: Reihe 2, Rechtswissenschaft, 1990.

Webley, Lisa. "Qualitative Approaches to Empirical Legal Research." In *The Oxford Handbook of Empirical Legal Research*, eds. Cane, Peter and Kritzer, Herbert M., 926-50. Oxford: Oxford University Press, 2010.

Wegerstad, Linnéa. *Skyddsvärda intressen & straffvärda kränkningar.* Lund: Media-Tryck Lunds universitet, 2015.

Weigend, Thomas. "Sentencing in West Germany." *Maryland Law Review* 1983, Vol.42: 37-89.

Westberg, Peter. *Domstols officialprövning.* Lund: Juristförlaget i Lund, 1988.

Westerman, Pauline. "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law." In *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline*?, ed. Van Hoecke, Mark, 87-110. Oxford: Hart Publishing, 2011.

White, Susan. "Interdiscursivity and child welfare: the ascent and durability of psycho-legalism." *The Sociological Review* 1998, Vol.46, No.2: 264-92.

Wikström. Per Olof H. and Loeber, Rolf. "Do disadvantaged neighbourhoods cause well-adjusted children to become adolescent delinquents?." *Criminology* 2000, Vol.38: 1109–42.

Yablonsky, Lewis. "The Role of Law and Social Science in the Juvenile Court." *The Journal of Criminal Law, Criminology, and Police Science* 1962, Vol. 53, No.4: 426-36.

Zedner, Lucia. "Sentencing Young Offenders." In *Fundamentals of Sentencing Theory – Essays in Honour of Andrew von Hirsch*, eds. Ashworth, Andrew and Wasik, Martin, 165-86. Oxford: Clarendon Press, 1998.

Zieger, Matthias. *Verteidigung in Jugenstrafsachen*. 5th Edition. Heidelberg: C.F. Müller Verlag, 2008.

Zila, Josef. *Det straffrättsliga påföljdsystemet.* 2nd Edition. Stockholm: Norstedts Juridik AB, 1998.

Zila, Josef. "The Prosecution Service Function within the Swedish Criminal Justice System." In *Coping with Overloaded Criminal Justice Systems – The Rise of Prosecutorial Power Across Europe*, eds. Jehle, Jörg-Martin and Wade, Marianne, 285-311. Berlin: Springer, 2006.

Zimring, Franklin E. *American Youth Violence.* Oxford and New York: Oxford University Press, 1998.

Zimring, Franklin E. *American Juvenile Justice*. Oxford and New York: Oxford University Press, 2005.

Zippelius, Reinhold. *Juristische Methodenlehre.* 11th Edition. München: CH Beck, 2012.

Zweigert, Konrad and Kötz, Hein. *An Introduction to Comparative Law*. 3rd Edition. Oxford: Oxford University Press, 1998.

Ågren, Jack. *Billighetsskälen i BrB 29:5 – Berättigande och betydelse vid påföljdsbestämning*. Stockholm: Jure Förlag AB, 2013.

Åkerström Andersen, Niels. *Discursive Analytical Strategies – Understanding Foucault, Koselleck, Laclau, Luhmann.* Bristol: The Policy Press, 2003.

Örnemark Hansen, Helén. "Liket inför lagen-lika inför straffet?- För- och nackdelar med individanpassad rättssäkerhet." *Nordisk Tidsskrift for Kriminalvidenskab* 2011, Vol.98, No.3: 267-83.

Preparatory Work and Reports

Barnombudsman 2013. *Från insidan*.

Brå. *Nytt straffsystem*. Report 1977:7. Stockholm: Brottsförebyggande rådet, 1977.

Brå. *Påföljdssystemet för unga lagöverträdare*. Report 2000:7. Stockholm: Brottsförebyggande rådet, 2000.

Brå. *Sannolikheten att dömas till fängelse. En statisk analys*. Report 2000:13. Stockholm: Brottsförebyggande rådet, 2000.

Brå. *Sju ungdomar om sin rättegång*. Report 2002:18. Stockholm: Brottsförebyggande rådet, 2002.

Brå. *Vad händer med unga lagöverträdare? Om överlämnande till vård inom socialtjänst*. Report 2002:19. Stockholm: Brottsförebyggande rådet, 2002.

Brå. *Brottsutvecklingen i Sverige fram till år 2007*. Report 2008:23. Stockholm: Brottsförebyggande rådet, 2008.

Brå. *Ungdomsvård och Ungdomstjänst – En utvärdering av 2007 års påföljdsreform för unga lagöverträdare*. Report 2011:10. Stockholm: Brottsförebyggande rådet, 2011.

Brå. *Brottsutveckling i Sverige 2008-2011*. Report 2012:13. Stockholm: Brottsförebyggande rådet, 2012.

Brå. *Särbehandling av lagöverträdare 18-20 år. En kunskapssammanställning*. Stockholm: Brottsförebyggande rådet, 2012.

Brå. *Rättsväsenets hantering av ungdomsärenden. Handläggningstid och personuppklaring.* Report 2012:5. Stockholm: Brottsförebyggande rådet, 2012.

Brå. *Brott bland ungdomar i årskurs nio – Resultat från skolundersökningen om brott åren 1995-2011*. Report 2013:3. Stockholm: Brottsförebyggande rådet, 2013.

Brå. *Vårdnadshavare i förhör och huvudförhandling – En studie av deras närvaro och betydelse för unga misstänkta i rättsprocessen*. Report 2014:11. Stockholm: Brottsförebyggande rådet, 2014.

Brå. *Unga i häkte. De intagnas uppfattning av de insatser som vidtagits för att förbättra situationen för unga i häkte.* Promemoria. Stockholm: Brottsförebyggande rådet, 2015.

Brå. *Målsägandes medverkan i rättsprocessen*. Report 2016:8. Stockholm: Brottsförebyggande rådet, 2016.

Brå. *Brottsutvecklingen i Sverige fram till år 2015.* Report 2017:5. Stockholm: Brottsförebyggande rådet, 2017.

Brå. *Att minska isolering i häkte.* Report 2017:6. Stockholm: Brottsförebyggande rådet, 2017.

Bundesamt für Statistik. *Jugendkriminalität 2008*. https://www.destatis.de/DE/Publikationen/STATmagazin/Rechtspflege/2008_1/2008_1Jugendstrafen.html (last visited 2017-02-06).

Bundestagsdrucksache 1/3264.

Bundesministerum für Jugend-, Familie und Gesundheit. *Diskussionsentwurf eines Jugendhilfegesetzes*. Bonn: 1973.

Collected Studies in Criminological Research. *Disparities in Sentencing: Causes and Solutions.* Volume XXVI. Strasbourg: 1989.

Justitieombudsman JO 2008/09. *Fråga om handläggningstid, rätt till försvarare och genomförande av förhör i en förundersökning där målsäganden och de misstänkta var under 18 år*.

Justitieombudsman (JO) 1994/95, 255.

Justitieombudsman (JO) 2009/10, 252.

Justitieombudsman (JO) 2016/17, 71.

Justitieutskottets betänkande 2014/15: JuU9. *Tydligare reaktioner på ungas brottslighet.*

Kommittédirektiv 2009:60. *En översyn av påföljdssystemet*.

Kommittédirektiv 2015:17. *Tilläggsdirektiv till Barnrättighetsutredningen (S 2013:08)*.

Public Prosecutor's Office. *Report: Häktningstider och restriktioner*. 2014.

Regeringens Proposition. *Kungl. Maj:ts proposition med förslag till införande av brottsbalken*. 1964:10.

Regeringens Proposition. *Kungl. Maj:ts proposition med förslag till lag om ändring i rättegångsbalken m. m.* 1971:100.

Regeringens Proposition. *Om ändring I brottsbalken m.m.*1978/79:212.

Regeringens Proposition. *Om ändring i brottsbalken m.m. (straffmätning och påföljdsval m.m.).* 1987/88:120.

Regeringens Proposition. *Om försöksverksamhet med samhällstjänst*. 1989/90:7.

Regeringens Proposition. *Handläggning av ungdomsmål*. 1994/95:12.

Regeringens Proposition. *Vissa reformer av påföljdssystemet*. 1997/98:96.

Regeringens Proposition. *Stöd till Brottsoffer*. 2000/01:79.

Regeringens Proposition. *En modernare rättegång - reformering av processen i allmän domstol*. 2004/05:131.

Regeringens Proposition. *Ingripanden mot unga lagöverträdare*. 2005/06:165.

Regeringens Proposition. *Straffet för mord m.m.* 2008/09:188.

Regeringens Proposition. *Ett skärpt skadeståndsansvar för vårdnadshavare*. 2009/10:142.

Regeringens Proposition. *Gallring ur belastningsregistret av uppgifter om unga lagöverträdare.* 2009/10:191.

Regeringens Proposition. *Åtgärder för att hantera stora brottmål och inställda förhandlingar*. 2013/14:170.

Regeringens Proposition. *Tydligare reaktioner på ungas brottslighet*. 2014/15:25.

Regeringens Proposition. *Ny påföljd efter tidigare dom*. 2015/16:151.

Report of the Swedish Public Prosecutor's Office. *Häktningstider och restriktioner*. January 2014.

Rikspolisstyrelsen. *Polisens hantering av ungdomsverksamhet*. Inspektionsrapport 2009:2. January 2009.

Riksrevisionen. *Hanteringen av unga lagöverträdare – en utdragen process*. RiR 2009:12

Riksrevisionen. *Hantering av unga lagöverträdare*. RiR 2009:12.

Riksåklagarens riktlinjer. *Handläggning av ungdomsärenden*. RåR 2006:3.

Riksåklagarens Riktlinjer. *Unga misstänktas rätt till försvarare*. RåR 2016:1.

RättsPM 2013:7. *Unga lagöverträdare och barnkonventionen*. Utvecklingscentrum Stockholm.

SOU 1956:61. *Ny barnavårdslag*.

SOU 1986:13-15. *Huvudbetänkande Påföljd för brott*.

SOU 1986:14. *Påföljd för brott*.

SOU 1993:35. *Betänkande angående Reaktion mot ungdomsbrottslighet*.

SOU 1995:91. *Ett reformerat straffsystem*.

SOU 1999:108. *En utvärdering av 1995 års ungdomsmålsreform*.

SOU 2001:103. *En modernare rättegång*.

SOU 2004:122. *Betänkandet Ingripanden mot unga lagöverträdare*.

SOU 2009:68. *Lag om stöd och skydd för unga (LBU)*.

SOU 2011:45. *Förundersökning – objektivitet, beslag, dokumentation m.m.*

SOU 2012:17. *Psykiatrin och lagen – tvångsvård, straffansvar och samhällsskydd*.

SOU 2012:34. *Nya påföljder – Betänkande av Påföljdsutredningen*.

SOU 2013:17. *Brottmålsprocessen - Betänkande av Straffprocessutredningen*.

SOU 2016:19. *Barnkonventionen blir svensk lag.*

SOU 2016:52. *Färre i häkte och minskad isolering*.

Statistiska centralbyrån. *Women and Men in Sweden – Facts and figures 2012*. Statistics Sweden. Örebro 2012

International legislative material

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (”the Beijing Rules”), adopted by General Assembly resolution 40/33 of 20 November 1985.

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985.

United Nations Convention in the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989
entry into force 2 September 1990.

United Nations guidelines for the Prevention of Juvenile Delinquency (“the Riyadh Guidelines”), adopted by General Assembly resolution 45/112 of 14th December 1990.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“the Havana Rules”), adopted by General Assembly resolution 45/113 of 14th December 1990.

UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment’s report 2014: ”Concluding observations on the sixth and seventh periodic reports of Sweden”, CAT/C/SWE/6-7, 2014.

European legislative material

Council of Europe’s Reccomendation Rec (87)20.

Council of Europe’s Recommendation Rec (2003)20.

Table of Cases

Sweden

NJA II 1943, 450

NJA 1960, 521

NJA 1978, 471
NJA 1989, 870
NJA 1991, 444
NJA 1992, 190
NJA II 1993, 434
NJA 1994, 153
NJA 1996, 509
NJA 1996, 757
NJA 1998, 693
NJA 2000, 314
NJA 2000, 421
NJA 2001, 225
NJA 2001, 913
NJA 2002, 489
"Hallandsåsmålet" by Hovrätt (County Court) över Skåne och Blekinge B 1381-04
NJA 2005, 878
NJA 2007, 624
NJA 2007, 636
NJA 2008, 81
NJA 2008, 359
NJA 2008, 626
NJA 2009, 121
B 3843-08 from 2009-03-25
Thomas Quick case" by Svea Hovrätt (County Court) Ö 3147-09
NJA 2011, 466
B 5566-11 from 2012-01-31
NJA 2012, 16
NJA 2014, 658
NJA 2015, 649.
NJA 2015, 769
NJA 2015, 1024
B 3830-16 from 2016-03-22

Germany

BVerfGE 1, 345
BVerfG 2 BvR 716/01
BVerfGE 6, 389
BVerfGE 19, 47
BVerfGE 19, 348
BVerfGE 20, 49
BVerfGE 20, 323.
BVerfGE 22, 323
BVerfGE 23, 133
BVerfGE 33, 367
BVerfGE 33, 382
BVerfGE 38, 111
BVerfGE 55, 88
BVerfGE 57, 275
BVerfGE 74, 102
BVerfGE 82, 114
BVerfGE 96, 231
BVerfG NJW 2001, 2245
BVerfG NJW 2003, 2004
BVerfG NStZ-RR 2007, 3
BVerfG NStZ-RR 2007, 385

BGH 2, 375
BGHSt 8, 349
BGHSt 8, 354
BGHSt 9, 280
BGHSt 12, 180
BGHSt 14, 74
BGHSt 15, 224
BGHSt 18, 207
BGHSt 24, 11

BGH 27, 250
BGHSt 28, 341
BGHSt 29, 269
BGHSt 30, 98
BGHSt 32, 245
BGHSt 37, 10
BGHSt 35, 137
BGHSt 40, 211
BGHSt 44, 43
BGHSt 46, 159
BGHSt 51, 34
BGH MDR 1958, 3256
BGH NStZ 1991, 235
BGH NStZ 1996, 506
BGH StV 2000, 670
BGH NJW 2000, 748
BGH NStZ 2003, 364

Caught in the middle?

Responding to a criminal offence committed by a young person raises complex questions. Multiple factors play important roles: the offence itself, but also the juvenile's background in terms of education, socialization, prior convictions, etc. Every case is unique, but the criminal legal system has to follow the principles of legal certainty and predictability. A legal response to juvenile offending is a consequence of the criminal action, but it also has to consider the lesser maturity and greater vulnerability of young offenders. The ideology of culpability and punishment emphasizes the seriousness of a certain offence. The ideology of welfare accentuates the social situation of the young offender and his or her individual needs. Juvenile criminal justice systems seem to face contradictory demands from the law in a strict sense and from society at large. They are caught in the middle: between the culpability for the offence and the best interests of the young person.

This thesis investigates the tension(s) between "welfare" and "justice" that the juvenile criminal justice system has to deal with (the "welfare/justice clash") in Sweden and Germany. After exploring the differences between young and adult offenders which underlie the welfare/justice clash, the project presents an in-depth investigation of the Swedish and the German juvenile criminal justice systems. The analysis suggests an explanation for the ability of the juvenile criminal justice systems of Sweden and Germany to function in spite of the tensions highlighted.

Printed by Media-Tryck, Lund 2017 NORDIC ECOLABEL, 3041 0903

LUND UNIVERSITY

LUND UNIVERSITY
Faculty of Law
Department of Law
ISBN 978-91-7753-283-5